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11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**

14
15 AliveCor, Inc.,

16 Plaintiff,

17 v.

18 Apple Inc.,

19 Defendant.

CASE NO. 4:21-CV-03958-JSW

**DEFENDANT’S NOTICE OF MOTION
AND MOTION TO DISMISS
PLAINTIFF’S COMPLAINT**

Date: September 3, 2021
Time: 9:00 a.m.
Place: Courtroom 5, 2nd Floor

The Honorable Jeffrey S. White

SUMMARY OF ARGUMENT

1
2 After releasing and benefitting from various ECG-capable devices and apps that it has built to
3 work with and on the Apple Watch, iPhone, and Android smartphones, AliveCor now accuses Apple
4 of anticompetitive conduct because Apple's updates to its own Apple Watch and watchOS
5 purportedly made it more difficult for AliveCor's products to utilize Apple Watch data. This does not
6 give rise to plausible antitrust claims for the following reasons:

7 1. AliveCor does not plead plausible antitrust product markets. Its three proposed hardware
8 markets fail to include reasonable substitutes (including AliveCor's own products) and in some cases
9 include non-ECG products, and thus are too narrow and too broad. Its two proposed app markets
10 likewise are inadequately defined: they exclude reasonable substitutes, have vague boundaries, and
11 provide no basis for watchOS being a standalone product market. *See Hicks v. PGA Tour, Inc.*, 897
12 F.3d 1109, 1120 (9th Cir. 2018) (market must include "product at issue" and "economic substitutes").

13 2. AliveCor makes unsupported market share allegations that fail to establish that Apple holds
14 market power in the proposed markets. At most, AliveCor presents a 37.5% market share in a single
15 quarter, which fails to "establish a prima facie case of market power." *Image Technical Servs., Inc. v.*
16 *Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997). AliveCor's attempt to increase that market
17 share is based only upon unsupported assumptions and implausible interpretations of third-party
18 articles. *See FTC v. Facebook, Inc.* – F. Supp. 3d. --, 2021 WL 2643627, at *12 (D.D.C. 2021).

19 3. AliveCor generally fails to state an antitrust claim. AliveCor's claims accuse an Apple
20 product design improvement itself as anticompetitive conduct, without separate, associated
21 anticompetitive conduct. Even assuming Apple were a monopolist in a relevant product market,
22 which it is not, it is an "uncontroversial proposition that product improvement by itself does not
23 violate Section 2, even if it is performed by a monopolist and harms competitors as a result." *Allied*
24 *Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F. 3d 991, 998-1000 (9th Cir. 2010).

25 4. AliveCor's § 17200 claim has no independent basis and should be dismissed along with the
26 Sherman Act claims for the reasons stated above. *See Aguilar v. Atlantic Richfield.*, Cal. 4th 826,
27 866-867 (Cal. 2000).

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1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on September 3, 2021, at 9:00 a.m., or as soon thereafter as
3 the matter may be heard, in the U.S. District Court for the Northern District of California, Courtroom
4 5, 2nd Floor, Federal Courthouse, Defendant Apple Inc., through their undersigned counsel, will, and
5 hereby do, move to dismiss Plaintiff AliveCor, Inc.’s Complaint for failure to state a claim upon which
6 relief can be granted. This Motion is supported by this Notice of Motion and Motion; the accompanying
7 Memorandum of Points and Authorities; the accompanying Request for Judicial Notice; the [Proposed]
8 Order filed herewith; the pleadings and papers on file herein; and such other matters that may be
9 presented to the Court at the hearing.

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 Defendant Apple Inc. (“Apple”) respectfully submits this Memorandum of Points and
12 Authorities in support of its Motion to Dismiss Plaintiff AliveCor, Inc.’s (“AliveCor”) Complaint
13 pursuant to Fed. R. Civ. P. 12(b)(6).

14 **STATEMENT OF ISSUES TO BE DECIDED**

15 Does the Complaint fail to state a claim for which relief can be granted under the Sherman Act,
16 or the California Unfair Competition Law, and therefore require dismissal of all claims, because:

- 17 1. AliveCor did not plead a plausible relevant product market;
18 2. AliveCor failed to plead Apple holds a sufficient market share in the relevant markets; or
19 3. AliveCor failed to state an antitrust claim.

20 **I. PRELIMINARY STATEMENT**

21 Initially released in 2015, the Apple Watch provided consumers a way to use their smartphone
22 features on the go, along with a host of health and fitness related features unique to the Watch. The
23 Apple Watch has undergone upgrades and improvements over time, including approval of its Series 4
24 model by the FDA to record ECGs.

25 Until recently, AliveCor has taken advantage of Apple Watch (and iPhone) software, hardware,
26 and customer bases in order to develop apps and devices to track and analyze users’ heart rates,
27 including the portable, ECG-capable KardiaMobile and KardiaBand devices that work with the iPhone
28 and Apple Watch respectively. Complaint, ECF 1 (“Compl.”), ¶ 20 n. 9; *see also* Decl. of Jennifer Rho

1 ISO Def’s Req. for Judicial Notice (“RJN”), Ex. C. Indeed, AliveCor appears to concede that Apple’s
2 conduct was *not* anticompetitive or exclusionary for much of the Apple Watch’s history. AliveCor’s
3 lengthy factual allegations boil down to a complaint about one of Apple’s latest Apple Watch
4 improvements: that an update of the heart rate algorithm with the Series 4 Apple Watch made it difficult
5 for AliveCor to offer one specific functionality—using heart rate data to encourage a user to take an
6 ECG—not offered by Apple itself. But companies are generally under no obligation to provide their
7 assets for use by another and so, even if true, Apple’s actions would not constitute an antitrust violation.

