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12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN JOSE DIVISION**

15 **FEDERAL TRADE COMMISSION,**

16 Plaintiff,

17 v.

18 **META PLATFORMS, INC., et al.**

19 Defendants.

Case No. 5:22-cv-04325-EJD

**PLAINTIFF FEDERAL TRADE
COMMISSION'S PRE-HEARING
PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

**REDACTED VERSION OF DOCUMENT
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PLAINTIFF FTC’S PROPOSED FINDINGS OF FACT

A. The Parties and the Proposed Acquisition

1
2
3 1. Through an Agreement and Plan of Merger dated October 22, 2021, Meta
4 Platforms, Inc. (“Meta”) proposes to acquire Within Unlimited, Inc. (“Within”) (the
5 “Acquisition”), for approximately [REDACTED]. PX6 (Agreement and Plan of Merger) at 1, 100.

6 2. Defendant Meta, formerly known as Facebook, is a publicly traded company
7 organized under the laws of Delaware with headquarters in Menlo Park, California. PX6
8 (Agreement and Plan of Merger) at 1, 161.

9 3. Meta is one of the largest technology companies in the world, with profits
10 exceeding \$46 billion in 2021. PX937 (Meta 2021 Form 10-K) at 51.

11 4. Meta’s “Family of Apps”—Facebook, Instagram, Messenger, and WhatsApp—
12 claim nearly 3.6 billion “monthly active people.” PX937 (Meta 2021 Form 10-K) at 50.

13 5. Meta also develops and commercializes virtual reality (“VR”) and other
14 metaverse products in its Reality Labs division. PX50 (Zuckerberg (Meta) Dep.) at 87:11-13.

15 6. Defendant Within is a privately held virtual and augmented reality company
16 organized under the laws of Delaware with headquarters—and its principal business—in Los
17 Angeles, California. PX6 (Agreement and Plan of Merger) at 1, 161.

18 7. Within’s flagship product is Supernatural, a VR dedicated fitness app that offers
19 over 800 fully immersive, trainer-led workouts set to music in various virtual settings from the
20 Galapagos Islands to the Great Wall of China. Dkt. No. 1 (Complaint) ¶ 25; Dkt. No. 83
21 (Defendant Within Unlimited, Inc.’s Answer and Affirmative Defenses) ¶ 25.

B. Virtual Reality Technology and the “Metaverse”





22
23 8. Virtual reality (“VR”) technology allows users to put on a VR headset, such as
24 Meta’s market-leading Quest 2, and enter an immersive digital experience. *E.g.*, PX50
25 (Zuckerberg (Meta) Dep.) at 53:9-10, 75:24-76:3; PX66 (Rubin (Meta) Dep.) at 246:7-248:10.

26 9. Users typically engage with the VR experience through a headset with displays
27 in front of each eye to place a user in a fully rendered, three-dimensional environment. PX52
28

1 (Stojsavljevic (Meta) Dep.) at 65:3-7.

2 10. Cutting-edge VR technology creates an immersive digital experience that
3 enables users to instantly be transported anywhere in the world, backward or forward in time,
4 into outer space or fictional lands—all from the comfort and safety of their own homes. PX66
5 (Rubin (Meta) Dep.) at 246:7-247:11.

6 11. Unlike a game, video, or app on a tablet, phone, or monitor, the three-
7 dimensional VR environment creates the perception of completely surrounding the user,
8 enabling the user to feel “immersed” in the projected space. *E.g.*, PX314 (Meta) at 1; PX713
9 (Within) at 25, 41; PX63 (Rabkin (Meta) Dep.) at 40:1-41:1, 214:4-24.

10 12. As Meta’s founder, CEO, Chairman, and controlling shareholder Mark
11 Zuckerberg has explained, “you’re right there with another person or in another place and that’s
12 very different from every experience of technology that we’ve had before.” PX931 at 4; *accord*
13 PX54 (Bosworth (Meta) Dep.) at 50:7-13 (“
14 
15 
16 ”).

17 13. VR users consume content, or applications (“apps”), on their headsets to engage
18 in VR experiences. *E.g.*, PX52 (Stojsavljevic (Meta) Dep.) at 66:23-67:4.

19 14. Users can download apps from app stores like the Meta Quest Store, which
20 connect VR app developers and users in an online marketplace through which developers can
21 offer their products to users for download onto their individual VR devices. PX53 (Pruett
22 (Meta) Dep.) at 23:15-20, 28:19-29:10; PX55 (Verdu (Meta) Dep.) at 51:17-22.

23 15. App availability and prices on the Quest Store can and do vary by region, as
24 Quest headsets have a dynamic region lock that tracks a user’s geolocation and may block
25 content in certain regions. PX969 at 1-2; PX52 (Stojsavljevic (Meta) Dep.) at 68:14-18.

26 16. VR is a major technology for the “metaverse,” which generally refers to the idea
27 of persistent, connected online virtual worlds. PX54 (Bosworth (Meta) Dep.) at 49:21-54:25.
28

1 [REDACTED]. PX937 (Meta 2021 Form 10-K) at
2 51; PX50 (Zuckerberg (Meta) Dep.) at 87:14-91:9; *see also* PX15 (Singer Rep.) ¶ 116 (2022 Q3
3 earnings show that Meta is on course to spend \$14.5 billion in 2022).

4 26. Meta boasts more than 10,000 developers in its Reality Labs Division today—up
5 from just 50 in 2014. PX56 (Carmack (Meta) Dep.) at 124:5-25; *see also* PX54 (Bosworth
6 (Meta) Dep.) at 27:8-11 (number of engineers in Reality Labs numbers in the thousands).

7 27. In 2021, the same year as it announced the Acquisition, Mr. Zuckerberg made
8 the “call” to [REDACTED]
9 [REDACTED] PX50 (Zuckerberg (Meta) Dep.) at 90:13-16.

10 **D. Meta Is Already Well on Its Way to Its Dominating this “[REDACTED]**

11 [REDACTED]”

12 28. Meta’s Quest headsets “[REDACTED].” PX50
13 (Zuckerberg (Meta) Dep.) at 53:9-10.

14 29. In 2020, Meta’s VR headset sales accounted for [REDACTED] of all VR
15 headsets sold worldwide. PX109 (Meta) at 14.

16 30. That percentage [REDACTED] in 2021, when industry sources estimate that
17 Meta sold more than 8.7 million Quest 2 headsets. PX15 (Singer Rep.) ¶ 21.

18 31. Unlike earlier Meta headsets that had to be tethered to a personal computer,
19 Quest headsets can “[REDACTED].” PX63 (Rabkin (Meta) Dep.) at 24:4-5, 25:4-5.

20 32. Meta [REDACTED] in order to attract users.
21 PX50 (Zuckerberg (Meta) Dep.) at 12:17-13:19; PX951 (Meta) at 3.

22 33. Meta also boasts the [REDACTED] app store for VR (the Meta Quest Store) by usage.
23 PX15 (Singer Rep.) ¶¶ 20-24; PX140 (Meta) at 1.

24 34. Meta receives 30 percent of the monetary value of sales from apps sold on the
25 Quest Store. PX53 (Pruett (Meta) Dep.) at 37:25-38:7, 47:15-21.

26 35. Meta also offers the “App Lab,” a Meta-produced tool that allows developers to
27 distribute apps that are unavailable in the Quest Store. PX63 (Rabkin (Meta) Dep.) at 27:12-17.
28

1 36. [REDACTED]

2 [REDACTED] PX63 (Rabkin (Meta) Dep.) at 31:18-24 (“[REDACTED]

3 [REDACTED]”).

4 37. Meta owns many of the leading apps distributed on the Meta Quest Store,
5 including the wildly popular rhythm game Beat Saber, in which the player uses virtual swords
6 to hit incoming targets timed to music. PX315 (Meta) at 1; PX121 (Meta) at 3; PX385 (Meta) at
7 4; PX57 (Dass (Meta) Dep.) at 25:15-21.

8 38. Beat Saber is “[REDACTED]” PX54 (Bosworth (Meta) Dep.)
9 at 123:25-124:6, 130:12-131:11, 139:21-22 (Beat Saber is “[REDACTED]”);
10 PX56 (Carmack (Meta) Dep.) at 38:1-12 (“[REDACTED]”).

11 39. Since 2019, Beat Saber has been the highest earning app in the Quest store. Dkt.
12 No. 84 (Defendant Meta Platforms, Inc.’s Answer and Affirmative Defenses) ¶ 33.

13 40. Meta acquired Beat Saber by purchasing Beat Games studios in late 2019. PX52
14 (Stojsavljevic (Meta) Dep.) at 34:18-20.

15 41. Meta executives have described Beat Saber as a “[REDACTED]”
16 PX55 (Verdu (Meta) Dep.) at 55:2-16; PX342 (Meta) at 4.

17 42. Since its acquisition of Beat Games, Meta has acquired a series of other studios
18 behind many popular VR apps (PX66 (Rubin (Meta) Dep.) at 173:5-176:8), giving it a large
19 first-party VR content organization. PX63 (Rabkin (Meta) Dep.) at 51:2-5.

20 43. Meta has purchased at least nine VR app studios in the past three years (PX50
21 (Zuckerberg (Meta) Dep.) at 61:23-66:12), including closing three additional VR studio
22 acquisitions *after* announcing its proposed acquisition of Within.

23 a. In November 2019, Meta acquired Beat Games, maker of Beat Saber. PX4 at 172
24 (incorporating PX505); Dkt. No. 84 (Defendant Meta Platform, Inc.’s Answer
25 and Affirmative Defenses) ¶ 33.

26 b. In January 2020, Meta acquired Sanzaru Games, maker of the fantasy Viking
27 combat game Asgard’s Wrath. PX4 at 172 (incorporating PX505); Dkt. No. 84
28

(Defendant Meta Platforms, Inc.’s Answer and Affirmative Defenses) ¶ 34.



- c. In May 2020, Meta acquired Ready at Dawn Studios, maker of Lone Echo II, a zero-gravity adventure game, and Echo VR, an online team-based sports game. PX4 at 118 n. 227, 119 n. 231; Dkt. No. 84 (Defendant Meta Platform, Inc.’s Answer and Affirmative Defenses) ¶ 34.
- d. In April 2021, Meta acquired Downpour Interactive, maker of Onward, a team-based first-person shooter. PX4 at 172 (incorporating PX505); Dkt. No. 84 (Defendant Meta Platforms, Inc.’s Answer and Affirmative Defenses) ¶ 34.
- e. In May 2021, Meta acquired BigBox VR, maker of Population One, a multi-player first-person arena shooter. PX4 at 172 (incorporating PX505); Dkt. No. 84 (Defendant Meta Platforms, Inc.’s Answer and Affirmative Defenses) ¶ 34.
- f. In June 2021, Meta acquired Unit 2 Games, the maker of Crayta, a collaborative platform that allows users to create and play their own games. PX4 at 172 (incorporating PX505); Dkt. No. 84 (Defendant Meta Platforms, Inc.’s Answer and Affirmative Defenses) ¶ 34.
- g. In November 2021, Meta acquired Twisted Pixel, a studio that makes various games, including Path of the Warrior (a fighting game), B-Team (a first-person shooter), and Wilson’s Heart (a mystery noir thriller game). PX4 at 172 (incorporating PX505); Dkt. No. 84 (Defendant Meta Platforms, Inc.’s Answer and Affirmative Defenses) ¶ 34.
- h. In the second quarter of 2022, Meta acquired Armature Studio, a studio that co-develops VR apps with other studios and is “[REDACTED]”. PX52 (Stojsavljevic (Meta) Dep.) at 55:7-13, 136:24-137:23; PX17 (Meta Responses and Objections to FTC Interrogatory No. 1) at 8.
- i. In September 2022, Meta acquired Camouflaj, which currently developing Ironman and [REDACTED] VR apps for Quest. PX17 (Meta Responses and Objections

1 to FTC Interrogatory No. 1) at 10.

