APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-55723

NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA, a California Limited Liability Company; ENTERTAINMENT STUDIOS NETWORK, INC., a California corporation,

Plaintiffs-Appellees,

v.

CHARTER COMMUNICATIONS, INC., a Delaware corporation,

Defendant-Appellant.

Argued and Submitted: Oct. 9, 2018
Filed: Feb. 4, 2019

Before: Mary M. Schroeder, Milan D. Smith, Jr., and Jacqueline H. Nguyen, Circuit Judges

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ORDER AND OPINION

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withdrawn.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.

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.

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

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]

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

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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 immediate 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.

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]

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

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[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 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.

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 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]

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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.").

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 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]

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[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. 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-

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)).

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

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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).

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 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,

[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).

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

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

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

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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.

[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

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).

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

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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.

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*.

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

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]

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*,

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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.

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 B

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 16-cv-00609

NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA, a California Limited Liability Company; ENTERTAINMENT STUDIOS NETWORK, INC., a California corporation,

Plaintiff,

v.

CHARTER COMMUNICATIONS, INC., a Delaware corporation,

Defendant.

Filed: Oct. 24, 2016

CIVIL MINUTES - GENERAL

PROCEEDINGS: DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT [48]

Court hears oral argument. The Tentative circulated and attached hereto, is adopted as the Court's Final Ruling. Defendants' Motion is GRANTED IN PART and DENIED IN PART. The Court will grant Defendant's motion with leave to amend, as to NAAAOM's standing. Otherwise, it will deny Defendant's motion.

* * *

I. BACKGROUND

On August 31, 2016, with leave of the Court, the National Association of African American-Owned Media ("NAAAOM") and Entertainment Studios Networks, Inc. ("ESN" and, together with NAAAOM, "Plaintiffs") filed a First Amended Complaint ("FAC") in this action which they first initiated against Charter Communications, Inc. ("Defendant" or "Charter") on January 27, 2016. *See* Docket No. 47. The FAC contains a single claim for relief, for violation of 42 U.S.C. § 1981 (generally, equal rights to make and enforce contracts).

Byron Allen, an African American actor, comedian and media entrepreneur, is the owner, founder and CEO of ESN. *See* FAC ¶ 8, 20. ESN is a 100% African-American owned television production and distribution company. *See id.* ¶¶ 18, 86. ESN has channel carriage contracts with more than 40 television distributors nationwide, including AT&T U-Verse, DirecTV, VerizonFIOS, Suddenlink, RCN and CenturyLink, broadcasting ESN's networks to nearly 80 million cumulative subscribers throughout the United States. *See id.* ¶¶ 21, 32. It has launched seven television networks/channels since 2009, and its shows have been nominated for, and have won, highly coveted and internationally recognized awards such as the Emmy Award. *See id.* ¶ 22.

NAAAOM is a limited liability company that works to obtain equal contracting opportunities for African American-owned media companies. *See id.* ¶¶ 14-15. ESN is a member of NAAAOM. *See id.* ¶ 17.

Defendant is currently the third-largest television distribution company in the country, with more than

17 million subscribers, and it refuses to carry African American-owned channels on its distribution platform. *See id.* ¶¶ 24, 30. Allan Singer was Defendant's Senior Vice President of Programming, the executive in charge of dealing with ESN and Allen. *See id.* ¶¶ 4, 7, 34. Tom Rutledge was Defendant's Chairman and CEO. *See id.* ¶ 8.

Plaintiffs allege that Defendant refuses to carry ESN's content because ESN is owned by an African American, thereby constituting a violation of 42 U.S.C. § 1981. To substantiate this claim (which Plaintiffs summarily assert is consistent with how Defendant has treated prominent African American media executives and entrepreneurs "[f]or years," *see id.* ¶¶ 62, 88), Plaintiffs allege that:

- Defendant pays no licensing fees to 100% African-American owned multichannel media companies. *See id.* ¶ 30.
- ESN offered Defendant a deal of seven networks for ten cents per subscriber, a deal that is "far below the millions of dollars Charter pays to white-owned programmers to license their networks." *Id.* ¶ 2. But Defendant has never dealt in good faith with, nor provided a competitive proposal, offer or counter-offer to, ESN. *See id.* ¶ 33.
- Singer refused, rescheduled and postponed meetings with ESN, preventing meaningful discussions about a carriage deal. *See id.* In 2011, Singer told ESN that it needed to "be a bit patient," insisting that ESN try again "next year." *Id.* ¶ 36. The next year, Singer again communicated that it was not the right time and that a "meeting in 2012 doesn't make sense," informing ESN that its

"bandwidth and operational demands [had] increased" and that it was not launching any new networks, but then announced in late 2012 the launch of two new networks and announced in 2013 that it had entered into a channel-carriage agreement with RFD-TV, a white-owned/controlled network focusing on rural and Western lifestyle issues. *See id.* ¶¶ 37-38, 40, 87. In 2013, Defendant told ESN that it would not launch ESN's networks "for the foreseeable future," and indicated that it would not even allow ESN to make another pitch. *See id.* ¶ 39. However, that same year, Singer told ESN that it would keep one of ESN's channels, JusticeCentral.TV, in consideration for "the next e basic launches"—i.e., the "expanded basic" or "second-highest penetrated tier in the industry." *Id.* ¶ 42. But ESN learned that this was a ruse, with Singer telling ESN "I was being facetious. We are never doing e basic launches…." *Id.* ¶ 43. He then told ESN that "Even if you get support from management in the field, I will not approve the launch of your networks." *Id.* ¶ 44.

- Singer also informed ESN that Charter did not believe in ESN's "tracking model" because ESN's content appears on both ESN's channels and on other broadcast stations and cable networks. *See id.* ¶ 41. But the same is true of the vast majority of cable networks Charter carries, including several white-owned media companies with carriage agreements with Charter. *See id.*
- When ESN attempted to get around what it perceived was Singer's discriminatory behavior and requested a meeting with Rutledge, Singer told ESN that Rutledge "does not meet with

programmers." *Id.* ¶ 45. But Rutledge actually regularly meets with CEOs of white-owned programmers, such as Phillipe Daumann, CEO of Viacom. *See id.* When ESN reached out to Rutledge in March 2013, he never responded, and has refused to take or return any of ESN's calls or to meet with Allen. *See id.* ¶ 46.

- When ESN contacted Singer again in June 2015, Singer pretended to be surprised that ESN was still interested in doing a deal and required that ESN "provide a presentation about [its] channels as the first step to considering carriage," despite the fact that ESN had already provided such information directly to Singer on multiple occasions over the previous four years. *See id.* ¶¶ 47-48. When ESN "called Singer out on his lies and excuses," Singer agreed to set a meeting with ESN in July 2015. *See id.* ¶ 50. But, when ESN's team traveled from Los Angeles to Defendant's headquarters in Connecticut, they learned that Singer had just agreed to the meeting so that he could say "on the record" that he had met with ESN and considered offering a carriage deal, while Singer made clear that he would never do business with ESN. *See id.* ¶ 51. Singer also told ESN that Rutledge wanted to wait to "see what AT&T does," though AT&T already carried one of ESN's networks, and since that time has launched ESN's entire portfolio of channels. *See id.* ¶ 52. He also told ESN that any deal would have to wait until after Defendant's merger with Time Warner Cable because there were "too many unknowns," such that ESN would have to "go back to the line." *Id.* ¶ 53. ESN believes that Defendant was attempting

to ensure that ESN would not publicly oppose the merger based on Defendant's refusal to do business with ESN. *See id.* ¶ 54. Defendant again also cited limited bandwidth as a reason there could be no deal, but in that same year Defendant expanded the reach of two white-owned, lesser-known channels, RFD-TV and CHILLER. *See id.* ¶¶ 55, 87. After that July 2015 meeting, Singer ceased returning ESN's calls and Rutledge continued to refuse to meet. *See id.* ¶ 56.

- Until the recent approval of its merger with Time Warner Cable, Defendant had an all-white male board of directors. *See id.* ¶ 10. While Plaintiff acknowledges that Defendant made diversity commitments in connection with pursuing approval of its merger, it alleges that these commitments are a sham that Defendant knows the Federal Communications Commission will not enforce. *See id.* ¶¶ 63-66, 73- 83.
- In mid-March 2016, Singer approached protestors outside Charter's headquarters and "made derogatory racist comments about African Americans." *See id.* ¶ 4. Among other things, he specifically told them to "get off welfare and that they were typical African Americans looking for 'handouts.'" *Id.* ¶¶ 5, 58. Two days after Plaintiffs showed Defendant their allegations about Singer's statements, Defendant announced that Singer was leaving the company. *See id.* ¶ 5.
- Rutledge attended the Cable Hall of Fame Dinner on May 16, 2016, and Allen was also in attendance. *See id.* ¶ 8. At the dinner, Allen tried to speak with Rutledge, but Rutledge refused, making a

dismissive hand gesture and calling Allen a "Boy," a term with racial connotations. *See id.* ¶¶ 8-9, 60.

- Plaintiffs also allege, on information and belief, that a message originating from within Charter was sent to Charter subscribers through their cable box in late July or early August (presumably of 2016). *See id.* ¶ 61. The message read "F*** Black Lives Matter! 1488 Brought to you by Phreak of Nature Baby J and King Benji! All N****** Must Die!" *Id.*

Defendant now moves to dismiss the FAC in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6) and, to the extent it fails in that regard, to dismiss NAAAOM for lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1). Thus, the ultimate question on this motion is whether Plaintiffs'—or one of the Plaintiffs'—action deserves to proceed beyond the pleadings.

II. ANALYSIS

A. Procedural Standard

Under Rule 12(b)(6), a court must (1) construe the complaint in the light most favorable to the plaintiff, and (2) accept all well-pleaded factual allegations as true, as well as all reasonable inferences to be drawn from them. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.), *amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001); *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998). The court need not accept as true "legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). In its consideration of the motion, the court is limited to the allegations on the face of the

complaint (including documents attached thereto), matters which are properly judicially noticeable[1] and "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001); *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994), *overruling on other grounds recognized in Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

Dismissal pursuant to Rule 12(b)(6) is proper only where there is either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561-63 (2007) (dismissal for failure to state a claim does not require the appearance, beyond a doubt, that the plaintiff can prove "no set of facts" in support of its claim that would entitle it to relief). A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 556). "'Specific facts are not necessary; the statement need only give

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[1] Both parties have submitted requests for judicial notice. *See* Docket No. 48-1, 52-1, 55. While there have been arguments over the meaning or weight that can be attributed to the materials that are the subject of those requests, there has been no objection to the requests. As such, the Court grants the requests (though, in truth, some of the materials in question are not proper matters of judicial notice, but are nevertheless able to be considered in connection with a Rule 12(b)(6) motion).

the defendant[s] fair notice of what…the claim is and the grounds upon which it rests.'" *Johnson*, 534 F.3d at 1122 (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)). However, a plaintiff must also "plead 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570); *see also William O. Gilley Enters., Inc. v. Atlantic Richfield Co.*, 588 F.3d 659, 667 (9th Cir. 2009) (confirming that *Twombly* pleading requirements "apply in all civil cases"). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "'[I]t may appear on the face of the pleadings that recovery is very remote and unlikely but that is not the test.'" *Johnson*, 534 F.3d at 1123 (quoting *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 515 (2002)).

A motion to dismiss for lack of standing may consist of a "facial" attack under Rule 12(b)(1), where a court accepts plausible factual allegations as true. *See Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa Cnty.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003); Schwarzer, Tashima, et al., *California Practice Guide: Federal Civil Procedure Before Trial* (2016) ("*Schwarzer & Tashima*") §§ 9:76.2, 9:84-84.2, at 9-23, 9-29-30.

B. Pleading a Claim Under Section 1981

Section 1981 of Title 42 of the United States Code provides, in part, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts…and to the full and equal benefit of all laws

and proceedings for the security of persons and property as is enjoyed by white citizens…." 42 U.S.C. § 1981(a); *see also id.* § 1981(b) ("For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."); *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 977 (9th Cir. 2004) ("Had Cholla a viable claim, Cholla would have standing to sue for racial discrimination, even though it is a corporation, if it 'either suffers discrimination harm cognizable under § 1981, or has acquired an imputed racial identity.'") (quoting *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1060 (9th Cir. 2004)).

"In order to withstand a motion to dismiss for failure to state a claim, a § 1981 cause of action need only allege 'that plaintiff suffered discrimination…on the basis of race.'" *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1487 (9th Cir. 1995) (quoting *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 625 (9th Cir. 1988)).[2] Under Section 1981, "[p]roof of intent to discriminate is necessary to

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[2] For instance, in *Parks School of Business*, the Ninth Circuit found sufficient to state a Section 1981 claim allegations that the defendants "took the disputed actions 'based on the fact that plaintiff is a proprietary postsecondary institution catering to minority and inner-city students, which students traditionally have a higher default rate than nonminority students'" and that one of the defendants "acted 'because [plaintiff] primarily teaches minority and inner-city students.'" *Parks Sch. of Bus.*, 51 F.3d at 1487. Curiously, the parties' briefs on this motion do not so much as mention that Ninth Circuit decision.

establish a violation," meaning that a plaintiff "must at least allege facts that would support an inference that defendants intentionally and purposefully discriminated against them." *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1313 (9th Cir. 1992), *abrogated in other respects as recognized by Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1055 (9th Cir. 2008); *see also Evans v. McKay*, 869 F.2d 1341, 1344 (9th Cir. 1989) ("What is required in a section 1981 action…is that the plaintiffs must show intentional discrimination on account of race."). Causation is of course also a necessary element of a Section 1981 claim. *See Coral Constr. Co. v. King Cnty.*, 941 F.2d 910, 926-27 (9th Cir. 1991).

