

**ANALYSIS OF AGREEMENT CONTAINING
CONSENT ORDERS TO AID PUBLIC COMMENT**

In the Matter of Intercontinental Exchange, Inc. and Black Knight, Inc.

File No. 221-0142, Docket No. 9413

I. Introduction

The Federal Trade Commission (“Commission”) has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) with Intercontinental Exchange, Inc. (“ICE”) and Black Knight, Inc. (“Black Knight”) (collectively, “Respondents”).

On May 4, 2022, ICE and Black Knight entered into an agreement whereby ICE would acquire Black Knight for approximately \$13.1 billion (the “Proposed Transaction”). The Proposed Transaction raises significant competitive concerns relating to the price and quality of residential mortgage origination software throughout the United States. ICE and Black Knight are the nation’s two dominant residential mortgage loan origination system (“LOS”) and product, pricing, and eligibility engine (“PPE”) providers. Their combination would further consolidate already-concentrated LOS and PPE markets and would increase ICE’s incentive to disadvantage independent PPE providers who rely on software integration with ICE’s Encompass LOS to serve their own customers.

On March 7, 2023, ICE and Black Knight announced a deal to divest Black Knight’s Empower LOS and certain associated products and services to Constellation Web Solutions Inc. and its affiliates (collectively, “Constellation”). Because Respondents’ proposed divestiture did not address the full range of possible harms arising from the Proposed Transaction, the Commission chose to challenge the deal. On March 9, 2023, the Commission issued an administrative complaint alleging that the Proposed Transaction, if consummated, may substantially lessen competition in the markets for LOSs, commercial LOSs, PPEs, and PPEs for users of ICE’s Encompass LOS in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. On April 10, 2023, Commission staff also filed suit in the United States District Court for the Northern District of California under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), seeking to enjoin Respondents from merging until the legality of the Proposed Transaction had been adjudicated.

After months of litigation, ICE and Black Knight announced on July 17, 2023, a deal to divest Black Knight’s Optimal Blue business unit, also to Constellation, which contains the Optimal Blue PPE product. In light of the deals to divest Black Knight’s LOS and PPE businesses and progress made in negotiations, the Commission and Respondents agreed to a dismissal without prejudice of the United States District Court action on August 7, 2023.

Since the announcement of the Optimal Blue divestiture, the Commission and Respondents have negotiated additional terms, now memorialized in the Consent Agreement and incorporated in the Decision and Order (“D&O”), that better ensure that these divestitures will position Constellation as an effective competitor. The Consent Agreement requires Respondents to complete the divestitures to Constellation within 20 days after ICE consummates its acquisition of Black Knight. The Consent Agreement contains additional safeguards to ensure that Respondents maintain the viability of the divestiture assets until the divestitures are complete and provide necessary transition services to Constellation.

The Commission has placed the Consent Agreement on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the comments received and decide whether it should withdraw, modify, or finalize the Consent Agreement.

II. The Respondents

Respondent ICE is a publicly traded corporation incorporated in Delaware, with its headquarters in Atlanta, Georgia. ICE provides market infrastructure, data services, and technology solutions in three segments: exchanges (including the New York Stock Exchange), fixed income and data services, and mortgage technology. In 2020, ICE acquired Ellie Mae, along with its widely used Encompass LOS. ICE also offers a PPE—the Encompass Product and Pricing Service (“EPPS”)—to Encompass users.

Respondent Black Knight is a publicly traded corporation incorporated in Delaware, with its headquarters in Jacksonville, Florida. Black Knight is a provider of software, data, and analytics for the mortgage, real estate, and consumer loan markets. Black Knight’s mortgage technology products include the Empower LOS, the Mortgage Servicing Platform, and the Optimal Blue PPE. Black Knight acquired Optimal Blue from the private equity firm GTCR in 2020.

III. The Relevant Markets

The Proposed Transaction presents substantial antitrust concerns relating to two services central to the residential mortgage loan origination workflow: LOSs and PPEs. Mortgage lenders of all sizes rely on LOS software as the primary tool to manage the residential mortgage loan origination process. An LOS serves as the lender’s system of record for each loan and is used to manage the workflow for the origination process and to perform commercial, legal, and compliance tasks required during the lending process. As a mortgage moves from application to close, it touches on numerous ancillary services necessary to process, underwrite, fund, and close a loan. The LOS coordinates and automates much of a lender’s interaction with these ancillary services. Because of the administrative complexity, regulatory framework, and risk involved in the mortgage origination process, originating mortgage loans without an LOS would be prohibitively burdensome and costly for most lenders.

Most mortgage lenders rely on commercial LOSs provided by specialized vendors, such as ICE’s Encompass LOS and Black Knight’s Empower LOS. Though some lenders choose to originate mortgages with in-house LOSs, the complex programming and compliance tasks involved with operating an LOS require significant investment and specialized expertise that is beyond the capabilities of all but a few large lenders. Even among the few lenders with proprietary systems, the trend has been to move toward commercial LOSs. Commercial LOSs therefore constitute a relevant product market in which to analyze the effects of the Proposed Transaction. A market including commercial and proprietary LOSs is an appropriate alternate relevant product market in which to evaluate the effects of the Proposed Transaction.

