

Case No. 18-13834

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**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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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.

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

**APPELLANTS' REPLY BRIEF**

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## **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  
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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.

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## ARGUMENT AND CITATIONS OF AUTHORITY

### PRELIMINARY STATEMENT

Appellants' argument rests on the following five indisputable facts, firmly rooted in the record before this Court.

*First*, the District Judge presiding over this matter did not disclose his family and social connections to Aflac's senior executives Daniel and Paul Amos, and refused to recuse himself based on plain errors of law after such connections were raised by Appellants. In particular, the Judge relied on the non-existing "duty to sit" instead of resolving all doubts in favor of recusal, and applied the subjective rather than the required objective test to the Section 455(a) allegations of the appearance of bias.

*Second*, Appellants' demands for investigation of the alleged wrongdoings were handled from inception by Alston, an outside counsel to Aflac who also represented Messrs. Amos and the SLC members investigating them. Doc. 49-1.

Alston is a long-time outside advisor to Aflac and its affiliates, see, e.g., O'Rear v. American Family Life Assur. Co., 784 F. Supp. 1561, 1565-66 (M.D. Fla. 1992) (case featuring Aflac Columbus and its counsel Alston and Mary Gill as well as Aflac's "agent or employee" Don Land, a relative of the Honorable Judge Land). Here, Alston represented both the executives accused of fraud and the individual independent directors investigating those accusations, advised those

directors with respect to shareholder demands, and controlled the flow of information to the directors from the very inception of this dispute.

Alston itself insisted from the March 2017 that it has “been engaged on [independent directors’] behalf *to serve as your point of contact* for any communications [with directors] regarding your clients and their contentions pertaining to Aflac,” requiring the shareholders to “forward all future communications regarding these matters to [its] attention,” before admitting on April 4, 2017, that it represented Aflac as well as “*the Messrs. Amos, the Board and the individual directors in this matter.*” Doc. 49-1 (emphasis added throughout). Alston would continue to represent the individual SLC members while they were conducting their investigations in 2017 and 2018.

In that capacity, Alston (i) controlled the flow of information to the directors; (ii) collected 1.5 million documents from Aflac custodians; (iii) filtered out the vast majority of those documents using its own search terms; (iii) was present during SLC witness interviews; (iv) communicated the SLC’s refusal of their demands to Appellants; and (v) continued to represent the SLC members in this litigation while the SLC investigation was still ongoing.

**Third**, all three SLC members concealed their longstanding ties to Daniel Amos, Aflac’s CEO since 1990, and misrepresented them in all three SLC Reports and in their first sets of declarations submitted to the District Court. See Doc. 23-1

Ex. 2 at pp. 19-20; Doc. 42-4. It was not until Appellants pointed out certain undisclosed connections when the SLC members submitted their second sets of declarations partially disclosing for the first time their ties to Daniel Amos going back decades in each case, while the full extent of those ties remains undisclosed. Docs. 59-1 – 59-3.

*Fourth*, the SLC had failed to interview any of the eyewitnesses of the alleged misconduct – the sales associates themselves who had reported it and offered their full cooperation with the directors’ investigation but were never contacted by the SLC or anyone on its behalf.

There ought to be no dispute that a reasonable investigation of a sex harassment complaint could not be conducted without interviewing the victim herself. There is likewise no dispute that the SLC investigated Debbie Cort’s allegations of sexual harassment without so much as even attempting to contact her; it necessarily follows that the SLC investigation was *unreasonable*. The SLC’s failure to contact any of the other sales associates who had alleged fraudulent business and market practices and offered their cooperation and evidence was unreasonable by the same token.

*Fifth*, at the time of Appellants’ demands, Aflac was subject to the 2012 RSA with the three States, which expressly referred to such market misconduct as “overselling,” “conversion of preexisting coverage,” “duplicate” sales etc. – *i.e.*,

the type of misconduct independently alleged by Appellants. Doc. 23-1 at Ex. 4. In August 2018, Aflac entered in another RSA with the same States, paying fines for its violations of the 2012 RSA and agreeing into a new corrective action plan.

In light of the 2012 RSA, Appellees ought to have had no reasons to doubt Appellants' independent allegations of the same or similar misconduct, and it was unreasonable for them to label shareholders' allegations as "wholly without merit" in January 2017 and as "false" in January 2018 without having them properly investigated (and further prejudicing the then-ongoing SLC investigation).

