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)

NOTICE OF FILING OF DISCOVERY DISPUTES

Pursuant to this Court's order at the November 19, 2003 Status Conference, the United States hereby submits a summary of the discovery disputes it seeks to raise with the Court in the 11:00 a.m. EST telephone conference on November 20, 2003.

1. **Refusal to provide variable cost documents essential to testing efficiencies claims.**

   a. According to *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 721-22 (D.C. Cir. 2001), it is important to look at variable cost to evaluate alleged efficiencies. Indeed, Defendants' expert (Dr. Hausman)'s report predicts efficiencies in terms of "variable cost savings." To enable ourselves to test and evaluate such efficiencies claims, Plaintiff United States asked First Data for documents reporting the variable, or incremental, cost of switching a PIN debit transaction on First Data's network, NYCE. First Data responded that it does not have such documents. (Attachment A.) But the President of NYCE, Dennis Lynch, has testified that NYCE does prepare such reports, and that they are compiled on a quarterly basis by Mr. Hemmer, NYCE's chief financial officer. (Attachment B.)

2. **Refusal to produce their expert witness, Dr. Hausman, whose expert report addresses the issues of efficiencies, at any time other than the day before trial or 1 day after supplemental and rebuttal reports concerning efficiencies are due.**

   a. Due to their delay in producing a large number of efficiencies documents, defendants agreed to allow plaintiffs' rebuttal report concerning efficiencies to be

produced on December 3, rather than the December 1 date reflected in the scheduling order. Plaintiffs' similarly agreed that defendants' supplemental expert reports, concerning efficiencies only, could be provided on December 3.

b. Based on the expert reports exchanged last night, it is clear Dr. Hausman, one of defendants' two expert economists, will testify concerning the efficiencies defense.

c. The Scheduling And Case Management Order, based on dates agreed upon by the defendants, indicates expert depositions are to be concluded by December 11.

d. Defendants have refused to produce Dr. Hausman between December 5, 2003 and December 13, 2003, due to a "long-standing professional commitment" abroad. Defendants have offered to produce Dr. Hausman for deposition only on December 4, one day after the exchange of efficiencies-related supplemental and/or rebuttal reports; or on December 14, the day before trial begins. Only at 4:14 p.m., yesterday (30 minutes before the scheduled telephonic Status Conference) did defendants even agree to permit a December 14 deposition of Dr. Hausman to take place in Washington, D.C., rather than Boston, MA.

e. In the November 5 Status Conference with the court, counsel for First Data indicated Dr. Hausman could be available to return from his travel abroad in order to appear at a possible hearing on December 11 or 12. (". . . . he said he could come back from Egypt early and he could be available on the 12th for like an hour if you wanted to explore with him what his -- or whatever time you want . . . . I could push him and try to get him back on the 11th, if that works for Your Honor.") (Attachment C)

3. **Refusal to timely provide efficiencies documents and to provide important information related to many of these late-produced documents.**

a. In response to discovery requests propounded by plaintiffs on the subject of efficiencies, defendants have now produced thousands of documents, including a total of 2,642 electronic documents from the "integration team" and "integration database" custodians, which are preparing defendants' efficiencies claims. These are documents, not pages; and many are extremely dense spreadsheets, accounting, and financial documents.

b. Contrary to an impression the Court may have had when it set the schedule in this case, it is now apparent that, at the time the complaint in this case was filed, the Government had just 16% of the integration team and database documents (410 of 2,642). (Not to mention many other hard copy and electronic documents related to efficiencies that are included in the files of other custodians.) This is true

because the defendants requested, and the Government granted, a June 15, 2003 document review cut-off date for the large majority of documents produced during the investigation.

c. Two-thirds of the 2,642 integration team and database documents (1,762 documents) were produced by defendants two days after the date a response was due under the court's scheduling order. These late-produced documents appeared without notice to plaintiffs, when defendants' web-based vendor added them to a massive electronic production database available to plaintiffs. Two days is a 20% extension of the time allotted for a response, and over 5% of the entire fact discovery period.

