Exhibit 1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLIL AND MICHEL R. MILANOSKI, AS TRUSTEES OF ONE HUNDRED FORTY REALTY TRUST, Plaintiffs, v. TOWN OF HOPEDALE, THE HOPEDALE SELECT BOARD, BY AND THROUGH ITS MEMBERS, GLENDA HAZARD, BERNARD STOCK, AND SCOTT SAVAGE, AND THE HOPEDALE CONSERVATION COMMISSION, BY AND THROUGH ITS MEMBERS, BECCA SOLOMON, ELENORE ALVES, AND DAVID GUGLIELMI, Defendants.	Civil Action No. 4:22-cv-40080-MRG Leave to File Granted on _____

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO ISSUE INDICATIVE RULING UNDER RULE 62.1 TO LIFT STAY AND DISSOLVE PRELIMINARY INJUNCTION

The defendants, the Town of Hopedale *et al*. (the "Town"), hereby submit this reply memorandum in support of their Motion to Issue Indicative Ruling under Fed R. Civ. P. 62.1 to Lift Stay and Dissolve Preliminary Injunction ("Motion for Indicative Ruling") (Dkt. 82). The Town's Motion for Indicative Ruling seeks ultimately to dissolve an injunction prohibiting the Town from taking Forestland by eminent domain, because the injunction was based on the plaintiff Grafton & Upton Railroad Company's ("GURR's") specific plan for a massive railroad transloading facility that GURR has now abandoned. The Town submits this reply to address significant misstatements of fact in GURR's opposition to the Town's motion. (Dkt. 84).

GURR states in its opposition that, in seeking a preliminary injunction against the Town's effort to take the Forestland for conservation purposes, it "did not commit itself to any one development plan," Plaintiffs' Opposition to Defendant Town of Hopedale's Motion for an Indicative Ruling ("GURR Opp.") at 8, and it "never" based its preemption claim "on the specifics of the plan" attached to its pleadings and displayed during argument before the Court. *Id*. at 7. GURR further argues that the District Court "did not base its decision on any preliminary plan submitted by GURR." *Id*. at 9. As explained below, these statements misrepresent the record. GURR repeatedly advanced a single, specific plan to the District Court; the District Court based its grant of a preliminary injunction on that plan; and GURR now admits, as the Town has argued from the outset (Dkt. 44), that the plan is "not workable" and "impractical." Affidavit of Jon Delli Priscoli[1] ¶ 7, Dkt. 83-1. As a result GURR has now abandoned it. *Id.*

But even if GURR's plan was merely "conceptual" or "preliminary" as GURR now claims, GURR Opp. at 8, 9, and GURR was planning all along just to use "some portion of the [Forestland] for railroad purposes," GURR Opp. at 6, it reveals an unfortunate but inescapable truth about GURR's conduct. Ownership of the Forestland is hotly contested in Land Court. *Reilly v. Town of Hopedale*, 102 Mass. App. Ct. 367 (2023). Nonetheless, GURR pointlessly destroyed more than 100 acres of Forestland based on nothing more than a preliminary concept. Second Affidavit of Sean P. Reardon ("Second Reardon Aff.") ¶¶ 4, 5(c), Exhibit 5. It then used its destruction of the Forestland to convince the District Court that its plan for a transloading

[1] This Court may take judicial notice of pleadings filed in state courts. *United States v. Mercado,* 412 F.3d 243, 247-248 (1st Cir. 2005); *E.I. Du Point de Nemours & Co. v. Cullen*, 791 F.2d 5, 7 (1st Cir. 1986) ("Federal courts, in appropriate circumstances, may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matter at issue.") (citation omitted).

facility was real and that it justified ICCTA preemption, before abandoning the plan altogether once it obtained the relief it had sought. That is egregious misconduct, and egregious misconduct by GURR should bar any claim it has to injunctive relief.

ARGUMENT

A. GURR Repeatedly Based Its Claim for Injunctive Relief on Its Now Abandoned Site Layout Plan.

GURR claims in its opposition to the Motion for Indicative Ruling that the so-called Site Layout Plan for its massive transloading facility was merely "conceptual" or "preliminary," GURR Opp. at 8, 9, and that "GURR never asserted that preemption of the Town's eminent domain taking was dependent on the *specifics* of the plans attached to the Second Milanoski Affidavit." GURR Opp. at 7 (emphasis added). These statements misrepresent the record. GURR repeatedly touted the Site Layout Plan to the District Court. It did so in its Complaint for Declaratory Relief ("Complaint") (Dkt. 1), which described the Site Layout Plan in considerable detail and attached the Site Layout Plan as an exhibit. Complaint ¶ 31 and Exhibit 2. GURR then again promoted the Site Layout Plan in the first Affidavit of Michael Milanoski, which again described it fully and again attached it as an exhibit. Affidavit of Michael Milanoski (Dkt. 6) ¶¶ 62, 65, and Ex. 12. And then, apparently in case the District Court overlooked these first two presentations of the Plan, GURR described it fully and displayed it a third time in the Second Affidavit of Michael Milanoski (Dkt. 30), ¶ 28. And if GURR really meant to convey to the District Court that the Site Layout Plan was just "conceptual," it is puzzling that GURR, in its efforts to obtain the injunction in July 2022, would boast that it had already clearcut the Forestland to accommodate the Site Layout Plan, *id.*, ¶ 22, and represent to the Court that "site development" for the first five of twenty-two buildings depicted on the Plan would begin approximately six weeks later. *Id.*, ¶ 26.

If GURR's written submissions, tree-clearing, and imminent site development work were not enough, GURR's current effort to disclaim reliance on "the *specifics* of the plan attached to the Second Milanoski Affidavit," GURR Opp. at 7, is belied by its reliance on that plan on a fourth occasion: the virtual hearing on its motion for preliminary injunction. GURR displayed, via Zoom, the Site Layout Plan depicted in Mr. Milanoski's Second Affidavit, and then proceeded to argue to the District Court (contrary to its current position) that "we've been *incredibly specific as to what our plans are, incredibly specific* that it all relates to transloading, additional rail tracks, additional rail facilities and warehouses." Transcript of Hearing on Motions for Preliminary Injunction ("PI Transcript") (attached as Ex. A) (emphasis added) at 16-17. In short, GURR's current claim that it never relied on "the specifics" of the Site Layout Plan is flat out contradicted by the transcript.

B. The District Court Specifically Relied on the Site Layout Plan in Determining that the Town's Proposed Taking Was Preempted.

GURR twice claims in its opposition that the District Court "did not base its decision on the specific conceptual plan submitted by GURR." GURR Opp. at 1, 9, and later goes so far as to claim that "the Court did not reference the specific site plan once in its 28-page opinion." *Id.* at 14. These statements also misrepresent the record. The District Court specifically accepted that "[t]he 'Transloading and Logistics' center that GURR intends to build on the property will include new track, more than 1,500,000 square feet of space for transloading and temporary storage, and necessary infrastructure to support the facility. . ." Memorandum and Order at 2 (Dkt. 72). The District Court then cited the precise paragraph in GURR's Complaint that described the Site Layout Plan and incorporated the exhibit depicting the Site Layout Plan. *Id.*, citing Complaint ¶ 31.

And then further in its Memorandum and Order, the District Court specifically described the basis for its ruling that it was likely that the Town's exercise of eminent domain was preempted. The Court again cited the paragraph of the Complaint which described in detail and incorporated the attached Site Layout Plan. *Id.* at 22. The Court specifically described the plans depicted, "including development of, among others, new tracks and 1,500,000 square feet of transloading." *Id*. It further referenced the work that had been done to advance the Site Layout Plan, including the fact that GURR "has now finished harvesting trees at the site." *Id*. It is simply incorrect to argue, as GURR now does, that the District Court "did not reference [GURR's] specific site plan once" in its decision, and that the Court "did not base its decision on any specific preliminary plan cited by GURR." GURR Opp. at 14, 19.

C. If GURR Never Had Anything Other Than "Conceptual" or "Preliminary" Plans, Then Needlessly Clearcutting More than 100 Acres of Forestland Should Bar Its Claim for Injunctive Relief.

It is difficult to fathom why GURR would have clearcut more than 100 acres of Forestland to accommodate a Site Layout Plan that was merely "preliminary" or "conceptual." Especially because there is serious question about whether GURR even owns the Forestland in the first place, *Reilly v. Town of Hopedale*, 102 Mass. App. Ct. 367 (2023), prematurely and unnecessarily clearcutting the Forestland was egregious misconduct that should bar GURR's claim for injunctive relief.

Both Mr. Milanoski and Mr. Delli Priscoli recognize the harm and potential consequences of GURR's "harvesting" of the Forestland, as they are now blaming each other for orchestrating that plan. *Compare* Affidavit of Michael Milanoski (Dkt. 83-3) ¶ 12 ("Mr. Delli Priscoli personally ordered the removal of the trees"); Verified Complaint, *Milanoski v. Delli Priscoli*, Civil Action No. 2384-cv-00071-BLS2 (Suffolk Super. Ct.) (attached as Ex. B) ¶ 18 (Delli Priscoli is directing "preemption activities," and "directing tree clearing activities"); *with*

Affidavit of Jon Delli Priscoli ¶ 7 ("Milanoski's decision to clearcut trees [in the Forestland] is now the focus of potential wetland violation investigations by the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers."); *id*. ¶ 9, ("The Milanoski-ordered clear cutting at [the Forestland] has resulted in significant attorney and expert costs . . . as will the anticipated compliance orders from EPA."). It is hard to read Mr. Milanoski's use of the term "preemption activities" as anything other than conduct solely designed to increase GURR's likelihood of convincing the District Court that the Forestland would be put to railroad use, and that the planned taking of the Forestland should therefore be preempted.

GURR now claims to have a new, smaller "CONCEPTUAL #2" plan for the site. Second Reardon Aff. ¶ 3, Ex. 2. Even taking GURR's new "conceptual" plan at face value, GURR appears to have clearcut dozens of acres of Forestland for no reason. *See id.* ¶¶ 4, 5(d), Ex. 6. GURR clearcut about 103 acres of the Forestland to further the Site Layout Plan it has now abandoned. Second Reardon Aff. ¶¶ 4, 5(c), Ex. 5. Even if it proceeds to build the smaller CONCEPTUAL #2 plan, GURR would only require 58.4 acres, *id.* ¶ 5(b), Ex. 4, and therefore needlessly clearcut about 45 acres of Forestland. *Id*. ¶ 5(d), Ex. 6.

"It is old hat that a court called upon to do equity should always consider whether the petitioning party has acted in bad faith or with unclean hands." *Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 880 (1st Cir. 1995). This doctrine applies here, where GURR's "misconduct is directly related to the merits of the controversy between the parties." *Id.* In fact, not only are GURR's so-called "preemption activities" directly related to its claim for ICCTA preemption, they are in fact one of the bases for that claim. GURR proudly described to the Court how "feverishly" it had clear cut the Forestland, Dkt. No. 27, at 4, and proudly displayed to the Court photographs of the destruction to prove its claim of railroad use.

Second Milanoski Aff. (Dkt. 30) ¶ 22. It would be ironic, and inconsistent with basic principles of equity, that this needless destruction of the Forestland could somehow justify GURR's request for equitable relief.

CONCLUSION

For the foregoing reasons, this Court should issue an indicative ruling under Fed. R. Civ. P. 62.1 that, if the First Circuit Court of Appeals remanded the matter, then this Court would vacate the injunction, or, in the alternative, should issue an indicative ruling that the Town's Motion for an Indicative Ruling "raises a substantial issue." Fed. R. Civ. P. 62.1(a)(3).

TOWN OF HOPEDALE, ET AL.,

By their attorneys,

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Dated: September 13, 2023

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system was sent electronically to counsel of record for all parties on this 13th day of September, 2023

/s/ Sean M. Grammel
Sean M. Grammel

Exhibit A

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

GRAFTON & UPTON RAILROAD COMPANY,

Plaintiff,

v.

TOWN OF HOPEDALE, ET AL.,

Defendants.

