UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, LOCAL LODGE NO. 1821, et al.,	)	CIVIL ACTION NO. 1:14-cv-00530-JAW
Plaintiffs,	)	
v.	)	
VERSO PAPER CORP., VERSO PAPER LLC, and **AIM DEVELOPMENT (USA) LLC**,	)	
Defendants.	)	

DEFENDANTS VERSO PAPER CORP. AND VERSO PAPER LLC'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendants Verso Paper Corp. and Verso Paper LLC (together "Verso") move to dismiss each of the remaining counts set forth in Plaintiffs' First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). Specifically, the Court should dismiss Counts 1-4, consisting of Plaintiffs' claims under federal antitrust statutes, and Count 9, consisting of Plaintiffs' claims for severance and vacation pay under Maine law, because Plaintiffs have not stated a claim for relief under each respective cause of action.[1]

First, Plaintiffs' antitrust claims against Verso are moot. By their Amended Complaint, Plaintiffs seek a variety of declaratory and injunctive relief from Verso, all of which is aimed at declaring unlawful the shut down and sale of the Bucksport mill; enjoining Verso's sale of the mill to Defendant AIM Development (USA) LLC ("AIM"); and/or requiring that Verso take affirmative steps to preserve certain of the mill's physical assets. But Verso shut down the mill two months ago, Verso's sale of the mill to AIM closed on January 29, 2015, and Verso no

[1] By stipulation, Plaintiffs' previously dismissed their state antitrust claims (Counts 5-8) with prejudice. *See* ECF No. 106 (stipulation of dismissal).

longer has the legal right to possess or manipulate any of the mill's physical assets. In short, even if this Court ultimately determined that Verso violated federal antitrust law, Plaintiffs can no longer obtain any of the relief requested from Verso. The only relief Plaintiffs seek is to preserve a mill that Verso no longer owns and to prevent the sale of a mill that Verso already has sold. Accordingly, Plaintiffs' claims against Verso are now moot and the Court should dismiss them.

Second, even if any live antitrust claims remain against Verso, the Court nevertheless should dismiss those claims because each of them fails to state an actionable theory of liability. Plaintiffs' claim under Section 1 of the Sherman Act (Count 1) must fail because Plaintiffs have not adequately alleged the existence of any contract, combination or conspiracy in restraint of trade. Plaintiffs' claims under Section 2 of the Sherman Act (Counts 2 and 3) must fail because Plaintiffs' basic theory of liability – that Verso has refused to sell the Bucksport mill to a competitor – is not actionable under the Supreme Court's decision in *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). And 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.

Third, in the event that the Court does not dismiss all of Plaintiffs' federal antitrust claims, the Court nevertheless should hold that Plaintiffs may proceed with respect to any remaining claims only in their capacity as consumers, not as employees. The Court previously adopted this holding in its ruling on Plaintiffs' motion for preliminary injunctive relief, and, in the event that any of Plaintiffs' claims are permitted to proceed, the Court should reaffirm that holding here.

Finally, the Court should enter a formal order dismissing Plaintiffs' claims under Maine state law for severance and vacation pay (Count 9). Although there can be no dispute that the Court intended to dismiss these claims in its previous order on these issues, the Court's language (dismissing Plaintiffs' motion for declaratory judgment) does not appear to have formally dismissed Count 9. *See* ECF No. 73 at 85. The Court's prior order, as well as Plaintiffs' acknowledgements, leave no doubt that such a dismissal is appropriate.

RELEVANT FACTS ALLEGED IN THE AMENDED COMPLAINT

Plaintiffs' Amended Complaint alleges as follows with respect to their antitrust claims:

On January 6, 2014, Verso announced its plan to acquire another paper company, NewPage Holdings Inc. ("NewPage"). Amended Complaint ("Am. Compl.") at ¶¶ 10, 31. Certain analysts predicted that the combined company would control a large percentage of the North American coated paper market. *Id*. at ¶¶ 33, 79. In subsequent filings submitted to the Court, Plaintiffs allege that the combined company will control between 35 and 40% of the North American coated paper market. *See* ECF No. 96 at 66.[2] The terms of the purchase agreement required Verso and NewPage to use their "reasonable best efforts" to obtain regulatory approval for the transaction, and to refrain from selling any assets without the written consent of the other party, but only if the sale of any such assets was necessary to obtain regulatory approval. Am. Compl. at ¶ 34. The United States Department of Justice ("DOJ") thereafter announced its intention to review the terms of the deal to determine whether it violated Section 7 of the Clayton Act. *Id*. at ¶ 11.

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[2] This Court may take judicial notice of Plaintiffs' prior pleadings and characterizations of their claims. *See Disc. Video Ctr., Inc. v. Does 1-29*, 285 F.R.D. 161, 165 (D. Mass. 2012) (the court accepted the plaintiff's characterization of its claims because "it is the Plaintiff's binding stated intention"); *Jackson v. Broadcast Music, Inc.*, No. 04-CV-5948, 2006 WL 250524, at *7 (S.D.N.Y. Feb. 1, 2006) ("the court may take judicial notice of … admissions in pleadings and other documents in the public record") (internal quotations omitted).

After the announcement of the Verso/NewPage transaction, Verso, NewPage and outside financial analysts each projected that the resulting combined company would be better positioned to compete in the market for coated paper. *Id*. at ¶¶ 36-42. Plaintiffs allege that this predicted improvement would be due in part to the combined company's ability to "reduce capacity, inventory, and the supply of coated paper in the market." *Id*. at ¶ 35. Plaintiffs also claim that Verso and NewPage began to implement these strategies before the completion of the deal when they "agreed that Verso would permanently shut down [the Bucksport mill] before the end of December, 2014." *Id*. at ¶ 47. Verso announced on October 1, 2014, that it would close the Bucksport mill; ceased paper production at the mill on or before December 4, 2014; and informed papermaking workers that they would be laid off by the end of 2014. *Id*. at ¶¶ 48, 57.

