No. 22-2806

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
UNITED STATES SUGAR CORPORATION, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Delaware, No. 1:21-cv-1644

APPELLEES' OPPOSITION TO EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

Lawrence E. Buterman
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020

Christopher S. Yates
LATHAM & WATKINS LLP
505 Montgomery Street
Suite 2000
San Francisco, CA 94111

Jack B. Blumenfeld
Brian P. Egan
MORRIS, NICHOLS, ARSHT & TUNNELL LLP
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899

Melissa Arbus Sherry
Counsel of Record
Amanda P. Reeves
Lindsey S. Champlin
David L. Johnson
Charles S. Dameron
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
melissa.sherry@lw.com

Counsel for United States Sugar Corporation
[Additional counsel listed on signature page]

INTRODUCTION

For 18 months Plaintiff has sought to prevent U.S. Sugar from consummating its acquisition of Imperial. At a four-day bench trial in April, Plaintiff presented the district court with its case as to why the transaction should be enjoined. The only evidence Plaintiff presented to satisfy its burden to establish relevant product and geographic markets came *from a single expert*. The district court heard testimony from dozens of witnesses (including that expert), examined the evidence, made numerous credibility determinations (including adverse credibility determinations regarding Plaintiff's aforementioned expert), and issued a 59-page decision with over 100 paragraphs of factual findings. As the district court explained, its findings were based on "substantial," "ample," "abundant," and "particularly credible" evidence running against Plaintiff, which adduced "scant evidence" or "no evidence" in support of its "flawed" market definitions. Memorandum Opinion, D.I. 242 ("Op.") at 25, 31, 44 n.22, 46, 48, 51, 53. That is why the district court held that the acquisition does not violate Section 7 of the Clayton Act.

Plaintiff's emergency motion ignores all of that. It says nothing about the district court's factual findings and credibility determinations, the failures of the government's expert, and its absence of proof. To try to avoid the high hurdle of a clearly erroneous standard of review, Plaintiff recasts its failures of proof as legal errors. There was no error of law. A fair reading of the district court's decision—and the decision denying the same emergency relief yesterday (which Plaintiff also ignores)—makes that clear. But, more importantly, the district court's denial of injunctive relief rested on three, independent failures of proof: two on the product market and one on the geographic market. For all three reasons, Plaintiff did not even get past the first step of its *prima facie* case. It is exceedingly *un*likely Plaintiff could pull off the hat trick of getting all three fact-intensive rulings overturned on appeal. That alone is reason to deny any emergency relief.

Plaintiff relies heavily on the fact that this Court granted interim relief in *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327 (3d Cir. 2016). But *Penn State* had nothing to do with product market definition. The district court there mistakenly applied a test that multiple courts held should not be used to analyze hospital mergers. Here, the district court found that Plaintiff failed to put forth a qualified expert and separately found that Plaintiff's markets were "simply not credible," Op.51, and "ignore[d] the commercial realities of the sugar industry in this country," Op.52. That is not legal error. Far more on point is this Court's recent refusal to grant an injunction in *FTC v. Thomas Jefferson Univ.*, after the district court rejected a challenge to a merger on the basis that the government failed to carry its prima facie burden. *FTC v. Thomas Jefferson Univ.*, 2020 WL 8455862, at *1 (3d Cir. Dec. 21, 2020).

Plaintiff also cannot establish the other factors needed. Plaintiff's irreparable-harm argument is overstated; the evidence at trial established that consummation of this transaction will not cause any harm, and in any event the government regularly brings suit to address deals that have already been consummated. At the same time, Plaintiff understates the substantial harm and prejudice an injunction pending appeal would inflict on U.S. Sugar and Imperial. Plaintiff has always known that delay might get it the same result (stopping the deal) as actual success on the merits. The unfortunate reality is that granting Plaintiff's requested relief puts this transaction in jeopardy. As the district court acknowledged yesterday in denying the same motion Plaintiff now presents to this Court, "the [g]overnment continues to try to obtain via delay what it could not obtain on the merits." Mem. Op., D.I. 253 (Ex. A) at 1.

