“Harnessing Shareholder Power to Advance Diversity and Opportunity”

Keynote Address by Cyrus Mehri at the 2016 Human Capital Management Summit
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Introduction

I am thrilled to be here among such an influential and dedicated group of shareholder investor leaders. Rightfully, you are gathering today to address what is one of the most important, yet least valued corporate assets: human capital.

Each of you has been entrusted with a critical and powerful charge: to help ensure that the publicly traded companies value, invest in and develop their human capital. Today, I will review the landscape in corporate America on diversity and inclusion and set forth three reforms that institutional investors can champion to harness shareholder power to advance diversity and equal opportunity:

1. Deployment of diverse slates for selection of members of boards of directors;
2. Creation of Human Capital Subcommittees on boards of directors; and
3. Annual report disclosures on the 200 highest paid employees by race, gender and ethnicity.

American Creed

Before we go any further, I ask you to take a moment to quietly reflect and contemplate some key phrases that are pillars of the American creed:

“Life, Liberty, and the Pursuit of Happiness”

“Judge A Person, Not By the Color of Their Skin, but by the Content of their Character”

“Equal Opportunity”

“Fair Competition”

“Upward Mobility”

While these phrases have long been deeply imbedded in our American values, achieving these mighty goals have long been elusive, and remain elusive to this day.

What are some of the cross-currents today that we face making these mighty goals so elusive? At this juncture, we face some interesting paradoxes:

1. Diversity & Inclusion: Never before has there been such a strong recognition that we must strive for diversity and inclusion, yet due more to inertia than ill will, due more to lack of imagination and determination than animus, we are nowhere near where we need to be. Indeed, we are stuck in the mud.

2. Upward Mobility: More than any time since the 1930's, there has been a societal focus on the need to address income inequality and lack of upward mobility, yet we have firmly dashed the hopes of younger people who see prospects of staying even, let alone surpassing their parents' generation, out of reach, regardless of their work ethic.

3. Human Capital: If you review a typical corporate annual report or 10-K you will see lots of touting of corporate physical assets, new product lines, mergers and acquisitions, but you will see very few if any words touting new investments in human capital, or new efforts to develop, retain and strengthen the workforce. Most annual reports to shareholders virtually ignore the companies' most important asset: human capital.

Woeful State of Diversity & Inclusion Across American Industries

Let's have some fun. Let me pass around a hat with names of various industries. You can pick out the name of the industry and I will give you a snapshot overview of that industry on diversity and inclusion.

Entertainment:

The controversy over the Oscars is just the very tip of the iceberg. People raising their voices through #OscarsSoWhite are correct, but the lack of diversity in this industry goes far beyond these awards. There is a woeful lack of diversity behind the camera. According to the California ACLU, there is a woeful lack of female directors[1]. But it goes beyond movies to television, where very few women and minorities get on- or off-camera opportunities.

Even though African-American women disproportionately watch daytime soaps, historically there have been less than a handful of full-time roles for African-American women. We represent soap opera star Victoria Rowell in federal court in Los Angeles. She has been retaliated against and blacklisted for being an outspoken critic of the lack

[1] Buckley, Cara. "A.C.L.U., Citing Bias Against Women, Wants Inquiry Into Hollywood's Hiring Practices". *Nytimes.com*. N.p., 2015. Web. 4 Apr. 2016.

of diversity in her industry. We hope to vindicate both equal opportunity and free speech in this case.

My firm launched the Madison Avenue Project several years ago because few, if any, people of color serve in creative director roles. Yes, this is an industry that has not evolved much from the “Mad Men” days of the 1960s. Even though advertising agencies are largely based in New York City and the educational requirements are minimal compared with other professions, they have all but excluded people of color. We commissioned a report by noted labor economist Marc Bendick,entitled “Research Perspectives on Race and Employment in the Advertising Industry,” which found that the industry hiring rates of African-Americans fall short of the available pools of talent. [2]

The pinnacle of advertising is to be the creative director of a Super Bowl ad. In 2011, we asked sports and justice activist Richard Lapchick, who runs the TIDES (The Institute for Diversity and Ethics in Sports) program at University of Central Florida, to ask his graduate students to study the Super Bowl ads. Out of the 60 professional ads during that Super Bowl, only six percent had a female creative director and not one-- yes zero percent-- had a person of color as a creative director.

Our investigation of Madison Avenue found people of color routinely funneled to “ethnic markets” and away from mainstream markets regardless of their skillsets and portfolios. We even discovered instances where major corporations’ marketing departments wanted to portray middle-class African-American families in a positive light only to be vetoed by Madison Avenue with the excuse that “it doesn’t sell because it doesn’t fit” the stereotypes.

