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

SEPTEMBER 21, 2017

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I. EXECUTIVE SUMMARY

On June 23, 2017, an attorney named Dimitry Joffe sent a letter on behalf of four purported shareholders[1] of Aflac Incorporated (the "Company") to the Company and its Board of Directors demanding that the Company take "suitable action" against Paul Amos, II for alleged insider trading (the "Demand Letter"). The Demand Letter claims that Paul Amos violated his fiduciary duties and committed securities fraud when he sold 222,889 shares of Company stock on June 12, 2017—four days after the public announcement of his resignation from the Company, its subsidiaries, and affiliates effective July 1, 2017. Mr. Joffe claims Paul Amos sold his shares while purportedly in possession of material, nonpublic information, namely, knowledge of the alleged fraudulent activities at the Company (and the investigation thereof) that Mr. Joffe described in several previous letters addressed to members of the Company's senior management, several members of the Board of Directors, and others starting in December 2016. While in the Demand Letter Mr. Joffe states that Paul Amos is "one of the subjects of our allegations," the only reference to Mr. Amos in Mr. Joffe's letters is Paul Amos's e-mail exchange with one of Mr. Joffe's clients, Martin Conroy, where Mr. Conroy purportedly conveyed his concern that a metric used by the Company—the average weekly producer ("AWP") metric—*can* be manipulated, and Mr. Amos disagreed with Mr. Conroy's stated position. The Demand Letter asks the Company to file an action against Paul Amos, and no other person.

On July 12, 2017, the Company's Board of Directors passed a resolution forming a special litigation committee (the "Special Committee") to investigate and evaluate these allegations of wrongdoing by Paul Amos set forth in the Demand Letter. Three independent

[1] Mr. Joffe makes the demand on behalf of Martin Conroy, Gerard McCarthy, Louis Varela, and Julio Leaty.

directors—W. Paul Bowers, Joseph L. Moskowitz, and Melvin T. Stith—comprise the Special Committee. The law firm of Jones Day represents the Special Committee.

The demand references O.C.G.A. § 14-2-831 and claims that Paul Amos "violated his fiduciary duties to the Company and its shareholders, as well as committed securities fraud." Because the Company is a Georgia corporation, the Special Committee and its counsel investigated the alleged facts and assessed whether their factual findings supported a breach of fiduciary duty claim under Georgia law or stated a claim for insider trading under federal or state laws.

The Special Committee now has completed its investigation, review of the Demand Letter, and review of the allegations of wrongdoing by Paul Amos asserted therein, and finds and concludes as follows:

First, the Company does not have a viable claim for violation of the federal securities laws as a result of Paul Amos's sale of Company shares on June 12, 2017. That claim would require, at a minimum, for the Company to allege with particularity and ultimately prove that: (i) Paul Amos sold the stock on June 12, 2017, while in possession of material, nonpublic information; (ii) Paul Amos acted with scienter (that is, with an intent to deceive or defraud); (iii) he used the material nonpublic information in making the sale; and (iv) loss causation (i.e., the transaction proximately caused the Company to suffer an economic loss); and (v) the Company contemporaneously bought the stock that Mr. Amos sold.

Based upon a review of the facts and the law, the Company would have difficulty establishing at least four, if not all five, of these essential elements of the claim. The Special Committee's investigation revealed that Paul Amos had little to no involvement in or knowledge of the underlying allegations and the investigation of those allegations. The little knowledge he

had was that the allegations were without merit, and the Company considered them to be immaterial. Accordingly, the Company will not be able to establish that Paul Amos acted with an intent to deceive, or that he used the alleged material, nonpublic information in making the sale. In addition, the Company likely would fail to survive a motion to dismiss, much less ultimately prevail at trial, given that Mr. Joffe's allegations regarding the AWP metric—even if true and whether viewed individually or collectively—are quantitatively immaterial. Further, as Mr. Joffe agreed during his discussion with the Special Committee's counsel, his allegations regarding the AWP metric do not impact any financial statements issued by the Company or suggest that any of those statements fail to comply with Generally Accepted Accounting Principles ("GAAP"). Furthermore, Mr. Joffe points to no specific documents or conversations showing that anyone ever communicated to Paul Amos that any of the allegations in Mr. Joffe's letters had merit or raised any material risks to the Company. The Special Committee did not find evidence of such communications to Paul Amos. To the contrary, the Company communicated directly to Mr. Joffe that it denied his allegations and that his clients' claims were without merit. The Special Committee's investigation did not reveal any facts that contradict in any way the position previously communicated to Mr. Joffe. Also, if the Company were to assert a claim against Mr. Amos based upon the allegations made in the Demand Letter, he would possess a very strong equitable estoppel defense. Paul Amos sought authorization from the Company before trading, and he received it. The Company did not consider the allegations to be material and thus never instituted a trading blackout based upon these allegations or the related investigation. As a result, it cleared Mr. Amos to make the trade on June 12, 2017. He was entitled to rely on that clearance. Finally, the Company would not be able to prove that it was harmed by Mr. Amos's trade.

Second, the Company likely does not have a viable state law claim against Paul Amos for insider trading. Such a claim would likely proceed as a breach of loyalty claim under the reasoning set forth in *Brophy v. Cities Service Co.*, 70 A.2d 5 (Del. Ch. 1949), and its progeny. Georgia has never addressed this issue. As a result, it is unclear whether it would follow Delaware courts in regard to this corporate legal question. Some state courts have rejected such insider trading claims on the ground that it is difficult to prove harm to the Company (that is other than, perhaps, reputational harm) when an officer or director trades shares based on inside information. The other obstacle expressed by some courts is that there is no need for a state law claim because of the availability of a remedy under federal law. There are some state courts that permit these claims, however, with Delaware being one. Although Georgia has followed Delaware's guidance on certain corporate law issues, it is unclear whether it would do so in regard to this issue given that several courts have rejected Delaware's position, but instead require that a company establish that the trade harmed it to proceed with the claim. The Demand Letter does not identify any harm to the Company here. Because, as a general rule, Georgia courts require a party alleging a breach of fiduciary duty to show damage proximately caused by the breach, those same courts may be disinclined to follow the *Brophy* line of cases given those cases do not require any showing of harm to the corporation. In any event, even if Georgia were to follow Delaware's lead, the Company still would need to prove both the element of intent and that Paul Amos used material, nonpublic information in selling his shares, which, as discussed above, is not likely to be successful.

Third, the Special Committee examined whether it could bring a breach of fiduciary duty claim against Paul Amos relating to his alleged participation in the purported AWP metric manipulation—here, allegedly being informed of a possible problem and doing nothing. The

Special Committee finds no basis for such a claim. In addition to its factual finding that the AWP allegations are without merit, the Special Committee also finds that the Company cannot show that it was damaged by the alleged violation. Moreover, the Company will have difficulty establishing a breach of the duty of care as the Special Committee has seen no evidence to suggest that Paul Amos did anything other than exercise his business judgment, which would be a defense to such a claim. Indeed, given that Georgia law and the Company's Articles provide for indemnification for alleged breaches of the duty of care, the Company will be unable to recover damages associated with any such breach. In addition, the Special Committee finds no basis for a breach of loyalty claim. The Special Committee saw no evidence of self dealing or any other benefit that Paul Amos would derive from the alleged "scheme." In addition, the statute of limitations for a derivative claim against Mr. Amos has expired, as the only alleged improper conduct occurred in 2010, well beyond the four-year limitations period.

Finally, the Special Committee finds that it is not in the Company's best interests to bring the demanded action against Mr. Amos. In addition to the specious merit of such an action and Mr. Amos's potential defenses, such an action would cause unnecessary expense, and would be time consuming and disruptive to the Company's operations.

In sum, the Special Committee's determination is to reject the demand.

II. BACKGROUND

A. The Company, Its Board Of Directors, And Paul Amos

The Company is a Georgia corporation headquartered in Columbus, Georgia. It is an international corporation with net earnings of approximately $2.7 billion. Its stock is traded on the New York Stock Exchange ("NYSE"), with a current market capitalization in excess of $33 billion. [Appendix ("App.") 1, Investor Relations Stock Information Chart, http://investors.aflac.com/stock-information/interactive-chart.aspx (last accessed Sept. 17, 2017).]

Currently, the Company's Board has eleven directors that are independent, meaning they are not officers or employees of the Company and are not affiliated with the Amos family. They are: W. Paul Bowers, Toshihiko Fukuzawa, Elizabeth Hudson, Douglas W. Johnson, Karole F. Lloyd, Robert B. Johnson, Thomas J. Kenny, Charles B. Knapp, Joseph L. Moskowitz, Barbara K. Rimer, and Melvin T. Stith. All of the directors are "independent" under the NYSE's listing requirements. [App. 2, 2017 Proxy Statement.] In addition, two Company executives, Daniel P. Amos, and Kris Cloninger III, serve on the Board.

In 2007, Paul Amos became the President of American Family Life Assurance Company of Columbus, a wholly owned subsidiary of the Company, and joined the Board of Directors of the Company at that time. [*Id.* at 9.] Paul Amos retained the title of President of American Family Life Assurance Company of Columbus from 2007 until 2017, although his responsibilities changed in 2014 when he moved to Japan to focus on the Company's Japanese operations, which comprise approximately 70 percent of the Company's revenue. [App. 3, Excerpts of Second Quarter 2017 Form 10-Q, at 9.]

On June 6, 2017, the Company filed a Form 8-K with the Securities and Exchange Commission ("SEC") announcing the resignation of Paul Amos as President of American Family Life Assurance Company of Columbus and as a member of the Company's Board of Directors, and describing his separation agreement. [App. 4, June 6, 2017 Form 8-K.] Among other things, pursuant to the terms of his separation agreement, Mr. Amos is required to exercise any outstanding, vested options within "three months" of the effective date of his resignation. [App. 5, Paul S. Amos, II's Separation Agreement, at 2.] The resignation became effective on July 1, 2017.

Paul Amos has since joined a Columbus private investment firm, now known as JBA Capital. [App. 6, AJC Article, Russell Graham, "Third-Generation Aflac Executive Leaving Georgia Based Company," dated June 9, 2017, http://www.ajc.com/business/third-generation-aflac-executive-leaving-georgia-based-company/CFNaBxovSWZwD1G4tu5tKJ/ (June 9, 2017); App. 7, Homepage of JBA Capital Website, http://jba.capital/, (last accessed Sept. 20, 2017.)]

On June 12, 2017, according to the Form 4 filed with the SEC on June 14, 2017, Paul Amos exercised options on 206,975 shares of the Company's common stock, and, on that same day, sold 222,889 shares of the Company's common stock at a sale price of $77.4043. [App. 8, Paul S. Amos, II Form 4, filed June 14, 2017.] At the time of these transactions, Mr. Amos was not subject to any blackout period imposed by the Company, and, consistent with Company policy, he sought and received clearance to trade. According to the Form 4, Mr. Amos paid a total of $10,023,965.70 to exercise his options,[2] and received a total of $17,252,567 for the sale of his Company shares, a difference of $7,228,601.30. [*Id*.] According to the Form 4, Mr. Amos still owns 1,447,877 shares of Company stock, either directly or indirectly through his spouse, family members, or held in trust. [*Id.*] The price of the Company's stock has risen following Mr. Amos's stock sale on June 12 through September 19 from $77.12 to $83.15.

[2] Assuming Mr. Amos sold the shares he acquired through exercising his options on the same day, which Mr. Amos confirmed, he would have realized a net gain of approximately $5,996,789 on those shares, not including any tax liabilities associated therewith. [*See* App. 4, Paul S. Amos, II Form 4, filed June 14, 2017.] Using the Form 4, counsel for the Special Committee calculated the net gain by subtracting the total cost of exercise from the total amount of sale. Based on the Form 4, the total cost of exercise here, calculated by multiplying the number of options exercised by their respective exercise price, was $10,023,965.70. The total amount of sale here, calculated by multiplying the total number of shares acquired by the market price sold, was $16,020,755. Therefore, the net gain here (16,020,755-10,023,965.70) was $5,996,789.29. [*See* App. 4, Paul S. Amos, II Form 4, filed June 14, 2017.]

B. The Demand Letter And The Formation Of The Special Committee

Shortly following the filing of the Form 4, Mr. Joffe sent the Demand Letter to Lisa Cassilly of Alston & Bird, counsel for the Company. [App. 9, June 23, 2017 Demand Letter]. The Demand Letter references O.C.G.A. § 14-2-831 (the provision of the Georgia Code authorizing derivative actions) and demands that the "Company bring a suitable action against Mr. [Paul] Amos II" for alleged insider trading. Mr. Joffe claims that Paul Amos sold "44% of his total direct shareholding in the Company" on June 12, 2017 while "in possession of material, nonpublic Company information"—that is, the allegations of "massive fraud at Aflac"[3] (including a "scheme" relating to the use of the average weekly producer metric) that Mr. Joffe previously described in a series of letters he sent to the Company and others. Mr. Joffe further asserts in the Demand Letter that Paul Amos was one of the "subjects of our [previous] allegations." The Demand Letter points out that the June 12, 2017 stock sale occurred within days of the public announcement of Paul Amos's resignation, effective July 1, 2017, from all positions with the Company, its subsidiaries, and affiliates.

Mr. Joffe alleges that Paul Amos "violated his fiduciary duties to the Company and its shareholders, as well as committed securities fraud," and demands that the Company bring a "suitable action . . . to redress these violations and seek appropriate remedies," including "disgorgement of his improperly obtained profits and other damages."[4] In subsequent

[3] Mr. Joffe does not define "Aflac" in the Demand Letter. For purposes of the report, we assume that he means the Company.

[4] Under Georgia law, a shareholder on behalf of the corporation, or the corporation itself, may bring a derivative proceeding against one or more directors or officers of the corporation to procure for the benefit of the corporation a judgment for the neglect of, failure to perform, or other violation of his duties in the management of the corporation. O.C.G.A. § 14-2-831(a)(1)(A). In other words, a director or officer who commits a breach of fiduciary duty generally may be held accountable to the corporation itself. A shareholder seeking to recover for

discussions with the Special Committee's counsel, Mr. Joffe confirmed that his letter dated June 23, 2017, is the only letter that he has sent on behalf of his clients seeking relief under O.C.G.A. § 14-2-831.

In response to the Demand Letter, the Board adopted a resolution forming the Special Committee to investigate and evaluate the Demand Letter and the allegations therein. [App. 10, July 12, 2017 Board Resolution.]

C. The Alleged Material, Nonpublic Information

The purported material, nonpublic information to which Mr. Joffe referred consists of a series of allegations included in letters he sent in December 2016 and March 2017, and a related investigation by the Company. He and his co-counsel, Andrew St. Laurent, directed these letters to the Company and certain of its Board members.[5] The first letter, dated December 10, 2016, (the "December 10 Letter") was addressed to Dan Amos, the Company's Chief Executive Officer, Audrey Tillman, the General Counsel, and Paul Amos. In addition, Mr. Joffe sent a

(continued…)

wrongs done to a corporation, such as waste or misappropriation of corporate assets, may bring a derivative action. *See* 6 Ga. Jur. Corporations § 4:67. Any damages recovered are paid to the corporation. *Id.* The general rule is that actions for a breach of fiduciary duties are to be brought in derivative suits rather than direct suits. *See Phoenix Airline Servs., Inc. v. Metro Airlines, Inc.*, 260 Ga. 584, 585 (1990) (citing *Cole v. Ford Motor Co.*, 566 F. Supp. 558, 569 (W.D. Pa. 1983) (applying Delaware law)); *APA Excelsior III, L.P. v. Windley*, 329 F. Supp. 2d 1328, 1360 (N.D. Ga. 2004) (applying Georgia law and stating that "[i]t is an established rule that whenever a plaintiff sues in a stockholder capacity for corporate mismanagement, he must bring the suit derivatively in the name of the corporation.") (quoting *Citibank, N.A. v. Data Lease Fin. Corp*., 828 F.2d 686, 692 (11th Cir. 1987)).

