Case No. 18-13834

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARTIN CONROY, GERARD MCCARTHY, and LOUIS VARELA, derivatively on behalf of AFLAC, INC.,

Plaintiffs-Appellants,

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-Appellees,

-and-

AFLAC, INCORPORATED,

Nominal Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Georgia

APPELLANTS' INITIAL BRIEF

CERTIFICATE OF INTERESTED PERSONS

I, Dimitry Joffe, counsel to Appellants, disclose on their behalf the following known "trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party" pursuant to Eleventh Circuit's Rule 26.1:

Aflac Incorporated (NYSE: AFL)
Alston & Bird LLP
Amos, Daniel
Amos II, Paul
Behre, Kirby
Bowers, W. Paul
Chaiken, David
Conroy, Martin
Davis Gillett Mottern & Sims LLC
Gill, Mary
Harris, St. Laurent & Chaudhry LLP
Hudson, Elizabeth
Joffe Law P.C.
Joffe, Dimitry
Johnson, Douglas
Knapp, Charles
Land, Clay (U.S.D.J.)
Lexstone Fund II L.P.
Macon, Lauren
McCarthy, Gerard
Miller & Chevalier
Moskowitz, Joseph
Rimer, Barbara
Sims, Jerry
St. Laurent, Andrew
Stith, Melvin
Troutman Sanders
Versus Funding Partners L.P.

STATEMENT REGARDING ORAL ARGUMENT

This appeal involves claims of violations of securities law and breaches of fiduciary duties by directors and officers of a major publicly traded insurance company, Aflac Incorporated, dismissed by the District Court directly contrary to this Court's ruling in Stepak v. Addison, 20 F.3d 398 (11th Cir. 1994), among other authorities. Appellants respectfully request oral argument because they believe it would assist this Court in resolving important corporate governance issues raised on this appeal.

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STATEMENT OF JURISDICTION

Appellants initiated this action on December 14, 2017 in the U.S. District Court for the Southern District of New York. Doc. 1. The District Court had original jurisdiction over the action pursuant to 28 U.S.C. § 1331 because the action involved federal questions. The District Court had supplemental jurisdiction over Appellants' state law claims pursuant to 28 U.S.C. § 1367(a). By order dated February 12, 2018, the District Court granted appellees' motion to transfer venue to the U.S. District Court for the Middle District of Georgia pursuant to 28 U.S.C. § 1404(a). Doc. 31.

On August 31, 2018, the District Court for the Middle District of Georgia entered an order granting Appellees' motions to dismiss the complaint and denying Appellants' motion for limited discovery (the "Order"). Doc. 63. On September 4, 2018, the Court entered a final judgment of dismissal pursuant to the Order. Doc. 64. On September 10, 2018, Appellants filed their Notice of Appeal of the Order and final judgment. Doc. 65. This Court's jurisdiction to consider this appeal arises under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The principal issues on appeal are: (a) whether the District Judge erred in refusing to recuse himself based on the old "duty to sit" doctrine that 28 U.S.C. § 455 itself "did away with," United States v. Alabama, 828 F.2d 1532, 1540-

41 (11th Cir. 1987), cert. denied sub nom. Alabama State Univ. v. Auburn Univ., 108 S.Ct. 2857, 101 L.Ed.2d 894 (1988); (b) whether the District Judge erred in analyzing the fact of an appearance of bias subjectively instead of applying the required objective standard under 28 U.S.C. 455(a); (c) whether the District Court erred in refusing to apply this Court's ruling in Stepak v. Addison, 20 F.3d 398 (11th Cir. 1994), to find Appellees "grossly negligent" for entrusting the investigation of Appellants' allegations of wrongdoing to a conflicted counsel Alston & Bird LLP ("Alston"); (d) whether the District Court erred in holding that Appellees' investigation of Appellants' shareholder demand satisfied all elements of O.C.G.A. § 14-2-744 and in dismissing the complaint on that ground; and (e) whether the District Court erred in denying limited discovery into the independence and disinterestedness of the SLC members and the reasonableness of their investigation in aid of the O.C.G.A. § 14-2-744 inquiry.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Appellants initiated this action on December 14, 2017, in the U.S. District Court for the Southern District of New York by filing a verified derivative stockholder complaint against Appellees (Doc. 1), amended on January 31, 2018. Doc. 23. By order entered on February 12, 2018, the S.D.N.Y. District Court transferred the action to the U.S. District Court for the Middle District of Georgia

pursuant to 28 U.S.C. § 1404(a) (Doc. 32), where it was assigned to the Honorable Clay D. Land.

On March 5, 2018, Appellees moved to dismiss the amended complaint pursuant to O.C.G.A. § 14-2-744 and Federal Rule of Civil Procedure 23.1; in the alternative, for failure to state any claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Docs. 42-43. Accompanying their motions were three declarations from Appellees-members of the Special Litigation Committee (the "SLC") of Aflac's Board, attesting that they have no "personal interest or current or prior personal or business relationships that would affect [their] assessment and conclusions as a member of the Special Committee." Doc. 42-4.

Appellants opposed the motions on April 9, 2018 (Docs. 51-52) and included in its opposition publicly available information from credible sources (Bloomberg) showing that two out of three SLC members had undisclosed business associations with Appellees Amoses, which was at odds with their declarations. In footnote 10 of their brief, Appellants also invited the Honorable Clay D. Land to evaluate, pursuant to 28 U.S.C. § 455, his family and social ties to Appellees Amoses that Appellants had come across in researching the relationships between the SLC members and the Amoses.

Appellees replied on May 7, 2018 (Docs. 56-57) without explaining the discrepancies between publicly available information and their first declarations.

Appellees also stated that "Plaintiffs incorrectly assert that there are familial relationships between the Court and the Amos family. Even if true, the relationships as described would not meet the threshold for recusal under the applicable statute." Doc. 56 p. 5.

On May 31, 2018, the District Court converted Appellees' motion to dismiss in a "hybrid motion for summary dismissal" to the extent the motion relied on O.C.G.A. § 14-2-744, stating that "[r]egardless of the label, 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," giving Appellees 21 days to submit additional briefings and evidence, and Appellants, 21 days thereafter to submit theirs. Doc. 58.

Appellees' supplemental submissions, filed on June 21, 2018, included three supplemental declarations from the SLC members, in which they disclosed for the first time that each of the three SLC members had had prior relationships with the accused executives the Amoses going back 20-30 years, which relationships had not been disclosed in those SLC members' initial declarations. Compare Doc. 42-4 (first SLC declarations) and Doc. 59-1 – 59-3 (supplemental SLC declarations).

Appellants then filed their supplemental submissions on July 12, 2018, submitting additional evidence of the SLC members' still undisclosed

relationships, and arguing that Appellees' decades-long ties to the accused executives, as well as their failure to disclose those ties in the SLC Reports, put the SLC members' independence and the good faith of their investigation in grave doubt.

In light of Appellees' supplemental disclosures, Appellants also made a separate motion to lift the previously consented to stay of discovery (Doc. 47) for purposes of conducting a limited discovery of the SLC members' independence, disinterestedness, and reasonableness of their investigation, in aid of the O.C.G.A. § 14-2-744 inquiry. Doc. 61.

