IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

FUBOTV INC., and FUBOTV MEDIA INC., Plaintiffs, - against - THE WALT DISNEY COMPANY, ESPN, INC., ESPN ENTERPRISES, INC., HULU, LLC, FOX CORPORATION, and WARNER BROS. DISCOVERY, INC., Defendants.	Case No. 1:24-cv-01363 (MMG) ORAL ARGUMENT REQUESTED

DEFENDANT FOX CORPORATION'S
MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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Defendant Fox Corporation ("Fox") respectfully submits this memorandum in support of its motion to dismiss Counts 1-4, 6, 8, 11, 12, 13, and 14 in the Amended Complaint (Dkt. Nos. 144, 145) ("Complaint" or "Compl.") filed by Plaintiffs FuboTV Inc. and FuboTV Media Inc. ("Fubo") for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).[1] To avoid unnecessary duplication, Fox incorporates the arguments advanced by the Disney Defendants and by Warner Bros. Discovery ("WBD").[2]

PRELIMINARY STATEMENT

Fubo brings this case in an effort to rewrite agreed-upon contracts and to protect its business from the dynamic forces of market competition. Such a lawsuit abuses the antitrust laws, which exist "for 'the protection of competition not competitors[.]'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (citation omitted). This Court has already considered Fubo's effort to prevent the JV from launching and competing with Fubo for subscribers. Fubo's non-JV claims against Fox center, not on a new joint venture, but on Fox's decision to license its networks to Fubo as a package of channels and on Fox's purported entry into "most favored nation" provisions ("MFNs") in agreements with two of Fubo's competitors.

First, Fubo fails to state a claim that Fox's longstanding practice of licensing its content in bundles violates Section 1 of the Sherman Act. To start, Fubo fails to allege that Fox has sufficient

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[1] In view of the Court's decision on the preliminary injunction motion, Fox does not offer detailed argument in moving to dismiss Counts 1, 2, and 11. For the reasons previously argued, Fox respectfully submits that those claims should be dismissed as a matter of law and preserves the issues should the law of the case change following the pending appeal. In addition, by filing this motion in accordance with this Court's scheduling order, Fox does not waive its pending motion to sever and transfer these claims to the United States District Court for the Central District of California (Dkt. No. 307).

[2] The Disney Defendants are Walt Disney Company, ESPN, Inc., ESPN Enterprises, Inc., and Hulu, LLC.

market power upon which to predicate a Section 1 tying claim. Because Fubo's tying claims against Fox do not allege any horizontal agreement with other programmers, Fubo must plausibly allege that Fox alone independently controls enough market share to force an illegal tying arrangement. But Fox allegedly controls just 17.3% of the market for live sports licensing rights. And, under blackletter antitrust law, such a small slice of the market does not suffice to allege a tying claim, which means Fubo's claims should be dismissed.

Beyond that threshold problem, Fubo's tying claims against Fox fail for several other reasons. Fubo fails to state a plausible claim that Fox's licensing to Fubo of a bundle of eight channels—six of which contain live sports and two of which do not—constitutes an unlawful tie of "commercially critical sports programming" with "non-critical" channels. *Compl.* ¶¶ 114–120. Although vague with its allegations, Fubo identifies the Fox Broadcast Network as a commercially critical sports channel (the tying product). Fubo cites just one other channel, [redacted] as a "non-critical television channel" (the tied product). However, Fubo does not identify any details relating to the terms under which it licenses [redacted], and it conspicuously avoids mentioning Fox News Channel, which is a far more expensive, non-sports network [redacted] *Id.* ¶ 202. At bottom, to state a tying claim, Fubo must allege that Fox is trying to extend its market power over the tying product into the market for the tied product. The Complaint does not plausibly allege that by bundling six sports channels with one non-critical non-sports channel, Fox could conceivably be harming competition in the market for "non-critical channels."

Second, Fubo's MFN claims are the sort of speculative claims that the *Twombly* pleading standard prohibits. [redacted] Then, because MFN provisions alone are not

illegal (in fact they tend to lower prices), Fubo hypothesizes other agreements between Fox and other distributors to posit harm to Fubo [redacted] An antitrust claim cannot be built upon such rank speculation: [redacted] Fubo does not allege how they would have had an anticompetitive impact on the rates Fox negotiated with Fubo.

In sum, Fubo does not invoke the antitrust laws to protect competition, but to protect itself from competitors while trying to force Fox to license its valuable content on Fubo's preferred terms. Neither is a valid use of the antitrust laws, and Fubo's claims against Fox should be dismissed with prejudice.

LEGAL 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. "In considering a motion to dismiss for failure to state a claim [], a district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference." *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991).

A court "may also consider matters of which judicial notice may be taken" pursuant to Federal Rule of Evidence 201. *Id.* Relevant here, "a district court may take judicial notice" of documents when they "are the very documents that are alleged to contain" particular statements "and are relevant not to prove the truth of their contents but only to determine what the documents

stated." *Id.* at 774. A "plaintiff whose complaint alleges that such documents" contain particular statements "can hardly show prejudice resulting from a court's studying of the documents." *Id.* Where judicially noticeable documents conflict with a complaint's characterization of them, the documents control. *See id.* at 773–774.

