

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

Opening Statement



==== THE UNITED STATES ====

DEPARTMENT *of* JUSTICE



# Competition Between United and Imperial Has Caused Lower Prices

Buds Best 2021

AGREEMENT  
Buds Best 2021  
This Agreement is entered into on Aug 5, 2020 (the "Effective Date"), by United Sugar Corporation, a Minnesota corporation with offices located at 8000 West 78th Street, Suite 300, Edina, Minnesota ("Seller"), and Bud's Best Cookies ("Buyer").  
In consideration for the mutual promises and covenants set forth below, the parties agree as follows:

**From:** Julie Campbell  
**Sent:** Tuesday, August 4, 2020 4:35 PM  
**To:** Dirk Swart; Robert Schreck  
**Subject:** RE: Bud's Best - Buyer's Bid 2021

I have confirmed that we are matching Imperial's quote. He didn't get a quote from Domino...as he says they are just always too high. They have not spoken with Cargill.

delivered in satisfaction of a Seller's Quarterly Deficiency shall be the price for that producer in the calendar quarter in which the Seller's Quarterly Deficiency was created. In the event that a Seller's Quarterly Deficiency not cancelled by Buyer exists during any calendar quarter of this Agreement, Seller's obligation to deliver sugar products of a quantity equal to that Seller's Quarterly Deficiency shall survive the term of this Agreement. The terms of this entire Paragraph 5 are subject to and not in lieu of the force majeure provisions in Paragraph 12.

6. **WEIGHTS** Certified net weights at origin of shipment shall govern all transactions under this Agreement.

7. **INSPECTION/ACCEPTANCE** Buyer shall inspect any sugar products delivered under the terms of this Agreement and must, within 30 days after delivery, notify Seller of any alleged adulteration, misbranding, or other nonconformance in the sugar products. Unless Buyer gives notice of adulteration, misbranding, or other nonconformance within 30 days after delivery, the sugar products shall be deemed to have been accepted by Buyer with full notice of any such adulteration, misbranding, or other nonconformance.

8. **PAYMENT TERMS** Payment terms are 2% 15 Net 16 From Arrival of Product. In the event that Seller is required to bring any type of legal action against Buyer to recover amounts due under the terms of this Agreement, Buyer agrees to reimburse Seller for all costs.

Confidential - Exempt from FOIA  
UNITED-DOJ-00244181

# Competition Between United and Imperial Has Caused Lower Prices

To: Jeana Hines[JEANA.HINES@ldc.com]; SGL-Refined Trading[SGL-RefinedTrading@ldc.com]  
From: Heidi Hancock  
Sent: 2018-09-12T15:59:47-06:00  
Subject: RE: Costco Large gran Quote - NOT IN FORESIGHT  
Received: 2018-09-12T15:59:47-06:00

**From:** Jeana Hines  
**Sent:** Friday, September 07, 2018 1:09 PM  
**To:** Heidi Hancock <[HEIDI.HANCOCK@ldc.com](mailto:HEIDI.HANCOCK@ldc.com)>; SGL-Refined Trading <[SGL-RefinedTrading@ldc.com](mailto:SGL-RefinedTrading@ldc.com)>  
**Subject:** RE: Costco Large gran Quote - NOT IN FORESIGHT

Costco feedback – any room to go down slightly? Competing with united cane.

costco Northeast/Southeast	50lb FFG paper	40,860	10/1/2018	12/31/2018	25.50	\$ 6.62	3.50
			8				
costco Northeast/southeast	25lb FFG paper	22,645	10/1/2018	12/31/2018	25.50	\$ 6.71	4.63
			8				

