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FEDERAL TRADE COMMISSION

In re:)
INTERCONTINENTAL EXCHANGE)
and) Docket No. 9413
BLACK KNIGHT)
)

Prehearing Scheduling Conference
Via Teleconference
Tuesday, March 28, 2023
1:30 p.m.

BEFORE: THE HONORABLE D. MICHAEL CHAPPELL

Deborah Wehr, RPR, Reporter

Prehearing Scheduling Conference
Intercontinental Exchange and Black Knight

3/28/2023

1 A P P E A R A N C E S

2

3 ON BEHALF OF THE COMPLAINANT:

4 ABBY L. DENNIS, ESQUIRE

5 ASHLEY MASTERS, ESQUIRE

6 Federal Trade Commission

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11 ON BEHALF OF INTERCONTINENTAL EXCHANGE:

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19 ON BEHALF OF BLACK KNIGHT:

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1 P R O C E E D I N G S

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3 (Proceeding called to order, 1:30 p.m.)

4 THE COURT: This is the prehearing scheduling
5 conference in Docket Number 9413 in the matter of
6 Intercontinental Exchange, Inc., and Black Knight, Inc.

7 I'm Judge Chappell. This scheduling conference
8 is being conducted telephonically and is being
9 transcribed by a court reporter, who is on the line
10 with us. I have chosen to conduct this scheduling
11 conference telephonically. This choice will save time
12 and resources for a short scheduling conference which
13 is merely procedural and is not evidentiary.

14 Will the court reporter please state your name
15 for the record.

16 THE REPORTER: My name is Deborah Wehr.

17 THE COURT: Thank you. Welcome, Deborah.

18 I need everyone to mute your phones when you
19 are not speaking to prevent feedback and echoes. Also,
20 before you speak on the call, I need you to identify
21 yourself for the court reporter, just in case she
22 doesn't identify your voice.

23 I will now take appearances of those designated
24 to speak for the parties, and I need you to identify
25 who is on this call for your client or party. I'll

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1 start with the government and complaint counsel.

2 MS. DENNIS: Good afternoon, Your Honor. My
3 name is Abby Dennis for complaint counsel, and on the
4 call with me, I have my colleague, Ashley Masters.

5 THE COURT: Thank you. And for respondent,
6 Intercontinental Exchange?

7 MR. EVERETT: Good afternoon, Your Honor. Clay
8 Everett from Morgan Lewis for Intercontinental
9 Exchange. And also on the line for Intercontinental
10 Exchange are my partners, Jack Dodds and Ryan Kantor.

11 THE COURT: All right. And for respondent,
12 Black Knight?

13 MR. MOSES: Good afternoon, Your Honor. This
14 is Jonathan Moses from Wachtell, Lipton, Rosen & Katz
15 for Black Knight. And with me on the call is my
16 partner, Adam Goodman.

17 THE COURT: Thank you. Also on the line with
18 me are my attorney advisors.

19 In addition, the press and the public have
20 access to this scheduling conference through a
21 toll-free telephone connection that allows them to
22 listen in. Therefore, you are cautioned not to reveal
23 any confidential information that should not be made
24 public.

25 Let's talk about the scheduling order. The

1 parties were provided a proposed scheduling order in
2 advance of this scheduling conference. They have
3 jointly proposed several changes to dates and to
4 additional provisions. Most of those provisions will
5 be incorporated.

6 I have a question regarding the parties'
7 proposed changes to the deadline for issuing document
8 requests, interrogatories and subpoenas, which appears
9 to be duplicated as falling on both May 2nd and
10 May 12th. That's May 2 and May 12. I don't need a
11 resolution on this now. Please e-mail my staff by the
12 end of the day providing your suggested language for
13 May 2 or May 12. I will issue a scheduling order
14 thereafter.

15 Is there a parallel federal action or do you
16 contemplate there being one?

17 MS. DENNIS: Good afternoon, Your Honor. This
18 is Abby Dennis for complaint counsel. There is
19 currently no parallel federal proceeding because
20 respondents cannot close the proposed merger at this
21 time. They cannot do so because certain conditions
22 have not been satisfied, including the vote of Black
23 Knight's shareholders regarding certain amendments to
24 the merger agreement concerning the proposed
25 divestiture of Black Knight's Empower business to

1 Constellation. The shareholder vote cannot occur until
2 the Securities & Exchange Commission concludes its
3 review of the proposed proxy statement prospectus that
4 respondents filed with the FTC on March 15th.

5 Complaint counsel is moderating that process and will
6 be prepared to proceed in federal court if necessary.

7 I'll note that complaint counsel added a
8 provision to the scheduling order, to which respondents
9 agreed, that allows for discovery here to be used in
10 the federal court proceeding so we'll be able to move
11 quickly and efficiently there as well as avoid
12 duplicative efforts.

13 THE COURT: Just be aware that should the
14 conditions occur so the merger could close, I don't see
15 any way that this trial, if it goes to court and
16 finishes, could be done with a decision before the deal
17 could close. Just keep that in mind.

18 MS. DENNIS: Yes, Your Honor. I should note
19 that the parties have a stipulated TRO for if and when
20 it becomes necessary for a Federal Court action. And
21 that TRO would run until two days after the District
22 Court makes its decision.

