No. 22-2806

IN THE

United States Court of Appeals
for the Third Circuit

UNITED STATES,
Plaintiff-Appellant,
v.
UNITED STATES SUGAR CORP., ET AL.,
Defendants-Appellees.

On Appeal from the
United States District Court for the District of Delaware
Honorable Maryellen Noreika
No. 1:21-cv-01644

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INTRODUCTION

Section 7 of the Clayton Act prohibits mergers "where in any line of commerce . . . the effect of such acquisition may be substantially to lessen competition." 15 U.S.C. § 18. Congress enacted Section 7 "'to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act.'" *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 n.39 (1962) (quoting S. REP. NO. 81-1775, at 6 (1950)); *see also* Amicus Curiae Brief for Am. Econ. Liberties Project in Support of Appellant 6-23. Here, the U.S. Sugar-Imperial merger is a prototypical *prima facie* Section 7 violation because the market shares give rise to a presumption of reasonably probable anticompetitive effects in any of the geographic markets proposed. Opening Brief ("Br.") 36-37.

The District Court reached the opposite conclusion because it misapplied binding market-definition precedent. Under the Government's proposed market definition, all firms that control output by producing refined sugar were treated as *suppliers* and received market shares. And all entities that purchase refined sugar from those suppliers, including distributors, were *customers* in the markets. The basic legal question in this case is whether a relevant market can, as the Government proposed, treat distributors of refined sugar as customers that purchase it from producers that control output. The answer is clearly yes.

Defendants' arguments to the contrary are unpersuasive—and either disregard or misread controlling precedent. In particular, many of Defendants' arguments essentially turn horizontal-merger law on its head—erroneously treating distributors as competitors of sugar refiners even though distributors operate at a different level of the supply chain. Because the merger is between refined-sugar producers, any analysis of competitive effects must fully encompass competition *at the production level of the supply chain*. And distributors do not operate at that level of the supply chain. The District Court recognized as much when it found that distributors purchase their refined sugar from refined-sugar producers. *See* JA1961 (Op. 11). As the Supreme Court has reaffirmed, distributors are vertically-related customers, not horizontally-related competitors, of producers. Indeed, in *Sugar Institute v. United States*, 297 U.S. 553 (1936), sugar refiners conspired to control prices, and the Supreme Court recognized that, like the sugar refiners' other customers, distributors were victims of the conspiracy. *Id.* at 585, 601; *see also Atl. Refining Co. v. FTC*, 381 U.S. 357, 363 (1965) (describing "wholesale distributors" not as competitors, but as part of the "distribution system" for oil refiner); *FTC v. Texaco, Inc.*, 393 U.S. 223, 226-27 (1968) (similar).

The Government's approach—treating distributors as *customers* in the relevant markets—also comports with the hypothetical monopolist test, which this Court has used to define relevant markets. *See FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 169 (3d Cir. 2022); *FTC v. Penn State Hershey Med. Ctr.* ("*Hershey*"), 838 F.3d 327, 337, 339 (3d Cir. 2016). Applying the test confirms that distributors need not be treated as suppliers in the relevant market because they could not avoid a price increase by a hypothetical sugar-refining monopolist—which, by definition, will control sales to distributors.

Once this Court corrects the District Court's erroneous requirement that distributors be included in a sugar-producer market, none of the District Court's other conclusions can sustain its decision. The Government need not further subdivide the market between sales to retail and sales to industrial customers, especially considering that doing so would have only strengthened the Government's *prima facie* case. And, while Defendants cannot salvage the District Court's rejection of the "Georgia Plus" and "Southeast" markets based on a supposedly crucial "arbitrage" finding that the District Court did not make (Brief of Defendants-Appellees ("Resp.") 22), the Government established a *prima facie* case in any of the proposed geographic markets at issue in this case. Accordingly, this Court should reverse the District Court's conclusion that the Government failed to establish a *prima facie* case and remand for further proceedings.

ARGUMENT

The District Court's legal errors—and failure to apply correct law to the facts—require this Court's plenary review and reversal. *See Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982) ("issue [of] whether the facts satisfy the [legal] standard" is a "mixed question[] of law and fact"); *Blackledge v. Blackledge*, 866 F.3d 169, 177 (3d Cir.

2017) ("For mixed questions of law and fact," court applies "plenary standard to the legal" aspects.).[1]

I. THE GOVERNMENT PROPERLY DEFINED THE RELEVANT PRODUCT MARKET

A. DISTRIBUTORS ARE CUSTOMERS OF SUGAR PRODUCERS IN THE RELEVANT MARKET, AND THE DISTRICT COURT'S ERRONEOUS CONTRARY HOLDING REQUIRES REVERSAL

The District Court's holding that distributors must be treated as suppliers in the relevant market constitutes legal error. First, distributors are not refined-sugar producers' horizontal competitors but rather are vertically related to producers in the refined-sugar supply chain. Second, the hypothetical monopolist test confirms that a market defined at the producer level—in which distributors are customers, not competitors—is properly defined.

