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 REPLY
MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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Defendant Fox Corporation ("Fox") respectfully submits this reply in support of its motion to dismiss the Fox-specific counts of the Amended Complaint (Dkt. Nos. 144, 145).[1]

INTRODUCTION

Fubo's Amended Complaint sought to rewrite the carriage agreements to which it voluntarily agreed. The Opposition now seeks to rewrite the Amended Complaint. Nevertheless Fubo's alleged tying and tied markets remain incoherent, and Fox's small market share cannot plausibly grant it any kind of market power. As for the MFN claims, they are demonstrably false; Fox [redacted] For these reasons, and for the others reflected in Defendants' motions, the carriage agreement claims should be dismissed.

ARGUMENT

I. Fubo Cannot Explain Away The Legal Flaws In Its Bundling Claims Against Fox.

Fubo cannot state a claim against Fox for illegal tying because it fails to grapple with the key fact of market definition: consumer interchangeability. And even if its markets were coherent (they are not), Fubo cannot allege that Fox's minority market position gave it market power, or that the harms it implausibly alleges that it suffered amount to harm to the market as a whole.

A. Fubo Does Not Demonstrate Two Separate, Coherent Product Markets.

Any tying clam must allege "separate and distinct" tying and tied markets. *Kaufman v. Time Warner*, 836 F.3d 137, 141 (2d Cir. 2016). Fubo argues that it has identified a tying market composed of "commercially critical sports programming" consisting of five channels that show "marquee" live sports programming that a distributor "must" license to remain viable: ABC, Fox,

[1] Fubo asserts that Fox does "not now challenge Fubo's claim challenging the JV." Opp. at 1. That is mistaken. In the motion to dismiss, Fox preserved its arguments pending appeal. Dkt. No. 326 at 1 n.1. By filing this motion in accordance with the scheduling order, Fox does not waive its pending motion to sever and transfer these claims to California. Dkt. No. 307.

ESPN, CBS, and NBC. Opp. at 14; Compl. ¶¶ 199, 202. It alleges that the tied product consists of other channels that a programmer "*might*," but "does not *need*," to choose to license. Opp. at 16.

Neither market holds up. Start with the tying market. When "a proposed product market 'clearly does not encompass all interchangeable substitute products,'" a claim predicated on it fails. *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) (quoting *Chapman v. N.Y. State Div. for Youth*, 546 F.3d 230, 238 (2d Cir. 2008)). Here, Fubo alleges that TNT and TBS are *not* commercially critical sports channels. Compl. ¶ 202; Opp. at 18–19. Yet it concedes that Warner Brothers Discovery (WBD), the owner of TNT and TBS, holds the rights to "marquee" content from top-tier sports leagues comparable to what Fubo's five handpicked channels carry, including the NBA, NASCAR, and the NCAA's March Madness tournament. Compl. ¶¶ 80–82. To the extent there is a market for "commercially critical sports programming," TNT and TBS are self-evidently "interchangeable substitutes." A market definition that arbitrarily cleaves them off fails to "encompass all interchangeable substitute products," and must fail. *Set-Top Cable*, 2011 WL 1432036, at *8 (citation omitted).

Fubo seeks to avoid this obvious fact in two ways. First, Fubo argues that TNT and TBS cannot be "commercially critical" because Fubo dropped them without collapsing. Opp. at 19. But Fubo did not have ESPN until [redacted], and it did not collapse. The far more plausible inference is that there is no such thing as a "commercially critical" channel in the first place. A market is defined "by the choices available to consumers of the product," not the offerings that keep a competitor afloat. *Downtown Music Publ'g LLC v. Peloton Interactive, Inc.*, 436 F. Supp. 3d 754, 765 (S.D.N.Y. 2020) (cleaned up). In litigating its joint venture claims, Fubo treated TNT and TBS as critical components of Venu's "skinny sports bundle" offering. Fubo cannot now

arbitrarily exclude them as "acceptable substitutes" to its five preferred channels. *Id.*

So Fubo tries to distinguish TNT and TBS on "the amount and quality of sports content available on these channels." Opp. at 18.[2] But Fubo has alleged that TNT and TBS carry top-tier sports content, and a lot of it. Compl. ¶¶ 81–83. Even if some consumers prefer Fox's sports programs, TNT and TBS remain reasonably interchangeable substitutes. Then-Judge Sotomayor made the same point in *Global Discount Travel Services, LLC v. Trans World Airlines, Inc.*, 960 F. Supp. 701 (S.D.N.Y. 1997), where the plaintiff tried to define a market for "tickets for travel on TWA between certain city pairs," rather than travel on all airlines between those routes:

> The plaintiff's argument is analogous to a contention that a consumer is "locked into" Pepsi because she prefers the taste, or NBC because she prefers "Friends," "Seinfeld," and "E.R." A consumer might choose to purchase a certain product because the manufacturer has spent time and energy differentiating his or her creation from the panoply of products in the market, but at base, Pepsi is one of many sodas, and NBC is just another television network.

