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.	)	

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)

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In their Motion to Transfer, Defendants requested in the alternative that this Court set an expedited trial date in order to allow a decision to be issued in advance of the outside date in the Asset Purchase Agreement. Defendants appreciate the fact that this Court has set a trial date in April 2022, which moots that part of the Motion.

Nonetheless, DOJ brought this case to stop U.S. Sugar, which is located in Florida, from acquiring Imperial's Port Wentworth, Georgia sugar refinery, arguing that if the proposed transaction were allowed to occur, it would cause "particularly acute" harm in "Georgia and the five states that border it." D.I. 1 ¶¶ 4, 33. Delaware does not border Georgia and has no real connection to this dispute. DOJ points to the facts that two of the four Defendants are organized under Delaware law, and that the Defendants agreed that any disputes *between them* relating to the purchase agreement would be resolved in Delaware as a neutral forum. But those realities do not establish a connection to Delaware that allows the DOJ's preference to litigate close to Washington, D.C. to override all of the other factors in the transfer analysis—and particularly the convenience of non-party witnesses. At the end of the day, what should matter is what DOJ alleges: that the transaction will lead to harm to sugar customers in Georgia and its "backyard." *Id.* ¶¶ 4, 33, 34.

I. DOJ'S CHOICE OF DELAWARE DOES NOT OUTWEIGH ALL OF THE OTHER FACTORS IN THE TRANSFER ANALYSIS

DOJ argues that its selection of Delaware is "paramount." D.I. 30 at 6-7. That is wrong where, as here, the plaintiff's selection "has no meaningful ties to the controversy." *FTC v. Graco Inc.*, 2012 WL 3584683, at *5 (D.D.C. Jan. 26, 2012); *see also United States v. Microsemi Corp.*, 2009 WL 577491, at *7 (E.D. Va. Mar. 4, 2009) (discrediting DOJ's choice of venue "[w]here the plaintiff is not located in the chosen district and the cause of action did not arise in that district").

DOJ also argues that its choice of Delaware is entitled to weight because "the transaction at issue here is between two Delaware corporations, U.S. Sugar and Louis Dreyfus." D.I. 30 at 7. However, the fact that an entity is incorporated in Delaware does not mandate deference to a plaintiff's choice of venue. *See In re Link_A_Media Devices Corp.*, 662 F.3d 1221, 1223 (Fed. Cir. 2011) (reversing denial of transfer where district court treated defendant's "incorporation in Delaware" as "effectively dispositive"); *see also Express Mobile Inc. v. Webcom Group*, 2020 WL 3971776, at *20 (D. Del. July 14, 2020) ("A party's state of incorporation cannot be a dispositive fact in the venue transfer analysis."). And, DOJ's argument ignores the two other defendants.

DOJ relies on the fact that the Asset Purchase Agreement specifies that disputes **between the parties regarding the purchase agreement** must be brought in Delaware. D.I. 30 at 7-8; *see also* D.I. 33 Ex. 1, § 12.20. However, DOJ is not a party to the Asset Purchase Agreement. DOJ's case does not concern the proper interpretation of the Asset Purchase Agreement, and nothing in the Agreement obligates Defendants to litigate actions brought by third-parties in Delaware. *See United States v. Energy Sols., Inc.*, 2016 WL 7387069, at *4 (D. Del. Dec. 21, 2016) ("The court agrees with Defendants that they are not obligated by the forum selection clause to litigate actions brought by third parties in Delaware.");[1] *see also* Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3854.1 (Apr. 2021) (a forum selection "clause may be ignored as a factor if it does not clearly apply to the action").

Finally, DOJ contends that there is a connection to Delaware because "this case focuses on harm in a discrete region in the United States that includes Delaware." D.I. 30 at 8. Notably, there

[1] Although the *Energy Solutions* court ultimately denied transfer, in that case, DOJ alleged a coast-to-coast market claiming harm in California, North Dakota, Maine, Florida, Puerto Rico, and 33 states in-between; and every defendant was a Delaware company. *See* 2016 WL 7387069, at *1, 3, 5; *see also* Compl. ¶ 1 n.1, *United States v. Energy Sols., Inc.*, 2016 WL 6803190 (D. Del. Nov. 16, 2016) (defining the 38 "Relevant States").

are no allegations in the Complaint specific to Delaware.[2] In contrast, DOJ alleges that the proposed transaction will cause "particularly acute harm" to "customers in Georgia and its bordering states," "given Defendants' refinery locations and the locations of other sugar producers." D.I. 1 ¶ 33.

II. THE REMAINING PRIVATE AND PUBLIC FACTORS WEIGH IN FAVOR OF TRANSFER TO GEORGIA

A. Plaintiff's Section 7 Claim Arose In The Southern District of Georgia

Imperial's only sugar refinery—and the key asset in the proposed transaction—is located just outside of Savannah, Georgia, in the Southern District of Georgia. D.I. 17 ¶ 3. Imperial's President and Chief Executive Officer ("CEO"), Michael Gorrell, who is based at the Georgia refinery was "personally involved in Imperial's efforts to sell its Georgia facility," and "helped lead the negotiations of the Asset Purchase Agreement" from Georgia. *Id.* ¶¶ 3, 8. And, U.S. Sugar conducted in-person due diligence of the refinery including site visits and plant tours "[d]uring the course of negotiations of the Asset Purchase Agreement." *Id.* ¶¶ 8-9; D.I. 18 ¶ 5.

