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

FUBOTV INC., and FUBOTV MEDIA INC.,

Plaintiffs,

- against -

THE WALT DISNEY COMPANY, ESPN, INC., ESPN ENTERPRISES, INC., HULU, LLC, FOX CORPORATION, and WARNER BROS. DISCOVERY, INC.,

Defendants.

Case No. 1:24-cv-01363 (MMG)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT WARNER BROS. DISCOVERY INC.'S MOTION TO DISMISS FUBO TV'S AMENDED COMPLAINT

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MEMORANDUM OF LAW

Warner Bros. Discovery Inc. ("**WBD**") respectfully submits this Memorandum of Law in support of its Motion to Dismiss the Ninth and Fourteenth Causes of Action of Plaintiffs FuboTV Inc. and FuboTV Media Inc.'s (together, "**Fubo**" or "**Plaintiffs**") amended complaint, (ECF No. 145, the "**Amended Complaint**") pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

I. PRELIMINARY STATEMENT

Fubo's complaint alleges that "Defendants" entered into carriage agreements with Hulu and YouTube TV for sports programming, and that MFN provisions in those carriage agreements resulted in reduced competition and higher carriage rates to Fubo. However, [redacted] ***between WBD and Hulu or YouTube TV in 2018—when the last sports programming deal between Turner and Fubo was entered into***. Fubo's theory is obviously baseless as to WBD, and its antitrust claims must be dismissed.

Fubo's claims fail for multiple, additional reasons. To plead an antitrust claim here, Fubo must either offer direct evidence of anticompetitive harm, or allege harm indirectly by identifying the relevant market and alleging market power within that market. Fubo fails on both counts. Fubo fails to plead evidence of harm to competition because WBD is alleged to have only 9.9% of the "Sports Programming Licensing Market," which is far below the requisite market power level. While the Amended Complaint alleges that Disney and Fox are "dominant" programmers, Am. Compl. ¶¶ 52–54, Fubo makes no such allegation against WBD. Further, [redacted] with Hulu and YouTube TV, those distributors account for only 16% of the MVPDs and vMVPDs that purchase sports programming—a share far below the thresholds where courts have recognized potential competitive harm from MFNs. Fubo also does not plead

any direct evidence of harm to *competition*, but rather only harm to *Fubo*, which is not sufficient. The remaining allegations are all either improper group pleadings or conclusory as to WBD.

Fubo's claims also fail because it has not pled the requisite harm to itself that is required pursuant to Rule 12(b)(1). Specifically, Fubo does not plead that absent the [redacted] MFN provisions, WBD's carriage rates would have been lower. Fubo voluntarily dropped WBD's sports networks in 2020, so there certainly could be no harm since that time. Fubo claims that larger distributors enjoyed better rates, but sellers routinely offer favorable terms to larger purchasers. And courts have held that a seller generally can choose its price, and is not obligated in this circumstance to offer similar terms to all buyers. Indeed, years ago Fubo was offered the option to arbitrate its carriage rates for WBD's sports networks if Fubo thought that the rates were unreasonable, but it chose not to do so. Finally, even if Fubo did have a claim here, it would be limited to only a few short months due to the four year statute of limitations for Sherman Act and Donnelly Act damage claims.

Fubo's MFN claims are baseless on the facts, on the law, and on the merits. Accordingly, the Ninth and Fourteenth Causes of Action of Fubo's Amended Complaint should be dismissed.

II. FACTUAL BACKGROUND[1]

A. Sports Programming Licensing[2]

WBD is an entertainment company and television programmer that acquires the rights to

[1] This statement of facts is based on the allegations in the Amended Complaint, which are assumed true solely for the purposes of this Memorandum of Law in support of the Motion to Dismiss, except where statements are contradicted by documents incorporated by reference. This statement of facts also includes items upon which the Court may take judicial notice.

[2] The changes in the Amended Complaint highlight Fubo's focus on the sports industry, *see* Am. Compl. ¶¶ 187–97, and as the Ninth and Fourteenth Causes of Action only allege harm to the Sports Program Licensing Market, *see* Am. Compl. ¶¶ 319, 339, only the Turner networks are relevant, as it is WBD's only portfolio that has networks that air live sports.

live sports content from major sports leagues through long-term licensing agreements, which sports leagues frequently sell to programmers for billions of dollars. Am. Compl. ¶¶ 46, 173. WBD is a smaller player in sports programming, including as compared to the other two defendants, accounting for only 9.9% of U.S. sports programming. *Id.*[3] ¶ 169. WBD (and other programmers) license their linear channels with sports programming through carriage agreements with distributors, including multi-channel video programming distributors ("**MVPDs**") and streaming services offered by platforms that provide multi-channel television service via internet connection ("**Virtual MVPDs**"). *Id.* ¶¶ 46–51, 93.