Id. at 705. In other words, the plane tickets, soft drinks, and networks were still "reasonably interchangeable," and thus in the same market, even if individual customers might prefer one or the other. *Id.* So too here. Fubo cannot plausibly exclude TNT or TBS, each of which is "just another television network" carrying marquee sports content, from a market for sports programs including ABC, Fox, and the rest. *Id.* Fubo's gerrymandered tying market thus fails as a matter of law and should be dismissed. *See, e.g.*, *Chapman*, 546 F.3d at 238.

Moreover, the fact that Fubo's alleged tying market inexplicably excludes TNT and TBS reveals the deeper incoherence in its market definitions. Fubo defines the "commercially critical sports channels" market as those channels that an "MVPD or virtual MVPD subject to bundling

[2] Fubo claims that it can distinguish its preferred five channels based on "viewership and pricing data, and Defendants' own statements." Opp. at 18. But Fubo makes no allegations about comparative affiliate fees, *see* Compl. ¶ 209, and Defendants' isolated statements selling their own content are not "industry or public recognition" of a five-channel market. Opp. at 16.

requirement *must* license to offer a commercially viable package of channels." Compl. ¶ 199. Fubo has not licensed TNT or TBS since [redacted]. *Id.* ¶ 83. Yet Fubo alleges its own commercial viability. *See id.* ¶¶ 13, 105. In other words, once TNT and TBS are included within the market, Fubo's own continued existence *disproves* the idea of a "commercially critical" market, rendering its tying-market allegations inconsistent with reality. When "a plaintiff has defined the relevant market in an inconsistent and facially implausible way," "dismissal is appropriate." *Cinema Village Cinemart, Inc. v. Regal Ent. Grp.*, 2016 WL 5719790 at *6 (S.D.N.Y. Sept. 29, 2016).

Fubo gets no further with its tied market. A plaintiff cannot satisfy its pleading burden by alleging a market that is "vague," "exceptionally broad," and "covers an enormous variety of goods with an enormous number of uses." *E & L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23, 32 (2d Cir. 2006). Such a market definition fails to give sufficient notice of "the conduct alleged to be coercive, the customers who would have purchased a product elsewhere but for the coercion, the particular products sold as a result of the coercion, the anticompetitive effects in a specified market, and the effect on the business of the plaintiff." *Id.* Here, Fubo suggests a market definition encompassing every other channel in the United States other than the preferred five. Compl. ¶¶ 214–221; Opp. 15–18. In short, the tied market lacks coherent boundaries. Claims predicated on such a broad, vague tied market must be dismissed. *E & L Consulting*, 472 F.3d at 32.

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

Even taking the product markets as alleged, Fubo has not—and cannot—show that Fox has sufficient market power over the tying product.[3] Fubo's tying claims do not allege that Fox

[3] Fubo also alleges so-called "block-booking" claims. *See* Compl. ¶¶ 293–297. But block booking is merely "a form of tying agreement." *Fields Prods., Inc. v. United Artists Corp.*, 318 F. Supp. 87, 88 (S.D.N.Y. 1969), *aff'd*, 432 F.2d 1010 (2d Cir. 1970). Moreover, it is not a *per se* violation. As this Court has observed (and as Disney further explains), "[a]lthough *per se* illegal seventy years ago, today, courts would analyze [block booking] under the rule of reason." *United States v.*

colluded with any other Defendant. Compl. ¶¶ 279-87, 293–297. When that is the case, market power exists only when "a firm has 'the ability to raise unilaterally prices and profitably maintain those prices above competition levels and/or restrict output." *K.M.B. Warehouse Distributors, Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995) (citation omitted); *accord Kaufman*, 836 F.3d at 143). Typically, market power is inferred from market share. And "[c]ourts 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) (quotation omitted) (emphasis added); Fox MTD at 15, 19. That means "a market share of 30 percent is ***presumptively insufficient*** to establish the power to control price." *CollegeNet, Inc. v. Common Application, Inc.*, 355 F. Supp. 3d 926, 958 (D. Or. 2018) (emphasis added) (quoting *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995)).

