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. RIMER, ELIZABETH HUDSON, W. PAUL BOWERS, JOSEPH L. MOSKOWITZ, MELVIN T. STITH, Defendants, -and- AFLAC, INCORPORATED, Nominal Defendant.	**C.A. NO. 4:18-CV-00033-CDL**

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other authorities

PRELIMINARY STATEMENT

In its Order dated May 31, 2018, this Court stated that "Defendants' motions can only be granted if they establish that independent directors made a good faith determination after conducting a reasonable investigation and if Plaintiff fails to create a genuine factual dispute on any of those issues." ECF No. 58 at n.1. Plaintiffs respectfully submit that Defendants have not satisfied any of these requirements, and their motion should therefore be denied.

First, Defendants' initial decision to relegate the investigation of Plaintiffs' allegations to the conflicted law firm of Alston & Bird was "unreasonable" and "grossly negligent" as a matter of law pursuant to the Eleventh Circuit's holding in Stepak v. Addison, 20 F.3d 398 (11th Cir. 1994), which Defendants have utterly failed to distinguish. See Part I below.

Second, these "***unreasonable***" and "***grossly negligent***" actions exposed the director Defendants, including the SLC members, to a substantial risk of personal liability because "gross negligence" is the standard of liability for directors and officers of Georgia corporations under O.C.G.A. §§ 14-2-842(c) and 14-2-830(c). Defendants also incurred liability for failing to investigate Plaintiffs' credible allegations of serious fraud at the Company while issuing false and misleading Annual Report and Proxy Statement. Accordingly, the SLC members were not "disinterested" in the outcome of their investigation of Plaintiffs' demand – they were directly ***interested*** in rejecting that demand to avoid their personal liability. See Part II below.

Third, the SLC members ***lacked independence*** as each of their second declarations revealed for the first time, after missing at least three opportunities to speak, that each SLC member has had business, social and/or personal connections to Aflac's CEO and Chairman

Daniel Amos accused of wrongdoing going back 20-30 years, which connections Defendants had concealed and affirmatively misrepresented in their SLC reports and initial declarations. See Part III below.

Fourth, the SLC did not conduct its investigation in good faith or reasonably because: (a) the SLC failed to investigate its members' independence or to disclose their longstanding connections to the alleged wrongdoers Defendants Amoses; (b) the SLC failed to interview any witnesses outside the Company itself, including in particular the witnesses identified by Plaintiffs as having relevant information supporting their allegations; and (c) the SLC failed to investigate most of Plaintiffs' substantive allegations of wrongdoing, as is apparent from the SLC Reports themselves. As Defendants' own authority LR Trust v. Rogers, 270 F. Supp. 3d 1364, 1373 (N.D. Ga. 2017) recognized, "***the mere filing of a [Demand Review Committee] report is not, in and of itself, enough to automatically tilt the burden of proof to the plaintiff-shareholder***" (emphasis added throughout).

Indeed, after the SLC released its third and final Report, Bloomberg News revealed on May 31, 2018 the existence of an ongoing SEC probe of Plaintiffs' allegations, which probe Aflac itself subsequently confirmed, undermining Defendants' premise that Plaintiffs' allegations had all been investigated and found without merit. See Part IV below.

Accordingly, Plaintiffs have raised genuine factual disputes with respect to each of O.C.G.A. § 14-2-744's requirements – independence and disinterestedness of the directors and the reasonableness and good faith of their investigation -- to withstand Defendants' summary judgment motion, which should therefore be denied. *Finally*, the Complaint properly alleges scienter – directors' actual knowledge of the alleged fraud – and the other *prima facie* elements

of their claims with the requisite plausibility and particularity to survive Defendants' motion to dismiss under Rule 12(b)(6). See Part V.

ARGUMENT

I. A conflicted law firm impermissibly and irrevocably tainted the Board's response to Plaintiffs' demands.

The Eleventh Circuit Court of Appeals held in Stepak, 20 F.3d at 406-07, that "it is ***unreasonable*** for a board of directors to entrust its investigation of a shareholder's demand to conflicted counsel," and 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. "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. The Court ruled that "***[t]he initial decision . . . 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***." Id. at 404.[1]

Indeed, Defendants themselves conceded that point in their reply brief. See ECF No. 56 at p. 7 ("***Defendants do not disagree with Stepak that 'it is unreasonable for a board of directors to entrust its investigation of a shareholder demand to conflicted counsel***.'"). However, in their supplemental brief, they must have forgotten that admission, arguing that Stepak is inapposite because "it was decided under Delaware substantive law and only on the pleadings." ECF No. 59 at p. 7. Neither one of these purported distinctions is valid.

