

Plaintiffs, by and through their undersigned counsel and pursuant to the provisions of Federal Rule of Civil Procedure 65, hereby request that the Court enter a temporary restraining order (“TRO”) and preliminary injunction (“PI”) enjoining and restraining Verso Paper Corp. and Verso Paper LLC (collectively “Verso”) and AIM Development (USA) LLC (“AIM”) as requested herein. Expedited review and disposition of this Motion and matter is requested in the interest of justice.

Plaintiffs’ purpose in filing this Motion for a TRO and Preliminary Injunction is to protect and preserve the capacity of the Bucksport Mill to operate as a paper mill capable of continuing in the production of coated paper for the North American market for such products.¹

Plaintiffs are employees of the Bucksport Mill (the “Mill”), with specialized skills, and have a direct commercial interest in having the Bucksport Mill remain a potential supplier of coated paper to creators of magazines, catalogues, and other high quality printed publications. The Plaintiffs are also purchasers of magazines and other products that contain coated paper, and thus have an interest in ensuring that prices for coated paper are not affected by an anti-competitive reduction of output.

On December 8, 2014, defendant Verso announced an agreement to sell the Bucksport Mill to AIM for the intended purposes of scrapping the printing facilities and operating it solely as a power plant. This deal is scheduled to be completed on or before January 9, 2015. If AIM is allowed to acquire the Bucksport Mill, then AIM could begin destroying its paper manufacturing facilities as soon as January 9, 2015 (if not earlier).

In addition, Defendant Verso has informed Plaintiffs that even sooner than January 9, 2015, it will begin removing data that it characterizes as “proprietary” from the hard drives of

¹ It is also the hope of the Plaintiffs, and all other similarly situated Bucksport employees, that they can retain the possibility of continuing employment at the Bucksport Mill under the employ of a successor employer to Verso Paper Corp.

the computers that operate the paper machines at the Bucksport Mill. (Exhibit 21). This is in direct contravention of prior commitments by Verso not to do anything to the hard drives or data on the hard drives for the computers that operate the paper machines at the Bucksport Mill “prior to a sale of the mill.” (Exhibit 32).

However, on December 9, 2014, Verso General Counsel Peter Kesser informed the Plaintiffs that:

Verso hopes to complete the sale of the Bucksport mill to AIM on or about January 9, 2015. As for the wiping of computers at the Bucksport mill, Verso does not intend to wipe them of our proprietary information *until a few days before the transaction is completed*. Further, as we have said before, the wiping of the computers in any event will not affect the ability of the paper machines to operate.

Exhibit 21.

Accordingly, Verso has accelerated the time from damaging the information on the hard drives to a time prior to consummation of a sale, violating its prior commitment to Plaintiffs – necessitating this Motion to preserve the paper making equipment of the Bucksport Mill.

Plaintiffs respectfully assert that Verso’s closure of the Bucksport Mill, and sale to a scrap company, will destroy the Bucksport Mill’s capacity to produce coated paper for the North American market. Thus, it is anticompetitive and violates federal antitrust laws, specifically Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1-2), and Section 7 of the Clayton Act (15 U.S.C. §18), as well as Maine’s similar antitrust laws (10 M.R.S. §§1101, 1102, and 1102-A).

The Bucksport Mill employs over 500 people (including the Plaintiffs) and provides about 44% of the tax revenue for the town of Bucksport.² Therefore, the impending sale of the Bucksport Mill for scrap will destroy the employment of the Plaintiffs as well as several hundred other employees. The economic effects of this on the Plaintiffs, on Bucksport and the

² “Future of paper industry unclear as Verso closes Bucksport mill”, NBC-WCSH, Channel 6, October 2, 2014, available at <http://www.wcsh6.com/longform/news/local/2014/10/02/verso-bucksport-mill-closing/16616153/>.

surrounding communities will be devastating. Once AIM takes control of the Bucksport Mill, it will be nearly impossible for Plaintiffs to obtain the relief they seek in their lawsuit, which is a limited injunction against the destruction or sale of the Bucksport Mill to any entity which does not intend to continue to use it for the production of paper until at least June 1, 2015, so that a paper-manufacturer has adequate time to make a bona fide offer for the Bucksport Mill.

Moreover, as a by-product of the Defendants' threatened actions, they will have destroyed the ability of Plaintiffs to have continued and future employment in their chosen profession in the area where they live.

It is for these reasons that the Plaintiffs seek the extraordinary relief of a TRO and preliminary injunction ("PI"). Requiring the Defendants to hold off on the sale and destruction of the Bucksport Mill facilities, costs the Defendants little to nothing, and at the same time preserves the status quo. Should this Court find the actions of Verso's sale of the Bucksport Mill to AIM to be "anti-competitive", a TRO and PI could allow the Mill to be sold in another legal fashion, and hopefully preserve the economy and jobs in the Bucksport area.

