THIRD REPORT OF THE SPECIAL LITIGATION COMMITTEE OF THE BOARD OF DIRECTORS OF AFLAC INCORPORATED

MAY 2, 2018

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I. BACKGROUND

On three separate occasions, Plaintiffs[1] have identified potential derivative claims against certain officers and directors of Aflac Incorporated (the "Company"). The first was set forth in a June 23, 2017 demand letter (the "First Demand" or the "Demand Letter"), which invoked O.C.G.A. § 14-2-831 and demanded that the Company take "suitable action" against Paul S. Amos, II for an alleged breach of fiduciary duty and insider trading. [App. 1, Demand Letter, at 1]. After receipt of the Demand Letter, the Company's Board of Directors created a special litigation committee (the "Special Committee") to investigate, evaluate, and (if appropriate) prosecute the alleged wrongdoing. The Special Committee investigated the allegations in the Demand Letter, and, as set forth in its report dated September 21, 2017 (the "First Report"), the Special Committee rejected the demand determining, among other things, that it was not in the best interests of the Company to pursue the demanded action.

Subsequently, Plaintiffs filed a shareholder derivative action, which is now pending as *Conroy v. Amos,* Case No. 4:18-cv-00033-CDL, in the United States District Court for the Middle District of Georgia (the "Action"). The complaint in the Action (the "Complaint") alleges the claims against Paul Amos that the Special Committee previously investigated and declined to pursue. In addition, the Complaint alleges claims not included in the Demand Letter and names six defendants in addition to Paul Amos. These newly identified defendants are the Company's Chief Executive Officer, Daniel P. Amos, and five independent directors – Douglas W. Johnson, Charles B. Knapp, Barbara K. Rimer, Elizabeth J. Hudson, and W. Paul Bowers. The Special Committee treated the newly added claims described in the Complaint as a new

[1] The plaintiffs are purported shareholders Martin Conroy, Gerard McCarthy, and Louis Varela (the "Plaintiffs").

demand (the "Second Demand") and proceeded to investigate and evaluate the Second Demand. As set forth in its report dated February 9, 2018 (the "Second Report"), the Special Committee rejected the Second Demand, again determining, among other things, that it was not in the best interests of the Company to pursue the demanded action.

Days before the Special Committee issued its Second Report, on January 31, 2018[2] Plaintiffs filed an amended complaint in the Action (the "Amended Complaint"), which contains additional allegations that were not included in either the First or Second Demands and two additional defendants – Joseph L. Moskowitz and Melvin T. Stith – both of whom are members of the Special Committee. In all, Plaintiffs have named as defendants in the Action Daniel Amos, Paul Amos, and seven of the Company's twelve outside directors[3] (collectively, the "Defendants").[4]

The Amended Complaint includes the allegations set forth in the initial Complaint in addition to new allegations regarding three allegedly false and misleading Company statements from January 2018. Specifically, Plaintiffs claim that, in response to a January 11, 2018 article describing Plaintiffs' allegations in a publication called *The Intercept*, the Defendants "caused" the Company (1) to issue a January 12, 2018 press release, (2) to issue a January 16, 2018 Form

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[2] The Court rejected the Plaintiffs' initial attempt to file the Amended Complaint for technical reasons. Plaintiff re-filed on February 2, 2018.

[3] The outside directors are W. Paul Bowers, Toshihiko Fukuzawa, Elizabeth J. Hudson, Douglas W. Johnson, Karole F. Lloyd, Robert B. Johnson, Thomas J. Kenny, Charles B. Knapp, Joseph L. Moskowitz, Barbara K. Rimer, Katherine T. Rohrer, and Melvin T. Stith. With the exception of Thomas J. Kenny, due to fees paid for his previous role as a consultant to the Board, the Board has determined that all are "independent" under the NYSE's listing requirements. [App. 2, 2017 Proxy Statement; App. 3, Aflac's Board of Directors, available at, http://investors.aflac.com/corporate-governance/board-of-directors.aspx (last accessed May 2, 2018)].

[4] Information regarding the Defendants can be found in the Special Committee's First and Second Reports, which are incorporated herein by reference.

8-K, and (3) to publish the Special Committee's First Report (together, the "January 2018 Statements"). According to Plaintiffs, the January 2018 Statements falsely led the public to believe that (1) all of the Plaintiffs' allegations had been investigated and (2) the allegations were without merit.

With regard to the scope of the Company's and the Special Committee's investigations, Plaintiffs argue that neither addressed all of the "broad categories of . . . alleged violations" described by Plaintiffs in their December 10, 2016 letter to Daniel Amos, Paul Amos, and Audrey Tillman (the Company's General Counsel) (the "December 2016 Letter") and March 2017 letters to Board members and others (the "March 2017 Letters"). [App. 5 Am. Compl., ¶¶ 13, 72]. In the Amended Complaint, Plaintiff added an additional category – sexual harassment – which they now claim was one of the "broad categories of alleged violations" described in the December 2016 Letter. [*Id.*, ¶ 72].