Fubo is a Virtual MVPD that stopped licensing sports content from WBD in June 2020—a decision by Fubo that was, by its own admission, entirely unrelated to WBD's conduct or negotiations with Fubo. *Id.* ¶¶ 83, 119, 135 (alleging that Fubo stopped licensing sports content from WBD for reasons unrelated to any WBD conduct). At the time of filing the Amended Complaint, Fubo only licensed "non-sports content from WBD." *Id.* ¶ 83.

Fubo alleges that pursuant to a supposed "scheme," "Defendants" entered into carriage agreements for sports programming with Hulu and YouTube TV that contain Most Favored Nations ("**MFN**") clauses. These carriage agreements allegedly include artificially high carriage rates, but through so-called "side deals," Hulu and YouTube TV's parent (Google) receive "rebates" that net out the high carriage rates. Fubo claims that because of these MFNs between Defendants and Hulu/YouTube TV, Defendants are not incentivized to offer Fubo lower rates because WBD would then be contractually obligated to match those rates with Hulu and YouTube TV. *Id.* ¶¶ 131, 232, 245. Fubo's Ninth and Fourteenth Causes of Action are predicated entirely

[3] Disney and Fox, in comparison, are alleged to be "dominant" in the relevant market. *Id.* ¶¶ 52–54.

on the alleged existence of these MFN provisions for sports programming and the so-called "side deals." Importantly, the only "rebate" specifically referenced as to WBD is unrelated to sports programming—an alleged discount that "WBD predecessor Discovery" (which did not offer any sports programming) paid to Hulu. *Id.* ¶ 135.[4]

Contrary to Fubo's allegations, at the time WBD and Fubo entered into the only sports programming carriage agreement between them, Hulu's and YouTube TV's carriage agreements [redacted] for sports networks. *See* Aquila Decl. Ex. A, Affiliate Agreement between Turner Network Sales, Inc. and Hulu, LLC (August 1, 2016) ("**Hulu Agreement**"); *id.* Ex. B, Affiliate Agreement between Turner Network Sales, Inc. and Google LLC (January 23, 2018) ("**YTTV Agreement**").

Fubo further claims that the [redacted] MFNs caused harm to the "Sports Program Licensing Market," but does not cite any specific market-wide harm attributable to WBD's MFN clauses, and does not allege that WBD has the requisite market power in that market. Am. Compl. ¶ 169 (showing that WBD constitutes only 9.9% of the Sports Program Licensing Market). Fubo alleges that Hulu and YouTube TV account for a high percentage of vMVPD subscribers, but the figures cited in the Amended Complaint result in those two companies accounting for only approximately 16% of the purchasing of sports programming from WBD and others. *Id.* ¶¶ 96, 128.

Fubo—or any other distributor of WBD's sports networks—could have availed itself of an arbitration proceeding if Fubo believed that its rates were anything other than fair and reasonable. *See United States v. AT&T, Inc.*, 916 F.3d 1029, 1035 (D.C. Cir. 2019) ("Turner Broadcasting sent letters to approximately 1,000 distributors 'irrevocably offering' to engage in 'baseball style'

[4] Fubo admits that Discovery does not carry sports programming. *See* Am. Compl. ¶¶ 80, 83.

arbitration at any time within a seven-year period.").[5] Under that offer, a distributor had the option to arbitrate, "as it can do whenever negotiations reach impasse – Turner cannot even threaten a blackout; the distributor is legally entitled to carry the Turner networks on the same terms as before, subject to a retroactive true-up based on the arbitrator's award." Appellee's Final Brief, *United States v. AT&T, Inc.*, 916 F.3d 1029 (D.C. Cir. 2019) (No. 18-521), 2018 WL 5099064 at *14. Fubo does not claim that it requested to arbitrate its carriage rates for sports programming with WBD.

