UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FUBOTV INC. and FUBOTV MEDIA INC.,

Plaintiffs,

-against-

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

Defendants.

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

PLAINTIFFS' OPPOSITION TO FOX CORPORATION'S MOTION TO SEVER CLAIMS AND TRANSFER VENUE

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Fox has availed itself of this forum for more than seven months to seek dismissal of and discovery into all of Fubo's claims. It now asserts for the first time that a forum-selection clause in a carriage agreement its affiliates entered with Fubo requires that some of those claims be severed and transferred to the Central District of California. In April 2024, Fox moved to dismiss all claims in Fubo's complaint without even mentioning the forum-selection clause, let alone seeking to sever or transfer claims. It then participated in three months of "intense but expedited discovery" regarding Fubo's motion for preliminary injunction, during which Fox took broad discovery into *all* of Fubo's claims—as well as apparent counterclaims that Fox is trying to develop against Fubo. Only after this Court expressed significant doubts regarding some of Fox's dismissal arguments—and granted Fubo's preliminary injunction motion barring Fox's participation in an anticompetitive joint venture—has Fox now raised the possibility of severance and transfer. The Court should reject Fox's attempt to forum-shop mid-case, which would significantly prejudice Fubo and harm the public interest in the efficient adjudication of this important antitrust case.

First, Fox has waived any request to sever and transfer any of Fubo's claims by litigating those same claims in this forum without challenging venue, and by changing course only after learning that the Court was skeptical of some of Fox's arguments on the merits. Courts routinely rule that a party waives the ability to enforce a forum-selection clause by intentionally delaying a transfer request until after the party previews a district court's thinking or otherwise avails itself of the forum to litigate the claims that party seeks to transfer. Any other rule would invite open forum-shopping—allowing litigants like Fox to delay invoking a forum-selection clause until it suspects it could achieve a better result in a different forum.

Second, the forum-selection clause in the Fox-Fubo carriage agreement applies only to claims [redacted] Courts in this district have construed similar language to cover claims for breach of contract, not statutory claims like Fubo's antitrust claims. That clause has no application to Fubo's claims based on "most-favored-nation" clauses in Fox's agreements with *other* distributors (which of course cannot be subject to a forum-selection clause in Fubo's agreements with Fox), or Fox's anticompetitive business practice of requiring Fubo (and other distributors) to bundle sports and non-sports content.

Third, the interests of justice weigh strongly against severance and transfer. As this Court has recognized, there is significant overlap between Fubo's claims related to Defendants' Joint Venture (which Fox does not seek to transfer) and the bundling claims Fox seeks to transfer. There is also significant overlap between Fubo's bundling and MFN claims against Fox and nearly identical claims that Fubo has brought against other Defendants. The parties have already expended significant time and resources taking discovery pertinent to *all* of these claims and are set to proceed to a trial next fall. In these circumstances, Fox's untimely severance and transfer request would waste judicial resources; increase costs to the parties and third-party witnesses; and undermine the proper and efficient adjudication of this an important antitrust case.

BACKGROUND

On February 20, 2024 Fubo sued Fox Corporation ("Fox"), The Walt Disney Company and three of its affiliates (collectively, "Disney"), and Warner Bros. Discovery ("WBD"), alleging violations of New York and federal antitrust laws. Both Fubo and Fox are headquartered in New York City. *See* Doc. 291 at 7. Fubo's complaint challenges Defendants' "multifaceted campaign to frustrate Fubo's innovative sports-first streaming business," which includes "*first*, using their power over commercially critical sports content to force Fubo to broadcast unwanted, expensive content that prevents Fubo from offering the sports-centric

package of channels that its customers want; *second*, imposing artificial, above-market prices and other economic terms on Fubo through a web of most-favored-nation ('MFN') clauses in their contracts with Fubo's competitors; and *third*, and most recently, assuring that this campaign would culminate in a total freeze-out by announcing a Joint Venture ('JV') that will combine rights to most commercially critical sports content in a single entity." *Id.* ¶¶ 1-2. As this Court has recognized, the different aspects of Defendants' anticompetitive campaign overlap with and reinforce each other: Defendants force all third-party distributors (including Fubo) to bundle sports and non-sports content, but have agreed to exempt their JV from that anticompetitive constraint, giving the JV an insuperable competitive advantage and driving others out of the market. *See* Doc. 291 at 47.

On April 8, Fubo sought a preliminary injunction to block the JV. *See* Doc. 94. The next day, Fox moved to dismiss Fubo's complaint "in its entirety," arguing that all of Fubo's claims were legally invalid. Doc. 120 at 1. Fox's motion did not mention the forum-selection clause. On April 10, Fox and other Defendants moved to stay Fubo's claims pending resolution of their motions to dismiss. *See* Doc. 128. Their motion to stay again did not refer to any venue issue. That same day, the parties submitted a joint Proposed Civil Case Management Plan; Fox's portions included proposals for both preliminary injunction and merits discovery if the Court denied a stay. *See* Doc. 123-1 at 7-8 (Fox proposing a "merits fact discovery" period of "12 to 18 months"); *id.* at 12-13 (Fox proposing "4 to 6 months" for expert discovery). The accompanying joint letter included a section on "Contemplated Motions," which referenced Fox's motion to dismiss. It did not mention any motion to sever or transfer. *See* Doc. 123 at 3.

One week later, after reviewing the Defendants' motions to dismiss, this Court said at a status conference that "I think it's very unlikely that the motions to dismiss would result in a

complete dismissal of the complaint." Apr. 16, 2024 Hr'g Tr. at 3:15-17. On April 29, 2014, Fubo filed an amended complaint alleging an additional antitrust market but no additional causes of action against Fox or any other Defendant. *See* Doc. 145. The Court stayed Fox's deadline to file a renewed motion to dismiss until after the Court had decided Fubo's PI motion. *See* Doc. 137.

