UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MAINE

THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, LODGE NO. 1821, on behalf of its individual members employed at the Bucksport Paper Mill; **RICHARD GILLEY,** individually and as IAMAW District 4 Business Representative for Local Lodge No.1821; **COREY DARVEAU,** individually and as President of Local Lodge No. 1821; **BRIAN SIMPSON,** individually and as Vice President of Local Lodge No. 1821; **BRIAN ABBOTT,** individually and as Recording Secretary of Local Lodge No. 1821; **HAROLD PORTER,** individually and as Financial Secretary for Local Lodge 1821, and **FIFTY-THREE LOCAL NO. 1821 MEMBERS,** Individually and for all other similarly situated Salaried and hourly wage employees, Plaintiffs, v. **VERSO PAPER CORP.,** a Delaware Corporation; **VERSO PAPER LLC**, a Delaware Limited Liability Company (LLC) and a wholly owned subsidiary of Verso Paper Corp., **AIM DEVELOPMENT (USA) LLC**, a Delaware Limited Liability Company and indirect wholly-owned subsidiary of American Iron & Metal Company, Inc., Defendants.	CIVIL ACTION NO. 1:14-CV-00530-JAW

PLAINTIFFS' CONSOLIDATED RESPONSE IN OPPOSITION TO DEFENDANTS' SEPARATE MOTIONS TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT PURSUANT TO RULE 12(b)(6)

Plaintiffs submit this consolidated response in opposition to Defendants' separate motions to dismiss, as both AIM and the Verso Defendants base their motions to dismiss on common and overlapping theories – especially the alleged mootness of the injunctive relief claims after the Verso-AIM sale was permitted to proceed – and authorities. To avoid repetition in responding to these similar and coordinated motions to dismiss, a single response is filed.

I. BACKGROUND: SUMMARY OF CLAIMS AND RELIEF

The Chronology attached as Attachment A to this Response in Opposition is incorporated herein to summarize the known anticompetitive acts committed since 2010, by Verso's parent Apollo Global Management ("Apollo"), the Verso entities ("Verso"), NewPage Holdings, Inc. ("NewPage"), and AIM Development (USA) LLC (f/k/a AIM Demolition (USA) LLC, hereinafter "AIM"). Plaintiffs assert that the pattern of conduct that Apollo, Verso, NewPage, and AIM, have engaged in since at least 2011 (or 2010 for Apollo), detailed in the Chronology, has violated Sections 1 and 2 of Sherman and Section 7 of Clayton.

Plaintiffs submit that Apollo used its acquisition of NewPage's second lien debt to exert improper influence over NewPage, to force a merger with Verso and to reduce capacity in the highly concentrated coated paper markets in North America in anticipation and preparation for that merger. This acquisition and exertion of influence reduced competition and had the intent to further Verso's monopoly power over the North American coated paper markets, in violation of Sections 1 and 2 of the Sherman Act and Section 7 of the clayton Act.

AIM was the instrument Verso and NewPage used to ensure that any reductions in capacity in these markets was permanent, by selling these mills to a scrapper rather than competitors willing to pay a higher price to continue to operate the mills in the production of coated paper products.

A. November 28, 2014 Complaint and TRO

In the November 28th undocketed Complaint and Motion for TRO,[1] the IAMAW Local Lodge No. 1821 and five (5) individual machinist members of the fifty-nine members of that

[1] The November 28, 2014 Complaint is attached as Exhibit 1. The November 28, 2014, Motion for Temporary Restraining Order is attached as Exhibit 2.

union filed a 3-count complaint against Verso Paper Corp. and Verso Paper LLC (the entity that a Plaintiffs sought a declaratory judgment that Verso's reduction of capacity through the destruction of equipment and closure of the Bucksport Mill violated Sections 1 and 2 of the Sherman Act. The Prayer for relief sought a permanent injunction requiring Verso to preserve the paper making equipment for the purpose of paper production and requesting compulsory divestiture of the Bucksport Mill by Verso with its sale to a competitor to preserve competition in the North American coated paper market, as well as preserving this facility as an asset in the economy of Maine that produces jobs and revenue.

This Complaint and TRO were withdrawn before docketing after Verso agreed not to wipe the hard drives of the computer systems for the paper machines "prior to sale" of the mill, and to allow time for "good faith" negotiations regarding the outstanding effects bargaining issues, including the timely payment of severance pay and accrued 2015 vacation time pay.

Although additional agreement was reached during this period of "good faith" negotiations regarding Verso's obligation to pay accrued 2015 vacation time pay and severance pay to Local 1821 members on extended leaves of absence, including leaves of absence for union business for the international union, no agreement was reached regarding Verso's obligation to *timely* pay accrued 2015 vacation time within the time requirements in 26 M.R.S.A. § 626, or severance pay by the first regular pay period after the last full day of work – which for most employees was to be December 17, 2014. See 26 M.R.S.A. § 625-B and 626; FAC Exhibit 10 (December 3, 2014 Memorandum of Agreement ("MOA")); and FAC Exhibit 1 (2011 Collective Bargaining Agreement ("CBA"), Section 12).

B. Original and First Amended Complaints

In addition to refusing to comply with Maine statutory requirements regarding the timing for the payment of severance and accrued 2015 vacation time, during the period of "good faith"

negotiations Verso doubled down on its efforts to permanently destroy the paper making capabilities of the Bucksport Mill by having its agents approach AIM Development (USA) LLC on November 30, 2014 (during the period of "good faith" negotiations regarding preservation), with the proposal that AIM acquire the Bucksport Mill.[2]

AIM is a U.S. subsidiary of a Canadian scrap metal company (American Iron and Metal), that both Verso and its merger partner NewPage had used in 2011-2013 to permanently destroy the paper making capacity of Verso's Sartell, MN Mill (2012-2013) and NewPage's Kimberly, WI Mill (2011). AIM acquired those mills from Verso and NewPage and then auctioned off the mills' paper making and other essential equipment, and then demolished the paper mill facilities – even though there were Verso and NewPage competitors interested, willing and able to acquire those mills for the continued production of coated paper, jobs and revenue.

In each prior case, AIM destroyed the Kimberly and Sartell Mills despite having offers or expressions of interest to submit offers from other willing and able companies seeking to purchase the Mills from AIM to continue to operate these facilities as operational paper plants engaged in the production of coated paper products in the North American coated paper market. After rebuffing offers from Verso-NewPage competitors for these mills as going concerns, AIM marketed the Sartell power plant as stand alone facility – after Verso had used $9.4 in federal grant money from the U.S. Department of Energy to upgrade that power plant (and the Bucksport co-generation power plant).[3]

Furthering its stated intent to "never sell the Bucksport Mill to a competitor (See, FAC Exhibits 28-31), on December 5, 2014, Verso and AIM executed a purchase agreement for the

[2] This is a fact developed through declarations Verso and Aim submitted after the FAC was filed.

[3] Verso obtained $9.4 million in D.O.E. grant funds, and more in state tax incentives in Maine and Minnesota, by claiming that the hundreds of jobs provided by the Sartell and Bucksport Mill could and would be preserved if the power plants at these facilities were upgraded to improve the biomass cogeneration capacity. These upgrades would allegedly make the mills more competitive and therefore preserve the jobs that these facilities provide. Sartell and Bucksport were the only two Verso facilities that were unionized.

Bucksport Mill, termed a "Membership Interest Purchase Agreement" ("MIPA"). The terms of this agreement made clear that AIM had no intent to run this mill as a going concern – but rather AIM acquired the Bucksport Mill with the immediate intent of acquiring the power plant and spinning off this asset only to a subsequent buyer. The paper making equipment was to be scrapped and the mill demolished – permanently removing this mill as a valuable asset in the Maine economy.

Despite the fact that the MIPA was signed with a scrapper during the first week of "good faith" negotiations over the preservation with the Plaintiffs, Verso failed to advise the Plaintiffs of the existence of this MIPA until December 8, 2014 -- after or about the same time that Verso released an 8K announcing this transaction with the Securities and Exchange Commission ("SEC").

From December 8 through 12 Plaintiffs investigated AIM and learned of the prior Verso-AIM and NewPage-AIM transactions that resulted in the significant reduction of capacity in the North American coated paper market. Upon concluding that the prior course of conduct between Verso, NewPage, AIM and Apollo (Verso's parent company) revealed a pattern of concerted and coordinated efforts to significantly reduce capacity in the North American coated paper market by these entities, acting in combination and cooperation to effect anticompetitive capacity reductions in this market to facilitate a price increase by Verso after its planned merger with NewPage, Plaintiffs amended their complaint and re-filed this action on December 15, 2015.

The Original (December 15) Complaint was amended, on December 22, 2014, to include by name all 58 of the individual machinists in local 1821 who were losing their jobs if the mill closed, and added additional facts related to the pattern of anticompetitive capacity reductions by Verso, NewPage and AIM, with the support of Apollo, that began in January 2011.

In the initial and First Amended Complaints ("FAC"), Plaintiffs sought a declaratory

judgment declaring that Verso's sale of the Bucksport Mill to scrapper AIM violated Section 7 of the Clayton Act and Sections 1 and 2 of the Sherman Act. Plaintiffs asserted that the closure of the Bucksport Mill was done in anticipation of the merger of Verso and NewPage and would not have occurred but/for Verso's expectation that DOJ would approve the merger without requiring the divestiture and sale of the Bucksport Mill to a competitor. Plaintiffs further asserted that the closure and scrapping of the Bucksport Mill is only the latest in a pattern of conduct by Verso, and its parent Apollo, to reduce paper making capacity in North America by closing and permanently scrapping Verso and NewPage mills in anticipation of a Verso and NewPage merger – after which the merged entity would control more than 50% of the remaining paper making capacity of the North American coated paper market. Plaintiffs' prayer for relief and request for Preliminary Injunction sought an order preventing Verso's sale of the Bucksport Mill to AIM and preservation of the Mill as a functional paper mill, as well as divestiture and sale of the Bucksport Mill to a competitor.

