

1 Abby L. Dennis, DC Bar No. 994476
2 Peter Richman, CA Bar # 149107
3 Ashley Masters, TX Bar # 24041412
4 Abigail Wood, DC Bar # 242239

5 Federal Trade Commission
6 600 Pennsylvania Avenue, NW
7 Washington, DC 20580
8 Tel: (202) 326-2381

9 *adennis@ftc.gov; prichman@ftc.gov;*
10 *amasters@ftc.gov; awood@ftc.gov*

11 [Additional counsel identified on signature page in accordance with Local Rule 3-4(a)(1)]

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.

**COMPLAINT FOR A TEMPORARY
RESTRAINING ORDER
AND PRELIMINARY INJUNCTION
PURSUANT TO SECTION 13(B)
OF THE FEDERAL TRADE
COMMISSION ACT**

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

1 Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), by its designated
2 attorneys, petitions this Court to enter a stipulated temporary restraining order and grant a
3 preliminary injunction enjoining Defendants Intercontinental Exchange, Inc. (“ICE”) and Black
4 Knight, Inc. (“Black Knight”), including their agents, divisions, parents, subsidiaries, affiliates,
5 partnerships and joint ventures, from consummating their proposed acquisition (“Acquisition”).
6 Plaintiff seeks this provisional relief pursuant to Section 13(b) of the Federal Trade Commission
7 Act (“FTC Act”), 15 U.S.C. § 53(b). Absent such relief, ICE and Black Knight (collectively,
8 “Defendants”) have represented that they will close the Acquisition immediately following a
9 vote of Black Knight shareholders scheduled for April 28, 2023.

10 Plaintiff requires the aid of this Court to maintain the status quo and prevent interim harm
11 to competition during the pendency of an administrative proceeding on the merits. The
12 Commission has already initiated that administrative proceeding pursuant to Sections 7 and 11 of
13 the Clayton Act, 15 U.S.C. §§ 18, 21, and Section 5 of the FTC Act, 15 U.S.C. § 45, by filing an
14 administrative complaint on March 9, 2023. The administrative hearing on the merits will begin
15 on July 12, 2023. That administrative hearing will determine the legality of the Acquisition and
16 will provide all parties a full opportunity to conduct discovery and present testimony and other
17 evidence regarding the likely competitive effects of the Acquisition.

18 **NATURE OF THE CASE**

19 1. A vast majority of homebuyers in the United States rely on mortgages to finance
20 their home purchases. Homebuyers obtain mortgages from a variety of mortgage lending
21 institutions, including small and large banks, credit unions, and independent mortgage banks.
22 When ready to purchase a home, homebuyers can choose among these lenders to find the most
23 favorable interest rates and mortgage terms.

24 2. To finance a home purchase through a mortgage, a homebuyer typically submits a
25 mortgage application to a lender. The lender then begins the mortgage loan origination process.
26 Mortgage origination involves many steps between the application and the closing of the loan.
27 Those steps include processing information from the mortgage application, determining the loans

1 and interest rates for which the homebuyer qualifies, locking the interest rate, underwriting the
2 loan, funding the loan, then closing the loan and preparing it to be serviced.

3 3. Mortgage lenders, regardless of type and size of lender, rely on mortgage loan
4 origination system (“LOS”) software as their primary tool to manage the residential mortgage
5 loan origination process. The LOS serves as the lender’s system of record for each loan and is
6 used to manage their workflow and to perform the various commercial, legal, and compliance
7 tasks required during the lending process.

8 4. ICE’s Encompass LOS (“Encompass”) is the dominant LOS in the United States
9 and processes nearly half of all residential mortgages originated across the nation each year.
10 Black Knight’s Empower LOS (“Empower”) is the second largest LOS in the United States.

11 5. ICE and Black Knight compete vigorously to provide their respective LOSs to the
12 same mortgage lender customers. As stated by Black Knight’s CFO, “[W]e have one primary
13 competitor in each business. . . . In [o]rigination, it’s ICE” This competition has resulted in
14 tangible benefits for lenders and the marketplace more generally, including lower LOS prices,
15 greater discounting, and efforts to provide a robust array of features.

16 6. As a mortgage moves from application to close, it touches on tens to hundreds of
17 services (“ancillary services”) necessary to process, underwrite, fund, and close a loan.
18 Ancillary services are offered by LOS providers, including ICE and Black Knight, as well as
19 third-party vendors that do not provide LOSs. Most ancillary services connect to an LOS via
20 software integration. The LOS coordinates and automates many of the interactions between
21 lenders and these ancillary services. This provides a significant benefit to the LOS’s lender
22 customers, reducing the burden on each lender’s own personnel and minimizing the risk of
23 human data entry error while ensuring compliance with the complex web of federal, state, and
24 local mortgage-related regulations.

25 7. ICE and Black Knight each offer a broad array of ancillary services in addition to
26 their LOSs, and directly compete for customers for a number of these services. Most notably,
27 Black Knight owns the Optimal Blue product pricing and eligibility engine (“PPE”). A PPE is

1 software that allows a lender to identify potential loan rates for a borrower, determine the
2 borrower's eligibility for a given loan, and lock in the loan's terms for the borrower. Each of
3 these functions is an important step in originating a residential mortgage. Software integration
4 between a lender's PPE and LOS enables and automates many of the PPE's features for the
5 lender. Black Knight's Optimal Blue is the clear industry leader, serving lenders that originate
6 as much as 40% of the nation's residential mortgages each year. Second to Optimal Blue is its
7 close competitor, ICE's Encompass Product and Pricing Service PPE ("EPPS"), currently
8 available only to lenders who use the Encompass LOS.

9 8. Like the competition between ICE's and Black Knight's LOSs, the competition
10 between ICE's EPPS and Black Knight's Optimal Blue also benefits lenders and the marketplace
11 more generally. Defendants' efforts to win PPE customers from one another have led to
12 discounting and other price concessions as well as competition to offer the best PPE with the
13 richest features.

14 9. For example, prior to agreeing to acquire Black Knight, ICE launched what it
15 termed [REDACTED] in response to a perceived [REDACTED]
16 [REDACTED] According to internal ICE
17 documents, ICE named [REDACTED]
18 [REDACTED] was a major ICE initiative to
19 develop [REDACTED]

20 10. Through its [REDACTED], ICE planned to develop [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 ICE further considered making [REDACTED]
24 However, the day ICE announced the Acquisition, its executives began the process of
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

1 11. Defendants' Acquisition will reduce competition in one or more lines of
2 commerce. ICE's internal documents reflect an ethos that seeks to [REDACTED]
3 [REDACTED] If the Acquisition proceeds, the loss of competitive pressure
4 from Black Knight will allow ICE to further increase prices for its LOSs. ICE's incentives to
5 improve features on Encompass also will diminish.

6 12. The Acquisition similarly will reduce competition for ancillary services, including
7 PPEs. Indeed, it has already done so, as evidenced by ICE's [REDACTED]
8 [REDACTED] Moreover, ICE's anticipated "[REDACTED]
9 [REDACTED]" from the Acquisition make explicit that ICE plans to [REDACTED]
10 [REDACTED]

11 13. Post-Acquisition price increases for LOSs and ancillary services, including PPEs,
12 likely will be passed on to consumers in the form of higher mortgage origination costs. Given
13 that origination costs remain relatively constant regardless of the amount of a mortgage, an
14 increase in origination costs will result in a proportionally larger price increase for a homebuyer
15 seeking a \$200,000 mortgage than for a homebuyer that can afford a \$1,000,000 mortgage.
16 Similarly, increased origination costs will affect homebuyers who must finance their home
17 purchases to a greater degree than wealthier homebuyers who may pay cash. Put simply, higher
18 origination costs will disproportionately harm lower-income and first-time homebuyers.

19 14. The Acquisition also will increase ICE's incentive to harm third-party ancillary
20 service providers. With the Acquisition, ICE will stand to earn more revenue by diverting
21 customers to its own ancillary services, such as Optimal Blue. Additionally, by acquiring Black
22 Knight's business and its ancillary services, ICE will have fewer gaps in its own ancillary
23 services portfolio, making it less reliant on third-party providers to fill those gaps. Because of
24 ICE's dominant LOS market share and the dependency of PPEs and other ancillary service
25 providers on LOS integration, ICE will be in a position to act on those incentives by
26 disadvantaging existing and potential competing ancillary service providers, including competing
27 PPE providers, by foreclosing or impeding LOS access. The Acquisition also may accelerate an

1 ongoing trend toward vertical integration and consolidation in, and raise barriers to entering, the
2 relevant antitrust markets.

