

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Lina M. Khan, Chair**
 Rebecca Kelly Slaughter
 Alvaro M. Bedoya

In the Matter of

Intercontinental Exchange, Inc.,
a corporation;

and

Black Knight, Inc.,
a corporation.

Docket No. 9413

PUBLIC

**RESPONDENTS' MOTION TO STAY ADMINISTRATIVE HEARING
PENDING FEDERAL COURT PRELIMINARY INJUNCTION ACTION**

Pursuant to 16 C.F.R. §§ 3.22(a), 3.21(c), 3.41(b), and 3.41(f)(1), Intercontinental Exchange, Inc. (“Intercontinental Exchange”) and Black Knight, Inc. (“Black Knight,” and, with Intercontinental Exchange, the “Merging Parties”) request to stay the administrative hearing in this matter or, in the alternative, to continue the hearing to a date that does not conflict with the preliminary injunction hearing set to begin on July 25, 2023, in *Federal Trade Commission v. Intercontinental Exchange, Inc.*, No. 23-1710 (N.D. Cal. Apr. 10, 2023) (the “Section 13(b) Action”). The FTC’s rules governing the administrative proceeding expressly provide that the Section 13(b) Action “shall take precedence” over a conflicting administrative hearing and permit postponement of the administrative hearing for good cause when a parallel federal action is pending. 16 C.F.R. §§ 3.1, 3.41. Both circumstances are present here. Proceeding on the current schedule risks substantially prejudicing the Merging Parties, unduly burdening third parties, and wasting the judicial resources of Chief Administrative Law Judge Chappell and his staff. Resetting the administrative hearing, on the other hand, would address these concerns while allowing the

hearing to proceed in a timely and efficient manner. In an order issued earlier today, Chief Administrative Law Judge Chappell advised that, “pursuant to Rule 3.21(c)(2), requests to change the date of the evidentiary hearing must be addressed to the Commission.” Dkt. No. 9413. The Merging Parties therefore respectfully request that the Commission stay or continue the administrative hearing until after the district court issues a decision in the Section 13(b) Action.

The Commission has filed an action in federal court pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), seeking a preliminary injunction barring closing of the Merging Parties’ proposed transaction. *See* Complaint for a Temporary Restraining Order & Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act, Section 13(b) Action, ECF No. 1. Under the schedule recently set by the federal court, the parties are required to submit direct evidence through declarations, deposition designation, and exhibits on June 30, 2023, attend a conference on July 20, 2023, participate in an evidentiary hearing beginning on July 25, 2023, and submit post-hearing proposed findings of facts and conclusions of law on July 31, 2023. *Id.* These dates directly conflict with the hearing in the administrative proceeding, which the Commission set to begin on July 12, 2023. *See id.* The parties expect the administrative hearing to last for approximately 4–5 weeks, concluding at the earliest on or around August 9, 2023.¹

There are at least three overarching reasons why the Commission should grant this motion:

First, the FTC’s rules governing the administrative action require a stay or continuance.

Specifically, 16 C.F.R. § 3.1 provides:

In the event of a scheduling conflict between a proceeding in which the Commission also has sought or is seeking relief under Section 13(b) of the FTC Act . . . and another proceeding, the proceeding in which the Commission also has sought or is seeking relief under Section 13(b) shall take precedence.

¹ The Commission’s administrative hearing in *In re Microsoft/Activision Blizzard* is scheduled to commence on August 2, 2023, exacerbating the scheduling difficulties posed by dual-tracking the administrative hearing in this case and the preliminary injunction proceeding.

Here, there is a direct conflict between the Section 13(b) hearing and the administrative hearing, triggering § 3.1's rule. The federal hearing therefore "shall take precedence" over the administrative hearing. The July 12 administrative hearing should be stayed or continued.

Second, the General Hearing Rules permit the Commission to postpone an administrative hearing "for good cause" when there is a pending, parallel federal court action. *Id.* § 3.41(f)(1). In light of the conflicting hearing dates in the Section 13(b) Action, along with immediately surrounding pre- and post-hearing briefing deadlines, good cause exists to postpone the administrative hearing until after the district court has resolved the Commission's request for a preliminary injunction.