CONFIDENTIAL SUBMISSION LDC-SRQ21-ESI-00105280

# Relevant Product Market

## *Refined Sugar in All Its Forms*

Granulated



Powdered



Brown



Liquid



# Geographic Market



## ***United States v. Philadelphia Nat'l Bank,***

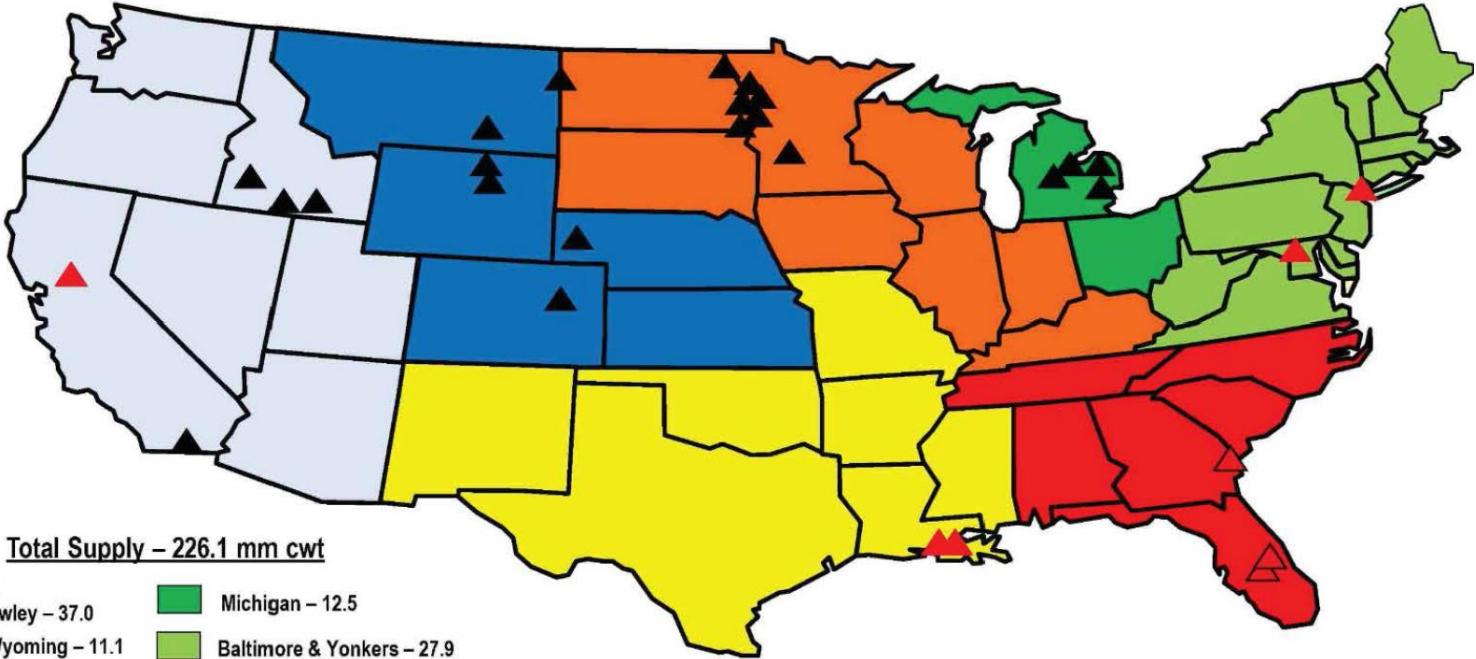
374 U.S. 321, 357 (1963)

“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.”

