UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	**Docket No. 9342**
The Dun & Bradstreet Corporation	)	
Respondent.	)	

PUBLIC RECORD

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION REGARDING COMPLAINT COUNSEL'S PRELIMINARY WITNESS LIST

Respondent's novel motion to limit the number of witnesses that Complaint Counsel can identify in its Preliminary Witness List should be denied in its entirety because it lacks any support in law, fact or logic.[1]

During the course of this litigation, the parties are required to exchange three separate witness lists: a Preliminary Witness List, a Revised Witness List and a Final Witness List. Pursuant to the agreed-upon Scheduling Order entered in this proceeding, Complaint Counsel served its Preliminary Witness List only four weeks after the parties exchanged their initial disclosures and approximately six months prior to the scheduled date for the commencement of

[1]Complaint Counsel takes no position as to whether Respondent's motion should be treated under Rule 3.38 or Rule 3.22, other than to state that the motion should be denied under either rule. Out of an abundance of caution, however, Complaint Counsel has filed its response in compliance with Rule 3.38 (*i.e.*, providing response within 5 days and 2,500 word limit) and therefore Respondent has no right of reply.

Complaint Counsel further notes that the parties have reached an agreement concerning that part of Respondent's motion concerning the confidentiality designation of the Preliminary List, and a Joint Submission was filed with the Court on July 6, 2010.

the hearing. The fundamental purpose of the Preliminary Witness List is for the disclosing party to identify the present universe of its potential deponents or trial witnesses based upon currently available information subject to what is revealed during subsequent discovery. Disclosing the identities of potential deponents and trial witnesses on the Preliminary Witness List enables the adversary to conduct meaningful discovery and prepare for trial without unfair surprise. Thus, the parties do not have the burden to assess whether each individual they identify on the Preliminary Witness List will actually be called to testify at trial. In stark contrast, the Revised Witness List and Final Witness List are served later in the litigation process, and the parties are then required to identify in good faith on those lists the witnesses they are likely to call to testify in their cases in chief.

The Preliminary Witness List necessarily can identify only those potential deponents and trial witnesses currently known to the disclosing party before further refining the list, either by adding or removing names, as discovery progresses. This is especially true for Complaint Counsel, who neither has informal access to the Respondent's employees nor relationships with the Respondent's customers. Moreover, Respondent has not yet produced any documents pursuant to Complaint Counsel's document requests, which were served on June 9, 2010.[2]

Respondent's argument that Complaint Counsel should be constrained from conducting adequate discovery by arbitrarily limiting the number of individuals it may identify on its Preliminary Witness List should therefore be denied because: (1) Respondent incorrectly seeks to impose on Complaint Counsel a heightened and unrealistic discovery standard; (2) the

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[2]To date, Respondent has refused to produce certain categories of documents, such as customer files, pursuant to the document requests on an expedited and rolling basis. Such information also would help Complaint Counsel pare down its witness list.

Preliminary Witness List identifies a reasonable number of potential deponents and trial witnesses; and (3) more than one-third of the deponents and trial witnesses identified are current or former MDR employees, so Respondent has no burden concerning obtaining relevant information from those witnesses.

1. Respondent incorrectly seeks to impose a heightened and unrealistic discovery standard.

The Preliminary List is merely the first of three witness lists required to be exchanged as discovery proceeds under the Scheduling Order. It is designed to alert the adversary to the existence of witnesses whose testimony may be helpful to the disclosing party. The Preliminary Witness List is neither intended nor required to be a Revised Witness List nor a Final Witness List.

Respondent incorrectly argues that Complaint Counsel's Preliminary Witness List should be limited to only twenty names "whom Complaint Counsel genuinely and in good faith believes it might call to testify at trial." (Respondent's motion at p. 4.) That heightened standard simply does not apply to the Preliminary Witness List.[3] Rather, the Scheduling Order expressly states: "The *revised and final* witness lists shall represent counsels' good faith designation of all potential witnesses who counsel reasonably expect may be called in their case-in-chief." Scheduling Order ¶ 12 (emphasis added); *cf. El Camino Resources, Ltd. v. Huntington Nat'l Bank*, 2009 U.S. Dist. Lexis 36704, at *10-11 (W.D. Mich. April 30, 2009) (contrasting and

[3]Respondent itself is unable to articulate a standard it believes should be applied to the Preliminary Witness List, other than to require that the individual names be of persons for which there is a possibility that they will be called to testify. Thus, for example, Respondent variously proposes two other standards: "reason to reasonably believe that they might be called to testify" (Respondent's motion at p. 3); or "who genuinely might testify at trial" (Respondent's motion at p. 4).

distinguishing the requirements for initial disclosures from pretrial disclosures and finding it unreasonable to require a party to commit that it will or even may call a witness identified on its initial disclosures). Thus, the Scheduling Order provides the parties with an opportunity to engage in discovery so that they can meaningfully assess and identify which witnesses they likely will call at trial. The Revised Witness List and the Final Witness List are not due until August 18 and November 10, respectively.

