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)

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

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PRELIMINARY STATEMENT

Fubo's MFN antitrust claim against WBD is predicated on MFNs [redacted] and conduct by a defendant with too small of a market share to be able to harm competition. Fubo pled (and repled) a claim based on the alleged existence of MFN agreements and "side deals" with Hulu and YouTube that supposedly caused Fubo to pay higher carriage rates for sports programming. But WBD's motion to dismiss appears to have caught Fubo by surprise because [redacted] when Turner licensed its sports networks to Fubo in [redacted]. Now being in the unenviable position of pursuing a case based on facts [redacted], Fubo tries to improperly amend its Amended Complaint (the "**Complaint**") through its opposition brief. This Court should not permit Fubo to do that, and instead should hold Fubo to the already once-amended Complaint it filed, and the plain, clear reading of Fubo's MFN claim.

First, Fubo claims now in its brief that MFNs related to *non-sports* programming are relevant to its case—but the only relevant market referenced in the MFN Causes of Action is the Sports Program Licensing Market, and the Complaint does not articulate harm to any non-sports programming market. *Second*, Fubo now claims that MFNs with distributors other than Hulu and YouTube are relevant to its claims—but no agreements with such distributors are mentioned in Fubo's MFN allegations, while Hulu and YouTube are referenced over 125 times as the clear and sole basis for Fubo's antitrust claims. *Third*, Fubo now claims that its MFN case is about terms other than rates. But a plain reading of Fubo's Complaint shows this to be disingenuous—Fubo's MFN allegations are clearly grounded on paying allegedly inflated rates. Fubo is mischaracterizing its allegations to fit the facts, but the Court should not let Fubo escape its own pleading.

Even if these [redacted] MFN clauses [redacted], they could not harm competition. Fubo asserts that WBD has only 9.9% of the Sports Program Licensing Market. The MFN claims are not based upon concerted action with Disney and Fox (even though Fubo tosses around the words "concerted

action" in its brief). Accordingly, WBD's market share must be evaluated independently, and 9.9% is plainly insufficient for WBD to cause harm to the marketplace. Fubo now backpedals and claims that it does not have to rely on market shares (despite relying on them in its Complaint), and instead argues it has alleged "direct" evidence of anticompetitive effects. But these allegations are merely vague, broad, generalized assertions, and references to conduct by "Defendants" generally, without the requisite particularity as to specific market-wide effects that are directly attributable to WBD.

Fubo has already had two opportunities to plead its claims—and should not be permitted a third bite at the apple. Its MFN antitrust theory is groundless as to WBD, and dismissal here will streamline this case and focus judicial resources efficiently. Fubo cannot amend the Complaint to [redacted], so repleading would be fruitless. For these reasons, the MFN claims against WBD should be dismissed with prejudice.

I. FUBO HAS NOT PLAUSIBLY ALLEGED MFN CLAIMS AGAINST WBD[1]

A. [redacted] with YouTube and Hulu for the Turner Networks When Fubo Paid for Them, Which is the Proper Scope of Fubo's Alleged MFN Claims

1. The Court Can Consider the Agreements Incorporated in the Complaint

Fubo does not deny that [redacted] that impacted what Fubo paid WBD for sports programming. *See* Opp. 40–44. Instead, Fubo advances several arguments in an effort to escape this inconvenient reality. As an initial matter, Fubo argues that the relevant agreements with Hulu and YouTube cannot be considered by the Court. *Id.* 40–41. But these agreements are indisputably core to Fubo's allegations, and the law is clear that, on a motion to dismiss, the Court may consider contracts that are integral to the Complaint. *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47–48 (2d Cir. 1991). Fubo claims that there is a "factual dispute" regarding [redacted]

[1] 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) (citations omitted).