Outside analysts reacted to the closure of the Bucksport mill by predicting that it would significantly improve Verso's financial position by reducing excess capacity from a precipitously declining market. *Id*. at ¶¶ 48-50. Plaintiffs dispute the views of these analysts, however, claiming that the Bucksport mill was profitable at the time of the shutdown announcement. *Id*. at ¶¶ 51-52. Plaintiffs also claim that the closure of the Bucksport mill will reduce paper production capacity "substantially" and that Verso will benefit from that reduced capacity by achieving greater freedom to raise prices. *Id*. at ¶¶ 47-48.

After announcing that it would shut down the Bucksport mill, Verso began preparing to take the physical steps necessary to effect that shut down, which steps Plaintiffs allege will destroy any future paper making capacity at the mill. *Id*. at ¶¶ 53-55. Plaintiffs also allege that a Verso employee told representatives of Plaintiff International Association of Machinists and Aerospace Workers (the "IAM") that Verso would not sell the mill to a competing paper company. *Id*. at ¶ 56. On December 8, 2014, Verso agreed to sell the mill to AIM, which

Plaintiffs allege will not continue papermaking at the mill and which Plaintiffs allege to be contractually bound to harvest the mill's materials for scrap metal. *Id*. at ¶¶ 56, 65.

Plaintiffs claim that Verso's decision to sell the Bucksport mill to AIM is the latest in a series of similar transactions between AIM and either Verso or NewPage, including Verso's sale to AIM of a paper mill in Minnesota, and NewPage's sale to AIM of a paper mill in Wisconsin. *Id*. at ¶¶ 63-64. Plaintiffs allege that each of these three sales was motivated by Verso's or NewPage's knowledge that AIM would destroy each facility and sell their respective materials for scrap, in furtherance of an anticompetitive desire to reduce capacity in the papermaking industry. *Id*. at ¶¶ 62-72. Plaintiffs argue that "[b]y reducing market capacity substantially while foregoing the profitable sales of these shuttered plants to competitors Verso is assuring itself of long-term monopoly profits for the much smaller investment in foregone profits that could legitimately accrue from profitable sales of the plants in question." *Id*. at ¶ 76.

In sum, Plaintiffs allege that the sale of the Bucksport mill to AIM, rather than to a competing paper company, and AIM's alleged intention to destroy the papermaking capacity of the mill, would further the ability of a combined Verso/NewPage entity to achieve illegal monopoly power. *Id*. at ¶¶ 76, 82.

ADDITIONAL FACTS

As the Court is aware, a number of relevant events have occurred since Plaintiffs filed their Amended Complaint on December 22, 2014. First, the DOJ approved the Verso/NewPage transaction and, in doing so, concluded that Verso's decision to sell the Bucksport mill to AIM was unrelated to Verso's acquisition of NewPage. Second, Verso's acquisition of NewPage closed on January 7, 2015. Third, Verso's sale of the Bucksport mill to AIM closed on

January 29, 2015. The Court can and should consider these discrete facts on this motion to dismiss and, in doing so, need not convert this motion to a motion for summary judgment.[3]

THE COURT'S ORDER ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND TRO

The Court first considered Plaintiffs' antitrust claims in connection with their Motion for Preliminary Injunction and TRO, wherein Plaintiffs sought a variety of emergency and preliminary injunctive relief aimed at, among other things, halting Verso's sale of the mill to AIM. *See* ECF No. 4 ("PI Motion"). In denying Plaintiffs' PI Motion, the Court reached two legal conclusions relevant to the sufficiency of Plaintiffs' pleadings and the viability of their

[3] Although they are not set forth in the Amended Complaint, the Court may consider each of these facts without converting this motion to a motion for summary judgment, because they are either "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, [or arise from] exhibits attached to the complaint whose authenticity is unquestioned." 11 Charles Alan Wright *et al.*, Federal Practice and Procedure § 1357 (3d ed., Westlaw 2014). The Court may take judicial notice of the completion of the Verso/NewPage acquisition because it is the subject of a filing submitted to the Securities and Exchange Commission. *See* Verso Corporation, Current Report (Form 8-K) (Jan. 7, 2015) (disclosing completion of transaction) (available at http://investor.versoco.com/secfiling.cfm?filingID=1193125-15-4117&CIK=1421182); *Wilson v. Bodnar*, 750 F. Supp. 2d 186, 187 n.1 (D. Me. 2010) (taking judicial notice of fact of merger from Form 8-K filing). The Court may take judicial notice of the DOJ's conclusions concerning the sale of the Bucksport mill to AIM, and any other contents of the DOJ's Competitive Impact Statement ("CIS"), because the CIS was published in the Federal Register. *See* United States v. Verso Paper Corp. and NewPage Holdings Inc. Proposed Final Judgment and Competitive Impact Statement, 80 Fed. Reg. 1957 (Jan. 14, 2015); 44 U.S.C. § 1507 ("[t]he contents of the Federal Register shall be judicially noticed and without prejudice to any other mode of citation, [and] may be cited by volume and page number"); *Ginsburg v. InBev NV/SA*, 649 F. Supp. 2d 943, 949 (E.D. Mo. 2009), *aff'd*, 623 F.3d 1229 (8th Cir. 2010) (taking judicial notice of the DOJ's approval of the merger and its finding that the merger did not violate Section 7 of the Clayton Act by citing the Proposed Final Judgment and CIS). Finally, the Court may consider the fact and date of the closing of the AIM transaction because it has been widely reported by the news media in Maine and has been confirmed by a sworn declaration that already is part of the record of this case. *See*, *e.g.*, Whit Richardson, *New owner of Bucksport paper mill in talks with possible operator*, Portland Press Herald, Jan. 31, 2015, http://www.pressherald.com/2015/01/31/new-owner-of-bucksport-paper-mill-in-talks-with-possible-operator/ (reporting closing of sale); ECF No. 100-1 (Declaration of Charles Welch) at ¶ 6 ("Verso's sale of the Bucksport Mill to Defendant AIM Development (USA) LLC ("AIM") closed on Thursday, January 29, 2015."); 11 Charles Alan Wright *et al.*, Federal Practice and Procedure § 1357 ("items appearing in the record in the case … may be considered by the district judge without converting the motion into one for summary judgment").

