UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, LOCAL 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 of Local Lodge 1821; COREY DARVEAU, individually and as President of Local Lodge 1821; BRIAN SIMPSON, individually and as President of Local Lodge 1821; BRIAN ABBOTT, individually and as Secretary of Local Lodge 1821; HAROLD PORTER, individually and as Financial Secretary for Local Lodge 1821, Plaintiffs, v. VERSO PAPER CORP., VERSO PAPER LLC, and AIM DEVELOPMENT (USA) LLC	Civil No. 1:14-CV-00530-JAW

MEMORANDUM OF AIM DEVELOPMENT (USA) LLC IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

AIM Development (USA) LLC ("AIM") is under contract to acquire ownership of the Bucksport Mill. Plaintiffs seek to enjoin AIM's purchase until at least June 2015, in the hope an alternative buyer can be found who is more suitable to them, in which case they seek to block the purchase forever. Plaintiffs have not made out any of the elements they must prove to obtain such an extraordinary injunction. Their request should be denied.

LEGAL STANDARD

Plaintiffs seek an injunction under the authority of §16 of the Clayton Act, which authorizes an injunction "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." 15 U.S.C. § 26. Those conditions and principles are well known in this Court. "'A preliminary injunction is an extraordinary and drastic remedy that is never awarded as of right.'" *Bruns v. Mayhew*, 931 F. Supp. 2d 260, 266 (D. Me. 2013) (Woodcock, J.) (quoting *Peoples Fed. Sav. Bank v. People's United Bank*, 672 F.3d 1, 8-9 (1st Cir. 2012)). Plaintiffs bear the burden of proof on each of the elements of an established four-factor test for obtaining a preliminary injunction. *Id.* They must prove that the following four factors weigh in their favor: "'(1) the likelihood of success on the merits; (2) the potential for irreparable harm [to the movant]; (3) the balance of the relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest.'" *Id.* (quoting *Esso Std. Oil Co. v. Monroig-Zayas*, 445 F.3d 13, 17-18 (1st Cir. 2006)) (square brackets in original). The Court enjoys wide discretion in determining whether to grant a preliminary injunction. *See id.*

ARGUMENT

Proof of likelihood of success on the merits is the "sine qua non" of a plaintiff's burden of proof to obtain a preliminary injunction. *Id.* If a plaintiff does not prove it is likely to succeed on the merits, "'the remaining factors become matters of idle curiosity,'" because satisfying them will not entitle the plaintiff to relief. *Id.* (quoting *New Comm Wireless Servs., Inc., SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002)). Plaintiffs' request for an injunction here is based on their claim that they will prove a violation of federal and state antitrust laws. The opposition brief being submitted by Verso thoroughly explains how Plaintiffs have not shown a likelihood of success on the merits of any of their antitrust claims. To avoid unnecessary duplication of briefing, AIM simply adopts by reference and joins in all arguments offered by Verso.

As a factual matter, AIM would simply add that the factual premise of Plaintiffs' claim of a conspiracy between AIM and Verso is false. AIM is under no restriction whatsoever regarding its disposition of the Mill, has not promised Verso that AIM will dismantle the Mill, and in fact if AIM were offered a better economic opportunity than salvage from a manufacturer seeking to make paper at the Mill, AIM would sell to that manufacturer. (Declaration of Jeff McGlin (hereinafter "McGlin Decl.") at ¶ 13).[1]

[1] Mr. McGlin's Declaration is being filed contemporaneously herewith.

Based on Plaintiffs' unlikelihood of success alone, the Court should deny the request for a preliminary injunction. The Court's analysis can and should stop there.

If more were needed – and no more is needed – the Court should deny Plaintiffs' request for a preliminary injunction because Plaintiffs have not proven that the other three elements weigh in their favor.