[1] This appeal is analogous to other antitrust cases in which the Supreme Court and this Court reversed decisions that misapplied legal standards to the facts. In *Hershey*, the district court "correctly identified the hypothetical monopolist test," but "plenary" review was required because the "decision reflect[ed] neither the proper formulation nor the correct application of that test." 838 F.3d at 337, 339; *see also United States v. Gen. Motors Corp.*, 384 U.S. 127, 141 (1966) (reversing district-court finding of no conspiracy because applying correct legal standards to court's factual findings "compel[led] the conclusion that a conspiracy" was proven); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 192, 196-97 (3d Cir. 2005) (relying on district court's factual findings to reverse holding of no Sherman Act violation); *Allen-Myland v. Int'l Bus. Machines Corp.*, 33 F.3d 194, 201-07 (3d Cir. 1994) (reversing market-definition holding based on errors "in formulating or applying legal principles"); *Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1252 (3d Cir. 1975) (reversing market-definition holding based on failure to "apply the proper legal standard").

1. *Distributors Are Vertically Related to Producers in the Supply Chain for Refined Sugar*

The merging parties produce refined sugar. Analyzing the effects of their merger thus requires assessing competition at the production level. *See Brown Shoe*, 370 U.S. at 324 (relevant market in horizontal merger case is "area of effective competition" between the merging parties). Distributors are *not* producers of refined sugar: They do not control market-wide sugar supply or output; rather, they purchase all of their sugar from producers and then resell this purchased sugar to other customers. *See* JA1961 (Op. 11) (distributors "buy domestic and imported sugar"); JA1962 (Op. 12) (distributor "buys imported and domestic refined sugar" and then "distributes it"); JA1962-1963 (Op. 12-13) (distributor must first buy refined sugar from suppliers). Despite Defendants' attempts to overcomplicate this straightforward issue, these undisputed facts are dispositive. The "area of effective competition" between the merging parties—the area in which their merger will have an effect on competition—is the production of refined sugar. *See Brown Shoe*, 370 U.S. at 324. Distributors do not produce refined sugar.

Countless cases confirm the essential intuitive premise that producers and distributors operate at different levels of the supply chain. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007) (describing "vertical restraints a manufacturer imposes on its distributors"); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988) (restraints "imposed by agreement between firms at different levels of distribution" are "vertical restraints"); *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 212 (3d Cir. 1992) (conspirators were "vertically aligned" where "manufacturer" pressured "distributor to aid it in driving a competitor out of business"); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1368 (3d Cir. 1996) ("Agreements between entities at different market levels are termed 'vertical restraints.'"); *AT & T Corp. v. JMC Telecom, LLC*, 470 F.3d 525, 531 (3d Cir. 2006) (even if "a distributor and manufacturer also compete at the distribution level," agreements between them are treated as "[v]ertical restraints").

These cases—which Defendants misunderstand or misstate to the extent they address them at all (Resp. 40 n.3)—treated agreements between manufacturers and distributors as vertical agreements (i.e., agreements between parties at different levels of the supply chain), not horizontal agreements between competitors. Br. 24-25. And the cases did so in large part because the distributors did not compete with the manufacturers at the manufacturing level. *Id.* at 24-25.

Contradicting the fundamental reasoning in all of these cases, the District Court treated refiners and distributors as horizontal competitors in the production and sale of refined sugar. Br. 24-25. Defendants have no answer for this error.

<u>In the Government's proposed product markets, the suppliers are domestic and foreign *producers* of refined sugar that control supply within the refined-sugar supply chain</u>. Suppliers in the relevant market include two categories of firms: (1) all domestic

producers of refined sugar and relevant agricultural cooperatives, including Defendants;[2] and (2) all foreign producers of refined sugar that export the sugar they produce into the United States.[3] All suppliers in these categories received market shares.

The purchasers in the relevant market are *customers* of these suppliers. As the District Court found, distributors are among suppliers' customers in this market. *Supra* p. 5.

2. *The Hypothetical Monopolist Test Validated the Government's Treatment of Distributors*

Consistent with this Court's precedent, the Government used the hypothetical monopolist test to confirm that a market excluding distributors' resales of sugar from the relevant market was properly defined. *See Hackensack*, 30 F.4th at 169; *Hershey*, 838

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[2] With respect to the first category of suppliers, Defendants erroneously suggest (without support) that the Government's treatment of the agricultural marketing cooperatives and their sugar-refiner members as a single firm is somehow problematic. Resp. 27. The District Court did not adopt this argument. And for good reason. The Supreme Court has made clear that agricultural cooperatives under the Capper-Volstead Act, 7 U.S.C. § 291, are properly treated as a single firm with their members under the federal antitrust laws. *See Copperweld v. Indep. Tube Corp.*, 467 U.S. 752, 773 & n.21 (1984); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 28-29 (1962); *cf. Brown Shoe*, 370 U.S. at 337 n.66 (where firm has control over multiple entities, firm and controlled entities are properly treated as a single firm under Section 7).

