

Exhibit J

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20 UNITED STATES DISTRICT COURT
21 NORTHERN DISTRICT OF CALIFORNIA

22 SAN JOSE DIVISION

23 FEDERAL TRADE COMMISSION,

24 Plaintiff,

25 v.

26 META PLATFORMS, INC., et al.,

27 Defendants.

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

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR A
PRELIMINARY INJUNCTION**

**REDACTED VERSION OF DOCUMENT
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Dept.: Courtroom 4 – 5th Floor
Judge: Hon. Edward J. Davila

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
BACKGROUND	4
ARGUMENT	6
I. The FTC Cannot Establish a Likelihood of Success on the Merits	6
A. No Evidence Supports the Nine-App “VR Dedicated Fitness” Market	7
B. The FTC Cannot Prove Any Elements of Its Potential Competition Theory	11
1. The FTC Proffers No Evidence That Its “VR Dedicated Fitness” Market Is Oligopolistic – as <i>Marine Bancorporation</i> Requires	11
2. The “Actual Potential Competition” Claim Also Fails Because There Is No Evidence Meta Would Enter if It Did Not Acquire Within	14
3. The “Perceived Potential Competition” Claim Fails Because There Is No Evidence That Fear of Meta’s Entry Stopped Anticompetitive Conduct	20
C. The FTC Cannot Show Any Likelihood of Harm to Consumers	22
II. The Equities Sharply Weigh Against Preliminary Injunctive Relief	24
CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

<i>Adaptive Power Sols., LLC v. Hughes Missile Sys. Co.</i> , 141 F.3d 947 (9th Cir. 1998)	23
<i>B.A.T. Indus., Ltd., In re</i> , 1984 WL 565384 (FTC Dec. 17, 1984).....	13, 15, 16, 17, 18, 19
<i>BOC Int’l Ltd. v. FTC</i> , 557 F.2d 24 (2d Cir. 1977)	15, 19
<i>Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.</i> , 509 U.S. 209 (1993).....	12
<i>Brown Shoe Co. v. United States</i> , 370 U.S. 294 (1962)	9, 10, 11
<i>Concord Assocs., L.P. v. Entm’t Props. Tr.</i> , 817 F.3d 46 (2d Cir. 2016).....	10
<i>Epic Games, Inc. v. Apple Inc.</i> , 559 F. Supp. 3d 898 (N.D. Cal. 2021)	8
<i>FTC v. Affordable Media</i> , 179 F.3d 1228 (9th Cir. 1999).....	6
<i>FTC v. Arch Coal, Inc.</i> , 329 F. Supp. 2d 109 (D.D.C. 2004)	14
<i>FTC v. Atl. Richfield Co.</i> , 549 F.2d 289 (4th Cir. 1977).....	7, 15, 16, 17, 18, 19
<i>FTC v. Evans Prods. Co.</i> , 775 F.2d 1084 (9th Cir. 1985)	25
<i>FTC v. Exxon Corp.</i> , 636 F.2d 1336 (D.C. Cir. 1980).....	24
<i>FTC v. Great Lakes Chem. Corp.</i> , 528 F. Supp. 84 (N.D. Ill. 1981).....	24
<i>FTC v. Lab. Corp. of Am.</i> , 2011 WL 3100372 (C.D. Cal. Mar. 11, 2011).....	6-7, 10, 24, 25
<i>FTC v. Meta Platforms Inc.</i> , 2022 WL 16637996 (N.D. Cal. Nov. 2, 2022)	6
<i>FTC v. Qualcomm Inc.</i> , 969 F.3d 974 (9th Cir. 2020).....	14
<i>FTC v. RAG-Stiftung</i> , 436 F. Supp. 3d 278 (D.D.C. 2020)	11
<i>FTC v. Simeon Mgmt. Corp.</i> , 532 F.2d 708 (9th Cir. 1976).....	25
<i>FTC v. Steris Corp.</i> , 133 F. Supp. 3d 962 (N.D. Ohio 2015)	7, 15, 17, 19
<i>FTC v. Tenneco, Inc.</i> , 433 F. Supp. 105 (D.D.C. 1977)	7
<i>FTC v. Warner Commc’ns Inc.</i> , 742 F.2d 1156 (9th Cir. 1984).....	6, 24
<i>FTC v. World Wide Factors, Ltd.</i> , 882 F.2d 344 (9th Cir. 1989)	6
<i>Ginsburg v. InBev NV/SA</i> , 649 F. Supp. 2d 943 (E.D. Mo. 2009), <i>aff’d</i> , 623 F.3d 1229 (8th Cir. 2010)	20

1	<i>Hicks v. PGA Tour, Inc.</i> , 897 F.3d 1109 (9th Cir. 2018).....	7, 8
2	<i>hiQ Labs, Inc. v. LinkedIn Corp.</i> , 485 F. Supp. 3d 1137 (N.D. Cal. 2020).....	10
3	<i>IT&T Corp. v. Gen. Tel. & Elecs. Corp.</i> , 518 F.2d 913 (9th Cir. 1975).....	10
4	<i>Madison 92nd St. Assocs., LLC v. Courtyard Mgmt. Corp.</i> , 624 F. App'x 23 (2d Cir. 2015).....	7
5	<i>Mercantile Texas Corp. v. Bd. of Governors of Fed. Rsrv. Sys.</i> , 638 F.2d 1255 (5th Cir. Unit A Feb. 1981).....	18
6	<i>Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.</i> , 555 U.S. 438 (2009).....	24
7	<i>Rebel Oil Co. v. Atl. Richfield Co.</i> , 51 F.3d 1421 (9th Cir. 1995).....	12-13
8	<i>Rothery Storage & Van Co. v. Atlas Van Lines, Inc.</i> , 792 F.2d 210 (D.C. Cir. 1986).....	9
9	<i>Tenneco, Inc. v. FTC</i> , 689 F.2d 346 (2d Cir. 1982).....	13, 14, 18, 20
10	<i>Twin City Sportservice, Inc. v. Charles O. Finely & Co.</i> , 512 F.2d 1264 (9th Cir. 1975).....	10
11	<i>United States v. AT&T, Inc.</i> , 916 F.3d 1029 (D.C. Cir. 2019).....	22
12	<i>United States v. Baker Hughes Inc.</i> , 908 F.2d 981 (D.C. Cir. 1990).....	22
13	<i>United States v. Bazaarvoice, Inc.</i> , 2014 WL 203966 (N.D. Cal. Jan. 8, 2014).....	14
14	<i>United States v. Booz Allen Hamilton, Inc.</i> , 2022 WL 9976035 (D. Md. Oct. 17, 2022).....	11
15	<i>United States v. Gen. Dynamics Corp.</i> , 415 U.S. 486 (1974).....	14
16	<i>United States v. Hughes Tool Co.</i> , 415 F. Supp. 637 (C.D. Cal. 1976).....	21
17	<i>United States v. Marine Bancorporation, Inc.</i> , 418 U.S. 602 (1974).....	2, 7, 11, 12, 13, 15, 18, 19, 20, 21
18	<i>United States v. Phillips Petroleum Co.</i> , 367 F. Supp. 1226 (C.D. Cal. 1973), <i>aff'd mem.</i> , 418 U.S. 906 (1974),.....	20
19	<i>United States v. Siemens Corp.</i> , 621 F.2d 499 (2d Cir. 1980).....	12, 15, 16, 17, 18, 19, 20, 21
20	<i>United States v. U.S. Sugar Corp.</i> , 2022 WL 4544025 (D. Del. Sept. 28, 2022).....	11
21	<i>Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP</i> , 540 U.S. 398 (2004).....	18

STATUTES

Clayton Act, 15 U.S.C. § 12 *et seq.*:

§ 7, 15 U.S.C. § 18..... 7, 15, 22, 24

Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*6

§ 13(b), 15 U.S.C. § 53(b)6, 7, 24

INTRODUCTION

Meta Platforms, Inc. (“Meta”) is an American success story. Over nearly two decades of innovation and investment, its flagship services (Facebook, Instagram, Messenger, WhatsApp) have enabled billions of people around the world to communicate, share, and be entertained. But business success is fragile. Meta faces not only fierce competition in all of its business but also the reality that Apple and Google, companies many times Meta’s size, control the platforms that Meta relies on to conduct its business.

To confront these challenges – and because it has never been content to rest on past success – Meta is investing billions to pioneer development of a new computing platform. Built on internet-enabled devices, virtual reality (“VR”) and augmented reality (“AR”) – and the metaverse experiences that these technologies enable – will offer people the ability to socialize, work, and enjoy other activities in a brand new way. Other large and successful technology companies like ByteDance, HTC, Sony – [REDACTED] – are following Meta’s lead into VR, AR, and the metaverse. The competition in this space is already intense and is only growing. Many observers have commented on the audacity of Meta’s strategy, and some have questioned its prospects. But Meta’s vision is a more open ecosystem, free of the dominance of Apple and Google, and it has made a major bet that it will succeed.

To realize that vision, Meta needs more than just a VR platform strategy. It needs a wide range of attractive applications (“apps”) that enable consumers to *do* things on these platforms. Although Meta has attempted to develop some VR apps, it is fundamentally a VR platform developer and not a VR app developer. It has instead encouraged, funded, and (in a few cases) acquired third-party app developers – all to help create a menu of appealing options that will attract consumers to these novel platforms. In short, Meta’s announced and executed strategy is to expand the VR “ecosystem.” This expansion is critically important because VR is currently a niche product, limited for the most part to a modest audience of “gamers.”

This case involves the acquisition of Within Unlimited, Inc. (“Within”), a small startup that developed and offers a VR fitness app called “Supernatural.” Meta seeks to acquire Within and its expert VR developers and engineers focused on fitness as part of Meta’s efforts to expand the

audience for VR beyond “gamers” while scaling Supernatural. Owning a fitness app will help Meta make both VR hardware and software better suited to this new fitness use case. That will be good for Meta, developers, and consumers.

The Federal Trade Commission (“FTC”) no longer claims the acquisition may lessen *horizontal* competition between Supernatural and Meta’s Beat Saber. Rather, it concedes this is a *vertical* acquisition – Meta is acquiring a company that makes software to complement its Quest hardware. The pro-competitive benefits of such transactions are well-recognized; there has not been a single successful antitrust challenge to a vertical acquisition litigated in 50 years. The FTC therefore attempts to block this acquisition because it eliminates “actual” or “perceived” potential competition. But its theories find no support in existing law; the FTC is seeking to make new law, asking this Court to do what Congress and the courts have *not* done.

The reason this case cannot succeed is clear: it does not satisfy the authoritative standards that the Supreme Court set down in *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974), which swept aside a patchwork of prior “potential competition” cases. *Marine Bancorporation* holds that *no* potential competition theory applies unless the relevant market is “oligopolistic” and protected by steep entry barriers, where a small number of entrenched firms can and do coordinate pricing and behavior to protect high profits. The Supreme Court pointedly refused to endorse the actual potential competition theory and expressed skepticism that *any* such claim could ever work – certainly not without “proof” that the acquirer would actually enter itself but for the transaction. And, as to perceived potential competition, the Court held that the theory requires that a perceived entrant on the edge of the market *actually* and *uniquely* restrained oligopolistic, coordinated behavior. The FTC alleges (let alone proves) nothing of the sort.

The parties disagree fundamentally on the law: the FTC ignores the substance of *Marine Bancorporation*, pretending that it need not satisfy the Supreme Court’s rigorous and precise test. It urges this Court to block the acquisition because, in the agency’s view, it would be better if Meta “built” rather than “bought.” Such regulatory central planning has no legal support and does not come close to satisfying *Marine Bancorporation*. And the FTC’s evidence fails to meet even the toothless standard that it puts forth.

1 ***The FTC is not likely to succeed on the merits.*** The FTC’s “VR dedicated fitness app”
 2 market – which the FTC increased from five to nine firms since it commenced this case – is a
 3 litigation fiction. *Every relevant competitor* who will testify – including representatives of three of
 4 the FTC’s claimed in-market apps and one that is poised to enter – will state that there are many
 5 other VR and non-VR fitness alternatives available to consumers beyond the nine cherry-picked
 6 apps that comprise the FTC’s gerrymandered market. And even the FTC’s invented market is
 7 neither oligopolistic nor even “concentrated” in any meaningful respect. It is robustly competitive
 8 with many competitors jockeying for consumers’ attention and more entering all the time.

9 As to actual potential competition, Meta had and has no intention of entering the alleged
 10 market by building its own VR fitness app or modifying an existing app – and the FTC has *no*
 11 evidence to the contrary. Instead, substantial evidence will show that the senior executives who
 12 would have been required to approve any such plan – and its funding – were never even presented
 13 with a proposal and would not have approved it in any event. The FTC’s reliance on scraps of
 14 emails reflecting employee brainstorming is not even close to proof of what Meta would or will
 15 actually do, particularly given its financial challenges and priorities.

16 As to perceived potential competition, the relevant competitors (most notably Within) will
 17 uniformly testify that they do not perceive Meta as a likely entrant and certainly not a *uniquely*
 18 likely or well-positioned entrant. They did not make decisions based on concern over Meta as an
 19 entrant, much less halt anticompetitive coordinated conduct for that reason. The competitors
 20 instead view many other fitness and technology firms as potential entrants. There is no credible
 21 evidence that fear of Meta, and Meta alone, had any actual effect on competition.

22 ***The balance of the equities does not support an injunction.*** If the FTC gets its injunction,
 23 [REDACTED]. Meta will fall behind larger rivals
 24 like [REDACTED]. But as part of Meta, Supernatural
 25 can reach additional consumers and jumpstart innovations that will make VR a more effective
 26 alternative in the crowded fitness space – broadening VR’s reach to new audiences and use cases.
 27 Moreover, if the FTC succeeds in killing this deal based on nothing more than the assertion that
 28 Meta could build rather than buy, it will deal a cruel blow to investment in the VR ecosystem,

1 where the possibility of being acquired is a key incentive. The FTC offers nothing to
 2 counterbalance, other than a self-serving claim that it is protecting the public interest. No public
 3 interest is served by blocking this pro-competitive acquisition.

4 **BACKGROUND**

5 Meta is investing billions of dollars in – and making a substantial bet on – VR. Its aim is
 6 audacious: to build the next “general computing” platform, competitive with today’s dominant PC
 7 and smartphone incumbents, e.g., Apple and Google. *See* Ex. 1 (Zuckerberg 11:1-12:16, 197:10-
 8 198:4, 200:4-201:5); Ex. 2 (Bosworth 113:15-115:1); Ex. 3 (PX0224-002). Meta manufactures a
 9 popular VR headset – the Quest 2 – and it recently released an innovative new headset, the Quest
 10 Pro. *See* Ex. 4 (Carlton Rep. ¶ 37); Ex. 5 (Zyda Rep. ¶ 84 & Fig. 1).

11 But vigorous competition among many powerful competitors will determine winners and
 12 losers in this new arena. *See* Ex. 4 (Carlton Rep. ¶¶ 36-39). VR is nascent – the FTC admits that
 13 the “VR industry is currently characterized by a high degree of innovation and growth,” Am.
 14 Compl. ¶ 25 – as Meta’s Quest 2 sales are only a fraction of PC, smartphone, and gaming console
 15 sales. *See* Ex. 4 (Carlton Rep. ¶¶ 34-35 & Tbl. 1); Ex. 5 (Zyda Rep. ¶¶ 83-84 & Fig. 1). And VR
 16 competition is dynamic, featuring significant actual and expected entry from some of the most
 17 successful technology companies in the world. *See* Ex. 4 (Carlton Rep. ¶¶ 36-37); [REDACTED]

18 [REDACTED]
 19 [REDACTED].

20 So far, VR is also niche, appealing mostly to a small audience of gaming enthusiasts. *See*
 21 Ex. 1 (Zuckerberg 200:4-201:5); Ex. 3 (PX0224-002). To grow VR, Meta and its rivals need a rich
 22 ecosystem of apps that will attract a broad range of users, who will attract more app developers,
 23 who will in turn attract even more users. *See* Ex. 1 (Zuckerberg 92:20-93:18); Ex. 9 (Verdu 9:1-
 24 10:23); Ex. 4 (Carlton Rep. ¶¶ 144, 169, 180); *see also* Am. Compl. ¶ 6. Meta therefore offers
 25 developers support, including a platform for distribution plus technological and financial assistance
 26 – even for third-party apps that compete against Meta apps. *See* Ex. 2 (Bosworth 204:21-205:8);
 27 Ex. 10 (Rabkin 47:7-19); Ex. 11 (Rubin 30(b)(6) 64:6-68:10); Ex. 4 (Carlton Rep. ¶¶ 141-144, 183-
 28 185). Meta’s goal is a library with, ultimately, many thousands of apps to rival app stores on

1 smartphones and PCs – not only games but also apps for social, productivity, and many more use
2 cases. *See* Ex. 1 (Zuckerberg 51:21-53:20); Ex. 11 (Rubin 30(b)(6) 23:19-26:11, 38:5-20).

3 Fitness is one such use case that can expand VR’s audience beyond gamers (who tend to be
4 younger males) to a broader population (including older and female users). *See* Ex. 9 (Verdu 61:13-
5 62:13); Ex. 4 (Carlton Rep. ¶ 66). In just three years, developers have built more than 100 apps for
6 the Quest platform that Meta classifies as “fitness” apps – *see* Ex. 12 (Paynter 30(b)(6) 56:22-23);
7 Ex. 13 (PX0451) – and developers expect additional significant new entry soon. *See* Ex. 14 (Garcia
8 Decl. ¶¶ 9-11, 17-19); Ex. 15 (Janszen Decl. ¶¶ 10, 19-25, 37).

9 However, the fitness use case in VR remains unproven. *See* Ex. 16 (Vickey Rep. ¶¶ 29-31).
10 Fitness, and “connected fitness” in particular, is a crowded field, with scores of products, services,
11 and applications available to consumers on- and off-VR, ranging from Apple Fitness+ – [REDACTED]
12 [REDACTED] – to the
13 augmented reality Peloton Guide, video streaming on YouTube, and more. *See* Ex. 4 (Carlton Rep.
14 ¶¶ 69-80 & App’x Tbl. 12); Ex. 16 (Vickey Rep. § IV(A)(3) & App’x C); [REDACTED]
15 [REDACTED]
16 [REDACTED].

17 Meta determined that it would be a good idea to support VR fitness. *See* Ex. 1 (Zuckerberg
18 153:7-154:2). It discussed but dismissed the idea of building an app from the ground up – Meta has
19 little experience building VR apps from scratch, and it possesses zero fitness expertise, experience,
20 or branding, among other resources. *See* Ex. 10 (Rabkin 194:4-196:22); Ex. 20 (Rubin 166:11-
21 171:8); *see also* Ex. 21 (Meta’s Supp. Resp. to FTC Interrog. No. 5). Instead, Meta’s success with
22 VR apps has largely been improving and scaling startups. *See* Ex. 20 (Rubin 173:5-175:21); Ex. 4
23 (Carlton Rep. ¶¶ 192-193); *see also* Ex. 11 (Rubin 30(b)(6) 53:12-55:13).

24 So Meta decided to support third-party developers bringing VR fitness apps to the public,
25 including Within, Odders Labs (which develops one of the in-market apps), and more. *See* Ex. 22
26 (Meta’s Supp. Resp. to FTC Interrog. No. 3); Ex. 23 (META-E-LIT-DATA-0000029); *see also*
27 Ex. 24 (Brown 30(b)(6) 11:12-14, 14:13-16, 16:23-17:1); Ex. 11 (Rubin 30(b)(6) 38:5-20, 64:6-17);
28 Ex. 4 (Carlton Rep. ¶¶ 141-144). Meta saw Within’s Supernatural – a VR fitness app [REDACTED]

1 [REDACTED] a high-quality user experience built on promising technologies, *see* [REDACTED]
 2 [REDACTED]; Ex. 11 (Rubin 30(b)(6) 27:25-28:20, 35:9-19) – as a way to
 3 showcase fitness as a VR use case, attract a new and broader group of users to VR, and spur new
 4 entry among developers. *See also* Ex. 14 (Garcia Decl. ¶¶ 25-26); Ex. 15 (Janszen Decl. ¶¶ 29-31).

5 Meta is acquiring Within to grow the VR ecosystem. If the acquisition closes, Meta will
 6 improve and scale Supernatural; and Meta will use the Within studio as a laboratory for improving
 7 the Quest platform for all fitness apps by developing technologies it will share freely with
 8 competitive fitness app developers – just as Meta uses its gaming studios to innovate technologies
 9 that it shares with app developers that compete against Meta’s own games. *See* Ex. 11 (Rubin
 10 30(b)(6) 8:14-12:5, 53:12-55:13); *see also* Ex. 10 (Rabkin 171:8-172:5).

11 But if the Court blocks the acquisition, [REDACTED]
 12 [REDACTED]
 13 [REDACTED]

14 [REDACTED] Meta will not build its own VR fitness app for many reasons, including the relatively
 15 low priority for this use case. *See* Ex. 2 (Bosworth 211:1-216:4); Ex. 11 (Rubin 30(b)(6) 31:13-
 16 33:1); *see also* Ex. 1 (Zuckerberg 147:10-152:11). Investment in VR fitness generally will take a
 17 significant blow. *See* Ex. 4 (Carlton Rep. ¶¶ 40-41, 189); *see also* Ex. 14 (Garcia Decl. ¶¶ 25-26);
 18 Ex. 15 (Janszen Decl. ¶¶ 29, 31). And consumers will be worse off for it.

19 ARGUMENT

20 I. The FTC Cannot Establish a Likelihood of Success on the Merits

21 Section 13(b) of the Federal Trade Commission Act requires the FTC to show a “likelihood
 22 of ultimate success.” *FTC v. Affordable Media*, 179 F.3d 1228, 1233 (9th Cir. 1999). Consistent
 23 with traditional equitable standards, that entails establishing “probable success.” *FTC v. World*
 24 *Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989). The FTC does not, as it asserts (at 11), carry
 25 its burden merely by raising “questions.” *See FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1159-
 26 60 (9th Cir. 1984) (per curiam). Rather, courts are “charged with exercising their ‘independent
 27 judgment’ and evaluating the FTC’s case and evidence on the merits.” *FTC v. Meta Platforms Inc.*,
 28 2022 WL 16637996, at *5 (N.D. Cal. Nov. 2, 2022) (citation omitted); *see also FTC v. Lab. Corp.*

1 of *Am.*, 2011 WL 3100372, at *15 (C.D. Cal. Mar. 11, 2011) (“serious question” standard does not
2 eliminate “FTC’s need to demonstrate a likelihood of success on the merits”).

