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

15 **FEDERAL TRADE COMMISSION,**

16 Plaintiff,

17 v.

18 **INTERCONTINENTAL EXCHANGE, INC.**

19 and

20 **BLACK KNIGHT, INC.,**

21 Defendants.

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

23 **PLAINTIFF FEDERAL TRADE**
24 **COMMISSION'S PRE-HEARING**
25 **PROPOSED FINDINGS OF FACT AND**
26 **CONCLUSIONS OF LAW**

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

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FEDERAL TRADE COMMISSION’S PROPOSED FINDINGS OF FACT

I. The Parties and the Proposed Acquisition

1. Defendant Intercontinental Exchange, Inc. (“ICE”) is a publicly traded corporation incorporated in Delaware, with its headquarters in Atlanta, Georgia, that provides market infrastructure, data services, and technology solutions in three segments: exchanges, fixed income and data services, and mortgage technology. PX0017 (ICE) at 32.

2. In 2020, ICE acquired Ellie Mae, including its industry-leading Encompass loan origination system (“LOS”). PX6046 (Tyrrell (ICE) Dep.) at 15:12-24.

3. ICE operates Encompass and its other mortgage-related businesses, including its EPPS product, pricing, and eligibility engine (“PPE”), through its ICE Mortgage Technology business unit (PX6046 (Tyrrell (ICE) Dep.) at 14:1-10, 15:12-24, 69:14-21), headquartered in Pleasanton, California. PX6021 (Lyons (ICE) Dep.) at 13:21-13:25.

4. Defendant Black Knight, Inc. (“Black Knight”) is a publicly traded corporation incorporated in Delaware, with its headquarters in Jacksonville, Florida, that provides software, data, and analytics. PX0017 (ICE) at 32.

5. Black Knight’s mortgage technology products include the Empower LOS, the Mortgage Servicing Platform (“MSP”), and the Optimal Blue PPE¹, which Black Knight acquired in 2020. PX0021 (Black Knight) at 16, 108.

6. On May 4, 2022, ICE and Black Knight signed an Agreement and Plan of Merger (“Merger Agreement”), whereby ICE agreed to acquire 100% of Black Knight for approximately \$13.1 billion (the “Acquisition”). PX0017 (ICE) at 3, 145-46.

II. Residential Mortgage Origination in the United States

A. The Loan Origination System

7. Homebuyers obtain mortgages from a variety of mortgage lending institutions, including small and large banks, credit unions, and independent mortgage banks. To finance a home purchase through a mortgage, a homebuyer typically submits a mortgage application to a

¹ In addition to its PPE, Optimal Blue offers certain secondary services, including hedging. References to Optimal Blue herein are only to the Optimal Blue PPE unless otherwise specified.

1 lender. The lender then begins the mortgage loan origination process. PX0042 (ICE) at 11.

2 8. Mortgage lenders, regardless of type and size, rely on LOSs, such as ICE's
3 Encompass or Black Knight's Empower, as their primary tool to manage the residential
4 mortgage loan origination process. *E.g.*, PX6048 (██████████ (Strong Home) Dep.) at 74:10-75:4;
5 PX6038 (██████████ (Mutual of Omaha) Dep.) at 75:1-12.

6 9. Mortgage origination involves many steps between the application and the
7 closing of the loan. Those steps include processing information from the mortgage application,
8 determining the loans and interest rates for which the homebuyer qualifies, locking the interest
9 rate, underwriting the loan, funding the loan, then closing the loan and preparing it to be
10 serviced. *E.g.*, PX0042 (ICE) at 11; PX6038 (██████████ (Mutual of Omaha) Dep.) at 18:14-19:1;
11 PX6047 (Sahi (ICE) Dep.) at 25:11-26:4.

12 10. As a mortgage moves from application to close, it touches on ██████████ services
13 ("ancillary services") necessary to process, underwrite, fund, and close a loan. PX2519 (Black
14 Knight) at 2 (showing various third-party ancillary service providers in the origination process).

15 11. Ancillary services include services such as document vendors, point-of-sale
16 ("POS") systems for interacting directly with borrowers, and PPEs. *E.g.*, PX6038 (██████████
17 (Mutual of Omaha) Dep.) at 19:22-20:3, 78:7-21; PX6047 (Sahi (ICE) Dep.) at 25:10-26:13.
18 Other ancillary services include credit reports, identity verification, settlement services (e.g.,
19 inspection, appraisal, and flood and title reports and insurance), notary services, and document
20 management. PX2519 (Black Knight) at 2.

21 12. Ancillary services can include those owned and offered by the LOS operator
22 itself, as is the case with ICE's EPPS PPE and with Black Knight's Optimal Blue PPE. PX0042
23 (ICE) at 31-32; PX2063 (Black Knight) at 3. They can also include ancillary services offered by
24 third-party vendors. PX0042 (ICE) at 19.

25 13. The LOS coordinates and automates many of the interactions between lenders
26 and ancillary services via software integration. PX6046 (Tyrrell (ICE) Dep.) at 16:22-17:16,
27 23:4-13; PX6023 (Hart (ICE) Dep.) at 33:17-34:2; PX6047 (Sahi (ICE) Dep.) at 26:22-27:10;
28 PX6038 (██████████ (Mutual of Omaha) Dep.) at 76:16-78:2.

1 surprisingly, [REDACTED], routinely recognize LOSs as a distinct
2 product in the ordinary course of their business. *E.g.*, PX2525 (Black Knight) at 7; PX1706
3 (ICE) at 2; *cf.* PX8000 (Sacher (FTC) Rep.) ¶¶ 129-146 (a hypothetical monopolist of LOSs
4 could profitably impose a small but significant and nontransitory increase in price (“SSNIP”).

5 21. LOS providers offer their services and compete on a nationwide basis. PX1102
6 (ICE) at 57; PX0021 (Black Knight) at 63.

7 **2. Commercial v. Proprietary LOSs**

8 22. LOSs come in two forms: those licensed from third party providers
9 (“commercial LOSs”) and those developed and maintained in-house by lenders (“proprietary
10 LOSs”). *See* PX6050 ([REDACTED] (Impac) Dep.) at 44:2-14.

11 23. A proprietary LOS is designed specifically for and around the needs of a
12 particular lender. PX6014 (Connors (ICE) IH) at 103:5-18. [REDACTED]
13 [REDACTED]. PX6055
14 ([REDACTED] (Carrington) Dep.) at 91:20-92:17.

15 24. Indeed, the [REDACTED]
16 [REDACTED]
17 [REDACTED]. *E.g.*, PX6051 ([REDACTED] (Impac) Dep.) at 41:9-42:5; PX7002 ([REDACTED] (Impac)
18 Nov. 10, 2022 Decl.) ¶¶ 1, 8.

19 25. As Black Knight itself has recognized: [REDACTED]
20 [REDACTED]
21 [REDACTED] PX2316 (Black Knight) at 221.

22 26. For these reasons, [REDACTED] rely on commercial LOSs, rather than
23 proprietary LOSs, PX2022 (Black Knight) at 8, and the trend among those lenders who
24 maintain proprietary LOSs is [REDACTED]. PX6065 ([REDACTED] (Lender Price)
25 Dep.) at 180:16-181:21; PX1709 (ICE) at 8; PX6046 (Tyrrell (ICE) Dep.) at 67:7-68:2.

26 27. By way of recent example, in 2023, [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED] PX6046 (Tyrrell (ICE) Dep.) at 66:17-68:2.

2 28. [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED] PX6046 (Tyrrell (ICE) Dep.) at 67:15-24.

6 29. Lenders using proprietary LOSs do not [REDACTED]

7 [REDACTED] See PX6033 (Larsen (Black Knight) Dep.) at 17:11-16.

8 30. On the other hand, firms such as ICE and Black Knight [REDACTED]

9 [REDACTED] E.g., PX2523 (Black Knight) at 3; PX6046
10 (Tyrrell (ICE) Dep.) at 128:18-132:19.

11 31. ICE's Encompass has maintained [REDACTED] among LOSs (PX1711
12 (ICE) at 5; PX2319 (Black Knight) at 7) despite [REDACTED]

13 [REDACTED] E.g., PX6046 (Tyrrell (ICE) Dep.) at 36:17-24; PX1096 (ICE) at 13; cf. PX8000
14 (Sacher (FTC) Rep.) ¶¶ 154-59 (SSNIP by a hypothetical monopolist of commercial LOSs
15 would not be defeated by lenders switching to proprietary LOSs).

16 **3. Barriers to Entry**

17 32. Building a successful LOS is no small undertaking. Black Knight itself estimates
18 that it would cost [REDACTED] to develop an LOS plus [REDACTED] to
19 support developing regulatory requirements. PX0021 (Black Knight) at 97.

20 33. A potential LOS entrant has limited opportunities to persuade a lender to switch
21 LOSs because LOS contracts typically have a multiyear term. [REDACTED]

22 [REDACTED] PX6012 (Tyrrell (ICE) IH) at 63:20-65:8. As of July 2022, [REDACTED]

23 [REDACTED]

24 [REDACTED] PX0019 (ICE) at 3.

25 34. Any potential LOS entrant must also overcome lenders' costs of switching LOSs.
26 E.g., PX6055 ([REDACTED] (Carrington) Dep.) at 85:20-86:22 ([REDACTED]

27 [REDACTED]);

28 PX6050 ([REDACTED] (Impac) Dep.) at 44:21-45:10 ([REDACTED]

1 [REDACTED]; PX1158 (ICE) at 4-6.

2 35. Furthermore, switching an LOS [REDACTED]
3 [REDACTED]. PX7002 ([REDACTED] (Impac) Dep.) at 47:1-21.

4 **B. The Product, Pricing & Eligibility Engine**

5 **1. The Role of PPEs in Mortgage Origination**

6 36. One of the most important ancillary services in mortgage origination is the
7 pricing engine—or PPE. PX6007 ([REDACTED] (Lender Price) IH) at 27:21-30:5, 30:16-32:13;
8 PX6043 ([REDACTED] (Polly) Dep.) at 115:14-117:17.

9 37. Mortgage lenders use PPEs to price and to lock a mortgage. PX6021 (Lyons
10 (ICE) Dep.) at 31:12-32:10; PX6045 (Connors (ICE) Dep.) at 132:22-133:7.

11 38. First, a loan officer or borrower inputs the borrower’s financial, property, and
12 other application data. The PPE then analyzes that data and returns products (i.e., mortgage
13 terms, such as fixed or adjustable rates) and prices (i.e., interest rates) for which the borrower is
14 eligible. *E.g.*, PX6035 ([REDACTED] (Umpqua) Dep.) at 20:5-21:1; PX6038 ([REDACTED] (Mutual of
15 Omaha) Dep.) at 19:22-20:3; PX6048 ([REDACTED] (Strong Home) Dep.) at 79:12-80:7.

16 39. Once a borrower has settled on mortgage terms, the loan officer can use the PPE
17 to lock in the interest rate pending closing of the underlying real estate transaction. PX6021
18 (Lyons (ICE) Dep.) at 47:22-48:18.

19 40. A PPE replaces manual review of various rate sheets and calculations. A
20 seasoned loan officer might take [REDACTED] to generate a quote for a customer, whereas a
21 PPE can compile that information in [REDACTED]
22 [REDACTED] PX6048 ([REDACTED] (Strong Home) Dep.) at 79:12-81:12.

23 41. No other product can serve as a replacement for a PPE. PX6043 ([REDACTED] (Polly)
24 Dep.) at 115:14-117:17; PX6041 ([REDACTED] (SouthPoint) Dep.) at 20:8-21:15, 63:14-64:9;
25 PX7008 ([REDACTED] (SouthPoint) Decl.) ¶ 6; PX6048 ([REDACTED] (Strong Home) Dep.) at 79:12-80:20;
26 *cf.* PX8000 (Sacher (FTC) Rep.) ¶ 201 (in the event of a SSNIP on all PPEs by a hypothetical
27 monopolist, lenders would not switch to alternate methods of pricing and locking loans in
28 sufficient numbers to render the price increase unprofitable).

1 42. [REDACTED], recognize PPEs as a distinct product.
2 See PX6035 ([REDACTED] (Umpqua) Dep.) at 122:25-123:19; PX7007 ([REDACTED] (Umpqua) Feb.
3 14, 2023 Decl.) ¶ 7 ([REDACTED]
4 [REDACTED]); PX6007 ([REDACTED] (Lender Price) IH) at 27:21-30:5
5 ([REDACTED]
6 [REDACTED]); PX1166 (ICE) at 42; PX2259 (Black Knight) at 8.

7 43. PPE providers offer their services and compete on a nationwide basis. PX1102
8 (ICE) at 57; PX0021 (Black Knight) at 63.

9 44. As with LOSs, some lenders may use proprietary PPEs, [REDACTED]
10 [REDACTED] PX6024 (McMahon (Black Knight) Dep.) at 116:5-12.

11 45. The President of Black Knight's Origination Technology business [REDACTED]
12 [REDACTED]
13 [REDACTED]. PX6008 (Gagliano (Black Knight) IH) at 123:20-24.

