IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NATHANIEL CLAYBROOKS and CHRISTOPHER JOHNSON, individually, on behalf of all others similarly situated, Plaintiffs v. AMERICAN BROADCASTING COMPANIES, INC., WARNER HORIZON TELEVISION, INC., NEXT ENTERTAINMENT, INC., NZK PRODUCTIONS, INC., and MICHAEL FLEISS Defendants	CLASS ACTION COMPLAINT Case No. 3:12-cv-00388 Judge Arleta A. Trauger

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INTRODUCTION[1]

Plaintiffs' conclusory allegations of racially discriminatory casting for *The Bachelor* and *The Bachelorette* are demonstrably false and unsupportable. This is not a case of racial discrimination. Rather, this lawsuit is about Plaintiffs' attempt to communicate their preferred message to the public by controlling the content and casting of Defendants' television series.

Plaintiffs' express goal in filing this lawsuit is to promote racial tolerance, eliminate "outdated racial taboos," and "help normalize minority and interracial relationships by showcasing them to mainstream America." Am. Compl. ¶¶76-78. Defendants share Plaintiffs' goals of reducing racial bias and prejudice and fostering diversity, tolerance and inclusion. Defendants have selected persons of color to be participants on both shows, and have never discriminated based on race in connection with the casting process. Indeed, as Plaintiffs acknowledge, series creator and producer Michael Fleiss has publicly stated that Defendants "always want to cast for ethnic diversity." *Id.* ¶45.

But Plaintiffs' lawsuit is a decidedly ill-suited – and unconstitutional – vehicle for seeking to achieve such goals. It violates the First Amendment, which protects Defendants' creative choices concerning the content – including the casting – of the television series that they produce and broadcast to the public. Television programming is core protected speech, and Defendants' expressive choices regarding both the message their programming conveys, and the individuals who convey it, are entitled to broad protection. *See, e.g.*, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 579, 115 S.Ct. 2338, 2350 (1995) (rejecting discrimination claim on First Amendment grounds because the government "is not free to interfere with speech for no better reason than promoting an approved message or

[1] Defendants had planned to file a concurrent Motion to Transfer, but nonparty witness travel and work conflicts delayed the execution of several supporting declarations. Defendants will file their Motion to Transfer shortly.

discouraging a disfavored one, however enlightened either purpose may strike the government"). Moreover, application of federal anti-discrimination laws in the unprecedented manner advocated by Plaintiffs would create insurmountable vagueness problems that would violate both the First Amendment and the Due Process Clause. *See, e.g.*, *F.C.C. v. Fox Television Stations, Inc.*, U.S. No. 10-1293, 2012 WL 2344462, at *10-12 (U.S. June 21, 2012) [hereinafter *Fox*] (unanimously striking down application of FCC indecency rule, as applied, on vagueness grounds).

In addition to its constitutional deficiencies, this lawsuit should be dismissed because Plaintiffs do not and cannot "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 556 S. Ct. 1937, 1949 (2009). Rather than facts, Plaintiffs have asserted the kind of "conclusory" allegations that the Supreme Court has deemed insufficient as a matter of law in discrimination and other cases. *Id.*

Accordingly, this Court should dismiss Plaintiffs' Amended Complaint with prejudice.

APPLICABLE LEGAL STANDARDS

"[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1973 (2007) [hereinafter *Twombly*]) (internal quotation marks omitted)). Rule 8(a)(2) of the Federal Rules of Civil Procedure "demands more than [] unadorned, the-defendant-unlawfully-harmed-me accusation[s]." *Id.* "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do" and must be dismissed. *Id.* (quoting *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965) (internal quotation marks omitted).

The Court may consider the face of the Amended Complaint, material "integral to the complaint," and judicially noticeable matters, when ruling upon a Motion to Dismiss. *Indiana*

State Dist. Council of Laborers and Hod Carriers Pension and Welfare Fund v. Omnicare, Inc., 583 F.3d 935, 942 (6th Cir. 2009). While the Court must generally "accept all well-pleaded factual allegations in the complaint as true," it "need not accept as true a legal conclusion couched as a factual allegation." *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965) (internal quotation marks omitted); *see also Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949.