An injunction pending appeal would not just affect U.S. Sugar and Imperial; it would also harm the public. This is a unique case in that respect. As the evidence at trial established, this acquisition will likely raise the output and lower the price of refined sugar in the United States. Plaintiff's motion should be denied.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Proposed Transaction Between U.S. Sugar And Imperial

U.S. Sugar grows sugar cane and operates a cane mill and refinery in Florida. Op.2. Every year, U.S. Sugar grows more sugar cane than it has the capacity to process at its mill, and must sell its excess sugar cane to third-party mills. *Id.*

Imperial operates a cane sugar refinery in Georgia. Op.3. Imperial does not grow its own sugar cane or own or operate sugar mills, and instead imports over 90% of the raw sugar that it refines at its facility. Op.20. "Imperial's reliance on high-cost imports makes it less competitive and, as such, it struggles to compete with vertically-integrated" domestic sugar refiners and processors. Op.21. Imperial sells refined sugar in more than 40 states, Op.4, but it is "a residual or back-up supplier," and describes itself as "structurally uncompetitive," Op.21. Its refinery operates at only 75% capacity on average. *Id.*

Imperial's owner has been trying to sell Imperial for the past five years. Op.22. On March 24, 2021, U.S. Sugar and Imperial's owner entered into an asset purchase agreement whereby U.S. Sugar would acquire Imperial's assets—principally, its refinery—initially for $315 million. Op.4. U.S. Sugar's acquisition of Imperial's refinery will enable U.S. Sugar to refine all of the excess raw sugar that it produces in Florida, and U.S. Sugar plans to "use targeted capital expenditures to increase the capacity utilization of" Imperial's refinery. Op.22. By having refineries in two different states, U.S. Sugar will also increase the amount of sugar it refines and provide customers with greater security against weather and other supply chain risks. Op.22-23.

B. The District Court's Proceedings

After a lengthy investigation, on November 23, 2021, Plaintiff filed suit against U.S. Sugar, Imperial, Louis Dreyfus, and United Sugars Corporation (an agricultural cooperative in Minnesota that markets U.S. Sugar's products) under

Section 7 of the Clayton Act, seeking to permanently enjoin U.S. Sugar's proposed acquisition of Imperial. The district court held a four-day bench trial in April 2022.

At trial, Plaintiff sought to define the relevant product market in this case as the market for "the production and sale of refined sugar to wholesale customers." Op.43. And it proposed two possible geographic markets for that product: first, a market that Plaintiff called "Georgia Plus," encompassing the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Tennessee; and second, a broader "Southeast" market encompassing the "Georgia Plus" states as well the States of Delaware, Kentucky, Maryland, Mississippi, Virginia, and West Virginia, and the District of Columbia. Op.49. In support of these product-market and geographic-market definitions, Plaintiff relied entirely on the expert testimony of Dr. Dov Rothman. Op.24.

On September 23, 2022, the district court entered judgment in favor of Defendants after concluding that Plaintiff had "failed to prove that the proposed acquisition of Imperial Sugar by U.S. Sugar is likely to substantially lessen competition or tend to create a monopoly under Section 7 of the Clayton Act." Op.59. As the district court explained, "Section 7 merger challenges are reviewed under a burden-shifting framework. First, the Court determines whether the government has established a *prima facie* case that the proposed merger is anticompetitive by (1) identifying the proper relevant market and (2) showing that the effects of the merger are likely to be anticompetitive." Op.40. The "relevant market" must "correspond to the commercial realities of the industry," *id.* (quoting *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2285 (2018)), and consists of "two components: a 'product market' and a 'geographic market,'" *id.* (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962)). "[F]ailure to properly define either a product or geographic market is fatal to a plaintiff's case." *Id.* (citing *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436-42 (3d Cir. 1997)).

The district court's opinion includes 105 paragraphs of findings of fact and includes numerous credibility determinations. Key among those findings was that Plaintiff's only expert witness was "lacking" in "credentials and experience," "simply not credible," and that his opinions were "flawed and largely unpersuasive." Op.24, 51. (The district court repeated those findings, reaffirming that "the Court found the expert's testimony to be unpersuasive (as have other courts)," when it just yesterday denied the same relief Plaintiff seeks here. Ex. A at 2 n.2.)

