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

**FEDERAL TRADE COMMISSION**,

Plaintiff,

v.

**META PLATFORMS, INC.,**

and

**WITHIN UNLIMITED, INC.,**

Defendants.

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

**PLAINTIFF FEDERAL TRADE COMMISSION'S OPPOSITION TO DEFENDANTS' MOTION TO STRIKE**

Defendants' belated motion to strike all of Dr. Singer's expert testimony regarding relevant antitrust market definition should be denied. First, it is untimely—coming after his testimony occurred, after Dr. Singer was deposed, after the Court's deadline for *Daubert* motions, and long after the time when Defendants received the information forming the basis of their motion. Second, and importantly, Defendants' motion is extremely overbroad because the challenged consumer survey is only one facet of Dr. Singer's opinion on relevant market definition. Even if this Court were to disregard the survey's reported results entirely, Dr. Singer's opinions regarding market definition are based on more than just the survey, and the underlying logic of the hypothetical monopolist test ("HMT") as applied to this case remains sound, persuasive, and consistent with standard antitrust market definition practices. Indeed, Defendants' own economic expert, Dr. Carlton, affirmed these principles under cross-examination at the hearing, despite purporting to offer an alternative conclusion based on his own selective interpretation of testimony and documents. Finally, in this bench hearing, exclusion of expert testimony is unnecessary, and Defendants' critiques go the weight, not admissibility, to be accorded to the results of the survey from Dr. Singer—the only expert in this case who tried to ascertain the views of actual consumers. Plaintiff respectfully requests that the Court deny Defendants' Motion to Strike.

## I. Defendants' Motion Is Untimely

"An objection is timely if it is made as soon as the opponent knows, or should know, that the objection is applicable." *Jerden v. Amstutz*, 430 F.3d 1231, 1236-37 (9th Cir. 2005) (internal quotation marks and citation omitted) (district court abused its discretion by excluding part of expert's testimony). Here, Defendants had the information that forms the basis of their motion on or shortly after receiving Dr. Singer's report and backup data on October 27, 2022—a full seven weeks before they filed this motion. Moreover, Defendants hired four separate experts to respond to Dr. Singer's report. The timeline of events clarifies how and why Defendants' motion is untimely:

- **September 6, 2022:** Court orders that motions *in limine* be filed by November 21, 2022. Dkt. 86 at 8.
- **October 27, 2022:** Defendants receive Dr. Singer's report and backup data that supplied the survey information that is in question here. *See infra* (Dr. Dubé testimony explaining the information found in Dr. Singer's backup data).
- **November 7, 2022:** Meta employees Dr. David Vannette and Curtis Cobb receive an email from Elizabeth Dean of Qualtrics concerning Qualtrics' use of survey panels. This email is later cited in Dr. Dubé's Report. *See* DX1231 (Dkt. No. 203-2, Dubé Report) at 8, n.25.
- **November 11, 2022:** Defendants serve four expert reports, including Dr. Dubé's, which was devoted exclusively to undermining Dr. Singer's survey results. *See* DX1231 (Dkt. No. 203-2, Dubé Report) at 4 ("I have reviewed the backup materials that Dr. Singer has produced that are relevant to my work.").
- **November 21, 2022:** FTC files motion *in limine* to exclude three third-party witnesses; Defendants file no motions *in limine*.
- **November 25, 2022:** Defendants serve trial testimony subpoena on Qualtrics.
- **November 30, 2022:** Defendants serve trial testimony subpoenas on panel providers Cint USA, Inc., Dynata, LLC, and Torfac USA, Inc.
- **December 5, 2022:** Defendants depose Dr. Singer.
- **December 12, 2022 at 8:36 p.m. PT:** Defendants serve the declaration of Rachael McChrystal of Qualtrics on the FTC.
- **December 13, 2022 at 3:58 a.m. PT:** Defendants serve the declaration of Ricky Odello of Cint on the FTC.
- **December 13, 2022 at 7:44 a.m. PT:** Defendants serve the declaration of Steven Duncan of Dynata on the FTC.
- **December 13, 2022:** Dr. Singer testifies at preliminary injunction hearing.
- **December 15, 2022:** Defendants file the instant motion.

