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May 20, 2016

Via FedEx Overnight Mail

Irene Kim Asbury, Secretary
Board of Public Utilities
44 South Clinton Avenue
3rd Floor, Suite 314
Trenton, NJ 08625

Re: In the Matter of the Petition of Time Warner Cable Inc., Charter Communications, Inc. and Time Warner Cable New York City LLC, for Approval of the Transfer of Control of Time Warner Cable New York City LLC and Approval of Transaction Financing Docket No. CM15070770; and

In the Matter of the Petition of Charter Communications, Inc., and Time Warner Cable Inc., for Approval of the Transfer of Control of Time Warner Cable Information Services (New Jersey), LLC and the Petition of Time Warner Cable Information Services (New Jersey), LLC for Approval of Transaction Financing Docket No. TM15070772

Our File No. 41141.1000

Dear Secretary Asbury:

We write on behalf of the Joint Petitioners, Time Warner Cable Inc., Charter Communications, Inc., Time Warner Cable New York City LLC, and Time Warner Cable Information Services (New Jersey), LLC (hereinafter, collectively, "Joint Petitioners"), with regard to the above-referenced matters.

We are in receipt of a copy of your letter dated May 18, 2016, to Rocky L. Peterson, Esq., with regard to an application filed with the Board of Public Utilities ("Board") by the National Association of African American-Owned Media ("NAAAOM") and Entertainment Studios, Inc. ("ESI"), in which NAAAOM and ESI seek a stay of the Board's Order dated March 31, 2016, in these matters. Although NAAAOM's and ESI's application was dated May 4, 2016, you advised

Case Mgmt
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that it was not filed with the Board until May 12, 2016. Accordingly, you further advised that responding parties shall be entitled to file a response with the Board by May 23, 2016.

On the belief that NAAAOM's and ESI's application had been filed with the Board on May 4, 2016, the Joint Petitioners filed a Joint Opposition to NAAAOM's and ESI's Request for a Stay with the Board on May 13, 2016. The Joint Petitioners remain opposed to the grant of the relief requested by NAAAOM and ESI and accordingly, pursuant to your May 18, 2016 letter, filed the within Joint Opposition to NAAAOM's and ESI's Request for a Stay. The enclosed Joint Opposition is identical to that filed on May 13, 2016.

It would be appreciated if you would kindly date stamp the extra copy of this letter and the Joint Opposition "FILED" and return same to our office in the self-addressed stamped envelope provided herein.

I trust the foregoing will prove satisfactory. Needless to say, however, should any questions arise, or should you require additional information, please do not hesitate to contact me.

Very truly yours,

Dennis Linken /dp

Dennis C. Linken
For the Firm

DCL/dp

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BEFORE THE STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

In the Matter of the Verified Petitions of Charter Communications, Inc. and Time Warner Cable Inc. for Approval of the Transfer of Control of Time Warner Cable Information Services (NJ), LLC and for Approval of Transaction Financing, and Time Warner Cable Inc.; Charter Communications, Inc.; and Time Warner Cable New York City LLC for Approval of the Transfer of Control of Time Warner Cable New York City LLC and Approval of Transaction Financing.	)	BPU Docket Nos.: TM15070772 CM15070770

JOINT OPPOSITION TO NAAAOM'S AND ESI'S REQUEST FOR A STAY

Charter Communications, Inc. ("Charter"), Time Warner Cable Inc. ("TWC"), Time Warner Cable New York City, LLC ("TWCNYC") and Time Warner Cable Information Services (NJ), LLC ("TWCIS") (collectively, "Joint Respondents") respectfully respond to the request dated May 4, 2016, filed by the National Association of African American Owned Media ("NAAAOM") and Entertainment Studios, Inc. ("ESI"), that the Board of Public Utilities ("Board") "stay the implementation of the merger" between Charter and TWC. *See* Letter and Brief from Rocky L. Peterson to Board (May 4, 2016) ("Request to Stay"). For the reasons below, the Board should deny the Request to Stay.

