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

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

FILED UNDER SEAL

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GLOSSARY

Acronym	Definition
DOJ	U.S. Department of Justice
DTC	Direct to Consumer
MLB	Major League Baseball
MVPD	Multi-Channel Video Distributor (*e.g.*, Comcast or Fubo)
NBA	National Basketball Association
NFL	National Football League
NHL	National Hockey League
NYSE	New York Stock Exchange
SVOD	Subscription Video on Demand
Fubo Witnesses	**Title**
David Gandler	Co-Founder and Chief Executive Officer, Fubo
Alberto Horihuela	Co-Founder and Chief Operating Officer, Fubo
John Janedis	Chief Financial Officer, Fubo
Todd Mathers	Senior Vice President of Content Strategy, Fubo
Jonathan Orszag	Senior Consultant, Compass Lexecon, LLC
James Trautman	Managing Director, Bortz Media & Sports Group, Inc.
Defendant Witnesses	**Title**
Sean Breen	Executive Vice President of Platform Distribution, Disney
Bruce Campbell	Chief Revenue and Strategy Officer, WBD
Paul Cheesbrough	Tubi Media Group, CEO; Fox executive and former CTO
Justin Connolly	President of Platform Distribution, Disney
Edwin Desser	Sports media consultant, Desser Sports Media, Inc.
Pete Distad	Chief Executive Officer, Venu
Robert Iger	Chief Executive Officer, Disney
Justin Lancer	Executive Vice President of Corporate Development, Fox
Lachlan Murdoch	Executive Chairman and CEO, Fox
John Nallen	Chief Operating Officer, Fox
James Pitaro	Chairman, ESPN
Justin Warbrooke	Executive Vice President, Corporate Development, Disney
Mike Whinston	Professor of Economics, Massachusetts Institute of Technology
Third Party Witnesses	**Title**
Gary Schanman	Executive Vice President, EchoStar Corporation
Robert Thun	Chief Content Officer, DirecTV

INTRODUCTION

Through their joint venture (codenamed "Raptor"), Defendants have given themselves the exclusive right to offer a product that they deny to all others: a skinny bundle of sports channels. For decades, Defendants—massive media conglomerates that control more than half the live sports television rights in the country—have exploited their control over live sports to force distributors to license and distribute unwanted general entertainment channels (such as Freeform) as a condition of licensing their commercially critical sports channels (such as ESPN). This practice—known as bundling—lines Defendants' pockets at the expense of distributors and consumers, who pay for dozens or hundreds of channels they never watch.

Now, Defendants are combining all of their sports rights into a single joint venture (Raptor) on an exclusive *unbundled* basis. Raptor represents an unprecedented departure from the "fat bundle" that Defendants impose on all other distributors: As Defendants' executives have admitted in internal documents, [redacted][1] In fact, [redacted] is the entire idea behind Raptor: Defendants' executives [redacted]

If allowed to launch, Raptor will immediately monopolize the market for a skinny sports bundle (which Defendants have not allowed any other distributor to serve) and will give Raptor an insuperable competitive advantage over other distributors (like Fubo) that are [redacted] It will also eliminate any incentive Defendants

[1] "Ex." refers to Exhibits to the Declaration of Thomas Schultz filed in support of this Reply, dated August 1, 2024.

might otherwise have had to unbundle their sports for a third-party distributor: Defendants will now have a strong shared incentive to [redacted]

Raptor will also irreparably harm Fubo, which has long sought to offer the skinny sports bundle that Raptor will now exclusively provide. Fubo's ordinary course projections show that, [redacted] And Fubo is not alone in expressing concern about Raptor: consumer groups, distributors, the Department of Justice, and Congress each have expressed significant concerns that, for example, Raptor [redacted] and "has the potential to reshape this already-concentrated space to the detriment of consumers, sports leagues, and third-party distributors." Ex. 122 at 2 (PX448); Ex. 85 at 3 (PX216).

Defendants spend much of their opposition denying what they have said publicly and privately about Raptor and otherwise making bald claims contradicted by record evidence. Defendants' reality-defying assertions that they do not require distributors to bundle their content are at odds with sworn declarations from [redacted] Defendants' assertions that Raptor will target only a small number of "cord nevers" outside the Pay TV ecosystem are belied by [redacted] Defendants' disparagement of Fubo's business—besides being irrelevant and gratuitous—ignores Fubo's well-documented path towards profitability. And Defendants' assertions that they will still

compete after Raptor launches are refuted by the observation of [redacted]

BACKGROUND

A. Live Sports Is the Lynchpin of Live Television

1. As discovery has confirmed and the evidence at trial will show, sports are uniquely valuable in today's live television industry—[redacted][2] In an era of cord-cutting, live sports is the [redacted]

While live television viewership has declined sharply for entertainment programing—which most consumers now view on video-on-demand services, such as Netflix—ratings for live sports [redacted] For example, Fox reported that [redacted][3]

2. Because sports are the lynchpin of live television, Defendants' channels with premium live sports are "must-have" for MVPDs (including virtual MVPDs). Indeed, Defendants'

[2] Like Defendants, Fubo submits both the exhibits attached to its Motion and this Reply and the testimony and documents to be presented at the preliminary injunction hearing in support of its Motion. *See* Opp. 1.

[3] *See also* [redacted]

industry expert—Ed Desser—has described sports as "must-have," "vital," and "among the best forms" of content for live pay TV providers for years.[4] Each Defendant has confirmed this:

ESPN: Disney CEO Bob Iger has stated publicly that "you cannot launch a new multi-channel platform . . . successfully without ESPN." [redacted] Internally, ESPN describes itself as [redacted]

Fox: Fox's sports are similarly must-have. For example, [redacted]

Warner Brothers: Just last week, Warner Brothers stressed the must-have nature of sports programming in its lawsuit against the NBA, in which Warner Brothers is seeking to retain its media rights to broadcast NBA games on TNT. Ex. 118 (PX438). Warner Brothers alleged in its complaint: "NBA telecast rights are a unique asset that cannot be replaced. Each NBA game is a one-of-a-kind sporting event" that "drives significant viewership and ratings on TNT." *Id.* ¶ 4.

B. Defendants Are Dominant Live Sports Programmers

Disney, Fox, and Warner Brothers collectively control roughly 60% of all live televised sports in the United States—and a much higher share for the Big 5 Sports (i.e., NFL, NBA, MLB, NHL, and college football). Defendants' ordinary-course documents say [redacted]

[4] *See*, *e.g.*, Ex. 2 (Ed Desser, *Sports Media Marketplace Quickly Evolving But Still Robust*, LinkedIn (June 12, 2017)) ("Sports is essential to MVPDs. Sports networks continue to be 'must-haves.'"); Ex. 7 (Sportico: The Business of Sports, *Comcast Heralds NBA's Return to NBC as TNT Drama Unfolds* (May 21, 2021)) ("You can't really have a streaming service with broad appeal without a representative sample of key sports."); Ex. 23 (Desser Dep. 30:7-9) ("sports are an important genre to MVPDs, as they are to customers"); *id.* at 40:10-11 ("Sports are among the best forms of – of programming"); Ex. 120 at 5 (PX442) ("There is still nothing else quite like sports to gather a huge, reliable audience.").

