

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

	)	
<b>In the Matter of</b>	)	
	)	
<b>Meta Platforms, Inc., et al.,</b>	)	
	)	
<b>Respondents.</b>	)	<b>Docket No. 9411</b>
	)	
	)	<b>PUBLIC</b>

**RESPONDENTS’ MOTION TO COMPEL INTERROGATORY RESPONSES**

Respondents respectfully move to compel Complaint Counsel to sufficiently respond to four interrogatories that go to central issues in this case, but for which Complaint Counsel have served vague, evasive, and plainly deficient responses.

Complaint Counsel seeks to block Meta’s proposed acquisition of Within, the developer of a virtual reality (“VR”) fitness application (“app”) called Supernatural. On top of that, Complaint Counsel seeks to impose an unprecedented prior notice-and-approval regime on all *future* potential acquisitions by Meta, Within, or Mark Zuckerberg in his personal capacity. The basis for this staggering relief is two “potential competition” theories, which posit that, absent the proposed acquisition, Meta would either (a) enter the putative “Dedicated VR Fitness Apps” market itself by transforming its popular rhythm game Beat Saber into a fitness app or building a new fitness app from scratch, or (b) Meta’s app Beat Saber would remain on the edge of the alleged antitrust market and exert competitive pressure on market participants, including Supernatural.

Core facts in this dispute are thus (1) the scope of Complaint Counsel’s proposed notice-and-approval requirement, (2) competition between Beat Saber and apps in the putative antitrust market such as Supernatural, and (3) market definition. Yet Complaint Counsel has refused to

provide adequate responses to interrogatories addressing *all* of these topics. Perhaps most egregious is Complaint Counsel’s refusal to provide anything beyond its subjective “understanding” of the notice-and-approval provision it chose to seek—which is so vague and broad that it could cover businesses with any remote connection to VR, including apps in the supposed “incidental fitness app” market that Complaint Counsel dropped from this case. Nothing justifies Complaint Counsel’s position; indeed, Complaint Counsel’s core objections are squarely foreclosed by the FTC Rules.

The Court should grant this motion and compel Complaint Counsel to sufficiently respond to the interrogatories identified below within three days of this Court’s order.

**I. Complaint Counsel’s Notice-and-Approval Interrogatory Response is Deficient**

**A. Interrogatory No. 1 Seeks Critical Information Known Only to Complaint Counsel**

In this Part 3 proceeding, Complaint Counsel is seeking extraordinary and unprecedented relief: An order barring *all* Respondents—Meta, Within, and Mark Zuckerberg in his personal capacity—from attempting to “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,**” absent prior consent and approval from the FTC. Amended Complaint (“AC”), at 18 (emphasis added). Yet because the Amended Complaint does not define what constitutes “related business activity and markets,” Respondents cannot determine the scope of the relief sought by the FTC.

To this end, Respondents served Interrogatory No. 1, which seeks the most basic information about Complaint Counsel’s requested relief: “[T]he precise contours of the ‘related business activity and markets.’” Ex. A, at 8. Complaint Counsel has never disputed the central relevance of this Interrogatory. Nor could it. The FTC Rules expressly authorize seeking

discovery on Complaint Counsel’s requested relief, *see* 16 C.F.R. § 3.31(c)(1), and the “purpose of interrogatories is to narrow the issues and thus help determine what evidence will be needed at trial and to reduce the possibility of surprise at the trial,” *In re Union Oil Co. of California*, 2003 WL 21672867, at \*2 (F.T.C. 2003). Moreover, only Complaint Counsel can know the answer to this interrogatory since it addresses Complaint Counsel’s requested relief.

### **B. Complaint Counsel Served a Vague and Deficient Interrogatory Response**

In response to Interrogatory No. 1, Complaint Counsel served a vague, imprecise, and facially deficient response about its subjective “understanding” of the relief it chose to seek:

Complaint Counsel understands the phrase “related business activity and markets” to refer to business activities or markets that are related to the VR Dedicated Fitness App market, as that market is alleged in the Amended Complaint, and which would include **any virtual reality hardware, software, or service that involve the provision of, or the reasonable probability of providing, physical fitness benefits or activities in virtual reality.**

Ex. A, at 9–10. Among other failures, this response:

- Does not define which businesses “involve . . . the reasonable probability of providing[] physical fitness benefits or activities in virtual reality,” even though VR by definition involves some movement and thus *every single VR app* could theoretically fall under this definition;
- Does not define or explain which businesses “involve the provision of . . . physical fitness benefits or activities in virtual reality,” even though the terms “physical fitness benefits” and “activities” are extremely broad and could include all “incidental” fitness apps like Beat Saber (AC ¶¶ 33-34, 64); and,
- Does not define or explain what constitutes a “virtual reality hardware, software, or service”—which could encompass *any* business (not just VR apps) that provides some services related to VR, such as companies that manufacture specific hardware components, generalist studios that could theoretically provide content in VR, and so forth.