[redacted], but there is no dispute: [redacted] with Hulu and YouTube (and Fubo does not claim otherwise). Fubo cannot overcome this defect in its Complaint by simply claiming that there is a "dispute," especially when Fubo offers no explanation for what that dispute is, or any alternative interpretation of the agreements that would support the existence of a dispute.[2]

Next, Fubo contends that WBD's arguments about the [redacted] of MFN clauses in earlier agreements "is premature" because it "goes to the damages for Fubo's MFN claims." Opp. 41.[3] But that is incorrect: the [redacted] MFNs is central to the question of whether Fubo has a claim here. Fubo's MFN/rebate theory underlying its antitrust claims is predicated on [redacted] MFNs for carriage rates between WBD and Hulu/YouTube for sports programming. If the [redacted], there is no liability and Fubo has no claim (and, of course, no injury or damages). Fubo's argument regarding antitrust injury fares no better. Fubo's Complaint fails to adequately plead that, absent the [redacted] MFNs, Fubo would have paid less for its WBD sports programming—and thus Fubo has no standing. Fubo argues that this is a question of causation, Opp. 54–5 & n.27, but that is also simply incorrect—Fubo is required to plead with sufficient detail, as a matter of standing, that it suffered an injury traceable to the alleged anticompetitive conduct, and that the injury *flows from* that which makes the conduct unlawful. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (emphasis added). It is

[2] Fubo relies on *Millenium Health*, but that case provides that where a "complaint is 'replete with references to the contract and requests judicial interpretation of its terms, the contract is integral to the complaint'" and can be considered on a motion to dismiss. 240 F. Supp. 3d 276, 284 (S.D.N.Y. 2017). And in *Nicosia*, the court considered the parties' arbitration agreement on a motion to dismiss, but found there was a factual question of whether the parties intended to arbitrate where defendant did not move to compel arbitration. 834 F.3d 220, 229–30 (2d Cir. 2016).

[3] *Maersk* is inapposite because that case addressed whether or not a court may dismiss a request for punitive damages at the 12(b) stage. WBD is not addressing whether any type of *damages* should be dismissed here, but rather whether Fubo suffered *injury* such that it has standing.

quite simple: [redacted] means no injury, and thus Fubo's MFN claims fail.

2. Fubo Only Pleads Harm to the Sports Program Licensing Market

The only market alleged to have been harmed by WBD's MFNs is the "Sports Program Licensing Market." Am. Compl. ¶ 319; *see also* Am. Compl. ¶¶ 316–23. Fubo does not deny this. Instead, it points to a non-sports agreement (Discovery's agreement with YouTube)—but Fubo offers no explanation for why a non-sports programming agreement could have any impact on the market for sports programming, or what Fubo paid for sports programming. *See* Op. at 42. This is particularly so given there is no bundling claim against WBD.

3. Fubo's Case is Based on Alleged Agreements Only with Hulu and YouTube

Since WBD [redacted] with Hulu and YouTube, Fubo pivots and now asserts that WBD's alleged MFNs with other distributors are relevant to its claims. But the Complaint only contains allegations related to YouTube and Hulu, Am. Compl. ¶¶ 9–10, and there are no MFN allegations related to any other distributor. In fact, the Complaint includes ***over 80*** references to Hulu and ***over 45*** references to YouTube relevant to Fubo's MFN claims. By contrast, Fubo does not identify any other specific distributor as being part of the alleged MFN scheme. Tellingly, Fubo's own summary of its MFN claims *exclusively* references YouTube and Hulu. *See* Opp. 57. And all of the alleged "side deals"[4] relate solely to contracts with YouTube and Hulu. *See, e.g.*, *id.* ¶¶ 133, 135–136. Fubo cannot escape what it pled in its own Complaint.

In a last-ditch effort to resuscitate its MFN claims, Fubo cites the concurrence opinion in *Citizens for Resp. & Ethics in Wash. v. Trump*, 971 F.3d 102, 133 (2d Cir. 2020) to argue that "ambiguities" must be construed in its favor.[5] But there is no "ambiguity"—Fubo's Complaint

[4] While Fubo contends it sufficiently alleged the MFNs are anticompetitive standing alone, *see* Opp. 45, the Complaint explicitly alleges in its fourteenth cause of action that the MFNs are unlawful "***in combination with*** other anticompetitive conduct." Am. Comp. ¶ 339.

[5] And in *Citizens for Resp. & Ethics in Wash.*, the ambiguity was so minor it could be resolved by

unambiguously relies on MFNs and "side deals" with Hulu and YouTube, and cites no others.

