UNITED STATES DISTRICT COURT
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.

Civil Action No. 24-cv-1363-MMG-JW

CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Defendants Disney, Fox, and Warner Bros. Discovery ("WBD") together control more than half the television rights to the nation's professional and collegiate sports. For years, they have used that control to raise costs on consumers and distributors through two key anticompetitive practices. *First*, Defendants tie the licensing of their highly valuable sports channels (such as ESPN) to distributors' agreements to license and broadcast other, low-demand channels (like the Freeform channel). That arrangement—which Defendants call the "fat bundle"—forces distributors and consumers to pay for dozens of channels that nobody watches. *Second*, Defendants use most-favored-nation ("MFN") clauses in their agreements with large distributors (such as YouTube TV and Hulu + Live TV) to set high price floors on the channels they license, further driving up prices on distributors and consumers. Defendants then enter into side deals with the large distributors that offset the burdens imposed by the MFN clauses—side deals unavailable to smaller competitors such as Plaintiff Fubo. The effect is to freeze out small distributors and new entrants, harming competition and consumers.

More recently, Defendants announced a third anticompetitive project: the launch of a Joint Venture ("JV") they called Raptor among themselves (for public consumption, Venu) that would have the exclusive ability to sell viewers Defendants' critical sports content unbundled from low-demand channels. The JV, which this Court has preliminarily enjoined, would have had a built-in advantage that threatened to drive Fubo and other distributors out of the marketplace. Defendants do not now challenge Fubo's claims challenging the JV. But they move to dismiss Fubo's antitrust claims against their tying practices and MFN clauses. Their arguments are misplaced. Fubo's claims are well grounded in established antitrust law and detailed fact allegations. The Court should deny the motions to dismiss.

The Amended Complaint plausibly alleges that Defendants' practice of bundling commercially critical sports channels with other low-demand channels constitutes illegal "tying" and "block-booking" in violation of Section 1 of the Sherman Act. Courts in this District and around the country have either ruled that similar bundling practices are *per se* unlawful, *see, e.g.*, *Cablevision Sys. Corp. v. Viacom Int'l Inc.*, 2014 WL 2805256, at *2 (S.D.N.Y. June 20, 2014), or allowed plaintiffs to obtain discovery and present evidence of these bundling practices' anticompetitive effects, *see, e.g.*, *Biddle v. Walt Disney Co.*, 696 F. Supp. 3d 865, 872 (N.D. Cal. 2023). Those cases persuasively counsel for rejecting Defendants' arguments and allowing Fubo's claims to proceed to full factual discovery. The harm that Defendants' bundling practices cause to competition and to consumers is especially clear in light of their planned JV, to which they plan to grant a unique exemption from their requirements. That plan undermines any argument Defendants might present that their tying practices are efficient or procompetitive.

The Amended Complaint also plausibly alleges that Defendants' use of MFN clauses with large distributors is anticompetitive. It contains ample facts that, taken as true, show that MFN clauses raise prices on smaller distributors and consumers and dampen competition between Defendants themselves. Defendants devote much of their motions to disputing [REDACTED] MFN clauses—a factual dispute that is premature on a Rule 12(b)(6) motion. But ultimately no Defendant disputes the Amended Complaint's well-pleaded allegations that each Defendant currently has MFN clauses in its carriage agreements with both YouTube TV and Hulu + Live TV ("Hulu Live"). Discovery on Fubo's MFN claims should proceed so that Fubo can obtain the evidence it needs to establish that Defendants' MFN clauses have anticompetitive effects that outweigh any procompetitive effects that Defendants may later attempt to prove.

BACKGROUND

1. Defendants own television networks that broadcast sports and other programming. Am. Compl. ¶ 46. Like other programmers, Defendants license the rights to distribute those networks to multi-channel video distributors ("MVPDs"), including traditional cable and satellite providers (such as Comcast and DISH) and streaming services (called virtual MVPDs) that provide TV packages over the internet (such as Fubo and YouTube TV). *Id.* ¶ 47.

The most valuable content for pay TV distributors and their customers is live sports. *Id.* ¶¶ 55-63. In an era when consumers have shifted entertainment viewing to video-on-demand services such as Netflix, sports fans still subscribe to MVPD services for access to live sports. *Id.* ¶ 62. In 2023, 97 of the top 100 TV broadcasts were live sports. *Id.* ¶ 55. Because live sports are the "lifeblood" of live pay TV and "the only thing keeping many television networks alive," *id.* ¶¶ 58-59, channels that carry substantial premium live sporting events (such as NFL games) are "must have" for distributors like Fubo, *id.* ¶¶ 58-63. Defendants' executives have made this point themselves. Disney CEO Bob Iger has stated: "You cannot launch a new multichannel platform or bundle successfully without ESPN." *Id.* ¶ 59. Fox Executive Chairman Lachlan Murdoch has called "sports . . . the number one driver of TV viewing." *Id.*

Disney, Fox, and WBD are dominant sports programmers in the United States. *Id.* ¶ 64. Collectively, they control more than half the live televised sports in the United States, *id.* ¶¶ 168-169, including the four major professional leagues (NFL, NBA, MLB, NHL); high-level college football and basketball; and many more niche sports with smaller but loyal followings. *Id.* ¶¶ 64-83. Defendants broadcast those sporting events on their networks (such as Disney's ABC and ESPN, FOX, and WBD's TNT and TBS). *Id.* ¶¶ 52-54.

Even measured individually, Disney and Fox stand out as uniquely powerful sports programmers. Disney is a "dominant licensor" of sports programming with "the rights to a vast

number of America's most popular sporting events." *Id.* ¶ 52. Fox Sports CEO Eric Shanks has expressed confidence about the dominance and staying power of Fox's sports properties: "We know in five years that Fox's [NFL] 'America's Game of the Week' is still going to be the No. 1 show on television. We're still going to have the NFC package and the Super Bowl. We're still going to have the World Series. Those are the core properties that drive our business." *Id.* ¶ 59.

2. For decades, consumers have had little choice when it comes to live television. Even as of 2010, 90% of U.S. households watched television through traditional cord- or satellite-based cable subscriptions. *Id.* ¶ 85. The industry was controlled by a few dominant programmers (including Defendants) and local cable monopolies, *id.* ¶ 84, to the detriment of consumers who were forced to purchase bloated cable packages stuffed with rarely watched channels, *id.* ¶¶ 4, 87-88. Technological advances, however, made innovation and choice possible. About a decade ago, virtual MVPDs began to emerge, offering consumers streaming television services over broadband internet connections. *Id.* ¶¶ 92-93. Virtual MVPDs held the promise of a more consumer-friendly future for the industry, including slimmed-down (and less-expensive) television packages tailored to consumer tastes. *Id.* ¶¶ 94-95.

3. Fubo was an early innovator in the virtual MVPD market. *Id.* ¶ 97. Since its founding in 2015, Fubo has sought to offer streamlined television packages tailored to sports fans, without dozens and dozens of entertainment channels that increase costs and drive potential customers away. *Id.* ¶¶ 98-99. But Defendants' licensing restrictions have blocked Fubo from delivering more flexible, lower-cost packages to television subscribers.

Bundling restrictions: Defendants "bundle" their must-have sports channels with their non-sports channels—requiring Fubo to license and distribute █ (or virtually █) of their channels as a condition of licensing must-have sports channels such as ESPN and Fox. *Id.*

¶¶ 110, 114-120. For example, to license ABC and ESPN, Disney requires Fubo to spend $[redacted] million per year licensing general entertainment channels, including channels such as [redacted]. *Id.* ¶ 115. Few of Fubo's subscribers want those channels, and Fubo would not license them voluntarily. *Id.* ¶¶ 115, 219, 221.

Disney and Fox enforce bundling through, among other contractual terms, "minimum penetration" requirements. *Id.* ¶¶ 116-117. These provisions require Fubo to distribute [redacted] Disney and Fox channel to [redacted] Fubo subscriber (with a few minor exceptions), foreclosing Fubo from offering skinnier packages of channels that are less expensive and more tailored to consumer interests.[1] *Id.* ¶¶ 116-117, 119. Because Fubo must pay for and distribute that long list of unwanted non-sports channels from Disney and Fox, it has dropped or forgone licensing other networks it would prefer to carry, such as TNT, TBS, A&E, and AMC. *Id.* ¶¶ 83, 119.

Most-favored-nation (MFN) clauses: Defendants use MFNs to raise the carriage fees they charge Fubo for licensing their networks and to set floors on other contractual terms (such as penetration requirements) in their carriage agreements with Fubo. An MFN clause is "a contractual provision in which one party agrees not to give more favorable terms to anyone else without offering that same deal to the counterparty." *Id.* ¶ 124. Defendants' carriage agreements with large distributors—including YouTube TV and Hulu Live—contain such MFNs. *Id.* ¶ 111. To obtain these MFN clauses, large virtual MVPDs like YouTube TV (owned by Google) and Hulu Live (majority-owned by Disney) agree to above-market "content prices, penetration requirements, and other economic terms" in their carriage agreements with Defendants. *Id.*

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[1] Fox attempts to use Fubo's own bundled offerings of channels as evidence that tying arrangements are commonplace. *See* Fox Mot. at 7 ("Fubo itself offers . . . bundles of preselected channels."). But Defendants' minimum penetration requirements *are the reason* Fubo must offer bundles of channels to consumers. So Fox's argument only highlights the pervasive reach of Defendants' anticompetitive conduct.

¶ 130. In "exchange for those above-market prices" and other terms, Defendants give YouTube TV and Hulu Live "MFN status in the virtual MVPD market." *Id.* ¶ 131. These MFN agreements "set a floor on the prices, penetration requirements, and other economic terms" that Defendants can offer to YouTube TV's and Hulu Live's smaller rivals, including Fubo, meaning that those smaller rivals must bear the same above-market terms (or worse) when licensing content from Defendants. *Id.*

MFN clauses benefit both Defendants and their large distributor partners. Large distributors benefit, even though they agree to pay a premium in exchange for MFN status, because they "can better afford these premiums and onerous economic terms than Fubo" and other small distributors. *Id.* ¶ 130. That is, "artificial MFN-based high prices and penetration requirements . . . allow the biggest players in the virtual MVPD market to keep prices high, thus pricing out smaller competitors and raising barriers to entry." *Id.* ¶ 142. MFNs likewise "benefit the [programmer] Defendants by giving them the pretext (and uniform incentive) to charge Fubo above-market rates and impose other unreasonable terms . . . mak[ing] it easier for Defendants to maintain high content prices and onerous economic terms without fearing that their competitors will undercut them." *Id.*

Defendants' MFN agreements are even more anticompetitive because Defendants accompany them with "side deals" that offset the above-market fees in their carriage agreements. *Id.* ¶ 132. For example, Disney and Fox purchase cloud and advertising services from Google (YouTube TV's parent), which "defrays the premiums" that YouTube TV pays for Defendants' content. *Id.* ¶ 133. Similarly, WBD's predecessor, Discovery, gave Hulu a discount on its video-on-demand content to offset the premium for Discovery's content in Hulu Live's carriage agreement. *Id.* ¶ 135. And Fox provided extra "marketing services for Hulu in exchange for

Hulu Live's agreement to pay" MFN-protected "premiums for Fox content." *Id.* ¶ 136. ██████████ to provide similar side deals to Fubo or other virtual MVPDs, which must bear the MFN-protected above-market prices and penetration rates at face value. *Id.* ¶¶ 111, 121-123, 127, 137, 141-143, 214-218.

As a result of these MFN agreements and side deals, Fubo and other virtual MVPDs (and their customers) pay higher prices. Meanwhile, large distributors like YouTube TV and Hulu Live either avoid these high sticker prices entirely (through side deals) or can better absorb above-market terms because of their size. The MFN regime thus creates structural disadvantages for smaller competitors and new entrants. Fubo pays effective carriage fees that are ██% to ██% higher than "the average prices charged to other video distributors" (many of whom are not subject to MFNs), and Fubo is also subject to far more onerous penetration rates and other contractual terms imposed through MFN clauses. *Id.* ¶¶ 121-122. Fubo has no choice but to pass those higher costs along to subscribers (at least in part) and forgo licensing other networks to offset the high prices that Defendants maintain through their MFN agreements. *Id.* ¶¶ 142-144.

4. In stark contrast to the bundling requirements they impose on every other MVPD, Defendants in February 2024 entered a JV to unbundle their sports networks for themselves—and themselves alone—through a "skinny sports bundle" service codenamed Raptor. *Id.* ¶¶ 152-162. The Court granted Fubo's motion to preliminarily enjoin that JV, after finding it likely violates Section 7 of the Clayton Act. *See* Doc. 291 at 34-54 ("PI Order"). Defendants have accordingly do not seek to dismiss Fubo's claims concerning the JV (Counts 1, 2, and 11).

LEGAL STANDARD

"When ruling on a Rule 12(b)(6) motion, the district court must accept all factual allegations contained in the complaint as true and draw all reasonable inferences in favor of the plaintiff." *Saba Cap. Master Fund, Ltd. v. BlackRock ESG Cap. Allocation Term Tr.*, 2024 WL 3162935, at *7 (S.D.N.Y. June 25, 2024) (Garnett, J.). "A court's function on a Rule 12(b)(6) motion is 'not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient.'" *Cornelio v. Connecticut*, 32 F.4th 160, 168 (2d Cir. 2022) (citation omitted). "Consequently, a complaint will survive a motion to dismiss under Rule 12(b)(6) if it alleges facts that, taken as true, establish plausible grounds to sustain a plaintiff's claim for relief." *Id.*

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy" that unreasonably restrains "trade or commerce among the several States." 15 U.S.C. § 1; *see Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984). The Act "was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 n.27 (1984). To that end, the Act "is aimed at substance rather than form." *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 193 (2010).

Some conduct is subject to *per se* liability under Section 1 if it is "so plainly anticompetitive that no elaborate study of the industry is needed to establish [its] illegality." *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 692 (1978). In other cases, "a plaintiff must identify the relevant market that is subject to the restraint and then demonstrate the restraint's adverse effects on competition in that market." *Caruso Mgmt. Co. v. Int'l Council of Shopping Ctrs.*, 403 F. Supp. 3d 191, 201 (S.D.N.Y. 2019). This analysis is "deeply fact-intensive," *id.* at 202, and takes "into account a variety of factors, including specific

information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect," *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

"The requirements for establishing claims under [the Donnelly Act] are essentially the same as those for doing so under the Sherman Act." *In re Aluminum Warehousing Antitrust Litig.*, 95 F. Supp. 3d 419, 457 (S.D.N.Y. 2015).

