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

UNITED STATES' ANSWERING BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a) OR TO EXPEDITE TRIAL

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Dated: December 13, 2021

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NATURE AND STAGE OF THE PROCEEDINGS

On November 23, 2021, the United States filed this antitrust action for injunctive relief to prevent United States Sugar Corporation ("U.S. Sugar") from acquiring its rival sugar refiner, Imperial Sugar Company ("Imperial"), a wholly owned subsidiary of Louis Dreyfus Company LLC ("Louis Dreyfus"), and to prevent United Sugars Corporation ("United"), the cooperative partially owned by U.S. Sugar, from marketing and selling the refined sugar produced by Imperial. As alleged in the Complaint, this acquisition violates Section 7 of the Clayton Act because it would combine two of the three largest suppliers of refined sugar to customers across the U.S. Census Bureau's South Atlantic and East South Central Divisions (shorthanded in the Complaint as "the Southeast"), including Delaware,[1] leaving just two firms in control of approximately 75 percent of sugar sales in the region and likely leading to higher prices, reduced quality, and reduced service reliability. Compl. ¶¶ 3-5 (D.I. 1). On December 3, 2021, Defendants filed a Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a) or to Expedite Trial. On December 6, 2021, the Court ordered an expedited briefing schedule on Defendants' motion to transfer.[2]

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[1] Defendants quibble with this terminology, insisting "Delaware is uniformly regarded as a Mid-Atlantic state," Defs.' Br. at 2 n.1 (D.I. 14), but in fact the U.S. Census Bureau includes Delaware as a "South Atlantic" state, *see* U.S. Census Bureau, 2010 Census Regions and Divisions of the United States, https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us_regdiv.pdf (last visited Dec. 12, 2021). In any event, the nomenclature is irrelevant—the United States has defined, and will prove at trial, that this proposed acquisition would substantially lessen competition in a geographic market that includes the state of Delaware, in violation of Section 7 of the Clayton Act.

[2] In the same order, the Court granted Defendants' request to expedite trial, setting trial for the week of April 11, 2022. As discussed with the Court, the United States intends to request, in a teleconference on Wednesday, December 15, 2021, that the Court vacate that trial date and order the parties to meet and confer regarding case scheduling.

SUMMARY OF ARGUMENT

Plaintiff's choice of forum is given paramount consideration in the venue analysis, particularly in government antitrust enforcement actions, as long as the plaintiff has selected the forum for a legitimate reason. The United States' reasons for selecting the District of Delaware are clearly legitimate. As Defendants concede, the parties to the acquisition at issue here, U.S. Sugar and Louis Dreyfus, are both Delaware corporations that chose Delaware as the exclusive venue for litigating disputes relating to the proposed acquisition. Defs.' Br. at 2 (D.I. 14). Defendants are also the largest sellers of sugar to customers in Delaware and, if the acquisition is allowed to proceed, will control an overwhelming percentage of the sales into this state. And Delaware is one of the twelve states plus the District of Columbia in which the United States alleges customers will suffer harm if Defendants consummate their proposed acquisition.

Defendants now seek a transfer to the Southern District of Georgia, Savannah Division, a district in which no Defendant is incorporated or maintains a corporate headquarters and where little, if any, of the corporate decision-making that led up to the merger occurred. Two Defendants, United and Louis Dreyfus, are in fact located closer to Wilmington than to Savannah. A third Defendant, U.S. Sugar, is also located outside of Georgia and all the information about sales and pricing of its products—the key evidence in an antitrust case—is kept even farther from Georgia at United, which sells all the sugar produced by U.S. Sugar. Defendants have failed to identify any potential non-party witness located in the Southern District of Georgia and, because Congress has provided for nationwide service of process in antitrust enforcement actions, Defendants cannot show that any potential witness would be unavailable in Delaware.

Although the target company, Imperial, has a sugar refinery in Georgia, it is a Texas

corporation with Texas headquarters, and almost all of its salespeople are located outside of Georgia. In a previous attempt to transfer a United States antitrust enforcement action from Delaware, this Court has held that "'convenience of the parties'" is not "synonymous with 'convenient for [the target company].'" *United States v. Energy Sols., Inc.*, 2016 WL 7387069, at *4 (D. Del. Dec. 21, 2016). In that case, facing facts similar to those here, this Court concluded that "Plaintiff's forum preference, the Defendants' decision to incorporate in Delaware, and the fact that this is an anti-trust case [is] enough to warrant keeping the case in this District." *Id.* at *7.