4. Fubo's MFN Claims are Limited to Allegations on Rate-Based MFN Clauses

Fubo finally argues that its MFN claims are not limited to carriage rates—but this is belied by the plain language of its Complaint. Fubo consistently and repeatedly articulates that the alleged unlawful terms are based on rates, and does not allege that MFNs impacted any other specific terms. *See, e.g.*, Am. Compl. ¶ 121 ("The average prices that Defendants charge Fubo are between [redacted] higher than the prices that Defendants charge other video distributors, as reflected in market data published by Kagan . . ."). To the extent Fubo claims harm to consumers, it is clear those harms are also attributable to the rate-based MFNs on the prices that Fubo pays for content. *See id.* ¶¶ 232, 245. At bottom, the harm Fubo pled is that it paid too much money for sports content—Fubo cannot now seize on obscure references to unspecified "other economic terms" in its Complaint to distract the Court from the plain reading of its pleading.

5. Negotiations That the Parties Did Not Consummate Through a Contract Are Not Relevant to Fubo's Alleged Antitrust Injury of an Improper Overcharge

Since there were [redacted] in existence that could have impacted what Fubo *paid* for WBD's sports programming, Fubo now claims that later-in-time MFNs impacted its later *negotiations* with WBD for sports networks. But there is no such allegation in the Complaint, and certainly none of the requisite facts concerning this theory are pled (*e.g.*, Which negotiations? Who proposed what terms? How did the MFNs result in failed negotiations?). Indeed, Fubo specifically alleges that it dropped the Turner networks because ***ESPN*** was too expensive. Opp. 44; *see also* Am. Compl. ¶¶ 83, 119 ("because of Disney/ESPN's and Fox's bundling practices, Fubo has been unable to license content from Turner").

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amending one line in the operative Complaint. *Id.* at 133 & n.9. Allowing Fubo to re-plead an entirely new scheme now that its current theory has failed would be inappropriate.

Even if Fubo pled with the requisite particularity that MFNs impacted its negotiations for sports networks, the law says that is not enough. Fubo "must show that it actually *paid* supracompetitive rates to establish antitrust injury." *DIRECTV, LLC v. Nexstar Media Grp., Inc.*, 2024 WL 1195524, at *5–6 (S.D.N.Y. Mar. 20, 2024) (emphasis added); Am. Compl. ¶ 167. In *DIRECTV*, the court dismissed plaintiff's claims, finding that any potential harm was actually caused by "the unilateral decision to abandon . . . negotiations." *Id.* at *5. The court noted that while this result "may have been influenced by Defendants' demands, it does not result from Defendants' claimed unlawful acts, *i.e.*, *the extraction of supracompetitive prices*." *Id.* (emphasis added) (citing Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (4th ed. 2014)) ("Anyone could claim that he or she would have purchased at the competitive price but was priced out of the market as a result of the anticompetitive pricing. Thus, courts are likely to find that the claims of those who refused to purchase at the cartel price are *speculative*."). Here, Fubo only contracted for WBD's sports networks once—in [redacted]. Any WBD MFN agreements with any distributors entered into after Fubo executed the [redacted] WBD agreement cannot support Fubo's claimed injury because they could not have resulted in "actually paid supracompetitive rates." *Id.* at *5–6; Am. Compl. ¶ 83.

B. Each of Fubo's Five Reasons why the MFN Claims Should Survive Lack Merit

First, Fubo argues, "Fubo's Amended Complaint seeks to void the anticompetitive MFN clauses that are part of Fox's and WBD's current agreements with YouTube TV and Hulu Live, whose existence Fox and WBD do not dispute." ***But*** Fubo does not currently have *any* agreements with WBD, and has not had any sports agreement since [redacted]. Also, Fubo did not plead that any MFNs affected agreements or negotiations between Fubo and WBD; as noted above, Fubo cannot maintain antitrust claims when it did not pay alleged supracompetitive rates.

Second, Fubo argues, "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." ***But*** the carriage agreements Fubo references were—as it admits—for *non-sports networks*, and since Fubo's MFN claims only allege harm to the Sports Program Licensing Market, WBD's agreements for non-sports networks are not relevant.

