

1 Michelle Park Chiu, Bar No. 248421
michelle.chiu@morganlewis.com
2 Minna Lo Naranjo, Bar No. 259005
minna.naranjo@morganlewis.com
3 **MORGAN, LEWIS & BOCKIUS LLP**
One Market, Spear Street Tower
4 San Francisco, CA 94105-1596
Telephone: (415) 442-1000
5 Facsimile: (415) 442-1001

6 J. Clayton Everett Jr., *pro hac vice*
clay.everett@morganlewis.com
7 Ryan M. Kantor, *pro hac vice*
ryan.kantor@morganlewis.com
8 **MORGAN, LEWIS & BOCKIUS LLP**
1111 Pennsylvania Avenue, NW
9 Washington, D.C. 20004-2541
Telephone: (202) 739-3000
10 Facsimile: (202) 739-3001

11 John C. Dodds, *pro hac vice*
john.dodds@morganlewis.com
12 Zachary M. Johns, *pro hac vice*
zachary.johns@morganlewis.com
13 **MORGAN, LEWIS & BOCKIUS LLP**
1701 Market Street
14 Philadelphia, PA 19103-2921
Telephone: (215) 963-5000
15 Facsimile: (212) 309-6001

16 *Attorneys for Defendant*
17 *Intercontinental Exchange, Inc.*

18 **UNITED STATES DISTRICT COURT**
19 **NORTHERN DISTRICT OF CALIFORNIA**
20 **SAN FRANCISCO DIVISION**

21 FEDERAL TRADE COMMISSION,
22
23 Plaintiff,
24
25 v.
26 INTERCONTINENTAL EXCHANGE, INC.
and
27 BLACK KNIGHT, INC.,
28 Defendants.

Kalpana Srinivasan, Bar No. 237460
ksrinivasan@susmangodfrey.com
Michael Gervais, Bar No. 330731
mgervais@susmangodfrey.com
Jesse-Justin Cuevas, Bar No. 307611
jcuevas@susmangodfrey.com
SUSMAN GODFREY L.L.P.
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
Telephone: (310) 789-3100
Facsimile: (310) 789-3150

Shawn Raymond, *pro hac vice pending*
sraymond@susmangodfrey.com
Alex Kaplan, *pro hac vice*
akaplan@susmangodfrey.com
Adam Carlis, *pro hac vice forthcoming*
acarlis@susmangodfrey.com
Alejandra Salinas, *pro hac vice forthcoming*
asalinas@susmangodfrey.com
Abby Noebels, *pro hac vice forthcoming*
anoebels@susmangodfrey.com
SUSMAN GODFREY L.L.P.
1000 Louisiana, Suite 5100
Houston, Texas 77002-5096
Telephone: (713) 651-9366
Facsimile: (713) 654-6666

Case No. 3:23-cv-01710-AMO
**DEFENDANT INTERCONTINENTAL
EXCHANGE, INC.'S ANSWER AND
AFFIRMATIVE DEFENSES AND
COUNTERCLAIMS**

1 FTC, and participating in a host of meetings with the FTC to discuss the deal as completely and
2 transparently as possible.

3 Intercontinental Exchange and Black Knight have taken the FTC’s concerns seriously.
4 Most notably, in direct response to what the FTC identified as its primary concern,
5 Intercontinental Exchange and Black Knight agreed to spin-off from the proposed transaction a
6 Black Knight-owned business called Empower that provides processing, underwriting, and pre-
7 closing services (“LOS services”). A highly-qualified third-party, Constellation Software, Inc.,
8 purchased Empower and a broad package of other assets so that Intercontinental Exchange’s
9 acquisition of Black Knight will not reduce the number of competitors in the claimed LOS
10 market. That market already sees rigorous competition from a variety of other LOS providers—
11 *e.g.*, Blue Sage, Byte, Calyx, Finastra, Fiserv, Integra, Mortgage Cadence, and Wipro—each of
12 which has won and continues to win business from lenders of every size. The divestiture of
13 Black Knight’s Empower will ensure that the pre-transaction levels of competition for LOS
14 services are maintained post-transaction and moots the FTC’s principal objection—concern about
15 competition in the LOS services market.

16 The FTC’s remaining concerns are misplaced, and the FTC cannot meet its burden to
17 obtain the extraordinary relief of a preliminary injunction. The FTC focuses on product pricing
18 engines (“PPEs”)—software systems that lenders use to identify loans available to buyers and
19 their terms. Intercontinental Exchange and Black Knight’s PPE solutions are not close substitutes
20 and do not competitively constrain each other. Intercontinental Exchange’s PPE solution is called
21 “EPPS” and is a native feature of Intercontinental Exchange’s Encompass software portal,
22 available only to Encompass LOS customers. EPPS provides only the most basic functionalities
23 of aggregating and displaying mortgage rate terms available from certain mortgage investors. On
24 the other hand, Black Knight’s Optimal Blue PPE is a stand-alone commercial PPE used on more
25 than a dozen different LOS platforms. Optimal Blue provides much broader functionality and is
26 aimed at lenders active in the secondary mortgage market. Those differences lead to significantly
27 different pricing (Optimal Blue PPE is substantially more expensive than EPPS) and customer
28 bases (Optimal Blue PPE customers are generally closing many more loans than EPPS

1 customers). Intercontinental Exchange is committed to keeping the Optimal Blue PPE available
2 on as many competitor LOS platforms as possible, consistent with Intercontinental Exchange's
3 open mortgage network.

4 The proposed transaction also does not present meaningful vertical concerns.
5 Intercontinental Exchange has always maintained its Encompass LOS as an open platform that
6 allows third parties to integrate with and add functionality to the platform, which is the driving
7 force behind its success. Encompass's open platform is now integrated with hundreds of third-
8 party vendors, many of which provide solutions that compete with solutions also offered by
9 Intercontinental Exchange on Encompass. The proposed transaction will not change that fact:
10 Encompass will continue to maintain an open platform for PPEs, providing its users with access,
11 as it does now, to many PPEs besides just EPPS and Optimal Blue. The FTC speculates that
12 third-party vendors could be limited or degraded, but that would be against Encompass's interests
13 (its platform is successful precisely because it is open) and inconsistent with how Encompass has
14 always operated. The FTC's challenge to the transaction and its complaint for preliminary
15 injunctive relief thus lacks substantive merit.

16 There are also constitutional barriers to the procedural approach the FTC is pursuing in
17 this case. The FTC's complaint seeks an injunction, which only this Court can issue, but the FTC
18 seeks that relief in support of the FTC's administrative adjudication process. That administrative
19 process violates Intercontinental Exchange's rights under the Due Process and Equal Protection
20 clauses. The FTC has, and will, act as prosecutor, judge, and jury in those administrative
21 proceedings. And the administrative law judge appointed by the FTC to conduct the initial
22 administrative trial is insulated from presidential control by removal protection, which is directly
23 contrary to Article II. Because the FTC's administrative process will adjudicate Intercontinental
24 Exchange's right to engage in a private commercial transaction with heavily constrained judicial
25 review and without any right to a jury trial, it violates Article III of the Constitution and the
26 Seventh Amendment. By its counterclaims, Intercontinental Exchange seeks declaratory relief
27 that the FTC's administrative process is unconstitutional and should thus be permanently
28 enjoined.

1 In light of the substantive problems, factually and legally, with the FTC's complaint, as
 2 well as the constitutional problems with the administrative procedure the FTC envisions, the FTC
 3 cannot meet its burden for preliminary injunctive relief. The FTC cannot show that it is likely to
 4 prevail in securing legally valid relief against Intercontinental Exchange, and cannot show that its
 5 claimed injury from the transaction would outweigh the serious injury to Intercontinental
 6 Exchange and Black Knight caused by the constitutional defects. It is contrary to law, the public
 7 interest, and basic principles of equity to grant an injunction pending resolution of an
 8 unconstitutional FTC administrative proceeding.

9 **PRELIMINARY STATEMENT**

10 All allegations not expressly admitted herein are denied. Intercontinental Exchange does
 11 not interpret the headings and sub-headings throughout the Complaint as well-pleaded allegations
 12 to which any response is required. To the extent such a response is required, Intercontinental
 13 Exchange denies all allegations in the headings and sub-headings of the Complaint. Use of
 14 certain terms or phrases defined in the Complaint is not an acknowledgment or admission of any
 15 characterization the Commission may ascribe to the defined terms. Unless otherwise defined,
 16 capitalized terms shall refer to the capitalized terms defined in the Complaint, but any such use is
 17 not an acknowledgment or admission of any characterization the Commission may ascribe to the
 18 capitalized terms. Intercontinental Exchange does not concede the truthfulness of sources quoted
 19 or referenced in the Complaint. To the extent that a response is required and unless otherwise
 20 indicated, Intercontinental Exchange denies all allegations of sources quoted in or referenced in
 21 the Complaint. Intercontinental Exchange additionally denies that the Commission is entitled to
 22 any of the relief sought in Paragraph 149 of the Complaint. Intercontinental Exchange reserves
 23 the right to amend and/or supplement this Answer at a later stage of the proceedings as permitted
 24 by the Federal Rules of Civil Procedure.

25 **I. NATURE OF THE CASE**

26 1. Intercontinental Exchange denies the general characterizations framed as
 27 allegations in Paragraph 1.

28 2. Intercontinental Exchange denies the general characterizations framed as

1 allegations in Paragraph 2.

2 3. Intercontinental Exchange denies the general characterizations framed as
3 allegations in Paragraph 3.

4 4. Intercontinental Exchange denies the allegations in Paragraph 4, except to admit
5 only that Intercontinental Exchange’s Encompass LOS operates in the United States and
6 processes residential mortgages originated across the nation. Intercontinental Exchange lacks
7 knowledge or information sufficient to admit or deny the allegations in Paragraph 4 concerning
8 Black Knight, and on that basis denies them.

9 5. Certain of the allegations in Paragraph 5 purport to characterize, summarize, or
10 quote from selected portions of unidentified documents and/or transcripts, offered without
11 attribution or context. To the extent such documents and/or transcripts are identified,
12 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
13 statement of their contents. To the extent such documents and/or transcripts are unidentified,
14 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
15 allegations, and on that basis denies them. Intercontinental Exchange lacks knowledge or
16 information sufficient to admit or deny the allegations in Paragraph 5 concerning Black Knight,
17 and on that basis denies them. Intercontinental Exchange denies the remaining allegations in
18 Paragraph 5.

19 6. Intercontinental Exchange admits only that it offers services used to process,
20 underwrite, fund, and close a loan. Intercontinental Exchange lacks sufficient knowledge or
21 information regarding the vague or undefined term “ancillary services,” and on that basis denies
22 any allegations relating thereto. Intercontinental Exchange lacks sufficient knowledge or
23 information to admit or deny the allegations in Paragraph 6 concerning Black Knight, and on that
24 basis denies them. Intercontinental Exchange denies the remaining allegations in Paragraph 6.

