UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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

REPLY MEMORANDUM OF AIM DEVELOPMENT (USA) LLC IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

The First Amended Complaint ("FAC") asserts two claims against AIM, a conspiracy claim and a claim not based on conspiracy: (1) a claim under the Sherman Act, alleging that AIM and Verso conspired for AIM to salvage the Mill rather than resell it to a Verso competitor; and (2) a claim under the Clayton Act that AIM's purchase of the Bucksport Mill should be enjoined, even absent any conspiracy, because the purchase tends to lessen competition or create a monopoly. In its motion to dismiss, AIM raised four principal substantive problems with Plaintiffs' claims against it, in addition to the fact that the relief Plaintiffs seek against AIM is moot. As to the conspiracy claim: (1) Plaintiffs have failed to plead adequately any agreement by AIM not to resell the Mill, and the parties' written agreement as a matter of law is not such an agreement; and (2) the Court already has properly established as law of the case that the antitrust laws allow a Mill owner to choose the parties with whom it will and will not deal in the sale of a Mill. As to the Clayton Act § 7 claim: (3) Plaintiffs have not alleged that AIM's acquisition is what tends to create a monopoly; and (4) Plaintiffs cannot state a § 7 claim against AIM, where AIM does not operate

in the alleged market and is not acquiring an entity or asset that will operate in the alleged market.

To save their claims, Plaintiffs must overcome every one of these objections. They have failed to overcome any of them.

I. Plaintiffs Have Made No Showing That They Have Adequately Pled a Sherman Act Claim Against AIM.

A. Plaintiffs Have Not Pled a Promise by AIM to Verso That AIM Will Salvage the Mill Rather Than Resell It.

Tellingly, Plaintiffs pass over in utter silence the detailed analysis of the Membership Interests Purchase Agreement ("MIPA"), set forth in AIM's motion to dismiss. (AIM Mot. at 8-11). That analysis shows clearly that AIM did not make the "promise" to Verso that Plaintiffs allege AIM made, and on which their entire claim of conspiracy hangs – a promise that AIM would salvage the Mill. The Court rightly so concluded as a matter of law in denying Plaintiffs' request for a preliminary injunction. (Order Den. TRO/PI at 58-59). Plaintiffs' complete failure to address this issue shows that there is no valid objection to the Court's prior conclusion and the analysis AIM has presented, and it is a concession that the agreement between AIM and Verso is not as they alleged.

Ignoring the written agreement completely, Plaintiffs simply repeat allegations that AIM has engaged in its ordinary line of business by salvaging another Verso mill and by salvaging a NewPage mill. As Plaintiffs themselves point out, AIM does not operate paper mills; it is in the business of salvaging such assets. (FAC at ¶¶ 65, 198). The allegation that AIM bought a paper mill, or more than one paper mill, in order to salvage it, is an allegation of independent conduct; it is not an allegation that bespeaks conspiracy.

Additionally, Plaintiffs ignore AIM's argument that the conspiracy they allege is completely implausible, as far as AIM is concerned. Again, it requires no conspiracy for AIM to agree to purchase a mill and then to salvage it; that is

AIM's business. And Plaintiffs' claim that AIM must have conspired not to resell the mill to Verso's competitors out of fear of angering Verso is pure speculation that will not sustain a claim of conspiracy – especially where, as here, the actual written agreement between Verso and AIM directly contradicts Plaintiffs' speculation. And though no more is needed, there is more: Plaintiffs can offer no plausible explanation why AIM would fear angering one paper maker, Verso, more than AIM would fear angering another paper maker, a Verso competitor, by refusing to deal with it. If there were answers to these arguments, Plaintiffs would have presented them. Instead, Plaintiffs pass over them in silence.

