IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
United States Department of Justice
Antitrust Division
450 Fifth Street, NW, Suite 7100
Washington, DC 20530

Plaintiff,

v.

VERIFONE SYSTEMS, INC.,
2099 Gateway Place, Suite 600
San Jose, CA 95110,

and

HYPERCOM CORPORATION,
8888 East Raintree Drive, Suite 300
Scottsdale, AZ 85260

Defendants.

Case: 1:11-cv-00887
Assigned to: Kessler, Gladys
Assign. Date: 5/12/2011
Description: Antitrust

AMENDED COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action against VeriFone Systems Inc. ("VeriFone"), and Hypercom Corporation ("Hypercom") pursuant to the antitrust laws of the United States to enjoin VeriFone's proposed acquisition of Hypercom, and to obtain such other equitable relief as the Court deems appropriate. The United States alleges as follows:

I. NATURE OF ACTION

1. Point of sale ("POS") terminals enable retailers and other firms to accept a wide range of non-cash payment types, such as credit cards and debit cards, at millions of locations nationwide. Given the increasing popularity of electronic payments, the vast majority of merchants need to accept such cards and use POS terminals to handle billions of dollars of on-site electronic payments daily. This complaint seeks to enjoin Defendants VeriFone and Hypercom from proceeding with a transaction that, if permitted, would eliminate nearly all competition in the sale of POS terminals in the United States.

2. VeriFone and Hypercom are two of the three leading providers of POS terminals in the United States. If the Verifone-Hypercom transaction is not enjoined, Hypercom would cease to exist as an independent competitor in this concentrated market. The proposed transaction would result in VeriFone and the third leading provider of POS terminals in the United States, Ingenico, S.A. ("Ingenico"), becoming a duopoly in full control of the sale of POS devices in the United States.

3. POS terminals can operate on a standalone basis, connected to payment networks by a standard telephone line or by wired or wireless internet protocol technologies. POS terminals of this type are commonly referred to in the industry as "countertop" machines, and are typically used by small- or medium-sized businesses or retailers to enable them to accept credit and debit cards. POS terminals can also be connected to an electronic cash register or similar device as part of an integrated point of sale system. POS terminals of this type are often referred to in the industry as "multi-lane" or "consumer-facing" machines, and are typically used by large retailers to accept

credit and debit cards. Each of these industry segments constitutes an antitrust market. The countertop POS terminals market and the multi-lane POS terminals market are the two relevant markets that would be affected by the proposed transaction challenged in this Complaint. The line of business including both relevant markets is referred to as the "POS terminals industry."

4. The POS terminals industry, both in the United States and on a worldwide basis, is extremely concentrated and dominated by VeriFone, Hypercom, and Ingenico. In 2009, according to a leading market analyst report, VeriFone had a 48 percent share of the sale of all POS terminals in the United States, while Hypercom had an 18 percent share and Ingenico had a 26 percent share.

5. Similarly, each of the relevant markets is extremely concentrated in the United States and there is little timely prospect of either of them becoming less concentrated. VeriFone and Hypercom together control over 60 percent of the countertop POS terminals market in the United States. VeriFone, Hypercom, and Ingenico together control well over 90 percent of the multi-lane POS terminals market in the United States. Their position in the relevant markets is also protected by the high barriers to entry that characterize these markets.

6. In November 2007, VeriFone's CEO, Douglas G. Bergeron, projected that the worldwide POS terminals industry was trending towards a "very benevolent duopoly" consisting solely of VeriFone and Ingenico. Bergeron's description of such a potential duopoly as "very benevolent" has led VeriFone to eschew robust and vibrant competition in favor of cooperation with, and benevolence toward, competitors. Consummation of the proposed transaction would achieve Mr. Bergeron's vision.

7. On November 17, 2010, following approximately eighteen months of negotiations, VeriFone agreed to purchase Hypercom in a $485 million deal that would combine two of only three significant sellers of POS terminals in the United States.

8. VeriFone's proposed acquisition of Hypercom would substantially extend VeriFone's position as the largest seller of all POS terminals in the United States. Ingenico would be the only remaining substantial competitor to VeriFone. Post-transaction, VeriFone and Ingenico together would dominate the multilane POS terminals market – the very duopoly envisioned by VeriFone's CEO four years ago. The acquisition would reduce competition in the relevant markets by eliminating Hypercom as an independent source of competitive discipline and by reducing impediments to successful coordination. This would inevitably lead to higher prices, inferior service, a reduction in the variety of products sold, and reduced innovation.