8 AliveCor compounds its failure to plead a plausible claim for relief by failing to present an
9 appropriate market in which Apple holds market power or a monopoly and purportedly committed that
10 anticompetitive conduct. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (requiring a plaintiff
11 to plead “enough facts to state a claim to relief that is plausible on its face”). AliveCor pleads two sets
12 of markets, each with alternative constructions, and all of which are implausibly overbroad and/or
13 narrow. First, AliveCor alleges a hardware-based market with two alternative constructions: “the U.S.
14 ECG-capable smartwatch market (or, in the alternative, the U.S. ECG-capable wearable devices market
15 or U.S. smartwatch market).” Compl., ¶ 99. Second, AliveCor also alleges a “market for watchOS heart
16 rate analysis apps or, in the alternative, heart rate analysis apps for wearable devices.” *Id.*, ¶ 95.

17 These proposed market definitions do not, as they must, “encompass the product at issue as
18 well as all economic substitutes for the product.” *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120 (9th
19 Cir. 2018). AliveCor’s hardware-based market definitions are each limited to wearable or smartwatch
20 devices. But according to AliveCor, various factors affect the development of and demand for ECG-
21 capable devices: “a user concerned with the ability to meaningfully diagnose any heart rate issues in
22 real time can only choose a device that is capable of taking ECG readings.” At the same time,
23 AliveCor’s proposed “U.S. smartwatch market” would encompass devices that are *not* ECG-capable.
24 Nor does AliveCor address why a non-wearable ECG-capable device, or one not paired with a
25 smartwatch, is not an economic substitute for a user concerned with “medically determin[ing]
26 whether they are experiencing a heart-related event requiring medical assistance.” Compl., ¶ 34.

27 AliveCor’s proposed app market definitions fare no better. As its primary proposed market,
28 AliveCor claims that watchOS heart rate analysis apps constitute their own market. But “such single-

1 brand markets are, at a minimum, extremely rare and courts have rejected such market definitions
2 even where brand loyalty is intense.” *Epic Games, Inc. v. Apple Inc.*, 493 F. Supp. 3d 817, 835 (N.D.
3 Cal. 2020) (internal alterations and citations omitted). AliveCor’s alternative market—all heart rate
4 analysis apps—is likewise impermissibly narrow, excluding reasonable substitutes for consumers.
5 AliveCor cannot draw up artificial markets contorted to meet its litigation needs which do not
6 encompass all interchangeable products. *See Hicks*, 897 F.3d at 1121; *Queen City Pizza, Inc. v.*
7 *Domino’s Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997).

8 AliveCor also fails to plead that Apple has sufficient market power in these markets while the
9 alleged anticompetitive conduct has occurred. AliveCor relies upon a contorted reading of a few tech
10 news articles, limited data collected during the COVID-19 pandemic, and unsupported assumptions
11 about Apple’s competitors in order to craft a purported market share data point for a single quarter in
12 2020. AliveCor’s claims regarding Apple’s market power in the heart rate analysis app markets are
13 based on the same faulty allegations, and fail to take into account any other heart rate analysis apps.
14 Such allegations are not “enough to raise a right to relief above the speculative level on the assumption
15 that all of the complaint’s allegations are true.” *Twombly*, 550 U.S. at 555.

16 Fundamentally, AliveCor’s claims accuse Apple’s product design improvement as being
17 anticompetitive, without separate, associated anticompetitive conduct. However, it is an
18 “uncontroversial proposition that product improvement by itself does not violate Section 2, even if it
19 is performed by a monopolist and harms competitors as a result.” *Allied Orthopedic Appliances Inc.*
20 *v. Tyco Health Care Group LP*, 592 F.3d 991, 999-1000 (9th Cir. 2010).

21 Finally, because AliveCor’s Unfair Competition Law claim is predicated on the same
22 allegations and theories as the Sherman Act claim, it must fail for the same reasons as AliveCor’s
23 antitrust claims. *See e.g., Aguilar v. Atlantic Richfield Co.*, 25 Cal.4th 826, 866-867 (Cal. 2001).

24 II. ALIVECOR’S ALLEGATIONS

25 Since first released, the Apple Watch has been equipped with a number of health features and
26 included a photoplethysmography (“PPG”) sensor to help monitor users’ heart rate. Compl., ¶ 1.
27 Apple has continued to improve and update the health features in new generations of the Apple
28 Watch and watchOS. *Id.*, ¶¶ 7, 78. For example, Apple added the ability to record an ECG and a new

1 heart rate analysis app to the Series 4 Watch, although Apple to this day also offers Watches that do
2 not have ECG capability, including the Series 3 Watch, which starts at half of the price of later Series
3 Watches like the Series 5. *Id.*, ¶ 21, n.10 (RJN, Ex. A); ¶ 40 n.19 (RJN, Exs. D-E).

