

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA**

MARTIN CONROY, GERARD MCCARTHY, and)	
LOUIS VARELA, derivatively on behalf of Aflac,)	
Incorporated,)	
)	
Plaintiffs,)	
v.)	
)	
DANIEL P. AMOS, PAUL S. AMOS, II, DOUGLAS W.)	
JOHNSON, CHARLES B. KNAPP, BARBARA K.)	C.A. NO. 4:18-CV-00033-CDL
RIMER, ELIZABETH HUDSON, W. PAUL BOWERS,)	
JOSEPH L. MOSKOWITZ, MELVIN T. STITH,)	
)	
Defendants,)	
)	
-and-)	
)	
AFLAC, INCORPORATED,)	
)	
Nominal Defendant.)	
)	

**PLAINTIFFS’ CORRECTED MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS’ MOTION TO DISMISS THE COMPLAINT**

April 11, 2018

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PRELIMINARY STATEMENT

Plaintiffs, through their undersigned counsel, respectfully submit this memorandum of law in opposition to Defendants' motion to dismiss Plaintiffs' Amended Complaint (the "Complaint," ECF No. 23). Defendants' motion should be denied on the following grounds.

First, Aflac wrongfully refused Plaintiffs' demands to conduct a reasonable investigation of their credible allegations of fraud and other serious misconduct at the Company and to take corrective actions. Defendants' refusal was wrongful pursuant to Stepak v. Addison, 20 F.3d 398, 407 (11th Cir. 1994), because of the heavy involvement of a thoroughly conflicted law firm of Alston & Bird LLP ("Alston") in investigating Plaintiffs' claims and shaping Defendants' refusal. See Part II.A below.

Second, Defendants' refusal of Plaintiffs' demand was also wrongful because Defendants faced a substantial likelihood of liability due to their knowledge and conscious disregard of the fraud and other serious misconduct credibly alleged by Plaintiffs, and for the misleading 2017 Proxy and FY2016 Annual Report they had issued in conscious disregard of the fact that those allegations had not been properly investigated. See Part II.B below.

Third, the Defendants-SLC members have failed to disclose the full extent of their business, personal and social relationships with Defendants Aflac and Amoses, which failure casts heavy doubt on their claim of independence. See Part II.C below.

Fourth, the Complaint alleges all elements of claims for violations of Sections 10(b), 14(a) and 20A of the Exchange Act, as well as state law claims of breach of fiduciary duties and unjust enrichment, with the requisite particularity and plausibility. See Part III below.

FACTS

1. The Company dismisses Plaintiffs' credible fraud allegations after a whitewash investigation.

On December 10, 2016, Plaintiffs and other former Aflac sales associates sent a Dispute Notice to Aflac's CEO and Chairman of the Board Defendant Daniel Amos, to Aflac's then President and Board member Defendant Paul Amos, II, and to Aflac's General Counsel Audrey Boone Tillman. ECF No. 1-1, Ex. A. Among numerous other violations, the 16-page single-spaced Dispute Notice specifically alleged pervasive fraudulent activities, including but not limited to the Wells Fargo-type "cross-selling" fraud ("overselling" in the insurance industry parlance): policies sold without policyholders' knowledge or consent by faking their signatures; policies sold to ineligible policyholders; sales that are merely conversion of pre-existing policies; illicit bundling of stand-alone policies; and many others.

Aflac knew very well that Plaintiffs' allegations were credible because, unbeknownst to Plaintiffs at the time of their Dispute Notice but well-known to Aflac, in May 2012 the Company entered into a Regulatory Settlement Agreement with the States of Idaho, Missouri and Minnesota, which enumerated many of the same violations, imposed a \$1.6 million penalty upon Aflac (upon information and belief, the largest statutory penalty in Aflac's history); required the Company to implement a Corrective Action Plan calling for a major overhaul of Aflac's "claims handling, sales and marketing procedures, and agent supervision and compensation practices"; and submitted Aflac to an intrusive three-year regulatory monitoring of its compliance with those requirements. ECF No. 23-1, Ex. 4. Accordingly, when Plaintiffs brought their own allegations of much the same misconduct to the Company's attention in December 2016, the Company should have had little reason to doubt their merits.

On December 14, 2016, Aflac responded to the Dispute Notice through its in-house counsel Catherine Coppedge, stating that “we take these allegations seriously and will be looking into them thoroughly.” ECF No. 1-1, Ex. B. On January 5, 2017, Aflac sent another letter to the Plaintiffs’ counsel, stating that “Aflac unequivocally denies the allegations raised in your December 10, 2016 letter,” and labelling them “wholly without merit.” ECF No. 1-1, Ex. C. It is implausible that Aflac had “look[ed] into [the allegations] thoroughly” during the three-week holiday period and had formed any good-faith basis during that period for denying them as “wholly without merit.” Indeed, Aflac’s statement that the allegations are “wholly without merit” flies in the face of its own 2012 RSA, whereby Aflac had agreed to pay fines for and to correct many of the same violations.

