

United States of America
v.
U.S. Sugar, et al.

Closing Argument

April 21, 2022



==== THE UNITED STATES ====

DEPARTMENT *of* JUSTICE



Enjoining the Merger Will Protect Competition

1

Commercial Realities Demonstrate The United States Correctly Defined Relevant Markets

2

Distributors Are Not Independent Competitive Constraints

3

USDA Regulation Is No Substitute For Competition

4

Markets Would Become More Vulnerable to Coordination

Defendants' Documents Recognize The Southeast as a Market

Appointment

From: Steve Hines [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=2B11995436D245389F97ED2A944CB00-STEVE HINES]
Sent: 8/17/2018 12:01:02 PM
To: Steve Hines [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2b11995436d245389f97ed2a944cb00-steve hines]; Kae Kaske [kkaske@unitedsugars.com]; David Susla [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b467248ace9f47885c164cd3152d4-David Susla]; Steven Hanson

Subject: SE Product Mix - Status and Next Steps

Show Time As: Busy

Please let me know ASAP if this time/date will not work for you.

Let's get the smaller team together for an update and re-configure our next steps.

After a conversation with Bob Buker, Matt would like us to identify the potential contribution of a base case facility:

Attack the market like Chicago

the best product mix to produce at this facility.

Oh and by the way, he wants this as soon as we possibly can.

- 1)Merits of marketing with United vs 50/50 JV with a distributor (drafted, done)
- 2)Potential distribution cost savings of unconstrained product mix at Clewiston vs current mix (need cane-only data to complete)
- 3)Potential benefit of selling more high VCM products at the expense of low VCM products (need potential incremental high VCM sales)
- 4)Net contribution of base case scenario above.
- 5)Potential distribution cost savings of packing/producing/storing in Birmingham/Atlanta.

PLAINTIFF EXHIBIT
PTX380
1:21-cv-01644

CONFIDENTIAL

UNITED_00657035

USC Southeast Strategy

USC Southeast Strategy

Page 34 of 89

Industrial - Similar to Chicago Strategy

- Focus sales on higher NSP line-items (50# FG and Liquid)

Consumer / Retail

- Focus on additional customers / lanes in the key markets for volume and consumption while maintaining

Industrial - Similar to Chicago Strategy

- Focus sales on higher NSP line-items (50# FG and Liquid)

Needs

- Additional sales manager(s) focused on small and medium accounts (dependent on increased demand)
- Additional supply chain capacity and flexibility/swing capacity (50# FG, liquid, supersacks)(dependent on increased demand)

SUGARS
2462

Commercial Reality: Defendants Consider Regional Markets

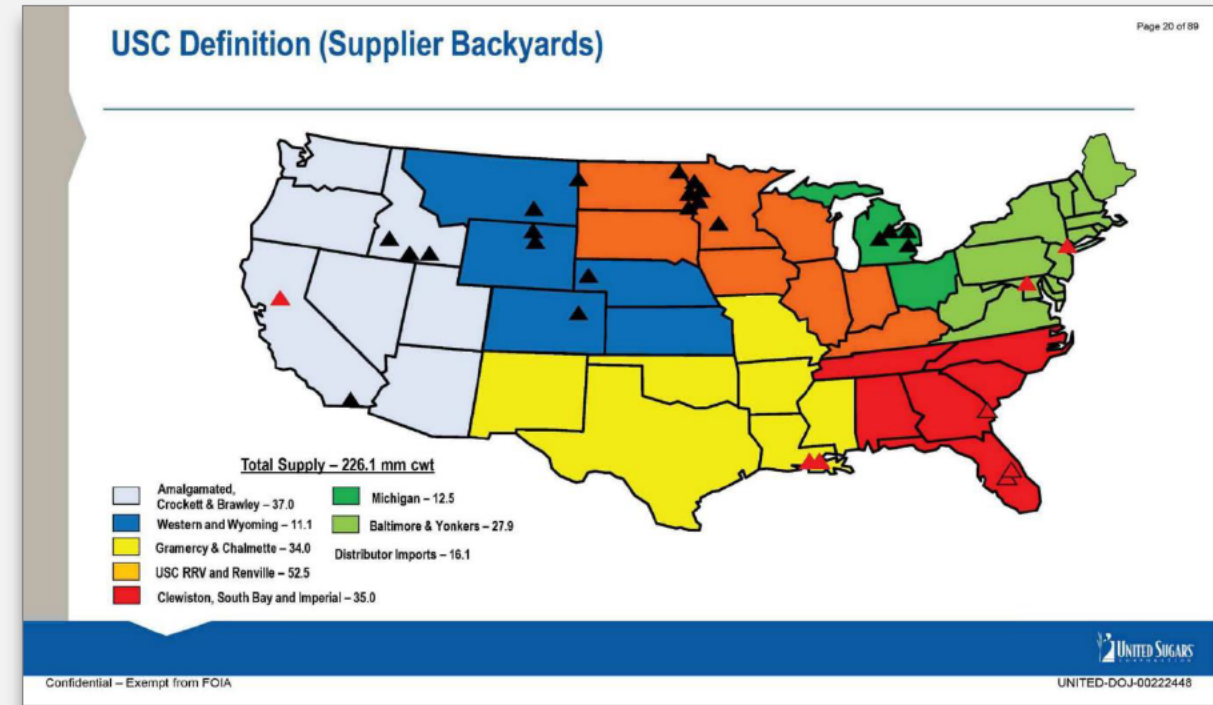


Dirk Swart
Executive VP of Sales



- Q.** All right. Now this is a map created by United that shows markets where different sugar producers have freight cost advantages, right?
- A.** Yeah, it's a map that reflects groups of states and identifies the producing locations within those groups of states.
- Q.** And United's secondary of high concentration of sugar sold is in the southeast market; right?
- A.** Yes, that's correct.
- Q.** And customers located in a southeast market predominantly get sugar from a Clewiston refinery because Clewiston is the lowest cost way to get sugar to United's customers that are located in the southeast, right?
- A.** Yes, that's right.

Dirk Swart (United Sugars), Trial Tr. at 149:14-19, 151:17-24 (Apr. 18, 2022)



Commercial Reality: Defendants Consider Regional Markets



Jeana Hines
Vice President of Sales



Q. Imperial would have an advantage because Imperial's cost to supply sugar to Miller Coors would be less than the competition, right?

A. That was his estimate, yeah.

Q. Now the competitors he is estimating this message, he's estimating freight cost for LSR, ASR and United, right?

A. Yeah.

Jeana Hines (Imperial), Trial Tr. at 234:4-10 (Apr. 18, 2022)

Figure 11. Regions defined in Imperial's internal document, as produced in Dr. Rothman's report

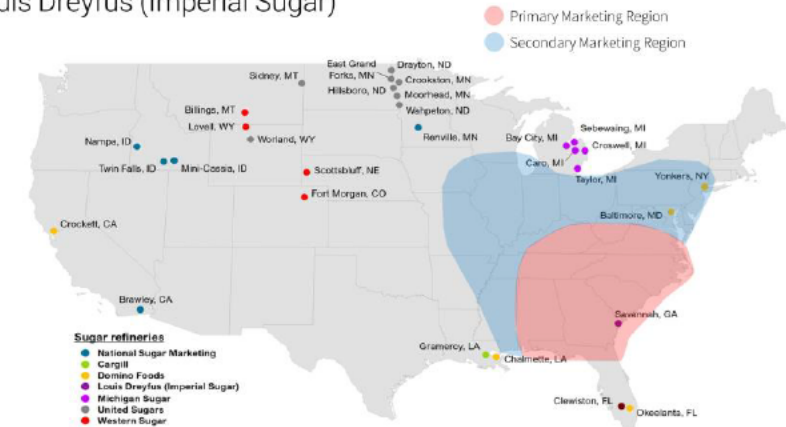
Market Environment:
Transportation inflation continues to increase our distance to deficit areas