After the Court ordered pre-hearing discovery on Fubo's preliminary injunction motion, Fox sought discovery into a broad array of topics concerning all of Fubo's claims—not just the JV. For example, Fox served broad requests for production seeking "all Documents Concerning or Regarding efforts by Fubo to license any Programmer's Sports Programming separate from Non-Sports Programming and vice versa," "All Documents Concerning or Regarding competition between Fubo and any other distributor," "Documents sufficient to show any efforts by Fubo to obtain live sports media rights from any sports leagues or teams," and "Any Communications You have had with any Third Party Regarding the Action"—defined as the lawsuit that Fubo brought against Fox and other Defendants. Ex. 1 at 11-13. Fox sought similarly broad discovery in subpoenas it issued to Sony, Netflix, T-Mobile, and Paramount Global. *See* Exs. 2-5. Fox recognized the broad scope of discovery, asserting at the May 31, 2024 status conference that "we are producing an enormous amount of information" and there was "more than enough evidence in the record . . . about the terms [on which] defendants offer content to . . . distributers." May 31, 2024 Hr'g Tr. at 11:7-14.

Fox's counsel also questioned witnesses about Fubo's claims regarding bundling and MFN clauses. *See, e.g.*, Ex. 6 (Gandler Dep.) at 176:1-180:18 (Fox's counsel questioning Fubo's CEO about MFN clauses); *see also id.* at 27:14-29:8 (questioning Fubo's CEO about requests for unbundled sports content); 35:15-36:22 (same); 37:19-38:21 (same); 58:13-18

(same); 29:11-35:24 (questions about importance of non-sports content to Fubo); 60:14-71:16 (same); 137:11-154:18 (questions about consumer demand for bundled content); 160:10-175:4 (same); 159:6-18 (questions about bundling requirements in carriage agreements with Disney, WBD, and NBC); 187:20-188:12 (questions about effect that Fubo's small size on its ability to obtain fair prices); Ex. 7 (Janedis Dep.) at 139:3-146:13 (Fox counsel questioning Fubo's CFO regarding Fubo licensing content "from programmers like Disney and Fox and NBC Universal and Warner Brothers, Discovery and Paramount"); 168:19-170:22 (questions regarding bundling); 214:19-218:14 (similar); 248:9-251:10 (similar questions about bundling); 205:9-25 (questions regarding "other major content providers with whom you have failed to renegotiate your carriage agreements"); 206:5-20 (questions regarding [redacted]); 218:15-219:8 (questions regarding "restrict[ions]" in "existing carriage agreements with . . . programmers that are not parties in this case"); Ex. 8 (Trautman Dep.) 248:24-249:17 (Fox's counsel asking Fubo's industry expert about MFN clauses); Ex. 9 (Schanman Dep.) 70:13-80:6 ([redacted]).

Indeed, many of Fox's deposition questions had little to do with any of Fubo's claims against Defendants, but instead focused on potential counterclaims that Fox was apparently trying to develop, such as [redacted] under the parties' carriage agreements and a sublicensing deal between Fubo and Fox for UEFA soccer feeds. *See, e.g.*, Ex. 7 (Janedis Dep.) at 36:25-38:21 (Fox's counsel asking whether Fubo must [redacted] and whether it is Fubo's [redacted]); 37:20-42:18 (asking Fubo's purported [redacted]); 42:19-45:18 (asking about [redacted]

[redacted]); 48:19-49:6 (asking [redacted]); 224:10-228:7 (asking about whether "any content partners [have] pursued litigation against Fubo on account of Fubo not making its payments"); Ex. 10 (Mathers Dep.) at 300:18-302:20 (similar questions about audits); Ex. 6 (Gandler Dep.) at 40:4-45:17 (Fox's counsel asking Fubo's CEO about UEFA sublicensing deal); 79:11-17 (same); 88:15-89:17 (questions about Fubo's alleged [redacted]); 76:16-78:25 (questions about specific customer complaints to Fubo).

Fox not only took broad discovery into Fubo's bundling allegations, but also pinned its defense against Fubo's preliminary injunction motion to the factual contention that Fox does not require third-party distributors like Fubo to bundle its sports and non-sports content—the central factual issue underlying Fubo's bundling claims. *See* Aug. 7, 2024 Hr'g Tr. at 381:15-383:10 (the Court expressing "surprise" that Defendants had pressed the "factual dispute about [their] business practices related to what we have generally been referring to as bundling"). As a result, Fox's bundling practices were thoroughly explored during discovery and at the PI hearing.

In August 2024, this Court enjoined the proposed Joint Venture, finding that, based on the record before it, "the evidence is overwhelming" that the Joint Venture "will tend to produce anticompetitive effects in a relevant market." Doc. 291 at 54. In so ruling, the Court noted that, while Fubo's tying claims were not before the Court on the PI motion, "the fact of bundling is very relevant to the factual context of this case in which the Court has to decide whether the proposed JV violates the antitrust laws," and that it was "difficult to avoid the conclusion that, on balance, [Defendants' bundling] practices are bad for consumers." *Id.* at 45, 54-55 n.37.

In the wake of the Court's PI ruling, Fox informed Fubo for the first time on September

9, 2024 that it would move to sever Fubo's bundling and MFN claims from the rest of the case and transfer those claims to the Central District of California, based on a forum-selection clause in the carriage agreement between Fox's affiliates (Fox Cable Network Services, LLC, Fox News Network L.L.C, and Fox Television Holdings, LLC) and Fubo. That provision states:

Doc. 109-3 at 36.

At the September 12, 2024 status conference, Fox obtained additional information about the Court's views regarding Fubo's claims. At that conference, counsel for Disney (speaking for all Defendants) previewed Defendants' motion-to-dismiss argument that "the *Brantley* . . . case in the Ninth Circuit has already considered tying claims in this industry that will, obviously, be part of our motion to dismiss." Sept. 12, 2024 Hr'g Tr. at 13:2-4. This Court replied, "I have read *Brantley*, and – it is a very different context than this case. So I certainly think it's a relevant case, but given that it's a motion to dismiss and a case brought by consumers, with no discovery, you know, I don't think it's dispositive of this case. That's my view right now. I am keeping an open mind, obviously, about your motions to come." *Id.* at 13:5-11.