The Commission has concluded in other recently litigated Part 3 merger matters that, like here, the existence of a parallel federal proceeding presents good cause to postpone an administrative hearing until after the decision on a preliminary injunction in a Section 13(b) action. Finding good cause, the Commission has reasoned that "the public interest is not ideally served if litigants and third parties bear expenditures that later prove unnecessary." *In re Meta Platforms, Inc.*, No. 9411, 2023 WL 621507, at *1–2 (F.T.C. Jan. 11, 2023) (granting motion to postpone administrative hearing until after date expected for federal court decision on preliminary injunction);² *accord In re Hackensack Meridian Health, Inc.*, No. 9399, 2021 WL 2379546, at *1–

² In the Commission's challenge to Meta/Within, the Administrative Law Judge requested that Complaint Counsel and the merging parties file a joint motion to postpone the administrative hearing until a date that was two weeks after a ruling by the district court in the parallel preliminary injunction proceeding. *See* Joint Expedited Motion to Continue the Evidentiary Hearing Until February 13, 2023, *In re Meta Platforms, Inc.*, No. 9411, at Ex. A (F.T.C. Dec. 27, 2022), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/d09411jtmtncontinuance.pdf (reflecting request of Judge Chappell that the parties "confer about filing a joint motion to the Commission . . . seeking a continuance or extension of the trial date until 2 weeks after a ruling by the district court in the pending preliminary injunction proceeding"). As the Judge explained, "continuance or extension

2 (F.T.C. May 25, 2021) (same); *In re Thomas Jefferson Univ.*, No. 9392, 2020 WL 7237952, at *1–2 (F.T.C. Nov. 6, 2020) (same); *In re RAG-Stiftung*, No. 9384, 2020 WL 91294, at *1–3 (F.T.C. Jan. 2, 2020) (same); *In re Sanford Health*, No. 9376, 2017 WL 5845596, at *1–2 (F.T.C. Nov. 21, 2017) (same).

Such unnecessary expenditures and inefficiencies are precisely what the Commission risks absent a stay. If the administrative hearing proceeds on the current schedule, the parties will be required to undertake a weeks-long hearing in the administrative court that overlaps with the federal court hearing. This will create unnecessarily duplicative work for Complaint Counsel, the Merging Parties, third parties, and the Administrative Court. For example, in the weeks leading up to the administrative hearing, both Complaint Counsel and the Merging Parties will be required to file briefs in support of and in opposition to Complaint Counsel’s motion for preliminary injunction in the Section 13(b) action, with deadlines on June 2, June 16, and June 23. The week before the administrative hearing, Complaint Counsel and the Merging Parties are required to file responses to motions for *in camera* treatment of proposed hearing exhibits as well as oppositions to motions *in limine*, all while preparing for the separate administrative hearing. The burden of simultaneously preparing for completely separate hearings, in separate locations, and in separate courts, will be immense for all parties.

In addition to the attorney resources and time that would be spent preparing for overlapping hearings in separate courts, third-party and party witnesses will be called to testify twice—perhaps days apart at proceedings in different locations (even if the administrative proceeding is virtual, it will require the travel of witnesses and counsel to present those witnesses)—which would burden

of the date for the administrative trial will conserve the resources of the parties, and nonparties, and promote efficient judicial administration.” *Id.*

them unnecessarily, put undue strain on the parties' trial preparation, and may disincentivize some non-party witnesses from participating at all. Significant time also would be required of Judge Chappell and his judicial staff with respect to pretrial deadlines, resolving pending pretrial motions, and preparing for the hearing. All of these investments of time and resources by Complaint Counsel, the Merging Parties, third parties, and the Administrative Court will be unnecessary if the outcome of the Section 13(b) Action obviates the need to hold an administrative hearing in this proceeding. These are precisely the types of unnecessary expenditures identified by the parties and acknowledged by the Commission as against the public interest in *Meta*. 2023 WL 621507, at *2.