As shown in Appellants' initial brief, it necessarily follows from these five indisputable facts that Appellees' conduct in responding to the shareholder demand was "grossly negligent" and "unreasonable," stripping their actions of the protection of the business judgment rule under the Eleventh Circuit's clear holding in Stepak and other authorities cited in Appellants' initial brief, and making the District Court's contrary ruling an abuse of discretion.

As further shown below, nothing in Appellees' contrary arguments or the authorities Appellees rely upon dents any of these facts or undercuts the reasonable inferences and conclusions inevitably flowing from them.

## LEGAL ARGUMENT

**1. The District Judge refused to recuse himself in misplaced reliance on the long-abolished “duty to remain” and based on the subjective analysis of the facts creating an appearance of bias.**

“We review Judge[‘s] decision not to recuse himself under section 455(a) and section 455(b) for abuse of discretion. See Wu v. Thomas, 996 F.2d 271, 274 (11th Cir.1993).” United States v. Bailey, 175 F.3d 966, 968 (11th Cir. 1999) (*per curiam*).

Notwithstanding, Appellees claim that “[w]hile an abuse of discretion standard applies in some recusal circumstances, when, as here, a party failed to seek recusal of the district court judge, the plain error standard applies,” Response Br. at 11, citing United States v. Berger, 375 F.3d 1223, 1227 (11th Cir. 2004).

In fact, this Court in Berger observed that the abuse of discretion standard “ordinarily” applies to denials of recusal, but “because Berger failed to seek recusal of the district judge in the proceedings below,” and raised the issue “for the first time on appeal,” “we review his recusal request for plain error.” Id.

Here, shareholders raised the recusal issue in the proceedings below, inviting the Court to evaluate the facts creating an appearance of bias pursuant to Section 455. See In re BellSouth Corp., 334 F.3d 941, 968-69 (11th Cir. 2003) (“Section 455 now *places a judge under a self-enforcing obligation to recuse himself* where the proper legal grounds exist. . . . 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.") (J. Tjoflat, citing United States v. Alabama, 828 F.2d 1532, 1541 (11th Cir. 1987), and dissenting on other grounds).

Even if the plain error standard of review applied here, Appellants argued in their initial brief that "the District Judge's refusal to recuse himself was plainly erroneous as a matter of law." Initial Brief at p. 29. Appellees themselves concede the Judge's error, admitting that "§ 455 'did away with the duty to sit.'" (Response Br. at 21). The error is plain as it is directly contrary to this Court's unambiguous controlling precedent, including in U.S. v. Alabama, 828 F.2d at 1541, and has affected shareholders' substantial rights and the fairness and integrity of the judicial proceedings in this Action.

Appellees claim that "Chief Judge Land's statement [regarding his 'solemn duty to remain'] recites word for word the law of this Court as set forth in In re Moody, 755 F.3d 891 (11th Cir. 2014)." Response Br. at p. 21. In Moody, however, this Court says nothing about any "duty to remain," and prefaces the sentence quoted by Appellees with the statement that "***any doubts must be resolved in favor of recusal***," citing United States v. Patti, 337 F.3d 1317, 1321 (11th Cir. 2003).

Aside from relying on the non-existing "duty to remain," the Judge committed another plain error of law and abused his discretion by using the

subjective test for recusal, which the current Section 455(a) was intended to displace in favor of the objective “reasonable factual basis — reasonable man test.” Parrish v. Bd. of Comm’rs of Ala. State Bar, 524 F.2d 98, 103 (5th Cir. 1975).

The ties that tie Judge Land to Daniel and Paul Amos start with the Judge’s relative Donald Land Jr. working as an inhouse counsel for Aflac, which fact the Judge denied in the appealed-from decision (Doc. 63 at p.5) before admitting it in the subsequent recusal challenge in the Youngblood-West action.

That tie leads to another undisclosed connection: the Judge’s relative Donald Land Jr. not only works for Aflac but is also a grandson of John Amos, the founder of Aflac, and therefore a blood relative of John Amos’ nephew and great-nephew Appellees Daniel and Paul Amos. This familial connection between Donald Land Jr. and Daniel and Paul Amos necessarily makes the Judge himself their relative as well, but those familial ties are not acknowledged or addressed by the Judge or Appellees anywhere.

