APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA, a California limited liability company; ENTERTAINMENT STUDIOS NETWORKS, INC., a California corporation, Plaintiffs-Appellants, v. COMCAST CORPORATION, a Pennsylvania corporation, Defendant-Appellee.	No. 16-56479 D.C. No. 2:15-cv-01239-TJH-MAN MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, District Judge, Presiding

Argued and Submitted October 9, 2018
Pasadena, California

[Filed: November 19, 2018]

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: SCHROEDER, M. SMITH, and NGUYEN, Circuit Judges.

Plaintiffs-Appellants National Association of African American-Owned Media (NAAAOM) and Entertainment Studios Networks, Inc. (Entertainment Studios, and together with NAAAOM, Plaintiffs) appeal the district court's dismissal under Rule 12(b)(6) of their second amended complaint (SAC). We have jurisdiction under 28 U.S.C. § 1291, and we reverse and remand.

Entertainment Studios, an African American-owned operator of television networks, sought for more than a decade to secure a carriage contract from Defendant-Appellee Comcast Corporation (Comcast), the largest cable television-distribution company in the United States. These efforts were unsuccessful, and Plaintiffs filed suit, claiming that Comcast's refusal to contract was racially motivated and in violation of 42 U.S.C. § 1981. The district court thrice dismissed Plaintiffs' complaints, concluding in its third and final dismissal order that "not one fact added to the SAC is either antithetical to a decision not to contract with [Entertainment Studios] for legitimate business reasons or, in itself, indicates that the decision was racially discriminatory."

1. We conclude that the district court improperly dismissed Plaintiffs' SAC. As discussed at length in the contemporaneously filed opinion in *National Association of African American-Owned Media v. Charter Communications, Inc.*, No. 17-55723, to prevail in a Rule 12(b)(6) motion on their § 1981 claim, Plaintiffs needed only to plausibly allege that discriminatory intent was a factor in Comcast's refusal to contract, and not necessarily the but-for cause of that decision.

Here, Plaintiffs' SAC includes sufficient allegations from which we can plausibly infer that Entertainment Studios experienced disparate treatment due to race and was thus denied the same right to contract as a white-owned company, which violates § 1981. *See* 42 U.S.C. § 1981(a) ("All persons . . . shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ."). These allegations include: Comcast's expressions of interest followed by repeated refusals to contract; Comcast's practice of suggesting various methods of securing support for carriage only to reverse its position once Entertainment Studios had taken those steps; the fact that Comcast carried every network of the approximately 500 that were also carried by its main competitors (Verizon FIOS, AT&T U-verse, and DirecTV), *except* Entertainment Studios' channels; and, most importantly, Comcast's decisions to offer carriage contracts to "lesser-known, white-owned" networks (including Inspirational Network, Fit TV, Outdoor Channel, Current TV, and Baby First Americas) at the same time it informed Entertainment Studios that it had no bandwidth or carriage capacity.[1]

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[1] Comcast argues, and the district court concluded, that Plaintiffs' SAC failed to adequately plead that these other, white-owned channels were similarly situated to Entertainment Studios' networks. However, an extensive comparison of these channels for purposes of determining disparate treatment due to race would require a factual inquiry that is inappropriate in a 12(b)(6) motion. *See Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1114–15 (9th Cir. 2011) (describing the fact-intensive, context-dependent analysis needed to determine whether individuals are similarly situated in the related context of employment discrimination). At this stage, we must instead accept as true Plaintiffs' allegations that lesser-known, white-owned channels secured carriage at the same time that Comcast refused to contract with Entertainment Studios.

Although Comcast notes that legitimate, race-neutral reasons for its conduct are contained within the SAC, when considered in the light most favorable to Plaintiffs, we cannot conclude that these alternative explanations are so compelling as to render Plaintiffs' theory of racial animus implausible. *See Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

We can infer from the allegations in the SAC that discriminatory intent played at least some role in Comcast's refusal to contract with Entertainment Studios, thus denying the latter the same right to contract as a white-owned company. Accordingly, Plaintiffs stated a plausible claim pursuant to § 1981, and their SAC should not have been dismissed under Rule 12(b)(6).

2. For the reasons discussed at length in our opinion in *Charter Communications*, we also conclude that the First Amendment does not bar Plaintiffs' § 1981 claim.

3. Because we reverse the district court's dismissal of Plaintiffs' SAC, we need not consider whether the court abused its discretion when it denied Plaintiffs further leave to amend.

4. We deny Plaintiffs' motion to take judicial notice.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

NATIONAL ASSOCIATION OF AFRICAN-AMERICAN OWNED MEDIA, *et al.*, Plaintiffs, v. COMCAST CORPORATION, Defendant.	CV 15-1239 TJH (MANx) Order [October 5, 2016]

The Court has considered Defendant Comcast Corporation's ["Comcast"] motion to dismiss Plaintiffs' Second Amended Complaint ["SAC"] under Fed. R. Civ. P. 12(b)(6), together with the moving and opposing papers.

To survive a 12(b)(6) motion, a plaintiff must plead facts sufficient to state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The crux of Plaintiffs' claim is that "Comcast's . . . refusal to contract with Plaintiff Entertainment Studios [Network, Inc.]" ["ESN"] was "racially discriminatory."

In dismissing the First Amended Complaint ["FAC"], the Court clearly identified the problem: the benchmarks provided by Plaintiffs — allegedly representing demand by viewers for ESN channels — were

ambiguous, and did not exclude the alternative explanation that Comcast's refusal to contract with ESN was based on legitimate business reasons. *See Eclectic Properties E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014). The Court went out of its way to suggest cures for the pleading deficiencies.

In the SAC, Plaintiffs have merely provided the Court with different opaque benchmarks. For example, Plaintiffs added the allegation that eighty million people may have *access* to ESN in all fifty states. But, similar to the viewer growth statistics in the FAC, this allegation represents potential, not actual, demand for ESN content, and thus it does not necessarily undercut the Comcast's alternative explanation. In short, not one fact added to the SAC is either antithetical to a decision not to contract with ESN for legitimate business reasons or, in itself, indicates that the decision was racially discriminatory. Accordingly, the SAC "stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted).

Federal Rule of Civil Procedure 15(a) provides that leave to amend shall be given freely "when justice so requires." Nonetheless, "[r]epeated failure to cure deficiencies by amendments previously allowed is [a] valid reason for a district court to deny a party leave to amend." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 809–10 (9th Cir. 1988). In the Order dismissing the FAC, Plaintiffs were warned, in no uncertain terms, that "leave to amend" would only be provided "one last time." Indeed, the Court specifically stated that "[i]f Plaintiffs file a second amended complaint

with pleading deficiencies, this case will . . . be dismissed with prejudice." The deficiencies identified have not been cured.

Accordingly,

It is Ordered that Comcast's motion to dismiss be, and hereby is, Granted with prejudice.

Date: October 5, 2016

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Terry J. Hatter, Jr.
Senior United States District Judge

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA, a California Limited Liability Company; ENTERTAINMENT STUDIOS NETWORKS, INC., a California corporation, *Plaintiffs-Appellees*, v. CHARTER COMMUNICATIONS, INC., a Delaware corporation, *Defendant-Appellant*.	No. 17-55723 D.C. No. 2:16-cv-00609-GW-FFM ORDER AND OPINION

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Argued and Submitted October 9, 2018
Pasadena, California

Filed February 4, 2019

Before: MARY M. SCHROEDER, MILAN D. SMITH, JR., and JACQUELINE H. NGUYEN, Circuit Judges.

Opinion by Judge Milan D. Smith, Jr.

ORDER

Defendant-Appellant's petition for panel rehearing is GRANTED. The opinion filed November 19, 2018, and reported at 908 F.3d 1190, is hereby withdrawn. A superseding opinion will be filed concurrently with this order.

Judge M. Smith and Judge Nguyen vote to deny the petition for rehearing en banc, and Judge Schroeder so recommends. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED. No further petitions for panel rehearing or rehearing en banc will be entertained.

OPINION

M. SMITH, Circuit Judge:

Plaintiff-Appellee Entertainment Studios Networks, Inc. (Entertainment Studios), an African American-owned operator of television networks, sought to secure a carriage contract from Defendant-Appellant Charter Communications, Inc. (Charter). These efforts were unsuccessful, and Entertainment Studios, along with Plaintiff-Appellee National Association of African American-Owned Media (NAAAOM, and together with Entertainment Studios, Plaintiffs), claimed that Charter's refusal to enter into a carriage contract was racially motivated, and in violation of 42 U.S.C. § 1981. The district court, concluding that Plaintiffs' complaint sufficiently pleaded a § 1981 claim and that the First Amendment did not bar such an action, denied Charter's motion to dismiss. The court then certified that order for interlocutory appeal. We have jurisdiction pursuant to 28 U.S.C. § 1292(b), and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

Entertainment Studios is a full-service television and motion picture company owned by Byron Allen, an African-American actor, comedian, and entrepreneur. It serves as both a producer of television series and an operator of television networks, and currently operates seven channels and distributes thousands of hours of programming.

Entertainment Studios relies on cable operators like Charter for "carriage contracts"; these operators, which range from local cable companies to nationwide enterprises, carry and distribute channels and programming to their television subscribers. Although Entertainment Studios managed to secure carriage contracts with more than 50 operators—including prominent distributors like Verizon, AT&T, and DirecTV—it was unable to reach a similar agreement with Charter, the third-largest cable television-distribution company in the United States, despite efforts that began in 2011.

From 2011 to 2016, Charter's senior vice president of programming, Allan Singer, declined to meet with Entertainment Studios representatives or consider its channels for carriage. Plaintiffs alleged that, instead of engaging in a meaningful discussion regarding a potential carriage contract, Singer and Charter repeatedly refused, rescheduled, and postponed meetings, encouraging Entertainment Studios to exercise patience and proffering disingenuous explanations for its refusal to contract. Although Singer stated that Charter was not launching any new channels and that bandwidth and operational demands precluded carriage opportunities, Plaintiffs claimed that Charter

nonetheless negotiated with other, white-owned networks during the same period, and also secured carriage agreements with The Walt Disney Company and Time Warner Cable Sports. Charter allegedly communicated that it did not have faith in Entertainment Studios' "tracking model," despite contracting with other white-owned media companies that used the same tracking model. Plaintiffs also asserted that Singer blocked a meeting between Entertainment Studios and Charter CEO Tom Rutledge because the latter "does not meet with programmers," despite the fact that Rutledge regularly met with the CEOs of white-owned programmers, such as Viacom's Philippe Dauman. Singer was allegedly steadfast in his opposition to Entertainment Studios, saying, "Even if you get support from management in the field, I will not approve the launch of your network."

Plaintiffs claimed that they finally managed to secure a meeting with Singer in July 2015. However, during the meeting at Charter's headquarters in Stamford, Connecticut, Singer once again made clear that Entertainment Studios would not receive a carriage contract, citing a series of allegedly insincere explanations for this decision. For example, Singer informed Entertainment Studios that he wanted to wait and "see what AT&T does," despite the fact that AT&T already carried one of Entertainment Studios' networks. Charter also mentioned its purported lack of bandwidth, even though at that time, it expanded the distribution of two lesser-known, white-owned channels into major media markets: RFD-TV, a network focused on rural and Western lifestyles, and CHILLER, a horror channel.

In addition to recounting Entertainment Studios' failed negotiations with Charter, Plaintiffs' amended

complaint also included direct evidence of racial bias. In one instance, Singer allegedly approached an African-American protest group outside Charter's headquarters, told them "to get off of welfare," and accused them of looking for a "handout." Plaintiffs asserted that, after informing Charter of these allegations, it announced that Singer was leaving the company. In another alleged instance, Entertainment Studios' owner, Allen, attempted to talk with Charter's CEO, Rutledge, at an industry event; Rutledge refused to engage, referring to Allen as "Boy" and telling Allen that he needed to change his behavior. Plaintiffs suggested that these incidents were illustrative of Charter's institutional racism, noting also that the cable operator had historically refused to carry African American-owned channels and, prior to its merger with Time Warner Cable, had a board of directors composed only of white men. The amended complaint further alleged that Charter's recently pronounced commitments to diversity were merely illusory efforts to placate the Federal Communications Commission (FCC).

II. Procedural Background

Plaintiffs initiated this action on January 27, 2016, asserting both a claim against Charter under § 1981 and a claim against the FCC under the due process clause of the Fifth Amendment.[1] After learning of the derogatory racial comments allegedly made by Singer and Rutledge, Plaintiffs sought leave to file a first amended complaint (FAC), which the district court granted. The FAC alleged one claim against Charter for racial discrimination in contracting in violation of § 1981.

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[1] Plaintiffs voluntarily dismissed their claim against the FCC before filing their first amended complaint.

Charter moved to dismiss the FAC, arguing that it failed to plead that racial animus was the but-for cause of Charter's conduct and that the First Amendment barred a § 1981 claim based on a cable operator's editorial discretion. The district court denied the motion. It determined that, under *Metoyer v. Chassman*, 504 F.3d 919 (9th Cir. 2007), Plaintiffs needed only to plead that racism was a *motivating factor* in Charter's decision, not the *but-for* cause—a requirement, the court concluded, that Plaintiffs satisfied. Addressing Charter's contention that *Metoyer* was no longer good law following two subsequent Supreme Court decisions, the district court concluded that "if *Metoyer* is no longer good law on this point, [then] the Ninth Circuit [] should announce that conclusion." As for Charter's First Amendment challenge, the district court allowed that the cable operator's "ultimate carriage/programming activity is entitled to some measure of First Amendment protection," but declined to apply strict scrutiny and bar the § 1981 claim.

Subsequently, Charter moved for certification of the district court's order under 28 U.S.C. § 1292(b), which the district court granted. This appeal followed.

STANDARD OF REVIEW AND JURISDICTION

"We review de novo a district court order denying a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)." *Fortyune v. City of Lomita*, 766 F.3d 1098, 1101 (9th Cir. 2014). We have jurisdiction pursuant to 28 U.S.C. § 1292(b).[2]

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[2] "A non-final order may be certified for interlocutory appeal where it 'involves a controlling question of law as to which there is substantial ground for difference of opinion' and where 'an im-

ANALYSIS

"Section 1981 offers relief when racial discrimination blocks the creation of a contractual relationship." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006). The statute provides that "[a]ll persons . . . shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981(a). It further defines "make and enforce contracts" as including "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* § 1981(b). The Supreme Court has emphasized that § 1981 reaches both public and "purely private acts of racial discrimination." *Runyon v. McCrary*, 427 U.S. 160, 170 (1976); *see also* 42 U.S.C. § 1981(c) ("The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."). However, it "reaches only *purposeful* discrimination." *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389 (1982) (emphasis added).[3]

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mediate appeal from the order may materially advance the ultimate termination of the litigation.'" *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 687–88 (9th Cir. 2011) (quoting 28 U.S.C. § 1292(b)). "Although we defer to the ruling of the motions panel granting an order for interlocutory appeal, 'we have an independent duty to confirm that our jurisdiction is proper.'" *Id.* at 688 (quoting *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 318–19 (9th Cir. 1996)). Here, we are satisfied that the district court and the motions panel of this court correctly concluded that certification under § 1292(b) was appropriate.

[3] Although the Supreme Court has not squarely decided whether a corporation may bring suit under § 1981, *see Domino's Pizza*, 546 U.S. at 473 n.1, we have held that a corporation may do so when it "has acquired an imputed racial identity." *Thinket*

Charter advances three primary arguments on appeal: the district court applied the wrong causation standard to Plaintiffs' § 1981 claim; Plaintiffs' FAC failed to plead a plausible claim; and the First Amendment bars a § 1981 claim premised on a cable operator's editorial decisions. We will consider each of these arguments in turn.

I. Causation Standard

Charter argues that the Supreme Court's decisions in two discrimination cases require us to apply a but-for causation standard to § 1981 claims. Although we agree that these precedents necessitate reconsideration of our § 1981 approach, we disagree that the but-for causation standard should be applied.

A. *Metoyer* and the Motivating Factor Standard

In the past, we have held that "the same legal principles as those applicable in a Title VII disparate treatment case" govern a § 1981 claim. *Metoyer*, 504 F.3d at 930 (quoting *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 850 (9th Cir. 2004)). "In a Title VII discrimination case, even an employer who can successfully prove a mixed-motive defense, i.e., he would have made the same decision regarding a particular person without taking race or gender into account, does not escape liability." *Id.* at 931; *see also* 42 U.S.C. § 2000e-2(m) (providing that a plaintiff can prevail in a Title VII disparate treatment case by showing "that race, color, religion, sex, or national

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Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1058–59 (9th Cir. 2004). Thus, as a "100% African American-owned" company that is a "bona fide Minority Business Enterprise," Entertainment Studios can bring a § 1981 claim, even though it is a corporation and not an individual.

origin was a motivating factor for any employment practice, even though other factors also motivated the practice"). Accordingly, we previously ruled that a § 1981 defendant may be held liable even if it had a legitimate reason for its refusal to contract, so long as racial discrimination was a *motivating factor* in that decision.

B. *Gross* and *Nassar*

Charter correctly notes that two Supreme Court decisions cast doubt on the propriety of our application of the Title VII standard to § 1981 claims. In these two cases, the Supreme Court departed from application of the Title VII motivating factor standard, and instead endorsed a but-for causation requirement as applied to two federal statutes: the Age Discrimination in Employment Act (ADEA), *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177–78 (2009), and retaliation claims brought under Title VII, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362–63 (2013). In *Gross*, the Court admonished that "[w]hen conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'" *Gross*, 557 U.S. at 174 (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)). That examination did not center on the shared objectives of the statute at issue there and Title VII's antidiscrimination provision—the approach that this court employed in *Metoyer* and its antecedents with regard to § 1981—but instead focused on the statute's text and history:

> Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover,

> Congress neglected to add such a provision to the ADEA when it amended Title VII . . . .
>
> Our inquiry therefore must focus on the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim.

Id. at 174–75. In *Nassar*, the Court expanded upon this textual analysis, explaining that

> [i]n the usual course, [the causation] standard requires the plaintiff to show "that the harm would not have occurred" in the absence of— that is, but for—the defendant's conduct. . . . This, then, is the background against which Congress legislated in enacting Title VII, and these are the default rules it is presumed to have incorporated, absent an indication to the contrary in the statute itself.

570 U.S. at 346–47.

In both cases, after analyzing the relevant statutory texts, the Court endorsed the use of a default, but-for causation standard in the application of the statutes being construed—a standard from which courts may depart only when the text of a statute permits. *See Gross*, 557 U.S. at 175 n.2 ("[T]he textual differences between Title VII and the ADEA [] prevent us from applying [the motivating factor standard] to federal age discrimination claims."); *Nassar*, 570 U.S. at 352 ("Given the lack of any meaningful textual difference between the text in this statute and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require

proof that the desire to retaliate was the but-for cause of the challenged employment action.").[4]

We conclude that *Metoyer* does not emerge from *Gross* and *Nassar* unscathed. We premised our opinion in *Metoyer* on a determination that "an '[a]nalysis of an employment discrimination claim under § 1981 follows the same legal principles as those applicable in a Title VII disparate treatment case.'" *Metoyer*, 504 F.3d at 934 (alteration in original) (quoting *Fonseca*, 374 F.3d at 850). That opinion followed a line of cases in which this court applied Title VII's causation standard to § 1981 cases because both statutes sought to combat intentional discrimination.[5] This approach is

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[4] Plaintiffs argue that *Gross* and *Nassar* have no bearing here because of the textual differences between the ADEA, the Title VII retaliation provision, and § 1981. We disagree. Although it is true that the use of the word "because"—which does not appear in § 1981—drove the Court's *results* in those cases, *see Gross*, 557 U.S. at 176–78; *Nassar*, 570 U.S. at 352, the decisions do not hold that the preceding *inquiry* only occurs in cases where a statute features the word "because" or other similar language. Indeed, in *Nassar*, the Court cautioned against reading *Gross* in too narrow a manner. *Nassar*, 570 U.S. at 351 ("In *Gross*, the Court was careful to restrict its analysis to the statute before it and withhold judgment on the proper resolution of a case, such as this, which arose under Title VII rather than the ADEA. But the particular confines of *Gross* do not deprive it of all persuasive force.").

[5] *See, e.g.*, *Fonseca*, 374 F.3d at 850 ("Analysis of an employment discrimination claim under § 1981 follows the same legal principles as those applicable in a Title VII disparate treatment case. Both require proof of discriminatory treatment and the same set of facts can give rise to both claims." (citation omitted)); *Manatt v. Bank of Am., NA*, 339 F.3d 792, 797–98 (9th Cir. 2003) ("We also recognize that those legal principles guiding a court in a Title VII dispute apply with equal force in a § 1981 action."); *EEOC v. Inland Marine Indus.*, 729 F.2d 1229, 1233 n.7 (9th Cir.

incompatible with *Gross*, which suggests that, rather than borrowing the causation standard from Title VII's disparate treatment provision and applying it to § 1981 because both are antidiscrimination statutes, we must instead focus on the text of § 1981 to see if it permits a mixed-motive claim. *See Gross*, 557 U.S. at 174–75.[6]

C. Departing from *Metoyer*

Although not addressed by the parties, a departure from *Metoyer* is permissible here under our opinion in *Miller v. Gammie*, which held that a higher court ruling is controlling when it has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." 335 F.3d 889, 900 (9th Cir. 2003) (en banc). *Gross* and *Nassar* are fairly clear that our approach in *Metoyer*—borrowing the causation standard of Title VII's discrimination provision and applying it to § 1981 due to the statutes' shared objectives, without considering § 1981's text—is not permitted. *See Nassar*, 570 U.S. at 350–51; *Gross*, 557 U.S. at 175–75 ("Our inquiry therefore must focus *on the text of the ADEA* to decide whether it authorizes a mixed-motives age discrimination claim." (emphasis added)).

1984) ("A plaintiff must meet the same standards in proving a § 1981 claim that he must meet in establishing a disparate treatment claim under Title VII; that is, he must show discriminatory intent." (citing *Gen. Bldg. Contractors Ass'n*, 458 U.S. at 391)).