Here, Plaintiffs plainly have pled that ESN suffered discrimination on the basis of race, and that such racial discrimination caused Defendant's repeated refusal to contract with ESN. Apart from a general *Twombly*/*Iqbal* challenge, Defendant presents a two-pronged argument for why Plaintiff's claim should nonetheless be dismissed. First, it argues that Plaintiffs have not eliminated—indeed, the FAC reveals—the possibility that the reasons for Defendant's refusal to contract were not race-based at all, but were due to legitimate business considerations. Second, somewhat linked to that first argument, Defendant asserts that Plaintiff is required to demonstrate not just that racial animus was *one* contributing factor in Defendant's decisions, but that it must have been the "but for" cause of those decisions.

1. Exclusion of Innocent Explanations

With respect to the first argument, Defendant asserts that Plaintiffs are required to allege facts tending to exclude obvious alternative grounds for Defendant's decision not to carry ESN's channels. As the Court has recounted above, the FAC acknowledges that Defendant proffered business-based decisions not to carry the channels: limited bandwidth; a decision not to do "e basic" launches; problems with ESN's "tracking model"; and timing issues. Defendant relies upon *Iqbal* and, in particular, *Eclectic Properties East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996-97 (9th Cir. 2014), for the proposition that Plaintiffs must allege facts tending to exclude the possibility that the alternative, non-liability-producing, explanation is true.

Eclectic Properties does indeed repeat the Supreme Court's direction that "[w]here 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" and comments that "[w]hen considering plausibility, courts must also consider an 'obvious alternative explanation' for defendant's behavior." *Eclectic Props.*, 751 F.3d at 996 (quoting *Iqbal*, 556 U.S. at 678, 682). In addition, the Ninth Circuit noted that when a plaintiff simply offers allegations that are consistent with their favored explanation, but also with an alternative explanation, "[s]omething more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible." *Id.* at 996-97 (quoting

In re Century Aluminum Co. Secs. Litig., 729 F.3d 1104, 1108 (9th Cir. 2013) (omitting quotation marks).

However, the Ninth Circuit's explanation of the applicable standard set forth in *Eclectic Properties* did not stop there. The court also added, quoting from another of its recent decisions, *Starr v. Baca*, 652 F.3d 1202 (9th Cir. 2011), that—when "there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible"—a complaint may "be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is *implausible*." *Eclectic Props.*, 751 F.3d at 996 (quoting *Starr*, 652 F.3d at 1216).

The FAC survives the approach outlined in *Eclectic Properties*. Plaintiffs have proffered reasons why Defendant's reasons appear incredible, *i.e.* "facts tending to exclude the possibility that the alternative explanation[s are] true." *See* FAC ¶¶ 37-38, 40-42, 45, 52, 55, 87. The same can be said with respect to the merger-related actions Defendant emphasizes as demonstrating that discrimination could not have been the basis for the decision not to carry ESN's content: Plaintiffs have pled that the governmental oversight and approval of Defendant's merger necessitated the seemingly diversity-promoting commitments Defendant undertook. *See id.* ¶¶ 63-66, 73-83.

Presumably in an attempt to preclude a determination that Plaintiffs have done exactly what Defendant asserts that *Iqbal* and *Eclectic Properties* require that they do, Defendant argues that Plaintiffs have not identified any "similarly situated" content-

providers (defined, according to Defendant's emphasis, by content, quality, popularity, or any objective metric relevant to a carriage decision) who were treated differently than ESN. But, even if the Court were to agree with Defendant in that regard (and the Court does not believe that issue is quite so clearly in Defendant's favor as Defendant asserts that it is, *see* FAC ¶¶ 21-22, 32, 41, 45, 55, 87), comparisons with a similarly-situated entity is only one way that Plaintiff could demonstrate discrimination, as Defendant concedes. *See* Docket No. 48, at 13:20-22; Docket No. 52, at 13:12-19. Direct evidence of racial animus suffices as well, *see Evans*, 869 F.2d at 1344-45, and—viewed in Plaintiffs' favor—Singer's and Rutledge's statements could qualify.[3] Moreover, alleging the existence of a similarly situated entity is *not* one of the *pleading* requirements for Plaintiffs' claim *in the Ninth Circuit*. *See Maduka v. Sunrise Hosp.*, 375 F.3d 909, 912-13 (9th Cir. 2004). Defendant's citation—for the opposite proposition—to the Fifth Circuit's decision in *Paske v. Fitzgerald*, 785 F.3d 977, 985 (5th Cir. 2015), is therefore pointless.

Defendant also rejects Plaintiffs' attempt to demonstrate "pretext" as irrelevant, as part of an effort to explain away the ways in which Plaintiffs have poked holes in the reasons Defendant gave for not carrying ESN's content. In doing so, Defendant

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[3] Plaintiffs believe this view is bolstered by Singer's departure from Defendant's employ almost immediately after Plaintiffs' presented Defendant with Singer's alleged comments. Defendant proffers a different reason for Singer's departure, *see* Docket No. 52, at 6 n.2, but that allegation is not found on the face of the FAC, and therefore may not be considered on this motion.

seeks to combine the collection of individual, arguably-refuted, reasons for declining carriage into a package deal that allowed Defendant to simply conclude that ESN's offerings simply were not "good enough" to carry. But, as explained above, Plaintiffs have offered reasons that tend to exclude the possibility that the non-nefarious explanation was true. To go much beyond that extends *Iqbal*'s and *Eclectic Properties*' reach further than the Court believes is warranted.

Defendant also attempts to minimize, if not entirely eliminate, the Court's consideration of the alleged statements made by programming executive Singer and CEO Rutledge by noting that those comments were not made directly in connection with any carriage discussion and were uttered months after the last negotiations between ESN and Defendant, citing (insofar as Ninth Circuit case law is concerned) *Merrick v. Farmers Insurance Group*, 892 F.2d 1434, 1438 (9th Cir. 1990), an Age Discrimination in Employment Act ("ADEA") decision on an appeal from a summary judgment ruling and jury verdict. First, the Court rejects the assertion that such laterin- time comments simply cannot be considered for purposes of assessing whether Plaintiffs have sufficiently alleged a Section 1981 claim. *See Metoyer v. Chassman*, 504 F.3d 919, 937 (9th Cir. 2007) ("We have held that bigoted remarks by a member of senior management may tend to show discrimination, even if directed at someone other than the plaintiff."). Second, simply because formal negotiations between ESN and Defendant had ceased does not mean that the Court could not view later evidence of discriminatory intent as related to a continued refusal to enter into a contract with ESN, especially where there are

substantial allegations of Defendant simply ignoring, putting off, or stringing-along ESN over the course of several years. Even under Defendant's characterization of the "stray remarks" doctrine (which is what *Merrick*—without any detailed guidance on the operation of the "doctrine"—involved, in the context of assessing the "pretext" step of the *McDonnell Douglas* framework used at the summary judgment stage in such cases[4]), only two of the factors favor their position—"whether the comment is related in time and subject matter to the decisional process" and "whether there are multiple comments or only a single statement"—whereas two others favor Plaintiffs—"whether the comment is ambiguous as an indicator of discriminatory animus" and "whether the comment is uttered by a decisionmaker." Docket No. 52, at 6:3-9 (quoting *Marques v. Bank of Am.*, 59 F.Supp.2d 1005, 1019 (N.D. Cal. 1999)).

If Singer's and Rutledge's alleged arguably-racist statements were all that Plaintiffs could muster, the Court would likely agree with Defendant that they were insufficient to satisfy even a "motivating factor" standard at the pleading stage. But when they are viewed in combination with the several-year effort made by ESN and the—viewed most-favorably to Plaintiffs—continued stonewalling and provision of excuses that do not match up with Defendant's

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[4] Decisions rendered on summary judgment motions about the meaning (or lack thereof) attributed to particular remarks, such as in *Carper v. Tribune Media,* CV 15-4259-VAP (SSx), 2016 WL 4062047 (C.D. Cal. July 25, 2016), are not particularly helpful to resolving the question of whether Plaintiffs merely have stated a claim.

practices with non-African American-owned media companies, the Court believes Plaintiffs have validly stated a claim under Section 1981. Plaintiffs are entitled to proceed to discovery on their claim.[5]

2. But-For Causation Requirement

As for the second argument, Defendant relies on numerous out-of-circuit decisions for the proposition that Plaintiffs must demonstrate discrimination was the "but for" cause of Defendant's decision not to contract with ESN. *See Thomas v. Berry Plastics Corp.*, 803 F.3d 510, 516-17 (10th Cir. 2015); *Mabra v. United Food & Commercial Workers Local Union No. 1996*, 176 F.3d 1357, 1358 (11th Cir. 1999); *Bachman*

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[5] Defendant has directed the Court to an August 5, 2015 decision, a May 10, 2016 decision, and an October 5, 2016 decision rendered by a court in this District in a similar suit Plaintiffs brought, *National Association of African- American Owned Media v. Comcast Corporation*, CV 15-01239 TJH (MANx). *See* Request for Judicial Notice, Exhs. A-B (Docket No. 48-2, 48-3); Second Request for Judicial Notice, Exh. K (Docket No. 52-1). The August 5, 2015, decision contains no reasoned analysis or explanation as to why the pleading challenged failed the Rule 12(b)(6) standards. *See* Request for Judicial Notice, Exh. B, at pg. 4 of 4 (Docket No. 48-3). The May 10 and October 5, 2016, decisions concluded that the complaints in question failed to plead facts tending to exclude the possibility that an innocent explanation was true. *See* Request for Judicial Notice, Exh. A, at pgs. 3-4 of 4 (Docket No. 48-2); Second Request for Judicial Notice, Exh. K, at pgs. 2-3 of 3. However, the *Comcast* decisions are not controlling on this Court (an appeal has been filed with the Ninth Circuit, *see* Plaintiffs' Response to Defendant's Request for Judicial Notice (Docket No. 55), at 2:2-4), and here the Court has simply concluded otherwise based on the allegations in *this case*. In addition, none of the *Comcast* decisions made any reference whatsoever to any statements similar to those allegedly attributable to Singer and Rutledge here.

v. St. Monica's Congregation, 902 F.2d 1259, 1262-63 (7th Cir. 1990); *Lewis v. Univ. of Pittsburgh*, 725 F.2d 910, 914 (3d Cir. 1983). But the Ninth Circuit has specifically rejected the argument that a "mixed-motive" defense provides a complete defense to liability on a Section 1981 claim, including by dismissing the approach the Eleventh Circuit took in *Mabra*. *See Metoyer*, 504 F.3d at 932-34. *Metoyer* is still good law in this Circuit.[6]

Notwithstanding *Metoyer*, Defendant rejects the suggestion that a "mixed motive" or "motivating factor" analysis—where simply one of the motives behind the conduct in question was racially discriminatory—is sufficient to state a Section 1981 claim. While the Ninth Circuit has held that legal principles applicable in Title VII disparate treatment cases (where a "mixed motive" or "motivating factor" approach is sufficient) apply also to Section 1981 claims, *see Johnson*, 534 F.3d at 1122 n.3, Defendant responds that the Supreme Court decisions in *University of Texas Southwest Medical Center v. Nassar*, 133 S.Ct. 2517 (2013) and *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) demonstrate that Plaintiffs are simply wrong as a matter of law that a "mixed motive" or "motivating factor" approach applies here, as opposed to the "but for" requirement Defendant champions.

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[6] In addition, over 20 years before *Metoyer*, the Ninth Circuit had also held that a plaintiff did not have to show that discrimination was the sole factor behind the impact on the plaintiff. *See Mitchell v. Keith*, 752 F.2d 385, 391 (9th Cir. 1985).

Unlike here, *Nassar* involved a Title VII retaliation claim,[7] and *Gross* concerned discrimination under the ADEA. Those claims are not present in this litigation, and Defendant has not established that—unlike Title VII—Section 1981 analysis takes any guidance from ADEA claims. Beyond even that, *Nassar* made clear that "[a]n employee who alleges statusbased discrimination under Title VII need *not* show that the causal link between injury and wrong is so close that the injury would not have occurred but for the act. So-called but-for causation is *not* the test." *Nassar*, 133 S.Ct. at 2522-23 (emphasis added). "Status-based discrimination," not retaliation, is what is (allegedly) involved in this case.

Beyond reliance on those decisions, Defendant acknowledges the Ninth Circuit's ruling in *Metoyer*, but just emphasizes that the ruling conflicts with the decision of every other Court of Appeals to address the issue. That may or may not be true, but *Metoyer* is a Ninth Circuit decision, and it therefore binds this Court in the absence of any intervening Supreme Court decision overruling it. Defendant argues that *Nassar* and *Gross* do just that. But as noted above, those cases involved claims and statutes not present or at issue here. Given that neither *Nassar* nor *Gross* dealt with Section 1981 and that neither case mentioned *Metoyer* (or, in *Gross*'s case, Section 1981)

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[7] *Metoyer* is actually *consistent* with *Nassar* insofar as retaliation claims are concerned. *See Metoyer*, 504 F.3d at 934 ("[W]e must find that a mixed-motive defense to liability *is* available for a retaliation claim brought under § 1981…[s]ince a claim under § 1981 follows the same legal principles as those applicable in a Title VII case….") (emphasis added).

at all, if *Metoyer* is no longer good law on this point, this Court believes that it is the Ninth Circuit that should announce that conclusion.

C. The First Amendment

Defendant also argues that imposing liability on it in this case for refusing to contract with ESN would violate its First Amendment rights, and Plaintiff therefore may not employ Section 1981 to that end.[8] This argument has no clear resolution, and the parties must resort to inferential reasoning from several decisions bearing some—but not total, or even necessarily controlling—similarities with this case.

At base, the argument is that Defendant's decision over which stations or programs to include in its distribution enjoys First Amendment protection in line with the Supreme Court's decisions in *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994) and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). That Section 1981 is (as was true in *Hurley*) a law of general applicability does not save it from this approach, a proposition that Defendant asserts—citing one district court decision, *Claybrooks v. American Broadcasting Companies*, 898 F.Supp.2d 986 (M.D. Tenn. 2012)—is "well settled."[9]

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[8] Plaintiffs do not contest that Defendant may present this First Amendment defense in connection with a Rule 12(b)(6) motion.

