

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

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In the Matter of)	
)	
Meta Platforms, Inc.,)	
a corporation,)	
)	Docket No. 9411
Mark Zuckerberg,)	
a natural person, and)	
)	
Within Unlimited, Inc.,)	
a corporation,)	
)	
Respondents.)	
)	

**ORDER DENYING RESPONDENTS' MOTION TO COMPEL
FURTHER ANSWERS TO INTERROGATORIES**

I.

On December 16, 2022, Respondents Meta Platforms, Inc. (“Meta”), Mark Zuckerberg, and Within Unlimited, Inc. (“Within”) (collectively, “Respondents”) filed a Motion to Compel Federal Trade Commission (“FTC”) Complaint Counsel to provide further answers to interrogatories 1, 7, 8 and 11 issued by Respondents Meta and Within (“Motion”). Complaint Counsel filed an Opposition to the Motion on December 23, 2022. The Motion is DENIED, as set forth below.

II.

This is an action to enjoin Meta’s proposed acquisition of Within. Meta markets and sells a virtual reality (“VR”) game application (“app”) known as “Beat Saber.” Within markets and sells a VR app known as “Supernatural.”

On October 13, 2022, with leave of court, Complaint Counsel filed an Amended Complaint. The original Complaint alleged two relevant markets, one comprising dedicated virtual reality (“VR”) fitness applications (“apps”), which is alleged to include Supernatural, and one comprising VR fitness apps in general. The Amended Complaint deleted allegations of the broader VR fitness apps market. The Amended Complaint alleges that Meta is positioned to enter the dedicated VR fitness apps market with Beat Saber, and that Meta’s acquisition of Within is likely to substantially lessen competition in the dedicated VR fitness apps market.

Respondents Meta and Within served their first set of interrogatories on October 4, 2022. Complaint Counsel filed supplemental answers and objections to interrogatories 1, 7, 8, and 11 on December 5, 2022. The parties dispute the sufficiency of Complaint Counsel’s supplemental answers and objections.

Pursuant to Commission Rule 3.31(c)(1): “Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” 16 C.F.R. § 3.31(c)(1). If a party fails to comply with any discovery obligation under the rules, Rule 3.38 authorizes the opposing party to seek an order compelling such compliance. “Unless the Administrative Law Judge determines that the objection is justified, the Administrative Law Judge shall order that . . . [responses] be made.” 16 C.F.R. § 3.38(a).

The specific interrogatories at issue in the Motion are addressed below.

III.

Interrogatory 1 states:

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

Motion Exhibit A at 7.

Complaint Counsel responded to Interrogatory 1 that:

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

Motion Exhibit A at 8-9. Complaint Counsel’s supplemental answer further stated that “Complaint Counsel has provided all the factual, non-privileged information in its possession responsive to Interrogatory 1.” *Id.* at 9.

Respondents argue that Complaint Counsel’s phrase, “reasonable probability of providing, physical fitness benefits or activities in virtual reality,” is overbroad and insufficiently defined, which will lead to relief that could potentially encompass all incidental fitness apps, such as Beat Saber. Respondents’ argument is a substantive and legal one, which objects to the potential breadth of the relief sought in this case. Respondents do not identify any facts, or application of law to fact, within the knowledge or possession of Complaint Counsel that is required to be disclosed under the discovery rules. Accordingly, Respondents have failed to demonstrate that Complaint Counsel’s answer is insufficient.

Interrogatory 7 states:

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

Motion Exhibit A at 9.

Interrogatory 8 is similar to Interrogatory 7, stating:

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

Motion Exhibit A at 11.

Complaint Counsel provided the same response to Interrogatories 7 and 8, stating that at the parties' November 18, 2022 meet and confer, Respondents "clarified," that the interrogatories seek to discover:

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

Motion Exhibit A at 11, 13.

Respondents argue that Complaint Counsel failed to respond to the substance of Interrogatories 7 and 8 as written. However, Respondents do not dispute Complaint Counsel's characterization of Respondents' clarifications of the intended scope of Interrogatories 7 and 8, or contend that the information provided by Complaint Counsel to the interrogatories, as modified by Respondents, is unresponsive. Under these circumstances, Respondents have failed to demonstrate that Complaint Counsel has failed to properly respond to the requested discovery.

Interrogatory 11 states:

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

Motion Exhibit A at 13.

There is no dispute that the Amended Complaint omits general, or “incidental” VR fitness apps as an alleged relevant market. Therefore, the identity of participants in that market is no longer relevant and Complaint Counsel’s objection to Interrogatory 11 on that basis is valid. Discovery regarding new and potential entrants into the dedicated VR fitness apps market, as requested by Interrogatory 11, however, is relevant for purposes of discovery. Complaint Counsel has responded to that request, and it has also committed to further supplementing its answer with respect to VR dedicated fitness apps “should it become aware of” additional responsive information. Motion Exhibit A at 16. Furthermore, Respondents assert that “Respondents seek a response only *after* the federal court proceeding [for a preliminary injunction between Respondents and the FTC] has concluded and only *if* a supplemental response is required based on new or potential entrants to the alleged antitrust markets.” Motion at 8 (emphasis in original). Respondents have failed to demonstrate Complaint Counsel is presently in breach of its duty to supplement.

IV.

For all the foregoing reasons, Respondents’ Motion to Compel is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: December 28, 2022