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

PLAINTIFF'S RESPONSE TO DEFENDANTS' RESPONSE TO SECTION II.C. OF PLAINTIFF'S REPLY BRIEF

Defendants' Response to Section II.C of Plaintiff's Reply Brief primarily reiterates and repackages their flawed arguments on geographic market from Defendants' prior Post-Trial Brief. Defendants, however, do raise a few new (and incorrect) legal and factual arguments. Given these new, flawed assertions, Plaintiff must briefly respond.

I. Defendants misstate the case law to argue Plaintiff's application of hypothetical monopolist test is flawed.

Citing *FTC v. Advocate Health Care Network* for the first time, Defendants now contend that Dr. Rothman's application of the hypothetical monopolist test is flawed because he did not follow an "iterative analysis," in which he "proposes a candidate market, … then adjusts the candidate market and returns the simulation as necessary." 841 F.3d 460, 473 (7th Cir. 2016), D.I. 238 at 2. Defendants, however, misstate that court's reasoning and the law on the hypothetical monopolist test more generally. The court in *Advocate Health Care* ruled that the hypothetical monopolist test is iterative "***as necessary***," and further explained that an expert

should adjust the market definition only "*if* the results require it" because the original market failed that test. 841 F.3d at 473 (emphasis added). Here, Dr. Rothman tested the United States' proposed markets and concluded that they passed the hypothetical monopolist test. *See* D.I. 214 at 11. No further "adjustment" or iteration was required.

Relatedly, Defendants also incorrectly state that applying the hypothetical monopolist test is not sufficient to prove the alleged markets, D.I. 238 at 1. This misrepresents controlling Third Circuit precedent. *FTC v. Hackensack Meridian Health, Inc*., 30 F.4th 160, 167 (3d Cir. 2022). And they incorrectly imply that Plaintiff relied solely on the hypothetical monopolist test to prove a relevant market. D.I. 238 at 2. This, too, is wrong, as Plaintiff introduced significant evidence that freight costs and other commercial realities support both the broader and narrower proposed markets. D.I. 214 at 5-9; *see also id.* at 13 (*Brown Shoe* and *Pabst* recognize there may be more than one relevant market).

II. Defendants misstate the factual record regarding evidence of customer arbitrage.

Defendants also make a new argument grounded in misstatement of the factual record. Defendants claim that "Plaintiff and its expert did not account for arbitrage" by purchasing from distributors or suppliers outside the geographic market and shipping it back. D.I. 238 at 2-3. That is incorrect. Dr. Rothman explicitly analyzed customers' options and concluded any arbitrage would not be sufficient to invalidate the relevant markets. D.I. 214 at 11-12; D.I. 215 at ¶¶ 76-82.

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, a true and correct copy of the foregoing was served on all counsel of record via electronic notification.

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