[3] In addition to Defendants, domestic suppliers in the relevant market include: Domino, Louisiana Sugar Refining, National Sugar Marketing, Michigan Sugar, Western Sugar, CSC Sugar, Zucarmex, Sucro Sourcing, and L&S Sweeteners. *See* JA575-576 (Tr. 611:10-612:1). Contrary to Defendants' suggestion (Resp. 27), three firms that both produce and distribute refined sugar—Zucarmex, Sucro Sourcing, and L&S Sweeteners—received market shares to account for sales of refined sugar that they produced. *See* JA575-576 (Tr. 611:10-612:1); JA1963, JA1978 (Op. 13, 28).

F.3d at 345-46. As the District Court explained, this oft-used test asks whether "a hypothetical monopolist who owns all the firms in the proposed market could profitably impose a small but significant non-transitory increase in price ('SSNIP') on buyers in that market." JA1999 (Op. 49) (quoting *Hackensack*, 30 F.4th at 167). If so, the "proposed market is properly defined." *Hackensack*, 30 F.4th at 167. If not, the market is "too narrow." *Id.* at 169.

The District Court's product-market analysis ignored the hypothetical monopolist test, which this Court has held to be a "proper legal test" for evaluating relevant markets. *See Hershey*, 838 F.3d at 338-39, 344-45; *see also Hackensack*, 30 F.4th at 169 (stating that "courts often employ the hypothetical monopolist test" to "confirm the feasibility" of relevant markets). As the Government's application of the test confirmed, distributors *reselling* refined sugar could not constrain a price increase imposed by a hypothetical-monopolist sugar producer because distributors would have to purchase refined sugar from the monopolist. *See Hershey*, 838 F.3d at 338. The Government thus showed that a hypothetical monopolist of refined-sugar production in the relevant markets would likely raise prices to distributors alongside its other customers. Accordingly, for product-market purposes, the Government properly defined a market in which distributors are *customers*.

Nothing in the District Court's opinion undercuts the determinative point that, like all customers, distributors would be subject to a price increase (SSNIP) imposed by a monopolist. *Hershey* explains that market definition under the hypothetical monopolist test turns on whether purchasers could defeat a price increase imposed by "a *hypothetical* monopolist," irrespective of current (and potentially fleeting) market conditions. 838 F.3d at 344; *see id.* at 346. Contrary to Defendants' claim (*see* Resp. 28-29), it does not matter whether distributors might have a limited one-time ability to sell sugar available in storage that they bought before the price increase: Once distributors sold this sugar, they would need to buy additional sugar from the monopolist at the monopolist-imposed price.[4]

Simply put, the District Court misapplied the hypothetical monopolist test by disregarding the test's results without identifying a flaw in its application. Because a proper application of the test suffices to define a market, the District Court erred as a matter of law by adopting an alternative market definition (including both refiners and distributors) that is inconsistent with the test. *See Hackensack*, 30 F.4th at 169-72 (adopting Government's market based on hypothetical monopolist test); *Hershey*, 838 F.3d at 345-46 (same). At the very least, a court must provide economically sound

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[4] Defendants frame some of their arguments as credibility attacks on the Government's expert. *See, e.g.*, Resp. 9-12. Not only are these attacks meritless (Br. 34 n.25), but they are also irrelevant: As Defendants concede, the Government's opening brief focuses little on the expert's testimony (Resp. 2), and the legal errors identified by the Government still require reversal. Far from justifying the District Court's legal conclusions, its credibility findings are infected by legal misunderstandings. Br. 30-31 (identifying credibility finding resting on erroneous legal conclusion); Resp. 50-51 (acknowledging that credibility finding relies on this conclusion); *see FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 125-26 (D.D.C. 2016) (rejecting criticism of expert for not selecting relevant markets entirely on his own).

reasons for refusing to apply the hypothetical monopolist test. Here, the District Court simply cited *Brown Shoe*'s "reasonable interchangeability" standard. 370 U.S. at 325; JA1991 (Op. 41). That is *precisely* what the hypothetical monopolist test implements.[5] The District Court ignored the Government's proper application of the test and failed to provide economically sound reasons for refusing to apply it. That was legal error.

