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.	Civil Action No. 1:03CV02169 (RMC) Filed: October 23, 2003

JOINTLY PROPOSED PROTECTIVE ORDER

Pursuant to Fed. R. Civ. P. 26(c)(7), and in the interest of ensuring an efficient and prompt resolution of this action and of protecting information of the parties and non-parties from improper disclosure, the undersigned hereby stipulate, subject to approval and entry by the Court, to the following Protective Order:

A. DEFINITIONS

1. As used herein:

(a) "confidential information" means any trade secret, or other confidential research, development, or commercial information of a party or protected person, as such terms are used in Fed. R. Civ. P. 26(c)(7).

(b) "disclosed" means directly or indirectly shown, divulged, revealed, produced, described, transmitted, or otherwise communicated, in whole or in part;

(c) "document" is defined as the term is used in Fed. R. Civ. P. 34(a);

(d) "party" or "parties" means one or more of the plaintiffs or one or more of the defendants;

(e) "protected person" or "protected persons" means any non-party who voluntarily or in response to a Civil Investigative Demand from the Department of Justice

or from a plaintiff State, or to formal or informal discovery in this action produced or produces any information to any party in connection with this action or the Department of Justice's or plaintiff States' investigations of the matters at issue in this action;

(f) "protected information" means information designated as "BUSINESS SENSITIVE" or "CONFIDENTIAL" as defined below; and

(g) "this action" means the above-captioned action pending in this Court, including any discovery, pretrial, trial, post-trial, or appellate proceedings.

B. DESIGNATION OF PROTECTED INFORMATION

2. A party or protected person may designate as "BUSINESS SENSITIVE" any document, testimony, affidavit, declaration, or information it hereafter discloses, either voluntarily or pursuant to discovery in this action, to any party in connection with this action, to the extent such information constitutes confidential information as defined in this Order. Such designations shall constitute a representation to the Court that such party or protected person (and counsel, if any) in good faith believes that the information so designated constitutes confidential information.

3. A party or protected person may designate as "CONFIDENTIAL" any document, testimony, affidavit, declaration, or information it hereafter discloses, either voluntarily or pursuant to discovery in this action, to any party in connection with this action, only if the party or protected person believes in good faith that the material is highly sensitive and which, if disclosed to persons other than those listed in paragraph 9, is likely to cause substantial competitive harm.

4. Documents, deposition transcripts, affidavits, declarations, or any information containing confidential information produced or provided by any party or any protected person, that the producing party or producing protected person seeks to designate as "BUSINESS SENSITIVE" or "CONFIDENTIAL" in accordance with this Order, shall be designated as such by placing on or affixing to the document or transcript containing confidential information (in such a manner as will not interfere with the document's legibility), the

designation "BUSINESS SENSITIVE" or "CONFIDENTIAL" as appropriate, or any other appropriate notice, together with an indication of the portion or portions of the document considered to be confidential information. With respect to electronic documents, the party or protected person at the time such information is produced shall specify in writing the information that is "BUSINESS SENSITIVE" or "CONFIDENTIAL".

5. A party or protected person that has previously testified in deposition, provided an affidavit or declaration, or produced documents or other information in any form in connection with the investigation of the matters at issue in this action to a party voluntarily in response to an informal discovery request or pursuant to the Hart-Scott-Rodino Antitrust Improvement Act (15 U.S.C. § 18a) or the Antitrust Civil Process Act (15 U.S.C. §§ 1311-1314), may designate any such deposition testimony, affidavit, declaration, document, or information submitted in response to such discovery requests as "BUSINESS SENSITIVE" or "CONFIDENTIAL," to the extent such information constitutes protected information as defined in this Order. A party or protected person shall make confidentiality designations for depositions, affidavits, declarations, documents, and information obtained by a party prior to the filing of the Complaint in this action within three business days of entry or notice of entry of this Order (whichever comes later), and in the meantime, the parties shall treat all material as "CONFIDENTIAL" pursuant to this Order. Deposition testimony, documents, affidavits, or declarations containing confidential information produced previously to the Division during the investigation of the transaction at issue in this action by any protected person and or parts that such person seeks to designate as confidential shall be designated as "BUSINESS SENSITIVE" or "CONFIDENTIAL" by forwarding a letter to all parties identifying the confidential information (by ranges of document identification numbers or page and line numbers where applicable, or other appropriate means) to be so designated. If the entire deposition, document, affidavit, or declaration is not confidential, the protected person shall specify the portions of the document, deposition, affidavit, or declaration that contains confidential information. Such designation shall be communicated to all parties.