[5] Mr. Joffe has also filed an Occupational Safety & Health Administration ("OSHA") Whistleblower complaint asserting many of the same allegations, but none concerning Paul Amos specifically. [*See generally* App. 11, March 3, 2017 Letter to Mr. Whelan Attaching OSHA Complaint.] The Company has responded to the complaint, stating that the allegations are without merit. [App. 12, April 24, 2017 Letter from Cassilly to Ferrell-Jennings.]

letter to each of the following directors on March 16, 2017: Barbara K. Rimer, Charles B. Knapp, Elizabeth J. Hudson, Melvin T. Stith, W. Paul Bowers, and Joseph L. Moskowitz.

In the December 10 Letter, Messrs. Joffe and St. Laurent, on behalf of[6] seven current and former sales associates,[7] described alleged wrongdoing at the company falling into four general categories: fraudulent recruiting; manipulation of the average producer metric; fraudulent underwriting; and earnings manipulation. In sum, Mr. Joffe asserts that (1) the recruiting pitch to potential associates is a "sham" because it sets unrealistic earnings expectations; (2) the Company touts a metric to financial analysts and others called the average weekly producer metric that is susceptible to and has been manipulated by falsely assigning one dollar of credit to non-producing associates; (3) the Company has engaged in "a number of unfair, deceptive and illicit underwriting practices that inflate its other key operational metrics, such as the 'number of policies in force,' the 'annualized premiums in force,' and the 'total new annualized premium.'"[8]; and (4) that the Company engaged in potential earnings manipulation by holding open reporting periods "past their calendar close date and improperly booking production revenues from business received in that extra time period." [*Id.*, at 13.] Paul Amos is mentioned only in

[6] Their clients include Martin Conroy, Gerard McCarthy, Louis Varela, Debbie Cort, Anibal Alcantara, Jr., Frederick Baker, and Julio Leaty. Only four of these clients are mentioned in the Demand Letter, presumably because they are not also shareholders of the Company.

[7] According to the Company, sales associates are independent contractors, not employees. [App. 13, Aflac 5 Ways to Take Off, at 2.]

[8] This topic covers a wide range of alleged wrongs, including wrongful enrollment of police officers who do not have the rank of sergeant in the New York Sergeants' Benevolent Association ("SBA") account, the inappropriate use of the SmartApp Next Generation Enrollment platform, alleged wrongful bundling of policies, alleged improper transfer of individual policies to group policies, and the use of "sit codes" by regional coordinators to split or reassign commissions.

connection with the alleged manipulation of the AWP metric. The letter concludes by requesting that the Company waive the arbitration provision in the associates' contracts.

Following receipt of the December 10 Letter, the Company conducted an internal investigation. On January 5, 2017, Catherine Coppedge, a lawyer for the Company, responded that "Aflac unequivocally denies the allegations raised in your December 10, 2016 letter[.]" [App. 14, January 5, 2017 Letter to Joffe.] She further stated that "[y]our clients' claims are wholly without merit," and invoked the arbitration provision in Mr. Joffe's clients' associates' agreements, stating that "Aflac is ready and willing to arbitrate your clients' disputes[.]" Thus far, neither Mr. Joffe nor Mr. St. Laurent have pursued arbitration on behalf of any of their clients. Additionally, according to Audrey Tillman, the Company's General Counsel, her report to the Audit Committee and to the Board in executive session[9] was consistent with what Ms. Coppedge told Mr. Joffe.

In March 2017, Mr. Joffe sent letters to Doug Johnson, Chair of the Audit and Risk Committee of the Company, as well as several other directors, attaching a series of documents, including (i) a letter that he previously sent to the SEC, dated December 21, 2016; (ii) an OSHA Complaint, dated February 8, 2017; (iii) an Internal Revenue Service ("IRS") Whistleblower submission, dated February 23, 2017; and (iv) a Supplemental SEC submission, dated March 6, 2017. [*See, e.g.*, App. 15, March 8, 2017 Letter to Doug Johnson.]

The March letters (and attachments) cover many of the same allegations set forth above, but also assert that the Company failed to withhold employment taxes for the associates, maintained an undisclosed slush fund, and violated Section 125 of the Internal Revenue Code.

[9] Ms. Tillman confirmed that the executive sessions included only non-management directors; accordingly, neither Dan Amos nor Paul Amos were present.

[*Id.*] Notably, these additional letters include no allegations relating to Paul Amos. Mr. Joffe also points to what he describes as remedial measures by the Company in response to the December 10 Letter, including his claim that the Company has now "decommissioned" the AWP metric and has removed a recruitment video from the Company's website. [*Id.*; App. 16, March 28, 2017 Letter.] Mr. Joffe contends that these measures are evidence that the Company considered the December 10 allegations to have merit.

Mr. Johnson responded on March 20, 2017, stating that the "Board had previously been advised of the allegations raised in your December letter and on the company's due diligence efforts." On March 28, 2017 Mr. Joffe sent a response to Mr. Johnson stating that Mr. Joffe believed that the Board of Directors had not been "sufficiently and truthfully apprised of our allegations and of the company's true financial position by the management." [App. 16, March 28, 2017 Letter to Johnson.] Mr. Joffe then asked Mr. Johnson and the other non-management members of the Board to "remove the current executive management." [*Id.*]

At the Company's May 1, 2017 Annual Meeting of Shareholders, Dan and Paul Amos were re-elected to the Board of Directors. [App. 2, 2017 Proxy Statement; App. 17, May 4, 2017 Form 8-K.]

D. Clarification Of The Scope Of The Demand Letter

On September 15, 2017, the Special Committee's counsel participated in a telephone conference with Messrs. Joffe and St. Laurent regarding the Demand Letter to ensure that the Special Committee's understanding of the scope of the investigation matched Messrs. Joffe's and St. Laurent's expectations, and to give them an opportunity to provide the Special Committee with any additional facts they would like it to consider in connection with evaluating the Demand Letter. Messrs. Joffe and St. Laurent confirmed that the Demand Letter contains their only formal derivative demand under Georgia law. In other words, the only demand currently

before the Special Committee is a demand to bring an action against Paul Amos for the wrongdoing alleged in the Demand Letter.

When asked to identify the information they possess concerning Paul Amos's involvement in the allegations set forth in the December 2016 and March 2017 letters, Mr. Joffe responded that Mr. Amos's personal involvement is irrelevant to the insider trading claim. Rather, he stated that what is at issue is that he knew of the allegations when he sold his shares. Mr. Joffe could point to no evidence of Paul Amos's involvement in the alleged wrongdoing described in the December and March letters, except for one 2010 e-mail exchange between Mr. Joffe's client, Martin Conroy, and Paul Amos. This e-mail exchange is described in the December 2016 Letter. Mr. Joffe has sent a copy of that e-mail to counsel for the Special Committee.

Mr. Joffe claims that the Company has taken actions in light of his December and March letters that prove the merit of the allegations, but yet has not made these allegedly material allegations public. First, Mr. Joffe suggests that the timing of Paul Amos's resignation shortly after his re-election to the Board is evidence that the Board believes that Mr. Joffe's allegations are true and material. Second, Mr. Joffe claims that the Company decommissioned the AWP metric because of the validity of his assertions regarding its manipulation. His evidence of the alleged decommissioning of the AWP metric is a "big red notice" posted in an internal company portal available to associates that reported that the AWP metric had been decommissioned. In addition, he claims that the AWP metric is not referenced in the most recent Annual Report when it had been in previous Annual Reports. He confirmed that he is aware of no other evidence of this claimed decommissioning. Mr. Joffe also confirmed that his allegations relate only to

activities in the United States; he has no evidence of any fraud in the Company's Japanese operations.

III. THE SPECIAL COMMITTEE'S FORMATION, COMPOSITION, AND INDEPENDENCE

A. Appointment And Scope Of Authority

Upon receiving the Demand Letter, the Board determined that the allegations raised in the Demand Letter should be investigated to determine whether the claims had merit and whether it would be in the best interests of the Company to pursue any or all of the relief demanded. On July 12, 2017, the Board voted in favor of creating a special committee comprised of three independent directors for the purpose of investigating the "potential claims the Company may have against Mr. Amos, II in connection with his June 12, 2017 sale of Company shares while in possession of alleged material, nonpublic Company information regarding claims asserted in a December 10 Letter from Joffe Law P.C." [App. 10, July 12, 2017 Board Resolution.]

The Special Committee was authorized to investigate, review, and analyze the facts, allegations, and circumstances that are the subject of the potential claims against Mr. Amos as well as any additional facts, allegations, and circumstances that may be at issue in any related inquiry, investigation, or proceeding. [*Id.*] The Board granted the Special Committee broad powers regarding its resources and authority, which includes "the full and exclusive authority to consider and determine whether or not the prosecution of the Potential Claims or any other claims related to the facts, allegations and circumstances of the Potential Claims is in the best interests of the Company and its shareholders, and what action the Company should take with respect to the Potential Claims and any related inquiry, investigation or proceeding." [App. 10, July 12, 2017 Board Resolution.] The Special Committee's determinations are final, binding, and not subject to review by the Board. [*Id.*]

To permit the Special Committee to carry out its duties and powers, the Board authorized the Special Committee to incur expenses on the Company's behalf in connection with its activities, and to engage and retain such experts and advisors, including counsel and other advisors, as the Special Committee shall deem necessary or appropriate in order to assist it in the discharge of its responsibilities. [*Id.*] The Board further authorized and directed the Company's directors, officers, employees, public accountants, and advisors to provide assistance to the Special Committee, and to provide it with any and all documents and other information that the Special Committee deems necessary to carry out its duties. [*Id.*]

B. The Special Committee's Composition

The Special Committee is comprised of W. Paul Bowers, Joseph L. Moskowitz, and Melvin T. Stith.

1. W. Paul Bowers

Mr. Bowers is Chairman, President and Chief Executive Officer of Georgia Power Company, the largest subsidiary of Southern Company. Prior to assuming his current role in January 2011, Mr. Bowers served as Chief Financial Officer of Southern Company from January 2008 to August 2010. Previously, he served in various senior executive leadership positions across Southern Company in Southern Company Generation, Southern Power, and the company's former U.K. subsidiary, where he was President and Chief Executive Officer of South Western Electricity LLC/Western Power Distribution. Mr. Bowers also currently serves on the board of Nuclear Electric Insurance Limited and is a member of the Atlanta Federal Reserve Bank energy advisory board. He is a graduate of the University of West Florida and holds a master's degree in management from Troy University. In addition, he completed the Advanced Management Program at Harvard Business School. Mr. Bowers qualifies as an independent director under the NYSE's listing requirements, [App. 18, NYSE Listed Company

Manual, Independence Test, Section 303A.02], is independent, capable of acting in a disinterested manner with respect to the investigation and evaluation of the Demand Letter and allegations therein, and had sufficient time and energy to devote to the investigation.

2. Joseph L. Moskowitz

Mr. Moskowitz retired from Primerica, Inc. in November 2014, at which, from 2009 until 2014, he served as Executive Vice President, where he led the Product Economics and Financial Analysis Group. Since joining Primerica in 1988, he served in various capacities, including managing the group responsible for financial budgeting, capital management support, earnings analysis, financial supplement, and analyst and stockholder communications support. He served as Chief Actuary from 1999 to 2004. Prior to joining Primerica, Mr. Moskowitz was Vice President of Sun Life Insurance Company from 1985 to 1988, and was a senior manager at KPMG from 1979 to 1985. He received his Bachelor of Science, Industrial Management, from Georgia Institute of Technology while jointly enrolled at Georgia State University, where he completed coursework in Actuarial Science. Mr. Moskowitz is a Fellow of the Society of Actuaries and a member of the American Academy of Actuaries. Mr. Moskowitz qualifies as an independent director under the NYSE's listing requirements, [App. 18, NYSE Listed Company Manual, Independence Test, Section 303A.02], is independent and capable of acting in a disinterested manner with respect to the investigation and evaluation of the Demand Letter and the allegations therein, and had sufficient time and energy to devote to the investigation.

3. Melvin T. Stith

Dr. Stith is Dean Emeritus of the Martin J. Whitman School of Management at Syracuse University and served as Dean from 2005 until July 2013. Prior to taking this position in 2005, Dr. Stith was the Dean Emeritus and Jim Moran Professor of Business Administration at Florida

State University for thirteen years. He has been a professor of marketing and business since 1977 after serving in the U.S. Army Military Intelligence Command and achieving the rank of Captain. He holds a bachelor's degree from Norfolk State College, a master's degree in business administration, and a Ph.D. in marketing from Syracuse University. Dr. Stith currently serves on the boards of Synovus Financial Corp., where he serves on the compensation committee, and Flowers Foods, Inc., a publicly held baked foods company, where he serves on the compensation and governance committees. He has also served on the boards of Correctional Services Corporation, JM Family Enterprises Youth Automotive Training Center, the Keebler Company, United Telephone of Florida, Rexall Sundown, and the Jim Moran Foundation. Dr. Stith qualifies as an independent director under the NYSE's listing requirements, [App. 18, NYSE Listed Company Manual, Independence Test, Section 303A.02], is independent and capable of acting in a disinterested manner with respect to the investigation and evaluation of the Demand Letter and the allegations therein, and had sufficient time and energy to devote to the investigation.

C. The Special Committee's Independence

The Special Committee has evaluated the independence of its members under the standards established by the Georgia Business Corporations Code, O.C.G.A. § 14-2-101 *et seq.*, and the Georgia courts.

1. Legal Factors

Georgia law recognizes that a corporation's board of directors may assert control over derivative claims that a shareholder of the corporation seeks to assert on the corporation's behalf. O.C.G.A. §§ 14-2-742, 14-2-744. In this regard, the board may also delegate its authority to a committee of two or more independent directors. O.C.G.A. § 14-2-744; *Benfield v. Wells*, 324 Ga. Ct. App. 85, 88 (2013). A duly appointed special committee may exercise the full powers of

the board to the extent that the resolution delegating those powers to the special committee so provides.

In evaluating a special litigation committee's exercise of its authority to assert control over derivative claims (*i.e.*, when a corporation moves to dismiss a derivative proceeding filed by a shareholder of the corporation on the basis of a special litigation committee's determination), the court must examine (a) the independence and (b) the disinterestedness of the special litigation committee's members. *See* O.C.G.A. § 14-2-744 cmt. ("[t]he decisions that have examined the qualifications of members of special litigation committees have required that they be both 'disinterested' in the sense of not having a personal interest in the transaction . . . and 'independent' in the sense of not being influenced in favor of the defendants by reason of personal or other relationships.") (citing *Aronson v. Lewis*, 473 A.2d 805, 812–16 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000)).

O.C.G.A. § 14-2-744(c) provides that a director does not lack independence simply because he or she was (i) nominated or elected by directors who are not independent; (ii) named in a derivative proceeding; or (iii) approved the act being challenged, provided the director did not receive a personal benefit as a result of the action. Courts have considered whether the special litigation committee member possess a personal interest in the underlying transactions involved in the claim, and whether any personal or other relationship between the committee member and the alleged wrongdoer renders the director to be not independent. *See Millsap v. American Family Corp.*, 208 Ga. Ct. App. 230, 232 (1993); *Benfield*, 324 Ga. Ct. App. at 89.

