PRETRIAL BRIEFS

Chancellor's Forum
April 14, 2012
Chancellor Carol L. McCoy

1. **Local Rule § 29.03 Briefs in Non-Jury Civil Cases**
   In all non-jury civil cases, except divorces and General Sessions Court appeals, **trial briefs are required.** At least seventy-two (72) hours (excluding weekends and holidays) before the trial of a civil case, trial briefs shall be submitted to the court and furnished to opposing counsel. If an issue to be litigated at trial has been briefed in pre-trial motions and counsel believes that the motion brief adequately covered the issue, counsel may refer to the court to the motion brief in lieu of briefing the issue for trial. (Emphasis added.)

2. A brief is another way attorneys present their arguments to a judge.

3. A brief is a written summary or statement explaining your position on a particular issue to the judge. The trial brief states the facts. The evidence that you intend to submit, and the legal arguments that you plan to present at trial and typically includes citations to legal authority (such as statutes, case law or rules) to support your position.

4. Structure

   Introduction – type of case and one or two sentences that describe the issue(s)

   Issue(s) presented (if elaboration is necessary)

   Factual History (included evidence that you propose to introduce or know will be introduced)

   Legal Argument

   Sub Issues – emphasize the strength of your arguments by citing to the evidence that you anticipate will be in your favor and explain any **real** weaknesses that you anticipate might harm the outcome that you seek

   Relief Sought

   Conclusion

5. **Preparation:** According to John Day,

A pre-trial brief takes a lot of effort, but it can really set the stage for success before you walk into the courtroom – particularly in a bench trial. Preparing for trial is exhausting so it's tempting to put the pre-trial brief on the backburner. Don't. Give the court all of the information that should be necessary for you to win, and then a little bit more. Acknowledge the weaknesses in your case so the court isn't surprised when you walk into trial with a half as good a case as your brief suggest.

6. **PRETRIAL BRIEF SUBMITTED BY CLAIMANT JOHN SMITH**
http://www.dayontorts.com/Pre-Trial%20Brief.pdf

LEGAL ANALYSIS

Focus on relevant legal issues
Originality and creativity
Effective use of supporting cases and authorities
Effectiveness in dealing with contrary arguments and authorities

WRITING QUALITY

Logical organization
Clarity in expressing arguments
Effectiveness of writing style
Use proper grammar and citation form
Overall appearance of the brief

Three edited samples of briefs

A. Brief in support of Motion to Set Aside a Default Judgment
B. Supplement to Trial Brief
C. Plaintiff's Trial Brief – seeking an injunction

Writing Tips – by Brian A. Garner

http://www.texasbarcle.com/Materials/Events/9211/136669.pdf

[PDF] LEGAL WRITING: LESSONS FROM THE BESTSELLER LIST
https://mcle.wcc.ne.gov/ext/AttachmentHelper.do?id=15549

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al.,
Plaintiffs,

v.

CASE NUMBER: 1:03CV02169 (RMC)

FIRST DATA CORPORATION,
and
CONCORD EFS, INC.,
Defendants.

PLAINTIFFS' PRETRIAL BRIEF

First Data Corporation's proposed acquisition of Concord EFS, Inc. would combine two of the three largest PIN debit networks, further concentrating an already highly concentrated market. The merger would eliminate the existing competition between First Data's NYCE network and Concord's STAR network, leaving only two dominant firms providing PIN debit network services to merchants. Thousands of merchants, and millions of American consumers, will bear the costs of this near-duopoly in the form of higher prices for an important method of payment to the American economy, and ultimately in higher prices for all goods and services.

Through the testimony of a diverse group of leading American retailers, the United States will demonstrate that the provision of PIN debit network services is a relevant product market under the antitrust laws, sound economic theory, and business reality. Because the transaction would combine two of the three largest firms in a highly concentrated market, the transaction is presumed illegal as a matter of law. The United States' merchant witnesses will demonstrate through their testimony about the business realities of the PIN debit market that the defendants cannot overcome this presumption. If completed, this transaction would significantly reduce competition. Expansion by small networks, or entry by new firms, will not overcome the substantial anticompetitive effects this transaction would produce. Indeed, there has been no meaningful entry into the PIN debit market for years.