On September 16, 2024, Fox moved to sever Fubo's bundling claims (Counts IV, VI, XII, and XIII) and MFN claims (Counts VIII and XIV) and transfer those claims to the Central District of California. *See* Doc. 309. In that motion, Fox acknowledged that Fubo's joint venture claims (Counts I, II, and XI) are properly before this Court and should remain here. *See*

id.[1] On September 20, even after its motion to transfer, Fox joined in a brief to the Second Circuit in which it cited *Brantley* and urged that court to rule that "bundling practices in the cable TV industry are 'fully consistent with a free competitive market.'" Br. of Defs.-Appellants at 44-45, *fuboTV Inc., et al. v. The Walt Disney Co., et al.*, No. 24-2210, Doc. 67 (2d Cir. Sept. 20, 2024) (quoting *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1202 (9th Cir. 2012)).

ARGUMENT

Section 1404(a) authorizes a court to transfer an action to another federal district "[f]or the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). Generally, in determining whether to transfer an action, a court should consider "a number of factors, commonly referred to as 'private' and 'public-interest' factors," the "weighing [of which] is essentially an equitable task left to the Court's discretion." *Pence v. Gee Grp., Inc.*, 236 F. Supp. 3d 843, 850 (S.D.N.Y. 2017) (citation omitted). When a party seeks to transfer claims pursuant to a forum-selection clause, the court determines whether the clause is enforceable and applicable to the claims at issue. *See id.* If so, the court "must deem the private-interest factors to weigh entirely in favor of the preselected forum" and "may consider arguments about public-interest factors only." *Id.* (quoting *Atlantic Marine Contsr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex*., 571 U.S. 49, 64 (2013)).

[1] Fox's actions are consistent with the attempts of other Defendants to ensure that disputes over its licensing agreements will not be adjudicated in this Court. According to DIRECTV, during recent carriage negotiations with Disney, Disney demanded that DIRECTV agree that "any future lawsuits resulting from DIRECTV/Disney licensing agreements would be adjudicated in California – and not New York – because – as Disney counsel specifically stated – SDNY Judge Garnett 'didn't understand the issues' when granting a preliminary injunction against Disney's Venu Sports." DIRECTV, Press Release (Sept. 1, 2024), https://www.directv.com/insider/unbundle-disney-2/.

Where a party seeks to transfer only certain claims that are part of a larger action, it must first persuade the court to sever the claims under Federal Rule of Civil Procedure 21. That is because § 1404(a) "authorizes the transfer only of an entire action and not of individual claims." *Wyndham Assocs. v. Bintliff*, 398 F.2d 614, 618 (2d Cir. 1968). Accordingly, to transfer only certain claims, a court must first sever them, create "two or more separate 'actions,'" and then "transfer certain of such separate actions while retaining jurisdiction of others." *Id.* "The decision whether to grant a severance motion [Under Rule 21] is committed to the sound discretion of the trial court." *A & E Prods. Grp. v. The Accessory Corp.*, 2002 WL 1041321, at *1 (S.D.N.Y. May 23, 2002) (quoting *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1082 (2d Cir. 1980)). "The moving party bears the burden of demonstrating that 'severance is required to avoid prejudice or confusion and to promote the ends of justice.'" *N. Jersey Media Grp. Inc. v. Fox News Network, LLC*, 312 F.R.D. 111, 114 (S.D.N.Y. 2015) (citation omitted). Federal courts "view severance as a procedural device to be employed only in exceptional circumstances." *Oram v. SoulCycle LLC*, 979 F. Supp. 2d 498, 503 (S.D.N.Y. 2013).

Here, severance and transfer are inappropriate for three independent reasons. *First*, Fox waived any right to sever and transfer Fubo's bundling and tying claims when it chose to litigate these claims in this Court for more than seven months, seeking to dismiss Fubo's claims on the merits and taking broad discovery into those claims. It reversed course only after the Court granted a preliminary injunction on Fubo's related JV claims and cast doubt on Fox's defenses.

Second, even if Fox could enforce the forum-selection clause, it does not apply to Fubo's statutory antitrust claims because they are based on Fox's anticompetitive business practices, not on any breach of contract. Indeed, many of Fubo's claims are based on Fox's MFN clauses in its

contracts with *other* parties (such as YouTube TV and Hulu + Live TV), which cannot be subject to any forum-selection clause in Fox's carriage agreement with Fubo.

Third, even if the forum-selection clause applies to Fubo's claims and Fox did not waive enforcement of that clause, the strong public interests in litigating these important antitrust claims in a single forum outweigh any private interests in severance and transfer. If granted, Fox's request to simultaneously litigate in two forums would undermine the efficient and uniform enforcement of antitrust laws, increase the risk of inconsistent verdicts, waste judicial resources, increase costs on non-parties (as well as parties not subject to the forum-selection clause), delay the resolution of this publicly important antitrust case, and harm this forum's interest in adjudicating New York state law claims between two New York companies concerning anticompetitive conduct that harms New York consumers.

I. Fox Waived Any Right to Transfer By Intentionally Delaying Its Transfer Motion

Fox waived its right to seek enforcement of the forum-selection clause by actively participating in this litigation for many months in the Southern District of New York, including by asking this Court to dismiss all of Fubo's claims (twice) and by developing its defenses to Fubo's bundling and MFN claims (as well as apparent counterclaims) during PI discovery. Fox moved to sever and transfer Fubo's bundling and MFN claims only after this Court entered a preliminary injunction and expressed doubt about Fox's merits arguments, demonstrating that Fox's motive to transfer the case is not the parties' "settled expectations" in the contract but Fox's mid-case assessment that another court might be more sympathetic to its defenses.

A party waives a contractual right when it intentionally abandons the enforcement of that right. *See Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.*, 448 F.3d 573, 585 (2d Cir. 2006). Courts have recognized that "a forum selection clause will be deemed waived if the party invoking it has taken actions inconsistent with it." *Unity Creations, Inc. v.*

Trafcon Indus., Inc., 137 F. Supp. 2d 108, 111 (E.D.N.Y. 2001) (quoting *In re Rationis Enters., Inc.*, 1999 WL 6364, at *2 (S.D.N.Y. Jan. 7, 1999)); *see also Wachovia Bank Nat'l Ass'n v. EnCap Golf Holdings, LLC*, 690 F. Supp. 2d 311, 328 (S.D.N.Y. 2010) ("[F]orum selection clause will be deemed waived if the party invoking it has taken actions inconsistent with it, or delayed its enforcement, and other parties would be prejudiced.") (quoting *In re Rationis Enters.*, 1999 WL 6364, at *2); *In re Howmedica Osteonics Corp*, 867 F.3d 390, 407 (3d Cir. 2017) ("[V]enue objections are waivable, even when premised on a forum-selection clause."); 15 Fed. Prac. & Proc. Juris. § 3844 (4th ed.) ("[I]t is common sense that the party seeking a change of venue should act with reasonable promptness and that delay may cause the district court to refuse a transfer that otherwise would have been granted had it been sought earlier."). When a party waives a forum-selection clause, "the controlling effect that *Atlantic Marine* would normally give the forum-selection clause d[oes] not apply." *Kettler Int'l, Inc. v. Starbucks Corp.*, 55 F. Supp. 3d 839, 851 (E.D. Va. 2014).