Our Sugar Shipments by Region

	2013	2014	2015	2016	2017	2018	Grand Total
Southeast (AL, FL, GA, NC, SC)	39%	42%	40%	41%	41%	44%	41%
Southwest (MS, AR, LA, OK, TX)	17%	16%	19%	16%	17%	16%	17%
Mid-Atlantic (VA, MD, WV, DE, NJ, PA)	16%	14%	15%	13%	14%	13%	14%
Kentucky/Tennessee	11%	8%	9%	11%	13%	13%	11%
Ohio/Michigan/Indiana	6%	6%	8%	10%	8%	7%	8%
Midwest	7%	7%	6%	5%	3%	4%	6%
Northeast (NY, VT, NH, MA, CT, RI, ME)	2%	2%	2%	4%	3%	1%	2%
Export	2%	5%	0%	0%	0%	0%	1%
West Coast	0%	0%	0%	0%	0%	0%	0%
Mountain	0%	0%	0%	0%	0%	1%	0%
New England	0%	0%	0%	0%	0%	0%	0%
Alaska/Hawaii	0%	0%	0%	0%	0%	0%	0%
Grand Total	100%	100%	100%	100%	100%	100%	100%
Total Cwt Shipped	15,154,339	15,875,952	16,319,274	15,290,395	11,529,773	8,077,290	82,247,022

Louis Dreyfus (Imperial Sugar)



Industry Participants Recognize Regional Markets

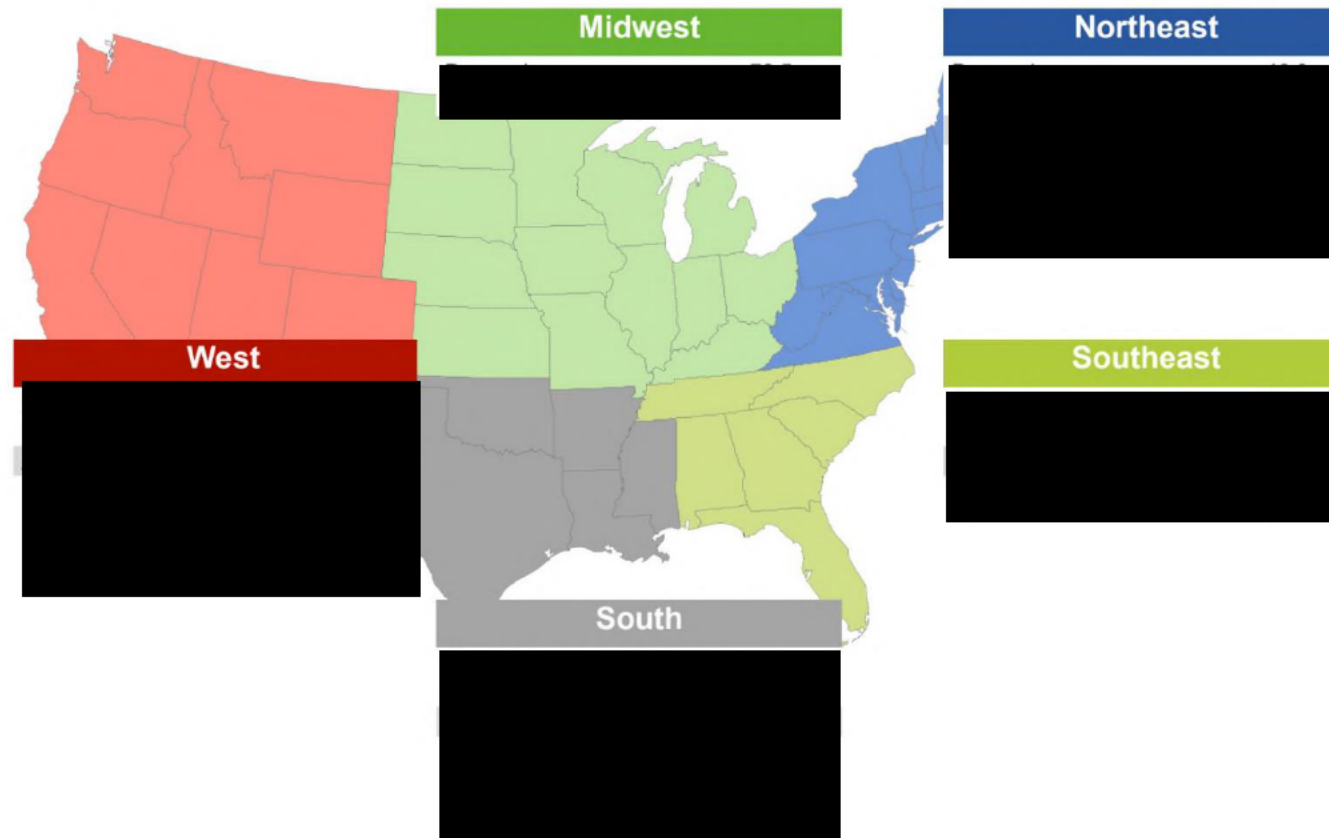
FLORIDA CRYSTALS CORPORATION

CONFIDENTIAL TREATMENT REQUESTED



US demand and ASR's refining capacity by region

mm cwt, dry basis



Note: 260 days represents 5/2 refining schedule. 312 days represents 12/2 refining schedule. 340 days represents theoretical maximum refining schedule

(a) Includes dry bulk, liquid bulk, consumer packaged and industrial packaged products. Excludes specialty blends and industrial natural products

(b) Assumes Baltimore and Yonkers daily melt rates at 65k cwt and 43k cwt, respectively

FCC-00001574

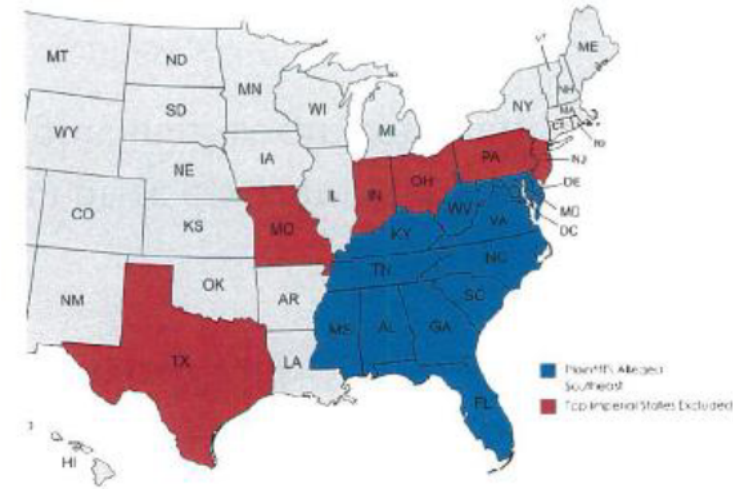
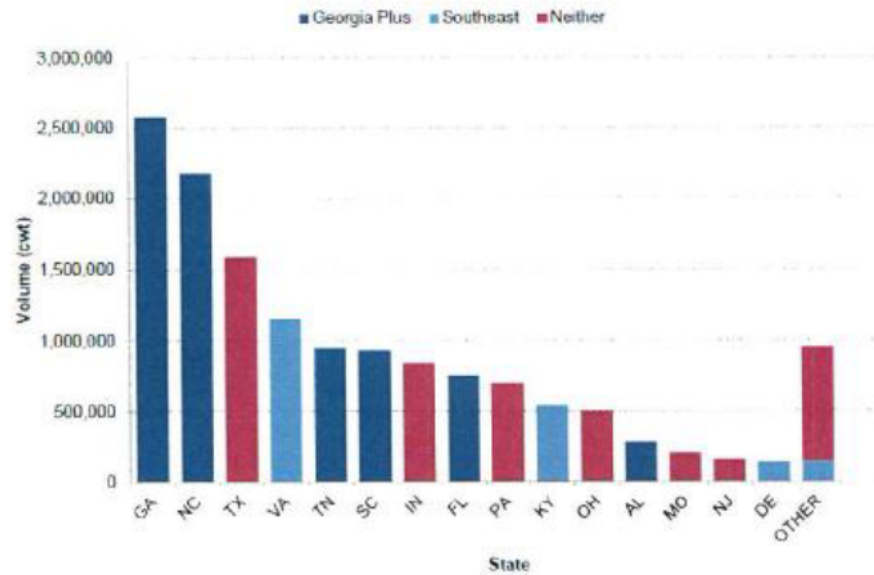
Source: Demand by region represents 2018 estimates provided by McKeaney-Flavell.