On August 31, 2018, the District Court entered an order granting Appellees' motions to dismiss the complaint pursuant to O.C.G.A. § 14-2-744 and denying Appellants' motion for limited discovery (the "Order"). Doc. 63. In the Order, the Court ruled that (a) the District Judge should not recuse himself despite several family and social connections to Appellees; (b) the complaint should be summarily dismissed pursuant to O.C.G.A. § 14-2-744; and (c) no discovery was necessary in aid of the O.C.G.A. § 14-2-744 inquiry. The District Court did not reach the issue of the legal sufficiency of the complaint under Rule 12(b)(6). On September 4, 2018, the Court entered a final judgment of dismissal pursuant to the Order. Doc. 64. Appellants filed their Notice of Appeal of the Order and the final judgment on September 10, 2018. Doc. 65.

II. FACTUAL BACKGROUND

The current dispute between Appellants -- shareholders and former sales associates of Aflac, Incorporated ("Aflac" or the "Company"), a major supplemental insurance provider -- and Appellees, Aflac's top executives and members of its founding family Daniel Amos and his son Paul Amos, II, as well as certain directors of the Company, is laid out in detail in the 50-page amended stockholder derivative complaint (Doc. 23), and is summarized herein to the extent relevant to the District Court's dismissal of the complaint pursuant to O.C.G.A. § 14-2-744.

1. The Company dismissed Appellants' credible fraud allegations without any investigation.

On December 10, 2016, Appellants and other former Aflac sales associates sent a Dispute Notice to Aflac's CEO and Chairman of Appellee Daniel Amos, to his son, Aflac's then President and Board member Appellee Paul Amos, II, and to Aflac's General Counsel Audrey Boone Tillman. Among numerous other violations, the 16-page single-spaced Dispute Notice alleged pervasive fraudulent activities, including but not limited to the Wells Fargo-type "cross-selling" fraud ("overselling" in the insurance industry parlance): policies sold without policyholders' knowledge or consent by faking their signatures; policies sold to ineligible policyholders; sales that are merely conversion of pre-existing policies; illicit bundling of stand-alone policies; and many others. Doc. 1-1 at Ex. A.

On December 14, 2016, Aflac responded to the Dispute Notice through its in-house counsel, stating that "we take these allegations seriously and will be looking into them thoroughly." Doc. 1-1 at Ex. B. Three weeks later, on January 5, 2017, Aflac advised Appellants that "Aflac unequivocally denies the allegations raised in your December 10, 2016 letter," labelling them "wholly without merit." Doc. 1-1 at Ex. C. It is implausible that Aflac had conducted any good-faith due diligence, let alone a thorough investigation, of those allegations during the three-week holiday period to deny them as "wholly without merit." Indeed, it would later take the SLC many months of considerable effort to investigate just a few of those allegations.[1]

[1] Appellees also knew at the time that Appellants' allegations were well-founded and not "wholly without merit" because, unbeknownst to Appellants at the time of their Dispute Notice but well-known to Aflac, in May 2012 the Company entered into a Regulatory Settlement Agreement with the States of Idaho, Missouri and Minnesota, which enumerated many of the same violations, imposed a $1.6 million penalty; required a corrective action plan calling for a major overhaul of Aflac's "claims handling, sales and marketing procedures, and agent supervision and compensation practices"; and submitted the Company to a 3-year regulatory monitoring of its compliance with those requirements, Doc. 23-1 at Ex. 4, which corrective and monitoring plans apparently did not work, leading to another Regulatory Settlement Agreement between Aflac and the same States in August 2018 (the "2018 RSA"), which states that Aflac had not complied with the terms of the 2012 RSA and imposes a $2.5 million fine, a nationwide corrective action plan, and a 5-year monitoring. See 2018 RSA, available at https://insurance.mo.gov/Contribute%20Documents/AFLAC918.pdf. Accordingly, when Appellants brought their own allegations of much the same misconduct to the Company's attention in December 2016, the Company should have had little reason to doubt their merits.

2. Appellees refuse Appellants' shareholder demands for an independent investigation of their allegations.

Having been rebuffed by Aflac and its top executives the Amoses, Appellants turned to the Company's independent directors. On March 8, 2017, Appellants, through the undersigned counsel, reported the alleged fraud to the Company's independent directors, asking them to conduct an independent investigation and take appropriate corrective actions. Doc. 1-1 at Ex. D; Doc. 23-1 at Exs. 5-6. Appellants' March 8, 2017 submission to the independent directors attached the Dispute Notice, as well as copies of Appellants' whistleblower submissions to regulatory authorities, and asked the directors "to conduct a proper internal investigation of our allegations without any interference by the executive directors or management, in particular Messrs. Daniel Amos, Paul Amos II, and other AFLAC executives expressly alleged in the Dispute Notice to have been personally aware of and/or participated in the fraud. We are happy to cooperate with and assist the independent directors in their investigation." Id.

On March 20, 2018, Aflac's lead non-management director and Chair of the Audit Committee Appellee Johnson personally responded by a letter to Appellants' counsel, confirming that Appellants' March 8, 2017 submission was being delivered to the addressee Directors, revealing that "***the Board had previously been advised of the allegations raised in your December letter and on the company's due diligence efforts***" and relegating Appellants to "***Ms. Lisa H.***

Cassilly, with the law firm of Alston & Bird, LLP, [who] has been retained to represent Aflac." Doc. 1-1 at Ex. E (emphasis added throughout unless otherwise stated).

In their March 28, 2017 response to Appellee Johnson's letter, Appellants referred to the just published proxy statement and stated that "it is simply inconceivable that the Audit Committee could have made the statements it made in the [proxy statement] had it been sufficiently and truthfully apprised of our allegations and of the company's true financial position by the management." Doc. 1-1 at Ex. F. Appellants' March 28, 2017 letter concluded by requesting the Board, again, to "investigate our allegations in good faith, and take all the necessary corrective actions." Id. The Board, however, did not conduct any such good-faith investigation at the time and did not take any corrective action.

3. Appellee directors retain a conflicted law firm to represent them in the matter of Appellants' demands for investigation; the law firm attempts to conceal the conflicted representation.

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

In fact, Alston was retained to represent not only Aflac itself but its accused executives Appellees Amoses, other Aflac executives-defendants in a pending

DOL whistleblower retaliation action, as well as the Board itself and its individual members, including independent Directors, all with respect to Appellants' demand. These multiple representations, which Alston unsuccessfully sought to conceal from Appellants, irrevocably tainted Appellees' response to Appellants' demands with a severe and unconsentable conflict of interests.

Alston's reluctance to admit its conflicting representation is laid out in seven tediously teeth-pulling pieces of correspondence between Alston and the undersigned counsel for Appellants (Doc. 49-1), in which Alston's responses as to the precise nature of their representation had gone from unclear to elusive to evasive to aggressive before finally admitting that "***the answer is 'yes,' Alston & Bird LLP represents the Messrs. Amos, the Board and the individual directors in this matter***." Doc. 49-1 at Ex. G.

