MERGER ANTITRUST LAW

Unit 10: U.S. Sugar/Imperial Sugar

Class 16

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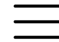
The Deal



MEDIA CENTER

U.S. Sugar to Expand Domestic Sugar Production to Better Serve Customers

March 24, 2021 | U.S. Sugar

Acquisition of Imperial Sugar provides U.S. Sugar's and Imperial Sugar's customers with increased production and distribution, a full suite of sugar products, and a more secure sugar supply

CLEWISTON, FLORIDA— March 24, 2021 — U.S. Sugar announced today it has reached an agreement with Louis Dreyfus Company to acquire the business and assets of Imperial Sugar Company, a port refiner with operations in Georgia and Kentucky. The acquisition returns Imperial Sugar to all-American ownership.

"We are excited to combine our operations with Imperial Sugar's port refinery, consumer brands, and sugar processing capabilities," said Robert H. Buker, Jr., President and CEO of U.S. Sugar. "Together, U.S. Sugar and Imperial Sugar will provide our customers with a more dependable, secure supply of sugar."

"Imperial Sugar has a strong heritage as a family-owned business and could not be more proud to become part of the U.S. Sugar family," said Mike Gorrell, CEO of Imperial Sugar. "This move will increase production and reduce costs at Imperial Sugar's refinery, generating significant efficiencies that ultimately will benefit our customers."

Imperial Sugar currently operates a refinery at Port Wentworth in Savannah, Georgia and a sugar transfer and liquification

facility in Ludlow, Kentucky. The company primarily sources its raw sugar from Central and South America, and the

Caribbean. Imperial Sugar's various facilities, consumer brands and raw/refined sugar inventories will be included in the purchase.

"U.S. Sugar has a world-class sugar business focused solely in America, including a historic relationship with the Savannah refinery," said Adrian Isman, Head of the North American Region at Louis Dreyfus Company. "Imperial Sugar's port refining capabilities will be an excellent addition for the company, while enabling LDC to concentrate more fully on its global sugar merchandizing business."

"Two storied American companies with a long history in the domestic sugar business – each with its own unique strengths – now will become a truly great American sugar company that will better serve our people, our customers, and our communities," said Buker.

Prior to building its Clewiston refinery in 1998, U.S. Sugar for decades sold and shipped its raw sugar to the Savannah refinery it is now acquiring. The company sustainably farms more than 200,000 acres of sugarcane in South Florida and also owns and operates a short-line railroad, the South Central Florida Express, which facilitates shipping sugar products.

Acquisition to Expand Sugar Production, Increase Sugar Supply Security, Create Logistics and Shipping Synergies, and Improve Competition—All Which Will Ultimately Benefit American Customers and Farmers

- *Expand Sugar Production and Reduce Costs:* U.S. Sugar will be investing in Imperial's refinery to expand production and reduce manufacturing costs. Adding Imperial's facility will provide U.S. Sugar and its local Florida farmers with enough refining capacity to utilize all the sugarcane they farm. Importantly, no facility closings or major employment impacts are anticipated as a result of this acquisition.

- *Increase Domestic Sugar Supply Security:* Increased production capacity and access to Imperial's Savannah port refinery will supplement U.S. Sugar's marketing cooperative's sugar supply if supplies of domestic beet and cane crops are limited from freezes or hurricanes. This will allow U.S. Sugar to better honor customers' contracts and requirements.

- *Create Logistics and Shipping Synergies:* Adding Imperial Sugar's operations to U.S. Sugar's marketing cooperative will create substantial distribution synergies and cost savings that will benefit customers.

- *Improve Competition:* The new combined company will be a better competitor, offering customers a full suite of sugar products (which U.S. Sugar does not supply today) and expanding distribution capabilities throughout the country. U.S. Sugar will continue to compete across the U.S. with both domestic and imported sugar refiners, along with independent resellers and distributors.

The transaction, expected to close in 2021, is subject to review under the Hart-Scott-Rodino Antitrust Improvements Act and other customary conditions. Wells Fargo Securities, LLC is serving as the exclusive financial advisor to U.S. Sugar. The transaction will be financed through committed debt financing provided by Wells Fargo Bank, N.A. and PGIM Agricultural Finance.

***U.S. Sugar** is a recognized leader in farming and food production, owned primarily by its employees and charities set up by its founder, Charles Stewart Mott. The Company farms more than 200,000 acres of the most productive farmland in the United States. Its consolidated, automated milling and refining facility in Clewiston, Florida is the world's largest vertically integrated sugarcane milling and refining operation — capable of processing 42,000 tons of sugarcane per day and producing ~850,000 tons of refined sugar per year. In addition to sugarcane farming and processing, the company also grows citrus, sweet corn, green beans and other fresh produce. For more information, visit www.ussugar.com and follow on Twitter and Facebook.*

***ial Sugar** is one of the oldest processors and marketers of refined sugar in the United States to food manufacturers, retail grocers and foodservice distributors. Imperial Sugar Company produces only the finest sugar and specialty sweetener ingredients for*

consumers, retailers, foodservice distributors, food manufacturers, private label customers, culinary professionals and specialty markets. For more information about Imperial Sugar, visit www.imperialsugar.com.

***Louis Dreyfus Company** is a leading merchant and processor of agricultural goods. Since 1851, its portfolio has grown to include Grains & Oilseeds, Coffee, Cotton, Juice, Rice, Sugar, Freight and Global Markets. Structured as a matrix organization of six geographical regions and eight platforms, Louis Dreyfus Company is active in over 100 countries and employs approximately 17,000 people globally. For more information, visit www.ldc.com and follow the company on Twitter and LinkedIn.*

More News

IN THE NEWS

SAP News: U.S. Sugar: Ninety Years of Sustainable, Innovative Agriculture

MEDIA CENTER

Joe Marlin Hilliard (1943-2022)

The District Court

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Tuesday, November 23, 2021

Justice Department Sues to Block U.S. Sugar's Proposed Acquisition of Imperial Sugar

Acquisition Would Eliminate Significant Refined Sugar Producer in the Southeastern United States

The Department of Justice filed a civil antitrust lawsuit today to stop United States Sugar Corporation (U.S. Sugar) from acquiring its rival, Imperial Sugar Company (Imperial Sugar). The complaint, filed in the U.S. District Court for the District of Delaware, alleges that the transaction would leave an overwhelming majority of refined sugar sales across the Southeast in the hands of only two producers. As a result, American businesses and consumers would pay more for refined sugar, a significant input for many foods and beverages.

"Robust antitrust enforcement is an essential pillar of the Justice Department's commitment to ensuring economic opportunity and fairness for all," said Attorney General Merrick B. Garland. "We will not hesitate to challenge anticompetitive mergers that would harm American consumers and businesses alike."

"U.S. Sugar and Imperial Sugar are already multibillion-dollar corporations and are seeking to further consolidate an already cozy sugar industry. Their merger would eliminate aggressive competition in the supply of refined sugar that leads to lower prices, better quality, and more reliable service," said Assistant Attorney General Jonathan Kanter of the Justice Department's Antitrust Division. "This deal substantially lessens competition at a time when global supply chain challenges already threaten steady access to important commodities and goods. The department's lawsuit seeks to preserve the important competition between U.S. Sugar and Imperial Sugar and protect the resiliency of American domestic sugar supply."

According to the department's complaint, U.S. Sugar operates a large sugar refinery in Florida, and sells all of its refined sugar through United Sugars Corporation (United Sugars), a marketing cooperative owned by U.S. Sugar and three other refined sugar producers. Imperial Sugar operates its own sugar refinery in Georgia, and sells its refined sugar directly to customers. American Sugar Refining, known more commonly by its "Domino" brand name, is the other producer supplying a significant share of refined sugar in the southeastern United States. The complaint further alleges that United Sugars and Imperial Sugar compete head-to-head to supply refined sugar to customers across the Southeast in states stretching from Mississippi to Delaware. This competition has resulted in lower prices, better-quality products and more reliable service for customers across the region.

If U.S. Sugar is permitted to acquire Imperial Sugar, Imperial's production would be folded into the United Sugars cooperative, leaving two significant sugar producers in the region. As alleged in the complaint, because transportation costs make up a significant portion of the total price customers pay for refined sugar, the nearest sugar producers tend to be a customer's best competitive options. The complaint alleges that U.S. Sugar's proposed acquisition of Imperial Sugar will further consolidate an already concentrated market for refined sugar. If the transaction is allowed to proceed, United Sugars and Domino would control the vast majority of refined sugar sales in the region, enhancing the likelihood going forward that they will coordinate with each other and refrain from competing aggressively.

U.S. Sugar, a Delaware corporation headquartered in Florida, is the world's largest vertically-integrated cane sugar milling and refining operation. U.S. Sugar is one of four member-owners of United Sugars. In 2020, U.S. Sugar received payments of $533 million from United Sugars, representing the company's share of United Sugars's net sales.

United Sugars, a Minnesota corporation headquartered in Minnesota, markets and sells all of the refined sugar produced by its four member-owners — U.S. Sugar, American Crystal Sugar Company, Minn-Dak Farmers Cooperative, and Wyoming Sugar Company. Its member-owners operate a total of nine sugar refineries located in Florida, Minnesota, North Dakota, Montana and Wyoming. United Sugars's revenues were $1.8 billion in 2020.

Imperial Sugar, a wholly-owned subsidiary of Louis Dreyfus Company LLC, is a producer of refined sugar in the United States and independently markets and sells its products on its own behalf. Imperial Sugar has a refinery in Savannah, Georgia, and an intermediate sugar transfer and liquification facility in Ludlow, Kentucky. Imperial Sugar's revenues were over $700 million in 2020.

Louis Dreyfus Company LLC, a Delaware corporation headquartered in the Netherlands, is a worldwide leader in sugar trading and merchandising and among the largest cane sugar refiners in the world. In 2020, the company had over $33 billion in net sales.

Attachment(s):
Download Complaint.pdf

Topic(s):
Antitrust

Component(s):
Antitrust Division
Office of the Attorney General

Press Release Number:
21-1163

Updated November 23, 2021

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES SUGAR CORPORATION, UNITED SUGARS CORPORATION, IMPERIAL SUGAR COMPANY, and LOUIS DREYFUS COMPANY LLC,

Defendants.

COMPLAINT

The United States of America brings this civil action to stop United States Sugar Corporation ("U.S. Sugar") from acquiring its rival sugar refiner, Imperial Sugar Company ("Imperial") in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. U.S. Sugar is a member and owner of United Sugars Corporation ("United"), a cooperative that sells—and sets the prices for—all the sugar produced by U.S. Sugar and three other sugar refiners. If U.S. Sugar is allowed to acquire Imperial and to fold Imperial's production into the United cooperative, United and just one other company, American Sugar Refining ("ASR" or "Domino"), would account for nearly 75 percent of sugar sales across the Southeast, leaving wholesale customers in this region at the mercy of a cozy duopoly. As a result, fragile supply chains would be further strained, and American families would pay more for sugar and many staple food and beverage products.

Due to the locations of the U.S. Sugar refinery and the refineries of the other United members, United is in a particularly strong position to supply the sugar needs of grocery stores, distributors, food and beverage manufacturers, and other customers located across the

Southeastern United States. Imperial, which operates a large refinery located in Georgia, is one of the few competitive constraints on United in the Southeastern United States. Today, competition from Imperial causes United to lower prices. Competition from Imperial also causes United to improve delivery reliability, which is a crucial factor for food manufacturers and grocery stores that depend on a robust supply chain to run their businesses. This is a straightforward case: the merger of two direct competitors that will result in a highly concentrated market and lead to higher prices for a product that is vital to our country's food supply. Simply put: this case is not a close call.

The United States alleges as follows:

I. INTRODUCTION

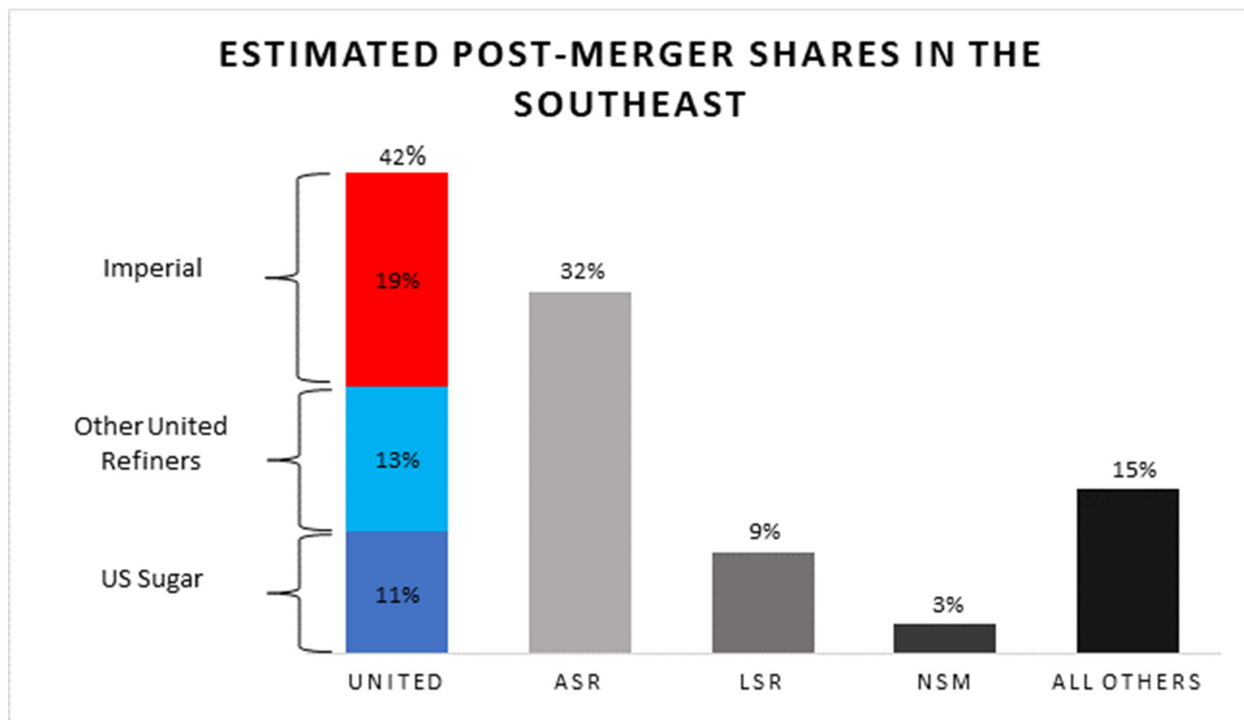
1. Sugar is a ubiquitous ingredient found in almost every American's kitchen and in Americans' favorite foods and beverages. It is refined from sugar beets or sugarcane and sold to wholesale customers in various forms (e.g., granulated, liquid, and powdered) and varieties (e.g., white and brown sugar). It then makes its way onto grocery shelves and into the foods Americans eat every day. In 2020, the average American consumed 40 pounds of refined sugar.

2. U.S. Sugar sells its sugar through United, a marketing cooperative that is jointly owned and controlled by U.S. Sugar and three other sugar producers. The four owners of United do not compete with one another; United manages all aspects of the sale and marketing of its owners' sugar, including deciding whether to submit a bid for a particular customer and what price to charge. If U.S. Sugar acquires Imperial, United would also gain control over the sale and marketing of all sugar produced by Imperial, thereby eliminating competition between United and Imperial.

3. United and Imperial are two of the three largest suppliers of refined sugar to grocery stores, distributors, and food and beverage manufacturers located across the regions defined by the U.S. Census Bureau as the East South Central and South Atlantic United States, an area that stretches from Mississippi to Delaware ("the Southeast"). Transportation costs can add thousands of dollars to the total cost of a delivery, and the need to ship refined sugar even a few hundred additional miles can yield a substantially higher total price for the customer. Based on data from United, shipping refined sugar an additional 500 miles by truck would increase the price of delivered sugar by over 10 percent. Making the same shipment entirely via rail, which is often impossible, would increase the price of delivered sugar by more than five percent. Because of these transportation costs, wholesale customers in the Southeast rely heavily on producers that have large refineries located nearby. United has an advantage in this region through its ability to sell sugar from U.S. Sugar's refinery in Florida, as well as from other United members' refineries. Imperial is also well positioned to serve customers in the Southeast from its refinery in Savannah, Georgia. Buying from United and Imperial helps customers in the Southeast keep costs low, and ensures they continue to have reliable and affordable access to this essential ingredient for their products. In addition to United and Imperial, large conglomerate ASR, often referred to by its "Domino" brand name, has significant sales in the Southeast owing to its major refineries in Florida, Maryland, and Louisiana.

4. If the transaction is completed, just two multibillion-dollar corporations, United and Domino, would control approximately 75 percent of sugar sales in the Southeast, a region where over 5.5 billion pounds of refined sugar are purchased each year. As shown in the estimated shares figure below, although other sugar suppliers sometimes sell to customers in the Southeast, they provide much smaller quantities because they operate at a significant disadvantage due to

transportation and shipping costs and/or capacity constraints, among other competitive limitations. Other suppliers therefore would have limited ability or incentive to constrain the dominance of United and Domino. United and Domino would be even more dominant in Imperial's backyard: Georgia and the five states that border it. For these states, more distant suppliers face even higher transportation costs, and consequently they are more limited in their ability to compete effectively.



5. Today, United and Imperial compete head-to-head to supply refined sugar to customers across the Southeast. This competition has led to lower prices, better service reliability, and better product quality for wholesale customers in this region. For example, for many years, United and Imperial have competed fiercely with one another to win the business of a large American food manufacturer, leading Imperial's Vice President of Sales to complain, "on EVERY bid we have won on the auction and we were #1 in price, United has come back in after the fact . . . with a lower price and then got the business." In another instance, when United and Imperial were competing to win the business of another major food manufacturer, United acknowledged

that it had "a significant freight disadvantage over one competitor in Savanah [sic], GA which is why [United] went with a much lower" price to retain the business. United's only competitor in Savannah is Imperial. The proposed acquisition would eliminate this competition, enabling United to raise prices and reduce quality and service reliability for customers throughout the Southeast, to the detriment of millions of American consumers, including families who would be forced to pay more to stock their kitchen pantries.

6. The proposed acquisition also would increase the likelihood that United and Domino, the two largest remaining refiners, will find it in their mutual self-interest to coordinate rather than compete on price, quality, and service reliability. Indeed, after the acquisition was announced, Domino's Vice President of Commodities Purchasing told his colleagues that he had spoken directly with Imperial's CEO. Reporting on that conversation, the Domino executive opined that U.S. Sugar's proposed acquisition of Imperial "likely is a good thing for us." Likewise, Domino's Director of National Accounts observed: "It's going to be more important than ever to stay close to United. . . . This is setting up to smell a bit like ADM/Cargill in the corn sweetener industry. 2 players that account for ~65% of the industry."

7. Although the proposed acquisition would be "a good thing" for billion-dollar refined sugar companies, it would not be good for competition, or for wholesale customers and American consumers. For the reasons discussed below, the proposed acquisition would likely result in substantial harm to wholesale customers and other American consumers in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and should be blocked.

II. DEFENDANTS AND THE PROPOSED TRANSACTION

8. U.S. Sugar is the world's largest vertically-integrated cane sugar milling and refining corporation, capable of processing 850,000 tons of refined sugar per year. It owns over

200,000 acres of land in central Florida, as well as a cane milling facility and a nearby cane sugar refinery in Clewiston, Florida. U.S. Sugar harvests cane from the land owned by the company, mills that cane into raw sugar, and then converts that raw sugar into refined sugar at the Clewiston refinery. U.S. Sugar is one of four member-owners of United, a marketing cooperative that markets and sells all of the refined sugar produced by U.S. Sugar and its three other member-owners. In 2020, U.S. Sugar received payments of $533 million from United, representing the company's share of United's net profits from sales of the refined sugar produced by the member-owners. U.S. Sugar is a Delaware corporation headquartered in Florida.

9. As discussed above, United is a cooperative owned by four sugar refiners: U.S. Sugar, American Crystal Sugar Company, Minn-Dak Farmers Cooperative, and Wyoming Sugar Company. Its member-owners operate nine sugar refineries located in Florida, Minnesota, Montana, North Dakota, and Wyoming. In 2020, United generated $1.8 billion in sales. United is a Minnesota corporation with headquarters in Minnesota.

10. Defendant Louis Dreyfus Company LLC ("Louis Dreyfus") is a worldwide leader in sugar trading and merchandising. Louis Dreyfus is a Delaware corporation with several U.S. offices.

11. Imperial is a wholly-owned subsidiary of Louis Dreyfus, with headquarters in Sugar Land, Texas. Imperial produces refined sugar in the United States and independently markets and sells its refined sugar products. Imperial has a cane sugar refinery in Savannah, Georgia and an intermediate sugar transfer and liquification facility in Ludlow, Kentucky. Imperial's revenues exceeded $700 million in 2020.

12. In 2019, on behalf of itself and its members, United sought to acquire Imperial but Louis Dreyfus rejected United's offer as too low. Shortly thereafter, one of United's member-owners, U.S. Sugar, pursued the acquisition of Imperial.

13. On March 24, 2021, U.S. Sugar and Louis Dreyfus entered into an asset purchase agreement whereby U.S. Sugar would acquire all of Imperial's assets for approximately $315 million. United, U.S. Sugar, Imperial, and Louis Dreyfus simultaneously entered into a side letter agreement dated March 24, 2021, whereby United agreed to comply with certain obligations of the asset purchase agreement. On April 20, 2021, United entered into an agreement with U.S. Sugar and the other member-owners pursuant to which United would market and sell all of the refined sugar produced by Imperial if U.S. Sugar is permitted to acquire Imperial.

III. INDUSTRY OVERVIEW

A. The Sugar Production Process

14. Refined sugar can be produced from either cane or beets. In the United States, sugarcane is grown only in the tropical and semitropical climates of Florida, Louisiana, and Texas. Sugar beets are grown in a range of temperate climate conditions across eleven states: California, Colorado, Idaho, Michigan, Minnesota, Montana, Nebraska, North Dakota, Oregon, Washington, and Wyoming. Sugarcane is not a genetically modified crop, while sugar beets grown in the United States are genetically modified. After it is harvested, sugarcane is converted to "raw" sugar at sugar mills, and then the raw sugar is processed into refined sugar at refineries. Harvested sugar beets are processed in a single facility where they are converted into refined sugar directly with no milling process required.

15. Refined sugar is predominantly sold in granulated form, including the familiar dry white granulated sugar that many households stock in their kitchens. Refined sugar also may be

modified into liquid sugar (by dissolving granulated sugar in water or, for a few liquid-only producers, by melting raw sugar), brown sugar (by adding molasses to granulated sugar), or powdered sugar (by pulverizing granulated sugar and adding corn starch).

16. As only a portion of the raw sugar necessary to meet the demand of domestic sugarcane refineries is produced domestically, some domestic sugar refiners import raw sugar into the United States. On the East Coast, only Imperial and Domino refine imported raw sugar into dry forms of refined sugar. Pursuant to agreements between the United States and other sugar exporting countries, a limited quantity of raw cane sugar and refined sugar may be imported into the United States at low tariffs or duty-free. The U.S. Department of Agriculture ("USDA") has authority to increase the quantity of imports from Mexico and other exporting countries under certain circumstances.

17. The USDA administers a sugar loan program that essentially sets a floor for raw and refined sugar prices; however, the USDA does not prescribe the price that sugar refiners may charge their customers for refined sugar, nor does the USDA set the terms and conditions of private contracts between sugar refiners and their customers. Since early 2014, for example, the wholesale price of sugar has increased substantially.

B. Producers of Refined Sugar

18. Few companies refine sugar in the United States. Only four companies produce dry refined cane sugar: the Defendants, Domino, and Louisiana Sugar Refinery ("LSR"). Domino has cane refineries in California, Florida, Louisiana, Maryland, and New York. LSR has a cane refinery in Louisiana and markets and sells all of its refined sugar through its partner, Cargill. There are also two small liquid refiners—CSC Sugar and Sucro Sourcing—that produce liquid

cane sugar directly from raw sugar, but these liquid refiners do not produce any dry refined sugar in the United States.

19. In addition to United's beet sugar member-owners, there are three other beet sugar producers—National Sugar Marketing ("NSM"), Michigan Sugar, and Western Sugar. NSM is a marketing entity that sells refined sugar made by two beet cooperatives, which have beet processing facilities in California, Idaho, and Minnesota. NSM makes only a small volume of sales to customers in the Southeast. Michigan Sugar has beet processing facilities in Michigan with negligible sales to customers in the Southeast. Finally, Western Sugar has beet processing facilities in Colorado, Montana, Nebraska, and Wyoming. Western Sugar sells primarily to customers west of the Mississippi River and has negligible sales to customers in the Southeast.

C. Marketing and Distribution to Customers

20. Sugar producers market and sell refined sugar to wholesale customers including retailers, food and beverage manufacturers, and distributors that re-sell refined sugar to other customers. Each customer may have slightly different needs and preferences. For instance, some customers are looking only for granulated sugar, whereas others may want liquid sugar, and other customers may be able to purchase or use either. Some customers require refined cane sugar in order to market their products as "Non-GMO" or as containing "pure cane sugar," whereas other customers may be willing to purchase either cane or beet sugar. Whatever specifications a customer may have, all of these forms of sugar are refined sugar.

21. Customers can buy granulated refined sugar in either bulk or packaged form and have it shipped by train or truck. Packaged granulated refined sugar comes in various sizes (e.g., 10- or 50-pound bags, 2,400-pound supersacks) and is typically delivered by truck. Certain customers operate facilities that can readily accommodate deliveries of granulated refined sugar

in bulk. Such customers often prefer bulk shipments because it is more efficient and reduces labor costs. Other customers are not set up to receive bulk deliveries of granulated refined sugar.

22. Customers typically purchase refined sugar annually pursuant to a request for proposal or other form of bid solicitation. As part of the bidding process, customers specify the type or variety of refined sugar products required (e.g., granulated, brown, powdered, or liquid), whether the customer requires cane sugar, volume requirements, and delivery locations. Prices and terms of sale are finalized in individual negotiations. Customers rely on competition between refined sugar producers to obtain competitive prices and to ensure product quality and reliable service.

23. Sugar producers' customers include sugar distributors that resell refined sugar to their own customers. Distributors primarily serve as a sales channel for sugar producers to reach smaller customers. United and Imperial both have separate sales teams focused on the distributor customer channel. Distributors have no capability to process raw sugar into refined sugar. Instead, they are essentially resellers that rely largely on domestic sugar producers to source granulated refined sugar. Distributors may also source from some of the limited quantities of granulated refined sugar imports. Distributors generally resell the same refined sugar products they purchase from producers, but some distributors further process the granulated refined sugar they purchase from producers to create brown, powdered, or liquid sugar for resale. Distributors tend to sell to customers on a spot basis (i.e., a one-time transaction) or focus on serving customers that need less than a full truckload of sugar for a given delivery. Larger customers do not generally purchase from distributors because buying directly from the sugar producers is typically the most cost-competitive option. In addition, many customers that require or prefer bulk shipments do not view the limited quantities of imported sugar sold by distributors as a viable option due to many factors.

These reasons include the labor cost to empty the imported packaged bags into bulk containers, and concerns about the quality and safety of imported sugar.

24. Customers pay a delivered price, i.e., one that includes transportation costs. The distance between a sugar producer and the customer is a significant determining factor in the price a customer pays for refined sugar. Transportation costs make up a significant percentage of the delivered cost of refined sugar. Shorter shipping distances also reduce the likelihood of shipping delays, which can be very costly for customers that depend on a reliable supply of ingredients to run their facilities. Longer shipping distances also increase the likelihood of damage to the refined sugar. For these reasons, customers often buy refined sugar from producers in close proximity.

IV. RELEVANT MARKETS

25. Courts define a relevant market to help determine the areas of competition most likely to be affected by a merger. A relevant market has both a product and a geographic dimension.

26. Unless enjoined, the proposed transaction would result in anticompetitive effects in the production and sale of refined sugar sold to wholesale customers such as industrial food and beverage manufacturers, distributors, and retailers located in (1) the Southeastern United States and (2) Georgia, where Imperial's refinery resides, and its bordering states. As recognized by the Supreme Court and the U.S. Department of Justice and Federal Trade Commission *Horizontal Merger Guidelines*, the focus in defining product markets is the extent of substitution in response to changes in price or quality. One tool used to assess the extent to which products are substitutes, and thus whether they belong in the same market, is known as the "hypothetical monopolist" test. This test, as described in the *Horizontal Merger Guidelines*, asks whether a firm that is the only seller of a product (a hypothetical monopolist) could profitably impose a price increase—

specifically, a small but significant and non-transitory increase in price—on at least one product sold by the merging firms in the relevant product market. As described below, the relevant markets satisfy this hypothetical monopolist test.

A. The Production and Sale of Refined Sugar is a Relevant Product Market

27. The production and sale of refined sugar is a relevant product and a line of commerce under Section 7 of the Clayton Act and is a relevant product market in which competitive effects can be assessed. Refined sugar is food-grade sugar that is produced by refining either sugar beets or raw cane sugar. Although some customers may not see beet sugar and cane sugar as substitutes, and the acquisition would result in even higher concentration in the sale of cane sugar, it is not necessary to consider separate markets for refined beet sugar and refined cane sugar to determine that the acquisition is likely to lessen competition. Refined sugar is sold primarily as granulated refined sugar but may also be sold as liquid sugar, brown sugar, or powdered sugar. An industrial food or beverage customer that uses refined sugar in its products is unlikely to switch to using another sweetener because it would require changing recipes, production methods, and product labeling, which risks depressing demand for its products. Similarly, grocery stores and other retail customers are unlikely to replace sugar on their shelves with other sweetener products because American households demand sugar for uses like baking cookies and sweetening coffee. Other kinds of sweeteners, such as high fructose corn syrup, are not reasonable substitutes for sugar.

28. For these reasons, the production and sale of refined sugar satisfies the well-accepted hypothetical monopolist test set forth in the *Horizontal Merger Guidelines*. A hypothetical monopolist of the production and sale of refined sugar would likely raise prices by a small but significant and non-transitory amount because substitution away from refined sugar would be insufficient to make that price increase unprofitable. Accordingly, the production and

sale of refined sugar constitutes a relevant product market and line of commerce under Section 7 of the Clayton Act.

B. The Proposed Transaction Would Harm Customers in Two Relevant Geographic Markets

29. The proposed transaction would harm customers across the Southeast. Within this broader geographic market is a narrower region, spanning Georgia and bordering states, in which the harm from the transaction is likely to be especially acute because the Imperial refinery is located in Georgia. The competition between United and Imperial is particularly important for customers in these states. This narrower region also constitutes a relevant geographic market in which the competitive effects of the proposed transaction should be evaluated.

30. When a supplier can price differently based on a customer's location, the relevant geographic market may be defined based on the locations of targeted customers. Refined sugar producers can and do charge different prices to customers in different areas. They negotiate prices with each individual customer for each individual customer location. In addition, the cost to transport refined sugar limits the geographic reach from which a customer can cost-effectively buy refined sugar. Moreover, due to the transportation costs, concerns over quality, and risks of contamination, most customers cannot practically buy refined sugar from a different customer located outside of the relevant geographic market (i.e., by engaging in arbitrage).

(1) The Southeast is a Relevant Geographic Market

31. United and Imperial compete vigorously for customers with food and beverage manufacturing facilities, distribution warehouses, or retail stores across the Southeast, a region that includes the areas that the U.S. Census Bureau defines as the East South Central and the South Atlantic: Alabama, Delaware, the District of Columbia, Florida, Georgia, Kentucky, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia.

32. The Southeast is a relevant geographic market under Section 7 of the Clayton Act. Customers with manufacturing facilities, retail stores, or distribution warehouses in the Southeast do not have reasonable substitutes for refined sugar in this geographic region. Thus, a hypothetical monopolist producer of refined sugar sold to customers that have manufacturing facilities, retail stores, or distribution warehouses in the Southeast would likely increase prices by at least a small but significant and non-transitory amount. This price increase would not be defeated by substitution away from refined sugar or by arbitrage.

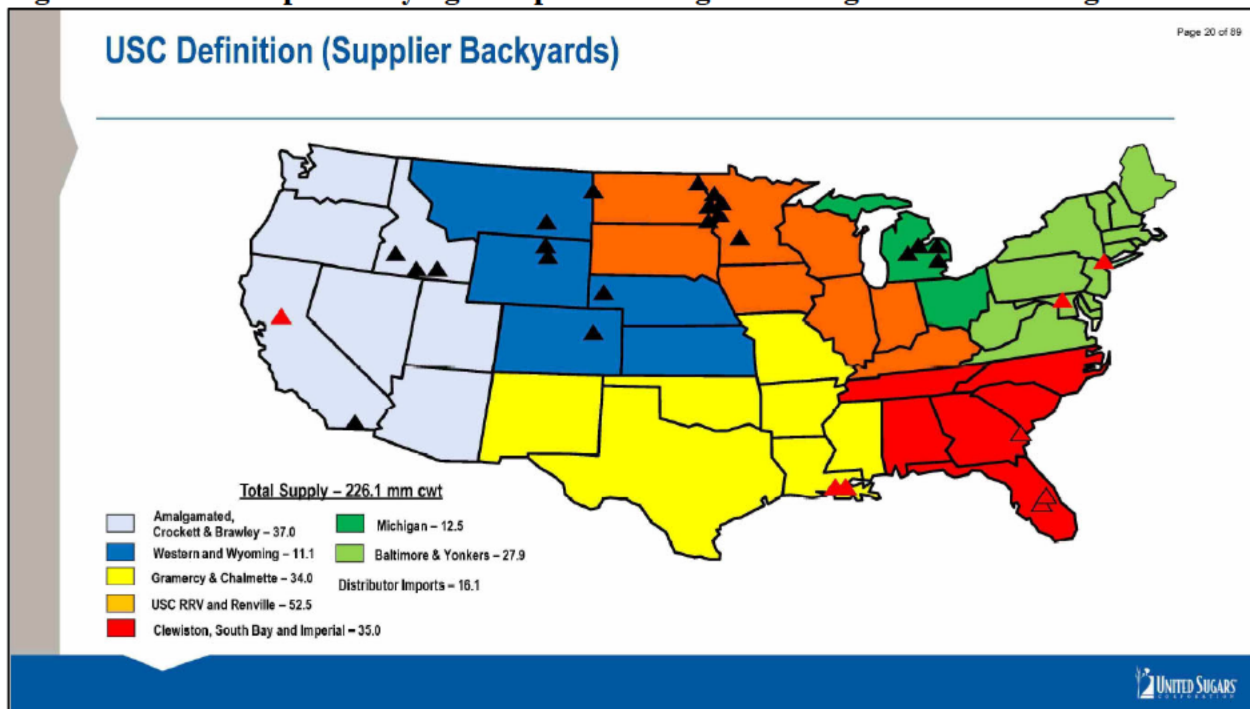
(2) Georgia and Its Bordering States is a Relevant Geographic Market

33. Within the Southeast, customers in Georgia and its bordering states would face particularly acute harm because United and Imperial are especially close competitors for these customers given Defendants' refinery locations and the locations of other sugar producers. Therefore, it is also appropriate to assess the competitive effects of the proposed transaction by considering the effects on customers within this narrower area. Accordingly, the states of Alabama, Florida, Georgia, North Carolina, South Carolina, and Tennessee constitute a relevant geographic market and section of the country under Section 7 of the Clayton Act. This geographic market encompasses Georgia, where the Imperial refinery is located, and its bordering states.

34. The states constituting this narrower relevant market are shaded red in Figure 1 below, a March 2020 United presentation to the United Executive Committee, comprised of the CEOs of United's four member-owners, with the title "Regional Markets Overview." As United's Executive Vice President of Industrial Sales explained, this Regional Markets Overview presentation was provided to assist with analyzing "what geographies would result . . . in the best net selling price" for the incremental refined sugar volume United's members planned to produce. Each shaded geographic region of Figure 1 represents the "Supplier Backyards"—or, as the

executive explained, the "geographies in which the producers that are identified in those various regions have freight advantage." This Regional Markets Overview identifies United (by selling the refined sugar produced at U.S. Sugar's Clewiston refinery), Imperial, and Domino (by selling out of its South Bay, Florida refinery) as the producers with a freight cost advantage over other refined sugar producers for customers located in the red-shaded states.

Figure 1. United Map Identifying Competitors' Regional Freight Cost Advantages



35. The narrower market of Georgia and bordering states satisfies the hypothetical monopolist test and is a relevant geographic market under Section 7 of the Clayton Act. Customers located in Georgia and its bordering states do not have reasonable alternatives to purchasing refined sugar in this narrower market. Thus, a hypothetical monopolist producer of refined sugar sold to customers with manufacturing facilities, retail stores, or distribution warehouses in Georgia and its bordering states would likely increase prices by at least a small but significant and non-transitory amount. This price increase would not be defeated by substitution away from refined sugar or by arbitrage.

V. ANTICOMPETITIVE EFFECTS

36. The proposed transaction would leave only two major refined sugar producers supplying to both relevant geographic markets—United (selling its member-owners' sugar production) and Domino. Together, these companies would control about 75 percent of refined sugar sales to customers in each relevant geographic market. Important head-to-head competition between United and Imperial would be eliminated, and these already concentrated markets would become even more concentrated. As a result of this disruption to the competitive process, United would likely raise prices and face reduced pressure to provide reliable service and a high-quality product. The proposed transaction also would increase the likelihood of coordination between United and Domino. Unless enjoined, the proposed acquisition would raise costs for food and beverage manufacturers, retailers, distributors, and ultimately American households.

A. The Transaction is Presumptively Unlawful in the Relevant Markets

37. The Supreme Court has held that mergers that significantly increase concentration in concentrated markets are presumptively anticompetitive and unlawful. To measure market concentration, courts often use the Herfindahl-Hirschman Index ("HHI"). HHIs range from 0 in markets with no concentration to 10,000 in markets where one firm has 100 percent market share. Courts have found that mergers that increase the HHI by more than 200 and result in an HHI above 2,500 in any market are presumed to be anticompetitive.

38. Using this measure, the proposed acquisition is presumed anticompetitive in both relevant markets and thus is presumptively unlawful. United makes all of the pricing and selling decisions on behalf of all its member-owners, and if the transaction is completed would make all pricing and selling decisions for Imperial as well. United, not its individual members, is viewed as the competitor in the market by Imperial, other refined sugar suppliers, and customers.

Therefore, to reflect these market realities, the proper measure of concentration combines all of United's sales in the relevant markets. In the market for the production and sale of refined sugar to customers located in the Southeast, the proposed acquisition of Imperial would significantly increase concentration, from an HHI of about 2,000 to an HHI of over 2,800, an increase of over 800 points. Similarly, in the market for the production and sale of refined sugar to customers located in Georgia and its bordering states, the proposed acquisition of Imperial would significantly increase concentration, from an HHI of over 2,000 to an HHI of over 3,100, an increase of over 1,100 points.

39. These market concentration measures understate the likelihood that the transaction would harm competition. Some customers have specific preferences or needs for granulated refined sugar instead of liquid sugar; some customers have specific needs or preferences for bulk shipments over bagged sugar; and some customers have specific needs or preferences for cane sugar over beet sugar. All of these factors make Imperial and United particularly close competitors for many customers and, after the proposed transaction, United would likely be able to target these customers for additional price increases.

B. The Proposed Transaction Would Eliminate Head-to-Head Competition between United and Imperial in Both Relevant Markets

40. United and Imperial often compete head-to-head to win customers' contracts. This competition has resulted in lower prices and more reliable service.

41. For example, for a certain large industrial customer with facilities across the United States, including in the relevant markets, United understood that Imperial was the customer's current supplier for a particular plant in the Southeast, having lost the business as the incumbent to Imperial a few years earlier. In bidding for this customer's 2022 refined sugar supply, United had its "eye on" winning this business back. United's bidding strategy focused on estimating and

beating the delivered price Imperial would offer. United even reached out to the railroad carrier serving Imperial and the customer to obtain competitive intelligence on Imperial's freight cost. Ultimately, United dropped its bid price significantly and won the business back for 2022.

42. For another large industrial customer's 2020-2021 sugar needs in the Southeast, United learned that the customer "decided to go with 'Savannah'"—in other words, Imperial. United lost the bid to Imperial because United's freight costs and additional charges were "not competitive compared to the competition," but United "was not too far off from competition."

43. United and Imperial do not just compete against each other aggressively for large industrial customers. For example, in 2020, United and Imperial were competing for a family-owned company's Southeast business. After the customer indicated that Imperial's price was too high to retain the business, Imperial came back with a lower price. The Imperial sales manager noted that it "Took a bit of back and forth, I thought we lost it, but we got it." In another bidding event for a regional, family-operated bakery in the Southeast, Imperial learned that incumbent United had lowered its bid price to maintain the business. Imperial therefore "want[ed] to offer [the customer] our very best, right off the top" and submitted a bid. "United came back" and bettered its previous offer, but Imperial was still able to win the business. The following year United wrested it back.