3 15. New entry will not be timely, likely, or sufficient to counteract the
4 anticompetitive effects of the Acquisition. Significant barriers exist for potential new LOS or
5 PPE entrants. The development of a new LOS or PPE is an expensive, significant undertaking.
6 Further, any entrant will face steep barriers in attracting new customers.

7 16. Defendants cannot show cognizable, merger-specific efficiencies that would
8 offset the reasonably probable and substantial competitive harm resulting from the Acquisition.

9 17. On March 9, 2023, by a 4-0 vote, the Commission found reason to believe that the
10 Acquisition would substantially lessen competition in violation of Section 7 of the Clayton Act,
11 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45. On the same day, the
12 Commission commenced an administrative proceeding on the antitrust merits of the Acquisition
13 before an Administrative Law Judge, with the merits trial scheduled to begin on July 12, 2023.
14 The ongoing administrative proceeding provides a forum for all parties to conduct discovery,
15 followed by a merits trial with up to 210 hours of live testimony. *See* 16 C.F.R. § 3.41. The
16 decision of the Administrative Law Judge is subject to appeal to the full Commission, which, in
17 turn, is subject to judicial review by a United States Court of Appeals.

18 18. The parties have stipulated to a temporary restraining order preventing ICE and
19 Black Knight from consummating the Acquisition until after 11:59 p.m. Eastern Time on the
20 second business day after the court rules on the Commission's motion for a preliminary
21 injunction pursuant to Section 13(b), or until after the date set by the District Court, whichever is
22 later. Such a temporary restraining order is necessary to preserve the status quo and protect
23 competition while the Court considers the Commission's application for a preliminary
24 injunction.

25 19. Preliminary injunctive relief is similarly necessary to preserve the status quo and
26 protect competition during the Commission's ongoing administrative proceeding. Allowing the
27 Acquisition to proceed while the Commission is assessing whether the Acquisition's potential

1 anticompetitive effects would harm consumers would undermine the Commission’s ability to
2 remedy the anticompetitive effects of the Acquisition if it is found unlawful after a full trial on
3 the merits and any subsequent appeals.

4 **JURISDICTIONAL STATEMENT**

5 **A. Jurisdiction**

6 20. This Court’s jurisdiction arises under Section 13(b) of the FTC Act, 15 U.S.C. §
7 53(b), and under 28 U.S.C. §§ 1331, 1337, and 1345. This is a civil action arising under the Acts
8 of Congress protecting trade and commerce against restraints and monopolies, and is brought by
9 an agency of the United States authorized by an Act of Congress to bring this action.

10 21. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), provides in pertinent part:

11 Whenever the Commission has reason to believe—

12 (1) that any person, partnership, or corporation is violating, or is about to
13 violate, any provision of law enforced by the Federal Trade Commission, and

14 (2) that the enjoining thereof pending the issuance of a complaint by the
15 Commission and until such complaint is dismissed by the Commission or set

16 aside by the court on review, or until the order of the Commission made
17 thereon has become final, would be in the interest of the public—

18 the Commission by any of its attorneys designated by it for such purpose
19 may bring suit in a district court of the United States to enjoin any such act or

20 practice. Upon a proper showing that, weighing the equities and considering
21 the Commission’s likelihood of ultimate success, such action would be in the

22 public interest, and after notice to the defendant, a temporary restraining
23 order or a preliminary injunction may be granted without bond. . . .

24 22. Defendants and their relevant operating entities and subsidiaries are, and at all
25 relevant times have been, engaged in activities affecting “commerce” as defined in Section 4 of
26 the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

B. Venue

23. Defendants have consented to personal jurisdiction in the Northern District of California. In addition, personal jurisdiction exists where service is effected pursuant to a federal statute. Fed. R. Civ. P. 4(k)(1)(C). The FTC Act, 15 U.S.C. § 53(b), authorizes nationwide service of process. Defendants are therefore subject to personal jurisdiction in the Northern District of California. Venue is proper in the Northern District of California under 28 U.S.C. § 1391(b) and (c), as well as under 15 U.S.C. § 53(b).

C. Intradistrict Assignment

24. Assignment to the San Francisco Division is proper. This action arises in Alameda County because a substantial part of the events giving rise to these claims occurred in Alameda County, where Defendant ICE's Mortgage Technology business unit is headquartered.

THE PARTIES AND THE PROPOSED ACQUISITION

25. Plaintiff, the Commission, is an administrative agency of the United States government, established, organized, and existing pursuant to the FTC Act, 15 U.S.C. §§ 41 *et seq.*, with its principal offices at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The Commission is vested with authority and responsibility for enforcing, *inter alia*, Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45.

26. Defendant Intercontinental Exchange, Inc. is a publicly traded corporation incorporated in Delaware, with its headquarters in Atlanta, Georgia. ICE provides market infrastructure, data services, and technology solutions in three segments: exchanges (including the New York Stock Exchange), fixed income and data services, and mortgage technology. In 2016, ICE acquired Mortgage Electronic Registration Systems, Inc., owner of the Mortgage Electronic Registration System electronic database for mortgage loan ownership. In 2019, ICE acquired Simplifile, an e-recording and closing software firm. In 2020, ICE acquired Ellie Mae, including its industry-leading Encompass LOS. Today, ICE operates these and its other mortgage-related businesses through its ICE Mortgage Technology business unit, which is headquartered in Pleasanton, California.

1 maintaining a compliant proprietary LOS. Commercial LOSs benefit from efficiencies generated
2 by having a third party serve multiple lenders, such as supporting federal agencies' requirements
3 and maintaining compliance requirements. By outsourcing the operation of the LOS, lenders can
4 also focus their resources on other parts of the business.

5 33. A proprietary LOS is designed specifically for and around the needs and
6 workflows of a particular lender. The result is a highly customized, lender-specific system.
7 Only lenders with resources, expertise, and scale across which to spread fixed costs can build a
8 proprietary LOS, and even then, high maintenance costs and regulatory compliance requirements
9 may discourage lenders from pursuing an in-house LOS. Lenders typically do not license their
10 proprietary LOSs for use by other lenders.

11 34. In addition to the LOS, lenders also rely on many ancillary services, such as
12 document vendors, point-of-sale systems for interacting directly with borrowers, and PPEs for
13 generating loan pricing terms based on borrower criteria that determine eligibility for various
14 loan programs. Those ancillary services generally must interoperate with an LOS. Some LOS
15 providers, like ICE and Black Knight, own a number of ancillary services that they offer to their
16 LOS lender customers. LOS providers with ancillary services often bundle those services with
17 the LOS, either as products included in the LOS functionality or as add-ons.

18 35. One of the most important ancillary services is the PPE, which is a tool that
19 lenders use to determine how to price a mortgage and structure its terms. PPEs help a lender
20 manage product pricing, create rate sheets, and lock in the interest rate for a particular loan. To
21 accomplish its core task of pricing a loan, a PPE typically first collects rate sheets from the
22 lender or other investors. The PPE then draws mortgage application data from the LOS, such as
23 a borrower's credit score and debt-to-income ratio. The PPE compares the rate sheets with data
24 from the borrower's application to determine what loan products are available for the borrower
25 and at what rates. The PPE then locks the rate for a period of time to ensure that the borrower's
26 interest rate does not change prior to closing on the sale of the residential property.

1 40. Commercial LOSs also target distinct customers: mortgage lenders that lack the
2 ability and/or the desire to devote substantial resources and software engineering expertise to
3 develop and maintain a proprietary LOS in compliance with the ever-changing technological and
4 regulatory landscape. Failing to adequately maintain a proprietary LOS exposes a lender to
5 unacceptable business and regulatory risk.

