UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FuboTV Inc., and FuboTV Media Inc.,

Plaintiffs,

v.

The Walt Disney Company, et al.,

Defendants.

1:24-cv-01363-MMG

ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW
IN SUPPORT OF DISNEY'S MOTION TO DISMISS

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The Walt Disney Company and its affiliates ESPN, Inc. and ESPN Enterprises, Inc. (together, "ESPN") and Hulu, LLC ("Hulu") (collectively, "Disney") submit this memorandum of law in support of their motion to dismiss Counts 3, 5, 7, 10, 12, 13 and 14 in the Amended Complaint (Dkt. Nos. 144, 145) filed by fuboTV Inc. and fuboTV Media Inc. (together, "Fubo") for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).[1]

PRELIMINARY STATEMENT

This motion addresses Fubo's non-JV claims, which are based on industry practices as they exist today—and as they have existed for decades—without the formation of Venu. Fubo's core complaint is that Disney (and other programmers) license their networks as a package and thereby force Fubo to license networks it otherwise would not. Fubo also claims that the prices it pays Disney are too high, which Fubo attributes to "most favored nation" provisions ("MFNs") that larger distributors negotiated with Disney, but Fubo did not. Even if Fubo could prove these allegations (which Disney disputes, but will assume to be true for purposes of this motion to dismiss only), they do not state an antitrust claim.

Fubo Fails To State a Tying Claim. *First*, the alleged tying arrangement here—selling networks as a bundle—has existed for many years, is industry standard, and has been found to be consistent with competition both by the FCC (the primary regulator in this space) and the Ninth Circuit. Network bundling therefore does not meet the Supreme Court's high threshold to qualify as one of the rare cases in which conduct is so obviously anticompetitive and blatantly pernicious that it merits *per se* treatment. *Second*, Fubo fails to plead a viable tying claim under either the *per se* standard or the rule of reason. To do either, Fubo must allege that the bundling of purported "Non-Critical Television Channels" (the tied product) with purported "Commercially Critical Sports Channels" (the tying product) has ***harmed competition*** in the ***tied product market***. Alleging that bundling forces distributors and consumers to license networks they do not want or allows Disney to charge distributors or consumers more than it could absent

[1] Disney maintains that Fubo's JV-related claims are legally insufficient, but Disney does not move to dismiss them due to the Court's preliminary injunction order (Dkt. Nos. 290, 291).

the alleged tie is not enough. Rather, to state a viable tying claim, Fubo must plausibly plead facts showing that Disney's network bundling has foreclosed other Non-Critical Television Channels from the market as a whole, thereby preventing them from competing with Disney's Non-Critical Television Channels. Fubo alleges no such thing. Fubo does not allege that Disney's bundling arrangements have foreclosed programmers from the purported "Non-Critical Television Channels" market, nor does Fubo allege that any MVPD, other perhaps than Fubo itself, has been unable to license supposed "non-critical" channels from non-Disney programmers. Fubo's own decision to forgo certain networks is insufficient as a matter of law to establish harm ***to competition*** under Supreme Court precedent. Fubo cannot plead any ***market-wide*** anticompetitive effects in the purported tied market because MVPDs indisputably license numerous supposedly "non-critical" networks from many programmers other than Disney.

Fubo's MFN Allegations Do Not State a Claim. Fubo does not allege any horizontal agreement among programmers. Fubo concedes that the MFNs are ***vertical*** restraints, which requires Fubo to plausibly plead market power and to state a claim under the rule of reason. It cannot. *First*, Fubo concedes that Disney and Hulu each have a market share below 30%, which defeats any claim of market power as a matter of law. *Second*, Fubo cannot plead anticompetitive effects. MFNs guarantee low prices; they do not increase them. Fubo does not explain why, absent the MFNs, Disney would lower prices for Fubo. There is no plausible allegation that the prices Fubo pays for Disney programming are elevated by MFNs that other distributors, with greater size and more leverage, obtained from Disney. Because Fubo alleges no causal connection between these MFNs and the higher prices it purportedly pays, Fubo also fails to plead that it has suffered antitrust injury as a result of any MFNs, as it must to sustain a claim.

BACKGROUND

For purposes of this motion only, Disney assumes Fubo's fact allegations to be true.[2]

Types of Television Networks: Programmers' networks include different types of

[2] Citations to the Amended Complaint are designated by "¶" and relevant paragraph number(s).

content, such as entertainment programming, news or sports-related programming. (¶¶58, 177.) Networks that broadcast primarily general entertainment programming include [REDACTED] (¶¶83, 209-210, 219.)

News-focused networks include [REDACTED] and [REDACTED]. (¶¶202, 220.) Among the many channels with live sports are TNT, TBS, Fox Network, Fox Sports 1, Fox Sports 2, Fox Soccer Plus, Fox Deportes, Big Ten Network, CBS, NBC, Golf Channel, ABC, ESPN, ESPN International, ESPN2, ESPN3, ESPNews, ESPN Deportes, ESPNU, Longhorn Network, SEC Network, Big 12 Now and ACC Network. (¶¶66, 73, 80, 169, 203.) Many of those networks also telecast entertainment, news and other non-sports content. (¶¶56, 99, 177.)

Allegedly, Disney licenses 26.8% of U.S. sports rights, Fox Corporation ("Fox") licenses 17.3%, Warner Bros. Discovery, Inc. ("WBD") licenses 9.9%, and each of non-defendants NBC and CBS each license 13.1% and 12.9%, respectively. (¶169, Fig. 5.) Other programmers allegedly license around 20% of U.S. live sports content. (*Id.*)

Network Licensing: Programmers for decades have licensed their networks to distributors as a bundle. (¶4.) Fubo alleges that only five networks with sports content—ABC, CBS, ESPN, Fox and NBC—are "commercially critical" and that no MVPD can offer a commercially viable package without them. (¶¶203-204.) Fubo alleges that thirteen other channels that broadcast a mix of entertainment, news and sports programming are "non-critical" to an MVPD. (¶¶203, 209-210.) Fubo does not allege whether hundreds of other channels (ESPN2, Fox News, Food Network, etc.) are "commercially critical" or "non-critical" channels.

Fubo: Fubo licenses networks from many programmers; it carries some networks that offer sports, such as CBS, NBC, ACC Network and Big Ten Network, as well as networks without sports, such as [REDACTED]. (¶¶66, 83, 202, 209.) Fubo alleges it would like to carry even more non-critical networks, specifically A&E, AMC, TNT and TBS, but that it cannot do so because it licenses certain Disney networks that it would rather not carry and wants "to maintain an economical channel package". (¶¶99, 119, 210, 221.)

MFN Provisions: MFNs guarantee certain distributors the same or better terms that a programmer grants certain other distributors. (¶124.) Fubo alleges that programmers—including NBC, Univision, A&E, Disney, Fox and WBD—have MFNs with Hulu and YouTube TV ("YouTube"). (¶¶130-132, 139.) Fubo asserts that these MFNs "induce those programmers to charge Fubo higher prices and penetration requirements". (¶139.)