[9] Defendant also advances *Jian Zhang v. Baidu.com Inc.*, 10 F.Supp.3d 433 (S.D.N.Y. 2014), as a case supporting a First Amendment-focused outcome. Insofar as it is both non-controlling and does not involve television programming or carriage issues, the Court sees little reason to consider that case

While Plaintiffs agree that Defendant is entitled to some First Amendment protection in deciding which channels to carry, they draw the line at Defendant being allowed "to decide which channels to carry based on the race of the owners." Docket No. 49, at 15:15-16. In part, they rely on *Turner Broadcasting*, asserting that Section 1981 "is a content neutral law that does not require Charter to carry any channels," *id.* at 16:5-6, but instead requires only equal treatment and merely prohibits Defendant from using different criteria for African American-owned networks. As such, Plaintiffs argue that Plaintiffs' claims trigger, at most, intermediate scrutiny. And because Defendant did not analyze the FAC under intermediate scrutiny, Plaintiffs argue that it has not met its burden on this motion with respect to this argument.[10]

Plaintiffs also reject Defendant's reliance on *Hurley* by arguing that, in that case, the Supreme Court explained that the forced association problems that existed with the parade at issue in that case were "absent in the cable context" and affirmed the notion that cable *distributors* like Defendant were not entitled to the same degree of First Amendment protection as cable *programmers*. They also

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in detail here considering the more-immediate applicability and/or precedential considerations of *Turner Broadcasting*, *Hurley* and *Claybrooks*.

[10] Plaintiffs assert that that their claim easily passes intermediate scrutiny because the government clearly has a legitimate interest in preventing racial discrimination and because their claim furthers this interest by seeking redress against Defendant's use of race as a criteria for contracting.

distinguish *Claybrooks* from this case by noting that they are not challenging any decision by Defendant regarding the content of television programming.

Turner Broadcasting made clear 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." 512 U.S. at 636. That case specifically dealt with an analysis of certain sections of the Cable Television Consumer Protection and Competition Act of 1992 that "require[d] cable television systems to devote a portion of their channels to the transmission of local broadcast television stations," "so-called must-carry provisions." *Id.* at 626, 630. A similar message-forcing issue was present in *Hurley*, where the Supreme Court considered whether Massachusetts, by way of a state public accommodations law, could "require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey." *Hurley*, 515 U.S. at 559, 561, 566; *see also id.* at 572-73 ("Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade."). Similarly, *Claybrooks*—a case which, unlike *Turner Broadcasting* and *Hurley*, *did* involve a Section 1981 claim—involved a lawsuit against a broadcaster and producers of the shows "The Bachelor" and "The Bachelorette," alleging racially discriminatory casting selections, seeking damages and injunctive relief prohibiting the defendants from engaging in the alleged discriminatory practices and requiring the

defendants to consider non-whites as finalists for the role of the Bachelor and the Bachelorette. *See* 898 F.Supp.2d at 989-90. Though the Court acknowledges that these cases make clear that Defendant is entitled to First Amendment protection for its speech activities, several considerations give it some pause with respect to the notion that it can employ the First Amendment to avoid the reach of Section 1981 in the present context.

First, *Turner Broadcasting*, *Hurley* and *Claybrooks* all dealt, to some degree, with forced speech. The parties here battle over whether this case is more like *Turner Broadcasting* or *Hurley* in terms of Defendant's association with the message that it asserts would result should Plaintiffs prevail here.[11]

Commenting on *Turner Broadcasting*, in *Hurley* the Supreme Court explained that the forced "dissemination of a view" compromising "the speaker's right to autonomy over the message" was "absent in the cable context, because '[g]iven cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable

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[11] It may be that Plaintiffs—and a jury and the Court—could not force Defendant to carry ESN's networks because of the First Amendment. But, at base, what this case appears to be about is Plaintiffs' attempt to get Defendant to stop (allegedly) discriminating against ESN based upon the race of its owner. Indeed, none of the relief requested in the FAC's Prayer asks that the Court force Defendant to carry Plaintiff's networks/channels. In *Hurley*, in contrast, the trial court had ruled that the plaintiff was "entitled to participate in the Parade on the same terms and conditions as other participants." *Hurley*, 515 U.S. at 563.

operator.'" 515 U.S. at 576. In contrast, "[u]nlike the programming offered on various channels by a cable network, [a] parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience," and is thus "not understood to be so neutrally presented or selectively viewed." *Id.* As *Hurley* itself could be taken to suggest by way of its summary of *Turner Broadcasting*, the Court finds any "forced message" issue in this case to be more similar to that involved in *Turner Broadcasting* than in *Hurley*. That is not to say that there is no forced-message issue here at all, but only one that is much more similar to what was involved in *Turner Broadcasting* (where there was "little risk" of association) than in *Hurley*.

Continuing with that issue in mind, although *Claybrooks*—which, of course, is not controlling on this Court in any sense—dealt with plaintiffs attempting to use Section 1981 to eliminate racial considerations in connection with a television broadcast, that case specifically dealt with the *casting decisions* for a *single program*. In that sense, there was—as compared to the situation at hand here—a much-more-direct impact on the content of the speech at issue and, simultaneously, a much more direct association between the defendants and that impacted speech. *See Claybrooks*, 898 F.Supp.2d at 993 ("[T]he court finds that casting decisions are part and parcel of the creative process behind a television program—including the Shows at issue here—thereby meriting First Amendment protection against the application of antidiscrimination statutes to that process. Thus, as applied here, § 1981 would force the defendants to

employ race-neutral criteria in the casting process, thereby regulating the creative content of the Shows. Accordingly, *as applied in this specific context*, § 1981 regulates speech based on its content—i.e., the race(s) of the Shows' respective cast members—which implicates strict scrutiny.") (emphasis added); *see also id.* at 996 ("[T]he Court in *Hurley* articulated a general principle that governs the court's analysis in this case: *under appropriate circumstances*, antidiscrimination statutes of general applicability must yield to the First Amendment.") (emphasis added).[12]

Next, under the approach laid out in *Turner Broadcasting*, the strength of Defendant's argument as to whether application of Section 1981 in the context of this case would be *content-based* would appear to depend on the activity focused upon. *See Turner Broad.*, 512 U.S. at 641- 43. "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Id.* at 643. Here, punishing Defendant for refusing to carry ESN's

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[12] In the other similar lawsuits Plaintiffs have pursued against other similar defendants, only one court reached the First Amendment issue, tentatively ruling—following a single paragraph of analysis of the issue, based almost entirely on the analysis set forth in *Claybrooks*—in favor of the defense position before that litigation settled. *See* Request for Judicial Notice, Exh. C (Docket No. 48-4), at pg. 11 of 18. That tentative decision did not appear to contemplate the distinctions present between the casting issues of a single show presented in *Claybrooks* and the carriage decisions impacting a distributor's entire line of available programming, nor did it appear to recognize the steps the *Claybrooks* decision took to emphasize the limited context at issue in that case, as set forth in the quoted material reproduced above.

programming because that decision runs afoul of Section 1981 (assuming that it, in fact, does) would appear to be tied to the content of that decision not to contract, but *that decision* is not the speech activity in question here, according to Defendant's argument. The speech activity Defendant has identified is the actual programming it carries, not the behind-closed-doors contracting decisions (race-based or not) leading to that programming.[13] The Court is not convinced that Defendant could rely—even if it had chosen to do so—on reasoning analogous to *Claybrooks*, where the district court determined that the casting decisions were "part and parcel of the creative process behind a television program," the more-obvious ultimate speech activity. Thus, whereas *Claybrooks* believed "strict scrutiny" was the proper analytical construct in that case, *see* 898 F.Supp.2d at 993, and *Hurley* may have reached that conclusion too (even *Claybrooks* was uncertain on that point, *see id.* at 995 n.11), it is not clear to this Court that the same should be true here.

In sum, the Court believes that, in terms of speech-impact, this case is more similar to *Turner Broadcasting* than it is to *Hurley* and *Claybrooks*, and that while Section 1981 might not be "content-neutral" with respect to the contracting decisions in question

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[13] The Court is somewhat further troubled by the fact that, in essence, what Defendant seeks here is a First Amendment-based exemption from racial discrimination laws for an entire industry. Were that the law, the Court might expect there to have been more decisions supporting or reflecting it than a single district court decision from Tennessee that dealt simply with a challenge to the casting decisions for one television show, a situation that—as set forth further above—appears to have a much more direct impact on speech activities than what is presented here.

here, those decisions are not the speech activity Defendant attempts to rely upon here for First Amendment protection. As a result, while Defendant's ultimate carriage/programming activity is entitled to some measure of First Amendment protection, the Court does not believe that Defendant has identified and applied the proper method of analyzing the First Amendment impact of an application of Section 1981 to the contracting activity in question here. Having failed (to this point) to convince the Court of its position in that regard, the Court declines to rule in Defendant's favor on First Amendment grounds.[14]

D. NAAAOM's Standing

Finally, Defendant asserts that NAAAOM lacks standing. "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Defendant asserts that the individual plaintiff, ESN, is in the best position to litigate its own claims, meaning that prudential standing considerations support a determination that

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[14] Before the case settled, the tentative ruling issued in Plaintiffs' similar lawsuit against AT&T Inc., AT&T Services, Inc., AT&T Mobility LLC, and DirecTV granted an interlocutory appeal of the First Amendment issues raised by the case. *See* Request for Judicial Notice, Exh. C (Docket No. 48-4), at pgs. 17-18 of 18. The Court will not consider whether a similar order is proper here in the absence of briefing directed to that issue.

NAAAOM lacks standing. In addition, it argues that the FAC lacks any allegations about any other member of NAAAOM, meaning that there is no demonstration that any injunctive relief NAAAOM might pursue would benefit anyone other than ESN. Finally, Defendant contends that the form of injunction Plaintiffs request—amounting to a requirement that Defendant obey the law—is not a proper form of injunction.[15]

Plaintiffs respond to this standing argument by asserting that NAAAOM has standing to seek injunctive relief on behalf of its members other than ESN and that such a claim does not require the participation of ESN. Their only wholly-separate contention with respect to this issue is that Defendant failed to meet and confer with respect to this issue/argument, meaning that the motion is the first time Plaintiffs were put on notice that Defendant would be challenging NAAAOM's standing. Defendant's response to this last point, in turn, is rather weak—it simply asserts that it "has consistently claimed that Plaintiffs' claims lack merit" (which does not address standing) and that Plaintiff has not identified any prejudice that it will suffer as a result of Defendant having raised the issue now. *See* Docket No. 52, at 25:1-4.

While the Court agrees with Plaintiffs that Defendant should have raised this issue, specifically, in connection with meet-and-confer efforts, "whether or not the parties raise the issue, '[f]ederal courts are

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[15] This last point seemingly has little to do with standing (or at least Defendant has not sufficiently explained the connection).

required sua sponte to examine jurisdictional issues such as standing.'" *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1036 (9th Cir. 2008) (quoting *Bernhardt v. Cnty. of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2001)). That being said, while there may be problems with the injunctive relief requested as it is formulated in the FAC, if indeed NAAAOM has members other than ESN, the Court does not perceive a standing problem. If, however, ESN is NAAAOM's *only* member, then the individual member is already participating in the lawsuit and NAAAOM's participation is unnecessary, at least from the standpoint of prudential standing considerations. At this point in time, Plaintiffs' allegations are unclear with respect to whether NAAAOM has any members other than ESN (and Defendant has provided judicially-noticeable material at least calling into question whether ESN is NAAAOM's only member). *See* FAC ¶¶ 14-17; Docket No. 48, at 4:3-5.[16] As such, the Court would dismiss the FAC so as to allow Plaintiffs to provide further information supporting NAAAOM's standing, if they are able to do so.

E. Conclusion

The Court will grant Defendant's Rule 12(b)(1) motion, with leave to amend, as to NAAAOM's standing. Otherwise, it will deny Defendant's motion.

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[16] In their Opposition brief, Plaintiffs assert that "NAAAOM has other members as well," citing paragraph 17 of the FAC. *See* Docket No. 49, at 2:16-17. But paragraph 17 of the FAC does not contain such an allegation. *See* FAC ¶ 17.

Appendix C

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 16-cv-00609

NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA, a California Limited Liability Company; ENTERTAINMENT STUDIOS NETWORK, INC., a California corporation,

Plaintiff,

v.

CHARTER COMMUNICATIONS, INC., a Delaware corporation,

Defendant.

Filed: Dec. 12, 2016

CIVIL MINUTES - GENERAL

PROCEEDINGS: DEFENDANT CHARTER COMMUNICATIONS, INC.'S MOTION FOR 28 U.S.C. § 1292(b) CERTIFICATION [63];

DEFENDANT CHARTER COMMUNICATIONS, INC.'S MOTION TO STAY PROCEEDINGS PENDING APPEAL [68];

DEFENDANT CHARTER COMMUNICATIONS, INC.'S MOTION FOR RECONSIDERATION OF THE COURT'S OCTOBER 24, 2016 ORDER, OR IN THE ALTERNATIVE, FOR JUDGMENT ON THE PLEADINGS UNDER RULE 12(c)

Court hears oral argument. The Tentative circulated and attached hereto, is adopted as the Court's Final Ruling. Defendant's Motion for Reconsideration [69] is DENIED. Defendant's Motion to Stay [68] is GRANTED and Defendant's Motion for Certification [63] is GRANTED. Counsel for Defendant will file a proposed order forthwith.

The Court sets Status Conference for March 27, 2017 at 8:30 a.m. Parties will file a joint status report by noon on March 23, 2017.

* * *

Defendant Charter Communications, Inc. ("Defendant") has filed three motions set for this date: 1) a motion for reconsideration or, in the alternative, for judgment on the pleadings; 2) a motion to certify an interlocutory appeal; and 3) a motion to stay any proceedings in this Court should the Court certify the appeal. The Court will discuss the motions in that order.