Civil Action
No. 22-cv-40080-ADB

Court of Appeals
Case No. 23-1404

August 10, 2022
Pages 1 to 69

TRANSCRIPT OF HEARVING VIA ZOOM VIDEOCONFERENCE
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
ONE COURTHOUSE WAY
BOSTON, MA 02210

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P R O C E E D I N G S

(The following proceedings were held via Zoom Videoconferencing before the Honorable Allison D. Burroughs, United States District Judge, United States District Court, District of Massachusetts, on August 10, 2022.)

THE CLERK: This is civil action 22-40080, Grafton and Upton Railroad Company versus Town of Hopedale, et al. Will counsel identify yourselves for the record.

MR. KEAVANY: Good morning, Your Honor. Donald Keavany for the plaintiffs, in this case the moving party Grafton Upton Railroad Company, and I'm here with my colleague, Andrew DiCenzo.

MR. MACKEY: Good morning, Your Honor. David Mackey from *Anderson* Krieger representing the defendants Town of Hopedale, et al.

MR. GRAMMEL: And good morning, Your Honor. Sean Grammel from Anderson and Krieger also representing the defendants.

THE COURT: It's the plaintiff's motion. You can go first, Mr. Keavany, unless you all have made a different arrangement.

MR. KEAVANY: No, Your Honor. Just one technical thing. There are two different motions this morning. My colleague, Mr. DiCenzo was going to argue the enforcement action by the Con-Comm. I was going to argue the initial

eminent domain portion.

THE COURT: That's fine. Just so you know, we have a hard stop at 12.

MR. KEAVANY: I think we'll fall into that with plenty, Your Honor.

THE COURT: That would be fantastic.

MR. KEAVANY: May I proceed?

THE COURT: You may.

MR. KEAVANY: Thank you very much. And good morning, Your Honor, and thank you very much for accommodating me today for this hearing to be conducted via Zoom. I did test positive for COVID yesterday morning, which altered our plans to be in front of you in person today. So I do appreciate the last minute modification to accommodate me. Thank you for that.

THE COURT: It's no problem. I hope you're feeling all right.

MR. KEAVANY: Thank you. So, Your Honor, this motion is again a motion to continue a TRO that Chief Judge Saylor entered a few weeks ago against the Town of Hopedale enjoining them from taking 130.18 acres of land that is owned by the railroad at 364 West Street in Hopedale. I think I want to address the jurisdictional issue first. That just came in as a result of the opposition that was filed last week.

We think clearly, Your Honor, that the cases we provided you, Local 12004, the *Shaw* case and the *Verizon* Maryland case clearly provide us with a federal question jurisdiction, subject matter jurisdiction, before this Court, Your Honor. The cases cited by my brothers in their opposition aren't really on point.

They cite the *Anderson* case. The *Anderson* case, Your Honor, was not a pending eminent threat by a state regulatory or state municipal actor by those plaintiffs. Those plaintiffs in Anderson were seeking to get compensated according to the comprehensive Medicaid statute. In that case the Supreme Court said you don't have federal subject matter jurisdiction to bring a claim to enforce the Comprehensive Medicaid Enforcement Statute. But again, Your Honor, in that case there was no pending action being threatened against those plaintiffs.

And similarly they cited a case you decided a few years ago. I'm going to call it the *Crimson* case. Again, Your Honor, that's where plaintiffs were trying to enforce the Federal Controlled Substance Act. There is no private remedy there, which you noted. Again the plaintiffs in that case were not threatened by any act by the Town of Cambridge. They were trying to enjoin the issuance of licenses to other parties. But in essence they were seeking to enforce the Federal Controlled Substance Act.

And as you noted, the Controlled Substance Act is judicially -- I'm going to butcher this, unadministrable due to the judgment latent discretion of the DOJ to bring enforcement access. That's who enforces the controlled judgment actor, the Department of Justice, not plaintiffs in different communities running around to Federal Court to seek enforcement of that act. Those two cases are just not remotely on point.

Our case is directly in line with the Local 12004 case that was cited by the Federal Court relied on *Shaw* and *Verizon*, and that is that plaintiff may assert federal preemption as an affirmative cause of action to enjoin plaintiffs from interfering with federal rights. And that's what the ICA as amended by the ICCTA is all about.

It says, "We are going to remove any and all ability for these states to unreasonably interfere with rail transportation. We want to have a fluid, consistent policy with respect to rail transportation that is consistent across the country. And we are not going to permit states to intermittently file claims or assert actions that are going to interfere with the ability of a rail carrier to engage in rail transportation."

And that's exactly what we have here, Your Honor. The ICCTA preempts state law and state remedies that unreasonably interfere with rail transportation. The action

by the Town, and they have voted, Your Honor, an update on August 1, they voted, the Board of Selectmen voted, to take the property. So if this injunction is denied, they can go and record that today. If you deny that today, they can record it today. They can record it tomorrow. And Massachusetts, once that's recorded, we are divested of ownership of that property. And that is why the injunction is necessary.

And my brothers also talk about -- our sole forum is the STB. Your Honor, that is just incorrect. We cited the *Skinner Norfolk* case, which is a Fourth Circuit case, in our reply that recognize *Pejobscot* in the First Circuit and a couple of other circuits that have recognized that the federal courts have concurrent jurisdiction with the STB over matters with respect to the interpretation of the ICA as amended by the ICCTA.

There has been no circuit, and they cited no circuit that says the opposite that Federal Court does not have jurisdiction to entertain claims involving the ICA. So, Your Honor, the *Pejobscot* case helps us. The language I'd like to pull out of that case, Your Honor, is on page 204 to 205 where -- Pardon me. I had that right in front of me. The thrust of the statute is to federalize these disputes, not to deprive the federal courts of jurisdiction. And we've cited the *Ayer* case, the *Pejobscot* case, even the *Grafton*

Upton Milford case that was started in Federal Court, went to the STB, then came back to Federal Court. There's never been a question as to whether or not the federal courts have concurrent jurisdiction over these claims.

Now, there might be an argument as to whether or not the STB has primary jurisdiction, but that's not subject matter jurisdiction. This Court has subject matter jurisdiction under the cases we cited. And you should proceed to the merits of the motion. If you have no questions, I'll cut right to -- [technical interruption.]

I do think context matters, Your Honor, and I'd ask for the Court's indulgence to bring a little bit of history here as to how we got to where we are on August 10, 2022. There's no doubt that pursuant to the affidavits, uncontested affidavits, we've submitted, we've targeted -- the Railroad has targeted this property on West Street since back in the mid 2,000 teens. But certainly in 2019 they filed a position with DPU, and it has always been their intention to acquire this property for purposes of enhancing its rail transportation activities including transloading. And that is considered rail transportation under the ICA, Your Honor.

This land, I know my brothers and the citizens like to refer to this land as forest land, and it certainly was classified as that under Chapter 61 for a period of time. But this is industrially zoned land, Your Honor. It has

always been zoned industrial in Hopedale. And the Town of Hopedale has never taken any action to change that. So in 2019 the Railroad filed a petition before the DPU to acquire this property by eminent domain. Ultimately it reached a deal to acquire the property from the landowner.

There was an issue with respect to the Notice of Intent that was sent by the owners of the property that would give rise to a potential right of refusal under Chapter 61 to the Town. But as a result of an issue that arose there, which I summarized in my papers --

THE COURT: Hold on. Can everyone that's not talking please mute themselves. There's a phone, 774-249-0744 that needs to be muted. Thank you. Go ahead.

MR. KEAVANY: Thank you, Your Honor. Instead of requiring record title by deed to this property, they acquired the beneficial interest. The Railroad acquired the beneficial interest to this property in October 2020. The Town of Hopedale was not happy about that. They believe that violated Chapter 61.

As a result of that, Your Honor, they, the Board of Selectmen, the Town of Hopedale filed a lawsuit in land court alleging that the acquisition of the beneficial interest by the Railroad was the effect -- it was effectively transfer of interest which effectively gave the Town a right of first refusal to match the Railroad's purchase of that property.

That case was litigated in a short period of time. The case settled. We went to mediation with former land court Judge Leon Lombardi and the parties reached a resolution of those claims that again were Chapter 61 claims brought by the only entity that could bring them, the Board of Selectmen. They brought them. They settled them. We filed a stipulation of dismissal with prejudice in February of 2001.

The Chapter 61 issue is done. The Town thought we were wrong. They filed suit. We settled. We filed a stipulation of dismissal. The case is over. Ten Taxpayers didn't like the way that settlement was done.

If I can take a step back, Your Honor. In October of 2020, the Town had a town meeting, and they voted at this town meeting to acquire this 130.18 acres. And they also authorized the appropriation of 1.175 million dollars to acquire this 130 acres. So the settlement involved the Town paying a lesser sum to the Railroad for a lesser piece of that property. And the Ten Taxpayers filed a lawsuit after the case was dismissed in land court, and they went to superior court, Your Honor. And they said, hey you, Town, cannot use that appropriation of October of 2020 for 1.175 million that was appropriated to acquire 130 acres, you can't use that to acquire a less sum of property. That's described in the settlement agreement. And they were successful on that, Your Honor. They sought an injunction enjoining the

Town from using 587,000 of that 1.1 million to acquire 64 acres of that 130 acres. So they were successful on that.

But the Ten Taxpayers also sued to have the Town enforce their Chapter 61 rights, which they had waived and dismissed in the land court case, and they asserted another claim.

Your Honor, judgment entered, and we've attached a copy that entered in the *Ten Taxpayer* case, and that's at Exhibit 6 of the Michael Milanoski affidavit. Judgment entered on behalf of the Ten Taxpayers on Count 1 and entered on behalf of GNU on Count 2 and entered on behalf of the Town on Count 3. That was the end of the superior court case, and that was in November of 2001, Your Honor.

As a result of that decision, the Town was getting a lot of pressure from these citizens. They went back to land court and said, hey, we were going to use this money from October 2020 to buy this property. And the superior court said you can't do that. So vacate the dismissal that we entered back in February of 2021. And the land court heard arguments, accepted briefing on that, and the land court denied the Town's motion to vacate the stipulation of dismissal, Your Honor. And that's Exhibit 7 to the Michael Milanoski affidavit. That was done in January of '22.

Then the Town moved in the land court to get an injunction against the Railroad from continuing to do any

work at the site. That was denied. They filed an appeal. Mass Rule Appellate procedure Rule 6 request for an appeal not only in the land court, but then they went to the appeals court. And initially that was granted. But after full briefing, the single justice denied the motion for injunction pending appeal. And, Your Honor, that is Exhibit 8 to the Milanoski affidavit.

And the single justice specifically noted that the Town and the Ten Taxpayers had joined that had failed to establish a likelihood of success on the merits of their appeal. And as a result of that, Your Honor, that was in April of 2022, the Board of Selectmen met and they agreed to dismiss their appeal that was pending in land court. And that appeal was docketed and accepted by the land court in May.

So the Ten Taxpayers filed an appeal of that because the Ten Taxpayers, Your Honor, tried to intervene in the land court. And they were denied. They tried to intervene in January of 2022 which was about 11 months after judgment had entered, and they were denied. So the only appeals that are pending are appeals that have been filed by the Ten Taxpayers. They've appealed their denial of the motion to intervene in land court, and they've appealed the judgment that entered on Count 2 in favor of the Railroad and the Town of Hopedale in the superior court Tax Payer action.

That's where everything stands. The Town doesn't have any claim asserting any ownership interest in this property. There's references that the Railroad owns nominal title, questionable title, it's challenged title. The only people that are challenging anything the railroad did are Ten Taxpayers. What they're challenging is is whether they can force the Town to exercise the Chapter 61 right that the Town dismissed in February of 2021, which they weren't entitled to do.

They didn't need any consideration to dismiss their land court action, Your Honor. Again, that was the appropriate vehicle to bring a claim asserting that the Railroad violated Chapter 61. The Town did it. They settled. They dismissed. And they have not appealed that. And they have not appealed anything in the superior court case, Your Honor.