3 Under the prevailing substantive standard set by *Marine Bancorporation*, the FTC has lost
4 each of the three potential competition cases that it has brought under Section 13(b) in the last 50
5 years. *See FTC v. Tenneco, Inc.*, 433 F. Supp. 105 (D.D.C. 1977) (denying Section 13(b) injunction);
6 *FTC v. Atl. Richfield Co.*, 549 F.2d 289 (4th Cir. 1977) (same); *FTC v. Steris Corp.*, 133 F. Supp.
7 3d 962 (N.D. Ohio 2015) (same). The FTC does not attempt to satisfy *Marine Bancorporation* here
8 – it just ignores it. This claim fails – like all those before it – for at least three reasons. *First*, the
9 FTC’s made-for-litigation “VR dedicated fitness” market is impermissibly narrow. Supernatural
10 competes in a space that is robustly dynamic and competitive, not limited to the few VR apps the
11 FTC arbitrarily selected. (Part A) *Second*, the FTC cannot prove a single element of its potential
12 competition theories: there is no evidence that (1) the market is afflicted by oligopoly structure or
13 behavior; (2) Meta would actually enter on its own; or (3) market participants perceive Meta as the
14 only potential entrant such that it actually deterred coordinated anticompetitive conduct. (Part B)
15 *Third*, the FTC has not shown (and cannot show) that the acquisition is likely to result in harm to
16 competition and consumers, as Section 7 requires. (Part C)

17 **A. No Evidence Supports the Nine-App “VR Dedicated Fitness” Market**

18 **1.** The FTC’s claim fails because it cannot establish a relevant antitrust market. *See*
19 *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 619 (1974). Specifically, the FTC’s
20 market definition – limited to just nine selected “VR dedicated fitness apps” – impermissibly omits
21 scores of “[e]conomic substitutes,” i.e., products that “have a ‘reasonable interchangeability of use’
22 or sufficient ‘cross-elasticity of demand’ with the relevant product.” *Hicks v. PGA Tour, Inc.*, 897
23 F.3d 1109, 1120 (9th Cir. 2018) (citation omitted). Products are reasonably interchangeable in the
24 antitrust context where consumers can use them “for the same purposes, because the ability of
25 consumers to switch to a substitute restrains a firm’s ability to raise prices above the competitive
26 level.” *Madison 92nd St. Assocs., LLC v. Courtyard Mgmt. Corp.*, 624 F. App’x 23, 28 (2d Cir.
27 2015). The FTC’s market does not include, as it must, “the group or groups of sellers or producers
28 who have actual or potential ability to deprive each other of significant levels of business.” *Hicks*,

897 F.3d at 1120-21; *see also Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1015 (N.D. Cal. 2021) (plaintiff’s market definition “cannot ignore economic reality”). No witness other than the FTC’s economist – who has no expertise in this area – has provided evidence to support the FTC’s market. Not one. Every witness with actual knowledge of this arena has refuted the FTC’s artifice.

Scores of products, services, and apps are available to consumers who want to exercise. *See* Ex. 16 (Vickey Rep. § IV(A)(3) & App’x C); Ex. 27 [REDACTED]. That includes 150 apps on the Quest platform that Meta classifies as “fitness,” *see* Ex. 12 (Paynter 30(b)(6) 56:22-23); fitness apps on gaming consoles and other VR platforms, *see* Ex. 4 (Carlton Rep. ¶¶ 104-112); and scores of off-VR “connected fitness” products and services, e.g., Apple Fitness+, the Peloton Guide, and more, *see* Ex. 16 (Vickey Rep. § IV(A)(3) & App’x C). Meta’s ordinary course documents – including each the FTC cites (at 5 & n.1) – explain that many VR apps the FTC omits [REDACTED] (Ex. 28 (PX0102-049)), [REDACTED] [REDACTED] (Ex. 29 (PX0452-003)), and [REDACTED] [REDACTED] (Ex. 30 (PX0557-008)). *See also* Ex. 4 (Carlton Rep. ¶¶ 104-112 & App’x Tbl. 13).

Witnesses from the so-called “VR dedicated fitness app” market confirm that omitted VR apps and off-VR fitness products are competitors. [REDACTED]

[REDACTED] *see* [REDACTED] [REDACTED]. *See* Ex. 31 (PX0672 at 046) [REDACTED]

[REDACTED]; Ex. 32 (PX0664) [REDACTED]; Ex. 33 (PX0667 at 033)

[REDACTED]; Ex. 34 (WITH000258643 at 650-51) [REDACTED].

The developer of Les Mills Body Combat identifies the following competitors: “at-home smart fitness equipment or apps (e.g., Peloton, Mirror, Tonal, Apple Fitness+, Zwift, ClassPass); fitness solutions offered on gaming consoles . . . ; and fitness options offered on competing and emerging VR systems,” Ex. 14 (Garcia Decl. ¶ 17) – all of which the FTC omits. And the founder of VirZoom, another “VR dedicated fitness app,” lists as competitors “over 200 fitness related apps” on VR plus “in-home connected” fitness products. Ex. 15 (Janszen Decl. ¶¶ 21-24).

Established fitness and technology firms as well as new entrants likewise view VR fitness as competitive with off-VR products. For example, [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]. And Black Box VR – a fitness company and VR app developer – plans to launch a new VR fitness app “within the next year” that will “compete with all of those options (both physical, at-home, and two-dimensional apps).” Ex. 36 (Lewis Decl. ¶¶ 18-20, 31). This industry recognition of product overlap destroys the FTC’s artificial market definition. *See Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 219 (D.C. Cir. 1986) (crediting the view of industry participants).

2. The FTC’s arguments in support of its proposed market cannot come close to establishing a likelihood of success in overcoming these facts.

a. The FTC relies on supposed “practical indicia,” but its selective and self-contradictory assertions do not substantiate its market definition. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). The FTC claims (at 13-14) that “VR dedicated fitness apps” have “peculiar characteristics and uses” because they can be immersive and portable, or include trainer-designed courses and fitness tracking – but that says nothing about whether other products offer similar features, much less whether such characteristics are so distinctive that other fitness products do not compete.¹ *See* Ex. 4 (Carlton Rep. ¶¶ 104-105). “[M]erely asserting that a commodity is in

¹ The FTC asserts (at 14-15) that “VR dedicated fitness” appeals to an “older” and “more female” audience – *cf.* Ex. 28 (PX0102-019) ([REDACTED]) – without even attempting to show that these consumers do not consider off-VR fitness products as substitutes. And the FTC’s citation dump (at 15) includes contradictory ordinary course documents showing that [REDACTED]
 [REDACTED] Ex. 37 (PX0529-004); Ex. 30 (PX0557-016), and [REDACTED], *see* Ex. 38 (PX0908).

1 some way unique is insufficient to plead” – let alone prove – “a relevant market.” *Concord Assocs.,*
 2 *L.P. v. Entm’t Props. Tr.*, 817 F.3d 46, 54 (2d Cir. 2016); *see also IT&T Corp. v. Gen. Tel. & Elecs.*
 3 *Corp.*, 518 F.2d 913, 932 (9th Cir. 1975) (criticizing rote application of *Brown Shoe* indicia to
 4 ignore what is “economically significant”); *hiQ Labs, Inc. v. LinkedIn Corp.*, 485 F. Supp. 3d 1137,
 5 1149 (N.D. Cal. 2020) (differentiated features do not put products in separate markets).

6 The FTC makes *no* showing (nor could it) that myriad other connected fitness products,
 7 services, and apps off-VR do not also feature portability, immersion, fitness tracking, and trainer-
 8 designed workouts – dozens *do* have these features. *See* Ex. 16 (Vickey Rep. § IV(A)(3), (B) &
 9 App’x C); Ex. 4 (Carlton Rep. App’x Tbl. 12). It instead relies (at 13-14) on sleight of hand – e.g.,
 10 noting the Peloton Bike is not portable, but ignoring that Peloton’s AR product (the Peloton Guide)
 11 and mobile fitness app are portable, *see* Ex. 16 (Vickey Rep. ¶ 43) – and incomplete snippets of
 12 testimony from deponents who also concluded that [REDACTED]
 13 [REDACTED], Ex. 39 (Pruett 135:16-136:4), or that [REDACTED]
 14 [REDACTED], *see* Ex. 9 (Verdu 22:18-23:7). For example, the FTC cites Mr. Zuckerberg’s
 15 deposition (at 14), while eliding his testimony that [REDACTED]
 16 [REDACTED] Ex. 1 (Zuckerberg 209:8-211:11). And of millions of produced
 17 pages, the FTC cites three documents (at 13-14) as supposed proof that VR has unique fitness
 18 features, even though each [REDACTED]
 19 [REDACTED]. *See* Ex. 40 (PX0111-001) [REDACTED]
 20 [REDACTED]; Ex. 41 (PX0573-001) [REDACTED]
 21 [REDACTED]; Ex. 42 (PX0906-007) [REDACTED].

22 The FTC does no better pointing (at 14) to how “VR dedicated fitness apps” supposedly
 23 have different prices and pricing models. “[T]he relevant market is not governed by the presence of
 24 a price differential between competing products,” *Twin City Sportservice, Inc. v. Charles O. Finely*
 25 *& Co.*, 512 F.2d 1264, 1274 (9th Cir. 1975), and products are not in separate markets “simply
 26 because consumers pay for those products in different ways,” *Lab. Corp.*, 2011 WL 3100372,
 27 at *18. More striking, many of the apps that the FTC includes in the market are *not* subscription-
 28 only services. *See* Ex. 16 (Vickey Rep. ¶ 47); Ex. 4 (Carlton Rep. ¶ 109). And as to price, the FTC

1 simply ignores the many off-VR subscription alternatives – including Apple Fitness+ – that are
 2 cheaper than Supernatural. *See* Ex. 4 (Carlton Rep. ¶ 112); Ex. 16 (Vickey Rep. ¶ 49). The range
 3 of business models and a continuum of pricing for on- and off-VR fitness products make price an
 4 “unrealistic” way to define the market. *Brown Shoe*, 370 U.S. at 326.

5 **b.** The FTC offers no evidence at all regarding consumers’ actual substitution patterns;
 6 it instead relies (at 15) exclusively [REDACTED]

7 [REDACTED]
 8 [REDACTED]. *Cf.* Ex. 4 (Carlton Rep.
 9 ¶¶ 69-74 & Tbls. 11-13) [REDACTED]

10 [REDACTED]. That survey is junk science that provides evidence of nothing except
 11 perhaps the enthusiasm of a [REDACTED] of the early adopters who like Supernatural. *See*
 12 *United States v. Booz Allen Hamilton, Inc.*, 2022 WL 9976035, at *13 (D. Md. Oct. 17, 2022)
 13 (rejecting methodologically flawed hypothetical monopolist test); *United States v. U.S. Sugar*
 14 *Corp.*, 2022 WL 4544025, at *24 (D. Del. Sept. 28, 2022) (rejecting hypothetical monopolist test
 15 contrary to industry evidence); *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 308-09 (D.D.C. 2020)
 16 (similar). [REDACTED]

17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED].
 20 *See* Ex. 43 (Dubé Rep. ¶¶ 28-31); *see also id.* ¶¶ 32-46 (describing other flaws in the survey); Ex. 4
 21 (Carlton Rep. ¶¶ 89-93). There is neither quantitative nor legally valid support for the FTC’s
 22 contrived market definition. *See* Ex. 4 (Carlton Rep. ¶¶ 88, 91, 93 & Tbls. 14-16).

23 **B. The FTC Cannot Prove Any Elements of Its Potential Competition Theory**

24 **1. The FTC Proffers No Evidence That Its “VR Dedicated Fitness” Market**
 25 **Is Oligopolistic – as *Marine Bancorporation* Requires**

26 **a.** *Marine Bancorporation* – the Supreme Court’s last and definitive word on potential
 27 competition – holds that the “potential-competition doctrine . . . comes into play *only* where there
 28 *are* dominant participants in the target market engaging in interdependent or parallel behavior *and*

1 with the capacity effectively to determine price and total output of goods or services.” *Marine*
 2 *Bancorporation*, 418 U.S. at 630 (emphases added). That requires the FTC to prove that the “VR
 3 dedicated fitness” market is *not* “in fact genuinely competitive” today. *Id.* at 631; *see also United*
 4 *States v. Siemens Corp.*, 621 F.2d 499, 505 n.6 (2d Cir. 1980) (“[T]he perceived potential competition
 5 doctrine is only available to the Government if the market is oligopolistic.”). The FTC utterly fails
 6 to satisfy this demanding standard applicable to both of its theories – it does not even try. And the
 7 evidence here shows an intensely competitive space with constant new entry – conditions that the
 8 Supreme Court has held foreclose any potential competition claim.

9 *First*, the FTC proffers no evidence that any “participants” in the so-called “VR dedicated
 10 fitness” market “*are . . . engaging*” in oligopolistic conduct. *Marine Bancorporation*, 418 U.S. at
 11 630 (emphasis added). There is no evidence of coordination, parallel pricing, or profit-maximizing
 12 output restraints. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227
 13 (1993) (defining oligopoly behavior). The nine apps the FTC includes are brand new – two entered
 14 in 2022 – and wide-ranging. *See* Ex. 4 (Carlton Rep. ¶¶ 56-62). Far from coordinated pricing, their
 15 prices and pricing structures are all over the place – ranging from free, to one-time purchase, to
 16 monthly only subscriptions, to monthly or annual subscriptions. *See id.* ¶ 88 & App’x Tbl. 12.
 17 There is no evidence of any coordinated price increases. *See id.* ¶¶ 126-129 & App’x Tbl. 4. Nor is
 18 there any evidence of supracompetitive pricing or profits – on the contrary, [REDACTED]

19 [REDACTED]
 20 [REDACTED]. *See* [REDACTED]; *see*
 21 *also* Ex. 4 (Carlton Rep. ¶¶ 90, 120). Two of the FTC’s other “VR dedicated fitness apps” have
 22 submitted sworn testimony that there is no parallel or interdependent behavior as to pricing or
 23 otherwise. *See* Ex. 14 (Garcia Decl. ¶¶ 34-35); Ex. 15 (Janszen Decl. ¶¶ 36-38); *see also* Ex. 44
 24 (Singer Rep. ¶¶ 132-136) (describing current competition). This evidence is unrefuted.

25 *Second*, the FTC has also failed to show, as it must, that the structure of the claimed market
 26 is such that the nine current “VR dedicated fitness apps” have “the capacity effectively to determine
 27 price and total output.” *Marine Bancorporation*, 418 U.S. at 630. For firms to have such power,
 28 “entry barriers must be significant.” *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1439 (9th Cir.

1995); *see also In re B.A.T. Indus., Ltd.*, 1984 WL 565384, at *8 (FTC Dec. 17, 1984) (rejecting potential competition claim where entry barriers were low). The FTC has no evidence to make such a showing; in fact, more firms enter constantly. *See* Ex. 4 (Carlton Rep. App’x Tbls. 12-13). Every firm in the FTC’s market began as a tiny startup. *See id.* ¶¶ 60-61; Ex. 14 (Garcia Decl. ¶ 31); Ex. 15 (Janszen Decl. ¶¶ 3-4); *see also* Am. Compl. ¶ 61. And the number of those firms grew by nearly 30 percent in 2022 alone, even using the FTC’s contrived market definition, *see* Ex. 4 (Carlton Rep. ¶ 57 & Tbl. 7); with more entry expected in 2023, *see* Ex. 36 (Lewis Decl. ¶¶ 13-14); Ex. 4 (Carlton Rep. ¶¶ 51, 129). That actual and expected entry demonstrates that building a successful VR fitness app takes skill and luck, but not a lot of cash or an existing network of users. *See* Ex. 20 (Rubin 171:14-172:11); Ex. 4 (Carlton Rep. ¶¶ 61, 151, 155-156). The FTC’s assertion that Meta might increase entry barriers by restricting access to Quest – which it has never done – is pure speculation and economically irrational: Meta needs *more* third-party apps on its VR platform to attract consumers. *See* Ex. 1 (Zuckerberg 51:21-53:20); Ex. 2 (Bosworth 121:21-122:5, 171:7-172:11, 204:21-205:8, 229:2-230:18); Ex. 11 (Rubin 30(b)(6) 66:16-68:10); *see also* Ex. 4 (Carlton Rep. ¶ 180); Ex. 5 (Zyda Rep. ¶¶ 46-47, 89-96). And there are many other existing and forthcoming VR platforms besides Meta’s on which to launch apps. *See* Ex. 4 (Carlton Rep. ¶¶ 36-39, 45, 55 & App’x Tbl. 1); Ex. 5 (Zyda Rep. ¶¶ 89-96); Ex. 45 (Nylander Decl. ¶¶ 18-21); [REDACTED].

19 **b.** The FTC asserts (at 16-17) that it satisfies *Marine Bancorporation* simply by claiming the market is concentrated based on snapshot revenue figures. But that is both factually incorrect, as the “market” is vibrant and growing, and legally irrelevant.

22 To start, the FTC ignores the express terms of *Marine Bancorporation*: evidence of oligopolistic *behavior*, not just a showing that the market is concentrated, is *required*. The FTC cannot succeed without evidence of “actual market behavior, and especially the presence . . . of significant parallel conduct.” *Marine Bancorporation*, 418 U.S. at 632 n.34. That makes perfect sense because, if the market is *behaving* competitively, then there are no grounds for treating one firm’s potential entry as critical to competition. The FTC says nothing about behavior and even invokes (at 16) *Tenneco, Inc. v. FTC*, 689 F.2d 346 (2d Cir. 1982), which explains that “high

1 concentration” ratios make a market “a *candidate* for the potential-competition doctrine,” subject to
 2 examination for oligopolistic “structure” and actual “conditions in the market.” *Id.* at 352-53
 3 (emphasis added).² The FTC’s tacit admission that it cannot satisfy the oligopoly element should
 4 end this case. *See FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116 (D.D.C. 2004) (“[P]laintiffs
 5 have the burden on every element of their Section 7 challenge, and a failure of proof in any respect
 6 will mean the transaction should not be enjoined.”).

7 Further, the FTC’s claim (at 17) of “concentration” is empty, because historical revenue
 8 proves nothing about the structure of the claimed market – factually, *see* Ex. 4 (Carlton Rep.
 9 ¶¶ 115-121, 132-133), or legally, *see United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 501
 10 (1974) (“Evidence of past production does not, as a matter of logic, necessarily give a proper
 11 picture of a company’s future ability to compete.”). As market participants have testified, firms in
 12 this dynamic new arena are vying for customers – not yet measuring progress by revenue. *See*
 13 Ex. 15 (Janszen Decl. ¶ 30). [REDACTED]

14 [REDACTED]
 15 [REDACTED] *See* [REDACTED] The blossoming of new apps
 16 – including four the FTC added to its list of five *since filing its complaint* – is a testament to the fact
 17 that the “market” is not remotely concentrated or blocked. *See* Ex. 4 (Carlton Rep. ¶¶ 124-130).
 18 This is the very picture of vigorous competition. *See* Ex. 36 (Lewis Decl. ¶¶ 13-14).

19 **2. The “Actual Potential Competition” Claim Also Fails Because There Is** 20 **No Evidence Meta Would Enter if It Did Not Acquire Within**

21 The FTC does not even try to argue that there is “clear proof” Meta would actually build its
 22 own “VR dedicated fitness app” but for the transaction. Yet the FTC itself has held that such clear
 23

24 ² Contrary to the FTC’s assertion (at 17 n.3), *United States v. Bazaarvoice, Inc.*, 2014 WL
 25 203966 (N.D. Cal. Jan. 8, 2014), does not lower the bar for emerging technologies – the court did
 26 not “weigh in on this debate.” *Id.* at *76. And the Ninth Circuit has clarified that antitrust courts
 27 must be wary of interfering with “novel business practices – *especially* in technology markets,” lest
 28 intervention impede “innovation.” *FTC v. Qualcomm Inc.*, 969 F.3d 974, 990-91 (9th Cir. 2020).

proof is required. *See B.A.T. Indus.*, 1984 WL 565384, at *10 (“Our review of the legal and economic bases for the actual potential competition doctrine has persuaded us that clear proof that independent entry would have occurred but for the merger or acquisition should be required to establish that a firm is an actual potential competitor.”). The FTC adopted that standard after the Supreme Court doubted the theory’s existence on the ground that “[u]nequivocal proof that an acquiring firm actually would have entered de novo but for a merger is rarely available.” *Marine Bancorporation*, 418 U.S. at 624; *see also Atl. Richfield*, 549 F.2d at 294 (“[t]he novelty of the doctrine and the absence of definitive authority sanctioning it and defining its parameters could well serve as a basis for denial of a preliminary injunction under [§] 13(b)”)³.

The FTC’s attempt to avoid that law echoes its most recent failed actual potential competition case (*Steris*). There as here, the FTC argued for a lower standard, but could not satisfy it, even with far more credible evidence of likely entry. *See Steris*, 133 F. Supp. 3d at 966 (citing FTC’s brief). The FTC has not come close to making any showing of probable entry; its claim rests on nothing more than snippets of emails about ideas Meta never pursued. Substituting the FTC’s business judgment for that of Meta’s witnesses is not proof of anything.

a. The evidence is unequivocal: Meta never had any plan and still has no plan to build a VR fitness app, and it will not build one if the acquisition is blocked. The company decided to pursue an acquisition because the brainstormed ideas to build were impractical concepts and Meta never pursued them in any serious way. *See* Ex. 9 (Verdu 110:10-111:8, 178:7-180:18, 198:18-200:22). No one at Meta ever presented a plan for building a fitness app to the Meta decision makers who would need to sign off. *See* Ex. 1 (Zuckerberg 243:6-7) [REDACTED]; *id.* at 164:3-164:7; Ex. 2 (Bosworth 223:21-22) [REDACTED]; *see*

³ The theory fails here, assuming *arguendo* it exists. *See* Dkt. 108, at 16-17. Neither the Supreme Court, the Ninth Circuit, nor this district has ever accepted “actual potential competition” as a viable Section 7 claim. *See Siemens*, 621 F.2d at 504 (noting “the Supreme Court’s reluctance to embrace the doctrine”); *BOC Int’l Ltd. v. FTC*, 557 F.2d 24, 25 (2d Cir. 1977) (similar).

1 also Ex. 9 (Verdu 178:7-20). And those Meta senior executives testified that no Meta-developed
 2 VR fitness app would have been approved before the Within deal, nor would it be approved now.
 3 See Ex. 1 (Zuckerberg 150:9-14, 238:12-240:17); Ex. 2 (Bosworth 211:1-16). Ignoring this
 4 conclusive testimony, as the FTC does, is no answer for it. The absence of any “concrete plans”
 5 that made it to “progressively higher levels of corporate management” is fatal. *B.A.T. Indus.*, 1984
 6 WL 565384, at *6, *12-13.

