

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

ELECTRONIC PAYMENT)
SERVICES, INC.)

Defendant.)

Civ. No. 94-208

Entered: October 14, 1994

FINAL
JUDGMENT

WHEREAS Plaintiff, United States of America, having filed its Complaint in this action on April 21, 1994, and plaintiff and defendant, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law; and without this Final Judgment constituting any evidence or admission by any party with respect to any issue of fact or law;

AND WHEREAS defendant has agreed to be bound by the provisions of this Final Judgment pending its approval by the Court;

NOW, THEREFORE, before any testimony is taken, and without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I.

JURISDICTION

This Court has jurisdiction of the subject matter of this action and of the person of the defendant. The Complaint states a claim upon which relief may be granted against the defendant under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

II.

DEFINITIONS

As used in this Final Judgment:

A. "Defendant" and "EPS" means defendant Electronic Payment Services, Inc., its divisions, subsidiaries, affiliates, agents, officers, employees, successors and assigns, and without restriction means the business currently known as "Money Access Service" or "MAC," its employees, agents, officers, and any successor or assign of that business or any significant portion of the assets of that business. "Defendant" also includes all persons made subject to this Final Judgment pursuant to Section III hereof.

B. "ATM" means automatic teller machine, a machine typically owned and deployed by a depository institution, and used by depositors of that institution and others to withdraw cash and, in certain configurations, to perform one or more of the following additional functions: account inquiry, payment authorization, transfer or deposit.

C. "ATM network" means an arrangement whereby more than one ATM and more than one depository institution (or the deposit records of such depository institutions) are interconnected by electronic or telecommunications means, to one or more computers, processors or switches for the purpose of providing ATM services to the retail customers of depository institutions.

D. "ATM processing" means providing the data processing services and telecommunications facilities and services used:

1. to operate, monitor and support the operation of ATMs deployed by a depository institution;

2. to connect the ATMs deployed by a depository institution to that institution's deposit authorization records, for authorization and confirmation of "on-us transactions," and the record-keeping and other functions related to such transactions; and

3. to connect the ATMs deployed by a depository institution to one or more branded ATM networks for authorization and confirmation of "on-others transactions," and the record-keeping and other functions related to such transactions.

ATM processing can be provided as a service distinct from branded ATM network access, and can be performed in the facilities of the ATM switch, a depository institution's own facilities, or in the facilities of a data processing service organization.

E. "ATM switch" means a telecommunications and data processing facility used to receive and route transactions from ATMs or ATM processors to data processing facilities used by depository institutions to authorize ATM transactions. A "MAC switch" is an ATM switch operated by or on behalf of, or providing such functionality for branded ATM network access to, the MAC or any successor branded ATM network controlled by defendant.

F. "Authorization processing" means providing the data processing services and telecommunications facilities and services used to connect a branded ATM network to a depository institution's deposit authorization records, for authorization and confirmation of ATM transactions, and the record-keeping and other functions related to such transactions.

G. "Branded ATM network access" means access to an ATM network identified by a common trademark or logo displayed on ATMs and ATM cards, and includes the offering for sale of the ability for an ATM card holder with an account at one member depository institution to request withdrawal, deposit, payment authorization, transfer or account inquiry transactions at an ATM identified by a network's trademark or logo owned by another member depository institution; transaction switching by an ATM switch; and the right to brand ATMs or ATM cards with the trademark or logo of an ATM network.

H. "Depository institution" means a bank, savings bank, savings and loan association, credit union or other institution authorized by federal or state law to take deposits. For the purpose of this Final Judgment, "depository institution"

also includes any other member of a branded ATM network operated by defendant that also deploys ATMs within that network.

I. "Intercept processor" means a depository institution that provides ATM processing for itself.

J. "MAC" means Money Access Service, the branded ATM network owned, controlled and operated by EPS, or any successor brand to "MAC."

K. "MAC Midwest Platform" means MAC's data facility (or facilities) that on October 1, 1994, provides branded ATM network access to depository institutions located in the States of Illinois, Indiana, Kentucky, Michigan, Ohio and Tennessee, and at least the greater number of the depository institutions in the State of West Virginia that are branded ATM network customers of defendant.