6. Any or all documents and other information delivered to one or more of the plaintiffs prior to the filing of the Complaint in this action by any party or protected person, may be presumptively designated, in whole or in part, "CONFIDENTIAL" by the party or protected person producing such documents or other information by communicating such designation to the receiving party. With respect to materials and testimony received by plaintiffs prior to the filing of the Complaint in this action, the parties agree, in view of time constraints, that a party's or protected person's designation of those materials in whole as "CONFIDENTIAL" is, under the circumstances, a good faith designation in accordance with paragraph 3 above. Such designations shall be communicated to all parties, who shall then treat all such documents or other information produced by that party or protected person as "CONFIDENTIAL". In addition, any party or protected person may similarly designate the transcripts of, and exhibits marked at, any depositions of employees of that party or protected person, taken by one or more plaintiffs, prior to the filing of the Complaint in this action, as "CONFIDENTIAL". All documents and other information designated "CONFIDENTIAL" under this paragraph are subject to the provisions of paragraph 15.

7. All transcripts of depositions taken in this action after the filing of the Complaint shall be treated as if designated "CONFIDENTIAL" for a period of five business days after a full and complete copy of the transcript has been available to the deponent or deponent's counsel. Any deponent or counsel for that deponent or counsel for a party may designate during the deposition or during the five-day period after the transcript is available from the court reporter any portion of the transcript as "BUSINESS SENSITIVE" or "CONFIDENTIAL" by denominating by page and line, and by designating any exhibits, that are to be considered "BUSINESS SENSITIVE" or "CONFIDENTIAL". Such designation shall be communicated to all parties.

C. DISCLOSURE OF "BUSINESS SENSITIVE" INFORMATION

8. Except as otherwise authorized by this Order, information designated as "BUSINESS SENSITIVE" shall be used only in connection with this action, shall not be

disclosed to any person other than the individuals set forth below, and may be disclosed only as necessary in connection with this action to the individuals set forth below:

(a) the Court and all persons assisting the Court in this action, including court reporters and stenographic or clerical personnel;

(b) plaintiffs' attorneys and employees, and anyone retained to assist the plaintiffs in the preparation or trial of this action, including contract paralegals, secretaries, other administrative personnel and any persons employed or retained as data base managers and their employees;

(c) no more than two specifically identified inside counsel for each party, as may be agreed upon by the parties or (in the absence of agreement) ordered by the Court, as well as the designated inside counsel's necessary secretarial, clerical, administrative or support staff, provided that the inside counsel, secretarial, clerical, administrative or support staff are not involved in competitive decision making for the party (*i.e.,* development, marketing or pricing decisions) as to the subjects of the information designated as "BUSINESS SENSITIVE".

(d) outside counsel of record for defendants and the employees of such outside counsel including paralegals, secretaries, and other administrative personnel and any persons employed or retained as data base managers and their employees, provided that such persons are not employed or affiliated in any other way with any defendant;

(e) employees of third-party contractors of the parties involved solely in providing copying services or litigation support services such as organizing, filing, coding, converting, storing, or retrieving material connected with this action, provided that such persons are not employed or affiliated in any other way with any defendant;

(f) experts or consultants retained by a party solely to assist in the conduct of this action, including employees of the firm with which the expert or consultant is associated to the extent necessary for purposes of this action only, provided that such experts and staff are not employed or affiliated in any other way with any defendant and provided that such expert or consultant has executed Appendix A hereto;

(g) authors, addressees, and recipients of particular information designated as confidential solely to the extent of disclosing such information of which they are an author, addressee, or recipient;

(h) persons who have had, or whom any counsel for any party in good faith believes to have had, prior access to confidential information, or who have been participants in a communication that is the subject of the confidential information and from whom verification of or other information about that access or participation is sought, solely to the extent of disclosing such information to which they have or may have had access or that is the subject of the communication in which they have or may have participated, except that, unless and until counsel confirms that any such persons have had access or were participants, only as much of the information may be disclosed as may be necessary to confirm the person's access or participation.