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Defendants Incorrectly Focus On Where the Merging Parties Do Business

Plaintiff Ignores States Where Imperial Sells More Sugar

Figure 10. Imperial's 2021 sales by state





United States v. Philadelphia Nat'l Bank,

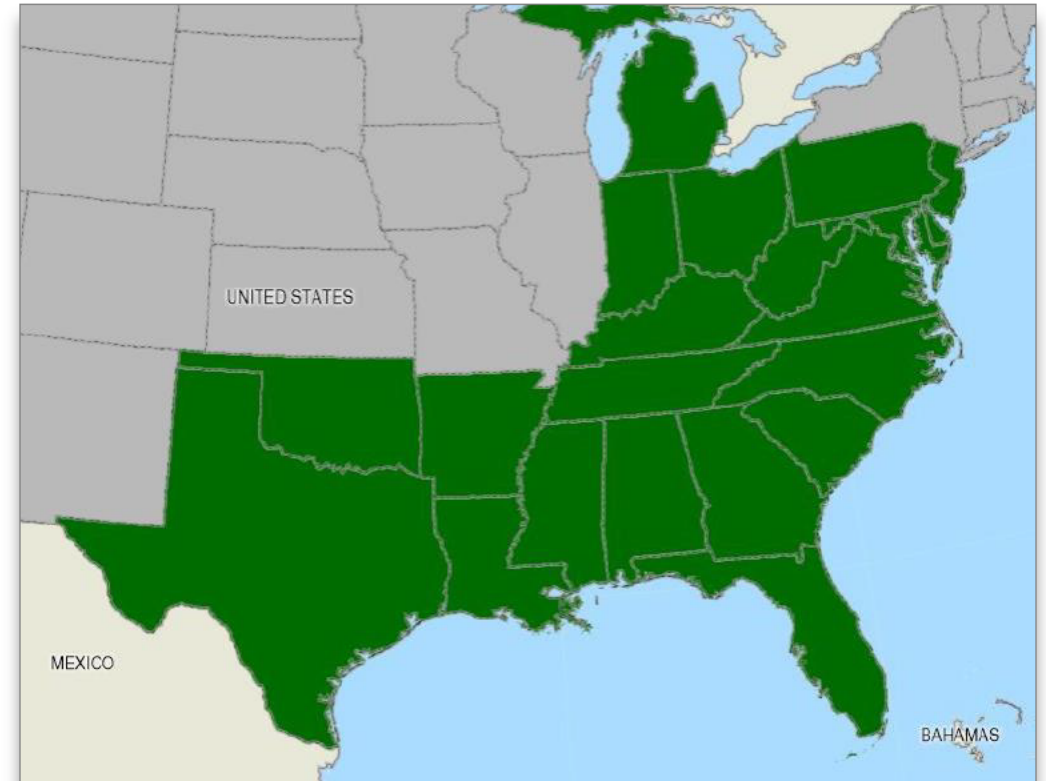
374 U.S. 321, 357 (1963)

“The proper question to be asked in this case is **not where the parties to the merger do business** or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate.”

Competitive Options Vary in Dr. Hill's Competitive Overlap Region

Dr. Hill includes states that clearly do not have similar competitive conditions:

- Michigan Sugar has a 57% market share in Michigan and a 44% market share in Ohio, whereas the company only has a 1% share in the two geographic markets alleged in the complaint
- LSR's market share in Texas is approximately twice as large as the company's share in the markets alleged in the complaint



Law is Clear: Focus on Where Competitive Effects Will be Greatest



United States v. Philadelphia Nat'l Bank,

374 U.S. 321, 357 (1963)

“The proper question to be asked in this case is **not** where the parties to the merger do business or **even where they compete**, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate.”

