

MERGER ANTITRUST LAW

Unit 11: Meta/Within

Class 20

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Georgetown University Law Center
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Meta/Within



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

For Release

FTC Seeks to Block Virtual Reality Giant Meta's Acquisition of Popular App Creator Within

Agency Alleges that Meta and CEO Mark Zuckerberg are Attempting Illegal Acquisition to Expand Virtual Reality Empire

July 27, 2022

Tags: [Competition](#) | [Bureau of Competition](#) | [Merger](#) | [Horizontal](#) | [Internet commerce](#) | [Technology](#)

The Federal Trade Commission is seeking to block virtual reality giant Meta and its controlling shareholder and CEO Mark Zuckerberg from acquiring Within Unlimited and its popular virtual reality dedicated fitness app, Supernatural. Meta, formerly known as Facebook, is already a key player at each level of the virtual reality sector. The company's virtual reality empire includes the top-selling device, a leading app store, seven of the most successful developers, and one of the best-selling apps of all time. The agency alleges that Meta and Zuckerberg are planning to expand Meta's virtual reality empire with this attempt to illegally acquire a dedicated fitness app that proves the value of virtual reality to users.

"Instead of competing on the merits, Meta is trying to buy its way to the top," said FTC Bureau of Competition Deputy Director John Newman. "Meta already owns a best-selling virtual reality fitness app, and it had the capabilities to compete even more closely with Within's popular Supernatural app. But Meta chose to buy market position instead of earning it on the merits. This is an illegal acquisition, and we will pursue all appropriate relief."

The virtual reality industry offers a uniquely immersive digital experience and is characterized by a high degree of growth and innovation. Unlike content on a tablet, phone, or monitor, virtual reality

gives users the perception of being completely surrounded as they move. Users typically engage with the virtual reality experience through a headset with displays in front of each eye to place them in a fully rendered, three-dimensional environment. Software and studio companies develop virtual reality apps that run on headsets and are distributed in online app stores. These apps run the gamut of genres from rhythm games to e-sports to creation and exploration and more.

Meta, the global technology behemoth that owns Facebook, Instagram, Messenger, and WhatsApp, is the largest provider of virtual reality devices, and also a leading provider of apps in the U.S. The complaint alleges that under the leadership of Zuckerberg, the company began its campaign to conquer virtual reality with the acquisition of headset manufacturer Oculus VR, Inc. Fueled by the popularity of its top-selling Quest headsets, Meta's Quest Store has become a leading U.S. app platform with more than 400 apps available for download.

In a publicly reported email to executives, Zuckerberg said that it was critical for the company to also be "completely ubiquitous in killer apps," which are apps that prove the value of the underlying technology. As part of its app expansion, Meta purchased seven of the most successful virtual reality development studios, and now has one of the largest first-party virtual reality content catalogues in the world. The acquisition of the Beat Games studio gave Meta control of the wildly popular app Beat Saber.

Within Unlimited is an independent virtual reality development studio that designed and built Supernatural, a popular app in the dedicated fitness virtual reality app market. Supernatural offers a variety of high-quality workouts set to music, including tracks from A-list artists like Katy Perry, Imagine Dragons, Lady Gaga, and Coldplay, and virtually located in striking, photorealistic locales, like the Galapagos Islands. The agency's complaint notes that according to Within's co-founder and CEO, "Fitness is the killer use case for VR."

The complaint alleges that Meta is a potential entrant in the virtual reality dedicated fitness app market with the required resources and a reasonable probability of building its own virtual reality app to compete in the space. But instead of entering, it chose to try buying Supernatural. Meta's independent entry would increase consumer choice, increase innovation, spur additional competition to attract the best employees, and yield other competitive benefits. Meta's acquisition of Within, on the other hand, would eliminate the prospect of such entry, dampening future innovation and competitive rivalry.



The complaint further alleges that the mere possibility of Meta's entry has likely influenced competition in the virtual reality dedicated fitness app market. If Meta is allowed to buy Within, that competitive pressure will slacken. That lessening of competition violates the antitrust laws, according to the complaint.

The complaint also alleges that when viewed against the broader backdrop of the market for all virtual reality fitness apps, Meta's proposed acquisition of Within is also illegal. Meta already participates in this broader market with its Beat Saber app, as does Within with its premium rival app Supernatural. The two companies currently spur each other to keep adding new features and attract more users, competitive rivalry that would be lost if this acquisition were allowed to proceed.

The Commission vote to authorize staff to seek a temporary restraining order and preliminary injunction was 3-2. Commissioners Noah Joshua Phillips and Christine S. Wilson voted no. A federal court [complaint and request for preliminary relief](#) has been filed in the U.S. District Court for the Northern District of California to halt the transaction.

The Federal Trade Commission works to [promote competition](#), and protect and educate consumers. You can learn more about [how competition benefits consumers](#) or [file an antitrust complaint](#). For the latest news and resources, [follow the FTC on social media](#), [subscribe to press releases](#) and [read our blog](#).

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[Meta](#)

The FTC's Attempt to Block Meta's Acquisition of Within Is Wrong on the Facts and the Law

July 27, 2022

By Nikhil Shanbhag, VP and Associate General Counsel, Competition and Regulatory

Takeaways

- Meta's acquisition of Within would be good for people and developers and would spark further interest in fitness as a growth area in VR.
- This deal brings more competition and innovation to VR more generally.
- The FTC is wrong on the facts and the law.

Today, the Federal Trade Commission (FTC) filed a lawsuit seeking to block Meta's planned acquisition of Within, the company behind the VR fitness app *Supernatural*.

The FTC's case is based on ideology and speculation, not evidence. The idea that this acquisition would lead to anticompetitive outcomes in a dynamic space with as much entry and growth as online and connected fitness is simply not credible. By attacking this deal in a 3-2 vote, the FTC is sending a chilling message to anyone who wishes to innovate in VR. We are confident that our acquisition of Within will be good for people, developers and the VR space.

There is No Merit to the FTC's Case

Under US law, the FTC is required to prove that an acquisition would "substantially lessen competition" in order to successfully block a deal. We believe it's clear that neither the evidence nor the well-established law will support such a result.

It's always been clear that our acquisition of Within will inject new investment into the VR fitness space, improve the Quest platform to better support all fitness apps and expand the VR ecosystem as a whole – all to the benefit of people and developers alike. The FTC rests its arguments on a number of flawed premises and unsupported assumptions that do not stand up to scrutiny.

First, they allege that *Supernatural* competes closely with Meta's *Beat Saber* app, which is a music and rhythm game, and that people would be harmed by bringing them together. But this position misunderstands the nature of the space entirely and ignores the market realities. *Beat Saber* is a game people play to have fun and it has many competitors. *Supernatural* couldn't be more different. It is a subscription-based virtual exercise service that offers boxing, flow, meditation and stretching workouts in the context of trainer-led sessions for a full body and wellness experience.

Supernatural competes far more closely with the many other fitness-specific VR apps (like *FitXR*, *Liteboxer*, and *Les Mills Body Combat*) and connected fitness more broadly (such as Peloton and many others). In reality, *Beat Saber* and *Supernatural* are fundamentally different products with different user bases, different use cases and different competitive dynamics. And this is not just our take – Within's leadership team strongly believes its competitors are the Pelotons and other established fitness brands of the world, not *Beat Saber* or other casual VR games.

Second, the FTC asserts, seemingly based on little more than Meta's size, that we would either build a fitness-specific service like *Supernatural* from scratch or somehow convert *Beat Saber* into such a service. But given the vastly different uses and audiences for these apps, and the fact that many other well-established brands like Apple and Peloton are far better positioned than Meta to bring their existing fitness products and content to VR, doing so wouldn't make any sense. Indeed, we looked into building a fitness-specific service and decided we simply weren't in a position to do so.

Third, the FTC believes that just the possibility that we might eventually develop our own VR fitness app somehow keeps existing participants in check and is reason enough to block this deal. But this ignores the reality that fitness-specific app developers, including *Supernatural*, don't see us as their current or future competition and are focused on the strong existing players in the space, the well-positioned recent actual entrants and the far more likely future entry from established online and connected fitness brands.

The FTC also insinuates that Meta is trying to buy VR apps in an effort to "control" the VR ecosystem. To the contrary: We have spent nearly a decade and invested billions of dollars in expanding the VR space, supporting and growing a viable and sustainable ecosystem for developers. With over a thousand apps having been built for Quest and the number earning over a million dollars in revenue having doubled year over year, it is clear that the ecosystem we are building is creating meaningful innovation opportunities. Unlike many of our competitors, we don't force developers or users into our store. We offer options like sideloading, linking to play VR content from PC, and App Lab, because we want to foster choice and competition in the VR ecosystem.

Finally, and maybe most importantly, VR is a rapidly growing and evolving space, and the fact that there are so many firms developing hardware and software shows that there is widespread belief in the promise of the technology. We've always recognized that success for the entire industry depends on having a vibrant and interconnected hardware and developer community. In such a world, the FTC has no answer to the most basic question — how could Meta's acquisition of a single fitness app in a dynamic space with many existing and future players possibly harm competition?

The FTC's Burden

The FTC must prove that our deal violates the law and that people and competition will be harmed. We don't believe their case can withstand the required scrutiny. The FTC has had nine months to investigate and we've cooperated throughout, including by producing millions of documents and reams of data in response to the FTC's Second Request, plus hundreds of pages of written responses. We also postponed the closing date of this transaction to August 1, 2022 at the FTC's request to give them even more time to consider this matter.

We are confident this transaction does not reduce competition in any way, will bring countless benefits to people and VR developers, and should therefore be allowed to proceed. At the end of the day, attempting to bar Meta from making acquisitions at all benefits *no one* — especially if the goal is to encourage innovation and competition. If this deal is allowed to go forward, we intend to invest significant resources in growing *Supernatural* to bring more innovation to a new and rapidly developing space, with room for many participants.

Categories:

Competition and Innovation, Meta, Public Policy



Tags: Virtual Reality

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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

META PLATFORMS, INC., et al.,

Defendants.

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

**AMENDED COMPLAINT FOR A
 PRELIMINARY INJUNCTION
 PURSUANT TO SECTION 13(B) OF THE
 FEDERAL TRADE COMMISSION ACT**

**REDACTED VERSION OF DOCUMENT
 SOUGHT TO BE SEALED**

AMENDED COMPLAINT FOR A PRELIMINARY INJUNCTION PURSUANT TO SECTION 13(B) OF THE
 FEDERAL TRADE COMMISSION ACT, CASE No. 5:22-cv-04325-EJD

1 Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), by its designated
 2 attorneys, petitions this Court for a preliminary injunction enjoining Defendants Meta
 3 Platforms, Inc., and its subsidiaries (collectively “Meta”) from consummating its proposed
 4 acquisition (the “Acquisition”) of Within Unlimited, Inc. (“Within”). The Commission seeks
 5 this relief pursuant to Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15
 6 U.S.C. § 53(b). Absent such relief, Meta and Within (collectively, “Defendants”) have
 7 represented that they would be free to consummate the Acquisition after 11:59 p.m. Eastern
 8 Time (or 8:59 p.m. Pacific Time) on December 31, 2022.

9 Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the Commission, whenever
 10 it has reason to believe that a proposed merger is unlawful, to seek preliminary injunctive relief
 11 to prevent consummation of a merger until the Commission has had an opportunity to
 12 adjudicate the merger’s legality in an administrative proceeding. Preliminary injunctive relief is
 13 imperative to preserve the *status quo* and to protect competition while the Commission
 14 adjudicates whether the Acquisition is unlawful. The Commission initiated the administrative
 15 proceeding on the legality of the Acquisition under antitrust law, pursuant to Sections 7 and 11
 16 of the Clayton Act, 15 U.S.C. §§ 18, 21, and Section 5 of the FTC Act, 15 U.S.C. § 45, by filing
 17 an administrative complaint on August 11, 2022. Pursuant to FTC regulations, the
 18 administrative trial will begin on January 19, 2023. Allowing the Acquisition to proceed would
 19 harm competition and consumers and undermine the Commission’s ability to remedy the
 20 anticompetitive effects of the Acquisition if the Commission issues an administrative complaint
 21 and the Acquisition is found unlawful after a full administrative trial on the merits and any
 22 subsequent appeals.

23 **NATURE OF THE CASE**

24 1. Meta, one of the largest technology companies in the world and the leading
 25 provider of virtual reality (“VR”) devices and applications (“apps”) in the United States, seeks
 26 to acquire Within, a software company that develops apps for VR devices, including the highly
 27 popular and rapidly growing fitness app “Supernatural.” If consummated, the Acquisition would
 28

1 substantially lessen competition, or tend to create a monopoly, in the relevant market for VR
 2 dedicated fitness apps. That lessening of rivalry may yield multiple harmful outcomes,
 3 including less innovation, lower quality, higher prices, less incentive to attract and keep
 4 employees, and less consumer choice.

5 2. A global technology behemoth, Meta reaches into every corner of the world
 6 through its “Family of Apps”—Facebook, Instagram, Messenger, and WhatsApp—with more
 7 than three billion regular users. Seeking to expand its empire even further, Meta in recent years
 8 has set its sights on building, and ultimately controlling, a VR “metaverse.” One need look no
 9 further than the rebranding of the company from Facebook to “Meta” in 2021 to understand its
 10 vision—and its priorities—for the future. And Meta is serious about its goals: it has become the
 11 largest provider of VR devices and apps to customers in the United States.

12 3. Meta’s campaign to conquer VR began in 2014 when it acquired Oculus VR,
 13 Inc., a VR headset manufacturer. Since then, Meta’s VR headsets have become the cornerstone
 14 of its growth in the VR space: its current generation headset, the Meta Quest 2, is by far the
 15 most widely used VR headset today, with a significant majority of headset sales in 2021 and
 16 2022. Meta CEO Mark Zuckerberg has publicly stated that Meta subsidizes its VR devices or
 17 sells them at cost in order to attract users.

18 4. And Meta’s Quest Store (formerly Oculus Store) has become the leading
 19 distribution platform for VR software apps in the United States, connecting app developers and
 20 VR users in an online marketplace through which developers can offer their products to users
 21 for download onto their individual VR devices. Meta controls the wildly popular app Beat
 22 Saber, which it acquired by purchasing Beat Games in November 2019. Beat Saber [REDACTED]

23 [REDACTED]
 24 [REDACTED] In addition to Beat Games, Meta owns a number of other VR
 25 apps, some of which it developed in-house but most of which it acquired by rolling up other app
 26 studios.

1 5. Meta has thus become a key player at each level of the VR ecosystem: in
2 hardware with its Meta Quest 2 headset, in app distribution with the Quest Store, and in apps
3 with Beat Saber and several other popular titles. This is not by accident; Meta has an explicit
4 strategy of harnessing strong network effects in VR to ensure its leading status in this growing
5 industry. Meta could have chosen to try to compete with Within on the merits; instead, Meta
6 decided it preferred to simply buy the [REDACTED] in a vitally important, [REDACTED]
7 [REDACTED]

8 6. As Meta fully recognizes, network effects on a digital platform can cause the
9 platform to become more powerful—and its rivals weaker and less able to seriously compete—
10 as it gains more users, content, and developers. The acquisition of new users, content, and
11 developers each feed into one another, creating a self-reinforcing cycle that entrenches the
12 company’s early lead. This market dynamic can spur companies to compete harder in beneficial
13 ways by, for example, adding useful product features or hiring additional employees. But it can
14 also make anticompetitive strategies more attractive.

15 7. Meta seeks to exploit the network-effects dynamic in VR. Indeed, Mr.
16 Zuckerberg has made clear that his aspiration for the VR space is control of the *entire*
17 ecosystem. As early as 2015, Mr. Zuckerberg instructed key Facebook executives that his vision
18 for “the next wave of computing” was control of apps *and* the platform on which those apps
19 were distributed, making clear in an internal email to key Facebook executives that a key part of
20 this strategy was for his company to be “completely ubiquitous in killer apps”—i.e., in
21 significant VR apps that prove the value of the technology. In that same email, Mr. Zuckerberg
22 told his executives that Facebook should “us[e] acquisitions opportunistically.”

23 8. The proposed acquisition of Within would be one more step along that path
24 toward dominance. According to Within’s co-founder and CEO, “Fitness is the killer use case
25 for VR.” But instead of choosing to compete on the merits through its own VR dedicated fitness
26 app, Meta has resorted to proposing this unlawful acquisition.

1 9. If Meta is able to proceed with this proposed acquisition of Within, the merger
2 poses a reasonable likelihood of substantially lessening competition in the market for VR
3 dedicated fitness apps, where Supernatural is [REDACTED]

4 10. Having simply bought up the [REDACTED] Meta would no longer have
5 any incentive to develop its own competing app from scratch, add new features to Beat Saber or
6 other existing Meta apps to compete with Supernatural on the merits, or acquire a small
7 generalist studio that could supplement Meta's considerable existing resources and VR know-
8 how to develop an app to compete with Supernatural. Instead of adding a significant new rival
9 to the mix, the Acquisition would simply let Meta assume total control of the [REDACTED]
10 overnight. That lessening of competition violates the antitrust laws.

11 11. Moreover, a company poised on the edge of a market may exert competitive
12 pressure on existing participants. Regardless of whether such a company actually intends to
13 enter, the possibility that it may do so can spur other companies already in the market to
14 proactively ramp up their own competitive efforts. Meta, poised on the edge of the VR
15 dedicated fitness app market with its popular Beat Saber app, and with all its vast resources and
16 unique strategic advantages, exerts such an influence. That pressure spurs the market leader,
17 Within, to add new features, retain employees, continue innovating, and generally compete
18 harder in order to stay a step ahead of Meta in the event it decides to enter. The Acquisition
19 would eliminate that incentive for market participants to compete, again in contravention of the
20 antitrust laws.

21 12. Accordingly, this Acquisition poses a reasonable probability of eliminating
22 competition. That lessening of competition may result in reduced innovation, quality, and
23 choice, less pressure to compete for the most talented app developers, and potentially higher
24 prices for VR dedicated fitness apps. And Meta would be one step closer to its ultimate goal of
25 owning the entire "Metaverse."

26 13. The Commission voted to file this Complaint seeking preliminary relief pursuant
27 to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). The Commission is entitled to preliminary
28

1 relief in this Court because of its likelihood of success on the merits and the weight of the
 2 equities. To succeed on the merits, the FTC must prove that the Acquisition violates Section 7
 3 of the Clayton Act, which prohibits mergers the effect of which “may be substantially to lessen
 4 competition, or tend to create a monopoly.” For the reasons described below, the FTC is likely
 5 to succeed in proving an antitrust violation, and the equities weigh strongly in favor of
 6 enforcing the antitrust laws.

7 14. On August 11, 2022, the Commission found reason to believe that the Acquisition
 8 would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. §
 9 18, and Section 5 of the FTC Act, 15 U.S.C. § 45. On August 11, 2022, the Commission
 10 commenced an administrative adjudication proceeding to determine whether the Acquisition is
 11 unlawful. An administrative trial before an Administrative Law Judge, is scheduled to begin on
 12 January 19, 2023. The ongoing administrative trial provides a forum for all parties to conduct
 13 discovery, followed by a merits trial with up to 210 hours of live testimony. *See* 16 C.F.R. §
 14 3.41. The decision of the Administrative Law Judge is subject to appeal to the full Commission,
 15 which, in turn, is subject to judicial review by a United States Court of Appeals.

16 15. Preliminary injunctive relief restraining Defendants from proceeding with the
 17 Acquisition is necessary to prevent interim harm to competition during the pending
 18 administrative proceeding. Absent preliminary relief, Defendants can close the Acquisition and
 19 combine Meta’s and Within’s operations. Allowing Defendants to consummate the Acquisition
 20 before any administrative proceeding has concluded is likely to cause immediate harm to
 21 competition and consumers and would undermine the Commission’s ability to remedy the
 22 anticompetitive effects of the Acquisition if it is found unlawful after a full trial on the merits
 23 and any subsequent appeals.

24 **JURISDICTIONAL STATEMENT**

25 **A. Jurisdiction**

26 16. This Court’s jurisdiction arises under Section 13(b) of the FTC Act, 15 U.S.C. §
 27 53(b), and 28 U.S.C. §§ 1331, 1337, and 1345. This is a civil action arising under Acts of

1 Congress protecting trade and commerce against restraints and monopolies and is brought by an
2 agency of the United States authorized by an Act of Congress to bring this action.

3 17. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), provides in pertinent part:

4 Whenever the Commission has reason to believe—

5 (1) that any person, partnership, or corporation is violating, or is about to
6 violate, any provision of law enforced by the Federal Trade Commission, and

7 (2) that the enjoining thereof pending the issuance of a complaint by the
8 Commission and until such complaint is dismissed by the Commission or set
thereon has become final, would be in the interest of the public—

9 the Commission by any of its attorneys designated by it for such purpose
10 may bring suit in a district court of the United States to enjoin any such
11 act or practice. Upon a proper showing that, weighing the equities and
12 considering the Commission's likelihood of ultimate success, such action
would be in the public interest, and after notice to the defendant, a
temporary restraining order or a preliminary injunction may be granted
without bond. . . .

13 18. Defendants and their relevant operating entities and subsidiaries are, and at all
14 relevant times have been, engaged in activities affecting “commerce” as defined in Section 4 of
15 the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

16 **B. Venue**

17 19. Venue in the Northern District of California is proper under Section 13(b) of the
18 FTC Act, 15 U.S.C. § 53(b), and 28 U.S.C. §§ 1391(b) and (c). Defendants are found, reside,
19 and/or transact business in this state and district, and are subject to personal jurisdiction therein.

20 **C. Intradistrict Assignment**

21 20. Assignment to the San Francisco Division is proper. This action arises in San
22 Mateo County because a substantial part of the events giving rise to these claims occurred in
23 San Mateo County, where Defendant Meta is headquartered.

24 **THE PARTIES AND PROPOSED ACQUISITION**

25 21. Plaintiff, the Commission, is an administrative agency of the United States
26 government, established, organized, and existing pursuant to the FTC Act, 15 U.S.C. §§ 41 *et*
27 *seq.*, with its principal offices at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

1 The Commission is vested with authority and responsibility for enforcing, *inter alia*, Section 7
2 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45.

3 22. Defendant Meta is a publicly traded company organized under the laws of
4 Delaware with headquarters in Menlo Park, California. Meta develops and sells VR and other
5 extended reality hardware and software through its “Reality Labs” division. Reality Labs has
6 been growing at breakneck speed: it generated revenues of \$2.274 billion in 2021, which
7 reflected a 127% jump from 2019 and a 100% increase since 2020. Meta’s best-selling VR
8 hardware product to date is the Meta Quest 2, while its best-selling VR software product is the
9 wildly popular Beat Saber, which was initially released by Beat Games, a studio that Meta
10 acquired in 2019. Meta continues to add new downloadable content to Beat Saber; for example,
11 it recently added a “Lady Gaga Music Pack” available for a \$12.99 add-on fee.

12 23. Defendant Within is a privately held virtual and augmented reality company
13 organized under the laws of Delaware with headquarters—and its principal business—in Los
14 Angeles, California. Founded by Chris Milk and Aaron Koblin, Within’s flagship product is
15 Supernatural, a VR subscription fitness service. Supernatural offers over 800 fully immersive
16 VR workouts, each set to music and located in a virtual setting like the Galapagos Islands or the
17 Great Wall of China. Through deals with major music studios, Supernatural continues to grow
18 its catalog, which includes songs from A-list artists like Katy Perry, Imagine Dragons, Lady
19 Gaga, and Coldplay. Supernatural’s workouts are fitness classes that customers can access by
20 paying a monthly subscription fee of \$18.99, or a yearly subscription fee of \$179.99.
21 Supernatural is presently only available on the Meta Quest and Quest 2 and is sold in the United
22 States and Canada.

23 24. On October 22, 2021, Meta and Within signed an Agreement and Plan of
24 Merger, pursuant to which Meta would acquire all shares of Within in a transaction valued at

25 [REDACTED]

INDUSTRY BACKGROUND

25. The VR industry is currently characterized by a high degree of innovation and growth. Global sales are predicted to more than double in just three years, from \$5 billion in 2021 to more than \$12 billion in 2024.

26. Users typically engage with the VR experience through a headset with displays in front of each eye to place a user in a fully rendered, three-dimensional environment. Cutting-edge VR technology creates an immersive digital experience like no other. VR users can instantly be transported anywhere in the world, backward or forward in time, into outer space or fictional lands—all from the comfort and safety of their own homes. Unlike a game, video, or app on a tablet, phone, or monitor, the three-dimensional VR environment creates the perception of completely surrounding the user, allowing the user to move around in the projected space. As Mark Zuckerberg explains, “you’re right there with another person or in another place and that’s very different from every experience of technology that we’ve had before. . . .”

27. Meta’s Quest 2 is the best-selling VR headset and has been since shortly after its launch in 2020. In 2020, Meta shipped more than 62% of all VR headsets sold worldwide. That percentage surged to 78% in 2021, when industry sources estimate that Meta sold more than 8.7 million Quest 2 headsets.

28. The majority of users get apps for VR headsets from online app stores, which distribute products for use on individual VR devices. Meta controls its own app store called the “Meta Quest Store,” with more than 400 apps available for download. Meta also offers the “App Lab,” a Meta-produced tool that allows third-party developers to distribute apps not present in the Meta Quest Store directly to consumers. Other VR app stores include Valve’s Steam Store and SideQuest, but the Meta Quest Store is the leading VR app store in the United States.

29. VR software and studio companies like Within develop the apps that run on VR headsets. These apps run the gamut of genres from rhythm games to shooters to e-sports to creation and exploration and more.

30. [REDACTED] Meta's Beat Saber, an enormously popular rhythm game "where you slash the beats of adrenaline-pumping music as they fly towards you, surrounded by a futuristic world." Meta acquired control of Beat Saber through its purchase of Beat Games [REDACTED] in November 2019.

31. Since its acquisition of Beat Games, Meta has continued to acquire a series of studios behind many popular VR apps, and now boasts one of the largest first-party VR content organizations in the world:

- a. In January 2020, Meta acquired Sanzaru games, maker of the fantasy Viking combat game Asgard's Wrath.
- b. 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.
- c. In April 2021, Meta acquired Downpour Interactive, maker of Onward, a team-based first-person shooter.
- d. In May 2021, Meta acquired BigBox VR, maker of Population One, a multiplayer first-person arena shooter.
- e. 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.
- f. And, 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).

32. In addition to the aforementioned acquisitions, Meta has developed and released its own VR apps. These include:

- a. Horizon Worlds, a Massively Multiplayer Online game that allows users to build, share, and interact in virtual worlds;
- b. Horizon Workrooms, a productivity app that lets teams of people share their computer screens, collaborate on virtual whiteboards, and more;
- c. Horizon Venues, a live-events app that lets users experience concerts, sporting events, and more; and
- d. Horizon Home, a social-space app that lets users hang out with their friends, watch videos together, and join multiplayer VR games together.

33. Among VR apps, dedicated or deliberate fitness is [REDACTED]

[REDACTED] As Within's co-founder and CEO puts it, "Fitness is the killer use case for VR." [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

platform-level tools such as Oculus Move, a calorie and time counter that runs in the background of other Quest apps and displays to users data about their activity levels while in VR. [REDACTED]

THE RELEVANT ANTITRUST MARKET

34. The Acquisition would substantially lessen competition or tend to create a monopoly in the relevant antitrust market for VR dedicated fitness apps in the United States ("VR Dedicated Fitness App market").

A. The VR Dedicated Fitness App Market

35. The VR Dedicated Fitness App market is the relevant product market. The market consists of VR apps, like Within's Supernatural app, that are designed so that users can exercise through a structured physical workout in their own homes.

1 36. [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 37. Dedicated fitness apps offer distinct functionality when compared to other VR

5 apps, including apps, such as rhythm and active sports games, that provide an incidental fitness

6 benefit (“incidental fitness apps”). For example, they 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.

10 38. VR Fitness App market participants distinguish VR dedicated fitness apps from

11 VR incidental fitness apps like rhythm and sports games that offer fitness benefits simply

12 because they require users to move and physically exert themselves while engaging with the

13 app. Dedicated fitness apps typically entail a higher degree of physical exertion than incidental

14 fitness apps. According to the Virtual Reality Institute of Health and Exercise, which rates

15 energy expenditures during VR app usage, Within’s Supernatural currently has the highest

16 energy expenditure, at 12–13 calories per minute.

17 39. VR dedicated fitness apps are also typically offered using a distinct,

18 subscription-based pricing model. Industry participants recognize that this is a distinguishing

19 characteristic of dedicated fitness VR apps when compared to other VR apps, including

20 incidental fitness apps.

21 40. [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 41. The VR Dedicated Fitness App market does not include other products that are

27 neither close substitutes for, nor offered under similar competitive conditions as, VR dedicated

1 fitness apps. For example, it does not include non-VR at-home smart fitness solutions, such as
2 digitally connected exercise bikes, treadmills, weight machines, mobile phone apps, video
3 games, or workout videos.

4 42. Functional, practical, technological, and price differences show that non-VR at-
5 home smart fitness solutions and at-home exercise products are distinct from VR dedicated
6 fitness apps.

7 43. VR offers a level of immersion that other at-home fitness experiences do not, and
8 cannot, offer. VR technology allows users to exercise from the comfort, privacy, and safety of
9 home with the feeling and visuals of being somewhere else—atop a mountain, on a tropical
10 island, in a futuristic world, virtually anywhere. The sensors in a VR headset and controllers
11 also allow for a degree of tracking, adjustment, and feedback that non-immersive exercise
12 programs cannot match. As Within’s co-founder and CEO explained, “[W]orking out in
13 Supernatural feels like you’re a champion of a sport from the future. I love that and haven’t felt
14 that sense of athleticism ever on a treadmill or an exercise bike.”

15 44. There also tend to be substantial price differences between VR fitness and smart
16 at-home fitness products. Most smart at-home fitness solutions have much higher up-front costs
17 and much higher ongoing costs than current VR fitness apps. A Peloton smart bicycle, for
18 example, costs over \$1,000, with an additional \$44 per month subscription cost, compared to
19 the cost of a \$299 Meta Quest 2 plus \$18.99 per month for Supernatural. It also weighs 135
20 pounds.

21 45. In addition to Supernatural, other apps in the VR Dedicated Fitness App market
22 include FitXR, Holofit from Holodia, VZFit from Virzoom, and Les Mills Body Combat from
23 Odders Lab.

24 46. [REDACTED]
25 [REDACTED] Other than Supernatural and FitXR, [REDACTED]
26 [REDACTED]

B. The Relevant Geographic Market

47. The relevant geographic market in which to analyze the competitive effects of the Acquisition is the United States. While VR app suppliers may be located outside the United States, customers in the relevant markets affected by the Acquisition are located in the United States. The availability of VR apps and headsets for consumers varies by country, and VR consumers in the United States can only buy headsets and apps that are available in the United States. Industry participants recognize the United States as a market.