With regard to the Company's statements that Plaintiffs' claims are without merit, Plaintiffs argue that the statements are knowingly false because (Plaintiffs claim) the Company settled similar claims with the States of Idaho, Missouri, and Minnesota on May 12, 2012 and the States are re-examining the Company's compliance. According to the Plaintiffs, the May 12, 2012 Regulatory Settlement Agreement (the "RSA") with these three States arose from the same alleged fraudulent misconduct that Plaintiffs have alleged. Plaintiffs claim that "Aflac's[5] public statements that the Company or the [Special Committee had] investigated Plaintiffs' allegations and found them to be 'false' and 'without merit' fly in the face of the 2012 RSA executed by Aflac itself." [*Id.*, ¶ 15-17].

[5] Plaintiffs' references to "Aflac" lack specificity because they use the term interchangeably to refer to the Company and to its subsidiaries. For purposes of the report, the Special Committee interprets the references to "Aflac" to mean any of these entities.

The Special Committee considers the new allegations in the Amended Complaint to constitute a third demand (the "Third Demand"). This report (the "Third Report") sets forth the Special Committee's findings and conclusions with regard to the Third Demand.

II. THE SPECIAL COMMITTEE'S AUTHORITY AND INDEPENDENCE

As discussed in the Special Committee's First and Second Reports, on July 12, 2017 the Board created the Special Committee to investigate the "potential claims (the "Potential Claims") the Company may have against Mr. Paul Amos, II, in connection with Mr. Amos's June 12, 2017 sale of Company shares[.]" [App. 4, July 12, 2017 Board Resolution]. The Board's authorization, however, also gave the Special Committee the authority to "investigate, review and analyze the facts, allegations and circumstances that are the subject of the Potential Claims, as well as any additional facts, allegations and circumstances that may be at issue in any related inquiry, investigation, or proceeding[.]" [*Id.*].

The Special Committee reviewed whether the resolution creating the Special Committee authorized it to investigate the new claims raised in the Amended Complaint. The Special Committee determined that it had the authority because the Board authorized the Special Committee to investigate any additional facts or allegations that may be at issue in any proceeding involving allegations regarding Paul Amos' stock sale. [*See id*.].

The Special Committee also examined whether the allegations of the Amended Complaint impacted its previous analysis of the independence and disinterestedness of the members of the Special Committee – W. Paul Bowers, Joseph L. Moskowitz, and Melvin T. Stith. Plaintiffs had previously named Mr. Bowers as a Defendant and added Messrs. Moskowitz and Stith as Defendants in the Amended Complaint. Plaintiffs' act of naming the remaining members of the Special Committee as Defendants in the Amended Complaint does not change the Special Committee's analysis described in the previous Reports confirming the

independence and disinterestedness of the Special Committee members. [*See, e.g.*, Second Report, at 20-24]. Rather, under Georgia law, the mere naming of a director as a defendant does not mean the director lacks independence. *See* O.C.G.A. § 14-2-744(c). While a "substantial likelihood of personal liability" may cause a director to lack independence, the mere threat of personal liability is not enough. *See Clifford v. Ghadrdan*, No. 1:12-cv-3683-SCJ, 2014 WL 11829337, at *5 (N.D. Ga. Mar. 5, 2014) (quoting *In re Friedman's, Inc. Derivative Litig.*, 386 F. Supp. 2d 1355, 1363 (N.D. Ga. 2005)). The Amended Complaint contains no allegations specific to any of the Special Committee members that would suggest that they face a substantial likelihood of personal liability that would affect their independence.[6] In addition, the Amended Complaint does not raise any facts that would change the previous analysis that the Special Committee members are also disinterested. [*See, e.g.*, Second Report, at 20-24].

III. THE SCOPE OF THE SPECIAL COMMITTEE'S INVESTIGATION

As discussed in the First and Second Reports, the Special Committee and its counsel spent approximately two months investigating and evaluating the allegations in the Demand Letter and approximately three additional months investigating and evaluating the allegations in the Second Demand. The Special Committee and its counsel have spent approximately three

[6] Plaintiffs also attack the independence of the Special Committee members in their recently filed responses to the motions to dismiss in the Action. They argue that the independence of some members of the Special Committee is compromised because of relationships arising from board memberships at other companies. That type of "business-only connection," however, is insufficient under Georgia law to render a director to be non-independent. *See Benfield v. Wells*, 324 Ga. App. 85, 89 (2013) (affirming dismissal of action where plaintiff alleged that the equivalent of a special committee lacked independence due to a member's joint Executive Committee membership with a defendant and stating that this "business-only connection … was insufficient to render [the Special Committee member] unable to base his decision on the merits of the issue rather than being governed by extraneous considerations or influences").

months investigating the Third Demand, which included meetings among the Special Committee and its counsel, document collection and review, and additional witness interviews.

With regard to document collection and review, in addition to the thousands of documents described in the First and Second Reports, the Special Committee reviewed over 6,000 additional documents during its investigation. The Company provided documents for the Special Committee's review in response to several additional document requests from the Special Committee, which included the following categories of documents, among others:

1. Aflac employee handbooks, associate's agreements and pledges, and other policy statements related to prohibited practices;
2. Information relating to sexual harassment complaints and investigations relating thereto;
3. Minutes of relevant Board of Directors and Audit and Risk Committee meetings regarding the tri-state market examination;
4. Agreements and reports relating to the tri-state market examination;
5. Reports from Martin Conroy regarding sexual harassment allegations; and
6. The Company's Ethics, Fraud, and Prohibited Practices training materials.