III. LEGAL STANDARD

A. Federal Rule of Civil Procedure 12(b)(1)

To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), the court must have the "power to adjudicate" the case. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). Article III standing "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The "irreducible constitutional minimum of standing" consists of three elements: "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision"—"injury in fact," "causation," and "redressability," respectively. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Plaintiffs bear the burden of establishing the existence of Article III standing and, at the pleading stage, "must 'clearly . . .

[5] This Court may take judicial notice of facts on a motion to dismiss that "can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." FED. R. EVID. 201 (b)(2); *see, e.g.*, *Lewis v. M&T Bank*, 2022 U.S. App. LEXIS 6596 (2d Cir. March 15, 2022) (upholding the district court's decision, which relied on judicially noticed facts).

allege facts demonstrating' each element." *Id*. In the absence of such standing, this Court lacks subject matter jurisdiction and must dismiss the case. *Makarova*, 201 F.3d at 113.

B. Federal Rule of Civil Procedure 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) requires dismissal of a complaint that lacks "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In determining a complaint's adequacy, a court must disregard conclusory allegations and legal conclusions, which are not entitled to the assumption of truth, and determine whether the remaining "well-pleaded factual allegations" suggest that the plaintiff has a plausible—as opposed to merely conceivable—claim for relief. *Id.* at 679–80. The factual allegations must "possess enough heft to show that the pleader is entitled to relief." *Twombly*, 550 U.S. at 557.

In the Second Circuit, it is well settled that a complaint fails to state a claim when it "lump[s] all the defendants together . . . and provid[es] no factual basis to distinguish their conduct." *Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001); *see also In re Zinc Antitrust Litig*., 155 F. Supp. 3d 337, 384 (S.D.N.Y. 2016) (citing *Twombly*, 550 U.S. at 557–58) ("Rule 8 provides that a defendant is entitled to notice of the claims brought against him; *Twombly* makes clear that at the pleading stage in this antitrust case, that means that each defendant is entitled to know how he is alleged to have conspired, with whom and for what purpose.").

In the context of a Rule 12 motion to dismiss, this Court may consider documents that are incorporated by reference and "integral" to the Amended Complaint, such as the WBD carriage agreements with Hulu and YouTube TV. *See Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47–48 (2d Cir. 1991); *see also Nghiem v. United States Dep't of Veteran Affairs*, 451 F. Supp. 2d 599, 603 (S.D.N.Y. 2006).

IV. ARGUMENT

A. WBD Had [redacted] Hulu and YouTube TV

Fubo alleges a "scheme" between "Defendants" and Hulu/YouTube TV, by which "Fubo is forced to pay above-market rates" for sports programming due to MFN provisions and "side deals." *See, e.g.*, Am. Compl. ¶¶ 9–10, 317.[6] Fubo entered into a carriage agreement for the Turner networks in August 2018 (the only agreement Fubo ever executed to carry WBD sports networks). *Id.* ¶ 83. However, at that time, Hulu and YouTube TV's carriage agreements for the Turner networks [redacted]. *See* Hulu Agreement; YTTV Agreement. Fubo is claiming harm from MFN provisions [redacted]. Putting aside Fubo's group pleading allegations about "Defendants," Fubo includes only one allegation specific to WBD regarding MFNs—that "WBD predecessor Discovery agreed to give Hulu a discount on its video-on-demand content to offset the high prices that Hulu TV was paying for Discovery's live streaming content." But Discovery did not carry sports programming, and therefore any MFN in a Discovery carriage agreement had no relevance to Fubo's claim that it overpaid for WBD's *sports* networks. Fubo's MFN claim against WBD is entirely predicated on a false premise.

B. Fubo Fails to Plead the Requisite Harm to Competition

Even if there had been any WBD MFN clauses relevant to Fubo's claims, they could not have harmed competition or Fubo because (1) WBD's share of the relevant sports programming market is far below the threshold for market power; and (2) Hulu and YouTube TV's combined share as purchasers in that same market is far below the level that courts require to sustain an antitrust claim.

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[6] These conclusory allegations should not be accepted when contradicted by documents incorporated by reference in the Amended Complaint. *See Nghiem*, 451 F. Supp. 2d at 603; *see also Cortec Indus., Inc.*, 949 F.2d at 47–48.

