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16 **UNITED STATES DISTRICT COURT**  
 17 **NORTHERN DISTRICT OF CALIFORNIA**  
 18 **SAN JOSE DIVISION**

19 **FEDERAL TRADE COMMISSION,**

20 Plaintiff,

21 v.

22 **META PLATFORMS, INC.,**

23 **MARK ZUCKERBERG,**

24 and

25 **WITHIN UNLIMITED, INC.,**

26 Defendants.

Case No. 3:22-cv-04325-EJD

*Hearing: As soon as the matter may be heard.*

**PLAINTIFF FEDERAL TRADE  
 COMMISSION'S NOTICE OF MOTION  
 AND EMERGENCY MOTION FOR  
 TEMPORARY RESTRAINING ORDER;  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES**

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

**NOTICE OF MOTION AND MOTION<sup>1</sup>**

PLEASE TAKE NOTICE that, as soon as the matter may be heard, Plaintiff Federal Trade Commission (“FTC” or “Commission”) shall move and hereby does move the Court for a temporary restraining order (“TRO”) against Defendants Meta Platforms, Inc., Mark Zuckerberg, and Within Unlimited, Inc., pursuant to 15 U.S.C. § 53(b) and Civil L.R. 7-2.

Plaintiff respectfully requests this Court to issue, prior to 8:59 p.m. PT on Sunday, July 31, 2022, a TRO that will preserve the status quo and prevent Defendant Meta Platforms, Inc. (“Meta”) and its subsidiaries from consummating its proposed acquisition (the “Acquisition”) of Within Unlimited, Inc. (“Within”), until this Court has had an opportunity to conduct an evidentiary hearing on the preliminary injunction requested in the Complaint. Absent a TRO, Defendants will be able to consummate the Acquisition after 8:59 p.m. PT on July 31, 2022.

Plaintiff’s motion is based on this Notice of Motion; the Memorandum of Points and Authorities in Support filed concurrently; the declarations of Justin Epner and Jennifer Snyder and the attachments thereto; all other pleadings on file in this action; and any other written or oral argument that Plaintiff may present to the Court.

**ISSUE TO BE DECIDED**

Whether the Court should grant a temporary restraining order to preserve the status quo and prevent Defendants from consummating the Acquisition “pending the issuance of a[n administrative] complaint by the Commission,” 15 U.S.C. § 53(b)(2), and if such administrative complaint is issued, until this Court has had an opportunity to conduct an evidentiary hearing on the preliminary injunction requested in Plaintiff’s Complaint when (1) the Commission has found reason to believe that the proposed Acquisition may substantially lessen competition, or tend to create a monopoly, in one or more relevant markets; (2) Plaintiff is likely to succeed on the merits; and (3) the balance of the equities is in favor of Plaintiff.

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<sup>1</sup> For reasons explained herein, this matter is urgent. The FTC respectfully requests that this Court act on this Motion as expeditiously as is possible.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

Over the past decade, Defendant Meta has leveraged its status as one of the largest technology companies in the world to become a key player in the rapidly growing virtual reality (“VR”) industry. Meta [REDACTED]  
[REDACTED]  
popular Beat Saber app. It now seeks to acquire Within, a competing VR software developer whose chief product is the fitness app Supernatural. If consummated, the Acquisition may substantially lessen competition, or tend to create a monopoly, by eliminating potential competition in the market for VR dedicated fitness apps, where Meta is a potential entrant and exerts present competitive pressure, [REDACTED]; and by eliminating present competition in the broader market for VR fitness apps, where Supernatural competes with Meta’s Beat Saber.

The Commission filed a Complaint in this Court pursuant to 15 U.S.C. § 53(b) to preliminarily enjoin Defendants from completing the Acquisition “pending the issuance of a[n administrative] complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final.” 15 U.S.C. § 53(b)(2). Pursuant to 15 U.S.C. § 53(b)(2), such complaint must be filed no later than 20 days after this Court grants a TRO.<sup>2</sup>

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<sup>2</sup> As the Supreme Court has stated, “the Commission may use § 13(b) to obtain injunctive relief while administrative proceedings are foreseen or in progress, or when it seeks only injunctive relief.” *AMG Capital Mgmt. v. FTC*, 141 S. Ct. 1341, 1349 (2021). Indeed, the Commission has often filed complaints seeking to preliminarily enjoin mergers under Section 13(b) pending the issuance of an administrative complaint. *E.g.*, *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001) (preliminary injunction “was sought in aid of an FTC administrative proceeding which was subsequently instituted by complaint . . . .”); *Compl., FTC v. Aloha Petroleum, Ltd.*, No. CV-05-00471, 2005 WL 1991781 (D. Haw. July 27, 2005).

1 The issue now before the Court is Plaintiff’s request for a TRO to preserve the status  
 2 quo for a limited period of time, “pending the issuance of a[n administrative] complaint by the  
 3 Commission,” 15 U.S.C. § 53(b)(2), and if such administrative complaint is issued, until the  
 4 Court has the opportunity to conduct an evidentiary hearing regarding the Commission’s request  
 5 for a preliminary injunction. If the administrative complaint “is not filed within such period  
 6 (not exceeding 20 days) as may be specified by the court after issuance of the temporary  
 7 restraining order or preliminary injunction, the order or injunction shall be dissolved by the  
 8 court and be of no further force and effect.” *Id.* If the administrative complaint is filed,  
 9 Plaintiff, subject to this Court’s availability and after meeting and conferring with Defendants,  
 10 anticipates seeking a date in November for the evidentiary hearing regarding Plaintiff’s request  
 11 for a preliminary injunction. In other words, the proposed TRO would be of limited duration.

12 For the reasons set forth below, the Court should issue a TRO preventing Defendants  
 13 from consummating the Acquisition pending the issuance of an administrative complaint, and if  
 14 such complaint is filed, until a hearing on Plaintiff’s motion for a preliminary injunction can be  
 15 completed.<sup>3</sup>

---

16  
 17 <sup>3</sup> Unlike Federal Rule of Civil Procedure 65(b), Section 13(b) of the FTC Act does not prescribe  
 18 any time limitations for a TRO if the administrative complaint is filed within 20 days of its  
 19 entry. *Compare* Fed. R. Civ. P. 65(b) (“order expires at the time after entry—not to exceed 14  
 20 days—that the court sets”) *with* 15 U.S.C. § 53(b) (providing no such limitation). Because  
 21 Section 13(b) was enacted to preserve the FTC’s ability to order relief upon completion of its  
 22 administrative proceedings, *see* H.R. Rep. No. 73–624, at 31 (1973) (Conf. Rep.), reprinted in  
 23 1973 U.S.C.C.A.N. 2523), courts issue TROs sought under Section 13(b) for the period of time  
 24 it takes the court to decide the motion for a preliminary injunction—assuming, of course, that  
 25 the administrative complaint is filed within 20 days of entry of the TRO. *See, e.g., FTC v.*  
 26 *RagingBull.com, LLC*, 507 F. Supp. 3d 629, 636 (D. Md. 2020); *FTC v. Lancaster Colony*  
 27 *Corp. Inc.*, 434 F. Supp. 1088, 1092 (S.D.N.Y. 1977).

