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

DISNEY'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Disney's motion to dismiss demonstrated the shortcomings of Fubo's Amended Complaint. Fubo's Opposition does nothing to ameliorate these shortcomings. As Disney established, even accepting Fubo's allegations as true for purposes of this motion, they do not state an antitrust claim.

Fubo Fails To State a Tying Claim. Fubo nowhere alleges that programmers without "critical sports channels" have been foreclosed from the purported market for non-critical channels, as is required under either the *per se* or rule of reason standard. To the contrary, Fubo concedes that no programmer has been prevented from competing, but nevertheless insists that, if the tie has prevented Fubo alone from licensing certain channels, that suffices to plead anticompetitive effects. It does not. Under controlling precedent that Fubo ignores, Fubo must show that the purported tie adversely affects competition *as a whole* in the tied product market. Fubo cannot make this showing by alleging idiosyncratic harms to itself or pointing to supposed harms outside the tied market. Accordingly, both its *per se* and rule of reason claims should be dismissed. And, contrary to Fubo's suggestion, the Court also can and should decide now whether Fubo's tying allegations can support a *per se* claim. The *per se* theory (if available at all) is reserved for ties that have an obvious pernicious effect on competition. As a matter of law, network bundling does not meet this standard because it is pervasive throughout the pay TV industry and has existed for decades, without any court or regulator *ever* prohibiting it. To the contrary, competition in the alleged market has thrived.

Fubo's MFN Allegations Do Not State a Claim. Recognizing the implausibility of the "side deal" allegations in its Complaint, Fubo now argues that Disney's and Hulu's MFNs are anticompetitive even without them. That is even less plausible than the allegations in the Complaint, as Fubo itself alleges distributors would not agree to pay above-market rates without the "rebates" supposedly earned through side deals. Nor does Fubo plausibly allege that, absent MFNs, Disney would offer Fubo lower rates. Fubo's failure is not merely a question of "causation"—the problem is Fubo alleges no facts from which to infer antitrust standing.

Further, Fubo tries to distract from its failure to plead anticompetitive effects by pointing to purported harms outside the alleged relevant licensing market, but such alleged harms cannot support its MFN claim. Consequently, Fubo cannot establish market power through direct evidence of increased prices, decreased output or reduced quality. Nor can Fubo allege market power through the indirect evidence of market share, as Fubo acknowledges that Disney and Hulu each have insufficient market share as a matter of law to establish market power in any relevant market. Fubo's claims should be dismissed.

ARGUMENT

I. There Is No Unlawful Tie.

The fundamental flaw with Fubo's tying claims is that Fubo never alleges that any programmers were foreclosed from the alleged market for non-critical channels—*i.e.*, that programmers without sports channels (*e.g.*, Hallmark or A&E) cannot find licensees for their networks. And it is beyond cavil that foreclosure from the tied market (here, the alleged market for non-critical channels) is a basic pleading requirement for any tying claim, regardless whether the claim is analyzed under the rule of reason or the *per se* standard. Absent that essential foreclosure allegation, Fubo's tying claims must be dismissed, as the claim was in *Brantley*. *See, e.g.,* Hovenkamp, *Antitrust and Nonexcluding Ties*, 8 Competition Pol'y Int'l J. 41, 44 (2012) ("[T]he [*Brantley*] complaint was dismissed because the plaintiffs could not identify any independent program providers who were foreclosed, or excluded, by the arrangement.").

A. Fubo Fails Plausibly To Plead Its Tying Claim.

1. Fubo fails plausibly to allege anticompetitive effects in the tied market.

Fubo has not alleged the fundamental "vice of tying agreements"—that Disney uses "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) (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 11 (1958) (alterations omitted)). Fubo's reliance on the purported impact on it from the alleged bundling practice—its decision not to license four other networks carried by *virtually every other MVPD and virtual MVPD*—does not

suffice to plead the required foreclosure. Opp'n at 32. It is well-established that an idiosyncratic impact, such as the one Fubo alleges, is insufficient to plead the kind of anticompetitive effects necessary for a Sherman Act Section 1 violation. *See Deem v. Lockheed Corp.*, 749 F. Supp. 1230, 1236 (S.D.N.Y. 1989) ("[A] plaintiff must allege injury to competition, not just injury to one competitor."); *Frito-Lay, Inc. v. Bachman Co.*, 659 F. Supp. 1129, 1133 (S.D.N.Y. 1986) ("No violation of section 1 of the Sherman Act is possible absent proof of anticompetitive effect beyond the injury to plaintiffs[.]").

