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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

NATIONAL ASSOCIATION OF AFRICAN-AMERICAN OWNED MEDIA, a California limited liability company; and ENTERTAINMENT STUDIOS NETWORKS, INC., a California corporation,

Plaintiffs,

v.

COMCAST CORPORATION, a Pennsylvania corporation; TIME WARNER CABLE INC., a Delaware corporation; and DOES 1 through 10, inclusive,

Defendants.

CASE NO. 2:15-cv-01239-TJH-MAN

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT BY DEFENDANT COMCAST CORPORATION

Judge: Hon. Terry J. Hatter, Jr.
Hearing Date: December 28, 2015
Time: UNDER SUBMISSION
Courtroom: 17

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INTRODUCTION

The First Amended Complaint filed by Plaintiffs Entertainment Studios Networks, Inc. ("ESN") and the National Association of African-American Owned Media ("NAAAOM") is virtually identical to the one that this Court already dismissed: it "fails to allege any plausible claim for relief." Dkt. 42 at 3. Rather than addressing the concerns raised by this Court and alleging *facts* to support their claim of race discrimination and demand for *twenty billion* dollars in damages, Plaintiffs continue to peddle the offensive and utterly implausible theory that Comcast conspired with respected civil rights organizations and federal officials to systematically discriminate against African Americans. FAC ¶¶ 28−39. Plaintiffs still allege no facts to support their allegations of a vast conspiracy. Instead they have doubled-down on ludicrous slander, and now boldly claim without any factual support that "Comcast devised a strategy to shut out African American–owned media companies" that has somehow "bamboozled President Obama and the federal government." FAC ¶ 3. Because Plaintiffs have failed to allege facts sufficient to state any plausible claim, this action should again be dismissed—this time with prejudice.

The facts that Plaintiffs *do* allege continue to tell the same story: ESN proposed its channels for carriage to Comcast, Comcast considered ESN and gave advice on how ESN could improve its proposal, but ultimately declined to carry ESN's channels, citing concerns over bandwidth and low demand for ESN's content. FAC ¶¶ 56–63. Thus, the FAC itself contains factual allegations that supply an obvious, non-discriminatory reason for Comcast's decision to decline carriage that has nothing to do with race. That is, Comcast did not believe that ESN's content was a good enough value for Comcast and its subscribers to justify the use of Comcast's limited video bandwidth to carry its channels—which is precisely the same judgment that Comcast makes every year to reject hundreds of other carriage applicants (owned by persons of all different races). *See, e.g.*, *In re Herring Broad., Inc.*, 24 F.C.C. Rcd. 12967, 12991 (2009) (noting that Comcast's practice is "to carry unaffiliated networks *if such*

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1 *carriages further Comcast's business interests*") (emphasis added). The fact that there
2 is an "'obvious alternative explanation'" for Comcast's supposedly wrongful
3 conduct—namely, that Comcast denied ESN carriage for legitimate business reasons—
4 is fatal to the Plaintiffs' latest complaint, because Plaintiffs have alleged no "facts
5 tending to exclude the possibility that the alternative explanation is true." *Eclectic*
6 *Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996–97 (9th Cir. 2014)
7 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009)).
8 Plaintiffs' other concessions make their claims of intentional race discrimination
9 all the more implausible. Plaintiffs expressly *admit* that Comcast *does* contract with
10 African American content providers, including the 100% African American owned
11 Africa Channel. *See* FAC ¶¶ 53, 75–76. Plaintiffs provide no legitimate reason to
12 ignore Comcast's carriage of the Africa Channel. Instead, they attack the other
13 African American content providers that have been added by Comcast as part of its
14 voluntary commitment to increase diverse programming under Comcast's
15 Memorandum of Understanding ("MOU") with leading civil rights organizations. The
16 attack is a peculiar one: that those African American companies are not "100% African
17 American owned" and thus do not meet Plaintiffs' idiosyncratic notions of racial
18 identity. *See* FAC ¶¶ 50–52. But Plaintiffs still allege no *facts* that would plausibly
19 explain why Comcast would welcome business partners owned or controlled
20 substantially by African Americans (and focused on African American programming),
21 but not "100%" by African Americans, if its carriage decisions were based on race
22 rather than legitimate business concerns.
23 Against this backdrop, the few new allegations alleged in Plaintiffs' FAC do not
24 make their underlying theory any more plausible. They allege, for example, that over
25 the course of "decades," FAC ¶ 81, some channels owned by African Americans were
26 denied carriage or received terms from Comcast that (Plaintiffs assert) were
27 commercially unfavorable, FAC ¶¶ 81–94. But Plaintiffs' conclusory allegations do
28 nothing to plausibly demonstrate that Comcast's treatment of those channels was based

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on race, rather than bona fide business considerations. Indeed, there is not a single fact alleged in the FAC that would plausibly establish that these channels were treated poorly in comparison to similarly situated channels owned by persons of other races. The remainder of Plaintiffs' new allegations consist of a handful of non-material details regarding ESN's negotiations with Comcast, and an expansion of their baseless attack on Comcast's efforts to promote diversity through the MOU.