In addition, the Special Committee interviewed for a second time three of the witnesses the Special Committee interviewed while investigating the Second Demand – Trevor Fennell, Kenneth Meier, and Benito Rotondi. The Special Committee also interviewed the Company's Chief Compliance Officer, Thomas McDaniel, twice (once by telephone and once in person).[7]

The Company's officers, directors, and employees cooperated with the Special Committee and its counsel. The Company's in-house counsel assisted in scheduling interviews and meetings and the Company responded to the Special Committee's requests for documents

[7] An Alston & Bird attorney was present by telephone for these interviews. The attorney did not object to any questions or interject in any way that affected the candor of any witness in the opinion of counsel for the Special Committee.

and information. Witnesses made themselves available and provided responsive answers to the Special Committee's questions. The Special Committee considers the documents and information made available for its review to be complete and sufficient to allow it to complete its investigation. There was no category of documents that the Special Committee sought that was not provided for the Special Committee's review, if available, and there were no witnesses who refused to speak with the Special Committee's counsel.

IV. THE SPECIAL COMMITTEE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE THIRD DEMAND

A. The Special Committee Finds No Merit To A Rule 10b-5 Claim Arising From The January 2018 Statements.

In connection with the Third Demand, the Special Committee reviewed the Amended Complaint to determine which claims were impacted by the new allegations regarding the January 2018 Statements and whether it would be in the best interests of the Company to pursue such claims. The Amended Complaint contains the same causes of action as the initial Complaint. The only Count Plaintiffs appear to have amended to include allegations regarding the January 2018 Statements is Count I, which alleges that Defendants violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.[8] Accordingly, the Special Committee analyzed whether the allegations regarding the January 2018 Statements give rise to a Rule 10b-5 claim by the Company against the Defendants. As noted below, the Special

[8] Plaintiffs have not revised Count IV (breach of fiduciary duty) other than to update definitions used throughout the Amended Complaint. The breach of fiduciary duty claim continues to be based on events occurring in 2017 and earlier. In addition, Count II (violation of Section 14(a) of the Exchange Act and SEC Rule 14a-9) alleges claims regarding a 2017 proxy statement. The Amended Complaint does not allege any facts that would suggest that the later-in-time January 2018 Statements would be relevant to that Count. Counts III and V concern the allegations of insider trading by Paul Amos, which Plaintiffs do not attempt in any way to tie to the January 2018 Statements. Additional information regarding the Special Committee's investigation and findings regarding Counts II through V can be found in the First and Second Reports.

Committee finds that the Company's pursuit of this claim against these Defendants would likely be unsuccessful for numerous reasons.

Plaintiffs claim that "Defendants caused" [9] the Company to make three false and misleading statements in response to a January 11, 2018 article in a publication called *The Intercept*, which described Plaintiffs' various allegations set forth in their December 2016 and March 2017 Letters as well as in their initial Complaint. Plaintiffs claim these statements falsely suggest that all of the Plaintiffs' allegations had been investigated and found to be without merit. According to Plaintiffs, the Company made these January 2018 Statements "with the purpose of falsely comforting the market that there was nothing to see," because "the majority of Plaintiffs' allegations, including of the 'fraudulent sales' and 'financial manipulation,' had not been investigated by the [Special Committee] or so much as disclosed in its [First] Report." [App. 5, Am. Compl., ¶¶ 4, 10, 19].

The first challenged statement is the Company's press release issued on Friday, January 12, 2018, the day after the publication of *The Intercept* article (the "Press Release"). The Press Release states that "[r]ecent media stories regarding Aflac contain false allegations made by a very small group of independent contractors" and that the Company "intends to aggressively fight these allegations beginning with filing for their dismissal." [App. 6, Press Release]. The Press Release described the allegations discussed in *The Intercept* article as

[9] Plaintiffs generally claim that the nine named Defendants "caused" the Company to make the January 2018 Statements. Plaintiffs do not identify how Defendants did so, or what roles (if any) each Defendant had in the drafting or approval of the text of either the January 12, 2018 Press Release or the January 16, 2018 Form 8-K. Plaintiffs also state generally that the "Defendants" as a group "caused" the issuance of the January 2018 Statements, but do not say whether it was all of the Defendants or only some, and, for those who were involved, who wrote, read, and/or approved the language of either announcement. Plaintiffs ignore the fact that Paul Amos is no longer employed by Aflac or on the Board of the Company, and provide no insight as to how he would have "caused" the publication of the January 2018 Statements months after his resignation.

pertaining to "insider trading, fraudulent sales and financial manipulation," and states that the "Company has investigated these claims and found them to be without merit." [*Id.*]. In addition, the Press Release states that the allegations of "insider trading, fraudulent sales and financial manipulation . . . have been investigated by the Company and an independent special committee of the Company's board of directors." [*Id.*]. The Press Release does not reveal what the Special Committee's determination was with respect to its investigation. [*See id.*].