1 **I. FACTUAL BACKGROUND**

2 The VR industry is currently characterized by a high degree of innovation and growth,  
3 with global sales predicted to jump from \$5 billion in 2021 to more than \$12 billion in 2024.<sup>4</sup>  
4 Cutting-edge VR technology creates an immersive digital experience like no other, allowing  
5 users to be transported anywhere—all from the comfort of their own homes. As Meta’s CEO  
6 and founder, Mark Zuckerberg, explains, “you’re right there with another person or in another  
7 place and that’s very different from every experience of technology that we’ve had before.”<sup>5</sup>

8 Meta recognizes the explosive potential of VR. While best known for its “Family of  
9 Apps”—Facebook, Instagram, Messenger, and WhatsApp—the company has committed  
10 substantial resources to building a VR “metaverse.” Meta spent almost \$25 billion on its  
11 Reality Labs division from 2020 through March 2022<sup>6</sup>—and it intends to increase those  
12 investments over the next several years.<sup>7</sup> One need look no further than the rebranding of the  
13 company from Facebook to “Meta” in 2021 to understand its vision for the future.<sup>8</sup>

14 Meta’s foray into VR began in 2014 when it acquired Oculus VR, Inc., a headset  
15 manufacturer.<sup>9</sup> Since then, Meta has emerged as key player at each level of the VR ecosystem:  
16 Its current generation headset, the Meta Quest 2, is the most widely used VR headset today.<sup>10</sup>

17 [REDACTED]—its Quest Store—  
18  
19  
20

21 <sup>4</sup> PX1043 at 009.

22 <sup>5</sup> PX4066 at 004.

23 <sup>6</sup> PX4072 at 051; PX4075 at 008.

24 <sup>7</sup> PX4003 at 002.

25 <sup>8</sup> PX4067 at 001.

26 <sup>9</sup> PX4061 at 001; PX4062 at 001.

27 <sup>10</sup> PX4063 at 001.  
28



1 through which app developers offer their products to VR users for download.<sup>11</sup> [REDACTED]  
 2 [REDACTED] app sellers, a position it obtained by both acquiring studios with existing apps—like  
 3 Beat Games, which it acquired for [REDACTED] in 2019<sup>12</sup>—and developing its own apps.<sup>13</sup>  
 4 Meta’s best-selling app—[REDACTED]<sup>4</sup>—is the  
 5 popular game Beat Saber, “where your goal is to slash the beats (represented by small cubes) as  
 6 they are coming at you” with “great sound and visual effects to emphasize the rhythm.”<sup>15</sup> Beat  
 7 Saber is recognized by industry participants as among a category of VR rhythm and active  
 8 sports games that provide incidental fitness benefits to users (“incidental fitness apps”). Meta  
 9 has repeatedly extolled the fitness benefits of Beat Saber on its Oculus website and in  
 10 advertisements to Quest users.<sup>16</sup>

11 Like Meta, Within is a software app developer. Its flagship product is Supernatural, a  
 12 VR fitness app that offers over 800 fully immersive VR workouts, each set to music and located  
 13 in a virtual setting like the Galapagos Islands or the Great Wall of China.<sup>17</sup> Supernatural’s  
 14 workouts are fitness classes that customers can access by paying a monthly subscription fee of  
 15 \$18.99, or a yearly subscription fee of \$179.99.<sup>18</sup> [REDACTED] Supernatural as  
 16 among a category of apps referred to as “dedicated” or “deliberate” fitness apps that offer to  
 17  
 18

19 <sup>11</sup> Snyder Decl. at ¶ 7 [REDACTED]

20 [REDACTED] PX1053 at 062 [REDACTED]

21 <sup>12</sup> PX0004 at 117-119; PX1018 at 001; PX4018 at 001.

22 <sup>13</sup> PX0004 at 176-177; PX1042 at 005.

23 <sup>14</sup> PX1023 at 004.

24 <sup>15</sup> PX4043 at 001-02.

25 <sup>16</sup> *E.g.*, PX4034 at 001, 005; PX4023 at 007-08.

26 <sup>17</sup> PX0005 at 009.

27 <sup>18</sup> PX0003 at 006.

1 users a structured physical workout in their own homes (“dedicated fitness apps”).<sup>19</sup> Other  
2 dedicated fitness apps include FitXR, Holofit, VZFit, and Les Mills Body [REDACTED]

3 [REDACTED].<sup>20</sup>

4 Among VR apps, dedicated fitness is [REDACTED].<sup>21</sup> [REDACTED]

5 [REDACTED]

6 [REDACTED].<sup>22</sup> [REDACTED]

7 [REDACTED]<sup>23</sup> [REDACTED]”<sup>24</sup> [REDACTED]

8 [REDACTED]”<sup>25</sup> [REDACTED]

9 [REDACTED].<sup>26</sup> [REDACTED]

10 [REDACTED]

11 [REDACTED]<sup>27</sup> [REDACTED]

12 [REDACTED]”<sup>28</sup>

13 [REDACTED]

14 [REDACTED].<sup>29</sup> [REDACTED]

15 [REDACTED] industry participants and VR users view Beat Saber and Supernatural as already

16 \_\_\_\_\_  
17 <sup>19</sup> PX1003 at 007-09.

18 <sup>20</sup> PX1051 at 006.

19 <sup>21</sup> PX1003 at 053.

20 <sup>22</sup> PX1004 at 001.

21 <sup>23</sup> PX1027 at 003.

22 <sup>24</sup> PX1025 at 001.

23 <sup>25</sup> PX1019 at 001.

24 <sup>26</sup> PX1034 at 003.

25 <sup>27</sup> PX1029 at 002.

26 <sup>28</sup> PX1019 at 001.

27 <sup>29</sup> PX2015 at 008; PX2019 at 004.

