No. 22-2806

IN THE
United States Court of Appeals
for the Third Circuit

UNITED STATES,
Plaintiff-Appellant,
v.
UNITED STATES SUGAR CORP., ET AL.,
Defendants-Appellees.

On Appeal from the
United States District Court for the District of Delaware
Honorable Maryellen Noreika
No. 1:21-cv-01644

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JURISDICTION

The District Court had jurisdiction under 15 U.S.C. § 25 and entered final judgment on September 23, 2022. Joint Appendix ("JA") 157. The Government filed a notice of appeal on September 26, 2022. JA1. This Court's jurisdiction rests on 15 U.S.C. § 29(a) and 28 U.S.C. § 1291.

ISSUES PRESENTED

I. Whether the District Court legally erred in holding that the Government failed as a matter of law to identify a relevant market and thus failed to establish a *prima facie* case. JA1048-1067 (Tr. 1137:24-1156:9); JA1991-2004 (Op. 41-54).

II. Whether the District Court legally erred in presuming that USDA regulation could counteract any anticompetitive effects. JA1067-1070 (Tr. 1156:10-1159:23); JA2004-2008 (Op. 54-58).

STATEMENT OF RELATED CASES

None.

STATEMENT OF THE CASE

Section 7 of the Clayton Act bars any merger "the effect" of which "may be substantially to lessen competition" "in any line of commerce" and "in any section of the country." 15 U.S.C. § 18. The merger at issue in this case involves a leading Florida-based sugar refiner's acquisition of its major rival's Georgia-based refinery. As the Government has established, the merger threatens precisely the harm that

Section 7 proscribes: substantially lessening competition in the market for the production and sale of refined sugar.

I. THE MERGER

This case arises from the Government's suit to block U.S. Sugar Corporation's ("U.S. Sugar") acquisition of its rival: the Georgia-based sugar refiner Imperial Sugar Company ("Imperial"). U.S. Sugar owns and operates a refinery in Clewiston, Florida, that produces about 850,000 tons of refined cane sugar annually. JA2844 (PSAF ¶¶ 3, 5). On March 24, 2021, Defendants entered into an Asset Purchase Agreement, under which U.S. Sugar would acquire "all of Imperial's assets," including Imperial's sugar refinery located less than 500 miles north of Clewiston in Port Wentworth, Georgia. JA1954 (Op. 4 (footnote omitted)).

Sugar refiners play an important role in the refined-sugar supply chain. In particular, they convert the raw material for sugar (sugar beets and raw sugar produced from sugar cane) into refined sugar. JA2852 (PSAF ¶¶ 52-53). The merging parties own two of the three large sugar refineries located in Georgia and its five bordering states. JA2330 (PTX452).

Refiners sell to wholesale customers. Wholesale customers include "industrial customers," such as food processing companies like General Mills. This category also includes distributors that themselves resell refined sugar to other wholesale customers. JA221-222 (Tr. 123:23-124:3); JA1961-1963, JA1978-1979 (Op. 11-13, 28-29). These distributors "must first purchase refined sugar from producers like Domino or

Imperial"—in other words, must first purchase refined sugar from refiners, whether domestic or foreign. JA1994 (Op. 44). Distributors are down the refined-sugar supply chain from refiners and play no part in refining or producing refined sugar. Refiners also sell to "retail" customers—consumer-facing stores like Wal-Mart. JA328 (Tr. 255:2-9). While some refiners sell directly to wholesale customers, the merged entity sells through a marketing affiliate called United Sugars Corporation ("United"). JA2845-2846 (PSAF ¶¶ 12, 15, 19).

Both of the sugar refiners at issue in this case use industrial processes to produce refined sugar from raw cane sugar. JA2844, JA2847 (PSAF ¶¶ 3, 30, 36). The refineries melt down sugar crystals, filter them to remove impurities, centrifugally extract molasses, recrystallize the sugar, and package it for sale. JA712-713 (Tr. 766:5-767:3). The merger combined these competing refineries under a single owner. JA2850-2851 (PSAF ¶ 44).

Following a six-month investigation, the Government initiated this antitrust action under Section 7 of the Clayton Act, 15 U.S.C. § 18, to enjoin the merger.

II. THE GOVERNMENT'S *PRIMA FACIE* CASE

During a twenty-eight-hour bench trial, the Government presented evidence to establish a prima facie case that the merger is unlawful under Section 7 by (A) proposing proper relevant markets and (B) showing, in multiple ways, that the merger will have reasonably probable anticompetitive effects.

A. To define relevant markets, the Government must point to an "area of effective competition" within which the merger threatens to "substantially lessen competition." *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). That determination includes showing (1) "a product market (the 'line of commerce')" and (2) "a geographic market (the 'section of the country')." *Id.* (quoting 15 U.S.C. § 18).

1. With respect to the product market, as the District Court made clear, "[t]here is no dispute that the relevant product market in this case includes refined sugar in all forms (*i.e.*, granulated, brown, liquid, powdered) regardless of whether the sugar is derived from sugar cane or sugar beets." JA1993 (Op. 43). Because the "area of effective competition" in this case concerns competition between suppliers of sugar—in this case, sugar refiners—the Government explained that distributors are properly treated as wholesale customers.

Consistent with this Court's precedent, the Government verified the relevant markets using the hypothetical monopolist test. *See FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 169 (3d Cir. 2022); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 345-46 (3d Cir. 2016). As the District Court explained, this test, which courts frequently use to determine the relevant market, 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." JA1999 (Op. 49) (quoting *Hackensack*, 30 F.4th at 167). If so, the "proposed market is properly defined." *Hackensack*, 30 F.4th at 167. If not, the market is "too narrow." *Id.* at 169. Here, the test verified that the market for the production and sale of refined sugar to wholesale customers was properly defined. JA555-556 (Tr. 591:20-592:7).

2. With respect to geographic markets, the parties in this case proposed the following geographic markets in the District Court.

- First, the Government proposed the "Georgia Plus" market, which includes six states: Georgia, Florida, Alabama, Tennessee, South Carolina, and North Carolina.[1]
- In addition, the Government proposed the "Southeast" market, which includes the six-state Georgia Plus market plus six additional states and the District of Columbia.[2]
- Defendants proposed a third geographic market—the "Competitive Overlap" market—which includes the Southeast market plus nine additional states.[3]

[1] JA1983 (Op. 33). A United presentation entitled "Regional Markets Overview" described the Georgia Plus market as the "[b]ackyard[]" for U.S. Sugar's Clewiston, Florida, and Imperial's Port Wentworth refineries. *See* JA2330 (PTX452); JA2845 (PSAF ¶ 3).

[2] The six additional states in the Southeast market are: Delaware, Kentucky, Maryland, Mississippi, Virginia, and West Virginia, plus the District of Columbia. JA1983 (Op. 33).

[3] The nine additional states in the Competitive Overlap market are: Arkansas, Indiana, Louisiana, Michigan, New Jersey, Ohio, Oklahoma, Pennsylvania, and Texas. JA1989 (Op. 39).

- Finally, Defendants proposed a fourth geographic market—the "National" market—which covers the entire United States.[4]

The merger at issue in this case eliminated a competitor (Imperial) with a Georgia-based refinery. As a result, the Government defined two concentric geographic markets—the Georgia Plus and Southeast markets—based upon the location of the customers most likely to be harmed by the merger's elimination of competition between United and Imperial. These customer-based markets encompassed sales to all customers located within the markets from producers located *anywhere*, including outside the Georgia Plus and Southeast regions.

All producers that sell refined sugar to customers located in the proposed geographic markets—including foreign producers of refined sugar—were treated as suppliers of the relevant product (refined sugar) and were assigned market shares. And all entities located in those regions that purchased refined sugar from producers, including imported sugar from foreign producers, were treated as customers in the relevant markets, regardless of whether these entities used the sugar for their own purposes or were distributors that resold it. And the hypothetical monopolist test

[4] The Government also presented evidence related to the "USDA South" market, which consists of the states (plus the District of Columbia) in the Southeast market as well as Arkansas, Louisiana, Oklahoma, and Texas. JA578 (Tr. 614:8-13); *see* JA269-270 (Tr. 171:19-172:23) (United executive testifying that United considers USDA regions, including USDA South, when analyzing demand).

verified that a hypothetical monopolist of the market for the production and sale of refined sugar to wholesale customers in the Georgia Plus and Southeast markets could impose a SSNIP. JA563-564 (Tr. 599:9-600:13).