Plaintiffs did not name Apollo or NewPage as defendants in this action, nor did Plaintiffs challenge the merger of Verso and NewPage. The legality of the Verso-NewPage merger was the subject of a long-running, and on-going investigation by the Antitrust Division of the U.S. Department of Justice ("the Division" or "DOJ"). Rather than attempt to undertake a challenge to the Verso-NewPage merger, Plaintiffs' antitrust counsel communicated Plaintiffs' concerns regarding the closure and scrapping of the Bucksport Mill to DOJ in early November, 2014. Plaintiffs requested that DOJ condition the approval of the Verso-NewPage merger on divestiture of the Bucksport Mill and sale to a competitor. See Exhibits 3, 4 and 5 (Letters from Don Baker to William Baer). This request was consistent with the divestiture of the NewPage Biron, WI and Rumford, ME mills – that Verso and NewPage announced, on October 30, would be done to

facilitate DOJ's approval of their merger.[4]

C. Specific Allegations Presented by Plaintiffs in the FAC and Supporting Submissions

Although Plaintiffs have had no opportunity for discovery to date, Plaintiffs have presented more than bald allegations to support their antitrust claims, including:

1. The FAC details the coordinated actions by Apollo, Verso, NewPage and AIM to reduce capacity since at least 2011, after Apollo acquired NewPage's second lien debt and began exerting influence to compel a Verso-NewPage merger.[5] The Chronology provides references to publicly available sources that confirm the plausibility and probability of coordinated combined actions and the existence of express written agreement(s) between and by Verso and NewPage to reduce capacity, that have been aided by agreements between Verso and AIM and NewPage and AIM. The parallel commencement of capacity reductions by Verso and NewPage through mill closures, flowed by sale and destruction of paper making equipment and facilities by AIM, follows Apollo's acquisition of NewPage's second lien debt and coincides with the start of merger discussions between Verso and NewPage in 2011 and efforts by Apollo to compel a Verso-NewPage merger beginning in at least 2011 (or 2010).

2. On January 31, 2013, Verso and AIM Development (USA) LLC, filed an "Application for Approval of Transfer of License for the Sartell Project," Project No. 8315,[6] requesting that the Federal Energy Regulatory Commission (FERC) transfer a license for the power plant at the Verso Sartell Mill from Verso Sartell

[4] Mr. Baker never received any written response to Plaintiffs' requests for assistance from DOJ; however, the Division clearly rebuffed Plaintiffs' concerns.

[5] Apollo's substantial acquisition of the NewPage debt, for the purpose of exercising some control over the largest printing paper competitor of Apollo's subsidiary Verso, appears to be an asset acquisition which violates Section 7 of the Clayton Act, 15 U.S.C. Section 18. See *Mr. Frank, Inc. v. Waste Mgmt.*, 591 F.Supp. 859, 864-67 (N.D. Ill. 1984) (Section 7 is applicable where acquisition of debt may create opportunities to control a competitor's decision making); and *Metro-Goldwyn-Mayer, Inc. v. Transamerica Corp.*, 303 F. Supp. 1344, 1351 (S.D.N.Y. 1969) ("[i]t would be naive, of course, to believe that a powerful creditor, which has placed a debtor in a position of dependency upon it, would not use its position as leverage to put pressure upon the debtor to conduct its business, including its control over others, in a way that would accord with the creditor's interests"). Ironically, both the Antitrust Division and Apollo have had reported first hand experience with this very subject. See *United States v. The Gillette Company, et al.*, Civil No. 90-0053-TFH (D.D.C.), 55 FR 12567 (April 4, 1990) (Proposed Final Judgment preventing Gillette from acquiring additional debt in competitor, and requiring them to remain passive debt holder); and *Vantico Holdings S.A. v. Apollo Mgmt.*, 247 F. Supp. 2d 437, 455 (S.D.N.Y. 2003) (analyzing whether acquisition of a competitor's debt by Apollo was anti-competitive, but ultimately finding that the facts presented by the plaintiff were not sufficient to support imposition of a preliminary injunction).

In Apollo's present case involving NewPage debt, subsequent history has proven that this possibility of control was not just speculative; rather, in the subsequent NewPage bankruptcy proceeding, Apollo tried unsuccessfully to use its position as debtor to force a $1.5 billion merger with Verso. See f.n. 4 above.

[6] http://elibrary.ferc.gov/idmws/file_list.asp?document_id=14086980

LLC ("Verso"), the existing licensee, to AIM Development (USA) LLC ("AIM"). All communications on behalf of "Verso Sartell" for the transaction transferring the Verso Sartell license to AIM Development (USA) LLC were requested to go to Dennis Castonguay, while he was the Bucksport Mill's Manager, at the Bucksport Mill's address; and two of the contacts for AIM Development (USA) LLC, listed in the January 31, 2013 FERC Request for Transfer, are the same two contacts listed for AIM Development (USA) LLC on the December 5, 2014 MIPA to transfer the Bucksport Mill to AIM Development (USA) LLC.[7] FAC ¶ 30.

3. In a Form 8K filed on January 14, 2014, Verso stated that the NewPage Acquisition would result in significant costs attributed to the "closures of facilities".[8] FAC ¶ 36.

4. In a Form 8K filed on January 15, 2014, NewPage posted a powerpoint presentation that was to be presented to NewPage's lenders ("Presentation").[9] This Presentation stated that one of the goals of the NewPage Acquisition by Verso was the "[r]eduction of redundant product and supply inventory", demonstrating that Verso is acquiring NewPage in order to exercise market power by reducing capacity.[10] This Presentation also stated that: "A Combination [between Verso and NewPage] Will Result in the Largest Coated Paper Producer in N. America".[11] FAC ¶ 37.[12]

5. Slide 22 of the Presentation states that "NewPage and Verso Mills have Lower Cash Costs Relative to Competitors, Driven by their Pulp-Integration and Structural Characteristics." FAC ¶ 37.

6. Slide 22 also shows that Bucksport has *average operating costs* in comparison to other mills within the industry – contradicting Verso's recent claims in the October 1, 2014 8K and to DOJ that this facility was too unprofitable to operate. Indeed, as demonstrated by Exhibit A to Bucksport Tax Assessor Jef Fitzgerald's Declaration, filed on January 9, 2015 by Plaintiffs as ECF 80-1, Verso invested $48.7 million in upgrades in the mill and power plant in 2013-2015 and since 2007 invested at least $130.2 million in upgrades. FAC ¶ 37 and ECF 80-1.

7. Slide 25 of the Presentation states that: "The Combined Company [Verso and NewPage] Would Become the Cost Leader in the North American Coated Paper Industry", showing that the combined entity intends to exercise market power. This Presentation provides further evidence that the goal of the NewPage

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[7] FAC Exhibit 19.

[8] http://www.sec.gov/Archives/edgar/data/1395864/000119312514010953/d658330dex992.htm

[9] http://www.sec.gov/Archives/edgar/data/1578086/000119312514011410/d659471dex991.htm

[10] *Id.* at p. 9.

[11] *Id.*, at p. 10.

[12] The evidences an intent, through combination, to obtain monopoly and increased market power as Verso and NewPage together had market shares in excess of 50% of the already highly concentrated North American coated paper market(s).

Acquisition is to reduce capacity, and that both Verso and NewPage agreed to reduce capacity. FAC ¶ 37.

8. According to the terms of the Verso-NewPage merger, after the acquisition is completed, Verso intends to operate NewPage as a "non-guarantor restricted subsidiary of Verso" under a "Shared Services Agreement."[13] As Slide 7 of the Presentation explains, "The NewPage Operating Company Will Be a Non-Guarantor Restricted Subsidiary for Verso's [Promissory] Notes with a Standalone Capital Structure." Since NewPage currently has a more "favorable cash flow" than Verso (according to the Presentation), NewPage's lenders do not want to be burdened with any of Verso's debt.[14] Therefore, NewPage's debt and Verso's debt will remain separate after the NewPage Acquisition is complete, so that "NewPage financials will remain un-changed from what they would be as [a] NewPage standalone."[15] FAC ¶ 38.

9. A Term Sheet for the "Shared Services Agreement" to be put in place after Verso and NewPage combine was filed with the SEC on January 6, 2014, the same date that the NewPage Acquisition was announced.[16] This "Shared Services Agreement" provides:

> "From the Effective Date until the final maturity of the longest-dated indebtedness of NewPage, in the event that a party experiences a reduction in production capacity ("Reducing Party") that exceeds 10% relative to such party's production capacity immediately prior to the Effective Date (such amount of capacity the "Relevant Capacity"), a "Triggering Event" will be deemed to have occurred.
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> Upon a Triggering Event, if the party that did not experience the capacity reduction ("Non-Reducing Party") realizes an increase in tons sold in any of the four subsequent quarters, as compared to the amount of tons sold prior to the Triggering Event (the "Excess Amount"), of at least 10% of the Relevant Capacity, then the Non-Reducing Party will pay to the Reducing Party, the lesser of (i) $75 *multiplied by* the Excess Amount *divided by* four and (ii) the amount of EBITDA attributable by the Reducing Party to the Relevant Capacity, in the four quarters prior to the to the Triggering Event, *divided by* four. Such amounts will be paid quarterly, in arrears, 60 days after the conclusion of such quarter."[17]

In summary, the above provision means that if either NewPage or Verso reduce capacity by greater than 10% (the "Reducing Party"), and the other entity gains an increase in sales (the "Non-Reducing Party"), then the Non-Reducing Party will make a payment to the Reducing Party, so that the gains from the capacity reduction are shared proportionally among the entities.[18] This provides further

[13] *Id.* at p. 5, 27.

[14] *Id.*

[15] *Id.* at 27.

[16] http://www.sec.gov/Archives/edgar/data/1421182/000119312514002327/d647650dex101.htm

[17] http://www.sec.gov/Archives/edgar/data/1421182/000119312514002327/d647650dex101.htm

[18] http://www.sec.gov/Archives/edgar/data/1421182/000119312514002327/d647650dex101.htm

evidence that the goal of the NewPage Acquisition (and closure and scrapping of Bucksport) is to reduce capacity, and that both Verso and NewPage agreed to reduce capacity. FAC ¶ 39.

10. Verso has been able to exercise market power even before the NewPage Acquisition is completed because of the 2011-2013 Kimberly and Sartell closures, destruction and permanent capacity reductions. For example, on May 12, 2014, both Verso and Sappi (who together will control more than 80% of the coated paper market if the NewPage Acquisition is completed) announced that they were raising coated paper prices by $40/ton.[19] One week later, on May 19, 2014, NewPage also announced that it would be raising prices for coated freesheet by $40-$60/ton.[20] On November 13, 2014, Verso CEO David Patterson reported during an earnings call that "Coated freesheet prices improved 4% sequentially" (from the second quarter to the third quarter of 2014), and that, overall, "coated prices were . . . up 1.6% from the second quarter."[21] On the same call, Verso Chief Financial Officer Robert Mundy stated that: "Versus last quarter, coated prices were higher as we had some traction relative to our announced price increase for coated freesheet."[22] FAC ¶ 43.

