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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

**INTERCONTINENTAL
EXCHANGE, INC.**

and

BLACK KNIGHT, INC.,

Defendants.

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

JOINT CASE MANAGEMENT
STATEMENT

1 **JOINT CASE MANAGEMENT STATEMENT**

2 Plaintiff Federal Trade Commission (“FTC” or “Commission”) has met and conferred
3 with Defendants Intercontinental Exchange, Inc. (“Intercontinental Exchange”) and Black
4 Knight, Inc. (“Black Knight”) (collectively, “Defendants”) as required under Civil Local Rule
5 16-3. The FTC, ICE, and Black Knight jointly submit this JOINT CASE MANAGEMENT
6 STATEMENT pursuant to the Standing Order for All Judges of the Northern District of
7 California and Civil Local Rule 16-9:

8 **A. JURISDICTION AND SERVICE**

9 The parties agree that this Court has subject-matter jurisdiction over the FTC’s
10 complaint for a preliminary injunction pursuant to Section 13(b) of the FTC Act, 15 U.S.C.
11 § 53(b), and 28 U.S.C. §§ 1331, 1337(a) and 1345. There are no issues pending regarding
12 personal jurisdiction. Defendants do not plan to contest venue in this district. Defendants
13 waived service on April 11, 2023.

14 **PLAINTIFF’S STATEMENT REGARDING DEFENDANTS’ COUNTERCLAIMS:**

15 On April 25, 2023, Defendants filed counterclaims asking the Court to declare the
16 FTC’s structure and administrative procedures unconstitutional and to enjoin the Commission
17 from pursuing an administrative enforcement action against Defendants. It is unknown to the
18 FTC whether Defendants have effected service on the United States, including on the United
19 States Attorney for the Northern District of California, as required by Federal Rules of Civil
20 Procedure 4(i) and 12(a)(2). The FTC reserves its rights to contest the Court’s subject-matter
21 jurisdiction over Defendants’ counterclaims and to dispute the adequacy of service.

22 **DEFENDANTS’ STATEMENT REGARDING DEFENDANTS’ COUNTERCLAIMS:**

23 Last month, the United States Supreme Court unanimously confirmed this Court’s
24 subject matter jurisdiction over defendants’ constitutional claims. *See Axon Enter., Inc. v. Fed.*
25 *Trade Comm’n*, 598 U.S. ____, 143 S. Ct. 890, 900 (2023) (“We now conclude that the review
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1 schemes set out in the Exchange Act and the FTC Act do not displace district court jurisdiction
2 over Axon’s and Cochran’s far-reaching constitutional claims.”).

3 **B. FACTS**

4 Defendants Intercontinental Exchange and Black Knight are (among other things not
5 relevant here) financial technology companies that offer to lenders systems that facilitate the
6 origination, underwriting, issuance, and servicing of mortgage loans. The Intercontinental
7 Exchange Mortgage Technology business unit operates, among other things, a loan origination
8 system (“LOS”) called Encompass and a product pricing and eligibility engine (“PPE”) called
9 Encompass Product and Pricing Service (“EPPS”). Among other things, PPE software helps
10 lenders identify loan rates for a borrower, determine the borrower’s eligibility for a given loan,
11 and lock in the loan’s terms for the borrower. Black Knight operates, among other things, an
12 LOS called Empower and a PPE called Optimal Blue. EPPS is embedded in and has been
13 offered only to Encompass customers; Optimal Blue is a PPE that is available on numerous
14 LOS systems, including Encompass, and is integrated into Empower.

15 On May 4, 2022, Intercontinental Exchange and Black Knight signed an Agreement and
16 Plan of Merger, whereby Intercontinental Exchange agreed to acquire 100% of Black Knight for
17 approximately \$13.1 billion. The merger agreement’s outside date is November 4, 2023.

18 In May 2022, the FTC began an investigation of the proposed merger. On March 7,
19 2023, Intercontinental Exchange and Black Knight agreed (in response to concerns raised by the
20 FTC about competition among LOS providers) to remove Empower (Black Knight’s LOS
21 system) from the proposed transaction, sell Empower to a third party (Constellation Web
22 Solutions, Inc.), and revise the merger consideration accordingly. Two days later, on March 9,
23 2023, the Commission voted 4-0 to issue an administrative complaint challenging the merger
24 and authorize the petition for a TRO and PI. On the same day, the Commission commenced an
25 administrative proceeding on the antitrust merits of the proposed acquisition before an
26 Administrative Law Judge and set July 12, 2023, as the date on which the merits trial would
27 begin. According to the FTC’s Rules of Practice for Adjudicative Proceedings, the
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1 Administrative Law Judge shall file an initial decision within 70 days after the last filed, post-
2 hearing initial or reply proposed findings of fact, conclusions of law, and order. The
3 Administrative Law Judge may extend this time period by up to 30 days for good cause, and the
4 Commission may further extend this time period for good cause. Any ruling by the ALJ is an
5 initial ruling subject to de novo review by the Commission.