# United Views Sugar Markets as Regional



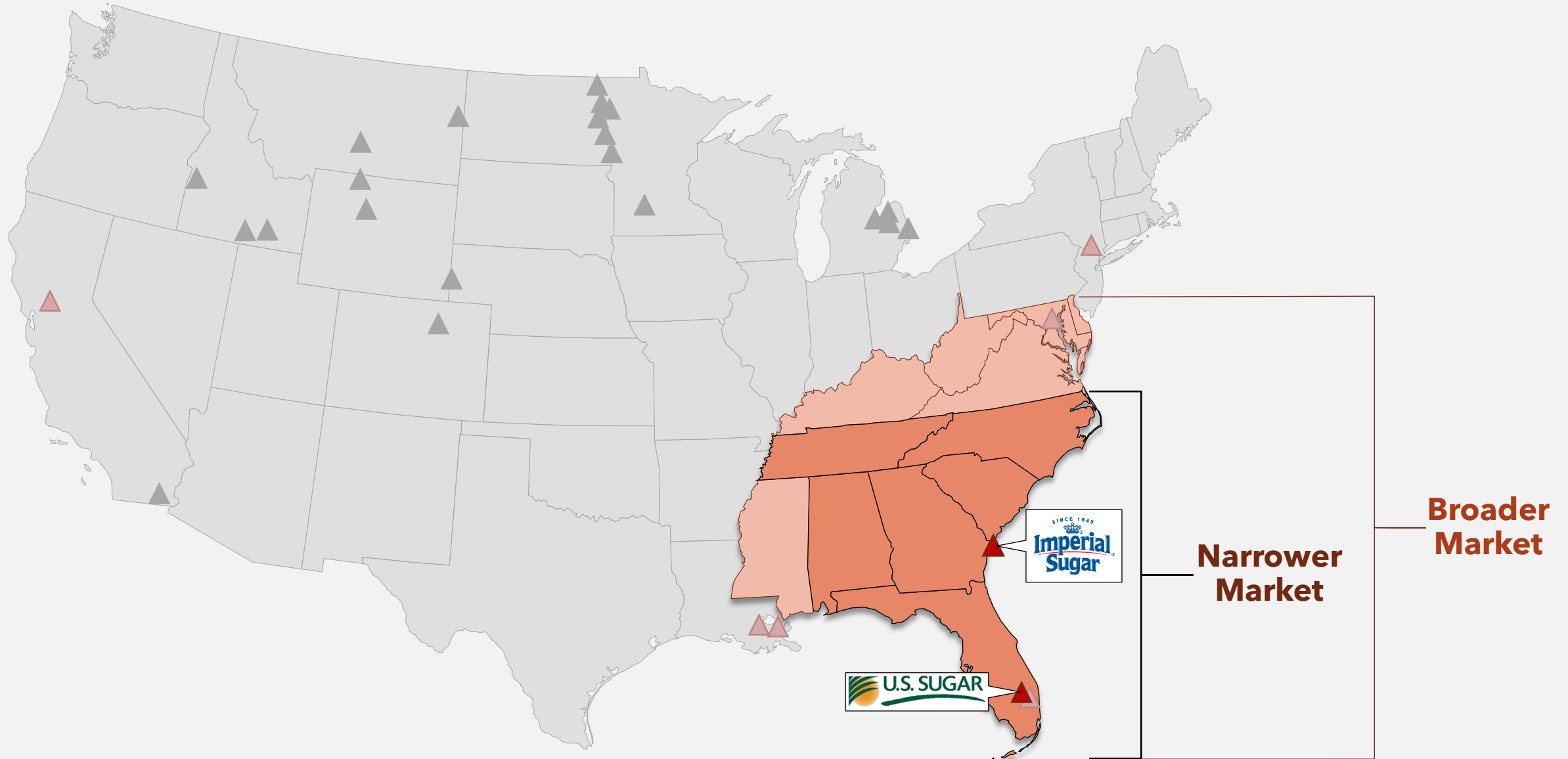
## USC Definition (Supplier Backyards)



Total Supply - 226.1 mm cwt

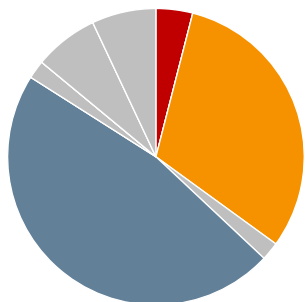
- Amalgamated, Crockett & Brawley - 37.0
- Western and Wyoming - 11.1
- Gramercy & Chalmette - 34.0
- USC RRV and Renville - 52.5
- Clewiston, South Bay and Imperial - 35.0
- Michigan - 12.5
- Baltimore & Yonkers - 27.9
- Distributor Imports - 16.1