Here, Fox allegedly controls only 17.3% of the tying market. Compl. ¶ 169 & fig.5. That alone makes it "presumptively incapable" of exerting market power. *Com. Data Servers*, 262 F. Supp. 2d at 74. Fubo comes nowhere near overcoming that presumption. To start, Fox is in second place to another competitor with a bigger market share—Disney, with 26.8% of the alleged market—and Fox has three other peers. Compl. ¶ 169 & fig.5. Under Fubo's theory, every one of those five programmers would have market power, which defies established antitrust jurisprudence. Meanwhile, Fubo's "allegations" of market power consist entirely of the allegations that (i) Fox chooses to license its channels in a bundle, (ii) Fubo, a small distributor, pays more than larger distributors pay, (iii) Fox's sports programming is desired by consumers, and (iv) its executives publicly promote its products. *See* Opp. at 21–25. Fubo thus makes no

Paramount Pictures, Inc., 2020 WL4573069, at *12 (S.D.N.Y. Aug. 7, 2020). The block-booking claims should be dismissed with the tying claims, and for the same reasons.

"empirical demonstration concerning the [adverse] effect of the [defendants'] arrangement on price or quality" across the market (rather than just on Fubo). *K.M.B. Warehouse*, 61 F.3d at 128 (alterations in original) (quoting *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 30 n.49 (1984)). And none of these allegations can suffice to show that Fox could "raise ***unilaterally*** price and profitably maintain those prices above competition levels" when three peer and one market-leading rival unilaterally employ the same licensing practices and carry comparable mixes of marquee sports. *K.M.B. Warehouse*, 61 F.3d at 129.[4]

C. Fubo Fails To Allege Market-Wide Anticompetitive Effects.

To allege an unlawful-tying claim, a plaintiff must allege that the tie "has anticompetitive effects ***in the tied market***." *Kaufman*, 836 F.3d at 141 (emphasis added). To do that, the plaintiff must show that "competitors were foreclosed from selling" the tied product because of the tie. *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 57 (2d Cir. 1980); *accord In re Wireless Tel. Servs. Antitrust Litig.*, 385 F. Supp. 2d 403, 424–26 (2005). Yet Fubo fails to allege facts suggesting that Fox's alleged bundling forecloses or otherwise limits competition among programmers in the non-critical channels market. *See Jefferson Par.*, 466 U.S. at 12-14; Fox MTD at 9–11. Fubo identifies no programmers who, because of Fox's decision to bundle its networks, have been prevented from entering the alleged market for non-critical programming. Nor does it actually point to any specific allegation as to any "amount of potential sales" foreclosed in the tied market. *Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp.*, 880 F.2d 1514 (2d Cir. 1989). If anything, Fubo alleges a host of programmers that vigorously *compete* in the purported "non-critical television channels" market. *See* Compl. ¶¶ 209-10, 216-17, 219-20 (identifying over a dozen disparate channels).

[4] Fubo suggests that market power can be inferred from the "unique" nature of a product. Opp. at 23–24, 26 n.5 (quotation omitted). But Fox's five designated channels at most offer "differentiat[ed]" yet substitutable content. *Global Discount Travel Servs.*, 960 F. Supp. at 705.

Fubo cannot avoid such incongruities by claiming it has pled anticompetitive effects. First, Fubo says it would "prefer" to license channels a la carte. Opp. at 32. Fubo's preference for different licensing terms is not an anticompetitive effect. Fubo must instead show a *competitor to Fox* was "foreclosed" from selling channels. Fubo's own choices as a customer shed no light on foreclosure.[5] Nor could Fubo plausibly allege that it was "foreclosed" from selling channels when it was able to offer its consumers every channel it sought to offer from Fox. Fubo then focuses upon allegedly high prices in the consumer market. Opp. at 34–39. But Fubo concedes that "there is authority that a plaintiff in a tying case must show anticompetitive effects in the 'tied market.'" Opp. at 38 (quoting *Kaufman*, 836 F.3d at 141). Because Fubo did not allege any foreclosure from that market, its tying claim must fail.

