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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 EXCHANGE, INC.**

19 and

20 **BLACK KNIGHT, INC.,**

21 Defendants.

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

**PLAINTIFF FEDERAL TRADE  
COMMISSION'S RESPONSE TO  
DEFENDANTS' SUBMISSION  
ADDRESSING THE COURT'S  
AUTHORITY**

1 The Federal Trade Commission (“FTC”) respectfully submits this filing in response to  
2 Defendants’ submission regarding “the Court’s authority to supersede and/or stay administrative  
3 proceedings.” Dkts. 161, 164. We first note that this afternoon, the Commission granted the  
4 parties’ joint request for a continuance of the administrative evidentiary hearing to September 25,  
5 2023. *See* Exhibit A. Accordingly, Defendants’ suggestion that a stay is warranted to prevent  
6 overlapping judicial and administrative proceedings (Dkt. 161 at 3-4) is now moot.

7 Nevertheless, the FTC wishes to correct several misstatements of law in Defendants’  
8 submission:

9 1. Commission rules set forth how and when the start date of the administrative  
10 evidentiary hearing can be postponed, and that is a matter within the Commission’s purview.  
11 Congress intended the Commission, as an independent tribunal with “substantive expertise,” to  
12 serve as “a uniquely effective vehicle for the development of antitrust law in complex settings in  
13 which the agency’s expertise [could] make a measurable difference.” 74 Fed. Reg. 1803, 1805  
14 (Jan. 13, 2009) (cleaned up). With Congress’s authorization (*see* 15 U.S.C. § 46(g)), the  
15 Commission has promulgated its own rules to govern Commission adjudicative proceedings, 16  
16 C.F.R. §§ 3.1 *et seq.* (“FTC Rules”).

17 As for the timing of the administrative evidentiary hearing, the FTC Rules provide that  
18 the Commission itself, “upon a showing of good cause, may order a later date for the evidentiary  
19 hearing to commence.”<sup>1</sup> 16 C.F.R. § 3.41(b). The Commission now has acted pursuant to that  
20 provision, granting the parties’ requested continuance of the administrative hearing through  
21 September 25, 2023. That action is consistent with the wide latitude agencies have to “manage  
22 their own dockets.” *Calif. Trout v. FERC*, 572 F.3d 1003, 1007 (9th Cir. 2009).

23 2. In their submission, Defendants argued that the FTC’s Rules of Practice and the All  
24 Writs Act would have authorized the Court to stay the administrative proceeding, pending the  
25 Court’s upcoming Section 13(b) preliminary injunction hearing. Dkt. 161 (“Br.”). Those claims  
26 are unfounded.

27 \_\_\_\_\_  
28 <sup>1</sup> The Administrative Law Judge, who presides over the evidentiary hearing, has authority to  
extend deadlines “other than the date of the evidentiary hearing.” 16 C.F.R. § 3.21(c)(2).

1 a. As an initial matter, an order staying the administrative hearing would be a preliminary  
2 injunction against the Commission, and, as such, would have to comply with both Federal Rule  
3 of Civil Procedure 65 and the established preliminary injunction standard. *See, e.g., 33 Federal*  
4 *Practice & Procedure* (Wright & Miller) § 8386 (Apr. 2023 update). The movant would need to  
5 “establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in  
6 the absence of preliminary relief, that the balance of equities tips in [its] favor, and that  
7 an injunction is in the public interest.” *Winter v. Natural Resources Defense Council*, 555 U.S. 7,  
8 20 (2008); *Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).  
9 Defendants have neither moved for a preliminary injunction nor addressed the relevant factors  
10 for granting one. There thus is no basis for the Court to stay the administrative proceedings.

11 b. Defendants rely on the All Writs Act (Br. 1-2), but that statute does not permit a court  
12 to enjoin administrative proceedings when, as here, the traditional legal standards for an  
13 injunction are not satisfied and the Court’s jurisdiction is not imperiled. The All Writs Act  
14 authorizes federal courts to “issue all writs necessary or appropriate in aid of their respective  
15 jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651. This permits  
16 orders “to effectuate and prevent the frustration of orders [a court] has previously issued in its  
17 exercise of jurisdiction otherwise obtained.” *United States v. New York Tel. Co.*, 434 U.S. 159,  
18 172 (1977). Orders under the Act generally must be necessary to the integrity or jurisdiction of a  
19 court proceeding. *See, e.g., National Organization for Reform of Marijuana Laws v. Mullen*, 828  
20 F.2d 536, 544 (9th Cir. 1987). And “in the context of ongoing agency proceedings,” judicial  
21 power under the Act “is narrowly circumscribed” and “properly invoked only in extreme or  
22 extraordinary circumstances warranting disruption of the administrative process.” *Clark v.*  
23 *Busey*, 959 F.2d 808, 813-814 (9th Cir. 1992).