25 7. Intercontinental Exchange lacks sufficient knowledge or information to admit or
26 deny the allegations in Paragraph 7 concerning Black Knight, and on that basis denies them.
27 Intercontinental Exchange admits the second sentence in Paragraph 7. Intercontinental Exchange
28 further admits that EPPS is currently available only to lenders who use Encompass.

1 Intercontinental Exchange denies the remaining allegations in Paragraph 7.

2 8. Intercontinental Exchange denies the allegations in Paragraph 8.

3 9. Intercontinental Exchange only admits the portion of the first sentence between
4 “Black Knight” and “in response.” Intercontinental Exchange denies the remaining allegations in
5 Paragraph 9.

6 10. Intercontinental Exchange denies the allegations in Paragraph 10.

7 11. The allegations in Paragraph 11 constitute legal conclusions to which no response
8 is required. To the extent a response is required, Intercontinental Exchange denies the allegations
9 in Paragraph 11.

10 12. Intercontinental Exchange lacks sufficient knowledge or information regarding the
11 vague or undefined term “ancillary services,” and on that basis denies any allegations relating
12 thereto. Intercontinental Exchange denies the remaining allegations in Paragraph 12.

13 13. Intercontinental Exchange lacks sufficient knowledge or information regarding the
14 vague or undefined terms “origination costs” and “proportionally larger price increase” and on
15 that basis denies any allegations relating thereto. Intercontinental Exchange denies the remaining
16 allegations in Paragraph 13.

17 14. Intercontinental Exchange lacks sufficient knowledge or information regarding the
18 vague or undefined terms “ancillary service providers,” “ancillary services portfolio,” and “third-
19 party providers,” and denies any allegations relating thereto. Intercontinental Exchange denies
20 the remaining allegations in Paragraph 14.

21 15. The allegations in Paragraph 15 constitute legal conclusions to which no response
22 is required. To the extent a response is required, Intercontinental Exchange denies the allegations
23 in Paragraph 15.

24 16. The allegations in Paragraph 16 constitute legal conclusions to which no response
25 is required. To the extent a response is required, Intercontinental Exchange denies the allegations
26 in Paragraph 16.

27 17. Intercontinental Exchange lacks sufficient knowledge or information to admit or
28 deny the allegations in Paragraph 17 concerning the Commission, and on that basis denies them.

1 Intercontinental Exchange avers by way of further response that the Commission voted out an
 2 administrative Complaint on March 9, 2023, by a 4-0 vote, that alleged that the Acquisition
 3 would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. §
 4 18, and Section 5 of the FTC Act, 15 U.S.C. § 45. The remaining allegations purport to
 5 characterize the Scheduling Order entered by the Administrative Law Judge on March 29, 2023,
 6 the FTC's administrative Complaint, and the FTC's Rules of Practice, and Intercontinental
 7 Exchange respectfully refers the Court to those documents for a complete and accurate statement
 8 of their contents. To the extent the remaining allegations are inconsistent with those documents,
 9 Intercontinental Exchange denies the remaining allegations in Paragraph 17.

10 18. The allegations in Paragraph 18 constitute legal conclusions to which no response
 11 is required. To the extent a response is required, Intercontinental Exchange denies the allegations
 12 in Paragraph 18.

13 19. The allegations in Paragraph 19 constitute legal conclusions to which no response
 14 is required. To the extent a response is required, Intercontinental Exchange denies the allegations
 15 in Paragraph 19.

16 **II. JURISDICTIONAL STATEMENT**

17 **A. Jurisdiction**

18 20. The allegations in Paragraph 20 are legal conclusions to which no response is
 19 required. To the extent a response is required, the allegations in Paragraph 20 are denied.

20 21. The allegations in Paragraph 21 are legal conclusions to which no response is
 21 required. To the extent a response is required, the allegations in Paragraph 21 are denied.

22 22. The allegations in Paragraph 22 are legal conclusions to which no response is
 23 required. To the extent a response is required, the allegations in Paragraph 22 are denied.

24 **B. Venue**

25 23. The allegations in Paragraph 23 are legal conclusions to which no response is
 26 required. To the extent a response is required, the allegations in Paragraph 23 are denied.

27 **C. Intradistrict Assignment**

28 24. Intercontinental Exchange admits only that its Mortgage Technology business has

1 an office in Alameda County. The remaining allegations in Paragraph 24 are legal conclusions to
2 which no response is required. To the extent a response is required, the allegations in Paragraph
3 24 are denied.

4 **III. THE PARTIES AND THE PROPOSED ACQUISITION**

5 25. Intercontinental Exchange lacks knowledge or information sufficient to admit or
6 deny the allegations in Paragraph 25 concerning the Federal Trade Commission, and on that basis
7 denies them.

8 26. Intercontinental Exchange admits only the first, second, fourth, and sixth sentences
9 of the allegations in Paragraph 26. Intercontinental Exchange denies the remaining allegations in
10 Paragraph 26.

11 27. Intercontinental Exchange lacks knowledge or information sufficient to admit or
12 deny the allegations in Paragraph 25 concerning the Black Knight, and on that basis denies them.

13 28. Intercontinental Exchange denies the allegations in Paragraph 28.

14 29. Intercontinental Exchange admits only that Intercontinental Exchange and Black
15 Knight advised the FTC that they would seek to close the Transaction immediately following a
16 vote of Black Knight shareholders scheduled for April 28, 2023 in the event the FTC did not seek
17 a preliminary injunction. The remaining allegations are legal conclusions to which no response is
18 required. To the extent a response is required, the remaining allegations in Paragraph 29 are
19 denied.

20 **IV. RESIDENTIAL MORTGAGE ORIGINATION**

21 30. Intercontinental Exchange admits only that many homeowners utilize mortgages to
22 finance the purchase of a home. Intercontinental Exchange lacks sufficient knowledge or
23 information regarding the vague and undefined phrases “most important,” “financially
24 significant,” and “overwhelming majority,” and on that basis denies those allegations.
25 Intercontinental Exchange denies the remaining allegations in Paragraph 30.

26 31. Intercontinental Exchange admits only that LOS technology is used by mortgage
27 lenders to assist mortgage lenders by automating the loan creation process. Intercontinental
28 Exchange lacks sufficient knowledge or information regarding the vague and undefined phrases

1 “foundational technology” and “vast majority,” and on that basis denies those allegations.

2 Intercontinental Exchange denies the remaining allegations in Paragraph 31.

3 32. Intercontinental Exchange lacks sufficient knowledge or information regarding the
4 vague or undefined phrases “vast majority,” “compliance requirements,” and “outsourcing,” and
5 on that basis denies those allegations. Intercontinental Exchange lacks sufficient knowledge or
6 information to admit or deny the allegations regarding any decisions that lenders make, and on
7 that basis denies them. Intercontinental Exchange denies the remaining allegations in Paragraph
8 32.

9 33. Intercontinental Exchange lacks sufficient knowledge or information regarding the
10 first, second, and fourth sentences of Paragraph 33, particularly regarding any decisions that
11 lenders make, and on that basis denies them. Intercontinental Exchange denies the remaining
12 allegations in Paragraph 33.

13 34. Intercontinental Exchange lacks sufficient knowledge or information regarding the
14 vague or undefined terms “interoperate,” “ancillary services,” and “bundle,” and on that basis
15 denies those allegations. Intercontinental Exchange denies the remaining characterizations in
16 Paragraph 34.

17 35. Intercontinental Exchange lacks sufficient knowledge or information regarding the
18 characterization of PPEs generally, and on that basis denies those allegations. Intercontinental
19 Exchange denies the remaining allegations in Paragraph 35.

20 36. Intercontinental Exchange lacks sufficient knowledge or information to form a
21 belief as to the truth of the general allegations contained in Paragraph 36, and on that basis denies
22 them. Intercontinental Exchange denies the remaining allegations in Paragraph 36.

23 **V. THE RELEVANT ANTITRUST MARKETS**

24 37. The allegations in Paragraph 37 constitute legal conclusions to which no response
25 is required. To the extent a response is required, Intercontinental Exchange denies the allegations
26 in Paragraph 37.

27 **A. The Commercial LOS Market**

28 38. The allegations in Paragraph 38 constitute legal conclusions to which no response

1 is required. To the extent a response is required, Intercontinental Exchange denies the allegations
2 in Paragraph 38.

3 39. The allegations in the first sentence of Paragraph 39 constitute legal conclusions to
4 which no response is required. To the extent a response is required, Intercontinental Exchange
5 denies the allegations in the first sentence of Paragraph 39. Intercontinental Exchange lacks
6 sufficient knowledge or information regarding the vague or undefined term “peculiar” and denies
7 any allegations relating thereto. Intercontinental Exchange lacks knowledge or information
8 sufficient to admit or deny the allegations in Paragraph 39 concerning Black Knight.
9 Intercontinental Exchange denies the remaining allegations in Paragraph 39.

10 40. The allegations in Paragraph 40 constitute legal conclusions to which no response
11 is required. To the extent a response is required, Intercontinental Exchange denies the allegations
12 in Paragraph 40.

13 41. Intercontinental Exchange lacks knowledge or information sufficient to admit or
14 deny the allegations in Paragraph 41 regarding Black Knight, and on that basis denies them.
15 Certain of the allegations in Paragraph 41 purport to characterize, summarize, or quote from
16 selected portions of Black Knight’s Form 10-K for 2021. Intercontinental Exchange refers to
17 Black Knight’s Form 10-K for 2021 for a true and complete statement of its contents.
18 Intercontinental Exchange denies the remaining allegations in Paragraph 41.

19 42. The allegations in the first sentence of Paragraph 42 constitute legal conclusions to
20 which no response is required. To the extent a response is required, Intercontinental Exchange
21 denies the allegations in the first sentence of Paragraph 42. Certain of the allegations in
22 Paragraph 42 purport to characterize, summarize, or quote from selected portions of unidentified
23 documents and/or transcripts, offered without attribution or context. To the extent such
24 documents and/or transcripts are identified, Intercontinental Exchange refers to those documents
25 and/or transcripts for a true and complete statement of their contents. To the extent such
26 documents and/or transcripts are unidentified, Intercontinental Exchange lacks knowledge or
27 information sufficient to admit or deny those allegations, and on that basis denies them.
28 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny the

1 allegations in Paragraph 42 regarding Black Knight, and on that basis denies them.

2 Intercontinental Exchange denies the remaining allegations in Paragraph 42.

3 43. The allegations in Paragraph 43 constitute legal conclusions to which no response
4 is required. To the extent a response is required, Intercontinental Exchange lacks sufficient
5 knowledge or information regarding the vague or undefined phrase “commercially reasonable
6 substitute,” and on that basis denies those allegations. Intercontinental Exchange denies the
7 remaining allegations in Paragraph 43.