14 2. Importance of LOS Integration

15 46. Software integration between a PPE and a lender's LOS enables a PPE's full
16 functionality, enabling loan and application data to flow automatically between the LOS, PPE,
17 and other ancillary services. PX6021 (Lyons (ICE) Dep.) at 32:11-33:16; PX6025 (Anderson
18 (Black Knight) Dep.) at 68:15-70:1; PX6065 ([REDACTED] (Lender Price) Dep.) at 20:1-21:3.

19 47. [REDACTED]
20 [REDACTED]
21 [REDACTED] PX6065 ([REDACTED] (Lender Price) Dep.)
22 at 20:1-21:3, 178:18-180:12, 186:4-187:2; PX6052 (Batt (Black Knight) Dep.) at 75:12-22.

23 48. Lenders thus [REDACTED]
24 [REDACTED] E.g., PX6048 ([REDACTED] (Strong Home) Dep.) at 85:5-14; PX6041 ([REDACTED] (SouthPoint)
25 Dep.) at 33:10-15, 72:18-74:2, 80:2-6.

26 49. Nearly all lenders using a PPE [REDACTED]. PX6065 ([REDACTED]
27 (Lender Price) Dep.) at 21:17-22:6, 17:9-20, 176:13-17; PX6043 ([REDACTED] (Polly) Dep.) at
28 78:13-79:22.

1 50. Integrating a PPE with an LOS is a significant software engineering undertaking
2 [REDACTED]. PX1701 (ICE) at 1. Most mortgage lenders [REDACTED]
3 [REDACTED]. PX6041 ([REDACTED]
4 (SouthPoint) Dep.) at 33:10-15; PX6007 ([REDACTED] (Lender Price) IH) at 205:15-25.

5 51. Because it is a [REDACTED]
6 [REDACTED] few lenders [REDACTED]. PX6007 ([REDACTED] (Lender
7 Price) IH) at 205:15-25. Indeed, lenders [REDACTED]
8 [REDACTED]. PX1698 (ICE) at 3-5; *cf.* PX8000
9 (Sacher (FTC) Rep.) ¶¶ 202-215 (in event of a SSNIP for PPEs for users of ICE’s Encompass
10 LOS, lenders would not switch to alternative LOSs or PPEs not integrated with Encompass in
11 sufficient volumes to render the price increase unprofitable).

12 52. As such, ICE itself has [REDACTED]
13 [REDACTED]
14 [REDACTED]. PX1640 (ICE) at 8.

15 3. Barriers to Entry

16 53. ICE’s EPPS and Black Knight’s Optimal Blue are two PPEs in [REDACTED]
17 [REDACTED] due to acquisitions and consolidation, PX1640 (ICE)
18 at 6, and is characterized by high barriers to entry.

19 54. Black Knight has estimated that it would take approximately [REDACTED]
20 [REDACTED] to develop a commercial pricing tool comparable to the capability of the Optimal
21 Blue. PX0021 (Black Knight) at 102. Altogether, Black Knight has further estimated it would
22 take [REDACTED] for a competitive pricing tool to compete profitably. *Id.* at 103.

23 55. In part, this is because once development of the pricing tool is complete, a new
24 PPE entrant would need to [REDACTED]
25 [REDACTED]. PX0021 (Black Knight) at 101-02.

26 56. Importantly, a new PPE entrant would also need to [REDACTED]
27 [REDACTED]. PX0021 (Black Knight) at 102; PX6065 ([REDACTED] (Lender Price)
28 Dep.) at 176:2-17. In particular, integration with ICE’s Encompass is [REDACTED]

1 [REDACTED]. *Infra* Findings of Fact (“FOF”) ¶¶ 134-37; PX6043 ([REDACTED] (Polly)
2 Dep.) at 25:22-27:12, 64:22-65:21 [REDACTED]

3 [REDACTED]

4 57. Lender Price has raised roughly [REDACTED], and today has
5 [REDACTED]. PX6065 ([REDACTED] (Lender Price) Dep.) at 165:23-167:2, 175:9-21.

6 **III. ICE’s Encompass and Black Knight’s Empower Dominate the LOS Space**

7 58. ICE’s Encompass is the dominant LOS in the United States and processes [REDACTED]
8 [REDACTED] of all residential mortgages originated across the nation each year. Black Knight’s
9 Empower is the [REDACTED] LOS in the United States. *Infra* FOF ¶¶ 60-64.

10 59. ICE and Black Knight compete vigorously to provide their respective LOSs to
11 the same mortgage lender customers. *Infra id.* ¶¶ 65-74. As stated by Black Knight’s CFO,
12 “[W]e have one primary competitor in each business. . . . In [o]rigination, it’s ICE”
13 PX2316 (Black Knight) at 56. This competition has resulted in tangible benefits for lenders and
14 the marketplace more generally, including [REDACTED]
15 [REDACTED]. *Infra* FOF ¶¶ 75-86.

16 **A. Encompass and Empower Are the [REDACTED]**

17 60. The Home Mortgage Disclosure Act (HMDA) is used by lenders and regulators
18 to evaluate loan volumes. HMDA requires financial institutions that originate mortgage loans to
19 maintain and report loan-level mortgage data. PX6046 (Tyrrell (ICE) Dep.) at 50:4-24.

20 61. HMDA data is [REDACTED] data source for the number of
21 mortgage loans originated by lenders and [REDACTED] of loan origination volume available.
22 PX6046 (Tyrrell (ICE) Dep.) at 50:14-17, 55:1-6; PX1091 (ICE) at 1 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]. ICE has [REDACTED]

26 [REDACTED] PX1046 (ICE) at 5-7; PX6046 (Tyrrell (ICE) Dep.) at 50:14-24.

27 62. [REDACTED] place
28 ICE’s share among commercial LOSs [REDACTED] and its share among all LOSs [REDACTED]

1 PX1046 (ICE) at 6; PX2319 (Black Knight) at 7; PX8000 (Sacher (FTC) Rep.) Tables 9-12.

2 63. Black Knight's share among commercial LOSs [REDACTED] and its share
3 among all LOSs is [REDACTED] PX1046 (ICE) at 6; PX2319 (Black Knight) at 7; PX8000 (Sacher
4 (FTC) Rep.) Tables 9-12.

5 64. No other commercial LOS has captured more than [REDACTED] among commercial LOSs
6 or more than [REDACTED] among all LOSs. PX8000 (Sacher (FTC) Rep.) Tables 9-12.

7 **B. ICE and Black Knight Compete Head-to-Head for LOS Customers**

8 65. ICE and Black Knight [REDACTED]
9 [REDACTED], *e.g.*, PX6047 (Sahi (ICE) Dep.) at 121:4-8, and
10 [REDACTED]. *E.g.*, PX2002 (Black Knight) at 5-10;
11 PX6040 (Dugan (Black Knight) Dep.) at 41:8-17, 46:1-47:17; PX1656 (ICE) at 12.

12 66. In 2020, Black Knight's former CEO and current Chairman, Anthony Jabbour,
13 called Ellie Mae (now ICE's Encompass) [REDACTED]
14 [REDACTED] PX6058 (Jabbour (Black Knight) Dep.) at 31:3-33:12 (discussing PX2033
15 (Black Knight) at 19).

16 67. Kirk Larsen, Black Knight CFO, was more direct later that year:

17 [H]istorically, Black Knight was focused on the high end of the market. And so we were
18 selling in the top 50 ... until about probably two years ago where we started going down
19 market in earnest As you go - as we started going down market, say to the top 500
20 lenders, that's where Ellie Mae has their primary market share and there's other players
there. But really it's Ellie Mae with Encompass that is the primary competitor there. So,
we really went after that market in earnest, like I said, starting a couple of years ago

21 PX2316 (Black Knight) at 39.

22 68. Similarly, Joe Tyrrell, former ICE Mortgage Technology President, noted that,
23 for [REDACTED]
24 [REDACTED] PX6046 (Tyrrell (ICE) Dep.) at 11:7-22, 63:7-
25 64:11; PX1076 (ICE) at 1.

26 69. And Black Knight, in [REDACTED], noted:

27 [REDACTED]
28 [REDACTED] PX2316 (Black Knight) at 169.

1 70. While Encompass and Empower may have traditionally targeted certain sized
2 customers in the past, PX2316 (Black Knight) at 39, [REDACTED]
3 [REDACTED] PX6045 (Connors (ICE) Dep.) at 108:22-109:5; PX0019 (ICE) 2-3.

4 71. [REDACTED]
5 [REDACTED]. Black Knight's [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED] PX8000 (Sacher (FTC) Rep.) at ¶¶ 297-300.

10 72. Many lenders consider ICE's Encompass LOS and Black Knight's Empower
11 LOS [REDACTED]. For example, [REDACTED]
12 [REDACTED]
13 [REDACTED] PX6055 ([REDACTED] (Carrington)
14 Dep.) at 67:21-68:11 (discussing PX7000 ([REDACTED] (Carrington) Oct. 31, 2022 Decl.) ¶ 7).

15 73. Lender [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]. PX6055 ([REDACTED]
19 (Carrington) Dep.) at 88:7-10, 88:13-90:2; PX6050 ([REDACTED] (Impac) Dep.) at 57:14-58:4,
20 58:10-25; PX7002 ([REDACTED] (Impac) Nov. 10, 2022 Decl.) at ¶ 13.

21 74. [REDACTED]
22 [REDACTED]
23 [REDACTED]. PX6050 ([REDACTED] (Impac)
24 Dep.) at 47:1-3, 47:11-21, 57:14-58:4, 58:10-25; PX7002 ([REDACTED] (Impac) Nov. 10, 2022
25 Decl.) ¶ 10. Notably, when [REDACTED]
26 [REDACTED]. PX6050 ([REDACTED] (Impac)
27 Dep.) at 49:9-15, 49:18-50:4; PX7002 ([REDACTED] (Impac) Nov. 10, 2022 Decl.) ¶ 11.

28 **C. ICE and Black Knight Uniquely Compete to Offer an Integrated Suite of**

LOS and Ancillary Services

75. Today, ICE and Black Knight have the broadest range of ancillary offerings available—either owned and offered by one of the parties or integrated with the parties’ platforms—providing them with the unique ability to provide lenders with a full set of tools that obviate the need to go outside their respective ecosystems for ancillary services.

76. ICE boasts that it has “[REDACTED]” See PX9050 at 1.

77. For its part, Black Knight supplements functionality of its Empower LOS with a host of ancillary services aimed at one or more of the discrete steps in the mortgage origination workflow, including POS, marketing, compliance, fees, closing, funding, and business intelligence. PX6040 (Dugan (Black Knight) Dep.) at 14:24-15:3, 17:4-19, 22:1-14 (discussing PX2063 (Black Knight)); PX2063 (Black Knight) at 3; PX2521 (Black Knight) at 11, 14.

78. In addition to offering third-party ancillary services on their LOSs, ICE and Black Knight own or resell a number of ancillary services that they offer to their LOS lender customers. PX2063 (Black Knight) at 3; PX1582 (ICE) at 28-29.

79. ICE and Black Knight’s ownership of certain ancillary services allows for [REDACTED] [REDACTED] PX6020 (Moreno (Black Knight) Dep.) at 46:1-3 (“[REDACTED] [REDACTED].”); PX6045 (Connors (ICE) Dep.) at 132:10-14, 135:9-137:2 ([REDACTED]).

80. Having these services at their disposal also means ICE and Black Knight are uniquely positioned to offer lenders [REDACTED] [REDACTED] PX2023 (Black Knight) at 13-14 ([REDACTED]).

81. ICE and Black Knight also can [REDACTED] into their respective LOS offerings. Black Knight [REDACTED] [REDACTED] [REDACTED]. PX6040 (Dugan (Black Knight) Dep.) at 14:24-15:3, 20:7-21:4,

23:14-25:19; PX2063 (Black Knight) at 3.

82. Bundling mortgage technologies appeals to lenders because it simplifies their pricing, contracts, and vendor management. PX6040 (Dugan (Black Knight) Dep.) at 94:25-95:13; *see also id.* at 112:17-23 (“ [REDACTED] ”); PX6030 (Gagliano (Black Knight) Dep.) at 64:8-18, 64:20.

83. According to former ICE Mortgage Technology President Joe Tyrrell, [REDACTED] [REDACTED] PX1073 (ICE) at 1. And ICE’s [REDACTED] . PX6065 ([REDACTED] (Lender Price) Dep.) at 134:22-24, 135:1-15.

84. The threat of Black Knight’s [REDACTED] [REDACTED] [REDACTED] . *E.g.*, PX1085 (ICE) at 3 [REDACTED] [REDACTED] [REDACTED]).

D. Lenders Benefit from Competition Between ICE and Black Knight in the Provision of LOS Services

85. Head-to-head competition between Encompass and Empower has resulted in [REDACTED] , including in the form of [REDACTED] . *See, e.g.*, PX1077 (ICE) at 10-11 ([REDACTED]); PX1012 (ICE) at 4 ([REDACTED]); PX1059 (ICE) at 2-4 ([REDACTED]); PX2524 (Black Knight) at 2; PX6035 ([REDACTED] (Umpqua) Dep.) at 121:10-14, 121:16-20; *see also* PX6046 (Tyrrell (ICE) Dep.) at 56:14-18 ([REDACTED]).

