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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

INTERCONTINENTAL EXCHANGE, INC.

and

BLACK KNIGHT, INC.,

Defendants.

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

PLAINTIFF FEDERAL TRADE COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE TESTIMONY OF MICHAEL L. KATZ

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that, at the pre-hearing conference set by the Court for July 20, 2023, at 11:00 a.m., Plaintiff Federal Trade Commission ("FTC" or "Commission") shall move and hereby does move the Court for an order excluding certain testimony by Michael L. Katz, Defendants Intercontinental Exchange, Inc. ("ICE") and Black Knight, Inc. ("Black Knight")'s putative expert. Plaintiff respectfully requests that this Court issue an order precluding Dr. Katz from testifying at trial or otherwise presenting opinions related to alleged efficiencies or benefits resulting from the purchase of Black Knight's assets by ICE ("the Acquisition") because Dr. Katz's testimony and opinions relating to such efficiencies are irrelevant, unreliable, and factually unsupported. Dr. Katz's testimony and opinions relating to these alleged efficiencies are therefore not permissible expert opinion testimony pursuant to Federal Rule of Evidence 702 as more fully set forth below. Plaintiff's motion is based on this Notice of Motion; the Memorandum of Points and Authorities in Support filed concurrently; the declaration of Caitlin Cipicchio and the attachments thereto; all other pleadings on file in this action; and any other written or oral argument that the FTC may present to the Court.

ISSUE TO BE DECIDED

Whether the Court should grant a motion *in limine* to exclude testimony and opinions from Defendants' expert Michael L. Katz regarding alleged efficiencies when his testimony and opinions do not satisfy the standards in Federal Rule of Evidence 702.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Defendant ICE proposes to acquire its primary loan origination software ("LOS") and product and pricing eligibility engine ("PPE") competitor, Defendant Black Knight. Plaintiff has challenged this proposed Acquisition as illegal under Section 7 of the Clayton Act because it may substantially lessen competition in LOS and PPE markets. ECF 1, Compl. ¶¶ 76, 93, 147. In an attempt to justify the Acquisition, Defendants claim the Acquisition would create a more efficient, end-to-end mortgage origination and servicing system. ECF 145, Defs.' Mem. in Opp. at 5-6. Apparently in support of this defense, Defendants seek to introduce expert testimony from Dr. Michael L. Katz, who opines on alleged benefits that would result from the proposed Acquisition. Dr. Katz's opinions and testimony should be excluded as irrelevant, unreliable, and without factual support. Dr. Katz's initial report ("Katz Rep.") focuses on [redacted] But Plaintiff has not alleged a Clayton Act violation [redacted]. Therefore, any alleged benefits Dr. Katz identifies do not support an efficiencies defense because they would occur outside of the alleged antitrust markets. Dr. Katz's opinions and testimony regarding these benefits are irrelevant to the legality of the Acquisition and do not help the Court. Further, Dr. Katz's report does not apply any reliable methodology to show that any of these alleged benefits are cognizable efficiencies that could potentially offset the anticompetitive effects of the merger. Finally, the benefits Dr. Katz suggests may result from the Acquisition lack sufficient factual underpinnings, as he [redacted] For all of these reasons, Dr. Katz's testimony and opinions relating to alleged benefits or efficiencies resulting from [redacted]—particularly those set out in paragraphs 11 and 33 through 60 of his initial report, and 91 through 93 of his rebuttal report— should be excluded for failure to meet the requirements of Federal Rule of Evidence 702.

II. Legal Standard

Pursuant to Federal Rule of Evidence 702, if a witness is qualified as an expert, he or she may testify only if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." *Id.*

In *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), the Supreme Court provided the framework for the admissibility of expert testimony under Rule 702: Courts must play a "gatekeeping role" to determine "whether the reasoning or methodology underlying the testimony is scientifically valid" and "whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93, 597. "Read together, *Daubert* and Rule 702 broadly require that an expert not only be qualified, but also that the expert's testimony be reliable and relevant." *GSI Tech., Inc. v. Cypress Semiconductor Corp.*, Case No. 5:11-cv-03613-EJD, 2015 WL 364796, at *1 (N.D. Cal. Jan. 27, 2015) (citing *Daubert*, 509 U.S. at 589-91).