Furthermore, the subsequent investigation by the Special Litigation Committee (the “SLC”) of the very same allegations took an extensive, at least five-month effort, which could not have been accomplished by the Company in just 3 weeks in December 2016-January 2017. Accordingly, Aflac had no basis for denying Plaintiffs’ allegations as “wholly without merit” on January 5, 2017, and denied them in bad faith.¹

¹ According to the Second SLC Report, the SLC has found no evidence that the Company’s internal investigation was a whitewash, as Plaintiffs allege; however, the substance of the Report undermines that conclusion. The Report admits that “the Company did not share with the Special Committee the Company’s counsel’s analysis and conclusions following their investigation into the allegations in the December 2016 and March 2017 Letters. However, the Company did provide the Special Committee with access to the documents that the Company gathered in connection with its investigation, which included over 30,000 e-mails. The Company also made available to Jones Day information gathered by Aflac Trust and the internal audit department in connection with their investigations relating to the allegations in the December 2016 and March 2017 Letters.” What follows in the Report, however, is a lengthy discussion of just one (AWP manipulation) of the many schemes set out in Plaintiffs’ December 2016 Dispute Notice and further amplified in the March 2017 letters, to the complete exclusion of any others. The much more serious allegations of the ongoing fraudulent underwriting, the SBA fraud, financial manipulations, fraudulent recruiting, whistleblower retaliation, sexual harassment, and others are nowhere mentioned in the information or documents gathered in the course of that internal investigation and shared by the Company with the SLC, according to the Report itself. The Second SLC Report on its face thus makes crystal clear that the Company’s internal investigation was woefully incomplete and inadequate; indeed, it was nothing but a whitewash. As alleged in the Complaint, the First SLC Report and investigation were flawed for much the same reasons (see Complaint, ECF No. 23, ¶¶10-17, 134-42); among other things, the SLC did not then investigate (or even disclose) most of Plaintiffs’ allegations of fraud and other serious misconduct.

2. Director Defendants refuse Plaintiffs' demand to investigate their allegations.

Having been so rebuffed by Aflac and its top executives Defendants Amoses, on March 8, 2017, Plaintiffs through counsel reported the alleged fraud to the Company's independent directors, including all Director Defendants, in the hopes that they would investigate Plaintiffs' allegations and take appropriate corrective actions. ECF No. 1-1, Ex. D; ECF No. 23-1, Exs. 5-6. Plaintiffs' March 8, 2017 submission to the independent directors attached the Dispute Notice, as well as copies of Plaintiffs' whistleblower submissions to the SEC, the IRS, and the DOL, which submissions included additional allegations of serious misconduct at the Company, and stated:

We believe our clients' allegations laid out in these submissions are credible, well-supported by evidence, and raise extremely grave concerns about the conduct of the current executive management of the Company. On January 6, 2017 – less than a month after our Dispute Notice – AFLAC responded by denying all our allegations as “wholly without merit” (Exhibit F). It is simply inconceivable that the management had properly investigated our detailed allegations, given the scope and breadth of the alleged wrongdoings, and determined in good faith that they were all without any merit.

We believe it is incumbent upon the independent directors of AFLAC, and consistent with their fiduciary duties, to conduct a proper internal investigation of our allegations without any interference by the executive directors or management, in particular Messrs. Daniel Amos, Paul Amos II, and other AFLAC executives expressly alleged in the Dispute Notice to have been personally aware of and/or participated in the fraud. We are happy to cooperate with and assist the independent directors in their investigation.

On March 20, 2018, Aflac's lead non-management director and Chair of the Audit Committee Defendant Johnson personally responded by a letter to Plaintiffs' counsel, confirming that Plaintiffs' March 8, 2017 submission was being delivered to the addressee Directors, and revealing that “*the Board had previously been advised of the allegations raised in your December letter and on the company's due diligence efforts.*” ECF No. 1-1, Ex. E (emphasis added throughout unless otherwise stated).

Defendant Johnson then relegated Plaintiffs to “*Ms. Lisa H. Cassilly, with the law firm of Alston & Bird, LLP, [who] has been retained to represent Aflac.*” Id. Defendant Johnson’s letter prompted the following response from Plaintiffs on March 28, 2017 (ECF No. 1-1, Ex. F):

Just three days prior to your letter, on March 17, 2017, AFLAC published its annual proxy statement and filed the corresponding Form DEF14A with the SEC. The proxy statement included your letter “to my fellow shareholders,” executed in your capacity of a lead non-management director of AFLAC, and a report from the Audit and Risk Committee that you chair.

In your letter to shareholders, you encourage Aflac shareholders to vote for the slate of directors including the current executive management of the company, alleged in our December letter to have committed massive fraud at the company.

The Audit and Risk Committee Report, in turn, states that the “Committee has recommended to the Board of Directors, and the Board has approved, the audited financial statements to be included in the Company’s Annual report on Form 10-K for the year ended December 31, 2016, for filing with the SEC” – financial statements alleged to have been based on fraud.