44. Customers use this head-to-head competition between United and Imperial as leverage in pricing negotiations. For example, when Imperial competed to win a large retail chain's business in the Southeast and Northeast, Imperial understood from the customer's feedback that Imperial was "competing with United cane" and was asked if Imperial had "any room to go down [in price] slightly." Imperial responded by reducing its bid price and won the customer's business.

45. Customers similarly rely on head-to-head competition between the parties to negotiate more reliable terms of service. For example, during the 2020 RFP process, United and Imperial competed to supply one food manufacturer's refined sugar. After awarding Imperial the business, the customer notified United that its loss "really came down to service."

46. United and Imperial often view each other as close competitors for a given customer's business and assess each other's ability to supply the customer. For example, for one large industrial customer, Imperial took steps not to "tip off United" when reaching out to truck carriers to secure freight pricing to include in its bid. Given the proximity of their refineries to each other, United and Imperial sometimes proactively lower prices to win business over the other. For example, a United sales manager informed a customer in the Southeast that United had "a significant freight disadvantage over one competitor in Savanah [sic], GA [i.e., Imperial] which is why [United] went with a much lower" price to maintain the business.

47. Imperial has been an important competitive constraint on United in both relevant markets. The proposed transaction would eliminate this important competitive pressure, likely leading United to increase prices and face reduced pressure to provide reliable service.

C. The Proposed Transaction Would Increase the Incentive and Ability of Industry Giants United and Domino to Coordinate to Raise Prices and Reduce Quality

48. Post-transaction, the few remaining producers of sugar would be more likely to coordinate with one another to the detriment of customers. In both relevant markets, just two remaining producers, United and Domino, would control the overwhelming majority of sales. With few significant rivals, it would be easier for the two to coordinate to raise prices to customers, such as by raising prices in parallel or refraining from trying to win one another's existing customers. Indeed, after the deal was announced, a Domino Vice President apparently spoke

directly with Imperial's CEO, and then the Domino Vice President reported back to his colleagues that he thought the U.S. Sugar/Imperial transaction "likely is a good thing for us." During the same discussion with the Domino Vice President, a Domino national sales director noted that "[i]t's going to be more important than ever to stay close to United."

49. The transaction would more closely align the incentives of United and Domino, increasing the likelihood of coordination on price or other dimensions of competition. The number of firms in a market is an important factor in assessing the ease of coordination, as are the size, product offerings, and other characteristics of those firms. In particular, firms that are more similarly situated often have similar interests and therefore find it easier to coordinate on price or output. Today, Domino is a very large vertically integrated firm that imports some raw sugar, whereas United is somewhat smaller and imports nothing, and Imperial is the smallest of the three and has no domestic sugar growing business to defend against imports. After the acquisition, Imperial would be eliminated as an independent force, and United and Domino would both be very large firms with similar market shares and a similar level of vertical integration. Both would benefit from a competitive détente.

50. The refined sugar market is vulnerable to such coordinated interaction between competitors due to a number of factors. Refined sugar is a relatively homogenous product, and there are high barriers to entry. Refined sugar prices are also relatively transparent, and sugar producers regularly monitor their competitors' prices. Both United and Imperial obtain competitive information about their rivals' pricing and capacity decisions from a variety of sources, including customers, distributors, and brokers. This transparency is sufficient for firms to discern when their rivals are undercutting them on price or generally increasing prices. It enables competitors to signal to each other to indicate a willingness to increase price and encourage

others to do the same. In one instance, United raised prices in part to "send[] a message" to its competitors "that we were not interested in allowing the market to slip lower." United's CEO testified that he was "confident" that "word got back" to United's competitors.

51. Likewise, producers can readily identify which competitors are serving particular customers. For example, United's Executive Vice President of Industrial Sales testified that "[m]ost of the trucking companies are aligned with one source or another" and "[t]he railcars are all numbered, so we . . . identify the routing of the car and understand where it was last loaded." He further testified that United can "send the sales manager to look at a bulk rail siting or a receiving location and figure out who's trucking the sugar in there" and thus "over time we come to understand what competitors might be at one location or another, or all." This transparency is sufficient for competitors to avoid competing too aggressively to poach one another's existing customers. For example, when Imperial was considering dropping its bid price to a customer in the Southeast in order to be more competitive with United, Imperial's Senior Vice President of Sales warned the CEO, "The main downside would be snatching something from United just as they are starting to show some upside price movement."

52. Moreover, producers other than United and Domino would benefit from increased prices and therefore would not have the incentive to frustrate increased coordinated interaction between United and Domino. Other producers also would not have the ability to undermine coordinated behavior by United and Domino by expanding sales into the relevant markets. The small shares of other refined sugar producers in the relevant markets demonstrate that competition is regional and largely determined by transportation costs. These costs also make it unlikely that these refined sugar producers would significantly increase sales into the relevant geographic markets in response to a price increase.

53. Similarly, distributors would lack the ability to constrain the prices charged by refined sugar producers like United and Domino. The prices and quantities of refined sugar that distributors can offer are dependent upon, and largely controlled by, the prices and terms set by the sugar producers, including United and Domino. Indeed, sugar suppliers like United and Domino have the power to adjust terms and prices charged to distributors to curb their ability to compete.

E. The Most Vulnerable Customers Would Suffer Particularly Acute Harm

54. Although United and Imperial compete in a relevant market that includes the sale of sugar refined from both sugarcane and beets, when assessing likely competitors and deciding what price to offer, United and Imperial factor in whether the customer has a specific demand for cane sugar. For customers that purchase only cane sugar, such as for non-GMO or other marketing purposes, United and Imperial are particularly close substitutes. Cane-only customers are unlikely to turn to a beet sugar producer in the event the price of cane sugar increases. Beet sugar producers cannot switch to refining cane sugar at their beet sugar processing facilities. Thus, customers that strongly prefer cane sugar over beet sugar are likely to face greater harm from the acquisition than other customers.

55. Similarly, many customers need or prefer to use granulated refined sugar due to established product specifications or specialized manufacturing processes and therefore are unlikely to switch to liquid sugar if prices increase for granulated refined sugar. These customers would likely suffer greater harm, as liquid-only sugar producers like CSC Sugar and Sucro Sourcing are not options even if they operate close to the customer.

VI. ABSENCE OF COUNTERVAILING FACTORS

A. Entry and Expansion Will Not Prevent the Substantial Harm Threatened by this Deal

56. New entry or expansion by existing producers of refined sugar is unlikely to prevent or remedy the transaction's likely anticompetitive effects in the relevant markets. There are high barriers to building a sugar refinery, including the cost and time to develop sufficient refining capacity to serve the relevant geographic markets. Existing sugar producers that do not currently serve these markets are unlikely to begin shipping a significant quantity of refined sugar into the relevant geographic markets due to the same factors—mainly transportation costs—that make them uncompetitive in these markets today.

B. USDA's Sugar Policy Will Not Prevent the Substantial Harm Threatened by this Deal

57. Defendants have claimed that USDA's sugar program would safeguard against the substantial harm threatened by this deal. But USDA's sugar program is not a substitute for antitrust enforcement and will not protect American grocers, food and beverage manufacturers, or consumers from the likely harm from this acquisition. Put simply, competition matters. USDA's program exists today, and yet it is vigorous competition among sugar refiners—not federal regulation—that sets the prices and terms of sale for refined sugar and that ensures that American families and food producers receive quality products and reliable service. Indeed, despite the USDA's role, there are significant regional variations in the prices charged to customers due to differences in competitive conditions in each area. Elimination of this robust domestic competition would result in higher prices and lower quality products and services. It would also further strain beleaguered supply chains by forcing customers to turn to more distant or foreign suppliers for alternatives. Thus, the transaction is unlawful under Section 7 of the Clayton Act, and challenging

it on that basis does not conflict with or impede the regulations administered by the USDA. The Supreme Court has rejected the argument that antitrust laws have no role in regulated industries, including in agriculture. *See United States v. Borden Co.*, 308 U.S. 188, 202 (1939); *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960). Rather, Section 7 requires "that forces of competition be allowed to operate within the broad framework of governmental regulation of the industry." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 371-372 (1963).

58. USDA's sugar program exists to support robust domestic sugarcane and sugar beet farming. Nothing about the combination of two of the country's largest sugar refining corporations is necessary to ensure that American sugarcane and sugar beet farmers can continue to earn a good living. To the extent that American sugar farming needs additional support, USDA has the requisite policy tools. This merger is not necessary.

C. There Are No Merger-Specific Efficiencies That Outweigh the Substantial Harm Threatened by this Deal

59. Defendants have claimed that this deal would allow U.S. Sugar to improve Imperial's operations. But such improvements can be achieved without eliminating the significant competition at stake in this deal. Time and again, history has shown that competition—not consolidation—drives corporations to improve their products. Grocers, food and beverage manufacturers, and consumers will be better off if these rivals continue to compete for their business.

VII. JURISDICTION AND VENUE

60. The United States brings this action under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to prevent and restrain the Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18. This Court has subject matter jurisdiction over this action under Section 15 of the Clayton Act, 15 U.S.C. § 25.

61. Defendants U.S. Sugar, United, Imperial, and Louis Dreyfus are engaged in interstate commerce and in activities substantially affecting interstate commerce. Either directly or indirectly, Defendants process and sell refined sugar to customers in the United States, including in Delaware and throughout the Southeast. They are engaged in a regular, continuous, and substantial flow of interstate commerce, and their sales of refined sugar have had a substantial effect on interstate commerce.

62. This Court has personal jurisdiction over each Defendant. U.S. Sugar, United, Imperial, and Louis Dreyfus transact business within this district. U.S. Sugar and Louis Dreyfus are incorporated in this district.

63. Venue is proper in this district under Section 12 of the Clayton Act, 15 U.S.C. § 22, and under 28 U.S.C. §§ 1391(b) and (c).

VIII. VIOLATIONS ALLEGED

64. Unless enjoined, U.S. Sugar's proposed acquisition of Imperial, as well as United's agreement to market and sell Imperial's refined sugar in the event of the closing of the proposed transaction, are likely to substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

65. The acquisition would likely have the following anticompetitive effects, among others, in the relevant markets:

i. competition between United and Imperial in the production and sale of refined sugar to customers in the Southeast and in Georgia and its bordering states would be eliminated;

ii. the acquisition would increase the likelihood of, or enable, successful anticompetitive competitor coordination in the production and sale of

refined sugar to customers in the Southeast, as well as in Georgia and its bordering states;

iii. competition in the relevant markets would be reduced generally;

iv. prices of refined sugar would likely increase to levels above what would prevail absent the transaction, forcing retailers, food and beverage manufacturers, and distributors in the Southeast and in Georgia and its bordering states to pay higher prices to buy refined sugar;

v. the quality of refined sugar would likely be reduced; and

vi. customer service, including delivery reliability, and choice would likely be reduced.

IX. REQUEST FOR RELIEF

66. The United States requests that the Court:

(a) adjudge U.S. Sugar's acquisition of Imperial to violate Section 7 of the Clayton Act, 15 U.S.C. § 18;

(b) permanently enjoin Defendants from consummating U.S. Sugar's proposed acquisition of Imperial, from implementing United's agreement to sell the sugar products of Imperial, and from entering into or carrying out any other transaction by which control of the assets or business of Imperial would be combined with U.S. Sugar and/or United;

(c) award the United States its costs of this action; and

(d) grant the United States such other relief as the Court deems just and proper.

Dated this 23rd day of November, 2021

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 21-1644 (MN)
	)	
UNITED STATES SUGAR CORPORATION, UNITED SUGARS CORPORATION, IMPERIAL SUGAR COMPANY and LOUIS DREYFUS COMPANY LLC,	)	**PUBLIC VERSION**
	)	
Defendants.	)	

MEMORANDUM OPINION

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September 23, 2022
Wilmington, Delaware

NOREIKA, U.S. DISTRICT JUDGE:

In this antitrust case under the Clayton Act, the United States of America ("the Government") seeks to prevent the proposed acquisition of Imperial Sugar Company ("Imperial") by United States Sugar Corporation ("U.S. Sugar"). The Court presided over a four-day bench trial in April 2022. (D.I. 222, 223, 224 & 225 ("Tr.")). After trial, the parties submitted proposed findings of fact and post-trial briefs. (*See* D.I. 214, 215, 220, 221 & 233; *see also* D.I. 238 & 240). For the reasons set forth below, the Court finds that the Government has failed to meet its burden of proof and, as a result, the Court will not enjoin U.S. Sugar's proposed acquisition of Imperial. This opinion constitutes the Court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

I. BACKGROUND

On November 23, 2021, the Government initiated this antitrust action under Section 7 of the Clayton Act, ultimately seeking to permanently enjoin U.S. Sugar from acquiring Imperial. (*See generally* D.I. 1). In addition to U.S. Sugar and Imperial, the Government also named as defendants Louis Dreyfus Company LLC ("Louis Dreyfus"), which owns Imperial, and United Sugars Corporation ("United"), a sugar-selling agricultural cooperative in Minnesota (collectively, U.S. Sugar, Imperial, Louis Dreyfus and United are "Defendants"). The Government alleged that U.S. Sugar's acquisition of Imperial would leave only two entities – United and Domino[1] – in control of roughly 75% of the sugar sales in the Southeastern United States. (D.I. 1 ¶ 4). On December 3, 2021, Defendants filed a motion to transfer this action to the Southern District of Georgia, where Imperial's Port Wentworth refinery (*i.e.*, the main target asset) is located.

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[1] American Sugar Refining Group International, Inc. ("ASR") is often referred to by its "Domino" brand name. (D.I. 1 ¶ 3).

(*See* D.I. 13, 14, 15, 16, 17 & 18; *see also* D.I. 30, 32, 33 & 37). On January 10, 2022, Defendants answered the Complaint, denying that that proposed transaction would harm customers or competition in any relevant geographic market. (*See generally* D.I. 72). The next day, the Court denied Defendants' motion to transfer. (*See* D.I. 73 & 74). Discovery ensued and the parties proceeded to an expedited trial in April of 2022.

II. FINDINGS OF FACT

This section contains the Court's findings of fact ("FF") on disputes raised by the parties during trial, as well as uncontested facts to which the parties have stipulated. Certain findings of fact are also provided in connection with the Court's conclusions of law. (*See infra* § IV).

A. The Parties and the Proposed Transaction

1. U.S. Sugar is a Delaware corporation, headquartered in Clewiston, Florida. (SAF ¶ 1).[2] U.S. Sugar grows sugar cane in South-Central Florida, and it owns and operates a cane mill and cane refinery in Clewiston. (SAF ¶¶ 2-3). U.S. Sugar currently grows more sugar cane than it has the capacity to process at its mill and each year sells sugar cane to third-party mills in Florida. (SAF ¶¶ 8-9; *see also* Tr. at 769:20-25 & 770:9-14). U.S. Sugar's Clewiston refinery – which is operating at maximum capacity – produces about 850,000 tons of refined sugar cane annually. (SAF ¶ 5; *see also* Tr. at 770:9-14). The 850,000 tons of refined sugar produced annually at the refinery is less than 7% of nationwide capacity. (SAF ¶ 5; DTX-028 at -022 (total U.S. capacity is about 12.9 million tons)). The Clewiston refinery only produces granulated and liquid sugar (*i.e.*, not brown or powdered sugar) and U.S. Sugar does not itself sell the refined sugar that it produces. (SAF ¶ 6; Tr. at 767:4-10).

[2] Citations to "SAF" are to the Parties' Statement of Admitted Facts in the Pretrial Order. (*See* D.I. 168, Ex. 1; *see also* D.I. 176).

2. United is a Capper-Volstead[3] agricultural cooperative based in Edina, Minnesota that markets and sells refined sugar for U.S. Sugar and three other refined sugar producers. (SAF ¶¶ 12 & 14). Since becoming a member of United in 1998, all of U.S. Sugar's refined sugar has been marketed and sold by United. (SAF ¶¶ 12-13). The other three member-owners of United are American Crystal Sugar Corporation, Minn-Dak Farmers Cooperative and Wyoming Sugar Company, LLC, all of which grow and process sugar beets. (SAF ¶¶ 15-16). In addition to refined sugar from U.S. Sugar's Clewiston refinery, United markets refined sugar produced at eight other member-owned sugar production facilities located in Minnesota, Montana, North Dakota, and Wyoming in an area known as the Red River Valley. (SAF ¶ 17; *see also* Tr. at 124:21-23). United sells refined sugar made from sugar cane and sugar beets across 45 states. (Tr. at 552:12-15). United has no control over the amount of sugar that its members produce and its mission is to sell all of its members' sugar every year. (*Id.* at 169:5-22; *id.* at 550:3-24).

3. Louis Dreyfus is a Delaware limited liability company and an indirect, wholly-owned U.S. subsidiary of Louis Dreyfus Company B.V., which is headquartered in the Netherlands. (SAF ¶¶ 28-29).

4. Imperial is headquartered in Sugar Land, Texas, and it is an indirect, wholly-owned subsidiary of Louis Dreyfus. (SAF ¶ 27; *see also* Tr. at 793:7-10). Imperial does not own any cane farming or milling assets, and instead primarily refines imported raw sugar. (SAF ¶ 36). Through its subsidiaries, Imperial operates a cane sugar refinery and integrated liquid sugar production facility located in Port Wentworth, Georgia (near Savannah). (SAF ¶ 30). Imperial's Port Wentworth facility can make a variety of refined sugar products, including brown sugar,

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[3] Capper-Volstead cooperatives are agricultural cooperatives that are exempt from certain antitrust scrutiny. *See* 7 U.S.C. §§ 291 & 291.

powdered sugar, and liquid sugar, and it is one of Imperial's main assets to be acquired in the U.S. Sugar transaction. (SAF ¶¶ 31 & 45). Imperial sells refined sugar into more than 40 states, including Texas, Indiana, Pennsylvania, and Ohio. (Tr. at 254:12-255:1 & 287:22-288:1; *see also* DTX-516).

5. On March 24, 2021, U.S. Sugar and Louis Dreyfus entered into an Asset Purchase Agreement, whereby U.S. Sugar[4] would acquire all of Imperial's assets – including the Port Wentworth facility – for $315 million ("the Proposed Transaction"). (SAF ¶¶ 44-45; *see also* PTX-287 (Asset Purchase Agreement)). In addition to the Port Wentworth facility, the to-be-acquired assets also include Imperial's leasehold interest in a sugar transfer and liquification facility in Ludlow, Kentucky and four retail sugar brands (*i.e.*, Imperial Sugar, Dixie Crystals, White Gold, and Holly Sugar). (SAF ¶ 45). Under the Asset Purchase Agreement, the Outside Date is September 24, 2022 but the parties can mutually agree to extend this date. (PTX-287 § 10.1(b)).

6. Also on March 24, 2021, United and U.S. Sugar entered into a letter agreement in connection with the Proposed Transaction whereby United agreed to comply with certain obligations of the Asset Purchase Agreement. (SAF ¶ 46).

7. On April 20, 2021, United and its member-owners entered into a letter agreement providing that United would market all of the refined sugar produced at Port Wentworth on behalf of U.S. Sugar. (SAF ¶ 48; *see also* JTX-41 (United and member-owners agreement)). The agreement between United and its member-owners is to become effective as of the closing of U.S. Sugar's acquisition of Imperial. (SAF ¶ 48).

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[4] The specific acquiring entity was U.S. Sugar's subsidiary, Ibis Acquisition, LLC (now United States Sugar Savannah Refinery, LLC). (SAF ¶ 44).

8. By letter agreement dated December 31, 2021, U.S. Sugar and Louis Dreyfus amended certain conditions to closing and reduced the cash payment for the Proposed Transaction to $297 million (subject to adjustments specified in the Asset Purchase Agreement). (SAF ¶ 44).

B. Sugar Processing

9. Refined sugar is a food-grade sugar that is produced by refining sugar cane or processing sugar beets. (SAF ¶ 49).

10. U.S. farmers grow sugar cane in Florida, Louisiana, and Texas. (SAF ¶ 50). After it is harvested, sugar cane is milled into raw sugar at sugar mills, and the raw sugar is then refined into refined sugar at refineries. (SAF ¶ 52; Tr. at 766:5-767:3).

11. In the U.S., sugar beets are grown in a range of temperate climate conditions across eleven states: California, Colorado, Idaho, Michigan, Minnesota, Montana, Nebraska, North Dakota, Oregon, Washington, and Wyoming. (SAF ¶ 51). Harvested sugar beets are processed and converted into refined sugar directly with no milling process required. (SAF ¶ 53).

12. Refined sugar produced from sugar beets is chemically identical to that produced from sugar cane. (*See, e.g.*, Tr. at 74:12-16, 395:19-21 & 1023:8-11).

13. Refined sugar includes white granulated sugar, brown sugar, powdered sugar, and liquid sugar. (SAF ¶ 54; Tr. at 794:9-13). Brown sugar, powdered sugar, and liquid sugar are produced by further processing of white granulated sugar. (SAF ¶ 85; Tr. at 806:14-18). Liquid sugar can be made by melting granulated sugar or refining directly from raw sugar. (*See* SAF ¶ 81; Tr. at 803:22-804:1 & 1036:7-10).

14. Whether ultimately derived from sugar cane or beets, refined sugar is produced in locations across the U.S. (*See* SAF ¶¶ 61, 62 & 65 (sugar cane refineries in California, Louisiana,

Maryland, New York, and Florida); SAF ¶¶ 75, 76, 79 & 80 (sugar beet processing plants in Idaho, Minnesota, Michigan, California, Colorado, Montana, Nebraska, and Wyoming)).

C. Sugar Producers and Refiners in the United States

1. Louisiana Sugar Refining / Cargill

15. Louisiana Sugar Refining, LLC ("LSR") operates a refinery in Gramercy, Louisiana that produces granulated sugar, turbinado (raw) sugar, liquid sugar, and brown sugar. (SAF ¶ 65; JTX-001 at -038). LSR is a joint venture between Cargill Inc. and the Louisiana Sugar Growers and Refiners, Inc. ("SUGAR"), a cooperative of eight sugar cane growers and mills. (SAF ¶¶ 66-67). LSR began operations in 2011. (PTX-293 at 2(c)). LSR refines the raw sugar that SUGAR produces [REDACTED]. (SAF ¶¶ 68-69). [REDACTED]. (SAF ¶¶ 71-72; Tr. at 1134:8-12).

16. Cargill sells all of the refined sugar produced by LSR. (Tr. at 1105:15-1106:22; *see also* JTX-024 § 1.1). Cargill sells LSR's refined sugar throughout the U.S., including to customers on both coasts and nearly all states in-between. (Tr. at 1111:1-24; DTX-028 at -024; DTX-025; DTX-026; *see also* DTX-518). In 2021, Cargill sold [REDACTED] cwt[5] of refined sugar across [REDACTED] states. (DTX-518).

17. Cargill delivers sugar to customers via rail (70%) and truck (30%) and has distribution terminals in Tennessee and Maryland, as well as storage facilities in Louisiana and Mississippi (and access to multiple third-party terminals). (*See* JTX-001 at -038; Tr. at 1108:4-

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[5] The term "cwt" stands for hundredweight (100 pounds).

1109:2 & 1125:4-10). Cargill's LSR refinery is located on rail lines and its rail and truck network allows it to distribute refined sugar throughout the U.S. (Tr. at 1109:3-10).

18. LSR currently has capacity to produce approximately 1 million tons of refined sugar annually, with plans to expand its output by 20-25% within [REDACTED] months. (Tr. at 1112:11-14 & 1113:7-1116:6; DTX-028 at -022 to -025; *see also* Tr. at 1128:11-1129:12; JTX-022 at -176; JTX-050 at 2; SAF ¶ 73). LSR's strategic plan is to become the first U.S. refinery to process 1.5 million tons of raw sugar annually, a 50% increase to its current capacity. (Tr. at 1128:22-1129:20; JTX-022 at -176). Part of LSR's plan includes an additional refinery, as well as adding packaging capability, more railcars, [REDACTED]. (Tr. at 1117:23-1118:11, 1132:6-1133:4 & 1136:6-19; *see also* Tr. at 1132:6-20; JTX-022 at -176; JTX-050 at 2). Cargill expects that the additional production will enable it to [REDACTED]

[REDACTED]. (Tr. at 1114:5-1115:6; DTX-028 at -024).

2. American Sugar Refining / Domino

19. ASR is also known as Domino. (SAF ¶ 60; *see also supra* n.1). Domino operates cane refineries in California, Louisiana, Maryland, and New York. (SAF ¶ 61). One of Domino's parent companies – Florida Crystals Corporation – owns and operates a refinery in Florida as well. (SAF ¶ 62). Florida Crystals Corporation also owns and operates sugar cane mills in Florida, which process sugar cane into raw sugar. (SAF ¶ 63). Domino also imports raw sugar because it cannot purchase enough raw sugar domestically to satisfy its requirements. (Tr. at 754:9-11). Domino sells refined sugar to retail customers under the brand names Domino, C&H, and Florida Crystals (among others). (SAF ¶ 64).

20. In 2021, Domino sold approximately cwt of refined sugar to customers in all 50 states. (DTX-517 at 1-2; Tr. at 420:15-421:15). Domino's refinery in Louisiana produced more than cwt of refined sugar in 2021, which Domino sold to customers in 44 states (DTX-517 at 3-4), and Domino's refinery in Florida produced about cwt of refined sugar in 2021, which Domino sold in states (*id.* at 5-6).

3. National Sugar Marketing

21. National Sugar Marketing Cooperative, Inc. ("NSM") is a cooperative of sugar producers that markets the refined beet sugar produced by its members Southern Minnesota Beet Sugar Cooperative ("Southern Minn") and Amalgamated Sugar Company ("Amalgamated"). (SAF ¶ 77). Southern Minn and Amalgamated produce refined sugar from beets at facilities in Minnesota, Idaho, and California. (SAF ¶¶ 75-76). NSM is also the exclusive marketer of refined cane sugar that Sucden Americas (operating in Florida) imports into the U.S. (SAF ¶¶ 77-78; *see also* Tr. at 341:3-11 & 343:1-13). Sucden does not produce refined sugar in the U.S. and predominantly sells imported sugar. (SAF ¶ 78; *see also* Tr. at 343:4-13).

22. NSM is obligated to sell "all of the refined sugar produced by its members" each year and has no control over the amount of sugar its members produce. (Tr. at 342:11-20). NSM sells sugar "everywhere" in the U.S., including to customers located in (among others). (Tr. at 354:25-355:4 & 357:9-15; JTX-049 (NSM sales data)). percent of NSM's sales each year is to (Tr. at 347:11-13).

23. NSM competes throughout the country by transporting sugar by rail from the upper-midwest and also by relying on cane sugar imported by Sucden. (Tr. at 354:22-357:5; *see also id.*

at 256:20-257:11 (NSM competes for sales in Georgia by sending beet sugar in by rail)). United considers NSM to be one of its "most price aggressive competitors of late." (*Id.* at 177:8-14).

4. Michigan Sugar

24. Michigan Sugar Company ("Michigan Sugar") is a grower-owned cooperative that owns and operates four beet processing plants in Michigan, as well as a liquification facility in Ohio. (SAF ¶ 79; *see also* Tr. at 703:4-23). Michigan Sugar must produce as much sugar as it can from its members' sugar beets and then market the entire production. (Tr. at 710:17-22).

25. Michigan Sugar currently sells approximately 1.3 billion pounds (13 million cwt) of refined sugar each year, across approximately 25 states in the midwest, northeast, and south, including in Alabama, Florida, Georgia, South Carolina, North Carolina, Tennessee, Kentucky, Virginia, West Virginia, and Maryland. (*See* DTX-244; *see also* Tr. at 702:23-703:3 & 716:15-717:13 (DTX-244 is the "best source of information" for where Michigan is selling its sugar)).

26. In August 2021, Michigan Sugar announced that it was building a new desugarization facility by Spring 2024, which will allow Michigan Sugar to increase its annual output by 80 million pounds. (Tr. at 713:16-714:6 & 714:18-20). To sell its additional volumes, Michigan Sugar is willing to expand the areas in which it sells, including potentially in states like Tennessee, North Carolina, Virginia, and Georgia. (*Id.* at 714:21-715:11).

5. Western Sugar

27. Western Sugar Cooperative ("Western Sugar") is a cooperative that owns and operates four sugar beet plants in Colorado, Montana, Nebraska, and Wyoming. (SAF ¶ 80). Western Sugar's annual capacity is approximately short tons of (or cwt). (DTX-028 at -022). Western Sugar has, at times, displaced sales to large players (*e.g.*, Domino) with its aggressive pricing. (*See, e.g.*, DTX-094 at -297).

6. <u>CSC Sugar</u>

28. CSC, which began its liquid operations in 2006, is the largest independent company in the U.S. that converts raw sugar directly to liquid sugar. (SAF ¶ 82; *see also* Tr. at 1045:25-1046:2). CSC produces refined liquid sugar at refineries in Tennessee, Texas, Pennsylvania, and Virginia. (SAF ¶ 83). CSC sells liquid sugar to customers located in (among others). (JTX-002 at Tab "LBS by State by Cust.").

29. CSC created an innovative liquid sugar product tailored to customer needs and its liquid sugar has become the industry standard for almost all dairy products. (Tr. at 1048:3-19 & 1054:8-1055:4; *see also* DTX-314 at -880 to -881, -883 & -887 to -888). CSC builds facilities close to customers and produces high-quality liquid sugar at a low cost. (Tr. at 1053:22-1054:7; *see also* JTX-007 at -407 ("CSC has built a business around ")). By building facilities close to customers, CSC has been able to leverage new customers within 6 months to a year and for about $5-7 million dollars for a base refinery (plus the cost of land). (*See* Tr. at 1047:1-1048:2, 1048:16-1051:21, 1053:17-1054:7 & 1055:9-15; DTX-314 at -895 (CSC's "strategic footprint is highly scalable and can be opportunistically expanded to address specific customer opportunities"); Tr. at 804:18-24 (Imperial has lost customers to CSC); DTX-041 at -585 (indicating customers lost to CSC)). Since 2006, CSC has built seven refineries. (Tr. at 1045:25-1046:25).

30. CSC's total sales have increased more than from in 2011 to in 2021. (*See* Tr. at 1052:22-1053:10; *see also* JTX-002; DTX-314 at -906 (charting CSC's growth)).

7. Sucro Can Sourcing

31. Sucro Can Sourcing LLC d/b/a Sucro Sourcing ("Sucro") produces liquid refined sugar directly from raw cane sugar. (SAF ¶ 84; Tr. at 567:22-568:2). Sucro has a refinery in Lackawanna, New York that is capable of converting raw sugar into liquid sugar, with plans to begin producing granulated sugar as well. (SAF ¶ 84; *see also* DTX-041 at -567).

32. Sucro also refines raw sugar into liquid sugar at a facility in Memphis, Tennessee operated by Sugar Services. (DTX-043 at -490 (depicting [REDACTED] facilities in U.S.)). Sucro competes against Imperial, United, Domino, and others. (*See, e.g.*, Tr. at 804:4-24 (Imperial has lost business to Sucro liquid sugar); *id.* at 177:22-25 & 556:6-10 (United competes with Sucro); *id.* at 752:16-25 (Domino has to compete with Sucro)).

8. Zucarmex

33. Zucarmex is a Mexican company that processes sugar cane into raw sugar and recently opened a facility in California that refines imported raw sugar into liquid sugar. (*See* Tr. at 802:25-803:7). Zucarmex apparently has plans to convert its California facility into a refinery capable of producing granulated sugar. (*Id.* at 436:12-17; *see also* DTX-041 at -565).

D. Sugar Distributors in the United States

34. Distributors purchase refined sugar and may repackage it or further process it into liquid, invert, brown, or powdered sugar before reselling.[6] (SAF ¶ 85; *see also* Tr. at 1061:4-11; Tr. at 806:4-22). Distributors compete against producers and refiners throughout the U.S. by leveraging nationwide storage facilities to buy domestic and imported sugar opportunistically when prices are low and selling later when prices are higher or in areas that command higher

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[6] Those distributors that further process the refined sugar before reselling are sometimes referred to as "value-added distributors." (*See* Tr. at 1061:8-11).

prices. (*See, e.g.*, Tr. at 256:17-19, 290:3-21 & 806:4-807:3 (Imperial's experience competing against distributors); *id.* at 570:19-571:11 (United's experience competing against distributors in southeastern U.S.)). Distributors are also able to offer nationwide shipping using rail transfer stations and their own trucking fleets. (*See id.* at 806:12-807:5).

35. Indiana Sugars is a value-added distributor that has been in business for more than 100 years. (Tr. at 1061:4-18 & 1064:6-7). Indiana Sugars buys imported and domestic refined sugar from many different sources and then packages, liquefies, grinds, warehouses, and distributes it across the country. (*Id.* at 1061:4-11 & 1061:23-1062:10; DTX-115 (Indiana Sugars suppliers)). In fact, Indiana Sugars buys refined sugar from every U.S. producer of cane sugar and beet sugar. (Tr. at 1062:1-3). In 2021, Indiana Sugars sold approximately [redacted] cwt of refined sugar nationwide, with an average shipment size of about [redacted] pounds. (*Id.* at 1073:6-8; *see also* JTX-010 (average shipment size for 2021 calculated as [redacted] pounds)). Indiana Sugars has "pretty significantly" increased its sales in the southeastern U.S. over time. (*See* Tr. at 1071:2-21; JTX-010 (sales into "Southeast")). And it is planning to build a new facility there within 12-18 months because of its sales success and because it believes it has enough customers there to expand. (Tr. at 1063:4-13 & 1070:9-1072:4).

36. Batory Foods ("Batory") is one of the largest distributors of food ingredients in the U.S. and is growing rapidly, with its customer base growing by more than 10% in the past few years. (*See* Tr. at 323:10-23 & 324:12-15). Batory is also a value-added sugar distributor that produces [redacted] in facilities located in [redacted]. (*Id.* at 326:11-22 & JTX-045 ("refined sugar formats produced from these sites")). Batory has six distribution centers in the U.S. located in Georgia, Illinois, Minnesota, Texas, and California. (JTX-045; Tr. at 326:11-22). In 2021, Batory sold more than

cwt (pounds) of refined sugar that it had purchased from various domestic and foreign suppliers. (Tr. at 325:23-326:2 & JTX-046 (sales data); *see also* JTX-047 at summary tab (depicting suppliers)). Batory ships from its facilities into southeastern states, including . (Tr. at 339:21-25 & JTX-046). Batory entered into an agreement to purchase sugar . (Tr. at 1119:3-6). Batory can sell it anywhere. (*Id.* at 1118:12-1119:17).

37. Other examples of distributors selling refined sugar include (among many others): International Food Products Company, Evergreen, St. Charles Trading, ICI Foods, Atlantic Ingredients, ADM, Sweetener Supply, Sweeteners Plus, Pullman, and L&S Sweeteners. (*See* Tr. at 805:20-806:3; *see also* DTX-043 at -462 (map)).

E. Sugar Flows in the United States

38. Customers can buy refined sugar in bulk, packaged, or liquid form. (SAF ¶ 54). Bulk refined sugar may be delivered by rail, truck, or barge. (SAF ¶ 55).

39. A nationwide network of railroads, interstate highways, and transfer stations enables customers to buy refined sugar from suppliers located throughout the country. (Tr. at 552:24-553:6 & 554:9-24; *id.* at 1109:8-10 (Cargill's "rail and truck network allow it to distribute sugar throughout the United States"); *id.* at 288:2-15 (transfer stations keep costs low and allow for long-distance shipping); *id.* at 856:23-857:2 (agreeing "refined sugar can travel pretty long distances")). Sugar flows throughout the U.S. from areas of surplus to areas of deficit to meet customer demand. (Tr. at 927:3-928:6 ("extensive evidence" of sugar flowing); *id.* at 173:9-

174:16 (discussing PTX-452 at -449 and how "sugar flows throughout the U.S."); Tr. at 552:24-553:6 & 554:9-18 ("we [United] can ship sugar quite freely because sugar does flow easily")). If a shortage of sugar exists in an area, the price of sugar will increase and attract sugar from other sources to compensate. (Tr. at 856:15-22).

40. The southern U.S. is an area of sugar surplus and the northeastern U.S. is an area of sugar deficit. (Tr. at 815:12-19). As a result, sugar moves from the south to the northeast "all the time." (*Id.* at 815:6-19; DTX-193 at -595). For example, Cargill has shipped more than [redacted] pounds of sugar from Louisiana to a customer in [redacted] (Tr. at 1115:13-24) and [redacted] pounds to customers in [redacted] (*id.* at 1111:4-9 & DTX-518). Similarly, Domino has shipped [redacted] pounds of sugar from Louisiana to customers in Pennsylvania. (DTX-517 at 3 & Tr. at 423:7-11; *see also* DTX-517 at 3 (Domino also has shipped more than [redacted] pounds from Louisiana to customers in California)). And Domino has also shipped more than [redacted] pounds of sugar from Florida to customers in New York. (DTX-517 at 5 & Tr. at 424:7-18; *see also* DTX-517 at 5 (Domino also has shipped nearly [redacted] pounds from Florida to customers in California)).

41. Sugar also flows from surplus regions in the west and upper-midwest to the east coast and into the south. (Tr. at 173:9-174:16 (discussing PTX-452 at -449); Tr. at 217:8-218:10 (same)). For example, NSM rails beet sugar produced in the upper-midwest to customers "everywhere" in the U.S., including [redacted], and Post in North Carolina. (Tr. at 347:25-348:8 & 350:7-352:7; *see also* Tr. at 1030:9-18).

42. Transportation costs are relatively low and usually not determinative of whether a particular sugar supplier will supply a location.[7] (*See, e.g.*, Tr. at 287:14-21 (Imperial senior vice president testifying that freight costs are only about 5% of delivered price of sugar); *id.* at 455:12-15 (director of strategic accounts at United testifying that freight costs are 5-12% of FOB price); *id.* at 553:11-19 (president and chief executive officer of United testifying that "sugar is relatively inexpensive to transport")). Although a supplier located closer to a customer may have a "freight advantage" that could allow that supplier to supply the customer more efficiently, having a "freight advantage" does not allow a supplier to charge a higher delivered price to a customer or mean that suppliers only sell sugar in areas where they are "freight advantaged." (*Id.* at 174:17-175:10). That many suppliers already sell and ship sugar to customers throughout the U.S. – including to distant locations – indicates that transportation costs are not a meaningful barrier to sugar flowing across the country to meet competitive demand. (*See, e.g.*, *id.* at 174:3-175:10 (United only selling sugar close to home "not a realistic strategy" because other sales opportunities arise and fit margin requirements despite being farther from home); DTX-244 (Michigan Sugar primarily sells sugar in the midwest but sells sugar outside the midwest including into states like Tennessee, North Carolina, Virginia, and Georgia to be able to sell all inventory); FF ¶¶ 40-41 (Cargill, Domino, and NSM selling large volumes of sugar to geographically distant locations)).

[7] Shipping shorter distances is also not always cheaper than shipping longer distances because "different shipping lanes, railways, they have different costs and sometimes it can be less expensive to go further in terms of miles." (Tr. at 423:12-17). For example, Domino "primarily" serves Kraft Heinz's Dover, Delaware facility with rail cars from its Chalmette, Louisiana refinery instead of Domino's much closer Baltimore refinery because "it takes the same amount of time to get from Baltimore to Dover, Delaware via rail as it takes from Chalmette to go to Dover, Delaware" because the rail lines outside Baltimore are "messy." (*Id.* at 743:2-23).

43. Large amounts of raw and refined sugar also flow into the U.S. from abroad. (*See* Tr. at 935:19-936:11; *see also id.* at 751:11-22). Although the United States Department of Agriculture ("USDA") sets quotas on the amount of raw sugar coming into the U.S. at no or low duty (*infra* FF ¶¶ 51-52), approximately 40 countries have "preferential agreements" that allow them to export sugar into the U.S. on favorable terms. (Tr. at 830:19-831:2; *see also id.* at 870:3-6). The U.S. has the highest priced sugar in the world and, as a result, other countries look to sell refined sugar into the U.S. (*Id.* at 870:15-871:4).

44. Between 1 million and 1.5 million tons (20 million to 30 million cwt) of refined sugar is imported into the U.S. annually, including into Florida, Alabama, and up the east coast. (Tr. at 805:2-19 & 814:13-16). Imported refined sugar is primarily sold by distributors. (*Id.* at 219:10-14).

F. The Federal Sugar Program Administered by USDA

45. The sale of raw and refined sugar in the U.S. is heavily regulated through the Federal Sugar Program, a series of statutes, regulations, and international trade agreements that govern the supply of raw and refined sugar in the U.S. (Tr. at 851:2-7; *see also id.* at 172:2-4 & 797:4-798:2). The Federal Sugar Program, as run by the USDA, purports to balance somewhat competing government policies that impact the price of sugar – *i.e.*, the Government's support of American sugar cane and sugar beet farmers by ensuring that there is a guaranteed floor price to be able to stay in business and the Government's interest in ensuring that sugar prices do not get too high for the many businesses (known as sugar "users") that buy sugar to use in their products. (*Id.* at 851:2-7, 859:7-17 & 860:10-861:10).