Vertical agreements between companies at different levels of a distribution chain—like WBD's carriage agreements with Hulu and YouTube TV—are subject to the rule of reason, and thus are lawful unless they have an overall substantial anticompetitive effect in a properly defined relevant market. *See Ohio v. Am. Express Co.*, 138 U.S. 2274, 2284 (2018); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 894–99 (2007). To survive a Rule 12(b)(6) motion, Fubo's Amended Complaint must plausibly allege this market-wide anticompetitive effect either: (1) indirectly, by establishing that the defendant has adequate "market power" to adversely affect competition, *and* an additional indication that the claimed actions harmed competition; or (2) directly, that the challenged conduct caused an adverse effect on competition, such as through increased prices, decreased productively, or diminished value in the market overall. *MacDermid Printing Sols. LLC v. Cortron Corp.*, 833 F.3d 172, 182 (2d Cir. 2016); *Wellnx Life Scis. Inc. v. Iovate Health Scis. Rsch. Inc.*, 516 F. Supp. 2d 270, 294 (S.D.N.Y. 2007); *see also*; *Tops Mkts., Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 96 (2d Cir. 1998). Fubo fails on both counts.[7]

Fubo admits that WBD accounts for only 9.9% of the alleged "Sports Program Licensing Market," Am. Compl. ¶ 169, which is far below the market share that courts require to establish market power.[8] *See In re Wireless Tel. Servs. Antitrust Litig.*, 385 F. Supp. 2d 403, 418 (2005) ("While the precise amount remains an open question, it has become clear that possession of a 30 percent market share is the minimum sufficient by itself to confer market power."); *Bookhouse of Stuyvesant Plaza, Inc. v. Amazon.com, Inc.*, 985 F. Supp. 2d 612, 622 (S.D.N.Y. 2013) (noting

[7] New York law interprets the Donnelly Act "in light of federal antitrust precedent" such that "state and federal antitrust statutes 'require identical basic elements of proof.'" *Reading Int'l, Inc. v. Oaktree Cap. Mgmt. LLC*, 317 F. Supp. 2d 301, 332–33 (S.D.N.Y. 2003) (quoting *Altman v. Bayer Corp.*, 125 F. Supp. 2d 666, 672 (S.D.N.Y. 2000)).

[8] Notably, while Fubo alleges that Disney and Fox are "dominant," Fubo makes no such allegation as to WBD. *See* Am. Compl. ¶¶ 52–54.

market share between 30% and 40% was inadequate to demonstrate market power); *In re Amazon.com, Inc. eBook Antitrust Litig.*, 2023 WL 6006525 (S.D.N.Y. July 31, 2023), *report and recommendation adopted*, 2024 WL 918030 (S.D.N.Y. Mar. 2, 2024) (hereinafter *Amazon eBooks II*) at *25 (holding market share of 35% at most was insufficient to show market power).

Fubo tries to compensate for the absence of WBD's market power with generalized allegations of *Defendants'* market shares in the aggregate. But that is not proper—this court and others have held that each vertical agreement must be addressed separately, and that plaintiffs may not group agreements to artificially manufacture market power.[9] *In re Amazon.com, Inc. eBook Antitrust Litig.*, 2022 WL 4581903 (S.D.N.Y. Aug. 3, 2022), *report and recommendation adopted*, 2022 WL 4586209 (S.D.N.Y. Sept. 29, 2022) (hereinafter *Amazon eBooks I*) at *23; *Amazon eBooks II* at *25; *Bookhouse of Stuyvesant Plaza, Inc.*, 985 F. Supp. at 622 ("In the absence of a horizontal conspiracy, grouping the [defendants'] market share together is inappropriate."); *see also Dickson v. Microsoft Corp.*, 309 F.3d 193, 211 (4th Cir. 2002); *Paddock Publ'ns, Inc. v. Chicago Trib. Co.*, 103 F.3d 42, 46 (7th Cir. 1996); Order Granting in Part and Denying in Part Defendant's Motions to Dismiss, ECF No. 30, *Radikal Records, Inc. v. Warner Music Grp. Corp.*, No. CV-06-1713, at 8–9 (C.D. Cal. Oct. 11, 2006) (finding that defendants' market shares may not be aggregated to show market power absent allegations of a horizontal agreement). Furthermore, references to "Defendants" are properly ignored because a complaint fails to state a claim when it "lump[s] all the defendants together . . . and provid[es] no factual basis to distinguish their conduct." *Atuahene*, 10 F. App'x at 34.

