

# **Before the Murdoch takeover: new evidence indicating the need for a further “Fit and Proper” review**

**AVAAZ, 8th March 2017.**

**Submission for Karen Bradley, Secretary of State for Culture Media and Sport**

## **Introduction**

An acquisition of Sky Plc. by 21st Century Fox (21CF) would result in a major expansion of the influence of the Murdoch Family Trust (MFT) over Sky. In 2012 Ofcom was highly critical of the role of James Murdoch who was CEO and Chairman of News International during the period of criminal and other reprehensible conduct at that organisation. This submission details a long list of wrongdoings and criminal misgovernance that has emerged since Ofcom reviewed the licenses held by BSkyB in 2012. It also draws attention to an unfolding sexual harassment epidemic being unearthed at Fox News in the US.

The Secretary of State notes in her 6th March 2017 letter<sup>1</sup> to 21CF and Sky that 21CF’s record of compliance with the broadcasting code might reflect on the culture or corporate governance at 21CF. The “huge failings of corporate governance” at News Corporation, the precursor company to 21CF were noted in the Culture, Media and Sport Committee on News International and Phone Hacking and the Secretary of State herself acknowledges that James Murdoch’s actions during this time was a “failure of corporate governance.”

The shocking scale of corporate misgovernance and criminal conduct make it incumbent upon the Secretary of State to exercise her powers under Section 58(3) of the Communications Act 2003, to refer the Sky bid on broader public interest grounds than those she currently says she is minded to exercise. This is to ensure that people directing and controlling media enterprises are likely to maintain high standards of corporate governance, accountability and conduct.<sup>2</sup>

The “fitness and propriety” of members of the Murdoch Family Trust are relevant to the Sky takeover bid in several ways.

James Murdoch’s conduct and character are relevant because:

- Since 2015 he has been the CEO of the parent company, 21CF that owns and controls Fox News
- He also serves as a board member of 21CF.

Rupert Murdoch’s conduct and character are relevant because:

- He is currently Chairman and acting CEO of Fox News since July 2016, after Roger Ailes was ousted
- Currently, Executive Chairman of parent company 21CF.

Lachlan Murdoch’s conduct and character are relevant because:

- He is currently Executive Chairman of 21CF, parent company of Fox News
- From 2000-2005, he was Deputy Chief Operating Officer of 21CF and Chair of Fox TV stations.

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<sup>1</sup> Bradley, Karen, “To Jeffrey Palker and James Conyers” 3 March 2017. [21st Century Fox Inc. and Sky Plc. European Intervention Notice, DCMS website](#)

[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/596538/20130303\\_Sky\\_letter\\_FINAL.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/596538/20130303_Sky_letter_FINAL.pdf)

<sup>2</sup> Peretz George QC, “RE: ANTICIPATED ACQUISITION BY TWENTY-FIRST CENTURY FOX, INC (“21CF”) OF THE ENTIRE ISSUED AND TO BE ISSUED SHARE CAPITAL OF SKY PLC (“SKY”): PROPOSED EUROPEAN INTERVENTION NOTICE” submitted to DCMS on 8 March 2017 by Avaaz.

## Ofcom's duties and why a new "fit and proper" review is needed

In September 2012, Ofcom reported on its section 3(3) duty in relation to British Sky Broadcasting Limited following revelations of suspected criminality at newspapers owned by News International.<sup>3</sup>

The report contained harsh criticism of James Murdoch's conduct, saying it was "difficult to comprehend and ill-judged" and overall, it "fell short of the exercise of responsibility to be expected of him as CEO and Chairman" (paragraph 34). It went on to conclude that the events documented "raise questions regarding James Murdoch's competence in the handling of these matters, and his attitude towards the possibility of wrongdoing in the companies for which he was responsible" (paragraph 35).

Ofcom found the conduct and character of any director, of any shareholder with a significant holding, and of any other person able to exert influence over the company are relevant in principle to Ofcom's assessment.

The report stopped short of concluding that BSkyB was not fit and proper to hold a license on the basis of two factors. First, that BSkyB was only minority owned by the Murdochs: "While we consider that any director or large minority shareholder will count as exerting influence for these purposes [of fitness and propriety], *his or her influence may be limited, or may be moderated by other directors or shareholders, in such a way that conduct on the part of that individual is not in fact sufficient to render the company as a whole unfit or improper* (emphasis added)" (para. 43). This situation would now change, if the Sky takeover is allowed to proceed.

The second factor was that James Murdoch had stepped back from an executive role at BSkyB: "While we consider that James Murdoch's conduct in various instances fell short of the standard to be expected of the chief executive officer and chairman, we do not find that *James Murdoch's retention as a non-executive director* (emphasis added) of Sky means that Sky is not fit and proper to hold broadcast licenses" (para. 46).