# Relevant Geographic Markets

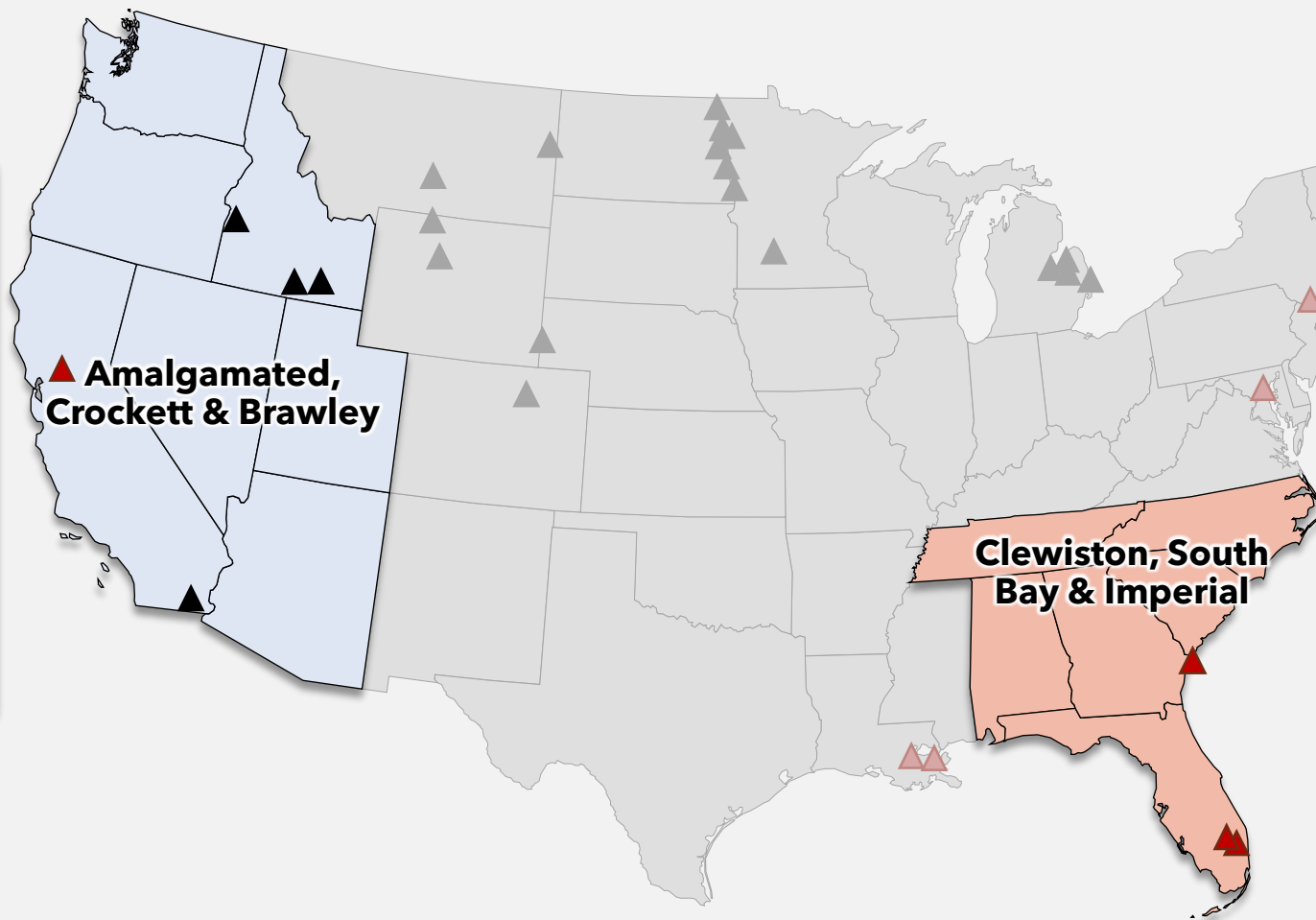


# Competitive Significance of Sugar Producers Varies by Region

**Amalgamated, Crockett & Brawley**



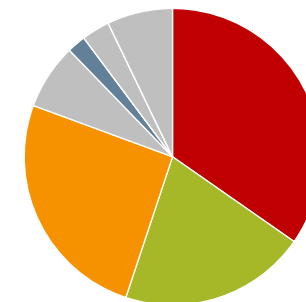
United	4%
Imperial	0%
Domino	31%
NSM	47%



▲ Amalgamated, Crockett & Brawley

▲ Clewiston, South Bay & Imperial

**Clewiston, South Bay & Imperial**



United	34%
Imperial	20%
Domino	25%
NSM	2%



# Geographic Market



## ***American Crystal Sugar Co. v. Cuban-Am. Sugar Co.***

**District Court:** a market for refined sugar sold in a broader ten-state region and a narrower 3-state region “correspond[ed] to the commercial realities of the sugar industry . . . because [of] the ***impact of freight rates on sugar prices.***”

152 F. Supp. 387, 398 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958))

**Second Circuit:** affirmed, noting that the merging parties were “better situated to supply this territory” where they had a “***locational advantage***” over refiners in other parts of the country.

