

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

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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.	)
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**PLAINTIFFS’ CORRECTED MEMORANDUM OF LAW IN OPPOSITION  
TO DEFENDANT PAUL AMOS, II’s MOTION TO DISMISS THE COMPLAINT**

April 11, 2018

Dimitry Joffe (admitted *pro hac vice*)  
JOFFE LAW P.C.  
230 Park Avenue, 10 Fl.  
New York, NY 10169  
Tel: (212) 309-8711  
Email: [dimitry@joffe.law](mailto:dimitry@joffe.law)  
*Counsel for the Plaintiffs*

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**PRELIMINARY STATEMENT**

Defendant Paul Amos' motion should be denied because, as a threshold matter, Defendants' refusal of Plaintiffs' demands to investigate fraud and other serious misconduct at the Company and to take corrective action was wrongful for the reasons set out in Plaintiffs' contemporaneous memorandum of law in opposition to the other Defendants' motion to dismiss, which memorandum is incorporated herein by reference as if fully set forth herein.

The remainder of this memorandum addresses Defendant Amos, II's and the other Defendants' arguments that the Complaint has failed to state any claim upon which relief may be granted under Rule 12(b)(6), and/or has failed to state fraud claims with the requisite Rule 9(b) particularity.

**FACTS**

On June 8, 2017, Aflac announced that Defendant Amos, II, President of Aflac since 2007, the son of its CEO and Chairman Defendant Daniel Amos, a grandson and great nephew of the Company's founders, abruptly resigned from Aflac's Board and from the Company, as well as from all of the Company's affiliates and subsidiaries. Prior to that day, Defendant Amos, II, was considered "the potential third-generation heir to his father Dan Amos." Upon his departure, Defendant Paul Amos joined a private equity firm JBA Capital in Columbus, Ga, partnering with the former CEO and the former President of Synovus Financial Corp., the father and son James and William Blanchard.

Defendant Amos, II, was re-elected to Aflac's Board barely a month before his departure, on May 1, 2017. Aflac's press release announcing the news quotes Defendant Amos, II's

explanation of sorts for his sudden departure: “I have been fortunate to be involved with this company my entire life. I’ve enjoyed it and have decided it’s time for me to look forward to the next phase.” According to Defendant Amos, II’s interview published the same day by Columbus Ledger-Esquire in an article titled Aflac President Paul Amos, Son of CEO Dan Amos, Leaving the Company, the parting was “bittersweet”:

Amos, who turns 42 in July, has worked in some form or fashion at the supplemental insurance company since his teens, with his first job that of answering telephones in the firm’s Investor Relations office. He joined the executive ranks in 2005, becoming executive vice president of U.S. operations, followed by a promotion to president and chief operating officer of Aflac U.S. in 2007. It was in 2013 that he was elevated to president of Aflac Inc., which included oversight of the firm’s critical Aflac Japan operation.

“It’s tough leaving the business my grandfather built and my father runs, and I will forever bleed Aflac blue,” Amos said. . . .

“While my family, my grandmother and my father, they’re all supportive, it’s still a bit of a sad day. It’s hard to leave Aflac,” he said.

According to Aflac’s 2017 Proxy, Defendant Amos, II’s compensation as President in his last full year at the Company (2016) was \$5,243,385.

On June 14, 2017, Defendant Amos, II, filed Form 4 with the SEC, disclosing that on June 12, 2017, he sold 222,889 of Aflac shares – or 44% of his total direct shareholding in the Company -- for over \$17 million.

At the very same time when Defendant Amos, II, engaged in his insider selling, Aflac was operating a share repurchase program, pursuant to which during the second quarter of 2017 - including June 2017, when Defendant Amos, II, sold his shares for \$17 million -- Aflac “repurchased \$200 million, or 2.7 million of its common shares. For the first half of the year, the company purchased \$800 million, or 11.2 million of its common shares. At the end of June, the

company had 15.6 million shares available for purchase under its share repurchase authorizations.” Aflac’s Form 10-Q for Q2 FY2017.

Furthermore, on August 8, 2017, Aflac issued a press release disclosing that “Aflac Incorporated’s board of directors has authorized the purchase of up to 40 million shares of its common stock. This authorization is in addition to the 15.6 million shares that remained under a previous authorization as of June 30, 2017, bringing the total number of shares available for purchase to approximately 55.6 million.”