L. "Person" means any natural person, corporation, firm, company, sole proprietorship, partnership, association, institute, governmental unit, or other legal entity.

M. "Third party processor" means any person that currently or in the future offers ATM processing services to depository institutions. Third party processors may include both depository institutions providing ATM processing for other depository institutions and firms unaffiliated with depository institutions that provide such services. A third party processor is "qualified" within the meaning of this Final Judgment if it is qualified within the meaning of Section IV.E below.

III.

APPLICABILITY

This Final Judgment shall apply to defendant and each of its affiliates, subsidiaries, officers, directors, employees, agents, successors, and assigns; to any successor to any substantial part of the MAC business; to any entity that controls defendant as control currently is defined under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and its implementing regulations (see 16 C.F.R. § 801.1(b)); and to all persons acting in concert with defendant and having actual notice of this Final Judgment.

IV.

PROHIBITED CONDUCT

Defendant is permanently enjoined and restrained as follows:

A. Defendant shall not require any depository institution that obtains branded ATM network access from defendant to obtain any ATM processing or authorization processing from defendant. Defendant shall not maintain or enforce any rule, policy, contract, agreement or arrangement pursuant to which defendant requires any depository institution to obtain ATM processing or authorization processing from defendant; that prohibits or purports to prohibit a depository institution from obtaining ATM processing or authorization processing from any third party processor; or that conditions MAC membership or availability of MAC or any successor branded ATM network access on any depository institution's obtaining ATM processing or authorization processing from defendant or not

obtaining ATM processing or authorization processing from a qualified third party processor.

B. Defendant shall not sell or contract to sell access to, membership in, or switching of transactions by the MAC or any successor branded ATM network controlled by defendant, on the condition, agreement, or understanding that the purchaser thereof shall not use or purchase ATM processing or authorization processing services from any other person.

C. Defendant shall not establish as any condition, agreement, or understanding with respect to access to, membership in, or switching of transactions by the MAC or any successor branded ATM network controlled by defendant, or the price or terms of such access, membership, or switching, that the purchaser thereof shall not use or purchase ATM processing or authorization processing services from any other person. Defendant shall not impose any additional fees on any depository institution based on its obtaining ATM processing or authorization processing from any person other than defendant, except that defendant may impose additional fees for set-up and establishment of the network. Defendant will not require an unreasonable amount of set-up and establishment testing and certification. The aggregate of set-up and/or establishment fees charged to a depository institution, as allowed by this paragraph, and /or its third party processor, as allowed by paragraph IV.E.2 of this Final Judgment, shall not exceed \$100 per person hour expended by Defendant up to a maximum of \$1,000 unless significant difficulties that require

additional work are caused by the third party processor or the depository institution. In such case, Defendant will charge \$100 per hour for the next 40 person hours and \$250 per hour for each additional hour that it expends. The hourly rates and maximum fees set forth in this paragraph may be adjusted over the term of this Final Judgment in accordance with the Consumer Price Index.

D. Defendant shall not restrict in any manner, directly or indirectly, the ability of a depository institution to obtain ATM processing or authorization processing for access to the MAC or any successor branded ATM network controlled by defendant from any qualified third party processor. Defendant shall not require any depository institution that obtains ATM processing or authorization processing from a third party processor to obtain any other service that is not required to provide such ATM or authorization processing from that processor or from any other person.

E. Defendant shall provide qualified third party processors with nondiscriminatory branded ATM network access to the MAC or any successor branded ATM network controlled by defendant that is at least equal in type and quality to the access defendant (a) provides to intercept processors, and (b) provided to intercept processors as of the date of the commencement of this action. Defendant shall not deny any qualified third party processor access to telecommunications ports or links necessary for the third party processor to provide ATM processing or authorization processing for depository institutions obtaining ATM network access from defendant. Defendant shall permit qualified

third party processors to aggregate transactions of multiple banks over one or several telecommunications links and ports as technically reasonable, and defendant shall not require third party processors to obtain a separate link or port for each of its depository institution customers. A third party processor is qualified, within the meaning of this Final Judgment, if it completes defendant's certification process and meets:

1. the technical, financial and operating criteria for intercept processors and third party processors that provide services to only one depository institution established by defendant and in effect as of the date of commencement of this action, or such other reasonable and nondiscriminatory technical, financial and operating criteria for intercept processors and third party processors hereafter established by defendant; and

2. such additional technical criteria regarding transaction information transmitted and the format for transmission of such information as is reasonably appropriate for third party ATM processing for unaffiliated multiple banks. No such criteria shall distinguish or discriminate between intercept processors and third party processors, except that volume discounts may be offered in a nondiscriminatory manner as provided in paragraph IV.G of this Final Judgment. Defendant shall not require any third party processor to satisfy additional certification requirements, or pay additional certification fees (other than reasonable set-

up fees), by reason of its seeking or obtaining the business of additional customers as long as the processor elects to employ for these additional customers a message format/communications protocol combination for which defendant already has certified the processor.

Notwithstanding the foregoing, Defendant is not required to certify as a qualified processor any branded ATM network that is dominant on a state-wide basis or a subsidiary of such network that seeks to become a qualified processor in the MAC or any successor branded ATM network controlled by Defendant unless reciprocal access to become a processor in that network is available on a substantially similar basis as to pricing and terms to all qualified third party processors including other branded ATM networks that offer third party ATM or authorization processing to depository institutions.

F. Defendant shall not terminate any third party processor's access to the MAC or any successor branded ATM network controlled by defendant except on written notice to the processor thirty (30) days before such termination, except that Defendant can terminate any processor immediately if that processor:

(1) fails to pay at any time specified fees, charges or other amounts due and owed to defendant or any participant in defendant's branded ATM network; (2) violates any law or government regulation applicable to it that has adverse effect upon the MAC or any successor branded ATM network controlled by defendant; (3) has a bankruptcy or insolvency proceeding filed against it; or (4) appoints or has appointed by court order a trustee or receiver for any substantial part of its

property. Defendant shall provide a copy of any notice of termination to the Antitrust Division of the Department of Justice, to the attention of counsel of record or their named successors. Any termination in violation of this Final Judgment shall constitute a contempt of this Court and be punishable thereby.

G. Defendant shall not discriminate in the pricing of branded ATM network access to the MAC or any successor branded ATM network controlled by defendant on the basis of a customer's choice of ATM processor, but shall offer branded ATM network access on a nondiscriminatory basis, except that:

1. Defendant may offer volume discounts on branded ATM network access fees on a nondiscriminatory basis, provided that defendant shall permit any depository institution or third party processor for a depository institution to aggregate that institution's transaction volume delivered to a MAC switch, and any such depository institution shall be entitled to any such nondiscriminatory volume discount. Defendant shall not offer volume discounts to a depository institution operating as an intercept processor that are more favorable than those offered to a depository institution that obtains ATM or authorization processing from a qualified third party processor.

2. Defendant shall be permitted to offer depository institutions the option of obtaining transaction switching between member depository institutions by third party processors at nondiscriminatory royalties that shall not be greater than the price for switched transactions.

3. Defendant shall provide branded ATM network access pursuant to a nondiscriminatory price schedule applicable at least to depository institutions located in the States of Pennsylvania, New Jersey, and Delaware. Defendant's provision of branded ATM network access in States other than Pennsylvania, New Jersey, and Delaware, pursuant to a nondiscriminatory price schedule in one State, shall not be deemed to be discriminatory by reason of the use of a different price schedule in another State.

H. Defendant shall not restrict in any manner the ability of a depository institution to obtain branded ATM network access through qualified third party processors or through their own intercept processor facilities to multiple providers of branded ATM network access. Defendant shall not condition its provision of branded ATM network access on a depository institution's not obtaining branded ATM network access from any other person. Defendant shall not sell or contract to sell access to, membership in, or switching of transactions by any branded ATM network controlled by defendant, on the condition, agreement, or understanding that the purchaser thereof shall not use or purchase branded ATM network access from any other person, or establish a price for, discount from, or rebate upon access to, membership in, or switching of transactions by the MAC or any successor branded ATM network controlled by defendant, on the condition, agreement, or understanding that the purchaser thereof shall not use or purchase branded ATM network access from any other person. Defendant shall in no

