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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,)	Case No. 22-2806
)	
Appellant,)	
)	
vs.)	January 18, 2023
)	
UNITED STATES SUGAR)	601 Market Street
CORPORATION, ET AL,)	Philadelphia, PA 19106
)	
Appellee.)	10:27 a.m.

ARGUMENT

BEFORE THE HONORABLES: AMBRO, PORTER and FREEMAN,
CIRCUIT JUDGES

APPEARANCES:

For Appellants:	PETER M. BOZZO, ESQ. UNITED STATES DEPARTMENT OF JUSTICE, Antitrust Division 950 Pennsylvania Ave., N.W. Washington, D.C. 20530
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1 P R O C E E D I N G S

2 (All Judges are notated as "The Court")

3 THE COURT: Our second and last case
4 this morning, United States versus United States Sugar
5 Corporation, et al, No. 22-2806, Mr. Bozzo and Ms.
6 Sherry.

7 (Pause)

8 THE COURT: Take your time setting up.

9 (Pause)

10 THE COURT: Whenever you're ready.

11 (Pause)

12 MR. BOZZO: May it please the Court,
13 Peter Bozzo for the United States.

14 I'd like to reserve seven minutes for
15 rebuttal.

16 THE COURT: That's fine.

17 MR. BOZZO: The defendants' merger
18 brings together and eliminates all competition between
19 two of the southeast's largest sugar refiners. These
20 two competitors operate facilities, refineries, that
21 take raw cane sugar and transform it into the refined
22 sugar that gets incorporated into food products that
23 households across the country consume every day.

24 The merger threatens to increase prices
25 for this household staple for customers across 12

1 states.

2 THE COURT: We're pretty familiar with
3 the facts. As I understand at trial and this was an
4 expedited trial; is that correct?

5 MR. BOZZO: That's correct.

6 THE COURT: That both sides presented
7 to the Court the hypothetical monopolist theory; is
8 that correct?

9 MR. BOZZO: The Government presented a
10 hypothetical --

11 THE COURT: For the product.

12 MR. BOZZO: -- monopolist theory. The
13 defendant --

14 THE COURT: The Court didn't -- the
15 Court went more of the Brown Shoe factors.

16 MR. BOZZO: Well, the court indicated
17 the important role that the hypothetical monopolist
18 has played an important role in antitrust cases. It
19 mentioned that in its geographic market analysis.

20 THE COURT: It didn't seem to decide
21 the issue on hypothetical monopolist theory.

22 MR. BOZZO: Well, it didn't reference
23 the test in its product market analysis, but that's
24 exactly where the Court's error, the misapplication of
25 the test lies. The test analyzes an entire market,

1 both its product and its geographic market components.

2 For the Court to reference the test's
3 importance on the geographic market side is to apply
4 one-half of the test without recognizing that the way
5 it operates is by analyzing an entire market. Hershey
6 makes --

7 THE COURT: If you were to assume for
8 the sake of argument that the Court chose not to apply
9 HMT to the product market, would that standing alone,
10 not thinking about the geographic market at all right
11 now, would that be valid to apply the practical
12 indicia instead?

13 MR. BOZZO: The -- yes, the Court could
14 apply an alternative test, but even if putting aside
15 the Court's errors with respect to the hypothetical
16 monopolist test, there's error under this Court's
17 decision in Allen-Myland. Allen-Myland addressed a
18 market for large scale mainframe computers and it
19 held that leasing companies when they leased new
20 computers that they had just purchased from
21 manufacturers and were functioning as distributors
22 for, that those leases did not belong in the relevant
23 market, because the leasing companies did nothing to
24 increase the supply of new machines. That's exactly
25 the error here.

1 The Court took distributors, which are
2 simply resellers, refiners' customers that do nothing
3 to increase the supply of the relevant product.

4 THE COURT: But the distributors aren't
5 solely these refiners' customers, right? They also
6 get their sugar from other refiners in the United
7 States and around the world which they then arbitrage
8 when opportunities arise. So in that sense, don't
9 they add new product?

10 MR. BOZZO: They don't, because they
11 are collectively constrained by the supply that
12 they're able to purchase from the refining level.

13 THE COURT: But the point -- I mean,
14 Judge Porter's point is the refining level doesn't
15 necessarily have to be within this country. It can be
16 outside. I mean, I'm looking at this, you know, from
17 more of a -- obviously a layperson's, but a practical
18 level.

19 If producers sell to distributors and
20 distributors get some from producers, some sugar, and
21 some from other producers that are outside the
22 geographic market, it sounds to me like what the
23 producers or distributors are trying to do, let's say,
24 you're a distributor and you're selling to Heinz and
25 you want to keep that customer really happy. And so

1 you probably put sort of a, what my law clerk calls a
2 speculative storage. I'm going to put some aside just
3 in case there's a high demand that comes up and I've
4 got to be able to supply Heinz. For God sake, I can't
5 let them go unfulfilled in terms of their requirements.

6 So that distributor then becomes in
7 effect, as Judge Noreika said just like a producer and
8 has to be included in the equation because the --
9 they're both producers and distributors are ultimately
10 selling to the customer, which is Heinz in my example.
11 Am I wrong?

12 MR. BOZZO: Yes. The --

13 THE COURT: Well, practically how am I
14 wrong?

15 MR. BOZZO: As to foreign supply, which
16 is one of the features that you mentioned that
17 distributors could potentially source sugar from, we
18 accounted for all foreign supply. So when sugar was
19 sold from a foreign refiner to customers located in
20 the relevant geographic markets that sugar was
21 accounted for and we assigned market shares to it. We
22 assigned 7 percent market shares to imports to reflect
23 those sales.

24 That indicates that under the
25 hypothetical monopolist test, distributors in the

1 relevant geographic markets would be subject to any
2 substantial price increase imposed by the monopolist,
3 so they would not be able to defeat that price
4 increase.

5 THE COURT: But again, it really comes
6 back to Judge Porter's question. If that distributor
7 can get the product elsewhere, the distributor is not
8 really affected in terms of pricing, right?

9 MR. BOZZO: These distributors would be
10 affected in terms of pricing under the hypothetical
11 monopolist test. That's where the district court went
12 wrong --

13 THE COURT: Well I guess -- true,
14 because then you say the hypothetical monopolist
15 controls the entire world.

16 MR. BOZZO: Exactly. And this is
17 exactly the error that this Court identified in
18 Hershey where the district court had considered
19 contracts between the merging defendants and third
20 parties that effectively prevented the imposition of a
21 substantial price increase. But this Court said, you
22 need to hypothesize a monopolist. That is part of the
23 exercise and that's exactly where the district court
24 here went wrong. It answered the wrong legal question
25 because it failed to posit a monopolist controlling --

1 THE COURT: I guess what I'm wondering
2 though is if you -- you're assuming that the district
3 court must apply the HMT to the product market
4 analysis. Where in Hershey we made clear that it does
5 not. It can use Brown Shoe instead.

6 THE COURT: It has the option.
7 Actually probably could do one or the other or
8 probably both if it wants to.

9 MR. BOZZO: So two responses. First, I
10 do think there's a misapplication of the test in
11 applying it to one-half of the market without
12 recognizing that the test tests the entire market.

13 The district court also failed to
14 reference the test in its product market analysis
15 without providing any legally or economically valid
16 justification for doing so. The Government put
17 forward its case using the test that this Court has
18 endorsed as sufficient to establish a relevant market.

19 THE COURT: Wait a minute, wait a
20 minute. What are you saying that she should not have
21 applied the Brown Shoe factors?