Alston's representation of Aflac's individual independent directors, including Appellees Bowers, Moskowitz and Stith who subsequently comprised the SLC, had continued uninterrupted while the SLC investigated and then rejected Appellants' shareholder demand with the help of the law firm of Jones Day. Indeed, Alston collected and filtered documents for Jones Day's review; Alston was present during witness interviews by Jones Day; Alston informed Appellants that the SLC had rejected their demand (Doc. 1-1 at Ex. H); and Alston would go

on to represent all Appellees (except Paul Amos, II) in the instant derivative litigation.

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

4. The SLC conducts a whitewash investigation.

On June 8, 2017, barely a month after Appellees Amoses were re-elected to the Aflac Board, Aflac issued a press release stating that Appellee Paul Amos, II, had resigned from his position as President of Aflac and from its Board of Directors effective July 1, 2017. On June 14, 2017, Appellee Paul Amos, II, filed Form 4 with the SEC, disclosing that on June 12, 2017, he sold 222,889 of Aflac shares – or 44% of his total direct shareholding in the Company -- for over $17 million.

On June 23, 2017, Appellants, through counsel, made a formal demand upon Aflac to take a suitable action against Appellee Paul Amos, II, for his insider trading while in possession of material non-public information (*i.e.*, knowledge of Appellants' uninvestigated fraud allegations). Doc. 1-1 at Ex. G. In response, in

July 2017 the Board formed the SLC comprised of Appellees Bowers, Moskowitz and Stith.

During the period from July 2017 until May 2018, the SLC conducted three investigations of Appellants' allegations, and issued three SLC Reports. Despite their heft, the SLC Reports have failed to demonstrates the reasonableness or good faith of the SLC investigation that produced them. As a threshold matter, the SLC Reports do not disclose the SLC member's longstanding ties to Appellee Daniel Amos, the Company's CEO and Chairman of the Board, and in fact affirmatively misrepresent those ties. The SLC Reports admit the existence of most of the alleged schemes but describes them as immaterial and episodic, notwithstanding the 7.4% stock drop caused by a partial revelation of those allegations on January 12, 2018. See Barron's, The Biggest Loser: Aflac Sinks 7.4%, (Jan. 12, 2018) ("Aflac (AFL) fell to the bottom of the S&P 500 on Friday, hurt by allegations by former employees, which the insurer denies.").[2] Stripped of their invalid materiality defenses, the SLC Reports actually confirm the existence of most of the violations alleged by Appellants.[3]

[2] As alleged in the complaint (Doc. 23), Appellees had managed to arrest the stock slide by falsely assuring the market that the Appellants' allegations had been all investigated and found false and without merit.

[3] 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" (Doc. 23-1 at pp. 81-82), explaining it away with a *leap-year* rationale that makes

Notably, Appellees' unprecedented three SLC investigations have failed to end this matter: 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 at the Company. Doc. 60-9.

5. The District Court enters the Order denying recusal, granting Appellees' motion to dismiss, and denying Appellants' motion for limited discovery.

In footnote 10 of their opposition to Appellees' motions to dismiss the complaint, Appellants raised the issue of the Honorable Clay D. Land's appearance of bias pursuant to 28 U.S.C. § 455 (Doc. 49 at p. 22):

> In the course of researching the relationships between Defendants Amoses and the SLC members for the purposes of this motion, Plaintiffs have come across several indicia of familial and other relationships between the Honorable Clay D. Land presiding over this action, and Aflac's executives Defendants Amoses. In particular, upon information and belief, John Amos' daughter Maria Teresa Amos Land, a first cousin of Defendant Daniel Amos and an aunt of Defendant Paul Amos, II, was married to Donald "Donny" Land, and W. Donald Land, Jr., upon information and belief their son, currently works as an in-house counsel for Defendant Aflac. Upon information and belief, the Honorable Clay D. Land's cousin Ted Land and his

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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." Doc. 60-8.

> daughter Deborah Land used to work for Defendant Aflac as well. A review of the local media also reveals the existence of the so-called "Fish House Gang," an influential tight-knit group of local elites who meet regularly for fried catfish dinners (hence the moniker), of which the Amos and the Land families are prominent members. As David Rose relays in his book The Big Eddy Club at 302 (The New Press, 2007), "from his early adulthood Clay Land had been on the list of regulars at the exclusive fried catfish suppers that his great-uncle John organized for more than half a century, that singular opportunity to network, the Fish House Gang." These familial and social relationships might reasonably be construed to create an appearance of partiality towards Defendants. Pursuant to 28 U.S.C. § 455(a), "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." . . .

By Order entered on August 31, 2018, Doc. 63, the District Judge refused to recuse himself citing a "solemn duty to remain," denied Appellants' motion for limited discovery, and dismissed their derivative complaint pursuant to O.C.G.A. § 14-2-744 without reaching the issue of the legal sufficiency of the complaint under Rule 12(b)(6). On September 4, 2018, the Court entered a final judgment of dismissal pursuant to the Order. Doc. 64. This appeal followed.

STANDARD OF REVIEW

Orders granting motions to dismiss shareholder derivative actions are reviewed for abuse of discretion. See Peller v. Southern Co., 911 F. 2d 1532, 1536 (11th Cir. 1990).

SUMMARY OF ARGUMENT

"Just as a biased judge would eviscerate the adversary system's value as a dispute resolution mechanism, a conflicted law firm can eviscerate the decisional process of a corporate board." Stepak v. Addison, 20 F.3d 398, 410 (11th Cir. 1994).

As Appellants' luck would have it, both of these threshold issues have confronted them in their quest to investigate the alleged shareholder fraud at the Company. The District Judge, instead of resolving reasonable doubts in favor of recusal, misapplied 28 U.S.C. § 455 by relying on the "solemn duty to remain," which duty the statute itself had long abolished, as this Court's rulings in United States v. Alabama, 828 F.2d 1532 (11th Cir. 1987) and United States v. Kelly, 888 F.2d 732 (11th Cir. 1989) make crystal clear. The Judge also misdirected himself as to the objective facts reasonably calling his impartiality in question, evaluating them subjectively rather than applying the objective standard as required by Liteky v. United States, 510 U.S. 540 (1994), and Parker v. Connors Steel Co., 855 F.2d 1510 (11th Cir. 1988). See Part I below.

The District Court also abused its discretion in failing to apply this Court's ruling in Stepak v. Addison , 20 F.3d 398 (11th Cir. 1994) and in refusing to find the Appellee directors "grossly negligent" and "unreasonable" for entrusting the

investigation of shareholder demands to a thoroughly conflicted law firm. See Part II below.

The District Court further abused its discretion in dismissing Appellants' complaint pursuant to O.C.G.A. § 14-2-744 because: (a) the SLC members were not "independent" due to each member's concealed decades-long associations with the accused executives; (b) the SLC members were not "disinterested" because of the significant personal liability they faced for failing to investigate allegations of wrongdoing, for entrusting it to the conflicted Alston, and for issuing materially false and misleading Proxy Statement and Annual Report; (c) the SLC investigation was not reasonable or in good faith; and (d) the Court dismissed the complaint without allowing Appellants a limited discovery for purposes of the O.C.G.A. § 14-2-744 inquiry. See Part III below.