A. Plaintiffs have not shown that they are exposed to a risk of harm that is both irreparable and preventable.

Plaintiffs devote only one short paragraph in their brief to the issue of irreparable harm (Pl. Mot. At 16). The only harm Plaintiffs claim is irreparable is the fact "that they will lose their ability to work for the Bucksport Mill if the Mill is sold to AIM and it is destroyed." (*Id.*). This shows neither that Plaintiffs will suffer harm that is irreparable nor that the injunction they seek would prevent that harm, both of which they must show in order to make out their claim for injunctive relief.

First, the harm Plaintiffs claim is not irreparable, if they can prove their antitrust claims. If Plaintiffs were correct about their antitrust claims – and the Court reaches the issue of irreparable harm only if Plaintiffs are likely to succeed on the merits of those claims – then they will have persuaded the Court that they have suffered antitrust injury in the loss of their jobs, for which Plaintiffs will have a damages remedy available to them under the antitrust laws. Obviously AIM disagrees that Plaintiffs have any such injury or remedy, for the reasons set forth in Verso's opposition. But if Plaintiffs are likely to succeed on the merits of

their antitrust claims, then they have such a statutory remedy available, and as a treble damages remedy, it is more than compensatory.

Second, the injunction Plaintiffs seek is not likely to cure the harm Plaintiffs allege. The loss of Plaintiffs' jobs is not being caused by AIM's purchase of the Mill; it is being caused by the Mill's unprofitability as a paper-making operation. Before AIM ever learned of the opportunity to purchase the Mill, much less agreed to purchase it, Verso had publicly announced the impending shutdown of the Mill and had notified the Plaintiffs and other Mill employees of the loss of their jobs. (McGlin Decl. at ¶ 10). At that time, the Mill was being actively marketed. *See id.* Plaintiffs have offered no evidence of any person interested in purchasing the Mill to continue its paper-making operations. (Indeed, if Plaintiffs' allegations were at all plausible, one would expect such interested purchasers to be before this Court now loudly complaining of the boycott against them as purchasers; instead we have only a union and its members tacking implausible antitrust allegations onto their severance-pay dispute). Accordingly, Plaintiffs have not shown any likelihood that such a buyer will express such an interest before the requested injunction would expire in June. Additionally, Plaintiffs have offered no evidence that any of the named Plaintiffs will be available to work at the Mill come June, if a buyer unexpectedly were to appear at that time. The Court has no evidence that these Plaintiffs, having currently lost their jobs, and instead of finding other work in the area or even leaving the

area altogether, will simply wait around hoping against hope that a paper maker buys the Mill. In other words, not only will stopping AIM's purchase not prevent these workers from losing their jobs, finding a new buyer for the Mill (and there is no evidence one can be found) will not necessarily get them their jobs back.

Moreover, if a buyer exists who places more value on the Mill than AIM does (and again, there is not a shred of evidence of any such buyer, and the evidence in fact suggests no such buyer does exist), AIM is free to assign its purchase rights to that buyer now with Verso's consent, which Verso cannot unreasonably withhold, (Membership Interests Purchase Agreement at § 11.05);[2] AIM is also unrestricted after closing in its ability to resell the Mill to any buyer of AIM's choosing. (McGlin Decl. at ¶ 13). Indeed, if a buyer appeared offering better economic opportunity than salvage, AIM would sell to that buyer. (*See id.* at ¶ 13). In short, if there is a buyer willing to pay to save the Plaintiffs' jobs, nothing about the AIM purchase transaction has prevented such a buyer from doing so, and nothing is now preventing that buyer from doing so. The injunction Plaintiffs seek simply will not lift any obstacle to such a buyer coming forward. But there is no evidence such a buyer exists. The evidence suggests the opposite. A brokered sale at arms' length has

[2] A copy of the Membership Interests Purchase Agreement, cited by Plaintiffs and incorporated by reference in their Complaint but not attached thereto, is attached hereto as Exhibit 1.

produced presumably the best terms the market is willing to offer on the Bucksport Mill.