Although the January 12 Press Release was technically correct that the Special Committee had investigated the alleged fraudulent practices, the Special Committee had not yet completed its investigation of those practices as of January 12. Prior to market open on the next trading day following the January 12 Press Release, January 16, 2018,[10] the Company issued a second announcement (the "January 16 8-K"), which clarified that the Special Committee's investigation of these alleged practices was not yet complete. The January 16 8-K stated that (a) the Company's Board of Directors established the Special Committee in July 2017; (b) the Company is making public the Special Committee's First Report; (c) following the completion of the First Report in September 2017, Plaintiffs raised additional claims that the Special Committee was in the process of investigating; and (d) the Company expected the Special Committee's second investigation to be concluded soon and planned to release the report before the end of February 2018. [App. 8, January 16, 2018 8-K]. The Company subsequently made public the Special Committee's Second Report on February 12, 2018. [App. 16, February 12, 2018 Form 8-K].

[10] As January 12, 2018 was a Friday and Monday, January 15, 2018, was Martin Luther King Jr. Day, on which the New York Stock Exchange was closed for trading, the next trading day was Tuesday, January 16, 2018. The January 16 8-K was issued prior to market open, around 6:03 a.m. [App. 17, Aflac Form 8-K, available at https://seekingalpha.com/filing/3831969 (last accessed, May 2, 2018)].

Finally, the third challenged statement is embodied in the Special Committee's First Report. Plaintiffs contend that publication of the Special Committee's First Report on January 16, 2018 "conceals" the misconduct because the First Report does not address all of Plaintiffs' allegations.

1. Plaintiffs Have Not Shown That The January 2018 Statements Were Knowingly False And Therefore Do Not Establish A Strong Inference Of Scienter

In order to evaluate whether it is in the best interests of the Corporation to pursue a Rule 10b-5 claim against the Defendants for the January 2018 Statements, the Special Committee examined whether the Statements were knowingly false. A Rule 10b-5 claim would have to comply with the Private Securities Litigation Act, 15 U.S.C. § 78u-4 (the "PSLRA"), which requires a plaintiff to state with particularity facts giving rise to a strong inference that each Defendant acted with the requisite state of mind, *i.e.*, "a showing of either an 'intent to deceive, manipulate, or defraud,' or 'severe recklessness.'" *Thompson v. Relationserve Media, Inc.*, 610 F.3d 628, 633 (11th Cir. 2010) (quoting *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1238 (11th Cir. 2008)).[11] A plaintiff must show that ***each*** Defendant was aware of – or was severely reckless in not knowing – facts that made their statements false or misleading when made. *See Mizzaro*, 544 F.3d at 1238. The Special Committee finds that a Rule 10b-5 claim faces significant obstacles and it would not be in the best interests of the Company to pursue these claims.

[11] "Severe recklessness is limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or so obvious that the defendant must have been aware of it." *Thompson*, 610 F.3d at 634 (quoting *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1282 n.18 (11th Cir. 1999)).

Plaintiffs claim the following assertions in the January 2018 Statements were knowingly false: (1) the Company investigated the Plaintiffs' allegations; (2) the Special Committee investigated the Plaintiffs' allegations; and (3) Plaintiffs' allegations are without merit.

First, Plaintiffs' challenge the statement that the Company investigated Plaintiffs' claims. The Special Committee has seen sufficient evidence to satisfy it that the Company indeed conducted an investigation of Plaintiffs allegations both internally and with the assistance of Alston & Bird. The Special Committee bases this determination upon the witness interviews it conducted in connection with the First and Second Reports, including, without limitation, the interviews with representatives of the Company's internal audit and legal departments, as well as personnel from Aflac Trust. The Special Committee saw the expansive document collection that the Company had conducted prior to the formation of the Special Committee, which is evidence that an investigation had indeed occurred. Further, counsel for the Special Committee interviewed the Defendants, who all responded that they believed that the Company had looked into the allegations raised by Plaintiffs.

Second, Plaintiffs state that the January 2018 Statements are misleading because they suggest that the Special Committee had investigated all of Plaintiffs' allegations as of the time of the Statements. The January 16 8-K, however, makes clear that the Special Committee had not completed its work as of that date. Rather, it states, "subsequent to completion of the initial report in September 2017, the derivative plaintiffs raised additional but related claims, and the [Special Committee] began to investigate the newly raised claims." [App. 8, January 16 8-K]. The First Report also clearly stated its scope, which was to address only the June 2017 Demand Letter requesting that the Company pursue a claim against Paul Amos. Indeed, Plaintiffs' counsel conceded that the June 2017 Demand Letter was Plaintiffs' first (and at the time only)

derivative demand under Georgia law.[12] The First Report states, in the section titled "Clarification Of The Scope Of The Demand Letter," that "the Demand Letter contains [Plaintiffs'] only formal derivative demand under Georgia law. In other words, the only demand currently before the Special Committee is a demand to bring an action against Paul Amos for the wrongdoing alleged in the [June 2017] Demand Letter." [First Report, at 12-13].[13]

Third, the Plaintiffs contend that the Company's denial of the merits of Plaintiffs' claims was knowingly false. The Special Committee did not find evidence supporting that assertion. There is no evidence that the Defendants had any facts contrary to what they heard from the Company's General Counsel, Audrey Tillman, who reported to the Board information consistent with the response Catherine Coppedge, a lawyer for the Company, sent to Plaintiffs' counsel in January 2017 stating that "Aflac unequivocally denies the allegations raised in your December 10, 2016 letter[.]" [App. 7, January 5, 2017 Letter to Joffe; *see* First Report, at 11]. Ms. Tillman also confirmed that she provided reports in executive management meetings consistent with Ms. Coppedge's letter. Therefore, if the Company were to bring a claim against the Defendants, it would have a very difficult time establishing that Defendants knew the challenged statements were false when made.