"An SLC member is independent 'when he is in a position to base his decision on the merits of the issue rather than being governed by extraneous considerations of [sic] influences.'" *Clifford v. Ghadrdan*, No. 1:12-CV-3682-JCJ, 2014 WL 11829337, at *2 (N.D. Ga. Mar. 5, 2014)

(quoting *Kaplan v. Wyatt*, 499 A.2d 1184, 1189 (Del. 1985)). While a "substantial likelihood of personal liability" may cause a director to lack independence, the mere threat of personal liability is not enough. *See Clifford*, 2014 WL 11829337, at *5 (quoting *In re Friedman's, Inc. Derivative Litig.*, 386 F. Supp. 2d 1355, 1363 (N.D. Ga. 2005)). Generally speaking, allegations of a mere personal friendship or an outside business relationship, without more, will not suffice to raise a reasonable doubt about a special litigation committee's independence. *See Benfield*, 324 Ga. Ct. App. at 89 (finding that tangential outside business relationships between special litigation committee members and defendants did not destroy the independence of the special litigation committee); *Clifford*, 2014 WL 11829337 at *5 (finding that occasional social interactions with the defendants do not, by themselves, raise an inference that the special litigation committee member lacks independence). The relationship generally must be such that the special litigation committee member feels that he or she "owes something" to the persons accused of wrongdoing, whether that obligation is financial or otherwise. *See London v. Tyrrell*, No. 3321-CC, 2010 WL 877528, at *12 (Del. Ch. Mar. 11, 2010).

2. Analysis

Each of the members of the Special Committee is disinterested and independent. Regarding disinterestedness, Mr. Bowers, Mr. Moskowitz, and Dr. Stith do not possess any interest, financial or otherwise, in the stock traded by Mr. Amos or in the various matters alleged in the Demand Letter or any of the of the other letters sent by counsel for the demand claimants. Also, none of the Committee members sold any Company stock after December 10, 2016, when Mr. Joffe sent his letter containing the alleged material, nonpublic information.

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. The law is clear, however, that mere stock ownership does not destroy a director independence. To the contrary, that ownership confirms the alignment of the Committee members' interests with those of the Company and its shareholders. *See Aronson*, 473 A.2d at 812 (distinguishing a personal benefit from a benefit "which devolves upon the corporation or all shareholders generally").

In addition, Mr. Bowers, Mr. Moskowitz, and Dr. Stith all lack any close social or personal relationships with Paul Amos or other members of the Amos family that would impact their ability to independently assess and make decisions with respect to the Demand Letter. *See Benfield*, 324 Ga. Ct. App. at 89.

D. Retention Of Counsel By The Special Committee

On or about July 24, 2017, pursuant to its power to retain independent legal counsel, the Special Committee retained Jones Day, an international law firm with over 2,500 lawyers worldwide, including over 75 lawyers in its Securities Litigation & SEC Enforcement practice group and over 1,100 lawyers in its Business and Tort Litigation practice group. Jones Day's attorneys have broad-based experience in litigation matters, enforcement actions, and investigations involving public companies. The firm's Atlanta office, whose history traces back to the Atlanta-based Hansell & Post, has over a century of experience advising and representing Georgia corporations in corporate governance and litigation matters in the Georgia courts. The principal Jones Day attorneys involved in advising the Special Committee with respect to the investigation are Michael J. McConnell and Janine Cone Metcalf, who practice in Jones Day's Atlanta office. Mr. McConnell is a member of the firm's Securities Litigation & SEC Enforcement Practice and is the Head of Litigation for Jones Day's Atlanta office. Mr. McConnell has over 30 years experience, and Ms. Metcalf has over 25 years experience,

representing public and private corporations, directors, officers, special committees, or other stakeholders in securities and corporate governance matters and internal investigations.

Jones Day does not represent the Company or any of its directors. Jones Day is therefore independent of the Company and the Board with respect to the investigation of the Demand Letter and the allegations therein. *See Clifford*, 2014 WL 11829337, at *3 (finding that the SLC appointment process was not flawed even though counsel involved in the process represented the Board of Directors as well as one of the Defendants personally at the same time); *Johnson v. Hui*, 811 F. Supp. 479, 487 (N.D. Cal. 1991) (stating that there is no evidence that the special litigation committee counsel is biased or has any improper interest because there is no evidence they have had any personal or business contacts with those involved other than as committee counsel).

IV. PURPOSE AND SCOPE OF THE SPECIAL COMMITTEE'S INVESTIGATION

The purpose of the Special Committee's investigation is "to take any and all action it deems appropriate or necessary" to "determine whether or not the prosecution of the Potential Claims or any other claims related to the facts, allegations and circumstances of the Potential Claims is in the best interests of the Company and its shareholders, and what action the Company should take with respect to the Potential Claims and any related inquiry, investigation or proceeding." [App. 10, July 12, 2017 Board Resolution.]

The Special Committee understands the Demand Letter to allege that Paul Amos (i) sold 222,889 shares of Company stock on June 12, 2017, (ii) while in possession of material, nonpublic information, namely, the alleged fraudulent activities at the Company (and investigation thereof) that Mr. Joffe described in his December and March letters. In addition, the Demand Letter includes an allegation that Paul Amos was aware of and condoned the alleged manipulation of the AWP metric.

A. Time Devoted To The Investigation By The Special Committee And Counsel

The Special Committee and its counsel spent approximately two months investigating and evaluating the allegations in the Demand Letter. The Committee met with its counsel multiple times, both telephonically and in person, reviewed documents, and was briefed on the interviews with witnesses. Counsel for the Special Committee devoted over 500 hours of work in assisting the Special Committee with its investigation.

B. Documents Reviewed And Considered

The Company and the Company's counsel, Alston & Bird, cooperated with the Special Committee's requests for documents, providing the Special Committee and its counsel with nearly 630,000 internal documents. The Special Committee and its counsel considered documents from the following sources:

1. The Company's Amended and Restated Articles of Incorporation and Bylaws;

2. Internal corporate governance documents and ethics codes, including the Company's Code of Conduct & Business Ethics and its Stock Ownership Guidelines, Insider Trading Policy, and Compliance Procedures;

3. Minutes of the Board of Directors and Audit Committee meetings relating to the Joffe Allegations;

4. The Company's records of Mr. Amos's stock transactions from August 2016 through June 2017, including correspondence regarding blackout notices and Mr. Amos's pre-clearance requests;

5. The Company's Long-Term Incentive plan;

6. The Company's management compensation plans;

7. Mr. Amos's Stock Option Award Certificates dated March 1, 2016 through July 1, 2017;

8. Paul Amos's 2015 Employment Agreement and 2017 Separation Agreement;

9. Correspondence from Messrs. Joffe and St. Laurent from December 10, 2016 through June 23, 2017;

10. The Company's filings with the SEC, including proxy statements, Form 10-K's, Forms 4 & 5 filings, and 8-Ks;

11. Financial Analysts Briefing Books and Supplements;

12. Documents generated by Aflac Trust and Internal Audit in connection with its investigation of the Mr. Joffe's allegations;

13. Documents collected by the Company and Alston & Bird during the course of the investigations of Mr. Joffe's allegations, including over 30,000 documents from over 25 custodians;

14. E-mails collected from Paul Amos and Dan Amos; and

15. An imaged copy of Paul Amos's MacBook computer.

Counsel for the Special Committee initially collected and reviewed Company documents. After applying search terms and using targeted searches, counsel reviewed over 9,000 documents. The Special Committee reviewed significant documents with assistance from counsel.

C. Witnesses Interviewed

1. W. Paul Bowers

On August 23, 2017, the Special Committee's counsel conducted an in-person interview of Mr. W. Paul Bowers. Mr. Bowers has served as an independent director of the Company since 2013 and is currently a member of the Audit Committee and the Special Committee. As an

independent director and Audit Committee member, among other things, Mr. Bowers was personally familiar with the discussions during executive session of the Audit Committee and executive session of the Board, regarding the investigation of and response to Mr. Joffe's December and March letters. Mr. Bowers is also personally familiar with the Demand Letter and the Special Committee's formation.

2. Melvin T. Stith

On August 24, 2017, the Special Committee's counsel conducted a telephonic interview of Dr. Melvin T. Stith. Dr. Stith has served as an independent director of the Company since 2011 and is currently a member of the Governance Committee and the Special Committee. As an independent director, among other things, Dr. Stith was personally familiar with the discussions during executive session of the Board regarding the investigation of and response to Mr. Joffe's December and March letters. Dr. Stith is also personally familiar with the Demand Letter and the Special Committee's formation.

3. Joseph L. Moskowitz

On August 24, 2017, the Special Committee's counsel conducted an in-person interview of Mr. Joseph L. Moskowitz. Mr. Moskowitz has served as an independent director of the Company since 2015 and is currently a member of the Audit Committee and the Special Committee. As an independent director, among other things, Mr. Moskowitz was personally familiar with the discussions during executive session of the Audit Committee and during executive sessions of the Board regarding the investigation of and response to Mr. Joffe's December and March letters. Mr. Moskowitz is also personally familiar with the Demand Letter and the Special Committee's formation.

4. Doug Johnson

On September 6, 2017, the Special Committee's counsel conducted an in-person interview of Doug Johnson. Mr. Johnson has served as an independent director of the Company since 2003 and is currently the Lead Non-Management Director and the Chairman of the Audit Committee. Mr. Johnson is a Certified Public Accountant and a retired Ernst & Young LLP audit partner. He began auditing insurance companies in 1972, spending the majority of his career focusing on companies in the insurance industry. During Mr. Johnson's 30-year tenure with Ernst & Young, and its predecessor firms, he was coordinating partner of several large multinational insurance companies, including the firm's largest American insurance client. His work experience includes extensive coordination with the audit committees of publicly held companies. Mr. Johnson holds a Bachelor of Science degree from Georgia Institute of Technology. He is a member of the American Institute of Certified Public Accountants and holds an MBA from the Harvard Business School.

As an independent director and Audit Committee Chairman, among other things, Mr. Johnson was personally familiar with the discussions during executive session of the Audit Committee and executive sessions of the Board regarding the investigation of and response to Mr. Joffe's December and March letters. Mr. Johnson is also personally familiar with the Demand Letter and the Special Committee's formation.

5. Dan Amos

On September 6, 2017, the Special Committee's counsel conducted an in-person interview of Dan Amos. Dan Amos has been Chief Executive Officer of the Company and Aflac since 1990 and Chairman since 2001. Dan Amos holds a bachelor's degree in risk management from the University of Georgia and has spent 37 years in various positions at the Company. Dan

Amos was a recipient of Mr. Joffe's December 10 Letter and was given high-level briefings from time to time regarding the Company's and Alston & Bird's investigation of the allegations in Mr. Joffe's December and March letters.

6. Paul S. Amos, II

On September 14, 2017, the Special Committee's counsel conducted an in-person interview of Paul S. Amos, II. Paul Amos is the former President of Aflac and a Company Board member from 2007 until his resignation effective July 1, 2017. Mr. Amos was a recipient of the December 10 Letter and is alleged to have sold Company stock with knowledge of material, nonpublic information, including an alleged scheme involving the AWP metric.

7. Audrey Boone Tillman

On August 30, 2017, the Special Committee's counsel conducted an in-person interview of Audrey Boone Tillman. Ms. Tillman is the Executive Vice President and General Counsel for the Company, where she directs the Legal division and functions related to Human Resources, Corporate Communications, Compliance, Government Relations, Federal Relations, Global Cyber Security and the office of the Corporate Secretary. Prior to joining the Company, Ms. Tillman served as an associate professor at North Carolina Central University School of Law. From 1990 to 1993, she was an associate with the Smith, Helms, Mulliss and Moore law firm in Greensboro, North Carolina, and also served as a federal judicial law clerk to Judge Richard C. Erwin, U.S. District Court for the Middle District of North Carolina. Ms. Tillman holds a Bachelor of Arts in political science from the University of North Carolina at Chapel Hill and a Juris Doctor from the University of Georgia School of Law.

Ms. Tillman was a recipient of the December 10 Letter and reported to the Audit Committee and Board of Directors in executive session regarding the allegations therein.

8. Catherine Coppedge

On September 1, 2017, the Special Committee's counsel conducted an in-person interview of Cathy Coppedge. Ms. Coppedge holds the titles of Counsel and Assistant Corporate Secretary at the Company, where she has a wide range of legal responsibilities, including responsibility for issues relating to the Company's associates. She has been with the Company for 16 years. Ms. Coppedge has a Juris Doctor from Samford University, Cumberland School of Law. Prior to joining the Company, Ms. Coppedge worked as a prosecutor in Columbus for two years. Ms. Coppedge is familiar with Mr. Joffe's December 2016 letter and was involved in responding to Mr. Joffe's assertions.

9. Peter Sumners

On September 1, 2017, the Special Committee's counsel conducted an in-person interview of Peter Sumners. Mr. Sumners joined the Company in November 2016 as Second Vice President and Governance & Securities Counsel where he handles securities, finance, and corporate governance issues. His responsibilities include determining whether information is material and should be disclosed in the Company's public filings. He holds a Bachelor's degree from Northwestern University and a Juris Doctor from University of Missouri-Columbia School of Law. After graduating from law school, Mr. Sumners worked as an attorney in Kansas City, Missouri until joining Westar Energy in 2006 as Corporate Secretary and Law Director in Topeka, Kansas. In 2014, he joined ClubCorp Holdings in Dallas, Texas, and served as Assistant General Counsel.

Mr. Sumners is familiar with the December 10 Letter and has responsibilities relating to the Company's public disclosures.

10. Kenneth Dowless

On August 30, 2017, the Special Committee's counsel conducted an in-person interview of Ken Dowless. Mr. Dowless is the Director of Aflac Trust, a group within the Company with responsibility for internal investigations of fraud allegations. Prior to joining the Company in 2009, Mr. Dowless served in the United States Army as a criminal investigator for 22 years focusing on federal level felony investigations for the military. Since April 2011, Mr. Dowless has worked with the Company's Special Investigations Unit ("SIU"), which responds to identified issues of fraud or misconduct. In 2015, he was promoted to Director of Aflac Trust.

Mr. Dowless was involved in the Company's investigation of the allegations in the December 10 Letter.

11. Joan Diblasi and Jacob Anderson

On August 31, 2017, the Special Committee's counsel conducted an in-person interview of Joan Diblasi and Jacob Anderson. Ms. Diblasi is the Director of Shareholder Services, and Mr. Anderson is a Manager in the Stock Administration division of Shareholder Services. Both Ms. Diblasi and Mr. Anderson had knowledge of the federal regulations regarding trading by Section 16 officers and the Company's insider trading policies and procedures. Ms. Diblasi and Mr. Anderson also had knowledge of Mr. Amos's pre-clearance to trade on June 12, 2017.

12. Courtney Ruckert and Lamar Barnett

On September 1, 2017, the Special Committee's counsel interviewed Courtney Ruckert and Lamar Barnett. Ms. Ruckert is the Manager of Internal Control over Financial Reporting ("ICFR") and Financial Audit at the Company. Mr. Barnett is Vice President of U.S. Internal Audit at the Company. Both Ms. Ruckert and Mr. Barnett had knowledge of, among other things,

the Company's investigation of the allegations in the December 10 Letter regarding the alleged manipulation of the AWP metric.