86. Indeed, Black Knight’s Empower currently serves as [REDACTED]

1 [REDACTED]. PX6055 ([REDACTED] (Carrington) Dep.) at 72:25-74:2 (discussing PX7000
2 ([REDACTED] (Carrington) Oct. 31, 2022 Decl.) ¶ 9) and [REDACTED]
3 [REDACTED]
4 [REDACTED]); PX6047 (Sahi (ICE) Dep.) at 129:21-24, 129:24-131:1; PX6046 (Tyrrell (ICE)
5 Dep.) at 25:12-21, 26:19-27:1 ([REDACTED]
6 [REDACTED]).

7 87. At ICE, [REDACTED]. When ICE
8 acquired Ellie Mae, ICE announced [REDACTED]
9 [REDACTED]
10 [REDACTED] PX6046 (Tyrrell (ICE) Dep.) at 33:8-34:3; PX1096 (ICE) at 9-10.

11 88. [REDACTED]
12 [REDACTED] PX1096 (ICE) at 13.

13 89. To meet its [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED] PX6046 (Tyrrell (ICE) Dep.) at 36:2-10, 36:17-24.

17 90. [REDACTED]
18 [REDACTED].
19 PX6045 (Connors (ICE) Dep.) at 130:20-132:6; PX6046 (Tyrrell (ICE) Dep.) at 45:11-46:3.

20 91. One way that ICE justifies [REDACTED]
21 [REDACTED]. PX6046
22 (Tyrrell (ICE) Dep.) at 30:11-21, 31:2-13, 37:3-21, 38:12-24 (discussing PX1596 (ICE));
23 PX1596 (ICE) at 4; PX1082 (ICE) at 1.

24
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92. ICE’s enthusiasm for [REDACTED] is evident in its internal documents, such as

a [REDACTED]

[REDACTED]

[REDACTED]:

[REDACTED]

PX1365 (ICE) at 8, 10-11.

93. Lenders have [REDACTED]

[REDACTED]. E.g., PX6038 ([REDACTED] (Mutual of

Omaha) Dep.) at 92:10-93:12, 99:18-100:15; PX7001 ([REDACTED] (Mutual of Omaha) Nov. 10,

2022 Decl.) ¶ 14; PX6069 ([REDACTED] (loanDepot) Dep.) at 106:3-107:5; PX7003 ([REDACTED]

(loanDepot) Nov. 14, 2022 Decl.) ¶ 15; PX6051 ([REDACTED] (Impac) Dep.) at 28:9-29:14;

PX6035 ([REDACTED] (Umpqua) Dep.) at 121:10-20 ([REDACTED] PX4154 (Umpqua) at 1).

IV. ICE’s EPPS and Black Knight’s Optimal Blue Dominate the PPE Space

94. As explained above, ICE and Black Knight each offer a broad array of ancillary

services in addition to their LOSs. *Supra* FOF ¶¶ 75-84. Most notably, Black Knight owns the

Optimal Blue PPE, the clear industry leader, serving lenders that originate as much as [REDACTED] of

the nation’s residential mortgages each year. [REDACTED] Optimal Blue is its close competitor,

EPPS, currently available [REDACTED]. *Infra* FOF ¶¶ 97-101.

95. ICE and Black Knight are two of few competitors offering PPEs in what ICE has

[REDACTED] due to acquisitions and consolidation. PX1640 (ICE)

at 6. Since 2019, Black Knight has driven this consolidation through its acquisitions of the

Compass Analytics and Optimal Blue PPEs. PX0021 (Black Knight) at 108.

96. Like the competition between ICE’s and Black Knight’s LOSs, the competition

1 between ICE’s EPPS and Black Knight’s Optimal Blue also benefits lenders and the
2 marketplace more generally. Defendants’ efforts to win PPE customers from one another have
3 led to [REDACTED]

4 [REDACTED]. *Infra* FOF ¶¶ 102-118.

5 **A. Optimal Blue and EPPS Are the [REDACTED]**

6 97. ICE’s data reflects that Optimal Blue commands a [REDACTED] share of PPE users on
7 Encompass, and ICE’s EPPS claims [REDACTED]. *See* PX8000 (Sacher (FTC) Rep.) ¶¶ 259-62 &
8 Table 15; *accord* PX1270 (ICE) at 1 [REDACTED]
9 [REDACTED]); *see also* PX6046 (Tyrrell (ICE) Dep.) at 71:1-
10 16, 71:22-72:25; PX1589 (ICE) at 1.

11 98. Black Knight estimates that its Optimal Blue boasts a [REDACTED] share among all
12 PPEs. PX2311 (Black Knight) at 5.

13 99. Although EPPS is [REDACTED]
14 [REDACTED]
15 [REDACTED] among all PPEs—irrespective of LOS platform. PX1166 (ICE) at 42.

16 100. [REDACTED] widely recognize Optimal Blue and
17 EPPS as the most used PPEs. *E.g.*, PX6047 (Sahi (ICE) Dep.) at 91:9-20; PX6065 ([REDACTED]
18 (Lender Price) Dep.) at 113:22-114:23.

19 101. No other PPE provider can claim more than [REDACTED] of PPEs on Encompass,
20 no matter how concentration is measured. PX8000 (Sacher (FTC) Rep.) Table 15-19.

21 **B. ICE and Black Knight Compete Head-to-Head For PPE Customers**

22 102. [REDACTED]
23 [REDACTED]. PX6041 [REDACTED] (SouthPoint) Dep.) at 24:25-
24 25:15, 77:11-78:5; PX6065 ([REDACTED] (Lender Price) Dep.) at 116:19-117:11, 129:21-131:12,
25 PX6021 (Lyons (ICE) Dep.) at 45:4-46:8, 193:12-194:24, 196:3-9.

26 103. Even though there may be differences in functionality between EPPS and OB,
27 [REDACTED]. PX1640 (ICE) at 4, 10-11.

28 104. Thus, not surprisingly, Optimal Blue regularly [REDACTED]. *E.g.*,

1 PX6020 (Moreno (Black Knight) Dep.) at 57:5-12, 14-15; PX2359 (Black Knight) at 1; PX2360
2 (Black Knight) at 1; PX2327 (Black Knight) at 1; PX2361 (Black Knight) at 2; PX2364 (Black
3 Knight) at 1-2; PX2372 (Black Knight) at 1.

4 105. Indeed, Black Knight's PPE [REDACTED] shows that between [REDACTED]
5 [REDACTED]
6 [REDACTED] PX6052 (Batt (Black Knight) Dep.) at 143:2-
7 144:20, 148:22-149:25; PX2517 (Black Knight) at 2.

8 106. Defendants' documents show that [REDACTED]
9 [REDACTED]. *Infra* FOF ¶¶ 107-110.

10 107. For example, when [REDACTED]
11 [REDACTED]
12 [REDACTED] PX6035 ([REDACTED] (Umpqua) Dep.) at 122:25-
13 123:19; PX7007 ([REDACTED] (Umpqua) Feb. 14, 2023 Decl.) ¶¶ 10-11.

14 108. To [REDACTED]
15 [REDACTED]
16 [REDACTED], *see infra* at FOF ¶¶ 113-122— [REDACTED]
17 [REDACTED] PX6035 ([REDACTED] (Umpqua) Dep.) at 122:25-123:19; PX7007 ([REDACTED] (Umpqua) Feb
18 14, 2023 Decl.) ¶ 11. [REDACTED]
19 [REDACTED]. PX7007 ([REDACTED] (Umpqua) Feb 14, 2023 Decl.) ¶ 11.²

20 109. [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 PX2212 (Black Knight) at 2. [REDACTED]
24 [REDACTED] *Id.* [REDACTED]

25
26 ² [REDACTED]
27 [REDACTED] PX6035 ([REDACTED] (Umpqua) Dep.) at 97:24-98:6.
28 [REDACTED].
Id. at 103:18-104:1, 122:25-123:19; PX7007 ([REDACTED] (Umpqua) Feb 14, 2023 Decl.) ¶ 13.

1 [REDACTED] *Id.* at 1. [REDACTED]
 2 [REDACTED]. *Id.* at 2; PX2218 (Black Knight) at 12.
 3 110. Additional examples of [REDACTED]
 4 [REDACTED] (PX2131 (Black
 5 Knight) at 1-2; PX2123 (Black Knight) at 1-2); [REDACTED] (PX2098 (Black Knight) at
 6 1-5; PX2509 (Black Knight) at 1-2); [REDACTED]. (PX2092 (Black Knight) at 1-2);
 7 and [REDACTED] (PX2094 (Black Knight) at 1-2).

8 111. Consistent with this documentary evidence of head-to-head competition, Black
 9 Knight's [REDACTED]
 10 [REDACTED]. PX8000 (Sacher (FTC) Rep.) ¶¶ 433-37.

11 112. [REDACTED], the FTC's expert Dr. Seth Sacher modeled that
 12 PPE prices for Encompass users may increase [REDACTED] post-Acquisition due to the
 13 elimination of competition between EPPS and Optimal Blue, depending on the methodology
 14 and assumptions applied. *Id.* ¶¶ 32-38.

15 **C. Competition Between Defendants Led ICE to [REDACTED]**

16 113. The competition between Optimal Blue and EPPS [REDACTED]
 17 [REDACTED]
 18 [REDACTED]. PX1553 (ICE) at 8-10.

19 114. ICE feared that [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED] PX6014 (Connors (ICE) IH) at 164:15-167:14; *see also* PX6045 (Connors (ICE)
 24 Dep.) at 58:6-59:23, 60:7-12.

25 115. In response, ICE [REDACTED]
 26 [REDACTED] (PX1556 (ICE) at 1), to [REDACTED]
 27 [REDACTED] PX1553 (ICE) at 10.

28 116. One pillar [REDACTED]

1 [REDACTED]
2 [REDACTED]. PX1553 (ICE) at 15-
3 19; PX1116 (ICE) at 4; PX6045 (Connors (ICE) Dep.) at 46:5-8; PX6047 (Sahi (ICE) Dep.) at
4 91:9-92:16; PX6027 (Davis (ICE) Dep.) at 49:15-50:10.

5 117. Beginning in 2021, [REDACTED]
6 [REDACTED] PX1116
7 (ICE) at 7; PX1588 (ICE) at 4; PX6027 (Davis (ICE) Dep.) at 55:22-56:3.

8 118. ICE continued to [REDACTED]
9 [REDACTED]
10 (PX1238 (ICE) at 1) and [REDACTED]
11 [REDACTED]. *E.g.*, PX1718 (ICE) at 1; PX6035
12 [REDACTED] (Umpqua) Dep.) at 97:6-19).

13 119. ICE further [REDACTED]
14 [REDACTED]
15 [REDACTED] PX6047 (Sahi (ICE) Dep.) at 97:21-98:10, 98:23-99:11.

16 120. However, on [REDACTED]
17 [REDACTED]
18 [REDACTED] PX1267 (ICE) at 2.

19 121. ICE [REDACTED]. PX6027 (Davis
20 (ICE) Dep.) at 55:22-56:3, 56:18-57:2, 57:8-13.

21 122. By [REDACTED]
22 [REDACTED]
23 [REDACTED]. PX1588 (ICE) at 3;
24 *see also* PX1096 (ICE) at 42; PX1241 (ICE) at 1. [REDACTED]
25 [REDACTED] PX6045 (Connors (ICE) Dep.) at 138:21-23.

26 123. Industry participants have noticed [REDACTED]
27 [REDACTED]. PX6065 ([REDACTED] (Lender Price) Dep.) at 129:21-
28 131:12; PX6035 ([REDACTED] (Umpqua) Dep.) at 97:24-98:6.

D. Third-Party PPE Providers Are Dependent on Integration with Encompass

124. Lenders use various ancillary services to originate mortgages. These services are typically integrated with a lender’s LOS. PX6047 (Sahi (ICE) Dep.) at 26:22-27:10; PX6046 (Tyrrell (ICE) Dep.) at 23:4-13; PX6038 ([REDACTED] (Mutual of Omaha) Dep.) at 76:16-78:2.

1. ICE Has the Ability to Disadvantage Ancillary Service Providers

125. LOSs make the determination of [REDACTED] [REDACTED] E.g., PX6023 (Hart (ICE) Dep.) at 43:15-18, 52:1-12, 58:9-12, 59:7-25; PX6045 (Connors (ICE) Dep.) at 121:23-122:6, 122:16-123:2; PX6065 ([REDACTED] (Lender Price) Dep.) at 195:10-199:15; PX2115 (Black Knight) at 1 ([REDACTED] [REDACTED].

126. One factor in that determination can be whether [REDACTED] [REDACTED] PX6047 (Sahi (ICE) Dep.) at 29:22-30:21, 52:7-13, 68:13-16. For instance, Black Knight has [REDACTED] [REDACTED]. PX6065 ([REDACTED] (Lender Price) Dep.) at 45:5-16, 217:7-219:15.