46. The USDA is statutorily mandated[8] to ensure that (a) raw and refined sugar prices are above loan forfeiture levels[9] and (b) there are adequate supplies of raw and refined sugar in the domestic market. (SAF ¶ 86; *see also* Tr. at 797:4-14, 859:7-860:2 & 886:13-25). The USDA purports to "manage the program to provide adequate supplies of both raw and refined sugar at reasonable prices." (DTX-278 at -947 (Former Secretary of Agriculture Perdue); *see also* Tr. at 862:24-863:5 & 872:21-25).

47. The USDA does not monitor individual contract prices between sugar producers and their customers, and the USDA has no ability to set the particular price at which domestic refiners sell refined sugar. (Tr. at 890:14-891:2; *see also id.* at 791:16-792:2). But the Federal Sugar Program gives the USDA tools to control the supply of raw and refined sugar that is available for sale, which ultimately controls price. (*Id.* at 859:18-22). If the USDA increases the supply of sugar, then prices decline. (*Id.* at 860:5-9). Conversely, if the USDA does not allow sufficient sugar imports or domestic production, then sugar prices will increase. (*Id.* at 858:13-21 & 862:18-23). Using these tools, the USDA ensures that prices do not get too high (due to undersupply) or too low (due to oversupply). (*Id.* at 862:24-863:5 & 865:10-866:8).

48. The USDA monitors industry metrics, including sugar prices, to determine whether to increase supply. (Tr. at 856:6-14 & 866:22-867:3). The USDA speaks with suppliers and customers regularly. (*Id.* at 852:6-12, 861:15-18 & 863:13-25; *see also id.* at 751:5-13). The USDA also speaks with sugar industry analysts and reads their publications. (*Id.* at 877:11-878:5).

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[8] *See generally* 7 U.S.C. § 7272.

[9] Under the Federal Sugar Program, beet processors and sugar cane processors can obtain annual non-recourse loans at favorable interest rates. (SAF ¶ 88). The beet and sugar cane processors may choose to forfeit their sugar to the USDA in lieu of repaying the loans and interest. (*Id.*). The purpose behind this loan program is to support the price of sugar and provide a guaranteed price floor to producers. (Tr. at 859:7-17).

And because beet and cane processors and cane refiners are required to submit detailed information to the USDA each month, the USDA has data going back to 1996 on producers' stocks, melt rates, production rates, deliveries, and ending stocks. (*Id.* at 898:4-12).

49. Once it determines that the supply of sugar in the U.S. should be increased, the USDA has the ability through the Federal Sugar Program to increase the supply of sugar in the following ways: (1) marketing allotments for domestic sugar processors (Tr. at 867:8-12), (2) a system of tariff rate quotas on sugar imports under various World Trade Organization and free trade agreement rules (*id.* at 869:23-870:9), and (3) control over Mexican imports under agreements known as the U.S.-Mexico Suspension Agreements (*id.* at 873:25-874:11).

50. Domestic marketing allotments allow the USDA to restrict or increase the amount of sugar that domestic processors are permitted to sell. (Tr. at 867:8-23). Any sugar produced in excess of a company's allotment for a given fiscal year will ordinarily be blocked from the market – *i.e.*, the excess cannot be sold. (*See, e.g.*, *id.* at 711:20-25; DTX-464 ("blocked stock" refers to sugar supplies exceeding marketing allocation)). Although marketing allotments limit the supply of sugar available for sale from domestic sources, the USDA can and frequently does increase those limits so that domestic processors can sell more sugar. (Tr. at 867:8-12; SAF ¶ 87). For example, in December 2021, the USDA increased the overall domestic allotment quantity and reassigned allotments to increase supply, doing so specifically to address "high sugar prices." (Tr. at 868:4-869:1; DTX-464 at 2).

51. The USDA also controls the amount of foreign sugar that can be imported into the U.S. at low or no duty under the tariff-rate quota ("TRQ") system and the U.S.-Mexico Suspension Agreements. (Tr. at 869:23-872:12 & 874:11; *see also* SAF ¶¶ 91 & 93). The TRQ system governs sugar imports from all countries other than Mexico. (*See, e.g.*, Tr. at 872:4-6). Unlimited amounts

of sugar may be imported into the U.S., but any foreign sugar in excess of the TRQs ("out-of-quota sugar") enters at the full-duty rate. (SAF ¶ 92; *see also* Tr. at 871:24-872:5). Such sugar is referred to as "high-tier" or "Tier 2" sugar. (SAF ¶ 92). At any time and in its sole discretion, the USDA can increase TRQs whenever additional sugar supply is necessary in the U.S. to maintain reasonable prices. (Tr. at 872:9-873:5; *see also* SAF ¶ 94). Because TRQ sugar enters the country at low or no duty, it serves as an effective price constraint in the U.S. marketplace. (Tr. at 872:9-12). Tier II sugar price generally functions as a price ceiling on U.S. prices. (*Id.* at 873:21-24).

52. The USDA controls the amount of duty-free sugar that can enter the U.S. from Mexico under the U.S.-Mexico Suspension Agreements. (SAF ¶ 93; *see also* Tr. at 873:25-874:11). As with the TRQ system, the USDA maintains the ability to increase the Mexican export limit when the U.S. market needs more raw or refined sugar to maintain reasonable prices. (Tr. at 874:9-11; *see also* DTX-515 at 26 (depicting examples of USDA increases of Mexican imports)).

53. Since 2007, USDA has taken at least 30 actions to increase foreign sugar imports into the U.S. when it believed that additional supply was necessary. (*See* DTX-515 at 26; *see also* Tr. at 875:18-877:2). Sugar suppliers and customers regularly monitor USDA action and know that the USDA has the ability to modify the supply of sugar in the U.S. (*See, e.g.*, Tr. 879:6-11 (Dr. Fecso agreeing that "most" of the sugar suppliers "are well aware that USDA has all these tools at its disposal to [] increase supply"); Tr. at 558:7-21 (United aware of Federal Sugar Program and ability to bring in more sugar); DTX-034 at -010 (Michigan Sugar's understanding of the Federal Sugar Program and issues with marketing allotments); Tr. at 1064:8-13 (Indiana Sugars president and chief operating officer testifying that the Federal Sugar Program "pretty much dictates the entire business"); Tr. at 750:12-751:22 (vice president of trading for Domino testifying that USDA "manage[s] supply and demand in the whole system"); Tr. at 84:24-85:16 (sourcing

business leader at General Mills understands that USDA can solve sugar supply problems in the U.S.)).

54. Both sugar buyers and sellers lobby the USDA with their own views on whether the USDA should take actions to increase the supply of sugar in the U.S. (Tr. at 861:15-18; *see also id.* at 777:14-24). For example, General Mills advocated in early 2021 for USDA to increase the supply of sugar from Mexico. (*Id.* at 85:17-86:6). Domino lobbies the USDA for more raw sugar every day because Domino would like to buy raw sugar at the cheapest price possible. (*Id.* at 751:5-13).

55. Without the Federal Sugar Program, imports would flood the U.S. market and sugar prices in the U.S. would plummet. (*See* Tr. at 870:15-872:3).

56. Dr. Barbara Fecso, the commodity analysis branch chief of economic and policy analysis division of farm production and conservation business officer of USDA (Tr. at 849:13-850:2), was called to testify at trial by Defendants. Dr. Fecso is responsible for collecting, publishing, and analyzing data on beet and cane processors and cane refiners on a monthly basis for the Federal Sugar Program in order to determine whether action is needed to rebalance the sugar market. (*Id.* at 851:8-17). She has worked with the Federal Sugar Program for almost 20 years. (*Id.* at 850:3-19).

G. Imperial's High-Cost Business Model and Financial Decline

57. Imperial is an import-based cane refiner that does not grow any sugar cane or sugar beets, nor does Imperial process sugar cane into raw sugar. (Tr. at 794:2-4; SAF ¶ 36). Instead, Imperial depends on purchased raw sugar and it imports more than 90% of the raw sugar needed for its Port Wentworth refinery. (Tr. at 252:5-13 & 793:25-794:4). Imperial is only able to run its

Port Wentworth refinery at about 75% capacity on average (and at 60-65% in some years), which increases its per unit costs. (*See id.* at 794:5-8 & 798:3-10).

58. The price of raw sugar comprises about 70-80% of the delivered price of Imperial's refined sugar. (Tr. at 283:20-284:5 & 798:3-16). Imperial's pricing to customers is thus driven by the price of raw sugar in the U.S., which is constantly changing and tracked on a public futures commodity index called the "Number 16." (*Id.* at 284:20-285:1; *see also id.* at 517:22-519:3 & 522:5-15). Imperial's reliance on high-cost imports makes it less competitive and, as such, it struggles to compete with vertically-integrated cane refiners (like LSR / Cargill) or domestic beet processors (like NSM) because of its higher input costs. (*Id.* at 798:5-16 & 802:25-803:21).

59. Imperial has been struggling financially for years and some parts of the Port Wentworth facility still use equipment from the 1940s. (Tr. at 794:16-21). The company went bankrupt in 2001 and had a "terrible accident" in 2008 and then, "almost immediately" after that, was offered for sale. (*Id.* at 794:21-795:9). Shortly after it was purchased by Louis Dreyfus, regulatory changes apparently made the business outlook for Imperial "very uncertain." (*Id.* at 795:9-11). As such, Louis Dreyfus and Imperial limit their capital expenditures at the Port Wentworth facility to maintenance, as well as safety, health, and environmental expenditures to ensure that the facility is safe to operate. (*Id.* at 795:12-796:15.5).

60. Imperial's documents describe it as an "import-based, price-uncompetitive sugar refinery" that is "structurally uncompetitive." (DTX-219 at -219). Due to Imperial's high-cost structure, Imperial is principally a residual or back-up supplier. (Tr. at 807:22-808:14; *see also id.* at 255:22-256:9 & 287:7-13). Imperial's customer base is shrinking: in 2021, Imperial had 208 customers, whereas in 2022, Imperial had 183 customers – a roughly 10% drop from the previous

year. (*See id.* at 257:12-21). Imperial's market position has been declining over the last several years, with a bigger decline year over year. (*Id.* at 898:4-22).

61. Even if operating at capacity, Imperial's Port Wentworth facility represents only about 7% of estimated nationwide capacity. (DTX-028 at -022).

62. Louis Dreyfus has been trying to sell Imperial for the past five years. (Tr. at 795:22-796:7).

H. Benefits of U.S. Sugar Acquiring Imperial

63. U.S. Sugar grows more sugar cane than it can currently process and refine. (*See* FF ¶ 1). U.S. Sugar is acquiring Imperial to integrate its sugar cane farming operations with Imperial's Port Wentworth refinery to create a more competitive, cost-effective, and efficient refinery. (Tr. at 771:21-773:11; JTX-034 at 2). After the transaction, U.S. Sugar will be able to provide Port Wentworth with between 1.5 and 3 million cwt of raw sugar each year. (Tr. at 774:21-775:1). This will allow U.S. Sugar to refine all of the raw sugar produced from its excess sugar cane and provide Port Wentworth with a more secure supply of raw sugar, allowing Port Wentworth to be somewhat less dependent on foreign imports. (*See id.* at 771:21-772:4 & 775:13-25; JTX-034 at 2).

64. U.S. Sugar plans to increase Port Wentworth's annual production from 16.1 to 17.5 million cwt, an increase of 140 million pounds of refined sugar. (*See* Tr. at 776:8-10 & 839:6-8; JTX-035 at 15). This increase in production will be a "steady state" increase in production output, rather than occasionally having high production years. (Tr. at 776:23-777:10). U.S. Sugar plans to draw on its experience in restoring "troubled plants" to achieve this improvement in operation at the Port Wentworth facility. (*Id.* at 839:6-840:6). In particular, U.S. Sugar will use targeted capital expenditures to increase the capacity utilization of Port Wentworth. (*Id.* at 845:17-18;

see also JTX-035 at 2 & 16). U.S. Sugar also plans to increase the number of operating days at Port Wentworth to 355 days per year. (Tr. at 838:23-839:3; *see also* JTX-035 at 15 (number of operating days at Port Wentworth ranged from 298 to 345 in the last several years)).

65. U.S. Sugar will be able to add Imperial's Port Wentworth facility into the United network, which is expected to result in at least $8-12 million in transportation cost savings by optimizing United's freight economics. (Tr. at 560:19-561:9; *see also* JTX-034 at 2 ("5. Create synergistic cost savings, including transportation")). United can then pass on those cost savings to customers, which United would not be able to do absent the transaction. (Tr. at 561:5-9).

66. Acquiring Imperial will also provide U.S. Sugar and United with additional supply-chain flexibility to meet demand and protect against weather events in the Red River Valley (where United's sugar beets are grown and processed) and Florida (where U.S. Sugar grows its sugar cane).[10] (Tr. at 555:22-556:5 & 772:25-773:7).

67. By acquiring Imperial, U.S. Sugar will be able to leverage Imperial's ability to make sugar products that U.S. Sugar itself cannot – *e.g.*, brown and powdered sugar. (*See* Tr. at 772:16-18). U.S. Sugar's acquisition of Imperial's Dixie Crystals and Imperial Sugar retail brands will also expand United's offering of branded refined sugar. (SAF ¶ 96).

68. If the U.S. Sugar acquisition does not proceed, Imperial's CEO is "quite worried" about Imperial's future prospects. (Tr. at 816:19-23).

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10 Because refined sugar is derived from agricultural crops that are vulnerable to weather events, the amount of sugar produced each year can vary dramatically.

I. Dr. Rothman's Analysis

69. In attempting to prove that the Proposed Transaction should be enjoined as anticompetitive, the Government relies on the economics analysis[11] of Dr. Dov Rothman, a managing principal at Analysis Group, Inc. (Tr. at 582:12-14). Although he has previously testified as an expert in the field of economics on behalf of the Government, Dr. Rothman's analysis in this case was flawed and largely unpersuasive.

70. As an initial matter, there is little evidence in the record as to Dr. Rothman's background or experience in the field of economics. The Government did not enter his full credentials into the record. On direct, he testified that he received a B.S. and Ph.D. from University of California at Berkley and "a degree" from Cambridge University. (Tr. at 581:25-582:3). He explained that his Ph.D. is in business administration, but there is no evidence as to what fields his B.S. and other "degree" are in. (*Id.* at 582:2-9; *see also id.* at 582:7-9 ("Just to avoid confusion, my training is economics, and in my [Ph.D.] program I took the core economics class in the economics department."); *id.* at 642:22-24 ("Q. Dr. Rothman, you don't have a Ph.D. in economics, do you? A. No.")). Prior to joining his current firm, Dr. Rothman was an assistant professor at the School of Public Health at Columbia University (*id.* at 582:10-12), and he has taught a course on merger economics at Harvard University (*id.* at 582:14-16).

71. Although the Court is not wholesale excluding Dr. Rothman from offering an economics opinion, his credentials and experience appear to be lacking (*see supra* FF ¶ 70), especially when compared to Dr. Nicholas Hill, Defendants' economic expert, who the Court

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[11] At trial, Defendants seemed to object to Dr. Rothman being recognized as an expert in the field of economics but stated that they would address that issue in post-trial briefing. (*See* Tr. at 583:5-16). Although Defendants argue that Dr. Rothman's analysis is unreliable for a variety of reasons (D.I. 220 at 43-44), there is no argument in Defendants' post-trial briefing that the Court should not recognize Dr. Rothman as an economics expert.

found to be particularly credible. Dr. Hill received a Ph.D. in economics from Johns Hopkins University (Tr. at 900:19-21), after which he worked for seven years at the U.S. Department of Justice in the Antitrust Division, followed by two years at the Federal Trade Commission as a staff economist and another three years at the Department of Justice as a supervising economist (*id.* at 900:24-901:5). Dr. Hill is currently a partner at the Bates White Consulting firm, working largely on merger cases in various industries. (*Id.* at 900:17-18 & 901:11-18).

72. Dr. Rothman's assumptions about the refined sugar product market are flawed. In attempting to define a product market that would purportedly be harmed by U.S. Sugar's acquisition of Imperial, Dr. Rothman's definition was at times internally inconsistent. He opined that "any seller that makes a sale to customers in the market is part of the market" (Tr. at 602:7-8) but then he excludes many sellers from the market – *e.g.*, all distributors. And despite articulating the product market as "the production and sale of refined sugar" (*id.* at 592:18-25), which would appear to be limited to sugar suppliers that sell sugar they refine, Dr. Rothman includes entities that market sugar refined by others – *e.g.*, NSM and United. (*See id.* at 611:19-25 & 676:10-677:21).

73. Additionally, as will be addressed more fully below (*infra* § II.J), Dr. Rothman excludes all refined sugar distributors from the proposed product market because they are assumed to be "purchasers" who would be "hit with the higher prices themselves" if competition were eliminated. (Tr. at 589:2-4 & 593:7-15). In his view, distributors are merely partners for the refiners to sell more sugar, rather than entities that can meaningfully compete. (*See id.* at 606:4-609:20). The Court does not view Dr. Rothman's assumption as valid, however, in light of the many witnesses at trial whose testimony was inconsistent with that assumption. (*See, e.g.*, *id.* at 389:4-11 (Piedmont's Chief Financial Officer testified that the prices that distributors have

competitive significance and that he disagreed with the Government's position that distributors are not part of the market); *id.* at 112:24-113:7, 115:3-116:1 & JTX-[redacted]; Tr. at 1023:15-1024:8 (Post purchases from distributors, refiners, and cooperatives)).

74. As to the proposed geographic markets (*infra* § II.L), Dr. Rothman opined on two markets defined by the Government in determining whether antitrust harm would result from the Proposed Transaction. (Tr. at 648:5-10). Dr. Rothman did not select the states included in either proposed market and he did not perform any meaningful analysis to test the propriety of the defined markets provided by the Government. (*Id.* at 648:11-650:4; *see also id.* at 592:8-14). Dr. Rothman also did not attempt to craft or test any market narrower than "Georgia Plus" to determine if a smaller region was a relevant geographic market. (*Id.* at 650:21-24).

75. Despite using the hypothetical monopolist test to assess the propriety of the Government's proposed geographic markets, Dr. Rothman acknowledged that the hypothetical monopolist test has its limits. After agreeing that all four proposed geographic markets at issue in this case pass the hypothetical monopolist test, Dr. Rothman asserted that that does not mean all are relevant geographic markets within which the Court is to look for antitrust harm. (*See* Tr. at 651:21-24 ("[M]ultiple markets can pass the hypothetical monopolist test. That doesn't mean that a national market is the relevant market for evaluating competitive effects for the proposed transaction.")). He offered no explanation for why he believed some (*i.e.*, the Government's) were relevant markets but others (*i.e.*, Defendants') were not.

76. In a number of other antitrust cases, Dr. Rothman's economic analysis has been found unpersuasive on various issues: *In re Altria Group, Inc. & JUUL Labs, Inc.*, No. 9393 (F.T.C. Feb. 23, 2022) (Initial Decision at 91) ("Dr. Rothman's post-Transaction HHI calculations

are not economically sound"); *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, No. 17-205, 2020 WL 3414662, at *4 (S.D. Cal. June 22, 2020) ("Dr. Rothman's study allegedly showing supracompetitive prices is seriously flawed."); *Aya Healthcare Sers., Inc. v. AMN Healthcare, Inc.*, No. 17-205, 2020 WL 2553181, at *18 (S.D. Cal. May 20, 2020) (Dr. Rothman's failure to account for certain market factors renders his opinion on an issue "unreliable under the *Daubert* standard and of marginal relevance"); *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 319 (D.D.C. 2020) (*Evonik*) ("Dr. Rothman provides no evidence to support his .8 pass-through rate of cost to price.").

J. The Relevant Product Market Must Include Refined Sugar Distributors

77. The relevant product market is centered on the sale of refined sugar to customers. (Tr. at 665:22-666:1; *see also id.* at 907:2-908:2). The product market includes refined sugar in all forms – granulated, powdered, brown, or liquid – whether derived from sugar beets or sugar cane. (*Id.* at 1137:24-1138:20 (all parties agreeing that refined sugar defines the relevant product market and includes sugar from cane and beets); *see also id.* at 1023:8-14 (Post is "indifferent" about whether it uses beet or cane sugar); *id.* at 1086:1-2 (McKee purchases both beet and cane); *id.* at 117:19-24 & JTX-)).[12] There are no reasonable substitutes for refined sugar. (Tr. at 592:18-593:6). The Government defined the relevant product market as "the production and sale of refined sugar to wholesale customers." (*Id.* at 665:22-666:1).

[12] At trial, only one customer – Piedmont Candy – testified that it is unwilling to use beet sugar to produce its peppermint puffs. (Tr. at 394:25-395:14). There was no other evidence that any customer ***required*** cane sugar over beet sugar for purposes of product quality, although some do prefer cane sugar for other reasons. (*See, e.g.*, *id.* at 441:7-12 (some Domino customers express a preference for cane sugar); *id.* at 707:10-21 (Michigan Sugar's vice president sees some customers willing to pay a premium on cane sugar over beet sugar); *id.* at 734:6-18 (Kraft Heinz's facility)).

78. Sugar refiners are undisputedly significant participants in the relevant product market. Although Dr. Rothman asserts that any supplier that sells to customers in the market is part of the market (Tr. at 602:7-8), he excludes sugar distributors from the relevant product market (*id.* at 606:4-17). Yet wholesale customers do not care whether the sugar they purchase is coming directly from the sugar producer / refiner or from a cooperative or distributor. (*See id.* at 907:4-14 & 917:23-919:8; *see also id.* at 112:24-113:7, 115:3-116:1 & JTX-[REDACTED] [REDACTED] [REDACTED] [REDACTED])); Tr. at 1023:15-1024:8 (Post has purchased refined sugar from sugar producer / refiners (Michigan, Imperial, and Domino), as well as non-producing cooperatives and distributors (United, Cargill, National Sugar Marketing, Cargill, Sucro, Sweetener Supply, and Indiana Sugar)); Tr. at 386:4-15, 387:24-388:15, JTX-027 & DTX-249 (Piedmont has sought to purchase refined sugar from sugar producer / refiners [REDACTED], as well as non-producing cooperatives and distributors [REDACTED])).

79. Distributors have the ability to purchase large quantities of refined sugar from many different sources, including foreign importers, and this allows distributors to price resales competitively. (*See, e.g.*, Tr. at 325:23-326:2 & JTX-047 ([REDACTED] [REDACTED]); Tr. at 1069:4-7 (Indiana Sugars is able to buy and sell refined sugar competitively because of "the size of [its] buys"); *see also* Tr. at 918:17-919:1 (Dr. Hill explaining that distributors buy from a variety of sources, which gives them independence and the ability to compete with refiners in the market)). Indeed, distributors tend to purchase the majority of foreign-produced refined sugar imports. (*See, e.g.*, Tr. at 1062:4-10 & DTX-115 (Indiana Sugars buys imported refined sugar); Tr. at 719:18-22 (about [REDACTED]% of

International Food Products Company's purchased refined sugar is imported); Tr. at 219:10-14 (United witness testifying that distributors are the primary importers of refined imports)). Distributors may repackage the refined sugar that they purchase or further process it into liquid, inverted, brown, or powdered sugar before reselling. (SAF ¶ 85).

80. Distributors account for approximately 25% of sales of refined sugar in the U.S. (Tr. at 807:4-10). Examples of distributors selling refined sugar include (among many others): Indiana Sugars, IFPC, Batory, Evergreen, St. Charles Trading, ICI Foods, Atlantic Ingredients, ADM, Sweetener Supply, Sweeteners Plus, Pullman, and L&S Sweeteners. (*See id.* at 805:20-806:3; *see also* DTX-043 at -462 (map [REDACTED])).

81. At trial, there were many examples of customers purchasing large quantities of sugar from distributors. (*See, e.g.*, Tr. at 1073:6-8 & JTX-010 (distributor Indiana Sugars sold over [REDACTED] cwt of refined sugar in 2021 (or [REDACTED] pounds) with a mean shipment size of [REDACTED] pounds, with more than [REDACTED]% of shipments for more than [REDACTED] pounds); DTX-113 (in 2021, distributor International Food Products Company sold over [REDACTED] pounds of [REDACTED] sugar to [REDACTED], over [REDACTED] pounds of [REDACTED] sugar to [REDACTED], and over [REDACTED] pounds of [REDACTED] sugar to [REDACTED]); JTX-007 at -404 (Generals Mills annually purchases upwards of [REDACTED] pounds of powdered sugar from [REDACTED]); Tr. at 807:6-10 (Imperial Sugar rejecting idea that distributors only sell small volumes)).

82. Distributors sell large volumes of sugar into the southeastern U.S. Of the roughly [REDACTED] cwt of refined sugar that Indiana Sugars sold nationally in 2021, about [REDACTED] cwt of that was to customers in the Government's "Southeast" market. (*See* Tr. at 1073:6-8 & JTX-010 (refine by 2021 sales into the relevant "Southeast" states to get roughly [REDACTED] pounds sold,

which is just under [REDACTED] cwt); *see also infra* FF ¶ 91 (defining "Southeast")).[13] In that market, Indiana Sugars sells refined sugar to companies [REDACTED]. (*See* DTX-116 & Tr. at 1072:5-13 (explaining that DTX-116 lists "top five customers" in "Southeast")). International Food Products Company sold more than [REDACTED] pounds of sugar in 2021 into the alleged "Southeast," including sales and shipments from its [REDACTED] facility. (DTX-113 at G124 (sum of sales into "Southeast" states for 2021); *see also* Tr. at 726:2-16). Batory ships [REDACTED] sugar from its [REDACTED] facilities into the "Southeast." (Tr. at 339:21-25). For example, in January and February 2022, [REDACTED] of the [REDACTED] shipments ([REDACTED]%) that Batory made into the "Southeast" came from [REDACTED] (*See* JTX-046 at Thru Feb 2022 tab (refine "ST" column by sales into the relevant "Southeast" states)).

83. Although distributors do not compete for every customer, distributors do compete for sales to wholesale customers of all sizes, including large industrial customers. (Tr. at 1062:11-18 (customers of Indiana Sugars range from "little mom and pop food companies, all the way up to top five consumer packaged goods companies"); *id.* at 388:6-18 & JTX-027 ([REDACTED] bid to supply Piedmont for calendar year 2021 was [REDACTED]); *see also, e.g.*, DTX-116 (Indiana Sugars sells sugar to [REDACTED] among others); DTX-113 (distributor International Food Products Company sells to [REDACTED], among others)). Indeed, distributors regularly compete against the suppliers from whom they purchase refined sugar. (*See, e.g.*, Tr. at 1063:14-18 & 1067:25-1069:7 (Indiana Sugars often competes with its own suppliers); *id.* at 428:15-21 (Domino supplies refined sugar to Indiana Sugars and sometimes loses industrial sales to Indiana Sugars); *id.* at

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[13] This corresponds to about [REDACTED]% of all sugar sold into the "Southeast." (Tr. at 918:4-11).

727:7-22 ([redacted]); *id.* at 330:8-11 ([redacted])).

84. Refined sugar suppliers view distributors as competitors. United competes against distributors. (*See* Tr. at 556:6-19). Imperial also competes against distributors, including Indiana Sugars, Batory, Evergreen Sweeteners, ICI Foods, and others. (*Id.* at 805:20-806:3). In fact, Imperial Sugar often sees distributors competing with "[Imperial's] own bags later in the year, selling them cheaper than [Imperial is] currently selling them." (*Id.* at 290:3-21; *see also id.* at 693:12-25 (Dr. Rothman admitting Imperial competes with distributors in relevant geographic market)). Michigan Sugar competes against distributors "pretty often." (*Id.* at 706:25-707:9). The same is true for Cargill. (*Id.* at 1126:12-14). And Domino competes with "melt houses"[14] and distributors. (*Id.* at 428:2-21; *see also* DTX-066 (column G [redacted])).

85. The Government introduced no evidence at trial that purchasers care whether their sugar supplier is a refiner producer, a marketing entity, a cooperative or a distributor.

86. Because there is ample evidence in the record that distributors are competing with other suppliers, including the very ones that supply the distributors, the Court finds that distributors of refined sugar must be included in the relevant product market.

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[14] The term "melt house" refers to an entity that purchases sugar in various forms (*e.g.*, raw, refined, etc.) and produces liquid sugar from that. (Tr. at 428:10-14).

K. The Relevant Product Market Should Not Include All Wholesale Customers

87. In the Government's proffered product market, wholesale customers include industrial food and beverage manufacturers, retailers, food service companies, and distributors.[15] (*See* Tr. at 668:7-15). Dr. Rothman did not differentiate between refined sugar sales to industrial customers and refined sugar sales to retail customers. (*Id.* at 668:16-24). Yet Dr. Rothman admitted that he made no attempt to consider whether industrial consumers have the same competitive alternatives as other customers. (*See id.* at 668:25-669:5).

88. Because the various wholesale customer types have different sugar needs and purchasing practices, sugar suppliers – *i.e.*, the sellers of sugar to customers – do not view all wholesale customers the same. For example, United has separate sales teams for industrial and retail customers. (*See* Tr. at 166:15-24 & 214:12-23; *see also id.* at 166:15-24 (United's vice president of industrial sales has no sales or pricing authority for retail customers); *compare also* PTX-452 at -449 (United presentation with slide on "Industrial Bulk Demand"), *with* PTX-452 at -451 (same United presentation with separate slide on "Retail/Foodservice Demand"), *and* PTX-452 at -461 (differing United strategies for industrial and retail customers)). In a similar vein, Domino also has different sales teams for grocery, food service, industrial, specialty, and export sales. (Tr. at 522:16-25 & 430:25-432:4; *see also* DTX-094 at -296 to -299 ([redacted] analyzing market conditions [redacted] [redacted])). [redacted] similarly differentiates among customer types. (*See* DTX-028 at -027).

89. The amount of sugar sold to the various types of wholesale customers differs widely among suppliers. For example, about 90% of United's sales are to industrial customers (Tr. at

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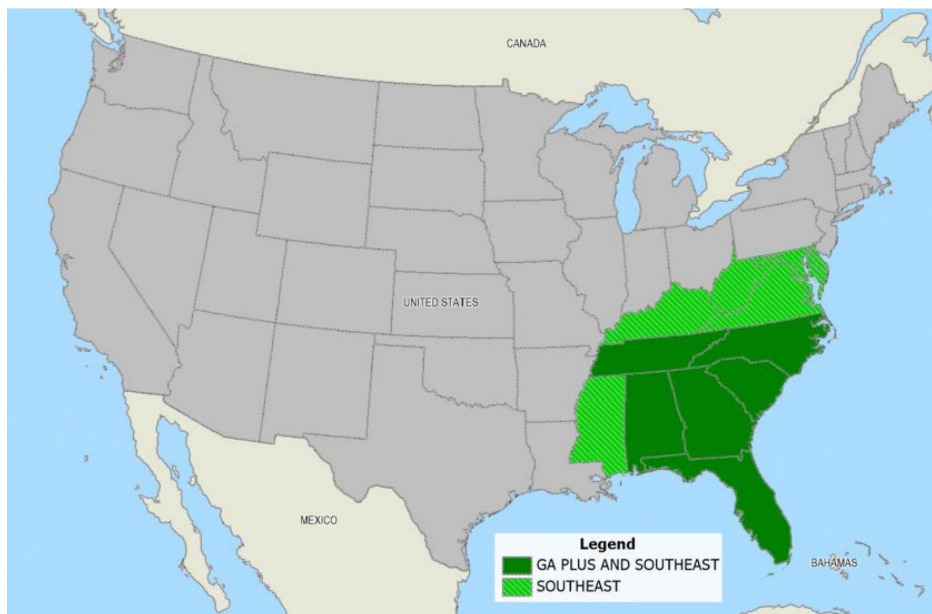
15 The Government treats distributors as customers because it does not consider them to be relevant suppliers. As previously addressed, however, the Court finds that distributors must be considered part of the relevant product market along with the other suppliers.

166:25-167:3), whereas about half of Domino's sales are to industrial customers with the remainder to food service, grocery, and specialty customers (*id.* at 522:16-523:14). As another example, about 21% of Imperial's sales last year went to retail customers. (*Id.* at 255:10-12).

90. At trial, the Government offered no testimony or documentary evidence from or about non-industrial customers to show that they are similarly situated to industrial customers such that all should be grouped together as "wholesale customers" in the relevant product market.

L. The Government Has Not Proven a Relevant Geographic Market

91. The Government offered two potential geographic markets where competition would purportedly be harmed by U.S. Sugar's acquisition of Imperial Sugar: (1) the broader region defined by the U.S. Census Bureau as the East South Central and South Atlantic United States (Alabama, the District of Columbia, Delaware, Florida, Georgia, Kentucky, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia) (referred to as the "Southeast") and (2) the narrower region of Georgia and its bordering states (Alabama, Florida, Georgia, North Carolina, South Carolina, and Tennessee) (referred to as "Georgia Plus").



(Demonstrative prepared by Dr. Hill to show the Government's geographic market proposals).

92. As explained above, Dr. Rothman simply used two geographic markets selected by the Government in performing his analysis. (FF ¶ 74). He cites no document from any party or the USDA that groups the states together in the way the Government has in its proposed "Southeast" market. (Tr. at 662:22-663:4). And Dr. Rothman acknowledges there is only one document that supports the Government's proposed "Georgia Plus" market. (*Id.* at 663:4-90; *see also* PTX-452 at -448 ("Supplier Backyards" slide in United presentation that Government relies on for "Georgia Plus" market)). Dr. Rothman did not attempt to define any other potentially relevant geographic market.

93. As set forth in further detail below, both of the Government's proposed geographic markets are too narrow and ignore the commercial realities that exist in the U.S. with regard to sugar supply, namely that sugar flows freely throughout the country. (*See* Tr. at 855:5-17 & 856:15-857:6 (Dr. Fecso explaining that sugar flows in response to supply and demand and can do so over long distances); *see also id.* at 857:10-21 ("market forces work to redistribute sugar to where it's needed")).

1. The Government's Proposed Geographic Markets Are Too Narrow

94. Customers located within the Government's "Georgia Plus" and "Southeast" markets purchase and receive refined sugar – in large quantities – from many locations and suppliers outside of that geographic region. A few noteworthy examples discussed below demonstrate the ease with which sugar flows into these areas from beyond that defined market.[16]

95. Many customers within the proposed "Southeast" and "Georgia Plus" markets purchase sugar from Louisiana, where LSR / Cargill own and operate a refinery and have storage

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[16] These examples exclude the large volume of refined sugar flowing in from distributors as the only way the Court would reach the geographic market is assuming distributors are properly excluded.

warehouses. (*See* FF ¶¶ 15-17). For example, Cargill ships sugar from Louisiana by rail to Kraft's facility in Dover, Delaware, over 1,200 miles away. (*See* Tr. at 743:2-23 & JTX-014 at -067 (pounds shipped)). Cargill also ships sugar by rail to Post in North Carolina and is sometimes the sole supplier for that location. (*See* Tr. at 1028:15-1029:15). Cargill also ships a large amount of bulk sugar from Louisiana to General Mills in Tennessee. (*See id.* at 108:25-109:15). And Cargill ships sugar by rail to . (*Id.* at 1086:9-14). Approximately % of Cargill's 2021 sales were to customers in the proposed "Southeast." (*See* DTX-518). Approximately % of Cargill's 2021 sales were to customers in the proposed "Georgia Plus" market. (*See id.*).

96. NSM ships sugar from Minnesota and Idaho to customers in the "Southeast," including in . (Tr. at 354:25-355:15; *see also* JTX-042 & JTX-049). NSM delivers beet sugar from Idaho or Minnesota to , and Post in North Carolina. (*See* Tr. at 355:16-356:14; *see also id.* at 1030:9-18 & 1086:17-22). Many of those customers are also located within the "Georgia Plus" market as well.

97. Michigan Sugar sells refined sugar into the alleged "Southeast." (DTX-244 (listing Michigan Sugar sales, including into Alabama, Florida, Georgia, Maryland, North Carolina, South Carolina, Tennessee, Virginia, and Kentucky)). Michigan Sugar recently beat out Domino for sales to in Tennessee, which is in both "Georgia Plus" and the "Southeast." (Tr. at 431:4-16; DTX-094 at -297). Because Michigan Sugar only has sugar beet factories in Michigan and bulk storage facilities in Ohio, this sugar is being shipped from either Michigan or Ohio into states in the "Southeast" and "Georgia Plus" markets. (*See* Tr. at 703:12-23).

98. United sells refined sugar derived from sugar cane and sugar beets across 45 states. (Tr. at 552:12-15). United sells beet sugar from the Red River Valley into the Government's proposed markets using bulk rail, bulk trucks, boxcars, and semi vans to ship the sugar. (*Id.* at 553:20-554:24). Indeed, United regularly ships beet sugar from the Red River Valley to customers in the "Southeast" and "Georgia Plus" markets, including General Mills in Tennessee, Pepsi in Virginia, Wal-Mart in Florida, and Post in North Carolina. (*See* Tr. at 109:3-11, 186:23-187:8, 554:4-8 & 1028:10-14). In 2019, United shipped 4.4 million cwt of refined sugar from the Red River Valley into Georgia, South Carolina, North Carolina, Tennessee, Alabama, Mississippi, and Kentucky. (PTX-452 at -461). United also sells cane sugar produced at U.S. Sugar's Clewiston, Florida refinery both inside and outside of the "Southeast" market. (PTX-452 at -460). For example, "United cane" always wins the Molson Coors facility in Georgia over Imperial. (*See* Tr. at 131:8-12 & PTX-163 at -833).

99. According to Dr. Rothman's analysis, importers currently account for 7% of sales in both the "Southeast" and "Georgia Plus" markets in 2021. (*See* Tr. at 611:12-612:1). Customers, including Danone, already purchase refined sugar directly from importers. (*Id.* at 1093:19-1095:4 (one of two major suppliers for Danone's Florida and Virginia facilities is a Brazilian supplier); DTX-039; DTX-037 at "pivot" tab; *see also* Tr. at 428:2-9 (Domino competes against imports)).

100. Many of these suppliers who are located outside the proposed "Southeast" and "Georgia Plus" markets but shipping to customers within them have additional supply that could also be sent to the area. For example, in 2021, only ██% of ██████ sugar went into the "Southeast," leaving more than ██% of ██████████ available ████████████████████ ██████████. (Tr. at 1121:17-20; *see also* DTX-518). Much of that additional sugar already

travels [redacted] to reach customers in states [redacted] [redacted], and others. (*See* FF ¶¶ 16-17; *see also* DTX-518 (listing Cargill customers and sales by state)). It would not be logistically or economically difficult for Cargill to deliver additional sugar to customers in the "Southeast." Similarly, in 2021, Domino shipped more than [redacted] cwt from Louisiana to Pennsylvania, New Jersey, New York, Michigan, and Massachusetts (DTX-517), passing through the "Southeast" and "Georgia Plus" markets along the way. Domino could also redirect sugar traveling to northeastern states from Louisiana to "Southeast" and "Georgia Plus" states.

101. Customers also have the ability to pick up refined sugar at locations outside of those markets and move it in. Today, 30-35% of customers pick up sugar at their supplier and 3% of customers pick up sugar at a supplier location outside of the Government's geographic markets and move it in. (Tr. at 936:12-22). Customers with multiple locations could also purchase sugar outside of the proposed markets and transport it to their locations inside the alleged markets to avoid a price increase. (*Id.* at 936:23-937:18). More than 75% of sugar purchased in these geographic markets is bought by customers with locations outside of those markets, enabling customers to shift supply among their plants located inside and outside of the Government's geographic markets to defeat any price increase. (*Id.*; *see also id.* at 107:1-108:5 (General Mills has flexibility to shift sugar among its facilities as needed, *e.g.*, shifting sugar from its Cedar Rapids, Iowa facility to its Murfreesboro, Tennessee facility or vice versa)).

102. A number of suppliers are undergoing expansions and targeting additional sales into the "Southeast." Most notably is LSR / Cargill. LSR's plans to expand its output capacity at its Louisiana facility by adding another refinery are already underway. (*See* FF ¶ 18). And Cargill [redacted]

(Tr. at 1113:24-1115:1 & DTX-028 at -023). Cargill expects that LSR's additional production will enable Cargill to [REDACTED] (Tr. at 1114:5-1115:6; DTX-028 at -024). Cargill has identified the states in this region as a [REDACTED] (Tr. at 1114:21-1115:1), and Cargill is targeting [REDACTED] customers there[17] for additional sales, including [REDACTED], among others. (*See* Tr. at 1116:13-1117:10; *see also* DTX-028 at -028 & -029).