9. The United States requests that the Court enjoin VeriFone's acquisition of Hypercom to protect consumers throughout United States from the loss of competition in the provision of devices used to facilitate billions of retail transactions each year.

II. DEFENDANTS

10. VeriFone is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located in San Jose, California. In the fiscal year ending October 31, 2010, VeriFone earned more than $1 billion in revenues worldwide.

11. Hypercom is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located in Alpharetta, Georgia. In 2010, Hypercom earned more than $450 million in revenues worldwide.

III. JURISDICTION, VENUE, AND COMMERCE

12. The United States brings this action pursuant to Section 4 of the Sherman Act, 15 U.S.C. § 4 to prevent and restrain Defendants from violating Section 1 of the Sherman Act, 15 U.S.C. § 1, and pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

13. The Court has subject-matter jurisdiction over this action pursuant to Section 4 of the Sherman Act, 15 U.S.C. § 4, Section 15 of the Clayton Act, as amended, and 28 U.S.C. § 1345. The Court also has subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337(a), as Defendants sell POS terminals and/or other products and services in the United States, and sell products and services in the flow of interstate commerce. Defendants' products and services involve a substantial amount of interstate commerce. Sales of countertop POS terminals and multi-lane POS terminals each exceeded $150 million in the United States in 2010.

14. This Court has personal jurisdiction over each Defendant and venue is proper over VeriFone and Hypercom in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22, because Defendants VeriFone and Hypercom both transact business and are found within this District.

IV. ADVERSE COMPETITIVE EFFECTS

15. VeriFone's proposed acquisition of Hypercom would reduce competition in two antitrust markets: the sale of countertop POS terminals and the sale of multi-lane POS terminals. VeriFone and Hypercom are two of only three companies with substantial sales in the countertop POS terminals market; the third company with

significant sales is First Data Corporation ("First Data"), which is vertically integrated and only sells devices to customers of its merchant processing services. VeriFone and Hypercom are two of the only three substantial competitors in the multi-lane POS terminals market; Ingenico is the third competitor in that market. The proposed acquisition would eliminate all competition between VeriFone and Hypercom, and would increase the likelihood of coordination in the POS terminals markets.

A. Relevant Product and Geographic Markets

1. *Countertop POS Terminals Market*

16. The sale of countertop POS terminals suitable for use in the United States is a relevant antitrust market for purposes of Section 1 of the Sherman Act and a relevant antitrust market and line of commerce for purposes of Section 7 of the Clayton Act.

17. Other types of payment devices are not adequate substitutes for countertop POS terminals. Purchasers of countertop POS terminals would not switch to other types of payment systems in sufficient numbers to render unprofitable a price increase imposed by a hypothetical monopolist in the sale of countertop POS terminals suitable for use in the United States.

18. A hypothetical monopolist of countertop POS terminals suitable for use in the United States could profitably raise prices by at least a small but significant, non-transitory amount. Purchasers of countertop POS terminals located in the United States would not be able to switch to other products, including to countertop POS terminals made for non-U.S. markets, to defeat such a price increase by a hypothetical monopolist.

19. The relevant geographic market is the United States, where the customers for countertop POS terminals suitable for use in the United States are located.

Countertop POS terminals suitable for use in the United States may be manufactured anywhere in the world.

20. Countertop POS terminals sold in other parts of the world will not work unmodified in the United States. Countertop POS terminals sold in the United States must be customized for the demands of U.S. purchasers and must comply with distinct U.S. technical specifications and certification requirements.

2. *Multi-lane POS Terminals Market*

21. The sale of multi-lane POS terminals suitable for use in the United States is a relevant antitrust market for purposes of Section 1 of the Sherman Act and a relevant antitrust market and line of commerce for purposes of Section 7 of the Clayton Act.

22. Other types of payment devices are not adequate substitutes for multi-lane POS terminals. Purchasers of multi-lane POS terminals would not switch to other types of payment systems in sufficient numbers to render unprofitable a price increase imposed by a hypothetical monopolist in the sale of multi-lane POS terminals suitable for use in the United States.

23. A hypothetical monopolist of multi-lane POS terminals suitable for use in the United States could profitably raise prices by at least a small but significant, non-transitory amount. Purchasers of multi-lane POS terminals located in the United States would not be able switch to other products, including to multi-lane POS terminals made for non-U.S. markets, to defeat such a price increase by a hypothetical monopolist.

24. The relevant geographic market is the United States, where the customers for multi-lane POS terminals suitable for use in the United States are located. Multi-lane

POS terminals suitable for use in the United States may be manufactured anywhere in the world.