II. Fubo's Opposition Brief Cannot [redacted].

The Amended Complaint alleges that Fox had charged Fubo higher prices because Fox had agreed to MFN clauses in Fox's carriage agreements with Hulu and YouTube. *See* Compl. ¶¶ 121–147. Because Fubo "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). Fox submitted carriage agreements showing that [redacted] Fox MTD at 16. Confronted with the absence of facts in support of its allegations, Fubo now tries to replead through its Opposition. This Court should reject the effort.

A. Fubo's Alleged Scheme Is Predicated On [redacted]

The Amended Complaint's MFN scheme is built atop allegations that Fox colluded with Hulu and YouTube "to raise content prices and penetration rates for smaller virtual MVPDs like

[5] For this, Fubo relies only on a ten-year-old unpublished opinion. Opp. at 32 (citing *Cablevision Sys. Corp. v. Viacom Int'l Inc.*, 13-Civ-1278 (LTS) (JLC), 2014 WL 2805256 (S.D.N.Y. June 20, 2014)). As Disney explained, that case is distinguishable. *See* Dkt. No. 320 at 14–15.

Fubo through the use of MFN clauses." Compl. ¶ 129; *id.* ¶ 232. Fox allegedly offered YouTube and Hulu MFNs "in exchange for . . . above-market prices and penetration requirements," Compl. ¶ 131; *see also id.* ¶132, and that Fox then used these MFNs to "impose these above-market prices on the entire industry" by demanding that smaller distributors match the "above-market rates" paid by Hulu and YouTube, curtailing Fubo's "ability . . . to engage in price competition." *Id.* ¶ 234. Hulu and YouTube allegedly "recoup[ed] the above-market premiums" through alleged "side deals." *Id.* ¶¶ 233, 132. This MFN regime supposedly resulted in "high[er] prices." *Id.* ¶ 127. In short, the lynchpin of Fubo's theory is that Fox actually leveraged price and penetration-rate MFNs with Hulu and YouTube to extract higher prices from Fubo.

These allegations are utterly [redacted]. Opp. at 40. Fox had [redacted]. Fox MTD at 16, n.7, & Exs. A–H. Fox could hardly employ [redacted] MFNs to force Fubo to accept price or penetration-rate terms. Fubo's claim is thus "demonstrably false" and "must be dismissed." *Martell v. Cohen Clair Lans Greifer Thorpe & Rottenstreich, LLP*, 2019 WL 4572196, at *2 (S.D.N.Y. Sept. 20, 2019) (quotation omitted).

Fubo counters that it "disputes Fox's . . . characterization of the agreements," but it pointedly does not explain what Fox gets wrong. Opp. at 40–41. Quoting *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016), Fubo instead first suggests that it might dispute "the relevance" of the carriage agreements. *Id.* at 41. Here, Fubo's *entire MFN claim* revolves around the carriage agreements allegedly containing these [redacted] MFNs. *See* Compl. ¶¶ 121–147, 232–235, 307–315. There is no chance that Fubo "may lack notice" (as in *Nicosia*) that Fox might use the carriage agreements to defeat the claim. *Nicosia*, 834 F.3d at 231. Next quoting *Millenium Health, LLC v. EmblemHealth, Inc.*, 240 F. Supp. 3d 276 (S.D.N.Y. 2017), Fubo suggests that it

might dispute "how the document related to or affected" Fox's contracts with Hulu and YouTube. Opp. at 41. But the carriage agreements *created* the relationship upon which Fubo bases its claim. And, as *Millenium Health* itself explains, "the Court may consider a document 'where the complaint relies heavily upon its terms," 240 F. Supp. 3d at 284 (quoting *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010)), and the plaintiff "requests judicial interpretation of its terms," *id.* (internal quotation omitted). That is the case here.