24 The All Writs Act is inapposite here. For starters, “where the relief sought is in essence a  
25 preliminary injunction, the All Writs Act is not available because other, adequate remedies at law  
26 exist, namely Fed. R. Civ. P. 65, which provides for temporary restraining orders and  
27 preliminary injunctions.” *Doe #1 v. Trump*, 458 F. Supp. 3d 1220, 1223-24 (D. Or. 2020)  
28 (quoting *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1123, 1129 (11th Cir. 2005). Again,

1 Defendants have not moved for such relief, nor could they show the requisite factors are met.

2 All Writs Act relief is not appropriate when, as here, no previous judgment or prior court  
3 order is at issue, and there is no threat to the Court’s jurisdiction or integrity. Regardless of when  
4 the Commission evidentiary hearing were to begin, the Court is plainly able to exercise its  
5 jurisdiction and conduct these proceedings, in which the FTC merely seeks a preliminary  
6 injunction preserving the status quo—and not a determination on the merits—while Commission  
7 adjudicates the legality of the proposed merger in the administrative court. 15 U.S.C. § 53(b);  
8 *FTC v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984) (FTC meets this burden if  
9 “raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make  
10 them fair ground for thorough investigation, study, deliberation and determination by the FTC in  
11 the first instance and ultimately by the Court of Appeals”); *see also FTC v. Food Town Stores,*  
12 *Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976) (“The district court is not authorized to determine  
13 whether the antitrust laws have been or are about to be violated. That adjudicatory function is  
14 vested in the FTC in the first instance.”). The issues in the Section 13(b) case would be fully  
15 within the Court’s jurisdiction to decide even if these 13(b) proceedings overlapped to some  
16 extent with the administrative evidentiary hearing (which they do not, given the recently granted  
17 continuance through September 25, 2023). Indeed, the statutory regime contemplates the two  
18 proceedings happening in tandem. *See* 15 U.S.C. § 53(b); *Warner*, 742 F.2d at 1164.

19 Defendants’ cited cases confirm that All Writs Act relief is inapplicable here. This case is  
20 unlike *California v. M&P Investments*, 46 F. App’x 876 (9th Cir. 2002), in which the Ninth  
21 Circuit found that a later-filed administrative proceeding “would impede [the district court’s]  
22 ability to exercise jurisdiction over the issues in the federal suit.” *Id.* at 878. Nor can Defendants  
23 find support in *SEC v. G.C. George Securities, Inc.*, 637 F.2d 685 (9th Cir. 1981), where the  
24 Ninth Circuit recognized that the All Writs Act could be used “to enjoin a party from attempting  
25 to relitigate” the same cause of action that the parties settled in an earlier court case.<sup>2</sup> *Id.* at 688.  
26 Nothing akin to those circumstances exists here. And the All Writs Act is not available merely

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27 <sup>2</sup> *George* did not hold that a stay would have been appropriate, but merely that the court had  
28 jurisdiction to consider the question. 637 F.2d at 687 (noting that “this appeal does not present  
the question of whether the district court should have enjoined the administrative proceeding”).

1 because the parties face a heavy workload due to parallel judicial and administrative proceedings  
2 (Br. 2-3). *See Perez v. Barr*, 957 F.3d 958, 967 (9th Cir. 2020).

3 c. There is likewise no merit to Defendants’ claim that FTC Rules authorize the Court to  
4 stay the administrative proceeding. Br. 1-2. FTC Rules govern procedure in *Commission*  
5 proceedings; they do not purport to limit or expand a district court’s powers. *See* 16 C.F.R. § 3.1  
6 (noting that the “rules in this part govern procedure in formal adjudicative proceedings”);  
7 *Kokkonen v. Guardian Life Ins. of Am.*, 511 U.S.375, 377 (1994) (federal courts “possess only  
8 that power authorized by Constitution and statute”) (cleaned up). In any event, Defendants  
9 misinterpret both the FTC Rules they invoke.

10 Rule 3.1 governs which administrative matters take “precedence” *before the Commission*;  
11 it does not suggest that the district court Section 13(b) proceeding supersedes the administrative  
12 proceeding. 16 C.F.R. § 3.1 (referring to scheduling conflicts “between a proceeding in which  
13 the Commission *also* has sought” Section 13(b) relief “and another proceeding”) (emphasis  
14 added). Rule 3.1 was intended to “substantially expedite ...*administrative cases* where the  
15 Commission is *also* seeking preliminary injunctive relief from a federal court under Section  
16 13(b).” Rules of Practice, 74 Fed. Reg. 20205 (May 1, 2009) (emphases added),  
17 <https://www.federalregister.gov/documents/2009/05/01/E9-9972/rules-of-practice>. As the  
18 Commission explained in its order granting the continuance, Rule 3.1 is “inapplicable” here  
19 because it “pertains not to a scheduling conflict between a federal court action and an  
20 administrative proceeding but to a scheduling conflict between two different administrative  
21 proceedings where one of the proceedings also has a related preliminary injunction court action  
22 and the other does not.” *See* Exhibit A at 2 n.1.

23 Defendants similarly misconstrue Rule 3.41(f). That rule—which is part of the  
24 Commission’s “[g]eneral hearing rules” and not limited to merger cases involving Section 13(b)  
25 relief—simply contemplates that a “court of competent jurisdiction” may order a stay in  
26 appropriate circumstances. 16 C.F.R. § 3.41(f). But the rule does not supplant the usual  
27 requirements for injunctions—including, as noted, the need for a movant seeking a preliminary  
28 injunction to show a likelihood of success and irreparable harm, among other factors.

\* \* \*

For all these reasons, a judicial stay of the administrative proceedings would not be appropriate here. In any event, because the Commission now has continued the administrative evidentiary hearing through September 25, 2023, Defendants' arguments that the Court would have authority to stay those proceedings are moot. The FTC respectfully requests that the Court and the parties proceed with the Section 13(b) preliminary injunction hearing as planned.

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Respectfully submitted,

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