Under the antitrust laws, "the key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition." *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 430 (1st Cir. 1985)(holding that divestiture was viable remedy under the antitrust laws). Therefore, in order to restore competition, Plaintiffs request a TRO and preliminary injunction that:

(i) Prohibits Verso and AIM ("Defendants") from closing and/or consummating the sale of the Bucksport Mill to AIM or any other similar entity that does not have the intent or capacity to operate the Bucksport Mill for the purpose of producing coated paper;

(ii) Prohibits Verso and AIM from taking any actions that would render the Bucksport Mill inoperable on a cost basis, or otherwise financially impair the Bucksport Mill;

(iii) Requires Verso to work with and through the Maine Department of Economic and Community Development or a neutral designated by the Court to seek, solicit, evaluate and respond to offers from prospective buyers willing to continue to operate the Bucksport Mill as a printing paper mill;

(iv) Prohibits Verso and AIM from taking any steps that would result in damage to the Bucksport Mill as a going concern for the production of coated paper. Such prohibited acts to include:

- A. Wiping, damaging, altering, deleting or removing the hard drives or any portion thereof, including the data and “recipes” on those hard drives, of any computer systems that operate the paper making machines and administrative support apparatus of the Bucksport Mill;
- B. Failing to release the tension on all belts and felts on the paper making machinery;
- C. Failing to maintain the temperature of the Bucksport Mill at 45°F or above at all times until a purchaser of this facility as an operational mill can be found for a reasonable price;
- D. Failing to maintain heated water in all tanks at the Bucksport Mill to ensure that the tile linings of these tanks are not damaged or destroyed;
- E. Failing to rotate and lubricate all metal rollers pursuant to current “best practices” protocols and schedules;
- F. Selling essential components of the paper making machines, including the OMC attachment for the #1 Paper Machine; and
- G. Damaging, altering, deleting or removing any computer or hard paper files from the Mill, or Defendants’ corporate files maintained outside the Mill, including outside the State of Maine, including files maintained by Verso’s parent and controlling shareholder Apollo Global Management, or AIM’s parent, or any of Defendants’ subsidiaries, agents, representatives, officers or employees, that would relate to the Bucksport Mill and its operations, “profitability,” closure or the proposed Verso-NewPage and Verso-AIM Bucksport Mill acquisitions.

(v) Prohibits Verso from selling or trying to sell the electric power plant associated with the Bucksport Mill, except as part of a sale of the whole Bucksport Mill as a going concern to a buyer that has agreed to resume production of coated paper at the Bucksport Mill; and

(vi) Prohibits Verso from rejecting any offer to purchase the Bucksport Mill at a reasonable price from any bona fide buyer willing to continue operating it as a printing paper mill, or to in any way impede the sale of the Bucksport Mill at a reasonable price to a competitor

willing and able to operate this facility as a paper mill, and capable of continuing to produce coated paper for sale.

The plaintiffs seek a preliminary injunction which embodies the foregoing, and also includes affirmative relief that:

(i) Requires Verso to publicize the availability of the Bucksport Mill for sale at a reasonable price to any bona fide buyer willing to continue operating it as a printing paper mill; and

(ii) Requires Verso to work through officials from the Maine Department of Economic and Community Development, including Rosaire Pelletier, or under the direction of a special master or trustee appointed by the Court, to find an appropriate buyer for a reasonable price (as determined by the Court or its designee).

Plaintiffs seek that the TRO be entered for 14 days, or until a hearing on the Preliminary Injunction (“PI”) can be heard. Upon a hearing, Plaintiffs seek that the PI will remain in effect until June 1, 2015, so as to give potential buyers an adequate time make a bona fide offer to continue operating the Bucksport Mill.

BACKGROUND STATEMENT

On January 6, 2014, defendant Verso announced that it would acquire NewPage Holdings, Inc. (“NewPage”), the largest producer of coated paper in North America (“NewPage Acquisition”).³ As required, the NewPage Acquisition has been submitted to the U.S. Department of Justice (“DOJ”) for an antitrust review and clearance, which is still pending.

³ Verso Paper Corp., Form 8-K, January 6, 2014, *available at* <http://www.sec.gov/Archives/edgar/data/1395864/000119312514002326/d647650d8k.htm>

On October 1, 2014, still in the middle of the DOJ review, Verso announced that it was shutting down the Bucksport Mill, which has a production capacity of approximately 350,000 tons of coated paper, and an additional 55,000 tons of specialty paper.⁴

On October 2, 2014, one day after Verso announced it would shut the Bucksport Mill, Dennis Castonguay, current Bucksport Mill Manager, expressly told employees that “Verso will not sell the Bucksport Mill to one of its competitors.” This statement was witnessed by Plaintiffs Harold Porter and Brian Simpson, as well as Chad Cote and Alfred George. (*See Exhibits 28-31*).