4 Two years after Apple first introduced the Apple Watch, AliveCor obtained FDA approval to
5 sell its KardiaBand, an ECG-capable wristband designed to be worn with the Apple Watch. *Id.*, ¶ 7,
6 20 n.9 (RJN, Ex. C). AliveCor also developed the SmartRhythm app, which “monitor[s] a user’s
7 heartrate and alert[s] them when there was some irregularity suggesting they should record an ECG.”
8 Compl., ¶ 2. AliveCor has utilized the Apple Watch’s heart rate algorithm in order to develop its
9 KardiaBand wristband and iOS-compatible apps and reach Apple’s consumers, while simultaneously
10 developing an AndroidOS compatible app. *Id.*, ¶ 2. AliveCor’s KardiaBand and apps, including the
11 Kardia app that remains available for free in Apple’s App Store, add to AliveCor’s offering of
12 portable, ECG-capable products that work with smartphones. *Id.*, ¶ 18, n.7 (RJN Ex. B); ¶ 20, n.9
13 (RJN Ex. C). AliveCor acknowledges that “Apple not only initially approved AliveCor’s apps for
14 distribution through the App Store, but also advertised AliveCor’s innovations in order to sell more
15 Apple Watches.” Compl., ¶ 2. AliveCor also admits: “Apple’s demonstrated commitment to heart
16 health on the Apple Watch validated AliveCor’s business concept and, as healthy competition should
17 do, initially led to an increase in AliveCor’s sales and public brand awareness.” *Id.*, ¶ 3.

18 With its Series 4 Watch, Apple added to the various options already available to consumers
19 for analyzing their heart rate: AliveCor’s apps, KardiaMobile, and/or KardiaBand; other third-party
20 heart rate analysis apps utilizing Apple Watch or other hardware data that were available on
21 watchOS; and other hardware devices able to measure heart rate and ECG that are sold by Fitbit,
22 Garmin, and Android manufacturers, among others. *Id.*, ¶¶ 6, 31-35. But even though users now have
23 more access than ever to sophisticated, portable, and affordable devices for analyzing heart rate and
24 ECG information, AliveCor filed the Complaint in the present case on May 25, 2021, alleging
25 violations of Section 2 of the Sherman Act and unfair competition.

26 III. LEGAL STANDARD

27 To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint
28 must contain sufficient factual matter “to ‘state a claim to relief that is plausible on its face.’”

1 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial
2 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
3 inference that the defendant is liable for the misconduct alleged.” *Id.* Applying this standard is a
4 “context-specific task that requires the reviewing court to draw on its judicial experience and
5 common sense.” *Id.* at 679. The Court need not “accept as true allegations that contradict matters
6 properly subject to judicial notice.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008)
7 (internal quotation marks and citation omitted). “Nor is the court required to accept as true allegations
8 that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v.*
9 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

10 IV. ARGUMENT

11 A. **AliveCor Fails to Allege Plausible Product Markets**

12 To state a claim for monopolization under Section 2 of the Sherman Act, a plaintiff must allege:
13 “(1) Possession of monopoly power in the relevant market; (2) willful acquisition or maintenance of
14 that power; and (3) causal antitrust injury.” *SmileCare Dental Group v. Delta Dental Plan of*
15 *California, Inc.*, 88 F.3d 780, 783 (9th Cir. 1996). Defining the relevant market is the “threshold” for
16 stating Section 2 claims. *FTC v. Qualcomm Inc.*, 969 F.3d 974, 992 (9th Cir. 2020) (citing *Ohio v. Am.*
17 *Express Co.*, 138 S. Ct. 2274, 2285 (2018)). “[T]he relevant market must still be plausibly alleged to
18 make it past a 12(b)(6) challenge.” *hiQ Labs, Inc. v. LinkedIn Corp.*, 485 F. Supp. 3d 1137, 1147 (N.D.
19 Cal. 2020); *Hicks*, 897 F.3d at 1120 (noting that a product market “must encompass the product at issue
20 as well as all economic substitutes for the product”).

21 An antitrust market consists of products “that have reasonable interchangeability for the
22 purposes for which they are produced,” such that customers would switch from one product to another
23 if faced with a price increase. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 404
24 (1956). “Most courts correctly define the presumptive market to include similar products, even though
25 they can be differentiated by brand or features.” P. Areeda & H. Hovenkamp, *Fundamentals of Antitrust*
26 *Law* § 15-11[D] (2019-2 Supp.). Dismissal is appropriate when a plaintiff “alleges a proposed relevant
27 market that clearly does not encompass all interchangeable substitute products.” *Queen City*, 124 F.3d
28 at 436–37 (citing cases); *see also, e.g., Hicks*, 897 F.3d at 1121. Courts also may reject a market

1 definition “contorted to meet [plaintiff’s] litigation needs.” *Id.* at 1121; *Golden Gate Pharm. Servs.,*
2 *Inc. v. Pfizer, Inc.*, No. C-09-3854 MMC, 2010 WL 1541257, at *2 (N.D. Cal. Apr. 16, 2010), *aff’d*,
3 433 Fed. App’x 598 (9th Cir. 2011) (dismissal appropriate where plaintiff does not define “relevant
4 market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or
5 alleges a proposed relevant market that clearly does not encompass all interchangeable substitute
6 products”) (internal quotations and citation omitted).

7 AliveCor points to two relevant markets—a hardware-based one for wearables, and one for
8 heart rate analysis apps—as well as alternatives within each market. However, none of the proposed
9 market definitions are legally tenable.