[redacted]

By many measures, Defendants' market share [redacted] Fox's data [redacted] And at a recent conference for media moguls in Sun Valley, Warner Brothers CEO David Zaslav said that, "between Fox, Warner Brothers Discovery and ESPN, we have about 75% of the sports." Ex. 112 (PX404); [redacted]

C. Defendants Bundle Their Sports and Non-Sports Channels, Forcing Distributors and Consumers To Purchase Unwanted Channels

For decades, Defendants have exploited their exclusive ownership of high-value sports content by requiring distributors (including Fubo) to license and distribute unwanted non-sports channels as a condition of licensing high-demand sports channels such as ESPN, Fox, and TNT. Mot. 6-7; Ex. 124 at 23-24 (PX453).

1. Fubo has repeatedly requested—and been denied—the right to carry Defendants' sports networks *without* the many non-sports entertainment networks that drive up costs. To cite just a few examples:

- [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

2. Consistent with Fubo's experience, other industry participants uniformly report that Defendants force distributors to license non-sports networks [redacted]

[redacted]

[redacted][5]

3. Defendants' testimony and documents [redacted]

Defendants' bundling practices have allowed them to reap enormous profits. [redacted]

[5] Recent public comments in an FCC proceeding concerning the live TV industry similarly confirm that "[t]o carry large programmers' most desired programming, MVPDs must also agree to carry a bevy of unwanted channels." Ex. 116 at 2 (PX434) (comments of ACA Connects); *see also* Ex. 117 at 2 (PX436) (comments of American Television Alliance) (programmers require "that an MVPD carry additional (typically less popular) programming, such as a cable network or multicast programming, as a condition to authorizing carriage of more popular programming (e.g., a broadcast station's primary signal or a sports or other popular cable network.)").

[redacted]

Defendants' industry expert, Mr. Desser, has called Disney "the biggest beneficiary of traditional bundle economics."[6]

Bundling, however, exacts a toll on distributors and their customers. Fubo pays Disney alone [redacted] for unwanted content (and must pass most of these costs on to consumers). Ex. 69 at 7 (PX105). [redacted]

4. [redacted]

[6] Ex. 4, Ed Desser & John Kosner, *The Fourth Quarter of Sports Media: Falling Bundles, Rising Streams*, Sportico: The Business of Sports (Jan. 8, 2021).

[7] [redacted]

[8] [redacted]

[redacted]

D. Defendants' Bundling Practices Have Caused Entertainment Consumers—But Not Sports Fans—To Cut the Cord and Flee to SVOD Services

Over the past decade, the emergence of subscription video on demand ("SVOD") services (such as Netflix) has provided entertainment-focused consumers with alternative, cheaper options for watching scripted entertainment programming (but generally not live sports). As a result, many non-sports fans have "cut the cord," ditching their expensive MVPD packages (with prices inflated by Defendants' bundling requirements) in favor of much cheaper SVOD services.[10]

But sports fans still overwhelmingly subscribe to MVPD services. [redacted] MVPDs have far more comprehensive live sports offerings than SVODs and remain the only place where consumers can get a broad selection of sports from different leagues and programmers.

For example, Fubo offers its users more than 55,000 live sporting events per year, Ex. 38 at -390 (FUBO_0150388), on channels such as ESPN, Fox, ABC, NBC, CBS, Regional Sports Networks (which carry local sports, such as the Yankees in New York), NFL Network, the MLB Network, the Golf Channel, and more. By contrast, SVODs typically have no or little live sports. Many popular SVOD services (such as Netflix, Disney+, and Hulu) have no regular live sports.

[9] *See*, *e.g.*, [redacted]

[10] *See*, *e.g.*, Ex. 3 (Ed Desser, *Twelve Ways Sports Networks Wil Adapt to Evolving Marketplace*, LinkedIn (Nov. 6, 2017)) ("subscriber fee increases . . . are a driver of cord cutting").

[redacted]

Other SVODs have some live sports, but their offerings are far more limited than an MVPD's. For example, Peacock offers only sports controlled by NBC and Paramount+ has only sports controlled by CBS. [redacted] Amazon Prime shows only the Thursday night NFL games—15 games total per year.[11] [redacted] Apple TV has Major League Soccer and Major League Baseball games once a week.[12]

Importantly, ESPN and Fox—the two leading sports programmers in the United States [redacted]—are available *only* through MVPDs. No ESPN or Fox linear sports network is available on any SVOD.

Because of their different functions and purposes, sports fans usually subscribe to *both* a live pay TV service and one or more SVODs. [redacted]

[11] Consumers often get Amazon Prime for free shipping. [redacted]

[12] Direct-to-consumer services offered by the sports leagues, such as the NBA and MLB, offer out-of-market games—*not* the nationally televised or local games (such as the Yankees in New York metro area) that are available through Live Pay services.

E. Raptor Will Target the [redacted] Between SVOD and Live Pay TV Services

Defendants' bundling practices have created a [redacted] between standalone SVOD services (which cost $5 to $10 per month but offer almost no sports content) and the fat bundles that Defendants force on MVPDs (which offer a wide array of sports and entertainment but cost $75 or more). [redacted]

Defendants have decided to exploit this [redacted] not by unbundling their sports content for distributors, but by pooling their sports channels into a new joint venture (Raptor) and unbundling those channels *exclusively* for themselves. Unlike existing MVPDs, Raptor will not be required to carry any of Defendants' non-sports networks. [redacted]

Indeed, this exclusivity is Raptor's fundamental premise: [redacted]

Freed from the dozens of unwanted entertainment channels that Defendants require third-party MVPDs like Fubo to carry, Raptor will offer 14 linear channels all featuring live sports, plus ESPN+—the first-ever skinny sports bundle in the United States. [redacted]

Because Raptor will not be overstuffed with Defendants' low-value entertainment channels, Defendants will be able to offer Raptor at a price far lower than any MVPD. Raptor will cost consumers $42.99 per month (as Raptor just publicly announced), compared to $75+ for virtual MVPDs and $100+ for traditional MVPDs, [redacted] Defendants recognize that [redacted]

Because fat bundles cannot compete with Raptor on price, [redacted]

[redacted]

[redacted] Defendants have publicly downplayed Raptor's expected size, with Mr. Murdoch announcing in March 2024 that Raptor expects to attract only 5 million subscribers by 2029. [redacted]

F. Defendants Have No Intention or Incentive To License Unbundled Sports Channels After Raptor Launches

1. Defendants have internally recognized that [redacted]

[13] [redacted]

[redacted] That is especially true because without Defendants' channels—and the ESPN and Fox sports networks in particular—a skinny sports bundle is unlikely to be successful. [redacted]

Defendants have also recognized [redacted]

[redacted]

Defendants' internal documents also show [redacted]

[redacted]

G. Despite Headwinds Created by Defendants' Licensing Practices, Fubo Is on a Steady Path to Profitability by 2025

Fubo launched in 2015 with the vision of offering sports fans a sports-centric television package without all the excess content (and cost) of the fat bundle. Fubo's goal always has been to "[a]ggregate sports content in the most affordable manner." Ex. 137 at -745 (FUBO_0165677). At the same time, Defendants' bundling requirements have forced Fubo to adapt to its competitive reality. Fubo's senior executives will testify that, because Defendants have prevented Fubo from executing on its plan to offer a streamlined, sports-focused service, Fubo has pivoted to marketing a bundle of sports and entertainment channels—exemplified by the company's tagline, "Come for the sports, stay for the entertainment." Ex. 67 at 8 (PX102).