The linchpin of pleading foreclosure in a tied market is plausibly alleging the purported tie "had an actual adverse effect on competition as a whole in the tied product market". *In re Wireless Tel. Servs. Antitrust Litig.*, 385 F. Supp. 2d 403, 415 (S.D.N.Y. 2005). Here, "one would expect . . . a detailed picture of the history of the [tied Non-Critical Television Channels] market in the United States, with the number of manufacturers in the market each year, and evidence of failed efforts to enter". *Id.* at 424. Fubo does not even attempt to meet that requirement. *See Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1201 & n.9 (9th Cir. 2012) ("The complaint does not allege that Programmers' practice of selling 'must-have' and low-demand channels in packages excludes other sellers of low-demand channels from the market, or that this practice raises barriers to entry into the programming market.").

Fubo misses the point when it says Disney focuses on anticompetitive effects on programmers, but not distributors. Opp'n at 33. That is a distinction without a difference. The alleged tie, to be actionable, must foreclose transactions between sellers and buyers in the tied market (here, between programmers, on the one hand, and distributors, on the other). If programmers are not foreclosed as sellers/licensors of noncritical networks, then nor are distributors foreclosed from transacting with such programmers as buyers/licensees. It is the contracts that programmers have with distributors that show programmers are not foreclosed.

Fubo's argument still boils down to its oft-repeated allegations that bundling "forces distributors and consumers to pay for dozens of channels that nobody watches", Opp'n at 1, and that "Fubo is forced to spend more than $█ million per year on content it does not want",

Opp'n at 34. That might seem unfair, but it is not an anticompetitive effect as a matter of well-settled law. As the Supreme Court held in the leading case on tying, *Jefferson Parish Hospital District No. 2 v. Hyde*, being "'forced' to buy a [tied] product [a purchaser] would not have otherwise bought" has "no adverse impact on competition" absent foreclosure of other sellers. 466 U.S. 2, 16 (1984).

Fubo is simply wrong as a matter of law that "it is enough to allege that the 'tie forecloses a not insubstantial amount of potential sales for the tied product". Opp'n at 33. Fubo's argument conflates the "anticompetitive effects" element with the separate and distinct element that the tie affect a "not insubstantial" volume of commerce. The very case that Fubo cites confirms that these elements are distinct, and not interchangeable as Fubo urges. The Second Circuit, in *Gonzalez v. St. Margaret's House Development Fund*, lists anticompetitive effects and the involvement of a "not insubstantial" amount of commerce as separate elements of a tying claim. 880 F.2d 1514, 1518 (2d Cir. 1989). *See also Yentsch v. Texaco, Inc.*, 630 F.2d 46, 57 (2d Cir. 1980) ("The law of tying requires proof of *five* specific elements: . . . *fourth*, anticompetitive effects in the tied market, . . . and *fifth*, involvement of a 'not insubstantial' amount of interstate commerce in the tied product market . . . ." (emphases added)).

Fubo further miscites cases to suggest that it can adequately allege anticompetitive effects for its tying claim by pointing to purported harms outside the tied market. Opp'n at 36-38. Most of the cases Fubo cites did not even involve tying claims. *See Ross v. Bank of Am., N.A.(USA)*, 524 F.3d 217 (2d Cir. 2008) (Section 1 conspiracy and group boycott); *Reading Int'l, Inc. v. Oaktree Cap. Mgmt. LLC*, 317 F. Supp. 2d 301 (S.D.N.Y. 2003) (Section 1 conspiracy); *Laumann v. NHL*, 907 F. Supp. 2d 465 (S.D.N.Y. 2012) (Section 1 and Section 2 conspiracies). Fubo's other cases hold only, as Disney explained in its motion, that a tying claim must allege, with sufficient facts, that "the tie-in has anticompetitive effects in the ***tied market***". *Kaufman v. Time Warner*, 836 F.3d 137, 141 (2d Cir. 2016) (emphasis added). That is because the very concern about illegal tying is that it may restrain competition in the *tied market*. *See N. Pac. Ry. Co.*, 356 U.S. at 11. Fubo cites *United States v. Microsoft Corp.*, which makes this very

