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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT DEPARTMENT OF
THE TRIAL COURT

MICHAEL R. MILANOSKI,
Plaintiff,

JOHN P. DEWAELE, III
Plaintiff,

vs.

JON DELLI PRISCOLI,
Defendant.

C.A. No. 2384CV00071-BLS2

**MEMORANDUM IN SUPPORT OF DEFENDANT’S
MOTION TO MODIFY PRELIMINARY INJUNCTION
AND REQUIRE PLAINTIFFS TO POST ADEQUATE SECURITY**

Defendant Jon Delli Priscoli submits this memorandum in support of his Motion to modify the preliminary injunction entered by the Court on February 2, 2023¹. As set forth in the accompanying Affidavit, upon assuming control of the Grafton & Upton Railroad (the “Railroad”), Mr. Delli Priscoli discovered numerous capital projects in addition to various related business transactions that cannot be accomplished absent modification of the injunction so that it only restricts Mr. Delli Priscoli’s sale or transfer of stock in the Railroad. The failure to grant such relief will jeopardize the continued viability of the Railroad.

Defendant Delli Priscoli further requests that a bond be set to safeguard him and the Railroad from damages that may be sustained as a result of the injunction should Plaintiffs Milanoski and DeWaele not prevail on their claim of Railroad ownership.

¹ Defendant Jon Delli Priscoli has also submitted an affidavit in support of the motion.

SUMMARY OF FACTS

The facts underlying this dispute are detailed in Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction and incorporated by reference herein. (Dkt. #7.) In summary, the parties to this action executed a Letter of Intent in late 2022 to sell Mr. Delli Priscoli's ownership interest in the Railroad and related assets to Plaintiffs. Specific conditions of the Letter of Intent were that the ownership interest was to be sold "free and clear of all liens with clear title," aside from certain specified debt, and that bank financing could be obtained. During the due diligence review period, Mr. Delli Priscoli learned that this condition could not be satisfied because Dana Transport was granted a Right of First Refusal to purchase the Railroad which it sought to exercise.

On February 2, 2023, following a hearing and with agreement of the parties, the Court entered the following preliminary injunction:

Jon Delli Priscoli and his agents, employees, attorneys, and other representatives shall not sell, transfer, or encumber – and shall not initiate, encourage, or accept any offer or proposal by any person other than Michael Milanoski or John DeWaele, III, to sell, transfer, or encumber – any interest or portion of any interest that Mr. Delli Priscoli or any entity owned or controlled by Mr. Delli Priscoli (including but not limited to Grafton & Upton Railroad Company) owns or holds in any of the following entities or other assets:

- Grafton and Upton Railroad Company;
- All railroad assets – including but not limited to real estate, equipment, and other infrastructure – located within the towns of Grafton, Upton, Hopedale, or Milford, Massachusetts;
- the CSX Freight Easement from Milford to Franklin, Massachusetts;
- Seaview Transportation and Logistics LLC;
- Quonset Transportation and Logistics LLC;

- One Hundred Forty Realty Trust;
- 1 Fitzgerald Drive LLC; and
- equipment from Fast Forward Auto Sales.

This order is entered without prejudice to any party seeking to modify or terminate this preliminary injunction based on a material change in circumstances.

(Dkt. #8.)

ARGUMENT

I. The Preliminary Injunction Should Be Modified Because Of A Material Change In Circumstances

The Court entered the preliminary injunction “without prejudice to any party seeking to modify or terminate” it based on a “material change in circumstances.” (Dkt. #8); *see also* Mass. R. Civ. P. 60 (Court may modify an order if “it is no longer equitable that the judgment should have prospective application”); *Concilio de Salud Integral de Loiza, Inc. v. Perez-Perdomo*, 551 F.3d 10, 16 (1st Cir. 2008) (“A change in operative fact may serve as a basis for vacating a preliminary injunction.”).

As demonstrated in the affidavit of Mr. Delli Priscoli submitted in support of the Motion, there has been a material change in circumstances since the preliminary injunction entered. (*See* Affidavit of Jon Delli Priscoli (“Delli Priscoli Aff.”).) As such, there is good cause to modify the preliminary injunction.

On or about January 20, 2023, Mr. Delli Priscoli suspended Mr. Milanoski from his role as President of the Railroad and thereafter on February 8, 2023, Mr. Delli Priscoli assumed the role of Chief Executive Officer of the Railroad and terminated the employment of Mr. Milanoski. (Delli Priscoli Aff., ¶ 2.) Upon re-assuming managerial control and oversight of the Railroad, Mr.