Frankly, they just filed a brief on July 1 in the superior court case requesting that the Court affirm the judgment of the superior court case. So again there's no challenge that the Town has made other than this eminent domain taking to the ownership of this property by the Railroad. The Railroad undisputedly owns this property. They have the only 100 percent beneficial interest of this trust. It is a nominee trust. They own it. And the Town, a new Board of Selectmen was elected in May, and they're not

happy with the settlement agreement. So they've tried to file in land court. They tried to go back to land court.

They've never sought to rescind the settlement agreement, and they retained new counsel. And apparently this is the new strategy. Rather than try to rescind the settlement agreement, which I don't think they would have any luck doing, but they haven't done it, they've decided to go on hyper speed to take this 130.18 acres from the Railroad.

And, Your Honor, the speed in which this was done reeks of incredibly bad faith. They met in executive session on June 1 to discuss the taking of our property. They came out of that executive session and voted to open a warrant, put one article on that warrant, close that warrant in five minutes. And that one article was to take the 130.18 acres from the Railroad. They did not have an appraisal. They also scheduled a town meeting, Your Honor, for July 21, in less than three weeks -- I'm sorry -- July 20, in less than three weeks after voting for the first time to announce their intention to take property by eminent domain.

They scheduled a special town meeting for that purpose on July -- on July 11. I'm sorry. June 21 was the Board of Selectmen meeting. July 11 I believe was the special town meeting. So they have the special town meeting, Your Honor, and they vote to take the property. They do that, Your Honor, they don't have a written appraisal. They

are moving full steam ahead. They have no written appraisal. They've been told verbally by their appraiser that they think the property is worth up to 3.9 million dollars. But again I believe as of today we certainly have not seen an appraisal.

They claim that we haven't permitted them on our property, Your Honor. They never asked to come on our property until after they filed their eminent domain taking. I submitted on Monday an excerpt from the May 23 Town Board of Selectmen meeting where the president of the Railroad specifically and directly invited the chair of the Board of Selectmen to visit the property. And she said no, thank you, didn't want it.

So they're trying to cast us as these bad actors because we won't let them on our property to help them appraise property which we believe they can't take because of its preempted by the ICA. And so that's what led to the emergency motion being filed on the 18th because after town meeting voted to take the property, Your Honor, they scheduled the Board of Selectmen meeting for July 19 to vote on that taking. So we obtained a TRO on that afternoon, the 19th, but they met -- So they cancelled that meeting on the 19th, Your Honor. But they met on August 1, and they voted to take the property on August 1.

So if this injunction is not granted, again they can go this afternoon, late this morning if we're out of here

by 11 and record that taking. According to Chapter 79, Massachusetts Law, that act of recording the taking divests the Railroad of the property, Your Honor.

And for the reasons set forth in our papers, both the TRO and Motion For Preliminary Injunction, Your Honor, it is patently clear this is not a insignificant railroad crossing, a utility easement. Those types of cases we concede and we concede it because we have to concede it. The STB and the federal courts interpreting that have said, listen, if they're straightforward, non interfering easements and the like, we're going to allow a town to get that easement. This isn't that. This is not a utility easement. This isn't a negligence claim. This is a wholesale land grab of 130.18 acres, Your Honor. And my brothers say, well, we haven't really been up front with you because we haven't told you that, well, they're not taking the actual rail line. Well, we have been up front with you. And if I can get a screen share because we did include this in Michael Milanoski's affidavit. I believe it's at paragraph 28.

Karen, do I have the ability to bring up a picture?

THE CLERK: Yes. Hold on one second. It should be all set.

MR. KEAVANY: Thanks. Drew, can you bring that up. So, Your Honor, highlighted in red is the land subject to this taking. We specifically -- can you go in a little bit,

Drew? We specifically highlight here. They're not taking the rail line. For sure they can't take our rail line. But look at what they're taking. These are buildings that have not been built. These are buildings that we're proposing to be built that are all going to be related to transloading. There's a reference in there that we haven't identified tenants because there are no tenants.

They cite the *Milford GNU* case, Your Honor. The reason the GNU, which was under prior ownership, lost that case under preemption because the entity that was going to be doing the work wasn't the Railroad. Here it's the Railroad. We've been incredibly specific as to what our plans are, incredibly specific that it all relates to transloading, additional rail tracks, additional rail facilities and warehouses. And under the broad, and no one can dispute the definition of transportation and railroad under the ICA, these are all covered. But if the Town is permitted to go forward and take this property, we have no ability to access our rail line other than if we take the rail car from Grafton or Upton and drive here. The one spot on the left-hand side, Your Honor, that's landlocked. That's 17 acres. We own it. That's landlocked. They want to take everything.

And you'll see here there's an easement that cuts through that landlocked piece that's in white. If this was an eminent domain taking of some acreage that ran along that

gas easement and the Town said, hey, we want to put some utility easements there, we want to run a water line there, that's a different ball game. And I think there's a discussion to be had. But a taking of this magnitude, and I disagree with my brothers, size does matter. The extent of this does matter. It is a wholesale taking of our property, the only property down where the text says proposed taking area by Town of Hopedale that's in white, that's wetlands and that's also some additional land that we own that really isn't developable.

So they're taking everything that is developable. By doing so, Your Honor, they are enjoining us and preventing us from engaging in rail transportation, which is contrary, directly contrary to the ICA. And we have established because of all of this, Your Honor, and because of the affidavits that have been submitted by Mr. Milanoski, that we've targeted this property what the intent of this property is, we've been consistent all along that this property is going to be used for rail transportation.

Now, the prior iterations of the plan show less building and maybe some less trackage, yes. That was three years ago. That was two years ago. Things have moved on. And it's not as if -- again they are identifying a section of land here that they want to take ten acres, and, hey, that plan from 2019 didn't show a building in those ten acres.

Now it does. We can have a fight about that. This isn't that, Your Honor. Again they're taking everything other than the rail line and the Railroad right of way. And we've been upfront with you because this document here is in paragraph 28 of Mr. Milanoski's affidavit. We've never claimed they were taking -- trying to take the railroad tracks and the railroad right of way. They're taking everything on both sides of it, Your Honor. They can't do that. And they cited no case that has permitted a taking of this magnitude.

The only cases they've cited are the *Gerard* case, which is the state court case from Ohio, which we clearly distinguished. That property was sitting there for nine years without anyone doing anything with it. The engineer for the railroad in the *Gerard* case said we only need 13 acres. They were taking 41. That case is black and white from this case, Your Honor, 180 degrees opposite of this case.

We cited the STB case, the *Norfolk* 2010, that is the closest case on point, that's an 18-acre taking. That was enjoined by the STB. That was preempted by the STB's ruling. And again that case dwarfs -- is dwarfed by this case and the magnitude of taking here, Your Honor. It's just -- Again all they've cited are cases which we've cited which says you can take easements and the like and you can assert negligence cases. Negligence cases aren't divested.

But an eminent domain taking of this magnitude, Your Honor, is preempted.

With respect to the irreparable harm, Your Honor, Chapter 79 -- we're seeking to enjoin Chapter 79. Chapter 79 is a state action. All that provides us is an opportunity to do something after they've taken our land. We've gone through it. Mr. Milanoski has gone through it. The irreparable harm that will be suffered by the Railroad -- not only is the land that's taken. This is a unique assemblage of 198 acres where the land is bisected by an active rail line.

You can't just get a sum of money and go out and buy another opportunity. It just doesn't happen. As Judge Saylor noted when we were in front of him a couple of weeks ago, it's not just the value of the land. It's the loss of potentially incalculable loss of business and business relationships and business income. The irreparable harm is huge, and we've established it.

Again we don't get into Chapter 79 because again Chapter 79 is a state action that the ICA was created to stop. You cannot have these towns running around taking property of the Railroad by eminent domain and then saying hey, you can't go to Federal Court, you've either got to go to the STB, which isn't set up to address something on an emergency case basis, or you have to go to Chapter 79, you've

got to file a state court action. That takes place after we take your property.

Again this is not a case where there's a pending lawsuit in state court. No wonder these preemption cases are that. The case like the *Grafton* case. The case is filed in state court, removed to Federal Court. Should it be remanded? There's nothing to remand to. The Town wants us to either have to go to STB and we argue our merits there after the Town takes the property or go to state court. And again not defend something in state court, put the burden on us to file something in state court to assert state law rights.

ICCTA preempts that. It doesn't require us to do that. What we've done is the only thing we could do to enjoin this from happening. And again the irreparable harm is not only losing the property for an unknown period of time, being provided money, trying to acquire a piece of property that provides this 198 acres on a rail line that bisects it, you can't find it in metro west Boston. Money damages is just not sufficient. It's not enough. The injunctive relief is the only relief that's appropriate.

Again balancing the harms, Your Honor, if we lose this property -- if you deny the injunction, they record this today, they record their taking tomorrow. We've lost the property. I don't know how long it is going to take for us

to get appropriately compensated and then determine what business we've lost as a result of this and then trying to find another assemblage of acreage that remotely comes close to this.

Their biggest issue on their reparable harm are the trees. Your Honor, we've again been up front. We've submitted pictures of the property. The trees are gone. The trees are gone. And the trees would have been gone a year ago. They would have been gone 18 months ago. We've been enjoined preliminary in different state court actions. Ultimately those injunctions have been dissolved because we've prepared on the merits. Recently they tried for injunctions three times, Your Honor; they've been denied three times.

Now this is again the last little rabbit in the hat they're trying to pull out. Their concern is trees. Well, the trees are gone. This area we have to protect. We're obligated under the settlement agreement. We're working with the Army Corps. of Engineers to protect the water supply there. There's going to be a deed restriction recorded with the Army Corps. of Engineers. We're following federal regulations like we're obligated to. We've provided the Court with copies of the plan we've submitted to EPA. We maintain communication with DEP, the State Department of Environmental Protection, even though we're not required to.

So we're complying with all federal regulations.

With respect to this property. We're keeping the state apprised of what we're doing. And the Con-Comm and the Town of Hopedale learns of that through the state. So the balancing, again -- and Judge Saylor thought it was 50/50. I think certainly the balance goes our way. It certainly doesn't go the Town's way, Your Honor.

And lastly, the public interest. We've submitted through Mr. Milanoski's affidavit lots of information with respect to National Rail policy, the Massachusetts Rail Transportation Policy, the environmental, the positive environmental impacts on rail transportation as opposed to trucking. And the public interest is served by maintaining -- and dealing with the supply chain issues that everyone has been dealing with over the past couple of years.

The public interest is on the Railroad's side on this. This is environmentally friendly, environmentally sound. The public interest again is tilted I think significantly towards the railroad.

THE COURT: On this map where is their water source?

MR. KEAVANY: We're looking for a water source, Your Honor. That's it right there. That's where we believe -- we've learned this through the Town because again we were engaged with the Town on a private public partnership

back in 2019, and this area was identified by the Town engineers as a potential water supply. But again we're working with EPA to identify that and Army Corps. of Engineers because we want water there, too. We need water. We have every interest in protecting that water supply. That's where that is.

We've been accused of not providing -- providing hypothetical or vague plans. Farthest from it, Your Honor. Again Mr. Milanoski's affidavit is incredibly detailed as to why this parcel was targeted, why it was acquired, and they've taken -- every action they've taken since they've acquired has been consistent with developing the property for rail transportation.

It does not matter, Your Honor, that a building is not there now. Again the *Norfolk* case cites that, and there are other cases we've submitted, that Seventh Circuit case from Illinois. Future plans for the property are entirely appropriate for consideration as to whether or not a taking is permitted.

And again, I got a little off track, this would have been done 18 months ago but for those injunctions that were ultimately dissolved. Again it's not like we've been like *Gerard*, buying this property doing nothing. The reason the Town has moved so quickly is because we finally got access in there kind of legitimately full-time in April.

Yeah, we've lost two years. Time is money. We're trying to, you know, trying to get this and fulfill our vision for a state of the art transloading facility in this industrially zoned land in the most northern part of Hopedale, Your Honor.

Again I believe we've established convincingly that we're likely to succeed on the merits. The irreparable harm is incredibly significant if the injunction is not granted. It outweighs by a long stretch any harm to the Town if the injunction is not granted. And again the public interest weighs in favor of the GNU on this, Your Honor. I respectfully request that the motion for a preliminary injunction is granted. I'm certainly available to answer any questions you may have.

