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

MOTION OF AIM DEVELOPMENT (USA) LLC TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT WITH INCORPORATED MEMORANDUM OF LAW

NOW COMES the Defendant, AIM Development (USA) LLC ("AIM"), by and through its undersigned counsel, and pursuant to Fed. R. Civ. P. 12(b)(6), moves to dismiss all claims against it in Plaintiffs' First Amended Complaint ("FAC").

Plaintiffs have dismissed all of their state-law antitrust claims (Counts V through VIII Amended Complaint). Count IX is a severance-pay claim that is not stated against AIM. What remains are four counts (Counts I through IV)

under the federal antitrust laws. Each of those counts fails as a matter of law to state any claim on which relief can be granted. Counts I and II plead claims against Verso only for violations of Sherman Act sections 1 and 2, respectively. AIM adopts by reference and joins in Verso's arguments in favor of dismissal of those counts, but those counts are not pled against AIM. Only counts III and IV are pled against AIM. Count III alleges a conspiracy between AIM and Verso in violation of § 2 of the Sherman Act. (Plaintiffs have not pled any Sherman Act § 1 claim against AIM, which would fail because AIM is not a competitor of any paper maker and would fail for the additional reasons set forth in Verso's motion to dismiss, which AIM adopts here without repeating). Count IV is a Clayton Act § 7 claim to enjoin the AIM acquisition as tending to lessen competition or create a monopoly. None of these counts states a claim on which relief can be granted against AIM. Accordingly, AIM seeks dismissal of this Action as to AIM, with prejudice and with costs.

AIM adopts the factual recitation in Verso's motion to dismiss without repeating it here. Plaintiffs' federal antitrust claims against AIM are that AIM and Verso, in violation of the Sherman Act, conspired for Verso to shut down the Bucksport Mill and for AIM to salvage the Mill, that Verso refused to sell the Mill to any competitor, and that AIM's acquisition of the Mill in order to salvage it must be enjoined under the Clayton Act because discontinuance of the Mill's operations will reduce the supply of coated printing paper in the North American market. In its ruling denying Plaintiffs' motion for a preliminary injunction, this Court has established as law of the case three principles that doom Plaintiffs' claims against AIM as a matter of law:

1. As a matter of law, the Verso-AIM Membership Interests Purchase Agreement does not evidence any agreement between Verso and AIM for AIM not to sell the Bucksport Mill to a competitor of Verso.

2. As a matter of law, the Verso-New Page merger agreement does not evidence any agreement between Verso and NewPage that Verso would close or sell the Bucksport Mill.
3. The antitrust laws generally do not require firms to deal with their competitors, *see, e.g., Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), and no exception applies to any refusal of Verso to sell the Bucksport Mill to a competitor – a factual premise AIM accepts solely for purposes of this motion and solely for the sake of argument.

The additional fatal flaw in Plaintiffs' complaint is a central, legally deficient theory that is never explicitly stated, because to state it is to refute it – namely, that any reduction of capacity by a manufacturer or discontinuance of a manufacturing facility threatens competition because it reduces manufacturing supply and therefore might lead to higher prices. That theory is incorrect as a matter of law. Competitive markets respond to shifting demand by curtailing supply, and the law of supply and demand can raise prices in functioning competitive markets as a result of such curtailments. The bare allegation that shuttering or scrapping the Bucksport Mill will reduce the supply of coated paper in North America and that such a curtailment of supply will raise prices in that market fails to state any injury to competition.