Finally, a stay of the administrative hearing in this proceeding will not unduly delay resolution of this matter, nor will it prejudice any party or the public interest. While the FTC's rules require that the administrative proceeding progress "expeditiously," *see* 16 C.F.R. § 3.1, the Commission has recognized that a "short delay in the start of the administrative hearing would not harm the Commission or the public interest should it be necessary for the administrative adjudication to go forward." Order Granting Continuance, *In re Advocate Health Care Network*, No. 9369 (F.T.C. May 6, 2016), available at <https://www.ftc.gov/system/files/documents/cases/160506advocateorder.pdf>. This is especially the case here, where discovery and pretrial deadlines in both proceedings are moving forward in parallel, and all parties will be ready to try this case before Judge Chappell, if necessary, upon expiration of the requested continuance.

Complaint Counsel's proposed solution is no solution at all. Complaint Counsel suggests proceeding with the administrative hearing on July 12, 2023, then suspending it so the parties can participate in the Section 13(b) preliminary injunction hearing in California, and then restarting the administrative hearing following the conclusion of the preliminary injunction hearing, whether

that be back in Washington or virtually. But 16 C.F.R. § 3.1 requires that, in the event of a conflict, “the proceeding in which the Commission also has sought or is seeking relief under Section 13(b) shall take precedence.” Squeezing in a preliminary injunction hearing during a forced break in the administrative hearing does not amount to the Section 13(b) Action taking “precedence.” Rather, the Section 13(b) Action should take precedence over the administrative action up and until the court issues a decision on the Commission’s motion for preliminary injunction.

Complaint Counsel’s proposal also runs counter to 16 C.F.R. § 3.41(b), which requires that hearings “shall continue, except for brief intervals of the sort normally involved in judicial proceedings, without suspension until concluded.” Suspending an administrative hearing to accommodate a live preliminary injunction hearing—requiring the parties’ and witnesses’ preparation and attention—in a separate court (which may moot the need to continue the administrative hearing altogether) is not the type of “brief interval[] of the sort normally involved in judicial proceedings.” Indeed, the Merging Parties are aware of no other instance in which this type of disruptive suspension in the administrative hearing has been allowed to occur. And Complaint Counsel has cited no precedent for its novel and inefficient approach.

The Merging Parties therefore respectfully move to stay the administrative evidentiary hearing scheduled to begin on July 12, 2023, or, in the alternative, to continue the administrative hearing until after a ruling has been issued in the Section 13(b) Action.

Dated: May 31, 2023

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

/s/ John C. Dodds

John C. Dodds
Zachary M. Johns
1701 Market Street

WACHTELL, LIPTON, ROSEN & KATZ

/s/ Jonathan M. Moses

Jonathan M. Moses
Sarah K. Eddy
Nelson O. Fitts

Philadelphia, PA 19103-2921
Tel: (215) 963-5000
Fax: (215) 963-5001
john.dodds@morganlewis.com
zachary.johns@morganlewis.com

J. Clayton Everett
Ryan M. Kantor
1111 Pennsylvania Avenue, NW
Washington, DC 20004-2541
Tel: (202) 739-3000
Fax: (202) 739-3001
clay.everett@morganlewis.com
ryan.kantor@morganlewis.com

Harry T. Robins
Susan Zhu
101 Park Avenue
New York, NY 10178-0060
Tel: (212) 309-6000
Fax: (212) 309-6001
harry.robins@morganlewis.com
susan.zhu@morganlewis.com

Kenneth M. Kliebard
110 North Wacker Drive
Chicago, IL 60606-1511
Tel: (312) 324-1000
Fax: (312) 324-1001
kenneth.kliebard@morganlewis.com

SUSMAN GODFREY LLP

Kalpana Srinivasan
Michael Gervais
Jesse-Justin Cuevas
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067-6029
Tel: (310) 789-3100
Fax: (310) 789-3150
ksrinivasan@susmangodfrey.com
mgervais@susmangodfrey.com
jcuevas@susmangodfrey.com

