

**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

**Supplemental Expert Declaration of Jonathan Orszag
April 29, 2024**

I. INTRODUCTION

1. I previously submitted an expert declaration in this matter, in which I analyzed the relevant antitrust markets and Defendants' market power in those markets, and concluded that the Defendants' proposed JV would result in harms to Fubo and competition.¹ In that declaration, I analyzed three antitrust markets that are relevant to the issues in this case: (i) an upstream market consisting of the sale of sports network programming to vMVPDs and MVPDs in the U.S.;² (ii) a downstream market for the sale of pay TV services to consumers in the U.S., that is no broader than vMVPDs and MVPDs;³ and (iii) a narrower downstream market for the sale of pay TV services to consumers that consists of vMVPDs only.⁴ I also noted that "there are likely other antitrust markets that are relevant to other aspects of potential competitive effects due to the proposed JV beyond those discussed" in that declaration.⁵

2. In this Supplemental Expert Declaration, I analyze one of those other antitrust markets: the nascent market for "skinny sports bundles"—that is, streaming packages containing a limited number of channels that all have live sports content.⁶ The Defendants' proposed JV would operate in this relevant market, as well, and would have a substantial share of the nascent skinny sports bundle market—which, depending upon the plans of other potential entrants, could be as much as 100 percent.

¹ Declaration of Jonathan Orszag in Support of Plaintiffs' Motion for Preliminary Injunction (Sealed), Civil Action No. 24-cv-1363-MMG-JW, ECF No. 99 (Orszag Decl.).

² See Orszag Decl., §II.B, ¶¶ 28-39.

³ See Orszag Decl., §II.C.1, ¶¶ 41-45.

⁴ See Orszag Decl., §II.C.2, ¶¶ 46-53.

⁵ See Orszag Decl., Footnote 19.

⁶ As I noted in my initial declaration, "Defendants recognize that there are some customers that want a 'skinny,' sports-focused bundle, and do not want to pay for other linear networks that are more focused on general entertainment or news." See Orszag Decl., ¶ 71.

II. THERE IS LIKELY A MARKET FOR SKINNY SPORTS BUNDLES

3. As I explained in my initial declaration, relevant markets are often defined around targeted sets of customers—an approach endorsed by U.S. competition authorities.⁷ In that declaration, I demonstrated that there was a targeted set of customers that purchase vMVPD services, based on the distinct characteristics of those customers. Similarly, there is likely a targeted set of customers within the universe of vMVPD customers that would prefer only to watch (and purchase) channels with live sports programming, and for whom larger bundles of channels that include those same sports are not reasonable substitutes for a skinny bundle of sports channels.⁸ Indeed, the proposed JV is—as Defendants openly admit—designed to target this set of customers. These targeted customers would constitute the market for skinny sports bundles.⁹

4. For example, Disney CEO Bob Iger stated that the JV would target “consumers looking for a seamless way to access an aggregated collection of sports-centric content,

⁷ See Orszag Decl., ¶ 48.

⁸ In my initial declaration, I noted that there is a strong consumer demand for live sports programming, which results in the high value advertisers and distributors also place on that programming. See Orszag Decl., §II.B, ¶¶ 28-39

⁹ Other market evidence indicates that firms are launching products that target different types of customers of video services. For example, MVPDs Charter and Comcast both announced that they were launching skinny streaming bundles of linear video programming. It was reported that Charter would soon launch its Spectrum TV Stream product, which will “provide 90 streaming channels for \$40 per month. A&E, AMC, CNN, Discovery, Disney Channel, Fox News, FX, Hallmark and HGTV are among the offerings.” Similarly, Comcast will soon launch its NOW TV product, “a \$20 per-month skinny streaming bundle with some 40 channels (including Food Network, A&E, AMC and Hallmark Channel), as well as Peacock Premium.” While neither of these offerings are expected to contain live sports programming, they indicate that video distributors seek to create skinny bundles of video programming designed to target specific sets of customers—in much the same way that the proposed JV seeks to offer its skinny bundle focused on live sports programming. See The Hollywood Reporter, “Even Cable TV Giants Know That Consumers Prefer Streaming—but They’ve Got a Plan,” April 23, 2024, available at: <https://www.hollywoodreporter.com/business/business-news/spectrum-xfinity-cheap-streaming-tv-plans-1235876009/>.

including capturing fans moving away from the full cable and satellite bundle.”¹⁰ Mr. Iger further elaborated that the JV:

“[I]s going to be substantially less expensive to consumers than the big bundle that they’d have to buy to get those same channels on cable and satellite. And again, designed for 2 things. One, we believe there are a number of sports fans out there that want to watch sports on television but didn’t want to sign up to the big cable and satellite bundle ... We also believe that either consumers have left the bundle because it wasn’t serving them well or they may leave the bundle, and we want to make sure that we grab them, too.”¹¹

5. Mr. Murdoch similarly stated that the JV “is focused entirely on cord—not cord-cutters but cord-nevers ... And so the target for this product ... is really that universe of, call it, 60 million-odd households that currently don’t participate in the bundled cable and pay television ecosystem.”¹²

6. Testimony from Fubo also supports the existence of a skinny sports bundle market.

[REDACTED]

¹⁰ Walt Disney Company, “2024 Q1 Earnings Conference Call,” February 7, 2024, p. 4, available at: <https://thewaltdisneycompany.com/app/uploads/2024/01/q1-fy24-earnings-transcript.pdf> (Disney 2024 Q1 Earnings Call).

¹¹ Disney 2024 Q1 Earnings Call, p. 22.

¹² Ex. 15 to Orszag Decl., Fox Corporation, “2024 Q2 Earnings Conference Call Transcript,” February 7, 2024, ECF No. 98-15, p. 7.

¹³ [REDACTED]

¹⁴ [REDACTED]

[REDACTED]

7. The market for skinny sports bundles is nascent, and therefore has no current market participants. However, the proposed JV is the only announced entrant into that market, and thus would have 100 percent market share of that market upon entry. This is consistent with the Horizontal Merger Guidelines, which state that “[f]irms that have ... committed to entering the market also will normally be treated as market participants.”¹⁶ In such a case, the Guidelines instruct that one should assign market shares to such market participants based on their “future competitive significance in the relevant market.”¹⁷ To the extent that other sports programming networks plan on entering the market for skinny sports bundles (i.e., they decide to offer a direct-to-consumer sports app), a reasonable basis to assess potential market shares (i.e., future competitive significance) is to examine the value of sports rights controlled by each sports programmer. In that case, the proposed JV—as I demonstrated in my initial declaration—would still control between 54 percent and 61 percent of the value of sports rights in the U.S. and would be assigned such market shares.¹⁸

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.


Jonathan Orszag
April 29, 2024

¹⁵ [REDACTED].

¹⁶ U.S. Department of Justice and the Federal Trade Commission, “Horizontal Merger Guidelines,” Issued: August 19, 2010, (2010 Horizontal Merger Guidelines), p. 27.

¹⁷ 2010 Horizontal Merger Guidelines, p. 17.

¹⁸ See Orszag Decl., ¶¶ 65-66 and Figure 5.