[1] See also id. at 405 ("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.").

First, "Georgia courts look to Delaware law for persuasive authority when there is no previously established Georgia law on the matters at issue." LR Trust, 270 F. Supp. 3d at 1379, relied upon by Defendants and citing in turn "Heard v. Perkins, 441 B.R. 701, 703 (N.D. Ala. 2010); see, e.g., Thompson, 275 Ga. App. at 683, 621 S.E.2d at 799, and Millsap, 208 Ga. App. at 232, 430 S.E.2d at 387 (reviewing Delaware authority)." Moreover, as the Court observed in Millsap v. American Family Corp., 430 S.E.2d 385, 232 (Ga. Ct. App. 1993), "the [Georgia] Code Revision Committee comment to OCGA § 14-2-744 recognizes that the new Code provision is predicated in large measure on [the Delaware Supreme Court decision in] *Zapata*"). Defendants themselves cite LR Trust, Thompson, and Millsap in their papers, and their own briefs rely on Delaware law, see ECF Nos. 56, 59.

Indeed, the proposition that "it is unreasonable for a board of directors to entrust its investigation of a shareholder demand to conflicted counsel" – with which Defendants have agreed in their reply brief -- appears to be broadly accepted. See, e.g., In re Oracle Sec. Litig., 829 F. Supp. 1176, 1188 (N.D. Cal. 1993), stating that "there is a substantial body of authority proscribing dual representation of corporate and individual defendants in a derivative action."[2] Defendants do not cite any contrary authority.

Second, the Eleventh Circuit's reasoning and holding on the substantive issue in Stepak – with which "***Defendants do not disagree***" (ECF No. 56 at p.7) -- hold true regardless of whether

[2] Citing, "e.g., Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209 (N.D. Ill. 1975), aff'd in part, rev'd in part, 532 F.2d 1118 (7th Cir. 1976); Lewis v. Shaffer Stores Co., 218 F. Supp. 238 (S.D.N.Y. 1963); Messing v. FDI, Inc., 439 F. Supp. 776 (D.N.J. 1977); Murphy v. Washington American League Base Ball Club, Inc., 324 F.2d 394 (D.C. Cir. 1963); Garlen v. Green Mansions, Inc., 9 A.D.2d 760, 193 N.Y.S.2d 116 (1959); Dukas v. Davis Aircraft Products Co., Inc., 129 Misc.2d 846, 494 N.Y.S.2d 632 (Sup. 1985); Essential Enterprises Corp. v. Dorsey Corp., 40 Del.Ch. 343, 182 A.2d 647 (1962)." Id. See also Forrest v. Baeza, 58 Cal. App. 4th 65, 74-75 (Cal. Ct. App. 1997) ("Current case law clearly forbids dual representation of a corporation and directors in a shareholder derivative suit, at least where, as here, the directors are alleged to have committed fraud," citing, *inter alia*, Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1317 (3d Cir. 1993), and Musheno v. Gensemer, 897 F. Supp. 833, 838 (M.D. Pa. 1995).

it was applied on a motion to dismiss or on a motion to dismiss converted into a "hybrid summary judgment motion for dismissal," and Defendants cite no authority why it should not.

Here, as shown by Plaintiffs and not refuted by Defendants, Alston & Bird has never ceased to represent the individual independent directors – including every member of the SLC – during the relevant period, and have represented them before, during, and after the SLC investigations. It is undisputed that "Alston & Bird LLP represents the Messrs. Amos, the Board and the individual directors in this matter," (ECF No. 49-1 at p. 20), in addition to the Company itself which has retained Alston & Bird in the first place. Accordingly, Alston & Bird 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. As Aflac's lead non-management Director Defendant Johnson acknowledged in rejecting Plaintiffs' March 2017 demand to investigate their allegations, "the Board ***had 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 & Bird, "retained to represent Aflac." ECF No. 1-1 at p. 42. At that time, the Board could only have been advised either by Aflac's management team accused of wrongdoing and/or by Alston & Bird representing them and Aflac. "***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***," Stepak, 20 F.3d at 405, which is precisely what Defendants have done here.