Finally, there is a fact of the District Judge’s and Amos’ membership in the Fish House Gang, which the Judge downplays as nothing more than a social gathering – contrary to the uniform view of disinterested outside observers describing the Fish House Gang as a highly coveted “singular opportunity to network,” a “behind-the-scene” “secretive network of politicians, lawyers and

businessmen,” “a shadowy association,” “a private freemasonry,” and “a powerful ad hoc group.” See Initial Brief at p. 27.

Considered together and viewed objectively, the Judge’s longstanding family and social connections to Appellees Daniel and Paul Amos raise significant “concerns about a judge’s impartiality” for purposes of Section 455(a). See Patti, 337 F.3d 1317. Indeed, the family and business connections between the Land and the Amos families can be traced back decades. 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.*”).

Appellees’ defenses advanced in support of the Judge’s refusal to recuse himself are invalid.

*First*, this Court in Patti underscores the “evident” difference between Section 455(b) that “sets forth specific circumstances requiring recusal,” and Section 455(a) that “does not set forth specific circumstances requiring recusal and instead sets forth a general rule requiring recusal in those situations that cannot be categorized neatly, but nevertheless raise concerns about a judge’s impartiality.” 337 F.2d at 1321-22.

According to Patti, 337 F.2d at 1321-22, it would be an error to apply the “stricter” standard of Section 455(b) to the allegations of the appearance of bias under Section 455(a) that “cannot be categorized neatly.” Yet, this is precisely what Appellees do: they break down the allegations of apparent bias made by Appellants under Section 455(a) into single strands, apply to each strand the more stringent Section 455(b) criteria, and conclude that no strand, standing alone, requires recusal. See, e.g., Response Br. at 16 (“[Appellants] argument collapses to the simple proposition that belonging to the same social group, *without more*, requires recusal.”).

*Second*, in Parrish v. Bd. of Comm’rs of Ala. State Bar, 524 F.2d 98, 101, 103 (5th Cir. 1975), heavily relied upon by Appellees, the Court has explained:

*[T]he language of § 455(a) was intended to displace the subjective “in the opinion of the judge” test for recusal under the old statute, and the so-called “duty to sit decisions.” We also noted that § 455(a) was intended to substitute a “reasonable factual basis — reasonable man test” in determining whether the judge should disqualify himself.*

The Court in Parrish deemed the mere “acquaintance or friendship with witnesses or defense counsel” not enough to create a disabling appearance of bias. 524 F. 2d at 104. Here, much more is alleged than in Parrish – the Judge is tied to the Appellees Daniel Amos and Paul Amos by family connections and by membership and prominent positions in the exclusive and secretive Fish House Gang, which the Judge evaluated under the “subjective ‘opinion of the judge’ test.”

Viewed instead under the “reasonable factual basis-reasonable men test” required by Parrish, these ties create a much stronger appearance of favoritism than the mere “acquaintance” with defendants and their counsel at issue in Parrish.

*Third*, in United States v. Greenough, 782 F.2d 1556, 1558 (11th Cir. 1986), another case relied upon by Appellees, this Court stated that “a judge, having been assigned to a case, should not recuse himself on unsupported, irrational, or highly tenuous speculation. . . . Rather, a charge of partiality must be supported by facts.” Here, the allegations are neither “unsupported,” nor “irrational,” nor “highly tenuous” – they are supported by solid facts, including facts from Judge’s own statements on recusal here and in Youngblood-West.

*Fourth*, Appellees fault Appellants for waiting “months after the case was transferred to” Judge Land to raise concerns about Judge Land’s impartiality. Response Br. at 15. However, according to this Court’s holding in Porter v. Singletary, 49 F.3d 1483, 1489 (11th Cir. 1995), it is the judge’s duty to disclose on the record the facts relevant to disqualification – not counsel’s duty to investigate the impartiality of judges, which is presumed as “both litigants and attorneys should be able to rely upon judges to comply with their own Canons of Ethics.” Neither Judge Land, however, nor the Appellees, nor their counsel Alston disclosed the Judge’s relationships to Appellees relevant to recusal, even though they were all aware of them.

Nor were these facts readily available publicly; indeed, one could not have discovered 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,” without getting to page 302 of The Big Eddy Club (The New Press, 2007).