Defendants' purported efficiencies do not, as a matter of law, overcome the transaction's substantial anticompetitive effects. The efficiencies, and their alleged benefits, are speculative, unsubstantiated, and would not prevent the anticompetitive harm this transaction will produce.

For these reasons, the transaction violates § 7 of the Clayton Act, 15 U.S.C. § 18. To prevent this substantial threat to competition from the merger, the United States seeks injunctive relief under 15 U.S.C. § 25 and Fed. R. Civ. P. 65.

The Parties

First Data Corporation

Concord EFS, Inc.

The Transaction

The PIN Debit Network Services Market

Background

Electronic funds transfer ("EFT") networks were widely introduced in the late 1970s, when bank consortiums formed numerous regional networks to enable their customers to withdraw money at ATMs owned by other banks. . . . Combining STAR and NYCE will eliminate the substantial number of routing conflicts that currently exist between them, reducing opportunities for merchants to reduce their costs through least-cost routing.

PIN Debit vs. Signature Debit

PIN debit has a number of price and quality advantages that allow PIN debit networks to raise prices without fear of loss of transactions to signature debit or other payment mechanisms.. . . .. Similarly, this fall, when STAR announced increased interchange rates, STAR introduced a new "petroleum" category that offered lower interchange rates for gas stations (which also have a relatively low average transaction value), while increasing rates for supermarkets and mass merchandisers, such as Safeway and Target.

PIN Debit Transactions Have Superior Features For Many Merchants

Many merchants also prefer PIN over signature transactions because PIN debit offers a more secure form of payment. .... Consequently, many merchants are reluctant to stop accepting or to discourage customers from using it for fear of incurring higher payment costs and risking alienation of many of their consumers.

The PIN Debit Market Is Highly Concentrated

The three largest PIN debit networks are STAR, NYCE, and Interlink.

PIN Debit Networks Competition

Competition for Financial Institutions

Competition For Merchants.

Dropping a Network

Routing Around a Network

2001-02 PIN Debit Price Increases

Legal Framework for Analyzing a Merger Under Section 7 of the Clayton Act

The Provision of PIN Debit Network Services in the United States Is a Relevant Antitrust Market

The Relevant Product Market Is Defined by Applying the Hypothetical Monopolist Test

The Provision of PIN Debit Network Services Is A Relevant Product Market

The Hypothetical Monopolist Test is Appropriate in a Two-Sided Market

Defendants Do Not Dispute the Results of the Hypothetical Monopolist Test

The Relevant Geographic Market in Which to Assess the Effect of the Proposed Merger Is the United States

The United States and defendants agree that the relevant geographic market in this matter is the United States.

The First Data/Concord Transaction Is Likely to Substantially Reduce Competition

The Transaction is Presumptively Illegal

Defendants Cannot Overcome the Presumption that the Transaction Is Likely To Substantially Reduce Competition

Market Events and Economics Analysis of Data Confirm the Presumption of Illegality

Transaction Will Increase the Financial Risk of Dropping a Network

Reduced Least-Cost Routing Opportunities

Interlink Will Not Prevent the Combined STAR/NYCE from Raising Prices to Merchants After the Merger

Entry Is Not Likely to Occur in a Timely and Sufficient Manner to Prevent First Data from Exercising Market Power

Network Effects Make Timely Entry Unlikely

Combining the Defendants' Merchant Processing Operations Will Impede Entry

The STAR Routing Rule Will Impede Entry

Defendants' Alleged Efficiencies Do Not Cure the Transaction's Competitive Harm

Defendants' Alleged Efficiencies Are Speculative, Not Verifiable

Much of Defendants Alleged Efficiencies Are Not Merger Specific

Defendants' "Better-Rival-to-Visa" Argument Fails

Conclusion

For the reasons stated above, the Court should enjoin the merger between First Data and Concord.