Neither Fox nor this Court need accept as true "legal conclusions couched as factual allegations." *Starr v. Sony BMG Music Ent.*, 592 F.3d 314, 317 (2d Cir. 2010) (quotations omitted); *see, e.g.*, *In re Fed Ex Corp. Secs. Litig.*, 517 F. Supp. 3d 216, 227–28 (S.D.N.Y. 2021). Fox thus accepts the Complaint's well-pleaded factual allegations as true solely for purposes of this motion, except where, as noted, they conflict with the carriage agreements incorporated by reference into the Complaint.

BACKGROUND

Fox's Television Channels. Fox licenses the following television channels to distributors: the Fox Broadcast Network, Fox News Channel, Fox Business Network, Fox Sports 1, Fox Sports 2, Fox Soccer Plus, Fox Deportes, and the Big Ten Network. Compl. ¶ 73. With the exception of Fox News Channel and Fox Business Network, all of Fox's channels feature live sports content. *See id.* ¶¶ 202, 220. Some of those channels, such as the Fox Broadcast Network, also offer a mix of entertainment, news, and other non-live sports content. According to Fubo, Fox's sports licenses account for 17.3% of sports rights. *Id.* ¶ 169 & fig.5. Fox competes for live sports media rights with Disney/ESPN, WBD, CBS, and NBC, each of whom, according to Fubo's allegations, license less than 27% of U.S. sports rights. *Id.* "Other" companies, including subscription video on-demand streaming platforms such as Amazon Prime, Netflix and Peacock, license another 17.1% of sports rights. *Id.*

Fox's Carriage Agreement with Fubo. Fubo has licensed content from Fox since [redacted] The current carriage agreement expires on [redacted]. *Id.* ¶ 78. Under its agreement, Fubo licenses all of its eight linear television channels. *Id.* ¶ 78, 202. Fubo alleges that the Fox Broadcast Network is a "commercially critical" channel (*id.* ¶¶ 53, 208) and that [redacted] is a "non-critical" channel (*id.* ¶ 220). Fubo's allegations are silent as to whether the remaining Fox channels are "commercially critical" or instead "non-critical," though it admits that Fox's only other non-sports channel, Fox News Channel, [redacted] *Id.* ¶ 202.[3] Similarly, while Fubo alleges that it would prefer not to license [redacted], Fubo does not identify any channels it has had to forego or drop because of the marginal cost of [redacted], or any facts that suggest the channel is so expensive that it has had any impact on Fubo's licensing decisions.

Fox's Agreements with Fubo's Competitors. Fubo alleges that Fox's carriage agreements with Hulu + Live TV ("Hulu") and YouTube TV ("YouTube") contain MFN clauses. *Id.* ¶¶ 121–147. MFNs guarantee, among other things, that the distributors that hold such MFN rights pay the lowest rates paid by other distributors. In other words, they ordinarily reduce prices. Fubo nonetheless claims that Fox has MFN provisions with YouTube and Hulu and that those MFNs somehow "induce" Fox "to charge Fubo higher prices and penetration requirements." *Id.* ¶ 139. Hulu and YouTube allegedly "agree to content prices, penetration requirements, and other economic terms" that are higher than market rates, *id.* ¶ 130, because Fox allegedly has unidentified "side deals" that operate as "rebates" with Hulu and YouTube for other services, *id.* ¶¶ 111, 132. According to Fubo, Fox then somehow leverages these MFN provisions to force Fubo

[3] Indeed, Fox News Channel is the second-most watched channel on Fubo. *See* PI Hearing Tr. 165:19–166:3.

to match the "above-market prices" in its carriage agreement, even though it is "nearly impossible for Fubo to bear these terms economically," *id.* ¶¶ 129–130.

Fubo's allegations rely upon the terms of the Hulu and YouTube carriage agreements, and the Complaint thus incorporates the terms of those agreements by reference. Pursuant to Federal Rule of Evidence 201, this Court may take judicial notice that [redacted] *See* Exhibits A–H. [redacted] Fubo's MFN claims therefore fail as a matter of law.

ARGUMENT

I. Fubo Does Not Plausibly Allege An Unlawful Tie

The Complaint challenges the widespread and longstanding industry practice by which networks license their media properties in multichannel bundles. *See* Counts 4, 6, 12, and 13. Fubo alleges that in order to purchase "commercially critical Sports channels" from Fox, Fox requires Fubo to purchase "non-critical television channels." Compl. ¶¶ 218–220. Fubo's tying claims fail for three reasons. *First*, Fubo has not pled anticompetitive effects in the tied market. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984), *abrogated in part on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006). *Second*, Fubo has not properly pled separate and plausible tying and tied product markets. *Third*, Fubo does not and cannot establish that Fox possesses market power in the first place.[4]

[4] For all its federal antitrust claims, Fubo pleads duplicative violations of the Donnelly Act, N.Y. Gen. Bus. L. § 340, but federal courts apply the same analysis to those claims. *See, e.g.*, *Cinema Vill. Cinemart, Inc. v. Regal Ent. Grp.*, No. 15-cv-05488 (RJS), 2016 WL 5719790, at *6 (S.D.N.Y. Sept. 29, 2016), *aff'd*, 708 F. App'x 29 (2d Cir. 2017) (internal citations omitted).