6 41. Indeed, even some of the nation’s largest lenders with the means to buy or
7 develop a proprietary LOS have determined that the benefits of using a commercial LOS
8 outweigh those of purchasing or developing an LOS in-house, and would not switch to a
9 proprietary LOS. As Black Knight stated in its Form 10-K for 2021: “In an effort to reduce
10 origination costs, we believe lenders are increasingly shifting from in-house solutions to third-
11 party solutions that provide a more comprehensive and efficient solution.” Ellie Mae’s COO
12 agreed, noting in a public analyst call regarding ICE’s acquisition of Ellie Mae: “[W]e’ve got a
13 really great pipeline where even these largest entities are starting to realize that it’s time to look
14 at a commercial application like ours.” Most mortgage lenders thus license commercial LOSs to
15 manage their origination workflows, and would not consider using a proprietary LOS.

16 42. Industry participants, including Defendants, recognize commercial LOSs as a
17 distinct category among LOSs. As phrased by Black Knight in preparation for a public earnings
18 call Q&A session [REDACTED]

19 [REDACTED]
20 43. No commercially reasonable substitute for commercial LOSs exists for most
21 mortgage lenders. Other mortgage origination services cannot replicate the functionality of
22 LOSs, which serve as the authoritative source of information regarding the status of a loan as the
23 loan moves from application toward closing and integrate and automate interactions between the
24 lender and the ancillary services used by the lender at each stage of the origination process. No
25 other mortgage service provides those functions.

26 44. Nor can most lenders rely on manual processes to manage their origination
27 workflows. Originating a residential mortgage loan is a complex, multi-step process that

1 requires voluminous information and data transfer and storage, compliance with multiple
2 regulatory frameworks, and the use of numerous distinct ancillary services. Attempting to
3 perform these tasks through manual processes—for example, by using spreadsheet software,
4 email, or pen and paper—would be prohibitively burdensome and costly for lenders. Moreover,
5 mortgage lending is a highly regulated industry that poses substantial risk for lenders in the event
6 of oversights or errors. By automating the origination workflow, the LOS reduces opportunity
7 for human error while enabling thorough, systematic review for compliance with frequently
8 updated local, state, and federal regulatory requirements.

9 45. Further, because of the difficulty, expense, and risk associated with developing
10 and maintaining a proprietary LOS, most mortgage lenders would not consider using a
11 proprietary LOS, rather than a commercial LOS, in their businesses.

12 46. A hypothetical monopolist of commercial LOSs profitably could impose a small
13 but significant and nontransitory increase in price (“SSNIP”). In the event of a SSNIP for
14 commercial LOSs, lenders would not switch to proprietary LOSs or to alternative methods to
15 perform the core origination functions facilitated by LOSs in sufficient volumes to render the
16 price increase unprofitable.

17 47. Among commercial LOSs, Encompass is the market leader, followed by
18 Empower. No other commercial LOS can claim more than a single-digit share of the market.

19 **B. The LOS Market**

20 48. The LOS market comprises all LOSs that lenders use to originate residential
21 mortgages. This broader market includes both commercial LOSs—like ICE’s Encompass and
22 Black Knight’s Empower—and proprietary LOSs.

23 49. LOSs are used by a distinct group of customers: mortgage lenders. Mortgage
24 lenders of all sizes and types rely on LOSs to originate residential mortgage loans. Then-
25 President of ICE Mortgage Technology [REDACTED]

26 [REDACTED]

1 50. LOSs also have distinct functionality. Different LOSs may offer different
2 features, but all LOSs—whether commercial LOSs or proprietary LOSs—provide certain basic
3 functions. First, an LOS serves as a lender’s system of record. The LOS tracks information
4 entered by a borrower on their mortgage application or by a loan officer, as well as data returned
5 from the myriad ancillary services integrated with the LOS. The mortgage lender relies on the
6 LOS as its authoritative source of information regarding the status of a loan as the loan moves
7 from application to closing. Second, the LOS serves as gatekeeper to the various supplemental
8 functions required to complete the loan origination process, often completed through LOS
9 integrations with third-party ancillary service providers. No other mortgage origination service
10 can or does provide these functions.

11 51. Industry participants, including Defendants, recognize LOSs as a distinct market
12 and separate economic entity in the ordinary course of their business. Public observers,
13 including media and analysts, likewise recognize LOSs as a distinct market.

14 52. For the reasons stated above with respect to commercial LOSs, other mortgage
15 origination services are not a substitute for LOSs. Nor are manual processes.

16 53. A hypothetical monopolist of LOSs profitably could impose a SSNIP. In the
17 event of a SSNIP for LOSs, lenders would not switch to alternative methods to perform the core
18 origination functions facilitated by LOSs in sufficient volumes to render the price increase
19 unprofitable.

20 54. Even within the broader LOS market, ICE’s Encompass remains the market
21 leader, followed by Black Knight’s Empower.

22 **C. The Market for PPEs for Users of Encompass**

23 55. PPEs for users of Encompass is another relevant antitrust product market for
24 evaluating the competitive effects of the Acquisition.

25 56. PPEs are products with peculiar characteristics and uses. PPEs perform the core
26 origination-related functions of pricing a residential mortgage loan, determining a borrower’s
27 eligibility for a given loan, and locking the loan for the borrower. Other ancillary services

1 cannot and do not replicate this functionality. Moreover, although some functions of a PPE
2 could be accomplished using paper, fax, email, or spreadsheet software, performing the
3 multitude of tasks required to price, determine eligibility for, and lock a loan using manual
4 processes without the automation enabled by a PPE would be prohibitively expensive and time-
5 consuming for most lenders.

6 57. Because mortgage lenders seek the benefits of LOS-PPE integration, lenders
7 using Encompass rely on a specialized group of PPE providers whose PPEs are already
8 integrated with Encompass. Though it is technically possible for additional PPEs to integrate
9 with Encompass, integration of a new PPE is a significant software engineering undertaking.
10 Moreover, ICE requires [REDACTED]

11 [REDACTED] in addition to [REDACTED]

12 [REDACTED]
13 [REDACTED] ICE also controls numerous other technical and contractual aspects
14 of the integration process that can affect a PPE provider's timing and ability to provide PPE
15 services to users of Encompass. Given the time and expense required to integrate a new PPE
16 with Encompass, most mortgage lenders that use Encompass find themselves functionally
17 limited to selecting among PPEs that are already integrated with Encompass.

18 58. PPEs available to users of Encompass are used by a distinct group of customers:
19 mortgage lenders who use Encompass.

20 59. In evaluating its PPE strategy, ICE itself has recognized PPEs used by customers
21 of Encompass [REDACTED]

22 [REDACTED]
23 60. The existence of an Encompass-only PPE market is further supported by a SSNIP
24 analysis. A hypothetical monopolist of PPEs used by customers of Encompass profitably could
25 impose a SSNIP. As discussed in more detail in paragraph 137 below, switching among LOSs is
26 an expensive, lengthy, and resource-intensive undertaking. In the event of a SSNIP for PPEs for
27 users of Encompass, lenders would not switch to alternative LOSs, PPEs not integrated with

1 Encompass, or alternative methods of performing the core origination-related functions for
2 which they use PPEs in sufficient volumes to render the price increase unprofitable.

3 61. [REDACTED]

4 [REDACTED] Other PPE providers exist and have
5 some sales on proprietary and non-Defendant LOSs, but none have more than [REDACTED]
6 among Encompass users.

7 **D. The PPE Market**

8 62. The broader PPE market comprises the provision or license of all PPEs for
9 residential mortgage loan origination.

10 63. As mentioned above with respect to the market for PPEs for users of ICE's
11 Encompass, PPEs are products with peculiar characteristics and uses. No other ancillary service
12 can or does provide the functionality of PPEs. Further, performing each of these functions
13 manually and without the aid of a PPE introduces opportunities for human error. According to
14 an analyst presentation quoting the [REDACTED] and considered by [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 64. PPEs are provided by specialized vendors. PPEs are complex software systems
18 that require sophisticated knowledge of the mortgage lending industry for their design and
19 implementation. Further, PPE vendors must maintain relationships and software integration with
20 each customer's LOS to provide full functionality and automation to a lender. Finally, PPEs for
21 lenders who intend to sell their loans once originated must maintain relationships with investors
22 whose pricing and eligibility requirements are incorporated into the PPE's pricing. For these
23 reasons, PPEs are provided by specialized software companies with mortgage industry expertise
24 and relationships, such as ICE and Black Knight.