http://www.justice.gov/atr/cases/f201800/201804.htm

1. Have something to say--and think it through.
2. For maximal efficiency, plan your writing projects. Try nonlinear outlining.
3. Order your material in a logical sequence. Use chronology when presenting facts. Keep related material together.
4. Divide the document into sections, and divide sections into smaller parts as needed. Use informative headings for the sections and subsections.
5. Omit needless words.
6. Keep your average sentence length to about 20 words.
7. Keep the subject, the verb, and the object together--toward the beginning of the sentence.
8. Prefer the active voice over the passive.
9. Use parallel phrasing for parallel ideas.
10. Avoid multiple negatives.
11. End sentences emphatically.
12. Learn to detest simplifiable jargon.
13. Use strong, precise verbs. Minimize *is, are, was*, and *were*.
14. Turn *-ion* words into verbs when you can.
15. Simplify wordy phrases. Watch out for *of*.
16. Avoid doublets and triplets.
17. Refer to people and companies by name.
18. Don't habitually use parenthetical shorthand names. Use them only when you really need them.
19. Shun newfangled acronyms.
20. Make everything you write speakable.
21. Plan all three parts: the beginning, the middle, and the end.
22. Use the "deep issue" to spill the beans on the first page.
23. Summarize. Don't overparticularize.
24. Introduce each paragraph with a topic sentence.
25. Bridge between paragraphs.
26. Vary the length of your paragraphs, but generally keep them short.
27. Provide signposts along the way.
28. Unclutter the text by moving citations into footnotes.
29. Weave quotations deftly into your narrative.
30. Be forthright in dealing with counterarguments.
31. Draft for an ordinary reader, not for a mythical judge who might someday review the document.
32. Organize provisions in order of descending importance.
33. Minimize definitions. If you have more than just a few, put them in a schedule at the end--not at the beginning.
34. Break down enumerations into parallel provisions. Put every list of subparts at the end of the sentence--never at the beginning or in the middle.
35. Delete every *shall*.
36. Don't use provisos.
37. Replace *and/or* wherever it appears.
38. Prefer the singular over the plural.
39. Prefer numerals, not words, to denote amounts. Avoid word-numeral doublets.
40. If you don't understand a form provision--or don't understand why it should be included in your document--try diligently to gain that understanding. If you still can't understand it, cut it.
41. Use a readable typeface.
42. Create ample white space--and use it meaningfully.
43. Highlight ideas with attention-getters such as bullets.
44. Don't use all capitals, and avoid initial capitals.
45. For a long document, make a table of contents.
46. Embrace constructive criticism.
47. Edit yourself systematically.
48. Learn how to find reliable answers to questions of grammar and usage.
49. Habitually gauge your own readerly likes and dislikes, as well as those of other readers.
50. Remember that good writing makes the reader's job easy; bad writing makes it hard.

(Source: Legal Writing in Plain English, by Bryan A. Garner)

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

Plaintiff,	)	
vs.	)	Docket No.
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SET ASIDE DEFAULT JUDGMENT

The defendant, LLC, in support of its contemporaneously filed Motion to Set Aside Default Judgment, respectfully states as follows:

1. This Court filed a default judgment against the defendant on December 1, 2008. Tenn. R. Civ. P. 55.02 provides that "For good cause shown, the court may set aside a default by judgment in accordance with Rule 60.02."[1]

2. Default judgments are not favored by the courts. ***Henry v. Goins***, 104 S.W.3d 475, 481 (Tenn. 2003). Default judgments run counter to the judicial system's general objective of disposing of cases on the merits. *Id.* A request to vacate a default judgment in accordance with Rule 60.02 should be granted if there is reasonable doubt as to the justness of dismissing the case before it can be heard on the merits. *Id.*

[1] Because the defendant has moved to set aside the default judgment within thirty (30) days of entry, this Motion has been filed under both Tenn. R. Civ. P. 59.04 and 60.02. As noted in ***Estate of Vanleer v. Harakas***, 2002 WL 32332191 (Tenn. App. 2002) (Appendix 1), the analysis a trial court is to use when disposing of a motion to set aside a default judgment is the same under either Rule 59.04 or Rule 60.02.