D. Potential Witnesses Who Were Not Interviewed By The Special Committee

The letters sent by counsel for the demand claimants refer to a number of Company representatives. The Special Committee considered interviewing these individuals, but concluded their alleged knowledge is not relevant to the issues identified in the Demand Letter. They are not alleged to know (i) whether Paul Amos possessed material, nonpublic information at the time of the pertinent stock sale, or (ii) his knowledge of any issues regarding the AWP metric. Indeed, for the last three years, Paul Amos's operational focus has been in Japan; his oversight of any such operational issues would be minimal at best. As such, the Special Committee determined that interviewing these individuals would provide no further information relevant to its investigation. This decision was not influenced in any way by the Company, other directors, or management.

E. The Company's Cooperation In The Investigation

The Company and its directors, officers, and employees were cooperative with the investigation. The Company's in-house counsel assisted in scheduling interviews and meetings, and the Company promptly responded to the Special Committee's request for documents. The Company, through Alston & Bird, provided to the Special Committee's counsel over 30,000 documents and e-mails previously collected from over 25 custodians. The electronic documents Jones Day received from Alston & Bird were filtered from a 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. In addition, the Company provided Jones Day with all of Paul Amos's available e-mails and an imaged copy of his MacBook computer so that Jones Day

could filter and apply search terms as Jones Day deemed appropriate. The Company also cooperated with several follow up requests for documents from Jones Day.

The Company's document production was thorough and well-organized. Witnesses made themselves available without hesitation and provided responsive answers to the Special Committee's questions without objection.[10]

The Special Committee considers the document production it has received to be complete and sufficient to allow them thoroughly to investigate the allegations raised in the Demand Letter. There was no document or category of documents sought by the Special Committee that was not provided if available, and no witness sought by the Special Committee who refused to speak with the Special Committee's counsel.

V. THE COMMITTEE'S FINDINGS OF FACT

The Special Committee finds that the allegation in the Demand Letter that Paul Amos possessed material, nonpublic information when he sold Company stock on June 12, 2017 lacks evidentiary support. Neither the documents referenced by Mr. Joffe in the Demand Letter nor any evidence reviewed in the investigation supports a finding that the allegations included in Mr. Joffe's letters were material to the Company. The Company concluded that the allegations were without merit before the sale in question. Also, counsel for the demand claimants agreed that none of the alleged misconduct impacted any financial statements issued by the Company. Finally, all of the actions taken by Mr. Amos and the Company regarding the trades are consistent with the foregoing finding. Mr. Amos followed the Company's insider trading

[10] An Alston & Bird attorney was present for certain of the witness interviews. The attorney did not object to any questions or interject in any way that affected the candor of any witness in the opinion of counsel for the Special Committee. Alston & Bird was not present for the interviews with Paul Amos or the members of the Special Committee.

policies, requested authorization to make the sale in question, and the Company cleared Mr. Amos to make the trade.

A. Paul Amos's Stock Sale On June 12, 2017 Complied With The Company's Insider Trading Policies.

The Company's insider trading policies are set forth both in its Code of Business Conduct & Ethics,[11] as well as in a separate Insider Trading Policy.[12] The policies require each employee annually to certify his or her acknowledgment of these policies, which Paul Amos certified in 2017. [App. 21, Paul S. Amos, II's 2017 Certification.] The Insider Trading Policy calls for mandatory pre-clearance of securities transactions, and allows trading only during the trading window when a blackout period is not in effect. [App. 20, Aflac Incorporated's Stock Ownership Guidelines, Insider Trading Policy, and Compliance Procedures.]

Paul Amos followed this pre-clearance policy with respect to the stock sale challenged in the Demand Letter. On June 12, 2017, during an open trading window,[13] and pursuant to

[11] The Company's Code of Business Conduct & Ethics states that "[i]f you are aware of material, nonpublic information (also known as 'insider' information) relating to our Company, competitors, or actual or potential business partners, you may not buy or sell securities of our Company or the other company." [App. 19, Code of Business Conduct & Ethics, at 23.] The Code further provides examples of "material" information, including: financial results and forecasts, change in dividends, possible mergers, acquisitions, and joint ventures, obtained or lost important contracts, information concerning significant discoveries, important product developments, major litigation developments, or major changes in business direction. [*Id.*]

[12] The Company's Insider Trading Policy further states that "[i]t is illegal and a violation of Company policy to purchase or sell securities of the Company or any other entity while you are in possession of material nonpublic information about the Company or other entity." [App. 20, Stock Ownership Guidelines, Insider Trading Policy, and Compliance Procedures.] The Policy defines material information as "any information that an investor would consider important in a decision to buy, hold or sell stock" and provides examples including: projections of future earnings or losses; news of a pending or proposed merger, acquisition or tender offer; news of significant sale of assets or the disposition of a subsidiary; changes in management; significant new products or discoveries." [*Id.*]

[13] Mr. Anderson confirmed that Paul Amos was not subject to any blackouts on June 12, 2017.

Company policy, Mr. Amos sought and received from the Company's Shareholder Services department pre-clearance for his June 12, 2017 stock transaction. [*See* App. 22, June 12, 2017 E-mail from Anderson to Loudermilk, *et al*.] Mr. Amos's Form 4 filed with the SEC on June 14, 2017, disclosed the trade. On June 12, 2017, Mr. Amos sold 222,889 shares of common stock, representing 44.71% of his total direct holdings. [App. 4, Paul S. Amos, II Form 4, filed June 14, 2017.] The 44% statistic, however, does not take into account the significant indirect beneficial holdings Paul Amos still maintains in Company stock. [*See* App. 4, Paul S. Amos, II Form 4, filed June 14, 2017 (showing 1,172,251 shares of common stock owned indirectly).]

Also on June 12, 2017, according to the Form 4 filed with the SEC on June 12, 2017, Mr. Amos exercised his options to acquire 206,975 shares of the Company's common stock, for which he paid a total of $10,023,965.70. [*See* App. 4, Paul S. Amos, II Form 4, filed June 14, 2017.] According to the Form 4, Mr. Amos paid a total of $10,023,965.70 to exercise his options, and received a total of $17,252,567 for the sale of his Company shares, a difference of $7,228,601.30, not including any tax liabilities he may have had in connection with the sale. [*Id.*]

Paul Amos explained in his interview that he sold all of the shares acquired through the non-qualified stock options he exercised on June 12, 2017 because his Separation Agreement provided that he had a limited amount of time to exercise those options. [App. 5, Paul S. Amos, II's Separation Agreement, at 2 ("Notwithstanding anything to the contrary contained in a stock option award agreement or notice of stock option grant, all outstanding stock options held by Employee that were vested as of the Resignation Date shall remain outstanding and exercisable for a period of three (3) months following the Resignation Date.").] According to Mr. Amos, he desired to sell his shares in order to achieve greater diversity in his portfolio and to become more liquid to help fund, among other things, his new business venture with JBA. As he is no longer a

member of the Board, he did not feel compelled to continue to hold as many shares as he had (or was entitled to exercise through his options). That said, Mr. Amos still maintains a sizeable direct holding in Company's stock (275,626 shares), as well as indirect holdings through different structures (1,172,251 shares). [*See* App. 4, Paul S. Amos, II Form 4, filed June 14, 2017.]

B. Paul Amos Had Limited Knowledge Of Mr. Joffe's Allegations And The Resulting Investigation.

Paul Amos had little knowledge of Mr. Joffe's December 10 Letter or involvement in the investigation thereof due to his focus on the Japanese operations. According to Mr. Amos, and confirmed by Dan Amos and Ms. Tillman, since 2014, Paul Amos's professional focus had been the Company's Japanese operations, which accounted for almost 70 percent of the Company's revenue. [App. 3, Excerpts of Second Quarter 2017 Form 10-Q, at 9.] Indeed, he lived in Japan from January 2014 to January 2016.

As Mr. Joffe acknowledged, the allegations do not concern the Japanese operations; and allegations of activities by sales associates in the United States would not have been an area for which Paul Amos would have day-to-day familiarity for a number of years. Indeed, the only allegation in the December or March letters that includes a direct reference to Paul Amos's involvement concerns the alleged manipulation of the AWP metric, but that metric is used in the Company's United States operations only. Given that his focus was not the United States operations, Mr. Amos also explained that he had little to no involvement in any United States operational metrics, including the AWP, after late 2013. Dan Amos and Ms. Tillman both independently corroborated the accuracy of these statements.

Although Paul Amos acknowledged that he received the December 10 Letter and had a few generalized discussions about the fact of his receipt of the letter with Dan Amos and Ms.

Tillman, once he understood that the legal department was handling the response, he had essentially no involvement. Dan Amos and Ms. Tillman had the same assessment of Paul Amos's involvement.

In addition, Ms. Tillman explained that she kept the Board informed of the investigation into Mr. Joffe's allegations, but only in executive session. Paul Amos was not present at any of Ms. Tillman's briefings. The Special Committee members, Mr. Johnson, and Ms. Tillman confirmed this fact. Moreover, both Dan and Paul Amos stated that they never had any substantive conversations about the allegations, and Ms. Tillman stated that at most she may have given a brief update on the status of the investigation or the OSHA complaint at an executive management meeting where Paul Amos may (or may not) have been present. Moreover, if he had been present, Ms. Tillman stated that her presentation of the issue was consistent with the response provided by Ms. Coppedge to Mr. Joffe in January 2017—*i.e.*, that the allegations are without merit. [*See* App. 14, January 5, 2017 Letter from Coppedge to Joffe.]

The witnesses unanimously stated that at no time did anyone ever suggest to Paul Amos that the information in Mr. Joffe's December or March letters could potentially have a material impact on the Company's financial statements, or were otherwise material to the Company's operations, financial performance, or outlook. In fact, the view was the opposite.

C. The Allegations In The Demand Regarding The Average Weekly Producer Metric Lack Merit.

In his December 10 Letter, Mr. Joffe alleges that the average weekly producer metric—a metric that the Company has used for approximately ten years to measure sales force activity[14]—has been manipulated to appear as though there are more associates producing sales on a weekly

[14] The AWP is calculated by taking the weighted average of all associates who produce business each week.

basis by including, as "producers," associates who have generated no sales, but instead were fraudulently credited with one dollar in commissions. [*See* App. 23, December 10 Letter, at 7.] Mr. Joffe alleges that Paul Amos knew of this manipulation and was involved in it. [*Id.*]

After reviewing documents and speaking with witnesses, the Special Committee found no evidence to support Mr. Joffe's allegations. Moreover, the Special Committee has seen no evidence that Paul Amos was aware of or involved in any such alleged manipulation. Mr. Joffe suggests that individuals at the Company were motivated to manipulate the AWP metric to increase their compensation. As this metric does not appear to influence Mr. Amos's compensation, the Special Committee finds no basis to assume that Mr. Amos was motivated to manipulate this metric for purposes of his personal compensation. To the extent that Mr. Joffe's letters suggest that any manipulation would impact the Company's financial statements, Mr. Joffe is incorrect. AWP is a non-GAAP measure that does not affect the Company's financial statements. Finally, even if the AWP metric was manipulated in the way alleged, the result of such manipulation would have been immaterial.

1. Paul Amos Was Not Aware Of Or Involved In Any Alleged Manipulation Of The AWP Metric.

In his December 10 Letter, Mr. Joffe relies on an e-mail exchange between Paul Amos and Martin Conroy in April 2010 to show that (1) Mr. Conroy informed Paul Amos of alleged potential manipulation of the AWP metric and (2) Paul Amos acknowledged the alleged potential manipulation and disagreed with Mr. Conroy's comment.

The December 10 Letter states:

> Thus, in his email to Mr. Amos II of April 13, 2010, Mr. Conroy expressly stated: "***Average Weekly Producers is, with all due respect, a 'bull pucky' number. There are too many ways to manipulate the figure.***"
>
> Mr. Amos II responded: "***I really like the DSC bonus and I think it aligns.***" Mr. Amos II was right: the bonus structure with the "average weekly producer" component to it perfectly aligned the coordinators' incentives to pad the AWP number for their own bonuses with the Company's goal of reporting growth in this key operational metric, even though Mr. Amos II knew, having been expressly forewarned by Mr. Conroy, that this metric would be easily manipulated.

[App. 23. December 10 Letter, at 8.]

Mr. Joffe provided the April 13, 2010 e-mail exchange in its entirety to counsel for the Special Committee on September 15, 2017. That e-mail exchange does not show either that Mr. Conroy informed Paul Amos of potential manipulation of AWP or that Paul Amos acknowledged the alleged claims of potential manipulation.

First, based on the entirety of the April 13, 2010 e-mail exchange, Mr. Joffe's contention that this e-mail put Paul Amos on notice of potential manipulation is not supported by a plain reading of this seven-year old communication. Mr. Conroy's e-mail to Paul Amos is quite lengthy. [*See* App. 24, April 13, 2010 E-mail from Martin Conroy to Paul Amos.] Mr. Conroy's e-mail spans four pages, twenty-one paragraphs, and over 1,700 words. [*Id.*] The e-mail focuses almost entirely on complaints about upcoming changes to the bonus structure for Mr. Conroy's position of District Sales Coordinator ("DSC"). [*Id.*] Only a small portion of Mr. Conroy's e-mail mentions AWP, and only one sentence (the one quoted in Mr. Joffe's December 10 Letter), mentions any potential manipulation of the metric. [*Id.*] In his December 10 Letter, Mr. Joffe used that one sentence containing a complaint about potential manipulation of AWP in an attempt to argue that Mr. Conroy informed Paul Amos of potential manipulation, while ignoring the fact that the majority of the e-mail had nothing to do with AWP. [*See id.*; App. 23,

December 10 Letter.] Further, at no point in the e-mail did Mr. Conroy say whether any manipulation, in fact, had occurred, or explain in any level of detail the alleged potential manipulation. [*See* App. 24, April 13, 2010 E-mail from Martin Conroy to Paul Amos.]

Second, Mr. Joffe's letter argues that Paul Amos, in his response, acknowledges Mr. Conroy's complaints about the potential manipulation of AWP and openly disagreed with them. [*Id.*]. This position distorts Paul Amos's response, which in no way addresses any of Mr. Conroy's comments about AWP. [*Id.*] Mr. Joffe's December 10 Letter quotes only a portion of Paul Amos's response. [App. 23, December 10 Letter.] The portion of the response that Mr. Joffe pulled his quotation from reads, in its entirety "[a]s for DSC income, I really like the DSC bonus and I think it aligns. Slight modifications may be made, but I don't foresee an overhaul." [*Id.*] It is clear that Paul Amos's response, when viewed in its entirety, was not responding to any of Mr. Conroy's comments about AWP. [App. 24, April 13, 2010 E-mail from Martin Conroy to Paul Amos.] It is not clear if Paul Amos even noticed that Mr. Conroy mentioned AWP at all in his email. In fact, when shown the quoted sections in the December 10 Letter, Paul Amos had no recollection of the e-mail exchange, and was surprised that he would have responded to comments about AWP given the tone of Mr. Conroy's critique.

2. Average Weekly Producer Is Not A Factor In Executive Compensation.[15]

Even assuming the allegations of manipulation are correct, Mr. Joffe supplies no motive for Paul Amos to participate in the alleged scheme. Even if the alleged conduct had occurred, Paul Amos would not have benefited financially from that conduct. The AWP metric did not have any direct impact on Paul Amos's compensation. [*See* App. 2, Excerpt of 2017 Proxy Statement, at 47.] According to Mr. Barnett, the AWP metric was never a factor in the executive level compensation bonus structure and to his knowledge never factored into Paul Amos's compensation. According to Paul Amos, he did not believe that metric had any impact on his compensation. According to the Company's 2017 Proxy Statement, Paul Amos's compensation was comprised of three key elements: (a) base salary; (b) Management Incentive Plan; and (c) Long-term incentives, without any direct reference to AWP as a component. [*See* App. 2, Excerpt of 2017 Proxy Statement, at 47; App. 25, Long Term Incentive Plan; App. 26, Management Incentive Plan.] Therefore, Paul Amos cannot be said to have engaged in any kind of self-dealing or obtained a personal advantage for himself.

