UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

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

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

The First Amended Complaint ("FAC") contains essentially three antitrust claims: (1) Verso and NewPage conspired to close the Bucksport mill in violation of Section 1 of the Sherman Act; (2) Verso attempted to monopolize the North American coated paper market (and conspired with AIM to do so) by selling the Bucksport mill to AIM in violation of Section 2 of the Sherman Act; and (3) Verso sold the Bucksport mill to AIM—a noncompetitor in the North American coated paper market—in violation of Section 7 of the Clayton Act. Verso moved to dismiss the FAC because (1) all of Plaintiffs' claims against Verso are now moot; (2) the Section 1 claim fails because Plaintiffs do not satisfy the pleading standard set forth in *Twombly*; (3) the Section 2 claims fail because Plaintiffs allege no conduct besides a purported refusal to deal with competitors, which is not a violation of the antitrust laws under *Trinko*; and (4) the Section 7 claim fails because it is nothing more than an effort to make an end-run around *Trinko*.

Unable to address Verso's arguments directly, Plaintiffs have apparently decided to embrace the philosophy that "[i]f you don't like what is being said, then change the conversation."[1] Plaintiffs attempt to do two things in their opposition brief to "change the conversation." First, they assert a wide range of entirely new facts and allegations in their opposition brief, which are principally directed at Verso's parent company, Apollo Global Management, LLC ("Apollo"), and Apollo's financial dealings, and which have nothing to do with this case. As part of this effort, Plaintiffs attach to the opposition brief, and suggest that the Court should rely on, numerous documents, including a so-called "factual chronology," that are not attached to the FAC or expressly incorporated therein and that are not properly before the Court under even the most flexible boundaries as to what might be considered on a motion to dismiss. Second, Plaintiffs attempt to convince this Court that it should consider their thirteenth hour attempt to replead the case they made to the Department of Justice ("DOJ") over five months ago opposing Verso's acquisition of NewPage.[2]

These new allegations in the opposition brief are, in effect, a thinly disguised attempt by Plaintiffs to amend the FAC through their brief.[3] In fact, Plaintiffs casually alert the Court by

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[1] *Mad Men*, Ep. 3:2: *Love Among the Ruins* (AMC Aug. 23, 2009).

[2] Plaintiffs document in excruciating detail the many contacts that their counsel has had with the DOJ in a futile attempt to prevent Verso's acquisition of NewPage or, failing that, to convince the DOJ that it should have required Verso to divest the Bucksport mill as a condition of not challenging the acquisition. These contacts consist of three lengthy letters from Plaintiffs' counsel to various DOJ officials, including, among others, the Deputy Assistant Attorney General, the Deputy Assistant Attorney General for Litigation, the Director of Civil Enforcement, the Chief of the Litigation 1 Section, and the lead attorney investigating Verso's acquisition of NewPage (Plaintiffs' Opposition Brief ("Opp.") at 6-7; *see also* Ex. 3-5); a phone call with DOJ officials regarding the acquisition (Opp. at 19); and a comment filed by Plaintiffs' counsel pursuant to the Tunney Act (Opp. 18-19; *see also* Ex. 9). Despite these persistent and exhaustive efforts, the DOJ did ***not*** provide the relief that Plaintiffs requested and, as Plaintiffs characterized it, "the Division clearly rebuffed Plaintiffs' concerns." Opp. at 7 n.4.

[3] *See* Addendum 1, which identifies new facts that Plaintiffs alleged in their opposition brief, but do not even try to cite to in their FAC. Plaintiffs also effectively attempt to assert entirely new claims in their brief. For instance, Plaintiffs argue that: Apollo conspired with Verso and NewPage to shut down paper mills (Opp. at 2-7); Apollo acquired NewPage's second lien debt in violation of Section 7 of the Clayton

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footnote that "it is likely appropriate to again amend the Complaint and conform the Complaint to the additional facts that have occurred since December 22 that evidence a violation of the antitrust laws." Plaintiffs' Opposition Brief ("Opp.") at 26 n.36.[4]

This wholesale effort by Plaintiffs to fundamentally change the nature of their case by and through their opposition to the pending motion to dismiss is improper under *Twombly*: "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to '***give the defendant fair notice of what the . . . claim is and the grounds upon which it rests***.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)) (emphasis added). Generally, when evaluating a motion to dismiss, a court cannot look beyond the complaint and documents attached thereto or expressly incorporated therein. *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993). And "it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) (citations omitted).[5] None of the new factual allegations that appear in Plaintiffs'

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Act (Opp. at 2); Verso and Apollo have engaged in conduct to monopolize the North American paper market (Opp. at 6); the Court has "erroneously summarized" Plaintiffs' Section 1 claims, and they are better stated as a conspiracy involving Verso, NewPage and Apollo to close paper mills (Opp. at 31); NewPage knew about the "Apollo-Verso-NewPage-AIM scheme to reduce capacity in advance of the desired and anticipated Verso-NewPage merger" (Opp. at 31); the Court should "cure" the DOJ's approval of Verso's acquisition of NewPage by ordering additional divestitures *in connection* with that transaction (Opp. at 17-18); the violation of Section 7 of the Clayton Act is actually Verso's acquisition of NewPage, and the sale of the Bucksport mill should be reviewed in the context of that transaction (Opp. at 39); and Plaintiffs do not allege a "refusal to deal with competitors" despite the fact that they repeatedly request the Court to order the Bucksport mill sold to a competitor (Opp. at 34).