Respondents explained these issues to Complaint Counsel on a meet and confer, but Complaint Counsel refused to budge, instead serving a “supplemental” interrogatory response that clarified

nothing. *See* Ex. A, at 10 (Complaint Counsel has “provided all the factual, non-privileged information in its possession responsive to this Interrogatory”).

### **C. Complaint Counsel Should be Ordered to Serve a Supplemental Response**

Because Complaint Counsel’s vague interrogatory response does not come close to “narrow[ing] the issues” or help “determine what evidence will be needed at trial,” *In re Union Oil Co. of California*, 2003 WL 21672867, at \*2, it is insufficient as a matter of law and requires supplementation. *See* 16 C.F.R. § 3.25(a)(2) (requiring that interrogatories be answered “fully”); *Corbus, LLC v. 8th Bridge Capital, Inc.*, Case No. 2:19-cv-10182, 2021 WL 1539261, at \*4 (C.D. Cal. 2021) (granting motion to compel due to “vague and non-responsive” interrogatory response).

Ordering Complaint Counsel to fully respond to Interrogatory No. 1 is particularly warranted given the paramount importance of this issue. At the evidentiary hearing, Respondents will mount a vigorous defense against Complaint Counsel’s draconian notice-and-approval regime. Doing so requires understanding the scope of that proposed relief, which Complaint Counsel exclusively knows but refuses to reveal. *C.f. Wolff v. McDonnell*, 418 U.S. 539, 564 (1974) (requiring sufficient notice to “enable [defendants] to marshal the facts and prepare a defense”). Complaint Counsel’s position flouts not only the core purpose of discovery—to “determine what evidence will be needed at trial,” *In re Union Oil Co. of California*, 2003 WL 21672867, at \*2—but also bedrock principles of due process, *see BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 & n.22 (1996) (“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment). Those due process principles are heightened when the complainant is a federal agency before an agency tribunal. *See Matthews v. Eldridge*, 424 U.S. 319 (1976).

Moreover, 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,<sup>1</sup> and yet Complaint Counsel’s notice-and-approval provision is so broadly framed it could easily encompass this market (and many others). Complaint Counsel should be required to answer the very basic question of the markets in which Complaint Counsel seek to impose a prior approval requirement.

#### **D. Complaint Counsel’s Objections Fail**

Complaint Counsel’s primary argument is that interrogatory responses can address only facts, and Interrogatory No. 1 impermissibly addresses a legal question—the meaning of Complaint Counsel’s proposed relief—which is privileged. The FTC Rules foreclose this position. FTC Rule 3.31(c)(1) authorizes seeking discovery on topics “relevant . . . to the proposed relief,” and FTC Rule 3.35(b)(2) expressly permits interrogatories that address “application of law to fact.” Interrogatory No. 1 is plainly permissible under the FTC Rules.<sup>2</sup>

Nor is there merit to Complaint Counsel’s bare-bones assertion of privilege, which is refuted by the fact that Complaint Counsel *already served* a non-privileged response. If no privilege precluded Complaint Counsel from serving this response, no privilege should prevent Complaint Counsel from clarifying the response to render it sufficiently precise. Moreover, even if privilege was implicated here (which it is not), “[t]he great weight of authority holds that the attorney-client privilege is waived when a litigant places information protected by it in issue

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<sup>1</sup> See *F.T.C. v. Meta Platforms, Inc., et al.*, Case No. 5:22-cv-04325-EJD, Dkt. 101 (N.D. Cal. Oct. 7, 2022) (dropping allegations on the “VR Fitness Apps” market, “including any anticompetitive effects in that market should the Proposed Transaction occur”).

<sup>2</sup> These Rules also defeat Complaint Counsel’s argument that this interrogatory “imposes requirements on the pleadings beyond those required by the applicable law and rules,” Ex. A, at 9.

through some affirmative act for his own benefit.” *Conkling v. Turner*, 883 F.2d 431, 434 (5th Cir. 1989). Here, Complaint Counsel affirmatively seeks to impose a prior approval requirement, which places the scope of that requirement squarely at issue and waives any privilege claims related to it.

Complaint Counsel also may cite *In re Intuit*, 2022 WL 16960876 (F.T.C. 2022) to support its position, but this case further supports compelling Complaint Counsel to supplement its interrogatory response. There, an interrogatory sought information on the difference between the relief sought in the administrative proceeding and the relief received in a settlement. *Id.* at \*6. This Court denied a motion to compel only because the parties were “*equally capable* of ascertaining the information requested by” the interrogatory. *Id.* (emphasis added). The inverse is true here: Because the phrase “in related business activity and markets” (and Complaint Counsel’s interrogatory response) is hopelessly vague, Respondents cannot understand its meaning or scope—only Complaint Counsel can. *Intuit*’s core logic on mutuality thus underscores the need for a supplemental response here.

