

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,

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

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

and

INGENICO S.A.,  
192, avenue Charles de Gaulle  
92200 Neuilly-sur-Seine  
France

Defendants.

**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"), Hypercom Corporation ("Hypercom"), and Ingenico S.A. ("Ingenico") pursuant to the

antitrust laws of the United States to enjoin VeriFone's proposed acquisition of Hypercom and the related licensing agreement among VeriFone, Hypercom, and Ingenico, 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, Hypercom, and Ingenico, from proceeding with a pair of related transactions that, if permitted, would eliminate nearly all competition in the sale of POS terminals in the United States.

2. VeriFone, Hypercom, and Ingenico are the three leading providers of POS terminals in the United States. If these transactions are not enjoined, Hypercom would cease to exist as an independent competitor, while VeriFone and Ingenico, the only two remaining competitors of significance, would become so intertwined and codependent in the United States that they would operate more as affiliates than as competitors. These transactions would result in VeriFone and Ingenico becoming a cooperative 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 transactions 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. As Ingenico explained in its 2010 Registration Document, the worldwide POS terminals industry is “concentrated” and “has consolidated in recent years,” leaving VeriFone, Hypercom, and Ingenico with “80 to 90 percent” of the worldwide POS terminals business in 2010.

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 Ingenico has stated are a characteristic of 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 transactions 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 countertop POS terminals in the United States and the largest and third-largest sellers of multi-lane 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-merger, VeriFone and Ingenico together would dominate each of the two POS terminals markets – 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 between VeriFone and Ingenico. This would inevitably lead to higher prices, inferior service, a reduction in the variety of products sold, and reduced innovation.

9. In January 2011 VeriFone and Hypercom announced that they anticipated divesting Hypercom's U.S. business in connection with the acquisition in an attempt to address the antitrust issues. Given that the original deal would reduce the number of substantial sellers in each relevant market from three to two, the parties recognized that the transaction was likely to receive intense antitrust scrutiny and was unlikely to be allowed to proceed.

10. On April 1, 2011, VeriFone and Hypercom entered into an agreement whereby Hypercom's U.S. business would be "divested" to Ingenico, the only other substantial seller of multi-lane POS terminals in the United States. The proposed deal with Ingenico has two fundamental flaws as a remedy for the anticompetitive effects of the VeriFone/Hypercom transaction. First, licensing the assets to Ingenico would eliminate the competitive discipline Ingenico provides today even as a small seller in the countertop POS terminals market and fails to replicate the three-way competition between VeriFone, Hypercom, and Ingenico in the multi-lane POS terminals market. Second, even setting aside Ingenico's current participation in the relevant markets, the structure of the agreement, which is akin to a franchise agreement rather than a clean divestiture, would not give Ingenico the means and incentive to maintain the level of premerger competition in the relevant markets. The so-called divestiture of Hypercom's U.S. business to Ingenico therefore exacerbates, rather than mitigates, the antitrust issues raised by the original transaction.

11. The agreement between VeriFone, Hypercom, and Ingenico is anything but a bona fide sale of a stand-alone Hypercom U.S. business. Rather, it is a complex licensing agreement whereby Ingenico would essentially become a Hypercom franchisee

of the combined VeriFone and Hypercom, with the exclusive right to sell Hypercom POS terminals in the United States for five years. This agreement is referred to as the "Hypercom franchise agreement" throughout this Complaint.

12. Pursuant to the Hypercom franchise agreement, Ingenico would not own the intellectual property relating to the Hypercom devices and would not be able to modify or improve the devices going forward. Ingenico would be required to rely on VeriFone to provide ongoing support for the Hypercom devices, including routine upgrades, bug fixes, and technical support. The ongoing entanglements are so integral to the transaction and run so deep that VeriFone is actually a party to the Hypercom franchise agreement. As a result, the Hypercom franchise agreement cannot be consummated independently of VeriFone's acquisition of Hypercom. This contradicts Defendants' claims to the public that the Hypercom franchise agreement is a straightforward sale of Hypercom's U.S. business to Ingenico. As a result of these entanglements, not only would Ingenico be unable to replace the competition between VeriFone and Hypercom in the countertop POS terminals market that would be lost, but the agreement would facilitate coordination in both relevant markets, leading to competitive harm beyond what would be expected from the reduction in the number of competitors alone.

13. While the resulting duopolies in each relevant market may benefit both VeriFone and Ingenico, the transactions would harm consumers, businesses, and commerce throughout the United States by eliminating competition in providing the devices used to facilitate billions of retail transactions each year.

