

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

VERSO PAPER CORP., and
NEWPAGE HOLDINGS INC.,

Defendants.

Case No. 1:14-cv-2216 (TSC)

**SUPPLEMENTAL BRIEF OF THE UNITED STATES
IN SUPPORT OF ENTERING THE PROPOSED FINAL JUDGMENT**

By Order dated July 23, 2015, the Court invited supplemental briefs from the parties and objectors. The Court said that it “is particularly interested in argument, and relevant legal authority in support of that argument, addressing the extent to which the court can or should consider post-complaint events in evaluating the proposed Final Judgment.”

This Supplemental Brief on behalf of the United States is organized as follows. First, we respond to the Court’s specific question and explain that the Court may consider post-complaint evidence to the extent it is relevant to whether the proposed Final Judgment “is in the public interest,” 15 U.S.C. § 16(e)(1). In doing so, however, “the relevant inquiry is whether the United States’ conclusion about the adequacy of the required divestiture was reasonable, not whether it was correct.” *United States v. Abitibi-Consolidated, Inc.*, 584 F. Supp. 2d. 162, 166 (D.D.C. 2008).

Second, we explain that the post-complaint evidence here confirms that the proposed Final Judgment is in the public interest because Catalyst, the acquirer of the divestiture assets, successfully took over the divested mills and is effectively competing in all three markets.

Third, we respond to the objectors' contention that a price increase reported by an industry publisher approximately one month after the merger closed in January 2015 demonstrates that the divestiture remedy is inadequate. This reported price increase, to the extent it was realized, does not undermine the reasonableness of the remedy. In fact, prices for several types of coated paper are currently reported to be lower than they were in January. The divestitures, which provide a long-term remedy, effectively preserve the level of competition that existed at the time of the merger.

Finally, we address the objectors' main complaint: that the settlement should have required the Bucksport paper mill to be re-opened and sold. While the Bucksport mill closure was accompanied by a loss of jobs that undoubtedly had a significant impact on the affected employees, that closure was not part of the case that the United States brought and therefore is not relevant to the Court's Tunney Act review. The Bucksport mill was unprofitable, its closure was announced and implemented before the Complaint was filed, and the United States concluded after a thorough investigation that the closure would have occurred irrespective of the merger.

I. A Tunney Act Court May Consider Evidence of Post-Complaint Events Relevant To Its Public Interest Determination

Nothing in the statutory language of the Tunney Act prohibits the Court from considering post-complaint events. To the contrary, the Act provides that the Court "may . . . as the court deems appropriate" obtain additional information (not limited to pre-complaint events), 15 U.S.C. § 16(f), including taking "such other action in the public interest as the court may deem

appropriate,” 15 U.S.C. § 16(f)(5). This language would appear to give the Court discretion to decide what evidence is relevant to its public interest determination. Although courts rarely review post-complaint market developments to assess the reasonableness of settlements under the Tunney Act, they have done so on occasion. In *Abitibi-Consolidated*, 584 F. Supp. 2d at 166, for example, the court considered whether the post-complaint closing of paper mill capacity showed that the remedy was inadequate and found that the settlement was reasonable.

As explained more fully in our prior filings, a court’s task under the Tunney Act is to determine whether entry of the proposed Final Judgment “is in the public interest,” 15 U.S.C. § 16(e)(1), rather than to devise the relief it considers best, *United States v. Microsoft Corp.*, 56 F.3d 1448, 1460-61 (D.C. Cir. 1995). “The court’s role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree.” *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981). A court should determine whether there is a factual foundation for the government’s decisions such that its conclusions regarding the settlement are reasonable. *See United States v. US Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (citations omitted) (“*US Airways*”). “The role of the court is not to determine whether the decree results in the array of rights and liabilities ‘that will *best* serve society, but only to ensure that the resulting settlement is within the *reaches* of the public interest.’” *United States v. Apple, Inc.*, 889 F. Supp. 2d 623, 631 (S.D.N.Y. 2012) (quoting *United States v. Keyspan*, 763 F. Supp. 2d 633, 637 (S.D.N.Y. 2011)) (emphasis in original). Should the Court consider post-complaint events, it should limit such consideration to determining whether this standard, which is highly deferential to the government’s judgment in settling the case, has been satisfied.

