

documents, is available from Mathew Craddock, Realty Specialist, at the above address, phone (541) 618-2221.

**SUPPLEMENTARY INFORMATION:** This land is being considered for direct sale to Jack and Jackie Gray, the family of Mary Gray, to resolve a long-term, inadvertent, unauthorized occupancy of the public land. The encroachment involves a residence currently occupied by Mary Gray, the original historic Gray family home, outbuildings, equipment storage, a road and a well. The Gray family owns private property adjacent to the subject public land. The initial occupancy began approximately sixty years ago when the Gray family placed improvements on the public land assuming it was part of their adjacent private ownership.

The sale would assemble the BLM lands to the Gray property, protect the improvements placed on the lands by the Gray family, and resolve an inadvertent trespass. The parcel is the minimum size possible to ensure that all of the improvements are included. A cadastral survey was completed to partition the sale parcel from the larger BLM ownership.

In accordance with 43 CFR 2710.0-6(c)(3)(iii), direct sale procedures are appropriate to resolve an inadvertent unauthorized occupancy of the land and to protect existing equities in the land.

Jack and Jackie Gray will be allowed 30 days from receipt of a written offer to submit a deposit of at least 20 percent of the appraised market value of the parcel, and 180 days thereafter to submit the balance.

The following rights, reservations, and conditions will be included in the deed conveying the land:

1. A reservation to the United States for a right-of-way for ditches and canals constructed by the authority of the United States, Act of August 30, 1890 (43 U.S.C. 945).

2. A reservation to the United States for a right-of-way for Bureau of Land Management road #34-7-2 (OR 1902).

The deed would contain a floodplain covenant pursuant to the authority contained in section 3(d) of Executive Order 11988 of May 24, 1977, and sections 203 and 209 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2750, 43 U.S.C. 1713 and 1719. The deed is subject to a restriction which constitutes a covenant running with the land. The land may be used only for a residential homesite. No additional structures may be placed within the floodplain area without the approval of local government planning offices.

The deed would also include a notice and indemnification statement under

the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9620) holding the United States harmless from any release of hazardous materials that may have occurred as a result of the unauthorized use of the property by other parties.

Acceptance of the direct sale offer constitutes an application for conveyance of the mineral interests also being offered under the authority of section 209(b) of the Federal Land Policy and Management Act of 1976. In addition to the full purchase price, a nonrefundable fee of \$50 will be required from the prospective purchaser for purchase of the mineral interests to be conveyed simultaneously with the sale of the land.

The land described is segregated from appropriation under the public land laws, including the mining laws, pending disposition of this action or 270 days from the date of publication of this notice, whichever occurs first. Protests/comments, including names, street addresses, and other contact information of respondents, will be available for public review. Individual respondents may request confidentiality.

If you wish to request that BLM consider withholding your name, street address and other contact information (such as: Internet address, FAX or phone number) from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your written comment. BLM will honor requests for confidentiality on a case-by-case basis to the extent allowed by law. BLM will make available for public inspection in their entirety all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses.

Dated: December 3, 2003.

**Lynda Boody,**

*Field Manager Glendale Resource Area,  
Medford District Office.*

[FR Doc. 04-2757 Filed 2-9-04; 8:45 am]

**BILLING CODE 4310-33-P**

## INTERNATIONAL TRADE COMMISSION

[USITC SE-04-002]

### Sunshine Act Meeting

#### AGENCY HOLDING THE MEETING:

International Trade Commission.

**TIME AND DATE:** February 17, 2004 at 11 a.m.

**PLACE:** Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205-2000.

**STATUS:** Open to the public.

#### MATTERS TO BE CONSIDERED:

1. Agenda for future meetings: none.
2. Minutes.
3. Ratification List.
4. Inv. Nos. 731-TA-1063-1068 (Preliminary) (Certain Frozen and Canned Warmwater Shrimp and Prawns from Brazil, China, Ecuador, India, Thailand, and Vietnam)—briefing and vote. (The Commission is currently scheduled to transmit its determination to the Secretary of Commerce on or before February 17, 2004; Commissioners' opinions are currently scheduled to be transmitted to the Secretary of Commerce on or before February 24, 2004.)

5. Outstanding action jackets: none. In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: February 5, 2004.

By order of the Commission.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 04-2941 Filed 2-6-04; 10:34 am]

**BILLING CODE 7020-02-P**

## DEPARTMENT OF JUSTICE

### Antitrust Division

#### ***United States v. First Data Corporation and Concord EFS, Inc.; Competitive Impact Statement, Proposed Final Judgment and Complaint***

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. section 16(b) through (h), that a proposed Final Judgment, Amended Hold Separate Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America v. First Data Corporation and Concord EFS, Inc.*, Civil Action No. 03CV02169. On October 23, 2003, the United States filed a Complaint alleging that the proposed acquisition by First Data of Concord would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The Complaint alleges that the acquisition would reduce competition substantially in the PIN debit network services market by combining Concord's STAR PIN debit network with the NYCE PIN debit network. First Data owns a controlling 64 percent interest in NYCE. The proposed Final Judgment requires

First Data to divest all of its interests in NYCE. Copies of the Complaint, proposed Final Judgment, Amended Hold Separate Stipulation and Order, and Competitive Impact Statement are available for inspection at the Department of Justice in Washington, DC, in Room 9500, 600 E Street, NW, and at the Office of the Clerk of the United States District Court for the District of Columbia, Washington, DC.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Renata Hesse, Chief, Networks and Technology Section, Antitrust Division, Department of Justice, Suite 9500, 600 E Street, NW., Washington, DC 20530, (telephone: 202-307-6200).

**J. Robert Kramer, II,**

*Director of Operations, Antitrust Division.*

### Competitive Impact Statement

Plaintiff, the United States of America ("United States"), pursuant to section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

### I. Nature and Purpose of the Proceeding

Defendant First Data Corporation ("First Data") and Defendant Concord EFS, Inc. ("Concord") entered into an Agreement and Plan of Merger on April 1, 2003, pursuant to which First Data would acquire Concord in an all-stock transaction then valued at approximately \$7 billion. On October 23, 2003, the United States and the States of Connecticut, Illinois, Louisiana, Massachusetts, New York, Ohio, Pennsylvania and Texas, and the District of Columbia ("Plaintiff States") filed a civil antitrust complaint, seeking to enjoin the proposed acquisition. The Complaint alleges that the acquisition would reduce competition substantially in the PIN debit network services market by combining the STAR and NYCE PIN debit networks, in violation of section 7 of the Clayton Act, 15 U.S.C. 18.

PIN debit networks provide a fast and secure payment mechanism that is used at more than one million merchant locations. The acquisition would have significantly increased the concentration levels in the already concentrated PIN debit network services market by combining the largest and third-largest PIN debit networks in the United States, STAR and NYCE,

respectively. This significant increase in market concentration would likely have substantially reduced competition among PIN debit networks for merchant customers, resulting in thousands of merchants paying higher prices and receiving poorer levels of service for PIN debit network services. Merchants would have passed on at least some of these higher costs by raising the prices of their goods and services, to the detriment of tens of millions of consumers throughout the United States. Accordingly, the complaint sought: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; and (2) permanent injunctive relief that would prevent Defendants from carrying out the acquisition or otherwise combining their businesses or assets.

On December 15, 2003, the United States, the Plaintiff States and the Defendants filed a proposed Final Judgment and Hold Separate Stipulation and Order, which will eliminate the anticompetitive effects of the acquisition. Upon the filing of the proposed Final Judgment and Hold Separate Stipulation and Order, the Defendants announced that they had extended the date for closing the transaction until April 30, 2004. On January 9, 2004, the parties filed an Amended Hold Separate Stipulation and Order.<sup>1</sup>

The proposed Final Judgment requires First Data, within 150 calendar days after the Court's signing of the original Hold Separate Stipulation and Order, or five days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest all of its governance rights in NYCE and its entire 64 percent ownership interest in NYCE (collectively "NYCE Holdings").<sup>2</sup> The requirement that First Data divest NYCE is equivalent to the relief the United

<sup>1</sup> The original Hold Separate Stipulation and Order signed by the Court on December 15, 2003 prohibited any First Data officer, director, manager, employee, or agent from serving on the NYCE Board of Directors after December 30, 2003. This deadline would have required six First Data employees who were serving on the NYCE Board to resign. On December 30, 2003, with the consent of all parties, the Court issued an order extending First Data's deadline concerning participation on the NYCE Board until January 9, 2004. On January 9, the parties filed a consent motion requesting that the Court enter the Amended Hold Separate Stipulation and Order, which the Court signed on January 13, 2004. The Amended Hold Separate Stipulation and Order allows First Data to retain its NYCE Board seats for certain limited specifically enumerated purposes unless the United States, in its sole discretion, in consultation with the Plaintiff States, requires First Data's representatives on the NYCE Board to resign.