22 MR. BOZZO: She could have applied the
23 Brown Shoe factors, but given that we put forward a
24 sufficient means of establishing the market, there
25 should have been consideration of that means and a

1 rejection of it on its own terms.

2 Looking at factors that are irrelevant
3 under the test --

4 THE COURT: You're talking about the
5 product market now, not the geographic market.

6 MR. BOZZO: Correct. Looking at
7 factors that are not relevant to the test's application
8 such as distributors' current sales that wouldn't be
9 possible on the same terms under a monopolist is
10 another misapplication under Hershey.

11 THE COURT: Are there any factual
12 findings that the district court made in support of
13 its product market decision that you believe are
14 erroneous?

15 MR. BOZZO: We believe that the
16 district court made legal errors, but if the Court
17 views its findings on --

18 THE COURT: Let's start with the facts.
19 The question was, are there any factual findings that
20 you believe are clearly erroneous?

21 MR. BOZZO: If the Court views the
22 application of the hypothetical monopolist test here
23 as a factual issue, we do believe that it was legally
24 erroneous and clearly erroneous because the Court
25 failed to posit a monopolist and instead considered

1 relevant -- irrelevant factors such as distributor's -
2 -

3 THE COURT: But just stick --

4 MR. BOZZO: -- current sales.

5 THE COURT: -- just stick with the
6 facts, factual findings. Are they all okay or are
7 there any of them that are clearly erroneous?

8 MR. BOZZO: We are -- other than the
9 challenge that I just mentioned --

10 THE COURT: Yeah.

11 MR. BOZZO: -- we have not based our
12 appeal on the challenge to legally erroneous findings
13 in the district court's decision and that's because we
14 think there are legal errors. This goes back to, in
15 addition to the hypothetical monopolist points.

16 I do want to emphasize the error in
17 failing to recognize that distributors' role as
18 resellers under Allen-Myland means that it was
19 permissible for the Government not to treat them as
20 suppliers.

21 THE COURT: We've said that delineating
22 the geographic market is a factual test. I don't
23 think we've said one way or the other about the
24 product market, but why should it be -- why should it
25 not be factual as well? I mean, you've got experts

1 testifying, they can't testify to matters of law,
2 right, they're testifying to matters of fact.

3 MR. BOZZO: Well, this Court said about
4 the geographic market in Hershey that it involved the
5 application of legal principles to factual findings.
6 And in Hershey there was de novo review --

7 THE COURT: Right.

8 MR. BOZZO: -- because the errors were
9 in the application of legal principles. That's
10 exactly the kind of error that we think happened here.
11 There was error in misapplying Allen-Myland based
12 on that failure to recognize distributors' status as
13 resellers, there was error under the hypothetical
14 monopolist test's in failing to recognize the test
15 application to both sides.

16 THE COURT: Okay. Let me just ask it
17 this way, if you were writing the rule for us to
18 determine the product market, is that a factual test
19 or a legal one?

20 MR. BOZZO: I would -- I believe that
21 the rule from geographic market applies here, which is
22 that while there are factual components to the test,
23 there is also an application of legal principles. And
24 where there's a misapplication of those principles,
25 that's reviewable de novo and reversable.

1 THE COURT: Well, let's just hang with
2 product market right now. Your product, suggested
3 product market was the producers or production and
4 consuming or -- of sale of refined sugar; is that
5 right?

6 MR. BOZZO: Correct.

7 THE COURT: And the Court suggested
8 that it should be producers, distributors, and
9 consumers.

10 MR. BOZZO: The Court held that
11 distributors should be treated as suppliers in our
12 relevant markets, yes.

13 THE COURT: Correct. And we talked
14 about that previously. What's so factually erroneous
15 with respect to that?

16 MR. BOZZO: What's factually erroneous
17 is the failure to appreciate the import of
18 distributors' role as resellers, as entities that do
19 nothing to increase the supply --

20 THE COURT: But --

21 MR. BOZZO: -- of the --

22 THE COURT: But the tenor at least of
23 my questions it sounds like the judge did appreciate
24 how important the distributors were in this chain.

25 MR. BOZZO: It's true that they're --

1 the district court did make a factual finding, paragraph
2 34, about the role that distributors play and that
3 they purchase refined sugar and resell it. But we
4 think there was a legal error in failing to recognize
5 the import of that fact.

6 THE COURT: Why shouldn't the product
7 just be -- and we're talking about a basic commodity
8 here. Why isn't the product refined sugar, who cares
9 about producers, distributors? The consumer, and
10 after all we're talking about consumer welfare, they
11 don't care about all those intermediate middleman and
12 so on, they just want sugar at a good price.

13 THE COURT: At a good price.

14 MR. BOZZO: I think that's a fair way
15 to look at it and there's a finding that the district
16 court again made that there are no reasonable
17 substitutes for refined sugar. So whether
18 distributors are considered as a product market
19 question or whether it's a separate question as to
20 whether they are participants in the product market
21 it's the error in application of Allen-Myland and the
22 hypothetical monopolist test that demonstrates where
23 the district court went astray.

24 THE COURT: So the Court made a factual
25 finding that distributors are participants in the product

1 market. How is that clearly erroneous?

2 MR. BOZZO: It is -- well, our position
3 is that it's legal error because it fails to reflect
4 the Allen-Myland principle that where entities are
5 resellers that do nothing to increase the supply of
6 the relevant product it's permissible not to treat
7 them as suppliers.

8 THE COURT: Well again I keep coming
9 back to Judge Porter's question. The supply can be
10 increased by just going outside the United States if
11 you're a distributor.

12 MR. BOZZO: It cannot because of the
13 way we accounted for foreign sales. So again, any
14 distributors located inside our relevant geographic
15 markets we accounted for foreign supply that they were
16 receiving. We assigned market shares to that supply.

17 So if there were a price increase on
18 that supply, distributors would be subject to it, they
19 couldn't rely on it as a source to defeat the price
20 increase.

21 We also looked at what's called
22 arbitrage, sales from customers, including
23 distributors located outside of the geographic markets,
24 to customers inside the geographic markets.

25 THE COURT: Basically the concept of

1 substitutability?

2 MR. BOZZO: Yes. This is an
3 alternative source that could defeat the geographic
4 markets. And there again, we concluded that those
5 sales would not be sufficient to undermine our
6 geographic market.

7 So foreign supply was accounted for
8 in the way we defined our markets, the way we applied
9 the hypothetical monopolist test and it didn't defeat
10 the markets as we defined them.

11 I would also like to note some of the
12 practical issues that come with holding that
13 distributors should have been assigned market shares.
14 Allen-Myland makes clear that double counting in the
15 assignment of market shares isn't appropriate. And
16 that's one way that distributor sales could have been
17 accounted for here.

18 If sales from refiners to distributors
19 were assigned to refiners and their market shares and
20 resales by distributors were assigned to distributors,
21 that's double counting of the sort that Allen-Myland
22 condemns.

23 The defendants have proposed an
24 alternative in which sugar sales from refiners to
25 distributors would be subtracted from refiners' market

1 shares, but that ignores Brown Shoe's command that
2 market definition has to reflect competition, where in
3 fact, competition exists. There's competition among
4 refiners for sales to distributors. We can't ignore
5 that as part of our product market.

6 THE COURT: Also competition, it may be
7 competition between producers and distributors with
8 respect to sales to customers. The customer -- I
9 mean, again, I keep going back to questions that Judge
10 Porter asked, he's saying the customer wants it at a good
11 price, doesn't really care where you get it. It could
12 be a distributor, could be a producer.