THE COURT: At this point is all that you're looking to have enjoined at the moment the recording of the taking?

MR. KEAVANY: Yes. There's nothing else -- That's all. That's the next step, Your Honor. That is what effectuates taking of the property. If this Court thinks that STB is the place to be, we've got no problem. The Town could have gone to STB, Your Honor. They didn't. I've got no problem with the referral to STB so long as the injunction is in place. Let STB go through it. I'm quite confident what the result will be. That's what we're seeking is the injunction for them taking the land. The only way they do

that is recording that notice of taking which they voted to do on August 1.

THE COURT: I know I'm going to hear from the other side in a minute. I read over Judge Saylor's transcript. This is obviously really complicated and not so much in my wheelhouse. I'm not thrilled about having to sort of jump into this dispute in kind of the posture of an injunction. I'd rather have the thing fully litigated.

What would the problem be with really just maintaining the status quo? Like not recording the deed but not letting you all build anything or do anything to the land either. If we just let it sit there exactly like it is while this gets litigated? That's the jurisdictional question aside, which we'll need to decide sooner rather than later.

MR. KEAVANY: The problem with that, Your Honor, is again time is money. We acquired this property in October of 2020 and have been hamstrung for almost two years. More importantly, Judge Saylor, this came up in front of Judge Saylor. Judge Saylor correctly noted there's nothing in front of me from the Town seeking an injunction against the railroad. And nothing is in front of you seeking an injunction by the Town. They were on notice that Judge Saylor took an issue with that as he should have.

So, number one, time is money, and we've waited a long time. That's the number one objection. And two,

they've never moved for an injunction, and I don't think they've moved for an injunction, Your Honor, because I don't think they can convince you that they're likely to succeed on the merits of any eminent domain taking in light of the ICCTA.

THE COURT: I'm not really talking about the merits. I'm just talking about buying a little more time to have this more fully fleshed out.

MR. KEAVANY: I can't commit to anything. My clients want to proceed, Your Honor. They don't think -- again they think the history here is just -- the Town has caused this rush. They're the ones who met on June 21 in executive session and came out, opened a warrant, closed it, scheduled a town meeting, scheduled a vote. They could have engaged us like they did back in 2019. They could have gone to STB. They didn't. They forced our hand to run around on the weekend of the 18th or 19th to verify a verified complaint and TRO, Your Honor. This rush is solely the responsibility of the town.

THE COURT: If I give you what you want and I tell them that they can't record the taking, what are you going to do? Are you going to start building?

MR. KEAVANY: We're going to continue developing the property as a rail transportation facility, yes.

THE COURT: Okay.

MR. KEAVANY: If they take it, Your Honor, we lose ownership.

THE COURT: I understand. I understand. I'm just wondering if I can keep them from taking it and keep you from doing anything while we figure this out. I don't love the posture of this. Right? You're talking about who's forced whose hands. The hand who I feel like is really being forced is mine which is to make all of these things without -- there's no real record in front of me. They're making the environmental argument, and you're telling me that there's no trees. I don't even have that in front of me.

MR. KEAVANY: Your Honor, I've given you multiple photographs that show there are no trees. Mr. Milanoski's affidavit has plenty of photographs that show that the trees are gone. The trees are gone, and his affidavit says 95 percent. I think it's probably up to 98 percent. There's a couple of stragglers left there. I was out at the site last week.

Again you're putting me in a little bit of a spot here because obviously I haven't talked to my client. I'm reading -- I'm hearing what you're saying and I appreciate that, and I'm not trying to be difficult. This was on for an injunction. It wasn't on for a cross motion for injunction. I just don't know what you're talking about in kind of a standstill. Are you talking about a week? Are you talking

about a month? Are you talking about something longer than that?

THE COURT: I don't know. You tell me. What needs to be done to fully litigate this? Are you going to tell me it's a summary judgment motion with no discovery? What are we looking at here?

MR. KEAVANY: I think it could be judgment on the pleadings, Your Honor. I don't think there's any discovery that's needed. This is purely a question of law that either they can take the property or they can't. I don't think any discovery is necessary.

THE COURT: And would the briefing on a motion on the pleadings look any different than the briefing that's already in front of me?

MR. KEAVANY: Probably not, Your Honor. I looked long and hard to see if there's another case that I missed on the issue of preemption.

THE COURT: The standard would be different, right?

MR. KEAVANY: The standard would be different, yes, I guess the standard would be different. Yeah, you are treating it almost like -- not almost, but as a motion to dismiss. So taking everything we alleged as true. Hmm. Well, I guess maybe it would be, Your Honor. Maybe it would be summary judgment but with -- I guess it could be converted to a summary judgment. Because they contest that we've

invade with our plans. I don't think that gets them anywhere. That affidavit they filed yesterday, I don't know what that has to do with anything. So we can't build every building there, but we can build ten of them. Again it would be different if they were seeking to take something less. They're taking everything. So whether we can build 10 buildings or all 22 is irrelevant.

But getting to your point or question, I guess the standard would not be 12(c) or 12(b)(6). It would have to be a Rule 56 standard. I just don't see the need for -- I have no problem with Attorney Mackey jumping in here if he thinks that I'm wrong on that, that significant discovery needs to be done on this. I just don't see it.

MR. MACKEY: Your Honor, I was going to say I do think there would be some discovery necessary. We've raised some very significant issues with respect to these -- what the Railroad has referred to as preliminary plans and as late as the opposition to our motion to file the affidavit of Mr. Reardon they've acknowledged. Well, ICCTA preemption applies. Even if we can't build the whole thing, a little piece of this, the whole taking is preempted.

I disagree with that on the law. But I think that also requires a little bit of analysis of what these late breaking plans by the Railroad are to literally develop every square inch of this property.

THE COURT: Do you agree with him that all the trees are gone?

MR. MACKEY: Well, we have no access to the site, Your Honor. So I can't assess that. Based on the photographs and Mr. Milanoski's affidavit in which he said they've been feverishly harvesting the forest, I do believe it's true that at least most of the trees are gone.

MR. KEAVANY: To the extent, Your Honor, there's some additional trees there, we'll certainly agree -- I'll confirm with him, but I can certainly represent that I'll recommend to them that they take no further trees down. Again I don't think there's many trees there. If that's what this is about, I can certainly talk to them about that and would encourage them to agree to take no further trees down.

THE COURT: Mr. Keavany, you've finished your argument. They have filed a consolidated response to the two motions. Does your side want to make your argument on the other motion, or how do y'all want to handle this?

MR. KEAVANY: That's fine. I think, Drew, are you good to go?

MR. DICENZO: That's fine with me if that's how the Court prefers to proceed.

THE COURT: I actually don't have a preference. I'm wondering -- however you want to do it is fine with me. If you can't agree on how to do it, then I'll decide. It

makes sense to me that you all finish your argument. They've filed a consolidated response. They have and seem to be willing to respond to them both of a piece.

So why don't we hear your whole argument and then we'll hear their whole argument unless you guys want to do it differently, which is fine.

MR. MACKEY: That makes sense.

MR. DICENZO: Good morning, Your Honor. Andrew DiCenzo for the Grafton and Upton Railroad. I appreciate the opportunity to participate. I know it was a lengthy argument on the taking issue. So I will be brief especially because the issues with respect to the ICCIA are the same or similar as it pertains to the Conservation Commission enforcement. GNU seeks a preliminary injunction to enjoin the enforcement order issued by the Town's Conservation Commission, and the enforcement order is attached to the first affidavit of Michael Milanoski which is document 61 at page 53.

At the outset, as Attorney Keavany was discussing, the Town has moved at warp speed to proceed with this taking. And it appears that the enforcement order was timed to coincide with the taking as almost a belt and suspenders action by the Town to ensure that the rail development planned by the GNU is prohibited and prevented. The enforcement order is, while it's a less dramatic regulation by the Town, than the threatened taking is, it's equally

preempted by the ICA. And the analysis on this issue is perhaps more clearcut. The ICA as amended by the ICCTA unequivocally and categorically preempts pre clearance and permitting requirements imposed by towns and states which may hinder or delay rail transportation by a rail carrier.

And the case law on this issue, Your Honor, is uniform. We cited a recent case from the District of Utah, 2021 case, the *American Rocky Mountaineer Railroad*, which stated that pre clearance requirements are always preempted. That's the same as the Ninth Circuit decided in the *City of Auburn versus the United States*. It's the same as the *Town of Ayer* case. The STB stated in that case that state and local permitting or pre clearance requirements, including environmental requirements, are preempted because by their nature they unduly interfere with interstate commerce.

And the STB again takes the same position and says that it has repeatedly held that state or local laws that impose local permitting or pre clearance requirements as a prerequisite to rail transportation are preempted by the ICA. Same for the *Norfolk Southern* case which was the Fourth Circuit in which a city sought to impose permitting requirements on a railroad's plan to conduct transloading of ethanol. It was found on that to be preempted by the ICA.

I would note, Your Honor, in the consolidated opposition filed by the Town, they do not dispute our

allegations that the enforcement order as issued by the Conservation Commission is a permitting or pre clearance requirement. And they cannot dispute that, Your Honor, because the basis of the order is that GNU performed various work on this site without permit. And that's the quote from the enforcement order which then identifies all of the alleged violations.

So this order on its face is a permitting requirement that's imposed by the Town against rail transportation by Grafton Upton Railroad. It purports to govern rail transportation and therefore as discussed by Attorney Keavany in the *Dickens* argument is preempted by the ICA. The remaining injunction's efforts are the same and similar as Attorney Keavany discussed in the *Dickens* argument. I would add that the enforcement order threatens both similar and criminal penalties up to and including imprisonment of the Railroad and its principals by the Town.

So I think that lends additional weight to the irreparable harm argument. It's also important to know that enjoining the enforcement order, enjoining the taking, finding preemption does not leave GNU unregulated. It continues to be subject to federal law, federal environmental regulations, the Clean Water Act. As Attorney Keavany said, GNU is continues working with the Army Corps. of Engineers, the EPA and DEP, has filed a storm water pollution protection

plan with the federal government. It has provided copies of that to the state and to the Town. So GNU is and will continue to be regulated with respect to this site. It's just it won't be regulated by the Town other than that the Town has a role to play in implementing federal regulation.

And that was noted in the First Circuit's *Town of Ayer* case that the Town cannot impose permitting or pre clearance environmental requirements. But they do have a role to play, a limited role to play, along with the federal government in regulation there. But they cannot step in on their own and issue an enforcement order requiring that a railroad cease and desist and reverse rail transportation development under penalty of imprisonment or daily fines.

It's clearly preempted by the ICA as a permitting regulation. And as mentioned earlier, the fact that it's a permitting regulation is not disputed by the Town in their consolidated opposition. So we would ask that any injunction that the Court issues include the enforceable order as well.

Your Honor, I believe you're on mute.

THE COURT: Sorry about that. Mr. Mackey and Mr. Grammel, are you set?

MR. GRAMMEL: Yes, Your Honor. Sean Grammel for the Hopedale defendants. I'll be speaking about the jurisdictional analysis here. So Grafton Upton argues that it has established federal question jurisdiction here because

it claims preemption. It claims that a federal law preempts the local regulation which is the anticipated taking by the Town. Federal courts can typically hear claims like this and have jurisdiction under Section 1331 because the plaintiff is invoking the Court's equity jurisdiction under ex parte Young. And the federal question there is whether the federal statute preempts the local law or the local regulation.

Grafton and Upton is right that the Supreme Court said something similar in the *Shaw v. Verizon Maryland* case, but that's not the end of the analysis. Congress gets to decide how its own laws are enforced, and Congress can limit the equity jurisdiction of federal courts to hear preemption claims based on certain statutes. The Supreme Court was crystal clear about this in both the *Seminole Tribe* case and the *Armstrong* case, both of which we cited in our surreply. Congress can do that explicitly or implicitly here.

Attorney Keavany referenced the *Crimson Galleria* case. That was an implicit preclusion case. But here we actually have an easier statute to analyze because Congress did so explicitly.