antitrust theories.[4] First, the Court held that, under *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), Verso's alleged refusal to sell the Bucksport mill to a competitor was insufficient grounds for a claim under Section 2 of the Sherman Act. *See* ECF No. 96 (order denying PI Motion) at 64-66. Second, with respect to Plaintiffs' Clayton Act claim, the Court held that the mere fact that Verso agreed to sell the Bucksport mill to a company that is not in the paper industry and that has a history of scrapping paper mills is insufficient to demonstrate that the AIM transaction will substantially lessen competition in the North American paper market. *Id*. at 58-60.

ARGUMENT

I. THE COURT NEED NOT ACCEPT PLAINTIFFS' CONCLUSORY AND SPECULATIVE ALLEGATIONS AS TRUE FOR PURPOSES OF THIS MOTION.

Although a court generally accepts a plaintiff's alleged facts as true when testing the legal sufficiency of his claims under Rule 12(b)(6), a court need not do so where the allegations are speculative, conclusory, or merely incant the elements of the cause of action. *See, e.g.*, *Mitchell v. Liberty*, No. 08-cv-341, 2008 WL 5216291, at *1 (D. Me. Dec. 11, 2008) (court need not credit "'formulaic recitation of the elements of a cause of action'") (quoting *Thomas v. Rhode Island*, 542 F.3d 944, 948 (1st Cir. 2008)); *U.S. v. Harriman*, No. 12-cv-113, 2012 WL 6616359, at *2 (D. Me. Nov. 16, 2012) ("a complaint must contain factual allegations that raise a right to relief above the speculative level") (internal quotations omitted); *Cardente v. Fleet Bank of Maine, Inc.*, 796 F. Supp. 603, 606 (D. Me. 1992) ("the Court need not accept conclusory allegations regarding the legal effect of events that do not reasonably flow from more specific

[4] This Court may take judicial notice of its prior decisions under the law of the case doctrine. *See In re Colonial Mortg. Bankers Corp.*, 324 F.3d 12, 16 (1st Cir. 2003) (stating that "a court on notice that it has previously decided an issue may dismiss the action sua sponte, consistent with the res judicata policy of avoiding judicial waste.") (quoting *Bezanson v. Bayside Enters., Inc.*, 922 F.2d 895, 904 (1st Cir. 1990)).

facts that have been alleged to have occurred"). The Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), not only underscores this point, but applies with specific force here because the claim in *Twombly* alleged an unlawful conspiracy under the Sherman Act. In *Twombly*, the Court scrutinized the plaintiff's conspiracy claim closely, and ultimately dismissed it after holding that "parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Twombly*, 550 U.S. at 557. In short, to the extent they allege the existence of any conspiracy between Verso and NewPage or Verso and AIM, Plaintiffs bear the burden of pointing to allegations in their Amended Complaint that plausibly demonstrate that an actual "meeting of the minds" took place. *Id*. Short of such allegations, Plaintiffs' claims fail.

II. BECAUSE AIM HAS COMPLETED ITS PURCHASE OF THE BUCKSPORT MILL, PLAINTIFFS CAN OBTAIN NO EFFECTUAL RELIEF FROM VERSO, THEREBY RENDERING THE CLAIMS AGAINST VERSO MOOT.

By each of their antitrust claims, Plaintiffs seek declaratory and injunctive relief aimed at both preventing Verso's sale of the Bucksport mill to AIM and requiring Verso to take a number of steps to maintain the mill pending its forced sale to another party. All of Plaintiffs' antitrust claims are now moot, however, because Verso completed the sale of the Bucksport mill to AIM on January 29, 2015. Therefore, Verso ceased to have an interest in the mill in any respect and Plaintiffs can no longer obtain any effectual relief from Verso under their antitrust claims.

"Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (citations omitted). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings." *Id.* at 477-78 (quotation omitted). "The doctrine of mootness enforces the mandate 'that an actual controversy must be extant at all stages of the review, not merely at the

time the complaint is filed.'" *Am. Civil Liberties Union of Mass. v. U.S. Conference of Catholic Bishops ("ACLU")*, 705 F.3d 44, 52 (1st Cir. 2013) (quoting *Mangual v. Rotger-Sabat*, 317 F.3d 45, 60 (1st Cir. 2003)). As the First Circuit has explained, to continue to litigate a case after intervening events have eliminated an actual controversy is, in effect, to issue an advisory legal opinion−something courts may not do under Article III of the Constitution. *See Overseas Military Sales Corp. v. Giralt-Armada*, 503 F.3d 12, 16-17 (1st Cir. 2007). Rather, the proper course is to acknowledge that "a case or controversy ceases to exist" and to dismiss the action accordingly. *Cruz v. Farquharson*, 252 F.3d 530, 533 (1st Cir. 2001) (citations omitted).