ARGUMENT

I. The Amended Complaint Adequately Pleads Tying and Block-Booking Claims Against Disney and Fox

Disney's and Fox's bundling requirements constitute unlawful tying under Section 1 of the Sherman Act. "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product.'" *In re Google Digit. Advert. Antitrust Litig.*, 627 F. Supp. 3d 346, 367 (S.D.N.Y. 2022) (citation omitted). A tying claim turns on "the seller's exploitation of its control over the tying product to force the buyer into the purchase of the tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Id.* at 367-68.

Where "defendants [possess] sufficient market power, 'certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable *per se.*'" *Park v. Thomson Corp.*, 2007 WL 119461, at *7 (S.D.N.Y. Jan. 11, 2007) (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9-16 (1984)). "[W]here a defendant's market power is sufficiently great that its tie qualifies as a *per se* violation, a plaintiff is relieved of the separate burden of showing an anticompetitive effect from the tying in the tied product market." *In re Wireless Tel. Servs. Antitrust Litig.*, 385 F. Supp. 2d 403, 423 (S.D.N.Y. 2005) (Cote, J.).

> The substantive elements of [an] illegal per se tying claim are: (1) that the tying arrangement affects a substantial amount of interstate commerce; (2) the two products are distinct; (3) the defendant actually tied the sale of the two products; and (4) the seller has appreciable market power in the tying market.

In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 133 n.5 (2d Cir. 2001) (Sotomayor, J.) (citing *United States v. IBM Corp.*, 163 F.3d 737, 741 (2d Cir. 1998)), *abrogated on other grounds by In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006). Tying agreements not *per se* unlawful are evaluated under the rule of reason. Where that rule applies:

> [A] plaintiff must allege facts plausibly showing 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).

A. Tying the Purchase of Commercially Critical Media Content to the Purchase of Unwanted Content Is Unlawful

Conditioning the purchase of commercially critical movies, television shows, and similar forms of media content on the purchase of non-critical content has been condemned as unlawful by courts in this District and around the country. In *Cablevision Systems Corp. v. Viacom International Inc.*, 2014 WL 2805256 (S.D.N.Y. June 20, 2014), this Court ruled that the distributor Cablevision had adequately alleged that the programmer Viacom had engaged in "illegal tying" by "requir[ing] Cablevision to license a dozen less popular programing networks . . . in order to gain license rights to what Cablevision alleges are 'four commercially critical' programming networks"—specifically, "Nickelodeon, Comedy Central, BET, and MTV." *Id.* at *1, *3. Cablevision succeeded in stating both a *per se* claim (because it alleged that Viacom had sufficient market power to force it to buy the less-popular channels) and an alternative rule-of-reason claim (because it alleged that buying the less-popular channels kept it from purchasing other channels from Viacom's competitors). *See id.* at *2.

Similarly, in *MCA Television Ltd. v. Public Interest Corp.*, 171 F.3d 1265 (11th Cir. 1999), the Eleventh Circuit affirmed a judgment that a programmer's "conditioning of its licensing to [the plaintiff] of several first-run television shows . . . on the willingness of [the plaintiff] to license a further first-run series called *Harry and the Hendersons* . . . constituted an illegal tying arrangement in violation of the Sherman Act." *Id.* at 1268. In *Biddle v. Walt Disney Co.*, 696 F. Supp. 3d 865 (N.D. Cal. 2023), the court sustained a tying claim against Disney based on its requirement that all distributors sell ESPN in their base packages—that is, bundling ESPN with all other channels. *Id.* at 872. And in *Paramount Pictures Corp. v. Johnson Broadcasting Inc.*, 432 F. Supp. 2d 707 (S.D. Tex. 2006), the court held that the counterclaimant had "presented sufficient evidence of Paramount's market power to withstand summary judgment" concerning its claim that "Paramount violated antitrust laws by illegally tying licenses for *Judge Judy* and *Judge Joe Brown* to the license for *Becker*." *Id.* at 708, 709.

2. *Cablevision*, *MCA Television*, and similar cases draw support from the Supreme Court's decisions in *United States v. Paramount Pictures*, 334 U.S. 131 (1948), and *United States v. Loew's, Inc.*, 371 U.S. 38 (1962). *Paramount Pictures* condemned the practice of "licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period" as an unlawful "add[ition] to the monopoly of the copyright." 334 U.S. at 156, 158. *Loew's* extended that holding to the television industry, where a group of distributors forced "[t]elevision stations . . . to take unwanted films," which "denied [them] access to films marketed by other distributors[,] who, in turn, were foreclosed from selling to the stations." 371 U.S. at 49. It held that such practices, commonly referred to as "block booking," were "tying arrangements [that] both by their 'inherent nature' and by their 'effect' injuriously restrained

trade." *Id.* (citation omitted); *see also Fields Prods., Inc. v. United Artists Corp.*, 318 F. Supp. 87, 88 (S.D.N.Y. 1969) ("[B]lock booking injures the television stations who are compelled to accept motion pictures that they do not want and it also injures other distributors who are deprived of an opportunity to license their pictures to television stations who have been forced to accept defendant's pictures."), *aff'd*, 432 F.2d 1010 (2d Cir. 1970) (per curiam).

Courts continue to strike down block-booking practices under the authority of *Paramount Pictures* and *Loew's*. *See, e.g.*, *Cablevision*, 2014 WL 2805256, at *3 (denying motion to dismiss block-booking claims); *Six W. Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.*, 2000 WL 264295, at *14-15 (S.D.N.Y. Mar. 9, 2000) (same); *see also In re Pandora Media, LLC*, 2022 WL 19299126, at *13 (C.D. Cal. Oct. 26, 2022) ("*Paramount Pictures* and *Loew's* are still good law for the proposition that there can be 'an illegal tie between copyrighted films that were partial substitutes competing in the same market for film audiences.'") (quoting Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 1747c (5th ed. 2021)). This Court should follow that established and persuasive precedent here.

B. The Amended Complaint Pleads Every Element of a *Per Se* and Rule-of-Reason Tying Claim

The Amended Complaint pleads every element of both *per se* and rule-of-reason tying against Disney and Fox. *First*, Fubo has identified both a tying product (Defendants' "commercially critical" sports channels) and a tied product (non-critical channels offered by Defendants and other programmers) that exist in distinct markets. *Second*, Defendants have "coerced" Fubo into licensing and distributing their non-critical channels by conditioning Fubo's license of their must-have sports content on the licensing of their non-critical content. *Third*, Defendants possess market power by virtue of their control over must-have sports programming, which is substantial enough to render their bundling practices unlawful *per se*. *Fourth*, under the

rule of reason, Defendants' bundling requirements have anticompetitive effects in the tied market (the market for non-critical television channels) by, *inter alia*, preventing Fubo from licensing non-critical channels of its choice from other programmers and offering consumers more attractive packages of channels. *Fifth*, Defendants' bundling requirements affect a "not insubstantial" amount of interstate commerce. Defendants do not dispute that Fubo has adequately pleaded the second element (coercion). For the reasons below, Fubo has also adequately pleaded the remaining elements of a tying claim.

1. The Amended Complaint Identifies Plausible Tying and Tied Products That Exist in Separate Markets

"The first element of a tying claim requires plaintiffs to allege the existence of two distinct products" that exist in different markets. *In re Wireless Tel. Servs. Antitrust Litig.*, 2003 WL 21912603, at *4 (S.D.N.Y. Aug. 12, 2003). The Second Circuit applies "a relatively permissive pleading standard" in evaluating a plaintiff's proposed product market: "At the motion-to-dismiss stage, a plaintiff's proposed relevant market must 'bear a rational relation to the methodology courts prescribe to define a market' and include a 'plausible explanation as to why a market should be limited' to exclude possible substitutes." *Regeneron Pharms., Inc. v. Novartis Pharma AG*, 96 F.4th 327, 338-39 (2d Cir. 2024) (quoting *Todd v. Exxon Corp.*, 275 F.3d 191, 200 (2d Cir. 2001) (Sotomayor, J.)).

"To determine the boundaries of a product market, [courts] look to 'the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.'" *Id.* (citation omitted); *see generally Jefferson Parish*, 466 U.S. at 19 (whether two products are distinct turns "on the character of the demand for the two items"). In addition, courts "often look to 'practical indicia' of market boundaries," including "industry or public recognition of the [ ]market as a separate economic entity, the product's peculiar

characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Regeneron*, 96 F.4th at 339 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)) (brackets in *Regeneron*). Because "identifying the scope of a relevant market requires resolving empirical questions that 'can be determined only after a factual inquiry into . . . commercial realities,'" *id.* (quoting *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992)), "courts . . . 'hesitate to grant motions to dismiss for failure to plead a relevant product market,'" *id.* (quoting *Chapman v. N.Y. State Div. for Youth*, 546 F.3d 230, 238 (2d Cir. 2008)).

a. The Amended Complaint defines a tying product market of commercially critical sports channels. "The linear networks ESPN, ABC, Fox, CBS, and NBC are commercially critical sports channels"—that is, "programming that an MVPD or virtual MVPD subject to bundling requirements *must* license to offer a commercially viable package of channels." Am. Compl. ¶¶ 199, 202. The Amended Complaint explains why these five sports channels are "commercially critical" using consumer demand data: The channels "[REDACTED]," with each having "[REDACTED]." *Id.* ¶ 202. (The other channel in Fubo's [REDACTED]. *Id.*). "[REDACTED] five channels were the most-watched sports channels in 2023." *Id.* The Amended Complaint also sets out specific consumer demand data for the three commercially critical sports channels owned by Defendants: ESPN "is [REDACTED]," while Fox "[REDACTED]

," and

." *Id.* ¶¶ 206-208.

Pricing data underscore the distinct demand for commercially critical sports channels. *Geneva Pharms. Tech. Corp. v. Barr Lab'ys Inc.*, 386 F.3d 485, 497 (2d Cir. 2004) ("[W]e find a substantial gap in pricing indicative of separate markets."). For instance, Fubo's affiliate fees per subscriber are $ for ESPN, $ for Fox, and $ for ABC, far higher than its affiliate fees for non-critical channels such as

. Am. Compl. ¶ 209.

The five commercially critical sports channels are so much more valuable and "see substantially more consumer demand than other sports channels because of the breadth and quality of the sports programming they offer." *Id.* ¶ 203. Live sports content is by far the most important content for an MVPD because of its capacity to attract subscribers and corresponding advertising revenues. "'Sports, more than any other form of entertainment, are . . . the principal driver of TV viewership.'" *Id.* ¶ 55. Because "[s]ports fans will pay a premium to watch their favorite teams play live," MVPDs must ensure they have robust live sports available or they "cannot attract or retain the many customers who demand this programming." *Id.* ¶ 62. And each of Defendants' commercially critical sports channels (ESPN, ABC, and Fox) "holds the exclusive rights to a vast array of the most popular live sports events." *Id.* ¶ 206 (describing ESPN); *see also id.* ¶¶ 207-208 (Fox and ABC). Together, the five commercially critical sports channels "broadcast almost all the NFL games that appear on linear television—the most valuable sports programming in the country, and content that Fox Executive Chairman Lachlan Murdoch called 'the foundation of [Fox's] marquee sports portfolio.'" *Id.* ¶ 203.

Defendants' own statements confirm the unique demand for commercially critical sports channels. *See Brown Shoe*, 370 U.S. at 325 (courts examine "industry or public recognition of the [ ]market as a separate economic entity" in defining a market). Disney and Fox have each publicly acknowledged that their channels are commercially critical: As Disney CEO Iger put it, "You cannot launch a new multichannel platform or bundle successfully without ESPN." Am Compl. ¶¶ 59, 205; *see also id.* ¶¶ 73-74 (similar statements from Fox); Doc. 98-13 at 4 (Fox CEO Murdoch: "only live news and sports platforms deliver" "engaged, real-time audiences").

b. The Amended Complaint defines a tied product market of "[n]on-critical television channels"—that is, "programming that an MVPD or virtual MVPD *might* choose to license for distribution in a given package of channels, but that it does not *need* to license to support a commercially viable package of channels." Am. Compl. ¶ 215.

> Non-critical television channels are reasonably interchangeable within a package of channels, because distributors (absent tying and bundling policies) could choose between non-critical television channels when offering a multi-channel package to consumers. For example, a distributor could choose to license A&E but not FX, or vice versa, and still offer a commercially viable service.

Id. ¶ 216. But "non-critical television channels are *not* reasonably interchangeable with commercially critical sports channels . . . For example, if Fubo decided to offer National Geographic instead of ESPN in a package of channels, that package would quickly shed subscribers and would not be commercially viable." *Id.* ¶ 217.

c. Commercially critical channels and non-critical channels exist in distinct markets because "the character of the demand" for them, *Jefferson Parish*, 466 U.S. at 19, is very different. Because of the massive consumer demand for them, Defendants' "must-have" sports channels have no reasonable substitutes; an MVPD must license them to offer a commercially viable service. Am. Compl. ¶ 57 (sports programming is "must-have" and " 'non-replicable' TV for large numbers of consumers"); *id.* ¶ 59 (sports are the "lifeblood of multi-channel video

distribution" while "movies and scripted shows are readily available from video-on-demand services such as Netflix"). But Defendants' non-critical channels are discretionary and not essential to a successful MVPD service. They have far lower demand from live pay TV consumers, and are thus not substitutes for must-have sports channels. *See supra* pp. 14-16 (discussing allegations showing the unique nature of commercially critical sports channels).

Numerous courts have recognized similar distinctions between markets for high-demand and low-demand television channels in tying cases. *See Cablevision*, 2014 WL 2805256, at *1, *3 (recognizing tying market of commercially critical channels and tied market of non-critical channels); *MCA Television*, 171 F.3d at 1268 (recognizing separate markets for the television show *Harry and the Hendersons* and other "first-run television shows"); *Biddle*, 696 F. Supp. 3d at 872 (separate markets for ESPN and other channels); *Johnson*, 432 F. Supp. 2d at 709 (separate markets for the television show *Becker* and the shows *Judge Judy* and *Judge Brown*).