103. Additionally, the Government's "Southeast" and "Georgia Plus" markets exclude three of Imperial's ten largest states by sugar sales volume –Texas, Indiana, and Pennsylvania. (Tr. at 922:24-923:15; DTX-516 at pg. 1; *see also* Tr. at 692:9-18). But the Government's "Southeast" includes states where Imperial made few sales, like Alabama. (Tr. at 923:2-17; DTX-516 at pg. 1; *see also* Tr. at 692:9-18). In fact, the alleged "Southeast" (and thus the narrower "Georgia Plus")[18] excludes 33% of Imperial's sales. (Tr. at 696:5-10 & 923:18-23).

104. The foregoing evidence shows that customers located in the proposed "Southeast" and "Georgia Plus" markets already regularly purchase and receive sugar from outside of these markets. The ease with which sugar flows across the country enables this to happen. In the event that U.S. Sugar's acquisition of Imperial led to price increases within either the "Southeast" or "Georgia Plus" markets, customers located within the area easily could (and likely would) turn to outside the area for additional sugar supply. This demonstrates that the "Southeast" and "Georgia Plus" markets as defined by the Government are too narrow to be the relevant geographic market.

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[17] Cargill is frequently recognized as one of the "most price aggressive competitors" and is on a "growth projection." (Tr. at 177:8-14 & 1104:17-20). Competitors expect the expansion to make the market "very, very competitive." (*See, e.g.*, *id.* at 434:10-435:20).

[18] "Georgia Plus" actually excludes 47% of Imperial's sales. (Tr. at 923:18-23).

2. Defendants' Proposed Geographic Markets

105. Defendants' economics expert, Dr. Hill, proposed two alternative geographic markets that were broader than the "Southeast" or "Georgia Plus." (*See* Tr. at 909:17-24). One of those markets was the entire U.S. (*See id.* at 910:3-17). The other market constructed and analyzed by Dr. Hill was termed the "Competitive Overlap" region, which encompassed areas in which United and Imperial compete with each other. (*Id.* at 939:2-6). Dr. Hill's "Competitive Overlap" market includes all the states in the Government's "Southeast" market and adds in Arkansas, Indiana, Louisiana, Michigan, New Jersey, Ohio, Oklahoma, Pennsylvania, and Texas. (*See, e.g.*, DDX-008 at -18). Dr. Rothman asserted that both alternative markets offered by Dr. Hill would pass the hypothetical monopolist test but he did not analyze them separately (Tr. at 657:11-13 & 651:25-652:9), and the Government only offered conclusory argument as to antitrust harm if the Court is persuaded to use either of Dr. Hill's markets (*see* D.I. 214 at 22-23).[19]

III. LEGAL STANDARDS

Section 7 of the Clayton Act prohibits any merger or acquisition "in any line of commerce or in any activity affecting commerce in any section of the country" whose "effect[s] . . . may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. To prevail on a claim under Section 7, the government must show a "reasonable probability that the merger will substantially lessen competition." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Although the government does not need to show "with certainty" that the proposed transaction will have anticompetitive effects, it is "not enough" to show "[t]he mere possibility of the prohibited restraint." *FTC v. Consol. Foods Corp.*, 380 U.S. 592, 598 (1965) (cleaned up).

[19] Given that the Government failed to establish both a relevant product and geographic market, the outcome of this case is clear and the Court does not endeavor to make further factual findings based on the proposals offered by the parties.

"[O]nly an acquisition which in the long run may reasonably be expected to substantially lessen competition within a relevant market[] will violate § 7." *Am. Crystal Sugar Co. v. Cuban-Am. Sugar Co.*, 259 F.2d 524, 527 (2d Cir. 1958).

Section 7 merger challenges are reviewed under a burden-shifting framework. First, the Court determines whether the government has established a *prima facie* case that the proposed merger is anticompetitive by (1) identifying the proper relevant market and (2) showing that the effects of the merger are likely to be anticompetitive. *See FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337-38 (3d Cir. 2016). If the government succeeds at this first step, the Court next determines whether the defendants have rebutted the government's *prima facie* case. *See id.* at 337. If so, "the burden of production shifts back to the [g]overnment and merges with the ultimate burden of persuasion, which is incumbent on the [g]overnment at all times." *Id.* Ultimately, the government must prove by a preponderance of the evidence that there is a reasonable probability the proposed merger will substantially lessen competition. *See United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 192 (D.D.C. 2017), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017).

"[D]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act." *Brown Shoe*, 370 U.S. at 324. "The relevant market is defined as the area of effective competition." *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2285 (2018) (cleaned up). It consists of two components: a "product market" and a "geographic market." *Brown Shoe*, 370 U.S. at 324. A properly identified relevant market "must correspond to the commercial realities of the industry." *American Express*, 138 S. Ct. at 2285 (cleaned up). Because a plaintiff has "the burden of defining the relevant market," the failure to properly define either a product or geographic market is fatal to a plaintiff's case. *See Queen City Pizza, Inc. v. Domino's Pizza, Inc.*,

124 F.3d 430, 436-42 (3d Cir. 1997); *see also FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1053 (8th Cir. 1999).

IV. DISCUSSION

A. The Government Has Failed to Establish a *Prima Facie* Case

To establish its *prima facie* case, the Government must (1) identify the proper relevant market and (2) show that the effects of the merger are likely to be anticompetitive. *See Penn State Hershey*, 838 F.3d at 337-38. For reasons set forth above in the findings of fact and further developed below, the Court finds that the Government has failed to establish a *prima facie* case. The Government has failed to identify the proper relevant market because its product market and geographic markets ignore the commercial realities of sugar supply in the U.S. *See FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 168 (3d Cir. 2022) (a reviewing court "must ***always*** consider the commercial realities of the industry involved" (emphasis added)). Because the Government has not identified the proper relevant market, it cannot prove its *prima facie* case under Section 7 of the Clayton Act and the Court will not enjoin the Proposed Transaction. *See United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618 (1974) ("Determination of the relevant product and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act.").

1. The Government Failed to Identify a Relevant Product Market

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325. Within a product market, there may be "well-defined submarkets" that are their own markets for antitrust purposes. *Id.* In determining the existence and boundaries of any submarket, courts look to "practical indicia" such as "industry or

public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors." *Id.* Determining whether a submarket exists is designed to answer the question of whether products are reasonably interchangeable such that they should be grouped together in the same product market for antitrust purposes. *See Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 496 (2d Cir. 2004) ("The term 'submarket' is somewhat of a misnomer, since the 'submarket' analysis simply clarifies whether two products are in fact 'reasonable' substitutes and are therefore part of the same market.").

The fundamental purpose of the interchangeability and cross-elasticity inquiry is to recognize where competition exists. *Brown Shoe*, 370 U.S. at 326; *see also id.* ("[T]he boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists."). Indeed, as the Third Circuit has described the analysis, "defining a relevant product market is a process of describing those groups of 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); *see also Geneva Pharms*, 386 F.3d at 496 ("The goal in defining the relevant market is to identify the market participants and competitive pressures that restrain an individual firm's ability to raise prices or restrict output.").[20] Without knowing the boundaries of the relevant product market, the Court lacks the

[20] *SmithKline* arises under the Section 2 of the Sherman Act. Although the Clayton Act and Sherman Act are separate antitrust statutes directed to different anticompetitive behavior, determining a relevant market follows the same inquiry under either statute. *See United States v. Grinnell Corp.*, 86 S. Ct. 1698, 1705 (1966) ("We see no reason to differentiate between 'line' of commerce in the context of the Clayton Act [§ 7] and 'part' of commerce for purposes of the Sherman Act [§ 2]."); *cf. also Kellam Energy, Inc. v. Duncan*, 616 F.

appropriate context in which it must judge any potential anticompetitive harm that could arise from a proposed acquisition.

Here, the Government proposes that the relevant product market is "the production and sale of refined sugar to wholesale customers." (*See* D.I. 214 at 15-20).[21] There is no dispute that the relevant product market in this case includes refined sugar in all forms (*i.e.*, granulated, brown, liquid, powdered) regardless of whether the sugar is derived from sugar cane or sugar beets. (*See* FF ¶ 77). The parties diverge, however, on who that refined sugar must come from (and who it is sold to) for it to be included in the relevant product market. In the Government's view, sugar distributors are excluded from the product market, while all wholesale customers are included regardless of type or industry – *i.e.*, retail customers like grocery stores are included alongside industrial food and beverage producers. (*See* FF ¶¶ 78 & 87). Ultimately disagreeing that distributors should be excluded or that all wholesale customers should be treated the same, the Court will address each of these points in turn.

As to distributors, the Government argues that sugar distributors should be excluded from the product market because they do not produce the refined sugar they are selling. (*See* D.I. 214 at 15-16). Instead, the product market should purportedly be crafted around the characteristics of the to-be acquired Imperial – *i.e.*, an entity that sells the refined sugar that it produces. (*See id.* at 16 ("Here, the market is defined around the top level of the refined sugar supply chain . . . because

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Supp. 215, 218 n.3 (D. Del. 1985) ("[T]he standards for geographic market definition under Section 7 of the Clayton Act and Sections 1 and 2 of the Sherman Act are the same.").

[21] Curiously, the Government's brief addresses the *prima facie* case in reverse – setting forth arguments about the relevant geographic market before the product market. (*Compare* D.I. 214 at 5-15 (addressing geographic market), *with id.* at 15-20 (addressing product market)). It would be difficult to properly define a relevant geographic market without first knowing the boundaries of the product market, which includes interchangeability of products (and therefore the various suppliers).

that is the level of the supply chain where Imperial competes today and where its competition will be eliminated by the proposed acquisition.")). According to the Government, sugar distributors are more properly considered customers[22] because they do not produce sugar and would have to shoulder any increased price of refined sugar resulting from the Proposed Transaction. (*Id.* at 17). Defendants argue that distributors must be included in the product market because they are highly relevant and competitive sellers of refined sugar in the various geographic markets at play in this case. (*See* D.I. 220 at 6-10). In Defendants' view, the "competitive set" of suppliers that customers can turn to if prices increase must include sugar distributors because they offer an interchangeable product (*i.e.*, the same product) at competitive prices. (*Id.* at 7). The Court agrees with Defendants.

Based on the evidence presented at trial, the Court cannot accept the proposition that distributors do not compete with and are incapable of being effective price constraints on refiners and other sugar suppliers. As an initial matter, distributors account for approximately 25% of sales of refined sugar in the U.S. (Tr. at 807:4-10), and it is counterintuitive to exclude such a large volume of sales from the product market, particularly when the distributors' product is identical to the product sold by the refiners and cooperatives – *i.e.*, refined sugar. But on a more granular level, even if distributors must first purchase refined sugar from producers like Domino or Imperial, the ultimate fate of that sugar is not simply resale at a price largely outside of a distributor's control and uncompetitive with producers. The record is replete with evidence of distributors competing with refiner producers like Domino and Imperial, as well as with

[22] In its proposed findings, the Government includes a single paragraph that asserts with minimal support that including distributors would "likely" be inconsequential. (*See* D.I. 215 ¶ 101). But, as set forth below, the record contains ample evidence to support the finding that wholesale customers could and would turn to distributors if the price of refined sugar sold by the new entity were to increase, thereby indicating that distributors are part of the relevant product market.

cooperatives like United. (*See, e.g.*, Tr. at 428:15-21 (Domino supplies Indiana Sugars and sometimes loses industrial sales to Indiana Sugars); *id.* at 256:17-19, 290:3-21 & 806:4-807:3 (Imperial's experience competing against distributors); *id.* at 570:19-571:11 (United's experience competing against distributors in southeastern U.S.); *see also* FF ¶¶ 80, 83 & 84). Indeed, distributors sell millions of pounds of sugar to large industrial customers like Anheuser-Busch, General Mills, and [REDACTED]. (FF ¶ 80).

The ability of distributors to remain competitive with producers is based on several factors that are well-supported by the record. For example, distributors can purchase large volumes of sugar from a variety of sources and move that sugar to other locations in the country experiencing a sugar deficit or high prices. (FF ¶ 79). Distributor Indiana Sugars purchases refined sugar from every supplier of cane and beet sugar in the U.S. and then sells that sugar nationally. (Tr. at 1062:1-3). Similarly, Batory buys from [REDACTED] suppliers and distributes that sugar across the U.S. (*Id.* at 325:23-326:2; *see also* JTX-046 (sales data) & JTX-047 (suppliers)). And Indiana Sugars sold about [REDACTED] cwt and Batory sold over [REDACTED] cwt of refined sugar in 2021. (*See* Tr. at 1073:6-8 (Indiana Sugars); *id.* at 325:23-326:2 & JTX-046 (Batory)). Distributors also purchase massive amounts of foreign imports. (*See, e.g.*, Tr. at 1062:4-10 & DTX-115 (Indiana Sugars); Tr. at 719:18-22 (about [REDACTED]% of International Food Products Company's purchased refined sugar is imported); Tr. at 219:10-14 (United witness testifying that distributors are the primary importers of refined imports)). Maintaining a diversity of supply – domestic and foreign – means that distributors are able to obtain their refined sugar supply at competitive prices and locations and thus resell the sugar at competitive prices. Moreover, distributors can also leverage their large network of transportation and storage to maintain and ship an adequate supply of refined sugar to exert competitive pressure when and where necessary. (FF ¶ 34).

The Court also heard substantial evidence that suggests customers are largely indifferent as to whether they are purchasing refined sugar from the sugar producer or from a distributor. (FF ¶ 78). Indeed, large industrial customers like General Mills and Post purchase sugar from refiner producers right alongside distributors. (*See* Tr. at 112:24-113:7, 115:3-116:1 & JTX-007 (General Mills); Tr. at 1023:15-1024:8 (Post)). Additionally, many suppliers in the industry view distributors as competitors. (*See* Tr. at 556:6-19 (United); *id.* at 805:20-807:3 (Imperial); *id.* at 706:25-707:9 (Michigan Sugar); *id.* at 1126:12-14 (Cargill); *id.* at 428:2-21 (Domino)). Thus, not only do customers view distributors as attractive competitive options, but the other sugar suppliers in the market also view distributors as competition.

Tying all of this evidence together, Defendants' expert, Dr. Hill, explained how distributors are independent actors within the market and this allows them to compete effectively with other suppliers. (*See* Tr. at 918:4-919:1). For example, he noted that Indiana Sugars accounts for roughly 4% of all sugar sales into the Government's broader "Southeast" market.[23] (*Id.* at 918:6-11). And, owing to its increasing success in targeting this market, Indiana Sugars has plans to build a new facility there in the next year or so and further expand its sales. (*Id.* at 1063:4-13 & 1070:9-1072:4; *see also* FF ¶ 35). In Dr. Hill's opinion, excluding distributors "tend[s] to overstate [Dr. Rothman's] market shares for the parties and it will tend to overstate his concentration, because he's assuming that the distributors are not independent." (Tr. at 919:5-8). The Court is similarly persuaded.

Essentially, the Government is asking the Court to find that refined sugar sold by distributors is a submarket separate from refined sugar sold by refiners and cooperatives. Given

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[23] In the Court's view, that is not an insubstantial amount of refined sugar being sold into one of the Government's proposed geographic markets.

that distributors already do compete with the various other suppliers for business, it is not difficult for the Court to conclude that customers would turn to distributors for refined sugar if producers and cooperatives were to increase their price for refined sugar.[24] The evidence thus shows that there is high cross-elasticity of demand between distributors' refined sugar and other suppliers' refined sugar and they may properly be considered part of the same market. *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*, 846 F.3d 1297, 1313 (10th Cir. 2017) ("If two products share a high cross-elasticity of demand – in that an increase in the price of one product causes consumers to switch to the other, and vice versa – then those products likely are interchangeable and may properly be considered part of the same product market."). The Government's proposed product market ignores this high cross-elasticity between "refiner or cooperative sold" refined sugar and "distributor sold" refined sugar.

Because a division of the refined sugar market into "refiner or cooperative sold" refined sugar and "distributor sold" refined sugar would be inconsistent with the commercial realities of the industry, the Court must reject the Government's proposed product market. And as the Government admits that it does not have evidence to prove its case if distributors are included in the product market (*see* Tr. at 1143:5-14), and there is no alternative product market offered, the Government cannot prevail in this case. *See, e.g.*, *F.T.C. v. Lundbeck, Inc.*, 650 F.3d 1236, 1240 (8th Cir. 2011) (judgment against government proper where it failed to prove relevant product market that grouped Indocin IV and NeoProfen together because evidence at trial supported a finding of low cross-elasticity of demand between Indocin IV and NeoProfen, thereby leading to

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[24] Although distributors may suffer some effect from increased prices, the Court believes that distributors would nevertheless remain a competitive constraint on price to end customers given distributors' ability to purchase sugar from a diverse array of sources (and locations) and to store and transport large amounts of sugar in response to shifting market conditions.

a conclusion that the two drugs were not in the same product market); *Berlyn Inc. v. The Gazette Newspapers, Inc.*, 73 F. App'x 576, 584 (4th Cir. 2003) (summary judgment on Clayton Act § 7 claim proper without reaching geographic market where relevant product market improperly excluded direct mail and non-print advertisers in action involving acquisition of newspaper company).

Moreover, there is a second problem with the Government's proposed product market – *i.e.*, it assumes that all wholesale customers are the same without regard to economic realities. That is, industrial food and beverage producers (*e.g.*, General Mills) are grouped together with retail companies (*e.g.*, grocery chains) and food service companies (*e.g.*, restaurants), all being treated as equal consumers in the product market. The fundamental problem with this proposal, however, is that there is no evidence in the record to support such a conclusion. At trial, the Government introduced no evidence to support a finding that industrial customers have the same competitive options and purchasing behavior as any other wholesale customer included in its proposed market. Indeed, Dr. Rothman admitted that he did not even consider whether retail customers have the same competitive alternatives as industrial customers. (Tr. at 668:16-669:5). Moreover, there is some evidence that tends to suggest that industrial customers are, in fact, treated differently by suppliers in the competitive landscape. (*See* FF ¶¶ 88-89 (many suppliers have distinct sales teams and channels for industrial customers as compared to retail customers presumably because of differing commercial realities facing each type of consumer)). The lack of sufficient evidence to support treating wholesale industrial customers the same as all other wholesale customers is yet another reason that the Government's proposed product market fails.

2. The Government's Geographic Markets Are Too Narrow

As noted above, the Government's failure to prove a relevant product market is dispositive and requires judgment in favor of Defendants. Yet even assuming the relevant product market properly excluded distributors while treating all wholesale customers the same, the outcome would be no different as the Government has failed to identify a relevant geographic market as well.

"The relevant geographic market is that area in which a potential buyer may rationally look for the goods or services he seeks." *Penn State Hershey*, 838 F.3d at 338 (cleaned up); *see also Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 726 (3d Cir. 1991) ("[T]he geographic market is not comprised of the region in which the seller attempts to sell its product, but rather is comprised of the area where his customers would look to buy such a product."). An often-used tool for determining a relevant geographic market is the hypothetical monopolist test. *See* U.S. Dep't of Just. & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (2010) (setting forth hypothetical monopolist test). "A proposed market is properly defined, under this test, if 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." *Hackensack*, 30 F.4th at 167. "If, however, consumers would respond to a SSNIP by purchasing the product from outside the proposed market, thereby making the SSNIP unprofitable, the proposed market definition is too narrow." *Penn State Hershey*, 838 F.3d at 338.

The Government offers two possible geographic markets: "Georgia Plus" and the "Southeast." The narrower "Georgia Plus" market includes Alabama, Florida, Georgia, North Carolina, South Carolina, and Tennessee. (FF ¶ 91). The "Southeast" market is broader, including all of these states in addition to the District of Columbia, Delaware, Kentucky, Maryland, Mississippi, Virginia, and West Virginia. (*Id.*). As a threshold matter, competitive overlap does

exist between United and Imperial in the "Southeast" and "Georgia Plus" markets. (*Compare* PTX-452 at -460 & -461 (depicting United sales by state for sugar originating from the Red River Valley and U.S. Sugar's Clewiston refinery), *with* DTX-516 (Imperial customers and sales by state); *see also* Tr. at 999:20-1000:21 (Dr. Hill agreeing significant competitive overlap between Imperial and United exists in the broader and narrower markets)). This overlap suggests that the areas could be a proper starting point in identifying a relevant geographic market to assess potential antitrust harm that may result from the Proposed Transaction. *See United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 357 (1963) ("The proper question to be asked in this case is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate.").

Against the backdrop of competitive overlap, the Government has identified its two proposed geographic markets based on customer locations, rather than supplier locations. (*See* Tr. at 601:1-602:8 (Dr. Rothman testifying as to his use of customer-location market)). In determining whether these markets were appropriate relevant geographic markets for antitrust purposes, Dr. Rothman analyzed each under the hypothetical monopolist test. (Tr. at 589:14-592:7; *see also id.* at 599:9-600:13; FF ¶¶ 74 & 92 (Dr. Rothman did not identify the "Georgia Plus" or "Southeast" markets, instead merely using what was provided by the Government)). Dr. Rothman has no opinion on which of the "Georgia Plus" and "Southeast" markets is better suited to the economic realities in this case. (*See* Tr. at 658:1-19). He also asserted – without analysis – that Defendants' proposed "Competitive Overlap" and entire U.S. markets would each pass the hypothetical monopolist test. (*Id.* at 652:8-9 & 657:11-13). In essence, according to Dr. Rothman and his application of the hypothetical monopolist test, a market that is merely six

states in the southeastern U.S. is as relevant a geographic market as the entire U.S. in this case. That is simply not credible.

A more fundamental problem with the proposed markets is that they ignore the abundant evidence of sugar consumers located in the "Southeast" and "Georgia Plus" markets purchasing their refined sugar outside those geographic regions. (*See, e.g.*, FF ¶ 95 (large volumes of sugar going into the "Southeast" and "Georgia Plus" from LSR / Cargill in Louisiana); FF ¶ 96 (NSM shipping beet sugar from Minnesota and Idaho into "Southeast" and "Georgia Plus"); FF ¶ 97 (Michigan Sugar selling sugar from Michigan and Ohio into "Southeast" and "Georgia Plus" markets)). Many of these and other suppliers have additional refined sugar to sell into these proposed markets, sugar that is already traveling through the region. (FF ¶ 100). And many customers either pick up their purchased refined sugar at locations outside these markets or have the capacity to do so in the future. (FF ¶ 101). None of this is particularly surprising given the low cost to transport sugar and the ease with which it can travel long distances. (FF ¶¶ 39 & 42). Moreover, at least one of the significant players outside of the "Southeast" – LSR / Cargill – has plans to increase their sales into the "Georgia Plus" and "Southeast" regions. (FF ¶ 102).

Despite the large volumes of sugar coming in from states outside the proposed geographic markets, under the Government's customer-based hypothetical monopolist test, expanding the region would be improper because the markets already account for sellers outside the region and expanding it only brings in additional ***customers*** with different competitive choices. (*See* D.I. 233 at 5-6). That is, because the market is formulated around customer locations, all relevant sellers to the area are already considered. The Court finds it hard to credit that the proposed markets properly account for the real-world impact of these sellers, especially given that Dr. Rothman discounted any potential for nearby LSR / Cargill to meaningfully increase their sales in the area

in response to a price increase in the region. (Tr. at 662:4-12). This stands in stark contrast to [redacted] actual plans [redacted]. (FF ¶ 18). Similarly, as to the assertion that expanding the region would only bring in customers with different competitive options, there is no factual support offered – just conclusory testimony from Dr. Rothman, who was not particularly credible. (*See* D.I. 233 at 6). The Court recognizes the important role that the hypothetical monopolist test plays in antitrust cases but, regardless of how articulated, the process of identifying the relevant geographic market must conform to the economic realities of the industry to recognize competition where competition exists. Any rigid application of the hypothetical monopolist test must yield to the economic realities of the industry. Here, the economic reality is that sugar flows easily across the country from areas of surplus to deficit in response to prices and demand.

The Government's proposed geographic markets ignore the commercial realities of the sugar industry in this country – namely, that sugar flows freely and over long distances in response to market forces. The evidence establishes that customers already look beyond the Government's proposed markets for competitive alternatives. Finding that they would continue to do so in the face of increased sugar prices is not difficult. *See Tenet Health Care*, 186 F.3d at 1050 & 1053-54 (proposed geographic market too narrow where evidence showed that significant number of patients already traveled outside of that area to obtain similar treatment services). The Government's proposed geographic markets are too narrow and neither can constitute a relevant geographic market.

Finally, the Court briefly addresses a third proposed geographic market that made its way into the Government's case in post-trial papers. That market, called "the USDA South" is purportedly an alternative relevant geographic market for purposes of assessing antitrust harm in this case. (*See, e.g.*, D.I. 214 at 22 ("Thus, even if the Court concluded that the only relevant

market for this transaction was as broad as the entire USDA South, the transaction would still be presumptively unlawful."); D.I. 215 ¶ 48 ("Although overbroad (because there are meaningfully different competitive options for customers in Texas) . . . the USDA South could also constitute an antitrust market." (citations omitted))). In a footnote, the Government suggests that the Court may construct any geographic market that will suffer competitive harm based on the record. (*See* D.I. 214 at 22 n.7 ("[T]he Court should enjoin the merger if the Court finds a reasonable probability of harm in any relevant market based on the evidence presented.")). Yet the Government's expert only offered opinions under the two markets provided to him by the Government – the "Southeast" and "Georgia Plus" markets. (Tr. at 591:20-592:14 & 650:25-651:6). The only testimony from Dr. Rothman that could remotely be considered to touch upon a broader market (*e.g.*, "the USDA South") was a mere five lines in the abstract or a conclusory assertion as to post-transaction effects. (*Id.* at 626:6-13 ("So the effect on the broadening market brings in areas in which the potential effects of the transaction are different from, in the market that is defined, that effects the harm for customer, but in a broader market there are more sales, so the total mark would be greater."); *id.* at 613:22-614:7 (Dr. Rothman opining on a post-transaction market concentration in "the USDA South" without analysis or supporting evidence)). Dr. Rothman did not present market shares for competitors in "the USDA South" and he did not present evidence of any price effects in that area if the Proposed Transaction were allowed. (*See id.* at 611:10-612:1 & 686:10-21). And there is scant evidence in the record on sales or behaviors of customers specifically in "the USDA South" as discovery (including expert discovery) was limited to only the markets alleged in the Complaint. (*See* D.I. 1 ¶¶ 29-35). Such proof cannot be sufficient to carry the burden of demonstrating that the USDA South is a relevant geographic market.

In reality, what the Government is asking the Court to do is figure out which market allows the Government to prevail and then to use that market. The Court declines to do so. *See, e.g.*, *United States v. Sabre Corp.*, 452 F. Supp. 3d 97, 142 (D. Del. 2020), *vacated*, No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020) ("The Court agrees with Defendants that, to the extent DOJ is now inviting the Court to 'unilaterally change the defective market allegations if necessary to save its case,' it would be wrong for the Court to do so under the circumstances here, which include that both parties (and the Court) have already devoted enormous resources to the case the government chose to bring.").[25] Because the Government has failed to identify the relevant market for analyzing any proposed competitive injury resulting from U.S. Sugar's acquisition of Imperial, the Government cannot establish its *prima facie* case. The Court need not and does not reach the second prong of the *prima facie* case – *i.e.*, whether the Government has shown that the effects of the acquisition are likely to be anticompetitive.

B. Even if the Government Established the Proposed Transaction Could Affect Sugar Prices, USDA Has Tools to Protect Against Anticompetitive Effects

In any action challenging a proposed acquisition under Section 7 of the Clayton Act, the transaction must be viewed "in the context of its particular industry." *Brown Shoe*, 370 U.S. at 321-22. To understand that context, the reviewing court must also consider the "structure, history and probable future" of the market in which the proposed transaction exists. *Id.* at 322 n.38. "Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation." *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004).

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[25] The decision in *Sabre* was vacated because the proposed transaction was abandoned. The Third Circuit, however, explicitly noted that its order "should not be construed as detracting from the persuasive force of the District Court's decision[] should courts and litigants find its reasoning persuasive." 2020 WL 4915824, at *1 (3d Cir. July 20, 2020).

The supply of sugar in the U.S. is tightly controlled by the federal government, the consequence of which is that sugar prices are artificially held high in this country. *See United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988) ("[W]e cannot ignore the fact that Congress has enacted a sugar program that has artificially inflated the price of sugar."). Although the USDA prefers to keep the price of sugar high, there are a number of tools at the USDA's disposal that can easily be deployed to modify the sugar supply (and thus price) in the U.S. As such, U.S. Sugar's acquisition of Imperial will not happen in a vacuum and must be viewed against the backdrop of the USDA's intimate involvement with the U.S. sugar industry. (*See generally supra* § II.F (setting forth details about the Federal Sugar Program)).

The USDA's official position on U.S. Sugar's acquisition of Imperial is that it has no position on whether it will affect sugar competition or prices in the U.S. (*See* Tr. at 882:4-8). It is noteworthy that the Government did not offer any documentary or testimonial evidence from USDA as to its view of the anticipated effects of U.S. Sugar's acquisition of Imperial. In essence, the Government decided to shield USDA officials from having to answer questions about the interplay between free market competition and the Federal Sugar Program. (*See id.* at 641:20-642:21 (Dr. Rothman admitting that he did not speak with anyone at the USDA to understand USDA's role in the sugar industry)). But Defendants called USDA's Dr. Fecso at trial and, with her testimony, the Court endeavors to discuss some additional context about the sugar industry in the U.S. and the various price constraints at play – some of which tightly controlled by the federal government. The Court firmly believes that USDA's power to manipulate sugar supply in the market would act as a safeguard against potential anticompetitive effects of the Proposed Transaction even if the Court were to find any such effects existed.

The Court is mindful of the fact that Dr. Fecso was not testifying on behalf of USDA at trial, but rather offering testimony in her personal capacity. That being said, Dr. Fecso is a Ph.D. economist who has worked at USDA for almost 30 years. (Tr. at 850:3-15). Moreover, Dr. Fecso has worked with the Federal Sugar Program for almost 20 years. (*Id.* at 850:16-19). She collects and publishes data on beet and cane processors and refiners and uses that data to forecast supply and demand. (*Id.* at 851:8-14). And using her analyses, she advises USDA undersecretaries on whether and when to take actions to rebalance the sugar market and increase the supply of sugar. (*Id.* at 851:14-25). There is no one else at USDA that has a longer tenure working on the Federal Sugar Program or in making recommendations to the undersecretaries for the Federal Sugar Program. (*Id.* at 852:20-24). The Court found Dr. Fecso to be an exceptionally knowledgeable and particularly credible witness.

In Dr. Fecso's view, U.S. Sugar's acquisition of Imperial is not likely to lead to higher prices in the U.S. (*See* Tr. at 854:25-855:4). In fact, she anticipates sugar prices in the U.S. may be lowered if the Proposed Transaction is allowed to proceed. (*See id.*). Indeed, Dr. Fecso believes that the deal will have an overall positive impact on the sugar industry in this country. (*Id.* at 853:6-11). In particular, having spoken to the parties and hearing U.S. Sugar and Imperial's plans post-merger, she believes that a number of efficiencies can be gained by the deal:

> There is a potential for Florida to send supplies of raw sugar to Imperial. Right now Imperial doesn't have a domestic source of sugar. There is a potential for another voice to be heard besides Imperial Sugar when they come to USDA and ask for us to increase imports to relieve tightness in the raw market. And because of the efficiencies that I see are possible with this merger, the engineers, for instance, from US Sugar revitalizing the Imperial facility, things like that, there could be cost savings and those cost savings could result in lower refined prices.

(*Id.* at 853:19-854:4). Dr. Fecso anticipates that the Port Wentworth facility having a domestic supply of raw sugar (from U.S. Sugar's Florida location) would reduce the facility's reliance on

imports, thereby lowering the cost of producing refined sugar (and in turn the selling price). (*Id.* at 854:5-24). Even if the Proposed Transaction were to ultimately lead to a regional increase in refined sugar prices, Dr. Fecso believes that sugar would flow in from other locations to bring the prices back down. (*Id.* at 855:5-17; *see also supra* § II.E (setting forth evidence of sugar flowing in response to market conditions)). And failing that, she believes that the USDA is equipped to respond appropriately. (Tr. at 855:18-24). This latter point is well-supported by the record.

The amount of sugar that is available for sale in the U.S. each year is largely controlled by the USDA. It monitors and estimates how much sugar will be necessary and how much will be produced each year. (SAF ¶ 86); *see also* 7 U.S.C. § 1359bb(a)(1). No less than 85% of all sugar sold in this country must come from domestic suppliers (whether beet or cane). 7 U.S.C. § 1359bb(b)(1)(B). Moreover, within this overall domestic marketing cap, the USDA dictates how much sugar any given domestic seller may market in any given year. (Tr. at 867:8-23). That is, any U.S. company selling domestic sugar has a volume cap on the amount of sugar it is allowed to sell each year. (*Id.* at 867:16-19; *see also id.* at 285:20-22 ("Each year the USDA sets 85 percent of the market for the domestic processors and allocates sugar to each one of them to sell . . . ."); PTX-330 at pg. 10; *see also* DTX-464 at 2 (showing initial 2022 allotments)). If a company has excess sugar, it is not permitted to sell the sugar unless the USDA increases the marketing allotments or reassigns allotments from one company to another. (Tr. at 711:20-25 & 868:2-17; SAF ¶ 87). That the USDA is able to modify domestic marketing allotments means that it has the power to do so in response to changes in market conditions – *e.g.*, an increase in sugar price that may result from the Proposed Transaction. Indeed, the USDA recently increased and reassigned marketing allotments to address high sugar prices (and excess supply). (*See* Tr. at 868:2-869:15 & DTX-464 ("Given the expected large amount of blocked beet sugar stocks and current high sugar prices, USDA is increasing the FY 2022 [overall sugar marketing allotment quantity.")).

Beyond just the domestic suppliers, the USDA also has power to increase the amount of imported sugar flowing into the U.S. Unlimited amounts of sugar can come into the U.S. from abroad, but only a limited amount is imported at low or no duty through the TRQ system and U.S.-Mexico Suspension Agreements. (*See* FF ¶¶ 51-52). Imported sugar beyond the limits of either system is imported as expensive "Tier II" sugar, which is effectively the price ceiling for sugar in the U.S. (SAF ¶ 92 & Tr. at 873:21-24; *see also* Tr. at 560:5-6 ("We [United] always know where Tier II sugar is priced because it sets the ceiling for us.")). The USDA maintains the discretionary ability to increase the amounts imported under the TRQ system and U.S.-Mexico Suspension Agreements in order to maintain reasonable prices. (*See* FF ¶¶ 51-52). If U.S. Sugar's acquisition of Imperial were to lead to higher sugar prices, the USDA has the ability to increase the amount of low- or no-duty sugar that can be imported into the U.S. to combat these effects. Doing so would increase the available sugar for sale in the U.S., thereby bringing prices back down. And to be sure, there is ample supply located outside of the U.S. – foreign suppliers are always looking to sell more sugar into this country because the price of sugar is so high. (*See* Tr. at 870:15-25). Thus, even if U.S. Sugar's acquisition of Imperial were likely to have any anticompetitive effects, the Court believes that the USDA has the ability to counteract those effects.

In the end, the Court finds it more than curious that the Government is purportedly concerned about anticompetitive harm and increased prices in an industry where the Government itself keeps the prices high and, in many ways, controls the competition. But even so, the Government has failed to meet its burden under the Clayton Act and the Proposed Transaction will not be enjoined.

V. CONCLUSION

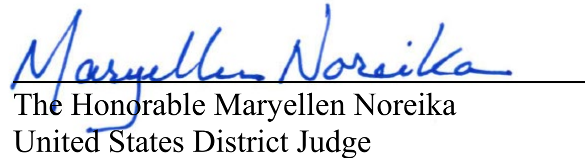
For the foregoing reasons, the Court finds that the Government has failed to prove that the proposed acquisition of Imperial Sugar by U.S. Sugar is likely to substantially lessen competition or tend to create a monopoly under Section 7 of the Clayton Act. Therefore, the Court will not enjoin the Proposed Transaction and judgment will be entered in favor of Defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 21-1644 (MN)
	)	
UNITED STATES SUGAR CORPORATION, UNITED SUGARS CORPORATION, IMPERIAL SUGAR COMPANY and LOUIS DREYFUS COMPANY LLC,	)	
	)	
Defendants.	)	

JUDGMENT

This 23rd day of September 2022, for the reasons set forth in the Court's SEALED Memorandum Opinion from today (D.I. 242), IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of Defendants and against Plaintiff that United States Sugar Corporation's acquisition of Imperial Sugar Company will not violate Section 7 of the Clayton Act, 15 U.S.C § 18.



The Honorable Maryellen Noreika
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES SUGAR CORPORATION,
UNITED SUGARS CORPORATION,
IMPERIAL SUGAR COMPANY, and
LOUIS DREYFUS COMPANY, LLC,

Defendants.

C.A. No. 21-cv-1644-MN

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff in the above-named case, hereby appeals to the United States Court of Appeals for the Third Circuit from this Court's Order dated September 23, 2022, entering judgement for Defendants and against Plaintiff, and the Court's Opinion in this case, also dated September 23, 2022.

September 26, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2022, a true and correct copy of the foregoing was served on all counsel of record via electronic notification.

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Attorney for Plaintiff United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 21-1644 (MN)
	)	
UNITED STATES SUGAR CORPORATION, UNITED SUGARS CORPORATION, IMPERIAL SUGAR COMPANY, and LOUIS DREYFUS COMPANY LLC,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

At Wilmington this 28th day of September 2022:

The United States Government, through the Federal Sugar Program administered by the United States Department of Agriculture ("USDA"), ensures that purchasers and consumers in the United States pay higher prices for refined sugar than those in other parts of the world. Now, however, the Government comes to the Court professing concern for those same purchasers and consumers should the Court not enjoin the acquisition of Imperial Sugar Company by United States Sugar Corporation ("the Proposed Transaction") until its appeal is concluded. (D.I. 246, 250). In essence, as Defendants put it, "the Government continues to try to obtain via delay what it could not obtain on the merits." (D.I. 251 at 1).[1]

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[1] The Government alternatively asks the Court for "a 14-day temporary injunction to give the Third Circuit sufficient time to consider" a motion the Government intends to file "later tonight." (D.I. 250). The Government has already filed its appeal and has given this Court on the order of one day to decide the pending motion. (D.I. 250). The Court will not presume that the Third Circuit cannot address a motion in less than 14 days (or decide for itself how long it needs to address any yet-to-be filed motion). Therefore, that relief is denied.

The Government seeks relief pursuant to Rule 62(d) of the Federal Rules of Civil Procedure. Courts traditionally consider four factors in determining whether to issue an injunction under Rule 62(d): "(1) whether the . . . applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured . . . ; (3) whether issuance . . . will substantially injure the parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

Here, the Government has not established a strong showing that it is likely to succeed on the merits. The Court held a trial, listened to witnesses and evaluated the evidence. As set forth in the Court's Memorandum Opinion of September 23, 2022 (D.I. 242), the Government failed in its burden to prove a *prima facie* case of a Clayton Act § 7 violation. The credentials and experience of the Government's only expert were lacking. (D.I. 242 at 24-25). And the Government, relying on that expert, failed to identify a relevant product market and its proffered geographic market was unduly narrow.[2] (*Id.* at 25-26, 41-53). The Government also ignored the economic realities of the sugar market, including the availability of its own regulatory tools to constrain any potential anticompetitive impacts of the Proposed Transaction. (*Id.* at 54-58).

The Government has also failed to establish irreparable harm in the absence of the requested injunction. According to the Government, once the Proposed Transaction occurs, it will be difficult to "unscramble[e] the eggs" – *i.e.*, to undo it. (D.I. 247 at 12). As Defendants point out, however, it is not impossible. (D.I. 251 at 13-14). Indeed, the Government has brought suits

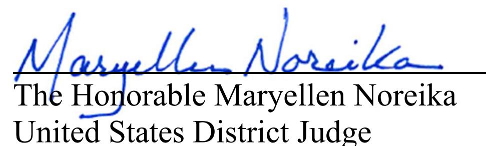
[2] The Government's expert did not conduct his own analysis of an appropriate market, but instead relied on markets defined by the Government. And as a whole, the Court found the expert's testimony to be unpersuasive (as have other courts). *See, e.g.*, *In re Altria Group, Inc. & JUUL Labs, Inc.*, No. 9393 (F.T.C. Feb. 23, 2022) (Initial Decision at 91) (finding that his calculations were not "economically sound"); *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, No. 17-205, 2020 WL 3414662, at *4 (S.D. Cal. June 22, 2020) (finding his study to be "seriously flawed.").

to address transactions which have already been consummated and obtained divestiture. *See, e.g.*, *In re ProMedica Health Sys., Inc.*, No. 9346, 2012 WL 2450574 (F.T.C. June 25, 2012) (ordering divestiture); *In re Whole Foods Market, Inc.*, No. 9324, 2008 WL 5724689 (F.T.C. Sept. 8, 2008) (same, post-appeal); *F.T.C. v. St. Luke's Health Sys. Ltd.*, No. 1:12-560-BLW et al., 2014 WL 407446 (D. Idaho Jan. 24, 2014); *U.S. v. Bazaarvoice, Inc.*, No. 13-133-WHO, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014).