Finally, Complaint Counsel has argued that Interrogatory No. 1 is premature because Judge Chappell will ultimately determine the scope of the notice-and-approval requirement. That ignores FTC Rule 3.31(c)(1), which specifically authorizes discovery on topics “relevant . . . to the proposed relief.” The sought-after discovery is relevant to this Court’s decision on the scope of relief. In any event, Complaint Counsel’s novel and insupportable position makes no sense and would bar *all* discovery on remedies, which are always determined by a court.

\* \* \*

For these reasons, the Court should order Complaint Counsel to supplement its response to Interrogatory No. 1 to provide a specific, tailored description of the scope of the “related business

activity and markets” it seeks to regulate here. This response should include (but not be limited to) providing examples of the types of businesses and applications that would and would not fall under the definition of “related business activity and markets.”

## **II. Complaint Counsel has Failed to Answer Interrogatories on Competition Between Beat Saber and Supernatural**

Interrogatory Nos. 7 and 8 seek information on whether Supernatural and Beat Saber are “significantly constraining the price and competitive behavior of” one another, “including why or why not [either] is or is not doing so.” Ex. A, at 10–14. Complaint Counsel has offered no meaningful response. Instead, Complaint Counsel has merely listed citations that supposedly support a single paragraph in the Amended Complaint (*see id.*), yet these citations do not address competition between Beat Saber and Supernatural and are therefore unresponsive.

Nothing justifies Complaint Counsel’s evasive and non-responsive interrogatory response. Complaint Counsel says that competition between Beat Saber and Supernatural is no longer relevant because Complaint Counsel abandoned its horizontal competition claim, but this is wrong. Beat Saber-Supernatural competition is squarely relevant to the Amended Complaint’s allegation that Meta is “poised on the edge of the VR dedicated fitness app market with its popular Beat Saber app” and therefore exerts competitive pressure on Supernatural. AC ¶ 11. It also relates to the legitimacy of the putative antitrust market—which *excludes* Beat Saber, thus implying there is little-to-no competition between it and “VR Dedicated Fitness” apps like Supernatural. *Id.* ¶¶ 33–42. Respondents are entitled to discovery on these highly relevant issues. *See* FTC Rule 3.31(c)(1) (allowing discovery on “information relevant to the allegations of the complaint”); *FTC v. Meta Platforms, Inc.*, No. 20-3590 (JEB), Dkt. No. 165 (D.D.C. Aug. 1, 2022) (compelling FTC to further respond to market definition interrogatory).

### III. Complaint Counsel has Refused to Provide Basic Information on Market Definition

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. Ex. A, at 14. And because the interrogatory is identical to an interrogatory served in the Northern District of California proceeding, Respondents seek a response only *after* the federal court proceeding has concluded and only *if* a supplemental response is required based on new or potential entrants to the alleged antitrust markets.

Respondents have agreed to respond to Interrogatory No. 11 for the “VR Dedicated Fitness Apps” market. Yet Complaint Counsel refuses to do so for the broader “VR Fitness App” market that Complaint Counsel put forth in this case but later abandoned. But the contours of that alleged market—which includes Beat Saber—remains highly relevant to the claims in this case. For instance, 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—a *requirement* for Complaint Counsel’s actual potential competition claim to succeed. *See FTC v. Steris Corp.*, 133 F. Supp. 3d 962, 966 (N.D. Ohio 2015). The existence of new “VR Fitness Apps”—which, under Complaint Counsel’s logic, could be quickly transformed into “Dedicated Fitness” apps—thus undermines Complaint Counsel’s allegation of Meta’s unique market-entry ability.

In addition, which apps are in the “VR Fitness apps” market but *excluded* from the narrower “VR Dedicated Fitness Apps” market goes to the legitimacy of Complaint Counsel’s market definition—a quintessential issue that is appropriate for fact discovery. *See supra*, § II.

The Court should order Complaint Counsel to respond to Interrogatory No. 11 (if necessary) for the VR Fitness App market.



\* \* \*

For these reasons, the Court should order Complaint Counsel to sufficiently respond to Interrogatory Nos. 1, 7, 8, and 11 within three days of this Court's order.

Dated: December 16, 2022

Respectfully submitted,

/s/ Eric Hochstadt

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***Counsel for Within Unlimited, Inc.***

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

_____	)	
<b>In the Matter of</b>	)	
	)	
<b>Meta Platforms, Inc.,</b>	)	
<b>a corporation,</b>	)	
	)	<b>Docket No. 9411</b>
<b>Mark Zuckerberg,</b>	)	
<b>a natural person,</b>	)	<b>PUBLIC</b>
	)	
<b>and</b>	)	
	)	
<b>Within Unlimited, Inc.,</b>	)	
<b>a corporation.</b>	)	
_____	)	

**[Proposed] Order Granting Motion to Compel**

Having considered Respondents’ motion to compel, the motion is hereby GRANTED.

It is so ORDERED.

\_\_\_\_\_

D. Michael Chappell  
Chief Administrative Law Judge

Date: December \_\_\_\_, 2022.