The Grafton Upton cites Section 10501 of ICCTA. And they want this Court to enforce Section 10501 through equity. But that statute is clear that any affirmative claim to enforce Section 10501 must be brought before the STB which has "exclusive jurisdiction". Grafton Upton routinely talks

about how broad the jurisdiction of the STB is, and that's right. They have exclusive jurisdiction to hear an affirmative claim under 10501.

And that same statute continues that the remedies provided by ICCTA are exclusive and expressly preempts all other remedies provided under federal or state law. Judge Hillman in the *Town of Grafton* case I think summarized this really well at page 10 footnote 7 of that case. He was looking at the first decision in the *Pejobscot* case. He was looking at Section 11704 of ICCTA and also Section 10501. Judge Hillman set 11704 provides the parties can either bring a dispute either in the STB or the Federal Court.

Congress when it wrote ICCTA knew how to do that. They new how to say you can go either to STB or to Federal Court, and they did that in 11704 and in a few other places in ICCTA. But Judge Hillman said that's not what Congress did. They didn't say you go to either place. They said the STB has "exclusive jurisdiction".

So Judge Hillman wrote, I'll quote, "If a section of the ICCTA provides district courts with concurrent jurisdiction like 11704 did, then the STB's jurisdiction under that section cannot be exclusive. Assuming that's true, however, then logically the contrapositive is equally true. If a section of the ICCTA provides the STB with exclusive jurisdiction, that's 10501, then the District

Court's jurisdiction cannot be concurrent. So when Grafton Upton argued for concurrent jurisdiction, Judge Hillman already rejected that argument in a case involving this railroad.

THE COURT: So let me ask. So they say they're willing to have this go before the STB but you all haven't tried to do that. So if you think it belongs there and they're willing to have it there, why isn't it there?

MR. GRAMMEL: They're welcome to do that, but what they can't do is after this Court has entered an injunction pending the resolution of that proceeding when this Court doesn't have subject matter jurisdiction. They could have filed in the STB. In fact, they have brought a preemptory based claim at the STB before, but they didn't do that here.

THE COURT: What they're saying if they go to the STB they don't have injunction authority. So you guys are going to file your thing and they're going to be out of luck. Right?

MR. GRAMMEL: Yes, Your Honor.

THE COURT: So what's the answer to that? That doesn't really seem fair.

MR. GRAMMEL: Your Honor, I would just point to the statute and the express language of Section 10501, and I would point the Court to *Seminole Tribe* which says, "The courts cannot supplement a statutory remedial scheme with an

equitable one. Congress gave broad preemptive rights, as alleged by Grafton Upton, allegedly broad preemptive rights under Section 10501, but then they want to mix and match these broad statutory rights with an equitable remedy. They want to use the rights provided by that section but don't want to follow the remedy.

THE COURT: I'm not really sure that's true. I'm not going to put words in his mouth, but I think what he's saying is you guys came at this so quickly that they didn't have time to go to the STB. And they're willing to go to the STB or you could have brought it to the STB, but they lose the property if you record before anyone gets to the STB or before the STB figures it out.

So what is the mechanism to protect them from losing their property while the STB is looking at this?

MR. GRAMMEL: Well, Your Honor, Attorney Keavany is right that if the injunction is denied, then we can record the taking. But I will also point out that the Town is committed to not doing anything to that property during the pendency of this case. I would disagree with Attorney Keavany, as I'm sure you'll understand, that we felt our hand was being forced, as in his clients' words, they were "working feverishly" to harvest the trees and build an industrial rail yard that would affect our water supply. And so in looking for the status quo here, the best way to

preserve the status quo is to deny the injunction and let the land sit how it is, which is what the Town will do and in which the Town has submitted the affidavit of the Town Administrator Diana Schindler.

THE COURT: Except but then they have to fight to get their land back. The way to maintain status quo is that you don't file and they don't do anything. But nobody seems amenable to that.

MR. GRAMMEL: I'll leave it to Attorney Mackey about whether we'd be amenable to that. We've committed to leaving the land as it is. I think that is something that the we --

THE COURT: I get that and I appreciate that, but that doesn't change the fact that they would then have to go fight to get their land back. You had already taken the land. I'm just wondering why we can't let the land sit in their ownership and nobody does anything to it while either I have a little bit more time to figure it out or maybe more appropriately the STB figures it out.

You say it should be the STB and they say they're willing to have it be the STB. And you have no idea how appealing that is to me. But what they're saying is they can't do that because you're going to record the taking, and then, for lack of a better word, they're already screwed.

MR. GRAMMEL: Your Honor, I would make two comments

to that. First is they could proceed under Chapter 79 as well which has a provision for a speedy trial. And they could raise ICCTA preemption as a defense in the state court. They could do that.

The second point I make is Grafton Upton is seeking an equitable remedy today. This Court has inherent equitable powers to craft the injunction. And so if that's what this Court is inclined to do, I don't think that a cross motion for preliminary injunction is necessary.

Your Honor, just to finish the jurisdictional argument, we maintain that the statute Section 10501 has an express limitation. That means equity just is not available here. So they cannot use the equity jurisdiction argument to get subject matter jurisdiction under Section 1331. So that's why the motion should be denied.

THE COURT: Okay.

MR. MACKEY: Good morning, Your Honor. David Mackey from Anderson Krieger. Also for the defendant here. I want to make up on this last point. Let me back up just a step. In order to get an injunction, the railroad has to demonstrate these four independent bases for a preliminary injunction: Likelihood of success; irreparable harm; balance of hardships; and the public interest.

And in a case like this the burden or its requirement merge where the government is proposing a request

for a PI. I'm going to take these a little bit out of order. I'll start with irreparable harm. Because the railroad doesn't really advance argument addressing head on these two issues.

I want to talk about irreparable harm for a minute. Just a few minutes ago, the First Circuit issued a decision together with employees. It was a COVID-related matter. And the court in that case reiterated that a showing of irreparable harm is required to obtain a preliminary injunction. And it went on to say, and this is dead on point for this case, A party cannot demonstrate irreparable harm without showing they have inadequate remedies of law.

So the burden, in other words, is squarely on the Railroad this morning to demonstrate its remedies of law are inadequate. How does the railroad try to meet this burden? It actually doesn't even try. Its brief never even advances an argument on the inadequacy of its legal remedies. The Railroad utterly ignores the fact that if the taking goes forward, it can seek to invalidate the taking in an expedited procedure by simply asserting its rights under Chapter 79, which is the statute pursuant to which the Town is seeking to take the property.

The Railroad never even mentions Chapter 79 in its briefing. The S.J.C. has just reminded us in its 2021 case *Albazara*, the circumstances in its 2021 case in *Albazara*,

Chapter 79 provides a right of action to challenge the validity of taken and have title to the property returned to the previous owner, and it can be done on an expedited basis.

Ignoring the Chapter 79 remedy, which the Railroad has, doesn't make the remedy inadequate. And, Your Honor, we've cited case after case in our brief where Federal Courts have denied preliminary injunctions against takings where state eminent domain law, just like Massachusetts law, provides an adequate remedy. The Puerto Rico Telephone case where the First Circuit denied an injunction against the taking of a portion of the Telephone Company's telephone system where Puerto Rico law provides, as the First Circuit says, "a plain, adequate and complete remedy".

The Third Circuit's opinion in the *Godbey* case. Same thing. No injunction against the taking of a right of way for high voltage of electrical lines that were going over the plaintiff's property. Where again, Pennsylvania law provides a means to challenge the taking through its public utilities utility commission.

Probably the best case, Your Honor, is Justice Renquist's decision. He was sitting as circuit judge justice in the Northern California case which we cited in our brief where he expresses just utter skepticism that a plaintiff could get an injunction against a taking. In that case it was a taking of a geothermal lease that the plaintiff had.

The plaintiff was arguing that the taking violated federal law. And Justice Renquist said, how can that be? The plaintiff has a plain and adequate remedy of law through the process offered under California's eminent domain laws.

He went on to say granting the injunction under these circumstances would be a significant departure of the way Rule 65 works. There is a path here for the Railroad to get adequate relief, a path for the railroad to seek to invalidate the taking. But for whatever reason it's simply not the path the Railroad took.

Now, there are two sort of factual issues here that make an injunction especially inappropriate and making an irreparable harm mark argument especially flimsy by the railroad. First of all, as my colleague Mr. Grammel mentioned, all that's going to happen when the Town records the taking is that title will transfer to the Town. The railroad would have to stop, in its own words, its feverish harvesting of the trees and other work on the property.

The but the Town isn't going to do anything to the property. The Town isn't going to touch any of the forest land while this challenge to this taking is pending. So in this kind of unusual way in this case, denying the injunction here is the best way to preserve the status quo. Nothing will happen on the property.

The second thing is, all the Railroad really

alleges as harm here is delay. If the railroad ultimately prevails under Chapter 79 in its challenge to the taking, all it will have suffered is the delay in its development plan. The Railroad can get back on the site, a site that's going to be in the exact condition as it was when the Town records the notice of taking, and the Railroad can be right back at its development plans.

On this score, Mr. Milanoski's affidavit is worth a great deal of attention. He has a 21-page affidavit as the leader of the Railroad operation. And in that affidavit, what's so interesting is he counts the Railroad year over year a 20 percent growth. Its rapid growth which will continue to be driven by customer demand, demand which, as he says, has maxed out existing business locations and available real estate. Customers been waiting for the Railroad to meet the demand.

In that entire affidavit, Your Honor, there isn't a single word about how a delay in the project caused by a taking, a taking the Railroad has a remedy to seek to invalidate, how this delay is going to somehow eliminate that customer demand. There's no word about how that delay is going to irreparably damage these business projects.

If Mr. Keavany and his colleague Mr. DiCenzo were right at the end of the day about preemption - we don't think there are, for reasons I'll describe. If there was, there

will have been delay, but that does not get you to irreparable harm. Mr. Keavany says it as well as anybody, time is money, money doesn't get you an injunction in Federal Court.

There are a lot of cases cited in our brief. I would urge the Court to look at one in particular. It's the *Stand Together* case decided by the Eastern District of New York, and it really is right on point. It involved a condemnation of several buildings, Your Honor, in Brooklyn for a pretty significant urban renewal project. And there were these several commercial properties the plaintiffs have all made, as the Court points out, significant investments in these businesses. And they all planned to make future investments. Nonetheless the Court denied the request to enjoin the taking.

First, as I pointed out in my first argument I made, as is the case here, transfer of title by itself cannot be irreparable so long as the Court has the power quite literally to repair it, which the state courts in Massachusetts do. And then as significantly, as is true here, with respect to the harm caused by any delay in that process the plaintiffs could avail themselves in New York. The District Court said that if the plaintiffs regain their property through that process, I'm quoting here, they would be free to resume their deferred dream at a cost of nothing

more than lost profit and increased costs. These economic damages do not justify preliminary injunctive relief.

THE COURT: Mr. Mackey, does Chapter 79, does it let them get the property back?

MR. MACKEY: Absolutely.

THE COURT: What's the provision of Chapter 79, please?

MR. MACKEY: General Law Chapter 79, Section 18 --

THE COURT: Hold on. I'm just looking at 18. I have it right in front of me. Where does it say they can get the property back?

MR. MACKEY: I'm sorry. I don't have the statute in front of me, Your Honor. But General Law Chapter 79, Section 18 does provide a remedy to invalidate the taking as interpreted by the S.J.C. in *Albazara*, a very emphatic decision saying the plaintiffs had actually the option under Section 18 both to invalidate the taking to get the property back and at the same time to preserve a claim for damages for compensation. They can do both at the same time.

THE COURT: Hold on. Mr. Keavany, do you agree that Chapter 79 let's you get the property back?

MR. KEAVANY: Your Honor, yes, I do believe there's a mechanism under Chapter 79 to get the property back. But the problem here is, and this property according to the article, is being taken for conservation and environmental

purposes. Once that's done, it becomes protected by Article 97 of Massachusetts Constitution, and you need two-thirds or three-quarters vote of the legislature to revert the title back out of the Town.

So I guaranty you, if this goes forward, they proceed, they're not going to simply give the property back. We'll be in another two or three or four years of litigation. So, Your Honor, that's a significant fact that they're not --

THE COURT: What chapter is that?

