

Kim Ervin Tucker

Attorney at Law

Katahdin Counsel

Admitted to Practice:
State of Maine
State of Florida
District of Columbia

United States Supreme Court
United States District Court District of Maine
United States District Court Northern District of Florida
United States District Court Middle District of Florida

March 12, 2015

Peter J. Mucchetti, Esquire
Chief, Litigation I Section
Antitrust Division
United States Department of Justice,
450 Fifth Street, NW
Suite 4100
Washington, DC 20530

RE: Proposed Consent Decree in *United States v. Verso Paper Corp. and NewPage Holdings*; Case No. 1:14-cv-2216 (D.D.C.)

Dear Mr. Mucchetti:

I am submitting this letter, pursuant to the Tunney Act, 15 U.S.C. § 16(b)-(h), to protest the clear inadequacy of the Antitrust Division's proposed Consent Decree – which fails to eliminate the negative competitive consequences of permitting a merger between Verso Paper Corp. and New Page Holdings ("Verso-NewPage Merger"). Not only were the two proposed divestitures required by the Consent Decree (in Biron, WI and Rumford, ME) insufficient in scale, but they were made to a party (Catalyst) which has already become Verso's dancing partner on pricing increases in the oligopolistic market that Verso now dominates as a result of the Verso-NewPage Merger. Moreover, the Division allowed Verso to amplify the likely anticompetitive effects of the Verso-NewPage merger by shutting down and selling its operational mill in Bucksport, Maine ("the Bucksport Mill") *for scrap* – which is intended to, and likely will result in the permanent loss of this facility as a productive asset in the economy of Maine and the North American coated paper market.¹ The loss of the Bucksport Mill and its capacity is a consequence that the Division had ample basis, opportunity and time to prevent – but inexplicably chose instead to allow to occur.

The Post-Merger Price Increases in January 2015

To see how badly the Division's proposed Consent Decree has failed to reduce the predictable and long-predicted, anticompetitive and negative market impacts of the Verso-NewPage merger, the reviewing Court will need look no further than the \$40/ton price increase announced by Verso, on

¹ This letter is submitted on behalf of 58 former employees of the Bucksport Mill who have lost their jobs as result of Verso's capacity-reduction actions made possible by the Verso-New Page Merger. A list of the impacted employees is attached to this letter as Exhibit A. I am also acting as counsel for Local 1821 of the International Association of Machinists and Aerospace Workers ("Local 1821"), which has represented these hourly wage employees for collective bargaining purposes.

Tunney Act Protest Letter Re: Verso-NewPage Merger

March 11, 2015

Page 2

Friday January 30, 2015.² This price increase was followed in quick succession with a similar price increase by Catalyst – the very entity to which the divested Biron and Rumford Mills were sold in order to "eliminate the anticompetitive effects of the [NewPage] acquisition in the North American market for coated publication papers by establishing a new, independent, and economically-viable competitor" (Competitive Impact Statement p. 9).³ Ironically, the Verso price increase occurred on the very day that the Division advised representatives of employees from the Bucksport Mill that the Division would not, *under any circumstances*, open an inquiry into the sale and closure of the Bucksport Mill by Verso to a scrap dealer (rather than a competitor willing to pay more to continue to operate the Mill).

As the Division's Complaint asserts, the Verso-NewPage Merger violates Section 7 of the Clayton Act. We believe that it also involves likely violations of Sections 1 and 2 of the Sherman Act. So far, requiring the divestiture of only the Biron and Rumford Mills to Catalyst has done less than nothing to reduce or even slow-down the adverse impact on consumers, direct and indirect, of the anticompetitive consequences of allowing this merger to proceed. A bigger divestiture package, to a more independent and vigorous competitor than Catalyst (which recently emerged from bankruptcy), might have provided greater consumer protections, but this option was expressly rejected by the Division when proposed by me and my colleagues on behalf of the employees of the Bucksport Mill.

The fact that Verso Corporation acted with such haste to increase prices after the merger deal with NewPage was approved by the Division – not even waiting until the 60-day Tunney Act comment period was past – demonstrates the impunity with which Verso will act now that it has been granted near monopoly status in the North American coated printing paper market. Further, Catalyst's immediate adoption of the price increase that Verso announced last month demonstrates that the divestiture of the Biron and Rumford Mills to Catalyst was, and is, a grossly inadequate remedy to prevent or delay the inevitable anticompetitive consequences of approving the Verso-NewPage Merger – utterly bereft of any chance of protecting direct and indirect consumers of coated paper products, now or in the future.

The Antitrust Division's Too Narrow Focus

The Division's inquiry into the Verso-NewPage Merger was fatally flawed from the outset, because of Litigation I Section's apparent limitation of its investigation to consideration of only events *after* the initial public announcement of this proposed merger by Verso and NewPage *in January of 2014*. This myopic 2014-centric focus on events and actions failed to put this merger in a realistic (and accurate) competitive context and ignored ample evidence, available from publicly available sources, regarding the lengths to which Apollo Global Management ("Apollo"), Verso's parent, had gone to use its acquisition of NewPage's second lien debt in 2011 as leverage

² "Price hike prospects brighten on coated as Verso announces immediate \$20-40 CFS, CM, SC increases", PPI Pulp & Paper Week, January 30, 2015. This price increase information is available at: <http://www.risiinfo.com/pulp-paper/ppippw/Price-hike-prospects-brighten-on-coated-as-Verso-announces-immediate-20-40-CFS-CM-SC-increases.html>

³ "Catalyst announces Apr. 1 price increase of \$40/ton for Its coated freesheet, CM, and high-brite grades in the US", PPI Pulp & Paper Week, February 6, 2015, available at <https://www.risiinfo.com/pulp-paper/ppippw/Catalyst-announces-Apr-1-price-increase-of-40ton-for-Its-coated-freesheet-CM-and-high-brite-grades-in-the-US.html>

Tunney Act Protest Letter Re: Verso-NewPage Merger

March 11, 2015

Page 3

to force a Verso-NewPage merger and to have both Verso and NewPage reduce capacity prior to the merger Apollo has sought to achieve since 2011.

Even the most cursory review of publicly available sources reveals that the January 2014 announcement of a Verso-NewPage merger was merely the most recent step in Apollo's quest to reduce competition by shutting down capacity and achieving this merger. In fact, a Verso-NewPage merger has been a goal actively pursued by Apollo, Verso's parent, since *at least* 2011 - when Apollo acquired a significant amount of NewPage's second lien debt and began exerting influence to force a Verso-NewPage merger. Publicly available sources reveal: (i) discussions of a merger between Verso and NewPage in 2011 and 2012; (ii) public claims by Verso of abandonment of interest in a merger with NewPage by mid-year in 2011, while Apollo was simultaneously attempting to use its status as a second line debt holder to force a Verso-NewPage merger through the NewPage bankruptcy proceedings in the Delaware Bankruptcy Court (efforts that continued through at least August 2012);⁴ and (iii) evidence that Verso and NewPage have engaged in a campaign to restrain competition and reduce industry capacity, by scrapping the equipment and physical plants of otherwise operational and productive paper mills with the help of AIM Development (USA) LLC.

Attached to this letter, as Exhibit B, is the Chronology that representatives of the Bucksport Mill employees previously provided to the Division, but which the Division chose to ignore. This Chronology lays out some of the pattern of conduct, engaged in by Apollo in conjunction with Verso and NewPage, to reduce capacity in anticipation of a Verso-NewPage merger, and committed in furtherance of an anticompetitive scheme to increase Verso's market power after such a merger. This pattern includes: (i) shutting down and scrapping paper making machinery and laying off hundreds of workers at Verso's Sartell and Bucksport Mills in 2011; (ii) the destruction of two viable and productive paper mills (NewPage's Kimberly, WI mill, and Verso's Sartell, MN mill) in 2011 through 2013; and (iii) the pending destruction of the Bucksport Mill, as ways of reducing capacity in order to facilitate post-merger pricing increases. All of these three facilities (Kimberly, Sartell and Bucksport) have been sold to the scrap metal company AIM Development (USA) LLC -- which has destroyed the paper making capacity of the first two mills and has indicated an intent to do the same with the Bucksport Mill, while spinning off the electrical assets of these facilities (after the electric plants had been upgraded with millions of dollars in public funds in the case of Sartell and Bucksport).⁵

⁴ Law360, "*Verso Paper publicly ended talks to acquire NewPage*," by Jamie Santo (September 5, 2012) <http://www.law360.com/articles/375444/verso-paper-ends-talks-to-acquire-newpage>
<http://www.law360.com/articles/375444/attachments/0>

⁵ Despite the availability of buyers willing to purchase the Bucksport Mill for more than AIM paid, on March 11, 2015, AIM's agents announced that the Mill's equipment will be auctioned off on March 24, 2015 – the same pattern used prior to the razing of the Sartell and Kimberly Mills, that have still left those communities in ruin. Bangor Daily News, "*Former Verso Equipment to go up for Auction*," by Bill Trotter (March 11, 2015) http://bangordailynews.com/2015/03/11/news/hancock/former-verso-equipment-to-go-up-for-auction/?utm_source=BDN+News+Updates&utm_campaign=e7ceb1d32c-RSS_AFTERNOONUPDATE_EMAIL_CAMPAIGN&utm_medium=email&utm_term=0_715eed3192-e7ceb1d32c-82421111

Tunney Act Protest Letter Re: Verso-NewPage Merger

March 11, 2015

Page 4

Apollo's substantial acquisition of the NewPage debt, for the purpose of exercising some control over the largest printing paper competitor of Apollo's subsidiary Verso, appears to be an asset acquisition which violates Section 7 of the Clayton Act, 15 U.S.C. Section 18. See *Mr. Frank, Inc. v. Waste Mgmt.*, 591 F.Supp. 859, 864-67 (N.D. Ill. 1984) (Section 7 is applicable where acquisition of debt may create opportunities to control a competitor's decision making); and *Metro-Goldwyn-Mayer, Inc. v. Transamerica Corp.*, 303 F. Supp. 1344, 1351 (S.D.N.Y. 1969) ("[i]t would be naive, of course, to believe that a powerful creditor, which has placed a debtor in a position of dependency upon it, would not use its position as leverage to put pressure upon the debtor to conduct its business, including its control over others, in a way that would accord with the creditor's interests"). Ironically, both the Antitrust Division and Apollo have had reported first hand experience with this very subject. See *United States v. The Gillette Company, et al.*, Civil No. 90-0053-TFH (D.D.C.), 55 FR 12567 (April 4, 1990) (Proposed Final Judgment preventing Gillette from acquiring additional debt in competitor, and requiring them to remain passive debt holder); and *Vantico Holdings S.A. v. Apollo Mgmt.*, 247 F. Supp. 2d 437, 455 (S.D.N.Y. 2003) (analyzing whether acquisition of a competitor's debt by Apollo was anti-competitive, but ultimately finding that the facts presented by the plaintiff were not sufficient to support imposition of a preliminary injunction).

In Apollo's present case involving NewPage debt, subsequent history has proven that this possibility of control was not just speculative; rather, in the subsequent NewPage bankruptcy proceeding, Apollo tried unsuccessfully to use its position as debtor to force a \$1.5 billion merger with Verso. See f.n. 4 above. Given this reality, we respectfully suggest that the question of whether Apollo used this debt-based-influence to encourage NewPage to shut down its Kimberly, WI mill in 2013 is entirely worthy of a Government Sherman Act investigation as well.

Indeed, it ought to be a source of concern to the broader public, and not just the Bucksport Mill employees, that the Division staff ignored their pleas for an investigation into the implementation and anticompetitive effects of the reductions of capacity since January 2011 by Verso and NewPage, and Apollo's involvement in those actions, given Apollo's history and tactics laid out in detail in *Vantico Holdings S.A. v. Apollo Management, LP, supra*. The substantial body of information relating to Apollo and these simultaneous capacity reducing activities in 2011-2013 was readily available through simple Googling and thus an initial investigation could have been carried out without requiring a significant expenditure of the Division's resources. The known fact and law all favored the Division undertaking the requested inquiry and requiring divestiture (rather than destruction) of the Bucksport Mill.

The Bucksport Mill, located in Bucksport, Maine, which was owned by Verso Paper Corp. until January 29, 2015, had been a fully operational paper mill for more than eighty (80) years, and at the time of its closure in December, 2014, produced coated and specialty paper. In order to provide a more complete record, I attach as Exhibit C a statement detailing the competitive significance of the Bucksport Mill and the summary of the Division's failure to take steps to prevent Verso's plan to eliminate its capacity from the market in conjunction with the Verso-NewPage Merger. This sad history is no doubt familiar to the Division, but will not necessarily be familiar to the reviewing Court.

The most troubling aspect of the Division's failure to act to prevent the destruction of the Bucksport Mill and its capacity is that it would have cost Verso no legitimate gain to avoid the human and economic suffering that closure has imposed on the Bucksport Mill employees and this

Tunney Act Protest Letter Re: Verso-NewPage Merger

March 11, 2015

Page 5

entire region of the State of Maine. First, had the Division required Verso to sell this valuable asset (that by the Division's own estimate in the Competitive Impact Statement would cost \$2 billion+ to rebuild from scratch) to a competitor willing and able to continue to operate it in the coated paper market, Verso would have directly made more money than the scrapper AIM paid Verso. Further, had such a sale been required, many or all of the 570 individual who worked at this Mill for decades (some over 4 decades) would still be working today. Instead, 524 people have lost their jobs, the town of Bucksport has lost 44% of its tax base, the State of Maine has lost a productive source of revenue that has employed thousands of people for more than 80-years, and the North American coated paper market has *permanently* lost a facility capable of producing hundreds of thousands of tons of coated and specialty paper annually. And, in addition, Verso and Catalyst have raised prices – to the detriment of all direct and indirect consumers of North American coated paper products.

These anticompetitive consequences were not speculative or unpredictable – in fact, within days of the announcement of the closure of the Bucksport Mill, industry analysts had raised Verso's credit rating *expressly because of* the anticipated anticompetitive benefits of the closure of the Bucksport Mill and the permanent loss of its capacity from the North American coated paper market.⁶

I also attach two letters to Assistant Attorney General William Baer from Donald Baker of Baker & Miller, arguing as a matter antitrust policy and established precedents, that parties to a merger among industry leaders should never be permitted to close down and eliminate capacity without having made a good faith offer of the closed capacity for sale to any qualified buyer willing to continue to operate in the market. Mr. Baker has served as our antitrust counsel during the Division's investigation of this matter and, as you know, is former head of the Antitrust Division. In the first of these letters dated December 5, 2014 (Exhibit D), Mr. Baker traced the history to show how the Bucksport Mill closure was premised on the Division allowing the Verso-NewPage merger to proceed. In the second letter dated January 27, 2015 (Exhibit E), Mr. Baker stressed that the Division's reliance on Verso's statement of its prior intentions was an improper and insufficient reason for the Division to ignore the competitive impact of the Bucksport Mill closure (see pp. 4-6); and he urged the Division to investigate the Verso-AIM transaction on the ground that its purpose and effect was to reduce competition in coated printing papers by destroying the significant productive capacity represented by the Bucksport Mill (see pp. 11-12).

⁶ In June 2014, Moody's had downgraded Verso's bond rating from B3 to Caa3, a change that reflected Moody's belief that Verso's debt obligations were "judged to be of poor standing and are subject to very high credit risk."⁶ The investors' service also speculated that the future of the acquisition was unclear. In taking this action, Moody's wrote in its report that: "The rating action reflects Moody's view that the announced agreement to acquire NewPage is becoming less likely to occur as the Department of Justice continues its review." *See*: <http://www.risiinfo.com/content-gateway/pulpandpaper/news/Market-profilesCoated-papers-A-sector-in-flux-in-the-face-of-secular-decline.html?industryId=21>.

However, within two days of Verso's announcement of the closure of the Mill in Bucksport, Moody's Rating Service upgraded Verso's rating, on October 3, 2014, and identified the closure of the Bucksport Mill and layoffs of more than 500 people by year's end as "a credit positive event."

Portland Press Herald, "*Verso's finances benefit from Bucksport mill closure, Moody's analyst says*," by Whit Richardson (October 8, 2014).

<http://www.pressherald.com/2014/10/08/versos-finances-helped-by-bucksport-mill-closure-moodys-analyst-says/>

Tunney Act Protest Letter Re: Verso-NewPage Merger

March 11, 2015

Page 6

Unfortunately, Mr. Baker never received any written response to these letters (or the earlier one that he had written Mr. Baer on November 12, 2014). And, as noted above, the only response Mr. Baker received was in the January 30, 2015 phone call that you and other Division staff members had with him and our team to advise us that no inquiry would be made of the Verso-AIM transaction – fittingly but ironically stated on the very same day that the merged Verso entity announced the \$40/ton increase in its pricing for coated printing paper! In that call, you responded to our request for clarification by telling us explicitly that the Division would “never undertake any Sherman Act investigation” into the propriety of the Verso-AIM sale and scrapping of the Bucksport Mill.

The Tunney Act submissions made to the District Court concerning communications between Verso and the Division tend to confirm that the Division failed to conduct any serious inquiry into the issues that Mr. Baker raised in his letters and other communications -- including: (i) the 2011-2013 merger-related efforts and capacity reduction activities involving Apollo, Verso, NewPage, and AIM; (ii) the likely adverse, anticompetitive market consequences of eliminating the Bucksport Mill’s capacity from the North American coated paper market; (iii) Verso’s express statements to Bucksport employees that it “would never sell the Bucksport Mill to a competitor”; and (iv) the likely availability of competitors willing to continue to operate the Bucksport Mill as a productive paper mill who were, and are, willing to pay more for the Bucksport Mill than the scrapper AIM ultimately paid for this facility as an incipient scrap heap.