11. This means that Verso was able to raise prices and that competitors followed Verso's price increase, and therefore Verso exercised market power, after the announcement by Verso and NewPage of their intent to merge – even before approval of the merger by DOJ. One year earlier, on August 8, 2013, during a call with analysts to discuss earnings, Verso CEO David Patterson also stated that: "We have been able to push through or negotiate through about half [of price hikes] on average across our coated paper grades."[23] Such price increases reflect the adverse impact on consumers of the capacity reductions began by Verso and NewPage in 2011, when destruction of NewPage's Kimberly Mill commenced and Verso's elimination of three paper making machines (2 in Sartell and 1 in Bucksport) occurred. FAC ¶ 43 and Chronology references.

12. According to Verso, closing the Bucksport Mill reduced its coated groundwood paper production capacity by "approximately 350,000 tons and its specialty paper production capacity by approximately 55,000 tons." *See,* Verso's October 1, 2014 8-K.[24] The shutdown of the Bucksport Mill will remove

[19] http://www.risiinfo.com/pulp-paper/news/Verso-and-Sappi-set-40-coated-paper-increases-in-North-America.html

[20] http://www.risiinfo.com/content-gateway/pulpandpaper/news/NewPage-sets-40-60ton-price-increases-on-coated-freesheet-grades.html

[21] http://www.nasdaq.com/aspx/call-transcript.aspx?StoryId=2678085&Title=verso-paper-s-vrs-ceo-david-paterson-on-q3-2014-results-earnings-call-transcript

[22] http://www.nasdaq.com/aspx/call-transcript.aspx?StoryId=2678085&Title=verso-paper-s-vrs-ceo-david-paterson-on-q3-2014-results-earnings-call-transcript#ixzz3MYhCFiCm

[23] http://seekingalpha.com/article/1618492-verso-papers-ceo-discusses-q2-2013-results-earnings-call-transcript?page=2&p=qanda&l=last

[24] http://investor.versopaper.com/secfiling.cfm?filingID=1421182-14-56&CIK=1421182

approximately between 4 to 5% of the entire capacity of coated paper in the North American market, based on the fact that the there is a total North American capacity of coated paper of between 7,306,000 and 8,139,000 tons.[25] FAC ¶ 48.

13. Verso and NewPage promptly realized financial benefits from removing Bucksport's paper making capacity from the North American coated paper markets. Specifically, in June 2014, Moody's had downgraded Verso's bond rating from B3 to Caa3, a change that reflected Moody's belief that Verso's debt obligations were "judged to be of poor standing and are subject to very high credit risk."[26] The investors' service also speculated that the future of the Verso-NewPage acquisition was unclear. In taking this action, Moody's wrote in its report that: "The rating action reflects Moody's view that the announced agreement to acquire NewPage is becoming less likely to occur as the Department of Justice continues its review."[27] However, within two days of Verso's announcement of the closure of the Mill in Buckport, Moody's Rating Service upgraded Verso's rating, on October 3, 2014, and identified the closure of the Bucksport Mill and layoffs of more than 500 people by year's end as "a credit positive event." FAC ¶ 49.

14. Indeed, it was the anticompetitive results of the Bucksport Mill's closure that resulted in this upgrade. Ed Sustar, the vice president and senior credit officer for Moody's Canada who wrote the issuer comment and is reported by the Portland Press Herald to have said the following:

> a. "Basically, Verso is on the edge of default, Sustar said. If the merger with NewPage is not successful, Sustar expects Verso is headed for bankruptcy. But even if the merger goes forward, Moody's would consider it a "limited default" because the deal includes a debt exchange offer that results in debt holders not receiving all the principal that was promised. The U.S. Department of Justice is currently reviewing the deal for antitrust concerns."
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> b. "We've got (Verso) rated as far down as we can," Sustar said. "They are the lowest-rated forest-paper products company we rate in North America, so we're starting out with a company with a very low credit rating."
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> c. That's why the closure makes sense, he said. Although it will incur some short-term costs associated with the closure, the long-term effects on

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[25] *See* http://www.risiinfo.com/content-gateway/pulpandpaper/news/Market-profilesCoated-papers-A-sector-in-flux-in-the-face-of-secular-decline.html?industryId=21.

[26] Portland Press Herald, "*Verso's finances benefit from Bucksport mill closure, Moody's analyst says*," by Whit Richardson (October 8, 2014). http://www.pressherald.com/2014/10/08/versos-finances-helped-by-bucksport-mill-closure-moodys-analyst-says/

[27] postcrescent.com, "*Verso CEO expects NewPage merger to close by year's end*," by Melanie Lawder (July 14, 2014). http://www.postcrescent.com/story/money/2014/07/14/verso-ceo-expects-newpage-merger-close-years-end/12541509/

> the company's bottom line will be a benefit, Sustar said. Verso estimates that the closure of the Bucksport mill will cost between $35 million and $45 million.
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> d. Besides saving money, the closure will also help the remaining coated paper mills by reducing supply. Verso's coated groundwood and specialty-paper production capacity will decrease by roughly 28 percent. It also reduces by about 10 percent the total North American coated capacity, a grade of paper that Moody's expects to decline by about 6 percent per year going forward.
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> e. The industry should be in a better balance on a supply-demand basis by taking this excess capacity out of the marketplace," Sustar said. "It will help all remaining mills that sell this product." Those other mills include Verso's Androscoggin Mill in Jay and NewPage's mill in Rumford. (emphasis added).[28] [FAC ¶ 50].

15. As stated in ¶ 170 of the FAC, "Plaintiffs further allege that discovery of internal communications between Verso and NewPage, and depositions of executives for both parties which were engaged in discussions between the parties, is likely to provide evidentiary support to show that Verso and NewPage unlawfully agreed to shut down and sell the Bucksport Mill to a non-paper manufacturer in order to make the pending NewPage Acquisition more attractive economically to Verso – as both NewPage and Verso have done with AIM in prior transactions involving Verso's Sartell Mill and NewPage's Kimberly Mill." However, at this stage of the proceedings, Plaintiffs have been denied any discovery to be able to support these allegations more specifically than can be inferred from the context and totality of Apollo, Verso, NewPage and AIM's actions since at least 2011, or confirmed with publicly available reports and records from contemporaneous reports by industry analysts and publications and 8K or similar filings.

16. The Court was in error when it stated that: "the DOJ's findings that the closing of the Mill was not a result of the merger suggests that written consent was unnecessary…" Order Denying Preliminary Injunction, ECF 96, p. 69. First, DOJ never made an inquiry or "finding that the closing of the [Bucksport] Mill was not a result of the merger". Rather, DOJ merely stated in footnote 1 of the CIS that: "*The United States does not allege that the closing of the Bucksport Mill is a result of the merger."* DOJ Verso CIS, p. 3; Exhibit 6, p. 3. The sole source DOJ cited for this footnote and the conclusion that: "Verso contemplated closing the [Bucksport] mill before it decided to merge with NewPage" was Verso's October 1, 2014 8K.[29]

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[28] "*Verso's finances benefit from Bucksport mill closure, Moody's analyst says*," by Whit Richardson, Portland Press Herald October 8, 2014 (emphasis added).
http://www.pressherald.com/2014/10/08/versos-finances-helped-by-bucksport-mill-closure-moodys-analyst-says/

[29] Specifically, in footnote 1 of the DOJ CIS, the Division made the following observation about Verso's closure of the Bucksport Mill:

> In December 2014, Verso closed its mill in Bucksport, Maine, which produced coated groundwood paper. In the press release announcing the closure, Verso's CEO indicated that the mill has been

17. The fact that DOJ did not conduct any specific, independent inquiry into nor make any findings about the basis for Verso's decision to close the Bucksport Mill, appears to be verified by: "The Defendants' Description Of Written Or Oral Communications Concerning The Proposed Final Judgment In This Action," filed on January 9, 2015, in the case brought by DOJ in the DC District Court. (Exhibit 6). This filing is required to be filed by Defendants, pursuant to Section 2(g) of the Antitrust Procedures and Penalties Act, 15 U.S.C. Sec. 16(g) (the "Tunney Act"). This filing provides a description of all written or oral communications by or on behalf of Defendants with any officer or employee of the United States concerning or relevant to the proposed Final Judgment filed in this action on December 31, 2014.[30] This filing reveals the only communications between DOJ and Verso, during the period before and after Verso's unexpected announcement of its decision to close the Bucksport Mill:

> 4. On September 23-24th, 2014, counsel for NewPage and Verso met with employees of the Department of Justice in Rumford, Maine for a tour of the Rumford mill. The following representatives of NewPage were also present: Kelly Berry (Rumford Controller), Brian Boland (Director, Strategy), Randy Chicoine (Rumford Paper Production Manager), Shannon Dwyer (Rumford General Manager, Engineering, Maintenance & Purchasing), Gerald LeClaire (Rumford Mill Manager), Tony Lyons (Rumford Director, Fiber Supply & Public Policy), Glenn Poulin (Rumford Technical Director), Scott Reed (Rumford Environmental Manager), Charles Rodrigue, (Rumford General Manager, Pulp & Utilities), and Curtis Short (Vice President, Strategy).
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> 5. On December 19, 2014, counsel for NewPage conducted a phone meeting with employees of the Department of Justice to discuss a potential settlement. The following representatives of NewPage also participated in the call: David L. Santez (Senior Vice President, General Counsel and Secretary), Curtis Short (Vice President, Strategy), and Brian Boland (Director, Strategy).

Exhibit 6, pp. 2-3. This recitation of communications between Verso and DOJ reveals that DOJ undertook no meaningful inquiry regarding the nexus between the merger of Verso and NewPage and the decision to close (and destroy the paper making capacity of) the Bucksport Mill.

17. That Verso has apparently explained to DOJ, perhaps through counsel, that the closure of the Bucksport Mill was "contemplated … before it [Verso] decided

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> unprofitable for a number of years and that in today's marketplace the Bucksport mill would be unlikely to become profitable in the future. Press Release, Verso Paper Corp., Verso Announces Closure of Bucksport, Maine Paper Mill (Oct. 1, 2014) (available at http://investor.versopaper.com/releasedetail.cfm?ReleaseID=874161). Verso contemplated closing the mill before it decided to merge with NewPage. *The United States does not allege that the closing of the Bucksport Mill is a result of the merger.*

DOJ Verso CIS, p. 3; Exhibit 6, p. 3 (emphasis supplied).

[30] In accordance with Section 2(g), the description excludes any communications "made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone."