25 65. Industry participants, including Defendants, recognize PPEs as a distinct market
26 and a separate economic entity in the ordinary course of their business.

1 66. A hypothetical monopolist of PPEs profitably could impose a SSNIP. In response
2 to a SSNIP, lenders would not switch to alternative methods to price, determine eligibility for, or
3 lock residential mortgage loans in sufficient volumes to render the price increase unprofitable.

4 67. Black Knight’s Optimal Blue has long been the market leader among all PPEs.

5 **E. The Relevant Geographic Market Is the United States**

6 68. The United States is the relevant geographic market in which to assess the
7 competitive effects of the Acquisition with respect to each of the relevant antitrust product
8 markets. LOS and PPE competition occurs at the national level, as lender customers frequently
9 operate in more than one locale or nationwide. Lenders tend to use a single LOS and a single
10 PPE to originate all of their residential mortgages, whether they originate mortgages in only
11 some states or in every state. Because of the complex web of federal, state, and local
12 regulations, lenders require LOSs and PPEs tailored specifically for use in originating residential
13 mortgages within the United States and for residential properties within the United States. While
14 state and local regulations may vary, the underlying framework of the origination process is the
15 same. Industry participants also recognize the United States as a market with respect to LOSs
16 and to PPEs.

17 **MARKET CONCENTRATION AND THE ACQUISITION’S**

18 **PRESUMPTIVE ILLEGALITY**

19 69. The Acquisition will lead to significant increases in concentration in multiple
20 markets that exceed the threshold for presumptive illegality.

21 70. The 2010 U.S. Department of Justice and Federal Trade Commission Horizontal
22 Merger Guidelines (“Merger Guidelines”) employ a metric known as the Herfindahl-Hirschman
23 Index (“HHI”) to assess market concentration. The Merger Guidelines explain that an
24 acquisition is presumptively unlawful if it leads to (i) a post-acquisition HHI above 2,500 points
25 and (ii) an HHI increase of more than 200 points.

26 71. The Home Mortgage Disclosure Act (“HMDA”) requires financial institutions
27 that originate a number of residential mortgage loans exceeding certain thresholds to maintain,

1 report, and publicly disclose loan-level information about their mortgages. The compiled
2 HMDA data is used by lenders and regulators to evaluate loan volumes. Defendants regularly
3 estimate and assess LOS market shares based on [REDACTED].

4 72. Based on Defendants' [REDACTED]
5 [REDACTED], the Acquisition will result in a HHI for commercial LOSs above 5,000 points with an
6 increase greater than 1,000 points, making the Acquisition presumptively illegal.

7 73. In the broader LOS market, the Acquisition will result in a HHI above 2,500
8 points with an increase greater than 500 points, making the Acquisition presumptively illegal.

9 74. In the market for PPEs for users of Encompass, the Acquisition will result in a
10 HHI above 8,000 points, with an increase greater than 3,500 points, making the Acquisition
11 presumptively illegal.

12 75. In the broader PPE market, the Acquisition will significantly increase the
13 concentration of firms and result in a combined market share exceeding 40%, making the
14 Acquisition presumptively illegal.

15 **EVIDENCE OF REASONABLY PROBABLE ANTICOMPETITIVE EFFECTS**

16 **A. Anticompetitive Effects in LOS Markets**

17 76. There is a reasonable probability that the Acquisition will substantially lessen
18 competition, or tend to create a monopoly, in both the U.S. market for commercial LOSs and the
19 U.S. market for LOSs.

20 77. ICE and Black Knight not only provide the two largest commercial LOSs in the
21 United States; they are one another's closest competitors. Head-to-head competition between
22 ICE and Black Knight manifests through competition to offer lower LOS prices and to deliver a
23 rich set of LOS features.

24 78. The Acquisition will eliminate this head-to-head rivalry. There is a reasonable
25 probability that this diminished competition will increase the cost of originating mortgages
26 (including the ultimate cost paid by homebuyers), stifle innovation, and reduce choice and
27 quality of LOSs available across the United States.

i. ICE and Black Knight Are Each Other’s Closest Head-to-Head Competitors

79. ICE and Black Knight each view the other as their closest competitor in the provision of LOSs to mortgage lenders. Black Knight’s former CEO and current chairman described Encompass developer Ellie Mae, just prior to its 2020 acquisition by ICE, as [REDACTED]. After ICE acquired Ellie Mae, Black Knight’s CFO [REDACTED]: “In origination, I say Ellie Mae is our most significant competitor. They have 40 plus percent market share. We have low double digit.” Reacting to Black Knight’s public projections that it anticipated gaining customers for Empower, ICE Mortgage Technology’s President noted: [REDACTED]

[REDACTED] An internal 2021 ICE Encompass Business Review presentation [REDACTED]

[REDACTED] Defendants’ rank-and-file employees also regularly [REDACTED]. For example, shortly after it was acquired by ICE, an Ellie Mae employee wrote in an internal e-mail that [REDACTED]

80. Ellie Mae, before its acquisition by ICE in 2020, prepared [REDACTED]

81. ICE (and Ellie Mae as owner of Encompass before ICE) and Black Knight aggressively target the same customers. As one Encompass account executive observed in 2019:

[REDACTED] Black Knight [REDACTED] noted in preparation for a 2021 earnings call: [REDACTED]

1 82. When possible, Black Knight has tracked the [REDACTED]

2 [REDACTED]

3 83. ICE, for its part, has sought to attract the [REDACTED]

4 [REDACTED] For example, one element of ICE's [REDACTED]

5 [REDACTED], launched in response to [REDACTED]

6 [REDACTED]. Because larger lenders are more likely to

7 require secondary market features such as loan trading, analytics, and hedging services, [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 84. Black Knight maintains competitive tracking data that shows [REDACTED]

11 [REDACTED] Black Knight's [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 **ii. There Is a Reasonable Probability That the Acquisition Will Eliminate**

18 **LOS Price Competition Between ICE and Black Knight**

19 85. The close head-to-head competition between Defendants' LOSs has benefited

20 their customers, including in the form of lower prices.

21 86. Defendants offer discounts and price concessions to win or protect business from

22 one another. For example, Black Knight offered [REDACTED]

23 [REDACTED]

24 [REDACTED] More recently,

25 ICE has [REDACTED]

26 [REDACTED]

1 Black Knight [REDACTED] has offered [REDACTED]
2 [REDACTED]

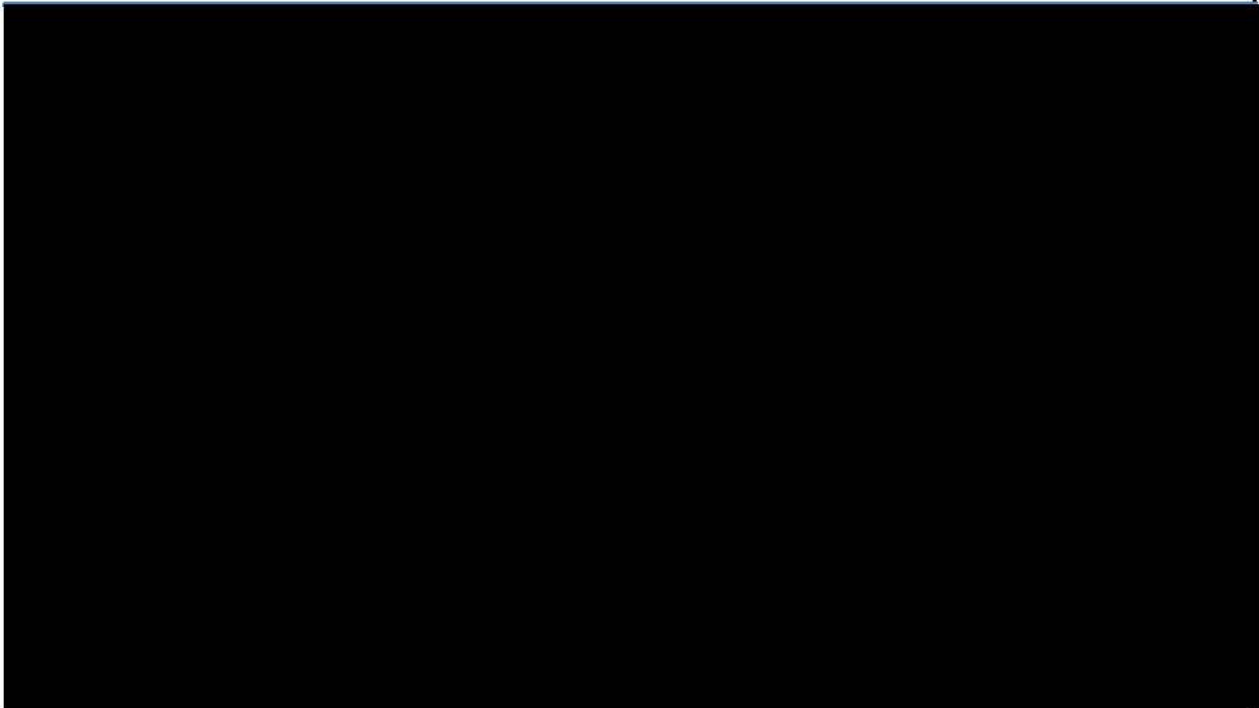
3 87. By removing competitive pressure from Black Knight, the Acquisition will
4 eliminate ICE's need to consider Black Knight's pricing when setting list prices for its own
5 Encompass LOS or to discount against Black Knight, freeing ICE to raise LOS prices
6 aggressively. When given the opportunity, ICE has demonstrated that it will act [REDACTED]