Requested Action

Pursuant to the Tunney Act, I respectfully request, on behalf of 58 former Bucksport Mill employees and IAMAW Local 1821 that: (i) the Division withdraw its consent to the Consent Decree, and (ii) if the Division fails to do so, that the Court reject the Consent Decree. The Court should then instruct the Division that it should either: (i) require the parties to divest at least two more paper mills, preferably to some more independent operator than Catalyst; or (ii) take steps to cause (or require Verso to cause) AIM to sell the Bucksport Mill to a qualified operator willing to reopen it as a paper mill and cease and desist from all actions intended to scrap the Mill’s paper-making capacity. Such a sale could be to a competitor of Verso’s willing to pay *a reasonable price* (i.e., scrap value + \$1) and continue to operate this facility as a paper mill engaged in the production of paper in the North American market.

We also respectfully request that the Division more fully explain than it did in the Competitive Impact Statement whatever legal reasoning and economic analysis there was behind its decision to only require, as a condition for approving the merger, the divestment of paper mills located in Rumford, Maine, and Biron, Wisconsin, while permitting destruction *rather than divestiture* of the Bucksport Mill. Such an explanation, if credible, might do much to improve the public image of the Division among those of us who live and work in the Penobscot Bay area of Maine.

Respectfully submitted,



Kimberly J. Tucker
D.C. Bar No. 478517
Maine Bar No. 6969

LIST OF IMPACTED BUCKSPORT EMPLOYEES

IAMAW Local 1821 Members Who Lost Their Jobs at the Bucksport Mill

- a. Brian Abbott, with 42.9 years of service;
- b. John M. Adams, with 40.25 years of service;
- c. Barry G. Adams, with 33.89 years of service;
- d. Russell W. Ames, with 38.53 years of service;
- e. Edwin W. Ames, with 36.88 years of service;
- f. John E. Bakeman, with 38.29 years of service;
- g. Benjamin W. Kendall, with 3.44 years of service;
- h. Mark A. Bennett, with 38.48 years of service;
- i. Kevin L. Bernier, with 3.84 years of service;
- j. Alden L. Blodgett, with 33.24 years of service;
- k. Brian L. Bridges, with 37.62 years of service;
- l. John A. Burke, with 26.11 years of service;
- m. Robert A. Burpee, with 38.48 years of service;
- n. Larry S. Carter, with 30.37 years of service;
- o. Jeffrey A. Clement, with 27.36 years of service;
- p. Michael L. Coleman, with 23.88 years of service;
- q. Michael L. Cookson, with 3.96 years of service;
- r. Wendell G. Corey, with 35.75 years of service;
- s. Chad R. Cote, with 3.84 years of service;
- t. Corey Darveau, with 15.75 years of service;
- u. Ronald A. Davis, with 4.26 years of service;
- v. Leon Dorr, with 42.27 years of service;
- w. Robert A. Downes, with 34.26 years of service;
- x. Kendal S. Dunbar, with 44.31 years of service;
- y. Kenneth P. Flannery, with 34.73 years of service;
- z. John R. Freeman, with 22.65 years of service;
- aa. Alfred F. George, with 33.37 years of service;
- bb. Richard Gilley, with 38 years of service;
- cc. James P. Goupee, with 31.21 years of service;
- dd. Merle H. Grant, with 3.44 years of service;
- ee. Aaron W. Gray, with 24.5 years of service;
- ff. Nathaniel H. Gray, with 37.88 years of service;
- gg. Leo W. Grunwald, II, with 30.37 years of service;
- hh. Gary A. Hopkins, with 37.73 years of service;
- ii. Randall T. Hyland, with 3.44 years of service;
- jj. Lawrence G. Johnson, with 4.26 years of service;
- kk. Allen W. Lawrence, with 22.13 years of service;
- ll. Scott A. Littlefield, with 28.63 years of service;
- mm. David Lowell, with 41 years of service;
- nn. Jesse MacNair, with service since 7-25-2011;
- oo. Patrick M. McGowan, with service since 7-25-2011;
- pp. George L. Miller, with 27.36 years of service;
- qq. Edwin L. Nason, Jr., with 4.26 years of service;
- rr. Steven C. Palmer, with 30.8 years of service;
- ss. Harold Porter, with 22 years of service;

LIST OF IMPACTED BUCKSPORT EMPLOYEES

IAMAW Local 1821 Members Who Lost Their Jobs at the Bucksport Mill

tt. Tracy D. Redmond, with 23 years of service;
uu. Terry A. Ring, with 39.42 years of service;
vv. Cory S. Robertson, with 27.22 years of service
ww. Robert E. Seekins, with 35.26 years of service;
xx. Brian R. Seekins, with 28.67 years of service;
yy. Frederick L. Shirland, with 39.74 years of service;
zz. Brina Simpson, with 27 years of service;
aaa. Mark D. Stevens, with 24.67 years of service;
bbb. Thomas Sweet, with 39.74 years of service;
ccc. John Trefethen, with 43.34 years of service;
ddd. Lance D. Trundy, with 24.5 years of service;
eee. Travis G. Veilleux, with 13.24 years of service;
fff. Linwood P. Violette, with 23.88 years of service;

EXHIBIT B

FACTUAL CHRONOLOGY:

Apollo, Verso, NewPage and AIM Merger and Capacity Reduction Efforts¹

Mid-January 2011 – The possibility of a merger between Verso and NewPage surfaced when conversations were reported between Cerberus, who owned NewPage—the largest maker of coated paper in the U.S.-- and Apollo Management, owner of paper maker Verso, sparking speculation of an [impending merger](#).² Signs of an impending merger noted at the time were that Apollo had purchased a large portion of NewPage's debt, giving it significant leverage over NewPage and putting itself into position to force NewPage into insolvency in six months by insisting on a full repayment.^{3/4}

June, 2011 - NewPage sells Kimberly, WI Mill property to AIM Demolition USA, LLC⁵

September, 2011 – Verso claims to have abandoned its plans to merge with NewPage raising question from industry watchers regarding the motivation and meaning of the public statements that Verso no longer is interested in a NewPage merger.⁶

¹ Additional information added since originally submitted to Division is indicated in red.

² Folio, “Report: Verso and NewPage Back in Merger Talks; A deal could trigger outcry from magazine publishers,” by Caysey Welton (January 18, 2011).
<http://www.foliomag.com/2011/report-verso-and-new-page-back-merger-talks/>

³ “NewPage's owner, Cerberus, and Apollo Management, which has a controlling interest in #2 maker Verso Paper, are discussing what to do about NewPage's high levels of debt, *PPI Pulp & Paper Week* reported recently. Apollo is also the largest holder of #1 NewPage's \$800 million second-lien bonds, the publication said.”

Dead Tree Edition, “[NewPage, Verso Owners Reportedly Discussing a Deal](#),” (January 18, 2011).
<http://deadtreeedition.blogspot.com/2011/01/newpage-verso-owners-reportedly.html>

⁴ Folio, “*No NewPage-Verso merger After All?*,” by Stefanie Botelho (February 10, 2011).
<http://www.foliomag.com/2011/no-newpage-verso-merger-after-all#.VK2LZCe7k6o>

⁵ <http://www.vokimberly.org/media/146836/new%20page%20mill%20site%20nov%202012.pdf>

⁶ As stated in the Dead Tree Edition at the time:

Verso Changes Course -- Why?

Only three weeks after Verso Paper's CEO said acquiring NewPage was the key to its future, Verso announced it no longer wants to buy its rival. Why the sudden change of heart?

In a mid-August interview with [The \(Memphis\) Commercial Appeal](#), Verso CEO David J. Paterson said that the company's key strategy is acquiring ailing companies “to get the cost reductions we can't get on our own.” NewPage, which is in Chapter 11 bankruptcy reorganization, is Verso's only publicly announced target.

But last week Paterson issued a statement saying, “After careful analysis, we believe it is in the best interests of our company and its stakeholders to focus on the many other opportunities for Verso, including internal growth projects and other potential strategic alternatives.”

Verso's new tack is something of a mystery. Chip Dillon, a long-time forestry industry analyst, announced yesterday that his Vertical Research Partners is dropping coverage of Verso because the company's future is so unclear. He sees “the restructuring of Verso's debt as inevitable” but is

Sept-Dec, 2011 -- Demolition of the Kimberly, WI Mill takes place, including: Phase I (oldest and smallest machine); Phase II (boiler house) areas; and the western areas of the mill property (former wastewater treatment plant) the latter demolition effort was done allegedly “to pursue development opportunities in that area (riverfront / park access).” *Id.*, p. 8 of 112.

October 23, 2011 – Verso shut down the #2 Paper Machine at the Bucksport Mill that made coated groundwood printing paper.

Nov-Dec, 2011 -- Equipment from the Kimberly Mill is auctioned and equipment for paper machine support (motors, pumps, screens etc.) is sold. *Id.*

December 24, 2011 – Verso shut down two Paper Machines at the Sartell, MN Mill that made supercalendared paper.⁷

February, 2012 – Demolition of Phase III of the Kimberly Mill (the large paper machines) was begun by AIM (this process continued into at least the middle of 2013). *Id.*

not sure how or when that will happen.

Among the possible reasons that Verso is no longer courting (or stalking) NewPage:

- **Hard to get:** Verso’s latest move may be a negotiating ploy to wrest a better deal out of NewPage.
- **We’ve seen this movie before:** Paterson was CEO of Bowater, the continent’s second-largest maker of newsprint, when it merged in 2007 with the #1 maker, Abitibi-Consolidated. The combined AbitibiBowater went into Chapter 11 a year and a half later. Wall Street isn’t exactly looking for a sequel to that saga.
- **Throwing in the towel:** Verso may have concluded its proposed merger with NewPage is hopeless. Many of NewPage’s stakeholders want it to emerge from Chapter 11 bankruptcy protection as an independent company rather than being saddled with Verso’s debt.
- **A new chapter:** Facing the prospect of competing with a post-bankruptcy, deleveraged NewPage, Verso may have decided that it too should join the debt-restructuring party. It wouldn’t do much for the company’s credibility on Wall Street to be talking acquisition one day and Chapter 11 the next.
- **Another target:** *The Commercial Appeal* article indicated Verso might have its eye on acquiring more than one ailing rival. Has it stopped pursuing NewPage because it needs to conserve what little capital is has to pull off a different acquisition or merger?
- **A suitor of its own:** Verso, with a market cap of less than \$100 million, might be a good buy for someone with the financial strength to take on, and refinance, its high-cost debt. Finnish giant UPM? A growing Asian paper company looking for a foothold in North America? Or maybe [Resolute Forest Products](#), the post-bankruptcy reincarnation of AbitibiBowater that has recently attracted a huge investment from “[the Warren Buffett of the North](#)”.

Dead Tree Edition, “*Verso Changes course – Why?*,” (September 12, 2011).

<http://deadtreeedition.blogspot.com/2012/09/verso-changes-course-why.html>

⁷ The closure of the Bucksport and Sartell machines in October-December, 2011, reduced the company’s output by 193,000 tons (17%) and eliminated 300 jobs. Verso’s remaining capacity was 925,000 tons annually after these machine shut downs. Verso estimated the cost of these combined partial closures in Bucksport and Sartell at \$22 million, including \$13 million for severance and benefits.

Memphis Business Journal, “*Verso Paper cutting production, jobs in Maine, Minnesota*,” (October 11, 2011).

<http://www.bizjournals.com/memphis/news/2011/10/11/verso-cutting-production-jobs-in.html>

May, 2012 – Fire and explosion in warehouse at Verso’s Sartell Mill, in Sartell, MN shut the mill down by destroying the wiring that carried electricity from the power house to the mill. Neither the paper Mill nor power plant was significantly damaged by the explosion and fire that killed one worker. However, the cables that brought power from the power plant to the paper making facilities were damaged or destroyed.⁸

August 31, 2012 – Apollo attempts to use its status as a second lien holder to force a \$1.5 billion merger with Verso in the NewPage bankruptcy proceedings pending in DE Bankruptcy Court. Verso’s merger offer is discussed in the NewPage Bankruptcy filing submitted on August 31, 2012, that states in relevant part: "...[T]he First Lien Noteholders want a quick confirmation of one type of chapter 11 plan, while the Second Lien Noteholders want a completely different plan contemplating a merger with Verso Paper Company, a major competitor, and requiring material time to formulate and to implement." August 31, 2012 Motion filed by NewPage in *In re: NewPage Corp. et al.*, case number 1:11-bk-12804, in the U.S. Bankruptcy Court for the District of Delaware.

September 4, 2012 –Verso Paper publicly ended talks to acquire NewPage. One public report states that Verso Paper Corp., owned by private equity firm Apollo Global Management LLC, said it would not pursue further merger discussions with bankrupt rival NewPage Corp., the troubled papermaker that recently entered mediation with its creditors in the hope of resolving its nearly year-old Chapter 11 case. Verso had previously submitted a \$1.5 billion merger offer for its bankrupt competitor, only to be rebuffed by NewPage and its first-lien noteholders. Verso said Tuesday it would cease negotiations with both the company and its creditors regarding a potential business combination.⁹

January, 2013 – Verso sold the Sartell Mill to AIM for \$12.5 million, which had now changed its name to AIM Development (USA) LLC from AIM Demolition (USA) LLC.¹⁰

May, 2013 – AIM announces that contents of former Verso Paper mill in Sartell, Minnesota, to be auctioned off June 4-5, including smaller items; large papermaking machinery to be sold to equipment brokers.¹¹

August, 2013 – AIM obtained permits to begin demolition of Sartell Mill.

⁸ The Minnesota Occupational Safety and Health Division cited Verso Paper with two serious violations following the fatal explosion and fire.

Twincities.com, “*Minnesota Verso Paper Mill demolition permit approved*,” Associated Press (August 23, 2013). http://www.twincities.com/localnews/ci_23926214/minnesota-verso-paper-mill-demolition-permit-approved

⁹ Law360, “*Verso Paper publicly ended talks to acquire NewPage*,” by Jamie Santo (September 5, 2012) <http://www.law360.com/articles/375444/verso-paper-ends-talks-to-acquire-newpage>
<http://www.law360.com/articles/375444/attachments/0>

¹⁰ Twincities.com, “*Minnesota Verso Paper Mill demolition permit approved*,” Associated Press (August 23, 2013). http://www.twincities.com/localnews/ci_23926214/minnesota-verso-paper-mill-demolition-permit-approved

¹¹ <http://www.cpbis.gatech.edu/events/2013/05/may-2013-mol-company-watch-list>

January 6, 2014 --Verso and NewPage announced their acquisition agreement.

January 14, 2014 – Verso signs deal with lenders to finance the acquisition, based representations and commitments by it and NewPage regarding future capacity reductions. .

April 3, 2014 --Verso and NewPage announced that they had received Second Requests for more facts from the Department of Justice ("DOJ").

May 2014, 2014 – Verso engages Concentric Energy Advisors to start shopping the Electric Power plant at Bucksport.

August 7—Verso filed an 8-K announcing that it had consummated certain debt-restructuring transactions necessary to meet the financial criteria in its merger agreement with NewPage.

October 1, 2014 --Verso announced, without any prior hint or warning, that it was shutting down the Mill effective in December.

October 2, 2014 --In an employee meeting, Verso management made very clear that the company would not sell the Mill to a competitor. Exhibits 28-31.

October 3, 2014 – A Moody’s analyst identified news of the Mill’s closure as a “credit positive” step, because of the resulting reduction in production capacity in the coated printing paper market.

October 13, 2014 -- The Portland Press Herald reported in a news story on the printing paper industry: "[A] company that is selling one of its mills is loath to do so to a competitor, said Mark Wilde, a senior analyst of the pulp, paper and forest product sectors for the Bank of Montreal. If the competitor buys the plant on the cheap, it could be in a position to undercut the previous owner. That leaves selling the mill for scrap as the only alternative, said Wilde."

October 17, 2014 -- At a State-sponsored job fair, Verso posted guards to prevent competing printing paper companies from interviewing Bucksport Mill employees.

October 30, 2014 -- Verso announced that NewPage was selling two of its mills in Wisconsin and Maine to a Canadian paper company (Catalyst) “in order to address antitrust considerations related to the NewPage Acquisition”. (DOJ has since confirmed that it required these divestitures.)

November 12, 2014 – State officials (including Rosaire Pelletier, Senior Forest Products Industries Advisor to the Governor) informed the Plaintiffs that there were two potential buyers interested in buying the Bucksport Mill, interested in continuing to operate the mill as a going concern producing paper, who had approached Verso but been rebuffed by Verso management and refused access to the mill to assess the equipment to make an offer.

November 17, 2014 -- At a meeting with union representatives, Verso refused to take any affirmative steps to preserve the paper making equipment in operational condition.¹²

November 18, 2014 --Energy consult Whitfield Russell communicates to Verso a client's interest in bidding on the electricity generation plant at Bucksport to operate as a cogeneration operation in conjunction with an operational mill, but Verso never replies. (Russell dec.)

November 19, 2014 (approximately) -- Verso managers instructed the Mill's IT staff that, as soon as paper production at the Mill had ceased, they were to pull the hard drives from the computers that run the paper making machines at the Mill and either "wipe" programming and "recipes" off them or dispose of them.

