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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of Intercontinental Exchange, Inc., a corporation, and Black Knight, Inc., a corporation, Respondents.	)	Docket No. 9413

ORDER DENYING THIRD-PARTY DANIEL SOGORKA'S MOTION TO QUASH OR LIMIT RESPONDENT INTERCONTINENTAL EXCHANGE, INC.'S DEPOSITION SUBPOENA

I.

On June 1, 2023, third-party Daniel Sogorka ("Sogorka") filed a motion to quash or limit a deposition subpoena ("Subpoena") served on him by Respondent Intercontinental Exchange, Inc. ("ICE" or "Respondent") ("Motion"). On June 8, 2023, Respondent filed an opposition to the Motion ("Opposition"). On June 14, 2023, Sogorka filed a motion for leave to file a reply brief, which Respondent opposed on June 16. The motion for leave to file a reply is GRANTED.[1] For the reasons set forth below, the Motion is DENIED.

II.

Sogorka is the President and Chief Executive Officer of non-party Sagent M&C, LLC ("Sagent"), which builds mortgage loan servicing software for banks and lenders. Sogorka is also a member of Sagent's Board of Directors. Relying on Commission Rule

[1] Commission
wish to draw the Administrative Law Judge's attention to "recent important developments or controlling authority that could not have been raised earlier in the party's principal brief." 16 C.F.R. § 3.22(d). Sogorka asserts that on June 8, 2023, seven days after Sogorka filed the Motion, Respondent took the deposition of a corporate representative for Sagent and that the bases for the reply relate to testimony taken in that deposition. Because Sogorka's additional arguments based on this deposition could not have been raised earlier, Sogorka's reply will be allowed and considered in the analysis of this order.

of Practice 3.31(c)(2) and the so-called "apex doctrine," Sogorka argues that the Subpoena should be quashed because Sogorka lacks unique, personal knowledge of the issues in this proceeding and because the information Respondent seeks from Sogorka is cumulative or duplicative of the discovery secured from Sagent's corporate representative on June 8, 2023.[2] Sogorka further argues that the information Respondent seeks from Sogorka is available from other less burdensome sources, including another Sagent board member who is also being deposed as the corporate representative of Sagent's private equity sponsor, Warburg Pincus LLC ("Warburg"). Sogorka contends in addition that sitting for a deposition will cause hardship to Sogorka and Sagent because Sogorka has "extensive commitments as Sagent's President and CEO" and board member, including providing testimony next month in a separate proceeding.

In its Opposition, Respondent argues, as an initial matter, that the apex doctrine has never been applied in a Federal Trade Commission ("FTC") administrative case and therefore does not govern Sogorka's Motion. Moreover, according to Respondent, Sogorka has unique, substantial personal knowledge that is not duplicative and is not contained in documents or obtainable through the depositions of the corporate representatives, including communications between Sogorka and witnesses in this proceeding, as well as information from Sogorka that has been cited in the expert report of Complaint Counsel's expert witness.

III.

Pursuant to Rule 3.31(c)(1) of the Commission's Rules of Practice, parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. 16 C.F.R. § 3.31(c)(1).

A non-party seeking to quash or limit a subpoena has the burden of demonstrating why discovery should be denied or restricted. *See In re HomeAdvisor, Inc.*, No. 9407, 2022 WL 4483130, at *2 (F.T.C. Sept. 26, 2022) (quoting *In re Polypore Int'l, Inc.*, No. 9327, 2008 WL 4947490, at *6 (F.T.C. Nov. 14, 2008)). "Even where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the proceeding." *HomeAdvisor*, 2022 WL 4483130, at *2 (citations omitted); *see In re Otto Block HealthCare N. Am. Inc.*, No.

[2] The "apex doctrine," cited by Sogorka, is based on Federal Rule of Civil Procedure 26 and has been applied to limit depositions of "apex" or high-level officials under certain circumstances, including when the information sought is unreasonably cumulative or duplicative or can be obtained from a lower-level employee or source that is more convenient or less burdensome. Fed. R. Civ. P. 26 (b)(2)(C)(i).

9378, 2018 WL 1836647, at *2 (F.T.C. Mar. 28, 2018) (denying motion to quash a subpoena for testimony of a non-party witness when "such information [was] uniquely in the possession of" the non-party and when the witness had "personal knowledge of facts that bear on key issues . . . about many topics that are relevant to the case").

IV.

Sogorka does not deny that he has relevant information. Instead, he objects on the basis that the information is cumulative or duplicative of what Respondent secured from Sagent's corporate representative, and what other, less burdensome sources, such as Warburg's corporate representative, could provide. According to Respondent, Sogorka: introduced the FTC to individuals on Complaint Counsel's witness list; engaged in one-on-one conversations with individuals on Complaint Counsel's witness list; and provided the FTC with information that has been cited in the report of Complaint Counsel's expert witness. Opposition at 7-8. The foregoing supports the conclusion that Sogorka has unique, substantial personal knowledge.

Moreover, Sogorka has failed to demonstrate that Sogorka's knowledge is obtainable from other, less burdensome, sources. It is undisputed that Sagent's corporate representative was not present during some of the one-on-one conversations Sogorka engaged in with witnesses in this proceeding on relevant topics. The fact that Sagent's corporate representative discussed these conversations with Sogorka in preparation for the June 8 deposition does not necessarily make the information sought from Sogorka cumulative or duplicative. In addition, Sogorka's assertion that the documents provided Respondent with "the exact information it seemingly hopes to extract from Mr. Sogorka" (Motion at 2) is unsupported. Sogorka does not deny Respondent's assertion that the documents Sagent and Warburg produced do not include any notes taken by Sogorka or records of his discussions with industry participants. In summary, Sogorka has failed to meet the burden of demonstrating that deposing Sogorka would be cumulative or duplicative to alternative discovery that has already taken place or may take place.[3]

Sogorka has also failed to establish that the

. *In re Polypore Int'l, Inc.*, No. 9327, 2009 FTC LEXIS 41 at *10 (F.T.C. Jan. 15, 2009); *In re Transpacific Passenger Air Transp. Antitrust Litig.,* 2014 WL 939287, at *3 (N.D. Cal. Mar. 6, 2014) ("a busy schedule is simply not a basis for foreclosing otherwise proper discovery").

[3] Sogorka's invocation of the "apex doctrine" is rejected. Sogorka fails to cite any FTC case applying the doctrine. Moreover, even assuming the doctrine applied to Sogorka's Motion, the doctrine would not shield Sogorka from being subject to deposition because Sogorka has relevant, non-duplicative information. *Zimmerman v. Al Jazeera Am., LLC et al.*, 329 F.R.D. 1, at *7 (D.D.C. 2018) ("When a witness has personal knowledge of facts relevant to the lawsuit, even a corporate president or CEO is subject to deposition.").

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V.

Based on the foregoing, the Motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: June 16, 2023