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[12] *See* First Report, at 8-9. ("In subsequent discussions with the Special Committee's counsel, Mr. Joffe confirmed that his letter dated June 23, 2017 [the Demand Letter"], is the only letter that he has sent on behalf of his clients seeking relief under O.C.G.A. § 14-2-831."); *see also* App. 1, Demand Letter (demanding pursuant to O.C.G.A. § 14-2-831 that the Company bring a "suitable action . . . to redress these violations and seek appropriate remedies," against Paul Amos for violating "his fiduciary duties to the Company and its shareholders [for] securities fraud").

[13] As counsel for the Special Committee confirmed with Plaintiffs' counsel, the December 2016 and March 2017 Letters were not derivative demands. Plaintiff later sought to bring a derivative action based on the December 2016 and March 2017 Letters, and, at that point, those allegations were treated as a new derivative demand – *i.e.*, the Second Demand – which the Special Committee addressed in its Second Report. [*See* Second Report, at 2].

Plaintiffs attempt to support their knowing falsity argument by pointing to the 2012 RSA with the States of Idaho, Missouri, and Minnesota. Plaintiffs claim that the tri-state market examination proves that that the assertions in the January 2018 Statements that Plaintiffs' allegations were all "'false' and 'without merit'" are "baseless and misleading." [App. 5, Am. Compl., ¶ 139]. According to the Plaintiffs, the tri-state market examination proves the truth of Plaintiffs' claims because (Plaintiffs assert) the market examination and Plaintiffs' allegations address the same wrongdoing.

As an initial matter, neither the First Demand nor the various letters swept into the Second Demand make any reference to the RSA or any Corrective Action Plan concerning the RSA. Nothing in the First Demand or the Second Demand raised any allegations regarding practices in Idaho, Missouri, or Minnesota. Nevertheless, prior to issuing the Second Report, the Special Committee reviewed the RSA, the related Corrective Action Plan, and the Company's semi-annual reports to the States. The Special Committee did not see evidence in connection with that review that would lead the Special Committee to different conclusions than the conclusions discussed in the Second Report.

In fact, the Special Committee found through that review that Plaintiffs make assumptions based on the general descriptions of the issues described in the RSA are not accurate. There is only one area where the Plaintiffs' allegations and the RSA specifically overlap and that is with regard to the use of the SmartApp electronic enrollment system. While the RSA-related documents did raise the possibility that the SmartApp electronic enrollment system could lead to unwanted policies, the semi-annual reports describe controls and analytics the Company put in place to detect wrongful use of the system. The reports also describe the Company's conclusion after application of the analytics that the use of the SmartApp system for

enrollment does not present a greater opportunity for fraudulent policies than a traditional paper application. According to Mr. McDaniel, the tri-state regulators have not raised the SmartApp issue in connection with the latest examination.

In sum, the Special Committee finds that Plaintiffs' attempt to prove knowing falsity based on the RSA and tri-state market examination fails because the Plaintiffs have substituted assumptions for facts. *See Hart v. Internet Wire, Inc*., 145 F. Supp. 2d 360, 366 (S.D.N.Y. 2001) (finding that conclusory allegations of intent are not enough to prove scienter); [*see* App. 5, Am. Compl., ¶¶ 15-17; 40-42]. Plaintiffs assume that the alleged practices that they claim occurred in the New York and New Jersey regions must be the same as the issues examined in the 2012 market examinations in Idaho, Missouri, and Minnesota. Plaintiffs also assume that the fact that the Company settled with the three States proves that misconduct had occurred. The express language of the RSA contradicts that argument. The RSA states: "The Company neither admits nor denies that their conduct in the areas of regulatory concern identified during the Examination violated any law or regulations, and desires to enter into this Agreement in order to promote efficiency." [App. 14, RSA, ¶ 4].

The absence of any allegations, much less specific ones, identifying with particularity the knowledge of each of the Defendants in regard to the challenged statements likely falls far short of establishing a strong inference of scienter as required under the PSLRA and case law within the Eleventh Circuit. *See Hart*, 145 F. Supp. 2d at 366; *see also Mogensen v. Body Cent. Corp*., 15 F. Supp. 3d 1191, 1220-1221 (M.D. Fla. 2014) (refusing to "strongly infer" scienter without demonstration that "on or about a certain date, Defendants were directly confronted with specific information that actually contradicted – or cast serious doubt upon – their public statements"); *Fidel v. Rampell*, No. 02-61258-CIV, 2005 WL 5587454, at *4, *7 (S.D. Fla. Mar. 29, 2005)

(scienter cannot be inferred where complaint failed to allege that defendants were directly told specific information contradicting their public disclosures); *Kinnett v. Strayer Educ., Inc.*, Nos. 8:10–cv–2317–T–23MAP, 8:10–cv–2728–T–23MAP, 2012 WL 933285, at *12–13 (M.D. Fla. Jan. 3, 2012) (scienter cannot be inferred where plaintiff failed defendants were informed of information contrary to their statements). Without specific allegations showing a strong inference of scienter, a Rule 10b-5 claim would fail. *See S. Cherry St., LLC v. Hennesee Grp. LLC*, 573 F.3d 98, 110 (2d Cir. 2009).