[4] Even if Plaintiffs' offhand remark were a request for leave to amend the FAC, which it expressly is not, Plaintiffs' failure to "file a separate motion to amend or [otherwise] elaborate on their request" is fatal to their effort. *Maine Springs, LLC v. Nestle Waters N. Am., Inc.*, No. 14-cv-00321, 2015 WL 1241571, at *1 n.1 (D. Me. Mar. 18, 2015).

[5] *See also Brown v. Whirlpool Corp.*, 996 F. Supp. 2d 623, 645 (N.D. Ohio 2014) ("'a complaint cannot be amended by briefs in opposition to a motion to dismiss'") (quoting *Dana Ltd. v. Aon Consulting, Inc.*,

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opposition brief and its myriad attachments are entitled to any reasonable inference in their favor—only the "well-pleaded facts as they appear in the complaint" are taken by the court in the light most favorable to plaintiffs. *Coyne v. City of Somerville*, 972 F.2d 440, 442-43 (1st Cir. 1992) (citation omitted).[6]

Plaintiffs first attempt to "change the conversation" by restating their Section 1 claims and combining extensive new material from their opposition brief with some of the facts that actually appear in their FAC in an attempt to show that they have alleged "parallel plus" factors under the *Evergreen* case. In their FAC, Plaintiffs allege that "Verso has . . . violated conspiracy prohibitions in Section 1 of the Sherman Act by acting in concert with ***NewPage*** to shut down The Bucksport Mill and caused it to permanently cease to be capable of producing coated printing paper." Am. Compl. ¶ 12 (emphasis added). Plaintiffs cite to three sources of support for this claim: (1) the Merger Agreement memorializing the terms of Verso's acquisition of NewPage (*id*. ¶ 169); (2) various SEC filings related to the Verso-NewPage transaction (*id*.); and (3) Verso's decision to close the Sartell mill after an explosion and fire (*id*. ¶¶ 69, 170). As Verso pointed out in its motion to dismiss, these facts are not sufficient to nudge Plaintiffs' claim of a conspiracy between Verso and NewPage to close and dismantle the Bucksport mill from possible to plausible.[7]

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984 F. Supp. 2d 744, 767 n.2 (N.D. Ohio 2013)); *Velázquez-Ortiz v. F.D.I.C.*, No. 11-1757, 2012 WL 1345174, at *6 (D.P.R. Apr. 18, 2012) (citing *Car Carriers*); *McGrath v. McDonald*, 853 F.Supp. 1, 2-3 (D. Mass. 1994) (documents submitted for first time in opposition brief are "not an appropriate subject for consideration on a motion to dismiss").

[6] It is unnecessary for Verso to move to strike Plaintiffs' extensive references to the various documents and materials attached to their opposition brief that are not appropriate for consideration on Verso's motion to dismiss, as the court may not consider these materials in the first instance when deciding the motion. *See McGrath*, 853 F. Supp. at 3 (unnecessary to strike materials ineligible for consideration).

[7] *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to

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Although the Merger Agreement unambiguously reflects the parties' intent for Verso to acquire NewPage, it does not hint at a commitment by Verso to close the Bucksport mill prior to the acquisition. Plaintiffs previously relied on Section 5.6 of the Merger Agreement to support their conspiracy allegation, but now appear to have abandoned this argument because they fail to address it in their opposition brief. With respect to the SEC filings to which they cite, these filings simply relate to Verso's acquisition of NewPage and also contain no hint of an agreement with NewPage to close the Bucksport mill. Finally, the prior mill closings of Verso and NewPage are no more than parallel conduct, which is insufficient to state a claim under Section 1 of the Sherman Act.[8]

Plaintiffs attempt to use *Evergreen Partnering Group, Inc. v. Pactiv Corp.*, 720 F.3d 33 (1st Cir. 2013), to support their argument that they have alleged facts in addition to the mill closures, or "parallel plus" factors, sufficient to support their Section 1 claim. Opp. at 23, 29-32. But the "facts" that Plaintiffs allege "meet the parallel plus probability standard," *id*. at 32, are the myriad statements relating to Apollo and its investment activities, including the acquisition in 2011 of second lien debt issued by NewPage.[9] The activities of Apollo are not properly before the Court because they are not in the FAC, nor are they relevant to the question of whether Verso, one of many portfolio companies that Apollo owns, conspired with NewPage to close the

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suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.").