**CERTIFICATE OF SERVICE**

I hereby certify that, on December 16, 2022, I caused the foregoing document to be electronically filed with the Secretary of the Commission using the Federal Trade Commission’s e-filing system, and I also served the documents via email to:

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 Secretary of the Federal Trade Commission  
 FEDERAL TRADE COMMISSION  
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The Honorable D. Michael Chappell  
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**STATEMENT REGARDING CONFERRAL WITH COMPLAINT COUNSEL**

Pursuant to FTC Rule 3.22(g) and paragraph 4 of the Scheduling Order, Respondents submit this statement representing that Counsel for Respondents have conferred with Complaint Counsel in a good faith effort to resolve the issues raised by this motion, but have been unable to reach agreement. Specifically, the parties held a telephonic meet and confer on November 18, 2022, at 11:00 AM EST. Attendees included Jeremy Cain, Luke Sullivan, and Christina Swiatowy from Weil, Gotshal & Manges on behalf of Meta, Christopher Fitzpatrick from Hogan Lovells on behalf of Within, and Jeanine Balbach, Frances Anne Johnson, and Adam Pergament from the FTC on behalf of Complaint Counsel. The parties also met and conferred on December 6, 2022, at 10:00 AM EST. Attendees included Eric Hochstadt, Luke Sullivan, and Christina Swiatowy from Weil, Gotshal & Manges on behalf of Meta, Christopher Fitzpatrick from Hogan Lovells on behalf of Within, and Frances Anne Johnson from the FTC on behalf of Complaint Counsel.

By: /s/ Eric Hochstadt  
Eric Hochstadt

**CERTIFICATE FOR ELECTRONIC FILING**

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the original filing, and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

By: /s/ Eric Hochstadt  
Eric Hochstadt

# **Exhibit A**

**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 FIRST SUPPLEMENTAL RESPONSES AND  
OBJECTIONS TO RESPONDENTS’ FIRST SET OF INTERROGATORIES**

Pursuant to Rules 3.31 and 3.35 of the Federal Trade Commission’s Rules of Practice for Adjudicative Proceedings, Complaint Counsel hereby responds to Respondents Meta Platforms Inc. and Within Unlimited Inc.’s (collectively, “Respondents”) First Set of Interrogatories to Complaint Counsel, dated October 4, 2022. Subject to the General and Specific Objections below, and without waiving these objections, Complaint Counsel answers as follows:

**PRELIMINARY STATEMENT**

On August 11, 2022, Complaint Counsel filed a complaint to initiate this proceeding. On October 4, 2022, Respondents served their First Set of Interrogatories. 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. For purposes of these responses and objections, Complaint Counsel construes all



references to the “Administrative Complaint” as references to the Amended Complaint filed on October 13, 2022.

Complaint Counsel’s discovery and investigation in this matter are continuing. These responses and objections are made on the basis of information currently available to and located by Complaint Counsel upon reasonable investigation consistent with the Commission’s Rules of Practice for Adjudicative Proceedings. Complaint Counsel reserves the right to assert additional objections to Respondent’s Interrogatories, and to amend or supplement these objections and responses as necessary after the close of discovery.

Each response is without waiver or limitation of Complaint Counsel’s right to object on grounds of competency, relevance, materiality, privilege, admissibility as evidence for any purposes, or any and all grounds to the use of any documents or information in any subsequent proceeding in, or trial of, this or any other matter.

A partial response by Complaint Counsel to any interrogatory that has been objected to in whole or in part is not a waiver of the objection. By asserting various objections, Complaint Counsel does not waive other objections that may become applicable. The failure of Complaint Counsel to object to any interrogatory on a particular ground may not be construed as a waiver of its rights.

### **GENERAL OBJECTIONS**

The following General Objections apply to all of Respondents, Interrogatories and are hereby incorporated by reference into our response to each of the following responses. The assertion of the same, similar, or additional objections or the provision of partial answers in response to an individual interrogatory does not waive any of Complaint Counsel’s general objections as to that interrogatory or any other interrogatories.

1. Complaint Counsel objects to each Interrogatory to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings, including seeking information that is beyond the scope of permissible discovery under Rule 3.31(c)(2). Complaint Counsel's responses will comply with the Commission's Rules of Practice for Adjudicative Proceedings.

2. Complaint Counsel objects to each Interrogatory to the extent it seeks to impose any duty or obligation beyond the applicable orders of the Chief Administrative Law Judge Chappell.

3. Complaint Counsel objects to each Interrogatory to the extent the Interrogatories, including all separate and distinct subparts, exceed the 10 Interrogatories per party allowed in the Court's Scheduling Order.

4. Complaint Counsel objects to each Interrogatory to the extent it seeks information that is duplicative of the information that has been sought in connection with the Preliminary Injunction Proceeding, in violation of Paragraph 7 of the Scheduling Order, which provides that "any discovery taken in the administrative proceeding shall be non-duplicative of the discovery taken in the [Preliminary Injunction] Proceeding."