Fubo alleges that Disney's carriage agreements with YouTube and Hulu include "above-market prices, penetration rates, and other economic terms" that are "nearly impossible for Fubo to bear". (¶¶123, 130.) Fubo alleges that the reason YouTube and Hulu enter into agreements with above-market terms is that Disney supposedly contracts with YouTube and Hulu for additional services, which operate as "rebates" to give these distributors relief from the above-market terms. (¶¶132-140.) Fubo contends that, as an independent streaming service, it cannot take advantage of the supposed "rebates" to lower the effective prices it pays. (¶141.)

APPLICABLE LEGAL STANDARDS

Motion to Dismiss Standard. A complaint must plead "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'". *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Allegations "merely consistent with" alleged wrongdoing "stop[] short of the line between possibility and plausibility". *Twombly*, 550 U.S. at 557. A court is "not required to credit conclusory allegations or legal conclusions couched as factual . . . allegations". *Rothstein v. UBS AG*, 708 F.3d 82, 94 (2d Cir. 2013).[3]

Tying Claims under Section 1 of the Sherman Act. Tying is prevalent: eggs are sold by the dozen, phones are sold with chargers, home appliances are sold with servicing contracts, credit cards are sold with travel points programs, and more. Virtually all tying arrangements are

[3] Under Federal Rule of Civil Procedure 12(b)(6), Disney for the purposes of this motion "must assume to be true" the facts pleaded in the Amended Complaint. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 711 (2d Cir. 1994). To be clear, however, Disney disputes many of Fubo's fact allegations and, should the case proceed past the pleadings, intends to introduce evidence as to why many of them are false.

permissible and procompetitive: "[m]any courts [have come] to see that arguable tie-ins are to be found everywhere, that most of them serve legitimate objectives without threatening competitive vitality in the second market or anywhere else and without even harming buyers." 9 Areeda & Hovenkamp, *Antitrust Law* ¶1701c (4th ed. 2018) ("Areeda"). "[E]ven tie-ins in concentrated markets may serve procompetitive purposes." *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 477 (3d Cir. 1992).

Tying arrangements are anticompetitive ***only if*** a firm with market power in the tying product market uses a tying arrangement to extend its market power to the tied product market, by ***foreclosing*** sellers or potential sellers of the tied product ***from competing in the tied product market.*** "[T]he question is whether . . . competitors were foreclosed from selling" the tied product because of the tie. *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 57 (2d Cir. 1980).

Typically, ties are analyzed under the rule of reason, and only certain ties receive *per se* treatment. *See Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 33 (1984) (O'Connor, J., concurring) (explaining that "[t]he Court has on occasion applied a *per se* rule of illegality in actions alleging tying in violation of § 1 of the Sherman Act"). "Per se treatment for tying arrangements seems particularly unwise given their manifest capacity for producing cost savings or improvements in product or service quality and only limited capacity to cause competitive harm." Areeda ¶1720a. "Four concurring Justices in *Jefferson Parish* similarly sought to abandon the 'per se' approach altogether because it is not truly per se and may condemn too much legitimate conduct." *Town Sound*, 959 F.2d at 477-78.

To the extent *per se* tying is still cognizable under the law (which Disney disagrees with), it applies only to a narrow category of ties—those that history has shown to have an obvious "pernicious effect on competition and lack of any redeeming virtue". *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); *Jefferson Par.*, 466 U.S. at 2, 9-18 (rejecting *per se* rule for all tying claims). When tying arrangements are longstanding and industry standard, they cannot be so obviously pernicious as to deserve *per se* treatment. For example, in *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, the court concluded that *per se*

treatment was inappropriate for evaluating an alleged tie of television network licenses because bundling is routine in the industry and the FCC had found bundling to be consistent with competitive marketplace considerations. 460 F. Supp. 2d 1012, 1028 (S.D. Iowa 2006).

Courts that recognize *per se* tying claims have developed unique requirements a plaintiff must meet "mainly to compensate for an overly aggressive legal rule". Areeda ¶1720a. Where *per se* tying has been recognized in this Circuit, courts have required plausible allegations (and ultimately proof) of both market power and anticompetitive effects, blurring any distinction between *per se* and rule of reason tying claims. *First*, "in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product". *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 46 (2006). "The Court has never been willing to say of tying arrangements, as it has of price-fixing, division of markets, and other agreements subject to *per se* analysis, that they are always illegal, without proof of market power or anticompetitive effect." *Jefferson Par.*, 466 U.S. at 34 (O'Connor, J., concurring).

Second, *per se* tying also requires a showing of anticompetitive effects. *Id.* "[A]nti-competitive effects in the tied market" is one of the "factors essential in determining whether a particular sales practice constitutes an illicit tying arrangement". *Coniglio v. Highwood Servs., Inc.*, 495 F.2d 1286, 1289 (2d Cir. 1974); *see also Kaufman v. Time Warner*, 836 F.3d 137, 141 (2d Cir. 2016) (identifying five elements of tying, including anticompetitive effects); *Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp.*, 880 F.2d 1514, 1516-17, 1519 (2d Cir. 1989) (same for "*per se* tying analysis"); *Yentsch*, 630 F.2d at 58 (requiring "actual foreclosure of competition in the tied product market" under *per se* theory).[4]

[4] In *In re Visa Check/MasterMoney Antitrust Litigation*, the Second Circuit listed four elements of a *per se* tying claim in *dicta* without mentioning an anticompetitive effects requirement. 280 F.3d 124, 133 n.5 (2d Cir. 2001). But that decision predates more recent Second Circuit cases that have restated the five-element tying test. Moreover, in that case, on remand from the Second Circuit, the district court declined to rule that the Second Circuit does not require proof of foreclosure for *per se* claims and ordered a trial on whether the alleged tying "harmed competition in the [tied product] market". *In re Visa Check/MasterMoney Antitrust Litig.*, 96-CV-5238 (JG), 2003 WL 1712568, at *5-6 (E.D.N.Y. Apr. 1, 2003).

At times, courts in this district have stated that plaintiffs can plead *per se* tying without alleging anticompetitive effects; however, those decisions are contrary to binding Second Circuit precedent. Not only has the Second Circuit repeatedly required anticompetitive effects, but scholars and other Circuit Courts likewise have concluded that anticompetitive effects are required for *per se* tying in the Second Circuit. Areeda teaches that "[t]he express requirement of an 'anticompetitive effect' appears to have originated in the Second Circuit's 1974 *Coniglio* decision", though "[m]ore often noted is the Second Circuit's later *Yentsch* decision", and other Second Circuit cases, like *Gonzalez*, that continue to require anticompetitive effects. Areeda ¶1722. The Tenth Circuit has explained that "the Second Circuit began explicitly requiring 'anticompetitive effect[s]' as an element of a *per se* tying claim" with *Coniglio. In re Cox Enters., Inc.*, 871 F.3d 1093, 1101 (10th Cir. 2017). ABA Model Jury Instruction 2.E.3 in Civil Antitrust Cases states that "proof of anticompetitive effects in the tied product market is an element of a *per se* unlawful tying arrangement" in the Second Circuit, citing *Smugglers Notch Homeowners' Ass'n v. Smugglers' Notch Mgmt. Co.*, 414 F. App'x 372, 374 (2d Cir. 2011).[5]

Because both market power and anticompetitive effects are required, "[t]he factual elements that must be proven for a tying claim capture much of what must be demonstrated in a rule of reason case." *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 468 (7th Cir. 2020).

