

# Toward a Brighter Future

## Thanks to Sweeping Workplace Reforms Achieved by Stockholders, Fox Employees Can Turn the Page on a Troubled Past

By Rebecca Boon

Stockholder derivative litigation that addressed widespread misconduct at Fox has resulted in an historic and groundbreaking opportunity to implement meaningful and lasting change.

**T**he Harvey Weinstein scandal and the ever-increasing number of high-profile individuals accused of sexual harassment spawned the birth of the “#MeToo” movement and ultimately shaped the headlines of 2017. The sad news and fallout continues but there is great reason for hope in this new era of candor, reflection, and direct action toward eliminating harassment and discrimination in the workplace.

Before the public Weinstein revelations, Fox News Channel (“Fox News”) was the high-profile poster child for this social ill with its CEO and top anchor forced out after multiple women had come forward and past settlements against them had become public. In the summer of 2016, the institutional investor community had quietly begun work to remedy this all-too-widespread problem. Working with BLB&G, the City of Monroe (Michigan) Employees’ Retirement System (“Monroe”) was prosecuting a stockholder derivative lawsuit

involving Twenty-First Century Fox, Inc. (“Fox”) and Fox News to address the far-reaching misconduct. In November 2017, the litigation resulted in an historic and groundbreaking opportunity to implement meaningful and lasting change.

### **The Fox derivative litigation: Corporate reform, monetary relief, and a chance to turn the page**

The scope of the issues at Fox News first publicly came to light in July 2016, when Gretchen Carlson filed a sexual harassment lawsuit against longtime CEO, Roger Ailes. While the conduct Ms. Carlson described in the complaint was deplorable, it signaled a deeper problem. No matter how many individual public figures are charged with abhorrent behavior toward women and minorities, historically it has been exceedingly rare for any corporate board of directors to treat the issue as a systemic problem requiring board oversight and involvement.



*The Fox settlement includes the creation of a council of experts to oversee and recommend policies, procedures, and other reforms, as well as a \$90 million recovery.*

The leadership at Monroe (a significant Fox shareholder) and BLB&G, deeply concerned about what we suspected was a widespread cultural problem at Fox News, worked together to assert Monroe's statutory right and conduct a "books and records" investigation into possible wrongdoing by the Fox Board of Directors and certain senior executives. At the same time, the public harassment claims quickly expanded to include Bill O'Reilly and others, and broad race discrimination claims also became known to the public.

After over a year of litigation and complex negotiations, in November 2017, the parties made public the terms of an historic settlement that gives Fox the opportunity to transform a company notoriously beset by workplace impropriety into a standard-bearer for creating, fostering, and protecting a positive and inclusive workplace culture — and by extension, preserving and creating stockholder value.

The key settlement components include:

- The creation of a council of experts, The Fox News Workplace Professionalism and Inclusion Council (WPIC), a majority of whom are independent of the company and Board; and
- One of the largest financial recoveries — \$90 million — ever obtained in a pure corporate board oversight dispute.

The WPIC has the power to oversee and recommend policies, procedures, and other reforms needed to address and correct the problems at Fox News, including hiring outside consultants and conducting independent investigations. The key aspects of the WPIC are described below.

**Complete transparency, a mandatory five-year term, and commitment to "zero tolerance"**

Public disclosure is accountability. The settlement requires Fox to publicly post reports issued by the WPIC (including any minority reports), and publicize its commitment to "zero tolerance" for harassment and discrimination. In the event that Fox chooses not to extend the WPIC after the end of its mandatory five-year term, Fox must publicly state the reasons for that decision. Complete transparency will ensure continued progress at Fox and public accountability reinforces Fox's commitment to truly turning the page.

**Independence**

The WPIC is a majority-independent council, which ensures that it can make the recommendations that are necessary to change Fox News's culture. The Council includes former federal judge Barbara Jones, who chaired the Congressional committee investigating and proposing policies to correct sexual harassment in the military. The WPIC's remaining members are three of the corporate world's most notable leaders in crafting policies to fight corporate discrimination and harassment, and in providing opportunities and protection for all employees — Sylvia Hewlett, Brande Stelling, and Virgil Smith.