7 The ideas went nowhere for good reason: Meta has no fitness expertise, limited and non-
 8 fungible VR engineering resources, and no history of successfully building VR apps from scratch.
 9 See, e.g., Ex. 9 (Verdu 182:1-15, 229:3-231:7) [REDACTED]
 10 [REDACTED]
 11 [REDACTED]; Ex. 46 (Dass 100:4-103:5) [REDACTED]; Ex. 10 (Rabkin 194:4-
 12 195:15) [REDACTED]; Ex. 47 (Stojavljevic 147:25-148:12) [REDACTED]
 13 [REDACTED]; Ex. 39 (Pruett 284:6-18) [REDACTED]
 14 [REDACTED]; Ex. 20 (Rubin 166:11-172:11) (same); Ex. 2 (Bosworth 225:2-227:1). That evidence
 15 eviscerates the claim. See *Siemens*, 621 F.2d at 507; see also *Atl. Richfield*, 549 F.2d at 296 (no
 16 evidence of actual potential entry where acquirer lacked “complete technical expertise”).

17 The contemporaneous ordinary course documents are consistent in recounting Meta’s lack
 18 of serious interest in building a VR fitness app. [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED] Ex. 48 (PX0179-002); see also Ex. 49
 24 (PX0127-001) [REDACTED]
 25 [REDACTED]; Ex. 50 (META-E-2R-03628924
 26 at 924) [REDACTED]
 27 [REDACTED]
 28 [REDACTED]. Completely

contrary to the FTC's theory, [REDACTED]

[REDACTED] Ex. 51 (META-E-2R-06413061 at 063, 065). By contrast, the FTC identifies no documents that evince any "concrete" planning, budgeting, or steps – let alone approval.⁴ *B.A.T. Indus.*, 1984 WL 565384, at *6; *see also Atl. Richfield*, 549 F.2d at 296 (without more, mere "continuing interest . . . and continuing studies as to the best means of entry . . . fails to show a significant commitment at the decisional level").

Each Meta document the FTC identifies (at 20) reflects merely that Meta considered alternative entry, yet ultimately dismissed the concept. *See* Ex. 48 (PX0179-002). There was never a plan to build. And even a plan would not suffice unless it had been approved by responsible executives. *See Steris*, 133 F. Supp. 3d at 977 (denying injunction because "the business plan" for alternative entry "had not been approved").⁵ As Meta's Chief Technology Officer and head of its VR division explained, [REDACTED] [REDACTED]. Ex. 2 (Bosworth 211:1-16, 217:2-221:6, 226:1-8, 227:24-228:24). Ideas that never developed into plans prove nothing, and plans not presented and approved are far short of the mark. *See B.A.T. Indus.*, 1984 WL 565384, at *13 ("Internal plans that have not been approved at that level cannot be relied upon, regardless of how enthusiastically they promote independent entry, because they cannot be characterized as the concrete plans of the corporation itself."); *see also Siemens*, 621 F.2d at 508 ("reliance upon a few memoranda of lower echelon" employees "as

⁴ The Meta document labeled [REDACTED]

[REDACTED]. Ex. 52 (META-E-LIT-00052181).

⁵ The contrast with the evidence in the only recent potential competition case the FTC has (unsuccessfully) attempted (*Steris*) is stark. There, the target was already providing services in Europe, and there was an already-approved project (at the board level) to enter the market in the United States. *See Steris*, 133 F. Supp. 3d at 972-73. The court found *that* evidence insufficient.

1 indicative of an intent to enter the market de novo is misplaced,” particularly where “their views do
2 not appear to have been brought to the attention of the decision-making management”).

3 **b.** The FTC argues that (1) the Court should disregard Meta’s witnesses and documents
4 and rely instead on “objective” evidence (i.e., the FTC’s business judgment of what would be best),
5 and (2) “reasonable probability” of actual entry is good enough. Both arguments are wrong.

6 First, the FTC’s argument (at 19-20) that Meta *could* have entered on its own is unavailing.
7 Ever since *Marine Bancorporation* rejected a potential competition claim and strictly limited the
8 doctrine going forward, no court has accepted speculation based on the FTC’s assessment of what a
9 firm *could* do. See *Tenneco*, 689 F.2d at 353-54 (“interest,” “incentive,” and “financial resources”
10 to enter only amounted to “unsupported speculation”); *Siemens*, 621 F.2d at 507 (“interest and
11 incentive to enter” was “inadequate to demonstrate the likelihood, much less the certainty,” of
12 entry); *Mercantile Texas Corp. v. Bd. of Governors of Fed. Rsrv. Sys.*, 638 F.2d 1255, 1268 (5th
13 Cir. Unit A Feb. 1981) (similar); *Atl. Richfield*, 549 F.2d at 299 (same). The FTC itself has held
14 that resources and motive are “not sufficient” for an actual potential competition claim. *B.A.T.*
15 *Indus.*, 1984 WL 565384, at *11, *13.

16 The “objective” standard is not objective at all. It is actually a “regulator knows best”
17 standard. See *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408
18 (2004) (warning against “antitrust courts . . . act[ing] as central planners”). Meta’s resources and
19 supposed motive do not give it any more objective ability to build its own app than myriad others –
20 including firms that, unlike Meta, have fitness background and expertise. The FTC’s highlighting
21 (at 19-20) of the decision in *March 2020* – 18 months before the acquisition – to add a “FitBeat”
22 song track to Beat Saber is revealing. FitBeat was a two-minute track with no fitness features, not
23 an attempt to test Beat Saber’s potential as a fitness app. See Ex. 53 (Carmack 63:8-23). And, in
24 any event, Meta never iterated on the concept, released additional fitness features, or even added a
25 single additional fitness track, *foreclosing* the FTC’s actual potential competition claim. See Ex. 4
26 (Carlton Rep. ¶¶ 137-139). Meta’s “failure to develop a technologically sound” VR fitness app in
27 the intervening 18 months between FitBeat and Meta’s announcement of the transaction plainly
28 “indicates that it lacks the necessary technological expertise” for entry on its own. *Siemens*, 621

1 F.2d at 507; *see also Atl. Richfield*, 549 F.2d at 296 (dismissing “objective” evidence favoring entry
2 where the acquirer did not have “complete technical expertise” to enter).

3 *Second*, the FTC’s claim (at 18-19) that it need only show a “reasonable probability” is not
4 the law. Courts have routinely rejected that standard as unduly speculative following *Marine*
5 *Bancorporation*’s warning – as has the FTC. *See Siemens*, 621 F.2d at 506-07 (affirming order
6 denying preliminary injunction without “clear proof that entry would occur”); *Atl. Richfield*, 549
7 F.2d at 294-95 (denying preliminary injunction where no evidence supported that “entry by internal
8 expansion would appear to have been certain” because *Marine Bancorporation* “impl[ies] that the
9 standard is one of ‘unequivocal proof’ in a case where only actual potential competition is claimed”);
10 *see also B.A.T. Indus.*, 1984 WL 565384, at *9 n.34.

11 In any event, here, as in *Steris*, the FTC cannot satisfy its own “reasonable probability”
12 standard – on the contrary, Meta considered building a VR fitness application but then categorically
13 rejected the idea. Further, “[i]f the FTC is correct, the evidence should show that if the merger does
14 not go through,” then Meta “is likely to revive its plans and build . . . in the near future.” *Steris*, 133
15 F. Supp. 3d at 977. Yet here, as in *Steris*, the evidence is all to the contrary. Mr. Zuckerberg
16 explained that, [REDACTED]

17 [REDACTED]
18 [REDACTED] Ex. 1 (Zuckerberg 150:9-14, 238:12-240:12). And

19 [REDACTED]
20 [REDACTED] *Id.* at 240:14-17. The head of Reality Labs was
21 even more categorical: [REDACTED]

22 [REDACTED]. *See* Ex. 2 (Bosworth 211:1-16, 217:2-221:6, 226:1-8, 227:24-228:24).

23 c. The FTC’s claim also fails because the FTC has nothing to show that any entry
24 would or could be “imminent.” *Marine Bancorporation*, 418 U.S. at 623 n.22. Eliminating the
25 mere “ephemeral possibility” of actual entry at some “wholly speculative” date uncertain is
26 insufficient as a matter of law. *BOC Int’l*, 557 F.2d at 28-29 (requiring entry in the “near future”);
27 *see also Siemens*, 621 F.2d at 507 (similar); *Steris*, 133 F. Supp. 3d at 978 (requiring entry “within a
28 reasonable period of time”). It would take Meta – which is without any in-house fitness expertise or

resources – *years* to build, launch, distribute, and market its own “VR dedicated fitness app.” See Ex. 20 (Rubin 169:5-14); Ex. 11 (Rubin 30(b)(6) 31:13-33:1, 39:3-8); *see also* Ex. 9 (Verdu 189:15-190:14) [REDACTED]. The only document the FTC cites (at 20) disproves its case: [REDACTED] [REDACTED]. Ex. 54 (PX0144-001) (emphasis added); *see also* Ex. 47 (Stojasavljevic 160:15-161:20) [REDACTED].

3. The “Perceived Potential Competition” Claim Fails Because There Is No Evidence That Fear of Meta’s Entry Stopped Anticompetitive Conduct

The FTC presents no evidence, as it must, that “the acquiring firm’s premerger presence on the fringe of the target market *in fact* tempered oligopolistic behavior on the part of existing participants in that market.” *Marine Bancorporation*, 418 U.S. at 624-25 (emphasis added); *see also Tenneco*, 689 F.2d at 355; *Ginsburg v. InBev NV/SA*, 649 F. Supp. 2d 943, 947 (E.D. Mo. 2009), *aff’d*, 623 F.3d 1229 (8th Cir. 2010).⁶

First, the FTC cites no evidence that existing “VR dedicated fitness apps” even perceive Meta as a potential entrant. One-third of the apps the FTC claims are in the market have given sworn testimony that they did not consider Meta a likely competitor. They also testified that fear of Meta’s possible entry had *no* effect on their conduct, pricing, or behavior. See Ex. 14 (Garcia Decl. ¶¶ 30-32); Ex. 15 (Janszen Decl. ¶¶ 32-35); Ex. 36 (Lewis Decl. ¶¶ 26-30); *see also* [REDACTED] [REDACTED]. And a startup that intends to enter the market next year swears the same. See Ex. 36 (Lewis Decl. ¶¶ 26-30). This uncontradicted industry testimony is dispositive. See *Siemens*, 621 F.2d at 509 (crediting market participant’s testimony that acquirer’s “possible entry never had any impact upon any pricing or marketing decision”). It also makes sense: [REDACTED] – to say nothing of fitness

⁶ The FTC incorrectly asserts (at 21-22) the standard is that the acquirer merely have a “likely influence” on market participants and competition, citing *exclusively* cases decided before *Marine Bancorporation* (e.g., *United States v. Phillips Petroleum Co.*, 367 F. Supp. 1226 (C.D. Cal. 1973)) and, as in so many other respects here, ignoring that standard.

1 applications specifically. *See* Ex. 49 (PX0127-001); Ex. 20 (Rubin 166:11-172:11); Ex. 39 (Pruett
 2 196:24-197:18, 284:6-18); Ex. 2 (Bosworth 212:21-216:4); Ex. 5 (Zyda Rep. ¶¶ 120-124). Industry
 3 observers and participants are aware of publicity about Meta’s failings in that respect. *See* Ex. 4
 4 (Carlton Rep. ¶¶ 146-147); Ex. 5 (Zyda Rep. ¶ 124); *see also* Ex. 14 (Garcia Decl. ¶¶ 30-32); Ex. 15
 5 (Janszen Decl. ¶¶ 32-35); Ex. 36 (Lewis Decl. ¶¶ 26-30).

6 *Second*, the FTC has no evidence that any concern about Meta “*in fact*” prevented app
 7 developers from engaging in coordinated anticompetitive conduct – a necessary predicate of a
 8 perceived potential competition claim. *Marine Bancorporation*, 418 U.S. at 624-25 (emphasis
 9 added). Those applications perceive *myriad* potential entry from firms of all stripes – large and
 10 small, on-VR and off-VR; losing just one could have no effect on how firms compete, particularly
 11 where market participants did not consider that firm (Meta) a likely entrant. *See Siemens*, 621 F.2d
 12 at 509 (“Usually this is proved by evidence that the actual or perceived potential entrant is one of
 13 but a few likely entrants.”); *United States v. Hughes Tool Co.*, 415 F. Supp. 637, 645-46 (C.D. Cal.
 14 1976) (similar). Current and future “VR dedicated fitness apps” monitor potential entry or
 15 expansion from many firms, e.g., Apple, among others. *See* [REDACTED]
 16 [REDACTED]; Ex. 14 (Garcia Decl. ¶¶ 30-32); Ex. 15 (Janszen Decl. ¶¶ 23-25, 37); Ex.
 17 36 (Lewis Decl. ¶ 31). Indeed, the advantages the FTC ascribes to Meta – “vast resources” and “the
 18 market’s potential” – are also held by larger technology firms with cash *and* fitness experience,
 19 including Apple and Google. *See* Ex. 4 (Carlton Rep. ¶¶ 51, 156-157); *see also* Ex. 5 (Zyda Rep.
 20 ¶¶ 89-97); Ex. 16 (Vickey Rep. ¶¶ 25, 27). Indeed, [REDACTED]
 21 [REDACTED]
 22 [REDACTED]. *See* Ex. 4 (Carlton Rep. ¶¶ 51-52,
 23 Tbl. 6 & App’x Tbl. 12). [REDACTED]
 24 [REDACTED]. *See id.* ¶ 37; Ex. 5 (Zyda Rep. ¶ 95).

25 Out of millions of produced pages, the FTC’s perceived potential competition claim rests
 26 (at 22-23) on just three Within internal documents – [REDACTED]
 27 [REDACTED].
 28 *See* Ex. 55 (PX0615, Nov. 2020); Ex. 56 (PX0619, June 2019); Ex. 57 (PX0621, Dec. 2020). The

1 earliest of these expressly [REDACTED]
 2 [REDACTED]. Ex. 56 (PX0619-002, 003). The next one [REDACTED]
 3 [REDACTED]
 4 [REDACTED] Ex. 55 (PX0615-008). And the most recent document, [REDACTED]
 5 [REDACTED]
 6 [REDACTED]. Ex. 57 (PX0621-002). As for Meta releasing “FitBeat” on Beat
 7 Saber 18 months before the transaction, Meta’s decision not to expand upon that one-off endeavor
 8 (a single two-minute song track; not a fitness app) confirms – and signals to the market – that it is
 9 not a potential entrant interested in building on its own. *See* Ex. 53 (Carmack 63:8-64:14); *see also*
 10 [REDACTED].

11 Finally, the FTC disproves its own case by arguing (at 22) that market participants perceive
 12 Meta as a potential entrant because Beat Saber is “widely recognized as providing incidental
 13 fitness.” Following that logic – i.e., “incidental fitness” equates to perceived ability to enter – then
 14 *more than 100* other VR fitness apps that provide at least “incidental fitness” also qualify as
 15 potential entrants. *See* Ex. 12 (Paynter 30(b)(6) 56:22-23); Ex. 16 (Vickey Rep. ¶ 29). In any
 16 event, the Within founders gave sworn testimony as to the company’s actual views of competition;
 17 other than urging the Court to ignore them, the FTC has no answer to this dispositive proof.

18 **C. The FTC Cannot Show Any Likelihood of Harm to Consumers**

19 Likely harm to consumers is a necessary element of every Section 7 claim. *See United*
 20 *States v. Baker Hughes Inc.*, 908 F.2d 981, 900 n.12 (D.C. Cir. 1990) (Section 7 requires “a
 21 judgment whether the challenged acquisition is likely to hurt consumers”); *see also United States v.*
 22 *AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019) (same). The FTC must prove that the merged
 23 entity would raise prices or restrict output. But there is no evidence of that; on the contrary, Meta’s
 24 clear incentive is to make Supernatural more appealing and widely available to consumers.

25 *First*, there is no evidence that Meta intends to raise prices or restrict output of Supernatural.
 26 The evidence is that Meta intends to expand the audience for Supernatural in order to drive
 27 expansion of headset sales. *See* Ex. 1 (Zuckerberg 152:20-154:24); Ex. 11 (Rubin 30(b)(6)
 28 5:6-7:13). If anything, Meta is an empirical price *cutter*. *See* Ex. 4 (Carlton Rep. ¶ 182). It would be

1 economically irrational for Meta to raise Supernatural's price. *See id.* ¶ 180. The FTC's entire
 2 theory – which expressly depends on the notion that Meta sees Supernatural as a way to attract
 3 additional users to the VR platform, *see* Am. Compl. ¶¶ 5-8 – directly contradicts the FTC's
 4 assertion that Meta might seek to earn a few additional dollars from a mere [REDACTED] at
 5 the expense of attracting additional users to its fragile VR platform. Indeed, Meta has *never* raised
 6 the price of an app after acquisition. *See* Ex. 4 (Carlton Rep. ¶¶ 181-182 & App'x Tbl. 11). The
 7 FTC's expert speculates without foundation that Meta could raise prices, *see* Ex. 44 (Singer Rep.
 8 ¶¶ 140-155), but he ignores all of the losses that Meta would incur from a price increase that will
 9 make consumers less likely to purchase a Quest headset, *see* Ex. 4 (Carlton Rep. ¶ 180).

10 *Second*, the FTC intimates that Supernatural's *rivals* might be hurt because Meta will seek to
 11 restrict access to its platform to favor Supernatural. That is not a colorable theory of harm to
 12 consumers, or even to rivals, who have access to other VR platforms no matter what Meta does.
 13 *See id.* ¶¶ 36-37, 159; Ex. 5 (Zyda Rep. ¶¶ 46-47, 89-96). The theory is also illogical in light of
 14 Meta's need to promote greater consumer adoption of VR overall. *See* Ex. 4 (Carlton Rep. ¶¶ 30,
 15 180); Ex. 5 (Zyda Rep. ¶¶ 100-108). Restricting access would inhibit growth, frighten off the
 16 developers Meta is courting, reduce the app library that will draw consumers to VR, and cost Meta
 17 lost commissions across *all* application sales. *See* Ex. 4 (Carlton Rep. ¶¶ 30, 172-175, 180); Ex. 5
 18 (Zyda Rep. ¶¶ 46-47, 89-96); Ex. 11 (Rubin 30(b)(6) 40:9-16). That is why Meta has given open
 19 distribution, technological assistance, and sometimes even financing to *hundreds* of VR games
 20 directly competitive with Meta's own VR games, including Beat Saber. *See* Ex. 11 (Rubin 30(b)(6)
 21 37:10-24, 64:6-68:10); *see also* Ex. 4 (Carlton Rep. ¶¶ 184-185). Meta even uses its own VR
 22 games and apps to test hardware and software improvements that it freely shares with third-party
 23 game and application developers – just as it would use Within to grow VR fitness overall. *See* Ex.
 24 11 (Rubin 30(b)(6) 8:14-12:5, 53:12-55:13). The FTC's speculation that Meta might at some
 25 unknown date take actions contrary to its own business interests is beyond farfetched – another
 26 reason to reject the claim. *See Adaptive Power Sols., LLC v. Hughes Missile Sys. Co.*, 141 F.3d
 27 947, 952 (9th Cir. 1998) (“Antitrust claims must make economic sense.”).

Lacking a theory of harm to consumers, much less evidence to support that claim, the FTC reveals its true colors as central planner rather than enforcer. It guesses (at 20-21) that things could be *better* if Meta were obligated to build to compete with Supernatural. *See, e.g.*, FTC Mem. 12 (“The proposed Acquisition . . . den[ies] consumers the benefit of adding another effective competitor to the market.”). But Section 7 bars transactions that are likely to *harm* competition, not ones that fail to enhance competition in the manner the FTC prefers. *See Pac. Bell Tel. Co. v. linkLine Commc’ns, Inc.*, 555 U.S. 438, 454-55 (2009) (no antitrust duty to *improve* competition).

II. The Equities Sharply Weigh Against Preliminary Injunctive Relief

The FTC cannot demonstrate, as it must, that the equities favor the injunction that will torpedo this acquisition. *See Lab. Corp.*, 2011 WL 3100372, at *15, *21 (“[T]he FTC must present evidence and make an actual showing [that] the equities favor enjoining the transaction.”). Equitable balancing under Section 13(b) mandates consideration of both “public equities” and the “private interests” of the parties. *Id.* at *21-22. Because a preliminary injunction would [REDACTED], *see* Ex. 1 (Zuckerberg 150:19-152:11); Ex. 2 (Bosworth 212:16-20) – both considerations weigh against an injunction. *See FTC v. Great Lakes Chem. Corp.*, 528 F. Supp. 84, 99 (N.D. Ill. 1981) (“the usual rule that a preliminary injunction is an extraordinary and drastic remedy is particularly true in the acquisition and merger context” because the “‘preliminary’ relief sought by the FTC would doom this transaction”); *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980) (“[A]s a result of the short life-span of most tender offers, the issuance of a preliminary injunction blocking an acquisition or merger may prevent the transaction from ever being consummated.”).

First, the public equities – which “include improved quality, lower prices, increased efficiency, [and] realization of economies of scale” – disfavor an injunction. *Lab. Corp.*, 2011 WL 3100372, at *22; *see also Warner*, 742 F.2d at 1165 (recognizing public’s interest in “beneficial economic effects and pro-competitive advantages”); *Great Lakes Chem.*, 528 F. Supp. at 98-99 (similar; denying Section 13(b) preliminary injunction). Killing the acquisition will impede VR technology improvements, setting back VR fitness generally, and reduce overall VR growth and output. *See* Ex. 11 (Rubin 30(b)(6) 5:13-12:5); Ex. 4 (Carlton Rep. ¶¶ 187-189). Halting the

1 acquisition would also harm non-party developers that would benefit from post-acquisition VR
 2 technology improvements and suffer from post-injunction reductions in VR investment. *See* Ex. 14
 3 (Garcia Decl. ¶¶ 20-26); Ex. 15 (Janszen Decl. ¶¶ 29-31); Ex. 36 (Lewis Decl. ¶¶ 21-25). Against
 4 this evidence, the FTC’s rote assertion (at 24) that public interests always favor the enforcer –
 5 where there is *no* evidence that the public will suffer⁷ – should carry zero weight.

6 *Second*, the private interests weigh against an injunction. *See FTC v. Evans Prods. Co.*, 775
 7 F.2d 1084, 1089 (9th Cir. 1985) (denying injunction given defendant’s “precarious financial
 8 position”); *FTC v. Simeon Mgmt. Corp.*, 532 F.2d 708, 717 (9th Cir. 1976) (Kennedy, J.) (similar);
 9 *Lab. Corp.*, 2011 WL 3100372, at *23 (same). Killing the acquisition [REDACTED]
 10 [REDACTED], *see* Ex. 4 (Carlton Rep. ¶ 116), [REDACTED]
 11 [REDACTED], *see* [REDACTED] And Meta will fall behind current and
 12 future VR rivals, losing time it cannot recover to dynamic and fast-moving competition. *See* Ex. 1
 13 (Zuckerberg 30:10-18, 35:13-24, 154:3-21, 159:8-13, 227:15-18); Ex. 2 (Bosworth 34:1-13, 148:12-
 14 149:5, 212:3-6); Ex. 4 (Carlton Rep. ¶ 51).