The district court ultimately concluded that Plaintiff "failed to identify the proper relevant market because its product market and geographic markets ignore the commercial realities of sugar supply in the U.S.," and therefore "failed to establish a *prima facie* case" for three independent reasons. Op.41.

First, the district court rejected Plaintiff's argument "that sugar distributors should be excluded from the product market because they do not produce the refined sugar they are selling." Op.43. It found that the "record is replete with evidence of distributors competing with refiner producers . . . as well as with cooperatives," Op.44-45, and that the "ability of distributors to remain competitive with producers is based on several factors that are well-supported by the record," including the distributors' "massive" purchases of "foreign imports," Op.45. The district court found that Defendants' expert, Dr. Nicholas Hill, had "[tied] all of this evidence together" and "explained how distributors are independent actors within the market" that "compete effectively with other suppliers." Op.46.

The district court found Dr. Hill to be a "particularly credible" witness. *Id*. Unlike Dr. Rothman, Dr. Hill received a Ph.D. in economics from Johns Hopkins University. Op.25. And Dr. Hill previously worked at the Antitrust Division and Federal Trade Commission. *Id.*

Dr. Hill testified that Plaintiff had improperly gerrymandered the product market by excluding sugar "distributors"—non-producing entities that purchase and store large quantities of sugar for wholesale—that compete with sugar refiners in the wholesale market. Op28. Dr. Hill's testimony was supported by extensive evidence from across the sugar industry indicating that "wholesale customers do not care whether the sugar they purchase is coming directly from the sugar producer/refiner or from a cooperative or distributor"; that "distributors tend to purchase the majority of foreign-produced refined sugar imports"; and that distributors' "ability to purchase large quantities of refined sugar from many different sources, including foreign importers, . . . allows distributors to price resales competitively" with producer/refiners. Op.28. As such, Plaintiff's exclusion of distributors from its product-market definition was "inconsistent with the commercial realities of the industry." Op.47. As the court explained, this finding alone was fatal to Plaintiff's case, as Plaintiff "admit[ted] that it does not have evidence to prove its case if distributors are included in the product market." *Id*.

Second, and independently, the district court noted that Plaintiff's proposed product market "assume[d] that all wholesale customers are the same without regard to economic realities," but "there is no evidence in the record to support such a conclusion." Op.48. Indeed, Plaintiff's own expert "admitted that he did not even consider whether retail customers have the same competitive alternatives as industrial customers." *Id*. The district court found that "various wholesale customer types have different sugar needs and purchasing practices," Op.32, such that "industrial customers are . . . treated differently by suppliers in the competitive landscape," Op.48. That flaw in Plaintiff's product-market definition was "yet another reason that [Plaintiff's] proposed product market fails." *Id.*

Third, the district court concluded that "even assuming the relevant product market" proposed by Plaintiff was valid, Plaintiff "failed to identify a relevant geographic market as well." Op.49. As it explained, "[a]n often-used tool for determining a relevant geographic market is the hypothetical monopolist test." *Id.* Under that test, a proposed market is properly defined "if 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." *Id.* (quoting *FTC v. Hackensack Meridian Health*, 30 F.4th 160, 167 (3d Cir. 2022)). But if consumers would "respond to a SSNIP by purchasing the product from outside the proposed market . . . the proposed market definition is too narrow." *Id.* (quoting *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 (3d Cir. 2016)).

Examining the evidence, the district court found that the "Georgia Plus" and "Southeast" region markets "defined by [Plaintiff] are too narrow to be the relevant geographic market" because "[i]n the event [of] . . . price increases within either the 'Southeast' or 'Georgia Plus' markets, customers . . . easily could (and likely would) turn to [suppliers] outside the area for additional sugar supply." Op.38. This is due to the "ease with which sugar flows across the country," *id.*, a finding supported by "abundant evidence of sugar consumers located in the 'Southeast' and 'Georgia Plus' markets [that are already] purchasing their refined sugar outside those geographic regions," Op.51; *see also* Op.13-16 (section of opinion entitled "Sugar Flows in the United States"). Dr. Rothman also could not identify any region in the country that would not satisfy his application of the hypothetical monopolist test." Op.50-51. In light of that evidence, Plaintiff's proposed geographic markets were "simply not credible," and "ignore[d] the commercial realities of the sugar industry in this country," Op.51-52.