23 THE COURT: Similar a hold separate agreement?

24 MS. DENNIS: Yes, Your Honor.

25 THE COURT: All right. Are you aware of any

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1 offshore activities regarding this case? For example,
2 to reviewing the merger, for example, the European --
3 anywhere in Europe or the UK, any other countries you
4 know of that are monitoring or involved in this merger
5 activity in this case?

6 MS. DENNIS: Your Honor, complaint counsel, and
7 Ms. Masters can correct me if I'm wrong on this, I
8 think complaint counsel is aware of none.

9 THE COURT: What about respondent, are you
10 aware of any other countries that are interested in
11 this merger?

12 MR. EVERETT: This is Clay Everett, Your Honor.
13 No, there are no other reviews by other countries that
14 are ongoing.

15 THE COURT: All right. Thank you. I would
16 hope the parties have attempted to settle this matter.
17 Does the government want to go first to provide the
18 status of any settlement discussions?

19 MS. DENNIS: Yes, Your Honor. Again, this is
20 Abby Dennis for complaint counsel. We are certainly
21 open to discussing any proposals the respondents may
22 have. The only proposal we have received, however,
23 which was pre-complaint, does not remedy the
24 anticompetitive effects of the merger. That proposal
25 is for Black Knight to divest its loan origination

1 system, Empower, as well as certain ancillary products,
2 but not Optimal Blue, to Constellation. As detailed in
3 the complaint, we do not think this proposed remedy is
4 sufficient. But again, we are happy to engage with
5 respondents if they have any additional proposals for
6 us.

7 THE COURT: And for respondents, keep in mind
8 the public and press are monitoring this conference,
9 why did you think that proposal would remedy the
10 situation, to settle this matter? Can you let me know
11 that?

12 MR. EVERETT: Yes, Your Honor. And just to be
13 clear, so we do have, at this point, an agreement in
14 place to sell the Black Knight LOS product and various
15 other ancillary products to a third party,
16 Constellation Software. We do think that that's the
17 only real horizontal overlap between the parties that
18 is in any way relevant and believe that it remedies any
19 issues that legitimately can be raised about the
20 merger.

21 THE COURT: So if I heard the government's
22 attorney correctly, what is happening is pretty much
23 what you offered, right, that they said was
24 insufficient?

25 MR. EVERETT: That the complaint says it's

1 insufficient. I will say that that agreement, we were
2 transparent about what the agreement would contain and
3 the process for actually selling the assets. The
4 agreement to sell to Constellation was finalized only
5 right before the Commission -- their complaint counsel
6 filed the complaint. And so I don't know that
7 Constellation has been vetted specifically by the
8 Commission. They decided instead to file this
9 complaint and proceed through Part 3.

10 But to answer your question, Your Honor, yes,
11 that is correct. That is what complaint counsel is
12 referring to and the agreement that is in place to
13 divest those assets.

14 THE COURT: All right. You said there's an
15 agreement in place. I think you said Constellation.
16 Is that a done deal or are there conditions precedent
17 that are connected to what we are doing here before
18 that deal would close or is that pretty much done?

19 MR. EVERETT: Well, the agreement is done. In
20 terms of closing that transaction, it is dependent on
21 the transaction between Intercontinental Exchange and
22 Black Knight closing, but that's the only, I believe,
23 outstanding condition present.

24 THE COURT: Okay. And I know this is not
25 something you probably do every day, but unlike in

1 District Court, the complaint is voted out by the
2 Commission rather than filed by the prosecuting
3 attorneys or what are called complaint counsel here.
4 So the Commission voted it out. And I'm telling you
5 that because there is a procedure under our rules where
6 if you think something has changed and you would like
7 to submit a settlement proposal, there's a way to do
8 that without complaint counsel joining in. I'm just
9 letting you know there are rules that provide for that
10 if you think that you have got something that the
11 Commission would want to consider.

12 MR. EVERETT: Appreciate that, Your Honor.

13 THE COURT: It's not a one-sided thing. The
14 government will -- the current counsel will be able to
15 weigh in, et cetera, et cetera, but if there's a motion
16 to withdraw filed by both sides or all sides, three in
17 this case, and those generally are approved. But we
18 have had cases where respondents only will file
19 something. So just keep that in mind.

20 And I will say this, if the parties think there
21 is anything to be gained by a settlement conference
22 with the judge involved, let me know. I've got another
23 trial going right now, but I'll try to make myself
24 available. But I don't want to waste my time or
25 anybody else's time. If it's something that will be

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1 fruitful, I'll be glad to do anything that I can to
2 assist.

3 As said, I will be getting the scheduling order
4 out shortly. I'll need to hear from you, the parties,
5 on these two dates that are conflicting. And with
6 that, I think that's all I have. Is there anything
7 further from the government?

8 MS. DENNIS: No, Your Honor. Thank you for
9 your time.

10 THE COURT: Anything further from respondent,
11 Intercontinental Exchange?

12 MR. EVERETT: No, Your Honor.

13 THE COURT: From respondent Black Knight?

14 MR. MOSES: No, Your Honor. Thank you very
15 much.

16 THE COURT: All right. Thank you all for your
17 time. And hearing nothing further, we are adjourned.
18 Thank you.

19 (Whereupon, the proceedings at 1:42 p.m., were
20 adjourned.)

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CERTIFICATE OF REPORTER

I, Deborah Wehr, do hereby certify that the foregoing proceedings were taken by me in stenotype and thereafter reduced to typewriting under my supervision; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.



Deborah Wehr, RPR
Notary Public