1 offering very similar products.<sup>30</sup> Both employ the same slashing mechanic, in which the player  
2 uses virtual bats or swords to hit incoming targets timed to music.<sup>31</sup> [REDACTED]

3 [REDACTED]

4 [REDACTED]<sup>32</sup> [REDACTED]

5 [REDACTED]

6 [REDACTED]<sup>33</sup> [REDACTED]

7 [REDACTED]

8 [REDACTED]<sup>34</sup>

9 Meta, however, chose [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]<sup>35</sup> Instead, Meta decided it preferred to simply buy [REDACTED],<sup>36</sup>

14 which is more than [REDACTED] build Supernatural [REDACTED]

15 [REDACTED] VR dedicated fitness app.<sup>37</sup>

16 **II. ARGUMENT**

17 Section 13(b), 15 U.S.C. § 53(b), of the FTC Act “allows a district court to grant the  
18 Commission a preliminary injunction ‘[u]pon a proper showing that, weighing the equities and

19 \_\_\_\_\_  
20 <sup>30</sup> PX4023 at 007-08.

21 <sup>31</sup> PX4020 at 003.

22 <sup>32</sup> PX2015 at 008.

23 <sup>33</sup> PX2015 at 008-09.

24 <sup>34</sup> PX2016 at 002.

25 <sup>35</sup> PX1004 at 001.

26 <sup>36</sup> PX0004 at 161.

27 <sup>37</sup> PX0002 at 001.

1 considering the Commission’s likelihood of ultimate success, such action would be in the public  
2 interest.” *FTC v. Affordable Media*, 179 F.3d 1228, 1233 (9th Cir. 1999). The statute “places  
3 a lighter burden on the Commission than that imposed on private litigants by the traditional  
4 equity standard.” *FTC v. Warner Commc ’ns Inc.*, 742 F.2d 1156, 1159 (9th Cir. 1984). “Under  
5 this more lenient standard, ‘a court must 1) determine the likelihood that the Commission will  
6 ultimately succeed on the merits and 2) balance the equities.” *Affordable Media*, 179 F.3d at  
7 1233 (quoting *Warner Commc ’ns*, 742 F.2d at 1160)). In weighing the equities under § 13(b),  
8 “public equities receive far greater weight.” *Warner Commc ’ns Inc.*, 742 F.2d at 1165. These  
9 public equities include effective enforcement of the antitrust laws and ensuring the  
10 Commission’s ability to obtain adequate relief if it ultimately prevails on the merits. *Id.*; *H.J.*  
11 *Heinz Co.*, 246 F.3d at 726; *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1225 (11th Cir. 1991).  
12 Preliminary injunctions under § 13(b) “are meant to be readily available to preserve the status  
13 quo while the FTC develops its ultimate case.” *FTC v. Whole Foods Market, Inc.*, 548 F.3d  
14 1028, 1036 (D.C. Cir. 2008). These same principles apply to the FTC’s request for a TRO  
15 under Section 13(b). *FTC v. Universal Premium Servs.*, No. CV 06-0849 SJO, 2006 WL  
16 8442134, at \*3 (C.D. Cal. Mar. 14, 2006).

17 Due to the primacy of public equities over private interests, and taking into  
18 consideration the practical challenges of considering complex factual questions on a limited  
19 record, courts in previous merger cases have taken a pragmatic approach to the Commission’s  
20 requests for a TRO. *See FTC v. Foster*, No. CIV 07-352 JB, 2007 WL 1302585, at \*4 (D.N.M.  
21 Apr. 13, 2007) (the court must grant a TRO so long as it finds “there is a serious question”);  
22 *FTC v. Exxon Corp.*, No. 79-1975, 1979 WL 1654, at \*3 n.6 (D.D.C. July 28, 1979) (the FTC  
23 need not “make precisely the same showing at the temporary restraining order and preliminary  
24 injunction stages[ ] [p]articularly where, as here, the factual and legal issues are massive, and  
25 the time the Commission has had for the preparation of its case was relatively short”).

26 Here, the Court should take a similarly pragmatic approach and issue a TRO “pending  
27 the issuance of a[n administrative] complaint by the Commission,” 15 U.S.C. § 53(b), and if  
28

1 such a complaint is filed, to preserve this Court’s ability to effectively analyze factual questions  
 2 for the limited period needed to conduct an evidentiary hearing on the Commission’s motion for  
 3 a preliminary injunction.<sup>38</sup> Plaintiff is likely to ultimately succeed on the merits, and the  
 4 equities weigh in favor of a TRO. Moreover, where the Commission has alleged harm in two  
 5 relevant antitrust markets, the TRO must issue if the Court determines that competition in either  
 6 market is in danger.

7 **A. The FTC Is Likely to Succeed in Showing That the Acquisition May**  
 8 **Substantially Lessen Competition.**

9 In evaluating the FTC’s likelihood of success on the merits, courts consider the FTC’s  
 10 ability to prove that the effect of the Acquisition “*may be* substantially to lessen competition, or  
 11 to tend to create a monopoly” in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.  
 12 *Warner Commc’ns*, 742 F.2d at 1160 (emphasis in original) (“It is well established that a  
 13 section 7 violation is proven upon a showing of reasonable probability of anticompetitive  
 14 effect”). “The Commission meets its burden if it ‘raise[s] questions going to the merits so  
 15 serious, substantial, difficult and doubtful as to make them fair ground for thorough  
 16 investigation, study, deliberation and determination by the FTC in the first instance and  
 17 ultimately by the Court of Appeals.’” *Id.* at 1162 (quoting *FTC v. Nat’l Tea Co.*, 603 F.2d 694,  
 18 698 (8th Cir. 1979)); *see also Whole Foods Market, Inc.*, 548 F.3d at 1036 (“[A]t this  
 19 preliminary phase [the FTC] just has to raise substantial doubts about a transaction. One may  
 20 have such doubts without knowing exactly what arguments will eventually prevail.”). Because  
 21

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22 <sup>38</sup> Courts commonly conduct preliminary injunction hearings in connection with the  
 23 Commission’s merger challenges under Section 13(b). *E.g.*, *FTC v. Hackensack Meridian*  
 24 *Health, Inc.*, No. 20-18140, 2021 WL 4145062 (D.N.J. Aug. 4, 2021); *FTC v. Peabody Energy*  
 25 *Corp.*, 492 F. Supp. 3d 865 (E.D. Mo. 2020); *cf. FTC v. Freeman Hosp.*, No. 95-1448, 1995  
 26 WL 155237, \*1 (8th Cir. Mar. 1, 1995) (remanding for “an evidentiary hearing on FTC’s  
 27 complaint for injunctive relief”).  
 28

1 the issue is a “narrow one,” the Court at the preliminary injunction stage (let alone the TRO  
 2 stage) “do[es] not resolve the conflicts in the evidence, compare concentration ratios and effects  
 3 on competition in other cases, or undertake an extensive analysis of the antitrust issues.”  
 4 *Warner Commc’ns*, 742 F.2d at 1164; *see also Cal. v. Am. Stores Co.*, 872 F.2d 837, 841 (9th  
 5 Cir. 1989) (“At this stage, we do not resolve conflicts in the evidence.”), *rev’d on other*  
 6 *grounds*, 495 U.S. 271 (1990).