2 44. Meta has also successfully developed its own apps. PX56 (Carmack (Meta)
3 Dep.) at 88:6-14; PX50 (Zuckerberg (Meta) Dep.) at 95:2-6, 103:13-20; Dkt. No. 84 (Defendant
4 Meta Platforms, Inc.’s Answer and Affirmative Defenses) ¶ 35.

5 45. These apps include:

- 6 a. Horizon Worlds, a massively multiplayer online game that allows users to build,
7 share, and interact in virtual worlds. PX54 (Bosworth (Meta) Dep.) at 51:14-22;
8 Dkt. No. 84 (Defendant Meta Platforms, Inc.’s Answer and Affirmative
9 Defenses) ¶ 35.
- 10 b. Horizon Workrooms, a productivity app that lets teams of people share their
11 computer screens, collaborate on virtual whiteboards, and more. Dkt. No. 84
12 (Defendant Meta Platforms, Inc.’s Answer and Affirmative Defenses) ¶ 35.
- 13 c. Horizon Venues, a live-events app that lets users experience concerts, sporting
14 events, and more. Dkt. No. 84 (Defendant Meta Platforms, Inc.’s Answer and
15 Affirmative Defenses) ¶ 35.
- 16 d. Horizon Home, a social-space app that lets users hang out with their friends,
17 watch videos together, and join multiplayer VR games together. Dkt. No. 84
18 (Defendant Meta Platforms, Inc.’s Answer and Affirmative Defenses) ¶ 35.
- 19 e. Dead and Buried, a multiplayer shooter game for the Oculus Rift and Go
20 devices, and Dead and Buried II, developed for the Quest and Quest 2 devices.
21 PX56 (Carmack (Meta) Dep.) at 88:24-89:6; PX55 (Verdu) Dep. at 83:13-84:4.
- 22 f. Oculus TV, an app that plays “immersive 360-degree and 180-degree VR
23 media.” PX56 (Carmack (Meta) Dep.) at 90:10-16.

24 46. Meta has also developed “shells,” which are “a wrapper program for any
25 platform or game.” PX55 (Verdu (Meta) Dep.) at 85:25-86:19; PX56 (Carmack (Meta) Dep.) at
26 15:1-3, 15:25-16:3 (“
27 ”).

1 47. Horizon Worlds competes directly with the cross-platform app Rec Room. PX50
2 (Zuckerberg (Meta) Dep.) at 114:2-21, 125:5-21; PX201 (Meta) at 2.

3 48. [REDACTED] PX308 (Meta)
4 at 3 (“[REDACTED]
5 [REDACTED]”); PX54 (Bosworth (Meta) Dep.) at 202:8-203:4.

6 49. According to Mr. Zuckerberg, “[REDACTED]
7 [REDACTED]” PX50
8 (Zuckerberg (Meta) Dep.) at 56:22-25.

9 50. [REDACTED]
10 [REDACTED] PX50 (Zuckerberg (Meta) Dep.) at 105:21-106:24.

11 **E. Meta Has Long Recognized That Content (“Apps”) Drives VR Adoption**

12 51. As mentioned above, Meta sees VR as the [REDACTED]. PX63
13 (Rabkin (Meta) Dep.) at 81:14-25 (“[REDACTED]
14 [REDACTED]”); PX54 (Bosworth (Meta)
15 Dep.) at 113:15-18 (“[REDACTED]
16 [REDACTED]”).

17 52. To achieve this vision, Meta has focused on bringing new users to its VR
18 platform. PX54 (Bosworth (Dep.) at 168:17-169:6 ([REDACTED]
19 [REDACTED]); PX63 (Rabkin (Meta) Dep. at
20 98:15-17.

21 53. Meta acknowledges that [REDACTED]
22 [REDACTED] *E.g.*, PX50 (Zuckerberg (Meta) Dep. at 92:20-93:4 (“[REDACTED]
23 [REDACTED]”); PX55 (Verdu
24 Dep.) at 128:12-18 (“[REDACTED]
25 [REDACTED]
26 [REDACTED]”); PX239 (Meta) at 1 (“[REDACTED]
27 [REDACTED]”).

1 [REDACTED]” PX52 (Stojsavljevic
2 (Meta) Dep.) at 67:9-14.

3 61. Not surprisingly, Mr. Zuckerberg has implored Meta personnel to “[REDACTED]
4 [REDACTED]. PX522 (Meta) at 1; PX52 (Stojsavljevic (Meta) Dep.) at 69:1-24.

5 62. Until recently, VR experiences have almost always involved games, and thus
6 attracted a heavily male, and young, audience. PX250 (Meta) at 1 (as of December 2019,
7 women were only [REDACTED] of Quest users).

8 63. To attract new users beyond young men, Meta has identified—and encouraged—
9 a number of VR “use cases” beyond games. PX50 (Zuckerberg (Meta) Dep.) at 51:25-52:2,
10 53:14-19 (“[REDACTED]

11 [REDACTED]
12 [REDACTED]”); PX63 (Rabkin (Meta) Dep.) at 42:14-43:8
13 (different use cases can “certainly” appeal to different people, and [REDACTED]

14 [REDACTED]
15 [REDACTED]); *id.* at 44:3-10.

16 64. As explained by Mr. Zuckerberg: “[REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]” PX50 (Zuckerberg (Meta) Dep.) at 84:7-16; *see also id.* at 198:1-4 (“[REDACTED]
21 [REDACTED]
22 [REDACTED]”).

23 65. The VR Content organization is “[REDACTED]
24 [REDACTED]”
25 PX63 (Rabkin (Meta) Dep.) at 26:23-27:6.

26 66. New content can include first-party apps developed directly by Meta employees
27 through its studios group, which, by the fall of 2020, [REDACTED]”
28

1 [REDACTED]. PX55 (Verdu (Meta) Dep.) at 117:5-18:12; *see also*
2 PX568 (Meta) at 1 (“[REDACTED]
3 [REDACTED]”)
4 (ellipsis in original); PX56 (Carmack Dep.) at 102:24-03:01 (“[REDACTED]
5 [REDACTED]”); PX367 (Meta) at 1
6 (“[REDACTED]
7 [REDACTED]”).

8 67. New content can also include apps built by third parties, including those who
9 may receive some funding or support from Meta. PX63 (Rabkin (Meta) Dep.) at 53:21-54:6
10 (describing third-party developers and Meta’s incentive programs); PX66 (Rubin (Meta) Dep.)
11 at 20:18-23 (describing Meta’s second-party work, whereby Meta funds the entirety of a project
12 built by an outside developer).

13 68. Meta acknowledges that investment in content can help grow use cases like
14 fitness. PX63 (Rabkin (Meta) Dep.) at 44:15-45:1.

15 69. The VR Content organization was overseen by Michael Verdu until a
16 reorganization following Mr. Verdu’s departure from Meta when it was taken over by Jason
17 Rubin and made part of Meta’s “Metaverse” organization. PX63 (Rabkin (Meta) Dep.) at 34:12-
18 35:21; PX66 (Rubin (Meta) Dep.) at 145:16-46:4.

19 70. Currently, Meta’s VR Content organization boasts [REDACTED]
20 employees. PX63 (Rabkin (Meta) Dep.) at 228:9-14; PX66 (Rubin (Meta) Dep.) at 22:14-17.

21 71. At the end of 2019, the VR Content organization anticipated that it would “[REDACTED]
22 [REDACTED]
23 [REDACTED]” PX162 (Meta) at 2.

24 72. As of November 2021, Meta anticipated investing [REDACTED] in developing
25 VR content in 2022 alone. PX227 (Meta) at 2; *see also* PX54 (Bosworth (Meta) Dep.) at 42:13-
26 43:16, 57:21-59:12).

27 73. Under Mr. Rubin, the Metaverse Content organization spends approximately
28

1 [REDACTED] a year. PX66 (Rubin (Meta) Dep.) at 24:5-25:8.

2 **F. VR Dedicated Fitness Apps Like Within’s Supernatural Offer a Unique**
 3 **Fitness Experience**

4 74. Both Meta and Within refer to VR apps intended to provide immersive at-home
 5 structured physical exercise as “deliberate” or “dedicated” fitness apps (“VR dedicated fitness
 6 apps”). *E.g.*, PX286 (Meta) at 1 (“[REDACTED]
 7 [REDACTED]”); PX487 (Meta) at 4 (“[REDACTED]
 8 [REDACTED]”);
 9 PX55 (Verdu (Meta) Dep.) at 120:22-24; PX63 (Rabkin (Meta) Dep.) at 179:17-181:13; PX53
 10 (Pruett (Meta) Dep.) at 134:24-135:19; PX4 at 169 (“Meta currently offers only ‘incidental’
 11 fitness apps (i.e., apps whose primary focus is not fitness but may provide some fitness benefits
 12 through their general use). By acquiring Supernatural, a deliberate fitness app, Meta can
 13 broaden its own library of content for users, [REDACTED]”);
 14 PX60 (Paynter (Meta) 30(b)(6) Dep.) at 22:21-24:1; PX62 (Milk (Within) Dep.) at 56:14-23.

15 75. More recently, Meta has adopted the terminology “[REDACTED]” apps to refer
 16 to apps it previously referred to as “deliberate fitness” apps. PX60 (Paynter (Meta) 30(b)(6)
 17 Dep.) at 22:21-24:20, 65:20-66:13; PX219 (Meta) at 7 (describing the terminology shift).

18 76. Typical characteristics of VR dedicated fitness apps include workouts designed
 19 by trainers or fitness experts and intended to maximize exertion and physical movement for the
 20 purpose of exercise. PX487 (Meta) at 4 (deliberate fitness apps are “Designed to allow a player
 21 to deliberately set and attain fitness goals with fitness-specific features, i.e., coaching, trackable
 22 progress”); PX63 (Rabkin (Meta) Dep.) at 179:25-181:13; PX62 (Milk (Within) Dep.) at 33:7-
 23 23; PX53 (Pruett (Meta) Dep.) at 134:24-136:4, 178:11-21, 182:17-183:21; PX66 (Rubin
 24 (Meta) Dep.) at 133:5-11 (referring to Supernatural and FitXR as VR physical fitness apps).