Despite the headwinds created by Defendants' bundling practices (and other anticompetitive conduct detailed in Fubo's Amended Complaint, *see* Dkt. 144), Fubo has steadily grown since its founding. Fubo's subscriber base has grown by double-digit percentages for the past several years, as Mr. Horihuela will testify at trial. And Fubo has steadily improved on key business metrics, including cost and profitability metrics and customer "churn" (the percentage of Fubo subscribers who cancel their subscriptions). Although Fubo—like many tech startups[14]—is not yet profitable, Fubo is on a path to reach profitability by 2025. *See* Ex. 129 (PX129). Since first projecting that path to profitability in 2022, Fubo has confirmed that guidance for six consecutive quarters, as Fubo CFO John Janedis will testify.

[redacted]

1. [redacted]

[14] For example, Spotify, Uber, Snapchat, Twitter, Pinterest, and Dropbox each took more than 10 years to become profitable. *See* Ex. 29 (Tipalti Approve, *The Fastest Time to Profit*). Fubo is ahead of the curve set by those tech companies.

[redacted]

2. [redacted]

[redacted] One study, published by Aluma Insights, concluded that "Fubo could lose as much as 10% to 15% of its subscriber base by summer 2025." Ex. 72 at 25 (PX122). Another study published by Horowitz Research suggests that Raptor could cannibalize more than 20% of Fubo's subscribers. Ex. 82 (PX204). [redacted]

ARGUMENT

I. Fubo Is Likely To Succeed on the Merits of Its Claims[15]

Fubo is likely to succeed on the merits of its antitrust claims. Defendants' JV violates Section 7 of the Clayton Act, because Defendants' scheme between horizontal competitors to give themselves a skinny sports bundle—while denying all rivals that same package—may substantially lessen competition in at least three markets. Moreover, Fubo is also likely to succeed on its tying claim, because Defendants use their control over must-have sports programming to coerce Fubo into licensing unwanted general entertainment channels.

A. Raptor Will Tend To Create a Monopoly in the Skinny Sports Bundle Market

Fubo is likely to prevail on its claim that Raptor will tend to create a monopoly and substantially lessen competition in the consumer market for skinny bundles of channels offering sports content (the "Skinny Sports Bundle Market").

[15] Although not necessary to resolve this motion, Defendants are incorrect to suggest (at 34 n.13) the Supreme Court's recent decision in *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570, 1576 (2024), abrogated the "serious questions" standard that the Second Circuit has "recognized . . . since at least 1953." *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 38 (2d Cir. 2010). *Starbucks* did not address the "serious questions" formulation, which has "survived earlier instances in which the Supreme Court described the merits prerequisite to a preliminary injunction as a 'likelihood of success' without specifically addressing the content of such a 'likelihood.'" *Id.* In any event, Fubo has met both formulations.

There Is a Relevant Market for Skinny Sports Bundles. A relevant antitrust product market consists of products that "consumers treat . . . as 'acceptable substitutes.'" *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 105 (2d Cir. 2002). In determining whether consumers view products as substitutes, courts examine "practical indicia" such as "industry or public recognition of the [market]," "distinct prices," "distinct customers," and "sensitivity to price changes." *Regeneron Pharm., Inc. v. Novartis Pharma AG*, 96 F.4th 327, 339 (2d Cir. 2024) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)). Each of these factors confirms the existence of an independent market for a Skinny Sports Bundle.

First, [redacted]

Second, Defendants' skinny sports bundle will have a "distinct price" that is significantly cheaper than even the lowest-cost MVPD. [redacted] And Disney CEO Bob Iger gloated publicly that Raptor's skinny sports bundle will come "at a price point that will be obviously more attractive than the big fat bundle." Ex. 110 at 18 (PX336). On the other end of the spectrum, standalone SVODs have a fraction of the sports of Raptor—and

none of ESPN's or Fox's must-have channels. [redacted]

Third, Defendants themselves assert that Raptor will target a distinct set of customers. [redacted] As Mr. Iger put it: "[W]e believe there a number of sports fans out there that want to watch sports on television but did not want to sign up for the big cable and satellite bundle." [redacted]; *see FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008) ("[W]hen one or a few firms differentiate themselves by offering a particular package of goods or services, it is quite possible for there to be a central group of customers for whom 'only that package will do.'") (cleaned up).

Fourth, [redacted] Courts often use a "hypothetical monopolist" test to define the relevant market, asking whether a hypothetical monopolist of the proposed market could impose a "small but significant non-transitory increase in price ('SSNIP')" (usually 5-10%). *Regeneron*, 96 F.4th at 339. "If the hypothetical monopolist can impose a SSNIP without losing so many sales to other products as to render the SSNIP unprofitable, then the proposed market is the relevant market." *Id.* [redacted]

[redacted]

Defendants' (at 40-41) criticize Fubo's expert (Jon Orszag) for defining Raptor as a "skinny sports bundle" because Raptor includes ABC and Fox, [redacted] Defendants also argue (at 36-38) that Mr. Orszag's definition of the Skinny Sports Bundle Market is "too narrow" because it does not include single-sport direct-to-consumer options like NBA League Pass. But again, [redacted] these options are *not* skinny sports bundles—they are far narrower specialty offerings that have none of the national games Raptor will carry. *See supra* p. 10.