Despite Defendants' representations to this Court that Dr. Singer "refused to provide any information about the survey," Dkt. 385 at 4, in fact, most of the critiques leveled in Defendants' late motion and at the hearing itself (e.g., those concerning survey respondents' geographic locations, IP addresses, demographic profiles, and indicated usage of various fitness products) come directly from the survey backup material that was provided to Defendants on October 27, 2022. *See* Dkt. No. 165-2 (Singer Report); *see also* Epner Decl. Ex. A (Dubé (Defendants' Expert) Hr'g Tr.) at 894:11-13 ("In fact, Qualtrics provided the exact location data in the data, and it was in the backup data that Dr. Singer himself provided to us."); *id.* at 911:12-17 (describing user demographic data derived from backup data); *id.* at 970:15-18 ("It turns out that Qualtrics, when it gives the data to the client when the survey is over, it actually includes the longitude and latitude already in the data set.").

Motions *in limine* in this case were due no later than November 21, 2022. Dkt. 86 at 8. As of that date, Defendants had known that Dr. Singer had performed a survey using Qualtrics since October 27, 2022 (when they received Dr. Singer's report, *see* Dkt. No. 165-2 (Singer Report) at 25)); they had possessed the survey backup material that forms the core of their motion since that same date; and they had filed a responsive report from their own survey expert, Dr. Dubé, on November 11, 2022 (DX1231 (Dkt. No. 203-2, Dubé Report)). But Defendants chose not to file a motion *in limine* in accordance with the Court-ordered deadline in this case or even at the pre-hearing conference. Instead, Defendants waited until two days after the full cross-examination of Dr. Singer at the hearing. There are no exceptional circumstances here that justify this late motion, which Defendants could have filed before the hearing.

## II. Defendants' Motion Is Overbroad, As the Survey Results Are Only One of the Factors Affirming Dr. Singer's Market Definition Opinions

Even if the Court were to completely set aside the reported results of Dr. Singer's survey—the only effort in this case from any expert to try to measure the views of actual consumers—those reported results are only one of the factors affirming Dr. Singer's opinions concerning the relevant antitrust market. No part of Defendants' motion even attempts to disturb

the *logic* underlying Dr. Singer's hypothetical monopolist test. That is, Defendants' motion does not contest the validity of the core premise: that a hypothetical monopolist of the FTC's alleged relevant antitrust market—VR dedicated fitness apps—could profitably impose a small but significant non-transitory increase in price ("SSNIP") on VR dedicated fitness apps.

Here, a SSNIP is equivalent to merely $1 per month at most. Regardless of whether the Court accepts the validity of particular survey results, Dr. Singer's hypothetical monopolist test succeeds—and confirms that VR dedicated fitness apps is a relevant antitrust market definition—so long as the Court accepts that a $1 per month price increase would be profitable for a hypothetical firm that owned all of the VR dedicated fitness apps. If such a price increase would not be defeated by users substantially switching away from VR dedicated fitness apps to other alternative products, the HMT is satisfied. Defendants' motion does not and cannot contest that premise. Indeed, Defendants' own expert, Dr. Carlton, admitted his agreement with the basic principles of relevant market definition using the HMT at the hearing. Epner Decl. Ex. A (Carlton (Defendants' Expert) Hr'g Tr.) at 1451:5-9 ("But the point is, can you raise the price by 5 percent? And as long as you can do that, then the [Horizontal Merger] Guidelines are saying that you don't have to include every other product as long as they're not a sufficient constraint to prevent that 5 percent increase.").