Finally, Plaintiffs' antitrust claims are now largely moot. The same legal principles of mootness set forth in Verso's motion to dismiss apply here, and AIM adopts them without repeating them. The vast majority of the relief Plaintiffs seek in their complaint is to enjoin AIM's acquisition of the facility and to require Verso to try to sell the facility to someone else. But AIM's acquisition has now closed, and all of those claims are moot. The only claims for relief that remain even technically live against AIM are the request for a

declaration that the Verso-AIM agreement violated the Sherman Act (Prayer for Relief ¶ 2), and that the Court prohibit AIM until June 1, 2015 from taking certain actions they allege would make sale of the Mill to a Verso competitor more difficult, (*id.* ¶ 5(iv) & (vi)). The Court has already denied these claims for status quo relief. (*See* Order Denying Plaintiffs' Request for Temporary Restraining Order and Preliminary Injunction (Jan. 20, 2015) (hereinafter, "Order Den. TRO/PI"). To the extent the injunctive claims are not technically moot until June 1, 2015, they are moot for all practical purposes, since AIM is not prohibited now from taking the actions Plaintiffs seek to enjoin.

Standard of Review

A motion to dismiss tests the legal sufficiency of the complaint. The motion should be granted where the properly pled factual allegations of a complaint, even if true, would not entitle the pleader to the relief requested. The Court must take the properly pled factual allegations as true, but the Court is not required to credit legal conclusions couched as factual allegations. Although the Rules of Civil Procedure require only a "short, plain statement" of the pleader's entitlement to relief, and a complaint "does not need detailed factual allegations, 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." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (square brackets in original) (citations omitted). The Court need not accept as true an allegation in a complaint that is merely "a legal conclusion couched as a factual allegation." *Id.* Rather, the factual allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Id. See also Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

The Court is not limited to the four corners of the Amended Complaint in deciding this Motion; without converting the motion to dismiss into a motion for summary judgment, the Court can also consider any exhibits to the FAC or documents incorporated by reference into the FAC, as well as any documents (the authenticity of which is not questioned) to which the FAC's allegations are linked or on which they depend. *United Auto., Aero., Agr. Implement Workers of Am. Int'l Union v. Fortuño*, 633 F.3d 37, 39 (1st Cir. 2011).

The courts' scrutiny of antitrust claims at the pleading stage is searching. In an antitrust complaint, the allegation that parties conspired merely states a legal conclusion. Accordingly, "a bare assertion of conspiracy will not suffice. . . . [A] conclusory allegation of agreement at some unidentified point does not supply facts adequate to show agreement." *Twombly*, 550 U.S. at 556-57. Indeed, to prove an antitrust claim, it is not enough to prove facts from which a conspiracy is one possible inference. A plaintiff fails to state a claim for antitrust relief by pleading facts "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Id.* at 554. A plaintiff must come forward "at the pleading stage [with] allegations plausibly suggesting (not merely consistent with) agreement." *Id.* at 557. Even an allegation that a monopolist has foregone a profitable transaction fails to state a claim if the monopolist would see it in its own best interest to refrain from the transaction. *Id.* at 567-68 (allegation that incumbent monopolists refrained from pursuing "especially attractive business opportunities" in each other's geographical territories failed to state a claim where each monopolist plausibly "would see their best interests in keeping to their old turf," and where monopolists "doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword.") A correct perception that another

will act in a way that it would be unlawful to agree to act does not state a claim of conspiracy, and acting on that correct perception is not an antitrust violation.

These pleading standards follow from rigorous application of the requirement that antitrust plaintiffs plead support for the strict elements of antitrust proof. To prove a conspiracy, it is not enough to prove conduct that is consistent with both unlawful agreement and with lawful conduct and let the jury decide; rather, the plaintiff must offer proof that "tend[s] to exclude the possibility of independent action." *Id.* at 554 (citing *Monsanto Co. v. Spray-Rite Svc. Corp.*, 465 U.S. 752 (1984); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). Accordingly, at the pleading stage, the complaint must contain allegations "plausibly suggesting (not merely consistent with) agreement"; allegations of facts "that could just as well be independent action" do not suffice. *Twombly*, 540 U.S. at 556-57.