In short, the FAC confirms that this case is nothing more than a publicity stunt. Plaintiffs have not come to court to pursue legitimate violations of the civil rights laws. Rather, Plaintiffs are using this Court's docket as a vehicle for ESN's owner, Byron Allen, to spew rhetoric against President Obama, respected civil rights organizations, and Allen's other perceived enemies. The Court has already given Plaintiffs a chance to salvage their suit by coming forth with facts sufficient to state a plausible claim. Their completely inadequate amendment confirms that Plaintiffs cannot allege any facts that could render their outlandish claims plausible. Further amendment would be futile, and this Court should dismiss this action with prejudice.

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SUMMARY OF ALLEGATIONS

As in the original complaint, Plaintiffs allege in the FAC that ESN—which Plaintiffs claim is "the only 100% African American-owned video programming producer and multi-channel operator/owner in the United States," FAC ¶ 2—"had multiple meetings for channel carriage with Comcast," FAC ¶ 56, but that Comcast "refuse[d] to launch [ESN's] channels" solely out of racial animus, FAC ¶ 58. The only additions in the FAC regarding ESN's interactions with Comcast are: (a) allegations of specific steps that Comcast suggested ESN take in order to "bolster its carriage request," FAC ¶¶ 59–60; and (b) the allegation that ESN "offered for Comcast to launch Justice Central *for free*," FAC ¶ 65.

The FAC repeats Plaintiffs' allegation that Comcast entered into a "sham" agreement to promote diversity (the Memorandum of Understanding) with the National Association for the Advancement of Colored People, the National Urban

1 League, Inc., and the National Action Network. FAC ¶¶ 30–39. Plaintiffs again claim
2 that "Comcast has used the MOU to facilitate its racist policies" by relegating African
3 American owned companies to a "separate, but not equal," process for seeking
4 carriage, FAC ¶¶ 44–49, 66–74, and that Comcast has failed to live up to its diversity
5 commitments under the MOU, FAC ¶¶ 40–41, 50–55.

6 Plaintiffs also allege that Comcast "has historically discriminated against
7 African American-owned media companies." FAC ¶ 81. Plaintiffs have added to the
8 FAC three purported examples of this supposed discrimination: the Black Family
9 Channel, FAC ¶¶ 82–88, the Historically Black Colleges and Universities Network
10 ("HBCU Network"), FAC ¶¶ 89–93, and the Soul Train Network, FAC ¶ 94.

11 **LEGAL STANDARDS**

12 A complaint must be dismissed under Rule 12(b)(6) unless it "contain[s]
13 sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on
14 its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.
15 Twombly*, 550 U.S. 544, 570 (2007)). The Court's first task on a motion to dismiss is
16 to separate the complaint's legal conclusions—which do not receive a presumption of
17 truth—from its factual allegations. *Id.* at 678–79.

18 Once the legal conclusions are set aside, a claim is facially plausible when the
19 facts to support it allow the court to reasonably infer that the defendant is liable for the
20 misconduct alleged. *Id.* at 678. Where there is an "'obvious alternative explanation'
21 for [the] defendant's behavior," the plaintiff has not plausibly alleged a violation of the
22 law. *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir.
23 2014) (quoting *Iqbal*, 556 U.S. at 682). Thus, as the Court previously explained, to
24 avoid dismissal a complaint must contain factual allegations establishing "more than a
25 possibility that the defendant has acted unlawfully," and "[w]here a complaint pleads
26 facts that are merely consistent with a defendant's liability, it stops short of the line
27 between possibility and plausibility of entitlement to relief." Dkt. 42 at 3 (citing *Iqbal*,
28 556 U.S. at 678; *Eclectic Properties*, 751 F.3d at 996).

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ARGUMENT

Rather than take seriously this Court's prior ruling that nothing in the original complaint stated a plausible claim for relief, Dkt. 42 at 3, Plaintiffs have virtually cut-and-pasted all of the same allegations into the FAC. In fact, Plaintiffs have recycled wholesale the same threadbare theories that this Court has already rejected, adding only minor, immaterial additions to the allegations that this Court previously found insufficient. And the bulk of the new allegations in the FAC—conclusory allegations of purported discrimination against other companies—fail to establish that Comcast has discriminated against *anyone*, let alone ESN specifically.