A. Legal Standard For Tying Claims

Tying arrangements are commonplace. Musicians sell their hit singles only as part of an album, writers may sell their short stories only as part of a collection, and grocers sell eggs by the dozen. Fubo itself offers its customers content through different bundles of preselected channels. *See* Fubo, https://bit.ly/4drvbgi (last visited September 26, 2024). Fubo's decision to sell subscribers multichannel packages does not present antitrust concerns, and neither does Fox's decision to license content to distributors in the same way. That is so because, as the Supreme Court has repeatedly recognized, tying arrangements can have competition-enhancing or competition-neutral effects. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54–55 (1977). Consumers "often find package sales attractive." *Jefferson Parish*, 466 U.S. at 12. And producers can "use such restrictions to compete more effectively" against rivals. *Continental T.V.*, 433 U.S. at 55 (noting that restrictions can, for example, be used "to induce competent and aggressive retailers" to invest time and money into exposing consumers to additional products). Tying is permissible so long as a company does not reduce competition in the tied market. *Jefferson Parish*, 466 U.S. at 12; *United States v. Loew's*, 371 U.S. 38, 45 (1962), *abrogated in part on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

Fubo argues that Fox's bundling of channels should be viewed as a *per se* violation of the antitrust laws. But because tying arrangements can have pro-competitive effects, simply alleging the existence of bundling is not enough. Instead, Fubo must allege an "actual adverse effect on competition" resulting from Defendants' bundling practices. *Jefferson Parish*, 466 U.S. at 31. Thus, to plead a tying claim in this Circuit, Fubo must allege that:

> (i) the sale of one product (the tying product) is conditioned on the purchase of a separate product (the tied product); (ii) the seller uses actual coercion to force buyers to purchase the tied product; (iii) the seller has sufficient economic power

> in the tying product market to coerce purchasers into buying the tied product; (iv) the **tie-in has anticompetitive effects in the tied market**; and (v) a not insubstantial amount of interstate commerce is involved in the tied market.

Kaufman v. Time Warner, 836 F.3d 137, 141 (2d Cir. 2016) (emphasis added).

Courts have applied these precedents to dismiss claims that fail to allege anticompetitive effects. In *Brantley v. NBC Universal, Inc.*, the Ninth Circuit relied on these Supreme Court decisions to affirm the dismissal of tying claims based on the premise that NBC Universal should "sell each cable channel separately, thereby permitting plaintiffs to purchase only those channels that they wish to purchase, rather than paying for multi-channels packages." 675 F.3d 1192, 1195, 1199 (9th Cir. 2012). The fact that "Programmers have chosen to limit the ability of Distributors to offer Programmers' channels for sale individually does not state a cognizable injury to competition" absent sufficient allegations that the arrangement harmed competition. *Id.* at 1202. The D.C. Circuit reached a similar conclusion in *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001). There, the Court applied *Jefferson Parish* and other precedents to hold that it would not condemn a software-bundling arrangement under a Section 1 *per se* legal standard absent an inquiry into the "'actual effect' of Microsoft's conduct on competition in the tied good market" because to do so might stifle efficiencies introduced by the tying arrangement. *Id.* at 95 (quoting *Jefferson Parish*, 466 U.S. at 29). Similarly, in *Mediacom Commc'n Corp. v. Sinclair Broad. Grp., Inc.*, 460 F. Supp. 2d 1012, 1028–29 (S.D. Iowa 2006), the court considered whether a company selling retransmission rights illegally tied some channels to others. *Id.* at 1016. The court held that "[p]roposals for carriage conditioned on carriage of any other programming" are "presumptively" permissible and "*consistent with competitive marketplace considerations.*" *Id.* at 1028–29 (emphasis added) (citation omitted). It then dismissed the claims because (among other reasons) they failed to adequately allege anticompetitive effects. *Id.* at 1027–29. Fubo's tying claims here fare no better.

B. Fubo Fails To Plead Anticompetitive Effects In The Tied Market

To establish a claim of unlawful tying, the plaintiff must allege "the tie-in has anticompetitive effects in the tied market." *Kaufman*, 836 F.3d at 141. Fubo fails to plead anticompetitive effects in the ***tied market*** because the alleged bundling by Fox of non-critical programming does not foreclose or otherwise limit competition ***from other programmers*** in the market for non-critical television channels. To meet this requirement, the Complaint should identify programmers who, because of Fox's decision to license its networks together, have been unable to enter the market for non-critical programming. *See In re Wireless Tel. Servs. Antitrust Litig.*, 385 F. Supp. 2d 403, 425 (S.D.N.Y. 2005) (explaining that plaintiff should have shown "evidence of failed efforts to enter" the tied market by producers of substitutes for the tied product).

But Fubo makes no such allegations. Nor is that surprising. The Complaint makes clear that much other "non-critical programming" remains active in the market and does not allege any such programming has exited because Fox has a practice of licensing its channels in bundles. It is thus implausible that the requirement to license [redacted] has any impact on the ability of other programmers to offer "non-critical" content.[5]

To work around this fundamental requirement, Fubo alleges that it would have licensed other "non-critical" channels from other programmers were it not forced to take non-sports channels like [redacted]. Compl. ¶¶ 210, 220. This allegation of a limited and isolated impact on Fubo does not amount to allegations of anticompetitive effects in the tied market.[6] The

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[5] In addition to the lack of foreclosure, Fubo has alleged no antitrust injury arising from the alleged tie. *See Freeland v. AT&T Corp.*, 238 F.R.D. 130 (S.D.N.Y. 2006).