10 **1. AliveCor’s Proposed Hardware Markets Are Too Narrow and Too Broad**

11 AliveCor pleads three alternative hardware-based markets: (1) ECG-capable smartwatches, (2)
12 all smartwatches, or (3) all ECG-capable wearable devices. Compl., ¶¶ 16, 45, 46. As an initial matter,
13 these market definitions fail because they exclude AliveCor’s own products. *Hicks*, 897 F.3d at 1120
14 (a market definition must “encompass the product at issue”); *Newcal Industries, Inc. v. Ikon Office*
15 *Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008). According to AliveCor, wearable devices constitute
16 wristwatches and fitness trackers. Compl., ¶¶ 31-34. But AliveCor has developed multiple ECG-
17 capable products that are not wearable and are instead designed to work with smartphones (not
18 smartwatches). Compl., ¶ 20 n.9 (RJN, Ex. C). AliveCor promotes its KardiaMobile device—a portable
19 ECG reader that is designed to work with a smartphone, and is not a smartwatch or a wearable device—
20 as a mobile ECG-capable device option. *Id.* (“AliveCor’s KardiaBand and KardiaMobile enable people
21 and their care teams to easily, quickly and inexpensively detect and manage possible abnormal heart
22 rhythms.”). Indeed, AliveCor describes the KardiaMobile as “FDA-cleared” and “the most clinically
23 validated mobile EKG solution on the market[,] ... recommended by leading cardiologists and used by
24 people worldwide for accurate EKG recordings.” *Id.* Likewise, AliveCor’s KardiaBand was a
25 wristband for the Apple Watch that was capable of recording an ECG. *Id.*, ¶ 2. It is not an ECG-capable
26 smartwatch, or smartwatch in general, and must be worn with the Apple Watch to function. The
27 KardiaBand is best categorized as an accessory to a smartwatch and would complement, but not
28 compete in, a market for wearable or smartwatch devices. An injured party, however, must “be a

1 participant in the same market as the alleged malefactors.” *Glen Holly Ent., Inc. v. Tektronix Inc.*, 343
2 F.3d 1000, 1008 (9th Cir.), opinion amended on denial of reh’g, 352 F.3d 367 (9th Cir. 2003) (internal
3 citation and quotation marks omitted); *Somers v. Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013).

4 AliveCor’s primary definition is further flawed because it focuses exclusively on a narrow
5 swath of consumers who want both ECG functionality and a smartwatch, and concludes without any
6 support there are no other substitutes. *Id.*, ¶¶ 31, 33, 34, 36. In so doing, AliveCor has focused on one
7 function—a device’s ability to take an ECG reading—and unilaterally declared that there is a class of
8 consumers who want a device with that functionality, as well as entirely *unrelated smartwatch*
9 *functions*, all in a single package. *Id.*, ¶ 30 (“[T]hose features provide users with smartphone-like
10 capabilities in a wearable device that is *also able to, inter alia*, monitor health characteristics”) (emphasis added). Such an unnatural and contorted market definition is not adequate to meet Rule
11 12(b)(6)’s plausibility standard. *See hiQ Labs, Inc.*, 485 F. Supp. 3d at 1147; *Hicks*, 897 F.3d at 1121.

12 In lieu of pleading support for this narrow and unique market, AliveCor simply describes
13 functionalities of ECG-capable smartwatches. Compl., ¶ 31; *id.*, ¶ 30 (“Smartwatches’ broad
14 functionality (including the ability to use multiple types of apps and easily select between them), as
15 well as their touchscreen capabilities are the main driver of demand for the devices, because those
16 features provide users with smartphone-like capabilities in a wearable device that is also able to, inter
17 alia, monitor health characteristics.”). Such allegations describe the features of products in this alleged
18 market; they do not describe why this is a plausible market, and why other products are not reasonably
19 interchangeable for ECG-capable smartwatches, much less of ECG devices in general. *See Newcal*
20 *Indus.*, 513 F.3d at 1045; *Queen City*, 124 F.3d at 437 (“Interchangeability implies that one product is
21 roughly equivalent to another for the use to which it is put; while there may be some degree of
22 preference for the one over the other, either would work effectively.”).

23 AliveCor’s “fail[ure] to define its proposed relevant market with reference to the rule of
24 reasonable interchangeability” is a fundamental problem. *Queen City*, 124 F.3d at 436–37. As
25 AliveCor’s own products demonstrate, ECG functionality can be provided by numerous devices,
26 including portable ones (some of which can be paired with smartphones), that are neither wearable nor
27 designed to be paired with a smartwatch and therefore outside the proposed market definitions. Compl.,
28

1 ¶ 44, n.20 (RJN, Ex. F) (“The Apple Watch’s ECG app isn’t your only option. Portable and home-
2 based ECGs are becoming increasingly common.”). AliveCor itself developed and promoted multiple
3 *iPhone*-related products and apps with ECG capabilities. Compl., ¶ 18, n.7 (RJN, Ex. B) (“AliveCor
4 expects to commercially launch its iPhone ECG case [] and wireless iCard.... AliveCor expects to offer
5 a free iPhone app for patients, with a paid version for physicians. Sometime after the iPhone ECG case
6 becomes commercially available, the company plans to launch the iCard, which works with other iOS
7 and Android devices.”). Even if one wants both ECG functionality as well as smartwatch functionality,
8 AliveCor fails to plead why that need could not be met by purchasing both a (lower-priced) ECG device
9 as well as a (lower-priced) smartwatch without ECG capability. *See Hicks*, 897 F.3d at 1120-21
10 (dismissing antitrust claim when relevant market ignored multiple ways of reaching consumers).