No wonder, Madison Avenue has been a poison by repeatedly reinforcing gender and racial stereotypes. Another poison reinforcing the worst stereotypes is the show “The Bachelor” and its companion show “The Bachelorette,” which have had 31 seasons between them and never had a person of color in a lead role.[3] When we challenged them in a case, the executive producer of the show, Michael Fleiss, said, "We always want to cast for ethnic diversity. It's just that, for whatever reason, they don't come forward." Even though simultaneously *Huffington Post* had an active campaign trying to get the producers to consider an African-American sports anchor, Lamar Hurd, with an impressive resume and good looks for the show, they completely ignored him.

So, the Oscar, for being disingenuous and exclusionary goes to…envelope please… “the entertainment industry”.

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[2] Bendick, Marc, Jr. and Mary Lou Egan. *Research Perspectives on Race and Employment in the Advertising Industry.* Publication. N.p.: n.p., 2009. Print.

[3] Blake, Meredith, 26. “Why are 'The Bachelor' and 'The Bachelorette' so white? Lifetime's 'UnREAL' Explores the Issue.” *Los Angeles Times.* Los Angeles Times, 26 Mar. 2016. Web. 05 Apr. 2016.

High Tech:

Silicon Valley, even though it is in a progressive and diverse part of the country, is notoriously exclusionary to women, African-Americans and Latinos. Women make up nearly 50 percent of the workforce and close to 60 percent of recent college and post-graduate students, yet they are only about one quarter of the nation's IT workforce.[4] Disappointing as those numbers are, when you take a closer look at major tech companies they drop further. For example, 30 percent of employees at Twitter are women but in tech positions, the number drops to 10 percent for women, with African-Americans and Latinos a mere 3 percent.[5] According to the National Center for Women in Information Technology, African-American women make up only 3% of workers in IT occupations, with Asian American women only at 5% and Latinas at only 1%. These numbers suggest a wider industry practice of exclusion.

Poor employment practices can stymie innovation as documented by investigative journalist Kurt Eichenwald, who showed that Microsoft's forced ranking evaluation system undermined teamwork and innovation, opening the door for Apple to overtake them as the leading company in the industry.[6]

We know that if the high tech industry took a tiny slice of the energy and talent they deploy in new products they could create new breakthroughs for human capital, diversity and opportunity. We know they could do so much more to bring in thought leaders, brainstorm and break new barriers.

So mostly, for lack of effort, the "Lack of Innovation in Diversity Award" goes to the technology industry.

Financial Services:

Under the banner of the Women on Wall Street Project, my firm has been lead counsel in a series of gender cases against financial services companies which resulted in settlements totaling over $114 million in cases against Morgan Stanley, Smith Barney (later they merged and became Morgan Stanley Smith Barney) and Wachovia. These historic settlements also provided sweeping injunctive relief to make sure that female financial advisors receive their fair share of business opportunities compared with their male counterparts.

[4] National Center for Women in Information Technology, Women in IT: By the Numbers (2016), www.ncwit.org/bythenumbers (based on data from the Bureau of Labor Statistics).

[5] Koh, Yoree. "Twitter's Diversity Report: Women Make Up 30 percent of Workforce." *WSJ.* The Wall Street Journal, 23 July 2014. Web. 05 Apr. 2016.

[6] Eichenwald, Kurt. "How Microsoft Lost Its Mojo: Steve Ballmer and Corporate America's Most Spectacular Decline." *Vanity Fair*. N.p., n.d. Web. 04 Apr. 2016.

These cases and other investigations allowed us to make several observations. Fortunately, we found that the overtly quid pro quo, sexualized workplace largely subsided from the industry behavior of the 1990s brought to light in Susan Antilla's book, *Tales from The Boom Boom Room: Women vs. Wall Street*.[7]

Sadly, though, we found at these firms that the representation of female financial advisors stayed exactly the same from the 1990s, 2000s and 2010s: 15 percent. No progress at all for women. We also found that representation of Blacks and Latinos was a far worse disaster area, each group at one, two or three percent. We also found that business opportunities, account distributions, distributions from retiring brokers, support services, were all heavily skewed towards white men against women and minorities.

Why is it so one-sided? We heard so many excuses. We heard, "Well, women are just not as good as brokers." I call this the "women don't run as fast" defense. But this is Wall Street, not the Olympics. Plus, the empirical evidence showed otherwise. A peer-reviewed study by esteemed labor economist Dr. Janice Madden showed that given the same portfolios as men, women actually outperformed their male counterparts, and other studies document that increasing the number of women managing funds can yield better financial results.[8] While men may have had more total assets in their portfolios that they managed than women given the historical bias in the workplace, our investigations showed women did just as well, if not better, at growing new portfolios with deft investments and obtaining new business.

Then we heard, literally, "Women don't want to make as much money as men." When that statement was made-- by a woman, no less-- all the women in the room on our side almost fell out of their chairs. They were steaming.

In one matter on behalf of an African-American in the industry, counsel for the other side forthrightly said, "We make a lot of money but we are not a meritocracy. This is simply a 'who you know' and 'who will look out for you' business. And we can't find Blacks who know anybody of wealth." They again ignored the evidence that there are plenty of African-Americans and Latinos with contacts and if given the opportunity, can equal or surpass their white counterparts.