Furthermore, even after the belated involvement of Jones Day as an outside counsel to the SLC, it was the conflicted counsel Alston & Bird who provided Jones Day with "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 at p. 50. This statement clearly indicates that the initial document collection, the search terms for the subsequent filtering, and the filtering out of 98% of all documents, leaving them unreviewed (some narrow search terms!), were ***all done by Alston & Bird***, with Jones Day merely blessing Alston & Bird's work post-factum and relying on the documents collected and filtered by the alleged wrongdoers' counsel. Moreover, according to the SLC Report, "[a]n ***Alston & Bird attorney was present for certain of the witness interviews***." ECF No. 23-1 at p. 51. Finally, Alston & Bird has continued to represent the SLC members in the course of this litigation and through the time of their the first, second and third investigations. And, just like the subsequent engagement of Sidley Austin as an independent counsel in Stepak did not remove the taint created by the initial involvement of the conflicted law firm of Troutman Sanders, so too here the subsequent involvement of Jones Day did not "remove any taint associated with [Alston & Bird's] involvement." 20 F.3d at 409.

Notably, Defendants and Alston & Bird themselves attempted to conceal the conflicted representation. Alston & Bird 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 conceding it. ECF No. 49-1. The SLC Reports misleadingly refer to Alston & Bird as "counsel to the Company" throughout, without disclosing that the law firm also represented the alleged

wrongdoers, the Board as a whole, and individually its independent directors-members of the SLC. Likewise, the Defendant SLC members themselves misleadingly refer to Alston & Bird as "the Company's counsel" in their declarations, without acknowledging the undeniable fact that "Alston & Bird LLP represent[ed] the Messrs. Amos, the Board and the individual directors in this matter" in addition to the Company itself. ECF No. 49-1 at 20. This reluctance indicates Defendants' awareness that such multiple conflicting representations were wholly improper and "unreasonable" in the shareholder demand context, if ever.

Finally, the conflict that has tainted Defendants' investigation and refusal of Plaintiffs' demand is both severe and unconsentable. "Dual representation is impermissible . . . because if the same counsel represents both the corporation and the director and officer defendants, the interests of the corporation are likely to receive insufficient protection. An increased recovery for the corporation is wholly incompatible with the goal of limiting the defendants' liability." In re Oracle Sec. Litig., 829 F. Supp. 1176, 1189 (N.D. Cal. 1993). "It is also clear that an inanimate corporate entity, which is run by directors who are themselves defendants in the derivative litigation, cannot effectively waive a conflict of interests as might an individual under applicable professional rules." Id. at 1188.[3]

[3] The Oracle Court quoted the Delaware Supreme Court's decision in Zapata Corp. v. Maldonado, 430 A.2d 779, 787 (Del. 1981), that "notwithstanding our conviction that Delaware law entrusts the corporate power to a properly authorized committee, we must be mindful that directors are passing judgment on fellow directors in the same corporation and fellow directors, in this instance, who designated them to serve both as directors and committee members. The question naturally arises whether a 'there but for the grace of God go I' empathy might not play a role." The Oracle Sec. Litig., Court proceeds to state that "[s]ince 'independent' directors are often beholden to the defendant directors who appointed them, the retention of an independent counsel by these directors provides one of the few safeguards to ensure the legitimacy of their acts and to aid the court the reasonableness of a derivative settlement or termination." 829 F. Supp. at 1187. No such safeguards ensured the legitimacy or reasonableness of the SLC investigations here.

II. The SLC members were not disinterested because of the substantial likelihood of personal liability.

The SLC members investigating Plaintiffs' demands were not disinterested in the outcome of that investigation because of the substantial likelihood of personal liability each of them faced if the demand was granted rather than rejected. There are several grounds for such liability, accruing in each case prior to the formation of the SLC in July 2017.

First, as discussed above, under the clear holding and reasoning of Stepak, Defendants were "grossly negligent" and "unreasonable" in relegating the investigation of Plaintiffs' allegations to the conflicted law firm representing the alleged wrongdoers. "Gross negligence" is the standard of liability of corporate directors and officers pursuant to Georgia Code.[4] Accordingly, Defendants' liability accrued no later than March 2017, months prior to the formation of the SLC in July 2017.

Second, Aflac and the Amoses knew about the alleged violations since at least Plaintiffs' December 2016 Dispute Notice. See ECF No. 1-1 at p. 4. Defendant Johnson, Aflac's lead non-management director and Chair of its Audit Committee, admitted in March 2017 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 at p. 42. Yet, those allegations remained uninvestigated at all until the SCL was formed in July 2017, and then only subject to a whitewash investigation with a predetermined result. Accordingly, as in the recent Wells Fargo case, Shaev v. Baker, No. 3:16-cv-05541 (N.D. Cal. May 4, 2017), "a majority of the Director Defendants – and in particular those Director Defendants who were on the risk committee, audit

[4] O.C.G.A. § 14-2-830(c) states: "There shall be a presumption that the process an officer [a director] followed in arriving at decisions was done in a good faith and that such officer [director] has exercised ordinary care; provided, however, that this presumption may be rebutted by evidence that such process constituted gross negligence by being a gross deviation of the standard of care of a director in a like position under similar circumstances." O.C.G.A. § 14-2-842(c) provides the same "gross negligence" standard of liability for corporate officers.