6 On April 10, 2023, the FTC filed this action. The parties anticipate that the following
7 factual issues regarding the merger will be disputed: (a) whether commercial LOSs, all LOSs,
8 PPEs for users of Encompass, and all PPEs constitute relevant antitrust markets as alleged in the
9 FTC's complaint (ECF No. 1, filed April 10, 2023) ("Complaint" or "Compl."), and, if so, the
10 contours of those markets (Compl. ¶¶ 37-68); (b) market shares and concentration in the
11 relevant markets (Compl. ¶¶ 69-75); (c) whether it is reasonably probable that the proposed
12 acquisition will result in anticompetitive effects in one or more of the relevant antitrust markets
13 alleged in the Complaint, or in other relevant antitrust markets for ancillary services (Compl. ¶¶
14 76-133); (d) whether new entry or expansion by existing firms will be timely, likely, or
15 sufficient to offset any anticompetitive effects (Compl. ¶¶ 134-143); (e) whether any merger-
16 specific, verifiable, and cognizable efficiencies from the merger outweigh any anticompetitive
17 effects of the merger; and (f) the effect of Defendants' contingent divestiture of certain Black
18 Knight assets (including its LOS) to Constellation (Compl. ¶¶ 144-145).

19 **C. LEGAL ISSUES**

20 This action presents the following legal issues for determination:

21 **PLAINTIFF'S STATEMENT:**

- 22 1. Whether, in an administrative proceeding, the Commission is likely to succeed in
23 showing that the effect of the proposed acquisition "may be substantially to lessen
24 competition, or tend to create a monopoly," in violation of Section 7 of the Clayton
25 Act, 15 U.S.C. § 18;

- 1 2. Whether the Commission has properly shown that, weighing the equities and
2 considering the Commission's likelihood of ultimate success, a preliminary injunction
3 would be in the public interest;
- 4 3. Whether the Section 13(b) inquiry must focus on the antitrust merits of the
5 transaction at issue or whether the Court should also consider Defendants'
6 constitutional challenges as affirmative defenses to the FTC's motion for a
7 preliminary injunction under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b); and
- 8 4. Whether the district court has subject-matter jurisdiction to entertain Defendants'
9 constitutional counterclaims for declaratory and injunctive relief.

10 **DEFENDANTS' STATEMENT**

- 11 1. Whether Defendants are entitled to declaratory relief that the FTC's administrative
12 process is unconstitutional, violates Article I of the Constitution, violates Article II
13 of the Constitution, and violates Defendants' respective constitutional rights under
14 the Due Process Clause, the Equal Protection Clause, and the Seventh Amendment;
15 and
- 16 2. Whether Defendants have shown that FTC's administrative process has caused and
17 will continue to cause Defendants to suffer immediate and irreparable harm to their
18 constitutional rights such that the FTC should be enjoined from pursuing an
19 administrative enforcement action against Defendants.

20 **D. MOTIONS**

21 On April 10, 2023, with respect to the Complaint, the FTC filed an administrative
22 motion to consider whether another party's confidential information should remain under seal.
23 Dkt. No. 4. On April 17, 2023, Defendants filed a joint administrative motion to file under seal
24 certain portions of the Complaint. Dkt. No. 22. The Court has not yet ruled on these motions.

25 On April 21, 2023, the FTC filed a motion for entry of a stipulated temporary restraining
26 order (Dkt. No. 37), which the Court granted that same day (Dkt. No. 39).

1 **E. AMENDMENT OF PLEADINGS**

2 Pursuant to Fed. R. Civ. P. 15(a)(1)(B), the FTC may amend its Complaint by May 8,
3 2023.

4 **F. EVIDENCE PRESERVATION**

5 The parties certify that they have reviewed the Guidelines Relating to the Discovery of
6 Electronically Stored Information, and that they met and conferred pursuant to Fed. R. Civ. P.
7 26(f) regarding reasonable and proportionate steps taken to preserve evidence relevant to the
8 issues reasonably evident in this action. The parties further certify that such steps are being
9 taken.

10 **G. DISCLOSURES**

11 On March 22, 2023, the parties exchanged mandatory initial disclosures pursuant to
12 Rule 3.31(b) of the FTC's Rules of Practice for Adjudicative Proceedings. 16 C.F.R. § 3.31(b)
13 (requiring disclosure of individuals "likely to have discoverable information," documents, and
14 electronically stored information "relevant to the allegations of the Commission's complaint, to
15 the proposed relief, or to the defenses of the respondent"). On April 3, 2023, Defendants served
16 amended mandatory initial disclosures, and, on April 17, 2023, the FTC served supplemental
17 mandatory initial disclosures.

18 The parties have agreed that their mandatory initial disclosures from the administrative
19 proceeding satisfy the initial disclosure requirements of Federal Rule of Civil Procedure
20 26(a)(1) for purposes of this proceeding. If the parties need to supplement or correct their
21 disclosures during the pendency of this action, they will do so pursuant to Federal Rule of Civil
22 Procedure 26(e) and Rule 3.31(e) of the FTC's Rules of Practice for Adjudicative Proceedings.

23 **H. DISCOVERY**

24 On March 29, 2023, Chief Administrative Law Judge Chappell issued a scheduling
25 order in the administrative proceedings that provided, in part, that "any discovery obtained in
26 this proceeding may be used in the related federal court litigation, and vice versa." 3/29/2023
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1 Order at ¶ 8.¹ Substantial discovery has already occurred, including the production of
2 documents, the issuance of non-party subpoenas, and many fact depositions.