ARGUMENT

I. The District Judge refused to recuse himself by misapplying controlling law.

In the "Fish and Family" part of the Order dealing with recusal (Doc. 63 at pp. 2-5), the District Judge misapplied the controlling law by (a) resolving doubts in favor of the non-existing "solemn duty to remain" instead of recusal; and (b) by evaluating the recusal facts subjectively rather than under the requisite "objective" standard.

a. By refusing to recuse himself in favor of the "solemn duty to remain," the District Judge misapplied 28 U.S.C. § 455.

The District Judge refused to recuse himself citing his "***solemn duty to remain***" and resolving all reasonable doubts about his impartiality in favor of that "duty to remain" rather than in favor of recusal. Doc. 63 at 9. By so doing, the District Judge misapplied 28 U.S.C. § 455. As this Court explained in United States v. Alabama, 828 F.2d at 1540-41:

> In 1974, Congress rewrote 28 U.S.C. § 455 to correct perceived problems in the disqualification statutes. Prior to 1974, both the technical and legal sufficiency requirements of § 144 had been construed strictly in favor of judges. Courts also operated under the so-called "duty to sit" doctrine which required a judge to hear a case unless a clear demonstration of extra-judicial bias or prejudice was made. Consequently, disqualification of a judge was difficult under § 144. In passing the amended 28 U.S.C. § 455, Congress broadened the grounds and loosened the procedure for disqualification in the federal courts. Although a party still is permitted to make a motion and submit affidavits to bring about a judge's disqualification, the statute places a judge under a self-enforcing obligation to recuse himself where the proper legal grounds exist. ***The statute also did away with the "duty to sit" so the benefit of the doubt is now to be resolved in favor of recusal***.

See also Federal Judicial Center, Recusal: Analysis of Case Law Under 28 U.S.C. §§ 455 & 144, at 2 (2002) ("[A] judicial 'gloss' on section 455 created a 'duty to sit' whereby judges resolved close questions against recusal. . . . In order to resolve these issues, in 1974 Congress enacted an extensive revision of section 4557 based on the 1972 American Bar Association Code of Judicial Conduct, which was adopted with only slight modifications by the Judicial Conference in 1973 as the

Code of Conduct for United States Judges. ***The legislative history made it clear that in revising the statute, Congress wished to remove the 'duty to sit."***") (citing H.R. Rep. No. 1453, 93d Cong., 2d Sess. 5, reprinted in 1974 U.S. Code Cong. & Admin. News 6351, 6355).

Accordingly, this Court has instructed district courts to resolve any doubts in favor of recusal instead of the "old 'duty to sit.'" As the Court explained in United States v. Kelly, 888 F.2d at 744:

> Congress rewrote section 455 in 1974 for the specific purpose of "broaden[ing] and clarify[ing] the grounds for judicial disqualification." Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 2197, 100 L.Ed.2d 855 (1988). Under the new version of section 455, a judge is under an affirmative, self-enforcing obligation to recuse himself *sua sponte* whenever the proper grounds exist. ***Section 455 does away with the old "duty to sit" doctrine and requires judges to resolve any doubts they may have in favor of disqualification.*** See United States v. Alabama, 828 F.2d 1532, 1540 (11th Cir. 1987), cert. denied sub nom. Alabama State Univ. v. Auburn Univ., __ U.S. __, 108 S.Ct. 2857, 101 L.Ed.2d 894 (1988).
>
> The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." Liljeberg, 108 S.Ct. at 2205. Neither actual partiality, nor knowledge of the disqualifying circumstances on the part of the judge during the affected proceeding, are prerequisites to disqualification under this section. The duty of recusal applies equally before, during, and after a judicial proceeding, whenever disqualifying circumstances become known to the judge. See id. at 2202-03.

The District Judge cited the Circuit Court Judge Tjoflat's addendum to pro forma order denying recusal motion in Carter v. W. Publ'g Co., No. 99-11959-EE,

1999 WL 994997 (11th Cir. 1999) in support of the "solemn duty to remain" doctrine. Doc. No. 63 at p.5. However, in In re BellSouth Corp., 334 F. 3d 941, 968-69 (11th Cir. 2003), Judge Tjoflat in his opinion (dissenting on other grounds) stated the exact opposite:

> In 1974, Congress amended 28 U.S.C. § 455 "to clarify and broaden the grounds for judicial disqualification and to conform with the recently adopted ABA Code of Judicial Conduct, Canon 3C (1974)." Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 859 n. 7, 108 S.Ct. 2194, 2202 n. 7, 100 L.Ed.2d 855 (1988). . . . Under the earlier version of section 455, courts "operated under the so-called 'duty to sit' doctrine which required a judge to hear a case unless a clear demonstration of extra-judicial bias or prejudice was made." United States v. Alabama, 828 F.2d 1532, 1540 (11th Cir. 1987). By enacting the current version of section 455, however, ***Congress "did away with the 'duty to sit' so the benefit of the doubt is now to be resolved in favor of recusal."*** Id. (footnote omitted).
>
> Section 455 now "places a judge under a self-enforcing obligation to recuse himself where the proper legal grounds exist." Id. . . . . Recusal under section 455(a) "should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality." United States v. Alabama, 828 F.2d at 1541 (internal quotation marks omitted) (quoting Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir.1980)).

Accordingly, the District Judge's decision to remain was based on the old "duty to sit" doctrine that had been long repudiated in this Circuit.

b. The District Judge did not apply the required "objective" standard in evaluating facts raising significant doubts about his impartiality.

The standard for recusal under Section 455(a) is "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on

which recusal was sought would entertain a significant doubt about the judge's impartiality." United States v. Torkington, 874 F.2d 1441, 1446 (11th Cir. 1989) (quoting Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988), cert. denied, 109 S.Ct. 2066, 104 L.Ed.2d 631 (1989)).

Section 455(a) makes clear that judges should apply an objective standard in determining whether to recuse. A judge contemplating recusal should not ask whether he or she believes he or she is capable of impartially presiding over the case -- the statute requires recusal in any case "in which [the judge's] impartiality might reasonably be questioned." In Liteky v. United States, 510 U.S. 540, 548 (1994), the Supreme Court stated:

> Subsection (a) [of Section 455] was an entirely new "catchall" recusal provision, covering both "interest or relationship" and "bias or prejudice" grounds, see Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) – but ***requiring them all to be evaluated on an objective basis, so that what matters is not the reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal was required whenever "impartiality might reasonably be questioned."***

See also Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988) (stating that "section 455(a) embodies an objective standard" and requires an evaluation of "the objective facts that might reasonably cause an objective observer to question Judge['s] impartiality").

Further, judges have an ethical duty to "disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the

question of disqualification." Porter v. Singletary, 49 F.3d 1483, 1489 (11th Cir. 1995).