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[5] Scattered district court decisions suggesting otherwise are limited to the context of monopoly power—as opposed to market power—or are contrary to Second Circuit precedent. For example, the court in *In re Google Digital Advertising Antitrust Litigation* suggested that *per se* tying does not require anticompetitive effects where a defendant has monopoly power. 627 F. Supp. 3d 346, 368 (S.D.N.Y. 2022). But Fubo does not allege Disney has monopoly power in the tying market. *See Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 99 (2d Cir. 1998) (even "a share between 50% and 70% can [only] occasionally show monopoly power"). In *Cablevision Systems Corp. v. Viacom International Inc.*, the court stated in dicta that anticompetitive effects were required for the rule of reason but not *per se* analysis, but found the plaintiff had sufficiently alleged anticompetitive effects. No. 13-CV-1278 (LTS), 2014 WL 2805256, at *2 (S.D.N.Y. June 20, 2014). And in *In re Wireless Telephone Services Antitrust Litigation*, 385 F. Supp. 2d 403, 414 (S.D.N.Y. 2005), the court stated in dicta that anticompetitive effects were not required for *per se* tying, but granted summary judgment because the plaintiffs failed to present evidence that the defendants had market power or that the alleged tying arrangements had an actual adverse effect on competition, which is an anticompetitive effect analysis.

Other Claims Under Section 1 of the Sherman Act. Fubo's challenge to MFNs must be analyzed under the rule of reason, as Fubo concedes. (*See* ¶¶303, 328.) To adequately plead a non-tying Section 1 violation under the rule of reason, a plaintiff must sufficiently allege: (1) "that defendants possess the requisite market power and thus the capacity to inhibit competition market-wide, plus some other grounds to believe that the defendant's behavior will harm competition market-wide, such as the inherent anticompetitive nature of defendant's behavior or the structure of the interbrand market" or (2) "an actual adverse effect on competition, such as reduced output", increased prices or decreased quality in the relevant market. *Bookhouse of Stuyvesant Plaza, Inc. v. Amazon.com, Inc.*, 985 F. Supp. 2d 612, 620 (S.D.N.Y. 2013).

The Donnelly Act. "The standard for a well-pleaded Donnelly Act claim is the same as a claim under Section 1 of the Sherman Act." *Nat'l Gear & Piston, Inc. v. Cummins Power Sys., LLC*, 861 F. Supp. 2d 344, 370 (S.D.N.Y. 2012).

ARGUMENT

I. There is No Unlawful Tie.

In Counts 3, 5, 12 and 13, Fubo claims Disney's alleged bundling constitutes an unlawful tie and so-called "block booking" in violation of Section 1 of the Sherman Act and the Donnelly Act. (¶¶270-278, 288-292, 334-337.) Fubo alleges that Disney ties the purchase of purported "Commercially Critical Sports Channels" (the tying product) to the purchase of "Non-Critical Television Channels" (the tied product). (¶163.) Fubo alleges that the bundling of Disney's networks "prevented Fubo from licensing other content that Fubo would prefer to distribute", specifically four "Non-Critical Television Channels": AMC, A&E, TNT and TBS. (¶¶83, 119.)

Fubo's claims fail as a matter of law because Fubo: (i) fails to allege a tying arrangement that could qualify for *per se* treatment; (ii) does not plausibly plead anticompetitive effects in the tied product market; and (iii) does not plausibly plead a tie of products in two separate, well-defined markets. The Donnelly and Sherman Acts are coextensive, and the two sets of claims fail for the same reasons. *See*, *e.g.*, *Nat'l Gear & Piston, Inc.*, 861 F. Supp. 2d at 370.

A. Fubo Has Failed To Plausibly Plead *Per Se* Tying.

1. Fubo's Tying Claim Does Not Qualify for *Per Se* Treatment.

To the extent *per se* tying remains good law (it does not), it is reserved for clear "pernicious effect[s] on competition", *N. Pac.*, 356 U.S. at 5, where "courts can predict with confidence that [the tie] would be invalidated in all or almost all instances under the rule of reason". *Solent Freight Servs., Ltd. Inc. v. Alberty*, 914 F. Supp. 2d 312, 320 (E.D.N.Y. 2012) (citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886-87 (2007)). Applying a *per se* rule is inappropriate unless "as a threshold matter there [is] a substantial potential for impact on competition" and "a substantial volume of commerce is foreclosed thereby". *Jefferson Par.*, 466 U.S. at 16.

Fubo alleges that "[f]or decades", programmers across the industry—not just Disney—have bundled networks. (¶¶4, 84, 86.) Where, as here, an entire industry bundles—openly, in a well-known manner—and has done so for almost half a century, the bundling cannot "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit" to qualify for *per se* treatment. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

Regulators and courts alike have historically found bundling to be consistent with a competitive market. The FCC expressly stated that "[w]e do not find anything to suggest that, for example, requesting an MVPD to carry an affiliated channel, another broadcast signal in the same or another market, or digital broadcast signals is impermissible or other than a competitive marketplace consideration". 15 FCC Rcd. 5445, 5469 (2000). In *Mediacom*, a cable provider, Mediacom, brought a tying claim against a programmer, Sinclair, because Mediacom only wanted to carry certain Sinclair stations and Sinclair "refuse[d] any offers made by Mediacom that were anything less than a 'global agreement' for all twenty-two stations". 460 F. Supp. 2d at 1016. In denying Mediacom's preliminary injunction motion, the court held that the alleged tie could not support a *per se* theory, reasoning that "[r]etransmission rights are routinely negotiated on a bundled basis" and thus industry practice indicated that Sinclair's tying arrangement would presumptively not qualify for *per se* treatment. *Id.* at 1028-29. The aforementioned FCC rule

"alone seems to indicate that Sinclair's tying arrangement is not anticompetitive and is an accepted industry practice". *Id.* at 1028. So too here; network bundling is not anticompetitive at all, let alone so obviously anticompetitive as to merit *per se* treatment.