<sup>2</sup> The term "NYCE Holdings" is defined at ¶II.G of the Final Judgment.

States would likely have obtained had it prevailed at trial.

The terms of the Amended Hold Separate Stipulation and Order require First Data to take certain steps to ensure that NYCE is operated as a competitively independent, economically viable and ongoing business concern, that will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestiture.

The United States, the Plaintiff States and the Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

### II. Description of the Events Giving Rise to the Alleged Violation

#### A. The Defendants and the Proposed Transaction

First Data is a Delaware corporation headquartered in Greenwood Village, Colorado. In 2002, First Data reported total worldwide revenues of \$7.6 billion. First Data owns 64 percent of NYCE, which operates the third largest PIN debit network. Citicorp, J.P. Morgan Chase & Co., FleetBoston Financial and HSBC USA Inc. own the remaining 36 percent of NYCE. First Data also owns substantial merchant and card issuing processing operations, as well as Western Union, the leading provider of consumer-to-consumer money transfer services.

Concord is a Delaware corporation headquartered in Memphis, Tennessee. Concord's revenues in 2002 totaled nearly \$2 billion. Concord operates STAR, the largest PIN debit network. STAR is comprised of a number of PIN debit networks that Concord acquired over the last several years. Concord brought MAC in 1999, Cash Station in 2000, and then STAR in 2001, merging it with the MAC network. Shortly before Concord acquired STAR, STAR bought the HONOR network, which had recently acquired the MOST network. Concord also is a leading merchant processor and provides an array of services to debit card issuers and ATM owners.

First Data and Concord executed a merger agreement on April 1, 2003. Under that agreement, First Data would acquire Concord through an all-stock transaction.

### *B. Product Market: PIN Debit Network Services*

The Complaint alleges that PIN debit network services is a line of commerce and a relevant antitrust product market within the meaning of section 7 of the Clayton Act, 15 U.S.C. § 18. During the 1970s, bank consortiums formed numerous regional electronic funds transfer ("EFT") networks to enable their customers to withdraw funds from ATMs owned by multiple banks. EFT networks were first used for PIN debit transactions in the early 1980s. It was not until the mid-1990s, however, that PIN debit transactions became a popular method of payment for consumers to purchase goods and services at retail stores. PIN debit transaction volume grew substantially over the past five years due to merchant and consumer recognition of the advantages of PIN debit as a form of payment. Today, consumers make over 500 million PIN debit transactions every month.

A PIN debit network provides the telecommunications and payments infrastructure that connects a network's participating financial institutions with merchant locations throughout the United States. A PIN debit network also performs a number of related functions necessary for the efficient operation of the network. For example, PIN debit networks: (1) Promote their brand names among consumers, merchants and financial institutions; (2) establish rules and standards to govern their networks; and (3) set fees and assessments for use of the network's products and services.

To execute a PIN debit transaction, a customer swipes a debit card at a point-of-sale terminal and enters a PIN on a numeric keypad. After the PIN is entered, the transaction and card information is sent over the PIN debit network to the card-issuing financial institution for authorization. The financial institution sends an electronic message to the PIN debit network, accepting or rejecting the transaction. The PIN debit network switches this reply back to the merchant to complete the transaction. The entire process takes place electronically in several seconds.

PIN debit networks charge both the merchant and the card-issuing financial institution a per transaction "switch" fee for the network's routing services. PIN debit networks also set an "interchange" fee. The interchange fee is paid by the merchant to the PIN debit network and then passed through to the card-issuing financial institution. Generally, the merchant's total charge from the PIN debit networks for each

transaction is the switch fee plus the interchange fee.

As stated, the Complaint alleges that PIN debit network services is a relevant antitrust product market. A hypothetical monopolist could profitably impose a small but significant and nontransitory increase in the price ("SSNIP") of all PIN debit network services. Merchants would not defeat a SSNIP for PIN debit network services by requiring or encouraging their customers to switch to other payment methods, including signature debit network services. In particular, PIN debit networks offer a number of substantial advantages to consumers and merchants that distinguish them from signature debit networks. PIN debit networks are generally significantly less expensive to merchants than signature debit networks. PIN debit networks also often provide a more secure method of payment than signature debit networks because it is easier to forge a person's signature than to obtain an individual's PIN. Because of the increased security of PIN debit network services, there is no need for the charge-back procedures that allow consumers to challenge signature debit transactions, thereby saving merchants additional time and money. PIN debit transactions also generally settle more quickly than signature debit transactions. Finally, PIN debit networks often allow for faster execution at the point of sale than signature debit networks.

Merchants also would not defeat a SSNIP for PIN debit network services because significant numbers of consumers prefer to use PIN debit transactions over other forms of payment, particularly at supermarkets, mass merchandisers and drug stores. Many consumers value the security and speed of PIN debit transactions, as well as the "cash back" feature that allows them to receive cash at the register when making a purchase. Consumers cannot receive cash back when making a signature debit purchase. Today, consumers request cash back in approximately 20 percent of all PIN debit transactions. Consequently, many merchants would risk causing substantial customer backlash if they stopped offering or discouraged PIN debit transactions.

### *C. Geographic Market: United States*

While certain PIN debit networks are stronger in particular areas of the country, the largest networks, including STAR and NYCE, are accepted at many merchant locations throughout the United States. Accordingly, the United States is a relevant geographic market for the provision of PIN debit network

services within the meaning of section 7 of the Clayton Act, 15 U.S.C. 18.

### *D. Harm to Competition in the PIN Debit Network Services Market*

The Complaint alleges the First Data's acquisition of Concord is likely to substantially reduce competition in the PIN debit network services market by combining the largest and third-largest PIN debit networks, STAR and NYCE. The loss of this significant competition would have caused higher prices and reduced levels of service to merchants and consumers. The PIN debit network services market is already very concentrated. As of March 2003, STAR routed approximately 56 percent of all PIN debit transactions, while Interlink and NYCE accounted for approximately 15 percent and 10 percent of the PIN debit market, respectively. Although recent contract losses may reduce STAR's market share (and increase Interlink's), under the most conservative estimates, STAR will remain the largest PIN debit network in the United States, with at least a 35 percent market share. Thus, if the transaction were completed, the combined STAR/NYCE network would be the largest PIN debit network, with at least a 45 percent market share. Together, the combined STAR/NYCE network and Interlink would form a near duopoly, accounting for more than 80 percent of all PIN debit transactions.

This highly concentrated market structure would have enabled PIN debit networks to increase prices and reduce levels of service to merchant customers. PIN debit networks compete for merchants' business by convincing merchants to accept their networks and to route debit transactions to their networks when there is a choice of routing options. PIN debit networks also compete for merchants by improving their networks' transmission speed, limiting network down-time and reducing the number of improperly rejected transactions. Merchants' ability to choose which PIN debit networks to accept at their stores, and to control the routing of some PIN debit transactions, constrains the prices that merchants pay for PIN debit network services and helps to ensure high quality levels of service.

#### 1. Merchant Threats To Drop PIN Debit Networks

The Complaint alleges that combining STAR and NYCE would have harmed competition in the PIN debit network services market by reducing merchants' ability to drop either network. The PIN debit networks take merchants' threats to drop their networks seriously. The loss merchant customers can significantly reduce a PIN debit

network's profits. In addition to the lost switch fees from merchants, the loss of merchant business can make a PIN debit network less attractive to its financial institution customers. PIN debit networks compete for financial institution members based in part on the number of merchants that accept their networks.

Merchant have prevented or reduced some large price increased from STAR, NYCE and interlink by credibly threatening to discontinue acceptance of the networks. During the past two years, STAR, NYCE and Interlink each reduced planned price increases by more than one third because of concerns that merchants would drop their networks. This reduction in the amount of the three leading networks' planned price increases resulted in more than \$100 million in annual savings to merchant customers.