Waiver occurs where, as here, a party asks the court to decide a case in its favor on the merits, or actively pursues discovery on its defenses, and moves to transfer only after it later decides a different forum would be more advantageous. For instance, in *American International Group Europe S.A. (Italy) v. Franco Vago International, Inc.*, this Court held that a defendant waived enforcement of a forum-selection clause where it failed to raise the forum-selection clause in response to the complaint and instead "availed itself of this forum by attempting to implead third-party defendants and filing several affidavits, affirmations, and memoranda of law with this Court." 756 F. Supp. 2d 369, 380 (S.D.N.Y. 2010); *see also Ferraro Foods, Inc. v. M/V IZZET INCEKARA*, 2001 WL 940562, at *4 (S.D.N.Y. Aug. 20, 2001) ("Courts have found implied waiver of venue where a party has repeatedly represented that venue is appropriate,

. . . or actively pursued substantive motions."); *Power Auth. of N.Y. ex rel. Solar Liberty Energy Sys., Inc. v. Advanced Energy Indus., Inc.*, 2021 WL 4244280, at *3 (W.D.N.Y. Aug. 23, 2021) (party waived forum-selection clause, even though it "raised the forum-selection clause in an affirmative defense of improper venue" because it "also filed several documents—including a substantive motion to dismiss—that did not ask for dismissal on venue grounds or to transfer venue"); *Wildhawk Invs., LLC v. Brava I.P., LLC*, 2022 WL 18539509, at *4 (S.D. Iowa Feb. 28, 2022) (cleaned up) (holding that defendant waived its right to invoke the forum-selection clause, noting that, "[i]n filing the motion to dismiss, the Estate asked the Court to consider the merits of the case and resolve the entire matter in its favor. In essence, the Estate wanted to see how the case was going in federal district court before deciding whether it would be better off there or in [state court]."); *cf. In re Pawn Am. Consumer Data Breach Litig.*, 108 F.4th 610, 615 (8th Cir. 2024) (holding that a party waived its right to seek arbitration by arguing that the complaint failed to state a claim and then invoking the arbitration clause "[o]nly after [it] had a chance to preview the district court's thinking"); *Se. Power Grp., Inc. v. Vision 33, Inc.*, 855 F. App'x 531, 537 (11th Cir. 2021) (similar).

By moving to dismiss Fubo's complaint "in its entirety," Doc. 120 at 1, Fox asked the Court to resolve Fubo's bundling and tying claims in its favor. By seeking discovery to develop defenses to Fubo's bundling and tying claims, and potential counterclaims, it has availed itself of this Court as a forum. Fox changed its mind only after its chances here looked less promising. Finding waiver in such cases prevents parties from "holster[ing] their forum selection clause arguments until they suspect they could achieve a better result in another forum." *Se. Power Grp.*, 855 F. App'x at 537.

Fubo would be seriously prejudiced by a severance and transfer after Fox's significant delay. Fubo has spent seven months (and significant resources) litigating this case against Fox and its co-Defendants in this forum and spending significant time drafting a response to Fox's motion to dismiss and responding to Fox's broad discovery requests. If this Court severed and transferred some of Fubo's claims against Fox, Fubo would need to start over in a new forum and respond to all-new motions and discovery requests, wasting significant time and resources.

II. The Forum-Selection Clause Does Not Encompass Fubo's Claims

Even setting aside Fox's waiver of its severance and transfer arguments, the forum-selection clause in the parties' carriage agreement does not encompass the claims that Fox seeks to sever. A "[p]laintiff's choice of forum in bringing his suit in federal court in New York will not be disregarded unless the contract evinces agreement by the parties that his claims cannot be heard there." *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 387 (2d Cir. 2007). The Clayton Act includes a broad venue provision, and courts in this district have recognized that in antitrust cases, a "plaintiff's choice of forum is entitled to particular respect." *Expoconsul Int'l, Inc. v. A/E Sys., Inc.*, 711 F. Supp. 730, 735 (S.D.N.Y. 1989) (collecting authority).

As Fox recognizes (at 6), courts in this District have looked to whether a forum-selection clause uses "narrower" or "broader" language in determining whether covers statutory claims that do not involve breach of contract. *Prod. Res. Grp., L.L.C. v. Martin Pro., A/S*, 907 F. Supp. 2d 401, 412 (S.D.N.Y. 2012) (comparing narrower language such as "arise from" with broader language such as "relating to").

The forum-selection clause in the carriage agreement between Fubo and Fox applies only to actions or proceedings [redacted] which belongs in the narrower category of forum-selection clauses. Doc. 109-3 at 36 (emphasis added). [redacted] [redacted] are "narrow in focus and do[] not encompass independent copyright claims" such as

statutory claims. *Light v. Taylor*, 2007 WL 274798, at *6 (S.D.N.Y. Jan. 29, 2007), *aff'd*, 317 F. App'x 82 (2d Cir. 2009); *see also Krist v. McGraw-Hill Sch. Educ. Holdings LLC*, 2019 WL 10960491, at *3 (S.D.N.Y. Jan. 4, 2019) (contrasting a broader forum-selection clause to the "narrow[]" phrase "'litigation . . . concerning . . . this Agreement'"); *Curwood Inc. v. Prodo-Pak Corp.*, 2008 WL 644884, at *6 (E.D. Wis. Mar. 7, 2008) (forum-selection clause for claims "concerning this agreement" did not apply to claims for breach of a different, related contract); *Henry v. Cent. Freight Lines, Inc.*, 2017 WL 4517836, at *2 (E.D. Cal. Oct. 10, 2017) ("Courts should construe terms such as 'arising under,' 'arising hereunder,' and 'arising out of' narrowly, meaning the forum-selection clause encompasses only those disputes concerning 'the interpretation and performance of the contract itself.'. . . Courts should construe phrases such as 'relating to,' however, more broadly.") (citing *Cape Flattery Ltd. v. Titan Mar.*, LLC, 647 F.3d 914, 922 (9th Cir. 2011)); *Hartig Drug Co. Inc. v. Senju Pharm. Co.*, 836 F.3d 261, 275 n.17 (3d Cir. 2016) ("Because [plaintiff's] antitrust causes of action arise by statute, there is a serious argument that they . . . arise by operation of an extrinsic legal regime rather than by contract.").