SUMMARY OF RELEVANT PROCEDURAL HISTORY

On July 2, 2015, Joint Respondents filed verified petitions with the Board seeking approval for Charter to acquire control of TWCNYC and TWCIS and approval of financing related to the transfers of control (the "Transactions"). Discovery commenced after submission of the petitions, and the New Jersey Division of Rate Counsel submitted comments to the Board on December 7, 2015, recommending approval of the Transactions, with conditions. On February 22, 2016, after extensive negotiations, Joint Respondents, Rate Counsel, and the Board Staff entered into a comprehensive stipulation whereby the parties agreed to recommend that the Board approve the Transactions, subject to certain conditions. The Board formally approved the petitions by Order dated March 31, 2016, effective April 1, 2016. *See* Order Approving Stipulation of Settlement, Docket Nos. CM15070770 & TM15070772 (Mar. 31, 2016) ("Order"). In its Order, the Board concluded that "positive benefits will flow to customers and that the Transaction will strengthen [the companies'] competitive posture in the telecommunications market due to their access to additional resources." Order at 13.

At no point in these proceedings did NAAAOM or ESI participate in any respect nor did they even attempt to do so. Rather, on May 4, 2016, more than 10 months after these proceedings were commenced, and more than a month after the Board issued its Order approving the Transactions, NAAAOM and ESI filed the Request to Stay, arguing that the merger is "not in the public interest" because it would "provide Charter with the ability and incentive to cause harm to and discriminate against independent programmers." Request to Stay at 3. At the same time they filed their request with the Board, NAAAOM and ESI also filed an Emergent Application with the Superior Court of New Jersey, Appellate Division. The Appellate Division *sua sponte* denied the Emergent Application one day later on May 5, 2016. *See* Ex. A.

ARGUMENT

The Board should deny the Request to Stay because (1) NAAAOM and ESI have no standing to raise their claims because they never bothered to become parties or intervenors in this proceeding; (2) their motion is barred under the Board's rules; (3) in any event, the claims are barred by laches; and (4) NAAAOM and ESI satisfy *none* of the requirements for obtaining injunctive relief.

A. NAAAOM and ESI Have No Standing To Seek A Stay.

As a threshold matter, the Board should deny the Request to Stay for the simple reason that NAAAOM and ESI are neither parties nor intervenors to this proceeding (nor did they even seek leave to participate as such) and have waited far too long to raise their concerns. The proposed merger was publicly announced almost a year ago, and the verified petitions were filed with the Board over ten months ago. *See* Order at 2, 17. The filings were publicly posted on the Board's website on July 10, 2015, and in accordance with Board regulations, *N.J.A.C.* 14:1-5.14(b)(12) and *N.J.A.C.* 14:17-6.18(a)(12), two public notices of the proceeding were published on July 22, 2015. Then, over the course of many months, the Board conducted extensive discovery and negotiations with all interested parties. In other words, there was full public notice of these proceedings over the last year—yet NAAAOM and ESI never once sought to intervene or to raise their concerns during that time. They could have done so, *see N.J.A.C.* 1:1-16.1 and -16.6, but chose not to, even though one of ESI's own press releases shows that ESI's CEO Byron Allen—whose affidavit was submitted in support of the Request to Stay—knew about the merger as early as June 2015.[1] Having declined to intervene or participate in the proceedings while they were

[1] *See Entertainment Studios CEO Byron Allen Speaks Out About Racial Discrimination*, PR Newswire (June 22, 2015), http://www.prnewswire.com/news-releases/entertainment-studios-ceo-byron-allen-speaks-out-about-racial-discrimination-300103027.html.

ongoing, NAAAOM and ESI lack standing to seek a stay now. *See N.J.A.C.* 1:1-12.6(a) (stating that emergency relief is available only upon "the application of a *party*" (emphasis added)).

B. NAAAOM's and ESI's Request Is Barred Under The Board's Rules For Reconsideration.

Further, other than stating that NAAAOM and ESI seek a stay of the Order, the Request to Stay is silent as to the Board rule or other authority under which it is filed. As a practical matter, it would appear that the Request to Stay is tantamount to a motion for reconsideration of the Order. Perhaps the omission of underlying authorization is intentional, as the Board's rules with regard to such motions make clear that NAAAOM and ESI lack standing to make such a motion, and that it is time-barred in any event.