MR. KEAVANY: It's Article 97 of the Massachusetts Constitution, Your Honor.

THE COURT: If they set an environmental purpose for the taking it goes to Chapter 97?

MR. KEAVANY: It goes to Article 97. Protected by Article 97 as park land, and you've got to get a vote of the legislate sure to take the title out of the Town.

MR. MACKEY: Your Honor, if I might. Article 97 would apply if the taking were valid. If the taking were invalidated, the Town doesn't own the property. Article 97 doesn't apply. That argument doesn't work. I do encourage the Court to read the *Albazara* case because it is an emphatic, an emphatic announcement with respect to the importance of protecting a property owner's ownership in property by giving them a right to challenge the validity of the taking even at the same time, frankly, that they're

challenging what the compensatory damages would be here.

So on irreparable harm, the Railroad doesn't really argue it's irreparable. It makes no effort. Where I started, the Railroad makes no effort to show it has an inadequate remedy of law. And it makes no effort to show that any of these purported plans for the site, I'm going to get to those in a minute, are going to be anything but delayed if the taking is overturned.

So let me move from there to balance of the hardships. Because this one is even more strikingly in favor of the Town. So, as I mentioned, according to the Doe case cited in our brief, the last two factors in the injunction test the balance of hardships and the public interest. They merge where the government is a party opposing the injunction.

So the Railroad's brief is worth a careful read on this point. It gives this argument exactly five lines on page 20. What does the Railroad say about hardship to the Town? Well, pretty much nothing. The Railroad just declines to engage in the balancing that's required by the standard for injunction because the balance of hardships -- presumably because the balance of hardships is so overwhelmingly in the Town's favor. Here's what the Railroad says on the balance of hardships. Page 20. It's brief.

The Town will suffer no harm because the Town has

no right to take GURR's land. Period. That's just a repeat of the Railroad's argument on the merits. The Railroad's failure to even try to make an independent showing on balance of hardships is just -- It's just fatal to its motion. If you're seeking an injunction, you have to show all four factors. And the Railroad just skipped this one. All it does is reiterate its arguments on the merits.

I don't want to take an enormous amount of time, Your Honor, to go through what in fact the Town's showing of hardship is here, but I want to go through what, in fact, the Town's showing of hardship is here. But it will suffer enormous harm if the injunction is granted.

First and most obvious is the complete devastation of the forest land, including the harvesting of all of the trees, which, I think Mr. Milanoski said in his affidavit, to be clear would be absolutely complete by the end of this month.

Second, there are, as Mr. Bird's affidavit says, significant potential harms and actual harms to the Town's water supply. Industrial developments on the site are going to endanger the Town's current water supply because it's up land, as Mr. Burt explained, of the Town's existing water supply. And because it's going to completely eliminate future options for the Town's water supply.

In addition, another significant problem is that to

clearcut the forest, they're going to replace it with impervious parking lots and roosts, creates a tremendous risk of flooding. As they say, Mr. Burt, chair of the Water and Sewer Commission said the development is going to result in devastating and long lasting and substantial harm.

The Railroad has offered no counter to this other than saying it doesn't think we'll prevail on the merits. As for the Railroad, to complete the balancing here which is important, the harm will railroad is going to suffer if it ultimately prevails on the merits is simply delayed development plans.

Given what Mr. Milanoski has taken such pains to describe in his affidavit, the inexorable increases in customer demand for these services with the limited amount of land available to do this stuff, these development opportunities aren't going away. If there's delay while the railroads challenge to the taking plays out, they'll still be there. It's only delayed opportunity. This is not lost opportunity because the Town isn't going to touch the site.

So the balance of hardships, complete destruction of the forest land, risk to the water supply, flooding on the Town side versus development delay on the Railroad's part tips enormously heavily in favor of denying the injunction here. Again, the best way to preserve the status quo is to deny the injunction.

I want to finish, Your Honor, on the injunction thing usually is where people start which is the likelihood of success on the merits because we've got a lot to say about that.

Railroad advances a single argument both with respect to both motions of the enjoin the taking and the motion to enjoin the Con-Comm order. It's all ICCTA preemption. To be very clear, ICCTA does not preempt the taking of property owned by a railroad. It only preempts the taking of property if it burdens, if the taking burdens the physical movement of passage or property in this taking.

As Mr. Keavany acknowledges, the argument they make in their brief that the threatened eminent domain taking will completely displace the Railroad from the entirety of the parcel for the purpose of stopping the Railroad from utilizing the property for rail transportation purposes. That's not really accurate. The special town meeting did not authorize the taking for the purpose of stopping the Railroad from utilizing the property for rail transportation purposes.

Special town meetings specifically excluded any property currently in use by the Railroad for railroad operations or transloading. So this is not a case about taking land the Railroad is currently using. It's a case about taking forest land the Railroad purports to own subject to what's happening in state court, but his, you know,

destroy, on which the Railroad claims to have what Mr. Milanoski's affidavit and they were up on the screen for Your Honor's view, preliminary plans, preliminary plans to build a massive transloading and logistics center.

So again the case is about Hopedale's interference with an allegedly planned rail activity, not actual rail activity. So what do we know about the plans today? Well, Mr. Keavany had the plans put up on the screen. I'm not sure we need to put them up again. They're attached to the plans, the third page following the signature page on the verified complaint. There's also a copy of the plan, Your Honor, attached to Mr. Reardon's affidavit that we filed before yesterday. All the same.

Where did the plan come from? First of all, what did it show? It is a massive transloading logistics center. 20 buildings spur lines, occupies pretty much every square inch of the property. Where did the plan come from? Well, it doesn't -- the plan doesn't reflect the name or stamp of any engineer. It does have a label on it from an entity called the D&L Design Group.

The website address shown on the plan, D&Ldesigngroup.com, and, Your Honor, you almost have to get out a magnifying glass to see all this because the plan is shrunk in size to fit 8 1/2 X 11. The web address on the plan, D&Ldesigngroup.com, doesn't exist. It's a fake web

address.

The phone number shown on the plan for D&L Design Group shown on the plan, that doesn't exist either. Your number could dial it. The number is not in service. So we've got a preliminary plan, as the Railroad acknowledges, from a design firm with a fake website address and a fake phone.

Now, the Railroad says in its pleadings, oh, don't worry, D&L is a legitimate engineering firm that was founded in May of 2022. That's pretty weird too, because the plan says it was initially created a year before that in May of 2021. So who drew up this plan? We don't really know. Now, the timing of the plan is as questionable as its problems.

If Your Honor will note in the lower right-hand corner of the plan, it says revision date July 8, 2022, July 8, 2022. The revised preliminary plan as of July 8, 2022, shows this massive expansion of the plan from a year earlier on which now Railroad now bases its claim, its whole claim is based on this plan on which the railroad bases its claim that a taking of the entire property is the preempted by ICCTA. This plan, Your Honor, was, in fact, sketched out two and a half weeks after, two and a half weeks after the Hopedale select board met and scheduled this special town meeting to authorize the taking.

Your Honor, if there's any doubt about what the

Railroad is up to here, please review the Railroad's plan submitted to Mass. DOT for funding and signed by Mr. Milanoski on June 16, 2021. Those plans submitted to Mass. DOT are attached to the Burt affidavit, Exhibit 5. That plan, which the railroad has now abandoned apparently, that plan showed two warehouses on either side of the railroad right of way alongside four parallel tracts running within feet of each other. This is pages 54, 55, and 56 of the Burt affidavit.

But then a year later, once the select board announced its intentions to seek authorization for a taking, the plan went from two warehouses along side a right of way with four parallel tracts close together to 20 buildings, multiple spur lines covering the entire property. The timing is really suspicious. The July 8 iteration of the Railroad's plans appear to be simply designed to block the Town's previously published plan to take the property.

Finally, the unlikelihood of success on the merits, Your Honor, and again it's the Railroad's burden here. What about the substance of the plan? Well, Mr. Milanoski acknowledges in his affidavit there are topography challenges with the site. This is a vast understatement according to an engineer who came by the Town, Mr. Reardon, whose affidavit you have in front of you.

Now, again, he has not been given access to the

site. You can't build a rail facility on a plot of land with a land with an average 13 percent grade where a railroad's maximum grade tolerance is 3 percent. And frankly where the grade tolerance and unloading or transloading dock is 0 percent. It's unrealistic and impractical.

But there's another honestly even more glaring error in the plan. It purports to be a transloading facility. A massive logistics transloading facility. But the multiple parking lots adjacent to all the warehouses on the preliminary plan, Your Honor, they're only 70 feet wide. The average tractor trailer is 70 to 73 feet long. You couldn't even fit -- you couldn't fit a tractor trailer in any of the parking spaces shown on the plan, much less maneuver it in and out. You need at least 100 to 120 feet to do that. The plan just doesn't work.

So we've got a preliminary plan drawn up by an engineer who wouldn't put his name on it, who has a fake website and phone number created only after the Town began its eminent domain process, with glaring designer errors. It's a transloading facility that can't fit a tractor trailer.

So what does the Railroad say? Well, we got hint of this when the Railroad opposed our motion to file the affidavit of Mr. Reardon. The Railroad now fully acknowledges that these preliminary plans might not reflect

what actually gets built on the site. In the Railroad's opposition to Hopedale's motion to file the affidavit, the Railroad now argues seemingly that the burden is on the Town to show that none of the project could be built.

The Railroad criticizes Mr. Reardon because, and I'm quoting here, because it's a remarkable opposition because he doesn't say the Railroad will be unable to construct any of its plan or be unable to use any portion of the property for Railroad purposes. The Railroad then continues in that opposition to say the taking is completely preempted even if the current vision for the site is not completely realized.

This cannot be the test for ICCTA preemption, that the taking of an entire forest land is preempted even if the railroad can only use at the end of the day some small portion of it. So in the end, Your Honor, when you put the railroad tracks to the side, tracks the town is not taking, these so-called preliminary plans are too uncertain, too unbuildable, too speculative. There is simply no likelihood of success on the merits there.

The *Gerard* case is right on point on this issue, Your Honor. A decision decided by the Ohio Supreme Court in 2012. It's a case that deals with a railroad's, as the Court describes it, desire to use the yard in the future for expansion and development in order to accommodate the growing

railway business in the area.

The Court said with respect to these future plans, a general desire for future development isn't enough to establish the property will be used for rail transportation.

The key question the Court said with respect to future plans is is it likely the plans will come to fruition. Well, the plan we've got is not likely to come to fruition. And the Railroad suggests as much in its opposition to the motion to file Mr. Reardon's affidavit. The Railroad cannot meet its burden to show the plans will come to fruition. It's got a massive plan with 20 buildings and spur lines over every square inch of the property sketched out after the Town has announced its intent to perform the taking it. Then it did this feverish tree harvesting effort to make the plans look real. But the steep grade makes it impractical. And really for a transloading facility it doesn't have enough room to accommodate a truck.

So, Your Honor, at the end of the day we are going to establish that these plans are the engineering equivalent of scribbles on a napkin. They're not going to be realized. So on the injunction, Your Honor, the Railroad can't show irreparable harm. It hasn't even tried to show that the balance of hardships tips in its favor, and it can't show a likelihood of success on the merits. The motion should be denied.

One further issue I get to, and I raise it reluctantly, is if the Court did decide to grant the injunction, and we urge the Court not to, the Railroad is obliged to post security under Rule 65C, post security, post a bond in an amount sufficient to compensate the Town if the injunction were wrongfully granted.

Now, in this case that would be an amount sufficient -- it would be an amount to fund a massive reclamation project, an amount sufficient to restore the property to the condition it's in today. As the Court's aware, the Railroad has cut down all the trees. It's announced these plans to immediately, if it hasn't already started, grade property, put up retaining walls, lay down track, put up 20 buildings, pave pretty much the whole surface, and it's working feverishly to do this.

It is impossible for us now to estimate the cost to the Town of restoring the land to the condition it's in today. As they say it's a massive reclamation project. It would involve removing buildings, tracks, parking lots, roads, retaining walls, regrading the property, replanting trees.