127. [REDACTED] [REDACTED] [REDACTED]. PX6046 (Tyrrell (ICE) Dep.) at 23:14-24:18; PX6065 ([REDACTED] (Lender Price) Dep.) at 196:25-198:18, 213:19-215:1; PX6047 (Sahi (ICE) Dep.) at 39:23-41:4.

128. Ancillary service providers have [REDACTED] [REDACTED]. See PX6043 ([REDACTED] (Polly) Dep.) at 75:5-21, 88:17-90:3; PX6065 ([REDACTED] (Lender Price) Dep.) at 196:25-199:15 ([REDACTED] [REDACTED]); see also PX6037 ([REDACTED] (Blend) Dep.) at 44:11-45:17.

129. One manifestation of this [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] PX6037 ([REDACTED] (Blend) Dep.) at 29:16-30:17.

1 130. [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED] E.g., PX6043 ([REDACTED] (Polly) Dep.) at 86:14-89:25; PX6007 ([REDACTED] (Lender Price)
 5 IH) at 156:4-24. ICE's contracts, [REDACTED]
 6 [REDACTED] PX6046 (Tyrrell
 7 (ICE) Dep.) at 25:4-14; PX6065 ([REDACTED] (Lender Price) Dep.) at 228:18-25, 229:10-21.

8 131. ICE's contracts with ancillary service providers [REDACTED]
 9 [REDACTED] PX6047 (Sahi (ICE) Dep.) at 82:15-84:2.
 10 For example, [REDACTED]
 11 [REDACTED]. PX6037 ([REDACTED] (Blend) Dep.) at
 12 23:18-25:6, 50:19-51:5; PX6047 (Sahi (ICE) Dep.) at 55:18-56:12; PX6023 (Hart (ICE) Dep.)
 13 at 133:24-134:7; PX2526 (Black Knight) at 15. ICE's goal is [REDACTED]
 14 [REDACTED]. PX6047 (Sahi (ICE) Dep.) at 57:20-58:17.

15 132. Ellie Mae, developer of the Encompass LOS acquired by ICE in 2020, clearly
 16 understood [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 PX1026 (ICE) at 7.

22 133. ICE also has [REDACTED]
 23 [REDACTED] PX6043 ([REDACTED] (Polly) Dep.) at 75:13-21.

24 **2. ICE Has the Ability to Disadvantage PPE Providers in Particular**

25 134. PPE providers in particular [REDACTED]
 26 [REDACTED]. PX6043 ([REDACTED] (Polly) Dep.) at 78:13-79:10 ([REDACTED]
 27 [REDACTED]); PX6065 ([REDACTED] (Lender Price) Dep.) at
 28 27:23-28:8 ([REDACTED]

1 [REDACTED], 204:2-7. This is especially so because [REDACTED]
2 [REDACTED]. See PX6065 ([REDACTED] (Lender Price) Dep.) at 45:5-16, 217:7-219:15.
3 135. According to one PPE provider: [REDACTED]
4 [REDACTED]
5 [REDACTED] PX6043 ([REDACTED] (Polly) Dep.) at 26:16-20.
6 136. Another PPE provider noted, [REDACTED]
7 [REDACTED]
8 [REDACTED] PX6065 ([REDACTED] (Lender Price) Dep.) at 204:2-19.
9 137. Indeed, PPE providers describe [REDACTED]
10 [REDACTED] PX6043 ([REDACTED] (Polly) Dep.) at
11 128:12-131:6; *accord id.* at 64:22-65:21 [REDACTED]
12 [REDACTED] PX6007 ([REDACTED] (Lender Price) IH)
13 at 181:1-12 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 138. Even when ICE allows [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED] *E.g.*, PX6047 (Sahi (ICE) Dep.) at 32:17-34:1, 66:5-25, 71:10-18,
20 71:24-72:8, 73:14-19; PX6065 ([REDACTED] (Lender Price) Dep.) at 195:10-199:15 ([REDACTED]
21 [REDACTED]); PX6043 ([REDACTED] (Polly) Dep.) at 79:11-22, 81:8-18
22 ([REDACTED]); *see also*
23 PX6045 (Connors (ICE) Dep.) at 122:16-123:2 ([REDACTED]
24 [REDACTED]).
25 139. [REDACTED]
26 PX6047 (Sahi (ICE) Dep.) at 112:2-23; PX6065 ([REDACTED] (Lender Price) Dep.) at 195:10-199:15.
27 140. ICE's response to [REDACTED]
28 [REDACTED]

1 141. After Black Knight acquired Optimal Blue, ICE [REDACTED]
2 [REDACTED] (PX1025 (ICE) at 1), [REDACTED]
3 [REDACTED] (PX1346 (ICE)
4 at 16). [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED] PX1025 (ICE) at 1.

8 142. To do so, [REDACTED]
9 (PX1346 (ICE) at 16), and began [REDACTED]
10 [REDACTED] PX1132 (ICE) at 1 [REDACTED]
11 [REDACTED]
12 [REDACTED]; PX1452 (ICE) at 1 ([REDACTED]
13 [REDACTED]
14 [REDACTED]); PX1411 (ICE) at 1-2; *see also* PX6043 ([REDACTED] (Polly) Dep.) at 81:24-
15 83:18 ([REDACTED]
16 [REDACTED]);
17 PX6065 ([REDACTED] (Lender Price) Dep.) at 204:21-205:23, 207:1-208:9; PX6047 (Sahi (ICE) Dep.)
18 at 110:21-111:13, 114:10-115:1 ([REDACTED]
19 [REDACTED]).

20 143. [REDACTED]
21 [REDACTED] PX1346 (ICE) at 26.

22 144. ICE [REDACTED]
23 [REDACTED]. PX1394 (ICE) at 1;
24 PX1392 (ICE) at 1 [REDACTED].

25 **3. Post-Acquisition, ICE Will Have Greater Incentive to Disadvantage Rival PPEs**

26 145. Despite ICE's [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]. PX6012 (Tyrrell (ICE) IH) at 254:7-24, 338:16-339:10.

2 146. Thus, [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED] PX8000 (Sacher (FTC) Rep.) ¶¶ 494-505.

6 147. [REDACTED]

7 [REDACTED], ICE’s incentive to
8 disadvantage those PPEs in favor of its own PPEs, to include Optimal Blue, will increase after
9 the Acquisition. PX8000 (Sacher (FTC) Rep.) ¶ 505.

10 148. [REDACTED]

11 [REDACTED]

12 [REDACTED] PX5102 (Lender Price) at 3; PX6007 ([REDACTED] (Lender
13 Price) IH) at 175:24-176:25.

14 **V. ICE Announces the Acquisition of Black Knight in May 2022**

15 149. ICE announced the Acquisition of Black Knight on May 4, 2022. PX1728 (ICE)
16 at 1. Following ICE’s and Black Knight’s required Hart-Scott-Rodino (“HSR”) Act filings, the
17 the FTC began a nearly 10-month investigation.

18 **A. ICE Provides Information Regarding Purported Synergies and Merger**
19 **Benefits to the FTC and Investor Community**

20 150. In response to inquiries by the FTC during its investigation, ICE provided [REDACTED]
21 [REDACTED]
22 PX1102 (ICE) at 90-92; PX1723 (ICE) at 1.

23 151. Joe Tyrrell, former President of ICE’s Mortgage Technology division, was [REDACTED]
24 [REDACTED] PX1102 (ICE)
25 at 92, and [REDACTED]
26 PX6012 (Tyrrell (ICE) IH) at 163:7-164:12; PX1102 (ICE) at 91; PX1100 (ICE) at 3.

27 152. Tyrrell conceded that much of the basis for [REDACTED]
28 [REDACTED] PX6046 (Tyrrell (ICE) Dep.) at 158:24-159:6, 160:11-162:9; PX6012 (Tyrrell (ICE)

1 IH) at 158:18-159:21. [REDACTED] PX6046 (Tyrrell
2 (ICE) Dep.) at 162:6-9.

3 153. Notably, ICE's [REDACTED]
4 [REDACTED]

5 [REDACTED] PX1100 (ICE) at 4; PX6046 (Tyrrell (ICE) Dep.) at
6 140:16-142:13 (discussing PX1100).

7 154. ICE's analysis of [REDACTED]
8 [REDACTED]. PX6034 (Jackson (ICE) Dep.) at 120:19-121:18.

9 155. ICE touted to the investment community that [REDACTED]
10 [REDACTED]. PX1582 (ICE) at 35.

11 156. ICE made similar representations to the FTC. PX1102 (ICE) at 91 [REDACTED]
12 [REDACTED]
13 [REDACTED]).

14 157. ICE's estimate of [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 PX6046 (Tyrrell (ICE) Dep.) at 121:18-123:6, 123:16-22, 125:5-9.

18 158. ICE never calculated [REDACTED]
19 [REDACTED]
20 [REDACTED]. PX6012 (Tyrrell
21 (ICE) IH) at 249:16-250:18; PX6034 (Jackson (ICE) Dep.) at 49:21-53:10, 200:24-201:7.

22 **B. ICE Considered [REDACTED]**

23 159. As part of the Acquisition, ICE will acquire MSP, Black Knight's loan servicing
24 technology and [REDACTED]. PX1582 (ICE) at 9; PX6033
25 (Larsen (Black Knight) Dep.) at 19:22-20:6.

26 160. Defendants claim certain efficiencies and benefits from the Acquisition will
27 occur as a result of [REDACTED] (Dkt. 145 at 1), but
28 ICE [REDACTED]

- 1 [REDACTED]:
- 2 a. [REDACTED] (PX6046 (Tyrrell (ICE) Dep.) at 74:2-7; PX6012 (Tyrrell
- 3 (ICE) IH) at 260:11-25, 262:10-263:5);
- 4 b. [REDACTED] (PX1568 (ICE) at 19); and
- 5 c. [REDACTED].
- 6 PX6046 (Tyrrell (ICE) Dep.) at 74:12-75:15; PX1085 (ICE) at 2-3; PX6014
- 7 (Connors (ICE) IH) at 89:11-89:18; PX6068 ([REDACTED] (Warburg) Dep.) at 167:13-
- 8 170:3, 147:17-152:8.

9 161. ICE, however, did not [REDACTED]

10 [REDACTED]

11 [REDACTED] PX6047 (Sahi (ICE) Dep.) at 140:10-23.

12 VI. Defendants Scramble to Divest Empower in a Self-Made, Slapdash Remedy

13 162. On March 7, 2023, [REDACTED],

14 ICE, Black Knight, and Constellation Software, Inc. (together with its subsidiaries and

15 affiliates, “Constellation”), [REDACTED] an agreement for the sale of certain assets including

16 Black Knight’s Empower to Constellation. PX6029 (Wilhelm (Constellation) Dep.) at 89:2-16;

17 PX6054 (Hubbard (Truist) Dep.) at 23:13-24:21. Notably, these assets do not include Optimal

18 Blue. PX4097 (Constellation) at 117.

19 163. Constellation [REDACTED] PX6054 (Hubbard (Truist)

20 Dep.) at 31:6-19, and offers a small LOS called MortgageBuilder [REDACTED]

21 [REDACTED] PX6055 ([REDACTED] (Carrington) Dep.) at 101:5-13; PX6051 ([REDACTED] (Impac)

22 Dep.) at 54:25-55:11.

23 164. Constellation [REDACTED]

24 [REDACTED]. PX6032 (George (Constellation) Dep.) at 161:21-23.

25 And according to the head of Constellation’s mortgage business, the deal team [REDACTED]

26 [REDACTED]

27 [REDACTED] PX6049 (Ryczek (Constellation) Dep.) at 112:22-113:5.

28 A. The Divestiture Conveys an Incomplete Business and Will Create Ongoing

Entanglements and Render Constellation Dependent Upon ICE

165. Under the terms of the proposed divestiture, Constellation, unlike Black Knight, will not own many of the ancillary products integrated with Empower, and can only resell, [REDACTED], some of those products under a Commercial Agreement with ICE (the “Resale Products”). See PX4097 (Constellation) at 100, 104, 117-19, 128-33.

166. Owning a broad portfolio of mortgage technologies that can be sold together with Empower allows Black Knight to [REDACTED] [REDACTED]. PX6040 (Dugan (Black Knight) Dep.) at 14:24-15:16, 23:14-25:14; PX8001 (Sacher (FTC) Rebuttal) ¶ 234.

167. Under the Commercial Agreement, however, Constellation [REDACTED] [REDACTED]. PX4097 (Constellation) at 104, 128-33. That [REDACTED] [REDACTED] [REDACTED] [REDACTED]. PX8001 (Sacher (FTC) Rep.) ¶ 235.

168. Today, Black Knight only offers [REDACTED] products in Empower bundles [REDACTED] [REDACTED]. Constellation will have [REDACTED] additional resale products in its Empower bundles. PX6040 (Dugan (Black Knight) Dep.) at 23:14-25:14, 28:12-29:1, 107:8-109:18.

169. Constellation’s founder and president recognized that [REDACTED] [REDACTED] [REDACTED] [REDACTED] PX4189 (Constellation) at 1.