[8] *Twombly*, 550 U.S. at 557 ("A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendants' commercial efforts stays in neutral territory.").

[9] Many of these new allegations follow directly from a passage in which Plaintiffs claim that the Court has "erroneously summarized the nature of Plaintiffs' Section 1 allegations," (Opp. at 30), and then proceed to assert these myriad new allegations with virtually no supporting citations to Plaintiffs' FAC (*id.* at 31).

Bucksport mill. Because Plaintiffs cannot cite to any language in the Merger Agreement, the SEC filings, or any other yet to be found source relating to Verso's closure of the Bucksport mill that "'indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement,'" the Court should dismiss the Section 1 claim. *Evergreen*, 720 F.3d at 45 (quoting *Twombly*, 550 U.S. at 557 n.4).[10]

Plaintiffs' next attempt to "change the conversation" is to claim that they have not actually alleged that "the Defendants are 'refusing to deal' with a competitor" in an effort to avoid the dispositive effect of the Supreme Court's holding in *Trinko* that a refusal to deal with a competitor does not violate Section 2 of the Sherman Act. Opp. at 34. But even a cursory reading of Plaintiffs' opposition brief belies this claim.[11] Plaintiffs refer to Verso's failure to sell the Bucksport mill or otherwise request such a sale to a competitor no fewer than eight times in their opposition brief.[12]

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[10] Plaintiffs also argue—bizarrely—that NewPage's "consent [to the sale of Bucksport] may be reasonably inferred by NewPage's failure to object to this sale … ." Opp. at 31. But any attempt by NewPage to exercise control over Verso's decision to sell the Bucksport mill would have risked violating the antitrust laws. So Plaintiffs argue, in effect, that the best evidence that NewPage conspired with Verso to violate the antitrust laws is conduct by NewPage that expressly avoided violating the antitrust laws.

[11] Plaintiffs' opposition brief continues to assert as fact that there are Verso competitors who are willing to purchase the Bucksport mill and continue operating its papermaking assets. *See* Opp. at 18 (citing the "known existence" of such competitors). To date, despite Plaintiffs' efforts to bring these competitors forward, not one has emerged.

[12] *See, e.g.*, Opp. at 3 ("[t]he Prayer for relief sought . . . compulsory divestiture of the Bucksport Mill by Verso with its ***sale to a competitor***"); Opp. at 6 ("Plaintiffs requested that DOJ condition the approval of the Verso-NewPage merger on divestiture of the Bucksport Mill and sale ***to a competitor***"); Opp. at 18 ("[I]t was error for DOJ . . . to fail to require divestiture and sale of the Bucksport Mill ***to a competitor*** as a condition of the Verso-NewPage merger. This Court has jurisdiction to cure that omission by DOJ."); Opp. at 20 ("Plaintiffs have requested . . . additional remedial measures including the nullification of the Verso-AIM sale and/or divestiture of the Bucksport Mill by AIM with a mandated sale ***to a Verso competitor***"); Opp. at 21 ("Further, this Court could direct AIM to divest itself of the Bucksport Mill and sell it ***to a Verso competitor***. . . "); Opp. at 26 n.36 ("Plaintiffs filed a Tunney Act Comment letter protesting the failure of the DOJ to require divestiture of the Bucksport Mill and sale ***to a Verso competitor***"); Opp. at 27 ("this Court still could . . . mandate divestiture of the Bucksport Mill *as a going concern by AIM*, so that the Mill could be sold ***to a Verso competitor***") (first emphasis in original); Opp.

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Plaintiffs challenge ***no*** other conduct by Verso as an act of monopolization besides the sale of the Bucksport mill to AIM and not to a competitor. If there was any doubt about this, Plaintiffs resolved it in their Reply Memorandum in Support of Temporary Restraining Order and Preliminary Injunction Under the Antitrust Laws:

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

ECF No. 79 at 33-34 (emphasis added).