The foregoing rules are not mere technicalities of federal procedure; they are an important substantive component of the proper application of federal antitrust law. The Supreme Court long has recognized that the antitrust laws pose an inherent danger: unless cautiously deployed, they can become the instrument of the very evil they are designed to prevent, namely, injury to competitive markets or deterrence of robust competition. *See, e.g., Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458-59 (1993). So, for example, the astronomical costs and delays of antitrust discovery and litigation provide a substantial disincentive to defend suits to judgment, even though truly competitive conduct has been challenged, and those costs and delays are a powerful deterrent to lawful conduct, if challenges to that lawful conduct survive beyond the pleading stage. *See Twombly*, 550 U.S. at 557-59. Moreover, the Supreme Court has recognized that antitrust plaintiffs' interests are not

always aligned with the interests of competitive markets, specifically observing that labor unions may make poor antitrust plaintiffs because their interests are not aligned with the interests in competitive markets for employers' goods and services that the antitrust laws are designed to protect. *See Associated Gen'l Contractors v. Calif. State Council of Carpenters*, 459 U.S. 519, 539-40 (1983) ("As a general matter, a union's primary goal is to enhance the earnings and improve the working conditions of its membership; that goal is not necessarily served, and indeed may actually be harmed, by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals. . . . Set against this background, a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains.") It is for these reasons that the Supreme Court insists that antitrust pleadings be rigorously reviewed at the motion to dismiss stage to ensure that they plead plausible claims on behalf of plaintiffs with real antitrust injury.

ARGUMENT

Plaintiffs concede they cannot recover if they merely are challenging Verso's response to competitive conditions by reducing output: "Verso is not merely exercising the right of a normal business in a competitive market to shut down a (purportedly) unprofitable plant. Verso's monopolistic and conspiratorial scheme involved acquiring market dominance through acquisition of rivals; colluding with AIM to shut down coated paper plants so as to reduce output in the relevant markets over which it exercises dominance; and most importantly selling off plant assets on below-market terms to a scrap metal company while refusing to entertain more profitable bids for the same plants from rival paper companies." (FAC ¶ 76).

Plaintiffs' problem is that, at bottom, all they have pled is a challenge to a decision to reduce output. Everything Plaintiffs have pled in an effort to color that competitive activity as something forbidden is legally insufficient – a combination of legal theories that are nonviable as a matter of law, and bare legal conclusions posing as factual allegations, factual allegations consistent with independent conduct, or characterizations of written contracts that are wrong as a matter of law. That is not enough to state a claim for relief under the antitrust laws. The pleading, defective on its face, should be dismissed as to AIM.

I. The Conspiracy Claim Against AIM Fails As a Matter of Law.

A. The complaint fails as a matter of law to allege an actual unlawful agreement between AIM and Verso.

Plaintiffs allege that AIM conspired with Verso to assist Verso in an effort to monopolize the alleged North American market for coated paper. (FAC ¶ 182). The FAC is littered with conclusory assertions that Verso and AIM colluded, conspired or unlawfully agreed, but when it comes to specifics to support those conclusions, the FAC offers far less than the law requires. The allegation of AIM's acquisition of a Verso mill in Minnesota after than mill was damaged in a fire, (FAC ¶ 63), is precisely the kind of allegation of independent conduct that does not bespeak conspiracy. (The allegation that AIM acquired a mill from NewPage also does not bespeak conspiracy, for the same reason, and for the additional reason that Plaintiffs do not allege anywhere that AIM conspired with NewPage.)

The allegation of agreement between Verso and AIM to have Bucksport destroyed comes down to be the following: "The Verso/AIM Membership Interest Purchase Agreement ("MIPA") includes in Sec. 1.10 ('Definitions'), a

highly relevant definition of what AIM intends to do with the Bucksport Mill: 'Buyer's Intended Use' means . . . use of the [Mill facility] for the generation of steam and electricity . . . use of the Landfill as a landfill . . . and . . . activities involving the Mill that are consistent with Buyer's and its Affiliates' current principal business operations." (FAC ¶ 56). "The [MIPA] contract is very clear that Verso expects AIM to destroy the Bucksport Mill . . . and AIM promises to do it." (FAC ¶ 186). That is not enough.