[6] As another circuit court has concluded, "No matter the shared goals and methods of two laws, [*Gross*] explains that we should not apply the substantive causation standards of one anti-discrimination statute to other anti-discrimination statutes when Congress uses distinct language to describe the two standards." *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 318–19 (6th Cir. 2012) (en banc).

Furthermore, in *Gross*, the Supreme Court determined that borrowing the Title VII causation standard was inappropriate in ADEA cases because 1) unlike Title VII's disparate treatment provision, the text of the ADEA did not explicitly provide that "a plaintiff may establish discrimination by showing that [the protected characteristic] was simply a motivating factor," and 2) the ADEA was not amended to include a motivating factor standard even though it was amended contemporaneously with Title VII. 557 U.S. at 174–75. Because § 1981 shares these two characteristics with the ADEA,[7] and because the Court determined that Title VII's standard could not be adopted in the ADEA context, *Gross* alone undermines *Metoyer* to the point of irreconcilability.

D. Section 1981's Text

Accordingly, rather than adopting Title VII's motivating factor standard in this case, we must instead look to the text of § 1981 to determine whether it permits a departure from the but-for causation standard.

Section 1981 guarantees "the same right" to contract "as is enjoyed by white citizens." 42 U.S.C. § 1981(a). This is distinctive language, quite different from the language of the ADEA and Title VII's retaliation provision, both of which use the word "because" and therefore explicitly suggest but-for causation. Charter contends that the most natural understanding of the "same right" language is also but-for causation. We disagree and are persuaded by the reasoning of the Third Circuit in *Brown v. J. Kaz, Inc.*, 581 F.3d 175 (3d Cir. 2009). There, albeit in dicta and without formally

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[7] Like Title VII and the ADEA, § 1981 was amended as part of the Civil Rights Act of 1991. *See* Pub. L. No. 102-166, 105 Stat. 1071, 1071–72 (1991).

resolving the issue, the court reasoned that "[i]f race plays any role in a challenged decision by a defendant, the plain terms of the statutory text suggest the plaintiff has made out a prima facie case that section 1981 was violated because the plaintiff has not enjoyed 'the same right' as other similarly situated persons." *Id.* at 182 n.5; *see also St. Ange v. ASML, Inc.*, No. 3:10-cv-00079-WWE, 2015 WL 7069649, at *2 (D. Conn. Nov. 13, 2015) ("Where race discrimination is a motivating factor in an adverse employment decision, the subject of the discrimination has not enjoyed the same right to the full and equal benefit of the law.").

If discriminatory intent plays *any* role in a defendant's decision not to contract with a plaintiff, even if it is merely one factor and not the sole cause of the decision, then that plaintiff has not enjoyed the *same right* as a white citizen. This, we conclude, is the most natural reading of § 1981. Therefore, unlike the ADEA or Title VII's retaliation provision, § 1981's text permits an exception to the default but-for causation standard by virtue of "an indication to the contrary in the statute itself." *Nassar*, 570 U.S. at 347.

Accordingly, mixed-motive claims are cognizable under § 1981. Even if racial animus was not the but-for cause of a defendant's refusal to contract, a plaintiff can still prevail if she demonstrates that discriminatory intent was a factor in that decision such that she was denied the same right as a white citizen.

II. Plausibility of Plaintiffs' § 1981 Claim

Having determined that a plaintiff in a § 1981 action need only prove that discriminatory intent was a factor in— and not necessarily the but-for cause of—a defendant's refusal to contract, we must now determine whether Plaintiffs pleaded a plausible claim for

relief in their FAC. We conclude that they did. Plaintiffs' allegations regarding Charter's treatment of Entertainment Studios, and its differing treatment of white-owned companies, are sufficient to state a viable claim pursuant to § 1981.

A. Allegations of Disparate Treatment

Plaintiffs' FAC alleged various instances of contradictory, disingenuous, and disrespectful behavior on the part of Charter and its executives. These allegations include: a pattern of declining and delaying meetings with Entertainment Studios, combined with a refusal to contract despite presenting intimations to the contrary; the offering of "provably false" explanations for its reluctance to carry Entertainment Studios' channels; and Singer's repeated misleading and insulting communications with Entertainment Studios. We acknowledge that, even when considered in the light most favorable to Plaintiffs, these claims alone would not constitute a plausible § 1981 claim. Corporate red tape, inconsistent decision-making among network leadership, and even boorish executives are not themselves necessarily indicative of discrimination.

However, Plaintiffs supplemented these claims by pleading that white-owned companies were not treated similarly. For example, the FAC stated that, although Charter informed Entertainment Studios that bandwidth and operational demands prevented carriage of the latter's channels, Charter secured contracts with "white-owned, lesser-known" networks during the same period.[8] Charter also allegedly

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[8] Charter argues that we cannot infer disparate treatment from these allegations because "[t]he complaint fails to allege any

pointed to Entertainment Studios' tracking model as a ground for refusing to contract, while simultaneously accepting white-owned channels that used the same model. Plaintiffs further alleged that Charter's CEO, Rutledge, refused to meet with Entertainment Studios' African-American owner, Allen, despite meeting with the heads of white-owned programmers during the same time period. We conclude that these allegations, when accepted as true and viewed in the light most favorable to Plaintiffs, are sufficient under

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facts whatsoever showing that [Entertainment Studios'] channels are 'similarly situated' to the channels Charter added (or expanded) in respects such as content, quality, popularity, viewer demand, or any objective metric relevant to a carriage decision." It is true that, in order for us to infer discriminatory intent from these allegations of disparate treatment, we would need to conclude that the white-owned channels were similarly situated to Entertainment Studios'. *See, e.g.*, *Lindsey v. SLT L.A., LLC*, 447 F.3d 1138, 1147 (9th Cir. 2006). It is also true that television networks can vary widely in terms of content, quality, and appeal. *See Herring Broad., Inc. v. FCC*, 515 F. App'x 655, 656–57 (9th Cir. 2013) (exploring various ways in which television networks can differ). However, such a thorough comparison of channels would require a factual inquiry that is inappropriate in reviewing a 12(b)(6) motion. *See Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1114–15 (9th Cir. 2011) (describing the fact-intensive, context-dependent analysis needed to determine whether individuals are similarly situated in the related context of employment discrimination). At this stage of the litigation, we must accept as true Plaintiffs' assertions that other, lesser-known, white-owned networks were selected for carriage at the same time that Charter refused to carry Entertainment Studios' offerings.

§ 1981 to plausibly claim that Charter denied Entertainment Studios the same right to contract as white-owned companies.[9]

B. Charter's Race-Neutral Explanations

Charter contends that we cannot ignore the legitimate, race-neutral explanations for its conduct that are, admittedly, present on the face of the FAC. These business justifications include limited bandwidth, timing concerns, and other operational considerations. However, at this stage, we are not permitted to weigh evidence and determine whether the explanations proffered by Plaintiffs or Charter are ultimately more persuasive. Instead, we have explained that "[i]f there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6). Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is *im*plausible." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

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[9] Furthermore, Plaintiffs' FAC also included direct allegations of racial animus: specifically, the racially charged comments allegedly made by Singer and Rutledge, both of whom were high-ranking Charter decision-makers. Notably, neither of these incidents occurred in the context of Entertainment Studios' attempts to secure a carriage contract with Charter, and they can therefore serve only as circumstantial evidence of discriminatory animus. *See, e.g.*, *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998); *Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993). However, circumstantial evidence of discrimination is still evidence, and is particularly compelling here when combined with the allegations of disparate treatment contained elsewhere in the FAC.

Here, it is plausible that Charter's conduct was attributable wholly to legitimate, race-neutral considerations. But we cannot conclude, based only on the allegations in the FAC, construed in the light most favorable to Plaintiffs, that those alternative explanations are so compelling as to render Plaintiffs' allegations of discriminatory intent *im*plausible. This is especially true given that Plaintiffs' allegations of disparate treatment and disingenuous statements suggest that Charter's race-neutral explanations lack credibility. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("[E]vidence that a defendant's explanation for an employment practice is 'unworthy of credence' is 'one form of *circumstantial evidence* that is probative of intentional discrimination.'" (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000))). In short, we can infer from the allegations in the FAC that discriminatory intent played at least some role in Charter's refusal to contract with Entertainment Studios, thus denying the latter the same right to contract as a white-owned company. Charter's race-neutral explanations for its conduct are not so convincing as to render Plaintiffs' theory implausible.[10]

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[10] Charter also relies in part on *In re Century Aluminum Co. Securities Litigation*, in which we held that

> [w]hen faced with two possible explanations, only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are "merely consistent with" their favored explanation but are also consistent with the alternative explanation. Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible within the meaning of *Iqbal* and *Twombly*.

III. First Amendment

Finally, Charter argues that Plaintiffs' § 1981 claim is barred by the First Amendment because laws of general applicability cannot be used "to force cable companies to accept channels they do not wish to carry." We disagree and conclude that the First Amendment does not bar Plaintiffs' claim.[11]

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729 F.3d 1104, 1108 (9th Cir. 2013) (citations omitted) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). However, *Century Aluminum* is not particularly persuasive here because we are not confronted with two mutually exclusive possibilities. It is entirely possible that Charter was motivated by both race-neutral business concerns *and* discriminatory intent—a scenario that, given the applicable causation standard, would still give rise to a viable claim under § 1981. Because both parties' explanations can logically coexist, we conclude that *Starr*, not *Century Aluminum*, provides the proper framework for our analysis. Plaintiffs therefore do not need to provide facts "tending to exclude" Charter's theory of the case; it is sufficient under *Starr* that Plaintiffs' explanation is not implausible.

[11] We note that our analysis here is limited to cases of discriminatory contracting based on a plaintiff's *race*, not contracting based on a plaintiff's *viewpoint*. A bookstore's choice of which books to stock on its shelves, or a theater owner's decision about which productions to stage, or a cable operator's selection of certain perspectives to air, are decisions based on content, and not necessarily on the racial identities of the parties with which they contract (or refuse to contract). Here, by contrast, Plaintiffs plausibly pleaded that Charter refused to contract with Entertainment Studios due to racial animus, and they must ultimately prove that Entertainment Studios' racial identity, separate and apart from the underlying content of its programming, was a factor in Charter's decision. Accordingly, our First Amendment analysis is limited to cases involving racially discriminatory contracting that incidentally impacts speech, and should not be construed as applying to cases where a refusal to contract is instead based solely on the viewpoint or substance of a plaintiff's content or message.

The Supreme Court has held that "[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 570 (1995) ("Cable operators . . . are engaged in protected speech activities even when they only select programming originally produced by others."). Because Plaintiffs' claim implicates the First Amendment, we must determine the appropriate standard of review for our analysis.

Here, there is some ambiguity as to whether rational basis review or a heightened form of scrutiny ought to be applied. Normally, laws of general applicability that regulate *conduct* and not *speech*—such as § 1981—trigger only rational basis review. *See, e.g.*, *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) ("Congress . . . can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct."); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670–71 (1991) (permitting application of a generally applicable law that had an incidental effect on speech and contrasting it with laws that "define[] the content of publications that would trigger liability").

In *Hurley*, however, the Supreme Court explained that even generally applicable laws directed at conduct rather than speech *might* implicate the First Amendment "[w]hen the law is applied to expressive activity" in a way that "require[s] speakers to modify the content of their expression to whatever extent

beneficiaries of the law choose to alter it with messages of their own." 515 U.S. at 578; *see also Turner Broad.*, 512 U.S. at 640–41 (noting that "the enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment" and contrasting *Cohen*, where enforcement of a law did not directly impact expressive conduct, with *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566–67 (1991), where expressive conduct was directly implicated). Here, we conclude that resolution of this issue is not required, since Plaintiffs' § 1981 claim survives even a heightened standard of review.

Contrary to Charter's position, the fact that cable operators engage in expressive conduct when they select which networks to carry does *not* automatically require the application of strict scrutiny in this case. If § 1981 is a content-neutral statute, then, at most, it would be subject to intermediate scrutiny. *See Turner Broad.*, 512 U.S. at 642 ("[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny."). Accordingly, § 1981 would pass muster under the First Amendment if it is content-neutral and if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 662 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

A. Content Neutrality

Section 1981 does not seek to regulate the *content* of Charter's conduct, but only the manner in which it reaches its editorial decisions—which is to say, free of discriminatory intent. It is therefore "justified without reference to the content of the regulated speech." *Clark*

v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). Just as "[n]othing in the [statute]" at issue in *Turner Broadcasting* "imposes a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select," 512 U.S. at 644, nothing in § 1981 punishes a defendant for the content of its programming. Section 1981 prohibits Charter from discriminating against networks on the basis of race. This prohibition has no connection to the viewpoint or content of any channel that Charter chooses or declines to carry. *See Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 801 (9th Cir. 2011) ("[A]ntidiscrimination laws intended to ensure equal access to the benefits of society serve goals 'unrelated to the suppression of expression' and are neutral as to both content and viewpoint." (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984))). Because it does not rely upon the content of Charter's expressive conduct, § 1981 is content-neutral.

B. Narrow Tailoring and Government Interest

Next, to satisfy intermediate scrutiny, a content-neutral statute must be "narrowly tailored to serve a significant governmental interest." *Clark*, 468 U.S. at 293. The Supreme Court has regularly emphasized that the prevention of racial discrimination is a compelling government interest. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014) ("The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) ("[T]he Government has a fundamental, overriding interest in eradicating racial

discrimination in education."). The Court has emphasized that this significant interest applies even when expressive activities are impacted:

> [A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection.

Roberts, 468 U.S. at 628. Thus, there can be little doubt that § 1981, which is part of a "longstanding civil rights law, first enacted just after the Civil War" to "guarantee the then newly freed slaves the same legal rights that other citizens enjoy," *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 445, 448 (2008), serves a significant government interest, and one that is "unrelated to the suppression of free expression." *Turner Broad.*, 512 U.S. at 662 (quoting *O'Brien*, 391 U.S. at 377).

As for whether § 1981 is narrowly tailored to that interest—in other words, whether "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest," *id.* at 662 (quoting *O'Brien*, 391 U.S. at 377)—there can be no dispute that the statute "promotes a substantial government interest that would be achieved less effectively absent the regulation," which satisfies the requirement of narrow tailoring. *Ward v.*

Rock Against Racism, 491 U.S. 781, 799 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). Such regulations are not "invalid simply because there is some imaginable alternative that might be less burdensome on speech." *Albertini*, 472 U.S. at 689. Section 1981 does not restrict more speech than necessary; it prohibits *all* racial discrimination in contracting, and the Supreme Court has noted that "[a] complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). Here, the *only* activity within § 1981's ambit is discriminatory contracting, which is, indisputably, an appropriately targeted evil. Therefore, § 1981 is narrowly tailored and would survive intermediate scrutiny.

In summation, as with the statute analyzed in *Turner Broadcasting*, § 1981 is a content-neutral regulation that would satisfy even intermediate scrutiny as set forth in *O'Brien* and its progeny. Therefore, the First Amendment does not bar Plaintiffs' § 1981 claim.

CONCLUSION

We AFFIRM the district court's order denying Charter's motion to dismiss, and REMAND for further proceedings. We also DENY Plaintiffs' motion to take judicial notice.

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA, a California limited liability company; ENTERTAINMENT STUDIOS NETWORKS, INC., a California corporation, *Plaintiffs-Appellants*, v. COMCAST CORPORATION, a Pennsylvania corporation, *Defendant-Appellee*.	No. 16-56479 D.C. No. 2:15-cv-01239-TJH-MAN ORDER

Filed February 4, 2019

Before: MARY M. SCHROEDER, MILAN D. SMITH, JR., and JACQUELINE H. NGUYEN, Circuit Judges.

ORDER

The panel unanimously votes to deny the petition for panel rehearing. Judge M. Smith and Judge Nguyen vote to deny the petition for rehearing en banc, and Judge Schroeder so recommends. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are DENIED.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

NATIONAL ASSOCIATION OF AFRICAN AMERICAN–OWNED MEDIA, a California limited liability company; and ENTERTAINMENT STUDIOS NETWORKS, INC., a California corporation, Plaintiffs, v. COMCAST CORPORATION, a Pennsylvania corporation; and DOES 1 through 10, inclusive, Defendants.	**CASE NO. 2:15-cv-01239-TJH-MAN** **SECOND AMENDED COMPLAINT FOR RACIAL DISCRIMINATION IN VIOLATION OF 42 U.S.C. § 1981; AND FOR DAMAGES AND INJUNCTIVE RELIEF** **DEMAND FOR JURY TRIAL** [Filed June 9, 2016]

Plaintiffs National Association of African American–Owned Media ("NAAAOM") and Entertainment Studios Networks, Inc. ("Entertainment Studios") allege against Defendants Comcast Corporation ("Comcast") and DOES 1 through 10, inclusive, (collectively, "Defendants") as follows:

INTRODUCTION

1. Plaintiffs bring this lawsuit to remedy harm caused by Defendant Comcast's racially discriminatory refusal to contract with Plaintiff Entertainment Studios, a 100% African American-owned media company, in violation of Plaintiff's civil rights under the Civil Rights Act of 1866, 42 U.S.C. §1981.

2. Plaintiff Entertainment Studios owns and operates seven different 24-hour per day television networks which are currently distributed to nearly 80 million cumulative pay television subscribers in nearly every zip code in the United States. These networks include Emmy-nominated and Emmy-award winning shows and talent, and original programming featuring well-known celebrities, all of which help to increase market demand for the networks.

3. Defendant Comcast is the largest cable television company, and has the highest number of pay television cable subscribers, concentrated primarily in highly African American-populated urban cities in the United States. Comcast currently generates approximately $40 billion in annual revenue from television subscribers, approximately $16 billion of which comes from African American subscribers. Comcast does not carry any 100% African American-owned television networks, not to be confused with African American "targeted" networks (e.g., Black Entertainment Television, or BET, which is owned by the conglomerate Viacom).

4. A majority of Comcast's main competitors—including Verizon FIOS, AT&T U-verse and DirecTV—all carry Entertainment Studios' networks. Like DirecTV, AT&T U-verse, and Verizon FIOS, there are more than 50 other television distributors

(in the industry, these are known as multichannel video programming distributors ("MVPDs")) who carry Entertainment Studios' networks because of market demand. The networks can be seen by nearly 80 million cumulative pay television subscribers.

5. Entertainment Studios has met and spoken with senior Comcast executives responsible for licensing television networks on numerous occasions beginning as early as 2008 and as recently as 2015 to license the Entertainment Studios networks for availability to Comcast's pay television subscribers. Comcast has repeatedly used disingenuous and pretextual excuses to carry out its racist agenda.

6. Comcast's refusal to carry Entertainment Studios' networks is unprecedented. Comcast carries **every single** television network of the approximately 500 networks that are also carried collectively by its main competitors, Verizon FIOS, AT&T U-verse and DirecTV, with one notable exception: the 100% African American-owned Entertainment Studios networks. Because the Entertainment Studios networks have achieved this high level of distribution on Comcast's main competitors, Comcast does not have any legitimate business reason to exclude Entertainment Studios. . Race-based discrimination is the only explanation.

7. Comcast has continued to offer bandwidth and network carriage to newer, lesser-known, white-owned television networks (e.g., Inspirational Network, Fit TV, Outdoor Channel, and Current TV) while it has simultaneously told Entertainment Studios it had no bandwidth or carriage availability. Comcast's years-long refusal to allow its pay television subscribers access to television networks from this 100% African American-owned media company,

or any other, is motivated by extreme, unfair, and illegal racial animus.

8. Comcast has given Entertainment Studios a horrible series of unfounded and pretextual excuses (e.g., no bandwidth) to justify its decisions not to carry Entertainment Studios networks, or any other 100% African American-owned networks for nearly 55 years. Comcast itself proves through its own public actions each such excuse to be untrue and misleading. Comcast provided these excuses in an attempt to conceal its racial bias against Entertainment Studios' sole owner, an African American. But after years of playing the same games with Entertainment Studios, Comcast's racial bias is no longer concealed – it is out in the open and well-documented by multiple legal complaints and settlements, one recently with its own African American employees.

9. On more than one occasion, Comcast gave Entertainment Studios the bogus excuse that it did not have enough "bandwidth" to carry Entertainment Studios' networks. However, at all relevant times Comcast had more than enough bandwidth to carry Entertainment Studios' networks as it continued to launch other, newer, lesser-distributed, white-owned networks as noted above. In fact, Comcast has launched more than 80 such networks at the same time it was telling Entertainment Studios it lacked sufficient bandwidth for Entertainment Studios' networks.

10. Comcast does not carry any unaffiliated, independent, African American-owned television networks. None of the networks that Comcast launched, while refusing carriage to Entertainment Studios, were 100% African American-owned.

11. Comcast also told Entertainment Studios on numerous occasions that there was insufficient demand for Entertainment Studios' networks. Yet, as detailed above, nothing could be further from the truth. In fact, Entertainment Studios' networks are carried by the majority of Comcast's competitors, as well as more than 50 other MVPDs.

12. For years Comcast has engaged, and continues to engage, in the practice of racial discrimination vis-à-vis Plaintiff Entertainment Studios. Unlike scores of other television network distributors, Comcast has refused to negotiate and contract with Entertainment Studios for carriage of its networks and programming on equal and nondiscriminatory terms.

13. Comcast's discriminatory conduct has taken several forms over the years, including bogus corporate run-arounds, unfulfilled promises and patently false pretexts. More recently, Comcast has embraced an overtly discriminatory approach. Following its acquisition of NBC/Universal in 2010—during the process of which Comcast's historically racially discriminatory conduct was significantly called into question by Plaintiff, minority groups, the FCC and other governmental agencies—Comcast created two paths for programmers like Entertainment Studios to obtain carriage on its systems: one path is available generally to white-owned-and-controlled programmers; the other, much more limited path is restricted to (supposedly) African American-owned programmers. To the extent that second path leads to carriage arrangements (only two in five years), those arrangements are inferior to those at the end of the other path.

14. This segregation of opportunity based on race is *prima facie* discriminatory. Even more damning is the fact that the path supposedly set aside for

the benefit of African American-owned/controlled entities has, after five years, led to carriage of a total of only two channels of programming produced by entities whose claim to African American-ownership and/or control is, at best, highly dubious. In other words, even the separate-but-far-from-equal set-aside opportunity touted as favoring African-American programmers has in actual practice proven to be a sham that reinforces and codifies Comcast's historically institutionalized race discrimination.