5. Complaint Counsel objects to each Request, Definition, and Instruction as overbroad and unduly burdensome to the extent it seeks information from beyond those "collected or reviewed in the course of the investigation of the matter or prosecution of the case and that are in the possession, custody or control of the Bureaus or Offices of the Commission that investigated the matter." Rule 3.31(c)(2).

6. Complaint Counsel objects to each Interrogatory to the extent that "information shall not be deemed to be available insofar as it is in the possession of the Commissioners, the

General Counsel, the office of Administrative Law Judges, or the Secretary in his or her capacity as custodian or recorder of any such information, or their respective staffs.” Rule 3.35(a)(1)

7. Complaint Counsel objects to each Interrogatory to the extent it seeks information for which the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served.

8. Complaint Counsel objects each Interrogatory to the extent it purports to require Complaint Counsel to conduct a search beyond that required by Rule 3.31(c)(2) or Rule 3.35(a)(1).

9. Complaint Counsel objects to each Interrogatory to the extent that each Interrogatory assumes the truthfulness of assertions that are disputed or erroneous. Nothing contained in these responses is intended to be, or in any way shall be deemed, an admission by Complaint Counsel as to the truth of any such allegations.

10. Complaint Counsel objects to each Interrogatory to the extent it concerns matters or issues that are beyond the scope of the allegations of the Amended Complaint filed in the above-captioned matter on October 13, 2022, to the proposed relief, or to the defenses of Respondents that are not contained in any Answer filed in the above-captioned matter, on the grounds that such discovery is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

11. Complaint Counsel objects to each Interrogatory to the extent it is overly broad, vague, ambiguous, unduly burdensome, oppressive, and not proportional to the needs of the case.

12. Complaint Counsel objects to each Interrogatory as premature and unduly burdensome to the extent it is a contention interrogatory. No response is required to contention interrogatories prior to the close of discovery pursuant to Rule 3.35(b)(2).

13. Complaint Counsel objects to each Interrogatory as premature to the extent it seeks information that relates to expert opinions prior to the dates for expert disclosures prescribed by the Court's Scheduling Order.

14. Complaint Counsel objects to each Interrogatory to the extent it seeks proprietary, confidential, financial, trade secret, or commercially sensitive information from third parties that could harm third parties' competitive or business positions or result in a breach of Complaint Counsel's obligation to maintain the confidentiality of such information. Any confidential or proprietary information will be produced pursuant to the Protective Order in this matter, or any modifications thereto.

15. Complaint Counsel objects to each Interrogatory to the extent it seeks information protected from disclosure by any applicable privilege, doctrine, order, or rule, including the attorney-client privilege, the government deliberative process privilege, the informant privilege, law enforcement investigatory privilege, the work product doctrine, Rule 3.31A(e), 3.31(c)(2) or 3.31(c)(4), or any other applicable privilege from disclosure. Complaint Counsel does not, by providing a response to any interrogatory, waive or partially waive any applicable privilege or attorney work product claim. Pursuant to Rule 3.31(g), the inadvertent production of any privileged information shall not constitute a waiver of the applicable privilege.

#### **SPECIFIC OBJECTIONS TO RESPONDENTS' DEFINITIONS**

16. Complaint Counsel objects to each interrogatory to the extent it purports to attribute any special or unusual meaning to any technical term or phrase. Complaint Counsel will respond to each interrogatory using the ordinary meaning of such term or phrase.

17. Complaint Counsel objects to definition of "Administrative Complaint" in Definition 3 to the extent it refers to the Administrative Complaint dated August 11, 2022, which

is no longer the operative complaint in this action. As noted above, for purposes of these responses and objections, Complaint Counsel construes all references to the “Administrative Complaint” as references to the Amended Complaint filed on October 13, 2022.

18. Complaint Counsel objects to Definition 8 and each Interrogatory as overly broad, unduly burdensome, and contrary to the Rules to the extent the Interrogatories seek information from “Commissioners of the FTC and their direct staff, including each Commissioner’s Attorney Advisors.” *See* Rule 3.35(a)(1) (“For this purpose, information shall not be deemed to be available insofar as it is in the possession of the Commissioners, the General Counsel, the office of Administrative Law Judges, or the Secretary in his or her capacity as custodian or recorder of any such information, or their respective staffs.”).

19. Complaint Counsel objects to the definitions of “Meta” and “Within” in Definitions 10 and 11. Complaint Counsel does not have knowledge of Respondents’ “subsidiaries, affiliates, divisions, either collectively, individually, or in any subset; or the “present and former officers, directors, employees, agents, and other persons acting on behalf of [Respondents], their divisions, subsidiaries, affiliates.”

20. Complaint Counsel objects to the Definitions of “You,” and “Your” in definition 12 as overly broad and unduly burdensome to the extent that they seek information from beyond that “collected or reviewed in the course of the investigation of the matter or prosecution of the case and that are in the possession, custody or control of the Bureaus or Offices of the Commission that investigated the matter.” Rule 3.31(c)(2). Complaint Counsel further objects Definition 12 and each Interrogatory as overly broad, unduly burdensome, and contrary to the Rules to the extent the Interrogatories seek information from the Federal Trade Commission or its “Commissioners and their direct staff, including each Commissioner’s Attorney Advisors.”

