PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of **Meta Platforms, Inc.,** **a corporation,** **Mark Zuckerberg,** **a natural person,** **and** **Within Unlimited, Inc.,** **a corporation.**	**DOCKET NO. 9411**

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO COMPEL INTERROGATORY RESPONSES

"The purpose of interrogatories is to narrow the issues and thus help determine what evidence will be needed at trial." *In re TK-7 Corp.*, 1990 FTC LEXIS 20, *1-2 (F.T.C. March 9, 1990). *See also In the Matter of Aspen Technology, Inc.*, 2003 FTC LEXIS 195, *5-6 (F.T.C. Dec. 23, 2003). Respondents' motion to compel seeks the exact opposite: to *expand* the issues in contention beyond those found in the Amended Complaint. Complaint Counsel have nonetheless responded adequately to all four Interrogatories in question here.

On August 11, 2022, the Commission initiated this proceeding. On October 4, 2022, Respondents served their First Set of Interrogatories, four of which are in dispute here. On October 13, 2022, Complaint Counsel filed an unopposed motion to amend the complaint. On the same day, the Chief Administrative Law Judge granted the motion, and Complaint Counsel filed an Amended Complaint. As Respondents see it, by amending the complaint, "Complaint Counsel has essentially conceded that this acquisition will cause no competitive harm in the

supposed 'VR Fitness Apps' market by dropping that market from the case." Mot. at 5. Yet, as to three of the four interrogatories in dispute here (Interrogatories, 7, 8, and 11), Respondents seek information that relates exclusively to the "VR Fitness Apps" market that is no longer relevant in this litigation. In other words, Interrogatories 7 and 8 bear no relationship to the Amended Complaint and, as to Interrogatory 11, the dispute relates exclusively to a portion that bears no relationship to the Amended Complaint.

With respect to the only other interrogatory in question here (Interrogatory 1), Respondents seek Complaint Counsel's interpretation of relief that is at the sole discretion of *the Commission*. Nevertheless, Complaint Counsel has produced a comprehensive and adequate response with all information known to it. Any further response could not possibly "be reasonably expected to yield information relevant to" anything about the administrative trial, 16 C.F.R. § 3.31(c)(1), and the Commission's public guidance is adequate to address any outstanding questions that Respondents may have. *See Statement of the Commission on Use of Prior Approval Provisions in Merger Orders*, Matter No. P859900 (Oct. 25, 2021).

Complaint Counsel therefore respectfully requests that this Court deny Respondents' Motion to Compel Responses to Interrogatories (filed Dec. 16, 2022) ("Motion to Compel").

I. Interrogatory 1: Complaint Counsel's Response Regarding Information Contained in the Commission's Notice of Contemplated Relief Is Sufficient

Respondents dispute the adequacy of Complaint Counsel's response to Interrogatory 1, which seeks information regarding the Commission's Notice of Contemplated Relief. *See* 16 C.F.R. § 3.11(b) ("The Commission's complaint shall contain the following . . . (3) Where practical, a form of order which *the Commission* has reason to believe should issue if the facts

are found to be as alleged in the complaint." (emphasis added)). In pertinent part, the Amended Complaint's Notice of Contemplated Relief states that should

> the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Acquisition challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to: . . . [a] requirement that, for a period of time, Respondents shall not, without giving prior notice to and obtaining the prior approval of the Commission, acquire, merge with, consolidate, or combine their businesses with any other company engaged in business activity in the relevant markets and, if necessary, in related business activity and markets.

In the Matter of Meta Platforms, Inc. et al., Dkt. No. 9411, Doc. No. 605837 at 18 (Oct. 13, 2022).

In response to Interrogatory No. 1, Complaint Counsel stated, to the best of its knowledge, what it "understands the phrase 'related business activity and markets' to" mean. That was all that is required, as it is all the information that Complaint Counsel possesses about the prior approval provision of the Notice of Contemplated Relief in the Amended Complaint. Complaint Counsel is unable to speak on behalf of the Commission itself or verify what the Commission understood the language of the Notice of Contemplated Relief to mean when it issued the Amended Complaint. *See* 16 C.F.R. § 3.11(b) ("The Commission's complaint shall contain the following . . . (3) Where practical, a form of order which *the Commission* has reason

to believe should issue if the facts are found to be as alleged in the complaint." (emphasis added)).

Indeed, Respondents appear to confuse or conflate the roles of Complaint Counsel on the one hand and the Commission on the other. For example, Respondents' chief gripe about Complaint Counsel's response to Interrogatory 1 is that "Complaint Counsel served a vague, imprecise, and facially deficient response about its subjective 'understanding' of the relief *it* chose to seek." Mot. at 3 (emphasis added). Likewise, respondents subject heading states, — "**Interrogatory No. 1 Seeks Critical Information Known *Only to Complaint Counsel***" Mot. at 2 (emphasis added). But, as noted above, it was the Commission, not Complaint Counsel, that issued the Notice of Contemplated Relief, which means that only the Commission can proffer an authoritative interpretation of that Notice. Complaint Counsel can only provide Respondents with its understanding of the Notice and the remedies that the Commission may impose. Complaint Counsel's response to this interrogatory did precisely that.

II. Interrogatories 7 & 8 May Have Been Relevant at One Time, but Are No Longer Relevant Today

The initial complaint filed on August 11, 2022 alleged that the merging parties' Beat Saber and Supernatural virtual reality applications are head-to-head competitors in the VR Fitness Apps market. In light of this, when Respondents propounded their interrogatories on October 4, it may have at that time been reasonable for Interrogatories 7 and 8 to seek information regarding whether those apps are "significantly constraining the price and competitive behavior" of each other. But the operative version of the complaint, the October 13 Amended Complaint, includes no allegations whatsoever regarding the VR Fitness Apps market, head-to-head competition between Beat Saber and Supernatural, nor anything else that implies

present-day head-to-head competition between the merging parties' existing goods or services. For that reason, Interrogatories 7 and 8 cannot possibly be "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). As Respondents know from the federal court Section 13(b) litigation, the alleged VR Dedicated Fitness App market includes Supernatural and *not* Beat Saber.