259 F.2d 524, 529 (2nd Cir. 1958)

# Transportation Costs Affect Competition

Patrick Henneberry  
hi 12:41 PM

on pepsi - the term about them having the right to call a recall is the same as the previous contracts - correct? 12:42 PM

I like the wording of the systemic volume. 12:42 PM

What is the deal on freight? Is it fixed or is it being determined. Have not gotten all the way thru yet, so if its obvious I may yet get there. 12:43 PM

bad news is that they have a lot going their way in the contract - good news is that it appears to be the same as we signed before. As long as you have agreed the freights are fixed now at the levels in the appendix, this looks ok to me. 12:49 PM

Jeana Hines  
this has been the same contract since the beginning 1:07 PM

freight we will not be able to adjust but will bill the monthly fuel as we have been 1:08 PM

Patrick Henneberry  
ok cool 1:10 PM

Jeana Hines  
what tolling range for the several year period do you want him to give to molsen coors today? 1:28 PM

Patrick Henneberry  
so they want a toll and not fixed pricing? 1:28 PM

Jeana Hines  
yes they want to discuss a 3 yr tolling agreement and mike had said we could do it 1:29 PM

Patrick Henneberry  
is the quantity still 115K for Jan/Dec in TX and 130 ish K cwt for GA? 1:32 PM

Jeana Hines  
yes 1:32 PM

we only have a chance really at GA but you never know 1:32 PM

they wanted to discuss a 3 yr declining toll rate but I say no on the declining rate 1:32 PM

Patrick Henneberry  
so lets propose to set the interest rate (90 day terms) and freights in December before each year starts 1:34 PM

Jeana Hines  
agree 1:35 PM

so what rates? 1:35 PM

what should she offer for the tolling rates? 1:41 PM

Patrick Henneberry  
so for Texas, we will likely be luck to be within a dollar of either LSR or Domino given the freight differentials - not to mention any fob price differences... I know they have done with United before. Do they care beet or cane? 1:49 PM

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PLAINTIFF EXHIBIT  
PTX163  
1:21-cv-01644

LDC-SRQ21-ESI-00117832

Patrick Henneberry

For GA, we have a locational advantage. Costs for LSR or Domino are probably about \$3.50-\$4 to either Chatt or Atlanta.... ATL is 185 miles, we are 220 and Chatt and Sanford FL both about 300 miles..... So ATL is probably about 50 cents per cwt cheaper truck frt and the other two locations are probably about \$1-\$1.2 more expensive. So all in FOB to Delivered costs in ATL are  $3.75 + 2.65 = 6.40$  our cost is 3.15, Chatt is about  $\$4 + 4.15 = 8.15$  and Sanford is probably  $3.00 + 4.15 = 7.15$ . Even with at \$2 fob price difference we would be able to command a premium of a Dollar for Sanford, \$2 for Chatt and we would be even with Atlanta. With the NSM uncertainty do you think anyone will offer atlanta transfers?

We should be able to get \$7 to \$8 for GA location

Jeana Hines

we have always lost GA to United cane on the last 3 bis

# Transportation Costs Affect Competition

**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=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=FF5923AFB7B344879ACF4F144E4A656C-ERIC G. SPEE]  
**Sent:** 5/20/2019 9:47:32 AM  
**To:** Eric Speece [/o=Exchange Labs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=ff5923afb7b344879acf4f144e4a656c-eric g. spee]; 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

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.

**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>; GELLON Cyril <Cyril.GELLON@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,

PLAINTIFF EXHIBIT  
PTX395  
1:21-cv-01644

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UNITED-DOJ-00129857

# Ways to Establish Presumption

## Market Shares



### ***United States v. Energy Sols., Inc.,***

265 F. Supp 3d 415, 441 (D. Del. 2017)

(citing *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 364 (1963))

“While there is no bright-line rule as to the minimum percentage that qualifies as undue, the Supreme Court has held that a post-merger market share of 30% triggered the presumption of anticompetitive effects.”