Plaintiffs have once again failed to provide a factual basis for their outlandish claims. At this point, it is clear they cannot do so. The Court should dismiss the FAC and not permit Plaintiffs to file another amended complaint.

A. Plaintiffs' Conclusory Allegations About Other Channels Have Nothing To Do With ESN And Do Not Provide Any Support For Plaintiffs' Claims

The primary difference between the FAC and Plaintiffs' original complaint is the addition of a series of conclusory allegations that Comcast discriminated against *other* channels with an African American identity at various, disparate times over "its 50+ years of operation": the Black Family Channel, HBCU Network, and the Soul Train Network. *See* FAC ¶¶ 81–94. But these allegations add nothing to Plaintiffs' still-unsupported claim that Comcast engaged in a vast conspiracy specifically designed to discriminate against ESN. Indeed, there is nothing in the FAC connecting Comcast's alleged interactions with these other companies, which are not parties to this lawsuit, to its carriage negotiations with ESN.

Even accepting as true every factual allegation in these paragraphs—but setting aside the conclusory labels of discrimination and disparate treatment, as *Iqbal* requires, *see* 556 U.S. at 679—there are no *facts* alleged that suggest in any way that Comcast discriminated against *any* of these companies. And from the few facts that Plaintiffs

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1 *do* allege, the far more plausible inference in each case is that Comcast made
2 legitimate business decisions regarding its channel lineup, as it did with ESN.
3 ***Black Family Channel.*** Plaintiffs allege that Comcast carried the Black Family
4 Channel from "1999 until 2002." FAC ¶ 84. At that point, Comcast allegedly told the
5 channel "that to guarantee continued carriage," it "would need to give Comcast a
6 significant ownership interest in the company," but "did not require similarly situated,
7 white-owned networks" to do likewise. FAC ¶¶ 84, 86. When Black Family Channel
8 supposedly refused, Plaintiffs say that Comcast "began retaliating and discriminating
9 against" the channel by limiting its expansion in new markets, curtailing its
10 "advertising opportunities," and downgrading its "program tier" and "channel
11 positioning"—all resulting in the channel's "demise." FAC ¶¶ 85, 87.
12 In the first place, it is entirely implausible that Comcast could make such a
13 demand on a small network. Both federal law and FCC regulations provide that a
14 cable operator like Comcast "shall [not] require a financial interest in any program
15 service as a condition for carriage[.]" 47 U.S.C. § 536(a)(1); *see also* 47 C.F.R.
16 § 76.1301(a). If Comcast had made the sort of demand that Plaintiffs allege, then
17 surely the Black Family Channel would have invoked its right to report Comcast to the
18 FCC. *See* 47 C.F.R. § 76.1302. Notably, Plaintiffs do not allege that any such
19 complaint was ever brought.
20 But even accepting, at this stage, Plaintiffs' allegation that Comcast demanded
21 an ownership interest in exchange for continued carriage, that does not support an
22 inference of intentional *race* discrimination. Plaintiffs' conclusory statement that
23 Comcast treated Black Family Channel differently from "similarly situated, white-
24 owned networks" is entitled to no weight because disparate treatment is a *legal*
25 *conclusion* that is an element of Plaintiffs' cause of action under 42 U.S.C. § 1981.
26 *See Iqbal*, 556 U.S. at 639. Just like Plaintiffs' allegations about ESN, the FAC pleads
27 nothing about which "white owned" channels supposedly were "similarly situated,"
28 and in what respects.

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When stripped of Plaintiffs' own self-serving labels, the facts alleged in these paragraphs are obviously explained by the more likely conclusion that Black Family Channel's "demise" was the result of poor performance. In which case, Comcast's alleged actions—limited expansion, downgraded program tier, and so forth—were a perfectly rational business response to the channel's troubles.

HBCU Network. Plaintiffs allege that Comcast was engaged in negotiations over a carriage agreement with HBCU Network and was "moving forward to finalize the terms" of a deal when Comcast "pulled the rug out from under the network," declined carriage and told the Network to "proceed via the MOU Process." FAC ¶¶ 91, 92. Comcast allegedly "turned them away completely" at a future unspecified date. FAC ¶ 93.