Delli Priscoli became aware of the necessity for numerous capital projects and ordinary business transactions that cannot be completed under the current terms of the preliminary injunction.

Among other things, Mr. Delli Priscoli has received a report from RJ Corman Railroad Services of Nicholasville, Kentucky that indicates that it is imperative for safety and increased commercial operations that the Railroad's main line rails and ties be upgraded from Light Rail ASCE 85 lb. per yard to Heavy Rail 115 lb. per yard. (Delli Priscoli Aff., ¶ 10.) Financing must be arranged by the Railroad to finance this essential project, which is estimated to cost in excess of \$10 million. (*Id.*) The current injunction bars the acquisition of financing for this needed project. Due to the prolonged lead time such projects require, it is imperative that Mr. Delli Priscoli be allowed to take such financial actions as may be required now for the railroad to finance this project.

Mr. Delli Priscoli also determined that the Railroad's transfer facility in Hopedale, MA must have track added, and an additional storage facility installed. (Delli Priscoli Aff., ¶ 11.) The likely costs of these upgrades, approximately \$7 million, must be financed. (*Id.*) Additionally, the Milford yard needs to have additional tracks installed to properly service the transloading needs of the existing and potential customers. (*Id.*)

In addition, two train engines need to be replaced; the lease for one is expiring and the other is failing. (Delli Priscoli Aff., ¶ 12.) There are various other pieces of equipment that need repair. (*Id.*) The current injunction bars financing for these expenditures. (*Id.*) Other equipment nearing the end of their useful life needs to be replaced and/or are no longer of importance to the operation; the Railroad needs to be able to make reasonable business decisions and be free to decide when to sell and when to buy. (Delli Priscoli Aff., ¶ 13.) Replacement of this equipment cannot await the completion of this litigation.

Currently a glass recycler which leases a building at the Railroad's Fitzgerald Drive, Hopedale location would like to purchase the building. (Delli Priscoli Aff., ¶ 14.) The cost of the building may be approximately \$10 million which would help pay for the needed track repairs. (*Id.*) The sale of the building is currently blocked by the preliminary injunction. (*Id.*)

Mr. Delli Priscoli wants the Railroad to reopen settlement negotiations with the Town of Hopedale and other interested parties to explore resolution of all pending disputes concerning the Railroad's property on West Street in Hopedale, MA, which ultimately may require a transfer of some land as part of a settlement. (Delli Priscoli Aff., ¶ 8.) The current injunction does not allow any settlement negotiations much less allow the transfer of some property in the West Street location to resolve the various suits in which the Railroad is involved. (*Id.*) Mr. Delli Priscoli should be able to direct Grafton & Upton to immediately engage in settlement negotiations, stop the hemorrhage of legal fees and related costs, and not have to continue West Street litigation while the instant suit is litigated.

Mr. Delli Priscoli is hamstrung in managing the railroad given the broad scope of the preliminary injunction: the injunction's sweeping scope bars Mr. Delli Priscoli from selling, transferring, or encumbering "any interest or portion of any interest" owned by him or any entity he owns or controls. (Delli Priscoli Aff., ¶ 3.) This applies not only to the specific railroad assets that were subject to a letter of intent with Plaintiffs Milanoski and De Waele, but to all of his other assets as well. (*Id.*)

The injunction contains no exception for expenditures made in the ordinary course of the Railroad's business. (Delli Priscoli Aff., ¶ 3.) The injunction contains no exception to allow financing for needed capital improvements. (*Id.*) The order against encumbering any ownership interests effectively precludes Grafton & Upton from obtaining bank loans for needed capital

projects. (*Id.*) By its terms the injunction applies to all assets of Mr. Delli Priscoli and is not restricted to assets that are in dispute in this litigation. (*Id.*)

In short, adherence to the terms of the current preliminary injunction will cause Mr. Delli Priscoli, the sole stockholder of Grafton & Upton, to sustain substantial damages and will threaten the Railroad's ability to continue operations. (Delli Priscoli Aff., ¶ 4.) Financing must be secured so that capital improvements in its tracks and terminal facilities can be made, aged equipment can be replaced, and settlement of the ongoing litigation with the town of Hopedale must be explored. (*Id.*) The preliminary injunction should be modified in light of the material change in circumstances to allow Mr. Delli Priscoli to operate Grafton & Upton while this litigation proceeds.