Instead of disclosing his family and social connections to Appellees Amoses, however, the District Judge took Appellants' suggestion of recusal as a personal affront, calling it "careless" while misdirecting himself from the objective facts that might reasonably lead a disinterested lay observer to question the Judge's impartiality in this case, and substituting his own subjective opinions and views instead.

First, with respect to the connections between the District Judge and Appellees, Appellants alleged that the District Judge and Appellees Daniel Amos and Paul Amos, II, might be related, and that the Judge's relative William Donald Land Jr. was currently employed as Aflac's in-house counsel. In response, the District Judge stated: "None of the individuals counsel identifies are within the third degree of relationship to the undersigned; at least one of the identified family members is dead; and ***to the best of the undersigned's knowledge, the others are not employed with AFLAC***." Doc. 63 at p. 5.

However, a few weeks later, in a decision refusing recusal in an unrelated matter, Youngblood-West v. Aflac et al., No. 4:17-cv-00083, ECF No. 85 (M.D. Ga. Oct. 10, 2018), brought against Daniel Amos among others, the District Judge

no longer denied that William Donald Land, Jr., was employed by Aflac, and acknowledged that he was the District Judge's "fourth cousin, once removed."[4]

[4] Pursuant to Rule 201 of the Federal Rules of Evidence, a court may take judicial notice of adjudicative facts at any stage of the proceeding. Appellants respectfully invite the Court to take judicial notice of Plaintiff's affidavit made pursuant to 28 U.S.C. § 144 laying out the factual basis for recusal in Youngblood-West v. Aflac, No. 4:18-cv-00083, ECF No. 84-1, and the District Judge's order denying Plaintiff's motion, id. ECF No. 85 (M.D. Ga Oct. 10, 2018), as highly relevant to this appeal.

Pursuant to 28 U.S.C. § 144, "[w]henever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding." Plaintiff Youngblood-West in that case filed a timely and sufficient 18-page Section 144 affidavit setting forth several bases for recusal, including (a) the District Judge's spouse's being a direct beneficiary under an agreement whose enforceability is one of the key issues in that action; (b) the Judge's family connections to Defendants Amoses (Daniel Amos and William L. Amos, Jr., in that case); (c) the Judge's Fish House Gang connections to Defendants Amoses; and (d) the Judge's actual bias in favor of Defendants Amoses demonstrated in that action. "If an affidavit is timely and technically correct, the trial judge may not pass upon the truthfulness of the facts stated in the affidavit even when the court knows these allegations to be false. The statute restricts the trial judge to determining whether the facts alleged are legally sufficient to require recusal. The test for legal sufficiency adopted by this Court requires a party to show: 1. The facts are material and stated with particularity; 2. The facts are such that, if true they would convince a reasonable person that a bias exists. 3. The facts show that the bias is personal, as opposed to judicial, in nature." U.S. v. Alabama, 828 F.2d at 1540. The District Judge, however, did not assign the motion to another judge as required by Section 144 but proceeded to deny it himself.

In its order denying that motion, the Judge disclosed additional factual information bearing directly on his refusal to recuse himself in this Action, which could be judicially noticed for the purposes of this appeal. The Judge's order denying motion to recuse in Youngblood-West is also relevant to the present appeal

Accordingly, the Judge's statement in the Order that the individuals identified by Appellants as his relatives, including William Donald Land, Jr., "are not employed with Aflac" is factually incorrect.[5]

More importantly, William Donald Land, Jr., is a grandson of Aflac's founder John Amos, while Appellees Daniel Amos and his son Paul Amos, II, are John Amos' nephew and grand-nephew, respectively, necessarily making them the District Judge's relatives as well. The Judge, however, does not mention or address his family connections to these Appellees in the Order – connections that matter for recusal under Section 455(a).

The Supreme Court in Liljeberg, 486 U.S. at 860, noting that the purpose of Section 455(a) is to promote public confidence in the integrity of the judicial process, observed that such confidence "does not depend upon whether or not the

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because in both of these cases, which are unrelated but for the identities of certain Amos-family defendants (including Daniel Amos and his cousin William L. Amos, Jr.), and the undersigned counsel also representing Plaintiff Youngblood-West in that action, the District Judge refused to recuse himself, in violation of either Section 144 in Youngblood-West or 455(a) in this Action, and by all too lightly and subjectively dismissing the objective facts demonstrating to any disinterested observer the District Judge's deep-seated favoritism towards Appellees Amoses.

[5] William Donald Land, Jr.'s father, William Donald Land, Sr., had also worked for Aflac for 15 years until his death in 1991. See Southeastern Underwriters v. AFLAC, 210 Ga. App. 444, 445 (Ga. Ct. App. 1993) ("AFLAC, a company based in Columbus, Georgia, was established in 1955 by John Amos for the purpose of selling various lines of insurance. In 1978, AFLAC entered into an agreement with Underwriters South, Inc., a company owned by ***Mr. and Mrs. Donald Land, the son-in-law and daughter of Amos***.").

judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew." It is reasonable to believe that the District Judge knows about his family connections to Appellees Daniel Amos and Paul Amos, II, and that "an objective, disinterested lay observer" may entertain significant doubts about the District Judge's impartiality both in light of his family ties to those Appellees and in light of the District Judge's reluctance to disclose those ties despite an ethical duty to do so. Porter, 49 F.3d at 1489.

Second, with respect to the Fish House Gang, Appellants alleged that "from his early adulthood Clay Land had been on the list of regulars at the exclusive fried catfish suppers that his great-uncle John organized for more than half a century, that ***singular opportunity to network***, the Fish House Gang," of which the Amos and the Land families were prominent members, quoting David Rose, The Big Eddy Club at 302 (The New Press, 2007).

In response, the District Judge confirmed that he "has been invited to these functions over the years and has attended with some regularity." Doc. 63 at p. 3. The Judge further states that "it is possible that one or more of the Defendants in this action may have attended one or more of these fried-fish suppers in the past," although "the undersigned has no specific recollection of them having done so and does not believe that they are presently on the invitee list." Id. The Judge in the Order also pointedly called the Fish House Gang the "Fish House Crowd," stating

that it was so known "by those who have no motive to sensationalize the moniker," and explaining the "Fish House Crowd" away as nothing more than a "social event." Doc. 63 at 3-4.