The Board has two provisions regarding motions for reconsideration. The first, *N.J.A.C.* 14:1-8.6(a), applies to telecommunications matters, such as those encompassed within Docket No. TM15070772. Pursuant to *N.J.A.C.* 14:1-8.6(a), "[a] motion for rehearing, reargument, or reconsideration of a proceeding may be filed by *any party* within 15 days after the effective date of any final decision or order by the Board." (Emphasis added). Thus, the rule regarding motions for reconsideration of Board orders in telecom matters requires (1) that the filing entity be a *party* to the proceeding, and (2) that the motion be filed within 15 days. NAAAOM and ESI's motion is thus barred twice over—first, because they were not parties to the underlying proceeding (in which they had the opportunity to move to intervene, but elected not to do so), and second, because the Order became effective on April 1, 2016, meaning that any motion for reconsideration needed to be filed no later than April 16, 2016, but NAAAOM and ESI waited until May 4, 2016.[2] By the

[2] The actual date of filing is unclear, but the papers are dated May 4, 2016.

unambiguous terms of *N.J.A.C.* 14:1-8.6(a), therefore, the Request to Stay in the telecom proceeding must fail.

NAAAOM and ESI's motion fails in the cable television proceeding, Docket No. CM15070770, for substantially the same reasons. A request for reconsideration in such proceedings must comply with *N.J.A.C.* 14:17-9.6(a), which states that "[a] motion for rehearing, reargument or reconsideration of a proceeding may be filed by *any party* within 15 days after the issuance of any final decision or order by the Board." (Emphasis added). Thus, like the telecom provision, the rule permits a motion for reconsideration, but only if the filing entity is a "party" to the proceeding. This eliminates NAAAOM and ESI. Further, similar to the telecom provision, the rule mandates that a motion for reconsideration be filed within 15 days of the date of issuance of a Board order. The Order was issued on March 31, 2016. Thus, the rule explicitly requires that, to have been timely, the Request to Stay must have been filed no later than April 15, 2016. It was not. Accordingly, the Request to Stay, insofar as the cable television proceeding is concerned, must similarly fail.

C. NAAAOM's and ESI's Claims Are Barred By Laches.

Even if the Request to Stay were not untimely and unauthorized, NAAAOM's and ESI's claims would be barred by laches, "an equitable doctrine that applies when a party sleeps on her rights to the harm or detriment of others. Laches is invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party." *N.J. Div. of Youth & Family Servs. v. F.M.*, 211 N.J. 420, 445, 48 A.3d 1075, 1089 (2012) (internal citation and internal quotation marks omitted). While NAAAOM and ESI slept on their interests for the last year, the parties to the Transactions engaged in months of negotiations. Any attempt to stay or alter the terms of approval at this late date would

work a significant detriment to all parties involved, including the Board itself, which has an interest in ensuring that third parties timely bring forward concerns and do so in accordance with its established rules and procedures, rather than attempt to sandbag the process by waiting until after approval to raise claims that the parties and Board never had a chance to address. *See id.* [3]

D. NAAAOM and ESI Cannot Show Entitlement To Injunctive Relief.

Finally, NAAAOM and ESI have the burden to show by clear and convincing evidence their entitlement to a stay, but they cannot satisfy *any* of the requirements here: (1) irreparable harm, (2) a reasonable probability of success on the merits, and (3) a balancing of relative hardships. *See Garden State Equality v. Dow*, 216 N.J. 314, 320, 79 A.3d 1036, 1039 (2013); *see also* N.J.A.C. 1:1-12.6.

First, NAAAOM's and ESI's own behavior confirms there is no irreparable harm here. They claim that Charter has refused to carry their channels "for years," Request to Stay at 6, yet they have waited until now—almost a year after the proposed merger was announced and more than a month after the Order was issued—to raise their claims with the Board. If NAAAOM and ESI believed their claims were urgent, they surely would have raised them at some point during the last year—but they did not. Further, NAAAOM and ESI have already sued Charter based on their meritless discrimination claims in federal court in California. *See* Complaint, *NAAAOM v. Charter Communications, Inc.*, No. 2:16-cv-00609-GW-FFM (C.D. Cal. Jan. 27, 2016). If the claims have any merit (which they do not) NAAAOM and ESI can secure relief in that forum and nothing about allowing the Board's Order to stay in effect (or allowing the Transactions to close)

[3] NAAAOM and ESI claim that they sent a letter to Rate Counsel on April 27, 2016, *see* Request to Stay at 1, but Joint Respondents have not received a copy of this letter. In any event, a late-April letter only confirms that NAAAOM and ESI did not timely raise their claims during the nearly year-long period since the proposed merger was publicly announced and publicly noticed by the Board.

will cause them any irreparable harm whatsoever. NAAAOM and ESI offer no rationale, let alone clear and convincing evidence, to explain how permitting the Transactions to close has any bearing on their ability to secure relief if they actually have any legitimate claims to bring.

Second, NAAAOM and ESI have no reasonable probability of success, because their claims of discrimination are meritless and in any event lack any nexus to the Transactions. As NAAAOM and ESI's own brief shows, Charter is hardly alone in declining to offer ESI's channels. *See* Request to Stay at 15 (noting that neither Comcast nor TWC carry ESI). The mere fact that Charter has decided not to carry ESI's channels cannot remotely raise an inference of invidious racial discrimination, because there are myriad legitimate reasons for a distributor like Charter to decide not to carry a channel. *Cf. In re Herring Broad., Inc.*, 26 FCC Rcd. 8971, 8976 (2011) (listing various considerations affecting carriage that provide alternative explanations other than discrimination). The suggestion that any entity that fails to carry ESI's channels is *ipso facto* discriminatory is transparently baseless. Their claims are particularly specious given their narrow focus solely on 100% African-American owned video programming companies — a set conveniently defined to have only one member: ESI itself. Contrary to ESI's apparent belief, ESI cannot gin up a novel, tailor-made definition of a subset of African-American businesses, pretend that doing business with that subset somehow represents the only "legitimate" way of showing the absence of discrimination in the video programming space, and declare that anyone who refuses to carry ESI's channels is necessarily engaged in racial discrimination.

Moreover, NAAAOM and ESI are especially unlikely to succeed in any claim for discrimination because Charter's decisions on which channels to include in its line-up are constitutionally protected under the First Amendment. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994); *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 993 (D.C. Cir. 2013)

(Kavanaugh, J., concurring). Indeed, just two days ago, a federal court in California dismissed *for the second time* similar baseless accusations that NAAAOM and ESI brought against Comcast, explaining that there are multiple legitimate reasons for cable companies not to carry ESI's channels and that ESI's allegations raised no plausible inference of discrimination. *See* Order, *NAAAOM v. Comcast Corp.*, No. 15-01239 TJH (MANx) (C.D. Cal. May 10, 2016) (Ex. B).

In addition, NAAAOM's and ESI's own brief acknowledges that Charter has made significant commitments to civil rights groups and towards improving diversity, and thus acknowledges that the facts in the record contradict any claim of racial animus. *Id.* at 7. If NAAAOM and ESI believed their claims were meritorious, they would (and should) have raised them earlier during the full proceedings, rather than trying to short-circuit a full review by waiting to raise them only after all discovery and substantive review of the proposed merger were finished, and an order issued by the Board.

Putting to one side the lack of merit in NAAAOM and ESI's baseless allegations of discrimination, the claims also lack any connection to the Transactions or to the remedy that NAAAOM and ESI seek before the Board. NAAAOM and ESI raise claims pertaining to Charter's programming decisions. However, the Board lacks jurisdiction to regulate Charter's programming, *see* 47 U.S.C. § 544, and thus there is no authority upon which the Board could actually grant relief sought by NAAAOM and ESI related to Charter's programming selection decisions. Rather, such claims arise under applicable anti-discrimination statutes and the appropriate remedies would be those provided under such statutes—not an order (by a state agency that does not regulate programming selection to begin with) preventing Charter from closing a national transaction to combine with two other broadband cable providers. NAAAOM and ESI's raising such claims in an inappropriate forum, with no colorable nexus to the conduct they allege

or the remedies they seek, suggests that they are seeking improperly to use this Board's transaction review process as a means for obtaining leverage in program carriage negotiations—precisely the use of the Board's regulatory authority that is forbidden under federal law. Indeed, in a submission to the FCC, NAAAOM and ESI made it expressly clear that is exactly the end game they seek: a *condition* imposed on the merger requiring Charter to set aside 10% of its entire channel capacity for ESI.[4] The Board should not reward such an abuse of its procedures—particularly given that NAAAOM and ESI slept on their interests for months and only now raise their baseless claims in an attempt to sandbag the Transactions that this Board approved in March.

Third, the equities strongly favor rejecting the Request to Stay. NAAAOM and ESI raised the same baseless discrimination claims at the federal level,[5] yet regulators at both the United States Department of Justice and Federal Communications Commission have approved the Transactions,[6] which the Joint Respondents expect to close once the remaining approval (from the California Public Utilities Commission) is obtained, which may come as soon as its upcoming May 12, 2016 meeting.[7] A stay of this Board's March 31, 2016 Order, therefore, has the potential materially to delay the closing of the Transactions and unsettle the expectations of marketplace participants and investors—not to mention to delay the numerous benefits the Transactions will

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[4] *See* Entertainment Studios/National Association of African-American Owned Media, *Notice of Ex Parte*, FCC 15-149 (Apr. 28, 2016), *available at* http://apps.fcc.gov/ecfs/comment/view?id=60001677082.

