UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

DEFENDANTS' OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

One business day after the Court denied Plaintiff's request for a permanent injunction, Plaintiff asks the Court to grant it either the "extraordinary remedy" of enjoining Defendants' merger pending appeal—or giving it a stay of (a) 30 days to *decide* whether or not to appeal or (b) 14 days to pursue an expedited motion to the Third Circuit. Plaintiff cannot meet its "very heavy" burden, and its request for a Rule 62(d) injunction should be denied. In addition, Plaintiff's request flies in the face of a timing agreement the parties agreed to in July 2021 (Ex. A to Plaintiff's Motion, D.I. 248-1) and makes clear, just as Plaintiff did in the pretrial process when it sought to postpone trial to the deal's outside date of September 2022, that the Government continues to try to obtain via delay what it could not obtain on the merits. For 18 months, Plaintiff has sought to prevent the consummation of this transaction with the hopes that doing so would cause the deal to fall apart. Plaintiff's current injunction request is just a last-ditch effort in pursuit of that delay tactic. Any request for further delay, no matter the length, must be seen for what it truly is.

Plaintiff cannot establish the required "strong showing" of likelihood of success on the merits in any appeal because the Court's opinion faithfully applies precedent and rests on robust findings of fact that would be reviewed for clear error. This Court specifically held that Plaintiff failed to meet its initial burden of establishing a relevant product market (for two independent reasons) *and* a relevant geographic market, both of which are a "necessary predicate to a finding of a violation of the Clayton Act." Mem. Op. at 40, D.I. 242 ("Op.") (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1965)). The Court characterized the outcome of the case as "clear," and its findings rejecting Plaintiff's case as "not difficult," and based on "substantial," "ample," "abundant," and "particularly credible" evidence. *Id.* at 24-25, 31, 39 n.19, 44 n.22, 46, 47, 51, 52. Plaintiff's theories, by contrast, relied on "scant evidence" or "no evidence" altogether.

Id. at 31, 48, 53. Understandably, Plaintiff disagrees with the Court's findings, but Plaintiff's Motion presents no real argument that the numerous factual findings that undergird the Court's decision are clearly erroneous. *See F.T.C. v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 335 (3d Cir. 2016) (where determination of relevant market depends on its "special characteristics," market definition is a "factual question" reviewed for clear error); *F.T.C. v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 167 (3d Cir. 2022) (factual market findings involving "special characteristics" reviewed for clear error). Instead, Plaintiff continues to repeat arguments based on its (now rejected) view of the evidence, including its expert's opinions, and claimed presumptions that flow from that (again, now rejected) viewpoint—even though contrary to the unrebutted factual findings by the Court and credibility determinations regarding Plaintiff's witnesses.

Nor can Plaintiff carry its burden on the remaining factors of the four-factor balancing test that governs its request. Unlike other merger challenges, Plaintiff cannot credibly claim any irreparable harm from the denial of an injunction here given that the USDA can, as the Court found, take action to remediate any price increases that might result from the consummation of the transaction. In contrast to Plaintiff's inability to show irreparable harm, issuing an injunction will harm not just U.S. Sugar and Imperial, but also the public, who will not see the benefit of increased output and lower prices that the USDA's chief economist anticipates from this transaction. Op. at 56-57. Plaintiff's Motion should be denied.

ARGUMENT

I. PLAINTIFF IMPROPERLY RELIES ON CLAIMED PRESUMPTIONS AND UNDERSTATES ITS BURDEN TO OBTAIN THIS EXTRAORDINARY RELIEF

"Injunctions pending appeal, like preliminary injunctions, are 'extraordinary remed[ies] never awarded as of right.'" *Donald J. Trump for President, Inc. v. Sec'y of Pa.*, 830 F. App'x 377, 389 (3d Cir. 2020). "For a stay or injunction pending appeal, the movant must show both

(1) a 'strong' likelihood of success on the merits and (2) irreparable injury absent a stay or injunction," which are the "most critical" factors. *Id.* (citation omitted). Courts also balance "(3) whether a stay or injunction will injure other interested parties (also called the balance of equities) and (4) the public interest." *Id.* (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *In re Revel AC, Inc.*, 802 F.3d 558, 568-571 (3d Cir. 2015)).