8 44. Intercontinental Exchange lacks sufficient knowledge or information regarding the
9 vague or undefined phrases “highly regulated” and “substantial risk,” and on that basis denies
10 those allegations. Intercontinental Exchange denies the remaining allegations in Paragraph 44.

11 45. Intercontinental Exchange denies the allegations in Paragraph 45.

12 46. The allegations in Paragraph 46 constitute legal conclusions to which no response
13 is required. To the extent a response is required, Intercontinental Exchange denies the allegations
14 in Paragraph 46.

15 47. Intercontinental Exchange denies the allegations in Paragraph 47.

16 **B. The LOS Market**

17 48. The allegations in Paragraph 48 constitute legal conclusions to which no response
18 is required. To the extent a response is required, Intercontinental Exchange denies the allegations
19 in Paragraph 48.

20 49. The allegations in the first sentence of Paragraph 49 constitute legal conclusions to
21 which no response is required. To the extent a response is required, Intercontinental Exchange
22 denies the allegations in the first sentence of Paragraph 49. Intercontinental Exchange lacks
23 sufficient knowledge or information regarding the vague or undefined phrases “distinct group”
24 and “types” and denies any allegations relating thereto. Certain of the allegations in Paragraph 49
25 purport to characterize, summarize, or quote from selected portions of unidentified documents
26 and/or transcripts, offered without attribution or context. To the extent such documents and/or
27 transcripts are identified, Intercontinental Exchange refers to those documents and/or transcripts
28 for a true and complete statement of their contents. To the extent such documents and/or

1 transcripts are unidentified, Intercontinental Exchange lacks knowledge or information sufficient
2 to admit or deny those allegations, and on that basis denies them. Intercontinental Exchange
3 denies the remaining allegations in Paragraph 49.

4 50. The allegations in the first sentence of Paragraph 50 constitute legal conclusions to
5 which no response is required. To the extent a response is required, Intercontinental Exchange
6 denies the allegations in the first sentence of Paragraph 50. Intercontinental Exchange lacks
7 sufficient knowledge or information to form a belief regarding the general background allegations
8 about all LOSs and mortgage lenders generally, and on that basis denies those allegations.
9 Intercontinental Exchange denies the remaining allegations in Paragraph 50.

10 51. The allegations in Paragraph 51 constitute legal conclusions to which no response
11 is required. To the extent a response is required, Intercontinental Exchange denies the allegations
12 in Paragraph 51.

13 52. The allegations in Paragraph 52 constitute legal conclusions to which no response
14 is required. To the extent a response is required, Intercontinental Exchange denies the allegations
15 in Paragraph 52.

16 53. The allegations in Paragraph 53 constitute legal conclusions to which no response
17 is required. To the extent a response is required, Intercontinental Exchange denies the allegations
18 in Paragraph 53.

19 54. The allegations in Paragraph 54 constitute legal conclusions to which no response
20 is required. To the extent a response is required, Intercontinental Exchange denies the allegations
21 in Paragraph 54.

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

23 55. The allegations in Paragraph 55 constitute legal conclusions to which no response
24 is required. To the extent a response is required, Intercontinental Exchange denies the allegations
25 in Paragraph 55.

26 56. The allegations in the first sentence of Paragraph 56 constitute legal conclusions to
27 which no response is required. To the extent a response is required, Intercontinental Exchange
28 denies the allegations in the first sentence of Paragraph 56. Intercontinental Exchange lacks

1 sufficient knowledge or information regarding the vague or undefined terms “peculiar,”
2 “prohibitively expensive,” and “time-consuming,” and on that basis denies those allegations.
3 Intercontinental Exchange denies the remaining allegations in Paragraph 56.

4 57. Intercontinental Exchange denies the allegations in Paragraph 57.

5 58. The allegations in Paragraph 58 constitute legal conclusions to which no response
6 is required. To the extent a response is required, Intercontinental Exchange denies the allegations
7 in Paragraph 58.

8 59. Certain of the allegations in Paragraph 59 purport to characterize, summarize, or
9 quote from selected portions of unidentified documents and/or transcripts, offered without
10 attribution or context. To the extent such documents and/or transcripts are identified,
11 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
12 statement of their contents. To the extent such documents and/or transcripts are unidentified,
13 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
14 allegations, and on that basis denies them. Intercontinental Exchange denies the remaining
15 allegations in Paragraph 59.

16 60. The allegations in Paragraph 60 constitute legal conclusions to which no response
17 is required. To the extent a response is required, Intercontinental Exchange denies the allegations
18 in Paragraph 60.

19 61. Intercontinental Exchange lacks sufficient knowledge or information regarding the
20 vague or undefined phrases “significant share” and “small share” and on that basis denies those
21 allegations. Intercontinental Exchange denies the remaining allegations in Paragraph 61.

22 **D. The PPE Market**

23 62. The allegations in Paragraph 62 constitute legal conclusions to which no response
24 is required. To the extent a response is required, Intercontinental Exchange denies the allegations
25 in Paragraph 62.

26 63. The allegations in the first sentence of Paragraph 63 constitute legal conclusions to
27 which no response is required. To the extent a response is required, Intercontinental Exchange
28 denies the allegations in the first sentence of Paragraph 63. Intercontinental Exchange lacks

1 sufficient knowledge or information regarding the vague or undefined term “peculiar,”
2 “functionality,” and “manually,” and on that basis denies those allegations. Certain of the
3 allegations in Paragraph 63 purport to characterize, summarize, or quote from selected portions of
4 unidentified documents and/or transcripts, offered without attribution or context. To the extent
5 such documents and/or transcripts are identified, Intercontinental Exchange refers to those
6 documents and/or transcripts for a true and complete statement of their contents. To the extent
7 such documents and/or transcripts are unidentified, Intercontinental Exchange lacks knowledge or
8 information sufficient to admit or deny those allegations, and on that basis denies them.
9 Intercontinental Exchange denies the remaining allegations in Paragraph 63.

10 64. Intercontinental Exchange lacks sufficient knowledge or information to form a
11 belief regarding the general background allegations about PPEs, and on that basis denies them.
12 Intercontinental Exchange denies the remaining allegations in Paragraph 64.

13 65. The allegations in Paragraph 65 constitute legal conclusions to which no response
14 is required. To the extent a response is required, Intercontinental Exchange denies the allegations
15 in Paragraph 65.

16 66. The allegations in Paragraph 66 constitute legal conclusions to which no response
17 is required. To the extent a response is required, Intercontinental Exchange denies the allegations
18 in Paragraph 66.

19 67. Intercontinental Exchange denies the allegations in Paragraph 67.

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

21 68. The allegations in Paragraph 68 constitute legal conclusions to which no response
22 is required. To the extent a response is required, the allegations are denied.

23 **VI. MARKET CONCENTRATION AND THE ACQUISITION'S**
24 **PRESUMPTIVE ILLEGALITY**

25 69. The allegations in Paragraph 69 constitute legal conclusions to which no response
26 is required. To the extent a response is required, Intercontinental Exchange denies the allegations
27 in Paragraph 69.

28 70. Certain of the allegations in Paragraph 70 purport to characterize, summarize, or

1 quote from selected portions of the Merger Guidelines. Intercontinental Exchange refers to the
 2 Merger Guidelines for a true and complete statement of their contents. Additionally, the
 3 allegations in Paragraph 70 constitute legal conclusions to which no response is required. To the
 4 extent a response is required, Intercontinental Exchange denies the allegations in Paragraph 70.

5 71. The first sentence of Paragraph 71 purports to characterize the Home Mortgage
 6 Disclosure Act (the “HMDA”), and Intercontinental Exchange respectfully refers the Court to the
 7 HMDA for a complete and accurate statement of its contents. To the extent the allegations set
 8 forth in the first sentence of Paragraph 71 are inconsistent with the HMDA, Intercontinental
 9 Exchange denies the allegations. The remaining allegations in Paragraph 71 are denied.

10 72. The allegations in Paragraph 72 constitute legal conclusions to which no response
 11 is required. To the extent a response is required, the allegations in Paragraph 72 are denied.

12 73. The allegations in Paragraph 73 constitute legal conclusions to which no response
 13 is required. To the extent a response is required, the allegations in Paragraph 73 are denied.

14 74. The allegations in Paragraph 74 constitute legal conclusions to which no response
 15 is required. To the extent a response is required, the allegations in Paragraph 74 are denied.

16 75. The allegations in Paragraph 75 constitute legal conclusions to which no response
 17 is required. To the extent a response is required, the allegations in Paragraph 75 are denied.

18 **VII. EVIDENCE OF REASONABLY PROBABLE ANTICOMPETITIVE EFFECTS**

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

20 76. The allegations in Paragraph 76 constitute legal conclusions to which no response
 21 is required. To the extent a response is required, the allegations in Paragraph 76 are denied.

22 77. Intercontinental Exchange lacks knowledge or information sufficient to admit or
 23 deny the allegations in Paragraph 77 regarding Black Knight, and on that basis denies them.
 24 Intercontinental Exchange denies the remaining allegations in Paragraph 77.

25 78. Intercontinental Exchange denies the allegation in the first sentence of Paragraph
 26 78. The allegations in the second sentence of Paragraph 78 constitute legal conclusions to which
 27 no response is required. To the extent a response is required, Intercontinental Exchange denies
 28

1 the allegations in the second sentence of Paragraph 78.

2 **i. Intercontinental Exchange and Black Knight Are Each Other’s Closest**
3 **Head-to-Head Competitors**

4 79. Certain of the allegations in Paragraph 79 purport to characterize, summarize, or
5 quote from selected portions of unidentified documents and/or transcripts, offered without
6 attribution or context. To the extent such documents and/or transcripts are identified,
7 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
8 statement of their contents. To the extent such documents and/or transcripts are unidentified,
9 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
10 allegations, and on that basis denies them. Intercontinental Exchange denies the remaining
11 allegations in Paragraph 79.

12 80. Certain of the allegations in Paragraph 80 purport to characterize, summarize, or
13 quote from selected portions of unidentified documents and/or transcripts, offered without
14 attribution or context. To the extent such documents and/or transcripts are identified,
15 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
16 statement of their contents. To the extent such documents and/or transcripts are unidentified,
17 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
18 allegations, and on that basis denies them. Intercontinental Exchange denies the remaining
19 allegations in Paragraph 80.

20 81. Certain of the allegations in Paragraph 81 purport to characterize, summarize, or
21 quote from selected portions of unidentified documents and/or transcripts, offered without
22 attribution or context. To the extent such documents and/or transcripts are identified,
23 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
24 statement of their contents. To the extent such documents and/or transcripts are unidentified,
25 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
26 allegations, and on that basis denies them. Intercontinental Exchange denies the remaining
27 allegations in Paragraph 81.