II. Plaintiffs Should Be Required To Post A Bond

Mass. R. Civ. P. 65(c) requires an applicant for a preliminary injunction to post security absent a showing of good cause:

Unless the court, for good cause shown, shall otherwise order, no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Good cause has not and cannot be shown to excuse Plaintiffs from the bond requirement.

The preliminary injunction is impeding Mr. Delli Priscoli from operating the Railroad and his other businesses and risks diminishing the value of those businesses. As Mr. Delli Priscoli explains in his Affidavit, the preliminary injunction prevents Grafton & Upton from taking the economic steps needed to remain viable and to continue to make upgrades to the tracks, related infrastructure, and equipment. (*See supra*; *see also* Delli Priscoli Aff., ¶ 17.)

Mr. Delli Priscoli has also discovered emails which demonstrate that Mr. Milanoski and Mr. DeWaele breached their fiduciary duties by, among other things, misrepresenting the value of the Railroad, thereby rendering the Letter of Intent null and void. Mr. Delli Priscoli has filed affirmative defenses and counterclaims on June 1, 2023 based on these misrepresentations and would have asserted them earlier in opposition to the motion for preliminary injunction had he been aware of them. (*See Answer and Counterclaim, Dkt. #14.*)

Accordingly, Plaintiffs should be required to post a bond of at least \$25 million by no later than one week after the date of the Court's order on Defendant's Motion. *See, e.g., Steward Health Care Sys., LLC v. Aya Healthcare, Inc.*, 2184CV00513BLS2, 2021 WL 2460509, at *1 (Mass. Super. Ct. Mar. 8, 2021) (requiring plaintiff to post \$10 million bond as security for preliminary injunction in a breach of contract action and ordering that the preliminary injunction would lapse if plaintiff failed to post the required bond by the deadline); *Verideim, Inc. v. Phelan*, 17 Mass. L. Rptr. 8, 2003 WL 2241390, at *3 (Mass. Sup. Ct. Sept. 26, 2003) (enjoining defendant employee from breaching his non-compete agreement by working for a competitor of his former employer and requiring employer to post security in the amount of \$100,000).

In their verified Complaint, Mr. Milanoski and Mr. DeWaele claim to have a bank financing commitment of \$20 million. The Letter of Intent states the value of Grafton & Upton at over \$42 million dollars. In his contemporaneous internal documentation, which was deleted but later forensically restored, Milanoski (with DeWaele's knowledge and assent) valued the assets in the range of \$69,020,000- 114,631,050. (Delli Priscoli Aff., ¶ 16.) Given the harm the injunction may cause to Grafton & Upton's ability to remain profitable while addressing its various business needs, an appropriate bond of at least \$25 million must be posted to protect against any losses the injunction may cause.

If the bond is not posted by the deadline, the preliminary injunction should be terminated.

CONCLUSION

For the reasons set forth above, Mr. Delli Priscoli moves this Honorable Court to:

- A. Revise the preliminary injunction so that only Mr. Delli Priscoli's sale or transfer of Grafton & Upton stock is prohibited, and that such Grafton & Upton shares may be encumbered by security interests of financial institutions associated with any capital projects or other business operations of the Grafton & Upton Railroad;
- B. Revise the preliminary injunction to make clear that Mr. Delli Priscoli and the Grafton & Upton Railroad may undertake capital improvement projects, replace equipment, engage in settlement discussions concerning ongoing claims and litigations, and make other business decisions in the regular course of business;
- C. Revise the injunction terms to require Plaintiffs to post a bond of \$25 million or such other sum as this Court may find appropriate, to cover damages that may be sustained by Mr. Delli Priscoli due to the ongoing restrictions on his ability to discuss the sale of this interest, or to sell or transfer his interest, in the Grafton & Upton Railroad or other assets subject to the injunction; and
- D. Obtain such other just and appropriate relief as this Honorable court finds warranted.

