

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of _____)
)
)
The Dun & Bradstreet Corporation)
)
)
_____)

Docket No. 9342

PUBLIC RECORD

MOTION OF RESPONDENT DUN & BRADSTREET REGARDING
COMPLAINT COUNSEL'S PRELIMINARY WITNESS LIST

Pursuant to Section 3.38 of the Rules of Practice for Adjudicative Proceedings ("Rules") of the Federal Trade Commission ("FTC"),¹ 16 C.F.R. § 3.38, Respondent The Dun & Bradstreet Corporation ("D&B") seeks the following relief with respect to Complaint Counsel's Preliminary Witness List (the "Preliminary Witness List"), disclosed to D&B on June 20, 2010:²

1. That the Court find that because Complaint Counsel has named sixty-four (64) witnesses in its Preliminary Witness List and for other reasons set forth below, Complaint Counsel has failed to satisfy its obligations under the Scheduling Order in this case and the applicable Rules, and that it be ordered to serve an amended list within three (3) business days; and
2. That the Court hold that Complaint Counsel has improperly designated the Preliminary Witness List as "confidential material" pursuant to the Protective Order Governing Discovery Material dated May 13, 2010 (the "Protective Order"), and further that D&B need not treat as confidential the text of the Preliminary Witness List in accordance with the terms of that order.³

¹ D&B has moved under Rule 3.38 because the issues raised by the motion involve the disclosure of Complaint Counsel's witnesses, and because the schedule for motions relating to disclosure is appropriate for the consideration of this motion. Alternatively, D&B moves under Rule 3.22. Should the Court treat the motion as one under Rule 3.22, D&B respectfully requests that the Court order that it be considered under an expedited schedule, consistent with the schedule provided under Rule 3.38.

² A copy of the Preliminary Witness List is attached hereto as Exhibit A. Because it has been designated as confidential, we are filing herewith a redacted version of this motion for filing in the public record, and a non-redacted version for filing under seal in accordance with 16 CFR § 3.45(e) and the Protective Order.

³ During the meet-and-confer process, the parties discussed a possible resolution of this issue. D&B expects that discussions regarding this issue will continue, and that such discussions might result in an amicable resolution of

The grounds for D&B's motion are set forth in the discussion below.

DISCUSSION

I. COMPLAINT COUNSEL'S DESIGNATION OF SIXTY-FOUR TRIAL WITNESSES DOES NOT SATISFY ITS DISCLOSURE OBLIGATIONS

The Court presumably imposed upon the parties an obligation to identify all potential trial witnesses relatively early in the discovery period to allow each party time to take discovery from those witnesses in advance of trial should it choose to do so. That goal can be easily thwarted in two ways: one, by a party being under-inclusive, and the other by the party being over-inclusive, in preparing its list.

Regrettably, Complaint Counsel has chosen the latter option and, in doing so, has rendered the Preliminary Witness List that it has disclosed to D&B of very limited utility; despite the fact that Complaint Counsel requested and *was granted* an additional week to prepare its Preliminary Witness List. Whether or not Complaint Counsel intended to limit the utility of its disclosure in this manner – and we do not assume that this was its intent – this is certainly the effect of Complaint Counsel's conduct.

It should be noted preliminarily that Complaint Counsel has been conducting its investigation since March 9, 2009. Thus, it has had the benefit of nearly sixteen (16) months to review the many documents already produced by D&B during the course of the investigation; interview third-party witnesses; review whatever documents Complaint Counsel might have obtained from those witnesses; speak with potential industry experts; and put its case together. Indeed, Complaint Counsel obviously needed to put together a case that was sufficient to decide that a complaint should be filed; present a case to the full Commission; and file its Complaint on May 6 of this year. In short, Complaint Counsel has had ample time, opportunity and *reason* to prepare a case that is more advanced than is reflected by its Preliminary Witness List.

this issue. D&B will of course advise the Court immediately if the parties are able to reach agreement over this issue.

Moreover, Complaint Counsel is required to file its revised witness list in six weeks, and fact discovery closes in little more than three months. While Complaint Counsel could conceivably use what it learns in formal discovery to refine its list, it cannot be that Complaint Counsel has not already developed its case to a point where it can reasonably identify those individuals who it genuinely believes might testify at trial; or that there are in fact sixty-four such individuals. Trial is limited to 210 hours: 105 hours per side. Complaint counsel cannot credibly assert that it will need to put on the stand anything even close to sixty-four witnesses to prove its case; that it would be prudent to do so; or even that it would be *feasible* to do so. Indeed, it would be surprising if either side ultimately needed to call more than ten witnesses for the trial of this case; there simply are not that many fact issues to be tried.

Moreover, the list itself further demonstrates that it does not reflect a careful, studied and deliberate effort to identify those individuals who genuinely might be called to testify at trial. For example, the list identifies twenty-one (21) D&B employees as potential witnesses. This list includes, in addition to Chairman and CEO Stephen Alesio, three individuals who no longer work for D&B, and who do not appear on the employee organization charts disclosed to Complaint Counsel on May 28, 2010.⁴ In other words, Complaint Counsel appears to have failed to avail itself of some of the most useful information at its fingertips in preparing its list.

In addition, of the forty-three (43) third-party witnesses identified in the list, five of them (numbers 39-43) are identified as "Person Most Knowledgeable." It would seem apparent that if Complaint Counsel cannot identify an individual at these third-party companies included in the list after sixteen months of investigation, it likely has little to no reason to reasonably believe that they might be called to testify. Similarly, Complaint Counsel has employed the exact same, boilerplate language to summarize the testimony that it expects to elicit from thirty-nine (39) of the forty-three (43) third-party witnesses included on the list.⁵ It cannot be the case that

⁴ This includes "Witnesses from the Dun & Bradstreet Corporation" numbers 6, 10 and 17.