A complaint that fails to allege (i) a legal claim, even where all of Plaintiffs' allegations are assumed to be true, or (ii) facts sufficient to prove the asserted misconduct, even if the legal claim asserted is otherwise permitted, is deficient as a matter of law and should be dismissed. *See Eagles Nest Ranch & Academy v. Bloom Twp. Bd. of Trs*, No. 2:06-CV-242, 2007 WL 650485, at *5 (S.D. Ohio Feb. 26, 2007) (conduct alleged "is simply not actionable" because "it is protected by the First Amendment"); *see also Hensley Mfg.*, 579 F.3d at 613 (motion to dismiss should be granted "where the undisputed facts conclusively establish an affirmative defense as a matter of law"); *AK Steel Corp. v. United Steel Workers of America*, No. C-1-00-374, 2002 WL 1624290, at *6 (S.D. Ohio Mar. 30, 2002) (granting motion to dismiss because statements made at union rallies were protected by the First Amendment and could not be used as a basis for imposing liability on defendants); *U.S. v. Lantz*, No. CR-2-08-015, 2009 WL 1107708, at *2 (S.D. Ohio Apr. 22, 2009) (on motion to dismiss on grounds of void-for-vagueness doctrine, court looked at whether statute did "not give adequate notice to people of ordinary intelligence concerning the conduct it proscribes" or "if it invite[d] arbitrary and discriminatory enforcement"); *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.") (quoting *Twombly*, 550 U.S. at 570, 127 S. Ct. at 1974)

(internal quotation marks omitted); *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1964-65 ("[A] plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.") (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 2944 (1986)) (internal quotation marks omitted).

ARGUMENT

Plaintiffs' Amended Complaint should be dismissed for three independent reasons.

First, as set forth in Section I, *infra*, Plaintiffs' Amended Complaint fails to state a claim as a matter of law because the content of Defendants' television series – including Defendants' casting decisions – is core speech/expression protected by the First Amendment. Plaintiffs' Amended Complaint expressly and impermissibly seeks to regulate and change the content of Defendants' speech to send Plaintiffs' desired message, in plain violation of basic First Amendment principles. *See, e.g.*, *Hurley*, 515 U.S. at 579, 115 S.Ct. at 2351.

Second, as set forth in Section II, *infra*, the novel application of 42 U.S.C. § 1981 ("Section 1981"), urged by Plaintiffs[2] would violate the Due Process void-for-vagueness doctrine because no law or other source of authority affords "fair notice" regarding which casting choices are prohibited and would trigger civil liability. As the Supreme Court made clear just last week, this doctrine carries special force when First Amendment rights are at stake. *See, e.g.*, *Fox*, 2012 WL 2344462, at *10.

Third, as set forth in Section III, *infra*, even if Plaintiffs' Section 1981 claim were not barred by the First Amendment and the Due Process Clause, Plaintiffs do not allege any facts

[2] Plaintiffs previously asserted California state law claims, but dropped those claims when they amended their complaint. While Plaintiffs recently filed an EEOC complaint and have raised the possibility of amending their complaint to assert employment claims, to date, no such claims have been asserted. Nor would they be appropriate, as neither the title characters nor the suitors are employees.

supporting a plausible claim for discrimination. Instead, Plaintiffs rely exclusively on exactly the type of "conclusory" and "unadorned" assertions that *Iqbal* and other cases have held are insufficient as a matter of law. *See, e.g.*, *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949.