28 82. Intercontinental Exchange lacks knowledge or information sufficient to admit or

1 deny the allegations in Paragraph 82 regarding Black Knight, and on that basis denies them.

2 83. Intercontinental Exchange denies the allegations in Paragraph 83.

3 84. Intercontinental Exchange lacks knowledge or information sufficient to admit or
4 deny the allegations in Paragraph 84 regarding Black Knight, and on that basis denies them.

5 Certain of the allegations in Paragraph 84 purport to characterize, summarize, or quote from
6 selected portions of unidentified documents and/or transcripts, offered without attribution or
7 context. To the extent such documents and/or transcripts are identified, Intercontinental
8 Exchange refers to those documents and/or transcripts for a true and complete statement of their
9 contents. To the extent such documents and/or transcripts are unidentified, Intercontinental
10 Exchange lacks knowledge or information sufficient to admit or deny those allegations, and on
11 that basis denies them. Intercontinental Exchange denies the remaining allegations in Paragraph
12 84.

13 **ii. There Is a Reasonable Probability That the Acquisition Will Eliminate**
14 **LOS Price Competition Between Intercontinental Exchange and Black**
15 **Knight**

16 85. Intercontinental Exchange denies the allegations in Paragraph 85.

17 86. Intercontinental Exchange lacks knowledge or information sufficient to admit or
18 deny the allegations in Paragraph 86 regarding Black Knight, and on that basis denies them.
19 Certain of the allegations in Paragraph 86 purport to characterize, summarize, or quote from
20 selected portions of unidentified documents and/or transcripts, offered without attribution or
21 context. To the extent such documents and/or transcripts are identified, Intercontinental
22 Exchange refers to those documents and/or transcripts for a true and complete statement of their
23 contents. To the extent such documents and/or transcripts are unidentified, Intercontinental
24 Exchange lacks knowledge or information sufficient to admit or deny those allegations, and on
25 that basis denies them. Intercontinental Exchange denies the remaining allegations in Paragraph
26 86.

27 87. Certain of the allegations in Paragraph 87 purport to characterize, summarize, or
28 quote from selected portions of unidentified documents and/or transcripts, offered without
attribution or context. To the extent such documents and/or transcripts are identified,

1 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
2 statement of their contents. To the extent such documents and/or transcripts are unidentified,
3 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
4 allegations, and on that basis denies them. Intercontinental Exchange denies the remaining
5 allegations in Paragraph 87.

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

8 88. Intercontinental Exchange denies the allegations in Paragraph 88.

9 89. Intercontinental Exchange lacks knowledge or information sufficient to admit or
10 deny the allegations in Paragraph 89 regarding Black Knight, and on that basis denies them.
11 Intercontinental Exchange denies the remaining allegations in Paragraph 89.

12 90. Intercontinental Exchange lacks knowledge or information sufficient to admit or
13 deny the allegations in Paragraph 90 regarding Black Knight, and on that basis denies them.

14 91. Certain of the allegations in Paragraph 91 purport to characterize, summarize, or
15 quote from selected portions of unidentified documents and/or transcripts, offered without
16 attribution or context. To the extent such documents and/or transcripts are identified,
17 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
18 statement of their contents. To the extent such documents and/or transcripts are unidentified,
19 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
20 allegations, and on that basis denies them. Intercontinental Exchange denies the remaining
21 allegations in Paragraph 91.

22 92. The allegations in Paragraph 92 constitute legal conclusions to which no response
23 is required. To the extent a response is required, the allegations in Paragraph 92 are denied.

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

25 93. The allegations in Paragraph 93 constitute legal conclusions to which no response
26 is required. To the extent a response is required, the allegations in Paragraph 93 are denied.

27 94. Intercontinental Exchange denies the allegations in Paragraph 94.

28 95. Certain of the allegations in Paragraph 95 purport to characterize, summarize, or

1 quote from selected portions of unidentified documents and/or transcripts, offered without
2 attribution or context. To the extent such documents and/or transcripts are identified,
3 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
4 statement of their contents. To the extent such documents and/or transcripts are unidentified,
5 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
6 allegations, and on that basis denies them. Intercontinental Exchange denies the remaining
7 allegations in Paragraph 95.

8 96. Certain of the allegations in Paragraph 96 purport to characterize, summarize, or
9 quote from selected portions of unidentified documents and/or transcripts, offered without
10 attribution or context. To the extent such documents and/or transcripts are identified,
11 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
12 statement of their contents. To the extent such documents and/or transcripts are unidentified,
13 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
14 allegations, and on that basis denies them. Intercontinental Exchange denies the remaining
15 allegations in Paragraph 96.

16 **i. There Is a Reasonable Probability That the Acquisition Will Eliminate**
17 **Head-to-Head PPE Competition Between Intercontinental Exchange**
18 **and Black Knight**

19 97. The allegations in Paragraph 97 constitute legal conclusions to which no response
20 is required. To the extent a response is required, the allegations in Paragraph 97 are denied.

21 98. Intercontinental Exchange lacks knowledge or information sufficient to admit or
22 deny the allegations in Paragraph 98 regarding Black Knight, and on that basis denies them.
23 Certain of the allegations in Paragraph 98 purport to characterize, summarize, or quote from
24 selected portions of unidentified documents and/or transcripts, offered without attribution or
25 context. To the extent such documents and/or transcripts are identified, Intercontinental
26 Exchange refers to those documents and/or transcripts for a true and complete statement of their
27 contents. To the extent such documents and/or transcripts are unidentified, Intercontinental
28 Exchange lacks knowledge or information sufficient to admit or deny those allegations, and on
that basis denies them. Intercontinental Exchange denies the remaining allegations in Paragraph

1 98.

2 99. The allegations in Paragraph 99 constitute legal conclusions to which no response
3 is required. To the extent a response is required, the allegations in Paragraph 99 are denied.

4 100. Intercontinental Exchange denies the allegations in Paragraph 100.

5 101. Intercontinental Exchange admits only the second sentence of Paragraph 101.
6 Intercontinental Exchange denies the remaining allegations in Paragraph 101.

7 102. Intercontinental Exchange lacks knowledge or information sufficient to admit or
8 deny the allegations in Paragraph 102 regarding Black Knight, and on that basis denies them.

9 103. Intercontinental Exchange lacks knowledge or information sufficient to admit or
10 deny the allegations in Paragraph 103 regarding Black Knight, and on that basis denies them.

11 104. Intercontinental Exchange lacks knowledge sufficient or information to admit or
12 deny the allegations in Paragraph 104 regarding Black Knight, and on that basis denies them.
13 Certain of the allegations in Paragraph 104 purport to characterize, summarize, or quote from
14 selected portions of unidentified documents and/or transcripts, offered without attribution or
15 context. To the extent such documents and/or transcripts are identified, Intercontinental
16 Exchange refers to those documents and/or transcripts for a true and complete statement of their
17 contents. To the extent such documents and/or transcripts are unidentified, Intercontinental
18 Exchange lacks knowledge or information sufficient to admit or deny those allegations, and on
19 that basis denies them. Intercontinental Exchange denies the remaining allegations in Paragraph
20 104.

21 105. Intercontinental Exchange lacks knowledge or information sufficient to admit or
22 deny the allegations in Paragraph 105 regarding Black Knight, and on that basis denies them.
23 Certain of the allegations in Paragraph 105 purport to characterize, summarize, or quote from
24 selected portions of unidentified documents and/or transcripts, offered without attribution or
25 context. To the extent such documents and/or transcripts are identified, Intercontinental
26 Exchange refers to those documents and/or transcripts for a true and complete statement of their
27 contents. To the extent such documents and/or transcripts are unidentified, Intercontinental
28 Exchange lacks knowledge or information sufficient to admit or deny those allegations, and on

1 that basis denies them. Intercontinental Exchange denies the remaining allegations in Paragraph
2 105.

3 106. Intercontinental Exchange lacks knowledge or information sufficient to admit or
4 deny the allegations in Paragraph 106 regarding Black Knight, and on that basis denies them.
5 Certain of the allegations in Paragraph 106 purport to characterize, summarize, or quote from
6 selected portions of unidentified documents and/or transcripts, offered without attribution or
7 context. To the extent such documents and/or transcripts are identified, Intercontinental
8 Exchange refers to those documents and/or transcripts for a true and complete statement of their
9 contents. To the extent such documents and/or transcripts are unidentified, Intercontinental
10 Exchange lacks knowledge or information sufficient to admit or deny those allegations, and on
11 that basis denies them. Intercontinental Exchange denies the remaining allegations in Paragraph
12 106.

13 107. Certain of the allegations in Paragraph 107 purport to characterize, summarize, or
14 quote from selected portions of unidentified documents and/or transcripts, offered without
15 attribution or context. To the extent such documents and/or transcripts are identified,
16 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
17 statement of their contents. To the extent such documents and/or transcripts are unidentified,
18 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
19 allegations, and on that basis denies them. Intercontinental Exchange denies the remaining
20 allegations in Paragraph 107.

21 108. Certain of the allegations in Paragraph 108 purport to characterize, summarize, or
22 quote from selected portions of unidentified documents and/or transcripts, offered without
23 attribution or context. To the extent such documents and/or transcripts are identified,
24 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
25 statement of their contents. To the extent such documents and/or transcripts are unidentified,
26 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
27 allegations, and on that basis denies them. Intercontinental Exchange denies the remaining
28 allegations in Paragraph 108.

1 109. Certain of the allegations in Paragraph 109 purport to characterize, summarize, or
2 quote from selected portions of unidentified documents and/or transcripts, offered without
3 attribution or context. To the extent such documents and/or transcripts are identified,
4 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
5 statement of their contents. To the extent such documents and/or transcripts are unidentified,
6 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
7 allegations, and on that basis denies them. Intercontinental Exchange denies the remaining
8 allegations in Paragraph 109.

9 110. Certain of the allegations in Paragraph 110 purport to characterize, summarize, or
10 quote from selected portions of unidentified documents and/or transcripts, offered without
11 attribution or context. To the extent such documents and/or transcripts are identified,
12 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
13 statement of their contents. To the extent such documents and/or transcripts are unidentified,
14 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
15 allegations, and on that basis denies them. Intercontinental Exchange denies the remaining
16 allegations in Paragraph 110.

17 111. Intercontinental Exchange admits that on May 4, 2022, Intercontinental Exchange
18 announced its agreement to acquire Black Knight. Certain of the allegations in Paragraph 111
19 purport to characterize, summarize, or quote from selected portions of unidentified documents
20 and/or transcripts, offered without attribution or context. To the extent such documents and/or
21 transcripts are identified, Intercontinental Exchange refers to those documents and/or transcripts
22 for a true and complete statement of their contents. To the extent such documents and/or
23 transcripts are unidentified, Intercontinental Exchange lacks knowledge or information sufficient
24 to admit or deny those allegations, and on that basis denies them. Intercontinental Exchange
25 denies the remaining allegations in Paragraph 111.