Plaintiff attempts to short-cut its heavy burden by citing a 1963 case for the proposition that "the court presumes" irreparable injury if "the United States establishes a likelihood of success on the merits in a Section 7 case." Mem. in Supp. of Pl.'s Mot. at 5, D.I. 247 ("Mem."). That is wrong as a matter of law. The cases Plaintiff cites (Mem. at 12), beginning with *United States v. Ingersoll-Rand Co.*, 320 F.2d 509, 523 (3d Cir. 1963), long predate modern injunction jurisprudence. In cases since the Supreme Court's decision in *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006), the Third Circuit has reasoned that inferring irreparable harm in an injunction analysis is "inconsistent with *eBay*'s admonition that courts may not fashion categorical rules or sweeping principles that would undermine the traditional four-factor test." *TD Bank N.A. v. Hill*, 928 F.3d 259, 279 (3d Cir. 2019). In the context of an injunction pending appeal, that means the injunction may only issue if the movant shows (1) that it can win on the merits, and (2) that it will suffer irreparable harm absent an injunction and, if those two requirements are met, that the balance of all four factors counsels in favor of an injunction. *In re Revel AC*, 802 F.3d at 571. In the Third Circuit, that means "[s]uch stays are rarely granted, because in [the Third Circuit] the bar is set particularly high." *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dept. of Health & Human Servs.*, 2013 WL 1277419, at *2 (3d Cir. Feb. 8, 2013); *F.T.C. v. Equitable Res., Inc.*, 2007 WL 1500046, at *3 (W.D. Pa. May 21, 2007) (explaining that the party seeking relief "bear[s] a very heavy burden of persuasion"). But in any event, even if a presumption applied, here the undisputed

facts from trial, including testimony from the chief economist from the USDA, establish that the United States itself, through the USDA, has the ability to remedy any such harm alleged (but unproven) to result from consummation of the transaction.

II. THE GOVERNMENT CANNOT ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS

As the Court correctly found, the "outcome of this case is clear." Op. at 39 n.19. "[T]he Government failed to establish both a relevant product and geographic market," *id.*, and therefore "cannot prove its *prima facie* case under Section 7 of the Clayton Act." *Id.* at 41. As the Court's robust and detailed findings demonstrate, the Government's "product market and geographic markets ignore the commercial realities of sugar supply in the U.S." *Id.* (citing *Hackensack*, 30 F.4th at 168). In reaching this conclusion, the Court resolved "a factual question dependent upon the special characteristics of the industry involved," which is reviewed only for "clear error." *Hackensack*, 30 F.4th at 167. Findings that "are plausible in light of the entire record," such as the Court's findings here, "are not clearly erroneous." *United States v. AT&T, Inc.*, 916 F.3d 1029, 1033 (D.C. Cir. 2019). Only if a "district court applies an incomplete *economic* analysis or an erroneous *economic* theory to [the] facts," will the Third Circuit conduct a "plenary review" of a market determination. *Hackensack*, 30 F.4th at 167 (emphasis added). That is not the case here.

A. The Court's Relevant Product Market Findings Are Not Clearly Erroneous

The Court dismissed Plaintiff's proposed product market based on factual findings that Plaintiff ignored "commercial realities" in the industry. Op. at 41, 47, 48. Specifically, "[b]ased on the evidence presented at trial," the Court rejected two independent foundations of the product market: (1) "that distributors do not compete with and are incapable of being effective price constraints on refiners and other sugar suppliers;" and (2) that all wholesale customers should be

"treated as equal consumers in the product market." *Id.* at 44-48. Plaintiff's Motion does not identify any likelihood that those findings will be overturned on appeal.