15. Comcast's history of discrimination against African Americans is not limited to Entertainment Studios. Other African American-owned programmers have suffered similar fates at the hands of Comcast, as detailed below.

16. By way of illustration of the economic disparities at work here and the real-world consequences of Defendants' discriminatory conduct, Comcast spends approximately $20 billion annually to license the carriage of television networks and to advertise its products and services. Of that amount, African American–owned media companies receive less than one one-hundredth of one percent (0.01%), or less than $3 million annually.

17. These disparities are the result of—and evidence of—long-term, institutionalized racial discrimination in contracting, in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981.

PARTIES, JURISDICTION AND VENUE

A. Plaintiffs

18. Plaintiff NAAAOM is a California limited liability company, with its principal place of business in Los Angeles, California.

19. NAAAOM was created and is working to obtain for 100% African American–owned media the same contracting opportunities enjoyed by their white counterparts for distribution, channel carriage, channel positioning and advertising dollars. Its mission is to secure the economic inclusion of truly African American-owned media in contracting, affording them the same opportunities, on the same terms, as are available to white-owned media. Historically, unlike their white-owned counterparts, 100% African American-owned media have been excluded from television network distribution, advertising support and other economic benefits. As a result, 100% African American–owned media have been forced either to (i) give away significant equity in their enterprises, (ii) pay exorbitant sums for network carriage, effectively bankrupting the business, or (iii) go out of business altogether, thereby pushing 100% African American–owned media to the edge of extinction. NAAAOM currently has six members and while it continues to pursue more, the dearth of African American-owned media companies in the United States makes the NAAAOM effort even more important as 100% African American-owned media stands on the brink of extinction (while there will always be African American performers, entertainers, writers, and other people of creative talent, their own ownership of media enterprises is all but non-existent).

20. As alleged herein, Entertainment Studios—a member of NAAAOM—is being discriminated against on account of race in violation of 42 U.S.C. § 1981. Entertainment Studios thus has standing to seek redress for such violations in its own right. The interests at stake in this litigation—namely, the right of 100% African American–owned media companies to make and enforce contracts in the same manner as

their white-owned counterparts—are germane to NAAAOM's purpose. Because NAAAOM seeks only injunctive relief, the individual participation of its members is not required.

21. Plaintiff Entertainment Studios Networks, Inc. is a California corporation, with its principal place of business in Los Angeles, California. Entertainment Studios is a 100% African American–owned media company which produces television programming and distributes that programming on over 1,200 broadcast television stations, its own subscription-based Internet service, and through the carriage of its seven separate television networks by cable systems and other MVPDs. It is the only 100% African American–owned multi-channel media company in the United States which owns and controls multiple television networks, a status it has achieved because most other 100% African American–owned media companies have been shut out and eventually forced out of business.

22. Entertainment Studios is certified as a *bona fide* Minority Business Enterprise as defined by the National Minority Supplier Development Council, Inc. and as adopted by the Southern California Minority Supplier Development Council.

23. Entertainment Studios was founded in 1993 by Byron Allen, an African American actor/comedian/media entrepreneur. Over the last 23 years, Allen has built Entertainment Studios into a vertically-integrated company from the ground up and remains its sole owner. Entertainment Studios has grown from producing one television series into a company that now produces nearly 40 television series, operates seven 24/7 television networks, operates a full-

service, theatrical motion picture production and distribution company, and continues to expand despite being shut out from Comcast's nearly 22 million pay television subscribers. This remarkable growth has occurred because of the clear and obvious high market demand for Entertainment Studios' programming and networks.

24. Allen is the sole owner of Entertainment Studios. Allen first made his mark in the television world in 1979, when he was the youngest comedian ever to appear on "The Tonight Show Starring Johnny Carson." He thereafter served as the co-host of NBC's "Real People," one of the first reality shows on television. Alongside his career "on-screen," Allen developed a keen understanding of the "behind the scenes" television business, and over the past 23+ years he has built Entertainment Studios into the independent media company it now is – a full-service television and motion picture production and distribution company with seven television networks carried by Comcast's main competitors and can be seen in nearly 80 million cumulative homes in the United States.

25. Entertainment Studios has carriage contracts through which its networks are carried to those nearly 80 million cumulative homes on more than 50 MVPDs spanning 350 cable systems nationwide. Among the MVPDs that carry Entertainment Studios' networks are three of the five largest in the country, *i.e.*, Verizon FIOS, AT&T U-verse and DirecTV—as well as dozens of others (including Suddenlink, RCN and CenturyLink). Verizon FIOS, for instance, has carried Entertainment Studios' networks since 2009. Verizon FIOS has repeatedly renewed its carriage agreements for the Entertainment Studios networks;

and Verizon FIOS has expanded (not reduced) its carriage of Entertainment Studios' networks by adding Entertainment Studios' seventh network, Justice Central.TV, a 24-hour per day court and legal news channel, due to market demand. Through these carriage arrangements Entertainment Studios' networks are delivered to approximately 80 million cumulative subscribers across the country. This level of distribution in the United States is an unmistakable indication of the market demand for Entertainment Studios' networks.

26. Entertainment Studios owns and operates seven high definition television networks (channels), six of which were launched to the public in 2009 and one, Justice Central.TV, in 2012. Entertainment Studios produces, owns, and distributes nearly 40 television series on broadcast and cable television, with over four thousand hours of television programming in its library.

27. Despite Comcast's discriminatory refusal to carry Entertainment Studios' networks, Entertainment Studios programming and television networks have viewers nationwide and have been recognized for their excellence within the entertainment industry. For instance, Entertainment Studios' network Justice Central.TV features Emmy-nominated court shows, including "Justice for All with Judge Cristina Perez," "We the People with Gloria Allred" and "America's Court with Judge Kevin Ross." Justice Central.TV's Judge Christina Perez has won the Emmy award in three consecutive years. A copy of an Entertainment Studios promotional presentation highlighting key aspects of the company and the programming it produces is attached hereto as **Exhibit A**.

28. "Comedy.TV" is another network owned and operated by Entertainment Studios. Comedy.TV features original sitcoms starring recognizable celebrities, such as Vivica A. Fox, Jon Lovitz, Marla Gibbs, John Witherspoon, Bill Bellamy and Gladys Knight. And Comedy.TV features marquee comedians such as Dennis Miller, Eddie Murphy, Jim Carrey, Jamie Foxx, Adam Sandler and Tina Fey, among others. There is a high demand in the marketplace for comedic programming and networks featuring such programming and talent (for instance, Comedy Central, a similar genre network, has been in existence and consistently popular for over 25 years).

29. Entertainment Studios' other networks include "ES.TV," which includes celebrity and entertainment-related programming. It provides original content, including interviews with celebrities such as Leonardo Di Caprio, Denzel Washington, Matt Damon, Halle Berry and George Clooney. There is a high demand in the marketplace for celebrity-driven news and entertainment programming.

30. Entertainment Studios also provides original programming on its other networks, including "Pets.TV," "Recipe.TV," "MyDestination.TV," and Emmy award-winning "Cars.TV." All of the foregoing Entertainment Studios' networks are carried by Comcast's biggest competitors and all feature subjects, celebrities, stories, and other programming for which there is a high demand in the marketplace.

B. <u>Defendants</u>

31. Comcast Corporation is a Pennsylvania corporation, with its principal place of business in Philadelphia, Pennsylvania. Comcast has its roots in Tupelo, Mississippi, where it was established in 1963.

32. Comcast also has an office, is registered to do business and operates in Los Angeles, California. Comcast is a global media giant. It owns NBC Television, Universal Pictures, Universal Studios, multiple (approximately 30) pay television networks (*e.g.*, USA Network, Bravo Network, E! Entertainment, etc.), and it is the largest cable company and Internet service provider in the United States. Comcast provides subscription television services to approximately 22 million subscribers. It has monopoly control over the cable market in several major geographic markets across the United States.

33. Since it was established 55 years ago in Tupelo, Mississippi, Comcast has not contracted with any 100% African-American owned television network other than Black Family Channel and the Comcast corporate executive insider-owned Africa Channel. And in 2000, The Black Family Channel drafted, but did not file, a complaint for racial discrimination in contracting against Comcast in violation of 42 USC §1981.

34. Plaintiffs are informed and believe, and on that basis allege, that Defendants DOES 1 through 10, inclusive, are individually and/or jointly liable to Plaintiffs for the wrongs alleged herein. The true names and capacities, whether individual, corporate, associate or otherwise, of Defendants DOES 1 through 10, inclusive, are unknown to Plaintiffs at this time. Accordingly, Plaintiffs sue Defendants DOES 1 through 10, inclusive, by fictitious names and will amend this Complaint to allege their true names and capacities after they are ascertained.

C. Jurisdiction & Venue

35. This case is brought under a federal statute, § 1981 of the Civil Rights Act; as such, there is federal question jurisdiction under 28 U.S.C. § 1331. Venue of this action is proper in Los Angeles because Defendants reside in this district, as defined in 28 U.S.C. § 1391; and the acts in dispute were committed in this district.

FACTS

A. Racial Discrimination in the Media

36. Racial discrimination in contracting for cable carriage is an insidious ongoing practice with far-reaching adverse consequences. The practice is so extensive that even a top advisor to the Chairman of the Federal Communications Commission ("FCC") candidly told an Entertainment Studios representative that "inherent racism" infects the cable television and broadband industry. As a result of that discrimination, 100% African American–owned media companies and African American individuals, and their diverse viewpoints, are precluded from access to the broadest possible audience; conversely, such discrimination deprives the U.S. audience of access to that rich diversity.

37. Both Congress and the Supreme Court—and, most recently, the U.S. Court of Appeals for the Third Circuit in *Prometheus Radio Project v. FCC*, Nos. 15-3863 *et al.* (May 25, 2016)—have repeatedly emphasized that a diversity of voices and viewpoints in the media advances First Amendment values and, thus, is quintessentially in the public interest and to be encouraged.

38. Both Congress and the judiciary—have recognized the need for diversity in media ownership. Indeed, the Third Circuit Court of Appeal recently held that the FCC **"**has a statutory obligation to promote minority and female broadcast ownership.**"** *Prometheus Radio Project v.)*. This statutory obligation stems from the recognition that "inadequate representation of minorities in the broadcast industry was detrimental not only to the minority audience but to all of the viewing and listening public." *Id*. (internal quotation omitted), In *Prometheus*, the Third Circuit censured the FCC and held that:

> Although courts owe deference to agencies, we also recognize that, "[a]t some point, we must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough." . . . For the Commission's stalled efforts to promote diversity in the broadcast industry, that time has come. We conclude that the FCC has unreasonably delayed action on its definition of an "eligible entity"—a term it has attempted to use as a lynchpin for initiatives to promote minority and female broadcast ownership—and we remand with an order for it to act promptly.

Id. (internal citations omitted).

39. The *Prometheus* decision is the backdrop to this case. Unfortunately, because of the FCC's lack of enforcement as detailed by the Third Circuit, Comcast has been able to perpetuate its institutionalized, exclusionary and racist agenda.

40. Major MVPDs like Comcast have unique power to limit the viewpoints available in the public media. Program production/distribution companies,

like Entertainment Studios, are reliant upon the services of such MVPDs for access to their distribution platforms not only to realize subscriber and advertising revenue, but also to reach television viewers themselves.

41. Comcast wields control over access to its cable distribution platform. Without such access, program production/distribution companies have, at most, very limited ability to reach the audiences served by those platforms. The fact that Comcast has historically excluded 100% African American–owned television networks from its channel line-ups has contributed substantially to the near-extinction of 100% African American ownership in mainstream media. That exclusion has been, and continues to be, self-perpetuating.

42. Comcast has used a variety of ploys to accomplish its discriminatory ends: bogus invitations to negotiate that lead nowhere; improper insistence on impermissible terms; questionable interactions with government agencies; and, more recently, the creation of two paths to carriage right out of the Jim Crow playbook. That approach shunts African American-owned programmers onto a hopeless, supposedly African American-only, path that is a dead end. The fact that this latest, most egregious tactic has been deployed successfully with the implicit support of the FCC underscores Comcast's willingness and ability to manipulate federal regulatory policy in its own favor (i.e., the sham MOU process).

B. <u>Comcast's Stated Reasons For Refusing to Contract with Entertainment Studios Are Misleading and Untrue</u>

43. Like many other African American–owned television networks that have tried to secure cable carriage during Comcast's more than 55 year history, Entertainment Studios for several years prior to filing this complaint sought carriage from Comcast through the conventional process supposedly available to all network suppliers. It approached Comcast as would any programmer, describing its available networks and requesting the opportunity to negotiate carriage arrangements. This led to multiple meetings over multiple years with multiple, senior Comcast officials, all to no avail.

44. Rather than accord Entertainment Studios carriage on the same terms available to white-owned programmers—or even to negotiate with Entertainment Studios at all—Comcast lied, misled and strung Entertainment Studios along, it becoming clear after **more than seven years** of wasted time, effort, resources and finances, that Comcast had never actually intended to do business with Entertainment Studios. Comcast officials have also repeatedly told Entertainment Studios the lie that Entertainment Studios' channels are on Comcast's "short list" for imminent carriage; invariably, though, Comcast has eventually denied such carriage, providing instead a variety of different excuses for its repeated refusals. Comcast's persistent refusal to carry Entertainment Studios networks is all the more suspicious because those same networks are carried on Comcast's competitors' systems.

45. Comcast has forced Entertainment Studios to play an unwinnable game of "whack-a-mole"—each

time Entertainment Studios satisfied one pretextual hurdle created by Comcast, another one would pop up. For example, senior Comcast executive Jennifer Gaiski required Entertainment Studios to present empirical data and secure support "in the field" (i.e., from Comcast regional offices and management) so that she could present such material to other Comcast senior management, Greg Rigdon and Neil Smit. Entertainment Studios got support "in the field," but Comcast still refused to carry any of Entertainment Studios' networks, saying that "field" support now did not matter.

46. Similarly, a representative of Comcast's overall corporate headquarters directed Entertainment Studios to garner similar support from Comcast's various Division offices in order to bolster its carriage request. But when Entertainment Studios reached out to the different Divisions (Northeast, Central and West) for the requested support, the Divisions indicated that they "deferred to Corporate" leaving Entertainment Studios dumbfounded and perplexed – did it need to garner "Corporate", "Division", "Field" or some other type of support? In some cases, Entertainment Studios was inconsistently advised not to meet with the field or Divisions because all carriage decisions were funneled through Comcast Corporate. Regardless, the answer was that no matter what support it may have received from the field, Divisions or otherwise, Entertainment Studios was still denied carriage.

47. By making all of these requests over many years, Comcast required Entertainment Studios to run around in circles—and waste hundreds of thou-

sands of dollars on travel, marketing and other expenses—without any intention of ever considering a carriage deal with Entertainment Studios.

48. Comcast's lies and deceitful behavior continued with Senior Comcast executives Madison Bond and Jennifer Gaiski also telling Byron Allen, Chairman, CEO and founder of Entertainment Studios, and Janice Arouh, Entertainment Studios' President of Distribution and Marketing, during one of the many pitch meetings that took place between Plaintiff Entertainment Studios and Defendant Comcast, that Comcast would carry Entertainment Studios' networks if they were carried by Comcast's competitors. Comcast's principal competitors, including Verizon FIOS, AT&T U-Verse and DirecTV, all carry Entertainment Studios' networks. Yet Comcast still refused to contract with Entertainment Studios.

The Bandwidth Lie

49. Comcast has used other phony excuses, in the guise of "legitimate business reasons" to justify its racial discrimination. For example, it has on occasion claimed that it does not have "sufficient bandwidth" to accommodate Entertainment Studios' networks. This excuse is a blatant lie.

50. First and foremost, more than 50 MVPDs all carry Entertainment Studios' networks. Those MVPDs run the gamut, from local cable companies to mega corporations like Verizon FIOS, AT&T U-Verse and DirecTV. If adequate "bandwidth" is in fact a "legitimate business reason" for Comcast to exclude Entertainment Studios' networks, then it would not have been able to launch 80+ networks since 2010. Bandwidth has not been a bar to carriage of Entertainment Studios' networks by MVPDs other than Comcast,

who is the largest cable television company in the United States with an advanced, state-of-the-art platform.

The Sports and News Lie

51. Comcast has also advised Entertainment Studios that Comcast is interested in providing carriage only for news and sports channels. But Comcast has added other non-news, non-sports channels during the relevant period. And Comcast did so while simultaneously refusing to contract, not only with either Entertainment Studios, but also with the Historical Black Colleges and Universities Network ("HBCU Network"), a 100% African American–owned network focused on black college sports which would have paid the historical black colleges and universities much needed capital. Comcast has added numerous channels since 2010, none of which are African-American owned, that are unrelated to sports or news. These include networks such as "Baby First Americas," a parenting-related network, "Fit TV", "Outdoor Channel" and many others. Comcast's conduct is unfortunately all too common. Restaurant owners in this country would frequently tell African American customers that the restaurant is "booked up," even though it was painfully obvious that there was more than enough seating available.

52. Comcast's unexplained and unsupported "bandwidth" claim is observably false. It is merely a pretext to deny carriage to 100% African-American-owned networks.

The Lack of Demand Lie

53. Comcast has also attempted to excuse its refusal to carry Entertainment Studios' networks by claiming that there is no demand for Entertainment

Studios' networks. But as previously discussed, that claim is false: Entertainment Studios' networks are carried on scores of MVPDs to nearly 80 million cumulative subscribers, many of whom are subscribers to Comcast's primary competitors. Such extensive, nationwide carriage shows demand for Entertainment Studios' networks.

54. Entertainment Studios' programming is currently carried on the following MVPDs (who concluded, based on sound business judgment, that there is strong consumer appeal and significant demand for Entertainment Studios' programming):

4COM, Adams Cable TV, Argent Communications, Atlantic Broadband, Bailey Cable TV, Block Communications, Cable Bahamas, Cap Cable, LLC (USA Communications), Caribbean Broadcasting Corporation, Caribbean Cable Communications, Centurytel Broadband Services, LLC, Chester Telephone Company, CIM Tel Cable Inc., Cincinnati Bell, Columbus Communications, Complete Communication Services, Consolidated Communications, Conway Corporation, CSI Digital (Ann Arundel), Dalton Utilities, Digicel Jamaica, Digicel Trinidad, Duncan Cable TV, Frontier, Geus, Great Plains, GTA Teleguam, Harron Communications (Metrocast), Hawaiian Telcom Services Company, ImOn Communications, Johnsonburg Community Television, Kenya/Samba, Kuhn Communications, Layer 3, Lancia Digital Broadcasting Limited, Massillon Cable TV, Matanuska Communications, Mayaro Cable, Media In Motion, Mid-Rivers Cable Television, Mid-Atlantic Broadband, Municipal Communications Utility - Cedar Falls, New Visions Communications, Norwood Light Broadband, Piedmont Communications Services, RCN, Satview, Skyline Telephone Membership Corporation, Suddenlink,

Sweetwater Cable TV Company, The Community Agency, Vermont Telephone Company, Vivicast, Vyve Broadband, Wilkes Communications, Wizzie Pty Ltd, Zito Media.

55. Attached as **Exhibit B** is a map of all areas in the United States where Entertainment Studios' networks have carriage. The map further reflects the fact that Entertainment Studios' networks have broad, nationwide appeal by the MVPDs who have contracted for these networks in all 50 states. Moreover, as noted above, MVPDs carrying Entertainment Studios networks include Comcast's biggest competitors Verizon FIOS, AT&T U-verse and DirecTV. Verizon FIOS has not only renewed its carriage agreements relative to six of Entertainment Studios' networks multiple times, but has added the seventh network as well. Such extensive, renewed carriage by MVPDs comparable in size, offerings and reach to Comcast clearly reflects the existence of market demand for Entertainment Studios' networks.

56. Entertainment Studios has undertaken a survey of industry publications with respect to all networks that are carried on three of the major MVPDs who directly compete with Comcast—Verizon FIOS, AT&T U-verse and DirecTV. Once the universe of networks common to all three of those MVPDs' line-ups was identified, that universe was then compared to Comcast's network line-up. Out of a universe of 500+ networks, the survey revealed that all of the networks that are carried on all three of those MVPDs are also carried on Comcast **with one glaring exception: Entertainment Studios' networks.**

57. There is one factor that distinguishes Entertainment Studios from those other program suppliers is undeniable: unlike all of the others, Entertainment

Studios is 100% African American-owned and controlled.

58. Entertainment Studios offered for Comcast to launch Justice Central.TV **for free with no license fees**, but Comcast still declined to carry the network. This is further evidence that Comcast's refusal to carry Entertainment Studios is based not on legitimate business reasons, but on illegal racial animus.

C. Comcast Bamboozles the FCC with Empty "Commitments"

59. White-owned media in general—and Comcast in particular—have worked hand-in-hand with governmental regulators to perpetuate the exclusion of truly African American–owned media from contracting for channel carriage and advertising. Congress and the Courts have, over the course of decades, repeatedly signaled to the FCC their concern about the lack of diversity in U.S. media. But the FCC has nonetheless shown itself to be susceptible to various tactics that run counter to those signals. For example, the use of "token fronts" and "window dressing"—African American celebrities posing as "fronts" or "owners" of so-called "Black cable channels" that are actually majority owned and controlled by white-owned businesses—has served to preserve that white-dominant media landscape. Comcast has almost singlehandedly created those tactics.

60. In 2010, Comcast proposed to acquire NBC Universal, a massive transaction that raised a host of regulatory questions. The transaction, which required the approval of the FCC, was opposed by a wide range of interests, among them minority-owned media companies—including Entertainment Studios—who

publicly criticized Comcast for its failure to do business with African American–owned media companies. Entertainment Studios (among others) urged the FCC to impose merger conditions on Comcast that would rectify Comcast's discriminatory practices in contracting for channel carriage.

