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12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO DIVISION**

15 **FEDERAL TRADE COMMISSION,**

16 Plaintiff,

17 v.

18 **INTERCONTINENTAL**
19 **EXCHANGE, INC.**

20 and

21 **BLACK KNIGHT, INC.,**

22 Defendants.

Case No. 3:23-cv-01710-AMO

PLAINTIFF FEDERAL TRADE
COMMISSION’S MOTION TO STRIKE
DEFENDANTS’ AFFIRMATIVE
DEFENSES

1
2 **NOTICE OF MOTION AND MOTION**

3 PLEASE TAKE NOTICE that, on June 22, 2023, at 2:00 p.m., Plaintiff Federal Trade
4 Commission (“FTC”) shall move and hereby does move the Court to strike certain affirmative
5 defenses of Defendants Intercontinental Exchange, Inc. (“ICE”) and Black Knight, Inc. (“Black
6 Knight”), pursuant to Federal Rule of Civil Procedure 12(f).

7 Plaintiff respectfully requests this Court to strike Defendants’ identical First, Second,
8 Third, Fourth, Fifth, Sixth, Seventh, and Eighth Affirmative Defenses. None of these defenses is
9 pertinent or material to the FTC’s request for a preliminary injunction pursuant to Federal Trade
10 Commission Act § 13(b), 15 U.S.C. § 53(b). These defenses also fail to meet minimum pleading
11 standards.

12 Plaintiff’s motion is based on this Notice of Motion; the Memorandum of Points and
13 Authorities in Support filed concurrently; all other pleadings on file in this action; and any other
14 written or oral argument that Plaintiff may present to the Court.

15 **ISSUE TO BE DECIDED**

16 Whether the Court should strike Defendants’ First, Second, Third, Fourth, Fifth, Sixth,
17 Seventh, and Eighth Affirmative Defenses because they, alternatively, (1) are immaterial and
18 impertinent to the FTC’s request for preliminary injunctive relief pursuant to Section 13(b) of
19 the Federal Trade Commission Act, 15 U.S.C. 53(b); and (2) fail to meet the pleading standards
20 of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

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MEMORANDUM OF POINTS AND AUTHORITIES

1
2 Plaintiff Federal Trade Commission (“FTC”) respectfully moves pursuant to Federal Rule
3 of Civil Procedure 12(f) to strike various affirmative defenses that Defendants Intercontinental
4 Exchange, Inc. (“ICE”) and Black Knight, Inc. (“Black Knight”) have asserted in this case. The
5 affirmative defenses that are the subject of this Motion raise various constitutional arguments
6 about the FTC’s process and powers. They should be struck for three reasons. First, Defendants
7 pled all but one of these defenses as counterclaims and previously told the Court that they “are
8 amenable to resolution of their counterclaims coming after and trailing the resolution of the
9 FTC’s request for a preliminary injunction.” Joint Case Mgmt. (Dkt. No. 72) at 18-19. In other
10 words, Defendants agree that constitutional issues are not necessary to deciding whether to grant
11 the FTC’s claim for a preliminary injunction. Second, even putting aside Defendants’
12 counterclaims and concession, the constitutional defenses should be struck as immaterial and
13 impertinent to the narrow inquiry that the Ninth Circuit has directed courts to undertake in
14 evaluating an FTC claim for a preliminary injunction pursuant to Section 13(b). In a recent
15 Section 13(b) merger challenge brought by the FTC, a court in this District held that
16 constitutional defenses that challenge the FTC’s process and powers are not part of the Section
17 13(b) inquiry and granted the FTC’s motion to strike constitutional affirmative defenses
18 (including defenses substantively identical to the ones Defendants pled here). *See FTC v. Meta*
19 *Platforms Inc.*, No. 5:22-CV-04325-EJD, 2022 WL 16637996, at *7 (N.D. Cal. Nov. 2, 2022).
20 Third, Defendants’ constitutional defenses should be struck because they consist of barebones
21 assertions that are insufficiently pled.