In considering the potential mootness of a claim that seeks injunctive relief, the Court must look to the action sought to be enjoined. When a complaint seeks injunctive relief, but there is "no ongoing conduct left for the court to enjoin," the case is moot. *ACLU*, 705 F.3d at 53. As such, with limited exceptions, "this ordinarily means that once the act sought to be enjoined occurs, the suit must be dismissed as moot." *Me. Sch. Admin. Dist. No. 35 v. Mr. R. & Mrs. R.*, 321 F.3d 9, 17 (1st Cir. 2003). "Even the United States Court of Appeals . . . cannot make time run backwards." *Gilpin v. Am. Fed'n of State, Cnty. and Mun. Emps.*, 875 F.2d 1310, 1313 (7th Cir. 1989). *See also In re Light Cigarettes Mktg. Sales Practices Litig.*, 271 F.R.D. 402, 422 (D. Me. 2010) (claim for injunctive relief is moot if court "cannot grant any 'effectual relief' by ordering the injunction") (quoting *Church of Scientology of Cal. v. United States*, 596 U.S. 9, 12 (1992)). And because requests for declaratory relief already rest on thin Article III grounds, they too are susceptible to mootness claims where the conduct at issue is no longer of "sufficient immediacy." *ACLU*, 705 F.3d at 54 (quotations omitted). *See also Ernst & Young v. Depositors Econ. Prot. Corp.*, 862 F. Supp. 709, 713 (D.R.I. 1994) ("the granting of declaratory

relief is discretionary, and, in the First Circuit, should be decided on the side of caution" because of the Article III case-or-controversy requirement).

Here, Plaintiffs ask the Court to declare that (i) Verso's alleged agreement with NewPage to close the Bucksport mill violated Section 1 of the Sherman Act; (ii) Verso's agreement to sell the Bucksport mill to AIM violated Section 2 of the Sherman Act; and (iii) Verso's alleged actions aimed at destroying the mill's paper making capacity violated Section 7 of the Sherman Act. *See* Am. Compl. at p.86. Plaintiffs also seek an injunction that would: (i) prohibit ***Verso*** from selling the Bucksport mill to AIM or any other salvage company; (ii) require ***Verso*** to publicize the sale of the mill "at a reasonable price"; (iii) prohibit ***Verso*** from rejecting bona fide offers to purchase the mill for use as a printing paper mill; (iv) prohibit ***Verso*** from taking any actions that would jeopardize continued operations of the mill after a brief shutdown; and (v) prohibit ***Verso*** from trying to sell the electric power plant separately from the rest of the mill itself. *Id*. at pp.86-88. Verso closed the Bucksport mill in December 2014 and subsequently sold it to AIM on January 29, 2015. These events are in the past. Verso no longer owns, operates, or controls the mill and, therefore, cannot perform any of the actions that Plaintiffs ask this Court to compel. Therefore, there no longer remains any effective relief that this Court may order against Verso. As a result, Plaintiffs claims against Verso are moot.

Moreover, none of the exceptions to the mootness doctrine applies here. For instance, the "voluntary cessation" exception arises in situations in which "the defendant voluntary ceases the challenged practice" prior to the court's resolution of the underlying dispute. *ACLU*, 705 F.3d at 54 (quoting *D.H.L. Assocs., Inc. v. O'Gorman*, 199 F.3d 50, 55 (1st Cir. 1999)). The exception ensures that a litigant cannot evade adjudication of a dispute merely by ceasing the challenged activity until the case is dismissed, but with the possibility that it might later reengage in the

challenged conduct. Here, Verso did not *cease* the challenged conduct – it thoroughly engaged in and *completed* the challenged conduct. Accordingly, this exception does not apply here.

Similarly, the exception for issues that are capable of repetition, yet evade review, also does not apply. That exception "applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). To demonstrate that this exception applies, "[p]laintiffs must show that (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Davidson v. Howe*, 749 F.3d 21, 26 (1st Cir. 2014) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)) (internal quotation marks omitted). Plaintiffs cannot meet this test. As noted above, Verso's sale of the Bucksport mill to AIM is final, and therefore, there is no opportunity for Verso to reengage in the conduct complained of here. This is thus a "one-time" occurrence that is not "'capable of repetition' in the requisite sense." *Cruz*, 252 F.3d at 534-35. For the same reason, Plaintiffs cannot make a reasonable showing that they will ever again be subjected to the alleged illegal conduct in the future.

Plaintiffs' claims against Verso are moot and should be dismissed for this reason alone.

III. THE COURT SHOULD DISMISS COUNT 1 OF THE AMENDED COMPLAINT BECAUSE PLAINTIFFS' CLAIM UNDER SECTION 1 OF THE SHERMAN ACT FAILS TO STATE A CLAIM THAT SATISFIES THE *TWOMBLY* PLEADING REQUIREMENTS.

In Count 1 of their Amended Complaint, Plaintiffs claim that Verso and NewPage conspired to decrease production capacity and thereby raise prices for coated paper in violation of Section 1 of the Sherman Act. Am. Compl. at ¶¶ 69, 174, 203. Although not clear from their pleading, Plaintiffs appear to base their conspiracy claim on two factual theories: that the parties

explicitly agreed to pursue such a conspiracy in their Merger Agreement; and that previous mill closures across the United States involving Verso and NewPage demonstrate a conspiracy between the two entities. Plaintiffs' allegations concerning these theories do not meet the *Twombly* pleading standard and the Court should dismiss Count 1 accordingly.