> to merge with NewPage" must be viewed in the context of DOJ's overly-narrow interpretation of the date this merger effort began. A review of the DOJ Complaint (Exhibit 7) and CIS (Exhibit 8), reveal that DOJ erroneously has confined its assessment of the Verso-NewPage merger, and its possible anticompetitive impacts, from the time immediately before the Verso-Merger merger agreement was announced in January of 2014. DOJ only has referred in the CIS to 2013 data on market share. DOJ has ignored Plaintiffs' requests to view this merger as a course of continuing conduct by Apollo, Verso and NewPage (with the assistance of AIM) to merge Verso and NewPage since at least 2011, and likely from the 2010 acquisition by Apollo of NewPage's second lien debt. In fact, in the CIS, DOJ appears to have defined Verso's pre- and post-merger market share *after first eliminating Bucksport capacity*. See, e.g. DOJ Verso CIS, pp. 11; Exhibit 8, p. 11 ("*The mills to be divested produced approximately 940,000 tons of coated publication papers, label paper, and other papers,* ***which is approximately the same amount of production as Verso currently operates***.") (emphasis supplied).

18. Plaintiffs do not dispute that Verso contemplated closing the Bucksport Mill prior to January of 2014 – indeed, it is Verso's effort to close productive Mills, including Sartell and Bucksport *since 2011* that forms the foundation of Plaintiffs' antitrust claims for anticompetitive reductions in capacity by Verso and AIM, to facilitate Verso's attainment of monopolistic post-merger market power and that has already enabled Verso to impose burdensome price increases, adopted by Verso's competitors (Catalyst), that are contrary to public interest. See footnotes 31 and 32, *infra*.

D. DOJ Antitrust Action Against Verso and NewPage

1. *DOJ's Section 7 Clayton Act Complaint and Proposed Consent Decree*

On December 31, 2014, the Antitrust Division of the U.S. Department of Justice filed a Complaint in the United States District Court for the District of Columbia seeking to enjoin the merger of Verso Paper Corp. and NewPage Holdings Inc. DOJ asserted that the merger of Verso and NewPage would result in a per se violation of Section 7 of the Clayton Act. Specifically, DOJ's Complaint asserts that:

> . . . The proposed acquisition would likely substantially lessen competition in the manufacture and sale of coated freesheet web paper, coated groundwood paper, and label paper to customers in North America. By acquiring NewPage, Verso would eliminate its foremost competitor in the sale of these products.
>
> * * *
>
> Verso's proposed acquisition of NewPage would eliminate this intense competition, and would likely increase the incentives of the merged firm – and the remaining firms in the market – to increase prices and reduce output.

DOJ Complaint, pp. 1-2; Exhibit 7, pp. 1-2.

The Verso-NewPage merger was not "approved" by DOJ; rather, the merger was conditionally approved, subject to the requirement that two NewPage mills (Biron and Rumford) first be divested and sold to a direct Verso competitor, Catalyst. Attached to the Complaint were a proposed Final Judgment, Consent Decree and Hold Separate Stipulation and Order that detail the terms for the required divestiture and sale of NewPage's paper mills, in Biron, WI and Rumford, ME, to competitor Catalyst.

In the Competitive Impact Statement ("CIS") required to be filed with DOJ's Complaint, DOJ expressly asserts that:

> The proposed acquisition is presumptively unlawful because it will increase concentration significantly in the highly concentrated coated freesheet web and label paper markets.

DOJ Verso CIS, p. 6; Exhibit 8, p. 6. DOJ then opines that the divestiture of the two NewPage Mills would be adequate to counteract the inevitable and substantial threat to competition posed by the Verso-NewPage merger, stating that:

> The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the North American market for coated publication papers and label paper by establishing a new, independent, and economically-viable competitor.
>
> * * *
>
> Under the terms of the Hold Separate Stipulation and Order, the Defendants will take certain steps to ensure that the assets being divested will be operated as a competitively independent, economically viable, and ongoing business concern, that will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestiture.

DOJ Verso CIS, pp. 9, 11; Exhibit 8, pp. 9, 11.

In the CIS, DOJ assesses the anticipated impact of the merger and divestiture of the Biron and Rumford Mills on competition. The CIS explains the basis for Government's Complaint and states in relevant part that:

> The Complaint alleges that the likely effect of this acquisition would be to lessen competition substantially in the markets for coated publication papers and label paper in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. For each product,

this loss of competition likely would result in higher prices, lower output, and fewer services for customers in North America.

* * *

The Complaint alleges three types of coated paper are relevant product markets within the meaning of Section 7 of the Clayton Act: coated freesheet web paper, coated groundwood paper, and label paper.

* * *

For each relevant product, the Complaint alleges that the relevant geographic market is no larger than North America (defined consistent with industry terminology as the United States and Canada). The market is defined around the location of customers because suppliers typically negotiate prices on a delivered basis with individual customers. As a result, suppliers charge different prices to different customers based on the customers' location. A hypothetical monopolist of each of the three relevant products sold to customers located in North America would likely profit from a small but significant price increase. Customers located in North America would likely not avoid the price increase by engaging in arbitrage. Arbitrage would entail a customer trying to avoid the price increase by purchasing products from another customer outside the relevant market. Arbitrage is unlikely to occur in sufficient quantities to make the price increase unprofitable because the end customer would need to pay significant incremental shipping costs that would make arbitrage an uneconomical strategy. Arbitrage is also unlikely to occur because a customer purchasing through arbitrage loses valuable services that producers often provide, such as inventory management, just-in-time delivery, warranties, and technical support.

* * *

The Complaint alleges that the proposed acquisition will likely substantially lessen competition in all three relevant markets. In each market, the Complaint alleges that the acquisition will likely increase concentration substantially and eliminate significant head-to-head competition, leading to higher prices and reduced output. In the coated freesheet web and coated groundwood markets, the Complaint further alleges that the acquisition will likely cause the remaining competitors to accommodate one another's price increases and output reductions…The proposed acquisition is presumptively unlawful because it will increase concentration significantly in the highly concentrated coated freesheet web and label paper markets. . . .

* * *

In addition, the coated freesheet web and coated groundwood markets are conducive to accommodating conduct by competitors because a small number of producers dominate the industry, and producers regularly obtain information from customers about their options and competitors' prices and product availability. Remaining competitors would likely find it more profitable to follow price increases rather than lower prices and risk a competitive response from other firms.

* * *

The Complaint alleges that supply responses from new competitors or expansion by existing competitors are unlikely to be timely or sufficient in scope to prevent the reduction in competition likely to result from the proposed acquisition. Entry or expansion into each of the relevant markets is costly and time-consuming. A competitive entrant would need a cost- effective mill. Building such a mill would

> cost billions of dollars, take two or more years to build, and require extensive environmental permits to construct. New competitors also would need to secure major customers, which often involves lengthy and expensive qualification processes.
>
> Non-North American producers are unlikely to increase imports into North America to prevent the likely anticompetitive effects.
>
> * * *
>
> Finally, the Complaint alleges that Defendants cannot demonstrate cognizable, merger- specific efficiencies that Verso would pass through to consumers in the form of lower prices, higher quality, or better service to counteract the likely anticompetitive effects.
>
> * * *
>
> The divestiture provisions of the proposed Final Judgment preserve the competition that would be lost if the proposed acquisition occurred without the divestiture. The divestiture will largely maintain the existing structure of the relevant markets. *The mills to be divested produced approximately 940,000 tons of coated publication papers, label paper, and other papers,* ***which is approximately the same amount of production as Verso currently operates***. In addition, the divestiture will provide the purchaser of the divested assets with a market presence comparable to Verso's current market presence in the relevant markets. The purchaser will also obtain production assets that have a track record of competitively producing a range of coated publication papers and label paper.
>
> * * *
>
> The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Verso's acquisition of NewPage. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the provision of coated freesheet web paper, coated groundwood paper, and label paper in the relevant market identified by the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

DOJ Verso CIS, pp. 1-14; Exhibit 8, p. 1-14 (emphasis supplied).

Significantly, DOJ compares the *post-Bucksport closure* production of Verso at Verso's Jay and Quinnesec, MN mills – ignoring the significant lost capacity that Verso caused in the North American coated paper market (especially the groundwood paper market (10% reduction)) by the closure and intended destruction of the Bucksport Mill – a mill that DOJ acknowledges would take "billions" and "years" to replace if an investor was willing to take on such a daunting

endeavor in a market with declining demand and high overhead costs for environmental compliance, energy generation, and labor.

However, Verso acknowledged in the October 1, 2014, 8K announcing its intent to close the Bucksport Mill that: "The [Bucksport] mill closure will reduce Verso's coated groundwood paper production capacity by approximately 350,000 tons and its specialty paper production capacity by approximately 55,000 tons."[31]

In light of the known existence of prospective buyers willing to continue to operate the Bucksport Mill in the production of coated paper, who have contacted Governor Paul LePage Rosaire Pelletier of his staff, it was error for DOJ to ignore the anticompetitive consequences of the Bucksport closure on the relevant markets, or to fail to require divestiture and sale of the Bucksport Mill to a competitor as a condition of the Verso-NewPage merger. This Court has jurisdiction to cure that omission by DOJ.

2. Tunney Act Comments

The Tunney Act, officially known as the "Antitrust Procedures and Penalties Act" (15 U.S.C.§ 16), was enacted on December 21, 1974. This remedial antitrust legislation was enacted by Congress to require court review of Justice Department decisions regarding mergers and acquisitions. Pursuant to the Tunney Act, DOJ was required to publish the terms of the Verso-NewPage merger settlement in the Federal Register and take comments on the proposed consent decree terms for a period of sixty (60) days. Subsequently, the District Court in DC will review the comments and DOJ's response and do whatever additional inquiry the Court deems appropriate, to make a determination regarding whether the consent decree and merger are in the public interest.

[31] The October 1, 2014 Verso 8K can be found at: http://investor.versoco.com/secfiling.cfm?filingID=1421182-14-56&CIK=1421182

DOJ published the notice in the Federal Register of the Verso-NewPage merger Complaint, divestiture and Consent Decree, as well as the CIS, on January 14, 2015.[32]

On January 30, DOJ officials had a phone conference with the Bucksport Plaintiffs' counsel and advised them that under no circumstances would the Division open an inquiry into the alleged anticompetitive motivation for the Verso-AIM transaction or the Plaintiffs' allegations that the closure of the Bucksport Mill was the latest in a string of anticompetitive capacity reductions, obtained through the closure and destruction of viable paper mills by Verso, NewPage and AIM, that have been executed since at least January 2011 to facilitate post -Verso-NewPage merger price increases and the enhancement of Verso's market and monopoly power before and after such a merger.