point. 253 F.3d 34 (D.C. Cir. 2001) (en banc). There, the circuit's instructions were clear: "on remand, plaintiffs must show that Microsoft's conduct unreasonably restrained competition. Meeting that burden involves an inquiry into the actual effect of Microsoft's conduct on competition ***in the tied good market***", *i.e.*, 'the putative market for browsers'". *Id*. at 95 (emphasis added). And, in *Eastman Kodak Co. v. Image Tech. Servs., Inc*., although anticompetitive effects were *not* even at issue, the harms alleged were in the alleged *tied market* for servicing Kodak machines, with the tie "exclud[ing] *service* competition" and "boost[ing] *service* prices". 504 U.S. 451, 465 (1992). Fubo wrongly suggests that the court can look to other purported harm to determine whether Fubo has adequately alleged anticompetitive effects because courts should avoid "formalistic distinctions" when "conduct[ing] market-definition inquiries". Opp'n at 37. Market definition, however, is a completely different analysis, separate from analyzing alleged *anticompetitive effects* necessary to support a tying claim.

Fubo's allegation that bundling prevents it "from offering varied packages of channels catered to consumer demand and leads to higher prices and reduced choices for viewers", Opp'n at 32, even if accepted as true, does not allege anticompetitive effects. As the Ninth Circuit in *Brantley* made clear in exactly this context, "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" in the tied market. *Brantley*, 675 F.3d at 1202; *see also* Hovenkamp, *Antitrust and Nonexcluding Ties*, 8 Competition Pol'y Int'l J. 41, 51 (2012) ("The *Brantley* plaintiffs simply want the seller to offer a smaller product than it wishes to offer. That is fundamentally not an antitrust problem.").

2. Fubo fails to plead the tie of two separate, well-defined products.

Fubo is wrong that "a relatively permissive pleading standard" saves its vague market definitions. Opp'n at 13. Market definition requires it to be sufficiently ascertainable whether a product is in the tying market, the tied market or neither. A proposed market definition fails as a matter of law if it does not make clear which of a "vast range of products"

are in an alleged market. *E & L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23, 32 (2d Cir. 2006) (rejecting a proposed market definition of "finished wood products" for the tied product market where that definition was "exceptionally broad and vague, potentially encompassing hundreds of different products" and "cover[ing] an enormous variety of goods"). Fubo likewise fails to provide usable definitions here, naming five networks in the tying market and only thirteen networks in the tied market. Fubo does not state whether the hundreds of other channels are in either of these markets or neither—depriving Disney of the specificity to which it is entitled that would "allow [Disney] to commence discovery and prepare a defense" to Fubo's nebulous market definitions. *Id.* Fubo defines "commercially critical sports channels" as "'must-have' sports channels" a distributor "*must* license to offer a commercially viable package of channels" and defines "non-critical television channels" as those distributors "*might* choose to license" but "do[] not *need* to license". ¶¶ 199, 215. Put simply, Fubo claims critical networks are essential and non-critical networks are those distributors can "choose between". ¶¶ 199, 216. These are insufficient defining principles—Fubo fails to identify *any* distinguishing features that would allow an objective categorization of a given channel as "critical" or "non-critical".

Even with respect to the limited number of "Commercially Critical Sports Channels" and "Non-Critical Television Channels" Fubo does identify, Fubo alleges no facts to show the networks in these purported markets are reasonable substitutes for each other. Fubo argues affiliate fees for the former are "far higher" than affiliate fees for the latter, Opp'n at 15, but that does nothing to advance the critical inquiry into whether the networks in either market are "reasonably interchangeable by consumers for the same purposes". *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 496 (2d Cir. 2004). For example, Fubo never alleges, or attempts to explain, if or why consumers treat Fox Business (¶ 220) as a "reasonable substitute" for the Disney Channel (¶ 219) in the alleged tied market. This failure to "articulate a plausible explanation" as to the supposed interchangeability of networks in the purported tying and tied markets warrants dismissal. *See Concord Assocs. L.P. v. Entm't Props. Trust*, 817 F.3d 46, 53-54 (2d Cir. 2016) (affirming dismissal where the alleged market was "too narrow and inherently

implausible" and suggesting that "merely asserting that a commodity is in some way unique is insufficient to plead a relevant market").