[9] While Fubo's Amended Complaint includes a few vague references to a "collusive scheme" or horizontal conduct between Defendants, Fubo does not allege a horizontal agreement or conspiracy, nor any facts or specific allegations indicating one. Accordingly, such claim is without merit and properly ignored. *See* Am. Compl. ¶¶ 123, 304, 329; *see also Iqbal*, 556 U.S. at 678.

Fubo's MFN claims also fail because the alleged counterparties to the [redacted] MFN clauses reflect a very small portion of the buyers of WBD's sports programming. Fubo claims that WBD was discouraged from offering lower rates to Fubo because it would have meant having to reduce the rates it charged to Hulu and YouTube TV based on WBD's alleged MFN agreements with those two distributors. *See, e.g.*, Am. Compl. ¶¶ 232, 245. [redacted], they could not have possibly impacted competition unless Hulu and YouTube TV accounted for a high percentage of WBD's sales, which Fubo does not plead. While Fubo alleges that Hulu and YouTube TV together account for 69% of *virtual* MVPD subscribers (approximately 12.6 million), Fubo fails to account for the many large *traditional* MVPD distributors (cable and satellite companies) to which WBD also licensed the Turner sports networks—which, according to Fubo's Amended Complaint, appear to account for almost 60 million subscribers. Am. Compl. ¶¶ 96, 128.[10] When those distributors are properly accounted for, Hulu and YouTube TV reflect only *approximately 16%* of sports programming distribution to distributors—a far cry from the high market share required to support Fubo's MFN claim. *See United States v. Delta Dental of Rhode Island*, 943 F. Supp. 172, 180 (D.R.I. 1996) (granting motion to dismiss where complaint alleged that single defendant "possesse[d] significant market power"); *see also Amazon eBooks II* at *2 ("Amazon enjoys nearly 90% of the eBook market and its closest competitor, Apple, has a distant 6% share."); *Reazin v. Blue Cross & Blue Shield of Kansas*, 899 F.2d 951, 969 (10th Cir. 1990) (evidence that defendant had market share of between 47 and 62 percent was sufficient to support jury's finding of market power).

[10] Fubo's Amended Complaint alleges a relevant market that comprises both MVPDs and vMVPDs – the "[market]". Am. Compl. ¶ 166; *see also id.* ¶¶ 164–76.

The small shares on both sides of the relevant market present entirely different facts than the cases in which courts have found liability based on MFN clauses. Research has not revealed a case in which a court found a violation of Section 1 of the Sherman Act based solely on MFN clauses, or where the defendant did not individually possess market or monopoly power. Rather, plaintiffs typically allege that MFN clauses constitute exclusionary conduct by a *monopolist* for purposes of a claim under Section 2 of the Sherman Act, which Fubo does not assert here. Cases involving MFN claims that survive a motion to dismiss typically involve a single dominant defendant that has leveraged MFN clauses to shield itself from competition. *See Amazon eBooks II* at *25–26 (granting motion to dismiss Section 1 claims against defendants that did not possess market power, but denying motion to dismiss Section 2 monopolization claims against Amazon); *Reazin*, 899 F.2d at 970–72 & n.30 (affirming a jury finding of monopolization, where MFN clause contributed to Blue Cross's market or monopoly power); *Delta Dental of Rhode Island*, 943 F. Supp. at 180 (denying motion to dismiss where defendant's "alleged market power [was] one important factor" in assessing the effects of its MFN clause).

Fubo also fails to plead any direct evidence of *market-wide* harm, such as market-wide higher rates for, or reduced output of, sports programming. Any specific factual allegations of harm in the Amended Complaint relate solely to *Fubo*, but the antitrust laws protect competition as a whole, not individual competitors, so evidence that a plaintiff "has been harmed as an individual competitor" is insufficient to state a claim. *Cap. Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993) (citing *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 343–44 (1990)); *Wellnx Life Scis. Inc.*, 516 F. Supp. 2d at 294 (granting motion to dismiss Section 1 claim where plaintiff failed to adequately allege market-wide harm to competition). Fubo's attempts to plead direct evidence of harm to competition boil

down to allegations that MFN clauses caused *Fubo* to pay prices that are higher than it would have preferred. *See* Am. Compl. ¶ 111; *see also id.* ¶ 321 ("MFN agreements raise prices for Fubo"). But "[s]etting a high price . . . is not in itself anticompetitive." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 294 (2d Cir. 1979). There are no factual allegations claiming harm to any other distributor.[11]