14. The parties have structured the transactions in such a way that formal notification of either deal with the United States under the pre-merger notification regime established by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, is not required. When the parties to a transaction file such a notification, the United States has the right to required production of information and documents from the parties sufficient to enable it to evaluate the competitive impact of the proposed transaction and to determine whether it is necessary to challenge the merger. Under the Hart-Scott-Rodino Act, the parties cannot close their transaction until they have provided the information and documents to the United States, and a specified waiting period – typically 30 days – has expired.

15. As originally constructed, VeriFone's \$485 million acquisition of Hypercom would have been reportable under the Hart-Scott Rodino Act, and the parties initially informed the United States that they would file a pre-merger notification for the deal. The Defendants instead entered into the Hypercom franchise agreement, which provided that it would be executed immediately prior to VeriFone's acquisition of Hypercom. This arrangement eliminated the need for VeriFone and Hypercom to file a pre-merger notification for the original acquisition as Hypercom would no longer have sufficient U.S. assets to meet the statutory requirements, since those assets would have been transferred to Ingenico. The \$54 million fee that Ingenico would pay to license the Hypercom assets would be below the statutory reporting threshold of \$66 million. The parties have also structured part of the deal as a support agreement with an additional \$15 million payment from Ingenico to Hypercom, though the separate nature of that payment still leaves the deal below the statutory filing threshold. The parties have therefore not

filed a pre-merger notification which would trigger the statutory waiting period for the Hypercom franchise agreement and require the parties to submit information to the United States relating to competitive conditions in the POS terminals industry.

16. The Defendants have repeatedly refused to allow the United States a comparable period of time to review their transactions as the United States would have under the Hart-Scott-Rodino Act.

17. Indeed, the Defendants have informed the United States that they will not fully comply with the document and information requests issued by the United States prior to June 2, 2011, the date on which the parties would be free to consummate the transactions if not enjoined by this Court.

18. The United States had no choice but to promptly file this Complaint. The United States requests that the Court enjoin VeriFone's acquisition of Hypercom and the related Hypercom franchise agreement with Ingenico in order to protect consumers throughout United States from the cooperative duopoly VeriFone and Ingenico seek to create.

## **II. DEFENDANTS**

19. 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.

20. 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.



21. Ingenico is a corporation organized and existing under the laws of the France, with its principal place of business located in France. In 2010, Ingenico earned more than €900 million (\$1.3 billion at current exchange rates) in revenues worldwide. Through its U.S. subsidiaries, it sells POS terminals and other products and services throughout the United States.

### **III. JURISDICTION, VENUE, AND COMMERCE**

22. 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.

23. 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.

24. 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. Venue is proper in the District of Columbia for Defendant

Ingenico, a French corporation, under 28 U.S.C. § 1391(d). Alternatively, venue is proper over Ingenico in the District of Columbia under 15 U.S.C. § 22 because Ingenico transacts business in this District through subsidiaries, over which Ingenico exercises dominant control.

#### **IV. ADVERSE COMPETITIVE EFFECTS**

25. 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, 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 likely lead to coordination between VeriFone and Ingenico in the POS terminals markets. The Hypercom franchise agreement, which would give Ingenico the right to sell certain Hypercom devices in the United States for five years, is not a remedy for the transaction as it would reduce the number of significant competitors in the multi-lane POS terminals market from three to two. The limited set of assets Ingenico would be acquiring would prevent it from adequately replacing Hypercom as a competitor in the countertop POS terminals market. In addition, the competitive discipline provided by Ingenico's presence as a worldwide leader in countertop POS terminals ready to expand in the United States would be eliminated. The ongoing nature of the relationship between VeriFone and Ingenico

contemplated by the Hypercom franchise agreement would likely lead to coordination between the companies, who together would dominate both relevant markets, and thereby exacerbate, rather than remedy, the anticompetitive effects of VeriFone's proposed acquisition of Hypercom.

**A. Relevant Product and Geographic Markets**

**1. Countertop POS Terminals Market**

26. 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.

27. 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.

28. 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.

29. 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.

30. 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*

31. 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.

32. 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.

33. 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.

34. 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.

35. 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**

36. VeriFone's proposed acquisition of Hypercom and the franchise agreement involving Hypercom's U.S. assets would, individually and taken together, increase market concentration in the POS terminals markets.

37. 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.<sup>1</sup> 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.

38. The countertop POS terminals market and the multi-lane POS terminals market are already highly concentrated, even before the effect of the proposed

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<sup>1</sup> 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.

transactions 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.