61. Faced with the possibility that its racist practices and policies might jeopardize the approval of its acquisition of NBC Universal, Comcast devised a clever way to sidestep those complaints while perpetuating its exclusion of 100% African American–owned networks. It did so by convincing the FCC that, despite Comcast's history of discrimination, going forward, Comcast had committed to carriage of independently-owned-and-operated networks of which a majority or substantial interest was to be owned and controlled by African Americans. Any such commitment was illusory, as has since become obvious. But by manipulating various groups (e.g., Al Sharpton) into signing "Memoranda of Understanding" ("MOUs"), and then by submitting those MOUs to the FCC in supposed demonstration of its diversity "commitment," Comcast was able to bamboozle the FCC as Comcast has said recently that the FCC has no authority to enforce the MOU conditions which Comcast has not lived up to and the FCC has opened a "Notice of Inquiry" to investigate these violations. Comcast's "playbook" in this regard is set forth below.

62. Comcast gave monetary "contributions" to various non-media minority special interest groups in order to "buy" their support. It "donated" funds to at least 54 different groups that went on publicly to endorse the Comcast/NBC Universal deal. After buying their support, Comcast entered into MOUs with these various non-media civil rights groups, including Al

Sharpton's National Action Network. Unlike Entertainment Studios, these non-media civil rights groups are not television program producers, distributors, or network owners, and do not operate in the television production or distribution business and have no expertise or true understanding in negotiating a sophisticated media MOU.

63. Through the MOUs, Comcast manipulated the FCC to obtain approval for its acquisition of NBC Universal. Comcast did this by, among other things, committing to launch several new networks with minority ownership and establishing an "external Diversity Advisory Council" to advise Comcast as to its "diversity practices," including in contracting for carriage. Through discovery in this case, it will become clear that the MOUs were a smokescreen designed to secure FCC merger approval without obligating Comcast to do business with truly African American–owned media companies and that the external Diversity Advisory Council had no power or input on network selections by Comcast, but was merely window dressing.

64. Each of the signatories to the MOU between Comcast and the "African American Leadership Organizations" was paid by Comcast in the time leading up to the Comcast/NBC-Universal deal. For example, Comcast paid $140,000 to Al Sharpton's National Action Network.

65. Comcast has also paid Al Sharpton and Sharpton's National Action Network over $3.8 million in "donations" and as salary for an on-screen television hosting position on MSNBC, a Comcast owned and operated network following the NBC/Universal merger, that Comcast awarded Sharpton in exchange for his signature on the MOU. Despite the low ratings

that Sharpton's show generated, Comcast allowed Sharpton to maintain his hosting position for more than four years in exchange for Sharpton's continued public support for Comcast on issues of diversity. By compensating Sharpton so that he and his cohorts would publicly endorse the NBC-Universal deal, Comcast was able to divert attention away from Comcast's historically, racially discriminatory carriage practices for a lot less money than it would have had to pay if it decided to carry 100% African American owned television networks.

66. Ironically, as reported in *The New York Times*, Comcast spent millions of dollars to pay non-media civil rights groups to support its acquisition of NBC Universal, but it still refused to do business with 100% African American–owned media companies which would have cost Comcast much more.

67. The MOU was signed by Comcast's then–Executive Vice President and Chief Diversity Officer David Cohen. Mr. Cohen was integral in structuring and getting the Comcast / NBC-Universal merger approved; and he was the main architect of the MOU. He is also Comcast's chief governmental lobbyist, a major political fundraiser, and the mastermind behind Comcast's conflicts of interest and wrongdoings recounted herein.

68. On information and belief, Mr. Cohen also oversees and signs off on the Annual Compliance Reports that Comcast submits to the FCC, in which Comcast misleadingly claims to be doing business with African American owned-and-operated television networks when, in fact, the networks Comcast has launched pursuant to the MOU are owned, controlled and backed by white-owned media and money.

69. The "Diversity Advisory Council" Comcast established is also a sham. Not only do the Council members have limited understanding of the cable industry and little-to-no experience operating television networks, but Comcast has not given the Council any real authority to "advise" Comcast as to its diversity initiatives in contracting for carriage. According to one of the Council members, Comcast gave the Council a standard tour of its corporate offices, and never even asked its members about channel carriage.

70. Comcast was also able to influence and secure FCC votes in other ways. FCC Commissioner Meredith Attwell Baker voted to approve the NBC Universal transaction and then, within a few short months, left the FCC to accept a senior executive position and a substantially higher salary at Comcast.

71. Presented with this array of seemingly independent support, the FCC approved Comcast's acquisition of NBC Universal in 2011. Comcast soon demonstrated that the FCC's faith was misplaced.

D. Comcast Fails to Comply with its MOU "Commitments"

72. Shortly after obtaining FCC approval, Comcast initiated a process through which African American-owned networks could apply to take one of the four network slots set aside (through the MOU) for African American-owned networks. Two of those slots were to be filled within two years of consummation of the NBC Universal acquisition, the other two within eight years of consummation. Entertainment Studios duly applied.

73. In 2012 Comcast announced the two networks to which it had accorded the first two African American slots. Both were new, unknown networks

with African American celebrity "fronts," who had no apparent experience in program production or distribution, no track record, and no demonstration that either was even controlled by African Americans, much less "majority or substantially" owned by them. Both have substantial ties to white individuals and entities, including Comcast itself.

74. One of Comcast's chosen programmers was "Aspire." According to Comcast, Aspire is "spearheaded" by a prominent African American retired professional athlete, Earvin Johnson. The precise nature and extent of Johnson's ownership interest are vague, even though the MOU expressly called for African Americans to hold a "majority or substantial ownership interest."

75. Similarly, the actual locus of control of Aspire is not known to Comcast. Only after prodding by Entertainment Studios, Aspire has disclosed that its ownership structure includes at least two types of ownership ("Common Units" and "Preferred Units"), and that white-controlled entities—UP Entertainment, LLC (formerly known as the Gospel Music Network ("GMC")), a white-owned company, and Yucaipa Funds (an entity managed by Ron Burkle, a white man)—are owners. But neither Aspire nor Comcast has disclosed the extent of the various financial contributions of the various owners, or what rights and/or powers any of the owners may hold.

76. Regardless of Johnson's actual ownership interest or involvement in the operation of Aspire, carriage of the Aspire network did not in any event meet the specifications of the MOU condition. As described by Comcast, the network is operated "in partnership with [GMC]." But the MOU condition specified car-

riage of an "independently-owned-and-operated" service. Operating "in partnership with" another programmer—especially a white-owned-and-operated programmer that has historically maintained close ties to Comcast, such as GMC—cannot be said to be an "independent" operation.

77. Aspire is a sham designed to create the false impression of compliance with the MOU while, in fact, serving as a cover to permit a white-owned, controlled and operated entity, GMC, and its owner, white-owned InterMedia Partners, L.P. ("InterMedia"), to acquire another television network. GMC is responsible for Aspire's "advertising sales, marketing, programming, production and technical operations"—and its owner, InterMedia, also reportedly owns 33% of Aspire.

78. Further supporting the conclusion that Aspire is a front for GMC are the facts that: (a) rather than set up its own offices, Aspire moved in and shares offices with GMC in Atlanta even though Earvin Johnson is based in Los Angeles, California; (b) according to the Application for Certificate of Authority for Foreign Limited Liability Company filed with the State of Georgia, Aspire's registered agent in Georgia is Charles Humbard, the founder, President and CEO of GMC, and a white person; (c) that application was submitted to the Georgia state government with a transmittal letter on GMC letterhead; (d) the records of the U.S. Patent and Trademark Office establish that the application for the trademark "ASPiRE" was submitted on February 17, 2012—more than two weeks after Aspire was formed, but that application was filed by GMC, not by Aspire or Johnson personally.

79. The second of Comcast's chosen programmers for an African American slot was another unknown, not-yet-in-existence network called "Revolt" also fronted by an African American celebrity with no television production, distribution or network operational experience. According to Comcast, Revolt was "[p]roposed by" African American entertainer Sean 'Diddy' Combs and Andy Schuon, a white man. As is the case with Aspire, the precise nature and extent of Combs's ownership interest—or anyone else's—in Revolt are vague. According to published reports, after putting up some undisclosed "starting finance," Mr. Combs relied on two white sources of funding, a "financial organization called Highbridge" and Ron Burkle (whose Yucaipa Funds has also been identified as an investor in Aspire). "Highbridge" refers to Highbridge Principal Strategies which, along with its subsidiary, HBRV Partners, holds an investment in Revolt. A Managing Director of Highbridge is Payne Brown, who was Vice President of Strategic Initiatives and a corporate officer at Comcast. Highbridge, in turn, is a subsidiary of Highbridge Capital Management, LLC, which in turn is owned by (and operates as a subsidiary of) J.P. Morgan Asset Management, part of the J.P. Morgan Chase & Co. ("Morgan") operation, one of whose directors is Stephen Burke, Chief Executive Officer of Comcast/NBC Universal and a longtime, senior executive of Comcast.

80. Having filled the first two African American network slots with Aspire and Revolt with their questionable ownership and control, Comcast summarily rejected all other proposals (including Entertainment Studios').

81. In a separate MOU submitted to the FCC in support of its application to acquire NBC Universal,

Comcast made similar "diversity commitments" to the Hispanic community. After inviting and, supposedly, considering applications from Hispanic programmers to satisfy those commitments, Comcast launched "Baby First Americas"—a channel owned not by Hispanics, but by two Israelis–and one of whose directors is the brother of Stephen Burke, CEO of Comcast/NBC Universal.

E. <u>Comcast Twists the MOU Process to Discriminate Against Media Companies with Truly "Majority or Substantial" African American Ownership</u>

82. Having established the MOU-based path to carriage reserved for African American networks, Comcast has twisted that path into an invidiously discriminatory, Jim Crow-like, system. In November 2014, Entertainment Studios was told by Comcast that, even though Comcast was "impressed" by Entertainment Studios' networks, efforts by Entertainment Studios to secure carriage with Comcast would be relegated to the MOU Process. Thus, rather than having an additional opportunity for obtaining carriage on Comcast, the only way Entertainment Studios could attain carriage would be by applying for one of the two remaining MOU channels set-aside for African American networks. In the words of a Comcast executive, although Entertainment Studios' networks are good enough for carriage on Comcast's platform, Entertainment Studios would have to wait to be part of the "next round of [MOU diversity] considerations." Entertainment Studios would not be permitted to use the normal approach available to white-owned programmers.

83. The availability of a separate, African American-only track to carriage appeared, at least initially, to be designed to afford more opportunity for African Americans: they could enjoy a separate path set aside exclusively for them. But Entertainment Studios has since learned that, instead of viewing that separate path as an additional means by which African American networks may achieve carriage—over and above the normal negotiation path presumably available to any network regardless of race—Comcast is now treating the MOU set-aside slots as the only way by which African American-owned networks may apply for carriage.

84. This is egregious racial discrimination on multiple levels. First, as demonstrated above, the MOU set-aside slots are not truly available to 100% African American-owned television networks. Comcast has demonstrated that by awarding two of the four set-aside slots to unknown, previously non-existent networks with African American celebrity "fronts" but whose African American ownership is a puzzle, it can exclude *bona fide* African American owned-and-controlled companies. Second, even if all four set-aside slots were legitimately available only to African American owned-and-controlled companies, the MOU Process/set-aside carriage opportunities are themselves demonstrably inferior to the opportunities available to non-African Americans as the terms of both the Aspire and Revolt carriage agreements are, on information and belief, inferior to those of similar networks that are white owned.

85. First the number of slots available through the MOU Process is limited: four only, two of which have already been doled out to the questionable networks, Aspire and Revolt. The opportunity to apply

for the remaining slots is limited to a particular time frame, after which the opportunity will close. By contrast, no such limits apply to carriage opportunities available to non-African Americans. Moreover, the terms and conditions to which carriage arrangements available through the MOU Process are subject—*e.g.*, shorter carriage terms, minimal (if any) licensing fees—are themselves inferior to the terms and conditions available through the conventional approach to carriage agreements reserved for non-African Americans.

86. The establishment of two paths for carriage that are separate—but not equal—is the very definition of discrimination. Comcast has created a Jim Crow process with respect to carriage of networks produced by media companies with "majority or substantial" African American ownership. Instead of allowing all networks seeking carriage the same "front of the bus" access, Comcast has shunted African Americans to a separate entrance at the "back of the bus," an entrance for which Comcast has set aside a small number of inferior seats. This is racial discrimination in contracting in violation of law.

F. Comcast's Discriminatory Practices Interfered with Entertainment Studios' Ability to Negotiate Carriage on Time Warner Cable

87. In 2015, Comcast proposed to acquire Time Warner Cable ("TWC"). At that time, Entertainment Studios was in the process of negotiating carriage of its networks on TWC's systems. Comcast, however, interfered with those negotiations by "gun jumping" once it had the opportunity to do so. Entertainment Studios had made progress negotiating the terms of a possible carriage deal with TWC prior to Comcast's announced intention to acquire TWC. But following

that announcement, senior Comcast programming executive, Jennifer Gaiski, asked Entertainment Studios about its discussions with TWC; in particular, Ms. Gaiski was interested in knowing which TWC representatives Entertainment Studios was negotiating with.

88. Entertainment Studios truthfully and transparently advised Ms. Gaiski that it had advanced negotiations with senior TWC executive Melinda Witmer . Soon thereafter, Entertainment Studios' discussions with TWC were abruptly terminated by TWC under orders from Comcast (even though Comcast did not at the time—and still does not—control TWC). Thus, TWC delegated channel carriage by according Comcast decision-making authority before its proposed acquisition had even been reviewed by the necessary governmental authorities, itself a violation of federal law.

G. Comcast's History of Racial Discrimination Against Other African American–Owned Media Companies

89. Comcast's discrimination against Entertainment Studios, as detailed herein, is part and parcel of a pattern of institutionalized racial discrimination that Comcast has perpetrated for decades. Indeed, Comcast cannot identify a single, independent, 100% African American–owned network that it has distributed on its television platform in its 50+ years of operation except for the Black Family Channel (and aforementioned Africa Channel owned by a former Comcast executive) whose fate is detailed below.

Black Family Channel

90. Entertainment Studios is not the first or only victim of Comcast's blatant racial discrimination

in contracting. Before Entertainment Studios endured this discrimination, Comcast discriminated against MBC Network (later known as Black Family Channel).

91. Black Family Channel was founded by renowned African American attorney Willie E. Gary and other prominent African American entrepreneurs, including baseball legend Cecil Fielder, former heavyweight boxing champion Evander Holyfield, Marlon Jackson of the Jackson Five, and television executive Alvin James.

92. Beginning in 2002, Comcast informed Black Family Channel that to guarantee continued carriage on Comcast's systems, Black Family Channel would need to give Comcast a significant ownership interest in the network. When Black Family Channel refused, Comcast retaliated. Comcast halted the expansion of Black Family Channel into new markets; it placed Black Family Channel on a more expensive, less-penetrated, less-favorable programming tier; it gave Black Family Channel inferior channel positioning; and it withdrew advertising opportunities from Black Family Channel, as explained by Alvin D. James (see **Exhibit C**.)

93. Comcast deliberately discriminated against Black Family Channel in contracting for carriage on the basis of race. Indeed, Comcast did not require similarly situated, white-owned networks to give Comcast an ownership interest in their networks in order to secure carriage on favorable, non-discriminatory terms.

94. As a result of Comcast's discrimination-based retaliatory actions, Black Family Channel was

placed at a competitive disadvantage and suffered severe financial harm, leading to the network's demise. The network was eventually sold (for an undervalued price because of its dire straits) to GMC, the same white-owned network which operates Aspire.

95. After Black Family Channel was taken over by GMC, Comcast rolled out the red carpet for the network: Comcast agreed to enter into a carriage agreement with GMC and to broadly distribute the network on its cable platform. Today, GMC's white owners are undertaking efforts to sell the network (now called Up TV) for approximately $550 million—in other words, Black Family Channel's value has increased more than 50-fold by virtue of Comcast's newfound willingness to do business with the network now that it is white-owned.

96. As the Black Family Channel saga shows, Comcast's treatment of Entertainment Studios is nothing new. Comcast crushed Black Family Channel, causing the network to draft a lawsuit against Comcast in 2004 (see **Exhibit D**. This discrimination must stop.

HBCU Network

97. Comcast also discriminated on the basis of race in its dealings with Historically Black Colleges and Universities ("HBCU") Network, another 100% African American–owned network. HBCU Network is a sports, entertainment and lifestyle network devoted to historically black colleges and universities. It was created by two African American media entrepreneurs, Curtis Symonds and Clint Evans. Mr. Symonds is a cable industry veteran—he was an executive at ESPN for eight years and served as Executive Vice President, Distribution and Marketing for BET

Networks for more than 14 years. HBCU Network pledged to give back to black colleges and universities by partnering with them and sharing in the network's ownership and profits.

98. Mr. Symonds has detailed Comcast's discriminatory dealings with HBCU Network in writing, as follows: HBCU Network met with Comcast's then–Senior Vice President of Programming, Madison Bond, and his executive team to negotiate a carriage agreement. Comcast told Mr. Symonds that it was excited about the network and, soon after the meeting, Comcast offered HBCU Network a 20-year carriage deal, including license fees.

99. As HBCU Network was moving forward to finalize the terms of its carriage deal, Comcast pulled the rug out from under the network: Comcast told HBCU Network that, in light of the merger between Comcast and NBC Universal, Comcast was required to launch a certain number of minority-owned networks and, even though HBCU Network had been at a very advanced stage of negotiations for carriage, it would need to start over and proceed via the application process for minority-owned networks (*i.e.*, the "MOU Process" described above).

100. In other words, because HBCU Network was a 100% African American–owned network, it was forced to proceed via the MOU Process rather than finalizing the carriage deal that had already been underway through Comcast's normal, white contracting process. And, as also described above, the MOU Process led HBCU Network nowhere: Comcast eventually turned them away completely, opting instead to award the only two slots awarded thus far to "front" companies with obvious ties to Comcast (see **Exhibit E**).

Soul Train

101. "Soul Train" is an iconic African American–owned television series created by the late Don Cornelius, a highly successful African American television producer. Like Black Family Channel and HBCU Network, Comcast also refused to do business with Don Cornelius Productions, a 100% African American–owned media company, that wanted to launch a Soul Train network. Comcast shut them out, forcing them to sell the Soul Train franchise to the same white businessmen who bought the Black Family Channel at a steep, below-market discount and who are effectively controlling the Aspire network.

H. Summary

102. For years Comcast has engaged in an unmistakable pattern of racial discrimination in violation of the Civil Rights Act. It has refused to deal with 100% owned and controlled African American television networks fairly; to the contrary, it has wielded its out-sized market power to the consistent economic disadvantage of minorities including African Americans. And most recently, it has formalized its discriminatory practices through the creation of a blatantly racist, two-path approach to carriage, with the one "Blacks Only" path little more than a charade of legitimate opportunity. These are violations of § 1981: Comcast's refusal to contract with media companies with majority or substantial African American ownership in the same manner with which it contracts with non-African American companies; its implementation of discriminatory dual paths for carriage (*i.e.*, one path for non-minority-owned media and a separate, but not additional, "MOU Process" supposedly for African American–owned media companies); its "award" of

two set-aside carriage opportunities to "front" companies; its discrimination in the contractual terms it offers to African American–owned media companies; and its misleading excuses for refusing to contract with 100% African American-owned media.

103. Entertainment Studios is being discriminated against on account of race in connection with contracting in violation of the Civil Rights Act. Without access to viewers and without licensing fees and advertising revenues from the largest television network distributors in the country, this 100% African American–owned media business is being shut out and severely damaged.

FIRST CAUSE OF ACTION: VIOLATION OF CIVIL RIGHTS (42 U.S.C. § 1981)

NAAAOM and Entertainment Studios Against Comcast

A. Section 1981

104. NAAAOM refers to and incorporates by reference each foregoing and subsequent paragraph of this Complaint as though fully set forth herein.

105. Comcast has engaged in, and are engaging in, pernicious, intentional racial discrimination in contracting, which is illegal under § 1981. Section 1981 is broad, covering "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

106. African Americans are a protected class under 42 U.S.C. §1981. Entertainment Studios is a 100% African American–owned media business.

107. As alleged herein, Entertainment Studios attempted many times over many years to contract

with Comcast to carry its networks, but Comcast has refused, providing a series of phony and misleading excuses. Yet Comcast has continued to contract with—and make itself available to contract with—similarly situated white-owned television networks.

108. Comcast has refused to contract with Entertainment Studios for channel carriage and advertising. Entertainment Studios has been deprived of the right to contract with Comcast by being relegated to the MOU Process, while non-minority-owned businesses have been afforded the right to contract with Comcast through its normal, more accessible process.

109. Comcast has dealt with Entertainment Studios and other African American–owned media companies in a markedly hostile manner and in a manner which a reasonable person would find discriminatory. Comcast has a pattern and practice of refusing to do business with, or offering unequal contracting terms to, African American–owned media companies.

B. Damages

110. But for Comcast's refusal to contract with Entertainment Studios, Entertainment Studios would receive approximately $277 million in annual license fees for its seven channels—calculated using a conservative license fee of fifteen cents per subscriber per month for each channel based on Comcast's estimated 22 million subscribers. If Defendants contracted in good faith, Entertainment Studios would also receive an estimated $200 million per year, per network, in national advertising sales revenue, or a total of $1.4 billion per year, equaling a combined total of nearly $1.7 billion in annual revenue.

111. Combining subscriber fees and advertising revenue, Entertainment Studios would generate approximately $1.7 billion in annual revenue from its carriage and advertising contracts with Comcast. Moreover, with distribution on the largest cable television platform in the nation, the demand for Entertainment Studios' channels both domestically and internationally would increase, leading to additional growth and revenue for Entertainment Studios' networks.

112. Based on the revenue Entertainment Studios would generate if Defendants contracted with them in good faith, Entertainment Studios would be valued at approximately $20 billion.

113. Similarly situated lifestyle and entertainment media companies are valued at higher amounts. But for Comcast's refusal to contract with Entertainment Studios, Entertainment Studios would have a valuation similar to those other media companies.