⁵ See descriptions for witness numbers 5-43.

Complaint Counsel intends to call anything close to thirty-nine (39) witnesses to offer cumulative testimony on the exact same topics. Rather, it seems virtually certain that Complaint Counsel, instead, has included in the list virtually anyone who even conceivably could serve as a third-party witness, subject to Complaint Counsel's further consideration.

In sum, the Preliminary Witness List disclosed by Complaint Counsel does not serve its apparent purpose of assisting D&B in shaping its discovery by identifying those individuals – and only those individuals – who genuinely might testify at trial. Courts in other circumstances have found that parties have failed to satisfy their disclosure obligations under similar circumstances. *Derechin v. State University of New York*, 138 F.R.D. 362, 364 (W.D.N.Y. 1991) (upholding imposition of sanctions, fees and costs upon counsel who included roughly two hundred witnesses pretrial statement for trial estimated to take not more than five days; "this Court finds that listing two hundred witnesses to testify to essentially the same thing was objectively unreasonable and vexatious"), *aff'd*, 963 F.2d 513 (2d Cir. 1992).

D&B therefore respectfully requests that the Court order Complaint Counsel to serve an amended list containing no more than a reasonable number of names⁶ whom Complaint Counsel genuinely and in good faith believes it might call to testify at trial. Given that the relatively short discovery period is well under way, D&B asks that Complaint Counsel be directed to serve their amended list within three business days.

II. COMPLAINT COUNSEL HAS IMPROPERLY DESIGNATED ITS PRELIMINARY WITNESS LIST AS "CONFIDENTIAL"

Complaint Counsel has designed its Preliminary Witness List as "confidential material" under the terms of the Protective Order, thereby depriving D&B from seeing the names of the third-parties and even of its own employees that appear on the list, and preventing D&B from using the list for other purposes including in communicating with third-parties. By doing so,

⁶ Given that ten witnesses per side should be adequate to try this case, D&B respectfully suggests that Complaint Counsel be directed to identify the twenty (20) individuals whom it thinks it is most likely to call at trial.

Complaint Counsel has significantly restricted the ability of D&B to use the list in order to plan its discovery and to prepare for trial.

Paragraph 1 of the Protective Order defines as “confidential material” for purposes of the Protective Order “any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information.” Protective Order ¶ 1. Complaint Counsel could not seriously argue that the names of potential witnesses and the topics of their potential testimony constitutes information that is “privileged,” “competitively sensitive,” or “sensitive personal information,”⁷ Rather, D&B assumes that Complaint Counsel wishes to protect the “fruits” of its investigation, and, indeed, Complaint Counsel confirmed during the meet and confer preceding the filing of this motion that this was their goal. And, while paragraph 2 of the Protective Order protects the identity of third-parties where requested, that confidentiality would of course have to be waived for those parties to testify at trial.

Thus, neither paragraph 1 nor paragraph 2 of the Protective Order provides a legitimate basis for designating the list as “confidential material,” under the letter or spirit of that order. While Complaint Counsel clearly has a legitimate purpose in keeping confidential the sources of information that it has relied upon in its *investigation*, the Preliminary Witness List purports to identify those individuals *whom Complaint Counsel intends to have testify*. There is and can be nothing confidential about this information assuming that the list is in fact what it purports to be. Accordingly, D&B respectfully requests that the Court hold that Complaint Counsel’s Preliminary Witness List need not be treated as “confidential material” under the terms of the Protective Order in this case.

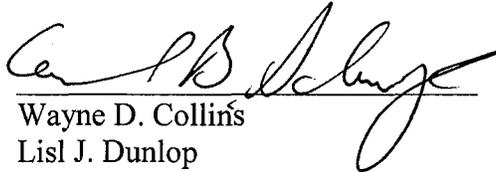
⁷ “Sensitive personal information” is further defined in paragraph 1 to include, for example, Social Security, taxpayer, driver’s license, and passport numbers, health information, medical information, etc.

CONCLUSION

For the reasons discussed above, D&B respectfully asks the Court to issue an order holding that 1) Complaint Counsel be directed to disclose within three business days an amended list that identifies no more than twenty (20) of the potential witnesses that Complaint Counsel in good faith believes are most likely to testify at trial; and that 2) D&B does not need to treat the Preliminary Witness List as "confidential material" under the terms of the Protective Order.

Dated: July 1, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2010, I served via email a copy of the foregoing Motion of the Respondent Dun & Bradstreet Corporation Regarding Complaint Counsel's Preliminary Witness List on the following:

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Dated: July 1, 2010

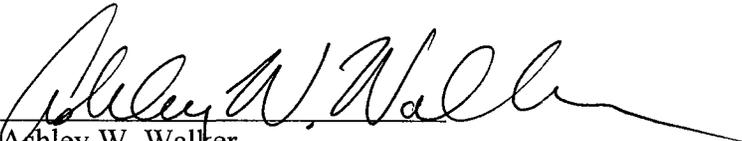

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Exhibit A

CONFIDENTIAL – FTC Docket No. 9342

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BEFORE THE FEDERAL TRADE COMMISSION**

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COMPLAINT COUNSEL'S PRELIMINARY WITNESS LIST

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CONFIDENTIAL – FTC Docket No. 9342

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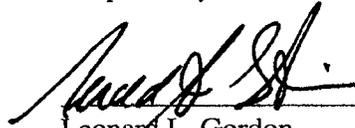
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