A month and a half later, however, the District Judge dropped the term "Crowd" and referred to the "Gang" instead throughout his 37-page order denying a motion to recuse in Youngblood-West, No. 4:18-cv-00083, ECF No. 85 (M.D. Ga. Oct. 10, 2018). That motion for recusal, supported by Plaintiff Youngblood-West's Section 144 affidavit, pointed out that the term "Fish House Crowd" was not readily found in the public domain outside the District Court's Order, while the term "Fish House Gang" had been notorious and long-established in the community, and not of a recent vintage or of Appellants' own invention. See Glenn Vaughn, Here is Lowdown on the "Fish House Gang," Columbus Ledger-Enquirer (Mar. 30, 1988) ("Judge [John] Land credits former Ledger government reporter Constance Johnson with labelling the group the 'Fish House Gang.'"). Glenn Vaughn is a former Chairman of Columbus-Ledger and a former member of Aflac Board of Directors; the late Judge John Land cited in the article was a long-time leader of the Fish House Gang; neither had any apparent "motive to sensationalize the moniker."[6]

[6] Indeed, the District Judge's use of the term "Crowd" presumably used by "those who have no motive to sensationalize the moniker" -- instead of "Gang" as has

The District Judge also dismisses the Fish House Gang as nothing more than a group of two-hundred invitees occasionally enjoying "fried fish, french fries, hushpuppies, coleslaw, and each other's company." Doc. 63 at 3. Cf. Glenn Vaughn, Here is Lowdown on the "Fish House Gang," Columbus Ledger-Enquirer (Mar. 30, 1988) ("Judge Land, auto dealer Gene Miller and other regulars insist [the Fish House Gang] is not a political organization, 'just a friendly get together.'"); David Rose, The Big Eddy Club, The Stocking Stranglings and Southern Justice at 127 (The New Press 2007) ("On the rare occasions that the media asked him about it, [Judge John Land] always insisted that the gang was merely a way of getting congenial people from different walks of life together, and that its meetings had no political content.")

But the Fish House Gang has not appeared as merely a social event or a dining club to many objective disinterested lay observers. Indeed, the Section 144 affidavit for recusal in Youngblood-West, No. 4:18-cv-00083, ECF No. 84-1 (M.D. Ga. Oct. 16, 2018), cites two books and a variety of media reports all concluding that the Fish House Gang is much more than that just a "friendly get-together" for fried fish. Indeed, the longtime observers of the local scene have consistently concluded in over thirty years of reporting on the subject that the Fish

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been used by the disinterested outside observers -- indicates the District Judge's "subjective" approach.

House Gang is a center of considerable power, extremely selective in its membership, and wielding significant behind-the-scene influence in Columbus and well beyond. Indeed, these observers have consistently referred to the Fish House Gang over the years as a "***secretive network of politicians, lawyers and businessmen***," "***a shadowy association***," "***a powerful ad hoc group***," "***a private freemasonry***," a "***singular opportunity to network***," and a "***behind-the-scene***" power group, with the Land and the Amos families among its Top Ten members.[7]

"From his early adulthood Clay Land had been on the list of regulars at the exclusive fried catfish suppers that his great-uncle John organized for more than half a century, that singular opportunity to network, the Fish House Gang." David Rose, The Big Eddy Club, The Stocking Stranglings and Southern Justice at 302 (The New Press 2007). In assessing his Fish House Gang connections, the District Judge incorrectly applied his own subjective views instead of those of the disinterested objective observers who had uniformly described the Fish House

[7] See, e.g., Glenn Vaughn, Here is Lowdown on the "Fish House Gang," Columbus Ledger-Enquirer (Mar. 30, 1988); Seymour Shubin, The Man From Enterprise: The Story of John B. Amos, Founder of Aflac at p. 82 (Mercer Univ. Press 1998); David Rose, The Big Eddy Club, The Stocking Stranglings and Southern Justice at 127, 302 (The New Press 2007); Richard Hyatt, Who's the Real Boss in Columbus, AllOnGeorgia.com (Dec. 8, 2016); David Rose, A Very Modern Lynching, Daily Mail (July 14, 2007): Powerful Judge John Henry Land Dies at Age 93, Columbus Ledger-Enquirer (Dec. 2, 2011); Richard Hyatt, That Old Fish House Gang is Running Out of Bones, AllOnGeorgia.com (Sept. 5, 2018), summarized in Younglbood v. Aflac, No. 4:17-cv-00083, ECF No. 84-1.

Gang as an influential old boys' club to which the District Judge and the Appellees Amoses have belonged for many years.

Indeed, "an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought" – here, the facts of the District Judge's family connections to Appellees Daniel Amos and Paul Amos, II, his family connection to Aflac's Senior Associate Counsel William Donald Amos, Jr., and the successive generations of the Land and the Amos families holding leadership positions in the secretive and exclusive Fish House Gang – "would entertain a significant doubt about the judge's impartiality," United States v. Torkington, 874 F.2d 1441, 1446 (11th Cir. 1989), and would reasonably suspect "a deep-seated favoritism that would make fair judgment impossible." Liteky, 510 U.S. at 555.

In sum, by resolving all these reasonable doubts in favor of the no longer existing "solemn duty to remain" and against recusal, the District Judge violated 28 U.S.C. § 455(a) as construed by this Court in the controlling precedents of U.S. v. Alabama, 828 F.2d 1532, and U.S. v. Kelly, 888 F.2d 732. Furthermore, by evaluating the recusal facts subjectively, the District Judge violated the "objective" standard established by the Supreme Court in Liteky v. United States, 510 U.S. 540 (1994), see also Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988).

Therefore, the District Judge's refusal to recuse himself was plainly erroneous as a matter of law. Improper denial of motions seeking recusal may have serious consequences, such as depriving parties of their right to a "neutral and detached judge," Ward v. Village of Monroeville, 409 U.S. 57 (1972), and diminishing public trust in the judicial system, which requires confidence in the impartiality of judges.

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

This Court held in Stepak v. Addison, 20 F.3d 398, 407 (11th Cir. 1994), that "if a shareholder pleads with sufficient particularity facts that, taken as true, show that a board's consideration of his demand was dominated by a law firm that represents or previously represented an alleged wrongdoer in criminal proceedings related to the very subject matter of the demand, then the shareholder raises a reasonable doubt that the board's rejection of his demand was an informed decision protected by the business judgment rule. In such a case, the shareholder's complaint is entitled, on a wrongful refusal theory, to survive a Rule 23.1 motion to dismiss." Id. at 407.[8]

[8] "In the leading case of Stepak v. Addison, the U.S. Court of Appeals for the Eleventh Circuit, applying Delaware law, held that the law firm's independence would be compromised if it previously represented those persons concerning 'the very subject matter of the [shareholder] demand.' 20 F.3d at 407. The court partly based its ruling on the "strong possibility that a 'lingering allegiance' toward the insider defendants will color or otherwise bias counsel's investigation of the

This Court concluded 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 reasoned 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.[9]

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allegations against its former clients, as well as any legal advice counsel provides to the corporation about the matter.' Id. at 405. While Stepak's ruling is expressly limited to instances where the prior representation concerned 'the very subject matter of the [shareholder] demand,' other courts have cautioned more broadly against retaining outside counsel with 'any ties' to the individuals under investigation. See In re Oracle Sec. Litig., 829 F. Supp. 1176, 1189 (N.D. Cal. 1993) (board was required 'to retain counsel with no prior ties to the individual defendants or the corporation'); Dalrymple v. Nat'l Bank & Trust Co., 615 F. Supp. 979, 986 (W.D. Mich. 1985) (outside counsel should have 'no previous professional relationship with either the corporate entity or its directors'); Messing v. FDI, Inc., 439 F. Supp. 776, 782 (D.N.J. 1977) (outside counsel must be 'unshackled by any ties to the directors')." W. Monahan, A. Magrid, Investigating Shareholder Derivative Claims: The Importance of Independent Counsel (Columbia Law School Blue Sky Blog, Mar. 1, 2013).