B. Plaintiffs Have Shown No Basis to Overcome the Law of the Case That *Trinko* Is Fatal to Their Antitrust Theory.

Plaintiffs claim that *Verizon Comms., Inc. v. Trinko*, 540 U.S. 398 (2004), does not apply here because Plaintiffs are not "alleging that the Defendants are 'refusing to deal' with a competitor. . . . Rather, here, the issue is Verso's choice . . . to sell[] the Bucksport Mill to a scrapper, rather than a competitor." (Pl. Opp. At 34). Plaintiffs' distinction between refusing to deal with a competitor in selling the mill and selling the mill to AIM "rather than a competitor" is a distinction without any difference. Nor does Plaintiffs' reference to reduction of supply distinguish this case from *Trinko*. Verizon chose not to sell CLECs a portion of its infrastructure; here, Plaintiffs allege Verso chose not to sell a competitor a portion of Verso's infrastructure. In *Trinko*, Verizon's choice reduced the supply of capacity available from competitive sellers; here, that is precisely what Plaintiffs complain about: Verso's choice not to sell to a competitor reduces the supply of capacity available from competitive sellers.

II. Plaintiffs Have Made No Showing That They Have Adequately Pled a Clayton Act Claim Against AIM.

AIM pointed out in its Motion that Plaintiffs were not alleging that the AIM acquisition itself lessens competition or tends to create a monopoly; they

challenge Verso's decision to shut down the Mill. In their Opposition, Plaintiffs double down on this approach of challenging a very different transaction than the AIM acquisition: now, the Verso-NewPage merger is the transaction that they say constitutes a Clayton Act violation, and the alleged inadequacy of DOJ-ordered divestitures is the sole reason that Plaintiffs "assert that divestiture of more facilities, and mandatory sale of those mills as going concerns . . . is essential." (Pls.' Opp. At 39-40). This recasting of their Clayton Act claim is in vain and inappropriate – for reasons that Verso explains and that AIM adopts here. AIM additionally would point out that it is even more true now that AIM's purchase is not the "acquisition" they are challenging under the Clayton Act.

Notably, Plaintiffs in their opposition point to not a single precedent for the relief they seek against AIM. Plaintiffs point to no case that says an asset owner violates the Clayton Act by selling its own asset to a non-competitor (or refusing to sell its own asset to a competitor). Moreover the cases they do cite involved acquiring the assets of competitors to prevent them from competing. Those cases are off point, as AIM has not acquired any competitor's assets. So Plaintiffs change tack, claiming that AIM's purchase of the Mill, and its subsequent dispositions of Mill-related assets – innocent, independent conduct, according to the facts Plaintiffs have pled – all can be undone not because AIM has violated the Clayton Act but because, they allege, the NewPage-Verso merger has. Plaintiffs point to no case that would allow the Court – in the exercise of an *equitable* power no less – to infringe so on the rights of third parties who are not conspirators. Plaintiffs far too blithely assume that 'divestiture' is available to them as a remedy against AIM, when in fact, "Never has a federal court ordered divestiture at the request of a private party who was neither a customer nor a competitor of the merging entities."

See Ginsburg v. InBev NV/SA, 623 F.3d 1229, 1234 (8th Cir. 2010). Here, Plaintiffs are neither customers nor competitors of AIM (nor of any other defendant, for that matter). And indeed, the equities call for dismissal of Plaintiffs' claims against AIM here at the pleading stage, given the fact that Plaintiffs as a matter of law, have not pled any conspiracy on AIM's part.

The cases Plaintiffs cite recognize quite clearly that the exercise of equitable power under the antitrust acts must not unduly interfere with vested rights, especially those of innocent third parties. *See United States v. Am. Tobacco Co.*, 221 U.S. 106, 185 (1911) (courts must keep "a proper regard for the vast interest of private property which may have become vested in many persons as a result of the acquisition . . . without any guilty knowledge or intent"). Divestiture of assets – even of a participant in an affected market – is the "most drastic" of antitrust remedies. *Ginsburg,* 623 F.3d at 1234. Even more drastic – and unprecedented – would be divestiture ordered against a firm like AIM, a stranger to the affected market.

Accordingly, where, as here, an antitrust plaintiff has failed to make the showing necessary to obtain a preliminary injunction; such plaintiff is neither a competitor nor a customer of the firm allegedly making an unlawful acquisition; and divestiture is the sole remaining claimed equitable remedy, a Section 7 claim will be dismissed on the face of the pleadings, because equitable considerations could never justify it, even assuming an antitrust violation and antitrust injury could be proven. *See Ginsburg*, 623 F.3d at 1234-36.