B. The Government presented undisputed evidence to establish a reasonable probability of anticompetitive effects from the merger in each of the relevant markets proposed before the District Court—market shares and market concentration in the proposed markets:

Proposed Geographic Market	**Post-Merger Market Shares**	**Post-Merger Change in Market Concentration (ΔHHIs)**
Georgia Plus	54%[5]	+1,393[6]
Southeast	46%[7]	+1,011[8]
Competitive Overlap	37%[9]	+>400[10]
National	31%[11]	+>300[12]

[5] JA575-577 (Tr. 611:10-613:6).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] JA930-932 (Tr. 992:21-994:17).

[10] *Id.*

[11] *Id.*

[12] *Id.*

In the Georgia Plus market, the post-merger entity will control 54% of the market, and the acquisition will increase HHIs by 1,393 to 3,658. In the Southeast market, the post-merger entity will control 46% of the market, and the acquisition will increase HHIs by 1,011 to 3,035. In the Competitive Overlap market, Defendants' expert testified that the post-merger entity would have a 37% share and that the acquisition would increase HHIs by at least 400 points. He testified that the post-merger entity would have a 31% share and that the acquisition would increase HHIs by at least 300 points in the National market. Accordingly, in any of the relevant geographic markets raised below—including the entire United States, the broadest market proposed below—the transaction would result in a single firm controlling more than 30% of the market, triggering a structural presumption of illegality under *United States v. Philadelphia National Bank*, 374 U.S. 321, 364 (1963).

In addition to the market-share and market-concentration evidence, the Government introduced evidence that the merger would eliminate head-to-head competition and increase the risk of coordination in the markets proposed below. *See infra* at 37-41 (describing extensive record evidence of coordinated and unilateral effects).

III. THE DISTRICT COURT'S DECISION

A.1. The District Court held that the Government failed to establish a *prima facie* case under Section 7 because it concluded the Government "failed to identify the proper relevant market." JA1991 (Op. 41). In particular, the District Court identified three purported legal problems with the Government's proposed markets. Two of the purported problems concern product-market definition: The District Court held that the Government failed to identify the relevant product market on the grounds that, as a matter of law, (a) distributors must be treated as suppliers in the relevant product market; and (b) sales to industrial customers and sales to retail customers must be treated as separate product markets. JA1991 (Op. 41). In addition, the District Court held that two of the geographic markets proposed below were "too narrow." JA1993, JA1998 (Op. 43, 48).

a. With respect to product-market definition, the District Court found that "[t]here is no dispute that the relevant product market in this case includes refined sugar in all forms (*i.e.*, granulated, brown, liquid, powdered) regardless of whether the sugar is derived from sugar cane or sugar beets." JA1993 (Op. 43). However, the District Court held that the Government failed as a matter of law to identify a relevant product market for two reasons that concern who "refined sugar must come from" and "who it is sold to." JA1993 (Op. 43).

i. First, although the District Court found that "[d]istributors purchase refined sugar" from suppliers (in this case, sugar refiners), it concluded that, as a matter of law, distributors must be treated as suppliers in the relevant market. It reached this conclusion on the grounds that "distributors are competing with other suppliers." JA1961, JA1981 (Op. 11, 31). Although the District Court said that it "recognize[d] the important role that the hypothetical monopolist test plays" in market definition, JA2002 (Op. 52), the District Court's product-market analysis did not address the hypothetical monopolist test. *See* JA1991-1998 (Op. 41-48).

ii. The District Court also identified "a second problem with the Government's proposed product market." JA1998 (Op. 48). It held that the Government's proposed product market failed as a matter of law because the Government was required to further subdivide the market and "differentiate between refined sugar sales to industrial customers and refined sugar sales to retail customers." JA1982 (Op. 32). This portion of the District Court's opinion again never addressed or mentioned the hypothetical monopolist test. Instead, the District Court suggested that because the Government failed to show that "non-industrial customers" are "similarly situated to industrial customers," further division of the market with respect to wholesale customers was required. JA1983 (Op. 33).

b. With respect to the geographic markets proposed below, the District Court rejected two of the proposed markets—the Georgia Plus and Southeast markets—on the grounds that they are "too narrow." JA2002 (Op. 52). The District Court acknowledged that, "because the [Government's] market is formulated around customer locations, all relevant sellers to the area are already considered." JA2001 (Op. 51). But the District Court concluded nonetheless that a "fundamental problem with the proposed markets is that they ignore the abundant evidence of sugar consumers located in the 'Southeast' and 'Georgia Plus' markets purchasing their refined sugar outside those geographic regions." JA2001 (Op. 51).

2. The District Court stated 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." JA2004 (Op. 54). It therefore declined to analyze the undisputed evidence of potential anticompetitive effects in the geographic markets proposed below, including two geographic markets proposed by Defendants. JA2002-2003 (Op. 52-53).

B. Nevertheless, the District Court held that "even if U.S. Sugar's acquisition of Imperial were likely to have any anticompetitive effects, the Court believes that the USDA has the ability to counteract those effects." JA2008 (Op. 58). The District Court did not identify what "potential anticompetitive effects" USDA could "act as a safeguard against" or address the Government's evidence of potential anticompetitive effects, including unilateral and coordinated effects. The District Court also relied on the testimony of a USDA agricultural economist, Dr. Fecso, who testified in her personal capacity about her belief "that the deal will have an overall positive impact on the sugar industry in this country." JA2006 (Op. 56). The District Court did not analyze whether this testimony met the requirements of any efficiencies defense such that it could rebut a *prima facie* case.

SUMMARY OF ARGUMENT

The District Court committed four separate legal errors. This Court should correct those errors and reverse and remand for further proceedings.

I. The District Court made three independent legal errors in holding that the Government "failed to identify the proper relevant market." JA1991 (Op. 41). The first of these errors alone is sufficient to warrant reversal.

A. Two of the errors concern the Government's proposed product market. First, the District Court committed legal error in holding that, as a matter of law, distributors must be treated as suppliers in the product market. That holding ignored the well-established hypothetical monopolist test, which this Court has pointed to as a guiding method for defining markets. *See Hershey*, 838 F.3d at 338, 344-45. Under that test, the District Court, after the relevant product (refined sugar) was proposed, should have asked whether distributors re-selling refined sugar could constrain a price increase imposed by a hypothetical-monopolist refiner. *See id.* at 338. In this case, because distributors must first purchase refined sugar from refiners, they are not the relevant sellers in the product market: A hypothetical monopolist of all sugar refining in the relevant markets would be able to raise prices to distributors alongside its other captive customers. Accordingly, for purposes of product-market definition, distributors are properly treated as the *customers*, not competitors, of refiners.

The District Court committed a second legal error in holding that sales to industrial customers and sales to retail customers must be treated as separate product markets. As the Supreme Court has repeatedly confirmed, there is no legal requirement that plaintiffs divide a broadly defined market into submarkets. *See, e.g.*, *Brown Shoe*, 370 U.S. at 327. And regardless, the Government established presumptive anticompetitive effects in a relevant market limited to sales to industrial customers.

B. The District Court also committed legal error in holding that the Government failed to define a relevant geographic market on the ground that two of the geographic markets proposed below—namely, the Georgia Plus and Southeast markets—were "too narrow." JA2002 (Op. 52). The District Court apparently failed to apprehend that these markets already accounted for sales by refiners outside those geographies to customers within them. Moreover, to the extent the District Court rejected the Government's proposed geographic markets because higher prices could lead to other suppliers' expanding their sales to customers in the relevant markets, this was error as well. Expansion and repositioning are not market-definition issues. Rather, under this Court's precedents, they are examined during the rebuttal stage of the burden-shifting framework, when Defendants bear the burden and must meet stringent legal requirements. Specifically, any expansion and repositioning must be timely, likely, and sufficient to counteract anticompetitive effects. And notwithstanding these errors, the evidence established a presumption of anticompetitive effects in any of the four geographic markets proposed below, including Defendants' proposed geographic markets—as confirmed by Defendants' expert testimony.