MARKET CONCENTRATION

48. The VR Dedicated Fitness App market is highly concentrated.

49. Market concentration within a properly defined relevant antitrust market is a useful indicator of the competitive effects of a merger. The 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (“Merger Guidelines”) measure market concentration using the Herfindahl–Hirschman Index (“HHI”). The Merger Guidelines outline the principal analytical techniques, practices, and enforcement policy of the FTC and Department of Justice with respect to mergers involving competitors. Though the Merger Guidelines are not binding on the courts, courts frequently cite the Merger Guidelines as persuasive authority.

50. The HHI for a given market is calculated by summing the squares of the individual firms’ market shares. HHIs range from 10,000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market). A market HHI above 2,500 is classified as highly concentrated.

51. If a merger combines two participants in a relevant market, thereby increasing the HHI by more than 200 points and resulting in a highly concentrated market, it is presumed to enhance market power and is, therefore, presumptively unlawful.

52. The market for VR Dedicated Fitness Apps is highly concentrated, [REDACTED]

[REDACTED]

[REDACTED]

53. Supernatural [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

54. The VR Dedicated Fitness App market HHI has been well above the thresholds for a market to be considered “concentrated” or “highly concentrated” under the Merger Guidelines.

EVIDENCE OF LIKELY ANTICOMPETITIVE EFFECTS

55. In addition to this presumption of illegality, additional evidence indicates that the Acquisition may substantially lessen competition in the relevant market for VR dedicated fitness apps.

A. Anticompetitive Effects in the VR Dedicated Fitness App Market

56. The Acquisition would cause anticompetitive effects by eliminating potential competition from Meta in the relevant market for VR dedicated fitness apps. These include eliminating any probability that Meta would enter the market through alternative means absent the Acquisition, as well as eliminating the likely and actual beneficial influence on existing competition that results from Meta’s current position, poised on the edge of the market. As the Merger Guidelines explain, “A merger between an incumbent and a potential entrant can raise significant competitive concerns.”

1. It Is Reasonably Probable That Meta Would Have Entered the VR Dedicated Fitness App Market Through Alternative Means Absent This Acquisition

57. Meta has the economic characteristics, size, resources, capabilities, advantages, and incentives to enter the VR Dedicated Fitness App market—and it has seriously considered

1 doing so—by means other than this Acquisition. Meta could have chosen to build a VR
2 dedicated fitness app from scratch, add dedicated fitness functionality to an existing app, and/or
3 acquire a smaller studio that could support and supplement Meta’s existing strengths to
4 facilitate its entry.

5 58. Consistent with its long-term strategy for its VR devices to become a widely
6 used platform that it ultimately will control, Meta has committed tens of billions of dollars to its
7 Reality Labs division, which develops its VR and AR products, including more than \$7.7 billion
8 in 2020, \$12.4 billion in 2021, and \$3.6 billion in the three-month period ending in March 2022.
9 Meta is already well on the way to realizing Mr. Zuckerberg’s goals of owning both the
10 dominant platform and the “killer apps” on that platform. Meta already produces the best-selling
11 VR headset in the United States by a wide margin. Meta’s Quest Store is the leading
12 distribution platform of VR apps. And Meta is the leading seller of VR apps, with a portfolio
13 that includes Beat Saber, the market-leading VR fitness app, and Horizon Worlds, a massive
14 social app that features its own game-creation tools for users.

15 59. Meta has the financial resources to develop a dedicated fitness app on its own—
16 either by creating a new app or by adding new features to an existing app such as Beat Saber. It
17 also has more than enough resources to enter the market through acquiring a generalist studio
18 that could supplement Meta’s formidable first-party studios group in developing a VR dedicated
19 fitness app.

20 60. In 2021, Meta had an annual profit of \$46.7 billion, and spent more than \$12
21 billion on its Reality Labs division.

22 61. With its vast financial resources, Meta continues to add features and content to
23 the apps it has already released, and to develop and release new apps. Meta has also developed
24 multiple full-featured VR apps in-house. What’s more, the [REDACTED] it proposes to spend on
25 this acquisition is [REDACTED]

26 [REDACTED] During that time and on that budget, Within built
27 Supernatural from the ground up into the [REDACTED] VR dedicated fitness app.

1 62. Meta could build instead of buy within a reasonable period of time if it could not
2 proceed with this Acquisition. Indeed, [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 63. Meta has developed multiple VR apps from scratch before, including the
8 ambitious Horizon Worlds, which allows users to create and explore virtual worlds; Horizon
9 Workrooms, an app that lets Meta test out new use-cases and platform-level features in the
10 emerging VR productivity category and allows users to connect and collaborate in real-time; the
11 Horizon Venues live-events app; and the Horizon Home social-space app.

12 64. Meta has also developed and released Oculus Move, a platform-level fitness
13 tracker on the Oculus Quest that allows users to track active time and calories burned across
14 apps.

15 65. Through its string of prior acquisitions, Meta already owns seven of the most
16 successful VR development studios in the world, including Beat Games, the studio behind Beat
17 Saber. And, as of March 2021, Meta had nearly 10,000 employees housed within Reality Labs,
18 its division devoted to virtual reality.

19 66. Meta's control over the Quest platform also gives it unique access to VR user
20 data, which it uses to inform strategic decisions.

21 67. In addition, Meta controls which VR apps appear and are featured in its Quest
22 Store. This control guarantees that Meta could reach millions of existing VR users with a built-
23 from-scratch or expanded app through an especially important avenue for consumer discovery.

24 68. Meta—formerly known as “Facebook Inc.”—rebranded its entire business as
25 “Meta” to reflect its focus on VR. Its brands, including Meta and Quest, are well-known to VR
26 users. Meta also has substantial marketing experience as to a wide range of VR apps, including
27 Beat Saber, that it could leverage to enter the VR Dedicated Fitness App market. Indeed, users
28

1 already associate Meta’s Beat Saber app with incidental fitness. This “name awareness” would
2 facilitate Meta’s organic entry into the VR Dedicated Fitness App market, as a dedicated
3 fitness-oriented version of Beat Saber would be in line with users’ understanding of the Beat
4 Saber brand.

5 69. Meta also has incentives to enter the VR Dedicated Fitness App market.

6 70. [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 71. Meta is well aware that fitness VR apps could enable it to reach new categories
10 of consumers. [REDACTED]

11 [REDACTED]

12 72. [REDACTED]

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 73. [REDACTED]

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

26 74. [REDACTED]

27 [REDACTED]

1 75. [REDACTED]

7 76. [REDACTED]

10 77. [REDACTED]

15 78. [REDACTED]

19 79. Thus, not surprisingly, after Meta's acquisition of Beat Games and immediately
20 prior to the launch of Supernatural, Beat Saber released a new track called "FitBeat," which
21 included virtual "walls" or "obstacles" that users would have to dodge. [REDACTED]

22 [REDACTED] Obstacles also appear on other tracks, forcing users to
23 duck and dodge, but they can be turned off.

24 80. [REDACTED]

25 [REDACTED] has already included both a 360-degree mode where targets come
26 from all sides and a no-fail mode that allows users to complete tracks despite missing blocks in
27

1 recent updates—a feature that fitness-focused users can adopt to ensure an uninterrupted
2 workout.

3 81. [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 82. [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 83. In fact, Meta’s internal codename for the proposed acquisition of Within was
16 “Project Eden,” a reference to its belief that Apple was also interested in acquiring Within.

17 84. Meta also hired away the head of product for Supernatural at Within to work at
18 Meta following the Supernatural launch. That individual’s portfolio at Meta included expanding
19 Meta’s presence into new verticals, including the VR fitness vertical.

20 85. [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 86. [REDACTED]
25 [REDACTED]
26 [REDACTED]

87. Accordingly, absent this anticompetitive Acquisition, there is a reasonable probability that Meta would have exercised one of its other available options to enter the VR Dedicated Fitness App market.

2. It is Reasonably Probable That Alternative Entry by Meta Would Substantially Deconcentrate the Market and Have Other Procompetitive Effects

88. Meta's entry into the VR Dedicated Fitness App market—whether by adding new features to one of its existing apps or developing a new VR dedicated fitness app from scratch—would have the effect of substantially deconcentrating and increasing competition in the market.

89. Building instead of buying would entail developing additional expertise, undertaking product research and design, hiring more employees, and making other key investments. Meta recognizes that building its own VR dedicated fitness app would require time, additional developer talent, and effort. But such efforts would reflect the very essence of competition, the dynamic that the antitrust laws seek to protect and promote.

90. Alternative entry by Meta would introduce a new competitor into the market with the backing of one of the world's largest, most well-resourced, and most experienced VR industry participants. Such entry would increase consumer choice, increase innovation, spur additional competition to attract the best employees, and yield a host of other competitive benefits. Crucially, it would *also* maintain the independent presence and competitive vitality of the [REDACTED] VR dedicated fitness app [REDACTED] Supernatural.

91. The Acquisition would eliminate the probability of such entry, potentially dampening future innovation and leading to a market with less beneficial rivalry and competitive pressure.

3. Within Reasonably Perceived Meta as a Potential Entrant to the VR Dedicated Fitness App Market

92. In light of Meta's economic characteristics, size, resources, capabilities, advantages, and incentives, it would be eminently reasonable for a VR dedicated fitness app market participant to perceive Meta as a potential entrant.

93. As explained in detail above, Meta is a massive, wealthy company with extensive control over and experience in various aspects of the VR industry. It has recently expanded into a variety of VR-related areas, including by acquiring the most popular VR incidental fitness app (Beat Saber) and by internally developing a system-level fitness tracking tool that can run in the background of other apps (Oculus Move). In a recent earnings report, Meta announced that it anticipated spending some \$10 billion across its Reality Labs division, which has found its biggest success to date with the Quest 2 Headset and Quest Store, and that it is committed to increasing those investments over the next several years. The VR dedicated fitness app market is especially attractive for a host of reasons, giving Meta a strong incentive to enter it. And Meta internally identified multiple means of entering the VR dedicated fitness app market.

94. [REDACTED]

95. [REDACTED]

96. Meta also lured away Within's head of product for Supernatural shortly after Supernatural's launch.

**4. Meta's Presence as a Perceived Potential Entrant Likely Influences
Competition in the VR Dedicated Fitness App Market**

97. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] The Acquisition would
eliminate that competitive influence.

98. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

99. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

100. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

101. [REDACTED]
[REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 102. [REDACTED]
 4 [REDACTED] That competitive
 5 pressure—and all of the benefits it yields—would be eliminated by the Acquisition.
 6

LACK OF COUNTERVAILING FACTORS

7 103. Defendants cannot demonstrate that new entry or expansion by existing firms
 8 will be timely, likely, or sufficient to offset the anticompetitive effects.

9 104. There are multiple barriers to entering or expanding in the relevant market,
 10 including time, network effects, ongoing development and content creation costs, post-launch
 11 support, capital, brand recognition, and the need for consumers to be able to discover the app.
 12 Developing a high-quality entrant also requires hiring the “talent needed to create true triple-A
 13 VR experiences,” talent that Meta acknowledges is increasingly scarce.

14 105. To be sold on the Quest store, Meta itself must decide to approve an app through
 15 a technical review and a curation process by Meta that examines “quality, polish, entertainment,
 16 value, and utility.” This can be a lengthy process and there is no guarantee any third-party app
 17 will ultimately be approved.

18 106. No other company has the combination of resources, VR know-how, and control
 19 over the leading app store and the overall Quest VR experience that Meta has.

20 107. Once Meta—which also owns the Quest platform and app store—entrenches [REDACTED]
 21 [REDACTED] in VR dedicated fitness through the Acquisition, it will effectively raise
 22 barriers to entry and expansion as other companies interested in the space will understand that
 23 they need to compete with a deep-pocketed platform operator that owns the [REDACTED] VR
 24 dedicated fitness app.

25 108. Defendants cannot demonstrate cognizable, verifiable, transaction-specific
 26 efficiencies that would be sufficient to reverse the strong presumption and evidence of the
 27 Acquisition’s likely significant anticompetitive effects.
 28

LIKELIHOOD OF SUCCESS ON THE MERITS,
BALANCE OF THE EQUITIES, AND NEED FOR RELIEF

109. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the Commission, whenever it has reason to believe that a proposed merger is unlawful, to seek preliminary injunctive relief to prevent consummation of a merger until the Commission has had an opportunity to adjudicate the merger's legality in an administrative proceeding. In deciding whether to grant relief, the Court must balance the likelihood of the Commission's ultimate success on the merits against the equities, using a sliding scale. The principal equity in cases brought under Section 13(b) is the public's interest in effective enforcement of the antitrust laws. Private equities affecting only Defendants' interests cannot tip the scale against a preliminary injunction.

110. The Commission is likely to succeed in proving that the effect of the Acquisition may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act or Section 5 of the FTC Act.

111. Preliminary relief is warranted and necessary. Should the Acquisition ultimately be adjudicated unlawful, reestablishing the status quo would be difficult, if not impossible, if the Acquisition has already occurred in the absence of preliminary relief. Allowing the Acquisition to close before the completion of the administrative proceeding would cause irreparable harm by, among other things, enabling the combined firm to begin altering Within's operations and business plans, accessing Within's sensitive business information, eliminating key Within personnel, changing Within's product development efforts, and preventing Within from raising the funding necessary to continue operations and maintain its growth trajectory. In the absence of relief from this Court, substantial harm to competition would occur in the interim.

112. Accordingly, the equitable relief requested here is in the public interest. The Commission respectfully requests that the Court:

1 113. Preliminarily enjoin Defendants from taking any further steps to consummate the
2 Acquisition, or any other acquisition of stock, assets, or other interests of one another, either
3 directly or indirectly;

4 114. Retain jurisdiction and maintain the *status quo* until the administrative
5 proceeding initiated by the Commission is concluded; and

6 115. Award such other and further relief as the Court may determine is appropriate,
7 just, and proper.

8
9 Dated: October 7, 2022

Respectfully submitted,

10
11 Of counsel:

/s/ Abby L. Dennis

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FEDERAL TRADE COMMISSION,
Plaintiff,
v.
META PLATFORMS INC., et al.,
Defendants.

Case No. [5:22-cv-04325-EJD](#)

**ORDER DENYING PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

Re: ECF Nos. 108, 164, 470

This action was brought by Plaintiff Federal Trade Commission (“FTC”) to block the merger between a virtual reality (“VR”) device provider and a VR software developer. Defendant Meta Platforms Inc. (“Meta”) has agreed to acquire all shares of Within Unlimited, Inc. (“Within,” collectively with Meta, “Defendants”). The FTC has come before the Court to seek preliminary injunctive relief pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), to enjoin Defendants from consummating their proposed merger (the “Acquisition”) pending the outcome of ongoing administrative proceedings before the FTC. ECF Nos. 101, 164.

In addition to the FTC’s motion for preliminary injunction, Defendants have filed a motion to dismiss the Amended Complaint (“FAC”) and a motion to strike the opinion of the FTC’s expert, Dr. Hal J. Singer, regarding the relevant product market definition. ECF Nos. 108, 470.

Over the course of a seven-day evidentiary hearing, the Court heard the parties’ arguments and evidence. The Court has also received briefing on all pending motions, as well as pre-hearing and post-hearing submissions of the parties’ proposed findings of fact. Having considered the parties’ submissions and evidence, the Court DENIES Defendants’ motion to dismiss, DENIES

Case No.: [5:22-cv-04325-EJD](#)
ORDER DENYING PLAINTIFF’S MOT. FOR PRELIM. INJUNCTION

the Defendants' motion to strike, and DENIES the FTC's motion for preliminary injunction.

I. FACTUAL FINDINGS

A. Defendant Meta Platforms, Inc.

1. Defendant Meta Platforms, Inc. is a publicly traded corporation organized under Delaware law and headquartered in Menlo Park, California. DX1237, at 11. Meta operates a collection of social networking platforms referred to as its "Family of Apps," which includes Facebook, Instagram, Messenger, and WhatsApp. PX0937, at 51. Meta also manufactures VR devices, such as the Quest 2 and the Quest Pro headsets, through its Reality Labs division. Stojsavljevic Hr'g Tr. 71:2–13; 74:10–19.

2. VR technology enables users to experience and interact with a digitally generated three-dimensional environment by wearing a headset with stereoscopic displays in front of each eye. Stojsavljevic Hr'g Tr. 72:25–74:9. Users can download a wide variety of VR software applications ("apps") from digital marketplaces, or app stores, for use on their personal VR devices. Pruett Hr'g Tr. 219:19–25. Quest headsets are designed so that a user's geolocation determines what content is available and at what price. Stojsavljevic Hr'g Tr. 79:23–80:6.

3. In 2020, 2021, and 2022, Meta spent several billion dollars each year on its VR Reality Labs division. Zuckerberg Hr'g Tr. 1280:9–1282:15.

4. Meta operates an app store called the Quest Store, previously known as the Oculus Store. Third-party app developers can request to have their app distributed in the Quest Store, and Meta also actively seeks out and invites developers to bring apps to the Quest Store. Stojsavljevic Hr'g Tr. 79:16–22; Pruett Hr'g Tr. 220:8–13. Apps must meet several content, technical, and asset requirements before they may be considered for listing on the Quest Store; however, Meta may still reject an app that meets all the requirements pursuant to the Quest Store's curation policy. Pruett Hr'g Tr. 220:25–223:16. Apart from the Quest Store, Meta also operates App Lab, an app distribution service for VR applications that meet basic technical and content requirements but is otherwise free from any editorial curating by Meta. Pruett Hr'g Tr. 260:16–22. Quest users can also download VR apps from other app stores on VR platforms that Meta

1 does not own, such as SideQuest and Steam VR Store. Pruett Hr’g Tr. 274:8–21.

2 5. The content and apps that are available for a particular VR system plays an
3 important role in the widespread adoption of that system, and many users may purchase a VR
4 system for specific content they want to experience. Zuckerberg Hr’g Tr. 1294:16–125:2;
5 Stojasavljevic Hr’g Tr. 101:6–13, 101:21–27. As a result, high quality and popular VR apps—
6 dubbed as “system sellers”—can drive adoption and sales of the specific headsets for which they
7 are available. Stojasavljevic Hr’g Tr. 107:23–108:5. Broad adoption of a specific VR system, in
8 turn, will attract third-party app developers to create more VR content for that system, a
9 phenomenon referred to as a “flywheel” effect. PX0100, at 2–3; Bosworth Hr’g Tr. 1048:21–
10 1049:3.

11 6. When a VR app is developed wholly by a developer unaffiliated with Meta,
12 Meta refers to that as third-party (“3P”) development. When Meta funds all or most of a VR app’s
13 development, Meta refers to that as second-party (“2P”) development. When a VR app is
14 developed in-house at Meta, either by acquired VR studios or Meta employees themselves, Meta
15 refers to that as first-party (“1P”) development. Stojasavljevic Hr’g Tr. 72:12–16; 106:16–21.

16 7. Meta encourages third-party VR app developers to build apps for the Quest
17 platform by providing funding and technical VR engineering assistance to those developers.
18 Stojasavljevic Hr’g Tr. 106:5–15. Specifically, Meta provides grants that are designed to improve
19 existing VR software or incentivize the development of software on Quest that may only exist on
20 another platform. Meta also maintains a developer relations engineering team consisting of
21 veteran engineers who work directly with developers to improve software quality, fix bugs, or
22 polish the experience they are building. Pruett Hr’g Tr. 285:19–286:12. Meta’s VR content
23 organization spends approximately [REDACTED]. PX0066 (“Rubin Dep.”) 24:5–25:8.

24 8. In addition to providing funding or engineering support to third-party VR
25 app developers, Meta has also sought to increase the VR app content available on its platform by
26 acquiring third-party app developers and developing its own apps internally. PX0055 (“Verdu
27 Dep.”) 117:5–118:12.

9. Although decisions may be made on a case-by-case basis, Meta typically will seek to acquire or build its own VR app if: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] PX0127, at 4–5.

10. Similarly, Meta is more inclined to build its own VR app instead of acquiring an existing third-party developer [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] PX0127, at 5.

11. In the past three years, Meta has acquired at least nine VR app studios: Beat Games, Sanzaru Games, Ready at Dawn Studios, Downpour Interactive, BigBox VR, Unit 2 Games, Twisted Pixel, Armature Studio, and Camouflaj. Stojavljevic Hr’g Tr. 87:5–88:2.

12. The VR apps that Meta has independently developed and released include Horizon Worlds (world building), Horizon Workrooms (productivity), Horizon Venues (live events), and Horizon Home (social networking). Meta’s Answer and Affirmative Defenses ¶ 35, ECF No. 84. Meta’s background and emphasis has been on communication and social VR apps. Zuckerberg Hr’g Tr. 1273:15–1274:22. That said, Meta has also developed and released Dead and Buried, a multiplayer shooter game. Bosworth Hr’g Tr. 1051:18–20.

B. Defendant Within Unlimited, Inc.

13. Defendant Within Unlimited, Inc. is a privately held corporation organized under the laws of Delaware with headquarters in Los Angeles, California. PX0006, at 1, 161. Within is a software development company founded by Chris Milk and Aaron Koblin, who were experienced visual artists. Milk Hr’g Tr. 669:25–670:6; Koblin Hr’g Tr. 649:9–13.

14. Within's flagship product is Supernatural, a subscription VR fitness service launched in April 2020 on the Quest Store. PX0005, at 77. Supernatural releases new workouts daily and continues to add new modalities (*e.g.*, aerobic boxing, meditation) to its lineup of workouts. Koblin Hr'g Tr. 605:15–606:4; Milk Hr'g Tr. 734:1–11. Users access Supernatural's workouts by paying a monthly subscription fee of \$18.99 or an annual subscription fee of \$179.99. FAC ¶ 24, ECF No. 101-1; Within's Answer and Affirmative Defense ¶ 25, ECF No. 83.

[REDACTED] Koblin Hr'g Tr. 636:15–22; Milk Hr'g Tr. 735:17–21. Within has never changed Supernatural's prices. Carlton Report ¶ 77. At present, [REDACTED] Milk Hr'g Tr. 735:20–21.

C. The Alleged “VR Dedicated Fitness App” Market

15. The FTC alleges that the relevant market consists of VR dedicated fitness apps in the United States. Mot. 13, ECF No. 164. The government defines “VR dedicated fitness apps” as VR apps that are “designed so users can exercise through a structured physical workout in a virtual setting anywhere they choose to use their highly portable VR headset.” *Id.*

16. Both Meta and Within have repeatedly referred to VR apps intended to provide immersive at-home structured physical exercise as “deliberate” or “dedicated” fitness apps. *E.g.*, Rabkin Hr'g Tr. 831:12-24; PX0001, at 5; PX0286, at 1; Milk Hr'g Tr. 681:19-21; PX487, at 4; Pruett Hr'g Tr. 263:6–264:2; PX0004, at 169. Meta now describes these apps as “trainer workout apps.” PX0060 (“Paynter Dep.”) 24:2–12, 56:14–23. VR dedicated fitness apps are sometimes called “VR deliberate fitness apps” or “trainer workout apps.” The Court will use the phrase “VR dedicated fitness apps” throughout.

17. VR dedicated fitness apps are marketed to customers for the purpose of exercise. Pruett Hr'g Tr. 263:6–18. Some other VR apps, often called “incidental” or “accidental” fitness apps, may include mechanics that may allow users to exercise as a byproduct but have a primary focus other than fitness (such as gaming). PX0001, at 5 n.10; PX0529, at 2; Carmack Hr'g Tr. 562:12–18. Unlike VR incidental fitness apps, VR dedicated fitness apps often

1 have features like trackable progress goals, heart rate tracking, and motion calibration. PX0001, at
 2 5 n.10; Milk Hr’g Tr. 683:8–21. Additionally, VR dedicated fitness apps generally require the
 3 producing company to have expertise and assets that allow them to create exercise content, *e.g.*,
 4 workout coaches, green screen studios, stereoscopic capture, post processing pipelines. PX0111;
 5 PX0251, at 2–3; PX0127, at 7; Koblin Hr’g Tr. 650:3–12; Garcia Hr’g Tr. 1079:16–24. And
 6 because VR dedicated fitness apps create content on an ongoing basis to avoid user boredom, they
 7 are better suited than most other VR apps to be priced using a subscription model (although not all
 8 VR dedicated fitness apps follow this model). Pruett Hr’g Tr. 269:9–270:17; Singer Hr’g Tr.
 9 359:2–18; Vicky Report ¶ 47.

10 18. The user base for VR dedicated fitness apps differs from that of VR overall.
 11 VR users generally skew younger and male, but VR dedicated fitness app users tend to have an
 12 older and more female set of users. PX0003, at 17; PX0004, at 167; Rubin Dep. 131:19–132:14;
 13 PX0127, at 1, 6; Bosworth Hr’g Tr. 1035:18–22. In addition to the diverse appeal of VR
 14 dedicated fitness apps, they have strong user retention and rapid growth. Carlton Report ¶¶ 33–35;
 15 PX0386, at 12. [REDACTED]

16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]. PX0003, at 9, 44. [REDACTED]
 19 [REDACTED]
 20 [REDACTED] PX0386, at 12. [REDACTED]
 21 [REDACTED] Carlton Report ¶ 67, Table
 22 10.

23 19. Multiple companies that make VR dedicated fitness apps consider their
 24 products to compete with the extensive range of methods by which an individual can seek to
 25 exercise. According to Within, Supernatural “compete[s] with every product or service or offering
 26 that offers fitness or wellness,” ranging from connected fitness devices like Peloton equipment to
 27 gyms to YouTube videos intended to be mimicked by a viewer. Milk Hr’g Tr. 724:15–25. Within

1 does not, however, consider a VR incidental fitness app to constitute a fitness offering. Koblin
 2 Hr’g Tr. 606:5–8. The founder of VirZoom, another VR company with a dedicated fitness app
 3 (VZfit), made similar claims, and added that VZfit even “compete[s] with somebody who wants to
 4 just jump on their bike and go for a bike ride.” Janszen Hr’g Tr. 1143:8–12; DX1290 (“Janszen
 5 Decl.”) ¶ 23. However, Odders Lab, another VR company that makes not only a dedicated fitness
 6 app but also a rhythm game app and a chess app, stated that its fitness app competed most directly
 7 with other fitness dedicated apps, such as Supernatural and FitXR, and that the launch of its fitness
 8 app had not diminished sales of its rhythm game app. Garcia Hr’g Tr. 1105:18–1106:21.

9 20. [REDACTED]

10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED] Apple provides Fitness+, a paid subscription app, and [REDACTED]
 15 [REDACTED] but it does not currently offer its own headset.
 16 DX1257, at 3, 24–28; Bosworth Hr’g Tr. 1022:13–16.

17 21. The customers for more established fitness offerings are perceived to be
 18 more likely to have long-term or well-developed fitness routines, while VR dedicated fitness app
 19 users are targeted more toward “[REDACTED]” who have less fitness experience. PX0051
 20 (“Cibula Dep.”) 84:20–25; PX0318, at 1; PX0563, at 1; DX1081, at 1–2. No record evidence
 21 suggests that these firms possess VR engineering expertise. PX0118, at 1; Singer Report ¶ 82. As
 22 such, these fitness offerings do not create the 360-degree embodiment in a virtual environment
 23 provided by VR dedicated fitness apps. *See, e.g.*, Zuckerberg Hr’g Tr. 1298:5–6; Rabkin Hr’g Tr.
 24 835:24–836:3. Although some fitness offerings may display videos of various locations around
 25 the world, those videos are displayed on a flat screen. Vickey Hr’g Tr. 1184:12–21.

26 22. Connected fitness devices are generally stationary and larger than the
 27 portable and relatively small VR headset equipment required to use a VR dedicated fitness app.

1 See, e.g., Milk Hr’g Tr. 689:17–25. The upfront device cost can be over \$1,000, and users pay a
 2 monthly subscription fee to access fitness content; for example, Peloton and Tonal are connected
 3 fitness device companies, and cost, respectively \$1,445 plus \$44 per month and \$3,495 plus \$49
 4 per month. Singer Report ¶¶ 68–69. There are also more affordable alternatives outside of VR,
 5 such as a Peloton mobile app-only subscription, which costs \$12.99 per month. *Id.* ¶ 65; DX1081,
 6 at 1–2. The subscription model is common in the overall fitness industry—in addition to the
 7 examples above, traditional gyms and Fitness+ charge monthly subscriptions. PX0001, at 2;
 8 DX1081, at 1–2; DX1257, at 3, 24–28.

9 23. Within’s VR app Supernatural is a dedicated fitness app: it was designed
 10 specifically for fitness and offers “daily personalized full-body workouts and expert coaching from
 11 real-world trainers.” PX0906, at 1. Within began developing Supernatural in February 2019, and
 12 launched it in the Quest Store on April 23, 2020. PX0005, at 77; PX0906, at 1. Supernatural now
 13 offers over 800 fully immersive video workouts set to music in various photorealistic landscapes,
 14 such as the Galapagos Islands and the Great Wall of China. FAC ¶ 24, ECF No. 101-1; Koblin
 15 Hr’g Tr. 604:18–605:19; ECF No. 83 ¶ 25; PX0906, at 1; *see id.* at 3–4, 6, 8. Through deals with
 16 major music studios, Supernatural sets each workout to songs from A-list artists like Katy Perry,
 17 Imagine Dragons, Lady Gaga, and Coldplay. FAC ¶ 24, ECF No. 101-1. Within optimized the
 18 exercise movements in Supernatural through consultations with experts holding PhDs in
 19 kinesiology and biomechanics; the workouts are led by personal trainers, calibrated to users’ range
 20 of motion, mapped out in VR by dance choreographers, and filmed at Within’s studio in Los
 21 Angeles. PX0712, at 18–20, 27–29. Within’s founders are experienced directors of interactive
 22 music videos. *Id.* at 3–4. [REDACTED] Supernatural is
 23 only available to Quest headset users in the United States and Canada. Milk Hr’g Tr. 671:4–9.

24 24. Other VR dedicated fitness apps include FitXR, Les Mills Bodycombat,
 25 VZfit, VZfit Premium, PowerBeats VR, RealFit, Holofit, Liteboxer, Liteboxer Premium VR, and
 26 VRWorkout. Singer Report ¶ 39. Like Supernatural, Liteboxer Premium VR costs \$18.99 per
 27 month. *Id.* Les Mills Bodycombat, PowerBeatsVR, and RealFit have respective one-time costs of
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\$29.99, \$22.99, and \$19.99; Liteboxer and VRWorkout are free; and the other VR dedicated fitness apps charge monthly subscription prices ranging from about \$9 to \$12. *Id.* Companies producing VR dedicated fitness apps generally pursue business strategies optimized for growth and market penetration, [REDACTED]. Milk Hr’g Tr. 736:15–21; Garcia Hr’g Tr. 1111:8–1112:14; Janszen Hr’g Tr. 1147:22–1148:1. These companies expect that high growth and penetration metrics will render them attractive acquisition targets. *Id.*; Zyda Hr’g Tr. 1227:18–22, 1228:15–18.