Moreover, the plaintiffs in *Brantley v. NBC Universal, Inc.*, who challenged the tying of so-called "high-demand" and "low-demand" television channels by virtually every participant in the industry, ended up "disclaim[ing] any contention that the tying practices in [that] case [were] *per se* antitrust violations". 675 F.3d 1192, 1197 n.7 (9th Cir. 2012). The *Brantley* plaintiffs took discovery "on the question whether the Programmers' practices had excluded independent programmers" from the market for low-demand channels (the tied product) and adduced *no evidence* that bundling foreclosed competition in the tied product market, leading the plaintiffs to amend their complaint to remove the foreclosure allegations. *Id.* at 1196 & n.5. Because network bundling has a long and widespread history across the industry, and because inquiries about it have adduced no anticompetitive effects, it cannot be presumptively anticompetitive and so blatantly "pernicious" to justify *per se* treatment.

2. Fubo Fails To Allege Anticompetitive Effects in the Tied Market.

An element of any tying claim, whether *per se* or rule of reason, is that "the tie-in has anticompetitive effects in the tied market". *Kaufman*, 836 F.3d at 141. "[T]he vice of tying agreements lies in the use of economic power in [the tying] market to restrict competition on the merits in [the tied market]." *Shop & Save Food Mkts., Inc. v. Pneumo Corp.*, 683 F.2d 27, 30 (2d Cir. 1982). Thus, a plaintiff must plausibly allege facts showing that the tying arrangement "harm[s] existing competitors or create[s] barriers to entry of new competitors in the market for the tied product", *Jefferson Par.*, 466 U.S. at 14, thereby extending the seller's market power in the market for the sale of the tying product into a separate market for the sale of the tied product, *see id.* A plaintiff cannot plead anticompetitive effects by merely alleging that a tying arrangement raises prices, forces buyers to buy products they do not want, or reduces consumer choice; rather, to plead a tying claim a plaintiff must allege foreclosure in the tied market. *See Brantley*, 675 F.3d at 1201-02; *see also Jefferson Par.*, 466 U.S. at 16 ("[W]hen a purchaser is

'forced' to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.").

Fubo's tying claims fail because Fubo does not plead harm to competition in the tied product market. It does not plead foreclosure of ***any*** participant in that market. That is fatal.

At its core, Fubo's claim is that bundling requires Fubo to license networks it otherwise would not have licensed, thus "prevent[ing] Fubo from executing on its business plan to offer a consumer-friendly package of sports content". (¶8.) That is insufficient to plead foreclosure in the tied product market as a matter of law.

The Ninth Circuit in *Brantley* rejected a theory of anticompetitive harm like Fubo's. There, a putative class of consumers[6] alleged unlawful tying based on carriage agreements between television programmers and distributors that "require[d] each [d]istributor that wishe[d] to purchase that [p]rogrammer's high-demand channels (the tying product) to purchase all of that [p]rogrammer's low-demand channels (the tied product) as well" and "[d]istributors [to] sell consumers cable channels only in packages consisting of each [p]rogrammer's entire offering of channels". *Brantley*, 675 F.3d at 1201. With initial discovery yielding no evidence of foreclosure in the tied product market, the plaintiffs deleted their allegations that the alleged tying practices "foreclosed independent programmers from participating in the upstream [program licensing] market", making the ***repleaded*** *Brantley* claim similar to Fubo's claim here. *Id.* at 1196 & n.5. The district court dismissed the plaintiffs' repleaded claims for failure to allege a cognizable injury to competition flowing from the tie. *Id.* at 1196.

The Ninth Circuit affirmed, reasoning that the plaintiffs failed to plead the requisite facts for a tying claim—that the alleged tie "exclude[d] other sellers of low-demand channels from the market, or that this practice raise[d] barriers to entry into the programming market"; nor did plaintiffs allege that the arrangement "force[d] [d]istributors or consumers to forego the purchase

[6] That plaintiffs in *Brantley* were consumers—rather than a distributor—is of no moment. Both they and Fubo must allege anticompetitive effects in the tied market, and neither did.

of alternative low-demand channels". *Id.* at 1201. The Ninth Circuit held that "mere allegations that [p]rogrammers have chosen to limit the ability of [d]istributors to offer [p]rogrammers' channels for sale individually" or that "an agreement has the effect of reducing consumers' choices or increasing prices to consumers does not sufficiently allege an injury to competition", as "[b]oth effects are fully consistent with a free, competitive market". *Id.* at 1202.

Like the *Brantley* plaintiffs, Fubo has not alleged foreclosure in the tied market. Fubo does not allege that Disney's purported bundling practices foreclose other programmers in the "Non-Critical Television Channels" market or impact other programmers' efforts to produce or license those channels. *Id.* at 1201. Fubo does not point to a single programmer that has been foreclosed from this purported market, let alone that bundling was the cause. *In re Wireless Tel. Servs. Antitrust Litig.*, 385 F. Supp. 2d 403, 425 (S.D.N.Y. 2005) ("[T]o make a foreclosure argument", "one would expect . . . evidence of failed efforts to enter."). Any foreclosure claim in the purported tied product market is inconsistent with the obvious reality that there is robust entry in and competition for so-called non-critical channels. Fubo itself alleges that numerous programmers compete with "non-critical" Disney networks in the purported "Non-Critical Television Channels" market, including TNT, TBS, A&E, AMC, [REDACTED] [REDACTED] (¶¶209-210, 220.) Any television viewer knows the ubiquity of non-Disney networks; that industry reality precludes any foreclosure claim.

Fubo tries to avoid *Brantley* by alleging that, but for the tie, Fubo itself would have licensed additional "Non-Critical Television Channels" from programmers besides Disney. (¶¶119, 210, 221.) Those allegations fail to plead anticompetitive effects.

First, accepting Fubo's allegations as true and presuming the cost of unwanted Disney channels caused Fubo to forgo licensing four additional non-critical channels, such an idiosyncratic impact on Fubo does not amount to anticompetitive effects in the purported tied product market. The question is not whether Fubo's choice of which "Non-Critical Television Channels" to license was affected by the alleged tie, but rather whether the tie "had an actual adverse effect on competition *as a whole* in the tied product market". *AngioDynamics, Inc. v.*

C.R. Bard, Inc., 537 F. Supp. 3d 273, 316 (N.D.N.Y. 2021) (emphasis added) (quoting *Geneva Pharms. Tech. Corp. v. Barr Labs.,* 386 F.3d 485, 506-07 (2d Cir. 2004)). At best, Fubo alleges an impact on Fubo alone—without identifying any other distributor that has been prevented from licensing any "non-critical" channels as a result of Disney's tying arrangements—and, thus, does not allege foreclosure in the tied market.[7] *See id.*

Nor can Fubo plausibly argue that the networks it supposedly forewent—AMC, A&E, TBS or TNT—have been foreclosed from any "non-critical" channels market. Those networks are some of the most widely distributed in the United States, with each reaching between 84.2% and 92.9% of households with MVPD subscriptions, as of December 2023.[8] U.S. Cable Network Households, available at: https://wrestlenomics.com/u-s-cable-network-households-universe-1990-2023-nielsen-data (citing Nielsen data). There can be no plausible allegation of any foreclosure.