Adam Carlis
Alexander L. Kaplan

Adam L. Goodman
51 West 52nd Street
New York, NY 10019
Tel: (212) 403-1000
JMMoses@wlrk.com
SKeddy@wlrk.com
NOFitts@wlrk.com
ALGoodman@wlrk.com

KEKER, VAN NEST & PETERS LLP

Elliot R. Peters
Steven K. Taylor
Khari J. Tillery
R. James Slaughter
Eleanor F. Brock
Kelly S. Kaufman
633 Battery Street
San Francisco, CA 94111
Tel: (415) 391-5400
epeters@keker.com
staylor@keker.com
ktillery@keker.com
rslaughter@keker.com
ebroock@keker.com
kkaufman@keker.com

Counsel for Respondent Black Knight, Inc.

Michael C. Kelso
Abigail Noebels
Shawn L. Raymond
Alejandra C. Salinas
Krisina Zuñiga
1000 Louisiana Street, Suite 5100
Houston, TX 77002-5096
Tel: (713) 651-9366
Fax: (713) 654-6666
acarlis@susmangodfrey.com
akaplan@susmangodfrey.com
mkelso@susmangodfrey.com
anoebels@susmangodfrey.com
sraymond@susmangodfrey.com
asalinas@susmangodfrey.com
kzuniga@susmangodfrey.com

*Counsel for Respondent
Intercontinental Exchange, Inc.*

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Lina M. Khan, Chair**
 Rebecca Kelly Slaughter
 Alvaro M. Bedoya

In the Matter of

Intercontinental Exchange, Inc.,
a corporation;

and

Black Knight, Inc.,
a corporation.

Docket No. 9413

PUBLIC

**[Proposed] Order Granting Respondents' Motion to Stay Administrative Hearing Pending
Federal Court Preliminary Injunction Action**

The Commission has considered Intercontinental Exchange, Inc. and Black Knight, Inc.'s motion to stay the administrative proceeding pending a ruling on the Federal Trade Commission's request for a preliminary injunction in the United States District Court for the Northern District of California in *Federal Trade Commission v. Intercontinental Exchange, Inc.*, No. 23-1710 (N.D. Cal. Apr. 10, 2023). Good cause having been shown, the motion is GRANTED. This administrative proceeding is stayed until after the district court rules on the Federal Trade Commission's request for a preliminary injunction.

By the Commission.

Secretary

ISSUED: _____

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2023, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I caused the foregoing document to be served via email to the following:

Daniel Aldrich
Laura Antonini
Catharine Bill
Steven Couper
Caitlin Cipicchio
Abby L. Dennis
Xuan Gong
Kurt Herrera-Heintz
Laura Krachman
Janet J. Kim
Christopher Lamar
Ashley Masters
Peter Richman
Lauren Sillman
Neal Perlman
Nicolas Stebinger
Nina Thanawala
Kurt Daniel Walters
Taylor Weaver
Abigail Wood
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Counsel Supporting the Complaint

Lee Van Voorhis
Ian R. Dickinson
Womble Bond Dickinson LLP
2001 K Street, NW
Suite 400 South
Washington, DC 20006

Counsel for Constellation Web Solutions, Inc.

Tammy A. Tsournas
Kirkland & Ellis LLP
2049 Century Park East, Suite 3700
Los Angeles, CA 90067

Counsel for Sagent M&C, LLC (d/b/a Sagent Lending Technologies)

Thomas N. Abbott
Perkins Coie LLP
1120 NW Couch Street, 10th Floor
Portland, OR 97209

Tiffany Lee
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101

Counsel for Newrez LLC

Steve Albertson
Fenwick & West LLP
733 10th Street NW, Suite 400
Washington, DC 20001

Erica R. Sutter
Fenwick & West LLP
902 Broadway, Suite 18
New York, NY 10010

Counsel for PollyEx, Inc.

By: /s/ John C. Dodds
John C. Dodds

*Counsel for Respondent Intercontinental
Exchange, Inc.*