The Court rejected Plaintiff's attempt to exclude distributors of refined sugar from the product market based on (1) a lack of evidence supporting Plaintiff's theory, and (2) "substantial evidence" demonstrating that customers would look to distributors as sources of supply in response to a post-merger price increase. The Court found 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." Op. at 44 n.22. The Court's findings included that (1) "[t]he record is replete with evidence of distributors competing with refiner producers . . . as well as with cooperatives," *id.* at 44-45; (2) it is "well-supported" that "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," *id.* at 45; (3) there was "substantial evidence" that "customers are largely indifferent as to whether they are purchasing refined sugar from the sugar producer or from a distributor," *id.* at 46; and (4) Defendants' expert, Dr. Hill, "persuaded" the Court by "[t]ying all of this evidence together" to explain "how distributors are independent actors within the market and this allows them to compete effectively with other suppliers." *Id.* By contrast, the Court found not credible Plaintiff's expert, who was "assuming that distributors are not independent," *id.* at 46, and who applied an "internally inconsistent" analysis that excluded distributors from the market because they are not producers, while including marketing cooperatives, which also do not produce refined sugar, FOF ¶ 72. Moreover, Plaintiff "introduced no evidence at trial that purchasers care whether their sugar supplier is a refiner producer, a marketing entity, a cooperative or a distributor." *Id.* ¶ 85. Weighing the evidence, the Court found "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." Op. at 47 (emphasis added). Plaintiff does not, and cannot, point to any clear error in those findings.

In a transparent attempt to convert a factual finding into a legal principle to obtain a more favorable standard of review, Plaintiff suggests that the Third Circuit would review the Court's decision to include distributors in the relevant product market "de novo." Mem. at 3. Yet it has not identified any "incomplete economic analysis or an erroneous economic theory" in the Court's analysis that justifies such a standard of review. *See Hackensack*, 30 F.4th at 167. To the contrary, the Court correctly identified and applied the Supreme Court's mandate that the relevant market "must correspond to the commercial realities of the industry," Op. at 40 (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018)), and that 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." *Id.* at 41 (quoting *Brown Shoe*, 370 U.S. at 325).

Plaintiff has not identified any categorical economic rule that distributors *must always* be excluded from the relevant product market[1]—and such a rule would violate the Third Circuit's and Supreme Court's admonition that market definition must be "[d]etermined within the specific context of each case." *Hackensack*, 30 F.4th at 166-67 (quoting *Penn State*, 838 F.3d at 338). Applying that standard, multiple courts have found, just as this Court rightly did, that distributors can be part of 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"); *PepsiCo, Inc. v.*

[1] None of the cases that Plaintiff cites (Mem. at 7) even purport to claim that distributors cannot be included along with producers in the relevant product market. Nor did any of those cases confront a situation where the commercial realities of the industry demonstrate that "distributors are independent actors within the market and this allows them to compete effectively with other suppliers." Op. at 46.

Coca-Cola Co., 114 F. Supp. 2d 243, 251 (S.D.N.Y. 2000) (rejecting product market distinguishing between means of distribution of the same product where "price reductions or other marketing strategies" could be used to lure customers from one type of supplier to another), *aff'd*, 315 F.3d 101 (2d Cir. 2002); *Ajir v. Exxon Corp.*, 1999 WL 393666, at *3-4 (9th Cir. May 26, 1999) (distributors are "potential competitors" of producers that sell their own products). That alone would be reason to affirm.

But Plaintiff also fails to identify any likelihood of reversal of the Court's conclusion that Plaintiff failed to carry its burden of showing that all wholesale consumers of refined sugar—regardless of size, type, or sugar usages—should be within the relevant product market. This independently sufficient holding was based on a factual finding that "the Government introduced no evidence to support a finding that industrial customers have the same competitive options and purchasing behavior." Op. at 48. In fact, Plaintiff's expert Dr. Rothman "admitted that he did not even consider whether retail customers have the same competitive alternatives as industrial customers." *Id.*; FOF ¶ 87. Put simply, "there is no evidence in the record to support" Plaintiff's inclusion of any and every "wholesale" sugar customer within the relevant product market. Op. at 48. By contrast, the Court credited the trial evidence showing that "the various wholesale customer types have different sugar needs and purchasing practices," FOF ¶ 88, and "[t]he amount of sugar sold to the various types of wholesale customers differs widely among suppliers," *id.* ¶ 89. Plaintiff presents no argument that these findings were clearly erroneous either.