With respect to the alleged tying market, Fubo concedes that the allegedly tying networks are in the same market only if the networks are substitutes for one another. Opp'n at 18 ("[T]he applicable analysis is whether or not the products are economic substitutes[.]"). A product is a substitute for another product if consumers choose one product or the other but not both. *See* 2B Areeda & Hovenkamp ¶ 565a ("Substitutes are goods that can replace one another and thus 'compete' for the user's purchase."). According to Fubo itself, the relevant inquiry is "the extent to which consumers are willing to substitute one [product] for the other". Opp'n at 18.[1] Fubo's core allegation disproves that the allegedly tying networks are substitutes: if one accepts as true Fubo's assertion that all five of the networks are "must-haves", then distributors do not choose between them but instead must take them all, making the networks *complements* not *substitutes*. "[C]omplements are goods that are most efficiently made or used together." *Dream Big Media Inc. v. Alphabet Inc.*, 22-cv-02314-RS, 2024 WL 3416509, at *4 (N.D. Cal. July 15, 2024) (citing 2B Areeda & Hovenkamp ¶ 565). "Grouping complementary goods into the same market is . . . economic nonsense[.]" 2B Areeda & Hovenkamp ¶ 565a. Because that is what Fubo does, it has not defined a viable tying product market. *See New York v. Actavis, PLC*, No. 14-cv-7473 (RWS), 2014 WL 7015198, at *15 (S.D.N.Y. Dec. 11, 2014) (two drugs were not in the same market when the "medications [were] complements rather than substitutes").

B. *Per Se* Treatment Is Inappropriate.

Contrary to Fubo's assertions that Disney is "not entitled to" dismissal of a *per se* claim, and contrary to its insinuation that any allegations of anticompetitive effects insulate such

[1] Fubo's suggestion that courts have recognized "championship boxing contests" or "regular season football games" as distinct markets for valuable sports content misses the point. Opp'n at 17. That consumers may treat championship boxing contests as reasonably interchangeable with other championship boxing contests, or regular season football games as reasonably interchangeable with other regular season football games, does not suggest they treat different networks, which often offer *completely different sports*, as substitutes, particularly where Fubo itself has alleged that each network is a "must-have" for MVPD and virtual MVPD viability.

a claim from dismissal, courts regularly grant motions to dismiss *per se* claims. *See, e.g.*, *Flash Elecs., Inc. v. Universal Music & Video Distrib. Corp.*, 312 F. Supp. 2d 379, 390, 395 (E.D.N.Y. 2004) (finding "no basis in the complaint to allow plaintiffs' Section 1 claim to proceed under a [*per se*] theory" while permitting the claim to proceed under the "rule of reason"); *In re Jan. 2021 Short Squeeze Trading Litig.*, 105 F.4th 1346, 1356 n.11 (11th Cir. 2024) ("[C]ourts routinely decide to use the rule of reason—rather than finding a restraint illegal *per se*—at [the motion to dismiss] stage."). The Supreme Court has made clear that *per se* condemnation is reserved for only a narrow category of ties history has shown to have an obvious "pernicious effect on competition and lack of any redeeming virtue". *N. Pac. Ry. Co.*, 356 U.S. at 5.

Industry practice and case law make clear that TV network bundling cannot, as a matter of law, amount to a *per se* antitrust violation. Where, as here, the entire industry has developed around bundling networks "[f]or decades" (¶¶4, 84), there can be no *per se* violation. Fubo wrongly asserts that "courts have been striking down [cable] bundling arrangements as *per se* unlawful". Opp'n at 28-29. Not so. No case Fubo cites holds what Fubo says it does. In *Biddle*, for example, recognizing that they could ***not*** adequately allege a tying claim in light of the Ninth Circuit's decision in *Brantley*, the *Biddle* plaintiffs specifically ***disavowed*** any tying claim and any challenge to Disney's bundling practices, stating that "virtually all of the *Brantley* court's discussion is directed towards a different legal theory—tying—that is not asserted in this case" and that "Plaintiffs do not seek to debundle channels, nor do Plaintiffs contend that bundling is unlawful". Plaintiffs' Opp'n to Mot. to Dismiss, *Biddle v. Walt Disney Co.*, No. 22-cv-0717-EJD, 2024 WL 124379, at *12 (N.D. Cal. Jan. 5, 2024). Even so, the court dismissed the *Biddle* plaintiffs' (non-tying) *per se* claim, allowing them to proceed only on a (non-tying) rule of reason Section 1 claim. 2024 WL 3171860, at *10, *13. That claim is directly contrary to Fubo's allegations; Plaintiffs in *Biddle* claim they were forced to subscribe to and pay for ESPN—the very network Fubo claims every distributor and subscriber "must have". *Id.* at *13. Clearly, *Biddle* does not and cannot support *per se* treatment of bundling.