13 MR. BOZZO: And we think that those
14 facts are not going to the relevant legal question,
15 not responding to the fact that distributors are
16 refiners' customers in this market. There's a long
17 line of Supreme Court and Third Circuit cases that
18 have treated relationships between suppliers and
19 distributors as vertical relationships. We think it's
20 not reflecting the need to posit a monopolist that
21 would control the terms under which sugar is sold to
22 distributors, the prices they're paying --

23 THE COURT: But again --

24 MR. BOZZO: -- potentially the terms of
25 resale.

1 THE COURT: -- just again focus on the
2 practical. Judge Noreika said that 20 -- made a
3 finding of fact that 25 percent of the sales to
4 customers in the national market are from
5 distributors. And you were trying to say I think in
6 your brief, opening brief and your reply brief, that
7 if you look at the national market it's 31 percent, so
8 you're trying to get the presumption that there's
9 anti-competitive effects.

10 But if you have 25 percent of that 31
11 percent coming from distributors and not producers,
12 that takes 25 percent off of 31, which gets you right
13 around a little over 23 I think.

14 So, I mean, I -- looking at this again
15 anew, it seems like if you're the Government, you're
16 trying to say, okay, I've got to get the narrowest
17 geographic market I can even though I'm working maybe
18 backwards. And that may explain why you at trial I
19 think focused on geographic market first; is that
20 correct?

21 MR. BOZZO: In our post trial briefing
22 we --

23 THE COURT: Post trial briefing,
24 correct.

25 MR. BOZZO: -- briefed geographic

1 market first, correct.

2 THE COURT: Okay. And so I get the
3 picture, but when you include distributors in there it
4 becomes a different ballgame, a different analysis.

5 MR. BOZZO: A couple of points, you
6 referenced the 31 percent market shares in the
7 national market, but the market shares in the other
8 proposed markets were higher, up to 54 percent.

9 THE COURT: But the Court didn't buy
10 that in connection with the product market.

11 MR. BOZZO: The Court did not think
12 that those markets were properly defined. In our
13 briefing and argument we've expressed disagreement
14 with that view, but regardless of the geographic
15 market in which effects were analyzed, there was a
16 prima facie case.

17 Now, this is true even putting aside
18 the market shares because of our evidence of
19 unilateral and coordinated effects. Unilateral
20 effects goes to the effect of eliminating Imperial as
21 an independent competitor, regardless of how other
22 firms would respond. And coordinated effects goes to
23 the increased --

24 THE COURT: Well, you know --

25 MR. BOZZO: -- incentives for

1 coordination.

2 THE COURT: -- Imperial was a
3 struggling company and it needed to get some type of
4 bail out, did it not?

5 MR. BOZZO: The district court made
6 some findings that Imperial was a struggling company,
7 yes.

8 THE COURT: But again coming back to
9 the big picture here, you're Heinz, and the product is
10 this commodity called refined sugar. Does Heinz
11 really care if it gets refined sugar from the Georgia
12 plus area or the larger area that you talk about the
13 southeast or nationally? I mean, Heinz probably
14 doesn't care if it gets it from California or even if
15 it gets it from somewhere outside this country.

16 MR. BOZZO: That's -- that may be right
17 and that's exactly what we accounted for in our
18 geographic markets. Our geographic markets are broad
19 markets that included supply from all producers,
20 wherever located that sold to customers located in
21 those markets.

22 So if Heinz is located in our
23 geographic markets regardless of where it purchased
24 from, we assigned market shares to the entity that was
25 making those sales. This is exactly what the district

1 court failed to engage with. It thought that we
2 hadn't accounted for sugar sold by refiners outside of
3 our markets, but customer location based markets of
4 the kind that we defined here, the kind that this Court
5 approved in Hackensack, account for precisely that.
6 That's one of the sources of error in the district
7 court's opinion.

8 THE COURT: Is it exactly that she
9 didn't account for it or she thought the evidence
10 contradicted your hypothetical?

11 MR. BOZZO: She -- I would say that she
12 didn't account for it, because the fact is that our
13 geographic markets include supply from any refiner
14 wherever that refiner is located.

15 So a failure to recognize that fact is
16 a misunderstanding of how customer location based
17 markets operate. It's not a question of consistency
18 with the evidence, it's a question of legal
19 principles, such as those discussed in Hackensack
20 where the Court approved a market where services were
21 provided to residents of a county, including by
22 hospitals outside of it. That's precisely the market,
23 the type of market that we defined here.

24 THE COURT: Is there any -- the test
25 applied by the Court was essentially Brown Shoe. Is

1 there any authority that you know of that says that if
2 you present the HMT theory the Court must deal with
3 that and not apply Brown Shoe?

4 MR. BOZZO: Not authority directly
5 making that point, but we do think that Hershey and
6 Hackensack demonstrate that the test is a sufficient
7 means of --

8 THE COURT: Well, Hershey and
9 Hackensack do not apply the HMT. I mean, they talk
10 about it.

11 MR. BOZZO: They do apply the HMT --

12 THE COURT: Well, they said the people
13 -- I'm sorry, they said the people agreed that it
14 applies, so they didn't have to make a decision.

15 MR. BOZZO: On that issue. But they
16 then go through and actively approved the relevant
17 markets that the Government approved in that -- that
18 the Government put forward in that case based on the
19 fact that they passed the hypothetical monopolist
20 test. That's a demonstration that the test is
21 sufficient as a means of proving the markets. Here,
22 there's no legally valid reason.

23 THE COURT: No, clearly it may be
24 sufficient, I agree with that. But the Court isn't
25 consigned to use that as the only test. It has the

1 option of applying Brown Shoe, does it not?

2 MR. BOZZO: Correct, yes. But when the
3 Court does apply the hypothetical monopolist test it
4 has to do so correctly. Failing to recognize that the test
5 analyzes the product and geographic markets together
6 is a form of misapplication and there's the
7 independent misapplication that I've addressed
8 regarding Allen-Myland, the failure to recognize
9 distributors as refiners', customers.

10 THE COURT: What if the district court
11 opted to apply Brown Shoe and addressed the product
12 market first and stopped there? Didn't continue to
13 look at the geographic market. Would that -- would it
14 be okay then to forego applying HMT altogether?

15 MR. BOZZO: It -- our argument is not
16 that it's necessary to apply the HMT but where the
17 Court acknowledged the test's importance for one-half of
18 the market analysis without recognizing that the way
19 the test operates is by testing the entire market,
20 that's a misapplication. And there is --

21 THE COURT: So if you use it, you have
22 to use it for product and geographic markets?

23 MR. BOZZO: Correct. There has to be -
24 -

25 THE COURT: And you have to reach both

1 --

2 MR. BOZZO: -- a --

3 THE COURT: -- even if one fails?

4 MR. BOZZO: You may not have to reach
5 both questions, but when you're applying the test
6 there does have to be a recognition that it operates
7 by testing the product and geographic markets
8 together.

9 THE COURT: What is it -- I'm sorry,
10 but is there -- is that in the guidelines or is there
11 case law to that effect? Where would we go to find
12 the proposition that says you have to apply -- you
13 can't mix and match, you have to do it for both
14 markets?

15 MR. BOZZO: That is in the guidelines,
16 Section 4, which both --

17 THE COURT: I'm looking at it. Could
18 you --

19 MR. BOZZO: Sure.

20 THE COURT: If you don't have it right
21 away, perhaps you can deal with it on rebuttal --

22 THE COURT: Yeah, that's fine.

23 THE COURT: -- because it's a question
24 that needs to be answered.

25 MR. BOZZO: Sure. Well, it's the

1 sentence in the umbrella part of Section 4 that says
2 the hypothetical monopolist test is applied to a group
3 of products together with the geographic region to
4 determine a relevant market.