I. PLAINTIFFS' CLAIM IS BARRED BY THE FIRST AMENDMENT

A. The First Amendment Bars Civil Claims That Intrude On And Regulate Protected Speech

The First Amendment provides: "Congress shall make no law…abridging the freedom of speech." U.S. Const. Amend. I. The First Amendment shields protected speech and expression from private litigation as well as statutory restrictions and criminal penalties. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 277–78, 84 S. Ct. 710, 725 (1964) ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law…."); *see also Bartnicki v. Vopper*, 532 U.S. 514, 524–25, 535; 121 S. Ct. 1735 (2001) (holding that the federal and state wiretapping statutes prohibiting publication of information, as applied to defendants, violated the First Amendment); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S.Ct. 694,709-10 (2012). Thus, "[a]lthough this is a civil lawsuit between private parties, the application of [anti-discrimination laws]…in a manner alleged to restrict First Amendment freedoms constitutes" prohibited government action and is barred. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916, n.51, 102 S. Ct. 3409, 3427 (1982) (applying First Amendment to state action pursuant to the Fourteenth Amendment); *see also E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1101 (9th Cir. 2008) ("[T]he First Amendment defense applies equally to [plaintiff's] state law claims as to its Lanham Act claim"); *Snyder v. Phelps*, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011) ("[t]he Free Speech Clause of the First Amendment…can serve as a defense") (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50-51, 108 S. Ct. 876, 879 (1988)).

B. Entertainment And Artistic Expression Are Protected

Defendants are private actors who are unquestionably engaged in protected speech when they create and broadcast television series like *The Bachelor* and *The Bachelorette*. It is well settled that "[e]ntertainment, as well as political and ideological speech, is protected" fully by the First Amendment. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65, 101 S. Ct. 2176, 2181 (1981). "[M]otion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works [all] fall within the First Amendment guarantee." *Id.*; *see also Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) ("[V]ideo games qualify for First Amendment protection."); *Joseph Burstyn v. Wilson*, 343 U.S. 495, 501, 72 S. Ct. 777, 781 (1952) ("[M]otion pictures … [are] included within the free speech and free press guaranty of the First and Fourteenth Amendments"); *Best v. Berard*, 776 F. Supp. 2d 752 (N.D. Ill. 2011) ("The status of *Female Forces* ["an unscripted 'reality' television series"] as an entertainment program, as opposed to a pure news broadcast, does not alter the First Amendment analysis."). That Defendants profit from the production and broadcast of television series does not affect that analysis, as media content "published and sold for profit" is still "expression whose liberty is safeguarded by the First Amendment." *Burstyn*, 343 U.S. at 501-02, 72 S. Ct. at 780.

Defendants' production and broadcast of *The Bachelor* and *The Bachelorette* – including the creative casting decisions at the core of that process – are an exercise of Defendants' artistic expression and free speech rights. *See, e.g.*, *Tamkin v. CBS Broad., Inc.*, 193 Cal. App. 4th 133, 143, 122 Cal. Rptr. 3d 264, 271 (2011) ("the creation, casting, and broadcasting of an episode of a popular television show" is an "an exercise of free speech"). Indeed, in reality programming, like the series at issue, casting is especially critical because the participants and their interaction are the story. Plaintiffs agree. The fundamental premise of this lawsuit is that Defendants'

casting decisions "send[ ] a message" that "is extremely influential in shaping the way people view one another and themselves." *See* Am. Compl. ¶¶76–78. As Plaintiffs' counsel has publicly acknowledged:

> The import of this case is less about whether Mr. Claybrooks and Mr. Johnson get selected. It's about what kind of imagery are we putting on the air in one of the most popular programs in this country when you're sending the message of exclusion.

Transcript of Interview with Lead Plaintiffs' Counsel Cyrus Mehri, Request for Judicial Notice ("RJN"), Ex. 6.