[5] *See, e.g., id.*

[6] Press Release, U.S. Dep't of Justice, *Justice Department Allows Charter's Acquisition of Time Warner Cable and Bright House Networks to Proceed with Conditions* (Apr. 25, 2016), https://www.justice.gov/opa/pr/justice-department-allows-charter-s-acquisition-time-warner-cable-and-bright-house-networks; Press Release, Fed. Communications Comm'n, *FCC Grants Approval of Charter—Time Warner Cable—Bright House Networks Transaction* (May 6, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0506/DOC-339243A1.pdf.

[7] Public Utils. Comm'n of the State of California, *Public Agenda 3377*(May 12, 2016), at 21, *available at* https://ia.cpuc.ca.gov/agendadocs/3377.pdf.

bring to the public, including a low-cost broadband service that Charter will offer to qualified low-income individuals in its service area, including New Jersey.[8]

* * *

Based on the foregoing, the Joint Respondents respectfully urge that the Request to Stay be denied.

May 20, 2016

Dennis Linken /dp

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[8] Order at 12.

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EXHIBIT A

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

MARIE E. LIHOTZ
JUDGE

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FAX COVER SHEET

DATE: 5/5/2016 **NO. OF PAGES (INCL.COVER SHEET):** 2

TO: **VIA FAX:**

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Dennis C. Linken, Esq. (Scarinci & Hollenbeck LLC)	(201) 806-3454

FROM: John Weiss, Law Clerk to MARIE E. LIHOTZ, P.J.A.D.

RE: I/M/O Petition of Time Warner Cable, Inc. et. al.

New Jersey Board of Public Utilities
Docket Nos. CM115070770; TM15070772

MESSAGE: Attached is the Order on Emergent Motion denying the emergent application. Thank you.

Superior Court of New Jersey
Appellate Division
Disposition on Application for Permission to File Emergent Motion

Case Name: I/M/O Petition of Time Warner Cable, Inc., et al.

Appellate Division Docket Number: (if available): _____

Trial Court or Agency Below: New Jersey Board of Public Utilities

Trial Court or Agency Docket Number: BPU Docket Nos. CM15070770; TM15070772

DO NOT FILL IN THIS SECTION – FOR COURT USE ONLY

I. The application for leave to file an emergent motion on short notice is **DENIED** for the following reasons:

☐ The application on its face does not concern a threat of irreparable injury, or a situation in which the interests of justice otherwise require adjudication on short notice. The applicant may file a motion with the Clerk's Office in the ordinary course.

☐ The threatened harm or event is not scheduled to occur prior to the time in which a motion could be filed in the Clerk's Office and decided by the court. If the applicant promptly files a motion with the Clerk's Office it shall be forwarded to a Panel for decision as soon as the opposition is filed.

☒ The applicant **only recently applied** to the agency for a stay, and obtain a signed court order, agency decision or other evidence of the ruling before seeking a stay from the Appellate Division.

☐ The application concerns an order entered during trial or on the eve of trial as to which there is no prima facie showing that the proposed motion would satisfy the standards for granting leave to appeal.

☐ The timing of the application suggests that the emergency is self-generated, given that no good explanation has been offered for the delay in seeking appellate relief. Due to the delay, we cannot consider a short-notice motion within the time frame the applicant seeks, without depriving the other party of a reasonable time to submit opposition. And the magnitude of the threatened harm does not otherwise warrant adjudicating this matter on short notice despite the delay. If the applicant promptly files a motion with the Clerk's Office it shall be forwarded to a Panel for decision as soon as the opposition is filed.

☐ Other reasons:

The order addressing the stay application is a prerequisite to this court's exercise of jurisdiction. Without it, the court has no authority to review the issues presented.

Marie E. Lihotz

MARIE E. LIHOTZ, P.J.A.D.

May 5, 2016
Date

EXHIBIT B

United States District Court
Central District of California
Western Division

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

Plaintiffs,

v.

COMCAST CORPORATION, *et al.*,

Defendants.

CV 15-01239 TJH (MANx)

Order

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

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

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

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

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

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

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

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

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

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

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

Date: May 10, 2016

Terry J. Hatter, Jr.

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