But even if the Court were to decide that the FTC's alleged market fails the HMT, courts in this District have repeatedly acknowledged, consistent with Supreme Court precedent, that a relevant antitrust market can also be defined by reference to *Brown Shoe*'s practical indicia. *E.g.*, *Klein v. Facebook, Inc.*, 580 F. Supp. 3d 743, 766-67 (N.D. Cal. 2022) ("[A] plaintiff may support its product market definition by pleading facts which show 'industry or public recognition of the [market] 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.'" (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962))); *Dang v. S.F. Forty Niners*, 964 F. Supp. 2d 1097, 1107 (N.D. Cal. 2013) (Davila, J.); *see also GSI Tech., Inc. v. Cypress Semiconductor Corp.*, No. 5:11-CV-03613-EJD, 2015

WL 364796, at *3 (N.D. Cal. Jan. 27, 2015) (Davila, J.) ("Cypress argues that Harris failed to meaningfully utilize fundamental market-based economic principles in considering whether other products were in the relevant product market. Since the Ninth Circuit allows a qualitative approach when determining the relevant market, Cypress' argument fails."). Thus, the Court can (and should) define the relevant market using the independent method of considering the *Brown Shoe* factors—supporting evidence for which is contained in Dr. Singer's testimony as well as in the overall factual record that the FTC adduced in this case. And that record is replete with evidence that the VR Dedicated Fitness Apps market satisfies the *Brown Shoe* practical indicia. *See* FTC Post-Hearing Proposed Findings of Fact and Conclusions of Law ("FoF-CoL"), Dkt. No. 515-2 ¶ 123 (industry recognition), ¶¶ 126-33 & 138-45 (peculiar characteristics and uses), ¶¶ 134-35 & 147 (distinct prices), ¶¶ 149-50 (distinct customers). To that end, Defendants' singular focus on the consumer survey results—which occupied a disproportionate amount of time in the courtroom during the preliminary injunction hearing—is a smokescreen aimed at obscuring the overwhelming weight of the facts in support of the FTC's alleged relevant antitrust market.

## III. Qualtrics Was Not an Undisclosed Expert

Defendants argue that Dr. Singer's survey results should be stricken because Qualtrics was a shadow expert. This argument does not stand up to scrutiny. The idea that Qualtrics—whose involvement with the survey was disclosed in Dr. Singer's Initial Expert Report—should have also been disclosed as a separate expert is not founded in facts, the federal rules, or caselaw.

First, contrary to Defendants' insinuations (Mot. at 1), an expert witness need not perform every facet of his or her work and can rely on others, including those not identified as expert witnesses. *See BladeRoom Grp. Ltd. v. Facebook, Inc.*, No. 5:15-cv-01370, 2018 WL 1611835, *4 (N.D. Cal. Mar. 30, 2018) (Davila, J.) ("Rule 26(a)(2)(B) contemplates outside involvement in the preparation of an expert report. Indeed, Federal Rule of Evidence 703 explicitly permits an expert to rely on facts or data provided by others. . . . An expert witness is

permitted to use assistants in formulating his expert opinion"). Indeed, Defendants' own experts utilized support staff—and Defendants' outside counsel—to formulate their analyses and draft their reports. For example, Dr. Carlton testified that his staff determined what evidence he reviewed, explaining that his "normal procedure is to meet regularly with my staff and identify what I think are the key economic issues, and then I ask my staff to provide me with material that bear on those issues so that I can evaluate what I think would be important economic issues. And then my staff would attempt to satisfy my request." Epner Decl. Ex. B (Carlton Depo.) at 38:18-39:1; *accord id.* at 41:1-6 ("That's what I rely on my staff to provide, to provide me with information that's relevant for me to understand the issues I think are important. And I give them that task and they search out the relevant information for me."). Dr. Carlton did not even necessarily hold the pen on the composition of his report: he "wrote this report with the assistance of my staff." *Id.* at 27:22-23. Dr. Vickey's report "was a team effort of writing this report"—the team being Dr. Vickey *and Meta's outside counsel*. Epner Decl. Ex. C (Vickey Depo.) at 27:23-29:2. And Dr. Dubé had a "staff working under my supervision," DX1231 (Dkt. No. 203-2, Dubé Report) at 4, and when he "provide[d] instructions to staff," he did not supervise his staff enough to know "how many people worked on that task." Epner Decl. Ex. D (Dubé Depo.) at 27:2-9 ("What happens is, I usually provide instructions to staff at Compass Lexecon, and then they report back to me, particularly rather promptly. But determining the number of hours would require knowing how much time was spent on that task and how many people worked on that task, and I just don't know the answer.").