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***." Third Joffe Decl. Ex. A.

Third, the Complaint alleges that Defendants issued the false and misleading Annual Report and Proxy Statement with the direct knowledge of the serious fraud alleged by Plaintiffs, and with the knowledge that those allegations had not been investigated or disclosed to shareholders. These allegations satisfy the scienter element of Plaintiffs' Rule 10b-5 and other claims and likewise create a substantial likelihood of personal liability on the part of Defendants, including members of the SLC.

The alleged substantial likelihood of personal liability is sufficient to show that Defendants were not "disinterested." See, e.g., 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."); Aronson v. Lewis, 473 A.2d 805, 815 (Del. 1984) ("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."); Wells Fargo, No. 3:16-cv-05541, Third Joffe Decl. Ex. A ("[D]emand 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."). Accordingly, Plaintiffs' allegations of a substantial likelihood of liability on the part of the SLC members, supported by clear evidence on the record, at the very least create material issues of fact sufficient to deny Defendants' summary judgment motion.

III. The SLC members were not independent because each had newly disclosed but longstanding connections to Defendant Daniel Amos.

None of the SLC members could be considered independent because each had business, social and/or personal connections with Aflac's CEO and Chairman Defendant Daniel Amos, who is accused of the underlying fraud, dating back 20-30 years, which connections were not disclosed in either the SLC Reports themselves, the SLC members' first set of declarations submitted to this Court, or their reply papers, having been revealed only in their second declarations filed on June 21, 2018.

Thus, the SLC Reports not only failed to disclose those connections but affirmatively misrepresented them. The First SLC Report states: "Regarding independence, the ***only*** business or financial relationships with the Company (or its subsidiaries, management or other directors) consist of their service as directors and various Board committee members and their ownership of Company stock and stock options." ECF No. 23-1 at pp. 40-41. The Second Report states the same, see Third Joffe Decl. Ex. B at p. 22.; the Third Report reaffirmed the SLC's "analysis described in the previous Reports confirming the independence and disinterestedness of the Special Committee members." ECF No. 59-4 at pp. 8-9.

Likewise, the first set of director declarations submitted in support of their motion to dismiss did not disclose ***any*** connections between those SLC members and the accused executives the Amoses, claiming that the SLC members "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. Nor did Defendants disclose any such connections in their reply papers after Plaintiffs pointed out in their response a number of such potential connections. Indeed, it was not until the Court converted the motion into a motion for summary judgment on May 31, 2018 (ECF No. 58) and invited supplemental

submissions by the parties that the defendants filed their supplemental declarations disclosing these heretofore concealed connections.

Putting aside their self-serving cookie-cutter proclamations of independence and disinterestedness,[5] these declarations revealed for the first time that:

- SLC member Defendant **Bowers** knew Defendant Daniel Amos for at least 20 years ("I first met Daniel Amos in the 1990s"; Amos "was chairman of the Board of the Japan America Society of Georgia [while Bowers] was Vice Chairman"; Bowers had held a number of executive positions at Southern Company and its subsidiaries Georgia Power and Southern Power while Daniel Amos served as a director of Southern Company and Georgia Power; "[o]ver the years, [Bowers and Amos] have had occasional social and professional interactions"; Bowers also "had met Paul Amos in passing prior to joining the Board of Aflac" (ECF No. 59-2 at p. 5);[6]

- SLC member Defendant **Stith** knew Defendant Daniel Amos for at least 20 years. Defendant Stith's declaration states that "I have served on the Board of Directors of Synovus Financial Corp.," and that "Daniel Amos also served as a director of Synovus with me for a period of time . . . I first met Daniel Amos in connection with our Board service at Synovus," (ECF No. 59-1 at pp. 3, 5);[7]

- SLC member Defendant **Moskowitz** knew Defendant Daniel Amos for at least 30 years ("I had spoken to [Daniel Amos] sometime in the early 1980s regarding a possible engagement," "that he "met him once in connection with a meeting I had with a former KPMG colleague, Kriss Cloninger, around 1999." (ECF No. 59-3 at p. 5).[8]

[5] Defendants' protestations of independence are summarized in Defendants' supplemental brief, ECF No. 59 at p.6; these conclusory boilerplate statements are undermined by the actual facts in the declarations themselves and the additional factual information submitted herewith.