It follows from these premises that you personally, the Audit and Risk Committee, and the full Board had approved AFLAC’s 2016 financial statements while internally aware of our allegations that those statements were fraudulent. By contrast, Aflac shareholders reading those publicly released financial statements would have had no clue that something might be seriously amiss at the company.

Plaintiffs’ March 28, 2017 letter to the Director Defendants further stated: “It is simply inconceivable that the Audit Committee could have made the statements it made in the Committee report had it been sufficiently and truthfully apprised of our allegations and of the company’s true financial position by the management.” Id. Plaintiffs’ March 28, 2017 letter concluded by requesting the Board, again, to “investigate our allegations in good faith, and take all the necessary corrective actions.” Id. The Board, however, did not conduct any such good-faith investigation at the time and did not take any corrective action; none was disclosed to Plaintiffs, or to the Company’s shareholders in general.

3. Director Defendants retain a conflicted law firm to represent them with respect to Plaintiffs' demands for investigation.

As set out above, in response to Plaintiffs' demand to investigate their fraud allegations, Defendant Johnson, on behalf of other independent Directors-recipients of Plaintiffs' demand, relegated Plaintiffs to Ms. Cassilly of the Alston law firm "retained to represent Aflac."

In fact, Alston was retained to represent not only Aflac itself but its accused executives Defendants Amoses, other Aflac executives-defendants in a pending whistleblower action, as well as the Board and its individual members, including its independent Directors, all with respect to Plaintiffs' demand. These multiple representations, which Alston unsuccessfully sought to conceal from Plaintiffs, tainted Defendants' response to Plaintiffs' demands with a severe and unconsentable conflict of interests.

Thus, in her inaugural correspondence to Plaintiffs on March 17, 2017, Ms. Cassilly of Alston stated that "Aflac and members of its Board of Directors are in receipt of your recent correspondence. This Firm is counsel to Aflac and has been engaged to represent Aflac in connection with your clients' claims and contentions." Second Declaration of Dimitry Joffe dated April 9, 2018 ("Second Joffe Decl."), Ex. A. Plaintiffs' counsel responded on March 20, 2017, inquiring about Alston's scope of representation (Second Joffe Decl., Ex. B):

Speaking of our respective clients, I understand from your letter that you represent Aflac. Do you also represent Aflac's top executives Messrs. Amos and Amos III, alleged to have been aware of and participated in the fraud? Do you represent Messrs. Meier, Fennell and Whelan, who are the current defendants, along with Aflac, in Mr. Conroy's OSHA action? Also, do you represent Aflac's Board of Directors and/or its independent directors? I note that your letter states that you are in receipt of our recent correspondence to members of Aflac's Board. That correspondence was addressed to the independent directors of Aflac, not to Aflac itself, and called for the Board's internal investigation of our allegations. If you do not represent them, please confirm that Aflac has forwarded our correspondence to its intended recipients.

Having received no response for a week, Plaintiffs' counsel wrote to Ms. Cassilly again on March 27, 2017, with the very same questions. Later that day, Ms. Cassilly responded by email: "Alston & Bird represents Aflac Incorporated and American Family Life Assurance Company of Columbus ("Aflac"), as well as the individual respondents named in Mr. Conroy's OSHA complaint." By contrast, with respect to Messrs. Amoses and Aflac's non-management directors, Ms. Cassilly stated the following: "While we are not aware of any legal claims asserted against Messrs. Amos or any director of Aflac's Board of Directors, we have also been engaged on their behalf *to serve as your point of contact* for any communications regarding your clients and their contentions pertaining to Aflac, its business operations and their relationship with Aflac." Second Joffe Decl. Ex. C.

Plaintiffs' counsel wrote back on March 28, 2017: "I understand from your response [that] Alston & Bird LLP represents Aflac, as well as Ken Meier, Trevor Fennell and Rick Whelan, defendants in the OSHA complaint, and does not represent any other parties. Yet, the precise nature of your relationship to those other parties – Messrs. Amoses, Aflac's Board of Directors, and the individual non-management directors remains elusive. It does not appear from your reply to be that of attorney-client" Second Joffe Decl. Ex. D. The email concluded: "unless you tell me that Alston & Bird LLP or another law firm is counsel to Messrs. Amoses, the Board, and the individual non-management directors, we shall treat them as unrepresented parties." Having still received no response from Alston, Plaintiffs mailed their March 28, 2017 letter (quoted above) to Defendant Johnson (ECF No. 1-1, Ex. F), copying Ms. Cassilly.

On March 30, 2017, Ms. Cassilly responded to Plaintiffs' attempt to clarify the scope of Alston's "point of contact" engagement by evading those questions and instead attacking Plaintiffs' counsel for purportedly violating the "no contact" Rule 4.2 of the New York Rules of

Professional Conduct arising out of the March 28, 2017 letter to Defendant Johnson. Second Joffe Decl., Ex. E. In response, Plaintiffs' counsel wrote on April 3, 2017, summarizing the parties' prior correspondence and stating (Second Joffe Decl., Ex. F).