In contrast, DOJ does not (and cannot) dispute that none of the corporate decision makers nor any of the negotiators of the proposed transaction are located in Delaware; nor did any meetings, discussions, communications related to the transaction, or execution of the Asset Purchase Agreement, take place in Delaware. D.I. 18 ¶ 5; D.I. 17 ¶ 10; *see also* D.I. 30 at 10.

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[2] DOJ's opposition brief notes that Imperial and United Sugars have customers in Delaware. D.I. 30 at 8. That is currently true—but those customers also have access to sugar supplied by non-defendants with locations in New York and other areas outside of the South. *See, e.g.*, D.I. 1 ¶ 18 (American Sugar Refining ("ASR" or "Domino") refineries in Maryland and New York); *id.* ¶ 19 (National Sugar Marketing ("NSM") processing facility in Minnesota; and Michigan Sugar facility in Michigan). In any event, Imperial and United Sugars ship a small fraction of their sales to Delaware—which is much farther than the 500 miles that DOJ alleges is critical to price effects from Imperial's plant in Port Wentworth, Georgia or United Sugars' facilities. *See* D.I. 17 ¶ 6; D.I. 16 ¶ 4; *see also* D.I. 1 ¶ 3.

B. The Convenience Of The Parties And Non-Party Witnesses Both Favor Transfer

DOJ contends that because two of the four defendants—U.S. Sugar and Louis Dreyfus—are Delaware entities, Defendants cannot argue that Delaware is an inconvenient forum. D.I. 30 at 11-12. That argument misses the point: there can be no real dispute that for any of Imperial's 400 Georgia-based employees (including its President and CEO) and U.S. Sugar's many Florida-based employees, trial in Georgia would be significantly more convenient than in Delaware. Although it may be more convenient for DOJ to litigate in Delaware due to its proximity to Washington, D.C., *id.* at 9, that cannot tip the scales. *See FTC v. Cephalon Inc.*, 551 F. Supp. 2d 21, 28 (D.D.C. 2008) (holding that the fact that FTC's lawyers are located in D.C. "carries little, if any, weight in an analysis under § 1404(a)" (citation omitted)).

The convenience of non-party witnesses also favors transfer to Georgia. DOJ attempts to downplay the significance of this factor by pointing out that Congress has provided for nationwide service of trial subpoenas in antitrust cases brought by the government, which ensures that non-parties can be compelled to attend trial in Delaware. D.I. 30 at 13. That fact, if anything, only increases the importance of the convenience to non-party witnesses because they cannot rely on the usual protections afforded by Federal Rule of Civil Procedure 45 to shield them from undue burden. *See United States v. Gen. Motors Corp.*, 183 F. Supp. 858, 861 (S.D.N.Y. 1960) ("In a Government antitrust suit, the court must consider the welfare of nonparty witnesses, because they are without the protection from subpoena to attend at places far from home . . . ."). Although third-party witnesses can be compelled to testify in Delaware, "how convenient or inconvenient it will be for them to testify in a given forum still weighs quite heavily in the analysis." *Energy Sols.*, 2016 WL 7387069, at *5.

DOJ's Complaint alleges "acute harm" to customers in "Georgia and the five states that

border it." D.I. 1 ¶¶ 4, 29, 33. Testimony from customers located in Georgia and its bordering states, as well as companies who market sugar to those states, will be pivotal witnesses for both sides. Although DOJ argues that none of Defendants' top 20 customers are "headquartered in the Southern District of Georgia," D.I. 30 at 14-15, it concedes that at least 3 are headquartered elsewhere in Georgia. D.I. 32 ¶ 19 n.1. And, DOJ has not identified a single potential witness located in Delaware.[3]

C. Georgia Has A Local Interest In The Resolution Of Plaintiff's Claim

The Southern District of Georgia also has an obvious interest in resolving a challenge to a proposed transaction that will allegedly cause "acute harm" to customers within its State and directly impact the 400 employees who work at the Port Wentworth facility. D.I. 1 ¶¶ 4, 29, 33; *see also Bader v. Air Line Pilots Assoc., Int'l*, 63 F. Supp. 3d 29, 36 (D.D.C. 2014) (recognizing that impact on employees in transferee venue provides "some local interest" and supports transfer). DOJ attempts to argue otherwise by analogizing to cases where the government has alleged "nationwide" harm. D.I. 30 at 17-18. But DOJ did not bring that case. At its broadest, DOJ has alleged harm to the "Southeast," a collection of 12 states and the District of Columbia, and at its narrowest, just Georgia and its five neighbors. D.I. 1 ¶¶ 31, 33.

[3] DOJ argues that proximity to the Port Wentworth refinery is immaterial because "counsel for the United States is not aware of any court presiding over an antitrust merger case that has conducted a site visit to evaluate an efficiencies claim," and because no court has credited an efficiencies defense. D.I. 30 at 15. DOJ is wrong on both counts. Site visits occur in contested merger cases, including to evaluate efficiencies. In *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd*, 1997 WL 420543 (6th Cir. 1997), the district court toured two hospitals involved in a merger and cited the tours as "instructive" in finding that the "proposed merger would result in significant efficiencies, in the form of capital expenditures avoidance and operating efficiencies." *Id.* at 1288, 1301; *see also Gen. Motors Corp.*, 183 F. Supp. at 861 (noting the use of a "view of a defendant's manufacturing plants in operation" in a merger challenge).

CONCLUSION

Defendants respectfully request that the Court grant their motion and transfer this case to the Southern District of Georgia, Savannah Division.

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December 17, 2021

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2021, 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 December 17, 2021, upon the following in the manner indicated:

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