[6] Moreover, even the supplemental declaration of Bowers is incomplete: one could hardly discern from Bowers' artful declaration that (a) Amos served on the Board of Southern Company where Bowers served in various leadership positions prior to becoming its CFO in 2008 and CEO and President in 2010: indeed, according to his Bloomberg executive profile, Bowers had served as executive Vice President, CEO and President of Southern Power (a subsidiary of Southern Company) since 2001 – at the same time when Amos served as a director of Southern Company (2000-2006); Bowers served as Senior VP of Georgia Power between 1995 and 1998, while Daniel Amos served as its director since 1997. Third Joffe Decl. Exs. C and D.

[7] Bloomberg reports that Stith has been director of Synovus Bank from 1994 till present, and director of Synovus Financial Corp. from 1998 till present; Daniel Amos has been director of Synovus Financial Corp. from 1991 to 1998 and again from 2001, compare Third Joffe Decl. Exs. E and D.

[8] Kriss Cloninger was not only Moskowitz's former KPMG colleague at the time of that meeting; according to his Bloomberg executive biography, Cloninger "served in various leadership roles [at Aflac] since 1992," the fact that Moskowitz's second declaration omits.

See Brosz v. Fishman, 2016 WL 7494883 (S.D. Ohio Dec. 29, 2016) (the Big Lots case) ("The fact that two members of the Committee had known two of the individual defendants for twenty to twenty-five years may well be incidental to the Committee's recommendation to reject Plaintiff's demand. But at this preliminary stage, the allegation that the Committee took no documented steps to discern the nature of those relationships and whether they would affect the Committee's independence weighs against a finding that the Board acted independently and in good faith.").

Furthermore, the SLC members' declarations are also notable for what they do not say: they do not deny that the SLC members were individually represented by the Company counsel Alston & Bird at the time of their initial rejection of Plaintiffs' March 2017 demand to investigate the alleged fraud at the company; nor do they deny relegating the investigation of Plaintiffs' allegations to that conflicted law firm at the time. Nor do they deny that they are continued to be represented by that law firm at the time of their first, second and third Reports, as well as in this litigation.[9]

In sum, not only did the SLC fail to take any steps to discern the nature of the relationships between its members and the Company's executives being the subjects of the SLC investigations, but Defendants too have left those connections out of (i) all three SLC Reports, (ii) all three initial declarations of Defendant SLC members, and (iii) Defendants' reply papers.

Finally, Defendants' failure to disclose – indeed, an attempt to conceal and misrepresent -- these business, social and/or personal connections in their SLC Reports, in their initial

[9] Defendants state that Jones Day "was the only law firm that has advised the Special Committee regarding the Special Committee's investigation" (paragraph 5 of each second declaration), but do not mention the undeniable fact that each member of the SLC – Defendants Stith, Bowers and Moskowitz – were individually represented by Alston & Bird at the very same time (and now).

declarations, in their reply papers after, and their eventual artful disclosures in their second declarations by themselves put these Defendants' independence and good faith in grave doubt.

IV. The SLC investigation was not reasonable or in good faith.

The SCL, comprised of the members who were neither disinterested nor independent, and who had entrusted the investigation to a thoroughly conflicted law firm of Alston & Bird, could not have been expected to conduct that investigation in a reasonable and good faith manner, and it did not. Indeed, the Company itself and its top executives the Amoses initially rejected Plaintiffs' demand without any investigation as "wholly without merit" as early as January 5, 2017, locking themselves in that position and prejudicing, compromising and predetermining any subsequent investigation. Likewise, independent directors in March 2017 adopted the Company's response and relegated Plaintiffs to the Company's counsel Alston & Bird, further prejudicing any subsequent investigation. By the time the SLC was formed in July 2017, therefore, the outcome of its investigation was predetermined by the previous rejections of Plaintiffs' allegations by the Company and the Board. Subsequent SLC investigations, conducted by the interested directors individually represented by the counsel for the alleged wrongdoers, was bound to arrive at the same predetermined conclusion and was nothing but a whitewash, which is reflected in the SLC Reports themselves.

First, despite their heft, neither one of the three SCL Reports demonstrates the reasonableness or good faith of the whitewash investigation that produced them. The First SLC Report covers only a carefully selected few of Plaintiffs' many grave allegations contained in their December 2016 Dispute Notice and their SEC, IRS and DOL submissions shared with the independent Directors in March 2017, and does ***not*** address -- or so much as disclose -- many of Plaintiffs' serious allegations, such as those of the Wells Fargo-style "overselling" of policies

without customers' knowledge or consent, and many others.[10] The few allegations that the SLC Report responds to it actually admits, explaining them away as immaterial, which explanation crashed along with Aflac's stock price on January 12, 2018.[11]

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 refers to the "the allegations in the December 2016 and March 2017 Letters" but only addresses one of the many schemes alleged by Plaintiffs (the AWP manipulation) to the complete exclusion of the other allegations of more serious wrongdoings, which are likewise nowhere mentioned among the documents gathered in the course of that internal investigation and shared by the Company with the SLC. 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.