A. Plaintiffs' Reliance On The Merger Agreement Is Insufficient To Satisfy The Requirement For An Illegal Agreement Under Section 1.

Plaintiffs allege that the January 3, 2014 agreement memorializing Verso's agreement to acquire NewPage (the "Merger Agreement") is evidence of an illegal agreement between Verso and NewPage to close the Bucksport mill.[5] Am. Compl. at ¶¶ 34, 38-39, 169, 172. Although the Merger Agreement describes the assets and liabilities that the parties intended to be included in the deal, and sets forth the parties' obligations to take action to bring about the success of the merger, nowhere in the Merger Agreement is there any requirement that Verso close the Bucksport mill or any other mill, and Plaintiffs cite to no such provision.

Nor is there anything in the Merger Agreement that can provide circumstantial evidence to show that Verso and NewPage agreed to close the Bucksport mill. In an unavailing effort to fill this gap, Plaintiffs point to a provision of the Merger Agreement (Section 5.6(c)) requiring each party to obtain written consent from the other before divesting any asset "where such action is taken in order to gain DOJ approval." Plaintiffs suggest that this provision supplies the requisite circumstantial evidence they need to support their Section 1 claim. Am. Compl. at ¶ 34 (citing Section 5.6.(c)). As is evident from the plain language of the agreement, however, this provision is specific to divestitures required by the DOJ in order to gain regulatory approval for the Verso-NewPage transaction. But the Amended Complaint lacks any allegation that Verso

[5] The Court can consider the Merger Agreement because it is cited repeatedly throughout, and thereby incorporated into, Plaintiffs' Amended Complaint. *See Bruns v. Mayhew*, No. 12-cv-131, 2012 WL 5874812, at *7 (D. Me. Nov. 20, 2012) (court can consider documents incorporated into a complaint on a motion to dismiss).

sold the Bucksport mill to AIM in order to gain DOJ approval. In fact, as the DOJ acknowledges in its Competitive Impact Statement analyzing the deal, Verso's decision to sell the Bucksport mill was unrelated to the Verso-NewPage transaction and Verso had contemplated selling the Bucksport mill prior to deciding to acquire NewPage. *See* United States v. Verso Paper Corp. and NewPage Holdings Inc. Proposed Final Judgment and Competitive Impact Statement ("CIS"), 80 Fed. Reg. 1957, 1960 n.1 (Jan. 14, 2015). Further, the DOJ noted that it did "not allege that the closing of the Bucksport mill is a result of the merger." *Id*. *See also* ECF No. 96 at 60. For these reasons, the sale of the Bucksport mill was not subject to the requirements of Section 5.6(c) and thus that provision does not plausibly suggest the existence of any conspiracy between Verso and NewPage concerning the Bucksport mill.

B. Plaintiffs' Allegations Concerning Past Mill Closures Merely Amount To Parallel Conduct, Which Is Insufficient To Allege A Claim Under Section 1 Of The Sherman Act.

Plaintiffs also suggest the existence of a conspiracy between Verso and NewPage by pointing to mill closures over the years by the separate companies. *Id*. at ¶¶ 62-72, 170. Plaintiffs allege that these closures result from an illegal conspiracy by Verso and NewPage to reduce competition in the coated paper market prior to Verso's purchase of NewPage. *Id.* But Plaintiffs' allegations amount merely to parallel conduct that is as consistent with independent market-driven outcomes arising out of declining demand for the products made at the Bucksport mill as it is with a conspiracy. Such allegations are therefore insufficient to adequately plead a violation of Section 1 of the Sherman Act.

The Supreme Court addressed this precise issue in *Twombly*, where it articulated the minimum pleading requirements to satisfy Federal Rule of Civil Procedure 8(a)(2) for claims alleging a violation of Section 1 of the Sherman Act. There, the Court held that a Section 1

claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Twombly,* 550 U.S. at 556. When relying on the existence of parallel conduct to show that "an agreement was made" in violation of Section 1, the claims "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.* at 557. Plaintiffs' mere identification of mill closures by Verso and/or NewPage does not satisfy this pleading requirement because it is unaccompanied by any meaningful, non-conclusory allegation of a preceding agreement.

Plaintiffs' allegations are also utterly consistent with conduct that just as easily, and far more plausibly, could be the result of "independent action." Indeed, Plaintiffs completely ignore the market realities of the coated paper industry, which they concede continues to decline. *See* Am. Compl. at ¶ 139. Indeed, one competitor's closure of a mill creates an opportunity for other competitors to take business away from the producer closing the mill. Plaintiffs' allegations lack any additional indicia of conspiratorial conduct between two rivals to pursue a policy of increasing coated paper prices by diminishing their ability to compete. The Supreme Court noted that "[w]ithout more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Id.* at 556-57. Here, Plaintiffs allege nothing more than parallel conduct (mill closures), which is insufficient to satisfy the pleading requirements of *Twombly*.

Without the support of Section 5.6(c) of the Merger Agreement, and without the ability to rely on the parallel conduct they allege, Plaintiffs are left without *any* non-conclusory allegation in the Complaint that supports the existence of an agreement between Verso and NewPage related to the sale of the Bucksport mill. Plaintiffs thus fail to meet the standard for a Section 1 claim under *Twombly*, which "requires a complaint with enough factual matter (taken as true) to

suggest that an *agreement* was made." *Twombly*, 540 U.S. at 556 (emphasis added). As Section 1 requires the allegation of an agreement, the lack of one defeats Plaintiffs' Section 1 claims and the Court should dismiss Count I accordingly. *See, e.g.*, *Gilbuilt Homes, Inc. v. Cont'l Homes*, 667 F.2d 209, 210 (1st Cir. 1981) (dismissing a Section 1 claim when "no conspiracy or agreement with other persons or entities was pleaded").