3 The parties agree that the deadlines for discovery in the administrative proceeding, as set
4 forth in Chief Administrative Law Judge Chappell’s March 29, 2023 Scheduling Order attached
5 as **Exhibit A**, will apply with respect to the FTC’s claim for a preliminary injunction under
6 Section 13(b) of the Federal Trade Commission Act and any defenses to that claim. In pertinent
7 part:

- 8 a) The deadline for fact discovery shall be **May 23, 2023**, other than discovery
9 permitted under Rule 3.24(a)(4) of the FTC’s Rules of Practice for
10 Adjudicative Proceedings, expert depositions, and discovery for purposes of
11 authenticity of exhibits; provided that this deadline will not preclude the
12 parties from completing discovery of third-parties pursuant to timely served
13 subpoenas whose document productions have not been completed by May
14 23, 2023 and/or who did not make themselves reasonably available for
15 deposition pursuant to a timely subpoena within the fact discovery period.
- 16 b) The FTC will provide its expert witness list on **April 21, 2023**; Defendants
17 will provide their expert witness list on **April 28, 2023**.
- 18 c) The FTC will serve its expert report(s) by **May 30, 2023**. Defendants will
19 serve their expert report(s) by **June 13, 2023**. The FTC will identify any
20 rebuttal expert(s) and serve any rebuttal expert report(s) by **June 23, 2023**.
- 21 d) The deadline for expert depositions shall be **June 29, 2023**.
- 22 e) The parties agree to no more than five (5) experts per side.
- 23

24 _____
25 ¹ Judge Chappell’s order also provides that “Document requests, interrogatories, and requests
26 for admission served by the parties in connection with any federal action will count against the
27 discovery request limits noted above and vice versa. No individual or entity deposed in one
28 action may be re-deposed in the other. The parties preserve all rights to object to the
admissibility of evidence.” 3/29/2023 Order at ¶ 8.

1 The parties agree that the same limits on discovery set forth in Chief Administrative
2 Law Judge Chappell's March 29, 2023 Scheduling Order apply in this proceeding. In pertinent
3 part, no more than 50 document requests, including all discrete subparts; 20 interrogatories,
4 including all discrete subparts; and 10 requests for admission, including all discrete subparts,
5 shall be served on any named party, except that there shall be no limit on the number of requests
6 for admission for authentication and admissibility of exhibits. There is no limit to the number
7 of sets of discovery requests the parties may issue, so long as the total number of each type of
8 discovery request, including all subparts, does not exceed these limits. Document requests,
9 interrogatories, and requests for admission served by the parties in connection with the
10 administrative proceeding will count against the discovery request limits noted above and vice
11 versa. No individual or entity deposed in one action may be re-deposed in the other. The
12 parties preserve all rights to object to the admissibility of evidence.

13 The parties have also reached additional discovery-related agreements:

14 Written Discovery. The parties agree to serve document requests, interrogatories, and
15 requests for admission (except for requests for admissions for purposes of authenticity of
16 documents) to parties by no later than **May 12, 2023**. The parties agree to serve any objections
17 to document requests within 5 business days of service of the request, to meet and confer to
18 attempt to resolve any disputes, and to discuss timing of production within 3 business days of
19 the objections being served. The party responding to document requests will make a good-faith
20 effort to produce responsive documents as expeditiously as possible, including by making
21 productions on a rolling basis.

22 Depositions. The parties agree that relief from the limitation on the number of
23 depositions set forth in Federal Rule of Civil Procedure 30(a)(2) is necessary and appropriate.
24 Each side may depose any witness who is listed on either side's preliminary, supplemental, or
25 final witness list in the administrative proceeding; who provides a declaration or affidavit; or
26 who is listed on any party's initial disclosures. All depositions, including depositions of fact
27 and expert witnesses, shall last no more than seven (7) hours on the record. Unless the parties
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1 otherwise agree, at the request of any party, the time and allocation for a non-party deposition
2 shall be divided evenly between them, but the noticing party may use any additional time not
3 used by the opposing party. If no party makes such a request, cross-examination of the witness
4 will be limited to one hour. For purposes of allocating deposition time, former employees,
5 consultants, agents, contractors, or representatives of the parties are considered party witnesses
6 if they are represented by Defendants' counsel or if any Defendant is paying for the witness'
7 counsel, and Defendants may not subpoena depositions of their own party witnesses.

8 Non-Party Subpoenas. Non-parties shall provide copies or make available for inspection
9 and copying of documents requested by subpoena to the party issuing the subpoena. The party
10 that has requested documents from non-parties shall provide copies of the documents received
11 from non-parties to the opposing party within three business days of receiving the documents.
12 No deposition of a non-party shall be scheduled between the time a non-party provides
13 documents in response to a subpoena duces tecum to a party, and three business days after the
14 party provides those documents to the other party, unless a shorter time is required by
15 unforeseen logistical issues in scheduling the deposition, or a non-party produces those
16 documents at the time of the deposition, as agreed to by all parties involved. The parties shall
17 serve any subpoenas on non-parties no later than **May 12, 2023**.