Ironically, on January 30, 2015, even *before* the expiration of the 60-day Tunney Act comment period, Verso announced a substantial price increase of $20-$40/ton price increase – that would be effective by March 2, 2015.[33]

To add insult to injury, by February 6, 2015, Catalyst (DOJ's hand-picked protector of competition in the North American coated paper market and the designated foil against the inherent anticompetitive consequences of a Verso-NewPage merger) announced it was implementing pricing increases of $40/ton effective April 1, 2015 – following in lock-step with Verso lead to raise prices.[34]

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[32] Federal Register Volume 80, Number 9 (Wednesday, January 14, 2015) http://regulations.justia.com/regulations/fedreg/2015/01/14/2015-00466.html

[33] "Price hike prospects brighten on coated as Verso announces immediate $20-40 CFS, CM, SC increases", PPI Pulp & Paper Week, January 30, 2015. This price increase information is available at: http://www.risiinfo.com/pulp-paper/ppippw/Price-hike-prospects-brighten-on-coated-as-Verso-announces-immediate-20-40-CFS-CM-SC-increases.html

[34] "Catalyst announces Apr. 1 price increase of $40/ton for Its coated freesheet, CM, and high-brite grades in the US", PPI Pulp & Paper Week, February 6, 2015, available at: https://www.risiinfo.com/pulp-paper/ppippw/Catalyst-announces-Apr-1-price-increase-of-40ton-for-Its-coated-freesheet-CM-and-high-brite-grades-in-the-US.html

On March 11, 2015, AIM's agents scheduled an auction for March 24 and 25 for the equipment essential for continued paper making at the former Bucksport Mill and then announced to Bucksport officials that they "hope to begin demolition of the mill" early in the Spring of 2015.[35]

On March 12, 2015, Plaintiffs filed their Tunney Act Comments protesting the proposed merger of Verso and NewPage on the grounds that divestiture and sale of NewPage's Biron, WI and Rumford, ME mills to Catalyst was clearly an inadequate remedial measure to address the significant anticompetitive impacts of the Verso-NewPage merger, which has already resulted in a significant price increase by both Verso and Catalyst in less than 60-days after this merger, divestiture and sale have taken place (i.e. prior to even the expiration of the Tunney Act comment period). Plaintiffs have requested additional divestitures to preserve competition, or nullification of the merger, and additional remedial measures including the nullification of the Verso-AIM sale and/or divestiture of the Bucksport Mill by AIM with a mandated sale to a Verso competitor capable of continuing the production of coated paper at this facility. See, Exhibit 9 (Tunney Act Comment Letter and attachments).

E. Potential Injunctive Relief Available in Each Action: Maine vs. DOJ D.C. Cases

1. DOJ

DOJ could withdraw its consent for the settlement, in light of the obvious failure of the divestiture of only the Biron and Rumbord Mills to prevent significant price increases by Verso and Catalyst – within 23 and 30 days, respectively, of the consummation of the Verso-NewPage merger. The United States District Court for the District of Columbia could reject the proposed Final Judgment and Consent Decree relating to the Verso-NewPage merger as contrary to public

[35] http://www.biditup.com/db-files/1425087607-265880.pdf
http://bangordailynews.com/2015/03/16/business/bucksport-union-challenges-federal-approval-of-verso-newpage-merger/

policy and interests. However, AIM is not currently a defendant in the DOJ action and the Verso decision to close the Bucksport Mill or the nexus of the Verso-NewPage merger to the decision to close and scrap the Bucksport Mill (or any other mill) are not currently matters at issue in that litigation. Thus, while the DOJ action in DC is related to the issues in the case at bar, the Court in that proceeding does not currently have jurisdiction over all of the parties necessary to impose injunctive remedies related to the preservation, divestiture, and sale of the Bucksport Mill to a Verso competitor.

2. Maine

In the pending Maine action, this Court retains jurisdiction over Verso and AIM. This Court could nullify Verso's sale of the Bucksport Mill as an *ultra vires* transaction, in furtherance of a violation of Section 7 of the Clayton Act and Section 1 and 2 of the Sherman Act. This Court could enjoin AIM's dismantling or destruction of the Mill and its paper making equipment and capacity. Further, this Court could direct AIM to divest itself of the Bucksport Mill and sell it to a Verso competitor willing and able to continue to operate the Bucksport Mill in the production of coated paper in the North American coated paper markets, especially the coated groundwood paper market.

II. DEFENDANTS HAVE FAILED TO DEMONSTRATE GROUNDS FOR DISMISSING THIS CASE

A. Standard for Dismissal

As noted by the First Circuit in *American Tel. & Tel. Co. v. IMR Capital Corp.*, 888 F.Supp. 221, 234 (D.Mass. 1995), in discussing the general standard for reviewing a request to dismiss an antitrust claim:

> In considering a motion to dismiss the Court begins "by accepting all well-pleaded facts as true, and ... draw[ing] all reasonable inferences in favor of the [nonmovant]." *Washington Legal Foundation v. Massachusetts Bar Foundation,* 993 F.2d 962, 971 (1st Cir. 1993). The complaint will be dismissed only if "it is clear that no relief could be granted under any set of facts that could be proved

> consistent with the allegations." *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984). In analyzing the sufficiency of the complaint, the court may consider official public records, the authenticity of which are not in dispute. *Watterson v. Page,* 987 F.2d 1, 3 (1st Cir. 1993).

Subsequent case law from the Supreme Court has clarified the standard to be applied at the pleading stage for determining whether a cause of action has been stated. These later decisions make clear that a Complaint must include sufficient facts to demonstrate that the plaintiffs have a "plausible" cause of action entitling them to relief for an injury resulting from an antitrust violation committed by the defendant(s) -- *even if the Court believes "that a recovery is very remote and unlikely"*. In fact, the Supreme Court expressly reaffirmed in *Twombly* that: "Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations."

In *Bell Atl.Corp. v. Twombly,* 550 U.S. 544, 555-556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the U.S. Supreme Court set out the standard to be applied in determining whether a claim for violation of Section 1 of the Sherman Act had been adequately stated for purposes of withstanding a motion to dismiss, pursuant to Rule 12(b)(6). The Court stated in relevant part that:

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests," *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.; Sanjuan v. American Bd. Of Psychiatry and Neurology, Inc.,* 40 F.3d 247, 251 (C.A. 7 1994), a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see *Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed. 2004) (hereinafter Wright & Miller) ("[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"), on the assumption that all the allegations in the complaint are true (even if doubtful in

> fact), see, *e.g.*, *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Neitzke v. Williams,* 490 U.S. 319, 327, 109 S.Ct. 1827, 104 S.Ct. 1827, 104 L.Ed.2d 338 (1989) ("Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations"); *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

There has been a fair amount of confusion created in the Circuits, regarding the proper standard to apply at evaluating the sufficiency of claims *at the pleading stage* after the Supreme Court decision in *Bell Atlantic Corp. v. Twombly, supra*. The First Circuit explained the proper standard for the district courts to apply in ruling on a motion to dismiss a Sherman Section 1 claim, post-*Twombly,* in *Evergreen Partnering Group, Inc. v. Pactiv Corp.,* 720 F.3d 33, (1st Cir. 2013) – a case in which the First Circuit *reversed* a dismissal of a Section 1 claim by the District Court for the District of Massachusetts. In Evergreen, the First Circuit held that:

> Section 1 of the Sherman Act does not prohibit all unreasonable restraints of trade, but "only restraints effected by a contract, combination or conspiracy." *Twombly,* 550 U.S. at 553, 127 S.Ct. 1955 (quoting *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 775, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984)). In evaluating whether a restraint is effected by such a combination or conspiracy in violation of § 1, " '[t]he crucial question' is whether the challenged anticompetitive conduct 'stem[s] from [an] independent decision or from an agreement, tacit or express.' " *Id.* (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.,* 346 U.S. 537, 540, 74 S.Ct. 257, 98 L.Ed. 273 (1954)). An agreement may be found when "the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Copperweld,* 467 U.S. at 771, 104 S.Ct. 2731 (internal quotation marks and citation omitted).
>
> * * *
>
> In alleging conspiracy, an antitrust plaintiff may present either direct or circumstantial evidence of defendants' "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto* [*Co. v. Spray-Rite Serv. Corp.*,] 465 U.S. [752] at 764, 104 S.Ct. 1464[, 79 L.Ed.2d 775 (1984)], (citation and internal quotation marks omitted).
>
> Since this appeal concerns dismissal at the pleadings stage, we need not concern ourselves with the evidentiary sufficiency of Evergreen's antitrust claims on the merits. *Cf. Rodriguez-Reyes v. Molina-Rodriguez,* 711 F.3d 49, 54 (1st Cir. 2013) (stating, in the discrimination context, that "[t]he prima facie standard is an evidentiary standard, not a pleading standard, and there is no need to set forth a detailed evidentiary proffer in a complaint."). Rather, we focus on the applicable

standard for pleading a plausible refusal-to-deal claim. Specifically, we concentrate on the requirements for sufficiently pleading an agreement under § 1 following *Twombly's* injunction that

> [a] statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief.

Twombly, 550 U.S. at 557, 127 S.Ct. 1955 (internal quotation marks omitted).

Courts have evaluated the line between "merely" alleging parallel conduct and alleging plausible agreement on a case-by-case basis after *Twombly,* and that process has elicited considerable confusion among the lower courts as to how much of a "setting" is required to sufficiently contextualize an agreement in the absence of direct evidence. *Compare Anderson News,* [*LLC v. American Media, Inc.,*] 680 F.3d 162, 189 [(2d Cir. 2012), *cert. denied,* ___ U.S. ___, 133 S.Ct. 846, 184 L.Ed.2d 655 (2013)] (finding sufficient allegations to support a plausible refusal-to-deal claim), *with Burtch v. Milberg Factors, Inc.* 662 F.3d 212, 230 (3d Cir. 2011) (finding the plaintiff did not show plausibility of agreement to restrain trade through circumstantial evidence); *see also In re Text Messaging Antitrust Litig.,* 630 F.3d 622, 624 (7th Cir. 2010) (district court certifying for interlocutory appeal the question of an antitrust complaint's adequacy because while "the Seventh Circuit had issued dozens of decisions concerning the application of *Twombly,* the contours of the Supreme Court's ruling, and particularly its application in the present context, remain unclear."); Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access,* 94 Iowa L.Rev. 873, 881 (2010) ("The [Supreme] Court's criticism of *Conley* has caused a great deal of confusion ... [in] determining exactly how the plausibility standard changes previous Rule 8(a)(2) pleading law.... 'Plausible' corresponds to a probability greater than 'possible.' Exactly how much greater is uncertain."). The slow influx of unreasonably high pleading requirements at the earliest stages of antitrust litigation has in part resulted from citations to case law evaluating antitrust claims at the summary judgment and post-trial stages, as the district court has done here. *See, e.g., In re Ins. Brokerage Antitrust Litig.,* 618 F.3d 300, 323 n. 21 (3d Cir. 2010) ("Although *Twombly's* articulation of the pleading standard for § 1 cases draws from summary judgment jurisprudence, the standards applicable to Rule 12(b)(6) and Rule 56 motions remain distinct."). It is thus imperative that we correct this confusion and clarify the proper pleading requirements for sufficiently alleging agreement in § 1 complaints.