A PPE is an ancillary service that a mortgage lender uses to identify potential loan rates for residential loan products for a borrower, determine the borrower’s eligibility for a given loan, and lock in the loan’s terms for the borrower. Software integration between a PPE and a lender’s chosen LOS enables a lender to take advantage of a PPE’s full functionality, allowing loan and

application data to flow automatically between the LOS, PPE, and other ancillary services. Lenders thus express a strong preference for PPEs integrated with their LOS of choice. Because users of ICE's Encompass LOS are functionally limited to choosing among PPEs integrated with Encompass, PPEs for Encompass users constitute a relevant product market in which to evaluate the effects of the Proposed Transaction. Similarly, a product market including all PPEs is an appropriate alternate market through which to evaluate the effects of the Proposed Transaction.

Because LOS and PPE competition takes place on a national scale, the relevant geographic market in which to evaluate the Proposed Transaction is the United States.

IV. Effects of the Proposed Transaction on Competition

The Proposed Transaction would eliminate direct and substantial competition between ICE and Black Knight in each of the relevant markets. ICE and Black Knight operate the two largest commercial LOSs in the United States. ICE's EPPS also competes directly with Black Knight's Optimal Blue PPE for the business of lenders using ICE's Encompass LOS. Respondents compete on price to market their LOSs and PPEs, and their customers have benefitted. Respondents also compete on functionality, which has driven innovation and investment in LOS and PPE features. By eliminating this head-to-head competition, the Proposed Transaction would enable the combined firm to increase LOS and PPE prices and reduce its investment in these products. By giving ICE control of the popular Optimal Blue PPE, the Proposed Transaction also would increase ICE's incentive to disadvantage rival PPEs who rely on software integrations with ICE's Encompass LOS to serve their customers by foreclosing or restricting the rivals' access to Encompass or degrading the quality of the rivals' integrations with Encompass. Finally, the Proposed Transaction would further an existing trend toward concentration in LOS and PPE markets.

Entry into each relevant market would not be timely, likely, or sufficient to deter or counteract anticompetitive effects arising from the Proposed Transaction. Significant barriers to LOS and PPE entry include substantial investment and software development timelines, as well as lenders' high switching costs, lengthy switching timelines, and reluctance to switch to unproven products.

V. The Proposed Order

The D&O would address the Proposed Transaction's anticipated anticompetitive effects by requiring Respondents to divest Black Knight's Optimal Blue business (including the Optimal Blue PPE), Empower LOS, and certain associated ancillary products and assets to Constellation. Under the terms of the proposed divestiture, Constellation would also receive a license to resell with Empower certain other Black Knight mortgage-related products and services which would be acquired by ICE. The D&O requires that the divestitures be completed no later than 20 days after Respondents consummate ICE's acquisition of Black Knight. The Order to Maintain Assets requires Respondents to maintain the viability of the divestiture assets until the divestitures are complete.

The D&O contains additional provisions designed to ensure the effectiveness of this relief. For example, the D&O requires Respondents to provide Constellation with transition assistance as it integrates the acquired assets to enable Constellation to operate the divested businesses similarly to how they were operated by Black Knight. The D&O also requires

Respondents to obtain all third-party and governmental consents necessary to effectuate the divestitures.

In order to help Constellation succeed in operating the divested assets, the D&O further requires Respondents for one year to facilitate Constellation's hiring of certain employees of the Black Knight divisions responsible for the Empower LOS and Optimal Blue, to the extent they were not already included in the divestitures. The D&O similarly prohibits Respondents from soliciting Constellation employees who came from Black Knight to work in the divested businesses for two years. It also prohibits Respondents from enforcing any noncompete or non-solicit provision or agreement against any employee who seeks or obtains a position in the divested businesses during the term of the D&O.

The D&O protects the confidential information of the divested Black Knight divisions as well as confidential information that Respondents may learn from Constellation in the course of providing transition services. These safeguards include limiting the purposes for which Respondents may use such confidential information and the employees to whom the information may be disclosed. The D&O facilitates the execution of NDAs by Black Knight employees who possess confidential information and who will remain with Respondents post-divestiture, and it prevents Respondents from allowing any such employees who decline to sign an NDA from working on an ICE LOS or PPE.

Black Knight and Constellation have agreed that Black Knight will finance a portion of Constellation's purchase price of Optimal Blue via a promissory note. In order to ensure that Respondents do not have a continuing entanglement with Constellation based on the promissory note, the D&O provides that the Commission will appoint a seller note trustee no later than one day after the divestiture closes. Not later than ten days after the Commission appoints the trustee, Respondents must transfer their rights, title, and interest in the promissory note to the trustee. The trustee will sell the note to a third party within six months of the divestiture.

The D&O requires Respondents to obtain prior approval from the Commission before reacquiring any divested assets or acquiring an interest in any business that owns or sells an LOS for ten years. The D&O also requires Respondents to provide the Commission with prior notice before acquiring an interest in any business that owns or sells a PPE for ten years. The D&O requires Constellation to obtain prior approval from the Commission before selling any of the divested assets for three years after the divestitures and for another seven years if the acquiring firm operates an LOS or PPE. Finally, the D&O provides for the appointment of an independent monitor to oversee compliance with the D&O's requirements.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and the Commission does not intend this analysis to constitute an official interpretation of the Consent Agreement or the D&O or modify their terms in any way.