Finally, as to the other factors, on balance those support denial of the Government's motion. Although it is unclear that Defendants will be harmed by a short delay,[3] the public interest lies in allowing the Proposed Transaction to go forward. The Court heard testimony from Dr. Barbara Fecso, a Ph.D. economist who has worked at USDA for almost 30 years and with the Federal Sugar Program for almost 20 years. There is no one at USDA with a longer tenure working on the Federal Sugar Program or in making recommendations to the undersecretaries for that program. Dr. Fecso testified credibly that she anticipates that the Proposed Transaction is not likely to lead to higher prices but, in fact, may lower prices for U.S. purchasers and consumers of refined sugar by creating certain efficiencies and cost savings. (*See* D.I. 242 at 55-58).

Thus, having considered the relevant factors, the Court finds that they weigh against the injunctive relief sought by the Government.

THEREFORE, IT IS HEREBY ORDERED that the Government's motion (D.I. 246) for an injunction pending appeal is DENIED.



The Honorable Maryellen Noreika
United States District Judge

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[3] Defendants, without informing the Court, agreed to a "timing agreement" that effectively modified the closing date (*see* D.I. 247, Ex. A § IV.B), suggesting that a short delay would not be prejudicial to them. The Government, however, seeks an injunction pending the decision on appeal, which could (take months or years). That would prejudice Defendants.

The Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant*, v. UNITED STATES SUGAR CORPORATION, UNITED SUGARS CORPORATION, IMPERIAL SUGAR COMPANY, and LOUIS DREYFUS COMPANY, LLC, *Defendants-Appellees*.	No. 22-2806

EMERGENCY MOTION OF THE UNITED STATES FOR AN INJUNCTION PENDING APPEAL AND AN ADMINISTRATIVE INJUNCTION PENDING ADJUDICATION OF THIS MOTION

The United States asks this Court to enjoin pending appeal United States Sugar Corporation's proposed acquisition of its rival, Imperial Sugar Company. Fed. R. App. P. 8(a)(2). The Government challenged the proposed acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18, because it would put sugar customers across the southeastern United States at the mercy of an effective duopoly. After a four-day bench trial, the District Court (Noreika, J.) entered an opinion, Exhibit A, on September 23, 2022, holding the proposed acquisition lawful. Ex. A at 54. On September 26, 2022, the Government filed a protective

notice of appeal and moved the District Court for injunctive relief, which was denied on September 28, 2022. Doc. 253.

The Government now asks this Court for an injunction pending appeal, or at a minimum, an administrative injunction until this emergency motion has been fully adjudicated. Immediate action is necessary because Defendants have refused to agree to delay consummation of the transaction, even temporarily.

This relief is necessary to protect competition and to preserve the Government's ability to obtain an effective remedy on appeal. Absent an injunction, Defendants can close their deal at 12:01 am on Monday, October 3, 2022. This Court issued an injunction pending appeal (and ultimately reversed) in a recent merger case that, like this one, presented substantial questions about market definition and stood to cause significant anticompetitive effects. *See FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338-46 (3d Cir. 2016); Order, *FTC v. Penn State Hershey Med. Ctr.*, No. 16-2365 (3d Cir. May 24, 2016). The same result should follow here.[1]

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[1] This appeal has been authorized by the Solicitor General. The Government informed the Clerk of the Court and Defendants of this motion before filing it. Defendants oppose it.

BACKGROUND

A. The Government's Case Against the Proposed Acquisition

U.S. Sugar and Imperial are competing producers of refined sugar. United Sugars Corporation, an agricultural cooperative, markets and sells all of U.S. Sugar's refined sugar. On March 24, 2021, U.S. Sugar agreed to acquire Imperial's assets for $315 million. Following an extensive investigation, the Government sued to block the proposed acquisition because its effect "may be substantially to lessen competition" in violation of Section 7.

Section 7 claims are assessed under a three-part burden-shifting framework. *Penn State*, 838 F.3d at 337. First, the Government must establish a prima facie case by (a) identifying a relevant product and geographic market and (b) showing that the proposed merger may have anticompetitive effects in that market. *Id.* Second, if the Government establishes a prima facie case, Defendants may then seek to rebut it. *Id.* Finally, if Defendants succeed in such a rebuttal, the burden shifts back to the Government to carry the ultimate burden of persuasion. *Id.*

The Government established a prima facie case by demonstrating the proposed merger's potential for anticompetitive effects in two regional markets for the production and sale of refined sugar to wholesale customers. U.S. Sugar and Imperial control important sugar refineries in Clewiston, Florida, and Port Wentworth, Georgia, respectively, and customers located closer to those refineries

generally bear a greater risk of anticompetitive harm from this merger. The Government's Complaint therefore raised two concentric customer-focused geographic markets for the production and sale of refined sugar: (1) a narrower market focused on customers in a six-state region consisting of Florida, Georgia, Alabama, Tennessee, North Carolina, and South Carolina; and (2) a broader market focused on customers across twelve states and the District of Columbia ("the Southeast").

At trial, the Government proved that these markets satisfied an established framework for defining relevant markets in Section 7 cases: the hypothetical monopolist test, which 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." *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 167 (3d Cir. 2022). Under this framework, the proposed market is defined too narrowly if enough purchasers would prevent the hypothetical monopolist from imposing a SSNIP by buying substitute goods outside the market.

The Government then established a presumption of potential anticompetitive effects in these markets under the legal framework established in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). There, the Supreme Court held that a merger producing a firm that controls a 30% share of the relevant market and

"results in a significant increase in the concentration of firms in that market" is presumptively unlawful. *Id.* at 363. In this case, post-acquisition, the merged firm and remaining competitor Domino would control about 75% of sales to customers in the Southeastern United States. Ex. B at 611:10-612:1. Post-merger, United alone would control over 45% of refined sugar sold to customers in the Southeast (and 56% in the narrower six-state market), and the acquisition would sharply increase concentration in both markets by combining important rivals. *Id.* at 611:10-612:1, 613:1-6. The presumption of anticompetitive effects would hold even under *Defendants'* proposed geographic markets—a national market and a "competitive overlap" market that extended west to Texas and north to Michigan—in both of which the post-merger firm would become the new market leader with at least a 30% market share. *Id.* at 992:18-993:9, 993:13-24. The Government also presented compelling evidence that the acquisition would likely lead to higher prices and less reliable services resulting from the elimination of competition between United and Imperial (unilateral effects) and enhanced incentives for price coordination between United and rival Domino (coordinated effects). *E.g.*, *id.* at 614:14-616:9, 622:9-25, 625:5-22, 627:17-628:5.

B. The District Court's Decision

The District Court set out the proper three-part burden-shifting framework governing Section 7 claims. Ex. A at 39-40. And in evaluating the Government's

prima facie case, the District Court recognized the hypothetical monopolist test as the operative framework for determining the relevant product and geographic markets. *See id.* at 49. However, in holding that the Government "failed to identify the relevant market for analyzing any proposed competitive injury," *id.* at 54, the District Court both misapplied and failed to apply that operative framework.

To begin with, in rejecting the Government's proposed product market—the production and sale of refined sugar to wholesale customers—the District Court did not dispute that the Government had satisfied the hypothetical monopolist test. Nevertheless, it imposed requirements above and beyond that framework in concluding that distributors should have been included in the proposed product market on the grounds that "even if distributors must first purchase refined sugar from producers like Domino or Imperial," they are "competitive with producers," *id.* at 44-45. The District Court also objected that the Government did not distinguish sales to industrial and retail customers. *Id.* at 48.

With respect to the relevant geographic market, the District Court did not question that the Government satisfied the hypothetical monopolist test but nevertheless deemed the Government's geographic markets inconsistent with evidence "that customers already look beyond the Government's proposed markets for competitive alternatives." *Id.* at 52.

Having rejected the Government's proposed geographic markets, the District Court declined to consider whether the evidence established that the acquisition may substantially lessen competition in geographic markets identified by Defendants. *Id.* at 52-53. And although the District Court made clear that it "need not and does not reach the second prong of the *prima facie* case—i.e., whether the Government has shown that the effects of the acquisition are likely to be anticompetitive"—it noted that it "firmly believe[d]" that the United States Department of Agriculture (USDA) "would act as a safeguard against potential anticompetitive effects" of the acquisition. *Id.* at 54-55.

ARGUMENT

In determining whether to grant an injunction pending appeal under Rule 8(a), this Court considers four basic factors: (1) likelihood of success on the merits of the appeal; (2) irreparable injury; (3) substantial harm to other parties; and (4) the public interest. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The first two factors are "the most critical." *Nken v. Holder*, 556 U.S. 418, 434 (2009).

On the first factor, the United States need only demonstrate that it has "'a reasonable chance, or probability, of winning.'" *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (en banc); *see R.R. Yardmasters of Am. v. Pa. R.R. Co.*, 224 F.2d 226, 229 (3d Cir. 1955) (in assessing first factor, court is "concerned only to find out if" the movant has "raised questions going to the

merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation" (citation omitted)). On the second, the Government must show "likely" irreparable harm. *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 & n.2 (3d Cir. 2017). The greater the moving party's showing of irreparable harm, the less it need show on the merits. *In re Revel AC, Inc.*, 802 F.3d 558, 569-70 (3d Cir. 2015) This Court then "determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief." *Reilly*, 858 F.3d at 179. Each factor favors an injunction here.

A. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS

The Government is likely to succeed on the merits because it met its burden of establishing a prima facie case by showing, among other things, that the proposed acquisition would be presumptively unlawful, extinguishing head-to-head competition between United and Imperial, who together would dominate sugar refining in the Southeast. The District Court, however, rejected the Government's case on the basis of a series of legal errors with respect to product and geographic market definition, misapplying the hypothetical monopolist test and other controlling market-definition precedent. On the basis of the market-definition errors alone, success on appeal is likely. *See Penn State*, 838 F.3d at 338-46.

As described in more detail below, the District Court misapplied the burden-shifting framework. It erroneously concluded it had no reason to reach "the second prong of the *prima facie* case," Ex. A at 54, and wrongly declined to consider that the Government established a presumption of anticompetitive effects *even in Defendants' own proposed markets*. It also erred in asserting, without legal support, that the mere existence of USDA's sugar program somehow acts "as a safeguard against potential anticompetitive effects" of the acquisition. *Id.* at 54-55. Together, these errors upend the Section 7 burden-shifting approach.

1. The District Court Misapplied the Hypothetical Monopolist Test and Controlling Market-Definition Precedent in Evaluating the Government's Prima Facie Case.

Evaluation of the Government's prima facie case begins with consideration of the relevant market (or markets), which is "determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country')." *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). A "trial court's determination of the market may be reversed where that tribunal has erred as a matter of law." *Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1252 (3d Cir. 1972). In particular, plenary review is appropriate where a district court's "application of the hypothetical monopolist test was incomplete" or otherwise erroneous. *Penn State*, 838 F.3d at 337, 344-45.

The hypothetical monopolist test involves two simple steps. First, for whatever relevant market is being tested, hypothesize a monopolist. Second, consider whether that hypothetical monopolist could impose a SSNIP without losing so many customers as to render that price increase unprofitable. Although the District Court, as in *Penn State*, "correctly identified" this framework, it repeatedly failed to apply it and otherwise erred in its application. *See* 838 F.3d at 339. Plenary review here shows that success on appeal is likely.

a. The District Court Committed Legal Error in Product-Market Definition

This is a merger of two sugar refiners, so the Government proposed a product market focused on the refining and sale of sugar. The District Court rejected this product-market definition because it insisted, erroneously, that distributors must be included as competitors. Ex. A at 43-48. But distributors do not refine sugar—they operate at a different level of the supply chain—and therefore do not compete in the refining of sugar. *See Phila Nat'l Bank*, 374 U.S. at 357 (market definition begins from "competitive overlap" between parties). Distributors are *customers* in the relevant market—their business depends on purchasing sugar from refiners for them to resell.

The District Court relied on distributors' current competitive significance as resellers (Ex. A at 44-47), but in so doing failed to hypothesize a monopolist of all sugar refining. Even if distributors *today* win sales in the relevant markets by

leveraging business relationships with low-priced refiners, a hypothetical monopolist would control distributors' access to the sugar they resell. It would control when, how, and at what price distributors may acquire sugar. A hypothetical monopolist thus could demand terms that would prevent competition to itself from distributors. Distributors, like all other buyers, would be dependent on the hypothetical monopolist.

Penn State reversed a similar error. There, the District Court had "grounded its reasoning, in part, on the private agreements" in place in the current competitive environment. 838 F.3d at 339. This Court explained that such relationships are "not relevant to the hypothetical monopolist test," *id.*, because the court must answer "whether a *hypothetical* monopolist could profitably impose a SSNIP." *Id.* at 344. Similarly here, whatever competitive relevance distributors derive from current refiner relationships, they would be subject to the whims of a hypothetical monopolist and could not prevent a SSNIP.

Aside from failing to hypothesize a monopolist, treating distributors as independent competitors in a market for the production and sale of goods they do not produce is inconsistent with Supreme Court and Third Circuit precedent that, when examining mergers between suppliers selling through a distribution chain, defines the market around suppliers. *See Brown Shoe*, 370 U.S. at 341 n.69 (calculating market shares by assigning distributors' sales to manufacturer whose

products were being distributed); *see also Phila. Nat'l Bank*, 374 U.S. at 356 (small-loan companies not in same market as commercial banks because the "companies' working capital consist[ed] in substantial part of bank loans"); *Allen-Myland, Inc. v. Int'l Bus. Machines Corp.*, 33 F.3d 194, 202-04 (3d Cir. 1994) (computer lessors not in same market as manufacturers because former obtained their equipment from latter); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 425 (2d Cir. 1945) (declining to assign market shares to aluminum-ingot *re*sellers in market for aluminum ingot). The District Court did not address this precedent.

Moreover, the District Court's approach would also involve double-counting distributor-sold sugar because the Government's market definitions *already accounted for such sugar*. Most distributors purchase their entire supply of refined sugar from refiners, and the relevant markets proposed by the Government already included any sugar purchased and then resold by distributors located within those markets.[2] If distributors' *resales* of this sugar were added to refiners' market shares, as the District Court's logic seems to require, the result would be substantial double-counting of sugar already reflected in refiners' market shares.[3]

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[2] If a distributor also produced its own sugar, the Government assigned market shares to account for that distributor's production—although these shares were so small that they rounded to 0%. Ex. B at 605:20-25, 611:10-18.

[3] The Government also specifically accounted for sugar sold into the relevant markets by distributors located outside of those markets, including through the hypothetical monopolist test. The Government put on evidence, never confronted

The District Court also erred in rejecting a market for the production and sale of refined sugar because it includes both industrial and retail customers. Ex. A at 48. Both types of customers would be subject to a price increase from a hypothetical monopolist. Indeed, customers in antitrust markets are never entirely homogenous, and courts regularly approve markets containing customers with different characteristics. *Brown Shoe*, 370 U.S. at 327 (market containing men's, women's, children's, and infants' shoes, among others); *Phila. Nat'l Bank*, 374 U.S. at 360-61 (market for commercial-banking services included "large borrowers," "very small borrowers," and "customers of intermediate size," all with different needs); *Hackensack*, 30 F.4th at 166 (market for inpatient general acute care services without distinguishing different patients' needs).

Furthermore, the District Court's holding overlooks the fact that the disaggregation of these customer groups would only have *strengthened* the presumption that the acquisition is unlawful: Because United and Imperial each sell roughly 80-90% of their sugar to industrial customers while their major competitor, Domino, sells only about 50% of its sugar to industrial customers (Ex. B at 166:25-167:3, 255:10-12), the already high market-share and market-concentration statistics put forward by the Government would have *increased* if

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or questioned by the District Court, that customers in the relevant geographic markets would not purchase enough sugar from such distributors to defeat a price increase. Ex. B at 610:14-611:2.

industrial customers were considered independently. *See Brown Shoe*, 370 U.S. at 327 (declining to divide market further where appellant "can point to no advantage it would enjoy" from "finer divisions"). That showing alone would have established a prima facie case. *See id.* at 325 (anticompetitive effect in any "submarket" enough).

b. The District Court Committed Legal Error in Geographic-Market Definition

The District Court also legally erred in holding that the Government failed to prove a relevant geographic market. First, the court stated that it was "simply not credible" for a market that is merely six states in the Southeastern United States to be as relevant a geographic market as the entire United States. Ex. A at 50-51. But that assertion misapprehends well-established merger precedent. The Supreme Court has long made clear that "a geographic submarket" of a broader market may be "the appropriate 'section of the country'" to analyze a merger's competitive effects, *Brown Shoe*, 370 U.S. at 336, and in appropriate circumstances has defined multiple concentric relevant markets, *see United States v. Pabst Brewing Co.*, 384 U.S. 546, 552 (1966) (Wisconsin, three-state region including Wisconsin, and United States all relevant geographic markets); *see also Am. Crystal Sugar Co. v. Cuban-Am. Sugar Co.*, 152 F. Supp. 387, 397 (S.D.N.Y. 1957) ("several relevant arenas" to measure "effect upon competition"), *aff'd*, 259 F.2d 524 (2d Cir. 1958).

Indeed, it is nearly always true that multiple markets will pass the hypothetical monopolist test, as it looks only at whether a market is "too narrow" and thus any market broader than a market that passes the test will also pass. *Penn State*, 838 F.3d at 338. For that reason, courts in merger cases often look to the "smallest" market that passes the test. *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 58-60 (D.D.C. 2011); *accord FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 201-02 (D.D.C. 2018); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 26 (D.D.C. 2015). The court erred in concluding it unusual, and thus incredible, for more than one market to pass the hypothetical monopolist test as the Government's markets did here.

In addition, the District Court misapplied the hypothetical monopolist test when it found the Government's geographic areas "too narrow" on the ground that "sugar flows" and "customers already look beyond the Government's proposed markets." Ex. A at 52. This critique fundamentally misunderstands the economics of the Government's customer-based geographic markets. When a geographic market is defined around the locations of customers, it includes all producers that serve those customers, whether or not located in the region. *See Hackensack*, 30 F.4th at 167-72 (hypothetical monopolist test satisfied for market including "any hospital that serves a resident of Bergen County" even "if that hospital is not in Bergen County"); *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d

435, 444-47 (4th Cir. 2011) (market based on sales to U.S. customers included foreign suppliers); HMG § 4.2.1-4.2.2.

Thus, the very suppliers the District Court claims the Government "ignor[ed] abundant evidence of" were already reflected in the proposed geographic markets. *See* Ex. A at 51. The Government's customer-focused geographic markets included all refiners—wherever they are located—that sell sugar to customers in those markets. For example, Louisiana Sugar Refining, LLC (with its refinery in Louisiana) was credited a 7% share of sales to customers in the Government's narrow six-state market; National Sugar Marketing was credited a 2% share; and both Michigan Sugar's and Western Sugar's sales were examined but rounded to 0%. Ex. B at 611:10-612:1. Nonetheless, the merging parties—with refineries in Florida and Georgia near to customers in the narrower six-state market—accounted for a 56% share of sales to those customers. In rejecting the Government's geographic markets for leaving out suppliers that those customer-focused markets actually already included, the District Court undertook an "incomplete economic analysis," *Penn State*, 838 F.3d at 336, that warrants reversal.

To the extent the District Court believed that the potential for repositioning or expansion by refiners outside of the geographic market undermined geographic-market definition, Ex A at 51-52, it misunderstood that market definition "focuses solely on demand substitution factors," *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 718

(D.C. Cir. 2001). Repositioning and supplier expansion are properly addressed in considering *Defendants' rebuttal case*, not in assessing market definition. *Penn State*, 838 F.3d at 351 (treating possibility of competitive "repositioning" as rebuttal factor); *Chi. Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 424, 427, 436 (5th Cir. 2008) (treating entry as rebuttal factor). It was error to consider this evidence at the prima facie step. At the rebuttal stage, the burden is on defendants to rebut a presumption that the merger will harm competition, and defendants must meet stringent requirements that the District Court never applied (or mentioned). In particular, as this Circuit has explained, "[i]n evaluating repositioning the *Merger Guidelines* call for consideration of 'timeliness, likelihood, and sufficiency.'"[4] *Penn State*, 838 F.3d at 351-52 (quoting HMG § 6.1).

[4] Although the Court suggested that "sugar flows" because "[t]ransportation costs are relatively low" (Ex. A at 15), several of its factual findings confirm sufficient transportation costs to permit a post-merger price increase on the refining and sale of sugar notwithstanding seller repositioning. *See* Ex. A at 47 n.24 ("distributors may suffer some effect from increased prices"); *id.* at 10 (CSC "builds facilities close to customers"); *id.* at 11–12 (discussing distribution into "areas that command higher prices"); *id.* at 14 ("If a shortage of sugar exists in an area, the price of sugar will increase …."); Ex. B at 81:4-13, 232:1-3, 455:9-23, 593:16-21, 600:1-13, 654:22-655:21. In any event, the District Court did not address the relevant question for market definition: whether a hypothetical monopolist would find it unprofitable to impose a SSNIP.

2. The District Court Misapplied the Burden-Shifting Framework

The District Court also failed to properly apply the burden-shifting framework under *Penn State* in two ways. First, it failed to complete the first step by refusing to consider whether the acquisition may substantially lessen competition in any other market. Both this Court and the Supreme Court have considered potential anticompetitive effects in a market the plaintiff did not propose. *See United States v. Cont'l Can Co.*, 378 U.S. 441, 457 (1964) (reasonable probability of harm in market "not pressed" by the parties); *FTC v. AbbVie Inc.*, 976 F.3d 327, 373 (3d Cir. 2020) (district court "defined the relevant antitrust market in terms no expert had endorsed"). Where evidence adduced at trial establishes anticompetitive effects in even a broader market, a district court cannot disregard it simply because plaintiff proposed a narrower one. *See Pabst*, 384 U.S. at 549-50 (Section 7 intended "to outlaw mergers which threatened competition in any or all parts of the country" and "[p]roof of [geographic market] where the anticompetitive effect exists is entirely subsidiary").

This declination was particularly troubling because, as the Government demonstrated below, the evidence of market shares and market concentration established a structural presumption of anticompetitive effect under *Philadelphia National Bank* in *the two geographic markets Defendants proposed*. *See supra* at 5. Moreover, the Government's evidence of unilateral and coordinated effects

similarly established potential anticompetitive effects in any of the markets that the court could have selected. *See id.* This should have shifted the burden to Defendants to rebut the prima facie case.

Second, instead of applying traditional rebuttal factors at the second step, the District Court merely pointed to its "firm[] belie[f]" that the USDA Sugar Program could counteract any anticompetitive effects. Ex. A at 54-58. But Section 7 generally applies with full force to both regulated and unregulated sectors except where there is an express or implied immunity from the antitrust laws—which Defendants have not argued is the case here. *See, e.g.*, *Md. & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 469-70 (1960) (Agricultural Adjustment Act did not displace Section 7's application to acquisition by agricultural cooperative).

Here, no precedent supports treating a regulatory framework like the USDA's as rebutting a prima facie case. The evidence showed that the relevant regulations merely restrict prices to a "zone of reasonableness." *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 460-62 (1945). *see* 7 U.S.C. §§ 1359bb *et seq.*; Ex. B at 859:7-17, 886:13-25, 887:22-888:10, 889:24-891:2. The Sugar Program is designed to support American farmers, not sugar consumers, and its mandate is to (1) ensure adequate U.S. supply of raw and refined sugar (2) while keeping prices above specified forfeiture levels. 7 U.S.C. §§ 1359bb *et seq.* As Congress made clear when enacting an earlier iteration of the sugar program, it "is a price-

influencing mechanism but it leaves ample room for keen price competition once sugar comes within the quota system." Staff of the House Comm. on Agric., 91st Cong., The United States Sugar Program 10 (Comm. Print 1971). Longstanding precedent holds that, in this situation, anticompetitive conduct "within that zone" can "constitute violations of the anti-trust laws." *Georgia*, 324 U.S. at 460-62.

For example, *Philadelphia National Bank*—in which the Supreme Court first announced the structural presumption—proscribed a merger in the heavily regulated bank industry because, "[i]n the range between the maximum fixed by state usury laws and the practical minimum set by federal fiscal policies . . . , bankers are free to price their loans as they choose." 374 U.S. at 328. Likewise, when a prior version of the sugar program was in effect, the Second Circuit upheld a decision blocking a merger. *Am. Crystal*, 259 F.2d at 527. The District Court did not address any of these precedents.

Instead, the District Court cited *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 412 (2004), but that was a Sherman Act Section 2 case about the details of regulated access to facilities. It dealt with the specific context of unilateral refusals to deal with rivals, not mergers. *Trinko* has never been understood to displace Clayton Act Section 7 merger analysis, even in the highly regulated telecommunications industry. Even assuming *arguendo* that *Trinko* could play a role in Section 7 merger analysis, it would not counsel in favor

of displacing merger enforcement here because the sugar program was not "designed to deter and remedy anticompetitive harm." *Trinko*, 540 U.S. at 412.

B. The Government Will be Irreparably Harmed If the Acquisition Proceeds

This is a textbook case of irreparable injury. Absent an injunction, Defendants can consummate the transaction and commingle their assets in five days. If that happens and the Government later prevails on appeal, this Court would need to issue a divestiture order to "unscramble the egg"—which is usually far less effective at preserving competition than simply retaining the status quo. *See Penn State*, 838 F.3d at 352-53 (after merger is consummated, "since it is extraordinarily difficult to unscramble the egg, it will be too late to preserve competition if no preliminary injunction has issued" (citation omitted)); *accord FTC v. Elders Grain, Inc.*, 868 F.2d 901, 904 (7th Cir. 1989).

In addition, post-consummation, Defendants may begin combining operations and sharing confidential and strategic information, depriving customers of the "benefits of competition *pendente lite* and perhaps forever." *Elders Grain*, 868 F.2d at 904. United would become the exclusive marketer and seller of sugar produced at Imperial's sugar refinery, "pooling [that] sugar" with the rest of its member-owners' production. Ex. C at 2; Ex. D at 2-4. United would also make decisions as a single firm about what refined sugar to offer and under what terms. United could enter long-term contracts that raise prices, reduce service reliability,

or reduce product quality to customers for which Defendants currently compete with each other.[5] The anticompetitive effects could persist for years to come, even if the court attempts to unscramble the merger later.

In any event, this Court presumes irreparable injury upon a showing by the Government of likelihood of success on a Section 7 claim. *United States v. Ingersoll-Rand Co.*, 320 F.2d 509, 524 (3d Cir. 1963) ("[T]he United States is not required to prove public detriment from a merger which would violate the provisions of Section 7."), *disapproved on other grounds by United States v. FMC Corp.*, 84 S. Ct. 4 (1963) (Goldberg, J., in chambers); *see also United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980) ("[O]nce the Government demonstrates a reasonable probability that § 7 has been violated, irreparable harm to the public should be presumed."). This presumption accords with the Government's statutory duty "to prevent and restrain" Section 7 violations. 15 U.S.C. § 25; *cf. Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (Government suffers irreparable injury when enjoined from "effectuating statutes enacted by representatives of its people.").

[5] While the District Court stated USDA could counteract these effects, that is belied by the court's factual finding that the Department does not monitor individual contract prices. Ex. A at 17.

C. DEFENDANTS WILL NOT BE INJURED SUBSTANTIALLY BY ENTRY OF AN INJUNCTION PENDING APPEAL

Defendants, by contrast, will not be injured substantially by a brief delay. An injunction would maintain the status quo, under which Defendants have operated as separate businesses for many years, for a short time. The Government is amenable to an expedited briefing schedule, which would mitigate any putative harm to Defendants.

D. THE PUBLIC INTEREST WEIGHS STRONGLY IN FAVOR OF AN INJUNCTION

American consumers have a strong interest in the protection of competition in production and sale of refined sugar. As this Court recognized, "the public's interest in effective enforcement of the antitrust laws" is a "principal equity weighing in favor of issuance of [an] injunction." *Penn State*, 838 F.3d at 352; *cf. FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1076 (D.C. Cir. 1981) ("not consistent with the fair, effective administration of justice" to deny "a party, situated as [is] the [Government] in this case, even a brief holding order affording time to apply to [an appellate] court for provisional relief").

Once the transaction is consummated, customers will no longer be able to choose between United and Imperial for refined sugar. Instead, Imperial's production will be pooled with the other sugar that United sells, and the price, quality, and service benefits that Imperial's competition provides customers will

disappear. The public interest is best served by preserving Imperial as an independent producer and seller of refined sugar pending appeal.

CONCLUSION

The Government respectfully requests that the Court grant an administrative injunction while this motion is pending, and thereafter enjoin the proposed acquisition pending appeal.

Dated: September 28, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2022, I caused the foregoing motion to be electronically filed with the Clerk of the United States Court of Appeals for the Third Circuit through the Court's CM/ECF system. In addition, on September 28, 2022, I caused the foregoing motion to be emailed to lead counsel before the district court for Defendants United States Sugar Corporation, Imperial Sugar Company, Louis Dreyfus Company LLC, and United Sugars Corporation:

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
UNITED STATES SUGAR CORPORATION, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Delaware, No. 1:21-cv-1644

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INTRODUCTION

For 18 months Plaintiff has sought to prevent U.S. Sugar from consummating its acquisition of Imperial. At a four-day bench trial in April, Plaintiff presented the district court with its case as to why the transaction should be enjoined. The only evidence Plaintiff presented to satisfy its burden to establish relevant product and geographic markets came *from a single expert*. The district court heard testimony from dozens of witnesses (including that expert), examined the evidence, made numerous credibility determinations (including adverse credibility determinations regarding Plaintiff's aforementioned expert), and issued a 59-page decision with over 100 paragraphs of factual findings. As the district court explained, its findings were based on "substantial," "ample," "abundant," and "particularly credible" evidence running against Plaintiff, which adduced "scant evidence" or "no evidence" in support of its "flawed" market definitions. Memorandum Opinion, D.I. 242 ("Op.") at 25, 31, 44 n.22, 46, 48, 51, 53. That is why the district court held that the acquisition does not violate Section 7 of the Clayton Act.

Plaintiff's emergency motion ignores all of that. It says nothing about the district court's factual findings and credibility determinations, the failures of the government's expert, and its absence of proof. To try to avoid the high hurdle of a clearly erroneous standard of review, Plaintiff recasts its failures of proof as legal errors. There was no error of law. A fair reading of the district court's decision—and the decision denying the same emergency relief yesterday (which Plaintiff also

ignores)—makes that clear. But, more importantly, the district court's denial of injunctive relief rested on three, independent failures of proof: two on the product market and one on the geographic market. For all three reasons, Plaintiff did not even get past the first step of its *prima facie* case. It is exceedingly *un*likely Plaintiff could pull off the hat trick of getting all three fact-intensive rulings overturned on appeal. That alone is reason to deny any emergency relief.

Plaintiff relies heavily on the fact that this Court granted interim relief in *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327 (3d Cir. 2016). But *Penn State* had nothing to do with product market definition. The district court there mistakenly applied a test that multiple courts held should not be used to analyze hospital mergers. Here, the district court found that Plaintiff failed to put forth a qualified expert and separately found that Plaintiff's markets were "simply not credible," Op.51, and "ignore[d] the commercial realities of the sugar industry in this country," Op.52. That is not legal error. Far more on point is this Court's recent refusal to grant an injunction in *FTC v. Thomas Jefferson Univ.*, after the district court rejected a challenge to a merger on the basis that the government failed to carry its prima facie burden. *FTC v. Thomas Jefferson Univ.*, 2020 WL 8455862, at *1 (3d Cir. Dec. 21, 2020).

Plaintiff also cannot establish the other factors needed. Plaintiff's irreparable-harm argument is overstated; the evidence at trial established that consummation of

this transaction will not cause any harm, and in any event the government regularly brings suit to address deals that have already been consummated. At the same time, Plaintiff understates the substantial harm and prejudice an injunction pending appeal would inflict on U.S. Sugar and Imperial. Plaintiff has always known that delay might get it the same result (stopping the deal) as actual success on the merits. The unfortunate reality is that granting Plaintiff's requested relief puts this transaction in jeopardy. As the district court acknowledged yesterday in denying the same motion Plaintiff now presents to this Court, "the [g]overnment continues to try to obtain via delay what it could not obtain on the merits." Mem. Op., D.I. 253 (Ex. A) at 1.

An injunction pending appeal would not just affect U.S. Sugar and Imperial; it would also harm the public. This is a unique case in that respect. As the evidence at trial established, this acquisition will likely raise the output and lower the price of refined sugar in the United States. Plaintiff's motion should be denied.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Proposed Transaction Between U.S. Sugar And Imperial

U.S. Sugar grows sugar cane and operates a cane mill and refinery in Florida. Op.2. Every year, U.S. Sugar grows more sugar cane than it has the capacity to process at its mill, and must sell its excess sugar cane to third-party mills. *Id.*

Imperial operates a cane sugar refinery in Georgia. Op.3. Imperial does not grow its own sugar cane or own or operate sugar mills, and instead imports over 90% of the raw sugar that it refines at its facility. Op.20. "Imperial's reliance on

high-cost imports makes it less competitive and, as such, it struggles to compete with vertically-integrated" domestic sugar refiners and processors. Op.21. Imperial sells refined sugar in more than 40 states, Op.4, but it is "a residual or back-up supplier," and describes itself as "structurally uncompetitive," Op.21. Its refinery operates at only 75% capacity on average. *Id.*

Imperial's owner has been trying to sell Imperial for the past five years. Op.22. On March 24, 2021, U.S. Sugar and Imperial's owner entered into an asset purchase agreement whereby U.S. Sugar would acquire Imperial's assets—principally, its refinery—initially for $315 million. Op.4. U.S. Sugar's acquisition of Imperial's refinery will enable U.S. Sugar to refine all of the excess raw sugar that it produces in Florida, and U.S. Sugar plans to "use targeted capital expenditures to increase the capacity utilization of" Imperial's refinery. Op.22. By having refineries in two different states, U.S. Sugar will also increase the amount of sugar it refines and provide customers with greater security against weather and other supply chain risks. Op.22-23.

B. The District Court's Proceedings

After a lengthy investigation, on November 23, 2021, Plaintiff filed suit against U.S. Sugar, Imperial, Louis Dreyfus, and United Sugars Corporation (an agricultural cooperative in Minnesota that markets U.S. Sugar's products) under

Section 7 of the Clayton Act, seeking to permanently enjoin U.S. Sugar's proposed acquisition of Imperial. The district court held a four-day bench trial in April 2022.

At trial, Plaintiff sought to define the relevant product market in this case as the market for "the production and sale of refined sugar to wholesale customers." Op.43. And it proposed two possible geographic markets for that product: first, a market that Plaintiff called "Georgia Plus," encompassing the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Tennessee; and second, a broader "Southeast" market encompassing the "Georgia Plus" states as well the States of Delaware, Kentucky, Maryland, Mississippi, Virginia, and West Virginia, and the District of Columbia. Op.49. In support of these product-market and geographic-market definitions, Plaintiff relied entirely on the expert testimony of Dr. Dov Rothman. Op.24.

On September 23, 2022, the district court entered judgment in favor of Defendants after concluding that Plaintiff had "failed to prove that the proposed acquisition of Imperial Sugar by U.S. Sugar is likely to substantially lessen competition or tend to create a monopoly under Section 7 of the Clayton Act." Op.59. As the district court explained, "Section 7 merger challenges are reviewed under a burden-shifting framework. First, the Court determines whether the government has established a *prima facie* case that the proposed merger is anticompetitive by (1) identifying the proper relevant market and (2) showing that

the effects of the merger are likely to be anticompetitive." Op.40. The "relevant market" must "correspond to the commercial realities of the industry," *id.* (quoting *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2285 (2018)), and consists of "two components: a 'product market' and a 'geographic market,'" *id.* (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962)). "[F]ailure to properly define either a product or geographic market is fatal to a plaintiff's case." *Id.* (citing *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436-42 (3d Cir. 1997)).

The district court's opinion includes 105 paragraphs of findings of fact and includes numerous credibility determinations. Key among those findings was that Plaintiff's only expert witness was "lacking" in "credentials and experience," "simply not credible," and that his opinions were "flawed and largely unpersuasive." Op.24, 51. (The district court repeated those findings, reaffirming that "the Court found the expert's testimony to be unpersuasive (as have other courts)," when it just yesterday denied the same relief Plaintiff seeks here. Ex. A at 2 n.2.)

The district court ultimately concluded that Plaintiff "failed to identify the proper relevant market because its product market and geographic markets ignore the commercial realities of sugar supply in the U.S.," and therefore "failed to establish a *prima facie* case" for three independent reasons. Op.41.

First, the district court rejected Plaintiff's argument "that sugar distributors should be excluded from the product market because they do not produce the refined

sugar they are selling." Op.43. It found that the "record is replete with evidence of distributors competing with refiner producers . . . as well as with cooperatives," Op.44-45, and that the "ability of distributors to remain competitive with producers is based on several factors that are well-supported by the record," including the distributors' "massive" purchases of "foreign imports," Op.45. The district court found that Defendants' expert, Dr. Nicholas Hill, had "[tied] all of this evidence together" and "explained how distributors are independent actors within the market" that "compete effectively with other suppliers." Op.46.

The district court found Dr. Hill to be a "particularly credible" witness. *Id.* Unlike Dr. Rothman, Dr. Hill received a Ph.D. in economics from Johns Hopkins University. Op.25. And Dr. Hill previously worked at the Antitrust Division and Federal Trade Commission. *Id.*

Dr. Hill testified that Plaintiff had improperly gerrymandered the product market by excluding sugar "distributors"—non-producing entities that purchase and store large quantities of sugar for wholesale—that compete with sugar refiners in the wholesale market. Op28. Dr. Hill's testimony was supported by extensive evidence from across the sugar industry indicating that "wholesale customers do not care whether the sugar they purchase is coming directly from the sugar producer/refiner or from a cooperative or distributor"; that "distributors tend to purchase the majority of foreign-produced refined sugar imports"; and that distributors' "ability to

purchase large quantities of refined sugar from many different sources, including foreign importers, . . . allows distributors to price resales competitively" with producer/refiners. Op.28. As such, Plaintiff's exclusion of distributors from its product-market definition was "inconsistent with the commercial realities of the industry." Op.47. As the court explained, this finding alone was fatal to Plaintiff's case, as Plaintiff "admit[ted] that it does not have evidence to prove its case if distributors are included in the product market." *Id.*

Second, and independently, the district court noted that Plaintiff's proposed product market "assume[d] that all wholesale customers are the same without regard to economic realities," but "there is no evidence in the record to support such a conclusion." Op.48. Indeed, Plaintiff's own expert "admitted that he did not even consider whether retail customers have the same competitive alternatives as industrial customers." *Id.* The district court found that "various wholesale customer types have different sugar needs and purchasing practices," Op.32, such that "industrial customers are . . . treated differently by suppliers in the competitive landscape," Op.48. That flaw in Plaintiff's product-market definition was "yet another reason that [Plaintiff's] proposed product market fails." *Id.*

Third, the district court concluded that "even assuming the relevant product market" proposed by Plaintiff was valid, Plaintiff "failed to identify a relevant geographic market as well." Op.49. As it explained, "[a]n often-used tool for

determining a relevant geographic market is the hypothetical monopolist test." *Id.* Under that test, a proposed market is properly defined "if 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." *Id.* (quoting *FTC v. Hackensack Meridian Health*, 30 F.4th 160, 167 (3d Cir. 2022)). But if consumers would "respond to a SSNIP by purchasing the product from outside the proposed market . . . the proposed market definition is too narrow." *Id.* (quoting *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 (3d Cir. 2016)).

Examining the evidence, the district court found that the "Georgia Plus" and "Southeast" region markets "defined by [Plaintiff] are too narrow to be the relevant geographic market" because "[i]n the event [of] . . . price increases within either the 'Southeast' or 'Georgia Plus' markets, customers . . . easily could (and likely would) turn to [suppliers] outside the area for additional sugar supply." Op.38. This is due to the "ease with which sugar flows across the country," *id.*, a finding supported by "abundant evidence of sugar consumers located in the 'Southeast' and 'Georgia Plus' markets [that are already] purchasing their refined sugar outside those geographic regions," Op.51; *see also* Op.13-16 (section of opinion entitled "Sugar Flows in the United States"). Dr. Rothman also could not identify any region in the country that would not satisfy his application of the hypothetical monopolist test." Op.50-51. In light of that evidence, Plaintiff's proposed geographic markets were

"simply not credible," and "ignore[d] the commercial realities of the sugar industry in this country," Op.51-52.