manner restrict any depository institution ATM deployer that chooses to be affiliated with multiple ATM networks from displaying multiple ATM network logos on its ATMs. Defendant shall not prohibit any depository institution ATM card issuer located in the States of Pennsylvania, New Jersey, Delaware, Indiana or Ohio that chooses to be affiliated with multiple ATM networks from issuing cards that display multiple ATM network logos. Notwithstanding the preceding, Defendant may require that its ATM network logo be displayed on ATMs and ATM cards in equal frequency and prominence as the logos of any other ATM networks and may restrict the branding of access cards that contain an integrated circuit computer chip with a stored value function. Defendant shall in no manner restrict any depository institution ATM deployer from enabling ATMs to function in multiple ATM networks.

I. Notwithstanding the preceding, defendant is not enjoined from entering into an agreement, not inconsistent with the terms of this Final Judgment, for the provision of ATM processing or authorization processing to any depository institution to which defendant has provided actual notice of, and a true copy of, this Final Judgment. Any such agreement shall be severable from any agreement to provide branded ATM network access to the MAC or any successor branded ATM network controlled by defendant.

J. The injunctions specified in Sections IV.A through IV.E of this Final Judgment shall become effective as provided by the terms of this paragraph:

1. Defendant shall commence certification of third party processors not later than January 1, 1995, except that defendant shall commence certification of processors in the MAC Midwest Platform not later than October 1, 1994.

2. Each third party processor who seeks certification shall be allowed to complete certification in a reasonably prompt manner and within the range of time common in the industry, and shall not be denied such resources under the control of defendant (e.g., test time) as are necessary for certification. Upon a third party processor's completion of certification, such processor shall be permitted to act as a qualified third party processor in the MAC network, except that defendant is not required by this paragraph IV.J.2, prior to January 1, 1995, to permit a third party processor that completes certification in the MAC Midwest Platform to act as a qualified third party processor for depository institutions not located in the States of Illinois, Indiana, Kentucky, Michigan, West Virginia or Ohio, or depository institutions located in the State of West Virginia but not served by defendant through the MAC Midwest Platform as of the date of commencement of this action.

3. Sections IV.A through IV.E of this Final Judgment shall be effective and in force, as to any third party processor and the depository institution customers of such processor, as of the date upon which such third party processor becomes a qualified third party processor.

4. Sections IV.A through IV.E of this Final Judgment shall be effective and in force as of the date of entry of this Final Judgment in any portion of the MAC or any successor ATM network controlled by defendant in which depository institutions had the option of using third party multi-bank ATM processors as of January 1, 1993. Defendant shall not renounce or deny any right that it previously granted to depository institutions to obtain ATM processing or authorization processing from third party processors.

5. Defendant shall not take steps to prevent or discontinue any existing arrangements whereby third party processors provide ATM processing or authorization processing in connection with branded ATM network access as of January 1, 1993.

V.

SANCTIONS

Nothing in this Final Judgment shall bar the United States from seeking, or the Court from imposing, against any defendant or person any relief available under any applicable provision of law.

VI.

PLAINTIFF ACCESS

A. To determine or secure compliance with this Final Judgment and for no other purpose, duly authorized representatives of the plaintiff shall, upon written

request of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant, be permitted:

1. access during the defendant's office hours to inspect and copy all records and documents in its possession or control relating to any matters contained in this Final Judgment; and

2. to interview the defendant's officers, employees, trustees, or agents, who may have counsel present, regarding such matters. The interviews shall be subject to the defendant's reasonable convenience and without restraint or interference from defendant.

B. Upon the written request of the Assistant Attorney General in charge of the Antitrust Division, a defendant shall submit such written reports, under oath if requested, relating to any of the matters contained in this Final Judgment as may be reasonably requested.

C. No information or documents obtained by the means provided in this Section VI shall be divulged by the plaintiff to any person other than a duly authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

VII.

FURTHER ELEMENTS OF DECREE

A. Defendant shall provide actual notice and a true copy of this Final Judgment to each depository institution to which it provides branded ATM network access as of the date of this Final Judgment.

B. Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

C. This Final Judgment shall terminate ten years from the date of entry.

D. Entry of this Final Judgment is in the public interest.

DATED: *October 14, 1994*
Wilmington, Delaware


U.S.D.J.