Other than the Fubo-specific allegations, all that remains is a small handful of generalized assertions that constitute improper group pleading or are conclusory—which are insufficient to support Fubo's claims. *See In re Treasury Sec. Auction Antitrust Litig.*, 595 F.Supp.3d 22, 43 (S.D.N.Y. 2022) (finding group pleadings do not constitute direct evidence of an antitrust claim); *see also In re Elevator Antitrust Litig.*, 502 F.3d 47, 50–51 (2d Cir. 2007) (holding plaintiffs failed to state a claim where the complaint "offer[ed] nothing more than conclusory allegations"). Fubo repeatedly and improperly lumps WBD together with the other Defendants, and fails to attribute any purported competitive harm specifically to *WBD's* alleged MFNs. *See, e.g.*, Am. Compl. ¶¶ 12, 111, 121–22, 147. Without drawing a link between WBD' MFNs and the harm to competition, Fubo's antitrust claim fails. Fubo's group pleading is particularly egregious here, where WBD [redacted] with Hulu and YouTube TV—nor could WBD cause any such alleged effects given its lower market share. *See supra* Sections IV.A, IV.B.1. The other allegations about WBD are purely conclusory: "WBD's MFN agreements substantially affect interstate commerce," *id.* ¶ 318, "WBD's MFN agreements unreasonably restrain trade under the rule of reason," *id.* ¶ 320; and "WBD's MFN agreements have anticompetitive effects," *id.* ¶ 321.

[11] While certain allegations relate to Hulu's MFN agreements with multiple distributors, *see id.* ¶ 134, Hulu is a separate defendant here and, as stated above, WBD [redacted] with Hulu for sports programming at the time the last sports programming deal between Turner and Fubo was entered into.

The Court should not accept these legal conclusions as adequate factual allegations. *See Iqbal*, 556 U.S. 679–80. In sum, Fubo fails to plead any direct evidence of harm to market-wide competition.

Fubo's failure to demonstrate any anticompetitive effect attribute to the MFNs is no surprise. Courts and observers have consistently recognized the potential economic benefits of MFN clauses. MVPD distributors seek these provisions to ensure that they are receiving a reasonable price for the content that they purchase. *See* Competitive Impact Statement, ECF No. 7, *U.S. v. Charter Commc'ns*, *Inc.*, No. 1:16-cv-00759-RCL, at 15 (U.S. Dep't of Just. May 10, 2016) (recognizing that MFNs are "ubiquitous in the [video programming] industry" and that "many MVPDs use MFN provisions"). They are "common devices that guarantee buyers will get the lowest prices or best terms from their suppliers, by getting the supplier to agree to treat them as favorably as any of their other customers." *Amazon eBooks I* at *3; *see also E.I. du Pont de Nemours & Co. v. F.T.C.*, 729 F.2d 128, 140–42 (2d Cir. 1984) (finding defendants used MFN clauses for legitimate business reasons and thus the use of the clauses was not an unfair practice under Section 5 of the FTC Act); *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995), *as amended on denial of reh'g* (Oct. 13, 1995) (Posner, J.) ("[MFN] clauses are standard devices by which buyers try to bargain for low prices . . . ."); *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island*, 883 F.2d 1101, 1110 (1st Cir. 1989) ("[A] policy of insisting on a supplier's lowest price . . . tends to further competition on the merits and, as a matter of law, is not exclusionary."); *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 698 (S.D.N.Y. 2013) ("[E]ntirely lawful contracts may include an MFN, price caps, or pricing tiers."), *aff'd*, 791 F.3d 290 (2d Cir. 2015); Areeda & Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1807 ("[MFNs] are generally

harmless in competitively structured markets, and purchasers facing competitive pressure may prefer them in order to ensure that they are getting as good a deal as their rivals."). Plaintiffs' allegation that "WBD cannot show any cognizable pro-competitive benefits that outweigh harm to competition," Am. Compl. ¶ 322, is simply false. [redacted], they would ensure customers receive lower prices.