Rule 4.2 states that "a lawyer shall not communicate about the subject of representation with a party" whom the lawyer "knows to be represented by another lawyer in the matter." . . . As shown above, you never stated in response to my direct questions that Mr. Johnson is represented by you, Alston & Bird, or any other counsel. To the contrary, by expressly representing that you are counsel to Aflac and Messrs. Meier, Fennell and Whalen, while at the same time you are merely a "point of contact" for the others, including Mr. Johnson, you have made it clear that you do not represent them as counsel, even though the precise nature of your "point of contact" representation remains uncertain. I direct your attention in this regard to NYSBA Opinions 663 (1994), which . . . address[es] the situation of a "recalcitrant attorney who will not confirm or deny the claimed relationship," and concludes that "[a]fter sending a series of letters, including the last one that warns of the consequences of a failure to respond, the interests protected by DR 7-104(A)(1) will have been satisfied and the lawyer justifiably can conclude that she does not 'know' that the debtor is represented by counsel." Here, I asked you several times directly to confirm that you represent those parties, but in each instance you have evaded answering that question directly, with coy references to the "point of contact" engagement.

In her response dated April 4, 2017, Ms. Cassilly finally admitted: "Your alleged confusion baffles me, but *the answer is 'yes,' Alston & Bird LLP represents the Messrs. Amos, the Board and the individual directors in this matter.*" Second Joffe Decl. Ex. G. That admission meant that Alston was retained to represent not only the Company itself, and not only Defendants Amoses and other executives accused of fraud and whistleblower retaliation, but also the Board itself and individually its independent directors presumably investigating those accusations at the same time, notwithstanding the apparent conflict of interests inherent in such representation. Alston's representation of individual directors, including Defendants Powers, Moskowitz and Stith comprising the SLC, has continued uninterrupted while the SLC investigated and then rejected Plaintiffs' demand with the help of the law firm of Jones Day;

indeed, it was Alston who informed Plaintiffs that the SLC had rejected their demand on September 21, 2017 (ECF No. 1-1, Ex. H), and it was Alston who would go on to represent them as Defendants in the instant derivative litigation.

The heavy involvement of the thoroughly conflicted Alston law firm representing the Company itself, its Board of Directors, its accused executives, and the individual Directors (including the three Directors composing the SLC) from the very inception of this matter and until present irrevocably tainted Defendants' investigation and refusal of Plaintiffs' demand.²

LEGAL ARGUMENT

I. Legal standards on a motion to dismiss derivative complaint

A complaint may be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure only where it appears that the facts alleged fail to state a “plausible” claim for relief. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). A complaint may survive a motion to dismiss for failure to state a claim, however, even if it is “improbable” that a plaintiff would be able to prove those facts; even if the possibility of recovery is extremely “remote and unlikely.” Bell Atlantic v. Twombly, 550 U.S. 544, 556 (2007). In ruling on a motion to dismiss, the court must accept the facts pleaded in the complaint as true and construe them in the light most favorable to the plaintiff. See Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A., 711 F.2d 989, 994-95 (11th Cir. 1983). In a shareholder derivative case, the

² As discussed below, the process was flawed in other legally cognizable respects, and as such could not and did not produce any credible result. Fundamentally, both SLC Reports confirm the fact of the majority of Plaintiffs' alleged schemes but seek to minimize their extent as “episodic” as opposed to “systemic,” and therefore not material. However, the very first public disclosure of Plaintiffs' allegations – incomplete as it was in scope and limited in reach – caused a 7.5% drop of Aflac's stock price on January 12, 2018, demonstrating that investors indeed considered such allegations material. Stripped of their invalid materiality defenses, the Reports actually confirm the existence of most of the violations alleged by Plaintiffs.

complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors. See Fed. R. Civ. P. 23.1(b)(3).

In the context of derivative litigation, O.C.G.A. § 14-2-744(a) also provides: “The court may dismiss a derivative proceeding if, on motion by the corporation, the court finds that one of the groups specified in subsection (b) of this Code section has made a determination in good faith after conducting a reasonable investigation upon which its conclusions are based that the maintenance of the derivative suit is not in the best interests of the corporation. The corporation shall have the burden of proving the independence and good faith of the group making the determination and the reasonableness of the investigation.”³ Commentary to O.C.G.A. § 14-2-744 states: “The decisions that have examined the qualifications of members of special litigation committees have required that they be both ‘*disinterested*’ in the sense of not having a personal interest in the transaction . . . and ‘*independent*’ in the sense of not being influenced in favor of the defendants by reason of personal or other relationships.”) (citing Aronson v. Lewis, 473 A.2d 805, 812–16 (Del. 1984), overruled on other grounds, Brehm v. Eisner, 746 A.2d 244, 253 (Del. 2000)).