**Board oversight and insider involvement**

Deep involvement from the Board and senior management is also essential to making sure that recommended changes make sense for Fox News and that change is implemented. The WPIC includes two Fox HR insiders who were hired after the Ailes scandal broke in order to reform

Fox's culture. By including insiders on the WPIC (and requiring public reporting to the Board), the settlement ensures that change will not be superficial and minimizes the risk of regression.

The WPIC's majority-independence, along with meaningful involvement from the Board and senior management, gives Fox the tools it needs to reform its culture. As Lachlan Murdoch, Fox's Executive Chairman, stated in the days following the announcement of the settlement: "We're going through this cathartic moment as an industry...and I think we [will] come out far stronger." We are hopeful that these words reflect a true commitment on behalf of Fox to turn the page at the company, and we believe that the WPIC provides Fox with the mechanisms to do so.

The Fox settlement sends the clear message that workplace harassment is unacceptable, and when it happens at public companies, there are serious consequences. This groundbreaking case is an example of how stockholder rights litigation can address a substantial problem at a company, and at the same time, fill a societal need for true reform.

### Securities litigation has long been a force to create meaningful change at public companies

The Fox case is not the only example of litigation being used to change corporate culture for the benefit of both the company and its stockholders, while at the same time addressing a broader public good. Indeed, BLB&G has harnessed the power of both stockholders and other stakeholders in a variety of other cases.



*Demonstrators protest against Fox News personality Bill O'Reilly, the subject of numerous sexual harassment allegations and legal settlements, outside of Fox's New York headquarters in 2017. (Photo: Drew Angerer/Getty Images)*

More than 20 years ago, in the seminal case of *Roberts v. Texaco, Inc.*, BLB&G brought a class action against Texaco alleging that Texaco had engaged in systemic race discrimination. Even in an industry generally considered to be behind in minority employment, Texaco's overall minority representation was significantly below its peers. The settlement that the parties ultimately achieved represented the single largest settlement in the history of employment race discrimination litigation. Notably, as part of the settlement, Texaco agreed to the creation of an independent Equality and Tolerance Task Force, which had broad powers over the company's anti-discrimination, affirmative action, and diversity efforts. Texaco also agreed to broad, company-wide diversity and sensitivity training for all employees.

Similarly, in 2009, BLB&G brought leverage to bear against illegal "off-label" marketing practices in which players in the pharmaceutical industry promoted dubious alternative usages of their drugs. Representing a group of institutional

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investors in a shareholder derivative litigation against pharmaceutical giant Pfizer, Inc., we obtained landmark governance reforms which set a new benchmark for highly regulated businesses. Our settlement included a \$75 million fund dedicated to a new Regulatory and Compliance Committee of the Pfizer Board to oversee and monitor Pfizer's compliance and drug marketing.

These successes became models on which other companies that faced these issues could build their own governance, policing, and compliance structures. Building from our experience, we viewed the systemic problems at Fox News as another opportunity to create meaningful and lasting reform, this time through stockholder derivative rights litigation.

### **A way forward**

It is hardly possible to open a newspaper today without reading new revelations of harassment and discrimination. According to Columbia Law Professor Suzanne B. Goldberg, an expert in harassment and discrimination policy, the Fox settlement could have a lasting impact on the fight against sexual harassment throughout corporate America by serving as a model for other public companies facing the same issues.

In approving the settlement, the Honorable Andre Bouchard, Chancellor of the Delaware Court of Chancery, applauded the substantial changes at Fox News which the settlement requires: "I will commend everyone in the room on what happened here....I think the settlement is an excellent settlement....There's real meaning to the Council."

Indeed, as BLB&G senior founding partner Max Berger — who has been at the center of numerous litigations in which he has fought for meaningful and lasting reforms (including all of the cases mentioned here) — commented:

"Fox News is taking historic steps to address harassment, discrimination and retaliation in the workplace to protect their employees and enhance shareholder value. Corporate leaders have too often and too long failed to act against harassing conduct in their midst by treating it as isolated incidents. The events giving rise to this case and the stream of reported misconduct by powerful individuals in the media industry and beyond show that corporate boards have an obligation to implement policies and structures that will protect current and future employees from the widespread improper abuse of the past. We believe the solution we developed alongside the senior lawyers and HR personnel at Fox can and should be implemented as a best practice for any company facing these issues."

At this turning point in history, the Fox settlement exemplifies how stockholder derivative litigation can lead to progressive and necessary reform, while at the same time providing concrete benefits to a company and its stockholders.

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