7 Courts evaluate the likelihood that the FTC will succeed on the merits in the context of a  
 8 Section 7 challenge through a burden-shifting framework. *St. Alphonsus Med. Ctr.-Nampa Inc.*  
 9 *v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015). The FTC first must establish  
 10 a prima facie case, by showing “a likelihood of anticompetitive effects,” which can be  
 11 accomplished (among other ways) via market share statistics. *United States v. Bazaarvoice,*  
 12 *Inc.*, No. 13-cv-00133-WHO, 2014 WL 203966, at \*64 (N.D. Cal. Jan. 8, 2014); *see also*  
 13 *United States v. Marine Bancorp., Inc.*, 418 U.S. 602, 631 (1974) (“the Government established  
 14 a prima facie case that the Spokane market was a candidate for the potential-competition  
 15 doctrine”). The burden then shifts to defendants to try to rebut that case. *St. Alphonsus*, 778  
 16 F.3d at 783. If, but only if, defendants successfully rebut the FTC’s prima facie case, the  
 17 Commission must carry its burden of persuasion by presenting “additional evidence of  
 18 anticompetitive effects.” *Bazaarvoice*, 2014 WL 203966, at \*64 (quoting *H.J. Heinz Co.*, 246  
 19 F.3d at 715).

20 Here, the Acquisition will result in “a likelihood of anticompetitive effects” by  
 21 eliminating competition in one or both of the relevant antitrust markets. First, in the VR  
 22 Dedicated Fitness App market, where Within’s Supernatural [REDACTED], the  
 23 Acquisition will both preclude Meta’s reasonably probable entry through alternative means—  
 24 which would have added another competitor to the market—and eliminate the threat of that  
 25 entry as a likely procompetitive influence on existing competition in the market. Second, in the  
 26 broader VR Fitness App market, where both Supernatural and Beta Saber compete, [REDACTED]  
 27 [REDACTED]  
 28 [REDACTED]

1 [REDACTED]; moreover, direct evidence shows that Meta and  
 2 Within currently engage in head-to-head competition that the Acquisition will eliminate.

3 **i. The Relevant Markets Are (1) VR Dedicated Fitness Apps in the United**  
 4 **States and (2) VR Fitness Apps in the United States.**

5 “Determination of the relevant product and geographic markets is a necessary predicate  
 6 deciding whether a merger contravenes the Clayton Act.” *St. Alphonsus*, 778 F.3d at 783. This  
 7 is true whether the merger is alleged to have anticompetitive effects on existing competition or  
 8 on potential competition. *Marine Bancorp., Inc.*, 418 U.S. at 618. In defining relevant product  
 9 markets, courts often evaluate “such practical indicia as industry or public recognition of the  
 10 [relevant market] as a separate economic entity, the product’s peculiar characteristics and uses,  
 11 unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and  
 12 specialized vendors.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); accord *Klein*  
 13 *v. Facebook, Inc.*, No. 20-CV-08570-LHK, 2022 WL 141561, at \*7 (N.D. Cal. Jan. 14, 2022).  
 14 Notably, within a broader market, “well-defined submarkets may exist which, in themselves,  
 15 constitute product markets for antitrust purposes.” *Brown Shoe*, 370 U.S. at 325; accord *United*  
 16 *States v. Joseph Schlitz Brewing Co.*, 253 F. Supp. 129, 146 (N.D. Cal. 1966), *aff’d mem.*, 385  
 17 U.S. 37 (1966). “The relevant geographic market is the area of effective competition where  
 18 buyers can turn for alternate sources of supply.” *St. Alphonsus*, 778 F.3d at 784 (internal  
 19 quotation marks omitted). The Ninth Circuit has emphasized that “what constitutes a relevant  
 20 market is a factual determination” best suited for resolution on a well-developed record. *Klein*,  
 21 2022 WL 141561, at \*6 (quoting *Image Tech. Servs. v. Eastman Kodak*, 125 F.3d 1195, 1203  
 22 (9th Cir. 1997)).

23 The *Brown Shoe* practical indicia show that VR Dedicated Fitness Apps and VR Fitness  
 24 Apps are relevant product markets. The United States is the relevant geographic market.

25 **1. VR Dedicated Fitness Apps Is a Relevant Product Market.**

26 The VR Dedicated Fitness App market consists of apps, like Within’s Supernatural app,  
 27 that are designed so that users can exercise through a structured physical workout in an  
 28

1 immersive virtual setting anywhere they choose to use their VR headset.<sup>39</sup>

2 VR dedicated fitness apps typically feature workouts designed by trainers or fitness  
3 experts; they are designed to maximize exertion and physical movement for the purpose of  
4 exercise; and they may feature classes or other active coaching. According to the Virtual  
5 Reality Institute of Health and Exercise, which rates energy expenditures during VR app usage,  
6 Supernatural currently has the highest rate of any VR app, at 12-13 calories per minute.<sup>40</sup> In  
7 this way, VR dedicated fitness apps feature “peculiar characteristics and uses” that distinguish  
8 them from other VR apps. *Brown Shoe*, 370 U.S. at 325. They are distinct from other VR apps  
9 in other ways: They typically offer distinct prices as compared to other VR apps—specifically,  
10 a subscription-based pricing model as compared to a one-time fee<sup>41</sup>—

11 [REDACTED].<sup>42</sup>

12 Moreover, functional, technological, and price differences show that non-VR at-home  
13 smart fitness solutions and at-home exercise products are distinct from VR dedicated fitness  
14 apps, through which users can exercise in fully immersive, 360-degree environments without  
15 any of the cost, discomfort, or risk of traveling to those environments.<sup>43</sup> VR technology allows  
16 users to exercise from home with the feeling and visuals of being somewhere else, while the  
17 sensors in a VR headset and controllers provide for a degree of tracking, adjustment, and  
18 feedback that non-immersive exercise programs cannot match: As Within’s co-founder and  
19 CEO explained, “working out in Supernatural feels like you’re a champion of a sport from the

20 \_\_\_\_\_  
21 <sup>39</sup> PX1003 at 028, 030.

22 <sup>40</sup> PX0001 at 010.

23 <sup>41</sup> PX2027 at 002.

24 <sup>42</sup> PX0001 at 002; PX1010 at 018-19.

25 <sup>43</sup> PX0005 at 009; PX0003 at 006. [REDACTED]

26 [REDACTED]

27 [REDACTED].