The report also, significantly, caveated its findings by indicating it awaited the findings of the Leveson Report on the conduct of the Murdochs (para 47):

*Our duty to be satisfied that a licensee is fit and proper is ongoing. Further evidence may become available in the future, which Ofcom would be obliged to consider in order to fulfil its duty. In particular, Ofcom considers that the findings of the Leveson Inquiry and the results of pending criminal proceedings (including evidence given in such proceedings) could be relevant to its performance of its duty under section 3(3).*

The part of the Leveson Inquiry which relates directly to the conduct of the Murdochs has still not even begun. This ongoing duty referred to by Ofcom is set out in Section 3(3) of the Broadcasting Acts 1990 and 1996.

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<sup>3</sup> Ofcom "DECISION UNDER SECTION 3(3) OF THE BROADCASTING ACT 1990 AND SECTION 3(3) OF THE BROADCASTING ACT 1996: LICENSES HELD BY BRITISH SKY BROADCASTING LTD.  
[https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0022/32485/bskyb-final.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0022/32485/bskyb-final.pdf)

Not only has none of the evidence material to the 2012 section 3(3) decision ever been subject to a Public Interest (“section 58”) review, but substantial new evidence has emerged since the September 2012 report, including from:

- the Report of Part 1 of the Leveson Inquiry (November 2012),
- the Report of the House of Commons Privileges Committee (2016)
- and from police investigations and criminal trials of News International (now news UK) executives, employees and agents
- from investigative journalism into some of the scandals (such as tapes of Rupert Murdoch addressing employees, and broadcasts about the Daniel Morgan murder)
- from the continuing civil litigation in both the UK and the US
- from observing governance decisions made by the Murdoch’s in relation to – for example - the re-employment of those who have a record of failure of corporate governance, and their failure to implement the form of regulation recommended by Part 1 of the Leveson Inquiry and by Parliament.

These show a clear pattern of gross failures of corporate governance, management and accountability in companies controlled by the Murdoch Family Trust, throwing new light on the issues analysed by Ofcom in its 2012 report, and revealing more recent wrongdoings, including in the US.

In the US, 21CF is under investigation by a federal prosecutor for mishandling a number of sexual harassment suits by its staff, after former staff and investors alleged a cover-up with strong echoes of how News International treated phone hacking in the UK until it was forced to divulge details by court cases, Part 1 of the Leveson Inquiry and parliamentary select committee inquiries.

While Ofcom can in principle undertake a review of these issues at any time, the Secretary of State has the power to request such a review now. Without a section 58 review fully covering these matters (of failures of corporate governance, management and accountability), it is impossible for the Secretary of State to be fully informed about the best way to protect the public interest before she takes her next decisions on the 21CF bid for Sky.

In her letter of 3rd March, the Secretary of State spells out her reasoning for asking Ofcom to produce a report on broadcasting standards, noting that Ofcom data on breaches by 21CF and by Sky indicate that

“21CF might be less effective than Sky at ensuring compliance with broadcasting standards, and therefore raises a concern that Sky’s compliance record may potentially deteriorate following the merger.”

She notes the implications, as follows:

“The Secretary of State recognises that there could be a number of reasons for 21CF’s compliance record: it might reflect on the culture or corporate governance at 21CF, alternatively it could simply be attributable to the circumstances of the individual breaches. Given that Ofcom is the regulatory body with responsibility for enforcing the Broadcasting Code, other Ofcom codes and broadcast licence conditions, the Secretary of State considers that it would be helpful for her to receive

a report from Ofcom on this issue.”<sup>4</sup>

James Murdoch and Rupert Murdoch are both very hands-on owners (for examples see Avaaz’s separate submission on the Fox Effect<sup>5</sup>) who have significant impact on the culture and corporate governance. It is therefore essential for the Secretary of State to receive a report on the fitness and propriety (by reference to their record on failures of corporate governance, management and accountability) of the Murdoch family members who would take full control of Sky, including Sky News, if this takeover proceeds.

It is noteworthy that Ofcom has produced “a list of all breaches of licence conditions and Ofcom’s codes and rules over the last 10 years against each of the licensees and VOD service providers owned by Sky plc subsidiaries and by 21st Century Fox subsidiaries”<sup>6</sup>, and the Secretary of State should ensure she obtains from Ofcom a full accounting of all concerns regarding senior executives as well as an assessment of their implications.

### **New evidence on corporate governance failings since Ofcom’s previous report**

Since Ofcom’s report of September 2012, there have been a number of developments which shed further light on the culture and practice (as exemplified by failures of corporate governance, management and accountability) in News International, its successor company and the companies and persons who controlled it. What follows is an indicative overview of the material Ofcom would be able to access and analyse in a new review of fitness and propriety, and Avaaz and other organisations will be happy to cooperate with Ofcom in providing more such information if a section 58 review which can deal with these matters is commenced.