Courts have also recognized distinct markets for highly valuable sports content and other content in other contexts. *See, e.g.*, *Int'l Boxing Club of N. Y., Inc. v. United States*, 358 U.S. 242, 249 (1959) (identifying separate markets for "championship boxing contests" and "all professional boxing events"); *Coniglio v. Highwood Servs., Inc.*, 495 F.2d 1286, 1291 (2d Cir. 1974) (crediting separate markets for "exhibition and regular season contests"). More generally, "courts have recognized the 'high end' of other broad markets as distinct submarkets for antitrust purposes." *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, 28 (D.D.C. 2022); *see FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1037-40 (D.C. Cir. 2008) (recognizing a distinct market for "premium" supermarkets that offer "high-quality" goods).

d. Defendants' contrary arguments provide no basis for dismissal. *First*, Defendants summarily argue (Disney Mot. at 16, Fox Mot. at 11) that Fubo has not adequately "define[d] the

bounds" between the markets for commercially critical and non-critical channels. But as shown, the Amended Complaint distinguishes between commercially critical channels and non-critical channels by reference to the amount and quality of sports content available on these channels, viewership and pricing data, and Defendants' own statements. *Supra* pp. 14-16. The Amended Complaint thus defines the tying and tied market by reference to the "interchangeability of use [and] cross-elasticity of demand." *Regeneron*, 96 F.4th at 338-39. Commercially critical sports channels are not interchangeable with non-critical channels, because non-critical channels cannot support a viable streaming package on their own. *Supra* pp. 16-17.[2]

Second, Defendants fail to show (Disney Mot. at 16, Fox Mot. at 13) that in addition to ESPN, Fox, and ABC, other channels that broadcast sports (such as TNT, TBS, and FS1) must also be part of the "commercially critical sports channels" market. The Second Circuit rejected a similar argument in *Regeneron*, reversing a district court's dismissal of a complaint after the district court "focus[ed] too heavily on the functional similarities between [two products], rather than on the extent to which consumers are willing to substitute one for the other." 96 F.4th at 339-40. As *Regeneron* explained, "the applicable analysis is whether or not the products are *economic* substitutes, not whether they appear to be functionally similar." *Id.*; *see supra* p. 17 (collecting cases differentiating markets between high-value and low-value sports content).

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[2] Disney also argues (at 17) that Fubo's identification of commercially critical channels is "subjective." But Disney's own CEO has recognized that "[y]ou cannot launch a new multichannel platform or bundle successfully without ESPN," and the Amended Complaint explains that "[REDACTED]." Am. Compl. ¶ 202. And to the extent Disney's argument is that the Amended Complaint must identify every single channel that occupies each of the two markets, that is not a burden Fubo must carry at trial—much less at the pleading stage. *See Pit Row, Inc. v. Costco Wholesale Corp.*, 101 F.4th 493, 505 (7th Cir. 2024) ("We know from long experience with antitrust cases that an elaborate definition of the relevant market is neither necessary nor, in some cases, possible"); *United States v. Conn. Nat'l Bank*, 418 U.S. 656, 669 (1974) ("[M]arkets need not—indeed cannot—be defined with scientific precision").

The Amended Complaint explains why not all sports channels are "commercially critical": the commercially critical channels are "distinguish[ed]" by "massive consumer demand for the sports programming" that they contain. Am. Compl. ¶ 203. TNT, TBS, and FS1 see far lower consumer demand for their content, and while they may be valuable for their sports (as Disney argues at 17), they are "not critical . . . to the viability of a traditional streaming package in the same way" as are ESPN, Fox, and ABC. *Id.* Fubo's own experience confirms this distinction: Fubo had to drop the sports channels TNT and TBS in [REDACTED], but still operates a commercially viable streaming platform. *Id.* ¶ 83. The Amended Complaint also includes demand and pricing data to explain why these channels do not qualify as commercially critical. *Id.* ¶¶ 200-203, 209. Fubo has thus offered a "plausible explanation," *Regeneron*, 96 F.4th at 338-39, necessary to pass the pleading stage. Fox's arguments to the contrary (at 13) amount to disagreement with the facts Fubo has pleaded.

Third, Defendants fail to show (Disney Mot. at 17, Fox Mot. at 5) that Fox News fits Fubo's definition of a "commercially critical sports channel." The Amended Complaint explains why: Fox News does not include any sports, and live sports is what drives subscribership for MVPDs. Am. Compl. ¶ 57. Because "[s]ports fans will pay a premium to watch their favorite teams play live," MVPDs must ensure they have robust live sports available or they "cannot attract or retain the many customers who demand this programming." *Id.* ¶ 62. Or as WBD has put it, "[p]remium sports programming drives audience and ratings growth, and continues to add value because consumers watch the product live across all screens." *Id.* ¶ 59. Fox News is a major market presence in its own way, but it does not "drive[ ] audience[s]" to Fubo in the same way that channels with premium live sports content do—and, most importantly for present purposes, it is not *interchangeable* with sports channels.

Fourth, Disney errs in suggesting (at 18) that NBC and CBS cannot be "commercially critical sports channels" because Defendants' own JV does not plan to carry those channels. The Amended Complaint addresses this point too: Defendants' JV is unique among all MVPDs in that it will *only* carry channels with sports content, without all of the low-demand non-sports content that Defendants force on other MVPDs like Fubo. Am. Compl. ¶ 204. Because the JV is unburdened by those low-demand channels, it could afford to carry a smaller subset of commercially critical sports channels while still attracting customers, because it would be the only "skinny sports bundle" in the market and could offer a dramatically lower price relative to the "fat bundle" that Defendants force on Fubo and other distributors. *Id.* ¶¶ 161, 204.

Fifth, Fox complains (at 13) that descriptions of channels as "critical" or "non-critical" are too vague because consumer demand for these channels can change over time. Of course, demand for all products can change over time, but that does not stop courts from defining markets by reference to "the character of the demand" for them, *Jefferson Parish*, 466 U.S. at 19. And here, the Amended Complaint alleges that consumer demand for live sports is not temporary: they have been the "most watched content on television" for decades, and "[t]wenty-seven of the thirty most-watched broadcasts of all time have been live sporting events." Am. Compl. ¶ 55. Moreover, the sports content on Defendants' channels are "lock[ed] up" through Defendants' "long-term deals with the leagues," *id.* ¶¶ 173-174. These barriers to entry prevent Defendants' sports channels from going from critical to non-critical overnight, as Fox suggests.

Sixth, Fox argues (at 14) that "there cannot be a separate demand for non-critical television channels" because "those channels do not constitute a 'commercially viable package'" on their own. But in assessing whether critical and non-critical channels occupy separate markets, the question is not whether non-critical channels could independently support a

commercially viable package of channels. *See Eastman Kodak*, 504 U.S. at 463 (rejecting argument that "because there is no demand for parts separate from service, there cannot be separate markets for service and parts"; "[w]e have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices"). Instead, the question is whether critical and non-critical channels "could be offered separately." *In re Visa Check/Mastermoney Antitrust Litig.*, 2003 WL 1712568, at *3 (E.D.N.Y. Apr. 1, 2003).[3] Here, the Amended Complaint alleges that Defendants *could* unbundle their non-critical channels from their critical channels, and that distributors (and consumers) would purchase these channels on an unbundled basis. *E.g.*, Am. Compl. ¶¶ 152-153, 190-192. Indeed, Defendants are planning to unbundle their sports and non-sports channels for their own JV, demonstrating that they can offer these products separately. *Id.* ¶ 18.

Seventh, Disney argues (at 18) that ESPN and ABC cannot be critical because "Fubo existed [REDACTED] without these networks." But Fubo's business transformed after licensing ESPN and other critical sports channels: "[b]y early 2022, after having added ESPN to its package, Fubo grew to more than one million subscribers." Am. Compl. ¶ 105.

2. The Amended Complaint Plausibly Alleges That Disney and Fox Have Market Power

The Amended Complaint alleges that Disney and Fox each have market power in the market for commercially critical sports channels because their control of those channels allows them to raise prices and impose burdensome economic terms on distributors and consumers.

[3] *See also In re Time Warner Inc. Set-Top Cable Television Box Antitrust Litig.*, 2010 WL 882989, at *4 (S.D.N.Y. Mar. 5, 2010) (products were distinct where they "could be sold separately and profitably"); *Kaufman*, 836 F.3d at 142 (products are separate if it "is efficient to offer [the former] separately from [the latter]"); *Eastman Kodak*, 504 U.S. at 462 (relevant question is whether there is "sufficient consumer demand [for the tied product] so that it is efficient for a firm to provide [it] separately from [the tying product]").

Market power exists where "the seller has the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market." *U.S. Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 620 (1977); *see Eastman Kodak*, 504 U.S. at 464 ("Market power is the power to force a purchaser to do something that he would not do in a competitive market.") (citation omitted).

Market power "can be shown by specific evidence of a seller's ability to control prices or exclude competitors from the market." *Kaufman*, 836 F.3d at 143; *see Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 98 (2d Cir. 1998) (market power "may be proven directly by evidence of the control of prices or the exclusion of competition"). It may also "be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." *Hill v. A-T-O, Inc.*, 535 F.2d 1349, 1353 (2d Cir. 1976) (quoting *Loew's*, 371 U.S. at 45); *Fortner*, 429 U.S. at 619 ("the unique character of the tying product has provided critical support for . . . finding[s] of illegality"). "Ascertaining the existence of market power is 'fact intense' and courts 'reserve dismissal on this issue for pleadings containing only bare and conclusory allegations.'" *In re Crude Oil Commodity Futures Litig.*, 913 F. Supp. 2d 41, 52 (S.D.N.Y. 2012) (quoting *CFTC v. Parnon Energy Inc.*, 875 F. Supp. 2d 233, 245 (S.D.N.Y. 2012)).

1. The Amended Complaint contains six groups of allegations showing that Disney and Fox have market power. *First*, Disney and Fox are able to "require purchasers to accept burdensome terms that could not be exacted in a completely competitive market." *Fortner*, 429 U.S. at 620. Without market power, they could not require Fubo to:

> (1) license and broadcast non-critical channels Fubo does not want to broadcast; (2) drop other noncritical television channels (such as TNT, TBS, AMC and A&E) that Fubo would select from other programmers instead of those offered by Disney and Fox; (3) agree to include most of Disney's and Fox's channels in every subscriber package that Fubo offers, including channels that Fubo would not otherwise include in those packages; (4) [redacted]

> [REDACTED]; and (5) agree to other one-sided and onerous contractual terms that Fubo would otherwise never accept.

Am. Compl. ¶¶ 8, 210, 213-214, 253-255, 276. These allegations are more than sufficient on their own to establish market power.

Second, Disney and Fox use their control of commercially critical sports content to charge higher prices than Fubo would pay for their channels on the open market. *Kaufman*, 836 F.3d at 143 ("[I]n a tying case, 'the best way' to plead market power is to allege facts that, if proven, 'establish directly that the price of the tied package is higher than the price of components sold in competitive markets.'") (citation omitted). As the Amended Complaint explains, "Fubo is forced to spend more than $[REDACTED] million per year on content it does not want and that does not fit its core business strategy because of Disney/ESPN's and Fox's anticompetitive bundling practices." Am. Compl. ¶ 115. "Absent this tying arrangement, Fubo (and its customers) would not license Disney/ESPN's non-critical content" at all—much less pay $[REDACTED] million for it annually. *Id.* ¶ 273.

Third, Disney and Fox use control of commercially critical sports content to set different prices (and other economic terms) for different buyers. *See United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 340 (S.D.N.Y. 2001) ("Defendants' ability to price discriminate also illustrates their market power."); *United States v. Eastman Kodak Co.*, 63 F.3d 95, 106 (2d Cir. 1995) ("[A] company's ability to price discriminate against certain classes of consumers may be evidence of power in a particular market") (citing *Eastman Kodak*, 504 U.S. at 112). Disney and Fox both charge Fubo far higher prices (and higher penetration rates) than they charge other distributors for the exact same channels. Am. Compl. ¶¶ 121-122, 211.

Fourth, Disney and Fox control content that has a "unique character." *Fortner*, 429 U.S. at 619. Each has exclusive rights to a wide array of unique, high-demand sporting events. "For

example, Fox controls the rights to broadcast four Super Bowls (in 2023, 2025, 2029, and 2033), all NFC championship games, the NFL 'America's Game of the Week' (which is 'the No. 1 show on television'), and the World Series through 2028," while ESPN "controls the rights to NFL's Monday Night Football, Wild Card Playoff game, Divisional Playoff Game, Pro Bowl, and future Super Bowls," and "ABC is currently the only broadcast network to broadcast games from all four major sports leagues (the NFL, the NBA, the NHL, and MLB)" and has "exclusive broadcasts of all games of the NBA Finals." Am. Compl. ¶ 212. The unique importance of the sporting events broadcast on Disney's and Fox's sports channels gives them an "advantage not shared by [their] competitors in the market for the tying product." *Fortner*, 429 U.S. at 620; *see, e.g.*, *Biddle*, 696 F. Supp. 3d at 883 (plaintiffs alleged market power by asserting that Disney owns ESPN, "the largest input into every [streaming live pay TV] product in the country").[4]

Fifth, Disney and Fox themselves recognize their own market power. *See supra* pp. 3-4 (quoting Disney's CEO's statement that "[y]ou cannot launch a new multichannel platform or bundle successfully without ESPN" and Fox's CEO's statement that "[w]e know in five years" that Fox will "still" have "the No. 1 show on television," the "NFC package," the "Super Bowl," and "the World Series"); Am. Compl. ¶¶ 59, 73. Such recognition further satisfies Fubo's burden to allege market power and harm to competition. *See, e.g.*, *Sidibe v. Sutter Health*, 103 F.4th 675, 698 (9th Cir. 2024) (defendant's concession that it forced purchasers to pay higher prices "because we could" was evidence that it had "amassed the market power to engage in tying"); *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1087 n.14 (10th Cir. 2006)

[4] Fox incorrectly suggests (at 12, citing *In re Set-Top Cable Television Box Antitrust Litig.*, 2011 WL 1432036, at *9 (S.D.N.Y. Apr. 8, 2011)), that Fubo has alleged a single-product market. Fubo alleges multiple commercially critical sports channels. The evidence will show that at least a critical mass of these channels is necessary for the success of an MVPD or virtual MVPD.