18 Declarations. A party that obtains a declaration from a non-party will promptly produce
19 it to the other side, and in any event not later than (1) seven days before the non-party is
20 scheduled to be deposed, or (2) **May 9, 2023**, whichever is earlier, absent a showing of good
21 cause. Each side is limited to 15 declarations by non-parties, except for declarations regarding
22 authenticity and admissibility of exhibits. The parties reserve all rights and objections with
23 respect to the use and/or admissibility of any declaration, and no declaration will be admitted
24 unless a fair opportunity was available to depose the declarant.

25 Limitations on Expert Discovery. Expert disclosures, including each side's expert
26 reports, shall comply with the requirements of Federal Rule of Civil Procedure 26(a)(2), except
27 as modified by agreement or order:
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- 1 a) Neither side must preserve or disclose, including in expert deposition
2 testimony, the following documents or materials:
- 3 i. any form of communication or work product shared between any of
4 the parties' counsel and their expert(s), or between any of the
5 experts themselves;
 - 6 ii. any form of communication or work product shared between an
7 expert(s) and persons assisting the expert(s);
 - 8 iii. expert's notes, unless they constitute the only record of a fact or an
9 assumption relied upon by the expert in formulating an opinion in
10 this case;
 - 11 iv. drafts of expert reports, analyses, or other work product; or
 - 12 v. data formulations, data runs, data analyses, or any database-related
13 operations not relied upon by the expert in the opinions contained in
14 his or her final report.
- 15 b) The parties agree that they will disclose the following materials with all
16 expert reports:
- 17 i. a list by Bates number of all documents relied upon by the
18 testifying expert(s); and copies of any materials relied upon by the
19 expert not previously produced that are not readily available
20 publicly;
 - 21 ii. a list of all commercially-available computer programs used by the
22 expert in the preparation of the report;
 - 23 iii. a copy of all data sets used by the expert, in native file format and
24 processed data file format; and
 - 25 iv. all customized computer programs used by the expert in the
26 preparation of the report or necessary to replicate the findings on
27 which the expert report is based.
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1 Protective Order. The parties are in the process of negotiating a protective order and
2 intend to submit a motion for entry of that protective order soon. Any party serving discovery
3 requests, notices, or subpoenas sent to a non-party shall provide the non-party with a copy of the
4 Protective Order.

5 Remote Deposition Protocol. The parties agree that the Stipulation and Order
6 Governing the Taking of Remote Depositions, entered by Chief Administrative Law Judge
7 Chappell in the administrative proceeding on April 6, 2023 and attached as **Exhibit B**, will
8 apply in this proceeding, and will file a joint stipulation and proposed order to that effect.

9 Pre-Trial Discovery Conference. This stipulated Order relieves the parties of their duty
10 under Federal Rule of Civil Procedure 26(f) and Civil Local Rule 16-2(d) to confer about
11 scheduling and a discovery plan.

12 **I. CLASS ACTIONS**

13 There is no proposed class at issue in this matter.

14 **J. RELATED CASES**

15 On March 9, 2023, the Commission commenced an administrative proceeding on the
16 antitrust merits of the proposed acquisition, FTC Dkt. No. 9413, with the merits trial scheduled
17 to begin on July 12, 2023.

18 **K. RELIEF**

19 The FTC requests that the Court enter a preliminary injunction to prevent Defendants
20 from taking any further steps to consummate the proposed acquisition, or any other acquisition
21 of stock, assets, or other interests of one another, either directly or indirectly; retain jurisdiction
22 and maintain the status quo until the administrative proceeding initiated by the Commission is
23 concluded; and award such other and further relief as the Court may determine is appropriate,
24 just, and proper. The FTC believes that Defendants are not entitled to the relief sought in their
25 counterclaims challenging the constitutionality of the administrative process filed on April 25,
26 2023.

1 Defendants believe that the FTC is not entitled to the relief sought. Defendants are
2 seeking both declaratory and injunctive relief based on their constitutional challenges to the
3 FTC's administrative process. Defendants preserve their right to seek preliminary injunctive
4 relief if that relief becomes necessary and appropriate.

5 **L. SETTLEMENT AND ADR**

6 The parties have not engaged in formal settlement discussions and believe that ADR is
7 unlikely to resolve their differences.

8 **M. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

9 The parties decline to consent to proceed before a Magistrate Judge for all purposes; this
10 matter was assigned to U.S. District Court Judge Araceli Martínez-Olguín on April 11, 2023.

11 **N. OTHER REFERENCES**

12 The parties agree this case is not suitable for reference to binding arbitration, a special
13 master or the JPML.

14 **O. NARROWING OF ISSUES**

15 The parties do not believe that it is possible to narrow the issues at this time.

16 **P. EXPEDITED TRIAL PROCEDURE**

17 The parties do not believe that this case is appropriate to be handled under the Expedited
18 Trial Procedure of General Order 64.