For these reasons, as well as those discussed below, Defendants' motion to transfer venue should be denied.

STATEMENT OF FACTS

U.S. Sugar is a Delaware corporation. Ptacek Decl., Ex. 1. U.S. Sugar is the world's largest vertically-integrated cane sugar milling and refining corporation, capable of producing 850,000 tons of refined sugar per year. *Id.*, Ex. 21. 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. *Id.* U.S. Sugar is one of four member-owners of United, a cooperative that markets and sells all of the refined sugar produced by U.S. Sugar and United's three other member-owners. Wineinger Decl. ¶ 2 (D.I. 16).

United is a Minnesota corporation with headquarters in Edina, Minnesota. *Id.* ¶ 3; Ptacek Decl., Ex. 8. United is a cooperative owned by four sugar refiners, including U.S. Sugar. Wineinger Decl. ¶ 2 (D.I. 16). Its member-owners operate sugar refineries located in Florida, Minnesota, Montana, North Dakota, and Wyoming. *Id.*

Louis Dreyfus is a Delaware corporation with headquarters in Wilton, Connecticut.

Ptacek Decl., Ex. 1, 7. Louis Dreyfus is a worldwide leader in sugar trading and merchandising. *Id.*, Ex. 21.

Imperial is a wholly-owned subsidiary of Louis Dreyfus. Gorrell Decl. ¶ 7 (D.I. 17). Imperial is a Texas corporation with headquarters in Sugar Land, Texas. *Id.* ¶ 3; Ptacek Decl., Ex. 22. Imperial produces, markets, and sells refined sugar in the United States. Ptacek Decl., Ex. 21, 22. Imperial has a cane sugar refinery in Port Wentworth, Georgia and an intermediate sugar transfer and liquification facility in Ludlow, Kentucky. *Id.*, Ex. 21. Almost no Imperial salespeople are located in Georgia. *Id.*, Ex. 4.

On March 24, 2021, U.S. Sugar and Louis Dreyfus entered into an asset purchase agreement that is the subject matter of this litigation. *See id.*, Ex. 1. The negotiation of this agreement appears to have involved executives and attorneys in Wilton, Connecticut; Clewiston, Florida; Omaha, Nebraska; and one executive in Port Wentworth, Georgia. *See* Gorrell Decl. ¶ 8 (D.I. 17); Buker Decl. ¶ 5 (D.I. 18); Ptacek Decl. ¶ 18.

The asset purchase agreement provides that "any claim, controversy or dispute arising out of or related to this Agreement, . . . whether arising in contract, tort, equity or otherwise, shall be governed by and construed in accordance with the domestic Laws of the State of Delaware," and that "all disputes, legal actions, suits and proceedings arising out of or relating to this agreement must be brought exclusively in the state or federal courts located in New Castle County, Delaware." Ptacek Decl., Ex. 1 §§ 12.8, 12.20. The asset purchase agreement also provides that "each Party hereby irrevocably waives . . . any objection which such party may now or hereafter have to the laying of venue of any suit, action or proceeding in any Designated Court, including any right to object on the basis that any dispute, action, suit or proceeding brought in the Designated Courts has been brought in an improper or inconvenient forum or venue." *Id.*, Ex. 1

§ 12.20.

U.S. Sugar and Louis Dreyfus' related transaction agreements, including their Raw Sugar Sourcing Agreement and es Agreement, similarly are governed by Delaware law, select Delaware as the exclusive forum for resolving disputes, and waive any objection to laying venue in Delaware. *Id.*, Ex. 2 §§ 5.7, 5.9; Ex. 3 §§ 6.8, 6.10.

ARGUMENT

I. Defendants Fail to Satisfy Their Heavy Burden to Show Transfer Is Warranted

The party seeking transfer bears "a heavy burden." *Virentem Ventures, LLC v. YouTube, LLC*, 2019 WL 2131877, at *2 (D. Del. May 16, 2019) (Noreika, J.). Transfer is "not to be liberally granted." *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970) (internal quotation marks omitted).