5 The D.C. District Court in FTC v Rag-
6 Stiftung made this point.

7 THE COURT: Is that -- are you looking
8 at 411, 412, 413?

9 MR. BOZZO: It's just the umbrella part
10 of Section 4 before Section 4.1. It's at the very end
11 of that chapeau. The hypothetical monopolist test
12 is applied to a group of products together with a
13 geographic region to determine a relevant market.

14 And both Hershey and Hackensack looked
15 to the guidelines in determining how the test
16 operates. This is a point that defendants recognize
17 as well, page 43 of their response, that the test
18 operates by testing a product market within a defined
19 geographic area, and there was a misapplication of
20 failing to apply it that way here.

21 THE COURT: Any further questions right
22 now? We'll get you back on rebuttal.

23 MR. BOZZO: Thank you.

24 THE COURT: Ms. Sherry.

25 MS. SHERRY: Good morning, Your Honors,

1 may it please the Court, Melissa Arbus Sherry here on
2 behalf of the defendants.

3 I want to start where counsel left off.
4 I would point you to the exact same place in the
5 horizontal merger guidelines because it shows the
6 disconnect in their theory on the hypothetical
7 monopolist test.

8 They argue essentially that you need to
9 imagine when you're talking about product market, you
10 have to imagine a worldwide monopolist. So there's
11 only one refiner in the entire world and so
12 distributors are stuck buying from that one single
13 refiner. But as they just quoted to you, that's not
14 how the hypothetical monopolist test works, even in
15 their own guidelines.

16 You have to look at the product market
17 in the context of the geographic market. And so what
18 geographic market do we have here, we have the
19 regional ones they defined. And to get back to all of
20 the questions when you look at the facts in those
21 regional markets, distributors have lots of different
22 options. They have suppliers outside of the regional
23 markets, they have imports, more than 50 percent of
24 distributors' refined sugar comes from imports.

25 THE COURT: Now, your suggestion was

1 that the market be national, so. And then the
2 Government ultimately accepted that, saying if it is
3 national we still win. Can they go outside the
4 national market easily?

5 MS. SHERRY: I mean they can. Again,
6 more than 50 percent of their refined sugar is coming
7 from imports, but I do want to address that argument
8 they made because they, you know, don't seem to do all
9 that much to defend their regional markets on appeal.
10 And so they like to fall back to this 31 percent that
11 you mentioned.

12 And I think it can't go without saying, I
13 mean, they tried their entire case based on regional
14 markets. All of the discovery leading up to it was
15 focused on --

16 THE COURT: They're trying to get the
17 biggest percentage and the smallest market --

18 MS. SHERRY: Exactly --

19 THE COURT: -- I get it, but -- and one
20 could say, okay, it's their burden so if they keep
21 going with Georgia Plus or the southeastern larger
22 market they're kind of stuck with that.

23 But going back to my days, let's say
24 you and I are against each other in a case and you say
25 it's X and I say it's Y. And finally, I say okay,

1 let's assume, Ms. Sherry, it's X, I still win. What's
2 wrong with logically saying that in the antitrust
3 area?

4 MS. SHERRY: So here's the problem with
5 saying it. They said that in the post trial briefs,
6 so after trial, all of the discovery, all the evidence
7 is in. In the post trial briefs for the first time
8 they said in like two or three sentences on pages 22
9 and 23 of their brief, look at this.

10 The problem when you do it so late is
11 you don't have evidence in the record to point to. So
12 let's look at the evidence they point to to support
13 the idea of this 31 percent. It's three pages, it's
14 in the joint appendix, page 930 to 932. These are
15 three pages from Dr. Hill's cross-examination. And
16 literally all they say about it is, look at Figure 23,
17 add up these two figures, does it equal 31 percent,
18 yes. Is 31 more than 30, yes.

19 So where's Figure 23? You know, where
20 did these numbers come from? It's not in the record.
21 There's nowhere in the record that shows where that
22 31 percent comes from, there's no methodology, there's
23 no explanation of it whatsoever.

24 And so the problem with coming up with
25 this late breaking theory to try to save your case is

1 you don't have the evidence to support it. As the
2 district court recognized, there was nothing the Court
3 could do with that, such a conclusory statement, you
4 know, after the fact. What is the Court supposed to
5 do, really say that there's a presumption based on,
6 you know, five lines of transcript in the testimony?

7 THE COURT: Well, they did what I guess
8 what they have to do, is they have to try to eliminate
9 distributors.

10 MS. SHERRY: Well, I mean, so let's
11 focus on the distributors. I mean, the
12 idea of Heinz, right, the question for purposes of the
13 product market is cross elasticity of demand, right,
14 are they substitutes, are they reasonably
15 interchangeable. And refined sugar absolutely is the
16 product. So is there a difference between distributor
17 sold refined sugar and refiner sold refined sugar?
18 It's the exact same product.

19 THE COURT: You look at it from the
20 basis -- from the viewpoint of the customer, you're
21 right. But they're, I guess, I'm trying to look at it
22 from the viewpoint of the supplier, are they not?

23 MS. SHERRY: Well, they do want to talk
24 about supply now, but that's another problem, right.
25 They came in -- they didn't come in with a production

1 defined market. And the reason they didn't focus on
2 production until now is because if what they really
3 cared about was production, then all of United sales
4 from the three other members wouldn't be included.
5 Because while United is, you know, united for lack of a
6 better word when it comes to sales, the members are
7 not united when it comes with respect to production.
8 They have different incentives when it comes to
9 production.

10 And so that's why they identified a
11 customer based market. They focused on sales, when
12 you look at it from the customer's perspective it
13 really doesn't matter.

14 Now, just to correct one thing. They
15 claim that we've already accounted for imports, right,
16 7 percent of the markets are imports and so even
17 though distributors can easily purchase and do
18 purchase from imports, don't worry about because it's
19 already accounted for. It's not.

20 All they've accounted for in the 7
21 percent is imports that are going directly into these
22 two regional markets. So Indiana Sugars, which is
23 outside the regional markets when they get imports and
24 they sell into the southeast, those sales are not
25 being accounted for at all.

1 So no double counting problem, no
2 issue, they're just not being accounted for. And so
3 they absolutely have left distributors out of the
4 market. And really the only argument that they have
5 is to where the district court could possibly have
6 committed a legal error because they now admit that
7 they're not challenging any of the factual findings,
8 is to come back to this idea that, you know, you have
9 to look at it under the hypothetical monopolist test.
10 And not just --

11 THE COURT: Although at trial, you
12 focused on the HMT as well, did you not?

13 MS. SHERRY: We did. And I -- you
14 know, to go to your questions about doctrine I don't
15 know if I view them as two totally distinct arguments.
16 I mean it has to be -- the markets have to be
17 consistent with commercial realities, that's what the
18 Brown Shoe says. That's what this Court said in
19 Hackensack and Hershey.

20 And it didn't say that to the exclusion
21 of the hypothetical monopolist test. I mean, the
22 purpose of the hypothetical monopolist test is one way
23 to test out the hypothesis, right. Here's the
24 commercial realities, this is what I think the market
25 is. I'm going to use this test to see if it's right

1 or not.

2 And the problem with their reliance on
3 appeal like so much on the hypothetical monopolist
4 test, number one is, it doesn't exist in the abstract.
5 So what evidence is there about why their markets, you
6 know, pass the hypothetical monopolist test. All they
7 have is Dr. Rothman, their expert.

8 The same expert that the district court
9 found to not be credible, not be persuasive. And you
10 look at how he applied the hypothetical monopolist
11 test and his transcript is in the joint appendix, I
12 think almost the entire transcript except for a few
13 pages. It starts on JA545. You can read it cover-to-
14 cover and not really know what methodology he used to
15 apply the test. You can read it. You won't see any
16 quantification, you know, what SSNIP could be imposed,
17 how, why.

