UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

UNITED STATES' REPLY

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

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

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

A. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS

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

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

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

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

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

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

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

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

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

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

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

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

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

B. IRREPARABLE INJURY IS LIKELY

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

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

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

C. Defendants Will Not Be Injured Substantially by Entry of an Injunction Pending Appeal

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

D. The Balance of Factors and Public Interest Support An Injunction Pending Appeal

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

* * *

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

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

CONCLUSION

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

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

Dated: September 30, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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