[6] The carriage agreements are incorporated by reference into Fubo's Complaint. *See, e.g., Kramer*, 937 F.2d 767 at 773. [redacted]

question is whether the tie "had an actual adverse effect on competition *as a whole* in the tied product market," not whether Fubo's choice of which "non-critical channel" to license was impacted by the tie. *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)). Fubo also does not allege that its supposed inability to license non-critical channels from other programmers has impacted those programmers' ability to compete, which further emphasizes the *de minimis* nature of any alleged harm.

Nor can Fubo save its claims by alleging that bundling practices "rais[e] entrants' costs and imped[e] their ability to offer a differentiated service to consumers" by "requiring any new entrant or nascent competitor to license dozens of low-value channels." Compl. ¶ 120. Putting aside the rhetoric, Fubo has identified only one non-critical, non-sports Fox channel, not "dozens." More fundamentally still, the alleged tied market is the "market for licensing non-critical television channels" in which programmers license to distributors. *Id.* ¶ 214. Any supposed impact on new *distributor* entrants would not impact that market, but rather the streaming market in which distributors sell to consumers. Because Fubo cannot win its tying claim by pointing to ephemeral anticompetitive effects supposedly felt somewhere besides the alleged tied market, *see Kaufman*, 836 F.3d at 141, the allegation is both irrelevant and immaterial. Fubo's tying claim fails to meet this requirement and should be dismissed.

C. Fubo Has Failed Adequately To Allege A Tie Involving Two Separate, Coherent Product Markets

Fubo cannot allege a valid tying claim unless it shows that Fox sought to tie two products that exist in separate, well-defined markets. In other words, "no tying arrangement can exist unless

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[redacted] *ee id.* at 11.

there is sufficient demand for the purchase of the tied product separate from the tying product to identify a distinct product market in which it is efficient to offer the former separately from the latter." *Kaufman*, 836 F.3d at 142 (alterations omitted) (citations omitted). By definition, every television channel is itself a bundle of "critical" programs and "non-critical" programs, depending upon what a particular viewer would like to watch. *See Brantley*, 675 F.3d at 1202 n.10 ("[C]hannels are themselves packages of separate television programs."). Here, according to Fubo, the Fox Broadcast Network is a product in the "Commercially Critical Sports Channel" market, along with ABC, CBS, ESPN, and NBC. The [redacted] is a product in the "Non-Critical Television Channel" market, as are [redacted] *E.g.*, Compl. ¶¶ 209, 210, 219, 220. Apart from the identification of a handful of channels that fall within each purported market, Fubo has not explained the basis for either market definition nor bothered to explain where the other six Fox channels fall.

This failure is fatal to Fubo's claims. An antitrust claim must be dismissed "when a proposed product market clearly does not encompass all interchangeable substitute products." *In re Set-Top Cable Television Box Antitrust Litig.*, No. 08 MD 1995, 2011 WL 1432036, at *21 (S.D.N.Y. Apr. 8, 2011) (citation omitted). This is because a defendant must be able to determine from the complaint "precisely what the tying and tied product markets are." *Fifth & Fifty-Fifth Residence Club Ass'n, Inc. v. Vistana Signature Experiences, Inc.*, No. 1:17-cv-1476-GHW, 2018 WL 11466157, at *13 (S.D.N.Y. Sept. 28, 2018) (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 443 (3d Cir. 1997)) (finding Plaintiff's tying product market "flawed and unsuitable to state a tying claim").

Tying Market. Fubo's tying claims should be dismissed because Fubo failed properly to plead a product market for "commercially critical sports channels." *See Smugglers Notch Homeowners' Ass'n, Inc., v. Smugglers' Notch Mgmt. Co., Ltd.*, 414 Fed. App'x 372, 375 (2d Cir. 2011). Fubo imagines a tying market called "commercially critical sports channels"—*i.e.*, "programming that a MVPD or virtual MVPD ***must*** license to offer a commercially viable package of channels"—and alleges that "[t]he linear networks ESPN, ABC, and Fox are commercially critical sports channels" because they hold exclusive rights to popular live sports events. Compl. ¶¶ 199, 202.

A plaintiff's "failure to define its market by reference to the rule of reasonable interchangeability is, standing alone, valid grounds for dismissal." *Glob. Disc. Travel Servs., LLC v. Trans World Airlines, Inc.*, 960 F. Supp. 701, 705 (S.D.N.Y. 1997) (citations omitted) (collecting cases). Courts have recognized that individual channels, such as ESPN and TNT, cannot alone comprise a relevant product market. *See In re Set-Top Cable TV Box Antitrust Litig.*, 2011 WL 1432036, at *9. Ignoring this well-established principle, Fubo alleges that the "critical" market includes a handful of linear networks but does not provide any objective way to separate a "commercially critical sports channel" from one that is not. Nor does Fubo account for the fact that channels gain and lose popularity, and that channels' sports licensing rights change over time.

Fubo alleges that "[t]he commercially critical nature of live sports is based on widespread consumer demand for the programming." Compl. ¶ 200. But this vague allegation cannot reverse engineer a sufficiently defined "market" under the antitrust laws. "Courts in this district have rejected the proposition that allegedly unique products, by virtue of customer preference for that product, are markets unto themselves." *United Mag. Co. v. Murdock Mags. Distrib., Inc.*, 146 F. Supp. 2d 385, 398 (S.D.N.Y. 2001) (alternation in original) (citation omitted) (collecting cases).