7 [REDACTED] For example, ICE has [REDACTED]
8 [REDACTED]

9 [REDACTED] and has succeeded in [REDACTED]

10 [REDACTED] ICE's enthusiasm for [REDACTED] is evident in its internal documents, [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



iii. There Is a Reasonable Probability That the Acquisition Will Eliminate Competition for LOS Features and Integrations

88. Lenders use ancillary services to perform many of the functions involved with the mortgage origination workflow, such as point-of-sale systems for the borrower to directly input application information, PPEs for pricing and eligibility determinations, document services to coordinate the execution of forms, compliance services to track and ensure the lender’s compliance with federal, state, and local regulations, and fee services to calculate and coordinate payment of the various fees associated with closing a property purchase.

89. In addition to competing on price, ICE and Black Knight compete against each other to attract LOS customers by offering the best and broadest array of ancillary services integrated with their respective LOSs.

90. Black Knight’s acquisition of PPE providers Compass Analytics and Optimal Blue and integration of those products with Empower are examples of such feature competition. Black Knight believed that adding 



1 91. ICE similarly has sought to compete with Black Knight through the range of
2 ancillary services available to Encompass users. For instance, and as described in greater detail
3 below, ICE [REDACTED]

4 [REDACTED]. ICE similarly views [REDACTED]
5 [REDACTED]

6 92. By eliminating competitive pressure to provide a robust suite of ancillary services
7 integrated with its LOS, the Acquisition will reduce ICE’s incentive to build and improve its own
8 ancillary service offerings.

9 **B. Anticompetitive Effects in PPE Markets**

10 93. There is a reasonable probability that the Acquisition will substantially lessen
11 competition, or tend to create a monopoly, in both the U.S. market for PPEs for users of
12 Encompass and the broader U.S. market for PPEs.

13 94. ICE and Black Knight compete to offer the two most widely-used commercial
14 PPEs in the United States.

15 95. ICE’s CFO described the leading positions of ICE and Black Knight when
16 reacting to Black Knight’s acquisition of Optimal Blue, explaining that when Ellie Mae
17 evaluated potential acquisitions in the mortgage technology space, it considered three
18 approaches: “[I]s it more valuable to just partner and do a rev[enue] share, or to build a
19 competitive offering[,] or to take that competitive offering out through M&A[?]” Before Black
20 Knight acquired Optimal Blue, Ellie Mae had considered buying Optimal Blue itself. However,
21 as ICE’s CFO noted to analysts on an investors conference call after the Black Knight-Optimal
22 Blue acquisition, “Well, as it happens, we ultimately concluded why pay a massive multiple to
23 buy that business when guess who the number two is? Ellie. Ellie is the number two in the
24 product pricing engine, let’s just build and make that better.”

25 96. After two years of working to challenge Black Knight’s Optimal Blue by making
26 EPPS better, however, ICE reconsidered. ICE resolved, as phrased by its CFO, simply “to take
27 that competitive offering out through M&A.” The result of the Acquisition thus will be not only

1 to consolidate ownership of the two leading PPEs in the United States, but also to put an end to
2 ICE's efforts to bolster EPPS with new features and functionality.

3 **i. There Is a Reasonable Probability That the Acquisition Will Eliminate**
4 **Head-to-Head PPE Competition Between ICE and Black Knight**

5 97. The Acquisition will eliminate significant head-to-head PPE price and feature
6 competition between Defendants. Indeed, it already has. Since the announcement of the
7 Acquisition, ICE has [REDACTED]

8 [REDACTED]
9 98. ICE and Black Knight are two of only a few competitors offering PPEs in what
10 ICE has called [REDACTED]. Black Knight itself has participated in this trend
11 toward industry consolidation and vertical integration. Though Black Knight's Empower
12 previously incorporated its own native PPE functionality, Black Knight also has acquired once-
13 independent Compass Analytics and Optimal Blue, and has integrated those PPEs with
14 Empower.

15 99. Black Knight's Optimal Blue is the clear PPE market leader in the United States,
16 serving lenders that originate as much as 40% of the nation's mortgages each year.

17 100. Black Knight [REDACTED]. Black Knight's
18 Optimal Blue is used in over [REDACTED] of PPE transactions processed through Encompass.

19 101. ICE's EPPS comes in [REDACTED]
20 [REDACTED]
21 [REDACTED]. ICE currently offers EPPS only to users of
22 Encompass.

23 102. In 2019, Black Knight personnel believed that [REDACTED]
24 [REDACTED]
25 [REDACTED] Black Knight thus acquired PPE provider Compass Analytics in an effort to
26 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 103. In 2020, Black Knight further consolidated the PPE space when it acquired
4 Optimal Blue. Optimal Blue was and is considered the premier PPE solution. Black Knight
5 viewed the acquisition of Optimal Blue as an opportunity to further grow both LOS and PPE
6 share and to cross-sell its other origination-related services.

7 104. Both before and after Black Knight's acquisition of Optimal Blue, competition
8 between Optimal Blue and EPPS has resulted in discounting and savings for mortgage lenders.
9 EPPS has typically [REDACTED]. To sway Encompass users

10 who are on the fence about their PPE selection, [REDACTED]
11 [REDACTED] Optimal Blue's CEO described [REDACTED]

12 [REDACTED]
13 [REDACTED] With regard to one specific lender
14 considering [REDACTED]

15 [REDACTED]
16 And indeed, [REDACTED].

17 105. Optimal Blue's practice of pricing aggressively to compete against EPPS has
18 persisted up to and through its acquisition by Black Knight. For example, in 2020, before Black
19 Knight acquired Optimal Blue, a lender [REDACTED]

20 That lender [REDACTED] In response,
21 Optimal Blue [REDACTED] Since acquiring
22 Optimal Blue, Black Knight has continued [REDACTED]

23 [REDACTED] As recently as 2022, Black Knight offered a lender [REDACTED]
24 [REDACTED] ICE
25 responded [REDACTED]

26 [REDACTED]

1 106. After its acquisition of Optimal Blue, Black Knight also began to aggressively
2 promote the integration of Empower and Optimal Blue as delivering superior accuracy and
3 automation to lenders. Black Knight’s LOS sales teams began [REDACTED]
4 [REDACTED]. Since the
5 acquisition of Optimal Blue, the overwhelming majority of [REDACTED]
6 [REDACTED] At the same time, Black Knight has
7 [REDACTED]. In a
8 2021 earnings call, Black Knight’s CEO touted the success of this “bidirectional . . . cross-
9 selling.”