II. Defendants’ refusal of Plaintiffs’ demand was wrongful.

A. A conflicted law firm impermissibly tainted the Board’s response to Plaintiffs’ demands.

The Eleventh Circuit Court of Appeals held in Stepak v. Addison, 20 F.3d 398, 407 (11th Cir. 1994), that “if a shareholder pleads with sufficient particularity facts that, taken as true,

³ O.C.G.A. § 14-2-744(c) provides: “None of the following shall by itself cause a director to be considered not independent for purposes of subsection (b) of this Code section: (1) The nomination or election of the director by directors who are not independent; (2) The naming of the director as a defendant in the derivative proceeding; or (3) The fact that the director approved the action being challenged in the derivative proceeding so long as the director did not receive a personal benefit as a result of the action.” Plaintiffs do not contend that any of these three factors causes Defendants to lack independence.

show that a board’s consideration of his demand was dominated by a law firm that represents or previously represented an alleged wrongdoer in criminal proceedings related to the very subject matter of the demand, then the shareholder raises a reasonable doubt that the board’s rejection of his demand was an informed decision protected by the business judgment rule. In such a case, the shareholder’s complaint is entitled, on a wrongful refusal theory, to survive a Rule 23.1 motion to dismiss.” *Id.* at 407.⁴

The Court of Appeals stated that “it is ***unreasonable*** for a board of directors to entrust its investigation of a shareholder’s demand to conflicted counsel,” and held that an involvement of a conflicted counsel in the demand investigations impermissibly tainted the whole process, which taint was not removed by the subsequent involvement of independent counsel, and reversed the District Court’s dismissal of that derivative action solely on that basis. *Stepak*, 20 F.3d at 406. ***“If Stepak’s allegations are true, Southern’s outside directors acted in a unreasonable manner by entrusting the investigation of Stepak’s demand to Troutman Sanders; the outside directors were grossly negligent.”*** *Id.* at 411. See also *Stone v. AmSouth Bancorporation v. Ritter*, 911 A.2d 362 (Del. 2006) (by relegating the investigation to the conflicted law firm, the Defendants “disable[ed] themselves from being informed of risks or problems requiring their attention”).

⁴ “In the leading case of *Stepak v. Addison*, the U.S. Court of Appeals for the Eleventh Circuit, applying Delaware law, held that the law firm’s independence would be compromised if it previously represented those persons concerning ‘the very subject matter of the [shareholder] demand.’ 20 F.3d at 407. The court partly based its ruling on the “strong possibility that a ‘lingering allegiance’ toward the insider defendants will color or otherwise bias counsel’s investigation of the allegations against its former clients, as well as any legal advice counsel provides to the corporation about the matter.’ *Id.* at 405. While *Stepak*’s ruling is expressly limited to instances where the prior representation concerned ‘the very subject matter of the [shareholder] demand,’ other courts have cautioned more broadly against retaining outside counsel with ‘any ties’ to the individuals under investigation. See *In re Oracle Sec. Litig.*, 829 F. Supp. 1176, 1189 (N.D. Cal. 1993) (board was required ‘to retain counsel with no prior ties to the individual defendants or the corporation’); *Dalrymple v. Nat’l Bank & Trust Co.*, 615 F. Supp. 979, 986 (W.D. Mich. 1985) (outside counsel should have ‘no previous professional relationship with either the corporate entity or its directors’); *Messing v. FDI, Inc.*, 439 F. Supp. 776, 782 (D.N.J. 1977) (outside counsel must be ‘unshackled by any ties to the directors’).” W. Monahan, A. Magrid, *Investigating Shareholder Derivative Claims: The Importance of Independent Counsel* (Columbia Law School Blue Sky Blog, Mar. 1, 2013).

The Court in Stepak stated in the language fully applicable to the facts of this case, 20 F.3d at 406:

We believe that it is unreasonable for a board of directors to entrust its investigation of a shareholder demand to conflicted counsel. . . . Selection of such a firm to conduct a board's investigation turns a blind eye to material information that would otherwise be available to the board, and therefore falls short of the standards that shareholders have a right to expect from the board.

The Court first considered “whether domination, in the manner described by the pleadings, of a board's consideration of a shareholder's derivative demand by a law firm that has represented the alleged wrongdoers in criminal proceedings involving the very subject matter of that demand, would raise a reasonable doubt that the board has properly informed itself prior to rejecting the shareholder's demand. We conclude that it would raise such a doubt.” Id. at 403-04, observing that “[j]ust as a biased judge would eviscerate the adversary system's value as a dispute resolution mechanism, a conflicted law firm can eviscerate the decisional process of a corporate board.” Id. at 410.

The Court held that the Board's eventual retention of another outside counsel “evidences the outside directors' recognition that they could not rely upon the conflicted law firm of Troutman Sanders in regard to the demand,” id. at 407, but was insufficient “to remove any taint associated with Troutman Sanders' involvement.” Id. at 409. The Court reasoned that “[*t*he *initial decision then as to what role if any the corporation should take must in the first instance be made completely free from any actual or apparent conflict.*” Messing, 439 F.Supp. at 782.” Id. at 404, and concluded that “this allegation [of a conflicted law firm] creates a reasonable doubt that the Board validly exercised its business judgment in refusing Stepak's

demand, and therefore we reverse as to Stepak.” Stepak, 20 F.3d at 400.⁵ The Court further stated:

*The problem in this case is not the amount of time or the quantity of ink expended by or on behalf of the outside directors in preparation for the September 21 and 24 meetings. . . . It is unreasonable to trust a conflicted law firm to present the relevant information and to do so in a neutral manner. If Stepak’s allegations are true, Southern’s outside directors acted in a unreasonable manner by entrusting the investigation of Stepak’s demand to Troutman Sanders; the outside directors were grossly negligent.*⁶

Here, “Alston & Bird LLP represent[ed] the Messrs. Amos, the Board and the individual directors in this matter,” in addition to Aflac itself which has retained Aflac in the first place. Accordingly, Alston has handled the response to Plaintiffs’ demands on behalf of all the Defendants from the very inception of this matter and has not extricated itself from these conflicting representations ever since.