*See* Rule 3.35(a)(1) (“For this purpose, information shall not be deemed to be available insofar as it is in the possession of the Commissioners, the General Counsel, the office of Administrative Law Judges, or the Secretary in his or her capacity as custodian or recorder of any such information, or their respective staffs.”).

21. Complaint Counsel objects to Definition 15 on the ground that it renders the Interrogatories vague, overly broad, unduly burdensome, and not proportional to the needs of the case.

### **SPECIFIC OBJECTIONS TO RESPONDENTS’ INSTRUCTIONS**

Complaint Counsel objects to each Instruction to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission’s Rules of Practice for Adjudicative Proceedings, including seeking the production of documents that are beyond the scope of permissible discovery under Rule 3.31(c)(2), Rule 3.35(a)(1) or any applicable orders of Chief Administrative Law Judge Chappell.

### **SPECIFIC OBJECTIONS AND RESPONSES**

Subject to the General Objections and the Specific Objections above and below, and without waiving these objections, Complaint Counsel answers as follows:

#### **INTERROGATORY 1:**

Identify the precise contours of the “related business activity and markets” referenced in the Administrative Complaint’s request for relief.

#### **OBJECTIONS AND RESPONSES TO INTERROGATORY 1:**

Complaint Counsel incorporates by reference its General Objections, Specific Objections to Definitions, and Specific Objections to Instructions. Complaint Counsel objects to this Interrogatory on the ground that Respondents’ Interrogatories, including all separate and distinct

subparts, exceed the 10 Interrogatories per party allowed in the Court's Scheduling Order.

Complaint Counsel objects to this Interrogatory to the extent that it seeks information protected from disclosure by attorney-client privilege, attorney work product doctrine, government deliberative process privilege, common-interest privilege, investigative privilege, or any other privilege, doctrine, or protection as provided by any applicable law.

Furthermore, Complaint Counsel objects to this Interrogatory on the grounds that it is vague, overly broad, unduly burdensome, and not proportional to the needs of the case, to the extent that by purporting to require Complaint Counsel identify the "precise contours" of the "related business activity and markets" referenced in the Amended Complaint's request for relief it imposes requirements on the pleadings beyond those required by the applicable law and rules.

Complaint Counsel also objects to this Interrogatory as premature and unduly burdensome because it is a contention Interrogatory, and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Subject to and without waiving the foregoing objections, Complaint Counsel answers as follows: The Amended Complaint in this administrative proceeding seeks 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." Complaint Counsel understands the phrase "related business activity and markets" to refer to business activities or markets that are related to the VR Dedicated Fitness App market, as that market is alleged in the Amended Complaint, and which

would include any virtual reality hardware, software, or service that involve the provision of, or the reasonable probability of providing, physical fitness benefits or activities in virtual reality.

**SUPPLEMENTAL OBJECTIONS AND RESPONSES TO INTERROGATORY 1:**

Subject to the General Objections and the Specific Objections regarding this Interrogatory, and without waiving these objections, Complaint Counsel further responds as follows:

In the parties' November 18, 2022 meet and confer, Respondents asked for additional information regarding Complaint Counsel's response to Interrogatory 1. Complaint Counsel has provided all the factual, non-privileged information in its possession responsive to Interrogatory 1.

**INTERROGATORY 7:**

Explain whether or not, in the present competitive environment, Beat Saber is significantly constraining the price and competitive behavior of Supernatural, including why or why not Beat Saber is or is not doing so.

**OBJECTIONS AND RESPONSES TO INTERROGATORY 7:**

Complaint Counsel incorporates by reference its General Objections, Specific Objections to Definitions, and Specific Objections to Instructions. Complaint Counsel objects to this Interrogatory on the ground that Respondents' Interrogatories, including all separate and distinct subparts, exceed the 10 Interrogatories per party allowed in the Court's Scheduling Order. Complaint Counsel objects to this Interrogatory to the extent that it seeks information protected from disclosure by attorney-client privilege, attorney work product doctrine, government deliberative process privilege, common-interest privilege, investigative privilege, or any other privilege, doctrine, or protection as provided by any applicable law. Complaint Counsel objects



to this Interrogatory on the ground that it seeks information that is duplicative of the information that has been sought in connection with the Preliminary Injunction Proceeding, in violation of Paragraph 7 of the Scheduling Order, which provides that “any discovery taken in the administrative proceeding shall be non-duplicative of the discovery taken in the [Preliminary Injunction] Proceeding.”