26 112. The allegations in Paragraph 112 constitute legal conclusions to which no response
27 is required. To the extent a response is required, the allegations are denied.

28 113. Intercontinental Exchange denies the allegations in Paragraph 113.

1 **ii. There Is a Reasonable Probability That the Acquisition Will Increase**
 2 **Intercontinental Exchange's Ability and Incentive to Foreclose**
 3 **Competition from Other PPE Providers**

4 114. The allegations in Paragraph 114 constitute legal conclusions to which no response
 5 is required. To the extent a response is required, the allegations are denied. Intercontinental
 6 Exchange lacks knowledge or information sufficient to admit or deny the allegations in Paragraph
 7 106 regarding Black Knight, and on that basis denies them.

8 **a. Intercontinental Exchange Can Disadvantage PPE Competitors**
 9 **by Degrading or Restricting LOS Integration**

10 115. Intercontinental Exchange lacks sufficient knowledge or information to form a
 11 belief regarding the general background allegations about PPEs and denies any allegations
 12 relating thereto, and on that basis denies those allegations. Intercontinental Exchange denies the
 13 remaining allegations in Paragraph 115.

14 116. Intercontinental Exchange lacks sufficient knowledge or information regarding the
 15 characterization of lenders, PPEs, and PPE providers generally, and on that basis denies those
 16 allegations. Intercontinental Exchange denies the remaining allegations in Paragraph 116.

17 117. Intercontinental Exchange denies the allegations in Paragraph 117.

18 118. Certain of the allegations in Paragraph 118 purport to characterize, summarize, or
 19 quote from selected portions of unidentified documents and/or transcripts, offered without
 20 attribution or context. To the extent such documents and/or transcripts are identified,
 21 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
 22 statement of their contents. To the extent such documents and/or transcripts are unidentified,
 23 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
 24 allegations, and on that basis denies them. Intercontinental Exchange denies the remaining
 25 allegations in Paragraph 118.

26 119. Intercontinental Exchange lacks knowledge or information sufficient to admit or
 27 deny the allegations in Paragraph 119 regarding Black Knight, and on that basis denies them.

28 120. Intercontinental Exchange denies the allegations in Paragraph 120.

 121. Certain of the allegations in Paragraph 121 purport to characterize, summarize, or

1 quote from selected portions of unidentified documents and/or transcripts, offered without
2 attribution or context. To the extent such documents and/or transcripts are identified,
3 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
4 statement of their contents. To the extent such documents and/or transcripts are unidentified,
5 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
6 allegations, and on that basis denies them. Intercontinental Exchange denies the remaining
7 allegations in Paragraph 121.

8 122. Certain of the allegations in Paragraph 122 purport to characterize, summarize, or
9 quote from selected portions of unidentified documents and/or transcripts, offered without
10 attribution or context. To the extent such documents and/or transcripts are identified,
11 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
12 statement of their contents. To the extent such documents and/or transcripts are unidentified,
13 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
14 allegations, and on that basis denies them. Intercontinental Exchange denies the remaining
15 allegations in Paragraph 122.

16 123. Certain of the allegations in Paragraph 123 purport to characterize, summarize, or
17 quote from selected portions of unidentified documents and/or transcripts, offered without
18 attribution or context. To the extent such documents and/or transcripts are identified,
19 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
20 statement of their contents. To the extent such documents and/or transcripts are unidentified,
21 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
22 allegations, and on that basis denies them. Intercontinental Exchange denies the remaining
23 allegations in Paragraph 123.

24 **b. Post-Acquisition, Intercontinental Exchange Will Have a**
25 **Greater Incentive to Foreclose Competition for PPEs**

26 124. The allegations in Paragraph 124 constitute legal conclusions to which no response
27 is required. To the extent a response is required, the allegations in Paragraph 124 are denied.

28 125. Certain of the allegations in Paragraph 125 purport to characterize, summarize, or

1 quote from selected portions of unidentified documents and/or transcripts, offered without
2 attribution or context. To the extent such documents and/or transcripts are identified,
3 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
4 statement of their contents. To the extent such documents and/or transcripts are unidentified,
5 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
6 allegations, and on that basis denies them. Intercontinental Exchange denies the remaining
7 allegations in Paragraph 125.

8 126. The allegations in Paragraph 126 constitute legal conclusions to which no response
9 is required. To the extent a response is required, the allegations are denied. Certain of the
10 allegations in Paragraph 126 purport to characterize, summarize, or quote from selected portions
11 of unidentified documents and/or transcripts, offered without attribution or context. To the extent
12 such documents and/or transcripts are identified, Intercontinental Exchange refers to those
13 documents and/or transcripts for a true and complete statement of their contents. To the extent
14 such documents and/or transcripts are unidentified, Intercontinental Exchange lacks knowledge or
15 information sufficient to admit or deny those allegations, and on that basis denies them.
16 Intercontinental Exchange denies the remaining allegations in Paragraph 126.

17 127. Certain of the allegations in Paragraph 127 purport to characterize, summarize, or
18 quote from selected portions of unidentified documents and/or transcripts, offered without
19 attribution or context. To the extent such documents and/or transcripts are identified,
20 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
21 statement of their contents. To the extent such documents and/or transcripts are unidentified,
22 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
23 allegations, and on that basis denies them. Intercontinental Exchange denies the remaining
24 allegations in Paragraph 127.

25 128. Intercontinental Exchange denies the allegations in Paragraph 128.

26 **C. Anticompetitive Effects in Other Relevant Antitrust Markets for Ancillary**
27 **Services**

28 129. Intercontinental Exchange denies the allegations in Paragraph 129.

1 130. Intercontinental Exchange denies the allegations in Paragraph 130.

2 131. Intercontinental Exchange denies the allegations in Paragraph 130.

3 132. Intercontinental Exchange lacks knowledge or information sufficient to admit or
4 deny the allegations in Paragraph 132 regarding Black Knight, and on that basis denies them.
5 Intercontinental Exchange denies the remaining allegations in Paragraph 132.

6 133. Intercontinental Exchange lacks knowledge or information sufficient to admit or
7 deny the allegations in Paragraph 133 regarding Black Knight, and on that basis denies them.
8 Intercontinental Exchange denies the remaining allegations in Paragraph 133.

9 **VIII. LACK OF COUNTERVAILING FACTORS**

10 134. The allegations in Paragraph 134 constitute legal conclusions to which no response
11 is required. To the extent a response is required, the allegations in Paragraph 134 are denied.

12 135. The allegations in the first two sentences of Paragraph 135 constitute legal
13 conclusions to which no response is required. To the extent a response is required, the allegations
14 in the first two sentences of Paragraph 135 are denied. Intercontinental Exchange lacks
15 knowledge or information sufficient to admit or deny the allegations in the third sentence of
16 Paragraph 135 regarding Black Knight, and on that basis denies them.

17 136. Intercontinental Exchange lacks knowledge or information sufficient to admit or
18 deny the allegations in Paragraph 136 regarding Black Knight, and on that basis denies them.
19 Certain of the allegations in Paragraph 136 purport to characterize, summarize, or quote from
20 selected portions of unidentified documents and/or transcripts, offered without attribution or
21 context. To the extent such documents and/or transcripts are identified, Intercontinental
22 Exchange refers to those documents and/or transcripts for a true and complete statement of their
23 contents. To the extent such documents and/or transcripts are unidentified, Intercontinental
24 Exchange lacks knowledge or information sufficient to admit or deny those allegations, and on
25 that basis denies them. Intercontinental Exchange denies the remaining allegations in Paragraph
26 136.

27 137. Certain of the allegations in Paragraph 137 purport to characterize, summarize, or
28 quote from selected portions of unidentified documents and/or transcripts, offered without

1 attribution or context. To the extent such documents and/or transcripts are identified,
2 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
3 statement of their contents. To the extent such documents and/or transcripts are unidentified,
4 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
5 allegations, and on that basis denies them. Intercontinental Exchange denies the remaining
6 allegations in Paragraph 137.

7 138. The first sentence of Paragraph 138 contains legal conclusions to which no
8 response is required. To the extent a response is required, the allegations in the first sentence of
9 Paragraph 138 are denied. Intercontinental Exchange denies the remaining allegations in
10 Paragraph 138.

11 139. The first sentence of Paragraph 139 contains legal conclusions to which no
12 response is required. To the extent a response is required, the allegations in the first sentence of
13 Paragraph 139 are denied. Intercontinental Exchange denies the remaining allegations in
14 Paragraph 139.

15 140. The first sentence of Paragraph 140 contains legal conclusions to which no
16 response is required. To the extent a response is required, the allegations in the first sentence of
17 Paragraph 140 are denied. Intercontinental Exchange lacks knowledge or information sufficient
18 to admit or deny the allegations in Paragraph 140 regarding Black Knight, and on that basis
19 denies them. Certain of the allegations in Paragraph 140 purport to characterize, summarize, or
20 quote from selected portions of unidentified documents and/or transcripts, offered without
21 attribution or context. To the extent such documents and/or transcripts are identified,
22 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
23 statement of their contents. To the extent such documents and/or transcripts are unidentified,
24 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
25 allegations, and on that basis denies them. Intercontinental Exchange denies the remaining
26 allegations in Paragraph 140.

27 141. Intercontinental Exchange denies the allegations in Paragraph 141.

28 142. Intercontinental Exchange lacks knowledge or information sufficient to admit or

1 deny the allegations in Paragraph 142 regarding Black Knight, and on that basis denies them.
 2 Certain of the allegations in Paragraph 142 purport to characterize, summarize, or quote from
 3 selected portions of unidentified documents and/or transcripts, offered without attribution or
 4 context. To the extent such documents and/or transcripts are identified, Intercontinental
 5 Exchange refers to those documents and/or transcripts for a true and complete statement of their
 6 contents. To the extent such documents and/or transcripts are unidentified, Intercontinental
 7 Exchange lacks knowledge or information sufficient to admit or deny those allegations, and on
 8 that basis denies them. Intercontinental Exchange denies the remaining allegations in Paragraph
 9 142.

10 143. The allegations in Paragraph 143 constitute legal conclusions to which no response
 11 is required. To the extent a response is required, the allegations in Paragraph 143 are denied.