(defendant's "own statements" that there were "profits to be protected by the exclusion" of the plaintiffs supported showing of market power as a matter of "common sense").

Sixth, there are significant barriers to entry in the market for commercially critical sports channels. *See State of N.Y. v. Anheuser-Busch, Inc.*, 811 F. Supp. 848, 873 (E.D.N.Y. 1993) ("High barriers to entry can . . . [give] the established participants more power in the market." (citation omitted); *Tops*, 142 F.3d at 98 (courts consider "barriers to entry" in assessing market power). Defendants have locked down the most valuable sports rights—including rights to NFL, NBA, MLB, NHL, and elite college football and basketball games—through exclusive, long-term contracts. Am. Compl. ¶¶ 164-165, 173-174 (exclusive rights). In addition, the enormous cost of acquiring license rights to popular sports, and the preferences of sports rights owners to award contracts to distributors with very large customer bases, effectively foreclose newer, smaller entrants from acquiring critical sports licensing rights. *Id.* ¶¶ 173, 175.

2. Defendants fail to address Fubo's detailed allegations. Instead, Fox argues that its market share in the Sports Program Licensing Market (17.3%) is too low for it to have market power. As an initial matter, Fox points to its market share in the Sports Program Licensing Market (all sports), rather than its share in the market for Commercially Critical Sports Channels ("must-have" sports channels). Looking to all sports in this way "significantly understate[s] the market power that Disney and Fox wield by virtue of their control of commercially critical channels, because Disney and Fox control the rights to many of the most valuable sporting events." Am. Compl. ¶ 212. Nonetheless, "[i]n this Circuit, a threshold showing of market share is not a prerequisite for bringing a Section 1 claim," because "market share . . . is not the only way to demonstrate [market power]." *Todd*, 275 F.3d at 206. Market power "may be *inferred* from one firm's large percentage share of the relevant market," but it also "may be proven

directly by evidence of the control of prices," *id.* (quoting *Tops*, 142 F.3d at 98), or "inferred from the tying product's desirability to consumers," *Hill*, 535 F.2d at 1353.

Here, the Amended Complaint alleges that Disney and Fox can control prices, force distributors to carry unwanted channels, and impose other unreasonable terms because they control must-have sports. *Supra* pp. 22-23. They could do none of those things without market power. The Amended Complaint also explains the source of that market power: Disney's and Fox's sports channels feature uniquely valuable sporting events (like the Super Bowl) that enjoy unparalleled consumer demand. *See supra* pp. 23-24. That is sufficient to allege market power.[5]

3. The Amended Complaint Plausibly Alleges That Defendants' Market Power Renders Their Tying and Block-Booking *Per Se* Unlawful

As the Supreme Court has recognized, "certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'" *Jefferson Parish*, 466 U.S. at 9. In the tying context, *per se* condemnation is appropriate where "the existence of

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[5] None of Defendants' cases is to the contrary. Each of them recognize that market power can be shown by evidence other than market share. *See Kaufman*, 836 F.3d at 143 (market power "can be shown by specific evidence of a seller's ability to control prices or exclude competitors from the market"); *Bookhouse of Stuyvesant Plaza, Inc. v. Amazon.com, Inc.*, 985 F. Supp. 2d 612, 620 (S.D.N.Y. 2013) (market power can be shown through "an actual adverse effect on competition, such as reduced output"); *In re Amazon.com, Inc. eBook Antitrust Litig.*, 2023 WL 6006525, at *24 (S.D.N.Y. July 31, 2023), *report and recommendation adopted*, 2024 WL 918030 (S.D.N.Y. Mar. 2, 2024); *Wireless Tel. Servs.*, 385 F. Supp. 2d at 414-15 ("market share" can demonstrate market power, but "market power may also exist in other circumstances"); *Wireless Tel. Servs.*, 2003 WL 21912603, at *5 ("Market power is 'the ability of a single seller to raise price and restrict output.'") (citation omitted); *Smugglers Notch Homeowners' Ass'n, Inc. v. Smugglers' Notch Mgmt. Co.*, 414 F. App'x 372, 375 (2d Cir. 2011) ("uniqueness" of a product "can provide sufficient market power"); *Com. Data Servers, Inc. v. Int'l Bus. Machs. Corp.*, 262 F. Supp. 2d 50, 73 (S.D.N.Y. 2003) (market power can be shown by "evidence . . . that [Defendant] had the ability to set prices at a supracompetitive level."). Defendants' other cited case—*CDC Techs., Inc. v. IDEXX Lab'ys, Inc.*, 7 F. Supp. 2d 119 (D. Conn. 1998)—concerns "monopoly power" in a Section 2 monopolization case, *id.* at 130, which is distinct from (and more difficult to prove than) "market power" under Section 1. *Eastman Kodak*, 504 U.S. at 481 ("Monopoly power under § 2 requires, of course, something greater than market power under § 1.").

[defendant's] market power is probable" or there is "a substantial potential for impact on competition." *Id.* at 16-17; *see Visa*, 280 F.3d at 133 n.5 (*per se* condemnation appropriate where the "the seller has appreciable market power in the tying market"). A "*per se* violation may be found [where] . . . a seller has a patent or similar monopoly over a product . . . or where it offers a unique product that 'competitors are not able to offer.'" *Wireless Tel. Servs.*, 2003 WL 21912603, at *5 (quoting *Jefferson Parish*, 466 U.S. at 16-17).

1. The Court need not (and should not) decide at the pleading stage whether Defendants' tying practices should be subject to a "*per se*" or "rule of reason" analysis, for two reasons. *First*, *per se* illegality and illegality under the rule of reason are not separate "claims," but alternative legal theories supporting the same claim against each Defendant. And "at the pleading stage, parties are not entitled to "a determination . . . that certain of the alternative legal theories under which [the plaintiff] might be entitled to relief will not fly." *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 343 F. Supp. 3d 94, 102 (E.D.N.Y. 2018) (quoting *Scientech, Inc. v. Metro-N. R.R.*, 2002 WL 1813854, at *2 (S.D.N.Y. Aug. 7, 2002)); *see Saba*, 2024 WL 3162935, at *7 ("Because [plaintiff] need only prevail on one of its theories to support a claim . . . the motion to dismiss is [denied]") (Garnett, J.).

Second, because "there is often no bright line separating *per se* from Rule of Reason analysis," and because application of "[p]er se rules may require considerable inquiry into market conditions," "resolution of the issue of which method of antitrust analysis to apply is premature" at the pleading stage. *Kamakahi v. Am. Soc'y for Reproductive Med.*, 2013 WL 1768706, at *8 (N.D. Cal. Mar. 29, 2013) (quoting *NCAA*, 468 U.S. at 104); *see Lumber Liquidators, Inc. v. Cabinets To Go, LLC*, 415 F. Supp. 3d 703, 713-14 (E.D. Va. 2019) (collecting cases illustrating the "general trend of district courts declining to resolve whether the

per se rule applies at the motion to dismiss stage").[6] Because the Amended Complaint plausibly alleges that Defendants' bundling practices have anticompetitive effects sufficient to support a rule-of-reason claim, *infra* pp. 31-39, the Court can deny Defendants' motions to dismiss on that basis and decide later whether the "impact on competition" of those practices is "substantial" enough to justify *per se* condemnation. *Jefferson Parish*, 466 U.S. at 16.

2. If the Court reaches the issue now, *per se* condemnation of Defendants' bundling practices is appropriate because those practices have a "substantial potential for impact on competition." *Supra* pp. 26-27. Indeed, as early as 1948, and as recently as 2014, courts have held that the block-booking of high-demand and low-demand film or television content is *per se* unlawful. *See Cablevision*, 2014 WL 2805256, at *1-2 (sustaining complaint alleging that defendant programmers' bundling practices constituted a "per se illegal tying arrangement"); *see also MCA Television*, 171 F.3d at 1278 (observing that "block booking" is "one of the specific contractual forms . . . for which the Supreme Court has deemed the *per se* standard appropriate"); *Six W. Retail Acquisition*, 2000 WL 264295, at *9 ("Block-booking, a per se violation of the antitrust laws, is an illegal practice through which film distributors condition the license or sale of their movies on the acceptance of unwanted or inferior films.") (footnote omitted); *see generally Paramount Pictures*, 334 U.S. at 156 (similar).[7] Or as this Court recently

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[6] *See also Jones v. Varsity Brands, LLC*, 618 F. Supp. 3d 725, 746 (W.D. Tenn. 2022) ("[A] conclusion as to whether the Indirect Purchasers can satisfy the rule of reason or *per se* approach applicable to this conspiracy claim is premature at the pleading stage."); *Int'l Constr. Prod. LLC v. Caterpillar Inc.*, 419 F. Supp. 3d 791, 806-07 (D. Del. 2019) (similar); *Borozny v. Raytheon Techs. Corp.*, 2023 WL 348323, at *9 (D. Conn. Jan. 20, 2023) (similar).

[7] Defendants cite one case suggesting that courts should analyze block-booking claims under the "rule of reason," *United States v. Paramount Pictures, Inc*., 2020 WL 4573069, at *6 (S.D.N.Y. Aug. 7, 2020), but that case did not address an actual block-booking claim (instead, it addressed an application to terminate a consent decree).

observed in granting Fubo's PI motion, "it is difficult to avoid the conclusion that, on balance, [bundling] practices are bad for consumers." PI Order at 45.

Disney argues (at 5, 9) that *per se* treatment of its bundling practices is inappropriate because cable bundling is a "longstanding" practice. But courts have been striking down bundling arrangements as *per se* unlawful just as long as industry participants have been employing these anticompetitive practices. *Supra* pp. 10-12. If anything, the "longstanding" nature of media content bundling—and the considerable body of case law evaluating and striking down bundling restrictions—counsels in favor of *per se* condemnation. *See Khan*, 522 U.S. at 10 ("*Per se* treatment is appropriate '[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.' ") (quoting *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 344 (1982)) (brackets in *Khan*); *accord New Dyckman Theatre Corp v. Radio-Keith-Orpheum Corp*, 16 F.R.D. 203, 205-06 (S.D.N.Y. 1954) ("Once a cause of action for violation of the Anti-Trust laws is established, 'it adds nothing that the calendar of years gone by might have been filled with transgressions.' "). The single out-of-circuit district court decision cited by Disney (at 5, 9) does not compel a different result. In that case, the court denied the plaintiff's motion for a preliminary injunction after concluding that the defendant programmer had "offered to negotiate on a station-by-station basis" (thus abandoning its tying practices) and because the plaintiff failed to "meet its burden of proving" the defendant's market power. *Mediacom Commc'ns Corp. v. Sinclair Broad. Grp., Inc.*, 460 F. Supp. 2d 1012, 1023, 1028 (S.D. Iowa 2006).[8]

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[8] In dicta, the *Mediacom* court cited an FCC Report and Order suggesting that "proposals for carriage conditioned on carriage of any other programming" did not violate the FCC's "good faith negotiation" rules. 460 F. Supp. 2d at 1028-29 (citing *In re Implementation of Satellite Home Viewer Improvement Act of 1999*, 15 F.C.C. Rcd. 5445, 5469 (2000)). But that Report and Order (which addressed market conditions 25 years ago) also made clear that "carriage terms that

3. "[W]here a tying arrangement may be condemned as illegal *per se*, plaintiffs need not allege, let alone prove, facts addressed to . . . anti-competitive effects." *Walker v. Merrill Lynch & Co.*, 181 F. Supp. 3d 223, 234 (S.D.N.Y. 2016). As Judge Cote has explained:

> [A]t the heart of the *per se* rule of tying is the intuition that where a seller has significant market power, one may "presum[e] unreasonableness without the necessity of any analysis of the market context in which the [alleged tying] arrangement may be found." As a consequence, where a defendant's market power is sufficiently great that its tie qualifies as a *per se* violation, a plaintiff is relieved of the separate burden of showing an anticompetitive effect from the tying in the tied product market.

Wireless Tel. Servs., 385 F. Supp. 2d at 423 (quoting *Jefferson Parish*, 466 U.S. at 9); *see also Wireless Tel. Servs.*, 2003 WL 21912603, at *5 ("A tying arrangement may be condemned as illegal per se . . . without inquiry into actual market conditions in the tied market (the fourth element)."). This is consistent with the general principle that a "[p]laintiff . . . must show harm to competition only under the rule of reason," and that "allegations pleading harm to competition are not required to withstand a motion to dismiss when the conduct challenged is a per se violation." *PharmacyChecker.com, LLC v. Nat'l Ass'n of Bds. of Pharmacy*, 530 F. Supp. 3d 301, 349 (S.D.N.Y. 2021) (emphasis omitted).

Defendants assert (Disney Mot. at 6, Fox Mot. at 7-8) that even under the *per se* framework, a plaintiff must allege anticompetitive effects to support a *per se* tying claim. In

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result from an exercise of market power by a broadcast station . . . the effect of which is to hinder significantly or foreclose MVPD competition" "are not consistent with competitive marketplace considerations." *Implementation of Satellite Home Viewer Improvement Act of 1999*, 15 F.C.C. Rcd. at 5470. In a subsequent report, the FCC cast doubt on this conclusion, explaining that "bundling may drive up retail prices, making video programming less affordable and causing some consumers not to purchase MVPD services." FCC, *Further Rep. on the Packaging and Sale of Video Programming Servs. to the Pub.*, 2006 WL 305873, at *2 (Feb. 9, 2006); *see Bebry v. ALJAC LLC*, 954 F. Supp. 2d 173, 176 (E.D.N.Y. 2013) ("letter decisions of government agencies, published reports, [and] records of administrative agencies" are subject to judicial notice).

support, Defendants rely primarily on the general recitation of the elements of a tying claim in *Kaufman*, 836 F.3d at 141. But *Kaufman* did not address a *per se* tying claim and did not discuss the distinctions between *per se* and rule-of-reason tying claims. Instead, it affirmed the dismissal of a complaint for failure to plead separate markets.[9] Other Second Circuit cases have explained that the "[t]he substantive elements of [an] illegal per se tying claim" do not include a showing of anticompetitive effects. *Visa*, 280 F.3d at 133 n.5.[10]

4. The Amended Complaint Plausibly Alleges Anticompetitive Effects in the Tied Market That Affect a "Not Insubstantial" Amount of Commerce

The Amended Complaint also alleges that Disney's and Fox's bundling requirements are unlawful under the rule of reason, because Defendants' bundling requirements have "anticompetitive effects in the tied market"—*i.e.*, the market for non-critical channels. *Kaufman*, 836 F.3d at 141. "To show an adverse effect on competition, a plaintiff 'may offer direct evidence of harm to competition by proving higher prices, reduced output, or lower quality in the market as a whole.'" *Amazon.com*, 2023 WL 6006525, at *24 (quoting *MacDermid Printing*

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[9] Defendants' other cited cases are inapposite for similar reasons. *Coniglio*, 495 F.2d at 1289, and *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 58 (2d Cir. 1980), did not address whether a *per se* tying claim required proof of anticompetitive effects and in any event predated the Supreme Court's holding in *Jefferson Parish* that some tying arrangements are subject to *per se* liability. In *Gonzalez v. St. Margaret's House Housing Development Fund Corp.*, the court noted that "in the past," the Second Circuit had referenced anticompetitive effects as an element of a tying claim, but then "adhere[d] to the views of a majority of the Supreme Court, which has not abandoned the per se test." 880 F.2d 1514, 1516-17, 1519 (2d Cir. 1989). *Smugglers Notch*, 414 F. App'x at 374, similarly did not address a *per se* tying claim.