Merchants' ability to drop a PIN debit network, or to credibly threaten to do so, depends on several factors, including: (1) A network's market share; and (2) the number of the network's PIN debit transactions that are routed over "single-bugged" debit cards. Generally, it is riskier for a merchant to drop a PIN debit network with a larger market share because of the increased likelihood of rejected transactions, delays at check-out lines, customer confusion and embarrassment, lost sales, and customers' use of more costly forms of payment for merchants. Dropping a PIN debit network with a large market share is particularly risky if many of the debit cards that can connect to that network are "single-bugged" with only that network. A single-bugged debit card can connect to only one PIN debit network. For example, some debit cards are single-bugged only with STAR. If a merchant does not accept STAR, then card holders with debit cards that are single-bugged only with STAR cannot execute a PIN debit transaction at that merchant. In contrast, if a debit card is bugged with STAR and other PIN debit networks, then a merchant's decision to drop STAR may not prevent the card holder from making PIN debit transactions at the merchant if the merchant accepts at least one of the other PIN debit networks on the debit card.

Combining STAR and NYCE would have made it substantially more difficult for merchants to drop, or credibly threaten to drop STAR or NYCE, to prevent future price increases. The merged networks would have had a large combined market share of at least 45%, a significant increase over each network's current market share. In addition, combining STAR and NYCE

would have increased substantially the number of STAR and NYCE PIN debit transactions executed with debit cards that were single-bugged.

## 2. Reduced Least-Cost Routing Opportunities

The Complaint also alleges that combining STAR and NYCE would have reduced competition in the PIN debit network services market for merchant customers by limiting merchants' opportunities to route PIN debit transactions to the least expensive network ("least-cost routing"). Some large merchants, either directly or through their processors, always route PIN debit transactions to the least expensive PIN debit network when a debit card is bugged with multiple PIN debit networks. Other merchants and processors least-cost route when there are conflicts in the networks' routing rules. Conflicts occur when two networks both claim "priority" status for a particular debit card. For example, both STAR and NYCE may require merchants (or their processors) to route PIN debit transactions executed with a particular debit card over their networks. In such instances, some merchants (and processors) will route to the less expensive network.

Least-cost routing opportunities constrain PIN debit networks from increasing prices to merchants, or reducing levels of service, because they permit merchants, in some circumstances, to route around more expensive networks, or networks that offer poorer levels of service. In recent years, major supermarkets and mass merchandisers have obtained superior prices and levels of service by routing, or threatening to route, transactions away from one PIN debit network to another network.

Merchants currently have a substantial number of opportunities to least-cost route PIN debit transactions between STAR and NYCE. A large number of debit cards can connect to both STAR and NYCE. Further, STAR and NYCE's routing rules often conflict. The merger would have prevented merchants from obtaining lower prices and improved levels of service from STAR and NYCE by leveraging their ability to route PIN debit transactions away from STAR to NYCE, and vice versa.

## E. *Timely and Sufficient Entry Is Unlikely*

The Complaint alleges that, in the near future, entry or expansion into the PIN debit network services market is unlikely to defeat the anticompetitive price increases that the combination of

STAR and NYCE would have caused. There has been virtually no new entry in the PIN debit network services market for more than five years. Entry and expansion are difficult because the market is characterized by substantial "network effects." A network must attract a substantial number of financial institutions as members, while at the same time convince a large number of merchants to accept the network. Coordinated development of both financial institution members and merchant acceptance is critical because the utility of a particular PIN debit network to consumers, banks and merchants depends heavily on the breadth of its acceptance and use.

In addition, most PIN debit networks have adopted rules and policies that increase the cost of expansion by a small network or entry by a new market participant. Most significantly, network routing rules that specify the routing of transactions executed with multi-bugged cards sometimes can slow the degree to which a new PIN debit network can expand. Companies (such as First Data and Concord) that own both merchant processing operations and PIN debit networks also can make entry or expansion by PIN debit networks more difficult. When a PIN debit transaction is executed with a multi-bugged card, in some circumstances, merchant processors can determine which of the multiple PIN debit networks receives the transaction. Accordingly, companies that own both merchant processing operations and PIN debit networks may have some opportunities and incentives to favor their own PIN debit networks.

## III. Explanation of the Proposed Final Judgment

The proposed Final Judgment's requirement that First Data divest its NYCE Holdings will eliminate the anticompetitive effects in the PIN debit network services market that the transaction would have produced. First Data's divestiture of its NYCE Holdings will prevent the combination of STAR and NYCE, the combination of First Data and Concord's assets that would have violated section 7 of the Clayton Act. By preventing the combination of STAR and NYCE, the proposed Final Judgment will ensure that merchants retain their current ability to obtain competitive prices and levels of service from the two networks, either by: (1) Dropping, or credibly threatening to drop, STAR and/or NYCE; or (2) taking advantage of least-cost routing opportunities between the two networks.

The proposed Final Judgment requires First Data, within 150 calendar days after the Court's signing of the original Hold Separate Stipulation and Order,<sup>3</sup> or five days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest all of its NYCE Holdings. Final Judgment ¶ IV.A. Again, the NYCE Holdings consist of all of First Data's governance rights in NYCE, and First Data's entire 64 percent ownership interest in NYCE, including all tangible assets. Final Judgment ¶ II.G. The United States agreed to allow First Data 150 days to divest its NYCE holdings, rather than the 120-day time period typically required for divestitures to remedy Section 7 violations, because NYCE's minority shareholders, by contract, have 30 days to match any third-party offer to purchase First Data's interests in NYCE. Had the United States not agreed to the additional 30-day divestiture period, First Data effectively would have had only 90 days to find a buyer for its NYCE holdings.

In addition to divesting its NYCE Holdings, the proposed Final Judgment requires First Data to provide certain guarantees to the buyer of the NYCE holdings, including warranting that: (1) Each asset therein that was operational as of the date of filing of the Complaint will be operational on the date of the divestiture; and (2) there are no material defects in the environmental, zoning or other permits pertaining to the operation of NYCE. Final Judgment ¶¶ IV.E and G.

The United States, in its sole discretion, after consultation with the Plaintiff States, may agree to one or more extensions of this time period, not to exceed in total 90 calendar days. Final Judgment ¶ IV.A. The NYCE Holdings must be divest in such a way as to satisfy the United States in its sole discretion, after consultation with the Plaintiff States, that NYCE can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market. Final Judgment ¶¶ IV.A and H. First Data must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective acquirers.

If First Data does not accomplish the ordered divestiture within the prescribed time period, the United States will nominate, and the Court will appoint, a trustee to assume sole power and authority to complete the divestiture. Final Judgment ¶ V.A. If a trustee is appointed, the proposed Final

Judgment provides that First Data will pay all costs and expenses of the trustee. Final Judgment ¶¶ V.B and D. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court, the United States and the Plaintiff States, setting forth his or her efforts to accomplish the divestiture. Final Judgment ¶ V.F. If First Data has not divested its NYCE Holdings at the end of six months, the United States and the Plaintiff States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment. Final Judgment ¶ V.G. Defendants must cooperate fully with the trustee's efforts to divest First Data's NYCE Holdings to an acquirer acceptable to the United States. Final Judgment ¶ V.E.

The proposed Final Judgment filed in this case is meant to ensure the prompt divestiture by First Data of its NYCE Holdings. The purpose of the divestiture is to ensure the maintenance of a viable PIN debit network competitor capable of competing effectively to provide PIN debit network services and to remedy the anticompetitive effects that the United States and the Plaintiff States allege would otherwise result from First Data's acquisition of Concord. See Final Judgment ¶ V.H.

The Amendment Hold Separate Stipulation and Order will ensure that NYCE is maintained and operated as an independent competing PIN debit network until First Data divests all of its NYCE Holdings. The Order, except when necessary to carry out First Data's obligations under the Order, bars First Data from: (1) Serving as an officer, manager, or employee, or in a comparable position with or for NYCE; (2) exercising any authority through its representatives on the NYCE Board of Directors, except for limited specifically enumerated actions; (3) participating in, attending, or receiving any notes, minutes, or agendas of, information from, or any documents distributed in connection with, any nonpublic meeting of NYCE's Board of Directors or any committee thereof; and (4) voting or permitting to be voted First Data's NYCE shares. Amended Hold Separate Stipulation and Order ¶¶ V.1 through V.3. In addition, the Order prevents First Data from communicating to or receiving from any officer, director, manager, employee, or agent of NYCE any nonpublic information regarding

any aspect of NYCE's business. Amended Hold Separate Stipulation and Order ¶ V.4. The Order also allows the United States, in its sole discretion, in consultation with the Plaintiff States, to require all of First Data's representatives on the NYCE board to resign. If the United States exercises its discretion to require First Data's NYCE directors to resign, First Data may only nominate individuals to fill the vacant NYCE Board seats who are officers or managers of NYCE or a minority shareholder of NYCE. Amended Hold Separate Stipulation and Order ¶ V.1.

