

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In Re:	Chapter 11
NEWPAGE CORPORATION, et al.,	Case No. 11-12804 (KG)
Debtors. ¹	Jointly Administered

MEADWESTVACO CORPORATION, MEADWESTVACO VIRGINIA CORPORATION and MW CUSTOM PAPERS LLC,	Adv. Pro. No. 12-50775 (KG)
Plaintiffs,	

- against -

NEWPAGE CORPORATION, NEWPAGE
ENERGY SERVICES LLC, UPLAND
RESOURCES, INC., RUMFORD PAPER CO.,
WICKLIFFE PAPER COMPANY LLC and LUKE
PAPER CO.,

Defendants.

AMENDED COMPLAINT

Plaintiffs MeadWestvaco Corporation, MeadWestvaco Virginia Corporation and MW Custom Papers LLC (together “MWV”), for their complaint in this adversary proceeding, allege as follows by their undersigned attorneys:

¹ The Debtors in these chapter 11 cases, along with the last four (4) digits of each Debtor’s federal tax identification number, as applicable are: Chillicothe Paper Inc. (6154), Escanaba Paper Company (5598), Luke Paper Company (6265), NewPage Canadian Sales LLC (5384), NewPage Consolidated Papers Inc. (8330), NewPage Corporation (6156), NewPage Energy Services LLC (1838), NewPage Group Inc. (2465), NewPage Holding Corporation (6158), NewPage Port Hawkesbury Holding LLC (8330), NewPage Wisconsin System Inc. (3332), Rumford Paper Company (0427), Upland Resources, Inc. (2996), and Wickliffe Paper Company LLC (8293). The Debtors’ corporate headquarters is located at 8540 Gander Creek Drive, Miamisburg, OH 45342.



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INTRODUCTION

1. The debtors came into existence as independent entities some seven years ago, when MWV sold to a newly-formed entity the businesses that became NewPage Corporation and its affiliates (“NewPage”). The sale transaction, which took place pursuant to an Equity and Asset Purchase Agreement (“EAPA”), closed effective as of April 30, 2005. At the closing, NewPage paid to MWV cash in excess of \$2 billion dollars, and MWV transferred to NewPage factories, plants, timber, real estate, intellectual property, contracts and other assets (including equity interests in certain subsidiaries) comprising MWV's former coated papers business. NewPage has been operating these businesses for the past seven years.

2. Because the debtors' businesses formerly were part of MWV, part of the sale transaction involved allocating various assets, obligations and other arrangements between the two newly separate entities. As part of that allocation of assets and obligations, in the EAPA the parties split between them a series of contracts and provided for arrangements designed largely to ensure that (a) NewPage could operate as an independent business even though much of the legal and operational infrastructure for those businesses had been put into place, and partially retained, by MWV; and (b) MWV could continue its operations even after having transferred certain facilities to NewPage.

3. In this action, MWV seeks relief with respect to the status of the EAPA and performance under the EAPA and its integrated satellite agreements. First, it seeks a declaration that the fully integrated EAPA, which includes its various supplemental and implementing agreements, has been substantially performed and thus is not executory and not subject to being assumed or rejected under § 365 of the Bankruptcy Code. Second, it seeks an injunction against any cessation of wastewater treatment services at Wickliffe, Kentucky.

PARTIES AND JURISDICTION

4. Plaintiff MWV is a Delaware corporation with its principal place of business Richmond, Virginia. Plaintiff MeadWestvaco Virginia Corporation is a Delaware corporation with its principal place of business at Richmond, Virginia. MW Custom Papers LLC is a Delaware limited liability company with its principal place of business at Richmond, Virginia.

5. Defendant NewPage Corporation is a Delaware Corporation with its principal place of business in Miamisburg, Ohio. It is a debtor in this Chapter 11 case before this Court. NewPage Energy Services LLC is a Delaware limited liability company. Upland Resources, Inc., is a West Virginia corporation. Rumford Paper Co. is Delaware corporation. Wickliffe Paper Company LLC is a Delaware limited liability company. Luke Paper Co. is a Delaware corporation. These entities are signatories or successors to signatories of the EAPA and/or one or more of its integrated satellite agreements, and are debtors in this proceeding before the Court.