More generally, Plaintiff's gratuitous reaches for a *de novo* review are baseless. Plaintiff's contention that case law does not require "that customers be identically situated" is a strawman and irrelevant. Mem. at 8. The Court applied no such standard, and instead found that "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.'" FOF ¶ 90 (emphasis added). Many courts have rejected claimed relevant markets for the exact same failing. *See, e.g.*, *United States v. Engelhard Corp.*, 126 F.3d 1302, 1306 (11th Cir. 1997) (failure to account for customer differentiation within a proposed relevant product market "undermin[ds] the Government's entire case"); *United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 182-83 (D.D.C. 2001) (finding government failed to establish relevant product market where "the government's market contains an extremely heterogeneous group of customers, particularly in terms of their needs"); *cf. also F.T.C. v. RAG-Stiftung*, 436 F. Supp. 3d 278, 294-99 (D.D.C. 2020) (product market definition failed where government included "standard, specialty, and pre-electronics grade hydrogen peroxide into a single market" without adequate evidence of comparability).[2]

Plaintiff's "failure to prove a relevant product market" for either or both reasons "is dispositive." Op. at 49. Just as it "require[d] judgment in favor of Defendants," *id.*, Plaintiff's failure to make a strong showing of likelihood of overturning either (let alone both) of the above two independent holdings requires a denial of Plaintiff's injunction Motion.

B. The Court's Relevant Geographic Market Findings Are Not Clearly Erroneous

Plaintiff's effort to argue that it has a likelihood of succeeding on an appeal of the Court's geographic market ruling—yet another independent and fatal defect in Plaintiff's *prima facie* case—fare no better. The Court's finding that Plaintiff failed to adequately prove that the so-called

[2] Plaintiff's argument that disaggregating sales to different customer classes would have "strengthened the presumption that the merger may substantially lessen competition," Mem. at 8, is a post-hoc argument unsupported by any factual finding or the record. Plaintiff put forward no market share or concentration estimates based on only industrial customers, and instead lumped all wholesale customers together. *See* Op. at 47 ("there is no alternative product market offered").

"Southeast" and "Georgia-Plus" areas are relevant geographic markets are steeped in detailed and unchallenged factual findings. The Court found that "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." FOF ¶ 93. As support for that conclusion, the Court found that, in the event of a post-merger price increase, "customers located within the area easily could (and likely would) turn outside the area for additional sugar supply." FOF ¶ 104. Customers could do that "easily" because, among other reasons, (1) it is "low cost to transport sugar" and it "can travel long distances" with "ease;" Op. at 51, FOF ¶ 42; (2) "transportation costs are not a meaningful barrier to sugar flowing across the country," FOF ¶ 42; (3) suppliers outside Plaintiff's two areas "have additional supply that could also be sent to the area," FOF ¶ 100; (4) customers can "pick up refined sugar at locations outside of those markets and move it in," FOF ¶ 101; and (5) "[c]ustomers with multiple locations could also purchase sugar outside the proposed markets and transport it to their locations inside the alleged markets to avoid a price increase," *id*.

In contrast with these "commercial realities," the Court considered and found not credible the testimony of Plaintiff's expert, upon whom Plaintiff appears to rest its entire geographic market argument. The record fully supports the Court's finding that Dr. Rothman's analysis was "not credible," Op. at 51, as Dr. Rothman "simply used two geographic markets selected by the Government," FOF ¶ 92, had "no opinion" which market is "better suited to the economic realities in this case," Op. at 50, cited "no document from any party or the USDA" that supports the alleged "Southeast" market, FOF ¶ 92, cited only one document that supports the proposed "Georgia Plus" market, *id.*, and did not identify any region that would not satisfy his application of the hypothetical monopolist test," Op. at 50-51; FOF ¶ 74. Furthermore, the Court rightly questioned the reliability

of Dr. Rothman's opinions based on his "lacking" credentials and experience, FOF ¶ 71, and the numerous "other antitrust cases" in which "Dr. Rothman's economic analysis has been found unpersuasive," FOF ¶ 76.

Plaintiff does not demonstrate any likelihood that the Third Circuit will disturb the Court's well-reasoned geographic market analysis. To begin with, Plaintiff's Motion does not identify anything comparable to the incorrect legal analysis that resulted in *de novo* review in *Penn State*. In that hospital merger case, the district court defined the geographic market using the Elzinga-Hogarty test, which had previously been found inappropriate for use in hospital cases. *See Penn State*, 838 F.3d at 340. Furthermore, the district court ignored the "commercial realities" in the hospital context when it "completely neglected any mention of the insurers in the healthcare market." *Id.* at 342. Contrary to that situation, here the Court's geographic market findings arise from a thorough effort to identify the relevant commercial realities, just as *Penn State* emphasized (no less than four times) the analysis should. *See id.* at 338, 342, 344. Here, it is Plaintiff that advances a standard in conflict with *Penn State* by arguing that the Court should ignore its robust findings regarding the commercial realities of the sugar industry and defer exclusively to a hypothetical monopolist test the Court found not credible, performed by an expert who has been routinely criticized, and whose credentials the Court found unpersuasive. FOF ¶¶ 70, 71, 76. What Plaintiff seeks to impose would itself be reversible error.