The Scheduling Order also contemplates broad disclosure on a Preliminary Witness List because 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." Scheduling Order ¶ 12. Although Respondent now argues that the Preliminary Witness List should be under-inclusive, one can easily predict the reaction that would result if Complaint Counsel served an abbreviated Preliminary Witness List and then identified other potential witnesses disclosed for the first time on the Revised or Final Witness Lists.[4] Complaint Counsel's Preliminary Witness List therefore provides Respondent with the benefit of the most complete and current disclosure.

Respondent's additional argument that Complaint Counsel must submit a bare bones Preliminary Witness List because it conducted an investigation prior to initiating Part 3 litigation is undercut by the Rules. *See, e.g.*, Rule 3.2 (distinguishing between Part 3 adjudicative proceedings and Part 2 investigational hearings); Rule 3.33(b) ("The fact that a witness testifies

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[4]Fully consistent with the foregoing rationale, the Scheduling Order specifies that objections to the "final proposed witness lists" must be filed by January 5, 2011– a date six months from now. The Scheduling Order does not provide or contemplate a date for which objections to a Preliminary Witness List should be filed. Accordingly, Respondent's motion should be denied for the additional reason that it is premature.

at an investigative hearing does not preclude the deposition of that witness."). Nothing in the Commission's Rules contemplates or supports Respondent's bald assertion.

2. The Preliminary Witness List identifies a reasonable number of witnesses for this proceeding.

On its face, identifying sixty-four individuals on Complaint Counsel's Preliminary Witness List is completely reasonable: MDR employs approximately 150 people and has more than 5,000 customers. Indeed, the sixty-four witnesses identified on the Preliminary Witness List reflects a sharp reduction from the 191 individuals who Complaint Counsel identified and the seventy-five individuals who Respondent identified on their respective Initial Disclosures as individuals likely to have discoverable information. Thus, contrary to Respondent's assertions, Complaint Counsel already has narrowed the focus of those witnesses it may call at trial. While Complaint Counsel fully expects that the discovery process will enable further modification of the list of potential deponents and trial witnesses (whether by adding or subtracting names), Respondent's argument that the Preliminary Witness List must resemble the final trial witness list is untenable – it would require Complaint Counsel to identify its actual trial witnesses before discovery even takes place.[5] If accepted, this requirement would render the entire discovery process meaningless.

[5]Respondent's reliance on *Derechin v. State Univ. of New York*, 138 F.R.D. 362, 364 (W.D. N.Y. 1991), *aff'd*, 963 F.2d 513 (2d Cir. 1992) is misplaced. The Court in *Derechin* found that the parties and their attorneys had engaged in a series of discovery abuses culminating in the granting of Rule 11 sanctions against defendant's counsel when it identified approximately 200 witnesses in its pretrial statement. Aside from no such conduct by Complaint Counsel in this case, identifying 64 witnesses in a Preliminary Witness List is a far cry from identifying 200 witnesses on a pretrial witness list.

3. More than one-third of the witnesses identified are current or former MDR employees.

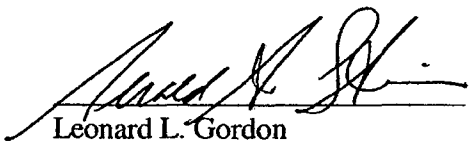
Twenty-three of the sixty-four witnesses identified on the Preliminary Witness List – *i.e.*, more than one-third – are either current or former MDR employees and therefore present no undue burden for Respondent to determine what relevant information they possess. *See, e.g., U.S. ex rel. Hunt v. Merck-Medco Managed Care, LLC*, 223 F.R.D. 330, 334 (E.D. Pa. 2004) ("Because an entire class of individuals listed by Plaintiffs consists of current or former employees of Merck-Medco, the Medco Defendants should already be aware of these individuals and could easily contact and question them regarding information relevant to this case."). Thus, Respondent's complaint about having to evaluate and assess discovery regarding the remaining forty-one third-party witnesses should be rejected.

CONCLUSION

For the reasons set forth above, Respondent's motion should be denied in its entirety.

Dated: July 9, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2010, I served via email a copy of the attached document titled Complaint Counsel's Opposition to Respondent's Motion Regarding Complaint Counsel's Preliminary Witness List upon the following:

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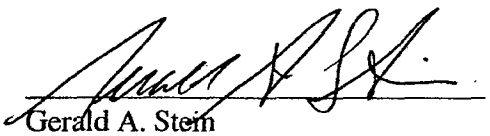

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