I. BACKGROUND

22
23 The FTC brought this action to preserve the status quo while it adjudicates whether ICE’s
24 proposed acquisition of Black Knight (the “Acquisition”) violates the antitrust laws. Compl.
25 (Dkt. No. 1) at 2 & ¶ 19. On May 4, 2022, ICE and Black Knight signed an Agreement and Plan
26 of Merger, pursuant to which ICE agreed to acquire 100% of Black Knight. *Id.* ¶ 28. On April
27 10, 2023, the FTC filed its Complaint in this Court requesting, *inter alia*, a preliminary
28

1 injunction pursuant to FTC Act § 13(b), 15 U.S.C. § 53(b), to restrain Defendants from
 2 completing the Acquisition until the FTC’s administrative adjudication on the merits is
 3 completed. *Id.* at 2 & ¶ 19. The FTC filed its administrative complaint on March 9, 2023. *Id.* ¶
 4 17; *see* Compl., *In re Intercontinental Exchange, Inc. & Black Knight, Inc.* (FTC Dkt. No. 9413),
 5 available at https://www.ftc.gov/system/files/ftc_gov/pdf/d09413icebkp3complaintredacted.pdf.¹

6 On April 25, 2023, ICE and Black Knight filed their respective Answers. Defendants
 7 each asserted identical defenses relevant to this Motion:

8 First Defense (Structure of Proceedings Violates Due Process): “The structure of the
 9 related administrative proceedings, in which the Commission both initiates and finally
 10 adjudicates the Complaint against Intercontinental Exchange, having prejudged the merits of the
 11 action, violates Intercontinental Exchange’s Fifth Amendment Due Process right to adjudication
 12 before a neutral arbiter.” ICE Answer (Dkt. No. 57) at 30; *see* Black Knight Answer (Dkt. No.
 13 58) at 26.

14 Second Defense (Commission’s Procedures Violate Due Process): “The Commission’s
 15 procedures violate Intercontinental Exchange’s right to procedural due process under the Due
 16 Process Clause of the Fifth Amendment.” ICE Answer (Dkt. No. 57) at 30; *see* Black Knight
 17 Answer (Dkt. No. 58) at 26.

18 Third Defense (Commission’s Procedures Violate Equal Protection Clause): “The
 19 Commission’s procedures arbitrarily subject Intercontinental Exchange to administrative
 20 proceedings rather than to proceedings before an Article III judge in violation of Intercontinental
 21 Exchange’s right to Equal Protection under the Fifth Amendment.” ICE Answer (Dkt. No. 57)
 22 at 30; *see* Black Knight Answer (Dkt. No. 58) at 26.

23 Fourth Defense (Constraints on Removal Violate Article II of the Constitution): “The
 24 related administrative proceedings are invalid because the constraints on removal of the
 25 _____

26 ¹ A court may take judicial notice of documents filed in FTC administrative proceedings. *E.g.*,
 27 *Veal v. LendingClub Corp.*, 423 F. Supp. 3d 785, 802 (N.D. Cal. 2019).

1 Commissioners and the Administrative Law Judge violate Article II of the Constitution and the
2 separation of powers.” ICE Answer (Dkt. No. 57) at 31; *see* Black Knight Answer (Dkt. No. 58)
3 at 26.

4 Fifth Defense (Delegation of Legislative Power Unconstitutional): “The related
5 administrative proceedings are invalid because Congress unconstitutionally delegated legislative
6 power to the Commission by failing to provide an intelligible principle by which the
7 Commission would exercise the delegated power.” ICE Answer (Dkt. No. 57) at 31; *see* Black
8 Knight Answer (Dkt. No. 58) at 27.

9 Sixth Defense (Violation of Fifth Amendment): “Granting the relief sought would
10 constitute a taking of Intercontinental Exchange’s property in violation of the Fifth Amendment
11 to the Constitution.” ICE Answer (Dkt. No. 57) at 31; *see* Black Knight Answer (Dkt. No. 58) at
12 27.

13 Seventh Defense (Violation of Seventh Amendment): “The adjudication of the Complaint
14 against Intercontinental Exchange through the related administrative proceedings violates
15 Intercontinental Exchange’s Seventh Amendment right to a jury trial.” ICE Answer (Dkt. No.
16 57) at 31; *see* Black Knight Answer (Dkt. No. 58) at 27.

17 Eighth Defense (Violation of Article III of the U.S. Constitution): “The adjudication of
18 the Complaint against Intercontinental Exchange through the related administrative proceedings
19 adjudicates private rights and therefore violates Article III of the U.S. Constitution and the
20 Seventh Amendment.” ICE Answer (Dkt. No. 57) at 31; *see* Black Knight Answer (Dkt. No. 58)
21 at 27.