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[7] Antilla, Susan. *Tales from the Boom-boom Room: Women vs. Wall Street.* Princeton, NJ: Bloomberg, 2002. Print

[8] Madden, J. F. "Performance-Support Bias and the Gender Pay Gap among Stockbrokers." *Gender & Society* 26.3 (2012): 488-518. Web; Luongo, Angela, "Fund-Management Gender Composition: The Impact on Risk and Performance of Mutual Funds and Hedge Funds," *Fordham Business Student Research Journal*: Vol. 1: Iss. 1, Article 7 2011 Foster, Lauren "The Business Case for Diversity," *CFA Institute*, 30 June 2015, https://blogs.cfainstitute.org/investor/2015/06/30/women-in-investment-management-the-business-case-for-diversity/.

Big Law Firms:

In 2011, along with one of my colleagues, I co-authored a paper called, “A Few Thoughts on Tackling the Issue of Diversity and Inclusiveness in Law Firms,” which we did for the Federal Bar Council for New York. [9] We found that out of the 200 largest law firms:

- Women make up 50 percent of the associates, but make up only 15 percent of the equity partners.
- Women of color don’t even make up 1 percent of equity partners which is why it is so tremendous to see Justice Sotomayor and Attorney General Loretta Lynch as shining lights in our profession.
- As to partners of color, equity or non-equity, African-Americans and Hispanics each accounted for 1.7 percent while Asian Americans fared a bit better at 2.3 percent.
- Minority lawyer representation at that time in big law firms accounted for 9.7 percent-- compared to 24 percent of physicians and surgeons, 21 percent of accountants and auditors, and 18 percent of college and university professors.

By all accounts, the representation of female and minority partners at big law firms has not improved and may have gone downward since the time we wrote that paper.

So the award for trying to be “Above the Law” when it comes to inclusion and equal opportunity goes to the Big Law Firms.

So rather than pass the hat around to look at other industries, let’s take a step back and see what we have learned from the front lines fighting for equal opportunity in corporate America.

Common Barriers to Equal Opportunity

One of the great privileges of our work is that we represent individuals in systemic discrimination cases across a healthy cross-section of America’s largest companies. This provides us a unique window into recurring themes and trends that go across the Fortune 100 or 1000 companies.

Evaluation Systems:

By far the most important tools used to make human capital decisions in the non-union workplace are performance evaluation systems. Creating the allure of a meritocracy,

[9] Cyrus Mehri & Danielle E. Davis,“A Few Thoughts on Tackling the Issue of Diversity and Inclusiveness in Law Firms,” Mehri & Skalet (May 2011)

these systems are often described as the cornerstone or touchstone of human resource decisions such as pay, performance, advancement and developmental opportunities. These systems are also drivers of retention and termination decisions.

The greatest human resource scandal in corporate America is that even though these systems are crucially important, almost all of these systems have discriminatory outcomes and have never been validated as required under the law. Interestingly, the major features of these systems tend to be largely similar, if not identical from company to company.

Looking at empirical data from company after company, as well as peer-reviewed scientific literature, here is what we have found:

Performance Evaluation Systems are having devastating consequences to African-American and Latino salaried workers and also create a headwind against women in the workforce.

- African-American and Latino workers almost always receive lower ratings on average than their white counterparts. African-American and Latino workers are disproportionately underrepresented at the highest rankings, the very rankings that are necessary for advancement, developmental opportunities and promotion. If African-American or Latino workers do achieve the highest ratings they are far less likely to maintain them over multiple years or by multiple managers.

- When you study the distribution of ratings by managers, you find that white managers disproportionately favor white employees, reflecting a pattern of favoritism, while African-American managers tend to distribute ratings in an even-handed way and show no evidence favoring African-American workers.

- The pipeline of African-Americans and Latinos for C-Suite or CEO-level positions appears to have reached a peak around 2007 or 2008, but has shrunk dramatically over the last eight or so years. It appears the flawed evaluation systems have been a major contributing factor depriving minority managers the ability to compete fairly and stay in the upper echelons of Corporate America.

- The flawed evaluation systems, which are incredibly similar from company to company, are very closely linked to compensation decisions, causing African-American and Latino salaried workers to consistently receive lower pay.

- Interestingly, women almost always receive ratings equal to or above male counterparts, but instead of getting equal pay, they get lower pay than their male

counterparts, further illustrating that the performance evaluation systems which are supposed to justify compensation decisions are deeply flawed in practice.

- It is extremely rare for a company to study the component parts of their evaluation systems to examine the source of the discriminatory outcomes.

- When there are disparities in outcomes in evaluation systems, companies are required under federal law to conduct a validation study to see if they can revise their systems to find less discriminatory alternatives to achieve their business goals (29 C.F.R. Part 1607 (1978)). We are not aware of any company, when they knew or should have known of racial disparities, conducting a validation study in this context as required by law.