Defendants also cite to deposition questions [redacted] As Mr. Orszag explained, the answer to that hypothetical question depends on consumer demand—but, in any event, speculation about future edge cases does not invalidate the existence of the market. *See New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 360 (S.D.N.Y. 1995) (markets "need not—indeed cannot—be defined with scientific precision"); [redacted][16]

[16] In any event, Mr. Orszag's definition of the Skinny Sports Bundle Market is entirely sensible. The market is composed of distinct customers [redacted]

Finally, Defendants argue (at 41) that the existence of a Skinny Sports Bundle Market (in which Raptor is a monopolist) is inconsistent with the existence of a broader Live Pay TV market (in which Raptor provides a lower-cost substitute for customers of MVPDs, like Fubo). But courts have long recognized that, "within [a] broad market, well-defined submarkets may exist which, in themselves, constitute product markets." *Brown Shoe*, 370 U.S. at 325. There is nothing illogical about the fact that Raptor will provide a lower-cost substitute for many existing MVPD subscribers (particularly those primarily interested in sports), while fat-bundle MVPDs will not constrain a hypothetical monopolist in the Skinny Sports Bundle Market. *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 26 (D.D.C. 2015) ("[T]he mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes."); *FTC v. IQVIA Holdings Inc.*, 2024 WL 81232, at *12 (S.D.N.Y. Jan. 8, 2024) ("[T]he relevant market need only include the competitors that would substantially constrain the merged firm's price-increasing ability.") (quotations omitted).

Defendants' JV Tends To Create a Monopoly and May Substantially Lessen Competition. Because Defendants' bundling restrictions prevent MVPDs from offering their own skinny sports bundles, Raptor will have a monopoly in the Skinny Sports Bundle Market upon launch. *See supra* pp. 5-8. [redacted]

Defendants incorrectly argue (at 41) that Raptor cannot lessen market competition because it will be the first skinny sports bundle. Courts have repeatedly rejected the argument that new products and nascent markets are immune from antitrust scrutiny. *See Illumina, Inc. v. FTC*, 88 F.4th 1036, 1049 (5th Cir. 2023) (recognizing "market definition [based] on what [businesses]

sought to achieve, not what they currently had to offer," and rejecting argument that market must be "based on the products that currently exist, not those that are anticipated or expected").

Simply put, the fact that Raptor is a "new product" does not make it lawful. *See In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, 64 F. Supp. 3d 665, 679 (E.D. Pa. 2014) (rejecting in the Sherman Act context the claim "that the introduction of a new product by definition increases competition in the relevant market, and therefore cannot be found to be anticompetitive"). "The key question is whether the defendant combined the introduction of a new product with some other wrongful conduct, such that the comprehensive effect is likely to stymie competition, prevent consumer choice and reduce the market's ambit." *Id.* at 682. Here, the answer is yes: Defendants are blocking every other distributor from offering a skinny sports bundle, thwarting the competition that would otherwise benefit consumers. [redacted]; *United States v. Columbia Pictures Indus., Inc.*, 507 F. Supp. 412, 430 (S.D.N.Y. 1980) *aff'd*, 181 U.S. App. LEXIS 21309, 7 Media L. Rep. 1342 (2d Cir. Apr. 7, 1981) (movie companies' "claim that [their JV] creates a totally new product" does not make it lawful given they "arrogat[ed] to themselves one-half of the essential product of the industry"), *aff'd*, 1981 U.S. App. LEXIS 21309, 7 Media L. Rep. 1342 (2d Cir. Apr. 7, 1981).

For this reason, Defendants' reliance on *Fraser v. Major League Soccer*, 97 F. Supp. 2d 130 (D. Mass. 2000), is misplaced: Here, in stark contrast to *Fraser*, Defendants are exploiting their restraints on rivals to monopolize a market that would otherwise include multiple sellers,

Fubo among them. In *Fraser*, the defendant Major League Soccer did nothing to prevent the market for professional soccer from coming into existence in the first place.[17]

B. Raptor Will Harm Competition in the Live Pay TV Market

Fubo is also likely to show that Raptor will harm competition in the broader consumer market for Live Pay TV services, in which MVPDs sell live TV subscriptions to consumers.

There Is a Relevant Market for Live Pay TV. As Fubo's opening brief showed, federal courts have repeatedly recognized a relevant market for Live Pay TV services in which MVPDs compete. *See* Mot. 15 (citing cases). Defendants' own cited cases similarly recognize a "downstream retail market [where] distributors . . . sell the programming channels to consumers." *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1195 (9th Cir. 2012).

Defendants do not offer a single contrary case; instead, they argue (at 36-39) that the market is "too narrow" because some SVOD and DTC services now offer limited sports content. That is incorrect: MVPDs have fundamentally different characteristics than SVODs and DTCs. MVPDs provide a broad selection of live sports, whereas SVODs and DTCs typically offer no or limited live sports. *See supra* pp. 9-10. Even consumers who "self-bundle" multiple SVOD and DTC services cannot recreate the sports offered on an MVPD. For example, consumers can watch live sports on ESPN and Fox—the nation's two leading sports programmers—*only* with an MVPD subscription.

Indeed, the evidence shows that MVPDs and SVODs are complements, not substitutes: the vast majority of sports fans subscribe to *both* a Live Pay TV service *and* multiple SVOD services.

[17] Moreover, *Fraser* arose in the context of a professional sports league, in which some degree of coordination among rivals is necessary for the product to exist. As the *Fraser* court noted, "a league with one team would be like one hand clapping." 97 F. Supp. 2d at 137. Here, by contrast, no collusion is required to create a skinny sports bundle: Defendants could have entered themselves or lifted their restraints on third-party distributors.

See supra p. 10; *Dream Big Media, Inc. v. Alphabet Inc.*, 2024 WL 3416509, at *4 (N.D. Cal. July 15, 2024) (two products are "complementary" when "they are used together"); *New York v. Actavis, PLC*, 2014 WL 7015198, at *15 (S.D.N.Y. Dec. 11, 2014) (two Alzheimer's drugs were complements, not substitutes, where "70% of Namenda patients also t[ook]" the other drug), *aff'd sub nom. New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638 (2d Cir. 2015). And the cord-cutting trend and growth in SVOD and DTC subscriptions has coincided with an *increase* in viewership and ratings for live sports on MVPDs. *See supra* p. 7. Consumers may now view SVODs and DTCs as adequate substitutes for the *entertainment* on MVPDs, but not for *live sports*.

The hypothetical monopolist test also defeats Defendants' claim that SVODs and DTCs are part of the Live Pay TV market. *See supra* p. 23. If Defendants were correct that the Live Pay TV market included SVODs and DTCs, that would mean that, if every MVPD (including Comcast, Charter, DISH, DirecTV, YouTubeTV, and Hulu Live) merged into a single firm, that firm could not profitably raise prices by 5%. *See Regeneron*, 96 F.4th at 339. [redacted][18]

[18] Although not necessary to the resolution of this motion, discovery has also confirmed that there is a narrower relevant submarket for Streaming Live Pay TV consisting of virtual MVPDs. Mot. 14-16. [redacted] The existence of this market, however, is ultimately not material to the result here, because Raptor will be the only MVPD of *any* kind (virtual or traditional) to be able to offer a skinny sports bundle, and will thus have an unfair competitive advantage against both virtual and traditional MVPDs.