114. Accordingly, Comcast's unlawful discrimination has caused Entertainment Studios in excess of $20 billion in damages, according to proof at trial; plus punitive damages for intentional, oppressive and malicious racial discrimination.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment, as follows:

1. Plaintiff Entertainment Studios prays for compensatory, general and special damages in excess of $20 billion according to proof at trial;
2. Plaintiffs NAAAOM and Entertainment Studios pray for injunctive relief prohibiting Comcast from discriminating against 100% African

American–owned media companies, including Entertainment Studios, based on race in connection with contracting for carriage and advertising;

3. Plaintiff Entertainment Studios prays for punitive damages, based on oppression and malice, according to Defendant's net worth;
4. Plaintiff Entertainment Studios prays for attorneys' fees, costs and interest; and
5. Plaintiffs NAAAOM and Entertainment Studios pray for such other and further relief as the court deems just and proper.

DATED: June 9, 2016 Respectfully Submitted,

MILLER BARONDESS, LLP

By: */s/ Louis R. Miller*
LOUIS R. MILLER
Attorneys for Plaintiffs

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

NATIONAL ASSOCIATION OF AFRICAN-AMERICAN OWNED MEDIA, *et al.*, Plaintiffs, v. COMCAST CORPORATION, *et al.*, Defendants.	CV 15-01239 TJH (MANx) Order [Filed May 10, 2016]

The Court has considered Defendant Comcast Corporation's ["Comcast"] motion to dismiss and the parties' requests for judicial notice, together with the moving and opposing papers.

A complaint must contain a short and plaint statement of the claim, showing the plaintiff's entitlement to relief. Fed. R. Civ. P. 8(a)(2). A complaint need not have detailed factual allegations, but must go further than a bare recitation of the elements of each claim. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). For a complaint to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the complaint must contain sufficient factual allegations, when accepted as true, to make each claim for relief plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009).

For a motion to dismiss, the Court must take judicial notice of matters of public record. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). Here, the parties ask the Court to take judicial notice of various documents that are now part of the public record, thus, they are properly subject to judicial notice. Accordingly, these documents were considered in the following analysis.

When determining the plausibility of a complaint's allegations, the Court must proceed through a two step process. *Eclectic Props. East, LLC. v. Marcus and Millichap Co.*, 751 F.3d 990, 995-96 (9th Cir. 2014).

First, the Court must identify pleadings that are not entitled to the presumption of truth. *Eclectic Props East, LLC.*, 751 F.3d at 995-96. While factual allegations in the complaint must be accepted as true for Rule 12(b)(6) purposes, this tenet does not extend to legal conclusions, nor to legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678. Here, the complaint contains only legal conclusions, not factual allegations, to support its § 1981 claim. *Iqbal* provides an apt description: "It is the conclusory nature of [a plaintiff's] allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth." *Iqbal* 556 at 682. Accordingly, Plaintiffs' conclusory allegations are not entitled to the presumption of truth.

Second, assuming the veracity of well-pled factual allegations, the Court must determine whether those allegations plausibly give rise to an entitlement to relief. *Iqbal,* 556 U.S. at 678. When evaluating plausibility, the Court, also, must consider obvious alternative explanations for a defendant's behavior. *See Eclectic Props. East, LLC.*, 751 F.3d at 996. A complaint

"stops short of the line between possibility and plausibility" if it merely pleads facts that are consistent with both the defendant's liability and the defendant's competing explanation. *Eclectic Props. East, LLC.*, 751 F.3d at 996. When, as here, the Court is faced with two mutually exclusive possible explanations, the complaint must go further and plead facts tending to exclude the possibility that the alternative explanation is true. *In re Century Aluminum Co. Secs. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013).

Here, Comcast argued that it had legitimate business reasons for denying Plaintiff Entertainment Studios Network ["ESN"] carriage, namely, lack of demand for ESN programming, and the bandwidth costs associated with carrying ESN's channels. ESN presented the ratings growth of one of its channels on a competing cable network to establish that Comcast's explanation is mere pretense for intentional racial discrimination. However, ratings growth by percentage is hardly compelling evidence that Comcast could not have declined to carry ESN's channels because of legitimate business concerns. Surely an increase from 1 viewer to 10 viewers results in ratings growth of 900%, but such a relative benchmark does nothing to exclude the possibility that the alternative explanation, Comcast's legitimate business reasons, is true. To better support its allegations, for example, Plaintiffs could have provided the actual number of viewers gained rather than just the percentage of viewer growth.

Therefore, Plaintiffs have not sufficiently pled facts that make a plausible claim for relief. Accordingly, this case will be dismissed with leave to amend one last time. If Plaintiffs file a second amended complaint with pleading deficiencies, this case will then

be dismissed with prejudice. *See McGlinchy v. Shell Chemical Co.*, 845 F.2d 802 (9th Cir. 1988).

It is Ordered that the requests for judicial notice be, and hereby are, Granted.

It is further Ordered that the motion to dismiss be, and hereby is, Granted with leave to file a second amended complaint within thirty days of this order.

Date: May 10, 2016

_____

Terry J. Hatter, Jr.
Senior United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

NATIONAL ASSOCIATION OF AFRICAN AMERICAN–OWNED MEDIA, a California limited liability company; and ENTERTAINMENT STUDIOS NETWORKS, INC., a California corporation, Plaintiffs, v. COMCAST CORPORATION, a Pennsylvania corporation; TIME WARNER CABLE, INC., a Delaware corporation; and DOES 1 through 10, inclusive, Defendants.	**CASE NO. 2:15-cv-01239-TJH-MAN** **FIRST AMENDED COMPLAINT FOR RACIAL DISCRIMINATION IN VIOLATION OF 42 U.S.C. § 1981; AND FOR DAMAGES AND INJUNCTIVE RELIEF** **DEMAND FOR JURY TRIAL** [Filed September 21, 2015]

Plaintiffs National Association of African American–Owned Media ("NAAAOM") and Entertainment Studios Networks, Inc. ("Entertainment Studios") allege against Defendants Comcast Corporation ("Com-

cast"), Time Warner Cable, Inc. ("Time Warner Cable"), and DOES 1 through 10, inclusive, (collectively, "Defendants") as follows:

INTRODUCTION

1. This case is about racial discrimination in contracting by Defendants Comcast and Time Warner Cable, two of the largest cable television companies in the United States. It involves refusals to contract and contracting on unequal and discriminatory terms.

2. Plaintiff Entertainment Studios is a 100% African American–owned media company involved in the production and distribution of television programming through broadcast television, its seven cable television channels, and its subscription-based internet service. It is the only 100% African American– owned video programming producer and multi-channel operator/owner in the United States (because the other 100% African American–owned media companies have been shut out and were eventually forced out of business).

3. Comcast and Time Warner Cable refuse to do business with truly African American–owned media companies, including Entertainment Studios. Instead, Comcast devised a strategy to shut out African American–owned media companies and, in the process, bamboozled President Obama and the federal government in the process.

4. To that end, Comcast entered into a phony memorandum of understanding ("MOU") with non-media civil rights groups, which it submitted to the FCC in order to secure approval of its 2011 acquisition of NBC-Universal. But as set forth herein, the MOU actually did nothing to promote the inclusion of truly

African American–owned media companies in the media industry. Quite the opposite, Comcast has used the MOU against Entertainment Studios to perpetuate its racial discrimination in contracting for channel carriage.

5. After filing this lawsuit, Plaintiffs learned that they are not alone— Comcast's racial discrimination has affected a number of other African American–owned networks and channels.

6. For example, Comcast's discriminatory contracting practices led to the demise of Black Family Channel, a network that was created by renowned African American attorney Willie E. Gary and other prominent African Americans, including baseball legend Cecil Fielder, former heavyweight boxing champion Evander Holyfield, Marlon Jackson of Jackson Five fame, and television executive Alvin James.

7. And after stringing along another 100% African American–owned channel—Historically Black Colleges and Universities Network ("HBCU Network")—Comcast pulled the plug on the carriage deal they had been negotiating before the Comcast/NBC-Universal merger was approved in 2011. Comcast told HBCU Network that it could obtain carriage on Comcast's television distribution system only via the "MOU Process"—an inherently unequal and discriminatory track for minority-owned networks. Other examples of Comcast's racial discrimination in contracting for carriage abound and will be brought forth in discovery in this action.

8. Comcast and Time Warner Cable collectively spend approximately $25 billion annually for the licensing of pay-television channels and advertising of their products and services ($20 billion licensing

and $5 billion advertising), yet 100% African American–owned media companies receive less than $3 million from these companies per year. This discrepancy is the result of—and evidences—racial discrimination in contracting, in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981.

PARTIES, JURISDICTION AND VENUE

A. Plaintiffs

9. Plaintiff NAAAOM is a California limited liability company, with its principal place of business in Los Angeles, California.

10. NAAAOM was created and is working to obtain for African American–owned media the same contracting opportunities as their white counterparts for distribution, channel carriage, channel positioning and advertising dollars. Its mission is to secure the economic inclusion of truly African American–owned media in contracting, the same as white-owned media. NAAAOM currently has six members and, possibly, more in the offing.

11. Historically, because of the lack of distribution/advertising support and economic exclusion, African American–owned media has been forced either to (i) give away significant equity in their enterprises, (ii) pay exorbitant sums for carriage, effectively bankrupting the business, or (iii) go out of business altogether, pushing African American–owned media to the edge of extinction.

12. As alleged herein, Entertainment Studios—a member of NAAAOM—is being discriminated against on account of race in violation of 42 U.S.C. § 1981. Entertainment Studios thus has standing to seek redress for such violations in its own right. The interests at stake in this litigation—namely, the right

of African American–owned media companies to make and enforce contracts in the same manner as their white-owned counterparts—are germane to NAAAOM's purpose. Because NAAAOM seeks only injunctive relief, the individual participation of its members is not required.

13. Plaintiff Entertainment Studios Networks, Inc. is a California corporation, with its principal place of business in Los Angeles, California. Entertainment Studios is a 100% African American–owned television production and distribution company. It is the only 100% African American–owned video programming producer and multi-channel operator/owner in the United States.

14. Entertainment Studios is certified as a bona fide Minority Business Enterprise as defined by the National Minority Supplier Development Council, Inc. and as adopted by the Southern California Minority Supplier Development Council.

15. Entertainment Studios was founded in 1993 by Byron Allen, an African American actor/comedian/media entrepreneur. Allen is the sole owner of Entertainment Studios. Allen first made his mark in the television world in 1979, when he was the youngest comedian ever to appear on "The Tonight Show Starring Johnny Carson." He thereafter served as the co-host of NBC's "Real People," one of the first reality shows on television. Alongside his career "on-screen," Allen developed a keen understanding of the "behind the scenes" television business, and over the past 22+ years he has built Entertainment Studios as an independent media company.

16. Entertainment Studios has carriage contracts with more than 40 television distributors nationwide, including VerizonFIOS, Suddenlink, RCN and CenturyLink. These television distributors broadcast Entertainment Studios' networks to their combined 7.5 million subscribers.

17. Entertainment Studios owns and operates seven, high definition television networks (channels), six of which were launched to the public in 2009 and one in 2012. Entertainment Studios produces, owns, and distributes over 32 television series on broadcast television, with thousands of hours of video programming in its library. Entertainment Studios' shows have been nominated for, and won, the Emmy award. A copy of an Entertainment Studios promotional presentation highlighting key aspects of the company and the programming it produces is attached hereto as **Exhibit A**.

18. In December 2012, Entertainment Studios launched "Justice Central," a 24-hour, high definition court/informational channel featuring several Emmynominated and Emmy-award winning legal/court shows. After just two years, Justice Central has already proved itself a successful channel. Justice Central has boasted tremendous ratings growth across key television viewing periods and demographics.

B. Defendants

19. Comcast Corporation is a Pennsylvania corporation, with its principal place of business in Philadelphia, Pennsylvania. Comcast also has an office, is registered to do business and operates in Los Angeles, California. Comcast is a global media giant. It owns NBC Television, Universal Pictures, Universal Stu-

dios, multiple (approximately 30) pay television channels (*e.g.*, USA Network, Bravo Network, E! Network, etc.), and it is one of the largest cable companies and internet service providers in the United States. Comcast provides subscription television services to approximately 22 million subscribers—more than any other cable television distributor in the United States. It has near-monopolistic control over the cable market in several major geographic markets across the United States.

20. Time Warner Cable, Inc. is a Delaware corporation, with its principal place of business in New York, New York. Time Warner Cable also has an office, is registered to do business and operates in Los Angeles, California.

21. Plaintiffs are informed and believe, and on that basis allege, that Defendants DOES 1 through 10, inclusive, are individually and/or jointly liable to Plaintiffs for the wrongs alleged herein. The true names and capacities, whether individual, corporate, associate or otherwise, of Defendants DOES 1 through 10, inclusive, are unknown to Plaintiffs at this time. Accordingly, Plaintiffs sue Defendants DOES 1 through 10, inclusive, by fictitious names and will amend this Complaint to allege their true names and capacities after they are ascertained.

C. Jurisdiction & Venue

22. This case is brought under a federal statute, § 1981 of the Civil Rights Act; as such, there is federal question jurisdiction under 28 U.S.C. § 1331. Venue of this action is proper in Los Angeles because Defendants reside in this district, as defined in 28 U.S.C. § 1391; and the acts in dispute were committed in this district.

FACTS

A. Racial Discrimination in the Media

23. Racial discrimination in contracting is an ongoing practice in the media industry with far-reaching adverse consequences. It effectively excludes African American–owned media companies and African American individuals, and their diverse viewpoints, from the public airwaves.

24. Major television channel distributors, like Comcast and Time Warner Cable, have unique power to limit the viewpoints available in the public media. Channel owners, like Entertainment Studios, are reliant upon the services of television distributors, like Comcast and Time Warner Cable, to provide access to their distribution platform not only to realize subscriber and advertising revenue, but also to reach television consumers themselves.

25. Comcast and Time Warner Cable have control over television distribution on their cable platforms; their exclusion of African American–owned channels has resulted in the near-extinction of 100% African American ownership in mainstream media, and this exclusion is self-perpetuating.

26. There is a statistic that highlights the inequity here: Comcast's Chairman, Brian L. Roberts, was paid $32.9 million in compensation in 2014 alone—ten times more than all of Comcast paid to 100% African American–owned media for channel carriage and advertising combined during the same period. Additionally, the CEO of Time Warner Cable during the same period (2014) was paid approximately $34.6 million, again, more than ten times the amount all of Time Warner Cable paid to 100% African American–owned media for channel carriage and advertising.

27. White-owned media in general—and Comcast in particular—has worked hand-in-hand with governmental regulators to perpetuate the exclusion of truly African American–owned media from contracting for channel carriage and advertising. This has been done through, among other things, the use of "token fronts" and "window dressing"—African American celebrities posing as "fronts" or "owners" of so-called "Black cable channels" that are actually majority owned and controlled by white-owned businesses.

28. Comcast is a powerful political player in Washington, D.C. and has used its clout and money to obtain regulatory approval for its acquisitions and sweep its racist practices under the rug. Comcast's chief lobbyist and executive vice president, David Cohen, is a major political fundraiser and the mastermind behind Comcast's conflicts of interest and wrongdoing recounted herein.

29. Comcast influenced and secured favorable votes from government regulators—including Federal Communications Commission ("FCC") commissioner Meredith Attwell Baker—for approval of the Comcast/NBCUniversal transaction; and then hired Baker as an executive shortly after she cast her vote and approved the deal. Comcast rewarded this government regulator with an executive position and a substantially higher salary after she used her power at the FCC to Comcast's benefit. This executive position and compensation package would not have been granted by Comcast had Ms. Baker voted against the merger.

B. Comcast Enters into Sham Memoranda of Understanding with Non- Media Civil Rights Groups

30. In connection with its 2010 bid to acquire NBC-Universal, Comcast was criticized for its refusal to do business with independent and minority-owned media companies, including African American–owned media companies. The Comcast/NBC-Universal merger was subject to regulatory approval by the FCC and the Department of Justice.

31. Entertainment Studios and other minority-owned media companies opposed the merger, publicly criticizing Comcast for its failure to do business with African American–owned media companies. Entertainment Studios urged the FCC to impose merger conditions that would address Comcast's discriminatory practices in contracting for channel carriage.

32. When Comcast's racist practices and policies jeopardized the approval of the NBC-Universal acquisition, Comcast manipulated ways to secure merger approval while perpetuating its exclusion of African American–owned channels. In order to gain approval of its acquisition of NBC-Universal, Comcast gave millions in monetary "contributions" to various non-media minority special interest groups in order to "buy" support for its expansion.

33. Comcast "donated" funds to at least 54 different groups that went on publicly to endorse the Comcast/NBC-Universal deal. And after buying their support, Comcast entered into what it termed "voluntary diversity agreements," *i.e.*, memoranda of understanding ("MOUs"), with non-media civil rights groups, including NAACP, National Urban League and Al Sharpton's National Action Network. These

non-media civil rights groups are not television channel owners and do not operate in the television channel business. They do not produce original television programming, or operate television channels, unlike Entertainment Studios, which does both.

34. Through the MOUs, Comcast purported to address the widespread concerns regarding the lack of diversity in channel ownership on its systems by, among other things, committing to launch several new networks with minority ownership and establishing "external Diversity Advisory Councils" to advise Comcast as to its "diversity practices," including in contracting for carriage. The MOUs were a smokescreen designed to secure merger approval without obligating Comcast to do business with truly African American–owned media companies.

35. Each of the signatories to the MOU between Comcast and the "African American Leadership Organizations" were paid by Comcast in the time leading up to the Comcast/NBC-Universal deal. Comcast paid $30,000 to the NAACP, $835,000 to the National Urban League, and $140,000 to Al Sharpton's National Action Network. Comcast also paid hundreds of thousands of dollars to the National Urban League's various regional affiliates.

36. Comcast has also paid Reverend Al Sharpton and Sharpton's National Action Network over $3.8 million in "donations" and as salary for the on-screen television hosting position on MSNBC that Comcast awarded Sharpton in exchange for his signature on the MOU. Despite the notoriously low ratings that Sharpton's show generates, Comcast allows Sharpton to maintain his hosting position for more than three years in exchange for Sharpton's continued public support for Comcast on issues of diversity.

37. Comcast paid Sharpton so that he would publicly endorse the NBC-Universal deal and divert attention away from Comcast's racial discrimination in contracting. In exchange, Sharpton's National Action Network and other non-media minority interest groups supported Comcast before the FCC with very little understanding about the merger or expertise in the media business.

38. The MOUs were given the appearance of legitimacy because they were approved by minority interest groups—NAACP, National Urban League, and Al Sharpton's National Action Network, none of which own or operate any television channels, and all of which accepted large donations/pay-offs for their signatures.

39. Ironically, as reported in *The New York Times*, Comcast spent millions of dollars to pay non-media civil rights groups to support its acquisition of NBC-Universal, while at the same time refusing to do business with African American owned media companies. These payments were a ruse made with an ulterior motive: To make Comcast look like a good corporate citizen while it steadfastly refused to contract with African American–owned media companies.

40. The MOU was signed by Comcast's then–Executive Vice President and Chief Diversity Officer David Cohen. Mr. Cohen was integral in structuring and getting the Comcast / NBC-Universal merger approved, including by acting as one of the main architects of the (phony) MOU. On information and belief, Mr. Cohen also oversees and signs off on the Annual Compliance Reports that Comcast submits to the FCC, in which Comcast misleadingly claims to be doing business with African American owned-and-operated channels when, in fact, the channels Comcast has

launched pursuant to the MOU are owned, controlled and backed by white-owned media and money.

41. The "Diversity Advisory Councils" Comcast established are also shams. Not only do the Council members have limited understanding of the cable industry and little-to-no experience operating cable networks, but Comcast has not given the Council any real authority to "advise" Comcast as to its diversity initiatives in contracting for carriage. Instead, Comcast gave the Council a standard tour of its offices, and never even asked its members about channel carriage.

C. Comcast Uses the MOU to Discriminate Against Media Companies with Truly "Majority or Substantial" African American Ownership

42. In light of the concerns about Comcast's failure to do business with independent, minority-owned media companies, Comcast had a problem. The sham MOUs solved it: Through the MOUs, Comcast purportedly agreed to enter into carriage agreements with minority-owned media companies; but the channels that were ultimately launched were fronts and were not truly minority-owned.

43. Through the MOU with the African American non-media civil rights organizations, Comcast purportedly agreed to enter into carriage agreements to distribute programming networks in which African Americans have "**majority or substantial**" ownership interest and to add these networks on commercially comparable and competitive terms.

44. But Comcast has done just the opposite. Comcast has used the MOU to facilitate its racist practices and policies in contracting—or, more accurately, refusing to contract—with media companies

with truly "majority or substantial" African American ownership. It has not contracted with majority or substantially owned African American media. The MOU is a sham.

45. With the MOU in hand, Comcast proceeded to segregate media businesses with "majority or substantial" African American ownership by creating two separate paths for contracting for channel carriage: one for non-minority-owned channels and a separate, but not equal, process for African American–owned channels (the "MOU Process").

46. The MOU Process is distinctly unequal from Comcast's normal process for contracting for carriage. Comcast limits the number of carriage agreements it will enter into through the MOU Process and offers inferior contracting terms. The MOU thus furthers Comcast's discriminatory practices against African American–owned channels. Comcast has used the MOU to create a segregated and unequal path for African American–owned channels to contract for carriage.

47. By relegating companies with "majority or substantial" African American ownership to the MOU Process, Comcast affords them inferior or no contracting opportunities. By contrast, media companies without "majority or substantial" African American ownership are able to contract with Comcast for carriage at any time via Comcast's normal process for contracting for carriage.

48. Comcast refuses to contract with African American–owned media companies—such as Entertainment Studios—through its normal contracting process. African American–owned channels are thus being denied the same opportunity to contract with

Comcast as channels without majority or substantial African American ownership. The MOU Process constitutes intentional discrimination.

49. In addition to these racial restrictions, African American–owned media companies face further inequities in the terms and conditions Comcast offers to the channels it chooses through the MOU Process. Comcast has offered shorter-term deals and little, if any, in licensing fees to the channels it launches through the MOU Process. These less favorable contracting terms make it difficult—if not impossible—for the channels launched through the MOU Process to succeed.