Ofcom can draw on the fact of, and the evidence from, successful prosecutions since its 2012 review. Criminal convictions of News International staff include:

- Six senior employees of News International have been convicted of phone-hacking. They are Andy Coulson (Editor), Greg Miskiw (News Editor), James Weatherup (News Editor), Ian Edmondson (News Editor), Neville Thurlbeck (Chief Reporter), Jules Stenson (Features Editor).<sup>7</sup>
- Over 30 police and public officials have been convicted of accepting corrupt payments from employees of News International, payments which were approved at high level by that organisation.<sup>8</sup>
- One News International journalist, Dan Evans, has been convicted of making unlawful payments, as part of Operation Elveden,<sup>9</sup>

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<sup>4</sup> Bradley, Karen, “To Jeffrey Palker and James Conyers” 3 March 2017. *21st Century Fox Inc. and Sky Plc. European Intervention Notice. DCMS website* [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/596538/20130303\\_Sky\\_letter\\_FIN\\_AL.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/596538/20130303_Sky_letter_FIN_AL.pdf) pg. 6

<sup>5</sup> Alexander, Meredith, Lenn, Rebecca, “Murdoch, the Fox Effect and Trump: How the Sky takeover could poison Britain’s public debate”, *Avaaz and Media Matters for America* submitted to DCMS on 8 March 2017. pg.10-12.

<sup>6</sup> Bradley, Karen, “To Jeffrey Palker and James Conyers” 3 March 2017. *21st Century Fox Inc. and Sky Plc. European Intervention Notice. DCMS website* [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/596538/20130303\\_Sky\\_letter\\_FIN\\_AL.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/596538/20130303_Sky_letter_FIN_AL.pdf) footnote 18, p.6

<sup>7</sup> Sedghi, Ami. “Operation Weeting: arrests and charges - timeline” *Guardian*, 2 Nov 2012. Web 8 Mar 2017. <https://www.theguardian.com/media/2012/nov/02/operation-weeting-arrests-charges-timeline>

<sup>8</sup> “Operation Elveden completed.” *Metropolitan Police*, <http://news.met.police.uk/news/operation-elveden-completed-152789>. Accessed 8 March 2017.

<sup>9</sup> “Ex-NOTW Reporter Dan Evans Spared Jail.” *Sky News*, 24 July 2014,

- A News International journalist. Nick Parker, was convicted of handling stolen property, namely MP Siobhan McDonagh's mobile phone.<sup>10</sup>
- A new and separate conspiracy, the Pinetree conspiracy, on the Features desk of the News of the World between 2005 and 2006, to hack phones has come to light, a journalist has been convicted, and it has been admitted by News Corporation.<sup>11</sup>

Mr Parker's case (which relates to his acts as an employee of the Sun newspaper not the News of the World), and the convictions of 30 police and public officials for accepting corrupt payments from (mainly) Sun journalists, are particularly important because they demonstrate that criminality was more widespread than recognised by the Secretary of State in her 6th March 2017 letter to 21CF and Sky:

"The Secretary of State recognises that some time has passed since these activities took place, and also that the findings related specifically to failings within NoTW, which no longer exists."<sup>12</sup>

New developments took place last year specifically in the case of Mazher Mahmood, a senior employee of News International:

- Mr Mahmood has been convicted of perverting the course of justice<sup>13</sup>;
- This fresh conviction points towards further, more widespread criminal activity. "After the verdict, the Guardian learned that News UK was facing more than 45 civil claims relating to Mahmood's stings. The media lawyer Mark Lewis, who is handling the claims, said they could "dwarf" those brought following the phone-hacking scandal."<sup>14</sup>
- News UK terminated Mazher Mahmood's employment with regret; the company also nodded to the possibility of further legal action against News UK as a result saying it would "vigorously defend" any civil claims brought against it.<sup>15</sup>
- As reported by the Guardian, Mark Lewis, the lawyer "who is representing some of those targeted by Mahmood and who acted against News UK in some

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<http://news.sky.com/story/ex-notw-reporter-dan-evans-spared-jail-10395547>. Accessed 8 March 2017.

<sup>10</sup> Ponsford, Dominic. "Three month suspended sentence for Sun's Nick Parker after conviction for handling MP's stolen mobile phone." *Press Gazette*, 9 December 2014, <http://www.pressgazette.co.uk/suns-nick-parker-cleared-over-payments-public-officials-convicted-handling-mps-stolen-mobile-phone/>. Accessed 8 March 2017.

<sup>11</sup> "Phone Hacking, Judge orders "Operation Pinetree" disclosure despite opposition by News Group", *Inform's Blog*, 13 July 2013, <https://inform.wordpress.com/2013/07/13/news-phone-hacking-judge-orders-operation-pinetree-disclosure-by-pollite-despite-opposition-by-obstructive-news-group/>. Accessed 8 March 2017.

<sup>12</sup> Bradley, Karen, "To Jeffrey Palker and James Conyers" 3 March 2017. *21st Century Fox Inc. and Sky Plc. European Intervention Notice. DCMS website* [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/596538/20130303\\_Sky\\_letter\\_FI\\_NAL.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/596538/20130303_Sky_letter_FI_NAL.pdf)

<sup>13</sup> Davies, Caroline "Mazher Mahmood: 'Fake Sheikh' jailed for 15 months" *Guardian*, 21 Oct 2016. Web 8 Mar 2017. <https://www.theguardian.com/media/2016/oct/21/fake-sheikh-mazher-mahmood-jailed-for-15-months> <https://www.theguardian.com/media/2016/oct/21/fake-sheikh-mazher-mahmood-jailed-for-15-months>.

