

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
Central District of California
Western Division

NATIONAL ASSOCIATION OF
AFRICAN-AMERICAN OWNED
MEDIA, *et al.*,

CV 15-01239 TJH (MANx)

Plaintiffs,

v.

Order

COMCAST CORPORATION, *et al.*,

Defendants.

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

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

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

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

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

19 Second, assuming the veracity of well-pled factual allegations, the Court must
20 determine whether those allegations plausibly give rise to an entitlement to relief.
21 *Iqbal*, 556 U.S. at 678. When evaluating plausibility, the Court, also, must consider
22 obvious alternative explanations for a defendant's behavior. *See Eclectic Props. East,*
23 *LLC.*, 751 F.3d at 996. A complaint "stops short of the line between possibility and
24 plausibility" if it merely pleads facts that are consistent with both the defendant's
25 liability and the defendant's competing explanation. *Eclectic Props. East, LLC.*, 751
26 F.3d at 996. When, as here, the Court is faced with two mutually exclusive possible
27 explanations, the complaint must go further and plead facts tending to exclude the
28 possibility that the alternative explanation is true. *In re Century Aluminum Co. Secs.*

1 *Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013).

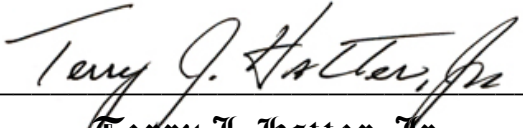
2 Here, Comcast argued that it had legitimate business reasons for denying Plaintiff
3 Entertainment Studios Network [“ESN”] carriage, namely, lack of demand for ESN
4 programming, and the bandwidth costs associated with carrying ESN’s channels. ESN
5 presented the ratings growth of one of its channels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

14 Therefore, Plaintiffs have not sufficiently pled facts that make a plausible claim
15 for relief. Accordingly, this case will be dismissed with leave to amend one last time.
16 If Plaintiffs file a second amended complaint with pleading deficiencies, this case will
17 then be dismissed with prejudice. *See McGlinchy v. Shell Chemical Co.*, 845 F.2d 802
18 (9th Cir. 1988).

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

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

22
23 Date: May 10, 2016

24
25 
26 **Terry J. Hatter, Jr.**
27 **Senior United States District Judge**
28