III. Argument

Dr. Katz's initial report of May 30, 2023 purports to examine [redacted] Cipicchio Decl. Ex. 1 (Katz Rep.) ¶ 8. He concludes that the [redacted] *Id.* ¶ 11. In his rebuttal report of June 23, 2023, Dr. Katz suggests FTC expert Dr. Sacher's analysis is flawed because Dr. Sacher does not consider [redacted]. Cipicchio Decl. Ex. 2 (Rebuttal Report of Michael L. Katz) ¶¶ 91-93. It is not clear that Dr. Katz's discussion of benefits even constitutes part of Defendants' efficiencies defense as Defendants do not cite him in their pretrial briefing. It is clear, however, that Dr. Katz's testimony and opinions regarding benefits are neither relevant to the legality of the Acquisition nor sufficiently rigorous to aid this Court in determining whether any efficiencies

defense may apply. In particular, paragraphs 11 and 33 through 60 of his initial report, and 91 through 93 of his rebuttal report, should be excluded as explained further below.

A. Dr. Katz's Discussion of Alleged Out-of-Market Efficiencies Is Irrelevant

As an initial matter, it is not clear that *any* efficiencies can serve as a defense to a Section 7 claim. *Saint-Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 788–89 (9th Cir. 2015) ("The Supreme Court has never expressly approved an efficiencies defense to a § 7 claim."); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 347 (3d Cir. 2016) ("Contrary to endorsing such a defense, the Supreme Court has instead, on three occasions, cast doubt on its availability."). In any event, to the extent efficiencies could serve as a defense to an otherwise anticompetitive merger, the efficiencies claimed must occur in the same market as the anticompetitive effects to offset those harms. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf ("Merger Guidelines") ("[T]he Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential harm to customers *in the relevant market*.") (emphasis added); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 370 (1963) ("anticompetitive effects in one market" cannot be justified by "procompetitive consequences in another."). As the Court in *Philadelphia National Bank* explained, "[i]f anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating [Section 7 of the Clayton Act], embark on a series of mergers that would make it in the end as large as the industry leader." *Id.* at 370. Because Dr. Katz identifies purported efficiencies only outside of the alleged relevant product markets, those out-of-market efficiencies cannot, as a matter of law, rescue this anticompetitive Acquisition; thus, his efficiencies testimony is irrelevant in this case.[1]

[1] Dr. Katz himself has recognized that under "existing antitrust principles," harms to competition in one market cannot be justified by benefits to participants in another market. Michael Katz & (Continued…)

The FTC has identified four relevant product markets for this case – the all-LOS market, the commercial LOS market, the all-PPE market, and the market for PPEs for Encompass users. Compl., ECF 1 ¶ 37. Dr. Katz does not [redacted] Thus, his testimony and opinions regarding [redacted] do nothing to aid this Court in determining whether any benefits from the Acquisition will outweigh the likely competitive harms from the Acquisition, and should be excluded on that basis.

Dr. Katz's initial report discusses [redacted] Ex. 1 (Katz Rep.) ¶¶ 33, 37, 40. [redacted] In fact, Dr. Katz [redacted] Cipicchio Decl. Ex. 3 (Katz Dep.) at 267:9-17. Based on the limited descriptions Dr. Katz does provide, [redacted] He confirmed in his deposition [redacted] Ex. 3 (Katz Dep.) at 67:8-70:5. Because [redacted] Therefore, Dr. Katz's opinions and testimony regarding these alleged benefits are not relevant to whether there are efficiencies to offset harms *in the relevant product markets*, and for that reason must be excluded. *See Phila. Nat'l Bank*, 374 U.S. at 370. *Cf. In re Elec. Books Antitrust Litig.*, No. 11 MD 2293 DLC, 2014 WL 1282298, at *14-15 (S.D.N.Y. Mar. 28, 2014) (excluding expert opinion on antitrust damages as legally irrelevant where it was based on a "supposed effect" in "a different market entirely").

Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 Yale L. J. 1742, 2169, 2171 (2018).