The First SLC Report also disclosed that, pursuant to its share repurchase program, Aflac repurchased its stock on the open market on June 13, 2017, the day after Defendant Amos’ sale.

Defendant Amos, II, sold his Aflac shares while in possession of material non-public Company information – *i.e.*, the credible, documented allegations of the massive fraud at Aflac provided by Plaintiffs to Defendant Amos, II, among others, during the period of six months prior to his departure.

First, on December 10, 2016, Defendants sent their Dispute Notice to Defendants Amos, II, and Daniel Amos, as well as to the Company’s General Counsel. The Dispute Notice (ECF No. 1-1, Ex. A) speaks for itself as it alleges numerous fraudulent schemes and other misconduct, such as those of the Wells Fargo-style cross-selling (or “overselling” in the insurance industry parlance) of policies without customers’ knowledge or consent; the AWP metric manipulation; the SBA fraud; the SNG fraud; fraudulent recruiting of sales associates; sales that are conversion of existing coverage; misclassification of employees as independent contractors; sexual harassment; whistleblower retaliation; institutionalized theft of commissions through “cheat codes”; and others. Among other things, the Dispute Notice alleged that Defendant Amos, II, had implemented the use of the AWP metric as part of the sales associate

bonus years prior to the Dispute Notice, despite having been forewarned that the metric would be easily manipulated.

Accordingly, Defendant Amos, II, had knowledge of the alleged fraud and other misconduct alleged by Plaintiffs since at least December of 2016 (and had been warned about the AWP manipulation in 2010) as a result of Plaintiffs' direct communication of those allegations to his personal attention by their Dispute Notice.

On January 5, 2017, the Company responded to Plaintiffs' Notice by labelling their allegations "wholly without merit." Given the breadth and depth of Plaintiffs' allegations, it was utterly implausible that the Company had conducted a good-faith, reasonable investigation of those allegations in just three weeks during the holiday season. Indeed, when the SLC belatedly retained another counsel to investigate those allegations, it took that counsel five months to conduct the investigations and 179 pages (not counting exhibits) to report their results.

In March 2017, Plaintiffs mailed their Dispute Notice, as well as their SEC, IRS and DOL whistleblower submissions, to the Company's independent directors, with a request that they conducted a reasonable investigation of those allegations. ECF No. 1-1, Ex. E. Those submissions expanded on the December 2016 claims with additional evidence, and added certain new claims, including with respect to employment tax violations, undisclosed "incentive fund," and violations of Section 125 of the IRC.

The Directors, however, passed Plaintiffs' submissions and relegated their investigation to Alston & Bird LLP ("Alston"), the firm that represented the alleged wrongdoers themselves, including Defendant Amos, II, despite Alston's apparent severe conflict of interests.

Accordingly, at the time of Defendant Amos, II, stock sale on June 12, 2017, he knew about the alleged violations, and he also knew that neither the Company, nor the Board, nor the

conflicted law firm that represented the Company and the Board alongside the accused wrongdoers, had properly investigated those allegations. None of this information had been disclosed to the market participants at the time of his trade, but was known to Defendant Amos, II, in his capacity as Aflac's corporate officer and director, one of the actual recipients of the Dispute Notice, and as one of the targets of those allegations.

Therefore, Defendant Amos, II, was indisputably in possession of inside non-public information about the Company at the time of his trade on June 12, 2017.

In response, Defendant Amos, II, claims that "Mr. Amos complied with the Company's insider trading policies; that the Company pre-approved his June 2017 stock sale as required; and that Mr. Amos possessed no actionable material nonpublic information at the time of his stock sale." Amos, II' Brief, ECF 43-1 at 11.

Defendant Amos, II, also argues that his "defenses against any insider trading claim were *nearly impregnable in light of the Company's pre-approval of his stock sale.*" *Id.* at 3. It is axiomatic that **no** pre-approval by any private party can ever insulate another from civil or criminal liability for insider trading in violation of the securities laws, as any contrary interpretation would have eviscerated securities laws by giving companies, *i.e.*, private non-governmental entities, a license to issue get-out-of-jail cards to its insider trading executives. Not surprisingly, Defendant Amos, II, cites no authorities in support of his "nearly impregnable" defense argument.