These are just some of the observations that underscore my belief that the failure to energize the performance evaluation systems to make them more accurate and more fair is a human capital scandal. Companies cannot properly leverage their human capital without an accurate, non-discriminatory performance management system. Fortunately, my firm is developing new ideas and approaches to solve this vexing problem which we hope to make known soon.

Stock Options and other forms of Special Compensation:

Most corporate boards have a Compensation Committee with a central duty to approve stock options and other special compensation for top executives. Having taken the depositions of both board members and human resource executives working on this task, it is fair to say there is almost an obsession over every detail regarding the distribution of stock options and special compensation to senior executives. Yet there is one crucial detail no one even looks at: whether or not the distribution creates a disparate impact based on race or gender. No one bothers to see if female managers or managers of color are disproportionately excluded from these wealth-creating distributions.

Indeed, when I talk to groups of employees, I will often ask them what pay grade starts the glass ceiling. After that, I will ask what pay grade do stock options and other forms of special compensation routinely begin. Every time it has turned out to be a direct correlation. So another human capital scandal is that while entrenched forces of in-group favoritism allow for some diversity, they create entrenched barriers when it comes to wealth creation. Women and minorities are disproportionately excluded from access to stock options and special compensation where wealth is created. In addition to facing glass ceilings at the precise point where wealth is created, women and minority executives face glass walls where they are channeled away from profit and loss centers

and operations and into supportive positions like human resources and community relations, which are valued far less than P/L positions in terms of special compensation.

Another similar blind spot is the use of benchmarking to compare senior executive compensation with the escalating compensation of their peers. An interesting article on this topic is "Executive Superstars, Peer Groups and Over-Compensation – Cause, Effect and Solution."[10] Companies routinely hire experts and conduct elaborate studies of compensation "equity" to test the fairness of their executive compensation system – but all too often those analyses ignore any potential equity issues linked to employee race or gender. Even though many major companies are subject to federal contractor regulations that require regular systematic reviews of whether there are compensation disparities adverse to women and minorities across the workforce, they do not deploy the same resources to examine internal pay equity and make sure that women and minorities are compensated fairly.

Retention:

Another human capital scandal is the staggering and unnecessary turnover companies have of talented employees. Indeed some industries – such as financial services with their entry-level financial advisors, and big law firms with their associates – have churning of talented employees as an essential part of their business model. With one financial company, we succeeded in demonstrating the competitive advantage of more accurately identifying prospective candidates, developing them and retaining them to not only dramatically reduce costs and unnecessary turnover, but to advance diversity. But that is rare. Most companies focus far more on hiring diverse talent and ignore how to effectively retain talent, diverse or otherwise.

Precious few resources go into training and development. Companies are far more likely to invest in building a new facility to improve their physical plant capital then to invest in training, development and retention of their human capital. This failure is not only wasteful; it has both company performance and equal opportunity consequences.

In Company after Company we have seen African-American salaried workers depart voluntarily or involuntarily at an alarming rate. U.S. federal courts treat a disparity measured by two standard deviations as statistically significant for purposes of supporting a claim that the Company's practices are discriminatory. A disparity measured by two standard deviations would occur only approximately one time out of 20 as a result of random chance. By way of explanation, if you toss a coin and it comes up heads over and over again it could be by chance. But at some point, if it keeps

[10] Elson, Charles M. and Ferrere, Craig K., Executive Superstars, Peer Groups and Overcompensation: Cause, Effect and Solution (August 7, 2012). Available at SSRN: http://ssrn.com/abstract=2125979 or http://dx.doi.org/10.2139/ssrn.2125979

coming up heads, the Courts will say it's not chance, it is a flaw in the coin. The break point in the judicial analysis is that if the possibility of randomness is less than one out of twenty – roughly two standard deviations – it is illegal.

With that context we have seen in company after company that African-American employees have higher turnover rates than white employees. Controlling for relevant, measurable non-discriminatory factors, the disparity between the turnover rates of white and black employees is not only two standard deviations, or even four standard deviations, which would occur by chance only six times in 100,000. Instead, the deviations almost always exceed six standard deviations, which would occur by chance only two times in a billion.

As these numbers indicate, for all practical purposes, any disparity larger than two standard deviations has not occurred by chance: either illegal discrimination or non-discriminatory factors associated with employees' race or gender are driving that disparity. And for purposes of corporate efficiency, it makes little difference whether the disparity is caused by illegal discrimination, one or more non-discriminatory factors related to race, or a combination of both illegal and legal factors. In any case, the company is losing tremendous amounts of potential production invested in the departing employee.

So if anyone wonders why Companies squander their human capital and create artificial barriers adverse to women and minorities and in contradiction to the American creed, ask them to look at their performance management systems, human capital development, advancement and retention practices, and distribution of stock options and other forms of special compensation.