25 77. VR dedicated fitness apps offer distinct functionality when compared to other
 26 VR apps, including those apps, such as rhythm and active sports games, that provide an
 27 incidental fitness benefit (“incidental fitness apps”). PX487 (Meta) at 4 (for incidental fitness
 28

1 apps, “[p]eople are primarily playing games, and as a by-product get a workout (‘come for the
 2 games, stay for the fitness’)”); PX63 (Rabkin (Meta) Dep.) at 179:21-81:21; PX529 (Meta) at 2;
 3 PX57 (Dass (Meta) Dep.) at 29:12-318; PX53 (Pruett (Meta) Dep.) at 136:6-138:7; PX65
 4 (Koblin (Within) Dep.) at 50:15-18 (“[REDACTED]
 5 [REDACTED]”).

6 78. For example, VR dedicated fitness apps may feature adjusting difficulty so that
 7 users never “fail” a workout; they may feature workouts designed by trainers or fitness experts;
 8 they are designed to maximize exertion and physical movement for the purpose of exercise; and
 9 they may feature classes or other active coaching. *E.g.*, PX346 (Meta) at 7 (“[REDACTED]
 10 [REDACTED]
 11 [REDACTED]”); PX55 (Verdu (Meta) Dep.) at 193:19-22 (“[REDACTED]
 12 [REDACTED]
 13 [REDACTED]”); PX60 (Paynter (Meta) 30(b)(6) Dep.) at 27:9-16 (describing trainers
 14 as an important part of trainer workout apps); PX1 (Meta) at 3 n.10 (“Meta draws a distinction
 15 between apps designed to allow users to set and attain fitness goals, with features like coaching
 16 and trackable progress (called ‘deliberate’ or ‘dedicated’ fitness apps) and games whose
 17 primary focus is not fitness that allow users to get a workout as a byproduct (sometimes called
 18 ‘incidental’ or ‘accidental’ fitness apps)”); PX1 (Meta) at 9 (“Supernatural users never fail out
 19 of a song or workout. Difficulty is automatically adjusted to fit users’ fitness levels”).

20 79. VR dedicated fitness apps are designed, built, and marketed with the intent of
 21 providing workout routines and delivering a fitness benefit to the user over time. *E.g.*, PX55
 22 (Verdu (Meta) Dep.) at 23:8-20 (“[REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]”); PX54 (Bosworth (Meta) Dep. at 122:22-123:1.

26 80. VR dedicated fitness apps typically offer distinct prices as compared to other VR
 27 apps—specifically, a subscription-based pricing model as compared to a one-time fee. PX55
 28

1 (Verdu (Meta) Dep.) at 56:11-57:6.

2 81. VR dedicated fitness apps also attract distinct customers when compared to other
3 VR apps, including incidental fitness apps; specifically, the market for dedicated fitness skews
4 older and more female than other VR categories like “games.” PX118 (Meta) at 2; PX55 (Verdu
5 (Meta) Dep.) at 61:13-62:13; PX1 (Meta) at 2; PX66 (Rubin (Meta) Dep. at 132:9-11 (“
6 [REDACTED]
7 [REDACTED]”); *see also* PX62 (Milk (Within) Dep.) at 152:19-153:7; PX731 (Within) at 1 (“Unique
8 user metrics for VR [REDACTED] female and [REDACTED]”).

9 82. Unlike other at-home fitness products, VR dedicated fitness apps enable users to
10 exercise in fully immersive, 360-degree virtual environments. PX314 (Meta) at 1; PX713
11 (Within) at 25, 41; PX63 (Rabkin (Meta) Dep.) at 40:1-41:1, 214:6-24; PX66 (Rubin (Meta)
12 Dep.) at 245:16-248:11; PX65 (Koblin (Within) Dep.) at 66:11-67:7; PX50 (Zuckerberg (Meta)
13 Dep.) at 60:24-61:22.

14 83. The sensors in a VR headset and controllers also allow for a degree of tracking,
15 adjustment, and feedback that non-immersive exercise programs cannot match. PX56 (Carmack
16 (Meta) Dep.) at 30:3-22.

17 84. And, unlike other at-home smart fitness devices, VR headsets are fully portable
18 and take up little space. PX66 (Rubin (Meta) Dep.) at 248:11-13; PX573 (Meta) at 2 (noting
19 space and portability as distinctions between VR fitness products and Peloton).

20 85. For example, Lululemon’s Mirror workout hardware device has no 3D video, [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED] [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]). PX82 (Lange (Lululemon) Dep.) at 37:17-38:13; 45:11-47:15; 54:3-
28

1 91. Through deals with major music studios, Supernatural continues to grow its
2 catalog, which includes songs from A-list artists like Katy Perry, Imagine Dragons, Lady Gaga,
3 and Coldplay. Dkt. No. 83 (Defendant Within Unlimited, Inc.’s Answer and Affirmative
4 Defenses) ¶ 25.

5 92. Customers access Supernatural’s offerings by paying a subscription fee of
6 \$18.99 per month or \$179.99 per year. Dkt. No. 83 (Defendant Within Unlimited, Inc.’s Answer
7 and Affirmative Defenses) ¶¶ 25, 47; PX65 (Koblin (Within) Dep.) at 37:17-38:4.

8 93. Supernatural is presently only available on Meta’s Quest headsets. Dkt. No. 83
9 (Defendant Within Unlimited, Inc.’s Answer and Affirmative Defenses) ¶ 25.

10 94. Due to [REDACTED], Supernatural is sold only in the United
11 States and Canada. PX51 (Cibula (Within) 30(b)(6) Dep.) at 71:17-22.

12 95. Other VR Dedicated Fitness Apps include FitXR, Holofit, VZFit, Les Mills
13 Body Combat and LiteBoxer, although Supernatural is [REDACTED]. PX15 (Singer
14 Rep.) at ¶ 76, Table 2-A.

15 96. Within has identified [REDACTED] as Supernatural’s “closest competitor.” PX762
16 (Within) at 1.

17 97. Supernatural and [REDACTED] comprised [REDACTED] of revenues generated by VR
18 dedicated fitness apps in 2022, according to the available data produced by Meta and Within.
19 PX15 (Singer Rep.) ¶ 76, Table 2-A.

20 98. Supernatural’s success is due in part to [REDACTED]
21 [REDACTED]
22 [REDACTED] PX479 (Meta)
23 at 4; PX478 (Meta) at 4 (“[REDACTED]
24 [REDACTED]”); PX53 (Pruett (Meta) Dep.) at 270:22-271:16.

25 99. In a candid internal exchange, Meta staff suggested that the fact that [REDACTED]
26 [REDACTED]
27 [REDACTED]. PX381 (Meta)

1 at 1; *see also* PX66 (Rubin (Meta) Dep.) at 209:20-21 (“
2 [REDACTED]”).

3 **G. VR Dedicated Fitness Apps Drive New—And More Diverse—Users to VR**

4 100. Within’s CEO Chris Milk has referred to fitness as the “[REDACTED]”
5 PX62 (Milk (Within) Dep.) at 22:20-23:20; PX657 (Within) at 1.

6 101. Meta too has observed that fitness brings opportunities to both attract new users
7 to VR and to sell more content to existing users in ways that can be habit-forming, encouraging
8 repeat use and high user retention rates. *E.g.*, PX55 (Verdu (Meta) Dep.) at 107:7-24; *see also*
9 *infra* Findings of Fact ¶¶ 102-116.

10 102. [REDACTED]
11 [REDACTED], Meta recognized that fitness was “retentive” and “could attract a broader audience,
12 particularly female” and older users. PX207 (Meta) at 3, 12; PX532 (Meta) at 1 (“Fitness is
13 retentive”); PX55 (Verdu (Meta) Dep.) at 62:11-13 (“[REDACTED]”
14 [REDACTED]”); PX54 (Bosworth (Meta) Dep.) at 187:4-21.

15 103. On top of its diversification of the user base, and retention of that user base,
16 Meta also recognized that fitness was “[REDACTED]”
17 which executives at Meta saw as “[REDACTED]” PX118 (Meta) at 2 (also noting that fitness apps
18 “[REDACTED]”); PX386 (Meta) at 12 (deliberate fitness
19 “[REDACTED]”); PX528 (Meta) at 2 (“[REDACTED]”
20 [REDACTED]”).

21 104. A “[REDACTED]” was attractive to Meta because it “[REDACTED]”
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]” PX63 (Rabkin (Meta) Dep.) at 152:21-153:7.

26 105. As such, by early 2021, Meta was “starting to look closely at the fitness trend
27 since it’s very exciting.” PX448 (Meta) at 2.

1 106. The fitness trend was “very exciting” because “[REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]” PX63 (Rabkin
5 (Meta) Dep. at 62:25-64:4).

6 107. Meta executives, including Mr. Zuckerberg, began to repeatedly, and
7 consistently, extol the potential of fitness to become a key “use case” for VR. PX50
8 (Zuckerberg (Meta) Dep. at 54:12-15 (“[REDACTED]
9 [REDACTED]
10 [REDACTED]”); *id.* at 153:7-22 (“[REDACTED]
11 [REDACTED]”); PX118 (Meta) at 1
12 (Mr. Zuckerberg: “[REDACTED]”).

13 108. According to Mr. Verdu, former Vice President of VR Content, [REDACTED]
14 [REDACTED]” PX55 (Verdu (Meta) Dep.) at
15 174:13-175:23.

16 109. This interest at the highest levels of the company led Meta employees to
17 conclude that, in internal analyses, [REDACTED]
18 [REDACTED] PX125 (Meta) at 3.

19 110. Indeed, members of the VR Content organization had determined, by spring
20 2021, that “[REDACTED]”
21 PX52 (Stojsavljevic (Meta) Dep.) at 74:19-75:5; PX179 (Meta) at 2 (observing that fitness “will
22 broaden and diversify our user base and increase Oculus frequency of use”).

23 111. Since that time, Meta has pursued a multifaceted strategy to promote fitness on
24 its devices, including developing platform-level tools such as Oculus Move, a fitness tracker
25 that Quest users can deploy to track their time spent moving and calories burned across apps.
26 PX63 (Rabkin (Meta) Dep.) at 62:1-18; PX57 (Dass (Meta) Dep.) at 37:16-38:5; PX58 (Dass
27 (Meta) 30(b)(6) Dep.) at 10:21-11:8; PX50 (Zuckerberg (Meta) Dep.) at 132:1-20, 195:2-22.
28

1 112. Meta built Oculus Move from scratch [REDACTED] PX50
2 (Zuckerberg (Meta) Dep.) at 131:7-14.

3 113. Meta has also produced the Quest 2 Active Pack, which includes a wipeable
4 interface, wrist straps, and adjustable knuckle straps, PX63 Rabkin (Meta) Dep. at 225:5-
5 227:16; PX50 (Zuckerberg (Meta) Dep.) at 214:11-23, and has considered [REDACTED]

6 [REDACTED]
7 [REDACTED]. PX349 (Meta) at 1; PX557 (Meta) at 49, 64; PX438
8 (Meta) ([REDACTED]).