Motion 1

Motion 1 is designed to have the Court correct its description of part of Defendant's argument in connection with the briefing that led to the Court's October 24, 2016 Order so that the record can be clear on appeal (if the Court grants Defendant's accompanying motion to certify an interlocutory appeal). In the alternative, if the Court believes that Defendant did not actually make the argument in question, Defendant offers that argument now in conjunction with a Rule 12(c) motion for judgment on the pleadings. The Court will deny this motion for several reasons.

First, the motion is not a proper motion for reconsideration. Local Rule 7-18 imposes the following standard:

> A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

C.D. Cal. L.R. 7-18;[1] *see also Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999) ("[A] motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence,

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[1] After itself citing to the Local Rule 7-18 standard in its opening brief, *see* Docket No. 69, at 4:5-7, in its Reply Defendant strangely argues that "Plaintiffs are wrong to argue that [Defendant's] motion"—which, again, is styled at least in part as a motion for reconsideration—implicates Local Rule 7-18" because Defendant "is not asking the Court to change its ultimate conclusion and dismiss the First Amended Complaint," Docket No. 79, at 2:16-19.

committed clear error, or if there is an intervening change in the controlling law."). Defendant appears to locate justification for this reconsideration motion in that part of the standard that allows such a motion based on "a manifest showing of a failure to consider material facts." But the Court quite plainly did not fail to consider "material facts" (and certainly does not conclude that it committed "clear error" in its conclusion on the motion)—according to Defendant, it either failed to consider or mischaracterized an *argument*.[2] But if Defendant were able to shoehorn an overlooked *argument* in through the "material facts" door, it would neuter the accompanying provision that "[n]o motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion."

Even though a court also always has the discretion to reconsider its interlocutory rulings, *see Smith v. Massachusetts*, 543 U.S. 462, 475 (2005) (Ginsburg, J., dissenting on other grounds) (internal quotations omitted), nothing Defendant has said to this point leads the Court to believe there is any reason to either clarify (or change the wording of) its October 24, 2016 Order, or to change the outcome thereof. The Court therefore concludes both that there is no adequate basis for a motion for reconsideration and that an alternative motion for judgment on the pleadings should be denied.

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[2] Nor did this Court reach any conclusion about the *waiver* of any defense, in contrast with the only cases Defendant was apparently able to find that came anywhere close to justifying a basis for reconsideration here. *See* Docket No. 69, at 9:3-7.

Second (and as a further basis to conclude that there is no reason for the Court to exercise its discretion to reconsider/revise its interlocutory order), the motion is pointless. Whatever the Court may have said in characterizing Defendant's argument does not alter whether the record does or does not reflect Defendant making the argument in a different fashion, or with different emphasis. In other words, any record on appeal will speak for itself. *See* Fed. R. App. P. 10(a) (noting that "the original papers…filed in the district court" are amongst "the record on appeal"). If there is indeed an interlocutory appeal of the Court's October 24, 2016 Order, Defendant will have ample opportunity to cite to the record on this point.

Third, while Defendant argues its impression that the Court misperceived the First Amendment argument it made in connection with its motion to dismiss, the Court also believes that Defendant has misunderstood the language employed—or at least the intent behind that language—in the October 24, 2016 Order. The passage in question analyzes whether "application of Section 1981 in the context of this case" would be "content-based" (thereby arguably implicating a more-demanding level of scrutiny) and stated that the outcome of that analysis "would appear to depend on the activity focused upon"—a textual context that Defendant appears to have overlooked in its reading of the Court's Order. Docket No. 57, at pg. 15 of 19. The Court attempted—perhaps inartfully—to explain why it failed to see, in this situation, the direct, content-based, impact present in such cases as *Claybrooks v. American Broadcasting Companies*, 898 F.Supp.2d 986 (M.D. Tenn. 2012) and *Hurley v. Irish-*

American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995), where the activity impacted by a Section 1981 suit (and its content-based implications, if any) is simply the contracting decision leading to a decision whether to carry a programmer's offerings: to the extent Defendant had been able to locate authority for application of strict scrutiny, it had relied on cases where the "speech activity" in question consisted of the "actual programming" carried or, in the case of *Hurley*, the parade.[3]

Indeed, contrary to how Defendant believes the Court perceived its argument, the Court later acknowledged that "Defendant's ultimate carriage/programming activity is entitled to some measure of First Amendment protection," and had earlier observed that "Plaintiffs agree that Defendant is entitled to some First Amendment protection *in deciding which channels to carry*." Docket No. 57, at pgs. 12, 16 of 19 (emphasis added). The issue in the passage in question is not whether a cable operator's editorial decisions are entitled to First Amendment protection, *but see* Footnote 4, *infra*, but what standards of analysis apply.

Whether or not the previous paragraph clarifies the Court's thinking is irrelevant (and, for that reason, superfluous). The Court has not changed its view on

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[3] Defendant asserts that "[i]f [Defendant] enters into a contract to carry a channel like ESN's Justice Central, on its cable systems, that decision will, by definition, determine part of the programming on [Defendant's] cable systems." Docket No. 79, at 5:4-6. Of course, the same was true in *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994), and strict scrutiny was not applied in that case.

the merits of Defendant's argument;[4] the Ninth Circuit's review will be *de novo*; and that review will be based upon the complete record of proceedings, including the arguments Defendant made (as supported by the record).

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[4] Defendant emphasizes that the contracting decision itself is entitled to First Amendment protection. But of course *Claybrooks* and *Hurley* did not involve contracting/association decisions in a vacuum (and *Turner Broadcasting* did not involve regulation in a vacuum). They involved contracting and regulation that led to either programming being aired or to the occurrence of a parade. As the Court more-explicitly pointed out with respect to *Claybrooks*, in particular, in that case "the casting decisions were 'part and parcel of the creative process behind a television program.'" Docket No. 57, at pgs. 15-16 of 19 (quoting *Claybrooks*, 898 F.Supp.2d at 993). Defendant's emphasis on its position causes the Court to confront additional questions regarding just how far Defendant's position would go. What would the situation be if, after rejecting a contract with Plaintiff due (according to Plaintiff) to racial considerations, Defendant had simply closed up shop and never aired another network or program? Would the contracting decision—divorced from the airing of *any* actual programming—*still* constitute speech protected by the First Amendment? If the answer to that question is "yes," if the mere decision whether or not to enter into a contract—separated out from a later, more traditional, expressive activity—is entitled to First Amendment protection such that contracting decisions can *never* be challenged as being improperly race-based because to do so would be content-based and run afoul of strict scrutiny, how would 42 U.S.C. § 1981 *ever* be enforceable? How would this be consistent with the limited notion reflected in *Claybrooks* that *Hurley* means that "*under appropriate circumstances*, anti-discrimination statutes of general applicability must yield to the First Amendment"? 898 F.Supp.2d at 996. If Defendant is correct, wouldn't Section 1981 yield to the First Amendment "under *all* circumstances?"

For the foregoing reasons, the Court denies Motion 1.

Motion 2

Defendant moves to have the Court certify its October 24, 2016 Order for appeal, pursuant to 28 U.S.C. § 1292(b). There are three statutory requirements for certifying an order for interlocutory appeal: (1) there must be a "controlling question of law"; (2) there must be "substantial ground[s] for difference of opinion" on this question; and (3) it must appear that "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b)[5]; *see also In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982), *aff'd*, 459 U.S. 1190 (1983). In fact, certifications of motions for interlocutory appeal are not common, such that Section 1292(b) should be "used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." *Id.*; *see also James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1068 n.6 (9th Cir. 2002)

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[5] Section 1292(b) provides, in part, as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order…. That application for an appeal…shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b).

(noting that Section 1292(b) certification is appropriate only in "rare circumstances"); *United States v. Woodbury*, 263 F.2d 784, 788 n.11 (9th Cir. 1959) (indicating that it "is to be applied sparingly and only in exceptional cases").

Beyond the foregoing framework, there are two important points to make at the outset here. First, unlike the Ninth Circuit's certification of questions of state law to state supreme courts, when a district court certifies an order for appeal pursuant to Section 1292(b), it is the *entire order* that is on appeal, not *particular questions*. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) ("As the text of § 1292(b) indicates, appellate jurisdiction applies to the order certified to the court of appeals, and is not tied to the particular question formulated by the district court.... [T]he appellate court may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court.'") (quoting 9 J. Moore & B. Ward, *Moore's Federal Practice* ¶ 110.25[1], p. 300 (2d ed. 1995)); *C. Delta Water Agency v. United States*, 306 F.3d 938, 952 n.10 (9th Cir. 2002). Thus, the Court need not consider *both* of the two separate questions Defendant presents as a basis for certification—if there is one question supporting certification, then the entire order is certified for appeal.[6]

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[6] The Court addresses only the First Amendment issue in its analysis. The principal reason why it refrains from doing so with respect to the causation issue—apart from it being unnecessary if the First Amendment issue is sufficient—is that there is controlling Ninth Circuit precedent on the causation issue. While

Second, once this Court certifies its order for appeal (assuming that it does), the Ninth Circuit still must accept the appeal, a decision which is within that court's absolute discretion. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978) ("[E]ven if the district judge certifies the order under § 1292(b), the appellant still 'has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgment.' The appellate court may deny the appeal for any reason, including docket congestion.") (omitting internal citation) (quoting *Fisons, Ltd. v. United States*, 458 F.2d 1241, 1248 (7th Cir. 1972)); *In re Cement*, 673 F.2d at 1026 ("If we conclude that the requirements [for certification] have been met, we may, but need not, exercise jurisdiction."); *see also* Fed. R. App. P. 5(a)(1); Goelz & Watts, *Federal Ninth Circuit Civil Appellate Practice* (2016) ("*Goelz & Watts*"), §§ 2:181-192, at 2-59. As a result, if the Ninth Circuit is concerned that this case is not of the type that should be certified—because it involves only a single claim against a single defendant, is not a class

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Defendant argues that "[t]he mere fact that the Ninth Circuit has already addressed the causation standard under section 1981 in *Metoyer v. Chassman* . . . does not undermine the basis for finding a substantial ground for difference of opinion," it cites no case law in support of that proposition. Docket No. 63, at 13:13-14:2. Without investigating that suggestion in detail, the Court has its doubts about its correctness. Moreover, "whether *Metoyer* can survive under recent Supreme Court decisions," *id.* at 16:21-24, is not the "controlling question of law" presented by the Court's October 24, 2016 Order. That is not a question of law at all, so whether reasonable jurists could disagree about its answer is irrelevant to the Section 1292(b) analysis.

action, multi-district litigation, or an antitrust case—or has any other reason for why it should not be certified, the Ninth Circuit can make that decision. This Court does not believe that only certain types of cases can qualify for a Section 1292(b) certification. Certification is possible if the statutory requirements are met. It is to those requirements that this analysis now turns.

Controlling Question of Law

A "controlling question of law" is one that would "materially affect the outcome of [the] litigation." *In re Cement*, 673 F.2d at 1026. But reversal of the underlying order need not terminate the litigation in order to satisfy this requirement. *See Goelz & Watts* § 2:160.3, at 2-49.

This requirement is easily met with respect to Defendant's First Amendment defense. Defendant has argued—based upon its reading of *Turner Broadcasting*, *Hurley* and *Claybrooks*—that it has something close to a near-total First Amendment right in its contracting decisions, such that an individual or entity effectively cannot even bring a claim founded upon 42 U.S.C. § 1981 in connection with those decisions. The Court has serious doubts regarding whether Defendant is correct in this regard,[7] but that is beside the point. The argument is akin to an

[7] In contrast, Plaintiffs first argued that intermediate scrutiny was warranted, but now—in their opposition to the certification motion—contend that only rational basis review may be appropriate (while exhibiting uncertainty themselves on that point, further suggesting the need for clarification). *See* Docket No. 71, at 12:22-13:5 ("Moreover, intermediate scrutiny is *most likely* not the right approach for this case.") (emphasis added).

argument for complete immunity, one that is often an appropriate "controlling question of law" for Section 1292(b) purposes. *See, e.g.*, *Schlegel v. Bebout*, 841 F.2d 937, 941 (9th Cir. 1988); *Catalina Cablevision Assocs. v. City of Tucson*, 745 F.2d 1266, 1267 (9th Cir. 1984); *Vaughn v. Regents of Univ. of Cal.*, 504 F.Supp. 1349, 1355 (E.D. Cal. 1981); *SolarCity Corp. v. Salt River Project Agricultural Improvement*, No. CV-15-00374-PHX-DLR, 2015 WL 9268212, *2 (D. Ariz. Dec. 21, 2015). Although immediate termination is not required to satisfy the "controlling question of law" analysis, here that is what would result if Defendant is correct—the single claim advanced in this case would almost certainly be dismissed.

Substantial Grounds for Difference of Opinion

"A substantial ground for difference of opinion exists where reasonable jurists might disagree on an issue's resolution, not merely where they have already disagreed." *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). Reasonable jurists typically disagree—and "[c]ourts *traditionally* will find that a substantial ground for difference of opinion exists"—"where the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented." *Couch v. Telescope, Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (citation omitted) (emphasis added). The First Amendment issue Defendant has raised is a novel (and important) one, at the intersection of (and sharing certain similarities with) the Supreme Court's decisions in *Turner Broadcasting* and *Hurley*. Although this Court

does not believe that Defendant can be correct in its argument, that argument is at least colorable. Because the question can only arise in limited circumstances[8]—cable television contracting decisions—its novelty is not surprising. "[W]hen novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions, a novel issue may be certified for interlocutory appeal without first awaiting development of contradictory precedent." *Reese*, 643 F.3d at 688. At the same time, as the Court noted in its October 24, 2016 Order, one other court *tentatively* ruled in favor of Defendant's argument and, in a somewhat-different setting, a federal district court in Tennessee rejected a Section 1981 claim along the lines of Defendant's argument. For all of these reasons, the Court believes that there are substantial grounds for difference of opinion with respect to just how *Turner Broadcasting* and *Hurley* can be synthesized in this area and how the First Amendment analysis—even if it does not lead to an automatic dismissal of the Section 1981 claim—is to be structured in light of those decisions.