Paramount Pictures Corp. v. Johnson Broadcasting, a case from the Southern

District of Texas, concerned alleged syndication rights for individual television shows to a local television station with limited time slots available for programming; it did not involve or condemn TV network bundling. 432 F. Supp. 2d 707, 709 (S.D. Tex. 2006). And, as Disney explained in its motion, the *Cablevision* case involved allegations of anticompetitive effects where technological constraints prevented Cablevision from carrying additional tied channels from alternative programmers. *Cablevision Sys. Corp. v. Viacom Int'l Inc.*, 13-Civ-1278 (LTS) (JLC), 2014 WL 2805256, at *1 (S.D.N.Y. June 20, 2014). While Fubo denies that *Cablevision* relied on technological constraints and asserts that "[t]he court relied instead on paragraph 10" of the Cablevision complaint, Opp'n at 32 n.11, that paragraph specifically alleged that "***Cablevision possesses a finite amount of network capacity available for channels***" and "[c]onsequently, each channel Cablevision carries forecloses the opportunity to carry a non-Viacom channel". Cablevision Am. Compl., 2013 WL 4828947 ¶10 (emphasis added). Fubo does not allege similar constraints.

Fubo's citations to block booking cases are likewise inapposite. Those cases, like *United States v. Paramount Picture*s, 334 U.S. 131 (1948) and *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), involved arrangements that prevented movie theaters with a finite number of screens from showing films from competitors; *physical constraints* meant that block booking resulted in exclusivity or near-exclusivity and thus foreclosure of others from the affected theaters. And, as Disney explained in its Motion, "[a]lthough *per se* illegal seventy years ago, today, courts would analyze [block booking] under the rule of reason[.]". *United States v. Paramount Pictures, Inc.*, 2020 WL 4573069, at *6 (S.D.N.Y. Aug. 7, 2020) (Torres, J.). Notably, Judge Torres terminated the very same consent decrees issued in the decades-old cases on which Fubo relies. *Id.* at *7. Fubo also relies on an earlier, out-of-circuit case analyzing a block booking claim with respect to syndicated television shows. *See MCA Television Ltd. v. Public Interest Corp.*, 171 F.3d 1265 (11th Cir. 1999). That decision is unavailing, as it predates Judge Torres' more recent analysis and is inconsistent with modern tying doctrine. *See* Areeda & Hovenkamp § 1782a6 (explaining that "the court [in *MCA*] relied on a very close reading of

the Supreme Court's now overruled *Loew's* decision, which had condemned block-booking [and] it paid less attention to subsequent developments in the law of tying"). In short, none of the cases Fubo relies on implies that the bundling of TV networks is presumptively illegal.

The only cases that dealt with allegations similar to Fubo's found those failed to state a tying claim *at all*, let alone a *per se* claim. In *Brantley,* the Ninth Circuit affirmed dismissal of tying claims brought under a rule of reason theory for failure to plead foreclosure in the tied market for "low-demand" channels. *Brantley*, 675 F.3d at 1201. And in *Mediacom*, the court concluded that the bundling of TV network retransmission rights could not sustain *per se* treatment and noted it was "an accepted industry practice". *Mediacom Commc'ns Corp. v. Sinclair Broad. Grp., Inc.*, 460 F. Supp. 2d 1012, 1029 (S.D. Iowa 2006). Although Fubo argues that the *Mediacom* court relied on certain FCC rulings and argues "the FCC cast doubt" on the propriety of bundling in subsequent decisions, it is undisputed that the FCC has repeatedly considered bundling and has never condemned or curtailed this practice. To be clear, *Mediacom* and the FCC's rulings are pertinent here because they demonstrate that bundling has never been found to have the obvious "pernicious effect on competition and lack of any redeeming virtue" that could justify *per se* treatment. *N. Pac. Ry. Co.*, 356 U.S. at 5.

