ORIGINAL

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

In the Matter of	)	
The Dun & Bradstreet Corporation, Respondent.	)	DOCKET NO. 9342

ORDER DENYING RESPONDENT'S MOTION TO REQUIRE AMENDED PRELIMINARY WITNESS LIST

I.

On July 2, 2010, Respondent The Dun & Bradstreet Corporation ("D&B") submitted a Motion Regarding Complaint Counsel's Preliminary Witness List ("Motion") seeking, *inter alia*, an order requiring Complaint Counsel to reduce the number of witnesses designated by Complaint Counsel on its preliminary witness list.[1] Complaint Counsel submitted an opposition to the Motion on July 8, 2010 ("Opposition"). After full consideration of Respondent's Motion and Complaint Counsel's Opposition, and as more fully explained below, Respondent's Motion is DENIED.

II.

Respondent contends that Complaint Counsel's June 20, 2010 preliminary witness list, which names 64 potential witness, including 5 non-party corporate representatives

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[1] Respondent submitted its Motion pursuant to Commission Rule of Practice 3.38, which governs motions to compel discovery, or in the alternative, pursuant to the general motions authority of Rule 3.22. Commission Rule 3.38 states in pertinent part:

> A party may apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery, including a determination of the sufficiency of the answers or objections with respect to the mandatory initial disclosures required by § 3.31(b), a request for admission under § 3.32, a deposition under § 3.33, an interrogatory under § 3.35, or a production of documents or things or access for inspection or other purposes under § 3.37.

16 C.F.R. § 3.38(a). *See also id.* § 3.38(b) (stating that "[i]f a party or an officer or agent of a party fails to comply with any discovery obligation imposed by these rules, upon motion by the aggrieved party, the Administrative Law Judge or the Commission, or both, may take such action in regard thereto as is just . . ."). It is patent from the plain language of Rule 3.38 that it does not restrict or otherwise regulate witness lists. Accordingly, Respondent's Motion is deemed submitted under Rule 3.22. 16 C.F.R. § 3.22.

identified as "persons most knowledgeable," fails to satisfy Complaint Counsel's "obligations under the Scheduling Order in this case and the applicable Rules . . . ." Motion at 1. According to Respondent, the length and extent of the investigation in this case to date has enabled Complaint Counsel sufficient time to provide a narrower list. Moreover, Respondent argues, it is neither credible nor feasible that Complaint Counsel intends to call 64 witnesses because the Commission's Rules of Practice limit each side to a maximum of 105 hours for trial. *See* 16 C.F.R. § 3.41(b) (stating that hearing should be limited to no more than 210 hours, and that each side shall be allotted no more than half of the trial time). Accordingly, Respondent requests an order requiring Complaint Counsel to serve an amended witness list "containing no more than a reasonable number of names whom Complaint Counsel genuinely and in good faith believes it might call to testify at trial" and to "identify the twenty (20) individuals whom it thinks it is most likely to call at trial." Motion at 4 and n.6.[2]

Complaint Counsel contends that its preliminary witness list sets forth a reasonable number of potential witnesses, and that there is no authority requiring a preliminary witness list to be limited in the manner urged by Respondent. Complaint Counsel notes that it served its preliminary witness list on Respondent only 4 weeks after the exchange of mandatory initial disclosures pursuant to Commission Rule 3.31(b), and 6 months prior to the January 6, 2011 scheduled hearing date. Complaint Counsel further states that the Scheduling Order, which was agreed to by both parties, contemplates refinement of the preliminary witness list as discovery progresses, including service of a revised witness list and a final witness list.

III.