In accordance with *Jumara v. State Farm Insurance Co.*, district courts in this Circuit weigh a variety of public and private interests when making transfer determinations. 55 F.3d 873, 879-80 (3d Cir. 1995). The private interests include the plaintiff's forum preference; the defendant's forum preference; whether the claim arose elsewhere; the convenience of the parties; the convenience of the witnesses; and the location of books and records. *Id.* at 879. The public interests include "practical considerations that could make the trial easy, expeditious, or inexpensive; the relative administrative difficulty in the two fora resulting from court congestion; the local interest in deciding local controversies at home; [and] the public policies of the fora." *Id.* (citations omitted).[3] Unless the balance of the "private and public interests protected by the language of § 1404(a) . . . is *strongly* in favor of the defendant, the plaintiff's choice of forum

[3] Defendants concede, and the United States does not dispute, that the two other public interests (enforceability of the judgment and familiarity of the trial judge with the applicable state law in diversity cases) are neutral. Defs.' Br. at 13 (D.I. 14).

should prevail." *Virentem Ventures*, 2019 WL 2131877, at *1-2 (brackets and internal quotation marks omitted, and emphasis added).

For the reasons discussed below, Defendants fail to meet their heavy burden to show that the relevant private and public interests weigh strongly in favor of venue transfer to the Southern District of Georgia, Savannah Division.

II. The Private Interest Factors Weigh Against Transfer

A. The United States' Choice of Forum is Paramount

"'It is black letter law that a plaintiff's choice of a proper forum is a paramount consideration in any determination of a transfer request' – one that 'should not be lightly disturbed.'" *Id.* at *2 (quoting *Schutte*, 431 F.2d at 25). This is especially true in antitrust cases, where the United States' venue choice is given "heightened respect." *Energy Sols.*, 2016 WL 7387069, at *2. In granting the United States heightened deference in antitrust enforcement actions, courts have pointed to the Clayton Act's liberal venue provisions. *Id.* Congress enacted Section 12 of the Clayton Act, 15 U.S.C. § 22, to broaden the general federal venue statute and make it easier for plaintiffs, including the United States, to obtain relief for violations of the antitrust laws. *See United States v. Nat'l City Lines, Inc.*, 334 U.S. 573, 581-82 (1948). Section 12 "is a special venue provision tailored for corporate antitrust defendants, whose convenience Congress was not particularly solicitous of." *Lee v. Ply*Gem Indus., Inc.*, 593 F.2d 1266, 1272 (D.C. Cir. 1979).

"The deference afforded plaintiff's choice of forum will apply *as long as* plaintiff has selected the forum for some legitimate reason." *Smart Audio Techs., LLC v. Apple, Inc.*, 910 F. Supp. 2d 718, 727 (D. Del. 2012) (internal quotation marks and brackets omitted). Where a plaintiff's choice of forum is "legitimate and rational," this choice is given "substantial weight in

the [transfer] analysis." *TSMC Tech., Inc. v. Zond, LLC*, 2015 WL 328334, at *1 (D. Del. Jan. 26, 2015).

The United States' decision to file the instant action in this District is both legitimate and rational. The transaction at issue here is between two Delaware corporations, U.S. Sugar and Louis Dreyfus. *See Helicos Biosciences Corp. v. Illumina, Inc.*, 858 F. Supp. 2d 367, 371 (D. Del. 2012) ("[A] defendant's state of incorporation had always been a predictable, legitimate venue for bringing suit."). These Defendants have availed themselves of the "rights, benefits, and obligations afforded by Delaware law," *Merck Sharp & Dohme Corp. v. Teva Pharm. USA, Inc.*, 2015 WL 4036951, at *3 (D. Del. July 1, 2015), and "should not now complain that [the plaintiff] has chosen to sue [them] here," *McKee v. PetSmart, Inc.*, 2013 WL 1163770, at *2 (D. Del. Mar. 20, 2013).[4]

There is also a substantial connection between Delaware and the proposed acquisition at issue in this case. In their asset purchase agreement, U.S. Sugar and Louis Dreyfus chose Delaware as the exclusive venue for litigating disputes relating to this proposed acquisition and waived all arguments that Delaware is an inconvenient venue. Ptacek Decl., Ex. 1 § 12.20.