II. In addition to the District Court's legal errors with respect to market definition, the District Court committed a fourth legal error in presuming that "even if U.S. Sugar's acquisition of Imperial were likely to have any anticompetitive effects," USDA could "counteract those effects." JA2008 (Op. 58). This statement effectively created an implied antitrust immunity for sugar refiners in violation of Supreme Court holdings that such immunities are appropriate only in cases of "clear repugnancy" between the antitrust laws and other regulations. *United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 719 (1975). If the District Court thought that USDA's regulations were relevant in considering the Government's prima facie case, that conclusion was wrong under Supreme Court precedent. And if the District Court thought that USDA's regulations could *rebut* the Government's prima facie case, that was wrong as well: Where regulations "do[] not provide remedies for the correction of all the abuses . . . which might constitute violations of the anti-trust laws," they cannot rebut a prima facie case. *Georgia v. Pa. R. Co.*, 324 U.S. 439, 461 (1945). USDA's regulations do not supplant antitrust enforcement in the refined sugar industry, and the District Court's assertions to the contrary were legal error.

STANDARD OF REVIEW

This Court reviews "findings of fact for clear error" and "conclusions of law *de novo*." *See Hershey*, 838 F.3d at 335.

The first set of questions raised by this appeal relates to the District Court's errors in holding that the Government failed to establish a *prima facie* case. This Court has made clear that "where a district court applies an incomplete economic analysis or an erroneous economic theory to those facts that make up" the relevant market, including by failing to "properly apply" the hypothetical monopolist test, the court "has committed legal error subject to plenary review." *Hershey*, 838 F.3d at 336. Plenary review applies here because, as explained below, the District Court misapplied the hypothetical monopolist test and market-definition precedent in the product-market and geographic-market analyses. The District Court's three legal errors with respect to market definition warrant de novo review. *See A.J. Canfield Co. v. Honickman*, 808 F.2d 291, 307 (3d Cir. 1986) (holding that where district court "did not apply" correct legal "test," appeals court "not bound" by findings made under incorrect test). While these market-definition holdings were legal error, this Court should reverse those holdings even if it views them as factual findings because they are also clearly erroneous.

In addition to these errors, the District Court further erred in indicating that USDA regulations eliminated any competitive concern as a matter of law. The District Court asserted that, "even if U.S. Sugar's acquisition of Imperial were likely to have any anticompetitive effects, the Court believes that the USDA has the ability to counteract those effects." JA2008 (Op. 58). This assertion runs afoul of Supreme Court precedent concerning the legal standards governing antitrust immunity, the role of regulation in Section 7 cases, and the efficiencies defense. The District Court's failure to apply the proper legal standards relating to those issues warrants *de novo* review. *See Allen-Myland, Inc. v. Int'l Business Machines Corp.*, 33 F.3d 194, 201-04 (3d Cir. 1994) (errors "in formulating or applying legal principles" warrant "plenary" review).

ARGUMENT

I. THE GOVERNMENT MET ITS BURDEN OF ESTABLISHING A PRIMA FACIE CASE UNDER SECTION 7 OF THE CLAYTON ACT

Under the "burden-shifting framework" for "assess[ing] Section 7 claims, the Government must establish a prima facie case that the merger is anticompetitive." *Hershey*, 838 F.3d at 337. To do so, the Government must (A) "propose [a] proper relevant market" and (B) show that the merger creates a reasonable probability of "anticompetitive effects in that market." *Id.* at 337, 346; *see Brown Shoe*, 370 U.S. at 325 (plaintiff need only show "reasonable probability" of anticompetitive effects). In this case, even accepting, *arguendo*, all of the District Court's factual findings, this Court can and should conclude that the Government established a *prima facie* case under a correct reading of the law.[13]

A. THE GOVERNMENT PROPERLY DEFINED THE RELEVANT MARKETS

Market definition is a means, not an end, to understanding competitive effects. *Hershey*, 838 F.3d at 338. It aids this inquiry by identifying "the locus of

[13] *Cf. United States v. Dentsply Int'l Inc.*, 399 F.3d 181 (3d Cir. 2005) (reversing judgment on § 2 claim based on legal error as applied to district court's factual findings).

competition[]" within which competitive effects are assessed. *Brown Shoe*, 370 U.S. at 320-21. For mergers between competitors, "the boundaries of the relevant market must be drawn with sufficient breadth" to "recognize competition where, in fact, competition exists." *Id.* at 326. The parties' competition is the proper place to begin because, when competitors merge, "whatever competition previously may have existed in th[e] market between the parties to the merger is eliminated." *Id.* at 335; *see Gen. Foods Corp. v. FTC*, 386 F.2d 936, 946 (3d Cir. 1967) (similar).

Supreme Court precedent makes clear that, to meet its burden in proposing a proper relevant market, the Government must identify an "area of effective competition" within which the merger threatens to "substantially lessen competition." *Brown Shoe*, 370 U.S. at 324. That determination requires showing (1) "a product market (the 'line of commerce')" and (2) "a geographic market (the 'section of the country')." *Id.* (quoting 15 U.S.C. § 18).

In this case, the District Court correctly articulated the basic legal principles that govern market definition in Section 7 cases[14] but ultimately misapplied them. In particular, the District Court's product-market analysis shifted the focus from the level of "competition where, in fact, competition exists"—the refiner level—to the

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[14] JA1991 (Op. 41) ("'The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and the substitutes for it.'" (quoting *Brown Shoe*, 370 U.S. at 325)).

distributor level, thereby ignoring competition among the merging parties and other refiners for sales to distributors. *Id.* at 326. And the District Court's geographic-market analysis failed to focus on "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate," *Phila. Nat'l Bank*, 374 U.S. at 357, and failed to appreciate how the hypothetical monopolist test and other market-definition principles apply to customer-based markets.

1. The Government Properly Defined the Relevant Product Market

In this case, the Government met its burden of properly defining the relevant product market. Because Imperial competes with United for refined-sugar sales, the Government identified refined sugar itself as the relevant product—as Defendants recognized was appropriate. JA1048-1049 (Tr. 1137:24-1138:16). The Government demonstrated its proposed markets using the hypothetical monopolist test, which established that a monopolist of the production and sale of refined sugar in the defined geographic areas would likely impose a SSNIP on customers. JA555-JA556 (Tr. 591:20-592:7).[15]

[15] The Government's proposed market included some entities—e.g., United and National Sugar Marketing Cooperative, Inc. ("NSM")—that operate alongside refiners as single, vertically-integrated producers and sellers. *See* JA2846 (PSAF ¶ 21 (United is "sole worldwide agent for the sale and marketing" of refined sugar produced by its four members)); JA2854 (PSAF ¶ 77 (NSM is "exclusive marketer and seller of refined sugar" produced by its two members)).

As the District Court acknowledged at one point, the hypothetical monopolist test examines whether markets are too narrowly defined such that they should include other products or geographies. JA1999 (Op. 49). For a putative relevant market, the test asks if customers would prevent, by turning to substitutes outside that putative market, a price increase by a hypothetical monopolist. *See Hershey*, 838 F.3d at 338.[16] For example, a profit-maximizing hypothetical monopolist of ridged potato-chip production might not be able to raise prices on ridged potato chips if many customers would switch to other potato chips. Accordingly, if too many customers would readily switch from monopolized ridged potato chips to other potato chips in that event, the test would suggest the market has been too narrowly drawn. But a hypothetical profit-maximizing monopolist of all potato chips might be able to raise prices without too many customers switching to other snack foods. Under those facts, a ridged-potato-chip product market would be too narrow, but a potato-chip product market would be appropriate.[17]

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[16] Although *Hershey* concerned geographic markets, "[t]he criteria" that determine the geographic market "are essentially similar to those" that determine the product market. *Brown Shoe*, 370 U.S. at 336.