Plaintiffs hope to draw the inference that Comcast was willing to consider HBCU Network for carriage, as an African American owned company, *only* to fulfill the diverse programming commitments in the MOU. But this is precisely the same implausible story that Plaintiffs told about ESN, only with a different protagonist and a different metaphor of choice ("pull the rug out" versus "whack-a-mole"). And the story gets no better by changing the names of the participants, because the MOU itself confirms that it is a *leg up* for minority-owned networks that Comcast might not otherwise carry because of bandwidth limitations and undemonstrated or limited demand—not a limitation on carriage. Just as with the already dismissed claim by ESN, Plaintiffs' new allegation is merely that Comcast considered HBCU Network for carriage, but ultimately passed, and then provided HBCU Network with an *additional* opportunity to be considered in light of the MOU, though ultimately did not select it. While Plaintiffs seem determined to smear diversity outreach efforts like the MOU and the companies and civil rights organizations that have made those efforts possible, this Court has already determined that Plaintiffs' perverse and fevered allegations impugning those efforts do not support a plausible inference of discrimination.

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Soul Train Network. Finally, Plaintiffs allege that, at an unspecified date, Comcast "refused to do business with Don Cornelius Productions, a 100% African American-owned media company that wanted to launch a Soul Train network." FAC ¶ 94. That is literally everything that Plaintiffs have to say about the putative Soul Train network. They say only that Don Cornelius Productions *wanted* to launch Soul Train network; Plaintiffs never allege that Don Cornelius Productions brought that idea into reality or pitched this channel to Comcast. Plaintiffs disclose no facts about when, why, or how Comcast "refused" to do business with this company—just that, at some point, it happened. Suffice it to say that this fails to allege any conceivably pertinent facts, much less raise a plausible inference of discrimination.

B. The Remainder Of The First Amended Complaint Reiterates The Same Unsupported Theories That This Court Has Already Rejected

Aside from conclusory allegations of discrimination regarding companies not parties to this suit and that have nothing to do with ESN, the FAC presents exactly the same claim as the original complaint: Plaintiffs allege that Comcast conspired with civil rights groups and public officials in order to deny television carriage to ESN on the basis of race, in violation of 42 U.S.C. § 1981. FAC ¶¶ 3, 99. Because Plaintiffs have added no material factual allegations in the FAC to support this claim, they have, once again, failed to plead the requisite facts to state a claim under § 1981.

Section 1981(a) provides 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 . . . as is enjoyed by white citizens[.]" The statute "reaches only purposeful discrimination." *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 389 (1982); *see also Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 536 (9th Cir. 1982). A plaintiff cannot state a claim under § 1981 by merely alleging that the defendant uses a policy that has a disparate racial impact, *General Building Contractors*, 458 U.S. at 390; for example, by drawing inferences from the amount of money that allegedly goes to "100% African American-owned channels,"

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FAC ¶ 24. Instead, the plaintiff must plead *facts*—not mere legal conclusions—that are "sufficient to plausibly suggest [the defendants'] discriminatory state of mind." *Iqbal*, 556 U.S. at 683.

Plaintiffs again claim that the multiple reasons Comcast gave for declining to carry ESN's channels were "phony excuses." FAC ¶ 61. Plaintiffs also reprise their allegation that the MOU between Comcast and civil rights organizations, in which Comcast agreed voluntarily to implement certain diversity initiatives, including increased carriage of diverse programming networks, was actually a "smokescreen" that gave Comcast cover to discriminate on the basis of race. FAC ¶ 34. While the MOU on its face explains Comcast's efforts to *increase* opportunities for African Americans by giving African American owned and operated networks increased opportunities for carriage, Plaintiffs again deride Comcast as "relegating" ESN and other African American owned content-providers to a "'Jim Crow' process." FAC ¶ 70. Simply to describe these allegations—which the Court has already considered—is nearly sufficient to demonstrate their implausibility, which is why this Court correctly dismissed Plaintiffs' original complaint for failure to state a plausible claim to relief.

Indeed, Plaintiffs' FAC—like their original complaint—is strikingly similar to the complaint that the Supreme Court rejected in *Iqbal*. Plaintiffs have offered little more than "[t]hreadbare recitals of the elements" of their § 1981 action, "supported by mere conclusory statements" that Comcast denied carriage based on race and gave preferential treatment to similarly situated applicants of other races. *Iqbal*, 556 U.S. at 678. Setting aside Plaintiffs' legal conclusions, the facts alleged do not raise a plausible inference of discrimination because they fail to exclude an "'obvious alternative explanation,'" *id.* at 682 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567 (2007))—namely that Comcast exercised its business judgment to determine that ESN's channels lacked sufficient consumer interest to warrant the costs in both dollars and bandwidth that those channels would impose on Comcast.