25. All of these apps, including Supernatural, were launched within the past five years. Carlton Report ¶ 125. New VR dedicated fitness apps are expected to launch in the near future. *Id.* Supernatural currently possesses an 82.4% share of market revenue among the existing VR dedicated fitness apps (or a 77.6% share of VR apps in the Quest Store’s “Fitness and Wellness” category). Singer Report ¶ 75, Tables 2-A, 2-B. [REDACTED] Singer Rebuttal Report ¶¶ 124–25, Tables 1-A, 1-B.

26. The FTC’s economics expert, Dr. Singer, analyzed the concentration of the VR dedicated fitness app market using the Herfindahl-Hirschman Index (“HHI”). Singer Report ¶ 76. Dr. Singer performed the HHI calculation multiple times to account for different conceptions of the firms contained within the VR dedicated fitness app market. *Id.* Using a set of firms based off a list of Supernatural competitors provided by Meta to the FTC, Dr. Singer calculated an HHI of 6,917 by measuring each firm’s market share of revenue. *Id.* ¶¶ 46, 76, Table 2-A. Then, to capture broader potential set of firms within the VR dedicated fitness app market, Dr. Singer analyzed all apps listed in Meta’s Quest Store under its “Fitness & Wellness” category and calculated an HHI of 6,148 (again, based on revenue). *Id.* ¶¶ 48, 76, Table 2-A. Dr. Singer also calculated HHI using market share of total hours spent and identified outputs 6,307 for the set of firms based off Meta’s list and 4,863 for the broader set of “Fitness & Wellness firms.” Singer Rebuttal Report ¶¶ 124–25, Table 1-A. Lastly, Dr. Singer calculated HHI using market share of monthly active users and identified outputs of 3,377 and 2,098 for the two respective sets of firms.

Id. ¶¶ 124–25, Table 1-B. Markets are generally considered “highly concentrated” when the HHI is above 2,500 and “moderately concentrated” when the HHI is between 1,500 and 2,500. Singer Report ¶ 76 & n.129.

D. The Challenged Acquisition

27. Meta and Zuckerberg first expressed interest in acquiring Within as early as February 22, 2021. PX0170, at 1–2.

28. After Zuckerberg showed some interest in [REDACTED], Michael Verdu (Vice President of VR Content) investigated and [REDACTED]. PX0118, at 2, Mar. 4, 2022; Verdu Dep. 7:22–8:02.

29. On March 11, 2021, Meta employees met to discuss potential VR fitness investments with Mark Rabkin, the head of VR technology at Meta and one of the final decision makers to approve any VR investment. PX0179, at 2; Rabkin Hr’g Tr. 800:7–11; Stojasavljevic Hr’g Tr. 189:24–190:12. In advance of this meeting, Ananda Dass (Meta’s director of non-gaming VR content) and Jane Chiao (business-side employee) prepared a pre-read document analyzing five potential investment options. PX0127, Mar. 10, 2021; Stojasavljevic Hr’g Tr. 69:18–24, 138:11–18, 140:23–141:1, 149:16–151:12. Shortly before this meeting, on March 4, 2021, Jane Chiao had also prepared a document titled, [REDACTED]

[REDACTED]. PX0492, at 7, Mar. 9, 2021. During the meeting, the attendees decided [REDACTED]. PX0179.

30. On March 17, 2021, Dass and Chiao summarized the advantages and disadvantages of acquiring Supernatural [REDACTED]. At this time, they proposed spending the next few months inquiring into [REDACTED]

[REDACTED]. PX0284, Mar. 17, 2021.

31. On April 20, 2021, Melissa Brown (Head of Developer Relations) prepared an executive summary pre-read in advance of Meta’s meeting with Within, which was circulated to Verdu and Dass. The executive summary contains [REDACTED]

[REDACTED] PX0565, Apr. 20, 2021.

32. On April 26, 2021, Brown circulated a [REDACTED]

[REDACTED] PX0253, Apr. 26, 2021.

33. On May 26, 2021, Anand Dass [REDACTED]

[REDACTED] DX1012, at 1, 3, May 26, 2021. [REDACTED]

[REDACTED] *Id.*; see also PX0123, at 2. [REDACTED]

[REDACTED] PX0117, June 10, 2021.

34. Frank Casanova (Apple’s senior director of augmented reality product marketing) testified that Apple [REDACTED]

Casanova’s personal recollection was that [REDACTED]

[REDACTED]. DX1219 (“Casanova Dep.”) 90:20–93:15.

35. In mid-July 2021, Meta and Within entered into a non-binding term sheet regarding a potential acquisition. PX0062 (“Milk Dep.”) 129:2–14; Milk Hr’g Tr. 720:12–15. Meta and Within executed the Merger Agreement on October 22, 2021. DX1072, Oct. 22, 2021.

E. Beat Saber Expansion Proposal

36. Beat Saber is a VR rhythm game in which players use virtual swords to slash oncoming blocks timed to music. FAC ¶ 30; Meta’s Answer and Affirmative Defenses ¶ 33. Beat Saber is the most popular and best-selling VR app of all time. Stojavljevic Hr’g Tr. 82:23–83:8; Rabkin Hr’g Tr. 820:9–11.

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37. Meta acquired Beat Games, the studio that produces Beat Saber, in late 2019. Meta’s Answer and Affirmative Defenses ¶ 4.

38. At the time it acquired Beat Games, Meta viewed Beat Saber as a potential “vector into fitness as a game-adjacent use case.” PX0342, at 2, Sept. 27, 2019. There was a continuing internal dialogue at Meta regarding a potential fitness version of Beat Saber, which was referred to as the “perpetual white whale quest to get . . . Beat Games to build a fitness version of Beat Saber.” Verdu Dep. 112:04–112:12, 178:12–20. The founders of Beat Games were “warm to the idea” and released a “FitBeat” song for Beat Saber, but the idea otherwise did not gain traction. Verdu Dep. 178:12–20; see also PX0123 [REDACTED] [REDACTED] Sept. 15, 2021.

39. On February 16, 2021, Rade Stojsavljevic (director of Meta’s first party studios) was riding his Peloton bike on a workout with a live DJ spinning music when he came up with the idea of a Peloton partnership with Beat Saber. Stojsavljevic Hr’g Tr. 127:20–128:24.

40. Shortly thereafter, Stojsavljevic collaborated on a presentation called “Operation Twinkie,” in which he proposed repositioning Beat Saber as a fitness app in a partnership with Peloton. The same presentation recommended [REDACTED] [REDACTED] PX0527, at 5, 8.

41. On March 4, 2021, Chiao responded to comments regarding partnering with Peloton to create VR content, [REDACTED] [REDACTED] PX0251, at 2–3, Mar. 4, 2021.

42. On March 11, 2021, Stojsavljevic attended the VR fitness investment meeting with Mark Rabkin. PX0179, at 2; *see also supra* ¶ 31. Alongside the acquisitions of [REDACTED] Supernatural, the March 11 meeting concluded that Stojsavljevic was to prepare a presentation to Rabkin to expand Beat Saber to dedicated fitness. PX0179, at 2.

43. On March 15, 2021, Stojsavljevic queried a group chat and solicited feedback on his proposal for a Beat Saber–Peloton partnership. PX0407, at 1, Mar. 15, 2021. The group members discussed different forms the partnership could take. *Id.*

44. On March 25, 2021, Stojavljevic received a presentation from a consultant, [REDACTED], titled “Beat Saber x Peloton Opportunity Identification.” PX0121, at 2. The presentation provided a quote for [REDACTED] to investigate the Beat Saber and Peloton opportunity, which was to take about 8 weeks and cost \$23,500. *Id.* at 8. [REDACTED]’s proposed research approach included nine action items, as follows: (1) analyze the home fitness market; (2) analyze the Peloton market; (3) assess the Peloton bike capabilities; (4) analyze the current XR¹ fitness market; (5) analyze Beat Saber’s current strategy and its Fitbeat song; (6) identify Beat Saber x Peloton opportunities; (7) identify XR fitness opportunities; (8) define the go-to-market approach; and (9) define how to approach Peloton with the partnership. *Id.* at 5–6. Stojavljevic ultimately did not engage [REDACTED] to undertake this research project. PX0052 (“Stojavljevic Dep.”) 219:23–220:1.

45. Based on the parties’ representations and to the best of the Court’s review of the evidence, the next reference to the Beat Saber–Peloton proposal was on June 11, 2021, after Meta began pursuing Within as an acquisition target. PX0341, at 2, June 11, 2021. In a chat, Stojavljevic briefly mentioned that Chiao and Dass had disagreed with his Beat Saber–Peloton proposal and had wanted to [REDACTED]. *Id.* At the evidentiary hearing, Stojavljevic testified that his enthusiasm for the Beat Saber–Peloton proposal had “slowed down” before Meta’s decision to acquire Within. Stojavljevic Hr’g Tr. 165:12–17. He also testified that he had not undertaken the research project that he had promised Rabkin because he had been busy working on another Meta acquisition. *Id.*; *see also supra* ¶ 44.

46. On September 15, 2021, [REDACTED] [REDACTED] Jason Rubin—who had just transitioned into his role as the vice president of Metaverse content on August 1, 2021—made comments about Beat Saber in response to [REDACTED] PX0123, at 2, Sept. 15, 2021; *see also* Rubin Dep. 28:8–15. Rubin suggested that [REDACTED] PX0123, at 2. He

¹ The Court understands “XR” to refer generally to virtual reality, augmented reality, and mixed reality.

subsequently remarked that [REDACTED]

[REDACTED] *Id.*

II. PROCEDURAL HISTORY

Defendants signed an Agreement and Plan of Merger for a proposed acquisition of Within by Meta (the “Acquisition”) on October 22, 2021. ECF No. 101-1 (“FAC”) ¶ 24; PX0004, at 161. On July 27, 2022, the FTC filed a complaint for a temporary restraining order and preliminary injunction enjoining the Acquisition. *See* Compl., ECF No. 1. At the time of the FTC’s filing, Defendants would have been free to consummate the Acquisition after July 31, 2022. *Id.* ¶ 27. On July 29, 2022, the Court granted the parties’ stipulated order preventing Defendants from consummating the Acquisition until after August 6, 2022. ECF No. 19. On August 5, 2022, the Court granted the parties’ second stipulated order and entered a temporary restraining order enjoining the Acquisition until after December 31, 2022. ECF No. 56. The FTC filed its amended complaint on October 7, 2022, *see* FAC, and Defendants moved to dismiss the amended complaint on October 13, 2022, ECF No. 108 (“MTD”). The Court took the MTD under submission without oral argument on December 2, 2022. ECF No. 388.

On October 31, 2022, pursuant to the parties’ stipulated order, the FTC filed its memorandum in support of its motion for a preliminary injunction (the “Motion”). ECF Nos. 86, 164. The evidentiary hearing on the Motion began on December 8, 2022. *See* ECF No. 441. Following the in-Court testimony of the FTC’s economics expert, Dr. Hal J. Singer, on December 13, 2022, Defendants orally moved the Court to strike Dr. Singer’s testimony. *See* ECF No. 464. Defendants subsequently filed a motion to strike Dr. Singer’s opinion regarding the definition of the relevant product market. ECF No. 470. The evidentiary hearing concluded on December 20, 2022, *see* ECF No. 492, and the Court granted the parties’ stipulated order extending the temporary restraining order to enjoin the Acquisition until January 31, 2023, ECF No. 508.

On January 31, 2023, the FTC filed an emergency motion requesting an extension of the temporary restraining order if the Court either was not prepared to rule on the Motion until after that date or denied the Motion. ECF No. 543 (“Emergency Motion”). The Court’s ruling on the

Emergency Motion will be filed in a separate order.

The Court now rules on the Motion, the MTD, and the motion to strike Dr. Singer's opinion on the relevant product market definition. See ECF Nos. 108, 164, 470.

III. LEGAL CONCLUSIONS

A. Legal Standard

Section 13(b) of the FTC Act provides that “[u]pon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond.” 15 U.S.C. § 53(b)(2). In evaluating a motion for preliminary injunction brought under Section 13(b), courts must “1) determine the likelihood that the Commission will ultimately succeed on the merits and 2) balance the equities.” *F.T.C. v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984) (emphasis added) (citing *F.T.C. v. Simeon Mgmt. Corp.*, 532 F.2d 708, 713–14 (9th Cir. 1976)).

The federal court is not tasked with “mak[ing] a final determination on whether the proposed merger violates Section 7, but rather [with making] only a preliminary assessment of the merger’s impact on competition.” *Warner Commc’ns Inc.*, 742 F.2d at 1162. To obtain a preliminary injunction, the FTC must “raise questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.” *Id.* (citations omitted); see also *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008) (“the FTC [must] ‘raise questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation.’”). Although a district court may not “require the FTC to prove the merits, . . . it must ‘exercise independent judgment’ about the questions § 53(b) commits to it.” *Whole Foods Market, Inc.*, 548 F.3d at 1035 (citations omitted). The FTC is therefore required to provide more than mere questions or speculations supporting its likelihood of success on the merits, and the district court must decide the motion based on “all the evidence before it, from the defendants as well as from the FTC.” *Id.* (citations omitted); see

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United States v. Siemens Corp., 621 F.2d 499, 506 (2d Cir. 1980) (noting that “the Government must do far more than merely raise sufficiently serious questions with respect to the merits” in demonstrating a “reasonable probability” of a Section 7 violation.).

B. Relevant Market Definition

The first step in analyzing a merger challenge under Section 7 of the Clayton Act is to determine the relevant market. *U.S. v. Marine Bancorporation, Inc.*, 418 U.S. 602, 619 (1974) (citing *E.I. Du Pont*, 353 U.S. 586, 593 (1957)); see *FTC v. Qualcomm Inc.*, 969 F.3d 974, 992 (9th Cir. 2020) (“A threshold step in any antitrust case is to accurately define the relevant market, which refers to ‘the area of effective competition.’”). The relevant market for antitrust purposes is determined by (1) the relevant product market and (2) the relevant geographic market. *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 324 (1962).

1. Product Market

“The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.” *Brown Shoe*, 370 U.S. at 325. “Within a general product market, ‘well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.’” *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1121 (9th Cir. 2018) (quoting *Brown Shoe*, 370 U.S. at 325); see also *Newcal Indus., Inc. v. Ikon Office Sol’n*, 513 F.3d 1038, 1045 (9th Cir. 2008) (“[A]lthough the general market must include all economic substitutes, it is legally permissible to premise antitrust allegations on a submarket.”). The definition of the relevant market is “basically a fact question dependent upon the special characteristics of the industry involved.” *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1299 (9th Cir. 1982). Products need not be fungible to be included in a relevant market, but a relevant market “cannot meaningfully encompass th[e] infinite range” of substitutes for a product. *Id.* at 1271 (quoting *Times Picayune Publishing Co. v. United States*, 345 U.S. 594, 611, 612 n. 31, (1953)). The overarching goal of market definition is to “recognize competition where, in fact, competition exists.” *Brown Shoe*, 370 U.S. at 326; see also *U.S. v. Continental Can Co.*, 378 U.S. 441, 449

(1964) (“In defining the product market between these terminal extremes [of fungibility and infinite substitution], we must recognize meaningful competition where it is found to exist.”); *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1039 (D.C. Cir. 2008) (“As always in defining a market, we must ‘take into account the realities of competition.’”) (citations omitted).

Courts have used both qualitative and quantitative tools to aid their determinations of relevant markets. A qualitative analysis of the relevant antitrust market, including submarkets, involves “examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.” *Brown Shoe*, 370 U.S. at 325; *see also, e.g., Klein v. Facebook, Inc.*, 580 F. Supp. 3d 743, 766–68 (N.D. Cal. 2022) (applying *Brown Shoe* factors). A common quantitative metric used by parties and courts to determine relevant markets is the Hypothetical Monopolist Test (“HMT”), as described in the U.S. Department of Justice and the FTC’s 2010 Merger Guidelines. U.S. Dep’t of Justice & FTC, *Horizontal Merger Guidelines* (“2010 Merger Guidelines”) § 4 (2010); *see also, e.g., U.S. v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 51 (D.D.C. 2011) (“An analytical method often used by courts to define a relevant market is to ask hypothetically whether it would be profitable to have a monopoly over a given set of substitutable products. If so, those products may constitute a relevant market.”).

There is “no requirement to use any specific methodology in defining the relevant market.” *Optronix Techs., Inc. v. Ningbo Sunny Elec. Co., Ltd.*, 20 F.4th 466, 482 (9th Cir. 2021). As such, courts have determined relevant antitrust markets using, for example, only the *Brown Shoe* factors, or a combination of the *Brown Shoe* factors and the HMT. *See, e.g., Lucas Auto. Eng., Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 766–68 (9th Cir. 2001) (relying on *Brown Shoe* factors alone in review of district court’s determination of relevant market); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 20–21 (D.D.C. 2017) (using HMT and *Brown Shoe* factors to analyze relevant market). The Ninth Circuit has “repeatedly noted that the *Brown Shoe* indicia are practical aids for identifying the areas of actual or potential competition and that their presence or absence does

not decide automatically the submarket issue.” *Thurman Indus., Inc. v. Pay ‘N Pak Stores, Inc.*, 875 F.2d 1369, 1375 (9th Cir. 1989) (citations omitted). The suitability of a submarket as a relevant antitrust market “turns ultimately upon whether the factors used to define the submarket are ‘economically significant.’” *Id.*

The FTC proposes a relevant product market consisting of VR dedicated fitness apps, meaning VR apps “designed so users can exercise through a structured physical workout in a virtual setting.” Mot. 13. According to the FTC, VR dedicated fitness apps are distinct from (1) other VR apps and (2) other fitness offerings. *Id.* 14. To differentiate their proposed market from other VR app markets, the FTC claims that VR dedicated fitness apps have distinct customers and pricing strategies. *Id.* The FTC further argues that VR dedicated fitness apps are in a separate market from other fitness offerings (*e.g.*, gyms, at-home fitness equipment) because they provide users with “fully immersive, 360-degree environments,” are fully portable, save space, cost less, and target a different type of consumer. *Id.* 14–15. The FTC claims that these qualitative product differences satisfy the *Brown Shoe* practical indicia of a relevant market, and that the Hypothetical Monopolist Test conducted by the FTC’s economics expert further confirms the relevant product market definition. *Id.* 15.

Unsurprisingly, Defendants disagree. They claim that the FTC’s proposed market is impermissibly narrow because it excludes “scores of products, services, and apps” that are “reasonably interchangeable” with VR dedicated fitness apps, including dozens of VR apps categorized as “fitness” apps on the Quest platform, fitness apps on gaming consoles and other VR platforms, and non-VR connected fitness products and services. Opp. 8, ECF No. 216. Defendants argue that members of the FTC’s proposed market subjectively consider other VR apps and other fitness offerings to be competing products, and that several such products also possess the very features—portability, immersion, and pricing models—that the FTC highlights as distinguishing or unique to its proposed market. *Id.* 8–10. Defendants also contend that Dr. Singer’s HMT analysis is fatally flawed due to methodological errors in the survey underlying the test. *Id.* 11.

In this case, the Court finds the FTC has made a sufficient evidentiary showing that there exists a well-defined relevant product market consisting of VR dedicated fitness apps.

a. Brown Shoe Analysis

The Court first examines in turn each of the *Brown Shoe* factors, *i.e.*, “practical indicia [such] as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.” 370 U.S. at 325.

i. Industry or Public Recognition

The evidence indicates that Defendants and other VR dedicated fitness app makers viewed VR dedicated fitness apps as an economic submarket of VR apps. For example, [REDACTED]

[REDACTED] PX0003, at 44. [REDACTED]

[REDACTED] *Id.* at 9. Within’s contemporaneous view of untapped market segments indicates that a “fitness first” app paired with a VR headset—*i.e.*, a VR dedicated fitness app—would be in a distinct segment of the overall VR market. *See id.* at 31. Likewise, as explained in greater detail in the sections below, Meta repeatedly stated that VR dedicated fitness apps constituted a distinct market opportunity within the VR ecosystem due to their unique uses, distinct customers, and distinct prices. *See infra* Sections III.B.1.a.ii., iv., v. And a representative the VR app company Odders Lab testified that the launch of its VR dedicated fitness app did not diminish sales of its VR rhythm app, acknowledging that its VR fitness app “compete[d] more directly with fitness dedicated applications than gaming applications.” Garcia Hr’g Tr. 1105:18–1106:21. Industry companies’ internal communications showing frequent distinctions between various categories of applications is “strong[] support” of a distinct submarket. *Klein*, 580 F. Supp. 3d at 758.

Participants in the broader fitness industry also recognized VR fitness as a “separate economic entity.” [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED] See *United States v. Microsoft Corp.*, 253 F.3d 34, 53

16 (D.C. Cir. 2001) (rejecting inclusion of middleware products in the relevant market where
 17 middleware was a potential, rather than current, competitor).

18 Defendants claim that members of the VR dedicated fitness app industry understood the
 19 market in which they operated to consist of “[s]cores of products, services, and apps available to
 20 consumers who want to exercise.” Opp. 8; Milk Hr’g Tr. 724:15–25 (“ [REDACTED]

21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]); *id.* 779:7–8 (“We have thousands of competitors.”); see also Janszen Hr’g Tr. 1143:8–
 25 12 (VR dedicated fitness app VirZoom “compete[s] with somebody who wants to just jump on
 26 their bike and go for a bike ride”). Defendants also contend that “[e]stablished fitness and
 27 technology firms . . . view VR fitness as competitive with off-VR products,” and point as an

example to Apple’s inclusion of Supernatural and the Peloton Guide in the “competitive landscape” when it [REDACTED].² Opp. 9; DX1257, at 3, 24–28.

Defendants’ evidence shows that there is a broad fitness market that includes everything from VR apps to bicycles. This in no way precludes the existence of a submarket constituting a relevant product market for antitrust purposes. *Brown Shoe*, 370 U.S. at 325; *Newcal Indus.*, 513 F.3d at 1045. As the Ninth Circuit has noted, a relevant antitrust market “cannot meaningfully encompass th[e] infinite range” of substitutes for a product—yet this is exactly how Defendants propose to define the market. *Twin City Sportservice, Inc. v. Charles O’Finley & Co., Inc.*, 512 F.2d 1264, 1271 (9th Cir. 1975). The Court therefore acknowledges that VR dedicated fitness apps compete for consumers with every manner of exercise (including gyms, bike rides, and connected fitness), but finds that Defendants and the broader fitness industry recognized VR dedicated fitness apps as an economically distinct submarket.

ii. Peculiar Characteristics and Uses

The evidence indicates that VR dedicated fitness apps have several “peculiar characteristics and uses” in comparison to both other VR apps and non-VR fitness offerings. *Brown Shoe*, 370 U.S. at 325. Even assuming “[a]lmost all VR applications require body movement,” Pruet Hr’g Tr. 264:16, VR dedicated fitness apps are “specifically marketed to customers for the purpose of exercise,” *id.* 263:6–18. To support that marketing, VR dedicated fitness apps (unlike other VR apps) are often characterized by their fitness-specific features, such as trainer-led workout regimens, calorie tracking, and the ability to set and track progress toward fitness goals. *See, e.g., id.* 263:14–23; Paynter Dep. 24:2–12 (“what [Meta] used to call [dedicated] fitness apps now correspond to a category . . . call[ed] . . . trainer workout apps”); PX0487, at 4 (VR dedicated fitness apps are “[d]esigned to allow a player to deliberately set and attain fitness goals, with fitness-specific features i.e. coaching, trackable progress”); PX0001, at 5

² Apple does not currently offer a VR headset. *See, e.g.,* Bosworth Hr’g Tr. 1022:13–16. Case No.: [5:22-cv-04325-EJD](#)

n.10 (“Meta draws a distinction between apps designed to allow users to set and attain fitness goals, with features like coaching and trackable progress (called ‘deliberate’ or ‘dedicated’ fitness apps) and games whose primary focus is not fitness that allow users to get a workout as a byproduct (sometimes called ‘incidental’ or ‘accidental’ fitness apps).”).

The most “peculiar characteristic” of VR dedicated fitness apps in comparison to non-VR fitness offerings is, of course, the VR technology itself. A VR user is “embodied” in a virtual environment. Zuckerberg Hr’g Tr. 1298:5–6. She is “teleported to a different place, feeling like when you move your head and look around, you’re in a new space and seeing virtual things as if they are real, which is virtual reality.” Rabkin Hr’g Tr. 835:24–836:3. Defendants’ fitness industry expert, Dr. Vickey, submitted that non-VR fitness options could also be immersive, describing the non-VR Hydrow rowing machine as an “immersive exercise piece of equipment” because the Hydrow displayed video footage of various locations on a touchscreen the user viewed while rowing.³ Vickey Hr’g Tr. 1184:12–21. The Court finds that no matter how crisp or accurate a video may be, a two-dimensional screen display is inherently far less immersive than a 360-degree environment. The evidence does not suggest—and the Court is not aware of—any other at-home fitness offering that can transport the user in this way. That a user of a VR dedicated fitness app can exercise in a VR setting is, therefore, a “distinct core functionality” indicative of a submarket. *Klein*, 580 F. Supp. 3d at 767 (quoting *Datel Holdings, Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974, 997 (N.D. Cal. 2010)).

The FTC puts forth other hallmarks of VR dedicated fitness apps that generally differ from characteristics of non-VR fitness offerings. For example, the FTC argues that “VR headsets are fully portable and take up little space.” Mot. 14. These appear to be distinguishing features in relation to bulky connected fitness devices, such as the Peloton Bike or Hydrow rowing machine, but Defendants persuasively argue that mobile fitness apps can offer these same functionalities.⁴

³ Dr. Vickey later testified that he had not used a Hydrow, and that he “would have” evaluated the machine by reviewing the company’s website and watching its videos. Vickey Hr’g Tr. 1202:8–18.

⁴ The Court is not persuaded by Defendants’ argument that the Peloton Guide is similarly portable
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Opp. 10. Nonetheless, the virtual reality fitness experience created by VR dedicated fitness apps appears to be vastly different from a workout conducted on a large and stationary device or based off a mobile phone screen.

With respect to “peculiar . . . uses,” Defendants have shown that consumers use non-VR fitness offerings for exercise. *See supra* Section III.B.1.a.i. Defendants have additionally shown that consumers may use other VR apps for fitness. *See, e.g.,* Carmack Hr’g Tr. 562:12–18 (“You can work up a pretty good sweat in Beat Saber.”); PX0529, at 2 (“UXR reports that many users have fitness intent among these [incidental fitness] apps”). As explained above, the existence of a broader fitness market does not mean a relevant submarket does not exist. *Supra* Section III.B.1.a.i. Defendants have themselves recognized the characteristics that distinguish VR dedicated fitness apps from other VR apps. *E.g.,* PX0001, at 5 n.10 (“Meta draws a distinction between apps designed to allow users to set and attain fitness goals, with features like coaching and trackable progress (called ‘deliberate’ or ‘dedicated’ fitness apps) and games whose primary focus is not fitness that allow users to get a workout as a byproduct (sometimes called ‘incidental’ or ‘accidental’ fitness apps).”); Milk Hr’g Tr. 683:8–21 (Supernatural, unlike Beat Saber, “employed experts in movement and fitness[;] built companion apps for the phones and for heart rate tracking integration[; and] calibrate[d to a] range of motion so that [it would not] injury anybody.”); *see also* Koblin Hr’g Tr. 606:5–8 (“VR games that require some incidental physical exertion” are not a fitness offering). The Court therefore finds that the “peculiar characteristics and uses” factor of the *Brown Shoe* analysis supports the finding that VR dedicated fitness apps constitute a relevant antitrust product market. *See, e.g., SC Innovations, Inc. v. Uber Techs., Inc.*, 434 F. Supp. 3d 782, 792 (N.D. Cal. 2020) (finding plaintiffs alleged a submarket for ride-sharing services excluding taxis, in part due to distinguishing features such as ability to rate and review

to a VR headset. *See* Opp. 10. [REDACTED]

[REDACTED] Vickey Report ¶ 43 (“[T]he Peloton Guide uses augmented reality features to track the user’s motions and a camera to position the user visually near an on-screen instructor.”).

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drivers and share rides).

iii. Unique Production Facilities

The parties did not explicitly develop arguments regarding unique production facilities in support of their positions regarding the relevant product market. *See* Mot. 13–16; Opp. 7–11. The Court notes, however, that VR dedicated fitness apps require a unique combination of production inputs. [REDACTED]

[REDACTED] *See* Singer Report ¶ 82 (“[T]he talent needed to create true triple-A VR experiences is going to be scarce and really valuable in a few years.”) (citing PX0118, at 1); Pruett Hr’g Tr. 286:6–8 (“I have an engineering team . . . [who] are a group of veteran engineers who are particular experts in our VR technology and our hardware.”). Similarly, most VR companies are unlikely to have the fitness expertise and equipment necessary to create content for VR dedicated fitness apps. *See* Singer Report ¶ 84 (“[REDACTED]”) (citing PX0251, at 2–3). Koblin Hr’g Tr. 650:3–12 (“[I]t seemed highly unlikely to me that [Meta] would get into virtual reality fitness . . . honestly at that level of depth, it just seemed extremely unlikely that they would hire coaches and build a green screen studio and dive deep into the psychology of what makes fitness fitness.”); Garcia Hr’g Tr. 1079:16–24 (“[One of the things that we have done in Odders Lab whenever developing any of our apps has always been looking into – – been looking at the experts. . . . And for our fitness app, we also started reaching out to local experts.”).

Although relevant markets are generally defined by demand-side substitutability, supply-side substitution also informs whether alternative products may be counted in the relevant market. *Twin City Sportservice, Inc.*, 512 F.2d at 1271 (“While the majority of the decided cases in which the rule of reasonable interchangeability is employed deal with the ‘use’ side of the market, the courts have not been unaware of the importance of substitutability on the ‘production’ side as well.”); *see also Brown Shoe*, 370 U.S. at 325 n.42 (“The cross-elasticity of production facilities

may also be an important factor in defining a product market.”); Julian von Kalinowski et al., 2 Antitrust Laws & Trade Regulation § 24.02[1][c], at 24–55 (2d ed. 2012) (“Another important factor in defining a product market is the ability of existing companies to alter their facilities to produce the defendant’s product. . . . The Supreme Court has long recognized the significance of this factor, often referred to as cross-elasticity of supply.”) (footnote omitted); 2010 Merger Guidelines, § 5.1 & n.8 (high supply side substitutability may be used to aggregate products into a market description).