11 By ignoring interchangeability, AliveCor has neglected to address the most fundamental issues,
12 including whether most users who buy ECG-capable smartwatches even use the ECG functionality.
13 *See High Tech. Careers v. San Jose Mercury News*, 996 F.2d 987, 990 (9th Cir. 1993) (holding that a
14 market “can be determined only after a factual inquiry into the commercial realities faced by
15 consumers”). If they do not, then AliveCor’s alleged relevant market would make no sense because the
16 prices of ECG-capable smartwatches would be very much constrained by smartwatches or wearables
17 without an ECG function. This is because users seeking functions such as improved GPS capabilities,
18 connectivity to a smartphone, or increased battery life may obtain non-ECG-capable smartwatches or
19 wearables that meet those needs.

20 AliveCor further alleges that users seeking functionality that analyzes heart rate irregularities
21 are distinct from users seeking to generally track their heart rate, *id.*, ¶ 44, and that the market for ECG-
22 capable devices is affected by the need for FDA approval. *Id.*, ¶ 51. But while a heart condition such
23 as AFib, “the only heart issue the ECG app can detect,” is a serious problem, it is probably not a
24 widespread condition “among Apple Watch wearers.” Compl., ¶ 44, n.20 (RJN, Ex. F) (indicating
25 “adults aged 18 to 34 are buying smartwatches more than any other age demographic... [but] the
26 majority of [people affected by AFib] are over the age of 65”). AliveCor’s decision to ignore whether
27 consumers purchase different wearables or smartwatches for different functionality (or purchase
28 updated devices because of functionality unrelated to ECG capability) is particularly notable given its

1 assertion that the Apple Watch has undergone an evolution in its purpose and consumer demand. *See,*
2 *e.g.*, Compl., ¶ 17, n.6 (RJN, Ex. A).

3 For these reasons, AliveCor’s proposed wearable or smartwatch-based market definitions
4 therefore necessarily result in *excluding* various product substitutes while *including* smartwatches
5 without ECG capability that cannot be substitutes. AliveCor’s first proposed alternative market of “U.S.
6 smartwatches” would exclude a range of ECG products that can be used independently of, or in
7 conjunction with a smartwatch, while including smartwatches that are *not* FDA-approved to monitor
8 ECG nor have the capabilities or hardware to monitor ECG. This suggests that a smartwatch without
9 ECG capability is somehow interchangeable for one with it. That, however, conflicts with AliveCor’s
10 assertion that “a user concerned with the ability to meaningfully diagnose any heart rate issues in real
11 time *can only* choose a device that is capable of taking ECG readings.” *Id.*, ¶ 34 (emphasis added).

12 AliveCor’s second alternative relevant market of “ECG-capable wearable devices” fares no
13 better. Though now limited to products with ECG capability, it continues to exclude portable ECG-
14 capable medical devices that can be used by the “user concerned with the ability to meaningfully
15 diagnose any heart rate issues in real time” and seeking an FDA-approved device. *Id.*, ¶¶ 34, 51. This
16 market therefore would exclude non-wearable ECG devices that are likely substitutes, such as
17 AliveCor’s “FDA-cleared KardiaMobile.” *Id.*, ¶ 20 n.9 (RJN, Ex. C).

18 **2. AliveCor’s Proposed Heart Rate Analysis App Markets Are Too Narrow**

19 AliveCor pleads two alternative markets for heart rate analysis apps: (1) watchOS heart rate
20 analysis apps, or (2) all heart rate analysis apps. AliveCor claims heart rate analysis apps are distinct
21 from other activity or health tracker apps and, further, that watchOS heart rate analysis apps constitute
22 a separate market because Apple Watch users can only use watchOS apps. Compl., ¶¶ 41-42, 45.

23 In other words, AliveCor asserts a single-brand market, comprised of watchOS heart rate
24 analysis apps. But AliveCor does not establish watchOS apps as a separate market. *See Epic Games,*
25 *493 F. Supp. 3d 817; Pistacchio v. Apple, Inc.*, Case No. 4:20-cv-07034-YGR, 2021 WL 949422, at *2
26 (N.D. Cal. Mar. 11, 2021) (granting motion to dismiss in part because “Pistacchio has not yet
27 adequately pled that the relevant market should itself be limited to the iOS platform”); *Ron Tonkin*
28 *Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376, 1378 (9th Cir. 1981) (rejecting market

1 definition limited to Fiat cars based on “unsubstantiated belief that for a sizeable number of customers
2 only a Fiat will do”); *Lucent Technologies, Inc. v. Gateway, Inc.*, Case No. 96-20959, 2007 WL
3 2900484, at *16 (S.D. Cal. Oct. 1, 2007) (rejecting relevant market of “MPEG-2 compliant computers”
4 where MPEG-2 was patented, yet “interchangeable with other technologies in the market”). Nor can
5 it. As explained in *Lambtek Yogurt Machines v. Dreyer’s Grand Ice Cream, Inc.*:

6 Defendants are incapable of monopolizing the market for its own brand of product. A
7 manufacturer has a natural monopoly in the sale and distribution of its own products.
[Citations omitted] Such natural monopolies do not contravene antitrust laws.

8 Case No. 96-20959, 1997 WL 108718, at *3 (N.D. Cal. Mar. 3, 1997) (dismissing an antitrust claim
9 alleging a single-brand market).