Nor does the Company's own insider trading policy itself provides Defendant any impregnable defense, as it could not without violating securities laws. To the contrary, Aflac's Insider Trading Policy (ECF No. 43-3) expressly states:

***It is illegal and a violation of Company policy to purchase or sell securities of the Company or any other entity while you are in possession of material non-public information about the Company or any other entity. . .***

If a Covered Person [which includes Defendant Paul Amos] has material non-public information relating to the Company, neither the Covered Person nor any member of the Covered Person's Immediate Family may buy or sell Company Securities or engage in any other action to take advantage of, or pass on to others, that information. . .

Material information is any information that an investor would consider important in a decision to buy, hold or sell stock. In short, it includes any information that could reasonably affect the price of the Company's stock."

The Policy provides that a Covered Person must consult with the Compliance Officer prior to any trading, but ends with this bold reminder in boldface: "***Remember, however, the ultimate responsibility for adhering to the Policy Statement and avoiding improper transactions rests with you, the Covered Person.***" ECF No. 43-3 (emphasis original). In relying on the Company's preapproval of his trades as his "nearly impregnable defense," Defendant Paul Amos, II, must have forgotten that key last sentence.

The First SLC Report states that the inside information was not material because since Defendant Amos, II's stock sale, "the price of the Company's stock has steadily risen. . . . The absence of a market decline after Paul Amos' stock sale contradicts any inference that it was improperly inflated at the time of his sale. Also, the fact that the Company's market capitalization has increased by nearly \$2.5 billion since the stock sale undercuts any inference that it was harmed by the sale." ECF No. 23-1, Ex. 2.

Of course, at the time of Defendant Amos, II's sale in June 2017, the insider information in his possession about the alleged fraud remained "insider" information not available to the general public. However, on January 12, 2018, after some of Plaintiffs' allegations were published for the first time by an online magazine, Aflac stock dropped 7.4%, making it "the

biggest loser” among all S&P500 companies and wiping out that \$2.5 billion increase in Aflac’s market capitalization in a single day.

Apparently, the shareholders did find even the partial and limited disclosure of Plaintiffs’ allegations as “having significantly altered the ‘total mix’ of information made available,” which is how Supreme Court defined materiality in Basic v. Levinson, 485 U.S. 224 (1988). The stock drop also undermines the SLC Reports’ conclusions that the violations alleged by Plaintiffs, most of which existence the SLC has confirmed, were not material.

### **LEGAL ARGUMENT**

**1. The Complaint alleges actionable misleading statements and omissions in the 2017 Proxy and FY2016 Annual Report with the requisite particularity.**

The Complaint’s particularized allegations of Defendants’ false and misleading statements and omissions in the 2017 Proxy Statement and in FY2016 Annual Report properly state an actionable misrepresentation for purposes of Sections 10(b) and 14(a) liability.

*First*, the Complaint alleges that Defendants omitted material information regarding Plaintiffs’ credible allegations of fraud at the highest levels of the Company and the Company’s utter failure to investigate those allegations from the 2017 Proxy and the FY2016 Annual Report, making them false and misleading for that reason.

*Second*, the 2017 Proxy’s affirmative statement that the Board’s Corporate Governance Committee chaired by Defendant Rimer selected the nominees, including Defendant Amoses, following its “Director Nominating Process” and on the basis of nominees’ “impeccable record and reputation for honest and ethical conduct in both professional and personal activities,” is false and misleading in light of Defendant Rimer’s and other Board members’ knowledge of the credible yet uninvestigated allegations of fraud against Defendants Amoses, which allegations on

their face raise severe doubts about their “impeccable record and reputation for honest and ethical conduct.” Defendants made this statement in conscious disregard of that knowledge.

Defendants’ argument that this statement was a mere “corporate puffery” or “vague, optimistic statement” is misplaced. This is in fact a statement from Aflac’s 2017 Proxy designed to solicit shareholder votes for the directors nominated by the Company. The Proxy describes the rigorous “Director Nominating Process” that the Corporate Governance Committee undertook to carefully examines each candidate based both on their “impeccable record and reputation for honest and ethical conduct,” which the Committee considers a “must have” or “threshold” quality, and on their “specific experiences and skills,” among other enumerated criteria. This is a purely factual statement of the Committee’s nomination process and its outcome, rather than merely “opinion” or “puffery” expressed by its individual members.