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[4] That non-Delaware corporations are also Defendants does not change that analysis. *See, e.g.*, *Intellectual Ventures I LLC v. Checkpoint Software Techs. Ltd.*, 797 F. Supp. 2d 472, 479-80 (D. Del. 2011) (plaintiff's preference is entitled to paramount weight when "three of the four domestic Defendants . . . are all Delaware corporations"); *Schubert v. OSRAM AG*, 2013 WL 587890, at *4 (D. Del. Feb. 14, 2013) (giving "significant weight" to "plaintiff's venue choice" where "'two of the four OSRAM defendants are incorporated in Delaware'"); *Auto. Techs. Int'l, Inc. v. Am. Honda Motor Co.*, 2006 WL 3783477, at *2 (D. Del. Dec. 21, 2006) (plaintiff's explanation that it sued in Delaware because it "and at least one of the Defendants are incorporated in Delaware . . . is a rational and legitimate reason for choosing to sue the Defendants in Delaware"). The cases that Defendants cite are not to the contrary. *See Cruise Control Techs. LLC v. Chrysler Grp. LLC*, 2014 WL 1304820, at *1, 3 (D. Del. Mar. 31, 2014) (plaintiff's "forum choice controls" even when some of the defendants are incorporated outside of Delaware); *Ceradyne, Inc. v. RLI Ins. Co.*, 2021 WL 3145171, at *1, 8 (D. Del. July 26, 2021) (Delaware's interest in a controversy is not as strong where the plaintiff, but *no defendant*, is incorporated in Delaware).

Moreover, this case focuses on harm in a discrete region in the United States that includes Delaware. *See* Compl. ¶ 29 (D.I. 1) ("The proposed transaction would harm customers across the Southeast"). While the United States also alleges a second, smaller geographic market in which "harm from the transaction is likely to be especially acute," *id.*, that does not negate the allegation that the proposed acquisition is presumptively unlawful in the broader market, *id.* ¶ 38 (alleging slightly higher market concentration in Georgia and its bordering states than in the Southeast as a whole). Indeed, as the evidence will show, United and Imperial are the two largest sellers of sugar to customers in Delaware, and, if this transaction is allowed to proceed, United would control an overwhelming percentage of sales of sugar in Delaware. *See* 15 U.S.C. § 22 (venue for antitrust suits is proper wherever a defendant "transacts business"). Defendants are simply wrong when they claim that this district has "little connection to the challenged transaction." Defs.' Br. at 2 (D.I. 14).[5]

[5] The out-of-circuit cases that Defendants cite are not to the contrary. Defendants cite several cases that, unlike here, involve defendants headquartered in the proposed transferee venue, contract negotiations in that venue, and no greater alleged harm in the government's chosen venue than in any other. *See FTC v. Illumina*, 2021 WL 1546542, at *1, 6 (D.D.C. Apr. 20, 2021) ("[b]oth companies are headquartered in California," "California was . . . the site of the merger negotiations," and the merger's alleged "nationwide impact makes this forum no different than any other"); *FTC v. Graco, Inc.*, 2012 WL 3584683, at *5 (D.D.C. Jan. 26, 2012) (buyer was headquartered in Minnesota, asset purchase agreement was negotiated in Minnesota, and alleged impact of acquisition was national); *United States v. Microsemi Corp.*, 2009 WL 577491, at *6 (E.D. Va. Mar. 4, 2009) (defendants were headquartered in California, challenged transaction was negotiated in California, and likely witnesses were in or significantly closer to California). Here, in contrast, no Defendant is headquartered in Georgia, Georgia was not the site of merger negotiations, the United States alleges harm in a discrete region that includes Delaware, and Defendants are the largest sellers of sugar to customers in Delaware. Defendants' other cases are even farther afield. *See Energy Sols.*, 2016 WL 7387069, at *3 (distinguishing *FTC v. Cephalon, Inc.*, 551 F. Supp. 2d 21 (D.D.C. 2008) on the basis that "[t]he most important reason for transfer in that case . . . was to avoid the risk" of "inconsistent judgments . . . because identical cases were simultaneously pending before the court in the Eastern District of Pennsylvania." (internal quotation marks omitted)); *FTC v. Acquinity Interactive, LLC*, 2014 WL 37808, at *1-2 (N.D. Ill. Jan. 6, 2014) (non-antitrust case in which alleged harm was national and "the FTC has not suggested that the alleged scheme had a greater impact here than elsewhere").

Finally, Delaware is convenient to the Antitrust Division's headquarters in Washington, D.C. and is the closest forum in which personal jurisdiction and venue are indisputably proper over all Defendants. *See Energy Sols.*, 2016 WL 7387069, at *4 ("The Antitrust Division of the Department of Justice is located in Washington, D.C. Delaware is certainly closer to Washington, D.C. than the Western District of Texas."); *Helicos*, 858 F. Supp. 2d at 373 (recognizing as a "legitimate" reason to file suit in Delaware that "Delaware is a venue close" to plaintiff's location).