Supply-side substitution focuses on suppliers’ “responsiveness to price increases and their ability to constrain anticompetitive pricing by readily shifting what they produce.” *RAG-Stiftung*, 436 F. Supp. 3d at 293 (citing *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995) (“reasonable market definition must also be based on ‘supply elasticity’”), *cert. denied*, 516 U.S. 987 (1995)). Here, as explained above, the evidence indicates that neither general fitness firms nor general VR firms have the production facilities to readily produce a substitute VR dedicated fitness app product, even if VR dedicated fitness apps were to raise prices and make market entry more attractive. *See also* Singer Report, Section F (“Would-Be Suppliers of VR Dedicated Fitness Apps Face Significant Barriers to Entry”). That existing companies are not easily able to alter their facilities to produce VR dedicated fitness apps is additional evidence that such apps constitute a distinct product market.⁵

iv. Distinct Customers

The FTC proffered evidence showing that users of VR dedicated fitness apps differ from those of other VR apps along multiple axes. Internal evaluations by Meta and Within found that although overall users of VR apps skewed younger and male, users of VR dedicated fitness apps tended to have an older and more female user base. For example, Meta claimed in its response to the FTC’s Second Request regarding the Meta-Within transaction that the overall Quest user base

⁵ This supply-side analysis of whether other firms would be able to switch production to VR dedicated fitness apps is independent of the demand-side inquiry (and main focus of the market definition analysis) of whether users would switch consumption to other products in the event of a price increase in VR dedicated fitness apps.

1 was about [REDACTED] See PX0004, at 167, May 2, 2022. VR fitness
 2 apps, on the other hand, drew far more women. *Id.* [REDACTED]
 3 [REDACTED]; PX0003, at 17 [REDACTED] Apr. 23,
 4 2021; PX0127, at 1 [REDACTED]
 5 [REDACTED] Mar. 10, 2021. Meta expected that VR dedicated fitness apps would
 6 expand the reach of virtual reality to new customer segments. To that end, Meta’s Vice President
 7 of Metaverse Content informed the company’s board of directors that “Supernatural, FitXR, and . .
 8 . other fitness applications, . . . unlike our gaming population . . . had tended to be more successful
 9 with on average an older person, on average more women. It was a very different demographic,
 10 and . . . we had always been in search of expanding VR beyond gaming into more of a general
 11 computing platform.” PX0066 (“Rubin Dep.”) 131:19–132:14; *see also* PX0127, at 6 (“[g]rowing
 12 [dedicated] fitness will broaden and diversify our user base, and bring on a disproportionate % of
 13 women”).

14 Defendants acknowledge that VR fitness appeals to different user demographics than other
 15 VR apps. Opp. 5 (“Fitness is one such use case that can expand VR’s audience beyond gamers
 16 (who tend to be younger males) to a broader population (including older and female users).”); *see*
 17 *also* Bosworth Hr’g Tr. 1035:18–22 (Meta perceived that “users of VR fitness apps represent[ed] a
 18 distinct category of customer compared to overall users of other VR apps on its platform”).

19 Defendants do, however, dispute that VR dedicated fitness apps have a customer base that is
 20 distinct from that of non-VR fitness offerings. Opp. 9 n.1. The evidence indicates that VR
 21 dedicated fitness apps are targeted more toward “[REDACTED]” who have less fitness
 22 experience and more difficulty finding motivating fitness products (rather than to individuals who
 23 have long-term or well-developed fitness routines.) As stated by Within’s executive vice president
 24 of business development and finance, it was “Within’s understanding that Supernatural appeals to
 25 [REDACTED] in a way that other existing fitness products do not.” PX0051 (“Cibula Dep.”)
 26 84:20–25. Within insiders also compared Supernatural to [REDACTED]
 27 [REDACTED]

1 [REDACTED] DX1081, at 1–2, Apr. 13, 2020. And in summer 2021—when Meta was in
 2 negotiations regarding the acquisition of Supernatural—a Meta employee described Within’s
 3 business model as “encouraging users who don’t think about fitness much as well as users with a
 4 light routine, not the fitness buff who is better served by the likes of Peloton cycling or Crossfit
 5 classes.” PX0318, at 1, June 22, 2021; [REDACTED]

6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED] The Court finds the VR dedicated fitness apps have
 9 a customer base that is distinct from those of both other VR apps and several other fitness
 10 offerings—[REDACTED] *See, e.g., FTC v.*
 11 *Sysco Corp.*, 113 F. Supp. 3d 1, 29–30 (D.D.C. 2015) (finding relevant product market in part
 12 based on erstwhile competitors’ inability to serve certain types of customers).

13 v. Distinct Prices

14 The pricing of VR dedicated fitness apps likewise differs in at least one key respect from
 15 other VR apps and non-VR fitness offerings. The main difference in comparison to the former
 16 category is that VR dedicated fitness apps are more likely to have a subscription-based pricing
 17 model. As one of Within’s founders testified, Within’s daily release of new workout content
 18 requires ongoing revenue, which is supported by a subscription membership. Milk Hr’g Tr.
 19 671:10–19. Likewise, Meta’s Director of Content Ecosystem testified that “subscriptions are
 20 particularly good monetization strategies for [fitness] applications” because “fitness applications
 21 need to produce content on an ongoing basis . . . in order to not get boring.” Pruett Hr’g Tr.
 22 269:9–23. However, subscription pricing does not provide a clear basis for delineating between
 23 VR dedicated fitness apps and other VR apps. Some VR dedicated fitness apps do not charge
 24 subscription fees, Vickey Report ¶ 47, and other VR apps may also be a good fit for subscription
 25 pricing, *see* Pruett Hr’g Tr. 268:22–269:4 (the “fitness, productivity, and social genres . . . all seem
 26 to be trending towards subscriptions as a default monetization method”). Nonetheless, the
 27 evidence indicates that “the majority of the video game applications on the Quest platform are not

a good fit for subscriptions” including because “most of them don’t have [an] ongoing content pipeline.” Pruet Hr’g Tr. 270:12–17.

Many fitness offerings, whether virtual or physical, use subscription models. As Meta noted in its June 2022 white paper to the FTC, Supernatural’s “monthly subscription model . . . is similar in structure to other connected fitness solutions included specialized equipment solutions (*e.g.*, Peloton, Mirror, Tonal), paid apps (*e.g.*, Apple Fitness+), and other VR fitness apps (*e.g.*, FitXR, Holofit, VZfit), as well as in-person gym memberships (*e.g.*, Equinox, CrossFit, 24 Hour Fitness).” PX0001, at 2; *see also* DX1081, at 1–2 (listing subscription prices for “leading fitness offering[s]”). The FTC argues that despite sharing a subscription pricing model, VR dedicated fitness apps tend to be “far less expensive” than “other at-home smart fitness devices.” Mot. 14. The evidence supports this assertion with respect to several connected fitness devices—Supernatural, the most expensive VR dedicated fitness app,⁶ costs \$399 plus \$18.99 per month, while Peloton costs \$1,445 plus \$44 per month and Tonal costs \$3,495 plus \$49 per month. Singer Report ¶¶ 68–69. There are, however, digital fitness options—generally mobile phone apps—with subscriptions “in the sort of \$8 to \$12 range.” Milk Hr’g Tr. 732:22–733:1; *see also* DX1081, at 1–2 (noting \$12.99 Peloton app-only monthly subscription); Singer Report ¶ 65 (same).

The Court finds that the VR app and non-VR pricing evidence tilts slightly in favor of the existence of a VR dedicated fitness app market. *See, e.g., FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 200–01 (D.D.C. 2018) (“The existence of distinct prices . . . are ‘not what one would expect if North American customers were willing and able to substitute one type of titanium dioxide for another in response to a change in their relative prices.’”) (citations omitted). Testimony from both Within and Meta indicate a practical reason for VR fitness apps to be generally best served

⁶ Some VR dedicated fitness apps charge a one-time price over \$18.99, and another VR dedicated fitness app has a free version as well as a premium version priced equally to Supernatural at \$18.99 per month. All other VR dedicated fitness apps charge subscriptions lower than \$18.99 per month, and one is free. Singer Report ¶ 39.

by a subscription pricing model, which is in line with broader non-VR fitness offerings. And VR dedicated fitness apps are much more affordable than the non-VR fitness products that come closest to offering the level of immersion available in VR. *See* Vickey Hr’g Tr. 1184:12–21 (opining that touchscreen on Hydrow rowing machine provides immersive experience). However, in light of the evidence that there exist both other VR apps that can strategically employ a subscription model and non-VR fitness offerings that are comparably priced to VR fitness apps, the overall weight of this factor is lessened.

vi. Sensitivity to Price Changes

The sixth *Brown Shoe* factor evaluates the change in sales of a possible substitute product given a change in the price of products within the relevant market. Because this is in essence the same question posed by the HMT, *see FTC v. Staples*, 970 F. Supp. 1066, 1075 (D.D.C. 1997), the Court will not duplicate its analysis here. Drawing from that analysis, *see infra*, Section III.B.1.b., the Court finds this factor to be neutral as to the existence of a VR dedicated fitness app market.

vii. Specialized Vendors

The final *Brown Shoe* factor considers whether a product’s distribution requires vendors with specialized knowledge or practices. *See Brown Shoe*, 370 U.S. at 325; *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 120–21 (D.D.C. 2016) (defining product market in part due to necessity that vendors have distinguishing capabilities such as sophisticated IT systems, personalized and high-quality service, and next-day delivery). The FTC has not presented evidence that the VR dedicated fitness app market requires specialized vendors.

* * *

For the reasons explained above, the Court finds that the following *Brown Shoe* “practical indicia” support the FTC’s assertion that VR dedicated fitness apps constitute the relevant product market: industry or public recognition; peculiar characteristics and uses; unique production facilities; distinct customers; and (to a lesser degree) distinct prices. These factors indicate that VR dedicated fitness apps present in-market firms with an economic opportunity that is distinct from both other VR apps and other fitness offerings. *See Thurman Indus., Inc.*, 875 F.2d at 1375.

The Court therefore finds that the FTC has met its burden of showing that VR dedicated fitness apps constitute a relevant antitrust product market. *Brown Shoe*, 370 U.S. at 325–28; *see also Lucas Auto. Eng.*, 275 F.3d at 766–68 (relying on *Brown Shoe* factors alone in review of relevant market); *Klein*, 580 F. Supp. 3d at 766–73 (same); *Newcal Indus.*, 513 F.3d at 1051 (“Even when a submarket is an *Eastman Kodak* submarket, though, it must bear the ‘practical indicia’ of an independent economic entity in order to qualify as a cognizable submarket under *Brown Shoe*.”).

b. Hypothetical Monopolist Test (HMT)

In the interests of thoroughness, the Court also addresses the parties’ HMT arguments. The HMT is a quantitative tool used by courts to help define a relevant market by determining reasonably interchangeable products. *Optronic Techs., Inc.*, 20 F.4th at 482 n.1. The test asks whether a “hypothetical monopolist that owns a given set of products likely would impose at least a small but significant and nontransitory increase in price (SSNIP) on at least one product in the market, including at least one product sold by one of the merging firms.” Singer Report ¶ 32; *see* 2010 Merger Guidelines § 4.1.1. If enough consumers would respond to a SSNIP—often calculated as a five percent increase in price—by making purchases outside the proposed market definition so as to make the SSNIP not profitable, then the proposed market is defined too narrowly. Singer Report ¶ 32; *Optronic Techs., Inc.*, 20 F.4th at 482 n.1.

The FTC’s economics expert, Dr. Singer, conducted a hypothetical monopolist test on the VR dedicated fitness app market. Singer Report ¶¶ 49–68. To inform his analysis of the response to a SSNIP in the VR dedicated fitness app market, Dr. Singer commissioned Qualtrics to conduct “a survey of Supernatural users to determine what fitness apps they perceive to be a reasonably close substitutes to Supernatural and to VR dedicated fitness products generally.” *Id.* ¶ 60. Dr. Singer testified that although an economist’s natural path would be to collect data about Supernatural customers’ transactions and reactions to any price increases, such data was unavailable here because Supernatural has never changed its price from \$18.99 per month. Singer Hr’g Tr. 365:2–13. The survey was his “next best” option, and the approach is supported by the 2010 Merger Guidelines. *Id.* 365:16–18; Singer Report ¶¶ 60–61; 2010 Merger Guidelines §

4.1.3. Based on his analysis of the survey, Dr. Singer determined that VR dedicated fitness apps constituted a relevant market. Singer Hr’g Tr. 360:7–8.

Defendants deride Dr. Singer’s survey as “junk science” and urge this Court not to rely on it. Opp. 11; Meta Closing Hr’g Tr. 1508:22–1509:3. In support of their arguments, Defendants relied on the expert reports and testimony of Dr. Dube and Dr. Carlton, who the Court found qualified as experts in the design and implementation of surveys and the economics of consumer demand for branded goods, *see* Dube Hr’g Tr. 872:16–873:19, and industrial organizations and microeconomics, *see* Carlton Hr’g Tr. 1355:15–20. Based on the testimony elicited by Defendants from Dr. Singer, Dr. Dube, and Dr. Carlton, the Court is troubled by various apparent flaws in the survey underlying Dr. Singer’s HMT. Most pertinently, there appear to be several indications that a high fraction of the 150 surveyed individuals, on whose answers Dr. Singer’s analysis necessarily relied, were untruthful in one or more responses. *See, e.g.*, Dube Hr’g Tr. 895:12–25 (respondents claimed to own multiple pieces of bulky, expensive equipment); Carlton Report ¶ 93 (over two dozen respondents claimed to regularly use all 27 fitness products listed on survey). Another facet of concern is the survey’s apparent inclusion of a non-VR product in the question designed to capture a hypothetical monopolist’s pricing power in a VR-only market. Carlton Hr’g Tr. 1428:21–1429:9. These questions, among others, suggest that the survey data underlying Dr. Singer’s HMT analysis may not be reliable, which in turn casts doubt on the conclusions to be drawn from the HMT.

The Court’s reservations about the survey do not change its finding that VR dedicated fitness apps constitute a relevant antitrust product market. Because the Court bases its determination of the relevant product market on its *Brown Shoe* analysis, *see supra* Section III.B.1.a., rather than the HMT, it need not determine the validity of Dr. Singer’s survey methodology. *See, e.g.*, Singer Hr’g Tr. 450:25–452:17. The *Brown Shoe* factors are sufficient to inform the Court’s understanding of the “business reality” of the VR dedicated fitness app market. *Lucas Auto. Eng.*, 275 F.3d at 766–68; *see also United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, (D.D.C. 2017) (noting *Brown Shoe* factors supported the “business reality” of the

government’s relevant market despite defense argument of “[in]sufficient economic rigor”); *RAG-Stiftung*, 436 F. Supp. 3d at 293 n.3 (“The *Brown Shoe* practical indicia may indeed be old school, and its analytical framework relegated ‘to the jurisprudential sidelines.’ But *Brown Shoe* remains the law, and this court cannot ignore its dictates.”) (citations omitted). Because the Court does not rely on the challenged portions of Dr. Singer’s report, the Court DENIES AS MOOT Defendants’ motion to strike Dr. Singer’s opinion that VR dedicated fitness apps constitute a relevant product market.⁷ ECF No. 470.

2. Geographic Market

“The relevant geographic market is the ‘area of effective competition where buyers can turn for alternate sources of supply.’” *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 784 (9th Cir. 2015) (citations omitted). “[I]n a potential-competition case like this one, the relevant geographic market or appropriate section of the country is the area in which the acquired firm is an actual, direct competitor.” *Marine Bancorporation*, 418 U.S. at 622. That is, the geographic market must “correspond to the commercial realities of the industry.” *Brown Shoe*, 370 U.S. at 336; *see also Staples*, 970 F. Supp. at 1073 (relevant geographic market is region where “consumers can practically turn for alternative sources of the product and in which the antitrust defendant faces competition”).

The FTC asserts that the United States is the relevant geographic market, and Defendants do not argue to the contrary. Mot. 15; *see generally* Opp. The Court agrees. As one of Within’s founders testified, Supernatural is only available to Quest headset users in the United States and Canada mainly [REDACTED]. Milk Hr’g Tr. 671:4–9. More broadly, Quest headsets are designed so that a user’s geolocation determines the availability and prices of content. Stojavljevic Hr’g Tr. 79:23–80:6. Because content developed in other countries may not be available in the United States, and because Supernatural is not available

⁷ Having independently reached the same conclusion as Dr. Singer regarding the relevant product market definition, the Court will rely on his subsequent analyses regarding the structure and characteristics of the defined market, which Defendants do not challenge. *See* ECF No. 470. Case No.: [5:22-cv-04325-EJD](#)

outside of the United States and Canada, the Court finds that the United States is an appropriate relevant geographic market. *See Staples*, 970 F. Supp. at 1073.

Accordingly, the relevant antitrust market for the analysis of the competitive impacts of Meta’s acquisition of Within is VR dedicated fitness apps in the United States.

C. Substantial Market Concentration

The FTC has challenged Meta’s acquisition of Within on the basis that the merger would substantially lessen potential competition. The Supreme Court has taken note of two species of potential competition theories: actual potential competition and perceived potential competition. *See United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974). Although the two theories have different elements and are grounded in different presumptions about the market, they share a common requirement: they have “meaning only as applied to concentrated markets.” *Marine Bancorporation*, 418 U.S. at 630–31. Because both doctrines posit that potential competitors can or will soon impact the market, there would be no need for concern if the market is already genuinely competitive. *Id.*

In assessing whether the relevant market is “substantially concentrated,” the Supreme Court sets forth a burden-shifting framework. First, the FTC may establish a prima facie case that the relevant market is substantially concentrated by introducing evidence of concentration ratios. *Id.* at 631. Once established, the burden shifts to the merging companies to “show that the concentration ratios, which can be unreliable indicators of actual market behavior, did not accurately depict the economic characteristics of the [relevant] market.” *Id.* If the prima facie case is not rebutted, then the market is suitable for the potential competition doctrines. *See United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 755 (D. Md. 1976).

1. Market Concentration Ratios

The Court finds that the FTC has sufficiently presented evidence using concentration ratios as permitted by *Marine Bancorporation*. Here, the FTC has provided the Herfindahl-Hirschman Index (“HHI”)—a widely accepted measure of industry concentration frequently used by courts considering antitrust merger and acquisition actions—for the relevant market. FTC Proposed

Post-Hearing Findings of Fact (“FTC’s Findings”) ¶¶ 80–83, ECF No. 516; *Optronix Techs., Inc. v. Ningbo Sunny Elec. Co.*, 414 F. Supp. 3d 1256, 1263 (N.D. Cal. 2019), *aff’d*, 20 F.4th 466 (9th Cir. 2021). The FTC’s 2010 Merger Guidelines provide that a market is considered “moderately concentrated” when the HHI exceeds 1500 and “highly concentrated” when it exceeds 2500. 2010 Merger Guidelines § 5.3.

The FTC’s expert, Dr. Singer, calculated the HHI multiple times, accounting for different market definitions and stipulations. Dr. Singer first calculated the HHI by measuring each firm’s market share using revenue. Singer Report ¶ 75, Table 2-A. This yielded an HHI of 6,917, [REDACTED] *Id.* Dr. Singer also calculated the market’s HHI using “total hours spent” and “average monthly active users” as metrics and data collected from the Quest Store. Singer Rebuttal Report ¶¶ 124–25, Tables 1-A, 1-B. The HHI for “total hours spent” was 6,307; and for “monthly active users” was 3,377. *Id.*

The Court finds that—regardless of the metrics used—every one of these ratios reflect a market concentration well above what the Merger Guidelines have designated as “highly concentrated.” Accordingly, the FTC have made their prima facie showing, and the burden shifts to Defendants to “show that the concentration ratios . . . did not accurately depict the economic characteristics of the [relevant] market.” *Marine Bancorporation*, 418 U.S. at 631.

2. Defendants’ Pleading Challenges

Before continuing to Defendants’ substantive arguments seeking to rebut the FTC’s prima facie case, the Court first turns to the Defendants’ legal attacks on the FTC’s pleadings. Defendants argue that the FTC’s case stumbles right out of the blocks because the complaint does not allege oligopolistic or “interdependent or parallel behavior.” Mot. Dismiss FAC (“MTD”) 10–13, ECF No. 108. Defendants’ position arises from the following language in *Marine Bancorporation*:

The potential-competition doctrine has meaning only as applied to concentrated markets. That is, the doctrine comes into play only where there are dominant participants in the target market engaging in interdependent or parallel behavior and with the capacity effectively to determine price and total output of goods or services.

1 418 U.S. at 631.

2 Defendants' argument is unpersuasive. Their fidelity to a stilted and strained reading of
3 the Supreme Court's commentary conveniently dodges the actual burden-shifting framework that
4 *Marine Bancorporation* set forth and applied. *Id.* at 631–32. In fact, the Supreme Court held that
5 the district court had erred by taking the precise course of action that Defendants urge the Court
6 takes here, *i.e.*, requiring the FTC to allege parallel behavior when it is Defendants' burden to
7 present the absence. *Id.* (“In our view, *appellees did not carry this burden*, and the District Court
8 erred in holding to the contrary. Appellees introduced no significant evidence of the absence of
9 parallel behavior in the pricing or providing of commercial bank services in [the relevant
10 market].”) (emphasis added). A similar attempt to stretch the language from *Marine*
11 *Bancorporation* to pin the burden on the government was likewise unsuccessful. *Black & Decker*,
12 430 F. Supp. at 750 n.41 (rejecting argument that “the government has failed to produce evidence
13 of any interdependent or parallel behavior in the market or of the market firms' capacity to
14 determine price and total output”). Defendants also are unable to identify any authority that has
15 adopted its proposed inversed framework, not even the one Fifth Circuit decision they cited. *See*
16 MTD 6; *Republic of Texas Corp. v. Bd. of Governors*, 649 F.2d 1026, 1045–46 (5th Cir. 1981)
17 (“Concentration ratios of this magnitude establish here . . . a prima facie case that the [] market is a
18 candidate for the potential competition doctrine, and *shift to Republic the burden to show that the*
19 *concentration ratios . . . do not accurately depict the economic characteristics of the [] market.*”)
20 (emphasis added).

21 For all the reasons discussed, Defendants' theory that the FTC was required to plead
22 oligopolistic, interdependent, or parallel behavior is without merit. To the extent Defendants'
23 motion to dismiss the FAC is premised on this theory, the Court DENIES Defendants' motion.

24 3. Economic Characteristics of the “VR Dedicated Fitness App” Market

25 The FTC having established a prima facie case of “substantial concentration” using
26 concentration ratios, the burden now shifts to Defendants to rebut that showing that “the
27 concentration ratios . . . did not accurately depict the economic characteristics of the [relevant]

market.” *Marine Bancorporation*, 418 U.S. at 631. The touchstone inquiry, however, appears to be whether the relevant market “is in fact genuinely competitive.” *Marine Bancorporation*, 418 U.S. at 631; *Tenneco, Inc. v. FTC*, 689 F.2d 346, 353 (2d Cir. 1982) (finding the FTC was “fully justified in concluding that the [] market was not genuinely competitive”); *Republic of Texas*, 649 F.2d at 1046 (finding that rebuttal evidence did not “establish that the overall competition from the thrift institutions was sufficient”); *Black & Decker*, 430 F. Supp. at 755 (noting that “various facets of competitive performance in the gasoline powered chain saw market offer conflicting indications”). The Court addresses each argument that Defendants have raised in rebuttal.

The Court first makes an opening observation that there appear to be at least some characteristics of the market that may be difficult to express with concentration ratios. If nothing else, both parties seem to agree that the VR dedicated fitness app market is a nascent and emerging market, which would be an economic characteristic of the market not fully captured by the concentration ratios. See FTC’s Findings ¶¶ 68–69; Singer Report ¶ 92. However, the Court must consider whether those characteristics indicate that the market is genuinely competitive.

Nascency. The Court has received conflicting expert evidence from both parties as to whether nascent markets are more or less vulnerable to coordinated oligopolistic behaviors. Dr. Carlton submits that a nascent market with rapidly evolving products is more difficult to coordinate behaviors, while Dr. Singer has asserted that there is no accepted economic theory to support the segmentation of nascent, adolescent, or mature markets. Compare Carlton Report ¶¶ 127–29, with Singer Rebuttal Report ¶¶ 130–33.

The evidence presented suggests that companies in the VR dedicated fitness market do not exhibit revenue or profit-maximizing behaviors, such as price competition. Koblin Hr’g Tr. 636:11–14; Milk Hr’g Tr. 736:6–8. Instead, their strategies appear to be optimized for growth and penetration—[REDACTED]—with the expectation that those qualities will render them an attractive acquisition target. See, e.g., Milk Hr’g Tr. 736:15–21 (“[REDACTED]

1 [REDACTED].”); Zyda Hr’g Tr. 1227:18–22, 1228:15–18 (“[S]tartups that work in the VR
2 space can get acquired, and that’s pretty much the dream of almost every startup.”); Garcia Hr’g
3 Tr. 1111:8–1112:14; Janszen Hr’g Tr. 1147:22–1148:1. It is unclear to the Court how this
4 departure from conventional profit-maximization strategies—an assumption often made in
5 defining antitrust markets, *see* 2010 Merger Guidelines § 4.1.1 (noting that the HMT “requires [] a
6 hypothetical profit-maximizing firm”)—should affect the assessment of genuine competition in
7 this market.⁸

8 Notwithstanding the experts’ robust economics discussions, neither party has presented the
9 Court with a working definition of “nascency,” such that it can distinguish a nascent market from
10 a more mature market. Rather, the parties appear to use the “nascency” label—however the lines
11 are drawn—as a proxy for other more observable market descriptions, such as highly
12 differentiated products, unstable market shares, and new entrants. Carlton Report ¶¶ 127–29.
13 Accordingly, the Court will give limited weight to the fact that the VR dedicated fitness market
14 may be characterized as a nascent market and focus instead on the underlying market indicators.

15 Market Share Volatility. Dr. Carlton claims that the VR dedicated fitness market exhibits
16 changing market shares, but he does not provide any historical data or evidence that the market
17 shares have changed over time. Carlton Report ¶¶ 124–25. Instead, Dr. Carlton relies on the fact
18 that none of the apps were in existence five years ago, that new entries are occurring, and on Dr.
19 Singer’s data on changes in *other* VR app markets. *Id.* ¶ 125. But new entrants do not necessarily
20 result in shifting or deconcentrating market shares, and Defendants have not presented evidence of
21 actual historical shifts in shares for the relevant market here. Moreover, [REDACTED]

22 [REDACTED]
23 [REDACTED]
24 [REDACTED] *Id.* ¶ 67, Table 10.

25 New Entrants. Defendants and Dr. Carlton have made much ado about the incoming
26

27 ⁸ Indeed, the many novel questions of law presented by this case may signal an ill fit between
28 these long-standing antitrust doctrines and the structures of modern technology markets.

entrants and the fact that the FTC’s relevant market has effectively doubled since the initiated this litigation. *See, e.g.*, Opp. 14. Although the “introduction of new firms and fluid condition of market entry and exit can indicate competitive behavior,” the bottom line is that these new entrants have not significantly deconcentrated the market, nor do they suggest a trend towards such deconcentration. *Black & Decker*, 430 F. Supp. at 751; *see also* Singer Rebuttal Report ¶¶ 124–25, Tables 1-A, 1-B (indicating *de minimis* shares of new entrants).

Barriers to Entry. Defendants rely on the new entrants into the market as evidence that barriers to entry are low. Opp. 13. However, the number of new entrants “does not belie the substantial entry barriers characteristic of the [relevant] market.” *Black & Decker*, 430 F. Supp. at 751. The evidence presented suggest that barriers to entry are existent but are not insurmountable. As the Court discusses further in this order, there are several ingredients required for a potential entrant considering entry into the VR dedicated fitness app entrant, including financial resources, VR engineering resources, fitness experience and content creation, and studio production capabilities. *See infra* Section III.D.2.a. On the other hand, for most potential entrants into any VR app market, Meta provides grants, software development kits, infrastructure code, and even engineering support to third-party VR app developers. Pruett Hr’g Tr. 284:18–285:18.

Having considered the VR dedicated fitness app market’s nascency, volatility, new entrants, barriers to entry, and price competition, the Court is inclined to find that Defendants have not rebutted the FTC’s prima facie case. The Court certainly appreciates that a nascent market with an emerging technology may have some features and market incentives that are not captured by concentration ratios. However, the evidence does not support a finding that the VR dedicated fitness app market exhibits the characteristics or desirable behaviors of a competitive market. And as the Supreme Court noted in *Falstaff Brewing*, the absence of “blatantly anti-competitive effects” may not necessarily preclude the propriety of potential competition theories, because the high degree of market concentration indicates that the “seeds of anti-competitive conduct are present.” 410 U.S. 526, 550; *see also id.* n.15 (“[A] market might be so concentrated that even though it is presently competitive, there is a serious risk that parallel pricing policies might emerge

1 sometime in the near future.”).

2 That said, because the Court finds *infra* that the FTC has not satisfied the other elements of
3 the potential competition theories they have brought, the Court need—and does not—decide
4 whether the Defendants’ showing here is sufficient to rebut the FTC’s prima facie case on
5 substantial concentration. *See United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980).

6 **D. Actual Potential Competition**

7 The FTC first argues that the Acquisition would substantially lessen competition because it
8 deprives the VR dedicated fitness app market of the competition that would have arisen from
9 Meta’s independent entry into the market, a theory known as the “actual potential competition” or
10 “actual potential entrant” doctrine. *See, e.g., United States v. Marine Bancorporation, Inc.*, 418
11 U.S. 602, 633 (1974). Although the Supreme Court has twice declined to resolve the doctrine’s
12 validity when presented, it has nonetheless identified two essential preconditions before the theory
13 can be applied: (1) the alleged potential entrant must have “available feasible means for entering
14 the [relevant] market other than by acquiring [the target company]”; and (2) those “means offer a
15 substantial likelihood of ultimately producing deconcentration of that market or other significant
16 procompetitive effects.” *Id.* The doctrine has since been applied by Courts of Appeal and district
17 courts alike, though the Ninth Circuit has not yet had an opportunity to provide guidance on the
18 actual potential competition theory.

