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) **REDACTED VERSION**

MEMORANDUM IN SUPPORT OF PLAINTIFF UNITED STATES' MOTION FOR A SCHEDULING AND CASE MANAGEMENT ORDER

The United States submits this memorandum in support of its motion for a scheduling and case management order. The United States proposes a schedule for this important antitrust case that will allow this Court to decide whether to permanently enjoin the proposed merger of First Data Corporation ("First Data") and Concord EFS, Inc. ("Concord"). To this end, the United States proposes that this Court follow a standard litigation schedule used by this Court (and many others) in antitrust challenges to mergers. This schedule will provide the Court with a complete record upon which to base its ultimate decision, while also accommodating the Defendants' desire to obtain preliminary review in advance of January 31, 2004. Specifically, the United States proposes an abbreviated preliminary injunction hearing schedule as soon after January 5, 2004, as this Court's schedule permits, with an aggressive schedule for a full trial on the merits as soon after May 20, 2004, as this Court's schedule permits.[1]

[1] Because the Defendants have agreed to provide the United States with three business days notice of any intention to consummate the transaction, it is currently unnecessary

Defendants, by contrast, prefer to rush this Court's final decision on the merits, proposing a consolidated preliminary injunction hearing with a full trial in just seven weeks, beginning December 15, 2003. Their schedule would deprive the United States of a full opportunity to obtain and present evidence to demonstrate the consumer harm that this merger would inflict. In addition, Defendants' schedule would deprive the Court of the opportunity to resolve the issues after full consideration of a complete record. Nothing about the circumstances of this case warrants the rush that Defendants seek to impose on the Plaintiffs and the Court. The United States respectfully requests that the Court enter its proposed Scheduling and Case Management Order, and reject Defendants' request for a sharp departure from standard merger litigation practice.

I. ISSUES IN THE CASE

The United States is challenging the proposed $7 billion acquisition of Concord by First Data under Section 7 of the Clayton Act. Concord and First Data own STAR and NYCE, respectively, the largest and third-largest PIN debit networks in the United States. PIN debit networks are electronic funds transfer networks that provide the electronic switch that connects more than a million merchant locations to thousands of financial institutions. To execute a PIN debit transaction, customers swipe their debit card on a merchant's keypad terminal and enter a Personal Identification Number, or PIN, for identification. PIN debit networks enable merchants to allow their customers to make safe and fast purchases with funds directly debited from their

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to file a motion for a temporary restraining order. If the Court grants the Untied States' motion for a Scheduling Order, the United States will promptly file a motion for a preliminary injunction.

bank accounts. For many merchants, including many of the largest mass merchandisers and supermarkets in the country, PIN debit is the most secure, most efficient, and least expensive form of card payment available. Consequently, the popularity of PIN debit has increased dramatically over the last five years. Consumers now make over 500 million PIN debit purchases every month; last year, consumers made more than $150 billion worth of PIN debit purchases.

The First Data/Concord transaction will further concentrate an already highly concentrated market for PIN debit network services. Today, the four largest networks are responsible for electronically routing approximately 90 percent of the nation's PIN debit transactions. Combining First Data and Concord would produce a network that routes approximately half of all U.S. PIN debit transactions. The transaction will also result in a market structure in which there are two very large networks – First Data/Concord and Visa's Interlink – controlling approximately 80% of all PIN debit transactions. The only other network with a meaningful market share would be PULSE, a regional, non-profit network whose presence is limited primarily to the Southwest and parts of the Midwest.

II. THE UNITED STATES' PROPOSED SCHEDULE

The United States is prepared to proceed with a preliminary injunction hearing on January 5, 2004, or as soon as the Court may otherwise deem appropriate, and is confident that the resulting partial record will be sufficient to meet its burden to obtain a preliminary

injunction.[2] The preliminary injunction hearing should take no more than 5 days. The United States, however, cannot reasonably be expected to develop and present a full-blown trial on the merits seven weeks from now.

A. The United States' Proposed Schedule Is Reasonable And Consistent With Law And Common Practice

The United States' proposal is consistent with the procedure set forth by Congress in the applicable statute authorizing the Court to issue a permanent injunction: ". . . and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just . . . ." 15 U.S.C. § 25.[3] The proposal also tracks most prior district court schedules for a preliminary injunction hearing to determine if the evidence warrants an injunction to preserve the *status quo* pending a full review of the merits. See, e.g., United States v. UPM-Kymmene Ojy, 2003 WL 21781902 (N.D. Ill. July 25, 2003) (preliminary injunction hearing held 55 days after complaint was filed); FTC v. Swedish Match, 131 F. Supp. 2d 151 (D.D.C. 2000) (preliminary injunction hearing held 74 days after complaint was filed); FTC v.