Second, the alleged tie does not *prevent* even Fubo from licensing any "non-critical channels". Fubo simply made a decision about where to spend its money. Fubo's actual complaint is that bundling allegedly "forc[es] Fubo to spend hundreds of millions of dollars to license and broadcast content that its customers do not want or need". (¶8.) Fubo alleges that it dropped TNT and TBS, and decided against licensing A&E and AMC, because Fubo wanted "to maintain an economical channel package (because Disney's prices are so high)". (¶¶210, 221.) Put differently, Fubo alleges it made a business decision to offer a cheaper product instead of carrying A&E, AMC, TNT and TBS, but no bundling arrangement forced Fubo to forego those

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[7] Having failed to allege any anticompetitive effect, Fubo also fails to allege that it has suffered "antitrust injury" flowing from any purported anticompetitive effect of the tying arrangement. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) ("Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.").

[8] The Court may take judicial notice of these publicly available facts because they are "not subject to reasonable dispute" and "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned". Fed. R. Evid. 201(b); *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007) (noting that courts ruling on 12(b)(6) motions to dismiss may consider "matters of which a court may take judicial notice").

channels. It could have licensed them, offered them to consumers and charged more if it needed to—as most other MVPDs do.

That makes this case fundamentally different from *Cablevision Sys. Corp. v. Viacom Int'l Inc.*, 13-Civ-1278 (LTS) (JLC), 2014 WL 2805256 (S.D.N.Y. June 20, 2014). In *Cablevision*, a cable company MVPD survived a motion to dismiss, pleading that a programmer's bundling practices foreclosed competition in the tied product market because available technological bandwidth caused "the channels on which [the plaintiff] is able to offer programming [to be] limited" and "if it were not forced to carry the [programmer's networks], it would carry other networks on the numerous channel slots that [the programmer's networks] currently occupy". *Id*. at *1-2; *see* Cablevision Am. Compl., 2013 WL 4828947 ¶33 (alleging that "[i]n determining the networks to offer subscribers, Cablevision must take into account . . . the scarce capacity (also called bandwidth) on Cablevision's systems that video channels consume. At any given time, capacity available on Cablevision's systems (*i.e.*, how much data can be carried per second) is finite."). Fubo streams its content over the Internet (¶183) and (unlike Cablevision) does not plead that it has a finite number of channel slots or that technology limits the number of channels it can offer. Fubo ***could*** license more channels; it just chose not to.

Third, Fubo admits that, at the time of filing the Amended Complaint, it licensed non-sports entertainment networks from WBD, including [REDACTED] [REDACTED] (¶83), and Fubo's base package includes nearly two hundred channels, well beyond the five channels it claims are "critical". *See* Channel Lineup, FuboTV, available at: https://www.fubo.tv/welcome/channels. This disproves the notion that Fubo has been forced to forgo alternatives in the tied product market. Fubo can license, and has licensed, "non-critical" channels (outside any bundle with sports content), disproving any foreclosure theory even as to Fubo itself. ***Which*** non-critical channels to license is just a business choice Fubo has made.

Fourth, any harm to competition in the tied product market is implausible. WBD, the owner of two of the four "non-critical" channels that Fubo claims that it alone has been prevented from licensing, does ***not*** assert that TNT or TBS has been foreclosed from any

relevant market because of Disney's bundling practices. It is implausible to conclude that Disney has thwarted competition if the alleged victim—WBD—disclaims foreclosure.

Finally, Fubo argues that Disney's alleged bundling arrangements raise barriers for distributors "by requiring any new entrant or nascent competitor to license dozens of low-value channels, raising entrants' costs and impeding their ability to offer a differentiated service to consumers". (¶120.) Fubo's argument confuses barriers to entry in two different markets, (i) a downstream distribution market (where MVPDs offer subscriptions to consumers) and (ii) a purported upstream program licensing market, upon which Fubo's tying claim relies. Critically, the "new entrant[s]" and "nascent competitor[s]" Fubo references are MVPDs, not programmers that offer non-critical channels—as would be required to show foreclosure in the tied product market here. Whether Disney's licensing terms make it expensive for new MVPDs to enter the downstream market is beside the point—it does not bear on "anticompetitive effects in the ***tied market***" for non-critical channels, which, as discussed above, Fubo has not plausibly alleged. *Yentsch*, 630 F.2d at 57 (emphasis added).[9] Fubo's tying claims fail.

3. Fubo Fails To Plead the Tie of Two Separate, Well-Defined Products.

Fubo's tying claim also fails for the independent reason that Fubo fails to adequately allege that "Commercially Critical Sports Channels" and "Non-Critical Television Channels" are separate, well-defined products in different markets. The purported market for "Commercially Critical Sports Channels" allegedly contains five channels: ABC, CBS, ESPN, Fox and NBC. (¶202.) In the purported market for Non-Critical Television Channels, Fubo specifically identifies the following networks, which broadcast entertainment, news and sports content: [REDACTED] A&E, AMC, [REDACTED]

[9] Fubo's arguments that "[h]igh barriers to entry protect Disney's and Fox's market power in the tying market" (¶213) and that creation of a "Commercially Critical Sports Channel" "requires obtaining the media rights to major sports leagues and events", which is "difficult and expensive" (*id.*)—are irrelevant to its tying claims. Fubo must plead foreclosure in the ***tied product market*** (Non-Critical Television Channels), not the tying product market (Commercially Critical Sports Channels). Fubo also must allege that bundling practices are responsible for "rais[ing those] barriers to entry". *Brantley*, 675 F.3d at 1201. These allegations do neither.

[REDACTED], TNT, TBS and [REDACTED]. (¶¶209-210, 219-220.) Fubo offers no reasoned basis for including or excluding networks in those markets. Fubo's market definitions are incoherent, based on its subjective views and insufficient as a matter of law.

For a tying arrangement to exist, the purported "tying product and tied product must be separate, *i.e.*, each must be in a separate and distinct product market". *Kaufman*, 836 F.3d at 141. "This is because if there is no separate market for the allegedly tied product, there can be no fear of leveraging" economic power in the tying product market to harm competition in the tied product market since the latter "simply does not exist". *Id.* at 142. A plaintiff must define tying and tied product markets such that each contain "all products 'reasonably interchangeable by consumers for the same purposes'". *Geneva Pharms.*, 386 F.3d at 496. "Reasonable interchangeability sketches the boundaries of a market" because "the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level". *Id.*

Fubo names only five networks in the "Commercially Critical Sports Channel" market and only thirteen networks in the "Non-Critical Television Market". (¶¶209-210, 219-220.) It is unclear whether Fubo contends that all other channels—or even just the "350+ top channels" from its own packages (Welcome, FuboTV, available at: https://www.fubo.tv/welcome)—fall into either the tying or tied markets, or whether some channels are in neither market. *See E & L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23, 26, 32 (2d Cir. 2006) (affirming dismissal for failure to adequately allege a tied product market of "finished wood products", which the court reasoned was "exceptionally broad and vague" and "covers an enormous variety of goods with an enormous number of uses"). Fubo fails to provide Disney fair notice of whether hundreds of channels are in the tying product market, in the tied product market or in neither.