In any event, Fubo's tying claims would still fail under a *per se* theory because Fubo has failed plausibly to allege anticompetitive effects. *See* Mot. at 6-7. Fubo argues that certain Second Circuit cases Disney cited do not discuss "the distinctions between *per se* and rule-of-reason tying claims" and points to other decisions to argue anticompetitive effects are not a required element of a *per se* tying claim. Opp'n at 31.[2] But Fubo ignores that courts, the ABA

[2] One case Fubo cites, *PharmacyChecker.com, LLC v. Nat'l Ass'n of Boards of Pharmacy*, 530 F. Supp. 3d 301 (S.D.N.Y. 2021), involved no tying claim. Fubo also claims the district court in *Visa* "reaffirmed the principle that tying is 'illegal under the *per se* test' . . . without regard to anticompetitive effects". Opp'n at 31 n.10. Instead, the court stated "it is not clear to me whether the Second Circuit's *per se* standard in fact requires proof of . . . foreclosure of competition or anticompetitive effect in the tied product market", and ordered a trial on whether the alleged tie "harmed competition in the [tied] 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).

Model Jury Instructions and treatises, all analyzing the same cases Disney cites, confirm that the Second Circuit requires a showing of anticompetitive effects in a *per se* tying case. *See In re Cox Enters., Inc.*, 871 F.3d 1093, 1101 (10th Cir. 2017) (explaining that "the Second Circuit began explicitly requiring 'anticompetitive effect[s]' as an element of a *per se* tying claim" with *Coniglio*); ABA Model Jury Instruction 2.E.3 in Civil Antitrust Cases ("proof of anticompetitive effects in the tied product market is an element of a *per se* unlawful tying arrangement" in the Second Circuit); 9 Areeda & Hovenkamp, *Antitrust Law* ¶ 1722c (4th ed. 2018) (same).[3] And for the reasons set forth *supra* in Section I.A.1, Fubo cannot make this showing.

II. Fubo's MFN Claims Fail as a Matter of Law.

Fubo's MFN claims, which Fubo acknowledges are governed by the rule of reason, should be dismissed because Fubo fails plausibly to allege three critical elements: market power, harm to competition and antitrust injury.

In its opposition, Fubo abandons its theory that Disney's and Hulu's alleged side deals were critical to its claim that their respective MFNs unlawfully restrain trade. Fubo now argues that these MFNs are anticompetitive "standing alone". Opp'n at 45. Once again, Fubo is wrong. MFNs, by definition, lower (rather than raise) prices when the MFN provision is triggered. MFNs standing alone therefore ***enhance*** competition. *See* Mot. at 23-24 (collecting cases and explaining that MFNs both are consistent with competitive markets and tend to further competition). That is why MFNs are standard in many industries, including the TV programming industry, where large distributors have demanded and obtained MFNs for decades. *See* Am. Compl. ¶ 125. Fubo offers no plausible explanation for why (without a side deal) distributors such as YouTube would agree to pay above-market rates. Instead, Fubo alleges

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[3] Contrary to Fubo's argument that "[i]n the tying context, *per se* condemnation is appropriate where 'the existence of [defendant's] market power is probable' ***or*** there is 'a substantial potential for impact on competition'", Opp'n at 26-27 (quoting *Jefferson Parish*, 466 U.S. at 16-17 (emphasis added)), the Supreme Court has explained that "there must be a substantial potential for impact on competition in order to justify *per se* condemnation" ***and*** "the existence of market power is probable." 466 U.S. at 16-17.

distributors would ***not*** do so. "Without the 'rebates' that their parent companies receive, YouTube TV and HuluTV would operate at significant losses", and "YouTube TV and Hulu TV can absorb these nominal losses only because they or their parent companies (Google and Disney, respectively) can recoup those losses through side deals with programmers." *Id.* ¶ 140. Because plausible allegations of "side deals" or "rebates" are critical to the MFN claim Fubo alleged (*see id.* ¶¶ 129, 132), and because Fubo now tacitly concedes that those allegations are not well-pled, Fubo's MFN claims must be dismissed.