9 114. By August 2021, Meta had deemed fitness a “[REDACTED]” PX314
10 (Meta) at 1; PX63 (Rabkin (Meta) Dep.) at 218:11-219:1.

11 115. Fitness continues to be a priority use case for Meta; an April 2022 strategy
12 document that was prepared for Mr. Zuckerberg identified fitness as “[REDACTED]
13 [REDACTED]” PX386 (Meta) at 11; PX54 (Bosworth (Meta)
14 Dep.) at 110:8-112:25.

15 116. At that time, Meta recognized deliberate fitness as the fastest growing category
16 among VR apps. PX386 (Meta) at 12; PX318 at 1 (“[REDACTED]
17 [REDACTED]” (brackets in original)).

18 **H. Meta Saw the Beat Saber Acquisition as a “[REDACTED]”**

19 117. Recognizing the potential for VR dedicated fitness apps to both expand its user
20 audience and drive retention, and thus propel headset sales and app monetization, Meta has
21 explored multiple pathways to enter VR dedicated fitness with its own product. *See infra*
22 Findings of Fact ¶¶ 118-134; 149-179.

23 118. One natural pathway was expanding Beat Saber, which employs the same
24 slashing mechanic as Supernatural, to include fitness offerings. PX52 (Stojsavljevic (Meta)
25 Dep.) at 112:14-25; PX57 Dass (Meta) Dep.) at 25:7-21.

26 119. Meta has acknowledged the similarity in mechanics between Beat Saber and
27 Supernatural. PX2 (Meta) at 3 (discussing Within’s reliance on a “proven game mechanic”);
28

1 PX54 (Bosworth (Meta) Dep.) at 175:11-76:21; *see also* PX52 (Stojsavljevic (Meta) Dep.) at
2 214:17-22 ([REDACTED]
3 [REDACTED]”).

4 120. And Meta employees have repeatedly [REDACTED]
5 [REDACTED] *E.g.*, PX246 (Meta) at 1; PX110 (Meta) at 1; PX466 (Meta) at 1;
6 PX561 (Meta) at 1; PX52 (Stojsavljevic (Meta) Dep.) at 208:9-18; PX179 (Meta) at 1.

7 121. Beat Saber is widely recognized as providing incidental fitness benefits, and
8 many users play Beat Saber for exercise. PX66 (Rubin (Meta) Dep.) at 167:17-24; PX56
9 (Carmack (Meta) Dep.) at 37:10-11, 57:4-58:11; PX50 (Zuckerberg (Meta) Dep.) at 81:15-25;
10 PX229 (Meta) at 5.

11 122. As early as August 2019, and prior to its acquisition of Beat Games, [REDACTED]
12 [REDACTED]
13 [REDACTED] PX249 (Meta) at 1 (“ [REDACTED]
14 [REDACTED]”); PX55 (Verdu (Meta) Dep.) at 21:10-22:3, 27:6-28:1.

15 123. Mr. Verdu, the sponsor for the Beat Games deal, believed Beat Saber could go
16 further and develop a version with the functionalities of a VR dedicated fitness app. PX55
17 (Verdu (Meta) Dep.) at 23:21-24:1, 63:10-21; PX342 (Meta) at 2 (“ [REDACTED]
18 [REDACTED]”).

19 124. When Meta was weighing a bid to acquire Beat Games later that year, it foresaw
20 Beat Saber “[REDACTED]” PX342 (Meta) at 2, with the
21 “[REDACTED]. PX162 (Meta) at 3; PX55 (Verdu (Meta)
22 Dep.) at 90:7-15.

23 125. Deal strategy documents detail the natural next step for Beat Saber into fitness,
24 noting that [REDACTED]
25 [REDACTED]” PX162 (Meta) at 3.

26 126. According to Mr. Verdu, the acquisition “[REDACTED]
27 [REDACTED]

1 [REDACTED]” PX55 (Verdu (Meta) Dep.) at
2 60:8-12; *see also id.* at 63:4-21.

3 127. Mr. Verdu was “[REDACTED]
4 [REDACTED]”
5 PX55 (Verdu (Meta) Dep.) at 21:20-22:3.

6 128. While the Quest and Quest 2 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]” PX55 (Verdu (Meta) Dep.) at 22:8-17.

11 129. Not surprisingly, since its acquisition of Beat Games in November 2019, [REDACTED]
12 [REDACTED]. PX55 (Verdu (Meta)
13 Dep.) at 97:19-24 (“[REDACTED]
14 [REDACTED]”).

15 130. The Beat Games founders—who remained with their studio post-acquisition—
16 have continued to express enthusiasm for expanding Beat Saber into fitness. *E.g.*, PX468 (Meta)
17 at 1-2; PX411 (Meta) at 1 (Beat Games founder Jaroslav Beck: “[REDACTED]
18 [REDACTED]”);
19 PX458 (Meta) at 5 ([REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]”).

24 131. By April 2020, just four months after the Beat Games acquisition and the same
25 month that Supernatural launched, Meta released a “bespoke” fitness track for Beat Saber called
26 “FitBeat.” PX52 (Stojsavljevic (Meta) Dep.) at 190:16-19; *see also* PX56 (Carmack (Meta)
27 Dep.) at 63:8-64:1 (“[REDACTED]
28 [REDACTED]”).

1 [REDACTED]"); PX77 (Beck (Meta) Dep.) at 101:23-103:11.

2 132. Beat Games' cofounder Jaroslav Beck, who created FitBeat, repeatedly referred
3 to it as "the fitness song" before naming it FitBeat. PX586 (Meta) at 1; PX376 (Meta) at 3.

4 133. From the day of its launch, FitBeat earned atypical acclaim from players to the
5 point that Mr. Beck wrote "[REDACTED]
6 [REDACTED]" PX575 (Meta) at 7.

7 134. In addition to FitBeat, Meta added a way to "loop" gameplay so users could keep
8 up physical activity in Beat Saber without stopping. PX54 (Bosworth (Meta) Dep.) at 141:19-22
9 ("[REDACTED]
10 [REDACTED]").

11 **I. Within Perceived Meta as a Potential Entrant into VR Dedicated Fitness**

12 135. Given Meta's vast resources, the market's potential, and the similarity between
13 Beat Saber and Supernatural, Within recognized that Meta was uniquely poised to enter the VR
14 dedicated fitness. *Infra* Findings of Fact ¶¶ 136-148.

15 136. [REDACTED]
16 [REDACTED]
17 [REDACTED]" PX607 (Within) at 2.

18 137. In a June 2020 Supernatural strategy presentation, [REDACTED]
19 [REDACTED]" PX615 (Within) at 8.

20 138. Another Within document reads: "[REDACTED]
21 [REDACTED]" PX619 (Within) at 4.

22 139. [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]" PX62 (Milk (Within) Dep. at 112:22-113:12; PX729 (Within) at 1.

26 140. Meta also hired away the head of product for Supernatural at Within to work at
27 Meta following the Supernatural launch, which was a "[REDACTED]" to Within. PX62 (Milk
28

1 (Within) Dep.) at 102:19-103:6; PX111 (Meta) at 1.

2 141. In the summer of 2020, Meta [REDACTED]
3 [REDACTED]
4 [REDACTED]” PX305 (Meta) at 2; PX54 (Bosworth (Meta) Dep.) at
5 178:14-79:22.

6 142. [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]” PX514
10 (Meta) at 2; *see also* PX67 (Brown (Meta) Dep.) at 115:5-117:18.

11 143. Based on this threat, Within developed competitive strategies for Supernatural
12 with the specter of Meta’s potential entry in mind. *Infra* Findings of Fact ¶¶ 144-148.

13 144. Within has long recognized that it must innovate and continually improve its
14 product to distance itself from potential competition; as Within’s CEO explained, “[REDACTED]
15 [REDACTED]
16 [REDACTED]” PX621 (Within) at 2.

17 145. [REDACTED]
18 [REDACTED]
19 [REDACTED] PX615 (Within) at 9.

20 146. Within also sought to [REDACTED]
21 [REDACTED]
22 [REDACTED]” PX615 (Within) at 9

23 147. Within’s efforts ultimately led Within executive Jonny Ahdout to remark in
24 October 2021, while preparing to launch Within’s boxing modality and publicizing the vast
25 catalogue of songs available to Supernatural users: “[REDACTED]
26 [REDACTED]” PX616 (Within) at 2.

27 148. Within was also concerned about making any moves that would limit its ability
28

1 to compete against Meta as a potential entrant; [REDACTED]

2 [REDACTED]
3 [REDACTED]” PX620 (Within) at 36.

4 **J. Meta Gets “Serious” About Fitness and Aims to Develop Its Own VR**
5 **Dedicated Fitness App**

6 149. The COVID-19 crisis, which occurred just after Meta’s acquisition of Beat
7 Games in late 2019, naturally heightened Meta’s longstanding interest in the VR dedicated
8 fitness space. PX207 (Meta) at 3 (“COVID was the perfect stimulus”).

9 150. In addition, holiday usage data from 2020 showed that fitness “[REDACTED]
10 [REDACTED]” and drove higher percentages of women to Meta’s VR platform than games.
11 PX52 (Stojsavljevic (Meta) Dep.) at 74:24-75:5, 78:13-20.

12 151. Thus, by February 2021, the VR Content organization recognized that “we need
13 to get serious about doing something big in fitness.” PX189 (Meta) at 1.

14 152. Something “big in fitness” meant Meta “[REDACTED]
15 [REDACTED]
16 [REDACTED]” PX52 (Stojsavljevic (Meta) Dep.) at 86:8-18.

17 153. “[REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]” PX52 (Stojsavljevic (Meta) Dep.) at 84:17-22.

21 154. This excitement was “[REDACTED]
22 [REDACTED]” PX52 (Stojsavljevic (Meta) Dep.) at 85:13-14.

23 155. Given this excitement for fitness, Mr. Stojsavljevic began exploring a separate
24 Beat Saber fitness offering, including through [REDACTED]
25 [REDACTED]” PX189 (Meta) at 1; PX52 (Stojsavljevic (Meta) Dep.) at 81:11-12, 82:23-24 (“[REDACTED]
26 [REDACTED]
27 [REDACTED]”).
28

1 156. Mr. Verdu “[REDACTED]” PX63 (Rabkin (Meta) Dep.) at
2 173:20, and told Mr. Stojavljevic “[REDACTED]
3 [REDACTED]” PX52 (Stojavljevic (Meta) Dep.) at 90:18-25.

4 157. A [REDACTED] appealed to Mr. Verdu [REDACTED]
5 [REDACTED]
6 [REDACTED]” PX55 (Verdu (Meta) Dep.) at
7 201:24-202:8.

8 158. Other members of the VR Content organization were similarly excited about a
9 Beat Saber [REDACTED] in February 2021. PX256 (Meta) at 1 ([REDACTED]
10 [REDACTED]); PX111 (Meta) at 1.

11 159. A March 2021 presentation called [REDACTED] and
12 proposed [REDACTED] to “position[] Beat Saber directly as a fitness app.” PX527
13 (Meta) at 5.