19 Although “available feasible means” for entry may be established either by *de novo* entry
20 or a toehold acquisition, the FTC has not argued that Meta could have entered the relevant market
21 through a toehold acquisition, nor does it identify any company in the relevant market that could
22 have served as such a target. *See, e.g., FAC* ¶ 57; Mot. 19. “Since the [FTC] offered no evidence
23 of a toe-hold purchase that was available and attractive to [Meta], any such theory must be
24 rejected for lack of proof.” *United States v. Siemens Corp.*, 621 F.2d 499, 508 (2d Cir. 1980).
25 Accordingly, the Court will only consider whether Meta had “available feasible means” for
26 entering the relevant market *de novo*.

1 **1. Threshold Issues**

2 Before discussing the evidence, the Court first turns to three threshold disputes of law
3 between the parties, which are: (1) the continued vitality of the actual potential competition
4 theory; (2) the standard of proof the FTC must meet; and (3) the roles and consideration of
5 objective and subjective evidence.

6 **a. Doctrinal Validity**

7 Throughout this litigation, Defendants have sought to cast doubt as to the very existence of
8 the actual potential competition theory because it has never been fully endorsed by the Supreme
9 Court. *See, e.g.*, Opp. 2; MTD, at 2, 16–17. Notwithstanding Defendants’ doubts, this doctrine
10 has been applied by multiple Circuit Courts of Appeal, *e.g.*, *Yamaha Motor Co. v. FTC*, 657 F.2d
11 971 (8th Cir. 1981); *United States v. Siemens Corp.*, 621 F.2d 499 (2d Cir. 1980); *FTC v. Atl.*
12 *Richfield Co.*, 549 F.2d 289 (4th Cir. 1977); the Federal Trade Commission itself, *Altria Group,*
13 *Inc.*, 2022 WL 622476 (Feb. 23, 2022); *B.A.T. Industries*, 1984 WL 565384 (Dec. 17, 1984); and
14 various district courts, including one that ordered divestiture upon a finding of actual potential
15 competition and whose judgment was affirmed by the Supreme Court. *United States v. Phillips*
16 *Petroleum Co.*, 367 F. Supp. 1226 (C.D. Cal. 1973), *aff’d sub nom. Tidewater Oil Co. v. United*
17 *States*, 418 U.S. 906 (1974), and *aff’d*, 418 U.S. 906 (1974). Given the actual potential
18 competition doctrine’s consistent, albeit distant, history of judicial recognition, the Court declines
19 to reject the theory outright and will apply the doctrine as developed. *See FTC v. Steris Corp.*,
20 133 F. Supp. 3d 962, 966 (N.D. Ohio 2015) (“[T]he FTC has clearly endorsed this theory by filing
21 this case, and the administrative law judge will be employing it during the proceeding. . . .
22 Accordingly, in deciding the likelihood of success on the merits, the Court will assume the validity
23 of this doctrine.”).

24 To the extent Defendants’ motion to dismiss sought dismissal of the FTC’s actual potential
25 competition claim on the basis that it is a “dead-letter doctrine,” ECF No. 108, at 2, Defendants’
26 motion is DENIED.

b. Standard of Proof

There is less consistency among courts as to the proper standard of proof by which the FTC must prove its case on actual potential competition, and it is an issue of first impression within the Ninth Circuit. The Fourth Circuit has held that the FTC must establish its case with “strict proof.” *Atl. Richfield*, 549 F.2d at 295. The Second Circuit has asked whether a defendant “would likely have entered the market in the near future.” *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982) (emphasis added). The Fifth Circuit adopted the “reasonable probability” standard, which it remarked “signifies that an event has a better than fifty percent chance of occurring [with a] ‘reasonable’ probability represent[ing] an even greater likelihood of the event’s occurrence.” *Mercantile Texas Corp. v. Bd. of Governors*, 638 F.2d 1255, 1268–69 (5th Cir. 1981). The Eighth Circuit also appeared to adopt the “reasonable probability.” *Yamaha Motor*, 657 F.2d at 977 (defining the inquiry as “would [defendant], absent the joint venture, *probably* have entered the [relevant] market independently”) (emphasis added). Finally, the FTC itself has unambiguously adopted a “clear proof” standard. *B.A.T. Industries*, 1984 WL 565384, at *10.

In the absence of guiding Ninth Circuit law, the Court begins with *Brown Shoe*’s teaching that Section 7 deals with neither certainties nor ephemeral possibilities but rather “probabilities.” *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 323 (1962). In the context of an actual potential competition claim, however, the Court must not only consider the effects of future scenarios where the Acquisition occurs and where it is blocked, but it must also gauge the likelihood—in the second scenario—that the blocked would-be acquirer would enter the relevant market independently. Furthermore, the harm to competition the doctrine aims to prevent is not the loss of *present* competition but rather the potential loss of a *future* competitor (the acquiring company). Given the many *a priori* inferences required by the doctrine, the Court is wary of any inquiry that strays too close to the specters of ephemeral possibilities, yet it must nonetheless ensure the standard does not require the FTC to operate on certainties. The Court accordingly holds that the “reasonable probability” standard—as clarified by the Fifth Circuit to suggest a likelihood noticeably greater than fifty percent—is the standard of proof that the FTC must present.

To the extent Defendants’ motion to dismiss is based on the assertion that the correct standard of proof is “clear proof,” the Court DENIES Defendants’ motion.

c. Objective vs. Subjective Evidence

Finally, the Court reaches the parties’ disagreement as to the roles of objective and subjective evidence. The FTC asserts that it may meet its burden using solely objective evidence regarding Meta’s “overall size, resources, capability, and motivation.” Mot. 18–19; *see also* FTC Closing Hr’g Tr. 1494:12–18. Defendants, meanwhile, strenuously emphasize subjective evidence that Meta never had any plan to enter the Relevant Market *de novo* and would not do so if the Acquisition is blocked. Opp. 15.

Courts have uniformly recognized the highly probative value of objective evidence in evaluating whether a potential entrant is reasonably probable to enter the market *de novo*; the disagreement only arises as to whether plaintiffs can satisfy their burden using only objective evidence and whether subjective evidence should warrant any consideration. *Compare Mercantile Texas*, 638 F.2d at 1270 (“Not only is objective evidence undeniably probative, but subjective evidence is not required to establish a violation of the Clayton Act standard. On remand, the Board may rely exclusively on objective evidence if that evidence is sufficient to support the findings we require.”) (internal citation omitted), *with B.A.T. Industries*, 1984 WL 565384, at *26 (noting that “the inherent limitations of economic evidence mean that, standing alone,” purely objective evidence could not “establish liability under the actual potential entrant theory”) (Bailey, Comm’r, concurring). Many courts have also consulted both objective and subjective evidence in reaching their conclusions. *See, e.g., Siemens*, 621 F.2d at 507; *Yamaha Motor*, 657 F.2d at 979; *Phillips Petroleum*, 367 F. Supp. at 1239 (recognizing that subjective evidence is “relevant and entitled to consideration, [but] cannot be determinative”).

Here, the Court will first consider whether the objective evidence presented by the FTC supports the findings and conclusions necessary to satisfy the actual potential competition doctrine. If the objective evidence is weak, inconclusive, or conflicting, the Court will consult subjective evidence to illuminate the ambiguities left by the objective evidence, with the

understanding that the subjective evidence cannot overcome any directly conflicting objective evidence. *See Falstaff Brewing*, 410 U.S. at 570 (“[T]he subjective evidence may serve as a counterweight to weak or inconclusive objective data. But when the district court can point to no compelling reason why the subjective testimony should be believed or when the objective evidence strongly points to the feasibility of entry *de novo* . . . it is error for the court to rely in any way upon management’s subjective statements.”).

2. Objective Evidence

Having disposed of the threshold questions, the Court now proceeds to apply the doctrine. The inquiry can be stated as follows: “Is it reasonably probable that Meta would have entered the VR dedicated fitness app market *de novo* if it was not able to acquire Within?”⁹

“In exploring the feasible means of entry alternative to the challenged acquisition, the court must analyze the incentive and capability of the acquiring firm to enter the relevant market.” *Black & Decker*, 430 F. Supp. at 755. The Court thus considers in turn the objective evidence on Meta’s capabilities and incentives to enter the VR dedicated fitness app market.

a. Capabilities of Entry

There can be no serious dispute that Meta possesses the financial resources to undertake a *de novo* entry. Meta has spent over \$12.4 billion in the most recent fiscal year on its VR business, and it anticipates investing more in the VR space. *See, e.g.*, DX1237, at 51, Dec. 31, 2021; ECF No. 514, Defs.’ Proposed Post-Hearing Findings of Fact (“Defs.’ Findings”) ¶¶ 44–47.

Unsurprisingly, Meta also enjoys a deep and talented pool of engineers in its Reality Labs Division, who could provide the technical VR expertise to develop a VR dedicated fitness app should Meta so choose. *See* ECF No. 516, FTC Proposed Post-Hearing Findings of Fact (“FTC’s Findings”) ¶¶ 32–33. In fact, Meta maintains a team of “veteran engineers who are particular experts in [Meta’s] VR technology and hardware” and who work directly with third-party VR app developers to “improve the quality of their software or help them fix bugs or [] polish the

⁹ As noted above, because the FTC has not argued that Meta could have entered the relevant market through a toehold acquisition, the Court considers only the question of *de novo* entry. Case No.: [5:22-cv-04325-EJD](#)

1 experience that the developer is building.” Pruett Hr’g Tr. 286:4–12. The Court finds that the
2 objective evidence establishes that Meta has the financial resources and ready access to qualified
3 VR engineers to enter the VR dedicated fitness app market *de novo*.

4 But financial and engineering capabilities alone are insufficient to conclude it was
5 “reasonably probable” that Meta would enter the VR dedicated fitness app market. Indeed, Meta
6 seems willing to concede—as is supported by the evidence—that it “does not take a large team or
7 substantial resources to make a successful VR app.” Defs.’ Findings ¶ 53. Instead, courts often
8 counterbalance undisputed financial capabilities with those capabilities unique to the relevant
9 market, rarely relying solely on the potential entrant’s substantial wherewithal. *Siemens*, 621 F.2d
10 at 507 (finding no evidence that potential entrant could “transfer its acknowledged capability with
11 respect to other types of equipment to *nuclear medical equipment*”) (emphasis added); *Atl.*
12 *Richfield*, 549 F.2d at 295 (“[Potential entrant] has no technological skills readily transferrable to
13 the *copper markets*; it has no channels of distribution which may be utilized to distribute
14 copper.”) (emphasis added); *cf. Yamaha Motor*, 657 F.2d at 978 (noting that the potential entrant
15 had “requisite experience in the production and marketing of *outboard motors* in areas of the
16 world other than Japan.”) (emphasis added). The Court here finds that Meta lacked certain
17 capabilities that are unique and critical to the VR dedicated fitness app market. *See* PX0127, at 7
18 (noting that Meta “will need to build 4 new [fitness] functions that are not part of Facebook’s
19 pipelines; Content development, instructors, studio production . . . , music rights & technology.”).

20 First and foremost, although Meta has an abundance of VR personnel on hand, it lacks the
21 capability to create fitness and workout content, a necessity for any fitness product or market. *See*
22 PX0111 (“The answer is content creation. . . . You need that content variety to serve different
23 ability levels, musical tastes, instructor personalities, etc.”), Feb. 23, 2021. As a comparison,
24 Supernatural’s VR workouts are led by personal trainers and are optimized for VR activity
25 through consultations with experts holding PhDs in kinesiology and biomechanics. PX0712, at
26 18, 27. Certainly, this absence is not an insurmountable obstacle; Meta could conceivably
27 circumvent it by partnering with an established fitness brand to provide the fitness content, as

1 Odders Lab did with Les Mills.¹⁰ FTC’s Findings ¶¶ 123, 148; *see also* Garcia Hr’g Tr. 1072:18–
 2 1073:1. [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED] *see also Tenneco*, 689 F.2d at 354 (rejecting as “unsupported
 8 speculation” the FTC’s suggestion that the potential entrant would have entered the market *de*
 9 *novo* “with the aid of a license” for necessary technology). Regardless of any potential
 10 workarounds, the objective fact that Meta presently lacks the capability to create fitness content is,
 11 at the very least, probative as to the reasonable probability that Meta would enter the VR dedicated
 12 fitness app market *de novo*.

13 In addition to fitness content, the evidence also indicates that Meta lacked the necessary
 14 studio production capabilities to create and film VR workouts. Once again comparing to
 15 Supernatural, Within records daily workout classes in its Los Angeles studio, and its founders
 16 have directed several interactive music videos. PX0712, at 3–4, 29. When Meta employees were
 17 strategizing VR fitness investments, they recognized that “studio production (e.g. green screen
 18 ops, stereoscopic capture, post processing pipelines)” was a new function that was “not part of
 19 Facebook’s pipelines.”¹¹ PX0127, at 7, Mar. 10, 2021. Contrary to the FTC’s suggestion, the
 20 Court finds that Meta’s acquisition of Armature Studio—a third-party VR studio with expertise in
 21 co-developing VR apps—does not provide the necessary studio production capabilities to develop
 22 a VR dedicated fitness app. *See* FTC’s Findings ¶¶ 125, 290. The evidence indicates that

24 _____
 25 ¹⁰ The Court can imagine more scenarios, *e.g.*, where Meta contracts independent fitness
 26 instructors or employs a team of regular fitness instructions, but they would require further
 27 speculation.

28 ¹¹ To clarify, the Court cites this internal Meta strategy document for its identification of functions
 that are *objectively* absent from Meta’s capabilities, and not for any probative value in determining
 Meta’s *subjective* intention, such as whether those absences are sufficient to deter it from entering
 the VR dedicated fitness app market *de novo*.

Armature is very much a *game* studio, not a *production* studio [REDACTED] PX0527, at 6 (listing Armature’s [REDACTED] The FTC highlights an internal Meta presentation that presented Armature as an acquisition target who could “build a fitness-first product based on Beat Saber x their sports experience.” *Id.* However, the basis for this suggestion comes not from any prior production studio experience but rather Armature’s experience developing the rendered VR video game, Sports Scramble. *Id.* As with Meta’s fitness expertise, its lack of production studio capabilities to film a VR fitness workout is a relevant—though less compelling—factor for the Court’s “reasonably probable” consideration.

b. Incentives to Enter

In addition to the objective evidence presented of Meta’s capabilities of entering the VR dedicated fitness app market, the Court also considers the objective evidence of Meta’s incentives and motivations for entering this market.

Users and Growth. The record is replete with evidence supporting Meta’s interest in the VR fitness space. Defs.’ Findings ¶ 280 (“[E]mployees at Reality Labs were interested in fitness as a promising VR use case”). First, fitness is a use for VR that appeals to a more diverse population, specifically consumers that are female and older. *Id.* ¶ 280 (citing testimony). This demographic is notably distinct from the typical VR demographic, which tends to skew younger and more male. *Id.*; see also *Black & Decker*, 430 F. Supp. at 756 (“[C]ommitment to diversification is an important factor to be considered in analyzing [] desire to enter a particular market.”). Fitness is also “retentive,” meaning that users will tend to regularly use the product or app. PX0386, at 12 (fitness apps had a “strong [REDACTED] retention”), Apr. 12, 2022; see Stojasavljevic Hr’g Tr. 108:19–25. Meta’s internal data also indicated that “deliberate fitness apps” were the “fastest growing segment” with [REDACTED] year-over-year growth. PX0386, at 12. These promising demographic, use, and growth metrics are especially important to Meta, because it has “bet[] on VR technology as a general computing platform to join today’s PCs, laptops, smartphones, and tablets.” Defs.’ Findings ¶ 44.

Although they undergird Meta’s undisputed interest in VR fitness, the aforementioned factors provide limited probative value in assessing Meta’s likelihood to enter the VR dedicated fitness app market itself. As the Court established earlier in this section, the relevant inquiry is whether it is “reasonably probable” that Meta would have entered the VR dedicated fitness app market *de novo*, not whether Meta was excited about or interested in more generally investing in VR fitness. Meta’s interest in the promising VR fitness app metrics—diverse appeal, strong user retention, rapid growth—stems from the potential for broader VR adoption and market penetration. *See* Carlton Report ¶¶ 33–35. And Meta, as a competitor in the VR headset market, benefits from that growth so long as high-quality VR fitness apps exist in the VR ecosystem; Meta need not itself be a player in that ecosystem. *See* Defs.’ Findings ¶ 49. This mutually beneficial relationship between the VR platform and third-party VR apps distinguishes this case from other potential competition cases where potential entrants are typically incentivized to enter the relevant market because they are not capturing any of the neighboring market’s growth or profitability. *See, e.g., Black & Decker*, 430 F. Supp. at 755 (electric saw manufacturer entering the gasoline-powered chain saw market); *Phillips Petroleum*, 367 F. Supp. at 1245 (non-California oil company entering the California market for gasoline sales); *Yamaha Motors*, 657 F.2d at 974 (Japanese motor company entering the U.S. outboard motor market). The Court accordingly does not find that these specific features of the VR dedicated fitness app market increase the probability that Meta would enter the market *de novo*, because Meta would enjoy those incentives even if it remained outside the relevant market and provided funding or technical support for in-market VR fitness app developers, as it already does.¹² *See supra* ¶ 7.

Hardware Integration. Apart from the incentives arising from the VR fitness market itself, the evidence also reflects one other incentive that arises from Meta’s direct participation in the relevant market. Specifically, entering the VR dedicated fitness app market with its own app

¹² To be sure, there is incentive for any company to enter a market that has stable consumers and is experiencing high growth, and the Court considers these incentives in assessing reasonable probability of Meta’s entry. However, those incentives are of a different type and on a different scale from Meta’s interest in VR dedicated fitness apps as a VR platform developer.

would facilitate Meta’s subsequent development of fitness-related VR hardware. This is an incentive to “first-party” entry that is acknowledge across multiple instances of internal contemporaneous correspondence at Meta. *See, e.g.*, PX0127, at 7 [REDACTED]
[REDACTED]
[REDACTED], Mar. 10, 2021; PX0146, at 10 (“[First-party] will allow us to test and iterate tools in our Fitness platform that we can then surface to other 3P”), June 18, 2021; PX0487, at 5 (“We believe that increasing [headcount] for 1P investment (Option 3) is worth the tradeoffs in order to: 1. Develop a cohesive fitness ecosystem faster by enabling developers and building platform features.”), May 14, 2021. That said, the evidence also suggests that *de novo* entry is not strictly necessary to develop fitness hardware, *see* FTC’s Findings ¶ 185 (indicating that Meta has also already produced “wipeable interface, wrist straps, and adjustable knuckle straps”), though independent entry into the market could streamline that development.

Profitability. Finally, there is some evidence of the relevant market’s profitability and that it [REDACTED] PX0386, at 12. The profitability of the relevant market is unsurprisingly a relevant incentive that many courts consider. *See, e.g., Phillips Petroleum*, 367 F. Supp. at 1245; *Black & Decker*, 430 F. Supp. at 755. While this factor is often quite salient in other potential competition cases, it is somewhat muted here, [REDACTED]
[REDACTED]. PX0062 (“Milk Dep.”) 19:8–12. Of course, a market’s current profitability does not reflect its future profitability, especially if that market is exhibiting rapid growth as the VR dedicated fitness app market does here. Nonetheless, the fact that [REDACTED]
[REDACTED] would indicate that the profitability of the relevant market warrants less consideration than it otherwise would.¹³

* * *

¹³ As discussed in the “Users and Growth” analysis above, the record reflects that Meta’s interest in the VR dedicated fitness market stems from the market’s potential contribution to broader VR adoption and corresponding headset sales. The Court recognizes that a thriving VR fitness market may contribute to Meta’s future profitability in headset sales. But that potential profitability in a different market is both too divorced from the likelihood of Meta’s *de novo* entry in the relevant market, and too speculative to evaluate under this factor.

Having reviewed and considered the objective evidence of Meta’s capabilities and incentives, the Court is not persuaded that this evidence establishes that it was “reasonably probable” Meta would enter the relevant market. Meta’s undisputed financial resources and engineering manpower are counterbalanced by its necessary reliance on external fitness companies or experts to provide the actual workout content and a production studio for filming and post-production. Furthermore, the record is inconclusive as to Meta’s incentives to enter the relevant market. There are certainly some incentives for Meta to enter the market *de novo*, such as a deeper integration between the VR fitness hardware and software. However, it is not clear that Meta’s readily apparent excitement about fitness as a core VR use case would necessarily translate to an intent to build its own dedicated fitness app market if it could enter by acquisition.

On balance, the objective evidence does not so “strongly point to the feasibility of entry *de novo*” that the Court should decline to consider subjective evidence of intent. *Falstaff Brewing*, 410 U.S. at 570.

3. Subjective Evidence

The Court first notes that it will accord little weight to subjective evidence and statements provided by Meta employees during the course of this litigation. Although they are relevant, entitled to some weight, and no doubt offered by persons of character, the bias affiliated with such *ex post facto* testimony is widely recognized and unavoidable. *See, e.g., Falstaff Brewing*, 410 U.S. at 565, 570 (Marshall, J., concurring). In reviewing the subjective evidence in the record, the Court will refer primarily to contemporaneous statements made by Meta employees.

The record reveals certain documents created contemporaneously by Meta employees that appear to set forth Meta’s overall third-party VR investment strategy, along with individualized analyses of various VR fitness investment options. PX0492 (“Quick Fitness / M&A Thoughts”), Mar. 9, 2021; PX0127 (“VR Fitness Content investment thesis v2”), Mar. 10, 2021; PX0146 (“FB Inc Fitness Strategy Working Draft”), June 18, 2021. The FTC has represented that these documents were sponsored by Meta employees: Rade Stojasavljevic, who oversaw all of Meta’s first-party VR gaming studios (Stojasavljevic Hr’g Tr. 69:18–24); Anand Dass, Meta’s director of

1 non-gaming VR content (*id.* 138:11–18); and Jane Chiao, a business-side employee who reported
 2 directly to Mark Rabkin, the head of VR technology at Meta (*id.* 140:23–141:1, Rabkin Hr’g Tr.
 3 800:7–11). Furthermore, exhibit PX0127 was a “pre-read” circulated in advance of a meeting
 4 with Mark Rabkin, *see* Stojavljevic Hr’g Tr. 149:16–151:12, who would have been one of the
 5 decisionmakers needed to sign off on any significant VR fitness investment. *Id.* 189:24–190:12.
 6 These are not “memoranda of lower echelon [] employees.” *Siemens*, 621 F.2d at 508; *see also*
 7 *Atl. Richfield*, 549 F.2d at 297 n.9. Accordingly, the Court finds that the statements in these
 8 documents reflect the thoughts and impressions of relatively significant stakeholders, as the
 9 authors were generally one or two people away from the final decisionmaker.

10 The evidence contained in these strategy documents is consistent—Meta’s subjective
 11 motivations to enter the relevant market were primarily to (1) better develop VR fitness hardware
 12 or (2) ensure the continued existence of a high-quality VR fitness app in the market. The Court
 13 notes that these incentives would apply to both entry by acquisition and entry *de novo*, though
 14 perhaps not with equal force.

15 First, this subjective evidence corroborates the objective evidence that Meta primarily
 16 wanted to be a first-party firm in the VR dedicated fitness market so it could improve its VR
 17 fitness hardware (*e.g.*, headsets, heart monitor, wrist straps). *See* PX0492, at 2 (“Deep integration
 18 with hardware and software to create best in class experience that other devs can follow”);
 19 PX0127, at 7 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]); PX0146 (“1P content is not a goal in itself – *it is only in the service of*
 22 *broader platform objectives* (*e.g.*, help accelerate progress of market phases).”) (emphasis added).
 23 The importance of this incentive is supported by internal Meta communications. *See* PX0179, at 2
 24 (noting that “strategic rationale already exists” to pursue VR fitness, which was to “[c]reate option
 25 value for [Meta’s device], software platform and hand tracking”), Mar. 11, 2021.

26 Second, the evidence also indicates that Meta would want to enter the VR dedicated fitness
 27 app market if the availability of VR fitness apps was at risk of becoming constrained and,

therefore, Meta could ensure that at least one high-quality VR fitness app remained in the market. Specifically, as early as March 2021, Meta employees were expecting Apple to “lock in” VR fitness content to be exclusive with Apple’s VR hardware. See PX0492, at 2 [REDACTED] [REDACTED] Mar. 9, 2021; PX0127, at 6 [REDACTED] [REDACTED], Mar. 10, 2021. This incentive was also corroborated by contemporaneous communications. DX1012, at 1 [REDACTED] [REDACTED] [REDACTED], May 26, 2021. The evidence also suggests that this incentive was the primary animating factor that ultimately compelled Meta to pursue Within as an acquisition. See, e.g., PX0117 [REDACTED] [REDACTED].

Meta’s prior ventures into other VR app markets also do not support a subjective intention or proclivity to build its own apps as opposed to an acquisition. Courts have considered a potential entrant’s history of acquisitions and expansions in determining its likelihood of *de novo* entry. See *Black & Decker*, 430 F. Supp. at 756 (potential entrant had previously “diversified almost exclusively through internal expansion [and] had a definite, if unwritten, policy known to its employees of discouraging growth by acquisition”); *Phillips Petroleum*, 367 F. Supp. at 1240 (“At no time prior to the [] acquisition did [the potential entrant] ever enter a new marketing area by acquiring a major company in that market.”). The evidence indicates that Meta has tended to build its own VR app where the experience did not call for specialized or substantive content, e.g., Horizon Worlds (a world-building app where other users can create worlds in VR), Horizon Workrooms (a productivity app), Horizon Venues (a live-events app), Horizon Home (social networking app). Meta’s Answer and Affirmative Defenses ¶ 35; see also PX0056 (“Carmack

Dep.”) 101:15–23 (indicating Meta does not have “anything internally developed that was a hit outside of our browser application”). Meanwhile, Meta has acquired other VR developers where the experience requires content creation from the developer, such as VR video games, as opposed to an app that hosts content created by others. Stojavljevic Hr’g Tr. 87:5–88:2. With respect to fitness, the Court finds that VR dedicated fitness is more akin to a gaming app—where the emphasis is on the content created or provided by the developer—than a browser or world-building app, where the value is derived from the users’ own creativity rather than the developers’. Accordingly, based on Meta’s past entries into VR app markets, the evidence would suggest an interest in entry by acquisition instead of entry *de novo*.

But even more pertinent than the record of Meta’s past entries into VR app markets is the evidence that Meta had consciously considered and appeared doubtful of the proposition to build its own independent VR fitness app. The pre-read strategy document prepared for Mark Rabkin’s attention contains a separate section that “[i]t will be hard to build Fitness from scratch.” PX0127, at 7. Specifically, a VR fitness app would require Meta to [REDACTED]

[REDACTED] *Id.* The document also recognized that Meta would have to “build new kinds of expertise at the intersection of software, instructor-led fitness, music, media.” *Id.* The decision not to build Meta’s own VR fitness app is corroborated by the lack of any other contemporaneous discussion on the topic. The record does, however, indicate that Meta attempted to gauge whether it could expand Beat Saber together with a fitness partner, a prospect the Court delves into further below.

In sum, the subjective evidence indicates that Meta was subjectively interested in entering the VR dedicated fitness app market itself, either for hardware development or defensive market purposes. However, the Court again notes that these incentives would support both market entry by acquisition and *de novo*, but the Court’s inquiry is only concerned with the feasibility of *de novo* entry. For instance, even though Meta’s concern about [REDACTED]

[REDACTED] was an incentive to acquire Within, that incentive does not apply with equal force

██████████ PX0127, at 1. And, as the Court elaborates below, the evidence shows that all these factors—Meta’s capabilities and incentives, both objective and subjective—did not result in Meta ever seriously contemplating a *de novo* entry, *i.e.*, building its own VR fitness app.

4. Identified Means of Entry

Up to this point, the Court has only addressed Meta’s capabilities, incentives, and intent to enter the VR dedicated fitness app market in the abstract. However, an assessment of the probability and feasibility of a hypothetical *de novo* entry would not be complete without addressing the *actual* means of entry that Meta considered. *See Black & Decker*, 430 F. Supp. at 757 (“Three avenues of entry into the gas lawn mower field were explored. . . .”); *Siemens*, 621 F.2d at 502–03 (summarizing multiple possibilities that other acquiring company had considered); *Phillips Petroleum*, 367 F. Supp. at 1243–44 (same).

Nevertheless, the FTC has implied that the Court may infer that Meta would have entered the market *de novo*—irrespective of its actual plans for entry—using “available feasible means” unbeknownst to the parties or the Court. *See* FTC Closing Hr’g Tr. 1494:16–18 (“We don’t have to show that Meta actually had a subjective intention to enter the market.”). To the extent the FTC implies that—based solely on the objective evidence of Meta’s resources and its excitement for VR fitness—it would have inevitably found and implemented some unspecified means to enter the market, the Court finds such a theory to be impermissibly speculative.

The FTC made a similar argument in *BOC International*, where it argued that “[s]imply because no entry had been effectuated at the time the [acquisition] presented itself did not mean that BOC would not have *eventually realized* its ‘long-term objectives’ of entering the [relevant] market by growth rather than by this major acquisition.” *BOC Int’l, Ltd. v. FTC*, 557 F.2d 24, 29 (2d Cir. 1977) (emphasis added). The Second Circuit rejected this “eventual entry” theory as “uncabined speculation,” holding that “it seems necessary under Section 7 that the finding of probable entry at least contain some reasonable temporal estimate related to the near future.” *Id.* The FTC recently reaffirmed this holding in *Altria Group, Inc.*, 2022 WL 622476, at *70

(“Complaint Counsel is arguing that due to Altria’s resources as a large company, and economic incentives to participate in the e-cigarette market, Altria would have eventually had a product competing in that market. *This is precisely the position rejected by the court in BOC.*”) (emphasis added). Additionally, insofar as the FTC implies Meta could overcome its lack of fitness experience and content creation by hiring experts or partnering with a fitness brand, the suggestion reflects “the kind of unsupported speculation” rejected in *Tenneco*. 689 F.2d at 354 (rejecting the FTC’s “conclusion that [potential entrant] would have entered the market de novo with the aid of a license” for the necessary technology).

The Court here does not hold that every case of actual potential competition will require consideration of a potential entrant’s actual and subjective plans for entry. *See Falstaff Brewing*, 410 U.S. at 565 (“We have certainly never suggested that subjective evidence of likely future entry is required to make out a § 7 case.”) (Marshall, J., concurring). Nor does the Court suggest that a particular entry strategy can only be “reasonably probable” and “feasible” if it has reached a certain inflection point in the firm’s decision-making process. Such a conclusion would incentivize corporate gamesmanship and reward decisionmakers for reaching merger decisions hastily without exploring non-merger alternatives. *See generally id.* at 563–71 (Marshall, J., concurring). However, where the objective evidence is “weak or inconclusive” and does not “strongly point[] to the feasibility of entry de novo,” *id.* at 570, it is incumbent on the Court to consider the potential entrant’s actual plans of entry for the purposes of ensuring that Section 7 enforcement does not veer into the realm of ephemeral possibilities. As applied here, the Court holds that the FTC may not rest solely on evidence of Meta’s considerable resources and the company’s clear zeal for the VR dedicated fitness app market as a whole; the evidence must show that Meta had *some* feasible and reasonably probable path to *de novo* entry.