[17] *See generally* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES ["HMG"] § 4.1, at 8 (2010) (noting that the hypothetical price increase tested for is a "small but significant and non-transitory increase in price" (SSNIP)).

a. The District Court Erred in its Legal Conclusion that Distributors Must Be Treated as Suppliers in the Relevant Market

The District Court rejected the Government's proposed relevant product market on the grounds that *distributors* of refined sugar must be treated as *suppliers* in the relevant market. JA1993 (Op. 43). The District Court reached this conclusion because it concluded that distributors can "compete with" and act as "effective price constraints on refiners." JA1994 (Op. 44). But the District Court's analysis ignored that distributors cannot constrain a hypothetical-monopolist refiner's pricing. In contrast to the refiner relationships that distributors enjoy today, a hypothetical refining monopolist would be distributors' only source of refined sugar to resell and thus could control the terms on which they acquire sugar, including potential conditions on resale. For the purpose of determining the relevant market participants in the product market, distributors are customers, not suppliers.

The District Court's error is consequential because many markets for the production of goods reach consumers through a distribution system. For example, a hypothetical monopolist of all milk pasteurization worldwide could raise prices, no matter how many delivery services and grocery stores today compete to sell pasteurized milk. A hypothetical monopolist of all oil refining could raise price, notwithstanding pipelines, storage, and stations that today distribute gasoline. And a hypothetical monopolist of all movie production could raise price, no matter how many streaming services, DVDs, and theaters now offer films from competing producers.

As discussed below, the District Court's view that distributors must be included in product markets for the goods they resell stems from an erroneous application of the hypothetical monopolist test and other controlling market-definition precedent.

i. The District Court asked and answered the wrong question when assessing whether distributors should be included in the relevant product market. Under the hypothetical monopolist test, "if a hypothetical monopolist could impose a [SSNIP] in the proposed market, the market is properly defined." *Hershey*, 838 F.3d at 338. "[I]f, however, consumers would respond to a SSNIP by purchasing the product from outside the proposed market, thereby making the SSNIP unprofitable, the proposed market definition is too narrow." *Id.*

The Government satisfied its burden on proving a relevant product market, and the District Court's holding that distributors should be treated as suppliers in the relevant market was legal error. A price increase imposed by a hypothetical monopolist impacts distributors and other customers alike. As the District Court acknowledged, distributors would be subjected to a price increase themselves. JA1997 (Op. 47 n.24). Distributors therefore cannot serve as a competitive alternative for themselves or other customers. Thus, a hypothetical monopolist of the production and sale of refined sugar could impose a SSNIP notwithstanding distributors' presence in the supply chain, and the product market need not be expanded to include distributors. The fact that some sales of refined sugar pass through distributors does not undermine that producers retain ultimate control of supply and pricing.

Even accepting the District Court's approach on its own terms, the two reasons it gave in support of its conclusion that distributors should be treated the same as refiners in the product market do not hold up to scrutiny. First, the District Court suggested that distributors compete with refiners because they can import foreign sugar, which serves as a constraint on the prices of domestic sugar refiners. But the Government included foreign sugar in its product-market definition. In applying the hypothetical monopolist test, that sugar is properly allocated to the foreign refiner that initially sells it.

Second, the District Court noted that distributors have the ability to purchase large quantities of sugar, which they can then move to parts of the country experiencing higher prices. JA1996-1997 (Op. 46-47). That may be true. But the geographic scope of competition is a relevant consideration—and one the Government expressly addressed—in its *geographic* market definition. It is not a reason that all sugar sold by sugar refiners to distributors should be considered as sales *by* the distributors. Distributors are customers, not suppliers, and the hypothetical monopolist test appropriately considers them as such.

In sum, the District Court's approach to market definition conflated current competitive conditions with the hypothetical monopolist test, which governs market definition. In doing so, the District Court committed a legal error similar to one this

Court reversed in *Hershey*. There, the district court "identified the [hypothetical monopolist test] and purported to apply it" but "incorrectly defined and misapplied" the test. 838 F.3d at 345. In particular, the court erred by considering "private contracts" between merging parties and customers that effectively "forb[a]d[e]" the merging parties from imposing a SSNIP. *Id.* at 344. In applying the hypothetical monopolist test, however, this Court held that courts should not look to present circumstances that constrain how the merging parties currently compete. Instead, the court must "answer whether a *hypothetical* monopolist" could impose a SSNIP. *Id.* (citation omitted); *see Queen City Pizza Inc. v. Domino's Pizza, Inc.*, 124 F.2d 430, 438 (3d Cir. 1997) (declining to look to "contractual restraints assumed by a particular plaintiff when determining whether a product is interchangeable"). The District Court here committed the same type of error: Instead of analyzing the right legal question (whether distributors could prevent or defeat a SSNIP imposed by "a *hypothetical* monopolist"), the District Court analyzed the wrong one (whether distributors currently compete in some sense with refiners in non-monopoly conditions). *Id.*[18]

[18] In addition to constituting a legal error that warrants reversal by this Court under plenary review, the District Court's application of the hypothetical monopolist test also amounts to clear error. The record evidence plainly shows that distributors could not constrain refiners' pricing. That is because distributors are entirely reliant on refiners for their product. Distributors do not refine sugar themselves; instead, they "purchase" refined sugar from refiners and "resell[]" it (JA1961 (Op. 11)). Accordingly, refiners collectively control (and a hypothetical-monopolist refiner

ii. The District Court's holding that distributors must be treated as direct competitors with suppliers in the Government's proposed market conflicts with numerous product-market-definition precedents, even beyond the *Hershey* case. Courts, including the Supreme Court, have consistently reaffirmed a simple point: Distributors and their suppliers are not horizontal competitors. For example, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, the Supreme Court held that an agreement between a manufacturer and distributor as to the price the distributor can charge is a *vertical* agreement—not a horizontal agreement between competitors. 551 U.S. 877, 881-82 (2007) (subjecting such manufacturer-distributor agreements to the "rule of reason" rather than the "per se" rule applicable to horizontal price agreements among competitors). In this case, by treating vertically related distributors as horizontal competitors of sugar refiners, the District Court's holding flouts *Leegin*'s essential reasoning. *See also United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972) (identifying "manufacturers and distributors" as an example of "combinations of persons at different levels of the market structure . . . which are termed 'vertical' restraints" (emphasis added)); *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 225 & n.15 (3d Cir. 2008) (citing *Leegin* in contrasting an alleged relationship

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would control) distributors' sugar supply, including when, how, and at what price distributors could acquire sugar.

between a manufacturer and distributors with "entities at the same level of a product's distribution chain").[19]

The Government's approach—assigning market shares to refiners for sales to distributors without assigning market shares to distributors themselves—finds support in the Supreme Court's and this Court's case law. To calculate a defendant's share of a retail market, *Brown Shoe* included both "sales to ultimate consumers" made directly by the defendant and "sales by [the defendant's] wholesale distributors" to retail outlets. 370 U.S. at 341 n.69. Counting distributors' sales in defendants' market shares (rather than according distributors their own market shares) closely resembles the Government's approach of assigning market shares to refiners for sales to distributors without assigning shares to distributors themselves.

This Court's decision in *Allen-Myland*, which addressed a product market consisting of "large-scale mainframe computer[s]" in a case against IBM, also illustrates the correct approach to distributors. 33 F.3d at 201. There, the district court had included in the product market leasing companies' leases of new large-scale mainframe computers, even though those leasing companies first purchased the computers from manufacturers in the product market. *Id.* at 202. This Court

[19] *See also, e.g.*, *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001, 1005 (5th Cir. 1981) ("When a producer elects to market its goods through distributors, the latter are not, in an economic sense, competitors of the producer even though the producer also markets some of its goods itself[.]").

reversed because manufacturers' market shares would already include new large-scale mainframe computers sold by manufacturers to leasing companies. *Id.* "[A]dd[ing]" those computers "in again when end users lease[d]" them from the leasing companies would result in "double counting" because the leasing companies themselves "do nothing to increase the *supply* of new machines." *Id.* This Court took a similar approach in *Dentsply*, where it accepted a product market consisting of manufacturers' sales to both end-users ("dental laboratories") and distributors ("dental dealers"). 399 F.3d at 187.