19 **Q. PROPOSED CASE SCHEDULE**

20 The parties have reached agreement on the schedule for fact and expert discovery
21 regarding the FTC's claims for a preliminary injunction under Section 13(b) of the Federal
22 Trade Commission Act, 15 U.S.C. § 53(b), but disagree as to the timing and scope of the
23 evidentiary hearing regarding the FTC's motion for a preliminary injunction and related briefing
24 as it pertains to the FTC's claims under Section 13(b). The parties have not reached agreement
25 on the schedule as it pertains to Defendants' counterclaims.
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FACT AND EXPERT DISCOVERY SCHEDULE:

As set forth in Section H above, the parties agree that the deadlines for discovery in the administrative proceeding, as set forth in Chief Administrative Law Judge Chappell's March 29, 2023 Scheduling Order attached as Exhibit A, will apply in this proceeding with respect to the FTC's claim for a preliminary injunction under Section 13(b) of the Federal Trade Commission Act and any defenses to that claim:

Event	Deadline
Close of fact discovery, other than depositions of experts, and discovery for purposes of authenticity of exhibits; provided that this deadline will not preclude the parties from completing discovery of third-parties pursuant to timely served subpoenas whose document productions have not been completed by May 23, 2023 and/or who did not make themselves reasonably available for deposition pursuant to a timely subpoena within the fact discovery period.	May 23, 2023
Deadline for Plaintiff to provide expert witness reports and all Backup Materials (as defined below).	May 30, 2023
Deadline for Defendants to provide expert witness reports and all Backup Materials (as defined below).	June 13, 2023
Plaintiff to identify rebuttal expert(s) and provide rebuttal expert report(s) and all Backup Materials (as defined below). Any such reports are to be limited to rebuttal of matters set forth in Defendants' expert reports. If material outside the scope of fair rebuttal is presented, Defendants will have the right to seek appropriate relief (such as striking Plaintiff's rebuttal expert reports or seeking leave to submit surrebuttal expert reports on behalf of Defendants).	June 23, 2023
Deadline for depositions of experts (including rebuttal experts) and exchange of expert related exhibits.	June 29, 2023

1 **PRELIMINARY INJUNCTION HEARING AND COUNTERCLAIMS:**

2 **PLAINTIFF’S POSITION:**

3 The issue before this Court is the FTC’s likelihood of success in already ongoing
4 proceedings before an Administrative Law Judge, *In the Matter of Intercontinental Exchange,*
5 *Inc. and Black Knight, Inc.*, FTC Docket No. 9413, in establishing that the effect of Defendants’
6 proposed transaction “may be substantially to lessen competition, or to tend to create a
7 monopoly” under Section 7 of the Clayton Act, 15 U.S.C. § 18. *FTC v. Affordable Media*, 179
8 F.3d 1228, 1233 (9th Cir. 1999) (Under Section 13(b) of the Federal Trade Commission Act, “a
9 court must 1) determine the likelihood that the Commission will ultimately succeed on the
10 merits and 2) balance the equities.”); *FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1162 (9th
11 Cir. 1984) (The “Commission meets its burden if it ‘raise[s] questions going to the merits so
12 serious, substantial, difficult and doubtful as to make them fair ground for thorough
13 investigation, study, deliberation and determination by the FTC in the first instance and
14 ultimately by the Court of Appeals.’”).

15 The administrative trial will begin in a little over two months, on July 12, 2023, and is
16 likely to conclude by early August. To lessen the burden on the Court, as well as on any
17 nonparties who would need to testify in both the preliminary injunction hearing and the
18 administrative trial, the FTC proposes submitting the entire administrative trial record to this
19 Court in August following the conclusion of the administrative trial, with briefing and any
20 hearing to be concluded by September 22, 2023, pursuant to the below proposed schedule. This
21 proposed schedule allows the Court to rule based on this administrative record or order a short
22 evidentiary hearing in August should the Court wish to hear from live witnesses. *FTC v.*
23 *Tronox Ltd.*, 332 F. Supp. 3d 187, 196 (D.D.C. 2018) (ruling based on “the complete
24 administrative record before the ALJ” along with “live testimony from three witnesses of [each
25 side’s] choosing”). It also leaves ample time for a decision by this Court in advance of
26 Defendants’ voluntary and self-imposed outside closing date of November 4, 2023, at which
27 point the merger agreement allows, but does not require, either Defendant to terminate the
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1 merger agreement.

2 The FTC does not dispute that the District Court must “exercise independent judgment”
 3 as to whether the FTC is entitled to a preliminary injunction. However, it does not follow that
 4 Defendants are entitled to the equivalent of a full merits trial in federal court, or that such a
 5 hearing is a “long-standing, standard approach.” Indeed, some preliminary injunctions under
 6 Section 13(b) have been decided solely on the papers and oral argument where, unlike here, the
 7 Court did not have the benefit of the full administrative record. *E.g., FTC v. Lab. Corp. of Am.*,
 8 No. SACV 10–1873 AG (MLGx) (C.D. Cal. Dec. 16, 2010) (declining Defendants’ request for
 9 an evidentiary hearing and setting “a hearing without witnesses” roughly two months after the
 10 FTC filed its complaint) (attached as Exhibit D to Dkt. 38).

11 Defendants propose holding the preliminary injunction hearing on the same date as the
 12 administrative trial—which was set, and can only be moved, by the FTC commissioners—is
 13 scheduled to commence.

