



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CITY OF MONROE EMPLOYEES'
RETIREMENT SYSTEM, derivatively on
behalf of TWENTY-FIRST CENTURY
FOX, INC.,

Plaintiff,

v.

RUPERT MURDOCH, LACHLAN
MURDOCH, JAMES MURDOCH,
CHARLES G. CAREY, DAVID F.
DEVOE, RODERICK I. EDDINGTON,
ROGER S. SILBERMAN, JACQUES A.
NASSER, JAMES W. BREYER,
JEFFREY W. UBBEN, VIET DINH,
DELPHINE ARNAULT, TIDJANE
THIAME, AND THE ESTATE OF
ROGER AILES,

Defendants,

and

TWENTY-FIRST CENTURY FOX,
INC.,

Nominal Defendant.

C.A. No. 2017-0833-AGB

**PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR
PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT
AND ENTRY OF SCHEDULING ORDER**

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Plaintiff City of Monroe Employees' Retirement System, derivatively on behalf of Twenty-First Century Fox, Inc., submits this brief in support of Plaintiff's Motion for Preliminary Approval of Proposed Settlement and Entry of Scheduling Order.

I. INTRODUCTION

On July 6, 2016, Gretchen Carlson ("Carlson"), former co-host of the highly-rated "Fox and Friends" morning show, sued Roger Ailes, the former Chief Executive Officer of Fox News ("Fox News"), Twenty-First Century Fox, Inc.'s ("21CF" or the "Company") prized subsidiary, for sexual harassment and wrongful termination. Carlson's lawsuit unleashed a torrent of allegations of sexual misconduct, racial discrimination, and retaliation within Fox News, resulting in the disclosure of prior settlements of sexual harassment claims lodged by Fox News employees, and myriad additional lawsuits against the Company and Fox News.

Carlson's lawsuit, and the resulting public disclosures regarding Ailes, its highest-profile talent, Bill O'Reilly ("O'Reilly"), and other Fox News employees depicted a toxic culture within Fox News that festered over many years. The proposed settlement here (the "Settlement") is the product of fifteen months of discovery, and complex arm's length settlement negotiations conducted out of the public eye and overseen by a nationally known and highly respected former federal

judge. If approved and implemented, the Settlement would provide significant compensation for damages incurred by the Company arising from the alleged misconduct at Fox News. More importantly, the Settlement would implement significant corporate changes to effect a fundamental transformation of that culture going forward. This will ensure that the kind of wrongdoing that went unchecked in the past will not repeat itself.

Over the last year, the Company has produced over 13,000 pages of discovery to Plaintiff in response to an inspection demand made pursuant to Section 220 of the DGCL. In addition, by agreement with the Company, Plaintiff's counsel interviewed or deposed numerous witnesses, including legal personnel, Board members, and senior business people at Fox News and 21CF. In negotiating the Settlement, Plaintiff's counsel worked closely with experts in the fields of harassment, discrimination, and retaliation, as well as corporate governance. The Settlement of the derivative claims provides a blockbuster result for 21CF and its public stockholders, and achieves historic governance reforms that could not have been achieved through litigation alone.

First, in terms of the financial accountability, the insurers for the Company and its officers and directors will pay the Company \$90 million. This is one of the largest derivative settlements ever, and we believe the largest ever in a case focused strictly on a board's oversight failure.

Second, the Settlement creates the “Fox News Workplace Professionalism and Inclusion Council,” which is comprised of a majority of independent members and two new senior human resources executives (one from 21CF and the other from Fox News). The Council is charged with providing independent oversight and guidance of the Company’s and Fox News’s implementation of meaningful reforms to address Fox News’s prior harassment, discrimination and retaliation issues. The members of the Council include a widely respected former federal judge, and three other highly qualified members with substantial expertise in addressing issues of harassment, discrimination, retaliation and best practices for improving inclusion. To our knowledge, this programmatic relief is unique and has not been incorporated into a derivative action settlement until now.

Third, this programmatic relief provides that the 21CF Board will be informed of the problems and the steps being taken to address the problems. Moreover, public reporting by the Council, including the issuance of minority reports if decisions are not unanimous, will make it impossible for 21CF to keep the world in the dark if it fails to act in good faith to address these serious issues.

