

United States House of Representatives  
Committee on Financial Services  
2129 Rayburn House Office Building  
Washington, D.C. 20515

August 22, 2023

The Honorable Lina M. Khan  
Chair  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Dear Chair Kahn:

As the Federal Trade Commission (FTC) continues its review of the proposed \$11.7 billion (down from \$13.1 billion last year) acquisition of Black Knight by Intercontinental Exchange (ICE) and considers a settlement agreement, I write to share my concerns and recommendations. Specifically, there are several anti-trust, financial stability, and consumer protection safeguards that the FTC should consider including in the final terms of any agreement that the commission reaches with ICE and Black Knight, which are outlined further below.

In December 2022, as then-Chair of the House Financial Services Committee, I sent a letter to you requesting a robust review of the potential effects of market consolidation of Black Knight and ICE on consumers and the U.S. housing system in part because it would result in our nation's largest housing finance technology conglomerate with a market capitalization of approximately \$75 billion.<sup>1</sup> Following the FTC's 4-0 vote to block the merger and file a lawsuit in federal district court, I issued a statement commending the commission for taking this action.<sup>2</sup> However, it has come to my attention that after announcements by Black Knight to divest and sell its Empower loan origination (LOS) and Optimal Blue product pricing engine (PPE) software products to a single Canadian company known as Constellation Software Inc., the FTC has filed a joint stipulation for dismissal alongside ICE and Black Knight stating that the parties intend to reach a "mutually acceptable [Agreement Containing Consent Order (ACCO)] by August 25, 2023."<sup>3</sup>

As our nation continues to grapple with crisis-level housing affordability and supply issues, it is vital that the federal government does not create conditions that exacerbate these challenges. In addition to potentially creating a housing finance conglomerate that would dwarf all other players in the industry, I remain concerned that this merger has the potential to harm consumers by displacing competing products and businesses that help mitigate rising loan origination and servicing costs, thereby pushing the dream of homeownership further out of reach for families across the country. In fact, on August 3, 2023, in response to questions about price increases in ICE's energy business, Chief Financial Officer Warren Gardiner highlighted ICE's ability to "capture value" (i.e. raise prices) across their platforms.<sup>4</sup> These comments are unsurprising and entirely consistent with the pricing trends I highlighted in my December 2022 letter, which described how New York Stock Exchange (NYSE) data prices increased over 1,000% in just five years following ICE's acquisition of the exchange in 2013.<sup>5</sup> In an ongoing lawsuit filed by PennyMac, Black Knight has also been accused of using monopolistic, predatory, and anticompetitive tactics and excessive pricing.<sup>6</sup> These price-setting trends should not be taken lightly. I ask you to

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<sup>1</sup> Financial Services Committee, [Chairwoman Waters Calls on the FTC to Conduct Robust Review of the Proposed ICE Acquisition of Black Knight](#) (Dec. 21, 2023).

<sup>2</sup> FTC, [FTC Acts to Block Deal Combining the Two Top Mortgage Loan Technology Providers](#) (Mar. 9, 2023); See also Financial Services Committee, [Ranking Member Waters Applauds FTC Move to Block Proposed ICE Acquisition of Black Knight](#) (Mar. 14, 2023).

<sup>3</sup> Black Knight, [Intercontinental Exchange and Black Knight Announce Agreement To Sell Black Knight's Optimal Blue Business To Constellation Software Inc.](#) (Jul. 17, 2023); *Federal Trade Commission v. Intercontinental Exchange, Inc., et al.*, Joint Stipulation For Dismissal Without Prejudice Case No. 3:23-Cv-01710-Amo (Aug. 7, 2023).

<sup>4</sup> Seeking Alpha, [Intercontinental Exchange, Inc. \(ICE\) Q2 2023 Earnings Call Transcript](#) (Aug. 3, 2023).

<sup>5</sup> SIFMA, [An Analysis of Market Data Fees](#) (Aug. 2018).

<sup>6</sup> *Pennymac Loan Services, LLC v. Black Knight Inc.* (Nov. 6, 2019).

consider how the following actions, at a minimum, as the FTC negotiates any agreement with ICE and Black Knight:

### **Community Benefits**

1. Require the merging parties to establish a Community and Stakeholder Advisory Board that is diverse and inclusive and will meet quarterly with senior executives to review how the company is meeting its obligations pursuant to the ACCO, including steps the company can take to benefit the public, especially underserved borrowers, borrowers of color, as well as diverse and mission-driven community lenders. This Board should be permanent and continue to meet quarterly with senior executives to provide a forum to discuss additional steps the company can take to benefit the public beyond its ACCO obligations.
2. Require the ICE-Black Knight conglomerate to engage in technical assistance, partnerships, and other activities to support smaller industry players, especially diverse and mission-driven community lenders like community development financial institutions (CDFIs) and minority depository institutions (MDIs) who are effective in reaching and serving borrowers of color and other underserved borrowers.
3. The FTC should ensure the ICE-Black Knight conglomerate is helping to advance fairness and equity in the market by requiring that a specified share of its annual profits is used to invest in:
  - a. HUD-approved housing counseling agencies and other non-profit entities that have as their mission to increase the supply and access to fair and affordable housing, increasing first-time, first-generation homeownership, and to close the racial wealth and homeownership gaps; and
  - b. Mission-driven industry players, as well as women- and minority-owned businesses, including those that affirmatively serve low-income borrowers, people of color, and rural communities.
4. The FTC should ensure that the ICE-Black Knight merger results in job growth and stability for current and future employees by requiring strong workers' rights as part of the ACCO, including benefits and livable wages that do not force any employee to pay over 30% of their income on housing.
5. Just as an ICE-Black Knight that profits are shared with workers by monitoring annual ICE-Black Knight CEO compensation and including strong executive accountability measures, like compensation clawback provisions in senior executive and board contracts that would be triggered in the event the company engages in any misconduct during their tenure.