10 AliveCor argues that Apple Watch users can only use watchOS apps with an Apple Watch. But
11 AliveCor acknowledges that there are numerous devices that offer heart rate analysis that compete with
12 the Apple Watch, including Fitbit and Garmin. Compl., ¶ 31. AliveCor does not establish that an Apple
13 Watch user would *not* also utilize a Fitbit, Garmin, or stand-alone device providing heart rate capability.
14 Similarly, AliveCor fails to explain why watchOS apps are not interchangeable with other types of
15 apps, such as iPhone or Android apps provided by Apple or third parties, that interact with other
16 hardware such as Fitbit, Garmin, or other portable heart rate or ECG-capable devices.

17 AliveCor’s proposed definition, which is focused on “apps,” also ignores devices that can
18 operate independently of either a smartwatch or a smartphone, such as a portable device with a display,
19 that could provide ECG or heart rate analysis independent of any app or separate device. In short,
20 AliveCor has impermissibly drawn up artificial markets contorted to meet its litigation needs. *See*
21 *Hicks*, 897 F.3d at 1121. Its alleged relevant markets “clearly do[] not encompass all interchangeable
22 substitute products even when all factual inferences are granted in plaintiff’s favor.” *Queen City Pizza*,
23 124 F.3d at 436. These markets are “legally insufficient and a motion to dismiss may be granted.” *Id.*

24 Finally, AliveCor again describes the features of products in the alleged market rather than
25 alleging what makes the product unique (i.e., not interchangeable) with other products. *See, e.g.*,
26 Compl., ¶ 38; *Id.*, ¶ 40 (“A heartrate analysis app is also different than a heartrate tracking app, which
27 is designed simply to keep track of certain aspects of a user’s heartrate (usually, beats per minute) in
28 order to assess general fitness and/or progress toward certain fitness goals.”). Descriptions of product

1 features do not evidence reasonable interchangeability for heart rate analysis apps.

2 **B. AliveCor Fails to Plead that Apple Has Sufficient Market Share in the Relevant Markets**

3 AliveCor’s claims also should be dismissed because the Complaint fails to plead that Apple
4 holds a sufficient market share, and, by extension, market power, in any of the proposed relevant
5 markets. AliveCor purports to identify different market shares held by Apple in the hardware-based
6 and app-based markets, of approximately 70% and 100%, respectively. However, these alleged market
7 shares lack coherent factual support and cannot satisfy AliveCor’s pleading burden. *See FTC v.*
8 *Facebook, Inc.* – F. Supp. 3d. – , 2021 WL 2643627, at *14 (D.D.C. 2021); *Korea Kumho*
9 *Petrochemical v. Flexsys Am. LP*, Case No. 07-1057, 2008 WL 686834, at *9 (N.D. Cal. Mar. 11,
10 2008) (holding that “[a]lthough [p]laintiff need not necessarily quantify [defendant’s] market share
11 with precision,” the allegation that defendant “dominat[ed] . . . the [relevant] market” fell short of
12 requirement to “assert some facts in support of its assertions of market power”).

13 AliveCor makes a predicate assumption that only Apple’s competitors, and not Apple, sell non-
14 ECG-capable smartwatches or wearables. Compl., ¶ 50 (concluding Apple must have a higher market
15 share in ECG-capable smartwatches than all wearables because its “closest competitors only offer ECG
16 functionality on a subset of their smartwatches (and not their fitness trackers)”). But Apple did not
17 introduce ECG functionality until its Series 4 Apple Watch, and not every Apple Watch contains a
18 native ECG app or functionality. *Id.* ¶ 81. AliveCor has provided no factual support for determining
19 the proportion of Apple Watches—or Apple’s competitors’ smartwatches or wearables—that are ECG-
20 capable. Nowhere in its Complaint does AliveCor acknowledge that Apple has continued to offer
21 multiple different Watch models (Series 3, Series 4 or later), only some of which have built-in ECG
22 capability. *Id.*, ¶ 40 n.19 (RJN, Ex. D) (article comparing Apple Watch models and identifying ECG
23 app for the Apple Watch Series 4 or later); *id.*, ¶ 86 n.29 (RJN, Ex. L). But AliveCor’s sources indicate
24 that sales of non-ECG-capable Series 3 watches are strong and growing. *Id.*, ¶ 49 n.22 (RJN, Ex. I)
25 (noting that by Q2 2020, there had been a “30% year-on-year growth for Apple Watch Series 3.”); *id.*,
26 RJN, Ex. K (“Series 3 sales were also strong, growing around 30%”).

27 Rather than take Apple’s product line composition into account, AliveCor goes out of its way
28 to ignore it. AliveCor makes no effort to quantify how many Apple Watches sold are ECG-capable.

1 AliveCor also provides no basis for its claim that “[i]f one broadens the market to include all ECG-
2 capable wearables, that market share does not appreciably change (i.e., does not dip below 70%),
3 because non-smartwatch ECG-capable wearables constitute only a very small portion of sales in such
4 an alternatively-defined market.” *Id.*, ¶ 50. The Complaint does not purport to identify what other
5 products are in this market, much less quantify Apple’s market share in this nebulous market.

