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

15 **FEDERAL TRADE COMMISSION,**

16 Plaintiff,

17 v.

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

20 and

21 **BLACK KNIGHT, INC.,**

22 Defendants.

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

**PLAINTIFF’S NOTICE OF MOTION
AND MOTION IN LIMINE TO EXCLUDE
ALL EVIDENCE CONCERNING
UNTIMELY DISCLOSED WITNESS, AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

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

1 **NOTICE OF MOTION AND MOTION**

2 To the Honorable Court, all parties, and their attorneys of record:

3 Please take notice that, at the pre-hearing conference set by the Court for July 20, 2023,
4 at 11:00 a.m., Plaintiff Federal Trade Commission (“FTC” or “Commission”) shall move and
5 hereby does move the Court for an order excluding in this action any testimony or other
6 evidence from [REDACTED] of Intercontinental Exchange, Inc (“ICE”), or any other late-
7 disclosed witnesses. The FTC’s motion is based on this Notice of Motion and Memorandum of
8 Points and Authorities in Support; the declaration of Ashley Masters and the attachments
9 thereto; all other pleadings on file in this action; and any other written or oral argument that the
10 FTC may present to the Court.

11 **ISSUE TO BE DECIDED**

12 Whether ICE’s failure to disclose [REDACTED] in its disclosures under Rule 26(a) of
13 the Federal Rules of Civil Procedure, and its delay in disclosing [REDACTED] as a potential
14 witness until after the close of fact discovery, requires the exclusion of all evidence from [REDACTED]
15 [REDACTED] in this action under Rule 37 of the Federal Rules of Civil Procedure.

MEMORANDUM OF POINTS AND AUTHORITIES

Federal Rule of Civil Procedure 26 requires each party to serve and, if necessary, to supplement “in a timely manner,” initial disclosures identifying each individual it “may use to support its claims or defenses.” Fed. R. Civ. P. 26(a), (e). The Federal Rules mandate these disclosures “to encourage parties to try cases on the merits, not by surprise, and not by ambush.” *Ollier v. Sweetwater Union*, 768 F.3d 843, 862 (9th Cir. 2014). Flouting the requirements of Rule 26, Defendants waited until service of the final witness lists in the administrative proceeding on June 15, 2023—almost three months after initial disclosures were due and weeks after the close of all fact discovery—to disclose a party witness, ██████████ of Intercontinental Exchange, Inc. (“ICE”), whom ICE knew it “may use to support its claims or defenses.” ICE’s strategic, belated disclosure of this witness violates Rule 26. The remedy for failure to disclose this witness is clear: Under Rule 37, if a party fails to disclose a witness “as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. 37(c)(1). Here, ICE’s belated disclosure precluded the FTC from taking document discovery from ██████████ or taking his deposition prior to the deadline for fact discovery.

The FTC respectfully requests that the Court not reward hearing by ambush and instead exclude from this action all evidence concerning ██████████ of ICE, whom ICE failed to timely disclose.¹

I. BACKGROUND

On March 22, 2023, Defendants served their initial disclosures on Complaint Counsel in the administrative proceeding, identifying ICE and Black Knight employees likely to have discoverable information. Declaration of Ashley Masters (“Masters Decl.”) Ex. 1 (Initial

¹ Although the FTC specifically addresses ██████████ in this Motion, its argument applies to any witness that either Defendant failed to disclose in its Rule 26(a) disclosures and thus was not deposed during fact discovery in this matter.

1 Disclosures of Respondent ICE), Ex. 2 (Initial Disclosures of Respondent Black Knight).² [REDACTED]
 2 [REDACTED] was not listed on either Defendant’s initial disclosures. *Id.* After Complaint Counsel
 3 notified Defendants of several deficiencies in their initial disclosures (Masters Decl. Ex. 3
 4 (March 29, 2023 Letter from Caitlin Cipicchio to John C. Dodds, Esq.), Ex. 4 (March 29, 2023
 5 Letter from Nina Thanawala to Jonathan M. Moses), Defendants served on April 3, 2023
 6 supplemental initial disclosures in the administrative proceeding. Masters Decl. Ex. 5 (ICE
 7 Supplemental Initial Disclosures), Ex. 6 (Black Knight Supplemental Initial Disclosures). Again,
 8 [REDACTED] was not identified. *Id.* To date, Defendants have never served—in this case or in the
 9 administrative proceeding— any supplemental disclosures identifying [REDACTED] as a person
 10 “likely to have discoverable information” whom Defendants “may use to support [their] claims
 11 or defenses.”³