The Bucksport Mill’s printing facilities officially shut down on December 4, 2014. Thereafter, Verso announced on December 8, 2014 that it would sell the Bucksport Mill to AIM for a purchase price of \$58 million (“Verso/AIM Acquisition”).⁵ AIM is an affiliate of American Iron & Metal Company Inc. (“American Iron”), a salvaging company.⁶ This deal is currently scheduled to be completed at the latest by January 9, 2015, if not earlier.⁷ Plaintiffs had no knowledge of this agreement prior to its announcement on December 8, 2014.

The Bucksport Mill sale agreement makes clear that AIM intends to use the Bucksport Mill solely for its power-generating facility, its scrap value, and for use as a landfill, but not for paper production.⁸ AIM does not own or operate any paper manufacturing mills, and has not stated that it intends to continue operating the Bucksport Mill as a paper-manufacturing facility. Further, AIM has worked with Verso to similarly acquire and destroy the paper making capacity

⁴ Verso Paper Corp., Form 8-K, October 1, 2014, *available at* <http://investor.versopaper.com/secfiling.cfm?filingID=1421182-14-56&CIK=1421182>

⁵ The Bucksport Mill property is assessed by the Town of Bucksport at \$360 million, and the Power Island portion of the plant alone is valued at \$86 million. *See* Bill Trotter, “This Mill Has Always Seemed to Be the Survivor,” Bangor Daily News, December 11, 2014. Available at: <http://bit.ly/1Gkw9Xo>.

⁶ Verso Paper Corp., Form 8-K, Dec. 8, 2014, *available at* <http://www.sec.gov/Archives/edgar/data/1421182/000119312514436360/d834648d8k.htm>. *See also* Purchase Agreement between AIM and Verso, Ex. 2.1, *available at* <http://www.sec.gov/Archives/edgar/data/1421182/000119312514436360/d834648dex21.htm>

⁷ *Id.*

⁸ Purchase Agreement between AIM and Verso, Dec. 8, 2014, Sec. 1.01 (“Definitions”), *available at* <http://www.sec.gov/Archives/edgar/data/1421182/000119312514436360/d834648dex21.htm>.

and assets of Verso's Sartell, MN paper mill in 2013, and Verso's putative merger partner NewPage's Kimberly, WI mill in 2011-12. Both prior AIM scrapping endeavors have been reported to have had devastating impacts on the communities where these mills were located and resulted in the loss of employment of hundreds of people.

It is apparent that Verso's sole purpose in shutting down the Bucksport Mill and selling it for scrap is to reduce competition in the North American market for coated paper, and increase its chances for obtaining monopoly power. These acts are patently anti-competitive, and completely contrary to the purpose of the antitrust laws. AIM's scrapping of the Sartell and Kimberly Mills, and now the Bucksport Mill (all within a roughly three year period) are all part of a Verso-NewPage-AIM scheme to reduce capacity and supply in the coated paper market.

Through the NewPage Acquisition, Verso will achieve dominance in the relevant market for coated paper; through the Verso/AIM Acquisition, Verso will effectively reduce capacity in that same market, thus putting upward pressure on prices. The antitrust laws do not permit a dominant firm to conspire to reduce output, as Verso plainly is poised to do. In short, Plaintiffs allege the following:

1) Verso's sale of the Bucksport Mill to AIM with the purpose and effect of destroying its paper-producing capacity, will result in a substantial reduction of competition, and tend to create a monopoly, in both the market for coated paper in North America, and the labor market for specialized Mill workers in the state of Maine, and should be blocked under Section 7 of the Clayton Act (15 U.S.C. §18), and Maine State law (10 M.R.S. § 1102-A);

2) Verso's scheme to acquire dominance in the relevant market for coated paper and its simultaneous sale of the Bucksport Mill to AIM, a scrap company, at below market value in order to reduce industry capacity, and hence, output, creates a dangerous probability that Verso will achieve monopoly power and raise market prices in violation of the prohibition against

attempted monopolization under Section 2 of the Sherman Act, 15 U.S.C. §2, and Maine State law (10 M.R.S. § 1102);

3) Verso's agreement with NewPage to shut down the Bucksport Mill and reduce output constitutes concerted action in restraint of trade in violation of Section 1 of the Sherman Act, and Maine State law (10 M.R.S. § 1101);

4) Verso's agreement to sell the Bucksport Mill to AIM for the main purpose of destroying and salvaging the printing facilities constitutes a conspiracy to monopolize under Section 2 of the Sherman Act, and Maine State law (10 M.R.S. § 1102).

I. A TRO should be Granted until a Hearing on the Preliminary Injunction can be Set

The legal standard for a TRO and a preliminary injunction are the same. *Aftermarket Auto Parts Alliance, Inc. v. Bumper2Bumper, Inc.*, No. 12-cv-00258, 2012 U.S. Dist. LEXIS 143685, 3, 2012 WL 4753407 (D. Me. Oct. 4, 2012). The main differences are that a TRO may be issued without notice to the opposing party and with a more limited amount of evidence, and is limited to a term of 14 days, or until a hearing on the preliminary injunction can be heard. Fed. R. Civ. P. 65(b).