39. As discussed above, the Hypercom franchise agreement does not involve a complete and clean sale of Hypercom's U.S. assets to Ingenico. Rather, the Hypercom franchise agreement would likely result in Ingenico being less effective in the ongoing sale and development of Hypercom's products than Hypercom would have been absent the merger. Nonetheless, even if the Hypercom franchise agreement were to be treated as a straight-forward sale of Hypercom's U.S. business to Ingenico, that transaction would result in a substantial increase in concentration as measured by HHI – in excess of 200 points – in the multi-lane POS terminals market.

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

40. 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.

41. 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.

42. 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.

43. The acquisition would result in coordinated effects in the multi-lane POS terminals market as VeriFone and Ingenico would be the only two remaining substantial competitors, and therefore would be able to more easily act in coordination. 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.

44. VeriFone's acquisition of Hypercom is a separate agreement which is independently unlawful, without regard to any subsequent efforts by the parties to dispose of or license certain Hypercom assets to Ingenico or any other third party.

45. Even if the Hypercom franchise agreement is taken into account, VeriFone's proposed acquisition of Hypercom would still be anticompetitive.

46. In the countertop POS terminals market, Ingenico would not be able to replace the competition lost by the elimination of Hypercom as an independent competitor. Moreover, Ingenico, as a leading provider of countertop POS terminals outside the United States, provides competitive discipline to the countertop POS terminals market today that would be lost as a result of the transactions. The ongoing entanglements between VeriFone and Ingenico would also heighten the potential for

coordinated behavior in this market, compounding the potential for coordination inherent in the reduction in the number of firms providing competitive discipline in this market.

47. In the multi-lane POS terminals market, even with the Hypercom franchise agreement, the number of significant competitors would be reduced from three to two, leading to both unilateral and coordinated anticompetitive effects. Competition between Hypercom and Ingenico would be eliminated, and entanglements between VeriFone and Ingenico would heighten the potential for coordinated behavior already resulting from the reduction of the number of significant competitors from three to two.

**D. VeriFone's Proposed Acquisition of Hypercom and the Hypercom Franchise Agreement, Taken Together, Would Result in Competitive Harm**

48. Taken together, VeriFone's proposed acquisition of Hypercom and the Hypercom franchise agreement constitute an agreement between the only significant general competitors in the POS terminals industry – VeriFone, Hypercom, and Ingenico – with the intent and result of restraining competition in the relevant markets.

49. While the Hypercom franchise agreement is offered as a “remedy” to resolve the obvious anticompetitive harm that would result from the original agreement for VeriFone to acquire Hypercom, the Hypercom franchise agreement would actually compound the anticompetitive effects of the VeriFone/Hypercom deal.

50. By licensing certain Hypercom U.S. assets to the only other significant competitor in the multi-lane POS terminals market, VeriFone would assure that the relevant markets would be substantially more concentrated as a result of these deals.

51. Ingenico, moreover, would not be acquiring the complete Hypercom business such that it would be able to maintain the market position of Hypercom's



products. Consumers would be less likely to purchase the Hypercom products post-transactions than they would be if Hypercom remained independent. Ingenico would not control development of, and improvements to, the Hypercom devices. Ingenico would be required to rely on VeriFone to provide ongoing support for the Hypercom devices, including routine upgrades, bug fixes, and technical support. Under the Hypercom franchise agreement, VeriFone, as the owner of Hypercom, would lack the incentive to improve the products in ways tailored for the U.S. markets since it would not profit from such improvements. Conversely, Ingenico would lack the ability to improve the Hypercom devices since it would not control the necessary intellectual property rights or possess the requisite development expertise with the Hypercom products. Indeed, Ingenico plans to transition all of its customers away from the Hypercom devices to its own devices by porting some of the software and applications from the existing Hypercom devices over to Ingenico-designed terminals. This would eliminate the Hypercom products as an ongoing separate choice for consumers and leave consumers to choose between VeriFone and untested and unproven Ingenico/Hypercom hybrid products.

52. This would have a significant unilateral effect on the countertop POS terminals market and the multi-lane POS terminals market.

53. VeriFone would be able to raise its prices in both relevant markets above pre-merger levels, as the limited nature of the Hypercom franchise agreement would make consumers less likely to switch from VeriFone to Hypercom products than they would be today.

54. Ingenico would be able to raise its prices in both relevant markets above pre-merger levels, and those of Hypercom as well, knowing that it would recapture the sales from consumers who would have or would switch between Hypercom and Ingenico products.