14 160. Subscription services are the best path to a financially successful VR platform,
15 PX118 (Meta) at 2; PX306 (Meta) at 2 (“[REDACTED]
16 [REDACTED]”), and [REDACTED]
17 [REDACTED] PX342
18 (Meta) at 2, 5 [REDACTED]
19 [REDACTED]
20 [REDACTED]).

21 161. Besides a [REDACTED], other means
22 for expanding Beat Saber into dedicated fitness included organically building out the Beat Saber
23 app, through hiring efforts that would [REDACTED] PX144 (Meta) at 1.

24 162. At this time, Messrs. Zuckerberg and Bosworth were supportive of [REDACTED]
25 [REDACTED]
26 [REDACTED] PX55 (Verdu (Meta) Dep.) at 204:22-205:8.

27 163. Meta could have also expanded Beat Saber into dedicated fitness by “[REDACTED]
28

1 [REDACTED]” PX144 (Meta) at 1.

2 164. Specifically, at this time in early March 2021, Meta considered [REDACTED]

3 [REDACTED]
4 [REDACTED]” PX527
5 (Meta) at 8; PX52 (Stojsavljevic (Meta) Dep.) at 136:24-137:23.

6 165. Meta ultimately purchased Armature in 2022. PX52 (Stojsavljevic (Meta) Dep.)
7 at 55:9-11; PX555 (Meta) at 3.

8 166. On March 4, 2021, Mr. Verdu apprised Mr. Zuckerberg of Meta’s internal efforts
9 to build its own VR dedicated fitness app, explaining that “[REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]” PX118 (Meta) at 2.

13 167. At Meta (then-Facebook), vice presidents like Mr. Verdu “[REDACTED]
14 [REDACTED]” PX50 (Zuckerberg
15 (Meta) Dep.) at 111:24-112:2.

16 168. Mr. Zuckerberg’s approval was not necessary for the expansion of Beat Saber
17 into fitness. PX50 (Zuckerberg (Meta) Dep.) at 144:2-11 (“[REDACTED]
18 [REDACTED]
19 [REDACTED]”).

20 169. Nevertheless, Mr. Zuckerberg responded supportively and enthusiastically within
21 minutes to Mr. Verdu’s March 4 email: “[REDACTED]
22 [REDACTED]” PX118
23 (Meta) at 1; PX50 (Zuckerberg (Meta) Dep.) at 172:2-173:5.

24 170. That very same day, on March 4, 2021, Messrs. Verdu and Stojsavljevic
25 finalized a presentation entitled “[REDACTED]” that described “strategies” including

26 [REDACTED]
27 [REDACTED] PX527 (Meta) at 1, 4; PX52 (Stojsavljevic (Meta) Dep.) at 114:8-115:8.

1 171. “Acqui-hired talent” refers to Meta’s ability to bring onboard additional content
2 producers or fitness expertise. PX52 (Stojsavljevic (Meta) Dep.) at 122:21-123:10.

3 172. The “[REDACTED]” presentation recognized that strong brand awareness
4 around Beat Saber would have facilitated Meta’s entry into the dedicated fitness space. PX527
5 (Meta) at 5 (“[REDACTED]”
6 [REDACTED]
7 [REDACTED]”).

8 173. Specifically, users already associate Meta’s Beat Saber app with fitness; a
9 dedicated fitness-oriented version of Beat Saber would be in line with users’ understanding of
10 the Beat Saber brand. PX527 (Meta) at 5; PX407 (Meta) at 1-2.

11 174. While Meta was developing paths to enter VR dedicated fitness with its own
12 product, it also was considering entering the market through acquisition of one of the existing
13 firms in the market. *E.g.*, PX63 (Rabkin (Meta) Dep.) at 169:10-17.

14 175. One purported reason to investigate the acquisition route was because “[REDACTED]
15 [REDACTED]” PX179 (Meta) at 2—but, as
16 noted above, that problem could have been solved by a hiring process that would
17 “[REDACTED]” which
18 Meta subsequently did. PX144 (Meta) at 1; PX52 (Stojsavljevic (Meta) Dep.) at 205:11-24
19 ([REDACTED]
20 [REDACTED]
21 [REDACTED]”).

22 176. Moreover, Meta already has engineers with the skill set to both expand Beat
23 Saber into fitness and to build a VR dedicated fitness app from scratch. PX56 (Carmack (Meta)
24 Dep.) at 39:24-40:4 (“[REDACTED]
25 [REDACTED]”), & 51:18-21 (“[REDACTED]
26 [REDACTED]
27 [REDACTED]”); *see also id.* at 53:18-54:6 (Meta could have [REDACTED]
28

1 [REDACTED].

2 177. Thus, although the company had, by March 11, 2021, decided to “[REDACTED]
3 [REDACTED]” Meta was still undertaking
4 parallel efforts to “expand[] Beat Saber to deliberate fitness.” PX179 (Meta) at 2.

5 178. In fact, Mr. Stojavljevic continued to believe that “[REDACTED]
6 [REDACTED]” to address “[REDACTED]
7 [REDACTED]” and “[REDACTED]
8 [REDACTED]” PX407 (Meta) at 1.

9 179. By the end of March 2021, he was informing colleagues that a pitch would go to
10 executives in April [REDACTED] PX533
11 (Meta) at 1.

12 180. Those efforts were tabled when Meta decided to pursue an acquisition of Within
13 in June 2021. PX52 (Stojavljevic (Meta) Dep.) at 235:19-236:1; PX341 (Meta) at 2.

14 **K. Instead of Building its Own VR Dedicated Fitness App, Meta Decides to Buy**
15 **the [REDACTED]**

16 181. Meta’s strategy for market entry shifted when the company [REDACTED]
17 [REDACTED]
18 [REDACTED] *Infra* Findings of Fact ¶¶ 182-183.

19 182. As Mr. Verdu, deal sponsor for the Within acquisition, explained, [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED] PX117 (Meta) at 1; *see also* PX55 (Verdu (Meta)
23 Dep.) at 240:8-241:4; PX579 (Meta) at 1 (“[REDACTED]
24 [REDACTED]”).

25 183. [REDACTED]
26 [REDACTED] PX55 (Verdu
27 (Meta) Dep.) at 242:22-243:3 (“[REDACTED]
28 [REDACTED]”).

1 [REDACTED]”).

2 184. To date, Apple has never marketed any VR headset (versus Meta’s marketing of
3 several different models over nearly a decade) and has zero headset sales (versus over 10
4 million units sold to consumers by Meta). PX54 (Bosworth (Meta) Dep.) at 103:12-17, 249:1-4;
5 *see also* PX55 (Verdu (Meta) Dep.) at 243:12-18.

6 185. [REDACTED]
7 [REDACTED]
8 [REDACTED] PX74 (Casanova (Apple) Dep.) at 113:17-114:11; 119:2-5.

9 186. [REDACTED], *id.*
10 at 114:12-116:2; 117:13-118:1, [REDACTED].
11 *Id.* at 123:14-124:6.

12 187. [REDACTED]
13 [REDACTED]
14 [REDACTED] PX74 (Casanova (Apple) Dep.) at
15 111:16-112:18.

16 188. [REDACTED]. *Id.* at 119:2-5.

17 189. In July 2021, Meta and Within entered into a non-binding term sheet. PX62
18 (Milk (Within) Dep.) at 129:2-14.

19 190. Two months later, however, there was a “hiccup” in the negotiations regarding
20 the purchase price, [REDACTED]” PX66 (Rubin (Meta)
21 Dep.) at 128:4-12; PX123 (Meta) at 1.

22 191. In response, after seeking guidance from Mr. Zuckerberg, Meta [REDACTED]
23 [REDACTED]
24 [REDACTED] PX123 (Meta) at 1; PX66 (Rubin (Meta) Dep.) at 158:3-162:22; PX560 (Meta) at 2.

25 192. That included the option to build a fitness-focused app based on Beat Saber.
26 PX123 (Meta) at 2; PX66 (Rubin (Meta) Dep.) at 162:18-22.

27 193. [REDACTED]
28

1 [REDACTED]. PX54 (Bosworth (Meta) Dep.) at 210:17-21.

2 194. The purchase price is more than [REDACTED] the amount of money Within spent to
3 develop Supernatural and build it into [REDACTED] VR dedicated fitness app. PX2 at 1; PX54
4 (Bosworth (Meta) Dep.) at 164:4-15.

5 195. Meta could have built its own VR dedicated fitness app for less than the [REDACTED]
6 [REDACTED] it proposes to spend to acquire Within. PX54 (Bosworth) (Meta) Dep.) at 210:17-21.

7 196. Buying Within was not the only way Meta could have developed the production
8 capabilities and expertise needed to create a premium VR fitness experience. PX54 (Bosworth
9 (Meta) Dep.) at 174:23-175:2.

10 197. [REDACTED]
11 [REDACTED] PX50 (Zuckerberg (Meta) Dep.) at 240:19-241:3;
12 PX384 (Meta) at 1.

13 198. Meta has identified [REDACTED]
14 [REDACTED]
15 [REDACTED]” PX54 (Bosworth
16 (Meta) Dep.) at 161:1-13; *see also* PX413 (Meta) at 2 ([REDACTED]
17 [REDACTED]
18 [REDACTED]”).

19 **L. VR Dedicated Fitness Is Characterized by High Barriers to Entry**

20 199. Building a successful VR dedicated fitness app requires [REDACTED]
21 [REDACTED] lity.
22 PX667 (Within) at 60; PX5 (Within) at 18 (“[REDACTED]
23 [REDACTED]”); PX712 (Within) at 48 (“[REDACTED]
24 [REDACTED]”); PX111 (Meta) at 1
25 (“[REDACTED]”); PX65
26 (Koblin (Within) Dep.) at 36:9-17; PX62 (Milk (Within) Dep.) at 17-19, 36:13-37:16.

27 200. Building a high-quality entrant also requires “[REDACTED]
28

1 [REDACTED]” PX118 (Meta) at 1;
2 *see also* PX527 (Meta) at 3 (“ [REDACTED]
3 [REDACTED]”); PX52 (Stojsavljevic (Meta) Dep. at 115:24-116:5 ([REDACTED]
4 [REDACTED]”) & 119:9-120:4
5 ([REDACTED]).

6 201. Moreover, inclusion on the Quest Store itself is a significant barrier to entry over
7 which Meta exercises total control. *Infra* Findings of Fact ¶¶ 202-212.

8 202. The Quest Store provides huge discoverability benefits to apps that are published
9 to it. PX53 (Pruett (Meta) Dep.) at 124:11-125:19.

10 203. Prior to appearing on the Quest Store, apps must meet certain technical
11 requirements, [REDACTED]
12 PX53 (Pruett (Meta) Dep.) at 31:4-17.

13 204. That is because Meta [REDACTED]
14 [REDACTED]
15 [REDACTED] PX276 (Meta) at 1; *see also* PX53 (Pruett (Meta) Dep.) at
16 51:5-20 ([REDACTED]
17 [REDACTED]) & 59:11-60:23.

18 205. Through “uniqueness,” Meta is trying to evaluate whether apps are sufficiently
19 differentiated from apps already in the Quest Store. PX53 (Pruett (Meta) Dep.) at 61:16-23.