[10] Disney (at 6 n.4) asserts that, on remand in *Visa*, the court ordered a trial on whether the tying arrangement in that case "harmed competition in the [tied] market." That is because the court found a "factual issue with regard to MasterCard's market power," and "[d]epending on the outcome of that issue, the merchants' tying claim against MasterCard may require them to prevail under the rule of reason test." *Visa*, 2003 WL 1712568, at *5. But the district court reaffirmed the principle that tying is "illegal under the per se test" if "the seller has appreciable market power in the tying market," without regard to anticompetitive effects. *Id.* at *2.

Sols. LLC v. Cortron Corp., 833 F.3d 172, 182 (2d Cir. 2016)). In a tying case, anticompetitive effects exist where "the freedom to select the best bargain in the second market is impaired by [the purchaser's] need to purchase the tying product." *Jefferson Parish*, 466 U.S. at 14-15. Here, Disney's and Fox's bundling requirements have the anticompetitive effect of preventing Fubo and other distributors from licensing more desirable content from other programmers in the upstream market. In addition, Defendant's conduct also prevents Fubo and other distributors from offering varied packages of channels catered to consumer demand and leads to higher prices and reduced choices for viewers.

1. The Amended Complaint alleges that "Disney's and Fox's tying policies have forced Fubo to license and broadcast non-critical television channels from them instead of other suppliers." Am. Compl. ¶ 221. It gives specific examples of content Fubo would "prefer" to license—and its subscribers would "prefer" to watch—such as "TNT and TBS." *Id.*; *see also id.* ¶¶ 119-120, 128, 277. Further, for those of its subscribers who want packages that include non-sports content, Fubo would prefer to offer channels "such as A&E and AMC" rather than Defendants' bundled non-sports conduct. *Id.* ¶ 119. Those allegations are more than sufficient to plead anticompetitive effects in the market for non-critical channels. *See Cablevision*, 2014 WL 2805256, at *2 (distributor sufficiently pleaded anticompetitive effect by alleging that it "would buy other 'general programming networks' from [a programmer's] competitors absent the tying arrangement"); *United Artists*, 318 F. Supp. at 88 ("[B]lock booking injures the television stations who are compelled to accept motion pictures that they do not want.").[11]

[11] Disney attempts (at 14) to distinguish *Cablevision* by arguing (incorrectly) that the court's decision turned on the "technological" constraints on "the number of channels [the plaintiff] can offer." Disney cites paragraph 33 of Cablevision's complaint, which references technological limits, but the court did not rely on this allegation in denying the motion to dismiss. The court relied instead on paragraph 10, which alleged that Cablevision "would buy

Defendants argue (Disney Mot. at 12, Fox Mot. at 9) that Fubo "does not point to a single programmer that has been foreclosed from the [the Non-Critical Television Channels] market," but that is wrong for two reasons. *First*, Defendants err in focusing solely on the harmful effects of bundling on programmers and ignoring the anticompetitive effects of bundling on distributors like Fubo. Unlawful tying arrangements are anticompetitive both because they "harm existing competitors or create barriers to entry of new competitors in the market for the tied product," and because "the freedom to select the best bargain in the [tied] market is impaired by [the] need to purchase the tying product." *Jefferson Parish*, 466 U.S. at 14-15.[12] Fubo has suffered that latter injury here.[13]

Second, even if Fubo must show some "foreclosure" of other programmers, it need not show that any programmer was *entirely* "foreclosed" from the tied market. Instead, it is enough to allege that the "tie forecloses a 'not insubstantial' *amount of potential sales* for the tied product." *Gonzalez*, 880 F.2d at 1518 (emphasis added); *see Kaufman*, 836 F.3d at 141 (similar). "The Supreme Court has defined 'substantial' in this context as 'substantial enough in terms of dollar-volume so as not to be merely *de minimis*.'" *Gonzalez*, 880 F.2d at 1518 (quoting

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other 'general programming networks' from Viacom's competitors absent the tying arrangement." *Cablevision*, 2014 WL 2805256, at *2; *compare* Am. Compl. ¶ 221.

[12] *See also Loew's*, 371 U.S. at 44-45 (tying agreements "are an object of anti-trust concern" because they "may force buyers into giving up the purchase of substitutes for the tied product" (citations omitted)); *United Artists*, 318 F. Supp. at 88 ("[B]lock booking injures the television stations who are compelled to accept motion pictures that they do not want."); *Ortho Diagnostic Sys., Inc. v. Abbott Lab'ys, Inc.*, 920 F. Supp. 455, 473 (S.D.N.Y. 1996) ("[P]roper analysis of alleged tying arrangements requires their consideration from the perspectives of both competitors and customers"); *Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc.*, 131 F.3d 874, 889 (10th Cir. 1997) (similar).

[13] *Yentsch*, on which Defendants rely, is not to the contrary. The plaintiff in that case "testified that he would not have bought any [tied] products at all" absent the tie. 630 F.2d at 57. Fubo alleges that it *would* have licensed other channels absent the tie.

Fortner Enters., Inc. v. U.S. Steel Corp., 394 U.S. 495, 501 (1969)). Although "[t]here is no magic number that definitively establishes whether a [defendant] has foreclosed a 'not insubstantial' amount of potential sales . . . the Supreme Court [has] held that a sum of almost $200,000 is not 'paltry or 'insubstantial,'" and the Second Circuit has "said that $600,000 of commerce clearly meets 'any test of substantiality.'" *Id.* (collecting authority). The Amended Complaint alleges that "Fubo is forced to spend more than $█ million per year on content it does not want . . . because of Disney/ESPN's and Fox's anticompetitive bundling practices," and that as a result Fubo has been unable to afford other more valuable non-sports channels such as AMC and A&E. Am. Compl. ¶¶ 115, 119. Contrary to Disney's assertions (at 12-15), the fact that Fubo has managed to license some non-critical channels from other programmers *despite* Defendants' tying does not mean those practices have not foreclosed "potential sales."

Moreover, "[f]or purposes of determining substantiality, a court measures the total volume of sales tied by the 'policy' under challenge, not merely the portion of this total accounted for by the particular plaintiff who brings suit." *Gonzalez*, 880 F.2d at 1518 (quoting *Fortner*, 394 U.S. at 502). Contrary to Disney's suggestion (at 12) that the harm to Fubo is "idiosyncratic" and affects "Fubo alone," the Amended Complaint cites specific examples of other "distributors complain[ing] vociferously about programmers' bundling policies," such as the American Cable Association's statement that the "wholesale tying and bundling profoundly shapes the channel offerings of small and medium-sized cable companies" and "cause substantial public interest harms." Am. Compl. ¶ 88. The Amended Complaint cites a 2013 academic paper "calculat[ing] that television bundling practices cost consumers—and lined the pockets of dominant programmers—to the tune of $27 billion a year." *Id.* ¶ 89. These allegations are more

than sufficient to establish a "substantial" "volume of sales tied by the 'policy' under challenge." *Gonzalez*, 880 F.2d at 1518.

Disney's citation (at 10-12) to *Brantley v. NBC Universal*, is also unavailing. In *Brantley*, a class of consumers alleged that NBC's bundling practices harmed consumers but "disavow[ed]" any allegation that these bundling practices "force[d] Distributors or consumers to forego the purchase of alternative low-demand channels." 675 F.3d 1192, 1201 (9th Cir. 2012). The Ninth Circuit affirmed dismissal of the complaint because it lacked such allegations, but recognized that a bundling requirement that "forced either Distributors or consumers to forego the purchase of other low-demand channels" would be a "competitive injury" sufficient to sustain a tying claim. *Id.* at 1203. Fubo alleges exactly what was missing in *Brantley*: that Disney's and Fox's "bundling requirements have . . . prevented Fubo from licensing other content that Fubo would prefer to distribute." Am. Compl. ¶ 119.

2. The Amended Complaint also alleges that Disney's and Fox's bundling requirements have the anticompetitive effect of preventing distributors from offering flexible sports-centric packages of channels, thereby raising barriers to entry for distributors, reducing consumer choice, and raising prices for consumers. *Id.* ¶¶ 230, 277, 286; *see also Jefferson Parish*, 466 U.S. at 15 (explaining that the Sherman Act "was especially intended to serve" the "interests" of "the consumer"). Disney and Fox use "draconian 'penetration' requirements . . . in each carriage agreement" that "require[ ] [Fubo] not only to license [the tied] channels from Disney/ESPN and Fox, but to distribute them to [REDACTED] and pay for those channels on a per-customer basis." Am. Compl. ¶ 116. In this way, Disney and Fox's bundling requirements force not only Fubo, but also its customers, to purchase non-critical channels they do not want in order to watch the commercially critical sports channels they do want, thereby directly raising

prices for consumers and denying consumers the option to purchase sports-centric packages. *Id.* ¶ 119. Defendants' bundling practices also "raise barriers to entry" by "requiring any new entrant or nascent competitor to license dozens of low-value channels, raising entrants' costs and impeding their ability to offer a differentiated service to consumers." *Id.* ¶ 120.

These anticompetitive effects are especially pernicious in light of Defendants' JV, which Defendants have agreed to exempt from the bundling requirements they impose on all other distributors. *Id.* ¶ 237. This exclusive arrangement—which Defendants have created through their bundling practices—will give the JV "an insuperable competitive advantage" over "rivals that Defendants force to sell the 'big fat bundle.'" *Id.* That competitive advantage will in turn "drive[ ] out distributors that cannot compete with the JV," allowing Defendants "to charge even higher prices for streaming live sports." *Id.* ¶ 162; *see* PI Order at 48 (explaining that Defendants' exclusive unbundling "could put [rival] distributors at a significant disadvantage and provide the JV Defendants with an unobstructed runway to dominance").[14]

"[H]igher [consumer] prices and market foreclosure" like these are "exactly the harm[s] that antitrust laws aim to prevent." *Eastman Kodak*, 504 U.S. at 478 (recognizing this form of harm in a tying case); *see Ross v. Bank of Am., N.A.(USA)*, 524 F.3d 217, 223-24 (2d Cir. 2008) ("[R]eduction in choice and diminished quality of . . . services" are "anti-competitive effects");

[14] Fubo has asserted separate claims (Counts 1, 2, and 11) challenging Defendants' "anticompetitive agreement between horizontal competitors" as part of the JV "to exclusively license their must-have sports content on a standalone basis to their jointly owned application, while denying rival distributors the ability to offer those same channels on an unbundled basis." Am. Compl. ¶ 237; *id.* ¶¶ 250-259 (challenging JV under Section 7 of the Clayton Act); *id.* ¶¶ 260-269 (alleging that the JV is an unlawful horizontal restraint under Section 1 of the Sherman Act); *id.* ¶¶ 332-333 (similar claim under Donnelly Act). This conduct represents a group boycott that is *per se* unlawful. *See Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Defendants, however, do not challenge those Counts at this stage, *see* Disney Mot. at 25; WBD Mot. at 18; Fox Mot. at 1, so the Court need not address this issue now.

Reading Int'l, Inc. v. Oaktree Cap. Mgmt. LLC, 317 F. Supp. 2d 301, 319 (S.D.N.Y. 2003) ("[H]igher box office and concession prices for consumers, reduction in discounts, and restricted output . . . are precisely the type that the antitrust laws were designed to prevent."); *Laumann v. NHL*, 907 F. Supp. 2d 465, 490 (S.D.N.Y. 2012) ("decreased consumer choice and increased price" are "injur[ies] to competition").

Defendants argue (Disney Mot. at 10, Fox Mot. at 9) that these harms—"rais[ing] prices, forc[ing] buyers to buy products they do not want, [and] reduc[ing] consumer choice"—cannot constitute "anticompetitive effects" because they do not occur in the "tied market" for "Non-Critical Television Channels." That is, Defendants argue that because their bundling arrangements are effectuated through contracts with distributors in the upstream market for Non-Critical Television Channels, the Court must limit its analysis of their bundling arrangements' anticompetitive effects to that market alone. The Court need not and should not accept that limit.

Defendants' proposed "categorical rule flouts the Supreme Court's instruction that courts should conduct market-definition inquiries based not on 'formalistic distinctions' but on 'actual market realities.'" *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 978 (9th Cir. 2023) (quoting *Ohio v. Am. Express*, 585 U.S. 529, 542 (2018)); *see United States v. Aiyer*, 33 F.4th 97, 114 (2d Cir. 2022) ("When applying the rule of reason, courts weigh all of the circumstances surrounding the challenged acts to determine whether the alleged restraint is unreasonable") (citation omitted); *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 658 (2d Cir. 2015) (similar). One actual market reality is that tying can affect multiple markets: In *Jefferson Parish*, for example, the Supreme Court explained that defendants' tying arrangement "had an impact on two different segments of the economy: consumers of medical services, and providers of anesthesiological services." 466 U.S. at 2, 7.