15 The stakes go well beyond this deal. The VR ecosystem depends on thousands of
 16 entrepreneurs who are willing to risk their time and capital on development of complementary
 17 technologies. For many such entrepreneurs, not only does acquisition provide the best route to
 18 scaling their apps, but it also provides a time-honored way to realize a return on risky investment –
 19 the promise of which encourages such productive risk-taking in the first place. *See* Ex. 5 (Zyda Rep.
 20 ¶ 126); Ex. 4 (Carlton Rep. ¶ 189). If the FTC can block this deal simply by arguing that Meta has
 21 the resources to build a fitness app in-house rather than acquiring one that has already demonstrated
 22 promise, virtually no deal in the VR space is safe, and the entire ecosystem is in jeopardy.

23 CONCLUSION

24 The Court should deny the FTC’s motion for a preliminary injunction.

25 _____
 26 ⁷ The FTC *asserts* (at 24) only that it “may” have to “unscrambl[e] the eggs” post-acquisition,
 27 but it says nothing about why that matters here. *See* Ex. 20 (Rubin 137:1-138:17); Ex. 9 (Verdu
 28 178:21-180:18); *see also* Ex. 58 (Agreement and Plan of Merger §§ 1.1, 1.10).

1 DATED: November 14, 2022

Respectfully submitted,

2 By: /s/ Mark C. Hansen

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

20 FEDERAL TRADE COMMISSION,

21 Plaintiff,

22 v.

23 META PLATFORMS, INC., et al.,

24 Defendants.
25
26
27
28

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

**DECLARATION OF AARON M. PANNER
IN SUPPORT OF DEFENDANTS'
OPPOSITION TO MOTION FOR A
PRELIMINARY INJUNCTION**

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

Dept.: Courtroom 4 – 5th Floor
Judge: Hon. Edward J. Davila

1 Pursuant to 28 U.S.C. § 1746, I, Aaron M. Panner, declare as follows:

2 I am a partner with the law firm of Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C.,
3 counsel for Defendant Meta Platforms, Inc. (“Meta”). I am an attorney admitted to practice law in
4 the District of Columbia and have been admitted to practice before the Court in this matter *pro hac*
5 *vice*. I submit this Declaration in Support of Defendants’ Opposition to the Federal Trade
6 Commission’s (“FTC”) Motion for a Preliminary Injunction.

7 1. Attached hereto as Exhibit 1 is a true and correct copy of the transcript of the
8 deposition of Mark Zuckerberg, taken October 18, 2022, which contains blue highlighting
9 identifying the portions cited in Defendants’ Opposition to the FTC’s Motion for a Preliminary
10 Injunction.

11 2. Attached hereto as Exhibit 2 is a true and correct copy of the transcript of the
12 deposition of Andrew Bosworth, taken October 19, 2022, which contains blue highlighting
13 identifying the portions cited in Defendants’ Opposition to the FTC’s Motion for a Preliminary
14 Injunction.

15 3. Attached hereto as Exhibit 3 is a true and correct copy of PX0224, an email from Jen
16 Prenner to Mark Zuckerberg and Alex Schultz, copying Andrew Bosworth, Rebecca Van Dyck,
17 Mark Rabkin, Brian Irving, Allison Berliner, Colan Sewell, and Andrea Besmehn regarding 2022
18 Reality Labs VR Category Plan [Review], produced as META-E-2R-04611404 to META-E-2R-
19 04611422, dated January 26, 2021.

20 4. Attached hereto as Exhibit 4 is a true and correct copy of the Expert Report of
21 Dennis Carlton, dated November 11, 2022.

22 5. Attached hereto as Exhibit 5 is a true and correct copy the Expert Report of Michael
23 Zyda, dated November 11, 2022.

24 6. Attached hereto as Exhibit 6 is a true and correct copy of a document [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28

1 7. Attached hereto as Exhibit 7 is a true and correct copy of a document [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 8. Attached hereto as Exhibit 8 is a true and correct copy of a document [REDACTED]

5 [REDACTED]

6 9. Attached hereto as Exhibit 9 is a true and correct copy of the transcript of the

7 deposition of Michael Verdu, taken October 24, 2022, which contains blue highlighting identifying

8 the portions cited in Defendants' Opposition to the FTC's Motion for a Preliminary Injunction.

9 10. Attached hereto as Exhibit 10 is a true and correct copy of the transcript of the

10 deposition of Mark Rabkin, taken October 26, 2022, which contains blue highlighting identifying

11 the portions cited in Defendants' Opposition to the FTC's Motion for a Preliminary Injunction.

12 11. Attached hereto as Exhibit 11 is a true and correct copy of the transcript of the

13 Federal Rule of Civil Procedure 30(b)(6) deposition of Jason Rubin, taken October 28, 2022, which

14 contains blue highlighting identifying the portions cited in Defendants' Opposition to the FTC's

15 Motion for a Preliminary Injunction.

16 12. Attached hereto as Exhibit 12 is a true and correct copy of the transcript of the

17 Federal Rule of Civil Procedure 30(b)(6) deposition of Dorothy Paynter, taken October 25, 2022,

18 which contains blue highlighting identifying the portions cited in Defendants' Opposition to the

19 FTC's Motion for a Preliminary Injunction.

20 13. Attached hereto as Exhibit 13 is a true and correct copy of PX0451, a document

21 located in the custodial files of Jane Chiao titled, "Apps with the highest fitness activity," produced

22 as META-E-LIT-00069699, dated September 19, 2022.

23 14. Attached hereto as Exhibit 14 is a true and correct copy of the Declaration of Jaime

24 Pichardo Garcia, Business Director at Odders Lab, dated November 2, 2022.

25 15. Attached hereto as Exhibit 15 is a true and correct copy of the Declaration of Eric

26 Janszen, Chairman, President, and CEO of VirZoom, dated November 4, 2022.

27 16. Attached hereto as Exhibit 16 is a true and correct copy of the Expert Report of

28 Theodore Vickey, dated November 11, 2022.

1 17. Attached hereto as Exhibit 17 is a true and correct copy of a document [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 18. Attached hereto as Exhibit 18 is a true and correct copy of a document [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 19. Attached hereto as Exhibit 19 is a true and correct copy of a document [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 20. Attached hereto as Exhibit 20 is a true and correct copy of the transcript of the

11 deposition of Jason Rubin, taken October 28, 2022, which contains blue highlighting identifying the

12 portions cited in Defendants' Opposition to the FTC's Motion for a Preliminary Injunction.

13 21. Attached hereto as Exhibit 21 is a true and correct copy of Meta's Supplemental

14 Responses and Objections to Plaintiff's Second Set of Interrogatories, dated October 14, 2022.

15 22. Attached hereto as Exhibit 22 is a true and correct copy of Meta's Supplemental

16 Responses and Objections to Plaintiff's Second Set of Interrogatory Nos. 2, 3, and 4, dated October

17 18, 2022.

18 23. Attached hereto as Exhibit 23 is a true and correct copy of a document produced in

19 response to Interrogatory No. 3 of the Federal Trade Commission's First Set of Interrogatories,

20 produced as META-E-LIT-DATA-0000029, dated October 7, 2022.

21 24. Attached hereto as Exhibit 24 is a true and correct copy of the transcript of the

22 Federal Rule of Civil Procedure 30(b)(6) deposition of Melissa Brown, taken October 26, 2022,

23 which contains blue highlighting identifying the portions cited in Defendants' Opposition to the

24 FTC's Motion for a Preliminary Injunction.

25 25. Attached hereto as Exhibit 25 is a true and correct copy of the transcript of the

26 deposition of Chris Milk, taken October 26, 2022, which contains blue highlighting identifying the

27 portions cited in Defendants' Opposition to the FTC's Motion for a Preliminary Injunction.

28

1 26. Attached hereto as Exhibit 26 is a true and correct copy of the transcript of the
2 deposition of Aaron Koblin, taken October 24, 2022, which contains blue highlighting identifying
3 the portions cited in Defendants' Opposition to the FTC's Motion for a Preliminary Injunction.

4 27. Attached hereto as Exhibit 27 is a true and correct copy of a document [REDACTED]
5 [REDACTED]

6 28. Attached hereto as Exhibit 28 is a true and correct copy of PX0102, a document
7 located in the custodial files of Mark Rabkin titled, "VR Fitness Literature Review," produced as
8 META-E-2R-01341336, dated April 2021.

9 29. Attached hereto as Exhibit 29 is a true and correct copy of PX0452, a document
10 located in the custodial files of Meta Platforms, Inc. titled, "Deliberate-Incidental Titles List,"
11 produced as META-E-LIT-00070069, dated September 12, 2022.

12 30. Attached hereto as Exhibit 30 is a true and correct copy of PX0557, a document
13 located in the custodial files of Melissa Brown titled, "VR Fitness Vertical Overview," produced as
14 META-E-LIT-00029704, dated June 17, 2022.

15 31. Attached hereto as Exhibit 31 is a true and correct copy of PX0672, an email from
16 [REDACTED]
17 [REDACTED]

18 32. Attached hereto as Exhibit 32 is a true and correct copy of PX0664, an email from
19 [REDACTED]
20 [REDACTED]

21 33. Attached hereto as Exhibit 33 is a true and correct copy of PX0667, a document
22 located in the custodial files of Jonny Ahdout titled, "Board extract for Markeing [*sic*] and product,"
23 produced as WITH000964576, December 3, 2020.

24 34. Attached hereto as Exhibit 34 is a true and correct copy of a document located in the
25 custodial files of Chris Milk titled, "Project Flow Master," produced as WITH000258643 to
26 WITH000258653, dated May 7, 2019.
27
28

1 35. Attached hereto as Exhibit 35 is a true and correct copy of a document [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 36. Attached hereto as Exhibit 36 is a true and correct copy of the Declaration of Preston

5 Lewis, co-founder, President, and Chief Design Officer of Black Box VR, dated November 4, 2022.

6 37. Attached hereto as Exhibit 37 is a true and correct copy of PX0529, a document

7 located in the custodial files of Anand Dass titled, "VR Fitness Partner Deck," produced as META

8 E-LIT-00117361, dated July 21, 2022.

9 38. Attached hereto as Exhibit 38 is a true and correct copy of PX0908, a blog post

10 titled, "Exercise by Accident: VR Games to Help You Work Out At Home," dated January 12,

11 2022.

12 39. Attached hereto as Exhibit 39 is a true and correct copy of the transcript of the

13 deposition of Christopher Pruett, taken October 11, 2022, which contains blue highlighting

14 identifying the portions cited in Defendants' Opposition to the FTC's Motion for a Preliminary

15 Injunction.

16 40. Attached hereto as Exhibit 40 is a true and correct copy of PX0111, a Workplace

17 chat among Mark Rabkin, John Anderson, Irfan Ganchi, Atman Binstock, Ian Carmichael, David

18 Yee, Karen Swanson, Ayman Omar Farahat, Christopher Pruett, Mark Rabkin, Allison Berliner,

19 Emre Motan, Raman Marya, Tamara Sciamanna, Tom Langan, Mike Sego, Jonathan Atkins, Tim

20 Loving, Michael Doran, David Martin, Anand Dass, Bill Allred, Erin Green, Caitlin Kalinowski,

21 Ashley Kelly, Rade Stojisavljevic, Michael Verdu, Rachel Cross, Fiona Fung, Jane Chiao, and Mike

22 LeBeau, produced as META-E-2R-01287249, dated February 23, 2021.

23 41. Attached hereto as Exhibit 41 is a true and correct copy of PX0573, a document

24 located in the custodial files of Jane Chiao titled, "Fitness HMD Partnership Proposal," produced as

25 META-E-LIT-00081641 to META-E-LIT-00081646.

26 42. Attached hereto as Exhibit 42 is a true and correct copy of PX0906, a blog post

27 titled, "Introducing 'Supernatural,' a Fun New Way To Stay Fit In VR," dated April 10, 2020.

28

1 43. Attached hereto as Exhibit 43 is a true and correct copy of the Expert Report of
2 Jean-Pierre Dubé, dated November 11, 2022.

3 44. Attached hereto as Exhibit 44 is a true and correct copy of the Expert Report of Hal
4 J. Singer, dated October 27, 2022.

5 45. Attached hereto as Exhibit 45 is a true and correct copy of the Declaration of Matti
6 Nylander, Chief Financial Officer of Varjo Technologies US, Inc., dated November 4, 2022.

7 46. Attached hereto as Exhibit 46 is a true and correct copy of the transcript of the
8 deposition of Anand Dass, taken October 20, 2022, which contains blue highlighting identifying the
9 portions cited in Defendants' Opposition to the FTC's Motion for a Preliminary Injunction.

10 47. Attached hereto as Exhibit 47 is a true and correct copy of the transcript of the
11 deposition of Rade Stojasavljevic, taken October 14, 2022, which contains blue highlighting
12 identifying the portions cited in Defendants' Opposition to the FTC's Motion for a Preliminary
13 Injunction.

14 48. Attached hereto as Exhibit 48 is a true and correct copy of PX0179, an email from
15 Anand Dass to Rade Stojasavljevic, Jane Chiao, Mark Rabkin, and Michael Verdu, regarding Pre-
16 read for Fitness Investments, produced as META-E-2R-05859972 to META-E-2R-05859973, dated
17 March 15, 2021.

18 49. Attached hereto as Exhibit 49 is a true and correct copy of PX0127, a document
19 located in the custodial files of Jane Chiao titled, "VR Fitness Content Investment Thesis v2,"
20 produced as META-E-2R-04865217 to META-E-2R-04865230, dated March 10, 2021.

21 50. Attached hereto as Exhibit 50 is a true and correct copy of a Workplace chat between
22 Michael Verdu and Anand Dass, produced as META-E-2R-03628924 to META-E-2R-03628928,
23 dated May 26, 2021.

24 51. Attached hereto as Exhibit 51 is a true and correct copy of a document located in the
25 custodial files of Michael Verdu titled, "[Decision] First Party Fitness Investment," produced as
26 META-E-2R-06413061 to META-E-2R-06413075, dated May 14, 2021.

52. Attached hereto as Exhibit 52 is a true and correct copy of a document located in the custodial files of Deborah Guzman Barrios titled, "Fitness 2021 Roadmap," produced as META-E-LIT-00052181 to META-E-LIT-00052186, dated May 10, 2021.

53. Attached hereto as Exhibit 53 is a true and correct copy of the transcript of the deposition of John D. Carmack, taken October 24, 2022, which contains blue highlighting identifying the portions cited in Defendants' Opposition to the FTC's Motion for a Preliminary Injunction.

54. Attached hereto as Exhibit 54 is a true and correct copy of PX0144, a Workplace chat among Jane Chiao, Rade Stojisavljevic, and Anand Dass, produced as META-E-2R-00841622 to META-E-2R-00841623, dated March 8, 2021.

55. Attached hereto as Exhibit 55 is a true and correct copy of PX0615, a document located in the custodial files of Jonny Ahdout titled, "Supernatural Product Strategy," produced as WITH000953928, dated June 3, 2020.

56. Attached hereto as Exhibit 56 is a true and correct copy of PX0619, a document located in the custodial files of [REDACTED]

57. Attached hereto as Exhibit 57 is a true and correct copy of PX0621, an email from Aaron Koblin to Dave Cowling regarding Getting Gameplay Running at Full Speed, produced as WITH000118270 to WITH000118274, dated December 10, 2020.

58. Attached hereto as Exhibit 58 is a true and correct copy of Attachment Item 3(b)-1 to Meta's Notification and Report Form filed under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 titled, "Agreement and Plan of Merger," dated October 22, 2021.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: November 14, 2022

/s/ Aaron M. Panner

Aaron M. Panner

ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1

I, Mark C. Hansen, am the ECF User whose ID and password are being used to file the foregoing. In compliance with Civil Local Rule 5-1(h)(3), I hereby attest that Aaron M. Panner concurred in this filing, and I shall maintain records to support this concurrence for subsequent production for the Court if so ordered or for inspection upon request by a party.

DATED: November 14, 2022

/s/ Mark C. Hansen

Mark C. Hansen

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18
19 (Additional Counsel Listed on Signature Page)

20 UNITED STATES DISTRICT COURT
21 NORTHERN DISTRICT OF CALIFORNIA
22 SAN JOSE DIVISION

23 FEDERAL TRADE COMMISSION,

24 Plaintiff,

25 v.

26 META PLATFORMS, INC., et al.,

27 Defendants.

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

**DEFENDANTS' INDEX OF EXHIBITS
TO DECLARATION OF AARON M.
PANNER IN SUPPORT OF
OPPOSITION TO MOTION FOR A
PRELIMINARY INJUNCTION**

FILED UNDER SEAL

Dept.: Courtroom 4 – 5th Floor

Judge: Hon. Edward J. Davila

Ex. No.	Description
Volume I	
1	Transcript of the deposition of Mark Zuckerberg, taken October 18, 2022, which contains blue highlighting identifying the portions cited in Defendants' Opposition to the FTC's Motion for a Preliminary Injunction.
2	Transcript of the deposition of Andrew Bosworth, taken October 19, 2022, which contains blue highlighting identifying the portions cited in Defendants' Opposition to the FTC's Motion for a Preliminary Injunction.
3	PX0224, an email from Jen Prenner to Mark Zuckerberg and Alex Schultz, copying Andrew Bosworth, Rebecca Van Dyck, Mark Rabkin, Brian Irving, Allison Berliner, Colan Sewell, and Andrea Besmehn regarding 2022 Reality Labs VR Category Plan [Review], produced as META-E-2R-04611404 to META-E-2R-04611422, dated January 26, 2021.
4	Expert Report of Dennis Carlton, dated November 11, 2022.
5	Expert Report of Michael Zyda, dated November 11, 2022.
6	Document [REDACTED] [REDACTED] [REDACTED] [REDACTED]
7	Document [REDACTED] [REDACTED]
8	Document [REDACTED] [REDACTED]
9	Transcript of the deposition of Michael Verdu, taken October 24, 2022, which contains blue highlighting identifying the portions cited in Defendants' Opposition to the FTC's Motion for a Preliminary Injunction.

Ex. No.	Description
10	Transcript of the deposition of Mark Rabkin, taken October 26, 2022, which contains blue highlighting identifying the portions cited in Defendants' Opposition to the FTC's Motion for a Preliminary Injunction.
Volume II	
11	Transcript of the Federal Rule of Civil Procedure 30(b)(6) deposition of Jason Rubin, taken October 28, 2022, which contains blue highlighting identifying the portions cited in Defendants' Opposition to the FTC's Motion for a Preliminary Injunction.
12	Transcript of the Federal Rule of Civil Procedure 30(b)(6) deposition of Dorothy Paynter, taken October 25, 2022, which contains blue highlighting identifying the portions cited in Defendants' Opposition to the FTC's Motion for a Preliminary Injunction.
13	PX0451, a document located in the custodial files of Jane Chiao titled, "Apps with the highest fitness activity," produced as META-E-LIT-00069699, dated September 19, 2022.
14	Declaration of Jaime Pichardo Garcia, Business Director at Odders Lab, dated November 2, 2022.
15	Declaration of Eric Janszen, Chairman, President, and CEO of VirZoom, dated November 4, 2022.
16	Expert Report of Theodore Vickey, dated November 11, 2022.
17	Document [REDACTED] [REDACTED] [REDACTED]
18	Document [REDACTED] [REDACTED] [REDACTED]

Ex. No.	Description
19	Document [REDACTED] [REDACTED] [REDACTED]
20	Transcript of the deposition of Jason Rubin, taken October 28, 2022, which contains blue highlighting identifying the portions cited in Defendants' Opposition to the FTC's Motion for a Preliminary Injunction.
Volume III	
21	Meta's Supplemental Responses and Objections to Plaintiff's Second Set of Interrogatories, dated October 14, 2022.
22	Meta's Supplemental Responses and Objections to Plaintiff's Second Set of Interrogatory Nos. 2, 3, and 4, dated October 18, 2022.
23	Document produced in response to Interrogatory No. 3 of the Federal Trade Commission's First Set of Interrogatories, produced as META-E-LIT-DATA-0000029, dated October 7, 2022.
24	Transcript of the Federal Rule of Civil Procedure 30(b)(6) deposition of Melissa Brown, taken October 26, 2022, which contains blue highlighting identifying the portions cited in Defendants' Opposition to the FTC's Motion for a Preliminary Injunction.
25	Transcript of the deposition of Chris Milk, taken October 26, 2022, which contains blue highlighting identifying the portions cited in Defendants' Opposition to the FTC's Motion for a Preliminary Injunction.
26	Transcript of the deposition of Aaron Koblin, taken October 24, 2022, which contains blue highlighting identifying the portions cited in Defendants' Opposition to the FTC's Motion for a Preliminary Injunction.
27	Document [REDACTED] [REDACTED]

Ex. No.	Description
28	PX0102, a document located in the custodial files of Mark Rabkin titled, "VR Fitness Literature Review," produced as META-E-2R-01341336, dated April 2021.
29	PX0452, a document located in the custodial files of Meta Platforms, Inc. titled, "Deliberate-Incidental Titles List," produced as META-E-LIT-00070069, dated September 12, 2022.
30	PX0557, a document located in the custodial files of Melissa Brown titled, "VR Fitness Vertical Overview," produced as META-E-LIT-00029704, dated June 17, 2022.
Volume IV	
31	PX0672, an email from [REDACTED] [REDACTED] [REDACTED]
32	PX0664, an email from [REDACTED] [REDACTED] [REDACTED]
33	PX0667, a document located in the custodial files of Jonny Ahdout titled, "Board extract for Markeing [sic] and product," produced as WITH000964576, December 3, 2020.
34	Document located in the custodial files of Chris Milk titled, "Project Flow Master," produced as WITH000258643 to WITH000258653, dated May 7, 2019.
35	Document [REDACTED] [REDACTED]
36	Declaration of Preston Lewis, co-founder, President, and Chief Design Officer of Black Box VR, dated November 4, 2022.

Ex. No.	Description
37	PX0529, a document located in the custodial files of Anand Dass titled, “VR Fitness Partner Deck,” produced as META-E-LIT-00117361, dated July 21, 2022.
38	PX0908, a blog post titled, “Exercise by Accident: VR Games to Help You Work Out At Home,” dated January 12, 2022.
39	Transcript of the deposition of Christopher Pruett, taken October 11, 2022, which contains blue highlighting identifying the portions cited in Defendants’ Opposition to the FTC’s Motion for a Preliminary Injunction.
40	PX0111, a Workplace chat among Mark Rabkin, John Anderson, Irfan Ganchi, Atman Binstock, Ian Carmichael, David Yee, Karen Swanson, Ayman Omar Farahat, Christopher Pruett, Mark Rabkin, Allison Berliner, Emre Motan, Raman Marya, Tamara Sciamanna, Tom Langan, Mike Sego, Jonathan Atkins, Tim Loving, Michael Doran, David Martin, Anand Dass, Bill Allred, Erin Green, Caitlin Kalinowski, Ashley Kelly, Rade Stojavljevic, Michael Verdu, Rachel Cross, Fiona Fung, Jane Chiao, and Mike LeBeau, produced as META-E-2R-01287249, dated February 23, 2021.
Volume V	
41	PX0573, a document located in the custodial files of Jane Chiao titled, “Fitness HMD Partnership Proposal,” produced as META-E-LIT-00081641 to META-E-LIT-00081646.
42	PX0906, a blog post titled, “Introducing ‘Supernatural,’ a Fun New Way To Stay Fit In VR,” dated April 10, 2020.
43	Expert Report of Jean-Pierre Dubé, dated November 11, 2022.
44	Expert Report of Hal J. Singer, dated October 27, 2022.