C. Plaintiffs Fail To Satisfy The Requirements For Stating A Conspiracy To Monopolize Claim Under *Twombly*.

To the extent that Plaintiffs' Section 1 claim can be read to include the theory that Verso and AIM have conspired to help Verso monopolize the North American coated printing paper market, that theory must fail as well. Just as Plaintiffs have not made sufficient factual allegations to allow the court to reasonably infer an illegal agreement between Verso and NewPage to close the Bucksport mill and reduce capacity, Plaintiffs also fail to sufficiently allege a conspiracy between Verso and AIM to destroy the Bucksport mill.

Plaintiffs rely on two facts, neither of which is availing, to support their claim for an unlawful conspiracy to destroy the Bucksport mill: (1) Verso sold the Sartell mill to AIM after the mill was badly damaged in a fire and AIM subsequently dismantled it, *see* Am. Compl. at ¶ 183; and (2) contractual language in the Verso/AIM membership interest purchase agreement ("MIPA") that recites AIM's intended use for the mill, *see id*. at ¶ 186.[6]

With respect to the first fact, simply noting that Verso sold another mill to AIM nearly three years ago that AIM later scrapped is, without more, insufficient to support an inference that Verso and AIM agreed to limit AIM's freedom to do with the mill what it chooses. At most, any decision of AIM to dismantle the Bucksport mill (should it choose to do so), as it previously did

[6] The Court may take judicial notice of the MIPA for the same reasons that it may take judicial notice of the Verso/NewPage Merger Agreement: Plaintiffs cite to and rely on the MIPA throughout their Amended Complaint. *See supra* n.5.

with the Sartell mill, will result in the functional equivalent of parallel conduct. As stated above, claims "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Twombly*, 550 U.S. at 557. Plaintiffs' allegation of what is essentially parallel conduct therefore fails to support the existence of a type of illegal agreement.

With respect to the second fact, Plaintiffs do not point to language in the MIPA (and, indeed, they cannot) that would allow this Court to reasonably infer an agreement between Verso and AIM to require AIM to dismantle the Bucksport mill in order to help Verso monopolize the North American coated printing paper market. Am. Compl. at ¶ 186. To the extent Plaintiffs wish to rely on MIPA § 1.01 ("Buyer's Intended Use") to support their claim, the plain language of this section merely describes how AIM intends to use the Bucksport mill facility−it does not obligate AIM to destroy the Bucksport mill. And there is no other language in the MIPA that would even remotely support a reasonable inference that Verso and AIM conspired in the manner alleged in the Amended Complaint.

IV. THE COURT SHOULD DISMISS COUNTS 2 AND 3 OF THE AMENDED COMPLAINT BECAUSE A REFUSAL TO DEAL WITH A COMPETITOR DOES NOT VIOLATE SECTION 2 OF THE SHERMAN ACT.

In Count 2 of their Amended Complaint, Plaintiffs allege that Verso has attempted to monopolize the North American market for coated paper "by intentionally closing the Bucksport Mill, refusing to discuss potential offers for the Bucksport Mill from any entities wishing to continue to produce paper, and finally selling the Bucksport Mill to an entity that specializes in scrap metal." Am. Compl. at ¶ 177. In Count 3 of their Amended Complaint, Plaintiffs similarly allege that Verso and AIM have conspired to allow Verso "to monopolize the North American coated printing paper market by destroying paper mills historically committed to producing

coated printing papers." *Id*. at ¶ 182. Plaintiffs clarify their claim in their Reply Memorandum in support of their Motion for a Temporary Restraining Order and Preliminary Injunction:

> Again, Plaintiffs are not challenging Verso's decisions to unilaterally decide how much paper it produces—that is Verso's prerogative. Nor are plaintiffs attempting to force Verso to continue operating the Bucksport Mill−again, that is their decision to make. Instead, plaintiffs are only challenging Verso's documented refusal to consider bids for the Bucksport Mill from any competitors and public statement that it would not sell the Mill to its competitors under any circumstances.

ECF No. 79 at 33-34.[7] *See also* ECF No. 96 at 68-70.

These allegations are insufficient to state a Section 2 claim under the Sherman Act, however, because "as a general matter, the Sherman Act 'does not restrict the long-recognized right of [a] trader or manufacturer engaged in an entirely private business, to freely exercise his own independent discretion as to parties with whom he will deal.'" *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). Indeed, "compelling negotiation between competitors may facilitate the evil of antitrust: collusion." *Id.*, 540 U.S. at 408. As the Court previously recognized, "[t]he Supreme Court has stated that, notwithstanding some exceptions, 'there is no duty to aid competitors.'" ECF No. 96 at 64 (quoting *Trinko*, 540 U.S. at 411). In short, Plaintiffs' Section 2 claims, as set forth in Counts 2 and 3, must fail because they are premised entirely on Verso's alleged refusal to sell the Bucksport mill to a competitor – a theory of liability previously rejected both by the Supreme Court and this Court.