The Supreme Court in *Twombly* has offered some guidance as to how to properly plead agreement:

> a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.... [W]hen allegations of parallel conduct are set out in order to make a §1 claim, they must be placed in a context that raises a suggestion of preceding agreement, not merely parallel conduct that could just as well be independent action.

Twombly, 550 U.S. at 556-57, 127 S.Ct. 1955. The Court affirmed the dismissal of plaintiffs' complaint because it proceeded "*exclusively* via allegations of parallel conduct." *Id.* at 565 n. 11, 127 S.Ct. 1955 (emphasis added). Specifically, the complaint alleged (1) that defendants "engaged in parallel conduct in their respective service areas to inhibit the growth of upstart" competitors, *id.* at 550, 127 S.Ct. 1955; and (2) that defendants collectively failed to meaningfully pursue "attractive business opportunit[ies] in contiguous markets where they possessed substantial competitive advantages," *id.* at 551, 127 S.Ct. 1955 (internal quotation marks omitted). Additionally, the complaint offered no "specific time, place or person involved in the alleged conspiracy," *id.* at 565 n. 10, 127 S.Ct. 1955, alleging only that "some illegal agreement may have taken place between unspecified persons at different [Incumbent Local Exchange Carriers] ... at some point over seven years," *id.* at 560 n. 6, 127 S.Ct. 1955. Thus, according to the Court, the "complaint le[ft] no doubt that plaintiffs rest[ed] their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the [defendants]." *Id.* at 564, 127 S.Ct. 1955.

In a footnote, the Court referred to commentators' examples of the type of evidence that may indicate collusion:

> "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties" ... [;] "conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement."

Id. at 557 n. 4, 127 S.Ct. 1955 (citations omitted). These types of facts have been characterized as "parallel plus" or "plus factors." *See, e.g., In re Text Messaging*, 630 F.3d at 628; *In re Ins. Brokerage*, 618 F.3d at 321-22; *Nelson v. Pilkington PLC* (*In re Flat Glass Antitrust Litig.*), 385 F.3d 350, 360 (3d Cir. 2004); *Petruzzi's IGA Supermarkets c. Darling-Delaware Co.,* 998 F.2d 1224, 1242 (3d Cir. 1993).

Twombly also clarified that "[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." 550 U.S. at 556, 127 S.Ct. 1955. It is not for the court to decide, at the pleading stage, which inferences are more plausible than other competing inferences, since those questions are properly left to the factfinder. *See Monsanto,* 465 U.S. n. 11, 104 S.Ct. (the meaning of documents that are "subject to" divergent "reasonable ... interpret[ations]" either as "referring to an agreement or understanding that distributors and retailers would maintain prices" or instead as referring to unilateral and independent actions, is "properly ... left to the jury"); *id.* at 767 n. 12, 104 S.Ct. 1464 ("The choice between two reasonable interpretations ... of testimony properly [i]s left for the jury."). At these

> early stages in the litigation, the court has no substantiated basis in the record to credit a defendant's counter allegations. Instead, we may at this early stage only accept as true all factual allegations contained in a complaint, make all reasonable inferences in favor of the plaintiff, and properly refrain from any conjecture as to whether conspiracy allegations may prove deficient at the summary judgment or later stages. *Twombly,* 550 U.S. at 555-56, 127 S.Ct. 1955 ("Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations." (internal quotation marks omitted)); *Anderson,* 680 F.3d at 185 ("A court ruling on ... a [Rule 12(b)(6)] motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible."). In fact, "a well-pleaded complaint may proceed if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely." *Twombly,* 550 U.S. at 556, 127 S.Ct. 1955 (internal quotation marks omitted).

Here, Plaintiffs have submitted significant facts, with citation to a plethora of publicly available source materials and indisputable public records (including Verso's 8K filings, materials prepared by Verso for investors, and materials filed by DOJ in support of its action to enjoin the Verso-NewPage merger) that support the facts alleged in support of Plaintiffs' claims for violation of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. Based on the record before this Court, coupled with this Court's continued ability (noted in more detail below) to impose injunctive remedies that would provide effectual relief to the Plaintiffs, no motion to dismiss may be entered in this case.[36]

[36] Some of the facts supporting relief in this case have occurred since the First Amended Complaint (FAC) was filed, and even since this Court's Order Denying Preliminary Injunction. For example, on January 30, 2014, Verso increased prices by $20-$40/ton, effective March 2 (discussed in more detail, *infra*); on February 6, 2015, Catalyst, the entity that acquired the Biron and Rumford Mills from NewPage, as a condition precedent imposed by the Antitrust Division of the U.S. Department of Justice for the Verso-NewPage merger to proceed, also raised prices by $40/ton effective April 1, 2015; on March 11, AIM announced its intent to auction off equipment from the Bucksport Mill on March 24-25, despite continued interest to purchase the mill by buyers willing to continue to operate the mill as a going concern; and on March 12, Plaintiffs filed a Tunney Act Comment letter protesting the failure of the DOJ to require divestiture of the Bucksport Mill and sale to a Verso competitor.

Accordingly, it is likely appropriate to again amend the Complaint and conform the Complaint to the additional facts that have occurred since December 22 that evidence a violation of the antitrust laws and the consequences of Defendants' anticompetitive actions, pursuant to Fed.R.Civ.P. 15(a)(2). However, even as currently plead, Plaintiffs respectfully maintain that Plaintiffs' First Amended Complaint adequately states a cause of action for violation of Section 1 and 2 of the Sherman Act and Section 7 of the Clayton Act against these defendants on which relief can be granted.

B. Plaintiffs' Antitrust Claims Against Verso and AIM Are *Not* Moot

Defendants are incorrect that this case is now moot – because, as noted above, it is still possible for the Court to impose injunctive relief against Verso and/or AIM to address the violations of the Clayton and Sherman Acts by the anticompetitive acts that Apollo, Verso, NewPage, and AIM, acting in combination, have committed. Even if some of the requested relief delineated in the prayer for relief in the FAC has now been rendered ineffective or unobtainable against Verso. as a consequence of the sale of the Bucksport Mill to AIM, the Court still could find the sale to AIM to be illegal and (i) order rescission of the Verso-AIM contract; or (ii) mandate divestiture of the Bucksoport Mill *as a going concern by AIM,* so that the Mill could be sold to a Verso competitor or any new entrant into the coated printed paper market (e.g., a foreign paper maker or a North American producer of other paper products). Any or all of these options remain as appropriate injunctive remedies that would provide effectual relief to redress the injuries to competition that Plaintiffs allege the closure of the Bucksport Mill has caused them and other similarly situated direct and indirect consumers of coated paper products. *Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council,* 589 F.3d 458 (1st Cir. 2009) (A court will only find a case moot if an intervening event makes it impossible for the court to grant any effectual relief.). Accordingly, dismissal of this case for mootness is not appropriate at this time. However, divestiture can and should be ordered at the earliest possible time to cure the Defendants' violation of antitrust laws and restore the Bucksport Mill as a productive contributor to the North American coated paper market. Divestiture and sale of the Bucksport Mill to a Verso competitor could and would aid in remedying the anticompetitive consequences of the Apollo, Verso, NewPage and AIM conspiracy to reduce capacity in furtherance of post-merger price increases and exertion of improper monopoly power by Verso).

The First Circuit explained the importance of the use of a broad and evolving injunctive

remedies, including divestiture, to combat violations of antitrust laws, in *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985), stating that:

> In an important private action requesting injunctive relief, the Court clarified the important role of § 16:
>
> > [T]he purpose of giving private parties treble-damages and injunctive relief was not merely to provide private relief but was to serve as well the high purpose of enforcing the antitrust laws.... Section 16 should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords [injunctive relief], like other equitable remedies, is flexible and capable of nice "adjustment and reconciliation between the public interest and private needs as well as between competing private claims." ... Its availability should be "conditioned by the necessities of the public interest which Congress sought to protect."
>
> *Zenith Radio Corp. v. Hazeltine,* 395 U.S. at 130–31, 1580–81.
>
> An order to divest stock or assets acquired in effecting a combination is one of the most effective kinds of remedies available to combat mergers that have, or threaten to have, anticompetitive consequences. *See, e.g., United States v. du Pont & Co.,* 366 U.S. [316,] at 326, 81 S.Ct. [1243,] at 1250[, 6 L.Ed.2d 318 (1961)]; [International Telephone and Telegraph] *I.T.T. [v. GTE Corp.],* 518 F.2d [913,] at 925 [(9th Cir. 1975)]. As the Supreme Court has observed:
>
> > Divestiture is the most important of the antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of the court's mind when a violation of § 7 has been found.
>
> *United States v. du Pont & Co.,* 353 U.S. [586,] at 597, 77 S.Ct. [872,] at 879 [(1957)]. *See also United States v. Greater Buffalo Press,* 402 U.S. 549, 556, 91 S.Ct. 1692, 1697, 29 L.Ed.2d 170 (1971) ("Divestiture performs several functions, the foremost being the liquidation of the illegally acquired market power"). Although the Court was speaking of divestiture in the context of a suit brought by the government, we apprehend no reasons why the efficacy of divestiture as a remedy would not hold as well in § 16 cases. Because we are concerned with "doing equity," efficacy concerns are relevant; the goal is to "*secur[e] complete* justice." *Brown v. Swann,* 10 Pet. [497,] at 503[, 9 L.Ed. 508].
>
> *Under the Clayton Act, courts have always possessed the power to prohibit a merger through a preliminary injunction**. It is a logical extension of that power to divorce the partners to a merger at a later time when anticompetitive effects of the merger are, if not actually felt, considerably more imminent***.

Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d at 429 (emphasis supplied). In making this ruling, the First Circuit acknowledged that divestiture was an option that could and likely would occur later in a proceeding, not necessarily through a preliminary

injunction. Indeed, because the high burden for a preliminary injunction occurs usually prior to any discovery, divestiture in many cases will be directed after a preliminary injunction has been denied for want of proof earlier in a proceeding. The gravest risk here, is that while Plaintiffs seek to obtain the necessary proof to demonstrate the need for divestiture, AIM is proceeding with its plan to destroy the Bucksport Mill and eliminate its capacity permanently. At the point AIM succeeds in destroying this asset that would cost "billions to restore" – the Plaintiffs' purpose for filing this case will all but be lost although there will still be injunctive measures that will be available to provide important remedied for violation of antitrust laws by these defendants. A victory on the antitrust claims after the destruction of the Bucksport Mill, would be a Pyrrhic victory for the Plaintiffs as well as the economy and people of the State of Maine – although it would still aid direct and indirect consumersin the North American coated paper markets, including Plaintiffs.