So can shareholders make a difference?

Shareholders Have Made A Difference in Landmark Cases

I served as co-lead counsel on two of our nation's largest race discrimination and most significant race discrimination employment class action cases: *Roberts v. Texaco Inc.* (S.D.N.Y.1997) ($176 million plus comprehensive injunctive relief including appointment of an outside Task Force Chaired by Deval Patrick) and *Ingram v. The Coca-Cola Company* (N.D. GA. 2001) ($192 million and comprehensive injunctive relief including appointment of an outside Task Force Chaired by Alexis Herman). In both of this cases, shareholder activism contributed to achieving these landmark results.

Roberts v. Texaco Inc :

This case was brought to my attention by the Interfaith Center for Corporate Responsibility, which had a shareholder proposal focused on the lack of equal opportunity at the giant oil company, Texaco. It was a Company that brazenly ruled by fear and squashed anyone who stood up for equal opportunity. At the Texaco shareholder meeting, two African-American executives of the company's finance department, Bari-Ellen Roberts and Sil Chambers, heard Gary Brouse of ICCR speak about the company's woeful record on equal opportunity. Roberts and Chambers approached Brouse to say they could not find counsel ready to take on Texaco due to their hard-line reputation. Gary referred them to me even though I had never done a Title VII case and my firm at the time had never done a Title VII class action.

When I met Roberts and Chambers, it was clear early on that they only came to counsel as a last resort. Indeed they had done their homework about best practices and approached the head of human resources with a game plan to take the company up to the next level. Instead of welcoming their suggestions, the head of HR was extraordinarily dismissive and ushered them and any chance of a peaceful resolution out the door.

We fiercely litigated the case. At one point, I took the deposition of the head of HR for the finance department, named Richard Lundwall. He testified that the finance department had a "master book" documenting the quarterly meetings of the company's treasurer and direct reports including all decisions on pay and promotion, high potential lists and other key data points. When I said to counsel on the record, "You have not produced any of the master books," they responded, "Put it in a letter." Over a period of months, I asked for the "master books" in letters, formal document requests and motions to compel, nine times. Not until the eve of our motion for class certification did they produce the master books, and when they were produced it was clear that they were sanitized with the key information removed.

A year later, Mr. Lundwall called me and said he was being pushed out of Texaco and wanted to talk to me. I said, "Well, let's wait until after you leave the company and talk." Lundwall called me back the next day to say, "I have something you might want to hear." I said, "That must mean tapes." He said it was, and indicated the tapes contained destruction of the most important evidence in the case. My colleagues warned me not to go, saying it was a trap to get me disqualified as counsel. I decided I had to go. My clients courageously stepped forward to take on one of the most powerful entities in the world. I felt duty-bound to my clients and to the court to get to the bottom of this because it could mean that my clients were deprived of not only their civil rights but of a fair day in court. I met Lundwall the next business day at a diner, near where I grew up and where he happened to live. I picked that particular diner because I knew the owners

and it seemed safe. Lundwall knew the place as the diner "where the bikers met on weekends before their long rides."

I arrived early and cased the joint. Lundwall came in with his baseball cap, sat down across from me and waved the tapes, saying it had language on it "not acceptable to the civilized world" and that they'd had a "shredding party." I suggested he needed to be represented by counsel and referred him to a list of lawyers. Ultimately, the tapes were produced to us and transcribed. They contained senior executives callously destroying documents, including apparently removing documents from the master books, all while pejoratively making fun of Blacks and those of Jewish descent.

We filed a motion for sanctions and the Court scheduled an evidentiary hearing with the Magistrate. The *New York Times* reported on this development and it became front-page news or front page business section news for 11 days straight. It was "11 days that shook the world." Hundreds of news outlets wanted the story, dying to play the "Texaco Tapes." Tom Brokaw called hourly, "60 Minutes" pleaded, but it was Ted Koppel and the noted "Nightline" show that was most convincing. Koppel said he cancelled a show with Newt Gingrich and booked the Texaco CEO to come on live. This was too good to be true. Koppel asks questions like a prosecutor so we enthusiastically said yes. Koppel spent hours prepping with us and pressed us for a number to settle the case. I thought of the highest plausible number: "$100 million," I told him.

Live on the air, he pushed the CEO, "You have lost $2 billion in stock value in the first two days of this crisis, why don't you settle for $100 million?" The CEO dodged and weaved. Koppel demanded an answer. Finally, the CEO said yes to $100 million and shortly thereafter the cash value of the settlement was $120 million.

But in the midst of this crisis including calls for boycotts, H. Carl McCall, the Treasurer of New York State and one of the nation's largest institutional investors, had a crucial role. He declared that if the company did not resolve the case soon, he was going to divest the state's assets from Texaco much like investors had divested from South African companies. Having lost billions of dollars of shareholder value and facing the prospect of a highly-respected state treasurer getting his state to divest, the business case for settlement was compelling.