All the more so should Plaintiffs' claims here be dismissed now. Plaintiffs have failed to obtain a preliminary injunction of AIM's acquisition of the Mill. And not merely because they had some chance of success against AIM that was too remote to warrant preliminary relief, but because what they pled as an

antitrust violation against AIM was, as a matter of law, not prohibited, and because the agreement they alleged was, again as a matter of law, based on a mischaracterization of a contract. Thereafter, AIM's acquisition has gone forward and closed, and AIM has carried on disposing of the assets acquired. Plaintiffs would have this Court order these subsequent purchases by innocent parties – AIM's purchase from Verso, and third parties' subsequent purchases of acquired assets from AIM – all unwound, in order to sell such assets on terms of Plaintiffs' choosing. In short, Plaintiffs are trying now to avoid dismissal of their claims against AIM on the grounds that the Court might order even more drastic relief against AIM than the Court has already denied, relief no court has ever ordered against a person like AIM. In doing so, Plaintiffs make a claim on the Court's equitable powers that the antitrust laws simply do not countenance, and that should be rejected at the pleading stage, just as Plaintiffs' request was rejected in *Ginsburg*.

In addition to the private equities arising from the vested rights of innocent third parties, the Court should reject Plaintiffs' claims based on the broader, public equities. As AIM noted in its opening brief, the Mill is a marketable asset and AIM bought it on the market, in order to run the power plant, salvage the Mill and redeploy the site. Plaintiffs are seeking to use the antitrust laws to attack a competitive outcome in the market for the Bucksport site. The Court should not allow the antitrust laws to be used as an instrument of the very harm those laws are designed to prevent.

Finally, the Court should not artificially blind itself to what is really going on here – given that the Plaintiffs come before the Court asking it to do equity. Plaintiffs dislike AIM's purchase of the Mill, because it lays bare the fact that their jobs – lost before AIM ever got involved – are not coming back. And they are using their antitrust claim for leverage in their employment dispute with

Verso over severance or for other relief related to their employment, not because they seek to vindicate their interests as consumers. Their Opposition betrays them clearly. Although the sole antitrust standing Plaintiffs have before the Court is as alleged indirect purchasers of paper products, they disavow that interest. Their sole interest in this lawsuit is as employees hoping to revive their jobs by a court-ordered sale of the Bucksport Mill to a particular purchaser whom the free market has not brought forward. Any other remedy that might address Plaintiffs' ginned-up claims of lessened competition or tendency toward monopoly but that did not affect AIM's use of the Bucksport Mill would not satisfy them. As they say – without any apparent sense of irony – such relief would "aid direct and indirect consumers," but as to Plaintiffs themselves, it "would be a Pyrrhic victory." (Pls. Opp. At 29). The Court could ask for no clearer evidence that Plaintiffs' claim of standing is nothing but a trick they are playing to try to leverage an anticompetitive result in the market for the disposition of the Bucksport site.

CONCLUSION

For all the foregoing reasons, and the reasons set forth in AIM's motion to dismiss and in the motion to dismiss and reply brief of Verso Paper, Plaintiffs' claims against AIM should be dismissed with prejudice and costs awarded to AIM.

DATED: April 8, 2015

/s/ Clifford H. Ruprecht
Clifford H. Ruprecht
ROACH HEWITT RUPRECHT
SANCHEZ & BISCHOFF, P.C.
66 Pearl Street, Suite 200
Portland, ME 04101
(207) 747-4870
cruprecht@rhrsb.com

Attorneys for AIM Development (USA) LLC

CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed the foregoing Reply Memorandum of AIM Development (USA) LLC in Support of Its Motion to Dismiss Plaintiffs' First Amended Complaint with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: April 8, 2015

/s/ Clifford H. Ruprecht

Clifford H. Ruprecht
ROACH HEWITT RUPRECHT
SANCHEZ & BISCHOFF, P.C.
66 Pearl Street, Suite 200
Portland, ME 04101
(207) 747-4870
cruprecht@rhrsb.com