B. Fubo Cannot Save Its Speculative MFN Claims Against Fox.

Faced with the [redacted] MFN clauses, Fubo pivots. ***First***, it moves from its allegations of supposed *past* harms to *future* harms in "upcoming renewal negotiations." Opp. at 41. That is not what Fubo pleaded, and "it is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss." *Kiryas Joel All. v. Vill. of Kiryas Joel*, 2011 WL 5995075, at *5 (S.D.N.Y. Nov. 29, 2011) (citing *Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998)). The Amended Complaint says that "because Defendants *have imposed* these above-market prices, penetration rates, and other economic terms on Fubo, Fubo itself *has had to significantly raise* the price it charges." Compl. ¶ 123 (emphasis added). It asserts that "Defendants *have deployed* a web of MFN clauses with YouTube TV and Hulu TV to coerce Fubo" into unfavorable terms. *Id.* ¶ 127 (emphasis added). It also claims that each Defendant [redacted] *Id.* (emphasis added). Because Fox had [redacted] when it "imposed" these higher prices on Fubo [redacted], those allegations make no sense. And the Amended Complaint never alleges that new MFNs will create a "backdrop" that will "affect" future negotiations. Opp. at 41. Fubo cannot now save its [redacted] retrospective claims by speculating how Fox *might* use a new MFN. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Second, Fubo argues that its MFN allegations actually encompass *any* contractual term

that provide Hulu or YouTube equal treatment with other distributors, even if they do not concern price or penetration rates. Opp. at 42. But this is another attempt to amend-by-opposition. The Amended Complaint focused entirely on how Fox supposedly leverages price and penetration-rate MFNs against smaller distributors like Fubo. *See* Compl. ¶ 130–132. Nowhere does Fubo allege, specifically or otherwise, that Fox ever relied on MFNs protecting Hulu and YouTube's [redacted] to extract higher prices from Fubo. Opp. at 42–43. Nor does Fubo explain *why* the inability to offer better [redacted] would "necessitate[]" Fubo paying "high prices and penetration rates." Compl. ¶ 127. Fubo cannot now reimagine a new baseless scheme involving other kinds of MFNs. *See Wright*, 152 F.3d at 178.

Fubo claimed that it alleged enough to survive a motion to dismiss because it obliquely alleged that Fox had agreed to MFNs pertaining to "other economic terms." Opp. at 43 (quoting Compl. ¶ 123). But "other economic terms" does not mean non-economic MFN, and a claim must offer more than a "wholly conclusory statement," *Twombly*, 550 U.S. at 561, that Fox used "other economic terms" to leverage higher prices. Fubo must allege facts "adequate to suggest an entitlement to relief under the legal theory invoked." *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 320 n.18 (3d Cir. 2010). Fubo offers none. The Amended Complaint gives no clue as to what these "other economic terms" might encompass or how they would impact price or penetration rates. Fubo alleges only that it pays Fox a [redacted] "premium[]" for Fox content, which up until now was supposed to have been caused by MFN-protected "penetration requirements" and "above-market prices" in the Hulu and YouTube contracts. Compl. ¶¶ 121–123.

Indeed, Fubo makes no effort to explain how any "other economic term" contributed. Immediately after declaring that Fox "coerce[s] Fubo into paying above-market prices and

agreeing to unreasonable penetration rates and other contractual terms[,]" the Amended Complaint claims that Fox [redacted] *Id.* ¶ 127. Conspicuously absent is any mention of how "other contractual terms" caused such an injury. *See id.* Fubo also alleges that Hulu and YouTube agreed to side deals "in exchange for [the] above-market prices and penetration requirements" protected by the MFNs. *Id.* ¶ 131. Again, Fubo has no theory about side deals bearing upon noneconomic MFNs. Instead, Fubo claims that these alleged side deals repay only the "high[er] sticker prices" that the price and penetration-rate MFNs protect. *Id.* ¶ 132; *see also, e.g.*, *id* ¶ 133 ("defrays the premiums" resulting from MFN-protected prices and penetration rates); ¶ 134 ("recoup the premiums"); ¶ 137 (offsetting "premiums"). Fubo cannot remedy these demonstrably false and defective allegations by pivoting to unidentified other terms that cause unidentified other harm. *See In re Processed Egg Prods. Antitrust Litig.*, 821 F. Supp. 2d 709, 720 (E.D. Pa. 2011) (citations omitted). The claims should be dismissed.

Third, Fubo argues that its "allegations are not limited to Fox's . . . MFN clauses in agreements with YouTube TV and Hulu Live" but instead encompass any "pernicious MFN clauses" with any large (unnamed) distributor in 2021, with YouTube and Hulu mere "examples." Opp. at 44. But Fubo affirmatively alleges that constraints on its "ability to compete are the result of MFN clauses in contracts between each of the Defendants and the two largest MVPDs, YouTube TV and Hulu TV." Compl. ¶ 123. The alleged "larger collusive scheme" is between Defendants and "these two large virtual MVPDs." *Id.* Fubo further alleges that the "MFN clauses with YouTube TV and Hulu TV . . . coerce Fubo" into accepting terms. *Id.* ¶ 127. And "YouTube TV and Hulu TV" are "give[n] . . . relief" via the alleged side-deals. *Id.* ¶ 132; *see id.* ¶¶ 132–147.