1 future. I love that and haven't felt that sense of athleticism ever on a treadmill or an exercise  
 2 bike."<sup>44</sup> Additionally, most smart at-home fitness solutions have much higher up-front costs  
 3 and much higher ongoing costs than current VR dedicated fitness apps. A Peloton smart  
 4 bicycle, for example, costs over \$1,000, with an additional \$44 per month subscription cost,  
 5 compared to the cost of a \$299 Meta Quest 2 plus \$18.99 per month for Supernatural.<sup>45</sup>

## 6 **2. VR Fitness Apps Is a Relevant Product Market.**

7 The broader VR Fitness Apps market comprises VR apps recognized and marketed as  
 8 providing a fitness benefit. It includes both VR dedicated fitness apps like Supernatural and  
 9 incidental fitness apps, such as rhythm and active sports games like Beat Saber. Meta and  
 10 Within recognize the existence of a VR Fitness App market comprised of both dedicated and  
 11 incidental fitness apps.<sup>46</sup> In a post on the Oculus website entitled "Exercise By Accident: VR  
 12 Games to Help You Work Out At Home," Meta extols the virtues of rhythm and sports games  
 13 for physical exercise: "while our first port of call for VR fitness is dedicated fitness apps like  
 14 Supernatural and FitXR, you can get a surprising amount of exercise 'by accident' with a bunch  
 15 of the games below," including Beat Saber. It classified the type of exercise offered by Beat  
 16 Saber as "Full-body, Aerobic"—the exact same type of exercise it listed for Supernatural.<sup>47</sup>

17 For the reasons stated above with respect to the VR Dedicated Fitness App market, the  
 18 VR Fitness App market also does not include non-VR at-home smart fitness solutions like  
 19 digitally connected exercise bikes, treadmills, weight machines, mobile phone apps, video  
 20 games, or workout videos. Again, as Meta's CEO has explained, VR is "very different from  
 21 every experience of technology that we've had before."<sup>48</sup> Meta advertises the immersive nature  
 22

23 <sup>44</sup> PX4024 at 003-04.

24 <sup>45</sup> PX0003 at 006.

25 <sup>46</sup> PX2026 at 004, 006; PX4034 at 001, 002, 005.

26 <sup>47</sup> PX4034 at 001, 002, 005.

27 <sup>48</sup> PX4066 at 004.

1 of VR, touting the ability to “[h]ave the time of your life with a high intensity workout that feels  
2 like a vacation . . . in stunning destinations, like the ruins of Machu Picchu and more.”<sup>49</sup>

3 Nor does the VR Fitness App market include VR apps that do not provide an exercise  
4 benefit and are neither marketed nor sought by users on that basis. Although many VR apps  
5 make use of some physical movement by the user to navigate the app or present an immersive  
6 experience to the user, not all VR apps involve physical movement that generates an exercise  
7 effect. Indeed, studies recognize the wide range of exercise effects that can be provided by  
8 different VR apps.<sup>50</sup> [REDACTED]

9 [REDACTED].<sup>51</sup>

### 10 **3. The United States Is the Relevant Geographic Market.**

11 The United States is the relevant geographic market with respect to both relevant  
12 product markets. Even though “technology knows no borders,” the “area of effective  
13 competition” is the United States because the “realities of selling” differ across national borders  
14 due to differences including in regulatory regimes, intellectual property considerations, and  
15 availability. *Bazaarvoice*, 2014 WL 203966, at \*27, \*68.<sup>52</sup> VR consumers in the United States  
16 can buy headsets and applications only if they are available in the United States, and thus the  
17 United States is the relevant geographic market.

#### 18 **ii. The Acquisition Has a Likelihood of Anticompetitive Effects in the VR 19 Dedicated Fitness App Market.**

20 It is well-settled that Section 7 of the Clayton Act prohibits the elimination of potential  
21 competition as well as present competition. *E.g.*, *United States v. Falstaff Brewing Corp.*, 410  
22

23 <sup>49</sup> PX4074 at 012.

24 <sup>50</sup> PX4048 at 007; PX4073 at 020.

25 <sup>51</sup> PX2026 at 004, 006.

26 <sup>52</sup> *E.g.*, PX0004 at 164 [REDACTED]  
27 [REDACTED]

1 U.S. 526, 531-32 (1973); *see also Marine Bancorp.*, 418 U.S. at 623-25. Courts have  
 2 recognized two distinct types of anticompetitive harm that can occur from mergers that  
 3 eliminate potential competition in a concentrated relevant market. First, a merger can lessen  
 4 “actual potential competition,” when it eliminates a firm reasonably likely to enter the relevant  
 5 market through alternative means absent the illegal acquisition. *United States v. Phillips Petrol.*  
 6 *Co.*, 367 F. Supp. 1226, 1233 (C.D. Cal. 1973), *aff’d*, *Phillips Petrol. Co. v. United States*, 418  
 7 U.S. 906 (1974); *see also Yamaha Motor Co. Ltd. v. FTC*, 657 F.2d 971, 977-79 (8th Cir. 1981).  
 8 Some Courts describe this as an “entry effect.” *Phillips Petrol.*, 367 F. Supp. at 1232. Second,  
 9 a merger can lessen “perceived potential competition” when it eliminates “a potential  
 10 competitor on the fringe of the market with likely influence on existing competition.” *Falstaff*  
 11 *Brewing Corp.*, 410 U.S. at 533-34; *accord Marine Bancorp.*, 418 U.S. at 624. In other words,  
 12 the merger eliminates an “edge effect,” or the *present effect* on the existing market that results  
 13 from the perception that a firm may become a competitor in the future. *Phillips Petrol.*, 367 F.  
 14 Supp. at 1232-33. A merger can lessen competition “even if it were assumed that the potential  
 15 competitor would *not actually have entered* the market.” *Id.* at 1234 (emphasis added).

### 16 **1. The VR Dedicated Fitness App Market Is Concentrated.**

17 “The potential-competition doctrine has meaning only as applied to concentrated  
 18 markets.” *Marine Bancorp.*, 418 U.S. at 630. “A commonly used metric for determining  
 19 market share is the Herfindahl-Hirschman Index (‘HHI’).” *St. Alphonsus*, 778 F.3d at 786.  
 20 HHI is calculated by summing the squares of the market shares of each market participant. *Id.*;  
 21 *see generally* U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines  
 22 (hereinafter “HMG”) § 5.3 (2010) (describing HHI). Two firms [REDACTED]

23 [REDACTED] Indeed, the

24  
 25 <sup>53</sup> The firms included in the VR Dedicated Fitness App market are based on [REDACTED]

26 [REDACTED]  
 27 (Continued...)

