August 4, 2023

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

Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

Dear Chair Khan and Director Chopra:

The Community Home Lenders of America (CHLA)[1] is writing - in advance of the August court hearing on the preliminary injunction and temporary restraining order (TRO) and the September 25th FTC administrative hearing - to reiterate our strong opposition to the proposed purchase of Black Knight by Intercontinental Exchange ("ICE"). In doing so, we make two essential points:

(1) CHLA continues to oppose the ICE purchase of Black Knight - notwithstanding divestitures like Empower and Optimal Blue - since ICE continues to engage in anti-competitive actions that hurt lenders and consumers, which would be greenlighted if the purchase is approved.

(2) If, however, this purchase is approved, there must be a process to monitor and curtail ICE anti-competitive actions, either as a part of an agreement with the FTC or through CFPB monitoring and use of statutory authorities to prevent anti-consumer actions.

First, divestitures like Optimal Blue and Empower do not address the abundant evidence that ICE already engages in anticompetitive, anti-consumer actions - including one-way pricing mechanisms for user seats, vendor access click fees that are simply junk fees, tying and bundling, and unfair treatment of lenders. Any resulting increase in size or market share, however limited by divestitures, will greenlight and strengthen ICE's capability to engage in such anticompetitive, anti-consumer practices.

Second, the issue is not simply market share, but as CHLA argued in our June 8, 2022 **Letter**, the effect of this market power is exacerbated by the vulnerability of mortgage lenders that use their LOS systems. Except for the largest lenders, IMB lenders are not capable of developing their own proprietary LOS system. Factors like the incompatibility of competitors' systems and ICE's unwillingness to facilitate a smooth transition to a new LOS system make lenders extremely vulnerable to having to accept large price increases at contract renewal and vulnerable to anti-competitive actions - since a rocky transition to a new LOS system represents a huge regulatory, reputational, and financial risk during any such transition.

Third, these vulnerabilities and the resulting imbalance in the relationship with lenders has facilitated unfair ICE and Empower treatment of and bad faith negotiations with individual IMBs. We are aware of instances in which payment of all services under a multi-year LOS contract was demanded, even though LOS performance was deficient or there were numerous substantive glitches with the LOS system.

However, IMBs are reluctant to share these stories publicly due to fear of retribution.

[1] CHLA is the only national trade association that exclusively represents independent mortgage bankers (IMBs). [See communitylender.org] Our members are small and mid-sized IMBs whose sole business is originating and servicing mortgage loans.

Vulnerabilities of Small and Mid-sized Independent Mortgage Banks (IMBs)

IMBs now originate over two thirds of all mortgage loans and over 90% of FHA loans (which dominate the market for home purchases by minority and other underserved borrowers). The number and diversity of IMB lenders has benefited consumers, through increased competition and more personalized service.

Much of the public debate regarding the ICE purchase of Black Knight has been around market share and pricing power. A good example of this is reflected in recent articles speculating that the sale of Optimal Blue might be a game changer in the ICE/Black Knight approval process.

However, an equally important issue is the vulnerability of lenders to a dominant Loan Origination Software (LOS) provider (and indeed to any LOS service provider). LOS is the software services infrastructure essential to executing mortgage loan originations.

As noted, the great majority of IMB lenders are not capable of developing their own proprietary LOS system. Transitioning to a different LOS system from ICE or Empower is exceedingly difficult, due to the incompatibility with other LOS systems and their unwillingness to facilitate a smooth transition.

A disruptive transition to a new LOS system can create regulatory risk to an IMB, since products like Mavent, which deal with regulatory compliance, are integrally related to a lender's regulatory compliance efforts. Mortgage lenders must keep records for periods as long as five years to comply with federal and state regulations and to protect themselves from repurchase claims or fines and enforcement actions by the CFPB and the states in which they do business. A transition to a new LOS provider can jeopardize these protections if the existing LOS provider does not cooperate after the transition.

There are also significant reputational and financial risks of a disruptive transition. Timely and accurate execution of mortgage loan closings is the lifeblood of a mortgage lender. Failure to process loan applications and close loans timely and accurately poses many significant risks from a choppy transition in LOS systems: loans falling through, loss of confidence in a lender's ability to close loans, and losses in secondary market execution or sales to aggregators from failure to close in a timely fashion.

These vulnerabilities, exacerbated by what would be a disproportionate combined ICE/Black Knight market share - that would now be vertical - create a relationship imbalance that facilitates both unwarranted pricing increases and the anti-competitive, anti-consumer practices outlined in this letter.

User Fees

ICE routinely engages in one-way pricing policies and contracts for so-called "user seats," a volume based charged based on the number of loan originators a lender has. Under a *"heads ICE wins, tails they don't lose"* policy, ICE increased user seat charges when the mortgage market boomed and a lender's user seats increased, as occurred until 2022. However, when the number of user seats significantly declined for most lenders in 2022, ICE kept user seats charges artificially inflated at the high-water mark.

Individual CHLA members have asked ICE to reduce user seat charges as user seats fall. ICE refused.

