

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 94-208 - SLR
)	
ELECTRONIC PAYMENT)	
SERVICES, INC.)	
)	
Defendant.)	

MOTION OF THE UNITED STATES FOR ENTRY OF FINAL JUDGMENT

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b) - (h) ("APPA"), the United States of America hereby moves for entry of the proposed Final Judgment in this civil antitrust action. The proposed Final Judgment may be entered at this time without further hearing if the court determines that entry is in the public interest. A Certificate of Compliance, certifying that the parties have complied with all applicable provisions of the APPA and that the waiting periods have expired, is attached.

I.

STATUS OF THE PROCEEDINGS

On April 21, 1994, the United States filed a civil antitrust complaint pursuant to Section 4 of the Sherman Act, as amended, 15 U.S.C. § 4, against defendant Electronic Payment Services, Inc. ("EPS"), owner of the Money Access Service ("MAC") regional automatic teller machine ("ATM") network. The complaint alleged that EPS's refusal to allow the MAC

network's bank customers to obtain ATM processing services from providers other than EPS violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

Also on April 21, 1994, the United States and EPS filed a Stipulation consenting to entry of an attached proposed Final Judgment. The United States also filed on that day a Competitive Impact Statement explaining the Complaint and the proposed Final Judgment.

The Stipulation provides that the proposed Final Judgment may be entered after compliance with the requirements of the APPA. As described in the Certificate of Compliance filed with this Motion, the requirements for the APPA have been met and therefore entry of the proposed Final Judgment is now appropriate. Entry of the Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, and enforce the Final Judgment and to punish violations thereof.

II.

ENTRY OF THE FINAL JUDGMENT IS IN THE PUBLIC INTEREST

Pursuant to 15 U.S.C. § 15(e), before entering the proposed Final Judgment the Court must determine that entry of the judgment is in the public interest. This determination can properly be made on the basis of the Competitive Impact Statement and the Response to Comments.¹ The Department of Justice has broad discretion in controlling antitrust litigation

¹The United States filed Comments Relating to Proposed Final Judgment and Response of United States to Comments ("Response to Comments") on August 15, 1994. Under 15 U.S.C. § 16(f), the Court may, among other things, take testimony of Government officials and experts or appoint a special master to assist it in making its public interest determination. These procedures are discretionary, however, and the court need not invoke any of them unless it believes that the documents have raised significant issues and that further proceedings would aid the court in resolving those issues. See S. Rep. No. 298, 93d Cong., 1st Sess. 6-7 (1973); H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8-9 (1974).

brought by the United States, including negotiating consent decrees and determining whether such settlements are in the public interest. As one court explained:

It is not the court's duty to determine whether this is the best possible settlement that could be obtained if, say, the government had bargained a little harder. The court is not settling the case. It is determining whether the settlement achieved is within the reaches of the public interest.²

The issue in an APPA proceeding is whether the relief provided by the proposed Final Judgment is adequate to remedy the antitrust violation alleged in the Complaint.³ The Complaint's two counts allege (1) that EPS's practice of requiring members of its MAC regional ATM network to purchase ATM processing services from EPS is a tying arrangement that is *per se* unlawful under Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1, and (2) that this tying arrangement is a means by which EPS has maintained a monopoly in regional ATM network access in the States of Pennsylvania, New Jersey, Delaware, West Virginia and New Hampshire, and in substantial portions of the State of Ohio, in violation of Section 2 of the Sherman Act, as amended, 15 U.S.C. § 2. As described in detail in the Competitive Impact Statement and the Response to Comments, injunctions in the proposed Final Judgment ensure that MAC members will be able to purchase ATM processing from third party processors. These injunctions, in combination with other injunctions of the proposed Final Judgment that require

²United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978)(quoting United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975)). See also, e.g., United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981), cert. denied, 454 U.S. 1083 (1982); United States v. G. Heilemen Brewing Co., 563 F. Supp. 642, 647 (D. Del. 1983).

³United States v. Bechtel Corp., 1979-1 Trade Cas. (CCH) ¶ 62,430 (N.D. Cal. 1979), aff'd 648 F.2d 660 (9th Cir. 1981), cert. denied, 454 U.S. 1083 (1982); United States v. National Broadcasting Co., 449 F.Supp. 1127, 1144 (C.D. Cal. 1978).

EPS to allow MAC members to join competing regional ATM networks, will open the MAC network to competition.⁴

Because the proposed Final Judgment adequately addresses the competitive concerns raised in the Complaint, its entry is in the public interest. The Court therefore may enter the Final Judgment at this time. The United States has been authorized by counsel for the Defendant to state that Defendant joins in this motion.

Respectfully submitted,

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⁴In a letter of August 30, 1994, EPS indicated that it disagreed with the United States' interpretation of one clause in the proposed Final Judgment. As discussed in that letter, a copy of which EPS delivered to the Court, this interpretation issue relates to conduct which is not now occurring and may never occur. Because the Court retains jurisdiction to interpret the Final Judgment after its entry, this interpretation issue need not be resolved prior to entry of the Final Judgment. Resolution should be undertaken only when it becomes necessary, if ever. Moreover, the only issue to be considered at this time is whether entry of the Final Judgment is in the public interest. The existence of a potential interpretation dispute does not change the fact that entry of the proposed Final Judgment, which terminates existing unlawful conduct, is in the public interest. "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.'" United States v. Bechtel, 648 F.2d 660, 666 (9th Cir. 1981), cert. denied, 454 U.S. 1083 (1982) (citations omitted).

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