# Ways to Establish Presumption

## Market Concentration



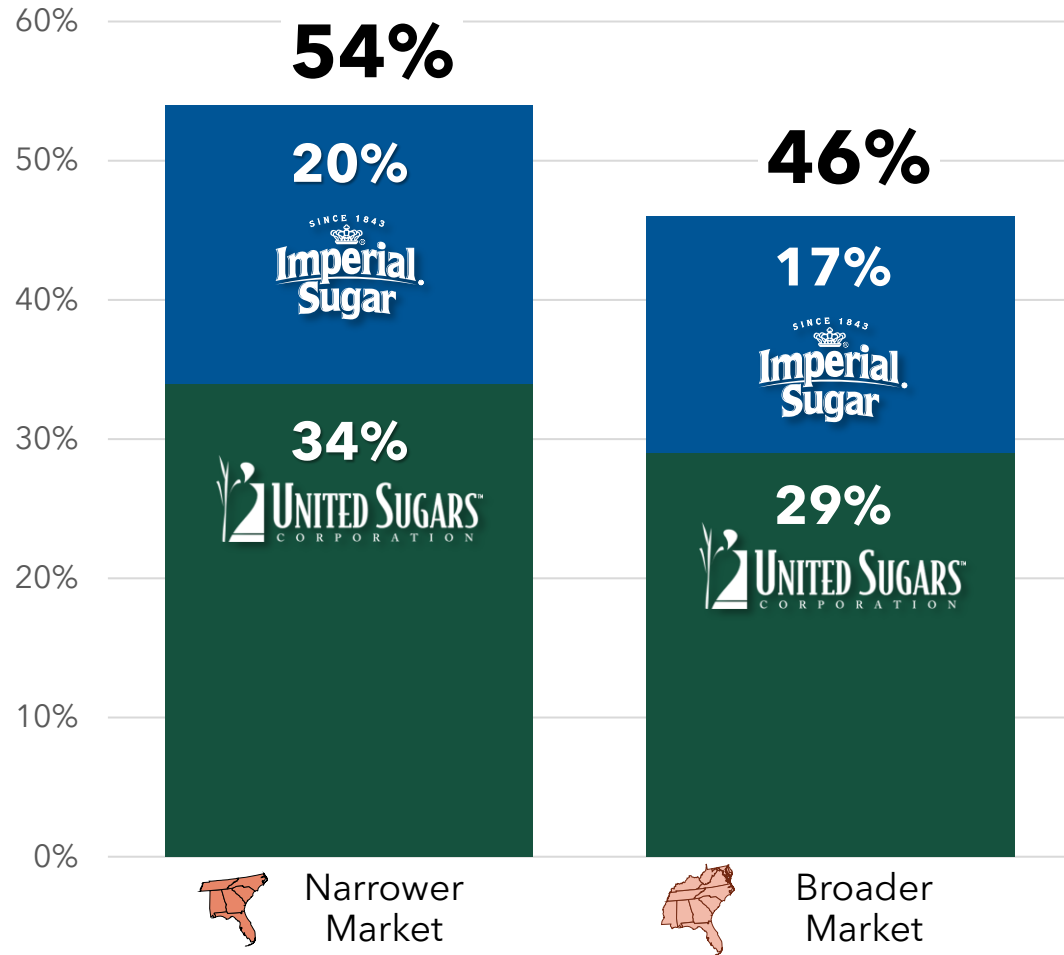
### ***FTC v. Hackensack Meridian Health, Inc.,***

-- F.4th --, 2022 WL 840463, \*8 (3d Cir. March 22, 2022)