Fubo's failure to define the bounds of either the tying or tied product market is fatal. Dismissal is appropriate "where the plaintiff has failed to articulate a plausible explanation as to why a market should be limited in a particular way". *Concord Assocs. L.P. v. Entm't Props. Trust*, 817 F.3d 46, 53-54 (2d Cir. 2016) (rejecting a gambling/racing market in the Catskills that excluded nearby gambling markets in Connecticut, Pennsylvania, and New Jersey). Fubo alleges

that the tying product market is the market for licensing "'must-have' sports channels" that "an MVPD or virtual MVPD subject to bundling requirements *must* license to offer a commercially viable package of channels". (¶199.) This "must-have" categorization appears to be entirely subjective, based on Fubo's current preferences rather than market realities. Such a market fails as a matter of law: "The test for a relevant market is not commodities reasonably interchangeable by a particular plaintiff, but 'commodities reasonably interchangeable by consumers for the same purposes.'" *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 438 (3d Cir. 1997) (citation omitted).

For example, Fubo does not consider TNT or TBS to be Commercially Critical Sports Channels. Fubo alleges that "massive consumer demand" for the five other networks it identifies "distinguishes them from other sports channels". (¶203.) But if "massive consumer demand" distinguishes critical sports channels, it is implausible that TNT and TBS would not be among them, because Fubo also alleges that TNT and TBS broadcast WBD's extensive sports programming, which Fubo contends accounts for approximately 10% of the rights in the so-called Sports Program Licensing market, including the NCAA March Madness tournament and NBA regular season and finals conference games. (¶¶54, 80, 81, 169, 202-208, 210, 221.) Fubo provides no explanation for why ABC, for example, is "critical", whereas TNT and TBS are not—and does not allege that all or even most distributors share that view. (*See* ¶221.) Fubo fails to adequately plead a viable tying market. *Bayer Schering Pharma AG v. Sandoz, Inc.*, 813 F. Supp. 2d 569, 577 (S.D.N.Y. 2011) ("[A] 'court cannot accept the market boundaries offered by plaintiff without at least a theoretically rational explanation for excluding [alternatives].'").

The assertion that Fubo's five critical channels are "critical" because they [REDACTED] and [REDACTED] (¶¶203, 210) is insufficient to define a market. For example, Fubo does not explain why [REDACTED] is not also a so-called "critical" channel, or what distinguishes it from the other five "critical" channels.

The question for antitrust market definition is what networks "consumers treat[] as acceptable substitutes" and switch between. *Downtown Music Publ'g LLC v. Peloton Interactive, Inc.*, 436 F. Supp. 3d 754, 765 (S.D.N.Y. 2020) (citation omitted). The fact that the five "critical" channels [REDACTED] does nothing to establish or even analyze whether, *e.g.*, distributors treat NBC as a substitute for Fox. Fubo cannot define a market by [REDACTED] when, for example, it is impossible to know how TNT and TBS's viewership would compare to that of the five "critical" channels if Fubo offered TNT and TBS to its subscribers.

Furthermore, it is entirely inconsistent for Fubo to claim that the five purportedly critical channels are absolutely necessary to the viability of any MVPD yet also claim that the Venu JV—which will be an MVPD that does *not* carry CBS or NBC—will be so successful as to drive Fubo out of business. Fubo tries to gloss over this contradiction between its JV claims and its tying claims by arguing that the JV "can succeed without all five of these channels" because it would be a "skinny" bundle, whereas "all five of these channels are commercially critical to MVPDs". (¶204.) But if "the massive consumer demand for the sports programming controlled by" CBS and NBC makes them "must have" networks to "profitably attract[] and retain[] customers" (¶¶199, 203), it is implausible that these channels would, at the same time, not be critical for an offering like the JV, designed to appeal to sports fans specifically. Likewise, it is implausible that ESPN and ABC are so critical that no MVPD would be viable without them when Fubo existed [REDACTED] without these networks (¶¶ 71, 98), and EchoStar's Sling Blue does so today. (*See* Sling Blue - Sports, Sling, available at: https://www.sling.com/service/sling-blue#sports.) These inherent inconsistencies render Fubo's purported market definitions facially untenable and require dismissal. *See Concord Assocs.*, 817 F.3d at 53 (affirming dismissal when proposed market was "too narrow and inherently implausible"); *Cinema Vill. Cinemart, Inc. v. Regal Entm't Grp.*, 15-Civ-05488, 2016 WL 5719790, at *7 (S.D.N.Y. Sept. 29, 2016) ("dismissal is appropriate where, as here, a plaintiff has defined the relevant market in an inconsistent and facially implausible way"), *aff'd*, 708 F. App'x 29 (2d Cir. 2017).

B. Fubo's Rule of Reason Tying Claims Fail.

In Counts 3 and 12, Fubo pleads, in the alternative, that Disney's alleged tying arrangements are illegal under the rule of reason. (¶¶275, 334-335.) Fubo also alleges so-called "block-booking" in Counts 5 and 13. (¶¶288-292, 336-337.)

Fubo's rule of reason tying claims fail for the same reasons as its *per se* tying claims. As discussed in Section A.2 above, a plaintiff must plausibly allege anticompetitive effects to state a tying claim, whether *per se* or under the rule of reason, and Fubo fails to allege foreclosure in the purportedly tied product market. And, as set out in Section A.3, Fubo fails to adequately allege separate tying and tied product markets.

Fubo's "block booking" claims in Counts 5 and 13 do not change this result. Fubo alleges that the same conduct that constitutes unlawful tying also constitutes block booking. *Compare* ¶271 ("Disney/ESPN has conditioned the sale of its commercially critical sports content—the linear channels ESPN and ABC—on Fubo's agreement to license its non-critical content as well") *with* ¶289 ("Disney/ESPN has conditioned the licensing of ABC and ESPN on Fubo's agreement to license and broadcast less-desired non-critical content from Disney/ESPN"). "Block-booking is the practice of licensing, or offering for license, one feature or group of features [*i.e.*, films] on condition that the exhibitor will also license another feature or group of features released by the distributors." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 156 (1948). Block-booking is just "a form of tying agreement". *Fields Prods., Inc v. United Artists Corp.*, 318 F. Supp. 87, 88 (S.D.N.Y. 1969). Fubo does not plead its block-booking claims as *per se*, and, as this Court recently explained, "[t]he legal framework used to evaluate . . . block booking" is "the rule of reason". *United States v. Paramount Pictures, Inc.*, 19 Misc. 544 (AT), 2020 WL 4573069, at *6 (S.D.N.Y. Aug. 7, 2020). Moreover, block booking historically involved arrangements that prevented movie theaters with a finite number of screens from showing films from competitors. *See id.* at *8 (explaining that in the 1930s and 40s, film distributors that "required block booking provisions in many of their theatrical licenses . . . . tied [theaters] up for weeks or months"). As explained above with respect to *Cablevision*,

Fubo does not claim that it lacks the capacity to license additional networks. Fubo's block-booking claims thus also fail to allege foreclosure in the tied market and are insufficient for the same reasons as its tying claims and should be dismissed.