18 All he says is, I don't really think
19 arbitrage is going to be a big issue, it's not going
20 to be sufficient enough to defeat a SSNIP here. Why?
21 Well, for the same assumptions that were proven false
22 at trial, because transportation costs are
23 prohibitively expensive, sugar doesn't flow easily
24 through the country. We don't think distributors are
25 real competitors. I mean, that is the hypothetical

1 monopolist test they're riding now.

2 THE COURT: When you were preparing for
3 this expedited trial, what was your thought process in
4 dealing with the hypothetical monopolist test
5 primarily? Because the Government did it and you felt
6 you needed to rebut it or because you thought
7 independently that's where one should start?

8 MS. SHERRY: Well, I think -- I
9 wouldn't say that's where we thought one should start.
10 I think one should start always with the commercial
11 realities.

12 THE COURT: I'm asking, I'm not --

13 MS. SHERRY: And to be clear, our
14 expert, Dr. Hill, didn't do a separate independent
15 hypothetical monopolist test. Dr. Rothman had done
16 one and we explained why that that test was flawed.
17 One, because it was inconsistent with the commercial
18 realities. And two, and it's sort of the same point,
19 is that he just didn't properly account for arbitrage.

20 And, you know, the Government says
21 there's no -- you know, the district court somehow
22 didn't make any arbitrage findings. I mean that's in
23 their reply brief. But that is exactly what the
24 district court was focused on.

25 Paragraph 101 is a very explicit

1 finding when it comes to arbitrage. There are ample
2 opportunities to look outside the market for
3 customers, to look outside the market in order to
4 purchase refined sugar in the event of a price
5 increase within the geographic markets.

6 THE COURT: How would you answer the
7 question I asked your friend about the product market
8 and delineating the product market? Is that a factual
9 matter or legal or some combination, how would --

10 MS. SHERRY: It's a factual matter. I
11 mean, you know, like anything. What the Court really
12 was saying in Hershey is market definition is a
13 question of fact. It's true whether it's product
14 market or geographic market.

15 Of course, if you get the law wrong in
16 doing so then, you know, that's a legal error subject
17 --

18 THE COURT: Yeah.

19 MS. SHERRY: -- to plenary review.

20 But, you know, and Hershey it was quite
21 different, right. In Hershey the district court said
22 I'm applying the hypothetical monopolist test, but in
23 fact, the test that the district court applied was
24 this Elzinga-Hogarty test that had been discredited at
25 least in the merger context. And then even with

1 respect to that test, it only applied one-half of the
2 test and not the other and there were other sort of
3 legal errors to that effect. There's nothing like
4 that here.

5 I mean, the district court made factual
6 findings. I think the only legal error they've tried
7 to articulate is the fact that the Court didn't apply
8 the hypothetical monopolist test with respect to the
9 product market --

10 THE COURT: Are you saying --

11 MS. SHERRY: -- but neither did their
12 expert. Their expert applied it looking at the two
13 together.

14 And the district court did talk about
15 about the hypothetical monopolist test when it came to
16 geographic market. And it just said, it doesn't work
17 because of the arbitrage opportunities because it
18 would be very easy to defeat any SSNIP in this context
19 because customers already do go outside the market to
20 purchase their sugar. They would continue to do so.
21 There are I think more than 75 percent of the sugar
22 sold into the southeast are to customers that even have
23 locations outside of the regional geographical markets
24 and so they would just go pick up their sugar from
25 there.

1 THE COURT: So going back to your
2 themes at trial, did you emphasize HMT or did you
3 emphasize Brown Shoe factors?

4 MS. SHERRY: The Brown Shoe factors.
5 And actually so did the Government. So, I mean,
6 that's the other strange thing about this appeal is if
7 you look at the complaint in this case, if you look at
8 even Dr. Rothman's testimony, if you look at their
9 closing argument, post trial briefing, it is all about
10 the Brown Shoe factors.

11 They use the hypothetical monopolist
12 test as like a third factor to kind of support what
13 they've already said with respect to commercial
14 reality. But their focus from the very beginning was
15 on commercial realities. And, in fact, the premise
16 when they brought this case was all about
17 transportation costs and the expense to look at a
18 regional market because the transportation costs are
19 prohibitive. It was all about sugar not flowing easily
20 throughout the country.

21 And that's why the district court came
22 out where it did. It's not that it disagreed with
23 them on the law or on the hypothetical monopolist test
24 or economic theory. It's because it disagreed with
25 the Court -- the Government, rather on the facts

1 because of how the evidence came out at trial. And as
2 it stands now, those factual findings are not in
3 dispute.

4 THE COURT: If the Court had applied
5 the hypothetical monopolist test, that assumes a
6 single hypothetical monopolist owns all the firms
7 globally. And the Court then focused on distributors,
8 but how could distributors possibly compete with a
9 hypothetical monopolist that controls global sugar
10 production?

11 MS. SHERRY: So where I push back is
12 the word global. That's not how the hypothetical
13 monopolist test would work here. It would assume that
14 a single refiner was all refining sugar in the
15 proposed regional geographic markets that the
16 Government defined. You don't zoom out to a
17 worldwide market that no one has ever suggested, and
18 if you did, the test would always be satisfied in the
19 circumstance.

20 But the question is really is a
21 practical one, right, whether it's in hypothetical
22 monopolist test terms or more generally. You're just
23 trying to see if the price can be increased or whether
24 there are other market factors at play that would --

25 THE COURT: But the district court

1 focused on imports. So does that talk globally, does
2 it not?

3 MS. SHERRY: Well, it does, but it
4 also, you know, is into the regional geographic
5 market. So the focus on imports was the idea that, as
6 you mentioned, distributor at 25 percent of the
7 market, more than 50 percent of their refined sugar
8 comes from imports. And so it's just one of, you
9 know, many examples that they have other suppliers
10 available to them and that's why they're able to
11 compete within these regional markets.

12 The other thing that the district --

13 THE COURT: So you're saying that the
14 Government's proposed market would not pass the HMT?

15 MS. SHERRY: I'm -- I think absolutely
16 not if you account for arbitrage as I think everyone
17 recognized is required to be accounted for. You know,
18 the Government again response is just to say there's
19 no such findings in arbitrage, there are.

20 THE COURT: There's kind of a garbage
21 in/garbage out thing, right, when doing the HMT. If
22 you have factual assumptions for a hypothetical aren't
23 aligned with commercial realities, your HMT is not
24 going to work. There's nothing magic about doing an
25 HMT, right, if the commercial realities don't line up

1 with your assumptions.

2 MS. SHERRY: That's exactly right. I
3 mean, it's an input question. So if you do an HMT
4 based on the idea that sugar doesn't flow, you're
5 going to come out with the wrong result. And I think
6 if you look at Dr. Rothman's (indiscernible) he gave
7 an example of how it is supposed to work and he gave
8 an example of milk.

9 So, you know, you have milk on one
10 block. If the price of milk goes up on that block
11 what's going to happen, are customers going to go to
12 the next block, if so, you broaden the market
13 and you kind of keep going through that exercise until
14 you define the correct market.

15 Dr. Rothman didn't do that. I mean,
16 Dr. Rothman took the Government's markets as he gave
17 them. He didn't test them. He took the Government's
18 assumptions with respect to transportation costs and
19 the like. He didn't, you know, look at or consider
20 the contrary evidence that came in in the record and
21 garbage in/garbage out. And that was the problem with
22 the test here.

23 And that's why when I think of commercial
24 realities they're not, you know, two distinct concepts
25 necessarily. The market has to be consistent with

1 commercial realities, but it's one way to test whether
2 or not that's true.