As the Court already has held, Plaintiffs' allegations do not fall under the limited exceptions to the foregoing doctrine identified by the Supreme Court. *See* ECF No. 96 at 65. As a general matter, the Supreme Court has "been very cautious in recognizing … exceptions" to the

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[7] *See supra* n.2.

general principle that firms may refuse to deal with competitors "because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm." *Trinko*, 540 U.S. at 408. The First Circuit also recognizes that there is a strong presumption that firms may refuse to deal with competitors without violating the antitrust laws. *See*, *e.g.*, *Homefinders of Am. v. Providence Journal Co.*, 621 F.2d 441, 443 (1st Cir. 1980) (a newspaper with monopoly power may refuse to deal with a company wishing to publish an advertisement). While the Supreme Court previously recognized an exception to this doctrine in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), *Trinko* subsequently held *Aspen Skiing* to be "at or near the boundary of Section 2 liability." 540 U.S. at 409. *Trinko* fixed the limits of that boundary by identifying (a) that the violative conduct in *Aspen Skiing* arose out of the defendant's decision to "cease participation in a cooperative venture" with the plaintiffs and (b) that "[t]he unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end." *Id.* (emphasis in original). The defendant's refusal to reengage in the business relationship, "*even if compensated at retail price* revealed a distinctly anticompetitive bent." *Id.* (emphasis in original). But here, as the Court has held, there is no allegation that Verso and Plaintiffs were engaged in a prior "cooperative venture" and so the Aspen Skiing exception does not apply. *See* ECF No. 96 at 65.

This Court should confirm its prior ruling that Verso had no duty to sell the Bucksport mill to a competitor and that its failure to do so cannot give rise to a claim under Section 2. Accordingly, the Court should dismiss Counts 2 and 3 of the Amended Complaint.

V. THE COURT SHOULD DISMISS COUNT 4 OF THE AMENDED COMPLAINT BECAUSE PLAINTIFFS FAIL TO ALLEGE A VALID CLAIM FOR VIOLATION OF SECTION 7 OF THE CLAYTON ACT.

Plaintiffs claim that the sale of the Bucksport mill to AIM, a non-competitor, violates Section 7 because the sale of the mill to AIM ***rather than to a paper competitor*** may have the effect of removing coated printing paper capacity and that this may cause prices to rise for future consumers of coated printing paper. Am. Compl. at ¶¶ 191-92. But this theory does not present a valid claim under Section 7. Plaintiffs have failed to state a claim under Section 7 of the Clayton Act because they have not adequately alleged that the acquiring party in the transaction (AIM) will face less competition as a result of the sale, nor have they alleged that the acquisition will harm competition.

A. Section 7 Only Prohibits Transactions That Tend To Lessen Competition.

Section 7 addresses situations in which the effect of a transaction "may be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. § 18. In other words, Section 7 asks the Court to answer the following question: Does the *acquiring* party face less competition *as a result of the transaction*? *See SCM Corp. v. Xerox Corp.*, 463 F. Supp. 983, 1001-02 (D. Conn. 1978) ("Section 7 is concerned with undue concentrations of power and the anti-competitive effects of permitting one entity with market power to strengthen its position by acquisition.") (citing *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962)). But Plaintiffs fail to allege how AIM's acquisition of the Bucksport mill allows AIM to obtain or enhance market power in any market, much less the relevant market upon which they rely in the Amended Complaint – the market for coated printing paper.

As the seller in the challenged transaction, Verso is not the appropriate focus of the competitiveness analysis under Section 7. But even if it were, Plaintiffs acknowledge that, by

the sale of the Bucksport mill, Verso loses market share, and thus loses market power, in the coated printing paper market in which it competes. Am. Compl. at ¶¶ 48, 52, 173. Nothing in either the Amended Complaint or accepted economic principles suggests how such a reduction in market share could lead to a reduction in competition in the market for coated paper. To the contrary, the reduction in Verso's productive capacity undeniably presents Verso's competitors with the opportunity to gain market share by serving the customers formerly served by the Bucksport mill. Verso is aware of no authority holding that a participant in the relevant market at issue can violate Section 7 through a transaction that *decreases* its market share and, therefore, its market power.

B. Plaintiffs Fail To Allege The Requisite Lessening Of Competition Under Any Recognized Section 7 Theory.

The Supreme Court has recognized only three circumstances under which an acquisition or a merger may violate Section 7, two of which the Court already has determined do not apply to Plaintiffs' claim.

First, an entity may violate Section 7 if it acquires its direct competitor (a so-called "horizontal merger"). *See*, *e.g.*, *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963). But Plaintiffs have not alleged that AIM is a competitor of the Bucksport mill (or of Verso) or otherwise competes in the North American coated paper market (as defined by Plaintiffs). Indeed, to the contrary, they have alleged that "neither AIM nor any affiliate of American Iron have ever operated a printing paper plant." Am. Compl. at ¶ 65. Accordingly, the Court has determined that the Verso/AIM transaction is not a horizontal merger. *See* ECF No. 96 at 58.

Second, an entity may violate Section 7 if it acquires one of its suppliers or distributors (a so-called "vertical merger"). *See*, *e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). Again, Plaintiffs do not allege that the Bucksport mill is an actual or potential supplier or

distributor of AIM, and the Court has held that the Verso/AIM transaction is not a vertical merger. *See* ECF No. 96 at 58.