10 107. In response to Black Knight’s acquisition of Optimal Blue, ICE [REDACTED]
11 [REDACTED] One
12 way ICE planned to achieve this goal [REDACTED]
13 [REDACTED]
14 [REDACTED] ICE also considered [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 108. [REDACTED]
19 ICE even considered [REDACTED]
20 [REDACTED]

21 109. While ICE was working to [REDACTED]
22 [REDACTED], it considered other ways to [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED] In particular, ICE strategized to enable [REDACTED]
26 [REDACTED]
27 [REDACTED]

1 110. ICE continued work on the [REDACTED]
2 [REDACTED] In January
3 2022, ICE Mortgage Technology's President wrote that one of the company's [REDACTED]
4 [REDACTED]. As
5 recently as April 2022, ICE continued to [REDACTED], and planned to [REDACTED]
6 [REDACTED]

7 111. However, on May 4, 2022, ICE announced its agreement to acquire Black Knight.
8 ICE managers immediately discussed the [REDACTED]
9 [REDACTED] On the day of the Acquisition's announcement, ICE Mortgage Technology's
10 Chief Operating Officer wrote [REDACTED]
11 [REDACTED] By August 2022, [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 112. [REDACTED] illustrates not only the sort of lost
15 feature and price competition that is likely to occur as a result of the Acquisition; it demonstrates
16 that the Acquisition *already* has harmed, and will continue to harm, competition. ICE has [REDACTED]
17 [REDACTED] in
18 favor of simply [REDACTED]

19 113. ICE anticipates certain [REDACTED] from the Acquisition. Rather than
20 competing to provide more PPE features and lower PPE prices, as ICE did prior to agreeing to
21 purchase Black Knight, ICE intends to use the Acquisition [REDACTED]
22 [REDACTED]

23 [REDACTED] ICE has projected that [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED] ICE anticipates [REDACTED]
27 [REDACTED]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

[REDACTED]

[REDACTED]

ii. There Is a Reasonable Probability That the Acquisition Will Increase ICE’s Ability and Incentive to Foreclose Competition from Other PPE Providers

114. In addition to eliminating head-to-head competition between the two dominant PPE providers, the Acquisition will increase the likelihood that ICE will disadvantage competing third-party PPE providers by technical means and by contract. It also will contribute to an existing trend toward concentration among PPEs and vertical integration of PPEs with LOSs. Black Knight’s acquisition of previously-independent Compass Analytics and Optimal Blue, and integration of those PPEs with Black Knight’s Empower, consolidated substantial PPEs with a single LOS operator. The Acquisition will further consolidate ownership of those PPEs with ICE’s EPPS, combining multiple formerly competing PPEs and LOSs under the ownership of a single, dominant LOS provider. As a result, there is a reasonable probability that the Acquisition will harm competition by further increasing prices for PPEs and by reducing PPE options available to lenders.

a. ICE Can Disadvantage PPE Competitors by Degrading or Restricting LOS Integration

115. As previously discussed, mortgage lenders use PPEs to price residential mortgage loans, determine a borrower’s eligibility for a particular loan, and lock the loan.

116. Lenders prefer PPEs that integrate with their LOSs. An LOS-integrated PPE allows a lender to perform mortgage-related tasks on a single system, rather than requiring the lender to interact with an additional, wholly separate PPE system and interface. LOS integration also facilitates core back-end functions of PPEs, such as pricing and rate-locking, by enabling the fast, reliable transfer of data between the LOS and PPE. PPE providers thus rely on LOS integration to market and operate their PPEs.

1 117. ICE can disadvantage rival PPEs by not allowing them on its market-leading
2 Encompass LOS. And even for those PPEs that it chooses to integrate with Encompass, ICE has
3 technological tools at its disposal to affect the nature and degree of each PPE’s integration with
4 Encompass. ICE also possesses significant leverage in negotiations over the technical terms
5 under which PPE providers integrate with Encompass. Cognizant of these tools, ICE is in a
6 position to pick winners and losers among the PPE providers integrated with its LOS—and to bar
7 rivals from Encompass entirely.

8 118. One recent example of ICE strategizing to pick winners and losers on Encompass
9 through technological means involves [REDACTED]. In response to [REDACTED]
10 [REDACTED] ICE developed [REDACTED] that [REDACTED]
11 [REDACTED]
12 [REDACTED] An internal ICE presentation [REDACTED]:

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]

17 119. Black Knight [REDACTED] has used varying levels of integration with Empower to
18 promote its own origination-related services while disadvantaging competing ancillary service
19 providers who serve lenders on Empower. One Black Knight executive described [REDACTED]

20 [REDACTED]
21 [REDACTED] Black Knight also has [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 120. ICE has contractual means to disadvantage competing PPE providers.

25 121. The lopsided bargaining position between ICE and third-party ancillary service
26 providers has allowed ICE to [REDACTED]
27 [REDACTED] in some cases [REDACTED]. For

1 example, before Black Knight acquired Optimal Blue, Optimal Blue was independent of an LOS,
2 [REDACTED]. However, after Black Knight acquired
3 Optimal Blue, ICE increased [REDACTED] charged to Optimal Blue for serving
4 users of Encompass. These fees can hinder competing ancillary service providers' profitability
5 and ultimately lead to higher origination and mortgage costs.

6 122. In addition to charging high fees to its competitors, ICE can use contracts to
7 control how PPE providers conduct business and interact with lenders. For example, some ICE
8 contracts [REDACTED]

9 [REDACTED] ICE also [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 123. Ellie Mae, developer of the Encompass LOS acquired by ICE in 2020, [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 **b. Post-Acquisition, ICE Will Have a Greater Incentive to Foreclose**
20 **Competition for PPEs**

21 124. The Acquisition will create a greater incentive for ICE to maximize its profits by
22 disadvantaging competing PPE providers on Encompass and Empower, because ICE will stand
23 to capture a greater proportion of revenue diverted from those providers.

24 125. ICE currently receives [REDACTED] from Black Knight's Optimal Blue
25 and other third-party PPEs in connection with serving customers that use Encompass. However,
26 after the Acquisition, ICE will receive 100% of the revenue associated with use of Optimal Blue
27 by users of Encompass and Empower. In other words, for each customer that leaves a competing

1 PPE provider for Optimal Blue *or* EPPS, ICE will go from receiving [REDACTED] from
2 its competitor to receiving 100% of the PPE revenue via its own PPEs.

3 126. Optimal Blue not only claims [REDACTED] of the U.S. PPE market, but also
4 [REDACTED] of business from lenders who use Encompass. Post-Acquisition, ICE will
5 control PPEs used to process over [REDACTED] of transactions on Encompass. ICE therefore will be in a
6 position to capture a proportionally large share of any business lost by or diverted from other
7 PPE providers who serve customers using Encompass.

8 127. Indeed, ICE's deal analysis documents [REDACTED]
9 [REDACTED]
10 Because each customer typically [REDACTED], ICE anticipates that
11 [REDACTED]
12 [REDACTED]

13 128. Accordingly, as the new owner of Optimal Blue, ICE would stand to benefit by
14 gaining greater revenues than before the Acquisition as a result of disadvantaging PPE
15 competitors by raising price for, foreclosing access to, or otherwise complicating their
16 integrations with ICE's LOSs.

17 **C. Anticompetitive Effects in Other Relevant Antitrust Markets for Ancillary**
18 **Services**

19 129. ICE and Black Knight offer numerous ancillary services in addition to PPEs.
20 Many of these ancillary services, like PPEs, rely on LOS integration to conduct business with
21 their customers and for aspects of their technical functionality. LOS integration therefore is a
22 critical input for many ancillary services. The Acquisition, however, will increase ICE's ability
23 and incentive to foreclose competition for these services, whether through inferior LOS
24 integration, onerous contractual terms, denying LOS integration altogether, or other means.

25 130. Both ICE and Black Knight are historically acquisitive companies. ICE plans to
26 continue an industry trend toward consolidation and vertical integration by acquiring Black
27 Knight's various ancillary services to round out ICE's own offerings. As ICE accumulates

1 additional ancillary services, its incentive to disadvantage third-party vendors will increase as its
2 need to do business with third parties who currently provide those services to users of
3 Encompass and Empower will diminish.

4 131. The Acquisition also will increase ICE's incentive to disadvantage additional
5 competing ancillary service providers by growing the revenue ICE stands to capture by diverting
6 business to its own ancillary services from third-party providers across the broader range of
7 services the combined firm will offer post-Acquisition.