1 market HHI [REDACTED]

2 [REDACTED] under the Horizontal Merger Guidelines.<sup>54</sup>

3 **2. It Is Reasonably Probable That Meta Would Enter the Market Through**  
 4 **Other Means Absent the Acquisition, Leading to Procompetitive Effects.**

5 A firm “must be considered a significant potential entrant” “where credible objective  
 6 evidence shows the basic economic facts of the acquiring company’s overall size, resources,  
 7 capability, and motivation with respect to entry into an adjacent attractive market involving a  
 8 line of commerce in which the firm is already heavily engaged.” *Phillips Petrol.*, 367 F. Supp.  
 9 at 1239; *accord Marine Bancorp.*, 418 U.S. at 633 (considering whether the acquiring firm had  
 10 “available feasible means” of entering absent the proposed acquisition). The standard is one of  
 11 reasonable probability, as “[u]nequivocal proof that an acquiring firm actually would have  
 12 entered de novo but for a merger is rarely available.” *Marine Bancorp.*, 418 U.S. at 624; *accord*  
 13 *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 175 (1964) (“to require more would be to  
 14 read the statutory requirement of reasonable probability into a requirement of certainty. This we  
 15 will not do.”); *BOC Int’l Ltd. v. FTC*, 557 F.2d 24, 29 n.7 (2d Cir. 1977) (“In view of the ample  
 16 express authority, including congressional authority, in favor of a reasonable probability  
 17 standard . . . , we decline to adopt any more stringent standard here.”). If alternative entry was  
 18 reasonably probable, the question becomes whether it offered a “substantial likelihood of  
 19 ultimately producing deconcentration of that market or other significant procompetitive effects.”  
 20 *Marine Bancorp.*, 418 U.S. at 633; *accord Yamaha Motor*, 657 F.2d at 979 (entry “would have  
 21 had an obvious procompetitive effect leading to some deconcentration.”).

22 Here, Meta’s “overall size, resources, capability, and motivation with respect to entry”  
 23 demonstrate a reasonable probability that Meta would have entered the relevant market—[REDACTED]

24 \_\_\_\_\_  
 25 [REDACTED]. Given the early stage of the proceedings, the FTC reserves the  
 26 right to revise its calculations as appropriate as this matter progresses.

27 <sup>54</sup> Snyder Decl. at ¶ 5.

1 [REDACTED] if it could not acquire [REDACTED],  
2 Supernatural. Meta has the financial resources to develop a dedicated fitness app on its own—  
3 either by creating a new app or by adding features to an existing app such as Beat Saber. It also  
4 has more than enough resources to enter the market through [REDACTED]

5 [REDACTED]  
6 [REDACTED] One of the largest, most valuable, and most technologically advanced companies in the  
7 world, Meta has committed tens of billions of dollars to its Reality Labs division, which  
8 develops its AR and VR products, including more than \$7.7 billion in 2020, \$12.4 billion in  
9 2021,<sup>55</sup> and \$3.7 billion (an increase of 55%) in the three-month period ending in March 2022,<sup>56</sup>  
10 and stated it anticipates spending billions more in the coming years to build its VR ecosystem.<sup>57</sup>

11 Meta already produces the best-selling VR headset in the United States.<sup>58</sup> Its Quest  
12 Store is the [REDACTED].<sup>59</sup> And Meta is [REDACTED] of VR  
13 apps. With its vast financial resources, Meta continues to add features and content to the apps it  
14 has already released, and to develop and release new apps in-house—something it has done  
15 previously, including with the ambitious Horizon Worlds, a massive social app that features its  
16 own game-creation tools for users.<sup>60</sup> The [REDACTED] price tag on this Acquisition alone  
17 demonstrates Meta’s financial capabilities: the money that Meta proposes using to acquire  
18 Within is [REDACTED]  
19 [REDACTED]—during which time Within developed Supernatural from

21 <sup>55</sup> PX4072 at 051.

22 <sup>56</sup> PX4075 at 008.

23 <sup>57</sup> PX4003 at 002.

24 <sup>58</sup> PX4063 at 001.

25 <sup>59</sup> Snyder Decl. at ¶ 7 [REDACTED]

26 [REDACTED] PX1053 at 062 [REDACTED]

27 <sup>60</sup> PX1023 at 004; PX0004 at 176-177; PX1042 at 007.

1 scratch.<sup>61</sup> The Horizontal Merger Guidelines caution against this precise type of transaction,  
2 where “one of the merging firms has capabilities that are likely to lead it to develop new  
3 products in the future that would capture substantial revenues from the other merging firm.”<sup>62</sup>

4 Meta also has incentives to enter the VR Dedicated Fitness App market. Its motivation  
5 to expand further into the metaverse is beyond question: It changed its name from one of the  
6 most visible brand names in the world to “Meta” the same week that it announced the proposed  
7 Acquisition.<sup>63</sup> Market facts also establish why a firm like Meta is motivated to enter the VR  
8 Dedicated Fitness App market. Among VR apps, dedicated fitness is [REDACTED]

9 [REDACTED].<sup>64</sup> [REDACTED]

10 [REDACTED],<sup>65</sup> and its personnel have proclaimed that [REDACTED]

11 [REDACTED]”<sup>66</sup> What’s more, [REDACTED]

12 [REDACTED]s.<sup>67</sup> This “name awareness” would facilitate Meta’s organic  
13 entry into dedicated fitness, as a fitness-oriented version of Beat Saber would be in line with  
14 users’ understanding of that brand.

15 In addition to the aforementioned objective facts, [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 \_\_\_\_\_  
21 <sup>61</sup> PX0002 at 001.

22 <sup>62</sup> HMG § 6.4.

23 <sup>63</sup> PX4013 at 001; PX4014 at 001.

24 <sup>64</sup> PX1003 at 053.

25 <sup>65</sup> PX0004 at 163.

26 <sup>66</sup> PX1039 at 002.

27 <sup>67</sup> PX1003 at 008.

1 [REDACTED].<sup>68</sup> Since then, Meta CEO Mark Zuckerberg has proclaimed that [REDACTED]  
 2 [REDACTED].<sup>69</sup> Thus,  
 3 it is not surprising that [REDACTED].<sup>70</sup>  
 4 Meta may try to argue it was never going to enter but for the Acquisition, but objective,  
 5 economic facts refute any subjective evidence Meta may present, *Phillips Petrol.*, 367 F. Supp.  
 6 at 1239 (“subjective evidence, while relevant and entitled to consideration, cannot be  
 7 determinative in evaluating the legality of the acquisition under § 7. If strong objective  
 8 evidence points to a contrary conclusion, the objective evidence must prevail”), and, in any  
 9 event, a disputed question of fact is not appropriate to resolve on this motion.

