

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

FuboTV, Inc., and FuboTV Media, Inc.,

Plaintiffs,

v.

The Walt Disney Company, et al.,

Defendants.

1:24-cv-01363-MMG

**REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DISNEY'S MOTION TO
DISMISS**

Pursuant to Federal Rule of Evidence 201, The Walt Disney Company and its affiliates ESPN, Inc. and ESPN Enterprises, Inc. (together, "ESPN") and Hulu, LLC ("Hulu") (collectively, "Disney" or "Defendants") respectfully request that the Court take judicial notice of and consider each of the following documents referenced in the Declaration of Wes Earnhardt (the "Earnhardt Declaration") in Support of Disney's Motion to Dismiss the Complaint:

1. Attached as Exhibit 1 is a true and complete copy of Disney's Q1 2024 Earnings Call Transcript, dated February 7, 2024, and publicly available at <https://www.fool.com/earnings/call-transcripts/2024/02/07/walt-disney-dis-q1-2024-earnings-call-transcript/>.

2. [REDACTED]

ARGUMENT

In considering a motion to dismiss, a "[c]ourt's consideration of documents attached to, or incorporated by reference in the Complaint, and matters of which judicial notice may be taken, [does] not convert the motion to dismiss into one for summary judgment". *Thomas v. Westchester Cnty. Health Care Corp.*, 232 F. Supp. 2d 273, 275 (S.D.N.Y 2002); *see also Apotex*

Inc. v. Acorda Therapeutics, Inc., 823 F.3d 51, 60 (2d Cir. 2016). “A document is incorporated by reference when the plaintiff relies on its terms and effects when drafting the complaint.”

Columbia Cas. Co. v. Neighborhood Risk Mgt. Corp., 2015 WL 3999192, at *5 (S.D.N.Y.

June 29, 2015). Moreover, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Fubo’s claim is based in part on information in the following documents cited in the Complaint:

- Disney’s Q1 2024 Earnings Call Transcript, dated February 7, 2024, Earnhardt Declaration, Exhibit 1. (Compl ¶¶ 18, 160.)
- Fubo’s carriage agreements with Disney. (Compl ¶¶ 70, 114-116, 253, 271.)

Fubo relied on the terms and effects of both documents when drafting the Complaint. *First*, Fubo directly rely on Mr. Iger’s statements from Disney’s Q1 2024 Earnings Call to support the allegations in the Complaint. (*See* Compl ¶ 18 (“Disney Chief Executive Officer Bob Iger acknowledged that creating an unfair playing field is key to Defendants’ strategy, as it will allow Defendants to sell the JV’s sports-centric streaming app ‘at a price point that will be obviously more attractive than the big fat bundle’ that Defendants themselves force rival distributors to offer.”), ¶ 160 (“Disney CEO Bob Iger candidly admitted, on an investor call, that by licensing their jointly owned sports content exclusively to the JV on a standalone basis, Defendants are joining forces to give themselves a huge advantage in the marketplace: They can sell the JV streaming app “at a price point that will be obviously more attractive than the big fat bundle” that Defendants impose on third-party distributors like Fubo.”).) These “clear, definite and substantial reference[s]” to Disney’s Q1 2024 Earnings Call ensure that it is incorporated by reference into the Complaint. *Helprin v. Harcourt*, 277 F. Supp. 2d 327, 330-31 (S.D.N.Y. 2003).

Second, Fubo’s Complaint directly relies on the terms of their carriage agreement with Disney and its affiliates in numerous paragraphs. (Compl. ¶¶ 70, 114-116, 253, 271.) Indeed, Fubo relies on terms in the carriage agreements as the basis for its tying and “block booking” claims. (Compl. ¶¶ 253, 271.) As explained in Disney’s memorandum in support of its Motion to Dismiss, [REDACTED], and it is therefore “integral to the issues raised in the complaint and [may be] treat[ed] as part of the pleadings, notwithstanding the fact that [Fubo] did not attach it as an exhibit.” *Chen v. Antel Commun., LLC*, 2015 WL 5793404, at *3 (E.D.N.Y. Sept. 30, 2015), *aff’d* 653 Fed. Appx. 43 (2d Cir. 2016). Put simply, Fubo cannot avoid [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] For completeness and accuracy, the Court should consider Exhibits 1 and 2 to the Earnhardt Declaration for purposes of Defendants’ Motion to Dismiss under the doctrine of incorporation by reference. *See Thomas*, 232 F. Supp. 2d at 27.

CONCLUSION

Defendants respectfully request that the Court take judicial notice of the documents referenced herein and consider them in deciding Defendants’ Motion to Dismiss.

April 9, 2024

CRAVATH, SWAINE & MOORE LLP,

by

/s/ J. Wesley Earnhardt

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