*Third*, the Proxy’s affirmative statement that “our Directors are equipped to make all of the [risk management] decisions” in the section “Enterprise-Wide Risk Oversight” is likewise a factual statement, not a puffery or merely an opinion. The statement was designed to comfort the investors that they are in good hands with the current Board with respect to the Board’s risk oversight over the management. The statement is false in light of the Directors’ utter failure to investigate or mitigate the risks that the uninvestigated allegations of fraud posed for the Company.

*Fourth*, the statement that the Directors, including Defendants Amoses, had “no reason to believe that any of the nominees will be unable or unwilling to serve” was false because the Directors knew about the serious fraud allegations that, if true, would prevent the Amoses from serving on the Board, and they also knew that those allegations had not been properly investigated by the Company at the time of the 2017 Proxy statement. Indeed, Defendant Paul

Amos, II, resigned from all positions at the Company and all its affiliates barely a month after being reelected to the Board pursuant to the false and misleading Proxy, and must have had reasons to believe that at least he would not be able to serve his full term at the time of that statement. Moreover, the circumstances of his departure alleged in the Complaint allow for a reasonable inference to be drawn in Plaintiffs' favor that his resignation was a forced one.

*Finally*, the Complaint also alleges that Defendant Daniel Amos signed a SOX certificate for Aflac's FY2016 Annual Report on February 24, 2017, stating that he had disclosed "***any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting***" to the Company's auditors and audit committee.

The Complaint alleges that this SOX certification statement was false and fraudulent, and Defendants do ***not*** challenge that particular allegation in their moving papers at all.

**2. The Complaint alleges Defendants' direct knowledge and conscious disregard of the alleged wrongdoings for purposes of pleading scienter.**

Likewise, the Complaint adequately alleges Defendants' scienter in that it alleges with the requisite particularity that Defendants have had direct knowledge of the numerous uninvestigated violations alleged by Plaintiff and consciously ignored them, which allegations, taken as true for purposes of this motion, satisfy the pleading requirements for scienter in the context of securities violations.

In In re Wells Fargo & Co. Shareholder Derivative Litig., No. 3:16-CV-05541, Slip Op. (N.D. Cal. Oct. 4, 2017), the Court held that Plaintiffs pled scienter sufficiently when they alleged that Wells Fargo's directors ignored a series of "red flags" raised over time, which collectively amounted to a conscious disregard of wrongdoing. This case is *a fortiori* of Wells Fargo, because each of the Defendants here received detailed submissions by Plaintiffs

documenting the fraud at the Company as early as in March 2017, and had acknowledged that they “*had previously been advised of the allegations raised in your December [2016] letter and on the company’s due diligence efforts,*” *i.e.*, prior to the issuance of the 2017 Proxy and FY2016 Annual Report.

Allegations of direct knowledge and/or conscious disregard of the alleged wrongdoing are sufficient to plead scienter. As in Wells Fargo, “Plaintiffs allege that ‘[t]he Director Defendants . . . caused Wells Fargo to issue proxy statements that failed to disclose the illicit account-creation scheme or the seriously deficient internal and disclosure controls that allowed the scheme to begin and helped perpetuated it. . . . In light of the extensive and detailed allegations suggesting that the Director Defendants knew about the illegal account-creation scheme by 2014 at the latest, the Court can also reasonably infer that the Director Defendants knew that these disclosures were false or misleading at the time they were issued. Therefore, Plaintiffs have sufficiently alleged scienter on the part of the Director Defendants for the reasons already discussed.” Shaev v. Baker, No. 3:16-CV-05541, Slip Op. (N.D. Cal. May 4, 2017). Plaintiffs respectfully submit that this reasoning applies with full force to the case at bar.

**3. Plaintiffs’ allegations satisfy the “contemporaneous purchaser” element of their Section 20A claim.**

Defendant Amos, II argues that the Complaint fails the “contemporaneous purchaser” requirement for the insider trading liability under Section 20A of the Exchange Act because Aflac repurchased its shares the day after Defendant Amos, II, sold his shares.