In addition to their fruitless attempt to disavow their core refusal to deal claim, Plaintiffs also attempt to evade the mandate of *Trinko* by citing to *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911), *United States v. Am. Can Co.*, 230 F. 859 (D. Md. 1916), and *FTC v. Cardinal Health*, 12 F. Supp. 2d 34 (D.D.C. 1998). In each of these cases, the defendants, which had market power in the relevant market, acquired an asset for the purpose of closing it in order to enhance their market power. Verso does not dispute that this conduct may violate the antitrust laws. But here, there is no allegation that AIM—the party acquiring the asset—has market power in the relevant market and, in fact, Plaintiffs acknowledge that AIM does not compete in the North American coated paper market.[13] Moreover, Verso, the party alleged to have market power in the North American coated paper market, is not the party that acquired the asset. In

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at 27 ("Divestiture and sale of the Bucksport Mill ***to a Verso competitor*** could and would aid in remedying the anticompetitive consequences of the Apollo, Verso, NewPage and AIM conspiracy to reduce capacity . . . "); Opp. at 34 ("the issue is Verso's choice to destroy capacity in a highly concentrated market, with exceptionally high entry costs, by selling the Bucksport paper mill to a scrapper, rather than ***a competitor***").

[13] Plaintiffs once again, and accurately, define AIM as the "U.S. subsidiary of a Canadian scrap metal company." Opp. at 4.

fact, Verso already owned the Bucksport mill and thus could not acquire the mill for the purpose of closing it. In each case Plaintiffs cite, the defendant *increased* its market share by its conduct (*i.e.*, each defendant *decreased* the total capacity of the market while *maintaining* its own production capacity), whereas Verso *decreased* its market share by engaging in the challenged conduct. Simply stated, Plaintiffs' trilogy of cases is not merely inapposite—their facts are opposite.[14]

Plaintiffs' third attempt to "change the conversation" is to address Verso's acquisition of NewPage rather than Verso's sale of the Bucksport mill to AIM. With respect to Plaintiffs' Section 7 claims, Plaintiffs simply do not dispute that their argument is an effort to make an end-run around *Trinko*. Opp. at 33. And in one of the few accurate statements in their opposition brief, Plaintiffs acknowledge that the FAC does not challenge Verso's acquisition of NewPage. *Id*. at 6 ("Plaintiffs did not name Apollo and NewPage as defendants in this action, nor did Plaintiffs challenge the merger of Verso and NewPage."). But then Plaintiffs remarkably proceed to devote nearly twenty pages of their opposition brief and seventy pages of exhibits to arguing that the effects of Verso's acquisition of NewPage *should* be before this Court and that this Court should focus on that transaction rather than the sale of the Bucksport mill. *Id*. at 18. Yet the Court will search in vain for any claim challenging Verso's acquisition of NewPage in the Plaintiffs' FAC. As noted above, the Court must reject this brazen attempt to amend the FAC through Plaintiffs' opposition brief. Simply stated, the legality of Verso's acquisition of

[14] The *New York v. Actavis* case cited by Plaintiffs is also not on point for the purpose Plaintiffs cite to it. No. 14-CV-7473, 2014 WL 7015198 (S.D.N.Y. Dec. 11, 2014). In that case, Actavis withdrew a drug from the market that was losing its patent protection in order to force patients to switch to a drug still under patent protection. Plaintiffs do not allege that Verso has removed all coated groundwood or specialty paper from the market in order to force consumers to purchase coated freesheet paper produced at Verso's other mills.

NewPage is not before this Court and Plaintiffs have all but conceded that they otherwise cannot state a claim for relief under Section 7 of the Clayton Act.

With respect to Verso's argument that the claims against it are moot, Plaintiffs appear to acknowledge that the requested relief largely has "been rendered ineffective or unobtainable against Verso." *Id.* at 27. And the only relief that Plaintiffs propose that potentially implicates Verso is the rescission of the sale of the Bucksport mill. *Id.* But rescinding the sale of the Bucksport mill to AIM would not remedy Plaintiffs' alleged harm as consumers—the only harm that they have standing to assert—because Plaintiffs do not allege that Verso would ever resume making paper at Bucksport. *See Nat'l Socy. of Prof. Eng'rs*, 435 U.S. 679, 698 (1978) (holding that the standard against which the sought-after antitrust relief must be judged is whether the relief represents a reasonable method of eliminating the consequence of the illegal conduct). And, as previously addressed, ordering rescission and the sale of the Bucksport mill to a Verso competitor is not relief available to Plaintiffs under *Trinko*. Plaintiffs therefore can obtain no material relief from this Court, rendering each and every one of their claims moot.

Finally, because Plaintiffs fail to address Verso's arguments concerning Plaintiffs' standing and vacation and severance pay claims, Plaintiffs appear to concede that it would be appropriate for the Court to confirm its prior ruling that Plaintiffs lack standing as union members and in their capacity as employees, and to enter an order formally dismissing Count 9 of the FAC.

CONCLUSION

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

Dated this 6th day of April, 2015.

Respectfully submitted,

/s/ David E. Barry

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2015, I caused the foregoing Reply in Support of Defendants Motion to Dismiss Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief to be electronically filed with the Clerk of Court using the CM/ECF system which will distribute a copy of the documents to all counsel of record.

Dated: April 6, 2015

/s/ David E. Barry

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