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FTC Sues Facebook Parent Meta to Block Acquisition of Virtual Reality Company Within Unlimited

On July 27, 2022, the U.S. Federal Trade Commission ("FTC") sued Facebook parent Meta to block its acquisition by merger of virtual reality ("VR") company Within Unlimited ("Within") on antitrust grounds. Meta founder, controlling shareholder, chairman and CEO Mark Zuckerberg and Within were also named. This is the second time in a month that the FTC and the Department of Justice ("DoJ") have invoked the antitrust laws in an effort to block merger & acquisition ("M&A") activity (see "DoJ Sues to Block Acquisition of Defense/Intelligence Contractor," June 29, 2022, available at **Kurtin PLLC Mergers & Acquisitions)**. A copy of the FTC complaint, as redacted by the FTC, filed in the U.S. District Court for the Northern District of California seeking injunctive relief including a temporary restraining order blocking the merger can be found **Here**.

The FTC alleges in its complaint that Meta, the owner of Facebook, Instagram, Messenger and Whatsapp, already the world's largest provider of immersive VR apps, offering over 400 apps available for download on its Quest App Store, has embarked on a roll-up campaign to dominate the VR market and create a VR "metaverse" (the reason for Meta's recently adopted parent company name, of course), and that its planned acquisition of Within, which offers a VR fitness product called "Supernatural" that horizontally competes with Meta's existing VR fitness app, will reduce competition and irreparably harm that market, necessitating an injunction blocking the planned merger before it closes.

Essentially, the FTC alleges that Meta is trying to dominate the VR market by buying its competitors rather than earning VR market share by developing its own product entries. Since Meta wields the buying power enabled by Facebook and Instagram, its VR roll-up targets, which tend to be far smaller, entrepreneurial companies often founded with the very kind of "exit" that Meta's checkbook offers in mind, without antitrust enforcement, Meta will be free to roll up the VR industry and dominate it, in violation of section 7 of the Clayton Antitrust Act, the antitrust law regulating M&A activity determined to be anticompetitive.

We have reported in the past year-and-a-half on the newly activist merger review policies of the Biden administration under FTC Chair Lina M. Khan and DoJ Antitrust Division Chief Jonathan Kanter after decades of a relatively "laissez faire" treatment of proposed M&A activity. See, "FTC and DoJ Launch Effort to Restrict Anticompetitive Mergers," "FTC Restores Restrictive Prior Approval Merger Review Policy," and "FTC Sets Ambitious M&A Enforcement Agenda," all also available at **Kurtin PLLC Mergers & Acquisitions**. Khan reportedly overruled the recommendation of her own staff in deciding to commence the legal action against Meta.

As we noted in the defense/intelligence contractor case a month ago, a generation of dealmakers and their attorneys have grown up with a relatively relaxed attitude towards the Government's likelihood of closely scrutinizing M&A activity. That time is past. Anyone structuring a transaction that will significantly reduce or eliminate competition generally, and one with tech sector market consolidation, concentration and monopoly implications, an announced FTC target, should be aware that antitrust review is a real issue even for smaller transactions, should plan for Government scrutiny, and structure their deals with that in mind.

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