The same reasoning applies here: To account for competition among refiners for sales to distributors, refiners' market shares must include sales to distributors. Distributors "do nothing to increase the *supply*" of new sugar. *Allen-Myland*, 33 F.3d at 202. And "[s]ince [distributors'] purchases are already in the relevant market, it [would be] double counting also to" assign distributors market shares for resales of that same sugar. *Id.*; *see also In re Processed Egg Prods. Antitrust Litig.*, 881 F.3d 262, 264 (3d Cir. 2018) (treating "grocery stores and other distributors" as customers of egg producers without referencing those further down supply chain); *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1214 (11th Cir. 2002) (recognizing that "manufacture and sale of beer" and "beer distributorships" comprise separate antitrust markets). Defendants are incorrect to suggest that the double-counting problem can be remedied by giving distributors market shares for resales of refined sugar and then excluding refiners' sales to distributors from refiners' market shares.

See Appellees' Opp. to Emergency Motion, Doc. 2 (3d Cir. Sept. 29, 2022), at 2. That approach would ignore "competition where, in fact, competition exists," *Brown Shoe*, 370 U.S. at 326, by disregarding competition among refiners, including between the merging parties, for sales to distributors and instead treating distributors as the sellers, rather than purchasers, in those sales.

b. The District Court Erred in Requiring the Government to Subdivide the Proposed Relevant Market

The District Court identified "a second problem with the Government's proposed product market," JA1998 (Op. 48), and concluded that the Government's proposed product market failed as a matter of law because the Government was required to further subdivide the market and "differentiate between refined sugar sales to industrial customers and refined sugar sales to retail customers." JA1982 (Op. 32). This was legal error. Regardless, even if such disaggregation were required, the Government established presumptive anticompetitive effects in a relevant market limited to sales to industrial customers.

i. As the Supreme Court has repeatedly confirmed, there is no legal requirement that plaintiffs divide a broadly defined market into submarkets. *See, e.g.*, *Brown Shoe*, 370 U.S. at 327. The mere existence of further potential submarkets does not render the Government's proposed product market invalid as a matter of law. The Supreme Court has made clear that the existence of possible "submarkets [is] not a basis for the disregard of a broader line of commerce that has economic significance." *United States v. Phillipsburg Nat'l Bank & Tr. Co.*, 399 U.S. 350, 360 (1970); *see also United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549, 553 (1971) (stating that the possibility of "submarkets within [a] broad market" did not defeat broader market); *United States v. Cont'l Can Co.*, 378 U.S. 441, 457-58 (1964) (finding that the existence of a "broader product market" did not "necessarily negative" submarkets). And the Supreme Court has held that a court was not "required to employ finer[] distinctions" or engage in "[f]urther division" of the market where such "division does not aid [the Court] in analyzing the effects of this merger." 370 U.S. at 327.

To the extent that the District Court held that the Government was required to show that "non-industrial customers are similarly situated to industrial customers," JA1983 (Op. 33), that was also legal error. Both the Supreme Court and this Court have defined markets encompassing widely divergent customers.[20] And this Court has defined relevant markets that included both sales from manufacturers to distributors and sales from manufacturers to end-users despite obvious differences between these customer groups.[21]

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[20] *See Brown Shoe*, 370 U.S. at 327 (market containing men's, women's, children's, and infants' shoes, among other shoes); *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"); *Hackensack*, 30 F.4th at 166 (accepting market for inpatient general acute-care services without distinguishing patients' medical needs).

[21] *See Dentsply*, 399 F.3d at 188 (including sales to dental dealers and dental labs); *Allen-Myland*, 33 F.3d at 198-99, 202-03 & n.12 (including IBM's sales to both leasing

ii. Although disaggregation of industrial and retail customers was not required, it would only have strengthened the presumption of anticompetitive effects in this case. As the District Court found, United and Imperial sell about 90% and 80% of their sugar, respectively, to industrial customers. JA1982-1983 (Op. 32-33). Domino, the post-merger entity's major competitor in the relevant markets, sells only about 50% of its sugar to industrial customers. *Id.* Because United and Imperial would compete more fiercely and face proportionately less competition from Domino in a market limited to industrial customers, the Government's evidence of market shares/concentration, unilateral effects, and coordinated effects would only have strengthened in such a submarket. *See Brown Shoe*, 370 U.S. at 325 (merger "proscribed" if reasonably probable harm in any submarket).

2. The Government Properly Defined the Relevant Geographic Market

If the distributor error is corrected, the Government established a prima facie case under any of the four geographic markets presented by the parties. The District Court, however, committed legal error in rejecting the two geographic markets alleged by the Government, which appropriately focused on the areas where "the effect of the merger on competition will be direct and immediate." *Phila. Nat'l Bank*, 374 U.S.

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companies and end-users); *see also Brown Shoe*, 370 U.S. at 341 n.69 (calculating firm's market shares based on firm's direct sales to end-consumers *and* sales made through distributors to retailers).

at 357. These geographic-market holdings reflect fundamental misunderstandings of (a) the hypothetical monopolist test; (b) customer-based markets; and (c) the burden-shifting framework.

a. The District Court improperly discounted the hypothetical monopolist test by stating that it was "simply not credible" for the Government's expert to testify that both a "six state[]" region and the entire country could pass the test. JA2000-2001 (Op. 50-51).

This holding rests on a legal and economic misunderstanding. Economically, it *always* follows that, if one geographic market passes the hypothetical monopolist test, a broader geographic market will, too. The test determines solely if a relevant market is "too narrow." *Hershey*, 838 F.3d at 338. Calling an economically correct application of the hypothetical monopolist test "simply not credible" (JA2000-2001 (Op. 50-51)) does not convert legal error into factual error.

The District Court's holding is flatly contradicted by the Supreme Court's decision in *United States v. Pabst Brewing Co.*, which found a Section 7 violation "in each" of three geographic markets: Wisconsin, a "three-state area" including Wisconsin, and "the entire country." 384 U.S. at 552; *see United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 621 n.20 (1974) ("*Pabst* stands for the proposition that there may be more than one relevant geographic market"); *Am. Crystal Sugar Co. v. Cuban-Am. Sugar Co.*, 152 F. Supp. 387, 398 (S.D.N.Y. 1957) ("ten state territory" and three-state "[t]riangle" within this territory were areas to evaluate competitive effects of sugar-refining merger), *aff'd*, 259 F.2d 524 (2d Cir. 1958); *see also United States v. Dairymen, Inc.*, 660 F.2d 192, 195 (6th Cir. 1981) (remanding for determination of "relevant geographic submarkets"). The District Court erred in rejecting the Government's proposed overlapping geographic markets on the basis that they were overlapping.

b. The District Court also found it "hard to credit" that the Government's alleged geographic markets "properly account[ed] for the real-world impact" of sugar flowing into those markets from sellers located outside those markets. JA1963, JA1984, JA1988, JA2001-2002 (Op. 13, 34, 38, 51-52). But the District Court was simply incorrect on this point. By definition, customer-based markets account for *all* producers that serve customers located in those markets, regardless of the producer's location. *Hackensack*, 30 F.4th at 167-72 (market included "any hospital that serves a resident of Bergen County" even if 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) (relevant market included any supplier "to commercial purchasers in the United States," including foreign suppliers). The Government's markets thus fully accounted for sugar that flows to customers in those proposed geographic markets from suppliers located outside of those geographies. The District Court's failure to apply the economic theory of customer-location-based geographic markets was legal error.[22]

The District Court's error mirrors one reversed in *Hershey*. In that case involving general acute-care services, the district court rejected the Government's geographic market because 43.5% of general acute-care patients at the acquiring hospital "travel[ed] from outside" the area. 838 F.3d at 340. This Court reversed because, "by relying almost exclusively" on patients entering the market, the lower court's "analysis more closely aligns with a discredited economic theory, not the hypothetical monopolist test." *Id.* at 339.[23] "[B]y relying almost exclusively" on sugar entering the proposed market—for which the Government accounted and which is not directly relevant to the hypothetical monopolist test's application in this case—the

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[22] To the extent the District Court properly applied customer-based geographic markets, but simply failed to apprehend that the Government had accounted for sugar suppliers outside the relevant customer geographies, it committed clear error. The market shares presented below included those outside suppliers. For example, the Government assigned LSR—with a single refinery located outside of both the Georgia Plus and Southeast markets (JA2853 (PSAF ¶ 65))—a 7% share in both markets, while NSM—which sells sugar refined at facilities in Minnesota, Idaho, and California (JA2954 (PSAF ¶¶ 75-77))—received 3% and 2% shares in the Southeast and Georgia Plus markets, respectively. JA575-576 (Tr. 611:10-612:1). Both Western Sugar (with facilities in Colorado, Montana, Nebraska, and Wyoming (JA2854 (PSAF ¶ 80)) and Michigan Sugar (with facilities in Michigan and Ohio (JA2854 (PSAF ¶ 79)) received 1% shares in the Southeast market and shares that rounded to 0% in the Georgia Plus market. JA575-576 (Tr. 611:10-612:1).