Plaintiff's remaining arguments have no merit. Plaintiff claims that the "Court overlooked that the United States proposed a customer-based geographic market in this case," Mem. at 9, when, in fact, the Court acknowledged and accounted for that very thing. *See* Op. at 50 ("[T]he Government has identified its two proposed geographic markets based on customer locations, rather than supplier locations."); *id.* at 51 ("[T]he market is formulated around customer

locations . . . ."). Citing that formulation, the Court's factual findings led it to "find[] it hard to credit that the proposed markets properly account for the real-world impact" of sellers located outside the alleged markets that sell into the alleged markets. *Id*. And Plaintiff's claim that the Court "invoked potential seller repositioning" in the geographic market analysis is both vague and unfaithful to the Court's actual findings and analysis. Mem. at 9. The Court's analysis cited, and rigorously applied, the principle that if "consumers would respond to a SSNIP by purchasing the product from outside the proposed market, thereby making the SSNIP unprofitable, the proposed definition is too narrow." Op. at 49 (quoting *Penn State Hershey*, 838 F.3d at 338). The Plaintiff's geographic market was based on the concept that suppliers would impose a SSNIP *only* on customers in the alleged geographic markets. And, based on the factual findings cited above, the commercial realities showed that customers would likely avoid any such price increase, rendering the Government's proposed markets too narrow. Op. at 52 ("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.").

Plaintiff's final argument that the Court "should have examined effects in whatever market(s) it believed appropriate" is simply wrong. Mem. at 10. Plaintiff has "the burden of defining the relevant market" and its "failure to properly define either a product or geographic market is fatal" to its case. Op. at 40 (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436-42 (3d Cir. 1997)). As the Court already acknowledged, it has no obligation to go fishing for a geographic market that Plaintiff has not carried its burden to prove. Op. at 54. Certainly the law does not require it. *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 . . . ."). And based on the factual record presented, it would be improper to do so here, where "discovery (including expert discovery) was limited to only the markets alleged in the Complaint." Op. at 53.

C. Plaintiff's Arguments Regarding Anticompetitive Effect Are Wrong And Irrelevant

Finally, Plaintiff has no credible basis for appealing the Court's decision based on its discussion of the USDA. Mem. at 10-11. As the Court explicitly made clear, it rejected the Plaintiff's challenge to the proposed acquisition because the Plaintiff failed to identify the relevant market for any proposed competitive injury resulting from the acquisition, and therefore could not establish its *prima facie* case under Section 7. Op. at 54. As a result, the Court's decision does not depend on an analysis of competitive effects of the acquisition—and the role of the USDA in assessing those competitive effects—at all.

Regardless, the Plaintiff's argument—that the Court erred by supposedly "fail[ing]" to apply Section 7 with "full force" because the sugar market is regulated by the USDA, Mem. 10-11—is a red herring. The Court did not hold that Section 7 does not apply, nor that the transaction is immune from antitrust challenge, because of USDA regulation. Op. at 54-58. Instead, the Court followed settled Supreme Court precedent requiring that a court consider the proposed transaction in the "context of its particular industry," Op. at 54 (quoting *Brown Shoe*, 370 U.S. at 321-22), including the impact of any industry regulation, *id.* (quoting *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004)). And, in doing so, the Court correctly found that U.S. Sugar's acquisition of Imperial "will not happen in a vacuum," Op. at 55, and that because USDA has the "power to manipulate sugar supply," it "would act as a safeguard" against any potential anticompetitive effects resulting from the proposed transaction. Op. at 55. The factual record from trial amply supports this finding. FOF ¶ 47 ("Using these tools, the USDA

ensures that prices do not get too high (due to undersupply) or too low (due to oversupply)."); FOF ¶ 53 ("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."). None of the cases relied on by Plaintiff—which involve either questions of immunity or entirely inapposite facts regarding other industries—suggest a different outcome.