6. On September 7, 2011, the debtors commenced this case by filing in this Court voluntary petitions under Chapter 11 of Title 11 of the United States Code. The debtors continue in possession of their assets and businesses pursuant to §§ 1107 and 1108 of the Bankruptcy Code.

7. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This dispute arises under Title 11, specifically, under 11 U.S.C. § 365, and arises in a case under Title 11. It is a core proceeding under 28 U.S.C. § 157(b)(2).

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1409.

FACTS

The Equity and Asset Purchase Agreement

9. On or about January 14, 2005, MWV and Maple Acquisition LLC (“Maple”), entered into a certain Equity and Asset Purchase Agreement (“EAPA”), under which MWV agreed to convey to Maple certain assets and equity interests comprising MWV’s coated papers and timber

businesses. Maple later changed its name to Escanaba Timber LLC (“Escanaba”). The parties amended the EAPA by subsequent agreements dated as of April 22 and April 30, 2005.

10. As of the closing, Escanaba designated NewPage and certain of NewPage’s subsidiaries as its “Designated Affiliates” to receive the assets, equity, obligations and contracts comprising and relating to the coated papers business. The coated papers business accounted for about \$2.05 billion of the cash purchase price. For ease of reference, the purchaser is hereafter referred to as “NewPage.”

11. The “Purchased Assets” conveyed to NewPage pursuant to EAPA § 1.2 include such items as real estate; machinery and equipment; inventory; intellectual property; receivables; contracts for supply of services, power or supplies; and other assets related to the sold businesses. As could be expected in a transaction in which a company divests itself of one of its major lines of business, the EAPA allocates as between buyer and seller a number of obligations relating to the transferred business that previously were entirely the responsibility of MWV. Thus, in addition to listing “Purchased Assets” in § 1.2 of the EAPA, the EAPA also lists in § 1.4 “Assumed Liabilities” that NewPage agreed to take on.

12. The EAPA further allocates responsibilities and rights between the parties after the closing: Article X of the EAPA sets forth a series of post-closing rights and obligations of each of the parties to the EAPA. For example, the parties agreed in § 6.3(b) to cooperate in securing third-party consent to assignment of contracts to the buyer or, failing such consent, to make such arrangements between buyer and seller that would replicate an assignment to the extent possible. For further example, the parties allocated between themselves ongoing and prospective liabilities to employees of the transferred businesses under §§ 1.4 and 10.1(c); and, in Article XI, they allocated responsibility for pending and future environmental litigations relating to the transferred businesses.

13. As is common in transactions of this type, the EAPA references, incorporates and is accompanied by a number of additional agreements that are part of the same transaction. A

number of these agreements were made exhibits to the EAPA. All these agreements were entered into contemporaneously with the EAPA as amended. These agreements generally implemented various provisions of EAPA, were conditions to closing or facilitated the success of the transaction after the closing.

14. These agreements included the following:

- Transition Services Agreement, dated as of April 30, 2005, between NewPage Corporation and MeadWestvaco Corporation;
- Information Technology Transition Services Agreement, between MeadWestvaco Corporation and NewPage Corporation, dated as of April 30, 2005.
- Human Resources Transition Services Agreement, dated as of April 30, 2005, between NewPage Corporation and MeadWestvaco Corporation;
- Wickliffe Services Agreement, dated as of April 30, 2005, between MeadWestvaco Virginia Corporation and Wickliffe Paper Company;
- Chillicothe Services Agreement, dated as of April 30, 2005, between MW Custom Papers, LLC and Chillicothe Paper Inc.;
- Lease and Services Agreement, dated as of April 30 2005, between Chillicothe Paper, Inc. and MeadWestvaco Corporation;
- NewPage Assignment and Assumption Agreement, dated as of April 30, 2005, between NewPage Corporation and MeadWestvaco Corporation;
- Accommodation Agreement, dated as of April 30, 2005, between NewPage Corporation and MeadWestvaco Corporation;
- License Agreement (laser technology) dated as of April 30, 2005, between NewPage Corporation and MeadWestvaco Corporation;
- License Agreement dated as of April 30, 2005, between MeadWestvaco Corporation, NewPage Corporation and Chillicothe Paper, Inc.;
- NewPage Assignment and Assumption Agreement, dated as of April 30, 2005, between NewPage Corporation and MeadWestvaco Corporation;
- Timber Assignment and Assumption Agreement dated as of April 30, 2005, among Escanaba Timber LLC, MeadWestvaco Corp., MeadWestvaco Maryland, Inc., MeadWestvaco Oxford Corp., MeadWestvaco Kentucky L.P., and MW Custom Papers LLC.