Ex. No.	Description
45	Declaration of Matti Nylander, Chief Financial Officer of Varjo Technologies US, Inc., dated November 4, 2022.
46	Transcript of the deposition of Anand Dass, taken October 30, 2022, which contains blue highlighting identifying the portions cited in Defendants' Opposition to the FTC's Motion for a Preliminary Injunction.
47	Transcript of the deposition of Rade Stojsavljevic, taken October 14, 2022, which contains blue highlighting identifying the portions cited in Defendants' Opposition to the FTC's Motion for a Preliminary Injunction.
48	PX0179, an email from Anand Dass to Rade Stojsavljevic, Jane Chiao, Mark Rabkin, and Michael Verdu, regarding Pre-read for Fitness Investments, produced as META-E-2R-05859972 to META-E-2R-05859973, dated March 15, 2021.
49	PX0127, a document located in the custodial files of Jane Chiao titled, "VR Fitness Content Investment Thesis v2," produced as META-E-2R-04865217 to META-E-2R-04865230, dated March 10, 2021.
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Volume VI	
51	Document located in the custodial files of Michael Verdu titled, "[Decision] First Party Fitness Investment," produced as META-E-2R-06413061 to META-E-2R-06413075, dated May 14, 2021.
52	Document located in the custodial files of Deborah Guzman Barrios titled, "Fitness 2021 Roadmap," produced as META-E-LIT-00052181 to META-E-LIT-00052186, dated May 10, 2021.

Ex. No.	Description
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55	PX0615, a document located in the custodial files of Jonny Ahdout titled, "Supernatural Product Strategy," produced as WITH000953928, dated June 3, 2020.
56	PX0619, a document located in the custodial files of [REDACTED] [REDACTED] [REDACTED]
57	PX0621, an email from Aaron Koblin to Dave Cowling regarding Getting Gameplay Running at Full Speed, produced as WITH000118270 to WITH000118274, dated December 10, 2020.
58	Attachment Item 3(b)-1 to Meta's Notification and Report Form filed under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 titled, "Agreement and Plan of Merger," dated October 22, 2021.

1 DATED: November 14, 2022

Respectfully submitted,

2 By: /s/ Mark C. Hansen

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Exhibit 1

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

Exhibit 2

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

Exhibit 3

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Exhibit 10

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Exhibit 12

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Exhibit 13

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

Exhibit 14

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6 UNITED STATES DISTRICT COURT
7 NORTHERN DISTRICT OF CALIFORNIA
8 SAN JOSE DIVISION

9 FEDERAL TRADE COMMISSION,
10 Plaintiff,
11 v.
12 META PLATFORMS, INC., et al.,
13 Defendants.

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

DECLARATION OF JAIME PICHARDO GARCIA

Complaint Filed: July 27, 2022

Judge: Hon. Edward J. Davila

14 I, Jaime Pichardo Garcia, declare as follows:

15 1. I am the Business Director at Odders Lab, which has its corporate headquarters in
16 Seville, Spain. I have personal knowledge of all the facts stated within this Declaration, and if called
17 to testify, I could and would testify competently to these facts.

18 2. In 2014, I graduated with a degree in Accounting and Finance from Universidad de
19 Sevilla.

20 3. From June 2018 to April 2019, I was the CEO of Warbler Gaming, a game developer
21 that focused on gamified gambling apps.

22 4. I started working at Odders Lab in August 2019. I served as Business Developer
23 until September 2020, and from October 2020 through the present I have served as Business
24 Director.

25
26
27
28
DECLARATION OF JAIME PICHARDO GARCIA

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



1 5. I submit this declaration on behalf of Odders Lab regarding Meta's proposed
2 acquisition of Within (the developer of Supernatural) (the "Proposed Acquisition") based on my
3 personal knowledge of the facts set forth herein.

4 *Odders Lab*

5 6. Odders Lab was founded as a separate company in 2019, owned by Oblumi. Oblumi
6 was an "internet of things" (IoT) development studio founded in 2014. Odders Lab has been
7 developing VR applications since 2019. Odders Lab now partners with Meta, HTC, PlayStation,
8 and Pico for VR.

9
10 7. Odders Lab develops a VR fitness application, Les Mills Body Combat, that is
11 available on the Meta Quest Store and the Pico Store. Odders Lab collaborates with Les Mills, an
12 established and successful fitness brand, to create Les Mills Body Combat. Les Mills Body Combat
13 is an immersive VR fitness application that offers an extensive workout portfolio, coaching from
14 Les Mills trainers, innovative mechanics, and different intensities for all levels of users.

15
16 8. Odders Lab also develops a VR game called OhShape, a VR rhythm game where
17 players go through, punch, or dodge walls to the beat of the music, and a VR app called Chess Club,
18 where users can play chess in VR environments. Both of these games are also available on the Meta
19 Quest Store, the Pico Store, and Steam. OhShape, like many VR applications, has fitness benefits
20 and is used for fitness. Indeed, OhShape won UploadVR's 2020 award in the Best VR for Fitness
21 category.

22 *Virtual Reality and the Fitness Use Case*

23
24 9. My view on the current state of VR is that VR is a nascent, rapidly evolving, and
25 dynamic technology space. Many companies have been investing heavily in developing their own
26 hardware solutions, and I expect there to be significant new hardware to be introduced in the next
27 few years.

28
DECLARATION OF JAIME PICHARDO GARCIA

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



1 10. I also anticipate that the VR space will continue to attract more developers,
2 platforms, hardware providers, and users in the coming years.

3 11. Both consumers and developers alike currently have many different VR hardware
4 platforms to choose from, including: Sony PlayStation VR (PSVR), HTC Vive Pro 2 and Cosmos,
5 Valve Index VR, HP Reverb G2, Varjo Aero, Pico Neo 3 Pro, G2 4K, and Pico 4, among others.
6 Additionally, other major technology companies, like Apple and HTC, are widely and credibly
7 speculated to be releasing new and updated VR headsets in the near-term future.

8 12. So far, VR adoption has generally been driven by the gaming and entertainment use
9 cases. While fitness and wellness appears to be an interesting potential new use case, it is not yet
10 fully developed.

11
12 *Competition for Fitness Solutions is Broad*

13 13. I am aware that the FTC has alleged that there is a “market” limited to Supernatural
14 and several other “deliberate” or “dedicated” VR fitness apps. This is not consistent with what I
15 have seen and experienced in developing and producing Les Mills Body Combat. Odders Lab is
16 acutely aware of competition from a wide range of products, not merely from *some* of the VR apps.

17
18 14. Fitness is a broad industry, with an ever-increasing range of choices available to
19 consumers, including numerous at-home smart fitness solutions.

20 15. Consumer interest (and investment) remains high in products and services like
21 Peloton, Ergatta, Tonal, Mirror, Apple Fitness+, SoulCycle at Home, Hydrow, FightCamp, Les
22 Mills+, and many others.

23 16. Consumers also have a wide range of fitness options offered on traditional gaming
24 consoles. In fact, gaming consoles have offered a number of fitness options for many years,
25 including Nintendo’s launch of *Wii Fit* in 2007, and remain very popular among console users.
26
27
28

DECLARATION OF JAIME PICHARDO GARCIA

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



1 17. This broad fitness market is where Odders Lab intends to compete. I believe VR
2 fitness apps compete closely with these other immersive fitness solutions, such as at-home smart
3 fitness equipment or apps (e.g., Peloton, Mirror, Tonal, Apple Fitness+, Zwift, ClassPass); fitness
4 solutions offered on gaming consoles like Nintendo Switch (e.g., Ring Fit Adventure, Fitness
5 Boxing), PlayStation (e.g., Yoga Master), and Xbox (e.g., Zumba Fitness: World Party, Your Shape
6 Fitness Evolved 2012, Nike+ Kinect Training); and fitness options offered on competing and
7 emerging VR systems (e.g., PlayStation VR, Valve Index and, eventually, the PSVR 2, HTC Vive
8 Air, and other new entrants to the VR headset space). We hope to offer consumers an alternative
9 to these products that they find compelling, and if they do not, I expect that they will opt for these
10 other products and services.

11
12 18. Odders Lab specifically considers the wide array of fitness options available to
13 consumers—including VR fitness apps, connected fitness solutions, immersive fitness solutions
14 available for gaming consoles, mixed-reality technologies, and smart TVs—as competition for user
15 engagement and time. This competition among VR fitness applications and other products is robust
16 and I expect it will only get more so in the coming months.

17
18 19. Even within a narrower extended reality segment, competition among VR fitness
19 applications is fierce. There have been at least 6 VR fitness applications introduced in the past three
20 years, and at least 2 in the past eight months. I expect that more will be introduced as early as this
21 coming year. What also adds to the competitive landscape is the fact that the incremental
22 development effort for making a VR application available on other VR platforms (like the Quest
23 Store, Pico Store, or Steam Store) once the VR application works on one platform is generally fairly
24 low.
25
26
27
28

DECLARATION OF JAIME PICHARDO GARCIA

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



Meta's Incentive to Grow the VR Ecosystem

1
2 20. I am aware that the FTC has alleged that Meta seeks to acquire Within to obtain
3 some kind of monopoly in "Dedicated VR Fitness" applications, and consequently to raise prices,
4 restrict output, or degrade quality. This is not consistent with my experience, and I have not seen
5 any evidence of this in my experience working with Meta as a developer.

6 21. Odders Lab has had a relationship with Meta for approximately four years. Odders
7 Lab applied to an Oculus start-up program with OhShape, and it was eventually selected for support
8 through the program and was able to launch on the Quest Store. Odders Lab then continued to
9 receive support, financial and otherwise, from Meta, to improve and expand our product offerings.
10
11 Odders Lab's relationship with Meta is friendly and positive.

12 22. Based on our experience working with Meta to bring OhShape, Chess Club, and Les
13 Mills Body Combat to the Quest Store, Odders Lab believes Meta is earnest in their goal to grow
14 the VR ecosystem as a whole, including growing VR fitness.

15 23. Meta's goal to grow the VR ecosystem is evidenced by Meta's provision of
16 financial, marketing, and operational support to Odders Lab to help develop and improve our VR
17 application offerings.
18

19 24. Odders Lab will continue to invest and collaborate with Meta based on our
20 expectation that they will continue to provide this support after the acquisition of Within, as Meta
21 has after other acquisitions of VR studios. I believe that this support is in Meta's interest, as the
22 proliferation and success of VR applications will drive adoption and sales of VR devices.
23

24 25. Odders Lab does not believe that Meta's acquisition of Within would be detrimental
25 to the VR ecosystem as a whole because the acquisition of Within could be a vote of confidence in
26 VR generally, and in fitness applications in particular.
27
28

DECLARATION OF JAIME PICHARDO GARCIA

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



1 26. Odders Lab also does not believe that Meta's acquisition of Within would be
2 detrimental to the VR fitness application ecosystem because it serves as validation for the fitness
3 use case in VR and allows Odders Lab and other fitness VR developers to continue growing and
4 finding new audiences.

5 *Meta as a Potential VR Fitness Application Developer*

6 27. I am aware that the FTC has claimed that, if Meta had not acquired Within, it would
7 have offered its own first-party VR fitness application to compete more closely with Supernatural.
8 I saw no evidence that this was likely, and did not believe that Meta had the capabilities and
9 characteristics (for example, producing high quality fitness content) necessary to develop such a
10 product. This never entered into our thinking at Odders Lab, and we certainly did not make product
11 pricing or quality decisions based on concern that Meta might offer a new product, or modify an
12 existing product like Beat Saber to be more competitive with Supernatural.
13

14 28. Over my three years of being involved with VR, I have observed the development
15 of Meta's Quest platform and other VR platforms. I am familiar with the fact that while Meta has
16 brought some studio app development in-house through acquisition, none of which has been fitness-
17 focused, Meta has not released a VR fitness application built from scratch.
18

19 29. My involvement with developing VR fitness apps has given me insight into the
20 requirements of building and releasing this type of app. Before Odders Lab partnered with Les
21 Mills, Odders Lab had started to develop its own VR fitness application. From a pure application
22 development perspective, we had the necessary resources, but we lacked fitness expertise, access
23 to trainers, music licensing know-how, and other components that go into creating a VR fitness
24 application. Partnering with an established fitness brand like Les Mills brought these capabilities
25 and expertise to our product.
26
27
28

DECLARATION OF JAIME PICHARDO GARCIA

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



1 30. Based on my experience, it takes a lot of effort to make a successful VR fitness
2 application because doing so involves a balance of fitness knowledge, knowledge of behavior
3 change, and the proper execution. I have not seen any evidence that Meta possesses any qualities,
4 characteristics, or abilities that uniquely position it to develop a virtual reality fitness application.

5 31. It is at least theoretically possible that large companies can develop apps like
6 Supernatural. It is similarly possible that such apps can and will be developed by small studios,
7 like Odders Lab. But I am not aware of any unique advantages that Meta would have in doing this.
8 While we are appropriately concerned that new products will be offered and will compete with our
9 app, we do not believe Meta was or is likely to be one of them, and we have never had particular
10 concern about Meta, which has been helpful to us (and itself) in developing the VR ecosystem.

11 32. Odders Lab has never believed, or even considered, that Meta would develop a VR
12 fitness application on its own, nor did it feel competitive pressure from the potential that it would.
13 Furthermore, Odders Lab does not believe that Meta will develop such an application after the
14 acquisition of Within.
15

16 33. Rather, Odders Lab's competitive concerns are chiefly centered on how to attract
17 users to VR fitness compared to more established alternatives, and how to ensure that its offerings
18 are competitive with possible entry by other fitness companies, like Peloton or Equinox, and VR
19 developers more broadly.
20

21 *Oligopoly*

22 34. It is my understanding that the FTC appears to allege that the "market" for VR fitness
23 is not competitive, and is characterized by "oligopolistic" behavior by Odders Lab. To the extent I
24 understand the term, "oligopoly" refers to a mature market, with a small number of competitors that
25 engage in parallel or interdependent behavior, all to the end of keeping profits high and preventing
26 competition. While it may be true that some VR fitness apps are currently more successful or
27
28

DECLARATION OF JAIME PICHARDO GARCIA


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



1 widely-known than others, due to their high quality, I do not believe that these more successful
2 applications act as an oligopoly. In fact, I have observed entry by new fitness applications over the
3 last couple of months, and expect additional new entry in the near future. I believe the entry barriers
4 for VR fitness applications are generally low.

5 35. Like the overall VR user base, the VR fitness application ecosystem is currently in
6 its infancy, but is rapidly expanding and new entrants are entering the space frequently. As such,
7 the VR fitness application ecosystem is highly competitive and dynamic, and I would not
8 characterize any firm as dominant. I do not believe it is fair or accurate to describe it as an
9 oligopoly.
10

11 I, Jaime Pichardo Garcia, declare under penalty of perjury under the laws of the United
12 States that the foregoing is true and correct and that this declaration was executed on November 2,
13 2022.

14
15
16 Signature: 

17 Printed Name: Jaime Pichardo Garcia

18 Address: Avda. Santa Clara de Cuba, 4. Nave 18 41007

19 Sevilla, Spain

20 Phone No.: +34 687654210
21
22
23
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25
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27
28

Exhibit 15

Eric Janszen
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Newton, MA 02458
ej@virzoom.com

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

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

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

DECLARATION OF ERIC JANSZEN

Dept.: Courtroom 4 – 5th Floor
Judge: Hon. Edward J. Davila

1 I, Eric Janszen, declare as follows:

2 1. I'm not here to represent Meta Platforms or Oculus. No other company has done
3 more to advance the VR industry than Meta. By supporting Meta in this matter, I
4 intend to support the VR industry as a whole.

5 2. I am the co-founder and Chairman, President, and CEO of VirZOOM, which is
6 based in Newton, Massachusetts. I have personal knowledge of all facts stated
7 within this Declaration, and if called to testify, I could and would testify competently
8 to these facts.

9 3. In 2014, Eric Malafeew and I began conducting product tests for what would become
10 VirZOOM. Our goal was to harness the power of virtual reality ("VR") to motivate
11 people to exercise.

12 4. In February 2015, Eric Malafeew and I co-founded VirZOOM. In June 2016, we
13 began VirZOOM commercial product shipments.

14 5. As Chairman, President, and CEO of VirZOOM, my job responsibilities cover all
15 aspects of the company, including: hiring; directing the management team; making
16 strategic product decisions; reviewing and approving product features; overseeing
17 financial operations, reviewing and approving commercial contracts, raising money
18 and interacting with investors, among other duties typical of a start-up company
19 CEO.

20 **VirZOOM**

21 6. VirZOOM has shipped thousands of its VR fitness products commercially since June
22 2016, and has shipped products worldwide. Prior to launching on Meta's Quest,
23 VirZOOM had consumer and commercial installs in 43 countries worldwide.

24 7. VirZOOM games and apps combined with a VR headset and cadence sensors
25 attached to a bike transform a stationary bike into a controller for virtual activities

1 that use your body to steer, pedaling to move, and VR hand controllers for game
2 play. While in VirZOOM's VZfit app, you can cycle any of 10 million miles of
3 roads mapped by Google Street View rendered in 3D. In VZplay you command
4 tanks, pilot helicopters, fly a Pegasus in virtual world games..

- 5 8. Stationary biking is ideal exercise for VR because it is an intuitive and safe way to
6 move, and does not need to take up much space. In 2015 we made a folding bike
7 with buttons and accurate speed controls to be used with a collection of exercise
8 games we designed for tethered VR. Starting in 2017 we created a turnkey VR kiosk
9 and wireless sensors for gyms to use with their own bikes. In 2019, we introduced
10 our current VZfit system, a fitness app made for the Oculus Go and Quest that can be
11 used on any bike at your home, gym, or office.

12 **The Early State of VR and Fitness in VR**

- 13 9. In my eight years developing and then working at VirZOOM, I have developed
14 insights into the VR industry and fitness on VR.
- 15 10. The VR industry is still very new. VR is an emerging and dynamic technology
16 space, with many companies investing heavily in hardware and poised to develop
17 new VR hardware and equipment. I expect that VR will continue to attract more
18 developers, platforms, hardware providers, and users in the coming years.
- 19 11. In Q2 2019 Meta launched the Oculus Quest, the world's first VR product suitable
20 for large scale consumer adoption. Unlike previous VR systems, the stand-alone
21 Quest was inexpensive and simple to set-up.
- 22 12. While Quest platform was groundbreaking from a cost and simplicity standpoint,
23 without a wide range of applications available for it consumers had no reason to buy
24 it. Meta invested heavily to build a curated content ecosystem to ensure enough high
25 quality applications for the headset to give millions of consumers a reason to buy it.

1 13. Sony has built a significant content ecosystem for its Playstation VR platform, but
2 not on the scale that Meta has. Between the primary Quest store and secondary
3 AppsLab store there are nearly 2,000 apps and games for Quest users to choose
4 from. By comparison apps and games available for PC-based VR and Sony
5 Playstation VR number in the hundreds. As a result, today the Meta Quest enjoys a
6 reported 80% VR market share.

7 14. Despite its position as the leading VR platform today, Meta remains vulnerable to
8 displacement by future VR industry players. The VR industry is still in its infancy.
9 Many customer problems remain to be solved before mass adoption can occur.

10 15. Among several potential future VR players, Apple may be in the strongest position
11 to displace Meta as the VR industry leader.

12 16. Meta Platforms is a social media company. To create its VR business it had to
13 develop competencies in consumer product design, manufacturing, distribution, and
14 support, and had to develop a content store from scratch for app and game
15 distribution. Apple is widely expected to ship a VR product within the next year, a
16 product that's been reported in the press as being in development for approximately
17 ten years. Unlike Meta, Apple is the world's premier consumer electronics product
18 company, with an installed base of over 1 billion iPhones to address with a future
19 VR product. In the year 2021 when 10.62 million app and game downloads by Quest
20 users were reported by some sources, 143.6 billion apps and games were reportedly
21 downloaded from Apple's store, nearly 14 thousand times as many as by Quest users
22 from the Quest store in that year. As mentioned above, all apps created for the Meta
23 Quest are likely to be portable to a future Apple VR platform. Needless to say, if and
24 when Apple ships a VR product, Meta could face formidable competition. Whether
25

Meta will face the same fate as Blackberry Ltd in competition with Apple in the VR market only time will tell.

17. It is easy and fast for VirZOOM, and other app developers, to move their VR content products to new VR platforms. All of the apps and games currently developed for Quest have been built using the Unity and Unreal game engines – which are designed to support portability between platforms. VirZOOM ported its VR apps from early mobile VR platforms like the Samsung GearVR to the Meta Quest in a short period. VR content for the Meta Quest is easily portable to the Miro platform today. It is likely that content created for the Meta Quest will be portable to future VR platforms including potential Apple VR products and others.

18. Meta has not asked that we make our products exclusive to the Quest platform, nor could it. Meta needs developers, like VirZOOM, to populate its app store with content in order to attract consumers to its platform. Meta is competing for VirZOOM – offering distribution, technical assistance, and even financial grants – because that is how it competes against other platforms and headset manufacturers. We made a decision in Q4 2018 to drop all other VR platforms and focus exclusively on the Meta Quest. We did so for three reasons. First, after reviewing an early version of the Quest before launch in Q2 2019 that the Quest met all of the key product requirements for rapid adoption and was likely to quickly gain market dominance. Second, Meta appeared to be committed to VR for the long run and was making the kind of investment to build a content ecosystem that's needed to motivate consumers to buy the platform. Third, focusing our development efforts on one VR platform allowed us to make the most efficient use of resources.

19. VR fitness is in its infancy and is a rapidly evolving technology. It is a broad category and broadening all the time. As headset technology changes and more

1 developers enter the market, VR fitness apps will continue to emerge and grow,
2 improving the range and nature of the consumer purchase options.

3 20. It is far too early in the VR industry for the government to be picking winners and
4 losers. The VR industry is barely 7 years old and consumer adoption is not high
5 enough nor is product design advanced enough for anyone to know what the winning
6 platforms or winning companies will be.