Materially Advance Ultimate Termination of Litigation

As noted above, if Defendant is correct in its First Amendment argument, this case would seemingly end. Even if it is incorrect,[9] any instruction from the

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[8] While the question arises in this specific circumstance, its resolution has potentially far-reaching effects, depending upon how widely First Amendment rights in contracting are construed. *See* Footnote 4, *supra*.

[9] Denials of motions to dismiss are not disfavored orders for Section 1292(b) purposes, even where the Ninth Circuit's

Ninth Circuit on just how it sees *Turner Broadcasting* and *Hurley* interacting in this area would clarify the applicable standards and—this Court believes—fruitfully aid in the resolution of this case, either in-court or otherwise.[10] *See Steering Comm. v. United States*, 6 F.3d 572, 575 (9th Cir. 1993) ("Whether the district court failed to articulate the appropriate standard of conduct for pilots under the federal aviation regulations is a question of law appropriate for interlocutory appeal."). While an appeal would, for the time-being, delay the case (assuming that this Court or the Ninth Circuit were to implement a stay), it would certainly streamline and focus discovery efforts for the parties to understand the proper analytical standards governing the sole claim in the case. In contrast, were this case to proceed through a trial applying incorrect legal standards because of uncertainty as to that question, the delay in reaching ultimate resolution would be significantly longer. *See Dalie v. Pulte Home Corp.*, 636 F.Supp.2d 1025, 1030 (E.D. Cal. 2009) ("[G]ranting the application for interlocutory appeal will permit resolution of the issue

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ultimate conclusion is simply to affirm the district court. *See, e.g.*, *Fortyune v. City of Lomita*, 766 F.3d 1098, 1100-01, 1106 (9th Cir. 2014); *see also Joffe v. Google*, 746 F.3d 920 (9th Cir. 2013).

[10] Although—because it finds the First Amendment aspect of the October 24, 2016 Order sufficient for certification purposes—the Court does not consider the causation issue in connection with this motion, an interlocutory appeal that would give the Ninth Circuit an opportunity to address the continued vitality (or not) of its earlier decision in *Metoyer v. Chassman*, 504 F.3d 919 (9th Cir. 2007) in the wake of more-recent Supreme Court decisions would likewise almost certainly materially advance the ultimate termination of this lawsuit.

of the enforceability of the class action waivers at an early enough stage in the litigation to avoid the possibility of two significantly duplicative trials if the court's ruling is reversed.").

Conclusion as to Section 1292(b) Certification

The First Amendment question confronted in the Court's October 24, 2016 Order meets all of the requirements for certification of an interlocutory appeal from that order. Defendant should prepare a proposed order accomplishing that purpose.

Motion 3

As set forth *supra*, Footnote 5, granting an interlocutory appeal does not automatically stay the litigation in the trial court. However, if the Court grants Motion 2, certifying for interlocutory appeal its October 24, 2016 Order, it would be illogical in this case for it to *deny* Defendant's motion for a stay pending that appeal. This case involves a single claim against a single defendant; the *entire case* will be on appeal and, conceivably, could be dismissed. Trial is currently set for July 2017, with discovery set to end in April 2017. If no stay is entered, the case will likely proceed through discovery and to a decision on the merits—either at trial or some point short of trial—before the appeal is even complete. At that point in time, the interlocutory appeal will have been pointless. This is a sufficient basis for a stay of this litigation.[11] *See, e.g.*, *Cal. Dep't of Toxic Substances*

[11] The Court does not find instructive, as to the applicable standard for a stay in these circumstances, the Supreme Court's decision in *Nken v. Holder*, 556 U.S. 418 (2009) or case law

Control v. Hearthside Residential Corp., No. SA CV 06-987-VBF (MLGx), 2008 WL 8050005, *9 (C.D. Cal. Dec. 8, 2008); *Asis Internet Servs. v. Active Response Grp.*, No. C07 6211 TEH, 2008 WL 4279695, *3-4 (N.D. Cal. Sept. 16, 2008). The Court sees no interest on Plaintiffs' part that will be damaged sufficiently so as to outweigh the basis for a stay.[12] Consequently, it grants this motion.

involving requests to stay court-issued injunctive relief during an appeal.

[12] If Plaintiffs are concerned about the loss of evidence, they may meet-and-confer with Defendant—as Defendant has offered, *see* Docket No. 80, at 18:16-18—to ensure there is no loss or destruction of relevant evidence during the course of the appeal. The parties may also wish to consider how best to reach a similar result with respect to potential witnesses who may have left, or who might yet leave, Defendant's employ.

Appendix D

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 16-cv-00609

NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA, a California Limited Liability Company; ENTERTAINMENT STUDIOS NETWORK, INC., a California corporation,

Plaintiff,

v.

CHARTER COMMUNICATIONS, INC., a Delaware corporation,

Defendant.

Filed: Nov. 4, 2016

SUPPLEMENT TO PLAINTIFFS' FIRST AMENDED COMPLIANT FOR CIVIL RIGHTS VIOLATIONS

Plaintiffs National Association of African American-Owned Media ("NAAAOM") and Entertainment Studios Networks, Inc. ("Entertainment Studios") (together "Plaintiffs") allege claims against Defendants Charter Communications, Inc. ("Charter") and DOES 1 through 10, inclusive, (together "Defendants") as follows:

INTRODUCTION

1. This case is about racial discrimination in contracting for television channel carriage.[1] Plaintiff Entertainment Studios is an African American-owned media company. For years, Entertainment Studios has been attempting to enter into a carriage agreement with Defendant Charter—now the third-largest television distributor in the United States—but Charter has refused to carry Entertainment Studios' channels because Entertainment Studios is owned by an African American.

2. Racial discrimination is the only explanation for Charter's refusal because Entertainment Studios has offered to license six of its networks for free and the seventh network for just ten cents per subscriber—which is the lowest offer Entertainment Studios can make, given the most favored nations clause in its other agreements. Entertainment Studios' offer of ten cents per subscriber for a total of seven networks is far below the millions of dollars Charter pays to white-owned programmers to license their networks.

3. Racial discrimination is an ongoing practice in the media industry with far-reaching adverse consequences. The practice is so extensive that a top legal advisor to the Chairman of the Federal Communications Commission (the "FCC") told a

[1] A carriage agreement is a contract between a multi-channel video programming distributor, such as Charter, and a channel vendor/programmer, such as Entertainment Studios, granting the distributor the right to "carry" (that is, distribute) the programmer's channels.

representative of Entertainment Studios that the "cable system in America is inherently racist."

4. Plaintiffs have powerful evidence of Charter's racial bias against Entertainment Studios. Four African Americans who were protesting outside of Charter's headquarters in Stamford, Connecticut have come forward and will testify that Charter's Senior Vice President of Programming, Allan Singer, approached them and made derogatory racist comments about African Americans.

5. Singer yelled at these African Americans and told them to get off welfare and that they were typical African Americans looking for "handouts." Singer stereotyped one of the people as an African American who was out of work, saying he spent his money on frivolous things. In his anger, Singer specifically mentioned race. These comments show Singer's racism—that African Americans are financially irresponsible and can succeed only through government assistance or "handouts." Two days after Plaintiffs showed Charter their allegations about Singer's racist statements to this African American group, Charter announced that Singer is leaving the company.

6. Singer's racism has roots in the racism that existed in this Country in the mid-19th Century when African Americans were thought to be genetically inferior to and lacking the intellectual capacity of whites.

7. A person with such racial bias carries these prejudices into all aspects of his life, including his work. At Charter, Singer was the executive in charge

of dealing with Entertainment Studios and its African American owner.

8. Plaintiffs also have evidence of racial animus harbored by Charter's Chairman and CEO, Tom Rutledge. Rutledge and the owner, founder and CEO of Entertainment Studios, Byron Allen, both attended the Cable Hall of Fame Dinner on May 16, 2016. At the dinner, Allen tried to talk with Rutledge, but Rutledge refused. Rutledge made a dismissive hand gesture and called Allen a "Boy," a derogatory name for an African American man. Rutledge told Allen that he needed to change his behavior.

9. Rutledge's use of the derogatory, insulting term "Boy" was no accident. Rutledge was expressing his belief that Allen was different from the white executives Rutledge is used to dealing with, echoing the days of Jim Crow when whites routinely called African American men "Boys" to demean them as inferior to whites.

10. The racism expressed by Rutledge and Singer accounts for why Charter has refused to carry Entertainment Studios' channels (and any other 100% African American-owned channels). It also explains why Charter, until the approval of its merger with Time Warner Cable, had an all-white male board of directors, even though women and racial minorities subscribe to Charter's services and are responsible for a significant portion of Charter's revenue. Rutledge and Singer will not do business with Entertainment Studios because of their racial animosity and because, per their statements, it would just be another "handout" for African Americans.

11. In addition to the derogatory racist statements by Charter CEO, Tom Rutledge, and Charter Senior Vice President of Programming, Allan Singer, as set forth above, there is abundant evidence pleaded herein showing Charter's racism including deceitful conduct, phony excuses for not contracting with Entertainment Studios, and paying-off non-media civil rights groups such as Al Sharpton's organization to supposedly fulfill diversity requirements.

12. Charter's discrimination is contrary to the law. Racial discrimination in contracting is prohibited by 42 U.S.C. § 1981, which ensures that all people have the same right to make and enforce contracts "as is enjoyed by white citizens." Section 1981 was enacted to eradicate racial discrimination in contracting and is derived from the Civil Rights Act of 1866, and applies with full force today.

13. Through this lawsuit, Plaintiffs seek to vindicate their rights under 42 U.S.C. § 1981.

PARTIES, JURISDICTION AND VENUE

A. Plaintiffs

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

15. NAAAOM was created for the purpose of and is working toward obtaining the same contracting opportunities for African American-owned media companies as their white counterparts for—among other things—distribution, channel carriage, channel positioning and advertising dollars. At the heart of its mission is obtaining the economic inclusion of African

American-owned media companies in the same manner as white-owned media companies.

16. Historically, because of economic exclusion, African American-owned media companies have 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.

17. Entertainment Studios—a member of NAAAOM—is being discriminated against on account of race in violation of 42 U.S.C. § 1981. NAAAOM 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 consonant with NAAAOM's purpose. NAAAOM does not seek money damages, so the individual participation of its members is not required. NAAAOM's individual members include: Akabueze Productions, Inc.; The Alvin James Group; HBCUX Network; NASA Studios; and The Yard.

18. Plaintiff Entertainment Studios is a corporation, with its principal place of business in Los Angeles, California. Entertainment Studios is a 100% African American-owned television production and distribution company, involved in all facets of the entertainment industry including television, film, digital publishing, advertising and multiple networks/channels featuring original content.

19. Entertainment Studios is 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.

20. Entertainment Studios was founded in 1993 by Byron Allen, an African American actor, comedian and media entrepreneur. Allen is the sole owner of Entertainment Studios. Allen first made his mark in the television world in 1979 as 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 "on-screen" career, Allen developed a keen understanding of the "behind the scenes" television business. For more than 22 years, Allen has built Entertainment Studios into an independent, global media company competing with the likes of The Walt Disney Company, Warner Bros., Lionsgate, Sony, and Paramount (among others).

21. Entertainment Studios has channel carriage contracts with more than 40 television distributors nationwide, including AT&T U-Verse, DirecTV, VerizonFIOS, Suddenlink, RCN and CenturyLink. These television distributors broadcast Entertainment Studios' networks to nearly 80 million cumulative subscribers throughout the United States.

22. In 2009 Entertainment Studios' launched six high definition television networks (channels) to the public, eventually launching a seventh in 2012. Entertainment Studios produces, owns and distributes over 35 television series on broadcast television, with thousands of hours of video programming in its library. Entertainment Studios' shows have been nominated for, and have won, highly

coveted and internationally recognized awards such as the Emmy Award. Entertainment Studios also acquires, produces and distributes motion pictures to movie theatres, home video distributors, television networks, and other licenses through its affiliate companies. A copy of an Entertainment Studios promotional presentation highlighting certain key aspects of the company and the programming it produces is attached hereto as **Exhibit A**.

23. In December 2012, Entertainment Studios launched "JusticeCentral.TV," a 24-hour-per-day, high definition court, news and entertainment channel featuring several Emmy-Award nominated and Emmy-Award winning television judges and legal/court shows. After just three years, JusticeCentral.TV has already proved itself a successful channel, being now available to approximately 25 million pay television subscribers in the United States.

B. Defendants

24. Charter Communications, Inc. is a Delaware corporation with its principal place of business in Stamford, Connecticut. Charter also has an office, is registered to do business and operates in California. Charter is now the third-largest television distribution company in this country, with more than 17 million subscribers.

25. Charter became the third-largest television distribution company after the FCC—the federal administrative agency tasked with regulating interstate and international communications by radio, television, wire, satellite and cable—approved the merger with Time Warner Cable.

26. 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 and Venue

27. This case is brought under a federal statute, 42 U.S.C. § 1981; as such, there is federal question jurisdiction under 28 U.S.C. § 1331. Venue of this action is proper in Los Angeles because the parties 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

28. Racial discrimination in this industry is so extensive that a top legal advisor to the Chairman of the FCC, Gigi Sohn, candidly told an Entertainment Studios representative that the "cable system in America is inherently racist." Such inherent racism prevents television audiences from viewing programming from African American-owned media companies.

29. Major television channel distributors such as Charter have unique power to limit economic opportunity for channel owners. To reach the television audience, channel owners like

Entertainment Studios are reliant upon the services of television distributors, like Charter, to provide access to their distribution platforms. Channel owners need distribution to realize subscriber and advertising revenue.