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1 By reiterating in the FAC the same conclusory assertions, the same twisted
2 reading of the MOU, and the same insufficient factual allegations, Plaintiffs have
3 given the Court more than enough reason to dismiss this case with prejudice. *See*
4 *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th Cir. 2004) ("Where the
5 plaintiff has previously filed an amended complaint, . . . the district court's discretion
6 to deny leave to amend is 'particularly broad.'") (citation omitted); *Marable v.*
7 *Nitchman*, 511 F.3d 924, 930 n.11 (9th Cir. 2007) (law of the case doctrine generally
8 bars reconsideration of "issue decided explicitly or by necessary implication . . . in the
9 identical case"); *Rosas v. Carnegie Mortg., LLC*, No. 11-7692, 2013 WL 791024, at *6
10 (C.D. Cal. Feb. 25, 2013) ("[P]laintiffs simply reassert unmodified
11 allegations . . . . [T]he Court previously found that these same allegations fail to state a
12 claim . . . . [T]he court dismisses these claims with prejudice.").

13 **1. As With Plaintiffs' Original Complaint, Conclusory Assertions of**
14 **Discrimination Must Be Disregarded**

15 At *Iqbal*'s first step, this Court identifies the "[t]hreadbare recitals of the
16 elements of a cause of action" and "mere conclusory statements" that "are not entitled
17 to the assumption of truth." 556 U.S. at 678–79. Here, Plaintiffs' FAC is once again
18 littered with conclusory statements that cannot be presumed true and that the Court
19 must disregard in assessing whether Plaintiffs have stated a plausible claim.

20 In particular, the FAC's repeated assertion that "Comcast has discriminated
21 against [ESN]," *e.g.*, FAC ¶ 56, is exactly the sort of conclusory assertion the Supreme
22 Court has held is not entitled to a presumption of truth, *see Iqbal*, 556 U.S. at 680–81.
23 Nor should the Court accept Plaintiffs' unfounded opinion that, because ESN's
24 channels have allegedly "achieved success," Comcast must have declined to purchase
25 them because of race discrimination and for no other reason. FAC ¶ 64; *see Amobi v.*
26 *Ariz. Bd. of Regents*, No. 10-1561, 2011 WL 308466, at *4 (D. Ariz. Jan. 28, 2011)
27 (dismissing a discrimination case in the analogous Title VII context because the
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plaintiff's "allegation that she was and is fully qualified for promotion and tenure is conclusory and not entitled to be assumed true").

Plaintiffs continue to assert, in conclusory fashion, that Comcast treats 100% African American owned companies differently from "similarly situated white-owned television channels." *E.g.*, FAC ¶ 98; *see also* FAC ¶¶ 61, 62. But leaving aside whether 100% African American owned companies are even a specifically protected class distinct from African American owned companies generally, Plaintiffs continue to provide no factual allegations regarding how, exactly, Comcast discriminates against this class, such as by identifying any of the supposedly similarly situated non-diverse channels or their supposedly preferable treatment. Nor do Plaintiffs provide any factual allegations that would establish that these unidentified channels are actually similarly situated to ESN in any relevant respect, such as in the nature of programming, target audience, ratings and consumer interest, or the "look and feel" of the network. *See Herring Broad., Inc. v. FCC*, 515 F. App'x 655, 656–57 (9th Cir. 2013).

In short, Plaintiffs' repeated failure to allege facts in support of their conclusory assertions of intentional race discrimination once again dooms the FAC, just as it doomed the original complaint. *See Ghosh v. Uniti Bank*, 566 F. App'x 596, 597 (9th Cir. 2014) (dismissing complaint where plaintiff "failed to allege any facts that support its contention that [the defendant] treated [the plaintiff] differently than similarly-situated mortgagees on account of [the plaintiff's] racial identity."); *Han v. Univ. of Dayton*, 541 F. App'x 622, 627 (6th Cir. 2013) (dismissing complaint where plaintiff "offered no specifics regarding who th[e] [similarly situated] employees were or how they were treated differently").

2. The Memorandum Of Understanding, On Its Face, Once Again Undermines Plaintiffs' Allegation Of Race Discrimination

Plaintiffs also recycle in the FAC their grossly distorted reading of the MOU. As before, this Court may consider the MOU because it is incorporated into the FAC

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1 by reference. *See, e.g.*, *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1160 (9th Cir.
2 2012). And on its face, the MOU makes clear that it is designed to *benefit* African
3 American programmers by providing additional opportunities to obtain carriage on
4 Comcast's cable systems. Specifically, Comcast "committed to add at least ten (10)
5 new independently-owned-and-operated programming services over the next eight (8)
6 years" and guaranteed that "[f]our (4) of the networks will be linear video
7 programming services in which African Americans have a majority or substantial
8 ownership interest." Dkt. 29-3, App'x A at 9. These networks, moreover, are to "be
9 added on commercially comparable and competitive terms to the carriage of the
10 services by other distributors." *Id.*