d. Defendants never notified plaintiffs of this late production. The only reason plaintiffs became aware of this production is that Government paralegals were on the telephone with the vendor at the time the documents were loaded and the vendor happened to mention they were loading more documents onto the website.

e. For over 500 of the late-produced documents, it is still impossible to determine the date on which they were created. This is important evidence to determine how the defendants' efficiencies claims were developed. For example, the Government cannot put different versions of the same document in chronological order.

f. On Tuesday, November 18, defendants belatedly electronically produced another 500 documents. Approximately 30% of these 500 documents relate to the defendants' efficiencies claims. Defendants still have not informed plaintiff of this additional late production. Rather, plaintiffs learned about it by noticing a new "load date" on the web-based vendor's website.

g. The first efficiencies witness deposition (First Data's 30(b)(6) designee for all efficiencies issues related to the merger) is scheduled to begin in five calendar days.

4. **Even after the Court ordered defendants to carefully review their privilege logs, defendants continued to claim numerous efficiencies-related documents were privileged; but withdrew that claim for many such documents after plaintiff challenged the amended privilege log.**

a. On October 28, the Court ordered defendants to review their privilege logs and provide an amended log, if necessary, to the Government within a week.

b. Included in First Data's amended privilege log are 38 entries related to their efficiencies claims and the "integration team," including: agendas (e.g., # 31,

357, 362,); reports of the leadership of the integration team (e.g., #373); meeting logs (e.g., #425); meeting minutes (e.g., #635); and documents distributed among 15-20 business people that are members of the integration team (e.g., # 653, 661). Each of these documents were withheld in their entirety.

c. At 4:15 p.m. yesterday (30 minutes before the scheduled Status Conference), First Data finally agreed to produce 5 of the documents in their entirety, and another 4 documents in redacted form.

d. Defendant First Data has yet to provide the Government with a privilege log for its document production during this litigation.

5. **The defendants have failed to produce their PIN debit transaction data in a timely manner**.

a. On or about October 2, less than three weeks before the complaint was filed, the parties for the first time presented BIN and transaction data to both the Antitrust Division Staff and, subsequently, to the Assistant Attorney General of the United States, using it to argue against a merger challenge.

b. On November 1, the United States served its First Request for Production of Documents, requesting the last six months of BIN and transaction data.

c. On November 2-3, the Government held discussions with Concord and First Data during which the Government agreed to explore narrowing the data requests.

d. On November 8, the Government agreed to narrow the data requests by approximately 75%, to one week per month. Neither Concord nor First Data could state definitely at this time even how much data they possessed. Concord stated, incorrectly, that they had only 30-60 days of data; later they revealed that they have 180 days. The Government's offer was followed by a letter to Concord's counsel on November 10. The Government could not make a more specific offer to First Data because First Data had not told the Government precisely how much data the company possessed.

e. On November 11, both Concord and First Data objected to the data requests, including the Government's offer to reduce the requests to a single-week per month. Moreover, the data that both parties produced lacked critical requested information needed to interpret data.

f. From November 12-17, the Government had various conversations with Concord's counsel during which Concord gradually agreed to produce several days per month of data. During this time period, First Data did not agree to

produce any additional data.

g. On November 18, the parties agreed to produce one week of data per month, but did not specify when the data would produced.

h. On November 19, the parties stated that they would produce the data on an unspecified rolling basis, to be completed by November 26. As of this morning, nine days after the parties' production was due, the parties still have not produced even a single week of data with the information necessary to conduct an analysis (with the exception of one week of data that was produced during the investigation).

6. **Defendants' intransigence, usually followed by cooperation when the Government indicates it will bring the issue to the Court, is part of a recurring problem.**

a. Belated identification of document custodians: Concord produced hard copy documents without identifying custodians. This makes preparation for depositions extremely difficult. In a letter dated November 13, 2003 (two days after the Government received the defendants' document production) the Government asked Concord to identify the custodians. Concord did not respond. The Government sent a follow-up e-mail on Saturday, November 15, which made it plain the Government was prepared to bring this issue to the Court. Concord finally provided an index of custodians this past Monday, November 17, 2003 - - 6 days after the response was due under the Scheduling Order.