*Fifth*, Appellees’ criticism that Appellants “rely heavily on an after-the-fact recusal decision entered by Chief Judge Land in another case brought by Appellants’ counsel against Aflac Inc.” (Afl. Br. at 16) misses the mark for much the same reasons. In that decision, the Judge disclosed the facts that he had not disclosed to the parties initially as was his ethical duty to do, and which facts the Judge had denied in the order below.<sup>1</sup>

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<sup>1</sup> Appellees claim that “[i]n that subsequent case, Chief Judge Land reiterated that the same accusations of bias challenged here ‘do not withstand minimal scrutiny.’ Youngblood-West v. Aflac Inc., No. 4:18-cv-83 (M.D. Ga. Oct. 16, 2018), ECF No. 85, at p. 36.” Response Br. at p. 16. In that case, the allegations of bias included an additional fact of the Judge’s spouse’s being a direct beneficiary of the release and confidentiality agreement whose legality and validity is at the heart of that RICO action, as well as allegations of actual bias demonstrated in that action. The motion for recusal in that case was brought pursuant to 28 U.S.C. § 144 and supported by an 18-page affidavit by Ms. Youngblood-West; despite the requirement of Section 144 that the “judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding,” Judge Land proceeded to deny that motion himself.

**2. By relegating the investigation of shareholder demands to conflicted Alston, Appellees acted unreasonably and lost the protection of the business judgment rule.**

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.*” The Court explained, 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.*

The Court concluded that “this allegation [of a conflicted law firm] creates a reasonable doubt that the Board validly exercised its business judgment in refusing Stepak’s demand, and therefore we reverse as to Stepak.” Stepak, 20 F.3d at 400. Cf. Sterling v. Stewart, 158 F. 3d 1199 (11th Cir. 1998) (“Stepak is distinguishable because . . . the Bondurant firm had not represented the defendants in the *same*

*subject matter* of the corporate claims, as did counsel in Stepak” (emphasis original).

Here, too, the Aflac Board’s consideration of shareholder demand, dominated by the conflicted Alston law firm, was grossly negligent and unreasonable, and its outcome was therefore “strip[ped] of the protection of the business judgement rule.”

Authorities cited by Appellees likewise recognize that directors lose the protection of the business judgement rule if they do not act in good faith on a fully informed basis. See Crescent/Mach I Partners, L.P. v. Turner, 846 A.2d 963, 981 (Del. Ch. Ct. 2000) (“[P]laintiffs’ Complaint alleges bad faith on the part of Turner and the remaining director defendants which is pleaded sufficiently and would rebut the presumptive validity of the board’s business judgment even in the absence of a tainted majority.”); Cottle v. Storer Comm., Inc., 849 F.2d 570, 575 (11th Cir. 1988) (“Under the business judgment rule directors are presumed to have acted properly and in good faith, and are called to account for their actions only when they are shown to have engaged in fraud, bad faith or an abuse of discretion.”); In FDIC v. Loudermilk, 761 S.E.2d 332, 335 (Ga. 2014) (“[W]hether a business decision was, in fact, a product of deliberation, reasonably informed by due diligence, and made in good faith are matters that may properly be questioned.”).

Appellees' authorities from other jurisdictions likewise do not lead to a different outcome than that mandated by Stepak. In Halpert Enters. v. Harrison, No. 07-cv-1144, Slip Op. at 7-8 (Del. Ch. Sept. 29, 2016), the court refused to consider the issue of conflicting representation because "this issue was not raised before the District Court [and] the record is simply incomplete." Here, unlike in Halpert, shareholders have raised this issue below.

In Sarnacki v. Golden, 778 F.3d 217, 225 (1st Cir. 2015), the First Circuit found "no evidence that SLC counsel was biased or conflicted. . . . The cases Sarnacki cites, which involved a conflict by the SLC's own counsel, have no bearing here. E.g., Stepak v. Addison." Here, Alston was clearly conflicted, and under Stepak, the Board's eventual retention of another outside counsel "was insufficient *"to remove any taint associated with [the conflicted law firm's] involvement."* 20 F. 3d at 409.