Thus, although there is authority that a plaintiff in a tying case must show anticompetitive effects in the "tied market," *e.g.*, *Kaufman*, 836 F.3d at 141, that does not mean that a tie can affect only one market and that other markets do not matter. A "tied product" is simply a product that a "buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish*, 466 U.S. at 12; *see also Sports Racing*, 131 F.3d at 887 ("Critical to a tying claim is the fact that the seller forced the buyer to purchase the tied product in order to get the tying product, but it is not critical that the buyer have purchased the tied product directly *from the seller*.") (emphasis in original). Here, Fubo alleges that Defendants' bundling practices—and in particular their penetration requirements—*directly* restrict the packages that Fubo may offer consumers, that consumers do not want the non-critical channels that Defendants force Fubo to distribute, and that consumers would prefer to purchase packages with other non-critical channels. Am. Compl. ¶ 119. Defendants' penetration requirements thus "tie" not only Fubo's licensing transactions with Defendants, but also Fubo's transactions with its own customers by forcing Fubo to distribute (and consumers to purchase) Defendants' non-critical channels as a condition of receiving Defendants' commercially critical sports channels. This fact distinguishes Defendants bundling practices from most other tying cases, which usually involve restrictions that apply only to a firm's *purchasing* decisions, but not the decisions it makes regarding the products to offer to its own customers.

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001), addressed a similar issue. Microsoft sold the Windows operating system and the Internet Explorer web browser to computer manufacturers, who installed the system and the browser on computers that they then sold to consumers. The government brought tying claims against Microsoft for bundling the browser with the operating system. *See id.* at 95-97. The D.C. Circuit, in remanding for

consideration of that tying arrangement's anticompetitive effects, reasoned that the "harm from tying" included "obstruction of direct consumer choice"—that is, the burden placed on end users who would "prefer an alternate browser." *Id.* at 97. The same analysis is appropriate here: although Defendants impose their bundling requirements through contracts with distributors, that tie directly restricts the content that distributors can *offer* to consumers, and that consumers can purchase from distributors, so it is proper to consider the effect on consumers as part of the harm Defendants cause. And the Amended Complaint plausibly alleges that Disney's and Fox's bundling requirements have anticompetitive effects in that market. Am. Compl. ¶¶ 230-231.

Defendants' own authority—*Brantley*—is consistent with this principle. In that case, the Ninth Circuit recognized that bundling practices can have anticompetitive effects where they "cause[ ] consumers to forego the purchase of substitutes for the tied product" or "foreclose[] rivals from entering or participating in the upstream or downstream markets." *Brantley*, 675 F.3d at 1201. Fubo alleges both harmful effects: Defendants' bundling practices prevent consumers from "purchasing substitutes" for the non-critical channels stuffed into the fat bundle that Defendants force distributors to offer, and they prevent distributors from "participating in . . . the downstream market" by offering consumers those alternatives to Defendants' fat bundle. Am. Compl. ¶¶ 119-120.

II. The Amended Complaint Plausibly Alleges That Defendants' MFN Agreements and Side Deals Unreasonably Restrain Trade

The Amended Complaint plausibly alleges that Defendants have unreasonably restrained trade under Section 1 of the Sherman Act through anticompetitive MFN clauses in carriage agreements with other large distributors, such as YouTube TV and Hulu Live. Defendants' MFN provisions harm competition by setting an artificial price floor (raising prices for both distributors and consumers), raising barriers to entry, and thwarting innovation and competition

from smaller market entrants like Fubo. Those provisions are subject to scrutiny under the rule of reason, which condemns: "(1) a combination or some form of concerted action between at least two legally distinct economic entities that (2) unreasonably restrains trade." *United States v. Am. Express Co.*, 838 F.3d 179, 193 (2d Cir. 2016), *aff'd sub nom. Am. Express*, 585 U.S. 529. The facts alleged in the Amended Complaint establish both elements.

A. The Amended Complaint Alleges Concerted Action Between Defendants and Large Distributors

1. Each Defendant has entered into carriage agreements containing MFN clauses with large distributors, including both YouTube TV and Hulu Live. Am. Compl. ¶¶ 133-137. That is all that is necessary to establish "concerted action" under Section 1. *See United States v. Apple, Inc.*, 791 F.3d 290, 315 (2d Cir. 2015) (concerted action can be proven by "direct evidence that the defendants entered into an agreement"); *Relevent Sports, LLC v. U.S. Soccer Fed'n, Inc.*, 61 F.4th 299, 306 (2d Cir. 2023) ("At the pleading stage, a plaintiff need only allege 'enough factual matter (taken as true) to suggest that an agreement was made.'") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

Defendants do not dispute the Amended Complaint's well-pleaded allegations that each has entered carriage agreements with YouTube TV and Hulu Live, and that each of these carriage agreements currently contains an MFN clause that applies to Fubo. Disney also does not dispute that its MFN clauses with YouTube TV and Hulu Live were in effect when Disney negotiated its last carriage agreement with Fubo in 2023. Fox and WBD contend, however, that the MFN clauses in their respective agreements with YouTube TV and Hulu Live were not added until after they executed their last carriage agreements with Fubo ([redacted] for Fox, 2018 for WBD)—attaching some (but not all) of their carriage agreements with these distributors as support. Fubo disputes Fox's and WBD's characterization of these agreements, *infra* pp. 42-43, and so these

arguments at most raise fact disputes that cannot be decided on a motion to dismiss. *See Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016) (on a motion to dismiss, a court may only consider documents incorporated in a complaint where there are "no material disputed issues of fact regarding the relevance of the document") (citation omitted); *Millennium Health, LLC v. EmblemHealth, Inc.*, 240 F. Supp. 3d 276, 284 (S.D.N.Y. 2017) ("when 'the parties dispute how the document related to or affected the contractual relationships, the document should not be considered on a motion to dismiss' ") (citation omitted). In any event, Fox's and WBD's contentions fail for five reasons.

First, Fubo's Amended Complaint seeks to void the anticompetitive MFN clauses that are part of Fox's and WBD's [REDACTED] agreements with YouTube TV and Hulu Live, whose [REDACTED] Fox and WBD do not dispute.[15] Am. Compl. at 76 (Prayer for Relief (e)). Those MFN clauses have already affected renewal negotiations with WBD and will likely also affect upcoming renewal negotiations with Fox, which will be conducted against the backdrop of Fox's MFN agreement with Fubo's largest competitor. *See* Fox Mot. at 5 (noting Fox's current carriage agreement with Fubo expires on [REDACTED]). At most, Defendants' argument about past MFN clauses goes to the damages for Fubo's MFN claims, but that argument is premature at this early stage: "A motion to dismiss under Rule 12(b)(6) is addressed to a 'claim'—not to a form of damages." *OL USA LLC v. Maersk A/S*, 2024 WL 1704706, at *5 (S.D.N.Y. Apr. 19, 2024)

[15] Fox admits (at 16 n.7) that it "[REDACTED]," while WBD likewise concedes that an [REDACTED] carriage agreement with YouTube TV. WBD does not address this issue directly but attaches carriage agreements that expired in [REDACTED] (YouTube TV) and [REDACTED] (Hulu Live) and does not dispute that its [REDACTED] carriage agreements with Hulu and YouTube TV contain [REDACTED].

(cleaned up) (denying motion to dismiss challenging punitive damages as "procedurally premature") (citation omitted).

Second, WBD omits important carriage agreements with YouTube TV and Hulu Live that were already in place when it executed its last carriage agreement with Fubo. As the Amended Complaint explains, WBD licenses multiple sets of channels to Fubo and other distributors, including: (1) the "Turner networks (including TBS and TNT)", and (2) the Discovery networks (which "[REDACTED]"). Am. Compl. ¶ 83. WBD's motion attaches its carriage agreements for the Turner Networks, but omits the agreements applicable to the Discovery networks. WBD does not argue that its agreements with Hulu Live and YouTube TV for the Discovery networks ever lacked MFN clauses. Fubo's MFN claims against WBD are not limited to "the Turner networks" but instead extend to all of WBD's networks, including the Discovery networks. WBD's motion thus does not contradict Fubo's well-pleaded allegations, Am. Compl. ¶¶ 121-147, and provides no basis for dismissal.

Third, Fox and WBD are incorrect that the carriage agreements attached to their motions do not include MFN clauses that were in effect as of their last contracts with Fubo. The carriage agreements attached to Fox's and WBD's motions include [REDACTED] [REDACTED][16] [REDACTED]

[16] *See* Doc. 327-2 ([REDACTED] Fox/YouTube Affiliation Agreement) § 7.1(b) [REDACTED]; § 7.5 ([REDACTED]); Doc. 327-6 ([REDACTED] Fourth Amendment to Fox/YouTube TV Affiliation Agreement) § 14 ([REDACTED]; § 15 ([REDACTED]); § 28 ([REDACTED]); Doc. 317-1 (Aug. 1, 2016 WBD/Hulu Carriage Agreement) Attachment B, § 4.E [REDACTED]); Doc. 327-1 ([REDACTED] Fox/Hulu Amended and Restated

[17] and the .[18] The Amended Complaint makes clear that Fox's anticompetitive MFN clauses pertain to "above-market prices, penetration rates, *and other economic terms* that constrain Fubo's ability to compete," Am. Compl. ¶ 123 (emphasis added), and describes non-price restrictions imposed by Defendants on Fubo that "degrad[e] the quality of Fubo's product," *id.* ¶¶ 148-151. The contracts attached to Fox's and WBD's motions support those allegations.

Carriage Agreement) § 7.3 ( ); § 7.4 ( ); § 7.6 ( ); Doc. 317-2 (Jan. 23, 2018 WBD/YouTube TV Affiliate Agreement) § 5.B).

[17] *See* Doc. 327-1 (Fox/Hulu Amended and Restated Carriage Agreement) § 8.4); Doc. 327-2 (Fox/YouTube Affiliation Agreement) § 8.4 ( ); § 4.1 ( ); § 1.143 ( ); § 9 ( ); Doc. 327-6 (Fourth Amendment to Fox/YouTube TV Affiliation Agreement) § 10 (; Doc. 317-1 (Aug. 1, 2016 WBD/Hulu Carriage Agreement) Attachment A, § 5(b)(ii) ( ).

[18] *See* Doc. 327-2 (Fox/YouTube Affiliation Agreement) § 1.143 ( ); § 7.14 ( ); Doc. 317-1 (Aug. 1, 2016 WBD/Hulu Carriage Agreement) Attachment B, § 2.M (; Attachment B, § 3.A ( ); Doc. 317-2 (Jan. 23, 2018 WBD/YouTube TV Affiliate Agreement) § 5.J ( ); § 16 ( ).

Fourth, even if Fox and WBD had no MFN clauses with YouTube TV and Hulu Live at the time of their last contracts with Fubo, MFN clauses still affected their later negotiations with Fubo. As the Amended Complaint alleges, Fubo attempted to negotiate a new deal with WBD after the expiration of the parties' carriage agreement in ██████—notably, after the expiration of the WBD-YouTube TV contract attached to WBD's motion. WBD does not dispute that its carriage agreement with YouTube TV in effect as of June 2020 contained MFN clauses.

Fifth, the Amended Complaint's allegations are not limited to Fox's and WBD's MFN clauses in agreements with YouTube TV and Hulu Live. The Amended Complaint alleges that Defendants' MFN clauses with YouTube TV and Hulu Live are *examples* of pernicious MFN clauses that suppress competition and artificially raise price floors in the industry. *See, e.g.*, Am. Compl. ¶ 308 ("Fox has entered into agreements with other distributors—*most notably*, YouTube TV and Hulu Live—that include MFN clauses") (emphasis added).[19] Although parts of the Amended Complaint focus on YouTube TV and Hulu Live when discussing MFN clauses, the allegations quoted above show that its allegations regarding MFN clauses are not limited to those two distributors. Because Defendants do not dispute the Amended Complaint's allegations regarding Defendants' MFNs with other large distributors, their factual assertions regarding MFNs with YouTube TV and Hulu Live do not warrant dismissal.[20]

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[19] *See also id.* ¶ 317 (same allegation for WBD); *see also id.* ¶ 233 ("The nominal prices and other economic terms that Defendants charge to large virtual MVPDs *such as* YouTube TV and Hulu [Live] do not reflect market realities.") (emphasis added), ¶ 235 ("MFN clauses . . . harm the competitive process by structurally and severely disadvantaging smaller, disruptive virtual MVPDs (such as Fubo) and raising barriers to entry.").

[20] To the extent the Amended Complaint is ambiguous on this point, the Court should construe it in Fubo's favor. *See Citizens for Resp. & Ethics in Wash. v. Trump*, 971 F.3d 102, 133 (2d Cir. 2020) ("[C]ourts . . . assessing the legal sufficiency of a complaint . . . construe ambiguities in the manner most favorable to the plaintiff."). The Court should at least grant Fubo leave to replead its MFN claim to identify other large distributors who had MFN clauses with Fox and WBD at all relevant times (which limited discovery has revealed). *Infra* pp. 58-59.

As for Disney, it does not dispute that it has had MFN clauses in place with large distributors (including YouTube TV and Hulu Live) at all relevant times, but it argues in a footnote (at 22 n.10) that its agreements with Hulu Live cannot violate Section 1 of the Sherman Act because "Hulu is a majority-owned subsidiary controlled by Disney." But the Amended Complaint makes no allegation that Disney "controls" Hulu, as Disney asserts. Instead, it merely asserts that Disney "owns the majority of Hulu." Am. Compl. ¶ 52.[21] Whether Disney in fact controls Hulu so as to create "a complete unity of interest" between the two, *Copperweld*, 467 U.S. at 771, is a question of fact. *See Square D Co. v. Schneider S.A.*, 760 F. Supp. 362, 367-68 (S.D.N.Y. 1991) (whether a "parent closely controls or dictates the policies of its subsidiary. . . . is a question of fact that precludes granting of the motion to dismiss").

2. Although Defendants' MFN clauses with large distributors such as YouTube TV and Hulu Live are anticompetitive (and unlawful) standing alone, the Amended Complaint also plausibly alleges the existence of side deals between Defendants and these large distributors that help offset some of the nominally high sticker prices these large distributors pay Defendants in exchange for Defendants' agreement to charge similarly high prices to other distributors.