Fubo's theory of harm also relies on the alleged existence of "side deals" and "rebates" with Hulu and YouTube TV which, when combined with the alleged MFN provisions, harm Fubo. Again, [redacted] with WBD, Fubo's theory makes no sense. But beyond this, the single example of an alleged "rebate" by WBD is especially irrelevant because it does not involve sports programming. Fubo alleges that an MFN applied to Discovery's networks and that there was a "side deal" related to that agreement, but Discovery carried no sports programming–so this agreement cannot support Fubo's claim. *Id.* ¶¶ 83, 135. The remaining allegations regarding these supposed "rebates" are conclusory claims about Defendants generally, which must be ignored as improper group pleading. *See Atuahene*, 10 F. App'x at 34. And Fubo does not allege that Defendants paid anything other than competitive rates for services that they received. Fubo's allegations say nothing more than that WBD may have a commercial relationship with YouTube TV's owner, separate and apart from its programming relationship. Fubo does not allege (and cannot allege) that this is improper.

Accordingly, for all of these reasons, the Ninth (Sherman Act) and Fourteenth (Donnelly Act) Causes of Action should be dismissed for a failure to plead requisite harm to competition.

C. Fubo Lacks Standing as it Does Not Adequately Plead Injury

Not only does Fubo fail to plead harm to competition based on [redacted] MFN clauses, but Fubo also does not adequately plead the requisite harm to itself. *Lujan*, 504 U.S. at 560 (holding that to have Article III standing, a plaintiff must plead and prove an injury that is "fairly

traceable to the challenged action of the defendant," meaning that "there must be a causal connection between the injury and the conduct complained of"). Fubo claims that the [redacted] MFN clauses and "rebates" caused Fubo to pay carriage rates that were higher than Hulu's or YouTube TV's rates, Am. Compl. ¶¶ 128–29, 132, but even assuming that was true and that Hulu and YouTube TV had [redacted] at the relevant time, Fubo fails to allege that its carriage rates would have been different if the MFN clauses did not exist. *See, e.g.*, Order Granting Motion to Dismiss, ECF No. 49, *Pierre v. Apple Inc.*, No. 3:23-cv-05981-VC, at 1 (N.D. Cal. Mar. 26, 2024) ("[P]laintiffs have not adequately alleged antitrust standing (and probably not even Article III standing) given the speculative nature of the connection between the alleged anticompetitive conduct and the plaintiffs' injury.").

Fubo admits that it has not carried WBD sports programming since June 2020—over four years ago. Am. Compl. ¶ 83. Fubo could not have suffered any harm attributable to the alleged MFN clauses during the period since June 2020, because Fubo was not carrying any WBD sports programming during that time. Fubo also does not allege that WBD refused to license sports content after its sports programming agreement with WBD expired in 2020, or that WBD's rates had any impact on Fubo's choice to not renew that agreement.

While Fubo asserts that the rates that Hulu and YouTube TV allegedly paid were lower than Fubo's, courts recognize that businesses can legitimately grant lower prices to larger customers in the form of volume discounts or otherwise. *See Virgin Atl. Airways Ltd. v. Brit. Airways PLC*, 257 F.3d 256, 264–65 (2d Cir. 2001) (finding that airline's use of "incentive agreements" offering fare reductions to corporations and travel agents making volume purchases did not constitute an unreasonable restraint of trade); *LePage's Inc. v. 3M*, 324 F.3d 141, 154 (3d Cir. 2003) (en banc) ("[C]ompeting by offering volume discounts . . . [is] concededly legal . . . .");

W. Parcel Exp. v. United Parcel Serv. of Am., Inc., 190 F.3d 974, 976 (9th Cir. 1999) ("[V]olume discount contracts are legal under antitrust law."). It would be entirely reasonable for WBD to offer a lower price to a larger buyer, as the volume of a large sale can make up for a lower price and thus make the transaction more profitable.

Indeed, Fubo does not allege (and it cannot) that WBD has any affirmative obligation under the antitrust laws to offer Fubo the same price that it offered to other distributors, or to deal with Fubo at all. *See Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) ("[T]he Sherman Act does not restrict the long recognized right of . . . an entirely private business, freely to exercise [its] own independent discretion as to parties with whom [it] will deal."); *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 448 (2009) ("As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing.") (citing *United States v. Colgate & Co.,* 250 U.S. 300, 307 (1919)).