However, we were not content with a historic monetary settlement. We needed to be sure that the Company would shed its past and go through transformative change. We insisted on the creation of an outside task force to drive cultural change. On the eve of the Magistrate's hearing on document destruction and facing divestment by Treasurer McCall, the Company folded and ceded power to the outside task force. Ultimately, the Court appointed Deval L. Patrick to chair the Task Force. Ironically, later the company was quite pleased by the highly constructive work of the task force and its focus on

developing new systems that leveraged opportunities and human capital to the benefit of the company and its employees. It became a win-win situation.

Ingram v. The Coca-Cola Company

When I completed the Texaco case, the legendary federal judge with the case, Judge Breant, took me aside and praised me for wisely handling the Texaco Tape situation, but said I was a young lawyer and that would be the peak of my career. What neither of us knew was, as fate would have it, shortly thereafter I would start my own firm and start on a journey for another landmark race discrimination case against another corporate giant that achieved an even bigger and more sweeping result.

A group of employees from Coca Cola called me from Atlanta and said they had a case just like Texaco. Before I knew it, I was before dozens of impressive African-American salaried employees all facing the subtle but powerful wrath of modern-day discrimination at a company they loved. There was one hitch: as I was just starting my firm, I had limited resources. I needed co-counsel. While searching for co-counsel, we tirelessly investigated the case. We obtained dozens of affidavits. An anonymous package of human resource data arrived and we conducted a statistical analysis showing disparities in distributions of evaluation scores and subsequent pay disparities. With the compelling evidence and draft complaint, I traveled up and down the East Coast searching for co-counsel. I was turned down over and over again. One esteemed member of the bar explained, “Suing Coke in Atlanta would be like suing the Pope in the Vatican. You have no chance.”

Since we worked so hard on the case and our clients were so deserving, I decided to bet the farm and roll the dice. After some early victories, we did bring on a very respected co-counsel in Atlanta, Bondurant, Mixson & Elmore, who weren’t afraid of Coke. We tenaciously and jointly prosecuted the case.

In the middle of the case, Coke went through a rare and unexpected restructuring. They offered a modest severance for anyone who signed a release of claims and they explicitly said that African-Americans would have to release their claims from our case. When the company informed us of this plan, I said to them, “This is going to backfire. This is going to create a firestorm. At least offer an offset from any recovery in our case.” They responded, “Cyrus, the Coca-Cola Company is not going to take advice from you.”

Even I could not have anticipated the firestorm to follow. African-American Coke employees started meeting at churches each Sunday morning in Atlanta and organizing. Before you knew it, dozens and dozens of Coke employees stood in front of a church holding up Coca-Cola cans calling for a boycott. When it hit the front page of the business section of the *New York Times*, the company folded and at our urging

rewrote the release to explicitly exclude our case so employees could receive a severance package and ultimately fully benefit from the historic results of our case. In retrospect, they would probably agree that they should have taken my advice.

With that victory in hand, we urged the African-American workers, to take a "Journey for Justice" bus ride from Atlanta to the shareholder meeting in Delaware. Led by Coke executive and preacher Larry Jones, they made the journey holding press conferences along the way arriving in Delaware a week later. The late *New York Times* reporter, Connie Hays, described in her book, *The Real Thing: Truth and Power at the Coca-Cola Company*[11], that she arrived at the Hotel Dupont in Wilmington, Delaware for the Coke shareholder meeting waiting for the arrival of the Journey for Justice bus and found that the Coca-Cola executives were extremely tense. To the Company's credit, the Journey for Justice riders were welcome to join the shareholder meeting and given a chance to be heard.

Sometime later, we achieved the largest race discrimination settlement in history at that point, and most likely the most sweeping equal opportunity injunctive relief involving a major U.S. company in U.S. history, which included an outside Task Force chaired by Alexis M. Herman. Coca-Cola became a leader on diversity and inclusion using state of the art and innovative tools to reduce disparities and to advance equal opportunity for people of color and women worldwide.

While litigation is an important tool and there have been pockets of success, if we are going to achieve the best ideals encompassed in the American creed, we need key non-litigation tools for sustainable success. I have three sets of reforms that can be encompassed in a game plan that will lead to remarkable results.

Three Reforms to Harness Shareholder Power for Diversity and Opportunity

1. Diverse Slate Requirement for Boards of Directors:

Back in September of 2002, the late Johnnie L. Cochran, Jr. and I issued a report, "Black Coaches in the NFL: Superior Performance and Inferior Opportunities." Using statistical data on regular season records and playoff appearances, we found that during the 15-year period we studied, African-American head coaches won significantly more games (over 9 per season vs. 8 for white coaches) and went to the playoffs far more often (2 out of 3 seasons vs. 1 out of 3 seasons), yet tended to be the last hired and first fired. This data suggested a double standard.

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[11] Hays, Constance L. *The Real Thing: Truth and Power at the Coca-Cola Company.* New York: Random House, 2004. Print.