For example, Disney licenses its networks to YouTube TV while also contracting with YouTube's parent, Google, for Google Cloud, Google Ads, and other services. Am. Compl. ¶ 133. Because Disney knows that Google competes fiercely with Amazon, Microsoft, and others for these lucrative ad and cloud services contracts, Disney sets high prices in its carriage

[21] Disney's cited cases are therefore inapposite. *Copperweld* discusses "the coordinated activity of a parent and its *wholly owned* subsidiary," 467 U.S. at 771—it says nothing about subsidiaries (like Hulu) that are not wholly owned). Similarly, *In re Aluminum Warehousing Antitrust Litigation*, 2015 WL 6472656 (S.D.N.Y. Apr. 28, 2020) states that "a non-wholly owned affiliate cannot conspire with its parent . . . if they are *jointly controlled*," *id.* at *10 (emphasis added); but the Amended Complaint does not allege such joint control.

agreements with YouTube TV, puts MFNs in its contracts with YouTube to ensure that those rates are the price "floor" for other distributors, and then purchases cloud, advertising, and other services from Google in order to defray the premiums it charges to YouTube. *Id.*; *see also id.* ¶ 132 (Disney's and Fox's side deals with YouTube TV); *id.* ¶ 135 (WBD's side deal with Hulu Live); *id.* ¶ 136 (Fox's side deal with Hulu Live); *id.* ¶ 137 (Disney's side deal with Hulu); *id.* ¶ 233 (summarizing Defendants' side deals); *see generally id.* ¶¶ 133-137, 233. Those side deals are additional "concerted action" between different firms.

Defendants are incorrect that the Amended Complaint's allegations regarding side deals constitute "improper group pleading." *E.g.*, Fox Mot. at 17-18, 23; WBD Mot. at 7, 9, 12. Group pleading warrants dismissal where a complaint "fail[s] to distinguish *at all* between any of the Defendants in claims alleging discrimination or constitutional-rights violations." *Angermeir v. Cohen*, 14 F. Supp. 3d 134, 143 (S.D.N.Y. 2014).[22] By contrast, the Amended Complaint describes specific side deals between Defendants and large distributors, including (1) a discount that WBD offered to Hulu for video-on-demand services, Am. Compl. ¶ 135, (2) a "multiplatform strategic marketing alliance" between Fox and Hulu, *id.* ¶ 136, and (3) cloud services agreements between each of the Defendants and Google, *id.* ¶ 133. "Unlike the complaints in each of the cases Defendants cite," therefore, "this Complaint contains numerous

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[22] Each case Defendants cite in support of their group-pleading argument is inapposite. None involved allegations specific to each individual defendant like Fubo's allegations here. *See Concord Assocs., L.P. v. Ent. Props. Tr.*, 2014 WL 1396524 at *24 (S.D.N.Y. Apr. 9, 2014), *aff'd*, 817 F.3d 46 (2d Cir. 2016); *In re Digit. Music Antitrust Litig.*, 812 F. Supp. 2d 390, 417 (S.D.N.Y. 2011) (plaintiffs complaint failed to allege parent corporations of defendants engaged in actionable conduct); *In re Processed Egg Prods. Antitrust Litig.*, 821 F.Supp.2d 709, 746-47 (E.D. Pa. 2011) (complaint failed where it attributed conspiracy conduct to a group of defendants and factual allegations failed to connect individual defendants to the conspiracy); *In re Travel Agent Com'n Antitrust Litig.*, 583 F.3d 896, 905 (6th Cir. 2009) (affirming dismissal of plaintiffs' conspiracy claim for failure to properly allege individual conduct and allegations necessary to suggest an agreement between defendants).

allegations specific to each of the Defendants." *Angermeir*, 14 F. Supp. 3d at 143; *see also Aghaeepour v. N. Leasing Sys., Inc.*, 2015 WL 7758894, at *3 (S.D.N.Y. Dec. 1, 2015) (similar).

The Amended Complaint also explains that these specific side deals are only "a few examples of the myriad ways that Defendants allow YouTube TV and Hulu Live (or their parent companies) to recoup the above-market premiums" they pay, but that more specific facts are not available to Fubo because "Defendants' carriage agreements and other contracts with YouTube TV and Hulu [Live] and their affiliates are confidential." Am. Compl. ¶ 138. In these circumstances, the Amended Complaint's allegations are more than sufficient. *See Waltree Ltd. v. Ing Furman Selz LLC*, 97 F. Supp. 2d 464, 469 n.6 (S.D.N.Y. 2000) ("'[G]roup pleading' is permissible when the facts are exclusively within the defendant's knowledge") (cleaned up); *Block v. First Blood Assocs.*, 663 F. Supp. 50, 52 (S.D.N.Y. 1987) (denying motion to dismiss complaint where "[t]he lack of greater specificity . . . is attributable to [plaintiff's] lack of knowledge of information in the exclusive possession of the defendants"); *Arista Recs., LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) (similar).

B. The Amended Complaint Alleges That Defendants' MFN Agreements and Side Deals Unreasonably Restrain Trade

The Amended Complaint plausibly alleges that Defendants' MFN agreements unreasonably restrain trade in the upstream licensing market and downstream live pay TV markets. At the pleading stage, it is enough to allege "that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Am. Express*, 585 U.S. at 541.[23] A plaintiff can allege such effects "directly or indirectly." *Id.* Direct

[23] Because Defendants do not challenge the Amended Complaint's market definition as to the MFN agreements, the only issue before the Court is whether those agreements have anticompetitive effects in those markets.

allegations of anticompetitive effects are allegations of actual "reduced output, increased prices, or decreased quality." *Id.* at 542. Indirect allegations of anticompetitive effects are allegations "of market power plus some evidence that the challenged restraint harms competition." *Id.*

Courts have recognized that MFN clauses such as those at issue here can be—and often are—anticompetitive. *See Apple*, 791 F.3d at 320 ("we are breaking no new ground in concluding that MFNs . . . can be misused to anticompetitive ends in some cases") (cleaned up).[24] Indeed, the Department of Justice has previously sued to stop cable operators and major programmers in the pay TV industry from using MFN clauses to block new distributors from entering the market. Am. Compl. ¶¶ 124-143; *supra* pp. 5-7 (MFN allegations). And the Amended Complaint cites media reports explaining that large programmers with "dominance of TV sports" have the "leverage to write MFNs in such a way that [they] get[] better deals" than their rivals and "use MFNs as 'smoke screens' to justify why they can't make their programs available to technology companies" like Fubo. *Id.* ¶¶ 126, 142.

1. The Amended Complaint alleges five ways that Defendants' MFN clauses with large distributors have "substantial anticompetitive effect[s]," including increased prices, decreased price competition, the elimination of competitors (and consequent reduced output), increased barriers to entry, and have facilitated possible horizontal collusion.

First, Defendants' MFN clauses and ancillary agreements have increased the prices that Fubo, other virtual MVPDs, and viewers pay. Industry data show that Defendants charge Fubo

[24] *See also, e.g.*, *Starr v. Sony BMG Music Ent.*, 592 F.3d 314, 323 (2d Cir. 2010) ("[D]efendants used the MFNs to enforce a wholesale price floor."); *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 971 (10th Cir. 1990) ("most favored nations clause . . . contributed to Blue Cross' power over price."); *Biddle*, 696 F. Supp. 3d at 884 n.8 ("MFN clauses can be used for anticompetitive ends."); *United States v. Delta Dental of R.I.*, 943 F. Supp. 172 (D.R.I. 1996) (discussing anticompetitive effects of MFN clauses).

rates that are [redacted]% higher than those they charge the average distributor (many of whom are not subject to MFN clauses). Am. Compl. ¶ 121. Indeed, Defendants' MFN agreements and side deals raise prices not just for Fubo, but for *all* virtual MVPDs subject to MFN clauses, as well as for downstream virtual MVPD subscribers. *Id.* ¶¶ 127, 129, 131, 137, 139-145, 147, 232-235.

MFN agreements that "result[] in consumers paying higher prices" typically are anticompetitive. *Amazon.com*, 2023 WL 6006525, at *10; *see also United States v. Apple Inc.*, 952 F. Supp. 2d 638, 698 (S.D.N.Y. 2013) *aff'd*, 791 F.3d 290 (2d Cir. 2015); *US Airways, Inc. v. Sabre Holdings Corp.*, 105 F. Supp. 3d 265, 272, 285 (S.D.N.Y. 2015); *Delta Dental*, 943 F. Supp. 172. Fubo's allegations that Defendants' MFN agreements here raise prices for virtual MVPDs and for end users are thus sufficient to state a claim.

Second, Defendants' MFN clauses degrade the quality of programming that distributors can offer consumers. That is true both because the MFN clauses raise prices and penetration rates that prevent distributors from licensing superior content from other programmers, Am. Compl. ¶¶ 143-144, and because the MFN clauses apply to other "economic terms" that restrict the feature and functionality of the services that distributors can offer consumers. *See supra* p. 43 & n.22; Am. Compl. ¶¶ 148-151 (describing feature restrictions); *see also Am. Express*, 585 U.S. at 542 ("Direct evidence of anticompetitive effects would be proof of actual detrimental effects on competition, such as . . . decreased quality in the relevant market") (cleaned up); *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, 2024 WL 1556931, at *21 (E.D.N.Y. Apr. 10, 2024) (plaintiffs' claims survived summary judgment because they offered evidence of "decreased output[] and quality").

Third, by artificially locking in high prices (and other onerous economic terms), Defendants' MFN clauses restrict competition. Am. Compl. ¶¶ 142-146; *see, e.g.*, *US Airways*,

105 F. Supp. 3d at 285 (practice was "anticompetitive because it allegedly restrict[ed] price competition in the [relevant] market" and "possibly" increased prices across the board); *Amazon.com*, 2023 WL 6006525, at *10 ("A practice that eliminates price competition . . . is anticompetitive."). Defendants' MFN agreements ensure that no competitor can offer lower prices or more innovative products than YouTube TV and Hulu Live, effectively foreclosing competition. Am. Compl. ¶¶ 142-146, 235.

Fourth, Defendants' MFN clauses have forced out smaller distributors and raised barriers to entry. *Id.* ¶¶ 123, 147; *see Biddle*, 696 F. Supp. 3d at 885 ("Detailed allegations of barriers to entry are sufficient to allege anticompetitive harm."). Defendants' MFN agreements set an artificially high "floor on the prices, penetration requirements, and other economic terms" that a new entrant must pay to acquire each Defendant's must-have sports content, "thus pricing out smaller competitors and raising barriers to entry." Am Compl. ¶ 131 (first quotation); *id.* ¶ 142 (second quotation); *see also id.* ¶ 137 ("the MFN clauses . . . set[ ] a floor on the prices that Fubo and other smaller virtual MVPDs are required to pay for" sports content). The Amended Complaint points to at least three smaller virtual MVPDs forced out of the market by Defendants' MFN agreements and the higher prices that they require. *Id.* ¶¶ 147, 235 (discussing the market exits of PlayStation Vue, Duo, and T-Mobile's virtual MVPD due to high prices).

Fifth, Defendants' MFN clauses dampen competition between Defendants and facilitate collusion among them. *Id.* ¶¶ 304, 313, 321, 329. "[C]ourts have recognized that vertical agreements can injure competition by facilitating horizontal collusion." *Laumann*, 907 F. Supp. 2d at 486 (cleaned up); *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 893 (2007) (a "vertical agreement" that "facilitate[s]. . . [a] cartel" is "unlawful under the rule of reason"); *In re NFL's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1151 (9th Cir. 2019)

(similar). That risk is especially great when a vertical restraint is "industry-wide" and competitors are aware of the vertical restraints they each impose. *See Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.18 (1977); *see also In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 603 (7th Cir. 1997) ("[T]he existence of industry-wide price discrimination is some evidence of collusion."), *abrogated on other grounds by Rivet v. Regions Bank of La.*, 522 U.S. 470 (1998); *Laumann*, 907 F. Supp. 2d at 486-87 (similar); *cf. Todd*, 275 F.3d at 211 (information sharing between firms, while not *per se* unlawful, can be unlawful under rule of reason because it may "affect future prices and facilitate price conspiracies").

Here, Defendants' "MFN agreements . . . facilitate coordination or collusion among horizontal competitors," Am. Compl. ¶¶ 304, 313, 321, 329, by "mak[ing] it easier for Defendants to maintain high content prices and onerous economic terms without fearing that their competitors will undercut them," *id.* ¶ 142. Defendants also know of each other's MFN clauses, which facilitates collusion and removes incentives for price competition. As numerous media accounts have explained, MFN clauses "pervade the pay TV industry," *id.* ¶ 126; *see also id.* ¶¶ 125-126, 142 (citing public accounts of widespread MFN clauses in the pay TV industry), and Defendants have "[f]ollow[ed] this model" in deploying their own MFN clauses, *id.* ¶ 127.

Biddle v. Walt Disney recently held that similar (and even less detailed) allegations of anticompetitive harm were sufficient to state a claim. In *Biddle*, a class of consumers alleged that Disney "imposes MFN clauses in the carriage agreements with cable providers" that "require[ ] Disney to provide the counterparty with the lowest price for ESPN and other channels offered to any other market participant," which "operate[d] as a price floor and exert[ed] upward pressure on prices." 696 F. Supp. 3d at 872, 883. The Northern District of California denied Disney's motion to dismiss because the MFN clauses "increased prices and strengthened

[barriers to entry] to prevent entry by potential rival[s]," and because Disney "maintain[ed] a cost input into each market participant's product, and can prevent or retard entry by mandating onerous terms or by outright refusing to license live television content." *Id.* at 886. Fubo's factual allegations provide even greater detail about Defendants' MFN clauses and side deals and their anticompetitive effects in the Sports Program Licensing Market.

2. None of Defendants' seven contrary points have merit. *First*, Defendants argue (Disney Mot. at 21-23; Fox Mot. at 18-19; WBD Mot. at 7-11) that they have too little market share in the Sports Program Licensing Market to have market power, and that Hulu Live and YouTube TV do not account for a high enough percentage of their distribution to affect competition. But in a rule-of-reason case, "[i]f a plaintiff can show an actual adverse effect on competition, such as reduced output . . . [courts] do not require a further showing of market power." *Todd*, 275 F.3d at 206-07 (ellipsis in original; citation omitted). Market power is merely a "'surrogate' for pleading an actual adverse effect on the market" in a rule-of-reason case. *Mooney v. AXA Advisors, L.L.C.*, 19 F. Supp. 3d 486, 502 (S.D.N.Y. 2014) (quoting *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986). Because the Amended Complaint plausibly alleges that Defendants' MFN clauses have had actual anticompetitive effects, *supra* pp. 48-51, Fubo need not plead that Defendants have market power.