In Morefield v. Bailey, 959 F. Supp. 2d 887, 902-03 (E.D. Va. 2013), the Court stated:

Plaintiff relies on the Eleventh Circuit's decision in Stepak v. Addison, 20 F.3d 398 (11th Cir.1994), holding that a board cannot effectuate its duties in good faith, and thus commits gross negligence, where it entrusts its investigation to a law firm that represented the alleged wrongdoers in related proceedings. Id. at 405. ***The Court certainly does not doubt the Eleventh Circuit's contention that "it is axiomatic" that this sort of conduct would not be in good faith.*** See id. However, the comparison is inapposite here. The alleged wrongdoers in this case are represented by the Skadden Arps Slate Meagher & Flom law firm in related proceedings before this Court;

however, the Board retained another firm -- Weil, Gotshal & Manges LLP -- in relation to the demand considerations. (See Am. Compl. Ex. B.) Thus, the firm advising the Board is not in the position presented in Stepak.

Here, unlike in Morefield, Alston did simultaneously represent the Company, its accused executives, its Board, and its individual members who conducted the allegedly neutral SLC investigation of shareholder demands; accordingly, Stepak applies with full force.

**3. The SLC members were not independent due to their longstanding ties to the accused executives, which ties the SLC members had attempted to conceal.**

As shown above, each of the three SLC members had business and/or personal connections with Daniel Amos going back decades, which connections they had all omitted from and misrepresented in each of the SLC Reports and in the first set of declarations submitted to the District Court.

Appellees claim that “each of the SLC members submitted Declarations confirming the absence of disabling factors . . . . [and] the SLC’s counsel verified the independence of its members.” Response Br. at 25. However, as the SLC Reports themselves make plain, none of the decades-long relationships of each of the three SLC members with Daniel Amos was in fact disclosed in the SLC Reports. Accordingly, in the absence of such disclosure, the SLC counsel could not have properly “verified the independence of its members.”

None of the authorities relied upon by Appellees compels a different outcome. In Staeher v. Alm, 269 F. Appx 888 (11th Cir. 2008), appellant argued that two board members of Coca Cola Enterprises Inc. “were interested by virtue of their membership on the boards of other corporations, Target, Kroger Company and/or Krystal Company. Appellant contends that the other corporations are major retailers of Coke’s products and have close business relationships with CCE and Coke.” The Court ruled that “[t]he bald allegation that Defendants . . . were directors of outside companies, without more, does not demonstrate that the Directors were interested, even if the companies had close relationships with Coke.”

Here, an analogous argument rejected in Staeher would be that Mr. Stith is not independent merely because of his service on the board of Synovus Bank, which has a very close business relationship with Aflac. Appellants do not advance that argument but allege that Mr. Stith and two other SLC members Messrs. Bowers and Moskowitz personally had longstanding ties to the accused CEO, Appellee Daniel Amos, in Mr. Stith’s case by virtue of their long-term overlapping directorships at Synovus, and similarly in cases of Messrs. Bowers and Moskowitz.

Defendants primarily rely on the Georgia state court decision dismissing derivative complaint in Benfield v. Wells, 749 S.E.2d 384, 324 Ga. App. 85 (Ga.

Ct. App. 2013). The critical facts leading the court to dismiss the complaint in that case, however, are worlds away from the facts of this case.

*First*, in Benfield, 749 S.E.2d at 386, 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 appearance that the DRC was not appropriately independent.”<sup>2</sup> Here, by contrast, every SLC member had not only served on Aflac’s Board during the period of the alleged wrongdoing, but prior to being appointed to the SLC in July 2017 had refused to investigate shareholders’ allegations, relegated them to the conflicted counsel in March 2017.

*Second*, the outside counsel to the DRC in Benfield “has never represented SunTrust on a regular or continuing basis” (ECF No. 42-6 at p.8) -- here, by contrast, Alston, a long-time advisor to Aflac, represented everyone in this matter.

*Third*, the O.C.G.A. § 14-2-744 challenge in Benfield was a limited one, scrutinizing 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.

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<sup>2</sup> So too was the case in LR Trust v. Rogers, 270 F. Supp. 3d 1364, 1373 (N.D. Ga. 2017), where two out of three 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.”