C. Plaintiffs May Not Use Anti-Discrimination Laws To Modify The Content Of Defendants' Television Series Or The Message They Convey

Plaintiffs' Amended Complaint expressly asks the courts to invoke Section 1981 to mandate that Defendants send the particular political and social message Plaintiffs advocate. But to permit governmental intrusion into the creative and artistic process would plainly violate the First Amendment's guarantees of free speech and free expression, and the prohibition against compelled speech. "Just as the State is not free to 'tell a newspaper in advance what it can print and what it cannot,'" *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 10–12, 106 S. Ct. 903, 909 (1986)), the government and private actors under its guise are not free to mandate that Defendants cast certain individuals in their television series, and cannot require as a matter of federal law that Defendants "help normalize minority and interracial relationships by showcasing them to mainstream America on *The Bachelor* and *The Bachelorette*." Am. Compl. ¶ 78; *see Wooley v. Maynard*, 430 U.S. 705, 717, 97 S. Ct. 1428, 1437 (1977) (declaring unconstitutional state law requiring New Hampshire motorists to display the state motto – "Live Free or Die" – on their license plates); *Miami Herald Publ'g. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258, 94 S. Ct. 2831, 2840 (1974) [hereinafter *Tornillo*] (declaring unconstitutional state law requiring newspapers to provide a political candidate equal space in

their publications to reply to any criticism or attacks on his or her record); *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 1187 (1943) (declaring unconstitutional state law requiring schoolchildren to pledge allegiance to the United States flag).

The fact that Plaintiffs have styled their claim as one for race discrimination does not alter the analysis. Even laws which advance important and worthwhile social policy objectives, like anti-discrimination laws, may not, consistent with the First Amendment, be used to regulate the content of protected speech. *Hurley* is directly on point. 515 U.S. at 560, 115 S. Ct. at 2341. In that case, the plaintiff was an organization known as "GLIB," which consisted of openly gay, lesbian and bisexual individuals of Irish heritage. *Id.* at 561, 115 S. Ct. at 2341. GLIB sued the organizers of the St. Patrick's Day parade in Boston under a Massachusetts public accommodations law to force the defendant to allow GLIB to march in the parade under its own banner. *Id.* In a unanimous decision, the Supreme Court held that the Massachusetts anti-discrimination law could not be used to force the organizers to grant GLIB a permit, as that would infringe on the organizers' right to free speech. *Id.* at 581, 115 S. Ct. at 2351.

The Court explained that "the fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message." *Id.* at 573, 115 S. Ct. at 2347. "Since *all* speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Id.* (citations omitted) (quoting *Pacific Gas & Elec. Co*, 475 U.S. at 22, 106 S. Ct. at 909 (1986)) (internal quotation marks omitted).

This First Amendment right to determine "what not to say" belongs not only to the press, but also to "business corporations" and "ordinary people," *id.* at 574, 115 S. Ct. at 2347, and, simply put, prohibits the government from forcing a defendant to communicate a plaintiff's

message:

> [W]hatever the reason [for excluding GLIB from the parade], it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.

Id. at 575, 115 S. Ct. at 2348.

The importance or desirability of the proposed message is irrelevant:

> While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

Id. at 579, 115 S. Ct. at 2350.

As in *Hurley*, Plaintiffs here wish to use Defendants' speech to send their preferred message – one that, in their view, would better promote tolerance, racial equality, and diversity. But notwithstanding the undisputed positive nature of Plaintiffs' message, the First Amendment prohibits them from using this lawsuit to force Defendants to deliver it by way of their casting decisions for the *Bachelor* and *Bachelorette*. The First Amendment bans legal mandates – and civil lawsuits – designed to compel citizens to deliver a specific message, however "enlightened" that message may be. *Id.*; *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784–85, 98 S. Ct. 1407, 1420 (1978) ("In the realm of protected speech, the Legislature is constitutionally disqualified from dictating...the speakers who may address a public issue.")