Turning then to the evidence, the record indicates that Meta would only have entered by acquisition or a Beat Saber collaboration with a fitness content creator; the Court is unaware of any evidence that Meta considered building a VR fitness app on its own. In the strategy document that was prepared for the meeting with Mark Rabkin, Meta personnel had outlined and analyzed

five options for investing in VR fitness: (1) acquire Within and Supernatural; (2) acquire [REDACTED]; (3) expand Beat Saber into deliberate fitness, likely by partnering with Peloton; (4) increase funding for development of third-party VR fitness apps; and (5) do nothing and maintain the status quo. PX0127, at 2–4. The record reflects that, although Meta initially pursued the first three options in parallel, the frontrunner was the [REDACTED] acquisition until approximately June 2021 when Meta pivoted to acquire Within. *See, e.g.*, PX0179, at 1–2 (indicating that action items included pursuing due diligence for both Supernatural and [REDACTED] and having Stojasavljevic “present a proposal to Rabkin on expanding Beat Saber to deliberate fitness”), Mar. 11, 2021; PX0284, at 1 (drafting email to Michael Verdu summarizing the “pros/cons of [REDACTED] vs. Supernatural”), Mar. 18, 2021; DX1012, at 1, 3 (“[Zuckerberg] asked if we were engaged with [Within]. . . . [Bosworth] responded that our focus has been on [REDACTED].”), May 26, 2021. Notably, even though Meta personnel had considered the option to increase third-party funding without entering the market and an option to do nothing as comparison, there was never an option for Meta to build its own VR dedicated fitness app to enter the market *de novo*.

Given the degree of analysis evident from these strategy documents, the Court finds that Meta had only considered the acquisition of Within, the acquisition of [REDACTED], and the partnership of Beat Saber with Peloton as feasible means to enter the relevant market. These three options, therefore, comprise the universe of “available feasible means” that the Court will consider for the purposes of the FTC’s actual potential competition claim.

a. Entry by Acquisition

Meta’s first two means of entry into the relevant market were both entries by acquisitions, either [REDACTED]. The evidentiary record indicates that these two options were both among the earliest proposals presented to Mark Zuckerberg, as well as the last two considered before Meta decided to acquire Within. *See, e.g., supra* Section I.D.

The evidence supports a finding that, but for its pursuit of Within as an acquisition, there was a reasonably probability that [REDACTED]

[REDACTED] However, the inquiry before the Court is not whether it was reasonably probable that Meta

1 [REDACTED] The FTC has argued almost exclusively that Meta’s “available feasible
2 means” of entering the relevant market is by *de novo* entry, not acquisition. The FTC also does
3 not take the position [REDACTED] that could have also
4 conceivably had procompetitive effects. *See, e.g.*, Mot. 21 (noting that Meta’s entry into the
5 market would have “introduce[ed] a strong, well-established new rival to Supernatural and
6 FitXR”); *see also Marine Bancorporation*, 418 U.S. at 625 (defining a toehold acquisition as a
7 “small existing entrant”).

8 Accordingly, the Court does not consider the “reasonable probability” that Meta could
9 have entered the VR dedicated fitness market [REDACTED] as an
10 “available feasible means” for the purposes of the actual potential competition analysis.

11 **b. Entry by Beat Saber–Peloton Partnership**

12 This brings us to the final means—and the FTC’s main theory—by which Meta could have
13 entered the VR dedicated fitness market: expanding its existing rhythm game app Beat Saber into
14 dedicated fitness and partnering with a fitness brand. The FTC claims that Meta scrapped this
15 Beat Saber proposal once it learned that Within was at risk of being acquired by Apple. Mot. 10,
16 20–21. However, this theory is neither supported by the contemporaneous remarks regarding the
17 Beat Saber proposal nor the timing of the subsequent investigation into this proposal.

18 First, the evidentiary record is unclear as to what exactly the widely referenced Beat
19 Saber–Peloton proposal would even look like. On some occasions, Stojavljevic—the proposal’s
20 primary advocate—refers to it as a “brand licensing w/ Peloton” or a “co-branding . . . Peloton
21 mode inside Beat Saber.” PX0144, at 1, Mar. 8, 2021; PX0407, at 1, Mar. 15, 2021. On other
22 occasions, Stojavljevic considers whether the proposal would be a separate Quest Store app.
23 PX0407, at 2. Michael Verdu—another proponent of expanding Beat Saber into fitness—also
24 recalled that the proposal never reached a point of “understanding what that partnership would
25 look like.” Verdu Dep. 201:14–23 (“[I]s it a Peloton-branded headset? Is it Peloton-branded
26 content inside of our headset? Like we didn’t even get to the point where we were exploring at
27 that level of detail.”). This uncertainty is consistent with the March 2021 “Beat Saber x Peloton

Opportunity Identification” presentation that [REDACTED] prepared at Stojavljevic’s request, which indicated that part of [REDACTED] task would be to define the partnership opportunity and determine how to present the proposal to Peloton. PX0121, at 5–6, Mar. 25, 2021. Ultimately, Stojavljevic did not even engage [REDACTED] to proceed with her proposed research into the Beat Saber proposal. PX0052 (“Stojavljevic Dep.”) 219:23–220:1.

Second, the Beat Saber–Peloton proposal did not enjoy uniform or even widespread support among the Meta personnel who were researching VR fitness opportunities. See PX341, at 2 (“Jane and Anand were arguing with me [Stojavljevic] when I was proposing Beat Saber x Peloton and thought we should buy [REDACTED] or Supernatural instead.”), June 11, 2021. Particularly, Jane Chiao had consistently and contemporaneously expressed doubts regarding the feasibility of repositioning Beat Saber to fitness. See PX0492, at 1, 7 (“Jane’s quick thoughts” included a section titled “Why not Beat Saber?” setting forth reasons against pivoting Beat Saber to fitness), Mar. 9, 2021. In one exchange, Chiao commented that [REDACTED] [REDACTED] [REDACTED].” PX0251, at 2, Mar. 4, 2021. Chiao’s opinion was informed by the previous difficulties she had in attempting to reposition Meta’s social functions for other uses. *Id.* at 2–3 ([REDACTED] [REDACTED]).

Third, the timeline and dearth of contemporaneous internal discussions on the Beat Games–Peloton proposal is inconsistent with the FTC’s narrative that the Within acquisition derailed an otherwise full-speed effort to explore the Beat Games proposal. See generally DDX07 (Defendants’ timeline demonstrative), at 31. In short, the idea was raised and endorsed by Stojavljevic on March 11, 2021 (PX0179); he solicited feedback from his peers a few days later (PX0407); and on March 25, 2021, he received a quote for a contractor to look into the proposal, but did not proceed with it (PX0121). After this initial scramble, the record reflects no further discussion about expanding Beat Saber into fitness before June 2021, when Meta began pursuing Within as an acquisition. Although the FTC argues that there is no direct evidence that Meta had

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1 deliberately dropped the Beat Saber proposal, the absence of active discussions could just as
 2 reasonably—and the Court finds that it does—support Meta’s explanation that the Beat Saber
 3 proposal had lost momentum after March 2021. The proposal’s main driver, Stojasavljevic,
 4 testified that he had already “slowed down before [Meta’s decision to pursue Within],” because he
 5 was busy with another Meta acquisition. Stojasavljevic Hr’g Tr. 165:12–17. Although subjective
 6 corporate testimony is generally deemed self-serving and entitled to low weight, Stojasavljevic’s
 7 lack of bandwidth is corroborated by his contemporaneous decision to outsource the research for
 8 the Beat Games proposal. See PX0121, at 1; see also Stojasavljevic Hr’g Tr. 163:25–165:11.

9 Moreover, when viewed alongside Meta’s history with Beat Saber, these two months of
 10 inactivity between March and June 2021 appear to have been the norm rather than the exception.
 11 Although Meta employees like Verdu were excited about Beat Saber’s potential as a vector into
 12 fitness, Meta has never been able to execute on that excitement in any of the years since they
 13 acquired Beat Saber. Verdu Dep. 178:12–20 (“[I]t was the perpetual white whale quest to get . . .
 14 Beat Games to build a fitness version of Beat Saber, which was like pushing on a string. We tried
 15 and tried and tried, and they never picked it up.”); see PX0123 (“[REDACTED] was on the goal
 16 list for the [beat] saber acquisition. . . . But that goal was never followed up on.”), Sept. 15, 2021.

17 Finally, the FTC cites two instances of contemporaneous Meta communications that
 18 suggest the Beat Saber proposal had not died on the vine when Meta pivoted to acquiring Within.
 19 See FTC Closing Hr’g Tr. 1495:10–24. The first is Verdu’s comment on June 20, 2021, that Meta
 20 was “in the *midst of a strategy exercise to decide between our alternatives* when Supernatural
 21 became in play (supposedly pursued by Apple), which accelerated everything.” PX0117, June 10,
 22 2021 (emphasis added). The FTC asserts that the referenced “alternatives” included the Beat
 23 Saber–Peloton proposal; however, this theory is inconsistent with the fact that there had been no
 24 internal discussion of the proposal in the preceding two months. The more likely interpretation is
 25 that “alternatives” referred to [REDACTED]

26 [REDACTED] See PX0253, at 1.

27 The second communication arose in the context of [REDACTED]

1 requested a sale price of [REDACTED]. PX0123, at 2, Sept. 15, 2021. In discussing alternatives to
 2 the Within acquisition, Jason Rubin suggested that another [REDACTED]
 3 [REDACTED] *Id.* He
 4 also suggested, “We might be able to buy [REDACTED], rebrand and redesign to Beat aesthetics.” *Id.* In
 5 assessing the weight of these statements, the Court makes a few contextual observations. At the
 6 time Rubin made his comments, he had only been in his role for about six weeks; Verdu (an
 7 employee with extensive knowledge of Meta’s history with VR fitness) previously held the role.
 8 PX0066 (“Rubin Dep.”) 28:8–15 (“On August 1st, I took or was handed the role that I have right
 9 now . . . and inherited [the Meta–Within] acquisition in full swing.”). Rubin also testified that,
 10 before switching roles, he “was not aware of anything having to do with fitness at all in the VR
 11 world” and had no knowledge of “how the company had come to its decision making to acquire
 12 [Within].” *Id.* 126:9–127:11. Perhaps on a record with more corroborating evidence, Rubin’s
 13 remarks may warrant more substantial weight towards the FTC’s theory that the Beat Saber fitness
 14 proposal remained a live proposition. However, given that Ruben’s remarks appeared to have
 15 been made off the cuff, are inconsistent with the overall weight of the evidence, and were made at
 16 a time when he was likely still unfamiliar with VR fitness and Meta’s history, the Court is
 17 disinclined to accord any significant weight to Rubin’s comments.

18 For all these reasons, the Court finds that it was not “reasonably probable” that Meta
 19 would have repositioned their top-selling VR app, Beat Saber, into a dedicated fitness app, even
 20 assuming that it could have identified a partner willing to provide VR fitness content.

21 * * *

22 After reviewing the evidentiary record and the parties’ arguments, the Court concludes that
 23 it is not “reasonably probable” that Meta would enter the market for VR dedicated fitness apps if it
 24 could not consummate the Acquisition. Though Meta boasts considerable financial and VR
 25 engineering resources, it did not possess the capabilities unique to VR dedicated fitness apps,
 26 specifically fitness content creation and studio production facilities. As a VR platform developer,
 27 Meta can enjoy many of the promising benefits of VR fitness growth without itself intervening in

the VR fitness app market. Finally, the proposal for Meta to expand Beat Saber into fitness was not “reasonably probable” for a whole host of reasons, in addition to the aforementioned obstacles to Meta’s *de novo* entry.

Accordingly, the Court finds that Meta did not have the “available feasible means” to enter the relevant market other than by acquisition. Because the FTC has not met its burden on this element, the Court does not proceed to the issue of whether Meta’s *de novo* entry was substantially likely to deconcentrate or result in other procompetitive effects in the relevant market.

In so finding, the Court concludes that the FTC has failed to establish a likelihood that it would ultimately succeed on the merits as to its Section 7 claim based on the actual potential competition theory.

E. Perceived Potential Competition

In addition to its claim that the Acquisition would lessen competition pursuant to the actual potential competition theory, the FTC also claims that the Acquisition violates Section 7 under the perceived potential competition theory. FAC ¶¶ 97–102. Under this theory, the FTC argues that the Acquisition would eliminate the competitive influence that Meta exerts on firms within the relevant market by virtue of its presence on the fringes of the market. *See, e.g., United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 559–60 (1973).

To prevail on a claim that the Acquisition would have eliminate perceived potential competition, the FTC must establish—in addition to showing a highly concentrated market, *see* Section III.C—the following: (1) Meta possessed the “characteristics, capabilities, and economic incentive to render it a perceived potential *de novo* entrant”; and (2) Meta’s “premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market.” *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 625 (1974). The same objective facts regarding Meta’s capability of entering the market under an actual potential competition theory are also “probative of violation of § 7 through loss of a procompetitive on-the-fringe influence.” *Falstaff Brewing*, 410 U.S. at 534 n.13; *see also Black & Decker*, 430 F. Supp. at 770. However, whereas a claim for actual potential competition may

consider the potential entrant's intent to enter the market, a perceived potential competition claim ignores the potential entrant's subjective intent to enter the market and instead focuses on the subjective perceptions of the in-market firms. *See Falstaff Brewing*, 410 U.S. at 533–36.

1. Potential Entrant Characteristics

In evaluating the FTC's perceived potential competition claim, the Court considers the same objective evidence regarding Meta's capabilities and incentives to enter the relevant market. Unsurprisingly, and for the same reasons explained above, the objective evidence in the record is insufficient to support a finding that it was "reasonably probable" Meta would enter the relevant market for purposes of the perceived potential competition doctrine. *See supra*, Section III.D.2.

Nor does the subjective evidence of the in-market firms' perceptions move the needle on this point. Although the FTC produced some evidence that Within co-founders and employees had expressed concern that Beat Saber or its fans could create a fitness version to compete with Supernatural, these statements are mostly stale with some significantly preceding the relevant time period. The FTC's strongest evidence that [REDACTED] were statements made [REDACTED] before Supernatural even entered the VR market in April 2020. *See, e.g.*, PX0627, at 2

[REDACTED] The FTC has only produced one document that post-dates Supernatural's launch, which is a June 2020 "Supernatural Product Strategy" presentation that noted [REDACTED] PX0615, at 8. However, even this document's weight is undercut by the fact that it was created nearly a year before Meta began pursuing Within as an acquisition target.¹⁴

¹⁴ The FTC also produces an April 2021 internal communication from *Meta*, where a Meta employee remarked that Within "very much worry that [Meta] will create a fitness first app
Case No.: [5:22-cv-04325-EJD](#)

Furthermore, subsequent but still contemporaneous evidence indicated that Within eventually came to [REDACTED]” DX1083, at 10, Sept. 22, 2020. In a September 2020 text conversation with a Within investor, Within’s co-founder Chris Milk explained that [REDACTED] *Id.* at 7. In the same conversation, Milk [REDACTED] [REDACTED] *Id.* at 67–68.

In summary, the evidentiary record indicates that [REDACTED] [REDACTED] [REDACTED] This finding, in addition to the overall absence of testimony from other in-market firms, would suggest that the FTC has failed to demonstrate that it was “reasonably probable” that Meta was perceived as a potential competitor into the relevant market. However, even if the FTC had prevailed on this element, the Court is convinced that it did not satisfy the second required showing for a perceived potential competition claim.

2. Tempering Effect

Under the second element of the perceived potential competition claim, the FTC must establish that Meta’s “premerger presence on the fringe of the target market *in fact* tempered oligopolistic behavior on the part of existing participants in that market.” *Marine Bancorporation*, 418 U.S. at 624–25 (emphasis added). In other words, the FTC must present evidence that it was “reasonably probable” that Meta’s presence as a potential competitor had a direct effect on the firms in the VR Dedicated Fitness market.

internally that takes their market share.” PX0514, at 2, Apr. 23, 2021. The Court is doubtful of the probative value of this hearsay statement, and the FTC has not produced any evidence to corroborate this statement. FTC Closing Hr’g Tr. 1498:2–9 (“[W]e heard from Ms. Brown, and you may recall that she did not remember much, if anything at all, about this document. . . . It’s up to this court to judge her credibility on that store. But she did say that she was being truthful when she wrote this.”).

Case No.: [5:22-cv-04325-EJD](#)

ORDER DENYING PLAINTIFF’S MOT. FOR PRELIM. INJUNCTION

In setting forth this standard, the Court rejects the FTC’s suggestion that it need only provide “[p]robabilistic proof of ‘likely influence’ on existing competitors.” Mot. 21. This interpretation arises from the language used by the Supreme Court in a footnote from *Falstaff Brewing*, specifically “[t]he Government did not produce *direct evidence* of how members of the [relevant] market reacted to potential competition from [the potential entrant], but *circumstantial evidence* is the lifeblood of antitrust law.” 410 U.S. at 534 n.13 (emphasis added). The Court reads this language to mean the FTC need not provide *direct evidence* of Within adopting its conduct to account for Meta’s presence (e.g., a hypothetical internal email at Within expressly communicating fear of Meta’s imminent entry and taking actions in anticipation). Direct evidence, however, is distinguishable from evidence of a *direct effect* experienced within the relevant market (e.g., circumstantial evidence that Within reduced prices shortly after Meta’s hypothetical public announcement that it was looking into the VR Dedicated Fitness market). This interpretation is supported by the Supreme Court’s statement of the law in *Marine Bancorporation*, 418 U.S. at 624–25 (requiring “presence . . . in fact tempered oligopolistic behavior”) and the Second Circuit’s interpretation in *Tenneco, Inc. v. FTC*, 689 F.2d 346, at 358 (“The Commission is correct that it need not produce direct evidence that [acquired company] altered its actions in response to a perception of [potential entrant] ‘in the wings.’ However, it must produce at least circumstantial evidence that [potential entrant’s] presence probably *directly affected* competitive activity in the market.”) (emphasis added). Accordingly, the FTC must produce *some* evidence—direct or circumstantial—that Meta’s presence had a direct effect on the firms in the relevant market.

Under this standard, the FTC’s evidence on this element is insufficient. The only evidence that suggests any kind of effect in the relevant market is that Within cited, as reasons not to reduce headcount at Within shortly before launching Supernatural, [REDACTED]
[REDACTED]
[REDACTED] PX0620, at 36, Mar. 8, 2020. As noted above, Within and Supernatural had not even entered the relevant market at the time of this

presentation. Consequently, this cannot be evidence of a direct effect within the VR dedicated fitness app market; rather, they are the preemptive considerations of a firm contemplating entry into the market. Moreover, the evidence indicates that Within had [REDACTED] [REDACTED]. *See supra* Section III.E.1. Other than this presentation, the FTC suggests that [REDACTED] [REDACTED] [REDACTED]” PX0621, at 2, Dec. 8, 2020. Although this is circumstantial evidence that Within was concerned about hypothetical potential entrants, absent further evidence, this email is no basis to infer the critical nexus, *i.e.*, that Meta was one such potential entrant.

The Court recognizes that its interpretation of the “effect” requirement sides with Defendants’ position set forth in their Motion to Dismiss. ECF No. 108, at 15–16; ECF No. 162, at 10–12. Although the Court ultimately determines that the FTC’s evidence has not established that Meta’s presence had a direct effect on Within’s behavior, it finds that the FTC’s *pleadings* are sufficient. The FTC had alleged that Within was “concerned about making any moves that would hurt its ability to compete against Meta as a potential entrant” and provided an example. FAC ¶ 101. At the pleadings stage, this satisfies their burden. Accordingly, the Court DENIES Defendants’ motion to dismiss the perceived potential competition claim.

In summary, the Court finds that the objective evidence does not support a reasonable probability that firms in the relevant market perceived Meta as a potential entrant. Even if it did, the Court finds that there is no direct or circumstantial evidence to suggest that Meta’s presence did in fact temper oligopolistic behavior or result in any other procompetitive benefits. Accordingly, the FTC has not demonstrated a likelihood of ultimate success as to its Section 7 claim arising from perceived potential competition.

F. Balancing of Equities

Because the FTC has not demonstrated a likelihood of ultimate success on the merits per the first § 13(b) element, the Court need not proceed to the balance the equities in the second

portion of the § 13(b) inquiry.

IV. CONCLUSION

Based on the foregoing reasons, the Court ORDERS as follows:

1. Defendants' Motion to Dismiss is DENIED;
2. Defendants' Motion to Strike is DENIED AS MOOT; and
3. Plaintiff's Motion for Preliminary Injunction is DENIED.

IT IS SO ORDERED.

Dated: January 31, 2023



EDWARD J. DAVILA
United States District Judge

United States District Court
Northern District of California

Nascent Competitors: Framework



Merger Guidelines

U.S. Department of Justice and the Federal Trade Commission

Issued: December 18, 2023

Eliminating a Nascent Competitive Threat. A merger may involve a dominant firm acquiring a nascent competitive threat—namely, a firm that could grow into a significant rival, facilitate other rivals’ growth, or otherwise lead to a reduction in its power.³⁷ In some cases, the nascent threat may be a firm that provides a product or service similar to the acquiring firm that does not substantially constrain the acquiring firm at the time of the merger but has the potential to grow into a more significant rival in the future. In other cases, factors such as network effects, scale economies, or switching costs may make it extremely difficult for a new entrant to offer all of the product features or services at comparable quality and terms that an incumbent offers. The most likely successful threats in these situations can be firms that initially avoid directly entering the dominant firm’s market, instead specializing in (a) serving a narrow customer segment, (b) offering services that only partially overlap with those of the incumbent, or (c) serving an overlapping customer segment with distinct products or services.

Firms with niche or only partially overlapping products or customers can grow into longer-term threats to a dominant firm. Once established in its niche, a nascent threat may be able to add features or serve additional customer segments, growing into greater overlap of customer segments or features over time, thereby intensifying competition with the dominant firm. A nascent threat may also facilitate customers aggregating additional products and services from multiple providers that serve as a partial alternative to the incumbent’s offering. Thus, the success and independence of the nascent threat may both provide for a direct threat of competition by the niche or nascent firm and may facilitate competition or encourage entry by other, potentially complementary providers that may provide a partial competitive constraint. In this way, the nascent threat supports what may be referred to as “ecosystem” competition. In this context, ecosystem competition refers to a situation where an incumbent firm that offers a wide array of products and services may be partially constrained by other combinations of products and services from one or more providers, even if the business model of those competing services is different.

Nascent threats may be particularly likely to emerge during technological transitions. Technological transitions can render existing entry barriers less relevant, temporarily making incumbents susceptible to competitive threats. For example, technological transitions can create temporary opportunities for entrants to differentiate or expand their offerings based on their alignment with new technologies, enabling them to capture network effects that otherwise insulate incumbents from competition. A merger in this context may lessen competition by preventing or delaying any such beneficial shift or by shaping it so that the incumbent retains its dominant position. For example, a dominant firm might seek to acquire firms to help it reinforce or recreate entry barriers so that its dominance endures past the technological transition. Or it might seek to acquire nascent threats that might otherwise gain sufficient customers to overcome entry barriers. In evaluating the potential for entrenching dominance, the Agencies take particular care to preserve opportunities for more competitive markets to emerge during such technological shifts.

³⁷ The Agencies assess acquisitions of nascent competitive threats by non-dominant firms under the other Guidelines.

Separate from and in addition to its Section 7 analysis, the Agencies will consider whether the merger violates Section 2 of the Sherman Act. For example, under Section 2 of the Sherman Act, a firm that may challenge a monopolist may be characterized as a “nascent threat” even if the impending threat is uncertain and may take several years to materialize.³⁸ The Agencies assess whether the merger is reasonably capable of contributing significantly to the preservation of monopoly power in violation of Section 2, which turns on whether the acquired firm is a nascent competitive threat.³⁹

³⁸ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

³⁹ *See id.* at 79 (“[I]t would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will. . .”).

Mallinckrodt/Novartis AG



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Mallinckrodt Will Pay \$100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants

Settlement requires the company to license rights to develop a synthetic alternative to Acthar

FOR RELEASE

January 18, 2017

TAGS: [Health Care](#) | [Prescription Drugs](#) | [Bureau of Competition](#) | [Competition](#)

Mallinckrodt ARD Inc., formerly known as Questcor Pharmaceuticals, Inc., and its parent company, Mallinckrodt plc, have agreed to pay \$100 million to settle Federal Trade Commission charges that they violated the antitrust laws when Questcor acquired the rights to a drug that threatened its monopoly in the U.S. market for adrenocorticotrophic hormone (ACTH) drugs. Acthar is a specialty drug used as a treatment for infantile spasms, a rare seizure disorder afflicting infants, as well a drug of last resort used to treat other serious medical conditions.

The FTC's complaint alleges that, while benefitting from an existing monopoly over the only U.S. ACTH drug, Acthar, Questcor illegally acquired the U.S. rights to develop a competing drug, Synacthen Depot. The acquisition stifled competition by preventing any other company from using the Synacthen assets to develop a synthetic ACTH drug, preserving Questcor's monopoly and allowing it to maintain extremely high prices for Acthar.

"Questcor took advantage of its monopoly to repeatedly raise the price of Acthar, from \$40 per vial in 2001 to more than \$34,000 per vial today – an 85,000 percent increase," said FTC Chairwoman Edith Ramirez. "We charge that, to maintain its monopoly pricing, it acquired the rights to its greatest competitive threat, a synthetic version of Acthar, to forestall future competition. This is precisely the kind of conduct the antitrust laws prohibit."

Acthar is a specialty drug used as a treatment for infantile spasms, a rare seizure disorder afflicting infants, and a drug of last resort to treat several other serious medical conditions – including nephrotic syndrome, flare-ups of multiple sclerosis, and rheumatoid disorders. According to the complaint, Acthar treatment for an infant with infantile spasms can cost more than \$100,000.

In Europe, Canada, and other parts of the world, the complaint notes that doctors treat patients suffering from these conditions with Synacthen Depot, which is available at a fraction of Acthar's price in the United States. The complaint alleges that Questcor has consistently viewed Synacthen Depot as a significant competitive threat to its Acthar monopoly in the United States.

The FTC alleges that in June 2013, Questcor acquired the U.S. rights to Synacthen from Novartis AG, outbidding several other companies that were seeking to acquire the rights to Synacthen. Those alternative bidders were interested in developing the drug and had plans to sell it at a significant discount to Acthar's price, capturing a substantial amount of Questcor's business. The FTC charges that Questcor's acquisition of Synacthen stifled competition and eliminated the possibility that an alternative bidder would make the drug available in the U.S. market and compete with Acthar.

In addition to the \$100 million monetary payment, the proposed stipulated court order requires that Questcor grant a license to develop Synacthen Depot to treat infantile spasms and nephrotic syndrome to a licensee approved by the Commission.

A monitor will ensure that Questcor complies with its obligation to grant the license within 120 days of the entry of the order; after that time, a trustee will be appointed to effectuate the license. The order also requires Questcor to provide periodic reports on its efforts, and provide the Commission with advance notice of any future acquisitions of U.S. rights to ACTH drugs.

The states of Alaska, Maryland, New York, Texas and Washington joined in the FTC's complaint. Under the settlement, the states will receive \$10 million from the \$100 million judgment and an additional \$2 million as payment for attorney's fees and costs.

The Commission vote authorizing staff to file the complaint and the proposed stipulated order in federal court was 3-0. [Commissioner Maureen K. Ohlhausen issued a concurring statement.](#) FTC staff filed the complaint and proposed order in the U.S. District Court for the District of Columbia.

NOTE: The Commission files a complaint when it has "reason to believe" that the law has been or is being violated and it appears to the Commission that a proceeding is in the public

interest. Stipulated orders have the force of law when approved and signed by the District Court judge.

The Federal Trade Commission works to [promote competition](#), and protect and educate consumers. You can learn more about [how competition benefits consumers](#) or [file an antitrust complaint](#). Like the FTC on [Facebook](#), follow us on [Twitter](#), read our [blogs](#) and [subscribe to press releases](#) for the latest FTC news and resources.

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[ftc.gov](https://www.ftc.gov)

**Concurring Statement of Maureen K. Ohlhausen
*In the Matter of Mallinckrodt ARD Inc.***

**File No. 131-0172
January 18, 2017**

Competition in healthcare markets, including pharmaceuticals, is vital for U.S. consumers. Thus, I have strongly supported the Commission's long-standing, bi-partisan work to protect competition in healthcare. But, as the Supreme Court has recognized "[t]he opportunity to charge monopoly prices at least for a short period is what attracts business acumen in the first place; it induces risk taking that produces innovation and economic growth."¹ Competition officials must allow a company to profit from its innovation, while preventing anticompetitive actions to unlawfully obtain or maintain a monopoly. Standing alone, a "high" pharmaceutical price is not an antitrust violation if it simply reflects a legally obtained intellectual property right. Antitrust comes into play when a firm lifts a competitive constraint on its market power, such as by acquiring a competitor or engaging in a pay-for-delay agreement. Likewise, in some circumstances, an action by a monopolist to block a nascent threat to its monopoly can violate antitrust law.²

I voted to accept the proposed consent in this matter because I have reason to believe that Mallinckrodt ARD Inc.—formerly known as Questcor Pharmaceuticals, Inc., and its parent company Mallinckrodt plc—violated the antitrust laws by acquiring the rights to the drug Synacthen Depot in the United States to protect its H.P. Acthar Gel monopoly. To restore competition, Questcor will divest rights to Synacthen Depot, and related assets, to a competitor committed, and already working to develop, a synthetic ACTH drug. This remedy will make a competitive drug option to Acthar more likely, thus decreasing prices and increasing availability for patients.

As part of the consent, however, Questcor also will pay more than \$100 million in disgorgement. I write separately because I have concerns about that aspect of the remedy.

I remain worried that the Commission sues in federal court and seeks disgorgement in matters that do not meet the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases,³ which the Commission withdrew over my objection in 2012.⁴ In empowering the FTC to bring cases in administrative adjudication, the President and Congress

¹ Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

² United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam) ("it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will.").

³ See Fed. Trade Comm'n, Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45820 (Aug. 4, 2003).

⁴ See Statement of Commissioner Maureen K. Ohlhausen Dissenting from the Commission's Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2012), <https://www.ftc.gov/public-statements/2012/07/statement-commissioner-maureen-k-ohlhausen-dissenting-commissions-decision>.

more than 100 years ago gave the Commission a responsibility to develop our antitrust laws. I would have brought, and settled, this case in administrative adjudication rather than filing in federal court.