12 **IX. DEFENDANTS' PROPOSED REMEDY WILL NOT FIX**
 13 **THE ACQUISITION'S ANTICOMPETITIVE EFFECTS**

14 144. Intercontinental Exchange admits only that Intercontinental Exchange and Black
 15 Knight have signed a definitive agreement to divest Empower to Constellation as part of the
 16 proposed transaction. Certain of the allegations in Paragraph 144 purport to characterize,
 17 summarize, or quote from selected portions of unidentified documents and/or transcripts, offered
 18 without attribution or context. To the extent such documents and/or transcripts are identified,
 19 Intercontinental Exchange refers to those documents and/or transcripts for a true and complete
 20 statement of their contents. To the extent such documents and/or transcripts are unidentified,
 21 Intercontinental Exchange lacks knowledge or information sufficient to admit or deny those
 22 allegations, and on that basis denies them. Intercontinental Exchange denies the remaining
 23 allegations in Paragraph 144.

24 145. The allegations in Paragraph 145 constitute legal conclusions to which no response
 25 is required. To the extent a response is required, the allegations in Paragraph 145 are denied.

26 **X. LIKELIHOOD OF SUCCESS ON THE MERITS,**
 27 **BALANCE OF EQUITIES, AND NEED FOR RELIEF**

28 146. The allegations in Paragraph 146 constitute legal conclusions to which no response
 is required. To the extent a response is required, the allegations in Paragraph 146 are denied.

1 147. Intercontinental Exchange denies the allegations contained in Paragraph 147.

2 148. Intercontinental Exchange denies the allegations in Paragraph 148.

3 149. Intercontinental Exchange denies the first sentence of Paragraph 149. The
4 remainder of Paragraph 149 is a request for relief to which no response is required. To the extent
5 a response is required, Intercontinental Exchange denies that the FTC is entitled to the relief
6 requested in Paragraph 149.

7 **AFFIRMATIVE AND OTHER DEFENSES**

8 Intercontinental Exchange asserts the following defenses with respect to the causes of
9 action alleged in the Complaint, without assuming the burden of proof or persuasion where such
10 burden rests on the FTC. Intercontinental Exchange has not knowingly or intentionally waived
11 any applicable defenses, and it reserves the right to assert and rely upon other applicable defenses
12 that may become available or apparent throughout the course of the action. Intercontinental
13 Exchange reserves the right to amend, or seek to amend, its Answer, including its affirmative and
14 other defenses.

15 **FIRST DEFENSE**

16 **(Structure of Proceedings Violates Due Process)**

17 The structure of the related administrative proceedings, in which the Commission both
18 initiates and finally adjudicates the Complaint against Intercontinental Exchange, having
19 prejudged the merits of the action, violates Intercontinental Exchange's Fifth Amendment Due
20 Process right to adjudication before a neutral arbiter.

21 **SECOND DEFENSE**

22 **(Commission's Procedures Violate Due Process)**

23 The Commission's procedures violate Intercontinental Exchange's right to procedural due
24 process under the Due Process Clause of the Fifth Amendment.

25 **THIRD DEFENSE**

26 **(Commission's Procedures Violate Equal Protection Clause)**

27 The Commission's procedures arbitrarily subject Intercontinental Exchange to
28 administrative proceedings rather than to proceedings before an Article III judge in violation of
Intercontinental Exchange's right to Equal Protection under the Fifth Amendment.

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

FOURTH DEFENSE
(Constraints on Removal Violate Article II of the Constitution)

The related administrative proceedings are invalid because the constraints on removal of the Commissioners and the Administrative Law Judge violate Article II of the Constitution and the separation of powers.

FIFTH DEFENSE
(Delegation of Legislative Power Unconstitutional)

The related administrative proceedings are invalid because Congress unconstitutionally delegated legislative power to the Commission by failing to provide an intelligible principle by which the Commission would exercise the delegated power.

SIXTH DEFENSE
(Violation of Fifth Amendment)

Granting the relief sought would constitute a taking of Intercontinental Exchange’s property in violation of the Fifth Amendment to the Constitution.

SEVENTH DEFENSE
(Violation of Seventh Amendment)

The adjudication of the Complaint against Intercontinental Exchange through the related administrative proceedings violates Intercontinental Exchange’s Seventh Amendment right to a jury trial.

EIGHTH DEFENSE
(Violation of Article III of the U.S. Constitution)

The adjudication of the Complaint against Intercontinental Exchange through the related administrative proceedings adjudicates private rights and therefore violates Article III of the U.S. Constitution and the Seventh Amendment.

NINTH DEFENSE
(Failure to State a Claim)

The Complaint fails to state a claim upon which relief can be granted, including, but not limited to, on the basis that: (1) new entrants to the relevant market were (and are) timely, likely, and sufficient to offset any alleged anticompetitive effects of the Transaction; (2) the alleged market definitions fail as a matter of both fact and law; (3) the Complaint fails to allege any plausible harm to competition, consumers, or consumer welfare; (4) the Complaint fails to allege

1 undue share in any plausibly defined relevant market; and (5) any alleged harm to potential
2 competition is not actionable.

3 **TENTH DEFENSE**
4 **(No Antitrust Injury)**

5 The Complaint fails to establish actual, cognizable antitrust injury of the type antitrust
6 laws are intended to remedy.

7 **ELEVENTH DEFENSE**
8 **(Transaction Is Not Unlawful)**

9 The Transaction does not violate the antitrust laws because: (1) the Transaction is
10 procompetitive, and will result in merger-specific efficiencies, cost synergies, product-quality
11 improvements, and other procompetitive effects that benefit consumers. The benefits outweigh
12 any alleged anticompetitive effects; (2) the combination of Respondents' businesses is not likely
13 to substantially lessen competition under the analytical framework set forth in the Merger
14 Guidelines promulgated by the FTC and Department of Justice; and (3) Intercontinental
15 Exchange and Black Knight's agreement with Constellation to divest Empower as well as certain
16 other products to Constellation would address any purported anticompetitive effects alleged in the
17 Complaint and, consistent with Section 7 of the Clayton Act, 15 U.S.C. § 18, and the decision in
18 *United States v. UnitedHealth Grp. Inc.*, No. 1:22-cv-0481, 2022 WL 4365867, at *9 (D.D.C.
19 Sept. 21, 2022), it is inappropriate to consider the transaction in the absence of the divestiture.

20 **TWELFTH DEFENSE**
21 **(Public Interest)**

22 Neither the filing of this Complaint nor the contemplated relief is in the public interest,
23 pursuant to 15 U.S.C. § 45.

24 **RESERVATION OF RIGHTS TO ASSERT ADDITIONAL DEFENSES**

25 Intercontinental Exchange has not knowingly or intentionally waived any applicable
26 defenses, and it reserves the right to assert and rely upon other applicable defenses that may
27 become available or apparent throughout the course of the action. Intercontinental Exchange
28 reserves the right to amend, or seek to amend, its Answer, including its affirmative and other
defenses.

COUNTERCLAIMS

1
2 Defendant Intercontinental Exchange, Inc. (“Intercontinental Exchange”), by and through
3 its undersigned attorneys, seeks the following counterclaims against Plaintiff Federal Trade
4 Commission (“Plaintiff” or “FTC”).

NATURE OF THE ACTION

5
6 1. Intercontinental Exchange challenges the unconstitutional structure and processes
7 employed by the FTC to prohibit lawful acquisitions. The FTC possesses the power to not only
8 prosecute cases, but to judge them as well. Yet the FTC’s Administrative Law Judges (“ALJs”)
9 exercise near-total protection from political accountability because they are subject to neither
10 democratic election nor at-will removal by the President. Instead, they have “dual layers” of
11 removal protection because they are only removable by Commissioners “for cause”, who, in turn,
12 are only removable by the President “for cause.”

13 2. In the related proceeding instituted against Intercontinental Exchange, the FTC has
14 not only charged and prosecuted the case but has also appointed an ALJ. And if the FTC
15 disagrees with the ALJ’s ultimate decision on either the facts or the law, the same Commissioners
16 who voted to file the enforcement action against Intercontinental Exchange have the right to
17 review these findings de novo and change them. A former FTC Commissioner has described this
18 procedure as an “unhealthy and biased institutional process” that virtually guarantees the
19 agency’s result will stand. *See* Joshua D. Wright, Section 5 Revisited: Time for the FTC to
20 Define the Scope of Its Unfair Methods of Competition Authority at 6 (2015).

21 3. This process also involves the adjudication of private rights. Particularly, the
22 parties’ ability to engage in a private commercial transaction and the risk that the parties will have
23 to pay a fine to the FTC. Such an adjudication is the exclusive province of Article III courts
24 where the parties may also be able to assert their Seventh Amendment right to a trial by jury.

25 4. This Court should declare the FTC’s structure and procedures unconstitutional.
26 And it should enjoin the FTC from subjecting Intercontinental Exchange to its unfair and
27 unconstitutional internal forum, adjudicating the legality of Intercontinental Exchange’s
28 acquisition in this Article III court instead.

THE PARTIES

1
2 5. Counterclaim Defendant FTC is an administrative agency of the United States
3 Government, established, organized, and existing pursuant to the FTC Act, 15 U.S.C. § 45, and is
4 authorized under certain circumstances by Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to
5 initiate court proceedings to enjoin ongoing or imminent violations of any law the FTC enforces.

6 6. Counterclaim Plaintiff Intercontinental Exchange is a publicly traded corporation
7 incorporated in Delaware, with its headquarters in Atlanta, Georgia. Intercontinental Exchange
8 provides market infrastructure, data services, and technology solutions in three segments:
9 exchanges, fixed income and data services, and mortgage technology.

JURISDICTION AND VENUE

10
11 7. This action arises under the Constitution and laws of the United States, and this
12 Court has federal question jurisdiction over this action pursuant to Article III of the Constitution
13 and 28 U.S.C. § 1331.

14 8. Counterclaim Plaintiff’s right to immediate judicial review in this Court with
15 respect to Counterclaim Defendants’ alleged conduct is based on the Due Process Clause of the
16 Fifth Amendment, Article III of the Constitution, the Seventh Amendment, and the Federal
17 Declaratory Judgment Act, 28 U.S.C. § 2201.

18 9. Venue is proper under 5 U.S.C. § 703 and 28 U.S.C. § 1391(b), (c), and (e).

FACTUAL BACKGROUND

19
20 **A. The Constitutional Infirmities Associated with the Government Merger**
21 **Review Process**

22 10. Both the FTC and the Department of Justice (“DOJ”) review mergers and
23 acquisitions that may present substantive antitrust concerns. Section 7 of the Clayton Act,
24 codified at 15 U.S.C. § 18, prohibits mergers and acquisitions where the “effect . . . may be
25 substantially to lessen competition” or “tend to create a monopoly.” As relevant here, the FTC’s
26 authority is based on Section 13(b) of the FTC Act.