B. <u>Defendants' Forum Preference Is Entitled to Limited Weight</u>

"Under Third Circuit law, Defendants' preference for an alternative forum is not given the same weight as Plaintiff's preference." *Intellectual Ventures I LLC v. Altera Corp.*, 842 F. Supp. 2d 744, 755 (D. Del. 2012); *see also Ithaca Ventures k.s. v. Nintendo of Am. Inc.*, 2014 WL 4829027, at *3 (D. Del. Sept. 25, 2014) ("this factor is only given limited weight" and "is not sufficient to displace the plaintiff's own choice of venue" (internal quotation marks omitted)).

This principle carries even greater force here, as Defendants' choice of forum conflicts with the preference for Delaware that U.S. Sugar and Louis Dreyfus expressed by incorporating here and choosing Delaware as their exclusive venue for litigating disputes arising out of their asset purchase agreement and related agreements. Moreover, none of the four Defendants maintains corporate headquarters in the Southern District of Georgia, and three of the Defendants (U.S. Sugar, United, and Louis Dreyfus) do not have any facilities or known employees in that district. In fact, Defendants' only connection to the Southern District of Georgia is that Imperial's sugar refinery is located there. Defendants' choice of forum therefore is entitled to minimal deference.

C. <u>The Claim Did Not Arise in Georgia and Has Substantial Ties to Delaware</u>

In determining whether a claim under Section 7 of the Clayton Act arose in a particular district, courts evaluate where the corporate decisions leading to the transaction took place. *Energy Sols.*, 2016 WL 7387069, at *4. In assessing the location of corporate decision-making, courts consider facts including where the negotiations took place and the location of the companies' headquarters. *See Graco*, 2012 WL 3584683, at *5. Here, none of Defendants' corporate headquarters is in Georgia, and only one of the four Defendants has any facilities or known employees there.

In addition, Defendants have failed to provide any evidence showing that the proposed acquisition was negotiated in Georgia. Instead, Defendants' declarations state that they "conducted negotiations in-person . . . in Florida," Buker Decl. ¶ 5 (D.I. 18), and their contemporaneous business documents show that some transaction negotiations occurred in New York City, which is near Louis Dreyfus' headquarters in Connecticut, Ptacek Decl., Ex. 5, 6. Defendants' only argument is that "due diligence, site visits, and plant tours"—not any contract negotiations or corporate decision-making—occurred in Georgia. Defs.' Br. at 8 (D.I. 14); Gorrell Decl. ¶ 9 (D.I. 17). Moreover, Defendants' evidence shows that only *a single* member of the deal team on either side of the transaction is based in Georgia. Gorrell Decl. ¶¶ 3, 8 (D.I. 17) (Mr. Gorrell is based in Georgia, but other members of the seller's negotiating team are from Louis Dreyfus, which is based in Connecticut); Buker Decl. ¶ 5 (D.I. 18) (no member of the buyer's negotiating team is based in Georgia). By contrast, this proposed acquisition was entered by two Delaware corporations that expressly selected Delaware law to govern their asset purchase agreement and voluntarily designated Delaware as their preferred forum for adjudicating their transaction-related disputes.

D. The Convenience of the Parties Does Not Favor Transfer

There is "a long line of decisions from this District, which make plain that a Delaware corporation must expect an uphill climb in proving that it is, in any meaningful sense, 'inconvenient' to defend its actions in the forum in which the corporation has freely chosen to create itself." *Altera*, 842 F. Supp. 2d at 756; *see also Virentem Ventures*, 2019 WL 2131877, at *3 ("Absent some showing of a unique or unexpected burden, a company should not be successful in arguing that litigation in its state of incorporation is inconvenient." (brackets and internal quotation marks omitted)).

Defendants' uphill climb is even steeper where, as here, U.S. Sugar and Louis Dreyfus agreed on a forum selection clause requiring litigation relating to the merger agreement to take place in Delaware. *See Jumara*, 55 F.3d at 880 ("a forum selection clause is treated as a manifestation of the parties' preference as to a convenient forum"). Indeed, in a prior antitrust merger challenge brought by the United States, this Court made clear that defendants' forum selection clause "designat[ing] Delaware as the venue where any disputes arising out of the[ir] agreement should be litigated" demonstrated "the parties' willingness to travel to and litigate in Delaware" and "undermine[d] any argument Defendants could make that Delaware is an inconvenient forum." *Energy Sols.*, 2016 WL 7387069, at *4.

Additionally, "[w]hen transfer is sought by a defendant with operations on a national or international scale, that defendant must prove that litigating in Delaware would pose a unique or unusual burden on its operations." *Checkpoint Software*, 797 F. Supp. 2d at 477 (internal quotation marks and brackets omitted); *see Bering Diagnostics GmbH v. Biosite Diagnostics, Inc.*, 1998 WL 24354, at *5 (D. Del. Jan. 6, 1998) (finding "minimal" burden in litigating in Delaware when "both parties are national corporations with revenues in the millions of dollars").