November 25, 2014 -- Verso plant managers again refused to take any affirmative steps to preserve the equipment in operational condition

November 28, 2014 – Plaintiffs filed a federal action on antitrust grounds with a request for TRO to compel Verso to take steps to preserve the mill's operational capacity. Verso's counsel (i) asked plaintiff's counsel to withdraw the action prior to docketing to allow time for "good faith" settlement discussions on the severance and antitrust issues and (ii) agreed that nothing would be done to incapacitate the hard drives or other computer programs, or to destroy other documents "until the mill was sold".

November 30, 2014 – AIM Development states that it first learned of opportunity to purchase the Bucksport Mill. (AIM Declaration).

December 1-2, 2014 – The #4 and #5 paper machines were shut down. Verso refused to take necessary steps to loosen belts and felt to preserve the gears of these machines¹³, although knowledgeable staff were present to perform this quick task.

December 2, 2014 – AIM Development allegedly makes its initial bid for the Bucksport Mill (Patterson Declaration).

December 4, 2014 – All paper making operations at the Bucksport Mill ceased.

¹²The requested actions releasing tension on the felts and belt, maintaining the rollers, lubricating the rollers and periodically turning the rollers in the same manner that the "best practices" manual used at the Mill now follows to prevent warping, pitting and other damage that will damage the integrity of this expensive and essential hardware, etc).

¹³ Verso refused to release tension on belts and felts, to keep heated water in the tile-lined tanks, or to periodically rotate and lubricate the rollers as is now done under the Mill's "best practices" policies for maintenance of this equipment.

December 5, 2014 - AIM signs agreement to purchase Bucksport Mill for approximately \$58 million, which becomes public on December 8, when it is filed with the S.E.C.

December 8, 2014 – Verso advises the Plaintiffs and press of the AIM purchase agreement (MIPA) and files an 8-K with the S.E.C. to which the MIPA without attaching the Schedules and additional confidentiality agreements between the parties.

December 8-12, 2014 – Plaintiffs’ counsels’ review of the Membership Interest Purchase Agreement (MIPA) between Verso and AIM reveals language reflects an intent to evade payment of the severance due under Maine law by shifting liability for this obligation to an asset-less subsidiary as part of the closing process – which was scheduled to take place after the obligation is due to be paid under the requirements of Maine law. Investigation by Plaintiffs counsel revealed a pattern of prior actions by AIM and Verso (Sartell, MN) and AIM and NewPage (Kimberly, WI) to reduce capacity by shuttering, destroying, and scrapping functional paper mills that produced coated paper.]

December 12, 2014 –Defendants tell Plaintiffs that they will still not timely pay severance or accrued 2015 vacation time payments].

December 15, 2014 – Plaintiffs filed this lawsuit against Verso and AIM for violation of federal and state antitrust laws and state severance and final wage payment statutes.

December 16, 2014 -- The Court set an initial briefing schedule for antitrust claims.

December 22, 2014 -- Plaintiffs file First Amended Complaint filed and seek a court order to require Verso to allow maintenance steps to maintain the equipment during a temporary shutdown.

December 24, 2014 -- The Court revised the briefing schedule for antitrust claims based on Verso’s representations that the closing with AIM would not take place earlier than January 16, 2015.

January 13, 2015 – Oral argument on antitrust preliminary injunction

January 20, 2015 – U.S. District Court for the District of Maine denied preliminary injunction to prevent the Verso-AIM sale transaction.

January 29, 2015 – Verso-AIM sale completed

March 11, 2015 – AIM’s agents scheduled an auction for March 24 for equipment at the former Verso Paper mill and then announced to town officials that they “hope to begin demolition of the mill” early in the Spring of 2015.

EXHIBIT C

The Competitive Significance of the Production Capacity of the Bucksport Mill

The Bucksport Mill, owned by Verso Paper Corp. until January 30, 2015, was a fully operational producer of coated paper located in Bucksport, Maine.

In October 2011, Verso shut down one of the paper making machines at Bucksport, reducing capacity and putting several hundred employees out of work. Subsequently the idled machine was cannibalized for parts for use on one of the remaining three Bucksport machines – ensuring it could not be added back into service in the production of paper.

On January 1, 2014, the Bucksport Mill had a coated printing paper production capacity of 350,000 tons, which represented about 1/3 of Verso's pre-merger capacity for this product. The Bucksport Mill was Verso's only remaining unionized plant since the shutdown and destruction of its Sartell, MN plant in 2013.

On October 1, 2014, Verso unexpectedly announced it would shut down the remaining three machines at the Bucksport Mill by the end of 2014. This announcement was particularly startling, in light of Verso's expenditure of tens of millions of dollars – much of it from public sources (federal and State) to upgrade the Mill and its cogeneration power plant since 2009. All of these funds had been provided based on Verso's representations that such upgrades would make the Bucksport Mill more competitive and preserve the hundreds of jobs that it provided to this region in Maine. From 2012 through 2014 alone, Verso had spent over \$55 million in mill and plant upgrades.

Verso's announcement about its decision to close the Bucksport Mill came only a week after Verso and NewPage had had a two day meeting (and presumably negotiations) with representatives of the Antitrust Division in Rumford, ME, concerning the planned divestiture of the NewPage plant in Rumford. (See Verso's Tunney Act Disclosures, p. 2, ECF No. 9, Case No. 14-cv-02216 (D.D.C. Jan. 9, 2015)).

On October 2, 2014, Dennis Castonguay, the Bucksport Mill Manager, publically told a meeting of all Bucksport Mill employees that Verso “would never sell the Mill to any of its competitors.” On December 8, 2014, Verso announced it had entered an agreement to sell the Bucksport Mill to AIM Development (USA) LLC (“AIM”), the same scrap dealer that had destroyed Verso's Sartell Mill in 2012-2013; the contract clearly was premised on AIM's intentions to do what it was experienced at doing--i.e., scrap and destroy the paper-producing facilities located at the Bucksport Mill. That sale was completed in January 2015, and the Bucksport Mill currently remains idle, though not yet destroyed. AIM has announced that an auction of all the equipment in the plant is scheduled for March 24, 2015.

Significantly, it was Mr. Castonguay who, in January of 2013 – *while serving as the Bucksport Mill's Manager* – oversaw the transfer to AIM of Verso's power plant licenses for the Sartell Mill's Power Plant, in FERC proceedings. Presumably, this was merely training for Mr.

Castonguay in the similar transfer recently hastened through FERC for the Bucksport Mill's Power Plant – a proceeding in FERC that Verso requested by accomplished on a confidential and expedited basis – over the protest of the Governor of Maine, Paul LePage.

The Bucksport Mill employed 570 persons at the time of its closure by Verso in December 2014 – approximately 524 of those employees lost their jobs when Verso closed the mill and sold it to the scrapper AIM. The remaining employees are working to keep just the power plant at the Mill functioning.

There is significant evidence that other, experienced producers of paper were, and still are, interested in purchasing the Bucksport Mill as a going concern, engaged in the production of coated paper; and were, and are, willing to pay more for the property than AIM paid Verso (\$58 million). Several companies even wrote letters to U.S. District Judge John Woodcock, assigned to the former Bucksport workers' case against Verso, indicating their interest in negotiating with Verso. However, Verso refused to even negotiate with any such bidders prior to its December 5, 2014 sale of Bucksport to the scrapper AIM. Verso is reported to have even denied access to such companies to the Mill property to assess its condition so that they could do proper due diligence to make any formal purchase offer(s).

The Division acknowledged in its Competitive Impact Statement (CIS) that it would take "billions" to replace or build such a paper factory from scratch. Thus, there is little likelihood that the Bucksport Mill can ever be rebuilt once it, and/or its machinery, is destroyed. However, ultimately, in exchange for approving Verso's acquisition of NewPage, the Division only required the divestiture of two paper plants, located in Rumford, Maine, and Biron, Wisconsin, and refused to require divestiture of Bucksport to a Verso competitor, despite the repeated requests of representatives of the Local 1821 Bucksport employees for such a requirement to be imposed on Verso to preserve competition, as well as their ability to work in the production of coated paper for the North American market.

Both of the mills divested as part of the Consent Decree negotiated by the Division (Biron and Rumford) were sold to Catalyst in order to "eliminate the anticompetitive effects of the [NewPage] acquisition in the North American market for coated publication papers and label paper by establishing a new, independent, and economically viable competitor" (CIS, p. 9).

However, despite the Bucksport Mill employees' repeated requests for the Division's intervention to prevent the sale of Bucksport to AIM and destruction of the Bucksport Mill as part of Verso's scheme to reduce capacity, the Division refused to act or even undertake an inquiry into the connection between the Kimberly, Sartell and Bucksport scrapping deals. Further, inexplicably, the Division refused to undertake any assessment of the competitive benefit of requiring divestiture of the Bucksport Mill to a competitor, even when presented with proof that there were buyers willing to purchase the Bucksport Mill and continue to operate it as a going competitive concern in the North American coated paper market. Instead, the Division allowed the sale of Bucksport to the scrapper AIM to proceed, refused the Bucksport Mill employees' requests to condition approval of the merger upon sale of the Bucksport Mill to a competitor, and stood by while 570 good-paying jobs and 44% of the tax-base of the Town of Bucksport, Maine were lost forever.

Indeed, without ever setting foot in the Bucksport Mill to conduct any real inquiry into the Verso-AIM transaction or the possibility of divestiture and sale to a competitor, the Division stated in a footnote in the CIS that:

In December 2014, Verso closed its mill in Bucksport, Maine, which produced coated groundwood paper. In the press release announcing the closure, Verso's CEO indicated that the mill has been unprofitable for a number of years and that in today's marketplace the Bucksport mill would be unlikely to become profitable in the future. Press Release, Verso Paper Corp., Verso Announces Closure of Bucksport, Maine Paper Mill (Oct. 1, 2014) (available at <http://investor.versopaper.com/releasedetail.cfm?ReleaseID=874161>). Verso contemplated closing the mill before it decided to merge with NewPage. The United States does not allege that the closing of the Bucksport Mill is a result of the merger.^[1]

Unfortunately, this statement and the analysis that underlies it, again reflect the Division's myopic analysis of this merger as though this decision to close Bucksport existed in a vacuum that was unrelated to the NewPage Merger. Of course, Apollo and Verso may have *contemplated* shutting down the Bucksport Mill for a long time (likely since January 2011), but the question the Division *should have been vigorously investigating* was: Would Verso have *actually decided* to shut down the Bucksport Mill before it knew that it was going to be able to proceed with the acquisition of at least six of NewPage's eight mills? This is why close proximity in time between (i) Verso's negotiations with Division staff over Rumford; and (ii) the surprise announcement of the Bucksport Mill closure seems so relevant. It is even more relevant when viewed in the context of all of the machinations that Apollo, Verso, NewPage and AIM have undertaken to reduce capacity in anticipation of a Verso-NewPage Merger since January 2011. See, e.g. Chronology attached.

Moreover a decision to close the Bucksport Mill prior to 2014 would have been flatly inconsistent with Verso's successful efforts since 2009 to obtain tens of millions of dollars of federal and state grant money and tax incentives (spendable as late as 2014), to upgrade the power plant and its biomass cogeneration generator in the name of improving the Mill's competitiveness and thus preserving jobs in Bucksport.

It is entirely possible and likely that Verso did indeed contemplate closing the Bucksport Mill prior to the January 2014 announcement of its proposed merger with NewPage – as footnote 1 in the Division's CIS indicates. The more important question this revelation raises is, however: Was such a closure a legally appropriate course to contemplate or merely an act contemplated (and now executed) in furtherance of an anticompetitive scheme to reduce capacity in the North American coated paper market in violation of federal antitrust laws (Clayton and Sherman)?

¹ DOJ Competitive Impact Statement, p. 3, n. 1.
http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/31/verso_cis_0.pdf

BAKER & MILLER PLLC

SUITE 300
2401 PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20037
TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

December 5, 2014

Honorable William J. Baer
Assistant Attorney General
Antitrust Division
U.S. Department of Justice
Washington, D.C. 20530

**Re: Investigation of the Proposed Acquisition of NewPage Holdings, Inc.
by Verso Paper Corp.**

Dear Bill:

I am writing now to supplement my November 12th letter to you requesting affirmative action by the Division to prevent the closure (and scrapping) of the Bucksport Paper Mill (“the Mill”) owned by Verso Paper Corp. (“Verso”) in conjunction with Verso's pending acquisition of NewPage Holdings (“NewPage”) which the Division is currently investigating. As I am sure you recall, we represent the International Association of Machinists & Aerospace Workers (“IAM”) whose Local 1821 is the collective bargaining representative for 59 workers at the Mill.

What we urged in my November 12th letter (a copy of which I attach) is that the Division not terminate its investigation of the NewPage acquisition (whether by agreement or litigation) without requiring Verso to promptly offer the Mill at a reasonable price to any purchaser willing to continue to operate it as a going concern producing coated printing paper.

My purpose here is to explain the additional facts and perspectives that have been developed since I wrote the November 12th letter (rather than to repeat what I wrote then). The case for doing what we urged the Division to do seems even stronger today than it did back then.

Chronology

Let me start with a very brief chronology because putting events in a time sequence helps illuminate the basic story related to the shutdown of the Mill. All dates are in 2014:

January 6 –Verso and NewPage announced their acquisition agreement.

April 3 –Verso and NewPage announced that they had received Second Requests from the Division.

August 7 – Verso filed an 8-K announcing that it had consummated certain debt-restructuring transactions necessary to meet the financial criteria in its merger agreement with NewPage.

October 1 – Verso announced, without any prior hint or warning, that it was shutting down the Mill effective in December.

October 2 – In answering questions at a meeting with employees over the closure announcement, Verso management made very clear that the company would not sell the Mill to a competitor – expressly making that statement.

October 3 – A Moody’s analyst improved Verso’s rating, and identified news of the Mill’s closure as a “credit positive” step, because of the resulting reduction in production capacity in the coated printing paper market.

October 12 – The Portland Press Herald reported in a news story on the printing paper industry: “[A] company that is selling one of its mills is loath to do so to a competitor, said Mark Wilde, a senior analyst of the pulp, paper and forest product sectors for the Bank of Montreal. If the competitor buys the plant on the cheap, it could be in a position to undercut the previous owner. That leaves selling the mill for scrap as the only alternative, said Wilde.”¹

October 17 – At a State-sponsored job fair, Verso posted guards to prevent competing printing paper companies from interviewing Bucksport Mill employees.

October 30 – Verso announced that NewPage was selling two of its mills in Wisconsin and Maine to a Canadian paper company “in order to address antitrust considerations related to the NewPage Acquisition.”²

November 17 – At a meeting with union representatives, Verso refused to take any affirmative steps to preserve the paper making equipment in operational condition.³

November 19 (approximately) – Verso managers instructed the Mill’s IT staff that on December 2nd, as soon as paper production at the Mill had ceased, and the paper machines had been “shut down”, they were to pull the hard drives from the computers that run the paper making machines at the Mill and either “wipe” programming and “recipes” off them or dispose of them.

¹ <http://www.pressherald.com/2014/10/12/buyers-for-paper-mills-dont-grow-on-trees/>

² <http://investor.versopaper.com/secfiling.cfm?filingID=1421182-14-59&CIK=1421182>

³ The requested actions releasing tension on the felts and belt, maintaining the rollers, lubricating the rollers and periodically turning the rollers in the same manner that the “best practices” manual used at the Mill now follows to prevent warping, pitting and other damage that will damage the integrity of this expensive and essential hardware, etc).

November 25 – At a meeting between the plant management and union representatives, Verso again refused to take any affirmative steps to preserve the equipment in operational condition and refused to answer questions about whether the hard drives for the papermaking machines would be altered, damaged, destroyed or removed.

November 28 – The IAM learned that Verso management had instructed Mill employees to delay the shut down of the #8 pulper, attached to the #5 paper machine, in order to allow staff to throw hard copy paper records, including the maintenance records for all of the Bucksport Mill's paper making machinery into the pulper for destruction.⁴

November 28 – Having been informed that the IAM and some employees were filing an antitrust complaint and TRO to enjoin destruction of computer programs and documents, Verso's counsel agreed that nothing would be done to incapacitate the hard drives or other computer programs, or to destroy other documents as a means of avoiding the filing of the Complaint and TRO on November 28 and to allegedly provide time to negotiate resolution of our concerns.

November 29 – After the IAM had complained the proposed document retention plan did not ensure all relevant documents related to the Mill's operations would be retained, Verso sent out a broader document retention plan to all staff.

December 1 – In bargaining with IAM, Verso: (i) agreed to a few steps necessary to preserve the machines in operational condition,⁵ but (ii) refused to take other necessary steps to achieve this goal.⁶

December 1-2 – The #4 and #5 paper machines were shut down. No steps were taken to loosen belts and felt to preserve the gears of these machines, although knowledgeable staff were present to perform this task which would take only minutes to perform.

December 1-4 – Rosaire Pelleitier (the official at the Maine Department of Community & Economic Development who specializes in finding buyers for forest products plants and mills being closed or sold) has offered to help Verso find a buyer for the Bucksport Mill willing to operate it as a going concern, but he has reported that he has not been contacted by Verso to seek assistance in finding such a buyer.

⁴ This instruction was actually given two days after the IAM had notified Verso that it would file a request for a TRO to compel Verso to take steps to preserve the integrity and functionality of the paper making machinery.

⁵ Verso agreed to continue maintaining adequate heat in the building and maintaining oil and lubricants in the Mill's tanks.

⁶ Verso refused to release tension on belts and felts, to keep heated water in the tile-lined tanks, or to periodically rotate and lubricate the rollers as is now done under the Mill's "best practices" policies for maintenance of this equipment.