Raptor May Substantially Lessen Competition in the Live Pay TV Market. Defendants' exclusive skinny sports bundle will give Raptor an insuperable advantage over rivals, based not on building a better product but rather by exploiting the contractual restraints they impose on rivals. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2024 WL 1556931, at *16 (E.D.N.Y. Apr. 10, 2024) (conduct that harms the "competitive *process*" "thereby harm[s] consumers"). Ultimately, Defendants' scheme threatens to drive out existing competitors, raise barriers to entry for new competitors (which will not be able to offer Raptor's skinny bundle), and ultimately allow Defendants to raise prices (as their internal presentations show they plan to do). Section 7 is designed to prevent those competitive harms.

Defendants' primary basis for claiming otherwise is their repeated, inaccurate assertion (*e.g.*, at 43) that Raptor "will have ***no*** exclusive content." But Raptor's license to offer *unbundled* sports *is* exclusive: Through bundling restraints on rivals, Defendants have ensured that Raptor will be the only skinny sports bundle in the Live Pay TV Market. *See supra* pp. 5-8. Defendants' effort to distinguish *Columbia Pictures* falls flat for that reason. Just as in *Columbia Pictures*, the harm to competition here arises because Defendants have denied any other distributor the opportunity to offer a product competitive with their JV. *See* 507 F. Supp. at 419, 432 (nine-month exclusivity window "could be disastrous" for competitors); [redacted]

Defendants also argue (at 47) that they "have no duty to deal with Fubo or other distributors." But cases they cite (*LinkLine* and *Trinko*) simply observe that a *single* firm, acting unilaterally, normally has no duty to deal with its rivals under Section 2 of the Sherman Act (which is not at issue here). Fubo challenges Defendants' *collective* action in pooling their unbundled sports in their own JV while refusing to unbundle for any other distributor. *See New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 654 (2d Cir. 2015) ("when an antitrust conspiracy involves multiple acts, the character and effect of the conspiracy are not to be judged by

dismembering it and viewing its separate parts, but only by looking at it as a whole") (cleaned up). Defendants' conduct is analogous to "[a] joint refusal to deal, or group boycott," which is "usually considered a per se violation of the antitrust laws." *Columbia Pictures*, 507 F. Supp. at 427; *see also Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 295 n.6 (1985) ("[A] concerted refusal to deal . . . on substantially equal terms . . . might justify *per se* invalidation if it place[s] a competing firm at a severe competitive disadvantage."); Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1521, 1532 (1982) ("Even if the joint venture does deal with outside firms, it may place them at a severe competitive disadvantage by treating them less favorably than it treats the [participants in the joint venture].").

Raptor's manufactured competitive advantage also sets it apart from the "market-expanding joint ventures" that Defendants cite (at 43). Neither of those JVs was combined with anticompetitive conduct that ensured the JV would be insulated from effective competition. *See Nat'l Bancard Corp v. Visa U.S.A., Inc.*, 596 F. Supp. 1231, 1253 (S.D. Fla. 1984) (joint venture of financial institutions to provide "universal payments service which ensures that a VISA card will be honored by any merchant regardless of which bank issued it"), *aff'd*, 779 F.2d 592 (11th Cir. 1986); *Fraser*, 97 F. Supp. 2d at 142 (joint venture creation of Major League Soccer).

Defendants argue (at 46) that Raptor will not harm competition in the Live Pay TV market because it "will be forced to compete with existing MVPDs, SVODs and DTC services." But SVODs and direct-to-consumer services are not part of the Live Pay TV market, *see supra* pp. 29-30, and Defendants have insulated Raptor from competition from other MVPDs through their bundling practices. Defendants also contend (at 46)—with no support, and contrary to the public statements of their CEOs—that "[m]ost sports fans will likely prefer" the fat bundle to Raptor. But the evidence indicates otherwise: [redacted]

[redacted]

C. Raptor Will Harm Competition in the Sports Licensing Market

Finally, Fubo is likely to show that Raptor may substantially lessen competition in the Sports Licensing Market, in which programmers license sports channels to MVPDs.

There Is a Relevant Market For Sports Licensing. Courts have repeatedly recognized an upstream licensing market in the Live Pay TV industry. *See* Mot 15. Defendants' own cases do as well. *See*, *e.g.*, *Brantley*, 675 F.3d at 1195. And for MVPDs, there are no adequate substitutes to channels with live sports: there is far greater consumer demand for live sports than for any other type of linear television programming (particularly because SVODs offer immense catalogs of entertainment shows on demand). *See supra* pp. 3-4, 9-10.[19]

Although Defendants dispute the existence of a Sports Licensing Market in this case, Defendants themselves have endorsed that very market in other ongoing litigations. In its lawsuit against the NBA just last week, Warner Brothers alleged that a loss of NBA sports rights would cause Warner Brothers to lose "market share in *the sports licensing market*," in which the rights to premium live sports are "irreplaceable" and provide Warner Brothers with "competitive advantages" in negotiations with "distributors." Ex. 118 at ¶¶ 9, 84 (PX438) (emphasis added).

[19] The DOJ agrees: In 2018, the DOJ blocked a merger that would have combined the sports channels of Disney and Fox, based on the obvious harm that merger would have caused in a near-identical sports programming market as Fubo alleges here. Ex. 119 at ¶ 12 (PX440). Likewise, [redacted]

That judicial admission forecloses Warner Brothers from taking a contrary position in this case. *See*, *e.g.*, *Kregler v. City of New York*, 821 F. Supp. 2d 651, 656 (S.D.N.Y. 2011).[20]

Defendants argue (at 36) that different sports channels are not substitutes from the perspective of the *consumer*, because "[n]o one believes a football fan would substitute watching football for watching golf." But the relevant purchasers in the upstream market are not consumers—they are MVPDs. *See P & L Dev., LLC v. Gerber Prods. Co.*, 2024 WL 456794, at *11 (E.D.N.Y. Feb. 6, 2024) (rejecting similar argument). And for MVPDs, sports channels are the closest substitutes for each other. As Defendants' industry expert has put it, MVPDs need "a critical mass of sporting events"[21] to attract and retain subscribers, and "[y]ou can't really have a streaming service with broad appeal without a representative sample of key sports."[22]

MVPDs live within budget constraints and thus sometimes pick between sports programmers. [redacted]

Raptor May Substantially Lessen Competition in the Sports Licensing Market. Raptor may substantially lessen competition in the Sports Licensing Market by substantially increasing

[20] Similarly, in *Biddle*, Disney took the position—contrary to its apparent position here—that "the relevant product market . . . is the market in which linear network programmers compete to sell linear networks (such as the ESPN network) to [Streaming Live Pay TV] providers." Def.'s MTD at 14, *Biddle v. The Walt Disney Co.*, No. 5:22-cv-07317-EJD (N.D. Cal. Dec. 1, 2023).

[21] Ex. 1, Ed Desser, *Handicapping the Netflix of Sports: Win, place, show, scratch*, Sports Bus. J. (Mar. 28, 2016).

[22] Ex. 132, *WarnerMedia, Discovery Merger Could Push Netflix Into Sports*, Sportico: The Business of Sports (May 21, 2021) (quoting Ed Desser).