12 The FTC only became aware that ICE may potentially rely on [REDACTED] on May 31,
 13 2023—well after the close of fact discovery on May 23, 2023, and after service of expert reports
 14 on May 30, 2023—and even then only in a corporate capacity, when ICE attempted to belatedly
 15 designate [REDACTED] as a corporate witness in response to a Rule 3.33(c)(1) deposition notice
 16 that Complaint Counsel in the administrative proceeding had served on ICE nearly a month
 17 earlier on May 4, 2023.⁴ Masters Decl. Ex. 9 (Complaint Counsel’s Notice of Deposition Issued
 18 _____

19 ² In the Joint Case Management Statement (Dkt. 72), the parties informed this Court that the
 20 “parties have agreed that their mandatory initial disclosures from the administrative proceeding
 21 satisfy the initial disclosure requirements of Federal Rule of Civil Procedure 26(a)(1) for
 22 purposes of this proceeding.” Dkt. 72 at 6. The parties also agreed that if they “need to
 23 supplement or correct their disclosures during the pendency of this action, they will do so
 24 pursuant to Federal Rule of Civil Procedure 26(e) and Rule 3.31(e) of the FTC’s Rules of
 25 Practice for Adjudicative Proceedings.” *Id.*

26 ³ Moreover, during the FTC’s 10-month investigation of the Proposed Acquisition, ICE never
 27 identified [REDACTED] as a document custodian. *See* Masters Decl. Ex. 7 at 111-116 (ICE’s
 28 Second Request Response), Ex. 8 (August 22, 2022 Letter from Taylor Weaver to Harry T.
 Robins, Esq. and Susan Zhu, Esq.).

⁴ Rule 3.33(c)(1) of the FTC’s Rules of Practice for Adjudicative Proceedings is similar to Rule
 30(b)(6) of the Federal Rules of Civil Procedure, and provides that a party to “name as the
 deponent a public or private corporation . . . and describe with reasonable particularity the
 (Continued...)”

1 to Respondent Intercontinental Exchange, Inc.) Following service of the Rule 3.33(c)(1) notice,
2 ICE waited ten days to object to the notice as [REDACTED] but then provided
3 the names of five deponents [REDACTED]
4 [REDACTED]—none of whom were [REDACTED]. Masters Decl. Ex. 10 at 7 (emails between
5 Ashley Masters and J. Clayton Everett, Jr, *et al.* between May 4 and June 1, 2023). The next day
6 on May 15, 2023, ICE’s counsel designated three of the previously identified individuals to
7 speak to the specific topics identified in the notice during their previously scheduled depositions
8 on May 16, 18, and 23, 2023. *Id.*; *see also* PX6042 (Clifton (ICE) Dep.) at 12:6-15 [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 Despite two months of fact discovery, preceded by a nearly 10-month investigation by
14 the FTC, the first time ICE’s counsel identified [REDACTED] was in an email on May 31, 2023,
15 when ICE belatedly attempted to name [REDACTED] as an additional corporate designee in
16 response to the Rule 3.33(c)(1) notice of May 4, 2023. Masters Decl. Ex. 10 at 2 (May 31, 2023
17 email from C. Everett to A. Masters: [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED] By
21 that time, fact discovery had already closed—on May 23, 2023—and initial expert reports had
22 been served. Dkt. 118 at 2. Moreover, to the extent ICE’s untimely correspondence identified
23 [REDACTED] as a potential witness, it was only in a corporate capacity—not an individual one.

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25 matters on which examination is requested. The organization so named shall designate one or
26 more officers, directors, or managing agents, or other persons who consent to testify on its
27 behalf, and may set forth, for each person designated, the matters on which he or she will
28 testify.” 16 C.F.R. § 3.33(c)(1).

1 Complaint Counsel promptly objected to the late designation of [REDACTED] as a corporate
2 deponent and rejected ICE’s offer of an out-of-time corporate deposition regarding the topics in
3 the Rule 3.33(c)(1) notice, which were already covered in previous depositions. Masters Decl.
4 Ex. 10 at 1 (June 1, 2023 email from A. Masters to C. Everett).