3. The Average Weekly Producer Metric Is A Non-Gaap Measure Used As One Means To Track Sales Activity.

The average weekly producer metric is a non-GAAP measure. It is derived from the Company's "RPM" system—an internal system separate from the Company's financial information system.

[15] Further, the AWP metric is not a factor in the compensation for state, district, or regional sales coordinators, and, as Ms. Ruckert and Mr. Barnett explained, has not been a factor in the compensation for those positions since at least 2012. A review of the current bonus and incentive program materials for 2013 to present reveals that the Company's bonus and incentive programs do not rely on the average weekly producer metric. [*See generally* App. 27, Honors Club Books 2013–2017.] Though it may have been selected as a factor in a local determination of compensation, there is no evidence that the Company has used it in determining compensation for any coordinators since at least 2012.

As Mr. Barnett and Ms. Ruckert explained in their interview, AWP is a metric that shows the average number of sales associates who are producing business for the Company each week. Based on explanations from Mr. Barnett and Ms. Ruckert, the Special Committee's understanding of the calculation of AWP is the weighted average of the number of sales associates who have credit for a sale in each week of a given quarter. This is done each year for each quarter. The number of average weekly producers for a given year is the average of each of the AWPs for the four quarters.

The Company refers to the AWP metric publicly, including in its SEC filings, Financial Analysts Briefings, and Financial Analysts Briefing Supplements. [*See, e.g.*, App. 28, Excerpt of Third Quarter 2016 Form 10-Q, at 117; App. 29, Excerpt of 2016 Form 10-K, at 50; App. 30, Excerpt of 2016 Financial Analysts Briefing, at 47; App. 31, Excerpt of First Quarter 2017 Financial Analysts Briefing Supplement, at 19.] Typically, any reference to AWP in the Company's SEC filings is limited to a sentence or two and appears in the Management Discussion and Analysis section. Because AWP is a non-GAAP measure, it is not referenced in the financial statements. [*See, e.g.*, App. 29, Excerpt of 2016 Form 10-K, at 50; App. 3 Excerpts of Second Quarter 2017 Form 10-Q, at 78.]

Doug Johnson, Chairman of the Company's Audit Committee, who frequently listens to the analyst presentations, recalled that the metric is discussed on less than 10% of analyst calls. Given that it is a non-GAAP measure, the AWP metric comprises a small piece of what analysts consider with regard to projections for the Company. Instead, in his view, analysts are more concerned about other metrics, such as the New Annualized Premium metric. [*See* App. 3, Excerpt of Second Quarter 2017 Form 10-Q, at 71.]

Mr. Joffe has asserted that the AWP metric is manipulated to make it appear that more associates are producing business, when many are not. Mr. St. Laurent explained in a telephone conference with the Special Committee's counsel his position that the Company is misrepresenting to the market the number of its sales associates through the use of the AWP metric. He explained: the Company has about 50,000 sales associates, but at any given moment tens of thousands of those associates have zero business associated with them, but they are still considered sales associates even though they generate nothing for the Company.

Messrs. Joffe and St. Laurent's argument assumes that the Company is withholding information from the market that there is a sizable gap between the number of sales associates and the number of associates producing on a weekly basis. The evidence reviewed by the Special Committee, however, contradicts this assumption.

It has always been the case that there are many more sales associates than the number of associates who are actually generating business on a weekly basis. This fact has never been hidden from the market. The Company classifies sales associates as independent contractors, who enter into contracts to sell Aflac policies. Many will enter into that agreement and then sell few to no policies. According to Paul Amos, he was instrumental in instituting the nationwide use of the average weekly producer metric to better track the number of associates who were actively selling Aflac policies. He wanted to incentivize his team not simply to recruit new sales associates, but to recruit associates who would produce business on a regular basis. The AWP metric was designed to track the progress towards that goal because it counted how many associates produced each week.

Indeed, the Company's publicly-available information makes it clear that there are far more sales associates than weekly producing associates. The Company has often provided to the

market the total numbers of sales associates and recruits alongside the number of average weekly producers. These numbers show a large difference between the number of sales associates and average weekly producers, which make it clear that there is a significant number of sales associates that do not produce business weekly. For example, in 2010, the Company provided the total number of "Licensed sales associates" in a chart along with "Average weekly producers."

Aflac's Distribution Channels

	Number
Average weekly producers	11,900
Licensed sales associates	74,500

[App. 33, Excerpt of 2010 Financial Analysts Briefing, at 52]. The numbers, 11,900 and 74,500, show that just under 16% of all licensed sales associates produce on a weekly basis.

The number of recruited agents also has consistently been shown directly next to the number of average weekly producers. In fact, in the third quarter of 2014, the Financial Analysts Briefing Supplement compares recruited agents and licensed sales associates with average weekly and monthly producers.

Aflac U.S. Sales Force Data

		Recruited Agents	% Increase	Licensed Sales Associates	% Increase	Weekly Average Producers	% Increase	Monthly Average Producers	% Increase
2006		26,108	7.8 %	68,394	8.5 %	10,330	6.4 %	44,482	6.3 %
2007		24,247	(7.1)	71,258	4.2	10,945	6.0	46,818	5.3
2008		25,755	6.2	74,390	4.4	11,232	2.6	48,402	3.4
2009		28,482	10.6	75,315	1.2	11,145	(.8)	48,292	(.2)
2010		22,167	(22.2)	72,535	(3.7)	10,410	(6.6)	45,113	(6.6)
2011		24,495	10.5	74,802	3.1	10,427	.2	45,188	.2
2012		24,955	1.9	76,462	2.2	10,197	(2.2)	44,398	(1.7)
2013		22,041	(11.7)	76,305	(0.2)	9,577	(6.1)	41,505	(6.1)
2013	1	5,434	(18.9)	75,919	(.5)	9,507	(6.7)	41,200	(6.7)
	2	6,307	(1.2)	76,244	(.8)	9,759	(5.1)	42,291	(5.1)
	3	5,317	(12.7)	75,895	(.9)	9,253	(5.6)	40,100	(5.6)
	4	4,983	(13.8)	76,305	(.2)	9,791	(6.9)	42,430	(6.9)
2014	1	5,599	3.0	73,331	(3.4)	9,024	(5.1)	39,110	(5.1)
	2	6,051	(4.1)	74,388	(2.4)	9,353	(4.2)	40,531	(4.2)
	3	**5,529**	**4.0**	**74,604**	**(1.7)**	**9,130**	**(1.3)**	**39,564**	**(1.3)**

[App. 33, Excerpt of Third Quarter 2014 Financial Analysts Briefing Supplement, at 22.] This shows that only 12.24% of licensed sales associates produced on a weekly basis for the third quarter of 2014.

Most recently, the Company provided analysts with a comparison of the number of recruited agents for each quarter and year with the average weekly producer and productivity numbers.

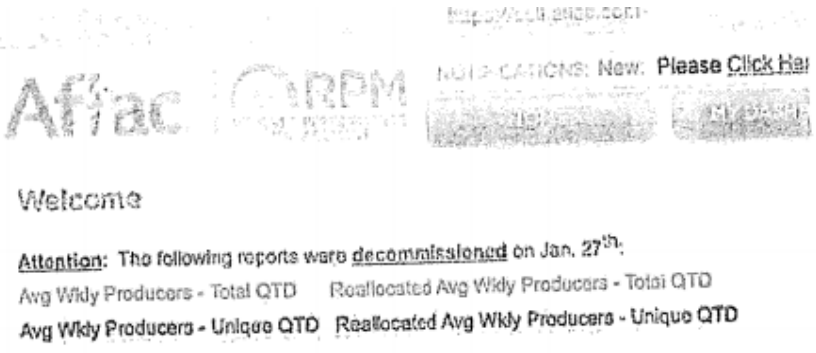
Aflac U.S. Sales Force Data

		Recruited Agents			Average Weekly Producer Equivalents	Productivity (Production/ Avg. Weekly Producers)
		Career	Broker	Total		
	2012	19,757	5,198	24,955	10,197	145,907
	2013	17,410	4,631	22,041	9,577	148,640
	2014	17,935	3,864	21,799	9,340	153,424
	2015	18,649	2,826	21,475	9,252	160,687
	2016	16,167	2,425	18,592	9,061	163,501
2015	1	4,692	714	5,406	9,019	35,054
	2	5,059	732	5,791	9,152	37,578
	3	4,760	658	5,418	8,910	37,000
	4	4,138	722	4,860	9,927	50,059
2016	1	4,044	677	4,721	9,069	36,134
	2	4,371	586	4,957	9,007	38,579
	3	4,175	637	4,812	8,678	37,305
	4	3,573	528	4,101	9,492	50,848
2017	1	4,392	667	5,059	8,844	37,680
	2	**4,525**	**632**	**5,157**	**8,749**	**40,664**

[App. 34, Excerpt of Second Quarter 2017 Financial Analysts Briefing Supplement, at 17]. This data shows the difference between recruited agents and those producing on a weekly basis. The Special Committee finds that the publicly-disclosed AWP statistics in no way mislead the public to believe that a sizeable percentage of the sales force is actively selling Aflac insurance. As that flawed premise is a basis for Mr. Joffe's alleged motive to manipulate this metric, Mr. Joffe's theory is without merit.

4. The AWP Has Not Been Decommissioned.[16]

In his March 6, 2017 letter to the SEC, Mr. Joffe alleges that the Company decommissioned the average weekly producer reports, and as evidence provides a screenshot of Aflac's internal system, RPM:



[App. 35, March 6, 2017 Letter from Joffe to SEC, at 5.]

In a March 28, 2017 letter directly to Mr. Johnson, Mr. Joffe again alleges that the Company had, since the December 2016 Letter, decommissioned the AWP reports. [Ex. 16, March 28, 2017 Letter.] In a conversation with counsel for the Special Committee, Messrs. Joffe and St. Laurent stated that the Company decommissioned the metric both internally and externally. Mr. Joffe contended that the average weekly producer metric was decommissioned

[16] In the course of the investigation, the only change in the AWP metric that the Special Committee found was a change in the description of the average weekly producer metric to add the word "equivalent." For example, in the most recent Financial Analysts Briefing Book Supplements. The term had changed from "average weekly producer" to "average weekly producer equivalent." [*Compare* App. 33, Excerpt of Second Quarter 2017 Financial Analysts Briefing Supplement, at 17, *with* App. 31, Excerpt of Third Quarter 2016 Financial Analysts Briefing Supplement, at 19.] Further, the Company's most recent public filings also include the term "average weekly producer equivalent." [*Compare* App. 3, Excerpt of Second Quarter 2017 Form 10-Q, at 73, *with* App. 28, Excerpt of Third Quarter 2016 Form 10-Q, at 84.] The change in language has not affected how the Company calculates the metric. Mr. Sumners explained that the addition of the word "equivalent" added precision and did not affect the calculation of the metric. Ms. Ruckert and Mr. Barnett confirmed that the calculation of the metric has not changed, and, according to Mr. Sumners, no financial analysts have even asked about the addition of the word "equivalents."

internally in January 2017, with the removal of related reports from the Company's "RPM" system, and externally with the release of the Company's Annual Report for 2016, which he claimed no longer mentioned the metric.

However, on September 1, 2017, Mr. Barnett and Ms. Ruckert showed counsel for the Special Committee the Company's internal RPM system, and counsel observed that RPM, in fact, contained a section for average weekly producer reports, including the reports alleged to be decommissioned. All individuals interviewed who were familiar with the metric believed that it was still in use throughout the Company, including Mr. Dowless, Ms. Ruckert, and Mr. Barnett. The Special Committee has found no evidence to support the claimed decommissioning of the AWP metric.

Further, contrary to Mr. Joffe's statement that the AWP metric is no longer mentioned in the Company's Annual Reports, the AWP metric is specifically mentioned in the Company's 2016 Form 10-K, as well as in Aflac Incorporated's 2016 Year in Review. [App. 29, 2016 Form 10-K and Aflac Incorporated's 2016 Year in Review.] Interestingly, the AWP metric did not appear in the Company's Year in Review for 2015 or 2014, or in its Form 10-Ks for 2012 or 2013. [2012 Form 10-K; 2013 Form 10-K; Aflac Incorporated's 2014 Year in Review; Aflac Incorporated's 2015 Year in Review.] The metric is also still explicitly referenced in the Company's Form 10-Qs. [*See, e.g.*, App. 3, Excerpt of Second Quarter 2017 Form 10-Q, at 73.]

5. Even Assuming There Was Manipulation Of The AWP Metric, Any Potential Manipulation Affected Only 0.09% Of Producers And Is Therefore Not Material.

Ms. Ruckert and Mr. Barnett explained that to determine whether the alleged manipulation of the AWP was material, the Company wanted to calculate the number of weekly producers with $1 or less of production in a given period. The Company's records show that, for

example, of the 112,815[17] producers counted in the third quarter of 2016, there were fewer than 100 instances in which a producer had less than $1 of production credit. Specifically, there were only 73 instances of a producer with less than $1 of production credit and 24 instances of a producer with exactly $1 of production credit for the third quarter of 2016, or approximately 0.09 percent of the producers with $1 or less of production credit. Based on this nominal percentage, the Special Committee determined that any such "manipulation" is at best episodic. Further, as a non-GAAP measure, any episodic "manipulation" would not impact the Company's financial statements. Therefore, any potential manipulation could not constitute a quantitatively material issue requiring disclosure. [*See* App. 36, SEC, Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150 (Aug. 12, 1999), https://www.sec.gov/interps/account/sab99.htm (endorsing 5% quantitative materiality threshold for financial statements).][18]

VI. GOVERNING LAW AND THE SPECIAL COMMITTEE'S EVALUATION OF DEMANDS MADE IN THE DEMAND LETTER

A. Legal Background

1. Duties of Directors And Officers Under Georgia Law

Georgia law has long recognized that directors and officers of a corporation owe fiduciary duties of care, good faith, and loyalty to the corporation and its shareholders. *See, e.g.*

[17] The number of producers likely will exceed the number of associates who are actively selling each quarter because of how the metric is calculated. The weekly producer number is calculated each week of the quarter. The metric is defined as the number of associates who produce each week, so if an individual associate qualifies as a producer in every week of a given quarter, that associate would be counted 13 times in that quarter.

[18] *See also Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 163 (2d Cir. 2000) (stating that "because SEC staff accounting bulletins 'constitute a body of experience and informed judgment'. . . and SAB No. 99 is thoroughly reasoned and consistent with existing law-its non-exhaustive list of factors is simply an application of the well – established *Basic* analysis to misrepresentations of financial results – we find it persuasive guidance for evaluating the materiality of an alleged misrepresentation") (citing *Christensen v. Harris County*, 529 U.S. 576, 586 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1976))).