170. Under the Commercial Agreement, Constellation will also rely on ICE to provide [REDACTED] for the Resale Products, but ICE is only obligated to provide these services for [REDACTED] [REDACTED] PX4097 (Constellation) at 107-08; PX6029 (Wilhelm (Constellation) Dep.) at 110:21-112:17; 124:4-125:9; PX6032 (George (Constellation) Dep.) at 83:17-22.

171. The Commercial Agreement requires Constellation to rely on ICE in other ways

1 to continue to sell Black Knight's bundle: [REDACTED]

2 [REDACTED]
3 [REDACTED] PX4097 (Constellation) at 101-02.

4 172. Because ICE will retain these key Empower-integrated services, Constellation
5 and its customers will depend on ICE for [REDACTED]

6 *Id.* at 100, 107, 122-27; PX6029 (Wilhelm (Constellation) Dep.) at 124:4-125:9; PX6032
7 (George (Constellation) Dep.) at 83:17-22; PX4097 (Constellation) at 100, 107, 122-27.

8 173. Constellation executives recognize this arrangement represents [REDACTED]

9 [REDACTED]
10 [REDACTED] PX4138 (Constellation) at 5; PX4142 (Constellation) at 4
11 [REDACTED]

12 [REDACTED] PX6032 (George (Constellation) Dep.) at 73:22-75:4, 76:14-25, 88:2-24.

13 174. Further, the Commercial Agreement provides Constellation the ability to

14 [REDACTED]. PX4097
15 (Constellation) at 109. [REDACTED]

16 [REDACTED]. *Id.*

17 175. The resale fee provisions of the Commercial Agreement will also provide

18 [REDACTED] to ICE regarding [REDACTED]
19 [REDACTED]

20 [REDACTED]. PX4097 (Constellation)

21 at 105; PX6062 (Wilhelm (Constellation) Dep. Vol. 2) at 230:6-15; PX6032 (George
22 (Constellation) Dep.) at 82:14-83:7; PX6047 (Sahi (ICE) Dep.) at 95:20-96:7.

23 176. Constellation's president of its mortgage product line [REDACTED]

24 [REDACTED]
25 [REDACTED] and that ICE [REDACTED]

26 PX4134 (Constellation) at 1. [REDACTED]

27 [REDACTED]. PX6049 (Ryczek (Constellation) Dep.) at 114:8-23.

28 177. The proposed divestiture further contemplates a Transition and Separation

1 Services Agreement (“TSSA”) under which ICE would provide Constellation services to ensure
2 that Empower does not [REDACTED]
3 [REDACTED] PX4097 (Constellation) at 135-177; PX6029 (Wilhelm (Constellation)
4 Dep.) at 99:14-20. These services include [REDACTED]
5 [REDACTED]
6 [REDACTED] PX6029 (Wilhelm (Constellation) Dep.) at 100:23-103:2,
7 103:25-106:9.

8 178. One Constellation board member [REDACTED]
9 [REDACTED] in a transition services agreement because [REDACTED]
10 [REDACTED] PX4104 (Constellation) at 1. The executive charged with
11 negotiating the Empower acquisition [REDACTED]. PX6029 (Wilhelm
12 (Constellation) Dep.) at 110:21-111:11.

13 179. Constellation’s founder [REDACTED]
14 [REDACTED] and that Constellation [REDACTED]
15 [REDACTED] PX6062 (Wilhelm (Constellation) Dep. Vol. 2)
16 at 293:17-294:3; PX4099 (Constellation) at 1. The parties [REDACTED]
17 [REDACTED] PX6029 (Wilhelm (Constellation) Dep.) at 91:12-15;
18 PX6062 (Wilhelm (Constellation) Dep. Vol. 2) at 393:17-394:22.

19 180. Bonnie Wilhelm, [REDACTED], PX6062 (Wilhelm
20 (Constellation) Dep. Vol. 2) at 239:18-21, noted to her supervisor [REDACTED]
21 [REDACTED] because of [REDACTED]
22 [REDACTED] PX4107 (Constellation);
23 PX6029 (Wilhelm (Constellation) Dep.) at 193:23-195:10, 195:23-196:7.

24 181. Constellation’s chief investment officer [REDACTED]
25 [REDACTED] which Wilhelm understood to mean that [REDACTED]
26 [REDACTED]
27 [REDACTED] and to which she responded [REDACTED] PX4224
28 (Constellation) at 1; PX6062 (Wilhelm (Constellation) Dep. Vol. 2) at 258:7-259:25.

1 **B. The [REDACTED] Purchase Price of the Divestiture Assets Reflects [REDACTED]**
2 [REDACTED]—And
3 **Defendants Desired to [REDACTED]**

4 182. Although ICE valued Empower at [REDACTED] PX6042 (Clifton
5 (ICE) Dep.) at 212:14-22, and the amended merger agreement (accounting for divestiture of
6 Empower) reduces the purchase price by about \$1.4 billion, PX1697 (ICE) at 2, Defendants
7 agreed to sell Empower and the other divestiture assets for [REDACTED] PX6029 (Wilhelm
8 (Constellation) Dep.) at 72:17-20.

9 183. Wilhelm quipped to another executive: [REDACTED]
10 PX4224 (Constellation) at 1; PX6062 (Wilhelm (Constellation) Dep. Vol. 2) at 249:24-250:18.

11 184. [REDACTED] is one
12 consideration that resulted in Constellation offering [REDACTED]
13 [REDACTED] *See, e.g.*, PX6029 (Wilhelm (Constellation) Dep.) at 48:11-19 [REDACTED]
14 [REDACTED]
15 [REDACTED], 58:2-3 [REDACTED]
16 [REDACTED] PX4222
17 (Constellation) at 1 [REDACTED]
18 [REDACTED]

19 185. At a [REDACTED] purchase price, Constellation’s models showed that [REDACTED]
20 [REDACTED] PX6062 (Wilhelm
21 (Constellation) Dep. Vol. 2) at 223:23-224:7.

22 186. Constellation [REDACTED]
23 [REDACTED] PX6062 (Wilhelm (Constellation) Dep. Vol. 2) at 238:3-239:5; *see also*
24 PX6029 (Wilhelm (Constellation) Dep.) at 72:22-73:23 [REDACTED]
25 [REDACTED]

26 187. Fundamentally, Defendants’ goal in marketing the divestiture assets was [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]. See PX4116 (Constellation) at 8; PX4219 (Constellation) at 1.

2 188. Moreover, ICE instructed its investment bank to [REDACTED]

3 [REDACTED]
4 [REDACTED] PX6054 (Hubbard (Truist) Dep.) at 68:22-69:19, 143:15-145:8; PX6061 (Hubbard
5 (Truist) Dep. Vol. II) at 167:4-171:9.

6 189. Numerous persons at Constellation, including its board members, have expressed

7 [REDACTED]
8 [REDACTED] PX6029 (Wilhelm (Constellation) Dep.) at 109:3-112:17; PX6062 (Wilhelm
9 (Constellation) Dep. Vol. 2) at 287:1-25, 290:3-291:19, 296:13-305:5.

10 190. Constellation's founder and chairman of the board expressed [REDACTED]

11 [REDACTED]
12 [REDACTED] PX4288 (Constellation) at 2.

13 191. And Constellation's former chief financial officer [REDACTED]

14 [REDACTED]
15 [REDACTED] PX4099 (Constellation) at 2.

16 192. Indeed, the Empower acquisition would be [REDACTED]

17 [REDACTED]
18 [REDACTED] PX6062 (Wilhelm (Constellation) Dep. Vol. 2) at 342:2-11, 343:5-10; *see also*
19 PX6032 (George (Constellation) Dep.) at 65:2-21; PX4136 (Constellation) at 3.

20 193. [REDACTED], Constellation's "goal" is to [REDACTED]

21 [REDACTED]
22 [REDACTED]. PX6029 (Wilhelm (Constellation) Dep.) at 200:4-19.

23 Constellation has also considered [REDACTED]

24 [REDACTED] PX6032 (George (Constellation) Dep.) at 69:1-70:8.

25 194. One Constellation executive [REDACTED]

26 [REDACTED]—where
27 Encompass is particularly dominant. PX4133 (Constellation) at 1; PX6032 (George
28 (Constellation) Dep.) at 33:16-36:6; PX2316 (Black Knight) at 39.

FEDERAL TRADE COMMISSION’S PROPOSED CONCLUSIONS OF LAW

1
2 1. Clayton Act § 7 prohibits mergers when “the effect of such acquisition may be
3 substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18.

4 2. Section 7 analysis “necessarily focuses on ‘probabilities, not certainties.’” *St.*
5 *Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys. Ltd.*, 778 F.3d 775, 783 (9th Cir.
6 2015) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)). This entails “‘a
7 prediction of [the merger’s] impact upon competitive conditions in the future; this is what is
8 meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in
9 their incipiency.’” *Id.* (quoting *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 362 (1963)).

10 3. Section 5 of the FTC Act proscribes “[u]nfair methods of competition in or
11 affecting commerce.” 15 U.S.C. § 45(a)(1). An acquisition that violates § 7 of the Clayton Act,
12 by definition, is a violation of Section 5 of the FTC Act. *See, e.g., FTC v. Ind. Fed’n of Dentists*,
13 476 U.S. 447, 454 (1986).

14 4. Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b),
15 authorizes the FTC, whenever it has reason to believe that a proposed merger is unlawful, to
16 seek preliminary injunctive relief to prevent consummation of a merger until the Commission
17 has the opportunity to adjudicate the merger’s legality in an administrative proceeding.

18 5. Specifically, § 13(b) “allows a district court to grant the Commission a
19 preliminary injunction ‘[u]pon a proper showing that, weighing the equities and considering the
20 Commission’s likelihood of ultimate success, such action would be in the public interest.’” *FTC*
21 *v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999) (quoting 15 U.S.C. § 53(b)).

22 6. The statute “places a lighter burden on the Commission than that imposed on
23 private litigants by the traditional equity standard.” *FTC v. Warner Commc’ns Inc.*, 742 F.2d
24 1156, 1159 (9th Cir. 1984). “Under this more lenient standard, ‘a court must 1) determine the
25 likelihood that the Commission will ultimately succeed on the merits and 2) balance the
26 equities.’” *Affordable Media*, 179 F.3d at 1233 (quoting *Warner Commc’ns*, 742 F.2d at 1160).

27 7. In weighing the equities under § 13(b), “public equities receive far greater
28 weight” than private equities. *Warner Commc’ns*, 742 F.2d at 1165.

1 8. Public equities include effective enforcement of the antitrust laws and ensuring
2 the Commission’s ability to obtain adequate relief if it ultimately prevails on the merits. *Id.*

3 9. Preliminary injunctions under § 13(b) “are meant to be readily available to
4 preserve the status quo while the FTC develops its ultimate case.” *FTC v. Whole Foods Mkt.,*
5 *Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008); *accord FTC v. Food Town Stores, Inc.*, 539 F.2d
6 1339, 1342 (4th Cir. 1976) (“The only purpose of a proceeding under § 13 is to preserve the
7 status quo until FTC can perform its function.”).

8 10. The FTC has shown a likelihood of success on the merits of its § 7 challenge in
9 the administrative court, and the equities favor issuing a preliminary injunction.

10 **I. The FTC Is Likely to Succeed on the Merits of Its § 7 Challenge**

11 11. In evaluating the FTC’s likelihood of success on the merits, the Ninth Circuit has
12 explained that the FTC satisfies its burden if it raises questions on the merits “serious” enough
13 to make them “fair ground for thorough investigation, study, deliberation and determination by
14 the FTC in the first instance and ultimately by the Court of Appeals.” *Warner Commc’ns*, 742
15 F.2d at 1162 (quoting *FTC v. Nat’l Tea Co.*, 603 F.2d 694, 698 (8th Cir. 1979)).

16 12. “[A]t this preliminary phase [the FTC] just has to raise substantial doubts about a
17 transaction.” *Whole Foods Mkt., Inc.*, 548 F.3d at 1036.

18 13. The Court’s task “is not ‘to determine whether the antitrust laws have been or are
19 about to be violated.’” *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 67 (D.D.C. 2009)
20 (quoting *Whole Foods Mkt.*, 548 F.3d at 1042 (Tatel, J., concurring)). “That adjudicatory
21 function is vested in the FTC in the first instance.” *Id.*

22 14. Rather, this Court is required only to consider the likelihood that “after an
23 administrative hearing . . . the Commission will succeed in proving that the effect of the
24 [proposed] merger ‘may be substantially to lessen competition, or to tend to create a monopoly’
25 in violation of section 7 of the Clayton Act.” *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C.
26 Cir. 2001) (quoting 15 U.S.C. § 18).

27 15. “[A] section 7 violation is proven upon a showing of reasonable probability of
28 anticompetitive effect.” *Warner Commc’ns*, 742 F.2d at 1160.

1 16. In the merits proceeding—the administrative proceeding—the FTC “must first
2 establish a prima facie case that a merger is anticompetitive.” *St. Alphonsus*, 778 F.3d at 783.