From the beginning, Plaintiff and its counsel have been steadfast in their commitment to litigating this case for the good of the Company, their strongly held belief that there were serious problems at Fox News and 21CF, and their conviction that both bold action and effective plans were required to address them.

The Settlement, especially the creation of the Council and the programmatic relief empowering the Council, is precisely the bold action that Fox News requires.

This historic settlement, however, should not be viewed in isolation. Over the past several months the news has been filled with shocking (and oftentimes grotesque) stories of sexual harassment, retaliation and worse conduct at numerous companies. Corporate boards can no longer pretend that such conduct is isolated, nor can corporate boards pretend that such conduct does not and will not pose a grave risk to companies and their stockholders. The Council and the programmatic relief here should be a model for the many other companies facing these issues.

II. BACKGROUND FACTS

On July 6, 2016, Carlson, former co-host of the highly-rated “Fox and Friends” morning show, sued Ailes for sexual harassment and wrongful termination. Compl. ¶¶71-73. In the wake of Carlson’s filing, there was a barrage of media coverage, as more than a dozen women came forward to report instances of sexual harassment and retaliation at the network. *Id.* ¶74. In response, 21CF retained Paul, Weiss, Rifkind, Wharton & Garrison LLP (“Paul Weiss”) to conduct a narrow investigation into the Ailes matter. Within days Paul Weiss uncovered serious allegations regarding multiple, corroborated incidents of sexual harassment by Ailes, with multiple women describing that they experienced and witnessed sexual misconduct by other supervisors at the network. By July 18, 2016, the

Company's senior management decided to oust Ailes. *Id.* ¶¶80-85. However, notwithstanding the severity of Ailes's misconduct, he was not fired for cause. As a result, Ailes received nearly \$50 million that he would not have received if he had been terminated for cause. *Id.* ¶¶84, 86.

On July 29, 2016, Plaintiff served a demand for books and records pursuant to 8 Del. C. § 220 (the "220 Demand"). Plaintiff's investigation confirmed that the Carlson complaint was the proverbial canary in the coal mine. In the months that followed, allegations of sexual misconduct and retaliation at Fox News expanded, and other employees came forward with serious allegations of racial discrimination as well. Plaintiff's Section 220 investigation quickly confirmed that the Company had failed to address the widespread and systematic nature of Fox News's sexual harassment, discrimination and retaliation problems. Indeed, during the course of Plaintiff's investigation, allegations of sexual misconduct against Fox News's top personality O'Reilly became public, as it was revealed that he personally settled several sexual harassment claims made against him arising from his conduct at Fox News. Nevertheless, the Company renewed O'Reilly's contract in March 2017, and then terminated him a month later.

Both Plaintiff and 21CF recognized that the highly personal nature of the allegations by witnesses and victims of sexual harassment, and unique business concerns facing 21CF, created a unique opportunity favoring the negotiation of a

private resolution of the derivative claims in this case. As a result, Plaintiffs and 21CF consensually followed a procedure that would allow Plaintiffs increased access not only to corporate documents, but also to interviews of key Fox News and 21CF personnel. Eventually, the parties agreed to a mediation process overseen by former federal judge the Honorable Layn Phillips.¹ The Settlement, which is the product of this extensive process, repairs significant structural deficiencies in 21CF's oversight and reporting structures regarding Fox News, provides substantial financial recovery for the Company for the damages wrought by the extensive misconduct, and establishes procedures to change the culture at Fox News and prevent ongoing misconduct in the future that could not have been accomplished through litigation alone.

¹ In preparation for mediation discussions, counsel for Plaintiff reached out to and successfully brought several other derivative plaintiffs on board. Those "Additional Plaintiffs" include: (i) Counsel for Seattle City Employees' Retirement System; (ii) Stuart Simon, as Trustee of the MSS 12-09 Trust; (iii) Gloria E. Stricklin, as Trustee of the Gloria E. Stricklin Trust; (iv) Chaile Steinberg; (v) Simcha Halberstam; (vi) Henry Zwang; and (vii) IBEW Local 38 Pension Fund. Counsel for the Additional Plaintiffs participated in the mediation sessions described below, while also collecting public and private discovery in furtherance of litigation in the event the mediation process failed.