20 206. [REDACTED] PX53 (Pruett (Meta)
21 Dep.) at 161:14-16, 281:15-23; PX246 (Meta) at 1 (“ [REDACTED]
22 [REDACTED]
23 [REDACTED]”).

24 207. When it comes to Meta’s curation of the Quest Store, [REDACTED]
25 [REDACTED] PX56 (Carmack (Meta) Dep.) at
26 19:17-20:8 ([REDACTED]
27 [REDACTED]

1 [REDACTED]”); *see also* PX53 (Pruett (Meta) Dep.) at 72:15-73:1, 74:5-8, 95:15-18;
2 PX465 (Meta) at 3 (“[REDACTED]
3 [REDACTED]”).

4 208. Even in instances where Meta permits an app to list on the Quest Store, the
5 process is uncertain and cumbersome because “[REDACTED]
6 [REDACTED]” PX56 (Carmack (Meta) Dep.) at 22:24-25.

7 209. [REDACTED]
8 [REDACTED]” PX145 (Meta) at 1; *see also* PX56 (Carmack (Meta) Dep. at 17:24-18:1 (“[REDACTED]
9 [REDACTED]”).

10 210. Meta also controls which apps are placed in “[REDACTED]” on the Quest Store.
11 PX56 (Carmack (Meta) Dep.) at 24:16-25:1.

12 211. Placement in featured slots improves an app’s uptake and growth. PX56
13 (Carmack (Meta) Dep.) at 24:21-25:1 (“[REDACTED]
14 [REDACTED]
15 [REDACTED]”).

16 212. Indeed, when negotiating this deal, [REDACTED]
17 [REDACTED]
18 [REDACTED]” PX62 (Milk (Within)
19 Dep.) at 146:15-147:6 (“[REDACTED]
20 [REDACTED]
21 [REDACTED]”); *see also* PX731 (Within) at 1 (“[REDACTED]”).

22 213. Meta has recognized that VR fitness apps [REDACTED]. PX135
23 (Meta) at 3 (“[REDACTED]
24 [REDACTED]”); PX57 (Dass (Meta) Dep.) at 64:8-18; PX136 (Meta) at 11
25 (“[REDACTED]
26 [REDACTED]
27 [REDACTED]”).

1 214. Meta intends to [REDACTED]
2 [REDACTED] PX63 (Rabkin (Meta) Dep.) at 171:19-172:2 (“ [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]”) & 188:21-189:5.

6 **PLAINTIFF FTC’S PROPOSED CONCLUSIONS OF LAW**

7 1. Section 7 of the Clayton Act prohibits mergers when “the effect of such
8 acquisition may be substantially to lessen competition, or to tend to create a monopoly.” 15
9 U.S.C. § 18.

10 2. Section 7 analysis “necessarily focuses on ‘probabilities, not certainties.’” *St.*
11 *Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys. Ltd.*, 778 F.3d 775, 783 (9th Cir.
12 2015) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)).

13 3. This entails “‘a prediction of [the merger’s] impact upon competitive conditions
14 in the future; this is what is meant when it is said that the amended § 7 was intended to arrest
15 anticompetitive tendencies in their incipiency.’” *Id.* (quoting *United States v. Phila. Nat’l Bank*,
16 374 U.S. 321, 362 (1963)).

17 4. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the Federal Trade
18 Commission, whenever it has reason to believe that a proposed merger is unlawful, to seek
19 preliminary injunctive relief to prevent consummation of a merger until the Commission has the
20 opportunity to adjudicate the merger’s legality in an administrative proceeding.

21 5. Specifically, Section 13(b) “allows a district court to grant the Commission a
22 preliminary injunction ‘[u]pon a proper showing that, weighing the equities and considering the
23 Commission’s likelihood of ultimate success, such action would be in the public interest.’” *FTC*
24 *v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999) (quoting 15 U.S.C. § 53(b)).

25 6. The statute “places a lighter burden on the Commission than that imposed on
26 private litigants by the traditional equity standard.” *FTC v. Warner Commc’ns Inc.*, 742 F.2d
27 1156, 1159 (9th Cir. 1984). *FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088, 1096 (S.D.N.Y.
28

1 1977) (“The equities to be weighed here are not the usual equities of private litigation but public
2 equities.”).

3 7. “Under this more lenient standard, ‘a court must 1) determine the likelihood that
4 the Commission will ultimately succeed on the merits and 2) balance the equities.’” *Affordable*
5 *Media*, 179 F.3d at 1233 (quoting *Warner Commc ’ns*, 742 F.2d at 1160).

6 8. In weighing the equities under § 13(b), “public equities receive far greater
7 weight.” *Warner Commc ’ns*, 742 F.2d at 1165.

8 9. Public equities include effective enforcement of the antitrust laws and ensuring
9 the Commission’s ability to obtain adequate relief if it ultimately prevails on the merits. *Id.*

10 10. Preliminary injunctions under § 13(b) “are meant to be readily available to
11 preserve the status quo while the FTC develops its ultimate case.” *FTC v. Whole Foods Mkt.,*
12 *Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008); *FTC. v. Food Town Stores, Inc.*, 539 F.2d 1339,
13 1342 (4th Cir. 1976) (“The only purpose of a proceeding under § 13 is to preserve the status quo
14 until FTC can perform its function.”).

15 11. The FTC has shown that it is likely to succeed on the merits of its Section 7
16 challenge in the agency’s administrative court, and the equities favor issuing a preliminary
17 injunction.

18 **A. The FTC Is Likely to Succeed on the Merits of Its Section 7 Challenge**

19 12. In evaluating the FTC’s likelihood of success on the merits, courts consider the
20 FTC’s ability to prove that the effect of the Acquisition “*may be* substantially to lessen
21 competition, or to tend to create a monopoly” in violation of Section 7 of the Clayton Act.
22 *Warner Commc ’ns*, 742 F.2d at 1160 (emphasis in original) (“It is well established that a
23 section 7 violation is proven upon a showing of reasonable probability of anticompetitive
24 effect”).

25 13. The Ninth Circuit has explained that the “Commission meets its burden if it
26 ‘raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make
27 them fair ground for thorough investigation, study, deliberation and determination by the FTC
28

1 in the first instance and ultimately by the Court of Appeals.” *Warner Commc ’ns*, 742 F.2d at
2 1162 (alteration in original) (quoting *FTC v. Nat’l Tea Co.*, 603 F.2d 694, 698 (8th Cir. 1979));
3 *see also Whole Foods Mkt.*, 548 F.3d at 1036 (“[A]t this preliminary phase [the FTC] just has to
4 raise substantial doubts about a transaction. One may have such doubts without knowing exactly
5 what arguments will eventually prevail.”).

6 14. Because the issue is a “narrow one,” the court “do[es] not resolve the conflicts in
7 the evidence, compare concentration ratios and effects on competition in other cases, or
8 undertake an extensive analysis of the antitrust issues.” *Warner Commc ’ns*, 742 F.2d at 1164;
9 *see also California v. Am. Stores Co.*, 872 F.2d 837, 841 (9th Cir. 1989) (“At this stage, we do
10 not resolve conflicts in the evidence.”), *rev’d on other grounds, California v. Am. Stores Co.*,
11 495 U.S. 271 (1990); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) (the FTC “is
12 not required to *establish* that the proposed merger would in fact violate Section 7” (emphasis in
13 original)); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 67 (D.D.C. 2009) (“the district
14 court’s task is not ‘to determine whether the antitrust laws have been or are about to be violated.
15 That adjudicatory function is vested in the FTC in the first instance’” (quoting *Whole Foods*
16 *Mkt.*, 548 F.3d at 1042 (Tatel, J., concurring))).

17 15. Rather, this Court’s task is only to “measure the probability that, after an
18 administrative hearing . . . the Commission will succeed in proving that the effect of the
19 [proposed] merger ‘may be substantially to lessen competition, or to tend to create a monopoly’
20 in violation of section 7.” *H.J. Heinz*, 246 F.3d at 714 (quoting 15 U.S.C. § 18).

21 16. The Supreme Court has recognized that Section 7 of the Clayton Act prohibits
22 the elimination of potential competition as well as present competition. *E.g., United States v.*
23 *Falstaff Brewing Corp.*, 410 U.S. 526, 531-32 (1973); *see also United States v. Marine*
24 *Bancorp., Inc.*, 418 U.S. 602, 623-25 (1974).

25 17. Courts have recognized two distinct types of anticompetitive harm that can occur
26 from mergers that eliminate potential competition in a concentrated relevant market.

27 18. First, a merger can lessen “actual potential competition,” when it eliminates a
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1 firm that is reasonably probable to enter the relevant market through alternative means absent
2 the illegal acquisition. *See United States v. Phillips Petrol. Co.*, 367 F. Supp. 1226, 1232 (C.D.
3 Cal. 1973), *aff'd*, *Phillips Petrol. Co. v. United States*, 418 U.S. 906 (1974) (describing the
4 harm to competition that may arise from the loss of an “entry effect”); *see also Yamaha Motor*
5 *Co. Ltd. v. FTC*, 657 F.2d 971, 977-79 (8th Cir. 1981).

6 19. Second, a merger can lessen “perceived potential competition” when it
7 eliminates “a potential competitor on the fringe of the market with likely influence on existing
8 competition.” *Falstaff Brewing*, 410 U.S. at 533-34.

9 20. Where, as here, an acquisition eliminates both a perceived potential competitor
10 and an actual potential competitor, the “combination renders the anticompetitive consequences
11 of the acquisition even greater.” *Phillips Petrol.*, 367 F. Supp. at 1234.

12 21. The Acquisition is likely to result in anticompetitive harm by lessening
13 competition in the VR Dedicated Fitness App market, where Within’s Supernatural is ■■■
14 ■■■ in a highly concentrated market. *Infra* Conclusions of Law ¶¶ 59-67.

15 22. The proposed Acquisition will preclude Meta’s reasonably probable entry
16 through alternative means, thereby denying consumers the benefit of adding another effective
17 competitor to the market. *Infra* Conclusions of Law ¶¶ 69-92; *see Yamaha Motor*, 657 F.2d at
18 977-79; *Phillips Petrol. Co.*, 367 F. Supp. at 1232.

19 23. The proposed Acquisition will also eliminate the current procompetitive
20 influence on existing competition that Meta’s threat of potential entry provides from the edge of
21 the market. *Infra* Conclusions of Law ¶¶ 93-110; *Marine Bancorp.*, 418 U.S. at 624-25; *Falstaff*
22 *Brewing*, 410 U.S. at 533-34; *Phillips Petrol.*, 367 F. Supp. at 1232-34.

23 24. Few firms are comparably situated to Meta with respect to entry into the VR
24 Dedicated Fitness App market, and new entry or expansion is unlikely to be sufficient to offset
25 the competitive harm of the proposed Acquisition. *Infra* Conclusions of Law at ¶¶ 111-115. *See,*
26 *e.g., United States v. Bazaarvoice, Inc.*, No. 13-cv-00133, 2014 WL 203966, at *71 (N.D. Cal.
27 Jan. 8, 2014) (noting that it is the defendants’ burden to show that alternative entry will be
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1 timely, likely, and sufficient in magnitude and character to deter or counteract the competitive
2 effects of concern).