27 11. The government employs an impermissibly arbitrary approach to deciding whether
28 the FTC or DOJ will lead a given investigation, despite the consequences that decision carries for

1 regulated parties. DOJ-led proceedings occur in federal court. By contrast, the FTC may pursue
2 proceedings before itself, where an ALJ presides over a hearing lacking the stringent evidentiary
3 and procedural rules of federal court, *see* 16 C.F.R. §§ 3.21-.43. Further, federal courts may
4 apply different standards of review depending on where the case originated. *Compare* Fed. R.
5 Civ. P. 52(a)(6) *with* 15 U.S.C. §§ 21(c), 45(c).

6 12. The FTC's and DOJ's process lacks standards and does not provide citizens with
7 necessary Due Process safeguards. *See Beckles v. United States*, 137 S. Ct. 886, 892 (2017)
8 (government cannot deprive property under law "so standardless that it invites arbitrary
9 enforcement"); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). The arbitrary manner in which the
10 FTC and DOJ determine parties' procedural rights also violates Equal Protection, *cf. Williams v.*
11 *Vermont*, 472 U.S. 14, 22-23 (1985) ("arbitrary distinction" among taxpayers violates equal
12 protection), and impermissibly delegates to the agencies legislative powers that belong
13 exclusively to Congress, *cf. Jarkesy v. SEC*, 34 F.4th 446, 459 (5th Cir. 2022) (SEC's ability to
14 assign matters to agency adjudication without intelligible principle violates the nondelegation
15 doctrine). The FTC's discretion to sue in federal court or its own tribunal (or both), afforded it by
16 Congress without the requisite intelligible principle to guide its exercise, likewise violates the
17 nondelegation doctrine. *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (Congress can
18 delegate its Article 1 legislative powers to another entity only if it provides an "intelligible"
19 principle by which to exercise that power); *Crowell v. Benson*, 285 U.S. 22, 50 (1932) ("[T]he
20 mode of determining" which cases are assigned to administrative tribunals is "completely within
21 congressional control."); *Jarkesy*, 34 F.4th at 462 (providing the SEC with broad "power to
22 decide which defendants should receive *certain legal processes* (those accompanying Article III
23 proceedings)" violated the nondelegation doctrine).

24 13. Moreover, the FTC's internal administrative hearing provides none of the
25 substantive or procedural protections enjoyed by litigants in federal district court. These
26 proceedings are, instead, fraught with Due Process and Equal Protection deficiencies.

- 27 • Federal district court judges are Article III impartial fact-finders who owe no
28 allegiances to the agency. In contrast, any FTC Commissioner (including those

1 who voted to sue Intercontinental Exchange and Black Knight) is permitted to
2 preside over the administrative hearing; and an ALJ appointed by and
3 compensated by the FTC will preside.

- 4 • Federal court proceedings are governed by the Federal Rules of Evidence and
5 Federal Rules of Civil Procedure. Neither apply in FTC administrative
6 proceedings.
- 7 • Litigants in federal court can appeal adverse decisions to impartial circuit court
8 judges. Decisions rendered in FTC administrative proceedings must first be
9 appealed to the same FTC Commissioners who voted to sue the defendant at the
10 outset, raising inherent concerns about proper review and opening the potential for
11 bias to reach an end result.
- 12 • The FTC Commissioners, on appeal, can ignore and completely change the merits
13 decision rendered in the administrative proceedings before the defendant appeals
14 to the circuit court. *See, e.g.,* Opinion of the Commission, *In the Matter of*
15 *Illumina, Inc., a corporation, and GRAIL, Inc., a corporation*, Docket No. 9401
16 (April 3, 2023) (opinion of the FTC reversing ALJ’s finding that Complaint
17 Counsel failed to prove that a substantial lessening of competition was probable or
18 imminent).
- 19 • Different appellate standards of review may apply depending on where the case
20 originated. On appeal from agency proceedings, “[t]he findings of the
21 Commission as to the facts, if supported by evidence, shall be conclusive.” 15
22 U.S.C. § 45(c).

23 14. The nature of administrative hearings at the FTC and the limited review of its
24 factual findings on appeal means the results can be preordained. As one court noted, the “FTC
25 has not lost a single case [in administrative proceedings] in the past quarter-century. Even the
26 1972 Miami Dolphins would envy that type of record.” *Axon Enter., Inc. v. Fed. Trade Comm’n*,

1 986 F.3d 1173, 1187 (9th Cir. 2021), cert. granted in part, 142 S. Ct. 895 (2022), and rev'd and
 2 remanded, No. 21-1239, 2023 WL 2938328 (U.S. Apr. 14, 2023).¹

3 15. This kind of discretionary hearing process is exactly what Article III, the Equal
 4 Protection Clause, the Due Process Clause, the nondelegation doctrine, and the Seventh
 5 Amendment were designed to prevent. As the Supreme Court has emphasized, the irreducible
 6 minimum of Due Process is “notice of the factual basis” of the Government’s assertions “and a
 7 fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”
 8 *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). Indeed, “Parties whose rights are to be affected are
 9 entitled to be heard; and in order that they may enjoy that right ... an opportunity to be heard
 10 must be granted at a meaningful time and in a meaningful manner.” *Id.* (quoting *Baldwin v.*
 11 *Hale*, 1 Wall. 223, 233 (1864)). And a “meaningful” hearing, for purposes of Due Process,
 12 “requires a neutral and detached judge.” *Id.* (quoting *Concrete Pipe & Prods. Of Cal., Inc. v.*
 13 *Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617 (1993)). “These essential
 14 constitutional promises may not be eroded.” *Id.* And yet that basic protection—provided to
 15 everyone from public employees to enemy combatants—is denied to companies caught up in a
 16 merger challenge pursued by the FTC.

17 **B. The FTC Lacks Political Accountability.**

18 16. Article II “vested” all “executive Power” in the President, Art. II, § 1, cl. 1, and
 19 charged the President alone with “tak[ing] Care that the Laws be faithfully executed,” Art. II, § 3.

20 17. As the Supreme Court has explained, the Constitution concentrates executive
 21 power solely in the President because the Framers wanted to “ensure ... accountability” in the
 22 Executive Branch. *Printz v. United States*, 521 U.S. 898, 922 (1997). They recognized that the
 23 President could not carry out all of his duties alone, and therefore, must be able to delegate some
 24 authority and responsibilities to others. *See* Art. II, § 2, cl. 2 (discussing appointments of superior
 25 and inferior officers); *Myers v. United States*, 272 U.S. 52, 117 (1926) (“the President alone and
 26 unaided could not execute the laws,” and thus must “select those who [are] to act for him under

27 ¹ This representation by the Ninth Circuit Court of Appeals was made before ALJ Chappell’s
 28 ruling in the Illumina/Grail matter referenced above. In the most recent instance of the FTC
 losing a case in an administrative proceeding, the Commissioners voted to reverse the ALJ.

1 his direction in the execution of the laws.”).

2 18. While the President may delegate power, the President must ensure that “the buck
3 stops” with him or her. *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 493 (2010).
4 Accordingly, the Supreme Court has recognized that, “as a general matter,” the President must
5 have the “power to remove” principal officers “who assist him in carrying out his duties.” *Id.* at
6 513-14. Indeed, if “any power whatsoever is in its nature Executive, it is the power of appointing,
7 overseeing, and controlling those who execute the laws.” *Id.* at 492 (quoting 1 Annals of Cong.
8 463 (1789) (Joseph 8 Gales ed., 1834) (Madison) (emphasis added)).

9 19. Just as the President’s ability to select administrative officers “is essential to the
10 execution of the laws by him, so must be his power of removing” officers. *Myers*, 272 U.S. at
11 117. That removal power is important to the democratic legitimacy of the Executive Branch in at
12 least two ways. First, it makes officers less likely to deviate from the President’s (and hence, the
13 People’s) will. An officer who knows that disobedience can (and will) be met with removal is
14 less likely to take an action at odds with the President’s agenda. Second, and perhaps more
15 importantly, the removal power gives the People political recourse if they are displeased with the
16 actions taken by those who enforce federal law. Although the People cannot vote for (or against)
17 an Executive officer directly, they can vote for (or against) the President, who bears ultimate
18 responsibility for federal law enforcement. Those two mechanisms for accountability work
19 together to ensure that the Government officials who carry out the work of the Executive Branch
20 do so in a way that reflects the People’s will, and not their own.

21 20. FTC Commissioners, however, are shielded from at-will Presidential removal—
22 and hence from the key mechanism of democratic accountability—in violation of Article II. The
23 FTC is headed by five Commissioners, nominated by the President and confirmed by the Senate,
24 each serving a 7-year term. 15 U.S.C. § 41. But once appointed, the Commissioners are not
25 subject to removal by the President absent a finding of “inefficiency, neglect of duty, or
26 malfeasance in office.” *Id.* This means FTC Commissioners are not politically accountable for
27 their actions.

28 21. The ALJs that initially conduct administrative proceedings receive an additional

1 layer of protection from Presidential removal. FTC-appointed ALJs can also only be removed for
 2 “good cause” in accordance with statutory procedures. 5 U.S.C. § 7521(a), (b)(1). This creates a
 3 dual layer of protection for these ALJs. The Supreme Court has uniformly held that such dual
 4 layered protection is unconstitutional. *See Free Enterp. Fund*, 561 U.S. at 495 (holding
 5 unconstitutional similar multi-layer tenure protection where Board members appointed by SEC
 6 could only be removed by those Commissioners, not the President, for cause); *Seila Law LLC v.*
 7 *CFPB*, — U.S. —, 140 S. Ct. 2183, 2192, 207 L.Ed.2d 494 (2020) (finding that the removal
 8 restrictions on the director of the CFPB violated Article II of the Constitution).

9 22. The result is that crucial law enforcement actions, sometimes with massive
 10 consequences for the American economy, are currently taken by individuals not elected by the
 11 People, and not controlled by the President. That runs directly contrary to Article II and the
 12 democratic principles underlying the Constitution.

13 **C. The FTC Adjudicates Private Rights with Limited Article III Judicial**
 14 **Review and no Trials by Jury.**

15 23. Article III provides that the judicial power of the United States is vested “in one
 16 supreme Court, and in such inferior Courts as the Congress may from time to time ordain and
 17 establish.” § 1. “Consequently, Congress cannot confer the Government’s ‘judicial Power’ on
 18 entities outside Article III.” *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 200 L.
 19 Ed. 2d 671, 138 S. Ct. 1365, 1372–73 (2018) (citing *Stern v. Marshall*, 564 U.S. 462, 484, 131
 20 S.Ct. 2594, 180 L.Ed.2d 475 (2011)). Specifically, “Congress may not withdraw from judicial
 21 cognizance any matter which, from its nature, is the subject of a suit at the common law, or in
 22 equity, or admiralty.” *Stern*, 564 U.S. at 484.