<sup>14</sup> Davies, Caroline "Mazher Mahmood: 'Fake Sheikh' jailed for 15 months" *Guardian*, 21 Oct 2016. Web 8 Mar 2017. <https://www.theguardian.com/media/2016/oct/21/fake-sheikh-mazher-mahmood-jailed-for-15-months> ; O'Carroll, Lisa. "Sentence for Mazher Mahmood closes one chapter, but the legal fallout rumbles on." *The Guardian*, 21 October 2016, <https://www.theguardian.com/media/2016/oct/21/sentence-for-mazher-mahmood-closes-one-chapter-but-the-legal-fallout-rumbles-on>. All accessed 8 March 2017.

<sup>15</sup> Ibid..

phone-hacking cases, said: "I've had calls from people from all walks of life that he deliberately set up. Some of these people had their lives ruined for over 20 years. They lost not just their livelihoods but their liberty, careers, families."<sup>16</sup>

- A former assistant commissioner and head of counter-terrorism at Scotland Yard argued in favour the second phase of the Leveson inquiry as a result of the Mahmood conviction.<sup>17</sup>

Mr Mahmood's case (which relates to his acts in 2014 and 2015 and as an employee of the Sun newspaper not the News of the World) is particularly important because it demonstrate that criminality was more widespread in both time and titles than recognised by the Secretary of State in her 6 March 2017 letter<sup>18</sup> to 21CF and Sky:

"The Secretary of State recognises that some time has passed since these activities took place, and also that the findings related specifically to failings within NoTW, which no longer exists."

Additional legal developments include:

- News International has admitted phone hacking at the News of the World in several hundred phone-hacking claims and has made payments to victims and lawyers in relation to these cases amounting to over \$600m.<sup>19</sup>
- Despite a challenge by News UK, a high court judge has permitted civil claims to be made about hacking at (i) the News of World Features desk beyond the staff and years covered by the Pinetree criminal investigation, and (ii) the Sun newspaper.<sup>20</sup>

Like the recent conviction for Mazher Mahmood, the point about the Sun is particularly important because they demonstrate that criminality was more widespread in both time and titles than recognised by the Secretary of State in her 6th March 2017 letter<sup>21</sup> to 21CF and Sky:

"The Secretary of State recognises that some time has passed since these activities took place, and also that the findings related specifically to failings within NoTW, which no longer exists."

Furthermore a number of revelations about corporate governance have emerged since the September 2012 Report.

- The Privileges Committee report into the alleged contempt of Parliament raised

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<sup>16</sup> Dodd, Vikram, Davies, Caroline and O'Carroll, Lisa. "News UK faces civil claims totalling millions after Mazher Mahmood trial." *The Guardian*, 21 October 2016, <https://www.theguardian.com/media/2016/oct/21/news-uk-rupert-murdoch-civil-claims-totalling-millions-after-mazher-mahmood-trial>. Accessed 8 March 2017.

<sup>17</sup> Ibid.

<sup>18</sup> Bradley, Karen. "To Jeffrey Palker and James Conyers." 3 March 2017. 21st Century Fox Inc. and Sky Plc. European Intervention Notice, *DCMS website*, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/596538/20130303\\_Sky\\_letter\\_FIN\\_AL.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/596538/20130303_Sky_letter_FIN_AL.pdf). Accessed 8 March 2017.

<sup>19</sup> Ponsford, Dominic. "News Corp hacking scandal costs total \$7m for last three months of 2015, up 40 per cent on previous quarter", *Press Gazette*, 8 May 2015, <http://www.pressgazette.co.uk/news-corp-hacking-scandal-costs-rise-512m/>. Accessed 8 March 2017.

<sup>20</sup> Jackson, Jasper. "The Sun to face trial over phone-hacking claims", *The Guardian*, 28 April 2016, <https://www.theguardian.com/media/2016/apr/28/sun-trial-phone-hacking-damages-les-dennis>. Accessed 8 March 2017.

<sup>21</sup> Bradley, Karen, "To Jeffrey Palker and James Conyers" 3 March 2017. 21st Century Fox Inc. and Sky Plc. European Intervention Notice. *DCMS website* [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/596538/20130303\\_Sky\\_letter\\_FIN\\_AL.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/596538/20130303_Sky_letter_FIN_AL.pdf)

serious questions about the conduct and competence of News International Chief Executive Les Hinton.

