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]

[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).

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[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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