II. The Post-Complaint Evidence Shows that the Divestiture Remedy Here is Effective

As discussed in its Response To Public Comments at 3 (Docket No. 12), the United States conducted a nearly year-long investigation of Verso's proposed acquisition of NewPage. The United States concluded that, unless remedied, the transaction would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, by substantially lessening competition in the sale of coated freesheet web paper, coated groundwood paper, and label papers to customers in North America.¹

As part of its investigation, the United States identified assets that, if divested, would restore the competition that would have been lost as a result of the acquisition. The Supreme Court has long held that divestiture is the "preferred remedy" in government actions challenging mergers. *California v. American Stores Co.*, 495 U.S. 271, 280-81 (1990). "Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found." *U.S. v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 330-31 (1961).

In determining what type of divestiture will preserve competition in a merger case, the antitrust authorities typically seek to replicate the competitive position held by one of the merging parties in the overlap markets at issue. After months of thorough investigation, the United States required the divestiture of the Rumford and Biron mills. These mills produced

¹ Counsel for both objectors recently asked the United States for information relating to an International Trade Commission Case concerning super-calendared paper, an uncoated paper which is typically of lower quality than coated groundwood or coated freesheet paper. That proceeding, which began after the United States filed its settlement in this matter, is not relevant to the present case because the United States did not include super-calendared paper in any of the three markets it pled in this matter. *See US Airways*, 38 F. Supp. 3d at 76 (holding that a court reviewing a settlement under the Tunney Act should not inquire into matters that the United States did not pursue).

over 95 percent of the coated paper volumes that Verso produced at the time of the divestiture,² which enables Catalyst to effectively replace the competition that would otherwise have been lost as a result of the acquisition.

Catalyst completed its acquisition of the divestiture assets shortly after the Court approved the Hold Separate Stipulation (Docket No. 5) and has been competing effectively. Since purchasing the Biron and Rumford mills in January 2015, Catalyst has undertaken a number of initiatives to reduce operating costs and run the acquired mills more efficiently. *See* Declaration of Joe Nemeth, Catalyst's President and Chief Executive Officer (attached as [Exhibit 1](#), ¶ 5). Among other things, Catalyst invested approximately \$16 million in the Rumford mill during the second quarter of 2015 alone, primarily to upgrade a recovery boiler. *Id.* Catalyst also plans to make additional investments that will further reduce operating costs, make the mills more efficient, and continue to enable Catalyst to compete effectively. *Id.*

Objector Local 1821 has noted that Catalyst is not operating the R12 paper machine at the Rumford mill (Docket No. 15), asserting that Catalyst has reduced output. In fact, Catalyst projects that Rumford will produce more tonnage in 2015 on the two more efficient machines at Rumford (R10 and R15) than all three machines produced in 2014. *Id.* at ¶ 6. "By shifting product mix, consolidating operations on R10 and R15, and shifting production of certain grades from Rumford to Biron, Catalyst has been able to reduce cost while simultaneously increasing output." *Id.* Further, Catalyst is ready to operate paper machine R12 if the machine can run profitably. *Id.* If R12 were to restart, it could produce 115,000 tons per year, *Id.*, making Catalyst a larger producer than Verso was at the time of the divestiture.

² As discussed in section IV below, the Bucksport mill was already closed at the time the merger closed and would have closed regardless of whether Verso acquired NewPage. Therefore, the proper benchmark for what Verso would have produced as an independent competitor going forward is the sum of its production at mills other than Bucksport. At the time of the divestiture, the Rumford and Biron mills were producing approximately 870,000 tons of coated paper per year (which was misstated in the Department's Response to Public Comments as 940,000 tons). Verso's surviving mills were producing approximately 910,000 tons.

For these reasons, the post-complaint evidence relating to the divestiture unambiguously shows that the remedy has been successful.