"[U]nless the defendant is truly regional in character—that is, it operates essentially exclusively in a region that does not include Delaware, transfer is almost always inappropriate." *Human Genome Scis., Inc. v. Genentech, Inc.*, 2011 WL 2911797, at *2 (D. Del. July 18, 2011) (internal quotation marks omitted).

Defendants fail to meet their burden to demonstrate inconvenience. Defendants are multibillion-dollar corporations transacting business on a daily basis throughout large parts of the United States, and, in Louis Dreyfus's case, around the world. Two Defendants, Louis Dreyfus (in Wilton, Connecticut) and United (in Edina, Minnesota) have headquarters closer to Wilmington than to Savannah. Ptacek Decl. ¶ 18 & Ex. 7, 8.[6] In the United States' investigation of this proposed acquisition, witnesses for United sat for their investigatory depositions in New York and Minnesota, both of which are closer to Delaware than to Georgia. Ptacek Decl., Ex. 20. There is no dispute that Defendants have financial resources that are more than adequate to litigate in this district. Defendants have offered "nothing in the record that demonstrates that litigating in either forum-at-issue would impose a serious or undue logistical or financial burden." *TruePosition, Inc. v. Polaris Wireless, Inc.*, 2012 WL 5289782, at *5 (D. Del. Oct. 25, 2012) (internal quotation marks omitted). While Imperial—uniquely of all the parties—has operations in Georgia, this Court has found that "'convenience of the parties'" is not "synonymous with 'convenient for [the target company]'" and denied transfer when only the company being acquired was located in the proposed transferee district. *Energy Sols.*, 2016 WL 7387069, at *4.

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[6] Defendants notably do not contend that Imperial or United employees do not travel regularly to Delaware, and it is likely that they do because they are the largest sellers of sugar to customers in Delaware. *See* Defs.' Br. at 9 (D.I. 14) (claiming only that Louis Dreyfus employees do not travel regularly to Delaware).

E. Defendants Have Not Shown That Any Witness Is Unavailable in This District

Defendants argue that "it would be more convenient for non-party witnesses" to appear in Georgia than in Delaware, Defs.' Br. at 9 (D.I. 14), but that is not the correct standard. "[T]his factor carries weight only to the extent that the witnesses may actually be unavailable for trial in one of the fora." *Virentem Ventures*, 2019 WL 2131877, at *4 (internal quotation marks omitted). Here, there is no issue of unavailability: in antitrust cases brought by the United States, Congress has provided for nationwide service of trial subpoenas, which "ensures that third-party witnesses will be available in . . . this District." *Energy Sols.*, 2016 WL 7387069, at *5 (citing 15 U.S.C. § 23). Third-party witnesses will likely be as available for trial in Delaware as they are in Georgia.

Moreover, "[i]t is the defendant's burden to show both the unavailability of a particular witness and that witness' importance to the defendant's case." *Smart Audio*, 910 F. Supp. 2d at 732 (internal quotation marks omitted). "[T]he movant must provide specificity as to: (1) the particular witness to whom the movant is referring; (2) what that person's testimony might have to do with a trial in this case; and (3) what reason there is to think that the person will 'actually' be unavailable for trial (as opposed to the proffer of a guess or speculation on that front)." *Elm 3DS Innovations LLC v. SK Hynix Inc.*, 2015 WL 4967139, at *8 (D. Del. Aug. 20, 2015). Defendants fail to meet their burden. *See Virentem Ventures*, at *4 ("Defendants offer no record evidence that demonstrates that necessary witnesses will refuse to appear in Delaware for trial."). While Defendants argue that testimony will be needed from American Sugar Refining ("ASR"), they admit that ASR has a refinery in Maryland, which borders Delaware. Defs.' Br. at 10 (D.I. 14).