A TRO requires a showing that "immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition". Fed. R. Civ. P. 65(b). Here, both the Complaint and attached exhibits, as described herein, demonstrate that Plaintiffs will lose their jobs, and their future ability to work at the Bucksport Mill if the sale to AIM is completed. Once the sale is complete, AIM can begin destroying and salvaging the Mill immediately, which cannot be reversed. Even prior to the completion of the AIM transaction, Verso has demonstrated its intent to begin taking irreparable and irreversible steps to shutter the Mill, lay off its employees and destroy the computers that operate the Mill. (Exs. 21, 32-34).

Secondly, in compliance with Fed. R. Civ. P. 65(b), plaintiffs' counsel has certified in writing that it has given notice to Verso and AIM of its intention to seek a TRO by e-mailing copies of the Complaint and this Motion to their representatives. (See attached Cert. of Service.) However, since the sale agreement between Verso and AIM to sell the Mill was signed on Dec. 5, 2014,⁹ this deal may be consummated at anytime, and therefore destruction of the Bucksport Mill could begin at anytime, and immediate relief is necessary. Therefore, until a hearing on the preliminary injunction can be heard, a TRO should be issued that grants the relief as stated on pages four (4) to six (6) of this Motion.

II. Legal Standard for Obtaining a TRO and a Preliminary Injunction

“The purpose of a preliminary injunction is simply to preserve the relative positions of the parties until a trial on the merits can be held.” *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 16 (1st Cir. 1996). In order to determine whether to grant a request for a preliminary injunction (“PI”), the Court must consider: “(i) the movant's likelihood of success on the merits of its claims; (ii) whether and to what extent the movant will suffer irreparable harm if the injunction is withheld; (iii) the balance of hardships as between the parties; and (iv) the effect, if any, that an injunction (or the withholding of one) may have on the public interest.” *Corporate Techs., Inc. v. Harnett*, 731 F.3d 6, 9 (1st Cir. 2013).

In deciding whether plaintiffs have met the requirements to show likelihood of success, the Court “need not predict the eventual outcome on the merits with absolute assurance...” *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 16 (1st Cir. 1996). The Court must merely decide based on a “plausible rendition of the evidence then before the court.” *Id.* And the Court “need not decide whether [plaintiffs] have proven a violation” under the antitrust laws. *Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687, 693 (2d Cir. 1973)(holding

⁹ *Id.*

that plaintiff should be granted preliminary injunction to enjoin merger). Here, all four factors favor granting a TRO and preliminary injunction.

III. Plaintiffs have Shown a Likelihood of Success on the Merits

Plaintiffs are likely to prevail on the merits of their claims that Verso has violated the antitrust laws under both Sections 1 and 2 of the Sherman Act (and similar Maine antitrust laws 10 M.R.S. §§ 1101-1102), and that AIM's purchase of the Bucksport Mill violates Section 7 of the Sherman Act (and similar Maine statute 10 M.R.S. § 1102-A).

A. The Acquisition of the Bucksport Mill by AIM Violates Section 7 of the Clayton Act

Under Section 7 of the Clayton Act, 15 U.S.C. §18, a merger or acquisition may be blocked where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” *Id.*¹⁰ Private parties have standing to seek injunctive relief to block an anti-competitive acquisition (as discussed in further detail in Sections VII-VIII). 15 U.S.C. § 26. The Court should grant a preliminary injunction when plaintiffs can show “the danger of irreparable loss or damage is immediate”. 15 U.S.C. § 26.

According to its purchase contract (“MIPA”), AIM has no intention to continue paper production at the Bucksport Mill. AIM's only intentions are to operate the power plant at the Mill, operate a landfill at the Bucksport Mill, and salvage the remaining remnants.¹¹ This is consistent with the pattern and course of conduct by AIM in acquiring and destroying the Sartell Mill from Verso, and the Kimberly Mill from NewPage.

¹⁰ Maine law 10 M.R.S. § 1102-A is worded similarly, and therefore plaintiffs provide the same analysis for both laws.

¹¹ Purchase Agreement between AIM and Verso, Dec. 8, 2014, Sec. 1.01 (“Definitions”), Definition for “Buyer’s Intended Use”, available at <http://www.sec.gov/Archives/edgar/data/1421182/000119312514436360/d834648dex21.htm>.

The fact that Bucksport’s Mill Manager, Dennis Castonguay, was the designated point of contact during the transfer of the Verso Sartell power plant to AIM, in FERC filings submitted in January, 2013 – *a year before the Verso-NewPage merger was publicly announced* – reveals the level of planning and collusion between these actors to facilitate this anticompetitive scheme to reduce the supply of coated paper in the North American market by destroying paper making capacity of Verso and New-Page mill assets, with the help and assistance of AIM. (Exhibit 19).

Therefore, the acquisition of the Bucksport Mill by AIM will lead to the immediate removal of 350,000 tons of production capacity from the market for coated paper and will “substantially lessen competition” in the same market. Additionally, it will also lessen competition in the market for the specialized labor provided by plaintiffs that have been trained to work in paper production.