Here, Fubo has not asserted breach-of-contract claims arising out of its contract with Fox. Instead, it has brought statutory antitrust claims [redacted] Fox's anticompetitive practices throughout the television industry. Fubo's MFN claims in particular implicate Fox's contracts and business practices with *other* distributors [redacted]: Fubo alleges that [redacted] *See* Doc. 145 ¶ 127. [redacted]

[redacted] *Id.* ¶ 132. These MFN claims, in other words, largely concern Fox's contracts with *other* distributors, which are of course not subject to any MFN clause [redacted] between Fox and Fubo.

Fubo's bundling claims, meanwhile, concern Fox's practice of conditioning Fubo's licensing of essential sports channels on Fubo's agreement to license and distribute non-essential channels that distributors would not otherwise purchase, which manifests in negotiations between Fox and Fubo. Although these practices are ultimately reflected in a carriage agreement between Fubo and Fox's affiliates (though not Defendant Fox Corporation itself), Fubo does not claim that Fox has breached those provisions, and the agreement provides no defense to the statutory antitrust claims that Fubo does bring. Accordingly, the narrow forum-selection clause applying only to claims [redacted] has no effect.

Fox's claim that [redacted] is a broad term relies (at 6) on a cherry-picked dictionary definition and factually inapposite cases. The dictionary it cites recognizes a number of definitions for "concern," including not only the one Fox prefers ("relate to") but also "be about" and "involve." Concern, *New Oxford American Dictionary* 358 (3d ed. 2010). As for the cases cited by Fox, *MVPF Lexington Partners, LLC v. W/V/P/C, LLC* applied a forum-selection clause to cover an artfully-pleaded declaratory judgment action that was really an action for breach of contract in disguise. 148 F. Supp. 3d 1169, 1178-79 (D. Colo. 2015). And *Schering Corp. v. First Databank, Inc.* involved a clause written to include "dispute[s] concerning [an] Agreement or [certain] Licensed Products," and construed the clause to cover an action for defaming the products that had been licensed. 479 F. Supp. 2d 468, 471 (D.N.J. 2007). None of those cases supports Fox's argument that the phrase "action or proceeding concerning this Agreement"

includes an action for statutory antitrust violations with no claim for breach of contract in sight. As the Second Circuit has held, in interpreting the scope of a forum-selection clause, courts must recognize "the language-specific nature of this inquiry [which] discounts the precedential weight of cases that deal with dissimilarly worded clauses." *Phillips*, 494 F.3d at 390.[2]

III. The Public Interests Weigh Heavily Against Severance and Transfer

1. Even if Fox could show that the forum-selection clause applied to Fubo's antitrust claims, and that Fox did not waive enforcement of that clause, its motion should still be denied because "the interest[s] of justice" weigh strongly against severance and transfer. 28 U.S.C. § 1404(a) (permitting court to transfer claims "in the interest of justice"); *N. Jersey Media*, 312 F.R.D. at 114 (citation omitted) (court may sever claims to "promote the ends of justice").

Where, as here, a severance and transfer motion concerns only some claims made against one of many defendants, courts have recognized that the public interest may outweigh enforcement of a valid and applicable forum-selection clause. *See, e.g.*, *In re TFT–LCD (Flat Panel) Antitrust Litig.*, 2014 WL 1477748, at *2 (N.D. Cal. Apr. 14, 2014) (denying transfer based on a forum-selection clause that would "require [plaintiff's] claims against [one defendant] be tried separately from its substantially similar claims against the other defendants"); *Aquila v. Fleetwood, R.V., Inc.*, 2014 WL 1379648, at *4-5 (E.D.N.Y. Mar. 27, 2014) (denying motion to transfer based on a forum-selection clause by a single defendant in "a case involving

[2] For this same reason, the other cases Fox cites (at 7) are inapposite. *See Bense v. Interstate Battery Sys. of Am., Inc.*, 683 F.2d 718, 720 (2d Cir. 1982) (forum-selection clause applying to claims "arising directly or indirectly" from the agreement); *TradeComet.com LLC v. Google, Inc.*, 693 F. Supp. 2d 370, 378 (S.D.N.Y. 2010) (forum-selection clause applies to "[a]ll claims arising out of or relating to this agreement"); *Universal Grading Serv. v. eBay, Inc.*, 2009 WL 2029796, at *14 (E.D.N.Y. June 10, 2009) (forum-selection clause applies to any claim that "arises out of this Agreement"); *Credit Suisse Sec. (USA) LLC v. Hilliard*, 469 F. Supp. 2d 103, 107 (S.D.N.Y. 2007) (discussing forum selection clauses that concern claims "arising out of" or "relating to" an agreement).

overlapping claims against multiple defendants" because of "the public interests in avoiding duplicative proceedings and potentially inconsistent results").

These public interest factors are particularly relevant in this antitrust case, which concerns harmful bundling practices and other anticompetitive conduct that hurts consumers. As the Second Circuit has observed:

> A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest. . . . Antitrust violations can affect hundreds of thousands—perhaps millions—of people and inflict staggering economic damage. . . . For [this] reason, it is . . . proper to ask whether contracts of adhesion between alleged monopolists and their customers should determine the forum for trying antitrust violations.