Defendants speculate about the locations of potential customer witnesses, but their

speculation is ill-founded. Although the complaint focuses on harm to customers, such as food and beverage manufacturers and grocery stores, in the Southeast, the best witnesses to speak to such harm are the employees who *negotiate* with suppliers for the purchase of sugar for these facilities—and they can be located anywhere. A large national grocery store chain, for example, will negotiate with Defendants to purchase sugar for its stores located in the Southeast, but the employee conducting that negotiation may be located at the grocery store's corporate headquarters outside the Southeast. Moreover, the United States has alleged that the proposed acquisition will cause harm throughout the Southeast, so customers in states including Delaware, Maryland, Virginia, and West Virginia could all be called to testify, and Delaware is likely to be more convenient for any witnesses located in those states. *See Energy Sols.*, 2016 WL 7387069, at *5 ("Plaintiffs further state that Defendants have customers in 36 states that rely on the merging firms for radioactive-waste disposal services. It seems that customers from any of those 36 states could be called to testify." (citation omitted)). The only customers that Defendants identify as having facilities or sales in or near Georgia are distributors, which often have multiple facilities throughout the country because they "primarily serve as a sales channel for sugar producers to reach smaller customers." Compl. ¶ 23 (D.I. 1). For example, Defendants cherry-pick Batory Foods' distribution facility in Georgia but ignore its distribution facilities in New Jersey and Pennsylvania, both of which border Delaware. Ptacek Decl., Ex. 10. Similarly, Defendants mention ICI Foods' distribution facility in Georgia but fail to mention that it is headquartered in Virginia. *Id.*, Ex. 11. Indeed, third-party witnesses are unlikely to be located in the Southern District of Georgia: Defendants fail to identify any distributor with a location in that district, *see* Defs.' Br. at 10 (D.I. 14) (identifying distributor facilities only in the Northern District of Georgia), and none of Defendants' top 20 refined sugar customers appears to be

headquartered in the Southern District of Georgia, Ptacek Decl. ¶ 19.

F. The Location of Books and Records Offers No Support for Transfer

"Modern technology has made this factor largely obsolete, given the ease with which documents can be compressed and transferred electronically." *Energy Sols.*, 2016 WL 7387069, at *5. Here, Defendants electronically produced many documents to the Antitrust Division in Washington, D.C. that it can just as easily produce in Wilmington. *See* Champlin Decl. ¶¶ 4-8. Moreover, critical evidence from Defendants is kept closer to Wilmington than to Savannah. Information about the sale of U.S. Sugar's products is all kept at United, which is located in Edina, Minnesota. Ptacek Decl., Ex. 18. And some Imperial data is kept in Louis Dreyfus' data systems. *Id.*, Ex. 19.

Defendants argue that the Court may need to visit Imperial's sugar refinery in Savannah to evaluate Defendants' efficiency claims, but counsel for the United States is not aware of any court presiding over an antitrust merger challenge that has conducted a site visit to evaluate an efficiencies claim. This is unsurprising, as no court has credited an efficiencies defense in an antitrust merger case, much less approved an anticompetitive merger on the basis of such a defense. *See St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Hosp. Sys., Ltd.*, 778 F.3d 775, 789 (9th Cir. 2015) (the Supreme Court has never recognized an efficiencies defense and "none of the reported appellate decisions [recognizing such a defense] have actually held that a § 7 defendant has rebutted a prima facie case with an efficiencies defense").

III. The Public Interest Factors Weigh Against Transfer

A. Practical Considerations Favor Keeping this Case in Delaware

In evaluating the "practical considerations that could make the trial easy, expeditious, or inexpensive," *Jumara*, 55 F.3d at 879, courts consider the relative expense and ease for each

party of litigating in this district as compared to the proposed transferee forum, *see, e.g.*, *FastVDO LLC v. Paramount Pictures Corp.*, 947 F. Supp. 2d 460, 463 (D. Del. 2013). Defendants' brief makes no effort to address this factor. *See Virentem Ventures*, 2019 WL 2131877, at *5 (practical considerations factor "does not weigh in favor of transfer" when "Defendants have offered no compelling evidence" to support it).

Litigating this action in Delaware would impose no meaningful burden on Defendants. U.S. Sugar and Louis Dreyfus are incorporated in Delaware, United and Imperial are the largest sellers of sugar to customers in Delaware, and all Defendants have access to ample financial resources. As this Court has recognized in a prior antitrust merger challenge, U.S. Sugar and Louis Dreyfus' selection of Delaware as the exclusive forum for resolution of all disputes related to this proposed acquisition undermines any argument Defendants could make that Delaware is an inconvenient forum. *See Energy Sols.*, 2016 WL 7387069, at *4. United and Louis Dreyfus are located closer to Wilmington than to Savannah, and only one Defendant has any facilities or known employees in Georgia. Defendants' non-local outside counsel are based in Washington, D.C., New York City, or Minneapolis, all of which are closer to Wilmington than to Savannah. None of the 13 lawyers listed on Defendants' brief is located in Georgia.