Because each of these findings was sufficient on its own to defeat the first prong of Plaintiff's *prima facie* case, the district court expressly declined to "reach the second prong of the *prima facie* case—i.e., whether [Plaintiff] has shown that the effects of the acquisition are likely to be anticompetitive." Op.54. The district court did note that "USDA's power to manipulate sugar supply in the market would act as a safeguard against potential anticompetitive effects . . . even if the Court were to find any such effects existed." Op.55. But the court's judgment rested on its conclusion that Plaintiff had "failed to meet its burden under the Clayton Act" due to the flaws in its proposed market definitions. *Id.*

Plaintiff filed a notice of appeal and moved for an injunction pending appeal in the district court. The district court denied that motion, finding that Plaintiff was "try[ing] to obtain via delay what it could not obtain on the merits," Ex. A at 1; that Plaintiff's appeal was unlikely to succeed in view of the district court's findings, following a trial at which the district court "listened to witnesses and evaluated the evidence," *id.* at 2; that Plaintiff "failed to establish irreparable harm in the absence of the requested injunction" because the government routinely brings "suits to address transactions which have already been consummated," *id.* at 2-3; that "an injunction pending the decision on appeal" would "prejudice Defendants," *id.* at 3 n.3; and that "the public interest lies in allowing the [acquisition] to go forward," given the testimony of a USDA economist that the deal "may lower prices for U.S. purchasers and consumers of refined sugar," *id.*

ARGUMENT

"Injunctions pending appeal, like preliminary injunctions, are 'extraordinary remedies.'" *Donald J. Trump for President, Inc. v. Sec'y of Pa.*, 830 F. App'x 377, 389 (3d Cir. 2020) (quoting *Winter v. NRDC*, 555 U.S. 7, 24 (2008)). The inquiry turns on four factors: "(1) whether the [] applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent [an injunction]; (3) whether issuance of the [injunction] will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *In re Revel AC, Inc.*, 802 F.3d 558, 568 (3d Cir. 2015) (citation and internal modifications omitted). If the applicant fails to establish either of the first two factors, "inquiry into the balance of harms and the public interest is unnecessary, and the stay should be denied without further analysis." *Revel*, 802 F.3d at 571. Plaintiff has not established either of the first two factors; but even if the Court reached the third and fourth factors, balancing the relative harms only reaffirms that an injunction is inappropriate.

A. Plaintiff Cannot Establish A Likelihood Of Success On The Merits

The district court's decision rests on three independent conclusions: (1) that Plaintiff's proposed product market was flawed because it erroneously excluded sugar distributors from the mix of sugar suppliers; (2) that Plaintiff's proposed product market was flawed because it failed to distinguish between differently situated classes of wholesale customers; and (3) that Plaintiff's proposed regional geographic markets were flawed because they flew in the face of abundant evidence of "economic reality": that "sugar flows easily across the country from areas of surplus to deficit in response to prices and demand." Op.52.

Each of these fact-intensive conclusions—derived from a four-day bench trial at which the district court made sharply contrasting credibility determinations regarding the parties' key witnesses—are reviewed in this Court for clear error. *See Hackensack*, 30 F.4th at 167; *Penn State*, 838 F.3d at 335; *see also, e.g.*, *FTC v. Sanford Health*, 926 F.3d 959, 963 (8th Cir. 2019); *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Inc.*, 778 F.3d 775, 783 (9th Cir. 2015); *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208, 1217 (11th Cir. 2012). To prevail on appeal, Plaintiff must run the table on *all* of these issues—under the most deferential standard. Plaintiff cannot make any showing—much less a strong showing—that it will do so.

Plaintiff is at pains to dress up its disputes with the district court's fact-finding as arguments regarding legal error. That effort must fail. As Plaintiff concedes (at 10), the district court "correctly identified" the relevant legal framework governing the definition of the relevant market. Plaintiff faults the district court (10) for purported "err[or] in its application" of that legal framework to the specific facts of the industry at issue here. But that kind of argument turns on "factual question[s] dependent on the special characteristics of the industry involved." *Hackensack*, 30 F.4th at 167 (quoting *Penn State*, 838 F.3d at 335). Accordingly, Plaintiff must show that the district court's fact-finding regarding the relevant market was clearly erroneous. *Id.* It cannot.