In Deal v. Tugalo Gas Co, No. 2:17-cv-209-RWS, Slip Op. at 20-21 (N.D. Ga. Sept. 6, 2018), also relied upon by Appellees, the LRC members “were elected as Directors after the occurrence of the conduct at issue” and “each seldom interacted with any of Defendants prior to this litigation.” The court in Deal also held that the facts that one of the directors owned a business in the past that was a customer of the company, and had “occasionally seen” a defendant executive at the local “airport over the years and considers him to be an acquaintance” were “insufficient to raise a question as to the LRC’s independence.” Id. The allegations of the SLC members’ undisclosed decades-long connections to Daniel Amos are much more significant than those in Deal.

In Sarnacki, 778 F.3d at 222, the “main challenge to the SLC’s independence is that two of the three SLC members, Wadecki and Furman, could not be independent for two reasons. The first is that they are defendants in this case. The second reason is that, as members of the Audit Committee, they reviewed and approved many of the allegedly misleading statements.” Appellants here allege different grounds for the SLC members’ lack of independence than those in Sarnacki.<sup>3</sup>

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<sup>3</sup> In the same vein, Appellees’ argument that “a director does not lack independence simply because he or she (i) was nominated or elected by directors who are not independent; (ii) was named as a defendant in the action; or (iii) approved the action being challenged so long as the director did not receive a personal benefit as a result of the action,” citing O.C.G.A. § 14-2-744(c) (Response

Appellees' authority of Beam ex rel Martha Stewart Living Omnimedia Inc. v. Stewart, 845 A.2d 1040, 1050 (Del. Sup. Ct. 2004), is distinguishable for a number of compelling reasons. As a threshold matter, Beam, a demand-excusal case, cogently distinguishes itself from the present SLC case, see id. at 1055:

Unlike the demand-excusal context, where the board is presumed to be independent, the SLC has the burden of establishing its own independence by a yardstick that must be “*like Caesar’s wife*” – “*above reproach*.” . . . We need not decide whether the substantive standard of independence in an SLC case differs from that in a presuit demand case. As a practical matter, the procedural distinction relating to the diametrically-opposed burdens and the availability of discovery into independence *may be outcome-determinative* on the issue of independence. Moreover, because the members of an SLC are vested with enormous power to seek dismissal of a derivative suit brought against their director-colleagues in a setting where presuit demand is already excused, the Court of Chancery must exercise *careful oversight of the bona fides of the SLC and its process*.

*Second*, the Beam court stated that “[a]llegations of mere personal friendship or a mere outside business relationship, *standing alone*, are insufficient to raise a reasonable doubt about a director independence.”). 845 A.2d at 1050. The Beam court noted that “some professional or personal friendships, which may border on or even exceed familial loyalty and closeness, may raise a reasonable doubt whether a director can appropriately consider demand. This is particularly true

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Br. at 25), is a red herring as Appellants do not allege any of these factors as a basis for the SLC members’ lack of independence.

when the allegations raise serious questions of either civil or criminal liability of such a close friend.”

Finally, in stating that Crescend, 846 A.2d at 981, held “that a ‘long-standing 15-year professional and personal relationship’ was insufficient ‘to raise a reasonable doubt that Hunt could not exercise his independent business judgment,’” Response Br. at 27, Appellees leave out the qualifier “alone,” as in the original “[t]his allegation *alone* fails to raise a reasonable doubt . . . .”<sup>4</sup>

Here, unlike the facts in Deal, Beam, and Crescend, the allegations casting doubt on the SLC members’ independence are neither “standalone” nor “without more” – Appellants allege (a) that all three SLC members have had longstanding connections with Daniel Amos, Aflac’s CEO since 1990s; (b) that all three SLC members have failed to disclose those connections and/or affirmatively misrepresented them in their three sworn declarations filed with the Court and in their three SLC Reports filed with the SEC and made available to its shareholders; (c) that their eventual disclosures revealing those connections going back at least 20-30 years made are still incomplete; and (d) that all three SLC members have

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<sup>4</sup> As if to illustrate the point, the other two cases cited by Appellees in the same string as Crescend (footnote 6 of Response Br.), in the quoted parentheticals use the “without more” qualifier three times, Huff Energy Fund, L.P. v. Gershen, No. 11116-VCS, 2016 Del. Ch. LEXIS 150, at \*36 (Del. Ch. Ct. Sept. 29, 2016), and the “alone” qualifier twice, Litt v. Wycoff, No. 19083-NC, 2003 Del. Ch. LEXIS 23, at \*16-17 (Del. Ch. Ct. Mar. 28, 2003), for emphasis.

been individually represented by the accused executives' lawyers in the matter of shareholder demand.