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[2] A party "is not required to prove his case in full at a preliminary injunction hearing." University of Texas v. Camenisch, 451 U.S. 390, 395 (1981). A preliminary injunction serves the "limited purpose" of "preserv[ing] the relative positions of the parties until a trial on the merits can be held." Id. In keeping with this limited purpose, procedures at a preliminary injunction hearing "are less formal and [the] evidence . . . less complete than in a trial on the merits." Id.

[3] Moreover, the Federal Rules of Civil Procedure grant the United States a right to request a preliminary injunction, and the rules help alleviate any burden of two hearings by providing that admissible evidence from one hearing need not be repeated at the other: "[A]ny evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes a part of the record on the trial and need not be repeated upon the trial." Fed. R. Civ. P. 65(a)(2). Because this case involves a bench trial, there should be few complications in applying this rule. The parties also may narrow the remaining points of dispute as a result of the preliminary-injunction hearing. Thus, holding a preliminary-injunction hearing followed by a trial on the merits will not be repetitive or burdensome.

H.J. Heinz Co., 116 F. Supp. 2d 190 (D.D.C. 2000) (preliminary injunction hearing held 52 days after complaint was filed), rev'd on other grounds, 246 F.3d 708 (D.C. Cir. 2001); FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34 (D.D.C. 1998) (preliminary injunction hearing held 91 days after complaint was filed).

Following the preliminary injunction hearing, the United States seeks to carry discovery forward only to the spring, for a full trial on the merits, and to do so only to complete necessary discovery. Many merger cases have been scheduled for a much longer period between complaint and trial. See United States v. Northwest Airlines, No. 98-74611 (E.D. Mich., complaint filed Oct. 23, 1998) (740 days from filing complaint to trial); United States v. Primestar, No. 1:98 CV 01193 (D.D.C., complaint filed May 12, 1998) (263 days from complaint to scheduled trial); United States v. Lockheed, No. 1:98CV00731 (D.D.C., complaint filed Mar. 23, 1998) (168 days from complaint to scheduled trial). Here, the public's interest in effective antitrust enforcement is best served by holding a preliminary injunction hearing followed by a full trial on the merits within an aggressive, but reasonable, time frame.

B. The United States Should Not Be Forced To Trial In Seven Weeks

Defendants' proposal to conduct a consolidated preliminary injunction hearing with a full trial on the merits in seven weeks is contrary to settled precedent, and would unduly prejudice the United States. Consolidation should not be granted where it will deprive the United States of a fair opportunity to develop its case. Paris v. U.S. Dept. of Hous. & Urban Dev., 713 F.2d 1341, 1346 (7th Cir. 1983); Pughsley v. 3750 Lake Shore Drive Coop. Bldg., 463 F.2d 1055, 1057 (7th Cir. 1972). See also Charles Wright & Arthur Miller, et al., Federal Practice and Procedure, § 2950 (1995) (quoting Pughsley). To adopt such a procedure would make no more

sense than granting summary judgment "before the non-moving party has had the opportunity to make full discovery." Dickens v. Whole Foods Market Group, Inc., 2003 WL 21486821, at *2 n.5 (D.D.C. Mar. 18, 2003) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986)). "In general, courts will not consolidate a decision on a preliminary injunction with a decision on the merits without a separate trial." American Trading Transp. Co. v. United States, 610 F. Supp. 457, 460 n.2 (D.D.C. 1985), vacated on other grounds, 791 F.2d 942 (D.C. Cir. 1986).

The First Circuit has made much the same point in a case where a district court permanently enjoined the Food and Drug Administration based on a filing made slightly less than two months after the complaint:

> Unlike many cases we review, which seem to have taken an unconscionable time to reach the appellate level, this case suffers from the opposite defect, too fast a track. The court was obviously pursuing the generally admirable objective of saving time and duplication of effort by consolidating the proceedings seeking preliminary injunctive relief with those seeking permanent relief. . . . Courts, however, have recognized the all-too-real hazards inherent in fully disposing of cases in such an expedited fashion–among them incomplete coverage of relevant issues and failure to present all relevant evidence.