B. THE ALTERNATIVES TO THE GOVERNMENT'S PROPOSED APPROACH FURTHER ILLUSTRATE THE DISTRICT COURT'S LEGAL ERROR

The District Court's holding that distributors must be treated as suppliers warrants reversal for another reason. The only two alternatives to the Government's approach to accounting for sugar sold to distributors require ignoring commercial realities. Crediting those resales to both producers and distributors would require double counting them, while crediting those sugar sales only to distributors would completely ignore the production layer in the supply chain.

First, if the District Court assigned distributors shares based on their resales, that would double-count sugar already reflected in producers' market shares. Br. 26. Suppose that refiners collectively sell 80 tons of sugar annually in the relevant markets, 20 of which are sold to (and eventually resold by) distributors. If the Government assigned an 80% market share to refiners (reflecting the full 80 tons) and 20% to distributors (reflecting the resold 20 tons), the 20 tons of sugar would be counted both

[5] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 4.1.1, at 8-9 (2010) (hypothetical monopolist test "identif[ies] a set of products that are reasonably interchangeable with a product sold by one of the merging firms").

when refiners sold the sugar *and* when distributors resold the same sugar. *Allen-Myland v. IBM* expressly condemns that approach. 33 F.3d 194, 202 (3d Cir. 1994) (rejecting market-definition approach that "double count[ed]" purchases).

Defendants propose an equally unworkable alternative to double-counting. Resp. 44. In particular, Defendants' proposal would require assigning sales of those 20 tons of sugar <u>only</u> to distributors by pretending that the sales refiners made to distributers never happened. That approach would ignore the important competitive role that refiners, as producers, play. If a significant producer—say, for example, a Georgia-based refiner—sold all of its sugar through distributors, that refiner would receive a market share of zero. The upshot of this approach would be that a significant market participant would be effectively immunized because the approach would treat a merger between two such refiners as if it did not change the market's structure. This approach would undercount competition among producers for their sales to distributors, violating the Supreme Court's admonition that market definition must "recognize competition where, in fact, competition exists." *Brown Shoe*, 370 U.S. at 326; *see also United States v. Cont'l Can Co.*, 378 U.S. 441, 453 (1964).

Instead, the Government defined its product market around "those groups of producers"—refiners, cooperatives, and foreign producers—"which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other." *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir. 1978). This approach best reflects the sugar industry's commercial realities and comports with the legal test that this Court relies upon to define the market. S*ee United States v. Dentsply*, 399 F.3d 181, 188 (3d Cir. 2005) (market included producers' sales to distributors); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 718-19 (D.C. Cir. 2001) (elimination of "competition at the wholesale level" established Section 7 violation regardless of downstream effects).

Defendants suggest that a "product market should include *sellers* with 'the ability actual or potential to take significant amounts of business away from each other.'" Resp. 19 (emphasis added) (quoting *SmithKline*, 575 F.2d at 1063); *see also* Resp. 25, 30 (citing *SmithKline*). But in *SmithKline*, this Court explained that "defining a relevant product market is a process of describing those groups of ***producers***"—not "sellers"—that can take "business away from each other." 575 F.2d at 1063 (emphasis added). That distinction is fundamental to the correct legal principle: A product market defined at the production level must include those firms that participate in the *production* of competitively similar products. Consistent with *SmithKline*, the Government's proposed product market includes all firms that *produce* refined sugar.

C. DEFENDANTS CANNOT JUSTIFY THE DISTRICT COURT'S HOLDING THAT DISTRIBUTORS BE TREATED AS SUPPLIERS IN THE RELEVANT MARKET

Defendants attempt to reconcile the District Court's inclusion of distributors with the hypothetical monopolist test while also suggesting that the test does not apply to product-market definition. Defendants also try to muster support for their approach from case law. None of these arguments withstands scrutiny.

First, seeking to reconcile the decision below with the hypothetical monopolist test, Defendants erroneously suggest that distributors "located outside" the geographic markets could defeat a SSNIP by selling to customers inside the markets at lower prices. Resp. 43. This argument conflates geographic-market definition with product-market definition. If sales from distributors outside the geographic markets could defeat a SSNIP, the geographic markets must be expanded. That implies nothing about the product-market question: whether distributors should be treated as producers or customers. Br. 22; *see infra* Part II (explaining why the geographic markets were correctly defined and, at any rate, the Government established a *prima facie* case in any plausible market).[6] Thus, the Government is not telling the District Court to "blind[] itself" to the "proposed geographic markets when considering the product market," Resp. 43; it is suggesting the step-by-step evaluation of product and geographic market foundational to longstanding market-definition precedent. Rather, Defendants' approach attempts to evade a careful consideration of competitive effects by subverting the limited role of product-market definition.