Am. Safety Equip. Corp. v. J. P. Maguire & Co., 391 F.2d 821, 826-27 (2d Cir. 1968) (Feinberg, J.); *see United States v. Columbia Pictures Indus., Inc.*, 507 F. Supp. 412, 434 (S.D.N.Y. 1980) (noting, in the context of balancing the equities on a PI motion, that "[f]ar more important than the interests of either the defendants or the existing industry . . . is the public's interest in enforcement of the antitrust laws and in the preservation of competition."); *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 323 (1961) ("The proper disposition of antitrust cases is obviously of great public importance."); *see also In re Aimcee Wholesale Corp. (Tomar Prods.)*, 21 N.Y.2d 621, 626-27 (1968) (recognizing that adjudication of claims under New York's Donnelly Act "transcends the private interests of the parties" and is intended to vindicate a "strong public policy in favor of free competition for New York").

The public's interest in the proper adjudication of this particular antitrust case is especially great, as anticompetitive practices in cable television have long been a subject of significant public interest. Five public interest organizations filed an amicus brief in support of Fubo's motion for preliminary injunction, which lamented Defendants' practices of "forc[ing]

[consumers] to purchase large bundles that include pricey, non-sports content." Doc. 253-1 at 3-4. Numerous other market participants, including other distributors and independent programmers, have likewise criticized Defendants' bundling practices, both at the recent PI hearing and in a pending FCC proceeding. Doc. 111 ([redacted]); Doc. 112 ([redacted]); Doc. 248-129 (June 6, 2024 FCC filing by American Television Alliance explaining that large programmers' "forced bundling" practices "significantly limits independent programmers' opportunities to reach MVPD customers"); 248-128 (similar submission by ACA Connects). Members of Congress have also expressed concern about Defendants' bundling practices in the context of the JV. *See* Docs. 248-25, 248-133, 248-134. Such concern is nothing new: In 2013, Senator John McCain called Defendants' "bundling" practices "an injustice being inflicted on the American people." Ex. 11 at 1. And in granting Fubo's motion for preliminary injunction, this Court remarked that it was "difficult to avoid the conclusion that, on balance, [Defendants' bundling] practices are bad for consumers." Doc 291 at 45. The Court should therefore give special weight to the public's interest in this case in deciding Fox's motion.

Severance and transfer would grossly undermine the public's strong interest in the proper adjudication of this case for at least six reasons:

First, severing and transferring Fubo's bundling and MFN claims against Fox would lead to parallel litigation over publicly important issues and risk inconsistent verdicts that undermine the public's interest in the efficient and uniform enforcement of the antitrust laws. *See CVS Pharmacy, Inc. v. AstraZeneca Pharms. L.P.*, 2020 WL 4671659, at *8 (S.D.N.Y. Aug. 12, 2020) (citation omitted) (the "substantial benefits of consolidat[ion]" include "the strong policy interests of achieving efficient pretrial discovery, avoiding duplicative litigation, and avoiding

inconsistent results.").[3] That is true both because Fubo has brought nearly identical claims against Disney and WBD, and because Fubo's JV claims against Fox (which Fox does not seek to transfer) overlap significantly with its bundling and MFN claims (which Fox does seek to transfer). As this Court has recognized, "the fact of bundling is very relevant to the factual context of this case in which the Court has to decide whether the proposed JV violates the antitrust laws." Doc. 291 at 54-55 n.37. This is because Defendants' JV represents an effort by Defendants to exclusively give *themselves* the right to offer unbundled sports content, while requiring all third-party distributors—including Fubo—to bundle sports and non-sports content. Because Fubo's bundling claims against Fox present "common questions of law or fact" with its JV claims against Fox, judicial economy weighs heavily against transfer. *Crown Cork & Seal Co., Inc. Master Ret. Tr. v. Credit Suisse First Bos. Corp*., 288 F.R.D. 331, 333 (S.D.N.Y. 2013).

In similar contexts, "courts in this district have held . . . the public interest in centralizing bankruptcy proceedings always outweighs the public and private interests in enforcing a forum-

[3] *See also Bartolucci v. 1-800 Contacts, Inc.*, 245 F. Supp. 3d 38, 51 (D.D.C. 2017) ("[G]iven the complex and novel nature of the legal issues in these [antitrust] cases, . . . and the fact that a ruling could have an impact on a nationwide market for an item that millions of consumers depend upon each day, the public interest is served by avoiding the possibility of overlapping and possibly inconsistent rulings."); *Ashley Furniture Indus., Inc. v. Packaging Corp. of Am.*, 275 F. Supp. 3d 957 (W.D. Wis. 2017) (denying transfer based on valid forum-selection clause because the "public interest factors favoring all members of an alleged conspiracy to restrain trade be judged in one lawsuit weigh strongly against severance and, consequently, against the transfer."); *Fed. Hous. Fin. Agency v. First Tenn. Bank Nat'l Ass'n*, 856 F. Supp. 2d 186, 195 (D.D.C. 2012) (cleaned up) ("[G]iven the risk of inconsistent judgments attendant with retaining this case, the Court adheres to the principle that the interests of justice are better served when a case is transferred to the district where related actions are pending."); *Hengle v. Curry*, 2018 WL 3016289, at *11 (E.D. Va. June 15, 2018) (internal citation omitted) ("Allowing related cases to proceed simultaneously on separate tracks creates a prospect of inconsistent outcomes that does not exist when the same court manages both cases."); *Byerson v. Equifax Info. Servs., LLC*, 467 F. Supp. 2d 627, 635 (E.D. Va. 2006) (recognizing that the interest of justice accounts for "judicial economy and the avoidance of inconsistent judgments").

selection clause." *Deutsche Oel & Gas S.A. v. Energy Cap. Partners Mezzanine Opportunities Fund A, LP*, 2020 WL 5814233, at *14 (S.D.N.Y. Sept. 30, 2020) (citation omitted); *Argosy Cap. Grp. III, L.P. v. Triangle Cap. Corp.*, 2019 WL 140730, at *8 (S.D.N.Y. Jan. 9, 2019) (denying transfer pursuant to forum-selection clause because the "palpable conflict between this action and [a related] [b]ankruptcy [c]ase evokes a public interest sufficient to outweigh the forum[-] selection clause"). That same principle should apply to a publicly important antitrust case of this nature.[4]