- CP Assignment and Assumption Agreement, dated as of April 30, 2005 between MeadWestvaco Corporation and Chillicothe Paper Inc.
- Assignment and Assumption Agreement, dated as of April 30, 2005, among Escanaba Timber LLC, MeadWestvaco Maryland, Inc., MeadWestvaco Oxford Corporation, MeadWestvaco Kentucky LP, MeadWestvaco Energy Services, LLC, Upland Resources, Inc., Rumford Falls Power Company, Rumford Cogeneration, Inc. and MeadWestvaco Corporation.
- EPC Assignment and Assumption Agreement, dated as of April 30, 2005, among MeadWestvaco Corporation, Escanaba Timber LLC and EPC Timberlands, LLC.
- Assignment Agreement (Assignment of General Partnership Interests), dated as of April 30, 2005, among MeadWestvaco Virginia Corporation and Wickliffe Paper Company (“Wickliffe”).
- Assignment Agreement (Assignment of Limited Partnership Interests), dated as of April 30, 2005, between MeadWestvaco Virginia Corporation and Wickliffe Paper Company.
- Assignment Agreement (Assignment of Membership Interests), dated as of April 30, 2005, between MeadWestvaco Corporation and NewPage Corporation.
- Allocation and Services Agreement, dated as of April 30, 2005, between Escanaba Timber LLC and NewPage Corporation.
- Letter Agreement dated April 30, 2005 between MeadWestvaco Corporation and Escanaba Timber LLC.

15. In § 10.3 of the EAPA the parties specifically agreed to enter into the “Transition Agreements.” These are defined as the Transition Services Agreement, Information Technology Transition Services Agreement, Human Resources Transition Services Agreement, Wickliffe Services Agreement, Chillicothe Services Agreement, and Lease and Services Agreement, which are annexed to the EAPA as Exhibits H, I, J, K, L and M. EAPA Section 3.2(i) requires these Transition Agreements to be delivered at the Closing.

16. As finally entered into, all these agreements listed in § 14 were effective as of April 30, 2005, the date of the Second Amendment to the EAPA and the effective date of the Closing. Each of these agreements explicitly references the EAPA as the premise for the agreement, and several of the agreements expressly recite, in a merger/integration clause, that they are part of a

single agreement together with the EAPA. All of them were entered into by MWV or a subsidiary of MWV, and NewPage or an affiliate of NewPage. All of them are designed to implement, effectuate or facilitate the transaction.

17. As the EAPA recites in § 2.1, the consideration for the sale of the coated paper and related timber businesses was (subject to adjustments): (a) \$2.3 billion dollars (\$2,300,000,000.00); and (b) assumption by the Purchaser or its designee of the Assumed Liabilities, which are listed in § 1.4. The vast bulk of this consideration was attributable to NewPage, which was designed to receive the coated paper business. NewPage paid approximately \$2.05 billion for the coated paper business.

Closing of the Transaction

18. On May 2, 2005, the transaction closed, effective as of April 30, 2005. MWV was paid, with certain adjustments, the purchase price of \$2.3 billion dollars, of which about \$2.05 billion was attributable to NewPage. As part of the purchase price, under § 2.1 NewPage also took on the Assumed Liabilities listed in EAPA § 1.4 that relate to the coated papers business. MWV in turn conveyed to NewPage or NewPage's designees (a) under § 1.1 of the EAPA, MWV's equity interests in certain listed entities that relate to the coated papers business, and (b) the assets listed in § 1.2 of the EAPA, including, among other things, real estate, plants and equipment, machinery and related assets, inventory, intellectual property, receivables, contracts, software, causes of action and other assets, all as listed in § 1.2 and related schedules.