December 2 – Mr. Pelletier reports that he has identified two buyers that have told him (and Verso) that they are interested in buying the Mill as an operating paper mill. However their inquiries had been rebuffed by Verso, which appeared to them to only be interested in selling the power plant at the Mill—a step that would make selling the Mill’s paper-making capacity virtually impossible.

December 3 – During bargaining on labor issues, Verso again rejected making any additional efforts to protect the Mill’s machinery.

December 4 – All paper making operations at the Bucksport Mill, including the most profitable machine – the #1 paper machine – ceased.

December 8 – This is the anticipated date when IAM and some employees will file an antitrust complaint and motion for PI against Verso, if they have been unable to agree with Verso on the remaining steps necessary to preserve the paper making equipment in operational condition pending a sale of the plant. Essentially, the plaintiffs will seek a court order to require Verso to do the maintenance that it would normally do if it were planning to renew paper production at the Mill within 6 months.

Additional Facts and Perspectives

1. Nexus to the Investigation. It is now clearer than ever that the Mill’s closure is intimately related to the NewPage acquisition that Litigation I is investigating. Even assuming that the Mill was Verso's least efficient plant, it would almost certainly *not* have been economic for Verso to shut down roughly 30% of its total capacity *unless it were acquiring substantial additional paper making capacity* to which orders could be switched.

2. Timing is Instructive. There was never a hint of shutting the Mill down before the October 1 announcement. This came almost 6 months to the day after Verso received its Second Request. I would respectfully suggest that by late September negotiations with the Division staff had proceeded to the point that Verso knew it was going to be allowed to proceed with the NewPage acquisition, subject to continuing negotiations over what divestitures would be agreed upon. Moreover, the December closure of Bucksport would coincide with Verso’s “before the end of the year” public projections on when it would be allowed to close the acquisition.

3. Verso’s New Incentives. By acquiring the much larger NewPage operation, Verso would become the industry leader in the North American coated printing paper market (even after the required divestiture of the two NewPage mills). With roughly 50% of the post-merger market, Verso has much more to gain from permanently reducing industry capacity as a way of increasing pricing than it would have gained by shutting down the Mill in late 2013 when its market share was less than 25% of the North American market for coated printing papers.

4. Verso's Motives Illuminated. Verso has been telling state officials and some elected representatives that its financial condition is dire and that, unless the merger is approved they do not have the money to pay the \$30-\$35 million in severance payments due Bucksport employees within 7 days after each employee's "last full day of work" as required under Maine law.⁷ Assuming that these dire projections were true, then a normal, non-dominant company would have tried hard to sell the Mill for as high a price as possible, rather than just shut it down and refuse to offer it for sale to competitors.⁸

5. Verso's Competitive Goal Has Become Indisputable. This has become a summary judgment case. Verso has made it clear that it wants to be absolutely certain that the Mill will never again produce coated printing paper that could compete with its own two remaining mills and the 8 additional mills that will be acquired from NewPage. That is the only possible explanation for the instructions to the IT staff on programming and its refusal to take simple preservation steps with the equipment, that past practice and best practices indicate are necessary to reliably preserve this equipment in the most functional condition, for much lower cost than replacement and repair would be.

The IAM's Proposal

As I am sure you and your colleagues will recall, we proposed that Verso not be permitted to go ahead with the NewPage acquisition unless it could show that it had made a good faith effort to offer the Mill for sale on reasonable terms to any qualified purchaser willing to continue to use it to produce coated groundwood and specialty printing papers; and the standard for evaluating whether the offer to sell on "reasonable terms" would be those used for a failing division in Section 11 of the Horizontal Merger Guidelines. Such a condition should be included, we argued, regardless of whether the Division resolved the antitrust issues clearly raised in the NewPage acquisition by (i) the normal route of agreement, or (ii) seeking injunctive relief in Court.

As I have indicated, IAM does not oppose approval of the Verso/NewPage acquisition, but we strongly oppose allowing it to go forward as a way of a would-be dominant Verso implementing its "productive capacity reduction" strategy.

⁷ As a matter of law, these severance payments will be due no later than January 8, 2015 for all employees except the 44 slated to keep the power plant operating.

⁸ The IAM has no desire to have bankruptcy forced on Verso (which is the owner of an even larger second coated printing paper plant at Jay, ME) and we are not asking the Division to block the transaction. But we strongly disagree with the Division (or a court) allowing Verso to close the transaction without proof that it has made a good faith effort to sell the Mill at a reasonable price to a new owner willing to continue to operate the plant and employ its skilled workforce.

Antitrust Policy

We are not making a “one day one train only” proposal. Rather, I strongly believe that, in any merger investigation based on likely diminution of existing competition, an antitrust enforcement agency should never permit the parties to destroy productive facilities without making a good faith effort to sell them to a buyer willing to keep them in the market. This is doubly true where the firm resulting from the merger is likely to be the clear industry leader and thus in the best position to capitalize on any price enhancement that results from the reduced production capacity in a highly concentrated market, like the coated printing paper market.

Of course, the parties can legitimately argue that, after the merger is consummated, the surviving party could unilaterally shut the same facility down, because nobody would impose an obligation to go on operating it. This is generally true, but the post-merger context is fundamentally different because there is no longer any lurking element of *collective action* by the merging competitors.⁹ And, moreover, a unilateral shutdown by a clearly dominant firm may not be entirely free of antitrust questions when clearly done to reduce market competition going forward. As Professors Areeda and Hovenkamp have helpfully explained.

Refusing to accept more than salvage value might seem to be economically irrational...[but] the defendant would presumably be acting rationally in the belief that its [immediate] loss would be exceeded by its gain from reduced competition in [the product market]. *But that very calculation is hardly one that antitrust law should respect*; it makes clear that the defendant’s action has the unjustified effect (and purpose) of impairing competition in [the product market].¹⁰

Finally, if a merger investigation revealed that the dominant surviving firm seemed likely to want to shut down facilities to reduce productive capacity in the market, I think that the enforcement agency would be entirely justified in seeking a consent decree or injunction that required the surviving company to offer any facilities that it wished to close, to any purchaser willing to buy the facilities as a going concern at a reasonable price.

There may well be an “efficiency” argument to explain why the merging parties may wish to go forward with a merger because it enables them to upgrade the average level of productive efficiency of their operations and frees up plants that they no longer need. But there

⁹ We know that certain actions reflect agreements between Verso and NewPage (including Verso’s August 7th debt restructuring announcement and NewPage’s October 30th sale of two paper mills; and Verso’s shutdown of the Mill may, or not, be a third instance of cooperative action responding to financial or legal impediments to their pending transaction. That familiar source of basic antitrust wisdom reminds us that, “Because economics teaches that an agreement to limit output is tantamount to agreement to fix price, courts also have applied the *per se* rule to agreements to limit production....” ABA Section of Antitrust Law, 1 Antitrust Law Developments 90-91 (7th ed. 2012).

¹⁰ IIIA P. Areeda & H. Hovenkamp, Antitrust Law ¶ 782n, p. 283-84 (2d ed. 2002). (emphasis added). (For your convenience, we attach the entire ¶ 782n on closing facilities as a potential antitrust violation.)

is no "efficiency" argument for letting them shut down and scrap facilities when there are potential purchasers willing to pay more than scrap value for the facilities in order to be able to go on operating them.

Conclusion

This is a case with both economic and human dimensions. The economic dimensions may appear to be somewhat abstract, although the likely effects seem quite clear. The human dimensions are up close and immediate for the workers (and their families) who have lived and worked, often for decades and generations in this somewhat isolated community in northeastern Maine. Moreover, it is a case where the interests of these workers and the interests of consumers (whose interests have been the principle focus of modern antitrust law) are totally intertwined. Both have a clear economic interest in the Mill continuing to produce coated printing paper for sale in North America. It also just happens to be a situation where a State's political interest in preserving jobs for its residents and constituents entirely coincides with the antitrust policy interest in preserving effective production capacity in a highly concentrated market.

The Division is in a position to require Verso to do something that makes very good sense as a matter of antitrust policy, while also potentially alleviating much personal economic misfortune. So very respectfully, I strongly urge you to do it.

Yours sincerely,



Donald I. Baker

cc. David I. Gelfand
Renata B. Hesse
Patricia A. Brink
Peter J. Muchetti
Karl Knutsen
(Via email w/ enclosure)

BAKER & MILLER PLLC

SUITE 300
2401 PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20037
TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

January 27, 2015

The Honorable William J. Baer
Assistant Attorney General
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Re: The Proposed Destruction of the Bucksport, Maine Printing Paper Plant by Verso Corporation and AIM Development (USA) LLC

Dear Bill:

On behalf of the International Association of Machinists & Aerospace Workers ("IAM"), I am writing to urgently renew my earlier request that the Division take action to prevent the planned destruction of the Bucksport Paper Mill ("the Mill") owned by Verso Corporation ("Verso"). On November 12th and December 5th, I made this request in connection with the Division's then-pending review of the merger transaction between Verso and its larger coated printing paper competitor NewPage Holdings ("NewPage"). As I am sure you recall, the IAM has a Local 1821 in Bucksport which is the collective bargaining representative for 59 workers at the Mill.

I. Recent Developments

Since my last letter on December 5th, much has happened to clarify the plans and motives of those seeking to destroy the Mill as a way of reducing output and raising prices for coated printing papers.

- On December 8th, Verso announced that three days earlier it had entered into a contract to transfer ownership of the Mill to AIM Development (USA) LLC—a subsidiary of American Iron & Metal Company which had scrapped Verso and NewPage mills in Kimberly, Michigan and Sartell, Minnesota in 2012 and 2013.

- On December 12th, the IAM and several of its Bucksport members filed a federal antitrust case against Verso and AIM seeking a temporary restraining order against implementation of their agreement on the grounds that their ongoing and proposed actions are not permitted under Section 7 of the Clayton Act, or under Sections 1 and 2 of the Sherman Act. (*IAMAW Local Lodge No. 1821, et al. v. Verso Paper Corp. and AIM Development (USA) LLC*, No. 1:14-cv-00530-JAW).
- On December 31st, the Division announced in a Consent Decree that it would allow the Verso-NewPage transaction to go forward subject to divestiture of two NewPage mills. The Government's Competitive Impact Statement ("CIS") stated in relevant part that: "Verso contemplated closing the [Bucksport] mill before it decided to merge with NewPage. The United States does not *allege* that the closing of the Bucksport Mill is a result of the merger."¹ (italics added).
- On January 7th, the Verso-NewPage transaction closed.
- On January 16th, Maine Gov. Paul LePage and Maine official Rosaire Pelletier (in charge of helping to broker deals for paper mills on behalf of the State of Maine), informed the Court that there is at least one (and maybe more) bidders willing to offer more than AIM for the Bucksport Mill, and to keep it in operation. But the identity of that bidder remains unknown, because Verso reportedly made all such bidders sign confidentiality agreements.
- On January 20th, U.S. District Court Judge John Woodcock (who sits in Bangor) denied IAM's request for a TRO to block the Verso-AIM transaction. His opinion included an incorrect factual statement that "the DOJ concluded that the closing of the Bucksport Mill was not a result of the merger." *Int'l Ass'n of Machinists & Aero. Workers, Local Lodge No. 1821 v. Verso Paper Corp.*, 2015 U.S. Dist. LEXIS 5912, *84 (D. Me. Jan. 20, 2015).

As I am sure you and your colleagues will recall, IAM did not oppose approval of the Verso/NewPage acquisition, but we strongly opposed allowing it to go forward as a

¹ http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/31/verso_cis_0.pdf.

way of implementing Verso's "productive capacity reduction" strategy. Now that the Division has declined to accept our recommendation that Verso be required to offer the Mill for sale on reasonable terms to any qualified purchaser willing to continue to use it to produce coated printing papers, our focus turns to the much simpler Verso-AIM transaction.

II. Why You Should Reopen The Division's Investigation

AIM's agreement to purchase the Mill from Verso is simply a contract between an industrial producer and a salvage company whose business is scrapping productive capacity (as it has done for both Verso and NewPage in the past 4 years). The assets being transferred in this sale include both the Bucksport paper-making mill ("Paper Mill"), and an electric co-generation facility ("Generator"), for which AIM is paying a reported price of \$58 million (i.e., about \$30m below what the Generator alone was assessed for).² AIM has made clear that it proposes to demolish the Paper Mill, operate or sell the Generator, and evaluate the remaining real estate for other uses.³

At this point, there is no court-imposed impediment to a closing on the Verso-AIM transaction, but the parties may still face some zoning or other federal, state or local regulatory impediments that are still preventing them from being willing and able to close the sale. In any event, they have made no public announcement setting a closing date or explaining the present delay. Our clients remain convinced that, as soon as AIM gets control of the Mill, it will start disabling and scrapping the big paper making machines there.

The intended destruction of Bucksport is part of a much broader supply reduction program going back to at least January 2011. In early 2011, Verso's parent Apollo Global Management ("Apollo"), became an important owner of NewPage's debt, and began exerting control over NewPage.⁴ Apollo, through its control over both Verso and NewPage, has orchestrated a coordinated campaign of capacity reduction since

² *Aff. of James Fitzgerald*, ECF No. 79-5, *IAMAW Local Lodge No. 1821, et al. v. Verso Paper Corp. et al.*, No. 1:14-cv-00530-JAW (D. Me. Jan. 8, 2015).

³ While AIM has told Judge Woodcock that it is not barred from reselling the Paper Mill as a going concern, AIM's supposed willingness to resell the paper mill is entirely inconsistent with anything it has ever done with any other mills that it has bought in the past, so we respectfully question the sincerity of such statements by AIM and its counsel. Additionally, AIM must realize that it would be unlikely to be contacted for any future scrapping jobs if it resells the Mill as a going concern to another printing paper company.

⁴ <http://www.pulp-paperworld.com/ex1/item/297-apollo.html> (published March 2010); <http://www.bloomberg.com/news/2011-04-19/cerberus-s-newpage-said-to-work-with-lazard-fti-dewey-on-restructuring.html> (April 20, 2011).

early 2011. We intend to promptly submit a memorandum to the staff urging the Division to open a Sherman Act investigation based on information that we have assembled about the Apollo-orchestrated efforts to reduce capacity at Verso and NewPage and thereby to raise prices for coated paper. This effort appears to have already been at least partially successful, since prices have been increased in 2014 (since the NewPage acquisition has come close to closing and the Bucksport closure has been announced), according to articles in the leading magazine covering the paper industry.⁵

Relying primarily on the extensive information that it has surely assembled during the Verso/NewPage merger investigation, the Division should be in a position to move quickly for a TRO to maintain the operational status quo at the Mill—assuming that it can oblige the State officials and/or Verso to identify the bidder(s) willing to pay more for the Mill than mill-scraping AIM.

As I said in my December 5th letter to you, our legal position is that:

[I]n any merger investigation based on likely diminution of existing competition, an antitrust enforcement agency should never permit the parties to destroy productive facilities without making a good faith effort to sell them to a buyer willing to keep them in the market. This is doubly true where the firm resulting from the merger is likely to be the clear industry leader and thus in the best position to capitalize on any price enhancement that results from the reduced production capacity in a highly concentrated market, like the coated paper market.

In response, the Division explained (citing Verso's October 1, 2014 press release announcing the Mill closure) that: "Verso contemplated closing the mill before it decided to merge with NewPage." CIS 3 n. 1. I am sure this is an accurate statement, but I respectfully suggest that it is too lenient a standard. The question should not be: did the acquirer *contemplate* closing a mill before entering into a merger agreement? The proper question is: Was Verso *reasonably likely* to have closed the Bucksport Mill absent the merger with NewPage? When the answer to this type of question is "no", then the acquirer's action in closing a significant production facility ought to be an important part of the agency's merger review under the HSR Act.

⁵ *PPI Pulp and Paper Week* (published by RISI), "Publication paper price hikes start gaining traction as capacity cuts bite...", Nov. 21, 2014 (Ex. 1); "December sees CFS price increases start to move in some market sectors with likelihood for a January rise", Dec. 19, 2014 (Ex. 2); RISI, "Verso, NewPage, Catalyst deals cause muddle in coated paper market and uneven price increase implementation", Jan. 23, 2015 (Ex. 3).

III. Would Verso Have Closed the Bucksport Mill Absent the NewPage Merger?

Let me put this question in a broader context. On January 1, 2011, Verso owned four printing paper mills with a total coated papermaking capacity of 1,698,000 tons.⁶ Two of them were union-organized (in Sartell, MN and Bucksport, ME), with a combined capacity of 758,000 tons, while the other two (Jay, Maine and Quinnesec, Michigan)⁷ were non-union with a combined capacity of 765,000 tons. In 2011, Verso permanently shut down 193,000 tons of capacity at its two union organized mills (Sartell and Bucksport).⁸ The next year, Verso entirely shut down the remaining coated papermaking machine in Sartell mill and had AIM scrap the mill, thus reducing its total productive capacity by another 215,000 tons.⁹

I am sure that in 2012, when it decided to scrap Sartell, Verso *contemplated* doing whatever it could to shut down its other union mill whenever it could. Verso clearly prefers to operate non-union mills. This clear preference still leaves the crucial question: would Verso in 2014, having recently shut down 24% of its production capacity since 2011, *been able* to shut down an additional 350,000 tons (or 27% of its remaining capacity) in 2014, absent its acquisition of the NewPage mills? With coated printing paper demand slowly declining, Verso's output was also declining but at a much slower rate (about 27%)¹⁰ than the 45% capacity reduction that Verso would have implemented

⁶ These figures cover the machines reported by Verso be used in producing lightweight (and ultra lightweight) coated groundwood, coated freesheet, and super calendered paper. These machines have considerable production flexibility, as the Division must have assumed when it settled the Verso-NewPage transactions based on the divestiture of two NewPage mills that had producing only coated ground paper; and yet the CIS explained that these divestitures would resolve the competitive problems in all three of the product markets where the Division had alleged violations.