Numerous courts have applied these bedrock principles in a wide variety of closely analogous circumstances. For example, in *McDermott v. Ampersand Publishing, LLC*, 593 F. 3d 950, 958 (9th Cir. 2010), a labor discrimination case, the Ninth Circuit held that a newspaper publisher could not be forced to re-hire specific editors and thus "relinquish editorial control over the content of its news reports[:]"

> Telling the newspaper that it must hire specified persons, namely the discharged employees, as editors and reporters constituting over 20 percent of its newsroom staff is bound to affect what gets published. **To the extent the publisher's choice of writers affects the expressive content of its newspaper, the First Amendment protects that choice.**

Id. at 962–63 (citing *Hurley*, 515 U.S. at 572-73; 115 S. Ct. at 2346-47) (emphasis added); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 132 S. Ct. at 709–710 (recognizing a ministerial exception, grounded in the First Amendment's Free Exercise and Establishment clauses, that precluded application of federal employment discrimination legislation to claims concerning the employment relationship between a religious institution and its ministers); *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F. 2d 888, 904, n.17 (1st Cir. 1988) ("We do not think it at all obvious, as do our dissenting brethren, that liability should attach if a performing group replaces a black performer with a white performer (or vice versa) in order to further its expressive interests.").

Similarly, in *Ingels v. Westwood One Broadcasting Services, Inc.*, 129 Cal. App. 4th 1050, 129 Cal. Rptr. 3d 933 (2005), the plaintiff, allegedly in his 60s, sought to express his views on a radio call-in show geared toward a younger audience demographic. The plaintiff was told by a screener that he was too old to be permitted on-air. *Id.* at 1056, 129 Cal. Rptr. 3d at 936. Although the plaintiff was ultimately allowed to speak on-air, his call was abruptly terminated following a barrage by the host, in keeping with the show's politically incorrect style. *Id.* at 1058, 129 Cal. Rptr. 3d at 937. The host explained (on-air) that the show targeted a young male demographic, which allowed it to sell more advertising time, and that because they were not trying to appeal to older people, the plaintiff did not belong on their broadcast. *Id.* at 1057–1058, 129 Cal. Rptr. 3d at 936. The plaintiff was never able to discuss the topic about which he had originally called. *Id.* at 1056-58, 129 Cal. Rptr. 3d at 936-37.

In denying the plaintiff's claims for age discrimination, the California Court of Appeal held that the defendants had "a First Amendment right to control the content of their program…." *Id.* at 1074, 129 Cal. Rptr. 3d at 1074-75; *see also, e.g.*, *Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264, 297, 132 P.3d 211 (Cal. 2006) (Chin, J., concurring) ("When, as here, the workplace product is the creative expression itself, free speech rights are paramount….Lawsuits like this one, directed at restricting the creative process in a workplace *whose very business is speech related*, present a clear and present danger to fundamental free speech rights.") (emphasis original).

A contrary holding would lead to untenable results. Allowing litigants to petition courts to control the editorial message of television programming would call into question the legality of a host of networks targeting a specific demographic or audience:

- Lifetime, a network geared toward female audience members, could be forced to display male-themed shows – to avoid claims of gender discrimination.

- BET ("Black Entertainment Television") and Centric (a BET spin-off), networks geared toward African American viewers, could be forced to alter their content to preclude claims of race discrimination.

- Telemundo, a network geared toward Latino viewers, particularly Spanish-speaking viewers, could be forced to program Caucasian or other ethnically-oriented programming.

- The Jewish Channel (TJCTV) could be forced to broadcast Christian-themed programming, while the 700 Club, the Christian Broadcast Network, the Son Life Broadcasting Network (Jimmy Swaggart's platform), the Inspiration Network (Protestant-focused), GOD TV (Christian), the Hope Channel (Seventh Day Adventist), the Eternal Word Television Network (Roman Catholic), and numerous other Christian-themed networks could be forced to exhibit Jewish or Islamic-themed shows.

- LOGO, a network geared toward gay and lesbian audience members, could be forced to display an equal amount of heterosexually themed programming – to avoid claims of sexual orientation discrimination.

A contrary holding would lead to similarly untenable results at the show level, including individual casting decisions:

- Would MTV have to cast African Americans or Latinos on *The Jersey Shore*, its show about Italian-Americans living in New Jersey?

- Would the producers of *The Shahs of Beverly Hills* have to cast African Americans, Latinos, or Caucasians on its show about Persian Americans living in Los Angeles?