D. <u>In Violation of the MOU, Comcast Has Not Launched Any Independent Networks with "Majority or Substantial" African American Ownership</u>

50. The "diversity" commitments Comcast made through the MOU are fraudulent. The MOU was purportedly intended to result in the launch of so-called "minority-owned" networks—*i.e.*, networks "in which African Americans have a **majority or substantial** ownership interest." In reality, the networks Comcast has launched pursuant to the MOU are owned, controlled, and backed by white-owned media and money. Comcast has given African American celebrities token ownership interests in those channels to serve as figureheads in order to cover up its racial discrimination in contracting.

51. For example, one of the supposedly "Black channels" Comcast launched—*REVOLT*—is actually owned by Highbridge Capital, which is run by a former Comcast executive who reported directly to David Cohen, Payne Brown. Highbridge Capital is also a

subsidiary of JP Morgan, whose Board of Directors includes Comcast's President and COO, Steve Burke. The other supposed "Black channel" Comcast launched—*Aspire*—is actually owned by Intermedia Partners, which is owned/controlled by white businessman Leo Hindery, a long-time friend of Comcast's CEO, Brian Roberts.

52. Although Comcast touts *REVOLT* and *Aspire* as satisfying its MOU commitments, neither is a network with truly "**majority or substantial**" African American ownership. These networks give African American celebrities token ownership interests but, in reality, are owned and operated by Comcast insiders.

53. The only channel with "majority or substantial" African American ownership that Comcast has launched—*The Africa Channel*—is owned and operated by a Comcast insider, Paula Madison. Madison is a former Comcast/NBC-Universal executive and oversaw the execution of the MOU.

54. In other words, aside from a channel that is owned and operated by the former Comcast/NBC-Universal executive who co-authored the MOU, Comcast has not launched a single channel with majority or substantial African American ownership—by way of the MOU or otherwise.

55. Comcast made similar "diversity commitments" to the Hispanic community in order to secure approval of its bid to acquire NBC-Universal. But again, rather than launching any truly Hispanic-owned channels, Comcast launched "Baby First Americas"—a non-Hispanic-owned channel (the channel's founders, owners and operators are Guy Oranim and his wife, Sharon Rechter, who are Israeli). Bill

Burke—brother of Comcast's President and COO, Steve Burke—is on the Board of Directors of Baby First Americas.

E. Comcast and Time Warner Cable Refuse to Contract with Entertainment Studios on the Basis of Race

56. Entertainment Studios, a 100% African American–owned media company, has been shut out from doing business with Comcast despite significant efforts to do so. Like many other African American–owned channels that have tried to secure cable carriage during Comcast's 50+ year history, Entertainment Studios has had multiple meetings for channel carriage with Comcast but, like the others, to no avail. Comcast has discriminated against Entertainment Studios at every turn.

57. Entertainment Studios has been trying for several years to contract with Comcast for carriage of one or more of Entertainment Studios' seven channels. Comcast has refused and strung Entertainment Studios along. Comcast has given Entertainment Studios the false impression that its channels are on Comcast's "short list" and provides a variety of different excuses for its refusal to carry any of Entertainment Studios' channels, even though the channels are widely viewed on Comcast's competitors' television distribution systems.

58. Comcast has been playing a game of "whack-a-mole" with Entertainment Studios—each time Entertainment Studios jumps a pretextual hurdle created by Comcast (*e.g.*, Comcast executive, Jennifer Gaiski, required Entertainment Studios to present empirical data and secure support "in the field" so that she could present such material to Comcast

senior management, Greg Rigdon and Neil Smit), Comcast replaces it with a new obstacle. Although Entertainment Studios has complied with each of Comcast's demands, Comcast still refuses to launch any of Entertainment Studios' channels.

59. For example, Comcast Corporate directed Entertainment Studios to garner support from Comcast's Division offices in order to bolster its carriage request. But when Entertainment Studios reached out to the different Divisions (Northeast, Central and West), the Divisions indicated that they "deferred to Corporate."

60. Comcast Corporate also emphasized the need for feedback from the Regions. But again, when Entertainment Studios received support from key Comcast Regions (*e.g.*, Chicago, Southwest), Comcast Corporate nevertheless denied carriage. In some cases, Entertainment Studios was inconsistently advised *not* to meet with the Regions because all carriage decisions were funneled through Comcast Corporate. Comcast required Entertainment Studios to run around in circles—and spend hundreds of thousands of dollars on travel and expenses—without any intention of considering a carriage deal.

61. Comcast has used other phony excuses to justify its racial discrimination. For example, it claims that it does not have the bandwidth to accommodate Entertainment Studios' channels or that it is not a buyer of new channels. But meanwhile, Comcast has entered into carriage agreements with other non-minority-owned channels, belying its various pretextual excuses.

62. Comcast also claims that it is interested in adding carriage only for news and sports channels.

This is yet another phony excuse. Comcast has added other, non-news, non-sports channels while simultaneously refusing to contract with Entertainment Studios and turning down another 100% African American–owned channel focused on black college sports, HBCU Network.

63. Comcast further claims that there is no demand for Entertainment Studios' channels, but that, too, is belied by the facts: Entertainment Studios' channels have a proven track record of high ratings and popularity among viewers and are distributed by other national television providers. Entertainment Studios' programming has garnered Emmy nominations and wins. Entertainment Studios sells its channels to dozens of other programming distributors and television stations, which distribute Entertainment Studios' channels to millions of subscribers.

64. For example, one of Entertainment Studios' most recently launched channels, Justice Central, has achieved success in the short time it has been on the air. Justice Central's double- to triple-digit ratings growth outperformed the vast majority of networks that Comcast and Time Warner Cable pay substantial license fees to carry. Indeed, between the first quarter of 2013 and the fourth quarter of 2014, Justice Central boasted huge ratings growth on AT&T's television platform, as follows:

Justice Central – AT&T U-Verse Ratings Growth

Daypart:	Air Time:	% Growth 1st Qtr. 2013 to 4th Qtr. 2014:
Early Fringe	4-7pm	+38%
Prime Access	7-8pm	+21%
Prime	8-11pm	+53%

Late Fringe	11pm-2am	+552%
Overnight	2-6am	+295%

65. Entertainment Studios even offered for Comcast to launch Justice Central *for free*, but Comcast still insisted that Entertainment Studios proceed via the MOU Process in its attempts to obtain carriage. This is evidence that Comcast's decision is based on racial animus and retaliation for Entertainment Studios' opposition to the Comcast/NBC-Universal merger, rather than legitimate business considerations.

66. Entertainment Studios did not know that Comcast was using the MOU as a vehicle to perpetuate racial discrimination in contracting until recently. In November 2014, Entertainment Studios first discovered that Comcast had set up dual paths for negotiating for carriage (one for non-minority-owned media and one for African American–owned media) when it was told by Comcast that it would be relegated to the MOU Process. These two paths for carriage are separate, but not equal—the very definition of discrimination.

67. Comcast has admitted that it is "impressed" by Entertainment Studios' programming and channels, but has excluded Entertainment Studios from obtaining carriage through Comcast's normal contracting process. Instead, Comcast has forced this 100% African American–owned media company to apply for carriage through the "MOU Process."

68. For example, in November 2014, a Comcast executive told Entertainment Studios that although its channels were good enough for carriage on Comcast's platform, Entertainment Studios would have to

wait to be part of the "next round of [MOU] considerations."

69. In other words, Comcast told Entertainment Studios that it would consider contracting to carry Entertainment Studios' channels only to the extent that the carriage agreement would satisfy Comcast's obligation to launch networks with "majority or substantial" African American ownership pursuant to the MOU. But as described above, the MOU Process has never resulted in the launch of channels with truly "majority or substantial" African American ownership.

70. Comcast has, in essence, created a "Jim Crow" process with respect to licensing channels from media companies with "majority or substantial" African American ownership. Comcast has reserved a few spaces for African American owned media companies in the "back of the bus," while the rest of the bus is occupied by non-African-American-owned media companies. This is racial discrimination in contracting.

71. Entertainment Studios is restricted to applying for carriage with Comcast via the MOU Process not because of the nature of its channels—which are broad market with global appeal—but because it is African American–owned. For racial reasons alone, Entertainment Studios is forced to participate in a discriminatory process. This is racial discrimination in contracting, in violation of 42 U.S.C. § 1981.

72. The MOU enables Comcast to tout a phony, non-existent "commitment" to racial diversity. All the MOU has done is allow Comcast to "legitimize" its racist policies and practices so it can continue to refuse to do business with African American–owned media companies.

73. According to Comcast, Entertainment Studios must go through the MOU Process for obtaining channel carriage. This prevents Entertainment Studios from being treated equally with its non-minority-owned/controlled counterparts.

74. These are violations of § 1981: Comcast's refusal to contract with media companies with majority or substantial African American ownership; its implementation of dual paths for carriage (*i.e.*, one path for non-minority-owned media and a separate "MOU Process" for African American–owned media companies); its discrimination in the contractual terms it offers to African American–owned media companies; and its pretextual excuses for refusing to contract.

75. Comcast's discriminatory intent is further evidenced by the fact that of the approximately $10 billion in content fees that Comcast pays to license channels and advertise each year, less than $3 million is paid to 100% African American owned media. The payments Comcast makes to African American–owned media companies are tokens and a charade. Comcast pays minimal amounts to license and distribute the Africa Channel, which is owned and operated by a former Comcast/NBC-Universal executive/insider, Paula Madison, one of the architects of the MOU Comcast uses to perpetuate its racial discrimination in contracting.

76. Time Warner Cable likewise refuses to contract with Entertainment Studios on the basis of race. Outside of a single channel (Africa Channel) that is owned and operated by the former Comcast executive, Time Warner Cable does not distribute any channels that are owned and operated by 100 % African American–owned media companies either.

77. In the time leading up to the then-pending merger between Comcast and Time Warner Cable, Entertainment Studios had made progress negotiating the terms of a possible carriage deal with Time Warner Cable. But then Comcast programming executive, Jennifer Gaiski, asked who Entertainment Studios was in discussions with at Time Warner Cable about launching its channels.

78. Entertainment Studios disclosed that it had advanced negotiations with Time Warner Cable executive, Melinda Witmer (who was presenting Entertainment Studios' information to Time Warner Cable President and COO, Robert Marcus). Soon thereafter, Entertainment Studios' channel launch opportunity was shut down by Time Warner Cable under orders from Comcast.

79. Thus, in the face of the then-pending pending merger between Comcast and Time Warner Cable, Time Warner Cable delegated channel carriage decision-making to Comcast—"gun jumping" the consummation of the Comcast / Time Warner Cable merger in violation of federal law. Time Warner Cable thus adopted Comcast's racist policies and practices in connection with refusing to contract with Entertainment Studios.

80. Entertainment Studios is being discriminated against on account of race in connection with contracting in violation of the Civil Rights Act. Without access to viewers and without licensing fees and advertising revenues from the largest video programming distributors in the country, this 100% African American–owned media business is being shut out and severely damaged, like all other truly African American–owned media networks.

F. Comcast's History of Racial Discrimination Against African American–Owned Media Companies

81. Comcast's discrimination against Entertainment Studios, as detailed herein, is part and parcel of a pattern of racial discrimination this media giant has perpetrated for decades. Indeed, Comcast cannot identify a single independent 100% African American–owned network that it has distributed on its television platform in its 50+ years of operation. As set forth below, Comcast has historically discriminated against African American–owned media companies in contracting for channel carriage in favor of media companies that are owned and operated by white Comcast cronies.

Black Family Channel

82. Entertainment Studios is not the first African American–owned media company to contemplate legal action against Comcast for its blatant racial discrimination in contracting. Another is MBC Network (later known as Black Family Channel), which threatened to sue Comcast for its racial discrimination in contracting—even going so far as to draft a lawsuit alleging violations of 42 U.S.C. § 1981, the same claim asserted herein.

83. Black Family Channel was founded by renowned African American attorney Willie E. Gary and other prominent African American entrepreneurs, including baseball legend Cecil Fielder, former heavyweight boxing champion Evander Holyfield, Marlon Jackson of Jackson Five fame, and television executive Alvin James.

84. From its launch in 1999 until 2002, the Black Family Channel was distributed to millions of

viewers on Comcast's television system. Beginning in 2002, however, Comcast informed Black Family Channel that to guarantee continued carriage on Comcast's systems, Black Family Channel would need to give Comcast a significant ownership interest in the company.

85. When Black Family Channel refused, Comcast began retaliating and discriminating against this 100% African American–owned media company. Comcast halted the expansion of Black Family Channel in new markets; placed Black Family Channel on a more expensive, less-penetrated, less-favorable program tier; and gave Black Family Channel inferior channel positioning. Comcast additionally withdrew advertising opportunities from Black Family Channel, eliminating an important revenue source for the network.

86. Comcast deliberately discriminated against Black Family Channel in contracting for carriage on the basis of race. Indeed, Comcast did not require similarly situated, white-owned networks to give Comcast an ownership interest in their networks in order to secure carriage on favorable, non-discriminatory terms.

87. As a result of Comcast's discrimination, Black Family Channel was denied increased carriage and licensing fees, leading to the network's demise. The network was eventually sold to Gospel Music Channel, a network that was financially backed and controlled by white businessman Leo Hindery. (Due to Comcast's discrimination and concomitant limited distribution of Black Family Channel, the network was undervalued and sold for less than $10 million.)

88. After Black Family Channel was taken over by a white businessman, Comcast rolled out the red carpet for the network: Comcast agreed to enter into a carriage agreement with Gospel Music Channel and to broadly distribute the network on its cable platform. Today, Leo Hindery is undertaking efforts to sell the network (now called Up TV) for approximately $550 million—in other words, Black Family Channel's value has increased more than 50-fold by virtue of Comcast's newfound willingness to do business with the network now that it is white-owned.

HBCU Network

89. Comcast also discriminated on the basis of race in its dealings with Historically Black Colleges and Universities ("HBCU") Network, another African American–owned network. HBCU Network is a sports, entertainment and lifestyle network devoted to historically black colleges and universities. It was created by two African American media entrepreneurs, Curtis Symonds and Clint Evans. Mr. Symonds is a cable industry veteran—he was an executive at ESPN for eight years and served as Executive Vice President, Distribution and Marketing for BET Networks for more than 14 years. HBCU Network pledged to give back to the black colleges and universities by partnering with them and sharing in the network's ownership and profits.

90. Mr. Symonds has detailed Comcast's discriminatory dealings with HBCU Network in writing, as follows: HBCU Network met with Comcast's then Senior Vice President of Programming, Madison Bond, and his executive team to negotiate a carriage agreement. Comcast told Mr. Symonds that it was excited about the network and, soon after the meeting,

Comcast offered HBCU Network a 20-year carriage deal, including license fees.

91. As HBCU Network was moving forward to finalize the terms of its carriage deal, Comcast pulled the rug out from under the network: Comcast told HBCU Network that in light of the merger between Comcast and NBC-Universal, Comcast was required to launch a certain number of minority-owned networks and even though HBCU Network had been at a very advanced stage of negotiations for carriage, it would need to start over and proceed via the application process for minority-owned networks (*i.e.*, the "MOU Process" described herein).

92. In other words, because—and only because—HBCU Network was an African American–owned network, it was forced to proceed via the MOU Process rather than finalizing the carriage deal that had already been underway through Comcast's normal contracting process.

93. Instead of launching HBCU Network via the MOU Process, Comcast turned them away completely. After Comcast had (purportedly) satisfied its MOU commitment, it was unwilling to do business with this 100% African American– owned network.

Soul Train

94. "Soul Train" is an iconic African American–owned television series created by the late Don Cornelius, a successful African American television producer. Like Black Family Channel and HBCU Network, Comcast also refused to do business with Don Cornelius Productions, a 100% African American–owned media company that wanted to launch a Soul Train network. Comcast shut them out, forcing them

to sell the Soul Train franchise to the same white businessman, Leo Hindery, who bought the Black Family Channel at a steep, below-market discount.

FIRST CAUSE OF ACTION: VIOLATION OF CIVIL RIGHTS (42 U.S.C. § 1981)

NAAAOM and Entertainment Studios Against Comcast & Time Warner Cable

A. Section 1981

95. NAAAOM refers to and incorporates by reference each foregoing and subsequent paragraph of this Complaint as though fully set forth herein.

96. Comcast and Time Warner Cable have engaged in, and are engaging in, pernicious, intentional racial discrimination in contracting, which is illegal under § 1981. Section 1981 is broad, covering "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

97. African Americans are a protected class under Section 1981. Entertainment Studios is a 100% African American–owned media business.

98. As alleged herein, Entertainment Studios attempted many times over many years to contract with Comcast and Time Warner Cable to carry its channels, but these television distributors have refused, providing a series of phony, pretextual excuses. Yet Comcast and Time Warner Cable have continued to contract with—and make themselves available to contract with—similarly situated white-owned television channels.

99. Comcast has refused to contract with Entertainment Studios for channel carriage and advertising. Entertainment Studios has been deprived of the right to contract with Comcast by being relegated to the MOU Process, while non-minority-owned businesses have been afforded the right to contract with Comcast through its normal, more accessible process.

100. Comcast has dealt with Entertainment Studios and other African American–owned media companies in a markedly hostile manner and in a manner which a reasonable person would find discriminatory. Comcast has a pattern and practice of refusing to do business with, or offering unequal contracting terms to, African American–owned media companies.

101. Time Warner Cable has likewise refused to contract with Entertainment Studios for channel carriage and advertising. In the face of the then-pending merger between Comcast and Time Warner Cable, Time Warner Cable delegated channel carriage decision-making authority to Comcast. Accordingly, Time Warner Cable engaged in the same discriminatory conduct as Comcast. Time Warner Cable adopted Comcast's racist policies and practices in connection with contracting for channel carriage. After Comcast demanded to know who Entertainment Studios was talking to at Time Warner Cable to get channel carriage, Time Warner Cable closed the door (at the instruction of Comcast) on negotiations and shut out Entertainment Studios.

B. <u>Damages</u>

102. But for Comcast's and Time Warner Cable's refusal to contract with Entertainment Studios, Entertainment Studios would receive approximately

$378 million in annual license fees for its seven channels—calculated using a conservative license fee of fifteen cents per subscriber per month for each channel for Comcast / Time Warner Cable's combined 30 million subscribers. If Defendants contracted in good faith, Entertainment Studios would also receive an estimated $200 million per year, per channel, in national advertising sales revenue, or a total of $1.4 billion per year, equaling a combined total of $1.8 billion in annual revenue.

103. Combining subscriber fees and advertising revenue, Entertainment Studios would generate approximately $1.8 billion in annual revenue from its carriage and advertising contracts with Comcast / Time Warner Cable. Moreover, with distribution on two of the largest television platforms in the nation, the demand for Entertainment Studios' channels both domestically and internationally would increase, leading to additional growth and revenue for Entertainment Studios' channels.

104. Based on the revenue Entertainment Studios would generate if Defendants contracted with them in good faith, Entertainment Studios would be valued at approximately $20 billion.

105. Similarly situated lifestyle and entertainment media companies are valued at higher amounts. But for Comcast's and Time Warner Cable's refusal to contract with Entertainment Studios, Entertainment Studios would have a similar valuation.

106. Accordingly, Comcast's and Time Warner Cable's unlawful discrimination has caused Entertainment Studios in excess of $20 billion in damages, according to proof at trial; plus punitive damages for

intentional, oppressive and malicious racial discrimination.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment, as follows:

1. Plaintiff Entertainment Studios prays for compensatory, general and special damages in excess of $20 billion according to proof at trial;
2. Plaintiffs NAAAOM and Entertainment Studios pray for injunctive relief prohibiting Comcast and Time Warner Cable from discriminating against African American–owned media companies, including Entertainment Studios, based on race in connection with contracting for carriage and advertising;
3. Plaintiff Entertainment Studios prays for punitive damages, based on oppression and malice, according to Defendants' net worth;
4. Plaintiff Entertainment Studios prays for attorneys' fees, costs and interest; and
5. Plaintiffs NAAAOM and Entertainment Studios pray for such other and further relief as the court deems just and proper.

DATED: September 21, 2015 Respectfully Submitted,

MILLER BARONDESS, LLP

By: */s/ Louis R. Miller*
LOUIS R. MILLER
Attorneys for Plaintiffs

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

NATIONAL ASSOCIATION OF AFRICAN-AMERICAN OWNED MEDIA, *et al.*, Plaintiffs, v. COMCAST CORPORATION, *et al.*, Defendants.	CV 15-01239 TJH (MANx) Order [Filed August 5, 2015]

The Court has considered the motions of Time Warner Cable and Comcast Corporation, National Association for the Advancement of Colored People, National Urban League, Inc., Al Sharpton, National Action Network, Inc., and Meredith Attwell Baker's to dismiss, together with the moving and opposing papers.

Since there is no applicable federal statute governing personal jurisdiction, district courts apply the law of the state in which they sit. *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1205 (9th Cir. 2006). As such, jurisdictional analysis under California law and federal due process is the same, and this Court may exercise jurisdiction under any basis allowable under the U.S. Constitution. *Yahoo! Inc.*, 433 F.3d at 1205.

Federal due process requires that the defendant have certain minimum contacts with the forum state such that the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 102 (1945). There is a three-part test to assess whether a defendant has sufficient contacts with the forum state to be subject to specific personal jurisdiction: (1) the non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or purposefully avail himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must arise out of or relate to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice. *Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015). The plaintiff bears the burden of proving the first two prongs. *Picot*, 780 F.3d at 1212. Should the plaintiff satisfy the first two prongs, the burden shifts to the defendant to "present a compelling case" that the exercise of jurisdiction would be unreasonable. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004).

As to the first prong, one of two tests guides the Court's jurisdictional analysis. *Picot*, 780 F.3d at 1212. For contract claims, the question is whether a defendant has purposefully availed himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. *Picot*, 780 F.3d at 1212. For tort claims, there is a three part "effects" test derived from *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (9th Cir. 1984). A defendant has purposefully directed

his activities at the forum if he: (1) committed an intentional act, (2) expressly aimed at the forum state, and (3) caused harm that the defendant knew was likely to be suffered in the forum state. *Calder*, 465 U.S. at 783.

Plaintiffs' claims sound in tort, and, thus, the "purposeful direction" test applies.