Obviously, Verso's unilateral expectation about what AIM might do does not constitute a conspiracy; it is only the allegation of AIM's "promise[] to do it" that alleges an agreement of any kind (ignoring for now the problem that the alleged "promise" is not a conspiracy to restrain trade). This allegation fails on the face of the pleading, because the MIPA itself – which is incorporated by reference in the Plaintiffs' complaint and can be considered by the Court without converting this motion into a motion for summary judgment – proves the allegation is false. The Court is not required to accept this allegation as true, where it purports only to characterize the content of a written agreement, and the characterization is plainly wrong.

The only provision of the MIPA that Plaintiffs rely on to support the allegation is the definition in the Agreement of the term "Buyer's Intended Use." (FAC ¶¶ 56, 186). The Court already has noted that Plaintiffs have mischaracterized that provision, which does not obligate AIM to scrap the Mill or restrict AIM's ability to sell the Mill to any buyer of its choosing. (Order Den. TRO/PI at 58-59). That conclusion is clearly correct. There is no representation or covenant of AIM as buyer that invokes the "Buyer's Intended Use" or that promises not to sell the Mill to any other person. To the contrary, the MIPA expressly conferred on AIM the right to assign its purchase rights to any person of its choosing, with consent from Verso required for a transfer prior to

closing, which consent Verso could not unreasonably withhold. (*Id.* at 59-60; MIPA § 11.05).

The definition of "Buyer's Intended Use" operates only in representations and covenants given by Verso as seller to AIM as buyer. These representations and covenants simply ensure to AIM that between the date of the MIPA and the ultimate closing, Verso will not take any actions with respect to the facility that will interfere with AIM's intended post-closing use. This ensures that AIM will receive at closing the facility that it thought it was paying for. So the "Buyer's Intended Use" is found in the following provisions of the MIPA:

- Definition of "Permitted Encumbrances": to allow Verso to encumber real estate assets so long as any encumbrances do not materially adversely affect AIM's intended use of the real estate;
- Definition of "Real Property Permitted Encumbrances": to allow exceptions in any title policy unless they would materially adversely affect AIM's intended use or the value of the real estate in light of AIM's intended use;
- § 3.06: Verso represents that it has all environmental permits required for AIM's intended use;
- § 3.09: Verso represents it has all permits required to operate the "Project" consistent with AIM's intended use;
- § 3.12: Verso represents there is no litigation that affects AIM's intended use;
- § 3.13: Verso represents there have been no changes in the facilities since 12/31/13 that materially adversely affect AIM's intended use;
- § 5.01(a)(iii): other than the anticipated shutdown of the Mill, Verso covenants it will keep operations intact consistent with AIM's intended use;
- § 5.01(b)(xiv): other than the anticipated shutdown of the Mill, Verso covenants it will not change operations prior to closing in any way that would materially adversely affect AIM's intended use;

- § 10.02: Verso agrees to indemnify AIM for certain liabilities but is not required to indemnify for environmental damages that are attributable to a change by AIM of its intended use.

The final provision is noteworthy. Not only does it show, as all the others do, that "Buyer's Intended Use" operates solely in defining *Verso's* obligations and representations, not AIM's; it also shows that AIM specifically is not promising to limit itself to "Buyer's Intended Use" after acquiring the facility, and that Verso does not take on an indemnification obligation for any such change of use.

B. Plaintiffs' economic theory for a conspiracy is implausible.

An additional flaw affects Plaintiffs' complaint: the conspiracy it alleges is implausible as an economic matter. As Verso establishes in its motion to dismiss, Verso cannot increase its market power by reducing its market share, yet that is precisely what Plaintiffs allege Verso conspired to do. And the NewPage merger does not change any of that, also for the reasons set forth by Verso.