The relevant affected market that will be affected by the closure of the Mill is the North American market for “coated printing paper” (also referred to as “coated paper”). Verso’s website describes that coated paper can be made from both “Freesheet paper” and “Groundwood paper”, as well as from a blend between the two, and that coated paper is sold to “publishers, catalogers, advertisers and commercial print producers.”¹² Thus the relevant product markets include at least the markets for coated papers used by publishers of magazines, newspaper inserts and catalogs. (See Declaration of Richard Gilley).

That Verso will become the dominant producer in the relevant market, or at least is dangerously likely to achieve market dominance, is beyond serious dispute. If the acquisition were allowed to be completed, the Verso-NewPage entity would control more than fifty percent

¹² See, Verso Paper Corp., “Coated Papers”, available at <https://www.versopaper.com/OurProducts/CoatedPapers/>.

(50%) of the North American coated paper market.¹³ Although the geographic market for coated papers is North America, the precise boundaries of the relevant geographic market need not be determined for purposes of this Motion because even on a national or state-wide market basis the combined Verso-NewPage entity will be dominant.¹⁴ Therefore, plaintiffs are likely to succeed on the merits of their Section 7 claim.

B. Plaintiffs Have Established that Verso has Attempted to Monopolize the Market for North American Coated Paper

Plaintiffs are also likely to succeed on the merits of their Section 2 allegation (15 U.S.C. ¶ 2) that Verso has attempted to monopolize the market for North American coated paper by continuing to destroy printing paper product capacity. To prove an attempt to monopolize, plaintiffs must show that: “(1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.” *Spectrum Sports v. McQuillan*, 506 U.S. 447, 448 (1993).¹⁵

First, plaintiffs have demonstrated that Verso has engaged in anticompetitive conduct by intentionally shutting down and selling the Bucksport Mill at below market value for salvage, as well as stating publically that it would not sell the Bucksport Mill to any competitor.

Verso’s plan to destroy the Mill by selling it to AIM will: 1) reduce competition in the market for coated paper in North America; 2) reduce the supply of available coated paper in North America; 3) lead to increases in the price for coated paper, and products containing coated paper; 4) prevent smaller competitors (or new entrants) from expanding capacity by purchasing

¹³ See, e.g. Capitol Forum: “Verso/NewPage: Near-Term Close Unlikely; Deal Risk Driven by NewPage’s Out; A Closer Look at Product Market Definition”, Aug. 14, 2014, *available at* <http://thecapitolforum.com/wp-content/uploads/2014/09/VRS-NWP-2014.08.14.pdf>; Jesse Marzouk, “Verso to acquire NewPage”, Hilco Valuation Services, 4th Quarter 2013, http://www.hilcovaluationservices.com/docs/librariesprovider5/perspectives/hilco_paper_industry_perspective_q4_2013.pdf

¹⁴ *Id.*

¹⁵ Maine law 10 M.R.S. § 1102, which also outlaws attempted monopolization, is worded similarly, and therefore plaintiffs provide the same analysis for both laws.

the Bucksport Mill; and 5) prevent Plaintiffs who are employed at the Bucksport Mill from continuing to work at the Bucksport Mill under a different owner. There can be no “pro-competitive” justification for Verso’s decision to refuse to sell the Bucksport Mill to any competitor, and sell it at below market value to a salvage company.

And, as the esteemed antitrust commentators Philip Areeda and Herbert Hovenkamp have noted, the decision to intentionally close a facility, and refuse to sell it to competitors, can violate the antitrust laws if done for the purpose of reducing competition. *See* IIIA P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 782n, p. 283-84 (2d ed. 2002). This is especially true when the entity closing the facility believes it has more to gain economically in the long-run from a reduction in competition, than from the immediate sale of the facility at fair value, as is the case here with Verso. *See id.* Here, just the announcement of its intent to close the Bucksport Mill resulted in an improvement of Verso’s financial rating by Moody’s expressly because of the anticompetitive advantages that would result from this action. *See, e.g.* Complaint ¶¶ 35 and 36.

Second, plaintiffs can demonstrate that Verso has the specific intent to monopolize by Verso’s statements that it will not sell the Mill to any competitor, and the suspicious timing of its actions to shut down the Bucksport Mill while a DOJ investigation is pending.

Third, plaintiffs can also demonstrate that Verso has a dangerous probability of achieving monopoly power in the market for North American coated paper. If Verso’s acquisition of NewPage is approved, Verso will have greater than 50% of the market for coated paper in the North America.¹⁶ This suffices to show a dangerous probability of achieving monopoly power. *See Hayden Pub. Co. v. Cox Broad. Corp.*, 730 F.2d 64, 69 n.7 (2d Cir. 1984)(stating that “a party may have monopoly power in a particular market, even though its market share is less than 50%”); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 667 (7th Cir. 1987)

¹⁶ *See* Capitol Forum and Marzouk articles, *supra* note 14.