8 132. For example, Black Knight currently offers the Ernst fee service. Fee services
9 provide data and calculations relating to a wide array of mortgage, tax, and other fees to enable
10 loan estimate and disclosure workflows in the mortgage origination process. [REDACTED]

11 [REDACTED]
12 [REDACTED] ICE, on the other hand, does not currently
13 offer a competitive fee service solution. Rather, ICE and Encompass users rely on third-party
14 fee service providers to fill this service gap. Post-Acquisition, as owner of the Ernst fee service,
15 ICE will gain an incentive to disadvantage third-party fee service providers serving customers
16 who use Encompass today, and to divert their business to the Ernst fee service.

17 133. Similarly, ICE currently offers the Mavent regulatory compliance service, one of
18 the leading regulatory compliance services in the United States. Black Knight offers the
19 Regulatory Assist regulatory compliance service, [REDACTED]

20 [REDACTED] and most [REDACTED]
21 [REDACTED] ICE has [REDACTED]

22 [REDACTED]
23 [REDACTED] Post-Acquisition, ICE will gain the incentive and ability to [REDACTED]
24 disadvantage competing regulatory service providers who currently serve users of Black
25 Knight's Empower, and to divert their business to Mavent.

LACK OF COUNTERVAILING FACTORS

1
2 134. New entry will not be timely, likely, or sufficient to offset the anticompetitive
3 effects of the Acquisition in any relevant antitrust market.

4 135. LOS entry will not replace LOS competition lost should the Acquisition proceed.
5 The development of a commercial LOS is lengthy and expensive, and unlikely to occur in a
6 timely manner to offset the competitive effects of the Acquisition in the market for commercial
7 LOSs or in the market for LOSs. Black Knight itself has estimated that to develop a new
8 commercial LOS would cost at least [REDACTED] and take at least [REDACTED].

9 136. Beyond the investment in engineering a new software platform, a new
10 commercial LOS also must provide or integrate with the ancillary services necessary for
11 residential mortgage loan origination. Defendants estimate that [REDACTED]
12 [REDACTED]. On the
13 other hand, establishing partnerships with third-party ancillary service providers would require
14 those providers to invest time and resources in developing software integrations before the new
15 LOS even has any customers to make it worth the ancillary service providers' while. As noted
16 by Black Knight's CFO, Black Knight's accumulated offerings and vendor partnerships serve as
17 a "key differentiator" for Black Knight. A new entrant would lack this competitive advantage.
18 The difficulty in assembling the array of ancillary services necessary to offer a marketable LOS
19 thus poses a substantial barrier to entry.

20 137. Any LOS entrant or existing LOS competitor seeking to reposition to replace
21 competition lost as a result of the Acquisition also must overcome lenders' high switching costs,
22 lengthy switching timelines, and general reluctance to switch to untested LOSs. ICE has
23 estimated that a lender's cost of switching LOSs would be roughly [REDACTED] in the first year.
24 Lenders also may be reluctant to switch to a new, untested LOS.

25 138. Users of commercial LOSs are unlikely to develop their own proprietary LOSs in
26 numbers adequate to offset the anticompetitive effects of the Acquisition. Developing or
27 acquiring a proprietary LOS is cost-prohibitive for all but the largest lenders and requires

1 specialized software expertise outside of the experience of most lenders. Further, maintaining a
2 proprietary LOS requires compliance with a constantly evolving technological and regulatory
3 landscape; failing to ensure compliance poses significant risk for a lending institution. Most
4 lenders, including some of the nation's largest lenders, therefore would not consider the use of a
5 proprietary LOS.

6 139. Repositioning by lenders with proprietary systems is unlikely to offset
7 anticompetitive effects of the Acquisition. Though some large lenders have implemented their
8 own internal LOSs, the investment needed to provide a commercial LOS for third parties is
9 greater, requiring the development of a software and sales-oriented organization that would
10 benefit little from a lender's core banking expertise. Further, providing a proprietary LOS to
11 another lender would mean exposing one's own proprietary technology and operations to a
12 competitor. Perhaps for these reasons, lenders with proprietary LOSs typically do not offer their
13 LOSs for use by other lenders.

14 140. PPE entry or repositioning similarly is unlikely to replace competition lost as a
15 result of the Acquisition. Developing a new PPE is a costly, lengthy process that will not restore
16 lost competition in a timely manner. Black Knight has estimated that [REDACTED]
17 [REDACTED] Nor is developing a
18 successful PPE simply a matter of making the necessary investment in technology. Black
19 Knight's CEO noted on an earnings call that, though the "[t]echnology is easier to create,"
20 Optimal Blue's place in the market was "a very difficult thing to create," thus Black Knight
21 decided to acquire Optimal Blue rather than undertake the development of a comparable PPE.
22 Indeed, Black Knight already owned two PPE technologies—the Empower native PPE and
23 Compass Analytics—when it made the decision to acquire industry-leading Optimal Blue. Even
24 with access to financial resources, a new PPE or a PPE seeking to reposition post-Acquisition
25 thus would face significant hurdles to commercial success.

26 141. The Acquisition also will make entry by a PPE provider more difficult by
27 exacerbating a trend toward concentration and vertical integration, as well as increasing the need

1 for two-level entry. Today, independent PPE providers are able to offer their products to lenders
2 using Encompass via software integration between their PPEs and the LOS. However, were ICE
3 to acquire Optimal Blue, its incentive to foreclose or disadvantage competing PPE providers on
4 Encompass would increase. Because LOS-PPE integration is crucial to enable a PPE's full
5 functionality, PPE providers unable to serve lenders on Encompass after the Acquisition may
6 find themselves facing a heightened entry requirement of needing to offer an both an alternative
7 LOS and an integrated PPE to attract customers.

8 142. Further, as reflected in Black Knight's [REDACTED]
9 [REDACTED] and as recognized by ICE [REDACTED]
10 [REDACTED], a company
11 offering both an LOS and a PPE can coordinate bundling and cross-selling to entice additional
12 customers. Because the Acquisition would increase ICE's ability to bundle and cross-sell its
13 LOS and PPE offerings, entry by competing PPE providers who lack a similar capacity to bundle
14 and cross-sell their own LOS and PPE combinations would become more difficult.

15 143. Defendants cannot demonstrate merger-specific, verifiable, and cognizable
16 efficiencies sufficient to rebut the presumption and evidence of the Acquisition's likely
17 anticompetitive effects.

18 **DEFENDANTS' PROPOSED REMEDY WILL NOT FIX**

19 **THE ACQUISITION'S ANTICOMPETITIVE EFFECTS**

20 144. Black Knight has proposed divesting Empower as well as certain ancillary
21 products—but *not* Optimal Blue—to Constellation Web Solutions, Inc. ("Constellation") in an
22 attempt to remedy the anticompetitive effects of the merger. This proposed remedy, which is
23 conditioned upon the closing of the Acquisition and is subject to approval by Black Knight's
24 shareholders, contemplates that, in addition to acquiring Empower, Constellation will act as a
25 reseller for certain Black Knight ancillary services obtained by ICE through the Acquisition,
26 including Optimal Blue. In connection with this proposal, Defendants also have reduced the
27 purchase price of Black Knight to approximately \$11.7 billion.

1 145. Defendants cannot meet their burden of showing that the proposed remedy will
2 restore competition. The proposed remedy does not attempt to address the reasonably probable
3 anticompetitive effects in the relevant PPE markets that will arise from ICE's acquisition of
4 Optimal Blue. Even with respect to the relevant LOS markets, the proposed remedy fails to
5 provide Constellation with the ability, resources and incentive to replace the intensity of the
6 competition between ICE and Black Knight. Among other things, the proposed remedy fails to
7 transfer a standalone business to Constellation and would require Constellation to rely on its
8 post-Acquisition competitor, ICE, to supply many ancillary services to Empower customers via a
9 resale agreement. This arrangement would create a risk of continuing entanglements and conflict
10 between ICE and Constellation, and it would limit the flexibility with which Constellation could
11 innovate, discount, and offer the array of services Black Knight operates in conjunction with
12 Empower today. Lenders and American consumers benefit from the competition between ICE
13 and Black Knight, and they should not be forced to bear the risk of a divestiture that fails to
14 maintain this competition.