Quinn v. Cardiovascular Physicians, P.C., 254 Ga. 216, 217 (1985) ("It is settled law that corporate officers and directors occupy a fiduciary relationship to the corporation and its shareholders, and are held to the standard of utmost good faith and loyalty."). Paul Amos, as an officer and director, would be bound by these duties. The Demand Letter appears to suggest that Paul Amos violated either the duty of care or duty of loyalty.[19]

a) *Duty of care*

Under Georgia law, a director or officer is required to perform his duties "in good faith and with the degree of care of an ordinarily prudent person in a like position would exercise under similar circumstances." O.C.G.A. § 14-2-830(a) (for directors); O.C.G.A. § 14-2-842(a) (for officers). Officers and directors are presumed to have followed a process in arriving at decisions that was in good faith pursuant to the exercise of ordinary care. That presumption, however, may be rebutted by evidence that such process constitutes gross negligence, meaning that process followed by the officer or director was a "gross deviation of the standard of care of a [director or officer] in a like position under similar circumstances." O.C.G.A. § 14-2-830(c) (for directors); O.C.G.A. § 14-2-842(c) (for officers).

Under Georgia law, an officer or director has a statutory right of reliance. In the performance of duties, an officer may rely upon other officers, employees, or agents of the corporation whom the officer or director "reasonably believes to be reliable and competent in the functions performed." The officer or director may also rely upon "[i]nformation, data, opinions, or statements provided" by employees of the corporation, legal counsel, public accountants, or others as to "matters involving the skills, expertise, or knowledge reasonably believed to be

[19] Georgia law also recognizes a duty of candor, but the Demand Letter does not suggest a violation of that duty as it concedes that the information regarding Mr. Amos's sale of stock was timely revealed through the Form 4 filed with the SEC.

reliable and within such person's professional or expert competence." O.C.G.A. § 14-2-830(b) (for directors); O.C.G.A. § 14-2-842(b) (for officers).

Georgia also recognizes the business judgment rule, which protects officers and directors from liability for good faith business decisions made in an informed and deliberate manner. As explained in *Fed. Deposit Ins. Co. v. Loudermilk*, the business judgment rule

> generally precludes claims against officers and directors for their business decisions that sound in ordinary negligence, except to the extent that those decisions are shown to have been made without deliberation, without the requisite diligence to ascertain and assess the facts and circumstances upon which the decisions are based, or in bad faith. Put another way, the business judgment rule at common law forecloses claims against officers and directors that sound in ordinary negligence when the alleged negligence concerns only the wisdom of their judgment, but it does not absolutely foreclose such claims to the extent that a business decision did not involve 'judgment' because it was made in a way that did not comport with the duty to exercise good faith and ordinary care.

295 Ga. 579, 585–86 (2014).

b) *Duty Of Loyalty*

Directors and officers must also discharge their duties in good faith. *See* O.C.G.A. §§ 14-2-830; 14-2-842. The duty of loyalty prohibits directors and officers from preferring their own interests to the interests of the corporation or using their role as directors or officers to obtain a personal advantage for themselves at the expense of the shareholders. They cannot engage in direct competition with the corporation, engage in self-dealing, commingle the corporation's assets and records with their own, or usurp "corporate opportunities" belonging to the corporation. *See Enchanted Valley RV Resort, Ltd. v. Weese*, 241 Ga. Ct. App. 415, 422 (1999) (commingling of funds and records violates the duty of loyalty); *Brewer v. Insight Tech., Inc.*, 301 Ga. Ct. App. 694, 697-98 (2009) (explaining corporate opportunity doctrine). Specifically with respect to stock transactions, a director's duties of loyalty and good faith require the director to treat all of the corporation's shareholders fairly, protect their investments, and manage the

corporation prudently for the benefit of all shareholders. *See Comolli v. Comolli*, 241 Ga. 471, 474 (1978).

2. Relevant Limitations On Director Liability

In addition to the protections the business judgment rule affords, the Georgia Code permits Georgia corporations in their articles of incorporation to limit or eliminate the personal liability of their directors to the corporation or its shareholders in certain circumstances. O.C.G.A. § 14-2-202. Specifically, an exculpatory clause enacted pursuant to Section 202 may eliminate a director's personal liability to shareholders for money damages. O.C.G.A. § 14-2-202(b)(4). In addition, a Georgia corporation is authorized to indemnify directors, officers, employees, and agents, subject to similar limitations. *See generally* O.C.G.A. §§ 14-2-851 *et seq*. Additionally, O.C.G.A. § 14-2-852 grants directors and officers a statutory right to mandatory indemnification both for their obligation to pay judgments, settlements, fines, penalties, and defense costs reasonably incurred in connection with the proceeding if that individual is "wholly successful, on the merits or otherwise" in defending a proceeding. This right accrues both in litigation brought by or in the right of the corporation and litigation brought by third parties.

There are exceptions to these protections. A director or officer cannot be exempted from liability arising from (1) misappropriation of corporate opportunities; (2) intentional misconduct and knowing violations of law; (3) unlawful distributions as defined in O.C.G.A. § 14-2-832; or (4) transactions in which the director received an improper personal benefit." *See id.* §§ 14-2-856 (for directors); 14-2-857 (for officers). Furthermore, a Georgia corporation cannot attempt to limit a director's liability for violations of the duty of loyalty in the same manner that it can limit liability for violations of the duty of care. *See* O.C.G.A. §§ 14-2-856 (for directors); 14-2-857 (for officers) (permitting a corporation to exculpate directors for certain types of conduct,

but not for conduct that results in the director obtaining an improper personal benefit). A corporation also may not indemnify a director or officer for such conduct. *See id.*

The Company's Articles of Incorporation mirror the Georgia protections and limitations. Specifically, the Articles state:

> No director shall be personally liable to the corporation or its stockholders for monetary damages for any breach of duty of care or other duty as a director. Notwithstanding the foregoing, a director shall be liable to the extent provided by applicable law: (i) for the appropriation in violation of his duties of any business opportunity of the corporation; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) for any action for which the director could be found liable pursuant to Section 14-2-154 of the Official Code of Georgia Annotated, or any amendment thereto or successor provision thereto; and (iv) for any transaction from which the director derived an improper personal benefit.

[App. 37, Amendment to the Articles of Incorporation, dated April 25, 1988.]

Article VII of the Company's Bylaws also provide for indemnification of any director, officer, employee or agent who:

> was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding (including, but not limited to, any action, suit, or proceeding by or in the right of the Corporation), whether civil, criminal, administrative or investigative, by reason of the fact that he is or was a director, advisory director, officer, employee or agent of the Corporation or is or was acting at the request of the Corporation.

[App. 38, Amended and Restated Bylaws Article VII, Section 1.] In addition, Article VII provides that the Company "shall advance expenses to such person reasonably incurred in connection therewith, to the fullest extent permitted[.]" [*Id.*, at Article VII.] The provisions relating to indemnification and advancement in the Company's Bylaws generally track the language of the Georgia Code and indicate an intent that the Company be permitted to indemnify its directors and officers to the maximum extent permitted by Georgia law.

3. Insider Trading Under Federal Law

A corporate "insider" such as a director or officer violates Section 10(b) and Rule 10b-5 when he trades the securities of a corporation while in possession of material, nonpublic information. *See Chiarella v. United States*, 445 U.S. 222, 246–49 (1980) (insiders are under a duty to either disclose all material, nonpublic information or to abstain from trading in the securities of their corporation); *see also United States v. O'Hagan*, 521 U.S. 642, 643 (1997) (citing *Chiarella*, 445 U.S. at 228–229, as the source of the "classical" or "traditional" theory of insider trading liability). To prevail in a section 10(b) civil action for violation of Rule 10b-5(b), a plaintiff must prove: "(1) a material misrepresentation or omission by the defendant, (2) scienter, (3) a connection between the misrepresentation or omission and the purchase or sale of a security, (4) reliance upon the misrepresentation or omission, (5) economic loss, and (6) loss causation." *Ledford v. Peeples*, 657 F.3d 1222, 1248 (11th Cir. 2011). With respect to pleading an insider trading claim under Rule 10b–5, a plaintiff must allege "(1) that the defendant traded on the basis of material, non-public information, (2) that the defendant knew the information was material and non-public (scienter), and (3) that the plaintiff traded contemporaneously with the defendant." *Edward J. Goodman Life Income Tr. v. Jabil Circuit, Inc.*, 595 F. Supp. 2d 1253, 1287 (M.D. Fla. 2009), *aff'd*, 594 F.3d 783 (11th Cir. 2010); *see also* 15 U.S.C. § 78t–1(a).

Information is material if there is a substantial likelihood that a reasonable shareholder would consider it important in making an investment decision. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). The SEC's Regulation FD includes examples of material information (*e.g.*, earnings info, change in assets, new products/discoveries, change in control, or events regarding a company's securities). *See* Selective Disclosure and Insider Trading, Exchange Act Release No. 33-7881, 65 Fed. Reg. 51716 (Aug. 24, 2000),

http://www.sec.gov/rules/final/33-7881.htm (adopting, among other things, Regulation FD and Exchange Act Rule 10b5-2).

Outside of the SEC's Regulation FD, there can be special circumstances giving rise to information being material, and courts will make such a determination on a case-by-case basis. *Basic v. Levinson*, 485 U.S. 224, 238–40 (1988) (endorsing a fact-specific approach to determining the materiality of information regarding merger discussions); *United States v. Smith*, 155 F.3d 1051, 1066 (9th Cir. 1998) (stating that determining materiality requires a "nuanced, case-by-case approach"). In *Basic*, the Court held that to fulfill the materiality requirement "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic*, 485 U.S. at 231–32 (citation omitted). The test is not whether the fact might have some hypothetical significance. Instead, the materiality standard requires showing that there is a substantial likelihood that, under all the circumstances, the fact "would have assumed actual significance in the deliberations of a reasonable investor." *SEC v. Hoover*, 903 F. Supp. 1135, 1146 (S.D. Tex. 1995) (finding that a zero to two percentage point estimated downward revision of the estimated year-end earnings is not material as a matter of law) (citation omitted).

The Eleventh Circuit defines scienter as "a mental state embracing intent to deceive, manipulate, or defraud" and necessarily requires that the insider have possession of material, nonpublic information at the time the insider trades. *S.E.C. v. Adler*, 137 F.3d 1325, 1340 (11th Cir. 1998). Further, according to the United States Supreme Court, in addition to proving scienter, the fiduciary must *use* the information to purchase or sell the security. *O'Hagan*, 521 U.S. at 682 ("the fiduciary's fraud is consummated, not when the fiduciary gains the confidential

information, but when . . . he *uses* the information to purchase or sell securities.") (emphasis added). Indeed, the Eleventh Circuit also has held that a fiduciary must actually use the material, nonpublic information when trading. *See Fried v. Stiefel Laboratories, Inc.*, 814 F.3d 1288, 1295 (11th Cir. 2016) ("This Circuit has stated that the mere possession of material nonpublic information is not sufficient to establish liability for insider trading; an insider must use that information[.]"); *Adler*, 137 F.3d at 1337 ("We believe that the use test best comports with precedent and Congressional intent, and that mere knowing possession … is not a per se violation.").

Finally, to satisfy the contemporaneous requirement of § 20A(a), a plaintiff must have had some relationship with the securities purchaser or seller (*i.e.*, the direct counterparty to the trade) and must have traded contemporaneously with the insider. *See In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1205 (C.D. Cal. 2008). However, neither the Securities Act nor the rules or regulations define "contemporaneously." A court in the Eleventh Circuit has found that "[a] strict interpretation of 'contemporaneously' includes only trades on the same day. A more lenient interpretation defines 'contemporaneously' to include trades within several days of each other." *Edward J. Goodman Life Income Tr.*, 595 F. Supp. 2d at 1287. The requirement of a contemporaneous transaction roughly approximates privity, therefore the insider must have sold his securities before the outsider purchased in order to show that the trade was essentially between them. *In re Countrywide Fin.*, 588 F. Supp. 2d at 1204.

4. Insider Trading Claim Under State Law

To state a claim for securities fraud under Georgia law, a plaintiff must prove that (a) by means of an untrue statement of a material fact or omission to state a material fact, (b) he or she purchased or sold a security, and (c) the plaintiff could not have known of the untruth or

omission in the exercise of reasonable care. *See* O.C.G.A. § 10-5-58. Georgia law is silent, however, on whether there is a state law cause of action by a corporation against an officer or director for securities fraud, or, more specifically, insider trading. Many states have rejected such claims on the basis that federal securities law already provides a remedy, or on the basis that an insider's trades do not *per se* harm the corporation.[20] But courts applying Delaware, New York,[21] and New Jersey[22] law have permitted such claims to proceed. As Georgia law is silent

[20] *See, e.g.*, *Brosz v. Fishman*, 99 F. Supp. 3d 776, 787 (S.D. Ohio 2015) (applying Ohio law and dismissing plaintiff's complaint with prejudice where complaint alleged only conclusory allegations of direct harm to company resulting from the alleged insider trading); *In re Cray Inc.*, 431 F. Supp. 2d 1114, 1133 (W.D. Wash. 2006) (granting defendants' motion to dismiss and concluding that "Washington state courts would decline to adopt a common law derivative claim for insider trading where there is no allegation of damage to the nominal defendant corporation); *Freeman v. Decio*, 584 F.2d 186, 188, 192–95 (7th Cir. 1978) (applying Indiana law and finding that a derivative suit may not be maintained against corporate officers and directors to recover profits for insider trading and dismissed the claim because (1) there were no damages to the corporation and (2) defendants would be subject to double liability given the availability of a 10b-5 claim); *Frankel v. Slotkin*, 795 F. Supp. 76, 80–81 (E.D.N.Y. 1992), *aff'd*, 984 F.2d 1328 (2d Cir. 1993) (granting defendants' motion for summary judgment in purported derivative action against alleged inside traders); *Schein v. Chasen*, 313 So. 2d 739, 746 (Fla. 1975) ("We adhere to previous precedent established by the courts in this state that actual damage to the corporation must be alleged in the complaint to substantiate a stockholders' derivative action. . . . Thus, in order for a complaint to state a cause of action entitling the stockholder to relief, it must allege two distinct wrongs: the act whereby the corporation was caused to suffer damage, and a wrongful refusal by the corporation to seek redress for such act.").

[21] In *Diamond v. Oreamuno*, 248 N.E.2d 910 (N.Y. Ct. App. 1969), a New York court recognized such a claim essentially finding that while a corporation may not be directly harmed by the insiders' trades, the reputational harm to the corporation is sufficient to support the claim. *Id.* at 912 (finding insiders' liable for breach of fiduciary duty for trade based on nonpublic information regardless of any showing that the corporation had actually been harmed by the trading other than harm to the corporation's "interest in maintaining a reputation of integrity, an image of probity, for its management and in insuring the continued public acceptance and marketability of its stock.").

[22] A federal district court, applying New Jersey law, recognized a fiduciary duty claim for insider trading, and rejected the notion that federal securities law provided sufficient protection. Yet, the court also stated that corporate recovery for insider trading is a "tort claim, requiring a showing of a duty, a breach, an injury, and causation," and suggested that harm to corporate goodwill might suffice. *In re ORFA Sec. Litig.*, 654 F. Supp. 1449, 1458 (D.N.J. 1987).

on the issue, a Georgia court may look to Delaware law for guidance. *See, e.g.*, *James & Jackson LLC v. Holyfield*, No. 206CV124372, 2009 WL 7479360 (Ga. Super. Ct. May 7, 2009) (looking to Delaware law for the scope of recovery for a breach of duty of loyalty); *see also* Questioning Authority: The Critical Link between Board Power and Process, 38 J. Corp. L. 1, 3 (Fall 2012) (Noting that Delaware's "corporate law enjoys quasi-national authority within the United States"); *Mullen v. Acad. Life Ins. Co.*, 705 F.2d 971, 973 n.3 (8th Cir. 1983) ("[C]ourts of other states commonly look to Delaware law . . . for aid in fashioning rules of corporate law."). It is unclear, however, whether a Georgia court would do so regarding this issue given that, in some instances, Georgia courts have chosen not to follow Delaware law. *Compare Dunn v. Ceccarelli*, 227 Ga. Ct. App. 505, 510 (1997) (concluding that the doctrine of futility is not applicable to Georgia derivative claims), *with Moran v. Household Int'l.*, 490 A.2d 1059, 1071 (Del. Ch. 1985) (finding plaintiff's claim established futility of demand), *disapproved of on other grounds in Tooey v. Donaldson, Lufin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004). *See also Boone v. Corestaff Support Servs., Inc.*, 805 F. Supp. 2d 1362, 1370 (N.D. Ga. 2011) (declining to apply Delaware law where a non-compete provision violates Georgia's public policy).