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[6] In any event, the District Court did not address the Government's evidence, in applying the hypothetical monopolist test, that sales from out-of-market distributors would be too small (and prices charged by out-of-market distributors too high) to defeat a SSNIP. *E.g.*, JA979 (Tr. 1062:19-22) ("majority" of distributor Indiana Sugars' customers "are within 250 miles" of Indiana Sugar); JA1000-1001 (Tr. 1083:24-1084:4) (customer does not buy from distributors "[b]ecause traditionally the prices are more expensive" since "the distributor has to make money").

Second, Defendants suggest that "none of this Court's cases applied the [hypothetical monopolist test] to a relevant *product* market." Resp. 42. But, as the Supreme Court has made clear, "[t]he criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market." *Brown Shoe*, 370 U.S. at 336. To the Government's knowledge, every court of appeals to confront the issue has found that the hypothetical monopolist test is a legally sufficient mechanism for defining a product market.[7] Defendants failed to identify a single case in which a court rejected the applicability of the hypothetical monopolist test to the product-market context.[8] And contrary to Defendants' suggestions, this Court has made clear that the hypothetical monopolist test is an important legal tool for *taking commercial realities into account* when defining the market. *See Hershey*, 838 F.3d at 344-45

[7] *See, e.g.*, *FTC v. Sanford Health*, 926 F.3d 959, 964-65 (8th Cir. 2019); *FTC v. Whole Foods Mkt., Inc.*, 584 F.3d 1028, 1038 (D.C. Cir. 2008) (opinion of Brown, J.); *Todd v. Exxon Corp.*, 275 F.3d 191, 202 (2d Cir. 2001); *Olin Corp. v. FTC*, 986 F.2d 1295, 1301 (9th Cir. 1993). Consistent with this Court's precedents, many district courts, including those in this Circuit, use the hypothetical monopolist test to analyze product markets. *See Radio Music License Comm., Inc. v. SESAC Inc.*, No. 12-cv-5807, 2013 WL 12114098, at *14-15 (E.D. Pa. Dec. 23, 2013); *TransWeb, LLC v. Innovative Props. Co.*, No. 10-4413, 2012 WL 10634568, at *6-7 (D.N.J. July 13, 2012).

[8] In both *Hackensack* and *Hershey*, this Court acknowledged that the hypothetical monopolist test is derived from the *Horizontal Merger Guidelines* (which have incorporated the test since 1982), and both cases applied principles described in the *Guidelines* when reviewing lower courts' application of the test. *Hackensack*, 30 F.4th at 167; *Hershey*, 838 F.3d at 338; U.S. DEP'T OF JUSTICE, HORIZONTAL MERGER GUIDELINES §§ 2.A, 2.C, at 3 & n.6, 8-9 (1982). The *Guidelines* recognize the test's application to both product and geographic markets. HMG §§ 4.1.1, 4.2 at 8-10, 13-14.

(finding that "failing to properly formulate and apply the hypothetical monopolist test" constitutes a failure to analyze "commercial realities" and thus "legal error").[9]

Nor do Defendants' other precedent-based arguments support the District Court's treatment of distributors. Defendants misdescribe several cases, claiming incorrectly that these cases address how to treat distributors in a market defined around producers. Resp. 37-39. None of these cases do the work Defendants assert they do. *See United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 306, 308 (1956) ("independent wholesalers" found to compete with "wholesale division[s]," not with smaller manufacturing division); *United States v. Sabre Corp.*, 452 F. Supp. 3d 97, 141-42 (D. Del. 2020) (relevant market included sales by airlines through two airline-ticket distribution methods; no holding that online travel agencies competed with airlines as producers of air-travel service),[10] *vacated by* 2020 WL 4915824 (3d Cir. 2020); *N. W. Controls, Inc. v. Outboard Marine Corp.*, 333 F. Supp. 493, 520-21 (D. Del. 1971) (not assessing market for production).

Defendants try to distinguish the Government's authorities by stating that none

[9] *See also FTC v. Advocate Health Care Network*, 841 F.3d 460, 468 (7th Cir. 2016) (applying hypothetical monopolist test and noting that "[t]he market must correspond to" industry's commercial realities" (internal quotation marks omitted)); *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 277-78 (6th Cir. 2014) (expert assessed "actual inputs" and thus did not "ignore commercial realities" in applying hypothetical monopolist test); *Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 197-98 (1st Cir. 1996) (assessing commercial realities in applying hypothetical monopolist test).

[10] The Government complied with *Sabre*'s holding by including producers' sales to all wholesale customers, including distributors, in producers' market shares.

"hold that distributors can never be suppliers in a relevant product market." Resp. 37. But that is not why the Government cited those cases. Rather, they outline legal principles that apply to determining whether to treat distributors as producers in the relevant market—principles that the District Court failed to apply. Br. 25-27. In *Dentsply*, for example, this Court upheld a market that included sales to both distributors and end-users without assigning market shares to distributors—the same approach the Government followed here. 399 F.3d at 187-88.