[9] 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***

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

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

The Court first considered "whether domination, in the manner described by the pleadings, of a board's consideration of a shareholder's derivative demand by a law firm that has represented the alleged wrongdoers in criminal proceedings involving the very subject matter of that demand, would raise a reasonable doubt that the board has properly informed itself prior to rejecting the shareholder's demand. We conclude that it would raise such a doubt." Id. at 403-04.

The Court then held that the Board's eventual retention of another outside counsel "evidences the outside directors' recognition that they could not rely upon the conflicted law firm of Troutman Sanders in regard to the demand," id. at 407, but was ***insufficient "to remove any taint associated with Troutman Sanders' involvement***." Id. at 409. The Court concluded that "this allegation [of a conflicted

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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.").

law firm] creates a reasonable doubt that the Board validly exercised its business judgment in refusing Stepak's demand, and therefore we reverse as to Stepak." Stepak, 20 F.3d at 400.[10] The Court further stated: "***The problem in this case is not the amount of time or the quantity of ink expended by or on behalf of the outside directors*** . . . . It is unreasonable to trust a conflicted law firm to present the relevant information and to do so in a neutral manner."

Appellees themselves have conceded that point. See Doc. 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.'"). Indeed, this proposition 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

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

individual defendants in a derivative action."[11] Appellees did not cite any contrary authority below.

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

As Aflac's lead non-management Director Johnson acknowledged in rejecting Appellees' 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

[11] Citing "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).

Appellants to Alston, "retained to represent Aflac." Doc. 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 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 Appellees had done here.

Furthermore, even after the belated involvement of Jones Day as an outside counsel to the SLC, it was the conflicted counsel Alston that 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." Doc. 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, were ***all done by Alston***, with Jones Day merely blessing Alston'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***." Doc. No. 23-1 at p. 51. Finally,

Alston has continued to represent the SLC members in the course of this litigation and through the time of their 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.

Significantly, Appellees and Alston themselves attempted to conceal the conflicted representation. Alston was initially recalcitrant and resisted disclosing that its representation with respect to the subject matter of Appellants' shareholder demands included the alleged wrongdoers themselves and the independent Board members, before eventually conceding it. Doc. 49-1. The SLC Reports likewise misleadingly refer to Alston as "counsel to the Company" without disclosing that the law firm also represented the alleged wrongdoers, executive Amoses, the Board as a whole, and individually its independent directors-members of the SLC. Appellees-SLC members too misleadingly refer to Alston as "the Company's counsel" in their declarations, without acknowledging the undeniable fact that Alston "the Messrs. Amos, the Board and the individual directors in this matter," in addition to the Company itself. Doc. 49-1 at 20. This reluctance indicates Appellees' and Alston's awareness that such multiple conflicting representations

were wholly improper and "unreasonable" in the shareholder demand context, if ever.

Finally, the conflict that has tainted Appellees' investigation and refusal of shareholder 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.[12]

[12] 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.

In rejected Appellants' arguments, the District Court distinguished Stepak by stating that "Alston & Bird did not *control* the flow of information to the SLC" (emphasis original). That conclusion, however, constitutes an abuse of discretion as it is not supported by the record, including Appellants' unchallenged evidence showing, in sum, that:

- Alston had initially handled Appellants' allegations of wrongdoing on behalf of Aflac and Appellees Amoses, who then rejected those allegations without investigation as without merit, with no basis for it and, indeed, contrary to the 2012 RSA echoing many of Appellants' allegations, repeated in the 2018 RSA;

- Alston "advised [the Board] of the allegations raised in [Appellees'] December letter and on the company's due diligence efforts," including apparently advising the Board not to conduct an independent investigation of Appellants' shareholder demands;

- Alston collected and filtered documents using its own search terms, and subsequently turned over to the SLC's counsel Jones Day 30,000 documents from the collection of over 1.5 million documents;

- Alston was even present during Jones Day's witness interviews as representatives of the accused top executives while Jones Day interviewed their employees (Doc. 23-1 at p. 51);

- Alston advised Appellants of the SLC's refusal of their demand; and

- Alston represented and advised the Board's independent directors, including every member of the SLC, along with Aflac itself and the accused executives, during the course of the SLC's investigations and in this litigation.

This record does not reasonably support the conclusion reached by the District Court that "Alston did not control the flow of information to the SLC." At

the very least, the record raises genuine issues of material fact precluding summary dismissal, particularly in the absence of any discovery, even limited discovery in aid of the O.C.G.A. § 14-2-744 inquiry requested by Appellants and denied by the District Court.

Accordingly, Stepak applies with equal if not stronger force to this case, and its application means that Aflac directors were "grossly negligent" and "unreasonable" in entrusting the shareholder demand investigation to a conflicted counsel.

III. The SLC investigation has failed the requirements of O.C.G.A. § 14-2-744.

a. The SLC members were not independent because each had longstanding undisclosed ties to Appellees Amoses.

None of the SLC members could be considered independent because each had business, social and/or personal connections with Aflac's CEO and Chairman Appellee 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, in the SLC members' first set of declarations, or their reply papers, having been revealed for the first time in their second declarations filed on June 21, 2018 – nearly a year after the SLC was formed, and only after the SLC had concluded its investigations and issued its Reports.

The SLC Reports had 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." Doc. 23-1 at pp. 40-41. The Second Report states the same, see Doc. 60-3 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." Doc. 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." Doc. 42-4. Nor did Appellees disclose any such connections in their reply papers after Appellants 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 (Doc. 58) and invited supplemental submissions by the parties that Appellees filed their supplemental declarations disclosing these heretofore concealed relationships. Docs. 59-1 – 59-3.

Those supplemental declarations revealed for the first time that:

- SLC member Appellee **Bowers** knew 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" (Doc. 59-2 at p. 5);[13]

- SLC member Appellee **Stith** knew Daniel Amos for at least 20 years. Appellee 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," (Doc. 59-1 at pp. 3, 5);[14]

- SLC member Appellee **Moskowitz** knew Daniel Amos for at least 30 years ("I had spoken to [Daniel Amos] sometime in the early 1980s regarding a possible engagement," and that he "met him once in

[13] Moreover, even the supplemental declaration of Appellee Bowers was 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. Compare Docs. 60-4 with 60-5.

[14] 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 Docs. 60-5 and 60-6.

> connection with a meeting I had with a former KPMG colleague, Kriss Cloninger, around 1999." Doc. 59-3 at p. 5).[15]

See, e.g., Brosz v. Fishman, 2016 WL 7494883 (S.D. Ohio Dec. 29, 2016) ("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.").

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 who were the subjects of the SLC investigations, but Appellees have left those connections out of (i) all three SLC Reports, (ii) all three initial declarations of the SLC members, and (iii) Appellees' reply papers.

[15] 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.

Finally, Appellees' repeated failures to disclose those long-standing relationships – indeed, their attempts to conceal and misrepresent them -- by themselves put these Appellees' independence and good faith in grave doubt.