Event	Deadline
The parties will jointly submit to this Court a comprehensive listing of all the materials in the record of the administrative proceeding, FTC Dkt. No. 9413. The entire administrative record from the FTC administrative proceeding will be in the record and can be considered as evidence in this Court.	August 18, 2023
The FTC shall file its memorandum in support of its request for a preliminary injunction. The FTC’s memorandum shall not exceed 50 pages.	August 18, 2023
Defendants shall file their memorandum(s) in opposition to the FTC’s request for a preliminary injunction. Defendants’ memorandum(s) shall cumulatively not exceed 50 pages.	September 1, 2023
The FTC shall file its reply memorandum in support of its request for a preliminary injunction. The FTC’s reply memorandum shall not exceed 25 pages.	September 8, 2023
Oral argument on the FTC’s motion for a	September 23, 2023

preliminary injunction	
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2 The above schedule follows the deadlines followed in Local Rules 7-2 and 7-3, although
3 the FTC is amenable to an accelerated briefing schedule in August should the Court want to
4 move more expeditiously.

5 Alternatively, if the Court prefers to hold the evidentiary hearing before the
6 administrative trial, the FTC requests that the Court schedule a hearing of 15 hours per side to
7 begin the week of June 26, if convenient for the Court, to allow time for the hearing to conclude
8 and for oral argument before the administrative trial begins on July 12, 2023.

9 With respect to Defendants' counterclaims, these counterclaims—which were filed after
10 this Court's order of April 25, 2023 regarding the case management conference and statement—
11 implicate 15 U.S.C. § 56(a), which requires the Commission to notify and consult with the
12 Department of Justice regarding defense of complaints filed against the Commission. The
13 Commission notified the Department of Justice regarding the counterclaims on April 26, 2023;
14 pursuant to Section 56(a), the Department of Justice has 45 days from such notification “to
15 commence, defend, or intervene” in the action. Under Federal Rule of Civil Procedure 12(a)(2),
16 the United States has 60 days after service to answer the counterclaims. As the FTC has
17 informed Defendants, it cannot proceed with setting a schedule regarding the counterclaims
18 until it knows how the Department of Justice intends to proceed.

19 DEFENDANTS' POSITION:

20 The FTC sought relief in this Court by filing a preliminary injunction and then
21 successfully obtaining a temporary restraining order. Defendants are subject to that temporary
22 restraining order and only this Court can grant or deny the extraordinary relief sought by the
23 FTC of an injunction to stop the ICE/BK merger. Defendants seek a prompt hearing on the
24 preliminary injunction – which can be done on a complete record in this Court rather than one
25 developed in another tribunal subject to different evidentiary standards and credibility
26 determinations. A prompt hearing is necessary because the outside date for closing this merger
27 is November 4, 2023. Defendants are amenable to beginning the preliminary injunction
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1 proceeding on June 26 or as soon after as the Court is available, though believe the parties’
2 current discovery schedule lends itself to beginning on July 12. The preliminary injunction – as
3 a decision of likelihood on the merits – should precede any hearing before the ALJ. The FTC
4 implicitly acknowledges this ordering is appropriate by indicating the preliminary injunction
5 can proceed on June 26 before its ALJ hearing.

6 This Court’s statutory authority to enter preliminary injunctions brings with it a duty to
7 “exercise independent judgment” about whether the FTC has met its burden to “raise questions
8 going to the merits so serious, substantial, difficult[,] and doubtful” to warrant a preliminary
9 injunction. *Fed. Trade Comm’n v. Meta Platforms Inc.*, No. 5:22-CV-04325-EJD, 2023 WL
10 2346238, at *8 (N.D. Cal. Feb. 3, 2023) (internal quotations omitted). As in the Meta matter,
11 there is a tried-and-true path for exercising independent judgment where (as here) the FTC both
12 requests a preliminary injunction and pursues an administrative proceeding: the preliminary
13 injunction takes precedent and is heard and decided first based on an evidentiary hearing in the
14 federal court. The preliminary injunction is the only time-sensitive issue and that standard
15 procedure puts it first. It is also the most efficient process (this Court’s ruling may moot the
16 administrative proceeding), the most prudent approach (it may avoid ruling on the substantial
17 constitutional issues raised by the FTC’s administrative proceeding that would be front and
18 center if this Court effectively deferred to that proceeding), and the only way to reach the merits
19 before the merger’s November 4, 2023 outside date (the administrative process will not finish
20 this year).