Likewise, Defendants cannot distinguish *Allen-Myland*, 33 F.3d at 203. *See* Br. 25-26. Just as that case held it would be "double counting" to account for leases of new computers that "do nothing to increase the *supply* of new machines," it would be "double counting" to include resales by distributors of new sugar that do nothing to increase the supply of new sugar. 33 F.3d at 202. While Defendants note that *Allen-Myland* included leases of non-IBM *used* computers in the market (Resp. 37-38), reselling used goods can increase output, and recycling resellers therefore serve as a kind of producer. But there is no such thing as used sugar. Rather, new refined sugar counts toward producer market shares just once—when it travels from producers to customers. *Id.* at 202-03; *see Dentsply*, 399 F.3d at 188 (citing *Allen-Myland* to support market definition including sales to distributors).[11] *Allen-Myland* supports reversal.

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[11] *United States v. Oracle Corp.* (Resp. 39) included defendants' sales of software programs in the same market as sales by "outsourcing firms"—some of which licensed defendants' software and sold access to third parties. 331 F. Supp. 2d 1098, 1159 (N.D. Cal. 2004). This approach may involve "double counting" of the sort

D. DISAGGREGATING INDUSTRIAL AND RETAIL CUSTOMERS IS NOT REQUIRED BUT DOING SO WOULD ONLY STRENGTHEN THE GOVERNMENT'S CASE

The District Court erred in holding that sales to industrial and sales to retail customers must be treated as separate markets. *See* Br. 27-29. The Supreme Court has repeatedly confirmed that there is no legal requirement that plaintiffs subdivide a market and that the existence of submarkets does not negate a broader market. Br. 27-28 (citing, *e.g.*, *Brown Shoe*, 370 U.S. at 327).

Although this Court should correct this error, reversal is warranted even if this Court corrects only the District Court's inclusion of distributors in the market. That is because the Government established presumptive anticompetitive effects in a relevant market limited to sales to industrial customers. *See* Br. 29. Where, as here, the merging parties compete disproportionately in one of the submarkets (*see id.*), the merged firm's market share and the market's concentration will be higher in that submarket than in the broad market. Defendants' only response is that, when the Government presented statistics to show that the presumption would strengthen in an industrial submarket, those statistics were "nationwide" and not targeted to the Government's geographic markets. Resp. 46. But this shows that, even in the broadest plausible geographic

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disapproved by *Allen-Myland*. 33 F.3d at 203. In any event, outsourcing firms are distinct from distributors because some outsourcing firms developed their "own proprietary software" rather than relying on defendants' programs. 331 F. Supp. 2d at 1159; *see supra* at 7 n.3 (Government accounted for entities that both produce and distribute sugar).

market (a nationwide one), the Government would have established a *prima facie* case in an industrial-only market.

II. THE GOVERNMENT ESTABLISHED A *PRIMA FACIE* CASE IN EACH OF THE PROPOSED GEOGRAPHIC MARKETS AT ISSUE IN THIS CASE

The District Court's holding that distributors must be treated as suppliers in the relevant market alone warrants reversal because the Government established a *prima facie* case in any of the geographic markets proposed in this case. *See* Br. 5-6, 29-34. As the District Court made clear, there are "four proposed geographic markets at issue in this case." JA1976 (Op. 26). The Government proposed two geographic markets:

- the <u>"Georgia Plus" market</u>, which includes six states: Georgia, Florida, Alabama, Tennessee, South Carolina, and North Carolina;
- the <u>"Southeast" market</u>, which includes the six-state Georgia Plus market plus six additional states and the District of Columbia;[12]

And defendants proposed two geographic markets:

- the <u>"Competitive Overlap" market</u>—which includes the Southeast market plus nine additional states;[13] and
- <u>the "National" market</u>—which covers the entire United States.

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[12] The six additional states in the Southeast market are: Delaware, Kentucky, Maryland, Mississippi, Virginia, and West Virginia, plus the District of Columbia. JA1983 (Op. 33).

[13] The nine additional states in the Competitive Overlap market are: Arkansas, Indiana, Louisiana, Michigan, New Jersey, Ohio, Oklahoma, Pennsylvania, and Texas. JA1989 (Op. 39).

Undisputed evidence established a *prima facie* case of a reasonable probability of anticompetitive effects from the merger in each of these four geographic markets. *See* Br. 7-8, 34-41. That evidence shows that the merged firm will have at least a 30% market share in each of these markets, *id.* at 36, which establishes a presumption of anticompetitive effects under *United States v. Philadelphia National Bank*, 374 U.S. 321, 364 (1963). *See* Br. 7; *see id.* at 7-8 (Government established *prima facie* case based on showing of market shares, HHIs, and delta-HHIs in Government's proposed markets).