Because each of these findings was sufficient on its own to defeat the first prong of Plaintiff's *prima facie* case, the district court expressly declined to "reach the second prong of the *prima facie* case—i.e., whether [Plaintiff] has shown that the effects of the acquisition are likely to be anticompetitive." Op.54. The district court did note that "USDA's power to manipulate sugar supply in the market would act as a safeguard against potential anticompetitive effects . . . even if the Court were to find any such effects existed." Op.55. But the court's judgment rested on its conclusion that Plaintiff had "failed to meet its burden under the Clayton Act" due to the flaws in its proposed market definitions. *Id.*

Plaintiff filed a notice of appeal and moved for an injunction pending appeal in the district court. The district court denied that motion, finding that Plaintiff was "try[ing] to obtain via delay what it could not obtain on the merits," Ex. A at 1; that Plaintiff's appeal was unlikely to succeed in view of the district court's findings, following a trial at which the district court "listened to witnesses and evaluated the evidence," *id.* at 2; that Plaintiff "failed to establish irreparable harm in the absence of the requested injunction" because the government routinely brings "suits to address transactions which have already been consummated," *id.* at 2-3; that "an injunction pending the decision on appeal" would "prejudice Defendants," *id.* at 3

n.3; and that "the public interest lies in allowing the [acquisition] to go forward," given the testimony of a USDA economist that the deal "may lower prices for U.S. purchasers and consumers of refined sugar," *id.*

ARGUMENT

"Injunctions pending appeal, like preliminary injunctions, are 'extraordinary remedies.'" *Donald J. Trump for President, Inc. v. Sec'y of Pa.*, 830 F. App'x 377, 389 (3d Cir. 2020) (quoting *Winter v. NRDC*, 555 U.S. 7, 24 (2008)). The inquiry turns on four factors: "(1) whether the [] applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent [an injunction]; (3) whether issuance of the [injunction] will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *In re Revel AC, Inc.*, 802 F.3d 558, 568 (3d Cir. 2015) (citation and internal modifications omitted). If the applicant fails to establish either of the first two factors, "inquiry into the balance of harms and the public interest is unnecessary, and the stay should be denied without further analysis." *Revel*, 802 F.3d at 571. Plaintiff has not established either of the first two factors; but even if the Court reached the third and fourth factors, balancing the relative harms only reaffirms that an injunction is inappropriate.

A. Plaintiff Cannot Establish A Likelihood Of Success On The Merits

The district court's decision rests on three independent conclusions: (1) that Plaintiff's proposed product market was flawed because it erroneously excluded

sugar distributors from the mix of sugar suppliers; (2) that Plaintiff's proposed product market was flawed because it failed to distinguish between differently situated classes of wholesale customers; and (3) that Plaintiff's proposed regional geographic markets were flawed because they flew in the face of abundant evidence of "economic reality": that "sugar flows easily across the country from areas of surplus to deficit in response to prices and demand." Op.52.

Each of these fact-intensive conclusions—derived from a four-day bench trial at which the district court made sharply contrasting credibility determinations regarding the parties' key witnesses—are reviewed in this Court for clear error. *See Hackensack*, 30 F.4th at 167; *Penn State*, 838 F.3d at 335; *see also, e.g.*, *FTC v. Sanford Health*, 926 F.3d 959, 963 (8th Cir. 2019); *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Inc.*, 778 F.3d 775, 783 (9th Cir. 2015); *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208, 1217 (11th Cir. 2012). To prevail on appeal, Plaintiff must run the table on *all* of these issues—under the most deferential standard. Plaintiff cannot make any showing—much less a strong showing—that it will do so.

Plaintiff is at pains to dress up its disputes with the district court's fact-finding as arguments regarding legal error. That effort must fail. As Plaintiff concedes (at 10), the district court "correctly identified" the relevant legal framework governing the definition of the relevant market. Plaintiff faults the district court (10) for purported "err[or] in its application" of that legal framework to the specific facts of

the industry at issue here. But that kind of argument turns on "factual question[s] dependent on the special characteristics of the industry involved." *Hackensack*, 30 F.4th at 167 (quoting *Penn State*, 838 F.3d at 335). Accordingly, Plaintiff must show that the district court's fact-finding regarding the relevant market was clearly erroneous. *Id.* It cannot.

1. The District Court's Findings Regarding The Two Flaws In Plaintiff's Product-Market Definition Were Not Clearly Erroneous

Plaintiff (at 10) first attacks the district court's recognition that "distributors must be included as competitors" in the relevant product market. Plaintiff asserts (11) that this Court's decision in *Penn State* "reversed a similar error." Not so. In *Penn State*, there was "no dispute" as to the scope of the relevant product market. *Penn State*, 838 F.3d at 338. This Court reversed the district court's determination as to the relevant *geographic* market because the court improperly employed a test, the "Elzinga-Hogarty test," rejected for use in hospital mergers, rather than the hypothetical monopolist test. *Id.* at 339-40. *Penn State* is inapposite with respect to the district court's conclusion here concerning the scope of the relevant product market.

Plaintiff also asserts more broadly (at 11) that "treating distributors as independent competitors in a market for the production and sale of goods they do

not produce is inconsistent with" precedents involving other industries.[1] But Plaintiff fails to grapple with the district court's extensive fact-finding (and witness-credibility determinations) on this point in the specific context of *this* industry. As the district court recognized, even in the event of concentration among domestic sugar producers, distributors can "remain competitive with producers . . . based on several factors that are well-supported by the record." Op.45. Among other things, distributors "purchase massive amounts of foreign imports," *id.*, and are able to maintain a "diversity of supply—domestic and foreign" such that they are able to "obtain . . . refined sugar supply at competitive prices" and then "resell the sugar at competitive prices," *id.* As the court found, for sugar, "distributors can also leverage their large network of transportation and storage to maintain and ship an adequate supply of refined sugar to exert competitive pressure when and where necessary." *Id.* at 45. Plaintiff never addresses these findings of fact upon which the district court's analysis turned.

The only point on which Plaintiff challenges the district court's fact-finding as to the inclusion of distributors in the relevant product market is its insistence (at 12) that the district court's approach necessarily "involve[s] double-counting

[1] Plaintiff ignores cases in which courts have properly found that distributors may not be excluded from the relevant market. *See, e.g.*, *PSKS, Inc. v. Leegin Creative Leather Prods., Inc*., 615 F.3d 412, 418 (5th Cir. 2010) (rejecting exclusion of distributors from product market because "market definition must focus on the product rather than the distribution level").

distributor-sold sugar." That is wrong. As Plaintiff acknowledges, its relevant-market analysis did not take into account any sales made to distributors outside the relevant market and then shipped into that market. *See* Plaintiff's Mot. at 12. That is a glaring analytical problem. As the district court found, distributors from outside those markets ship "large volumes" of sugar into the alleged markets from places much further afield, Op.45, 47 n.24, and it was Defendants' expert, not Plaintiff's, that the Court was "persuaded" by on this point. *Id.* at 46.. And even for sugar that distributors purchased in the alleged markets and resold there, avoiding a double-counting problem is simply a matter of subtraction: relevant market shares would reflect distributors' sales to the ultimate wholesale customers, subtracting refiners' sales to the in-market distributors. Nothing in the record suggests that such an analysis would be difficult, and there was extensive discovery and trial testimony into exactly where distributors were selling sugar and in what quantities. *See, e.g.*, FOF ¶¶ 34, 35, 36, 79. Indeed, the court entered a finding directly contrary to Plaintiff's position, when it ruled that it was "persuaded" by Defendants' expert that "excluding distributors 'tend[s] to overstate' market shares for the parties." Op.46.

Moreover, even if Plaintiff was right that non-producers should be excluded from the market, Plaintiff's expert *included* shares for some "entities that market sugar refined by others—*e.g.*, NSM and United," which the district court found

"internally inconsistent" with his opinion that distributors should not be included. FOF ¶ 72, Op. at 47.

As to Plaintiff's argument (13) that the district court "erred in rejecting a market for the production and sale of refined sugar because it includes both industrial and retail customers," that argument once again attacks the district court's findings of fact without actually engaging with those findings: namely, that Plaintiff "offered *no testimony or documentary evidence* from or about non-industrial customers to show that they are similarly situated to industrial customers." Op.33 (emphasis added). Many courts have rejected proposed product market definitions for exactly this reason. *See, e.g.*, *United States v. Engelhard Corp.*, 126 F.3d 1302, 1306 (11th Cir. 1997) (failure to account for customer differentiation without a proposed relevant market "undermin[es] the Government's entire case"); *United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 182 (D.D.C. 2001) (similar).

Plaintiff also asserts (13) that the district court's finding as to Plaintiff's failure to support its aggregation of industrial and retail customers "overlooks the fact that the disaggregation of these customer groups would only have *strengthened* the presumption that the acquisition is unlawful." But that is entirely speculative: If only industrial customers were included in the relevant market, then producers' sales to distributors would not be counted in the relevant market shares because distributors would be only sellers—not buyers—in the relevant market. *Cf.* Mot. at

10 (arguing that "[d]istributors are customers" in the markets Plaintiff alleged). That would have a significant effect on market-share calculations, and Plaintiff's assertion (13) that the "already high-market share and market-concentration statistics" put forward at trial would have "*increased*" lacks any basis: A necessary concomitant of the district court's finding that Plaintiff "offered no testimony or documentary evidence," Op.33, regarding the disaggregation of industrial and non-industrial sugar purchasers is that Plaintiff never put forth any analysis of what would happen to its market-share calculations in the event of that disaggregation.

The problems with Plaintiff's product-market definition cannot be fixed in this Court by reference to case law or post hoc rationalizations advanced in emergency briefing; they rest on a basic failure of proof. As the district court found, "Dr. Rothman's assumptions about the refined sugar product market are flawed," and his trial testimony regarding the definition of the product market "was at times internally inconsistent." Op.25. The district court had the chance to examine in minute detail, and at length, the "commercial realities of sugar supply in the U.S." Op.41. And after examining those realities, and assessing Plaintiff's proffered product-market definition, the district court came to the conclusion that Plaintiff's product market definition rested on expert testimony that was "flawed and . . . unpersuasive." Op.24; *see also* Op.26 (noting that "Dr. Rothman's economic analysis has been found unpersuasive on various issues" in other cases). There was

no clear error in the district court's fact-finding, and this Court should not second-guess that fact-finding in the absence of a sustained examination of the record.

2. *The District Court's Findings Regarding The Failure Of Plaintiff's Proposed Geographic Markets Were Not Clearly Erroneous*

Plaintiff also asserts (at 14) that the district court's findings regarding the relevant geographic market—which Plaintiff sought to restrict to an amalgam it calls the "Southeast" or "Georgia Plus"—were wrong, and reflected "legal error." That is untrue: as Plaintiff elsewhere concedes, the district court identified and applied the hypothetical monopolist test to determine whether customers in the proposed geographic markets would respond to a hypothetical monopolist by "purchasing the product from outside the proposed market." Op.49 (quoting *Penn State*, 838 F.3d at 338). And here the district court correctly determined as a matter of fact that customers would do so, since "sugar flows freely and over long distances in response to market forces," and the "evidence establishes that customers *already* look beyond [Plaintiff's] proposed markets for competitive alternatives," and concluding "that they would continue to do so in the face of increased sugar prices [in the proposed geographic markets] is not difficult." Op.52 (emphasis added).

Plaintiff criticizes the district court (at 14) for having noted that Plaintiff's proposed geographic markets were "not credible," but the court's conclusion on that point is unsurprising in light of its extensive findings regarding the "commercial

realities of the sugar industry in this country," which Plaintiff's proposed geographic markets "ignore[d]." Op.52; *see also* Op.33-39.

Plaintiff also argues (15-17) that the district court's analysis "misunderstands the economics," and that it erred by focusing on Southeast customers' ability to seek sugar supply from suppliers outside the proposed geographic markets. In particular, Plaintiff contends (17) that the district court never should have evaluated customers' ability to pivot to sellers outside the proposed geographic market in assessing Plaintiff's "prima facie" case. That argument turns the hypothetical monopolist test on its head: Under this Court's binding precedent, the district court was *required* to examine whether customers would adjust to a hypothetical monopolist in the relevant geographic markets by "purchasing the product from outside the proposed market[s]." *Penn State*, 838 F.3d at 338. That is what the district court did. And it was not clear error for the district court to determine, in light of the fact that customers *already* widely seek sugar from suppliers outside the proposed geographic markets, that they would continue to do so in the face of a hypothetical monopolist. Op.52. What is more, it is no response that those suppliers already sell some in the relevant area, because, as the court repeatedly found, "these suppliers have additional refined sugar to sell into these proposed markets, sugar that is already traveling through the region." Op.51; FOF ¶ 100.

3. *The District Court Did Not Misapply The Burden-Shifting Framework*

Plaintiff finally pretends (at 18) that its failure to prove a relevant product *or* geographic market, both independent grounds for denial, was not fatal to its case. Plaintiff's position is directly contrary to Third Circuit precedent, relying on Supreme Court precedent, holding that "[d]etermination of the relevant product and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act.'" *Penn State*, 838 F.3d at 338 (quoting *U.S. v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618 (1974)). Having failed to carry its burden, Plaintiff should have, and did, lose. Contrary to Plaintiff's claims, there is no legal requirement that the court continue its analysis (after finding two or more independent grounds for denial) by considering the effects of the transaction in some *other* unalleged market. *See United States v. Sabre Corp.*, 452 F. Supp. 3d 97, 142 n.20 (D. Del. 2020) ("[T]o the extent DOJ is now inviting the Court to 'unilaterally change the defective market allegations if necessary to save its case,' it would be wrong for the Court to do so under the circumstances here.").

Plaintiff immediately contradicts itself by suggesting that the district court's judgment *did* extend beyond the product-market and geographic-market conclusions discussed above. Plaintiff asserts (19-21) that district court wrongly relied on evidence of USDA's role in the sugar market. But as the district court made clear throughout, it considered "the Government's failure to prove a relevant product

market [to be] dispositive and [to] require[ ] judgment in favor of Defendants," Op.49, and thus the "Court need not and does not reach the second prong of the *prima facie* case—*i.e.*, whether the Government has shown that the effects of the acquisition are likely to be anticompetitive," Op.54. There was no error in the district court, having presided over a four-day trial, nonetheless entering a finding that it found "exceptionally knowledgeable and particularly credible," a UDSA economist who testified that "U.S. Sugar's acquisition of Imperial is not likely to lead to higher prices in the U.S." and likely would instead "have an overall positive impact on the sugar industry in this country." Op.56. That testimony—while certainly highly relevant to the ultimate questions at issue in this case—was not necessary to the district court's judgment.

B. Plaintiff Has Not Shown Irreparable Injury Absent An Injunction

Plaintiff argues (21-22) that it will be irreparably harmed absent an injunction because, if U.S. Sugar and Imperial close their transaction on October 3, Defendants "may begin combining operations," and it will be difficult to "unscramble the egg." But the relevant egg in this case will remain unscrambled for some time: The basic, procompetitive purpose of the acquisition is to allow U.S. Sugar to send sugar cane it cannot currently process to be refined at Imperial's Port Wentworth facility, and (over time) to increase the output of the Port Wentworth facility through new capital

expenditures. Op.22-23. None of this will happen overnight, and Plaintiff presents no argument why it could not be unwound.

Most of Plaintiff's argument rests on the generic assertion that the consummation of a merger is always irreparable, but that is empirically wrong. As the district court recognized, the government routinely sues to "address transactions which have already been consummated and obtain[s] divestiture." Ex. A at 3 (collecting cases). It can do so here too. And Plaintiff's claim (22) that even a temporary consummation could impose "anticompetitive effects [that] persist for years to come" is especially misplaced given that the USDA has the ability to counteract any (unlikely) anticompetitive effects on price. Op.58.

Plaintiff (22) falls back on the notion that irreparable harm can be presumed. But the case law it relies on has been superseded by the Supreme Court's (and this Court's) "admonition that courts may not fashion categorical rules or sweeping principles that would undermine the traditional four-factor test" for injunctive relief. *TD Bank N.A. v. Hill*, 928 F.3d 259, 279 (3d Cir. 2019) (citation omitted); *see also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392-94 (2006). Defendants made that same point in the district court; Plaintiff has no response.

C. The Balance Of Equities Clearly Disfavors An Injunction

The immediate harms that U.S. Sugar and Imperial will face in the event of an injunction pending appeal are real and imminent. The transaction has already

been pending for 18 months, past the original "outside date" of the transaction—that is, the latest date by which the transaction was meant to be consummated. Op.4. Any further delay would be harmful and would only serve to validate Plaintiff's strategy to "obtain via delay what it could not obtain on the merits." Ex. A at 1.

From the outset, Plaintiff has tried to delay the closing of the transaction as long as possible with the hope that time and changed circumstances will cause the parties to abandon their deal. After an extended investigation, Plaintiff initially proposed a discovery schedule twice as long as the average in comparable merger cases—with trial beginning in September 2022 only days before the outside date. The district court rejected that proposal. But Plaintiff's tactics have nonetheless already imposed very real harm on Defendants given the legal fees and costs inherent in litigating against the Department of Justice.

Any injunction would threaten a transaction that Dr. Fecso of the USDA testified would be beneficial to the marketplace. With changing financing options and economics, including rising interest rates, any further delay poses a real risk the deal never gets consummated. And if that happens, Imperial, which is already in "financial decline" and whose CEO is "'quite worried' about [its] future prospects," will continue to struggle. Op.20. Permitting the transaction to close would allow Defendants to begin the process of integration and improving the performance of the

Port Wentworth facility, all of which would benefit Imperial's employees and ultimately the marketplace.

D. An Injunction Would Impair The Public Interest

Defendants are unaware of any other Section 7 merger case brought by the United States in which the federal government's leading industry economist—the public official charged with monitoring industry supply and price—testified that the deal "will have an overall positive impact on the . . . industry." Op.56. This case may be *sui generis* in that regard. The public interest in consummation of this transaction is clear: it will likely lead to lower domestic sugar prices if and when it is finalized. *Id.* At the same time, this transaction also will have tangible benefits to the local community and economy in Savannah, which will see added investment by U.S. Sugar to modernize the Imperial facility. Allowing the transaction to close so that U.S. Sugar can begin achieving these positive impacts is in the public interest. The acquisition should proceed without further delay.

CONCLUSION

Plaintiff's motion should be denied.

Dated: September 29, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

According to the word count feature of Microsoft Word, this Opposition contains 5,743 words, excluding the exempted parts under Federal Rule of Appellate Procedure 32(f). The motion has been prepared in a proportionally spaced typeface using Times New Roman in 14 point size. In parallel with the filing of this Opposition Defendants will promptly file a motion to exceed the standard word count for this opposition to Plaintiff's motion. Plaintiff has informed undersigned counsel that it does not oppose the request for additional words.

September 29, 2022

s/ Melissa Arbus Sherry
Melissa Arbus Sherry

CERTIFICATE OF SERVICE

I, Melissa Arbus Sherry, hereby certify that I have this 29th day of September, 2022, electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system, which will send notice to all registered CM/ECF users. Participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

s/ Melissa Arbus Sherry
Melissa Arbus Sherry

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant*, v. UNITED STATES SUGAR CORPORATION, UNITED SUGARS CORPORATION, IMPERIAL SUGAR COMPANY, and LOUIS DREYFUS COMPANY, LLC, *Defendants-Appellees*.	No. 22-2806

UNITED STATES' REPLY

The District Court made a series of outcome-determinative legal errors in applying this Circuit's burden-shifting framework governing claims under Section 7 of the Clayton Act, 15 U.S.C. § 18. Contrary to Defendants' assertions, none of those errors requires debating the District Court's factual findings. Rather, the District Court's errors arise from a failure to properly apply prevailing Supreme Court and Third Circuit precedent, including the hypothetical monopolist test, to the facts that it found.[1] Simply put, the District Court's factual findings cannot cure its legal errors.

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[1] The Government's motion discussed numerous controlling decisions that the District Court failed to address in the pertinent portions of its decision. *See* Gov't

The Government has met its burden to demonstrate the need for injunctive relief here, including by demonstrating a likelihood of success on the merits. Preserving the status quo to allow for this Court's review of an anticompetitive merger is in the public interest: It will prevent irreparable public injury, and it will not substantially harm Defendants. The Government can brief this case on an expedited schedule under a short injunction in order to enable this Court's thorough consideration of this meritorious appeal.

A. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS

Defendants' lead argument is that "[t]here was no error of law" in the District Court's decision below. Opp. 1. But as the Government's Emergency Motion demonstrates, the District Court seriously erred in its application of the operative legal framework for claims under Section 7 of the Clayton Act at every step. *See* Gov't Mot. 8-21. To begin with, the District Court misapplied the hypothetical monopolist test and controlling market-definition precedent in holding that the Government failed as a matter of law to identify a relevant product market. Gov't Mot. Ex. A at 43-48; *see also* Gov't Mot. at 9-14. The District

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Mot. 11-12 (discussing *Brown Shoe*, *Philadelphia National Bank*, and *Allen-Myland*) (exclusion of distributors); *id.* at 18 (discussing *Continental Can*, *AbbVie*, and *Pabst*) (consideration of anticompetitive effects in alternative markets); *id.* at 19-20 (discussing *Georgia* and *Philadelphia National Bank*) (blocking mergers in regulated industries). Defendants' Opposition (other than one *Brown Shoe* citation) does not specifically address any of these decisions.

Court once again seriously erred in misapplying the hypothetical monopolist test when it held that the Government's "geographic markets are too narrow" on the mistaken basis that the Government's markets excluded non-local suppliers. Gov't Mot. Ex. A at 49; *see also* Gov't Mot. 14-17. The District Court again seriously erred in ignoring the presumptive illegality of this merger *even under Defendants' proposed markets*. And the District Court erred in concluding, without any legal support, that the mere existence of USDA's sugar program somehow acts as a sufficient "safeguard against potential anticompetitive effects." Gov't Mot. Ex. A at 55; *see also* Gov't Mot. 18-21.

For the reasons described in the Government's Emergency Motion and briefly reiterated below, the factual findings in the District Court's opinion do not cure its legal errors.

First, the District Court failed to apply the *hypothetical* monopolist test by rejecting a refiner-focused relevant product market on the basis of *current* competition from distributors. Defendants emphasize that the District Court's product-market analysis rested on its conclusion that distributors currently compete with sugar refiners. Opp. 14. Whatever the facts of distributors' ability to compete with refiners today, they could not compete with a hypothetical monopolist refiner who commanded control of their critical supply. The District Court's emphasis on competition as it exists today repeats the error this Court corrected in *Penn State*,

where the District Court improperly relied on actual competitive conditions that would no longer hold if a hypothetical monopolist were in control. 838 F.3d 327, 344 (3d Cir. 2016). Defendants' Opposition does not address this fundamental error in application of the relevant economic framework.[2]

Second, the District Court's geographic-market analysis failed to recognize that the Government *agreed* that refiners outside of the relevant geographic markets serve customers within them. As this Circuit explained in *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 167-68 (3d Cir. 2022), when applying the hypothetical monopolist test to a customer-location market, the Court should include any supplier to customers who are located in that market, wherever the supplier may be located. Out-of-geography refiners were therefore included in the Government's markets, just as the District Court demanded they should have been.[3] Gov't Mot. Ex. A at 51-52. Rejecting the Government's relevant markets

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[2] The District Court erroneously held that the Government should have disaggregated sales to retail and sales to industrial customers. Gov't Mot. Ex. A at 48. No case law supports imposing this disaggregation requirement, and much cuts against it. Gov't Mot. 13. Defendants' reliance on *United States v. Engelhard Corp.*, 126 F.3d 1302 (11th Cir. 1997), and *United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172 (D.D.C. 2001), *see* Opp. 16, is misplaced. *Engelhard* merely indicates that if a party relies on representative customer witnesses, they need to be representative. 126 F.3d at 1306. *Sungard* addressed customer groups that relied on differentiated products, 172 F. Supp. 2d at 182-83, distinguishing that case from the commodity (refined sugar) at issue here.

[3] Defendants' Opposition also notes the District Court's factual findings as to supplier repositioning. Opp. 19. However, as the Government explained in its

for failing to include suppliers that those markets actually included is not a factual error (*contra* Opp. 18) but a basic economic misunderstanding of how the hypothetical monopolist test applies in customer-location markets. Calling the economically correct application of the hypothetical monopolist test "simply not credible," as the District Court did (Gov't Mot. Ex. A at 51), does not convert a legal error into a factual one.

Third, the District Court's erroneous application of Section 7's burden-shifting framework also does not depend on analyzing the facts the District Court found. Rather, the District Court erred by failing to recognize that the merger would be presumptively unlawful, even in the markets Defendants themselves proposed. Defendants claim that "there is no legal requirement" that courts assess competitive effects "in some *other* unalleged market." Opp. 20. But the markets in which the Government established anticompetitive effects were not just "some other" market: They were ***Defendants'*** proposed markets. Gov't Mot. 18-19. Moreover, Defendants' own expert testimony about market shares and concentration in these markets established a presumption of anticompetitive effects. Gov't Mot. Ex. B at 992:21-994:17.

Emergency Motion, those facts must be considered at the rebuttal stage of the burden-shifting framework and assessed against the applicable requirements of timeliness, likelihood, and sufficiency, which the District Court did not do. *See* Gov't Mot. 16-17.

In addition, the District Court deviated from binding Supreme Court precedent in concluding that the mere existence of USDA's sugar program somehow counteracts any anticompetitive effects. Gov't Mot. 20. And it erred in relying on generic testimony by a USDA economist (Dr. Fecso), who was not admitted as an expert, "that the deal will have an overall positive impact on the sugar industry." Gov't Mot. Ex. A at 56. This Court has rejected similar efforts by defendants to rely on purported benefits outside the context of the burden-shifting framework; they may be considered only as part of an efficiencies defense within that framework. *See, e.g.*, *Hackensack*, 30 F.4th at 176 (addressing purported "procompetitive benefits"). That defense has a high bar, which the District Court never addressed in its opinion. *See id.* ("For the efficiencies defense to be cognizable, the efficiencies must (1) 'offset the anticompetitive concerns in highly concentrated markets'; (2) 'be merger-specific' (i.e., the efficiencies cannot be achieved by either party alone); (3) 'be verifiable, not speculative'; and (4) 'not arise from anticompetitive reductions in output or service.'" (quoting *Penn State*, 838 F.3d at 348-49)).

B. Irreparable Injury Is Likely

This Court has made clear that the consummation of a proposed merger, when courts may have to "unscramble the egg" later, presents a paradigmatic example of irreparable injury. *Penn State*, 838 F.3d at 352-53. Defendants attempt

to downplay these concerns on the grounds that the merger could be "unwound" later. Opp. 21-22. However, this Court has rejected this exact argument on the grounds that while "it may not be impossible to order divestiture," it is unduly "difficult to do so," particularly in light of the "practical implications of" such a remedy. *Penn State*, 838 F.3d at 353 n.11. The *Bazaarvoice* case cited by the District Court (Doc. 253 at 3) is a perfect example of the difficulty of overseeing and implementing a forced divestiture. In *Bazaarvoice*, the Government prevailed at trial in a post-consummation lawsuit, and the court ordered divestiture and other remedies that have required years of extensive and costly Government and District Court supervision. *See, e.g.*, Report No. 1 by the Trustee (filed August 1, 2014) (Doc. 265) through Report No. 48 by the Trustee (filed July 1, 2018) (Doc. 393), *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133-WHO (N.D. Cal.).

Moreover, Defendants' reliance on *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006), and *TD Bank N.A. v. Hill*, 928 F.3d 259 (3d Cir. 2019), is erroneous and misplaced. Opp. 22. Both *eBay* and *TD Bank* concerned *private* actions; *government* suits to enforce statutes are fundamentally different. *See* Gov't Mot. 22; *see also Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (finding irreparable injury where government was enjoined from "effectuating statutes").

C. DEFENDANTS WILL NOT BE INJURED SUBSTANTIALLY BY ENTRY OF AN INJUNCTION PENDING APPEAL

Defendants make no showing that they will be substantially harmed by an injunction pending appeal. They instead make general representations as to financing costs and rising interest rates. Opp. 22-23. All of these generalized concerns can and would reasonably be accommodated through an expedited briefing schedule at the merits stage.

D. THE BALANCE OF FACTORS AND PUBLIC INTEREST SUPPORT AN INJUNCTION PENDING APPEAL

This Court has held that "private equities are afforded little weight" and "cannot outweigh effective enforcement of the antitrust laws." *Penn State*, 838 F.3d at 352; *see also FTC v. H.J. Heinz Co.*, 246 F.3d 708, 727 n.25 (D.C. Cir. 2001); *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981). Defendants assert that is not the situation here, because of the "positive impact" on the industry testified to by Dr. Fecso, which the District Court credited. Opp. 24. This argument is unavailing. *See supra* at 6.

* * *

At this juncture, the Court need not resolve any or all of the legal issues raised by the appeal. Those questions are best left for full briefing on the merits. For now, this Court need only decide whether the status quo must be preserved before the merger is consummated to avoid the likelihood of irreparable injury to

competition during the pendency of the litigation and thereafter. For the reasons explained above and in the Government's motion, that bar is far exceeded here, as the Government has demonstrated serious errors with the District Court's legal reasoning and application of the relevant economic framework. An injunction pending appeal is warranted to preserve for this Court, in light of those serious questions, adequate power to grant whatever relief it might deem necessary to protect the public's vital interest in a competitive economy.[4]

CONCLUSION

The Government respectfully requests that this Court grant an administrative injunction while this motion is pending, and thereafter enjoin the proposed acquisition pending appeal.

[4] While not necessary to consideration of this motion, the Government must note its disagreement with Defendants' assertion that the Government's expert, Dr. Dov Rothman, is unqualified (Opp. 2). Dr. Rothman has a PhD in Business Administration, has taught a course on the economics of merger analysis at Harvard University, and has published in peer-reviewed economics journals. Reply Ex. A at 582:4-16. Moreover, as the District Court made clear, Defendants failed to argue that the District Court "should not recognize Dr. Rothman as an economics expert." Gov. Mot. Ex. A at 24 n.11.

Dated: September 30, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2022, I caused the foregoing brief to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all registered CM/ECF users. Participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ECO-055-E

No. 22-2806

UNITED STATES OF AMERICA,
Appellant

v.

UNITED STATES SUGAR CORPORATION;
IMPERIAL SUGAR COMPANY;
LOUIS DREYFUS COMPANY LLC;
UNITED SUGARS CORPORATION

(D. Del. No. 1-21-cv-01644)

Present: RESTREPO and PHIPPS, Circuit Judges

1. Emergency Motion filed by Appellant United States for an Injunction Pending Appeal and an Administrative Injunction Pending Adjudication of the Motion.

2. Response filed by Appellees United States Sugar Corp, Imperial Sugar Co, Louis Dreyfus Co, LLC, and United Sugars Corp to the Appellant's Emergency Motion for Injunction.

3. Unopposed Motion filed by Appellees United States Sugar Corp to accept Appellees' Response to Emergency Motion for Injunction Pending Appeal that is in excess of word limit.

4. Reply by the Appellant United States.

Respectfully,
Clerk/JK

ORDER

The foregoing motions, response, and reply are considered. Appellant's emergency motion for an injunction pending appeal and for an administrative injunction pending adjudication of the motion is DENIED in its entirety. Appellees' motion to file a response that exceeds the word limit is GRANTED.

The following expedited briefing schedule shall apply to this appeal:

Appellant's brief and appendix shall be filed and served no later than October 31, 2022;

Appellees' brief shall be filed and served no later than November 21, 2022;

Appellant's reply brief, if any, shall be filed and served no later than December 5, 2022.

After briefing is complete, the case will be calendared before the next available merits panel.

By the Court,

s/ L. Felipe Restrepo
Circuit Judge

Dated: September 30, 2022
JK/cc: All Counsel of Record

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November 29, 2022

Patricia S. Dodszuweit
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Re: No. 22-2806, *United States v. United States Sugar Corporation et al.*

Dear Ms. Dodszuweit:

Pursuant to Federal Rule of Appellate Procedure 26.1(d)(3), undersigned counsel for Defendants-Appellees United States Sugar Corporation ("U.S. Sugar"), Imperial Sugar Company ("Imperial"), and Louis Dreyfus Company LLC ("Louis Dreyfus") write to inform the Court that U.S. Sugar completed its acquisition of Imperial's assets on November 28, 2022. Under the asset purchase agreement, Imperial's assets—including its real property interests, tangible personal property, intellectual property, accounts receivable, inventory, and all goodwill and going-concern value—have been transferred to a wholly-owned subsidiary of U.S. Sugar. While Imperial, as previously identified in ECF No. 31, still exists and is owned by Louis Dreyfus Company Sugar Holdings LLC, which is a subsidiary of Louis Dreyfus, the entity will be renamed within the coming days.

Respectfully submitted,

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cc: All Counsel of Record (via ECF)

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 22-2806

____

UNITED STATES OF AMERICA,
Appellant

v.

UNITED STATES SUGAR CORPORATION; IMPERIAL SUGAR COMPANY; LOUIS DREYFUS COMPANY LLC; UNITED SUGARS CORPORATION

____

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil No. 1:21-cv-01644)
District Judge: Honorable Maryellen Noreika

____

Argued: January 18, 2023

Before: AMBRO[*], PORTER, and FREEMAN,
Circuit Judges.

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[*] Judge Ambro assumed senior status on February 6, 2023.

(Filed: July 13, 2023)

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OPINION OF THE COURT

PORTER, *Circuit Judge*.

The government appeals the denial of its motion to permanently enjoin the acquisition of Imperial Sugar by United States Sugar Corporation. The District Court found that the government failed to identify the relevant product and geographic markets and thus failed to establish a prima facie case under Section 7 of the Clayton Act. 15 U.S.C. § 18. It concluded that the government overlooked the procompetitive effects of distributors in the market for refined sugar, erroneously lumped together heterogeneous wholesale customers, and defined the relevant geographic market without regard for the high mobility of sugar throughout the country. Because the District Court's rejection of the government's proposed product market is not clearly erroneous, we will affirm.

I

Georgia-based Imperial Sugar Company has been in financial distress for years. It went bankrupt in 2001 and suffered a costly accident at its plant in 2008, prompting its owners to put it up for sale. Purchased by the Louis Dreyfus Company, Imperial has since received from Louis Dreyfus only a subsistence level of investment to keep its operation safe and environmentally sound. Imperial's internal reports describe it as an "import-based, price-uncompetitive sugar refinery" that is "structurally uncompetitive" and suffers from a shrinking customer base, losing roughly ten percent of its

customers from 2021 to 2022. For more than five years, Louis Dreyfus has been trying to sell it.

Enter United States Sugar Corporation, a large Florida-based sugar refiner that agreed to purchase Imperial. The government contends that U.S. Sugar's acquisition should be blocked because it would have anticompetitive effects in the market for refined sugar. The government alleges that the transaction would leave only two entities in control of 75% of refined sugar sales in the southeastern United States. It proffers an application of the hypothetical monopolist test (HMT) and argues that the results of that test demonstrate the validity of its proposed product and geographic markets.

U.S. Sugar answers first that it does not even sell its own sugar but rather participates with three other producers in a Capper-Volstead agricultural cooperative, United Sugar, that markets and sells the firms' output collectively but exercises no control over the quantities that its members produce.[1] Even if operated at capacity, it argues, Imperial's facility could produce only about seven percent of national output—an insufficient share either to invoke a per se presumption of anticompetitiveness or to merit an injunction under a rule-of-reason analysis. Second, U.S. Sugar argues that sugar distributors constitute a crucial competitive check on producer-refiners that would undermine any attempt to increase prices. This effect, it argues, goes unappreciated in the government's HMT analysis and undermines the government's product market definition. Finally, it argues, evidence of the high mobility of refined sugar throughout the country renders the

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[1] Capper-Volstead cooperatives are agricultural cooperatives exempted from certain antitrust scrutiny. *See* 7 U.S.C. §§ 291–92.

government's proposed regional markets vacuous and unrepresentative.

After an expedited trial, the District Court denied the government's plea for an injunction. It determined the credibility of the expert witnesses and carefully weighed the evidence. As to product market definition, the Court concluded that U.S. Sugar was right to extoll the effects of sugar distributors, who account for approximately 25% of sales of refined sugar in the U.S. It rejected the government's proposed product market, concluding that any proposed product market must include sales of refined sugar sold by distributors if it is to be relevant. Turning to the proposed geographic market, the Court recounted considerable evidence presented at trial of sugar's high geographic mobility and the ease with which producers and distributors could avail themselves of arbitrage by selling to out-of-region buyers. It concluded that the government's analysis failed to account for this mobility, making its proposed markets too narrow to be relevant. The government timely appealed.

II

The District Court had jurisdiction under 15 U.S.C. § 25 ("district courts of the United States are invested with jurisdiction to prevent and restrain violations of [the Clayton] Act"). It entered final judgment on September 23, 2022. The government filed a notice of appeal on September 26, 2022. This Court has jurisdiction under 28 U.S.C. § 1291.

On appeal from a Rule 52 ruling, we review "findings of fact for clear error" and "conclusions of law de novo." *See FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 335 (3d

Cir. 2016) ("*Hershey*").[2] As for the specific issues on appeal, "the determination of a relevant market is composed of the articulation of a legal test which is then applied to the factual circumstances of each case." *Id.* (quoting *White & White, Inc. v. Am. Hosp. Supply Corp.*, 723 F.2d 495, 499 (6th Cir. 1983)). Thus, "while a district court's conclusion concerning what constitutes the relevant market is subject to the clearly erroneous standard of review, the district court's formulation of the market tests may be freely reviewed on appeal as a matter of law." *Worldwide Basketball & Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n.*, 388 F.3d 955, 960 (6th Cir. 2004). A court's conclusion concerning what constitutes the relevant market is a finding of fact that is "clearly erroneous" only if it is "completely devoid of minimum evidentiary support displaying some hue of credibility or bears no rational relationship to the supportive evidentiary data." *Berg Chilling Sys., Inc. v. Hull Corp.*, 369 F.3d 745, 754 (3d Cir. 2004). "[S]o we review for clear error." *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 167 (3d Cir. 2022).[3] However,

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[2] U.S. Sugar suggests, that, by arguing only in terms of plenary review, the government has forfeited a clear error challenge. But "[a] party cannot waive, concede, or abandon the applicable standard of review," so we reject this contention. *United States v. Escobar*, 866 F.3d 333, 339 (5th Cir. 2017) (per curiam).

[3] Though the government characterizes the District Court's product market holding as "legal error" and urges us to review the question de novo, to do so would create inconsistency: market definition inquiries such as this rely heavily upon the testimony of expert witnesses who are prohibited from rendering legal opinions. *M.S. ex rel. Hall v. Susquehanna Twp. Sch. Dist.*, 969 F.3d 120, 129 (3d Cir. 2020) (noting that

"where a district court applies an incomplete economic analysis or an erroneous economic theory to those facts that make up the relevant geographic market, it has committed legal error subject to plenary review." *Hershey*, 838 F.3d at 336.

III

A. The District Court did not clearly err in rejecting the government's product market definition.

1. The relevant product market is the market for refined sugar.

A claim arising under the Clayton Act, § 7, is evaluated under a three-part burden-shifting framework. *Hackensack*, 30 F.4th at 166. First, the government must establish a prima facie case that the merger is anticompetitive. *Id.* To do so, it must "propose the proper relevant market and . . . show that the effect of the merger in that market is likely to be anticompetitive." *Id.* Second, the burden to produce evidence to rebut the government's prima facie case shifts to the defendant. *See, e.g.*, *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982–83 (D.C. Cir. 1990). Third, "[i]f the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." *Id.* at 983.

"an expert cannot testify to [a] legal conclusion"). Therefore, the history of Section 7 litigation and reliance upon expert witnesses necessitates an understanding of product market definition as a factual inquiry.

This appeal concerns only the first prong of the first part of that analysis: identification of the relevant market. The government argues that, in defining a product market under Section 7, the District Court clearly erred by treating distributors as separate sources of refined sugar capable of undercutting efforts by a hypothetical monopolist to restrict output and increase price.

The government contends that the HMT, the test "commonly used in antitrust actions to define the relevant market," *FTC v. Sanford Health*, 926 F.3d 959, 963 (8th Cir. 2019), requires courts to adhere to a stratified model of the market in which refiners sell to distributors, which then sell to wholesalers, which then sell to retailers, which then sell to consumers. In this abstract, stratified model, a distributor would have no source of refined sugar beyond the refiners in its (properly defined) geographic market. Therefore, the government argues, a court cannot take cognizance of distributors or alternate sugar sources as potential checks on refiners' market power.

This case is somewhat atypical among product-market-definition disputes, as it is not a dispute about defining the product. Notably, in *United States v. E.I. du Pont de Nemours & Co.*, the Supreme Court was pressed to answer whether DuPont's patent on cellophane created a monopoly or whether the relevant product market should be more broadly conceived of as "flexible wrapping materials," of which cellophane was just one kind. 351 U.S. at 396–400. Similarly, in *Erie Sand & Gravel Co. v. FTC*, we were asked to decide whether "lake sand" used to make concrete was its own product or whether sand from a pit or sand from a bank could fairly be included with it. 291 F.2d 279, 281 (3d Cir. 1961). These cases typify the standard product-market-definition inquiry.