With or without side deals, Fubo also fails plausibly to plead anticompetitive effects of Disney's MFNs, *i.e.* "a substantial anticompetitive effect that harms consumers in the relevant market". *Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018). As demonstrated in Disney's motion, Fubo neither pleads anticompetitive effects indirectly, through "proof of market power plus some evidence that the challenged restraint harms competition", or directly, through "actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality in the market". *Id.* at 542.

Fubo does not contest that Disney's alleged 26.8% market share is insufficient as a matter of law to support an allegation of market power for Count 7 (against Disney/ESPN). *See* ¶ 169, Fig. 5; *see also Am. Express*, 585 U.S. at 543 & n.7 (requiring proof of market power); Mot. at 21-22 (collecting cases). And while Fubo argues that market share is not the ***only*** way of showing market power, Opp'n at 52-53, that cannot overcome the legal principle that "[c]ourts have consistently held that firms with market shares of less than 30% are ***presumptively incapable*** of exercising market power." *Commercial Data Servers, Inc. v. Int'l Bus. Machs. Corp.*, 262 F. Supp. 2d 50, 74 (S.D.N.Y. 2003) (emphasis added). Fubo's attempt to escape this presumption by aggregating YouTube TV's and Hulu Live's percentages of virtual MVPD subscribers, *see* Opp'n at 53, is unavailing; it says nothing about **Disney's** market share ***as a programmer*** and is an inappropriate methodology for the ***vertical*** restraint Fubo alleges. Fubo also never rebuts its failure to plead that Hulu has market power; that failure is fatal to Count 10 (against Hulu). Even if Disney had market power (and it does not), pleading Disney's

market power as a *licensor* would not plead Hulu's market power as a *licensee*. *See* Mot. at 22.

Fubo's response to Disney's lack of sufficient market share, in a crowded market Fubo alleges comprises at least four other major competitors, *see* ¶ 169, Fig. 5, is to claim that instead it alleges "actual adverse effect on competition". Opp'n at 52-53. As a threshold matter, allegations of adverse effects do not negate the presumption that firms with a low market share are *incapable* of having market power and, therefore, of harming competition; Fubo's allegations of market share thus render its allegations of anticompetitive effects presumptively ***im***plausible. But even setting aside Disney's low market share, Fubo's argument that MFNs have increased and locked in the rates Fubo and other virtual MVPDs pay, *see* Opp'n at 48-50, is implausible. Fubo's argument is essentially that large distributors managed to negotiate both MFNs and low rates, whereas Fubo managed to negotiate neither. That cannot support a plausible inference that it is MFNs—and not, for example, vastly superior negotiating leverage of YouTube as compared to Fubo—that somehow adversely affected Fubo's licensing terms. Critically, Fubo does ***not*** allege that it pays YouTube TV's or Hulu Live's MFN rates. Instead, Fubo alleges Disney charges Fubo rates that are [redacted]% "higher than the prices that [Disney] charge[s] other video distributors", ¶ 121 & Fig. 4, "many of whom are not subject to MFNs". Opp'n at 7. If Disney charges Fubo higher rates than YouTube TV and Hulu Live—and many other distributors not even subject to MFNs—then MFNs could not plausibly set an artificial price floor for Fubo. And Fubo also pleads no plausible allegation that, without MFNs, Disney would be willing to offer lower prices to Fubo than those Fubo is already clearly willing to pay, such that it can be inferred Fubo has actually suffered harm from MFNs.[4] *See generally* Mot. at 24-25.

[4] Fubo says MFNs "often are anticompetitive", citing *United States v. Apple, Inc.*, 791 F.3d 290, 320 (2d Cir. 2015). Opp'n at 48. But in that case, the Second Circuit found a restraint of trade in a "horizontal agreement [which did not have MFNs] that Apple organized among the Publisher Defendants to raise ebook prices", but ***not*** in Apple's vertical agreements (which did have MFNs) with publishing companies. *Id*. at 323, 325. Likewise, *Starr v. Sony BMG Music Entertainment* alleged a horizontal "conspiracy by major record labels to fix the prices and terms under which their music would be sold over the Internet" and allegedly used MFNs to enforce a price floor. 592 F.3d 314, 317 (2d Cir. 2010). Fubo, by contrast, does not allege that Defendants have a horizontal agreement that they use MFNs to enforce.