In contrast, the transfer of this action to the Southern District of Georgia would impose higher travel costs on the third parties, the United States, and two Defendants. The Antitrust Division is located in Washington, D.C., and United and Louis Dreyfus are located closer to Wilmington than to Savannah. None of the merging parties' top 20 customers appears to be headquartered in the Southern District of Georgia. And none of Defendants' largest processing competitors—who may testify about general competitive conditions in the sugar industry and their ability to counteract the proposed acquisition's likely anticompetitive effects—appear to be

located in the Southern District of Georgia. *See* Ptacek Decl., Ex. 12-17. Transfer would also delay the prompt resolution of this action, which Defendants insist is of great importance to them. Practical considerations therefore weigh against transfer.

B. Administrative Concerns Do Not Favor Transfer

The relative docket congestion statistics cited by Defendants do not favor transfer to the Southern District of Georgia. Defendants cite the number of pending cases, civil filings per judgeship, weighted filings per judgeship, and civil cases over three years old. But "[t]his District's large caseload has not, in the past, been a sufficient justification for transfer." *Ithaca Ventures*, 2014 WL 4829027, at *6. On the other hand, "increased times from filing to disposition and trial are important factors that do influence the court's calculus." *Id.* Defendants point out that "there is no data on the median time to trial in civil cases in the Southern District of Georgia," Defs.' Br. at 13 (D.I. 6), but they ignore that the time from filing to disposition in civil cases is consistently slightly higher in the Southern District of Georgia (about 9 months over the last two years) than in this district (about 6-7 months over the same period). *See* United States Courts, Table N/A—U.S. District Courts–Combined Civil and Criminal Federal Court Management Statistics (June 30, 2021), https://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2021/06/30-1 (last visited Dec. 12, 2021); *cf. Blackbird Tech LLC v. TuffStuff Fitness, Int'l, Inc.*, 2017 WL 1536394, at *6 (D. Del. Apr. 27, 2017) (finding that higher median time for dispositions in Delaware than in another district slightly favored transfer).

C. The Proposed Acquisition Does Not Concern Local Interests

The interests presented by this case are not local. In *Energy Solutions*, in which the United States alleged that a merger would harm customers in 36 states, this Court found that the

local interest factor was "neutral . . . because this case concerns a question that has nationwide significance." 2016 WL 7387069, at *6 (internal quotation marks omitted); *accord Cephalon*, 551 F. Supp. 2d at 31 (government antitrust enforcement actions raise issues that are "not . . . local" but instead have "nationwide significance"). Here, the United States seeks to enjoin Defendants' proposed acquisition because it will likely lead to higher prices, reduced quality, and reduced service reliability to purchasers of sugar throughout the Southeastern United States. Compl. ¶ 5 (D.I. 1). As discussed above, the United States' allegations specific to Georgia and its bordering states do not diminish the allegations of immense likely harm throughout the Southeast. Indeed, Defendants are the largest sellers of sugar to customers in Delaware.

Moreover, only one Defendant, Imperial, has *any* facilities or known employees in the state, but it is a Texas company headquartered in Texas with a facility in Kentucky and almost no salespeople in Georgia. United (on behalf of U.S. Sugar and its other member-owners) and Imperial sell sugar throughout the Southeast, and United's website identifies a "[c]oast-to-coast distribution . . . network" with an accompanying graphic that prominently identifies capabilities near Delaware. Ptacek Decl., Ex. 9. Louis Dreyfus is a worldwide leader in sugar trading and merchandising with U.S. headquarters in Connecticut. "A district does not have a local interest in resolving litigation simply by virtue of having one of the parties present there. To hold otherwise would be to give undue weight to the location of the parties, which has already been accounted for in the private interest factors." *Ithaca Ventures*, 2014 WL 4829027, at *7. Thus, the local interests factor is neutral.

D. <u>Public Policy of the Fora Do Not Favor Transfer</u>

Defendants have not addressed the substance of the public policy factor, but instead merely add the words "and policies" to their discussion of the local interests factor. Defs.' Br. at

11 (D.I. 6). "Delaware's public policy encourages Delaware corporations to resolve their disputes in Delaware courts." *Virentem Ventures*, 2019 WL 2131877, at *6. "Defendants have not addressed this factor. Thus, this factor weighs against transfer." *Id.*

CONCLUSION

For the foregoing reasons, Defendants' motion to transfer venue should be denied.

Respectfully Submitted,

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Dated: December 13, 2021