2. The Price Response to the January 16 Clarification Makes Loss Causation Difficult to Prove.

Plaintiffs' challenge to statements included or referenced in the January 12 Press Release and the January 16 8-K also likely fails to meet the loss causation standard established by the Supreme Court in *Dura Pharmaceutical*, *Inc. v. Broudo*, 544 U.S. 336 (2005*).* As explained by the Eleventh Circuit, loss causation is shown by a plaintiff through:

> (1) identifying a "corrective disclosure" (a release of information that reveals to the market the pertinent truth that was previously concealed or obscured by the company's fraud); (2) showing that the stock price dropped soon after the corrective disclosure; and (3) eliminating other possible explanations for this price drop, so that the factfinder can infer that it is more probable than not that it was the corrective disclosure—as opposed to other possible depressive factors—that caused at least a "substantial" amount of the price drop.

FindWhat Investor Grp. v. FindWhat.com, 658 F.3d 1282, 1311-12 (11th Cir. 2011).

Plaintiffs' Amended Complaint fails to articulate how the Company could establish loss causation in regard to the challenged statements. Under Plaintiffs' apparent theory, the January 12 Press Release somehow "inflated" the price of the Company's stock on January 12 in suggesting that the Special Committee completed its investigation. The stock opened that day at $45 per share and closed at $42.40 per share. [App. 15, Aflac Stock Company Report]. Assuming for purposes of argument that Plaintiffs could show a "price impact" on January 12 (as

required under *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014)), they still need to point to a corrective disclosure where the unidentified inflation caused by this price impact is eliminated from the price of the stock. Plaintiffs do not point to a corrective disclosure correcting an alleged misstatement in the January 12 Press Release. And although the January 16 8-K clarified the status of the Special Committee's investigation, the price of the Company's stock *increased* after it was published. The Company's stock opened the day at $42.50 per share and closed at $43.20. [App. 15, Aflac Stock Company Report]. Consequently, contrary to the requirements outlined in *FindWhat*, the Company would not be able to show "the stock price dropped soon after the corrective disclosure." *See FindWhat*, 658 F.3d at 1311.[14]

B. Any Breach Of Fiduciary Duty Claim By The Company Against The Defendants Would Lack Factual Support And Be Subject To Several Defenses.

As noted in footnote 8 above, Plaintiffs did not amend their breach of fiduciary duty claim (Count IV) to add the new allegations raised in the Third Demand. Nevertheless, for the sake of completeness, the Special Committee analyzed whether the Company should pursue a breach of fiduciary duty claim against the Defendants based on the new allegations in the Amended Complaint.

Plaintiffs do not make any allegations in the Amended Complaint that Defendants engaged in self-dealing, commingled the corporation's assets with their own, or usurped corporate opportunities belonging to the Company, which are the types of activities that could give rise to a claim for breach of the duty of loyalty. *See* O.C.G.A. §§ 14-2-830; 14-2-842.

[14] To the extent that Plaintiffs suggest that Defendants put the Company at risk of a securities class action as a result of the January 12 Press Release, that concern is dubious as, at most, it would be a one-day class period with no damage as the stock price went up on January 16, the next trading day.

Furthermore, the Special Committee's investigation revealed no evidence that any Defendant gained financially from the January 2018 Statements. Therefore, the Special Committee does not believe a breach of loyalty claim would have merit.

In regard to the efficacy of a duty of care claim, to the extent that the Defendants "caused" the January 2018 Statements, they were entitled to rely on officers and employees regarding the status of the investigation and the merits of the claims.[15] As discussed above, the Company's General Counsel informed the Defendants that the Company denied the Plaintiffs' allegations.

In any event, even if the Special Committee believed that there was a viable breach of the duty of care claim, the Company's articles and bylaws contain exculpation clauses, as permitted under Georgia law. *See* O.C.G.A. § 14-2-202; [*see* App. 12, Amendment to the Articles of Incorporation, dated April 25, 1988; App. 13, Amended and Restated Bylaws]. The Articles of Incorporation state: "No director shall be personally liable to the corporation or its stockholders for monetary damages for any breach of duty of care or other duty as a director." [App. 12, Amendment to the Articles of Incorporation, dated April 25, 1988]. In addition, Article VII of the Company's Bylaws provides for indemnification of any director, officer, employee, or agent who "was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding (including, but not limited to, any action, suit, or proceeding by or in the right of the Corporation), . . . by reason of the fact that he is or was a director, . . . [or] officer . . . of the Corporation[.]" [App. 13, Amended and Restated Bylaws Article VII, Section 1]; *see generally* O.C.G.A. §§ 14-2-851 *et seq.* In sum, even if the Defendants had breached

[15] Under Georgia law, an officer or director has a statutory right of reliance. In the performance of duties, an officer may rely upon other officers, employees, or agents of the corporation whom the officer or director "reasonably believes to be reliable and competent in the functions performed." O.C.G.A. § 14-2-830(b)(1) (directors); O.C.G.A. § 14-2-842(b)(1) (officers).

their duty of care, the Company's Articles exculpate them, and the Bylaws would require the Company to indemnify them for any action, even an action brought by the Company.