**4. The SLC members were not disinterested due to the significant likelihood of personal liability.**

Appellants allege that the SLC members were not disinterested in responding to shareholders' demand because they faced a substantial likelihood of personal liability if the demand was granted rather than refused. That personal liability has two sources: "gross negligence" pursuant to Stepak, exposing directors to liability under O.C.G.A. § 14-2-830(c); and issuing false and misleading Annual Report and Proxy Statement while failing to investigate credible allegations of fraud, further exposing them to liability for violation of federal securities laws and regulations.

Appellees' attempts to distinguish Stepak are addressed above. In response to the allegations of the false and misleading securities filings, Appellees principally argue that they have had no duty to disclose uncharged conduct, citing authorities to that effect. But Appellees did not merely fail to disclose the allegations – they made affirmative public statements in conscious disregard of Appellants' credible allegations of misconduct (echoing those in the 2012 RSA) and with full knowledge that those allegations remained uninvestigated at the time when Appellees issued those public statements. In that sense, this case is on all fours with a Wells Fargo derivative case, Shaev v. Baker, No. 3:16-cv-05541, Slip

Op. (N.D. Cal. May 4, 2017), where “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. 60-1 at Ex. A.

**5. The SLC investigation was an unreasonable whitewash.**

While the choice of which witnesses to interview is in the SLC’s discretion, the SLC exercised its discretion in an unreasonable manner. Indeed, it appears axiomatic that investigating a sexual harassment claim without talking to the victim herself would be unreasonable. The Dispute Notice among other thing alleged on behalf of Debbie Cort that “the Company would purposely send her and other attractive young female associates to the New York City fire departments and other male-dominated environments around the city to sell Aflac insurance, where they would be solicited by employees to perform various favors of explicit sexual nature, making Ms. Cort extremely uncomfortable in her work.” Doc. 23-1 at Ex. 3. The SLC had managed to investigate Ms. Cort’s claim by reviewing Aflac’s written policies and interviewing people with no direct knowledge of the relevant facts instead of talking to Ms. Cort herself; the SLC investigation was therefore unreasonable. The same holds true with respect to the rest of Appellants allegations

– none of the other victims-whistleblowers reporting them were interviewed by the SLC.

The Court in Halpert, relied upon by Appellees, distinguished Hasan v. CleveTrust Realty Investors, 729 F.2d 372 (6th Cir. 1984), because there “the court indicated that the omitted interviews actually might have provided evidence that was both otherwise unavailable and necessary to evaluate the finding in the committee's report that the plaintiff's allegations were unfounded.” Indeed, the Hasan court has found, 729 F.2d at 379:

We also find that the corporation failed to demonstrate the procedural adequacy of Galvin's investigation. Galvin failed to interview representatives from Tulip and Champion, [who] . . . could have provided crucial evidence of the purpose of that challenged transaction and the value of CleveTrust's transferred assets. . . . Testimony from Tulip and Champion would provide further concrete evidence of CleveTrust's possible self-interested motivation for the transaction. Galvin's investigation stands in direct contrast to the special litigation committee's investigation in Auerbach. The Auerbach Court found that the committee promptly engaged eminent special counsel for guidance, examined the prior work of a special audit committee, interviewed representatives of Wilmer, Cutler & Pickering, and reviewed testimony before the SEC. Perhaps most important, the Court found that the committee conducted personal interviews with individuals who had “participated in any way in the questioned payments.” 419 N.Y.S.2d at 930, 393 N.E.2d at 1003. Unlike the committee's efforts in Auerbach, therefore, Galvin's investigation lacked the thoroughness which is necessary for a truly objective and meaningful recommendation.

So is the case here, where the SLC did not interview any of the sales associates who provided their first-hand accounts of the fraudulent practices and

other misconduct, including sexual harassment, and repeatedly offered their cooperation with any good-faith investigation.

Furthermore, it was unreasonable for the SLC not to consider Appellants' allegations in the context of the 2012 RSA requiring Aflac to cease such practices as "overselling" and "conversion," independently alleged by Appellants, particularly since Aflac was not in compliance with the 2012 RSA at the time, as reflected in the 2018 RSA.