- Would a network have to consider Caucasian or Latino actors for the title characters in any remake of *The Cosby Show*, *The Jeffersons*, *Sanford and Son*, *Good Times*, *Family Matters*, *The Fresh Prince of Bel-Air*, *A Different World*, *Martin*, *Moesha*, *The Steve Harvey Show*, *Everybody Hates Chris*, or any other television show regarding an African American family or social setting?

The list is endless; the conclusion self-evident. *See Hurley*, 515 U.S. at 572–73, 115 S. Ct. at 2347 (forcing defendants to include GLIB in the parade would "essentially requir[e] petitioners to alter the expressive content of their parade"). Plaintiffs' Amended Complaint impermissibly seeks to regulate the content of Defendants' expression in violation of the First Amendment and, accordingly, fails to state a legally cognizable claim.

II. THE VOID-FOR-VAGUENESS DOCTRINE ALSO BARS PLAINTIFFS' CLAIM

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *Fox*, 2012 WL 2344462 at *10; *see also Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S. Ct. 618 (1939) (people living under a rule of law "are entitled to be informed as to what the State commands or forbids.") This essential due process "requirement of clarity in regulation," as the Supreme Court recently explained, "**requires** the invalidation of laws that are impermissibly vague." *Fox*, 2012 WL 2344462 at *10 (emphasis added).

> Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them

> so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

Id. at *10 (citation omitted); *see also Reno v. American Civil Liberties Union*, 521 U. S. 844, 870–71, 117 S. Ct. 2329, 2344 (1997) ("The vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect on free speech."). Plaintiffs' claim fails for this additional, independent reason as well.

Plaintiffs request an unprecedented application of Section 1981 that affords Defendants and others no notice whatsoever as to what federal anti-discrimination law prohibits or mandates when casting roles for television series, movies, plays and other creative enterprises. It is unclear whether, when, and to what extent any show or network that targets a specific audience or demographic could be considered illegal, or whether any casting decision that takes into account race or any immutable characteristic of an actor or actress could subject a television producer or network to civil liability. This lack of concrete standards, known in advance, for the imposition of civil liability for allegedly discriminatory casting violates the void-for-vagueness doctrine because it deprives content creators such as Defendants of fair notice of what is, and is not, prohibited in the context of making casting decisions integral to the messages those creators intend to convey. *See Fox*, 2012 WL 2344462, at *10 ("a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved").

Such uncertainty will undoubtedly compel Defendants, and others like them, either to alter their ultimate casting decisions or, in some cases, not to broadcast certain series at all, to avoid litigation or potential liability for purported discrimination. Put simply, faced with the

potential of liability for its casting choices, Defendants "might well conclude" that "the safe course is to avoid controversy" – a result wholly antithetical to the First Amendment's purpose of fostering free speech and expression. *Tornillo*, 418 U.S. at 257, 94 S. Ct. at 2839. Plaintiffs' requested application of federal anti-discrimination law to the casting of *The Bachelor* and *The Bachelorette* is so "vague and standardless that it leaves [Defendants] uncertain as to the conduct prohibits," and, accordingly, cannot pass constitutional muster. *City of Chicago v. Morales*, 527 U.S. 41, 52, 119 S. Ct. 1849, 1859 (1999) (citations omitted); *see also Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127 (1926) ("a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"). Plaintiffs' Amended Complaint should be dismissed on this basis alone.

III. PLAINTIFFS HAVE NOT PLED AND CANNOT PLEAD FACTS SUFFICIENT TO STATE A CLAIM OF RACE DISCRIMINATION

Plaintiffs have not alleged – nor can they allege – any factual support for their claim that Defendants engaged in intentional race discrimination. *See Quinn-Hunt v. Bennett Enters., Inc.*, 211 Fed. App'x 452, 455 (6th Cir. Dec. 21, 2006). Plaintiffs' conclusory allegations of intentional discrimination are insufficient as a matter of law. *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949 (under Rule 8(a) "'naked assertion[s] devoid of 'further factual enhancement'" do not state a claim for relief).