23 24. To determine if an entity is improperly exercising the “judicial power” courts
 24 distinguish between public and private rights, with private rights requiring adjudication by Article
 25 III courts. *Id.* at 495. Private rights were historically understood to include rights to “the three
 26 ‘absolute’ rights, life, liberty, and property, so called because they appertain and belong to
 27 particular men merely as individuals,’ not ‘to them as members of society or standing in various
 28 relations to each other’—that is, not dependent upon the will of the government.” *Wellness Int’l*

1 *Network, Ltd. v. Sharif*, 575 U. S. 665, 713–714 (2015) (dissenting opinion) (quoting 1 W.
2 Blackstone, Commentaries on the Laws of England 119 (1765)(internal quotation marks omitted
3 25. As part of its administrative proceedings, the FTC determines the rights of parties
4 to engage in private transactions. This directly regulates the right of parties to use their property
5 and therefore their private rights as historically understood. Moreover, an FTC order in these
6 administrative proceedings brings with it the possibility of future civil penalties. 15 U.S.C. §
7 45(l). Civil penalties require a party to surrender its property and so also implicate “private
8 rights.” See *Tull v. United States*, 481 U. S. 412, 422 (1987) (“A civil penalty was a type of
9 remedy at common law that could only be enforced in courts of law”).

10 26. Although FTC actions are technically subject to judicial review, that review is
11 limited. The FTC Act provides that “the findings of the commission as to the facts, if supported
12 by testimony, shall in like manner be conclusive” in federal court. 38 Stat. 720 (codified, as
13 amended, at 15 U. S. C. §45(c)). And, review of these proceedings is typically restricted to “the
14 court of appeals of the United States, within any circuit where the method of competition or the
15 act or practice in question was used or where such person, partnership, or corporation resides or
16 carries on business.” *Id.*

17 27. The FTC review process also includes no right for a regulated defendant to receive
18 a trial by a jury. The Seventh Amendment explicitly provides this right in “Suits at common law,
19 where the value in controversy shall exceed twenty dollars.” This includes actions “analogous to
20 Suits at common law.” *Tull*, 481 U. S., at 417.

21 28. The FTC’s actions in its administrative proceedings that implicate the rights of
22 parties to engage in private commercial transactions and create the possibility of civil penalties
23 are analogous to actions at common law and so implicate parties’ Seventh Amendment rights.

24 29. The combination of this limited judicial review and the substantial adjudication of
25 private rights that occurs in the FTC’s administrative process violates Article III of the
26 Constitution because the FTC is wielding power that is in the exclusive domain of the federal
27 courts. Additionally, the failure to provide parties to these proceedings with a right to a jury trial
28 violates the Seventh Amendment.

D. The FTC’s Administrative Proceeding Against Intercontinental Exchange.

30. On May 18, 2022, Counterclaim Plaintiff Intercontinental Exchange and Black Knight, Inc. submitted Premerger Notification and Report Forms to the Federal Trade Commission’s Premerger Notification Office and the Department of Justice’s Antitrust Division.

31. On June 17, 2022, the FTC issued a request for additional information and documentary materials (“Second Request”) to both Counterclaim Plaintiff Intercontinental Exchange and Black Knight in connection with the proposed acquisition.

32. On October 17, 2022, Counterclaim Plaintiff Intercontinental Exchange and Black Knight certified compliance with the Second Request.

33. Counterclaim Plaintiff Intercontinental Exchange and Black Knight engaged in meaningful dialogue and negotiation with the FTC, both throughout the Second Request process and after certification, seeking to educate the FTC on market realities and the effects of the proposed acquisition.

34. Despite confidence that the proposed acquisition would not lead to a substantial lessening of competition in the loan origination software (“LOS”) market, in an effort to assuage concerns articulated by the FTC, Counterclaim Plaintiff Intercontinental Exchange and Black Knight agreed to divest Black Knight’s LOS product, Empower, along with related assets, to Constellation Web Solutions Inc.

35. On March 9, 2023 and as a result of a vote the Commissioners, the FTC instituted the administrative proceedings against Intercontinental Exchange and Black Knight.

36. That same day, the FTC commenced an administrative proceeding on the antitrust merits of the Acquisition before an Administrative Law Judge. In this proceeding the FTC seeks to prevent Intercontinental Exchange and Black Knight from engaging in the Acquisition. The trial on the merits trial scheduled to begin on July 12, 2023. Once this trial is complete and an ALJ decision is rendered any review of that decision will be by the Commissioners themselves. The same Commissioners who voted to institute proceedings.

37. In a departure from longstanding practice, the FTC chose not to simultaneously file a complaint for a preliminary injunction in federal court. Instead, the FTC waited until April

1 10, 2023, to file a complaint with this court.

2 38. The FTC's complaint in this action is in aid of the administrative proceedings. It
3 seeks to preliminarily enjoin the acquisition.

4 **COUNT I**
5 **(Violation of Intercontinental Exchange's Constitutional Rights**
6 **Declaratory and Injunctive Relief)**

7 39. Intercontinental Exchange restates and incorporates by reference each and every
8 allegation of the preceding paragraphs.

9 40. The ongoing administrative proceeding, in which the FTC will act as prosecutor,
10 judge, and jury, violates several of Intercontinental Exchange's constitutional rights.

11 41. It violates Intercontinental Exchange's Due Process rights, by, among other things,
12 arbitrarily subjecting Intercontinental Exchange to the FTC's administrative processes and
13 depriving Intercontinental Exchange of the ability to make its case before a neutral arbiter.

14 42. By arbitrarily subjecting Intercontinental Exchange to unfair procedures before an
15 administrative body, rather than to a fair trial before a neutral judge appointed in accordance with
16 Article III of the Constitution with the procedural protections of a federal court, the FTC has also
17 violated Intercontinental Exchange's Equal Protection rights.

18 43. The FTC's actions separately violate Intercontinental Exchange's Constitutional
19 rights because the agency's structure, on its face, is unconstitutional under Article II. In
20 particular, the ALJ appointed by the FTC, has an impermissible dual-layer of insulation from
21 removal. Because the agency's structure violates Article II, any actions taken against
22 Intercontinental Exchange under its present structure are invalid.

23 44. Additionally, in this administrative proceeding, the FTC is adjudicating
24 Intercontinental Exchange's private rights. Such an adjudication is improper and is the exclusive
25 province of a court established by Article III of the Constitution.

26 45. Moreover, the adjudication of Intercontinental Exchange's substantial private
27 rights in an action analogous to common law actions without a jury is unlawful under the Seventh
28 Amendment to the Constitution.

46. Moreover, by failing to provide a clear principle to the FTC and DOJ to determine

1 which agency would investigate and prosecute a transaction under the antitrust laws, Congress
2 unconstitutionally delegated its legislative power to the agencies, in violation of the
3 nondelegation doctrine. So too Congress's provision to the FTC the power to sue in federal or
4 administrative court.

5 47. The Commission's conduct has caused and will continue to cause Intercontinental
6 Exchange to suffer immediate and irreparable harm to its Constitutional rights. No money
7 damages can remedy this harm, and Intercontinental Exchange has no legal avenue by which to
8 recover any money damages against the Commission. The FTC's administrative proceeding is
9 not speculative. It is happening and ongoing. Further, the FTC's suit in this court is in aid of this
10 administrative proceeding.

11 48. These violations of its constitutional rights entitle Intercontinental Exchange to
12 declaratory relief under the Declaratory Judgment Act 28 U.S.C. § 2201, as well as injunctive
13 relief against the continuation of the FTC's administrative proceeding.

14 **NOTICE OF CONTEMPLATED RELIEF**

15 WHEREFORE, Intercontinental Exchange respectfully requests that the Court enter
16 judgment:

- 17 A. Denying the FTC's requested relief;
- 18 B. Dismissing the Complaint in its entirety, with prejudice;
- 19 C. Declaring the FTC's structure unconstitutional;
- 20 D. Declaring the FTC's administrative procedures unconstitutional;
- 21 E. Enjoining the FTC and its Commissioners from pursuing an administrative
22 enforcement action against Intercontinental Exchange;
- 23 F. Awarding Intercontinental Exchange the costs it has incurred in defending this
24 action and expenses; and
- 25 G. Awarding such other and further relief to Intercontinental Exchange as the Court
26 may deem just and proper.
- 27
- 28

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

Dated: April 25, 2023

By /s/ Minna Lo Naranjo
Minna Lo Naranjo

Michelle Park Chiu, Bar No. 248421
michelle.chiu@morganlewis.com
Minna Lo Naranjo, Bar No. 259005
minna.naranjo@morganlewis.com
MORGAN, LEWIS & BOCKIUS LLP
One Market, Spear Street Tower
San Francisco, CA 94105-1596
Telephone: (415) 442-1000
Facsimile: (415) 442-1001

J. Clayton Everett Jr., *pro hac vice*
clay.everett@morganlewis.com
Ryan M. Kantor, *pro hac vice*
ryan.kantor@morganlewis.com
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004-2541
Telephone: (202) 739-3000
Facsimile: (202) 739-3001

John C. Dodds, *pro hac vice*
john.dodds@morganlewis.com
Zachary M. Johns, *pro hac vice*
zachary.johns@morganlewis.com
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921
Telephone: (215) 963-5000
Facsimile: (212) 309-6001

Kalpana Srinivasan, Bar No. 237460
ksrinivasan@susmangodfrey.com
Michael Gervais, Bar No. 330731
mgervais@susmangodfrey.com
Jesse-Justin Cuevas, Bar No. 307611
jcuevas@susmangodfrey.com
SUSMAN GODFREY L.L.P.
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
Telephone: (310) 789-3100
Facsimile: (310) 789-3150

(cont.)

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

Shawn Raymond, *pro hac vice pending*
sraymond@susmangodfrey.com
Alex Kaplan, *pro hac vice*
akaplan@susmangodfrey.com
Adam Carlis, *pro hac vice forthcoming*
acarlis@susmangodfrey.com
Alejandra Salinas, *pro hac vice forthcoming*
asalinas@susmangodfrey.com
Abby Noebels, *pro hac vice forthcoming*
anoebels@susmangodfrey.com
SUSMAN GODFREY L.L.P.
1000 Louisiana, Suite 5100
Houston, Texas 77002-5096
Telephone: (713) 651-9366
Facsimile: (713) 654-6666

*Attorneys for Defendant
Intercontinental Exchange, Inc.*

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

Proof of Service

I, Minna Lo Naranjo, hereby certify that on April 25, 2023, I electronically filed the documents entitled “DEFENDANT INTERCONTINENTAL EXCHANGE, INC.’S ANSWER AND AFFIRMATIVE DEFENSES AND COUNTERCLAIMS” with the Clerk of the Court for the United States District Court, Northern District of California using the CM/ECF system and served a copy of same upon all counsel of record via the Court’s electronic filing system.

Dated: April 25, 2023

By: /s/Minna Lo Naranjo
Minna Lo Naranjo