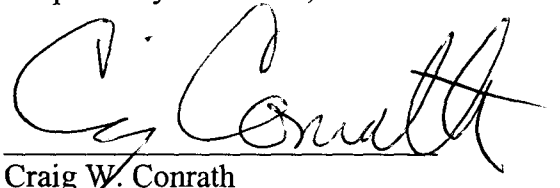
b. Belated identification of document custodians: Similarly, Concord did not provide custodian information for its belated document production in response to the Government's second document request. But, yesterday, at 4:23 p.m. (approximately 25 minutes before the status conference), Concord identified the custodians – 3 days after a response was due.

c. Unjustified Confidentiality Claims: Defendants were under an obligation to review transcripts of court proceedings to create a redacted, public version. Although the Court's order required defendants to review the transcript 24 hours after receiving the transcript, they did not do so until four days after the transcript was made available and more than 48 hours after the Government sent a copy of the transcript to the defendants. Defendants then claimed confidentiality on a substantial amount of information. Although the Government told defendants that much of the information they sought to keep under seal was publicly available, they persisted in their claims. With simple research, we were able to point out citations where the information had been publicly disclosed by corporate representatives (e.g., newspaper articles citing statements by First Data's spokesman). When the Government told defendants that it had prepared a brief it

was ready to file, they receded – one hour before the court order required any disputes to be submitted in writing. The filed version eliminated 90% (by words) of defendants' proposed redactions.

d. Defendants have failed to respond to proposed stipulations: Defendants rejected four simplifying stipulations the Government offered on November 4. Defendants failed even to respond to a fifth – despite repeated pleas to do so. In particular, defendants failure to agree to an evidentiary stipulation that data sources cited in their documents are admissible (e.g. a power point presentation cites to industry statistics in the EFT Data Book, etc.) may lead the Government to have to notice depositions in order to lay a foundation for the admissibility of published industry statistics defendants ordinarily rely on in their business.

Respectfully Submitted,



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DATED: November 20, 2003

ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., Plaintiff, v. FIRST DATA CORPORATION and CONCORD EFS, INC., Defendants.	CASE NO. 1:03CV02169 (RMC)

DEFENDANT FIRST DATA CORPORATION'S RESPONSE TO PLAINTIFF UNITED STATES OF AMERICA'S SECOND REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to Federal Rule of Civil Procedure 34, defendant First Data Corporation ("First Data") responds to plaintiff United States of America's Second Request for Production of Documents as follows:

DEFINITIONS AND INSTRUCTIONS

The following objections and limitations are incorporated by reference into each of the specific responses as if set forth therein.

First Data objects to the definition of "your company," "you," and "First Data" on the grounds that it is overbroad and unduly burdensome. First Data will produce responsive non-privileged documents not previously produced on behalf of First Data and NYCE.

First Data objects to Instruction 22 as overbroad and unduly burdensome, but will provide the requested privilege log, subject to the parties' written agreements of August 1, 2003 and November 6, 2003.

An agreement to produce responsive documents or data should not be construed as a

representation that such documents or data exist or, if they exist, as an agreement that such documents are relevant, probative, or admissible in evidence.

DOCUMENT REQUESTS

DOCUMENT REQUEST NO. 1:

Documents sufficient to identify each card issuer that in 2003 belonged to both STAR and NYCE, and to determine or estimate the number of PIN debit transactions that were executed with that card issuer's debit cards that were switched by NYCE during each month in 2003.

RESPONSE TO DOCUMENT REQUEST NO. 1:

First Data does not, by itself, have documents fully responsive to this request. However, First Data will produce documents that, when read in conjunction with Concord's documents (to the extent they exist and can be produced), will be sufficient to identify each card issuer that in 2003 belonged to both STAR and NYCE, and to determine or estimate the number of PIN debit transactions that were executed with that card issuer's debit cards that were switched by NYCE during each month in 2003.