3 THE COURT: What do you say to the
4 argument that it's legal error to purport to do an HMT
5 analysis with respect to geography but not product
6 market?

7 MS. SHERRY: Yeah. And that's never --
8 I mean, that's not the law. That's never been their
9 position and the HM -- I mean, the horizontal merger
10 guidelines that they read to you it doesn't talk about
11 doing an HMT, and in fact, the part they read is right
12 before and this is at the end of Section 4, it's right
13 before 4.1.

14 THE COURT: Yeah.

15 MS. SHERRY: What it basically says is,
16 okay, we're going to go on and we're going to talk
17 about product market on the one hand and then we're
18 going to talk about geographic market, but to be
19 clear, these are not two completely separate and
20 distinct concepts. And when you apply the
21 hypothetical monopolist test, it's applied to a group
22 of products together with a geographic region to
23 determine a relevant market.

24 And so it's not like you look at
25 product market in the abstract, apply some test to it

1 in a worldwide hypothetical -- you know, hypothetical
2 monopolist situation. You look at it within the
3 regional geographic markets.

4 I think the other way to look at it
5 when we're talking about product market and you look
6 at the case and like, what is the test for product
7 market, it's whether there's reasonable
8 interchangeability, as to whether there's cross-
9 elasticity of demand. The district court made a
10 finding with respect to that. That's at JA52.

11 And it's for all the same reasons we've
12 already discussed because distributors in this market,
13 I know they like to say they're just resellers, but
14 the facts proved otherwise. They are a lot more than
15 just resellers.

16 It talked about the diversity of
17 supply, but there's also the example you gave with
18 respect to saving up storage, I forgot what you said
19 your law clerk called it, speculative storage. They
20 have -- distributors buy in large quantities. They
21 have the ability to store it in and they do store
22 sugar and they're able to move it across the country
23 to areas of demand. That's something that United, for
24 example, can't do. United has the obligation to sell
25 all of the sugar from its members each year.

1 And so that's another reason they have
2 this ability to compete within the market. And so
3 unlike all the, you know, cases they like to point to
4 where you have distributors or resellers who don't
5 have that ability to compete, here the factual
6 findings show that they are more than able to compete
7 with refiners in these particular markets.

8 THE COURT: Your friend keeps referring
9 to Allen-Myland.

10 MS. SHERRY: Yes.

11 THE COURT: Can you say a few words
12 about how that case applies or doesn't apply here?

13 MS. SHERRY: So I think Allen-Myland
14 helps us a lot because what it shows is it's not an
15 on/off switch. You know, you look and see how
16 distributors fare in the market, whether there are
17 competitor restraint. And what Allen-Myland did is a
18 very nuanced analysis and said, in certain
19 circumstances they are, in other circumstances they're
20 not. When they are, we need to actually include them
21 in the market.

22 That's the analysis the district court
23 engaged in here and said in this industry, in this
24 market, they are a competitive restraint and so they
25 should have been included in the market.

1 And I think, you know, one way to -- at
2 least I've been able to conceptualize is to take a
3 step back and think of their argument that
4 distributors -- I mean, it's really categorical,
5 right, distributors are never competitors in the
6 market.

7 That can't possibly be right, I don't
8 even think they would defend it. I mean, if you
9 imagine a situation where Imperial were to enter into
10 a price fixing agreement with Indiana Sugar as a
11 distributor and they agree to fix prices for
12 customers, I mean, the Government would be the first
13 one coming in here and saying, it's a horizontal
14 restraint it's per se liability.

15 The point is the facts matter. The
16 district court made fact finding here. That fact
17 finding's not challenged on appeal.

18 THE COURT: Looking at this case from
19 afar, since Brown Shoe came out in '67, there's been a
20 lot of academic criticism, there's been some judicial
21 criticism. Is it your view that Brown Shoe should
22 ultimately be put aside for something like the
23 hypothetical monopolist test or not and why?

24 MS. SHERRY: I don't think it should be
25 put aside, and you know, I'll start with the governing

1 Supreme Court law, you know, as the first point --

2 THE COURT: I know I get that.

3 MS. SHERRY: -- but even putting that
4 to the side --

5 THE COURT: I get that.

6 MS. SHERRY: -- and I -- you know,
7 putting that to the side, putting this Court's
8 decision to the side, it still is part of the
9 analysis.

10 Now, I recognize that there's some idea
11 that you want some more quantification maybe, right,
12 it's a little too vague --

13 THE COURT: It's the -- one of the
14 basic criticism is it's too mushy. You --

15 MS. SHERRY: Right.

16 THE COURT: -- have a result and you
17 sort of work your way to getting to that desired
18 result.

19 MS. SHERRY: And I -- so that's the
20 criticism and, you know, maybe some of the factors are
21 more indicative than others and I think the idea of
22 distinct prices and stuff still has some force in
23 this area, but there's other factors that some have
24 thought are a little bit too mushy in that respect.
25 But it's still, you know, the guiding force behind

1 these cases.

2 And in instances where there are -- you
3 know, ways to quantify it, great --

4 THE COURT: My question --

5 MS. SHERRY: -- the Government should
6 put on --

7 THE COURT: -- to you is if you were
8 writing this, you're the boss, and you're setting up
9 the test, would you follow Brown Shoe into the future
10 or not?

11 MS. SHERRY: I would. I would say it
12 still needs to be consistent with commercial
13 realities. There are different ways to test that.
14 And to the extent there's -- you know, there's ways to
15 quantify it and test it that that informs the
16 analysis. But whether or not it, you know, that is
17 done and whether it's done in the correct way is up to
18 whoever the plaintiff is and so the Government in this
19 case.

20 And the problem here is, you know,
21 number one they went forward on the theory underlying
22 Brown Shoe. They chose to put forward a hypothetical
23 monopolist test to confirm what they said the
24 commercial realities are, but it's the garbage
25 in/garbage out problem. All they have is Dr. Rothman.

1 I mean, that is the hypothetical monopolist test they
2 have. It has nothing to do with an independent
3 product market like they say now. I mean, he doesn't
4 do that analysis either.

5 If you look at the -- in the joint
6 appendix at page 555, that is how he describes what he
7 did for the hypothetical monopolist test. And he says
8 I looked at it in the two markets that the Government
9 identified, the regional markets. And so this idea of
10 a worldwide hypothetical monopolist like that isn't in
11 the record anywhere. Nobody did that analysis and
12 nobody should have done the analysis because that's
13 not how the test is designed to work.

14 THE COURT: So you're suggesting you
15 would leave in place the possibility of testing
16 something under the Brown Shoe factors or testing
17 something under HMT; is that correct?

18 MS. SHERRY: I wouldn't separate them
19 out. I mean, to me it's the input. I think the
20 commercial realities have to be the inputs into the
21 hypothetical monopolist test. I think that's one way
22 to test it.

23 THE COURT: But in terms of the test,
24 there could be two tests depending on the commercial
25 realities.

1 MS. SHERRY: I think there can be and I
2 think, you know, it depends on how the plaintiff
3 chooses to put on the case. I think the Court, you
4 know, made the point in Hershey I believe it was that
5 the parties there agreed that that was the right test
6 and so that's fine, but it's not the only test. And I
7 think it's important --

8 THE COURT: Same thing in Hackensack --

9 MS. SHERRY: -- to leave that open.

10 THE COURT: -- as well I think.

11 MS. SHERRY: Yeah.

12 THE COURT: But so when do commercial
13 realities point to Brown Shoe and when do commercial
14 realities point to the better test being HMT?