Facebook/Instagram/WhatsApp

FTC v. META PLATFORMS, INC.
775 F. Supp. 3d 16, 26, 53, 55-74 (D.D.C. 2024)
(excerpt on Instagram/WhatsApp acquisitions^{*})

JAMES E. BOASBERG, Chief Judge:

[Facebook, now Meta Platforms, acquired Instagram in 2012 and WhatsApp in 2014. Instagram offered a rapidly growing mobile photo-sharing service. WhatsApp, founded by Brian Acton and Jan Koum in 2009, operated an “over-the-top” (OTT) mobile-messaging service that used the internet rather than traditional telephone infrastructure. By April 2013, it had 320 million registered users, most of them outside the United States. Both acquisitions underwent premerger review under the Hart-Scott-Rodino Act. The FTC investigated Instagram for more than four months, including a request for additional information and documents, before allowing the acquisition to proceed. It closed its investigation of WhatsApp less than a month after the parties’ HSR filing. These decisions did not immunize the acquisitions from subsequent challenge or create a presumption of legality.

In December 2020, the FTC sued Facebook, alleging that it had unlawfully maintained a monopoly in personal social-networking (PSN) services in violation of Section 2 of the Sherman Act. The FTC alleged that this conduct also violated Section 5 of the FTC Act and sought permanent injunctive and other equitable relief, including possible divestiture, under Section 13(b) of that Act. The FTC alleged that Meta had acquired two actual or nascent competitors. On its theory, Instagram already competed with Facebook or was poised to do so, while WhatsApp posed a nascent threat because its messaging service could develop into a competing PSN service. The court applied a single standard to “actual competitors or nascent threats.” It found evidence that Instagram “arguably qualified as an actual competitor,” but much of that evidence concerned the threat Meta believed Instagram would pose if it remained independent.

The FTC did not assert a claim under Section 7 of the Clayton Act, which prohibits acquisitions whose effect “may be substantially to lessen competition, or to tend to create a monopoly.” The monopoly maintenance claim pleaded under Section 2 required proof of monopoly power and exclusionary conduct that maintained that power. Section 7 does not require proof that the acquiring firm already possesses monopoly power. The statutory distinction also shaped the court’s analysis of competitive harm and justifications: the court applied the Section 2 framework of *United States v. Microsoft Corp.*, declined to import the stricter entry-probability standard associated with Section 7 potential-competition cases, and considered how

^{*} Record citations and cross-references omitted without notation. “[Redacted]” notations appear in the publicly released version of the opinion.

Section 2's treatment of procompetitive justifications related to the treatment of merger efficiencies under Section 7.

Meta moved for summary judgment, and the FTC cross-moved for partial summary judgment on Meta's procompetitive justifications. The court held that disputed issues of material fact required a trial on the acquisitions and most of the asserted justifications; it rejected Meta's de-platforming justification. The following excerpts address the standards for identifying anticompetitive acquisitions, their application to Instagram and WhatsApp, and the treatment of procompetitive justifications. The court's separate analysis of monopoly power is omitted. The court refers to the company as "Meta" throughout, even for events before its 2021 name change, and uses "Facebook" (or "Facebook Blue") for the social-networking application itself. Mark Zuckerberg, Meta's founder, was its CEO throughout the period at issue.]

...

Although the field of the parties' combat has shrunk somewhat over time, the FTC's story has remained "essentially unchanged." *FTC v. Facebook, Inc. (Facebook II)*, 581 F. Supp. 3d 34, 40 (D.D.C. 2022). Armed now with experts and evidence, Plaintiff continues to argue that a relevant antitrust market exists for personal social-networking (PSN) services and that, since at least 2012, Meta has enjoyed monopoly power in that market. The Commission further contends that Defendant unlawfully maintained that monopoly by acquiring two actual or nascent competitors, Instagram and WhatsApp, that posed a threat to its dominance at the time. Meta retorts that PSN services do not constitute a relevant antitrust market over which the company exercises any degree of monopoly power and that no other direct effects of monopoly power have been shown. Even if it did possess such power, Meta denies that its Instagram and WhatsApp acquisitions were anticompetitive, especially considering the significant investments it has since made to improve and grow both applications.

In the end, while the parties' legal jousting is both impressive and comprehensive, it leaves no clear victor. This case must go to trial. Under the forgiving summary-judgment standard, the FTC has put forward evidence sufficient for a reasonable factfinder to rule in its favor. Prevailing here, however, does not obscure the fact that the Commission faces hard questions about whether its claims can hold up in the crucible of trial. Indeed, its positions at times strain this country's creaking antitrust precedents to their limits. All the same, except for Count II,[†] which the Court previously found lacking but could not dismiss, and one of Meta's defenses, for which Defendant has not proffered sufficient evidence to survive summary judgment, the

[†] [Editor's note: Count II combined the acquisition allegations in Count I with allegations concerning Meta's restrictions on interoperability with rival applications. The court had previously held that the interoperability allegations concerned past conduct and did not support injunctive relief under Section 13(b). It could not dismiss only that portion of Count II at the pleading stage because the count also included the viable acquisition allegations. At summary judgment, it removed the interoperability component, leaving the acquisition claims for trial. See 775 F. Supp. 3d at 32-33, 52-53.]

Court will deny Meta's Motion for Summary Judgment and the FTC's Cross-Motion for Partial Summary Judgment.

...

III. Analysis

...

A. Monopoly Power

...

B. Anticompetitive Conduct

...

In evaluating these [acquisitions], the Court is guided by the Circuit's holding in [*United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc)]. It there held that “[w]hether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge ... lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it.” 253 F.3d at 58. To aid in that task, the *Microsoft* court articulated several principles that “emerge” from “a century of case law on monopolization under § 2.” *Id.* “First, to be condemned as exclusionary, a monopolist's act must have an ‘anticompetitive effect.’ That is, it must harm the competitive process and thereby harm consumers.” *Id.* “Second, the plaintiff, on whom the burden of proof of course rests, must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect.” *Id.* at 58–59 (citations omitted). “Third, if a plaintiff successfully establishes a *prima facie* case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a ‘procompetitive justification’ for its conduct.” *Id.* at 59. And “[f]ourth, if the monopolist's procompetitive justification stands un rebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.” *Id.*

...

1. Legal Framework

a. Anticompetitive Effects

[Meta argued that the FTC could make out a *prima facie* case only by showing that the acquisitions raised prices, reduced output, or degraded quality compared with a world in which they had not occurred. The court disagreed. Under *Microsoft*, it held, conduct has a Section 2 anticompetitive effect if it maintains a monopoly by means other than competition on the merits; evidence of price and output effects is probative but not required.]

Critically, Microsoft's anticompetitive conduct was aimed at what the court called “nascent threats”—middleware products that did not yet compete with Microsoft in the operating-system market but posed the threat of doing so. *Id.* at 53–54, 79. The court went on to articulate a “rather edentulous test” for determining that Microsoft's exclusionary conduct contributed to its continued monopoly: causation could be

inferred “from the fact that a defendant has engaged in anticompetitive conduct that reasonably appears capable of making a significant contribution to maintaining monopoly power.” *Id.* at 79 (cleaned up). Thus, the court wrote, the analysis came down to two key questions: first, “whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant’s continued monopoly power,” and second, “whether [the middleware products] reasonably constituted nascent threats at the time Microsoft engaged in the anticompetitive conduct at issue.” *Id.* As to the first question, the court had no doubt that such conduct was proscribed. *Id.* On the second, it found the record supported that the middleware products “showed potential as ... threats.” *Id.*

Meta strains to read into *Microsoft* a focus on price or output effects, but it comes up empty. Again and again, *Microsoft* holds that anticompetitive conduct by a monopolist is simply conduct that maintains or expands its monopoly other than through competition on the merits. The “exclusion” of competitors, the court held, qualifies as such conduct. This Court sees no reason why a monopolist’s acquisition of its competitors should be any different. *See* III Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 701b, at 228 (5th ed. 2022) (“The monopolist’s acquisition of a rival must be treated ... clearly as anticompetitive to the extent that it eliminates competition that might have otherwise dissipated the monopolist’s power. As such, it is a classic strategy of monopoly maintenance.”). To hold otherwise would imply that, had Microsoft simply acquired Netscape Navigator rather than sought to exclude it from the market, Section 2 would have remained dormant. Meta provides no authority—nor is the Court aware of any—that would support such a conclusion.

...

Under *Microsoft*, moreover, the presumption of illegality [that attaches to a monopolist’s acquisition of an actual competitor] would appear to apply to acquisitions of nascent as well as actual competitors. “Indeed, one of the most effective ways for a dominant firm to maintain its monopoly position is to acquire incipient rivals as they appear on the horizon.” Herbert Hovenkamp, *Federal Antitrust Policy*, § 7.2, at 314 (4th ed. 2011). “[W]hen the dominant firm in the market” merges with a nascent rival, the merger “tends to maintain a monopoly by cutting off an avenue of future competition before it has had a chance to develop. As a result, condemnation under § 2 is appropriate.” IV Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 912b, at 92 (4th ed. 2016).

...

At issue here is emphatically not the merger of rivals in a competitive industry, but the acquisition of a nascent competitor by the dominant firm in a market protected by entry barriers. *Cf. McWane[, Inc. v. FTC]*, 783 F.3d [814] at 836 [(11th Cir. 2015)] (“[C]ompetitors and competition are linked, particularly in the right market settings”); *Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917, 951 (6th Cir. 2005) (“[I]n a concentrated market with very high barriers to entry, competition will not exist without competitors.”). When a monopolist acquires a rival, even a nascent one, a rebuttable presumption therefore arises that the merger is anticompetitive. *See* IV

Areeda & Hovenkamp, ¶ 912a, at 92 (acquisition by dominant firm of nascent rival “eliminates an important route by which competition could have increased in the immediate future” and “thus bears a very strong presumption of illegality that should rarely be defeated”).

...

Following *Microsoft*, then, the Court holds that, as a general matter, the acquisition of actual competitors or nascent threats by a monopoly is “the type of conduct that is reasonably capable of contributing significantly to a defendant’s continued monopoly power.” 253 F.3d at 79. This is so because such action tends to maintain monopoly by means other than competition on the merits. The key question in this case thus becomes whether Instagram and WhatsApp “reasonably constituted nascent threats” (or actual competitors) “at the time” Meta acquired them. *Id.* If so, then the Commission has made out a prima facie case of monopolization, see [*United States v. Google [LLC]*, 747 F. Supp. 3d [1] at 165 [(D.D.C. 2024)] (“The loss of nascent competitors is a clear anticompetitive effect.”), and the burden shifts to Meta to show that the acquisitions nonetheless have sufficient procompetitive justifications. Defendant’s arguments concerning low prices, increased output, and increased innovation are thus properly viewed, if anything, as procompetitive rebuttals to Plaintiff’s prima facie case, rather than as evidence that the acquisitions themselves had no anticompetitive effects. The Court stresses, moreover, that *Microsoft*’s toothless causation standard applies only to the question of liability. If Plaintiff achieves a favorable verdict at trial, it must meet a stricter standard to merit a structural remedy like divestiture. See *Microsoft*, 253 F.3d at 80.

b. Nascent Threats

So formulated, this standard places pressure on what it means to “reasonably constitute[] a nascent threat.” *Id.* at 79. Neither party has thoroughly briefed this question. For its part, Meta at times makes use of precedent from a parallel but different context: that of the potential-competition doctrine, which is typically employed in cases brought under Section 7 of the Clayton Act when an acquisition eliminates the possibility that one firm would have entered a new market and created procompetitive effects. See, e.g., [*United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 639 (1974)]. Although the viability of the doctrine is a subject of considerable debate, most courts that accept it appear to hold that it requires at least something like a “reasonable probability” that the competitor would have entered the target market and matured into a competitive force. See *FTC v. Meta Platforms, Inc.*, 654 F. Supp. 3d 892, 926–27 (N.D. Cal. 2023) (discussing cases). Our Circuit, however, has not endorsed or applied the potential-competition doctrine even in the Section 7 context, and its strict standard is in significant tension with *Microsoft* itself, which never adverted to it.

The doctrine has, moreover, mostly arisen to evaluate the competitive harm that arises when the acquiring firm chooses to merge with an existing market participant rather than to compete in a concentrated market itself. See, e.g., *Marine Bancorporation*, 418 U.S. at 605; *United States v. Phillips Petrol. Co.*, 367 F. Supp. 1226, 1228–29 (C.D. Cal. 1973), *aff’d sub nom. Tidewater Oil Co. v. United States*, 418 U.S. 906 (1974); *Meta*, 654 F. Supp. 3d at 908; *cf. FTC v. Steris Corp.*,

133 F. Supp. 3d 962, 966 (N.D. Ohio 2015) (applying theory to acquisition of potential entrant rather than established participant). That is a materially different circumstance from a monopolist's acquisition of a nascent threat that may develop into a future competitor. *Cf.* III Areeda & Hovenkamp, ¶ 701d, at 233 (while potential-competition doctrine is “rightfully criticized for involving courts in undue speculation about likely consequences,” “anticompetitive concerns are much less speculative” when “one of the merging firms is a monopolist and the other is a potential entrant into the same market in which the monopolist has power”). Here, moreover, Meta has not explicitly pushed the adoption of such a standard, and the Court is not inclined to adopt it *sua sponte* as appropriate for a Section 2 case.

That leaves the Court with little other guidance. *Microsoft* observed only that, in the context of that case, the excluded competitors “showed potential as . . . threats,” relying in part on the estimation of Microsoft itself. *See* 253 F.3d at 79 (noting concession by counsel for Microsoft). That formulation appears simply to reword the court's “reasonably constituted nascent threats” standard. Professors Areeda and Hovenkamp have advocated applying the potential-competition doctrine to such circumstances while considerably lowering the bar and would thus label as presumptively anticompetitive a monopolist's “acquisition of any firm that has the economic capabilities for entry and is a more-than-fanciful possible entrant.” III Areeda & Hovenkamp, ¶ 701d, at 235. Neither party to this case has provided an alternative.

Bound by *Microsoft*, the Court will implement its laconic standard as best it can. At a minimum, if the acquiring firm itself—a rational economic actor in possession of relevant information about the market's competitive dynamics, *see* III Areeda & Hovenkamp, ¶ 701d, at 233 (“The single-firm monopolist is in a position to make unilateral decisions about the risk and impact of new entry”)—reasonably viewed the acquisition as a nascent competitor, that is likely to be highly probative evidence that the acquired firm constituted such a threat. This approach aligns with the accepted rule that evidence of anticompetitive intent “is relevant only to the extent it helps us to understand the likely effect of the monopolist's conduct.” *Microsoft*, 253 F.3d at 59; *see Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (“[K]nowledge of intent may help the court to interpret facts and to predict consequences.”). A monopolist's fearful acquisition of a nascent competitor tends to show that the “likely effect” of the acquisition is to eliminate a threat to its dominance, and *ipso facto* that the acquired firm “reasonably constituted” such a threat.

That said, objective evidence of the acquired firm's capability or willingness to develop into such a threat—where available—will also be probative. Threats can be overstated, especially by firms protective of their dominance. Evidence that the acquired firm could not reasonably have matured into a real competitor must cut heavily against a monopolist's subjective expectation that it would. Conversely, evidence that the acquired firm had the capability and willingness to enter the monopolist's market may suffice to show it was a nascent threat, even in the absence of strong evidence that the monopolist so viewed its acquisition target. *Cf. Mercantile Tex. Corp. v. Bd. of Govs. of Fed. Rsrv. Sys.*, 638 F.2d 1255, 1270 (5th Cir. Unit A

1981) (absence of subjective intent not fatal to potential-competition claim if objective evidence supports reasonable probability of procompetitive entry). In the sections that follow, the Court will thus focus on Meta's own assessment of Instagram and WhatsApp, coupled with any other objective evidence of the target firms' capabilities or willingness to compete in Defendant's market, to form a realistic understanding of the competitive threat they posed.

Before doing so, however, one last piece of housekeeping is in order. Meta has re-upped its argument that a presumption of legality should be extended to its acquisitions because the FTC previously cleared them to go forward during the Hart-Scott-Rodino process. The Court previously rejected this argument, *see Facebook II*, 581 F. Supp. 3d at 57, and it sees no reason to revisit that issue. As it previously explained, the closing of the HSR process is explicitly “not to be construed as a determination that a violation may not have occurred,” and “it would be improper to draw a merits conclusion about the legality of the mergers on the basis of” such decisions. *Id.* (internal quotation marks omitted). While unusual, the Commission's decision to revisit mergers it previously declined to block is entitled to full consideration on the merits.

2. Acquisitions

The Court will now assess whether Plaintiff's evidence could convince a reasonable factfinder that Instagram and WhatsApp either were actual competitors with Meta or “reasonably constituted nascent threats” to Meta's monopoly at the time of their acquisitions. *Microsoft*, 253 F.3d at 79. It finds that the FTC has met its burden on this front, as it has proffered evidence that Instagram arguably qualified as an actual competitor and that WhatsApp constituted a nascent threat.

a. Instagram

The FTC's story of the Instagram acquisition begins with what it calls the “shift to mobile”: a period beginning in 2010 with the launch of the iPhone 4 where the competitive dynamics of social media shifted. Designed for desktop computers, Facebook had “enormous disadvantages” in adapting to the new environment compared to “mobile first” start-ups. According to the FTC, moreover, Facebook's transition to mobile was not going well: users complained of the mobile application's poor quality, lack of speed, and propensity to crash, even as, by 2012, most of its users were accessing Facebook on their mobile devices. The application's photo features were a particular pain point. In 2012, for instance, Zuckerberg wrote that “when you look at Instagram and Path and then go back to our Newsfeed, it looks like ours was built in the stone age.” A few months later, he admitted that Facebook was “behind” Instagram in developing a compelling mobile experience.

Meanwhile, Instagram was pitching itself to investors as a “mobile-first network focused on photos.” Launched in 2010, it “was designed specifically to take advantage of the shift to mobile.” In contrast to Facebook's mobile application, Instagram's was “praised as exemplifying the speed, reliability, and simplicity necessary to succeed in the mobile environment.” It accordingly grew quickly: from 25,000 registered users on its first day to 35 million users by the time Meta agreed to acquire the company. By

2012, it was growing faster than the Facebook application's mobile photo-sharing capability. Evidence in the record suggests, moreover, that Instagram was eyeing expansions beyond photo sharing, including video features and direct messaging.

This growth posed competitive problems for Meta. At the time, Instagram's founders, Kevin Systrom and Mike Krieger, viewed their start-up as either already or imminently in competition with Defendant. Systrom has testified that Instagram was “clearly competitive” with Meta, and that it would be “inevitable” that Zuckerberg would “think that we were in conflict” if Instagram remained independent. Krieger similarly testified that Instagram's “continued growth posed a challenge” to Meta because, “for people who used Instagram heavily,” it was “a primary way in which they kept up with their friends and family potentially, and that is also a use case that Facebook has.”

Meta, meanwhile, fretted over the challenge posed by Instagram. Zuckerberg noted in 2011 that Instagram was “kick[ing] ass,” and he worried that “they could easily add pieces of their service that copy what we're doing now,” which could pose “a real issue for [Meta].” “[F]rom a defense perspective,” a Meta engineer also told Zuckerberg, Instagram was a “compelling” acquisition “because of the potential for someone like Apple to use them as a foothold.” By February 2012, Zuckerberg described Meta as “very behind” Instagram, and the prospect of having to catch up was “really scary”—so Meta “might want to consider paying a lot of money” to acquire it. Four months later, his worries only intensified. He noted that Instagram could “hurt [Meta] meaningfully” by shifting “a core use case[]” away from Meta, and that “it's kind of going to be tough to dislodge” Instagram.

These worries were not helped by the fact that Facebook's own photo-sharing forays were not seeing comparable success. A few months after Instagram launched, a Meta executive informed Zuckerberg that the Facebook photos team was “now focused almost exclusively on a new mobile photo app as we gawk at Instagram's simple photo-sharing app taking off.” Meta began to develop a standalone product—initially known as “Snap,” then “Facebook Camera”—to compete with Instagram, given initial difficulties with integrating photo-sharing on the Facebook Blue application. But progress was slow, and Instagram was growing quickly. In April 2012, Zuckerberg urged his team “to crank and get [Facebook Camera] out,” or otherwise Instagram “may really be unreachable.”

Small surprise, then, that the case for acquiring Instagram focused heavily on neutralizing a competitive threat. By February 2012, Zuckerberg was suggesting to colleagues that Meta “should consider buying Instagram, even if it costs ~\$500m” because “they seem to have two things that we don't: a really good camera and a photo-centric sharing network.” On camera features, he worried that it would take Meta “a huge amount of work” and “too long to catch up [to Instagram], if we even will,” and the company would thus “be very behind in both functionality and brand on how one of the core use cases of Facebook will evolve in the mobile world, which is really scary and why we might want to consider paying a lot of money for this.” Discussing the potential acquisition with his CFO, Zuckerberg wrote that Instagram and another potential acquisition target—Path—were “nascent but the networks are established,

the brands are already meaningful[,] and if they grow to a large scale they could be very disruptive to us.” He then wrote that his purpose in acquiring Instagram and potentially other startups would be a combination of “neutraliz[ing] a potential competitor” and “integrat[ing] their products with ours in order to improve” Meta’s service.

He then explained his reasoning at length:

The basic plan would be to buy these companies and leave their products running while over time incorporating the social dynamics they’ve invented into our core products.

One thing that may make [neutralizing a potential competitor] more reasonable here is that there are network effects around social products and a finite number of different social mechanics to invent. Once someone wins at a specific mechanic, it’s difficult for others to supplant them without doing something different....

[Integrating their products to improve Meta] is also a factor but in reality we already know these companies’ social dynamics and will integrate them over the next 12–24 months anyway. The integration plan involves building their mechanics into our products rather than directly integrating their products if that makes sense....

[O]ne way of looking at this is that what we’re really buying is time. Even if some new competitors spring[] up, buying Instagram, Path, Foursquare, etc[.] now will give us a year or more to integrate their dynamics before anyone can get close to their scale again. Within that time, if we incorporate the social mechanics they were using, those new products won’t get much traction since we’ll already have their mechanics deployed at scale.

In light of these justifications, Zuckerberg and his team were willing to pay a pretty penny to buy Instagram. By April 2012, he was expressing the view that Instagram could be worth the “really expensive—probably ~\$1 billion” cost because it was “pretty threatening” and could “hurt [Meta] meaningfully.” Sure enough, Meta paid \$1 billion to acquire the company. That amount was double Instagram’s recent Series B valuation, and, according to Instagram’s founders, an “unprecedented” amount of money. After the acquisition, Zuckerberg nonetheless explained to Meta employees that the buyout “was a no brainer” because Instagram had grown into a “mega-network” that was “on the path to win” had Meta not acquired it. Another Meta executive explained that the “high level rationale” for the acquisition was that Instagram “had escape velocity in terms of user traction (growth, engagement) and had/would become a ‘core’ social, mobile service in a strategically important area for us (photo sharing) and in a different but important way (follower graph).”

Evidence put forward by the FTC also suggests that Instagram was uniquely positioned to pose this competitive threat to Meta. Other competitors at the time—namely, Path, PicPlz, and Treehouse—failed to reach a comparable level of success. Path, [Redacted], grew slowly, reaching only 2 million users (to Instagram’s 30 million) by April 2012, even though it was [Redacted]. It limped along until 2018,

when it was eventually shuttered. Internal documents suggest that Meta accordingly took a more dismissive attitude toward it. And PicPlz and Treehouse faded even faster.

This evidence is sufficient to convince a reasonable factfinder that Instagram was already a competitive threat to Meta at the time of its acquisition; that few other firms posed a comparable threat; and that Meta's acquisition of Instagram while it enjoyed monopoly power was thus presumptively anticompetitive. *Cf. Microsoft*, 253 F.3d at 79.

...

Plaintiff points out that Defendant decided to discontinue Facebook Camera—its competitive response to Instagram—as a standalone application shortly after the acquisition.

Meta argues that the above evidence overstates Instagram's competitive threat and underappreciates the procompetitive benefits that flowed from the merger. At the time of the acquisition, Defendant points out, “Instagram was a startup with just 13 employees that had limited features, no plan to make money, and a third-party infrastructure that suffered repeated service outages and spam attacks.” It is thus mere “conjecture” that Instagram would have even survived, much less thrived, had Meta not bought it. After the acquisition, according to Meta, it poured billions into developing and growing Instagram, adding “dozens of new features” and providing “hundreds of billions of dollars of consumer surplus” since 2012. Indeed, Meta argues, Instagram could not have achieved such success and growth without Meta's expertise.

Defendant's arguments, however, mostly demonstrate the existence of factual disputes over whether Instagram was a competitive threat (or very likely to become one) at the time of the acquisition. Plaintiff has put forward ample evidence that it was, and that evidence carries its burden at this stage in the proceedings. Defendant is also wrong to suggest that Plaintiff must prove that Instagram would have avoided the “graveyard ... of promising startups” in order to make its case. On the contrary, *Microsoft* held that, where it can be shown that a monopolist squashed an actual or nascent competitor, “the defendant is made to suffer the uncertain consequences of its own undesirable conduct.” 253 F.3d at 79 (internal quotation marks omitted). Meta's evidence of consumer surplus and the procompetitive benefits of the merger are, moreover, best understood as rebuttals to the Commission's *prima facie* case—*i.e.*, as evidence that the elimination of a monopolist's competitor did not actually result in reduced consumer welfare, as expected. The Court will thus consider that evidence when assessing Plaintiff's Cross-Motion for Partial Summary Judgment.

b. WhatsApp

Unlike Instagram, WhatsApp was not Meta's actual competitor when acquired. Instead, the FTC's theory is that WhatsApp was a nascent competitor: a messaging application with the potential to expand into the PSN market. Although Plaintiff's evidence on this front is less extensive than it is for Instagram, it also creates a triable issue of fact over whether the WhatsApp acquisition was anticompetitive.

The switch to mobile again provides the starting point for this tale. As part of that transformation, OTT mobile-messaging applications—which relied on the internet to send messages—became newly available. One such application was Meta's own

Facebook Messenger; another was WhatsApp. As previously recounted, WhatsApp grew quickly, especially overseas. Meta executives assessed at the time that WhatsApp was outperforming Facebook Messenger along multiple dimensions, including its ability to notify users that they had received a message. As a result, more users relied on WhatsApp than on Messenger to send messages.

The real danger, however, was not WhatsApp's dominance of OTT mobile messaging. It was the possibility that it might pivot into providing PSN services. As Plaintiff notes, other OTT mobile-messaging services had made such a pivot in Asia by 2012, mostly to grand success. Meta executives, noting WhatsApp's growth as a messaging service, began tracking such pivots. Leadership was openly nervous: one internal presentation called mobile messengers “one of the most significant competitive threats [Meta] face[s]” because they were “increasingly moving into core social-networking product areas,” posing “a direct threat to [Meta's] primary products.” In February 2013, Zuckerberg told Meta's board of directors that he wanted to “use M&A to build a competitive moat around [Meta] on mobile and ads.” He explained that “the biggest competitive vector for [Meta] is for some company to build out a messaging app for communicating with small groups of people, and then transform[] that into a broader social network.” A month later, he wrote of “rumors of WhatsApp” doing just that. A different Meta executive said in an email that this possibility kept him “awake every night.”

Record evidence suggests that these fears had some basis in reality. WhatsApp may have been capable of the pivot: the FTC's expert witness opined that it showed “extraordinary promise as indicated by industry metrics for scale, growth, and engagement.” Sequoia Capital, a prominent venture firm that took a seat on WhatsApp's board as part of its growth-round investment, provided comprehensive assistance to WhatsApp, from hiring, to acquisitions, to money management and more. Such evidence supports the thesis that WhatsApp could have pulled off an expansion into new markets. In addition to the capability to pivot, moreover, WhatsApp had a reason to do so: it needed a viable monetization approach. While it was operating on a paid subscription model for some users (and a single download fee for others), [Redacted]. Advertising typically provides such a path, but it was a poor match for a messaging service because it detracted from the user experience significantly. [Redacted].

Meta also appeared to worry that another company could snap up WhatsApp and develop it into a PSN service. By April 2012, Zuckerberg was under the impression that WhatsApp had turned down a sizable offer from Google and stated that he was willing to pay \$1 billion “if [Meta] could get them.” Meta leadership speculated that Google would be interested in trying again, especially after the failure of its own PSN service, Google+. That outcome, all agreed, would be a major issue for Meta. And, as it turns out, Google had been trying to buy WhatsApp—since at least 2010, to the tune of up to [Redacted]—potentially to develop it (according to one Google presentation) “into a mobile social network.” Meta was also aware that other suitors, such as WeChat's owner Tencent, were pursuing a WhatsApp acquisition.

So, Meta acted. Spurred on by renewed interest[] from Google, Meta leadership began more explicit overtures to WhatsApp's Jan Koum in early February 2014. By February 17, Meta's board of directors had met to approve the acquisition, at a total cost of \$19 billion. Two days later, the acquisition was announced at that price. Plaintiff's evidence suggests that most valuations of WhatsApp prior to that date, either explicit or implied, reached at most \$12.5 billion. It also suggests that Meta did not conduct such a valuation itself. Indeed, using a post-hoc valuation conducted by accounting firm KPMG at Meta's behest in 2015, the FTC asserts that Meta incurred "a \$10.9 billion or 135% transaction premium for its acquisition of WhatsApp."

Defendant amusingly contends that the FTC's narrative "makes Jack-and-the-Beanstalk sound like a documentary." It points in rebuttal to several pieces of evidence that WhatsApp did not constitute the threat to Meta that the Commission claims, including statements from WhatsApp's founders that it had no intention of pursuing growth in the U.S. market, pivoting into providing PSN services, or pursuing monetization via advertising, to which it had a "deep aversion." Defendant also observes that several other messaging products could have been well positioned to make the pivot, putting pressure on the FTC's theory that the acquisition of WhatsApp materially reduced competitive pressure on Meta. As for the story about Google's interest in acquiring WhatsApp to build it into a PSN service? A "chain of speculation," built on "spectral possibilities."

Whatever the persuasiveness of Meta's arguments on this front, however—and they are surely stronger than its maneuvers regarding the Instagram acquisition—they merely raise the existence of deep factual disputes requiring the weighing of various pieces of evidence. At this stage, a reasonable factfinder could conclude, based on the evidence Plaintiff has presented, that WhatsApp constituted a nascent threat to Meta at the time of its acquisition, and that the merger was therefore anticompetitive. The evidence certainly provides reason to think that Meta feared WhatsApp's potential as a nascent PSN service and that WhatsApp was capable of making such a pivot, as many of its rivals had done outside the United States. That evidence is sufficient to preclude summary judgment.