Law is Clear: Focus on Where Competitive Effects Will be Greatest

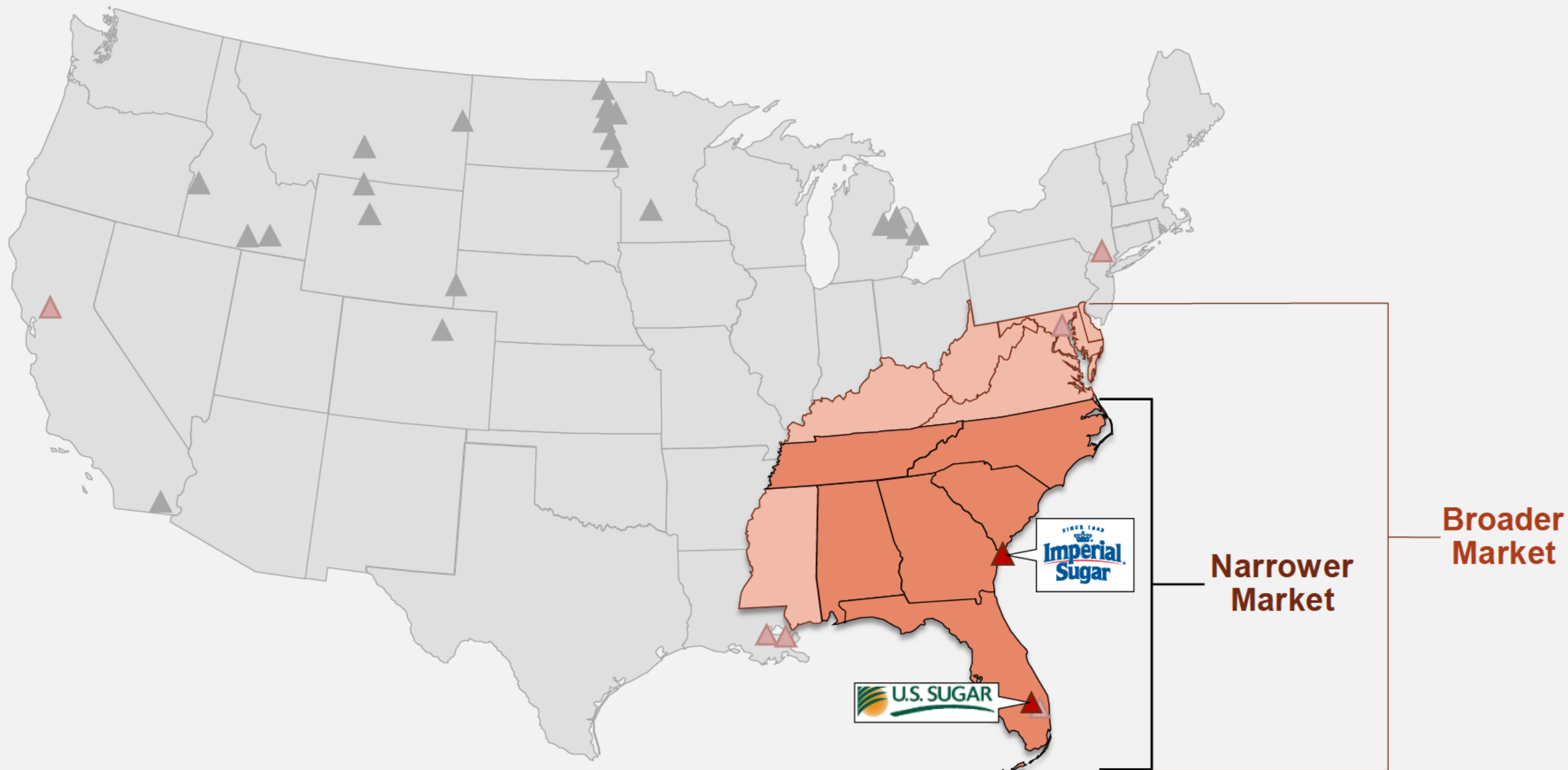


United States v. Philadelphia Nat'l Bank,

374 U.S. 321, 357 (1963)

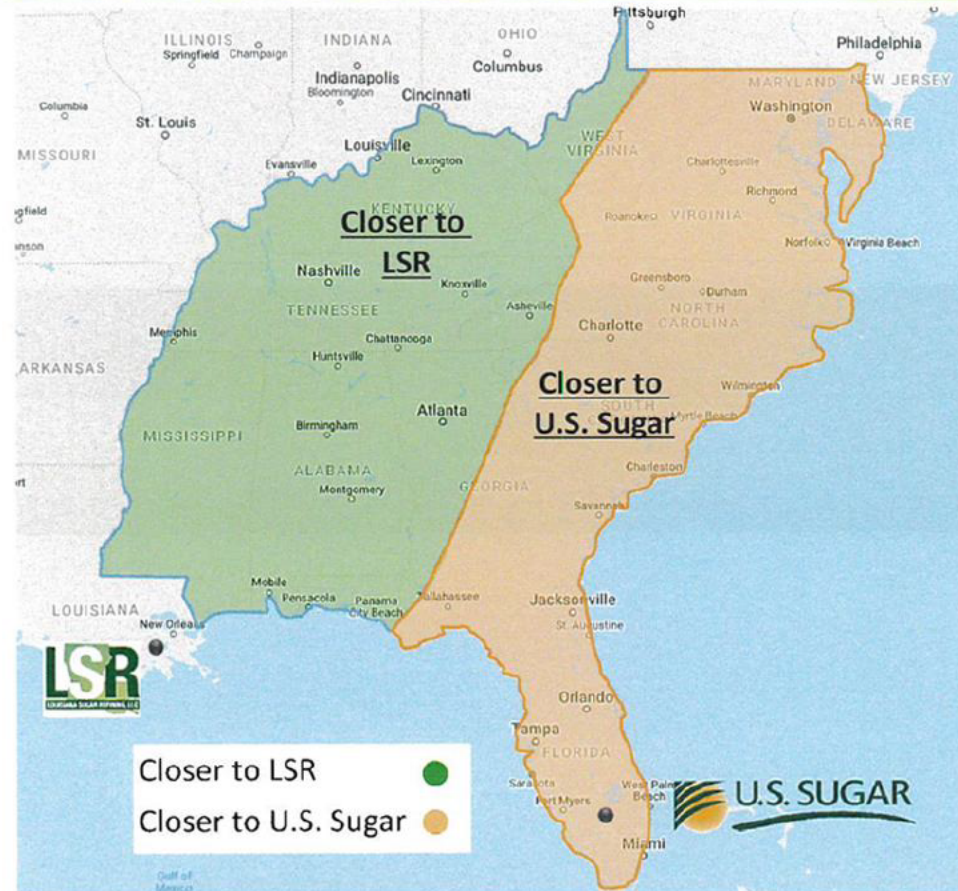
“The proper question to be asked in this case is not where the parties to the merger do business or even where they compete, **but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate.**”

Evidence Supports Relevant Geographic Markets



Defendants Pretend LSR is Not in the Market

Why Isn't LSR In The Market?



Customer-Based Markets



FTC v. Hackensack Meridian Health, Inc.,

30 F.4th 160, 2022 WL 840463, at *2 (3d Cir. Mar. 22, 2022)

“Some Bergen County residents seek care in nearby Northern New Jersey counties—e.g., Hudson, Essex, and Passaic Counties—and New York . . . The FTC proposed a relevant geographic market defined by all hospitals used by commercially insured patients who reside in Bergen County. This means that any hospital that serves a resident of Bergen County is included as a market participant even if that hospital is not in Bergen County. **The FTC’s proposed geographic market is thus patient-based, i.e., it is defined by the location of patients rather than the location of hospitals.**”

LSR is in the Relevant Markets



Market Shares

Market Shares of Refined Sugar Producers by CWT

Calendar Year 2021

	United	Imperial	ASR	LSR	CSC	NSM	Michigan	Western	Zucarmex	Sucro Sourcing	L&S	Imports
Narrower Market	34%	20%	25%	7%	3%	2%	0%	0%	0%	0%	0%	7%
Broader Market	29%	17%	28%	7%	6%	3%	1%	1%	0%	0%	0%	7%

So are CSC, Beet Growers, and Imports



Market Shares

Market Shares of Refined Sugar Producers by CWT

Calendar Year 2021

	United	Imperial	ASR	LSR	CSC	NSM	Michigan	Western	Zucarmex	Sucro Sourcing	L&S	Imports
Narrower Market	34%	20%	25%	7%	3%	2%	0%	0%	0%	0%	0%	7%
Broader Market	29%	17%	28%	7%	6%	3%	1%	1%	0%	0%	0%	7%

Commercial Reality: Sugar Flows at a Cost



Aaron
Riippa



Q. And to your understanding, why does that matter?

A. From a freight perspective, sugar is contracted and measured off of a delivered price, and so the freight component although not the biggest part, but still can be significant, is – would allow them to remain competitive in a given area.

Aaron Riippa (General Mills), Trial Tr. at 80:10-15 (Apr. 18, 2022)



Chris
Simons



Q. In terms of – we talked about, you know, freight being a, you know, a significant factor that you consider. What role does freight play in determining, you know, which geographic areas you might be interested in marketing to?

A. Most part, freight rates are [linear]. Further mile – more miles you go, the [] cost there is, whether it be truck or rail. Another key component is the facility's ability to turn our railcars, and the amount of time a railcar is away from our facility. Just simple math, if my railcar leaves Renville, Minnesota, and it takes 40 days to come back, versus my ability to ship a customer and I get it back in 20, I can turn it twice to the same railcar that would be for one railcar going 40 days. That's a major decision point for us when we are looking at freight.

Chris Simons (NSM), Trial Tr. at 347:6-19 (Apr. 18, 2022)

Commercial Reality: Sugar Flows at a Cost



**Matthew
Kling**
COO



- Q.** But the bottom line, depending on the circumstances, it can make business sense to ship sugar more than 1,000 miles to Florida from your facilities in the Midwest; right?
- A.** It doesn't make sense.
- Q.** Then why would you do it?
- A.** All right. Let me – I'll start over again. We would do it because we don't have the inventor[y] in our warehouses closer to the destination. And what our customer-service people do, when an order comes in, they will schedule it against a facility that has the inventory. And my suspicion here is we did not have the inventor in Lithia or Garland or we could not get it from any of the cane suppliers in Florida, so we made a decision United was the supplier business decision [to] ship it from Chicago to satisfy the customer paragraph.
- Q.** And that business decision made sense for Batory, right?
- A.** We took a loss.