3. In ***Henry v. Goins***, the Supreme Court identified three (3) factors which a trial court should consider to determine whether a default judgment should be vacated: (1) whether the default was willful; (2) whether the defendant has a meritorious defense; and (3) whether the non-defaulting party would be prejudiced if relief were granted. ***Id.*** These factors favor setting aside the default judgment issued against the defendant.

4. First, the default was not willful. Shortly after the summons and complaint was served on the defendant, the defendant consulted with its counsel with regard to this case. Aff., ¶ 1. The counsel that the defendant first selected was unable to represent the defendant in this matter because of its prior representation of the plaintiff, Tennessee, Inc. ***Id.*** The defendant therefore contacted a second law firm to represent its interests in this case. ***Id.*** at ¶ 2. Unfortunately, the second counsel that defendant selected had the same conflict of interest. ***Id.*** Ultimately, the defendant was able to retain counsel who did not have a conflict of interest, but this did not occur until after a default judgment had already been filed. ***Id.*** The defendant has at all times intended to defend this case. ***Id.***

5. Second, the defendant has a meritorious defense. Although the plaintiff has pled this action as though it were a simple case involving a duplicate payment, the rent that has paid to the defendant to lease the premises very closely approximates the amount due under the Lease Agreement. ***Id.*** at ¶ 3. The plaintiff has attempted to reduce amounts owed to the defendant by reliance upon two (2) amendments to the Lease Agreement. The defendant, however, had no notice of these unrecorded amendments to the Lease Agreement prior to its purchase of the property (***Id.***) and is not bound by such amendments. The proof will show that very little, if any, refund is owed to the plaintiff.

6. Third, there would be no prejudice to the plaintiff were the Court to set aside the default judgment. The default judgment is not yet final. No execution has issued on the judgment, nor will any execution issue on the judgment prior to this Court's disposition of this Motion. Now that the defendant has retained counsel, this action may proceed swiftly to judgment without the plaintiff suffering any prejudice from this Court's setting aside a default judgment which is only 29 days old.

7. Given these circumstances, this Court should set aside the default judgment and allow this matter to proceed on its merits. In this regard, the defendant would note that the Tennessee Court of Appeals strongly prefers that cases be decided on the merits, and has not been reluctant to reverse a trial court's refusal to set aside a default judgment. *See, e.g.*, ***World Relief Corp. of Nat'l Ass'n of Evangelicals v. Messay***, 2007 WL 2198199 (Tenn. App. 2007) (Appendix 2); ***Reynolds v. Battles***, 108 S.W.3d 249 (Tenn. App. 2003), *perm. app. denied* May 27, 2003; and ***Vanleer***, at *10.

For all of the foregoing reasons, this Court should grant defendant's Motion to Alter or Amend in all respects.

Respectfully submitted,

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT
AT NASHVILLE

Plaintiff,	)	
vs.	)	Docket No.
Defendant.	)	

SUPPLEMENT TO TRIAL BRIEF OF PLAINTIFF/COUNTER-DEFENDANT

Comes now Plaintiff/Counter-Defendant name, by and through counsel, and pursuant to Local Rule 29.03 of the Twentieth Judicial District, and submits this Supplement to its Trial Brief filed with the Court on date (the "Plaintiff's Trial Brief"). Terms not defined herein have the meaning set forth in the Plaintiff's Trial Brief.

In addition to the arguments and authorities set forth the Plaintiff's Trial Brief, Plaintiff directs the Court to a cite case decision of the Delaware Court of Chancery involving the application of the entire fairness standard when the controlling member and operator of a limited liability company engages in a conflict of interest transaction,

. A copy is attached to this Supplement.