III. THE PROPOSED SETTLEMENT PROVIDES SUBSTANTIAL BENEFITS TO 21CF AND SHOULD BE PRELIMINARILY APPROVED

Delaware has long favored the voluntary settlement of lawsuits.² In reviewing the settlement of an action brought on behalf of a company and its stockholders, the Court “consider[s] the nature of the claim[s], the possible defenses thereto, the legal and factual circumstances of the case, and then . . . appl[ies] its own business judgment in deciding whether the settlement is reasonable in light of these factors.”³ Although unusual, there is precedent under Delaware law supporting the filing of a proposed settlement with the contemporaneous commencement of the action to be settled.⁴ And more importantly, the proposed settlement here more than adequately satisfies the requirements of Delaware law.

The Settlement provides substantial and, indeed, historic and precedent-setting benefits to the Company and its stockholders. Most obviously, solely as a

² See, e.g., *Trexler v. Billingsley*, 166 A.3d 101 (Del. 2017); *Kahn v. Sullivan*, 594 A.2d 48, 58-59 (Del. 1991); *Nottingham Partners v. Dana*, 564 A.2d 1089, 1102 (Del. 1989); *Polk v. Good*, 507 A.2d 531, 535 (Del. 1986).

³ *In re Philadelphia Stock Exch., Inc.*, 945 A.2d 1123, 1137 (Del. 2008) (quoting *Polk*, 507 A.2d at 535); see also *Ryan v. Gifford*, 2009 WL 18143, at *5 (Del. Ch. Jan. 2, 2009) (In approving a settlement of a derivative action, “the Court of Chancery’s most important yardstick of a settlement’s fairness is its business judgment.”) (quoting *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1284 (Del. 1989)).

⁴ See *Berger v. Ford*, C.A. No. 792-CC, Del. Ch. Feb. 16, 2005 (Transaction ID # 5157103) (Order).

result of the litigation efforts of Plaintiff and Plaintiff’s Counsel, the Settlement provides that the Company will receive \$90 million in cash, in the form of “outside” money that will be paid by insurers on behalf of the Settling Defendants. This substantial amount reflects not only the strength of the claims, but also the recognition by Defendants that Plaintiff and Plaintiff’s Counsel were determined and willing to take these claims to trial.

Beyond the monetary recovery, the proposed settlement implements significant governance reforms and creates a majority-independent and powerful body that should unmistakably mark a departure from the problems of the past, and signal that the Company is effectively turning a new page and is dedicated to creating an inclusive and appropriate work environment for all of its employees and media guests. Reflective of the gravity of the matters at issue, and the importance of getting it right, counsel for Plaintiff retained two experts to consult with regard to the programmatic relief for Fox News. First, counsel for Plaintiff retained Professor Suzanne Goldberg from Columbia Law School, a prominent expert in the fields of sexual harassment, racial discrimination and equality. Second, counsel for Plaintiff retained Professor Lawrence A. Hamermesh from Widener University School of Law to advise on the corporate governance-related components of the proposal. Declarations of Professors Goldberg and Hamermesh in support of the proposed settlement are attached hereto as Exhibits A and B,

respectively. With the assistance of these highly qualified individuals, Plaintiff negotiated for and achieved historic and extensive structural and corporate governance reforms for the Company and Fox News.

The Settlement, if approved, would implement significant corporate governance changes at 21CF and Fox News, including:

- The adoption and public announcement of a corporate commitment statement, affirming their commitment to “zero tolerance” for harassment, discrimination, and retaliation;
- Requiring that Fox News Human Resources report all complaints regarding racial or sexual harassment, discrimination or retaliation to the General Counsel of 21CF, and that the General Counsel of 21CF review and approve any settlements of such claims;
- Continuing live harassment and discrimination training for all Fox News employees with video introductions by Company senior management to emphasize the training’s importance;
- Reformation of the Company’s bonus clawback policy to include clawing back executive discretionary bonus compensation when it relates to discrimination, harassment, or retaliation or the failure to respond appropriately to complaints or allegations; and

- Prohibiting the use of “key man”⁵ clauses in employment contracts without the prior approval of the Company General Counsel.