55. In addition, Ingenico is currently the next-best alternative to market leaders VeriFone and Hypercom in the countertop POS terminals market for customers that do not use First Data's processing services. Ingenico therefore provides competitive discipline in the market as a result of its worldwide presence as a leading provider of countertop POS terminals, and its position as the next-largest provider in the United States not affiliated with a particular processor. This discipline would be lost as a result of the Hypercom franchise agreement. Instead of a market where VeriFone and Hypercom are the two largest independent competitors with substantial market shares, while Ingenico stands to the side ready to leap on any opportunity to displace VeriFone and Hypercom, Ingenico would be a weak version of Hypercom and no other firm would be as well-positioned to provide discipline to the market as a whole as Ingenico is today.

56. Ingenico's existing position in the market, and the inadequacy of any other competitor, is well demonstrated by an internal Ingenico document. Ingenico concludes that if VeriFone's proposed acquisition of Hypercom goes through, banks in the United States, who provide the processing services that must interact with countertop POS terminals, "will have little choice but to migrate to Ingenico" if they want to have more than one supplier, given that VeriFone and Hypercom currently "account for 98%" of the market. (This document does not include First Data's sales in the market since First Data is vertically integrated and does not sell its countertop POS terminals to all consumers.)

57. The transactions would also result in significant coordinated effects in both POS terminals markets. Coordination would be more likely as the number of significant independent players in the markets is reduced from three to two. Moreover, the structure of the Hypercom franchise agreement would tie together VeriFone and Ingenico in numerous ways going forward, facilitating tacit or express collusion between the companies and resulting in the very “duopoly” projected by VeriFone’s CEO.

**E. Absence of Countervailing Factors**

**1. Entry**

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

59. As Ingenico itself has explained to investors, 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 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 transactions.

60. Hypercom’s CEO, Philippe Tartavull, has also 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.”

61. The only firm to enter the U.S. market in recent years and achieve any non-trivial amount of sales is First Data Corporation, 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.

62. 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. The statements from Ingenico and Hypercom regarding the difficulty of entry that are quoted in paragraphs 59 and 60, respectively, were also made after First Data’s entry.

63. 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.

64. 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.

65. 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*

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

**V. VIOLATIONS ALLEGED**

67. The United States incorporates the allegations of paragraphs 1 through 66 above.

**Count One**

**Violation of Clayton Act § 7, 15 U.S.C. § 18**

*VeriFone Agreement to Acquire Hypercom*

68. VeriFone and Hypercom are named as Defendants to this Count.

69. 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.

**Count Two**

**Violation of Sherman Act § 1, 15 U.S.C. § 1**

*VeriFone Acquisition of Hypercom and the  
Hypercom Franchise Agreement*

70. Hypercom, Ingenico, and VeriFone are named as Defendants to this Count.

71. The proposed acquisition of Hypercom by VeriFone, and the proposed franchise agreement between Hypercom, Ingenico, and VeriFone, pursuant to which Ingenico would acquire the rights to sell certain Hypercom POS terminals in the United States, comprise a unitary agreement directed to a common purpose that amounts to an unlawful agreement and combination in the form of trust, in restraint of interstate trade and commerce, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, in that:

- a. actual and potential competition between VeriFone, Hypercom, and Ingenico 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**

72. 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. the proposed acquisition of Hypercom by VeriFone and the Hypercom franchise agreement, taken together, be adjudged to violate Section 1 of the Sherman Act, 15 U.S.C. § 1;
- c. 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;

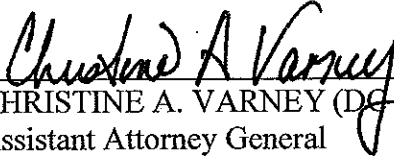
- d. VeriFone, Hypercom and Ingenico be enjoined from carrying out the proposed licensing agreement or carrying out any other agreement, understanding, or plan by which Hypercom and Ingenico would acquire, be acquired by, or merge with each other, in whole or in part, or by which the assets of one would be licensed to the other;
- e. The United States be awarded their costs of this action; and
- f. The United States receive such other and further relief as the case requires and the Court deems just and proper.




Dated: May 12, 2011

Respectfully submitted,

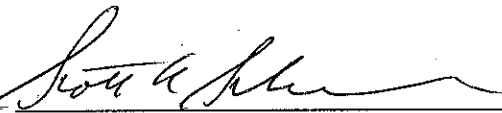
FOR PLAINTIFF UNITED STATES:

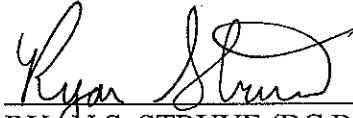
  
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