Here, all are agreed: the product is refined sugar. The dispute is over defining the product market as either that for the sale of refined sugar or for the "production *and* sale" of refined sugar, Appellant's Br. 2, the latter of which excludes parties who sell but do not produce—i.e., distributors and wholesalers. The government contends that a proper application of the HMT requires us to limit our focus to only those firms that both produce *and* sell refined sugar and to exclude sellers who do not themselves refine sugar. It reasons that even if, *arguendo*, distributors can bring sugar to market from other regions of the country or from overseas in response to higher local prices, all refined sugar must begin with a refiner, so under the HMT, distributors are customers, not suppliers, and should be treated as such under a proper application of the test. It therefore maintains that the District Court erred in considering distributors who could counteract monopolistic restrictions by releasing their own supplies.

U.S. Sugar, in turn, citing our decision in *Allen-Myland Inc. v. IBM Corp.*, 33 F.3d 194 (3d Cir. 1994), argues that where, as a matter of fact, independent distributors in this industry already are and will remain competitors, acknowledging them as such is entirely consistent with our case law. There, we addressed allegations against IBM of unlawful tying in violation of the Sherman Act. *Id.* at 200. In defining the relevant market, the question arose whether *leases* of computer mainframes competed with computer manufacturers' *sales* to end users. *Id.* at 202. Reversing the district court, we held that

> to the extent that leasing companies deal in used, non-IBM mainframes that have not already been counted in the sales market, these machines belong in the relevant market for large-scale mainframe computers. Unlike

> IBM, there is no allegation that the manufacturers of these computers possess the market power to control prices, much less that they would do so in concert with IBM. When these computers are placed in service by leasing companies, they provide an alternative that limits IBM's power in the market.

Id. at 203 (footnotes omitted).

Allen-Myland thus makes clear that resellers may serve as competitive checks on a seller-manufacturer. The government offers a different interpretation. In its telling, the *Allen-Myland* Court "reversed because manufacturers' market shares would already include new large-scale mainframe computers sold by manufacturers to leasing companies," and to add the products in again when end-users leased them from leasing companies would lead to double-counting "because the leasing companies themselves 'do nothing to increase the *supply* of new machines.'" Appellant's Br. 26 (quoting *Allen-Myland*, 33 F.3d at 202) (cleaned up).

While the government's quoted language from the *Allen-Myland* opinion is accurate, it lacks context. The *Allen-Myland* Court did say that leasing companies themselves did "nothing to increase the *supply* of new machines" when the machines in question were IBM machines. 33 F.3d at 202. But "to the extent that leasing companies deal in used, non-IBM mainframes that have not already been counted in the sales market," "they provide an alternative that limits IBM's power in the market." *Id.* at 203. So when the product is defined by its source, e.g., "IBM computers" or "U.S. Sugar refined sugar," then aftermarket sales or leases of that product "do nothing to increase the supply" thereof. *Id.* at 202. But when an ostensible downstream party—a leasing company or

wholesaler—has alternative sources for the same *kind* of product, e.g., computers or refined sugar, and places them in the stream of commerce, they impose a competitive check upon that source's power in the market. And this is more likely to be true the more homogeneous the product: customers generally place less value upon the question of who manufactured the product when the product is a commodity, like sugar, rather than a branded piece of technology, like a computer. *See* George Stigler, *A Theory of Oligopoly*, 72 JOURN. POL. ECON. 44, 49 (1964) ("From the viewpoint of any one buyer . . . [t]he costs of shifting among suppliers will be smaller the more homogeneous the goods[.]").

The government's focus on "production and sale" is a red herring. The proper product market definition here is the market for refined sugar, much as it was the market for "flexible packaging material" in *E.I. du Pont*, 351 U.S. at 400, or for concrete-grade sand in *Erie Sand & Gravel*, 291 F.2d at 281. The District Court noted that the "Government introduced no evidence at trial that purchasers care whether their sugar supplier is a refiner producer, a marketing entity, a cooperative or a distributor." J.A. 36, ¶ 85. So defining the product market to include production *and* sale is irrelevant to consumer welfare and a purely self-serving description by the government.

2. The District Court's analysis, based in practical indicia, was valid.

There is some ambiguity regarding the extent to which the District Court relied upon HMT analysis in making its decision. It mentioned the HMT only once, in the section of its opinion analyzing the government's proposed geographic market. In defining the product market, it instead focused on

the "practical indicia" of "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." J.A. 46–47 (quoting *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 325 (1962)). And it properly defined its inquiry as one of interchangeability and cross-elasticity in order "to recognize where competition exists." J.A. 47.

The District Court did not err by considering facts on the ground rather than relying upon HMT analysis. Our precedent makes this clear. *Cf. Hershey*, 838 F.3d at 345 ("We are not suggesting that the hypothetical monopolist test is the only test that the district courts may use."). The government cites no authority for its contrary view that "the hypothetical monopolist test . . . *governs* market definition." Appellant's Br. 22 (emphasis added). The District Court permissibly considered the "highly factual issue" of cross-elasticity of demand and the "[s]pecial characteristics of the relevant industry [that] may influence market definition." *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 952 F.2d 715, 723 (3d Cir. 1991).

That factual inquiry was well-founded and not clearly erroneous. The District Court found that "[d]istributors have the ability to purchase large quantities of refined sugar from many different sources, including foreign competitors, and this allows distributors to price resales competitively." J.A. 33, ¶ 79. It also found that "[d]istributors account for approximately 25% of sales of refined sugar in the U.S.," *id.* at 34, ¶ 80, and noted that "[a]t trial, there were many examples of customers purchasing large quantities of sugar from distributors," *id.*, ¶ 81, with distributors "compet[ing] for sales to wholesale

customers of all sizes, including large industrial customers," J.A. 35, ¶ 83.

It found that "distributors are the primary importers of refined [sugar] imports," tending "to purchase the majority of foreign-produced refined sugar imports" in the United States, J.A. 33–34, ¶ 79. And U.S. Sugar's expert witness, Dr. Hill, testified "that distributors buy from a variety of sources, which gives them independence and the ability to compete with refiners in the market." *Id.* Based on sufficient evidence and weighing the testimony of the parties' expert witnesses, the District Court thus rejected, in this industry, the government's preferred rigid hierarchy of refiners, distributors, wholesalers, retailers, and consumers, with each only buying from the source above it.

The District Court's factual findings are extensive and carefully noted. It considered the government's proposed market, the objections thereto, and other factors on which it was free to rely to inform its view of the situation. The government would prefer that the HMT be deemed to "govern" the field at Stage I and that its own construction of the HMT be accepted without scrutiny. The law does not require the District Court to do either, and its decision as to product-market definition evinces no clear error.

3. The District Court was not required to accept a market encompassing "widely divergent customers."

The government contends that the District Court committed "legal error" by "requiring" the government to "further subdivide the market and differentiate between refined sugar sales to industrial customers and refined sugar sales to

retail customers." Appellant's Br. 27 (cleaned up). It proposed a product market in which wholesale customers include industrial food and beverage manufacturers, retailers, food service companies, and distributors. J.A. 37, ¶ 87. The District Court found that, in advocating for this proposed market, the government's expert failed to differentiate between refined sugar sales to industrial customers and those to retail customers and that he "made no attempt to consider whether industrial consumers have the same competitive alternatives as other customers." *Id.*

"Defining a relevant product market is . . . a factual question," and the District Court treated it as such. *Polypore Intern., Inc. v. FTC*, 686 F.3d 1208, 1217 (11th Cir. 2012). It looked to the facts, considered expert witness testimony, made credibility determinations, and concluded that the government witness was less credible and his testimony less helpful than that of the defendant's witness. This is not "a matter of law," as the government styles it, but a matter of fact. Appellant's Br. 27; *see SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1062 (3d Cir. 1978).

The government asserts that "the Supreme Court has repeatedly confirmed[] there is no legal requirement that plaintiffs divide a broadly defined market into submarkets." Appellant's Br. 27. Its references meant to support the argument are not on point. Appellant's Br. 28 (citing *Brown Shoe*, 370 U.S. at 327; *United States v. Phillipsburg Nat'l Bank & Tr. Co.*, 399 U.S. 350, 360 (1970); *United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549, 553 (1971); *United States v. Cont'l Can Co.*, 378 U.S. 441, 457–58 (1964)). In *Brown Shoe*, the Court held that a district court was not "required to employ finer[] distinctions" or pursue "[f]urther division" of the market where such "division does not aid [the court] in

analyzing the effects of [a] merger." 370 U.S. at 327. To say that finer distinctions are not "required" does not mean that they are prohibited. *Id.* The standard is what "aid[s]" a district court in analyzing the facts. *Id.* And the government's other cases stand for the mere proposition that a court should not let the existence of submarkets persuade it to "disregard a broader line of commerce that has economic significance." *Phillipsburg Nat'l Bank*, 399 U.S. at 360. Here, the District Court did not disregard the broader line of commerce in refined sugar; it simply determined that distinguishing between industrial and retail sales more accurately described the reality of the market.

Contrary to the government's portrayal, the District Court did not make any categorical statements about a need to always subdivide markets. It simply recognized that when defining a market, courts may draw distinctions as necessary to understand a merger's effects on consumers. That factual determination was not clearly erroneous.

To establish its prima facie case, the government must propose the proper relevant market, "includ[ing] both a product market and a geographic market." *Hackensack*, 30 F.4th at 166. As it has failed to articulate a relevant product market, we do not consider its argument as to a proposed geographic market.

B. The District Court's consideration of USDA responses as a remedy for antitrust harm was error, but it is not material.

The District Court offered one further argument against the government's case: that "even if U.S. Sugar's acquisition of Imperial were likely to have any anticompetitive effects, the Court believes that the USDA has the ability to counteract

those effects" by "increas[ing] the amount of low- or no-duty sugar that can be imported into the U.S." J.A. 63. "Doing so," it reasoned, "would increase the available sugar for sale in the U.S., thereby bringing prices back down." *Id.* In particular, the Court highlighted the USDA's "discretionary ability to increase the amounts imported under the TRQ [tariff-rate quota] system and U.S.-Mexico Suspension Agreements in order to maintain reasonable prices." *Id.*

The government is correct to describe this line of reasoning as improper. "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 350 (1963) (citations omitted). A finding of implied repeal "can be justified only by a convincing showing of clear repugnancy between the antitrust laws" and an alternative "regulatory system." *United States v. Nat'l Ass'n of Sec. Dealers*, 422 U.S. 694, 719 (1975). And in this case, there is no argument presented that any statutory provision immunizes the sugar industry against antitrust challenge. The government's simultaneous efforts to keep sugar prices high through USDA policy and to lower them through antitrust suits may seem contradictory, but it is not unlawful for the government to pursue contradictory aims, and price supports do not create immunity from antitrust.

That said, as the District Court's reasoning on USDA price supports did not alter the outcome of its opinion, reversing it would not salvage the government's case. The Court's analysis of market definition stands unaffected by those portions of its opinion on USDA policy.

* * *

Defining a relevant market depends in equal parts upon defining the product market and the geographic market, and a failure to do either is dispositive. The District Court concluded that the government failed to define a relevant product market. Its analysis is not clearly erroneous. We will affirm.

Injunctions Pending an Appeal

FEDERAL COURT INJUNCTIONS PENDING AN APPEAL

FEDERAL RULES OF CIVIL PROCEDURE

Rule 65. Stay of Proceedings to Enforce a Judgment

(a) *Automatic Stay*. Except as provided in Rule 62(c) and (d), execution on a judgment and proceedings to enforce it are stayed for 30 days after its entry, unless the court orders otherwise.

(b) *Stay by Bond or Other Security*. At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or other security.

(c) *Stay of an Injunction, Receivership, or Patent Accounting Order*. Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or receivership; or
(2) a judgment or order that directs an accounting in an action for patent infringement.

(d) *Injunction Pending an Appeal*. While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:
(1) by that court sitting in open session; or
(2) by the assent of all its judges, as evidenced by their signatures.

(e) *Stay Without Bond on an Appeal by the United States, Its Officers, or Its Agencies*. The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government.

. . .

(g) *Appellate Court's Power Not Limited*. This rule does not limit the power of the appellate court or one of its judges or justices:

(1) to stay proceedings—or suspend, modify, restore, or grant an injunction—while an appeal is pending; or

(2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 8. Stay or Injunction Pending Appeal

(a) *Motion for Stay*.

(1) *Initial Motion in the District Court*. A party must ordinarily move first in the district court for the following relief:

(A) a stay of the judgment or order of a district court pending appeal;

(B) approval of a bond or other security provided to obtain a stay of judgment; or

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

(2) *Motion in the Court of Appeals; Conditions on Relief*. A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

(A) The motion must:

(i) show that moving first in the district court would be impracticable; or

(ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.

(B) The motion must also include:

(i) the reasons for granting the relief requested and the facts relied on;

(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) A motion under this Rule 8(a)(2) must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.

(E) The court may condition relief on a party's filing a bond or other security in the district court.

(b) *Proceeding Against a Security Provider*. [*omitted*]

(c) *Stay in a Criminal Case*. [*omitted*]

Geographic Market Definition

U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4.2 (rev. 2010) (geographic market definition)

Horizontal Merger Guidelines

U.S. Department of Justice

and the

Federal Trade Commission

Issued: August 19, 2010

hypothetical monopolist could price separately and limit arbitrage, baby food manufacturers would be vulnerable to a targeted increase in the price of glass containers. The Agencies could define a distinct market for glass containers used to package baby food.

The Agencies also often consider markets for targeted customers when prices are individually negotiated and suppliers have information about customers that would allow a hypothetical monopolist to identify customers that are likely to pay a higher price for the relevant product. If prices are negotiated individually with customers, the hypothetical monopolist test may suggest relevant markets that are as narrow as individual customers (see also Section 6.2 on bargaining and auctions). Nonetheless, the Agencies often define markets for groups of targeted customers, i.e., by type of customer, rather than by individual customer. By so doing, the Agencies are able to rely on aggregated market shares that can be more helpful in predicting the competitive effects of the merger.

4.2 Geographic Market Definition

The arena of competition affected by the merger may be geographically bounded if geography limits some customers' willingness or ability to substitute to some products, or some suppliers' willingness or ability to serve some customers. Both supplier and customer locations can affect this. The Agencies apply the principles of market definition described here and in Section 4.1 to define a relevant market with a geographic dimension as well as a product dimension.

The scope of geographic markets often depends on transportation costs. Other factors such as language, regulation, tariff and non-tariff trade barriers, custom and familiarity, reputation, and service availability may impede long-distance or international transactions. The competitive significance of foreign firms may be assessed at various exchange rates, especially if exchange rates have fluctuated in the recent past.

In the absence of price discrimination based on customer location, the Agencies normally define geographic markets based on the locations of suppliers, as explained in subsection 4.2.1. In other cases, notably if price discrimination based on customer location is feasible as is often the case when delivered pricing is commonly used in the industry, the Agencies may define geographic markets based on the locations of customers, as explained in subsection 4.2.2.

4.2.1 Geographic Markets Based on the Locations of Suppliers

Geographic markets based on the locations of suppliers encompass the region from which sales are made. Geographic markets of this type often apply when customers receive goods or services at suppliers' locations. Competitors in the market are firms with relevant production, sales, or service facilities in that region. Some customers who buy from these firms may be located outside the boundaries of the geographic market.

The hypothetical monopolist test requires that a hypothetical profit-maximizing firm that was the only present or future producer of the relevant product(s) located in the region would impose at least a SSNIP from at least one location, including at least one location of one of the merging firms. In this exercise the terms of sale for all products produced elsewhere are held constant. A single firm may operate in a number of different geographic markets, even for a single product.

Example 12: The merging parties both have manufacturing plants in City X. The relevant product is expensive to transport and suppliers price their products for pickup at their locations. Rival plants are some distance away in City Y. A hypothetical monopolist controlling all plants in City X could profitably impose a SSNIP at these plants. Competition from more distant plants would not defeat the price increase because supplies coming from more distant plants require expensive transportation. The relevant geographic market is defined around the plants in City X.

When the geographic market is defined based on supplier locations, sales made by suppliers located in the geographic market are counted, regardless of the location of the customer making the purchase.

In considering likely reactions of customers to price increases for the relevant product(s) imposed in a candidate geographic market, the Agencies consider any reasonably available and reliable evidence, including:

- how customers have shifted purchases in the past between different geographic locations in response to relative changes in price or other terms and conditions;
- the cost and difficulty of transporting the product (or the cost and difficulty of a customer traveling to a seller's location), in relation to its price;
- whether suppliers need a presence near customers to provide service or support;
- evidence on whether sellers base business decisions on the prospect of customers switching between geographic locations in response to relative changes in price or other competitive variables;
- the costs and delays of switching from suppliers in the candidate geographic market to suppliers outside the candidate geographic market; and
- the influence of downstream competition faced by customers in their output markets.

4.2.2 Geographic Markets Based on the Locations of Customers

When the hypothetical monopolist could discriminate based on customer location, the Agencies may define geographic markets based on the locations of targeted customers.[7] Geographic markets of this type often apply when suppliers deliver their products or services to customers' locations. Geographic markets of this type encompass the region into which sales are made. Competitors in the market are firms that sell to customers in the specified region. Some suppliers that sell into the relevant market may be located outside the boundaries of the geographic market.

The hypothetical monopolist test requires that a hypothetical profit-maximizing firm that was the only present or future seller of the relevant product(s) to customers in the region would impose at least a SSNIP on some customers in that region. A region forms a relevant geographic market if this price increase would not be defeated by substitution away from the relevant product or by arbitrage,

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[7] For customers operating in multiple locations, only those customer locations within the targeted zone are included in the market.

e.g., customers in the region travelling outside it to purchase the relevant product. In this exercise, the terms of sale for products sold to all customers outside the region are held constant.

> *Example 13:* Customers require local sales and support. Suppliers have sales and service operations in many geographic areas and can discriminate based on customer location. The geographic market can be defined around the locations of customers.

> *Example 14:* Each merging firm has a single manufacturing plant and delivers the relevant product to customers in City X and in City Y. The relevant product is expensive to transport. The merging firms' plants are by far the closest to City X, but no closer to City Y than are numerous rival plants. This fact pattern suggests that customers in City X may be harmed by the merger even if customers in City Y are not. For that reason, the Agencies consider a relevant geographic market defined around customers in City X. Such a market could be defined even if the region around the merging firms' plants would not be a relevant geographic market defined based on the location of sellers because a hypothetical monopolist controlling all plants in that region would find a SSNIP imposed on all of its customers unprofitable due to the loss of sales to customers in City Y.

When the geographic market is defined based on customer locations, sales made to those customers are counted, regardless of the location of the supplier making those sales.

> *Example 15:* Customers in the United States must use products approved by U.S. regulators. Foreign customers use products not approved by U.S. regulators. The relevant product market consists of products approved by U.S. regulators. The geographic market is defined around U.S. customers. Any sales made to U.S. customers by foreign suppliers are included in the market, and those foreign suppliers are participants in the U.S. market even though located outside it.

5. Market Participants, Market Shares, and Market Concentration

The Agencies normally consider measures of market shares and market concentration as part of their evaluation of competitive effects. The Agencies evaluate market shares and concentration in conjunction with other reasonably available and reliable evidence for the ultimate purpose of determining whether a merger may substantially lessen competition.

Market shares can directly influence firms' competitive incentives. For example, if a price reduction to gain new customers would also apply to a firm's existing customers, a firm with a large market share may be more reluctant to implement a price reduction than one with a small share. Likewise, a firm with a large market share may not feel pressure to reduce price even if a smaller rival does. Market shares also can reflect firms' capabilities. For example, a firm with a large market share may be able to expand output rapidly by a larger absolute amount than can a small firm. Similarly, a large market share tends to indicate low costs, an attractive product, or both.

5.1 Market Participants

All firms that currently earn revenues in the relevant market are considered market participants. Vertically integrated firms are also included to the extent that their inclusion accurately reflects their competitive significance. Firms not currently earning revenues in the relevant market, but that have committed to entering the market in the near future, are also considered market participants.

Firms that are not current producers in a relevant market, but that would very likely provide rapid supply responses with direct competitive impact in the event of a SSNIP, without incurring

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

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conditions of competition are reasonably similar. (See Section 4.3.D.4 for further discussion of cluster markets.)

Analogous considerations arise for a merger involving one or more buyers or employers. In this case, the analysis considers whether buyers target suppliers, for example by paying targeted suppliers or workers less, or by degrading the terms of supply contracts for targeted suppliers. Arbitrage would involve a targeted supplier selling to the buyer indirectly, through a different supplier who could obtain more favorable terms from the buyer.

If the HMT is applied in a setting where targeting of customers is feasible, it requires that a hypothetical profit-maximizing firm that was the only present or future seller of the relevant product(s) to customers in the targeted group would undertake at least a SSNIPT on some, though not necessarily all, customers in that group. The products sold to those customers form a relevant market if the hypothetical monopolist likely would undertake at least a SSNIPT despite the potential for customers to substitute away from the product or to take advantage of arbitrage. In this exercise, the terms of sale for products sold to all customers outside the region are held constant.

4.3.D.2. Geographic Markets

A relevant antitrust market is an area of effective competition, comprising both product (or service) and geographic elements. A market's geography depends on the limits that distance puts on some customers' willingness or ability to substitute to some products, or some suppliers' willingness or ability to serve some customers. Factors that may limit the geographic scope of the market include transportation costs, language, regulation, tariff and non-tariff trade barriers, custom and familiarity, reputation, and local service availability.

4.3.D.2.a. Geographic Markets Based on the Locations of Suppliers

The Agencies sometimes define geographic markets as regions encompassing a group of supplier locations. When they do, the geographic market's scope is determined by customers' willingness to switch between suppliers. Geographic markets of this type often apply when customers receive goods or services at suppliers' facilities, for example when customers buy in-person from retail stores. A single firm may offer the same product in a number of locations, both within a single geographic market or across geographic markets; customers' willingness to substitute between products may depend on the location of the supplier. When calculating market shares, sales made from supplier locations in the geographic market are included, regardless of whether the customer making the purchase travelled from outside the boundaries of the geographic market (see Section 4.4 for more detail about calculating market shares).

If the HMT is used to evaluate the geographic scope of the market, it requires that a hypothetical profit-maximizing firm that was the only present or future supplier of the relevant product(s) at supplier locations in the region likely would undertake at least a SSNIPT in at least one location. In this exercise, the terms of sale for products sold to all customers at facilities outside the region are typically held constant.[87]

[87] In some circumstances, as when the merging parties operate in multiple geographies, if applying the HMT, the Agencies may apply a "Hypothetical Cartel" framework for market definition, following the approach outlined in Section 4.3.A, n.81.

4.3.D.2.b. Geographic Markets Based on Targeting of Customers by Location

When targeting based on customer location is feasible (see Section 4.3.D.1), the Agencies may define geographic markets as a region encompassing a group of customers.[88] For example, geographic markets may sometimes be defined this way when suppliers deliver their products or services to customers' locations, or tailor terms of trade based on customers' locations. Competitors in the market are firms that sell to customers that are located in the specified region. Some suppliers may be located outside the boundaries of the geographic market, but their sales to customers located within the market are included when calculating market shares (see Section 4.4 for more detail about calculating market shares).

If prices are negotiated individually with customers that may be targeted, geographic markets may be as narrow as individual customers. Nonetheless, the Agencies often define a market for a cluster of customers located within a region if the conditions of competition are reasonably similar for these customers. (See Section 4.3.D.4 for further discussion of cluster markets.)

A firm's attempt to target customers in a particular area with worsened terms can sometimes be undermined if some customers in the region substitute by travelling outside it to purchase the product. Arbitrage by customers on a modest scale may be possible but sufficiently costly or limited that it would not deter or defeat a targeting strategy.[89]

If the HMT is used to evaluate market definition when customers may be targeted by location, it requires that a hypothetical profit-maximizing firm that was the only present or future seller of the relevant product(s) to customers in the region likely would undertake at least a SSNIPT on some, though not necessarily all, customers in that region. The products sold in that region form a relevant market if the hypothetical monopolist would undertake at least a SSNIPT despite the potential for customers to substitute away from the product or to locations outside the region. In this exercise, the terms of sale for products sold to all customers outside the region are held constant.[90]

4.3.D.3. Supplier Responses

Market definition focuses solely on demand substitution factors, that is, on customers' ability and willingness to substitute away from one product or location to another in response to a price increase or other worsening of terms. Supplier responses may be considered in the analysis of competition between firms (Guideline 2 and Section 4.2), entry and repositioning (Section 3.2), and in calculating market shares and concentration (Section 4.4).

4.3.D.4. Cluster Markets

A relevant antitrust market is generally a group of products that are substitutes for each other. However, when the competitive conditions for multiple relevant markets are reasonably similar, it may be appropriate to aggregate the products in these markets into a "cluster market" for analytic convenience, even though not all products in the cluster are substitutes for each other. For example, competing hospitals may each provide a wide range of acute health care services. Acute care for one health issue is not a substitute for acute care for a different health issue. Nevertheless, the Agencies may

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[88] For customers operating in multiple locations, only those customer locations within the targeted region are included in the market.

[89] Arbitrage by suppliers is a type of supplier response and is thus not considered in market definition. (See Section 4.3.D.3)

[90] In some circumstances, as when the merging parties operate in multiple geographies, the Agencies may apply a "Hypothetical Cartel" framework for market definition, as described in Section 4.3.A, n.81.

FTC V. SANFORD HEALTH
No. 1:17-CV-133, at 21-24 (D.N.D. Dec. 15, 2017),
***aff'd*, 926 F.3d 959 (8th Cir. June 13, 2019)**

Excepts on the Relevant Geographic Market[1]

ALICE R. SENECHAL, United States Magistrate Judge

[The FTC and the State of North Dakota filed a complaint alleging that the proposed acquisition by Sanford Health of Mid Dakota Clinic, P.C. would likely substantially lessen competition in four relevant medical service markets (adult primary care physician (PCP) services, pediatric services, OB/GYN services, and general surgery physician services) in the four-county Bismarck, ND Metropolitan Statistical Area. Sanford Health is an integrated healthcare system operating in North Dakota and several other states. In the Bismarck-Mandan region of North Dakota, Sanford operates an acute care hospital, eight primary care clinics, and several specialty clinics. MDC is a multispecialty for-profit physician group with nine clinics and one ambulatory surgery center in the region. Among other things, the complaint alleged that the proposed transaction would create by far the largest—and in one case, the only—group of physicians offering these services in Bismarck MSA.]

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FINDINGS OF FACT

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63. The geographic market definition considers "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." United States v. Phila. Nat'l Bank, 374 U.S. 321, 357 (1963).

64. The Merger Guidelines support use of the HMT to define a geographic market, and other courts have endorsed that approach. See Horizontal Merger Guidelines § 4.2; Advocate Health, 841 F.3d at 468-73. Dr. Town agreed that, if one were going to define a geographic market in this situation, use of the HMT—or SSNIP—test would be an appropriate method for doing so. (Tr-4, p. 112). It is appropriate to use the HMT to define the geographic market for this case.

65. The Bismarck-Mandan area includes the cities of Bismarck and Mandan and smaller communities within the surrounding 40 to 50 mile radius. The population of the Bismarck-Mandan area is approximately 130,000, with approximately 93,000 of those people living within either Bismarck or Mandan. The cities closest to Bismarck and Mandan (Minot, Dickinson, and Jamestown) are each between 90 and 110 miles away. Clinics within the Bismarck-Mandan area are almost all within an eight-mile radius of central Bismarck. (PX 3002, p. 2; PX 6000, pp. 55, 235).

66. Both MDC and Sanford Bismarck consider their primary geographic market to be the area encompassing the four counties that the plaintiffs include in their proposed

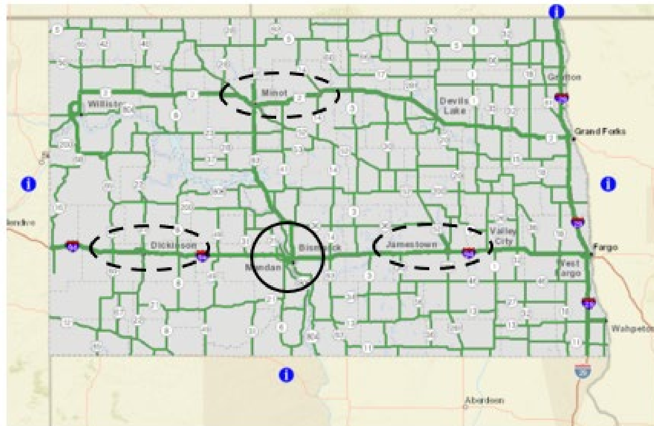
[1] Reported at 2017 WL 10810016, at *11. Footnotes omitted.

definition of the relevant market. (JX 0012, pp. 202-03; JX 0007, p. 31). Dr. Sacher's quantitative analysis confirms that patients residing within the Bismarck-Mandan area prefer to receive healthcare services within that area, (PX 6000, pp. 62, 64, 70, 155), and the defendants do not question that fact. A health insurance plan that did not include Bismarck-Mandan area adult PCP services, pediatrician services, OB/GYN physician services, and general surgeon services would not be marketable in the Bismarck-Mandan area. The relevant geographic market is the Bismarck-Mandan area—Burleigh, Morton, Oliver, and Sioux Counties.

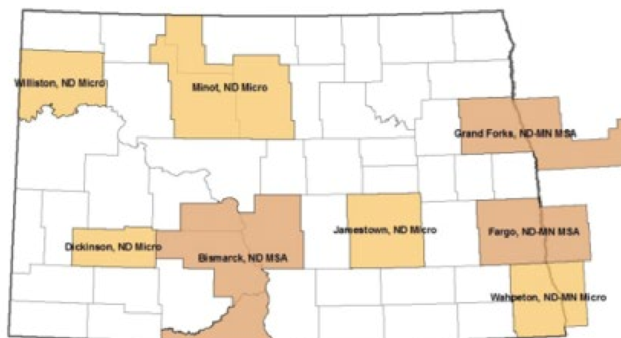
67. The plaintiffs established that commercial health insurers would accept a hypothetical monopolist's SSNIP rather than market a health insurance plan in the Bismarck-Mandan area that did not include Bismarck-Mandan area adult PCP services, pediatrician services, OB/GYN physician services, and general surgeon services.

68. The relevant market is adult PCP services, pediatrician services, OB/GYN physician services, and general surgeon services sold to or provided to commercial insurers and their members in the Bismarck-Mandan area.

North Dakota County Map



Metropolitan and Micropolitan Areas in North Dakota



FTC V. ADVOCATE HEALTH CARE NETWORK
841 F.3d 460, 464, 468-76 (7th Cir. 2016)
(excerpt on relevant geographic market[1])

DAVID F. HAMILTON, Circuit Judge

This horizontal merger case under the Clayton Act depends on proper definition of geographic markets for hospitals. Defendants Advocate Health Care Network and NorthShore University HealthSystem both operate hospital networks in Chicago's northern suburbs. They propose to merge. Section 7 of the Clayton Act forbids asset acquisitions that may lessen competition in any "section of the country." 15 U.S.C. § 18. The Federal Trade Commission and the State of Illinois sued in district court to enjoin the proposed Advocate-NorthShore merger while the Commission considers the issue through its ordinary but slower administrative process. *See* 15 U.S.C. § 53(b); 15 U.S.C. § 26; *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 260-61 (1972).

To obtain an injunction, plaintiffs had to demonstrate a likelihood of success on the merits. 15 U.S.C. § 53(b); 15 U.S.C. § 26; *West Allis Memorial Hospital, Inc. v. Bowen*, 852 F.2d 251, 253 (7th Cir. 1988). To show that the merger may lessen competition, the Commission and Illinois had to identify a relevant geographic market where anticompetitive effects of the merger would be felt. *See United States v. Philadelphia National Bank*, 374 U.S. 321, 357 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). Plaintiffs relied on a method called the hypothetical monopolist test. That test asks what would happen if a single firm became the sole seller in a proposed region. If such a firm could profitably raise prices above competitive levels, that region is a relevant geographic market. *In re Southeastern Milk Antitrust Litig.*, 739 F.3d 262, 277-78 (6th Cir. 2014). The Commission's expert economist, Dr. Steven Tenn, chose an eleven-hospital candidate region and determined that it passed the hypothetical monopolist test.

The district court denied the motion for preliminary injunction. *Federal Trade Comm'n v. Advocate Health Care*, No. 15 C 11473, 2016 WL 3387163 (N.D. Ill. June 20, 2016). It found that the plaintiffs had not demonstrated a likelihood of success because they had not shown a relevant geographic market. *Id*. at *5. The plaintiffs appealed, and the district court stayed the merger pending appeal. That stay remains in place.

Even with the deference we give a district court's findings of fact, the district court's geographic market finding here was clearly erroneous. The court treated Dr. Tenn's analysis as if its logic were circular, but the hypothetical monopolist test instead uses an iterative process, first proposing a region and then using available data to test the likely results of a price increase in that region. Also, the evidence was not equivocal on two points central to the commercial reality of hospital competition in this market:

[1] Most footnotes omitted.

most patients prefer to receive hospital care close to home, and insurers cannot market healthcare plans to employers with employees in Chicago's northern suburbs without including at least some of the merging hospitals in their networks. The district court rejected that evidence because of some patients' willingness to travel for hospital care. The court's analysis erred by overlooking the market power created by the remaining patients' preferences, something economists have called the "silent majority" fallacy.

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II. Relevant Antitrust Markets

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B. The Geographic Market

The dispute here is about the relevant geographic market. The relevant geographic market is "where . . . the effect of the merger on competition will be direct and immediate." *Philadelphia National Bank*, 374 U.S. at 357. It must include the "sellers or producers who have the . . . 'ability to deprive each other of significant levels of business.'" *Rebel Oil Co. v. Atlantic Richfield Co*., 51 F.3d 1421, 1434 (9th Cir. 1995), *quoting Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir. 1989). "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one." *Brown Shoe*, 370 U.S. at 336. The market must "'correspond to the commercial realities' of the industry." *Id*., *quoting American Crystal Sugar Co. v. Cuban-American Sugar Co*., 152 F. Supp. 387, 398 (S.D.N.Y. 1957); *see also 42nd Parallel North v. E Street Denim Co*., 286 F.3d 401, 406 (7th Cir. 2002) (evaluating geographic market with "sensible awareness of commercial reality").

1. Geographic Markets in General

Since at least 1982, the Commission has used the "hypothetical monopolist test" to identify relevant geographic markets. Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 Antitrust L.J. 253, 253 (2003). That test asks what would happen if a single firm became the only seller in a candidate geographic region. *Federal Trade Comm'n v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1038 (D.C. Cir. 2008). If that hypothetical monopolist could profitably raise prices above competitive levels, the region is a relevant geographic market. Kenneth G. Elzinga & Anthony W. Swisher, *Limits of the Elzinga-Hogarty Test in Hospital Mergers: The Evanston Case*, 18 Int'l J. of Economics of Business 133, 136 (2011). But if customers would defeat the attempted price increase by buying from outside the region, it is not a relevant market; the test should be rerun using a larger candidate region. *Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health System, Ltd.*, 778 F.3d 775, 784 (9th Cir. 2015); *In re Southeastern Milk Antitrust Litig.*, 739 F.3d 262, 277-78 (6th Cir. 2014). This process is iterative, meaning it should be repeated with ever-larger candidates until it identifies a relevant geographic market. *Southeastern Milk*, 739 F.3d at 278.

That market can be as large as the globe, if for example the buyers and sellers are sophisticated merchants and transportation costs and other barriers are low. *See United States v. Eastman Kodak Co.*, 63 F.3d 95, 98, 104 (2d Cir. 1995) (using worldwide

market for photographic film); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 50 n.7 (D.D.C. 2011) (describing stipulated worldwide geographic market in tax preparation software provided on the Internet); *see also Brown Shoe*, 370 U.S. at 337, 82 S.Ct. 1502 ("[A]lthough the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area.").

Retail markets, on the other hand, are often small, especially when customers are motivated by convenience. *Philadelphia National Bank*, 374 U.S. at 358 ("In banking, as in most service industries, convenience of location is essential to effective competition. Individuals and corporations . . . find it impractical to conduct their banking business at a distance. The factor of inconvenience localizes banking competition. . . .") (footnote and citation omitted). (Still, there are limits. *See 42nd Parallel North*, 286 F.3d at 406 (rejecting as "absurdly small" a proposed market for retail designer jeans and t-shirts comprising only the "central business district" of Highland Park, Illinois).)

The hypothetical monopolist test focuses on "the area of effective competition" between firms. *See E. I. du Pont*, 353 U.S. at 593 (emphasis added), *quoting Standard Oil Co. of California v. United States*, 337 U.S. 293, 299 n.5 (1949). A geographic market does not need to include all of the firm's competitors; it needs to include the competitors that would "substantially constrain [the firm's] price-increasing ability." *AD/SAT, a Division of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 228 (2d Cir. 1999) (citation omitted); *Rebel Oil* Co. [*v. Altantic Richfield Co.*], 51 F.3d [1421] at 1434 [((9th Cir. 1995))] ("[A] 'market' is the group of sellers or producers who have the 'actual or potential ability to deprive each other of significant levels of business.'") (citation omitted).

An alternative approach to relevant geographic markets is the Elzinga-Hogarty test. *See* Elzinga & Swisher, *supra*, 18 Int'l J. of Economics of Business at 136 (comparing Elzinga-Hogarty test and the hypothetical monopolist test). Devised in the 1970s from studies of coal and beer markets, the test uses product or customer movement to define geographic markets. Cory S. Capps, *From Rockford to Joplin and Back Again: The Impact of Economics on Hospital Merger Enforcement*, 59 Antitrust Bull. 443, 450 (2014); Kenneth G. Elzinga & Thomas F. Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 Antitrust Bull. 45, 73-74 (1973); Cory S. Capps et al., *The Silent Majority Fallacy of the Elzinga-Hogarty Criteria: A Critique and New Approach to Analyzing Hospital Mergers* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 8216, 2001). A geographic market passes the Elzinga-Hogarty test if few customers enter or leave the area. Elzinga & Hogarty, *supra*, 18 Antitrust Bull. at 73-74.

Put more formally, a market passes the Elzinga-Hogarty test if both: (1) a high level of sales (usually 75 or 90 percent) is to buyers located in the market; and (2) a similarly high percentage of buyers located in the market buys within it. *Id*.; Kenneth G. Elzinga & Thomas F. Hogarty, *The Problem of Geographic Market Delineation Revisited: The Case of Coal*, 23 Antitrust Bull. 1, 2 (1978); *Federal Trade Comm'n v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1292 (W.D. Mich. 1996), *aff'd mem*., 121 F.3d 708

(6th Cir. 1997). The test treats pre-merger customer movement as a proxy for likely post-merger changes in customer movement. Elzinga & Swisher, *supra*, Int'l J. of Economics of Business at 136. It assumes that if some customers currently buy from firms outside the area, others would also switch to avoid a price increase within the area. *Id*. at 136-37. That assumption holds, however, only if the customers who currently buy from firms outside the area are similar to those who do not. Capps et al., *supra*, at 1.

2. Geographic Markets for Hospitals

Markets for hospital services have three notable features. First, because most patients prefer to go to nearby hospitals, there are often only a few hospitals in a geographic market. *See United States v. Rockford Memorial Corp*., 898 F.2d 1278, 1284-85 (7th Cir. 1990) (approving six-hospital market in part because "for the most part hospital services are local"); *Evanston Northwestern Healthcare Corp.*, F.T.C. No. 9315, 2007 WL 2286195, at *2, *66 (Aug. 6, 2007) (finding that three merged hospitals used market power to increase prices); Steven Tenn, *The Price Effects of Hospital Mergers: A Case Study of the Sutter-Summit Transaction*, 18 Int'l J. of Economics of Business 65, 66, 79 (2011) (plaintiffs' expert showing a possibly anticompetitive price increase following a two-hospital merger); *Saint Alphonsus*, 778 F.3d at 781, 784 (geographic market included primary care physician services in Nampa, Idaho, without extending to Boise, 20 miles away); Capps et al., *supra*, at 11 (explaining that its analysis "implies that the average patient is highly averse to travel"); *cf. Philadelphia National Bank*, 374 U.S. at 358 ("The factor of inconvenience localizes [retail] banking competition as effectively as high transportation costs in other industries."). This case's record reflects that preference: in the Commission's proposed market, 80 percent of patients drove to the hospital of their choice in 20 minutes or less.

