

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

FIRST DATA CORPORATION,

and

CONCORD EFS, INC.,

Defendants.

CASE NUMBER: 1:03CV02169 (RMC)

Filed: 12/15/2003

HOLD SEPARATE STIPULATION AND ORDER

I. Definitions

As used in this Hold Separate Stipulation and Order:

- 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 services 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 operations 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,” service 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 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.

M. "Plaintiff states" means the District of Columbia and the States of Connecticut, Illinois, Louisiana, Massachusetts, New York, Ohio, Pennsylvania, and Texas.

II. Objectives

The Final Judgment filed in this case is meant to ensure the prompt divestiture by First Data of NYCE Holdings for the purpose of ensuring the establishment of a viable competitor capable of competing effectively to provide EFT network services, including PIN debit network services, and EFT processing services in the United States and to remedy the anticompetitive effects that the United States and plaintiff states allege would otherwise result from defendant First Data's acquisition of defendant Concord. This Hold Separate Stipulation and Order ensures that, prior to such divestiture, NYCE is operated as a competitively independent, economically viable, and ongoing business concern, that will remain independent and uninfluenced by the consummation of that acquisition, and that competition is maintained during the pendency of the ordered divestiture.

III. Jurisdiction and Venue

This Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the United States District Court for the District of Columbia.

IV. Compliance With and Entry of Final Judgment

A. The parties stipulate that a Final Judgment in the form attached hereto as Exhibit A may be filed with and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16), and without further notice to any party or other proceedings, provided that the United States has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on defendants and by filing that notice with the Court.

B. Defendants shall abide by and comply with the provisions of the proposed Final Judgment, pending entry of the Final Judgment by the Court, or until expiration of time for all appeals of any Court ruling denying entry of the proposed Final Judgment, and shall, from the date defendants signed this Stipulation, comply with all the terms and provisions of the proposed Final Judgment as though the same were in full force and effect as an order of the Court.

C. Defendants shall not consummate the transaction sought to be enjoined by the Complaint herein before the Court has signed this Hold Separate Stipulation and Order.

D. This Stipulation shall apply with equal force and effect to any amended proposed Final Judgment agreed upon in writing by the parties and submitted to the Court.

E. In the event (1) the United States has withdrawn its consent, as provided in Section IV.A. above, (2) First Data notifies the Court that the proposed acquisition of Concord has been abandoned and will not be consummated, or (3) the proposed Final Judgment is not entered pursuant to this Stipulation, the time has expired for all appeals of any Court ruling denying the proposed Final Judgment, and the Court has not otherwise ordered continued compliance with the terms and provisions of the proposed Final Judgment, then the parties are released from all further obligations under this Stipulation, and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

F. Defendants represent that the divestiture ordered in the proposed Final Judgment can and will be made, and that they later will raise no claim of mistake, hardship, or difficulty of compliance as grounds for asking the Court to modify any of the provisions contained therein.

V. NYCE Governance

During the period in which this Hold Separate Stipulation and Order are in effect, First Data is enjoined and restrained, directly or indirectly from:

1. suggesting or nominating, individually or as part of a group, any candidate who is not an officer or manager of NYCE or minority shareholder of NYCE for election to NYCE's Board of Directors, or, after fifteen (15) calendar days after the signing by the Court of this Hold Separate Stipulation and Order, having any officer, director, manager, employee, or agent serve as an officer, director, manager, employee, or in a comparable position with or for NYCE;

2. participating in, being present at, 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, or any other governing body of NYCE, except as necessary to carry out First Data's obligations under this Hold Separate Stipulation and Order. For purposes of this provision, the term "meeting" includes any action taken by consent of the relevant directors in lieu of a meeting;
3. voting or permitting to be voted any NYCE shares that First Data owns or using or attempting to use any ownership interest in NYCE to exert any influence over NYCE, except as necessary to carry out First Data's obligations under this Hold Separate Stipulation and Order; and
4. communicating to or receiving from any officer, director, manager, employee, or agent of NYCE any nonpublic information regarding any aspect of NYCE's business, including any plans or proposals with respect thereto, except in the ordinary course of business or as required by applicable law.