1. *The District Court's Findings Regarding The Two Flaws In Plaintiff's Product-Market Definition Were Not Clearly Erroneous*

Plaintiff (at 10) first attacks the district court's recognition that "distributors must be included as competitors" in the relevant product market. Plaintiff asserts (11) that this Court's decision in *Penn State* "reversed a similar error." Not so. In *Penn State*, there was "no dispute" as to the scope of the relevant product market. *Penn State*, 838 F.3d at 338. This Court reversed the district court's determination as to the relevant *geographic* market because the court improperly employed a test, the "Elzinga-Hogarty test," rejected for use in hospital mergers, rather than the hypothetical monopolist test. *Id.* at 339-40. *Penn State* is inapposite with respect to the district court's conclusion here concerning the scope of the relevant product market.

Plaintiff also asserts more broadly (at 11) that "treating distributors as independent competitors in a market for the production and sale of goods they do not produce is inconsistent with" precedents involving other industries.[1] But Plaintiff fails to grapple with the district court's extensive fact-finding (and witness-credibility determinations) on this point in the specific context of *this* industry. As the district court recognized, even in the event of concentration among domestic sugar producers, distributors can "remain competitive with producers . . . based on several factors that are well-supported by the record." Op.45. Among other things, distributors "purchase massive amounts of foreign imports," *id.*, and are able to maintain a "diversity of supply—domestic and foreign" such that they are able to "obtain . . . refined sugar supply at competitive prices" and then "resell the sugar at competitive prices," *id.* As the court found, for sugar, "distributors can also leverage their large network of transportation and storage to maintain and ship an adequate supply of refined sugar to exert competitive pressure when and where necessary." *Id.* at 45. Plaintiff never addresses these findings of fact upon which the district court's analysis turned.

The only point on which Plaintiff challenges the district court's fact-finding as to the inclusion of distributors in the relevant product market is its insistence (at 12) that the district court's approach necessarily "involve[s] double-counting

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[1] Plaintiff ignores cases in which courts have properly found that distributors may not be excluded from the relevant market. *See, e.g.*, *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 418 (5th Cir. 2010) (rejecting exclusion of distributors from product market because "market definition must focus on the product rather than the distribution level").

distributor-sold sugar." That is wrong. As Plaintiff acknowledges, its relevant-market analysis did not take into account any sales made to distributors outside the relevant market and then shipped into that market. *See* Plaintiff's Mot. at 12. That is a glaring analytical problem. As the district court found, distributors from outside those markets ship "large volumes" of sugar into the alleged markets from places much further afield, Op.45, 47 n.24, and it was Defendants' expert, not Plaintiff's, that the Court was "persuaded" by on this point. *Id.* at 46.. And even for sugar that distributors purchased in the alleged markets and resold there, avoiding a double-counting problem is simply a matter of subtraction: relevant market shares would reflect distributors' sales to the ultimate wholesale customers, subtracting refiners' sales to the in-market distributors. Nothing in the record suggests that such an analysis would be difficult, and there was extensive discovery and trial testimony into exactly where distributors were selling sugar and in what quantities. *See, e.g.*, FOF ¶¶ 34, 35, 36, 79. Indeed, the court entered a finding directly contrary to Plaintiff's position, when it ruled that it was "persuaded" by Defendants' expert that "excluding distributors 'tend[s] to overstate' market shares for the parties." Op.46.

Moreover, even if Plaintiff was right that non-producers should be excluded from the market, Plaintiff's expert *included* shares for some "entities that market sugar refined by others—*e.g.*, NSM and United," which the district court found "internally inconsistent" with his opinion that distributors should not be included. FOF ¶ 72, Op. at 47.