(i) subject to the provisions of paragraph 10, other persons not included in the above subparagraphs who are examined by deposition in this action.

D. DISCLOSURE OF "CONFIDENTIAL" INFORMATION

9. Except as otherwise authorized by this Order, information designated as "CONFIDENTIAL" shall be used only in connection with this action, shall not be disclosed to any person other than the individuals set forth below, and may be disclosed only as necessary in connection with this action to the individuals set forth below:

(a) the Court and all persons assisting the Court in this action, including court reporters and stenographic or clerical personnel;

(b) plaintiffs' attorneys and employees, and anyone retained to assist the plaintiffs in the preparation or trial of this action, including contract paralegals, secretaries, other administrative personnel and any persons employed or retained as data base managers and their employees;

(c) outside counsel of record for defendants and the employees of such outside counsel including paralegals, secretaries, and other administrative personnel and any

persons employed or retained as data base managers and their employees, provided that such persons are not employed or affiliated in any other way with any defendant;

(d) employees of third-party contractors of the parties involved solely in providing copying services or litigation support services such as organizing, filing, coding, converting, storing, or retrieving material connected with this action, provided that such persons are not employed or affiliated in any other way with any defendant;

(e) experts or consultants retained by a party solely to assist in the conduct of this action, including employees of the firm with which the expert or consultant is associated to the extent necessary for purposes of this action only, provided that such experts and staff are not employed or affiliated in any other way with any defendant and provided that such expert or consultant has executed Appendix A hereto;

(f) authors, addressees, and recipients of particular information designated as confidential solely to the extent of disclosing such information of which they are an author, addressee, or recipient;

(g) persons who have had, or whom any counsel for any party in good faith believes to have had, prior access to information designated "CONFIDENTIAL", or who have been participants in a communication that is the subject of the information designated "CONFIDENTIAL" and from whom verification of or other information about that access or participation is sought, solely to the extent of disclosing such information to which they have or may have had access or that is the subject of the communication in which they have or may have participated, except that, unless and until counsel confirms that any such persons have had access or were participants, only as much of the information may be disclosed as may be necessary to confirm the person's access or participation.

(h) subject to the provisions of paragraph 10, other persons not included in the above subparagraphs who are examined by deposition in this action.

10. Subject to the exceptions stated in this paragraph, before disclosure of protected information is made to any person or persons not authorized to receive the information

under the provisions of Paragraph 8 or 9 of this Order, the party wishing to make such a disclosure shall give at least five business days' advance notice in writing, via facsimile, to the party or protected person who provided the protected information, stating the names, addresses, and employers of the person(s) to whom the disclosure will be made. The notice shall identify with particularity the documents or specific parts of the information to be disclosed, including the production number of the documents. If, within the five-business-day period, an objection is made regarding a disclosure, disclosure of the protected information shall not be made pending a ruling by the Court. The Court will permit access upon such terms as it deems proper, unless the party or protected person objecting to the proposed disclosure shows good cause why the proposed disclosure should not be permitted. The notice provisions of this Paragraph shall not apply with respect to any deposition, pretrial, or trial testimony of any employee of any party or protected person designating particular information as protected information; any author, addressee, or recipient of particular information designated protected information; or any persons who have had, or whom any counsel for any party in good faith believes to have had, prior access to information designated as protected information, or who have been participants in a communication that is the subject of the protected information at issue in the deposition or testimony of such witness.