19. At and after the closing (except for the postpetition breaches by NewPage set forth below), for the past seven years and two months the parties performed their obligations under the EAPA and the various agreements listed above that are integrated with the EAPA. Most of the listed agreements have been fully performed.

NewPage's Chapter 11 Proceeding

20. More than six years after the closing, on September 7, 2011 – long after it purchased its businesses from MWV; after it completed performance under most of the integrated satellite agreements and accepted performances from MWV; and after it continued for years to perform the few remaining uncompleted post-closing obligations that that EAPA allocated to it – NewPage filed its Chapter 11 petition, together with several of its subsidiaries.

21. In correspondence and conversations with MWV since the petition date, NewPage has asserted that it intends to reject the EAPA and its integrated supplemental and implementing agreements. NewPage has since taken steps to halt performance of certain of its obligations under EAPA.

FIRST CLAIM FOR RELIEF (Declaratory Judgment)

22. MWV incorporates the foregoing allegations by reference.

23. The EAPA, together with its supplemental and implementing contracts integrated with it, has been substantially performed by NewPage, through (a) NewPage's payment to MWV in 2005 of the \$2.05 billion purchase price for the coated papers business; (b) its acceptance of the equity interests and assets transferred to it at the closing; (c) its completion of performance under various transitional agreements; and (d) its completed or continued performance under the various supplemental and implementing agreements that are integrated as part of the EAPA transaction.

24. The EAPA and its integrated agreements have been substantially performed by MWV, through (a) its acceptance in 2005 of NewPage's payment of the cash purchase price; (b) the conveyance to NewPage of the equity interests and assets transferred at the closing; (c) its completion of performance under various transitional agreements; and (d) its completed or continued performance under the various supplemental and implementing agreements that are integrated as part of the EAPA transaction.

25. NewPage has informed MWV that it considers the EAPA to be executory and intends to seek to reject it.

26. A controversy exists with respect to whether the EAPA and its integrated agreements are substantially performed and thus not executory and not subject to being rejected under § 365 of the Bankruptcy Code.

27. Pursuant to 28 U.S.C. § 2201 and Bankruptcy Rule 7001(9), MWV is entitled to a declaration that the EAPA, together with the agreements integrated with it, is substantially performed and thus is not executory and not subject to being assumed or rejected under § 365 of the Bankruptcy Code.

SECOND CLAIM FOR RELIEF (Injunction)

28. MWV incorporates the foregoing allegations by reference.

29. Under the Wickliffe Services Agreement (“WSA”), which is an agreement supplemental to the EAPA, NewPage subsidiary Wickliffe Paper Co. (“WPC”) provides certain services to MeadWestvaco of Virginia, Inc. (“MWV Va”), which operates a plant immediately adjacent to WPC’s facility. Before the 2005 transaction, the two installations were both owned by MWV. The main service WPC provides is wastewater treatment.

30. MWV Va cannot operate its facility for longer than a few days without having its wastewater treated. There are no feasible alternatives for wastewater treatment other than via the pipe into the WPC wastewater treatment facility.

31. At its Wickliffe plant, MWV Va manufactures carbon for pollution control devices in automobiles. It is the leading supplier of such carbon for the domestic auto manufacturers. Any sustained interruption in MWV Va’s ability to manufacture carbon would (a) severely injure MWV Va’s business; (b) seriously disrupt automobile manufacturing in the United States and abroad; and (c) provide next to no cost saving or other benefit to WPC.

32. MWV, MWV Va and the public interest would be irreparably harmed by any cessation of services under the WSA. The WSA acknowledges as much in Section 20, which provide that MWV Va would be entitled to an injunction in the event of any actual or threatened breach by WPC of its obligations.

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WHEREFORE, plaintiffs respectfully pray that judgment be entered in their favor as follows:

- A. On the First Claim for Relief, declaring that the EAPA and the satellite agreements referred to herein have been substantially performed, are not executory and are thus not subject to assumption or rejection under § 365 of the Bankruptcy Code;
- B. On the Second Claim for Relief enjoining defendants from threatening, causing or participating in any cessation of wastewater treatment services under the WSA;
- C. Costs, interest and attorneys fees to the extent permitted by law; and
- D. Such other and further relief as may seem to the Court just and proper.

Dated: Wilmington, Delaware
September 5, 2012

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