

MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
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Tuesdays and Thursdays, 3:30 pm – 5:30 pm
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Class 19 (October 30): Meta/Within (Unit 10)

The FTC's challenge to Meta/Within represents one of the most ambitious attempts in recent decades to extend potential and nascent competition doctrine under Section 7 of the Clayton Act. On July 27, 2022, after a nine-month HSR second request investigation and a 3-2 vote, the FTC filed a complaint in the Northern District of California under FTC Act § 13(b) seeking a preliminary injunction to block Meta Platforms, Inc.'s proposed acquisition of Within Unlimited, Inc.¹ The case asked whether a dominant platform's acquisition of a small but pioneering developer in an emerging VR niche could violate antitrust law even when the acquired firm was not yet a meaningful competitor and the acquirer had no competing product in development. The district court's response—denying the preliminary injunction and reaffirming the need for concrete proof of likely, imminent entry—makes this an important study in both the promise and the limits of nascent competition theory.

The parties and market context help illustrate why the case proved so challenging for the FTC. Meta, formerly known as Facebook, is the leading developer of virtual reality ("VR") devices and apps, including the Oculus Quest 2 VR headset, through its Reality Labs division. Under CEO Mark Zuckerberg, Meta spent \$36 billion on Reality Labs (for an operating loss of \$30.7 billion) from January 1, 2019, to September 30, 2022.[²] Within, a privately owned company founded in 2014, creates products, original content, formats, proprietary software, and tools for virtual and augmented reality entertainment, fitness, and learning. Its flagship product, *Supernatural*, is a complete fitness subscription service exclusively for the Oculus Quest 2 VR headset. Supernatural offers over 800 fully immersive VR workouts, each set to music and located in a virtual setting such as the Galapagos Islands and the Great Wall of China. It is the leading VR dedicated fitness app. The complaint alleged that the VR dedicated fitness app market is highly concentrated, although it did not allege (at least in the public version) that the market was operatively noncompetitively.

The FTC's amended complaint alleged that the acquisition, if consummated, would substantially lessen competition in the national market for VR dedicated fitness apps in violation of Section 7.² The complaint's principal theory of anticompetitive harm was that the acquisition eliminated the possibility of Meta entering the VR dedicated fitness apps market through other

¹ Amended Complaint for a Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act, *FTC v. Meta Platforms, Inc.*, No. 3:22-cv-04325 (N.D. Cal. filed Oct. 7, 2022; original complaint filed July 27, 2022). The staff reportedly recommended against challenging the transaction but were overruled by a majority of the commissioners. *See FTC's Khan Overruled Staff to Sue Meta Over VR App Deal*, BloombergLaw.com (July 29, 2022). For the major papers in the case, see [here](#).

² The complaint also alleges that the acquisition, if consummated, would violate Section 5 of the FTC Act. But there is no indication that the Section 5 extends beyond Section 7 and incorporates a Section 2 violation. *See* Am. Compl. ¶ 14 ("On August 11, 2022, the Commission found reason to believe that the Acquisition would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45.").

means, which the complaint alleged was reasonably probable but for the acquisition. The harm then was the elimination of Meta's actual potential competition in VR-dedicated fitness apps.

This theory of anticompetitive harm is a significant extension beyond what current law recognizes under the actual potential competition theory since it fails to allege facts making a plausible claim that (1) the VR dedicated app fitness market was operating noncompetitively, (2) Meta was one of the few firms positioned to enter the VR dedicated fitness app market in the near future, (3) Meta was developing or had plans to develop a competing dedicated fitness app absent the acquisition, or (4) Meta's entry, if it occurred, would make the VR dedicated fitness app market more competitive.

The Meta/Within complaint was the first of only a few efforts to date by the Biden administration to extend antitrust law significantly beyond its current boundaries. It is worth careful attention.

Read the FTC's press release announcing the enforcement action (pp. 164-66) and Meta's response to it (pp. 167-69). You can skim or skip the amended complaint (pp. 170-95). Finally, read the district court's opinion finding the FTC's evidence insufficient on both the Commission's actual and perceived potential competition theories and denying the Commission's Section 13(b) petition for a preliminary injunction (pp. 196-260). This is an important opinion doctrinally and worth careful study. The case slides provide a summary (slides 39-49).

As always, email me if you have any questions.