#### **IV. Remedies Available to Potential Private Litigants**

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against the Defendants.

#### **V. Procedures Available for Modification of the Proposed Final Judgment**

The United States, the Plaintiff States and the Defendants have stipulated that the proposed Final Judgment may be entered in the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest. 15 U.S.C. 16(e).

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. 15 U.S.C. 16(b&d). Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the **Federal Register**. The United States will evaluate and respond to the comments. All comments will be given due consideration by the United States which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the

<sup>3</sup> The Court signed the original Hold Separate Stipulation and Order on December 15, 2003.

Court and published in the **Federal Register**.

Written comments should be submitted to: Renata B. Hesse, Chief, Networks & Technology Section, Antitrust Division, United States Department of Justice, 600 E Street, NW., Suite 9500, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation or enforcement of the Final Judgment.

#### VI. Alternatives to the Proposed Final Judgment

The United States considered as an alternative to the proposed Final Judgment a full trial on the merits against the Defendants. The United States could have continued the litigation and sought permanent injunctive relief against First Data's acquisition of Concord. The United States is satisfied, however, that the divestiture of all of First Data's interests in NYCE to an independent third party will achieve all of the relief the United States would have obtained through litigation and will preserve competition for the provision of PIN debit network services in the United States.

#### VII. Standard of Review Under the APPA for the Proposed Final Judgment

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e). In making the determination, the Court may consider:

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other consideration bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

*Id.* The United States Court of Appeals for the District of Columbia Circuit has held that the statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear,

whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

In conducting this inquiry, "[t]he Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney).<sup>4</sup> Rather:

[a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should \* \* \* carefully consider the explanations of the government in the competitive statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

*United States v. Mid-America Dairymen, Inc.*, 1977 WL 4532, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. May 17, 1977).

With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); see also *Microsoft*, 56 F.3d at 1460-62. Rather, the case law requires that:

[t]he balancing act of competing social and political interests by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

*Bechtel*, 648 F.2d at 666 (emphasis added) (citations omitted).<sup>5</sup>

<sup>4</sup> See also *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (recognizing it was not the court's duty to settle; rather, the court must only answer "whether the settlement achieved [was] within the reaches of the public interest"). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues that further proceedings would aid the court in resolving those issues. See H.R. Rep. No. 93-1463, 93rd Cong., 2d Sess. 8-9 (1974), reprinted in 1974 U.S.C.C.A.N. 6535, 6538.

<sup>5</sup> Cf. *BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is

The proposed Final Judgment, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (quoting Gillette, 406 F. Supp. at 716), aff'd sub nom., *Maryland v. United States*, 460 U.S. 1001 (1983). See also *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. *Id.* at 1459-60.

#### VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: January \_\_, 2004

Respectfully submitted,

For Plaintiff United States:

Joshua H. Soven, Esq.,

*Antitrust Division, U.S. Department of Justice, 600 E Street, NW., Suite 9500, Washington, DC 20530.*

limited to approving or disapproving the consent decree"); Gillette, 406 F. Supp. at 716 (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). See generally *Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so in consonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

## Final Judgment

Whereas, plaintiff United States of America (“United States”), the District of Columbia, and the States of Connecticut, Illinois, Louisiana, Massachusetts, New York, Ohio, Pennsylvania, and Texas (“plaintiff states”), filed their Complaint on October 23, 2003, and the United States, plaintiff states, and defendants, First Data Corporation and Concord EFS, Inc., by their respective attorneys, have consented to the entry of this Final Judgment without trial:

And whereas, this Final Judgment does not constitute any evidence against or admission by any party, regarding any issue of fact or law;

And whereas, defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

And whereas, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by First Data to assure that competition is not substantially lessened;

And whereas, the United States and plaintiff states require First Data to make a certain divestiture for the purpose of remedying the loss of competition alleged in the Complaint;

And whereas, defendants have represented to the United States and plaintiff states that the divestiture required below can and will be made and that defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

Now therefore, without trial and upon consent of the parties, it is ordered, adjudged and decreed:

### I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against defendants under section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

### II. Definitions

As used in this Final Judgment:

A. “Acquirer” means the entity or entities to whom defendant First Data divests NYCE Holdings.

B. “Concord” means Concord EFS, Inc., a Delaware corporation headquartered in Memphis, Tennessee, and its successors and assigns, its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. “EFT network services” means the provision to financial institutions and

retailers of shared electronic fund transfer network services for automatic teller machine (ATM) transactions, online and offline debit point-of-sale (POS) transactions, electronic benefits transfer, and point-of-banking transactions.

D. “EFT processing services” means the provision to financial institutions of real-time processing services that support ATM driving and fully-automated monitoring services, gateway access, and debit card issuance and authorization solutions.

E. “First Data” means First Data Corporation, a Delaware corporation headquartered in Greenwood Village, Colorado, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures (excluding those entities not controlled by First Data), and their directors, officers, managers, agents, and employees.

F. “NYCE” means NYCE Corporation, a Delaware corporation headquartered in Montvale, New Jersey, and its successors and assigns, its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures (excluding those entities not controlled by NYCE), and their directors, officers, managers, agents, and employees. NYCE includes its EFT network service business (the NYCE Network) and its EFT processing services business.

G. “NYCE Holdings” means, unless otherwise noted, all of First Data’s governance rights in NYCE, and First Data’s entire 64 percent ownership interest in NYCE, including all of NYCE’s rights, titles, and interests in the following:

1. all tangible assets of NYCE, including facilities and real property; data centers; assets used for research, development, engineering or other support to NYCE, and any real property associated with those assets; manufacturing and sales assets relating to NYCE, including capital equipment, vehicles, supplies, personal property, inventory, office furniture, fixed assets and fixtures, materials, on- or off-site warehouses or storage facilities, and other tangible property or improvements; all licenses, permits and authorizations issued by any governmental organization relating to NYCE; all contracts, joint ventures, agreements, leases, commitments, and understandings pertaining to the operation of NYCE; supply agreements; all customer lists, accounts, and credit records; and other records maintained by NYCE in connection with its operations; and

2. the intangible assets of NYCE, including all patents, licenses and

sublicenses, intellectual property, copyrights, trademarks, computer software and related documentation, trade names, service marks, “bugs,” services names, technical information, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, data and results concerning historical and current research and development, quality assurance and control procedures, design tools and simulation capability, and all manuals and technical information NYCE provides to its employees, customers, suppliers, agents or licensees in connection with the NYCE’s operations.

H. “Online debit” means PIN debit.

I. “PIN” means a Personal Identification Number.

J. “PIN debit” means a method of electronic card payment by which consumers purchase goods and services from merchants by swiping a bank card at a point-of-sale terminal and entering a PIN on a numeric keypad, upon which the purchase amount is debited from the customer’s bank account and transferred to the retailer’s bank.

K. “PIN debit network” Means a telecommunications and payment infrastructure that enables PIN debit transactions by providing the switch that connects merchants to consumers’ demand deposit accounts at banks.

L. “PIN debit network services” means the PIN debit network and its performance of those related functions necessary for the efficient operation of the network, including promotion of brand names among consumers, merchants, and banks; establishment of rules and standards to govern the networks; and the setting of fees.

### III. Applicability

A. This Final Judgment applies to First Data and Concord, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. Defendants shall require, as a condition of the sale or other disposition of all or substantially all of their assets or of lesser business units that include NYCE, that the purchaser agrees to be bound by the provision of this Final Judgment.

### IV. Divestiture

A. Defendant First Data is ordered and directed, within one hundred fifty (150) calendar days after the Court’s signing of the Hold Separate Stipulation and Order in this matter, or five (5) days after notice of the entry of this Final

Judgment by the Court, whichever is later, to divest NYCE Holdings in a manner consistent with this Final Judgment to an Acquiree acceptable to the United States in its sole discretion, after consultation with plaintiff states. The United States, in its sole discretion, after consultation with plaintiff states, may agree to one or more extensions of this time period, not to exceed in total ninety (90) calendar days, and shall notify the Court in each such circumstance. Defendant First Data agrees to use its best efforts to divest NYCE Holdings as expeditiously as possible.