11 The MOU also established other diversity goals for Comcast, including creation
12 of a "National African American Advisory Council" to "provide advice to the senior
13 executive teams at Comcast and [NBCUniversal] regarding the companies'
14 development and implementation of the master strategic plan to improve diversity
15 practices at Comcast." *Id.* at 3. With respect to workforce diversity, Comcast agreed
16 to "actively take steps to recruit African Americans in its workforce," such as
17 "requiring a diverse pool of candidates for all hires at the vice president level and
18 above." *Id.* at 5–6. And on procurement, Comcast agreed in the MOU to "commit at
19 least an additional $7 million on advertising with minority-owned media," to work to
20 "identify opportunities for spending with African American suppliers" in a variety of
21 areas, ranging from construction to financial services, and to take additional steps to
22 "enhance the utilization of African American owned enterprises." *Id.* at 8.

23 Contrary to Plaintiffs' allegations, the MOU guaranteed to networks with
24 majority or substantial African American ownership an *additional* avenue to obtain
25 carriage. In no way did it exclude those applicants from the "normal" contracting
26 process. The MOU on its face establishes a contracting opportunity for African
27 American content that might not be selected in the normal course given constrained
28 bandwidth resources and the content's relatively unproven or limited demand—not a

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limitation on such carriage. Because the text of the MOU itself plainly contradicts Plaintiffs' attempted distortions, this Court need not accept those allegations as true. *See Gonzalez v. Planned Parenthood of L.A.*, 759 F.3d 1112, 1115 (9th Cir. 2014) ("'[I]f those documents [incorporated by reference into the complaint] conflict with the allegations in the complaint, we need not accept those allegations as true.'" (quoting *Slater v. A.G. Edwards & Sons, Inc.*, 719 F.3d 1190, 1196 (10th Cir. 2013) (alteration in original))).

In short, Plaintiffs' continued distortion of the MOU in the FAC—which this Court has already once rejected—does nothing to establish a plausible claim that Comcast discriminated against ESN on the basis of race.

3. Plaintiffs' Repeated Allegations About Comcast's Implementation Of The MOU Remain Irrelevant

Plaintiffs also continue to assert in conclusory fashion that Comcast has not lived up to various diversity initiatives from the MOU. *E.g.*, FAC ¶ 44. The Court previously deemed that allegation to be insufficient. Now Plaintiffs allege that Comcast has also misrepresented its progress on those initiatives in "Annual Compliance Reports" that are submitted to the FCC. *See* FAC ¶ 40. But merely calling Comcast a "liar" does not somehow lessen Plaintiffs' burden to come forward with facts substantiating their allegations of race discrimination. These types of conclusory allegations carry no presumption of truth. *See Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1044 (9th Cir. 2010) (allegations that defendant "misrepresented its intentions in the merger to the FCC and customers, and then misled customers concerning the quality of the new service" were mere "conclusory allegations about fraud and the unfair treatment" of customers). In any event, even if these allegations were accepted as true, they have nothing to do with ESN's requests for carriage of its programming and thus do nothing to establish a plausible claim of racial discrimination. Indeed, Plaintiffs do not plead any facts as to how Comcast's

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progress on its diversity goals is connected in any way to their purported injury. These conclusory allegations are thus wholly irrelevant to Plaintiffs' claims.

More fundamentally, the FAC's allegation that Comcast has not fulfilled its commitment to increase diverse programming rests entirely on Plaintiffs' idiosyncratic view of racial identity. Plaintiffs concede, as they must, that Comcast *has* launched two new African American owned networks, just as Comcast committed to doing in the MOU. FAC ¶¶ 50–53. Plaintiffs merely rehash their offensive (and false) allegations that "[t]hese networks give African American celebrities token ownership interests," FAC ¶ 52, and that Comcast refuses "to do business with *truly* African American-owned media companies," *e.g.*, FAC ¶ 3 (emphasis added), which is to say "100% African American-owned" media companies, *e.g.*, FAC ¶ 80. Ironically, Plaintiffs purport to support that contention in part by alleging that one of these channels is "owned by Highbridge Capital, which is run by . . . Payne Brown"—an African American man. FAC ¶ 51. Further, Plaintiffs again concede that Comcast carries the Africa Channel, which is owned 100% by African Americans. *See* FAC ¶¶ 53, 75–76. More fundamentally, "100% African American owned" is not a racial category that is known to either the law or the television industry.