Third, Fubo argues, "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." ***But*** the Complaint is plainly focused on the impact of *rate* MFNs, and on higher rates Fubo paid for sports content, whereas the attached carriage agreements [redacted] any rate MFNs.

Fourth, Fubo argues, "even if Fox and WBD [redacted] 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." ***But*** it did not plead in any way that MFNs impacted later negotiations or its decision to voluntarily drop WBD's sports networks. Where Fubo did not enter into an agreement and did not pay any supracompetitive rates, Fubo has no injury and no standing.

Fifth, Fubo argues, "the Amended Complaint's allegations are not limited to Fox's and WBD's MFN clauses in agreements with YouTube TV and Hulu Live." ***But*** all of Fubo's allegations regarding the alleged scheme pairing MFNs and "rebates" refer specifically to YouTube and Hulu, and do not identify similar MFN "rebates" with any other distributor.

In short, none of these arguments has merit.

C. Fubo Fails to Sufficiently Allege Anticompetitive Effects in the Relevant Market

Even if Fubo's [redacted], the allegations in the Complaint remain insufficient to allege anticompetitive effects in the relevant market. Fubo bears the burden to adequately plead that the alleged MFNs harm *competition*—not just Fubo. *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 96 (2d Cir. 1998). Notably, Fubo does not dispute that no court

has found antitrust liability based solely on a MFN claim. Fubo similarly fails to state a claim here because it does not plausibly allege anticompetitive effects in the alleged relevant market.

As an initial matter, WBD reflects only 9.9% of the alleged Sports Program Licensing Market—a market share too small to enable WBD to harm competition market-wide. Opp. 52; Am. Compl. ¶¶ 210; 221; *see Com. Data Servers, Inc. v. Int'l Bus. Machs. Corp.,* 262 F. Supp. 2d 50, 74 (S.D.N.Y. 2003) ("market shares of less than 30% are presumptively incapable of exercising market power"); *In re Amazon.com, Inc. eBook Antitrust Litig.*, 2023 WL 6006525, at *26 n.22 (S.D.N.Y. July 31, 2023), *adopted*, 2024 WL 918030 (S.D.N.Y. Mar. 2, 2024) (35% market share insufficient). Fubo does not and cannot allege "concerted" action with Disney and Fox with respect to its MFN claims. While Fubo alleges Disney and Fox are "dominant" programmers, Am. Compl. ¶¶ 52–54, it makes no such allegation about WBD. Indeed, Fubo asserts that WBD's TNT and TBS sports networks are "non-critical television channels." *See id.* ¶¶ 210; 221.

Nor do Hulu and YouTube have a high enough market share of purchasers in the Sports Program Licensing Market. Fubo's claim that YouTube and Hulu "together account for more than two-thirds of all virtual MVPD subscribers" is irrelevant. *Id.* ¶¶ 131, 128. For purposes of this calculation, the denominator should account for *all* the buyers in the relevant market—in this case, both vMVPDs and MVPDs. *Id.* ¶ 166. Accepting Fubo's allegations as true, YouTube and Hulu account for only 16% of the buyers in the Sports Program Licensing Market—a mere fraction of the shares that courts typically find to be sufficient for a MFN antitrust claim.[6]

Since WBD clearly lacks sufficient market share, Fubo asserts it has adequately plead

[6] Typical MFN antitrust claims involve defendants with high market share imposing MFNs—not a market participant with a single digit market share like WBD. *See, e.g.*, *U.S. v. Delta Dental of R.I.*, 943 F.Supp. 172, 192 (D.R.I. 1996) (35%–45% share of market); *U.S. Airways, Inc. v. Sabre Holdings Corp.*, 105 F.Supp.3d 265, 271 (S.D.N.Y. 2015), *aff'd,* 938 F.3d 43 (S.D.N.Y. 2019) (49%–52% of market share).