A December 2022 CHLA **Letter** asked ICE to reduce charges as user seats fall. ICE did not respond.

A subsequent February 2023 CHLA **Letter** was sent to the new ICE President, reiterating this request. ICE did not respond.

If ICE is so non-responsive to such reasonable requests when they have every incentive to appear reasonable during the period in which the Black Knight purchase is being scrutinized, we ask what will happen if and after such a purchase is approved with no ongoing monitoring and enforcement authority.

Click Fees (Junk Fees)

ICE routinely charges vendor access fees to a mortgage loan originator, each time the lender needs to access certain vendor information in the LOS process. Examples include separate vendor fees for access to, for example, the appraisal, the credit report, title insurance, and flood certification.

These click fees - functionally toll fees - typically total $50 per mortgage loan. However, this vastly underestimates the true cost to the lender - and ultimately to the consumer. If a lender has a pull through ratio of 80% of loans they are working on, this raises the cost to consumer to over $60/ per loan.

In practice this can be magnified by a factor of 2 to 4 times that amount. A loan could be originated by a mortgage broker (one set of LOS fees) then sold to an IMB (another set of LOS fees) prior to closing. In turn, the loan could be sold to a loan aggregator/investor (another set of LOS fees) which then brings in a subservicer (another set of LOS fees).

Technically, these fees are being charged to mortgage loan originators. However, a lender has no practical ability to complain about or negotiate away these fees - since they are part of the ICE contract for LOS services, an essential part of the mortgage loan origination process. This problem is exacerbated by the dominant market share and lender vulnerabilities described in this letter.

Thus, these ICE lender access fees will be passed along to consumers in the form of higher mortgage rates and costs, just as surely as if they were charged directly to the consumer.

The Senate Banking Committee recently held a hearing on excessive fees charged by financial entities for which no real services are provided. Separately, CFPB Director Chopra has called out what he refers to as “junk fees.”

These ICE vendor access charges are for information that the lender is already legally entitled to have. Therefore, CHLA considers these junk fees.

Further, the fees do not correspond to any incremental service provided to the lender. Thus, they should be scrutinized for RESPA compliance.

Tying and Bundling

In addition to LOS mortgage origination services, ICE and Black Knight offer a number of other software services. These include services for: (1) regulatory compliance, (2) consumer mortgage loan leads, (3) a product and pricing engine, (4) E-Close, and (5) POS Consumer connect (controlling consumer web applications and a borrower portal).

To be clear, these software services can be valuable, and many of our CHLA members use them. However, they should be optional - an add-on that the lender chooses to pay for.

Instead, our members report instances of tying (pressuring or even requiring a lender using ICE’s LOS to purchase additional add-on services they do not want) and the related practice of bundling (only offering services that a lender wants or needs with services a lender does not want or need).

In a truly competitive market, these practices would be tempered or eliminated by competition. However, in light of ICE’s dominant market strength, combined with lender vulnerabilities identified in this letter, our member lenders have no choice but to accept such practices.

Vertical Integration

Black Knight, through its MSP platform, already services 64% of all mortgages in the United States. MSP offers lenders' automation of servicing functions, such as setup and maintenance, escrow administration, account management, default management, and others.

ICE does not offer a competing servicing platform.

However, the proposed merger would combine one firm with an already dominant share of mortgage origination software and related systems (ICE) with another firm (Black Knight) with an already dominant share of mortgage servicing software and related systems.

This raises vertical integration concerns, that the merger will make it easier to engage in anticompetitive practices with regard to tying software and systems between mortgage origination and servicing.

In fact, ICE's determination to move forward with this purchase, even being willing to divest Empower and Optimal Blue, implies that they see significant vertical integration pricing advantages of becoming the dominant player in software services for both mortgage origination and servicing. Such status would increase their pricing power capability and further facilitate their ability to engage in anti-competitive practices.

Monopoly Pricing Power

The provision of mortgage origination software and related services can have a cost savings benefit to mortgage lenders – and in turn consumers - through the more efficient provision of services by a third party than many lenders can provide themselves through their own proprietary systems development. However, such a benefit is dependent on there being a competitive market for such third-party services.

Contracts for provision of mortgage services are typically for a stated period of time, e.g., three years. This leaves lenders, particularly smaller IMBs, particularly vulnerable to the threat of non-renewal. As noted, even a short transition to a new LOS services provider could shut down mortgage loan closings for a lender, which could be very costly financially and could harm the lender's reputation for execution.

As a result, CHLA continues to believe that the approval of an ICE purchase of Black Knight will exacerbate the monopoly pricing power of ICE, increasing their ability to demand significant and unwarranted price increases upon renewal.

This power is tempered by the practical reality that while approval is pending for the ICE purchase of Black Knight, there are obvious incentives not to engage in large price increases. However, CHLA members fear that if and when this purchase is approved, this check on price increases will cease.

In such a case, a smaller lender could have no practical option other than to accept the significant and unwarranted cost increases.

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Thank you for your consideration of these comments and requests.

Sincerely,

COMMUNITY HOME LENDERS ASSOCIATION