3 17. The FTC may make this showing “by establishing that the merger would produce
4 a ‘firm controlling an undue percentage share of the relevant market, and results in a significant
5 increase in the concentration of firms in that market.’” *United States v. Bazaarvoice, Inc.*, No.
6 13-CV-00133-WHO, 2014 WL 203966, at *64 (N.D. Cal. Jan. 8, 2014) (quoting *Phila. Nat’l*
7 *Bank*, 374 U.S. at 363).³

8 18. “Such a showing establishes a ‘presumption’ that the merger will substantially
9 lessen competition.” *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 23 (D.D.C. 2015) (quoting *United*
10 *States v. Baker Hughes, Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990)).

11 19. This presumption of illegality will be dispositive unless Defendants “clearly
12 show[]” that the Acquisition “is not likely to have such anticompetitive effects.” *United States*
13 *v. Gen. Dynamics Corp.*, 415 U.S. 486, 497 (1974) (quoting *Phila. Nat’l Bank*, 374 U.S. at 363).

14 20. If Defendants do make such a showing, the FTC may nevertheless carry its
15 burden by presenting “additional evidence of anticompetitive effect.” *Bazaarvoice, Inc.*, 2014
16 WL 203966, at *64 (quoting *H.J. Heinz Co.*, 246 F.3d at 715).

17 21. Under § 13(b), the Court’s task is to assess the FTC’s likelihood of success in the
18 administrative proceeding under this burden-shifting framework. *Sysco Corp.*, 113 F. Supp. 3d
19 at 22-23.

20 22. Because the issue of whether the FTC has presented evidence to raise substantial
21 doubts about the Acquisition is a “narrow one,” the Court need not “resolve the conflicts in the
22 evidence, compare concentration ratios and effects on competition in other cases, or undertake
23 an extensive analysis of the antitrust issues.” *Warner Commc’ns Inc.*, 742 F.2d at 1164.

24 23. “[D]oubts are to be resolved against the transaction.” *FTC v. Elders Grain, Inc.*,
25 868 F.2d 901, 906 (7th Cir. 1989) (citing *Phila. Nat’l Bank*, 374 U.S. at 362-63).

26 24. Although the standard at this preliminary stage requires only that the FTC raise

27 ³ Like other DOJ federal-court merger challenge cases cited herein, *Bazaarvoice, Inc.* was
28 decided after a full merits trial. 2014 WL 203966, at *2. Unlike the FTC, the DOJ does not house
an adjudicatory and remedial function akin to that embedded in the FTC’s statutory construction.

1 “substantial doubts” about the Acquisition, the evidence here indicates that the Acquisition (1)
 2 may substantially lessen competition in both the commercial LOS and broader all-LOS markets
 3 by combining the two dominant LOSs in the United States; (2) may substantially lessen
 4 competition in the markets for PPEs for Encompass users and all PPEs by combining ownership
 5 of the two leading PPEs in the United States; and (3) by cementing ICE’s dominant LOS and
 6 PPE position, will likely increase ICE’s ability and incentive to disadvantage competing PPE
 7 providers who depend upon access to Encompass to serve their own customers.

8 25. Defendants thus cannot “clearly show” that the Acquisition “is not likely to have
 9 such anticompetitive effects,” *see Gen. Dynamics Corp.*, 415 U.S. at 497, let alone dispel the
 10 “substantial doubts” raised by the ample evidence. *See Whole Foods Mkt.*, 548 F.3d at 1036.

11 26. The FTC is thus likely to succeed at the administrative hearing in proving that
 12 the effect of the Acquisition may be substantially to lessen competition or to tend to create a
 13 monopoly.

14 **A. The Acquisition Is Presumptively Illegal and Likely to Cause**
 15 **Anticompetitive Effects in the Markets for Commercial LOSs and All LOSs**

16 **1. Commercial LOSs and All LOSs Are Relevant Product Markets**

17 27. The Supreme Court has recognized that § 7 prohibits acquisitions that may
 18 “substantially lessen competition within the area of effective competition.” *Brown Shoe*, 370
 19 U.S. at 324 (quoting *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957))
 20 (internal quotations omitted).

21 28. To determine the “area of effective competition,” courts “reference . . . a product
 22 market (the ‘line of commerce’) and a geographic market (the ‘section of the country’).” *Brown*
 23 *Shoe Co.*, 370 U.S. at 324.

24 29. At the § 13(b) preliminary injunction stage, the FTC need not prove the exact
 25 delineations of a market, and rather must only “rais[e] some question of whether [the candidate
 26 market] is a well-defined market.” *Whole Foods Mkt., Inc.*, 548 F.3d at 1036-37, 1041.

27 30. A relevant product market consists of “products that have reasonable
 28 interchangeability for the purposes for which they are produced—price, use and qualities

1 considered.” *du Pont*, 351 U.S. at 404.

2 31. In defining relevant product markets, courts evaluate “such practical indicia as
3 industry or public recognition of the [relevant market] as a separate economic entity, the
4 product’s peculiar characteristics and uses, unique production facilities, distinct customers,
5 distinct prices, sensitivity to price changes, and specialized vendors.” *Brown Shoe Co.* 370 U.S.
6 at 325; *accord, e.g., FTC v. Meta Platforms Inc.*, No. 5:22-CV-04325-EJD, 2023 WL 2346238,
7 at *9 (N.D. Cal. Feb. 3, 2023). Relevant markets “can exist even if only some of these [*Brown*
8 *Shoe*] factors are present.” *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1075 (D.D.C. 1997).

9 32. Courts also can look to quantitative evidence of interchangeability derived from
10 the hypothetical monopolist test. *E.g., Sysco Corp.*, 113 F. Supp. 3d at 27, 33-34.

11 33. In this case, the *Brown Shoe* practical indicia and hypothetical monopolist test
12 both reflect that markets comprising (1) commercial LOSs and (2) all LOSs are appropriate
13 product markets in which to evaluate the Acquisition.

14 34. Commercial LOSs, and LOSs more generally, exhibit several of the *Brown Shoe*
15 factors, *see supra* FOF ¶¶ 15-31.

16 a. *Peculiar characteristics and uses.* Lenders rely on LOSs as their system of record
17 and to coordinate their workflows with the many ancillary services they use in
18 connection with loan origination. PX6046 (Tyrrell (ICE) Dep.) at 17:20-18:9, 23:4-
19 13; PX6047 (Sahi (ICE) Dep.) at 25:7-26:4. No other software serves the same
20 purpose. PX6043 (██████████ (Polly) Dep.) at 115:23-117:17.

21 b. *Industry recognition.* ██████████, routinely
22 recognize LOSs as a distinct market in the ordinary course of their business. *E.g.*,
23 PX2525 (Black Knight) at 7; PX1706 (ICE) at 2.

24 c. *Specialized vendors and unique production facilities.* Firms such as ICE and Black
25 Knight specialize in developing, optimizing, and maintaining LOSs. *E.g.*, PX2523
26 (Black Knight) at 3; PX6046 (Tyrrell (ICE) Dep.) at 128:18-132:19.

27 d. *Distinct customers.* ██████████ rely on commercial LOSs, rather than
28 proprietary LOSs. PX2022 (Black Knight) at 8. In practical terms, that ██████████

1 [REDACTED] rely on commercial LOSs reflects that these customers have
2 unique needs and preferences satisfied by commercial LOSs. *See, e.g., Whole Foods*
3 *Mkt.*, 548 F.3d at 1037-40 (“In short, a core group of particularly dedicated distinct
4 customers paying distinct prices may constitute a recognizable submarket.”).

5 35. Further, both the commercial LOS market and the broader market for all LOSs
6 satisfy the hypothetical monopolist test.

7 36. This test asks whether a hypothetical monopolist of products within a proposed
8 market could profitably impose a small but significant and nontransitory increase in price
9 (“SSNIP”). Merger Guidelines § 4.1.1; *see also Theme Promotions, Inc. v. News Am. Mktg. FSI*,
10 546 F.3d 991, 1002 (9th Cir. 2008); *Bazaarvoice, Inc.*, 2014 WL 203966, at *28.

11 37. As discussed in the expert report of Dr. Sacher, because of the challenges
12 associated with developing and operating a proprietary LOS, a SSNIP by a hypothetical
13 monopolist of commercial LOSs would not be defeated by lenders switching to proprietary
14 LOSs. PX8000 (Sacher (FTC) Rep.) ¶¶ 154-59.

15 38. Consistent with this conclusion, ICE’s Encompass LOS has maintained a [REDACTED]
16 [REDACTED], PX1711 (ICE) at 5; PX2319 (Black Knight) at 7, despite [REDACTED]
17 [REDACTED]. *E.g.*, PX6046 (Tyrrell (ICE) Dep.) at 36:17-24;
18 PX1096 (ICE) at 13.

19 39. Similarly, because mortgage lenders lack an adequate substitute for LOSs, a
20 hypothetical monopolist of LOSs could profitably impose a SSNIP, thus the broader market for
21 all LOSs constitutes a relevant antitrust market. PX8000 (Sacher (FTC) Rep.) ¶¶ 129-146.

22 **2. The Acquisition Creates a Presumptively Illegal Increase in Concentration in**
23 **the Relevant LOS Product Markets**

24 40. In assessing a proposed merger’s effects on competition, courts commonly
25 employ a statistical measure of market concentration called the Herfindahl-Hirschman Index
26 (“HHI”). “Mergers that increase the HHI more than 200 points and result in highly concentrated
27 markets are ‘presumed to be likely to enhance market power.’ Sufficiently large HHI figures
28 establish the FTC’s prima facie case that a merger is anti-competitive.” *St. Alphonsus*, 778 F.3d

1 at 786 (quoting Merger Guidelines § 5.3 and *H.J. Heinz*, 246 F.3d at 716).

2 41. Based on HMDA data and Defendants' own documents, the Acquisition will
3 result in an HHI of at least [REDACTED] and an increase of at least [REDACTED] points in the commercial LOS
4 market. PX8000 (Sacher (FTC) Rep.) Tables 11-12.

5 42. In the broader all-LOS market, the Acquisition will result in an HHI of at least
6 [REDACTED] and an increase of at least [REDACTED] points. *Id.* at Tables 9-10.

7 43. In both markets, the Acquisition therefore leads to a highly concentrated market
8 and a presumption of illegality. *See St. Alphonsus*, 778 F.3d at 786; Merger Guidelines § 5.3.

9 **3. There Is a Reasonable Probability that the Acquisition Will Result in**
10 **Anticompetitive Effects in the Relevant LOS Product Markets**

11 44. The presumption of illegality based on market concentration for the relevant
12 LOS product markets is reinforced by ample evidence demonstrating that the Acquisition will
13 eliminate head-to-head LOS competition that benefits Defendants' customers today. *See, e.g.,*
14 *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 173 (3d. Cir. 2022).

15 45. Black Knight's former CEO and current chairman described Encompass
16 developer Ellie Mae, just prior to its 2020 acquisition by ICE, as [REDACTED]
17 [REDACTED] PX2033 (Black Knight) at 19; *see also*
18 PX6033 (Larsen (Black Knight) Dep.) at 39:21-40:7; PX6053 (Eagerton (Black Knight) Dep.)
19 at 105:19-106:5; *supra* FOF ¶¶ 65-72.

20 46. The combination of ICE and Black Knight will eliminate this direct, frequent,
21 head-to-head competition to provide [REDACTED] for their LOS
22 customers. *See supra* FOF ¶¶ 75-86.

23 47. The diminished competitive pressure on ICE post-Acquisition also will allow it
24 to act more freely on [REDACTED]. *See supra* FOF ¶¶ 85-93.

25 48. [REDACTED]
26 [REDACTED]. *E.g.*, PX6038 [REDACTED] (Mutual of
27 Omaha) Dep.) at 71:8-18, 92:10-93:12, 99:18-101:2; PX7001 ([REDACTED] (Mutual of Omaha) Nov.
28 10, 2022 Decl.) ¶ 14; PX6069 ([REDACTED] (loanDepot) Dep.) at 106:3-107:5; PX7003 ([REDACTED]

(loanDepot) Nov. 14, 2022 Decl.) ¶ 15; PX6051 (Impac) Dep.) at 28:9-29:14; PX6035 (Umpqua) Dep.) at 121:10-20 (discussing PX4154 (Umpqua) at 1).

49. In sum, the Acquisition is presumptively illegal because of the increase in concentration in the commercial LOS and all LOS markets. Beyond this presumption, the Acquisition will eliminate head-to-head LOS competition that directly benefits Defendants' customers today.

B. The Acquisition Is Presumptively Illegal and Reasonably Likely to Cause Anticompetitive Effects in the Relevant PPE Product Markets

1. PPEs for Encompass Users and All PPEs Are Relevant Product Markets

50. “[A]ntitrust markets can be based on targeted customers.” *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 46 (D.D.C. 2018).

51. Moreover, “[t]wo products that are differentiated from one another may nonetheless compete.” *E.g., United States v. Cont’l Can Co.*, 378 U.S. 441, 449-53 (1964).