21 The only case the FTC has cited to support its contrary approach is *Tronox*, but even
22 there the court did not agree to decide the injunction based on an evidentiary record developed
23 in the administrative proceeding and instead adopted the defendants’ proposal for live witnesses
24 and argument. *See Fed. Trade Comm’n v. Tronox Ltd.*, 332 F. Supp. 3d 187, 196 (D.D.C. 2018)
25 (“The Commission proposed that the hearing proceed with oral arguments based solely on the
26 closed evidentiary record before the ALJ. The Defendants objected, ultimately proposing that
27 each side be allowed to present live testimony from two expert witnesses and a fact witness.
28

1 The Court allowed each side to present live testimony from three witnesses of their choosing,
2 and to present opening and closing arguments.”). The only reason the preliminary injunction
3 hearing followed the administrative hearing in *Tronox* is because, unlike here, the government
4 did not seek a preliminary injunction in federal court until after administrative hearing had
5 finished. *Id.* (“[T]he ALJ held an administrative trial from May 18 to June 22, 2018. . . . On
6 July 10, 2018, the FTC petitioned this Court for a TRO and a preliminary injunction to halt a
7 potential closing of the deal.”). Here, the administrative hearing has not started, the schedule
8 for discovery would be identical, the parties are many months away from a ruling by the ALJ,
9 and any ALJ ruling is subject to de novo appeal. Indeed, the parties have had limited
10 interaction with the ALJ beyond a preliminary scheduling conference and the ALJ has not
11 begun to address the substantive issues in this case. There is no reason to abandon the long-
12 standing, standard approach that the United States District Court fully hear and decide the
13 FTC’s requested preliminary injunction before the administrative hearing occurs.

14 The FTC’s approach would have this Court exercise its “independent judgment” on the
15 basis of a paper record that this Court would have no role in overseeing. Since this Court is the
16 only court that may enjoin the merger, it should see and hear the parties’ witnesses for itself,
17 make its own determinations on the admissibility of evidence, and come to its own conclusions
18 on the law and the facts.

19 Defendants respectfully request a full and fair hearing on the preliminary injunction. To
20 the extent this Court’s preferred dates and deadlines conflict with the schedule and dates in the
21 administrative proceeding, 16 C.F.R. § 3.1 provides that “[i]n the event of a scheduling conflict
22 between a proceeding in which the Commission also has sought or is seeking relief under
23 Section 13(b) of the FTC Act . . . and another proceeding, the proceeding in which the
24 Commission also has sought or is seeking relief under Section 13(b)”—here the preliminary
25 injunction proceeding—“shall take precedence.”

26 Defendants believe the FTC’s concerns as to the counterclaims and schedules are not
27 warranted because the counterclaims raise solely legal questions. Nonetheless, Defendants are
28

1 amenable to resolution of their counterclaims coming after and trailing the resolution of the
 2 FTC’s request for a preliminary injunction – which would allow the preliminary injunction to
 3 complete discovery and proceed in the near term. Defendants’ proposed deadlines track the
 4 schedule set by the ALJ for a July 12, 2023² hearing:
 5

Event	Deadline
7 Parties to provide updated preliminary witness list 8 identifying those fact witness each side may call, 9 which will include no more than 30 persons total 10 with no more than 7 witnesses who did not appear 11 on that side’s preliminary list exchanged in the 12 Administrative Action, with a brief summary of 13 the proposed testimony.	May 5, 2023
12 Plaintiff provides to Defendants final proposed 13 witness list, comprised of no more than 25 14 witnesses that Plaintiff anticipates will be called to 15 testify at the Hearing, with no more than 5 16 witnesses who did not appear on Plaintiffs’ 17 preliminary or updated witness lists, and exhibit 18 lists, including depositions, copies of all exhibits 19 (except for demonstrative, illustrative or summary 20 exhibits and expert related exhibits), Plaintiffs’ 21 basis of admissibility for each proposed exhibit, 22 and a brief summary of the testimony of each 23 witness.	June 8, 2023
19 Plaintiff’s Motion for Preliminary Injunction and 20 Memorandum of Points and Authorities in Support. 21 This motion and Defendants’ opposition are 22 limited to 50 pages. Plaintiff may file a reply 23 limited to 25 pages.	June 15, 2023
23 Defendants provide to Plaintiff final proposed 24 witness list, comprised of no more than 25 25 witnesses that Defendants anticipate will be called 26 to testify at the Hearing, with no more than 5	June 15, 2023

26 ² If the Court sets the evidentiary hearing for June 26 or a different date in July, Defendants are
 27 confident the parties could reach agreement on any necessary adjustments to the pre-trial
 28 deadlines so that trial could start on that date.

1	witnesses who did not appear on Defendants’ preliminary or updated witness lists, and exhibit lists, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.	
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5	Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non- party.	June 16, 2023
6		
7		
8	Deadline for filing motions <i>in limine</i> to preclude admission of evidence.	June 26, 2023
9		
10	Deadline for filing motions for <i>in camera</i> treatment of proposed trial exhibits.	June 26, 2023
11		
12	Deadline for filing responses to motions <i>in limine</i> to preclude admission of evidence.	June 30, 2023
13		
14	Deadline for filing responses to motions for <i>in camera</i> treatment of proposed trial exhibits.	June 30, 2023
15		
16	Defendants’ Opposition to Motion for Preliminary Injunction and Memorandum of Points in Authority.	June 30, 2023
17		
18	Exchange final proposed witness lists and exhibit lists.	July 3, 2023
19		
20	Exchange proposed stipulations of law, facts, and authenticity.	July 7, 2023
21		
22	Pretrial Conference.	July 11, 2023
23	Trial begins.	July 12, 2023
24		
25		
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28		

1 **R. PRELIMINARY INJUNCTION HEARING**

2 The parties do not have agreement on this issue.

3 The FTC requests a hearing on the FTC's request for a preliminary injunction as soon as
4 convenient for the Court on or after **September 22, 2023**, following the July 12 administrative
5 trial, or as soon as convenient for the Court on or after **June 26, 2023**, preceding the July 12
6 administrative trial.