10 Alternative entry by Meta would introduce a new competitor into the market with the  
 11 backing of one of the world’s largest, most well-resourced, and most experienced VR industry  
 12 participants. Such entry would increase consumer choice, increase innovation, spur additional  
 13 competition to attract the best talent, and yield a host of other competitive benefits. Crucially, it  
 14 would also maintain the independent presence and competitive vitality of the most successful  
 15 VR dedicated fitness app to date, Supernatural. The Acquisition would eliminate the  
 16 probability of such entry, leading to less beneficial rivalry and competitive pressure.

17 **3. Within Reasonably Perceived Meta as a Potential Entrant, and Meta’s**  
 18 **Presence as Such Likely Influences Competition.**

19 The “same facts” that a district court must assess in determining a Clayton Act violation  
 20 based on actual potential competition are “probative of [a] violation of § 7 through loss of a  
 21 procompetitive on-the-fringe influence.” *Falstaff Brewing Corp.*, 410 U.S. at 534 n.13; accord  
 22 *Phillips Petrol.*, 367 F. Supp. at 1255. For a claim based on loss of perceived potential  
 23 competition, a court must “determine whether in any realistic sense [the acquiring firm] could  
 24

25 <sup>68</sup> PX1040 at 001.

26 <sup>69</sup> PX1027 at 003; PX1004 at 001.

27 <sup>70</sup> PX1048 at 001.

1 be said to be a potential competitor on the fringe of the market with likely influence on existing  
2 competition.” *Falstaff Brewing Corp.*, 410 U.S. at 534. Probabilistic proof of “likely  
3 influence” on existing competitors is sufficient; proof of “actual influence” is not necessary. *Id.*  
4 at 534 n.13 (“The Government did not produce direct evidence of how members of the New  
5 England market reacted to potential competition from Falstaff, but circumstantial evidence is  
6 the lifeblood of antitrust law”); *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729,  
7 773 (D. Md. 1976) (“the government need not introduce evidence of actual market response”).

8 Here, both direct and circumstantial evidence establish that Meta “could be said to be a  
9 potential competitor on the fringe of the market.” *Falstaff Brewing Corp.*, 410 U.S. at 534. As  
10 explained in detail above, Meta is a massive, wealthy company with extensive experience in  
11 various aspects of the VR industry. It has recently expanded into a variety of VR fitness-related  
12 areas, including by acquiring the [REDACTED] incidental fitness app (Beat Saber) and by  
13 internally developing a system-level fitness tracking tool (Oculus Move).<sup>71</sup> [REDACTED]

14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]<sup>72</sup> [REDACTED]  
19 [REDACTED]”<sup>73</sup>

20 Meta’s perceived potential entry also has “likely influence on existing competition.”  
21 *Falstaff Brewing Corp.*, 410 U.S. at 534. [REDACTED]  
22 [REDACTED]<sup>74</sup> [REDACTED]

23 \_\_\_\_\_  
24 <sup>71</sup> PX0004 at 177.

25 <sup>72</sup> PX2015 at 008.

26 <sup>73</sup> PX2019 at 003-04.

27 <sup>74</sup> *E.g.*, PX2021 at 002.



1 [REDACTED]

2 [REDACTED]

3 [REDACTED]<sup>75</sup> [REDACTED]

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

6 **iii. The Acquisition Poses a Reasonable Probability of Substantially Lessening**  
7 **Competition in the Broader VR Fitness App Market.**

8 Viewed through the broader lens of the relevant antitrust market for all VR fitness apps,  
9 Meta and Within are *already* head-to-head competitors. When the challenged acquisition  
10 involves two present competitors, as it does for Within’s Supernatural and Meta’s Beat Saber in  
11 the VR Fitness App market, a “prima facie case can be established simply by showing high  
12 market share.” *St. Alphonsus*, 778 F.3d at 785. Here, the Acquisition will increase market  
13 concentration in the VR Fitness App market to levels sufficient to trigger a presumption that the  
14 Acquisition will result in enhanced market power and is, therefore, presumptively unlawful.

15 **1. The Acquisition Will Increase Concentration in the VR Fitness App**  
16 **Market to Such a Degree That It is Presumptively Unlawful.**

17 As described above, the *Brown Shoe* practical indicia establish that there is a broader  
18 relevant antitrust market for VR Fitness Apps, consisting of both VR dedicated fitness apps  
19 (e.g., Within’s Supernatural) and VR incidental fitness apps (e.g., Meta’s Beat Saber).

20 “Statistics that indicate excessive post-merger market share and market concentration  
21 create a presumption that the merger violates the Clayton Act.” *Am. Stores Co.*, 872 F.2d at  
22 842. Specifically, if a merger increases the HHI of the relevant market by more than 200 points  
23 to a post-merger total of more than 2,500 points, the merger is “presumed to be likely to  
24 enhance market power.” *St. Alphonsus*, 778 F.3d at 786. Here, Beat Saber [REDACTED]

25  
26 \_\_\_\_\_  
27 <sup>75</sup> PX2015 at 008-09.

1 [REDACTED] The pre-merger HHI is [REDACTED], and the proposed acquisition of Within by Meta  
 2 would increase the HHI [REDACTED].<sup>77</sup> “The extremely high HHI on its own establishes the  
 3 prima facie case.” *St. Alphonsus*, 778 F.3d at 788.<sup>78</sup>

## 4 **2. Evidence Shows the Acquisition Will End Head-to-Head Competition.**

5 The high market shares and HHIs establish a clear presumption of illegality, and  
 6 Defendants cannot produce “evidence clearly showing that the merger is not likely to have such  
 7 anticompetitive effects,” as they are required to do to rebut the presumption of illegality.  
 8 *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 363 (1963). Nonetheless, abundant direct  
 9 evidence of competition between Meta and Within, which the Acquisition would eliminate,  
 10 corroborates the presumption of harm.

11 Meta and Within are head-to-head competitors at this very moment in the VR Fitness  
 12 Apps market. That competition has forced both merging parties to sharpen their respective  
 13 offerings. Meta has added fitness features to Beat Saber to better compete for users seeking an  
 14 exercise effect. For example, in April 2020—just before *Supernatural*’s launch—Meta released  
 15 “FitBeat,” a song for Beat Saber designed for fitness-focused beat maps.<sup>79</sup> Media coverage at  
 16 the time attributed “FitBeat” as a reaction to *Supernatural*’s release.<sup>80</sup> [REDACTED]  
 17 [REDACTED]

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18  
 19 <sup>76</sup> Snyder Decl. at ¶ 6.

20 <sup>77</sup> *Id.*

21 <sup>78</sup> The firms included in the VR Fitness App Market are based [REDACTED]  
 22 [REDACTED] and a search for the terms “exercise” and  
 23 “fitness” on the Meta Quest Store (excluding meditation-focused apps). [REDACTED]

24 [REDACTED] Given the early stage of the proceedings, the  
 25 FTC reserves the right to revise its calculations as appropriate as this matter progresses.