So Fubo cannot define a market simply based on the channels for which there is "widespread consumer demand" as compared to channels for which there is less demand, particularly since such undefined categories shift over time. *Glob. Disc. Travel Servs.*, 960 F. Supp. at 705. Indeed, Fubo does not even allege a coherent definition of what "sports channel" would qualify for this market. The Complaint singles out the Fox Broadcast Network and ABC as "commercially critical sports channels," but the vast majority of content on those channels does not consist of sports at all. At the same time, Fubo apparently does not view Fox Sports 1 to be a "commercially critical sports channel," even though that channel focuses on providing live sports content to consumers. Compl. ¶¶ 73–76.

Worse, Fubo excludes from the tying product market other channels that carry highly valuable live sports content—TNT and TBS—simply because they do not fit the theory of the Complaint. The Complaint explicitly calls TNT and TBS "non-critical television channels" that are "reasonably interchangeable within a package of channels." *Id.* ¶¶ 210, 216. Yet, elsewhere, Fubo admits that TNT and TBS have a 9.9% market share in in the "Sports Program Licensing Market," *id.* ¶¶ 80, 169 & fig.5, and carry such highly watched events as the NCAA Men's Basketball March Madness tournament, *id.* ¶¶ 3, 79–83. The Complaint does not offer any plausible explanation for why TNT and TBS may be excluded from the market for "commercially critical sports channels," except perhaps that Fubo once carried those channels, but then stopped carrying them. *Id.* ¶ 83. The exclusion of TNT and TBS demonstrates that Fubo's product market fails to include all reasonably available substitutes for the products at issue.

Tied Market. Fubo's tying claims should also be dismissed because Fubo's tied market is equally vague and "exceptionally broad." *See E & L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23, 32 (2d Cir. 2006) (rejecting the tying product market of "finished wood products" because

it is "a term that covers an enormous variety of goods with an enormous number of uses" and "is exceptionally broad and vague"). The Complaint defines the tied market as every other television channel in the world, consisting of "programming that an MVPD or virtual MVPD subject to bundling ***must*** license to offer a commercially viable package of channels." Compl. ¶ 199 (emphasis in original). This vague and subjective definition makes it impossible to determine whether Fox's other channels fall into the tying market, the tied market, or neither.

To successfully plead a tying claim, Fubo must plead that the alleged tie prevents distributors from licensing non-critical channels from programmers other than the Defendants. But the Complaint does not allege separate consumer demand for "non-critical television channels." Instead, Fubo alleges that "without commercially critical sports channels, an MVPD or a virtual MVPD ***cannot*** offer a commercially viable package of channels that profitably attracts and retains customers." Compl. ¶ 199 (emphasis added). Thus, accepting Fubo at its word, there cannot be a separate demand for non-critical television channels (the tied product) since those channels do not constitute a "commercially viable package" without the commercially critical sports channels (tying product). Fubo's entire tying theory precludes the finding that the non-critical channels exist in a separate product market because Fubo's allegations fail to distinguish between critical and non-critical channels, which means "no tying arrangement can exist," and Fubo's tying claims must fail. *Kaufman*, 836 F.3d at 142 (citations omitted).

Because Fubo does not allege coherent tying or tied product markets inclusive of all reasonably interchangeable products, it is impossible to assess both the nature of the alleged tie and any anticompetitive effects resulting from that tie. *See Bayer Schering Pharma AG v. Sandoz, Inc.*, 813 F. Supp. 2d 569, 577–78 (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].'") (alteration in original) (internal citation omitted)); *United Mag. Co.*, 146 F. Supp. 2d at 398 (same). Its tying claims therefore fail to state a claim.

D. Fubo Fails To Allege That Fox Has Market Power In The Tying Market

Fubo's tying claims also fail because Fubo does not and cannot establish that Fox possesses market power. Courts routinely dismiss antitrust claims where, as here, the plaintiffs rely on conclusory or implausible allegations of market power. That is because, "without market power, there is little risk of anticompetitive harm from the seller's tie-in." *See Kaufman*, 836 F.3d at 143; *Yankees Ent. & Sports Network LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d 657, 665–666 (S.D.N.Y. 2002).

Courts typically examine market power by starting with market share. *See Kaufman*, 836 F.3d at 143. Here, Fubo alleges that Fox holds just 17.3% of the sports rights in the alleged Sports Program Licensing Market, which is the necessary content that Fubo believes creates a "commercially critical sports channel." Compl. ¶ 169 & fig.5. That market share falls well below the threshold necessary to support an inference of market power, which typically must exceed 40% to adequately demonstrate market power. *See, e.g.*, *Bookhouse of Stuyvesant Plaza, Inc. v. Amazon.com, Inc.*, 985 F. Supp. 2d 612, 622 (S.D.N.Y. 2013). The Complaint contains no facts concerning Fox's "share of these markets or how the presence of [] competitors affects [Fox's] power over price in these markets." *Kaufman*, 836 F.3d at 148. Fubo thus fails to support the proposition that Fox has the power to control prices or to exclude competitors from the "commercially critical sports" channel market. Such allegations are insufficient to adequately allege market power. *See Smugglers Notch Homeowners' Ass'n.*, 414 Fed. App'x at 374.