And we have no access to the site. We only have this very superficial plan. Our engineers have looked at it. They ballpark an estimate of funding this reclamation project at approximately 17 and a half million dollars. We can be

more precise about it once the discovery process enables our access to the site and have any more detailed plans that we could get from the railroad. But if the Court does grant the injunction, and we urge it not to, the Railroad can't meet the requirements. But if it does, the Railroad needs to post security now, and we suggest a bond in the amount of $17.5 million dollars.

So thank you very much, Your Honor, for your time.

THE COURT: All right. Plaintiffs want to be heard again or no? You're muted, Mr. Keavany.

MR. KEAVANY: Thank you, Your Honor. I apologize. The plaintiffs want to make this about everything other than preemption. All this -- and that's why we objected to the affidavit coming at the last minute. It's unfair for us to be able to respond to. We did the best we could in the short amount of time we had. The larger point is -- and as for the gratuitous attacks on the engineer. We provided the website. He used to work for another local company in town. He's legitimate. If the Court is interested, we'll certainly provide that CV.

But they want to make it about everything other than whether the taking is preempted, and that's what the issue is about, Your Honor. So whether there's one building, ten buildings or twenty buildings, the wholesale taking of 130 acres is preempted. And that is what the issue is. They

want us to have to go file a lawsuit in state court. The federal law -- that violates the supremacy clause. It violates ICCTA. What they're asking is -- they're asking everything to be flipped on its head and requiring us to take actions after they take the property. And they just dismiss as insignificant the fact that they're taking our property and we'll be disowned from that property.

We have no access from West Street to the rail line if that taking is allowed. Again, we are not asserting a claim, we're not asserting a cause of action under ICCTA. We're saying that the Town state action is preempted by the ICCTA. This is not the Town of Grafton. This is not Fared. This is the railroad filing suit to enjoin an unlawful state action against a federally regulated railroad. And that's a as simple and direct as I can be on this, Your Honor.

They want to make it about everything other than that. Again if you look at the breadth of the ICCTA, the breadth of the definition of transportation in railroad, what they're seeking in the cases we've cited including the *Norfolk Southern Railroad Company*, STB decision from 2010, Condemnation can be a form of regulation, and using state eminent domain law to condemn railroad property or facilities for another use that would conflict with the rail use is exercising control, the most extreme type of control over rail transportation as it is defined in 49 U.S.C. 101.02.

That's what they're doing. The *Norfolk* case further states, as the Court stated in the City of Lincoln, 414 F.3d at 862 with similar facts to this case, Condemnation is a permanent action and it can never be stated with certainty at what time any particular right of way may become necessary for railroad uses. And then they have a footnote. Thus the board's practice is to consider both current and future transportation plans in determining whether a railroad has proposed a bona fide rail operation.

Your Honor, again, whether we build five buildings or ten buildings, if this was a taking of 20 acres, 30 acres, 50 acres, maybe we're having a discussion as to whether or not it's going to unreasonably interfere with rail transportation, Your Honor. But the town didn't do that. The Town wanted it all or nothing. They wanted 130 acres. And as I showed you in that plan, that is everything other than the actual rail line, Your Honor.

They're trying to trying to make it about everything other than the preemptive effect, the incredibly strong preemptive effect of the ICCTA, Your Honor. And their efforts should be not tolerated. It's a relatively straightforward question here, and that is have we met our burden to establishing that we have a likelihood of success that this particular state court action -- I'm sorry -- state action by the Town of Hopedale to take our property by

eminent domain is preempted by the ICA as amended by the ICCTA, Your Honor. And I, frankly, do not think it's a close call. It is an overwhelming overreach. And it will be ultimately deemed to be preempted it.

And if this Court, follow to my brother a little bit, if this Court is inclined to deny the motion, I respectfully request that you give us an opportunity, we'll be filing a Rule 8, Appellate Rule 8 motion for injunction pending appeal. We're going to either, one, refer it to the First Circuit; or, two, continue the stay while we pursue an appeal; or three, enter an injunction and send it to the STB because we think this is as close to charcoal gray, a black and white, as it can be with respect to an eminent domain taking as it relates to in the context of the ICCTA, Your Honor.

So again, respectfully request we have met our burden that the Court should enter an injunction. Again if it's inclined not to, give us an opportunity to file a motion for injunction pending appeal with the First Circuit.

One last thing, Your Honor, it's 17.5 million they want to post the bond. They just have told the property that the property is worth 3.9 million. That's what the Town has appropriated to take. Now it's five times that to put it back in its former state. That doesn't seem to make sense.

MR. MACKEY: Your Honor, if I may. I'll be very

brief.

THE COURT: Yes.

MR. MACKEY: Mr. Keavany says it's all about preemption, it's all about preemption. To get an injunction, they have to satisfy all of these standards including irreparable harm and balance of the hardships tipping in their favor, and whatever Your Honor thinks about these preliminary plans and the likelihood of success, the Railroad has utterly failed to meet its burden on irreparable harm, meet its burden on balance of hardships.

THE COURT: All right. What are we going to do while I take the time to decide this?

MR. KEAVANY: According to the order that we agreed and submitted to you, the injunction stays in place until you issue a decision.

THE COURT: Do you agree with that, Mr. Mackey?

MR. MACKEY: Well, Your Honor, with respect that the answer to that is it sort of depends. I do absolutely respect the number of issues Your Honor has to deal with here, and we do not want to rush the Court in terms of its ability to make a decision.

THE COURT: No. No one ever wants to do that.

MR. MACKEY: So yes, it goes without saying. So if Your Honor is inclined to take some time, you know, weeks or longer, we would request the Court at least preserve the

status quo by preventing the Railroad from doing additional work on the property.

If you read Mr. Milanoski's affidavit, literally they are grading the property, putting up retaining walls. So every day that goes by makes the harm to the Town greater. If Your Honor needs to take more time, which we fully respect and appreciate, we would request a measure to keep the status quo in place until the Court issues its decision.

THE COURT: That's what I would like to do. Mr. Keavany, I would like y'all to stop working on the property and I would like them not to record their taking. I'd like to maintain the status quo. Can we agree to that, or do you want to submit something that I'll sign? Or do you want me to draft something? How should I effectuate that?

MR. KEAVANY: Ten days ago we submitted a proposed order to you, Your Honor, that said just what I said it said. And that is that the order would stay in effect until the decision was made. I talked to Attorney Mackey about that. We agreed on the content of the language on the amended order. We submitted it jointly. It was approved and signed by you. Now, he wants to change that. I don't think that's fair.

I cannot voluntarily, as I sit here right now, I have no authority to agree to a standstill. Again, and I don't know if you're thinking of sending it to the STB or

you're thinking about issuing a decision yourself and the timing of that. That's my --

THE COURT: If you're not going to agree to stop working on the property, that's going to weigh in favor of me letting them record the deed, record the taking. I want the status quo maintained.

MR. KEAVANY: Your Honor, I would like the opportunity to consult with my client and report back to you this afternoon.

THE COURT: That's fine. That's fine.

MR. MACKEY: Your Honor, just for the record from the Town's perspective, we're absolutely agreeable to Your Honor taking the time the Court needs to issue a decision here, and we will not record the order of taking during that period of time. Again --

THE COURT: You keep saying that, Mr. Mackey. It makes me wonder about your sincerity on that topic. We'll do the best we can. I have three TRO hearings this week including one this afternoon. And nobody wants to wait. So I don't know. We'll get to it as quickly as we can. In the meantime, I want the status quo maintained.

I know Mr. Keavany's position is that I don't have anything in front of me that let's me make that happen. And I guess, Mr. Keavany, that Mr. Mackey could file a motion to make that happen and then you'd have to brief it and then

we'd be here all over again when you already know what the outcome is going to be.

MR. KEAVANY: I don't think I said -- I never question a Judge's authority to do what he or she wants. I wasn't questioning your authority to do what you want to do. My comments were directed at -- notice of this issue was placed on the defendant's defendants in front of Judge Saylor, and there's been nothing in front of you. That was my point. I wasn't saying in a you couldn't do what you wanted to do. But if I can just again report back this afternoon, I would appreciate it.

THE COURT: No one ever said that. They just think it. Yes, so why don't you all put your heads together and come up with something that helps me do what I want to do. And we'll take it from there. I guess I want to say in the nicest way possible, that one way or another, that's what's going to happen. The development on the land is going to stop, and they're not going to file the -- they're not going to record the taking.

You guys can help me figure out a palatable way to make that happen or you can just leave it to me.

MR. KEAVANY: Okay.

MR. MACKEY: Thank you, Your Honor.

THE COURT: All right. So I'm not going to do anything until I hear back from you.

MR. KEAVANY: Thank you.

MR. MACKEY: I understand, Your Honor.

THE COURT: Anything else today?

MR. MACKEY: No.

THE COURT: All right. Thanks everyone. The case is recessed.

(Court recessed at 1:32 p.m.)

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CERTIFICATION

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter to the best of my skill and ability.

/s/ Joan M. Daly **July 7, 2023**

Joan M. Daly, RMR, CRR
Official Court Reporter

Date

Exhibit B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

BUSINESS LITIGATION SESSION
DOCKET NO.

MICHAEL R. MILANOSKI
Plaintiff,

JOHN P. DEWAELE, III
Plaintiff,

vs.

JON DELLI PRISCOLI
Defendant.

VERIFIED COMPLAINT

SUMMARY OF CASE

Michael R. Milanoski (hereinafter, "Mr. Milanoski") and John P. DeWaele III (hereinafter, "Mr. DeWaele"), by and through their undersigned counsel, bring suit against Jon Delli Priscoli (hereinafter, "Mr. Delli Priscoli") to enforce a binding letter of intent by requiring specific performance, to seek all costs and fees associated with this action because of Mr. Delli Priscoli's bad faith dealings and breach of the binding letter of intent and to prevent Mr. Delli Priscoli from continuing to breach the binding letter of intent by offering the subject assets to unrelated third-parties through the Court's issuance of injunctive relief.

PARTIES

1. Mr. Milanoski, Plaintiff, is a Massachusetts resident with an address of 171 South Main Street, Cohasset, Massachusetts 02025. Mr. Milanoski is currently the President of the Grafton & Upton Railroad Company (hereinafter, "Grafton & Upton" or the "Company").

2. Mr. DeWaele, Plaintiff, is a Massachusetts resident with an address of 8 Crestwood Drive, Blackstone, Massachusetts 01504. Mr. DeWaele is currently employed as General Manager and Vice President of Railroad Operations at Grafton & Upton.

3. Defendant, Mr. Delli Priscoli, is a New Hampshire resident with a residential address of 69 South Main St. Wolfeboro, NH 03894. Mr. Delli Priscoli is the Treasurer and Secretary of Grafton & Upton and the sole member of the Company's Board of Directors. Mr. Delli Priscoli is also the holder of all of the outstanding and issued shares of Grafton & Upton.

FACTS

Parties and Background

4. Mr. Milanoski has been employed with First Colony Development Group, LLC since May 19, 2017, serving in various capacities, including as President of all companies owned in whole or part by Mr. Delli Priscoli. Mr. Milanoski has been the President of Grafton & Upton since May 19, 2017.

5. Mr. DeWaele has been employed with Grafton & Upton since February 22, 2018. Mr. DeWaele was initially hired as General Manager. Mr. DeWaele was promoted to Vice President of Railroad Operations and General Manager at Grafton & Upton on January 3, 2020.

6. Mr. Delli Priscoli has been the sole owner of Grafton & Upton since 2009.

7. Mr. Delli Priscoli is also the majority owner of Quonset Transportation and Logistics LLC (hereinafter, "Quonset Transportation"), a Massachusetts based limited liability company with a principal place of business at the McCormack Firm, LLC, One International Place, 7th Floor, Boston, Massachusetts 02110.

8. Mr. Delli Priscoli is also a part owner of the outstanding and issued shares of Seaview Transportation Company, Inc. (hereinafter, "Seaview Transportation"), a Rhode Island based corporation with a principal place of business at 25 Compass Circle, North Kingstown, Rhode Island 02852.