As for AIM, Plaintiffs allege that it has an incentive not to sell to any of Verso's competitors because "if it ever did anything like that, it would never be offered another printing paper mill for purchase and demolition." (FAC ¶ 185). This claim is the type of pure speculation that does not suffice to state a claim of antitrust conspiracy. It is pure argument of counsel, without any factual matter to render it plausible. And it is implausible on its face. Plaintiffs are claiming that AIM is so scared of angering owners of paper mills, for fear of not being offered future mills for demolition, that it conspires against … whom? None other than owners of paper mills in a conspiracy to refuse to deal with them. Plaintiffs offer no basis for the Court to indulge their speculation that AIM has somehow determined that the only source of future paper mills for

demolition will be Verso, and that the opportunity to salvage future Verso mills (as opposed to competitors' mills) – *after* Verso has disposed of a quarter of its production capacity – is so important, AIM should enter a conspiracy with Verso to spurn any other mill owner who wants to acquire Bucksport from AIM. Especially where, as here, Verso's and AIM's agreement regarding the Mill is in writing and that writing belies the unlawful agreement Plaintiffs allege, Plaintiffs' speculation cannot support a cause of action.

II. The Clayton Act Claim Against AIM Fails As a Matter of Law.

Plaintiffs' Clayton Act Section 7 claim "challenges AIM's acquisition of Verso's subsidiary that owns the paper-making capability of Bucksport for the contractually-expressed purpose of scrapping [the] plant" because the destruction of the Mill's paper-making capacity "will substantially lessen competition, and tend to create a monopoly, in the relevant national market for coated printing paper." (*Id.* ¶ 3). This claim fails for two reasons. It alleges that something other than AIM's acquisition – namely, Verso's shutdown of the Mill – is the cause of the harm alleged, and its claims that the shutdown decision violates the antitrust laws fail as a matter of law.

A. AIM's acquisition of the Mill is not the cause of the harm Plaintiffs allege.

In order to sustain their Clayton Act § 7 claim, Plaintiff's must prove that the transaction they seek to enjoin – namely, the AIM acquisition, not some other decision or transaction – tends to lessen competition or threatens to create a monopoly. 15 U.S.C. § 18 (prohibiting acquisition only "where the effect *of such acquisition*" may be to harm competition) (emphasis added). This they cannot do. If reduction of supply in the circumstances alleged ever could

be conceived of as some kind of threat to competition (and it cannot), such a threat is not caused by AIM's acquisition of the Bucksport Mill but by Verso's decision to shut down the Mill. The very same condition Plaintiffs call a threat to competition would be present if Verso chose not to sell the Mill at all but rather to let it sit idle. That is fatal to the Clayton Act § 7 claim. Section 7 is directed only at acquisitions of stock or assets – not at decisions to idle factories. But here it is not AIM's acquisition of Verso Bucksport that Plaintiffs seek to prohibit to protect competition, but the shutdown of the Mill; what they claim to be the threat to competition is not cured by prohibiting the acquisition but only by ordering that the Mill operate. Here lurks the danger posed by labor unions acting as antitrust plaintiffs, as the Supreme Court noted in *Associated General Contractors. See* 459 U.S. at 539-40. Plaintiffs are using the claim to be paper consumers – the only claim of antitrust standing the Court has recognized – to pursue their interest as employees in preventing something the antitrust laws do not prohibit: Verso's unilateral decision to reduce capacity or not to sell its assets to a competitor. More to the point, the Clayton Act claim fails because Plaintiffs' theory does not posit AIM's acquisition as the event that threatens competition, nor does the theory posit that merely blocking the acquisition (as opposed to ordering Verso to operate the Mill or sell to someone who will) will prevent the harm to competition as Plaintiffs have theorized it. The harm Plaintiffs allege is the reduction of production capacity caused by Verso's decision to shut down the Bucksport Mill, and that is not enough to state any Clayton Act claim against AIM as a purchaser.

But even if a challenge to the shutdown decision could be presented as a Clayton Act claim against AIM, such a claim would fail as a matter of law. Any decision to shut down the Mill reduces Verso's market share and tends to increase Verso's competitors' relative competitive strength and reduce any risk

of monopolization by Verso. Plaintiffs' attempts to plead some antitrust challenge to the shutdown decision, beyond mere reduction of output, also fail as a matter of law, and do not entitle them to enjoin AIM's acquisition as a proxy for their challenge to the decision to shut the Mill down.