5 Two weeks later, on June 15, 2023, Defendants served their proposed final witness list in
6 the administrative proceeding, listing [REDACTED] as a witness, and identifying him as a witness
7 with relevant, personal knowledge for the very first time. Masters Decl. Ex. 11 (Respondents’
8 Proposed Final Witness List) at 4. According to Defendants, [REDACTED] will testify in the
9 administrative proceeding to not just topics in the Rule 3.33(c)(1) notice, but also to a wide range
10 of issues in this merger challenge. *Id.* at 4-5 [REDACTED]

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED].
18 Based on the inclusion of [REDACTED] on Defendants’ witness list in the administrative
19 proceeding, the FTC anticipates that Defendants will present testimony and evidence from [REDACTED]
20 [REDACTED]—as well as potentially other undisclosed witnesses—in the evidentiary hearing in this
21 Section 13(b) proceeding.

22 **II. ARGUMENT**

23 **A. Defendants’ Disclosures Violate Rules 26(a) and (e)**

24 Under Rule 26(a)(1), parties are required to provide “the name and, if known, the address
25 and telephone number of each individual likely to have discoverable information.” Fed. R. Civ.
26 P. 26(a)(1)(A)(i). Initial disclosures “must be based upon information reasonably available to the
27 disclosing party at the time of the disclosure.” *Forte v. County of Merced*, No. 11-cv-00318,

1 2014 WL 4745923, at *3 (C.D. Cal. Sept. 23, 2014) (citing Fed. R. Civ. P. 26(a)(1)(E)). Under
2 Rule 26, “a party is not excused from its initial disclosure obligation merely because the party
3 has not yet fully investigated its case.” *Id.* (citing Fed. R. Civ. P. 26(a)(1)(E)). Rule 26(e) also
4 “imposes a continuing obligation to supplement the initial disclosures whenever the parties find
5 that the initial disclosures were incomplete or incorrect, making the operation of Rule 26 the
6 functional equivalent of a Standing Request for Production under Rule 34.” *San Francisco v.*
7 *Tutor Saliba Corp.*, 218 F.R.D. 219, 220 (N.D. Cal. 2003) (internal quotation and citation
8 omitted).

9 “[T]he duty to disclose is not only limited to information a party is *certain* it will use, but
10 *may* use to support its claims or defenses.” *In re Sonic Corp. Customer Data Sec. Breach Litig.*,
11 No. 1:17-MD-02807, 2018 WL 11255772, at *3 (N.D. Ohio Apr. 17, 2018) (emphasis in
12 original). If it were, “parties would be free to hide witnesses or evidence from the opposing
13 party, arguing. . . they did not ‘intend’ to use it.” *Id.* at *4; *accord Guzman v. Bridgepoint Educ.*,
14 *Inc.*, 305 F.R.D. 594, 605 (S.D. Cal. 2015) (“Requiring parties to disclose only those witnesses
15 they subjectively intend to use in substantiating their claims, rather than those they merely ‘may
16 use’ as Rule 26 explicitly requires, would erode the efficacy of the rule’s disclosure
17 requirements.”).

18 Defendants have never disclosed ██████████ as an individual “likely to have
19 discoverable information—along with the subjects of that information—that the disclosing party
20 may use to support its claims or defenses.” Fed. R. Civ. P. 26(a)(1)(A)(i). And Defendants never
21 identified ██████████ as a witness with personal information through any other means until
22 serving their final witness list in the administrative proceeding—over three weeks after the close
23 of fact discovery. Defendants’ untimely disclosure of ██████████ violates both the letter and
24 spirit of Rule 26.⁵ *See, e.g., Morris v. BNSF Railway Co.*, 969 F.3d 753, 765 (7th Cir. 2020)

25 _____
26 ⁵ Defendants’ untimely disclosure also violates the Scheduling Order in the administrative
27 proceeding, which the parties attached to the Joint Case Management Statement in this case. The
28 Scheduling Order states that, unless the parties consent or Defendants have shown good cause,
(Continued...)

1 (“[I]t’s one thing to know that a person’s name is out there [but] it’s another thing to know that
 2 the other side is intending to call him as a witness. That’s why we have Rule 26(a) disclosures.”)
 3 (internal quotation and citation omitted).

4 **B. Defendants’ Belated Disclosure Requires Exclusion of Evidence**

5 “Rule 37(c)(1) gives teeth to the[] requirements [of Rule 26] by forbidding the use at trial
 6 of any information required to be disclosed by Rule 26(a) that is not properly disclosed.”
 7 *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008), as amended
 8 (Sept. 16, 2008) (citation omitted). Under Rule 37(c)(1), “[i]f a party fails to provide information
 9 or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that
 10 information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the
 11 failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c). Rule 37(c)(1) thus
 12 provides “a self-executing, automatic sanction to provide a strong inducement for disclosure of
 13 material.” *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001)
 14 (internal quotation and citation omitted).