In LR Trust, 270 F. Supp. 3d at 1374, 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." Here, by contract, the SLC did not interview *any* of the witnesses with direct knowledge of the subjects under investigation, and its investigation was unreasonable on other grounds as well.

**6. The SLC did not conduct its investigation in good faith.**

In Deal, No. 2:17-cv-209-RWS, Slip Op. at 20, relied upon by Appellees, the District Court stated:

The term "good faith" is not defined in the Corporations section of the Georgia Code, but Georgia courts have concluded that "dictionaries may supply the plain and ordinary meaning of a word." . . . Thus, the Court will look to the dictionary to provide the ordinary meaning of the term "good faith." Black's Law Dictionary defines the term as: "A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or

(4) absence of intent to defraud or to seek unconscionable advantage.” Black’s Law Dictionary 762 (9th ed. 2009).

The facts alleged in the derivative complaint, which must be accepted as true for the purpose of the motion to dismiss pursuant to O.C.G.A. § 14-2-744, compel the conclusion that the SLC has failed the “good faith” test as defined above. Indeed, Appellees’ parsimony with the truth (witness the SLC members’ initial concealment of their longstanding ties to the Amoses; Alston’s initial concealment of its conflicting representations) is in itself a factor undermining their “good-faith,” which requires “honesty in belief or purpose” and “absence of intent to defraud or to seek unconscionable advantage.”

**7. The Court abused its discretion in denying limited discovery.**

Under Georgia law, “discovery 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. 1085).

The Judge abused his discretion in denying *any* discovery in this Action, reasoning that it is “not likely to make material difference in the case.” However, the irregularities in the SLC investigative process that underlie Appellants’

challenge scream for further discovery on such material issues of the SLC'

independence, disinterested and reasonableness as:

- the full extent of the SLC members' ties to Daniel Amos and Paul Amos II;
- the full extent of Alston's involvement in the SLC investigation; indeed, in light of the close involvement of Alston and its representation of the individual directors comprising the SLC, it is entirely plausible and indeed probable that Alston had also participated in editing the SLC reports;
- the circumstances surrounding the SLC's decision not to interview any eyewitnesses, including Debbie Cort complaining of sexual harassment;
- the circumstances surrounding the missing email exchange with Paul Amos, II, which the SLC counsel had to request from the undersigned, see Doc. 23-1 at Ex. 2, p. 13, including whether other unfavorable documents were missing or otherwise withheld from the SLC.

Each of these discovery subjects bears directly on the issues of director independence, disinterestedness and good faith, and could lead to further evidence that the investigation did not meet the standards set out in O.C.G.A. § 14-2-744 and Stepak. See, e.g., Sterling, 158 F. 3d at 1203 (“[T]he district court permitted the plaintiffs to conduct Beard’s deposition, limited only by the attorney-client privilege, and found that the receiver engaged in a diligent investigation of the case.”); Sarnacki, 778 F.3d at 227 (“Zitin v. Turley, No. Civ. 89-2061-PHX-CAM, 1991 WL 283814, at \*2-4 (D. Ariz. June 20, 1991) (granting discovery of communications between an SLC and its counsel). Only one case suggests that

plaintiffs should receive that discovery as a matter of course. Grimes v. DSC Commc'ns Corp., 724 A.2d 561, 567 (Del. Ch. 1998).”).

### **CONCLUSION**

As this Court fittingly put in Stepak, “[j]ust as a biased judge would eviscerate the adversary system’s value as a dispute resolution mechanism, a conflicted law firm can eviscerate the decisional process of a corporate board.” Stepak, 20 F.3d at 410. Both of these factors (and more) are present here, each presenting a compelling reason for reversal.

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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 Reply Brief complies with the word limit requirements of FRAP 32 (a)(7)(B)(ii) because it contains 6,450 words, and complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6). The foregoing brief was prepared using Times New Roman (14 point) proportional type.

Dated: December 4, 2018

/s/ Dimitry Joffe  
Dimitry Joffe  
*Counsel for Appellants*

**CERTIFICATE OF SERVICE**

I, Dmitry Joffe, hereby certify that on this 4th day of December 2018, I caused a copy of the Appellants' Reply Brief, to be sent electronically to the registered participants in this case through the ECF system.

/s/ Dmitry Joffe

Dimitry Joffe

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