VI. Hold Separate Provisions

Until the divestiture required by the Final Judgment has been accomplished, subject to the provisions of Section V and consistent with past practice:

- A. First Data shall preserve and maintain NYCE as a separate, independent, ongoing, economically viable competitive business, with NYCE's management, sales, and operations held

entirely separate, distinct, and apart from First Data's other operations. Within twenty (20) days after the entry of this Hold Separate Stipulation and Order, First Data shall inform the United States and plaintiff states of the steps First Data has taken to comply with this Hold Separate Stipulation and Order.

B. First Data shall take all steps necessary to ensure that (1) NYCE is maintained and operated as a separate, independent, ongoing, economically viable, and active competitor in the provision of EFT network services, including PIN debit network services, and EFT processing services, and (2) the books, records, competitively sensitive sales, marketing and pricing information, and decision-making concerning NYCE will be kept separate, distinct, and apart from First Data's other operations. First Data's influence over NYCE shall be limited to that necessary to carry out First Data's obligations under this Hold Separate Stipulation and Order or as required by applicable law. First Data shall not hire any officer or employee of NYCE and shall not seek the termination or transfer of any NYCE officer or employee, or alter, to the detriment of such officer or employee, such person's salary or benefits.

C. First Data shall continue to honor and comply fully with all contractual obligations, understandings, and formal or informal agreements (collectively "Agreements") that First Data has with NYCE.

D. To the extent that First Data sells, leases, rents, or otherwise provides, any product or service to NYCE, whether pursuant to contract or any Agreement or practice, First Data shall continue to sell, lease, rent, or provide such products or services in the ordinary course of business, and in a manner consistent with First Data's plans, strategies, policies and practices, and

under the same terms and conditions, in existence as of the date First Data signs this Hold Separate Stipulation and Order.

E. To the extent that First Data purchases, leases, rents, or otherwise obtains, any product or service from NYCE, whether pursuant to any Agreement or practice, First Data shall continue to purchase, lease, rent, or provide such products or services in the ordinary course of business, and in a manner consistent with First Data's plans, strategies, policies and practices, and under the same terms and conditions, in existence as of the date First Data signs this Hold Separate Stipulation and Order.

F. First Data shall not take any action, or permit, authorize, allow or encourage any inaction, which discriminates against NYCE, including, but not limited to, using its merchant processing, merchant acquiring, card issuing or card processing services to reduce the volume or diminish the volume growth of ATM or PIN debit transactions switched by NYCE or degrade, impede or reduce the performance of any aspect of NYCE platforms or data centers.

G. First Data shall use reasonable efforts to maintain and increase sales and revenues of NYCE and shall maintain at 2003 levels or previously approved levels for 2004, whichever are higher, all promotional, advertising, sales, technical assistance, marketing, and merchandising support for NYCE.

H. First Data shall provide sufficient working capital and lines and sources of credit, at 2003 levels or previously approved levels for 2004, whichever are higher, to continue to maintain NYCE as an ongoing, economically viable, and competitive business.

I. First Data shall take all steps necessary to ensure that NYCE is fully maintained in operable condition at no less than the previously projected 2004 capacity and sales that existed as

of the date First Data signs this Hold Separate Stipulation and Order, and shall maintain and adhere to normal repair and maintenance schedules for NYCE.

J. First Data shall not, except as part of a divestiture approved by the United States in accordance with the terms of the proposed Final Judgment, remove, sell, lease, assign, transfer, pledge, or otherwise dispose of any assets, rights, or interests of NYCE Holdings or NYCE, provided, however, that nothing in this Section VI.J. shall prohibit NYCE from doing so in the ordinary course of business.

K. First Data shall maintain, in accordance with sound accounting principles, separate, accurate, and complete financial ledgers, books and records that report on a periodic basis, such as the last business day of every month, consistent with past practices, the assets, liabilities, expenses, revenues and income of NYCE.

L. Defendants shall take no action that would jeopardize, delay, or impede the sale of NYCE Holdings.

M. This Hold Separate Stipulation and Order shall remain in effect until consummation of the divestiture required by the proposed Final Judgment or until further order of the Court.

FOR PLAINTIFF UNITED STATES:

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Date: December 14, 2003

ORDER

IT IS SO ORDERED ON THIS ____ DAY OF _____, 2003.

United States District Judge

EXHIBIT A
PROPOSED FINAL JUDGMENT