1. The shutdown of the Mill is not subject to challenge.

Plaintiffs allege that AIM's acquisition of the Bucksport Mill should be enjoined because it will substantially lessen competition and tend to create a monopoly. How? Over and over again, Plaintiffs offer nothing more than the observation that the sale and salvage of the Bucksport Mill will reduce supply in the coated paper market:

> Verso has agreed to sell the Bucksport Mill at a heavily discounted price to AIM, and has foregone profits from the sale of the Bucksport Mill to a paper-producer, in order to ensure that the paper production capacity of the Bucksport Mill is permanently removed from the market. (FAC ¶ 59)
>
> Verso's monopolistic and conspiratorial scheme involved . . . colluding with AIM to shut down coated paper plants so as to reduce output in the relevant markets (FAC ¶ 76)
>
> The likely (and intended) competitive effect of this significant reduction in capacity caused by the AIM acquisition is that future consumers of coated printing paper will pay higher prices than they would if the Bucksport Mill remained operational in Verso's hands or those of a competitor. (FAC ¶ 192)

These claims prove too little and too much.

The Plaintiffs' claims prove too little, because Verso's reducing its market share does not increase Verso's market power or tend it toward monopoly. Verso cannot increase its market power by effectively granting its competitors a greater relative share of supply by reducing Verso's own share of supply. Plaintiffs cannot cite a single precedent to support their entirely implausible

theory of an attempt to monopolize by reducing market share under these circumstances.

Plaintiffs' claims prove too much because they allege only what is true of every discontinuation of a manufacturing facility: it reduces potential supply, which might lead under certain competitive conditions to an increase in prices. If Plaintiffs' theory were viable, then every discontinuation of a manufacturing facility tends to lessen competition or create a monopoly and can be enjoined under the Clayton Act.

Unsurprisingly, Plaintiffs' claim is unprecedented under the Clayton Act. Plaintiffs here seek to enjoin an acquisition that is neither horizontal nor vertical, *and in which neither the acquiring entity, AIM, nor the acquired entity, Verso Bucksport LLC (owner of the Mill), will operate post-acquisition in the alleged relevant market.* Section 7 cases under the Clayton Act target acquisitions where horizontal competitors merge to increase their dominance of the markets they operate in both before and after the acquisition; where vertically-related entities merge to similar effect; or where a non-participant in a market merges with a market participant, to eliminate that current non-participant as a potential competitor or otherwise allow the market participant to exclude or deter meaningful competition as it continues to operate in the relevant market. *See generally FTC v. Procter & Gamble*, 386 U.S. 568 (1967)**.** Plaintiffs have pointed to no support for their claim that a merger can be enjoined under Section 7 where neither the acquiring party nor the acquired party intends to operate in the alleged relevant market. Here AIM is acquiring the Bucksport Mill to deploy it in markets other than the coated printing paper markets – the generation and sale of electricity, and the market for use of redeveloped industrial sites (whether by AIM itself or someone else). It is possible that a paper producer might purchase the site from AIM, but in that

case, Plaintiffs have no antitrust objection. It is as though an early manufacturer of automobiles acquired a buggy-whip factory to convert it to manufacture of wood and leather parts for automobiles. Such an acquisition might be described in many ways, but certainly not as having a tendency to create monopoly power in the buggy-whip market.

2. Plaintiffs' attempts to plead the shutdown decision as an antitrust violation fail as a matter of law.

a. Plaintiffs fail as a matter of law to adequately plead an unlawful agreement between Verso and NewPage.