(finding that a market share between 17 and 25% can sustain a finding of monopolization).

Therefore, plaintiffs are also likely to succeed on the merits of their attempt to monopolize claim.

C. Verso has Violated Section 1 of the Sherman Act

Section 1 of the Sherman Act bars every “contract, combination . . . or conspiracy, in restraint of trade” 15 U.S.C. §1.¹⁷ First, an agreement to shut down the Bucksport Mill constitutes a restraint of trade. “A horizontal cartel among competing manufacturers...that decreases output or reduces competition in order to increase price is...per se unlawful.” *Leegin Creative Leather Products v. PSKS, Inc.*, 127 S. Ct. 2705, 2717 (2007).

Plaintiffs’ Complaint demonstrates that Verso and NewPage, who are competitors and operate in the same market, reached an unlawful agreement to shut down the Bucksport Mill in order to reduce output. “An agreement may be found when the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.” *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 43 (1st Cir. 2013)(internal citation omitted).

Here, both Verso and NewPage already have a written agreement for Verso to acquire NewPage.¹⁸ The January 3, 2014 agreement provides that neither Verso or NewPage will take any action to sell, divest or dispose any assets belonging to either party without written consent of the other party, where such action was taken in order to gain DOJ approval.¹⁹ Thus, in order to shut down the Bucksport Mill, Verso had to obtain the written consent of NewPage.

Furthermore, both parties understand that reducing their market share in the market for North American coated paper would improve the chances for the acquisition gaining approval. To that end, Verso has already agreed with NewPage that NewPage should sell two of its paper

¹⁷ Maine law 10 M.R.S. § 1101 is worded similarly, and therefore plaintiffs provide the same analysis for both laws.

¹⁸ Sale Agreement between Verso and New Page, Jan. 6, 2014, p. 53-55, *available at* <http://www.sec.gov/Archives/edgar/data/1395864/000119312514002326/d647650dex21.htm>

¹⁹ *Id.*

mills to a third party if the acquisition is approved.²⁰ Taking into account all of the above, an unlawful agreement between Verso and NewPage to shut down the Bucksport Mill and reduce output may be found. While it is unnecessary for the Court to fully resolve the merits at this time, discovery is likely to uncover further evidence to support plaintiffs' allegations. Therefore, Plaintiffs are likely to succeed on the merits of their Section 1 violation.

D. Plaintiffs Have Demonstrated a Conspiracy to Monopolize between Verso and AIM

Sherman Act Section 2 also outlaws any conspiracies to monopolize. 15 U.S.C. ¶ 2.²¹ A claim for conspiracy to monopolize requires a showing of: “(1) concerted action; (2) overt acts in furtherance of the conspiracy; and (3) specific intent to monopolize.” *Bos. Sci. Corp. v. Schneider (Eur.) AG*, 983 F. Supp. 245, 268 (D. Mass. 1997). To prove an antitrust conspiracy, an “antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the [defendant] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.” *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)(internal citations omitted).

Here, plaintiffs allege that Verso and AIM have conspired to monopolize the market for North American coated paper on behalf of Verso. As evidence of concerted action, plaintiffs point to the sale agreement between Verso and AIM, which specifically sets forth that AIM will only use the Mill as a power plant, as a landfill, and for salvage (and therefore not for paper production).²² Plaintiffs also point to AIM's purchase and destruction of the paper mills in

²⁰ <http://investor.versopaper.com/secfiling.cfm?filingID=1421182-14-59&CIK=1421182>

²¹ Maine law 10 M.R.S. § 1102, which also outlaws conspiracies to monopolize, is worded similarly, and therefore plaintiffs provide the same analysis for both laws.

²² Purchase Agreement between AIM and Verso, Dec. 8, 2014, Sec. 1.01 (“Definitions”), Definition for “Buyer’s Intended Use”, available at <http://www.sec.gov/Archives/edgar/data/1421182/000119312514436360/d834648dex21.htm>.

Sartell, MI and Kimberly, WI. Those acts, along with the sale of the Bucksport Mill to AIM, all constitute overt acts in furtherance of the conspiracy to reduce output and reduce competition.

Lastly, both Verso and AIM have specific intent to monopolize. Verso's intent is demonstrated by its public statement that it would refuse to sell the Mill to competitors. AIM also has the specific intent to aid Verso's accumulation of monopoly power, because AIM has benefitted financially by acquiring the Bucksport Mill site at far below market value.²³ Thus, Verso has sold the Mill at a severe discount because it knows it will recover more profits over the long-term through the reduction of capacity, and the collection of monopoly rents. AIM benefits financially from these monopoly rents by obtaining valuable property at a reduced price.

IV. Plaintiffs Would Suffer Irreparable Harm if the TRO and PI were Denied

The second factor to consider in granting a TRO and PI is whether plaintiffs would suffer irreparable harm if the Motion were denied. Here, the plaintiffs have demonstrated that they will lose their ability to work for the Bucksport Mill if the Mill is sold to AIM and it is destroyed. Once the key facilities and machines of the Bucksport Mill are gone, it would require enormously large investments of money and capital to reopen the Bucksport Mill and restart paper production. Therefore, this factor has been satisfied.