- The Privileges Committee report cast further light on the culture of paying what was alleged to be “hush money” to employees guilty of criminal offences to deter them from co-operating with the police and prosecution authorities. These payments were approved by News International Chief Executive, Les Hinton.
- After she was acquitted in 2014, Rebekah Brooks sought to recover some of the legal costs that had been incurred in her defence by NI. However, the trial judge told the company, “*I have to consider whether any defendant brought it on themselves and also whether I would have to consider News International conduct in relation to the matter*”<sup>22</sup> – in other words, he would have to examine how the company dealt with evidence of wrongdoing when it emerged. News International decided to drop the request for costs recovery rather than have their conduct so investigated.
- In March 2013, Rupert Murdoch privately addressed Sun journalists in London to reassure them about the company’s co-operation with police; in July of that year, a secret recording of the meeting emerged. which raise questions about whether the scandal really changed News Corp’s attitude to corporate governance and wrongdoing by its employees. In the recording Murdoch was heard to:
  - minimise the significance of illegal payments to public officials: “*But why are the police behaving in this way? It’s the biggest inquiry ever, over next to nothing*”
  - imply that he had known illegal payments had been going on at his newspapers: a Sun journalist tells him “*I’m pretty confident that the working practices that I’ve seen here are ones that I’ve inherited, rather than instigated,*” to which he replies, “*We’re talking about payments for news tips from cops: that’s been going on a hundred years. You didn’t instigate it*”
  - promise to rehire any journalist found guilty of crimes: “*What you’re asking is, what happens if some of you are proven guilty? What afterwards? I’m not allowed to promise you – I will promise you continued health support – but your jobs – I’ve got to be careful what comes out – but frankly, I won’t say it, but just trust me.*”<sup>23</sup>

News Corp re-hired Nick Parker after his conviction for handling an MP’s stolen phone, and in apparent contradiction of The Sun’s apology to the court on that matter. Most remarkably, the Murdochs re-hired Rebekah Brooks in mid-2015 even after major doubts about her character and fitness to run a company were raised in court;

- Brooks’s defence at the phone hacking trial was that she did not know that

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<sup>22</sup> O’Carroll, Lisa. “Phone-hacking trial: Rebekah Brooks drops costs application.” *The Guardian*, 1 October 2014, <https://www.theguardian.com/uk-news/2014/oct/01/phone-hacking-trial-rebekah-brooks-costs>. Accessed 8 March 2017.

<sup>23</sup> Davies, Andy. “Revealed: the Rupert Murdoch tape.” *Channel 4 News*, 3 July 2013, <https://www.channel4.com/news/murdoch-rupert-tape-police-the-sun-journalists>.

“Rupert Murdoch tape: read extracts from the transcript.” *The Guardian*, 4 July 2013, <https://www.theguardian.com/media/2013/jul/04/rupert-murdoch-tape-extracts-transcript>. Both accessed 8 March 2017.

her own journalists were breaking the law to get the stories they delivered to her, and that in all the years of working as a journalist and editor, she never realized they were the product of phones being illegally hacked. This explanation should have alarmed News Corp, despite the fact of her acquittal.

- When Brooks was CEO of News International between 2009-11, the company aggressively denied allegations of widespread criminality without being in full possession of the facts, or having conducted a rigorous internal investigation.
- Moreover, she is alleged to have personally negotiated a legal settlement and confidentiality agreement with the celebrity agent Max Clifford in March 2010 over his phone hacking claim against the company.<sup>24</sup> Given that his clients were celebrities, not royalty, it must have seemed unlikely to her that his phone was hacked at the instigation of the *News of the World's* royal correspondent Clive Goodman, in which case the company's public line about Goodman being 'one rogue reporter' was false.
- Furthermore James Murdoch's defence when the scandal blew up in July 2011 was that it took until December 2010 for him to realize that the company's public line was false, and only then as a result of documents the company was forced to disclose in a different civil claim it was fighting in court (lodged by Sienna Miller).<sup>25</sup> If it is true Brooks negotiated the Clifford settlement and confidentiality agreement, it is hard to understand why she would not have told him in the intervening period.
- In September 2016 The House of Commons Privileges Committee published a police witness statement by former News of the World Editor (2007-2011) Colin Myler in which he stated that, in July 2009, he told Rebekah Brooks of the confession of News of the World Chief Reporter, Neville Thurlbeck to phone hacking the Home Secretary David Blunkett in 2004. He told how it was covered up by the then editor, Andy Coulson, the then deputy editor, Neil Wallis and the then Managing Editor, Stuart Kuttner. It is clear that Rebekah Brooks either told James Murdoch and both continued to cover up the criminality or she did not and was thus guilty of a gross failure of corporate governance. The response by the company to this allegation was merely to suggest that Mr Myler's statement, given under caution, to the police should not be relied upon because it conflicted with his evidence to the CMSSC given when he was an employee of the Company. This defence of Ms Brooks is weak and weakened further by the finding of the Privileges Committee that Mr Myler's evidence to the CMSSC was, in parts, untruthful).

Part 1 of the Leveson Inquiry, published two months after Ofcom's review of fitness and propriety, found "a serious failure of governance within the NoTW, NI and News Corporation. There was a failure on the part of the management at the NoTW to take appropriate steps to investigate whether there was evidence of wrongdoing within the organisation".

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<sup>24</sup> Watson, Tom and Hickman, Martin. *Dial M for Murdoch*, p. 107: "Clifford lunched Rebekah Brooks in London, and agreed a deal: News International would pay him £220,000 a year for three years and costs of £331,112 – a total of £991,112 – in return for his silence, and for reopening the flow of exclusives"; Davies, Nick, *Hack Attack*, pp. 208-9.

<sup>25</sup> CMSC, *News International and Phone Hacking, Volume II – Evidence*, p. 16, Q153.