7
8 **Competition for Fitness Solutions Is Broad**

9 21. The fitness segment of the VR industry is broad and dynamic. Current VR fitness
10 products have only scratched the surface of the full range of future possibilities that
11 developers have discovered so far, and new VR products will make new fitness
12 solutions possible that are not possible today.

13 There is no sharp line between VR games that produce fitness benefits as a result of
14 game play like VirZOOM's and Beat Saber and apps like SuperNatural that are
15 specifically designed and marketed as fitness solutions. There is rather a continuum
16 from games that are designed to deliver fitness benefits to gamified fitness apps, with
17 consumer preferences deciding which is most suitable for personal fitness needs.

18 New VR motion controls recently invented by VirZOOM will further blur the line,
19 as VR games that play more like sports in the physical world are developed. In this
20 way VR will come to imitate the physical world, with its nearly infinite myriad of
21 fitness and exercise options.

22 22. Supernatural and FitXR currently dominate the narrow segment of VR fitness apps
23 that imitate aspects of online, connected fitness solutions like Peloton and Mirror,
24 with organized classes and trainers for guidance. But as Peloton's recent experience
25 shows, consumer preferences for fitness solutions can be fickle. Today's seemingly

1 unassailable leader can quickly become tomorrow's laggard, with innovation
2 constantly providing consumers with new more compelling options.

3 23. VR fitness applications offered on Meta's Quest Store compete with all the various
4 options, including health clubs, in-home connected, and mobile fitness apps. While I
5 personally believe VR is a fundamentally superior medium for motivating exercise
6 activity by consumers, the competition among VR fitness applications and games
7 and other products is robust and I expect it will only get more so in coming months
8 and years.

9 24. Among VR fitness applications segment alone, the last time I checked around six
10 months ago, there were six titles on the Quest store that meet the narrow definition
11 of VR fitness applications by virtue of titles and marketing that clearly delineate
12 them to consumers as exercise or sports related (e.g., boxing, tennis, etc.).
13 Reviewing today, I can count a dozen such VR fitness applications available in the
14 Quest store, and doubling in a matter of six months..

15 25. Then there's AppsLab, a secondary Meta Quest store that functions as a proving
16 ground for new independently developed games for the Meta Quest. Firststrike, Gym
17 Masters, Fitness, Powerbeats, Challengebox, Octonic VR Fitness, Realfit, Punchfit,
18 Ultra Real Runner, XR Fitness Quest, Dragonfit, Fit Adventure, Hyper Run, Song
19 Beater, Ultra Height, Zombie Range, Race Yourself!, and Pacebreaker are just the
20 first 18 of over 200 fitness related apps there, with new arrivals so frequent that
21 Meta's content approval team is in my experience challenged to keep up. Any of
22 these VR fitness applications can potentially move to the curated Oculus Quest store
23 if they prove themselves popular among consumers. Meta has done a fantastic job at
24 creating an environment that encourages content developers to use their creative
25 talents to find new ways to meet the fitness consumer's needs.

1 26. I am no more worried about competing with Within as a part of Meta then I am about
2 competing with Within as they are today, as an independent third-party developer
3 with more funds than we currently have. To effectively compete, my team has to
4 come up with technology and content that is different and better, which results in
5 new products that are substantially differentiated from Within's. This is what we
6 have always done, and what we will continue to do after the acquisition. This
7 seeking out of new ways to use VR to meet the varied needs of fitness product
8 consumers ultimately benefits consumers. Because VR fitness is such a broad
9 category, it is unlikely one single company will be able to provide the full range of
10 VR fitness offerings, and Meta will need to continue to support other VR fitness
11 companies to provide a full range of offerings on its VR devices.

12
13 **Meta's Incentive To Grow the VR Ecosystem**

14 27. I surmise from what I have read in the media that the FTC believes the acquisition of
15 Within by Meta may somehow discourage new entrants into the VR fitness segment.
16 This makes no sense to me, and is inconsistent with my experience in working with
17 Meta as an app developer.

18 28. The data on new number of recent entrants both on the primary Quest store and
19 secondary AppsLab store provided above aside, with respect to the VirZOOM app
20 for the Quest Store in particular, my experience working with Meta has demonstrated
21 that Meta is committed to growing its VR ecosystem as a whole, including VR
22 fitness, which is as stated earlier one of the reasons why we decided to focus entirely
23 on the Meta Quest as the VR platform for the content we develop. Meta has
24 provided us and other VR fitness app and game developers with marketing and
25 operational support, including special promotions, to support app sales on the Quest

1 Store. In addition Meta provides development grants to qualified developers,
2 including fitness application developers that compete directly with Supernatural.
3 VirZOOM is among those that qualify for potential funding from Meta and is in the
4 process of applying for it. In our case, our new patent pending VR motion controls
5 that can make an entirely new class of VR fitness apps and games possible, qualifies
6 VirZOOM for potential grant funding. The technology applies to the VR industry
7 broadly, and can be of interest to other VR players in addition to Meta.
8 We experienced no change in the level of support from Meta following the
9 announcement of Meta's acquisition of Within. VirZOOM will continue to invest
10 and collaborate with Meta based on our expectation that Meta will continue to
11 provide such support after it acquires Within.

12 29. Importantly, Meta's acquisition of Within is beneficial to the VR ecosystem as a
13 whole, and, in particular, application developers. In fact, blocking the proposed
14 acquisition would likely harm competition. The acquisition is a vote of confidence
15 in VR generally and fitness apps in particular, and an indication that investment in
16 VR and VR fitness can generate a return on investment. It will encourage others to
17 develop VR products, including fitness products, because it is important to
18 entrepreneurs to see that companies are investing in and are willing to acquire and
19 grow apps in this space. Investment is important for these developers to succeed,
20 and investors are motivated by liquidity. Acquisitions generally demonstrate that
21 there are viable exits and returns for shareholders. The opportunity for a good return
22 on investment from an acquisition is the primary motivation for entry into a market
23 for entrepreneurs and their financial backers.

24 30. It also will help companies like VirZOOM for Meta to have a first-party studio that
25 works on fitness app development – a competency it currently lacks. I expect Meta

will be able to use Within as a studio to better understand the product requirements for fitness for future VR products, optimize the Quest hardware for fitness use, develop new SDKs and APIs it can share with other fitness developers, and otherwise improve the technical support it provides to apps like VirZOOM.

31. Meta's acquisition of Within is also beneficial to the VR fitness app ecosystem because it further validates the fitness use case in VR. It will help fitness apps, including VirZOOM, to continue to grow and find new audiences and possibly even additional investors. This acquisition is helpful to show investors how popular VR fitness is becoming and that developing VR applications can be a profitable business.

Meta As a Potential VR Fitness App Developer

32. The Oculus Quest is a game console, analogous to the Microsoft xBox and Sony Playstation. Microsoft and Sony have over the past 20 years acquired over 40 independent developers, much as Meta has acquired a number of Meta Quest developers. The reason they did this is because console makers excel at developing the hardware, operating systems and tools needed for developers to create great content for the console, but are notoriously bad at developing apps and games for their platforms from internal resources. Failed attempts are numerous and successes rare. I expect that Meta, on reviewing the historical record of past attempts by other console makers, wisely made a "buy" versus "build" decision, to acquire rather than attempt to develop the expertise needed to create an app like SuperNatural internally.

33. We have never made product pricing or feature decisions based on concern that Meta might offer a new product or might modify a first party product to be more competitive with VirZOOM.

1 34. Additionally, when VirZOOM makes business decisions, such as decisions about
2 pricing, quality, or innovation, we do so in a fiercely competitive environment, in
3 which users have a plethora of fitness options. We have not made business decisions
4 based on any concern that Meta may offer a new fitness app or a modified version of
5 a current app that competes with VirZOOM.

6 35. Since 2016, I have observed the development of Meta's VR ecosystem and other VR
7 ecosystems. While Meta has brought some studio application development in-house
8 through acquisitions, Meta has not released a VR fitness application.

9
10 **The VR Fitness Industry Is Not Oligopolistic**

11 36. Competition for fitness products, VR and non-VR, is intense. New products have
12 come out and will continue to come out, pricing is widely variable, and quality is
13 constantly improving as more developers and consumers adopt this emerging
14 technology. I am unaware of any interdependent or parallel behavior by anyone
15 offering these products.

16 37. Like the overall VR user base, the VR fitness application ecosystem is currently in
17 its infancy, but is rapidly expanding and new entrants are entering the space
18 frequently.

19 38. In this early stage, our pricing strategy is solely designed to increase our user base.
20 We measure our progress by the number of subscribers to our product and our ability
21 to both retain existing users and grow that number while maintaining fixed costs. If
22 we are successful in those respects, we feel confident that profits will follow later.

23
24 I, Eric Janszen, declare under penalty of perjury under the laws of the United States that the
25 foregoing is true and correct and that this declaration was executed on 11/14/2022.

1

2

Signature:

Eric H. Janszen

3

Printed Name:

Eric H. Janszen

4

Address:

198 California Street

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Newton, MA 02458

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Phone No.:

781-354-3243

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Exhibit 16

**REDACTED VERSION OF DOCUMENT
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Exhibit 35

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

Exhibit 36

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

META PLATFORMS, INC., et al.,

Defendants.

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

DECLARATION OF PRESTON LEWIS

Complaint Filed: July 27, 2022

Judge: Hon. Edward J. Davila

I, Preston Lewis, declare as follows:

1. I am the co-founder, President, and Chief Design Officer of Black Box VR, which has its corporate headquarters in Boise, Idaho. I have personal knowledge of all facts stated within this Declaration, and if called to testify, I could and would testify competently to these facts.

2. In 2009, I obtained a Bachelor of Business Administration degree in International Business from Boise State University. I have also attended the University of Washington, where I studied business, and Northwest Nazarene University's College of Business, where I studied business and finance.

3. In 2010, I joined my current business partner, Ryan DeLuca, at Bodybuilding.com. My last title there was Director of Product.

4. While at Bodybuilding.com, Ryan and I spent years building the Web site Bodybuilding.com, which became the largest online nutritional supplement retailer in the world, to our knowledge, with nearly \$500 million in annual sales. Collaborating with others, Ryan and I

1 created some of the world's most recognized supplement brands, chart-topping fitness mobile
2 applications, award-winning health and fitness campaigns, and one of the world's largest online
3 fitness social networks.

4 5. In 2016, I co-founded the Idaho Virtual Reality Council. I am currently the Co-
5 Chairman of the Council. The Council's mission is to bring together people, technologies, and
6 companies to create a thriving virtual reality industry for the economic and social benefit of Idaho
7 citizens and families. The Council provides networking events and educational seminars to help
8 Idaho organizations learn faster, cooperate on projects, and promote virtual reality in Idaho.
9

10 6. In 2016, Ryan DeLuca and I founded Black Box VR. Ryan and I founded Black Box
11 VR with a mission to disrupt the fitness industry by creating innovative products and experiences
12 that would create lasting change in people's lives.

13 7. As President and Chief Design Officer of Black Box VR, my job responsibilities
14 include hiring, leading our various product teams, product creation (including ecommerce,
15 community, content, mobile, desktop, and hardware), product innovation, user experience design,
16 user interface design, and solving customer problems.
17

18 *Black Box VR*

19 8. Black Box VR is now a virtual reality gym that operates in six locations: San
20 Francisco, California; Boise, Idaho; Gilbert, Arizona; Tempe, Arizona; Oceanside, California, and
21 Peoria, Arizona.

22 9. When users exercise in our gyms, they enter a private work out space in which they
23 use a VR headset and a dynamic resistance machine in combination. The resistance machine we
24 invented is mapped into the virtual reality app and the player uses the machine to workout as their
25 fitness movements are mapped to in-game actions as they defend their "base" in the workout app.
26
27
28

1 10. The workout app is set up like a game, where users are defending a “crystal,” which
2 is at a “base” that is in turn shielded by “gates,” all of which occurs in a battle arena within the app.
3 Throughout the workout, enemies in the app will attack the gate and the user can attack enemy
4 gates. Using the resistance machine for various exercises throughout the game (such as chest
5 presses or bicep curls), users can get points for breaking through opposing gates and destroying
6 enemy crystals.

7 11. Each work out session has a warm up period followed by as many rounds of exercise
8 as possible within a 30-minute time-period.
9

10 12. Within the app, users get points for destroying enemy gates and crystals to secure
11 wins. The more wins, then the more virtual trophies the user can obtain and the higher the user rises
12 in the ranks.

13 13. Although Black Box VR’s fitness app is currently only available in our gyms and
14 partner gyms, Black Box VR is working with Meta to produce a version of the app for sale on the
15 Quest Store. Instead of using the resistance machine, that version of the app will use body resistance
16 and cardio, and will require users to engage their full body to obtain fitness results.
17

18 14. Our goal is to release the app on the Quest Store in 2023 and we are on track to meet
19 that goal.

20 *Fitness in Virtual Reality*

21 15. With my six years of work at Black Box VR and many years in the virtual reality
22 industry generally, I have insights into the virtual reality industry and knowledge of how fitness
23 apps fit into the virtual reality industry.
24

25 16. Virtual reality is an emerging and dynamic technology space, with many companies
26 investing heavily in hardware and, according to industry reports, many companies poised to
27
28

1 develop new virtual reality hardware and equipment. Virtual reality will continue to attract more
2 developers, platforms, hardware providers, and users in the coming years.

3 17. Virtual reality fitness is in its infancy and is a rapidly evolving technology. As more
4 developers enter the market, virtual reality fitness apps will continue to grow, improving the user
5 experience.

6 *Competition for Fitness Solutions is Broad*

7 18. In developing and producing our fitness product, we are acutely aware of
8 competition from a wide range of products, and not merely from *some* of the VR fitness apps.

9 19. As things currently stand, users have an ever-increasing range of choices for fitness
10 solutions, including physical locations like Black Box VR, Equinox, and other gyms, as well as at-
11 home connected and smart fitness solutions, such as Peloton, Mirror, and Apple Fitness+.

12 20. Virtual reality fitness applications offered on the Quest Store compete with all of
13 those options (both physical, at-home, and two-dimensional apps). This competition among virtual
14 reality fitness applications and other products is robust and I expect it will only get more so in
15 coming months. In VR fitness applications alone, there have been several new products introduced
16 in the past three years. I expect that more will be introduced within the next year (including Black
17 Box VR's app for the Quest Store). Virtual reality customers thus will continue to have numerous
18 choices and an expanding range of options for virtual reality fitness apps.

19 *Meta's Incentive to Grow the VR Ecosystem*

20 21. I am aware that the FTC has alleged that Meta seeks to acquire Within to obtain
21 some kind of monopoly in "Dedicated VR Fitness" apps, and consequently to raise prices, restrict
22 output or degrade quality. This makes no sense to me, and is inconsistent with my experience in
23 working with Meta as an app developer.
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1 22. With respect to the Black Box VR app for the Quest Store in particular, my
2 experience working with Meta has demonstrated that Meta is earnest in its stated goal to grow the
3 virtual reality ecosystem as a whole, including growing virtual reality fitness. Meta has provided
4 Black Box VR with financial support and agreed to provide marketing and operational support in
5 the future to develop and improve the Quest Store app in development.

6 23. I believe that Meta will continue to provide such support after it acquires Within. In
7 fact, Meta has continued to support outside gaming studios after it acquired gaming studios, as
8 shown by Meta's continued support of Black Box VR even after Meta announced its purchase of
9 Within. I believe that this support is in Meta's interest, as the proliferation and success of VR apps
10 will drive adoption and sales of VR devices.

11 24. Importantly, Meta's acquisition of Within is beneficial to the virtual reality users
12 and developers. In fact, blocking the Proposed Acquisition would likely harm competition. The
13 acquisition is a vote of confidence in VR generally and fitness apps in particular. It will encourage
14 others to develop such products, because it is important to entrepreneurs to see that successful
15 companies are investing, and are willing to acquire and grow apps in this space. Such a possible
16 "exit ramp" makes entry less risky for entrepreneurs and their financial backers.

17 25. Meta's acquisition of Within is beneficial to the virtual reality fitness app ecosystem
18 because it serves as validation for the fitness use case in virtual reality. It will help Black Box VR
19 to continue to grow and find new audiences. In fact, Black Box is currently in a funding round and
20 using Meta's acquisition of Within as support for our use case. This acquisition is helpful to show
21 investors how popular VR Fitness is becoming.

22 *Meta as a Potential VR Fitness App Developer*

23 26. I am aware that the FTC has claimed that, if Meta had not acquired Within, it would
24 have offered its own first-party VR fitness app to compete more closely with Supernatural. I saw
25
26
27
28

1 no evidence that this was likely, and did not believe that Meta had the specialized expertise (for
2 example, high quality fitness content) necessary to develop such a product. This never entered into
3 our thinking at Black Box VR. We certainly did not make product pricing or quality decisions based
4 on concern that Meta might offer a new product, or modify an existing product (Beat Saber) to be
5 more competitive with Supernatural.

6 27. Additionally, when Black Box VR makes competitive decisions, such as decisions
7 about pricing, quality, or innovation, we have not made them based on any concern that Meta may
8 offer a new fitness app (or a modified version of a current app).

9 28. Since 2016, I have observed the development of Meta's Quest ecosystem and other
10 virtual reality ecosystems. While Meta has brought some studio application development in-house
11 through acquisition, Meta has not developed any virtual reality fitness application on its own.

12 29. Based on my experience, it takes a tremendous amount of effort to make a successful
13 fitness app because doing so involves a balance of fitness knowledge, knowledge of behavior
14 change, and proper execution. I have not seen anything to suggest that Meta possesses any qualities,
15 characteristics, or abilities that uniquely position it or give it an advantage to develop a better virtual
16 reality fitness application than another company. In fact, in the absence of established fitness IP,
17 Meta has more ground to make up when compared to established fitness brands.

18 30. It is at least theoretically possible that large companies can develop apps like
19 Supernatural. It is similarly possible that such apps can and will be developed by small studios,
20 like ours and Within's. But I am not aware of any unique advantages that Meta would have in
21 doing this with greater success than other companies. While we are appropriately concerned that
22 new products will be offered and will compete with our app, we don't believe Meta as an
23 independent developer was or is likely to be one of them, and we have never had particular concern
24 about Meta, which has been helpful to us (and itself) in developing the VR ecosystem.
25
26
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1 31. We do, however, pay close attention to a number of VR apps and non-VR products
2 that offer fitness solutions. Some of the actual and potential competitors we pay closest attention
3 to are Supernatural, and Fit XR, Les Mills Bodycombat, Liteboxer, Oh Shape, Thrill of the Fight,
4 and offerings from Peloton and Apple Fitness+. We're more concerned about other competitors
5 than Meta.

6 *Oligopoly*

7 32. It is my understanding that the FTC appears to allege that the "market" for VR
8 fitness is not competitive, and is characterized by "oligopolistic" behavior. I do not agree.
9 Competition for fitness products, VR and non-VR, is intense, new products have come out and will
10 continue to come out, pricing is widely variable, and quality is constantly improving as this
11 emerging technology is adopted by more developers and consumers. I am unaware of any
12 interdependent or parallel behavior by anyone offering these products.
13

14
15 I, Preston Lewis, declare under penalty of perjury under the laws of the United States that the
16 foregoing is true and correct and that this declaration was executed on November 4, 2022.
17

18
19 Signature: _____



20 Printed Name: _____ Preston Lewis

21 Address: _____ 851 W. Front St. #1501

22 _____ Boise, ID. 83702

23 Phone No.: _____ 208-631-9910
24
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26
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Exhibit 37

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Exhibit 38

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6/9/22, 2:29 PM

Exercise by Accident: VR Games To Help You Work Out at Home



EXERCISE BY ACCIDENT: VR GAMES TO HELP YOU WORK OUT AT HOME

[Oculus Blog](#)

Posted by Hayden Dingman

January 12, 2022

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For some, exercise comes naturally. You crave the exhaustion and the ensuing endorphin rush of your body saying, “Hey, nice job today,” like a supportive coach in a ‘90s sports film.

The rest of us need a bit more coaxing. Luckily, VR exists. And while our first port of call for VR fitness is dedicated fitness apps like [Supernatural](#) and [FitXR](#), you can get a surprising amount of exercise “by accident” with a bunch of the games below. If you’ve ever thought you’d be better at aerobics if there were swords involved or wished the rowing machine might plunge you into a stealthy spec ops mission, then this list is for you.

And if you’re playing on Quest or [Quest 2](#), our system-level fitness tracker [Oculus Move](#) lets you set daily fitness goals and track the calories you’re burning across all VR apps—from [Pistol Whip](#) to [Phantom: Covert Ops](#) to [Supernatural](#) and more. Find Oculus Move in your Library. Once you’ve set it up, you can even keep an eye on your stats in real-time by enabling an in-game overlay. How much is 200 calories worth of [Beat Saber](#)? Now you can find out!

Note: This post is periodically updated to keep the list of games current and relevant. Something you think we should add to the list? Let us know in the comments!

DEDICATED FITNESS

SUPERNATURAL

Supernatural Launch Trailer | Oculus Quest

6/9/22, 2:29 PM

Exercise by Accident: VR Games To Help You Work Out at Home



While plenty of people develop an ad hoc VR fitness regimen, *Supernatural* offers an alternative: Guided workouts led by real fitness trainers, hosted in beautiful locations around the world (or off-world). *Supernatural*'s "Flow" workouts mix sweeping arm movements with plenty of squats and lunges for intense full-body workouts that will leave you equal parts exhausted and satisfied. Or you can opt for one of the new Boxing workouts, learning to bob, weave, and throw a right hook on Mars or the Great Wall of China. There are hundreds of workouts, expertly rhythm-mapped to your favorite music—whether that's today's hits, '80s hair metal, hip-hop, EDM, even Tchaikovsky—with new workouts added every day, and even a library of stretching and meditation sessions to cool down. Check out *Supernatural* with the free trial, after which you can sign up for less than \$15 a month (when you sign up annually).

Exercise: Full-body, Aerobic

Developer: [Within Unlimited, Inc.](#)

Available On: [Quest Platform](#)

FITXR

FitXR: Change The Way You Think About Exercise



6/9/22, 2:29 PM

Exercise by Accident: VR Games To Help You Work Out at Home

FitXR is an immersive virtual fitness club, merging VR with total body workouts designed by top fitness experts. Dedicated to making fitness more fun and accessible for everyone, *FitXR* offers workout classes within three distinct studios: Box, Dance and HIIT. Taking a cue from group fitness classes, *FitXR* is inspired by the power that comes from exercising together and brings this to life via a Multiplayer feature which allows up to seven members to workout together, live. *FitXR* also provides constantly refreshed content with a new class added each day, new coaches, fresh music and updated workout environments. *FitXR* is available for \$9.99 a month or \$83.99 for an annual membership.