Evidence of discriminatory intent is required to support a claim of discrimination under Section 1981. *See Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 389, 102 S. Ct. 3141, 3142 (1982) (Section 1981 "reaches only purposeful discrimination"). The plaintiff must plead and show "(1) [he or] she belongs to an identifiable class of persons who are subject to discrimination based on their race; (2) the defendant **intended to discriminate** against [him

or] her on the basis of race; and (3) the defendant's discriminatory conduct abridged a right enumerated in § 1981(a)." *Quinn-Hunt*, 211 Fed. Appx. At 456 (emphasis added); *see also Halton v. Great Clips, Inc.*, 94 F. Supp. 2d 856, 867 (N.D. Ohio 2000) (stating "proof of discriminatory intent is required").[3]

Where, as here, a complaint "does not contain **any factual allegation** sufficient to plausibly suggest [Defendants'] discriminatory state of mind," it does "not meet the standard necessary to comply with Rule 8." *Iqbal*, 556 U.S. at 683, 129 S. Ct. at 1952. The Supreme Court's decision in *Iqbal* is instructive. There, the Court held that a complaint's "bare assertions" of an "invidious policy" to subject the plaintiff to "harsh conditions of confinement . . . solely on account of [his] religion, race and/or national origin" amounted to "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim," and were thus not entitled to the "assumption of truth." *Id.* at 679, 680-81, 129 S. Ct. at 1950-951. The Court found that the "conclusory nature" of the plaintiff's allegations of discrimination were insufficient to survive dismissal. *Id.* at 681, 129 S. Ct. at 1951.

The Sixth Circuit's recent decision in *HDC* is likewise directly on point: "[C]onclusory allegations of discriminatory intent without supporting factual allegations" are simply insufficient to show an "entitlement to relief," and cannot survive a motion to dismiss. *HDC, LLC v. Ann Arbor*, 675 F.3d 608, 613 (6th Cir. 2012); *see also, e.g.*, *Akhavein v. Argent Mortg. Co.*, No. 5:09-cv-00634 RMW (RS), 2009 WL 2157522, at *6 (N.D. Cal. July 18, 2009) (dismissing race discrimination claim under, *inter alia*, Section 1981 because the discrimination "allegations are vague and conclusory, and seem contradictory to plaintiffs' [other]

[3] Although many cases arising under Section 1981 are employment claims, as noted in footnote 2, *supra*, Plaintiffs here allege no employment claims and none of the participants on the shows – neither the title characters nor the suitors – are employees.

allegation[s]").

Plaintiffs "bare allegations" of intentional race discrimination are similarly conclusory. For example, Plaintiffs allege, without any factual support, that "Defendants knowingly, intentionally, and as a matter of corporate policy refused to cast people of color in the role of the Bachelor and Bachelorette," Am. Compl. ¶ 41, and that "Defendants have intentionally denied Plaintiffs and many other applicants of color the equal opportunity as whites to contract without regard to skin color," *id.* ¶ 80. These allegations are nearly identical to those found to be too "conclusory" to be entitled to a presumption of truth by the Supreme Court in *Iqbal*. 556 U.S. at 680-81, 129 S. Ct. at 1951 ("bare assertions" of an "invidious policy" found "conclusory and not entitled to be assumed true").

Indeed, the only factual allegations asserted in support of Plaintiffs' claim of intentional discrimination are that (i) the 23 title characters have always been Caucasian, Am. Compl. ¶38; (ii) Plaintiffs believe that they were "well-qualified to become the next Bachelor," *id.* ¶65; and (iii) Plaintiff Claybrooks' feeling that he was "rushed through the [interview] process" because of his race, *id.* ¶62.[4] But such allegations are plainly insufficient to "nudge" Plaintiffs' discrimination claim "across the line from conceivable to plausible.'' *Iqbal*, 556 U.S. at 680, 129 S. Ct. at 1951 (quoting *Twombly*, 550 U.S. at 570, 127 S. Ct. at 1974).