II. The MFN Clauses Are Not Agreements in Restraint of Trade.

In Counts 7, 10 and 14, Fubo claims that the MFNs in Disney's carriage agreements with YouTube and Hulu, and in Hulu's carriage agreements with various programmers, including Fox, WBD, NBC, Univision and A&E, unreasonably restrain trade in violation of Section 1 of the Sherman Act and the Donnelly Act. (¶¶298-306, 319, 324-331, 338-339.)

Fubo concedes that its MFN claims challenge vertical restraints and are evaluated under the rule of reason. (Count 7 & ¶303; Count 10 & ¶328.) These claims fail. Fubo (a) does not plausibly allege a horizontal agreement between the Defendants to include MFNs in their respective carriage agreements with distributors; (b) fails to plausibly allege that either Disney or Hulu has market power in the purported Sports Program Licensing Market; and (c) fails to plausibly allege that the MFNs harm competition in a well-defined market and also harm Fubo itself. Fubo's Donnelly Act claims fail for the same reasons its Sherman Act claims fail.

A. Fubo Does Not Allege a Horizontal Agreement.

Fubo suggests—without any alleged ***facts***—that Disney, Fox and WBD each include MFNs in their respective agreements with YouTube and Hulu as "part of a larger collusive scheme" (¶123) and that an effect of the MFNs may be to "facilitate coordination or collusion among horizontal competitors" (¶¶304, 329). But Fubo does not allege any facts showing, or even suggesting, that Disney colluded or coordinated in any way with either Fox or WBD (or any other programmer) when Disney agreed on MFNs with YouTube or Hulu. (¶¶298-306.) Nor does Fubo allege any facts showing, or even suggesting, that Hulu colluded or coordinated in any way with YouTube (or any other distributor) when Hulu agreed on MFNs with Fox, WBD, NBC, Univision and A&E. (¶¶324-331.)

Thus, for Fubo's MFN claims, the alleged agreements are entirely *vertical*: between an individual programmer and an individual distributor. Fubo has not brought horizontal restraint

claims against any Defendant related to the MFNs and admits as much, labeling its MFN claims as "vertical" restraint of trade claims that it challenges under the rule of reason. (*See* ¶¶298-306, 324-331, 338-339.) At most, Fubo alleges that the programmer Defendants independently entered into carriage agreements containing MFNs with each of YouTube and Hulu, and that Hulu independently entered into carriage agreements containing MFNs with other programmers.

Two consequences follow from Fubo's concession that its MFN claims are vertical. *First*, market power is evaluated individually for each party and counterparty to the MFNs (*e.g.*, each of Disney and YouTube, or each of WBD and Hulu), and the market shares of competitors acting in parallel (without an agreement between them) cannot be aggregated. *Bookhouse of Stuyvesant Plaza*, 985 F. Supp. 2d at 622 ("In the absence of a horizontal conspiracy, grouping the [Defendants'] market share together is inappropriate."). (*Infra* Section II.B.) *Second*, the MFN claims are evaluated under the rule of reason. *United States v. Am. Express Co*., 838 F.3d 179, 194 (2d Cir. 2016) (explaining that vertical restraints are generally judged under the rule of reason), *aff'd sub nom. Ohio v. Am. Express Co*., 585 U.S. 529 (2018). (*Infra* Section II.C.)

B. Fubo Fails To Plausibly Allege Market Power.

Fubo fails to plausibly allege, as it must, that either Disney or Hulu has market power in the relevant market, which Fubo alleges is the Sports Program Licensing Market. *See, e.g.*, *Am. Express*, 585 U.S. at 543 & n.7. "To show market power, a plaintiff must show not only that defendant had a significant share of the market, but also that this share can be sustained over a period of time." *CDC Techs., Inc. v. IDEXX Labs., Inc.*, 7 F. Supp. 2d 119, 130 (D. Conn. 1998). Notably, "a market share of between 30 and 40% does not lead to an inference of market power". *In re Amazon.com, Inc. eBook Antitrust Litig.*, 1:21-cv-00351-GHW-VF, 2023 WL 6006525, at *26 n.22 (S.D.N.Y. July 31, 2023), *R&R adopted*, 2024 WL 918030 (S.D.N.Y. Mar. 2, 2024). "Courts have consistently held that firms with market shares of less than 30% are presumptively incapable of exercising market power." *Com. Data Servers, Inc. v. Int'l Bus. Machs. Corp.*, 262 F. Supp. 2d 50, 74 (S.D.N.Y. 2003).

For Count 7 (against Disney/ESPN), Fubo fails to allege facts to support the conclusion

that Disney has market power in the purported Sports Program Licensing Market. Fubo alleges that Disney has only a ***26.8%*** share of this purported market. (¶¶169, Fig. 5, 301.) A market share that low is insufficient as a matter of law to infer market power. *See, e.g.*, *Amazon.com, Inc. eBook Antitrust Litig.*, 2023 WL 6006525, at *26 n.22; *Com. Data Servers*, 262 F. Supp. 2d at 74. Moreover, Fubo alleges that there are four other major competitors in the purported Sports Program Licensing Market that each have between a 9.9% and a 17.3% market share. (¶169, Fig. 5.) The presence of multiple competitors with similar shares in the alleged market further supports that Disney does not have market power. *See Wireless Tel. Sys. Antitrust Litig.*, 385 F. Supp. 2d at 417 (concluding that "[n]one of the defendants enjoys a market share that would, standing alone, permit an inference of market power to be drawn" when "no defendant has ever possessed more than twenty-four percent of the wireless services market").

For Count 10 (against Hulu), Fubo does not even try to plead that Hulu has market power in the purported market. Instead, Fubo alleges that "Hulu TV has facilitated and entered into MFN agreements with *counterparties that have market power* in the Sports Program Licensing Market" and that "Hulu TV's *majority owner Disney has market power*" as a programmer in this alleged market. (¶327 (emphasis added).) But pointing to licensors' (programmers') purported market power does not plead *Hulu's* market power as a licensee (distributor) in the alleged market. Nor, as discussed above, does Fubo allege market shares for Disney or any other programmer sufficient to establish market power as a licensor.[10] Moreover, even if Fubo tried to allege that Hulu itself had market power among MVPDs in this alleged market, this claim would fail too. Traditional MVPDs and vMVPDs are in the same market. But even if vMVPDs were a separate market, Fubo alleges that Hulu TV has only "28% of all virtual MVPD subscribers"

[10] Because Hulu is a majority-owned subsidiary controlled by Disney (¶327), an agreement between those two entities cannot violate Section 1. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984) ("the coordinated activity of a parent and its wholly owned subsidiary" does not violate Section 1); *In re Aluminum Warehousing Antitrust Litig.*, 13-md-2481 (KBF), 2015 WL 6472656, at *10 (S.D.N.Y. Apr. 28, 2020) ("[A] non-wholly owned affiliate cannot conspire with its parent in violation of § 1 of the Sherman Act if they are jointly controlled.").