Just like the conflicted law firm in Stepak “handled the directors’ correspondence with Stepak and his attorney,” “conducted the actual investigation into Stepak’s allegations,” and “provided the outside directors with legal advice concerning Stepak’s allegations and the outside directors’ potential responses,” id. at 407, so did Alston & Bird in this case, retained by Aflac to represent the company itself, its executives accused of fraud, the Board, and its individual members. Indeed, as Defendant Johnson acknowledged in March 2017, “the Board *had*

⁵ “We take it as axiomatic that a board would not be acting consistently with its fiduciary duties were it to reject a shareholder demand based on an investigation and presentation by the alleged wrongdoers. *See, e.g., Smith v. Van Gorkom*, 488 A.2d 858, 874 (Del.1985). Likewise, when a board chooses to entrust its investigation to a law firm—and it is unquestionably the board’s prerogative to do so—the directors must ensure that counsel is capable of independently evaluating the corporation’s interests. *Selection of a law firm that has actually represented the alleged wrongdoers in proceedings related to the very subject matter that the law firm is now asked to neutrally investigate reaches, in our opinion, the level of gross negligence and is incompatible with a board’s fiduciary duty to inform itself ‘of all material information reasonably available’ prior to making a business decision. Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985). Such a shortcoming strips a board’s rejection of a shareholder demand of the protection of the business judgment rule.” Stepak, 20 F.3d at 405.

⁶ Georgia law, as amended in 2017, likewise sets the gross negligence standard for directors’ liability, see O.C.G.A. 7-1-490(c).

previously been advised of the allegations raised in your December [2016] letter and on the company's due diligence efforts" while referring Plaintiffs to Alston, "retained to represent Aflac." At that time, the Board could only have been advised either by Aflac's management team accused of wrongdoing, or by Alston representing them and Aflac.

Furthermore, even after the belated involvement of Jones Day as an outside counsel to the SLC, it was Alston that provided to Jones Day "over 30,000 documents and emails previously collected from over 25 custodians. *The electronic documents received from Alston & Bird were filtered from collection of over 1.5 million documents pursuant to a list of search terms that Jones Day reviewed and considered appropriate for the purposes of this investigation.*" ECF No. 23-1, Ex. 2 at p. 29. This statement clearly indicates that the initial document review and collection, the subsequent filtering, and the search terms for the filtering were all done by Alston, with Jones Day merely reviewing them post-factum. Moreover, according to the SLC Report, "[a]n Alston & Bird attorney was present for certain of the witness interviews" despite the fact that Alston was representing, among many other parties, the very executives being accused of wrongdoers. *Id.* at 30. In the words of the Stepak opinion, "[i]t is unreasonable to trust a conflicted law firm to present the relevant information and to do so in a neutral manner. *If [Plaintiffs'] allegations are true, Southern's outside directors acted in a unreasonable manner by entrusting the investigation of [Plaintiffs'] demand to [Alston & Bird]; the outside directors were grossly negligent.*"⁷

⁷ The Stepak court stated in another directly applicable passage: "[a]n adversarial approach to the investigation and evaluation of a shareholder demand . . . is in and of itself *incompatible with the directors' fiduciary obligations and strips any resultant decision of the protection of the business judgment rule.*" *Id.* at 410. As alleged in the Complaint, Defendants' approach to Plaintiffs' demands was nothing but adversarial.

Finally, it is indicative that Defendants and Alston themselves attempted to conceal the conflicted representation. Alston was initially recalcitrant and resisted disclosing that its representation with respect to the subject matter of Plaintiffs' demand included the alleged wrongdoers themselves and the independent Board members, before eventually and reluctantly conceding it. Likewise, both SLC Reports misleadingly refer to Alston as "counsel to the Company," without disclosing that Alston also represented the alleged wrongdoers, the Board, and the individual members of the SLC. This reluctance indicates that Defendants were well aware that such multiple representation was wholly improper in the shareholder demand context.

B. Defendants, including the SLC members, faced a substantial likelihood of liability, casting reasonable doubts upon their disinterestedness and independence.