Matthew Kling (Batory Foods), Trial Tr. at 337:10-338:4 (Apr. 18, 2022)

Commercial Reality: Sugar Flows at a Cost

From: Eric Speece <espeece@unitedsugars.com>
Sent: Wednesday, May 15, 2019 3:23 PM
To: KERNAN Gwendolyn <gwen.kernan@danone.com>
Cc: GELLON Cyril <Cyril.GELLON@danone.com>; BUENO ATILIO Rodrigo <rodrigo.atilio@danone.com>; VERT Brice <brice.vert@danone.com>
Subject: RE: [EXTERNAL] 2020 Liquid Sugar Quote Sheet.xlsx

Appointment
From: Eric Speece [/O=EXCHANGE/EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=FF5923AFB7B344879ACF4F144E4A656C-ERIC.G.SPE]
Sent: 5/20/2019 9:47:32 AM
To: Eric Speece [/o=Exchange/Labs/Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=recipients/cn=FF5923afb7b344879acf4f144e4a656c-eric.g.spe]; KERNAN Gwendolyn [gwen.kernan@danone.com]
Subject: [EXTERNAL] 2020 Liquid Sugar Quote Sheet.xlsx
Location: I'll call you
Start: 5/22/2019 3:00:00 PM
End: 5/22/2019 4:00:00 PM
Show Time As: Busy

From: KERNAN Gwendolyn [mailto:gwen.kernan@danone.com]
Sent: Friday, May 17, 2019 11:00 AM
To: Eric Speece
Subject: RE: [EXTERNAL] 2020 Liquid Sugar Quote Sheet.xlsx

Thanks for sending this Eric. Do you have time this afternoon if you would like to send an invite. Thank you.

From: Eric Speece <espeece@unitedsugars.com>
Sent: Wednesday, May 15, 2019 3:23 PM
To: KERNAN Gwendolyn <gwen.kernan@danone.com>
Cc: GELLON Cyril <Cyril.GELLON@danone.com>; BUENO ATILIO Rodrigo <rodrigo.atilio@danone.com>; VERT Brice <brice.vert@danone.com>
Subject: RE: [EXTERNAL] 2020 Liquid Sugar Quote Sheet.xlsx

Hello Gwen,

Thank you for your feedback and discussion on our quote for 2020. I always like to lead with my best price taking into consideration the market and our competition.

We do have a significant freight disadvantage over one competitor in Savannah, GA which is why I went with a much lower FOB bulk basis number. Given your recent feedback, we have lowered our FOB bulk basis down to a \$35/cwt. Included in the \$35/cwt is the industry standard of \$2/cwt liquid premium. Hence the true bulk basis is a \$33/cwt, which given the current average NY 16 2020 strip at \$26.26 it is the equivalent of a \$4.24 EO. I hope you view this as a very competitive EO equivalent and most importantly a competitive delivered price to maintain the business at Jacksonville, FL.

Offer good through 5-24-2019

Attached please find our revised quote.

Best,

Confidential – Exempt from FOIA

Thank you for your feedback and discussion on our quote for 2020. I always like to lead with my best price taking into consideration the market and our competition.

We do have a significant freight disadvantage over one competitor in Savannah, GA which is why I went with a much lower FOB bulk basis number. Given your recent feedback, we have lowered our FOB bulk basis down to a \$35/cwt. Included in the \$35/cwt is the industry standard of \$2/cwt liquid premium. Hence the true bulk basis is a \$33/cwt, which given the current average NY 16 2020 strip at \$26.26 it is the equivalent of a \$4.24 EO. I hope you view this as a very competitive EO equivalent and most importantly a competitive delivered price to maintain the business at Jacksonville, FL.

PLAINTIFF EXHIBIT
PTX395
1:25-cv-01644

UNITED-DJ-00129857

Self-Serving Party Testimony Does Not Rebut Plaintiff's Evidence

Ordinary course documents showing a national market?

Ordinary course documents showing NSM, LSR or distributors will squelch competition?



American Crystal Sugar Co. v. Cuban-Am. Sugar Co.,

259 F.2d 524, 526-529 & n.6 (2nd Cir. 1958)

- Cuban-American sought to buy American Crystal Sugar—beet sugar seller
- Regional markets: ten-state area in the Midwest called the “River Territory”
- “Locational advantage” and “favorable return area” in markets in close proximity to factories
- Cited in Supreme Court’s decision in *Philadelphia National Bank*:
“The factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries. See, e. g., *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F.Supp. 387, 398 (D. C. S. D. N. Y. 1957), aff'd, 259 F.2d 524 (C. A. 2d Cir. 1958).”

Distributors Do Not Constrain Prices



Allen-Myland, Inc. v. Intern. Business Mach. Corp.,

33 F. 3d 194, 202 (3rd Cir 1994)

“Thus, to the extent that IBM had the power to set prices, that power would not be diminished, or at most would only be slightly diminished, by its sales to leasing companies rather than end users. Since these purchases are already in the relevant market, it was double counting also to include them as part of the leasing market.”



United States v. Anthem, Inc.

236 F. Supp. 3d 171, 206 (D.D.C. 2017)

“[I]f the hypothetical monopolist in the relevant market were to raise prices on all plans sold to national account customers, prices would go up on the exchanges as well, since the exchanges are just an alternative means to bring plans sold by the existing carriers in the market to the customer.”

Distributors Do Not Constrain Prices

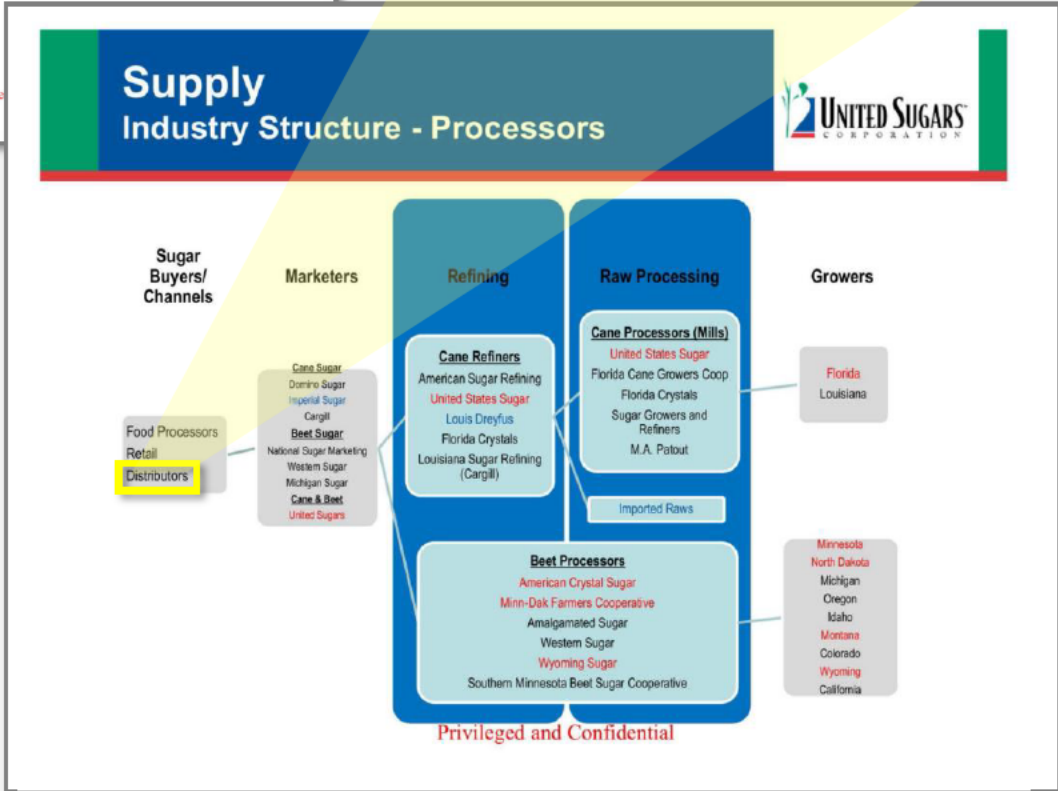
United States Sugar Corporation
4(d)-1
April 5, 2021