Defendants' "ability and incentive to foreclose rivals from sources of supply or distribution." *Illumina*, 88 F.4th at 1051; *see* Mot. at 20 nn.10-11 (collecting additional authority).

As an initial matter, Defendants already have substantial market power in the Sports Licensing Market. Collectively, they control more than half of all U.S. sports rights—[redacted] High barriers to entry protect that market power. Major sports rights cost billions per year to acquire. Ex. 124 at 17-19 (PX453). And even the few firms that can credibly bid for those rights cannot do so until 2028 at the earliest, because Defendants have long-term deals with all the major sports leagues. Ex. 49 (Major Rights Agreement Expirations). Defendants' control over these sports rights gives them tremendous leverage over distributors, which they have long used (and continue to use) to impose onerous contractual restrictions (like bundling).[23]

The launch of Raptor, however, will transform Defendants from *suppliers* of MVPDs into direct *competitors* of those same MVPDs, substantially altering Defendants' incentives and leverage in the Sports Licensing Market in two distinct respects:

First, Raptor will increase Defendants' ability and incentive to raise content prices and impose other onerous terms on MVPDs. *See* Ex. 125 at 62-63 (PX454). As Mr. Orszag will testify, with Raptor in the market, Defendants will have greater incentives to raise affiliate fees, because subscribers that leave existing MVPDs following price increases may switch to Raptor. *See also* [redacted]

[23] Defendants spill a lot of ink arguing their market power in the Sports Licensing Market does not matter because Raptor is styled as a joint venture rather than a merger. But nothing in this case turns on that distinction. The point, instead, is that Defendants have the power to hobble rivals by virtue of their collective control over must-have sports programming. And after Raptor, they will have unified incentives to discriminate against rivals for the benefit of their jointly owned service.

[redacted] And as Mr. Trautman will testify, the outlet that Raptor provides for these subscribers will substantially increase Defendants' leverage in negotiations with distributors, since Defendants will able to more credibly threaten a blackout in the event that they are unable to come to terms with a distributor. Ex. 124 at 37-39 (PX453). [redacted]

Second, Raptor will give Defendants strong shared incentives to [redacted] —because doing so would create a competitor that could [redacted] *see United States v. Paramount Pictures*, 334 U.S. 131, 151 (1948) ("where theatres are jointly managed, the natural gravitation of films is to the theatres in whose earnings the distributors have [a joint ownership] interest"—joint ownership "becomes a device for strengthening their competitive position as exhibitors by forming an alliance as distributors"). [redacted] *See supra* p. 16.

Defendants argue (at 48-50) that they won't raise prices on MVPDs [redacted].[24] But the relevant question is not whether Defendants will have *any* incentive to deal fairly with distributors after the launch of Raptor, but how Raptor's launch will *change* those incentives. Before Raptor,

[24] [redacted]

if Defendants raise price on an MVPD, that could cause subscribers to cut the cord, depriving Defendants of *all* revenue from those cancelled customers. After Raptor, however, Defendants can have their cake and eat it too: If the customer stays despite the price increase, Defendants get extra profit from higher carriage fees. And if the customer leaves, Defendants will recapture some their lost revenue from cord-cutters who flock to Raptor. Ex. 125 at 60-61 (PX454).

Defendants finally argue (at 51) that they have long-term contracts with distributors and thus will be unable to raise prices immediately. But the question here is whether the transaction may substantially lessen competition—that is a question of antitrust law that does not turn on the timing of the harm to Fubo. *See United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963) (Clayton Act requires "not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future").[25] In any event, [redacted], which is likely well before any trial on the merits could take place. Ex. 143 at 4 (PX191).

D. No Procompetitive Rationale Overcomes These Anticompetitive Harms

Because Fubo has shown that Raptor could "have an adverse effect on competition in the relevant market[s]" "the burden shifts to the defendant[s], who must demonstrate the procompetitive effects of the challenged restraint." *N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 883 F.3d 32, 42 (2d Cir. 2018). Defendants cannot meet this burden.

[25] Notably, Fubo's irreparable harm in this case flows from an independent antitrust injury: [redacted] *See infra* pp. 37-40. But even if Defendants' changed incentives were the only antitrust injury at issue, Defendants cite zero authority in support of their claim that the antitrust injury required to support Fubo's Section 7 claim must be the same as the irreparable harm to support a preliminary injunction.

Defendants assert (at 52) that Raptor "will offer an innovative new product that the JV members could not create on their own" at an attractive price. Here again, Defendants miss the forest for the trees: the question is not whether a skinny sports bundle could be procompetitive in a vacuum, but whether Defendants' larger scheme—unbundling their sports networks exclusively for their own JV while forcing the fat bundle on third-party distributors (and their customers)—is procompetitive. Defendants offer no justification for that discriminatory conduct.

Even ignoring the exclusivity afforded to Raptor by Defendants' bundling practices, Defendants offer no procompetitive justification for jointly entering the downstream market, as opposed to doing so separately and competing against each other. In other words, Defendants offer no procompetitive justifications that can be achieved *only* through the joint venture. *See*, *e.g.*, *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 721-22 (D.C. Cir. 2001) (procompetitive justifications "must be 'merger-specific,'" meaning they must be unachievable "by [any] company alone"). [redacted] Consumers could then self-bundle Defendants' direct-to-consumer services in any desired combination, providing lower prices and even greater choice and flexibility.[26]

E. Fubo Is Also Likely To Succeed on Its Tying Claims

Fubo is also likely to prevail on its independent tying claims based on Defendants' bundling practices.[27] Defendants' bundling practices are classic tying: they are exploiting their

[26] [redacted]

[27] Defendants are wrong (at 64) that Fubo's tying claim falls outside the scope of the PI hearing: This Court has recognized that Fubo's tying claim is relevant, at the very least, to its alternative request for relief. *See* Opp. Ex. 130 (Tr. Initial Pretrial Conf. 11:16-12:1). Defendants'

market power over commercially critical "must-have" sports content (such as ESPN and Fox) to coerce Fubo into licensing other channels that Fubo and its customers do not want. Mot. 20-23 (citing cases); *see supra* pp. 3-8. Such coercion is "illegal *per se*" under the Sherman Act. *Cablevision Sys. Corp. v. Viacom Int'l Inc.*, 2014 WL 2805256, at *2 (S.D.N.Y. June 20, 2014).[28]

Defendants' main response is to deny reality—claiming they *don't* in fact bundle their must-have sports networks with their non-sports networks. But that is [redacted] *See supra* Section (C)(1)-(4).

Putting Defendants' flawed factual contention to the side, their rebuttal to Fubo's tying claim rests entirely on the suggestion (at 8, 65) that a single Ninth Circuit decision, *Brantley v. NBCUniversal*, categorically endorsed forced bundling as lawful. *Brantley* did no such thing.