As the Court correctly ruled in denying Plaintiffs' motion for preliminary injunction, Plaintiffs are wrong as a matter of law in alleging that the Agreement and Plan of Merger they cite contains any promise by Verso to cooperate with NewPage in any decision to shut down the Bucksport Mill. The Agreement Plaintiffs rely on required Verso and NewPage to obtain one another's consent only if they were "selling any assets to gain DOJ approval" of the merger. (Order Den. TRO/PI at 69) (citing Agreement and Plan of Merger § 5.6(c)). There is not only no allegation in the Amended Complaint that the sale of Bucksport was necessary to gain DOJ approval of the merger, the Court can take judicial notice of the fact that DOJ did not require any such sale. (*Id.*). Finally, Plaintiffs' theory that "Verso and NewPage knew that reducing their market share by shutting down the Mill would improve their chances at gaining DOJ approval, (*id.*), has two other problems. First, as the Court noted, Plaintiffs' theory is "mere speculation," and mere speculation does not suffice to state a claim of collusion. (*Id.*). Second, the speculative allegation only exacerbates the logical flaw in Plaintiffs' theory: by ridding itself of production capacity, Verso tends *away from* not toward monopolization, improving the odds of gaining DOJ approval.

b. Plaintiffs' allegations that Verso refused to sell the Mill to a competitor fail as a matter of law to state an antitrust violation.

The Court correctly has ruled, following the Supreme Court's *Trinko* decision, that the antitrust laws do not require a firm to sell its assets to a competitor. (Order Den. TRO/PI at 64-65); *see also Verizon Comms., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004)). If anything, the antitrust laws are chary of direct dealings between horizontal competitors. *See id.* (quoting *Trinko*, 540 U.S. at 408 ("compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion")). Accordingly, Plaintiffs' core allegation that liability arises under the antitrust laws if Verso refuses to solicit or accept bids on its Mill from a direct competitor fails as a matter of law. As the Court learned in the preliminary injunction process, the allegation fails as a matter of fact as well – no person came forward with any direct proof that Verso received and refused any better offer than AIM's prior to entering the MIPA with AIM, and letters the Court received from persons claiming some kind of interest in the facility turned out to be at best hopelessly vague, (*see, e.g.* Dkt. Item 93), and apparently in one instance at least, false. (*See* Dkt. Item 98 (noting claims in Dkt. Item 94 were unauthorized and false, and investigation into the matter would be opened)). But for purposes of this motion, AIM focuses solely on the legal insufficiency of the allegation. AIM asks the Court to assume – contrary to the available evidence, but as required on a motion to dismiss – that the factual allegation could somehow be proven. The allegation fails as a matter of law to establish an antitrust violation. This is the law of the case.

CONCLUSION

At the end of the day, Plaintiffs have alleged no more than the ordinary operation of a competitive market. Verso has an industrial site it no longer

wants. There is a market for that site. Some potential buyers, Plaintiffs allege, might buy the site to compete with Verso in the production of paper. AIM intends to deploy the site for other uses – at a minimum, electrical generation, operation of a landfill, salvage of the paper mill, and redevelopment of the site for some new use. Armed with nothing more than speculative, and legally insufficient, allegations of conspiracy and attempts to monopolize in some other market, Plaintiffs ask this Court to interfere in the market for purchase and sale of industrial sites by ordering that only one class of purchaser be allowed to bid on the site. And their motives are clear: Plaintiffs are members of a disappointed labor union who seek such interference in order to protect their jobs – to the detriment of the market's allocation of this industrial site to its highest and best use, whatever that may turn out to be as a result of robust competition among buyers truly interested in the site. The federal courts are rightly wary of allowing persons disappointed by market outcomes from wielding the antitrust laws to deter those outcomes. The Supreme Court has insisted not only on a high threshold of proof for claims like Plaintiffs', but on a high standard of pleading. For all the foregoing reasons, and the reasons set forth in Verso's motion to dismiss, which AIM joins and adopts by reference here, Plaintiffs have not met that standard. Their claims against AIM should be dismissed with prejudice and without costs.

DATED: March 2, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed the foregoing Motion of AIM Development (USA) LLC 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: March 2, 2015

/s/ Clifford H. Ruprecht

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