US Sugar Market
As it relates to Seine
February 2020

Privileged and Confidential

Distributors

Plus Distributors – 0% of supply



- Supply Industry Structure - Marketers**
- **United Sugars – About 29%**
 - United States Sugar Corporation
 - American Crystal Sugar Company
 - Minn-Dak Farmers Cooperative
 - Wyoming Sugar Company
 - **Domino Sugar – About 29%**
 - American Sugar Refining
 - Florida Crystal Sugar
 - **National Sugar Marketing (NSM) – About 14%**
 - Amalgamated Sugar
 - Southern Minnesota Beet Sugar Cooperative
 - **Cargill – About 8%**
 - Louisiana Sugar Refining (LSR)
 - **Imperial – About 6%**
 - Louis Dreyfus
 - **Michigan – About 6%**
 - **Western Sugar – About 2%**
 - **Plus Imports – About 7%**
 - **Plus Distributors – 0% of supply**
- Privileged and Confidential

Distributors Do Not Constrain Prices



**Matthew
Kling**
COO

Q. Are you able to compete with United on price in Chicago for, say, 50-pound bags?

A. No, we're not.

Q. And why not?

A. They're a producer. They control the supply chain from the field to the – basically to the delivery point. They're producing and making and bagging and shipping sugar. We're buying the sugar, and, you know, we're adding our margin on to it.



Matthew Kling (Batory Foods), Trial Tr. at 336:16-24 (Apr. 18, 2022)

“Production and Sale” Markets are Common

“***production and sale*** of beer in the United States and in various sections thereof”

United States v. Pabst Brewing Co., 384 US 546, 548 (1966)

“the relevant product market is the ***production and sale*** of beer, and the six New England States compose the geographic market”

United States v. Falstaff Brewing Corp., 410 US 526, 527 (1973)

“the ***production and sale*** of coal in either or both of two geographic markets”

United States v. General Dynamics Corp., 415 US 486, 490 (1974)

“the ***production and sale*** of florist foil may rationally be defined . . . as comprising the relevant line of commerce”

Reynolds Metals Co. v. FTC, 309 F.2d 223, 227 (D.C. Cir. 1962)

“the relevant product is the development, ***production and sale*** of 4” submersible turbine pumps”

United States v. Franklin Electric Co., 130 F. Supp.2d 1025, 1026 (W.D. Wisc. 2000)

USDA Sugar Program Not Designed to Deter and Remedy Competitive Harm



Q. Dr. Fecso, does the USDA dictate the prices offered by a refined sugar producer or are those prices the result of negotiations between sugar producers and their customers?

A. USDA does not dictate prices.

Q. And when prices do come up, Dr. Fecso, would you ever take pricing information that one sugar processor has shared with you and share it with another sugar processor?

A. No.

Q. Dr. Fecso so, based on your long ten-year at the USDA as defendant's counsel described, will the USDA always make the same decision with regards to the sugar program when faced with similar market conditions and circumstances?

A. No, decisions are based on the administration at the time.

Q. Okay. Dr. Fecso, so, if US Sugar does acquire Imperial, would the USDA be able to require United to offer lower prices?

A. No, that's not in our jurisdiction.

Q. How did you come to form your belief that the transaction could result in efficiency?

A. It was based on the conversation I had with Matt Wineinger and Mike Gorrell and Elaine Wood and Robert Buker the day before they announced the transaction, they set up a meeting with me and we thoroughly went over what the plan was for this. And knowing these people as long as I have, it sounded – I had high faith that it was good.

Q. Did the individuals that you just mentioned, Dr. Fecso so, did they show you any data to support their claims about the purported efficiency?

A. No.

Dr. Barbara Fesco (USDA), Trial Tr. at 885:18-21, 886:9-12, 879:3-6, 881:2-7, 877:11-22 (Apr. 20, 2022)

Mergers in Regulated Industries Not Immune From Scrutiny



United States v. Philadelphia Nat'l Bank,

374 U.S. 321, 372 (1963)

Section 7 requires “that the forces of competition be allowed to operate within the broad framework of governmental regulation of the industry.”



Georgia v. Pennsylvania R.R. Co.,

324 U.S. 439, 460–61 (1945)

Even in an industry where prices are directly regulated and restricted to a “zone of reasonableness,” anticompetitive conduct “within that zone” can “constitute violations of the anti-trust laws.”

Fewer Incentives to Compete = Coordinated Effects

Horizontal Merger Guidelines



U.S. Department of Justice
and the
Federal Trade Commission

Issued: August 19, 2010

7. Coordinated Effects

Coordinated interaction includes a range of conduct. . . Coordinated interaction alternatively can involve parallel accommodating conduct not pursuant to a prior understanding. Parallel accommodating conduct includes situations in which each rival's response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms. **Coordinated interaction includes conduct not otherwise condemned by the antitrust laws.**

Markets Would Become More Vulnerable to Coordination



United States v. H & R Block, Inc.,

833 F. Supp. 2d 36, 77 (D.D.C. 2011)

“Since the government has established its prima facie case, the burden is on the defendants to produce evidence of ‘structural market barriers to collusion’ specific to this industry that would defeat the ‘ordinary presumption of collusion’ that attaches to a merger in a highly concentrated market.”



FTC v. H.J. Heinz Co.,

246 F.3d 708, 715 (D.C. Cir. 2001)

Coordinated effects refers to rivals “coordinat[ing] their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels” and is likely “where rivals are few.”

United Doesn't Like Customers Using Rivals' Bids to Negotiate



Dirk Swart

Executive Vice
President of Sales



Q. And you testified at your deposition that you believe customers use the pricing that they get from alternative suppliers to leverage the price down from United, right?

A. That's correct.

Q. And this strategy of customers using pricing from competitors to leverage prices down is proven to be destructive for United, right?

A. No, that's correct.

Q. And you believe this dynamic has been destructive because prices get pushed down, correct?

A. During the negotiation process, that's correct.

Q. Now, if you had better information about what your competitor's actual prices were, you could better avoid these destructive situations, couldn't you?

A. Yes.

Dirk Swart (United Sugars), Trial Tr. at 159:23-160:8, 160:24-171:2 (Apr. 18, 2022)

Dr. Hill's Coordinated Effects Testimony Ignored Commercial Reality

>> On Feb 15, 2021, at 3:50 PM, Eric Speece <espeece@unitedsugars.com>
>> I will call him rather than put in writing.

>> From: Commodity Information Inc. <rich@commodinfo.com>
>> Sent: Monday, February 15, 2021 3:26 PM
>> To: Eric Speece <espeece@unitedsugars.com>
>> Subject: [EXTERNAL] severe winter weather, FY22 pricing

>> Any action in FY22?
>> Has United put a number on it yet?
>> No word back from other processors/refiners, I'll send along indications.

Subject: Re: crop updates, pricing

Just talked with United: prices unchanged, spot and forward, Hello!?
But their head honcho is on vacation, bad timing.

From: Commodity Information Inc. <rich@commodinfo.com>
Sent: Monday, February 15, 2021 3:26 PM
To: Eric Speece <espeece@unitedsugars.com>
Subject: [EXTERNAL] severe winter weather, FY22 pricing
Only about 40% covered. But expect big action over the next month, 20+% add to bookings, and at that time expect to raise prices, and not by just a dollar.
Saying they're not feeling the heat from Renville that they did last year, or from Cargill.