9. Mr. Delli Priscoli holds a sixty-six and 66/100 (66.66%) percent ownership interest in One Hundred Forty Realty Trust u/d/t dated September 16, 1981 and recorded with the Worcester County District Registry of Deeds at Book 7322 and Page 177 (hereinafter, the "One Hundred Forty Realty Trust").

10. Mr. Delli Priscoli also holds all of the outstanding membership interests of 1 Fitzgerald Drive, LLC, a Massachusetts limited liability company with a principal place of business of 7 Eda Avenue, P.O. Box 952, Carver, Massachusetts 02330 (hereinafter, "1 Fitzgerald Drive") that owns certain real estate assets located in Hopedale, Massachusetts.

11. Mr. Milanoski and Mr. DeWaele have been running Grafton & Upton since 2017 and 2018, respectively. Prior to an including 2018, Grafton & Upton consistently struggled to operate as a profitable entity.

12. Since Mr. Milanoski and Mr. DeWaele joined Grafton & Upton, the company has become successful. Under their leadership, Grafton & Upton has increased its operational footprint, expanded the service mix offered to customers, obtained both financial success and stability and operated in a safe an efficient manner.

13. During the course of their employment, Mr. Delli Priscoli made various promises to Mr. Milanoski and Mr. DeWaele. Mr. Delli Priscoli often declared Mr. Milanoski and Mr. DeWaele would succeed him at the helm of Grafton & Upton and his other enterprises for

their unwavering commitment and success.

14. Mr. Delli Priscoli went as far as outlining his succession plan to the families of Mr. Milanoski and Mr. DeWaele as well as his financial institution that has Grafton & Upton's current debt.

15. Given Mr. Delli Priscoli's representations and promises in an effort to maintain their employment, Mr. Milanoski and Mr. DeWaele have forgone various other potential business opportunities and continued to focus on Grafton & Upton and Mr. Delli Priscoli's other business ventures.

Letter of Intent Between Parties

16. Starting in November of 2022, Mr. Milanoski and Mr. DeWaele learned of Mr. Delli Priscoli's decision to sell his interest in Grafton & Upton and several other tangentially related assets to another railroad despite his aforementioned succession plan.

17. Mr. Milanoski and Mr. DeWaele understood Mr. Delli Priscoli's inclination to sell some illiquid assets stemmed from his precarious financial situation and lack of liquidity and cashflow, leading Mr. Delli Priscoli to have concerns about potential foreclosures on his businesses.

18. While Mr. Milanoski and Mr. DeWaele continued to operate Grafton & Upton, as Mr. Delli Priscoli has largely stepped away from the day-to-day operations of Grafton & Upton with the exception of direction railroad preemption activities, directing tree clearing activities in the Town of Hopedale, and signing all Grafton & Upton checks, the parties continued the preliminary discussions about the aforementioned sale of assets for an employee/management buyout of Mr. Delli Priscoli's interest.

19. These preliminary discussions ultimately resulted in the parties executing a Letter of Intent on November 23, 2022, attached hereto as Exhibit A, an Amendment to the Letter of Intent on November 28, 2022, attached hereto as Exhibit B, and a Restated Letter of Intent on December 1, 2022 (hereinafter, the "Restated LOI"), attached hereto as Exhibit C.

20. According to the terms of the Restated LOI, the Restated LOI replaced "all previous agreements (verbal or written) including but not limited to original LOI dated November 23, 2022 and Amendment #1 to LOI dated November 28, 2022[.]"

21. On November 28, 2022, in an email communication with a third party, Mr. Delli Priscoli documented his desire to structure a transaction that placed Mr. Milanoski and Mr. DeWaele in control of Grafton & Upton.

22. In the Restated LOI, Mr. Delli Priscoli agreed to sell: (1) Grafton & Upton and all related assets and easements; (2) Quonset Transportation; (3) his ownership stake in Seaview Transportation; (4) his ownership stake in One Hundred Forty Realty Trust; (5) 1 Fitzgerald Drive LLC; and (6) equipment from Fast Forward Auto Sales (hereinafter, the "Assets").

23. Mr. Milanoski and Mr. DeWaele agreed to provide Mr. Delli Priscoli with $36,000,000 and assume debt of approximately $8,000,000 for a total purchase price of roughly $44,000,000 (hereinafter, the "Purchase Price").

24. The Restated LOI also included several other relevant provisions:

(a) Section 9 – The parties acknowledged that the Restated LOI was binding.

(b) Section 20 – The parties agreed to keep the terms and existence of the LOI confidential.

(c) Section 21 – The parties agreed to "act honestly and diligently to enter into 'good faith' negotiations to execute a [purchase and sale agreement], consistent with the terms of

this LOI."

(d) Section 22 – Mr. Delli Priscoli agreed to grant Mr. Milanoski and Mr. DeWaele the "exclusive opportunity" to purchase the Assets for forty-five (45) days after the execution of the Restated LOI. This provision also prevented Mr. Delli Priscoli and his affiliates and respective officers, directors, employees and agents from engaging in any discussions with any third parties about the sale of the Assets. Specifically, "[f]ollowing the execution of this LOI, [Mr. Delli Priscoli] agree[s] to not negotiate or enter into discussion[s] with any other party."

(e) Section 23 – Mr. Delli Priscoli agreed not to sell or transfer any portion of the Assets.

Mr. Delli Priscoli's Campaign of Obfuscation and Underhandedness

25. Since the week after the execution of the Restated LOI, Mr. Delli Priscoli has shown a blatant disregard for the agreed upon contractual terms.

26. Starting on or about December 7, 2022, Mr. Delli Priscoli began his attempts to renegotiate the Restated LOI.

27. In or about this timeframe, Mr. Delli Priscoli suggested to Mr. Milanoski that Mr. Milanoski and Mr. DeWaele were replaceable.

28. Starting on or about December 9, 2022, Mr. Delli Priscoli began stating there was a need to offer a "new deal" to a third party.

29. From this point onwards, Mr. Delli Priscoli's sole focus was to work with a third party to complete a transaction different than the transaction set forth in the Restated LOI.

30. Specifically, Mr. Delli Priscoli unearthed a letter of intent from 2009, Letter of Intent (dated January 23, 2009) attached hereto as Exhibit D.

31. Despite the grandstanding from Mr. Delli Priscoli and his affiliates, Mr. Delli Priscoli knew the letter of intent was terminated by Grafton & Upton on October 25, 2010, which at the time of the termination, was wholly owned and managed by Mr. Delli Priscoli, Notice of Termination (dated October 25, 2010) attached hereto as Exhibit E.

32. Mr. Delli Priscoli attempted to use the smokescreen created by the terminated letter of intent to renege on his obligations under the Restated LOI, in part, by creating roadblocks and preventing Mr. Milanoski and Mr. DeWaele from communicating with potential investors.

33. Mr. Delli Priscoli began using this expired document to renegotiate the terms of the Restated LOI with Mr. Milanoski and Mr. DeWaele, attempting to force Mr. Milanoski and Mr. DeWaele to pay more money for less assets and threatening Mr. Milanoski and Mr. DeWaele with the risk of total loss unless they engaged in said renegotiations.

34. In direct conflict with Section 20, Section 22 and Section 23 of the Restated LOI, Mr. Delli Priscoli also began negotiating a sale of Grafton & Upton with unrelated third-parties for more money and less assets than the Restated LOI.

35. On or about December 9, 2022, in violation of the Restated LOI, Mr. Delli Priscoli reached out to an unaffiliated third-party to discuss the sale of the Assets discussed in the Restated LOI.

36. Around this same time, Mr. Delli Priscoli began attempting to revise material terms of the Restated LOI in negotiations with Mr. Milanoski and Mr. DeWaele, such as changing the composition of the Assets and increasing their cash payment.

37. On or about December 19, 2022 while meeting with Mr. Milanoski and Mr. DeWaele, Mr.

Delli Priscoli proclaimed that the third party named in the stale letter of intent could not have Mr. Milanoski and Mr. DeWaele's deal, leading Mr. Milanoski and Mr. DeWaele to have significant reservations about Mr. Delli Priscoli's handling of the deal.

38. Upon information and belief, Mr. Delli Priscoli has discussed the sale of Grafton & Upton with several additional third parties from December 9, 2022 to the present, in violation of the confidentiality clause of the Restated LOI.

39. On January 3, 2023, and without any legal basis, Mr. Delli Priscoli's attorney sent an email purporting to terminate the Restated LOI.

Present Situation and Necessary Remedial Actions

40. From the execution of the Restated LOI on December 1, 2022 to the present, Mr. Milanoski and Mr. DeWaele have acted in "good faith" to satisfy their obligations under the Restated LOI. Mr. Milanoski and Mr. DeWaele continue to operate the company as they have in good faith since hired and through this transition.

41. Mr. Milanoski and Mr. DeWaele have engaged counsel, discussed financing with various entities and individuals and completed preliminary due diligence on the Assets, including receiving a loan commitment for proposed financing of roughly twenty million ($20,000,000) dollars.

42. Mr. Milanoski's and Mr. DeWaele's efforts and reputations have been torpedoed by Mr. Delli Priscoli's subterfuge.

43. From on or about December 7, 2022 to the present, Mr. Delli Priscoli has refused to engage in "good faith" negotiations to execute a purchase and sale agreement in accordance the Restated LOI's terms.

44. Mr. Delli Priscoli has refused to meaningfully engage in any discussions related to the consummation of the Restated LOI and the creation of a corresponding purchase and sale agreement.

45. From on or about December 9, 2022 to the present, Mr. Delli Priscoli has continued to negotiate with various third-parties about the sale of the Assets for an amount significantly greater than the Purchase Price in direct violation of several provisions of the Restated LOI, undermining Mr. Milanoski and Mr. DeWaele's efforts to secure financing.

46. Without the relief requested herein, Mr. Milanoski and Mr. DeWaele will suffer irreparable harm.

47. The parties recognized that any remedies at law would be inadequate relief for a breach of the Restated LOI. Section IX of the Restated LOI states that "the parties acknowledge that the remedies at law will be inadequate for any breach of the LOI and consequently agree that this LOI shall be enforceable by specific performance."

48. Mr. Milanoski and Mr. DeWaele have already expended significant amounts of time and resources to satisfy their obligations under the Restated LOI.

49. Mr. Delli Priscoli's obfuscation and underhandedness beginning on or about December 7, 2022 have resulted in significant damages to both Mr. Milanoski and Mr. DeWaele.

50. Many provisions of the Restated LOI are set to elapse on or about January 17, 2023 – forty-five (45) days after the execution of the Restated LOI.

51. Prompt remedial action provided in the form of specific performance of Mr. Delli Priscoli's obligations under the Restated LOI and injunctive relief to prevent Mr. Delli Priscoli from shopping the Assets to any unaffiliated third parties is warranted.

COUNT I - BREACH OF WRITTEN CONTRACT

52. Plaintiffs reassert and reallege the allegations set forth above as if each were separately stated herein.

53. The parties entered into a binding, express written agreement.

54. Plaintiffs have not violated any terms of the binding, express written agreement.

55. Defendant has materially breached the terms of the binding, express written agreement.

56. Plaintiffs have suffered and will continue to suffer irreparable harm as a result of Defendant's breaches.

WHEREFORE THE PLAINTIFFS DEMAND THAT THIS COURT:

a) Enter a preliminary injunction, in form substantially similar to the proposed order submitted herewith, prohibiting Defendant from engaging in the conduct complained of herein.

b) After hearing, enter a permanent injunction, in the form substantially similar to the proposed order submitted herewith, prohibiting Defendant from engaging in the conduct complained of herein.

c) After hearing, award Plaintiffs damages for the injuries suffered as a result of the Defendant's unlawful conduct.

d) Ordering Defendant to specifically perform his obligations under the Restated LOI and consummate the closing in accordance with the terms of the Restated LOI.

e) Ordering an extension of all deadlines established by the Restated LOI.

f) Ordering Defendant to continue to employ Plaintiffs in their current positions to

maintain and preserve the valuation of the Grafton & Upton.

g) Such other relief as the Court deems just and reasonable.

Respectfully submitted,
Michael R. Milanoski and John P. DeWaele, III
By their attorneys,

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