III. Recent Price Increases Do Not Undermine the Reasonableness of the Remedy

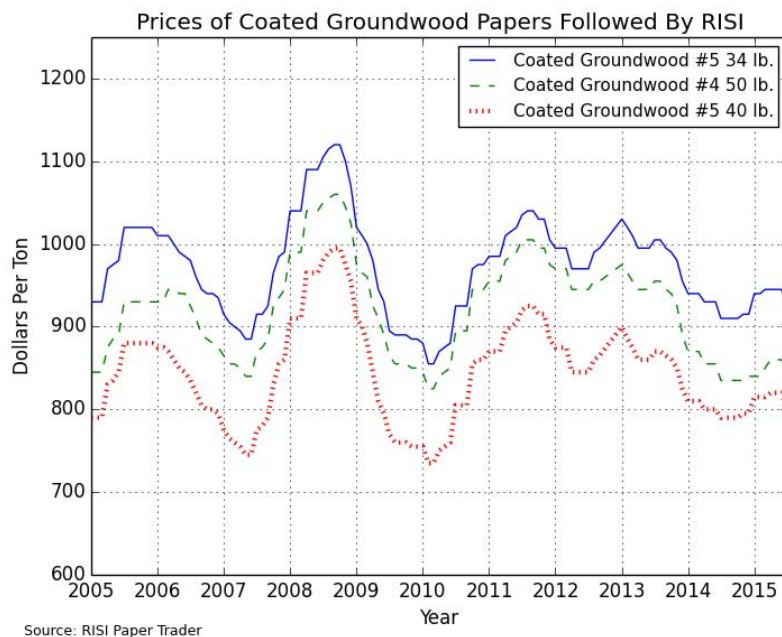
In its Tunney Act comment criticizing the remedy, Local 1821 states, “the reviewing Court will need look no further than the \$40/ton price increase announced by Verso, on Friday January 30, 2015.” (Docket No. 12-1) This point is without merit.

The \$40 per ton figure overstates actual price changes. Furthermore, prices for some products have actually decreased since January. Because prices are the subject of individual negotiations between suppliers and customers, realized prices are often lower than announced prices. And because prices are negotiated on a regular basis, price increases are often competed away. The same publisher (RISI) that reported the price announcements cited by Local 1821 uses surveys to track actual monthly prices for three types of coated groundwood. For two of these, RISI reported that prices increased by only \$5 per ton (less than 1 percent) in the months following the announcement. RISI, *Paper Trader*, July 2015 at 20 (attached as Exhibit 2). And by July, the most recent data available, prices for these grades had fallen below January levels. *Id.* For the third type of coated groundwood, RISI reported that the price initially increased by \$20 per ton (a 2.4 percent increase), but by July was only \$10 higher (a 1.2 percent increase) than the January level. *Id.*

Moreover, recent reports suggest that coated groundwood and coated freesheet paper prices will continue to decline over the next year. *See, e.g.*, John Maine, RISI Global Printing and Writing Paper Outlook, July 2015 at 47 (“RISI Global Outlook”) (“Outlook for publishing paper prices Prices falling with no possible recovery until mid-2016 at the earliest.”) (attached as Exhibit 3); RISI, *Paper Trader*, at 1 (“Weak demand and rising imports overcame

producer attempts to raise coated paper roll prices, and transaction prices slid \$20/ton in July with another \$10/ton decline likely over the next month or two.”) (attached as Exhibit 2); Carolina Millan, *Apollo-Backed Verso’s Bonds Plunge Following Weak Paper Forecast*, Bloomberg Business, (July 23, 2015) (quoting an analyst as stating “[p]rices are simply going down not up”).³

These price changes are unremarkable given the historical volatility in coated groundwood prices caused by changes in input costs, shifts in demand, mill closures, and other factors. The objectors ignore all of these market factors and merely assert that a one-time price increase announcement was caused by the merger. The chart below, which is based on published RISI coated paper indices, shows the volatility of coated groundwood prices.



For these reasons, the price announcement cited by Local 1821 does not undermine the reasonableness of the proposed Final Judgment.

³ Available at <http://www.bloomberg.com/news/articles/2015-07-23/apollo-backed-verso-s-bonds-plunge-following-weak-paper-forecast?cmpid=yhoo>.