⁷ Verso Paper Corp., Annual Report (Form 10k) (Mar. 6, 2014), *available at* <http://www.sec.gov/Archives/edgar/data/1395864/000142118214000024/vrs12312013-10k.htm>

⁸ This was accomplished by shutting down the #2 paper machine at Bucksport (which was producing coated groundwood) in October 2011 and two more machines at the Sartell mill (which were producing super calendered paper) in December 2011.

⁹ This machine had been producing groundwood and supecalendered parpers. Verso has made much about the fire at the Sartell Mill being the catalyst for the closing of that facility, but in fact the 2012 fire and explosion did not damage the paper making equipment, the mill structure, or the power plant. Rather the explosion occurred in a warehouse building that was located between the mill and the power plant and damaged cables and wires used to to transmitted power from the power plant to the paper making operations in the mill.

¹⁰ This calculation was made by comparing Verso's reported coated paper volume for the first three quarters of 2011 (1,184,100 tons) with its reported volume for the first three quarters of 2014 (860,800 tons).

had it shut down both Sartell and Bucksport without adding any new capacity to its system.

This, we respectfully suggest, is the operations question that Division should have investigated, rather than just accepting Verso's self-serving statement of prior intent as disposing of the capacity-reduction issue that I complained about in IAM's two prior letters to you.¹¹

In this connection, the staff should review Dr. Warren-Boulton's declaration submitted in the Maine litigation: he briefly explains the economic literature on plant closures, and how it is important to the decisional process whether the plant-closing enterprise to have alternative plants to which customers of the closure candidate can be switched.¹² Thus, a multi-plant firm will close a plant that the single-plant firm would keep open; and an owner of 8 other plants would have been much more likely to shut Bucksport down than an owner that only owned two other plants in Jay, Maine and Quinnesec, Michigan.

Moreover, Verso's October 1, 2014 press release,¹³ which the CIS relied on, also sheds considerable light on Verso's anticompetitive strategies. It cites costs related to the closing on the order of \$35-45 million.¹⁴ The vast majority of these costs (about \$30-35m) were costs associated with severance and vacation pay that Maine law mandates for workers at a shutdown facility that employs over 100 workers. These statutorily-mandated payments would have been avoided if Verso had tried successfully to sell Bucksport as a going concern to a new owner willing continue to employ all or most of the existing workforce; but of course such an effort was exactly

¹¹ Verso's representations to the Division about having contemplated shutting down the Bucksport Mill seem inconsistent with representations that we have been informed that Verso made in 2009 in order to obtain over \$9 million in taxpayer funds from the U.S. Department of Energy to upgrade the cogeneration capabilities at the energy plants at both the Bucksport and Sartell mills, on the justification of making these mills more competitive and preserving jobs at these mills. <http://bangordailynews.com/2009/11/03/business/verso-nets-93m-for-energy-projects-at-3-mills/>. This may be something that the Division would want to call to the attention of the Inspector General at the Department of Energy.

¹² Declaration of Rick Warren Boulton, ECF No. 79-7, *IAMAW Local Lodge No. 1821, et al. v. Verso Paper Corp. et al.*, No. 1:14-cv-00530-JAW (D. Me. Jan. 8, 2015).

¹³
<http://www.sec.gov/Archives/edgar/data/1421182/000142118214000056/vrsannouncesmillclosure.htm>.

¹⁴
<http://www.sec.gov/Archives/edgar/data/1421182/000142118214000056/vrsannouncesmillclosure.htm>.

what Verso was adamant about not doing.¹⁵ Verso has no doubt calculated that it would extract more profits in the long-term through increases in the price for coated paper than it would gain by avoiding statutory severance costs from a sale of the Mill to a paper producer, assuming such a purchaser could be found.¹⁶ In other words, Verso is trying to extract monopoly rents through its control and removal of capacity that is financially impossible to replace.

There is another important element here, which is that the paper-producing machines located at the Bucksport Mill are highly flexible, and may be converted from producing coated paper to other types of paper or paper products. Thus, the Bucksport Mill is not limited to producing only coated groundwood paper, if a new buyer chose to focus on other product lines. In fact, one of the machines at Bucksport was almost fully devoted to producing the paper for Splenda packets (the sugar substitute), and was highly profitable. But Verso elected to close Bucksport and has attempted to move all of its customers to its other plant in Jay, Maine, as well as its other soon-to-be acquired NewPage mills.¹⁷

IV. Additional Evidence on the Close Nexus between the Bucksport Closure and the NewPage Acquisition

It is clear from public documents filed with the SEC that one of the main goals of Verso's acquisition of NewPage was to reduce production capacity, and thereby reduce supply and increase prices of coated paper.

First, in an SEC filing by Verso on January 14, 2014, Verso made clear it planned to close mills as a direct result of the NewPage Acquisition. In addition Verso set aside funds for reorganization or closures of facilities. These documents contain the following statements regarding this merger transaction:

¹⁵ In the IAM-initiated court proceedings against Verso and AIM, Verso never denied or even challenged the witness declarations that showed that Verso's Bucksport Mill Manager, Dennis Castonguay, publically told workers on October 2, 2014 that Verso would never sell the Mill to any of its competitors.

¹⁶ Because such a purchaser, as successor operator, would be assuming potential liability for statutory severance payments, it would be likely to have offered to pay less for Bucksport than a bidder today, starting with a clean slate, might bid.

¹⁷ Declaration of David Patterson, ECF No. 67-1, Para. 12, *IAMAW Local Lodge No. 1821, et al. v. Verso Paper Corp. et al.*, No. 1:14-cv-00530-JAW (D. Me. Jan. 2, 2015).

We expect to incur approximately \$65 million of transaction fees and other costs related to the consummation of the Merger [with NewPage]. In addition, we expect to incur one-time costs of approximately \$80 million in connection with integrating the operations, products and personnel of Verso and NewPage into a combined company, in addition to costs related directly to completing the Merger described below. *These costs may include costs of....reorganization or closures of facilities.*¹⁸

Secondly, on January 15, 2015, executives at Verso and NewPage (including Verso CEO David Paterson) made a presentation to various bondholders and lenders in order to convince them to support the acquisition. In this presentation:

- Verso and NewPage asserted that *one of the goals of the acquisition was the “[r]eduction of redundant product and supply inventory”*;¹⁹
- This Presentation also stated that “A Combination [between Verso and NewPage] Will Result in the Largest Coated Paper Producer in N. America.”;²⁰
- Verso and NewPage also presented a graph that showed that the Bucksport Mill has *average* operating costs in comparison to other unidentified coated groundwood paper mills within the industry (as opposed to the unprofitable margins claimed in the October 1, 2014 press release), and that it is cheaper on a cost-basis to deliver paper to Chicago from Bucksport than the average European Mill;²¹

¹⁸ Verso Paper Corp. & NewPage Holdings Inc., Unaudited Pro Forma Condensed Combined Financial Information (Exhibit 99.2) at 5 (Jan. 14, 2014), *available at*: <http://www.sec.gov/Archives/edgar/data/1395864/000119312514010953/d658330dex992.htm> (emphasis supplied).

¹⁹ NewPage Holdings Inc., Lenders Presentation – Public, at 9 (Jan. 15, 2014), *available at* <http://www.sec.gov/Archives/edgar/data/1578086/000119312514011410/d659471dex991.htm> (emphasis supplied).

²⁰ *Id.* at 10.

²¹ *Id.* at 22.

- Later, Verso and NewPage stated that the combined company would “Operate[] many of the lowest cost mills in both CFS [Coated Freesheet] and CGW [Coated Groundwood]”.²²

Thirdly, in order to obtain financial support for the acquisition, Verso had to obtain approval from various banks to restructure its debt. To those ends, Verso signed an unusual deal with several banks on January 3, 2014 that shows that, when either the Verso or NewPage subsidiary reduced capacity after the merger was completed, then the other subsidiary would have to make a payment to the capacity-reducing entity for having done so. This system was put in place because outstanding loans were to be secured by either the Verso or the NewPage subsidiary; and each lender wanted to make sure its borrower would be fairly rewarded for the benefits of potential price increases that resulted from its capacity reduction(s).²³

The timing of the Bucksport closure announcement is also informative. Verso announced that Bucksport would close on October 1, 2014. This announcement came without any prior hint or warning, either internally at the Mill or publicly.²⁴ It came almost (i) nine months after the deal with NewPage was announced, and (ii) almost six months after Verso and NewPage announced having received “second requests” from the Division. By October 1, 2014, Verso must have known that Division would allow their acquisition to forward, subject to a divestiture package still being negotiated.

V. Legal Standards

It is clear that Verso could not have bought NewPage for the purpose of shutting down some of NewPage’s mills.

- *United States v. American Tobacco Co.*, 221 U.S. 106, 183 (1911) (finding an antitrust violation for “persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them but in

²² *Id* at 25.

²³ Verso Paper Corp., Consent and First Amendment to Credit Agreement, at Annex I (Jan. 3, 2014), available at: <http://www.sec.gov/Archives/edgar/data/1421182/000119312514002327/d647650dex101.htm>.

²⁴ This announcement came as a particular shock to State and local officials in view of the more than \$50 million public subsidies received by Verso in 2012-14 for upgrades to the power asset and conversion of the power plant for biomass power production based on Verso’s representations that upgrading the power plant make the mill more competitive and thus help to preserve jobs. See n. 12 above.

order to close them up and render them useless for the purposes of trade”).

- *United States v. Am. Can Co.*, 230 F. 859, 876-877 (D. Md. 1916) (finding an antitrust violation where “[t]he defendant began to shut up plants so soon as it got possession of them” and “[t]here was no other conceivable reason, than the desire to suppress competition, for buying plants which it obviously would not pay to run....What was done in that respect shows that the plants were bought, not for use, but to get them out of the market.”)
- See generally *State of Hawaii v. Gannett Pacific Corp.*, 99 F.Supp.2d 1241 1250 (D. Haw. 1999)(stating that “the State has presented a strong argument that the intent of the agreement is for GPC to buy out Liberty so that Liberty may then shut down the Star-Bulletin...”)²⁵
- *FTC v. Cardinal Health*, 12 F.Supp.2d 34, 63 et seq. (D.D.C. 1998) (rejecting the defendant’s argument that its proposed mergers would promote efficiency by eliminating “excess capacity”: “If the mergers were to be approved and excess capacity removed from the market, this Court finds that pricing pressure would ease and prices would not likely continue to go down. In the end, this would inevitably affect competition to the detriment of the American consumer.”)

If Verso could not buy NewPage mills for the purpose of shutting them down and scrapping them, why should Verso be able to buy NewPage partially for the purpose of being able to shut down and scrap one of its own mills? What is the difference as a matter of economic analysis? Why should it be different as a matter of antitrust law?

This being so, we deeply regret that Division’s decision not to include in its proposed Consent Decree a requirement that Verso offer its Bucksport Mill to the highest bidder willing to keep operating it as a productive facility for paper products, as is normally required by the DOJ’s Horizontal Merger guidelines in the case of failing firms or divisions. This was the best opportunity to have prevented the unfolding human tragedy and economic disaster in Bucksport from occurring, while offering printed paper

²⁵ This is a case where the Division had declined to take action, despite being urgently invited to do so by a citizens/consumers group which ultimately filed a parallel action to the State’s successful effort.

consumers some additional check on post-merger price increases which Verso and its bankers were hoping to achieve.

VI. Our Proposal

With the Verso/NewPage merger having closed, we recommend that the Division's more effective course would be to focus urgent efforts on investigating the Verso/AIM transaction that has apparently not yet closed.

We recommend that the Division investigate the Verso-AIM transaction under Clayton Act Section 7 based on an *elimination of potential competition* theory which I will explain. Because it falls below the HSR threshold, Verso did not have to submit the AIM transaction to the Division (and the FTC) for review. Even if it was considered before the Division signed off on Verso-NewPage consent decree, we respectfully believe that it deserves more intense scrutiny than it was probably given in the waning moments of the long investigation of the NewPage acquisition.

The simple truth is that decisions relating to industrial capacity are very sensitive competitively, because of the likely relationship between production capacity and market supply, which in turn drives price levels. This is particularly true in the printing paper industry, where demand is declining and output is generally sold on a non-public delivered price basis. Thus capacity coordination is possible (and likely) where competitors can see what each other is doing and there is recurring concern expressed about excess capacity driving prices down.

Bucksport (with its 350,000 tons of coated paper capacity, and 55,000 tons of specialty paper capacity) represented almost a third of Verso's pre-merger printing capacity; and thus it represented about 4.5% of the total North American capacity for making coated printing papers.²⁶ In other words, before it closed, it was a source of *actual competition* in coated groundwood paper; and after it closed it was still a source of *potential competition* in both groundwood paper *and* various other types of coated printing papers that could be efficiently produced on its big machines. The coated printing paper market is quite highly concentrated, and so are the segments that make it up, as the Government alleged in its Verso Complaint and CIS.

The plain purpose of the Verso-AIM transaction is to permanently eliminate the Mill as a source of potential competition in the industry where Verso has become the

²⁶ See George Hay Ex. 6b in Support of Verso's Opposition, No. 1:14-cv-00530, ECF No. 67-11, alleging that North America had 9,282,000 tons of Coated Groundwood, Coated Freesheet and SuperCalendered capacity before Bucksport closed (excluding imports). 425,000 tons divided by 9,282,000 tons = 4.5%.

leader. A merger that creates a substantial loss of *potential* competition has of course been illegal under Section 7 of the Clayton Act since *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964) and in *F.T.C. v. Procter & Gamble Co.*, 386 U.S. 568, 585-86 (1967), and the doctrine has continued to be applied in the merger context. See *Polypore Int'l, Inc. v. F.T.C.*, 686 F.3d 1208, 1214 (11th Cir. 2012).

The intent of Verso's sale of the Bucksport Mill to AIM is to destroy the Mill as a threatened source of potential competition in the hands of a new owner. Thus, these circumstances offer a uniquely strong "potential competition" merger case.

As you well know, there are two key parts of the "potential competition" doctrine--both of which are easily met here. See generally *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974). First, the potential entrant must be perceived as likely to enter the market. Here Verso perceives Bucksport, in independent hands, as a threat to its market leadership, which is why Verso has been so adamant about not selling Bucksport to a competitor. Verso recognizes that the new owner of Bucksport—having purchased this substantial production facility—would be very likely to enter the coated printing paper market.

The second part of the "potential competition" doctrine is that the relevant enterprise being removed be *one of only a few* potential entrants. *U.S. v. Falstaff Brewing Corp.*, 410 U.S. 526, 534 n.13 (1973). In our case, this condition should be easy to satisfy. Since building a new plant would cost billions of dollars and take a long time (according to the CIS, p. 8), today the only potential entrants to the coated paper market would be the owner of another shutdown mill that: (i) had been mothballed in operational condition; and (ii) could be restarted reasonably promptly without great capital expense. I suspect there are few operational-ready coated paper plants that are not being used—in large part because NewPage and Verso have been so intent on disabling and permanently destroying any mills that they have shut down since 2011.

Thus, the AIM acquisition of the Mill fits neatly within the "potential competition" doctrine—with the difference being one of form. Instead of the transaction being between the market leader and the potential entrant (as in *El Paso*, *P&G-Clorox*, etc), this transaction involves the potential entrant being transferred by the market leader to a liquidator. But it still involves a sale of corporate stock or assets whose effect certainly may be to substantially lessen competition or tend to create a monopoly.

VII. Proposed Relief

We respectfully submit that the appropriate relief would be an order requiring whichever party that owns the Mill to offer it for sale at a reasonable price in accordance with the processes for failing divisions under Section 11 of the Horizontal Merger Guidelines. If necessary, the Paper Mill and the Generator could be offered separately, because co-generation economics would give two different owners of these two facilities very strong incentives to work together in providing each other with steam and electricity.²⁷

It would also be of fundamental importance that the Division obtain disclosure of the identity and financial capability of the entity (or entities) that the Governor of Maine and Maine official Rosaire Pelletier (in charge of helping to broker deals for paper mills) which have the means, interest and willingness to buy and operate the Bucksport Mill as an ongoing paper mill. In fact, all indications are that this entity offered Verso more than the amount that AIM is paying Verso and made that offer prior to the Verso-AIM agreement being signed. Confidentiality agreements entered between this entity and the State and, more importantly, imposed by Verso on the entity have prevented us (or Judge Woodcock) from learning the identity of this entity. However, using the CID statute if necessary, the Division should be able to require Verso and/or the State to release this information or not object to having this or other qualified bidders from coming forward.

Mr. Pelletier has reported that Verso have provided him with a list of 30 names of entities that had contacted Verso with an interest in buying the Bucksport Mill. At least 4 or 5 of the names on that list included the names of paper companies that currently produce paper, including coated groundwood paper. In addition, Mr. Pelletier stated in a letter submitted to the Judge on January 16, 2015, that Verso had omitted the name of a potential buyer from the list it had provided to him, of a paper maker that Mr. Pelletier had been in communication with and knew had provided an offer for the Mill to Verso. It is unclear whether Verso omitted this buyer from the list because it had required the buyer to sign a confidentiality agreement and gag order about its offer, and did not know Mr. Pelletier had been working with the buyer prior to Verso requiring them to enter that agreement.

²⁷ Declaration of Whitfield Russell, ECF No. 79-1, *IAMAW Local Lodge No. 1821, et al. v. Verso Paper Corp. et al.*, No. 1:14-cv-00530-JAW (D. Me. Jan. 8, 2015).