"direct" evidence of market-wide harm. But the Complaint only contains specific allegations of harm to *Fubo* arising from WBD's [redacted] MFNs, not the market-wide harm to competition it must plead and support with the requisite specificity. *See, e.g., Id.* ¶¶ 121–23. A plaintiff having "been harmed as an individual competitor" is insufficient to state an antitrust 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)). Any assertions in the Complaint as to market-wide harm are conclusory, generic, and/or applicable to "Defendants" without distinguishing between them.[7] Courts have consistently held this does not satisfy *Twombly*'s requirements that antitrust claims be pled with particularity. *See In re Treasury Sec. Auction Antitrust Litig.*, 595 F. Supp. 3d 22, 43 (S.D.N.Y. 2022), *aff'd,* 92 F.4th 381 (2d Cir. 2024); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50–51 (2d Cir. 2007); *compare* Am. Compl. ¶¶ 137, 145 *with id.* ¶¶ 121–23, 143 (specific allegations of harm to Fubo). As in *Amazon eBooks*, "absent evidence of a conspiracy,[8] the Complaint does not plausibly allege that [WBD's] agreement[s] . . . could have had a market-wide effect on the price of" carriage rates. 2023 WL 6006525, at *25.[9]

[7] Fubo relies on *Biddle v. Walt Disney Co.* to argue that Defendants' barriers to entry demonstrate the existence of anticompetitive harm. 696 F. Supp. 3d 865, 885 (N.D. Cal. 2023). But in *Biddle*, unlike here, plaintiffs included detailed allegations regarding specific barriers to entry. *Compare id. with* Am. Compl. ¶ 142.

[8] Fubo's opposition brief repeatedly refers to "concerted action" but this is misleading because, unlike the JV claims, there are no allegations that WBD acted in concert with Disney or Fox as to MFNs. *Compare* Am. Compl. ¶¶ 9, 111, 127–34 *with id.* ¶¶ 3, 153–54, 240. Thus the cases Fubo cites that address horizontal agreements among competitors are inapposite. *See United States v. Apple, Inc.*, 791 F.3d 290, 315 (2d Cir. 2015); *Relevent Sports, LLC. v. U.S. Soccer Fed'n, Inc.*, 61 F.4th 299, 306 (2d Cir. 2023). As such, Fubo's argument, citing the PI Order, that "no duty to deal" is not a defense to concerted actions is misplaced as applied to its MFN claims. Opp. 56–57.

[9] Fubo tries to bolster its arguments with generalized references to alleged consumer harm by the [redacted] MFNs, but Fubo's MFN claims do not define a relevant market in which consumers are the purchasers, and thus those references should be ignored. And the cases Fubo cites to argue that MFNs that "result[] in consumers paying higher prices" are typically anticompetitive, are distinguishable. Opp. 49. In *Amazon eBooks*, the court dismissed the plaintiff's Section 1 MFN claims—despite allegations that the relevant agreements caused an increase in price to

D. Fubo's Damages for its MFN Claims are Limited to February to [redacted]

Although Fubo's claims should be dismissed entirely, they must, at the very least, be dismissed other than from February to [redacted], due to the four-year statute of limitations. *See* 15 U.S.C. § 15b. Fubo filed suit on February 22, 2024—thus, it can only recover for overcharge amounts suffered in the four years prior to that date. *See id.*; ECF No. 1. And Fubo admits its agreements for the Turner sports networks terminated on [redacted]. Opp. 57. As such, Fubo can only recover amounts allegedly overpaid to WBD after February 22, 2020 until the parties' agreement expired on [redacted]. Fubo argues that determining the scope of damages is "premature," and that discovery is required. Opp. 57. However, Fubo does not present a reasoned explanation for why discovery is required—and offers no examples of potentially discoverable facts that may be relevant. A statute of limitations defense can be successfully asserted on a motion to dismiss if the "untimeliness is apparent on [the Complaint's] face." *Griffin v. Carnes*, 72 F.4th 16, 21 (2d Cir. 2023). Here, Fubo's agreement related to its alleged overpayment expired in [redacted], and Fubo has not since carried WBD's sports networks. Am. Compl. ¶¶ 83, 319. No amount of discovery will change that.

II. 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. At a minimum, 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 [redacted].

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consumers—because the complaint failed to allege that each publisher's agreement with Amazon had a market-wide effect on eBook prices. 2023 WL 6006525, at *25.

Dated: November 13, 2024
New York, NY

Respectfully submitted,

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