(¶128), an insufficient market share as a matter of law to plead market power.

C. Fubo Fails To Plausibly Allege the MFNs Harm Competition or Fubo.

Fubo's MFN claims also must be dismissed because Fubo fails to allege, as required, that Disney's or Hulu's MFNs caused "actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality in the relevant market". *Giordano v. Saks Inc.*, 654 F. Supp. 3d 174, 208 (E.D.N.Y. 2023) (quoting *Am. Express*, 585 U.S. at 542). Nor does Fubo allege, as it must to plead the separate element of antitrust injury, a causal connection between these MFNs and the higher prices Fubo purportedly pays. *See Brunswick Corp.*, 429 U.S. at 489.

According to Fubo, Disney uses MFNs to inflate prices through three steps: (1) YouTube and Hulu agree to "content prices, penetration requirements, and other economic terms" in their carriage agreements with Disney that would be "nearly impossible for Fubo to bear"; (2) in exchange for accepting these, Disney "afford[s] YouTube TV and Hulu TV MFN status in the virtual MVPD market", which prevents Disney from "offer[ing] Fubo better terms unless [Disney] also agree[s] to offer those same terms to YouTube TV and Hulu TV"; and (3) Disney "enter[s] side deals with YouTube TV and Hulu TV" that give them "relief from the above-market prices". (¶¶130-132.) Fubo allegedly suffers harm because two large vMVPD competitors get better terms and lower prices than Fubo, resulting in Fubo paying "above-market price" for Disney's content. (¶111.) Fubo alleges that it "will never have a better cost structure and thus cannot effectively compete on price" due to the MFNs and [REDACTED] [REDACTED] (¶¶141, 145.) Fubo's claim is that Disney supposedly would offer Fubo lower prices than it currently offers YouTube and Hulu but does not do so because of the MFNs.

First, as a threshold matter, MFNs, standing alone (without the alleged "side deals"), ***enhance*** competition and therefore do no plausibly harm competition in any purported market. MFNs "are standard devices by which buyers try to bargain for low prices". *Blue Cross & Blue Shield of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) (Posner, J.); *see Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1110 (1st Cir. 1989) ("[A] policy of insisting on a supplier's lowest price . . . tends to further competition

on the merits."). This is precisely why MFNs are commonly demanded by buyers, like the MVPDs here, to ensure them the same or better deal than any of their competitors receive. *See Amazon.com, Inc. eBook Antitrust Litig.*, 2023 WL 6006525, at *3 n.5 ("MFNs are common devices that guarantee buyers will get the lowest prices or best terms from their suppliers . . . ."). The presence of MFNs is inconsistent with an anticompetitive conspiracy and instead is consistent with normal competitive behavior by strong buyers.

Second, Fubo does not plausibly allege that the fees it pays Disney are tied to the MFN rates in Disney's agreements with YouTube or Hulu, and as a result, Fubo not only fails to allege harm to competition, but also to allege that it has suffered antitrust injury resulting from the challenged MFNs. Fubo alleges that the prices Disney charges Fubo are [REDACTED] "higher than the prices that [Disney] charge[s] other video distributors". (¶121 & Fig. 4.) But Fubo conspicuously does *not* allege that YouTube or Hulu pay Disney prices at that same above-market level, such that the YouTube or Hulu MFN *causes* higher prices to Fubo by setting an artificial price floor. There can be no causal link between these MFNs and Fubo's terms if the price Fubo pays is entirely disconnected from the MFN rates. That is fatal. *See Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 122 (2d Cir. 2007) (A court "can ascertain antitrust injury only by identifying the [] anticompetitive effect of the specific practice . . . and comparing it the actual injury" alleged.); *see also G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762, 766 (2d Cir. 1995). And Fubo cannot fill this gap by merely alleging that unnamed individuals from each Programmer Defendant told Fubo that [REDACTED] (¶127.) Pleading that [REDACTED] does not render plausible Fubo's allegation of harm to competition from MFNs *in fact* elevating the prices that smaller distributors pay.

Third, even if Fubo did allege that its rates match those in the YouTube and Hulu MFNs, Fubo still could not plausibly allege any causal connection between the MFNs in Disney's

carriage agreements with YouTube or Hulu and the allegedly high prices Fubo pays for Disney's networks. Fubo asserts that Disney includes MFNs in its carriage agreements with the largest distributors to avoid giving discounts to smaller distributors who have less leverage. (¶130-132.) But that makes no sense; Disney would not need MFNs to give Fubo and smaller MVPDs less favorable rates than it gives MVPDs with more leverage. There simply is no plausible allegation that the prices Fubo pays are elevated not due to the disparity in negotiating leverage, but rather due to MFNs that distributors with more leverage than Fubo successfully obtained from Disney. Fubo fails to allege why, absent the MFNs, Disney would have any economic incentive to offer Fubo lower prices than those Fubo is indisputably willing to pay. It is commonplace, in industries throughout the economy with individually negotiated pricing, that smaller buyers with less leverage pay higher prices. And such pricing is not an antitrust violation.

Fubo's failure to allege a plausible connection between the harm it purportedly suffered and the MFNs that Disney has with other companies is fatal to its claims. Because the purportedly inflated prices Fubo pays for Disney's networks are not "fairly traceable" to the challenged conduct, Fubo cannot have plausibly suffered antitrust injury, *see Brunswick Corp.*, 429 U.S. at 489, nor does it even have constitutional standing, *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Fubo's failure to adequately allege that Disney would have any incentive to charge Fubo lower prices with or without the MFNs confirms that Fubo fails to plead that these MFNs have caused Fubo cognizable injury, let alone ***antitrust*** injury.[11]

CONCLUSION

Disney requests that Counts 3, 5, 7, 10, 12, 13 and 14 be dismissed with prejudice.

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[11] Nor does the recent motion to dismiss ruling in *Biddle v. Walt Disney Co.*, No. 22-cv-07317-EJD, 2024 WL 3171860 (N.D. Cal. June 25, 2024) support Fubo's claims. There, putative classes of MVPD subscribers alleged that MFNs in Disney's carriage agreement with every major distributor set an industry-wide price floor, *id.* at *2-4, whereas here, Fubo suggests that MFNs with YouTube and Hulu combined with "side deals" have increased prices for Fubo and "smaller competitors", while YouTube and Hulu pay lower effective rates. (¶¶111, 123.) Further, the *Biddle* plaintiffs allege that Disney forces ESPN on MVPDs, which allegedly do not want to pay for sports channels, whereas here, Fubo alleges exactly the opposite—that MVPDs "must license [ESPN] to offer a commercially viable package". (¶199.)

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