Caribbean Produce Exch., Inc. v. Secretary of Health and Human Serv., 893 F.2d 3, 5 (1st Cir. 1989). See also Chicago Prof'l Sports Ltd. v. Nat'l Basketball Ass'n, 961 F.2d 667, 676 (7th Cir. 1992) (affirming injunction in antitrust case decided seven weeks from complaint to trial, while noting that, if defendant had protested, "we would have been inclined to question whether it was prudent to issue a final, rather than a preliminary, injunction so quickly").

Consolidation is particularly inappropriate in Section 7 merger cases because they raise complex legal and factual issues, including product- and geographic-market definition, and the structure and performance of the market both before and after the proposed merger. This case is no exception. Defendants intend to dispute the PIN debit network services product market

alleged by the United States. Product market definition, alone, is an extremely fact-intensive analysis.[4] Defendants have also informed the United States they will argue that the merger will create efficiencies that should be counter-balanced against the likely anticompetitive effects. Quantifying those efficiencies is daunting, as illustrated by the fact that the Defendants themselves are uncertain about their precise levels.[5] Moreover, Defendants have refused to rule out amending the transaction before their proposed December 15 trial, so the United States could be faced with litigating a transaction different from the one investigated. Due to the number of complex factual issues, the ordinary progression of discovery is particularly appropriate in antitrust cases going to trial.[6] Consequently, it would be inappropriate for the Court to finally dispose of these fact-intensive issues in January.

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[4] See Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 482 (1992) ("The proper market definition in this case can be determined only after a factual inquiry into the 'commercial realities' faced by consumers."); Neumann v. Vidal, 1981 WL 2219, at *1 (D.D.C. Nov. 9, 1981) ("Determination of the relevant market is predominantly a question of fact. Consequently, full discovery is necessary to establish what the relevant market might be.").

[5] In a 30(b)(6)-style CID deposition on benefits and efficiencies from the transaction, Scott Betts, President of First Data Merchant Services and the senior executive in charge of estimating the efficiencies from the transaction often had no answer. In effect, Betts's answer amounted to "I don't know" on at least 30 different topics related to efficiencies. See, e.g., **[REDACTED]** The Soven Affidavit submitted with this Memorandum identifies and authenticates the materials cited in this Memorandum, which are attached to the Soven Affidavit at Tab A through Tab G.

[6] Litigants should be afforded the opportunity to fully develop a factual record. Ordinarily, document and written discovery is the first step of discovery. After the documents have been produced and analyzed, depositions are taken to "flesh out" the facts revealed in the documents. Following the conclusion of fact discovery, expert witnesses evaluate and analyze the facts developed and formulate opinions contained in reports. Those opinions are rebutted by other experts; and then tested through expert depositions. Finally, issues are vetted through pre-trial motions practice.

III. DEFENDANTS' ARGUMENTS DO NOT JUSTIFY A RUSH TO JUDGMENT

The United States understands that Defendants will argue that a rush to trial is appropriate because their merger agreement contains a negotiated date of permissible termination. This "urgency" is self-created. It can be altered with the stroke of pen. Similarly, the Defendants' argument that the United States' investigation into the proposed transaction is sufficient for the United States to rapidly proceed to trial is legally insufficient and factually misplaced.

A. Defendants' January 31, 2004, "Deadline" Does Not Justify a Rushed Trial

Defendants suggest that this Court should adopt the extraordinary schedule of holding a full trial in seven weeks because there is a January 31, 2004 deadline in their merger agreement. This is a self-created problem and is no basis for the Defendants' schedule.

Nature of the Defendants' "deadline". The Defendants' merger agreement contains a provision that permits, but does not require, either party to terminate the agreement if it has not been consummated by the specified time. ("This Agreement *may* be terminated . . ." (emphasis added), Section 9.1(I) of the Agreement and Plan of Merger.) If the merger is important and valuable to Defendants, all they have to do is nothing – *i.e.*, not give termination notice. Or, if Defendants prefer, they can amend the January 31 date to a new date. As a senior First Data official testified, the January 31, 2004 date has no particular external significance:

> I think somebody's lawyer, I don't remember if it was ours or it was theirs, picked a date when we first met in February and we started talking about it, picked a date that said how about the end of the year so we can start next year clean? We said fine. And then when the deal stretched from February into March, and it didn't look like we were going to get it done until the end of March, we said, well, we're a month later than we thought, should we move the date out a month? And we said that sounds reasonable, so we moved it out

a month.[7]

Faced with similar arguments in the Heinz merger case, the Court of Appeals of this Circuit said,

> [A]lthough the appellees state that if an injunction pending appeal is granted they *may* abandon the merger, they do not unequivocally state that they *will* do so. . . . Moreover, even if the current merger plans were abandoned, the evidence does not establish that the efficiencies the appellees urge could not be reclaimed by a renewed transaction following success on appeal.