11. Each individual described in Paragraph 8, 9 and 10 above, to whom protected information is disclosed, shall not disclose that information to any other individual, except as provided in this Order, or use it for any purpose other than in connection with this action. Before any protected information may be disclosed to any person described in Paragraph 8, 9 or 10 above, he or she shall have first read this Order or shall have otherwise been instructed in his or her obligations under the Order by counsel for a party. Additionally, before any protected information may be disclosed to any expert or consultant described in Subparagraph 8(f) or 9(e), he or she shall have executed the agreement included as Appendix A hereto. Counsel for the party making the disclosure shall maintain the original of such executed agreement for a period of at least one year following the final resolution of this action.

12. Notwithstanding the provisions of this Protective Order, nothing in this Order shall:

(a) limit a party's or protected person's use or disclosure of its own protected information;

(b) prevent disclosure of protected information with the consent of counsel for the designating party or protected person;

(c) prevent plaintiffs, subject to taking appropriate steps to preserve the confidentiality of such information, from disclosing protected information: (i) to duly-authorized representatives of the Executive Branch of the United States Government; (ii) in the course of legal proceedings to which the United States or any plaintiff State is a party; (iii) for the purpose of securing compliance with any Final Judgment in this action; or (iv) for law enforcement purposes or as otherwise required by law. Unless otherwise prohibited by law or regulation, the plaintiffs will endeavor to promptly inform the party or protected person who designated the information as protected information if disclosure pursuant to this paragraph is made.

D. USE OF PROTECTED INFORMATION IN LITIGATION

13. All protected information contained or discussed in any pleading, motion, exhibit, or other paper filed with the Court shall be filed under seal. Where possible, only portions of filings with the court containing protected information shall be filed under seal. Information filed under seal shall be placed in a sealed envelope/box with the endorsements required by the applicable rules of the Court and/or filed in accordance with the electronic filing rules of the Court. The Clerk shall keep such papers under seal until further order of this Court; provided however, that such papers shall be furnished to the Court and to persons and entities who may receive protected information pursuant to the Protective Order. Upon or within five business days after the filing of any paper containing protected information, the filing party shall file on the public record a copy of the paper with the protected information deleted.

14. The parties shall provide protected persons with notice of potential use of any protected information produced by them if and when such materials are listed as potential exhibits if such exhibits are to be made part of the public record. The parties shall give protected persons notice as soon as practicable after protected information which is not listed as an exhibit is determined to be used by counsel for a party in the course of examination or cross-examination at trial if such protected information is to be disclosed as part of the public record. Nothing in this paragraph shall require any advance notice of the use of any document of a party in cross-examining a witness for that party, except immediately before such use. A party or protected person may request the Court to establish and apply protective procedures (including, without limitation, *in camera* review of protected information, sealing of portions of transcripts containing or discussing confidential information and/or excluding persons from the courtroom who are not described in Paragraph 8, 9 or 10 when protected information is shown or discussed) governing the disclosure of protected information at any hearing or trial in this case.

E. OTHER PROCEDURES

15. If a party believes that another party or protected person has designated material as "BUSINESS SENSITIVE" or "CONFIDENTIAL" that is not entitled to such protection, the party seeking disclosure shall make a good faith attempt to resolve the disagreement over the classification of the material with the protected person or party. If the parties and/or the protected person cannot resolve the matter, the party seeking disclosure has the burden to file a motion, notify all parties and affected protected persons of the filing of the motion, identify each document that is the subject of the motion (*e.g.*, by Bates-number or title, author, recipient and date) and submit the matter to the Court for resolution. In the event that a motion is filed challenging a confidentiality designation, the person designating the material shall respond within the time-period allowed for opposition to the motion. Failure to respond shall constitute a waiver of opposition to the motion.