The plaintiffs have failed to plead sufficient facts to show that this Court has personal jurisdiction over defendants National Urban League, National Action Network, the National Association for the Advancement of Colored People, Al Sharpton and Meredith Attwell Baker. As to these defendants, none of the traditional bases for personal jurisdiction have been established. Additionally, the plaintiffs have failed to show that these defendants' contacts with California establish, either, general or specific jurisdiction. These defendants are dismissed.

In considering a motion to dismiss, all material allegations in the complaint are accepted as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868, 884 (2009). However, a complaint must contain sufficient facts to state a "plausible" claim for relief. *Shroyer v. New Cingular Wireless Services, Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). A claim is facially plausible when the facts to support it allow the court to reasonably infer that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 1949. This requires more than a possibility that the defendant has acted unlawfully. *Iqbal*, 556 U.S. at 1949. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. *Eclectic Props. East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014).

Accepting all of the factual allegations in the complaint as true, the plaintiffs have failed to allege any plausible claim for relief.

It is Ordered, that the motions to dismiss be, and hereby are, Granted.

_____

Terry J. Hatter, Jr.
Senior United States District
Judge

APPENDIX I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

NATIONAL ASSOCIATION OF AFRICAN-AMERICAN OWNED MEDIA, a California limited liability company; and ENTERTAINMENT STUDIOS NETWORKS, INC., a California corporation, Plaintiffs, v. COMCAST CORPORATION, a Pennsylvania corporation; Time Warner Cable Inc., a Delaware corporation; National Association for the Advancement of Colored People, a New York corporation; National Urban League, Inc., a New York corporation; Al Sharpton, an individual; National Action Network, Inc., a New York corporation; Mere-	**CASE NO. 2:15-cv-01239 COMPLAINT FOR:** **1) RACIAL DISCRIMINATION IN VIOLATION OF 42 U.S.C. § 1981; AND** **2) CONSPIRACY TO VIOLATE 42 U.S.C. § 1981;** **AND FOR DAMAGES AND INJUNCTIVE RELIEF** **DEMAND FOR JURY TRIAL** [Filed February 20, 2015]

dith Attwell Baker, an individual; and DOES 1 through 10, inclusive,

Defendants.

Plaintiffs National Association of African-American Owned Media ("NAAAOM") and Entertainment Studios Networks, Inc. ("Entertainment Studios") allege against Defendants Comcast Corporation ("Comcast"), Time Warner Cable, Inc. ("Time Warner Cable"), National Association for the Advancement of Colored People ("NAACP"), National Urban League, Inc. ("National Urban League"), Reverend Al Sharpton ("Sharpton"), National Action Network, Inc. ("National Action Network"), Meredith Attwell Baker; and DOES 1 through 10, inclusive, (collectively, "Defendants") as follows:

INTRODUCTION

1. This case is about racial discrimination in the contracting process by Defendants Comcast and Time Warner Cable—the two largest cable television companies in the United States—against 100% African American–owned media. These companies are preparing to merge into what will be the largest pay-television distributor in the United States.

2. Plaintiff Entertainment Studios is a 100% African American–owned media company involved in the production and distribution of television programming through broadcast television, its seven cable television channels, and its subscription-based internet service. It is the only 100% African American–owned video programming producer and multi-channel operator/owner in the United States, and is a victim of this racial discrimination by Comcast and Time Warner Cable.

3. African Americans comprise 13% of the U.S. population and represent more than $1 trillion in consumer spending power. Both Comcast and Time Warner Cable profit greatly by providing television service to African Americans. When combined with Time Warner Cable, Comcast would become the largest pay television distributor in the United States, with nearly one-third (1/3) of all television homes. (In fact, Comcast must divest itself of nearly 2.5 million customers to remain at the 30 million customer cap that the FCC will require for merger approval.)

4. Comcast and Time Warner Cable collectively spend approximately $25 billion annually for the licensing of pay-television channels and advertising of their products and services ($20 billion licensing and $5 billion advertising), yet 100% African American–owned media receives less than $3 million per year.

5. In connection with its 2010 bid to acquire NBC-Universal, Comcast was criticized for its refusal to do business with 100% African American–owned media. In response, Comcast entered into what it termed "voluntary diversity agreements," *i.e.*, memoranda of understanding ("MOUs"), with non-media civil rights groups, including the other Defendants herein: NAACP; National Urban League; Al Sharpton; and Al Sharpton's National Action Network.

6. Defendants NAACP, National Urban League, Al Sharpton and National Action Network entered into the MOUs in order to facilitate Comcast's racist practices and policies in contracting—or, more accurately, refusing to contract—with 100% African American–owned media companies. The MOUs are a sham, undertaken to whitewash Comcast's discriminatory business practices. Comcast uses the MOUs to

perpetuate discrimination against 100% African American–owned media in contracting for channel carriage and advertising.[1]

7. In fact, to date, the only 100% African American–owned channel Comcast has agreed to broadcast is the Africa Channel, with only limited distribution and channel carriage fees. But the Africa Channel is owned by Paula Madison, the former Executive Vice President and Chief Diversity Officer of Comcast/NBC-Universal, who was directly involved in putting together the sham [1] MOUs and obtaining government approval for the Comcast acquisition of NBC Universal, thus creating a serious conflict of interest. In other words, aside from a channel that is owned and operated by the former Comcast/NBC-Universal executive who authored the MOUs, Comcast has not launched a single 100% African American–owned channel—by way of the MOUs or otherwise.

8. To obtain support for the NBC-Universal acquisition and for its continued racist policies and practices, Comcast made large cash "donations" to the non-media groups that signed the MOUs. For example, Comcast has paid Reverend Al Sharpton and Sharpton's National Action Network over $3.8 million in "donations" and as salary for the on-screen television hosting position on MSNBC that Comcast awarded Sharpton in exchange for his signature on the MOUs, another blatant example of conflict of interest. But Sharpton and his organization, like all of the other

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[1] A carriage agreement is a contract between a multichannel video programming distributor, such as Comcast and Time Warner Cable, and a video programming vendor, like Entertainment Studios, granting the distributor the right to "carry," that is, distribute, the programmer's content.

groups that entered into the sham MOUs with Comcast, are not television channel owners and do not operate in the television channel business. They do not produce original television programming, or operate television channels, unlike Entertainment Studios, which does both.

9. Ironically, as widely reported in major news outlets such as *The New York Times*, Comcast spent millions of dollars to pay non-media civil rights groups to support its acquisition of NBC-Universal, while at the same time refusing to do business with 100% African-American owned media companies. These payments were a ruse made with an ulterior motive: To make Comcast look like a good corporate citizen while it steadfastly refused to contract with 100% African American–owned channels.

10. With the MOUs in hand, Comcast proceeded to segregate white-owned media businesses and 100% African American–owned media businesses, by creating two separate paths for contracting for channel carriage: one for white-owned channels (the "White Process"); and a separate, but not equal, process for 100% African American–owned channels (the "MOU/Minority Process").

11. The MOU/Minority Process and the White Process are distinctly unequal. Comcast limits the number of carriage agreements it will enter into through the MOU/Minority Process and offers inferior contracting terms. By relegating 100% African American–owned media to the MOU/Minority Process, Comcast thereby affords them inferior or no contracting opportunities.

12. Comcast refuses to treat 100% African American–owned media companies, including Entertainment Studios, the same as similarly-situated white-owned media companies. Comcast has admitted that it is "impressed" by Entertainment Studios' programming and channels, but has relegated Entertainment Studios to the MOU/Minority Process, excluding Entertainment Studios from obtaining carriage like its white counterparts.

13. Comcast has, in essence, created a "Jim Crow" process with respect to licensing channels from 100% African American–owned media. Comcast has reserved a few spaces for 100% African American–owned media in the "back of the bus" while the rest of the bus is occupied by white-owned media companies. This is the epitome of racial discrimination in contracting.

14. 100% African American–owned channels are being denied the same opportunity to contract with Comcast as white-owned channels. Comcast is intentionally treating 100% African American–owned media differently on account of race.

15. Comcast's racial animus is also demonstrated by its own statements: On one of the many occasions when Entertainment Studios attempted to contract with Comcast, a Comcast executive told Entertainment Studios: "We're not trying to create any more Bob Johnsons," *i.e.*, no more pay days for Black media entrepreneurs.

16. Bob Johnson is an African American and the founder of Black Entertainment Television ("BET"), a television network targeting African American audiences. In 2001, Mr. Johnson sold BET to Viacom for $3 billion.

17. Comcast refused to negotiate with Entertainment Studios because Comcast did not want to create any more successful Black media entrepreneurs, like Bob Johnson. Entertainment Studios has been rejected in its attempts to contract with Comcast because its founder and owner, Byron Allen, is African American.

18. Comcast has discriminated, and is discriminating, against Entertainment Studios on account of race, in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981. Defendants NAACP, National Urban League, Al Sharpton and National Action Network conspired with Comcast to violate Entertainment Studios' civil rights by entering into sham "diversity" agreements that enable Comcast to perpetuate its racist policies and practices. White-owned channels are not relegated to the MOU/Minority Process and are not denied carriage on account of Comcast claiming that it has met its "diversity obligations" under the MOU/Minority Process. The sham MOUs have perpetuated the Comcast agenda whereby 100% African American-owned media companies receive less than $3 million of the $15 billion Comcast spends annually on channel carriage and advertising.

19. Comcast has engaged in, and is engaging in, pernicious, intentional racial discrimination in contracting, which is illegal under Section 1981. Section 1981 is broad, covering "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

20. The "diversity" commitments Comcast made through the MOUs are fraudulent. The MOUs were purportedly intended to result in the launch of

so-called "minority" networks. In reality, the networks Comcast has launched pursuant to the MOUs are owned, controlled, and backed by white-owned media and money. And Comcast still refuses to launch any 100% African American–owned media channels, other than one that is owned and operated by the former Comcast/NBC-Universal executive who oversaw the execution of the MOUs.

21. White-owned media in general—and Comcast in particular—has worked hand-in-hand with governmental regulators to perpetuate the exclusion of 100% African American–owned media from contracting for channel carriage and advertising. This has been done through, among other things, the use of "token fronts" and "window dressing"—African American celebrities posing as "fronts" or "owners" of so-called "Black cable channels" that are actually majority owned and controlled by white-owned businesses.

22. For example, one of the "Black channels" is actually owned by Highbridge Capital, which is run by a former Comcast executive, Payne Brown. Highbridge Capital is also a subsidiary of JP Morgan, whose Board of Directors includes Comcast's President and COO, Steve Burke. The other "Black channel" is actually owned by Intermedia Partners, which is owned/controlled by Leo Hindery, a long-time friend of Comcast's CEO, Brian Roberts.

23. Similarly, as one of its MOU "commitments" to the Hispanic community, Comcast launched "Baby Americas," a non–Hispanic owned channel. Bill Burke—brother of Comcast's President and COO, Steve Burke—is on the Board of Directors of Baby Americas, which is further evidence of Comcast's blatant conflict of interest and an example of how Comcast uses the MOUs to conduct racial discrimination

in contracting, while also benefitting insiders and family members.

24. Comcast is now proposing to acquire Time Warner Cable for $45 billion. If this deal is approved by government regulators, it would combine the country's two biggest cable TV operators. The combined Comcast / Time Warner Cable entity would control approximately a third of the U.S. pay-television market (*i.e.*, 30 million subscribers out of 100+ million), including 16 of the top 20 advertising markets in the country, such as New York, Los Angeles and Chicago.

25. The proposed acquisition is part of a growing national trend of media consolidation that will further concentrate racial discrimination in contracting and eliminate diverse voices, contrary to the public interest and in violation of the First Amendment to the U.S. Constitution.

26. Comcast is a major player in Washington, D.C. and has used its clout and money to buy approval for its acquisitions and sweep its racist practices under the rug. Comcast's chief lobbyist and executive vice president, David Cohen, is a powerful political fundraiser and the mastermind behind Comcast's many conflicts of interest recounted herein. Mr. Cohen has attended state dinners at the White House honoring foreign dignitaries and has had President Obama as a guest in his home on so many occasions that the President recently joked, "I have been here so much, the only thing I haven't done in this house is have Seder dinner." Mr. Cohen's boss, Comcast's Chairman, Brian Roberts, plays golf with the President regularly and Comcast has raised millions of dollars for the elections of President Obama.

27. Comcast is devious in its manipulations: It influenced and secured favorable votes from government regulators—including Federal Communications Commission ("FCC") commissioner Defendant Meredith Attwell Baker—for approval of the Comcast/NBC-Universal transaction; and then hired Baker as a highly paid executive almost immediately after the deal was approved as a result of her vote. This is the very definition of conflict of interest and a blatant betrayal of the public trust by a highly placed governmental regulator.

28. 100% African American–owned media has been shut out by Comcast. Of the approximately $11 billion in channel carriage fees that Comcast pays to license television channels each year, less than $3 million is paid to 100% African American–owned media. Nor does 100% African American–owned media see much, if any, of the additional, approximate $4 billion Comcast spends each year on advertising.

29. Outside of the Africa Channel deal, Time Warner Cable does not distribute any channels that are owned and operated by 100 % African American–owned media. And in the face of the pending merger between Comcast and Time Warner Cable, Time Warner Cable has delegated channel carriage decision-making to Comcast—"gun jumping" the consummation of the Comcast / Time Warner Cable merger in violation of federal antitrust laws. Time Warner Cable has thus adopted and agreed with Comcast's racist policies and practices in connection with contracting for channel carriage, including the dual paths for carriage (*i.e.* the White Process vs. the MOU/Minority process).

30. African Americans comprise 13% of the U.S. population and represent more than $1 trillion in consumer spending power, yet 100% African American–owned media companies cannot get Comcast or Time Warner Cable to distribute their channels on their television systems. While Comcast and Time Warner Cable, two of the world's largest media companies, extract billions from African American consumers, they refuse to contract with, and present their television subscribers with, channels from 100% African American–owned media companies—including Entertainment Studios. Instead, Comcast and Time Warner Cable exclude 100% African American–owned media companies from contracts for channel carriage and advertising.

28. This lawsuit is brought pursuant to § 1981 of the Civil Rights Act, which provides that all persons in the United States shall have the same right to make and enforce contracts as is enjoyed by white persons. Section 1981 prohibits racial discrimination in contracting and applies to both non-governmental and governmental discrimination.

29. Racial discrimination in contracting is an ongoing practice in the media industry. NAAAOM seeks to eliminate this discrimination, and to obtain equality in contracting for 100% African American–owned media.

30. As alleged herein, Entertainment Studios—a member of NAAAOM—is being discriminated against on account of race in violation of 42 U.S.C. § 1981. Entertainment Studios thus has standing to seek redress for such violations in its own right. The interests at stake in this litigation—namely, the right of 100% African American–owned media to make and enforce contracts in the same manner as their white-

owned counterparts—are germane to NAAAOM's purpose. Because NAAAOM seeks only injunctive relief, the individual participation of its members is not required.

31. Defendants' ongoing refusal to contract with Entertainment Studios constitutes unlawful racial discrimination in violation of § 1981, for which Entertainment Studios seeks to recover monetary damages resulting from Defendants' racial discrimination. Plaintiffs NAAAOM and Entertainment Studios also seek injunctive relief prohibiting Defendants from discriminating against African American–owned media companies on the basis of race in contracting for channel carriage and advertising.

PARTIES, JURISDICTION AND VENUE

A. Plaintiffs

32. Historically, because of the lack of distribution/advertising support and economic exclusion, 100% African American–owned media has been forced either to (i) give away significant equity in their enterprises, (ii) pay exorbitant sums for carriage, effectively bankrupting the business, or (iii) go out of business, all pushing 100% African American–owned media to the edge of extinction.

33. Plaintiff NAAAOM is a California limited liability company, with its principal place of business in Los Angeles, California.

34. NAAAOM was created and is working to obtain for 100% African American–owned media the same contracting opportunities as their white counterparts for distribution, channel carriage, channel positioning and advertising dollars. Its mission is to secure the economic inclusion of truly 100% African

American–owned media in contracting, the same as white-owned media.

35. Plaintiff Entertainment Studios Networks, Inc. is a California corporation, with its principal place of business in Los Angeles, California. Entertainment Studios is a 100% African American–owned television production and distribution company. It is the only 100% African American–owned video programming producer and multi-channel operator/owner in the United States.

36. Entertainment Studios was founded in 1993 by Byron Allen, an African American actor / comedian / media entrepreneur. Allen first made his mark in the television world in 1979, when he was the youngest comedian ever to appear on "The Tonight Show Starring Johnny Carson." He thereafter served as the co-host of NBC's "Real People," one of the first reality shows on television. Alongside his career "on-screen," Allen developed a keen understanding of the "behind the scenes" television business, and over the past 22+ years he has built Entertainment Studios into a successful, independent media company.

37. Entertainment Studios has carriage contracts with more than 40 television distributors nationwide, including major distributors such as Verizon, Century Link, and RCN. These television distributors broadcast Entertainment Studios' networks to their combined 7.5 million subscribers.

38. Entertainment Studios owns and operates seven, high definition television networks (channels), six of which were launched to the public in 2009 and one in 2012. Entertainment Studios produces, owns, and distributes over 32 television series on broadcast

television, with thousands of hours of video programming in its library. Entertainment Studios' shows have been nominated for, and won, the Emmy award. A copy of an Entertainment Studios promotional presentation highlighting key aspects of the company and the programming it produces is attached hereto as **Exhibit A**.

39. In December 2012, Entertainment Studios launched "Justice Central," a 24-hour, high definition court/informational channel featuring several Emmynominated and Emmy-award winning legal/court shows. After just two years, Justice Central has already proved itself a successful, high-demand channel. Justice Central has boasted tremendous ratings growth across key television viewing periods and demographics.

B. Defendants

40. Comcast Corporation is a Pennsylvania corporation, with its principal place of business in Philadelphia, Pennsylvania. Comcast also has an office, is registered to do business and operates in Los Angeles, California.

41. Time Warner Cable, Inc. is a Delaware corporation, with its principal place of business in New York, New York. Time Warner Cable also has an office, is registered to do business and operates in Los Angeles, California.

42. National Association for the Advancement of Colored People ("NAACP") is a New York not-for-profit corporation, with national headquarters in Baltimore, Maryland. NAACP also has a regional branch that has an office and operates in Los Angeles, California.

43. National Urban League, Inc. is a New York not-for-profit corporation, with its principal place of business in New York, New York. National Urban League also has a regional affiliate that has an office, is registered to do business and operates in Los Angeles, California.

44. Reverend Al Sharpton is an individual residing in New York, New York. Sharpton is the founder and President of Defendant National Action Network, Inc.

45. National Action Network, Inc. is a New York not-for-profit corporation, with its principal place of business in Harlem, New York. National Action Network also has a regional chapter that has an office, is registered to do business and operates in Los Angeles, California.

46. Meredith Attwell Baker is a former FCC Commissioner and is an individual residing in Washington, D.C.

47. Plaintiffs are informed and believe, and on that basis allege, that Defendants DOES 1 through 10, inclusive, are individually and/or jointly liable to Plaintiffs for the wrongs alleged herein. The true names and capacities, whether individual, corporate, associate or otherwise, of Defendants DOES 1 through 10, inclusive, are unknown to Plaintiffs at this time. Accordingly, Plaintiffs sue Defendants DOES 1 through 10, inclusive, by fictitious names and will amend this Complaint to allege their true names and capacities after they are ascertained.

C. Jurisdiction & Venue

48. This case is brought under a federal statute, Section 1981 of the Civil Rights Act; as such, there is federal question jurisdiction under 28 U.S.C. § 1331.

Venue of this action is proper in Los Angeles because Defendants reside in this district, as defined in 28 U.S.C. § 1391; and the acts in dispute were committed in this district.

FACTS

A. Racial Discrimination In Contracting

49. Comcast is a global media giant. It owns NBC Television, Universal Pictures, Universal Studios, multiple (approximately 30) pay television channels (*e.g.*, USA Network, Bravo Network, E! Network, etc.), and it is the largest cable company and internet service provider to consumers in the United States. Comcast provides subscription television services to approximately 22 million subscribers more than any other cable television distributor in the United States.

50. Comcast collects billions of dollars from its television subscribers annually. A substantial portion comes from African American consumers.

51. Racial discrimination in contracting is an ongoing practice in the media industry with far-reaching adverse consequences. It effectively excludes 100% African American–owned media companies and African American individuals, and their diverse viewpoints, from the public airwaves, which is distinctly not in the public interest.

52. 100% African American–owned media has been shut out from doing business with Comcast despite significant efforts to do so. Like many other 100% African American–owned channels that have tried to secure cable carriage during Comcast's 50+ year history, Entertainment Studios has had multiple meetings for channel carriage with Comcast but, like all of the others, to no avail.

53. In the more than six years Entertainment Studios has been reaching out to Comcast for carriage, Comcast has given Entertainment Studios the false impression that its channels are on Comcast's "short list," and provides a variety of different excuses for its refusal to carry any of Entertainment Studios' channels. Comcast has been playing a game of "whack-a-mole" with Entertainment Studios each time Entertainment Studios jumps a pretextual hurdle created by Comcast (*e.g.*, Comcast executive, Jennifer Gaiski, required Entertainment Studios to present empirical data and secure support "in the field" so that she could present such material to Comcast senior management, Greg Rigdon and Neil Smit), Comcast replaces it with a new obstacle. Although Entertainment Studios has complied with each of Comcast's demands, Comcast still refuses to launch any 100% African American–owned channels, including Entertainment Studios' channels.

54. For example, despite the demonstrated success of Entertainment Studios' Justice Central on their competitors' television platforms, both Comcast and Time Warner Cable (at the order of Comcast) refuse to license Justice Central for carriage on their television platforms. Justice Central's double- to triple-digit ratings growth outperformed the vast majority of networks that Comcast and Time Warner Cable pay substantial license fees to carry. Indeed, between the first quarter of 2013 and the fourth quarter of 2014, Justice Central boasted huge ratings growth on AT&T's television platform, as follows:

Justice Central – AT&T U-Verse Ratings Growth

Daypart:	Air Time:	% Growth 1st Qtr. 2013 to 4th Qtr. 2014:
Early Fringe	4-7pm	+38%
Prime Access	7-8pm	+21%
Prime	8-11pm	+53%
Late Fringe	11pm-2am	+552%
Overnight	2-6am	+295%

55. Of the approximately $10 billion in content fees that Comcast pays to license channels and advertise each year, less than $3 million is paid to 100% African American–owned media. Even the token payments Comcast makes to 100% African American–owned media companies are a charade. Comcast pays minimal amounts to license and distribute the Africa Channel, which is owned and operated by a former Comcast/NBC-Universal executive/insider and one of the architects of the MOUs Comcast uses to perpetuate its racial discrimination in contracting.