15 MS. SHERRY: Again, I don't think they
16 point to two different tests. I just think you have
17 to consider --

18 THE COURT: Well, I mean, you're
19 preparing for a case.

20 MS. SHERRY: Right.

21 THE COURT: And you've got certain
22 facts and your client's telling you here's what it is,
23 here's what the Government is suggesting in its
24 complaint and you've got to figure out how do I go
25 about attempting to rebut that because I'm

1 representing the defendant here. When is it that you
2 would prefer to use HMT and when is it under
3 commercial -- what commercial realities would cause
4 you to say I prefer to go the Brown Shoe factors way?

5 MS. SHERRY: I think it probably
6 depends on the type of market. I'm not going to get
7 more nuanced than that because I'm sure I'll mess up,
8 you know, the economics of it all. But I think are
9 some markets and how they're defined that maybe are
10 more amenable to a hypothetical monopolist test. I
11 mean, it's the same way that --

12 THE COURT: Healthcare systems, like
13 healthcare systems.

14 MS. SHERRY: Yeah, health -- I mean,
15 that's a good example, right. The test that was
16 discredited with respect to mergers there was in part
17 because of the unique nature of the healthcare market,
18 how it's a two staged market. And I think that's
19 probably true in other circumstances where it may lend
20 itself to some markets. There may be other tests that
21 are more appropriate in other markets. And so I
22 think, you know, someone that's an expert would have a
23 better sense of what test is best suited to figure out
24 what the commercial realities in fact are and make
25 sure you've defined the market.

1 If you look at Dr. Hill's testimony I
2 think he does a nice job sort of explaining the way
3 you go about it and how it's a holistic inquiry and
4 there's qualitative inputs and there's also
5 quantitative inputs to try to figure out --

6 THE COURT: So if it's healthcare,
7 let's say that the cardio-thoracic specialty is at the
8 Cleveland Clinic and people come from all over the
9 world to go to the Cleveland Clinic as opposed to just
10 the regular hospital. And you have that type of
11 situation, which test do you think fits better?

12 MS. SHERRY: I -- again I think it's a
13 little bit of both. I don't view it and others may
14 disagree --

15 THE COURT: I realize I'm asking an
16 academic --

17 MS. SHERRY: -- I don't view it as an
18 either or.

19 THE COURT: -- question like at a
20 colloquium.

21 MS. SHERRY: Right.

22 THE COURT: But I'm trying to get some
23 background as to how counsel goes about thinking about
24 these things and do the academics make the call here
25 or does counsel make the call or what?

1 MS. SHERRY: I think it's probably a
2 little bit of both, right, that counsel will look at
3 it --

4 THE COURT: Or I guess in the end it's
5 probably courts --

6 MS. SHERRY: -- but I think usually and
7 hopefully --

8 THE COURT: -- relying on both, but.

9 MS. SHERRY: Yeah. And hopefully in
10 consultation with an expert, right, an economics
11 expert who can look at the market and see, you know,
12 both what the commercial realities are, which we can
13 all, you know, look at it and see. But there's more
14 to it. I know, you know, there's a criticism that
15 it's too mushy. But you can look at price
16 differentials throughout the country. Dr. Hill did
17 that here to see whether there's a difference or
18 whether the price, you know, is equalized.

19 And can look at other things along
20 those lines that aren't, you know, strictly the
21 hypothetical monopolist test, but ways to measure
22 whether it makes sense to focus on a regional market
23 for example instead of a national market.

24 And there are things like, you know,
25 transportation costs, convenience factors that comes

1 up in the healthcare market a lot, other reasons why -
2 - you know, it's a perishable item. Reasons why you
3 would define a regional market and I think those are
4 the kind of things that counsel probably on the
5 Government side and on the defense side will look at
6 it in trying to, first, identify the market and then
7 test it to see if they really have it right.

8 And so I'm not meaning to avoid the
9 question, I just don't want to pretend that I have the
10 expertise to know in a healthcare case or any other
11 case what the right way to go about it is.

12 I think in a lot of cases, you know,
13 that have come to this court, the parties' have joined
14 issue on the way they've done it, it's been litigated
15 in one way and there wasn't a fight about the test.
16 And I think that's probably true actually in a fair
17 number of cases where there's a lot of evidence,
18 there's a lot of input into what the market should be
19 and the fights tend to be things along the lines of,
20 you know, should this be included, should this be
21 excluded, you have to zoom out a little bit more, what
22 are the arbitrage opportunities and the like.

23 THE COURT: Do you foresee a case
24 coming up in the near future where somebody may
25 attempt to take to the Supreme Court the issue of

1 whether Brown Shoe should any longer be used?

2 MS. SHERRY: I think it's possible. I
3 don't know if I think it's likely. It does seem to be
4 despite the academic criticism accepted enough as at
5 least one thing --

6 THE COURT: And some --

7 MS. SHERRY: -- you look at.

8 THE COURT: -- judicial criticism, for
9 example, the dissent of Judge Kavanaugh, then Judge
10 Kavanaugh.

11 MS. SHERRY: There is, although you
12 know, he also recognized, right, that market
13 definition is a necessary predicate and you have to
14 start with that. And so you can imagine it going up.

15 I sort of suspect the question would
16 maybe be more whether it's the be all and end all, as
17 opposed to whether you have to consider commercial
18 realities at all. But, you know, you can imagine it
19 going up. I don't feel like it's going up any time
20 terribly soon, but I could be wrong about that.

21 I mean, I think in the antitrust
22 context, right, people's views and economics change.
23 The economic literature changes and the case law at
24 the Supreme Court level tends to develop in reaction to
25 it. That's the, you know, per se and rule of reason

1 cases have kind of developed in that fashion to take
2 into account new, you know, views on economics. And
3 for lack of a better phrase, commercial realities as
4 we face them today.

5 THE COURT: It almost looks like
6 colloquially Brown Shoe is kind of in the bull pen
7 and HMT either doesn't seem to work or you have
8 questions about whether it should work, you bring out
9 Brown Shoe.

10 MS. SHERRY: That might be true. I
11 mean, I have to say, you know, I think this is not the
12 case honestly to deal with those deeper doctrinal
13 questions, because I just don't think it's presented
14 here.

15 There was no -- I mean, the Government
16 is the one that pushed the commercial realities theory
17 below. They did layer on the HMT a little bit on top
18 of it, but not with respect to product market
19 exclusively. And what was their HMT, it was Dr.
20 Rothman, you know, an expert who was found not
21 credible and not persuasive.

22 And so I think there are -- you know,
23 in antitrust law generally there's a lot of really
24 interesting legal and doctrinal issues and the law has
25 developed some in this area. I just don't think this

1 case is one that presents any of those legal issues.
2 It is -- I think it's the Eleventh Circuit case in
3 Englehart that we quoted in our briefs, this is just
4 like any other civil case. It's just one where the
5 Government failed to meet its burden of proof. It
6 really is a failure of proof case, plain and simple.

7 They came in with a theory, they
8 litigated that theory. They presented evidence on the
9 theory and the trial court just, you know, disagreed
10 on the facts, not as a matter of law, but on the
11 actual facts.

12 And so I think there will certainly be
13 other cases that will hit on these legal issues. I
14 don't think this is the one.

15 THE COURT: But insofar as the law is
16 concerned, the Court did use the Brown Shoe test.

17 MS. SHERRY: Yeah, but -- yes, but
18 didn't ignore the hypothetical monopolist test. I
19 mean, they sort of suggest that with respect to
20 product market, but again they never presented a
21 hypothetical monopolist test that just focused on
22 product market. And the Court absolutely talked about
23 the hypothetical monopolist test when it came to
24 geographic market.