IV. The Closure of the Bucksport Mill Is Outside the Scope of the Complaint

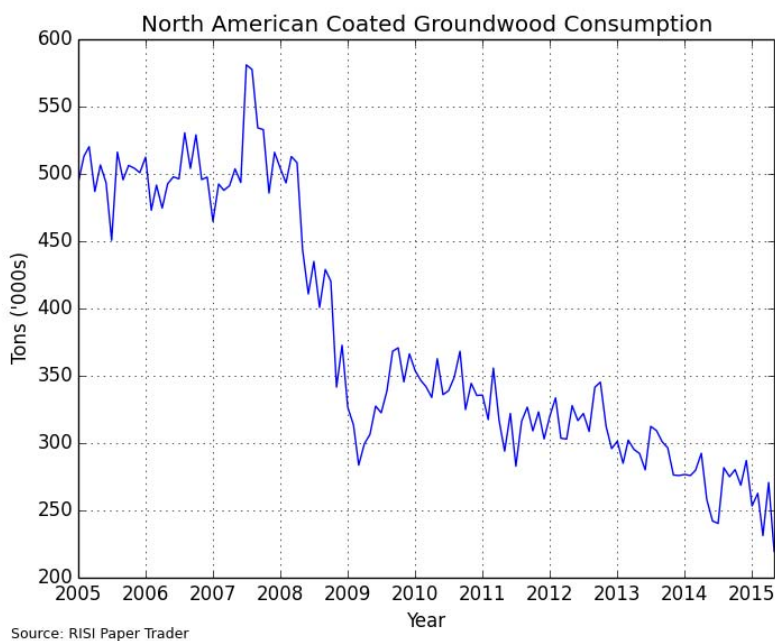
As explained in the United States' Competitive Impact Statement, Verso had considered closing Bucksport for years before it acquired NewPage due to the mill's lack of profitability. CIS n.1 at 3 (Docket No. 3).⁴ Verso announced its intention to close the mill on October 1, 2014, three months before the Complaint was filed. Press Release, Verso Paper Corp., Verso Announces Closure of Bucksport, Maine Paper Mill (Oct. 1, 2014) ("The Bucksport mill unfortunately has not been profitable for a number of years, in spite of our employees' dedicated efforts to make it so. Our assessment indicates that it is impossible for the mill to achieve profitability in today's marketplace," said Verso President and Chief Executive Officer, Dave Paterson.)⁵ Verso closed the Bucksport mill in early December 2014, and on December 5, 2014, Verso announced that it had agreed to sell the mill to a salvage company. *See* Declaration of Jonathan M. Rich, Partner of Morgan, Lewis & Bockius LLP (Docket No. 23-4, at ¶ 9).

These events occurred before the United States settled this case and filed its complaint on December 31, 2014. Nevertheless, as discussed in the Response to Public Comments, the United States thoroughly investigated the Bucksport mill closure and concluded that it was unrelated to the merger and would have occurred even if the acquisition were never consummated. (Docket No. 12, at 8-10) In particular, the United States concluded that the Bucksport mill was unprofitable and unlikely to become profitable in the future. *Id.* Among other reasons, the Bucksport mill did not have an integrated pulp supply and thus had higher and more volatile costs than many other mills. Accordingly, the United States determined that the closing and selling of the Bucksport mill was not an anticompetitive effect of the acquisition.

⁴ *See* Declaration of David J. Paterson, President and Chief Executive Officer of Verso ("The Bucksport mill was unprofitable for the past several years, despite Verso's attempts to increase its profitability.") (Docket No. 23-5, at ¶ 6).

⁵ Available at <http://investor.versoco.com/releasedetail.cfm?ReleaseID=874161>.