Some of Lord Justice Leveson's findings particularly bear highlighting:

- Although I endorse the right of any business to seek to protect its reputation, it surely must first take every step to get to the bottom of what had happened. To argue that the decision by the police to conclude their criminal investigations precluded the requirement for a proportionate but robust internal investigation is, in the circumstances, of real concern; and the attitude at NoTW to the police investigation equally meant that reliance could not be put on their having done so. In any event, if the explanation of James and Rupert Murdoch is correct, far from simply limiting external damage to reputation, one or more parts of the management at the NoTW was engaged in a determined cover-up to keep relevant information about potential criminal activity within the organisation from senior management within NI.<sup>26</sup>
- Lord Justice Leveson additionally found that “A similar analysis stands in respect of News Corporation. Although there is no evidence from which I could safely infer that Rupert Murdoch was aware of a wider problem, it does not appear that he followed up (or arranged for his son to follow up) on the brief that he believed had been given to Mr Myler to “find out what the hell was going on”, leaving the matter solely in the hands of Mr Hinton. If News Corporation management, and in particular Rupert Murdoch, were aware of the allegations, it is obvious that action should have been taken to investigate them. If News Corporation were not aware of the allegations which, as Rupert Murdoch has said, have cost the corporation many hundreds of millions of pounds, then there would appear to have been a significant failure in corporate governance and in particular in the effective identification and management of risks affecting NI and, thus, the corporation.” (p.349)
- And “In truth, at no stage, did anybody drill down into the facts to answer the myriad of questions that could have been asked and which could be encompassed by the all embracing question “what the hell was going on”? These questions included what Mr Mulcaire had been doing for such rewards and for whom?; what oversight had been exercised in relation to the use of his services?; why had Mr Goodman felt it justifiable to involve himself in phone hacking?; why had he argued that he should be able to return to employment and why was he being (or why had been) paid off. On any showing, these questions were there to be asked and simple denials should not have been considered sufficient. This suggests a cover up by somebody and at more than one level. Although this conclusion might be parsimonious, it is more than sufficient to throw clear light on the culture, practices and ethics existing and operating at the News of the World at the material time.” (p. 350)
- Material of real significance has also been disclosed to officers working on Operation Elveden, which appears to indicate that not only were routine payments made to public officials by some journalists working at the NoTW but that similar payments had also been made by the employees of The Sun. These payments are alleged to have occurred on multiple occasions and included large payments in figures of thousands of pounds. In her oral evidence, DAC Akers said that: “There also appears to have been a culture at the Sun of illegal payments, and systems have been created to facilitate those payments, whilst hiding the identity of the officials receiving

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<sup>26</sup> The Leveson Inquiry, “AN INQUIRY INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS”, November 2012, pp. 348-349, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/270939/0780\\_i.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270939/0780_i.pdf). Accessed 8 March 2017.

the money. The emails indicate that payments to sources were openly referred to within the Sun, in which case the source is not named, but rather the category “public official” is identified, rather than the name.” (p. 430)

Since The Leveson Report, further details have emerged that call into question how much James Murdoch would have known about phone hacking and other illegal activities, and how “fit and proper” he can be in the context of the Sky deal:

- In 2016, it was alleged at the high court, that James Murdoch was personally involved in authorising the deletion of emails at News International in early 2010. As covered in the Guardian: “Acting on behalf of 17 people suing the publisher of the now-defunct News of the World and the Sun over alleged phone hacking, David Sherborne claimed on Monday there were documents, emails and meeting agendas that showed senior executives including Murdoch and Rebekah Brooks pursued an email deletion policy that removed “emails that could be unhelpful in future litigation in which News International could be a defendant”. A full trial is expected this year.<sup>27</sup>
- The same court case alleged that James Murdoch specifically encouraged emails to be deleted on six occasions between January and April 2010.<sup>28</sup>
- James Murdoch also served as an NDS director -- NDS was News Corp's secure-encryption subsidiary, under which the unit Operational Security was accused of piracy.<sup>29</sup>

Ofcom’s concerns about the conduct of Mr James Murdoch and his corporate stewardship in September 2012 can only have been vindicated and significantly strengthened by events and emerging evidence since. They more than add up to a material change in circumstances and mean that the Secretary of State should make a section 58 referral to allow this evidence to be fully considered by Ofcom in relation to fitness and propriety of the Murdochs (as evidenced by their record of past corporate governance, accountability and conduct), This would ensure she has a complete picture of the company and the persons aiming for more complete control of Sky before she makes her decisions on the takeover.

## **21st Century Fox under fire for sexual harassment and cover-ups**

In recent months, serious allegations of sexual harassment and corporate misgovernance have been levelled at Fox News, a subsidiary of 21CF. These are so serious that a federal prosecutor is now examining aspects of them.

On 23 June 2016 - Fox news anchorwoman Gretchen Carlson filed a lawsuit against Fox News CEO Roger Ailes in the New Jersey Superior Court. She was forced to file against Ailes and not Fox News because her contract had a clause that mandated employment disputes be resolved in private arbitration.