52. The markets for PPEs for Encompass users and all PPEs both exhibit multiple *Brown Shoe* practical indicia, *see supra* FOF ¶¶ 36-52:

a. *Peculiar characteristics and uses.* Mortgage lenders use PPEs to determine how to price a mortgage and to lock the mortgage. PX6035 (Umpqua) Dep.) at 20:9-21:1; PX6038 (Mutual of Omaha) Dep.) at 19:22-20:3; PX6021 (Lyons (ICE) Dep.) at 47:22-48:18. No other product performs this service. PX6043 (Polly) Dep.) at 117:3-17.

b. *Industry recognition.* PPEs as a distinct product. *See* PX6035 (Umpqua) Dep.) at 122:25-123:19; PX7007 (Umpqua) Feb. 14, 2023 Decl.) ¶ 7 (Lender Price) IH) at 27:21-30:5 31:18-32:13; PX1166 (ICE) at 42; PX2259 (Black Knight) at 8.

1 [REDACTED]. PX1640 (ICE) at 8.

2 c. *Distinct customers.* Mortgage lenders constitute distinct customers who use PPEs.

3 Further, these lenders [REDACTED]

4 [REDACTED] PX1698 (ICE) at 3-5. Users of

5 Encompass thus are a distinct set of customers for PPEs on the Encompass LOS.

6 d. *Specialized vendors.* PPEs integrated with Encompass thus exhibit peculiar

7 characteristics and uses—namely offering the functionality of a PPE and integration

8 with Encompass—and are furnished by a limited selection of specialized vendors

9 integrated with Encompass, which supports a finding that PPEs for users of

10 Encompass constitute a relevant product market.

11 53. The hypothetical monopolist test confirms that PPEs for Encompass users
12 constitute a relevant product market: In the event of a SSNIP for PPEs for Encompass users,
13 lenders would not switch to alternative LOSs, PPEs not integrated with Encompass, or other
14 methods of performing the origination-related functions for which they use PPEs in sufficient
15 volumes to render the price increase unprofitable. PX8000 (Sacher (FTC) Rep.) ¶¶ 202-215.

16 54. Likewise, in the event of a SSNIP on all PPEs by a hypothetical monopolist,
17 lenders would not switch to alternate methods of pricing and locking loans in sufficient numbers
18 to render the price increase unprofitable. *Id.* ¶ 201.

19 **2. The Acquisition Creates a Presumptively Illegal Increase in Concentration in**
20 **the Relevant PPE Product Markets**

21 55. “[A] merger which significantly increases the share and concentration of firms in
22 the relevant market is ‘so inherently likely to lessen competition’ that it must be considered
23 presumptively invalid and enjoined in the absence of clear evidence to the contrary.” *FTC v.*
24 *Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 52 (D.D.C. 1998) (quoting *Phila. Nat’l Bank*, 374
25 U.S. at 363).

26 56. In *Philadelphia National Bank*, the Supreme Court wrote: “Without attempting
27 to specify the smallest market share which would still be considered to threaten undue
28 concentration, we are clear that 30% presents that threat.” 374 U.S. at 364.

1 57. The PPE market shares at issue take this case well beyond the thresholds
2 discussed in *Philadelphia National Bank*, and lead to a clear presumption of illegality.

3 58. These shares result in a combined post-Acquisition market share of [REDACTED] with an
4 HHI over [REDACTED] and an increase of more than [REDACTED] points (PX8000 (Sacher (FTC) Rep.) Table
5 15), far in excess of the thresholds that create a presumption of enhanced market power and
6 illegality. *See St. Alphonsus*, 778 F.3d at 786, 788; Merger Guidelines § 5.3.

7 59. The same is true of the broader market for all PPEs, where Black Knight
8 estimates that its Optimal Blue boasts a [REDACTED] market share. PX2311 (Black Knight) at 5.

9 60. Although EPPS is [REDACTED], Encompass's
10 dominance combined with [REDACTED]
11 [REDACTED] even in an all-PPE market. PX1166 (ICE) at 42.

12 61. Defendants' combined post-Acquisition all-PPE market share thus significantly
13 exceeds the combined shares found sufficient to trigger a presumption of undue concentration
14 and illegality under *Philadelphia National Bank* and its progeny.

15 **3. There Is a Reasonable Probability that the Acquisition Will Result in**
16 **Anticompetitive Effects in the Relevant PPE Product Markets**

17 **a) The Acquisition Will Eliminate Head-to-Head PPE Competition**
18 **Between ICE and Black Knight**

19 62. The Acquisition also is likely to violate § 7 because it will eliminate significant,
20 head-to-head PPE competition that benefits Defendants' customers today and which has
21 resulted in [REDACTED] and other value for lenders. *See also supra* FOF ¶¶ 102-118.

22 63. [REDACTED] analyzed by the FTC's economic expert
23 [REDACTED].
24 PX8000 (Sacher (FTC) Rep.) ¶¶ 433-37.

25 64. [REDACTED], the FTC's expert, Dr. Sacher, modeled that PPE
26 prices for Encompass users may increase [REDACTED] post-Acquisition due to the elimination
27 of competition between EPPS and Optimal Blue, depending on the methodology and
28 assumptions applied. *Id.* ¶¶ 32-38.

1 65. The loss of competitive pressure on ICE has already manifested in [REDACTED]
2 [REDACTED] illustrates the
3 [REDACTED] competition already lost due to the Acquisition. *See supra* FOF ¶¶ 113-123.

4 66. Moreover, [REDACTED]
5 [REDACTED]
6 [REDACTED].
7 PX1100 (ICE) at 4; PX6046 (Tyrrell (ICE) Dep.) at 141:20-142:13 (discussing PX1100 (ICE)).

8 67. In light of the evidence of head-to-head PPE competition that will cease to exist
9 post-Acquisition, coupled with [REDACTED]
10 [REDACTED] Defendants will not be able to overcome the presumption of competitive harm
11 from the consolidation of the markets for PPEs for Encompass users and all PPEs.

12 **b) The Acquisition Will Likely Increase ICE’s Ability and Incentive to**
13 **Foreclose Competition from Other PPE Providers**

14 68. As the Supreme Court has explained, “[t]he primary vice of a vertical merger . . .
15 is that, by foreclosing the competitors of either party from a segment of the market otherwise
16 open to them, the arrangement may act as a clog on competition, . . . which deprives rivals of a
17 fair opportunity to compete.” *Brown Shoe Co.*, 370 U.S. at 323-24 (cleaned up).

18 69. Complete foreclosure is not required for a merger to run afoul of the Clayton
19 Act. *See id.* at 323 n.39 (explaining that goal of § 7 is “to arrest restraints of trade in their
20 incipency”). “Such foreclosure may be achieved by increasing prices, withholding or degrading
21 access, reducing service or support, or otherwise increasing the costs or reducing the efficiency
22 or efficacy” of rival products. *In re Illumina, Inc.*, No. 9401, 2023 WL 2823393, at 32 (FTC
23 Mar. 31, 2023).

24 70. “Case law provides two different . . . standards for evaluating the likely effect of
25 a vertical transaction.” *In re Illumina, Inc.*, 2023 WL 2823393, at *32. Courts may evaluate a
26 vertical transaction through a set of factors discussed by the Supreme Court in *Brown Shoe Co.*,
27 370 U.S. at 328-34. More recently, “courts . . . have focused on whether a transaction is likely
28 to increase the ability and/or incentive of the merged firm to foreclose rivals.” *In re Illumina*,

1 *Inc.*, 2023 WL 2823393, at *33.

2 71. Factors discussed by the Supreme Court in *Brown Shoe Co.* to assess the effects
3 of a vertical merger include any “trend toward concentration in the industry” and entry barriers,
4 among others. 370 U.S. at 328-34; *Ford Motor Co.*, 405 U.S. at 566-70; *see also In re Illumina,*
5 *Inc.*, 2023 WL 2823393, at *33.

6 72. The multifactor analysis of *Brown Shoe* is not a “precise formula[,]” and not
7 every factor must be present or even considered for a finding of liability. *In re Illumina, Inc.*,
8 2023 WL 2823393, at *33; *see Ford Motor Co.*, 405 U.S. at 566-71 (affirming finding of
9 illegality and considering trend of concentration, amount of foreclosure, and barriers to entry).

10 73. The ability and incentive analysis focuses “on whether a transaction is likely to
11 increase the ability and/or incentive of the merged firm to foreclose rivals.” *In re Illumina, Inc.*,
12 2023 WL 2823393, at *33.

13 74. Satisfying both the *Brown Shoe* and ability and incentive standards is not
14 required to find liability—either method can provide the basis for a liability determination. *See*
15 *In re Illumina, Inc.*, 2023 WL 2823393, at *33.

16 75. Here, there is a “trend toward concentration in the industry.” *Brown Shoe Co.*,
17 370 U.S. at 332-33; *supra* FOF ¶ 95; *cf. Warner Commc’ns Inc.*, 742 F.2d at 1162–63 (listing
18 “industry trends toward concentration, the degree of concentration within the industry, prior
19 mergers by the firms in question and the barriers to entry in the industry” among “[f]actors to
20 consider when determining the impact on competition” in case involving horizontal merger).”

21 76. The Acquisition also would increase entry barriers in the relevant PPE product
22 markets. *See Ford Motor Co.*, 405 U.S. at 568-72; *supra* FOF ¶¶ 53-57, 145-48.

23 77. Moreover, the Acquisition may substantially lessen competition in the relevant
24 PPE markets by increasing ICE’s ability and incentive to disadvantage competing third-party
25 PPE providers. *In re Illumina, Inc.*, 2023 WL 2946882 at *35, *39-43.

26 78. PPEs depend on LOS integration to automate and enable aspects of PPE
27 functionality, and [REDACTED]
28 [REDACTED]. *Supra* FOF ¶¶ 46-52.

1 79. Third-party PPE providers integrated with Encompass today [REDACTED]
2 [REDACTED]. PX6043 ([REDACTED] (Polly) Dep.) at 85:18-88:1; PX6007
3 [REDACTED] (Lender Price) IH) at 176:11-25, 181:1-12; *see also supra* FOF ¶¶ 46-52, 134-37.

4 80. After acquiring Black Knight and Optimal Blue, however, ICE's [REDACTED]
5 [REDACTED], freeing ICE to disadvantage
6 competing PPEs that rely on integration with Encompass. *See supra* FOF ¶¶ 141-42, 146-48.

7 81. ICE currently possesses the technical ability to disadvantage competing PPEs
8 integrated with Encompass. *See supra* FOF ¶¶ 134-144. ICE also has contractual levers to
9 disadvantage competing PPEs who rely on Encompass integration. *Supra id.* ¶¶ 127-133.

10 82. By eliminating Black Knight's Optimal Blue as a competitive threat, however,
11 the Acquisition will remove the current competition that has motivated ICE to collaborate [REDACTED]
12 [REDACTED]. *See supra id.* ¶¶ 141-42.

13 83. The Acquisition will also amplify ICE's financial incentives to disadvantage
14 competing Encompass-integrated PPEs. *See supra id.* ¶¶ 145-48.

15 84. Because of Optimal Blue's [REDACTED] share among Encompass users, after
16 the Acquisition ICE will stand to recapture via Optimal Blue [REDACTED] of
17 business lost by competing PPE providers as a result of any foreclosure or other disadvantages
18 that ICE may inflict. PX8000 (Sacher (FTC) Rep.) ¶¶ 494-505; *see also supra* FOF ¶¶ 145-48.

19 85. When a third-party PPE's customer switches to Optimal Blue after the
20 Acquisition, ICE will realize [REDACTED] associated with the customer's PPE use.
21 Because ICE will stand to gain a larger proportion of third-party PPE providers' lost business
22 and revenue after the Acquisition, its incentive to disadvantage those PPE competitors will
23 increase. PX8000 (Sacher (FTC) Rep.) ¶ 505; *see also supra* FOF ¶¶ 145-48.

24 **C. Defendants Cannot Rebut Plaintiff's Prima Facie Case**

25 86. Under the § 7 burden-shifting framework, once the FTC establishes its prima
26 facie case, the burden shifts to Defendants to rebut that case. *St. Alphonsus*, 778 F.3d at 783.

27 **1. Defendants Cannot Demonstrate that the Divestiture Will Restore Competition**

28 87. When a merger violates § 7, an injunction prohibiting the merger is the "default

1 remedy.” *In re Illumina, Inc.*, 2023 WL 2946882, at *53; *see also du Pont*, 366 U.S. at 329
2 (“The very words of § 7 suggest that an undoing of the acquisition is a natural remedy.”).

3 88. Further, “it is well settled that once the Government has successfully borne the
4 considerable burden of establishing a violation of the law, all doubts as to the remedy are to be
5 resolved in its favor.” *St. Alphonsus*, 778 F.3d at 793 (quoting *du Pont*, 366 U.S. at 334).

6 89. The HSR Act requires merging parties to file notification of transactions
7 exceeding certain thresholds. 15 U.S.C. § 18a. In enacting the HSR Act, one goal of Congress
8 was to give the FTC advance notice of an impending merger, to provide a “meaningful chance
9 to carry its burden of proof, and win a preliminary injunction against a merger that appears to
10 violate [Clayton Act] section 7.” H.R. Rep. No. 94-1373, at 8 (1976).

11 90. Some courts thus recognize that when merging parties propose a divestiture to
12 address antitrust concerns, they are proposing a solution to problems created by the merger
13 rather than a wholly new transaction, and thus bear the burden of showing the divestiture will
14 restore competition. *See United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 59-60 (D.D.C. 2017).