* * *

In *Microsoft*, our Circuit prohibited monopolists from "squash[ing] nascent, albeit unproven, competitors at will — particularly in industries marked by rapid technological advance and frequent paradigm shifts." 253 F.3d at 79. Today, the Court holds that a trier of fact could reasonably conclude that Meta did just that when it acquired Instagram and WhatsApp and eliminated them as actual or nascent competitive threats. Abundant evidentiary disputes of course remain, just as they do for whether Meta possesses monopoly power in the first place. But those disputes, whatever their ultimate resolution, hold open the courthouse doors for now.

3. Procompetitive Justifications

What remains to be decided is the FTC's Cross-Motion for Partial Summary Judgment on certain of Defendant's affirmative defenses. Having survived Meta's barrage against its own case, Plaintiff fires back that there is no further dispute of

material fact as to whether Meta's procompetitive justifications for the acquisitions outweigh their anticompetitive effects. It thus asks the Court to bar Defendant from raising these defenses at trial. Here, however, the (brown) shoe is on the other foot. In evaluating much of the same record evidence as above, the Court changes tack and gives Meta all of the favorable factual inferences that it has just given to the FTC. It first discusses the applicable legal principles for evaluating such justifications. It then applies that framework to Meta's asserted justifications and finds that each but the last survives to trial.

a. Legal Framework

Unfortunately for the reader, who has already traversed hill and dale, more tricky terrain must be navigated before we are home. The central issue is this: for many decades, mergers in this nation have been challenged mostly under Section 7 of the Clayton Act, which permits enforcement agencies to block any merger where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly” in “any line of commerce.” 15 U.S.C. § 18. In that forward-looking context, the law has treated claims of procompetitive merger efficiencies with some hostility, especially when monopoly looms. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.C. Cir. 2001) (merger in highly concentrated market requires “proof of extraordinary efficiencies” to rebut *prima facie* case of illegality); [*United States v. Anthem[, Inc.]*, 855 F.3d [345] at 353–54 [(D.C. Cir. 2017)] (expressing doubt over the legal viability of an efficiencies defense but rejecting that proposed efficiencies would save merger in any event); *see also* IV Areeda & Hovenkamp, ¶ 912c, at 92 (“[P]rovable merger-specific efficiencies from the acquisition of a nascent firm should be quite unusual; in most circumstances the dominant firm could readily duplicate anything that the nascent firm has to offer.”).

Plaintiff, however, brings this suit under Section 2 of the Sherman Act, challenging a long-consummated merger. That context is distinct from the aforementioned “typical” merger challenge in at least two relevant respects. For one, it is not prospective; Meta can point to actual consumer benefits that it contends have flowed from the acquisition. Merger law's traditional concern with speculative efficiencies therefore has less purchase here. *See* 2023 Merger Guidelines, § 3.3; *United States v. Anthem, Inc.*, 855 F.3d 345, 355 (D.C. Cir. 2017) (distinguishing between “possible” efficiencies and “verifiable” efficiencies).

Second, courts' treatments of procompetitive justifications under the Sherman Act's rule-of-reason framework are notably more forgiving than their evaluations of merger efficiencies under the Clayton Act. *Cf. Rothery Storage [& Van Co. v. Atlas Van Lines, Inc.]*, 792 F.2d [210] at 220 [(D.C. Cir. 1986)] (describing Section 7 as “much more stringent” than rule-of-reason analysis). In *Microsoft*, for instance, this Circuit adopted a rule-of-reason approach to evaluating Section 2 claims, holding that a defendant may rebut a plaintiff's *prima facie* case simply by asserting “a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal.” 253 F.3d at 59. The court's subsequent treatment of Microsoft's scattered procompetitive justifications was far more lenient than the exacting scrutiny typically

applied to mergers. *See, e.g., id.* at 63, 67 (accepting two justifications without real balancing against anticompetitive effects). That approach is consistent with other Section 2 cases where courts have not condemned actions otherwise injurious to competition when defendants can show a “legitimate business purpose.” *Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 804 (8th Cir. 1987); *see Morris Commc’ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1295–96 (11th Cir. 2004) (preventing “free-riding” is legitimate business purpose in refusal-to-deal case); *cf. Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 483–85 (1992) (cataloguing potential procompetitive justifications and identifying triable issues of fact as to each).

The relevant question, then, is which governs here: the Clayton Act’s stricter, merger-specific framework; the Sherman Act’s laxer, rule-of-reason approach; or some other standard. As a preliminary matter, the Court is skeptical that a dramatically different standard should apply depending on the statutory hook for challenging a merger. In addition to the obvious inequities such a path would introduce, it would also exalt “formalistic distinctions” over “actual market realities.” *Eastman Kodak*, 504 U.S. at 466. The Court is nonetheless mindful that the Clayton Act was originally envisioned to be more plaintiff friendly than the Sherman Act, *see Brown Shoe [Co. v. United States]*, 370 U.S. [294] at 328–29 [(1962)], and, having made its bed with the latter statute, the FTC must lie in it.

Recent cases evaluating mergers under the Sherman Act, however, are few and inconsistent. *See Hovenkamp*, Federal Antitrust Policy, § 7.2, at 315 (describing Sherman Act treatment of mergers as “all but superfluous” because of Clayton Act); *compare, e.g., [United States v.] Grinnell [Corp.]*, 384 U.S. [563] at 576 n.7 [(1966)] (declining even to reach question of procompetitive justifications because “the record clearly shows that this monopoly power was consciously acquired”), *with In re Northshore University HealthSystem Antitrust Litig.*, 657 F. Supp. 3d 1077, 1102 (N.D. Ill. 2023) (evaluating, but rejecting, procompetitive justification for hospital merger challenged under Section 2 and Section 7). Despite this paucity, the Court gleans from the applicable caselaw a few core principles that should govern here.

First, Meta’s procompetitive justifications must be a form of “competition on the merits.” *Microsoft*, 253 F.3d at 59; *see also id.* at 67 (defendants must show that their conduct “serves a purpose other than protecting” their “monopoly”). In a merger, that typically requires showing that the union will result in “greater efficiency,” *id.* at 59, or, more directly, increased consumer welfare. *See LePage’s Inc. v. 3M*, 324 F.3d 141, 163 (3rd Cir. 2003) (“In general, a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare.”) (quoting *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1183 (1st Cir. 1994)). For instance, a merger might have a procompetitive justification if it increased output, decreased prices, improved service or quality, spurred greater innovation, or the like. *See McWane*, 783 F.3d at 841; *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 478 (7th Cir. 2020); III Areeda & Hovenkamp, ¶ 651d, at 130.

Second, as the Commission correctly argues, such justifications cannot be pretextual. *See Microsoft*, 253 F.3d at 59 (requiring a “nonpretextual” claim); *Eastman*

Kodak, 504 U.S. at 484 (court not required to credit procompetitive justifications that are “pretextual”); *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1212 (9th Cir. 1997) (“A plaintiff may rebut an asserted business justification by demonstrating ... that the justification is pretextual.”). Meta retorts that it would “upend established law” to invalidate proven consumer benefits because of a monopolist’s “impure” motives. It is Meta’s position, however, that ignores the consistent teaching of Section 2 cases that manufactured justifications cannot be credited. *See McWane*, 783 F.3d at 841–42 (noting that defendant’s “damning internal documents” were “powerful evidence that its procompetitive justifications are merely pretextual”) (internal quotation marks omitted); *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 658 (2d Cir. 2015) (“Because we have determined that Defendants’ procompetitive justifications are pretextual, we need not weigh them against the anticompetitive harms.”). Such a rule also makes good sense. Were it otherwise, monopolists engaging in exclusionary conduct could evade liability by advancing post-hoc justifications based on their later actions or events outside their control.

Third, Meta must show that the procompetitive benefits could not have been achieved without the acquisitions in question. This requirement follows from cases holding that Sherman Act defendants must choose the “least restrictive” means available to achieve an asserted procompetitive justification, *see Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1495 (D.C. Cir. 1984); *LePage’s*, 324 F.3d at 167; XI Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1913a, at 395–96 (4th ed. 2018), but it also mirrors the Clayton Act’s requirement that efficiencies be merger specific. *See Anthem*, 855 F.3d at 356; *Heinz*, 246 F.3d at 722 (defendant must show that efficiencies from merger “cannot be achieved by either company alone because, if they can, the merger’s asserted benefits can be achieved without the concomitant loss of a competitor”). The principle in both is essentially the same: if the claimed benefits could have been achieved without the anticompetitive conduct, then they cannot rescue that conduct.

The FTC asserts—and Meta does not appear to contest—that the burden of meeting this narrow-tailoring requirement is on Defendant. The D.C. Circuit has adopted that view for Section 1 rule-of-reason cases, *see Kreuzer*, 735 F.2d at 1495, and generally for mergers under Section 7. *See Anthem*, 855 F.3d at 356 (burden on defendant to show merger-specific efficiencies). Because the point is uncontested, the Court will accordingly assume that the burden is Defendant’s to bear. *But see [Ohio v.] American Express [Co.]*, 585 U.S. [529] at 542 [(2018)] (holding, in context of Section 1 case, that “[i]f the defendant [shows a procompetitive rationale], then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means”); XI Areeda & Hovenkamp, ¶ 1914c, at 409 & nn.25–26 (collecting cases split on this question).

Finally, procompetitive benefits in one market may only rarely rebut a showing of anticompetitive effects in a different market. Plaintiff proposes a blanket prohibition on considering out-of-market effects, relying on *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972). *Topco*, however, did not involve different antitrust markets and thus could not have held that market specificity is required under the Sherman Act. *See*

405 U.S. at 601–02 (referring only to different “marketing territor[ies]” within single national market); *but cf.* [*United States v.*] *Phila. Nat’l Bank*, 374 U.S. [321] at 370 [(1963)] (construing Section 7 of Clayton Act to require market specificity). The Supreme Court has, moreover — and without apparent explanation — considered out-of-market procompetitive justifications in at least one other Sherman Act case. *See, e.g., NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 117 (1984) (acknowledging legitimacy of “fostering competition among amateur athletic teams” to “enhance public interest in intercollegiate athletics” in case concerning anticompetitive conduct in market for televised intercollegiate football games).

The weight of authority nonetheless appears to be broadly against recognizing out-of-market procompetitive justifications without very good justification. *See Sullivan v. Nat’l Football League*, 34 F.3d 1091, 1112 (1st Cir. 1994) (while courts should “generally give a measure of latitude to antitrust defendants in their efforts to explain the procompetitive justifications for their policies and practices,” it nonetheless “seems improper to validate a practice that is decidedly in restraint of trade simply because the practice produces some unrelated benefits to competition in another market”); IVA Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 972, at 57 (4th ed. 2016) (“As a general proposition, antitrust rejects” that “possible injuries to competition in one market are offset by efficiency benefits in a different market.”); David Crane, *Balancing Effects Across Markets*, 80 *Antitrust L.J.* 397, 397 (2015) (“[T]he principle is best operationalized as a presumption against balancing effects across market lines that can be rebutted based on compelling evidence in particular cases.”). Professors Areeda and Hovenkamp, for instance, suggest that out-of-market benefits should be cognizable only when “the threatened market is significantly smaller than the benefitted market.” IVA Areeda & Hovenkamp, ¶ 972c, at 60. Others suggest that the burden should be on the defendant to show that out-of-market procompetitive effects should register in the balance. *See Crane*, 80 *Antitrust L.J.* at 411.

Out of an abundance of caution, and because the parties have not briefed this unsettled question, the Court will permit Meta to present evidence of procompetitive effects outside the PSN-services market, subject to a strong showing that such effects are relevant in this case. In doing so, the Court acknowledges that many mergers with nascent competitors may present market-specificity issues because, by definition, a nascent competitor will often operate in a different market from its acquirer. Here, that affects the viability of Meta’s WhatsApp-related affirmative defenses, as the messaging application was not—and still is not — a part of the FTC’s proposed product market. Under the Commission’s bright-line rule, the Court seemingly would be prohibited from balancing any consumer benefits (*e.g.*, lower prices) that materialized in the OTT mobile-messaging market because of the acquisition against the anticompetitive effect of cutting off a nascent competitor in the separate PSN-services market. The Commission, however, has not asked the Court to categorically bar consideration of such effects on this basis. The Court therefore will not do so at this juncture. Meta will nonetheless have to demonstrate at trial why any of its WhatsApp-related affirmative defenses should be cognizable.

b. Application

Meta asserts ten categories of procompetitive justifications: six related to how it improved Instagram, three related to how it improved WhatsApp, and one related to how WhatsApp strengthened Meta's strategic position against Apple and Google. The categories encompass, by the FTC's count, approximately 120 discrete benefits—including, to take just a few examples, improving Instagram's reliability by bringing to bear Meta's “world-class data centers”; integrating Instagram more fully with Facebook and thus accelerating the acquisition's growth; and making WhatsApp free for all users.

The Commission retorts that none of these categories is a legally cognizable procompetitive justification. On Plaintiff's telling, the evidence supports only one story: Meta acquired both Instagram and WhatsApp solely to eliminate a competitive threat, and any improvements it made to those applications it could equally have made to its own products, Facebook Camera and Messenger. The first nine categories are thus, the FTC claims, both pretextual and non-merger specific. It also argues that the final procompetitive justification must go the same way because a monopolist is not entitled to improve its strategic positioning against other firms via anticompetitive conduct. The Court addresses these arguments *seriatim*.

i. Pretext

As Meta points out, issues of motivation or intent—which require fact-intensive inquiries to resolve—are “peculiarly not susceptible to resolution by summary judgment.” [*Miller v. Saxbe*, 403 F. Supp. 1314, 1316 (D.D.C. 1975)]; *see also Tech 7 Systems v. Vacation Acquisition, LLC*, 594 F. Supp. 2d 76, 85 (D.D.C. 2009) (“It is well-established that it is inappropriate to resolve issues of credibility, motive, and intent on motions for summary judgment.”) (internal quotation marks omitted). Plaintiff therefore faces an uphill climb in seeking judgment as a matter of law that virtually all of Meta's procompetitive justifications were mere pretext. Such an outcome would be justified only if no credible evidence suggested otherwise.

But that is not the case here. To be sure, the evidence that Meta sought to neutralize competitive threats is weighty, as recounted previously. Other evidence, however, points the other way. Start with Instagram. Defendant has proffered evidence that the company was struggling with scaling its operations to match its growth. Integrity issues were, on Meta's telling, rampant, which threatened to derail Instagram's rise. Running on Amazon Web Services, the platform was “under water from an engineering perspective,” such that the founders felt that they had to devote themselves 24/7 to managing infrastructure problems or else Instagram would come “crumbling down.” Complete outages were not uncommon. What Meta therefore had to offer in any potential acquisition was the scale and expertise to address such challenges while incorporating into its product offering a platform that was, from the consumer's perspective, highly successful.

Record evidence supports that these opportunities motivated the merger with Instagram, at least in part. In Zuckerberg's February 2012 email to his CFO, quoted at length above, he acknowledges that part of the purpose in seeking to acquire Instagram was to “integrate” it with Meta's products “in order to improve [Meta's] service.” That

integration involved “building [Instagram’s] mechanics into [Meta’s] products rather than directly integrating” them—*i.e.*, permitting Instagram to run on its own while learning from its success to improve Facebook and other Meta products. True, Zuckerberg’s email also indicated that one of the deal’s rationales was to “neutralize a potential competitor.” But the FTC omits that Zuckerberg later followed up on that email exchange seemingly to disavow that motivation and re-emphasize his integration point:

I didn’t mean to imply that we would be buying them to prevent them from competing in any way. Buying them would give us the people and time to incorporate their innovations into our core products, which is how we’d do the integration rather than actually combining the products. I’m mostly excited about what the companies could do together if we worked to build what they’ve invented into more people’s experiences.

That internal justification matched Zuckerberg’s external sales pitch. At around the same time as his conversation with his CFO, he emailed an Instagram investor to broach a merger, arguing that it could “make sense since photos by themselves aren’t a great business.” In his later communications with Systrom, Zuckerberg wrote that he was “really excited about what [Meta] can do to grow Instagram as an independent brand and product,” specifically mentioning the “infrastructure [Meta] built ... around storing and serving photos, querying them, etc.” and emphasizing “the value of using all of the infrastructure that we’ve built up rather than having to build everything from scratch.” These statements are credible evidence, sufficient to convince a reasonable trier of fact, that Meta’s proffered procompetitive justifications were more than mere pretext for its desire to crush competition.

Plaintiff quibbles with this evidence, arguing that it neither matches up with the justifications Meta has already provided (which focus on benefits it provided to Instagram, not vice versa) nor outweighs the heaps of evidence pointing in the other direction. Whether the latter holds true, however, requires a weighing of evidence reserved exclusively for trial. See [*Anderson v.*] *Liberty Lobby[, Inc.]*, 477 U.S. [242] at 255 [(1986)]. As to the former, Meta expressly stated that the list of procompetitive benefits it has thus far provided is incomplete and non-exhaustive. It would be inappropriate at this stage of the litigation to discount evidence of a procompetitive motivation for the merger simply because it fits awkwardly with Meta’s response to an interrogatory—especially when some of that same evidence does support Meta’s current justifications.

As for WhatsApp, Meta likewise contends that the FTC’s story does not hold up, and that claims of pretext are therefore unfounded. Substantial record evidence—including testimony from WhatsApp’s founders—disputes the notion that the messaging application was at all interested in pivoting into the PSN-services market. Indeed, Acton testified that there was no doubt in his mind that WhatsApp would not have made such a pivot and instead would have “continued on the trajectory it had been on” absent the acquisition. According to Koum, that was in part because of WhatsApp’s goal of staying “simple to use and elegant and not all burdened with all these complexities with these additional features,” unlike WhatsApp’s competitors in

Asia that had pivoted into other markets. At the same time, however, WhatsApp struggled with fragile infrastructure and the lack of a clear path to monetization.

Importantly for present purposes, Meta appears to have been aware of all of the above when formulating the case for the acquisition. Notes from Zuckerberg's July 2012 meeting with Koum reveal that he knew that WhatsApp, for instance, “[l]ook[ed] down on features in Asian clones” and “[w]ant[ed] to stay focused on messages” while remaining “small with no managers.” Documents from Meta's board meeting to discuss the acquisition also describe multiple rationales for the transaction, including that it could “help Facebook grow by exposing Facebook to people who are not yet part of” it and “help [WhatsApp] grow by using [Meta's] distribution, infrastructure, etc.” Finally, in answer to the FTC's accusation that Defendant overpaid for the acquisition without conducting a valuation—thus negating any business case for it—Meta points to evidence that the board did conduct such a valuation and that it showed that “the price Meta paid was less than other companies paid in peer transactions on a per-user basis.”

In total, this evidence is sufficient to support a finding at trial that Meta's procompetitive justifications for the acquisition of WhatsApp were not entirely pretextual. Plaintiff's response, as before, is to poke holes in this evidence and point to other documents telling a different story. These arguments, however valid, only underscore the persistence of factual disputes about whether Meta's genuine motivation was to “squench a threat.” In light of the general injunction against resolving such fact-intensive inquiries of motive or intent at summary judgment, the Court is not persuaded that the Commission is entitled to judgment as a matter of law on the evidence so far presented.

ii. Merger Specificity

Falling back to its second line of attack, the FTC argues that, regardless, these pretextual justifications miss the mark for the additional reason that they are not merger specific. The core of its argument is that any purported consumer-welfare gains from Meta's investments in Instagram and WhatsApp could have been achieved if Defendant had instead invested in Facebook Camera and Messenger, so the acquisitions could not have been necessary to realize those benefits. To make this argument, Plaintiff leans heavily on this Circuit's decisions in *Heinz* and *Anthem*, contending [in its reply brief] that they require Meta to produce evidence that it “was unable to develop on its own a product ‘equivalent’ to the post-acquisition offerings of the acquired firms.” See *Heinz*, 246 F.3d 708; *Anthem*, 855 F.3d 345. According to the Commission, Defendant has conceded that it cannot make this showing.

Meta does dispute, however, that it could have grown Messenger or Camera into comparable products. It points out that Camera was not designed to house “the dozens of non-camera features [that] Meta introduced to Instagram like direct messaging, video, Reels, Stories, Shop, and more,” and that Messenger was linked to Facebook's social graph and thus was not seen—especially abroad—as a texting replacement the way WhatsApp was. These arguments illustrate a fundamental dynamic of digital applications that Plaintiff elsewhere harnesses to its advantage: differences in norms and usage, coupled with network effects, can differentiate products and cement early

advantages. Record evidence from the FTC itself suggests that Camera's substantial underperformance relative to Instagram in 2012 could not have been remedied merely by throwing more resources at it, especially in light of Instagram's early lead in mobile photo-sharing and Meta's stumbles in adjusting to a mobile-first environment. The Court is likewise aware of no evidence or testimony that the significant differences between Messenger and WhatsApp—which stem from the applications' different purposes, contact infrastructure, and geographic reach—could have been bridged by adequate “investment” from Meta. Indeed, Meta continues to operate both WhatsApp and Messenger as separate applications today.

This case is thus not readily comparable to those on which the FTC relies, both of which involved Section 7 challenges. In *Heinz*, for instance, this Circuit held that the district court erred by not considering whether the acquiring firm could have obtained better baby-food recipes (a motivation for the merger) by instead investing more money in developing its own recipes. *See* 246 F.3d at 722. *Anthem*, meanwhile, concerned a claim that a health-insurance company could realize merger-specific efficiencies by combining its low rates with another company's superior customer-facing programs. *See* 855 F.3d at [357]. Our Circuit upheld the district court's finding that the defendant could have improved its own programs instead by changing its marketing strategy or allocating more resources to them. *See id.* at [357–58]. Here, however, there is some evidence that Meta could not have replicated either Instagram or WhatsApp in any reasonable period merely by investing more heavily [in] its own products. Any consumer-welfare benefits from the acquisitions (which the FTC plans nonetheless to contest at trial) could thus be seen as merger specific. *Cf. Anthem*, 855 F.3d at [358] (acknowledging that achieving efficiencies faster via merger may be cognizable benefit); *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 211 (S.D.N.Y. 2020) (holding that efficiencies were merger-specific when they occurred on quicker timeframe than they would have otherwise). At the very least, a reasonable factfinder could find, on the current record, that there were no “practical and more than merely theoretical” alternatives to combining the unique product features of Instagram and WhatsApp with the infrastructure and resources of Meta. *Anthem*, 855 F.3d at 357.

iii. De-platforming Justification

That leaves Defendant's tenth procompetitive justification: that it acquired WhatsApp as part of a broader strategy to expand its application portfolio in order to prevent Apple or Google from “de-platforming” Meta's applications from their mobile operating systems. Unlike Meta's other justifications, however, it is not at all clear to the Court that this one “serves a purpose other than protecting” Meta's “monopoly.” *Microsoft*, 253 F.3d at 67. As the FTC notes, Defendant appears to be claiming that increasing its “bargaining leverage” over Apple or Google could justify an anticompetitive acquisition. The Court is aware of no authority for such a proposition, which would be theoretically available to any monopolist that sought to entrench its position via anticompetitive acquisitions. Indeed, if Apple and Google were some of Meta's “fiercest competitors,” as Defendant claims, then the threat of “de-platforming” its products may have been a legitimate form of competition; and if it were anticompetitive (which Meta does not even argue), Meta's proper recourse would have

been a lawsuit—not anticompetitive conduct of its own. *Cf. Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 877 n.8 (9th Cir. 1987) (“[I]ntentional anticompetitive behavior . . . cannot be justified on the basis of a benign ultimate objective . . .”).

Even assuming that this rationale is procompetitive, a deeper issue is that Meta has provided no evidence that acquiring WhatsApp was the least restrictive means of obtaining that benefit. *See Kreuzer*, 735 F.2d at 1495. Very little in the record discusses the de-platforming issue, much less demonstrates its likelihood, illustrates what actions Meta otherwise took to avert it, or explains why the WhatsApp acquisition advanced that goal. Nor has Meta even tried to claim that the acquisition was the only way to prevent de-platforming. Even under the lenient standard at summary judgment, too little has been produced to support Meta's final procompetitive justification. The Court will accordingly grant Plaintiff's Cross-Motion as to that defense.

IV. Conclusion

For the foregoing reasons, the Court will grant in part and deny in part both Meta's Motion for Summary Judgment and the FTC's Cross-Motion for Partial Summary Judgment. A separate Order so stating will issue this day.

NOTES

1. The conclusion resolves two different motions. Meta sought summary judgment on the FTC's monopoly maintenance claims. Judge Boasberg granted that motion only as to the interoperability portion of Count II, for the reasons explained in the editor's footnote, and denied it as to the acquisition claims. The FTC's cross-motion sought partial summary judgment excluding Meta's asserted procompetitive justifications for the acquisitions. The court granted that motion only as to the tenth justification—that acquiring WhatsApp would protect Meta against de-platforming by Apple or Google—and denied it as to the other nine. The court doubted that the tenth justification served any purpose other than protecting Meta's monopoly and held that, in any event, Meta had supplied no evidence that acquiring WhatsApp was the least restrictive means of obtaining the asserted benefit.¹

2. These rulings fixed the legal framework and narrowed the issues for trial. A party obtains summary judgment only if no genuine dispute of material fact remains and it is entitled to judgment as a matter of law. Each motion is evaluated separately, with reasonable factual inferences drawn for the opposing party. Thus, allowing the acquisition claims to proceed did not establish that Meta possessed monopoly power, that either acquisition was anticompetitive, or that the FTC had proved liability. Similarly, preserving nine justifications did not establish their factual basis or that their benefits outweighed any competitive harm. Those issues remained for trial.²

¹ See *FTC v. Meta Platforms, Inc.*, No. 20-3590, Order, ECF No. 383 (D.D.C. Nov. 13, 2024); 775 F. Supp. 3d at 73-74.

² See 775 F. Supp. 3d at 33-34, 52-53, 66-74.

3. Following a bench trial, the court entered judgment for Meta on November 18, 2025. Applying the Section 13(b) interpretation discussed in Note 4, the court found that the relevant market included TikTok and YouTube and that the FTC had failed to establish current monopoly power. That conclusion disposed of the case without resolving whether the Instagram and WhatsApp acquisitions unlawfully eliminated actual or nascent competition. The trial decision therefore did not resolve the acquisition issues left open by the summary-judgment opinion.³

4. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), supplied the FTC’s authority to seek injunctive relief in district court. The substantive theory was monopoly maintenance under Section 2 of the Sherman Act, enforced by the FTC through Section 5 of the FTC Act. Section 13(b) authorizes suit when the agency has reason to believe that a defendant “is violating, or is about to violate” a law it enforces. The present-tense language imposes a temporal limit on this enforcement route, separate from the substantive Section 2 standard.

The limitation had two distinct consequences here. First, the court rejected the interoperability allegations because they concerned long-past conduct and failed to allege an ongoing or imminent violation. The acquisitions stood differently: continued ownership of the acquired businesses could support a claim of ongoing unlawful monopoly maintenance even though the transactions had closed years earlier. Section 13(b) did not categorically immunize consummated acquisitions.⁴

Second, at trial the court held that the FTC had to prove a current or imminent violation, rather than merely show that it had reason to believe one existed when it sued. The agency argued that a past violation’s continuing competitive harm was sufficient; the court rejected that reading. Because the pleaded violation was monopoly maintenance, proof of present monopoly power was necessary. The age of the transactions therefore did not bar the acquisition claims, but intervening changes in competition could defeat them. This temporal requirement explains why the court could resolve the case on current monopoly power without deciding whether either acquisition had unlawfully eliminated a nascent competitor when made.⁵

5. A finding of Section 2 liability would not by itself establish that divestiture of Instagram or WhatsApp was warranted. For liability, *Microsoft* permits an inference of causation from exclusionary conduct that reasonably appears capable of contributing significantly to the maintenance of monopoly power; the plaintiff need not reconstruct with certainty how a nascent rival would have developed absent the conduct. Structural relief requires a clearer showing of a significant causal connection between the unlawful conduct and the creation or maintenance of monopoly power, and the remedy must fit the violation.⁶ Judge Boasberg expressly reserved this more

³ See *FTC v. Meta Platforms, Inc.*, No. 20-3590, slip op. at 22-24, 85-89 (D.D.C. Nov. 18, 2025).

⁴ See *FTC v. Facebook, Inc.*, No. 20-3590, slip op. at 50-53 (D.D.C. June 28, 2021); *Meta Platforms*, 775 F. Supp. 3d at 52-53.

⁵ See *FTC v. Meta Platforms, Inc.*, No. 20-3590, slip op. at 22-24 (D.D.C. Nov. 18, 2025).

⁶ See *United States v. Microsoft Corp.*, 253 F.3d 34, 79-80, 106-07 (D.C. Cir. 2001) (en banc).

demanding remedial inquiry. Thus, even if the FTC had prevailed on liability, it would still have had to justify divestiture under that standard.⁷ This inquiry is distinct from Section 13(b)'s requirement of a current or imminent violation. Because the FTC failed to prove current monopoly power, the court never reached whether divestiture was appropriate.

6. The absence of a Section 7 claim matters to the scope of this disposition. Section 7's prohibition on acquisitions that may substantially lessen competition does not depend on proof of monopoly power. The failure of the pleaded Section 2 claim therefore does not establish that the acquisitions satisfied Section 7. The court did not decide a Section 7 claim or whether such a claim could have overcome the separate limits on relief under Section 13(b). The 2023 Merger Guidelines treat a dominant firm's acquisition of a nascent competitive threat as one way in which a merger may unlawfully entrench a dominant position.⁸

7. The FTC filed a notice of appeal on January 20, 2026.⁹ On appeal, the FTC argues that it needed to show only that Meta held monopoly power when the agency sued in 2020, not at the time of decision, and that TikTok and YouTube do not belong in the relevant market. Merits briefing concluded in late September 2026; as of early October, oral argument had not been scheduled.¹⁰ The nascent-competition issues addressed in this excerpt would return to the district court only if the court of appeals sets aside the monopoly-power ruling.

⁷ See *Meta Platforms*, 775 F. Supp. 3d at 58.

⁸ See U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines § 2.6.A (Dec. 18, 2023) ("A merger may involve a dominant firm acquiring a nascent competitive threat.").

⁹ See Press Release, Fed. Trade Comm'n, FTC Appeals Ruling in Meta Monopolization Case (Jan. 20, 2026).

¹⁰ See *FTC v. Meta Platforms, Inc.*, No. 26-5028 (D.C. Cir. docketed Jan. 26, 2026); Wendy Davis, *FTC Presses To Revive Antitrust Case Against Meta*, MediaPost (Oct. 5, 2026).