C. The Sexual Harassment Allegations Were Not Part Of The Previous Demands, And, In Any Event, Do Not Give Rise To Any Claim Against The Defendants.

In the Amended Complaint, Plaintiffs fault the Company and the Special Committee for not addressing Plaintiffs' claimed allegations of sexual harassment. Plaintiffs claim that sexual harassment was among the "broad categories of . . . alleged violations" described in the December 10, 2016 Letter. [*E.g.*, App. 5, Am. Compl., ¶ 72]. That is not the case. Rather, the December 2016 Letter specifically enumerates "broad categories" of "alleged violations" on pages 4 through 14 of the Letter, and sexual harassment is not among them. Instead, the Letter makes a passing reference to alleged sexual harassment in Plaintiffs' counsel's introduction of one of his current clients. [App. 9, December 2016 Letter, at 1]. In Mr. Joffe's description of his client, Debbie Cort (who is not a plaintiff in the Action), he states:

> [D]uring Ms. Cort's stay at Aflac, the Company would purposely send her and other attractive young female associates to the New York City fire departments and other male-dominated environments around the city to sell Aflac insurance, where they would be solicited by employees to perform various favors of explicit sexual nature, making Ms. Cort extremely uncomfortable in her work."

[App. 9, December 2016 Letter, at 3]. The Amended Complaint adds no detail regarding the alleged sexual harassment, and never mentions Ms. Cort or any other female associate. Plaintiffs neither link this isolated harassment reference to any of the claims set forth on pages 4 to 14 of the Letter, nor do they reference it in either the First or Second Demands. In the Amended Complaint (the Third Demand), Plaintiffs refer to "sexual harassment" three times, but provide no detail regarding Ms. Cort's alleged experience, or any other alleged harassment issues concerning Aflac. [App. 5, Am. Compl., ¶ 12 ("What the [Special Committee] does not address . . . sexual harassment . . . .); ¶ 72 (Finally, the [December 2016 Letter] alleged other

fraudulent activities and practices at the Company . . ., including . . . sexual harassment . . . .); ¶ 138 ("The [Special Committee] Report . . . omits Plaintiffs' allegations of . . . sexual harassment . . . .")).

Nevertheless, the Special Committee investigated whether there were complaints from associates relating to sexual harassment at the New York City fire department.[16] The Special Committee also inquired whether there were sexual harassment complaints generally in the New York City region (the "NY Metro/Long Island Region"). The Special Committee requested and received information from the Company regarding sexual harassment complaints by associates in the NY Metro/Long Island Region made to either Aflac Trust, the Company's legal department, or the Company's human resources department since 2015 (the year Plaintiffs' counsel states Ms. Cort became an associate). The Special Committee also requested information regarding any complaints from Ms. Cort herself.

The Company found no evidence to support Plaintiffs' assertions regarding sexual harassment. The Company had no record of a complaint of sexual harassment by Ms. Cort, nor any record of complaints by associates relating to sexual harassment while selling Aflac insurance at the New York City fire department. In addition, the Special Committee asked for any reports of sexual harassment by the lead female associate for the New York City fire

[16] The Company has policies and procedures in place to prevent harassment. There are many avenues for associates to raise such concerns, including hotlines, email addresses, and websites for Aflac Trust, the Company's legal department, and the Company's human resources department. In addition, associates (even though they are not employees) are informed of the Company's anti-harassment policies including through the Associate's Agreement and pledge that each associate signs prior to selling Aflac insurance. The Associate's Agreement states that an associate "shall at all times conduct himself/herself in . . . compliance with . . . regulations, ordinances and laws, including those that prohibit discrimination, harassment and other inappropriate behavior[.]" [App. 10, Associate's Agt., ¶ 2.4]. The associates also sign a pledge stating: "I further understand that unacceptable and unprofessional behavior includes, but is not limited to, any type of discrimination or harassment [.]" [App. 11, Brand Pledge].

department account. There were none. And, out of the approximately 1,200 active associates selling Aflac insurance in the New York Metro/Long Island Region, the Company has received only three complaints of sexual harassment since 2015. Interviews with Trevor Fennel, Kenneth Meier, and Ben Rotondi confirmed that claims in the Region of sexual harassment were rare.[17]

Plaintiffs fail to articulate any theory of derivative liability against Defendants based upon Plaintiffs' sexual harassment allegation. Plaintiffs do not allege that any of the Defendants were involved in the harassment described by Ms. Cort. To the extent that Plaintiffs rely upon a *Caremark* type argument, that theory of liability lacks merit. *See In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996); *In re Bank of Am. Corp. Sec., Derivative, & Emp. Ret. Income Sec. Act (ERISA) Litig.*, Master File No. 09 MD 2058 (PKC), 2013 WL 1777766, at *13 (S.D.N.Y. Apr. 25, 2013) ("To state a claim that directors have not satisfied their oversight duties, a complaint must plausibly allege that directors 'utterly failed to implement any reporting or information system or controls,' or that, 'having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention.'"); Second Report, at 100-02.[18]

The December 2016 Letter's claims of alleged sexual harassment never rose to the level of Board involvement. There were no allegations that any of the Defendants were involved in or were informed about the alleged isolated claims of sexual harassment involving Ms. Cort that

[17] In email communications with the Company, Mr. Conroy also referenced the potential sexual harassment of two other women. These women were not associates in the NY Metro/Long Island Region. Nevertheless, the Special Committee looked into whether those two individuals had reported sexual harassment. The Company had no record of any such reports.