But regardless, it is clear there is at least one paper company that is interested, willing and able to buy the Bucksport Mill and keep this facility operating to produce paper and good-paying jobs.

If there is a willing buyer that can continue to operate the Bucksport Mill in the production of paper that will preserve competition in the North American coated printing paper markets, Verso should be required to divest the Bucksport Mill to this or any other entity that will continue to operate this mill in the production of paper, and divest the cogeneration facility to the same buyer or to an independent entity willing to provide power at lower cost in conjunction with the production of paper. Further, as a matter of public policy, allowing the complete permanent destruction of the valuable paper making assets of the Bucksport Mill should be prevented, where the cost of new construction of such a facility are so high and the potential for other uses – including uses that do not even compete with Verso – so great according to the long list of suitors that Verso chose to ignore.

In considering this remedy, the Division ought to remember the helpful explanation by Professors Areeda and Hovenkamp gave in their oft-cited treatise:

Refusing to accept more than salvage value might seem to be economically irrational...[but] the defendant would presumably be acting rationally in the belief that its [immediate] loss would be exceeded by its gain from reduced competition in [the product market]. *But that very calculation is hardly one that antitrust law should respect*; it makes clear that the defendant's action had the unjustified effect (and purpose) of impairing competition in [the product market].²⁸

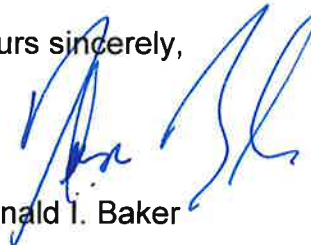
VIII. CONCLUSION

We appreciate your consideration in finding a solution that can preserve competition by preserving the Bucksport Mill as a going concern. We will provide the staff with copies of all materials from the Maine litigation that I have referred to in this letter. Needless to say, we would be glad to answer and questions of provide any additional information that you or staff might desire to review.

²⁸ IIIA P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 782n, p. 283-84 (2d ed. 2002). (emphasis added)" For your convenience, we attach the entire ¶ 782n on closing facilities as a potential antitrust violation.)

As I indicated earlier, we believe that the intended destruction of Bucksport is part of a much broader supply reduction program organized by Apollo and going back to at least to 2011.²⁹ We intend to promptly submit a memorandum to the staff urging the Division open a Sherman Act investigation based on information that we have assembled about the Apollo-orchestrated efforts to reduce capacity at Verso and NewPage and thereby to raise prices for coated paper.

Yours sincerely,



Donald I. Baker

cc. David I. Gelfand, Esquire
Peter J. Mucchetti, Esquire
Karl Knutsen, Esquire

²⁹ Significantly, through at least September 2012, Apollo (presumably using its influence as a significant NewPage second-lien debt holder) attempted to force a Verso-NewPage merger for \$1.5 billion in the Delaware Bankruptcy Court – an effort opposed by the first-lien holders.
<http://www.pulpandpaper.net/netletter/dj09142011.htm>.

UNITED STATES DISTRICT COURT
FOR THE
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 for Local Lodge No.1821;)
COREY DARVEAU, individually and as)
President of Local Lodge No. 1821;)
BRIAN SIMPSON, individually and as Vice)
President of Local Lodge No. 1821;)
BRIAN ABBOTT, individually and as Recording)
Secretary of Local Lodge No. 1821;)
HAROLD PORTER, individually and as Financial)
Secretary for Local Lodge 1821, and)
FIFTY-THREE LOCAL NO. 1821 MEMBERS,)
Individually and for all other similarly situated)
Salaried and hourly wage employees,)
Plaintiffs,)
v.)
VERSO PAPER CORP., a Delaware Corporation;)
VERSO PAPER LLC, a Delaware Limited)
Liability Company (LLC) and a wholly owned)

CIVIL ACTION NO.
1:14-CV-00530-JAW

DECLARATION OF FREDERICK R. WARREN-BOULTON

My name is Frederick R. Warren-Boulton. I am an economist and Principal with MiCRA, an economics consulting and research firm with offices at 1155 Connecticut Avenue, N.W., Washington, D.C. I received a B.A. degree from Yale University, a M.P.A. from the Woodrow Wilson School of Princeton University, and a Ph.D. in Economics from Princeton University. From 1972 to 1983 I was an Assistant and then Associate Professor of Economics at Washington University in St. Louis. From 1983 to 1989, I served as the chief economist for the Antitrust Division of the U.S. Department of Justice ("DOJ"), first as Director of its Economic Policy Office and then as Deputy Assistant Attorney General for Economic Analysis. Since leaving the government, I have served as a Resident Scholar at the American Enterprise Institute, a Visiting Lecturer of Public and International Affairs at the Woodrow Wilson School at Princeton University, and as a Research Associate Professor of Psychology at the American University. As a principal at MiCRA, I have served as an expert witness or consultant on a large number of antitrust matters, including as an expert witness for the Federal Trade Commission in *FTC v. Staples and Office Depot*, for the States and the DOJ in *United States v. Microsoft* and, most recently, for the DOJ in *United States v. H&R Block*. A copy of my resume is attached to this report.

I have been asked by counsel for Plaintiffs to explain the circumstances under which Verso's acquisition of NewPage would result in the closing of Verso's Bucksport plant even though that plant would be likely to remain open if either (i) Verso did not acquire the New Page plants or (ii) Verso had been required to sell the Bucksport plant to the highest bidder without any restriction or understanding requiring that the buyer remove the Bucksport assets from the relevant market (e.g., by scrapping the mill). I have also been asked to explain the conditions under which the closing of the Bucksport plant can be expected to harm customers currently purchasing products supplied from the Bucksport mill.

Except under unusual circumstances, a multi-plant company is more likely to close a plant in response to a decline in demand than is a single-plant company, and the more plants a company owns the more likely it is to close a plant.¹ There is a simple intuition behind this

¹ Bernard, Andrew B., and J. Bradford Jensen. "Firm structure, multinationals and manufacturing plant deaths." *The Review of Economics and Statistics* 89, no. 2 (2007): 193-204.

statement. The profitability to a company of closing a plant depends on the share of the closed plant's customers or revenues that the company can expect to retain by supplying the closed plant's customers from its other plants. The more revenues that are retained, the fewer profits a company will lose when it closes a plant.²

In general, the more plants that a company owns, the closer some of its plants will be to customers of the closed plant and the more likely it will be that the capacity at one of its plants matches the requirements of that customer, and thus the higher the share of the customers at the closed plant that it can divert to its other plants rather than lose to its rivals.

Because Verso's acquisition of the NewPage plants will greatly increase the total number of plants owned by Verso the acquisition can be expected to increase the share of Bucksport's current customers that Verso could reasonably anticipate being able to retain. In turn, this means the acquisition will increase the profitability to Verso of closing Bucksport, and can make the closure of Bucksport profitable even though it would not be profitable to close the mill, at least at this time, absent the merger.

George Hay correctly notes in his declaration³ that it is economically sensible for a firm to close a plant when the price of the produced good falls below the plant's average variable cost. While this is a sufficient condition for closure to be profitable, it is not a necessary condition. Generally, not all of a firm's fixed costs are sunk. The elimination of these non-sunk fixed costs (NFSC) when a plant is closed can be an important consideration when a firm is deciding whether to close a plant. In considering a plant closure, however, the firm will also consider the effect of that closure on its profits at its other plants. When a multi-plant firm closes one of its plants, profits at its other plants will rise by an amount equal to the sales diverted to those other plants times the profit margin it can earn on those diverted sales. If a merger would result in a higher share of the closed plant's sales being diverted internally to its other plants, the merger will increase the profitability of closing the plant.⁴

In a declining industry, a primary goal of the firms considering a merger can often be to facilitate the "rationalization" of capacity, i.e., to increase capacity utilization rates by shutting

² Stated differently, the more revenues that are retained, the more profits a company will earn at its other plants.

³ See Declaration of Professor George Hay, pages 24-25.

⁴ Abstracting from other considerations, the simplified condition for a closure to increase profits is thus that $AR < AVC + ANSFC + IDR * M$, i.e., that average revenue (or price) at the closed plant is less than average variable cost plus average non-sunk fixed costs at the closed plant, plus the internal diversion ratio to its other plants times the incremental profit margin at those other plants.

down plants and thus reduce fixed costs while allowing production to be shifted to plants with similar capabilities.⁵ The profitability of a merger in such an industry, and even the choice of the merging party, will thus depend on the extent to which the merging party has plants with capacity that can better and more profitably meet the requirements of the closing plant's customers than does the closed plant's firm, since this would result in a higher share of the closed plant's customer to be retained within the firm. Especially if the merging firms tend to specialize their plants due to economies of scale or to allow longer production runs, the merging party is more likely to have a plant with similar capabilities to that of the closed plant than does the firm that currently owns that plant.⁶

As a corollary, this analysis also indicates that it may well be profitable for a buyer other than AIM to continue operating Bucksport even if it is not profitable for Verso to operate Bucksport after the merger. Specifically, a new could find it profitable to operate Bucksport and would be willing to pay more for Bucksport than AIM is willing to pay. It is quite likely, however, that Verso would find it more profitable to sell Bucksport to AIM even if AIM offered a lower price than a buyer that would continue to operate Bucksport as a producer of paper because selling to AIM would eliminate a potential competitor. If Bucksport remains open in the hands of a new competitor, Verso could expect that fewer current Bucksport customers could be switched to its other plants (or only switched on better terms) and therefore that its profits at those other plants would be lower than if the Bucksport assets exited the market as a competitive force. Stated differently, the higher profits Verso will earn at its other plants if Bucksport is sold to AIM can more than compensate for a lower price from AIM.

Finally, for several reasons, the closing of the Bucksport plant can be expected to harm customers currently being supplied from the Bucksport mill, and may also harm both other

⁵ I understand that there is support in the record in this case that one purpose of the merger was to remove excess capacity and close at least one plant. See, for example, Verso's January 14, 2014 SEC filing at <http://www.sec.gov/Archives/edgar/data/1395864/000119312514010953/d658330dex992.htm>, at p. 5 ("These costs may include costs of ... closures of facilities").

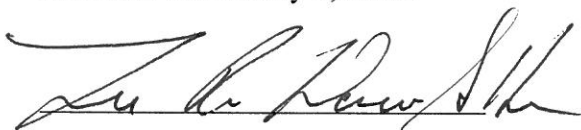
⁶ As a potential example in this case, I understand that Verso's Bucksport plant specializes in the production of lightweight coated groundwood paper, and no other Verso plant currently produces lightweight coated groundwood paper. New Page, however, owns a plant in Biron, Wisconsin, which also produces lightweight coated groundwood paper. The two plants have similar capacity (370,000 tons at Biron versus 405,000 tons at Bucksport) and costs (see <http://www.sec.gov/Archives/edgar/data/1578086/000119312514011410/d659471dex991.htm>, p. 22-23). If Bucksport's current production of lightweight coated groundwood paper would be shifted to the Biron plant, the merger would have increased the expected profitability of closing the Bucksport plant if the Biron plant was expected to be retained by the merging party or if (as I understand has been agreed to under the consent decree with the Department of Justice) Biron is divested to a third party, but the prospect of those diverted sales affected the price received for the Biron plant.

customers of the merging firm and customers served by its competitors. In general, transport costs can be expected to rise as plant closures reduce the number of plant locations. In addition, as customers of the closed Bucksport mill shift to other plants of the merged firm or to its rivals, capacity utilization at those plants will rise, and marginal costs at those plants will increase if marginal costs increase with capacity utilization, as can be expected, at least as output approaches full capacity utilization. Both increases in transport costs and increases in marginal cost at the plant result in higher delivered marginal cost, which in turn can be expected to lead to customers facing higher prices.⁷

Since current customers of the Bucksport mill find that purchasing from Bucksport is their best choice, eliminating that alternative must leave them worse off, even if they continue to purchase from the merged firm. And if, as Professor Hay implies⁸, rivals of the merging firm are likely to increase their sales because of the closure, current Bucksport consumers who had previously rejected that alternative must be worse off as a result of the closure of the Bucksport plant. Requiring the sale of Bucksport to the highest bidder will at least force the merged firm and its rivals to compete for those customers.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 8, 2015.



Frederick R. Warren-Boulton

⁷ News reports indicate that prices for coated groundwood paper (also referred to as coated mechanical paper) have already begun to go up as capacity is shut down and capacity utilization rises in the remaining mills. See RISI, "Publication paper price hikes start gaining traction as capacity cuts bite; imports may cap mills' 2015 gains", Nov. 21, 2014 (Ex. 1).

⁸ See Declaration of Professor George Hay pages 18-20.



Microeconomic Consulting & Research Associates, Inc.

FREDERICK R. WARREN-BOULTON, Ph.D.

PRINCIPAL

Microeconomic Consulting & Research Associates, Inc. (MiCRA)
1155 Connecticut Avenue, N.W., Suite 900
Washington, D.C. 20036
www.micradc.com

Direct: (202) 467-2504

rwb@micradc.com

Fax: (202) 296-1915

November 12, 2014

CURRICULUM VITAE

Education

- 1975 Ph.D., Economics, Princeton University
- 1969 M.A., Economics, Princeton University
- 1969 M.P.A., (Master of Public Affairs) Woodrow Wilson School of Public & International Affairs, Princeton University
- 1967 B.A., Economics, Yale University, *cum laude* with High Honors in Economics

Experience

Principal, MiCRA: Microeconomic Consulting and Research Associates, Inc.,
Washington, D.C.; August 1991 - present.

Visiting Lecturer of Public and International Affairs, Woodrow Wilson School of Public and International Affairs, Princeton University, Princeton, NJ; Spring Semester, 1991.

Resident Scholar, American Enterprise Institute for Public Policy Research, Washington, D.C.; May 1989 - April 1990, Adjunct Scholar from May 1990.

Senior Vice President, ICF Consulting Associates, Inc., Washington, D.C.; November 1989 - August 1991.

Research Associate Professor of Psychology, The American University, Washington, D.C.; September 1983 - 1990.

Deputy Assistant Attorney General for Economic Analysis, Antitrust Division, U.S. Department of Justice, Washington, D.C.; October 1985 - May 1989.

Director, Economic Policy Office, Antitrust Division, U.S. Department of Justice, Washington, D.C.; September 1983 - September 1985.

Research Associate, Center for the Study of American Business, Washington University in St. Louis; July 1978 - June 1985.

Associate Professor, Department of Economics, Washington University in St. Louis; July 1978 - June 1985. Chairman, Graduate Committee, 1978 - 1980. Chairman, Undergraduate Committee, 1980 - 1983.

Assistant Professor, Department of Economics, Washington University in St. Louis; September 1972 - June 1978.

Assistant in Instruction, Woodrow Wilson School of Public and International Affairs, Princeton University, Princeton, N.J.; 1969 - 1971.

Research Consultant, Ford Foundation, Kingston, Jamaica, W.I.; Summer 1969.

Fields Taught

Graduate: Industrial Organization, Economic Development and Planning, Microeconomic Theory, International Trade, International Finance, Economic Theories of Behavior, Applied Microeconomics.

Undergraduate: Government and Business, Industrial Organization, International Trade, International Finance, Economic Development, Intermediate Microeconomic Theory, Intermediate Macroeconomic Theory, Introductory Microeconomic Theory, Introductory Macroeconomic Theory.

Grants

National Science Foundation. Grant title: "Income Maximizing in Choice and Rate Effects," 1988 - 1991.

National Science Foundation. Grant title: "Application of Economic Theory to Operant Schedule Effects," 1985 - 1987.

National Science Foundation. Grant title: "Income and Choice," 1983 - 1985.

Professional Activities

Referee, *American Economic Review*, *The Bell Journal of Economics/Rand Journal*, *Economic Inquiry*, *Industrial Organization Review*, *Journal of Industrial Economics*, *Journal of Law and Economics*, *Journal of Political Economy*, *Quarterly Journal of Economics*, *Southern Economic Journal*.

Member, Editorial Boards, *International Journal of the Economics of Business*, *Journal of Forensic Economics*.

Member, American Bar Association, American Economic Association.

Languages

French, German

Citizenship

United States, United Kingdom

Publications

“US v. H&R Block: Market Definition in Court since the 2010 Merger Guidelines,” *The Antitrust Bulletin*, forthcoming, Fall 2014, with Marc Remer.

“Market Definition and the Price Effects of Mergers: Staples-Office Depot (1997),” in *The Antitrust Revolution: Economics, Competition and Policy*, John E. Kwoka and Lawrence J. White, eds.; Oxford University Press, Third Edition, 1999; Fourth Edition; Case 7, Fifth Edition, 2009; Sixth Edition, 2014, Case 6; with Serdar Dalkir.

“From Structure to Effects: the Economics of Merger Control,” *Global Competition Review*, June 2008 with R.S. Khemani and R. Duplantis.

“On Loss Aversion in Capuchin Monkeys,” *Journal of the Experimental Analysis of Behavior*, 89 (March 2008) with A. Silberberg, P. Roma, M. Huntsberry, T. Sakagami, A. Ruggiero and S. Suomi.

“The Contribution of the Merger Guidelines to the Analysis of Non-Horizontal Mergers,” 20th Anniversary of the 1982 Merger Guidelines: The Contribution of the Merger Guidelines to the Evolution of Antitrust Doctrine, May 21, 2002, on <http://www.usdoj.gov/atr/hmerger.htm#papers>.