### **Anti-Trust Protections**

1. The merging parties should be prohibited from shackling Constellation Software Inc. with non-compete clauses and other contractual provisions that would limit them from integrating or merging with other third parties in the mortgage technology market. It is critical that the divestitures of Empower and Optimal Blue result in greater competition in the market, not outsized competitive advantages for the newly merged ICE-Black Knight conglomerate. This is especially true as I understand that Black Knight may not have held a fair and open bidding process and may be selling Empower and Optimal Blue to Constellation Software Inc. at below market values.
2. The FTC must account for how products are bundled and sold in the market and ensure that Black Knight's sale of Empower and Optimal Blue includes all products that are necessary to keep Constellation Software Inc. fully independent and competitive. Currently, the Securities and Exchange Commission (SEC) filings do not give specific details about what products are being sold. For example, for Constellation Software Inc. to fully and independently operate the LOS and PPE software products, it would require additional data and software products. However, these products are not specifically named in the SEC filings. I am concerned that without these additional products, Constellation Software Inc. will be dependent on the new ICE-Black Knight conglomerate for Empower and Optimal Blue to be fully functioning products in the market.

3. The ACCO and divestiture should be monitored over a long period of time (i.e. ten years) to ensure the behavior of the merging parties is consistent with the terms of the deal and a competitive marketplace and allow the deal to be reopened if any terms of the deal are violated.
4. The FTC should conduct a shorter term, retrospective review of the transaction two years from the closing date to assess its effects and determine whether the acquisition has, despite the ACCO stipulations and safeguards, resulted in harm on consumers, unfair, deceptive, or abusive acts or practices, or unduly raised data prices, etc. If the FTC makes an affirmative determination of harm on consumers or the market, the agency should use the full extent of its authorities to disapprove the merger and force the sale of the acquired Black Knight unit from ICE.
5. The FTC should use this as an opportunity to institute fee transparency requirements for data usage and transfer fees. Currently, ICE and Black Knight charge customers fees to access their data that is stored on ICE and Black Knight platforms and even higher fees to transfer that data off of ICE and Black Knight platforms onto other third-party platforms. With a dominant market share of the origination software market, the new ICE-Black Knight conglomerate would have an even greater ability to upcharge its data usage and transfer fees, potentially deterring customers from using non-ICE-Black Knight products to decrease costs.

### **Financial Stability**

1. The FTC should share any information it gathers in the course of its work with the Financial Stability Oversight Council (FSOC) and its member agencies to ensure they are aware of the ICE-Black Knight transaction and that they use all appropriate authorities, including any third-party vendor oversight authority, systemic risk designations, and other tools, to appropriately monitor and address any systemic risk posed by this massive non-bank financial institution that will have access to a significant amount of consumer, capital markets, and national mortgage data.

There is no doubt that the combined technology services business of ICE and Black Knight's, even with planned divestitures, will affect the pricing of mortgage loans and mortgage servicing rights in profound ways. I urge the FTC to give these suggestions full and fair consideration to avoid additional pricing pressures on a market that is already facing serious consolidation, access, and affordability concerns that affect upward economic mobility for families across the country and exacerbate the U.S. racial wealth and homeownership gaps.

Sincerely,



Maxine Waters  
Ranking Member  
Committee on Financial Services

cc: The Honorable Patrick McHenry, Chair, Committee on Financial Services, U.S. House of Representatives  
The Honorable Janet Yellen, Secretary, U.S. Department of the Treasury, and  
Chairperson, Financial Stability Oversight Council (FSOC)  
The Honorable Rohit Chopra, Director, Consumer Financial Protection Bureau (CFPB)  
The Honorable Jerome Powell, Chair, Board of Governors of the Federal Reserve System  
The Honorable Martin Gruenberg, Acting Chairman, Federal Deposit Insurance Corporation (FDIC)  
The Honorable Todd Harper, Chairman, National Credit Union Administration (NCUA)

The Honorable Sandra Thompson, Director, Federal Housing Finance Agency (FHFA)  
The Honorable Gary Gensler, Chairman, U.S. Securities and Exchange Commission (SEC)  
Mr. Michael Hsu, Acting Comptroller, Office of the Comptroller of the Currency (OCC)  
The Honorable Rostin Behnam, Chairman, Commodity Futures Trading Commission (CFTC)  
The Honorable Jonathan Kanter, Assistant Attorney General for the Antitrust Division, Department of Justice (DOJ)  
The Honorable Julia Gordon, Assistant Secretary for Housing and the Federal Housing Commissioner, U.S. Department of Housing and Urban Development (HUD)  
The Honorable Alanna McCargo, President, Government National Mortgage Association (Ginnie Mae)