II. Fubo Fails To Plausibly Plead That Fox Has Entered Into Illegal Agreements In Restraint Of Trade (Counts 13 And 14)

A. Fubo Cannot State A Claim Premised On [redacted]

Fubo alleges that Fox's carriage agreements with Hulu and YouTube contain MFN clauses which "prevent Fubo from engaging in fair competition on price." Compl. ¶ 232. Fox allegedly agreed to MFN clauses with two other streaming distributors, Hulu and YouTube, but then used various "side deals" and "rebates" to secretly repay Hulu and YouTube (or their parent companies) for those prices. *Id.* ¶¶ 129–138. Fox then supposedly wields these nominally high prices against smaller distributors like Fubo by insisting that those smaller distributors pay the higher price so that Fox can avoid tripping the Hulu and YouTube MFNs. Fubo alleges that it is thus "forced" to agree to match the Hulu and YouTube licensing prices. *Id.* ¶ 144.

When considering a motion to dismiss, a district court may take judicial notice of the contents of a document "where a plaintiff has alleged that the document contains, or does not contain, certain statements." *Roth v. Jennings*, 489 F.3d 499, 511 (2d Cir. 2007); Fed. R. Evid. 201(b). Here, [redacted] Compl. ¶ 111. Fubo thus cannot state its claims as a matter of law.

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7 [redacted]

B. MFNs Are Evaluated Under The Rule Of Reason

[redacted] Fubo fails to state a claim because it does not plausibly allege Fox's market power or that Fox's agreements have harmed competition.

Fubo claims that the MFN clauses have caused it harm because, supposedly, they are set at above-market prices that "will be nearly impossible for Fubo to bear." *Id.* ¶ 130. Notably, Fubo does not allege a horizontal agreement to fix prices. *See Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) (noting that MFNs are "not price-fixing"). Instead, it alleges only that Fox independently agreed to provide two virtual MVPDs with MFNs. Compl. ¶ 123. Such vertical agreements are analyzed "according to the rule of reason." *K.M.B. Warehouse Distrib., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 128 (2d Cir. 1995) (citation omitted).

To state a rule-of-reason claim, Fubo must allege (1) an agreement (2) that unreasonably restrains trade (3) and affects interstate commerce. 15 U.S.C. § 1; *see, e.g.*, *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 186 (2010). To allege an unreasonable restraint, a plaintiff must allege facts suggesting "that defendants possess the requisite market power . . . to inhibit competition," or that the agreements in question caused "an actual adverse effect on competition." *K.M.B. Warehouse Distrib.*, 61 F.3d at 129 (citations omitted). In addition, the plaintiff must allege the "threshold requirement" of an "antitrust injury" through indirect or direct means. *Drug Emporium, Inc. v. Blue Cross of W. N.Y., Inc.*, 104 F. Supp. 2d 184, 189 (W.D.N.Y. 2000).

Moreover, Fubo cannot evade this defendant-specific requirement through group pleading. Instead, it must allege market power ***for each defendant*** because, "[i]n the absence of a horizontal conspiracy" allegation, "grouping [defendants'] market share together is inappropriate." *Bookhouse*, 985 F. Supp. 2d at 622. When horizontal rivals compete, one rival's market power will counterbalance, rather than supplement, the other's market power. Thus, if rivals have similar

market shares, none can "establish the kind of dominant market position" needed to exert market power. *In re Wireless Tel. Servs.*, 385 F. Supp. 2d at 414, 417 (citation omitted).

In addition, courts have repeatedly held that an antitrust claim "is simply insufficient to withstand review on a motion to dismiss" if it relies on "[g]roup pleading." *Concord Assocs., L.P. v. Ent. Props. Tr.*, No. 12 Civ. 1667(ER), 2014 WL 1396524, at *24 (S.D.N.Y. Apr. 9, 2014), *aff'd*, 817 F.3d 46 (2d Cir. 2016); *see In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 417 (S.D.N.Y. 2011); *In re Processed Egg Prods. Antitrust Litig.*, 821 F. Supp. 2d 709, 720 (E.D. Pa. 2011) (collecting cases). That rule springs from *Twombly*, which holds that courts should not expose defendants to the "litigation expense and disruption" accompanying antitrust litigation unless the allegations make defendants "at least reasonably aware of what they have done or failed to do." *In re Processed Egg Prods.*, 821 F. Supp. 2d at 720. To satisfy *Twombly*, a complaint must make "specific allegations that would tie each particular defendant to the conspiracy." *Id.* (citation omitted). Any allegation couched in "[c]onclusory, collective language is too convenient, too undisciplined, and too unfocused" to do that. *Id.*; *see also In re Travel Agent Com'n Antitrust Litig.*, 583 F.3d 896, 905 (6th Cir. 2009) (noting that group pleadings "represent precisely the type of naked conspiratorial allegations rejected by the Supreme Court in *Twombly*").

C. Fubo Does Not Plausibly Allege Market Power

Fubo fails to allege that Fox has market power in "the Sports Program Licensing Market." *See, e.g.*, *Ohio v. Am. Express Co.*, 585 U.S. 529, 543, 543 & n.7 (2018). Again, Plaintiffs who rely on market power typically must allege that the defendant controls more than 40% of the market. *See, e.g.*, *In re Amazon.com, Inc. eBook Antitrust Litig.*, No. 21-cv-00351-GHW-VF, 2023 WL 6006525, at *26 n.22 (S.D.N.Y. July 31, 2023) (*Amazon eBooks II*), *report and recommendation adopted*, No. 1:21-CV-00351-GHW-VF, 2024 WL 918030 (S.D.N.Y. Mar. 2, 2024); *see, e.g.*, *Bookhouse*, 985 F. Supp. 2d at 622.