- “Optimizing in Choice When a Token Deposit is the Operant,” *Journal of the Experimental Analysis of Behavior*, 2002, with J. J. Widholm, A. Silberberg, S.R. Hursh, and A.A. Iman.
- “Staples and Office Depot: An Event-Probability Case Study,” *Review of Industrial Organization*, 19: 469-481, 2001, with Serdar Dalkir.
- “Unilateral Price Effects: Staples and Office Depot,” in *The M&A Lawyer*, June 1998, Vol. 2, No. 3, with Serdar Dalkir. Available in revised form as “How Do You Know an Office Superstore? Staples and Office Depot,” on <http://www.antitrust.org/cases/>.
- “Resale Price Maintenance Reexamined: Monsanto v. Spray-Rite (1984),” in *The Antitrust Revolution: Economics, Competition and Policy*, John E. Kwoka and Lawrence J. White, eds.; Oxford University Press, Case 14, Second Edition, 1994; Third Edition, 1999.
- “Exclusionary Behavior in the Market for Operating System Software: the Case of Microsoft,” in *Opening Networks to Competition: the Regulation and Pricing of Access*, David Gabel and David F. Weiman, eds.; Kluwer Academic Publishers, 1998, with Kenneth C. Baseman and Glenn A. Woroch.
- “Riding the Wave: Exclusionary Practices in Markets for Microprocessors Used in IBM-Compatible Personal Computers,” Conference and Festschrift in Honor of Merton J. Peck, Yale University, September 30, 1994, and *International Journal of the Economics of Business* 2-2 (July 1995), pp. 241-262, with Robert W. Wilson.
- “The Economics of Intellectual Property Protection for Software: The Proper Role for Copyright,” American Council on Interoperable Systems, Washington, D.C., June 1994, and *StandardView : ACM Perspectives on Standardization* 3-2 (June 1995), pp.68-78, with Kenneth C. Baseman and Glenn A. Woroch.
- “Microsoft Plays Hardball: Use of Nonlinear Pricing and Technical Incompatibility to Exclude Rivals in the Market for Operating Software,” *The Antitrust Bulletin* 40-2 (Summer 1995), pp.265-315, with Kenneth C. Baseman and Glenn F. Woroch.
- “Copyright Protection of Software Can Make Economic Sense,” *The Computer Lawyer*, 12 (February 1995), pp. 10, 18-28, with Kenneth C. Baseman and Glenn A. Woroch.
- “Exclusionary Practices in High-Technology Industries,” *The St. Louis Bar Journal*, 16 (Summer 1994), pp. 28-34.
- “Monsanto v. Spray-Rite: Resale Price Maintenance Reexamined,” in *The Antitrust Revolution: The Role of Economics*, John E. Kwoka and Lawrence J. White, eds.; Scott, Foresman and Company, Glenview, Illinois, second edition, 1994.

“A Commentary on the 1992 U.S. Merger Guidelines,” *International Merger Law*, 22 (June 1992), pp. 14-19.

“The Use of Stock Market Returns in Antitrust Analysis of Mergers,” *Review of Industrial Organization*, 7-1 (1992), pp. 1-11, and *Economic Analysis Group Discussion Paper #88-1*, January 1988, with Robert H. McGuckin and Peter Waldstein.

“Implications of U.S. Experience with Horizontal Mergers and Takeovers for Canadian Competition Policy,” in *The Law and Economics of Competition Policy*, Frank Mathewson, Michael Trebilcock and Michael Walker, eds.; The Fraser Institute, Vancouver, B.C., 1990.

“Maricopa and Maximum-Price Agreements: Time for a New Legal Standard?” *Journal of Health Economics*, 7 (June 1988), pp. 185-190.

“Maximizing Present Value: A Model to Explain Why Moderate Response Rates Obtain on Variable-Interval Schedules,” *Journal of the Experimental Analysis of Behavior*, 49 (May 1988), pp. 331-338, with Alan Silberberg and Toshio Asano.

“Sources of the ‘Crisis’ in Liability Insurance: An Economic Analysis,” in *Yale Journal of Regulation*, 5 (Summer 1988), pp. 367-395; *Economic Analysis Group Discussion Paper #88-2*, February 1988; and *An Update on the Liability Crisis: Tort Policy Working Group*, U.S. Government Printing Office: 181-487:60075, March 1987, with Richard N. Clark and David D. Smith.

“State and Federal Regulation in the Market for Corporate Control,” *The Antitrust Bulletin*, 32 (Fall 1987), pp. 661-691, and *Economic Analysis Group Discussion Paper #86-4**, January 1986, with Margaret E. Guerin-Calvert and Robert H. McGuckin.

“Income and Choice Between Different Goods,” *Journal of the Experimental Analysis of Behavior*, 48 (September 1987), pp. 263-275, with Alan Silberberg and David Shurtleff.

“Inferior-Good and Giffen-Good Effects in Monkey Choice Behavior,” *Journal of Experimental Psychology: Animal Behavior Processes*, 13 (1987), pp. 292-301, with Alan Silberberg and Toshio Asano.

“Efficiencies, Failing Firms, and Alternatives to Merger: A Policy Synthesis,” *The Antitrust Bulletin*, 31 (Summer 1986), pp. 431-450, and *Economic Analysis Group Discussion Paper #86-14*, August 1986, with John Kwoka.

Oil Pipeline Deregulation: Report of the U.S. Department of Justice, U.S. Government Printing Office: 1986, 491-510:40159, May 1986, with Charles J. Untiet.

“Merger Policy and Enforcement at the Antitrust Division: The Economist's View,”
Antitrust Law Journal, 54 (Spring 1985), pp. 109-115.

“Reanalysis of the Equation for Simple Action,” *Journal of the Experimental Analysis of Behavior*, 43 (March 1985), pp. 265-277, with Alan Silberberg, Michael Gray and Randolph Ollom.

“Considering the Effects of Financial Incentive and Professional Ethics on ‘Appropriate’ Medical Care,” *Journal of Health Economics*, 3 (December 1984), pp. 223-237, with Robert Woodward.

Deficits and Dollars: The Effects of Government Deficits in an International Economy.
Center for the Study of American Business, Contemporary Series 3, 1982.

“Physician Productivity, Remuneration Method, and Supplier-Induced Demand,” in
Issues in Physician Reimbursement, N.T. Greenspan (ed.), HCFA, 1981, pp. 115-134, with Robert Woodward.

“Paying the Doctor: A Model of Work-Leisure Decisions under Alternative Remunerations,” *Proceedings of the American Statistical Association*, 1979, with Robert Woodward.

Vertical Control of Markets: Business and Labor Practices. Ballinger Publishing Company, Cambridge, Mass., 1978.

“Vertical Control by Labor Unions,” *American Economic Review*, 67 (June 1977), pp. 309-322. Reprinted as Publication Number 17, Center for the Study of American Business, November 1977.

“Vertical Control with Variable Proportions,” *Journal of Political Economy*, 82 (July - August 1974), pp. 783-802.

Preliminary Survey of Jamaican Management Manpower: Resources and Requirements.
Jamaican Institute of Management, 1969.

Conference, Seminar, Working and Discussion Papers

“Advanced Topics in Merger Analysis.” Canadian Bar Association, 2010 Fall Competition Law Conference, Gatineau QC, October 1, 2010.

“Upward Pricing Pressure in the Merger Guidelines” Canadian Bar Association Teleconference, March 10, 2010.

- “Competition Issues in the Air Transport Sector in India.” National Conference, State of Competition in the Indian Economy (Competition Commission of India, World Bank, FIAS and DFID), New Delhi, India, June 12, 2009.
- “Price-Fixing, Bid-Rigging, and Mergers; The Shift from Structure to Effects.” Minnesota Bar Association, October 13, 2009.
- “Demand-Side and Supply-Side Linkages in the Antitrust Analysis of Aftermarkets.” 57th Antitrust Law Spring Meeting, American Bar Association Section of Antitrust Law, “Aftermarkets and Tying: The Legacy of *Kodak*” Session, March 26, 2009
- “Have Big Deal Contracts Prevented Entry by Small Publishers of Academic Journals?” International Industrial Organization Conference, Washington, DC, May 17, 2008, with S. Silberman, D. Haar and R. Lipstein.
- “Collusion: Price-fixing and Bid-rigging.” (IFC/World Bank), Bangladesh, April 15, 2008.
- “Open Access Policies, Net Neutrality and Incentives for Innovation in the Telecommunications Industry” 19th Annual Western Conference, Advanced Workshop in Regulation and Competition, Center for Research in Regulated Industries, Rutgers Business School, Rutgers University, June 29, 2006, with Michael Pelcovits.
- Department of Justice/Federal Trade Commission Section 2 Hearings on Single Firm Conduct: Predatory Buying Panel. Washington, DC, June 22, 2006
- “Market Share Discounts: Collusion and Exclusion.” International Industrial Organization Conference, Boston, April 9, 2006, with Daniel Haar.
- “On Using Economists as Expert Witnesses.” 54th Antitrust Law Spring Meeting, American Bar Association Section of Antitrust Law, “Economic Experts Speak” Session, March 29, 2006
- “Mergers Without Markets: Do Mergers Among Publishers Of Academic Journals Affect Prices?” MiCRA Working Paper No. 2, November 4, 2005, with Renee Duplantis, Daniel Haar, Steve Silberman and Hal Van Gieson, available at www.micradc.com.
- “Antitrust Issues in Agriculture,” National Agricultural Council Global Agrifood Forum 2005, Mexico City, June 10, 2005.
- “The Economics of Vertical Restraints,” ABA Economics Committee, Economics for Lawyers, April 20, 2005. See www.micradc.com

“On Using an Economist as an Expert Witness.” DOJ / FTC Trial Strategy Program,
Airlie House, January 29, 2004

Presentation at the ABA Session on *Dentsply*, November 4, 2003

Presentation at the ABA Antitrust Meetings in San Francisco, August 11, 2003

“The Contribution of the Merger Guidelines to the Analysis of Non-Horizontal Mergers,”
20th Anniversary of the 1982 Merger Guidelines: The Contribution of the Merger
Guidelines to the Evolution of Antitrust Doctrine, May 21, 2002, on
<http://www.usdoj.gov/atr/hmerger.htm#papers>.

“Congestion Pricing at Airports,” ACI-NA 11th Annual Conference, Salt Lake City,
November 12, 2002; 2001 FAA Commercial Aviation Forecast Conference,
Washington, D.C., March 14, 2001; ACI-NA 9th Annual Conference, New York
City, October 3, 2000.

FTC Workshop: Competition Policy in the World of B2B Electronic Marketplaces, June
30, 2000.

FTC Workshop: Slotting Allowances, June 1, 2000.

“Consumers, Consolidation, and Concentration: Policy Issues,” at the ERS of the USDA
conference, The American Consumer and the Changing Structure of Food
System, May 4, 2000.

“Design and Implementation of Competition Law and Policy” and “Mergers,
Acquisitions and Other Structural Arrangements.” Competition Law and Policy:
Cross-country Approaches Experiences. World Bank Institute, Singapore Trade
Development Board, and Organization for Economic Co-operation and
Development May 14-May 20, 2000.

“The Case Against an Agrarian Antitrust Policy,” 2000 USDA Agriculture Outlook
Forum. February 24, 2000.

“Is Structure Still Enough”, 25th Anniversary of the EPO/EAG, November 4, 1998

“Proving Damages in a Business Case,” Business Litigation Seminar, Business Law
Section of the Florida Bar, November 20 (Tampa) - 21 (Miami), 1997.

“Basic Economics for Lawyers,” Section of Antitrust Law, American Bar Association,
New York, N.Y., October 3-4, 1996.

“Vertical Control in the Entertainment Industry,” Chair’s Showcase Program: The
Integration, Disintegration and Reintegration of the Entertainment Industry,

American Bar Association, Section of Antitrust Law, 44th Annual Antitrust Spring Meeting, Washington D.C., March 28, 1996.

“Privatization and Regulation in the Restructuring of Electric Utilities in Eastern Europe,” IBRD Conference on the Privatization of Electric Utilities, Prague, The Czech Republic, September 1993.

“Implications of the United States Experience with Regulation and Antitrust for Competition Policy in Countries in Transition from Centrally Planned Economies to Market Economies,” IBRD/EDI/USAID Seminar on Microeconomics, Vienna, Austria, July 1993.

“The Economics of Punitive Damages.” Punitive Damages after TXO: American Bar Association Antitrust Section Meeting, New York, August, 1993.

“Regulatory Alternatives for FERC Following the Energy Policy Act of 1992,” The Federal Energy Bar Association Mid-Year Meeting, Washington, D.C., November 19, 1992.

“The Economics of Credit Card Interest Rate Caps,” Seminars at the Economic Analysis Group, U.S. Department of Justice, September 29, 1992; the Board of Governors of the Federal Reserve System, October 7, 1992; and the D.C. Bar Association, November 19, 1992.

“Straws in the Bottleneck: A Proposal for Efficient Network Interconnection,” presented at the Tenth Biennial Conference of the International Telecommunications Society, Cannes, France, June 1992; *Journal of Regulatory Economics* Editors' Conference, San Diego, October 1992, with John Woodbury and Glenn Woroch.

“Economic Principles of Penalties for Antitrust Violations, and the Role of the Economist in Corporate Sentencing,” Corporate Sentencing Under the Federal Sentencing Guidelines for An Antitrust Defendant, The Federal Bar Association, Antitrust and Trade Regulation Section, May 1992.

“The State of Antitrust in 1991: A Kindler, Gentler Antitrust?” The CATO Institute Conference, 1991, with Steve Calkins.

“Economic Analysis and Policy Implications of the Financial Interest and Syndication Rule,” Telecommunications Policy Research Conference, October 1990, with John Woodbury.

“The Design and Evaluation of Competitive Rules Joint Ventures for Mergers and Natural Monopolies,” American Enterprise Institute conference on Policy Approaches to the Deregulation of Network Industries, October 1990, and at the American Economic Association Meetings, December 1989, with John Woodbury.

- “Regulation and the Partially Monopolized Network: Lessons from Telecommunications,” American Enterprise Institute conference on Policy Approaches to the Deregulation of Network Industries, October 1990, with Roger Noll.
- “Price Regulation and Common Carrier Regulation,” AEI Conference on Oil Pipeline Deregulation, American Enterprise Institute.
- “Regulation of New Crude-Oil Pipelines: Natural Monopoly and Information Externalities,” AEI Conference on Oil Pipeline Deregulation, American Enterprise Institute.
- “Economic Theory as the Missing Link in the Merger Guidelines,” American Bar Association Antitrust Section Spring Meeting, March 1990.
- “Testing the Structure-Competition Relationship on Cross-Sectional Firm Data,” *Economic Analysis Group Discussion Paper #88-6*, May 1988, and at the Southern Economic Association Meetings, November 1986, with Donald M. Brown.
- “Deterring Criminal Antitrust Behavior: Sanctions versus Structure,” Stanford University Conference, June 1987.
- “Deregulation of Electric Power Generation,” New Mexico State University Conference, September 1986, and Edison Electric Institute, April 1987.
- “Do Successful Tender Offers Benefit Bondholders?” Southern Economic Association Meetings, November 1986, with Catherine Benham, Donald M. Brown and Susan E. Woodward.
- “Professional Ethics and Financial Incentives: ‘Appropriate’ Medical Care,” *Washington University Department of Economics Working Paper #40*, May 1982, with Robert Woodward.
- “Hospital Care Expenditure Inflation: Crisis or Consumption?” *Washington University Department of Economics Working Paper #43*, December 1982, with Robert Woodward and Walter Chien.
- “Transfer Pricing within U.S. Corporations,” Sixth U.S.-Soviet Economic Symposium; Alma-Ata, Kazakhstan, U.S.S.R., May - June, 1981.
- “The Impact of Automobile Mileage Standards,” Western Economic Association Meetings, 1979, with Michael Smirlock.

“The Effect of Factor-Augmenting Technical Change on Factory Demand, and the Response by Factor Suppliers,” Western Economic Association Meetings, October 1977.

“Vertical Integration in Telecommunications,” Telecommunications Policy Research Conference, April 1974.

Other Papers

Brief of Amici Curiae of Economics Professors and Scholars in Support of Petitioner, Supreme Court of the United States, *Leegin Creative Leather Products, Inc. v. PSKS Inc. (d.b.a. Kay’s Kloset...Kay’s Shoes)*, No. 06-480, January 2007.

Brief of Amici Curiae of Economics Professors in Support of Respondent, Supreme Court of the United States, *Verizon Communications, Inc. v. Law Offices of Curtis v. Trinko, LLP*, No. 02-682, July 25, 2003.

Brief Amici Curiae of Economics Professors and Scholars in Support of Respondent, Supreme Court of the United States, *Lotus Development Corp. v. Borland International, Inc.*, No. 94-2003, December 1995.

“Implementing Competitive Rules Joint Ventures for Railroads,” IBRD (World Bank), April, 1995.

“Critical Loss and Critical Elasticity: Their Derivation and Use in Market Definition for Mergers,” November 1994.

“When Nominally Monopolistically-Competitive Firms are Really Perfectly Competitive: Going First-Class on the Paris Metro,” July 1986.

“Mandatory Energy Performance Standards and Residential Energy Demand,” 1981, with Alan Rockwood and Richard Adams.

“The Effects of Endogenous Quality Change on Demand and Costs,” October 1977.

Testimony, Commissioned Studies, and Government Consulting

FTC: FTC v. Ardagh Group S.A. and Saint-Gobain Containers, United States District Court for the District of Columbia, 1:13-cv-01021 (RMC). Expert Report August 28, 2013. Deposition, September 13, 2013.