Our report concluded with what we called the “Fair Compensation Proposal,” in which we called on the league to require a diverse slate of candidates before selecting head coaches and general managers. This was inspired in part by my settlement with the Coca-Cola Company, in which we successfully used this approach to overcome the glass ceiling. After a slow start, it ultimately became an invaluable tool for the company.

Whereas many entities faced with this type of challenge would stick their head in the sand, Commissioner Paul Tagliabue and General Counsel Jeff Pash took a very different approach. They decided to review our report with an open mind and they appointed an Ownership Committee to closely examine our report and our proposal. Chaired by Pittsburgh Steelers owner Dan Rooney, other owners such as Philadelphia Eagles owner Jeff Lurie, Arthur Blank of the Atlanta Falcons, Stan Kroenke of the then-St. Louis Rams and Denver Broncos owner Pat Bowlen served on the committee. In addition, a working group of distinguished club executives such as Bill Polian, Ozzie Newsome and Ray Anderson of the Colts, Ravens and Falcons, respectively, came together as an invaluable resource. Even during the crunch of a busy NFL season, the owners and working group met every week for three months studying this proposal and looking for alternatives. The fact that the league and club leaders looked at this challenge as an opportunity and did not shy away from asking the tough questions and looking for practical answers, is a profile in leadership that others should emulated.

In December of 2002, the owners of all 32 NFL clubs agreed that a diverse slate requirement (in this context a requirement to interview at least one minority candidate for head coach openings) was the best way to go. When *Washington Post* reporter Len Shapiro called to ask me, “Should we call it the Cochran/Mehri rule or the Mehri/Cochran rule?” I immediately said, “Call it the Rooney Rule, in honor of Dan Rooney.” I believed then and believe now it is far better for the owners to own this reform than for it to be an outside reform.

The Rooney Rule has been an incredible success. In the twelve years prior to its adoption, four African-American head coaches and one general manager or general manager-equivalent were hired. In the 12 years after the adoption of the rule, 16 minority head coaches were hired, a 400 percent increase and 8 minority general managers were hired, an 800 percent increase. The rule has been highly effective.

And, moreover, the head coaches and general managers who have received opportunities in the years since the rule’s implementation have seized those opportunities and met with substantial success. Since 2007, when Lovie Smith Head Coach of the Bears, and Tony Dungy, Head Coach of the Colts met in the Super Bowl as NFC and AFC Conference Champions, 10 Super Bowl Clubs have been led by a minority head coach or a general manager. This includes Head Coaches Dungy, Smith, Mike Tomlin (Steelers twice), Jim Caldwell (Colts), and Ron Rivera and general

managers Rod Graves (Cardinals), Jerry Reese (Giants twice) and Ozzie Newsome (Ravens). (See Attachment).

The benefits of diversity are, of course, not restricted to pro football. There is a correlation between diverse leadership in publicly traded companies and shareholder gains. For example, a 2014 global analysis of 3,000 companies by Credit Suisse found that board and management diversity are associated with better returns on equity and higher valuations, and Catalyst has found in a series of studies that companies with more women on boards of directors outperform those with fewer.[12] This is also consistent with the scientific literature which shows that diverse organizations make sounder and stronger decisions.

This just shows organizations that want to succeed should want to have diverse leadership. It is no wonder that major companies are increasingly calling for the diverse slate requirement. In addition to pioneers like the Coca-Cola Company, more recent converts include Xerox, Facebook and Intel. Institutional investors have increasingly called for a diverse slate requirement for boards of directors.

So with this background, I propose that institutional investors and other organizations of goodwill seek a requirement that all publicly-traded companies interview a diverse slate of highly qualified candidates prior to selecting a new member of the board. This would be consistent with the Board Room Accountability project spearheaded by the New York City Comptroller, Scott Stringer.[13] In this context, a diverse slate would require at least one woman and at least one candidate of color. While not a formal requirement, I would also encourage that diversity of life and work experiences be included so that boards of directors would be enriched by individuals not typically on boards, to offer worker, consumer, environmental and other perspectives.

I strongly believe that a company by company approach is too incremental to be ultimately effective. To create a sea change, we need to include all publicly-traded companies. Specifically, institutional investors and other people of good will should look at the New York Stock Exchange Listing Standards that already include corporate governance standards such as requiring independent board members. The diverse slate requirement ("Rooney Rule") could be adopted as a new listing standard. Similarly, the Securities and Exchange Commission could adopt a new regulation along these lines.

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[12] Credit Suisse, *The CS Gender 3000: Women in Senior Management*, 2014, https://publications.credit-suisse.com/tasks/render/file/index.cfm?fileid=8128F3C0-99BC-22E6-838E2A5B1E4366DF; Catalyst, *Why Diversity Matters*, July 2013, http://www.catalyst.org/system/files/why_diversity_matters_catalyst_0.pdf.