Here, the Complaint does not allege that the MFNs result from any kind of horizontal agreement among Fox and the other Defendants. Compl. ¶¶ 128, 289–297. Therefore, for purposes of Fubo's MFN claims against Fox, Fubo can rely only on Fox's own market share in the "Sports Program Licensing Market" to establish its market power. *Id.* ¶ 311. Yet, again, Fubo alleges that Fox controls merely 17.3% of that market. *Id.* ¶ 169 & fig.5. That market share is insufficient "as a matter of law." *Drug Emporium*, 104 F. Supp. 2d at 189 ("[A] defendant with 30 percent of the relevant market share lacked the relevant market power for an antitrust violation"). Even "a market share of between 30 and 40% does not lead to an inference of market power." *Amazon eBook II*, 2023 WL 6006525, at *26 n.22; *see, e.g.*, *Bookhouse*, 985 F. Supp. 2d at 622. That is especially true when, as here, rivals enjoy similar and even larger market shares. *See* Compl. ¶¶ 169 fig.5 (noting four rivals enjoying between 9.9% and 26.8% market share); *In re Wireless Tel. Services*, 385 F. Supp. 2d at 411–17. In sum, Fubo cannot rely on Fox's alleged 17.3% market share to support the kind of inference of market power that would be needed to survive a motion to dismiss. *See Amazon eBooks II*, 2023 WL 6006525, at *26 n.22. Fubo's failure to allege facts that support Fox's market power in the alleged Sports Program Licensing Market is fatal to Fubo's MFN claim.

D. Fubo Fails To Allege Harm To Competition

Fubo also fails to allege that the alleged MFNs have harmed competition. *See Ohio*, 585 U.S. at 542. An antitrust plaintiff must "show more than just that [it] was harmed by defendants' conduct." *K.M.B. Warehouse Distrib.*, 61 F.3d at 127. The plaintiff must instead allege "that the challenged action has had an ***actual*** adverse effect on competition as a whole in the relevant market." *Id.* (citation omitted).

First, it is important to emphasize that Fubo's allegations target a type of contractual clause that typically ***enhances*** competition by securing ***lower*** prices for buyers. MFN clauses "are

standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favorably as any of [the seller's] other customers." *Marshfield Clinic*, 65 F.3d at 1415; *In re Amazon.com, Inc. eBook Antitrust Litig.*, No. 21-cv-00351-GHW-VF, 2022 WL 4581903, at *3 (S.D.N.Y. Aug. 3, 2022), *report and recommendation adopted sub nom. In re Amazon.com, Inc. eBook Antitrust Litig.*, No. 1:21-cv-00351-GHW-VF, 2022 WL 4586209 (S.D.N.Y. Sept. 29, 2022) (*Amazon eBooks I*) ("MFNs are common devices that guarantee buyers will get the lowest prices or best terms from their suppliers, by getting the supplier to agree to treat them as favorably as any of their other customers."). MFNs tend "to minimize the cost of" the product sold by driving down prices, reducing transaction costs, and reducing uncertainty, which ultimately allows the final distributor to sell to consumers at lower prices. *Marshfield Clinic*, 65 F.3d at 1415. "[A]ntitrust laws seek to encourage" this "sort of conduct." *Id.*; *see also Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1110–12 (1st Cir. 1989) ("insisting on [the] supplier's lowest price . . . tends to further competition on the merits").

Second*,** Fubo offers ***no factual allegations to support the claim that the alleged MFNs somehow gave Fox the power to charge prices exceeding what the market would support absent the MFNs. *See, e.g.*, *US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 63 (2d Cir. 2019). Fubo points first to the fact that the price of live sports content charged to "smaller competitors" has risen over time, thus "raising barriers to entry." Compl. ¶ 142. In Fubo's telling, Fox would offer Fubo lower prices if not for the MFNs. *Id.* ¶ 142–143. But the allegation that Fubo pays an above-market price is "wholly conclusory." *Twombly*, 550 U.S. at 561. Courts have long recognized that the competitive "[m]arket price" is simply "the price at which a seller is ready and willing to sell and a buyer ready and willing to buy in the ordinary course of trade." *Bourjois, Inc.*

v. McGowan, 12 F. Supp. 787, 790 (W.D.N.Y. 1935). If a buyer willingly pays a high price, then "[s]etting a high price . . . is not in itself anticompetitive." *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1361 (2d Cir. 1988) (citation omitted).