Fubo also fails to acknowledge that if it had any concern about the rates for the WBD sports networks, it had the right to avail itself of an arbitration proceeding with WBD. *See AT&T, Inc.*, 916 F.3d at 1035 (D.C. Cir. 2019). In connection with AT&T's acquisition of Time Warner, Fubo and other distributors were offered the right to arbitrate their carriage rates to ensure that the transaction did not prejudice distributors of WBD's programming. *See id.* Fubo, like all antitrust plaintiffs, had a duty to mitigate damages, and should therefore have accepted the offer to arbitrate if it was unhappy with its carriage rates. *See Borger v. Yamaha Int'l. Corp.*, 625 F.2d 390, 399 (2d Cir. 1980); *Three Crown Ltd. P'ship v. Salomon Bros., Inc.*, 906 F. Supp. 876, 887 (S.D.N.Y. 1995).

Fubo's claims reflect nothing more than the grievances of a company that is unhappy with the terms it freely negotiated. *See Atl. Richfield Co.*, 495 U.S. at 337–38 ("A firm complaining

about the harm it suffers from nonpredatory price competition is really claiming that it [is] unable to raise prices[,]"which "is not *antitrust* injury . . . ."). Fubo's broad, sweeping condemnation of MFN clauses falls particularly flat given that Fubo admits that MFN clauses are common in the industry, and has failed to plausibly allege that they are unlawful here.

D. At a Minimum, Claims for Damages Under the Ninth and Fourteenth Causes of Action Should Be Limited to the Four Month Period Between February 2020 and June 2020

To the extent Fubo's claims are not dismissed in their entirety, Fubo's recovery should be limited to four month period between February 2020 and June 2020. The statute of limitations in private antitrust suits for damage claims is four years. *See* 15 U.S.C. § 15b; *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 401 U.S. 321, 338, 91 S. Ct. 795, 28 L.Ed.2d 77 (1971) ("The basic rule is that damages are recoverable under the federal antitrust acts only if the suit therefor is commenced within four years after the cause of action accrued[.]"). A "cause of action of a purchaser seeking to recover an illegal overcharge accrues when . . . it actually pays the overcharge." *Berkey Photo,* 603 F.2d at 295. As a result, Fubo "clearly can recover only for overcharges suffered since the beginning of the limitations period." *Id.; O.E.M. Glass Network, Inc. v. Mygrant Glass Co., Inc.*, 436 F. Supp. 3d 576, 588 (E.D.N.Y. 2020) (acknowledging antitrust plaintiff "may not recover damages accruing more than four years prior to the filing of the Complaint"); *In re: Am. Express Anti-Steering Rules Antitrust Litig.*, 2016 WL 748089, at *7 (E.D.N.Y. Jan. 7, 2016) ("The statute of limitations . . . bars Plaintiffs' claims based on overcharges outside of the limitations period—i.e. overcharges paid more than four years before filing suit."); *In re Buspirone Pat. Litig.*, 185 F. Supp. 2d 363, 378 (S.D.N.Y. 2002).

Here, Fubo filed suit on February 22, 2024, meaning it can only recover for overcharge amounts allegedly suffered in the four years prior to that date. *See* ECF No. 1, Complaint; *see also* 15 U.S.C. § 15b. But Fubo itself admits that its carriage agreement with WBD for the Turner

sports networks terminated on June 30, 2020. Am. Compl. ¶¶ 83, 319. As Fubo's injury in the Ninth and Fourteenth Cause of Action are only related to overpayment for content in the "Sports Program Licensing Market," *id.* ¶¶ 319, 339, Fubo can only recover on amounts paid to WBD for the Turner sports networks after February 22, 2020 and until the parties' carriage agreements expired on June 30, 2020. *See Berkey Photo*, 603 F.2d at 295; *see also* Am. Compl. ¶ 83. To the extent the Court does not dismiss the Ninth and Fourteenth Causes of Action in their entirety, the Court should dismiss claims for damages prior to February 21, 2020 and after June 30, 2020.

V. CONCLUSION

For the foregoing reasons, WBD respectfully requests that the Court dismiss the Ninth and Fourteenth Causes of Action of Plaintiffs' Amended Complaint pursuant to Rules 12(b)(1) and 12(b)(6) with prejudice, as any attempt to amend the allegations would be futile, for the reasons discussed in this Memorandum of Law. At a minimum, should the claim not be dismissed in its entirety, WBD requests that the Court dismiss any claims for damages under the Ninth and Fourteenth Causes of Action of Plaintiffs' Amended Complaint except for those that were allegedly incurred between February 21, 2020 and June 30, 2020.

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Respectfully submitted,

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