56. Time Warner Cable likewise discriminates against 100 % African American–owned media. Following the announcement of the Comcast / Time Warner Cable merger, in May 2014, a Time Warner Cable board member told Entertainment Studios that any channels to be launched on Time Warner Cable's television platforms needed to be expressly approved by Comcast's David Cohen—such conduct constitutes "gun jumping" in violation of federal antitrust law. In other words, Time Warner Cable has delegated channel carriage decision-making authority to Comcast and has adopted and agreed with Comcast's racist policies and practices in contracting for carriage, including the dual paths to carriage (*i.e.*, the White Process and the MOU / Minority Process).

57. Comcast programming executive, Jennifer Gaiski, asked Entertainment Studios who it was in discussions with at Time Warner Cable about launching its channels. Soon after Entertainment Studios disclosed that it had advanced negotiations with Time Warner Cable executive, Melinda Witmer (who was presenting Entertainment Studios' information to Time Warner Cable President and COO, Robert Marcus), Entertainment Studios' channel launch opportunity was shut down by Time Warner Cable under orders from Comcast. Based on Comcast's instructions, Entertainment Studios has not heard anything further from Time Warner Cable.

58. By virtue of this exclusion by both Comcast and Time Warner Cable, 100% African American ownership in mainstream media is nearly extinct; and this exclusion is self-perpetuating.

B. <u>The MOUs Are Fraudulent Shams</u>

59. In collusion with the FCC and non-media civil rights advocacy groups, Comcast has manipulated ways to perpetuate its exclusion of 100% African American–owned channels.

60. In 2010, Comcast announced plans to merge with NBC-Universal. Opponents of the merger voiced concerns about the lack of diversity in Comcast's channel offering; Comcast did not distribute any channels owned by 100% African American–owned media companies.

61. As with the pending Comcast / Time Warner Cable merger, the Comcast/NBC-Universal merger was subject to regulatory approval by the FCC and the Department of Justice. Comcast's racist practices and policies jeopardized the approval of the NBC-Universal acquisition.

62. As has been well documented in the media, in order to gain approval of its acquisition of NBC-Universal, Comcast "stacked the deck." It colluded with government regulators and conspired with and paid off non-media civil rights groups in order to secure their compensated support and silence its critics.

63. Just 90 days after the FCC approved the Comcast/NBC-Universal transaction, Meredith Attwell Baker, one of only three FCC commissioners who had voted in favor of the merger, was hired as a Senior Vice President at Comcast. Comcast rewarded this helpful government regulator with an executive position and a substantially higher salary after she used her power at the FCC to Comcast's benefit. This executive position and compensation package clearly would not have been granted by Comcast had Ms. Baker voted against the merger. This is another blatant and horrific conflict of interest and betrayal of the public trust.

64. Comcast has given millions in monetary "contributions" to various minority special interest groups in order to "buy" support for its expansion. Comcast "donated" funds to at least 54 different groups that went on publicly to endorse the Comcast/NBC-Universal deal by sending Comcast-authored letters to the FCC or by entering into fraudulent, sham MOUs with Comcast.

65. The MOUs were given the appearance of legitimacy because they were approved by minority interest groups—NAACP, National Urban League, and Al Sharpton's National Action Network, none of which own or operate any television channels, and all of which accepted large donations/pay-offs for their signatures. This is another blatant and horrific conflict of interest and betrayal of the public's trust.

66. Each of the signatories to the MOU between Comcast and the "African American Leadership Organizations" were paid by Comcast in the time leading up to the Comcast/NBC-Universal deal. Comcast paid $30,000 to the NAACP, $835,000 to the National Urban League, and $140,000 to Al Sharpton's National Action Network. Comcast also paid hundreds of thousands of dollars to the National Urban League's various regional affiliates. This is yet another blatant conflict of interest and betrayal of the public trust.

67. In addition to its payments to Al Sharpton's National Action Network, Comcast gave Al Sharpton a prime-time television series with Sharpton as host on Comcast's MSNBC, for which Sharpton has been paid approximately $750,000 per year according to public records. Despite the notoriously low ratings that Sharpton's show generates, Comcast has allowed Sharpton to maintain his hosting position for more than three years in exchange for Sharpton's continued public support for Comcast on issues of diversity.

68. Sharpton has a business model and track record of obtaining payments from corporate entities in exchange for his support. Sharpton is a vocal member of the African-American community whose public support can be secured for a price. The National Legal & Policy Center has stated that Sharpton "specializes in shakedowns" of corporations—either they "contribute" thousands of dollars to Sharpton's National Action Network or risk losing Sharpton's support and influence in the African-American community. Sharpton has even gone so far as to organize boycotts and protests against companies unless and until those companies make monetary contributions to his National Action Network; but once the money comes in, the protests cease.

69. Comcast paid Sharpton so that he would publicly endorse the NBC-Universal deal and divert attention away from Comcast's racial discrimination in contracting. In exchange, Sharpton's National Action Network and other non-media minority interest groups supported Comcast before the FCC with very little understanding about the merger they were supporting or expertise in the media business.

70. In exchange for these payouts and other favors, Defendants NAACP, National Urban League, Al Sharpton and his National Action Network agreed to enter into sham "diversity agreements"—MOUs—for the purpose of facilitating Comcast's racial discrimination in contracting. Defendants NAACP, National Urban League, and Al Sharpton's National Action Network signed onto the MOUs with Comcast knowing—and agreeing—that Comcast would use the MOUs to perpetuate civil rights violations against 100% African American–owned media companies, including Entertainment Studios.

71. Pursuant to the fraudulent MOUs, Comcast purportedly agreed to enhance its programming diversity by increasing the number of minority-owned networks it distributes. In reality, the MOUs are a smokescreen for Comcast's racially discriminatory business practices including, specifically, its refusal to contract for channel carriage or advertising with 100% African American–owned media.

72. NAACP, National Urban League, Sharpton, and National Action Network knew (and agreed) that Comcast would use the MOUs as a vehicle to perpetuate its racial discrimination in contracting. In particular, Defendants entered into the MOUs knowing that by doing so, Entertainment Studios, and other

100% 100% African American–owned media companies, would be shut out from contracting with Comcast for carriage.

73. In light of the widespread concerns about Comcast's failure to do business with African American–owned media companies, Comcast had a problem. The sham MOUs solved it: Through the MOUs, Comcast purportedly agreed to enter into carriage agreements with minority-owned media companies, but the channels that were ultimately launched were fronts and were not truly 100% African American owned.

74. Without the MOUs, Comcast would have had to actually do business with 100% African American–owned media companies in order to persuade the government to approve its merger with NBC-Universal. And without wielding the MOUs, Comcast would have had no other way to legitimize its racist practices, and would instead have to contract in good faith with 100% African American–owned media companies, such as Entertainment Studios.

75. Entertainment Studios' programming has proved popular among viewers, and even has garnered Emmy nominations and wins. Entertainment Studios sells its channels to dozens of other programming distributors and television stations, which distribute Entertainment Studios' channels to more than 7.5 million subscribers. Comcast has even acknowledged that Entertainment Studios' channels are good enough for carriage on its television platforms.

76. Pursuant to the MOUs, Comcast has launched two supposedly African American–owned channels. But, by design, these channels are not 100%, or even majority-owned/controlled, by African Americans.

77. The African American–owned channels that Comcast has launched are backed and controlled by white-owned businesses. Comcast has given African American celebrities token ownership interests in those channels to serve as figureheads in order to cover up its racial discrimination in contracting.

78. Entertainment Studios did not know that Comcast was using the MOUs as a vehicle to perpetuate racial discrimination in contracting until recently. In November 2014, Entertainment Studios first discovered that Comcast had set up dual paths for negotiating for carriage (one for white-owned media and one for African American–owned media) when it was told by Comcast that it would be relegated to the MOU/Minority Process.

79. In November 2014, a Comcast executive told Entertainment Studios that although its channels were good enough for carriage on Comcast's platform, Entertainment Studios would have to wait to be part of the "next round of [MOU] considerations," *i.e.*, the MOU/Minority Process. In other words, Comcast told Entertainment Studios that it would consider contracting to carry Entertainment Studios' channels only to the extent that the carriage agreement would satisfy Comcast's obligation to launch minority-owned networks pursuant to the MOUs. But the MOU/Minority Process has never resulted in the launch of 100% African American–owned channels.

80. Entertainment Studios is restricted to applying for carriage with Comcast via the MOU/Minority Process not because of the nature of its channels which are broad market with global appeal, and do not target African American viewers—but because it is 100% African American–owned. But for the existence of the MOUs, it is reasonably probable that Comcast

would have contracted with Entertainment Studios for carriage.

81. For racial reasons alone, Entertainment Studios is forced to participate in a discriminatory process. This is racial discrimination in contracting, which constitutes a violation of 42 U.S.C. § 1981.

82. The MOUs enable Comcast to tout a non-existent "commitment" to racial diversity, without granting 100% African American–owned media access to Comcast's national television platform. All the MOUs have done is allow Comcast to legitimize its racist policies and practices so it can continue to refuse to do business with 100% African American–owned media.

83. According to Comcast, Entertainment Studios must go through the MOU/Minority Process for obtaining channel carriage. This prevents 100% African American–owned media businesses, like Entertainment Studios, from being treated fairly and equally to their white-owned/controlled counterparts.

84. The MOUs thus enhance Comcast's discriminatory practices against 100% African American–owned channels. Comcast has used the MOUs to create a segregated and unequal path for 100% African American–owned channels to contract.

85. By contrast, white-owned media companies are able to contract with Comcast for carriage at any time via the White Process. Comcast refuses to contract with 100% African American–owned media companies—such as Entertainment Studios—through the White Process. The MOU/Minority Process constitutes intentional discrimination on its face.

86. In addition to these racial restrictions, Entertainment Studios faces further inequities in the

terms and conditions Comcast offers to the channels it chooses through the MOU/Minority Process. Comcast has historically offered shorter-term deals and little, if any, in licensing fees to the channels it launches through the MOU/Minority Process. These less favorable contracting terms make it difficult—if not impossible—for the channels launched through the MOU/Minority Process to succeed.

87. By its words and actions, Comcast has made clear that it does not want to, and will not, contract with Entertainment Studios—the only 100% African American owned program provider/multi-channel owner in the country—unless government regulators force Comcast to do so.

88. Comcast has used other phony excuses to justify its racial discrimination. For example, it claims that it does not have the bandwidth to accommodate Entertainment Studios' channels or that it is not a buyer of new channels. But it has entered into carriage agreements with other, similarly situated white-owned channels.

89. Comcast further claims that there is no demand for Entertainment Studios' channels, but that is belied by the facts: Entertainment Studios' channels are distributed by other national television providers who are competitors of Comcast; and Entertainment Studios' Justice Central network has shown tremendous ratings growth.

90. Comcast also claims that it is interested in adding carriage only for news and sports channels. This is yet another phony excuse. Comcast has added other, non-news, non-sports channels while simultaneously refusing to contract with Entertainment Studios.

91. Comcast's refusal to contract with 100% African American–owned media, its implementation of dual paths for carriage (*i.e.*, one path for white-owned media and a separate "MOU/Minority Process" for African-American owned media), and its pretextual excuses evidence racist policies and practices in violation of Section 1981.

C. Comcast's Racial Animus

92. A major television channel distributor, like Comcast, has unique power to limit the viewpoints available in the public media. Comcast limits the diversity of television programming available to its subscribers by refusing to contract with 100% African American–owned media.

93. Comcast rejects 100% African American–owned channel vendors in favor of white-owned channel vendors. As set forth above, Comcast blocks entry into its television platform for 100% African American–owned media.

94. Entertainment Studios has been trying for more than six years to contract with Comcast for carriage of one or more of Entertainment Studios' seven channels. Comcast has refused and strung Entertainment Studios along.

95. On one of the many occasions on which Entertainment Studios reached out to Comcast, a Comcast executive stated that Comcast was "not going to create any more Bob Johnsons." In other words, Comcast stated it did not want to see another 100% African American–owned media company and channel owner, like Mr. Johnson, succeed.

96. By this lawsuit, Plaintiffs seek the same treatment in contracting for Entertainment Studios as Comcast provides to white-owned channels; and

Entertainment Studios seeks damages as a result of racial discrimination in contracting.

D. The Comcast / Time Warner Cable Merger

97. In February 2014, Comcast announced plans to acquire Time Warner Cable for $45 billion. The deal was approved by the boards of both companies, but as with the Comcast/NBC-Universal transaction, it faces regulatory approval by the FCC and the Department of Justice.

98. Time Warner Cable currently provides cable television service to approximately 12 million subscribers. If the merger is approved by regulators, the combined Comcast and Time Warner Cable entity will serve approximately 30 million customers.

99. Post-merger, Comcast will control a huge percentage of the market for television channel distribution and broadband internet. It will have an even larger market share than AT&T will have if AT&T completes its pending acquisition of DirecTV.

100. This pay-TV merger, like the proposed AT&T acquisition of DirecTV, will result in more consolidation (and thus fewer options) in the industry. This affects not only subscribers, but also 100 % African American–owned channels.

101. In many cities where Comcast and Time Warner Cable have a share of the television distribution market, African Americans comprise a large part of the population. However, the availability of channels wholly owned by African Americans on Comcast's and Time Warner Cable's systems does not remotely reflect either company's subscriber base or viewership makeup.

102. Although Comcast's and Time Warner Cable's African American subscribers pay billions of dollars in yearly subscriber fees, Comcast and Time Warner Cable spend a combined $25 billion per year licensing channels and advertising their services, with less than $3 million being paid to 100% African American–owned media for either channel carriage or advertising.

103. Channel owners, like Entertainment Studios, are reliant upon the services of television channel distributors, like Comcast and Time Warner Cable, not only to realize television subscriber revenue, but also to reach television consumers themselves. By virtue of its control over the television distribution platform, Comcast effectively has control over the programming available to television viewers. If Comcast gets even bigger by acquiring Time Warner Cable, it will effectively control the channels and programs available to one-third of television viewers in the United States. Thus, if Comcast and Time Warner Cable continue to refuse to contract with 100% African American–owned media, they can prevent 100% African American–owned channels from reaching their 30 million subscribers.

104. Presently, Comcast spends upwards of approximately $11 billion in channel carriage fees each year. Time Warner Cable spends approximately $9 billion in channel carriage fees each year. If Comcast's bid is approved, of the almost $20 billion spent for channel carriage by the combination of Comcast and Time Warner Cable, less than $3 million per year will be used to license (and broadcast to Comcast and Time Warner Cable's 30 million subscribers) channels from 100% African American–owned media. Meanwhile, Comcast and Time Warner Cable will continue

to collect billions of dollars from television subscribers annually, a substantial portion coming from African Americans.

105. Comcast's 30% market share post-merger will include 16 of the top 20 advertising markets, including Los Angeles, New York and Chicago. Yet of the approximately $4 billion a year spent on television advertising by Comcast and Time Warner Cable, less than $3 million per year will be paid to 100% African American–owned media.

106. There is a statistic that highlights the inequity here: Comcast's Chairman, Brian L. Roberts, was paid $31 million in compensation in 2013 alone ten times more than all of Comcast paid to 100% African American–owned media for channel carriage and advertising combined during the same period. Additionally, the CEO of Time Warner Cable during the same period (2013) was paid approximately $118 million, or more than 39 times the amount all of Time Warner Cable paid to 100% African American–owned media for channel carriage and advertising.

107. Entertainment Studios is being discriminated against on account of race in connection with contracting in violation of the Civil Rights Act. Without access to viewers and without licensing fees and advertising revenues from the largest video programming distributors in the country, this 100% African American–owned media business is being severely damaged.

FIRST CAUSE OF ACTION: VIOLATION OF CIVIL RIGHTS (42 U.S.C. § 1981)

NAAAOM and Entertainment Studios Against Comcast & Time Warner Cable

A. Section 1981

108. NAAAOM refers to and incorporates by reference each foregoing and subsequent paragraph of this Complaint as though fully set forth herein.

109. Section 1981 of the Civil Rights Act, known as the Civil Rights Act of 1866, provides for the equality of citizens of the U.S. and prohibits racial discrimination in, among other things, contracting.

110. African Americans are a protected class under Section 1981. Entertainment Studios is a 100% African American–owned media business.

111. As alleged herein, Entertainment Studios attempted many times over many years to contract with Comcast to carry its channels, but Comcast has refused, providing a series of fraudulent, pretextual excuses. Yet Comcast has continued to contract with—and make itself available to contract with—similarly situated white-owned television channels.

112. Comcast has refused to contract with Entertainment Studios for channel carriage and advertising. Entertainment Studios has been deprived of the right to contract with Comcast by being relegated to the MOU/Minority Process, while white-owned businesses have been afforded the right to contract with Comcast through the more accessible White Process.

113. Comcast has dealt with Entertainment Studios in a markedly hostile manner and in a manner which a reasonable person would find discriminatory.

114. Time Warner Cable has likewise refused to contract with Entertainment Studios for channel carriage and advertising. In light of the pending merger between Comcast and Time Warner Cable, Time Warner Cable has delegated channel carriage decision-making authority to Comcast. Accordingly, Time Warner Cable engages in the same discriminatory conduct constituting a violation of 42 U.S.C. § 1981 as does Comcast. Time Warner Cable has adopted and agreed with Comcast's racist policies and practices in connection with contracting for channel carriage, including the dual paths for carriage (*i.e.* the White Process vs. the MOU/Minority process). After Comcast demanded to know who Entertainment Studios was talking to at Time Warner Cable to get channel carriage, Time Warner suddenly closed the door (at the instruction of Comcast) on negotiations and shut out Entertainment Studios.

B. Damages

115. But for Comcast's refusal to contract with Entertainment Studios, Entertainment Studios would receive approximately $378 million in annual license fees for its seven channels—calculated using a conservative license fee of fifteen cents per subscriber per month for each channel for Comcast / Time Warner Cable's 30 million subscribers. If Defendants contracted in good faith, Entertainment Studios would also receive an estimated $200 million per year, per channel, in national advertising sales revenue, or a total of $1.4 billion per year, equaling a combined total of $1.8 billion in annual revenue.

116. Combining subscriber fees and advertising revenue, Entertainment Studios would generate approximately $1.8 billion in annual revenue from its carriage and advertising contracts with Comcast /

Time Warner Cable. Moreover, with distribution on the largest television platform in the nation, the demand for Entertainment Studios' channels both domestically and internationally would increase, leading to additional growth and revenue for Entertainment Studios' channels.

117. Based on the revenue Entertainment Studios would generate if Defendants contracted with them in good faith, Entertainment Studios would be valued at approximately $20 billion.

118. Similarly-situated lifestyle and entertainment media companies are valued at higher amounts. But for Comcast's and Time Warner Cable's refusal to contract with Entertainment Studios, Entertainment Studios would have a similar valuation.

119. Accordingly, Comcast's unlawful discrimination has caused Entertainment Studios in excess of $20 billion in damages, according to proof at trial; plus punitive damages for intentional, oppressive and malicious racial discrimination.

SECOND CAUSE OF ACTION: CONSPIRACY TO VIOLATE 42 U.S.C. § 1981 (42 U.S.C. 1985(3))

By NAAAOM and Entertainment Studios Against Comcast, NAACP, National Urban League, Al Sharpton, National Action Network, and Meredith Attwell Baker

120. NAAAOM refers to and incorporates by reference each foregoing and subsequent paragraph of this Complaint as though fully set forth herein.

121. As set forth above, Comcast has violated 42 U.S.C. § 1981 by discriminating against Entertainment Studios on account of race in connection with

contracting. Comcast has refused to contract with Entertainment Studios for channel carriage and advertising. Entertainment Studios has been deprived of the right to contract with Comcast by being relegated to the MOU/Minority Process, while white-owned businesses have been afforded the right to contract with Comcast through the more accessible White Process.

122. As described above, Defendants NAACP, National Urban League, Al Sharpton, National Action Network and Meredith Attwell Baker acted as coconspirators by accepting cash payments, jobs and other favors from Comcast in exchange for their public support and approval of Comcast's racist policies and practices in contracting for channel carriage. In particular, Defendants intentionally agreed and conspired with each other to discriminate on the basis of race against 100% African American–owned media in connection with contracting, in violation of 42 U.S.C. § 1981. In furtherance of the conspiracy and to accomplish the goals of the conspiracy, Defendant Baker voted in favor of the Comcast / NBC-Universal merger and Defendants entered into sham MOUs, as set forth above. Defendants knew and agreed that Comcast intended to use the MOUs to discriminate against 100% African American–owned media companies in contracting for channel carriage by creating a separate path for carriage.

123. As set forth above, Defendants were motivated by racial animus.

124. As a direct and proximate result of the aforementioned conduct, Entertainment Studios has suffered damages in excess of $20 billion in damages, according to proof at trial; plus punitive damages for

intentional, oppressive and malicious racial discrimination.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment, as follows:

1. Plaintiff Entertainment Studios prays for compensatory, general and special damages in excess of $20 billion according to proof at trial;
2. Plaintiffs NAAAOM and Entertainment Studios pray for injunctive relief prohibiting Comcast from discriminating against 100% African American–owned media companies, including Entertainment Studios, based on race in connection with contracting for carriage and advertising;
3. Plaintiff Entertainment Studios prays for punitive damages, based on oppression and malice, according to Defendants' net worth;
4. Plaintiff Entertainment Studios prays for attorneys' fees, costs and interest; and
5. Plaintiffs NAAAOM and Entertainment Studios pray for such other and further relief as the court deems just and proper.

DATED: February 20, 2015

Respectfully Submitted,

MILLER BARONDESS, LLP

By: */s/ Louis R. Miller*
LOUIS R. MILLER
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