B. In accomplishing the divestiture ordered by this Final Judgment, defendant First Data promptly shall make known, by usual and customary means, the availability of NYCE Holdings. Defendants shall inform any person making inquiry regarding a possible purchase of NYCE Holdings that it will be divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendant First Data shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to NYCE customarily provided in a due diligence process except such information or documents subject to the attorney-client or work-product privilege. Defendant First Data shall make available such information to the United States and plaintiff states at the same time that such information is made available to any other person.

C. Defendant First Data shall provide perspective Acquirers of NYCE Holdings, the United States, and plaintiff states information relating to the personnel involved in the production, operation, research, development, and sales at NYCE to enable the Acquirer to make offers of employment. Defendants will not interfere with any negotiations by the Acquirer to employ any of NYCE's employees whose responsibilities includes the production, operation, development, or sale of the products and services of NYCE.

D. Defendant First Data shall permit prospective Acquirers of NYCE Holdings to have reasonable access to personnel and to make inspections of the physical facilities of NYCE; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

E. Defendant First Data shall warrant to the Acquirer of NYCE Holdings that each asset therein that was operational as of the date of filing to the Complaint in this matter will be operational on the date of divestiture.

F. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of NYCE or NYCE Holdings.

G. Defendant First Data shall warrant to the Acquirer of NYCE Holdings that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of NYCE, and following the sale of NYCE Holdings, defendants shall not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of NYCE.

H. Unless the United States otherwise consents in writing, after consultation with plaintiff states, the divestiture pursuant to Section IV, or by trustee appointed pursuant to Section V, of this Final Judgment, shall include the entire NYCE Holdings as defined in Section II(G) and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, after consultation with plaintiff states, that NYCE can and will be used by the Acquirer as part of a viable, ongoing business engaged in the provision of EFT network services, including PIN debit network services, and EFT processing services. Divestiture of NYCE Holdings may be made to an Acquirer, provided that it is demonstrated to the sole satisfaction of the United States, in its sole judgment, after consultation with plaintiff states, that the divested asset will remain viable and that the divestiture will remedy the competitive harm alleged in the Complaint. The divestiture, whether pursuant to Section IV or Section V of this Final Judgment,

1. Shall be made to an Acquirer that, in the United States' sole judgment, after consultation with plaintiff states, has the intent and capability (including the necessary managerial, operational, technical, and financial capability) to compete effectively in the provision of EFT network services, including PIN debit network services, and EFT processing services in the United States; and

2. Shall be accomplished so as to satisfy the United States, in its sole discretion, after consultation with plaintiff states, that none of the terms of any agreement between an Acquirer and defendants give defendants the ability unreasonably to raise NYCE's costs, to lower NYCE's efficiency, or otherwise to interfere in the ability of NYCE to compete effectively.

## V. Appointment of Trustee to Effect Divestiture

A. If defendant First Data has not divested NYCE Holdings within the time period specified in section IV(A), it shall notify the United States and plaintiff states of that fact in writing. Upon application of the United States, in its sole discretion, after consultation with plaintiff states, the Court shall appoint a trustee selected by the United States, and approved by the Court to effect the divestiture of NYCE Holdings.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell NYCE Holdings. The trustee shall have the power and authority to accomplish the divestiture of NYCE Holdings to an Acquirer acceptable to the United States, in its sole judgment after consultation with plaintiff states, at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V(D) of this Final Judgment, the trustee may hire at the cost and expense of defendant First Data any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by defendants must be conveyed in writing to the United States, plaintiff states, and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VI.

D. The trustee shall serve at the cost and expense of defendant First Data, on such terms and conditions as the NYCE approves, and shall account for all monies derived from the sale of NYCE Holdings and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendant First Data and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the asset to be divested and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestiture. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and defendants shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to customary confidentiality protection for trade secret or other confidential research, development, or commercial information. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestiture.

F. After its appointment, the trustee shall file monthly reports with the United States, plaintiff states, and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, NYCE Holdings and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest NYCE Holdings.

G. If the trustee has not accomplished such divestiture within six months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture; (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished; and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the United States and plaintiff states, and the United States and plaintiff states shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

## VI. Notice of Proposed Divestiture

A. Within two (2) business days following execution of a definitive divestiture agreement, defendant First Data or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States and plaintiff states of any proposed divestiture required by Section IV or V of this Final Judgment. If the trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in NYCE Holdings, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States and plaintiff states of such notice, the United States and plaintiff states may request from defendants, the proposed Acquirer, any other third party, or the trustee if applicable, additional information concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirer. Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States and plaintiff states have been provided the additional information requested from defendants, the proposed Acquirer, any third party, and the trustee, whichever is later, the United States, in its sole discretion, after consultation with plaintiff states, shall provide written notice to defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to defendants' limited right to object to the sale under section V(C) of the Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by defendants under Section V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

## VII. Financing

Defendants shall not finance all or any part of any purchase made pursuant

to Section IV or V of this Final Judgment.

## VIII. Hold Separate

Until the divestiture required by this Final Judgment has been accomplished, defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture ordered by this Court.

## IX. Affidavits

A. Within twenty (20) calendar days of the Court's signing of the Hold Separate Stipulation and Order in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V, defendants shall deliver to the United States and plaintiff states an affidavit as to the fact and manner of their compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in NYCE Holdings and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts defendants have taken to solicit buyers for the asset to be divested, and to provide required information to any prospective Acquirer, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States, in its sole discretion, after consultation with plaintiff states, to information provided by defendants, including limitations on the information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the Court's signing of the Hold Separate Stipulation and Order in this matter, defendants shall deliver to the United States and plaintiff states an affidavit that describes in reasonable detail all actions defendants have taken and all steps defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Defendants shall deliver to the United States and plaintiff states an affidavit describing any changes to the efforts and actions outlined in defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest NYCE Holdings until one year after such divestiture has been completed.

#### X. Compliance Inspection

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States, including consultants and other persons retained by the United States, shall, upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants be permitted:

1. access during defendants' office hours to inspect and copy, or at plaintiff's option, to require defendants to provide copies of, all books, ledgers, accounts, records and documents in the possession, custody, or control of defendants, relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by defendants.

B. Upon the written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit written reports, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to the United States, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, "Subject to claim of protection under

Rule 26(c)(7) of the Federal Rules of Civil Procedure," then the United States shall give defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

#### XI. No Reacquisition

Defendants may not reacquire any ownership interest in NYCE during the term of this Final Judgment.

#### XII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry to or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

#### XIII. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten years from the date of its entry.

#### XIV. Public Interest Determination

Entry of this Final Judgment is in the public interest.

Court approval subject to procedures of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16.

United States District Judge

Case Number 1:03CV02169

Judge: Rosemary M. Collyer.

Deck Type: Antitrust.

Date Stamp: 10/23/2003.

United States of America, United States Department of Justice, Antitrust Division, 600 E Street, NW., Suite 9500, Washington, DC 20530,

State of Connecticut, Office of the Attorney General, 55 Elm Street, Hartford, CT 06106,

State of Illinois, Office of the Illinois Attorney General, 100 W. Randolph Street, 13th Floor, Chicago, IL 60601,

State of Louisiana, Department of Justice, 301 Main Street, Suite 1250, Baton Rouge, LA 70801,

Commonwealth of Massachusetts, Office of the Attorney General, One Ashburton Place, Boston, MA 02108,

State of New York, Office of the Attorney General, 120 Broadway, Room 26C62, New York, NY 10271,

State of Ohio, Attorney General's Office, 150 E. Gay Street, Columbus, OH 43215,

State of Texas, Office of the Attorney General, P.O. Box 12548, Austin, TX 78711,

and

District of Columbia, Office of the Corporation Counsel, 441 4th Street, NW., Suite 450-N, Washington, DC 20001, *Plaintiffs,*

v.