V. The Balance of Hardships Favors Granting the TRO And Preliminary Injunction

The third factor to consider is the balance of hardships between the plaintiffs and the defendants. Here, there is no great hardship imposed on Verso if it was forbidden from selling the Mill to AIM on a temporary basis and required to maintain the Bucksport Mill in reasonable condition so that its production capability would be preserved until a new buyer can be found. On the other hand, plaintiffs will suffer a great and irreparable hardship if the Bucksport Mill is

²³ Verso has agreed to sell the Mill to AIM for a price of \$58 million, even though the Mill property is assessed by the Town of Bucksport at \$360 million, and the Power Island portion of the plant alone is valued at \$86 million. *See* Bill Trotter, "This Mill Has Always Seemed to Be the Survivor," Bangor Daily News, (December 11, 2014). Available at: <http://bit.ly/1Gkw9Xo>.

destroyed, and therefore no new buyer could acquire and operate the Mill. In that case, plaintiffs will be left without jobs, and the entire Bucksport community will be negatively affected.

VI. Denial of the TRO and Preliminary Injunction Would Harm the Public Interest

Here, there is a public interest in preserving the Bucksport Mill as a place where all of the plaintiffs can continue to work, and produce paper, in the future. The Bucksport Mill is vital not only to those it employs, but also the entire community of Bucksport and the surrounding area. The Mill employs more than 500 persons and provides about 44% of the town's tax revenue.²⁴ Therefore, the preservation of the Bucksport Mill until a new buyer can be found is in the public interest.

VII. Plaintiffs Have Standing to Pursue Injunctive Relief Under the Clayton Act

The Clayton Act states that: “[a]ny person...or association shall be entitled to sue for and have injunctive relief...against threatened loss or damage by a violation of the antitrust laws...” 15 U.S.C. § 26.²⁵

A plaintiff seeking injunctive relief need not show actual damages; they need only show “significant threat of injury from an impending violation of the antitrust laws”. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 US 100, 130 (1969). Furthermore, claims for injunctive relief can be sought by a “broader range of plaintiffs” than actions for damages because the “standards to be met are less exacting...” *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 407-08 (1st Cir. 1985).

The Supreme Court has recognized that the Clayton Act (15 U.S.C. § 15) “does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . [and it]

²⁴ “Future of paper industry unclear as Verso closes Bucksport mill”, NBC-WCSH, Channel 6, October 2, 2014, available at <http://www.wcsh6.com/longform/news/local/2014/10/02/verso-bucksport-mill-closing/16616153/>.

²⁵ Plaintiffs also have standing under Maine antitrust law, 10 M.R.S. § 1104, which provides:

“Any person...injured directly or indirectly in its business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by section 1101, 1102 or 1102-A, may sue for the injury in a civil action.”

protect[s] all who are made victims of the forbidden practices....” *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982).

Several Circuit Courts has held that indirect purchasers, such as plaintiffs here, do have standing to seek injunctive relief under the 15 U.S.C. § 26. *See Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1172 (8th Cir. 1998); *Mid-W. Paper Products Co. v. Cont’l Grp., Inc.*, 596 F.2d 573, 594 (3d Cir. 1979); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 274 (D. Mass. 2004).

Here, Plaintiffs have standing as both employees and purchasers of magazines containing coated paper, and both interests coincide. Both employees and consumers have a strong interest in the Bucksport Mill remaining a viable producer of coated paper over the long run. The consumers’ interest is obvious: incrementally more capacity supplying the market is likely to lead to somewhat lower prices. The employees’ complementary interest in maintaining the Bucksport Mill as a viable long term producer of coated paper is equally obvious: they are suppliers of specialized, skilled paper mill labor in an isolated geographic market, and thus are dependent on the Mill being productively operated to create the demand for their skilled services.

VIII. All of the *Associated General Contractors* factors support antitrust standing in this case

Antitrust standing must be evaluated on a case-by-case basis, and is determined by examining the following factors: “(1) the causal connection between the alleged antitrust violation and harm to the plaintiff; (2) an improper motive [by Defendant]; (3) the nature of the plaintiff’s alleged injury and whether the injury was of a type that Congress sought to redress with the antitrust laws (‘antitrust injury’); (4) the directness with which the alleged market restraint caused the asserted injury; (5) the speculative nature of the damages; and (6) the risk of duplicative recovery or complex apportionment of damages.” *Id.* (citing, *Associated General*

Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 529-35 (1983)).²⁶ All of the relevant factors support standing in this case.