B. Dr. Katz Fails to Provide Testimony or Opinions Supporting Cognizable Efficiencies

Caselaw and the Merger Guidelines recognize that only certain types of efficiencies have the potential to enhance a merged firm's ability and incentive to compete, and thus potentially offset the anticompetitive effects of a merger.[2] These efficiencies, referred to as "cognizable efficiencies," must be "merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service." Merger Guidelines § 10; s*ee also United States. v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 89 (D.D.C. 2011) (quoting Merger Guidelines § 10); Ex. 1 ¶ 15 n.22 (same). Efficiencies "will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means." Merger Guidelines § 10. Where markets are highly concentrated, "the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 721 (D.C. Cir. 2001). Dr. Katz's efficiencies testimony does not provide rigorous analysis on *any* of the points necessary to showing there are cognizable efficiencies resulting from the Acquisition.

As the Merger Guidelines direct, "it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific." Merger Guidelines § 10. [redacted] Ex. 1 (Katz Rep.) ¶¶ 13-20, but does not apply any methodology [redacted] and thus fails to satisfy the reliability requirement of Rule 702.

[2] And the Supreme Court has never recognized the viability of efficiencies as a defense in a merger case. *See supra*, III.A.

Instead, Dr. Katz concludes [redacted] Ex. 1 (Katz Rep.) ¶ 11.

Dr. Katz did not [redacted] Ex. 3 (Katz Dep.) at 76:12-78:14. Dr. Katz also does not [redacted] *id.* at 76:7-11, 77:5-9, [redacted] *See, e.g.*, *United States v. H&R Block, Inc.*, 833 F. Supp. 2d at 89 ("a 'cognizable' efficiency claim must represent a type of cost saving that could not be achieved without the merger and *the estimate* of the predicted saving must be reasonably verifiable by an independent party.") (emphasis added). Dr. Katz also did not [redacted] Ex. 3 (Katz Dep.) at 79:14-80:14. His efficiencies opinions and testimony should be excluded for failure to substantiate or verify efficiencies. Cipicchio Decl. Ex. 4 (Excerpt of Transcript of Bench Trial, AM Session, *United States v. Bertelsmann SE & Co.*, Civ. A. No. 21-02886 (D.D.C. Aug. 17, 2022)) at 2751-52 (excluding expert testimony on efficiencies where the efficiencies were neither "substantiated" nor "verified," and therefore testimony was not "reliable under Rule 702").

In short, Dr. Katz's initial report simply [redacted] and does not [redacted] Courts regularly exclude expert testimony that lacks any reliable methodology. *See, e.g., Erwine v. Cnty. of Churchill*, No. 22-15358, 2023 WL 2387584, at *2 (9th Cir. Mar. 7, 2023) (upholding district court's exclusion of expert opinion as unreliable where expert "fail[ed] to provide any specific methodology from which he was able to reach [his] judgments") (citing *Murray v. S. Route Mar. SA*, 870 F.3d 915, 922 (9th Cir. 2017)); *Rambus Inc. v. Hynix Semiconductor Inc.*, 254 F.R.D. 597, 605 (N.D. Cal. 2008) (excluding

[3] Dr. Katz did [redacted] Ex. 3 (Katz Dep.) at 31:21-32:20.

expert opinion as unreliable because report made clear expert "did no analysis"); *Perez v. State Farm Mut. Auto. Ins. Co.*, No. C 06-01962 JW, 2012 WL 3116355, at *5 (N.D. Cal. Jul. 31, 2012) (excluding expert opinion as unreliable because basis for expert's opinions did "not rise to the level of a methodology"). Dr. Katz's opinions and testimony regarding efficiencies or benefits resulting from the Acquisition should similarly be excluded.

