

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 19 2018

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

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

Plaintiffs-Appellants,

v.

COMCAST CORPORATION, a
Pennsylvania corporation,

Defendant-Appellee.

No. 16-56479

D.C. No.
2:15-cv-01239-TJH-MAN

MEMORANDUM*

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

Argued and Submitted October 9, 2018
Pasadena, California

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

Plaintiffs-Appellants National Association of African American-Owned
Media (NAAAOM) and Entertainment Studios Networks, Inc. (Entertainment

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

Studios, and together with NAAAOM, Plaintiffs) appeal the district court's dismissal under Rule 12(b)(6) of their second amended complaint (SAC). We have jurisdiction under 28 U.S.C. § 1291, and we reverse and remand.

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

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

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

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

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

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

2. For the reasons discussed at length in our opinion in *Charter Communications*, we also conclude that the First Amendment does not bar Plaintiffs' § 1981 claim.
3. Because we reverse the district court's dismissal of Plaintiffs' SAC, we need not consider whether the court abused its discretion when it denied Plaintiffs further leave to amend.
4. We deny Plaintiffs' motion to take judicial notice.

REVERSED AND REMANDED.

United States Court of Appeals for the Ninth Circuit

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Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>			
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* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

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Form 10. Bill of Costs - Continued

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("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk