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)

REDACTED VERSION

ORAL ARGUMENT REQUESTED

DEFENDANT WARNER BROS. DISCOVERY INC.'S
MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

MEMORANDUM OF LAW

Warner Bros. Discovery Inc. ("**WBD**") respectfully submits this Memorandum of Law in support of its Motion to Dismiss Plaintiffs FuboTV Inc and FuboTV Media Inc.'s (together, "**Fubo**" or "**Plaintiff**") complaint, (ECF No. 1, the "**Complaint**") pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rule of Civil Procedure. The Complaint fails to state a claim, and the Plaintiff lacks Article III standing to assert an antitrust claim.

I. PRELIMINARY STATEMENT

Fubo's Complaint is nothing more than a transparent attempt to use litigation to get better commercial terms from its suppliers than it has been able to negotiate at the bargaining table. Fubo claims (incorrectly) that WBD and the other defendants have harmed Fubo, but the antitrust laws protect *competition*, not *competitors*, and Fubo does not allege that competition has been harmed by any alleged conduct by the defendants. And while this is true for all of the defendants, it is especially true for WBD:

- Fubo does not license any sports programming from WBD, and [redacted]. Fubo admits that its decision to stop licensing WBD's sports programming had nothing to do with WBD's rates or other commercial terms.
- Of the four types of antitrust claims that Fubo asserts against the defendants, Fubo asserts only two against WBD. Fubo does not allege that WBD bundled desirable programming with less desirable content, or that WBD has withheld rights to any special features that would enable Fubo to better compete.
- WBD does not have market power even in the implausibly narrow market alleged by Fubo. It has only 9.9% of the alleged market for sports programming, and therefore is incapable of causing the requisite market-wide anticompetitive effect. In fact, while Fubo alleges that Disney and Fox are "dominant" programmers, it does not make such an allegation with respect to WBD.

The two types of claims that Fubo asserts against WBD should be dismissed in their entirety.

First, Fubo challenges defendants' proposed joint venture (the "**JV**"), a new streaming service that will offer sports programming from Disney, Fox, and WBD directly to consumers.

Fubo cannot challenge the planned formation of the JV itself, because it is a new, consumer friendly offering that necessarily *increases* competition. Indeed, the JV will embody the essence of what the antitrust laws encourage: a new competitor that will increase competition, create efficiency, and benefit consumers. Since it will not combine any competing businesses, it cannot itself diminish competition. And Fubo does not allege that the JV will be exclusive, which means that defendants will not be restrained from continuing to license their sports programming to Fubo and many other distributors, as they have done for decades. Fubo instead asserts that defendants will have some amorphous incentive not to license sports programming to Fubo, but offers no support for its speculation. To the contrary, Fubo alleges many facts that directly contradict its prediction. Clear Second Circuit law holds that the Clayton and Sherman Acts are not violated merely because of the *potential* for anticompetitive foreclosure, which is all that Fubo has alleged here.

Second, while Fubo's MFN claims against all defendants are deficient, they are especially so with respect to WBD. WBD's 9.9% of the Plaintiff's absurdly narrowly defined alleged sports programming market is far below the market power required to sustain an antitrust claim. Fubo's claims against WBD are particularly implausible given that Fubo has not even licensed WBD's sports programming [redacted]. Fubo's failure to plead any harm to itself is compounded by an even more clear failure to plead harm to competition in any market. The Complaint's generalized attacks on MFN clauses fall flat because MFN clauses are routine, legitimate contract provisions with recognized procompetitive justifications. [redacted]

For all of these reasons and others, Fubo's Complaint should be dismissed.

II. FACTUAL BACKGROUND[1]

A. Sports Programming Licensing

WBD is an entertainment company and television programmer that acquires the rights to live sports content from major sports leagues through long-term licensing agreements, which sports leagues frequently sell to programmers for billions of dollars. Compl. ¶¶ 46, 172. WBD, however, is a relatively small player in the sports entertainment industry, accounting for only 9.9% of U.S. sports programming. *Id.*[2] ¶ 168. WBD (and other programmers) broadcast that programming on their linear channels. *Id.* ¶ 46. Programmers such as WBD license the rights to distribute those linear channels through carriage agreements with distributors, known as multi-channel video programming distributors ("**MVPDs**"). *Id.* ¶¶ 46–48, 93. Traditional MVPDs are cable and satellite television providers, but in the last decade, consumers have also been able to view live programming through streaming services offered by platforms that provide multi-channel television service via internet connection ("**Virtual MVPDs**"). *Id.* ¶ 47. According to the Complaint, Virtual MVPDs subscribers have grown from almost zero in 2016 "to nearly 20 million subscribers" in 2023. *Id.* ¶ 95.

Fubo is a Virtual MVPD that stopped licensing sports content from WBD in [redacted]—a decision Fubo made, by its own admission, entirely unrelated to WBD's conduct or negotiations with Fubo. *Id.* ¶¶ 82, 118, 134 (stating that Fubo stopped licensing sports content from WBD due to its decision to license sports content from defendant ESPN instead). In comparison to Netflix, which has "200 million subscribers," Fubo had just under 1.48 million subscribers at the end of

[1] This statement of facts is based on the allegations in the Complaint, which are assumed true solely for the purposes of this Memorandum of Law in support of the Motion to Dismiss.

[2] Disney and Fox, in comparison, are alleged to be "Dominant" in the relevant market. *Id.* ¶¶ 51–53.

2023. *Id.* ¶¶ 104, 106. Fubo only licenses "non-sports content from WBD." *Id.* ¶¶ 82, 129. Fubo alleges that as a result of Most Favored Nations ("**MFN**") clauses between WBD and certain other Virtual MVPDs, defendants are not incentivized to offer Plaintiffs lower rates because WBD would then be contractually obligated to match those rates with respect to other Virtual MVPDs, such as Hulu and YouTube TV.[3] *Id.* ¶¶ 130, 215, 228. The Complaint alleges—without support—that as a result of these MFN clauses, Fubo is charged increased rates. *Id.* ¶ 138. However, Fubo importantly fails to allege that WBD has market power in the Sports Program Licensing Market. *Id.* ¶ 168 (showing that WB owns 9.9% of Sports Rights in Sports Program Licensing Market); *id.* ¶ 82 ("Fubo currently licenses non-sports content from WBD.").

WBD also has agreements with various companies for services entirely unrelated to programming licensing, which are separate, mutually beneficial business transactions. *Id.* ¶ 132–33. Fubo alleges without support that in connection with these agreements, "rebates" are paid to Virtual MVPDs that otherwise "agree to content prices, penetration requirements, and other economic terms" that are "more onerous" than those charged to traditional MVPDs. *Id.* ¶¶ 129, 132–33. Notably, the only "rebate" from WBD that Fubo alleges is unrelated to sports programming—an alleged "rebate" that "WBD predecessor Discovery" paid to Hulu. *Id.* ¶ 134. But according to Fubo, "Defendants" have "colluded" with Hulu TV and YouTube TV to "raise content prices and penetration rates for smaller virtual MVPDs like Fubo," *id.* ¶ 128, and "Defendants," in response to Fubo's competitive force in the market, "exploit[ed] their power over commercially critical sports content to frustrate" Fubo's success. *Id.* ¶¶ 6–7. But the only "rebate"

[3] While Hulu and YouTube TV represent a combined 69% of Virtual MVPD subscribers, they account for only roughly 16% of all MVPD (traditional and virtual) subscribers. *Id.* ¶¶ 95, 127.

from WBD that Fubo alleges is unrelated to sports programming—an alleged "rebate" that "WBD predecessor Discovery" (which had no sports programming at all) paid to Hulu. *Id.* ¶ 134.

B. Anticipated Joint Venture

On February 6, 2024, WBD, Walt Disney Company ("**Disney**"), and Fox Corporation ("**Fox**") (together with WBD and Disney, the "**Programmer Defendants**") announced a planned joint venture to create a service that will allow customers to access each entity's sports content through any device with internet connectivity. *Id.* ¶¶ 153, 253. The JV introduces a new competitor into the Virtual MVPD space, focused on providing sports content to customers. *Id.* ¶¶ 153, 155. This introduction of a new product in the direct-to-consumer market is responsive to demand for a "sports-first streaming package." *Id.* ¶ 152. This sports-first streaming package will increase competition by offering consumers an innovative product at a lower cost than the Virtual MVPD options currently on the market. *Id.* ¶¶ 154, 235. WBD, and the other Programmer Defendants, will continue to license their sports content to MVPDs and Virtual MVPDs, and make it available through their own direct to consumer offerings. *Id.* ¶ 18. Programmers such as WBD profit from licensing content to as many MVPDs and Virtual MVPDs as possible, which pay fees to the programmers on a per subscriber basis. *See id.* ¶¶ 105, 194.

Fubo alleges that the creation of the JV will cause WBD, and the other Programmer Defendants, to "raise prices or withhold [certain] sports channels in licensing negotiations with third-party distributors." *Id.* ¶¶ 222, 231, 240, 249. Nowhere does Fubo allege that the JV precludes WBD or the other Programmer Defendants from licensing sports programming content directly to Fubo, nor could it. *See id.* ¶¶ 243–51. The other Programmer Defendants [redacted]. And

regardless, Fubo does not currently license *any* sports programming from WBD, a decision Fubo made irrespective of the JV. *Id.* ¶ 82.

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 . . . 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 1113.

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 (internal quotations omitted).

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.").

IV. ARGUMENT

A. The Allegations in the Complaint are Insufficient to Plead that the JV Violates Section 1 of the Sherman Act or Section 7 of the Clayton Act

The Court should dismiss the Complaint's JV claims because Fubo fails to plead that the JV will harm competition in any market. Even accepting the premise of the Complaint's absurdly narrow definition of a sports programming market, the JV reflects a new and original market entrant, and thus is *procompetitive*. Because the Defendants are not licensing content to the JV on an exclusive basis, the JV cannot restrain trade as a matter of law. Fubo claims that the JV will deter WBD from offering sports programming on competitive terms, but the law is clear that an ambiguous and speculative contention of future possible incentives is not enough to plead the requisite likelihood of competitive harm.

1. Fubo Cannot Plausibly Allege a Sherman Act or Clayton Act Claim Because the JV Itself Does Not Harm Competition

Under Section 7 of the Clayton Act, "[n]o corporation . . . shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of another corporation . . . where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to

create a monopoly." 15 U.S.C. § 18. A joint venture, where the parties acquire stock in a newly created legal entity, is "subject to the regulation of § 7 of the Clayton Act." *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 168–70 (1964); *see, e.g.*, *Julius Nasso Concrete Corp. v. Dic Concrete Corp.*, 467 F. Supp. 1016, 1022–23 (S.D.N.Y. 1979). A plaintiff must show there is a "'tendency' toward monopoly or the 'reasonable likelihood' of a substantial lessening of competition in the relevant market." *Penn-Olin Chem. Co.*, 378 U.S. at 171.

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several states." 15 U.S.C. § 1. To state a Section 1 claim, plaintiffs must allege two elements: "(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) (internal citations omitted). Combinations that are not "inherently anticompetitive"—such as mergers, joint ventures, or other vertical agreements—are evaluated under the "rule of reason" standard, whereby "an inquiry into market power and market structure" is required "to assess the combination's actual effect" on competition. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (citations omitted); *see also N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249, 1259 (2d Cir. 1982) (noting that because "a joint venture can under some circumstances have legitimate purposes" that "they are subject to scrutiny under the rules of reason"). 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 Intern., 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)).

The JV is not anticompetitive because it is non-exclusive. The JV does not restrain WBD from licensing content to Fubo or any other distributor. Fubo does not deny that WBD currently licenses its programming to *hundreds* of distributors, including traditional cable companies, satellite television providers, Virtual MVPDs, and others—and will continue to do so. Courts have consistently recognized that a collective licensing agreement does not "restrain" trade under Section 1 of the Sherman Act where "an alternative opportunity to acquire individual rights is realistically available." *Spinelli v. Nat'l Football League*, 96 F. Supp. 3d 81, 115 (S.D.N.Y. 2015); *see also Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 24 (discussing that the district court found there was no impediment to "obtaining individual licenses," and thus no *per se* violation of the Sherman Act); *Columbia Broad. Sys. Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 620 F.2d 930, 936 (2d Cir. 1980) ("[T]he opportunity to acquire a pool of rights does not restrain trade if an alternative opportunity to acquire individual rights is fully available.").

The *Spinelli* case is particularly instructive here. Plaintiffs in *Spinelli*, professional sports photographers, alleged that the NFL entered into agreements with Getty Images to license rights to NFL content, which forced them to provide complimentary usage of their photos to the NFL. *Spinelli*, 96 F. Supp. 3d at 91–96. In granting the motion to dismiss, this Court held that where a collective licensing arrangement does not "preclude[]" the individual members "from granting an individual license," "a collective licensing agreement may not, ***as a matter of law***, violate Section 1." *Id.* at 114 n.15 (emphasis added). Similarly, here there is no allegation that WBD, or the other Programmer Defendants, are restricted from licensing their sports programming to Fubo, or others, because of the JV. *See* Compl. ¶¶ 243–51. Because WBD is "unimpaired" from "set[ting] competitive prices for individual licenses to a licensee willing to deal with them," the JV is not a restraint of trade. *See Columbia Broad. Sys.*, 620 F.2d at 936.

Contrary to Fubo's assertions, the JV is *procompetitive* because it will reflect a new service for consumers that does not exist today. *See* Compl. ¶¶ 153–55, 235. The JV is not a combination of current competitors that would necessarily reduce competition. This distinction from a typical M&A transaction is critical because enjoining the JV would necessarily *reduce* competition by eliminating a new market entrant.[4] The antitrust laws encourage market entry, new products and services, and increased output. *NCAA v. Board of Regents*, 468 U.S. 85, 102 (1984) ("[E]nabl[ing] a product to be marketed which might otherwise be unavailable . . . widen[s] consumer choice . . . and hence can be viewed as procompetitive."); *U.S. Gypsum Co. v. Indiana Gas Co*., 350 F.3d 623, 627 (7th Cir. 2003) (characterizing "productive efficiencies, higher output, and lower prices" as effects "which the antitrust laws are designed to encourage"); *United States v. Brown Univ.*, 5 F.3d 658, 675 (3d Cir. 1993) ("Enhancement of consumer choice is a traditional objective of the antitrust laws and has also been acknowledged as a procompetitive benefit."); *see also* Areeda & Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 100 ("[T]he general goal of the antitrust laws is to promote 'competition' [and] the principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively while yet permitting them to take advantage of every available economy that comes from internal or jointly created production efficiencies, or from innovation producing new processes or new or improved products."). Research has not revealed any case where a joint venture like this one—

[4] Fubo alleges that the JV somehow increases market concentration, Compl. ¶ 169, but for the reasons set forth in Disney's Memorandum of Law in Support of its Motion to Dismiss, Section I.A.i., these allegations have no merit and should be rejected.

which creates a new market entrant and does not combine any existing competing businesses—violated the Clayton or Sherman Acts.[5]

2. Fubo Lacks Standing Because it Fails to Plausibly Allege that WBD Has Any Incentive to Harm It

Since Fubo cannot credibly claim that the JV itself harms competition, it turns to an alternate, even more specious, theory: that WBD and the other defendants will have a diminished incentive to offer sports programming on competitive terms to Fubo in the future. Compl. ¶ 231. But the Complaint not only fails to support this theory with any facts, its allegations actually support the opposite conclusion and confirm that WBD and the other Programmer Defendants have an economic incentive to license to Fubo.[6] Indeed, Fubo does not adequately plead that WBD has had, or will have, any incentive to prejudice Fubo's growth plans or sales efforts. As Fubo does not currently license sports content from WBD (by its own choosing), Compl. ¶¶ 82, 204, these allegations are even more illogical as applied to WBD. The Complaint does not adequately demonstrate that the JV or WBD will harm Fubo, and thus Fubo does not have standing. *See Lujan*, 504 U.S. at 560; *Makarova*, 201 F.3d at 1113; *Latino Quimica-Amtex S.A. v. Akzo Nobel Chems. B.V.*, 2005 WL 2207017 (S.D.N.Y. Sept. 8, 2005) (dismissing Sherman Act and Clayton

[5] Indeed, the Supreme Court has recognized that in some instances, collaboration between competitors is required to bring a new product or service to the marketplace at all. *See Broad. Music, Inc.*, 441 U.S. at 23 (1979). As the Supreme Court explained, "[j]oint ventures and other cooperative arrangements are also not usually unlawful . . . where the agreement . . . is necessary to market the product at all." *Id.*; *see also Major League Baseball Props. Inc. v. Salvino, Inc.*, 542 F.3d 290, 323 (2d Cir. 2008) (finding that only the joint venture could offer licenses to the intellectual property of more than one baseball team).

[6] In the context of summary judgment, the Supreme Court has required that plaintiffs' theory must make "economic sense." *See Matsushita Electr. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (holding that where plaintiff's antitrust claims "make no economic sense," movants "must come forward with more persuasive evidence to support their claims than would otherwise be necessary").

Act claims, pursuant to Rule 12(b)(1), where plaintiffs did not adequately plead injury and standing).[7]

As an initial matter, [redacted], Fubo unilaterally chose to discontinue licensing WBD's sports programming, and Fubo admits that its decision was unrelated to WBD's rates or other offered licensing terms. *See* Compl. ¶¶ 82, 204. Fubo does not claim that WBD has ever refused to negotiate since that time, or that WBD refused to offer competitive terms. Further, Fubo's claim that WBD and others restrained Fubo's growth plans, *see id.* ¶¶ 7, 105–06, 108, is unsupported, and makes no economic sense. Instead, Fubo is correct when it alleges that "Defendants themselves have profited from Fubo's growth and success." *Id.* ¶ 105.

Programmers earn more income when their distributors grow—the more subscribers a distributor has, the more its programmers earn. WBD has a clear incentive to see Fubo (and other distributors) increase their resale of WBD's programming, and to license its content to as many MVPDs and Virtual MVPDs as possible. *See In re Application of MobiTv, Inc.*, 712 F. Supp. 2d 206, 213 (S.D.N.Y. 2010) ("[N]etworks simply license as many distributors of their programming as they can to reach as many viewers as possible in order to maximize their return."), *aff'd sub nom*, *Am. Soc'y of Composers, Authors & Publishers v. MobiTV, Incorporation*, 681 F.3d 76 (2d Cir. 2012); *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 243–44 (D.D.C. 2018) (finding that the Government's "unilateral theory" that AT&T "would [not] have [an] incentive to license Time Warner content to virtual MVPDs after the merger" is fatal, in part because "wide distribution is the *sine qua non* of the programming industry, driving both subscription and advertising revenue"), *aff'd sub nom*, *United States v. AT&T, Inc.*, 916 F.3d 1029 (D.C. Cir. 2019); *United States v.*

[7] WBD incorporates by reference the arguments set forth in Fox's Memorandum of Law in Support of its Motion to Dismiss, Section I, regarding standing.

AT&T, Inc., 916 F.3d at 1044 ("[W]hen a programmer and distributor merge, it is still in the best interests of the merged entity as a profit maximizer to license programming broadly to other distributors. That is, instead of withholding content in an attempt to benefit the merged entity, programmers will seek to license their content to other distributors.").

The commodity at issue is not a limited good—every additional viewer only creates more revenue and profit. And because the JV will not have exclusive rights to the defendants' sports programming, WBD will not have to choose between selling to the JV, or other MVPDs or Virtual MVDPs, such as Fubo. This Court has previously treated with skepticism allegations that programmers would have an incentive to foreclose content to MVPDs. *See AT&T Inc.*, 310 F. Supp. 3d at 243 (finding that a claim a programmer would have the incentive to restrict Virtual MVPDs' access to valuable content "is a curious claim, to say the least" because "it would be 'profitable' for the merger entity to continue to license Time Warner content to virtual MVPSs"); *see also AT&T, Inc*., 916 F.3d at 1043 (finding broadcasters have an "interest in spreading its content among distributors" because it "would redound to the merged firm's financial benefit"). As the allegations in the Complaint demonstrate, WBD has every incentive to license its programming to as many MVPDs and Virtual MVPDs as possible, including Fubo. This is especially true for WBD's sports content, because, as Fubo admits, WBD must pay high upfront costs to acquire the "expensive" broadcasting rights from sports leagues and associations. Compl. ¶ 172.

Fubo claims cryptically that its growth might somehow disrupt some status quo that currently benefits defendants, but does not explain why the Programmer Defendants would forego concrete sales and revenue today because Fubo might someday become a large customer later. Fubo admits that Programmer Defendants have historically profited from Fubo's growth, *id.* ¶ 105,

but does not explain why further growth would suddenly prejudice defendants. *Id.* ¶¶ 7, 106, 108. By Fubo's own admission, other Virtual MVPDs such as YouTube TV and Hulu have grown substantially, *id.* ¶¶ 95, 110, 127, but Fubo does not explain why WBD would permit their growth while now blocking Fubo's growth. And any purported fear that Fubo will become "the next Netflix" appears ungrounded: Fubo says that Netflix has "200 million subscribers," which is in comparison to Fubo's roughly 1.48 million at the end of 2023. *See id.* ¶¶ 6, 104, 106–07.

Finally, Fubo alleges that it sought to offer a "skinny package" of sports-centric programming to consumers, but was unable to do so because programmers required Fubo to license other content in a bundle with sports programming. *Id.* ¶¶ 8, 118, 213, 259, 268. But since Fubo does not allege that WBD bundled sports and other content, and Fubo does not even license any sports content from WBD today, WBD could not prejudice Fubo's effort to offer a sport-centric streaming service. Additionally, while Fubo claims that it wished to offer a "skinny package" of "sports centric" services, [redacted][8] In sum, Fubo's JV claims are based on nothing more than speculation, and as specifically applied to WBD—not grounded in reality.

3. WBD's Conduct Cannot Harm Competition

Even if the JV caused a reduced incentive to license content to Fubo at the rates that Fubo prefers (which it does not), that is far from adequately pleading that *competition* would be harmed as a result. Fubo must adequately plead that WBD's conduct has a "tendency toward monopoly"

[8] The Court may consider the terms of this agreement because they are incorporated by reference and integral to the complaint. *See Nghiem v. United States Dep't of Veteran Affairs*, 451 F. Supp. 2d 599, 603 (S.D.N.Y. 2006).

or the "reasonable likelihood" that competition would be substantially lessened in the whole market under Section 7 of the Clayton Act. *See Penn-Olin Chem. Co.*, 378 U.S. at 171; *see also Fruehauf Corp. v. FTC*, 603 F.2d 345, 354 (2d Cir. 1979) (holding that a Section 7 violation may not be shown merely because of the *potential* for anticompetitive foreclosure). Similarly, under Section 1 of the Sherman Act, Fubo must sufficiently allege that "the challenged action"—here, the JV—itself "had an actual adverse effect on competition as a whole in the relevant market." *Tops Mkts., Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 96 (2d Cir. 1998); *see, e.g.*, *In re Google Digital Advert. Antitrust Litig.*, 627 F. Supp. 3d 346, 377 (S.D.N.Y. 2022) (dismissing claim under Section 1 of the Sherman Act because plaintiffs did not "plausibly allege that defendant's challenged behavior had an adverse effect on competition as a whole in a relevant market."). Fubo plainly fails to meet either test here.

As Fubo has not shown an actual adverse effect caused by the JV, it is required to establish that WBD has market power such that it would have the "capacity to inhibit competition." *K.M.B. Warehouse Distributors, Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995); *see also Tops Mkts., Inc.*, 142 F.3d at 96. Fubo admits that WBD accounts for only 9.9% of the alleged relevant market and does not allege that WBD is "dominant." *See* Compl. ¶¶ 51–53, 168. Therefore, even if WBD had a diminished incentive to license to Fubo, it could not as a practical matter harm competition generally in the alleged market because it does not have market power. *See In re Wireless Tel. Servs. Antitrust Litig.*, 385 F. Supp. 2d 403, 418 (S.D.N.Y. 2005) (stating 30 percent market share is the "minimum" needed 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 30% to 40% market share is inadequate for demonstrating market power); *In re Amazon.com, Inc. eBook Antitrust Litig.*, 2023 WL 6006525, at *25 (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*") (finding 35% market share did not establish market power). Where Fubo's speculative injuries are based not on the JV itself, but on how WBD might behave in the future in light of the JV, the Complaint does not adequately allege that WBD's conduct will substantially harm competition and should be dismissed for failure to state a claim.

B. Fubo Fails to Plead Antitrust Claims Based on WBD'S MFN Clauses

Fubo's antitrust claims against WBD's MFN clauses should also be dismissed for several reasons. First, Fubo fails to plead that WBD's MFN clauses caused an overall harm to competition, which it must do for its complaint to survive. WBD's 9.9% sports programming market share is far below the level of market share necessary for market power, and thus not enough to cause the requisite market-wide anticompetitive effect. Second, Fubo fails to adequately plead that WBD's MFN clauses with Hulu and YouTube TV could have deterred WBD from offering lower rates to Fubo, since those agreements could cover at most *only 16%* of the approximately 80 million subscribers served by traditional and Virtual MVPDs. *See* Compl. ¶¶ 95, 127, 175. Simply put, WBD is too small for its distribution agreements or conduct to harm the market.

Beyond these two fatal flaws, Fubo also fails to plead that absent the MFN clauses, WBD would have offered lower rates to Fubo. Fubo's MFN claims lack merit in light of the facts that: (1) [redacted];[9] (2) Fubo has not carried any WBD sports programming [redacted], *see* Compl. ¶ 82; and (3) Fubo does not allege that WBD ever refused to license sports content [redacted] or that

[9] [redacted]

WBD's rates impacted Fubo's choice not to carry WBD's sports programming. These facts reveal that Fubo's MFN claim against WBD is meritless and pretextual.

1. MFN Clauses are Typically Procompetitive and Lawful

Vertical agreements between companies at different levels of a distribution chain—like WBD's agreements with distributors—are subject to the rule of reason, and thus deemed unlawful only if 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); *Tops Mkts., Inc.*, 142 F.3d at 96; *In re Amazon.com, Inc. eBook Antitrust Litig.*, 2022 WL 4581903, at *22 (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*"). To survive a Rule 12(b)(6) motion, Fubo's Complaint must plausibly allege this market-wide anticompetitive effect either (1) directly, by plausibly alleging "higher prices, reduced output, or lower quality in the market as a whole"; or (2) indirectly, by establishing that the defendant "had sufficient 'market power' to cause an adverse effect . . . [on] competition." *MacDermid Printing Sols. LLC v. Cortron Corp.*, 833 F.3d 172, 182 (2d Cir. 2016); *see also Tops Mkts., Inc.*, 142 F.3d at 96.

Courts and observers have consistently recognized the legitimate economic benefits of MFN clauses. 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.").

Fubo's allegations, and WBD's low market share, present completely different facts than the cases in which courts have found liability based in part on MFN clauses. Research has not revealed a case in which liability under Section 1 of the Sherman Act was found 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 allege 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 (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 v. Blue Cross & Blue Shield of Kansas*, 899 F.2d 951, 970–72 & n.30 (10th Cir. 1990) (affirming a jury finding of monopolization, where MFN clause contributed to Blue Cross's market or monopoly power); *United States v. Delta Dental of Rhode Island*, 943 F. Supp. 172, 180

(D.R.I. 1996) (denying motion to dismiss where defendant's "alleged market power [was] one important factor" in assessing the effects of its MFN clause). That is not the case here.

2. Fubo Does Not Adequately Plead Harm to Competition

As noted above, Fubo must plead either direct evidence of higher prices, reduced output, or lower quality in the market as a whole, or indirectly, or by establishing that the defendant "had sufficient market power to cause an adverse effect on competition." *Tops Mkts. Inc.*, 142 F.3d at 96; *see also MacDermid*, 833 F.3d at 182. Fubo does neither.

a. Fubo Fails to Plead Direct Evidence of Harm to Competition

Fubo fails to plead direct evidence of market-wide harm because its allegations are either conclusory, improper group pleading, or address alleged harm to Fubo only. Mere conclusory allegations are insufficient to state a claim for relief that is plausible on its face. *Twombly*, 550 U.S. at 555, 557, 570. References to "Defendants" are properly ignored because, as noted *supra*, 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.

Fubo's attempts to plead direct evidence of harm to competition essentially boil down to allegations that MFN clauses cause *Fubo* to pay prices that are higher than it would prefer. *See* Compl. ¶ 110. 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). And because the antitrust laws protect competition as a whole, not competitors, evidence that a plaintiff "has been harmed as an individual competitor" are 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)). This requirement "ensures that otherwise routine disputes between business competitors do not escalate to the status of an antitrust action." *Tops*

Mkts. Inc., 142 F.3d at 96; *see also Wellnx Life Scis. Inc. v. Iovate Health Scis. Rsch. Inc.*, 516 F. Supp. 2d 270, 294 (S.D.N.Y. 2007) (granting motion to dismiss Section 1 claim where plaintiff failed to adequately allege market-wide harm to competition). Fubo therefore fails to allege direct evidence of anticompetitive harm.

b. Fubo Fails to Plead Market Power

Given that Fubo does not plead direct evidence of anticompetitive harm, it must plead the existence of a relevant market and market power. Fubo fails to do so.

Fubo does not allege that WBD possesses market power in any alleged relevant market. Fubo admits that WBD accounts for only *9.9%* of the alleged "Sports Program Licensing Market." Compl. ¶ 168.[10] This is far below the level required by courts to establish market power. *See In re Wireless Tel. Servs. Antitrust Litig.*, 385 F. Supp. 2d at 418 ("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.*, 985 F. Supp. 2d at 622 (noting market share between 30% and 40% was inadequate to demonstrate market power); *Amazon eBooks II* at *25 (holding market share of 35% at most was insufficient to show market power).[11]

[10] Notably, while Fubo alleges that Disney and Fox are "dominant," Fubo makes no such allegation as to WBD. *See* Compl. ¶¶ 51–53.

[11] Even if WBD had entered into an exclusive agreement with another distributor, such that WBD was completely restricted from licensing any content to Fubo (which it has not), it would still have been lawful in light of WBD's small share. *See Geneva Pharms. Tech. Corp. v. Barr Lab'ys Inc.*, 386 F.3d 485, 508 (2d Cir. 2004) ("Exclusive dealing is an unreasonable restraint of trade and a § 1 violation only when the agreement freezes out a significant fraction of buyers or sellers from the market."); *In re Mylan N.V. Sec. Litig.*, 666 F. Supp. 3d 266, 291 (S.D.N.Y. 2023) ("There are certain factual bases that must be satisfied to challenge an exclusive dealing contract. Under either Section 1 or Section 2 [of the Sherman Act], it is required that plaintiffs 'present strong evidence' not just of effect but, specifically of substantial market foreclosure."). Here, Fubo admits that WBD had previously licensed sports content to Fubo, and Fubo does not claim that WBD refused

Fubo tries to compensate for the absence of WBD's market power with general allegations of Defendants' market shares in the aggregate. But this Court and others have held that each vertical agreement must be addressed separately, and that grouping agreements for purposes of determining market power is not appropriate. *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); *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."); Order Granting in Part and Denying in Part Defendant's Motions to Dismiss, ECF No. 30, *Radikal Records, Inc. v. Warner Music Group 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).[12]

c. The Hulu and YouTube TV MFN Clauses Cannot Harm Fubo or Competition

Fubo also does not plead that any MVPD or Virtual MVPD possesses market share sufficient for its MFN agreements with WBD to potentially cause harm to competition. Fubo alleges 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 MFN agreements with those two distributors. *See, e.g.*, Compl. ¶¶ 215, 228. But Fubo's allegation would only make sense if Hulu and YouTube TV accounted for a high percentage of WBD's sales, which Fubo does

---

to continue licensing sports content to Fubo [redacted]. If a complete refusal to sell would have been lawful, then certainly a sale at any price would similarly be lawful. *Geneva Pharms. Tech. Corp.*, 386 F.3d at 508.