30. Charter has refused to carry African American-owned channels on its distribution platform, contributing to the near-extinction of African American ownership in mainstream media. There is a statistic that highlights the inequity here: Charter's President and CEO, Tom Rutledge—the main perpetrator of the discrimination recounted herein and a blatant racist—was paid $16.1 million in compensation in 2014 alone, while 100% African American-owned media companies received *nothing* by way of license fees from Charter.

B. Charter's Racial Discrimination

31. Charter's racial bias is evident even in its own moving papers. In its motion to dismiss filed on June 16, 2016, Charter refers to Plaintiffs as extortionists and calls the lawsuit a "scam" brought with "cynical" motives—these are criminal accusations. When white-owned businesses file suit against Charter, they are called litigants. But when an African American-owned business files suit, Charter calls it extortion.

32. Entertainment Studios is an African American-owned global media company with 80 million cumulative television subscribers, seven television networks, a film studio and a robust production and distribution business. Charter's competitors—including AT&T U-Verse, DirecTV, VerizonFIOS, Suddenlink, RCN and CenturyLink—carry Entertainment Studios' channels. In fact,

VerizonFIOS has carried Entertainment Studios' networks since 2009 and has repeatedly extended carriage agreements with Entertainment Studios, and added JusticeCentral.TV in 2012. Charter's competitors would not carry, let alone extend, carriage agreements with Entertainment Studios unless Entertainment Studios' channels had market demand and working with Entertainment Studios made sound business sense.

33. Despite the fact that Charter's competitors carry Entertainment Studios' channels, Charter has never dealt in good faith with, nor provided a competitive proposal, offer or counter-offer to, Entertainment Studios. Charter's top programming official, Senior Vice President Allan Singer, has refused, rescheduled and postponed meetings with Entertainment Studios, which prevented Charter and Entertainment Studios from engaging in meaningful discussions about a carriage deal.

34. By virtue of his position, Singer has decision-making authority over which channels Charter carries. Motivated by racial animus, Singer blocked Entertainment Studios' attempts to obtain a carriage contract with Charter.

35. To hide their racial animus, Singer and other Charter executives, all at the direction of CEO Tom Rutledge, gave Entertainment Studios multiple phony excuses for why "now" was never the right time.

36. In 2011, Entertainment Studios reached out to Charter to discuss a possible carriage deal. Singer told Entertainment Studios they needed to "be a bit patient." Singer insisted that Entertainment Studios try again "next year."

37. When the next year rolled around, Singer explained that, again, "now" was not the right time. Speaking on behalf of Charter, Singer stated "we aren't launching" despite the fact that Charter was indeed launching new, white-owned channels throughout the entire time period in question. As additional excuses, Singer told Entertainment Studios that Charter's "bandwidth and operational demands have increased," such that it did "not have any opportunities for the foreseeable future." Just as he did in 2011, Singer told Entertainment Studios that a "meeting in 2012 doesn't make sense."

38. Charter's made-up excuse that it was not launching any new networks on its system in 2012 and that it had bandwidth problems are provably false. During this same period, Charter was in negotiations to launch several new white-owned networks on its system. Indeed, in late 2012, Charter publicly announced that it had entered into carriage agreements with, among others, the Walt Disney Company (for the Longhorn Network, among others) and Time Warner Cable Sports.

39. Charter's phony excuses and refusals to discuss a carriage deal with Entertainment Studios continued into 2013. Charter again told Entertainment Studios that it would not launch its networks "for the foreseeable future," further stating that it would not even allow Entertainment Studios to make "another pitch."

40. Charter's excuses for why Entertainment Studios would not be eligible for a carriage deal "in the foreseeable future" are patently false. Charter publicly announced in 2013 that it had entered into a

channel carriage agreement with white-owned/ controlled RFD-TV, which provides programming focused on rural and Western lifestyle issues.

41. Another phony excuse was that, according to Singer, Charter did not believe in Entertainment Studios' "tracking model" because Entertainment Studios' content appears on both Entertainment Studios' channels and on other broadcast stations and cable networks. This is yet another made-up excuse because several white-owned media companies with carriage agreements with Charter have the same business model—*i.e.*, their content not only appears on their channels but is also sold to other networks. Indeed, the vast majority of cable networks Charter carries have programming that simultaneously runs on broadcast networks, local broadcast television stations, other cable networks, and on digital platforms such as Netflix, Hulu and Amazon.

42. In 2013, Singer advised Entertainment Studios that Charter would be willing to keep one of Entertainment Studios' channels, JusticeCentral.TV, in consideration for "the next e basic launches"—*i.e.*, the "expanded basic" or second-highest penetrated tier in the industry. After several years of making no progress with Charter, Entertainment Studios was surprised and excited by this potential launch opportunity.

43. Entertainment Studios thanked Charter for its consideration of JusticeCentral.TV as part of its next e basic launches. But this potential launch opportunity was a Singer/Rutledge ruse. Charter had no intention of ever doing business with Entertainment Studios. Shockingly, Singer told

Entertainment Studios: "I was being facetious. We are never doing e basic launches . . . ."

44. In other words, Charter was only willing to consider Entertainment Studios for a service that it never intended to launch or utilize. Singer made it clear that he would block any future efforts to obtain carriage, telling Entertainment Studios: "Even if you get support from management in the field, I will not approve the launch of your networks."

45. Sensing that Singer was discriminating against Entertainment Studios, Entertainment Studios requested a meeting with Charter's President and CEO, Tom Rutledge. Singer tried to block this effort, telling Entertainment Studios that Rutledge "does not meet with programmers." This was a lie because Rutledge regularly meets with white CEOs of white-owned programmers. In fact, Entertainment Studios witnessed Rutledge meet with Phillipe Daumann, CEO of Viacom—*i.e.*, a programmer (who is white).

46. Seeking the same treatment Charter offers to white-owned programmers, Entertainment Studios reached out to Charter's CEO, Tom Rutledge, in March 2013 to pitch its channels. Rutledge never responded. In fact, Rutledge has refused to take or return any of Entertainment Studios' calls or to meet with Byron Allen, the African American founder, chairman and CEO of Entertainment Studios.

47. Despite Charter and Rutledge's repeated refusals to negotiate for carriage with Entertainment Studios, Entertainment Studios persisted. Entertainment Studios reached out again in June 2015. Despite several years of knocking on Charter's

door and countless attempts to set in-person meetings and phone calls to discuss a carriage deal, Singer told Entertainment Studios that he thought Entertainment Studios was "no longer interested" in a Charter carriage deal—a wholly illogical, disingenuous statement.

48. Condescendingly, Singer stated that the "practice in the industry" dictated that Entertainment Studios "provide a presentation about [its] channels as the first step to considering carriage." Singer even said that he "looked forward to learning more about them." But as Entertainment Studios had already provided information about its channels directly to Singer on multiple occasions over the past four years, Singer's comments were bizarre and fake.

49. As Singer knew, at no time did Entertainment Studios stop seeking carriage on Charter's system. Indeed, the suggestion that Entertainment Studios would not be interested is ludicrous; why would any television programmer decide to stop seeking carriage to reach Charter's 17 million subscribers and all of the potential advertising and licensing revenue associated with a carriage deal? Singer always balked at Entertainment Studios' persistence, telling them that he did not need "another pitch" from the company and that it did not make sense to "meet again" regarding Entertainment Studios' request for carriage. In reality, Singer was creating a record to cover up his past dealings with Entertainment Studios.

50. After Entertainment Studios called Singer out on his lies and excuses, Singer finally agreed to set a meeting with Entertainment Studios in July 2015.

51. Entertainment Studios' team traveled from Los Angeles to Charter's headquarters in Stamford, Connecticut, with the understanding that the purpose of the meeting was to negotiate the terms of a carriage deal. But when they arrived, they soon learned that was not the case. Singer lured Entertainment Studios to Connecticut just so he could say "on the record" that he met with Entertainment Studios' team and considered offering a carriage deal. Singer made clear that Charter would never do business with Byron Allen's company.

52. Once more, Singer gave Entertainment Studios all the excuses in the book. Singer told Entertainment Studios that Rutledge wanted to wait to "see what AT&T does." But AT&T already carried one of Entertainment Studios' networks (JusticeCentral.TV) at the time, and AT&T has since launched Entertainment Studios' entire portfolio of channels on its television distribution system. Despite this—and despite Charter's indication that it just wanted to wait to "see what AT&T does"—Charter still refuses to carry any of Entertainment Studios' channels.

53. Charter also told Entertainment Studios that it would have to wait until after the Time Warner Cable merger was approved to be considered for a carriage deal. According to Charter, until the merger is approved, there are "too many unknowns" to enter into a carriage deal with Entertainment Studios. Singer told Entertainment Studios: "You go back to the line"—*i.e.*, "Get to the back of the bus behind white-owned channels who have carriage."

54. Using this ploy, Charter wanted to postpone the negotiations and deceive Entertainment Studios into believing that it had a chance to obtain carriage on its system so that Entertainment Studios would not publicly oppose the merger on the basis of Charter's racist refusal to do business with the African American-owned Entertainment Studios.

55. Charter restated its phony excuse about limited bandwidth. Charter had ample bandwidth available to carry Entertainment Studios' channels. In fact, in 2015, Charter expanded the reach of its distribution of the white-owned, lesser-known channel RFD-TV across its entire television footprint—including in major urban cities such as Los Angeles and Atlanta where, presumably, the demand for rural networking is not nearly as high as the demand for the general audience, lifestyle networks offered by Entertainment Studios. Also in 2015, Charter expanded the reach of the white-owned, lesser-known channel CHILLER to all of its 17 million subscribers.

56. Meanwhile, Singer has ceased returning Entertainment Studios' calls altogether; and Rutledge has continued to refuse to meet.

57. There is no sound business justification for Charter's unwavering refusal to meet in good faith with Entertainment Studios and negotiate a carriage deal. There is also no sound business justification for Charter's refusal to provide a competitive proposal, offer or counter-offer to Entertainment Studios, especially since Charter's competitors carry Entertainment Studios' channels. Rather than engage in good faith discussions, Singer and his boss Rutledge simply do not want to do business with Entertainment

Studios' owner Byron Allen because he is African American.

58. Entertainment Studios has powerful direct evidence confirming Singer and Rutledge's racial bias. In mid-March 2016, as summarized above, Singer approached an African American group in front of Charter headquarters and made derogatory racist comments to them. Singer racially profiled these people, telling them to get off of welfare and that they were typical African Americans looking for a "handout."

59. These people were peacefully and lawfully protesting the merger that made Charter the third-largest television distributor in the United States, giving it even more power to discriminate against African American-owned media. Given Singer and Rutledge's racial bias, it is not surprising that Charter has refused to treat Entertainment Studios as a legitimate media company.

60. And more, the Chairman and CEO of Charter, Tom Rutledge, condescendingly dismissed Allen at the Cable Hall of Fame dinner, calling him a "Boy" and telling him to change his behavior. This is powerful, direct evidence of racial bias.

61. And there is still more evidence of Charter's racism. In or about late July or early August, Charter subscribers received a horrific, racist message through their cable box. The message read "F*** Black Lives Matter! 1488 Brought to you by Phreak of Nature Baby J and King Benji! All N****** Must Die!" The term 1488 is a combination of two white supremacist symbols. 14 refers to 14 words: "We must secure the existence of our people and a future for white

children." 88 refers to HH or "Heil Hitler" (H is the eighth letter of the alphabet). Charter has not identified the source of this message. On information and belief, this message came from within Charter.

62. Entertainment Studios is merely the most recent victim of Charter's racism towards African Americans. For years, prominent African American media executives and entrepreneurs have tried and failed to launch a cable television network on Charter's platform. Charter's refusals have led to the near extinction of 100% African American-owned media.

C. Charter Makes Sham Commitments to Diversity

63. Charter's racially discriminatory conduct is evidenced by its song-and-dance routine with the FCC, where Charter makes diversity commitments that appear genuine so that both Charter and the FCC can present themselves as champions of diversity—but in reality, these commitments are a sham that Charter knows the FCC will not enforce.

64. Diversity is a core concern for FCC merger approval. Indeed, a driving purpose of the Federal Communications Act and the First Amendment is to ensure the widest possible dissemination of information from diverse sources. Yet the FCC has done nothing to protect the voices of African American-owned media companies in the face of increased media consolidation. The FCC routinely encourages, and then accepts as reliable, empty diversity promises in order to ostensibly satisfy the law's diversity requirements.

65. It has become an all too common practice for merger applicants to satisfy diversity commitments by using "token fronts"—African American shills posing as "fronts" or "owners" of so-called "Black cable channels" that are actually majority owned and controlled by white-owned businesses. The FCC gives merger applicants significant credit for making "voluntary" diversity commitments that are truly empty and illusory. The result provides the merging parties with a "win-win" situation: The FCC can claim that it has secured voluntary diversity concessions (and, thus, can posture itself as a champion of diversity), while the applicants get what they want—*i.e.*, agency approval.

66. That is exactly what Comcast and the FCC did years ago during the FCC's review of the Comcast/NBC-Universal Merger, and has done again in more brazen fashion with the Charter/Time Warner Cable merger.

D. The Comcast/NBC-Universal Merger

67. In connection with its 2010 bid to acquire NBC-Universal, television distributor Comcast was required to show to the FCC that it was committed to diversity.

68. In the time leading up to the merger, Comcast was criticized for its failure to do business with minority-owned media companies, including African American-owned media companies.

69. Entertainment Studios and other minority-owned media companies opposed Comcast's merger bid, 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.

70. Realizing that its racist practices and policies jeopardized the approval of the NBC-Universal acquisition, Comcast entered into a memorandum of understanding ("MOU") with non-media civil rights groups, including 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.