Although the Commission's Rules of Practice clearly contemplate the exchange of witness lists at the final pre-hearing conference, *see* Rule 3.21(e), 16 C.F.R. § 3.21(e), the Rules do not specifically provide for a "preliminary" witness list. However, requiring such lists to be provided and refined in advance of the hearing is clearly within the authority of the Administrative Law Judge. 16 C.F.R. §3.21(c)(1) ("Administrative Law Judge shall enter a [scheduling] order that sets forth the results of the [parties' scheduling] conference and establishes a schedule of proceedings that will permit the evidentiary hearing to commence on the date set by the Commission."); *id.* at §3.42(c)(6) (providing ALJ's authority "[t]o regulate the course of the hearings . . ."). Accordingly, the Scheduling Order in this case provides for the parties' exchange of preliminary witness lists, revised witness lists, and final witness lists.

Pursuant to the Scheduling Order, Complaint Counsel was to provide Respondent a preliminary witness list no later than June 30, 2010, and in fact served the list on June 20, 2010 – approximately 6 weeks after issuance of the Complaint on May 6, 2010; approximately 4 weeks after the deadline for service of mandatory initial disclosures,

[2] As submitted, Respondent's Motion sought certain relief related to Complaint Counsel's designation of its preliminary witness list as confidential. This aspect of the Motion has been resolved by agreement of the parties. *See* Order on Joint Submission of Parties Regarding Complaint Counsel's Preliminary Witness List, July 15, 2010.

inter alia, of the identities of "each individual likely to have discoverable information relevant to the allegations" of the Complaint, *see* 16 C.F.R § 3.31(b); and more than 3 months before the October 6, 2010 deadline in the Scheduling Order for the conclusion of fact discovery. Given the timing and context in which the preliminary witness list is served, its purpose is not, as assumed by Respondent, to identify each individual that *will*, in fact, testify at trial. Indeed, "preliminary" is defined as "preceding and leading up to the main part, matter, or business; introductory; preparatory." *Webster's Revised Unabridged Dictionary* (1913, rev. 1998). Thus, the purpose of the preliminary witness list is to further discovery by identifying the universe of *potential* witnesses, based upon the universe of those identified in the initial disclosures as having "discoverable knowledge."

The preliminary witness list is indeed introductory, as the Scheduling Order subsequently requires two further witness lists: a "revised" witness list, due from Complaint Counsel on August 18, 2010, approximately 6 weeks after the preliminary list, and more than 4 months prior to the hearing; and the final proposed witness list, due from Complaint Counsel on November 10, 2010, after the close of discovery. These later lists are designed to refine, as necessary, the preliminary list. As additional provision 12 of the Scheduling Order states: "The final proposed witness list may not include additional witnesses not listed in the preliminary or revised preliminary witness lists previously exchanged unless by order of the Administrative Law Judge upon a showing of good cause." Moreover, the revised and final proposed witness lists, in contrast to the introductory, preliminary, witness list, must consist of those potential witnesses who counsel "in good faith . . . reasonably expect may be called in their case-in-chief." *Id.* Respondent's contention that these requirements must also apply to the preliminary witness list has no merit.

Finally, the fact that Complaint Counsel identified 64 witnesses on its preliminary witness list is not grounds for the relief requested by Respondent. *Derechin v. State University of New York*, 138 F.R.D. 362 (W.D.N.Y 1991), cited by Respondent in support of its Motion, is readily distinguishable. In that case, the defendant designated approximately 200 witnesses in its pre-trial statement, all to testify to essentially the same facts. In the instant case, Complaint Counsel designated only 64 witnesses, in a preliminary witness list, on a variety of topics, including the business strategies of the merging parties, the competitive landscape, product development, technical aspects of the databases at issue, and more. In addition, nothing in the Scheduling Order in this case limits the number of witnesses either side may designate on any witness list, although the parties had the opportunity to agree to a limitation, and apparently declined to do so. *Compare* Scheduling Order, *In re Intel Corp.*, No. 9341, January 14, 2010 (providing for 100 witness limit for revised witness lists).

IV.

Upon full consideration of Respondent's Motion and Complaint Counsel's Opposition, and for all the foregoing reasons, Respondent's Motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: July 15, 2010