[12] Fubo includes a brief allegation that absent the joint venture, the defendant programmers would independently compete with direct-to-consumer services. Compl. ¶ 223. But Fubo admits that WBD already offers Max, a direct-to-consumer service that includes sports programming, Compl. ¶ 79, so this claim makes no sense.

not plead. While Fubo alleges that Hulu and YouTube TV together account for 69% of *virtual* MVPD subscribers (approximately 12.6 million), this does not account for the many large *traditional* MVPD distributors that also may carry WBD's sports programming—which, according to Fubo's complaint, appear to account for almost 60 million subscribers. Compl. ¶¶ 95, 127. When those distributors are accounted for, Hulu and YouTube TV would account for only *approximately 16%* of programming distribution to MVPDs—a far cry from the high market share required to support Fubo's MFN claim. *See Delta Dental of Rhode Island*, 943 F. Supp. at 180 (granting motion to dismiss where complaint alleged that single defendant "possesse[d] significant market power" and the "alleged market power [was] one important factor" in assessing the effects of defendant's MFN clause, which defendant "applie[d] . . . selectively to block alternative reduced-fee plans from the dental insurance market"); *Amazon eBooks II* at *2 ("Amazon enjoys nearly 90% of the eBook market and its closest competitor, Apple, has a distant 6% share.") (quotations omitted); *Reazin*, 899 F.2d at 969 (evidence that defendant had market share of between 47 and 62 percent was sufficient to support jury's finding of market power).[13]

d. Fubo's "Rebate" Allegations Are Irrelevant

Fubo attempts to bolster its meritless MFN claims by alleging that its competitors enjoy better terms from Programmer Defendants through "rebates" and favorable terms on services offered by Hulu and YouTube TV. But the single specific example of an alleged "rebate" by WBD is irrelevant because it does not involve sports programming. Compl. ¶ 134. The remaining allegations regarding these alleged "rebates" are conclusory claims about defendants generally,

[13] The Complaint suggests in passing, Compl. ¶¶ 122, 286, 311, the possibility of a horizontal agreement between the Defendants regarding their licensing of sports programming, but since the Complaint offers no facts or specific allegations of any such agreement, any such claim is without merit and properly ignored. *See Iqbal*, 556 U.S. at 678.

which must be ignored as improper group pleading, *see Atuahene*, 10 F. App'x at 34, and they do 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 apart from its programming relationship. Fubo does not allege (and cannot allege) that this is improper in any way. Accordingly, Fubo's "rebate" allegations are nothing more than an irrelevant red herring, and do not support its groundless MFN claims.

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

Not only does Fubo fail to plead harm to competition based on the MFN clauses, but Fubo also fails to 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") (internal quotations omitted). Fubo claims that the MFN clauses and "rebates" have caused Fubo to pay rates that are higher than Hulu's or YouTube TV's rates, Compl. ¶¶ 127–28, 131, but even assuming that was true (as WBD must for the purposes of this motion), Fubo fails to allege that its rates would have been different if WBD did not agree to the MFN clauses. *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 [redacted]. Fubo could not have suffered any of the alleged harm attributable to WBD's MFN clauses with other distributors during [redacted], because Fubo was not paying for 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 [redacted], or that WBD's rates had any impact on Fubo's choice to not renew that agreement.[14]

While the rates that Hulu and YouTube TV allegedly pay are lower than what Fubo paid [redacted], 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 there is any affirmative obligation under the antitrust laws for WBD 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.") (internal quotations omitted); *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*

[14] Fubo alleges that it was unable to license content from WBD because of Disney/ESPN's and Fox's bundling practices. Compl. ¶ 118.

v. Colgate & Co., 250 U.S. 300, 307 (1919)); American Bar Association, 1-1 Antitrust Law Developments 1D-1-b-(5) (9th ed. 2024) ("Terminating or refusing to deal with a downstream firm rarely raises antitrust concerns.").

Fubo's claims reflect nothing more than the grievances of a company that seeks to litigate better rates and terms rather than compete for them in the marketplace. *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 . . . .") (internal quotations omitted). Fubo's broad, sweeping condemnation of MFN clauses falls particularly flat given that [redacted]. Fubo admits that MFN clauses are common in the industry, and has failed to plausibly allege that they are unlawful here.

V. CONCLUSION

For the foregoing reasons, WBD respectfully requests that the Court dismiss Plaintiffs' Complaint in its entirety 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.

Dated: April 9, 2024
New York, NY

Respectfully submitted,

/s/ David L. Yohai

WEIL, GOTSHAL & MANGES LLP
David L. Yohai
Adam C. Hemlock
Theodore E. Tsekerides
Robert W. Taylor
Elaina K. Aquila

767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
david.yohai@weil.com
adam.hemlock@weil.com
theodore.tsekerides@weil.com
robert.taylor@weil.com
elaina.aquila@weil.com

Counsel for Warner Bros. Discovery Inc.