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<sup>27</sup> Jackson, Jasper. “James Murdoch involved in News International email deletion, court told.” *The Guardian*, 5 December 2016:

<https://www.theguardian.com/media/2016/dec/05/james-murdoch-involved-news-international-email-deletion-high-court-phone-hacking>. Accessed 8 March 2017.

<sup>28</sup> Ibid; Robinson, Martin. “James Murdoch 'was personally involved in authorising the deletion of emails at News International in early 2010 amid phone-hacking scandal'.” *The Daily Mail*, 6 December 2016:

<http://www.dailymail.co.uk/news/article-4005444/James-Murdoch-personally-involved-authorising-deletion-emails-News-International-early-2010-amid-phone-hacking-scandal.html>. Accessed 7 March 2017.

<sup>29</sup> Prodhon, Georgina and Paul, Sonali. “TV piracy claims heap more pressure on Murdoch empire.” *Reuters*, 28 March 2012, <http://www.reuters.com/article/us-newscorp-piracy-idUSBRE82R04720120328>. Accessed 7 March 2017.

After Gretchen Carlson went to court, Fox News hired law firm, Paul, Weiss, Rifkind, Wharton & Garrison to investigate. Nearly 18 women came forward with complaints but we don't know how complete or effective this internal investigation was, nor do we know its findings, as so far nothing has been disclosed to shareholders or the public. It is important to note that Roger Ailes had been reporting to James and Lachlan Murdoch since June 2015, and that during this period that the abuse continued.<sup>30</sup>

The full extent of the sexual harassment epidemic inside Fox News is not yet clear to people outside the company, for the following reasons.

- a) New York state has a 3-year statute of limitations on sexual harassment. Roger Ailes' biographer reports that "many others (victims) who left or were forced out of the company before the investigation came away with far less - in some cases nothing at all."
- b) The company's forced arbitration clause shields Fox from scrutiny as has been reported by workplace and women's rights experts.<sup>31</sup>
- c) The company has not released information about its internal investigation.

There appears to be a pattern of finding ways to keep information away from the public and from regulators.

At an event at the US Capitol on 7 March 2017 with Ms. Carlson and others gagged by forced arbitration, Senator Franken raised concerns that Carlson and other victims of abuse are, "forced into a private justice system that is inherently biased towards corporations. Corporations can write the rules. Everything can be done in secret, without public ruling."<sup>32</sup>

Roger Ailes was banned from Fox News headquarters and his phone and email shut off. But instead of summarily firing him, Rupert Murdoch decided to pay him \$40 million and retain him as an "adviser", as reported by Ailes biographer. Ailes in turn agreed to a multi-year non-compete clause that prevents him from going to a rival network.

On his departure, Rupert Murdoch praised Roger Ailes saying, "Roger Ailes has made a remarkable contribution to our company and our country. Roger shared my vision of a great and independent television organisation and executed it brilliantly over 20 years."<sup>33</sup>Rupert Murdoch significantly increased his involvement by taking over as acting CEO after Ailes' departure.

Former Fox employee Andrea Tantaros is suing Fox accusing the network of retaliation after she complained of sexual harassment. Ms Tantaros' suit asserts that the network's newsroom resembled "a sex-fueled, Playboy Mansion-like cult." Besides the CEO Roger Ailes, the suit mentions a number of other Fox News executives who marginalised and removed her from the air after she complained. Her case has also been forced into

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<sup>30</sup>Sherman, Gabriel. "The Revenge of Roger's Angels." *NYMag*, 2 September 2016, <http://nymag.com/daily/intelligencer/2016/09/how-fox-news-women-took-down-roger-ailes.html>. Accessed 8 March 2017.

<sup>31</sup> Martin, Emily. "Keeping Sexual Assault Under Wraps." *US News*, 28 September 2016, <https://www.usnews.com/opinion/articles/2016-09-28/fox-news-forced-arbitration-keeps-sexual-harassment-under-wraps>. Accessed 8 March 2017.

<sup>32</sup> "Sen Franken, Top Dems Push Legislation to Crack-Down on Unfair Forced Arbitration Clauses." *YouTube*, 1:53, <https://www.youtube.com/watch?v=NhjRYuXX7hQ>. Accessed 8 March 2017.

<sup>33</sup>Beard, Lanford. "Fox News Boss Roger Ailes Quits Network amid Gretchen Carlson Sexual Harassment Lawsuit." *People*, 21 July 2016, <http://people.com/tv/roger-ailes-leaves-fox-news-amid-gretchen-carlson-sexual-harassment-claims/>. Accessed 8 March 2017.

arbitration<sup>34</sup>.

A well-informed commentator argues that Ailes' entire management team enabled harassment and abuse but Rupert Murdoch "rejected calls to conduct a wholesale housecleaning, promoting a few of Ailes' loyalists."<sup>35</sup>

Rupert Murdoch has a track record of backing senior employees despite illegal or unacceptable activities. For example, of phone hacking in the UK Murdoch said, "I do not accept ultimate responsibility. I hold responsible the people that I trusted to run it and the people they trusted." In the US he seemed to fully trust Roger Ailes without holding him to account, approving his budget without question year after year.