Defendants do not meaningfully address that their merger would yield sufficiently high market shares *in any plausible geographic market* to trigger a presumption of harm, which, undisputedly, carries the Government's *prima facie* burden.

Moreover, Defendants do not challenge the Government's central arguments regarding errors in the District Court's geographic-market analysis. Defendants do not dispute that customer-based geographic markets account for all sales made to customers in those markets, including sales by producers outside of the markets. Resp. 31-33. Nor do Defendants dispute that multiple concentric markets can qualify as relevant geographic markets. *Id.* at 30-31. And they do not dispute that *Hershey* treated supply-side factors, including supplier repositioning, as rebuttal factors rather than market-definition issues. *Id.* at 33-34.

A. THE GOVERNMENT CAN ESTABLISH THE STRUCTURAL PRESUMPTION IN THE "COMPETITIVE OVERLAP" AND "NATIONAL" GEOGRAPHIC MARKETS

Defendants misleadingly claim that courts accept only "alternative market[s]" that are "proposed by the *government*." Resp. 52-53. But plaintiffs may use any probative evidence to make their case, including evidence introduced by (or elicited from) other parties. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 765 (1984) ("testimony from [defendant's] district manager" provided "substantial *direct* evidence" of antitrust violation); *cf. United States v. Baker*, 928 F.3d 291, 296-97 (3d Cir. 2019) (relying on defendant's "own testimony" and "admission" to reject defense).

Indeed, one of Defendants' cited cases—which Defendants misdescribe[14]—rejected all of the Government's proposed markets and adopted two alternative markets of the court's own making. *Energy Sols.*, 265 F. Supp. 3d at 436-37. Other decisions accepted markets that the Government did not allege but argued in the alternative at trial or on appeal—exactly what the Government urges here. *Cont'l Can*, 378 U.S. at 457 (adopting market definition that "was not pressed upon the District Court" and urged only on appeal to Supreme Court); *FTC v. AbbVie Inc.*, 976 F.3d 327, 373 (3d Cir. 2020) (adopting market definition that "no expert had endorsed" but for which Government argued "in the alternative").

[14] Defendants state that *Energy Solutions* accepted two of the Government's proposed markets and rejected two others. Resp. 52-53. In fact, the court defined two relevant markets, each of which grouped together two of the Government's proposed markets and thus differed from any single market proposed by the Government. *United States v. Energy Sols., Inc.*, 265 F. Supp. 3d 415, 436-37 (D. Del. 2017).

Defendants fare no better in suggesting that their expert's testimony—on which the Government relied (Br. 36)—does not establish *Philadelphia National Bank*'s 30%-market-share presumption in Defendants' proposed geographic markets. If distributors are properly treated as customers and United's members are properly treated as a single entity, *supra* p. 6-7 & n.2, the presumption holds, and Defendants do not argue otherwise, *see* Resp. 54-55.

B. The Decision Below Erred in Rejecting the "Georgia Plus" and "Southeast" Geographic Markets, and It Cannot Be Upheld Based Upon an Arbitrage Finding the District Court Did Not Make

The District Court also committed legal error in rejecting the Government's two proposed markets—namely, the Georgia Plus and Southeast markets—as "too narrow." JA2002 (Op. 52).

The District Court apparently failed to apprehend that these markets already account for sales—which generally were low (Br. 32 n.22)—by producers outside those geographies to customers within them. The District Court's discussion of outside producers' ability to ship into the markets due to purportedly low transportation costs ignores this central—and undisputed—feature of the Government's markets that were demarcated in terms of *customer* locations (not producer locations, which were broader). *Id.* at 31-32.

Moreover, the District Court erroneously analyzed the possibility that suppliers located outside of the geographic markets might be able to expand or reposition supply. The District Court noted that suppliers that currently make sales to customers outside of the geographic markets might be able to shift their supply and make more sales to customers in the geographic markets in the future. JA2001-2002 (Op. 51-52). But the District Court failed to recognize that these considerations are not part of the market-definition analysis; instead, they are a point that Defendants can raise on rebuttal. *See Hershey*, 838 F.3d at 351-52; *see also* Br. 33-34.

Defendants seek to salvage the District Court's rejection of the Government's geographic markets by stating incorrectly that the District Court made a "crucial finding" on arbitrage. Resp. 22. The District Court made no such finding. "Arbitrage" is defined by the *Horizontal Merger Guidelines* as "defeating the [SSNIP] by purchasing indirectly from or through other customers." HMG § 3, at 6. Arbitrage would be relevant here only if a hypothetical monopolist would be unlikely to impose a SSNIP because too many customers would switch to purchases from *other customers* outside the geographic market. HMG § 4.2.2, at 14-15; *see United States v. Bertelsmann SE & Co.*, No. 21-2886-FYP, 2022 WL 16949715, at *18 n.23 (D.D.C. Nov. 15, 2022) (arbitrage did not defeat Government's proposed markets). If they could, the proposed market would need to be expanded. Arbitrage focuses on purchases from other customers because a customer-location geographic market, such as the one defined here, already accounts for all producers, wherever located.