15 **LIKELIHOOD OF SUCCESS ON THE MERITS,**

16 **BALANCE OF EQUITIES, AND NEED FOR RELIEF**

17 146. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the Commission,
18 whenever it has reason to believe that a proposed merger is unlawful, to seek preliminary
19 injunctive relief to prevent consummation of a merger until the Commission has had an
20 opportunity to adjudicate the merger's legality in an administrative proceeding. In deciding
21 whether to grant relief, the Court must balance the likelihood of the Commission's ultimate
22 success on the merits against the equities, using a sliding scale. The principal equity in cases
23 brought under Section 13(b) is the public's interest in effective enforcement of the antitrust laws.
24 Private equities affecting only Defendants' interests cannot tip the scale against a preliminary
25 injunction.

26 147. The Commission is likely to succeed in proving that the effect of the Acquisition
27 may be substantially to lessen competition or tend to create a monopoly in violation of Section 7

1 of the Clayton Act or Section 5 of the FTC Act, and that the Merger Agreement and Acquisition
2 constitute unfair methods of competition in violation of Section 5 of the FTC Act.

3 148. Preliminary relief is warranted and necessary. Should the Commission rule, after
4 the full administrative proceeding, that the Acquisition is unlawful, reestablishing the status quo
5 would be difficult, if not impossible, if the Acquisition has already occurred in the absence of
6 preliminary relief. Allowing the Acquisition to close before the completion of the administrative
7 proceeding would cause irreparable harm by, among other things, enabling the combined firm to
8 begin altering Black Knight's operations and business plans, accessing Black Knight's sensitive
9 business information, eliminating key Black Knight personnel, changing Black Knight's product
10 development efforts, and divesting certain Black Knight assets to Constellation. In the absence
11 of relief from this Court, substantial harm to competition would occur in the interim, even if
12 suitable divestiture remedies were obtained later.

13 149. Accordingly, the equitable relief requested here is in the public interest. The
14 Commission respectfully requests that the Court:

- 15 1. Enter the parties' stipulated temporary restraining order and preliminarily
16 enjoin Defendants from consummating the Acquisition, or any other
17 acquisition of stock, assets, or other interests of one another, either directly or
18 indirectly;
- 19 2. Retain jurisdiction and maintain the *status quo* until the administrative
20 proceeding initiated by the Commission is concluded; and
- 21 3. Award such other and further relief as the Court may determine is appropriate,
22 just, and proper.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: April 10, 2023

Of counsel:

HOLLY VEDOVA
Director
Bureau of Competition

PATTY BRINK
Acting Deputy Director
Bureau of Competition

SHAOUL SUSSMAN
Associate Director for Litigation
Bureau of Competition

Respectfully submitted,

/s/ Abby L. Dennis

ABBY L. DENNIS
Senior Trial Counsel

PETER RICHMAN
Assistant Director

ASHLEY MASTERS
Acting Deputy Assistant Director

Abigail Wood
Daniel Aldrich
Catherine Bill
Caitlin Cipicchio
Steven Couper
Kurt Herrera-Heintz
Janet Kim
Christopher Lamar
Laura Antonini
Lauren Sillman
Neal Perlman
Nicolas Stebinger
Nina Thanawala
Taylor Weaver

Attorneys

Bureau of Competition

CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Federal Trade Commission

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

See Attachment

DEFENDANTS

Intercontinental Exchange, Inc. and Black Knight, Inc.

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

See Attachment

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff 3 Federal Question (U.S. Government Not a Party)
2 U.S. Government Defendant 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, HABEAS CORPUS, OTHER, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District (specify) 6 Multidistrict Litigation-Transfer 8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

FTC Act § 13(b), 15 U.S.C. § 53(b)

Brief description of cause:

Action for Temporary Restraining Order and Preliminary Injunction

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P.

DEMAND \$

CHECK YES only if demanded in complaint: JURY DEMAND: Yes X No

VIII. RELATED CASE(S), IF ANY (See instructions):

JUDGE

DOCKET NUMBER

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only)

X SAN FRANCISCO/OAKLAND

SAN JOSE

EUREKA-MCKINLEYVILLE

DATE 04/10/2023

SIGNATURE OF ATTORNEY OF RECORD

/s/ Abby L. Dennis

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS-CAND 44

Authority For Civil Cover Sheet. The JS-CAND 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the “defendant” is the location of the tract of land involved.)
- c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section “(see attachment).”
- II. Jurisdiction.** The basis of jurisdiction is set forth under Federal Rule of Civil Procedure 8(a), which requires that jurisdictions be shown in pleadings. Place an “X” in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- (1) United States plaintiff. Jurisdiction based on 28 USC §§ 1345 and 1348. Suits by agencies and officers of the United States are included here.
 - (2) United States defendant. When the plaintiff is suing the United States, its officers or agencies, place an “X” in this box.
 - (3) Federal question. This refers to suits under 28 USC § 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 - (4) Diversity of citizenship. This refers to suits under 28 USC § 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS-CAND 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an “X” in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an “X” in one of the six boxes.
- (1) Original Proceedings. Cases originating in the United States district courts.
 - (2) Removed from State Court. Proceedings initiated in state courts may be removed to the district courts under Title 28 USC § 1441. When the petition for removal is granted, check this box.
 - (3) Remanded from Appellate Court. Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 - (4) Reinstated or Reopened. Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 - (5) Transferred from Another District. For cases transferred under Title 28 USC § 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 - (6) Multidistrict Litigation Transfer. Check this box when a multidistrict case is transferred into the district under authority of Title 28 USC § 1407. When this box is checked, do not check (5) above.
 - (8) Multidistrict Litigation Direct File. Check this box when a multidistrict litigation case is filed in the same district as the Master MDL docket. Please note that there is no Origin Code 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC § 553. Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an “X” in this box if you are filing a class action under Federal Rule of Civil Procedure 23. Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction. Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS-CAND 44 is used to identify related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- IX. Divisional Assignment.** If the Nature of Suit is under Property Rights or Prisoner Petitions or the matter is a Securities Class Action, leave this section blank. For all other cases, identify the divisional venue according to Civil Local Rule 3-2: “the county in which a substantial part of the events or omissions which give rise to the claim occurred or in which a substantial part of the property that is the subject of the action is situated.”
- Date and Attorney Signature.** Date and sign the civil cover sheet.

ATTACHMENT TO CIVIL COVER SHEET

I. Plaintiff's Attorneys

Abby L. Dennis
Peter Richman
Ashley Masters
Abigail Wood
Daniel Aldrich
Catharine Bill
Caitlin Cipicchio
Steven Couper
Kurt Herrera-Heintz
Janet Kim
Christopher Lamar
Laura Antonini
Lauren Sillman
Neal Perlman
Nicolas Stebinger
Nina Thanawala
Taylor Weaver

Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580
Tel.: (202) 326-2381
Email: adennis@ftc.gov

Counsel for Plaintiff Federal Trade Commission

II. Defendants' Attorneys

John C. Dodds
Zachary M. Johns
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103
(215) 963-5000
john.dodds@morganlewis.com
zachary.johns@morganlewis.com

Harry T. Robins
Susan Zhu
Morgan, Lewis & Bockius LLP

Jonathan M. Moses
Nelson O. Fitts
Sarah K. Eddy
Adam L. Goodman
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019
(212) 403-1361
NOFitts@WLRK.com
JMMoses@WLRK.com
SKeddy@WLRK.com
ALGoodman@WLRK.com

101 Park Avenue
New York, NY 10178
(212) 309-6728
harry.robins@morganlewis.com
susan.zhu@morganlewis.com

Counsel for Defendant Black Knight, Inc.

Ryan Kantor
J. Clayton Everett, Jr.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-5343
ryan.kantor@morganlewis.com
clay.everett@morganlewis.com

Kenneth Kliebard
Morgan, Lewis & Bockius LLP
110 North Wacker Drive, Suite 2800
Chicago, IL 60606
(312) 324-1774
kenneth.kliebard@morganlewis.com

Danielle L. Rose
Benjamin Sirota
Kobre & Kim LLP
800 Third Avenue
New York, New York 10022
(212) 488-1209
danielle.rose@kobrekim.com
benjamin.sirota@kobrekim.com

Counsel for Defendant Intercontinental Exchange, Inc.