Anything new of interest on the pricing front?
Hearing beets well sold, except possibly NSM (80-85%), and prices firm to higher. Michigan \$38.5+, selective 90+%; Western \$36.75, mostly out of the market, 90+%.

On Sep 21, 2020, at 1:13 PM, Eric Speece <espeece@unitedsugars.com> wrote:

Thanks, Rich.

We are firm at \$36.50 (no change) and now \$38.50 on cane (an increase of \$0.50/cwt) and yes you heard correctly we are 90% sold.

From: Commodity Information Inc. <rich@commodinfo.com>
Sent: Thursday, June 17, 2021 2:42 PM
To: Alan M Henderson <Alan.Henderson@asr-group.com>
Subject: Re: Update on U.S. Sugar Imports & Crop Development

United reportedly (I'll talk with them tomorrow) holding \$36.50 gross, bigs are booking and getting of about a buck or less, that's less than last season.

From: Alan M Henderson <Alan.Henderson@asr-group.com>
Sent: Wednesday, February 17, 2021 2:09 PM
To: Adam Whittaker <Adam.Whittaker@asr-group.com>
Subject: FW: No 16

FYI below from Rich Wistisen.....United is usually pretty upfront with Rich.

See comments below from Rich.

My real concern is the one beet supplier starting at \$35 net, likely NSM and in my opinion it is not necessary given they have the freight advantage into the Midwest. May want to communicate pricing earlier than the colloquium to send a msg.

From: Alan M Henderson [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=41EF73BBB33E4C2E822BE5C8A6A1509D-ALAN HENDER]
Sent: 7/12/2021 4:21:08 PM
To: Adam Whittaker [Adam.Whittaker@asr-group.com]; Brian Dahlman (Brian.Dahlman@asr-group.com) [Brian.Dahlman@asr-group.com]; Kevin M Williams [Kevin.Williams@asr-group.com]
Subject: FW: pricing, bookings

FYI below.....United price increase. Rich is thinking \$2.00 increase but no official word yet. Let's see if we can hunt something down.

Subject: Re: [EXTERNAL] severe winter weather, FY22 pricing

FY22:
NSM in the market at \$34.50
book, little interest ASR expected
FY21.

But that's not how Cargill plays the game.
And that's the concerning part heading into FY22 booking season: improved and/or abundant supply in the hands of the market's most aggressive sellers.

On Feb 15, 2021, at 2:32 PM

Rich,

I hear ya on the winter.

I'll say we were surprised by

We are still at the \$36.50 and \$38.50 with zero problems selling at those values. I do not anticipate any changes to our prices, but we have not formally decided.

On Aug 12, 2020, at 5:36 PM, Alan M Henderson <Alan.Henderson@asr-group.com> wrote:

Good competitive intelligence. Cargill moving up to \$37.75 is suspicious as Kraft Heinz and Mars have noted them being lower. Maybe they are holding some bids open a few more days.

Imperial being sold out gives us justification for a premium in Oct/Dec. vs. Cy2021 business.

A656C-ERIC G. SPEE

96-Dirk Swart]; Steven Hanson

95d-Steven Hans]

United Already Pulls Punches to Avoid Lower Prices



**Stephen
Hanson**

Director of Industrial
Products Marketing



Q. And the collective view was balanced moves would initiate relatively smaller competitive reactions; right?

A. Yes, that's what it says, yes.

Q. So be balanced on taking market share to make sure that the price response wasn't too strong, right?

A. The expectation was to work with customers to not elicit too strong of a reaction because when you're taking share with customers or moving into selling new customers, sometimes price has to drop for us to convert that customer over.

Q. So stay balanced so the price doesn't drop too much; right?

A. That's right.

Stephen Hanson (United Sugars), Trial Tr. at 201:20-202:7 (Apr. 18, 2022)

United and ASR Already Signaling to Competitors

From: Alan M Henderson <Alan.Henderson@asr-group.com>
Sent: Thursday, June 18, 2020 1:41 PM
To: Adam Whittaker <Adam.Whittaker@asr-group.com>
Subject: RE: [REDACTED] - quote needed

I would love to get aggressive here but Rob S. does not want to lower the bar with [REDACTED] at this time. We would like to avoid sending a signal out to competitors that we are chasing business and lowering pricing off the standard \$41.00 bulk basis.

From: Dirk Swart [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=0A9B0A57FC25490FB3A612C6A0977196-DIRK SWART]
Sent: 11/16/2020 12:38:21 PM
To: Eric Speece [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=ff5923afb7b344879acf4f144e4a656c-Eric G. Spe]
CC: Steven Hanson [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a2c972d22e70498fb0c6c7480dbdb95d-Steven Hans]
Subject: Re: [EXTERNAL] labor, storage, Florida, pricing

I'd like him to hear \$36.50/\$38.00 and probably moving higher based on the strength of the position. Stop short of saying anything about being oversold

No COVID disruptions to speak of at this time

> On Nov 16, 2020, at 11:25 AM, Eric Speece <espeece@unitedsugars.com> wrote:
>
> Should I let him know we are out of the market for the time being or selectively selling
> I have not heard we have had any issues at the plants due to covid.
>
> Thanks,
>
> ERIC

From: Eric Speece [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=FF5923AFB7B344879ACF4F144E4A656C-ERIC G. SPE]
1/20/2021 8:33:02 PM
Dirk Swart [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=0a9b0a57fc25490fb3a612c6a0977196-Dirk Swart]; Steven Hanson [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a2c972d22e70498fb0c6c7480dbdb95d-Steven Hans]
FW: [EXTERNAL] storage, acreage, prices

teve,

See comments below from Rich.

My real concern is the one beet supplier starting at \$35 net, likely NSM and in my opinion it is not necessary given they have the freight advantage into the Midwest. May want to communicate pricing earlier than the colloquium to send a msg.

I'll plan on calling him tomorrow as it is always easier than black and white. Let me know if there are any key messages you would like me to relay on. I saw the mail from Dirk and Barth on rail but I have not seen the truck shortages across Ted's an my book.

Eric

From: Rob Sproull [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9703BD2BD68D4EA7B221D07492159D5D-ROB SPROULL]
Sent: 1/8/2020 5:16:05 PM
To: Alan Henderson [Alan.Henderson@asr-group.com]
Subject: RE: [REDACTED] Oct.- Dec. 2020

I think it's really important we signal to the market that there's still going to be tightness. Beets come in with no supply. Some of their supply is already committed as they said they'd replace the 18% from United. We need to signal to the market that we're going to maintain price, especially for the Oct-Dec quarter. And there's not much to lose here. Pure price discovery.

I think we should go out with [REDACTED] Hell, we're booking other people at [REDACTED] Why give in to these guys?

Simultaneous Conversation with Competitors



Eric Speece
United



November 16, 2020 – 10:35 AM

Curious what you're hearing on domestic raw and refined pricing? sounds like united has pullback from spot market, is that right? Where would you put spot and forward beet prices?

November 16, 2020 – 12:04 PM

We remain at \$36.50 and \$38.50 but will probably go higher given our strong sold position.

November 17, 2020 - 8:08 AM

ASR saying prices keep climbing: \$46 spot all locations, forward prices ranging from \$39.50 Gulf to \$42 East/West coasts, cane refiners 85-90% booked for FY21.

Waiting to hear back from most contacts . . .



Richard Wistisen
Commodity Information, Inc.

November 16, 2020 – 11:13 AM

Curious what you're hearing on domestic raw and refined pricing? I haven't heard back from United yet. Did they pullback from spot market? Where would you put prices and cane coverage?