[13] http://comptroller.nyc.gov/boardroom-accountability/2016-focus-boardroom-accountability/

While some may see this as a bold proposal, it is actually quite modest. A diverse slate requirement does not tell you who to hire. It does not require a numerical result or anything of that sort and it does not limit the total number of interviewees. It improves the quality of the process by requiring them to start with a broader pool of qualified candidates, resulting in a more inclusive, and also more competitive process. This framework also aligns with the opportunity-based creed of the United States, as contrasted with the emerging European approach to adopt specific numerical requirements for female representation on boards of directors. Since it does not include a numerical result, a diverse slate requirement is modest by comparison and should be adopted promptly.

2. <u>Creation of a Human Capital Committee for Boards of Directors:</u>

We have learned that to create change in a company, someone has to own and drive the change. This is confirmed by our experience where diversity and inclusion only moves forward when it is a priority of the CEO and other senior management and/or there is a task force committed to driving change. Right now, diversity and inclusion in corporate America is stuck in the mud. Human capital overall is undervalued and treated just as a necessary expense, not as an asset to cultivate and develop. This oversight deprives U.S. companies of a competitive advantage.

Institutional investors should call on companies to have a board sub-committee devoted to human capital. This will dramatically elevate the importance of human capital as a genuine priority.

So what would a “Human Capital Subcommittee” do?

First, it would require management to keep and share robust metrics and analytics. Our experiences are consistent with the old adage, “what gets measured gets done.” The metrics could cover a wide range of human resources topics including diversity and inclusion metrics, data on compensation and benefits throughout the workforce, and data on development, investment in, and retention of human capital. In support of this mandate, the subcommittee would also have oversight over human resource systems including data collection systems.

Second, it could require deployment of independent resources. The CEO of Coca-Cola asked the outside task force to serve a 5th year when their four-year term approached, because the company saw this independent body as an incredible resource. Our firm has on occasion done an independent audit including focus groups that allowed us to present a strategic plan for the CEO. Well informed outside insights can provide the boards and CEOs a road map to better leverage their human capital assets.

Third, it would regularly undertake a company-wide review of human capital opportunities and vulnerabilities, based on only on its quantitative human capital performance measures, but also based on a more qualitative assessment involving engagement with employees and managers. The subcommittee would utilize organized corporate affinity groups and more informal employee feedback structures as part of this review. For purposes of risk assessment, the subcommittee would receive regular reports on EEO and labor complaints and government and private investigations and would have oversight on retention issues including a review of wages and benefits.

Any company that creates a Human Capital Subcommittee on their board will have an enormous strategic advantage over their competitors.

3. Using the Market To End the Glass Ceiling and Advance Equal Opportunity

If we want to create a sea change for equal opportunity, we need some new tools to bring that about. For years, I have been advocating for new disclosure requirements in SEC filings that would allow shareholders, consumers and other stakeholders to make informed decisions about where they want to invest their money.[14]

Here is the idea: The Securities and Exchange Commission should require that companies disclose the top 200 highest-paid executives using total compensation (including stock options and other forms of special compensation) by race, ethnicity and gender. This disclosure requirement could be phased in over a few years so companies can be motivated to create more equal opportunity before the sunshine comes in. It could also be limited to larger companies such as companies with 3,000 or more employees.

So by illustration it could work like this:

Companies A, B and C are competitors.

Company A has a stellar track record where 100, or 50 percent, of its 200 highest-paid are women, 12 percent of its 200 highest-paid are African-American, 10 percent are Latino and 15 percent are Asian-American.

Company B is horrible on diversity and inclusion: 10 percent of its 200 highest paid are women, 2 percent are African-American and zero are Latino or Asian American.

Company C is somewhere in between.

[14] One Nation Indivisible: The Use of Diversity Report Cards to Promote Transparency, Accountability, and Workplace Fairness, 9 Fordham Journal of Corporate and Financial Law 395 (2004); Stock Option Equity: Building Democracy While Building Wealth, Labor and Corporate Governance (November 2002)

With this information shareholders and institutional investors can make informed and educated decisions. Many investors using empirical evidence will determine that publicly-traded companies with diverse leadership produce better returns to shareholders. Consumers and other stakeholders can decide which of the companies to do business with. Employees can make informed decisions about which company to seek employment.

This will motivate companies to make diversity and inclusion, human capital investment and retention top priorities. Coupled with the other two reforms – diverse slates for open board positions and the creation of the Human Capital Subcommittee—we have a winning combination to bring this nation closer to its greatest ideals. It is also consistent with the American creed, with an emphasis on opportunity, accountability and market forces. It's also smart business that will provide U.S. companies an enormous competitive advantage.

We should commit to dreaming big, aiming high and breaking barriers. Picking up on the words of one of the esteemed speakers this morning, I respectfully submit we have the "right ideas" with these three reforms, that this is the "right time" and that we have the "right team -" all of you. Let's make it happen.