The Bucksport mill closure was neither a surprise nor an unusual event in the paper industry. With the digital explosion of the past decade, demand for paper has fallen precipitously and mill closures have become relatively commonplace. Like many parts of the paper industry, demand for most coated paper products has been declining for many years as demand for magazines, catalogs and other publications has fallen. Complaint, ¶ 24; RISI Global Outlook at 47 (showing historical declines and continued projected declines in printed magazine circulation, print advertisements, and catalog mailings) (attached as Exhibit 3). According to RISI, U.S. consumption of coated groundwood paper, the main product made at Bucksport, has declined by approximately 50 percent since 2008:



Not surprisingly, the decline in demand for coated paper has caused a large amount of coated paper capacity to close. From 2009 to 2013, according to materials submitted by Verso during the United States' investigation, North American coated paper producers closed twelve mills or machines, reducing capacity by more than 1.6 million tons. Coated Freesheet and Coated Groundwood Capacity Closures, January 2009 through December 2013. VPC 002208_A

(attached as Exhibit 4). In 2014, in addition to Verso's closure of its Bucksport mill, Futuremark closed its Alsip, Illinois mill. *See* Response of Plaintiff United States To Public Comments On The Proposed Final Judgment (Docket No. 12, at 11). And Verso announced today that it is closing its Wickliffe mill and one paper machine at its Androscoggin mill, although most of the output from these assets are products not at issue in this case. *See* Declaration of Michael A. Weinhold, Senior Vice President of Sales, Marketing and Product Development of Verso (Docket No. 23-1, at ¶¶ 19-21). The closure of the Bucksport mill thus fits into a pattern of mill closures caused by the dramatic decreases in demand for the products they produce.

The objectors claim that Verso should have been required to divest the Bucksport mill to a buyer that would reopen the mill. But in determining whether an antitrust settlement is in the public interest under the Tunney Act, the Court should not consider theories of harm unless they are alleged in the Complaint, and there is nothing in the Complaint alleging that Bucksport's closure and sale was caused by the merger. *See, e.g., US Airways*, 38 F. Supp. 3d at 76 (quoting *Microsoft*, 56 F. 3d at 1459-60) ("Because the 'court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing the case in the first place,' it follows that 'the court is only authorized to review the decree itself,' and not to 'effectively redraft the complaint' and inquire into matters that the United States did not pursue."); *United States v. Morgan Stanley*, 881 F. Supp. 2d 563, 567 (S.D.N.Y. 2012) (quoting *Microsoft*, 56 F.3d at 1461) ("A court must limit its review to the issues in the complaint and give 'due respect to the [Government's] perception of ... its case[.]'").

Finally, the United States notes that Local 1821 has aggressively pursued its claim related to Bucksport in U.S. District Court in Maine. It filed a motion for a preliminary injunction and temporary restraining order that was denied by the court there. *See Int'l Ass'n of Machinists and*

Aerospace Workers v. Verso Paper Corp., No. 1:14-cv-0530 (JAW), ___ F. Supp. 3d ___, 2015 WL 248819 (D. Me. Jan. 20, 2015) (Docket No. 12-3). Local 1821 argued that Verso's sale to a firm that would scrap the mill violated federal and state antitrust laws and sought injunctive relief to stop the sale. *Id.* After extensive briefing and oral argument, the Court rejected Local 1821's motion for a preliminary injunction and temporary restraining order. *Id.* at *73. Local 1821 continues to litigate that case.

V. Conclusion

A court's role under the Tunney Act is to determine whether there is a factual foundation for the government's decision and that its conclusions about the proposed settlement are reasonable. In this matter, the United States' decision was both factually supported and reasonable. The United States conducted a lengthy and thorough investigation of the Verso-NewPage transaction, the remedy, and the buyer of the divested assets. The United States concluded that, unless remedied, the merger would violate Section 7 of the Clayton Act. The United States then secured a remedy that fully addressed the violation by replacing Verso's competitive position with Catalyst, an experienced paper producer. Catalyst already is aggressively seeking business and investing significantly in the acquired mills. The divestiture is an excellent long-term structural remedy that will protect customers from the anticompetitive effects that the acquisition otherwise would have caused. Indeed, the United States received comments regarding the proposed Final Judgment only from former employees of Bucksport and not from any printer, publisher, or other paper customer concerned about a substantial lessening of competition.

Dated: August 20, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karl D. Knutsen, hereby certify that on August 20, 2015, I caused a copy of the Supplemental Brief of the United States in Support of Entering the Proposed Final Judgment to be filed and served upon all counsel of record by operation of the CM/ECF system for the United States District Court for the District of Columbia. Additionally, a copy of the foregoing was delivered via e-mail as follows:

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