15 Under Rule 37(c)(1), the “party facing sanctions bears the burden of proving that its
 16 failure to disclose the required information was substantially justified or is harmless.” *R & R*
 17 *Sails, Inc. v. Ins. Co. of Pennsylvania*, 673 F.3d 1240, 1246 (9th Cir. 2012); *accord Yeti by*
 18 *Molly*, 259 F.3d at 1107.

19 Defendants’ untimeliness was not substantially justified. Courts in this circuit weigh five
 20 factors in analyzing substantial justification: (1) the surprise to the party against whom the
 21 evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to
 22 which allowing the evidence would disrupt the trial; (4) the importance of the evidence, and (5)
 23 the nondisclosing party’s explanation for its failure to disclose the evidence. *See, e.g., Moua v.*
 24 *IBM Corp.*, No. 5:10-cv-01070-EJD, 2019 WL 917422, at *1 (N.D. Cal. Feb. 25, 2019). The

25 _____
 26 “the final proposed witness list may not include additional witnesses not listed in the preliminary
 27 or supplemental witness lists previously exchanged” and “[u]nder no circumstances ... may the
 28 final proposed witness list include a witness who has not been deposed.” Dkt. 72-1 at 9.

1 factors here weigh in favor of exclusion. First, the disclosure of [REDACTED] was a surprise;
 2 Defendants still have not supplemented their Rule 26(a) disclosures regarding [REDACTED], and
 3 identified him as a potential witness—whether it be in a corporate capacity (on May 31, 2023) or
 4 in as witness with personal knowledge (on June 15, 2023)—well after the close of fact discovery.
 5 Second, because of Defendants’ late disclosure, there was insufficient time for the FTC to obtain
 6 document discovery from [REDACTED] and then conduct an out-of-time deposition regarding all
 7 issues on which Defendants have indicated that he may testify. Third, given the compressed
 8 timeline of this matter, an additional witness will have a significant impact on the scheduled
 9 hearings. Finally, Defendants have not proffered any explanation for their failure to disclose [REDACTED]
 10 [REDACTED] or why the evidence that they may put on through him is important—especially as it
 11 concerns the topics in the Rule 3.33(c)(1), *which three other witnesses designated by Defendants*
 12 *already covered in their depositions.*

13 Nor was the untimely disclosure harmless. The untimely disclosure precluded the FTC
 14 from taking account of [REDACTED] during discovery, which concluded on May 23, 2023. The
 15 FTC would have been able to make use of such discovery in its expert report, in its brief in
 16 support of its motion for preliminary injunction, in its proposed findings of fact and conclusions
 17 of law, and in preparation for the hearing on its motion for preliminary injunction, without
 18 having to “scramble to make up for the delay.” *See Ollier v. Sweetwater Union High Sch. Dist.*,
 19 768 F.3d 843, 862 (9th Cir. 2014) (“late disclosure of witnesses throws a wrench in the
 20 machinery of trial,” and while “a party might be able to scramble to make up for the delay,”
 21 “last-minute discovery may disrupt other plans.”).⁶

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 24 ⁶ Consistent with *Ollier*, courts in this district and elsewhere routinely exclude late disclosed
 25 witnesses. *See, e.g., Montera v. Premier Nutrition Corp.*, No. 16-cv-06980, 2022 WL
 26 1452756, at *2 (N.D. Cal. May 9, 2022) (excluding witnesses disclosed three weeks before trial);
 27 *Baines v. Aaron's Inc.*, No. CV-20-01124-PHX-DWL, 2021 WL 4149719, at *4 (D. Ariz. Sept.
 28 13, 2021), (excluding witnesses rather than reopen fact discovery “on the eve of trial”); *Nunes v.*
Cnty. of Stanislaus, No. 1:17-cv-00633, 2020 WL 1324808, at *4 (E.D.
 (Continued...)

1 Thus, under Rule 37(c)(1), the Court should exclude testimony and any other evidence
2 from [REDACTED] and any other late-disclosed witness.

3 **III. CONCLUSION**

4 For the reasons stated above, the FTC respectfully requests that the Court exclude in this
5 action any testimony or other evidence from [REDACTED] of ICE and any other late-disclosed
6 witness.

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Cal. Mar. 20, 2020) (excluding witnesses disclosed four months before trial); *Lopez v. Lopez*,
26 No.18-cv-6473, 2020 WL 2043996, at *5 (C.D. Cal. Jan. 23, 2020) (excluding witnesses
disclosed the day before fact discovery closed).

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Respectfully submitted,

/s/ Laura Antonini

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