First Data Corporation, 6200 South Quebec Street, Greenwood Village, CO 80111,

and

Concord EFS, Inc., 2525 Horizon Lake Drive, Memphis, TN 38133, *Defendants.*

#### Verified Complaint

The United States of America, acting under the direction of the Attorney General of the United States, and the states of Connecticut, Illinois, Louisiana, Massachusetts, New York, Ohio, and Texas and the District of Columbia ("Plaintiff States"), acting under the direction of their respective Attorneys General, or other authorized officials, bring this civil action to enjoin the proposed merger of First Data Corporation ("First Data") and Concord EFS, Inc. ("Concord"), and allege as follows:

1. First Data's acquisition of Concord would combine the largest and third-largest point-of-sale ("POS") PIN debit networks in the United States. POS PIN debit networks are the telecommunications and payment infrastructure that connects merchants to consumers' demand deposit accounts at banks. These networks enable consumers to purchase goods and services from merchants through PIN debit transactions by swiping their bank card at a merchant's terminal and entering a Personal Identification Number, or PIN. Within seconds, the purchase amount is debited from the customer's bank account and transferred to the retailer's bank.

2. PIN debit networks provide an increasingly important method of payment for consumers and retailers because PIN debit is the least expensive, most efficient, and most secure form of card payment. In 2002, customers purchased more than \$150 billion in goods and services using PIN debit networks. PIN debit transaction volume has grown by more than 20 percent annually over the past 5 years. Today, merchants accept PIN debit transactions at more than one million retail locations in the United States.

3. Concord operates STAR, the nation's largest PIN debit network. STAR currently handles approximately half of all PIN debit transactions in the United States. First Data owns a controlling interest in NYCE, the nation's third-largest PIN debit network.

4. PIN debit networks compete for merchants to accept and route purchases over their networks. A significant number of banks that issue debit cards participate in more than one PIN debit network. In some cases, this allows merchants to choose the network over which to route a transaction; merchants made this choice based on a variety of factors, including price and network performance. Large merchants

usually accept the debit cards of many PIN debit networks.

5. First Data's acquisition of Concord would substantially reduce competition among the PIN debit networks for retail transactions in violation of section 7 of the Clayton Act, 15 U.S.C. 18. The merger would make prices for PIN debit network services to merchants less competitive. Merchants will pass on at least some of the higher costs of PIN debit transactions by raising the prices of their goods and services, to the detriment of tens of millions of consumers throughout the United States. The United States and Plaintiff States therefore seek an order permanently enjoining the merger.

### **I. Jurisdiction and Venue**

6. This action is filed by the United States under section 15 of the Clayton Act, 15 U.S.C. 25, to prevent and restrain the Defendants from violating section 7 of the Clayton Act, 15 U.S.C. 18.

7. The Plaintiff States bring this action under section 16 of the Clayton Act, 15 U.S.C. 26, to prevent and restrain the Defendants from violation section 7 of the Clayton Act, 15 U.S.C. 18. The Plaintiff States, by and through their respective Attorneys General, or other authorized officials, bring this action in their sovereign capacities and as *parens patriae* on behalf of the citizens, general welfare, and economy of each of their states.

8. First Data and Concord are engaged in interstate commerce and in activities substantially affecting interstate commerce. First Data and Concord provide PIN debit network services throughout the United States. First Data's and Concord's PIN debit networks are engaged in a regular, continuous, and substantial flow of interstate commerce, and have had a substantial effect upon interstate commerce as well as commerce in each of the Plaintiff States. The Court has jurisdiction over this action pursuant to sections 12 and 15 of the Clayton Act, 15 U.S.C. 22, 25, and 28 U.S.C. 1331, 1337.

9. First Data and Concord transact business and are found in the District of Columbia, Venue is proper under Section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1391(c).

### **II. The Defendants and the Transaction**

10. First Data is a corporation organized and existing under the laws of Delaware. In 2002, First Data reported total worldwide revenues of \$7.6 billion. First Data is organized into four business groups: merchant services, payment services, card issuer services,

and emerging payments. First Data's card issuing business offers a comprehensive set of services to banks that issue debit and credit cards. First Data's payment services group includes Western Union, the leading provider of consumer-to-consumer money transfer services.

11. First Data's merchant services segment, which primarily consists of NYCE and the merchant processing and acquiring business, was responsible for \$2.8 billion of the company's revenues in 2002. First Data owns 64 percent of NYCE Corporation, which operates the NYCE PIN debit and ATM network. Four large banks own the remaining 36 percent of NYCE Corporation. In addition, First Data is the nation's leading merchant processor. A merchant processor connects merchants to the various payment networks, ensuring that each transaction is sent to the appropriate network. First Data also acts as a merchant acquirer; merchant acquirers sponsor merchants into the PIN debit networks, facilitate settlement, and assume financial responsibility for the transactions. First Data provides merchant processing and acquiring services independently and through a series of alliances and partnerships with major financial institutions.

12. Concord is a corporation organized and existing under the laws of the state of Delaware. Concord's revenues in 2002 totaled nearly \$2 billion. Concord operates STAR, the largest PIN debit and ATM network. The STAR network is the result of a series of acquisitions of other large networks over the past several years. Concord bought MAC in 1999 and Cash Station in 2000. Concord then acquired STAR in 2001; STAR itself had acquired the Honor network, which in turn had acquired MOST. Concord is also a leading merchant processor and acquirer and provides an array of services to debit card issuers and ATM owners.

13. On April 1, 2003, First Data and Concord entered into an Agreement and Plan of Merger, pursuant to which First Data will acquire Concord in an all-stock transaction valued at approximately \$7 billion.

### **III. The Relevant Market**

#### *A. Description of the Product*

14. In the late 1970s, bank consortiums formed numerous regional electronic funds transfer ("EFT") networks to enable their customers to withdraw funds from ATMs owned by a variety of different banks. The EFT networks were first used to handle PIN

debit purchases at retailers in the early 1980s. It was not until the mid-1990s, however, that PIN debit became a popular method of payment for consumers to purchase goods and services at retail stores. PIN debit transaction volume has grown substantially over the past five years due to merchant and consumer recognition of the advantages of PIN debit as a form of payment. Today, over 500 million PIN debit transactions are made every month. Nearly three-quarters of all PIN debit purchases occur at thirty large retail chains.

15. Many EFT networks, including those operated by First Data and Concord, route both ATM and PIN debit transactions. Some companies, however, operate separate ATM and PIN debit networks. For example, while Interlink is Visa's PIN debit network, Visa operates a separate ATM network called Plus.

16. A PIN debit network serves as the critical electronic switch connecting a network's participating financial institutions with merchants that accept the network. PIN debit networks provide one of the primary means for consumers to access the money in their checking accounts. A PIN debit network also performs a number of related functions necessary for the efficient operation of the network. For example, PIN debit networks: Promote their brand names among consumers, merchants, and banks; establish rules and standards to govern their networks; and set fees and assessments for use of the network's products and services. Collectively, these products and services are "PIN debit network services."

17. To execute a PIN debit transaction, a customer swipes a debit card at a POS terminal and enters a PIN on a numeric keypad. After the PIN is entered, the POS terminal transmits the transaction and bank card information to a "merchant processor," which acts as a conduit between the merchant and the various PIN debit networks. The merchant processor sends the information to the appropriate PIN debit network, which switches the transaction to the issuing bank's "card processor." The card processor accesses the bank's account database to verify the PIN and ensure that the customer has sufficient funds to pay for the purchase. The card processor sends an electronic message to the PIN debit network accepting or rejecting the transaction. The PIN debit network switches this reply back to the merchant through the merchant processor to complete the transaction. The entire authorization process takes place electronically in just seconds. At the same time, the merchant acquirer

“purchases” the transaction from the merchant, guaranteeing payment and facilitating settlement of the transaction.

18. A transaction can only be routed over a particular PIN debit network if the customer's bank issues a debit card that participates in that network. This participation is signified by placing the network's logo, or “bug,” on the card. To provide their customers with seamless access to the widest array of merchants, a significant number of banks place the bug of more than one PIN debit network on their cards. Many networks, including NYCE, have a “priority routing” rule that allows the card issuer to designate which PIN debit network will serve as the primary network for PIN debit transactions when the bank bugs its cards with two or more networks. STAR, by contrast, imposes a network routing rule, requiring most transactions on cards bearing the STAR bug to be routed over the STAR network, regardless of whether there are other bugs on the card.