[23] The "economic theory" in question was "the Elzinga-Hogarty test," which analyzes the number of customers who enter and leave a proposed market to obtain the relevant product. 838 F.3d at 339-40.

District Court similarly misapplied the "economic theory" of customer-based markets. *Id.*

c. Finally, the District Court incorrectly considered, as part of market definition, the possibility that a competitor would increase sales in the alleged geographic markets "in response to a price increase." JA2002 (Op. 52). Under *Hershey*, supply-side factors, such as expansion of existing competitors, are considered in the second step of the burden-shifting framework in Defendants' rebuttal case—not part of market definition. 838 F.3d at 351 (evaluating "repositioning" in defendants' rebuttal).[24]

Moreover, courts analyze suppliers' potential repositioning under a specific legal framework. At the rebuttal stage, the burden "shifts" to defendants to refute the prima facie case. *Hershey*, 838 F.3d at 337. The stronger the prima facie case, the higher defendants' burden. *Id.* at 350 (HHIs suggested merger was "so likely to be anticompetitive that 'extraordinarily great cognizable efficiencies [are] necessary'" (citation omitted)). And to suffice, repositioning must be "timel[y], likel[y], and sufficien[t]" to counteract anticompetitive effects. *Id.* Had it applied these requirements, the District Court would have had to conclude that Defendants'

[24] *See also Chi. Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410 427 (5th Cir. 2008) ("'[p]otential [e]ntry'" defense "was [i]nsufficient to [r]ebut"); *see* HMG § 4, at 7 ("[m]arket definition focuses solely on demand substitution factors").

evidence—which related in large part to a third party's "lofty aspiration" to undertake an expansion [redacted] (JA2100, JA2110 (Tr. 1114:18-20, 1129:13-19))—was far from sufficient to clear the high legal bar.

By analyzing Defendants' repositioning argument at the wrong stage, subject to the wrong burden, and under the wrong standard of proof, the District Court legally erred.[25]

B. The Government Proved that the Merger is Presumptively Anticompetitive

As this Court has made clear, "[o]nce the relevant geographic market is determined, a prima facie case is established if the plaintiff proves that the merger will probably lead to anticompetitive effects in that market." *Hershey*, 838 F.3d at 346 (internal quotations and citation omitted). The Government can meet its burden by showing that the merger "produces a firm controlling an undue percentage share of the relevant market[] and results in a significant increase in the concentration of firms

[25] The District Court incorrectly suggested that the Government's expert, Dr. Rothman, lacked the requisite expertise because his PhD from the University of California, Berkeley, was in Business Administration, rather than Economics. JA1974 (Op. 24). Dr. Rothman received "training in economics" at Berkeley's business school as part of his PhD. JA546 (Tr. 582:2-9). Dr. Rothman has since taught a course on the economics of merger analysis at Harvard University, served as a managing partner at a major economic consulting firm, published in peer-reviewed economics journals, and testified in prior merger cases without being excluded as an economic expert. JA546 (Tr. 582:4-16). Accordingly, Defendants raised "no argument" that the court "should not recognize Dr. Rothman as an economics expert." JA1974 (Op. 24).

in that market." *Phila. Nat'l Bank*, 374 U.S. at 364. Although the Supreme Court has not "specif[ied] the smallest market share which would still be considered to threaten undue concentration," it has made clear that "30% presents that threat." *Id.*

The Government may also establish this presumption "simply by showing a high market concentration based on" Herfindahl-Hirschman Index ("HHI") numbers, alone. *Hershey*, 838 F.3d at 347. HHI numbers are "calculated by summing the squares of the individual firms' market shares." *Id.* Under the 2010 *Horizontal Merger Guidelines*—which this Court treats as "persuasive authority," *id.* at 338 n.2—"[a] post-merger market with a HHI above 2,500 is classified as 'highly concentrated,' and a merger that increases the HHI by more than 200 points is 'presumed to be likely to enhance market power.'" *Id.* at 347 (quoting HMG § 5.3, at 19).

In addition, the Government may meet its burden of showing reasonably probable anticompetitive effects through "other evidence of anticompetitive effects," *Hackensack*, 30 F.4th at 173, including "customer testimony," the "history of the market," and "internal documents" showing that the merger may result in substantially lessened competition—the effects of which can include increased prices and reduced quality, *Chi. Bridge & Iron*, 534 F.3d at 433; *see Hackensack*, 30 F.4th at 173 (other evidence "strengthen[ed]" prima facie case based on presumption).

1. In this case, undisputed trial evidence, including the testimony of Defendants' own expert, established the structural presumption in all four geographic markets proposed by the parties. *See supra* at 7-8. The Government argued during and after trial that, in the alternative geographic markets (including Defendants' own), the evidence established reasonably probable anticompetitive effects in that market. JA1115-1116 (Tr. 1204:20-1205:4); Pl.'s Post Trial Br., Dkt. 214 at 22-23. Specifically, even if the District Court believed that the Government "failed to identify the relevant market" (JA2004 (Op. 54)), undisputed evidence of post-merger market shares in Defendants' proposed geographic markets established the presumption.

Courts in antitrust cases have considered a merger's effect in markets other than those originally alleged. Where the evidence establishes that a merger threatens competition in product and geographic markets (even markets that differ from the Government's initial allegations), courts should address competitive effects in those markets in order to assess "competition where, in fact, competition exists." *Cont'l Can*, 378 U.S. at 453 (citation omitted). In *Continental Can*, the Supreme Court recognized a product market consisting of both glass and metal containers—even though the parties had "not pressed" these markets on the district court and the plaintiff had argued for separate submarkets, one comprising glass containers and the other comprising metal containers. 378 U.S. 441, 457 (1964). This Court took a similar approach in *FTC v. AbbVie Inc.*, affirming a district court's decision to define a relevant product market in terms that "no expert had endorsed" but that the

Government had argued for "in the alternative" (just as the Government argued for alternative markets here). 976 F.3d 327, 373 (3d Cir. 2020); *see United States v. Energy Sols., Inc.*, 265 F. Supp. 3d 415, 436-37 (D. Del. 2017) (finding different market than the one alleged). By failing to analyze competitive effects based on disagreement with the Government's alleged markets, the District Court elevated a "subsidiary" question—"where the anticompetitive effect exists"—into an improperly case-dispositive one. *Pabst*, 384 U.S. at 549-50.