Exercise: Full-body, Aerobic

Developer: [FitXR](#)

Available On: [Quest Platform](#) // [Rift Platform](#)

VZFIT



There are more than four million miles of road in the United States of America—and now you can bike every single one of them without leaving your house. *VZfit*, the latest app from veteran VR fitness company VirZOOM, pairs exercise with Google Street View so you can exercise all around the world. The best part is *VZfit* now supports up to five players per ride, so grab your friends and go explore! Ride through the streets of Tokyo, follow the Tour de France's route through the Pyrenees, or explore the Grand Canyon without the heat. *VZfit* works with your existing exercise equipment, or you can opt for a full-body "exerboard" workout created by a professional trainer. Get started with a seven-day free trial, after which you can subscribe and keep riding for \$9.99 USD/month.

Exercise: Full-body, Aerobic, Equipment Supported

Developer: [VirZOOM, Inc.](#)

Available On: [Quest Platform](#)

6/9/22, 2:29 PM

Exercise by Accident: VR Games To Help You Work Out at Home

HOLOFIT

Holofit by Holodia | Oculus Quest Platform



Can you sweat in Antarctica? Answer this burning question and more with *HOLOFIT*. Available on the Quest Platform, *HOLOFIT* pairs with any rowing machine (either via Bluetooth or through headset-tracking) and any bicycle or elliptical with an additional cadence sensor. If you don't have any home exercise equipment, *HOLOFIT* Freestyle lets you simulate (via bodyweight exercises) running, rowing, skiing, and cycling through a variety of unique VR worlds. Paddle through Antarctica, bike through San Francisco, or even fulfill those childhood dreams and exercise in outer space. You can explore at your own pace, or go for a guided HIIT workout if you want to crank up the intensity. Get started with a seven-day free trial, after which a subscription is \$12 USD/month or \$130 USD/year.

Exercise: Full-body, Aerobic, Equipment Supported

Developer: [Holodia](#)

Available On: [Quest Platform](#)

RHYTHM

BEAT SABER

Lady Gaga x Beat Saber | Meta Quest 2



6/9/22, 2:29 PM

Exercise by Accident: VR Games To Help You Work Out at Home



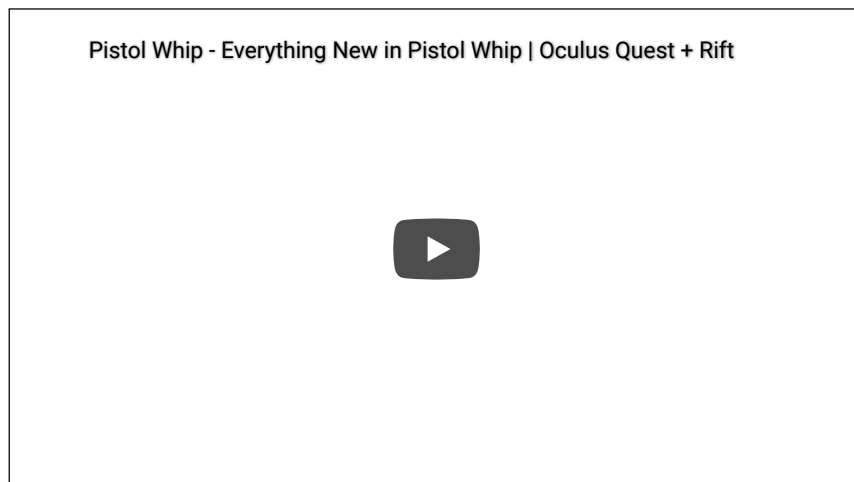
Beat Saber is one of the most popular VR games. Armed with a pair of laser sabers, your goal is to slash through incoming blocks to the beat of the music, and avoid walls either by ducking under them or moving to the side. Simple enough, but even at low difficulty levels it's supremely satisfying slicing and dicing through the fray. Developer Beat Games also continues to expand on *Beat Saber* with new music packs, adding high-energy tracks from Lady Gaga, Skrillex, Billie Eilish, Imagine Dragons, and Linkin Park—and with even more to come in 2022.

Exercise: Full-body, Aerobic

Developer: [Beat Games](#)

Available On: [Quest Platform](#) // [Rift Platform](#)

PISTOL WHIP



Starring in an action movie is hard work. In *Pistol Whip*, it's one against many as you try to fight off one assassin after another. The choreography is up to you though, as you dodge, duck, and weave through oncoming bullets and fire off a few of your own in return. Extra points are awarded for syncing your shots to the soundtrack, which gives *Pistol Whip* the feel of a deadly ballet. Your heartbeat will be up in no time. And the *Pistol Whip: 2089* and *Smoke & Thunder* expansions are even more intense, with pulsing soundtracks featuring acclaimed artists like *Magic Sword* and *Processor*.

6/9/22, 2:29 PM

Exercise by Accident: VR Games To Help You Work Out at Home

Exercise: Legs, Aerobic**Developer:** [Cloudhead Games, Ltd.](#)**Available On:** [Quest Platform](#) // [Rift Platform](#)

RAGNAROCK

Ragnarock - Official Trailer



In *Ragnarock*, you and your crew row a Viking longship to Valhalla—or rather, your *crew* rows and you keep time on a set of drums. Don't think you're getting off easy though. Thrash along to metal tracks by Alestorm, Gloryhammer, Wind Rose, and more. You're air drumming, but clever use of haptics makes *Ragnarock* feel about as real, as entertaining, and as exhausting as a proper drum kit. Sail through mythic landscapes, race for glory with your friends, and play until your arms are sore.

Exercise: Arms, Shoulders, Aerobic**Developer:** [WanadevStudio](#)**Available On:** [Quest Platform](#)

SYNTH RIDERS

Synth Riders | Oculus Quest + Rift Platform



6/9/22, 2:29 PM

Exercise by Accident: VR Games To Help You Work Out at Home

Synth Riders bills itself as a “dance-action VR rhythm game.” That’s a lot of words, but *dance* is the key. *Synth Riders* is driven by choreography, not complexity. While you’re free to compete for high scores, losing yourself in the music and movement is a perfectly acceptable alternative. Bash targets with your hands, ride the neon “rails,” and let it all wash over you. Multiplayer support lets you ride along with friends, and a diverse soundtrack rounds out the *Synth Riders* experience, with 56 free songs, four DLC packs, and custom song support on both Rift and Quest.

Exercise: Dance, Aerobic

Developer: [Kluge Interactive](#)

Available On: [Quest Platform](#) // [Rift Platform](#)

AUDIO TRIP

Audio Trip - Award-winning VR Dance Game! [Oculus Trailer Fall 2020]



Audio Trip loves to mix it up. You’re catching gems. You’re smashing drums. You’re swatting targets in a specific direction. You’re moving your hands along “ribbons.” You’re dodging big red barriers. It’s a lot to keep track of, but it’ll also get your heart rate up in no time. *Audio Trip* prides itself on its choreography. Even the “Beginner” difficulty nails that dancing-in-the-club feeling—and with tracks from Skrillex, Lady Gaga, Tiësto, deadmau5, and more, you might as well be dancing in the club. Or you can opt for Cardio mode, with flows designed for steady state cardio and exercise. Want to dial up (or dial back) the intensity? Edit levels in-headset until you’ve created the perfect routine. Put together a workout playlist of your favorite songs and get ready to move (a lot).

Exercise: Full-body, Aerobic

Developer: [Kinemotik Studios](#)

Available On: [Quest Platform](#) // [Rift Platform](#)

6/9/22, 2:29 PM

Exercise by Accident: VR Games To Help You Work Out at Home

OHSHAPE

OhShape | Oculus Quest + Rift Platforms



You know how cartoon characters will get scared and run straight through walls, leaving a perfect outline of their body behind? *OhShape* is basically that moment, over and over again. Walls come barreling towards you, and your goal is to match the person-shaped cutout and squeak through unharmed. *OhShape* also asks you to collect coins and either punch or avoid certain walls, but it's the pose recreation that's made it a hit among players. It's an intuitive (and funny) concept, but allows for surprisingly complex dance routines. And with a soundtrack that spans everything from K-pop to rock and synthwave, there's a little something for everyone—and custom song support as well.

Exercise: Dance, Aerobic

Developer: [Odders Lab](#)

Available On: [Quest Platform](#) // [Rift Platform](#)

DANCE CENTRAL

Dance Central | Oculus Quest + the Rift Platform



6/9/22, 2:29 PM

Exercise by Accident: VR Games To Help You Work Out at Home

Even the least coordinated person is bound to pick up a few moves from *Dance Central*. It's that beginner-friendly and intuitive. The Harmonix series has proved a popular fitness outlet for years on consoles and mobile devices, but *Dance Central's* first foray into VR adds a whole new layer. Hit the club scene and shake it with The Chainsmokers, groove along to Dua Lipa, and vibe with Kendrick Lamar. The club's patrons will teach you the moves. All you need to do is follow along and mirror their actions. And once you've got your dance routine down? Head into the Lounge! *Dance Central* is even better with friends, letting you customize your looks and dance the night away together.

Exercise: Dance, Aerobic

Developer: [Harmonix Music Systems, Inc.](#)

Available On: [Quest Platform](#) // [Rift Platform](#)

ACTION

UNTIL YOU FALL

Until You Fall | Oculus Quest + Rift Platforms



Synthwave is key to *Until You Fall's* aesthetic as well. It's like an album cover come to life, with wraithlike knights and fearsome crystalline beasts fighting you for control of this neon-drenched world. Pick up your sword and start swinging—until you can't anymore. Then start again. *Until You Fall* is an addictive run-based game, pitting you against more and more dangerous foes until you die, and then returning you to the battle stronger than before. And given the amount of work going into your back and shoulder muscles, you may soon find you're stronger in real life too.

6/9/22, 2:29 PM

Exercise by Accident: VR Games To Help You Work Out at Home

Exercise: Back, Shoulders, Arms, Aerobic**Developer:** [Schell Games](#)**Available On:** [Quest Platform](#) // [Rift Platform](#)

PHANTOM: COVERT OPS

Phantom: Covert Ops Launch Trailer | Oculus Quest



Row, row, row your boat gently down the stream—and be prepared for sore shoulders in the morning. In *Phantom: Covert Ops*, you're a special forces operative traversing hostile territory in a military kayak. Pick off enemies, plant bombs, and then slip away before you're spotted, like a ghost in the night. Tense stealth-action and a flare for the cinematic make *Phantom: Covert Ops* an easy recommendation regardless, but it's a surprisingly thorough workout as well, thanks to all that paddling. And hey, who doesn't like to exercise while sitting down?

Exercise: Shoulders and Back, Endurance**Developer:** [nDreams](#)**Available On:** [Quest Platform](#) // [Rift Platform](#)

IN DEATH: UNCHAINED

In Death Unchained | Oculus Quest



6/9/22, 2:29 PM

Exercise by Accident: VR Games To Help You Work Out at Home

Imagine *The Divine Comedy*, only Dante took up a bow to save Heaven and Hell. *In Death: Unchained* pits you against the souls of the forsaken, whether knights or mages or creatures too horrid to describe. Draw back your bow and fire, again and again. The further you go, the tougher the challenge—until you die and start back at the beginning. *In Death: Unchained* rewards a good eye and a fast arm, as you sink arrows into opponents like pincushions. And while your journey starts out easy enough, before long you're ducking behind cover, firing dozens of arrows every minute, and blinking away sweat. Chances are you won't even notice the soreness in your triceps, you'll be so focused.

Exercise: Arms and Shoulders, Endurance / Aerobic

Developer: Superbright

Available On: Quest Platform // Rift Platform

SPACE PIRATE TRAINER

Space Pirate Trainer - Official Trailer



Few games can get your heart pumping like *Space Pirate Trainer*. An arcade-shooter that's meant to be played and replayed, *Space Pirate Trainer* revels in stacking the odds against you. Within minutes you're squatting and kneeling and pulling maneuvers straight out of *The Matrix*, trying to elegantly (or not-so-elegantly) fit your body through near-impenetrable walls of incoming laser fire. Your goal is to survive as long as possible against the endless robot tide, taking out as many enemies as you can before going down in a blaze of glory. An early hit with people using VR for fitness, *Space Pirate Trainer* is every bit as exhausting and exhilarating now as it was upon release.

6/9/22, 2:29 PM

Exercise by Accident: VR Games To Help You Work Out at Home

Exercise: Full-body, Aerobic**Developer:** I-Illusions**Available On:** Quest Platform // Rift Platform

SUPERHOT VR

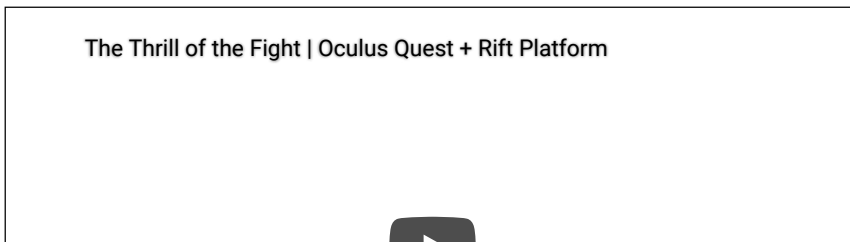


There are five guns pointed at you. You have a glass bottle in each hand. What do you do? In *SUPERHOT VR*, time only moves when you do, which gives you plenty of time to decide. Bullets, thrown bottles, punches, they all hang in the air waiting for you to break the stillness. Hopefully you can hold a pose, because *SUPERHOT VR* is a great go-at-your-own-pace workout, with an economy of movement that's almost reminiscent of yoga or Tai Chi at times. Squat under an incoming bullet, and then take a minute to think about your next move while your thighs start to burn.

Exercise: Full-body, Endurance**Developer:** *SUPERHOT Team***Available On:** Quest Platform // Rift Platform

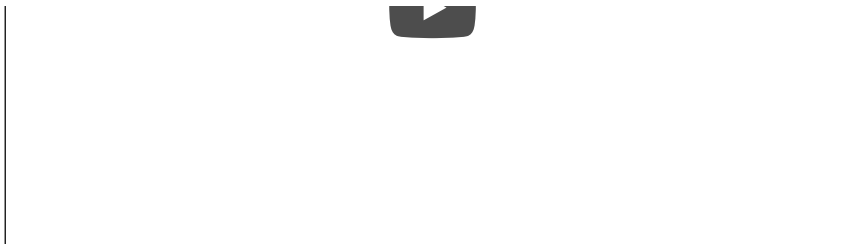
SPORTY

THE THRILL OF THE FIGHT



6/9/22, 2:29 PM

Exercise by Accident: VR Games To Help You Work Out at Home



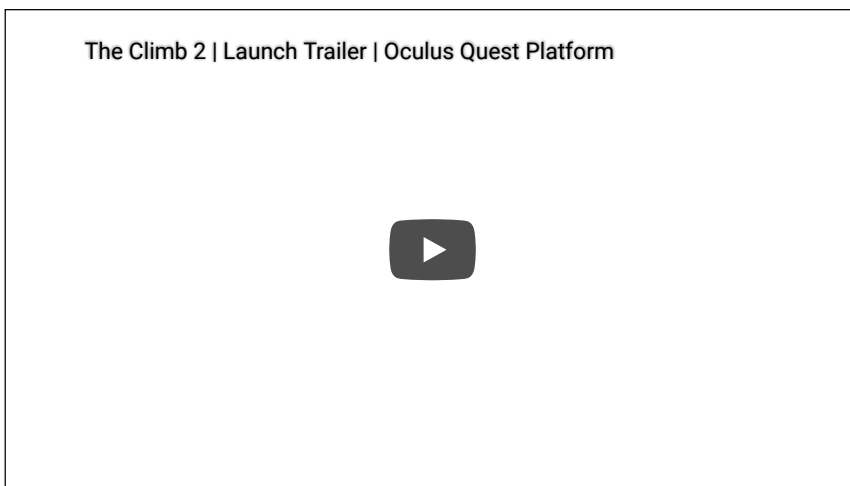
Cue the Survivor song and get ready for a training montage. *The Thrill of the Fight* brings the boxing gym to your home, pitting you against ever-tougher opponents on your journey to the top. Keep your gloves high to block incoming blows, then retaliate with a flurry of punches. Don't let them catch you flat-footed. And make sure you use proper form! *The Thrill of the Fight* is a lovingly crafted boxing simulation that's every bit as exhausting as going ten rounds in a proper ring, but without the next-day bruises. There are also a variety of speed bags and punching bags, if you just want to take a few days to train in peace.

Exercise: Arms, Shoulders, Back, Endurance / Aerobic

Developer: [Sealost Interactive LLC](#)

Available On: [Quest Platform](#) // [Rift Platform](#)

THE CLIMB 2



Picture it: You're hanging from your fingertips, high in the Alps. You're tired. You're sweaty. You pause, take the headset off, and drink some water. Scaling cliff faces unaided is probably off the table for most of us, but *The Climb 2* (like its [predecessor](#)) can make anyone feel like an expert rock climber. And while it probably won't prepare you to free solo El Capitan in real life, *The Climb 2* offers a surprisingly tough low-impact workout. It takes a lot of endurance to keep your arms moving through even a virtual rock climb,

6/9/22, 2:29 PM

Exercise by Accident: VR Games To Help You Work Out at Home

especially if you're hoping to post impressive times to the leaderboards. Don't worry about the competition the first time out though. The view from the top is its own (spectacular) reward.

Exercise: Shoulders and Arms, Endurance

Developer: [Crytek](#)

Available On: [Quest Platform](#)

HOLOPOINT

Holopoint: Oculus Edition Mixed Reality Trailer



It's impossible to stand still in *Holopoint*. An arcade-style archery game, survival is equal parts spatial awareness and the ability to dodge at the right time. Nock arrows, duck and weave, and hope you can channel Robin Hood as you try to clear wave after wave of enemies. Surrounded on all sides, *Holopoint* is an intense and active experience even in its early stages, and only gets harder as you progress. Skill, dedication, and a clear mind are mandatory here—but it's all worth it when you reach the next stage, blow past your old high score, and realize you've become a better athlete than you were before.

Exercise: Full-body, Shoulders, Aerobic

Developer: [Alzan Studios, LLC](#)

Available On: [Quest Platform](#)

CARVE SNOWBOARDING

Carve Snowboarding - Announcement Trailer | Oculus Quest



6/9/22, 2:29 PM

Exercise by Accident: VR Games To Help You Work Out at Home



Whether it's January or July, the powder is always fresh with *Carve Snowboarding*. No long drive into the mountains, no chairlift, no frozen fingers. It's just you, your board, and miles of untouched snow. *Carve Snowboarding* was developed by Chuhai Labs and Giles Goddard, creator of the Nintendo 64 classic *1080 Snowboarding*. Simulation-level snow physics pair with an over-the-top arcade trick system, a perfect blend of realism and entertainment. And while it might not seem like the most strenuous workout at first, standing in proper snowboarding form (meaning knees bent) for a few runs down the mountain will put some heat into your thighs.

Exercise: Squats

Developer: [Chuhai Labs](#)

Available On: [Quest Platform](#)

RACKET: NX



How much can you do with just a racket and a ball? If *Racket: Nx* is any indication, the answer is "Quite a lot." *Racket: Nx* takes place inside a giant dome. Your goal is to whack the ball into glowing targets as they appear. Hit the ball hard enough and it will roll across the inside of the dome and blow through additional targets. It's simple but thrilling, a futuristic take on racquetball that will have you vying for high scores in the campaign or losing track of time in the "Endless" mode. And while the soundtrack is great, you're welcome to pump in your own tunes if you have a custom workout playlist.

6/9/22, 2:29 PM

Exercise by Accident: VR Games To Help You Work Out at Home

Exercise: Coordination, Arm and Shoulder (Dominant Hand)**Developer:** [One Hamsa](#)**Available On:** [Quest Platform](#) // [Rift Platform](#)

TRAINING

REAKT PERFORMANCE TRAINER

REAKT Performance Trainer | Oculus Quest Platform



Training your mind is just as important as training your body. That's the principle behind *REAKT Performance Trainer*, which is based on technology used by professional athletes. Work on your reaction time, decision making, and hand-eye coordination in *REAKT's* virtual training gym. You can even focus on training your non-dominant hand, if you're playing catch-up. *REAKT* can help you become a better goalie or help you win the company kickball game—but these skills apply outside of athletic competitions as well, and can help you stay present and focused in your day-to-day life.

Exercise: Coordination, Reaction Time**Developer:** [NeuroTrainer](#)**Available On:** [Quest Platform](#)

PLAYER 22 BY REZZIL

Rezzil Player 22 | Oculus Quest Platform



6/9/22, 2:29 PM

Exercise by Accident: VR Games To Help You Work Out at Home

Practice makes perfect—and *Player 22 by Rezzil* makes practice fun, too. Developed with the help of world-renowned athletes, *Player 22 by Rezzil* can help improve both your overall fitness levels and your reaction times in a variety of sports. Improve your soccer heading technique, throw tighter passes, learn to better read the basketball court, and more as you explore *Player 22*'s ever-growing collection of training games. It's easier than ever to train like a professional, even if you're just starting out on your fitness journey.

Exercise: Reaction Time, Aim and Accuracy

Developer: [Rezzil](#)

Available On: [Quest Platform](#)

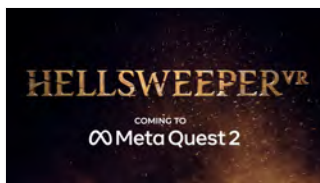
Got a favorite VR exercise routine of your own? Leave a comment below and let us know!