As to Plaintiff's argument (13) that the district court "erred in rejecting a market for the production and sale of refined sugar because it includes both industrial and retail customers," that argument once again attacks the district court's findings of fact without actually engaging with those findings: namely, that Plaintiff "offered *no testimony or documentary evidence* from or about non-industrial customers to show that they are similarly situated to industrial customers." Op.33 (emphasis added). Many courts have rejected proposed product market definitions for exactly this reason. *See, e.g.*, *United States v. Engelhard Corp.*, 126 F.3d 1302, 1306 (11th Cir. 1997) (failure to account for customer differentiation without a proposed relevant market "undermin[es] the Government's entire case"); *United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 182 (D.D.C. 2001) (similar).

Plaintiff also asserts (13) that the district court's finding as to Plaintiff's failure to support its aggregation of industrial and retail customers "overlooks the fact that the disaggregation of these customer groups would only have *strengthened* the presumption that the acquisition is unlawful." But that is entirely speculative: If only industrial customers were included in the relevant market, then producers' sales to distributors would not be counted in the relevant market shares because distributors would be only sellers—not buyers—in the relevant market. *Cf.* Mot. at

10 (arguing that "[d]istributors are customers" in the markets Plaintiff alleged). That would have a significant effect on market-share calculations, and Plaintiff's assertion (13) that the "already high-market share and market-concentration statistics" put forward at trial would have "*increased*" lacks any basis: A necessary concomitant of the district court's finding that Plaintiff "offered no testimony or documentary evidence," Op.33, regarding the disaggregation of industrial and non-industrial sugar purchasers is that Plaintiff never put forth any analysis of what would happen to its market-share calculations in the event of that disaggregation.

The problems with Plaintiff's product-market definition cannot be fixed in this Court by reference to case law or post hoc rationalizations advanced in emergency briefing; they rest on a basic failure of proof. As the district court found, "Dr. Rothman's assumptions about the refined sugar product market are flawed," and his trial testimony regarding the definition of the product market "was at times internally inconsistent." Op.25. The district court had the chance to examine in minute detail, and at length, the "commercial realities of sugar supply in the U.S." Op.41. And after examining those realities, and assessing Plaintiff's proffered product-market definition, the district court came to the conclusion that Plaintiff's product market definition rested on expert testimony that was "flawed and . . . unpersuasive." Op.24; *see also* Op.26 (noting that "Dr. Rothman's economic analysis has been found unpersuasive on various issues" in other cases). There was no clear error in the district court's fact-finding, and this Court should not second-guess that fact-finding in the absence of a sustained examination of the record.

2. *The District Court's Findings Regarding The Failure Of Plaintiff's Proposed Geographic Markets Were Not Clearly Erroneous*

Plaintiff also asserts (at 14) that the district court's findings regarding the relevant geographic market—which Plaintiff sought to restrict to an amalgam it calls the "Southeast" or "Georgia Plus"—were wrong, and reflected "legal error." That is untrue: as Plaintiff elsewhere concedes, the district court identified and applied the hypothetical monopolist test to determine whether customers in the proposed geographic markets would respond to a hypothetical monopolist by "purchasing the product from outside the proposed market." Op.49 (quoting *Penn State*, 838 F.3d at 338). And here the district court correctly determined as a matter of fact that customers would do so, since "sugar flows freely and over long distances in response to market forces," and the "evidence establishes that customers *already* look beyond [Plaintiff's] proposed markets for competitive alternatives," and concluding "that they would continue to do so in the face of increased sugar prices [in the proposed geographic markets] is not difficult." Op.52 (emphasis added).

Plaintiff criticizes the district court (at 14) for having noted that Plaintiff's proposed geographic markets were "not credible," but the court's conclusion on that point is unsurprising in light of its extensive findings regarding the "commercial realities of the sugar industry in this country," which Plaintiff's proposed geographic markets "ignore[d]." Op.52; *see also* Op.33-39.

Plaintiff also argues (15-17) that the district court's analysis "misunderstands the economics," and that it erred by focusing on Southeast customers' ability to seek sugar supply from suppliers outside the proposed geographic markets. In particular, Plaintiff contends (17) that the district court never should have evaluated customers' ability to pivot to sellers outside the proposed geographic market in assessing Plaintiff's "prima facie" case. That argument turns the hypothetical monopolist test on its head: Under this Court's binding precedent, the district court was *required* to examine whether customers would adjust to a hypothetical monopolist in the relevant geographic markets by "purchasing the product from outside the proposed market[s]." *Penn State*, 838 F.3d at 338. That is what the district court did. And it was not clear error for the district court to determine, in light of the fact that customers *already* widely seek sugar from suppliers outside the proposed geographic markets, that they would continue to do so in the face of a hypothetical monopolist. Op.52. What is more, it is no response that those suppliers already sell some in the relevant area, because, as the court repeatedly found, "these suppliers have additional refined sugar to sell into these proposed markets, sugar that is already traveling through the region." Op.51; FOF ¶ 100.