Finally, in a theory that first surfaced at oral argument on the preliminary injunction motion, Plaintiffs suggested a third category of merger, the "conglomerate" merger, which may violate Section 7. *See FTC v. The Procter & Gamble Co.*, 386 U.S. 568, 577 n.2 (1967) ("A pure conglomerate merger is one in which there are no economic relationships between the acquiring and the acquired firm."). What Plaintiffs refer to as a conglomerate merger, however, is in reality a merger between a company and its potential competitor (often referred to as "harm to potential competition" transactions). *See* Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L. Rev. 282, 319 (1975). There are two harm-to-potential-competition theories: (1) harm to perceived potential competition ("the threat of new entry by the ***acquiring firm*** induced competitors in the acquired firm's market to perform more competitively"); and (2) harm to actual potential competition ("because the merger forecloses the ***acquiring firm's*** future de novo entry into the acquired firm's market"). *Ginsberg v. InBev*, 623 F.3d 1229, 1234 (8th Cir. 2010) (emphasis added) (citing *United States v. Marine Bancorp., Inc.*, 418 U.S. 602, 623-35 (1974)).

Plaintiffs fail to allege facts sufficient to support harm under either of these theories for the simple reason that Plaintiffs have not alleged that Verso and AIM are actual or perceived potential competitors of one another. In fact, in their Amended Complaint, Plaintiffs clearly allege that AIM is neither a participant nor a potential participant in the coated printing paper market. *See, e.g.*, Am. Compl. at ¶ 190 (alleging AIM to be "a salvage company that has never operated a paper mill"), p. 87 (requesting that the Court prohibit Verso and AIM from closing the

sale of the Bucksport Mill to AIM or to "any other similar entity that does not have the intent or experience to operate the Bucksport Mill for the purpose of producing coated printing paper"). The allegations of the Amended Complaint thus foreclose any reliance on potential competition as a basis for challenge under Section 7.

C. Plaintiffs Improperly Attempt To Use Section 7 To Circumvent The Supreme Court's Holding In *Trinko*.

Faced with the limits of their own allegations within the four corners of the Amended Complaint, Plaintiffs offered an entirely new and unprecedented theory during oral argument on their motion for a preliminary injunction − that the Bucksport mill, during the time Verso owned it, was a potential competitor to Verso itself. This argument is patently nonsensical because it suggests that Verso is a potential competitor to itself. Verso is aware of no authority that ever has held that a company's own assets could be considered potential competitors of the company itself. Simply stated, Plaintiffs' Section 7 claim amounts to a backdoor attempt to circumvent the clear holding in *Trinko*, which, when applied here, leads to the conclusion that Verso does not have a legal obligation to do business with a competitor. Plaintiffs' attempted novel use of Section 7 is wholly unprecedented and is foreclosed by the Supreme Court's clear mandate in *Trinko*. Accordingly, the Court should dismiss Count 4 of the Amended Complaint.

VI. PLAINTIFFS LACK STANDING AS EMPLOYEES AND UNION MEMBERS.

If the Court declines to dismiss any of Plaintiffs' antitrust claims in their entirety, Verso seeks dismissal of those claims to the extent that Plaintiffs seek relief in their capacity as employees. Plaintiffs argue that they have antitrust standing as employees and as the union representing the interests of 58 union members formerly employed at the Bucksport mill because they "would suffer antitrust injury if Defendant Verso were allowed to sell the Bucksport Mill to an entity that does not intend to continue operating its paper-production facilities." Am. Compl.

at ¶ 139. This Court has already held, as a matter of law, that the loss of employment−without anything more−is insufficient to establish antitrust injury. *See* ECF No. 96 at 50. *See also Orr v. BHR, Inc.*, 4 Fed. Appx. 647, 650-51 (10th Cir. 2001); *Sharp v. United Airlines, Inc.*, 967 F.2d 404, 408 (10th Cir. 1992); *Trepel v. Pontiac Osteopathic Hosp.*, 599 F. Supp. 1484, 1493 (E.D. Mich. 1984) (loss of employment "is not the type of injury the antitrust statute was designed to remedy"); *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172 (5th Cir. 1976). Verso asks the Court, if necessary, to reaffirm this holding in the context of this motion to make clear, in the event that this case proceeds, that Plaintiffs bear the burden of showing injury to them in their capacity as consumers or indirect purchasers of coated printing paper.

VII. THE COURT SHOULD DISMISS PLAINTIFFS' SEVERANCE AND VACATION CLAIM.

As a matter of docket maintenance, the Court should enter an order dismissing Count 9 of Plaintiffs' Amended Complaint, which sets forth their claims for severance and vacation pay under Maine state law. In its previous order on these claims, the Court held that Plaintiffs no longer have a right to pursue their claim for severance and that the Court would abstain from consideration of Plaintiffs' vacation pay claims. *See* ECF No. 73 at 81, 85. Each of these holdings is finally dispositive of Plaintiffs' claims, and both the Court and Plaintiffs have interpreted them as such. *See id*. at 1 ("The Court dismisses Plaintiffs' claims for severance pay … and dismisses Plaintiffs' claims for vacation pay … ."); ECF No. 97 (Plaintiffs' motion for reconsideration) at 2 ("Plaintiffs … request reconsideration of the Court's dismissal of their severance pay claims"). Nevertheless, the wording and labeling of the Court's prior order only dismissed Plaintiffs' Motion for Expedited Declaratory Judgment and Request for Preliminary and Permanent Injunction, and did not formally dismiss County 9. *See* ECF No. 73 at 85. For

the purpose of clarity, Plaintiffs request that the Court enter an order dismissing Count 9 and adopting the Court's previous opinion.

CONCLUSION

For the reasons stated above, Defendants Verso Paper Corp. and Verso Paper LLC respectfully request that the Court dismiss Counts 1-4 and 9 of Plaintiffs' First Amended Complaint.

Dated this 2nd day of March, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2015, I caused the foregoing Motion to Dismiss to be electronically filed with the Clerk of Court using the CM/ECF system which will distribute a copy of the documents to all counsel of record.

Dated: March 2, 2015

/s/ David E. Barry

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