Indeed, the FAC touts ESN's status as a "certified" "bona fide Minority Business Enterprise" as defined by the "National Minority Supplier Development Council, Inc.," FAC ¶ 14, even though the Council defines that status as a company with at least 51% diverse ownership and control. *See* Ex. 2 to October 21, 2015 Decl. of Douglas Fuchs (Certification Criteria, Nat'l Minority Supplier Dev. Council, *available at* http://www.nmsdc.org/mbes/mbe-certification). The Court may review these certification criteria because Plaintiffs incorporated them by reference into the FAC. *See Davis*, 691 F.3d at 1160. Apart from being offensive, Plaintiffs' emphasis on 100% racial purity is entirely contrived for litigation.

Plaintiffs also assert that the Diversity Advisory Councils that were established in the MOU in order to advise Comcast regarding its diversity initiatives are "shams."

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1 FAC ¶ 41. But this is just another variation on the same theme—unchanged since the
2 original complaint—that Comcast has not met its voluntary MOU obligations. Even if
3 it were true that Comcast has not made sufficient progress on its efforts to build a more
4 diverse company and programming lineup, that would not remotely suggest that
5 Comcast actively discriminated against ESN on the basis of race. In any event,
6 Plaintiffs' allegation is contradicted by the very FCC compliance reports that Plaintiffs
7 mention, which this Court may consider because they are incorporated by reference.
8 *See Davis*, 691 F.3d at 1160. The 2013 report, for example, states clearly that the
9 councils "pla[y] a significant role in advising on the Company's diversity inclusion
10 efforts" and are "actively engaged" in their work. Ex. 1 to October 21, 2015 Decl. of
11 Douglas Fuchs, at 23. This Court, therefore, should not simply accept Plaintiffs'
12 assertions about the work of the Diversity Advisory Councils. *See Gonzalez*, 759 F.3d
13 at 1115.

14 **4. As With The Original Complaint, The FAC Itself Reveals An**
15 **Obvious, Non-Discriminatory Reason For Comcast's Decisions**

16 When Plaintiffs' conclusory assertions and attempted distortions are swept
17 aside, their remaining factual allegations give rise to the same plausible inference that
18 doomed Plaintiffs' original complaint: Comcast exercised its business and editorial
19 discretion in declining to carry ESN's programming. As in their original complaint,
20 the FAC contains no facts "tending to exclude the possibility that th[is] alternative
21 explanation is true." *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th
22 Cir. 2013). To the contrary, their allegations (which are substantially similar to those
23 in Plaintiffs' original complaint) once again *confirm* the existence of an obvious,
24 nondiscriminatory explanation for Comcast's actions.

25 Cable operators such as Comcast have limited bandwidth and thus consider a
26 range of "non-discriminatory business reasons" in making carriage decisions,
27 including their evaluation of the proposed programming, whether their bandwidth
28 could be put to better use (including by saving it for future networks), whether the

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1 channel is an established brand with proven appeal to subscribers, and whether the
2 terms offered by the channel are favorable. *In re Herring Broad.*, 26 F.C.C. Rcd.
3 8971, 8976 (2011) (internal quotation marks omitted). Cable operators also have
4 editorial discretion, protected by the First Amendment, to determine what
5 programming to carry on their networks. *See Turner Broad. Sys., Inc. v. FCC*, 512
6 U.S. 622, 636 (1994).

7 Here, Plaintiffs' own allegations demonstrate wholly plausible business reasons
8 behind Comcast's decision not to carry ESN's channels. By Plaintiffs' own admission,
9 Comcast told ESN that it did not want to devote its limited bandwidth to ESN's seven
10 channels in high-definition (which requires even more bandwidth), that Comcast was
11 more interested in expanding its programming with "news and sports channels," and
12 that there was a lack of "demand" for ESN's channels. FAC ¶¶ 61–63. All of these
13 are perfectly legitimate and plausible business reasons that appear on the face of the
14 FAC. And yet, Plaintiffs again provide no facts to exclude those plausible business
15 reasons: they respond only that Comcast has added *some* other (unspecified) channels,
16 *some* of which were not focused on news and sports, and that ESN has had significant
17 "ratings growth" during "the short time it has been on the air." FAC ¶¶ 61–64. But
18 those allegations do nothing to undermine Comcast's explanations for its decision not
19 to contract with ESN, much less demonstrate that Comcast was *intentionally*
20 discriminating against ESN on the basis of race. Comcast did not say that it would not
21 add *any* new channels, or *any* new non sport-or-news channels. Instead, the obvious
22 inference from the FAC is that Comcast had limited bandwidth and different priorities
23 that ESN did not fit. And just like the original complaint, the FAC's statements about
24 ESN's *growth*, even if true, do not show that ESN's channels had consumer demand
25 that was competitive when compared to other applicants to Comcast for channel
26 carriage.