Fubo again points to loose language suggesting that the allegations referred to large

MVPDs "*such as*" YouTube and Hulu because they are the "*most notabl[e]*" examples. Opp. at 44 & n. 19 (quoting Compl. ¶¶ 233, 308). But Fubo cannot avoid its pleading burden by alleging that Fox's [redacted] scheme with two distributors evidences more schemes with other (unnamed) distributors. Fubo instead "must allege 'enough factual matter (taken as true) to suggest that an [illegal] agreement was made'" between Fox and other distributors. *In re Interest Rate Swaps Antitrust Litig.*, 261 F. Supp. 3d 430, 461 (S.D.N.Y. 2017) (alteration in the original) (quoting *Twombly*, 550 U.S. at 556). The Amended Complaint does not identify any "other distributors," much less how MFNs and side-deals with them restrained trade. *See* Opp. at 44.

C. Fubo Still Has Not Pleaded Any Plausible "Side-Deal" Against Fox.

In all events, an alleged "quid pro quo" arrangement such as Fubo's MFN claims must "rise 'above the speculative level'" to survive *Twombly* review. *Mercer v. Gupta*, 712 F.3d 756, 759 (2d Cir. 2013) (quoting *Twombly*, 550 U.S. at 555). The Amended Complaint does not allege the "[f]actual allegations" that it "must" to surmount this hurdle. *Twombly*, 550 U.S. at 555. Fubo identifies just one alleged "side deal" with Fox: the existence of a "'multiplatform strategic marketing alliance' between Fox and Hulu." Opp. at 46 (quoting Compl. ¶ 136). Fubo cannot argue that a marketing deal "in line with a wide swath of rational and competitive business strategy" somehow, standing alone, permits an inference of collusion. *Twombly*, 550 U.S. at 554; Fox MTD at 23. And Fubo does not even try to point to ***any*** fact in the Amended Complaint connecting the alleged marketing agreement to the carriage agreement or the [redacted] MFN, let alone any nonspeculative inference of a quid pro quo, *see Mercer*, 712 F.3d at 759.

Fubo instead doubles down on group pleading. It first suggests that the rule against group pleading applies only to claims of "discrimination or constitutional-rights violations." Opp. at 46 (quoting *Angermeir v. Cohen*, 14 F. Supp. 3d 134, 143 (S.D.N.Y. 2014)). Yet Fubo relies upon a case that merely observed that "most of the cases Defendants cite[d]" in that motion to dismiss

arose in those contexts. *Angermeir*, 14 F. Supp. 3d at 143. It then explained that (unlike here) the plaintiffs relied on "allegations specific to each of the Defendants." *Id.* Meanwhile, many *antitrust* cases have endorsed the rule against group pleading in that context because "[c]onclusory, collective language is too convenient, too undisciplined, and too unfocused in light of exposures to litigation expense and disruption (even without ultimate liability) that are so great in antitrust (and other) cases." *Egg Prods.*, 821 F. Supp. 2d at 720 (collecting cases); Fox MTD at 18 (same).[6]

Fubo then invokes pre-*Twombly* cases suggesting that "'[g]roup pleading' is permissible when the facts are exclusively within the defendant's knowledge." Opp. at 47 (quotation omitted). Yet "*Twombly* makes clear that at the pleading stage in an antitrust case, each defendant is entitled to know how it is alleged to have conspired, with whom, and for what purpose" *before* discovery. *In re Crop Inputs Antitrust Litig.*, -- F. Supp. 3d --, 2024 WL 4188654, at *8 (E.D. Mo. Sept. 13, 2024); *see id.* at *5 ("*Twombly* bars the discovery-first, plead later approach that [plaintiff] urges us to adopt" (alteration in original) (quoting *Ass'n of Am. Physicians $ Surgeons, Inc. v. Am. Bd. of Med. Specialties*, 15 F.4th 831, 835 (7th Cir. 2021)). Simply put, the Supreme Court sought to spare antitrust defendants "inevitably costly and protracted discovery" arising from speculative and implausible claims by requiring plaintiffs to plead facts connecting *each* defendant to the allegations from the get-go. 550 U.S. at 558 (cleaned up). Fubo failed to do so.[7]