6 Instead, AliveCor bases a claim that Apple holds 68% U.S. market share for smartwatches on
7 one Canalsys report for Q2 2020. *Id.*, ¶ 49. But the Canalsys report does not set out that data. Instead, it
8 states that in Q2 2020, “Apple shipped approximately 37.6% of all wearable devices in North America,
9 a category that includes both smartwatches and fitness trackers.” *Id.*, ¶ 49 n.22 (RJN, Ex. I). AliveCor’s
10 68% figure thus assumes, without support, that: (1) Apple’s “closest competitors were Fitbit, Garmin,
11 and Samsung”; (2) entities in the “Others” category of the Canalsys report can be disregarded even
12 without Canalsys data identifying their product composition; (3) the shipments of all three of Fitbit,
13 Garmin, and Samsung comprised “50% smartwatches and 50% fitness trackers” based on a comment
14 about *only Fitbit’s* sales; (4) Apple’s market share for smartwatches can be doubled since it only sells
15 smartwatches; and (5) Apple’s sales in a single quarter can be representative of other quarters and other
16 years. *Id.* This report does not provide a basis for determining Apple’s ECG-capable market share,
17 what non-smartwatch ECG-capable wearables exist, or their level of sales. *Id.*, ¶ 50.

18 AliveCor’s unsupported assumptions fall short of plausibly establishing that Apple holds a
19 market share high enough to establish market power to support its monopolization or attempted
20 monopolization claims. *See Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206
21 (9th Cir. 1997) (“Courts generally require a 65% market share to establish a prima facie case of market
22 power.”); *FTC v. Facebook, Inc.* – F. Supp. 3d. --, 2021 WL 2643627, at *12 (“To merely allege that
23 a defendant firm has somewhere over 60% share of an unusual, nonintuitive product market—the
24 confines of which are only somewhat fleshed out and the players within which remain almost entirely
25 unspecified—is not enough.”); *Twin City Sportservice, Inc. v. Charles O. Finley & Co. Inc.*, 512 F.2d
26 1264, 1274 (9th Cir. 1975) (“[W]hile 90% of the market ‘is enough to constitute a monopoly; it is
27 doubtful whether sixty or sixty-four per cent would be enough; and certainly thirty-three per cent is
28 not.’”) (quoting *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945)).

1 At most, AliveCor presents a less than 40% market share for a single quarter, which fails to
2 “establish a prima facie case of market power” during the relevant time period. *Image Technical*, 125
3 F.3d at 1206. AliveCor does not provide a basis to conclude that Apple’s market share during one
4 quarter during the COVID-19 pandemic, which has caused lockdowns and potentially affected
5 consumer demand, is representative of purchasing trends in other periods. Compl., ¶ 49 n.21 (RJN, Ex.
6 H). Nor does AliveCor otherwise provide a basis for estimating Apple’s market share in other quarters.
7 *FTC v. Facebook, Inc.*, 2021 WL 2643627, at *12 (holding that “allegations [] which do not even
8 provide an estimated actual figure or range for [defendant’s] market share at any point over the past
9 ten years [] ultimately fall short of plausibly establishing that [defendant] holds market power”).
10 AliveCor also does not plead that “competitors are unable to expand their output in response to
11 supracompetitive pricing,” a characteristic of markets where a lower market share was found to support
12 an attempted monopolization claim. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir.
13 1995) (addressing a 44% market share).

14 These same faulty assumptions infect AliveCor’s contention that Apple holds dominant market
15 shares in watchOS heart rate analysis apps and heart rate analysis apps for all wearable devices. *See*
16 Compl., ¶¶ 8, 52-53. AliveCor bases these market share numbers on a claim that Apple has “dominance
17 of wearable devices capable of providing heartrate analysis.” *Id.*, ¶ 53. But AliveCor proffers no
18 support for extrapolating a proposed ECG-capable wearable market share to a heart rate analysis app
19 market share. Even if one accepts watchOS heart rate analysis apps as the appropriate market (which
20 it is not), AliveCor provides no evidence of Apple’s share of watchOS apps or of third party watchOS
21 apps for heart rate analysis. AliveCor also provides no facts that can be used to calculate market share
22 for more general tracker apps or non-watchOS apps, such as non-Apple heart rate analysis apps for
23 wearable devices other than the Apple Watch. AliveCor’s only purported support is an assertion that
24 Apple’s market share must be nearly 100% because “it has positioned itself as gatekeeper for watchOS
25 devices due to its control over watchOS distribution.” *Id.*, ¶ 52. AliveCor’s proffered allegations do not
26 allow the court to make a plausible inference that Apple holds a dominant market share in AliveCor’s
27 proposed markets.

28

1 **C. AliveCor Has Not Plausibly Alleged Anticompetitive Conduct**

2 AliveCor’s antitrust claims target Apple’s update of its own heart rate algorithm used in its
 3 own Apple Watch products. Compl., ¶¶ 6-8, 102, 118. This, however, is not a basis for an antitrust
 4 claim. Despite conclusorily alleging that the change was not a product improvement, *id.*, ¶ 86,
 5 AliveCor pleads that Apple’s heart rate algorithm update occurred as part of an improved product
 6 design that was reviewed and approved by the FDA. *Id.*, ¶¶ 6-7, 82. This included Apple offering
 7 *additional* functionalities of a new heart rate analysis app and the ability to record an ECG as a
 8 default app with the Series 4 Watch’s hardware and software. *Id.* The “courts are properly very
 9 skeptical about claims that competition has been harmed by a dominant firm’s product design
 10 changes.” *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 998 (9th
 11 Cir. 2010). “[A] design change that improves a product by providing a new benefit to consumers does
 12 not violate Section 2 absent some associated anticompetitive conduct.” *Id.* at 998-99.