FTC v H.J. Heinz, Co., 2000 WL 1741320, at *2 (D.C. Cir. Nov. 8, 2000). The same principles apply here. If the transaction is as advantageous to the Defendants as they maintain, they can complete it after the Court has held a full and fair trial. First Data has been evaluating various combinations with Concord since the mid-1990s.[8] More specific on-and-off negotiations about a transaction like the current one took place over the period 2002-2003.[9] **[REDACTED]**[10]

Defendants' actions belie their claim of urgency. The parties spent a substantial amount of time negotiating a merger.[11] Moreover, Defendants' prosecution of their merger review process also calls into question the actual urgency that they now claim. They made their initial Hart-Scott-Rodino notification on April 10, 2003, which began a process that imposes certain

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[7] Deposition of Richard E. Aiello, Senior Vice President of Strategic Investments, First Data Corporation, at 193:10-21 (Soven Affidavit, Tab B).

[8] See First Data Corp., Registration Statement Under the Securities Act of 1933, at 27-32 (Aug. 26, 2003) (hereinafter "Registration Statement") (Soven Affidavit, Tab C).

[9] Id.

[10] **[REDACTED]**

[11] See Registration Statement, at 27-32.

deadlines on the government agency reviewing the merger.[12] After Defendants went ahead with that process for four weeks, they withdrew those filings on May 9 and refiled May 13, triggering a new, and later, set of deadlines. The United States met its deadline and issued a "second request" for additional information on June 12, 2003.[13]

Defendants could have set a deadline to avoid or minimize any problems, but did not. Defendants are represented by experienced and able antitrust counsel. The companies were able to recognize the antitrust issues raised by the merger and the likely investigation that would be required. In addition, they were capable of drawing up an agreement that allowed for enough time to decide any litigation, by establishing contract provisions that would not artificially pressure a court into a hasty decisional process.

B. Business Considerations Do Not Warrant A Rush to Trial

Defendants' business requirements do not warrant their extremely expedited proposed trial schedule. While Concord has experienced some recent business difficulties, both companies appear to remain in solid financial condition. In its recent third-quarter earnings announcement, First Data reported that it expected annual revenue growth of 14%, and that its earnings per share in the quarter grew by 9%.[14] First Data's NYCE network achieved several substantial successes

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[12] The HSR Act requires that most substantial mergers be notified to the FTC and the Department of Justice. Merging firms may not close their transaction until 30 days after notification. If the investigating agency asks for more information (a "Second Request"), then the merging firms may not close their transaction until 30 days after substantially complying with the Second Request. The agency also may take investigative depositions.

[13] Soven Affidavit ¶¶ 3, 4.

[14] First Data Press Release, First Data Report Announces Third Quarter Results (Oct. 14, 2003).

this summer, including signing Fleet to an exclusive PIN debit contract,[15] and displacing Concord's STAR network for much of Wachovia Bank's ATM network business.[16]

Concord's business status also does not warrant scheduling a trial earlier than the aggressive timetable the United States has suggested. **[REDACTED]**.[17] This summer, STAR entered into a major exclusive contract with National City Bank, one of the largest issuers of PIN debit cards in the country. **[REDACTED]**.[18, 19, 20, 21]

Any concern by the Defendants that delay in closing may lead to employee attrition also does not warrant a rush to trial. Employee attrition is a concern in every merger and should not trump the Court's need for sufficient time to reach a decision on the basis of fully prepared presentations. Special contracts can protect against it. In this particular case, it appears that there is little risk of significant employee losses; **[REDACTED]**. [22]

C. Potential Inconvenience To United States' Witnesses

Defendants' proposed extraordinary schedule also may inconvenience the United States'

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[15] David Breitkopf, In Brief: FleetBoston Names NYCE for Point of Sale, American Banker, Sept. 12, 2003 (Soven Affidavit, Tab E).

[16] David Breitkopf and Jennifer A. Kingson, In Brief: Wachovia Drops Concord for NYCE, Visa, American Banker, Aug. 29, 2003 (Soven Affidavit, Tab F).

[17] **[REDACTED]**

[18] **[REDACTED]**

[19] **[REDACTED]**

[20] **[REDACTED]**

[21] **[REDACTED]**

[22] **[REDACTED]**

witnesses and thus disadvantage the United States. The United States will present testimony of a number of Defendants' substantial customers. These customers – some of the largest retailers in the country – will explain how the merger will harm them. The pre-holiday season, when Defendants propose to hold a full trial on the merits, is the busiest and most lucrative time of the year for most retailers.