In its Third Report, the SLC in the first part tries to explain why the allegedly false January 12 Press Release was not false: "Although the January Press Release was technically

[10] In July 2018, Aflac New York entered into a consent order with the New York Department of Financial Services, and agreed to pay $1.1 million in restitution and penalties for violating insurance law. Third Joffe Decl. Ex. F. The Consent Order lists among 15 separate types of violations "add[ing] the automatic policy loan provision to a policy without prior written consent from the applicant (or policy owner), in cases where the automatic policy loan provision was not affirmatively selected on the application." Id. "In January [2018], Aflac reached a $350,000 settlement with [the states of Florida, California, New Hampshire, North Dakota and Pennsylvania] over allegations the insurer failed to notify the beneficiaries of policy holders who had died, as originally reported by the Columbus Ledger-Enquirer." Atlanta Business Chronicle, *New York Regulators Order Aflac to Pay $1.1 million* (July 5, 2018).

[11] The first SLC Report even admits to Aflac' keeping its sales calendar open past year-end, resulting in "the nine day extension affect[ing] the sales data in 2015" (ECF No. 23-1 at pp. 81-82), explaining it away with a *leap-year* rationale that makes little sense: "According to Mr. Barnett and Ms. Ruckert, the sales team works on a 13 week cycle, which does not always follow the calendar year. As a result, every 5- 8 years they have to 'true it up' by leaving the production calendar open for extra days to get to December 31." Cf. United States v. Kumar, Dkt. Nos. 06-5482, 06-5654, Slip Op. at p. 1 (2d Cir. Aug. 12, 2010) upholding criminal convictions of Computer Associates' top executives for covering up "a fraudulent accounting practice known as the '35-day month,' whereby CA backdated contracts executed in the first few days of a financial quarter to recognize that revenue in the prior quarter." Third Joffe Decl. Ex. G.

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" so that on January 16 "the Company issued a second announcement . . . which clarified that the Special Committee's investigation of these alleged practices was not yet complete." The second part of the Report reveals that the SLC had managed to "investigate" Debbie Cort's allegations of sexual harassment without ever interviewing the victim Ms. Cort herself, and was beating around the bush instead by reviewing Aflac's written policies and interviewing Aflac's personnel with no relevant knowledge.

Second, more generally the SLC did not interview any of the witnesses outside the Company itself; none of the sales associates raising their complaints in the December 2016 Dispute Notice and the March 2017 correspondence with the Board were interviewed, even though they had offered their cooperation with the Board's investigation. See ECF No. 1-1 at p. 39 ("We are happy to cooperate with and assist the independent directors in their investigation"). Indeed, the SLC interviewed none of the eye-witnesses to the alleged wrongdoing identified in Plaintiffs' December 2016 Dispute Notice and/or March 2017 submissions.

The Microsoft court found this factor particularly compelling and denied a motion to dismiss for the *sole reason* that the board had not interviewed anyone outside the company regarding the violation. See Barovic v. Ballmer, 72 F. Supp. 3d 1210, 1215 (W.D. Wash. 2014) (the Microsoft case) ("[W]hen a stockholder identifies a witness or a set of witnesses 'who should have been interviewed but were not' in connection with a board's investigation, a court may find that the investigation was ***unreasonable***.").[12]

[12] See also id. at 1217 ("For motion to dismiss purposes, such failure to interview anyone outside the company . . . does permit the inference that the DRC's investigation was ***not*** conducted in good faith and was ***not*** reasonable. When we interpret this omission in the light most favorable to the non-moving party, we are led to the conclusion that the DRC's investigation was 'restricted in scope,' 'shallow in execution,' 'pro forma' and 'half-hearted.'")

Defendants' argument that "the reasonableness and good faith of this investigation is evidenced by the fulsome analysis and conclusions set forth in the three detailed Reports" (ECF No. 59 at p. 3) is demonstrably a self-serving *ipse dixit* of Alston & Bird, the conflicted law firm itself, and is factually incorrect for the reasons stated above. *See also* Stepak, 20 F.3d at 400 (noting that "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" but the tainted and unreasonable process of investigation itself); LR Trust, 270 F. Supp. 3d at 1373 (noting that "the mere filing of a DRC report is not, in and of itself, enough to automatically tilt the burden of proof to the plaintiff-shareholder").