Second, patients vary in their hospital preferences. Getting an appendectomy is not like buying a beer; one Pabst Blue Ribbon or Hoegaarden may be as good as another, no matter where they are bought. For surgery patients, who their surgeon will be matters, the hospital's reputation matters, and the hospital's location matters. Different patients value these and other factors differently. Capps et al., *supra*, at 12 ("The high degree of heterogeneity in the taste for hospital attributes and in willingness to travel highlights the key point that hospitals offer a differentiated product to a segmented market."). For example, some patients will be willing to travel to see a particular specialist. *See* Elzinga & Swisher, *supra*, 18 Int'l J. of Economics of Business at 137-38 (giving a similar example). Others will not. That means that, as Dr. Elzinga himself has explained, the Elzinga-Hogarty test will often overestimate the size of hospital markets. *Id*. at 137.2 The test assumes that if some patients presently travel for care, more would do so to avoid a price increase, making an increase unprofitable. *Id*. But in fact, often a "silent majority" of patients will not travel, enabling anticompetitive price increases. *Id*. The economic literature began describing this problem—termed the "silent majority fallacy"—as early as 2001. Capps *et al*., *supra*, at 1.

Finally, consumers do not directly pay the full cost of hospital care. Instead, insurance companies cover most hospital costs. Elzinga & Swisher, *supra*, at 138.

Insurance thus splits hospital competition into two stages: one in which hospitals compete to be included in insurers' networks, and a second in which hospitals compete to attract patients. *Saint Alphonsus*, 778 F.3d at 784 & n.10; [Gregory]Vistnes, [*Mergers, and Two-Stage Competition*,] *supra*, 67 Antitrust L. J. [671] at 672 [(2000)]. Insured patients are usually not sensitive to retail hospital prices, while insurers respond to both prices and patient preferences. *Id*. at 677, 680 (explaining that the credibility of an insurer's threat to drop a hospital from its network depends on the importance of the hospital to the plan's enrollees); Capps, *supra*, 59 Antitrust Bull. at 454-55 (observing that under most health insurance designs, the patient's and the physician's incentive to consider price is "either very small or nil"); [*FTC v.*] *Penn State Hershey*, 838 F.3d [327] at 341 [(3d Cir. 2016)] (explaining that insurers "feel the impact of price increases" and that patient behavior "affects the relative bargaining positions of insurers and hospitals as they negotiate rates").

The geographic market question is therefore most directly about "the 'likely response of insurers,'" not patients, to a price increase. *Saint Alphonsus*, 778 F.3d at 784, *quoting Saint Alphonsus Medical Center-Nampa, Inc. v. Saint Luke's Health System, Ltd*., 2014 WL 407446, at *7 (D. Idaho Jan. 24, 2014). This complication is sometimes termed the "payer problem." Elzinga & Swisher, *supra*, 18 Int'l J. of Economics of Business at 138.

The Commission and the judiciary have responded to the academy's evolving understanding of hospital markets. In the 1990s, they relied heavily on the Elzinga-Hogarty test. *See*, *e.g.*, *United States v. Mercy Health Services*, 902 F. Supp. 968, 977 (N.D. Iowa 1995) (noting government's reliance on Elzinga-Hogarty), *vacated*, 107 F.3d 632 (8th Cir. 1997); *Rockford Memorial*, 898 F.2d at 1284-85 (approving a hospital geographic market defined by where the defendants' patients came from); *see also* Capps, *supra*, 59 Antitrust Bull. at 455 ("courts in the 1990s relied heavily on analyses of patient inflows and outflows"). The Eighth Circuit briefly resisted that trend. In *Freeman Hospital*, the court rejected the Commission's proposed geographic market, which relied on the Elzinga-Hogarty test. 69 F.3d at 264-65, 268. The Commission's evidence, it reasoned, did not address the "crucial question," which was not where customers currently go but where they "could practicably go" in response to a price increase. *Id*. at 270-71. Four years later, the Eighth Circuit embraced the test, rejecting another Commission-proposed market in part because "over twenty-two percent of people . . . already use hospitals outside the . . . proposed market." [*FTC v.*] *Tenet Health Care* [*Corp*.], 186 F.3d [1045] at 1053 [(8th Cir. 1999)].

That reliance produced relatively large geographic markets in hospital merger cases. The Commission's proposed market in *Freeman Hospital*, for example, covered a 27-mile radius around Joplin, Missouri. [*FTC v. Freeman Hosp.*,] 69 F.3d [260] at 268 [(8th Cir. 1995)]. In *Butterworth Health*, 946 F. Supp. at 1291, the Commission proposed a market covering Grand Rapids, Michigan and the 30 miles surrounding that city. *Tenet Health* rejected as too narrow a market 100 miles across in Missouri. 186 F.3d at 1052-53. And *Mercy Health* relied on patient movement to argue that hospitals 70 to 100 miles away from the defendant hospitals were viable competitors. 902 F. Supp. at 971-72, 979-80. By way of comparison, in this case, 80 percent of

patients in NorthShore's service area drive 20 minutes or less (and 15 miles or less) to reach their hospital of choice.

As economists have identified the limits of the Elzinga-Hogarty test, courts and the Commission have begun to adjust their approaches to the problem. In *Evanston Northwestern*, the Commission heard testimony from Dr. Elzinga about those limits and concluded that patient movement was at best "one potentially very rough benchmark," to be used "in the context of evaluating other types of evidence." 2007 WL 2286195, at *66; *see also Penn State Hershey*, 838 F.3d at 338-40 (reversing denial of preliminary injunction, in part because district court relied on elements of Elzinga-Hogarty test).

That adjustment is necessary. If the analysis uses geographic markets that are too large, consumers will be harmed because the likely anticompetitive effects of hospital mergers will be understated. *Penn State Hershey*, 838 F.3d at 339 ("empirical research demonstrated that utilizing patient flow data to determine the relevant geographic market resulted in overbroad markets with respect to hospitals"); *Evanston Northwestern*, 2007 WL 2286195, at *65-66 (finding persuasive Dr. Elzinga's testimony that "application of the [Elzinga-Hogarty] test to patient flow data would identify overly broad geographic markets"); *see also* Cory Capps & David Dranove, *Hospital Consolidation and Negotiated PPO Prices*, 23 Health Affairs 175, 179 (2004) ("most consolidating hospitals raise prices by more than the median price increase in their markets"); Leemore S. Dafny, *Estimation and Identification of Merger Effects: An Application to Hospital Mergers* 26 (Nat'l Bureau of Econ. Research, Working Paper No. 11673, 2005) ("there is conclusive evidence that mergers of independent hospitals can lead to large increases in area prices"); Martin Gaynor & Robert Town, *The Impact of Hospital Consolidation—Update, Technical Report* (Robert Wood Johnson Foundation/The Synthesis Project, Princeton, N.J.), June 2012, at 2 ("Hospital mergers in concentrated markets generally lead to significant price increases.").

For example, in 2001 the Northern District of California refused to enjoin a hospital merger, relying in part on patient movement data. *California v. Sutter Health System*, 130 F. Supp. 2d 1109, 1131-32, 1137 (N.D. Cal. 2001). In 2011, a follow-up study found that the cheaper of the two hospitals raised its prices by 29 to 72 percent, much more than a control group had. Tenn, *supra*, 18 Int'l J. of Economics of Business at 75-76. Other merger case studies produced similar results. See Aileen Thompson, *The Effect of Hospital Mergers on Inpatient Prices: A Case Study of the New Hanover-Cape Fear Transaction*, 18 Int'l J. of Economics of Business 91, 99 (2001) (finding that, following a hospital merger, two insurers experienced substantial price increases, one a large decrease, and one a normal price change); Michael G. Vita & Seth Sacher, *The Competitive Effects of Not-For-Profit Hospital Mergers: A Case Study*, 49 J. of Industrial Economics 63, 65, 82 (2001) (finding that after a merger, both the merged entity and its remaining competitor raised prices).

NorthShore's own history makes the point. NorthShore was created in 2000 by a smaller merger between Evanston Northwestern Healthcare Corporation and Highland Park Hospital, involving just three hospitals. *Evanston Northwestern*, 2007 WL 2286195, at *2; *see also Messner v. Northshore University HealthSystem*, 669 F.3d

802, 809 (7th Cir. 2012). Four years later, the Federal Trade Commission challenged the merger alleging a violation of Section 7. NorthShore "substantially and immediately raised its prices after the merger." *Evanston Northwestern*, 2007 WL 2286195, at *53. NorthShore's own expert found price increases of nine to ten percent above price increases of a control group of hospitals. *Id*. at *21, *54. After a hearing before an administrative law judge and an appeal to the Commission, the Commission found that the merger violated the Clayton Act. *Id*. at *4, *76.

III. Analysis

We review the district court's decision in this case in light of this history. As noted, we review the court's legal determinations de novo, its factual findings for clear error, and its ultimate decision for abuse of discretion. *Penn State Hershey*, 838 F.3d at 334; *Abbott Laboratories*, 971 F.2d at 12-13. We find that the district court made clear factual errors. Its central error was its misunderstanding of the hypothetical monopolist test: it overlooked the test's results and mistook the test's iterations for logical circularity. Even if the court's focus on the candidate market had been correct, its criticisms were mistaken in three ways. It incorrectly found that Dr. Tenn lacked a basis for distinguishing local hospitals from academic medical centers. It erroneously determined that the evidence about patient preferences for local hospitals was "equivocal." Finally, its analysis fell prey to a version of the silent majority fallacy.

A. The Hypothetical Monopolist Test

As explained above, the hypothetical monopolist test is an iterative analysis. The analyst proposes a candidate market, simulates a monopolization of that market, then adjusts the candidate market and reruns the simulation as necessary. The district court criticized Dr. Tenn's candidate market but did not mention his results. The court did not explain why it thought that a narrow candidate market would produce incorrect results. Nor do the hospitals. We have not found support for that assumption. The economic literature explains that if a candidate market is too narrow, the test will show as much, and further iterations will broaden the market until it is big enough. *See* Elzinga & Swisher, *supra*, 18 Int'l J. of Economics of Business at 136.

The district court seems to have mistaken those iterations for circularity. It criticized Dr. Tenn's candidate market for "assum[ing] the answer" to the market definition question. *Advocate Health Care*, 2016 WL 3387163, at *4-5. But in fact, the candidate market offers a hypothetical answer to that question; the hypothetical monopolist analysis then tests the hypothesis and adjusts the market definition if the results require it. That is not circular reasoning.

B. Academic Medical Centers

When Dr. Tenn proposed a candidate market, he excluded what he called "destination hospitals," which are hospitals—primarily academic medical centers—that attract patients at long distances from throughout the Chicago metropolitan area. The district court criticized that classification, saying it had no "economic basis." *Advocate Health Care*, 2016 WL 3387163, at *4. The record belies that assessment: the witnesses consistently used the term "academic medical center" and recognized that demand for those few hospitals differs from demand for general acute care

hospitals like these parties' hospitals, which draw patients from much smaller geographic areas.

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C. Patient Preference for Local Hospitals

Before Dr. Tenn chose a candidate market, he determined that patients generally choose hospitals close to their homes. The district court called the evidence on that point "equivocal," citing testimony that workplace locations and outpatient relationships also influence patient choices. *Advocate Health Care*, 2016 WL 3387163, at *4. But most of the cited testimony addressed medical care broadly, not inpatient acute care specifically. For instance, one insurance executive testified that Chicago area consumers use "services" close to both their homes and their workplaces. Similarly, another witness explained that employees choose providers based on where they live, work, and have relationships with doctors, but that witness was speaking about "people . . . consuming benefits" generally, not about hospital choice in particular.

When it came to hospital care, the evidence was not equivocal on Dr. Tenn's central point. As one insurance executive put it: "Typically [patients] seek [hospital] care in their own communities." The evidence on that point is strong, not equivocal. For example, 73 percent of patients living in plaintiffs' proposed market receive hospital care there. Eighty percent of those patients drive less than 20 minutes or 15 miles to their chosen hospital. Ninety-five percent of those patients drive 30 miles or less—the north-to-south length of plaintiffs' proposed market—to reach a hospital. That evidence that many patients care about convenience is consistent with what we said in Rockford Memorial: "for the most part hospital services are local." 898 F.2d at 1285. That is consistent with retail markets generally, at least where the seller (hospital) and buyer (patient) must come face to face. *See Philadelphia National Bank*, 374 U.S. at 358, 83 S.Ct. 1715.

D. The Silent Majority Fallacy

The insurance executives were unanimous on a second point: in the North Shore Area, an insurer's network must include either Advocate or NorthShore to offer a product marketable to employers. The record as a whole supports that testimony. There is no evidence that a network has succeeded with employers without one or the other of the merging parties in its network. (One company offers a network in the Chicago area without either of the merging parties, but that network's membership is overwhelmingly individuals rather than employers. And fewer than two percent of those individual members live near NorthShore's hospitals.) *Cf. Penn State Hershey*, 838 F.3d at 342 (noting that antitrust defendant in theory "may be able to demonstrate that enough patients would buy a health plan . . . with no in-network hospital in the proposed geographic market," but not when an insurer that tried it "lost half of its membership").

The district court discounted that testimony, citing Dr. Tenn's diversion ratios, although it did not explain what it inferred from the ratios. *Advocate Health Care*, 2016 WL 3387163, at *4 n.4. We assume the court was referring to two of their features: the

proportion (52 percent) of patients who, if their first choice hospital were unavailable, would seek care outside the proposed market, and the proportion (7.2-29.2 percent) of patients who, if their first choice hospital were unavailable, would divert to Northwestern Memorial Hospital, an academic medical center outside Dr. Tenn's proposed market.

If patients were the relevant buyers in this market, those numbers would be more compelling since diversion ratios indicate which hospitals patients consider substitutes. But as we have explained, insurers are the most relevant buyers. Insurers must consider both whether employers would offer their plans and whether employees would sign up for them. "[E]mployers generally try to provide all of their employees at least one attractive option," and may not offer even a broadly appealing plan if it lacks services in a particular region. Vistnes, *supra*, 67 Antitrust L.J. at 678. As a result, measures of patient substitution like diversion ratios do not translate neatly into options for insurers. The district court erred in assuming they did.

The hospitals correctly point out that, strictly speaking, that reasoning is not the same as the silent majority fallacy. The silent majority fallacy treats present travel as a proxy for post-merger travel, while diversion ratios predict likely post-merger travel more directly. But the district court's reasoning and the silent majority fallacy share a critical flaw: they focus on the patients who leave a proposed market instead of on hospitals' market power over the patients who remain, which means that the hospitals have market power over the insurers who need them to offer commercially viable products to customers who are reluctant to travel farther for general acute hospital care.

That flaw runs through the district court's decision. The court focused on identifying hospitals that compete with those in the Commission's proposed market. But the relevant geographic market does not include every competitor. It is the "area of effective competition," *E. I. du Pont*, 353 U.S. at 593 (emphasis added) (citation omitted), the place where the "effect of the merger on competition will be direct and immediate," *Philadelphia National Bank*, 374 U.S. at 357. It includes the competitors that discipline the merging hospitals' prices. *AD/SAT*, 181 F.3d at 228; *Rebel Oil*, 51 F.3d at 1434. The geographic market question asks in essence, how many hospitals can insurers convince most customers to drive past to save a few percent on their health insurance premiums? We should not be surprised if that number is very small. Plaintiffs have made a strong case that it is.

We REVERSE the district court's denial of a preliminary injunction and REMAND for further proceedings consistent with this opinion. The merger shall remain enjoined pending the district court's reconsideration of the preliminary injunction motion.

FTC v. TRONOX LTD.,
332 F. Supp. 3d 187, 193-94, 202-07 (D.D.C. 2018)
(excerpt on relevant geographic market[1])

TREVOR N. MCFADDEN, U.S.D.J.,

Last year, two of the world's largest titanium dioxide ("TiO2") producers announced their intent to merge. Tronox Limited agreed to acquire the National Titanium Dioxide Company's TiO2 business, known as "Cristal," for $1.67 billion in cash and a 24% equity stake in the combined firm. Believing that the acquisition would likely violate federal antitrust laws, the Federal Trade Commission issued an administrative complaint challenging the deal.

TiO2 is a pigment used to add whiteness, brightness, and opacity to products like paints, plastics, and paper. It is manufactured by subjecting raw titanium ores to either a chloride or a sulfate production process. Chloride-process TiO2 comprises nearly all the pigment sold in the United States and Canada. The FTC believes that the Tronox-Cristal merger will significantly reduce competition for chloride TiO2 in these two countries, a combined market referred to herein and by the parties as "North America."

Following discovery and briefing by the parties, the FTC's Administrative Law Judge ("ALJ") held a month-long trial to determine the legality of the proposed transaction. The trial recently concluded, and the ALJ will soon issue an initial decision. That ruling is reviewable by the FTC's Commissioners, and a federal appeals court may in turn review the agency's final decision.

The transaction has now received conditional or final approval from the FTC's counterparts in the European Union, China, Saudi Arabia, and elsewhere. The Commission therefore seeks a preliminary injunction under Section 13(b) of the Federal Trade Commission Act to prevent Tronox and Cristal from consummating the merger until the agency's review process and any later judicial proceedings have concluded.

The Court finds that the FTC has met its burden under Section 13(b). It has shown a likelihood that the proposed transaction will substantially lessen competition for chloride-process TiO2 in North America, and it has shown that issuing a preliminary injunction is in the public interest. The Court will therefore grant the Commission's motion for preliminary injunctive relief.

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[1] Record citations and most footnotes omitted.

III. ANALYSIS

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2. "North America" is the Relevant Geographic Market

a. Industry Participants Believe that Distinct Regional Markets Exist

Like the product market, the relevant geographic market must "correspond to the commercial realities of the industry and be economically significant." *Brown Shoe Co.*, 370 U.S. at 336. It encompasses the "area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition." *F.T.C. v. Cardinal Health, Inc.*, 12 F.Supp.2d 34, 49 (D.D.C. 1998). Recall that in defining a market for antitrust purposes, the narrowest market principle applies. While the Defendants believe that the relevant market is global, the Commission contends that it should be limited to the United States and Canada.

Here too, the statements of titanium dioxide suppliers are instructive. On a 2014 earnings call, then-Tronox CEO Tom Casey asked, "are there different prices in the regional markets in which we do business? The answer to that question is yes. The European and Asian market prices and the Latin American market prices are relatively closely bunched, with the North American price being somewhat higher." On another earnings call in 2016, Mr. Casey expressed Tronox's view "that prices in Europe and in Asia were lower than prices in the United States and in other North American – the other North American markets." Ian Mouland, Tronox's vice president of sales for the Americas, suggested in an internal email that a customer "need[s] to stop being concerned about regional price differences and accept that regions are different . . . unless he is telling you that [he] sell[s] a can of paint in Mexico for the same price as in Germany?!" Tronox acknowledged that TiO2 pricing "depends upon the region . . . [redacted]."

Like Tronox, the other major producers segment their customers by location. Kronos has "a European region . . . [a]nd then we have North America, which represents the United States and Canada. And then we have [LatAm], which is Latin America, Central America, the Caribbean, and South America. And then the export market, which is for us rest of world." [redacted] "separates customer locations into five different regions: North America (United States and Canada); Europe, the Middle East, and Africa; Asia-Pacific excluding China; China; and Latin America (including Mexico)." [redacted] explained that "customers in the North American region generally have different requirements than in other regions."

Titanium dioxide customers also acknowledge the existence of a distinct North American TiO2 markets. Sherwin-Williams paints "have different pallets in different regions of the world," and customer demands require that the company has "different performance standards around the world as well." The firm has thus found that "sulfate has not been suitable for our formulations in North America [but in] other regions of the world with different quality standards, there has [sic] been levels of suitability." Dr. Malichky testified that "[i]n PPG jargon, we would call [the North American market] USCA, U.S. and Canada, and Mexico is different. The suppliers consider Mexico different, as well." He added that, for the North American market, "[t]he vast majority [of TiO2 PPG uses] is chloride," but that "in Europe, we use more sulfate."

b. Quantitative Evidence and the Hypothetical Monopolist Test Further Support Treating North America as a Separate Market

The available quantitative evidence also supports the existence of regional TiO2 markets. In a single, global market, sustained regional price variances are unlikely, as customers would engage in arbitrage—like importing TiO2 or purchasing it indirectly from other customers—that equalizes prices over time. *See* U.S. Dep't of Justice & F.T.C. Horizontal Merger Guidelines § 4.2.2 (2010) ("Merger Guidelines"). But by evaluating data from Tronox and Cristal, Dr. [Nicholas] Hill showed that, from 2012 to 2017, the average difference in TiO2 prices between North America and the rest of the world ranged from $250−$525 per metric ton.

A recent TiO2 supply restriction in Europe provides more proof of regionalized markets. In January 2017, a fire at a large TiO2 plant in Pori, Finland, decreased the available titanium dioxide in Europe and caused a rapid and significant price increase. Producer invoice data suggest that, before the fire, North American TiO2 prices were roughly $200−$250 per metric ton higher than European prices. After the fire, however, European prices significantly exceeded those in North America. From January to October 2017, Cristal's and Tronox's European prices each rose by [redacted] (compared to [redacted] and [redacted] increases in North America respectively). The Pori fire thus shows a dramatic relative increase in European prices not "disciplined by customer arbitrage."

Dr. Hill also conducted several iterations of the "hypothetical monopolist test" to prove that the relevant market consists of North American sales of chloride-process TiO2. The test seeks to determine whether a hypothetical company that is the only seller of the relevant product to customers in the relevant geography could profitably impose a "small but significant and non-transitory increase in price" ("SSNIP"). *See* Merger Guidelines §§ 4.1.1; 4.2.2. If this hypothetical monopolist can profit from imposing a SSNIP without losing a critical mass of customers, then a relevant antitrust market has been defined. If, on the other hand, customers can defeat the price increase "by substitution away from the relevant product or by arbitrage," the market definition must be broadened. *See also Sysco*, 113 F.Supp.3d at 33-34.

To run the test, Dr. Hill conducted a "critical loss analysis." He began by calculating the "critical loss," which is the percentage of "lost unit sales that would leave profits unchanged" if a hypothetical monopolist imposed a SSNIP. Merger Guidelines § 4.1.3. Dr. Hill determined that, with an SSNIP of 10%, a hypothetical monopolist could lose up to 15.4% of its sales and still break even. The critical loss threshold is thus 15.4%.

Next, Dr. Hill estimated the "predicted loss" that would be observed in the event of a SSNIP of 10%. If the predicted loss is less than the critical loss, imposing a SSNIP would be profitable for the hypothetical monopolist, and the relevant antitrust market has been correctly defined. Dr. Hill used three methods to calculate the predicted loss: the "price elasticity of demand" method, a "substitution components" method, and a "documentary evidence" method. Each showed that a hypothetical monopolist could profitably raise North American chloride TiO2 prices by 10%.

Price elasticity of demand measures the responsiveness of a product's sales to a 1% change in the product's price. Demand for a product is "elastic" if a 1% price increase decreases demand by more than 1%. It is "inelastic" if a 1% price increase decreases demand by less than 1%. The more inelastic a product's demand, the less likely it is that the product has adequate substitutes. Dr. Hill found that the price elasticity of North American chloride TiO2 is -0.45% (i.e., a 1% increase in price reduces sales by 0.45%). He multiplied this number and a 10% SSNIP to show that the predicted loss of sales, 4.5%, would be considerably lower than the critical loss of 15.4%. In other words, estimates of price elasticity show that a hypothetical monopolist could profitably increase North American chloride TiO2 prices by 10%.

Dr. Hill's "substitution components method" used the Defendants' data to estimate the expected increase of TiO2 imports in response to a 10% SSNIP. The TiO2 that firms acquire from imports or from other producers repatriating their exports represents lost sales for a hypothetical monopolist. Dr. Hill found that a 10% SSNIP would lead to roughly 75,000 more metric tons of TiO2 being imported or repatriated, and another 3% decrease in the monopolist's sales of rutile TiO2. Together, this represents roughly 12.6% of total North American chloride TiO2 sales. As a 12.6% loss is lower than the critical loss threshold of 15.4%, the substitution components method predicts that the hypothetical monopolist could profitably raise prices.

Finally, Dr. Hill used data from Tronox documents. At some future point, Tronox contends, "Chinese sulfate could take up to 15 percent of [all TiO2] applications" in North America, thus "reducing the share of chloride titanium dioxide by at most five percent." Dr. Hill assumed that such sulfate substitution would occur in response to a 10% SSNIP. He and calculated that the resulting loss of sales to the hypothetical monopolist would be about 8.7%, which again is lower than the critical loss threshold. Based on these calculations and his other analyses, Dr. Hill concluded that the relevant market for evaluating the merger's potential anticompetitive effects consists of North American chloride TiO2 sales.

c. The Defendants Define the Market Too Broadly

The Defendants argue that the Commission's geographic market definition is impermissibly narrow, and they challenge many of Dr. Hill's calculations. The FTC's "claim that the relevant geographic market is limited to North America," they contend, "ignores that TiO2 is a globally-traded commodity." If Dr. Hill's hypothetical monopolist "were to attempt to implement a SSNIP post-merger, the significant volume of TiO2 'on the water' that would be diverted to North America . . . would exceed the critical loss . . . within the FTC's candidate market." This is because global trade in TiO2 is "highly elastic.".

True, global trade flows of TiO2 are substantial. In 2016, 46% of the chloride TiO2 produced in North America was exported. The largest producers of the chloride pigment in North America—Chemours, Tronox, and Cristal—are also its largest exporters. Upon a price increase in North America, these producers could conceivably repatriate some of this exported TiO2 to increase their profit margins.

The Commission, however, provided plausible explanations for why sizeable repatriation of titanium dioxide would not occur. First, there has been no evidence of this behavior in the past. As mentioned earlier, Dr. Hill's analysis suggests a persistent variance in prices between North America and other regions. Regional price differences show that profiting from export repatriation is possible. But the persistence of these differences shows that nontrivial repatriation does not happen in practice.

One offered reason is that, in the TiO2 industry, "customer relationships" and "security of supply" are essential. TiO2 producers have large customers in export markets, and "alienating a customer base" could result in the long-term loss of business. As revenues depend on both sales volume and product price, "making a large change invoking the ire of your customers for a short period is probably not worth it." *See also* PX8005-004 (Venator explaining that "[o]ur European business is stable, and our primary focus is on serving the established relationships we have built over time with large customers in Europe. Given the cost of shipping and duties, we are generally better off selling in Europe than exporting to North America. We have not seen a sustained gap between North American prices and European prices large enough over a long enough period that it would make sense for us to export more to North America.").

The North American preference for slurry rather than dry TiO2 presents another reason to question the extent to which export repatriation might defeat a price hike imposed by the hypothetical monopolist. The "North American market is almost exclusively slurry," and customers in this region have "some of the most strict" quality of product and service demands. While all titanium dioxide trading is subject to logistical challenges, import duties, and shipping costs, slurry TiO2 requires at least some additional capital expenditure (such as physical locations at which the dry TiO2 is mixed with an aqueous solution and repackaged). These costs may make export repatriation even more unlikely absent a large and sustained regional price disparity. Together, the persistence of regionalized pricing, the lack of evidence of prior export repatriation, the incentives for maintaining customer relationships and supply security, and the domestic preference for slurry raise significant questions about whether customers could import enough TiO2 to offset a SSNIP.

Aside from ignoring global trade flows, the Defendants contend that the Commission's market definition is wrong because of the "flawed method with which" Dr. Hill implemented the hypothetical monopolist test. According to them, Dr. Hill wrongly "gives the hypothetical monopolist control over supply both inside and outside his hypothesized relevant market." This modeling decision means that "customers in North America could not get additional supply" from plants and producers in Europe or other regions.

But an assumption that North American customers will not be able to secure meaningful increases in TiO2 from foreign sources appears to comport with the industry's economic realities as described above. Moreover, the Merger Guidelines suggest that "[w]hen the hypothetical monopolist could discriminate based on customer location, [the Commission] may define geographic markets based on the locations of targeted customers . . . . Geographic markets of this type encompass the

region into which sales are made." Merger Guidelines § 4.2.2. Persistent regional pricing shows that TiO2 producers can discriminate based on customers' locations. And, as Dr. Shehadeh testified, the Merger Guidelines are "an excellent summary of a very broad set of tools that are used by economists" to engage in antitrust analysis. They have also been repeatedly relied on by the courts. *See, e.g.*, *Sysco*, 113 F.Supp.3d at 38 ("The Merger Guidelines are not binding, but the Court of Appeals and other courts have looked to them for guidance in previous merger cases.") (citing *Heinz*, 246 F.3d at 716; *H&R Block*, 833 F.Supp.2d at 52 n. 10). Thus, Dr. Hill's modeling assumptions seem reasonable given the nature of the TiO2 industry.

In summary, though the TiO2 market is characterized by considerable global trade, the Commission has credibly suggested that North American customers could not overcome a 10% SSNIP by increasing imports from foreign sources. It has also shown that customers cannot substitute away from chloride by using sulfate TiO2 in their coatings, paints, and plastics. The Court finds that the FTC has carried its burden, and that the market for chloride-process TiO2 in North America is the relevant market in which to assess the potential anticompetitive effects of Tronox's acquisition of Cristal.

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IV. CONCLUSION

The Commission has successfully shown that, in evaluating the proposed merger between Tronox and Cristal, the relevant antitrust market comprises sales of chloride-process titanium dioxide in the United States and Canada. It has raised serious, substantial, and difficult questions about the merger's possible anticompetitive effects. It has presented credible evidence that the merger will create a highly concentrated market in which producers face greater incentives to engage in strategic output withholding. Because of these showings, and because the equities favor injunctive relief, the Court will grant the FTC's Motion for Preliminary Injunction. A separate order will issue.

NOTES

1. Note that in *U.S. Sugar*, Dr. Nicholas D. Hill served as the testifying expert economist for the merging parties, but in *Tronox* he testified for the FTC. After receiveing his Ph.D. in economics from Johns Hopkins, Dr. Hill held various positions in the economics groups of the Antitrust Division and the FTC from 2006 to 2017. Since then, Dr. Hill has worked at Bates-White Economic Consulting, where is a partner. In addition to *U.S. Sugar* and *Tronox*, he was the DOJ's economist in *ABI/Grupo Modelo* and Evonik's economist in the successful defense of Evonik/PeroxyChem.

UNITED STATES V. JETBLUE AIRWAYS CORP., 712 F. SUPP. 3D 109, 148-50 (D. MASS. 2024) (excerpt on relevant geographic market[1])

YOUNG, JUDGE of the United States[1]

[In July 2022, Spirit Airlines accepted a $3.8 billion topping bid from JetBlue Airways, terminating its prior agreement to be acquired by Frontier Airlines. JetBlue is known as a low-cost carrier (LCC), offering affordable fares with enhanced services, while Spirit is the largest and fastest-growing ultra low-cost carrier (ULCC), focused on providing bare-bones, no-frills travel at the lowest possible price. JetBlue planned to discontinue Spirit's ULCC business model, refit Spirit's planes with JetBlue's trade dress and cabin configurations, and position the merged company to better compete with the "Big Four" legacy carriers to the benefit of airline consumers.

In March 2023, after a lengthy second-request investigation, the Department of Justice, together with the Attorneys General of the Massachusetts, New York, and the District of Columbia, filed a civil antitrust lawsuit to block the acquisition. The plaintiffs alleged that the merger would harm consumers by raising prices and reducing choices, particularly for budget-conscious travellers. JetBlue countered that the merger would strengthen its ability to compete with larger airlines, offering consumers a higher-quality, low-cost option. JetBlue also pointed to Spirit's financial challenges as a justification for the merger.

The court ultimately ruled in favor of the government, rejecting JetBlue's arguments about Spirit's financial difficulties and the potential benefits to consumers. The judge determined that the merger would likely reduce competition, especially on routes where both airlines currently operate. Importantly, the court found that it could take more than 15 years for other ultra-low-cost carriers to fully replace Spirit's capacity on these routes, and so rejected the airlines' ease of entry defense. The decision underscores Spirit's unique role in the market as a disruptive force with its ultra-low-cost business model.]

C. Market Definition

1. Legal Framework

Relevant markets are the "area of effective competition" within which competition may be lessened. *Brown Shoe* [*Co. v. United States*], 370 U.S. [294] at 324 [(1962)]. They are defined "by reference to a product market (the 'line of commerce') and a

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[1] Most footnotes omitted.

[1] This is how my predecessor, Peleg Sprague (D. Mass. 1841-1865), would sign official documents. Now that I'm a Senior District Judge I adopt this format in honor of all the judicial colleagues, state and federal, with whom I have had the privilege to serve over the past 45 years.

geographic market (the 'section of the country')." *Id*. (citation and quotation omitted). Defining relevant markets helps ascertain where "the effect of the merger on competition will be direct and immediate." [*United States v.*] *Philadelphia Nat'l Bank*, 374 U.S. [321] at 357 [(1963)]; *see Vazquez-Ramos v. Triple-S Salud, Inc.*, 55 F.4th 286, 296 (1st Cir. 2022) ("The relevant market is 'the area of effective competition . . . .'") (quoting *Ohio v. American Express Co.*, 585 U.S. 529 (2018)).

Courts should apply "a pragmatic, factual approach to definition of the relevant market and not a formal, legalistic one." *Brown Shoe*, 370 U.S. at 336. Market definition is a factual determination that must consider the "commercial realities" of the marketplace. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992) (quoting *United States v. Grinnell*, 384 U.S. 563, 572 (1966)). Markets may be defined from "the perspective of consumers" because "[i]t is the consumer's options and the consumer's choices among them on which relevant market analysis depends." *Flovac, Inc. v. Airvac, Inc.*, 817 F.3d 849, 855 (1st Cir. 2016); *see also United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956) ("In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers . . . .").

These consumer-centric principles apply specifically in defining the relevant geographic market. A relevant geographic market "consists of 'the geographic area in which the defendant faces competition and to which consumers can practically turn for alternative sources of the product.'" *Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 196 (1st Cir. 1996) (quoting *Baxley-DeLamar v. American Cemetery Assn.*, 938 F.2d 846, 850 (8th Cir. 1991)); *accord Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (geographic market is the "area in which the seller operates, and to which the purchaser can practicably turn for supplies"). Therefore, if customers "would not consider [a firm] a viable alternative" because it operates exclusively outside the geographic area to which the customers can practically turn for the relevant product, then that firm is outside the relevant geographic market. *Home Placement Servs., Inc. v. Providence J. Co.*, 682 F.2d 274, 280 (1st Cir. 1982).

Of course, in defining the relevant market, the Court may and should also consider the competitive effects on industry participants—it would be "erroneous" to "defin[e] a market on the basis of demand considerations alone." *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995); *see also American Express Co.*, 138 S. Ct. at 2285 (explaining in the Sherman Act context that the "area of effective competition" is typically the "arena within which significant substitution in consumption or production occurs" (emphasis added)); *see also United States Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 599 (1st Cir. 1993) ("Usage patterns, customer surveys, actual profit levels, comparison of features, ease of entry, and many other facts are pertinent in answering the question [of market definition].").

2. Defining the Market

Although the parties here agree that the relevant service market for assessing the competitive effects of the proposed acquisition is scheduled air passenger service, the parties dispute the appropriate geographic scope of the market: the Government argues that every route on which Spirit or JetBlue currently flies (or intends to fly absent the merger) is, in isolation, a relevant market; the Defendant Airlines advocate for a national geographic market. Both parties make a compelling case.

As previously explained, the airline industry is incredibly dynamic, with mobile assets (aircraft, pilots, crews, etc.) and constant exit and entry of new routes by airlines. Participants in the airline industry also compete vigorously at the national level: among other things, routes and flight frequencies change constantly in accordance with nationally planned route networks, airlines choose their business model and on-board product offerings at the national level, and airlines compete nationwide through valuable customer loyalty programs. An airline's relevance and value to consumers often hinges not just on the price and specific route, but also its nationwide loyalty program, airport presence, national and international route network, and product offerings.

Airlines also make many of their decisions on the route-by-route level, themselves oftentimes referring to an O&D pair as a "market." Airlines consistently plan pricing and network planning at the route level, and decisions to enter or exit a route are made with the specific, local customers in mind. The Defendant Airlines concede that airlines compete at the route level and that they track other airlines' actions on a route-by-route level.

Origin-and-destination pairs are the geographic areas within which "consumers can practically turn for alternative sources of" scheduled air passenger service. *Coastal Fuels*, 79 F.3d at 198 (quoting *Baxley-DeLamar*, 938 F.2d at 850). The purpose of scheduled air passenger service is to travel from one place to another. For consumers originating in one metropolitan area and purchasing scheduled air passenger service to travel to another metropolitan area, such consumers "would not consider it a viable alternative" to purchase scheduled air passenger service between a different origin-and-destination pair. *Home Placement Servs.*, 682 F.2d at 280.

Historically, O&D pairs have also been considered relevant geographic markets for evaluating competition between airlines in the market for scheduled air passenger service. *See United States v. American Airlines Grp. Inc.*, 675 F. Supp. 3d [65] at 117 [(D. Mass. May 19, 2023) (AA/JetBlue Northeast Alliance)] ("Here the parties agree, and the Court finds, that the relevant product market is 'scheduled air passenger service,' and the relevant geographic markets are O&Ds 'in which Defendants compete or would likely compete absent the NEA.'"); *see also Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 933 (6th Cir. 2005) (accepting Spirit's position that routes are relevant geographic markets: "It is at the route level, after all, that airlines actually compete with one another.") (internal citation omitted); *Fjord v. AMR Corp.*, 502 B.R. 23, 40 (Bankr. S.D.N.Y. 2013) (noting that both parties accepted that "city-pairs are the properly defined market," and rejecting a national market because "[a] product market contemplates products that are viable substitutes for each other" and plaintiffs had not explained how "a flight from Los Angeles to New York would

compete with a flight from Detroit to Seattle"); *Malaney v. UAL Corp.*, No. 3:10-CV-02858-RS, 2010 WL 3790296, at *12 (N.D. Cal. Sept. 27, 2010), *aff'd*, 434 F. App'x 620 (9th Cir. 2011) (finding city-pair markets persuasive and rejecting national market because "plaintiffs have not shown how, for example, a flight from San Francisco to Newark would compete with a flight from Seattle to Miami"); *In re Nw. Airlines Corp. Antitrust Litig.*, 197 F. Supp. 2d 908, 915 (E.D. Mich. 2002) ("[C]ity-pairs seem to comport with the ordinary and natural understanding of consumers as they contemplate the purchase of this industry's product—namely, such a consumer typically would survey the options for travel between the desired origin and destination cities.").

This Court, therefore, defines the relevant geographic market in this case as each individual O&D pair, otherwise known as a route, on which the Defendant Airlines currently compete. In doing so, the Court will continue to consider the impact of the national geographic market and those factors relevant to it.

In ruling the relevant market as the individual O&D pairs upon which the Defendant Airlines compete, the Court dismisses as immaterial, for the purposes of the Government's prima facie case, the "Spirit-entry routes" that the Government has put forth. Spirit is not currently present on these routes and instead has only considered entering these routes absent the merger. Neither of the merging Defendant Airlines currently compete on these routes, and therefore they are not relevant under Section 7. *See, e.g.*, *Philadelphia Nat'l Bank*, 374 U.S. at 357 ("The proper question to be asked in this case is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate.").

The Court accepts as relevant markets the following routes: nonstop overlap routes that both JetBlue and Spirit currently fly (both those identified by the Government as "presumptively illegal" and those identified by the Government as "econometric"); "connect routes", which are the routes on which both Spirit and JetBlue fly connecting service; "mixed routes", which are the routes on which one of the Defendant Airlines flies direct service and the other provides connective service, and "Spirit-only routes", which are routes that Spirit currently flies, but JetBlue does not.

NOTES

1. Following the court's entry of a permanent blocking injunction, JetBlue Airways and Spirit Airlines officially terminated their $3.8 billion merger agreement On July 27, 2023. After the termination, JetBlue paid Spirit an antitrust reverse breakup fee of $69 million.

2. The collapse of the merger with JetBlue had immediate and significant consequences for Spirit's financial stability and market position. Spirit, which had been grappling with financial challenges, had viewed the merger as a potential lifeline to address its fiscal difficulties. Without this prospect, the company found itself facing intensified financial pressures in an already competitive market. As of mid-2024, Spirit's long-term debt and finance leases amounted to approximately $3.06 billion, excluding current maturities. Additionally, the airline faced a critical deadline to refinance $1.1 billion in loyalty program bonds, which added to its financial strain

Compounding these financial concerns, Spirit continued to struggle with operational issues, notably problems with its fleet of Pratt & Whitney-powered Airbus jets. These aircraft required extended groundings for inspections, further straining the airline's operational capacity and financial resources.

The market swiftly reacted to these developments, with Spirit's stock price experiencing sharp declines. On October 4, 2024, shares of Spirit Airlines plunged 37% to a record low after a report that the airline restructuring options, including a potential bankruptcy filing. As of October 11, 2024, Spirit's shares had lost more than 85% of their value since the beginning of the year and closed at $1.61.

Spirit Airlines, Inc. (SAVE):