19. PIN debit networks charge both the merchant and the card-issuing bank a “switch” fee for the network switching services provided by the network. This fee typically ranges from 2 cents to 4 cents per transaction. The PIN debit networks also set an “interchange” fee, which is a fee paid by the merchant to the PIN debit network. The PIN debit network then passes through the interchange fee to the card-issuing bank as compensation for permitting access to the consumer's bank account. The interchange fee is normally at least 4–5 times as large as the switch fee, ranging from as low as 10 cents to as high as 45 cents, depending on the network, the merchant, and the size of the transaction. Consequently, the merchant's total charge for each PIN debit transaction is the interchange fee plus the switch fee.

20. At some networks, such as NYCE and Interlink, an advisory board representing the network's bank members has substantial authority over setting the network's interchange rates and determining the network's rules, including rules concerning the routing of PIN debit transactions.

21. The PIN debit network services market is characterized by significant network effects. Financial institutions are more likely to join networks that are accepted by many merchants. Conversely, merchants are more likely to accept networks that have many large financial institutions as members

because the value of a particular PIN debit network depends in great measure on the breadth of its acceptance and use.

22. Many debit cards can also execute “signature” debit transactions, in

addition to PIN debit transactions. Signature debit transactions are authenticated like credit card transactions, with the customer signing for identification rather than entering a PIN. Visa and MasterCard developed the only two signature debit networks from their existing credit card infrastructure. In contrast to a PIN debit transaction, in which the funds are immediately transferred from the customer's account, a signature debit transaction generally takes twenty-four to forty-eight hours to settle.

23. PIN debit networks offer a number of substantial advantages to consumers and merchants that distinguish them from signature debit networks. PIN debit networks are generally considerably less expensive to merchants than signature debit networks, due to significantly lower interchange rates. PIN debit networks also provide a more secure method of payment than signature debit because it is much easier to forge a person's signature than to obtain an individual's PIN; consequently, fraud rates for PIN debit are substantially lower than for signature debit. Because of the increased security of PIN debit, there is no need for the complicated and expensive charge-back procedures that allow consumers to challenge signature debit transactions, thereby saving merchants additional time and money. PIN debit transactions also settle instantaneously, guaranteeing the merchant ready access to its receipts, whereas signature debit transactions usually take a day or two to settle. Finally, PIN debit networks allow for faster execution than signature debit networks. With a PIN debit transactions, customers can enter their PIN as soon as the first product is scanned. By contrast, customers cannot sign for signature debit transactions until after the entire order is totaled, prolonging the checkout process.

24. PIN debit networks also allow individuals to receive cash back at the register when making a purchase, a popular feature with many consumers. Customers cannot receive cash back when making a signature debit purchase. Today, customers request cash back in approximately 20 percent of all PIN debit transactions. Customers also value the additional security provided by PIN verification as opposed to signature.

#### *B. Relevant Product Market*

25. The relevant product market affected by this transaction is the provision of PIN debit network services. A hypothetical monopolist could profitably impose a small but significant

and nontransitory increase in the price of all PIN debit network services.

26. Signature debit networks are not in the same product market as PIN debit networks because signature debit networks are substantially more expensive and have inferior functionality and features. PIN debit networks would remain substantially less expensive than signature debit or credit care networks even after a small but significant nontransitory increase in price. Merchants would continue to purchase and promote the use of PIN debit network services because of the low fraud rate, corresponding lack of charge-backs, speed of execution at the register, and the cash back feature that many customers demand. As the President of First Data Merchant Services testified, PIN debit “is still the lowest-cost, most efficient, most secure transaction there is out there in electronic transactions.”

27. Merchants would not defeat a small but significant and nontransitory increase in the price of PIN debit network services by requiring or encouraging their customers to switch from PIN debit to signature debit or other payment methods.

28. The provision of PIN debit network services is a line of commerce and a relevant product market within the meaning of section 7 of the Clayton Act, 15 U.S.C. 18.

#### *D. Relevant Geographic Market*

29. First Data and Concord compete with each other throughout the United States. Merchants in the United States could not switch to providers of PIN debit network services located outside of the United States in the event of a small but significant nontransitory increase in the price by PIN debit networks in the United States. While certain networks are stronger in particular areas of the country, the largest networks essentially operate on a national scale. Accordingly, the United States is a relevant geographic market within the meaning of Section 7 of the Clayton Act, 15 U.S.C. 18.

#### **IV. Market Concentration**

30. The relevant market is highly concentrated and would become significantly more concentrated as a result of the proposed transaction. As of March 2003, the most recent period for which data is available, Concord accounted for approximately 56 percent of PIN debit transactions, while First Data had approximately a 10 percent share. The top four networks—STAR, Visa's Interlink, NYCE, and Pulse—routed over 90 percent of all PIN debit transactions. Using a standard measure

of market concentration called the “HHI” (defined and explained in Appendix A), the market is highly concentrated, with a pre-merger HHI of approximately 3590. First Data’s acquisition of Concord would increase the HHI by approximately 1120, resulting in a post-merger HHI of approximately 4710. While STAR has recently lost some significant bank contracts to Interlink and NYCE, under even the most conservative estimate of future market shares the combined firm would have approximately a 45 percent post-merger share. Taking into account these lost contracts, the PIN debit network services market remains highly concentrated and would become substantially more concentrated as a result of the merger, with a post-merger HHI greater than 3000.

## V. Anticompetitive Effects

### A. *The Proposed Transaction Will Likely Substantially Reduce Competition Among PIN Debit Networks*

31. First Data’s acquisition of Concord will combine the largest and third-largest PIN debit networks and enable the resulting network to raise prices and to reduce levels of services to merchants.

32. PIN debit networks compete for merchant business by attempting to convince merchants to accept their networks and to route to their networks when there is a choice of routing options. PIN debit networks also compete for merchants by improving their networks’ transmission speed, limiting network down-time, and reducing the number of improperly rejected transactions. Merchants’ ability to choose which networks to accept at their stores and their control over the routing of some transactions acts as a constraint on the price of PIN debit network services to merchants.

33. While most large merchants generally accept all of the PIN debit networks, retailers can and have used the threat of dropping a network to obtain lower prices. For example, in 2001 Visa announced a substantial rate increase for its PIN debit network, Interlink; STAR, and later NYCE, followed by announcing comparable price increases. A number of large retailers responded by stating that if Interlink implemented the planned price increase, they would no longer accept Interlink. In response, Interlink delayed and substantially scaled back its proposed price increase. Then STAR delayed and reduced its planned price increase to remain competitive. Similarly, NYCE concluded in an internal document that its “previously

announced pricing [was] now out of balance with new market realities” and followed suit.

34. Combining STAR and NYCE will make it substantially more difficult for merchants to use the possibility of dropping a network to prevent price increases. The larger the network, the more risky it is for a merchant to drop that network because of the increased likelihood of rejected transactions, delays at check-out lines, customer confusion and backlash, lost sales, and customer use of other forms of payment that are more costly to the merchant.

35. The PIN debit networks take into account the merchants’ competitive reactions when they make decisions about pricing. Earlier this year, NYCE was considering raising interchange rates to attract financial institutions to the network. NYCE’s internal analysis of the market recognized, however, that “[t]aking a leadership role in POS interchange does not come without risk to the transaction growth engine of the NYCE Network and its current revenue stream \* \* \* [P]recedent has been set via major retailers in the past dropping or threatening to drop a payment card network due to pricing. \* \* \* [T]he risks are material that certain retailers or segments may decide to ‘send a message’ and simply stop taking NYCE-branded cards for purchases.” (emphasis added)

36. First Data’s acquisition of Concord will also reduce competition in the PIN debit market by limiting merchants’ ability to route transactions to the least-cost network. Major supermarkets and mass merchandisers have obtained superior prices and levels of service by routing, or threatening to route, transactions away from NYCE to STAR and vice versa. After the merger, merchants will no longer be able to seek lower prices and improved service from the combined firm by playing off NYCE and STAR against each other in this manner.

37. An internal merger planning document acknowledged the likely effect of First Data’s acquisition of Concord on pricing in the PIN debit network services market: The “[c]ombination of NYCE and STAR allows FDC [First Data Corp.] more leeway to set market pricing.”

38. Interchange fees have risen dramatically in the past several years as the PIN debit network services market has become more highly concentrated. First Data’s acquisition of Concord will likely exacerbate this trend toward higher pricing by further reducing competition in the market. Merchants will be forced to pass on a significant portion of the higher fees to tens of

millions of consumers, in the form of higher prices for all goods and services. Merchants do not typically pass through increase costs for particular forms of payment on a per-transaction basis.