Reed Construction Data, Inc.: Reed Construction Data, Inc. v. The McGraw-Hill Companies, Inc. et al., United States District Court, Southern District of New York, Case No. 09-cv-8578 (JPO). Expert Liability Report and Expert Damages

Report, September 7, 2012. Liability deposition, February 6, 2013. Damages deposition, March 12, 2013, Supplemental Report Deposition, June 19, 2013.

Graco: Graco Inc. and Graco Minnesota Inc. v. PMC Global, Inc. et al., United States District Court, District of New Jersey. Case No. : 08-CIV-1304 (FLW) (JJH). Reply Report, February 1, 2011. Deposition May 17, 2011. Second Reply Report, August 29, 2012. Deposition, October 2, 2012.

NCA: In Re: Air Cargo Shipping Services Antitrust Litigation, United States District Court Eastern District of New York, 06-MD-1775 (JG) (VVP). Declaration, May 25, 2012, Deposition, July 20, 2012.

Novell: In Re: Microsoft Corp. Antitrust Litigation, United States District Court, District of Maryland, MDL Docket No. 1332. Expert Report, May 1, 2009. Rebuttal Report, July 27, 2009. Deposition, August 13, 2009. Trial testimony, November 16-17, 2011.

U.S. Department of Justice, Antitrust Division: Expert witness in U.S. v. H&R Block, Inc.; 2SS Holdings, Inc.; and TA IX L.P., United States District Court for the District of Columbia, Civil Action No. 11-00948. Expert Report, July 25, 2011. Expert Reply Report, August 18, 2011. Deposition, August 31, 2011. Trial Testimony September 8, 9 & 20, 2011. See Memorandum Opinion, Judge Beryl A. Howell, November 10, 2011.

State of New York: State of New York, by Attorney General Andrew M. Cuomo v. Intel Corporation, United States District Court for the District of Delaware. Expert Report, July 25, 2011. Deposition, October 4-6, 2011.

Mylan Pharmaceuticals, Inc: Schering Corporation and MSP Singapore Corporation LLC v. Mylan Pharmaceuticals Inc., United States District Court for the District of New Jersey, Civil Action No. 2:09-cv-06383 and 2:10-cv-3085. Expert Report, August 16, 2011.

Western Coal Traffic League: Verified Statement on Competition in the Railroad Industry before the Surface Transportation Board, STB Ex Parte 705, April 12, 2011 (with Kenneth C. Baseman).

Ethypharm: Ethypharm S.A. France v. Abbott Laboratories, United States District Court for the District of Delaware, Case No. 08-126-SLR; Expert Report January 31, 2011. Reply Report March 28, 2011. Deposition May 3, 2011

Neon: Neon Enterprise Software, LLC v. International Business Machines Corporation, United States District Court, Western District of Texas, Case No. A09CA896JN; Expert Report, February 10, 2011.

Commonwealth of Pennsylvania: Commonwealth of Pennsylvania v. TAP Pharmaceutical Products, Inc., et al., Commonwealth Court of Pennsylvania, Case No. 212 MD 2004;

- a) Commonwealth of Pennsylvania v. Bristol-Myers Squibb Company, et al.;
Expert Report July 20, 2010. Supplemental Report August 9, 2010.
Testimony August 25, 2010. See
<http://www.leagle.com/xmlResult.aspx?page=124&xmlDoc=In%20PACO%2020110831460.xml&docbase=CSLWAR3-2007-CURR&SizeDisp=7>
See also Opinion re Post-Trial Motions of the Commonwealth of Pennsylvania and Bristol-Myers Squibb Company Defendants, Filed: August 31, 2011
- b) Commonwealth of Pennsylvania v. Johnson & Johnson Services Inc., et al.;
Supplemental Report September 30, 2010. Testimony November 3, 2010.
See Opinion re Post-Trial Motions of the Commonwealth of Pennsylvania and Johnson & Johnson Defendants, Filed: August 31, 2011
- c) Commonwealth of Pennsylvania v. Pfizer Inc., et al.; Supplemental Report, February 11, 2011.

L-3: L-3 Communications Integrated Systems, LP v. Lockheed Martin Corporation, United States District Court for the Northern District of Texas, Dallas Division, Civil Action Number 3:07-CV-0341-B, Expert Report, September 21, 2009. Deposition, November 10, 2009.

AT&T: In Re: Universal Service Fund Telephone Billing Practice Litigation, United States District Court, District of Kansas, Case No. 02-md-1468-JWL, Expert Report and Deposition, July-August 2008. Trial testimony, November 2008.

Entergy: Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc., Surface Transportation Board, Docket No. 42104, Verified Statement (with John Kwoka), July 2008; Rebuttal Statement (with John Kwoka), September 2008.

Joe Comes, et.al.: Joe Comes, Riley Paint, Inc., an Iowa Corporation; Skeffington's Formal Wear of Iowa, an Iowa Corporation; and Patricia Anne Larson v. Microsoft Corporation, a Washington Corporation, Iowa District Court for Polk County, Case No. CL82311. Expert Report, June 2, 2006; Deposition July 28, 2006; Rebuttal Report September 29, 2006; Deposition November 2, 2006.

Secure Data in Motion, Inc.: PostX Corporation v. Secure Data in Motion, Inc. et al., United States District Court, Northern District of California, Case Nos. C02-04483 SI and C03-0521. Expert Report, Deposition, and Declaration, April-July, 2005, Testimony March, 2006.

MAN Roland, Inc.: MAN Roland Inc. and MAN Roland Druckmaschinen AG v. Heidelberg Web Systems, Inc. and Heidelberger Druckmaschinen AG, United

States District Court for the District of New Hampshire, Civil Action No. C-03-513-SM. Expert Report. Deposition, December 13, 2005.

21st Services: Coventry First LLC v. 21st Services, United States District Court for the Eastern District of Pennsylvania, Civil Action No. 04-05239-PBT. Expert Report November 11, 2005. Deposition, December 1, 2005.

State of Alaska: (a) Testimony before the Alaska State legislature on the acquisition of ARCO by BP, January 19, 2000. (b) “Competitive Effects of Producer Ownership Of The Proposed Alaska Natural Gas Pipeline,” March 23, 2005.

Attorneys General of the Commonwealth of Pennsylvania and other States: Fatemah Azizian, et al. v. Federated Department Stores, Inc., et al., Declaration September 10, 2004.

Oldcastle, Inc.: The State of Utah v. Oldcastle Inc and Oldcastle Materials, Inc. U.S. District Court, District of Utah Central Division. Civil No. 2 02 CV-5165. Testimony

Material Technologies, Inc.: Material Technologies, Inc. and Net Shape LLC v. Carpenter Technology Corporation and Vallourec, SA. United States District Court for the District of New Jersey, Civil Action No. 01-CV-2965 (SRC). Expert Report, April 14, 2003, and deposition.

Six West Retail Acquisition Inc.: Six West Retail Acquisition, Inc. v. Sony Theater Management Corporation et. al., U.S. District Court, Southern District on New York, 97 Civ. 5499 (LAP) (JCF). Expert Report, December 23, 2002; Rebuttal Report, February 19, 2003, Deposition, February 25, 2003.

In Re. Microsoft Corp. Antitrust Litigation: U.S. District Court, District of Maryland, MDL Docket No. 1332, Liability Report, August 26, 2002, Rebuttal Report, November 4, 2002, Deposition, February 20-21, 2003.

Brown & Williamson Tobacco Corporation: Declaration and deposition of Frederick R. Warren-Boulton, in R.J. Reynolds Tobacco Company v. Philip Morris, Inc., Lorillard Tobacco Company v. Philip Morris, Inc., Brown & Williamson Tobacco Corp., v. Philip Morris, Inc., U.S. District Court, Middle District of North Carolina. Civil Action Nos. 1:99CV185, 1:99CV207, and 1:99CV232.

Menasha Corporation: Expert and supplemental report and deposition in Menasha Corporation v. News America Marketing In-Store, et al., U.S. District Court, Northeastern District of Illinois Eastern Division, Civil Action No. 00C-1895.

European Consumers: In Support of Statement of Objections Allegations, Case No. IV/C-3/37.345 Microsoft, Expert Report and Presentation 2001.

Power Mosfet Technologies, L.L.C. Expert witness in Power Mosfet Technologies, L.L.C. v. Infineon Technologies Corp., et al, U.S. District Court, Eastern District of Texas, Marshall Division, Cause No. 2-99-CV00168-DF. Expert Report; Deposition August 11, 2001; Trial testimony August 29, 2001.

Southwest Recreational Industries: (a) Expert witness in Southwest Recreational Industries v. FieldTurf, Inc. Trial testimony November 28, 2000; (b) Southwest Recreational Industries, Inc. v. Field Turf, Inc. US District Court, Eastern District of Kentucky, Civil Action No. 00-12. Expert reports, May 4, 2001 and Nov. 1, 2002.

J. Paul Getty Trust: In Re. Auction Houses Antitrust Litigation, U.S. District Court, Southern District of New York. Civ. 0648 (LAK), Expert Report, Jan. 12, 2001.

Anthony D. Viazis: Expert witness in Anthony D. Viazis v. American Association of Orthodontists. U.S. District Court, Eastern District of Texas, Sherman Division. Civil Action No. 4:98-CV-245, Expert report (with David Eisenstadt), July 13, 2000. Trial testimony, November 9, 2000.

Ventana Medical Systems: Report and testimony, Department of Energy, March 8, 2000.

State of New York, et al., and U.S. Department of Justice: Expert witness in United States of America v. Microsoft Corporation, and State of New York ex rel. v. Microsoft Corporation. C.A. No. 98-1232 (TPJ) and CA. No. 98-1233 (TTPJ). Declaration May 15, 1998, Report September 3, 1998, Deposition September 26, 1998, Direct Testimony and Trial Testimony November 19 - December 1, 1998.

Brunswick Corporation: Expert witness in Concord Boat Co. et al. v. Brunswick Corporation. U.S. District Court, Eastern District of Arkansas, Western Division. Trial testimony June 11, 1998. Depositions February 2-4, 1998.

Bepco, Inc.: Deposition in Bepco, Inc. et al. v. Allied Signal, Inc. and Allied Signal Truck Brake System Company, U.S. District Court for the Middle District of North Carolina Winston-Salem Division. C.A. No. 6:96CV00274, November 25-26, 1998.

St. Louis Convention and Visitors Commission: Declaration in St. Louis Convention and Visitors Commission v. National Football League, et al.; U.S. District Court, Eastern District of Missouri, Eastern Division, C.A. No. 4:95CV02443 JCH, September 12, 1997.

AT&T: (a) Direct testimony and deposition in State of Indiana, Indiana Utility Regulatory Commission, Cause No. 397051994, April 1994; (b) Position paper on Docket No. 94-07-02: Development of the Assumptions, Tests, Analysis and Review to Govern Telecommunications Service Reclassifications in Light of the 8 Criteria Set Forth in Section 8 of Public Act 94-83. State Of Connecticut,

Department of Public Utility Control, October 1994; (c) Comments on the Position Papers on Docket No. 94-07-02. State Of Connecticut, Department of Public Utility Control, November 1994; (d) Rebuttal Testimony in Kansas Corporation Commission Docket No. 190, 492-U, July 15, 1996; (e) Direct and Rebuttal Testimony in AT&T Communications of the Southwest Inc., Missouri Case No. TO-97-40; (f) Direct testimony in Southwestern Bell Telephone Company of Kansas' Compliance with Section 271 of the Federal Telecommunications of 1996, The State Corporation Commission of the State of Kansas. Docket No. 97-SWBT-411-GIT, May 12, 1998; (g) Application of Ernest G. Johnson, Director of the Public Utility Division Oklahoma Corporation Commission to Explore The Requirements of Section 271 of the Telecommunications Act of 1996, Cause No. PUD 970000064; (h) Declaration in Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act 1996, Federal Communications Commission, CC Docket No. 96-128, September 9, 1997; (i) Testimony in MGC Communications, Inc. v. AT&T Corporation, Federal Communications Commission: trial testimony June 28, 1999; (j) Testimony in Fibercomm, L.C., et al v. AT&T Communications of the Midwest, Inc., before the Iowa Utilities Board, December 20, 2000; (k) Affidavit, supplemental affidavit and deposition in AT&T Corporation v. Business Telecom, Inc., Federal Communication Commission. File No. EB-01-MD-002, January - March 2000; (l) Expert Report in Advantel, LLC, et al, v. AT&T Corp.

Federal Trade Commission: (a) Study on Vertical Distribution Arrangements, January 1, 1977 - August 1, 1978; (b) Expert witness in FTC v. Staples and Office Depot; U.S. District Court, District of Columbia, Trial Testimony, May 1997.

Leo One USA: Affidavit in Amendment of Part 25 of the Commission's Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service, FCC Docket No. 96-220, December 20, 1996.

Florida Panthers Hockey Club: Expert witness in Florida Panthers Hockey Club v. Miami Sports and Exhibition Authority and The City of Miami; U.S. District Court, Southern District of Florida Miami Division, Case No. 96-21 68-CIV. Trial Testimony, August, 1996.

ADM: "An Evaluation of: The Cost to U.S. Animal-Feed Manufactures of an Alleged Price-Fixing Conspiracy by Lysine Manufactures 1992-1995," Report, August 1996.

MCI: (a) Depreciation and Capital Recovery Issues, "Response to Professor Hausman," with K. Baseman and S. Woodward, FCC Docket No. 96-98, July 1996; (b) Direct testimony in Southwestern Bell Telephone Company of Kansas' Compliance with Section 271 of the Federal Telecommunications of 1996, The

- State Corporation Commission of the State of Kansas. Docket No. 97-SWBT-411-GIT, May 12, 1998; (c) Declaration in Application of BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in South Carolina. FCC Docket No. 97-208, October 17, 1997 (with Kenneth C. Baseman); (d) Declaration and supplemental declaration in Joint Applications of MCI WorldCom, Inc. and Sprint Corporation for Consent to Transfer Control, CC Docket No. 99-333, March 2000 and June 2000.
- K-2, Rossignol, Salomon, Tecnica, Skis Dynastar, Marker and The Ski Market: Expert witness in Sports Investment Co. vs. The Ski Market, Ltd., Inc., et al, U.S. District Court, District of Rhode Island, C.A. No. 95-097T. Deposition, December 1995.
- U.S. Department of Justice, Antitrust Division: (a) Expert witness in U.S. v. AT&T, 1981; (b) Regulation of oil pipelines, August 1983; (c) Expert witness in United States of America v. Engelhard Corporation, Florida Company, U.S. Borax Inc., U.S. Silica Inc. Case No. 6:96-CV-45 (WLS), Depositions, Trial Testimony August 1995 (d) Declaration in United States of America v. Dairy Farmer of America, Inc., et al.
- City of Los Angeles: Declaration in Air Transport Association of America, et al., v. City of Los Angeles, City of Los Angeles Department of Airports and Los Angeles Board of Airport Commissioners, Docket No. 50176, March 1995, and Supplemental Declaration, April 1995.
- The Bon-Ton Stores, Inc.: Declaration in The Bon-Ton Stores, Inc. v. The May Department Stores Company, McCurdy & Company, Inc., and Wilmorite, Inc., Civil Action No. 94-CV-6454L, November 1994.
- Cyrix Corporation: Deposition in Cyrix Corporation v. Intel Corporation, December 1993.
- Thermadyne Industries: Deposition in Thermadyne Industries, Inc. and Coyne Cylinder Co. v. K.C. Cylinder et al., December 1993.
- IBRD (World Bank): (a) Privatization and Regulation in the Restructuring of Electric Utilities in Eastern Europe, Prague, September 1993; (b) Implications of the United States Experience with Regulation and Antitrust for Competition Policy in Countries in Transition from Centrally Planned Economies to Market Economies, July 1993.
- Credit Card Coalition: "The Economics of Credit Card Interest Rate Caps," 1993, with Laurence H. Meyer.

Coalition to Preserve the Financial Interest and Syndication Rule: (a) Testimony before the Federal Communications Commission, December 7, 1990, in the matter of Evaluation of the Syndication and Financial Interest Rules, MM Docket No. 90-162; (b) Submitted reports: “Economic Analysis and Policy Implications of the Financial Interest and Syndication Rule,” June 14, 1990; “Reply Comments,” August 1, 1990; “Economic Analysis and Policy Implications of the Financial Interest and Syndication Rule,” January 24, 1991, with John Woodbury; (c) Declaration of Frederick R. Warren-Boulton, August 7, 1992, Exhibit 7, Comments of the Coalition to Preserve the Financial Interest and Syndication Rule on Proposed Modification of Network Consent Decrees. In United States of America v. CBS, Inc. Civil No. 74-3599-RJK, United States of America v. American Broadcasting Companies, Inc. Civil No. 74-3600-RJK, and United States of America v. National Broadcasting Company, Inc. Civil No. 74-3601-RJK.

California Public Utility Commission, Division of Ratepayer Advocacy: Proposed merger of Southern California Edison Company and San Diego Gas and Electric Company, July 1990.

Altai, Inc.: Expert witness in Computer Associates, Inc. v. Altai, Inc., April 1990.

NFL Players Association: Deposition in Marvin Powell v. National Football League, September 1989.

Consolidated Aluminum Corporation: Deposition in Indal, Inc. v. Consolidated Aluminum Corp., April 1983.

Battelle, Pacific Northwest Laboratories. Analyses of bidding for offshore oil leases and of the effects of Building Energy Performance Standards on energy demand, September 1979 -1981.

U.S. Senate Commerce Committee, Senator Danforth presiding: Testimony on corporate average fuel economy (CAFÉ) standards, November 15, 1979.

State of Missouri, Office of the Public Counsel: Expert witness on electric utility rate structures, 1978.