3. *The District Court Did Not Misapply The Burden-Shifting Framework*

Plaintiff finally pretends (at 18) that its failure to prove a relevant product *or* geographic market, both independent grounds for denial, was not fatal to its case. Plaintiff's position is directly contrary to Third Circuit precedent, relying on Supreme Court precedent, holding that "[d]etermination of the relevant product and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act.'" *Penn State*, 838 F.3d at 338 (quoting *U.S. v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618 (1974)). Having failed to carry its burden, Plaintiff should have, and did, lose. Contrary to Plaintiff's claims, there is no legal requirement that the court continue its analysis (after finding two or more independent grounds for denial) by considering the effects of the transaction in some *other* unalleged market. *See United States v. Sabre Corp.*, 452 F. Supp. 3d 97, 142 n.20 (D. Del. 2020) ("[T]o the extent DOJ is now inviting the Court to 'unilaterally change the defective market allegations if necessary to save its case,' it would be wrong for the Court to do so under the circumstances here.").

Plaintiff immediately contradicts itself by suggesting that the district court's judgment *did* extend beyond the product-market and geographic-market conclusions discussed above. Plaintiff asserts (19-21) that district court wrongly relied on evidence of USDA's role in the sugar market. But as the district court made clear throughout, it considered "the Government's failure to prove a relevant product market [to be] dispositive and [to] require[ ] judgment in favor of Defendants," Op.49, and thus the "Court 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," Op.54. There was no error in the district court, having presided over a four-day trial, nonetheless entering a finding that it found "exceptionally knowledgeable and particularly credible," a UDSA economist who testified that "U.S. Sugar's acquisition of Imperial is not likely to lead to higher prices in the U.S." and likely would instead "have an overall positive impact on the sugar industry in this country." Op.56. That testimony—while certainly highly relevant to the ultimate questions at issue in this case—was not necessary to the district court's judgment.

B. Plaintiff Has Not Shown Irreparable Injury Absent An Injunction

Plaintiff argues (21-22) that it will be irreparably harmed absent an injunction because, if U.S. Sugar and Imperial close their transaction on October 3, Defendants "may begin combining operations," and it will be difficult to "unscramble the egg." But the relevant egg in this case will remain unscrambled for some time: The basic, procompetitive purpose of the acquisition is to allow U.S. Sugar to send sugar cane it cannot currently process to be refined at Imperial's Port Wentworth facility, and (over time) to increase the output of the Port Wentworth facility through new capital expenditures. Op.22-23. None of this will happen overnight, and Plaintiff presents no argument why it could not be unwound.

Most of Plaintiff's argument rests on the generic assertion that the consummation of a merger is always irreparable, but that is empirically wrong. As the district court recognized, the government routinely sues to "address transactions which have already been consummated and obtain[s] divestiture." Ex. A at 3 (collecting cases). It can do so here too. And Plaintiff's claim (22) that even a temporary consummation could impose "anticompetitive effects [that] persist for years to come" is especially misplaced given that the USDA has the ability to counteract any (unlikely) anticompetitive effects on price. Op.58.

Plaintiff (22) falls back on the notion that irreparable harm can be presumed. But the case law it relies on has been superseded by the Supreme Court's (and this Court's) "admonition that courts may not fashion categorical rules or sweeping principles that would undermine the traditional four-factor test" for injunctive relief. *TD Bank N.A. v. Hill*, 928 F.3d 259, 279 (3d Cir. 2019) (citation omitted); *see also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392-94 (2006). Defendants made that same point in the district court; Plaintiff has no response.