Even if an independent showing of market power were necessary at the pleading stage—and it is not—"market share . . . is not the only way to demonstrate defendants' [market power]." *Todd*, 275 F.3d at 206; *supra* pp. 25-26. "[A] plaintiff show[ing] that a defendant's conduct exerted an actual adverse effect on competition . . . arguably is more direct evidence of market power than calculations of elusive market share." *Todd*, 275 F.3d at 206. So "a threshold showing of market share is not a prerequisite for bringing a § 1 claim." *Id.*; *see Biddle*, 696 F.

Supp. 3d at 883 ("Disney's ownership interests in ESPN . . . and Hulu and the carriage agreements" was sufficient to vest Disney with market power).[25]

Moreover, even if some measure of market share were necessary (and it is not), the Amended Complaint alleges that YouTube TV and Hulu Live "together account for more than two-thirds of all virtual MVPD subscribers," Am. Compl. ¶ 131; *id.* ¶ 128 (YouTube TV accounts for "41% of all virtual MVPD subscribers" while Hulu Live accounts for 28%). The large market shares of these two distributors ensures that Defendants have "no incentive to offer Fubo lower prices or better economic terms, because doing so will require Defendants to offer YouTube TV and Hulu [Live] those same terms" under their MFNs with those larger distributors (thus incurring a significant multiplier on any concession Defendants make to Fubo). *Id.* ¶ 131. WBD argues (at 10) that YouTube TV's and Hulu Live's market shares should be measured as a percentage of the larger Live Pay TV market (including traditional MVPDs such as Charter), but that ignores the Amended Complaint's allegations defining a "Streaming Live Pay TV Market" consisting only of virtual MVPDs (which Defendants do not challenge). Am. Compl. ¶¶ 181-186. Measuring YouTube TV's and Hulu Live's market shares as a percentage of the virtual MVPD market is particularly appropriate in assessing Defendants' MFN clauses, which give YouTube TV and Hulu Live "MFN status in the virtual MVPD market." *Id.* ¶ 131.

Second, Defendants argue (Disney Mot. at 23-25; Fox Mot. at 19-20; WBD Mot. at 13-14) that their MFN agreements are procompetitive because they guarantee the lowest possible prices to the two largest virtual MVPDs. But "[w]hether . . . MFN provisions actually ha[ve] procompetitive effects[ ] . . . is not an inquiry for resolution at the pleading stage." *Amazon.com*,

[25] As noted above, *supra* note 5, each of Defendants' cited cases recognizes that market power can be shown with evidence other than market share.

2023 WL 6006525, at *18; *see Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 460 (7th Cir. 2020) ("balancing anticompetitive effects against hypothesized justifications depends on evidence and is not amenable to resolution on the pleadings"). In any event, Defendants fail to show that their MFN clauses are procompetitive. They cite only some cases in which courts have observed that MFN agreements are *common* and *can* be procompetitive in some situations. *See* Disney Mot. at 23-24; Fox Mot. at 19-20; WBD Mot. at 13-14.[26] But Defendants cite no case holding that MFN clauses are *always* competitive or *per se* lawful. Nor could they, as courts in this Circuit and elsewhere have recognized that MFNs can be anticompetitive. *Supra* p. 48 & n.28. The Amended Complaint provides detailed allegations that show how these particular clauses, in the context of this particular industry, raise prices and thwart competition. *Supra* pp. 48-25.

Third, Defendants argue (Disney Mot. at 24-25; Fox Mot. at 21; WBD Mot. at 14-17) that Fubo has failed to allege that Defendants' MFN clauses are the "causes" of the onerous prices and other terms they impose on Fubo.[27] Fubo pleads exactly that, Am. Compl. ¶ 123 ("The above-market prices, penetration rates, and other economic terms that constrain Fubo's ability to compete are the result of [Defendants'] MFN clauses"), and alleges facts supporting that allegation, including public reporting that large programmers with "dominance of TV sports"

[26] *See, e.g.*, *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic & Sec. Health Plan of Wis.*, 65 F.3d 1406, 1415 (7th Cir. 1995); *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1110 (1st Cir. 1989); *In re Amazon.com, Inc. eBook Antitrust Litig*., 2022 WL 4581903, at *3 (S.D.N.Y. Aug. 3, 2022), *report and recommendation adopted*, 2022 WL 4586209 (S.D.N.Y. Sept. 29, 2022); *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 140-42 (2d Cir. 1984); *Apple*, 952 F. Supp. 2d at 698.

[27] Defendants phrase this argument as an attack on Fubo's allegations regarding "antitrust injury," but the substance of their argument concerns causation. *See* Disney Mot. at 24 (disputing allegation "that the YouTube or Hulu MFN *causes* higher prices to Fubo"); Fox Mot. at 21 (disputing allegation that Fox's MFNs "caused higher . . . prices"); WBD Mot. at 15 (disputing the "causal connection" between WBD's MFNs and prices).

routinely employ MFN clauses to increase prices, *id.* ¶ 126, data showing content prices continually increasing, *id.* ¶¶ 144-146, and Defendants' own statements in negotiations with Fubo that "[REDACTED]," *id.* ¶ 127. Defendants' factual challenge to the causal link between their MFN clauses and the terms they impose on Fubo—and Disney's inherently factual claim (at 24-25) that Fubo's high prices are actually the result of a "disparity in negotiating leverage"—at most raise a "question[ ] of causation" that is "not appropriate for resolution on a motion to dismiss." *Egypt v. United States*, 2024 WL 3236803, at *14 (S.D.N.Y. May 30, 2024) (quoting *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 189 n.21 (2d Cir. 2015)), *report and recommendation adopted*, 2024 WL 3236910 (S.D.N.Y. June 28, 2024); *see In re Sept. 11 Prop. Damage & Bus. Loss Litig.*, 468 F. Supp. 2d 508, 528 (S.D.N.Y. 2006) (similar), *aff'd sub nom. Aegis Ins. Servs. Inc. v. 7 World Trade Co., L.P.*, 737 F.3d 166 (2d Cir. 2013).[28]

Fourth, Fox erroneously argues (at 22) that Fubo's well-pleaded allegations of price increases and quality degradation are insufficient because Fubo must specifically allege that

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[28] Again, Defendants' cases are inapposite. *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117 (2d Cir. 2007) and *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762, 766 (2d Cir. 1995) did not address whether allegations regarding causation were sufficient. In *In re Bookends & Beginnings LLC*, the court dismissed a complaint alleging that book publishers had caused retailer to raise their prices by including "suggested retail price[s]" in their agreements with retailers, because the complaint also admitted that "booksellers are not constrained to sell a book at a retail price that equals the list price and, indeed, some booksellers sell at a discount from the list price"—the opposite of the MFN arrangements here, which contractually forbid Defendants from giving Fubo better terms than they give large distributors. 2023 U.S. Dist. LEXIS 151757, *75 (S.D.N.Y. Aug. 3, 2023). In *Pierre v. Apple Inc.*, the court held (in a two-paragraph order that cites no precedent and is available only on PACER) that the plaintiffs' had not offered an adequate "relevant market definition," that they had not "adequately alleged an agreement," and that the "connection between the alleged anticompetitive conduct and the plaintiffs' injury" was "speculative," with no further discussion. Order Granting Mot. to Dismiss at 1, No. 3:23-cv-05981-VC, Doc. 49 (N.D. Cal. Mar. 26, 2024). That case is not helpful authority.

Defendants use the MFN clauses to "restrict[ ] output." Fox cites no decision requiring specific allegations of output restriction for a Section 1 claim, and courts have made clear that other harmful effects, such as increased prices, diminished quality, or exclusion of small or nascent competitors constitutes anticompetitive harm. *Supra* pp. 47-49. *American Express*, on which Fox relies, makes clear that "competitive injury" may be inferred from evidence that "output was restricted *or prices were above a competitive level*." 585 U.S. at 549 (emphasis added). Fubo explicitly pleads that Defendants' MFN clauses have led them to impose prices and other terms on Fubo that are above competitive levels. *Supra* pp. 48-49. Fubo also pleads facts supporting an inference of reduced output: Defendants' MFN-driven prices and other terms have driven smaller virtual MVPDs from the market, *supra* p. 50, and have restricted Fubo's ability to offer its customers skinnier, more desirable packages, *supra* p. 5. *American Express* requires no more at this stage. *See Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842, 860 (2d Cir. 2021) ("[A] plaintiff is not required to plead evidence. . . .") (citation omitted).

Fifth, WBD argues (at 16) that it has no duty to deal with Fubo at all and thus has the right to charge Fubo any agreed-upon price. But the Amended Complaint does not allege unilateral refusal-to-deal claims under Section 2.[29] It instead alleges that each Defendant engaged in unlawful concerted action that violates Section 1 by entering into anticompetitive MFN agreements with large distributors that set artificial floors on prices and other economic terms. Am. Compl. ¶¶ 245, 298-331. As this Court explained in rejecting a similar argument by Defendants in opposing Fubo's PI motion, "courts have been clear that the 'no duty to deal'

[29] For this reason, WBD's citations to *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004), and *Pacific Bell Telelphone Co. v. linkLine Communication, Inc.*, 555 U.S. 438, 448 (2009)—Section 2 monopolization cases involving unilateral refusal to deal (*Trinko*) and a unilateral price squeeze (*linkLine*)—are inapposite. Fubo alleges no Section 2 claims, no unilateral refusal to deal, and no price squeezes.

defense raised by the JV Defendants in reliance on *linkLine* and *Trinko* is not a defense to concerted actions." PI Order at 37 (collecting authority); *see generally Copperweld*, 467 U.S. at 767-69 (distinguishing between unilateral and concerted action).

Sixth, WBD argues (at 15-16) that the "discounts" it offered through side deals with large distributors like YouTube TV and Hulu Live are not themselves unlawful. But in assessing the anticompetitive effects of a restraint, courts "avoid tightly compartmentalizing the various factual components of Plaintiffs' case and wiping the slate clean after scrutiny of each." *Watson Lab'ys, Inc. v. Forest Lab'ys Inc.*, 101 F.4th 223, 235 (2d Cir. 2024) (cleaned up). Instead, a course of "anticompetitive conduct"—such as Defendants' MFN agreements and side deals—"must be considered as a whole." *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 111 F.4th 337, 354 (4th Cir. 2024). WBD's side deals with YouTube TV and Hulu Live are part of a larger, multi-step "scheme" that allows those distributors to impose high prices and economic terms on their smaller competitors (through MFNs) while avoiding those same prices themselves (through side deals), causing anticompetitive harm. Am. Compl. ¶¶ 129-132; *see supra* pp. 45-46.

Seventh, WBD argues (at 17) that damages against it should be limited to the four-month period between February 2020 (four years before Fubo filed suit and the outer bound of the limitations period) and June 2020 (when Fubo's carriage agreement for the Turner networks ended). But disputes about the availability or scope of Fubo's damages is premature at this stage, *supra* p. 41, including disputes over whether a portion of damages are time-barred. *See Harris v. City of N.Y.*, 186 F.3d 243, 250 (2d Cir. 1999) (dismissal based on a statute-of-limitations defense "is appropriate only if a complaint clearly shows the claim is out of time," and was inappropriate where "it is possible that [plaintiff] could demonstrate some [unlawful] act that did occur within

the statute of limitations, so that his claim would not be time-barred"); *Cardwell v. Davis Polk & Wardwell LLP*, 2020 WL 6274826, at *40 (S.D.N.Y. Oct. 24, 2020) (similar). Moreover, WBD again wrongly assumes that Fubo's MFN claims relate solely to WBD's Turner networks, and ignores Fubo's claims based on the other networks WBD licensed to Fubo well after June 2020. *Supra* p. 42.[30]

III. The Court Should Allow Fubo To Replead Any Claim That the Court Dismisses

Fubo's Amended Complaint plausibly alleges that Defendants have engaged in unlawful tying and block-booking and have unreasonably restrained trade through MFN clauses. But if the Court is inclined to dismiss any of these claims, Fubo respectfully requests that the Court grant Fubo leave to replead any claim that Court dismisses. "The court should freely give leave [to replead] when justice so requires," Fed. R. Civ. P. 15(a)(2), and "it is the usual practice upon granting a motion to dismiss to allow leave to replead," *Cruz v. TD Bank, N.A.*, 742 F.3d 520, 523 (2d Cir. 2013). In this case, limited discovery related to Fubo's PI motion has significantly strengthened the allegations supporting Fubo's bundling and MFN claims: As this Court noted in granting Fubo's PI motion, "[e]ven after limited and expedited discovery, it is indisputable that the JV Defendants have long used the combination of bundling and minimum penetration requirements to make live pay TV distributors carry content they otherwise would reject, or would only offer based on express customer preferences," and "those distributors are forced to pass those superfluous costs on to consumers who, in many cases, also do not want that content."

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[30] WBD also argues (at 16) that Fubo failed to "mitigate damages" by not arbitrating its carriage rates for the Turner networks in 2018. But again, "[w]hether a party puts forth sufficient effort to mitigate damages is a question of fact" not suitable for resolution on the pleadings. *Mohegan Lake Motors, Inc. v. Maoli*, 559 F. Supp.3d 323, 346 (S.D.N.Y. 2021) (citation omitted); *In re WorldCom, Inc.*, 361 B.R. 675, 696 (S.D.N.Y. Bankr. 2007) (failure to mitigate reduces damages but "does not disallow the [c]laim in full").

PI Order at 40. Discovery has also shown that Defendants have (and have long had) MFN clauses with a host of large distributors beyond YouTube TV and Hulu Live, has revealed additional evidence of "side deals" between certain Defendants and large distributors, and has lent further factual support Fubo's allegations regarding the relevant markets and Defendants' power within those markets. If the Court dismisses any claim, it should allow Fubo to replead that claim to provide additional allegations regarding these practices and their harmful effects.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motions to dismiss, and in the alternative should grant Fubo leave to replead any claim that the Court dismisses.

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Respectfully submitted,

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