Finally, Defendants' unprecedented three SLC investigations have emphatically failed to end this matter. Indeed, after the issuance of the Third and last SLC Report in May 2018, Bloomberg reported that the SEC was conducting its own investigation of the alleged fraud. Third Joffe Decl. Ex. H.

V. Defendants' authorities do not compel a different outcome.

Defendants primarily rely on two decisions dismissing derivative complaints in Benfield v. Wells,749 S.E.2d 384, 324 Ga. App. 85 (Ga. Ct. App. 2013) and LR Trust, 270 F. Supp. 3d 1364. The critical facts leading the courts to dismiss the complaints in those cases, however, are worlds away from the facts of this case.

First, In Benfield, the Board elected to its Demand Review Committee ("DRC") "new members who had not served on the Board during most of the time period covered in [the] complaint and were not named as defendants therein [to] *best ensure that there would not be any*

(emphasis original); Google, 970 F. Supp. 2d at 1032 (stating that "plaintiff has identified witnesses who should have been interviewed but were not, and the court does find that any reasonable investigation of plaintiff's demand should have included an interview of Mr. Neronha, or someone with comparable knowledge"); Brosz, Slip Op. at 6 ("Other facts that weigh in favor of finding 'reasonable doubt' at the motion to dismiss stated include the board's failure to interview potentially adverse witnesses in its investigation. See, e.g., Google, 970 F. Supp. 2d at 1032 (noting that the board's special committee failed to interview specific witnesses that the plaintiff identified in his demand)."

appearance that the DRC was not appropriately independent," and the Board indeed appointed new members to the 2012 DRC. Benfield, 749 S.E.2d at 386. According to the trial court's opinion, the "DRC members did not serve on SunTrust's Board during . . . the time period most closely scrutinized in Plaintiff's complaint." Benfield v. Wells, No. 2011-CV-205554, Slip Op. at 7 (Ga. Super. Ct. Oct. 29, 2012). So too was the case in LR Trust, 270 F. Supp. 3d at 1373 (2 out of 3 committee members did not serve as directors "during the period of time at issue in the investigation, and [the third member] was only a director for a few months at issue."

Here, by contrast, every SLC member had not only served on Aflac's Board during the period of the alleged wrongdoing, but, more significantly, prior to being appointed to the SLC in July 2017 had refused to investigate Plaintiffs' allegations, relegated them to the conflicted counsel in March 2017, and issued false and misleading statements to shareholders with the knowledge that those allegations had not been investigated.

Second, the outside counsel to the DRC conducting the demand investigation in Benfield "has never represented SunTrust on a regular or continuing basis" (ECF No. 42-6 at p.8) -- here, by contrast, Alston & Bird represented everyone.

Third, the O.C.G.A. § 14-2-744 challenge in Benfield was a limited one, challenged the independence of the committee because of ***one*** of the committee members' connection to defendants. See Benfield, 749 S.E.2d at 388. Here, the challenge is manifold: Plaintiffs challenge (i) the reasonableness of the investigation conducted with the heavy involvement of the conflicted counsel; (ii) the disinterestedness of the SLC members based on their own antecedent liability; (iii) the independence of all three members of the SLC based on their long-term connections to Aflac's CEO and Chairman Defendant Daniel Amos.

Finally, the court in Benfield found that the challenged director's "business-only connection with" a defendant was insufficient to render him independent. Benfield, 749 S.E.2d at 388. Here, all three SLC members have had business, social and/or personal connections with the alleged wrongdoers going back 20 or 30 years, which they had concealed until June 21, 2018.

The LR Trust plaintiff principally argued the "the investigation was not reasonable because the DRC failed to act on an informed basis in that it failed to interview the Government investigators who found evidence of misconduct." LR Trust, 270 F. Supp. 3d at 1374. Here, by contract, Plaintiffs contend that the SLC investigation was not reasonable on that and many other grounds set out above.[13]

Finally, in Big Lots, the court upheld a derivative complaint alleging that defendants "conceal[ed] from the public the true financial condition of the Company while at the same time selling large portions of their personal holdings of the stock at inflated value. Plaintiff further alleges that the Individual Defendants caused the Company to repurchase a large amount of its stock at inflated value." Brosz, 2016 WL 7494883, No. 1:13-CV-753, Slip Op. at 2-3 (plaintiffs in Big Lots "issued a demand letter . . . in which he asked the Board to investigate the Individual