Second, unlike Drs. Carlton's and Dubé's staffs (or Meta's outside counsel), Qualtrics did not perform any expert work in this matter. On this score, Defendants mischaracterize what Qualtrics actually did do: Dr. Singer was responsible "for creating what is called the survey instrument, which is what, what actually survey respondents are going to be exposed to." Epner Decl. Ex. A (Singer (FTC Expert) Hr'g Tr.) at 366:6-11. Qualtrics, and its panel providers, merely administered the survey, with the instructions provided by Dr. Singer and his staff. *Id.* at 366:15-22 ("Qualtrics goes into the field and they actually, you know, find the panels, you

know, they do everything on the back end. So there's a certain point at which I do the handoff, and that handoff is when I finish the instrument, you know, I have to turn it over to Qualtrics. But in turning it over to Qualtrics, it's like turning over a package to UPS."); *see also id.* at 368:16-18 (Dr. Singer's firm "has the responsibility of designing the survey, and then we hand it to Qualtrics and then Qualtrics goes out in the field"). Contrary to Defendants' implications, Defendants have identified no "opinion" by Qualtrics on which Dr. Singer relied that would require disclosure of a separate expert in this matter. Dr. Singer analyzed the results of a survey that he designed and that Qualtrics administered on his behalf. Defendants' cases are therefore inapposite. *See, e.g.*, *Kim v. Benihana, Inc.*, 2022 WL 1601393, at *8 (C.D. Cal. Mar. 25, 2022) (excluding an expert who "did not even request access to the 'raw' or underlying survey data"); *Sound View Innovations, LLC v. Hulu, LLC*, 2019 WL 9047211, at *13-14 (C.D. Cal. Nov. 18, 2019) (excluding opinions where Expert A relied on undisclosed aspects of Expert B's hypothetical negotiation analysis); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 293 (3d Cir. 2012) (affirming exclusion of an expert opinion where the expert "did not know the methodology . . . or the assumptions" on which the estimates he relied on were based); *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 556 (C.D. Cal. 2014) (excluding expert who relied on surveys designed, conducted, and analyzed by others).

Perhaps not surprisingly, Qualtrics' work is routinely incorporated into expert reports that survive this type of motion, including in Dr. Singer's expert work in this very district. *See In re JUUL Labs, Inc., Mkt'ing Sales Practices and Prods. Liability Litig.*, No. 19-md-02913, 2022 WL 2343268, *52-53 (N.D. Cal. June 28, 2022) (Orrick, J.) (denying *Daubert* motion to exclude Dr. Singer's expert testimony where defendant "challenge[d] Singer's conjoint study, arguing that it is based on unreliable survey data. Singer used Qualtrics to administer the survey and report the data, an entity that regularly conducts such surveys on behalf of business schools and large corporations" (internal quotation marks omitted)); *Tortilla Factory, LLC v. GT's Living Foods, Inc.*, No. CV 17-7539, 2022 WL 3134458, *7 (C.D. Cal. June 9, 2022) (denying motion *in limine* where expert "contracted with Qualtrics, a widely used survey research company, to

administer the online survey"); *In re: MacBook Keyboard Litig.*, No. 5:18-cv-02813, 2021 WL 1250378, *5-6 (N.D. Cal. Apr. 5, 2021) (Davila, J.) (denying motion to strike portion of Dr. Singer report that used Qualtrics survey); *see also* Epner Decl. Ex. A (Singer (FTC Expert) Hr'g Tr.) at 366:25-367:2 ("Qualtrics was the firm that I used in the *MacBook Keyboard* defect case to do that survey").