25. Multi-lane POS terminals sold in other parts of the world will not work unmodified in the United States. Multi-lane POS terminals sold in the United States must be customized for the demands of U.S. purchasers and must comply with distinct U.S. technical specifications and certification requirements.

B. **Market Concentration**

26. VeriFone's proposed acquisition of Hypercom would increase market concentration in the POS terminals markets.

27. As articulated in the Horizontal Merger Guidelines issued by the Department of Justice and the Federal Trade Commission, the Herfindahl-Hirschman Index ("HHI") is a measure of market concentration.[1] Market concentration is often one useful indicator of the level of competitive vigor in a market and the likely competitive effects of a merger. The more concentrated a market, and the more a transaction would increase concentration in a market, the more likely it is that a transaction would result in a meaningful reduction in competition harming consumers. Mergers resulting in highly concentrated markets (with an HHI in excess of 2500) that involve an increase in the HHI of more than 200 points are presumed to be likely to enhance market power under the merger guidelines.

[1] See U.S. Dep't of Justice, Horizontal Merger Guidelines § 5.3 (2010), available at http://www.justice.gov/atr/public/guidelines/hmg-2010 html. The HHI 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 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$). It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches a maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

28. The countertop POS terminals market and the multi-lane POS terminals market are already highly concentrated, even before the effect of the proposed transaction is taken into account. VeriFone's proposed acquisition of Hypercom would result in a substantial increase in the HHI in both markets in excess of the 200 points presumed to be anticompetitive under the merger guidelines.

C. VeriFone's Proposed Acquisition of Hypercom Would Result in Competitive Harm

29. VeriFone's proposed acquisition of Hypercom would reduce competition in the relevant markets, leading to unilateral and coordinated effects such as an increase in prices and a reduction in innovation, quality, product variety, and service.

30. VeriFone's proposed acquisition of Hypercom would eliminate all competition between the two companies. VeriFone is the largest provider of both countertop and multi-lane POS terminals. Hypercom is one of only two other companies currently selling a significant number of countertop POS terminals and is the third-largest provider of multi-lane POS terminals. The competition between VeriFone and Hypercom is therefore especially important to consumers, and the elimination of that competition would substantially reduce the overall level of competition in each market.

31. The acquisition would result in unilateral effects in each relevant market as VeriFone would be able to raise the price of both VeriFone and Hypercom products because it would recapture some sales that would have been lost absent the acquisition as purchasers reacted to such price increases by switching between VeriFone and Hypercom products.

32. Eliminating competition between Verifone and Hypercom would also reduce the number of significant competitors from three to two in the POS terminals

markets, resulting in the very "duopoly" projected by VeriFone's CEO and heightening the potential for coordinated behavior. Coordination, whether tacit or explicit, is especially likely because the acquisition would enhance each company's ability to deter competitive behavior in one market by retaliating across a range of other product and geographic markets, if necessary.

D. **Absence of Countervailing Factors**

1. *Entry*

33. Supply responses from competitors or potential competitors would not prevent the likely anticompetitive effects of the proposed transaction.

34. Industry participants have described the POS terminals industry as highly concentrated, with high barriers to entry. These entry barriers include the need to obtain certifications, keeping up with changing payment regulations, having sufficient scale, being in close proximity to customers, and having a broad portfolio of customer applications. These factors are entry barriers for both the countertop and multi-lane POS terminals markets. Given these and other significant barriers to entry or expansion, entry or repositioning would not be likely, timely, or sufficient to prevent the anticompetitive effects that would result from the proposed transaction.

35. Hypercom's CEO, Philippe Tartavull, has emphasized the difficulty of entering the POS terminals industry, explaining that "[s]maller regional manufacturers who enter the business find it difficult because a typical product cycle is often too long for them to support" and they are "limited in the number of products they can bring to market." When these factors are combined with the "high costs of certifying new products," Tartavull concluded, "it can be very difficult to enter a new market geography

or market segment. It's not impossible, but it's not easy. Other companies have tried, but when all is said and done, there are two primary providers to the North American market, and Hypercom is one of them."

36. The only firm to enter the U.S. market in recent years and achieve any non-trivial amount of sales is First Data, a leading provider of electronic payment networks and services. Despite being as well placed as any company to break into the countertop POS terminals market given its complementary lines of business and its position as the largest merchant acquirer, and despite the fact that it purchased a small provider of U.S. POS terminals, First Data's sales are limited entirely to customers using its own network and First Data therefore has a very minimal ability to further expand its presence in the countertop POS terminals market. Smaller merchant processors would have less incentive and ability than First Data to place their own terminals on their network simply as a result of their significantly smaller volume of sales. First Data has no significant presence in the multi-lane POS terminals market.