B. Plaintiffs have not shown that the harm to them of a wrongly denied injunction outweighs the harm to AIM of a wrongly granted injunction.

The Declaration of Mr. McGlin accompanying this Memorandum sets forth in some detail the very specific harms to AIM should the requested injunction be granted. By contrast, Plaintiffs have offered no evidence – and only the most conclusory assertions of counsel – of any countervailing balance of harms. The only harm counsel even asserts is that "plaintiffs will suffer a great and irreparable hardship if the Bucksport Mill is destroyed . . .. In that case, plaintiffs would be left without jobs, and the entire Bucksport community will be negatively affected." (Pl. Mot. at 17). The evidence does not support those bald assertions.

As noted above, there is no evidentiary record to establish that a buyer exists who is willing to employ Plaintiffs in the Mill, nor is there evidence that Plaintiffs would be available for such employment if some such buyer unexpectedly materialized in the future. Counsel's vigor is no substitute for evidence.

There is evidence, however, of substantial countervailing harm to AIM.

First, even if Plaintiffs were correct that a buyer exists who is willing to offer a substantially better price for the Mill, then that opportunity for

profit belongs to AIM by virtue of its purchase agreement, and the injunction would serve only to steal that opportunity from AIM.

Second, if the injunction does no more than delay AIM's closing until June, that delay will significantly harm AIM. AIM will lose the benefit of sale of the output of the power plant for the entire period of any such delay. (McGlin Decl. at ¶¶ 15.b, 18.c). AIM will lose the opportunity to control in February the forward sale of 2019 capacity for the power plant's output. (*Id.* at ¶¶ 15.a, 18.c). AIM will lose the benefit of significant mobilization costs it will have to reimburse to the power plant operator it has retained. (*Id.* at ¶ 18.d). And AIM will lose the time value of its $10 million purchase deposit, as well as incur the cost of encumbering $48 million of capital for the balance of the purchase price, which will have to be maintained as committed to this transaction and unavailable for other corporate uses, even though AIM will be deprived during the period of delay of any return on the Mill investment. (*Id.* at ¶ 18.a & b).

So much for the harms AIM will suffer if the closing is merely delayed. Third, there is a significant chance that the injunction will kill this transaction, even if no other buyer can be found. If the Court grants the injunction, Verso and AIM, each independently, will be at liberty to terminate their current purchase agreement, by its terms. (Membership Interests Purchase Agreement at §§ 8.01(b), 8.01(c)(i), 8.01(d)(ii), 6.01(e)). Since delay of the closing will significantly affect the economics of the

transaction for AIM, as noted above, the transaction likely will have to be renegotiated, and there is no guarantee the parties will reach new terms. (Verso, too, may see the transaction differently if it is delayed, since Verso will lose the immediate liquidity benefits a prompt closing offers.) Granting the injunction could lead to the deal being canceled altogether, and that will cause additional harm to AIM. If the deal does not close at all, AIM will obviously lose any profit it expects to make on the deal. (*Id.* at ¶ 17). Those profits would come from future sales of power, disposition of the manufacturing facility at some point in the future (salvage will not commence immediately, *see id.* at ¶¶ 13, 15.c), as well as from future uses of the site that AIM has not yet determined. AIM may develop the site to be used profitably in conjunction with its other recycling facilities in Maine, may develop the deepwater port associated with the site, or may find other profitable disposition of the site. (*Id.* at ¶ 17). In addition, AIM has over $200,000 of costs sunk in the purchase transaction already, which will be unrecoverable if the deal does not close. (*Id.*)

Finally, granting the injunction would cause other, collateral harms to AIM. When acquiring a manufacturing facility for salvage, AIM does not include in its due diligence any investigation of the manufacturer's industry or perform any antitrust analysis of such industry. To do so would impose significant transaction costs of no benefit to AIM. (*Id.* at 6). If the Court were to suggest AIM can be liable for an antitrust

violation, or be deprived of its time, effort and resources committed to an acquisition merely because displaced workers invoke the shibboleth of the antitrust laws, AIM's transaction costs and risks will rise in ways that yield no benefit to AIM or its customers.