22 Defendants also pled all but one of these defenses as part of a counterclaim against the
23 FTC. Defendants each pled a single counterclaim (“Defendants’ Count I”), which charges that
24 the FTC’s administrative proceeding violates Article III, Defendants’ Equal Protection and Due
25 Process rights, Article II, and the Seventh Amendment and constitutes an unconstitutional
26 Congressional delegation of power. *See* ICE Answer (Dkt. No. 57) at 42–43; Black Knight
27 Answer (Dkt. No. 58) at 38–39. The only constitutional defense that Defendants have not also

1 raised in their counterclaim is their Sixth Defense that granting the FTC’s requested relief would
2 constitute a taking in violation of the Fifth Amendment’s Takings Clause.

3 **II. ARGUMENT**

4 Defendants’ constitutional defenses should be struck for several independent reasons.
5 First, Defendants concede that the constitutional issues they have raised as counterclaims are not
6 required to decide the FTC’s request for a preliminary injunction under Section 13(b) of the
7 Federal Trade Commission Act. That concession suffices to strike their constitutional defenses as
8 “impertinent” and “immaterial” under Federal Rule of Civil Procedure 12(f). Second, even
9 putting aside Defendants’ counterclaims and concession, the constitutional defenses are
10 “impertinent” and “immaterial” to the issues the Ninth Circuit has held that a court needs to
11 resolve in deciding whether to grant an FTC claim to preliminarily enjoin a merger. Another
12 court in this District recently applied that law and struck constitutional defenses from an FTC
13 action to preliminarily enjoin a merger. Third, the constitutional defenses each consist of bare
14 statements of legal conclusions that fail to meet the required pleading standards.

15 **A. Defendants’ Constitutional Defenses Are Immaterial and Impertinent**

16 Defendants’ constitutional defenses should be struck because they are “immaterial” and
17 “impertinent.” *See* Fed. R. Civ. P. 12(f). An “[i]mmaterial matter is that which has no essential or
18 important relationship to the claim for relief or the defenses being pleaded,” and an
19 “[i]mpertinent matter consists of statements that do not pertain, and are not necessary, to the
20 issues in question.” *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev’d on other*
21 *grounds*, 510 U.S. 517 (1994) (quoting 5 Charles A. Wright & Arthur R. Miller, *Federal Practice*
22 *and Procedure* § 1382, at 706–07, 711 (1990)); *see also Meta Platforms*, 2022 WL 16637996, at
23 *2, 4. “The purpose of a motion to strike under Rule 12(f) ‘is to avoid the expenditure of time
24 and money that must arise from litigating spurious issues.’” *Meta Platforms*, 2022 WL
25 16637996, at *1 (quoting *SidneyVinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983).

26 Defendants’ constitutional defenses raise “spurious issues” and should be struck for two
27 independent reasons.

1 *First*, Defendants concede that constitutional issues they have raised in this action may
2 properly be deferred until after the Court rules on the FTC’s claim for a preliminary injunction.
3 In the Joint Case Management Statement, Defendants sought a prompt hearing on the FTC’s
4 claim for a preliminary injunction under Section 13(b) of the Federal Trade Commission Act.
5 *See* Joint Case Mgmt. (Dkt. No. 72) at 16. Defendants told the Court that they “are amenable to
6 resolution of their counterclaims coming after and trailing the resolution of the FTC’s request for
7 a preliminary injunction.” *Id.* at 18-19. Defendants, therefore, concede that constitutional matters
8 are neither essential, necessary, nor pertain to deciding whether to grant the FTC’s claim for a
9 preliminary injunction under Section 13(b). In addition, Defendants argued that scheduling a
10 prompt hearing is “the most prudent approach” because “it may avoid ruling on the substantial
11 constitutional issues raised by the FTC’s administrative proceeding that would be front and
12 center if this Court effectively deferred to that proceeding.” *Id.* at 17. Defendants’ argument that
13 prudence supports avoiding “substantial constitutional issues” contradicts any attempt now to
14 urge this Court to maintain and decide their constitutional defenses. Defendants are right:
15 constitutional issues can be decided (if at all) later because they are not pertinent or material to
16 deciding the FTC’s claim under Section 13(b) of the Federal Trade Commission Act.