26 <sup>79</sup> PX1021 at 003.

27 <sup>80</sup> *Id.*

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[REDACTED]

[REDACTED]<sup>82</sup> [REDACTED]

[REDACTED]<sup>83</sup>

[REDACTED]

[REDACTED]

[REDACTED]<sup>84</sup>

In sum, Beat Saber [REDACTED] incidental fitness VR app and Supernatural [REDACTED] [REDACTED] dedicated fitness app, facts that pit the two squarely and uniquely head-to-head in the VR Fitness App market. This competition leads to innovations, new features, and consumer choice—and it will be eliminated as a result of the proposed Acquisition.

**iv. Defendants Cannot Rebut the FTC’s Prima Facie Case.**

At this early stage of the proceeding, Defendants have not advanced rebuttal arguments before the Court, so it is premature for the FTC to attempt to address them in detail, other than to observe that recognized methods of rebutting a prima facie case are unavailable.

Defendants cannot demonstrate expansion of existing firms or entry by new firms will replace the existing and potential competition that the Acquisition will eliminate. *See Bazaarvoice*, 2014 WL 203966, at \*71. “[D]evelopment of complex, customizable, and integrated software is a[] significant barrier to entry,” *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 52 (D.D.C. 2009), and that is precisely what would be required here. There are multiple other barriers to entering or expanding in the relevant markets, including time, ongoing development and content creation, post-launch support, capital, brand recognition, and the need for consumers to be able to discover the app. Developing a high-quality entrant also requires

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<sup>81</sup> PX2008 at 001.

<sup>82</sup> PX2009 at 001-02.

<sup>83</sup> PX2013 at 001.

<sup>84</sup> PX2027 at 002.

1 [REDACTED]  
 2 [REDACTED].<sup>85</sup> Moreover, Meta itself controls the surest paths to putative rivals' entry  
 3 and expansion through its control of the Quest Store. Meta examines "quality, polish,  
 4 entertainment value, and utility" when deciding what apps to permit into the Quest Store.<sup>86</sup>  
 5 This can be a lengthy process and there is no guarantee any app will ultimately be approved.<sup>87</sup>

6 Defendants will also be unable to present proof of "cognizable, merger-specific  
 7 efficiencies that will be passed through to customers and will be sufficient to offset the  
 8 anticompetitive effects of the transaction." *See Bazaarvoice*, 2014 WL 203966, at \*64. As a  
 9 preliminary matter, the "Supreme Court has never expressly approved an efficiencies defense to  
 10 a § 7 claim," *St. Alphonsus*, 778 F.3d at 788-89 ("*Brown Shoe* cast doubt on the defense . . ."),  
 11 and the Ninth Circuit has stated that it "remain[s] skeptical about the efficiencies defense in  
 12 general and about its scope in particular." *Id.* at 790. Indeed, the FTC is aware of no court that  
 13 has ever relied on efficiencies to rescue an otherwise unlawful transaction. In any event,  
 14 Defendants will not be able to "clearly demonstrate that the proposed merger enhances rather  
 15 than hinders competition because of the increased efficiencies." *Id.* (internal quotation marks  
 16 omitted); *accord id.* ("proof of 'extraordinary efficiencies' is required to offset the  
 17 anticompetitive concerns in highly concentrated markets"). Nor will they be able to show that  
 18 any efficiencies are merger-specific and verifiable and passed down to consumers.

19 **B. The Equities Support a Temporary Restraining Order.**

20 "The second step in deciding whether to grant [preliminary relief] is to balance the  
 21 equities." *Warner Commc'ns*, 742 F.2d at 1165. In weighing the equities under § 13(b),  
 22 "public equities receive far greater weight"; indeed, if the Commission has shown a likelihood  
 23 of success, "a countershooting of private equities alone does not justify denial of a preliminary  
 24 \_\_\_\_\_

25 <sup>85</sup> PX1020 at 001.

26 <sup>86</sup> PX4054 at 001.

27 <sup>87</sup> *E.g.*, PX1050 at 001 ([REDACTED])  
 28

1 injunction.” *Id.* “The principal public equity weighing in favor of issuance of preliminary []  
 2 relief is the public interest in effective enforcement of the antitrust laws.” *H.J. Heinz Co.*, 246  
 3 F.3d at 726; *Univ. Health*, 938 F.2d at 1225. An important public equity is preserving the  
 4 FTC’s ability to obtain “effective relief if the Commission ultimately prevails and divestiture is  
 5 ordered.” *Warner Commc ’ns*, 742 F.2d at 1165. Without preliminary relief, the Commission  
 6 may find it difficult to “unscrambl[e] the eggs” if the Acquisition is ultimately deemed  
 7 unlawful. *Peabody Energy*, 492 F. Supp. 3d at 918 (“Allowing the transaction to proceed and  
 8 then later ‘unscrambling the eggs’ upon a finding of illegality by the FTC is a daunting and  
 9 potentially impossible task” (quoting *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 87 (D.D.C.  
 10 2015))). As such, “[n]o court has denied relief to the FTC in a [Section] 13(b) proceeding in  
 11 which the FTC has demonstrated a likelihood of success on the merits.” *FTC v. ProMedica*  
 12 *Health Sys.*, No. 3:11-cv-47, 2011 WL 1219281, at \*60 (N.D. Ohio Mar. 29, 2011).

13 Here, the equities clearly support a TRO. Consumers are vulnerable to immediate harm  
 14 if Defendants combine Meta’s and Within’s operations “pending the issuance of a[n  
 15 administrative] complaint by the Commission,” 15 U.S.C. § 53(b)(2), and if such complaint is  
 16 issued, before the Court rules on the FTC’s request for a preliminary injunction. Denial of a  
 17 TRO may also “preclude relief if the Commission ultimately prevails and divestiture is ordered.  
 18 ” *Warner Commc ’ns*, 742 F.2d at 1165. Restraining Defendants will cause them minimal harm.  
 19 The contract for the Acquisition provides for an outside closing date of [REDACTED]. There is  
 20 “no reason why, if the merger makes economic sense now, it would not be equally sensible to  
 21 consummate the merger following a FTC adjudication on the merits that finds the merger  
 22 lawful.” *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 353 (3d Cir. 2016).

### 23 **III. CONCLUSION**

24 For the foregoing reasons, Plaintiff respectfully requests that the Court enter a TRO  
 25 before 8:59 PM Pacific Time on July 31, 2022, preventing Defendants from completing the  
 26 Acquisition pending the issuance of an administrative complaint by the Commission, and if  
 27 such complaint is issued, before the Court rules on Plaintiff’s requested preliminary injunction.  
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Dated: July 27, 2022

Respectfully submitted,

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