3 **1. The Relevant Market Is the Sale of VR Dedicated Fitness Apps in the United**
4 **States**

5 25. “Determination of the relevant product and geographic markets is a necessary
6 predicate to deciding whether a merger contravenes the Clayton Act.” *St. Alphonsus Med. Ctr.-*
7 *Nampa, Inc. v. St. Luke’s Health Sys. Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015).

8 26. This is true whether the merger is alleged to have anticompetitive effects on
9 existing competition or on potential competition. *Marine Bancorp.*, 418 U.S. at 618.

10 27. In defining relevant product markets (a term of art in antitrust law), courts often
11 evaluate “such practical indicia as industry or public recognition of the [relevant market] as a
12 separate economic entity, the product’s peculiar characteristics and uses, unique production
13 facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized
14 vendors.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); accord *Klein v.*
15 *Facebook, Inc.*, 580 F. Supp. 3d 743, 766-67 (N.D. Cal. 2022); *Dang v. San Francisco Forty*
16 *Niners*, 964 F. Supp. 2d 1097, 1107 (N.D. Cal. 2013).

17 28. “The relevant geographic market is the area of effective competition where
18 buyers can turn for alternate sources of supply.” *St. Alphonsus*, 778 F.3d at 784 (internal
19 quotation marks omitted).

20 29. “Put differently, a relevant market is the group of sellers or producers who have
21 the actual or potential ability to deprive each other of significant levels of business.” *Id.*
22 (internal quotation marks omitted).

23 30. “Relevant markets need not have precise metes and bounds.” *Pac. Steel Grp. v.*
24 *Comm. Metals Co.*, No. 20-CV-07683, 2022 WL 1225030, at *7 (N.D. Cal. Apr. 26, 2022).

25 31. Both the *Brown Shoe* practical indicia and the Hypothetical Monopolist Test
26 (“HMT”) demonstrate that VR dedicated fitness apps, like Within’s Supernatural app, are an
27 appropriate relevant product market in which to evaluate the Acquisition.
28

1 [REDACTED]. *Supra*
2 Findings of Fact ¶¶ 88-89.

3 41. Lastly, the VR Dedicated Fitness App market satisfies the HMT, further
4 confirming it is an appropriate relevant product market in which to evaluate the effects of the
5 Acquisition. PX15 (Singer Rep.) ¶¶ 29-35, 49-69.

6 42. This test asks whether a hypothetical monopolist could profitably impose at least
7 a small but significant and nontransitory increase in price (“SSNIP”) on a collection of
8 products, including at least one product sold by one of the merging firms. *See* U.S. Dep’t of
9 Justice & FTC Horizontal Merger Guidelines (“Guidelines”) (2010) § 4.1.2.

10 43. Dr. Hal Singer, the FTC’s expert economist, conducted a consumer survey to
11 evaluate how Supernatural users would respond to a SSNIP on Supernatural and other VR
12 Dedicated Fitness products. PX15 (Singer Rep.) ¶¶ 49-69.

13 44. Dr. Singer’s survey showed that over 95% of Supernatural users would keep
14 their Supernatural subscriptions in response to a SSNIP on Supernatural or all VR dedicated
15 fitness apps. *Id.* ¶¶ 63-64, Table 1.

16 45. These results, combined with the margins for VR dedicated fitness products,
17 indicate that a hypothetical monopolist could profitably impose a SSNIP on VR dedicated
18 fitness apps, and therefore that VR dedicated fitness apps constitute an appropriate and relevant
19 antitrust market. *Id.* ¶¶ 49-69.

20 46. The United States is an appropriate relevant geographic market in which to
21 assess the probable effects of the proposed Acquisition. *Id.* ¶¶ 70-73.

22 47. The relevant geographic market is the region in which “consumers can
23 practically turn for alternative sources of the product and in which the antitrust defendant faces
24 competition.” *FTC v. Staples Inc.*, 970 F. Supp. 1066, 1073 (D.D.C. 1997).

25 48. As the Supreme Court has explained, the relevant geographic market must
26 “correspond to the commercial realities of the industry” as determined by a “pragmatic, factual,
27 approach.” *Brown Shoe*, 370 U.S. at 336.

1 probable to enter the relevant market through alternative means. *See, e.g., Phillips Petroleum,*
2 367 F. Supp. at 1239 (determining Phillips was a likely unilateral entrant based on its size,
3 resources, capability, and motivation with respect to entry into an “adjacent attractive market”);
4 *BOC Int’l Ltd. v. FTC*, 557 F.2d 24, 29 n.7 (2d Cir. 1977) (requiring only a reasonable
5 probability that the acquiring firm would enter the relevant market).

6 57. For perceived potential competition, the question is whether the merger would
7 eliminate “a potential competitor on the fringe of the market with likely influence on existing
8 competition.” *Falstaff Brewing*, 410 U.S. at 533-34.

9 58. That the market may be an emerging one poised for rapid growth might make it
10 particularly susceptible to antitrust harm. *Bazaarvoice*, 2014 WL 203966 at *76 (“rapid
11 technological progress may provide a climate favorable to increased concentration of market
12 power rather than the opposite.”) (quoting *Greyhound Computer Corp., Inc. v. Int’l Bus.*
13 *Machines Corp.*, 559 F.2d 488, 497 (9th Cir. 1977)); *In re Union Carbide Corp.*, 59 F.T.C. 614,
14 1961 WL 65409, at *35 (Sept. 25, 1961) (“Any lessening of competition is therefore doubly
15 harmful in a new industry since its inevitable effect is to slow down the growth rate of the
16 industry.”).

17 **a) The VR Dedicated Fitness App Market Is Concentrated**

18 59. The VR Dedicated Fitness App market more than satisfies the requirement of a
19 concentrated market.

20 60. The potential competition doctrine “has meaning only as applied to concentrated
21 markets.” *Marine Bancorp.* 418 U.S. 602, 630-31; *Falstaff*, 410 U.S. at 539-40 (“one of the
22 principal purposes of § 7 was to stem the rising tide of concentration”).

23 61. A plaintiff can establish a market is concentrated through the use of market share
24 statistics. *Marine Bancorp.*, 418 U.S. at 631 (“by introducing evidence of concentration ratios of
25 the magnitude of those present here the Government established a prima facie case that the
26 Spokane market was a candidate for the potential competition doctrine.”).

27 62. A common metric for evaluating market concentration is the Herfindahl-
28

1 Hirschman Index (“HHI”). *St. Alphonsus*, 778 F.3d at 786; *Optronic Techs., Inc. v. Ningbo*
2 *Sunny Elec. Co.*, 414 F. Supp. 3d 1256, 1263-64 (N.D. Cal. 2019) (Davila, J.).

3 63. HHI figures are calculated by summing the squares of the market share of each
4 market participant. Guidelines § 5.3.

5 64. According to the Guidelines, a market is considered “moderately concentrated”
6 when the HHI exceeds 1500, and “highly concentrated” when the HHI exceeds 2500. *Id.*

7 65. The level of market concentration in the VR Dedicated Fitness App market
8 greatly exceeds what is required for the potential competition doctrine to apply, with two
9 applications— [REDACTED] of the market’s revenues.
10 PX15 (Singer Rep.) ¶¶ 75-76, Table 2-A; *see also, e.g., Yamaha Motor*, 657 F.2d at 974 (top
11 four firms accounted for 98.6 percent and top two for 85 percent of the relevant market);
12 *Phillips Petrol.*, 367 F. Supp. at 1253 (top four accounted for 58 percent).

13 66. The HHI for the VR Dedicated Fitness App market is currently *over* [REDACTED]—well
14 above the threshold for a market to be considered “highly concentrated” under the Horizontal
15 Merger Guidelines. PX15 (Singer Rep.) ¶ 76.

16 67. The market concentration here, combined with the overall market structure,
17 makes this market particularly appropriate for applying the potential competition doctrine. *See*
18 *e.g., Marine Bancorp.* 418 U.S. 602, 630-31; *Falstaff*, 410 U.S. at 539-40.

19 68. Due to network effects and Meta’s unique powers from its operation and control
20 of the dominant VR platform, *see* Findings of Fact ¶¶ 199-214, the need to preserve the
21 potential for deconcentration is especially acute here. *Cf. Polygram Holding v. FTC*, 416 F.3d
22 29, 37 (D.C. Cir. 2005) (“as economic learning and market experience evolve,” so does antitrust
23 analysis).

24 **b) It Is Reasonably Probable That Meta Would Enter the Market Through**
25 **Other Means Absent the Acquisition, Leading to Procompetitive Effects**

26 69. The Supreme Court has stated that “[t]wo essential preconditions must exist
27 before it is possible to resolve whether the [actual potential competition] theory, if proved,
28

1 establishes a violation of § 7”: (1) the acquiring firm has “available feasible means” for entering
2 the market and (2) “that those means offer a substantial likelihood of ultimately producing
3 deconcentration of that market or other significant procompetitive effects.” *Marine Bancorp.*,
4 418 U.S. at 633.

5 70. Subsequent courts analyzing claims based on a theory of harm to actual potential
6 competition have interpreted *Marine Bancorp.* to require a showing that there is a reasonable
7 probability the acquiring firm would have entered the market but for the proposed acquisition,
8 and that its entry would have had pro-competitive effects. *E.g.*, *Yamaha Motor*, 657 F.2d at 977;
9 *Tenneco*, 689 F.2d at 352 (assessing whether Yamaha “probably” would have entered
10 independently); *see also Phillips Petrol.*, 367 F. Supp. at 1256-57 (determining Phillips is the
11 “most likely potential entrant”); *BOC Int’l* 557 F.2d at 29 n.7.

12 71. A firm “must be considered to be a significant potential entrant” “where credible
13 objective evidence shows the basic economic facts of the acquiring company’s overall size,
14 resources, capability, and motivation with respect to entry into an adjacent attractive market
15 involving a line of commerce in which the firm is already heavily engaged.” *Phillips Petrol.*,
16 367 F. Supp. at 1239.

17 72. Importantly, the inquiry focuses on *objective* evidence. *Id.* (subjective evidence,
18 like testimony from company executives about their intentions, “while relevant and entitled to
19 consideration, cannot be determinative in evaluating the legality of the acquisition under § 7. If
20 strong objective evidence points to a contrary conclusion, the objective evidence must prevail”);
21 *see also Falstaff Brewing*, 410 U.S. at 546 (“subjective evidence should be preferred only when
22 the objective evidence is weak or contradictory.”) (Marshall, J., concurring).

23 73. The standard is one of reasonable probability given that “[u]nequivocal proof
24 that an acquiring firm actually would have entered de novo but for a merger is rarely available.”
25 *Marine Bancorp.*, 418 U.S. at 624; *accord BOC Int’l Ltd. v. FTC*, 557 F.2d 24, 29 n.7 (2d Cir.
26 1977) (“In view of the ample express authority, including congressional authority, in favor of a
27 reasonable probability standard . . . we decline to adopt any more stringent standard here.”).