C. Plaintiffs have Adequately Alleged Violation of Section 1 of the Sherman Act

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States ... is declared to be illegal."

Here, Plaintiffs assert that the catalyst for the parallel conduct in capacity reduction that Verso and NewPage have undertaken, starting in 2011, is the acquisition by Verso's parent Apollo of NewPage's second lien debt in 2010. This acquisition was itself anticompetitive because, its purpose was to facilitate or compel the merger of Verso and NewPage – and attainment of the monopoly market power over the North American coated paper markets that such a merger undeniably and presumptively causes. See, e.g. authorities cited in footnote 4, *supra*; See also, *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004)

("[C]ompelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion.")

Indeed, Apollo's acquisition of a competitors debt has previously been challenged as anticompetitive in *Vantico Holdings S.A. v. Apollo Mgmt.*, 247 F.Supp.2d 437, 455-456 (S.D.N.Y. 2003). In *Vantico*, the court ultimately found the facts presented by the plaintiff were not sufficient to support imposition of a preliminary injunction). However, the *Vantico* court recognized the established precedents that hold that acquisition of a competitor's debt can violate antitrust laws.

The FAC and Chronology summarize the parallel actions. And the efforts of Apollo to exert undue influence, derived from its acquisition of its subsidiaries primary competitor, to compel a Verso-NewPage merger. Apollo and/or Verso directly attempted to merge with NewPage first voluntarily beginning in 2011, then through exertion of Apollo's second lien debt position in the Delaware NewPage Bankruptcy proceedings (in 2011 through at least September 4, 2012), and ultimately through the acquisition deal announced in January 2014 (that includes reductions in capacity as a required and stated goal of Verso and its lenders).

In the Court's Order denying Plaintiffs' request for preliminary injunction, the Court erroneously summarized the nature of Plaintiffs' Section 1 allegations, stating that:

> (1) Verso and NewPage are competitors and by joining forces they are attempting to reduce output by not offering the Mill for purchase to any other competitor; (2) Verso could not shut down the Bucksport Mill without the written consent of NewPage; and (3) Verso and NewPage knew that reducing their market share by shutting down the Mill would improve their chances at gaining DOJ approval, as demonstrated by NewPage agreeing to sell two of its paper mills. In their most recent filing, Plaintiffs conclude that "the only reason that Verso decided to close Bucksport" was because of its merger with NewPage. *Pls.' Corrected Reply* at 33.

Order Denying Preliminary Injunction, ECF 96, pp. 68-69.

However, Plaintiffs' Section 1 claims are more accurately summarized as follows:

(1) Verso and NewPage are competitors and, since at least January of 2011, after Verso's parent Apollo Global Management acquired a substantial portion of NewPage's second lien debt, these companies have engaged in anticompetitive and coordinated actions to reduce capacity in various North American coated paper markets, including the coated groundwood paper market, by closing down paper mills and having the equipment and facilities at those mills either sold, scrapped or destroyed by AIM – selling these facilities to AIM for substantially less than could be obtained by willing competitors interested in operating these mills as going concerns engaged in the production of coated paper products.

(2) NewPage clearly had knowledge of and was complicit in the strategic closure of the Bucksport Mill, in furtherance of the Apollo-Verso-NewPage-AIM scheme to reduce capacity in advance of the desired and anticipated Verso-NewPage merger, because Verso was prohibited under the terms of its merger agreement with NewPage from shutting down any mill, like the Bucksport Mill, without the written consent of NewPage. While discovery is required to obtain proof of such consent, consent may be reasonably inferred by NewPage's failure to object to this sale of a valuable asset (representing roughly a third of Verso's assets at the time the acquisition deal was announced) on the eve of merger. Clearly, NewPage concluded (as did the industry analysts) that the anticompetitive long-term benefits of a sale to AIM for $58 million, of an asset that is assessed at over $360 million and would cost "billions" to replace, outweighed the short-term loss of revenue from this mill post-merger or a sale for more money to a competitor.

(3) Verso and NewPage knew that reducing their market share by shutting down the Bucksport Mill would improve their monopoly power and provide an anticompetitive advantage if and when they obtained DOJ approval for their merger, because the prior capacity reductions from closure and scrapping of the Kimberly and Sartell Mills have allowed Verso and NewPage to raise prices in 2013 and 2014; and Verso and NewPage must have known that the best time to reduce capacity by closing the Bucksport Mill was *before* the Verso-NewPage merger was consummated and after DOJ indicated that they would approve the merger if NewPage agreed to divest its Biron and Rumford Mills and sell these paper mills to a competitor (Catalyst) – because, under controlling antitrust case law, after the merger and a subsequent significant price hike, DOJ would be under pressure to require divestiture rather than closure of a mill like Bucksport; and

(4) The only reason that Verso decided to close Bucksport and Sartell Mills (Verso's only unionized facilities), was because of its planned merger with NewPage – because, but/for that merger (which Verso's parent Apollo has sought since at least 2010 when Apollo acquired most of NewPage's second lien debt[37]), closing neither the Bucksport nor Sartell Mill – i.e. representing at least 50% of Verso's business assets in 2012 – would have made no economic sense. Further, under the financial terms of the merger agreement, reductions of capacity were a required and integral element of the merger plan approved by Verso and NewPage's lenders. See, e.g. FAC ¶¶ 36-40.

[37] Pulp and Paper World, "*Apollo and Avenue aim to roll-up paper sector with NewPage*," (March 2010) http://www.pulp-paperworld.com/ex1/item/297-apollo.html

These facts meet the parallel plus probability standard in *Twombly*. Accordingly dismissal of Plaintiff's Section 1 claims is not appropriate.

D. Plaintiffs have Adequately Alleged Violation of Section 2 of the Sherman Act

Section 2 of the Sherman Act "makes it unlawful to monopolize, or attempt to monopolize, ... any part of the trade or commerce among the several States." Simply possessing monopoly power and charging monopoly prices does not violate § 2; rather, the statute targets "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Pacific Bell Telephone Co. v. Linkline Communications, Inc.,* 555 U.S. 438, 447-448, 129 S.Ct. 1109, 1118, 172 L.Ed.2d 836 (2009), citing *United States v. Grinnell Corp.,* 384 U.S. 563, 570-571, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966).

"As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *Id.* at 448*, citing United States v. Colgate & Co.,* 250 U.S. 300, 307, 39 S.Ct. 465, 63 L.Ed. 992 (1919). But there are rare instances in which a dominant firm may incur antitrust liability for purely unilateral conduct. For example, the Supreme Court has ruled that firms may not charge "predatory" prices—below-cost prices that drive rivals out of the market and allow the monopolist to raise its prices later and recoup its losses. Ibid., citing *Brooke Group Ltd. V. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 222-224, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993).

To establish liability for a monopolization claim, a plaintiff must demonstrate "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Eastman Kodak v. Image Tech. Servs., Inc.* 504 U.S. 451, 480 (1992). To prove attempted monopolization, a plaintiff must show " '(1)

that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.' " *Cascade Health Solutions v. PeaceHealth,* 515 F.3d 883, 893 (9th Cir. 2008) (quoting *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 456 (1993)). The requirements of both claims are similar, "differing primarily in the requisite intent and the necessary level of monopoly power." *Image Tech. Servs., Inc. v. Eastman Kodak Co.,* 125 F.3d 1195, 1202 (9th Cir. 1997) (on remand).

Monopoly power is " 'the power to control prices or exclude competition.' " *Forsythe v. Humana, Inc.* 114 F.3d 1467, 1475 (9th Cir. 1997) (quoting *United States v. Grinnell Corp.*, 384 U.S. at 571). This power to control prices or exclude competition may be shown through direct or circumstantial evidence. *Forsythe,* 114 F.3d at 1467.

Plaintiffs' claims under Section 2 of the Sherman Act (Counts 2 and 3) are sufficient to state a claim. Defendants reliance on the Supreme Court's decision in *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) in support of their motions to dismiss is misplaced. The unique facts of *Trinko*, a case that involved the heavily regulated telecommunications industry and a claim that violation of a regulation requiring dealing with competitors constituted a violation of Section 2, do not apply to the case before this Court.

Although the Defendants here are generally correct in the assertion that *Trinko* forestalls antitrust claims based on refusals to deal with a competitor, *Trinko* does not prevent the Plaintiffs from bringing antitrust claims based on other valid antitrust theories, to wit:

> In *Trinko,* the plaintiff brought a claim under § 2 of the Sherman Act, arguing that Verizon failed to fulfill orders of rival carriers in violation of a detailed regulatory scheme enacted by Congress. The Court found that the legislation at issue did not foreclose antitrust claims. Nevertheless, the Court ruled that the plaintiff failed to state a claim under traditional antitrust principles because plaintiff's claim would not have existed in the absence of the legislation—prior to the legislation, Verizon had no obligation to share its facilities with its competitors.

AstroTel, Inc. v. Verizon Florida, LLC, Not Reported in F.Supp.2d, 2012, WL 1581596, at *2-3

(M.D.Fla. 2012), citing *Parsons v. Bright House Networks,* Case No. 2:09-cv-267-AKK, 2010 U.S. Dist. LEXIS 55277, at •26-27, 2010 WL 5094258 (N.D. Ala. Feb. 23, 2010) (citing *Trinko,* 540 U.S. at 404-411)(internal citations and emphasis omitted).

In *Pacific Bell Telephone Co. v. Linkline Communications, Inc.,* 555 U.S. at 449-450, the Supreme Court explained its holding in *Trinko*, stating that:

> Given that Verizon had no antitrust duty to deal with its rivals at all, we concluded that "Verizon's alleged insufficient assistance in the provision of service to rivals" did not violate the Sherman Act. [*Trinko*], at 410, 124 S.Ct. 872. *Trinko* thus makes clear that if a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous.

However, the Verso-AIM case is not a case in which the Plaintiffs are alleging that the Defendants are "refusing to deal" with a competitor, as that concept has been addressed by the Supreme Court in *Trinko, Linkline,* or *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472, U.S. 585, 601, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985) ("The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified."). Rather, here, the issue is Verso's choice to destroy capacity in a highly concentrated market, with exceptionally high entry costs, by selling the Bucksport paper mill to a scrapper, rather than a competitor that would continue to operate the mill in the production of coated paper in the North American coated paper markets (especially coated groundwood paper produced at the Bucksport Mill at the time that Verso chose to close it down).

The United States Supreme Court long-ago resolved that it is illegal to eliminate potential future competition by acquiring production capacity for the purpose of destroying it. In *United States v. American Tobacco Co.*, 221 U.S. 106, 183 (1911), the Court held that it was an antitrust violation, under both Section 1 and Section 2 of the Sherman Act, for a company or companies acting in combination to employ the "persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them but in order to close them up and render

them useless for the purposes of trade." In American Tobacco, the Court analyzed and applied the antitrust laws to a myriad of interconnected transactions spanning decades – that began in 1890.