While the Court can require a plaintiff to post security to protect enjoined parties from harm caused to them if they turn out to have been wrongly enjoined, *see* Fed. R. Civ. P. 65(c), a bond is not a practical solution in this instance. If a preliminary injunction issues, there is a significant chance the deal will be abandoned, in which case, the antitrust issues would likely become moot, or at least as a practical matter no longer worth litigating to the parties, and there would never be a final determination that AIM was wrongly enjoined, so as to trigger payment on the bond.

In short, the balance-of-harms tips substantially in AIM's favor. Plaintiffs have offered no evidence of any harm to them if their injunction is wrongly denied, and AIM has marshaled a record of very substantial costs and harms that it will suffer as a direct result of a wrongly issued injunction, whether that injunction merely delays its closing, or leads to its closing being abandoned altogether.

C. Plaintiffs have not shown that their request for an injunction serves the public interest.

In addition to the substantial harms to AIM, Plaintiffs' requested injunction threatens harms to the public interest.

First, as a result of Verso's settlement with the State of Maine and with all relevant unions other than the Plaintiff union here, all Bucksport Mill workers will receive all of their negotiated severance and vacation benefits within five days of AIM's closing, (or by March 19, 2015 if AIM has not closed by then). *See* Consent Order dated Dec. 23, 2014, *State of Maine et al. v. Verso Paper Corp. et al.*, Kennebec County Superior Court Docket No. CV-14-247, at ¶ 11 (the Consent Order was filed with this Court on Dec. 24, 2014, as Exhibit B to the Declaration of David Barry, Esq., Dkt. Item 40-3). Depriving those workers of their money during the heating season, and in the earliest part of their search for new employment, is a significant harm to those workers, to their dependents, and to local businesses that benefit from those workers' ability to spend.

Second, if the Mill cannot be used for paper making, it is in the best interest of the community that the site be redeployed to some other productive use. AIM is best positioned to make that happen promptly. It is ready to buy. It is exploring strategies to put the deepwater port to productive use. And it is exploring strategies for use of the Bucksport facilities and site. (*See id.* at ¶ 17).

Finally, for the reasons previously discussed, and discussed in the memorandum and supporting materials submitted by Verso, enjoining AIM's purchase of the Mill is destructive, not promotive, of competition. Dislocation of the mill workers is an unfortunate consequence of robust

competition, but it is not in the public interest for the courts to impair such competitive outcomes.

Plaintiffs claim there is a public interest in the recent unemployment of the mill workers. If there is, it does not affect the injunction analysis. This Court cannot change those workers' unemployment; it cannot put them back to work. Those particular jobs are gone and are not coming back, whether the Court grants the requested injunction or not. The broader public interest weighs decisively against the injunction Plaintiffs are seeking. The public good is not served by having the mill site idled while Plaintiffs wait with fingers crossed for a suitor they think they will like better than AIM, and who does not exist based on the available evidence. The site needs to be put to productive use, and the displaced workers cannot afford to wait on their search for substitute employment, or to forbear from alternative employment based on false hopes that the Mill will run again some day. Nor is the public interest served by displaced workers being denied prompt access to their negotiated severance and wages. The displaced mill workers' struggles should not be taken lightly, and the support they need should not be dallied with. The public interest ultimately is disserved by courts, rather than markets, deciding how assets like mills should best be used, or who should own them.

CONCLUSION

For all the foregoing reasons and the reasons set forth in the opposition of Verso Paper Corp., Plaintiffs' motion for a preliminary injunction or temporary restraining order should be denied.

DATED: January 2, 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 Notice of Appearance with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: January 2, 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