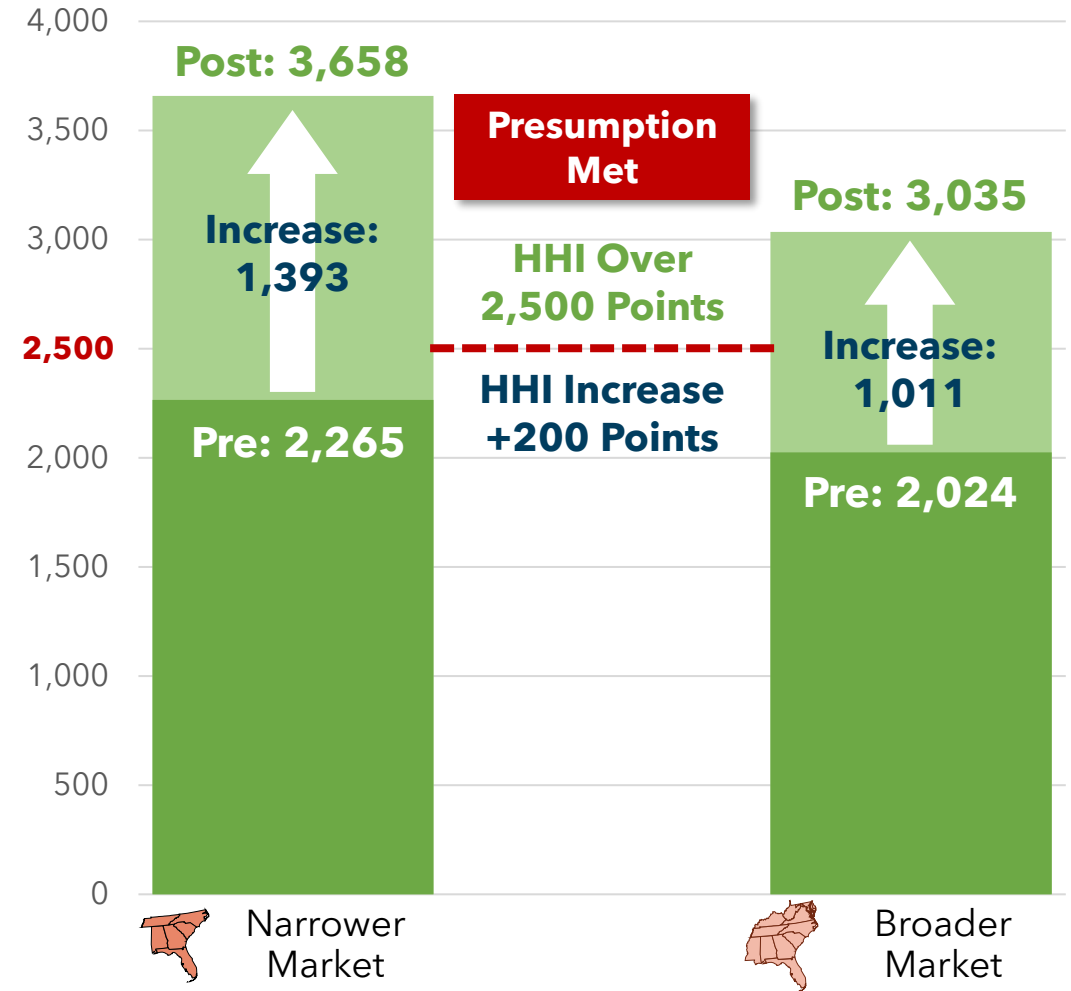
“The [government] may establish a prima facie case by showing a high market concentration based on HHI numbers alone.” When it does so, “the District Court need[s] no further evidence to find that the [government] had established its prima facie case.”

# Market Shares and HHI Concentration Analysis

**Market Shares of Refined Sugar Producers by CWT**  
Calendar Year 2021



**Pre and Post-Transaction HHI**  
(2021)



# Competition Between United and Imperial Poised to Intensify

Appointment

**From:** Steve Hines [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=2b11995436d245389ff97ed2a944cb0-STEVE HINES]  
**Sent:** 8/17/2018 12:01:02 PM  
**To:** Steve Hines [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2b11995436d245389ff97ed2a944cb0-Steve Hines]; Kae Kaske [kkaske@unitedsugars.com]; David Susla [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b467248aee9f4f78885e164cdf3152d4-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

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## 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

# Coordinated Effects



## ***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 States v. H&R Block, Inc.,***

833 F. Supp. 2d 36, 77-78 (D.D.C. 2011)

Finding support that “coordination would likely take the form of mutual recognition that neither firm has an interest” in driving prices lower.



# Price 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: Piedmont Candy Corp - quote needed

I would love to get aggressive here but Rob S. does not want to lower the bar with marginal accounts (less than 100K) 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.

FLORIDA CRYSTALS CORPORATION CONFIDENTIAL TREATMENT REQUESTED

Message

From: Adam Whittaker <Adam.Whittaker@asr-group.com>  
Sent: 5/18/2020 1:46:54 PM  
To: Alan M Henderson <Alan.Henderson@asr-group.com>  
Subject: RE: Piedmont Candy Corp - 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: Piedmont Candy Corp - quote needed

I would love to get aggressive here but Rob S. does not want to lower the bar with marginal accounts (less than 100K) 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.