The Settlement also would create the Fox News Workplace Professionalism and Inclusion Council (the “Council”) which is charged with overseeing the Company’s compliance with the reforms required by the Settlement, as well as providing independent oversight of Fox News’s efforts to implement the programmatic relief. The Council must report periodically to the Board “in sufficient detail to evaluate Fox News’s implementation of the commitment statement,” and to make those reports available to the public. The Council has the authority to engage unaffiliated expert firms to conduct periodic anonymous online surveys of employees and others working with Fox News, and the Company is committed to funding such surveys. Although the Council is encouraged to reach consensus with respect to its exercise of authority and oversight, any individual Council member who is dissatisfied with the Company’s handling of a matter under the Council’s authority can issue a “minority report,” which will be publicly disclosed to the Company’s stockholders.

The Council consists of six members. Two members are the heads of the Human Resources departments for 21CF and Fox News: Thomas Gaissmaier

⁵ “Key man” clauses, a practice used by Ailes, are clauses in employment contracts giving an employee the right to terminate his or her employment and receive a significant amount of money after such termination in the event that an executive leaves the Company or Fox News (e.g., Ailes).

(Chair), Executive Vice President, Chief Human Resources Officer for 21CF, and Kevin Lord, Executive Vice President of Human Resources for Fox News.⁶ The remaining four members of the Council are outsiders who are independent of the Murdochs and the Board, with two selected by each party. The independent members of the Council are as follows:

Hon. Barbara S. Jones (identified by Plaintiff). Judge Jones is a former judge of the U.S. District Court for the Southern District of New York. Among other key accomplishments, Judge Jones was appointed by the U.S. Secretary of Defense to chair a Congressional panel mandated to conduct a 12-month review and assessment of the systems used by the military to investigate, prosecute, and adjudicate crimes involving sexual assaults and sexual harassment.

Dr. Sylvia Ann Hewlett (identified by Plaintiff). Dr. Hewlett is the founder and CEO of the Center for Talent Innovation. Dr. Hewlett has advised more than 100 fortune 500 CEOs on best practices for handling diversity, gender and discrimination issues.

Brande Stellings (identified by 21CF). Ms. Stellings is an expert on women's leadership and diversity from Catalyst, a global nonprofit dedicated to helping organizations build workplaces to benefit women. Ms. Stellings leads

⁶ Both Mr. Gaissmaier and Mr. Lord joined 21CF and Fox News, respectively, in 2017, after Mr. Ailes left Fox News. Plaintiff's counsel has interviewed both Mr. Gaissmaier and Mr. Lord and has confirmed their independence and dedication to eradicating harassment, discrimination, and retaliation at 21CF and Fox News.

Catalyst's Advisory Services, where she works with companies to accelerate the advancement of women through the pipeline to leadership and the boardroom. She formerly served as Vice President, Litigation, for NBC Universal, Inc., and was the co-leader of the New York/New Jersey chapter of the GE Women's Network and a member of NBC Universal's Affinity Council.

Dr. Virgil Smith (identified by 21CF). Dr. Smith is the Chairman of the Smith Edwards Group, LLC, an Atlanta based coaching and consulting firm that specializes in executive, career and life coaching. Dr. Smith is a 24-year veteran of the Gannett Company where, as a president, publisher and corporate human resources executive, he focused on talent development, talent acquisition, talent management and diversity.

IV. CONCLUSION

The proposed settlement of this derivative action marks a monumental benefit for 21CF and a fundamental change for the culture at Fox News. Plaintiff appreciates that the proposed settlement here is presented in an unusual context, but it is the product of an over year-long process with extensive discovery and a hard-fought mediation overseen by Judge Phillips. Plaintiff respectfully requests that the proposed settlement be preliminarily approved and the Court enter the [Proposed] Scheduling Order filed as Exhibit B to the Stipulation.

Dated: November 20, 2017

Respectfully submitted,

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