25 The reason it didn't credit that test

1 or at least Dr. Rothman's performance of the test was
2 number one, Dr. Rothman himself was not persuasive or
3 credible. But also number two, because he based his
4 conclusions on the idea that there were no sufficient
5 arbitrage opportunities. And in extensive factual
6 findings she had found to the contrary.

7 And so in that sense, I don't think
8 it's fair to say that the district court ignored the
9 hypothetical monopolist test or treated it any
10 differently. It recognized the commercial realities,
11 but it also found that the only test they presented
12 was from an expert who was not credible and who made
13 an arbitrage finding that was inconsistent with the
14 facts at trial.

15 THE COURT: Okay. Any further
16 questions?

17 THE COURT: No.

18 THE COURT: Thank you very much.

19 MS. SHERRY: Thank you.

20 THE COURT: Mr. Bozzo.

21 MR. BOZZO: Thank you. I want to talk
22 about some of the practical issues, the commercial
23 realities questions that Your Honors raised and have
24 discussed.

25 THE COURT: Well, it's critical that

1 you do that because that's where the district court
2 went.

3 MR. BOZZO: Yes. And the critical
4 commercial reality here is the starting point of this
5 case. This is a merger among refiners, a horizontal
6 merger among competitors that operate at the same
7 level of the supply chain.

8 That means that under Brown Shoe and
9 under Philadelphia National Bank market definition has
10 to capture the area where the merger's effect on
11 competition will be direct and immediate. It has to
12 capture competition where competition exists.

13 Here, the competition is at the
14 refining level. That was the starting point for our
15 product market analysis. We tested that market using
16 the hypothetical monopolist test and that is the basic
17 commercial reality along with the fact that
18 distributors function as resellers in this industry,
19 not at the refining level, as customers that
20 demonstrates the appropriateness of our approach to
21 product market.

22 The other critical practical point here
23 is that the effect of the district court's failure to
24 follow Allen-Myland, the effect of its requirement
25 that we treat distributors as suppliers, is that even

1 a merger to monopoly among sugar refiners could pass
2 muster under Section 7, so long as independent
3 distributors continued to operate after the merger.

4 It's like saying that in a market in
5 which Apple and Samsung compete, Best Buy also
6 competes, adding in that extra layer of the supply
7 chain that it was appropriate for us to exclude.

8 I want to address counsel's discussion
9 of Allen-Myland a little bit because Allen-Myland drew
10 a distinction that is critical here. It distinguished
11 between the leases of new computers made by leasing
12 companies and leases of used computers.

13 The critical point about used computers
14 was that they were often reconfigured before they were
15 leased out to the market again. There was an
16 effective increase of supply based on what the leasing
17 companies in that case were doing, with respect to
18 used computers.

19 The pertinent holding of Allen-Myland
20 is its treatment of new computers, computers that
21 were purchased from manufacturers and sold down the
22 supply chain, just as distributors purchase sugar from
23 refiners and resell it. We think that's where the
24 Court needs to look in identifying the legal error
25 here.

1 I also want to address the geographic
2 market questions a bit. And in particular, to point
3 to one of the basic errors that the district court
4 made, which was to find that it was simply not
5 credible.

6 THE COURT: Do we even have to -- if we
7 disagree with you on the product market, do we even
8 have to get to the geographic market?

9 MR. BOZZO: Yes. I think even if the
10 Court disagrees with us on product market, we made out
11 a prima facie case in any plausible geographic market
12 based on our evidence of unilateral and coordinated
13 effects. That evidence shows the effects of this
14 merger on competition, even in a market in which
15 distributors are treated as suppliers. So we think
16 that the Court does need to reach that issue and that
17 there's reversible error that we did establish a prima
18 facie case regardless of the product market
19 resolution.

20 On the geographic market issue I do
21 want to address the district court's statement that it
22 was simply not credible for our expert to testify that
23 a market consisting of six states was just as relevant
24 a geographic market as the entire United States.

25 We think that that's plain legal error

1 under the Supreme Court's decision in Pabst, which
2 recognized that multiple geographic markets could
3 qualify as relevant markets. It defined a single
4 state market, a three state market, and the entire
5 country as relevant markets in that case.

6 THE COURT: But that wasn't your theory
7 at trial, right, in terms of geographic market?

8 MR. BOZZO: We did put forward two
9 overlapping geographic markets.

10 THE COURT: But not national?

11 MR. BOZZO: I'm sorry?

12 THE COURT: Not national.

13 MR. BOZZO: We did not put forward a
14 national market. Defendants did and we think we've
15 proved our prima facie case there as well.

16 And in any event, there's -- this also
17 reflects another misapplication of the hypothetical
18 monopolist test, in that the Court failed to recognize
19 that the test analyzes whether a market is too narrow.

20 THE COURT: I mean, prima facie case to
21 prove it is what, you have to prove both on product
22 market and on geographic? How do you prove a prima
23 facie case?

24 MR. BOZZO: You prove a prima facie
25 case by showing anti-competitive effects in a --

1 THE COURT: In --

2 MR. BOZZO: -- relevant market.

3 THE COURT: -- a relevant market, both
4 product and geographic.

5 MR. BOZZO: Correct.

6 THE COURT: Okay.

7 MR. BOZZO: And we did that both
8 through market shares and market concentration.

9 THE COURT: That goes back to my
10 question that if you don't prevail on product then
11 isn't the game over?

12 MR. BOZZO: Well, if we don't prevail
13 on the point that distributor -- that our treatment of
14 distributors was appropriate, we still can prevail
15 because based on unilateral and coordinated effects,
16 we showed anti-competitive effects in any market, even
17 one -- in any plausible market proposed below,
18 including one that does not treat distributors as
19 suppliers.

20 I also want to address just to clarify
21 quickly the treatment of imports. I heard counsel say
22 that we did not include distributors in our treatment
23 of imports. But foreign sales, sales by foreign
24 refiners to customers located in the geographic
25 markets, including distributors, were assigned market

1 shares.

2 We assigned a 7 percent market share to
3 the imports category that accounts for sales to all
4 customers in the geographic markets, including
5 distributors.

6 THE COURT: What about foreign sales to
7 distributors in let's say Wyoming?

8 MR. BOZZO: Those were addressed through
9 the arbitrage analysis which looked at whether sales
10 from out of market customers including distributors to
11 customers in the geographic markets could defeat a
12 substantial price increase. So we accounted for them
13 in that way and the conclusion again was that they
14 could not defeat a -- our relevant markets.

15 On this arbitrage issue I want to
16 emphasize that the district court did not make a
17 finding on arbitrage. If you look through its
18 geographic market findings, they relate to sales by
19 refiners from outside of the geographic markets to
20 customers located in them.

21 In footnote 16 of its opinion it says
22 that it's not in its geographic market analysis
23 addressing sales by distributors. So there's no
24 arbitrage finding in this opinion that would undermine
25 our geographic markets as we put them forward.

1 Unless there are any further questions

2 --

3 THE COURT: All right.

4 MR. BOZZO: -- we request that the
5 Court reverse and remand.

6 THE COURT: Thank you. Thank you very
7 much to both counsel. Very well presented arguments
8 and we'd ask that a transcript be prepared of this
9 oral argument and if you would split the cost if you
10 would, please.

11 Thank you for being here and we'll take
12 the matter under advisement.

13 (Proceedings concluded)

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CERTIFICATION

I, Sheila G. Orms, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: January 27, 2023

Signature of Approved Transcriber

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CERTIFICATE OF ACCURACY

I am liaison counsel in this matter and hereby certify that, with the corrections submitted by all counsel made, the transcript of oral argument is accurate.

Dated: February 1, 2023

Respectfully submitted,

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