## IV. Defendants' Arguments Go to the Weight of Dr. Singer's Testimony, Not to Its Admissibility

Finally, even assuming *arguendo* that Defendants' arguments have merit, the proper remedy is for the Court in this bench proceeding to accord less weight to—and not to exclude—the aspects of Dr. Singer's testimony that the Court believes are in question. *E.g.*, *FTC v. BurnLounge, Inc.*, 753 F.3d 878, 888 (9th Cir. 2014) ("When we consider the admissibility of expert testimony, we are mindful that there is less danger that a trial court will be unduly impressed by the expert's testimony or opinion in a bench trial."); *FTC v. DIRECTV, Inc.*, No. 15-cv-01129-HSG, 2017 WL 412263, at *2 (N.D. Cal. Jan. 31, 2017) ("the trial court's gatekeeping function is much less critical in a bench trial because there [is] 'little danger' of prejudicing the judge, who can, after hearing the expert's testimony or opinion, determine what, if any, weight it deserves."); *Turner Const. Co. v. Nat. Am. Ins. Co.*, No. C–03–1227 SBA, 2004 WL 6066675, at *2 (N.D. Cal. Sept. 20, 2004) ("most of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury."); *Fierro v. Gomez*, 865 F. Supp. 1387, 1395 n.7 (N.D. Cal. 1994) ("Under *Daubert*, the court concludes that the better approach in this bench trial is to admit the testimony of all of the recognized experts that it permitted to testify and, in the words of the Supreme Court, allow '[v]igorous cross-examination, presentation of contrary evidence' and careful weighing of the burden of proof to test 'shaky but admissible evidence.'" (quoting *Daubert v. Merrell Dow*

*Pharms., Inc*., 509 U.S. 579, 596 (1993), *vacated on other grounds by* 519 U.S. 918 (1996), *vacated on remand on other grounds by* 147 F.3d 1158 (9th Cir. 1998))).[1]

That is especially true given the opportunity for Defendants to conduct robust cross-examination. *Humetrix, Inc. v. Gemplus SCA*, 268 F.3d 910, 919 (9th Cir. 2001) ("To the extent [the defendant] sought to challenge the correctness of [the plaintiff's] experts' testimony, its recourse is not exclusion of the testimony, but, rather, refutation of it by cross-examination and by the testimony of its own expert witnesses."); *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010) (reversing district court's exclusion of expert testimony as abuse of discretion and observing that "[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion"); *DIRECTV*, 2017 WL 412263 at *2 (same (quoting *Primiano*)). Indeed, Defendants deposed and cross-examined Dr. Singer at great length on the specific topics at issue in their motion. In Dr. Singer's deposition, approximately 70 percent of the deposition was devoted to his survey (approximately 274 of 377 pages (from page 76 through to page 350)). During Defendants' cross-examination of Dr. Singer at the evidentiary hearing, 96 minutes of time on the record were devoted to cross-examination regarding the survey. *See* Epner Decl. Ex. A (Singer (FTC Expert) Hr'g Tr.) at 452:20-529:12. And Dr. Dubé's 101-minute direct examination was devoted exclusively to those topics. *See* Epner Decl. Ex. A (Dubé (Defendants' Expert) Hr'g Tr.) at 869:13-941:17.

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants' Motion to Strike.

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[1] The Ninth Circuit has held that professionally conducted surveys are generally admissible under *Daubert*. *Southland Farms v. Stover Seed Co.*, 108 F.3d 1134, 1143 n.8 (9th Cir. 1997) ("The Ninth Circuit has held that evidence from a professionally conducted survey should generally be found sufficiently reliable and admissible under the gatekeeping test of *Daubert*."); *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1292 (9th Cir. 1992).

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Respectfully Submitted,

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