[13] The LR Trust court also distinguished plaintiff's authorities holding that a failure to interview certain witnesses undermines the reasonableness of the investigation, stating that "in each of the three cited cases (i.e., Google, Microsoft, and Big Lots), there is no indication that a thorough-detailed DRC report was given to the plaintiff-shareholder for review prior to filing suit," whereas in LR Trust itself "Plaintiff has not contested Defendants' statements that it had the DRC Report for almost a year before filing the Complaint." 270 F. Supp. 3d at 1378 (internal alterations omitted). The Google court, too, held that defendants' failure to make its report public "insulated its investigation from any scrutiny, which is unreasonable." 970 F. Supp. 2d at 1030. Here, the SLC completed its first report in September 2017, but did not disclose it to Plaintiffs or the public at the time. Indeed, Defendants continued to keep the report under wraps for four months until January 2018, and only disclosed it after the instant complaint had already been filed, the *Intercept* article revealing it published, and Aflac's stock dropped 7.5% following that publication. Thus, even though Defendants eventually released that report, the record shows that they have done it only after a long delay, and in a self-serving effort to arrest the stock slide rather than in as a good-faith disclosure to shareholders. Accordingly, this aspect of the case makes it analogous to the situation in the Google (City of Orlando Police Pension Fund v. Page, 970 F. Supp. 2d 1022 (N.D. Cal. 2013), Microsoft (Barovic v. Ballmer, 72 F. Supp. 3d 1210 (W.D. Wash. 2014) and Big Lots (Brosz v. Fishman, 2016 WL 7494883 (S.D. Ohio Dec. 29, 2016) cases and further distinguishes it from LR Trust.

Defendants' sales of their own stock," which the Board rejected after an investigation by its special committee). The very same allegations are made in the instant Complaint (ECF No. 23 at pp. 32-35), and are absent in Benfield and LR Trust. In sum, Defendants' principal authorities, Benfield and LR Trust, only highlight the multiple defects of Defendants' investigation and rejection of plaintiffs' demands in the case at bar. Defendants' assertion that the record is those cases is "virtually identical" to the one *sub judice* is demonstrably wrong.

Finally, Defendants' attempts to distinguish the on-point decision in Shaev v. Baker, 2017 WL 1735573 (N.D. Cal. May 4, 2017) (the Wells Fargo case), where the court denied Wells Fargo's directors motion to dismiss a derivative complaint, are unavailing. Defendants argue that "unlike here, the Wells Fargo court was presented with 'a plethora of . . . allegations . . . regarding the Board's knowledge" of the alleged cross-selling fraud at the bank. Here, of course, Defendant directors' knowledge arises out of direct communications by plaintiffs in March 2017 of their allegations, including copies of plaintiffs' submissions to the Company itself, the SEC, the IRS and the DOL detailing such allegations at great length. Indeed, the March 20, 2018 letter from the lead non-management director Johnson confirmed 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 at p. 42. Aflac directors did not learn about these allegations over years from newspaper articles and media reports, as did the Wells Fargo directors – they clearly and unambiguously learned about them in early 2017 from Plaintiffs' direct communications to them.

VI. Plaintiffs properly allege scienter and the other *prima facie* elements of their claims for purposes of Rule 12(b)(6) motion.

The Complaint properly alleges scienter for purposes of Directors' fraud and Rule 10b-5 liability in the form of their direct knowledge of the credible yet uninvestigated allegations of

wrongdoing at the Company brought to their attention by Plaintiffs. Not only the Wells Fargo case is on all fours with the Complaint, but it is actually *a fortiori* of the situation here, where Plaintiffs alleged Directors' direct and indisputable knowledge of the fraud allegations acquired not from newspaper articles and other extraneous information as in Wells Fargo, but directly from Plaintiffs' hands. Also, Defendants' contention that Plaintiffs' allegations "were investigated and found without merit" (ECF No. 56 at p. 10) is unavailing – Defendants' internal investigation of those allegations was deeply flawed and incomplete for all the reasons set out above; furthermore, this contention flies in the face of the ongoing SEC inquiry of those allegations acknowledged by Aflac.

CONCLUSION

For reasons set out above and cited in Plaintiffs' opposition brief (ECF No. 51), Defendants' motion should be denied.

Respectfully Submitted,

Dated: July 12, 2018

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CERTIFICATE OF SERVICE

I, Dimitry Joffe, hereby certify that on this 12th day of July 2018, I caused a copy of the supplemental memorandum of law and the third declaration of Dimitry Joffe with exhibits thereto in opposition to Defendants' motion to dismiss to be served electronically upon the registered participants in this case through the ECF system.

Dimitry Joffe
Counsel for the Plaintiffs