November 16, 2020 – 5:30 PM

Near-by values back up to \$46.00 FOB all locations.
For calendar 2021:
East/West - \$42.00 fob
Gulf - \$39.50 fob
Cane Coverage - 85 to 90%

November 17, 2020 – 10:07 AM

So strange, I can't wrap my head around United's approach. They came up very short on production, and market has firmed, but they're still at \$36.50 RRV and \$38.50 Southeast?!?! But did say they'll probably be taking prices higher given strong sold position (you don't say??)

Waiting to hear back from a number of contacts.



Alan Henderson
Domino





==== THE UNITED STATES ====

DEPARTMENT *of* JUSTICE

Price Signaling to Competitors Impacts Prices Customers Pay

From: Alan M Henderson <Alan.Henderson@asr-group.com>
Sent: Thursday, June 18, 2020 1:41 PM
To: Adam Whittaker <Adam.Whittaker@asr-group.com>
Subject: RE: [REDACTED] - quote needed

Message
From: Adam Whittaker (Adam.Whittaker@asr-group.com)
Sent: 6/18/2020 1:40:52 PM
To: Alan M Henderson (Alan.Henderson@asr-group.com)
Subject: RE: [REDACTED] - quote needed

You bet. Will advise.

From: Alan M Henderson <Alan.Henderson@asr-group.com>
Sent: Thursday, June 18, 2020 1:41 PM
To: Adam Whittaker <Adam.Whittaker@asr-group.com>
Subject: RE: [REDACTED] - quote needed

I would love to [REDACTED] at [REDACTED] business and [REDACTED]

However, I will [REDACTED] from [REDACTED]

From: Adam Whittaker
Sent: Thursday, June 18, 2020 1:41 PM
To: Alan M Henderson
Cc: Alan M Henderson
Subject: FW: [REDACTED]

Alan

They are not in our budget but we'd like to go after this business considering [REDACTED] Rob is suggesting at [REDACTED] bulk FOB ([REDACTED]) price for [REDACTED] ([REDACTED])

OK to quote? Details below.

Adam

From: Rob Wester <Robert.Wester@asr-group.com>
Sent: Wednesday, June 17, 2020 2:51 PM
To: Adam Whittaker <Adam.Whittaker@asr-group.com>
Cc: Rob Wester <Robert.Wester@asr-group.com>
Subject: [REDACTED]

PLAINTIFF EXHIBIT
PTX055
121-cv-0104

Hi Adam,

We have the opportunity to quote [REDACTED] located in [REDACTED] NC. This account is managed by [REDACTED] [REDACTED] had this business for a while until we were not competitive on price in 2013. It would be nice if we could get a portion of this business in 2021. We are targeting [REDACTED] delivery [REDACTED] NC [REDACTED] [REDACTED] Also, [REDACTED] and [REDACTED] and I am working with him regarding 2021 bid. With that said, I recommend we offer the below based on [REDACTED] if we want to get this business in 2021. I'm concerned that United may quote more competitive price than listed below. When you have a moment, please review and advise on how to proceed. Thank you.

I would love to get aggressive here but Rob S. does not want to lower the bar with [REDACTED] at this time. We would like to avoid sending a signal out to competitors that we are chasing business and lowering pricing off the standard \$41.00 bulk basis.

Section 7 Analysis—May Lessen Competition



FTC v. Hackensack Meridian Health, Inc.,

30 F.4th 160, 2022 WL 840463, at *2 (3d Cir. Mar. 22, 2022)

Section 7 of the Clayton Act bars mergers whose effect “may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18. “Congress used the words ‘*may* be substantially to lessen competition’ . . . to indicate that its concern was with probabilities, not certainties.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 323, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)

Section 7 Analysis—Presumption and Burden-Shifting



FTC v. Hackensack Meridian Health, Inc.,

30 F.4th 160, 2022 WL 840463, at *2 (3d Cir. Mar. 22, 2022)

- Government must establish a prima facie case
- Prima facie case may be established by HHI alone
- Burden shifts to the defendants to rebut case
- If rebuttal succeeds, then burden shifts back

Claimed “Synergies” Benefit United, Not Customers



Steve Hines

Vice President of
Strategy



Q. But to be clear all of the refined sugar products listed on this slide are products that United sells today; right?

A. Yes, they are.

Q. And so Mr. Hines, United doesn't actually need the Port Wentworth refinery to be able to sell these package products since the company can already do so today; right?

A. Yes. We can do that today.

Q. Mr. Hines, really the quote savings here that you calculated is the increased returns that the combined company would get from higher margin sales. Right?

A. Yes.

Steve Hines (United Sugars), Trial Tr. at 304:2-9, 305:19-22 (Apr. 18, 2022)

Claimed “Synergies” Benefit United, Not Customers



Steve Hines

Vice President of
Strategy



Q. But the savings would in fact increase the NSP dollars available to United membership, that's what you were modeling, correct, sir?

A. Yes.

Q. Mr. Hines in all the financial modeling that you did for the transaction, going back to March 2019, despite estimating millions of dollars of purported synergies you did not model or consider giving these customers lower prices as a result of these savings, correct?

A. That's correct.

Q. But United never modeled lowering prices when it was running models for synergies, right?

A. We did not.

Steve Hines (United Sugars), Trial Tr. at 313:9-12, 314:16-21 (Apr. 18, 2022); 566:4-6 (Apr. 19, 2022)

Imperial is Not a Weakened Competitor



Neil Smith
Senior VP



Q. Mr. Smith Imperial’s capital plan that Imperial put together, that serves as the basis for the plan that you put together for Imperial, right?

A. Correct.

Q. Mr. Smith, you believe US Sugar can implement this plan because Imperial has all the people in place, the engineers, the knowledge, and the know how to do the project that you’ve identified, correct?

A. I believe – yes, correct.

Neil Smith (U.S. Sugar), Trial Tr. at 842:23-843:6 (Apr. 20, 2022)

**Table 14. Market Shares of Refined Sugar Producers by CWT Over Time
2018 - 2021**

	Narrower Market				Broader Market			
	2018	2019	2020	2021	2018	2019	2020	2021
United	35%	37%	28%	34%	33%	31%	23%	29%
Imperial	19%	20%	21%	20%	14%	17%	18%	17%
ASR	27%	26%	28%	25%	33%	30%	31%	28%
LSR	9%	7%	9%	7%	9%	8%	9%	7%
CSC	2%	2%	3%	3%	3%	4%	5%	6%
NSM	1%	1%	1%	2%	1%	1%	2%	3%
Michigan	0%	0%	0%	0%	2%	1%	1%	1%
Western	0%	0%	0%	0%	1%	1%	0%	1%
Zucarmex	0%	0%	1%	0%	0%	0%	0%	0%
Sucro Sourcing	0%	0%	0%	0%	0%	0%	0%	0%
L&S	0%	0%	0%	0%	0%	0%	0%	0%
Imports	6%	6%	10%	7%	6%	6%	10%	7%
Total	100%	100%	100%	100%	100%	100%	100%	100%

Note: See Appendix E for details.

Weakened Competitor Defense is a Hail Mary



ProMedica Health Sys., Inc. v. FTC,

749 F.3d 559, 572 (6th Cir. 2014) (quotations and citations omitted)

“This argument is known as a ‘weakened competitor’ one, and is itself ‘probably the weakest ground of all for justifying a merger.’ Courts ‘credit such a defense only in rare cases, when the [acquiring firm] makes a substantial showing that the acquired firm's weakness, which cannot be resolved by any competitive means, would cause that firm's market share to reduce to a level that would undermine the government's *prima facie* case.’ In other words, **this argument is the Hail–Mary pass of presumptively doomed mergers. . . .**”