C. Dr. Katz's Testimony and Opinions Are Unreliable Due to Lack of Evidentiary Support

Perhaps the reason Dr. Katz is [redacted] is because there is insufficient evidence to do so. The FTC has repeatedly sought information from ICE regarding efficiencies over the course of the investigation and discovery in this case, including in its Second Request, Requests for Production of Documents, and Interrogatories, and through a corporate deposition notice including a number of efficiencies-related topics. Cipicchio Decl. Ex. 5 (Request for Additional Information and Documentary Material Issued to Intercontinental Exchange, Inc.) ¶¶ 29, 34-35; Ex. 6 (Complaint Counsel's First Set of Requests for Production Issued to Intercontinental Exchange, Inc.) ¶¶ 7, 11; Ex. 7 (Complaint Counsel's First Set of Interrogatories Issued to Intercontinental Exchange, Inc.) ¶¶ 5, 13; Ex. 8 (Complaint Counsel's Notice of Deposition Issued to Intercontinental Exchange, Inc.) ¶¶ 1, 3. Dr. Katz does not cite to [redacted] Ex. 1 (Katz Rep.) ¶¶ 34, 36-46, 48. Instead of relying on [redacted] *Id.* ¶ 36. He does not [redacted] Expert testimony is "properly excluded" where it is not "sufficiently founded on facts." *Guidroz-Brault v. Missouri Pacific R. Co.*, 254 F.3d 825, 830-31 (9th Cir. 2001); *see also Volterra Semiconductor Corp. v. Primarion, Inc.*, 799 F.Supp.2d 1092, 1098-99 (N.D. Cal. 2011) ("When an expert opinion is not

supported by sufficient facts to validate it in the eyes of the law . . . it cannot support a jury's verdict") (quoting *Brooke Group Ltd. V. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993)). Here, where Dr. Katz fails [redacted] he has clearly not met the standard set forth in Fed. R. Evid. 702.

Where Dr. Katz does [redacted] [5] Ex. 1 (Katz Rep.) ¶ 35 nn. 65-66, ¶ 47 nn. 75-76, ¶ 52 n. 83. Dr. Katz admitted in his deposition that [redacted] Ex. 3 (Katz Dep.) at 56:12-25. Dr. Katz also cites to [redacted] Ex. 1 (Katz Rep.) ¶ 52 n. 83 (citing ICEPROD-16615201 and ICEPROD-16615199, attached as Exhibits 11 and 12 to the Cipicchio Decl.). Indeed, Dr. Katz's description of [redacted] *Compare* Exs. 11 and 12 (asserting that [redacted]) *with* Ex. 1

[4] It bears noting that neither [redacted] Cipicchio Decl. Ex. 9 (Initial Disclosures of Intercontinental Exchange, Inc.) at 2-3; Ex. 10 (Supplemental Set of Initial Disclosures of Intercontinental Exchange, Inc.) at 2-3, and [redacted] was not disclosed as a witness until the eleventh hour (as described further in a motion *in limine* filed today).

[5] As Dr. Katz explained, [redacted] Ex. 3 (Katz Dep.) at 55:6-23, 56:12-17.

[6] Dr. Katz [redacted] Ex. 3 (Katz Dep.) at 80:19-81:4.

(Katz Rep.) ¶¶ 33, 52 (describing the alleged post-merger plans using almost identical language). But "an expert may not rely merely on the self-serving projections of his client" or a client's "mere say-so." *Clear-View Techs., Inc. v. Rasnick*, 2015 WL 3505003, at *3 (N.D. Cal. June 2, 2015); *see also United Energy Trading, LLC v. Pac. Gas & Elec. Co.*, 2018 WL 5013580, at *2 (N.D. Cal. Oct. 16, 2018). Courts routinely exclude economic expert testimony under *Daubert* that "rests on faulty assumptions." *See Clear-View*, 2015 WL 3505003, at *2 (internal quotes omitted). Dr. Katz's testimony regarding efficiencies should be excluded for [redacted]

Because Dr. Katz [redacted], his opinions and testimony on the alleged benefits of the Acquisition are unreliable and lack factual foundation. The Court should exclude these opinions and testimony on that basis. *See Guidroz-Brault*, 254 F.3d at 830-31.

IV. CONCLUSION

For the foregoing reasons, the FTC respectfully requests that the Court grant the FTC's Motion *in limine* and prohibit Defendants from offering testimony or other opinions from Michael L. Katz relating to benefits or efficiencies from the Acquisition, including paragraphs 11 and 33 through 60 of his initial report, and 91 through 93 of his rebuttal report.

Dated: June 30, 2023

Respectfully submitted,

/s/ Caitlin Cipicchio

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