The Fist SLC Report itself acknowledges, as it must, that “many courts would consider sales on consecutive days to be contemporaneous.” ECF 23-1. Defendant Amos, II, further concedes in his brief that while the Eleventh Circuit has not addressed this issue, the only district court decision in Georgia held that *two days is contemporaneous.*” In re T<sup>2</sup> Med., Inc.

Shareholder Litig., No. 1:92-CV-1564, 1993 WL 594003, at \*5 (N.D. Ga. Nov. 16, 1993) (emphasis added).

The same arguments were raised and rejected more recently in the Wells Fargo derivative litigation. Like here, the Wells Fargo defendants conceded that “the duration of the period in which an insider defendant’s trade can be considered ‘contemporaneous’ with the plaintiff’s is ‘*not fixed*,’ and the Ninth Circuit [has] . . . expressly declined to elaborate on its ‘exact contours.’ Countrywide, 554 F. Supp. 2d at 1074-75.” In re Wells Fargo Shareholder Derivative Litig., No. 3:16-CV-05541, Slip Op. (N.D. Cal. Oct. 4, 2017).

Accordingly, there is no basis for dismissing the Complaints’ Section 20A claim against Defendant Amos, II.

**4. The Complaint properly alleges the unjust enrichment claim.**

The Complaint alleges that Defendant Amos, II, unjustly enriched himself from his insider trading in violation of his fiduciary duties to the Company and its shareholders, and in violation of securities laws. Citing Wachovia Ins. Servs. Inc. v. Fallon, 682 S.E.2d 657, 665 (Ga. App. Ct. 2009), Defendant Amos, II, argues principally that he “did in fact confer benefits to the Company in the form of his work and services,” making Plaintiffs’ unjust enrichment claim “fatally deficient.”

Whatever work or services Defendant Amos, II, provided to Aflac, he was more than amply compensated for it pursuant both to his employment contract and the separation agreement. Thus, according to Aflac’s public disclosures, Defendant Amos, II, earned over \$5 million in total compensation in FY2016, and additionally received a multimillion golden parachute payment upon his departure pursuant to the separation agreement (ECF No. 43-2, Ex. A-1).

Accordingly, the additional \$17 million Defendant Amos, II, received from his insider sale in breach of his fiduciary duties to the Company is a windfall with no relation whatsoever to whatever work or services he might have performed in the past, and for which he had been compensated already.

**5. Defendants are not immunized against allegations of intentional misconduct.**

Finally, with respect to Defendants' breach of fiduciary duty, neither the applicable statute nor Aflac's Articles of Incorporation eliminate the personal liability of the directors for "gross negligence," let alone for intentional misconduct or a knowing violation of law, which is precisely what Plaintiffs' have alleged.

The gross negligence standard for Directors' liability is codified in O.C.G.A. § 7-1-490(c), which provides: "There shall be a presumption that the process directors and officers followed in arriving at decisions was done in good faith and that such directors and officers have exercised ordinary care; provided, however, that this presumption may be rebutted by evidence that such process constitutes gross negligence by being a gross deviation of the standard of care of a director or officer in a like position under similar circumstances."

The Complaint alleges that Defendants consciously disregarded credible allegations of fraud without investigating them and thereby engaged in intentional or reckless misconduct, which satisfies the gross negligent threshold for Directors' liability under Georgia law.

**CONCLUSION**

For the reasons stated above, Defendant Paul Amos, II's motion to dismiss should be denied.

Dated: April 11, 2018

Respectfully Submitted,

A handwritten signature in cursive script, reading "Dimitry Joffe". The signature is written in black ink and is positioned above a horizontal line.

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Dimitry Joffe (admitted *pro hac vice*)  
JOFFE LAW P.C.  
230 Park Avenue, 10<sup>th</sup> Fl.  
New York, NY 10169  
Tel: (212) 309-8711  
Email: dimitry@joffe.law

*Counsel for the Plaintiffs*

**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 black ink, reading "Dimitry Joffe", written in a cursive style. The signature is positioned above a horizontal line.

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Dimitry Joffe  
*Counsel for the Plaintiffs*