Delaware courts recognize derivative claims against corporate insiders accused of insider trading for breach of the duty of loyalty. Known as a "*Brophy*" claim, after the 1949 case that first recognized it as a cause of action in Delaware, *Brophy*, 70 A.2d 5, in order to recover on a claim for a breach of the duty of loyalty based on alleged insider trading, a plaintiff must show that "(1) the corporate fiduciary was in possession of material, nonpublic company information, and (2) the corporate fiduciary used that information in making trades and was motivated, in whole or in part, by the substance of that information." *In re Primedia, Inc. S'holders Litig.*, 67 A.3d 455, 470, 478 (Del. Ch. 2013). Loss or damage to the corporation need not be alleged to

sustain the claim.[23] *Kahn v. Kolberg Kravis Roberts & Co.*, 23 A.3d 831, 840 (Del. 2011) ("actual harm to the corporation is not required for a plaintiff to state a claim").[24] Were a corporation to successfully assert such a claim, it could be entitled to disgorgement and the costs and expenses relating to regulatory, criminal, and civil proceedings initiated as a result of the fiduciary's misconduct. *See Kahn*, 23 A.3d 831 at 840.

B. Issues Raised In The Demand Letter

The Special Committee understands the Demand Letter to raise the following issues:

- First, does the Company have a claim against Paul Amos for violation of federal securities law as a result of his sale of Company shares on June 12, 2017?
- Second, did Paul Amos breach his fiduciary duties by selling Company stock on June 12, 2017?
- Third, did Paul Amos breach his fiduciary duties by not doing more in response to Mr. Conroy's e-mail purportedly regarding the AWP metric in March 2010?[25]

[23] *Brophy*, 70 A.2d at 246 ("Loss or damage to the corporation cannot be inferred from these general allegations. . . . But that conclusion does not determine the case. In equity, when the breach of a confidential relation by an employee is relied on and an accounting for any resulting profits is sought, loss to the corporation need not be charged in the complaint. . . ."Public policy will not permit an employee occupying a position of trust and confidence toward his employer to abuse that relation to his own profit, regardless of whether his employer suffers a loss.").

[24] Delaware courts do not see the fact that federal securities law addresses insider trading as an impediment to a state law claim. *Kahn*, 23 A.3d 831 at 840 ("[W]e find no reasonable public policy ground to restrict the scope of disgorgement remedy in *Brophy* cases – irrespective of arguably parallel remedies grounded in federal law."

[25] Although the Demand Letter does not expressly demand that the Company bring an action against Paul Amos relating solely to his alleged involvement in the claimed AWP manipulation, the Demand Letter states that Paul Amos knew of "the AWP scheme," that he was "one of the subjects of our allegations," and that the Company should pursue an action for damages against him. While less than clear, the Special Committee considered the Demand Letter to allege that Paul Amos breached his fiduciary duties with regard to the alleged manipulation of the AWP metric.

- Fourth, is it in the Company's best interest to pursue an action against Paul Amos?

The Special Committee's ultimate task is to determine whether it is in the best interest of the Company to take the remedial actions demanded by Mr. Joffe in the Demand Letter, or some other action, in light of all the circumstances.

Issue #1: Does the Company have a claim against Paul Amos for violation of federal securities laws as a result of his sale of Company shares on June 12, 2017?

First, the Company does not have a viable claim for violation of federal securities law against Paul Amos arising from his sale of Company shares on June 12, 2017. To bring such a claim, the Company would need to show that: (i) Paul Amos sold the stock, while in possession of material, nonpublic information; (ii) Paul Amos acted with scienter; (iii) he used the material, nonpublic information in making the sale; and (iv) the Company contemporaneously bought the stock that Mr. Amos sold. The fact that Paul Amos had little to no involvement in or knowledge of the underlying allegations and the investigation of those allegations likely will prevent any ability to establish scienter. In addition, the Company would have a difficult time establishing that Mr. Joffe's allegations (or the Company's investigation) represented material, nonpublic information. Moreover, Mr. Amos could effectively defend against any attempt to do so with a valid estoppel defense. Indeed, the Company itself did not consider the allegations to be material, and cleared Mr. Amos to make the disputed trade. Finally, while the Company repurchased stock during the month of June, 2017, none of the trades were on June 12. While there is no set definition of what it means to be a contemporaneous trade, Mr. Amos would likely point to case law requiring the trade to occur on the same day as the challenged stock sale.

1. Scienter / Use

The Special Committee finds that, if it were to bring an action, it would not be able to establish the intent elements of the claim. In other words, to prevail, the Company would have to show Paul Amos had an intent to deceive, had possession of material, nonpublic information at the time of the trades, and used that information when he traded. *See Adler*, 137 F.3d at 1340.

But the Company would not be able to prove an intent to deceive. Paul Amos had minimal knowledge of the allegations, and the information that he had was that the Company did not consider the allegations material. He had no reason to be concerned that a public disclosure was forthcoming and that the price of the stock was due to decline.

Indeed, the stock price has risen since the sale. [App. 39, Bloomberg Stock Price Report, dated September 19, 2017.] Moreover, the Company repurchased over 600,000 shares in the month of June 2017 and over 2.7 million shares from July 2017 through September 15, 2017. Even after Mr. Joffe sent the Demand Letter to the Company, the Company still continued to repurchase shares. The fact of a share repurchase often is evidence that the Company considers the share price to be undervalued, not inflated. "[S]tock repurchase programs actually *negate* a finding of scienter." *Plumbers & Pipefitters Local Union 7119 Pension Fund v. Zimmer Holdings, Inc*., 673 F. Supp. 2d 718, 749 (S.D. Ind. 2009) (alteration in original) (citation omitted), *aff'd*, 679 F.3d 952 (7th Cir. 2012); *see also McNamara v. Pre–Paid Legal Servs., Inc*., 189 F. App'x. 702, 718 (10th Cir. 2006) (finding the complaint insufficiently pled scienter because it was "lacking in allegations" demonstrating the defendants' alleged fraud was "economically logical in light of [the company's] repurchase of its own stock at allegedly inflated prices" and failed to allege that the accounting violations were the result of an intent to mislead investors).

In addition, the Company will have a difficult time showing an intent to deceive because Mr. Amos was transparent with the Company regarding his desire to sell. Mr. Amos, in seeking permission from the Company to trade, was in no way hiding his trading behavior from the Company.

Finally, Paul Amos did not use any information regarding Mr. Joffe's allegations or the Company's investigation in selling his shares. First, it is axiomatic that one cannot use what one does not have. Here, Mr. Amos did not have knowledge of any impending disclosure that may affect the stock price, as there was no impending disclosure planned. Mr. Joffe suggests that Paul Amos's departure from the Company was as a result of the investigation into the allegations and therefore (Mr. Joffe suggests) is proof that the allegations had merit, were material, and (presumably) would soon be publicly disclosed. But every director we questioned, as well as Paul Amos, Dan Amos, and Audrey Tillman, confirmed that Paul Amos's resignation had nothing to do with Mr. Joffe's allegations. Second, Paul Amos confirmed that Mr. Joffe's allegations were not a factor in his decision to sell his shares. As Mr. Amos explained, he sold the shares at issue because of his desire for liquidity and diversification, coupled with the requirement in his separation agreement that he exercise his remaining stock options within three months of the resignation. The Special Committee has seen no evidence to suggest any other motive.

2. Materiality

The Company would face a challenge in proving that Mr. Joffe's allegations and the Company's investigation thereof rise to the level of materiality necessary to state a claim for

insider trading.[26] As a threshold matter, the mere fact that someone alleges misconduct does not establish that the allegations are material. *See, e.g.*, *SEC v. Reyes*, 491 F. Supp. 2d 906, 912 n. 6 (N.D. Cal. 2007) (stating that simply alleging misstatements were made "is a woefully insufficient basis for finding that the misrepresentations are 'material' as a matter of law. If a misrepresentation is material simply because it is a misrepresentation, then the law's materiality requirement is altogether meaningless."); *see also In re Westinghouse Sec. Litig.*, 90 F.3d 696, 714 (3d Cir.1996) (holding that when the financial import of alleged misstatements is *de minimis*, those alleged misstatements are immaterial as a matter of law). Rather, in order to be material, the demand claimants would have to prove that the nonpublic information "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic*, 485 U.S. at 231–32. Here, Mr. Joffe has failed to quantify any purported impact his allegations have from a damages perspective. This alone is fatal to his claim that by virtue of Paul Amos's (alleged) knowledge of Mr. Joffe's allegations, he per se had knowledge of ***material***, nonpublic information. *See Alaska Elec. Pension Fund v. Adecco S.A.*, 434 F. Supp. 2d 815, 822 (S.D. Cal. 2006) (holding that in the absence of any allegations quantifying the financial impact, plaintiff failed to "allege enough to allow a court to discern whether the alleged GAAP violations were minor or technical in nature, or whether they constituted widespread and significant inflation of revenue.").

[26] Although the Company has not disclosed Mr. Joffe's allegations in its public statements, there is still a potential argument that the allegations may be publicly known. Mr. Joffe expressed his opinion during a telephone conference with counsel for the Special Committee that the alleged abuses set forth in the December Letter were widely known among the associates, who are classified by the Company as independent contractors. Mr. Conroy also has been quite vocal in social media about his allegations of wrongdoing at the Company. [App. 40, Martin Conroy Facebook Post dated June 9, 2017.]

Indeed, alleged examples of wrongdoing that do not impact the Company's financial statements, but rather are operational complaints, generally are not the sort of information that a reasonable investor would view as having significantly altered the total mix of information made available. In other words, operational complaints (and the investigations regarding such complaints) are not necessarily material. *See Day v. Staples, Inc.*, 555 F. 3d 42, 56 (1st Cir. 2009) (stating that a disagreement with management about an internal tracking system that is not reported to shareholders is not actionable as it does not meet the basic securities fraud element); *In re Sanofi Securities Litig.*, 155 F. Supp. 3d 386, 407 (S.N.D.Y. 2016) (stating that an argument that defendants misrepresented material facts by failing to disclose an internal investigation was not compelling because "whatever internal investigation took place – if any – did not uncover any unlawful activity of a material proportion.").

Many of Mr. Joffe's allegations describe episodic issues, some of which occurred several years ago. The allegations related to the alleged fraudulent recruiting, for example, concern purported misrepresentations made to a group of unnamed recruits to encourage them (allegedly) to enter into an independent contractor agreement with the Company. Likewise, another allegation concerning the Sergeants' Benevolent Association account involved an alleged error in signing up some police officers who were not Sergeants for a policy reserved for only for Sergeants. According to Mr. Dowless, the Company determined that some police officers had been signed up in error, but the Company has taken remedial action. With regard to the alleged earnings manipulation, Mr. Joffe is confusing the time period used for a sales cycle with the time period used for financial reporting. 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. According to various witnesses, this is not an uncommon practice in the insurance industry. According to Mr. Barnett, the Company spends a great deal of time planning out these production years well in advance. Further, Ms. Ruckert explained that, in 2015, the Company left the sales calendar open for nine days, but did so with formal approval and in connection with its usual process. In any event, according to Ms. Ruckert, the nine day extension affected the sales data in 2015, but not the Company's numbers used for revenue reporting. As a result, the Company's earnings were unaffected, and, therefore, this allegation is not material.

Finally, as discussed above, the allegations related to the alleged manipulation of the AWP lack merit, and, in any event, do not rise to the level of materiality necessary to assert a claim for insider trading. Given that it is a non-GAAP measure, the AWP metric comprises a small piece of what analysts look at regarding future projections for the Company, and is of passing interest during analyst calls. Further, as discussed above, the Company records show that in the sample reviewed by the Special Committee's counsel, the act of assigning $1 of production credit to associates happened in less than 100 instances out of 112,815 producers.

In light of the foregoing, the Special Committee concludes that Mr. Joffe's allegations would not be viewed by a reasonable investor as impacting the total mix of information available. Indeed, the Company itself did not consider these allegations to be material, as evidenced by the fact that neither Paul Amos nor any other member of the Board or executive management was subject to a blackout related to Mr. Joffe's allegations when he traded on June 12, 2017.

Furthermore, any attempt by the Company to argue that such information is material will be met by a valid defense based on the doctrine of estoppel. Estoppel requires a statement or action, which is intended to influence another, and the other's reliance upon that statement or action ultimately to their detriment. *See Knox v. Wilson*, 286 Ga. 474, 476–77 (2010) (citing

Ward v. Morgan, 280 Ga. 569, 572 (2006)); *Robinson v. Boyd*, 288 Ga. 53, 58 (2010). A party may be entitled to a defense based on the doctrine of estoppel "when the representations or conduct of a party cause another party to act in reliance thereon to the latter's detriment." *Arrow Exterminators, Inc. v. Zurich Am. Ins. Co*., 136 F. Supp. 2d 1340, 1351 (N.D. Ga. 2001) (applying Georgia law) (*citing Carter v. Digby*, 244 Ga. Ct. App. 217, 219 n. 8 (2000); *Georgia Farm Bureau Mutual Ins. Co. v. Vanhuss*, 243 Ga. Ct. App. 26, 26 (2000); *Allstate Ins. Co. v. Sapp*, 223 Ga. Ct. App. 443, 444 (1996); *Adler's Package Shop v. Parker*, 190 Ga. Ct. App. 68, 73 (1989). The defense prevents a party "with full knowledge of the facts, who accepts the benefits of a transaction, contract, statute, regulation or order" from subsequently taking "an inconsistent position to avoid the corresponding obligations or effects." *DeShong v. Seaboard Coast Line R.R. Co.*, 737 F.2d 1520, 1522 (11th Cir. 1984).

On June 12, 2017, Jacob Anderson from Shareholder Services cleared Paul Amos to sell his shares. [App. 22, June 12, 2017 E-mail from Anderson to Loudermilk.] The Company knew how the trading procedures worked and would know that Paul Amos would likely trade following the pre-clearance. Paul Amos, in reliance on having received clearance to trade, did so on June 12. But for the pre-clearance, there is no reason to believe that Paul Amos would trade. According to Shareholder Services representatives, Paul Amos followed the Company's trading clearance procedures. Moreover, Paul Amos can argue that the mere fact of an open trading window is evidence that the Company did not consider the allegations to be material, nonpublic information. Accordingly, Paul Amos has a defense that he relied to his detriment on the Company's pre-clearance for his trade.