Fubo is incorrect that this is merely a causality issue. Opp'n at 54-55. It is black-letter law that "[a]n antitrust plaintiff must show . . . antitrust standing at the pleading stage". *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 157 (2d Cir. 2016). Fubo does not. Even assuming Disney unlawfully entered into the MFN "scheme" Fubo alleges (and Disney has not done so), because the rates Fubo pays, based on the facts it alleges, do not "flow[] from that which makes [Disney's] acts unlawful", *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), Fubo does not "satisfy the antitrust standing requirement". *Aluminum Warehousing Antitrust Litig.*, 833 F.3d at 157.

Fubo's allegations of product quality degradation do not show anticompetitive effects in the relevant market. Fubo wrongly focuses on the downstream market for pay TV distribution to consumers. Even if (as Fubo alleges) MFNs have allegedly "degrade[d] the quality of programming that distributors can offer consumers" by "prevent[ing] distributors from licensing superior content from other programmers", Opp'n at 49, that would not establish anticompetitive effects. Fubo's own cases make clear that "direct evidence of anticompetitive effects" demands allegations of "decreased quality ***in the relevant market***". *Am. Express*, 585 U.S. at 542 (emphasis added). Thus, the decreased quality necessary to plead direct evidence of anticompetitive effects must be in the relevant market for "Sports Program *Licensing*". ¶ 163 (emphasis added). Alleged decreased quality downstream, in a distinct "Streaming Live Pay TV" market involving Fubo and its customers, cannot as a matter of law constitute direct evidence of anticompetitive effects in the relevant market.

Fubo's argument that MFNs facilitate horizontal collusion is also woefully inadequate. Fubo points to (i) four paragraphs in its Amended Complaint that state identically: "Among other things, the MFN agreements . . . facilitate coordination or collusion among horizontal competitors" (¶¶ 304, 313, 321 and 329) and (ii) non-Defendant statements that MFN clauses are widespread in the industry (¶¶ 125-126, 142). Opp'n at 50-51. But Fubo does not allege facts that Disney or Hulu had *actual knowledge* of the terms of Fox's, WBD's or any other programmer's or distributor's MFNs, let alone that Disney or Hulu colluded or coordinated, in

any way, with any such parties. Such conclusory allegations are patently insufficient to meet the pleading standard for a horizontal Section 1 agreement, which Fubo does not plead in any event (*see* ¶ 229 (alleging MFNs are "vertical restraints")). *See Rothstein v. UBS AG*, 708 F.3d 82, 94 (2d Cir. 2013) ("[W]e are not required to credit conclusory allegations or legal conclusions couched as factual allegations."); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007) ("[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice.").

Finally, Fubo argues that, under *Copperweld* and its progeny, it "is a question of fact" whether Disney has sufficient control over Hulu to preclude a Section 1 violation for the agreement between Disney and Hulu, Opp'n at 45, but this is beside the point. Fubo's own allegation decisively answers the relevant question: Disney "owns the majority of Hulu". ¶ 52. That precludes a Section 1 claim. "*[M]ajority ownership* with its centralized power to control, whether or not apparently exercised in detail on a day-to-day basis, creates a single entity for antitrust purposes." *See* 7 Areeda & Hovenkamp, *Antitrust Law* ¶ 1467a (4th ed. 2018) (emphasis added). Where majority ownership is alleged, courts regularly dismiss claims *without* the fact examination Fubo suggests is required. *See, e.g.*, *OJ Com., LLC v. KidKraft, Inc.*, 34 F.4th 1232, 1243 (11th Cir. 2022) (applying *Copperweld* immunity to a 57%-owned subsidiary); *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 344-45 (N.D. Ill. 1997) (dismissing Section 1 claims against a parent and two of its subsidiaries that were "legally incapable of conspiring").[5]

CONCLUSION

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

[5] The only case Fubo cites on this point does not preclude dismissal here. In *Square D Co. v. Schneider S.A.*, the court denied a motion to dismiss, *inter alia*, a Sherman Act Section 1 claim that alleged a corporation "conspired with its partially-owned subsidiaries, officers or employees of those subsidiaries, and its bank". 760 F. Supp. 362, 368 (S.D.N.Y. 1991). But the court emphasized: "especially in view of the fact that it appears that the proof of plaintiff's § 1 claims at a hearing would be no different from the proof offered in support of its other antitrust claims, we decline to dismiss [the § 1 claim]". *Id.*

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