On the contrary, there was "no dispute [in *Brantley*] that the complaint allege[d] the existence of a tying arrangement." 675 F.3d at 1200. *Brantley* instead turned on the fact that the consumer plaintiffs had "disavow[ed]" any allegation that the bundling at issue "force[d] Distributors or consumers to forego [sic] the purchase of alternative low-demand channels." *Id.*

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tying is also critical to Fubo's irreparable harm. Defendants' bundling is what forces Fubo (and all other MVPDs) to carry the fat bundle, preventing them from competing against Raptor.

[28] *See also Biddle v. Walt Disney Co.*, 2023 WL 6453799, at *13-14 (N.D. Cal. Sept. 30, 2023) (sustaining tying claim against Disney based on its bundling requirements); *MCA TV Ltd. v. Pub. Interest Corp.*, 171 F.3d 1265, 1268 (11th Cir. 1999) (affirming district court finding that programmer's "conditioning of its licensing … of … first-run television shows … on the willingness of [distributor] to license a further first-run series called *Harry and the Hendersons* … constituted an illegal tying arrangement"); *Paramount Pictures Corp. v. Johnson Broad. Inc.*, 2006 WL 367874, at *2 (S.D. Tex. Feb. 15, 2006) (sustaining tying claim where programmer "expressly conditioned its licenses of *Judge Judy* and *Judge Joe Brown* on [distributor] additionally entering into a license agreement for *Becker*"); *Paramount Pictures*, 334 U.S. at 156-59; *United States v. Loew's, Inc.*, 371 U.S. 38 (1962).

at 1201. The opposite is true here: Defendants' bundling practices prevent Fubo from licensing other content that Fubo would prefer to distribute (and its customers would prefer to watch). For instance, [redacted] Ex. 69 at 4 (PX105). And as Fubo executives will testify, absent Defendants' bundling requirements, Fubo would prefer to license other networks like the History Channel from A&E over Defendants' non-sports networks like Freeform, Disney Junior, Nat Geo Wild, and FXX.

Defendants do not contest any of the other elements of Fubo's tying claim. They do not challenge, for instance, Fubo's tying or tied markets. [redacted][29]

II. Fubo Will Be Irreparably Harmed Absent an Injunction

As set forth in Fubo's motion (at 9-12), [redacted] Fubo has separately established the JV will irreparably harm competition and consumers. Defendants' arguments that these harms flow from other sources, such as Fubo's purportedly flawed business model or from "legitimate competition," are without merit.

[29] [redacted] Am. Compl. ¶ 202 ("The linear networks ESPN, ABC, Fox, CBS, and NBC are commercially critical sports channels. These five channels represent five of the six most-watched channels on Fubo's platform.") [redacted]

A. Fubo Has Established Irreparable Harm by Showing It Faces [redacted]

That is irreparable harm. Mot. 9-12.

Defendants argue that Fubo's alleged harms are insufficiently "imminent" [redacted]

; *see also Sleep No. Corp. v. Young*, 33 F.4th 1012, 1018 (8th Cir. 2022) (plaintiff is "not required to prove with certainty the threat of irreparable harm").[30]

Defendants also mount several substantive critiques of [redacted] None are persuasive:

First, Defendants assert (at 56) that [redacted]

[30] Defendants' attempt (at 58) to distinguish *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969 (2d Cir. 1989), is unavailing: If anything, the threat of irreparable harm to Fubo is *more* "imminent" than the threatened harm in *Tucker*, which concerned the potential bankruptcy of a *third-party entity* in which the plaintiffs held a financial interest (not the plaintiff itself). Moreover, as the district court explained, the plaintiffs had "not show[n] that any creditors are actually threatening to file an involuntary bankruptcy petition." *Tucker Anthony Realty Corp.*, 1989 WL 8138, at *4 (E.D.N.Y. Jan. 30, 1989). The threat to Fubo is far more concrete.

[redacted] Fubo cannot remedy that harm through money damages.

Second, Defendants criticize Fubo for relying on [redacted] And it is entirely reasonable to infer that customers who sign up for Fubo and then immediately watch live sports on a Disney or Fox sports network would instead choose Raptor, which will offer those same channels for less than half the price. In any event, Mr. Horihuela will present other data (such as data showing a customer's "longest view" on the first day of sign-up) that independently corroborate Fubo's first view data.

Third, Defendants suggest (at 56-57) that [redacted]

[31] Defendants incorrectly claim (at 57) that Fubo assumed that subscribers who watched *any* Disney or Fox content on *any* Disney or Fox channel would instead subscribe to the JV. In fact, as Mr. Horihuela will explain, Fubo's first-view analysis looked *only* at subscribers who viewed Disney and Fox *live sports content* on the same channels that will be available on Raptor. Defendants are simply mistaken to claim otherwise.

Fourth, Defendants assert (at 57-58) that [redacted] from three massive sports conglomerates. Defendants identify no such silver bullet.[32]

Defendants argue that Fubo's harms are not irreparable because they can be remedied after the conclusion of a potentially years-long of litigation through (1) potential dissolution of the JV following a final judgment in Fubo's favor; or (2) money damages. But these proposals disregard Fubo's specific allegations of irreparable harm, which project that the JV will likely cause [redacted]

B. Fubo Is Likely To Suffer Other Forms of Irreparable Harm

Wholly apart from the risk of insolvency, "[i]t is well-established that a movant's loss of current or future market share may constitute irreparable harm." *Grand River Enter. Six Nations,*

[32] [redacted]

Ltd. v. Pryor, 481 F.3d 60, 67 (2d Cir. 2007). A "loss of reputation, good will, and business opportunities" can also suffice, *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004), as can the "potential loss of market advantage" threatened by the JV, *Muze, Inc. v. Digital On-Demand, Inc.*, 123 F. Supp. 2d 118, 131 (S.D.N.Y. 2000). Defendants make no attempt to address these alternative bases for irreparable harm, which Fubo's allegations satisfy.

The Second Circuit has also held that [redacted][33]

C. Fubo Has Independently Established That the JV Threatens Irreparable Harm to Competition and Consumers

Finally, Defendants do not dispute that harm to competition and consumers is irreparable. *See Actavis*, 787 F.3d at 661 ("Threatened economic harm to consumers is plainly sufficient to authorize injunctive relief.") (cleaned up); *Consol. Gold Fields PLC v. Minorco, S.A*, 871 F.2d 252, 261 (2d Cir. 1989) (similar). That is the case here, where the JV—if launched—will fundamentally harm the streaming marketplace by allowing Defendants to monopolize the Skinny Sports Bundle Market while requiring all other distributors to offer the fat bundle.

Defendants assert (at 60) that Raptor can be disbanded and competition restored after it launches and following trial on the merits, because Raptor is a joint venture, not a merger. That

[33] [redacted]

misconstrues the issue: As Fubo's motion explains, it would be difficult to restore effective competition after trial because, even if Fubo ultimately prevails and Raptor competitors are freed to offer a skinny sports bundle, Raptor will have enjoyed a years-long first-mover advantage as the only skinny sports bundle—[redacted] *See supra* p. 17.