Furthermore, Complaint Counsel objects to this Interrogatory on the ground that it is irrelevant, overly broad, unduly burdensome, and is not proportional to the needs of the case. This Interrogatory is premised on an alleged market for VR Fitness Apps, but the Amended Complaint in this action filed on October 13, 2022 does not allege a relevant market of VR Fitness Apps. Complaint Counsel objects to this Interrogatory on the ground that the undefined phrases “present competitive environment,” “significantly constraining,” and “competitive behavior” are vague and ambiguous, rendering the Interrogatory irrelevant, overly broad, unduly burdensome, and not proportional to the needs of the case.

Complaint Counsel also objects to this Interrogatory as premature and unduly burdensome because it is a contention Interrogatory, and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2). Complaint Counsel objects to the Interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case.

Subject to and without waiving the foregoing objections, Complaint Counsel is willing to meet and confer with Respondents concerning this Interrogatory.

#### **SUPPLEMENTAL OBJECTIONS AND RESPONSES TO INTERROGATORY 7:**

Subject to the General Objections and the Specific Objections regarding this Interrogatory, and without waiving these objections, Complaint Counsel further responds as follows:

During the parties' November 18, 2022 meet and confer, Respondents clarified that Interrogatory 7 seeks the bases for Complaint Counsel's allegation in paragraph 11 of the Complaint that Meta is "poised on the edge of the VR dedicated fitness app market with its popular Beat Saber app . . ." The factual bases for this allegation are set forth in the FTC's Proposed Findings of Fact in the federal court proceeding (Dkt. 275-2) ¶¶ 135-48, in Dr. Singer's expert report (PX15) ¶¶ 25, 116-18, 162-74, and in Dr. Singer's rebuttal report (PX16) ¶¶ 150-52.

**INTERROGATORY 8:**

Explain whether or not, in the present competitive environment, Supernatural is significantly constraining the price and competitive behavior of Beat Saber, including why or why not Supernatural is or is not doing so.

**OBJECTIONS AND RESPONSES TO INTERROGATORY 8:**

Complaint Counsel incorporates by reference its General Objections, Specific Objections to Definitions, and Specific Objections to Instructions. Complaint Counsel objects to this Interrogatory on the ground that Respondents' Interrogatories, including all separate and distinct subparts, exceed the 10 Interrogatories per party allowed in the Court's Scheduling Order. Complaint Counsel objects to this Interrogatory to the extent that it seeks information protected from disclosure by attorney-client privilege, attorney work product doctrine, government deliberative process privilege, common-interest privilege, investigative privilege, or any other privilege, doctrine, or protection as provided by any applicable law. Complaint Counsel objects

to this Interrogatory on the ground that it seeks information that is duplicative of the information that has been sought in connection with the Preliminary Injunction Proceeding, in violation of Paragraph 7 of the Scheduling Order, which provides that “any discovery taken in the administrative proceeding shall be non-duplicative of the discovery taken in the [Preliminary Injunction] Proceeding.”

Furthermore, Complaint Counsel objects to this Interrogatory on the ground that it is irrelevant, overly broad, unduly burdensome, and is not proportional to the needs of the case. This Interrogatory is premised on an alleged market for VR Fitness Apps, but the Amended Complaint in this action filed on October 13, 2022 does not allege a relevant market of VR Fitness Apps. Complaint Counsel objects to this Interrogatory on the ground that the undefined phrases “present competitive environment,” “significantly constraining,” and “competitive behavior” are vague and ambiguous, rendering the Interrogatory irrelevant, overly broad, unduly burdensome, and not proportional to the needs of the case.

Complaint Counsel also objects to this Interrogatory as premature and unduly burdensome because it is a contention Interrogatory, and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2). Complaint Counsel objects to the Interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case.

Subject to and without waiving the foregoing objections, Complaint Counsel is willing to meet and confer with Respondents concerning this Interrogatory.

**SUPPLEMENTAL OBJECTIONS AND RESPONSES TO INTERROGATORY 8:**

Subject to the General Objections and the Specific Objections regarding this Interrogatory, and without waiving these objections, Complaint Counsel further responds as follows:

During the parties' November 18, 2022 meet and confer, Respondents clarified that Interrogatory 8 seeks the bases for Complaint Counsel's allegation in paragraph 11 of the Complaint that Meta is "poised on the edge of the VR dedicated fitness app market with its popular Beat Saber app . . ." The factual bases for this allegation are set forth in the FTC's Proposed Findings of Fact in the federal court proceeding (Dkt. 275-2) ¶¶ 135-48, in Dr. Singer's expert report (PX15) ¶¶ 25, 116-18, 162-74, and in Dr. Singer's rebuttal report (PX16) ¶¶ 150-52.

**INTERROGATORY 11:**

Identify all applications or products included in the "VR dedicated fitness applications" and "VR fitness applications" markets identified in Your Administrative Complaint, as well as all anticipated or potential entrants into each relevant market, including the anticipated month and year for each such anticipated or potential entry.