These transactions began with a trade war between five (5) competitors engaged in the manufacture, distribution, and sale of a variety of tobacco products. Through a series of complicated transactions, the creation and acquisition of subsidiaries, stock exchanges, buy outs of smaller competitors and the imposition of long term non-compete agreements in which former leadership at acquired competitors agreed not to compete in the tobacco industry for lengthy, years long terms, American Tobacco obtained and exerted monopoly control over the domestic tobacco market, and a good bit of the foreign tobacco trade.

One of the primary mechanisms used by the American Tobacco Company (ATC), often through subsidiaries created to make the ATC's control appear less obvious, was to purchase small competitors with payment of cash and stock in ATC or more often the subsidiary, in exchange for an agreement to employ the competitors officers for a limited time and an agreement from the competitors officers to never engage in the tobacco industry for long periods of time in the future. After such a transaction was completed, the competitor's manufacturing facilities would be shuttered and/or destroyed, and their work forces terminated. Dozens and dozens of competitors nationwide were eliminated in this way beginning in 1891 through the time of the suit being heard in the Court in 1911.

The defendants in American Tobacco had concealed their role as ultimate puppet masters in control of a majority of the manufacturing, distribution and sales components of the tobacco industry by the complicated web of corporations, subsidiaries and agreements, that on their face, when viewed at the individual transaction level could be explained away as normal business decisions. However, when viewed from the origin of the transaction – in fact *only when viewed*

from the origin of the transaction – this scheme to combine with competitors for the sole purpose of reducing capacity and thus attaining greater market power and monopoly status was apparent.

In response, the Court imposed sweeping injunctive remedies, including the divestitures, after finding that the transactions were inherently anticompetitive and violative of Section 1, and – because such arrangement resulting in the creation of undue market power and monopoly status – violative of Section 2. The Court expressly held that: "the gradual absorption of control over all the elements essential to the successful manufacture of tobacco products, and placing such control in the hands of seemingly independent corporations serving as perpetual barriers to the entry of others into the tobacco trade" and "persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for the purposes of trade" violated Section 1 and Section 2 of the Sherman Act.

Similarly, in *United States v. Am. Can Co.*, 230 F. 859, 876-877 (D. Md. 1916), the Court found an antitrust violation where "[t]he defendant began to shut up plants so soon as it got possession of them" and "[t]here was no other conceivable reason, than the desire to suppress competition, for buying plants which it obviously would not pay to run….What was done in that respect shows that the plants were bought, not for use, but to get them out of the market.")

Mergers for the purpose of eliminating capacity are not a novel strategy, and have been condemned under antitrust law for decades. *See, e.g. FTC v. Cardinal Health*, 12 F.Supp.2d 34 (D.D.C. 1998)(blocking hospital merger where parties planned to remove excess capacity from the market, because the merger would ultimately hurt consumers). A recent decision from the Southern District of New York explains the law quite clearly:

> "While the mere possession of monopoly power is not unlawful, monopolists cannot run their businesses in an anticompetitive manner....A monopolist's decision to withdraw a product from customers may violate antitrust laws if done for the sole purpose of harming competition, i.e., if it constitutes exclusionary conduct."

New York v. Actavis, PLC, No. 14-CV-7473, 2014 U.S. Dist. LEXIS 172918 (S.D.N.Y., Dec. 11,

2014)("*Actavis*")(granting injunction to prevent drug company from removing a patent- expiring drug from the market in order to force patients to switch to a newly patented drug).

And, in a remarkably similar case to the case at bar, from the Sixth Circuit, the Court reversed a District Court's denial of an injunction where U.S. Steel refused to consider any bids from the Steelworkers Union that was interested in purchasing the factory where they worked. *United Steel Workers v. United States Steel Corp.*, 631 F.2d 1264, 1282-1283 (6th Cir. 1980). Defendants have challenged the validity of this holding, because ultimately the Steelworkers' case was dismissed on remand and the district court entered an order that the plaintiffs lacked standing to pursue these antitrust claims (as employees). However, upon closer examination of that unreported order (ECF 84-1, p. 15), this Court should note that it is a ***consent order*** – signed by counsel for all of the parties to that action.

A news account from the time of the entry of that order (attached as Exhibit 10) explains that this order was the product of a negotiated settlement to end the litigation, entered by the court ***after the defendants agreed to sell the paper mill to a third party buyer that would, and did, continue to operate this mill in the production of paper.*** Subsequently the mill resumed paper making operations and continued to operate ***– providing jobs and revenue for more than a decade after the defendants had proposed to close the mill down.***

Here, but/for the anticipated and now consummated merger with NewPage, Verso's decision to close the Bucksport Mill (and the Sartell Mill shortly before that) would not have made economic sense. Bucksport represented roughly a third of Verso's 2014 assets and Verso has invested more than $130 million in upgrading this facility since 2007 – over $48 million of which was spent since 2013. The mill's output of coated groundwood paper constituted 10% of the North American coated groundwood supply produced in 2013-2014 and 4.5% of all North American coated paper capacity. (ECF 79, p. 2). In the absence of Apollo's scheme to obtain

market control and monopoly power through a Verso-NewPage merger – that began with the acquisition by Apollo of NewPage's second lien debt in 2010 – Verso's decision to eliminate at least half its assets (Sartell and Bucksport) since 2012 cannot be explained as a rational business decision – when at the same time Verso has been raising prices paid by its customers since 2013.

Only when the series of actions and combinations undertaken by Verso, NewPage, and AIM is viewed through the prism of its origins – Apollo's acquisition of Verso's largest competitors second lien debt for the purposes of forcing a merger – can the anticompetitive nature of the parallel business decisions of Verso, NewPage and AIM (the agent of destruction in this process) be understood and the violation of Sections 1 and 2 of Sherman (as well as Section 7 of Clayton) be fully appreciated.

Because of the monopoly status that Verso has attained as a result of the Verso-NewPage merger, the decision to close the Bucksport Mill and *permanently* eliminate its paper making equipment and capacity from the North American coated paper market, through scrapping (not mere mothballing of the facility) reflects a concerted effort by Verso to obtain and maintain monopoly power. Coupled with the high cost of entering this market (billions of dollars) and the significant time and regulatory hurdles required for entry (years) – Verso's Bucksport closure decision has an even greater significance to the long-term competition in this market that is unlikely to be fully remedied by later – post-destruction – injunctive relief (or even damages). Because this is now the third time that AIM has been used to implement such a destruction of a viable valuable asset in this highly concentrated market since 2011, and the reductions in capacity have already led to Verso raising prices three times since 2013 – including a significant price increase of $20-$40/ton only 23 days after it merged with NewPage and assumed control of more than 50% of several coated paper markets in North America – this case states a cause of action for violation of Section 2 of the Sherman Act.

Trinko as a precedent related to a claim of refusal-to-deal with a competitor is utterly inapplicable to this situation. Plaintiffs have stated a cause of action under Section 2 of the Sherman Act.

F. Plaintiffs Have States A Cause of Action for Violation of Section 7 of the Clayton Act

Section 7 of the Clayton Act provides that "No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18.

Section 7 is "intended to arrest anticompetitive acquisitions in their incipiency." *United States v. Philadephia Nat'l Bank,* 374 U.S. 321, 362, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963). It is well established that "[a] company need not acquire control over another company to violate the Clayton Act." *Denver & Rio Grande W.R. Co. v. United States,* 387 U.S. 485, 501, 87 S.Ct. 1754, 18 L.Ed.2d 905 (1967). Rather, the question is whether "there is a reasonable probability that the acquisition is likely to result in the condemned restraints." *United States v. E.I. du Pont de Nemours & Co*., 353 U.S. at 607.

Defendants misstate the applicable standard to establish a claim under Section 7 of the Clayton Act when they state that: "Plaintiffs' claim under Section 7 of the Clayton Act (Count 4) must fail as well, because Plaintiffs have not alleged, as they must, either that the sale of the Bucksport mill to AIM would lessen competition in the market *where AIM competes* or that the *acquisition* will harm competition." Verso Motion to Dismiss, ECF 114, p. 2 (emphasis supplied).

The violation of Section 7 of the Clayton Act occurs because the sale of the Bucksport mill

to AIM will lessen competition, capacity and supply in the market *where Verso now has a near monopoly power* or that the *permanent destruction of the Bucksport Mill's valuable equipment, facility and capacity* will harm, and already has harmed, competition in the already highly concentrated North American coated paper markets. The potential adverse impact of this, and recent similar capacity reductions on direct and indirect consumers is not speculative. Rather, the impact has already begun to adversely impact competition and consumers.

At least in part because of the destruction by Verso and NewPage of two earlier mills, by selling to and scrapping by AIM, Verso has been able to increase prices three times since 2013. The most recent price hike was implemented by Verso just 23 days after it attained control of more than 50% of the North American coated paper markets; and, more importantly, this price increase was followed by Catalyst -- the very Verso-competitor on which DOJ was relying to preserve competition and reduce or "eliminate" the adverse impacts on competition that the Verso-NewPage merger causes.

DOJ has already determined that the Verso merger with NewPage violated Section 7 of the Clayton Act. The only question remaining was whether requiring NewPage to divest two of its mills (Biron and Rumford) was an adequate remedial measure to counteract the anticompetitive impacts of the Verso-NewPage merger. Verso's and Catalyst's significant price increases of up to $40/ton, imposed prior to the expiration of even the 60-day Tunney Act comment period, demonstrates that the divestiture of Biron and Rumford was a grossly inadequate remedy to address the damage to competition that the Verso-NewPage merger has caused.

Plaintiffs respectfully assert that divestiture of more facilities, and mandatory sale of those mills as going concerns engaged in the continued production of coated paper in the North American markets, is essential. But more importantly, preservation of the equipment, facility, and capacity of the Bucksport Mill is essential to the maintenance of pricing for the benefit of

consumers and is essential to maintaining sufficient coated paper supplies for consumers. Only by restoring the capacity of the Bucksport Mill to this market can the public interest be properly protected and served.

Conclusion

For the foregoing reasons and based on the foregoing authorities, Plaintiffs respectfully request that the Court deny Defendants' respective Motions to Dismiss Plaintiffs' federal antitrust claims in this case, pursuant to Fed.R.Civ.P. 12(b)(6).

Dated this *23rd* Day of March, 2015.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of March, 2015, a true and correct copy of the foregoing was served upon the all counsel of record electronically by the CM/ECF system:

Signed: /s/ *Kimberly J. Ervin Tucker*