D. The United States' Pre-Complaint Investigation Is Not A Justification For A Rushed Trial on the Merits

We understand that Defendants will argue that the United States' pre-complaint investigation under the Hart-Scott-Rodino Act justifies an immediate trial. This argument is incorrect. An agency's investigation of whether to bring an action is not a substitute for litigation discovery. See SEC v. Sargent, 229 F.3d 68, 80 (1st Cir. 2000). "'[T]here is no authority which suggests that it is appropriate to limit [an enforcement agency's] right to take discovery based upon the extent of its previous investigation into the facts underlying its case.'" Id. (quoting SEC v. Saul, 133 F.R.D. 115, 118 (N.D. Ill. 1990); see also United States v. GAF Corp., 596 F.2d 10, 14 (2d Cir. 1979) ("'It is important to remember that the [Justice] Department's objective at the pre-complaint stage of the investigation is not to 'prove' its case but rather to make an informed decision on whether or not to file a complaint.'") (quoting H. R. REP. 94-1343 at 26, Hart-Scott-Rodino ("HSR") Antitrust Improvement Act of 1976).

The United States' HSR investigation did not permit it to conduct the type of discovery litigants are afforded in preparing for a trial. First, substantial parts of the investigation were devoted to issues other than PIN debit network services. In addition to concerns about the transaction's competitive effects in the PIN debit network services market, customers complained about – and the United States and plaintiff States investigated – the transaction's impact on other

services, including ATM networks, ATM driving, electronic check verification, and person-to-person money transfer services.[23] Ultimately, Plaintiffs filed the instant case.

The pre-complaint investigation also is not a legitimate basis for a rush to trial because more than 95% of the Defendants' responses to the Second Requests were produced only about two months ago, on or after August 19. Defendants produced a very large number of documents, over 700,000. Moreover, Defendants produced the large majority of their documents using an internet-based electronic database system that proved substantially more difficult to work with than Defendants predicted. For example, it was not until September 26 that it was possible to identify the dates of numerous important e-mails. Consequently, during much of the limited time the United States had available to review the Defendants' e-mails, and take investigatory depositions, the United States could not determine when many of the Defendants' e-mails were generated.[24]

The United States is also entitled to substantial additional discovery about Defendants' claims that certain efficiencies will ensure that consumers are not harmed by the merger. On September 22, 2003, Defendants submitted their first presentation with any detail about the alleged efficiencies, long after the Second Requests were issued and after two depositions had

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[23] Soven Affidavit ¶ 5.

[24] Moreover, the documents and information the Defendants did produce concerning the PIN debit market are insufficient for a trial on the merits because they do not contain many materials that are highly relevant to this case. Most significantly, to minimize the parties' burden, the United States agreed to a June 15 cut-off date for virtually all of the parties' documents responsive to the Second Requests. Obtaining the Defendants' post-June relevant documents is particularly important because they contain the parties' most recent pricing plans, as well as information about competition between STAR, NYCE and Interlink for recent large bank contracts.

been taken on the subject.

In addition, Defendants may argue that recent events affect the competitive analysis of this transaction. The United States will need additional discovery to test their claims.

Finally, Defendants have withheld or redacted approximately 17,000 documents based on privilege claims. The Defendants continue to add to this total by pulling documents from their electronic database on the internet.[25] The United States requires sufficient time to determine the appropriateness of many of these privilege assertions.

In short, an aggressive, but balanced, schedule such as the United States proposes is warranted to allow the United States to, among other things: (1) obtain additional highly relevant documents and testimony; (2) test Defendants' denials of the Complaint's allegations and any affirmative defenses; (3) ascertain how and from whom evidence to be used at trial may be procured and admitted; and (4) test Defendants' voluminous privilege claims. Given these substantial tasks, a more expedited schedule requiring the United States to go to trial in less than two months is simply impractical and unduly burdensome. Consumers are entitled to have the Court evaluate this transaction on a full and fair record.

[25] Soven Affidavit ¶ 7.

Accordingly, the United States respectfully requests the Court to enter an Order for a Preliminary Injunction hearing beginning on January 5, 2004, and for a full trial beginning on May 20, 2004, or as the Court's calendar permits.

Respectfully submitted,

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Date

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Craig Conrath, Esq.
Department of Justice
Antitrust Division
Networks & Technology Section
600 E St., N.W.; Ste. 9500
Washington, D.C. 20530
(202) 307-6200