D. Defendants' Anticompetitive Conduct Is the Direct Cause of Fubo's Threatened Irreparable Harm

Defendants (at 54) disparage Fubo's business as "a middleman that adds [nothing] to the Pay TV ecosystem" and suggest that harms to Fubo therefore can be disregarded. Defendants' attempt to smear Fubo's business is wrong on the facts, *see supra* pp. 17-18, but in any event, Defendants' apparent legal theory—that Fubo's alleged "weakness" as a competitor disqualifies it from the protections of the antitrust laws—has no basis in law or logic. Tellingly, Defendants (at 53-54) cite no case law for this proposition. Defendants' misguided criticisms of Fubo's business have no bearing on the pertinent issues, namely, whether Defendants' proposed combination would likely violate the antitrust laws and irreparably harm Fubo.

Defendants' argument (at 54-55) that any harm to Fubo is the result of "legitimate competition" simply assumes Fubo's antitrust arguments fail. As Fubo has shown, Raptor's built-in advantages are not "legitimate"; rather, they are the product of Defendants' anticompetitive scheme to give Raptor the *exclusive* rights to their unbundled sports content while consigning Fubo (and all other rivals) to the fat bundle and walling off their joint service from effective competition.

Finally, Defendants note (at 55) that the antitrust laws are "meant to ensure competition and consumer choice," but that is precisely what Fubo wants: for consumers to benefit from competition between *multiple* skinny sports bundles, not just the one that three horizontal competitors agree amongst themselves to offer. By contrast, if Defendants install Raptor as the monopoly skinny sports bundle, and thereby drive Fubo out of business, consumers will suffer

through higher prices and reduced choice and innovation. *See Nat'l Soc. of Pro. Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (antitrust laws reflect a judgment that "competition will produce not only lower prices, but also better goods and services").

III. The Public Interest and Balance of Hardships Strongly Favor a Preliminary Injunction

1. "The public has an interest in enforcement of the antitrust laws and in the preservation of competition." *trueEX*, 266 F. Supp. 3d at 726. "Granting a preliminary injunction in this case would serve those interests because it would preserve competition in the [relevant] market[s] and would prevent [Defendants] from engaging in potentially anticompetitive conduct until a trial on the merits can take place." *Id.*[34] And in this antitrust case specifically, numerous members of the public—including members of Congress,[35] other distributors,[36] consumer groups,[37] and the Department of Justice[38]—have each expressed significant concerns that the JV

[34] None of the cases Defendants cite is to the contrary. Most are not antitrust cases and so did not involve the public's inherent interest in enforcing those laws and preserving competition. The two antitrust cases they do cite—*New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179 (S.D.N.Y. 2020), and *Doron Precision Systems, Inc. v. FAAC, Inc.*, 423 F. Supp. 2d 173 (S.D.N.Y. 2006)—did not involve preliminary injunctions.

[35] Ex. 121(PX447); Ex. 122 (PX448); Ex. 25 (Letter from Nancy Pelosi to Jonathan Kanter (July 30, 2024)).

[36] [redacted]

[37] "Allowing the biggest media players to join forces—while locking out traditional linear cable providers from offering the same package at the same price—only gives even more power and leverage to the Goliaths to extract more money from customers." https://acaconnects.org/press-releases/aca-connects-statement-on-the-anticompetitive-sports-streaming-juggernaut/. "[T]he JV will eventually dominate the distribution market for live sports and will drive out competition, leaving consumers captive to the JV for lives sports." https://ir.fubo.tv/news/news-details/2024/Final-Coalition-Letter/default.aspx.

[38] [redacted]; *see* Ex. 131 (PX431).

[redacted] and "has the potential to reshape this already-concentrated space to the detriment of consumers, sports leagues, and third-party distributors." Ex. 85 at 3 (PX216); Ex. 122 (PX448).

2. The balance of hardships also tips decidedly in Fubo's favor. Should Raptor launch, [redacted] Defendants, on the other hand, argue only that they have "invested substantial resources" in Raptor. These unsupported assertions cannot demonstrate hardship. *See Warner-Lambert Co. v. Northside Dev. Corp.*, 86 F.3d 3, 8 (2d Cir. 1996) (balance of hardships favored plaintiffs where the "only harm to [defendants] from the full preliminary injunction is the loss of profits on sales").

IV. In the Alternative, the Court Should Order Defendants to Unbundle

As an alternative to enjoining Raptor, the Court may enjoin Defendants from enforcing the anticompetitive bundling, packaging, and penetration requirements that force Fubo to license and distribute their non-sports networks together with their sports networks. Courts may issue mandatory injunctions that alter the status quo upon "a clear or substantial likelihood of success on the merits." *N. Am. Soccer League*, 883 F.3d at 37 (quoting *New York Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012)). For the same reasons discussed at length in the previous sections, Fubo is substantially likely to succeed on the merits of both its Section 7 claim and its tying claim. *See supra* pp. 20-37.

Enjoining Defendants' anticompetitive licensing restraints would enable Fubo to offer a Raptor-like package consisting primarily of sports networks, providing consumers with more competition and choice. By requiring Defendants to lift their bundling restraints on Fubo (just as they are doing for Raptor), the Court can offer meaningful relief—allowing Fubo to compete with Raptor with a much skinnier, sports-focused package at a far more competitive price. Indeed, as Mr. Marchesano will testify, Fubo could immediately offer a sports-focused package of roughly

40 channels, with that bundle growing substantially skinnier over the next year (as Fubo seeks to renegotiate with other programmers and existing contracts expire).

Defendants also argue (at 64) that this alternative remedy would require "the Court to wade into and rearrange the complex contractual agreements of sophisticated counterparties." Not so. The Court could instead order the parties to submit to binding, baseball-style arbitration[39] to determine fair and reasonable terms on which to license Defendants' sports content. Using such arbitration in antitrust contexts is well-established: Turner (now part of Warner Brothers) agreed to *exactly that* to get the AT&T-Time Warner merger approved in 2018.[40] And the "DOJ, FCC, and [U.S. District Court for D.C]" "blessed" a similar arbitration provision as part of the Comcast-NBCU merger in 2011.[41]

CONCLUSION

For the foregoing reasons, the Court should grant Fubo's motion.

[39] Baseball-style arbitration is where "each party puts forward a final offer before knowing about its counterparty's offer, and the arbitrator chooses between those two." *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 217 (D.D.C. 2018).

[40] *See AT&T*, 310 F. Supp. 3d at 184. The exact terms of the arbitration to which Turner agreed are available at Ex. 115, PX433. The Court could order Defendants to abide by those exact same arbitration terms.

[41] *AT&T*, 310 F. Supp. 3d at 241 n.51; *see generally United States v. Comcast Corp.*, 808 F. Supp. 2d 145 (D.D.C. 2011).

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Respectfully submitted,

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