3. Contemporaneousness / Harm

In addition to being unable to prove Mr. Amos sold his Company stock while in possession of material, nonpublic information, Mr. Amos may have a viable argument that the Company lacks standing to bring an action for insider trading because the Company was not a counterparty to Mr. Amos's sale. According to Mr. Sumners, the first day the Company repurchased shares in June 2017 was on June 13, as well as several other dates thereafter. The Company did not repurchase shares on June 12, 2017, the date of Mr. Amos's stock sale. While many courts would consider sales on consecutive days to be contemporaneous, there are courts that require the sales to be on the same date. The courts who have adopted this same day standard have concluded that, where a large volume of securities are sold on a daily basis on a national exchange, plaintiffs could not have realistically traded with a given defendant unless they traded on the same day. *See, e.g., In re Aldus*, No. C92-885C, 1993 WL 121478, at *7 (W.D. Wash. Mar. 1, 1993) ("[G]iven the unquestionably high volume of Aldus stock traded daily during the period in question, it is clear that plaintiffs did not trade with defendants other than possibly Mr. McAleer, as no plaintiffs traded on the days of the allegedly wrongful trades."); *In re MicroStrategy Inc. Secs. Litig.*, 115 F. Supp. 2d 620, 663-64 (E.D. Va. 2000) (concluding "contemporaneous" means a one-day period, stating, "the modern realities of the securities markets support an increasingly strict application of contemporaneity in order at once to satisfy the requirement's privity-substitute function and to guard against making the insider liable to all the world. Specifically, as the temporal separation between the trades increases, the increasingly dynamic nature of the securities markets, when viewed in light of the trading activity of the securities involved and other circumstances in a particular case, correspondingly makes it less likely that a purchaser traded with the insider and, therefore,

suffered the disadvantage of trading with someone with superior access to information.") (internal quotations and citations omitted); *see also In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, & ERIS Litig*., 503 F. Supp. 2d 25, 47 (D.D.C. 2007) ("Based on a review of the existing case law, the Court is satisfied that this same day standard strikes a fair and feasible balance" making it possible for . . . persons to bring suit while preserv[ing] the notion that only plaintiffs who were harmed by the insider have a claim.") (internal citations and quotations omitted); *In re AST Research Sec. Litig*., 887 F. Supp. 231, 234 (C.D. Cal. 1995) ("Since the 'contemporaneous' concept acts as a proxy for common law privity, there must be some logical limit on those plaintiffs that can bring insider trading claims. The Court concludes that a same-day definition of 'contemporaneous' is proper—i.e., the sale by an insider and subsequent purchase by an aggrieved party must occur on the same day. The same day standard is the only reasonable standard given the way the stock market functions."); *In re Aldus Sec. Litig.*, 1993 WL 121478, at *7 (finding that plaintiffs lacked standing to assert insider trading claims where plaintiffs did not trade on the days of the allegedly wrongful trades); *In re Stratus Computer Litig*., Civ. A. 89-2075-Z, 1992 WL 73555, at *6 (D. Mass. Mar. 27, 1992) (only same day trades are contemporaneous); *Steamfitters Local 449 Pension Fund v. Alter*, No. 09-4730, 2011 WL 4528385, at *12 (E.D. Pa. Sept. 30, 2011) (finding that plaintiffs must plead that they purchased stock on the same dates on which the defendant's sales took place to meet the contemporaneous requirement) (*citing Copland v. Grumet*, 88 F. Supp. 2d 326, 338 (D.N.J. 1999) (finding that in order to satisfy the contemporaneous requirement, a plaintiff must plead that he or she bought stock on the same date on which the defendant's sale took place)); *In re Able Labs. Sec. Litig*., No. 05-2681, 2008 WL 1967509, at *27 (D.N.J. Mar. 24, 2008) ("This Court agrees with the reasoning of [the Northern District of California] and the other district courts noted

above regarding the need for a narrow definition of 'contemporaneous,' at least in a case, such as this, involving a publicly traded company with millions of outstanding shares. Therefore, in order to satisfy the contemporaneousness prong of section 20A, Plaintiff must allege that the insider trading occurred on the same day as Plaintiff's trade.").

Moreover, even if the sale by Mr. Amos and the Company's repurchase were considered to be contemporaneous, the Company would not be able to establish that it was harmed (that is, suffered loss causation or economic loss), a required element of all claims asserted under Section 10(b) of the federal securities laws, including insider trading claims. *In re Verisign, Inc., Derivative Litig.*, 531 F. Supp. 2d 1173, 1207–08 (N.D. Cal. 2007) (plaintiff must establish loss causation, or economic loss, to establish insider trading claim). In *Verisign*, plaintiffs alleged an insider trading claim derivatively on behalf of Verisign. Plaintiffs claimed that the corporation repurchased its shares at inflated prices and thus suffered harm. The court, however, rejected this argument on the grounds that the plaintiff failed to allege the stock declined in response to any corrective disclosure:

> In order to plead loss causation, a plaintiff need only allege that the loss resulted from a stock price drop caused by revelation of the "relevant truth"—that is, true facts about the Company's financial condition or performance that defendants had concealed. *Dura*, 544 U.S. at 342–46, 125 S.Ct. 1627. Plaintiffs assert, however, that it is not necessary that there be a true "corrective disclosure," but rather that the market could learn about the possible fraud through a number of sources spread out through a period of time, during an investigation or because of resignations. Plaintiffs claim that the allegations of market knowledge through the resignation of key directors, followed by a drop in the price of the stock, are sufficient to adequately allege economic loss.
>
> The court finds that the CAC fails to plead facts showing economic loss or loss causation. Indeed, as defendants have pointed out***, it is questionable whether plaintiffs will ever be able to allege loss causation, because VeriSign's stock price went up, not down***, after the June 27, 2006, announcement of the grand jury subpoena, the inquiry from the SEC, and the announcement of the internal review of stock option practices by VeriSign's board of directors. Similarly, the stock price went up, not down, after VeriSign's November 21 and

> 22, 2006, announcements of the preliminary results of the directors' review of the stock option grants, and its statement of its intent to restate its 2001–2005 financial statements to record $250 million in non-cash, stock-based compensation expense.

Id. at 1208 (emphasis added).

The facts in *Verisign* align with the facts here. Since the June 12, 2017 stock sale, the price of the Company's stock has steadily increased. From June through July 2017, the stock traded at or above $77.4043 per share, which is the sale price of the stock Paul Amos sold. Since late July through the time of this report, the stock price has increased from $77 per share to $83 per share on September 18, 2017. Similar to *Verisign*, it is unclear how a derivative plaintiff would ever show loss causation here. As an initial matter, nothing in the demand points to a corrective disclosure revealing the "relevant truth" for purposes of establishing loss causation. The demand claimants could assert that Paul Amos's separation from the company, similar to the assertion by plaintiffs in *Verisign*, is a form of corrective disclosure. But, as in *Verisign*, that argument would be suspect since the price of the Company's stock increased following that separation. At market close on June 12, 2017, the Company's market capitalization was $30,677,682,664. At market close on September 20, 2017, the day prior to this report, the Company's market capitalization was $33,167,625,988, increasing to $2,489,943,324 since Mr. Amos sold his shares. [App. 3, Excerpt of 2017 Second Quarter Form 10-Q (shares outstanding); App. 41, Yahoo Finance, Aflac Incorporated, https://finance.yahoo.com/quote/AFL/ (Sept. 21, 2017) (Previous Close: 83.92).] The absence of a market decline after Paul Amos's stock sale contradicts any inference that it was improperly inflated at the time of his sale. Also, the fact that the Company's market capitalization has increased by nearly $2.5 billion since the stock sale undercuts any inference that it was harmed by the sale. Without this showing of economic harm, or loss causation, an insider trading claim under federal law is not sustainable.

Issue #2: Did Paul Amos breach his fiduciary duties when he traded his shares of Company stock on June 12, 2017?

The Company likely does not have a viable state law claim against Paul Amos for insider trading. Such a claim would likely proceed as a breach of loyalty claim, but, thus far, no Georgia court has recognized such a breach of loyalty claim. Some state courts have rejected such claims, either finding the lack of damage to the corporation or the availability of a federal securities law claim to make such a state law fiduciary duty claim unnecessary. Some state courts, including Delaware courts, permit these claims, however, and Georgia frequently will follow Delaware's guidance on matters of corporate law. Accordingly, it is possible that a Georgia court will look to Delaware to analyze the viability of such a claim, but it is not clear that Georgia will adopt Delaware's approach. In any event, if Georgia follows Delaware's lead, the Company would still need to prove the intent and that Paul Amos used the material nonpublic information in selling his shares, which, as discussed above, is not likely to be successful.

Issue # 3: Did Paul Amos breach his fiduciary duties in connection with his involvement regarding the AWP manipulation in March 2010?

The Special Committee also finds that the Company would be unlikely to prevail in a breach of fiduciary duty claim against Paul Amos relating to his alleged participation in the purported manipulation of the AWP metric. The Special Committee finds no basis for such a claim.

To state a claim for a breach of fiduciary duty, a plaintiff must prove: (a) the existence of a fiduciary duty; (b) a breach of that duty; and (c) damage proximately caused by the breach. *Knieper v. Forest Grp. USA, Inc.*, No. 4:15-CV-00222-HLM, 2017 WL 3446538, at *6 (N.D. Ga. July 13, 2017) (citing *Bienert v. Dickerson*, 276 Ga. Ct. App. 621, 623 (2005)); *see also Tante v.*

Herring, 264 Ga. 694, 694 (1994) (setting forth elements necessary to state a cause of action in tort: duty, breach, damage proximately caused by the breach).

In addition to its factual finding that the AWP allegations are without merit, the Special Committee does not believe that there is a viable breach of the duty of care here. There is no evidence to suggest that Paul Amos did anything other than exercise his business judgment, which is a defense to a duty of care claim. At most, the only evidence against Mr. Amos is that Mr. Joffe claims he ignored or dismissed an e-mail Mr. Conroy sent him purportedly warning of the potential to manipulate the AWP metric. This e-mail, as discussed above, is quite lengthy. Mr. Conroy housed his complaint about AWP among numerous complaints about changes to his bonus structure. The Special Committee has not seen evidence that would elevate Mr. Amos's response to this e-mail to a breach of fiduciary duty.

In addition, the Special Committee does not see the validity of a breach of loyalty claim. The Special Committee found no evidence of self-dealing or any other benefit that Paul Amos would derive from the alleged "scheme." The Special Committee's investigation revealed that the AWP metric did not directly impact Mr. Amos's compensation. Indeed, according to Mr. Barnett, the AWP metric was never a factor in Mr. Amos's compensation, and Mr. Amos confirmed that he did not believe the AWP metric was a factor. [*See also* App. 2, 2017 Proxy Statement (Mr. Amos's compensation was comprised of three key elements: (a) base salary; (b) Management Incentive Plan; and (c) Long-term incentives, none of which reference the AWP metric as a component).] As such, Mr. Amos's compensation did not appear to vary because he allowed the metric to stay in place. Therefore, Mr. Amos cannot be said to have engaged in any kind of self-dealing or obtained a personal advantage for himself in violation of his duties of care and loyalty.

Finally, the Special Committee finds that the Company cannot prove damages as a result of any breach as there have been no identifiable losses resulting from this alleged manipulation. As discussed previously, the insignificant impact of the purported manipulation indicates that the Company would not have suffered any harm as a result. Further, Mr. Amos did not profit from any purported manipulation in any way, much less to the Company's detriment.

In any event, to the extent he had any involvement in the issues Mr. Joffe raised, that involvement was in 2010. The four-year statute of limitations for a derivative claim against Mr. Amos has expired. *See* O.C.G.A. § 14-2-831.

Item #4: Is it in the Company's best interests to pursue an action against Paul Amos?

The Special Committee's ultimate task is to determine whether it is in the best interests of the Company to pursue a derivative action against Mr. Amos, or some other remedial action, in light of all circumstances. In addition to the legal considerations, the Special Committee may also consider any involved "ethical, commercial, promotional, public relations, employee relations, and fiscal factors." *See Peller v. The Southern Co*., 707 F. Supp. 525, 530 (N.D. Ga. 1988) (*citing Kaplan v. Wyatt*, 484 A.2d 501, 508–09 (Del. Ch. Ct. 1985) ("the rationale to be applied at the second step is that of public policy and the spirit of the law as well as, from a pure business standpoint, the overriding best interests of the corporation and its shareholders when weighing a good faith recommendation of dismissal made by the independent Committee . . . [i]n applying its own independent business judgment to this second-step analysis . . . it is necessary that the Court, in addition to considering matters of law and public policy, consider also such ethical, commercial, promotional, public relations, employee relations and fiscal factors as may be involved in a given situation.") (*citing Zapata v. Maldonado*, 430 A.2d 779, 788 (Del. 1981) ("we recognize that the final substantive judgment whether a particular lawsuit should be

maintained requires a balance of many factors ethical, commercial, promotional, public relations, employee relations, fiscal as well as legal.")).

As explained earlier, the Special Committee has concluded that the various claims falling within a plain reading of the Demand Letter are without merit and finds that the alleged misconduct has not caused harm to the Company. For these reasons, the Special Committee concluded that the prosecution of these claims is not in the best interests of the corporation.

Additionally, the Special Committee also concludes that, based on a cost-benefit analysis, the pursuit of these claims is not in the best interests of the Company. As an initial matter, the Company would likely incur substantial legal expenses in connection with the pursuit of this claim. *See Abella v. Universal Leaf Tobacco Co*., 546 F. Supp. 795, 801 n.13 (E.D. Va. 1982) (noting that committee concluded that the benefit to be derived from a successful decision on the merits was outweighed by, inter alia, the "[l]arge attorneys' fees and expenses"); *Mills v. Esmark, Inc.*, 573 F. Supp. 169, 172 n.2 (N.D. Ill. 1983) (noting committee's recommendation to seek dismissal based on, inter alia, the "cost of pursuing the claims"); *Lewis v. Fuqua*, 502 A.2d 962, 971 (Del. Ch. 1985) (observing expense was one of the "decisive factors" in committee's recommendation that the company move for dismissal of the derivative action). Furthermore, the Company would also be obligated to advance expenses on behalf of Paul Amos for his legal fees and expenses arising from his defense of the derivative claims. *See Lewis*, 502 A.2d at 971 (citing possible obligation to indemnify the defendant directors among the "decisive factors" in committee's recommendation that the corporation move for dismissal of the derivative litigation).

Additionally, the Special Committee also finds that the prosecution of these claims would likely be an unnecessary distraction to the officers' and directors' abilities to manage the corporation. *Abella*, 546 F. Supp. at 801 n.13 (E.D. Va. 1982); *see also Stein v. Bailey*, 531 F.

Supp. 684, 690 (S.D.N.Y. 1982) (considering, *inter alia*, the cost of litigation in terms of its "disruption of management"); *Lewis*, 502 A.2d at 971 (finding that disruptive effect on corporate management was one of the "decisive factors" in committee's recommendation that the corporation move for dismissal of the derivative action).

Given the low, if non-existent, probability of any recovery together with, at best, a meager recovery based upon the conduct referenced in the Demand Letter, the Special Committee concludes the costs of the prosecution of these claims far outweighs any potential benefits. *See Lewis*, 502 A.2d at 971 (noting that the low probability of recovery and the possibility of a meager recovery were among the "decisive factors" in committee's recommendation that the corporation move for a dismissal of the derivative action); *Mills v. Esmark, Inc.*, 544 F. Supp. 1275, 1282 n.2 (noting committee's determination that continuation of the litigation would not advance the best interests of the corporation was based on, *inter alia*, the committee's conclusion that the corporation's "chance of succeeding on the merits . . . would be too small to justify the expenditure of substantial legal fees").

VII. CONCLUSION

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

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