7 Intercontinental Exchange and Black Knight are amenable to beginning the preliminary
8 injunction proceeding on the FTC's proposed date of **June 26, 2023**, or as soon after as the
9 Court is available. The parties' current discovery schedule lends itself to beginning on **July 12,**
10 **2023**, but the Defendants will be ready as soon as the Court wishes.

11 **S. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

12 Pursuant to Civil Local Rule 3-15, Intercontinental Exchange filed its Certification of
13 Interested Entities or Persons on April 14, 2023. Intercontinental Exchange has no parent
14 corporation and no publicly held corporation owns more than ten percent of Intercontinental
15 Exchange. Defendant Black Knight filed its Certification of Interested Entities or Persons on
16 April 26, 2023. Black Knight has no parent corporation and no publicly held corporation owns
17 more than ten percent of Black Knight. There is no conflict or interest (other than the named
18 parties) to report.

19 **T. PROFESSIONAL CONDUCT**

20 All attorneys of record have reviewed the Guidelines for Professional Conduct for the
21 Northern District of California.

22 **U. OTHER MATTERS**

- 23 1. Service. Service of any documents not filed via ECF, including pleadings, discovery
24 requests, Federal Rule of Civil Procedure 45 subpoenas for testimony or documents,
25 expert disclosure, and delivery of all correspondence, whether under seal or
26 otherwise, shall be by electronic mail to the following individuals designated by
27 each party:
28

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In the event the volume of served materials is too large for email and requires electronic data transfer by file transfer protocol or a similar technology, or overnight delivery if agreed by the parties, the serving party will telephone or email the other side's principal designee when the materials are sent to provide notice that the materials are being served. For purposes of calculating discovery response times under the Federal Rules of Civil Procedure, electronic delivery shall be treated the same as hand delivery.

2. Answer. Defendants Intercontinental Exchange and Black Knight each answered the Complaint on April 25, 2023 and asserted counterclaims. Plaintiff has not yet answered Defendants' counterclaims. Pursuant to Federal Rule of Civil Procedure 12(a)(2), the United States must serve an answer within 60 days after proper service.
3. Privilege Logs. The parties agree to suspend the obligations of Federal Rule of Civil Procedure 26(b)(5)(A) to produce a log of privileged materials withheld from discovery taken in this action (excluding Defendants' productions made during the course of the FTC's pre-complaint investigation). Notwithstanding the foregoing, the parties shall log withheld materials that are: (1) authored by, addressed to, or received from any non-party; or (2) internal to a party that are not authored by, sent to, or received from the party's attorneys. For purposes of this paragraph, a "non-

1 party” excludes a party’s retained testifying or consulting expert and employees of
2 such expert within the meaning of Federal Rule of Civil Procedure 26(b). The
3 parties shall maintain all documents responsive to a discovery request that they
4 withhold pursuant to a claim of privilege or protection. Either Defendant may agree
5 with Plaintiff to further modify that defendant’s logging obligations.

6 4. Inadvertent Production of Protected Material. In accordance with Federal Rule of
7 Civil Procedure 16(b)(3)(B)(iv) and Federal Rule of Evidence 502(d), inadvertent
8 production of documents or communications containing privileged information or
9 attorney work product shall not be a basis for loss of privilege or work product of the
10 inadvertently produced material, provided that the producing party notifies the
11 receiving party within three (3) business days of learning of the inadvertent
12 production. When a party determines that it has inadvertently produced such
13 material, it will notify the other parties, who will promptly return, sequester, or
14 delete the protected material from their document management systems. Within five
15 (5) business days of identifying inadvertently produced information or documents(s),
16 the party seeking claw-back of such materials shall provide a revised privilege log
17 for the identified information or documents.

18 5. Attorney Work-Product. The parties will neither request nor seek to compel the
19 production of any interview notes, interview memoranda, or recitation of
20 information contained in such notes or memoranda, or recitation of information
21 contained in such notes or memoranda, created by any party’s Counsel, except as
22 specified in Paragraph H.8. Nothing in this agreement requires the production of
23 any party’s attorney work-product; confidential attorney-client communications;
24 communications with or information provided to any potentially or actually retained
25 expert; communications between counsel for the FTC, its Commissioners and/or
26 persons employed by the FTC; or materials subject to the deliberative-process
27 privilege or any other privilege.
28

1 6. Modification of Scheduling and Case Management Order. Any party may seek
2 modification of the Case Management Order for good cause, except that the parties
3 may also modify discovery and expert disclosure deadlines by agreement.
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1 Dated: May 5, 2023

Respectfully submitted,

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FILER'S ATTESTATION

I, Abby L. Dennis, am the ECF User whose ID and password are being used to file this
JOINT CASE MANAGEMENT STATEMENT (DKT. 72). In compliance with Civil Local Rule
5-1(h), I hereby attest that concurrence in the filing of this document has been obtained from
each of the other signatories.

By: /s/ Abby L. Dennis

Abby L. Dennis