As a result, the Court's well-reasoned point that USDA has the "ability to counteract" any anticompetitive effects by using tools at its disposal to increase the supply of sugar, Op. at 58, does not mean that the Court failed to apply a proper Section 7 analysis. If anything, it only further demonstrates why Plaintiff cannot show a likelihood of irreparable harm.

III. PLAINTIFF WILL NOT SUFFER IRREPARABLE HARM FROM CONSUMMATION OF THE TRANSACTION

Beyond incorrectly arguing for a presumption, Plaintiff argues that it will be irreparably harmed if the Court does not grant its request for a Rule 62(d) injunction because U.S. Sugar will close its acquisition of Imperial, "unscrambling the eggs" will be difficult, and customers will lose the benefits of competition. Mem. at 12-13. The same arguments could be made in any merger case—and are really just another way for Plaintiff to seek a presumption of irreparable harm. Moreover, Plaintiff's arguments continue to ignore the purpose of the transaction and the Court's findings. The purpose of the transaction is procompetitive: U.S. Sugar intends to send raw sugar it cannot process currently in Florida to Imperial's Port Wentworth refinery for processing—and it also intends to, over time, increase the output of Imperial's refinery. FOF ¶ 63-64. None of that will occur overnight—and, critically, Plaintiff presents no viable argument for why that process could not be undone if it were to prevail on appeal. Indeed, Plaintiff and its sister agency, the Federal Trade Commission, regularly bring suit to address mergers which have already been consummated. *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.*, 2014 WL 407446 (D. Idaho Jan. 24, 2014); *U.S. v. Bazaarvoice, Inc.*, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014).

Nor can Plaintiff claim that customers might be charged higher prices while its appeal is pending. The Court concluded 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." Op. at 58. That conclusion was based on the testimony of Dr. Fecso, who the Court found "to be an exceptionally knowledgeable and particularly credible witness." *Id.* at 56.

Put simply, Plaintiff cannot meet its burden of establishing that there would be irreparable injury absent a Rule 62(d) injunction—particularly when Plaintiff itself has not even determined there is a legitimate basis to appeal. *In re Revel AC, Inc.*, 802 F.3d 558, 569 (3d Cir. 2015).

IV. THE IMPOSITION OF AN INJUNCTION WILL HARM U.S. SUGAR AND IMPERIAL

Plaintiff argues that granting the requested injunction will not harm U.S. Sugar or Imperial. In essence, Plaintiff argues that because the acquisition has been pending for 18 months, any further delay will not cause harm. That is callous and baseless. The reality is that the Government's strategy from the outset has been 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. Indeed, after an extended investigation, the Government 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 of the transaction. Fortunately, that extreme proposal was rejected. But the Government'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, as well as the changed market conditions over the past 18 months that affect factors like financing. Any further delay in closing, even the temporary ones the Government seeks as alternative relief, would likely impose additional costs on U.S. Sugar—and all with respect to a transaction that Dr. Fecso of the USDA testified would be beneficial to the marketplace.

Granting the injunction would also be harmful to Imperial. As the Court found, Imperial has been in "financial decline" and Imperial's CEO is "'quite worried' about Imperial's future prospects" if the transaction does not proceed. Op. at 20; FOF ¶¶ 59, 68. 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.

V. THE PUBLIC INTEREST SUPPORTS DENYING THE INJUNCTION

As the Court found, Dr. Fecso anticipates that "sugar prices in the U.S. may be lowered if the Proposed Transaction is allowed to proceed" and the "deal will have an overall positive impact on the sugar industry in this country." Op. at 56. One of those positive impacts is that the transaction "would reduce the [Port Wentworth] facility's reliance on imports, thereby lowering the cost of producing refined sugar (and in turn the selling price)." *Id.* at 57. At the same time, this transaction 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.

CONCLUSION

Plaintiff has sought to win by "running out the clock" from the beginning of this case. Plaintiff lost on the merits and its continued effort to delay this transaction should be rejected; Plaintiff's Motion for a Rule 62(d) injunction or stay should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2022, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

I further certify that I caused copies of the foregoing document to be served on September 27, 2022, upon the following in the manner indicated:

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