The District Court, however, dismissed these allegations as follows:

> Plaintiffs point to the fact that the SLC members did not disclose their prior professional relationships with Amos until they filed supplemental declarations in support of the pending motions to dismiss. Their first declarations stated that they had no social or professional relationships with the Amoses that would impair their impartiality. Plaintiffs in response to Defendants' motions to dismiss asserted that the SLC members had such relationships with the Amoses. The SLC members then submitted supplemental declarations explaining their prior professional relationships with Amos, which consisted of Amos serving on boards of other organizations in which an SLC member also served as a director or officer. ***Notably, the first declarations were not false; they simply failed to mention that the SLC members had served with Amos in leadership capacities in other organizations***.

Appellants respectfully submit that the District Court's highlighted conclusion is a *non-sequitor*: in their first declarations, each of the SLC members stated that they "***do not have*** any personal interest or current or ***prior personal or business relationships*** that would affect [their] assessment and conclusions as a member of the Special Committee" (Doc. 42-4) – while disclosing in their second declarations for the first time each member's longstanding ties to the accused executives. Reading the two sets of declarations side by side clearly shows the first ones to be false and misleading as they omitted and misrepresented highly material

facts; at any rate, they raise genuine issues of material facts with respect to directors' independence precluding summary dismissal.

Likewise, the SLC Reports not merely only "failed to mention that the SLC members had served with Amos in leadership capacities in other organizations" – they affirmatively misrepresented their connections going back decades. 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." Doc. 23-1 at pp. 40-41. The Second SLC Report states the same, see Doc. 60-3 at p. 22, reaffirmed the SLC's "analysis described in the previous Reports confirming the independence and disinterestedness of the Special Committee members." Doc. 59-4 at pp. 8-9.

Accordingly, each Appellee-member of the SLC had had business relationships with Appellee Amos going back decades, which they had failed to disclose in their SLC Reports, putting their independence and the good faith of their investigation in grave doubt.

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

The SLC members investigating Appellants' 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, Appellees were "grossly negligent" and "unreasonable" in relegating the investigation of Appellants' 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.[16] Accordingly, Appellees' 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 Appellants' December 2016 Dispute Notice. See Doc. 1-1 at p. 4. Appellee Johnson, Aflac's lead non-management director and Chair of its Audit Committee, also 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." Doc. 1-1 at p. 42. Yet, those allegations remained uninvestigated at all until the SLC was formed in July 2017, and then only subject to a whitewash

[16] 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.

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 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***." Doc. 60-2.

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

The alleged substantial likelihood of personal liability is sufficient to show that Appellees 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 (Doc. 60-2) ("[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, Appellants' 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 raise genuine issues of material facts sufficient to deny Appellees' summary judgment motion.

c. 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, 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 Appellants' 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, the Company's independent directors in March 2017 adopted the Company's response and relegated Appellants to the Company's counsel Alston, 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 Appellants' allegations by the Company and the Board. Subsequent SLC investigations, conducted by the interested directors individually represented by the conflicted 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 SLC Reports demonstrates the reasonableness or good faith of the whitewash investigation that produced them, as shown in Part II.4 above.

Second, 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 Doc. 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 Appellants' December 2016 Dispute Notice and/or March 2017 submissions. See Barovic v.

Ballmer, 72 F. Supp. 3d 1210, 1215 (W.D. Wash. 2014) ("[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***.").[17]

Appellees' 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" (Doc. No. 59 at p. 3) is demonstrably self-serving and factually incorrect; see e.g., 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 v. Rogers, 270 F. Supp. 3d 1364, 1373 (N.D. Ga. 2017) (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").

[17] 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.'") (emphasis original); City of Orlando Police Pension Fund v. Page 970 F. Supp. 2d 1022, 1032 (N.D. Cal. 2013) (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").

Finally, Appellees' unprecedented three SLC investigations have 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. Doc. 60-9.

d. The Court should have allowed limited discovery in aid of the O.C.G.A. § 14-2-744 inquiry.

"[D]iscovery may be ordered to facilitate inquiries into independence, good faith, and the reasonableness of the investigation. This discovery is not by right, but by order of the Court, with the type and extent of discovery left totally to the discretion of the Court." Thompson v. Scientific Atlanta, Inc., 621 S.E.2d 796, 799 (Ga. Ct. App. 2005) (citing Kaplan v. Wyatt, 499 A.2d 1184, 1192 (Del. 1985)).

Here, discovery was stayed on consent on April 20, 2018 (and no discovery had been conducted prior to the stay), pending Appellees' motions to dismiss before the Court converted them into hybrid motions for summary dismissal and allowed the parties to make supplemental submissions, which Appellees did on June 21 (Doc. 59) and Appellants on July 12, 2018 (Doc. 60). On the same day, Appellants also made a separate motion for leave to conduct a limited discovery into the independence and disinterestedness of the SLC members and the reasonableness and good faith of their investigation for purposes of the O.C.G.A. § 14-2-744 inquiry, prompted by Appellees' repeated non-disclosures of the SLC members' long-standing ties to the Appellees Amoses. This very concealment,

without more – and there is more, as shown -- places these Appellees' independence, disinterestedness and good faith in considerable doubt, as the very least raising genuine issues of material facts concerning the independence, disinterestedness and reasonableness of the SLC investigation, precluding summary dismissal.

CONCLUSION

Appellees initially entrusted Appellants' shareholder demand for investigation to a conflicted law firm, which in turn sought to conceal its multiple conflicting representations. Appellees dismissed Appellants' allegations as "wholly without merit" in January 2017 and as "false" in January 2018, without having investigated them yet. Appellees concealed the longstanding ties between each member of the SLC and Aflac CEO and Chairman Appellee Daniel Amos going back 20-30 years and misrepresented them in their sworn first declarations and in all three publicly released SLC Reports.

These significant irregularities in Appellees' investigation and rejection of Appellants' shareholder demand, each contrary to the O.C.G.A. § 14-2-744 requirements, also show that Appellees' overall approach to Appellants' demand was nothing but adversarial, which is "in and of itself incompatible with the directors' fiduciary obligations and strips any resultant decision of the protection of the business judgment rule." Stepak, 20 F.3d at 410.

Each of these irregularities, as well as the District Judge's plain errors of law in relying on the "solemn duty to remain" doctrine long-abolished in this Circuit instead of resolving all reasonable doubts in favor of recusal, and in evaluating such doubts subjectively instead of objectively as required by the Supreme Court, should lead to a reversal of the Order.

October 22, 2018

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE AND TYPE-STYLE REQUIREMENTS

I, Dimitry Joffe, counsel for Appellants, certify that this document complies with the word limit requirements of FRAP 32(a)(7) because it contains 12,972 words, and complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6).

Dated: October 22, 2018

/s/ Dimitry Joffe
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CERTIFICATE OF SERVICE

I, Dimitry Joffe, hereby certify that on this 22d day of October 2018, I caused a copy of the Appellants' Initial Brief to be sent electronically to the registered participants in this case through the ECF system.

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