15 91. At the administrative proceeding, consideration of a remedy generally comes
16 only after a determination of the reasonably likely competitive effects of the Acquisition. *In re*
17 *Illumina, Inc.*, 2023 WL 2946882, at *51.

18 92. While some courts have inquired into the merits of a divestiture at the rebuttal
19 stage of the § 7 burden-shifting analysis, *see id.* at *60, under either approach, Defendants bear
20 the heavy burden to establish that their proposed divestiture would “‘restore competition,’
21 ‘eliminate the effects’ of the Acquisition, and replace the lost competitive intensity.” *Id.* at *53
22 (quoting *Ford Motor Co.*, 405 U.S. at 573 & n.8); *accord Staples*, 190 F. Supp. 3d at 137 n.15.

23 93. “Restoring competition requires replacing the competitive intensity lost as a
24 result of the merger rather than focusing narrowly on returning to premerger HHI levels.” *Sysco*
25 *Corp.*, 113 F. Supp. 3d at 72 (quoting Antitrust Div., U.S. Dep’t of Justice, Antitrust Division
26 Policy Guide to Merger Remedies 5 (2004)).

27 94. To assess whether merging parties have met their burden to show that a remedy
28 will restore competition, courts consider factors including whether a divestiture transfers an

1 intact business or a “lesser set of assets,” results in continuing entanglement between the seller
2 and divestiture buyer, or involves a low purchase price. *Aetna*, 240 F. Supp. 3d at 60, 72-73.

3 95. Defendants will not be able to make the required showing in the Administrative
4 Proceeding that the proposed divestiture will restore competition.

5 96. *First*, Defendants’ proposed divestiture fails outright as a remedy because it does
6 not address the anticompetitive harms the Acquisition likely will cause in the markets for PPEs
7 for Encompass users and for all PPEs. As explained above, the Acquisition is likely to result in
8 competitive harms in these PPE markets largely as a result of ICE’s acquisition of Black
9 Knight’s Optimal Blue PPE. *Supra* COL ¶¶ 55-85. The proposed divestiture, however, does not
10 include Optimal Blue. *Supra* FOF ¶ 162.

11 97. *Second*, because Constellation would receive only a fragment of Black Knight’s
12 business, the divestiture would fail to replace the competitive intensity lost as a result of the
13 Acquisition. Although Constellation would acquire some of the Black Knight services
14 integrated with Empower through the divestiture, it would rely on contracts with ICE to provide
15 the remainder, including the industry-leading Optimal Blue PPE. *See supra* FOF ¶¶ 165-69.
16 Constellation will be unable to offer the single point of contact for pricing, contracts, and
17 vendor management that Black Knight [REDACTED]. *See id.* ¶¶
18 170-74. Between its diminished flexibility to [REDACTED] and its inability to
19 provide lenders the convenience of a single point of contact, Constellation will be unable to
20 replicate Black Knight’s current competitive intensity.

21 98. *Third*, Defendants’ proposed divestiture also is fundamentally flawed because it
22 would create myriad contractual entanglements between ICE and Constellation [REDACTED]. *Supra*
23 *id.* ¶¶ 165-181. “Courts are skeptical of a divestiture that relies on a ‘continuing relationship
24 between the seller and buyer of divested assets’ because that leaves the buyer susceptible to the
25 seller’s actions—which are not aligned with ensuring that the buyer is an effective competitor.”
26 *Aetna*, 240 F. Supp. 3d at 60 (quoting *Sysco Corp.*, 113 F. Supp. 3d at 77).

27 99. As part of the proposed divestiture, Defendants and Constellation contemplate
28 executing an array of ongoing agreements. Of particular concern, Constellation will depend on a

1 Commercial Agreement with ICE to provide its customers with many Empower-integrated
 2 services that Black Knight owns today but that ICE will own after the Acquisition, including
 3 Optimal Blue. PX4097 (Constellation) at 100, 117-19. *Supra* FOF ¶¶ 165-69.

4 100. Constellation executives have acknowledged that these agreements will [REDACTED]
 5 [REDACTED] (PX4138 (Constellation) at 5) and [REDACTED]
 6 [REDACTED] PX6032 (George (Constellation) Dep.) at 76:14-
 7 25, 88:18-24; PX4142 (Constellation) at 4 [REDACTED]
 8 [REDACTED] PX4224 (Constellation) at 1 (after
 9 the deal closes, Constellation will be [REDACTED] PX6062 (Wilhelm
 10 (Constellation) Dep. Vol. 2) at 253:22-256:2 (same). [REDACTED]
 11 [REDACTED]. PX4097
 12 (Constellation) at 105 §§ 9.5-9.6; PX6032 (George (Constellation) Dep.) at 82:14-83:7.

13 101. In this case, a divestiture so likely to ensure that the buyer never becomes a
 14 credible competitive threat should not be endorsed. *Sysco Corp.*, 113 F. Supp. 3d at 77-78.
 15 Indeed, the court in *Sysco Corp.* rejected [REDACTED],
 16 finding that ongoing entanglement between the merged company and divestiture buyer rendered
 17 them “not . . . truly independent.” *Id.*; accord *CCC Holdings Inc.*, 605 F. Supp. 2d at 59 (it is a
 18 “problem” to allow “continuing relationships between the seller and buyer of divested assets
 19 after divestiture, such as a supply arrangement or technical assistance requirement, which may
 20 increase the buyer’s vulnerability to the seller’s behavior”).

21 102. *Fourth*, the [REDACTED] purchase price of the divestiture assets reflects [REDACTED]
 22 [REDACTED]. *See supra* FOF ¶¶ 182-194. “An
 23 extremely low purchase price reveals the divergent interest between the divestiture purchaser
 24 and the consumer: an inexpensive acquisition could still ‘produce something of value to the
 25 purchaser’ even if it does not become a significant competitor and therefore would not ‘cure the
 26 competitive concerns.’” *Aetna*, 240 F. Supp. 3d at 72 (quoting Antitrust Div., U.S. Dep’t of
 27 Justice, Policy Guide to Merger Remedies 9 (2011)).

28 103. Constellation has agreed to pay [REDACTED] for Empower and the

1 divestiture assets, though [REDACTED] (PX6032
 2 (George (Constellation) Dep.) at 29:19-22; PX6042 (Clifton (ICE) Dep.) at 212:14-22), and the
 3 amended merger agreement (accounting for divestiture of Empower) reduces the purchase price
 4 by about \$1.4 billion (PX1697 (ICE) at 2). [REDACTED]

5 [REDACTED]
 6 [REDACTED]. *Supra* FOF ¶¶ 182-194.

7 104. [REDACTED]

8 [REDACTED]
 9 [REDACTED]. PX6032 (George (Constellation)
 10 Dep.) at 69:1-70:8. [REDACTED]

11 [REDACTED]
 12 [REDACTED] *Aetna*, 240 F. Supp. 3d at 72, and thus
 13 the divestiture is unlikely to restore lost competition. *See id.*

14 **2. Defendants Cannot Demonstrate that Entry Will Be Timely, Likely, and**
 15 **Sufficient to Counteract the Acquisition's Anticompetitive Effects**

16 105. Defendants also cannot rebut the FTC's prima facie case by showing that entry
 17 will be timely, likely, and sufficient to counteract the competitive harms of the Acquisition. *See*
 18 *Bazaarvoice*, 2014 WL 203966, at *71.

19 106. LOS and PPE markets are characterized by high barriers to entry. Black Knight
 20 itself has estimated that to develop a new commercial LOS would cost at least [REDACTED] and
 21 take at least [REDACTED]. PX0021 (Black Knight) at 95-97; *see also supra* FOF ¶¶ 32.

22 107. Any LOS entrant or existing provider seeking to reposition also must overcome
 23 lenders' high switching costs, lengthy switching timelines, and general reluctance to switch to
 24 untested LOSs. *E.g.*, PX1158 (ICE) at 4-6; PX8000 (Sacher (FTC) Rep.) ¶¶ 567-69, 575-80; *see*
 25 *also supra* FOF ¶¶ 33-35.

26 108. New entry or repositioning of PPEs is similarly unlikely. *Supra* FOF ¶¶ 53-57.

27 **3. Defendants Fail to Establish Cognizable, Merger-Specific Efficiencies that**
 28 **Outweigh the Acquisition's Anticompetitive Effects**

1 109. The “Supreme Court has never expressly approved an efficiencies defense to a §
2 7 claim,” and the Ninth Circuit “remain[s] skeptical about the efficiencies defense in general
3 and about its scope in particular.” *St. Alphonsus*, 778 F.3d at 788-90.

4 110. To the extent efficiencies supply any defense of an otherwise anticompetitive
5 transaction, the burden would be on Defendants to “clearly demonstrate” proof of
6 “extraordinary efficiencies” that are merger-specific and verifiable. *Id.* at 790-91.

7 111. Here, ICE has claimed a shifting set of loosely defined efficiencies of varying
8 amounts that fail to satisfy the applicable standard. *See supra* FOF ¶¶ 150-161.

9 112. Joe Tyrrell, former President of ICE’s Mortgage Technology division, stated
10 much of the basis for [REDACTED] PX6046 (Tyrrell (ICE) Dep.) at
11 158:24-159:6, [REDACTED] *Id.* at 162:6-9. And ICE’s analysis of
12 [REDACTED] is only a [REDACTED]
13 [REDACTED] PX6034 (Jackson (ICE) Dep.) at 120:19-121:18.

14 113. These [REDACTED] and [REDACTED] do not clearly demonstrate proof of
15 extraordinary, merger-specific, verifiable efficiencies.

16 4. The Constitutional Affirmative Defenses Are Irrelevant to the § 13(b) Inquiry

17 114. Defendants have raised various affirmative defenses concerning the FTC’s
18 process and powers.

19 115. As one court in this District concluded, it follows from the limited scope of the
20 inquiry in a § 13(b) case that determining the likelihood of success “on the merits” means
21 determining “the action’s Section 7 antitrust merits, as distinguishable from any procedural due
22 process issues arising from the FTC’s proceedings.” *FTC v. Meta Platforms Inc.*, No. 5:22-CV-
23 04325-EJD, 2022 WL 16637996, at 6 (N.D. Cal. Nov. 2, 2022).

24 116. Indeed, the “oft-cited standard for ‘likelihood of ultimate success’ describes
25 merits questions [in a § 13(b) proceeding] as those that would require ‘thorough investigation,
26 study, deliberation, and determination by the FTC,’ a characterization that is consistent with a
27 ‘preliminary assessment of a merger’s impact on competition.’” *Id.* at *6 (quoting *Warner*, 742
28 F.2d at 1162).

1 117. Accordingly, affirmative defenses arising out of alleged procedural defects (even
2 constitutional procedural defects) are not pertinent to deciding whether to grant preliminary
3 relief pursuant to § 13(b) of the Federal Trade Commission Act. *See id.* at *7. (“[T]o the extent
4 Defendants’ constitutional defenses are predicated on . . . bias or procedural deficiencies, these
5 defenses would likewise be stricken without leave to amend.”).

6 **II. The Equities Support a Preliminary Injunction**

7 118. Under § 13(b), this Court must also “balance the equities.” *Warner Commc’ns*,
8 742 F.2d at 1165. If the FTC has shown a likelihood of success, “a countershowning of private
9 equities alone does not justify denial of a preliminary injunction.” *Id.*

10 119. The “principal public equity” favoring a preliminary injunction is “the public
11 interest in effective enforcement of the antitrust laws.” *H.J. Heinz*, 246 F.3d at 726.

12 120. Without preliminary relief, the Commission may face the “daunting and
13 potentially impossible task” of “unscrambling the eggs” if the Acquisition is deemed unlawful.
14 *FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 918 (E.D. Mo. 2020) (quoting *Sysco*, 113
15 F. Supp. 3d at 87). As such, “[n]o court has denied relief to the FTC in a 13(b) proceeding in
16 which the FTC has demonstrated a likelihood of success on the merits.” *FTC v. ProMedica*
17 *Health Sys., Inc.*, No. 3:11-CV-47, 2011 WL 1219281, at *60 (N.D. Ohio Mar. 29, 2011).

18 121. Defendants’ consideration of how long they will wait to merge is a private
19 concern outweighed by public interests in effective enforcement of the antitrust laws. *E.g., Wilh.*
20 *Wilhelmsen Holding*, 341 F. Supp. 3d at 74. Such private concerns receive “little weight” in
21 § 13(b) proceedings, to avoid undermining the statute’s “purpose of protecting the ‘public-at-
22 large, rather than individual private competitors.’” *FTC v. Univ. Health, Inc.*, 938 F.2d 1206,
23 1225 (11th Cir. 1991) (quoting *Nat’l Tea Co.*, 603 F.2d at 697 n.4).

24 122. On the other hand, allowing Defendants to merge could prevent the FTC from
25 ordering relief to preserve competition and enforce the antitrust laws were it to prevail in the
26 administrative proceeding.

27 123. Here, the equities support entry of a preliminary injunction pending resolution of
28 the administrative proceeding.

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Respectfully submitted,

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