**OBJECTIONS AND RESPONSES TO INTERROGATORY 11:**

Complaint Counsel incorporates by reference its General Objections, Specific Objections to Definitions, and Specific Objections to Instructions. Complaint Counsel objects to this Interrogatory on the ground that Respondents' Interrogatories, including all separate and distinct subparts, exceed the 10 Interrogatories per party allowed in the Court's Scheduling Order. Complaint Counsel objects to this Interrogatory on the ground that it seeks information that is duplicative of the information that has been sought in connection with the Preliminary Injunction

Proceeding, in violation of Paragraph 7 of the Scheduling Order, which provides that “any discovery taken in the administrative proceeding shall be non-duplicative of the discovery taken in the [Preliminary Injunction] Proceeding.” Complaint Counsel objects to this Interrogatory on the ground that it seeks information protected from disclosure by attorney-client privilege, attorney work product doctrine, government deliberative process privilege, common-interest privilege, investigative privilege, or any other privilege, doctrine, or protection as provided by any applicable law.

Furthermore, Complaint Counsel objects to this Interrogatory on the ground that it is overly broad, unduly burdensome, and not proportional to the needs of the case on the ground that the Interrogatory purports to require Complaint Counsel to identify “all applications or products.” Complaint Counsel objects to this Interrogatory on the ground that seeks information that is irrelevant to the claims and defenses in this litigation, and is not proportional to the needs of the case, as the Interrogatory is premised on an alleged market for VR Fitness Apps, but the Amended Complaint in this action filed on October 13, 2022 does not allege a relevant market of VR Fitness Apps.

Complaint Counsel also objects to this Interrogatory on the ground that it requests information that is not in Complaint Counsel’s possession, custody, or control. Complaint Counsel further objects to this Interrogatory to the extent it seeks discovery of publicly available information already available to Respondents, or information originally produced by Respondents, on the grounds that such information is equally available to Respondents.

Complaint Counsel also objects that this Interrogatory is premature to the extent that it asks Complaint Counsel to identify factual information that may be the subject of ongoing discovery that has not been completed. Complaint Counsel also objects to the extent that this

Interrogatory impermissibly seeks the premature and non-reciprocal disclosure of expert information or requires the FTC to produce factual analyses, comparative analyses, opinions, or theories that will be the subject of expert discovery, in advance of deadlines set by the Court for such disclosures. The FTC will submit its expert report(s) in accordance with the deadlines set forth in the Court's Scheduling Order.

The FTC also objects to this Interrogatory to the extent it seeks information related to communications between the FTC and its experts and potential experts, to the extent such information is protected from disclosure under the Court's Scheduling Order.

Subject to and without waiving the foregoing objections, Complaint Counsel answers as follows: Complaint Counsel refers Respondents to the following discovery responses in the Preliminary Injunction Proceeding: the FTC's Responses and Objections to Defendants' First Set of Interrogatories, served August 30, 2022, at Response to Interrogatory No. 5; the FTC's Supplemental Responses and Objections to Defendants' First Set of Interrogatories, served September 13, 2022, at Response to Interrogatory No. 5; the FTC's Second Supplemental Responses and Objections to Defendants' First Set of Interrogatories, served October 10, 2022, at Response to Interrogatory No. 5; and the FTC's Third Supplemental Responses and Objections to Defendants' First Set of Interrogatories, served October 25, 2022, at Response to Interrogatory No. 5. Complaint Counsel further refers Respondents to the Expert Report of Dr. Hal Singer served on Defendants in that action.

Complaint Counsel reserves the right to supplement this response based on additional fact discovery and the analysis of its experts.

**SUPPLEMENTAL OBJECTIONS AND RESPONSES TO INTERROGATORY 11:**

Subject to the General Objections and the Specific Objections regarding this Interrogatory, and without waiving these objections, Complaint Counsel further responds as follows:

In the parties' meet and confer of November 18, 2022 and in Respondents' emails of November 30, 2022 and December 2, 2022, Respondents requested that Complaint Counsel continue to supplement its responses to Interrogatory 11 (which is the same as Defendants' Interrogatory 5 in the federal court proceeding) after the conclusion of proceedings in the U.S. District Court for the Northern District of California. Respondents further requested that Complaint Counsel continue to supplement its responses to Interrogatory 11 not only with respect to VR Dedicated Fitness Apps (the relevant market alleged in the Amended Complaint) but also with respect to VR Incidental Fitness Apps, a market definition that is not at issue in this case. As explained in Complaint Counsel's initial objections and responses, Complaint Counsel will continue to supplement its response with respect to VR dedicated fitness apps should it become aware of additional facts responsive to Interrogatory 11. Complaint Counsel reaffirms its objection that Respondents' request for information about the VR incidental fitness apps market is irrelevant to the claims or defenses at issue, is unduly burdensome, and is not proportional to the needs to this case.

Dated: December 5, 2022

By: /s/ Abby L. Dennis

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*Complaint Counsel*



**CERTIFICATE OF SERVICE**

I hereby certify that on November 3, 2022, I caused the foregoing document to be served via email to:

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By: s/ **DRAFT**  
**DRAFT**

*Counsel Supporting the Complaint*