However, I do not want to lower the bar with marginal accounts (less than 100K) 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: Adam Whittaker <Adam.Whittaker@asr-group.com>  
Sent: Thursday, June 18, 2020 1:41 PM  
To: Alan M Henderson <Alan.Henderson@asr-group.com>  
Cc: Adam Whittaker <Adam.Whittaker@asr-group.com>  
Subject: RE: Piedmont Candy Corp - quote needed

Alan, Piedmont thru. They are not interested in our quote. They are looking for a quote for 60K CWT of TOTES delivered to Lexington, NC. They are suggesting at \$59.80 bulk FOB (\$7.93 cty) price for totes (\$42.90 too = \$7.00 cty).

OK to quote? Details below.

Adam

From: Rob Wester <Rob.Wester@asr-group.com>  
Sent: Wednesday, June 17, 2020 2:51 PM  
To: Adam Whittaker <Adam.Whittaker@asr-group.com>  
Cc: Rob Wester <Rob.Wester@asr-group.com>  
Subject: Piedmont Candy Corp

Hi Adam,

We have the opportunity to quote Piedmont Candy Corp located in Lexington, NC. This account is managed by Mike Crowder (SES). Mike 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 60K CWT of TOTES delivered to Lexington, NC. They no longer receive tanker trucks of sucrose. Piedmont is not currently on our 2021 budget plan because we have not sold them since 2013. Also, Mark Stephens is Piedmont's new CEO and Mike Crowder and I are working with him regarding 2021 bid. With that said, I recommend we offer the below based on freight disadvantage from Imperial 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.

FCC-00081048

**PLAINTIFF EXHIBIT**  
PTX055  
1:21-cv-01944

# 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?**



**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?**



**Alan Henderson**  
Domino



# Simultaneous Conversation with Competitors



**Eric Speece**  
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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.



**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%



**Alan Henderson**  
Domino



# Simultaneous Conversation with Competitors



**Eric Speece**  
United



**November 16, 2020 - 10:35 AM**

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**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.

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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



# Coordinated Effects Case Law / Principles



## ***Hosp. Corp. of Am. v. FTC,***

807 F.2d 1381, 1388-89 (7th Cir. 1986)

The routine exchange of “intimate information on prices” among competitors “facilitates collusion and therefore entitles [the government] to worry even more about large horizontal acquisitions in this industry.”

# Distributors Are Subject to Market Power of Sugar Producers

USC Board of Directors

June 2019



Confidential Commercial Information

USSC-2R-000061773

## Montgomery Post Audit

Increase Customer Revenue



- Chicago small and medium bag customers generate \$2.78/cwt. higher NSP's than large distributors
- Strategy: Eliminate dependence on Batory Foods, Increase direct bag shipments to Customers, Increase prices to Chicago area distributors

Capital Assumption	Year 1	Year 2	Year 3
Incremental Bag Volume (mm Cwt.)	.50	1.00	1.50
Premium over Distributors (\$/cwt.)	\$.070	\$.090	\$1.10
Incremental Revenue (\$ mm)	\$0.35	\$0.90	\$1.65

5

Confidential Commercial Information

USSC-2R-000061777

# Defendants' Claimed Efficiencies Are Unsupported and Would Be the Result of a Lessening of Competition



## *Fed. Trade Comm'n v. Penn State Hershey Med. Ctr.,*

838 F.3d 327, 348-49 (3d Cir. 2016)

- *Penn State Hershey* requires that efficiencies:
  - **Offset** anticompetitive concerns in the relevant market
  - Be **merger specific**, and not achievable by either company alone
  - Be **verifiable**, not speculative
  - Be shown in **real terms**
  - **Not arise** from anticompetitive **reductions** in output or service
- Defendants cannot meet this rigorous standard



# USDA's Role in Industry in No Way Lessens Importance of Competition ... and that is Consistent with Case Law



## ***United States v. Philadelphia Nat'l Bank,***

374 U.S. 321, 371-72 (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."



==== THE UNITED STATES ====

DEPARTMENT *of* JUSTICE