C. The Balance Of Equities Clearly Disfavors An Injunction

The immediate harms that U.S. Sugar and Imperial will face in the event of an injunction pending appeal are real and imminent. The transaction has already been pending for 18 months, past the original "outside date" of the transaction—that is, the latest date by which the transaction was meant to be consummated. Op.4. Any further delay would be harmful and would only serve to validate Plaintiff's strategy to "obtain via delay what it could not obtain on the merits." Ex. A at 1.

From the outset, Plaintiff has tried to delay the closing of the transaction as long as possible with the hope that time and changed circumstances will cause the parties to abandon their deal. After an extended investigation, Plaintiff initially proposed a discovery schedule twice as long as the average in comparable merger cases—with trial beginning in September 2022 only days before the outside date. The district court rejected that proposal. But Plaintiff's tactics have nonetheless already imposed very real harm on Defendants given the legal fees and costs inherent in litigating against the Department of Justice.

Any injunction would threaten a transaction that Dr. Fecso of the USDA testified would be beneficial to the marketplace. With changing financing options and economics, including rising interest rates, any further delay poses a real risk the deal never gets consummated. And if that happens, Imperial, which is already in "financial decline" and whose CEO is "'quite worried' about [its] future prospects," will continue to struggle. Op.20. Permitting the transaction to close would allow Defendants to begin the process of integration and improving the performance of the

Port Wentworth facility, all of which would benefit Imperial's employees and ultimately the marketplace.

D. An Injunction Would Impair The Public Interest

Defendants are unaware of any other Section 7 merger case brought by the United States in which the federal government's leading industry economist—the public official charged with monitoring industry supply and price—testified that the deal "will have an overall positive impact on the . . . industry." Op.56. This case may be *sui generis* in that regard. The public interest in consummation of this transaction is clear: it will likely lead to lower domestic sugar prices if and when it is finalized. *Id.* At the same time, this transaction also will have tangible benefits to the local community and economy in Savannah, which will see added investment by U.S. Sugar to modernize the Imperial facility. Allowing the transaction to close so that U.S. Sugar can begin achieving these positive impacts is in the public interest. The acquisition should proceed without further delay.

CONCLUSION

Plaintiff's motion should be denied.

Dated: September 29, 2022

Respectfully submitted,

/s/ *Melissa Arbus Sherry*
Melissa Arbus Sherry
Counsel of Record
Amanda P. Reeves
Lindsey S. Champlin
David L. Johnson
Charles S. Dameron
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
melissa.sherry@lw.com

Lawrence E. Buterman
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020

Christopher S. Yates
LATHAM & WATKINS LLP
505 Montgomery Street
Suite 2000
San Francisco, CA 94111

Jack B. Blumenfeld
Brian P. Egan
MORRIS, NICHOLS, ARSHT & TUNNELL LLP
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899

Counsel for United States Sugar Corporation

/s/ *Kelly E. Farnan*
Kelly E. Farnan (#4395)
RICHARDS, LAYTON & FINGER, P.A.
920 N. King St.
Wilmington, DE 19801
(302) 651-7700

Timothy G. Cameron
Hannah Dwyer
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Counsel for Imperial Sugar Company and Louis Dreyfus Company LLC

/s/ Daniel K. Hogan
Daniel K. Hogan (#28414)
HOGAN MCDANIEL
1311 Delaware Avenue, Suite 1
Wilmington, DE 19806
(302) 656-7540

Counsel for United Sugars Corporation

CERTIFICATE OF COMPLIANCE

According to the word count feature of Microsoft Word, this Opposition contains 5,743 words, excluding the exempted parts under Federal Rule of Appellate Procedure 32(f). The motion has been prepared in a proportionally spaced typeface using Times New Roman in 14 point size. In parallel with the filing of this Opposition Defendants will promptly file a motion to exceed the standard word count for this opposition to Plaintiff's motion. Plaintiff has informed undersigned counsel that it does not oppose the request for additional words.

September 29, 2022

s/ Melissa Arbus Sherry
Melissa Arbus Sherry

CERTIFICATE OF SERVICE

I, Melissa Arbus Sherry, hereby certify that I have this 29th day of September, 2022, electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system, which will send notice to all registered CM/ECF users. Participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

s/ Melissa Arbus Sherry
Melissa Arbus Sherry