27 Plaintiffs again allege that Comcast had "multiple meetings" with ESN, and now
28 claim that Comcast asked ESN to "garner support from Comcast's Division offices in

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order to bolster its carriage request," but ultimately advised that ESN "would have to wait to be part of the 'next round of [MOU] considerations.'" FAC ¶¶ 56–60, 68. But these allegations *undermine*, rather than support, Plaintiffs contention that Comcast discriminated based on race. Plaintiffs have never explained why Comcast would go to the trouble to conduct multiple meetings with ESN and give advice about ways that ESN could "bolster" its carriage application if Comcast never had any intention to make a deal. The far more plausible inference is that Comcast seriously considered ESN for carriage, but ultimately declined to carry ESN's channels for business reasons, and then offered ESN an *additional* opportunity to seek carriage through the process for minority applicants that was created in the MOU. None of Plaintiffs' other allegations "ten[ds] to exclude" this obvious, non-discriminatory explanation. *Century Aluminum*, 729 F.3d at 1108. Indeed, by pleading that Comcast spent so much time working with ESN before deciding to go in a different direction, *see* FAC ¶¶ 56–60, Plaintiffs' own allegations establish that Comcast makes carriage decisions based on business considerations, not race.

Nor can Plaintiffs infer discrimination from their new allegation that ESN offered for Comcast to launch one of its channels (Justice Central) for free. *See* FAC ¶ 65. Comcast has limited bandwidth, and cannot carry every channel that applies for carriage even when a channel is offered for "free." Every channel that goes on air—especially the high-definition channels that ESN produces—uses up bandwidth, which must either be taken from existing channels or that could be saved for other new channels with higher demand. *See, e.g.*, *TCR Sports Broad. Holding, LLC v. FCC*, 679 F.3d 269, 275–76 (4th Cir. 2012) (concluding that legitimate "business justifications for denying . . . carriage" included the "opportunity costs associated with . . . carriage," such as the potential that adding a network would require a cable company to "delete existing programming services"). Plaintiffs do not and cannot allege that Comcast accepts every channel offered to it for "free" or that Comcast has unlimited bandwidth.

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1 In short, Comcast's decision not to carry ESN's channels is explained entirely
2 by Comcast's own business interests. Plaintiffs' handful of additional allegations
3 about ESN's negotiations with Comcast do not come close to making it plausible that
4 ESN was a victim of race discrimination. Zero plus zero is still zero.

5 **C. Even If Plaintiffs Had Alleged Facts Sufficient To State A Plausible Claim,**
6 **Such A Claim Would Be Precluded By The First Amendment**

7 As demonstrated above, Plaintiffs have again failed to allege any plausible claim
8 and for that reason alone the Court should dismiss the FAC with prejudice. But even
9 assuming that Plaintiffs could state a plausible claim, that claim would fail as a matter
10 of law because Plaintiffs are seeking through this action to regulate Comcast's First
11 Amendment right to exercise its editorial discretion to select which channels to
12 transmit to its subscribers. "Cable programmers and cable operators engage in and
13 transmit speech, and they are entitled to the protection of the speech and press
14 provisions of the First Amendment." *Turner*, 512 U.S. at 636; *see also Comcast Cable*
15 *Commc'ns, LLC v. FCC*, 717 F.3d 982, 993 (D.C. Cir. 2013) (Kavanaugh, J.,
16 concurring) ("Just as a newspaper exercises editorial discretion over which articles to
17 run, a video programming distributor exercises editorial discretion over which video
18 programming networks to carry and at what level of carriage."). Plaintiffs'
19 insufficiently pleaded claim is, at its core, an attempt to have this Court impose
20 liability on Comcast for exercising its First Amendment right to select which content to
21 transmit to its subscribers. Accordingly, dismissal with prejudice is required for this
22 additional reason. *See Claybrooks v. Am. Broad. Cos.*, 898 F. Supp. 2d 986 (M.D.
23 Tenn. 2012) (dismissing § 1981 claim on First Amendment grounds).

24 **CONCLUSION**

25 This Court has already granted Plaintiffs an opportunity to amend their
26 complaint. Given Plaintiffs' approach in the FAC, it is clear that Plaintiffs cannot
27 plead any facts that would render their allegations plausible. Thus, any further
28

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amendment would be futile. This Court should dismiss Plaintiffs' FAC with prejudice for failure to state a claim to relief.

DATE: October 21, 2015

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