Second, severing and transferring Fubo's bundling and MFN claims against Fox would result in a significant waste of judicial resources. *See Dayton Monetary Assoc. v. Donaldson, Lufkin & Jenrett Sec. Corps*., 1999 WL 159889, at *2 (S.D.N.Y. Mar. 22, 1999) (denying severance because "having two trials would necessitate two sets of pretrial motions, two sets of pretrial orders, two sets of jury charges, and the possibility of having to select two different juries, . . . lead[ing] to greater delay and expense."); *Kehr ex rel. Kehr v. Yamaha Motor Corp., U.S.A.*, 596 F. Supp. 2d 821, 825 (S.D.N.Y. 2008) (declining to transfer because of the "[o]verriding . . . consideration affecting the expeditious management of court business"). As noted above, there exists significant factual overlap between the claims that Fox seeks to transfer

[4] Fox says (at 11) that courts have enforced forum selection clauses even when it would result in parallel litigation. Fox relies primarily on the Second Circuit's decision in *Phillips*, 494 F.3d 378 at 383. But in *Phillips*, the court severed claims that had no bearing on the remaining claims: the Second Circuit found that the plaintiff's breach of contract claim, which alleged that the defendant failed to pay a required installment on his advance of royalties, fell under the contract's forum-selection clause and should thus be severed and transferred. But the court held that the plaintiff's other claims—federal copyright and state-law claims alleging that the defendants' wrongfully exploited the plaintiff's music—that had no bearing on the breach of contract claims were not covered by the forum-selection clause. Here, Fubo has not asserted a breach of contract claim and its bundling claims are tightly intertwined with its JV claims.

and those that will remain here. There is no good reason for two different courts to adjudicate two different cases concerning the same conduct.

Third, severing and transferring Fubo's non-JV claims against Fox would impose duplicative burdens on other parties who are not subject to the forum-selection clause, as well as third parties who have information pertinent to Fubo's bundling and MFN claims. *See In re Rolls Royce Corp.*, 775 F.3d 671, 681 (5th Cir. 2014) (court should consider "private [interests] of the parties who have *not* signed a forum[-]selection agreement as it would under a Rule 21 severance and section 1404 transfer analysis"). Because Fubo's bundling claims against Fox intertwined with its JV claims against all Defendants, the same party and non-party witnesses (for example, other MVPDs who license content from Disney, Fox, and WBD) would likely need to participate in discovery and appear at trial twice. So would witnesses from Defendant Hulu, a Disney-owned streaming service that has MFN clauses in its agreement with Fox.

Fourth, severance and transfer would create significant "administrative difficulties flowing from court congestion" and delay the resolution of these publicly important claims. *Atlantic Marine*, 571 U.S. at 62 n.6. This Court has capably managed this case and has set an efficient discovery schedule that gives the parties a firm trial date on October 6, 2025—less than a year from now. "[T]he Central District of California," by contrast, "is extremely congested, with one of the busiest dockets in the country." *Banh v. Am. Honda Motor Co., Inc.*, 2020 WL 4390371, at *20 (C.D. Cal. July 28, 2020) (holding that this factor "weigh[ed] heavily" in favor of litigating in another forum). It is likely that severing and transferring Fubo's non-JV claims against Fox would delay the resolution of those claims by several years. Such delay would make discovery and pretrial coordination between this Court and the Central District of California

virtually impossible, exacerbate the risk of inconsistent verdicts, and frustrate the public's interest in the efficient and timely resolution of this important case.

Fifth, severing and transferring Fubo's bundling and MFN claims against Fox would undermine this forum's strong interest in adjudicating an antitrust case between two New York-based companies regarding conduct that harms New York residents and involves antitrust claims under New York's Donnelly Act. *See Carruthers v. Amtrak*, 1995 WL 378544, at *4 (S.D.N.Y. June 26, 1995) (courts consider the forum's "connection with the underlying events" and the "forum court's familiarity with the governing law" in considering a motion to transfer).[5] Fox and Fubo are both headquartered in New York City, and their respective senior executive teams—many of whom will be witnesses at trial—are largely based in New York. This forum thus has a strong interest in the adjudication of this dispute here. In addition, courts in this District have recognized "New York's vital interest in securing an honest marketplace" through enforcement of the Donnelly Act, and New York federal courts frequently adjudicate claims brought under the act. *FTC v. Vyera Pharms., LLC*, 2021 WL 4392481, at *4 (S.D.N.Y. Sept. 24, 2021) (quoting *People ex rel. Cuomo v. H & R Block, Inc.*, 870 N.Y.S.2d 315, 316 (1st Dep't 2009); *see also Aimcee*, 21 N.Y.2d 621. Because "courts in New York are more familiar with New York substantive law than are courts [elsewhere] . . . [t]he applicability of New York law weighs against a transfer." *Carruthers*, 1995 WL 378544, at *4.

[5] *See also Spiciarich v. Mexican Radio Corp.*, 2015 WL 4191532, at *6 (S.D.N.Y. July 10, 2015) ("The locus of operative facts is a 'primary factor' in evaluating a motion to transfer pursuant to section 1404(a) because it helps the court identify a suit's 'center of gravity,' and thus, where it should properly proceed."); *Orb Factory, Ltd. v. Design Sci. Toys, Ltd.*, 6 F. Supp. 2d 203, 209 (S.D.N.Y. 1998) (denying transfer where a "substantial portion of the wrongful acts . . . occurred in the Southern District"); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 843 (S.D.N.Y. 2012) (courts evaluating a transfer motion should consider whether "the operative facts underlying this action" have a "connection to this district").

Finally, Fox's delay in seeking severance and transfer—even if it does not rise to the level of waiver—weighs against its motion in the public-interest analysis. "Delay is relevant to considerations of judicial economy because transfer after significant rulings means that the transferor court will lose a case in which it has already invested." *Gaetano v. Gilead Scis., Inc.*, 2021 WL 3185822, at *5 (D.N.J. July 27, 2021). *See also Blake Marine Grp., LLC v. Dat Ha*, 2020 WL 5577842, *2 (E.D. La. Sept. 17, 2020) (relying on a party's failure to "raise any objection to venue in the eight months that his claim was pending before this Court" in denying transfer). Because of Fox's delay, the parties, third parties, and this Court have invested considerable resources in crafting discovery requests and objections; reviewing documents; and taking depositions that relate to Fox's tying practices. Thus, even if the Court finds that Fox's delay does not amount to a complete waiver of the forum-selection clause, that delay provides further reason to deny the discretionary remedy of severance.