In the cited case, , LLC owned a controlling interest in, and was the manager of, the LLC. *Id.* at The Properties was managed, controlled and partially owned by a person . *Id.* Person as manger of the Properties, was given the "power, on behalf of the LLC to do all things necessary or convenient to carry out the "day to day" operation of the Company." *Id.* at The , LLC was created to lease real property from the family and to utilize the same for the operation of a public golf course. *Id.* a The public golf course was to be operated by a third party operator, Corporation, to whom the LLC subleased the real property. *Id.* Pursuant to the sublease, the Corporation had a unilateral right to terminate the sublease after 10 years. *Id.* After 5 years of operation of the facility, Mr. learned that Corporation was likely to exercise such termination right. *Id* at . Due to Mr. s desire to have the underlying real property revert back to the family, Mr. engaged in a series of actions designed to accomplish the same and which resulted in Mr. purchasing at a "sham" auction where there were no competing bidders. *Id.* at The minority investors in brought, *inter alia*, breach of fiduciary duty and duty of loyalty claims against Properties and individually, claiming Mr. engaged in self-dealing by making a series of decisions which placed in an economically vulnerable position, failing to engage third-party buyers of the LLC and actively discouraging a potential third-party buyer of the LLC. *Id.*. Such self-

dealing allowed Mr. to purchase the LLC from the minority for himself at a price below market value. *Id.* at *24-25.

even attempted to play "hardball" when he threatened to sue the minority members if they did not sell their interests to him, a right he arguably had under the terms of Operating Agreement. *Id.* at *22. In response to that threat, the Delaware Court of Chancery stated that a "fiduciary may not play 'hardball' with those to whom he owes fiduciary duties, and our law provides recourse against disloyal fiduciaries or controllers who use their power to coerce the minority into economic submission." *Id.*

exemplifies the consistent application by Delaware courts of the mantra that "inequitable action does not become legally permissible because it is legally possible." *Id.* at (quoting (Del. Ch.). It also shows that individuals who control entities that are, in turn, controlling members of an LLC may be liable to the LLC and the minority members when the individuals engage in self-interested transactions that are not entirely fair to the LLC. *Id.* at 11, 12. Mr. ould not prove the transaction was entirely fair because Mr. could not show that "he performed, in good faith, a responsible examination of what a third-party buyer would pay for the Company." *Id.* Specifically, failed to meet the entire fairness standard because he failed to conduct a "real market check", explore market alternatives, contact credible buyers, engage an appraiser or engage a competent broker to sell the property at issue. *Id.* at *3, 15, 23, 24. Finally, Chancellor tated:

> [Mr.] was not free to create a situation of distress by failing to cause the LLC to explore its market alternatives and then to buy the LLC for a nominal price. The purpose of the duty of loyalty is in large measure to **prevent the exploitation by a fiduciary of his self interest to the disadvantage of the minority.**

Id. at *3 (emphasis added).

Similar to Mr. in and controlled Properties, an entity that controlled pursuant to 's operating agreement, is in control of the day to day operations of and has the right to break any voting deadlock. Properties, and forced into a conflict of interest transaction where and stood to benefit at the expense of the minority investors.

Just as in Properties and failed to meet the entire fairness standard because they failed to conduct a "real market check", explore market alternatives, contact credible buyers or engage a competent broker to sell the property at issue. In fact, beginning with the capital call and more importantly, by putting indebtedness into default through Properties, and engaged in a pattern of conduct which created a situation of distress for the LLC. Further, attempted to attract to make an offer on the property by informing them that was in disarray, certain partners of were having significant financial difficulties and that Messrs and had the necessary voting power to accomplish a sale of the Tract. Further, like in Messrs and withheld information from its "expert", 's listing agent for the property, when soliciting such agent's estimate of value for the property, namely that several appraisals had been done in May of and 's attempt to play "hardball" by threatening foreclosure, suits on personal guarantees, and collection of default rate interest related to the debt held by (and, by extension, and) was an attempt by

"disloyal fiduciaries or controllers who use their power to coerce the minority into economic submission." *Id.* at *22.

For the reasons set forth in the Plaintiff's Trial Brief and this Supplement, respectfully requests that this Court enter judgment in favor of on all issues raised in the First Amended Complaint and grant the relief requested in the prayer for relief.

Respectfully submitted,