First, Plaintiffs' numerical allegation is insufficient to prove intentional race discrimination. *See, e.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992-97, 108 S. Ct. 2777, 2787 (1988) ("It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of

[4] Plaintiff Johnson admits that the alleged employee who took his materials stated "that he would take Mr. Johnson's application materials and be sure to pass them on to the show's casting directors." Am. Compl. ¶ 54.

chance."). Facts that are "merely consistent with" Plaintiffs' theory of liability cannot remotely state a "plausible" claim of intentional discrimination. *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557, 127 S. Ct. at 1966); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555 (U.S. 2011) (statistical information insufficient to raise an inference of a company-wide policy of discrimination).

Second, Plaintiffs' subjective impressions or beliefs – no matter how heartfelt – are insufficient to support their conclusory allegation of discriminatory intent. Put simply, the mere fact that Plaintiffs were not selected for the lead role – from the multitude of individuals considered – does not establish that Defendants engaged in intentional race discrimination in casting for that series. *Veasy v. Teach for Am., Inc.*, No. 3:11-CV-01179, 2012 WL 1314084, at *6-7 (M.D. Tenn. Apr. 17, 2012) (Trauger, J.) (allegations that the plaintiff was a "highly qualified candidate" and had "noticed" that a "majority of other finalists were white," did "not suggest any discriminatory animus by [the defendant] with regard to its denial of [the plaintiff's] application or, for that matter, with respect to its hiring process generally").

Conspicuously absent from Plaintiffs' Amended Complaint are **any** factual allegations of discriminatory intent, comments or conduct by any of the Defendants. To the contrary, Plaintiffs' conclusory allegations **contradict** other specific allegations of **non**-discriminatory intent and conduct contained in their Amended Complaint and facts of which the Court may take judicial notice.

Plaintiffs concede (as they must) that some of the suitors who have appeared on the series – selected by Defendants – are people of color. Am. Compl. ¶¶ 39, 70; *see also* RJN, Exs. 1–4. Defendants cannot and do not determine the Bachelor's or Bachelorette's choice of love interest. If Defendants truly intended to prevent interracial romance on these shows – as Plaintiffs allege

– they would not place individuals of color in the pool of suitors. Indeed, various seasons of the programs have ended with interracial relationships. RJN, Exs. 1–4. And Plaintiffs admit that defendant Michael Fleiss—the creator and an executive producer of the shows— has publicly stated that "[w]e always want to cast for ethnic diversity." Am. Compl. ¶45.

Plaintiffs further concede that some of ABC's biggest hit television series highlight characters of color and interracial relationships. *See, e.g.*, Am. Compl. ¶¶72–75. Plaintiffs attempt to distinguish those series by alleging that they do not involve the "exhibition of actual romance between non-whites or whites and people of color." *Id.* ¶75. But that is simply false. Numerous television programs, including some of ABC's biggest current and recent hits, highlight non-Caucasian relationships and interracial romances. *See* RJN, Ex. 5 (e.g., *Grey's Anatomy*, *Modern Family*, *Desperate Housewives*, *Lost*, *and Ugly Betty*). In addition to *The Bachelor/Bachelorette* series, ABC also broadcasts romantic-themed reality shows, such as *Here Come the Newlyweds*, which contain diverse casts. Am. Compl. ¶ 39; RJN, Ex. 5. In short, all of these specific allegations and facts of which this Court may take judicial notice both contradict and belie Plaintiffs' conclusory allegations of discrimination.

Plaintiff's Amended Complaint, which tenders nothing more than "naked assertions" of discrimination, fails to state a claim that would entitle Plaintiffs to relief. Plaintiffs' unsupported allegations of intentional discriminatory casting for *The Bachelor* and *The Bachelorette* are insufficient as a matter of law, and require dismissal.

CONCLUSION

Plaintiffs' Amended Complaint should be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served this 28th day of June 2012, by filing the document pursuant to the Court's CM/ECF procedures, which includes electronic service upon the following:

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This 28th day of June 2012.

By: /s/ Shelby R. Grubbs