71. Through the MOU, 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 contracting for carriage.

72. In reality, the MOU was a ruse designed to secure merger approval without obligating Comcast to do business with truly African American-owned media companies. And the ruse worked: In 2011, the FCC approved Comcast's merger with NBC-Universal, emphasizing Comcast's adherence to the "commitments" it made in the MOUs.

73. But the FCC conducted no actual inquiry into Comcast's discriminatory practices in contracting for channel carriage, turning a blind eye to Comcast's institutionalized racist practices and policies. And the FCC never made any effort whatsoever to follow up as to whether Comcast actually fulfilled its "voluntary commitments," even in the face of substantial

evidence demonstrating that Comcast had violated those commitments entirely.

74. Post-merger, the FCC has allowed Comcast to flout its MOU commitments and the FCC's authority to enforce such commitments. Meanwhile, Comcast has not entered into carriage agreements with any truly African American-owned media companies. Rather, the networks Comcast has launched pursuant to the MOU are owned, controlled and backed by white-owned media and money. Comcast gave African American celebrities token ownership interests in those channels to serve as figureheads in order to cover up its racial discrimination in contracting. The FCC has taken no action.

75. Consistent with its failure to monitor and ensure Comcast's adherence to its diversity commitments made in the MOUs, the FCC has agreed to allow Charter and Time Warner to merge in reliance upon sham diversity commitments made in MOUs. The FCC thus signaled to Charter, and now any other media companies seeking approval of major mergers and acquisitions, that empty promises and symbolic gestures are all that is required to satisfy the FCC that a proposed merger will promote diversity and thereby be in the "public interest." There is no accountability imposed by the FCC.

E. Taking a Play out of Comcast's Playbook, Charter Enters into a Similar MOU

76. To receive regulatory approval from the FCC for its merger with Time Warner Cable, Charter entered into a memorandum of understanding ("MOU") with a dozen "multicultural leadership

organizations," including Al Sharpton's National Action Network, among other non-media civil rights groups. Through the MOU, Charter, like Comcast before it, made symbolic commitments, including appointing minority members to its all-male, all-white Board of Directors, appointing a socalled "Chief Diversity Officer," and enhancing its "involvement and investment" in organizations serving communities of color—*i.e.*, making monetary "contributions"—pay offs—to non-media civil rights groups that support the merger.

77. Charter and the FCC apparently think that Al Sharpton speaks for all African Americans, and thus if Charter enters into an MOU with Sharpton, Charter must be making a *bona fide* commitment to African American-owned media. But Sharpton does not speak for all African Americans, and certainly not for African American-owned media companies. Sharpton acts merely as racial cover, and it is far less expensive for Charter to pay him than to do business with African American-owned media companies like Entertainment Studios.

78. In fact, Sharpton has a well-documented business model and track record of obtaining payments from corporate entities in exchange for his support on "racial issues." Sharpton can be bought on the cheap, and allows businesses to avoid doing business with real African American-owned companies that would lead to true economic inclusion for African Americans—something that is unacceptable to Rutledge and Charter

79. Even worse, the implementation of Charter's illusory MOU was contingent upon the approval of

Charter's merger application by the FCC. Rutledge's motive in entering into the MOU is thus transparent: The pledges made by Charter are designed to facilitate approval of the merger; Charter otherwise has no intention of increasing diversity or inclusion in its business practices, including with respect to contracting for channel carriage. If the merger were to have fallen through, it would have been business as usual at Charter—*i.e.*, diversity is not on the agenda.

80. Charter's press release regarding the MOU states that the MOU includes "specific steps" that Charter will take post-merger, including the following:

- Appointing one African American, one Asian American/Pacific Islander and one Latino American to its board of directors within two years of the close of the transaction;
- Appointing a so-called "Chief Diversity Officer"; and
- Expanding "programming targeting diverse audiences."

81. These first two commitments—to add minority members to its board of directors and appoint a "Chief Diversity Officer"—are only symbolic. They do nothing to enhance diversity of the entities contracting with Charter or advance economic inclusion of African American-owned media companies. The fact that, in 2016, Charter does not already have a Diversity Officer indicates that Charter has no interest in diversity.

82. Nor does Charter's vague commitment to expanding "programming targeting diverse audiences" promote diversity in ownership or

economic inclusion of African American-owned media companies in any real way. Through this pledge, Charter committed only to distributing more programming "targeting" diverse audiences. Charter has made no commitment to actually do business with minority-owned media companies.

83. Without a commitment to do business with minority-owned media companies, there can be no true economic inclusion for such companies in the media industry. Charter's symbolic commitments to add minority members to its board and appoint a "Chief Diversity Officer" do nothing to protect African American-owned media companies like Entertainment Studios from continued economic exclusion by Charter. Post-merger and post-implementation of the MOU, the television content available to Charter's 17 million subscribers will continue to be limited by Charter's racial discrimination in contracting.

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

NAAAOM and Entertainment Studios Against Defendant Charter

A. Section 1981

84. Plaintiffs refer to and incorporate by reference each foregoing and subsequent paragraph of this Complaint as though fully set forth herein.

85. Charter has engaged in, and is 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."

86. African Americans are a protected class under § 1981. Entertainment Studios is a member of that class because it is a 100% African American-owned media company.

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

88. Charter has refused to contract with Entertainment Studios for channel carriage. Charter has a pattern and practice of refusing to do business, or offering unequal contracting terms to, African American-owned media companies.

B. Damages

89. But for Charter's refusal to contract with Entertainment Studios, Entertainment Studios would receive millions of dollars in annual license fees and advertising revenue. Moreover, with distribution on one 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.

90. Based on the revenue Entertainment Studios would generate if Charter contracted with them in good faith, Entertainment Studios would be valued at approximately $10 billion.

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

92. Accordingly, Charter's unlawful discrimination has caused Entertainment Studios in excess of $10 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:

Plaintiff Entertainment Studios prays for compensatory, general and special damages from Charter in excess of $10 billion according to proof at trial;

Plaintiffs NAAAOM and Entertainment Studios pray for injunctive relief prohibiting Charter from discriminating against African American-owned media companies, including Entertainment Studios, based on race in connection with contracting for channel carriage;

Plaintiff Entertainment Studios prays for punitive damages, based on oppression and malice, according to Charter's net worth;

Plaintiffs NAAAOM and Entertainment Studios pray for declaratory relief that the FCC's practice of facilitating sham "diversity" agreements/MOUs, including the Charter MOU described herein, violates the Due Process Clause of the Fifth Amendment of the U.S. Constitution;

Plaintiff Entertainment Studios prays for attorneys' fees, costs and interest; and

Plaintiffs NAAAOM and Entertainment Studios pray for such other and further relief as the court deems just and proper.

DATED: November 4, 2016

MILLER BARONDESS, LLP

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

EXHIBIT A

(See Insert Next Page)

Entertainment Studios Networks

Explore Your Passions

ESN
Entertainment Studios Networks

Executive Summary

Your 360 Cross-Platform Revenue Generating Partner

- Unencumbered 360-degree distribution and licensing strategy for our distributor partners, including linear, video-on-demand, and TV Everywhere to reach your customers on all screens within your footprint.
- Seven networks in 100% native HD featuring original content 24/7 around networks that are clearly defined, and relevant to your subscribers' passions.
- Foster competition and reduce content costs.
- Leverage ESN's library of over 5,000 hours of original programming.
- Capitalize on businesses that spend over $39-billion on media promoting categories our networks represent.

ESN
Entertainment Studios Networks

The Leader In Television Production

Founded in 1993 by Byron Allen, Entertainment Studios is the largest independent producer/distributor of television programming, with seven 24/7 HD networks and a library of over 5,000 hours of original content.

CBS TELEVISION STATIONS

NBC LOCAL MEDIA
ENGAGING CONSUMERS WHERE THEY LIVE, WORK AND PLAY

FOX TELEVISION STATIONS, INC.

SBG SINCLAIR BROADCAST GROUP

BELO

GANNETT

GRAY TELEVISION, INC.

abc

ENTERTAINMENT STUDIOS A GLOBAL MEDIA COMPANY

Value-Priced Passion Networks Offered By Over 50 Distributors

NATIONAL CABLE TELEVISION COOPERATIVE, INC.

CARIBBEAN BROADCASTING CORPORATION

CEDAR FALLS UTILITIES
The Power of Service

verizon FiOS

GREAT PLAINS COMMUNICATIONS

suddenlink

Buckeye CableSystem

Caribbean Cable Cooperative

GEUS
Energizing the Community

Electric
Cable Television
High Speed Internet

CenturyLink™ | prism

MetroCast

Value-Priced Passion Networks Offered By Over 50 Distributors

Award Winning Court Television

Justice Central - The Home of Emmy Nominated Court Programming

Justice Central – A new, around-the-clock HD legal and news cable network targeting court programming and justice fans, featuring the biggest names in law.

- Launched December 10, 2012, Justice Central presents trials and live coverage and analysis of the nation's biggest trials.
- The only cable network destination to feature the second most popular genres in daytime television.
- Target audience:
  - Primary: Adults 25-54.
  - Secondary: Adults 35+.
- Our mission is to provide compelling HD legal and news programming, featuring the biggest names and cases in law, targeting ~30M avid Court viewers.

The Unstoppable Judges From Entertainment Studios

America's Court with Judge Ross
Premiered 2010-11
America's Court with Judge Ross is the next generation in Court shows. Judge Ross shows litigants how they can responsibly deal with their disputes and understand the consequences of their actions.

We The People with Gloria Allred
Premiered 2011-12
The biggest name in law has assumed the gavel in **We The People with Gloria Allred**. Gloria Allred has been the real life advocate and leader in conflict resolution, and now she is the star of an explosive Court show.

Justice For All with Judge Cristina Perez
Premiered 2012-13
Three-time Emmy Award winner Cristina Perez is back on the bench in **Justice For All with Judge Cristina Perez**. Cristina is the ultimate crossover host, who appeals to young and old audiences everywhere.

Supreme Justice with Judge Karen
Premiered 2013-14
Judge Karen practiced criminal defense law in Miami for 13 years in the Office of the Public Defender, as well as in private practice. Judge Karen Mills-Francis is known for her feisty, full-of-life personality and passionate advocacy for families and children.

Justice With Judge Mablean
Premiered 2014-15
A former prosecuting attorney and long-time fan favorite, Judge Mablean Ephriam can bring a courtroom to laughter with her tell-it-like-it-is approach. She is well-known for playing the judge in Tyler Perry's Madea comedies and a seven year stint on Divorce Court.


Home of the Emmy Winner For Outstanding Lifestyle Program
CARS.TV
M SD 4019

Buckle Up For The Passion Of Cars.TV

Cars.TV features adrenaline pumping programming about the best cars the automotive industry has to offer:

- A showcase of the top collectors.
- Top of the line car shows.
- The most luxurious private collections.
- Popular car auctions, custom garages, races and much, much more.

Private Collections

Jay Leno
Jerry Seinfeld
John Cena

Auctions

Barrett Jackson
Manheim Bonhams

Car Shows

Concours d' Elegance
Detroit
Paris

Car Enthusiasts Are Well Established

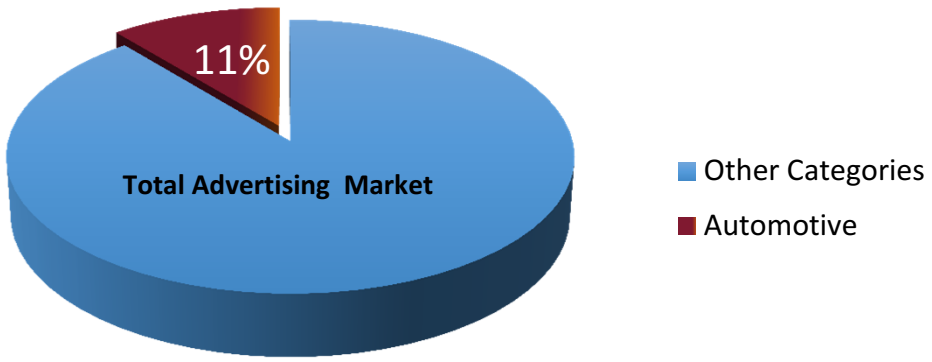
Cars.TV's core demographics consist of:

- Adults 35-64.
- College degree / post graduates.
- Have significant buying power; household income averages $93,000/year.
- More likely to own their homes.
- Core audience presents growth opportunities.

Scarborough Prime Lingo. Respondents: 300.
Target: watched Speed Channel past week or attended auto show past year.

Accelerate Your Local Automotive Advertising Revenue With Cars.TV

- Cars.TV's content aligns with companies that spend over $15-billion per year on advertising.
- Automotive is the **#1 category by spend – 11% of the total ad market.**



- Car dealerships **account for more than $3.5-billion** in local television advertising, making it the top category for local ad sales.
- The average family spends over 13% of their total expenditures on automotive/transportation; $11,450 annually.

Sources: WPP's TNS Media Intelligence (www.tns-mi.com). Spending based on TNS's 18 measured media. Numbers rounded. Categories are aggregated from TNS classifications by Ad Age Data Center. U.S. Department of Labor statistics – consumer spending


Comedy.tv
PURE LAUGHTER

Network Audiences Like To Laugh

Comedy.TV's core audience:

Will Ferrell

- Adults 18-49.
- Comedy programming yields an ethnically balanced audience.
- Reaches high income households $100,000/year+.
- Presents an opportunity to upsell subscribers.
- Target and convert competitors' subscribers.
- Audience shows heavy intent to purchase electronics and home entertainment products and services.

Source: Scarborough Prime Lingo.

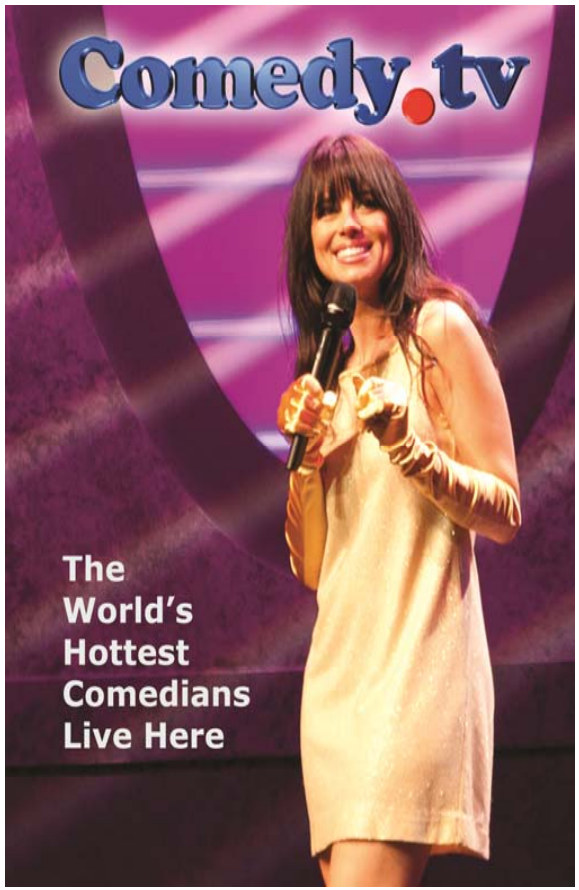
Comedy.tv

Unprecedented Access To Talent

Comedy.TV has already shot a 500+ comedians in HD, and has identified over 2,000 comedians to feature in future productions.

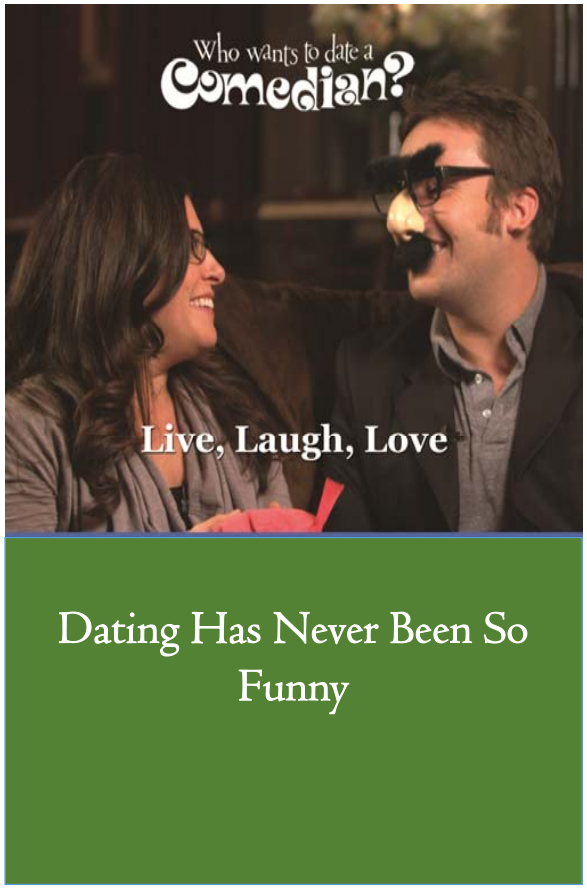
Comedy.tv

Original Stand Up, Talk Shows, And Dating Shows



Comedy.TV
Featuring the world's funniest stand ups

Comics Unleashed
The talk show where the biggest names in comedy hosted by Byron Allen



Who Wants To Date A Comedian?
The hottest new dating show

Comedy.tv

Original Sitcom – Mr. Box Office

The biggest movie star in the world is sentenced to teach for a year at South Central High School.

Bill Bellamy
Marcus Jackson

Jon Lovitz
Bobby Gold

Vivica A. Fox
Casandra Washington

Tim Meadows
Principal Martin

Gary Busey
John Anderson

Rick Fox
Andrew Thompson

Comedy.tv

Original Sitcom – The First Family

The First Family is a sitcom set in the most famous home in the world, the White House.

Christopher B. Duncan
President William Johnson

Kellita Smith
First Lady Katherine Johnson

Jack'ee Harry
Pauletta

Marla Gibbs
Grandma Eddy

John Witherspoon
Grandpa Alvin

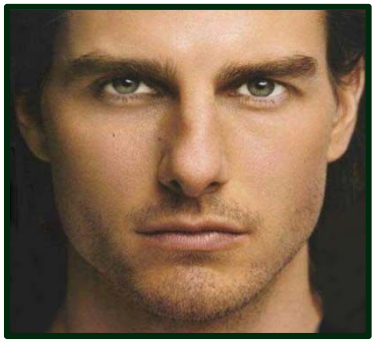
Gladys Knight
Grandma Carolyn

Comedy.tv


ES.TV
Your Ticket To The Red Carpet

There Is An Insatiable Appetite For Movie Stars And Entertainment News

- **ES.TV gives your subscribers unlimited access to the red carpet, breaking entertainment news, and behind-the-scenes of today's blockbusters with A-list stars.**


Tom Cruise


Julia Roberts


Denzel Washington


Cameron Diaz


Gabrielle Union


Johnny Depp


Salma Hayek


John Travolta

Celebrity And Entertainment Programming Offers Unique Opportunities

- ES.TV's core audience has broad appeal:
  - Core demo: 18-44.
  - Over indexes with multicultural audiences.
  - High income: $50K - $250K.
  - More likely to subscribe to cable & advanced services.

Race	Vertical	Index
Black / African American	14.3%	129
Asian	3.6%	112
Other – non-Hispanic	3.8%	114

Scarborough Prime Lingo. Respondents: 19,226.
Target: Cable networks/stations watched past 7 days: E!

Exclusive Original Entertainment Programming

ES.TV

- The daily celebrity magazine show featuring behind-the-scenes, up-close and personal interviews, and up to the minute entertainment news.

The Gossip Queens

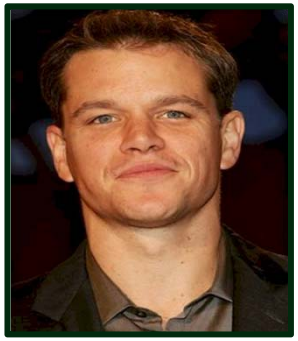
- A nightly gossip show hosted by comedians Loni Love, Bernadette Pauley, Alec Mapa and Michelle Collins.

Entertainers with Byron Allen

- Conversations with the biggest names in Hollywood.


Leonardo DiCaprio


Halle Berry


Matt Damon


Scarlett Johansson


MyDestination.tv

Escape And Indulge With MyDestination.TV

- My Destination.TV is your invitation to vacation retreats for couples or the whole family. Escape and indulge with amazing destinations all over the planet.
- Travel enthusiasts over index in the following categories:
  - Core demo: 25-54.
  - More likely to be married: 58.2%.
  - All high income categories $25K - $250K +.
  - Home ownership.
  - Advanced and bundled services.

Scarborough Prime Lingo. Respondents: 49,839.
Target: watched Travel Channel last week or 5+ domestic air trips or 3+ foreign trips past 3 years

MyDestination.tv

Amazing Estates And Breathtaking Resorts

Beautiful Homes & Great Estates

Beautiful Homes & Great Estates features fabulous homes and amazing estates from around the world. The show profiles the owners, architects and decorators as they share with us their passion for living life at its very best.

MyDestination.TV

MyDestination.TV is your invitation to the most exclusive vacation retreats around the world! We'll take you to luxury hotels and hideaways, and to the best in spa escapes.


Celebrate A Member Of The Family
Pets.tv

The First And Only 24-Hour Domestic Pet Network

- Pets.TV speaks to a passion that millions consider family.
- Programming that features a wide variety of household pets.
- Expert insights into pet care, pet health, and pet lifestyles.




More Than 54% Of U.S. Households Own A Pet

Pet ownership over indexes with younger demos and families:

- Core demo: 18-54.
- Income: $50,000 - $150,000.
- 58% of pet owners are married.
- Over index on advanced levels of education.
- Dual incomes and own their homes.
- Pet owners over index with satellite subscribers – an opportunity to pick up subscribers.
- Most pet owners represent more than three people in the household.
- Tech driven.
- More likely to buy advanced services.
- Pet owners do not use a cable provider for long distance, presenting an opportunity to market bundles.

Scarborough Prime Lingo
Total 18+, respondents 202,808

Pets.TV Original Series

Just Ask The Pet Vet

Just Ask The Pet Vet is the interactive program that provides viewers with the absolutely best advice from the experts.

Animal Control Patrol

Animal Control Patrol serves behind-the-scenes action with the government boards that save animals, and keep neighborhoods safe.

The Pet Chef

The Pet Chef dishes up nutritious and delicious food for your pets. Learn how to make your pet's life healthier and happier.

For The Love of Animals

For The Love of Animals highlights the diversely different ways that humans and animals coexist and interact; some are infectiously funny, others humanely heartwarming and all are inherently informative.

Pets.TV Original Series

The Pet Biz

- A look at the most successful and exotic pet shops in America. Find out from the pros the new toys, food, gadgets and healthcare options that are available for purchase at pet stores.

All About Dogs

- *All About Dogs* features our host and panel of experts interacting with everyday people who have a chance to show off their dogs and get advice from the experts on how to make their dog's life better.

All About Cats

- *All About Cats* features our host and panel of experts interacting with everyday people who have a chance to show off their cats and get advice from the experts on how to make their cat's life better.

A Day In The Life

- *A Day In The Life exposes viewers to a wide array of animals that people have at home. Experts deliver the do's and don'ts of pet care, and where to spend your dollars wisely on the "other" member of the family.*


RECIPE.TV
Spice Up Your Life

Your Private Lessons With The World's Greatest Chefs

- Recipe.TV is an interactive experience for viewers, taking you into the kitchens of the finest culinary artists.
- Renowned chefs select their signature recipes that both amaze and inspire.
- Entertainment Studios productions take you on location to the best resorts and restaurants all over the globe.



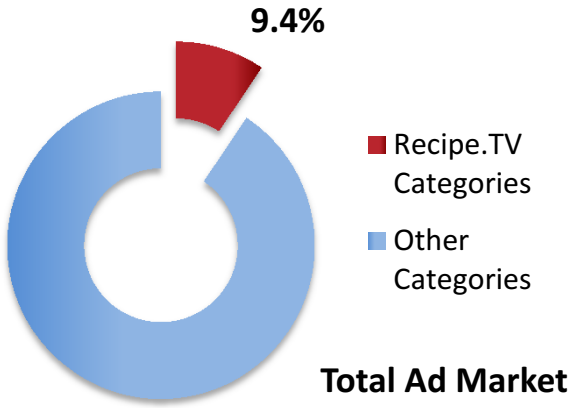
Recipe.TV Has A Recipe For Everyone

- Adults 35-64 make up a majority of the food programming viewership.
- Household income: $50,000 - $150,000+.
- Over-indexes with ethnic profiles.
- Core audience are home owners.
- Subscribe to cable and advanced video services.
- Over-index in TV consumption across most genres.
- Over-indexes with most cable internet service providers.

Wolfgang Puck

Recipe.TV Has A Recipe For Everyone

- Recipe.TV's content is directly tied to businesses that spend more than $13-billion annually on advertising.
  - Food and Beverage businesses spend $7.8-billion annually.
  - Restaurants spend $5.6-billion per year.
  - Combined, these categories make up 9.4% of the total advertising market.



- The entire food industry is a $1.25-trillion business.
  - $1.5-billion in restaurant sales per day.
  - Over $550-billion in super market revenues.
  - A retail business (cookware, books, etc.) approaching $500-million per year in sales.

Sources: WPP's TNS Media Intelligence(www.tns-mi .com). Spending based on TNS's 18 measured media. Numbers rounded. Categories are aggregated from TNS classifications by Ad Age Data Center; Plunkett Research; restaurant.org; US Census Bureau

RECIPE.TV

Networks For The Biggest Ad Categories

Entertainment Studios' networks and programming are designed for lucrative advertising sales categories that represent **$39 billion** per year in television ad spend.

- Automotive
- Entertainment
- Food & Restaurants
- Legal Services
- Pet Goods & Services
- Travel

Entertainment Studios' Networks Offer 100% Authentication Rights

- Deliver the ESN TV Everywhere experience.
- Utilize programming with no rights encumbrances to up-sell customers to new platform subscriptions.

Online

Mobile

On Demand

Social Networks

ENTERTAINMENTSTUDIOS A GLOBAL MEDIA COMPANY

Entertainment Studios Offers Video On Demand Content Across 30 Series

ENTERTAINMENT STUDIOS
A GLOBAL MEDIA COMPANY

Executive Summary

Your 360 Cross-Platform Revenue Generating Partner

- Unencumbered 360-degree distribution and licensing strategy for our distributor partners, including linear, video-on-demand, and TV Everywhere to reach your customers on all screens within your footprint.
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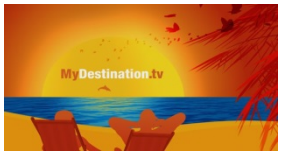
- Leverage ESN's library of over 5,000 hours of original programming.
- Capitalize on businesses that spend over $39-billion on media promoting categories our networks represent.



ESN
Entertainment Studios Networks

Technical Information

Galaxy 13
MUX MPEG 4
L-band FREQ 990MHz
Downlink FREQ 4160 MHz Vertical
Uplink FREQ 6385 MHz Horizontal
Data rate/symbol 30 Msyps
VCT 964
FEC 5/6
Polarity: Vertical
TR: 23C
Channels
1 – Justice Central
2 – Comedy.TV
3 – Recipe.TV
4 – Cars.TV
5 – Pets.TV
6 – My Destination.TV
7 – ES.TV

ESN is DVP-S2/8PSK MPEG 4 MUX on a Motorola Modular System

Equipment Options
Motorola DSR – 4410MD

Contact Encompass Digital Media
678.421.68729
altoc@encompass.tv

ESN Entertainment Studios Networks

Appendix E

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1981

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.