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[6] Fubo calls Fox's cases "inapposite," Opp. at 46 n.22, but admits that each one dismissed claims that "fail[ed] to properly allege individual conduct and allegations necessary to suggest any agreement between defendants." *Id.* (explaining *In re Travel Agent Com'n Antitrust Litig.*, 583 F.3d 896, 905 (6th Cir. 2009)). That is Fox's point—nowhere does Fubo allege facts suggesting that *Fox* had a quid pro quo agreement with Hulu or YouTube, and Fubo cannot paper over that absence with "naked conspiratorial allegations." *Travel Agent Com'n*, 583 F.3d at 905.

[7] Fubo cites *Arista Records, LLC v. Doe 3*, 604 F.3d 110 (6th Cir. 2010), but that case reinforces the point. Saying *nothing* about group pleading, the decision reiterates that *Twombly* requires "*factual* allegations" sufficient to "raise a right to relief above the speculative level," even if pled

D. Fubo Fails To Allege Anticompetitive Effects Or Market Power.

Fubo also fails adequately to allege anticompetitive effects or market power from the MFNs. *See* Fox MTD at 19–22. Fox, with a small share of the market, lacked the unilateral power to increase prices. *See supra* at 4–6. Fubo also fails to allege any anticompetitive effects.

First, Fubo points to allegations that it pays [redacted] higher rates" than others. Opp. at 48–49. But the fact that Fubo allegedly pays more (rather than the same) as "other video distributors" cannot be attributed to MFNs, much less reflect harm to competition. Compl. ¶¶ 121, 122. Fubo must show not that it "was harmed by defendants' conduct," but an "actual adverse effect on competition." *K.M.B. Warehouse Distrib.*, 61 F.3d at 127 (citation omitted).

Next, Fubo alleges that "MFN clauses degrade the quality of the programming" by imposing prices and penetration rates, and by "restrict[ing] the feature[s] and functionality of the services that distributors can offer." Opp. at 49. Fox had [redacted] And the Amended Complaint nowhere alleges that *Fox* ever deprived Fubo of any feature, let alone because of any such MFN. Fubo cites only paragraphs that concern *Disney*, not Fox. Opp. at 49 (citing Compl. ¶¶ 148–151).

Fubo then argues that the MFNs locked in high prices. Opp. at 49–50. That is implausible—MFNs typically "minimize the cost of" products by reducing input prices, transaction costs, and uncertainty, leading to cheaper final products. *Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic,* 65 F.3d 1406, 1415 (7th Cir. 1995). Fubo further points to three "smaller virtual MVPDs" allegedly "forced out of the market" by the alleged scheme, Opp. at 50, but alleges zero facts linking these three competitors' failure to Fox's [redacted] MFNs.

"upon information and belief." *Id.* at 120 (alteration in original). Here, the only relevant allegation was Fubo's impermissible group allegation that "Defendants' carriage agreements and other contracts with YouTube TV and Hulu TV and their affiliates . . . contain[] MFN clauses" agreed to in exchange for "side deals," Compl. ¶ 138. That conclusory allegation has been shown to be false.

See Compl. ¶ 147. Such "wholly conclusory" (and false) allegations cannot support an inference of anticompetitive effects. *Twombly*, 550 U.S. at 561. Finally, Fubo alleges that the MFN clauses "dampen competition between Defendants and facilitate collusion among them." Opp. at 50. Again, the allegations against Fox are wholly conclusory.

III. Fubo Should Not Be Granted Leave To Amend.

Leave to amend "may properly be denied" where a plaintiff failed to cure deficiencies by earlier amendments, defendants will suffer "undue prejudice," or amendment would be futile. *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2007). Fubo amended its complaint once already and had months to amend again after receiving the carriage agreements during expedited discovery. Discovery is ongoing as the Parties prepare for a set trial date. Here, amendment would be futile because both Fubo's bundling and MFN claims fail for reasons that cannot be cured.

CONCLUSION

For the reasons stated above, and in the other Defendants' motions, Fox respectfully requests that the Complaint be dismissed with prejudice.

Dated: November 13, 2024
New York, New York

Respectfully submitted,

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