17 *Second*, even putting aside Defendants’ concession, a recent decision from another court
18 in this District is directly on point and supports striking the constitutional defenses. *FTC v. Meta*
19 *Platforms, Inc.*, addressed this same issue, applied Ninth Circuit law, and concluded that
20 constitutional procedural defenses should be struck from an FTC action for a preliminary
21 injunction pursuant to Section 13(b) of the Federal Trade Commission Act. In that case, as here,
22 the FTC filed suit to preliminarily enjoin an acquisition pursuant to Section 13(b). 2022 WL
23 16647996 at *1. The defendants pled various affirmative defenses, including alleged bias that
24 violated, among other things, the Due Process Clause, and (like the Defendants here) other
25 constitutional defenses arising out of the Due Process Clause and Article II. *Meta Platforms*,
26 2022 WL 16637996, at *7; *Meta Platforms*, No. 5:22-CV-04325-EJD, Dkt. 84 (Defendant Meta
27 Platform, Inc.’s Answer and Affirmative Defenses) at 17 (“Chair Khan’s participation

1 irrevocably taints the FTC’s claim, including because its initiation and maintenance violates the
 2 Due Process Clause, U.S. Const. amend. V . . .”). The court struck all of the challenged
 3 affirmative defenses, and its reasoning applies here.²

4 Following Ninth Circuit precedent, the *Meta Platforms* court held that the inquiry under
 5 Section 13(b) of the Federal Trade Commission Act requires courts to (1) determine the
 6 likelihood that the Commission will ultimately succeed on the merits *in the underlying*
 7 *administrative proceeding* and (2) balance the equities. *See id.* at *4 (citing *FTC v. Warner*
 8 *Comm’ns Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984) and *FTC v. Simeon Mgmt. Corp.*, 532 F.2d
 9 708, 713–14 (9th Cir. 1976)); *see also id.* at *5 (relying on *FTC v. H.J. Heinz Co.*, 246 F.3d 708,
 10 714 (D.C. Cir. 2001) and *FTC v. Staples, Inc.*, 239 F. Supp. 3d 1, 5 (D.D.C. 2000)). The Ninth
 11 Circuit in “*Simeon* instructed courts considering a Section 13(b) request to *focus on the FTC’s*
 12 *proceedings* and expressly declined to comment on the case’s future disposition following the
 13 FTC’s final decision.” *Id.* at *5 (emphasis added).

14 It follows from the limited scope of the inquiry in a Section 13(b) case that determining
 15 the likelihood of success “on the merits” means determining “the action’s Section 7 antitrust

16
 17 ² The *Meta Platforms* court first analyzed the impertinence of the defendants’ bias defenses,
 18 which relied on, in part, the Due Process Clause, *see* 2022 WL 16647996, at *4–7, struck them,
 19 and then turned to the other constitutional defenses. The court first explained that its “assessment
 20 of the[] constitutional affirmative defenses overlaps significantly with its analysis of Defendants’
 21 bias-related defenses, particularly regarding the Court’s ability to consider these arguments in the
 22 limited procedural posture of a Section 13(b) preliminary injunction request.” *Id.* at *7. The court
 23 was clear that its reasoning applied also to constitutional defenses. *See id.* (“to the extent
 24 Defendants’ constitutional defenses are predicated on Chair Khan’s alleged bias or procedural
 25 deficiencies, these defenses would likewise be stricken without leave to amend”). The court
 26 ultimately struck the constitutional defenses because they also were insufficiently pled. *See id.*
 27 That part of *Meta Platforms* also applies here for the reasons set forth in Part II.B, *infra*.

1 merits, as distinguishable from any procedural due process issues arising from the FTC’s
2 proceedings.” *Id.* at *6. This is consistent with the “oft-cited standard for ‘likelihood of ultimate
3 success’ [that] describes merits questions [in a Section 13(b) proceeding] as those that would
4 require ‘thorough investigation, study, deliberation, and determination by the FTC,’ a
5 characterization that is consistent with a ‘preliminary assessment of a merger’s impact on
6 competition.” *Id.* at *6 (quoting *Warner*, 742 F.2d at 1162). Accordingly, affirmative defenses
7 arising out of alleged procedural defects (even constitutional procedural defects) are not pertinent
8 to deciding whether to grant preliminary relief pursuant to Section 13(b) of the Federal Trade
9 Commission Act. “[T]o the extent Defendants’ constitutional defenses are predicated on . . . bias
10 or procedural deficiencies, these defenses would likewise be stricken without leave to amend.”
11 *See id.* at *7.