DOCUMENT REQUEST NO. 2:

Documents sufficient to determine or estimate the number of debit cards that are currently bugged: (a) only with NYCE; (b) with both STAR and NYCE, and no other PIN debit network; and (c) with both STAR and NYCE, and one or more other PIN debit networks.

RESPONSE TO DOCUMENT REQUEST NO. 2:

First Data does not have documents responsive to this request.

DOCUMENT REQUEST NO. 3:

Documents sufficient to perform the calculations and analysis contained in the June 10,

2003 e-mail from March Welch to Will Peirce, EDD-CE05-00002034.

RESPONSE TO DOCUMENT REQUEST NO. 3:

First Data does not have documents sufficient to perform the calculations and analysis contained in the July 10, 2003 email from March [sic: Mark] Welch to Will Peirce, EDD-CE05-00002034. The calculations were performed using weekly reports that are retained only for eight weeks.

DOCUMENT REQUEST NO. 4:

Documents sufficient to show, since January 1, 2002, on a quarterly basis, NYCE's profitability of sales of PIN debit network services, expressed in terms of gross and net sales margins.

RESPONSE TO DOCUMENT REQUEST NO. 4:

First Data will produce responsive non-privileged documents not previously produced.

DOCUMENT REQUEST NO. 5:

Documents sufficient to show, since January 1, 2002, on a quarterly basis, NYCE's incremental cost and average variable cost of switching a PIN debit card transaction.

RESPONSE TO DOCUMENT REQUEST NO. 5:

First Data does not have documents sufficient to show NYCE's incremental cost and average variable cost of switching a PIN debit card transaction because NYCE does not engage in such calculations, nor does NYCE maintain documents that would enable such calculations to be made.

DOCUMENT REQUEST NO. 6:

NYCE's articles of incorporation, and documents sufficient to show NYCE's corporate structure, your company's legal rights to determine any NYCE corporate action or business or

strategic decision, and the rights of all members of the NYCE Network Oversight Board and any other NYCE committee or board which includes financial institution members.

RESPONSE TO DOCUMENT REQUEST NO. 6:

First Data will produce responsive non-privileged documents not previously produced.

Dated: November 16, 2003

FIRST DATA CORPORATION,

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ATTACHMENT B
(Filed Under Seal)

ATTACHMENT C

Excerpts from Transcript of Nov. 5, 2003, Status Conference

P. 7

MS. ALEXIS: Your Honor, this is Geraldine Alexis.
16 I think that's an excellent idea with respect to the hearing on
17 December 5. One question, though, has come up as one of our
18 experts is going to be in Egypt during that time period.
19 And we can produce our other experts for that hearing;
20 however, this one is out of pocket, and I wondered if there was
21 a way -- he said he could come back from Egypt early and he
22 could be available on the 12th for like an hour if you wanted to
23 explore with him what his -- or whatever time you want, explore
24 with him his theories, then, the bases for them.

. . . .

P. 10-11

UNIDENTIFIED: Judge, how about this as a suggestion,
15 kind of leapfrogging off of that. By that time the expert
16 reports will have been exchanged. Unless there's some
17 objection, those could be provided to Your Honor if Your Honor
18 has the time and inclination to read them.
19 Those experts that are available on the 5th from both sides
20 could be there to go through their credentials, their
21 experience, be available to answer questions you might have, and
22 to the extent one or more experts is unavailable on the 5th,
23 perhaps we could schedule, you know, a late day or evening
24 session that following that week, you know, the -- I guess the
25 12th is -- is the 12th the only day or the first day that this
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1 expert is going to be back, Geri?
2 MS. ALEXIS: I could push him and try to get him back
3 on the 11th, if that works for Your Honor.
4 THE COURT: No. I've got a trial. The only time I
5 could do it on the 11th or 12th is at 4:30 in the afternoon.