

January 9, 2025

VIA EMAIL

Ms. Doha Mekki
Acting Assistant Attorney General
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20536

Re: Settlement of *FuboTV v. Disney, et al.*

Dear Assistant Attorney General Mekki:

The American Antitrust Institute (AAI) urges the Department of Justice to investigate the Walt Disney Company’s purchase of 70 percent of Fubo and the other terms of the January 6, 2025 settlement of Fubo’s antitrust suit seeking to block Venu, the sports streaming joint venture of Disney, Fox and Warner Bros. Discovery.

Deep concerns about the threats to competition in live U.S. sports streaming led AAI to join with several other consumer advocacy and public interest organizations to file an amicus brief in support of Fubo’s suit to block the anti-competitive Venu joint venture.¹ We had hoped the outcome of the litigation would help restore competition and benefit consumers of live sports broadcasts. Instead, based on what limited information has been disclosed publicly, the settlement reached by the parties this week appears to leave the consumer harms that were the basis of the suit unaddressed and unremedied.²

Indeed, by bringing Fubo under the control of Disney, the settlement only exacerbates the competitive harm to the public. Fubo collects a hefty bounty of more than \$300 million in settlement payments and loan commitments.³ The anti-competitive Venu joint venture will be free to move ahead and Fubo, which described itself as having “continuously fought back” against the defendants’ “unconscionable practices,” will reap anticompetitive rewards from

¹ *Brief of Sports Fan Coalition and Other Consumer Advocacy and Public Interest Organizations as Amici Curiae in Support of Appellees, FuboTv, Inc. et al. v. The Walt Disney Company, et al.*, No. 24-2210 (2d Cir. Nov. 12, 2024).

² See FuboTv Inc. Investor Presentation, January 6, 2025, https://s21.q4cdn.com/819998841/files/doc_downloads/2025/01/Fubo_Investor-Presentation_20250106_0711.pdf

³ *Id.* at 3.

the broadcasting oligopoly it had until now resisted.⁴ In the meantime, the consumers who stood to benefit from Fubo’s successful efforts to block the Venu joint venture get nothing. Rather than protecting consumers, the settlement looks like an agreement to share the joint venture’s monopoly profits, with Disney and the other defendants paying Fubo to free themselves up to continue their anticompetitive conduct.

As described in our joint amicus brief in Fubo’s suit, the owners of live U.S. sports broadcast rights have long engaged in anticompetitive licensing practices that foreclose rivals.⁵ Their practices have forced consumers to pay higher prices for “fat” sports streaming content bundles when many would prefer less costly “skinny” bundles that provide only the content that they value. The Venu joint venture, while it claims to meet the consumer demand for “skinny” bundles, simply consolidates the monopoly power of the largest holders of sports broadcasting rights. It brings together three previously independent competitors who collectively control up to 80% of the market for U.S. live sports broadcasting rights, discouraging both new entry and the competitors’ efforts to develop their own competing “skinny” bundles.

After evaluating Fubo’s antitrust claims, the District Court for the Southern District of New York issued a preliminary injunction to block the Venu joint venture.⁶ The court agreed with Fubo that the joint venture was likely to substantially lessen competition and cause irreparable harm by reducing choice and incentives to innovate and increasing the risk that the defendants would engage in anticompetitive collusion.

The Antitrust Division shared our concerns and those of the district court about the Venu joint venture. In its own amicus brief to the Second Circuit, the Antitrust Division urged the court to uphold the district court’s injunction. It endorsed the district court’s legal analysis and stated emphatically that “by combining and consolidating their control over sports programming into a single entity intended to dominate the distribution level, [d]efendants created an arrangement of the sort that the antitrust laws were designed to counteract—thus making out a prima-facie Section 7 violation.”⁷

The settlement of the Fubo suit does not appear to address any of the concerns raised by the district court or those expressed by the Antitrust Division. It allows a joint venture to

⁴ FuboTV Press Release, February 20, 2024, <https://ir.fubo.tv/news/news-details/2024/Fubo-Sues-The-Walt-Disney-Company-FOX-Corp.-Warner-Bros.-Discovery-and-Affiliates-for-Antitrust-Practices/default.aspx>.

⁵ *Amici Brief* at 6-9.

⁶ *FuboTV Inc. v. The Walt Disney Co.*, 24-CV-01363 (MMG) (S.D.N.Y. Aug. 16, 2024).

⁷ *Brief for the United States of America as Amicus Curiae in Support of Plaintiffs-Appelles* at 24, *FuboTv, Inc. et al. v. The Walt Disney Company, et al.*, No. 24-2210 (2d Cir. Nov. 26, 2024).

proceed that a federal district court judge has already found likely to be illegal. Worse still, under the guise of “strengthening” Fubo, the agreed terms instead eliminate Fubo as an independent competitor.

The parties have claimed that Fubo will continue to operate independently, including by negotiating its own carriage agreements with content providers.⁸ That is an empty promise. Antitrust law has recognized that “internal competition” is not a substitute for true competition.⁹ And the Antitrust Division’s own experience has shown that a commitment to price independently or compete vigorously is meaningless if an arrangement gives the parties an ability and an incentive to reduce competition.¹⁰

For all of these reasons, we urge the Department of Justice to step up to represent the interests of the millions of affected consumers left unprotected by the Fubo settlement. We ask the DOJ to initiate an investigation of all the terms of the settlement, including Disney’s proposed purchase of a 70% stake in Fubo and the Venu joint venture. We also urge that the DOJ take any actions necessary to ensure effective remedies to any harms to competition in live U.S. sports broadcasting that its investigation reveals. Meaningless commitments to compete should be rejected if they do not align with the incentives of the parties.

If warranted by the outcome of DOJ’s investigation, we strongly encourage the DOJ to seek to block in their entirety both Disney’s acquisition of Fubo and the Venu joint venture. Consumers of U.S. live sports broadcasting deserve the choice, quality, innovation and fair pricing only a competitive market can provide. Only effective, enforceable remedies will ensure that outcome.

* * *

⁸ FuboTv, Inc. Investor Presentation, January 6, 2025, at 12.

⁹ See, e.g., *United States v. Bertelsmann SE & Co. KGaA et al*, 646 F.Supp. 3d 1 (D.D.C. 2022) (finding parties’ promise to compete internally inadequate given economic incentives and noting ways in which competition could be reduced despite the promise to compete).

¹⁰ See, e.g., Remarks of AAG Jonathan Kanter to the New York State Bar Association Antitrust Section (Jan. 24, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york> (noting that “[e]xperience shows that it is often impossible to craft behavioral remedies that anticipate the complex incentives that drive corporate decision-making”).



Thank you for considering the views of the American Antitrust Institute. For questions or comments please contact us using the information below.

Sincerely,

A handwritten signature in black ink, appearing to read "Randy Stutz", with a stylized, cursive script.

Randy Stutz
President
American Antitrust Institute
1025 Connecticut Avenue, NW, #1000
Washington, DC 20036
(202) 905-5420
rstutz@antitrustinstitute.org

A handwritten signature in black ink, appearing to read "Kathleen W. Bradish", with a cursive script.

Kathleen Bradish
Vice President & Director of Legal
Advocacy
American Antitrust Institute
1025 Connecticut Avenue, NW, #1000
Washington, DC 20036
(202) 828-1226
kbradish@antitrustinstitute.org