The proper legal question in an arbitrage analysis, therefore, is whether customers in the relevant geographic markets could obtain supply from other customers outside those markets to a sufficient degree to make a small but significant and non-transitory price increase unlikely—i.e., defeat a SSNIP. *See Hackensack*, 30 F.4th at 169. The question is not merely whether customers have the "ability to buy sugar from outside the region" to an undefined degree, as Defendants suggest (Resp. 48).

The District Court never made a finding about "arbitrage" or about purchases from customers outside the market defeating a SSNIP. While Defendants fault the Government for not mentioning arbitrage in the opening brief (Resp. 2), they should fault the District Court instead: None of the District Court's findings confront this question.

For example, the District Court found that transportation costs are "relatively low" and "[s]hipping shorter distances is also not always cheaper than shipping longer distances" (Resp. 32 (quoting JA20 (Op. 15)). But a SSNIP is relatively small too—it is a "small but significant and non-transitory increase in price." HMG § 4.1.1, at 9. Findings about shipping costs do not indicate whether transportation costs are "low" or "cheap[]" *enough* to defeat a SSNIP. The same is true of the other factual findings highlighted by Defendants (Resp. 32-33 (quoting JA18, JA40 (Op. 15, 37)): That "[s]ugar flows" through a "nationwide" transportation "network" and that customers "have the ability to pick up refined sugar at locations outside of th[e] [proposed] markets" does not show whether customers would likely engage in enough arbitrage to defeat a SSNIP. In fact, the Government's application of the hypothetical monopolist test—the technical features of which were not questioned by the District Court—established that customers would be unlikely to do so, as did evidence establishing that distributors do not ship sugar long distances and must build a margin into their prices. *Supra* at 13 n.5.

III. THE EXISTENCE OF USDA'S SUGAR PROGRAM CANNOT "COUNTERACT" THE MERGER'S ANTICOMPETITIVE EFFECTS

As the Government's opening brief makes clear (Br. 41-48), the District Court incorrectly assessed the effects of USDA's role in the sugar industry and erred in asserting that "even if U.S. Sugar's acquisition of Imperial were likely to have any anticompetitive effects," USDA could "counteract those effects." JA2008 (Op. 58). USDA's regulations do not supplant antitrust enforcement in the refined-sugar industry, and the District Court's assertions to the contrary were erroneous.

After dwelling on USDA regulations and the merger's ostensible benefits at trial, Defendants now forswear the District Court's conclusions on both topics. Defendants do not dispute that, if the District Court effectively immunized sugar refiners from Section 7 scrutiny, that was error. Br. 42-43. Nor do Defendants dispute that, if the District Court considered the role of USDA's regulations as part of the *prima facie* or rebuttal analysis, the District Court erred. *Id.* at 44-46; *see Georgia v. Pa. R. Co.*, 324 U.S. 439, 461 (1945) (holding that where regulations "do[] not provide remedies for the correction of all the abuses . . . which might constitute violations of the anti-trust laws," they cannot rebut a *prima facie* case). And they do not dispute that Dr. Fecso's testimony about the deal's purported benefits must be analyzed as an efficiencies defense under

Hershey and *Hackensack* and that her testimony fails to satisfy the defense's requirements (if such a defense were cognizable). Br. 46-48.

Instead, Defendants downplay the District Court's discussion of USDA's regulatory scheme by characterizing it as a mere "policy observation." Resp. 57. This concession only confirms that, once the District Court's error on distributors is corrected, reversal is required.

CONCLUSION

This Court should reverse and remand the case for further proceedings.

Respectfully submitted.

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Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts exempted by Fed. R. App. P. 32(f), this brief contains 6,296 words.

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in Microsoft Word 2019 using 14-point Garamond font, a proportionally spaced typeface.

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December 5, 2022

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Rules 28.3(d), 46.1(e), and 113.2(a), I certify that I represent the United States and thus am not required to be a member of the bar of this Court.

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CERTIFICATE OF VIRUS PROTECTION

Pursuant to Third Circuit Local Rule 31.1(c), I certify that Windows Defender has been run on this file and that no virus was detected.

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I certify that on December 5, 2022, I caused the foregoing brief to be filed through this Court's CM/ECF filer system, which will serve a notice of electronic filing on all registered users, including counsel of record for all parties.

December 5, 2022

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