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 Meta Quest

**QUEST 2
ACCESSORIES
RIFTS**

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Exercise by Accident: VR Games To Help You Work Out at Home

APPS & GAMES SUPPORT DEVELOPERS VR FOR WORK

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Exhibit 39

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Exhibit 40

**REDACTED VERSION OF DOCUMENT
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Exhibit 41

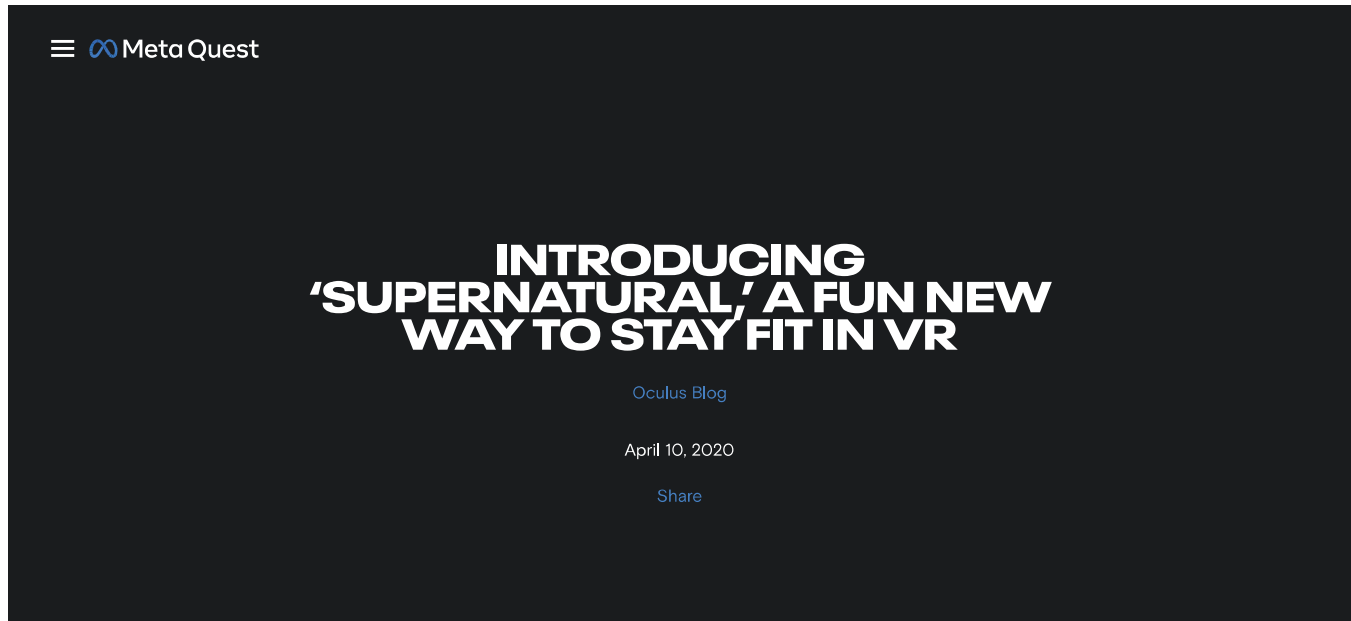
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Exhibit 42

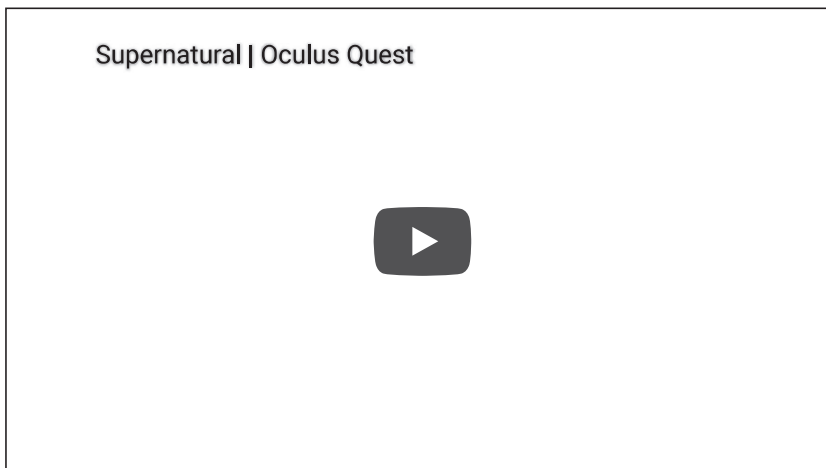
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Introducing 'Supernatural,' a Fun New Way to Stay Fit in VR



Get ready for a cardio workout that's fun, fast, and intuitive. *Supernatural* features an unforgettable on-demand workout adventure, and it's coming to Oculus Quest on April 23.



Building on the beloved mechanics of VR rhythm games, *Supernatural* is the first app that offers the full fitness package for VR. Designed specifically for fitness, *Supernatural* serves up daily personalized full-body workouts and expert coaching from real-world trainers. Sweat to music from popular artists and visit beautiful photorealistic landscapes. Track your progress with the companion app, letting you pair your heart rate monitor, schedule workouts, and follow friends for some healthy competition!

6/9/22, 11:57 AM

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Supernatural is a subscription service that offers new workouts published daily. At launch, *Supernatural* will offer members a discounted introductory rate of \$19 USD/month and include a free trial.

We sat down with Within Founder & CEO Chris Milk to learn more.

What was the inspiration behind *Supernatural*?

Chris Milk: When my Within co-founder Aaron Koblin and I realized we had developed dad-bods without having any actual children, we knew we had to do something. Neither one of us was fond of or good at sticking with exercise. We disliked the rigmarole of going to the gym and didn't think the home fitness solutions out there were particularly fun. We wanted the benefits of exercising regularly, but we didn't enjoy the short-term activity necessary to get those long-term results.

So the thing we were desperately searching for did not exist, and we decided to turn all our attention to trying to build it ourselves. We would watch people come out of the interactive VR music videos we were making, laughing and dripping in sweat—we thought maybe there was a solution here in VR. We thought it could solve the main problem we have with exercise; the long-term results don't outweigh our struggle to do it in the here and now. We started playing our favorite VR rhythm and boxing games as our morning exercise routines. We love these games and will be the first to say they were our inspiration for what we've created. We strapped weights and heart rate monitors to ourselves, trying to hack the perfect cardio routine, but none of them were really designed for this purpose. They lacked the sort of health-focused features and metrics you want in a daily exercise platform—things like calibrated range of motion, movements designed for effort expenditure, professional coaching and guidance, heart rate sensor integration, and fitness progress tracking.

How long was *Supernatural* in development?

CM: Close to two years now. We wanted to come out with a fully formed exercise platform. That meant committing to a broad pipeline of new workouts, the creation of new workouts with new songs in new worlds, and making them available on a daily basis. It takes time, resources, a great team, and a lot of infrastructure to produce daily content, but we knew it was worth the investment.

Equally important is having music you already know and love—music that makes the body move instinctively. It's so fundamental; we felt there was no way we could compromise and had to launch with it. We wanted people to have that feeling of surprise and delight when a song comes on that they love. The movement maps are essentially gamified dance, and—let's be honest—you wouldn't want to go to a club and only dance to songs you've never heard before. So we've been working and partnering with record labels to craft a deal to use their full catalogs. All these pieces take a lot of time and work, but they

6/9/22, 11:57 AM

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were all required to provide a service that was alive, visceral, and continuously updating to give you something new to discover every time you work out.



What sets *Supernatural* apart from other health and fitness apps?

CM: The home-fitness paradigm, for the most part, means copying what an instructor is doing on a screen. I've never taken great joy in that kind of exercise, to be honest. I was a competitive ski racer when I was 15, and skiing is incredible exercise, but I never felt like I was doing "an exercise." It filled me with exhilaration and joy, and the *by-product* was exercise and being healthy and in shape. So we set out to make something that felt more like that, only in the footprint of the floor in your bedroom.

Virtual reality offers the unique ability to create an experience like that because it can transport people anywhere. My favorite way to frame it is this: What if you had a wormhole in your closet, and you popped out of bed and dove through it to snowboard in the Swiss Alps every morning, and then popped back through the portal and took a shower and went to work? That reality is possible if you introduce VR into the equation. That's the emotion we were chasing—something that gives you the physical exercise you're after, but in a fun, joyous, exhilarating way, and most importantly, you can do it in your home.

6/9/22, 11:57 AM

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One of our coaches, Leanne, calls you “athlete” as a nickname, because working out in Supernatural feels like you’re a champion of a sport from the future. I love that and haven’t felt that sense of athleticism ever on a treadmill or an exercise bike.



How do you think VR and AR will continue to change the realms of health and fitness moving forward?

CM: I fit into the category of “had gym membership, did not use gym membership.” That’s because I wanted the results of doing exercise but disliked the actual act of going to the gym and doing it. I think there are a lot of other people who have a similar relationship with exercise. But exercise doesn’t have to be something painful, laborious, or something you dread—it’s just the methods we use to achieve it that are a bit uninspired.

Virtual reality uniquely allows us to bring you anywhere in the world and beyond. The exercise modalities achievable in VR are also things we could never achieve in the real world as we don’t need to worry about pesky things like the laws of physics.

Another big difference is since this is a 6DOF tracking system, we know how your body is moving through space at all times. And unlike most home fitness systems where you are watching a fixed streaming video clip of an instructor on a screen, we are built in the

6/9/22, 11:57 AM

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architecture of an interactive gaming system. That allows us to do a whole host of different things. We are dynamically changing, calibrating, and adjusting to you and what you're doing in real-time. Right now, that means calibrating to your personal range of motion, i.e., adjusting targets, lunges, and squats based on how your body is comfortable moving. If you have an injury and can reach far to the right but not to the left, the map will adjust the placement of the targets to accommodate.

We also calibrate your personal power range. If you want to get a good workout in VR, you have to put effort into your swings. You can hit a tennis ball with a solid follow-through, or you can flick it with your wrist and let the ball bounce off it. One is a considerably better workout than the other. So we calibrate your personal power range and reward you for hitting in the upper range of it. Everyone's is surprisingly different, so it's really about calibration and rewarding the healthy range that's right for you. Pro-tip: If you see a colored explosion when you hit a target, and a shock wave ring flies off to the horizon, you are hitting in your personal power zone.

We also added in dynamic difficulty: a feature that adjusts the difficulty of the maps in real-time based on how well you're doing. We're trying to get you to that magical place where you feel like you are performing just beyond your own capability. It's that flow state where you stop thinking and are in that zone. You feel like Bruce Lee or Neo, where you're one with the Matrix.

On the road map is interactive real-time coaching, where the coach is helping you and correcting your form in moments when we see you're struggling.

6/9/22, 11:57 AM

Introducing 'Supernatural,' a Fun New Way to Stay Fit in VR



Why did you make *Supernatural* a subscription fitness service?

CM: There are a few reasons. To start with, *Supernatural* is a completely different kind of experience in that it has been intentionally designed from the ground up as a living VR exercise platform. We built an entire ecosystem that gives people an extraordinary workout experience that gets them excited to come back every day. That includes coaching, a mobile companion app, leaderboards, and Bluetooth heart rate integration. The companion app can also set reminders in your calendar and lets you connect with and challenge your friends. We wanted to make this as intelligent as possible, so it uniquely calibrates to you specifically: your body, your effort, and your optimal heart rate.

Second, every day, our platform generates new content and new value for members, including new workouts, new premium songs, new landscapes and environments from around the world, and ongoing tracking of your progress.

Third, we had the choice of doing a discrete one-time fixed price download with a locked amount of workouts, that would allow you to add more workouts and songs through DLC packs. That works well for games but didn't feel like the best approach for a fitness system, particularly given one of the big things we are solving for is helping people find, stick with, and ultimately love their exercise program. The platform has been developed in

6/9/22, 11:57 AM

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conjunction with fitness experts and behavioral scientists for the purpose of really making a difference in helping people keep on schedule, not get bored with the workout, and not eventually quit.

Most digital fitness services are subscription-based, and there's a logical reason for that. They need to be because you are not just buying a fixed thing (like a standard exercise bike)—you're buying access to a living, breathing, dynamic service, one that is constantly producing new workouts with new music. And that requires those companies to be constantly investing every week in all that new programming, which comes with significant costs. We realize there aren't subscription services in consumer VR right now, and this might be new or surprising for some. But honestly, the only way you can build a premium fitness service like this—with the quality of music and the intensive ongoing creation of fresh workouts, movement maps, and environments, in addition to the 3D capture of a growing team of coaches—is to make it a subscription service.

It's not that different from Hulu or Netflix or Spotify or a gym for that matter. You're either pushing advertising or doing a subscription model, and we didn't think people wanted to watch ads while waiting to work out, but maybe we're wrong.

Who did you work with to choreograph the workouts? How did you ensure a compelling experience?

CM: This has really been about assembling a technically brilliant, creative, and collaborative team to design the workouts. Our head movement mapper is also a choreographer, and his maps are just incredibly fun to move your body to. They make you feel like you're really dancing to the music. We also recruited a number of choreographers, trained them to use our in-movement mapping system, and created an infrastructure that lets them map in VR. Not surprisingly, choreographers are naturally good at finding fun ways to move the human body to music.

In addition, we engaged trainers who are featured in *Supernatural's* individual workouts, as well as a team of experts in kinesthesiology, biomechanics, and healthy human movement. These experts helped us identify more effective ways to open up and move the body, to achieve smooth, healthy motions. They are a bit more open, fluid, and "flow-y" than what you might have experienced in other rhythm games. We also utilize a really fun triangle tunnel system that gets you to use your lower body doing squats and lunges.

How did your previous work in VR help inform your work on *Supernatural*?

CM: At Within, we've built a lot of interactive experiences that we've only released at festivals like SXSW, Sundance, and Tribeca. So a lot of people haven't seen our recent work in the last few years in the Oculus Store because of that.

Ultimately, VR is about crafting human experience for another person—that's the medium you're working with. The block of clay you're molding is the human experience that

6/9/22, 11:57 AM

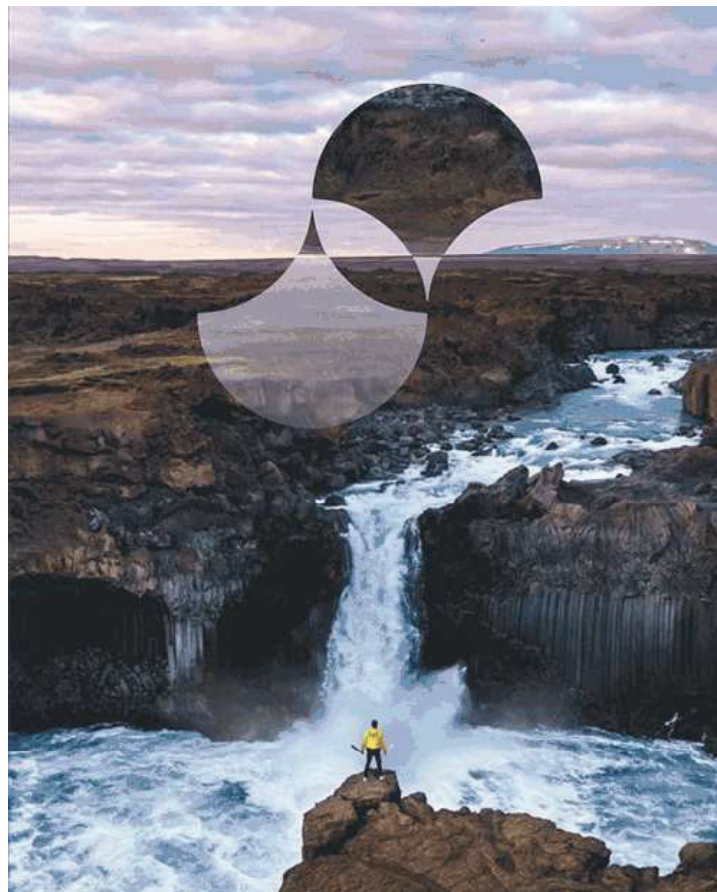
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someone else is going to have. So if you can give someone any human experience, what do you mold that block of clay into?

For more than a decade, Aaron and I have been making interactive immersive music video projects for artists like Arcade Fire, U2, and Johnny Cash as well as large-scale interactive installation art. We've taken everything we've learned from those projects and channeled it into this effort. This is the ultimate evolution of an experiential, immersive music video for us and honestly the fruition of many afternoons as a kid standing in front of the TV wildly imitating things I saw on MTV. I don't watch MTV standing up anymore like I did when I was 8, but adult me could undoubtedly use the cardio I was getting.

What's the best reaction you've seen so far when demoing the app?

CM: We have so many different types of people in early access, with so many different backgrounds. Many have never used VR until this because they weren't interested in gaming. But they are interested in exercise, so there are some really fascinating people who are the last people you would expect to see in a VR headset but are using it and crushing both Aaron and me on the leaderboard on a regular basis. What's been universally rewarding is that look on people's faces when they take the headset off after being in *Supernatural* ... pure joy and exhilaration. Makes it all worthwhile.



6/9/22, 11:57 AM

Introducing 'Supernatural,' a Fun New Way to Stay Fit in VR

What influenced the overall art direction?

CM: We are definitely trying to make the most photo-realistic experience that can run on the current processing power of an Oculus Quest. We're using high-resolution photo captures of the most amazing places on earth and building out 3D geometry underneath. This gives you 3D stereo vision and a sense of presence that you wouldn't get if you were looking at a flat photosphere around you.

When you're building a VR experience, you can obviously go in any aesthetic direction you want. You can go with a more stylized approach, or you can go with a realism approach. We felt like if you're going to be doing this every day, we wanted to provide a really uplifting, awe-inspiring experience. No one stands at the edge of the Grand Canyon and says, "Yeah, this is kind of bullshit."

We've also recently been experimenting with matte painters who typically create backgrounds for big Hollywood movies. We had them come up with some of their own designs. What does the Grand Canyon look like on a planet in another galaxy?

Who did you work with on the music for the workouts?

CM: The workouts feature some of the biggest artists from the major record labels, and amazing artists from indie labels as well. As a former music video director, I reached deep into all my old music industry relationships to try to get us the best music out there. The right song is like a spell the way it can instantly move you. We really believed we needed the best music period for something like this to work.

Did you encounter any technical challenges? How did you overcome those obstacles?

CM: If somebody wants the list, it's quite long. Two years long. It's very difficult to achieve a high level of fidelity and photorealism for so many elements. We spent a lot of time trying to get everything to feel as real as possible.

What's your favorite part of the experience and why?

CM: I really hope people find what I have found in it. Every morning now, I wake up, roll out of bed, throw on a Quest, and get in a fun, exhilarating state of flow. The dad bod receded, and I feel like I have so much more energy now.

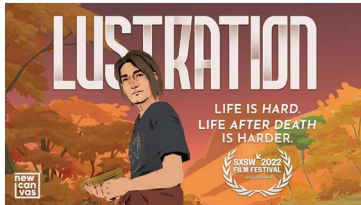
I don't feel like I ever have to force myself to do it or that it's a chore or something I have to endure for a greater end goal. It's something I enjoy in the moment. I never feel like I'm "working out." Emotionally it feels more like skiing when I was 15 again.

The additional benefit I've found is I feel sharper for the rest of the day. A neuroscientist told us that if you get into a flow state first thing in the morning, it's easier to find that flow state again through the rest of the day. I definitely feel that, and I hope others do as well.

6/9/22, 11:57 AM

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Exhibit 43

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

META PLATFORMS, INC., et al.,

Defendant.

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

**DECLARATION OF MATTI
NYLANDER, CHIEF FINANCIAL
OFFICER AND BOARD MEMBER AT
VARJO TECHNOLOGIES US, INC.**

CONTAINS HIGHLY CONFIDENTIAL INFORMATION

1 Matti Nylander, pursuant to 28 U.S.C. § 1746, hereby declares as follows:

2 1. I am over 18 years of age, of sound mind, and otherwise competent to make this
3 Declaration. The information set out herein is based on my personal knowledge.

4 2. My name is Matti Nylander. I am the Chief Financial Officer and a Board Member
5 at Varjo Technologies US, Inc. (together, with Varjo Technologies Oy, “Varjo”). I reside in
6 Vantaa, Finland. I am employed and regularly transact business in Helsinki, Finland.

7 3. I joined Varjo in October 2017. Prior to working at Varjo, I was the Director of
8 Finance at HMD Global. I have previously also held positions at Microsoft and Nokia.

9 4. My responsibilities at Varjo include leading Finance, IT, and administration teams.

10 5. I have five years of experience in the XR/VR business.

11 **A. Varjo**

12 6. Varjo is a Finland-based manufacturer of headsets for extended reality (“XR”) applications, including virtual reality (“VR”) applications. Varjo was founded in 2016 by former
13 Nokia and Microsoft executives.

14 7. Varjo currently offers three headsets: Varjo XR-3, Varjo VR-3, and Varjo Aero.
15 For certain headsets, Varjo also requires a subscription that provides access to proprietary XR/VR
16 software. Varjo offers subscriptions for 1, 2, or 3 years. Additionally, customers may purchase a
17 perpetual offline license.

18 8. Varjo’s XR-3 is a mixed reality (“MR”) headset for professionals that delivers an
19 immersive MR experience featuring photorealistic visual fidelity and depth awareness. It offers
20 the industry’s highest resolution. It retails in the United States for \$6,495, along with a software
21 subscription starting at \$1,495 for one year.

22 9. Varjo’s VR-3 is a VR headset for professionals that offers among the industry’s
23 highest resolution, the world’s fastest, most accurate integrated eye tracker, and built-in hand
24 tracking to capture natural hand movements. It retails in the United States for \$3,645, along with
25 a software subscription starting at \$795 for one year.

26 10. Varjo Aero is the lightest and brightest VR headset available for both professional
27 and recreational use. It offers a step-up in visual fidelity over consumer-grade Fresnel optics.
28

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1 Varjo Aero has a future-proofed optical design, dual mini-LED displays, and offers lightweight
 2 comfort with a 3-point precision fit headband, active cooling, and ergonomics for long-duration
 3 usage. Varjo Aero was originally released in October 2021. It retails in the United States for
 4 \$1,990. No annual software subscription is required.

5 11. Currently, all of Varjo's headsets are tethered by a cable. [REDACTED]
 6 [REDACTED]

7 12. Customers can purchase any of Varjo's headsets from Varjo directly, through
 8 Varjo's website or through Varjo's reseller network, which includes more than 35 partners across
 9 North America, Europe, Asia-Pacific, and the Middle East.

10 **B. Consumer Uses for Varjo's Headsets**

11 13. Currently, Varjo and its resellers market VR-3 and XR-3 headsets to
 12 enterprise/commercial customers and professionals for activities such as training, simulation,
 13 research, engineering, and design.

14 14. Varjo markets the Aero headset to enterprise/commercial customers for
 15 professional use and to individuals for recreational use.

16 15. On October 4, 2022, Varjo announced a partnership [REDACTED]
 17 [REDACTED] to make the Varjo Aero available for pre-order and later sale in North America
 18 through GameStop.

19 16. Varjo's goal with the GameStop partnership is to bring the highest resolution VR
 20 experience to gamers, power users, and others, thereby expanding availability of the product for
 21 North American consumers.

22 17. Varjo recognizes that a consumer channel could increase sales of Varjo Aero units,
 23 and Varjo is excited by the opportunity to expand the distribution of its devices further [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

26 18. Varjo's headsets are compatible with both OpenVR (SteamVR) and OpenXR
 27 applications. [REDACTED]
 28 [REDACTED]

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1 [REDACTED]
2 **C. Competition and Growth in the XR/VR Ecosystem**

3 19. The competitive landscape for XR/VR headsets is nascent and rapidly evolving. I
4 am aware of several manufacturers of XR/VR devices.

5 20. Use of XR/VR devices for business applications is anticipated to grow. Varjo's
6 past and anticipated investment in XR/VR products, including the introduction of the Aero in
7 2021, illustrates the potential for innovation and development for both professional and consumer
8 applications.

9 21. Growing the XR/VR ecosystem is important to and benefits Varjo. Without new
10 and interesting content, customers will not be attracted to use devices for XR/VR applications.
11 Without customer interest, Varjo would have little incentive to improve XR/VR devices. And
12 without XR/VR devices, there is no business opportunity for XR/VR developers.

13 I declare under penalty of perjury under the laws of the United States of America that the
14 foregoing is true and correct.

15 Executed on: November 4, 2022

16 
17 Matti Nylander
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Exhibit 46

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