[18] In any event, as discussed above, a claim for breach of the duty of care would be subject to exculpation and indemnification.

were briefly mentioned in the December 2016 Letter. To the contrary, the facts show there was no systemic issue in the New York Metro/Long Island Region regarding sexual harassment. Plaintiffs do not attempt to show how the Company was injured by the alleged incident involving Ms. Cort, or any basis for any Defendant to be liable to the Company for that unidentified and unsubstantiated harm. The Special Committee finds no evidence that the Defendants were ever made aware of any systemic problem in the New York Metro/Long Island Region of sexual harassment from 2015 to the present, as there is no record of any such problem. Accordingly, the Special Committee finds the Company has no claim against the Defendants relating to the sexual harassment allegations.

D. The Special Committee Finds That Pursuing The Claims Raised In The Third Demand Is Not In The Best Interests Of The Company.

The Special Committee's ultimate task is to determine whether it is in the best interests of the Company to pursue a derivative action against Defendants, or some other remedial action, in light of all circumstances. "[T]he final substantive judgment whether a particular lawsuit should be maintained requires a balance of many factors ethical, commercial, promotional, public relations, employee relations, fiscal as well as legal." *Zapata Corp. v. Maldonado*, 430 A.2d 779, 788 (Del. 1981) (quoting *Maldonado v. Flynn*, 485 F. Supp. 274, 285 (1980)).[19]

The Special Committee concludes that the new allegations in the Amended Complaint are without merit. It further finds that the alleged misconduct has not harmed the Company. Additionally, the Special Committee concludes that, based on a cost-benefit analysis, the pursuit of these claims is not in the best interests of the Company.

[19] Though Georgia law does not outline the exact factors it uses to determine whether an action is in the best interests of a company, it is likely to look to Delaware law for guidance. *See* Second Report, at 94 n.35.

As an initial matter, the Company would likely incur substantial legal expenses in connection with the pursuit of these claims. *See Abella v. Universal Leaf Tobacco Co*., 546 F. Supp. 795, 801 n.13 (E.D. Va. 1982) (noting that committee concluded that the benefit to be derived from a successful decision on the merits was outweighed by, *inter alia*, the "[l]arge attorneys' fees and expenses"); *Mills v. Esmark, Inc.*, 573 F. Supp. 169, 172 n.2 (N.D. Ill. 1983) (noting committee's recommendation to seek dismissal based on, *inter alia*, the "cost of pursuing the claims"); *Lewis v. Fuqua*, 502 A.2d 962, 971 (Del. Ch. 1985) (observing expense was one of the "decisive factors" in the committee's recommendation that the Company move for dismissal of the derivative action). Furthermore, the Company would be obligated to advance expenses on behalf of the Defendants for their legal fees and expenses arising from the defense of the derivative claims. *See id.* (citing possible obligation to indemnify the defendant directors among the "decisive factors" in the committee's recommendation that the corporation move for dismissal of the derivative litigation).

The Special Committee also finds that the prosecution of these claims would likely be an unnecessary distraction to the management of the Company. *See Abella*, 546 F. Supp. at 801 n.13; *see also Stein v. Bailey*, 531 F. Supp. 684, 690 (S.D.N.Y. 1982) (considering, *inter alia*, the cost of litigation in terms of its "disruption of management"); *Lewis*, 502 A.2d at 971 (finding that disruptive effect on corporate management was another one of the "decisive factors" in committee's recommendation that the corporation move for dismissal of the derivative action).

Given the low, if not non-existent, probability of any recovery, the Special Committee concludes that the monetary and other costs that would flow from the prosecution of these claims far outweighs any potential benefits. *See Lewis*, 502 A.2d at 971 (noting that the low probability of recovery and the possibility of a meager recovery were also among the "decisive factors" in

the committee's recommendation that the corporation move for a dismissal of the derivative action); *Mills v. Esmark*, 544 F. Supp. 1275, 1282 n.2 (noting committee's determination that continuation of the litigation would not advance the best interests of the corporation was based on, *inter alia*, the committee's conclusion that the corporation's "chance of succeeding on the merits . . . would be too small to justify the expenditure of substantial legal fees").

For these reasons, the Special Committee concludes that the prosecution of these claims is not in the best interests of the corporation.

V. CONCLUSION

In light of all circumstances, the Special Committee finds that bringing a derivative action based on the allegations in the Third Demand would not be in the best interests of the Company or its shareholders. The Special Committee has resolved to reject the demand.

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