2. Fox, for its part, asserts that the enforcement of a valid forum-selection clause necessarily serves the interests of justice. Fox cites only a single case, *Paduano v. Express Scripts, Inc.*, 55 F. Supp. 3d 400 (E.D.N.Y. 2014), in support, but *Paduano* undercuts Fox's arguments. *Paduano* involved four defendants: three sought to enforce valid arbitration clauses and the fourth a valid forum-selection clause. *See id.* at 435. In those circumstances, the court noted that, "regardless of how the Court resolve[s] [the fourth defendant's] motion to sever and transfer, the claims against [the other three defendants] may be resolved outside of a judicial forum," and any costs from such duplicative or inefficient arbitration proceedings "would be borne by the relevant parties rather than by the taxpayer." *Id.* The court thus concluded that "the decision whether to grant or deny the motion to sever and transfer, by itself, will have a marginal impact on judicial economy." *Id.* No such circumstances are present here. Fubo's antitrust

claims against other Defendants will proceed in this Court regardless of Fox's motion, as will Fubo's JV claims against Fox. Ordering that a subset of Fubo's antitrust claims against Fox be litigated in a parallel proceeding in different forum from both the dispute over the JV and Fubo's its nearly identical claims against Disney and WBD finds no support in *Paduano* and would offend both judicial economy and the public interest.

Fox also relies heavily on *Atlantic Marine*, 571 U.S. 49, but that case does not help it. *Atlantic Marine* considered the effect of a forum-selection clause that covered all of the claims against a single party. In those circumstances, the *Atlantic Marine* Court explained that the court weighing a transfer motion should "not consider arguments about the parties' private interests" and "may consider arguments about public-interest factors only." *Id.* at 64. *Atlantic Marine* did not decide what standard applies when, as here, a single party in multiparty litigation seeks to sever and transfer some (but not all) of the claims against it. And in the wake of *Atlantic Marine*, courts have expressed skepticism "that *Atlantic Marine* vitiates the traditional severance analysis in multiparty cases." *Rolls Royce*, 775 F.3d at 680; *see also Eastcott v. McGraw-Hill Glob. Educ. Holdings, LLC*, 2016 WL 3959076, at *1 (E.D. Pa. July 22, 2016) (explaining that *Atlantic Marine* does not displace traditional 28 U.S.C. § 1404(a) analysis when a forum-selection clause only implicates a fraction of the claims in the case and denying the transfer motion as "[j]udicial economy heavily favors litigating all claims together").

In *Rolls Royce*, for example, the Fifth Circuit recognized *Atlantic Marine*'s limited scope, and held that in deciding a severance-and-transfer motion "where some but not all parties have entered into a forum-selection clause," courts should "consider the private factors of the parties who have not signed a forum-selection agreement as it would under a Rule 21 severance and section 1404 transfer analysis," as well as "the judicial economy considerations of having all

claims determined in a single lawsuit." *Rolls Royce*, 775 F.3d at 681; *see also Crede CG III, Ltd. v. 22nd Century Grp., Inc.*, 2017 WL 280818, at *11 (S.D.N.Y. Jan. 20, 2017) (quoting *Wyndham*, 398 F.2d at 619) (recognizing that "while the Second Circuit has not yet addressed this exact question following *Atlantic Marine*, it has long affirmed its 'strong policy favoring the litigation of related claims in the same tribunal in order that pretrial discovery can be conducted more efficiently[;] duplicitous litigation can be avoided, thereby saving time and expense for both parties and witnesses[;] and inconsistent results can be avoided' ").

In addition, *Atlantic Marine* itself recognizes that even where a forum-selection clause forecloses consideration of the parties' private interests, "a district court may consider arguments about public-interest factors," and that it is "conceivable in a particular case that the district court would refuse to transfer a case notwithstanding the counterweight of a forum-selection clause." 571 U.S. at 64. Here, even assuming that the forum-selection clause governs Fubo's claims and is enforceable by Fox after seven months of intensely litigating the claims it now seeks to transfer, the strong public interest in the proper and efficient adjudication of Fubo's antitrust claims overwhelmingly counsels in favor of keeping those claims in this Court. Fox does not seriously argue otherwise.

CONCLUSION

For the reasons stated above, Fubo respectfully requests that this Court deny Fox's motion to sever and transfer.

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Respectfully submitted,

/s/ Mark C. Hansen

Mark C. Hansen (admitted *pro hac vice*)
Evan T. Leo (admitted *pro hac vice*)
Kevin J. Miller (admitted *pro hac vice*)
Joseph S. Hall (SDNY Bar No. JH2612)
Andrew C. Shen (SDNY Bar No. AS7963)
Thomas G. Schultz (admitted *pro hac vice*)
Joshua Hafenbrack (admitted *pro hac vice*)
Matthew J. Wilkins (admitted *pro hac vice*)
Hannah D.C. DePalo (admitted *pro hac vice*)
Dennis D. Howe (admitted *pro hac vice*)
Geoffrey J.H. Block (admitted *pro hac vice*)
Gavan W. Duffy Gideon (admitted *pro hac vice*)
Katherine V. Tondrowski (admitted *pro hac vice*)
Rachel T. Anderson (admitted *pro hac vice*)
KELLOGG, HANSEN, TODD, FIGEL
& FREDERICK, P.L.L.C.
1615 M Street NW
Suite 400
Washington, DC 20036
Tel.: (202) 326-7900
Fax: (202) 326-7999
Email: mhansen@kellogghansen.com
eleo@kellogghansen.com
kmiller@kellogghansen.com
jhall@kellogghansen.com
ashen@kellogghansen.com
tschultz@kellogghansen.com
jhafenbrack@kellogghansen.com
mwilkins@kellogghansen.com
hdepalo@kellogghansen.com
dhowe@kellogghansen.com
gblock@kellogghansen.com
ggideon@kellogghansen.com
ktondrowski@kellogghansen.com
randerson@kellogghansen.com

Counsel for Plaintiffs fuboTV Inc. and fuboTV Media Inc.