"The primary way to show [a reasonable doubt that the directors are disinterested and independent] is to show that a majority of the directors faced a substantial likelihood of liability on the underlying claims." Aronson v. Lewis, 473 A.2d 805, 815 (Del. 1984).⁸

More recently in the Wells Fargo derivative litigation, the Court has concluded that "demand is futile because the allegations in the Complaint create a reasonable doubt as to whether a majority of the Director Defendants face a substantial likelihood of liability as to Plaintiffs' claims." Shaev v. Baker, No. 3:16-cv-05541, Slip Op. (N.D. Cal. May 4, 2017). The

⁸ See also Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 102 (1991) ("[D]emand typically is deemed to be futile when a majority of the directors have participated in or approved the alleged wrongdoing"); In re Friedman's, Inc. Derivative Litig., 386 F.Supp.2d 1355, 1363 (N.D. Ga. 2005) ("Director is considered 'interested' when a corporate decision will have a materially detrimental impact on a director which is not shared by the corporation and the stockholders."); In re Abbott Labs. Deriv. S'holders Litig., 325 F.3d 795, 809 (7th Cir. 2003) (demand excused where the complaint alleged that the directors "took no steps in an effort to prevent or remedy the situation in the face of numerous known violations of law"); In re Pfizer Inc. S'holder Deriv. Litig., 722 F. Supp. 2d 453, 460 (S.D.N.Y. 2010) (demand was futile because the directors received numerous warnings of illegal marketing practices but "chose to disregard it"); Veeco Instruments, Inc. v. Braun, 434 F. Supp. 2d 267 (S.D.N.Y. 2006) (the company failed to do anything for more than a year to address deficiencies in its accounting, and even though the board acted in that case, the court found demand excused because the board failed to act until *after* the harm had occurred).

Court there found that “the abundance of particularized allegations in the Consolidated Amended Complaint support an inference that a majority of the Director Defendants – and in particular those Director Defendants who were on the risk committee, audit and examination committee, and corporate responsibility committee – ***knew about widespread illegal activity and consciously disregarded their fiduciary duties to oversee and monitor the company. As a result, they face a substantial likelihood of liability for Plaintiffs’ breach of fiduciary duty claims.***” Id.⁹

The case at bar is on all fours with the Wells Fargo derivative litigation. The Complaint herein likewise alleges that “faced with the direct and substantiated evidence of a pattern of fraudulent practices at the Company conducted with the participation and/or knowledge of the Company’s top executives Defendants Amoses, the Director Defendants, in utter dereliction of their duties, failed properly to investigate those fraudulent practices and the deficient internal controls that allowed the misconduct to occur; failed to disclose that misconduct, including its impact on Aflac’s financial results and key operational metrics reported in its SEC filings and other public statements, to the shareholders, regulators, and other market participants; and did nothing to bring the misconduct to an end choosing instead to cover it up, contrary to the best interests of the Company, in breach of their fiduciary duties and in violation of the applicable state and federal laws.” (ECF No. 23).

⁹ See also Rosenbloom v. Pyott, 765 F.3d 1137, 1152 (9th Cir. 2014) (“a battery of particularized factual allegations that strongly support an inference at this stage of the litigation that the Board knew of and did nothing about illegal activity.”); South v. Baker, 62 A.3d 1,15 (Del. Ch. 2012) (allegations “that the board consciously failed to act after learning about evidence of illegality – the proverbial ‘red flag’” – deemed sufficient at the motion to dismiss stage); David B. Shaev Profit Sharing Account v. Armstrong, 2006 WL 391931, at *5 (Del. Ch. Feb. 13, 2006) (“A claim that an audit committee or board had notice of serious misconduct and simply failed to investigate . . . would survive a motion to dismiss, even if the committee or board was well constituted and was otherwise functioning”).

Here, Defendant Directors faced a substantial likelihood of liability both for their conscious disregard of the widespread violations alleged by Plaintiffs in their demand for investigation, and for the false and misleading 2017 Proxy and FY2016 Annual Report they had issued while fully aware of those violations. That substantial likelihood of liability, whether standing alone or coupled with the conflicted law firm representation, raise sufficient doubts concerning Director Defendants' independence and disinterestedness.

C. Defendants' incomplete disclosure of business and other ties raises further reasonable doubts about their independence.

A director is considered independent where he is able to "base his decision on the merits of the issue rather than being governed by extraneous considerations or influences," such as "being influenced in favor of the defendants by reason of personal or other relationships." Millsap v. American Family Corp., 208 Ga. App. 230, 237-38 (Ga. Ct. App. 1993).

As shown below, two out of three members of the SLC, Defendants Stith and Powers, had undisclosed business associations with Defendants Amoses, notwithstanding their declarations that they "do not have any personal interest or current or prior personal or business relationships that would affect [their] assessment and conclusions as a member of the Special Committee." ECF No. 42-4, Ex. C.

According to the declaration of Defendant Stith, he serves on the Board of Synovus Financial Corp., a large financial institution based, like Aflac, in Columbus, Ga. According to Bloomberg, Aflac's key executive Defendant Daniel Amos "served as Director of Synovus Financial Corp., since 2001 and previously served as its Director from 1991 to 1998." ECF No. 42-4, Ex. C. Indeed, both corporations have maintained close and longstanding ties with each other for years, are customers of each other, and their CEOs Defendant Daniel Amos and Jim Blanchard, "in true small-town tradition are almost related. Amos' second cousin married one of

Blanchard's sons.” Richard Hyatt, Kingpins of Columbus, (Georgia Magazine, Mar. 2013).