1 Meta itself had the intentions to enter—and thus was a reasonably probable entrant into—the
2 VR Dedicated Fitness App market. *Supra* Findings of Fact ¶¶ 149-182.

3 83. Prior to deciding to acquire [REDACTED], Supernatural, Meta was in the
4 midst of “[REDACTED]” and exploring multiple paths to entry. *Supra*
5 Findings of Fact ¶¶ 151-182.

6 84. Those included “expanding Beat Saber to deliberate fitness,” either through
7 [REDACTED], and/or by building out the Beat Saber app
8 organically, [REDACTED]
9 [REDACTED]” *Supra* Findings of Fact ¶¶ 161-165.

10 85. In the second quarter of 2022, Meta did, in fact, buy a development studio,
11 Armature Studio, which Meta believed was “[REDACTED]
12 [REDACTED]” PX527 (Meta) at 8; PX52 (Stojsavljevic (Meta) Dep.) at 136:24-137:23.

13 86. When apprised of these efforts, Mr. Zuckerberg exclaimed: “[REDACTED]
14 [REDACTED]
15 [REDACTED]” PX118 (Meta) at 1.

16 87. Given its unique advantages and capabilities, Meta’s independent entry into the
17 VR Dedicated Fitness App market—derailed by the Acquisition—would have provided U.S.
18 customers an innovative alternative likely to result in significant deconcentration and
19 procompetitive benefits, including by, among other things, introducing a strong, well-
20 established new rival to Supernatural [REDACTED]. *See, e.g., Yamaha Motor*, 657 F.2d at 979
21 (“Any new entrant of Yamaha’s stature would have had an obvious procompetitive effect
22 leading to some deconcentration.”).

23 88. Even more so than the defendant in *Yamaha*, Meta is a well-established
24 international firm “with considerable financial strength” and “considerable marketing
25 experience in the United States,” *Yamaha*, 657 F.2d at 979, such that its entry “would have had
26 an obvious procompetitive effect” in the VR Dedicated Fitness App market. *See id.*

27 89. This entry would increase consumer choice, increase innovation, spur additional
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1 competition to attract the best talent, and yield a host of other competitive benefits.

2 90. By way of contrast, the Acquisition would simply swap an already “powerful
3 acquiring firm” for the current market leader, potentially entrenching its existing position. *FTC*
4 *v. Procter & Gamble Co.*, 386 U.S. 568, 578 (1967).

5 91. Crucially, Meta’s independent entry would add a new player to the mix while
6 also maintaining the independent presence and competitive vitality of Supernatural, [REDACTED]
7 [REDACTED] VR dedicated fitness app to date.

8 92. Consumers will lose the benefit of this competition if the Acquisition proceeds.

9 **c) Within Reasonably Perceived Meta as a Potential Entrant, and Meta’s**
10 **Presence on the Edge of the Market Likely Benefits Competition**

11 93. The proposed Acquisition may also substantially lessen competition through the
12 elimination of Meta as a perceived potential competitor on the edge of the relevant market with
13 a likely procompetitive influence on competition. *See, e.g., Phillips Petrol.*, 367 F. Supp. at
14 1232-34.

15 94. Probabilistic proof of “likely influence” on existing competitors is sufficient;
16 proof of “actual influence” is not necessary. *Falstaff Brewing*, 410 U.S. at 534 & n.13; *see also*
17 *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 773 (D. Md. 1976) (“the
18 government need not introduce evidence of actual market response”).

19 95. The “same facts” that a district court must assess in determining a Clayton Act
20 violation based on actual potential competition are “probative of [a] violation of [§] 7 through
21 loss of a procompetitive on-the-fringe influence.” *Falstaff Brewing*, 410 U.S. at 534 n.13;
22 *accord Phillips Petrol.*, 367 F. Supp. at 1255.

23 96. To determine if a merger ultimately violates Section 7, “the question . . . is not
24 what [the Acquiring company’s] internal company decisions were, but whether, given its
25 financial capabilities and conditions in [the relevant] market, it would be reasonable to consider
26 it a potential entrant in that market.” *Id.* at 533; *see also Phillips Petrol.* 367 F. Supp. at 1255
27 (noting that evidence of a likely influence on existing competition “may be shown by direct
28

1 evidence as well as by inference from objective economic facts” including “objective evidence
2 of capability and motivation” to enter the market at issue).

3 97. Notably, in perceived potential competition case, a merger can lessen
4 competition “even if it were assumed that the potential competitor would not actually have
5 entered the market.” *Phillips Petrol.*, 367 F. Supp. at 1234.

6 98. [REDACTED]
7 [REDACTED] “a potential competitor on the fringe of the
8 market.” *Supra* Findings of Fact ¶¶ 135-141, 144-148; *see Falstaff Brewing*, 410 U.S. at 534.

9 99. Moreover, [REDACTED]
10 [REDACTED] *Supra*
11 Findings of Fact ¶ 142.

12 100. Irrespective of Within’s subjective beliefs, objective evidence further supports
13 that it was reasonable for Within to perceive Meta as a potential entrant. *See Phillips Petrol.*,
14 367 F. Supp. at 1255.

15 101. Meta’s Beat Saber, the leading application on the Meta Quest Store, employs the
16 same mechanics as Supernatural, and is widely recognized as providing incidental fitness
17 benefits. *Supra* Findings of Fact ¶¶ 119-121.

18 102. Further, Meta took steps to expand Beat Saber into the dedicated fitness space by
19 releasing “FitBeat” in April 2020. *Supra* Findings of Fact ¶¶ 131-133.

20 103. Meta’s presence on the edge of the VR Dedicated Fitness App market provided
21 procompetitive benefits that will be eliminated if the Acquisition is consummated. *See Falstaff*
22 *Brewing*, 410 U.S. at 534; *Phillips Petrol.*, 367 F. Supp. at 1232-34.

23 104. Within acknowledges that it must innovate and continually improve its product
24 to distance itself from potential competition. *Supra* Findings of Fact ¶¶ 143-148.

25 105. [REDACTED]
26 [REDACTED] *Supra* Findings of Fact ¶¶ 143-
27 148.

1 106. [REDACTED]

2 [REDACTED]

3 [REDACTED] PX615 (Within) at 8-9.

4 107. [REDACTED]

5 [REDACTED]

6 [REDACTED] PX712 (Within) at 48.

7 108. That Within did take into account potential entry confirms that the VR Dedicated
8 Fitness App market is the type of market suited for the potential competition doctrine. *Marine*
9 *Bancorp.*, 418 U.S. at 631 (“If the target market performs as a competitive market in traditional
10 antitrust terms, the participants in the market will have no occasion to fashion their behavior to
11 take into account the presence of a potential entrant.” (emphasis added)).

12 109. In sum, Meta’s position as a potential entrant on the edge of the market has a
13 likely beneficial effect on competition that will be lost if Meta acquires Within. *See Falstaff*
14 *Brewing*, 410 U.S. at 534; *Phillips Petrol.*, 367 F. Supp. at 1232-34.

15 110. This loss of perceived potential competition, coupled with the loss of actual
16 potential competition, “renders the anticompetitive consequences of the acquisition even
17 greater.” *Phillips Petrol.*, 367 F. Supp. at 1234.

18 **3. Defendants Have Failed to Rebut the FTC’s Case**

19 111. Defendants cannot demonstrate that entry will be timely, likely, and sufficient,
20 *see Bazaarvoice*, 2014 WL 203966, at *71, or that there are cognizable merger-specific
21 efficiencies, to prevent the Acquisition’s anticompetitive effects.

22 112. The VR Dedicated Fitness App market is characterized by high barriers to entry.
23 *Supra* Findings of Fact ¶¶ 199-214.

24 113. Building a successful VR dedicated fitness app requires [REDACTED]
25 [REDACTED]

26 [REDACTED] *Supra* Findings of Fact ¶¶ 199-200.

27 114. Indeed, [REDACTED]

1 [REDACTED] are an acknowledgement that it is difficult to build a successful VR dedicated fitness
2 app. *See* PX50 (Zuckerberg (Meta) Dep.) at 154:3-155:21 ([REDACTED])
3 [REDACTED]
4 Quest); *Id.* at 156:21-157:24 ([REDACTED])
5 [REDACTED]); PX54 (Bosworth (Meta) Dep.) at 161:4-6 (“[REDACTED]
6 [REDACTED]”).

7 115. Moreover, inclusion on the Quest Store itself and other advantages of owning the
8 VR platform are significant barriers to entry over which Meta exercises total control. *Supra*
9 Findings of Fact at ¶¶ 201-214; *see also* PX50 (Zuckerberg (Meta) Dep.) at 154:20-21 ([REDACTED]
10 [REDACTED]”).

11 116. The “Supreme Court has never expressly approved an efficiencies defense to a §
12 7 claim,” and the Ninth Circuit has stated that it “remain[s] skeptical about the efficiencies
13 defense in general and about its scope in particular.” *St. Alphonsus*, 778 F.3d at 788-89.

14 117. No meaningful efficiencies defense has been presented here: [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]” PX54 (Bosworth (Meta) Dep. at 161:1-13).

18 118. Following acquisition, businesses are integrated into Meta, and Meta has
19 represented for every VR acquisition that it does not track “[REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]” PX17 (Meta Responses and
23 Objections to FTC Interrogatory No. 1) at 8-12.

24 **B. The Equities Support a Preliminary Injunction**

25 119. “The second step in deciding whether to grant a preliminary injunction is to
26 balance the equities.” *Warner Commc’ns*, 742 F.2d at 1165.

27 120. If the Commission has shown a likelihood of success, “a countershooting of
28

1 private equities alone does not justify denial of a preliminary injunction.” *Id.*

2 121. The “principal public equity” favoring a preliminary injunction is “the public
3 interest in effective enforcement of the antitrust laws.” *H.J. Heinz*, 246 F.3d at 726.

4 122. Without preliminary relief, the Commission may face the “daunting and
5 potentially impossible task” of “unscrambling the eggs” if the proposed Acquisition is
6 ultimately deemed unlawful. *FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 918 (E.D.
7 Mo. 2020).

8 123. As such, “[n]o court has denied relief to the FTC in a 13(b) proceeding in which
9 the FTC has demonstrated a likelihood of success on the merits.” *FTC v. ProMedica Health Sys.*
10 *Inc.*, 2011 WL 1219281, at *60 (N.D. Ohio Mar. 29, 2011).

11 124. Private equities do not support denial of a preliminary injunction.

12 125. Within’s survival is not in peril if the Court grants a preliminary injunction
13 because “[REDACTED]
14 [REDACTED]” PX632 (Within) at 1.

15 126. Moreover, the termination provisions of the merger agreement provide for a
16 [REDACTED] PX6 (Agreement and Plan of Merger) at
17 75.

18 127. Here, the equities support entry of a preliminary injunction pending resolution of
19 the administrative proceedings.

20
21 Dated: November 21, 2022

Respectfully submitted,

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