16. This Order shall be without prejudice to the right of any party to bring before the Court the question of whether any particular information designated "BUSINESS

SENSITIVE" or "CONFIDENTIAL" is appropriately designated, or whether any particular information designated "BUSINESS SENSITIVE" or "CONFIDENTIAL" is or is not discoverable or admissible evidence at any hearing or trial of this action. Nothing in this Order shall be construed to effect an abrogation, waiver or limitation of any kind on the right of the parties or protected persons to assert any applicable discovery or trial privilege. No party concedes by complying with this Order that any information designated by any party or protected person as protected information is in fact confidential as that term is defined in Paragraph 1(a) of this Order. However, no information designated as "BUSINESS SENSITIVE" or "CONFIDENTIAL" pursuant to this Order shall be disclosed except as provided herein unless and until the Court orders the release of such information from the confidentiality provisions of this Order.

17. Any production of information without its being designated as "BUSINESS SENSITIVE" or "CONFIDENTIAL" shall not thereby be deemed a waiver of any claim of confidentiality as to such information, and the same may thereafter be designated "BUSINESS SENSITIVE" or "CONFIDENTIAL". Upon receiving notice from a party or protected person that protected information has not been appropriately so denominated, all such information shall be redenominated and treated appropriately. Any such subsequent designation, however, shall not apply retroactively to any previously disclosed information for which disclosure was proper when made.

18. This Order shall not apply to information in the public domain or obtained from other sources regardless of whether such information is also contained in materials designated as confidential pursuant to this Order.

19. Upon entry of this Order, the parties shall provide notice and a copy of this Order to all protected persons who provided them documents or information in this action prior to entry of this Order.

20. The parties, in conducting discovery from non-parties, shall attach to such discovery requests a copy of this Order so as to appraise such non-parties of their rights.

F. PROCEDURES UPON TERMINATION OF LITIGATION

21. Within 90 days after receiving notice of the entry of an order, judgment or decree terminating this action, all persons having received protected information shall, at the election of the party or protected person who produced the information, either return such material containing such information and all copies thereof to counsel for the party or protected person that produced it, or destroy all such material and certify that fact in writing. The plaintiffs and their counsel and outside counsel for any defendant shall be entitled to retain court papers, deposition and trial transcripts and exhibits, and attorney-work product (including discovery material containing protected information), provided that plaintiffs' employees, and defendants' outside counsel, and employees of such outside counsel shall not disclose the portions of court papers, deposition transcripts, exhibits or attorney-work product containing protected information to any person except pursuant to court order, or agreement with the party or protected person that produced the protected information. All protected information returned to the parties or their counsel by the Court likewise shall be disposed of in accordance with this Paragraph. Nothing in this provision, however, shall restrict the rights of the plaintiffs to retain and use protected information for law enforcement purposes or as otherwise required by law.

G. RIGHT TO SEEK MODIFICATION

22. The parties reserve the right to apply to the Court for any order modifying this Order or seeking further protections against discovery or other use of protected information. Any protected person requiring further confidentiality protection than is provided by this Order may petition the Court for a separate order governing disclosure of its confidential material.

23. All hearings in this action, including the trial, will presumptively be open to the public, except that this Court will issue further orders as necessary to protect any protected person's or party's protected information from improper disclosure.

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IT IS SO ORDERED.

Dated: November __, 2003

UNITED STATES DISTRICT JUDGE

APPENDIX A

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.	Civil Action No. 1:03CV02169 (RMC) Filed: October 23, 2003

AGREEMENT CONCERNING CONFIDENTIALITY

I,_____, am employed as a _____ by _____. I hereby certify that:

1. I have read the Protective Order entered in the above-captioned action, and understand its terms.

2. I agree to be bound by the terms of the Protective Order entered in the above-captioned action. I agree to use the information provided to me only for the purposes of this litigation.

3. I understand that my failure to abide by the terms of the Protective Order entered in the above-captioned action will subject me, without limitation, to civil and criminal penalties for contempt of Court.

4. I submit to the jurisdiction of the United States District Court for the District of Columbia solely for the purpose of enforcing the terms of the Protective Order entered in the above-captioned action and freely and knowingly waive any right I may otherwise have to object to the jurisdiction of said Court.

5. I make this certificate this _____ day of _____, 2003.

_____

(SIGNATURE)