12 *Meta Platforms*’ reasoning applies here, and the constitutional defenses here should be
13 stricken as they were in that case. This is the same type of case, an FTC action for preliminary
14 injunctive relief pursuant to Section 13(b) of the Federal Trade Commission Act. The Ninth
15 Circuit precedent on the limited scope of a Section 13(b) proceeding applies. The Section 13(b)
16 inquiry is strictly focused on the antitrust merits, and alleged procedural issues (even of a
17 constitutional dimension) are outside the scope of issues necessary to decide whether to grant a
18 preliminary injunction. The constitutional defenses, therefore, are impertinent and immaterial
19 and should be struck.

20 ***

21 The grounds for striking the constitutional defenses are even stronger here than in *Meta*
22 *Platforms*. Perhaps mindful of the decision in *Meta Platforms*, Defendants here also pled the
23 constitutional defenses (except for their Takings Clause defense) as counterclaims. They have,
24 therefore, preserved an opportunity to litigate constitutional issues even after the defenses are
25 struck. And Defendants have, as explained above, conceded that the constitutional issues in their
26 counterclaims are best heard after the Court decides the Section 13(b) inquiry on the antitrust
27

1 merits. Defendants’ concession confirms what *Meta Platforms* held: constitutional defenses
2 should be struck.

3 **B. The Defenses Should be Stricken Because They Fail to Identify the Factual**
4 **Bases Underlying the Defenses.**

5 The constitutional defenses also are defective because they are insufficiently pled. Courts
6 in this District have routinely held that the pleading standard applied to complaints in *Bell*
7 *Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and clarified in *Ashcroft v. Iqbal*, 556 U.S. 662
8 (2009), applies also to affirmative defenses. *E.g.*, *Meta Platforms*, 2022 WL 16637996, at *1;
9 *Goobich v. Excelligence Learning Corp.*, No. 5:19-cv-06771-EJD, 2020 WL 1503685, at *2
10 (N.D. Cal. Mar. 30, 2020) (collecting cases). “Accordingly, although an affirmative defense
11 ‘need not include extensive factual allegations it must nonetheless include enough supporting
12 information to be plausible; bare statements reciting legal conclusions will not suffice.’” *Meta*
13 *Platforms Inc.*, 2022 WL 16637996, at *1 (quoting *MIC Prop. & Cas. Corp. v. Kennolyn Camps,*
14 *Inc.*, 2015 WL 4624119, at *2 (N.D. Cal. Aug. 3, 2015)). The *Meta Platforms* court struck
15 various constitutional defenses, finding “that Defendants’ constitutional defenses are
16 inadequately pled, as each consists of a single sentence asserting relief arising out of either
17 Article II of the U.S. Constitution or the Due Process Clause.” *Id.* at *7. “In the absence of any
18 factual allegations, Defendants’ constitutional defenses do not provide fair notice as to the bases
19 for these defenses and, therefore, are insufficient even under the most liberal of pleading
20 standards.” *Id.* (quotation marks omitted).

21 This is particularly true with respect to the only defense that Defendants did not also
22 plead as part of their counterclaims.³ The “Sixth Defense (Violation of Fifth Amendment)”

23
24 ³ That Defendants included factual allegations regarding the other constitutional defenses in their
25 counterclaim pleading does not render those defenses properly pled. “To the extent that
26 Defendant argues that Plaintiffs are aware of the nature of its affirmative defenses, there is no
27 (Continued...)

1 alleges in full: “Granting the relief sought would constitute a taking of Intercontinental
2 Exchange’s property in violation of the Fifth Amendment to the Constitution.” ICE Answer
3 (Dkt. No. 57) at 31; *see* Black Knight Answer (Dkt. No. 58) at 27. That barebones legal
4 conclusion is insufficient under even the most liberal pleading standard. It should be struck.

5 **III. CONCLUSION**

6 For the foregoing reasons, the FTC respectfully moves for this Court to strike with
7 prejudice Defendants’ First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Defenses.

8 Dated: May 16, 2023

Respectfully submitted,

9 /s/ Abby L. Dennis

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26 authority supporting the notion that the opposing party’s knowledge of the general facts of the
27 case excuses the omission of factual bases of pleading affirmative defenses.” *Facebook, Inc. v.*
28 *Gajjar*, No. 4:20-CV-02429-KAW, 2022 WL 2239834, at *7 (N.D. Cal. June 17, 2022)
(quotation marks omitted). Even if it did, there is no Taking Clause claim in the counterclaims,
and that defense remains insufficiently pled.