13 Here, AliveCor accuses Apple’s product improvement as the purported abuse, because it
 14 purportedly affected whether AliveCor would be able to “predict irregular heart rate situations” using
 15 Watch-generated data, in order to suggest “a user should take an ECG.”¹ Compl., at ¶¶ 6-8, 80, 85;
 16 *Tyco*, 592 F.3d at 1002 (“Thus, the product improvement at issue in this case, not some associated
 17 conduct by Tyco, caused the incompatibility.”). AliveCor does not establish that Apple engaged in
 18 associated anticompetitive conduct. Indeed, AliveCor does not even establish that Apple and
 19 AliveCor compete on the relevant functionality. AliveCor does *not* allege that Apple has ever offered
 20 or currently offers a competing product that “assesses when [heart rate irregularities] likely indicated
 21 that the user should record an ECG to check on their heart health.” Compl., ¶ 80. Nor does AliveCor
 22

23 ¹ AliveCor’s argument is an attempt to plead anticompetitive conduct under the criticized “essential
 24 facilities” doctrine. *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398,
 25 411 (2004). As a threshold matter, a facility is “essential” “only if it is ‘otherwise unavailable and
 26 cannot be reasonably or practically replicated.’” *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d
 27 1124, 1130–31 (9th Cir. 2004). AliveCor’s Complaint affirmatively establishes it has multiple
 28 alternative methods of receiving the information that it asserts it requires, including its own FDA-
 approved, ECG-capable products and as well as the available devices from Fitbit and Garmin that it
 mentions. Compl., ¶¶ 20 n.9, 34, 71-72, 76, 80; *see also* RJN, Ex. C. These products defeat
 AliveCor’s essential facilities claim and, accordingly, present an independent basis for dismissing the
 Complaint for failure to plead anticompetitive conduct. *See Sayre v. Google, Inc.*, No. C 19-02247
 WHA, 2019 WL 6036703, at *3 (N.D. Cal. Nov. 14, 2019) (“Google Play is not essential because
 RDevice could reach consumers by employing potential alternative channels of distribution.”).

1 argue that Apple is using data (allegedly withheld from third parties) to offer a functionality that third
2 parties no longer are able to offer. Instead, AliveCor’s core complaint is that Apple eliminated
3 AliveCor’s ability to offer a functionality with which Apple has *never* competed. *Id.*, ¶¶ 80-89.

4 Apple Watches sales also do not supply the requisite associated anticompetitive conduct.
5 AliveCor contends that Apple “implicitly condition[s] the sale of an Apple Watch to the use of its
6 heartrate analysis app[and] the user not using a third party developer’s heartrate analysis app.”
7 *Id.*, ¶¶ 107-08. But AliveCor does not establish that users actually use an Apple heart rate analysis
8 app in lieu of third party heart rate analysis apps, that Apple has rejected all third party developer
9 heart rate analysis apps, or that there are no third party heart rate analysis apps currently available to
10 Apple Watch users. AliveCor also does not plead that AliveCor has been unable to put multiple apps
11 on the Apple App Store because they all were rejected by Apple, that it has no apps presently
12 available on the Apple App Store, or that AliveCor faces anticompetitive conduct because it sells its
13 apps in a manner that entails payment of a commission to Apple. Nor does AliveCor contend Apple
14 Watch sales block AliveCor from continuing to sell products, such as the KardiaMobile, that can
15 collect heart rate data themselves (or that AliveCor has stopped selling those products, as it cannot).

16 AliveCor thus has failed to state an antitrust claim. Even if Apple were a monopolist (and it is
17 not), under Section 2, it “has the right to redesign its products to make them more attractive to
18 buyers.” *Tyco*, 592 F.3d at 999 (quoting *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d
19 534, 545 (9th Cir. 1983)). This is consistent with the general principle that “a firm has no antitrust
20 duty to deal with its competitors . . . under terms and conditions that the rivals find commercially
21 advantageous.” *Pacific Bell Telephone Co. v. Linkline Commc’ns, Inc.*, 555 U.S. 438, 450 (2009).

22 **D. AliveCor’s Unfair Competition Claim Has No Independent Basis**

23 AliveCor’s Unfair Competition Law claim is predicated on the same allegations and theories
24 as the Sherman Act claim. Since AliveCor’s antitrust claims are irreparably flawed, its § 17200 claim
25 must fail as well. *Aguilar*, 25 Cal.4th at 866-67 (no § 17200 claim where predicate antitrust law claim
26 dismissed); *RLH Industries, Inc. v. SBC Commc’ns, Inc.*, 133 Cal. App. 4th 1277, 1286 (2005).

27 **V. CONCLUSION**

28 Apple thus respectfully requests that the Court dismiss the Complaint with prejudice.

1 DATED: July 16, 2021

GIBSON, DUNN & CRUTCHER LLP

2 By: /s/ Jason C. Lo
3 Jason C. Lo

4 *Attorney for Defendant Apple Inc.*

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CERTIFICATE OF SERVICE

I, Jason C. Lo, certify that on July 16, 2021, the foregoing **DEFENDANT’S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS COMPLAINT** was filed with the Clerk of the Court via CM/ECF. Notice of this filing will be sent electronically to all registered parties by operation of the Court’s electronic filing systems.

DATED: July 16, 2021

By: /s/ Jason C. Lo
Jason C. Lo