The concerns about corporate governance go beyond the harassment itself to encompass the way the company responded. Roger Ailes biographer has stated that two sources at Fox have told him that Fox News has secretly settled sexual harassment claims with at least 4 women after Roger Ailes left, which means during the time that Rupert Murdoch has been acting CEO.<sup>36</sup> Fox disclosed last year that it had spent about \$35 million to settle claims and "potential litigations" surrounding Ailes. However, prosecutors are examining whether Fox properly disclosed previous payments.

There are two specific corporate governance concerns that arise from these decisions around payments:

- i) Did senior management know about these payments and if not, why not?
- ii) If senior management about these payments, were they ignoring an ongoing culture of abuse? Although the amounts paid were small (eg. a payment for \$3.15 million paid to a victim named Laurie Luhn is being investigated) relative to the \$30 billion a year in revenues being generated by Fox News; the ongoing series of payments, rather than the size of the payments could reveal a larger management problem that could be of interest to investors.

In February 2017, it emerged in a court case that federal prosecutors are investigating whether 21CF<sup>37</sup> should have disclosed to investors that it made secret settlement payments to female staffers who alleged sexual harassment. The investigation centers on whether Fox's settlement payments to women alleging harassment were so material that they should have been disclosed to investors.<sup>38</sup> A couple of shareholder law firms have publicly declared they are investigating Fox for breaches of fiduciary duties, and the results of those investigations are awaited.

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<sup>34</sup> Berthelsen, Christian, Dolmetsch, Chris and Sakoui, Anousha. "U.S. Probing 'Sexual Harassment Issues' at Fox, Lawyer Says." Bloomberg, 15 February 2017, <https://www.bloomberg.com/news/articles/2017-02-15/u-s-probing-sexual-harassment-issues-at-fox-lawyer-says>. Accessed 8 March 2017.

<sup>35</sup> Sherman, Gabriel. "The Revenge of Roger's Angels." *NYMag*, 2 September 2016, <http://nymag.com/daily/intelligencer/2016/09/how-fox-news-women-took-down-roger-ailles.html>. Accessed 8 March 2017.

<sup>36</sup> Sherman, Gabriel, *Twitter*, 10 January 2017, <https://twitter.com/gabrielsherman/status/818883065577701377>. Accessed 8 March 2017.

<sup>37</sup> Folkenflik, David, Fountain, Nick. "Federal Inquiry Said to Focus on Whether Fox News broke law in harassment payouts." *NPR*, 16 February 2017, <http://www.npr.org/sections/thetwo-way/2017/02/16/515509093/lawyer-alleges-fox-news-is-under-federal-investigation-related-to-sexual-harassment>. Accessed 5 March 2017.

<sup>38</sup> Berthelsen, Christian, Dolmetsch, Chris, Sakoui, Anousha. "U.S. Probing 'Sexual Harassment Issues' at Fox, Lawyer Says." *Bloomberg*, 15 February 2017, <https://www.bloomberg.com/news/articles/2017-02-15/u-s-probing-sexual-harassment-issues-at-fox-lawyer-says>. Accessed 6 March 2017.

## Conclusions:

The analysis done by Ofcom, and the decision it reached in 2012, has been overtaken by new evidence that has emerged from the Leveson Inquiry, the Privileges Committee, judicial processes and elsewhere in the intervening years.

Several senior News International staff have been convicted and fresh scandals have emerged in the UK, as well as the US with a growing number of Fox News employees accusing executives of sexual misconduct.

In both countries corporate governance experts argue that senior executives either should have known and acted, or did know and did not act. The seriousness of this evidence means it would be unwise for the Secretary of State to approve any deal before getting the full information that Ofcom and the Competition and Markets Authority can provide using their powers.

It is therefore essential that the Secretary of State use her powers under Section 58 of the Communications Act 2003, to specify in the EIN broader public interest grounds than those proposed in her 3rd March letter, to ensure that “persons carrying on media enterprises, and for those with control of such enterprises, to be persons who are likely to maintain high standards of corporate governance, accountability and conduct.”<sup>39</sup>

In addition, given the seriousness of the evidence and conclusions in Part 1 of the Leveson Inquiry, the Secretary of State would also be well-advised to move ahead rapidly with Part 2 of that Inquiry, which will inquire into, amongst other things, “the extent of unlawful or improper conduct within News International ... [and ] the extent of corporate governance and management failures at News International” (Leveson Report, p.5)<sup>40</sup>

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<sup>39</sup> Peretz George QC, “RE: ANTICIPATED ACQUISITION BY TWENTY-FIRST CENTURY FOX, INC (“21CF”) OF THE ENTIRE ISSUED AND TO BE ISSUED SHARE CAPITAL OF SKY PLC (“SKY”): PROPOSED EUROPEAN INTERVENTION NOTICE” submitted to DCMS on 8 March 2017 by Avaaz. para 20.

<sup>40</sup> The Leveson Inquiry, “AN INQUIRY INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS”, November 2012, p 5, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/270939/0780\\_i.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270939/0780_i.pdf). Accessed 8 March 2017.