The first factor is the “the causal connection between the alleged antitrust violation and harm to the plaintiff”. *Sullivan*, 25 F.3d 43, 46 (1st Cir. 1994). Here, the Plaintiffs have alleged that the Defendants have violated the antitrust laws through various acts and statements that center around shutting down and destroying the Bucksport Mill. As a direct result of such acts, the employees will lose their jobs and their ability to work for any entity which could purchase the Mill for continued paper production. In addition, if the Bucksport Mill is scrapped, consumers will have to pay higher prices for products containing coated paper. Therefore, there is a direct causal connection between the violation and the harm to Plaintiffs.

The second factor is whether plaintiffs have pled “an improper motive [by the defendant]”. *Id.* Plaintiffs have presented evidence that Defendants violated the antitrust laws when Verso stated that it would not sell the Bucksport Mill to any competitor, and then sold the Bucksport Mill to AIM for scrap (and for below market value) to avoid any other competitor purchasing and operating the mill. This is an improper motive.

The third factor is “the nature of the plaintiff’s alleged injury and whether the injury was of a type that Congress sought to redress with the antitrust laws”. *Id.* Plaintiffs are all suppliers of specialized labor to the Bucksport Mill. There is a labor market for those workers who have the skills and knowledge to work at the Bucksport Mill. If the Bucksport Mill were to be intentionally destroyed, this would have a direct impact on the plaintiffs’ ability to sell their labor, especially given the lack of alternative paper mills within a reasonable distance from Bucksport. This constitutes an “antitrust injury”. And as widely acknowledged, “loss of

²⁶ However, where only injunctive relief is sought, the sixth factor (the “risk of duplicative recovery or complex apportionment of damages”) is not relevant. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113 (1986).

employment” may constitute an antitrust injury. *See, e.g., Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1176 (5th Cir. 1976). Another Court found that the plaintiffs had standing because defendants’ antitrust violation “...directly impeded plaintiffs’ ability to sell their labor...” *Eichorn v. AT&T Corp*, 248 F.3d 131, 142 (3d Cir. 2001). In addition, Plaintiffs will also suffer antitrust injury as consumers of magazines and other products containing coated paper, because they will likely pay higher prices as a result of the destruction of the Bucksport Mill.

The fourth factor is “the directness with which the alleged market restraint caused the asserted injury”. *Sullivan*, 25 F.3d 43, 46 (1st Cir. 1994). As previously explained, the market restraint here is the intentional destruction of the Bucksport Mill through a sale to AIM. There is a direct relationship between those illegal acts and the loss of the plaintiffs’ employment and ability to sell their labor to the Mill, as well the likelihood that prices will increase for products purchased by plaintiffs that contain coated paper.

The fifth factor is “the speculative nature of the damages”. *Id.* Here, plaintiffs are only seeking injunctive relief, not damages, so this factor is not critical. Nevertheless, Plaintiffs’ damages is entirely clear: loss of employment and wages. Plaintiffs will also suffer damages through higher prices for products containing coated paper. Thus, plaintiffs’ damages are not at all speculative, and are, to the contrary, subject to calculation. For the purposes of the TRO and preliminary injunction, the Court should find that the Plaintiffs do have standing to seek the relief requested.²⁷ Therefore, Plaintiffs respectfully request a TRO and preliminary injunction be entered as described on pages four to six of this Motion.

²⁷ IAM also has standing. An association has standing when “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Merit Constr. Alliance v. City of Quincy*, 759 F.3d 122, 126-127 (1st Cir. 2014). Here, the members of IAM would have standing to sue in their own right (as established above). Second, IAM’s interest is to represent its employees in all labor negotiations, and the relief sought herein is germane to IAM’s purpose. Lastly, the relief requested by IAM is purely injunctive and does not require the participation of individual members of IAM.

Dated this 15th day of December, 2014

Respectfully submitted,

/s/ Kimberly J. Ervin Tucker

Kimberly J. Ervin Tucker
Maine Bar No. 6969
48 Harbour Pointe Drive
Lincolntonville, Maine 04849
202-841-5439
k.ervintucker@gmail.com

/s/ Dana F. Strout

Dana F. Strout, Esq.
Dana F. Strout, P.A.
Maine Bar No. 8239
270 West Street, Ste. B
Rockport, Maine 04856
207-236-0200
dfspcc@gmail.com

/s/ Donald I. Baker

Donald I. Baker
Petitioner to Appear *Pro Hac Vice*
District of Columbia Bar No. 944124
Baker & Miller PLLC
2401 Pennsylvania Ave., NW, Suite 300
Washington, D.C. 20037
202-663-7820
DBaker@bakerandmiller.com

Ishai Mooreville

Petitioner to Appear *Pro Hac Vice*
District of Columbia Bar No. 99283
Baker & Miller PLLC
2401 Pennsylvania Ave., NW, Suite 300
Washington, D.C. 20037
202-663-7820
IMooreville@bakerandmiller.com

Kamila Wirpszo
General Counsel, American Iron & Metal
AIM Holding LP
9100 Henri Bourassa East
Montreal, Quebec H1E 7R9
kwirpszo@aim-rg.com

Signed: /s/ Kimberly J. Ervin Tucker