Moreover, even if the Amended Complaint asserted allegations related to head-to-head competition between Beat Saber and Supernatural, Interrogatories 7 and 8 would still be improper. Although Rule 3.35(b)(2) authorizes an interrogatory to ask for facts supporting a specific contention, an interrogatory asking for all facts supporting the entire claim is impermissible. *Roberts v. Heim*, 130 F.R.D. 424, 427 (N.D. Cal. 1989); *Mort v. A/S/D/S Svendborg*, 41 F.R.D. 225, 226 (E.D. Pa. 1966). These two interrogatories purport to require Complaint Counsel to "explain" how the two aforementioned apps are "significantly constraining the price and competitive behavior of" each other, which is tantamount to seeking an explanation of Complaint Counsel's entire case (or, more precisely, its former case, which was not included in the Amended Complaint).

In all events, Complaint Counsel's responses to Interrogatories 7 and 8 are more than sufficient. During the parties' November 18, 2022 meet and confer, Respondents clarified that, through these two interrogatories, they seek the bases for the allegation regarding the planned expansion of Beat Saber into a VR dedicated fitness app, specifically the ways in which Meta is "poised on the edge" of the relevant market. Complaint Counsel pointed to (i) 14 paragraphs of its Proposed Findings of Fact in the federal litigation; (ii) 17 paragraphs of its expert witness's opening report; and (iii) and three paragraphs of its expert witness's rebuttal report. The 14

relevant paragraphs of the Proposed Findings of Fact alone cite a dozen individual sources (including both documentary and deposition evidence). This is more than sufficient.

III. Much Like Interrogatories 7 and 8, Interrogatory 11 Seeks Information That Is Not Relevant to the Amended Complaint

"Interrogatory No. 11 asks Complaint Counsel to identify which apps are in, or out of, the antitrust markets that Complaint Counsel alleged in the original complaint." Mot. at 8. There is no dispute as to Complaint Counsel's response with regard to the VR Dedicated Fitness App market. *See id.* Rather, Respondents move to compel interrogatory responses only as to a relevant market that was alleged in the initial complaint but not in the Amended Complaint.

As explained above, the Amended Complaint relates to the VR Dedicated Fitness App market but not to the broader "VR Fitness App" market that was contained in initial complaint. Respondents' argument that "the contours of that alleged market" (i.e., the broader "VR Fitness App" market that is not alleged in the Amended Complaint) "remains highly relevant to the claims in this case," Mot. at 8, would come as a surprise to anyone who is familiar with the federal court preliminary injunction hearing: the identification of the specific products that may or may not constitute that alternative market definition did not come up once in the recently completed federal court hearing, nor anywhere in any of the parties' preliminary injunction briefs or respective Proposed Findings of Fact.

Respondents are wrong that "Complaint Counsel allege that Meta's ownership of an incidental fitness app in that market (Beat Saber) uniquely positions it to enter the alleged 'VR Dedicated Fitness App' market." Mot. at 8. This explanation, which curiously lacks any citation, is the crux of Respondents' argument as to Interrogatory 11. Rather, as the Amended Complaint explains, Meta's ownership of the runaway most popular VR app of all time, which [redacted]

[redacted] combined with Meta's massive resources and expertise, are what "uniquely positions it to enter the alleged 'VR Dedicated Fitness App' market." *See* Amended Complaint (Oct. 13, 2022), ¶¶ 4, 10, 11, 55, 77, 91.

Respondents have repeatedly stated their belief that the federal court preliminary injunction hearing is the proceeding that will determine the fate of the proposed acquisition. *See, e.g.*, FTC v. Meta Platforms, Inc., Case No. 5:22-cv-4325 (N.D. Cal.) Dkt. Nos. 263 at 1 ("the FTC's motion for a preliminary injunction – which, if granted, would kill the parties' deal"). Taking their word at face value, it is telling that they have not made any argument in that proceeding that bears any relationship to the argument that they make here with respect to Interrogatory 11, namely that "the contours of" the broader "VR Fitness App" market "remains highly relevant to the claims in" the Amended Complaint. Mot. at 8.

In conclusion, Complaint Counsel respectfully requests that Respondents' Motion to Compel Interrogatory Responses be denied.

Dated: December 23, 2022

Respectfully submitted,

s/ *Abby L. Dennis*

Abby L. Dennis
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-2381
Email: adennis@ftc.gov

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2022, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I caused the foregoing document to be served via email to:

Michael Moiseyev
Weil, Gotshal & Manges LLP
2001 M Street, NW, Suite 600
Washington, DC 20036
(202) 682-7235
michael.moiseyev@weil.com
Meta.ALJ.Case-Weil.KH@weil.com

Counsel for Meta Platforms, Inc.

Logan M. Breed
Hogan Lovells LLP
555 13th Street, NW
Washington, DC 20004
(202) 637-6407
logan.breed@hoganlovells.com
WithinFTC9411@hoganlovells.com

Counsel for Within Unlimited, Inc.

Geoffrey M. Klineberg
Kellogg, Hansen, Todd, Figel & Frederick, PLLC
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036
(202) 326-7928
gklineberg@kellogghansen.com
ZUCKERBERG-ALJ@lists.kellogghansen.com

Counsel for Mark Zuckerberg

By: *s/ Abby L. Dennis*
Abby L. Dennis

Counsel Supporting the Complaint