Third*,** Fubo fails to allege harm to competition because the Complaint nowhere alleges a connection between the MFNs that Fox allegedly offered Hulu and YouTube and the allegedly high prices it charges Fubo. Fubo contends that consumer streaming prices have risen over time. Compl. ¶¶ 143–146. But a retailer may not rely simply on "high prices" as evidence of an anticompetitive effect up the chain. *See In re Bookends & Beginnings LLC*, No. 21-cv-02584 (GHW) (VF), 2023 U.S. Dist. LEXIS 151757, at *75 (S.D.N.Y. Aug. 3, 2023), *report and recommendation adopted sub nom. Bookends & Beginnings LLC v. Amazon.com, Inc.*, No. 21-cv-02584-GHW-VF, 2023 U.S. Dist. LEXIS 150858 (S.D.N.Y. Aug. 25, 2023). It must also allege that a wholesaler exercised market power and caused the retailer to charge the higher price. Thus, when a complaint alleges higher retail prices, but fails to allege that a wholesaler has sufficient market share to justify an inference of market power, "[t]he complaint . . . does not include factual allegations from which to plausibly infer that the [wholesaler's] conduct caused higher retail prices market wide." *Id.* This rule fits Fox's situation exactly. The Complaint alleges only that ***Fubo and its fellow distributors have raised consumer prices over time. Compl. ¶¶ 143–146. And, again, the Complaint alleges only that Fox has 17.3% market share in the upstream programming market, *Id*. ¶ 169 & fig.5, which is too low "as a matter of law" to suggest market power, *Drug Emporium*, 104 F. Supp. 2d at 189; *see supra* Section III.C. Fubo's MFN claim against Fox thus lacks any factual allegations to support the inference that ***Fox*** or the [redacted] ***MFN clauses*** "caused higher retail prices market wide." *In re Bookends & Beginnings*, 2023 U.S. Dist. LEXIS 151757, at *75.

Finally, Fubo nowhere alleges that Fox caused the alleged price increases "***by restricting output***." *Ohio,*585 U.S. at 549 (citations omitted). Given that in reality, courts "will not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level." *Id.* (quotation omitted). Here, Fubo alleges the opposite. The Complaint alleges that the virtual MVPDs' output has exploded over the last decade, with 20 million subscribers now enrolled and a raft of new linear and on-demand content now available. *See, e.g.*, Compl. ¶ 96 & fig.3. And Fubo offers ***no*** factual allegations to support the claim that the alleged MFNs somehow gave Fox the power to charge prices exceeding what the market would support absent the MFNs. *See, e.g.*, *US Airways, Inc.*, 938 F.3d at 63. Lacking allegations of either restricted output or supra-competitive pricing, Fubo has not plausibly alleged that the alleged MFNs had any actual adverse effect on competition.

E. Fubo's Vague, Implausible, And Conclusory "Side Deal" Allegations Fail To Show That The MFN Clauses Count As Unlawful Vertical Restraints

Fubo recognizes that MFNs are common, *see* Compl. ¶ 125–126, so Fubo concocts the notion of "side deals" that the Defendants allegedly cut with Google and Hulu. *Id.* ¶ 132. According to Fubo, Defendants won YouTube and Hulu's acquiescence to higher licensing prices through a vague and conclusory kickback scheme. They allegedly charged these virtual MVPDs artificially inflated prices and then kicked back some of that value by paying above-market rates for cloud computing, *id.* ¶ 133, discounting other content, *id.* at ¶ 135, or providing marketing, *id.* ¶ 136.

Fubo's conspiracy theory and implausible quid pro quo allegations are entirely speculative and conclusory. [redacted] In *Twombly*, the Supreme Court held that, to survive a motion to dismiss, the complaint must plead specific facts to suggest that unlawful action is

"plausible," not merely "conceivable." 550 U.S. at 561, 570; *see also Mercer v. Gupta*, 712 F.3d 756, 759 (2d Cir. 2013) (*per curiam*) (dismissing claim because quid pro quo allegation "fail[ed] to rise 'above the speculative level'") (citation omitted)).

The rebate allegations fail this test. Fubo generically alleges that "Defendants" entered into "side deals" with affiliates of Hulu and YouTube in unrelated businesses such as content purchasing and cloud advertising. Compl. ¶¶ 129–140. But the Complaint does not generally identify which Defendant supposedly entered into which agreement when; does not offer any particularized allegations that any Defendant entered into any particular deal as a quid pro quo for a carriage agreement; and does not allege that any Defendant agreed to pay above-market rates for such unrelated services, as would be necessary for Hulu and YouTube to receive kickbacks from the supposedly above-market prices that they had agreed to pay under the carriage agreements. [redacted] the Court should not credit such conclusory and implausible group allegations, which are entirely consistent with lawful business activities.

In its sole specific factual allegation against Fox, Fubo alleges that Fox and Hulu once formed an "'extensive multiplatform strategic marketing alliance'" in which Fox agreed to market Hulu across Fox platforms. *Id.* ¶ 136. But it does not (and cannot) allege that Fox and Hulu actually entered into such a marketing agreement to reimburse Hulu for paying above-market prices for Fox content under a carriage agreement. Indeed, Fubo alleges ***nothing*** to connect the alleged marketing "alliance" to the carriage agreement, much less to the MFN clauses [redacted] At bottom, Fubo alleges two agreements that are independently consistent "with a wide swath of rational and competitive business strategy"—one agreement to license programming to Hulu and a separate agreement to market ***all*** of Hulu's content. *Twombly*, 550 U.S. at 554, 561.

It is Fubo that then asserts the conclusory, implausible, and factually unsupported allegation that Fox and Hulu separately agreed that one was a quid pro quo for the other. Such a conclusory allegation of an illegal agreement does not "nudge[]" a claim predicated on otherwise legal conduct "across the line from conceivable to plausible," which means the "complaint must be dismissed." *Id.* at 570.

CONCLUSION

For the reasons stated above, and for the reasons stated by the other Defendants, Fox respectfully requests that the Complaint be dismissed, in its entirety, with prejudice.

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Respectfully submitted,

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