39. Any efforts the combined First Data/Concord might make to expand PIN debit usage after the merger would not prevent the company from raising prices to merchants that already accept PIN debit. PIN debit networks are able to charge different prices to merchants based on the value of the network to the particular company or type of merchant. For example, First Data and Concord have both recently offered substantial discounts to quick-service restaurants to encourage them to deploy PIN pads at all of their locations. At the same time, First Data and Concord have dramatically raised their merchant fees to the market as a whole. This ability to engage in price discrimination will facilitate First Data’s exercise of market power post-merger by allowing it to simultaneously raise prices to merchants that already accept PIN pads and cut special deals to attract new market segments to the network.

### B. *Lack of Countervailing Factors*

40. It is unlikely that entry or expansion in the PIN debit network services market will occur in a timely manner or on a scale sufficient to undo the competitive harm that the merger will produce. Entry and expansion are difficult because they require large, sunk investments to attract bank members, and, to a lesser degree, participating merchants. Coordinate development of both bank members and merchant acceptance is critical because the utility of a particular PIN debit network to customers, banks, and merchants depends not only on the cost and features of the card, but also on the breadth of its acceptance and use. These network effects that characterize the PIN debit network services market make it difficult for small networks to significantly expand their market share.

41. Banks would have little incentive to join a new or small network that was attempting to expand market share by offering lower interchange rates to merchants. To the contrary, a bank would only have an incentive to join a network if it offered higher interchange rates. Without such bank participation, a network’s attempts to expand would prove fruitless. Moreover, financial institutions benefit from a market structure characterized by a limited number of significant PIN debit networks and face fewer competitive constraints to setting higher prices to merchants.

42. The PIN debit networks have adopted rules and policies that further increase the cost for a network to expand by developing bank and merchant participation. For example, the networks' priority routing rules make entry more difficult and less likely. Even if a network succeeds in convincing banks to add its bug to the banks' debit cards, the network is unlikely to see many transactions because of the priority routing rules. In addition, STAR requires its member banks to use STAR for both ATM and PIN debit network services; this all-or-nothing requirement makes it more difficult for competing networks to convince banks to participate in their network. Finally, banks that want to act as acquirers for STAR ATM and PIN debit transactions must issue cards that participate in the STAR network. Because a significant number of banks have substantial ATM or merchant acquiring businesses, the STAR rule further inhibits potential expansion by competing PIN debit networks. After the merger, the application of any or all of these rules to First Data/Concord's combined network would inhibit entry or expansion by other PIN debit networks.

43. Finally, the combination of First Data's and Concord's merchant processing businesses with their PIN debit networks will raise barriers to entry. The combined First Data/Concord will process more than half of all PIN debit transactions. As the merchant processor, the merged firm will have significant control over which network routes a transaction on a double-bugged card. As the owner of the dominant PIN debit network, First Data will have a significant incentive to exercise this control after it acquires Concord, inhibiting other PIN debit networks from expanding their presence in the market.

## VI. Violation Alleged

44. The United States and the Plaintiff States hereby incorporate paragraphs 1 through 43.

45. First Data's acquisition of Concord would likely substantially lessen competition in the provision of PIN debit network services, in violation of section 7 of the Clayton Act, 15 U.S.C. 18. The transaction would likely have the following effects, among others:

(a) competition between First Data and Concord in the provision of PIN debit network services would be eliminated;

(b) competition generally in the provision of PIN debit network services would be eliminated or substantially lessened;

(c) prices of PIN debit network services to merchants that currently use them would likely increase to levels above those that would prevail absent the merger, forcing merchants to pass on these increased costs in the form of higher prices for all goods and services to tens of millions of consumers; and

(d) quality in the provision of PIN debit network services would likely decrease to levels below those that would prevail absent the merger.

### Request for Relief

46. The United States and the Plaintiff States request:

(a) that the proposed acquisition be adjudged to violate section 7 of the Clayton Act, 15 U.S.C. 18;

(b) that the Defendants be permanently enjoined and restrained from carrying out the Agreement and Plan of Merger dated April 1, 2003, or from entering into or carrying out any agreement, understanding, or plan by which First Data would merge with or acquire Concord, its capital stock, or any of its assets;

(c) that the United States and the Plaintiff States be awarded costs of this action;

(d) that as the Court may deem appropriate, the Plaintiff States be awarded reasonable attorneys fees and costs as permitted by law; and

(e) that the United States and the Plaintiff States have such other relief as the Court may deem just and proper.

Dated: October 23, 2003.

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October 20, 2003.

Louisiana's Signature Page for the FDC/  
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*United States of America, et al. (State of*  
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## Appendix A

### Herfindahl-Hirschman Index

“HHI” means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30%, 30%, 20%, and 20%, the HHI is 2600 ( $30^2 + 30^2 + 20^2 + 20^2 = 2600$ ). (Note: Throughout the Compliant, market share percentages have been rounded to the nearest whole number, but HHIs have been estimated using unrounded percentages in order to accurately reflect the concentration of the various markets.) The HHI takes into account the relative size distribution of the firms in a market and approaches zero when a market consists of a large number of small firms. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be highly concentrated. See Horizontal Merger Guidelines ¶ 1.51 (revised Apr. 8, 1997). Transactions that increase the HHI by more than 100 points in concentrated markets presumptively raise antitrust concerns under the guidelines issued by the U.S. Department of Justice and Federal Trade Commission. See *id.*

[FR Doc. 04-2688 Filed 2-9-04; 8:45 am]

BILLING CODE 4410-11-M

## DEPARTMENT OF LABOR

### Employment And Training Administration

[TA-W-53,875]

#### Cascade De Mexico, Inc., a Division of Cascade West Sportswear, Inc., Puyallup, Washington; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on December 23, 2003 in response to a petition filed by a company official on behalf of workers of Cascade de Mexico, Inc., a division of Cascade West Sportswear, Inc., Puyallup, Washington.

The investigation revealed that the subject firm can be certified upon an amendment to a previous certification (TA-W-53,873). The workers at the subject firm were in support of the production facility previously certified under (TA-W-53,873). Consequently the investigation has been terminated.

Signed at Washington, DC, this 12th day of January, 2004.

**Richard Church,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E4-240 Filed 2-9-04; 8:45 am]

BILLING CODE 4510-13-P

## DEPARTMENT OF LABOR

### Employment and Training Administration

[TA-W-53,874]

#### Cascade West Sportswear, Inc., Puyallup, Washington; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on December 23, 2003 in response to a petition filed by a company official on behalf of workers of Cascade West Sportswear, Inc., Puyallup, Washington.

The investigation revealed that the subject firm can be certified upon an amendment to a previous certification (TA-W-53,873). The workers at the subject firm were in support of the production facility previously certified under (TA-W-53,873). Consequently the investigation has been terminated.

Signed at Washington, DC, this 12th day of January, 2004.

**Richard Church,**

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[FR Doc. E4-242 Filed 2-9-04; 8:45 am]

BILLING CODE 4510-13-P

## DEPARTMENT OF LABOR

### Employment And Training Administration

[TA-W-53,042]

#### Solon Manufacturing Co., Rhinelander, Wisconsin; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on October 22, 2003, applicable to workers of Solon Manufacturing Company, Rhinelander, Wisconsin. The notice was published in the **Federal Register** on November 28, 2003 (68 FR 66879).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of ice cream sticks and are not separately identifiable by product line.

New findings show that there was a previous certification, TA-W-39,153, issued on May 8, 2001, for workers of Solon Manufacturing, Rhinelander, Wisconsin, who were engaged in employment related to the production of ice cream sticks. That certification expired May 8, 2003. To avoid an overlap in worker group coverage, the certification is being amended to change the impact date from September 24, 2002, to May 9, 2003, for workers of the subject firm.

The amended notice applicable to TA-W-53,042 is hereby issued as follows:

“All workers of Solon Manufacturing Company, Rhinelander, Wisconsin, who became totally or partially separated from employment on or after May 9, 2003, through October 22, 2005, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974 and are also eligible to apply for alternative trade adjustment assistance under section 246 of the Trade Act of 1974.”

Signed at Washington, DC, this 22nd day of January, 2004.

**Elliott S. Kushner,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E4-245 Filed 2-9-04; 8:45 am]

BILLING CODE 4510-13-P