37. Even after First Data entered the market, VeriFone's CEO expressed the view that the overall POS terminals business was likely to continue to consolidate until it was controlled by a duopoly consisting solely of VeriFone and Ingenico. Hypercom's statements regarding the difficulty of entry that are quoted in paragraph 36 were also made after First Data's entry.

38. Ingenico, an otherwise significant competitor in the POS terminals markets around the world, has faced significant difficulty in entering and expanding in the countertop POS terminals market in the United States. Ingenico has itself explained to investors that the POS terminals industry is "highly concentrated," has "consolidated

in recent years," and is characterized by "high barriers to entry." Ingenico has detailed a number of these entry barriers, including the need to obtain certifications, the "[c]onstant intensification of the Global Card Regulation over the last 10 years," and the importance of "[s]cale," "[p]roximity," and a "[p]ortfolio of customer application[s]." These barriers to entry have affected Ingenico's ability to expand in the countertop POS terminals market.

39. The countertop and multi-lane POS terminals markets are characterized by a number of common barriers to entry, including those identified above. Amongst the most significant other general entry barriers are the importance of reputation and a proven track record of success serving customers generally and certain types of customers in particular. Customers are reluctant to entrust their sales process to a company without the proven ability to operate in their type of environment, especially since service and software maintenance are critical factors in the decision-making process.

40. In addition, a new producer's countertop POS terminals must be certified to work with the various payment processors in order for the processor to be willing to fully support that producer's terminals. This certification is costly and time-consuming, and payment processors are unlikely to prioritize the terminals of a new company with no committed customers. Without this certification, it is very difficult for a producer to sell a significant number of countertop POS terminals.

41. In the multi-lane POS terminals market, new entrants face an additional entry barrier relating to the need to demonstrate that a terminal can interoperate with the electronic cash register and integrated payment system used by each potential customer.

As there are a range of integrated systems on the market and their providers are again unlikely to spend significant effort to work with a fledgling company with no customer base, new entrants face an uphill challenge. Even if a new entrant has a device with features comparable to those of VeriFone, Hypercom, and Ingenico, at an attractive price point, the consumer may not even consider bids from the company if it cannot demonstrate that its terminal already works with the integrated system used by that consumer.

2. *Efficiencies*

42. The anticompetitive effects of the proposed transaction are not likely to be eliminated or sufficiently mitigated by any efficiencies that may be achieved by the proposed transaction.

V. VIOLATION ALLEGED

43. The United States incorporates the allegations of paragraphs 1 through 42 above.

44. The proposed acquisition of Hypercom by VeriFone likely would substantially lessen competition in interstate trade and commerce, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, in that:

a. actual and potential competition between VeriFone and Hypercom in the sale of countertop and multi-lane POS terminals in the United States would be eliminated; and

b. competition in the sale of countertop and multi-lane POS terminals in the United States likely would be lessened substantially.

VI. RELIEF REQUESTED

45. The United States requests that:

a. the proposed acquisition of Hypercom by VeriFone be adjudged to violate Section 7 of the Clayton Act, 15 U.S.C. § 18;

b. VeriFone and Hypercom be enjoined from carrying out the proposed acquisition of Hypercom by VeriFone or carrying out any other agreement, understanding, or plan by which VeriFone and Hypercom would acquire, be acquired by, or merge with each other, in whole or in part;

c. The United States be awarded their costs of this action; and

d. The United States receive such other and further relief as the case requires and the Court deems just and proper.

Dated: June 22, 2011

Respectfully submitted,

FOR PLAINTIFF UNITED STATES:

CHRISTINE A. VARNEY (DC Bar #411654)
Assistant Attorney General

JOSEPH F. WAYLAND
Deputy Assistant Attorney General

PATRICIA A. BRINK
Director of Civil Enforcement

JAMES J. TIERNEY (DC Bar # 434610)
Chief

SCOTT A. SCHEELE (DC Bar # 429061)
Assistant Chief
Networks and Technology Enforcement Section

RYAN S. STRUVE (DC Bar # 495406)
Attorney
Networks and Technology Enforcement Section
Antitrust Division
U.S. Department of Justice
450 Fifth Street, N.W., Suite 7100
Washington, DC 20530
Telephone: (202) 514-4890
Fax: (202) 616-8544
Email: ryan.struve@usdoj.gov

SANFORD M. ADLER
AARON D. HOAG
IHAN KIM
ADAM T. SEVERT
JENNIFER A. WAMSLEY (DC Bar # 486540)
Attorneys for the United States