Defendant Paul Amos, II, joined former Chairman and former President of Synovus, Jim and William Blanchard, at JBA Capital upon resigning from Aflac in June 2017.

Defendant Powers has been Chairman, CEO and President of Georgia Power Company, and also held various executive positions at its parent Southern Company. According to Bloomberg, Defendant Daniel Amos also “served as a Director of Southern Co. from 2000 to February 2006. He served as a Director of . . . Georgia Power Co. since May 1997.”

Moreover, the SLC Reports refer to the “lack of *close* social or personal relationships” between its members and Defendants Amoses, allowing a reasonable inference to be drawn in Plaintiffs’ favor that there are at least *some* undisclosed social or personal relationships, which could further undermine the SLC members’ independence. In this regard, the Georgia Court of Appeals stated in Thompson v. Scientific Atlanta, Inc., 621 S.E.2d 796 (Ga. Ct. App. 2005), that “[i]n the *Zapata* context, discovery may be ordered to facilitate inquiries into independence, good faith, and the reasonableness of the investigation.”) (internal citations and alterations omitted). At the very least, the Court should allow Plaintiffs a limited discovery into these issues.¹⁰

¹⁰ In the course of researching the relationships between Defendants Amoses and the SLC members for the purposes of this motion, Plaintiffs have come across several indicia of familial and other relationships between the Honorable Clay D. Land presiding over this action, and Aflac’s executives Defendants Amoses. In particular, upon information and belief, John Amos’ daughter Maria Teresa Amos Land, a first cousin of Defendant Daniel Amos and an aunt of Defendant Paul Amos, II, was married to Donald “Donny” Land, and W. Donald Land, Jr., upon information and belief their son, currently works as an in-house counsel for Defendant Aflac. Upon information and belief, the Honorable Clay D. Land’s cousin Ted Land and his daughter Deborah Land used to work for Defendant Aflac as well. A review of the local media also reveals the existence of the so-called “Fish House Gang,” an influential tight-knit group of local elites who meet regularly for fried catfish dinners (hence the moniker), of which the Amos and the Land families are prominent members. As David Rose relays in his book The Big Eddy Club at 302 (The New Press, 2007), “from his early adulthood Clay Land had been on the list of regulars at the exclusive fried catfish suppers that his great-uncle John organized for more than half a century, that singular opportunity to network, the Fish House Gang.”

These familial and social relationships might reasonably be construed to create an *appearance* of partiality towards Defendants. Pursuant to 28 U.S.C. § 455(a), “[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”

III. The Complaint states claims for Sections 10(b) and 14(a) violations and for breach of fiduciary duties.

The Complaint alleges that all Defendants knew about the credible allegations of fraud and other misconduct at the Company but did nothing meaningful to investigate or address these allegations, in reckless breach of their fiduciary duties, and that all Defendants made or caused to be made false and misleading statements and omissions in the 2017 Proxy and FY2016 Annual Report in violation of Sections 10(b) and 14(a) of the Exchange Act (Counts I, II and IV). The Complaint also alleges derivative claims for Section 20A violation (insider trading) and unjust enrichment against Defendant Paul Amos, II (Counts III and V). Contrary to Defendants' *ipse dixit* pronouncement that Counts I, II and III – for securities laws violation – are “direct claims” while the state law claims for breach of fiduciary duties and unjust enrichment are “derivative,” all of these claims are properly brought as derivative claims on behalf of a nominal defendant Aflac. Not surprisingly, Defendants cite no authority in support of the false dichotomy they proffer here. See, e.g., In re Wells Fargo Shareholder Derivative Litig., No. 3:16-CV-05541, Slip Op. (N.D. Cal. Oct. 4, 2017) (upholding all such claims in the Wells Fargo derivative action). Plaintiffs incorporate by reference as though set forth fully herein their memorandum of law in opposition to Defendant Paul Amos, II's motion to dismiss all five Counts alleged in the Complaint.

Pursuant to 28 U.S.C. § 455(b), “[h]e shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; [or] (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (i) Is a party to the proceeding, or an officer, director, or trustee of a party; . . . (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.” Pursuant to 28 U.S.C. § 455(c), “[a] judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.”

CONCLUSION

For reasons set out above and incorporated herein by reference, Defendants' motion should be denied.

Respectfully Submitted,



Dated: April 11, 2018

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CERTIFICATE OF SERVICE

I, Dimitry Joffe, hereby certify that on this 11th day of April, 2018, I caused a copy of the corrected memorandum of law in opposition to Defendants' motion to dismiss to be served electronically upon the registered participants in this case through the ECF system.

A handwritten signature in blue ink that reads "Dimitry Joffe". The signature is written in a cursive style with a long horizontal stroke at the end.

Dimitry Joffe
Counsel for the Plaintiffs