2. The District Court committed a similar error by failing to address the Government's evidence of unilateral and coordinated effects, which applied in any of the four relevant markets proposed below. Each of those categories was independently sufficient to establish a prima facie case even in the broadest geographic market proposed by Defendants, the entire country. Declining, without explanation, to accept the implications of this evidence was reversible error.

a. First, the Government introduced evidence of **unilateral effects**, or increased post-merger "incentive[s] to raise prices or reduce quality" independent of other firms' reactions. *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 81 (D.D.C. 2011). United and Imperial both sell to many of the same customers. Defendants' expert testified that 77% of Imperial's sales to large customers in the Southeast market went to customers that also purchased from United. JA936-938 (Tr. 998:12-1000:21). Likewise, 56% of United's sales to large customers in the Southeast market went to customers that also purchased from Imperial. JA936-938 (Tr. 998:12-

1000:21). An Imperial slide deck—which Imperial's CEO participated in creating (JA742-743 (Tr. 798:17-799:6))—identified "United in Florida" as one of Imperial's "close competitors." JA1671 (DTX219). United and Imperial compete for Costco, Pepsi, General Mills, Molson Coors, Hospitality Mint, Helm's Candy, and Great American Cookie, among other customers.[26]

In addition, undisputed record evidence shows that customers play United and Imperial off one another to obtain better prices and services.[27] This competition between United and Imperial was poised to increase but was eliminated overnight by the acquisition. As early as 2018, United management began considering, and eventually recommended, expanding the Clewiston refinery to increase production of a bag size that Imperial also produces. JA1398-1400 (PTX348); JA1485 (PTX452);

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[26] *See* JA312-315 (Tr. 239:3-242:3) (Imperial lowering bid to Costco after learning about United's lower bid); JA1216-1218 (PTX154) (same); JA229 (Tr. 131:8-12) ("We [United] compete against Imperial" for two Pepsi locations); JA231-241 (Tr. 133:15-143:14) (United competing against Imperial and increasing discount to win back Pepsi business in 2022); JA2694 (JTX009) [redacted]); JA1220 (PTX163) ("we [Imperial] have always lost" to United on "last 3 bi[d]s" for Molson Coors); JA1223 (PTX192) (United and Domino listed as Imperial's "Competition" for Helm's Candy); JA1552 (PTX469) ("Imperial use[d] to sell [Great American Cookie] and lost the business to [United]").

[27] *See, e.g.*, JA1211 (PTX137) (Imperial employee: "on EVERY bid we have won on the auction and we were #1 in price" for General Mills facility, "United has come back in after the fact"); JA318-321 (Tr. 245:25-248:21) (Imperial, after winning Pepsi contract, describing Pepsi's complaints about service experiences with United); *see also* JA349, JA363 (Tr. 281:8-24, 295:2-6) (Imperial estimated United's pricing and lowered bid "to compete"); JA1227-1228 (PTX250) (similar).

JA253, JA296, JA516-518 (Tr. 155:7-10, 223:5-16, 539:15-541:24). But United "assum[ed]" that the Imperial acquisition would permit delaying or forgoing this expansion, and, as of trial, the expansion had not occurred. JA1405 (PTX348); JA369 (Tr. 301:7-9).

b. The Government also introduced evidence of **coordinated effects** between United and Domino, or the potential for post-merger "coordinat[ion]" of behavior to "restrict output" and achieve supra-competitive profits, *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001); *see FTC v. Elders Grain, Inc.*, 868 F.2d 901, 905 (7th Cir. 1989) ("highly concentrated" market, "largely standardized and homogenous" product, and "history" of collusion render market vulnerable to coordinated effects from merger). According to this evidence, United and Domino have the ability to assess each other's competitive positions and punish non-compliance with coordinated strategies because, among other reasons, competitors closely monitor each other's prices in this commodity market.[28] United and Domino already coordinate with one another to keep prices high. In September 2019, United's CEO stated that "we tried to push prices higher" (JA1450 (PTX450)) by putting "an

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[28] JA258, JA485 (Tr. 160:16-18, 488:17-22); JA2118-2120 (PTX028); JA2124-2129 (PTX041); JA1209-1210 (PTX127). Additionally, United, Imperial, and Domino have related ownership interests and personal ties. JA731 (Tr. 787:9-12) (U.S. Sugar has ownership interest in Sugar Cane Growers Cooperative); JA2853 (PSAF ¶ 60) (Sugar Cane Growers Cooperative part-owner of Domino); JA701-702 (Tr. 755:24-756:5) (Domino executive and Imperial CEO are "trusted friend[s]").

expiration date" on pending offers (JA520 (Tr. 543:16-18)), which he explained "sen[t] a message" to "competitors that we were not interested in allowing the market to slip lower." JA1450 (PTX450). Imperial and Domino similarly pull competitive punches to avoid price wars.[29]

United and Domino exchanged information about current and future prices, pricing strategies, and "sold position" (amount of inventory sold at a given time (JA262-263 (Tr. 164:22-165:1)) through Richard Wistisen, an analyst who authors a sugar-industry newsletter (JA278 (Tr. 180:11-15)). The record abounds with examples of these exchanges orchestrated by Wistisen, including an instance in which a United executive identified what information he would "like [Wistisen] to hear"—and then Wistisen reported almost exactly that information to Domino the next day.[30] As a Domino executive stated, after receiving "[g]ood competitive intelligence" about

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[29] JA1128 (PTX029) (Domino executive: "[w]e need to signal to the market that we're going to maintain price"); JA1228 (PTX250) ("main downside" to lowering Imperial bid "would be snatching something from United just as they are starting to show some upside price movement").

[30] JA1138 (PTX048) (telling Domino about United's "plan" to "hold steady at $36.50 and $38.50"); JA1153 (PTX059) (telling Domino that he "[j]ust talked with United: prices unchanged"); JA1165 (PTX064) (telling Domino that United pricing "info I provided was direct from them"); JA1438 (PTX393) (telling United that Domino "saying back up to $40.50 to $41"); *see* JA1130 (PTX030); JA1132-1133 (PTX043); JA1143-1146 (PTX051); JA1160-1164 (PTX063); JA1173-1175 (PTX065); JA1441-1444 (PTX406); JA1445-1447 (PTX426).

Imperial from a different analyst: "Imperial being sold out gives us justification for a premium." JA1147 (PTX053).

The merger increases risks of oligopolistic behavior, thus establishing coordinated effects. United and Domino, active information-exchangers, will now control approximately three-quarters of the relevant markets. JA575 (Tr. 611:10-25)). And Imperial—which apparently does not take part in the exchanges currently (JA773 (Tr. 829:15-24))—will now be absorbed by a participant in those exchanges.

II. THE DISTRICT COURT INCORRECTLY ASSESSED THE EFFECTS OF USDA'S ROLE IN THE SUGAR INDUSTRY

The District Court stated that, "even if U.S. Sugar's acquisition of Imperial were likely to have any anticompetitive effects, the Court believes that USDA has the ability to counteract those effects." JA2005 (Op. 55). It is unclear where the District Court thought its statements about USDA's role fit in the relevant burden-shifting framework. At any step, however, the District Court's assertion that "USDA's power to manipulate sugar supply in the market would act as a safeguard against potential anticompetitive effects of the Proposed Merger even if the Court were to find any such effects existed" constitutes legal error. JA2005 (Op. 55).

The USDA regulations referenced by the District Court fulfill a statutory mandate to support American farmers by (i) ensuring adequate supplies of raw and refined sugar and (ii) keeping sugar prices above "forfeiture" levels. 7 U.S.C. § 1359bb(b)(1). The regulations achieve this mandate by assigning "marketing allotments" that permit refined-sugar producers to sell a certain amount of sugar each crop year, 7 C.F.R. § 1435 Subt. D; implementing a loan program that supports domestic sugar prices, 7 C.F.R. § 1435 Subt. B; and defining quotas for low- and no-tier duty sugar imports, 15 C.F.R. § 2011 Subt. A; *see* 7 U.S.C. §§ 1359bb-1359-dd, 1359kk, 7272; JA2855-2856 (PSAF ¶¶ 86-95).

A. Section 7 applies with full force to regulated and unregulated sectors except those that enjoy express or implied immunity from the statute. *See Phila. Nat'l Bank*, 374 U.S. at 350-55. Thus, the first question courts ask when considering regulations in a Section 7 case is whether the regulations create an express or implied antitrust immunity. *Id.* at 350-55 (analyzing antitrust-immunity argument in Section 7 case); *see also In re Vehicle Carrier Servs. Antitrust Litig.*, 846 F.3d 71, 85 (3d Cir. 2017) (addressing statute that "expressly immunizes agreements filed by the [Federal Maritime Commission] from the federal criminal and civil antitrust laws"). The answer to that question here is no, and neither Defendants nor the District Court ever suggested otherwise. Simply put, there is no statute creating express immunity from the antitrust laws for the sugar industry.

Moreover, as the Supreme Court has made clear, implied immunity is "strongly disfavored." *Phila. Nat'l Bank*, 374 U.S. at 350. A finding of implied immunity "can be justified only by a convincing showing of clear repugnancy between the antitrust laws" and an alternative "regulatory system." *Nat'l Ass'n of Sec. Dealers*, 422 U.S. at

719.[31] Defendants never argued that such repugnancy exists between Section 7 and USDA's regulations. Indeed, the Supreme Court has rejected an antitrust-immunity argument in a merger case in the agriculture sector because of no clear repugnancy with the antitrust laws. *Md. & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 469-70 (1960).

Despite this case law, the District Court effectively created a sugar-refining immunity from Section 7. The District Court did not suggest that USDA's regulations advanced any non-competition goals that were "repugnan[t]," *Nat'l Ass'n of Sec. Dealers*, 422 U.S. at 719, to Section 7. Instead, the District Court suggested that the regulations could achieve competition-related goals at least as well as Section 7 by "counteract[ing]" anticompetitive effects. JA2008 (Op. 58). Because the District Court "d[id] not reach" the question of what anticompetitive effects the acquisition may cause (JA2004 (Op. 54)), it is impossible to understand how the District Court concluded that USDA could "counteract" those hypothetical and undefined effects. This analysis amounts to asserting that the mere existence of USDA regulations defeats Section 7 in sugar-refining cases, regardless of the harm a merger among refiners will generate—the type of implied immunity that the Supreme Court has deemed disfavored.

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[31] *See Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (discussing Supreme "Court's aversion to implied repeals").

B. To the extent the District Court considered the USDA's role and authority as part of its evaluation of the Government's prima facie case, the District Court erred. The Supreme Court has made clear that, where regulations do not afford immunity, they are not relevant to the prima facie case. In *Philadelphia National Bank*, the Court held that the Bank Merger Act did not immunize commercial-banking mergers from Section 7. 374 U.S. at 350-55. The Court then held that a merger was presumptively anticompetitive based on post-merger market shares. *Id.* at 364. The Court never considered the Bank Merger Act or the significant regulation of price and other competitive dynamics in assessing the prima facie case but instead focused on structural evidence of anticompetitive effects—market shares and concentration.

Moreover, courts regularly enjoin mergers in highly regulated industries without suggesting that the regulatory framework is relevant to assessing the prima facie case. *See, e.g.*, *Phillipsburg*, 399 U.S. at 357, 366-67 (banking); *United States v. Third Nat'l Bank in Nashville*, 390 U.S. 171, 174-75 (1968) (same); *Hershey*, 838 F.3d at 334 (hospitals); *Energy Sols.*, 265 F. Supp. 3d at 422-23 (radioactive-waste disposal); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 47-52 (D.D.C. 2017) (health insurance).

C. To the extent the District Court was suggesting that USDA's regulations rebutted the Government's prima facie case, the District Court still erred.

1. Where regulations "do[] not provide remedies for the correction of all the abuses . . . which might constitute violations of the anti-trust laws," they do not defeat a showing of an antitrust violation. *Pa. R. Co.*, 324 U.S. at 461. The Supreme Court has applied this principle repeatedly, holding that conduct can violate the antitrust laws despite the presence of industry-specific regulations, including regulations that restrict prices to a "zone of reasonableness" "between maxima and minima." *Id.* In *Philadelphia National Bank*, for example, the Supreme Court stated that, "[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. The Court then enjoined the merger based on market-structure evidence alone without referencing the regulatory backdrop as a relevant consideration or rebuttal factor. *Id.* at 364. Similarly, the Second Circuit blocked a merger in the refined-sugar industry based in part on market-structure evidence at a time when a prior version of USDA's price-influencing regulations was in effect. *Am. Crystal Sugar*, 259 F.2d at 527-28.

In its opinion below, the District Court never addressed this controlling precedent. Instead, it incorrectly relied on *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). JA2004-2005 (Op. 54-55). *Trinko* arose under Section 2 of the Sherman Act, not Section 7 of the Clayton Act, and the challenged conduct was the defendant's unilateral refusal to deal with rivals and the denial of statutorily guaranteed access to telecommunications facilities, not an unlawful merger among commodity producers. 540 U.S. at 401, 407-411. While *Trinko* asserted that courts should be "attuned" to "regulation," *id.* at 411, the case nowhere suggested that the mere existence of regulation immunizes the regulated industry or undermines a Section 7 prima facie case. In any event, *Trinko* focused on particular types of regulations—those "designed to deter and remedy anticompetitive harm," *id.* at 412—that are lacking here.

USDA's regulations "do[] not provide remedies for all abuses" that "might constitute" antitrust "violations" and thus do not rebut the prima facie case. *Pa. R. Co.*, 324 U.S. at 460. As the District Court found, "USDA does not monitor individual contract prices between sugar producers and their customers, and the USDA has no ability to set the particular price at which domestic refiners sell refined sugar." JA1967 (Op. 17). The record evidence showing that refiners negotiate prices with customers and compete with other refiners over price and service quality lays to rest any suggestion that USDA could remedy anticompetitive harm, especially since USDA's statutory mandate involves keeping prices *above* specified forfeiture levels, *supra* at 41, not counteracting anticompetitive price increases from mergers.

2. Moreover, just as the existence of USDA regulations fails to rebut the Government's prima facie case, testimony from Dr. Fecso, a USDA employee who was "offering testimony in her personal capacity" about the acquisition's purported "benefits," fails to do so as well. JA1972, JA2006 (Op. 22, 56). Based in part on this testimony, the District Court stated that the acquisition will allow U.S. Sugar to ship excess cane to Imperial, increase Port Wentworth's annual production and add the facility into the United network, promote supply-chain flexibility, and leverage Imperial's ability to make brown and powdered sugar. JA1972-1973 (Op. 22-23). But the District Court failed to subject these issues to the exacting legal scrutiny that this Court requires for an efficiencies defense.

This Court is "skeptical" that "an efficiencies defense even exists." *Hershey*, 838 F.3d at 348. No appellate court, including the Supreme Court, has ever relied on the defense to permit an otherwise anticompetitive merger. *See, e.g., Hackensack*, 30 F.4th at 176; *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality."). If it exists, the defense rebuts an especially strong prima facie case—such as the Government's here—only where "the anticompetitive effects of the merger will be offset by extraordinary efficiencies resulting from the merger." *Hershey*, 838 F.3d at 347.

While Defendants claimed that their evidence of purported benefits was not a "formal" "efficiencies defense," Defs.' Post Trial Br., Dkt. 220 at 28, this Court has not credited a similar claim before. In *Hackensack*, the defendants claimed "procompetitive benefits" from the merger but asserted that this argument was not "an efficiencies defense." 30 F.4th at 175-76. But this Court found defendants to be making a de facto "efficiencies defense" subject to the defense's standards of proof. *Id.* at 176. Those standards require the alleged efficiencies to "(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.'" *Id.* (citation omitted)).

Dr. Fecso's testimony does not meet these requirements. As the District Court recognized, she testified in her personal capacity rather than as a USDA representative or an expert. JA2006 (Op. 56). Moreover, she "based" her view on a "conversation" with United's and Imperial's CEOs, in whom she "had high faith." JA821-822 (Tr. 881:24-882:23). She did not perform any written quantitative analysis to support her speculation about the acquisition's benefits, and her conversation with the CEOs did not involve review of data to support those efficiencies. JA822 (Tr. 882:24-883:12). Nor did Dr. Fecso review any of Defendants' internal documents and communications produced during this litigation. JA824 (Tr. 884:11-14). Because her ipse dixit does not address in any detail *any* of the four requirements necessary to make out an efficiencies defense, her testimony cannot satisfy the efficiencies defense's "stringent standard." *Hackensack*, 30 F.4th at 176.

CONCLUSION

This Court should reverse and remand for further proceedings.

Respectfully submitted.

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Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts exempted by Fed. R. App. P. 32(f), this brief contains 11,324 words.

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November 1, 2022

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Pursuant to Third Circuit Local Rules 28.3(d), 46.1(e), and 113.2(a), I certify that I represent the United States and thus am not required to be a member of the bar of this Court.

November 1, 2022

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