Respectfully Submitted,

JON DELLI PRISCOLI

By his attorneys,

/s/ John F. Welsh

Timothy P. Wickstrom, BBO #541953
Wickstrom Morse, LLP
60 Church Street
Whitinsville, MA 05188

(518) 234-4551
timothy@wickstrommorse.com

John F. Welsh, BBO #522640
Justin L. Engel, BBO #683894
Armstrong Teasdale LLP
800 Boylston Street, 30th Floor
Boston, Massachusetts 02199
617-824-5150
jwelsh@atllp.com
jengel@atllp.com

Dated: June 2, 2023

CERTIFICATE OF SERVICE

I, John F. Welsh, counsel for the Defendant in the above-referenced matter, hereby certify that on June 2, 2023 I served upon Plaintiffs' counsel the foregoing *Motion to Modify Preliminary Injunction and Require Plaintiffs to Post Adequate Security* via email to the following address:

Jenifer M. Pinkham and Corey W. Silva
Phifer Pinkham, LLC
1900 Crown Colony Drive, Suite 309
Quincy, MA 02169
jpinkham@phiferpinkham.com
csilva@phiferpinkham.com

/s/ John F. Welsh

John F. Welsh

or portion of any interest owned by me or by any entity owned or controlled by me, not only in the railroad assets that were subject to a letter of intent with Milanoski and DeWaele, but to other assets as well. No exception was listed for expenditures made in the ordinary course of the Railroad's business. No exception was made to allow financing for needed capital improvements. No explanation was provided as to why the injunction went beyond assets in dispute in this litigation. And no bond was required to protect me from the potential negative consequences of the injunction.

4. First, the preliminary injunction is unsecured. Adherence to the terms of the current preliminary injunction will cause the Grafton and Upton Railroad to sustain substantial damages and will threaten its ability to continue operations. Financing must be secured so that capital improvements in its tracks and terminal facilities can be made, aged equipment can be replaced, and settlement of the ongoing litigation with the town of Hopedale must be explored.

5. My review of track update and maintenance requirements, the financial commitments of the railroad, ongoing litigation with abutters, and other operational matters require restructuring of property ownership. These needed upgrades require Grafton & Upton's immediate attention.

6. The Grafton & Upton Railroad owns property on West Street, Hopedale, MA where Milanoski planned to build a significant transloading facility. The town of Hopedale sought to acquire the property through eminent domain. That suit was stayed in favor of a U.S. Surface Transportation Board proceeding that currently is underway. *See Grafton & Upton Railroad V. V, Town of Hopedale*, ___F. Supp. 2d ___, 2023 WL 2761205 (D. Mass. March 31, 2023) (Burroughs, J); *Reilly v. Town of Hopedale*, 2023 WL 237559, 206 N.E.3d 572 (Mass. App. Ct. March 7, 2023).

7. In review of the West Street project, I have determined that Milanoski's plan for the site was not workable since slope issues make track installation impractical. Moreover, Milanoski's decision to clearcut trees at the West Street site is now the focus of potential wetland violation investigations by the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers.

8. I would like the railroad to reopen settlement negotiations with the Town of Hopedale and other interested parties immediately to explore resolution of all West Street disputes, which ultimately may require a transfer of some land as part of a settlement. The current injunction does not allow any settlement negotiations much less allow the transfer of some property in the West Street location to resolve the various suits.

9. The Milanoski-ordered clearcutting at the West Street site has resulted in significant attorney and expert costs accrued by the Grafton & Upton Railroad, as will the anticipated compliance orders from the EPA. Bank financing, with the security interests that normally are integral to such financing, would not be allowed under the present Order on the preliminary injunction.

10. I have received a report from RJ Corman Railroad Services of Nicholasville, Kentucky that indicates that it is imperative for safety and increased commercial operations that Grafton & Upton's main line rails and ties be upgraded from Light Rail ASCE 85 lb. per yard to Heavy Rail 115 lb. per yard. Financing must be arranged by Grafton & Upton to finance this essential project, which is estimated to cost in excess of \$10 million. The current injunction bars the acquisition of financing for this needed project. Given the many months period required for a project of this nature to ramp up, with acquisition of replacement rails and other supplies, and

arrangements for needed equipment and contractor personnel, there is a pressing need to get this project started now, for both safety and expanded operational reasons.

11. The Grafton & Upton transfer facility in Hopedale, MA must have track added, and an additional storage installed. The likely costs of these upgrades, approximately \$7 million, must be financed. Additionally, the Milford yard needs to have additional tracks installed to properly service the transloading needs of the existing and potential customers.

12. Two train engines need to be replaced; the lease for one is expiring and the other is presently out of service and in need of extensive repairs. There are various other pieces of equipment that need repair. The current injunction bars financing for these expenditures.

13. Other equipment nearing the end of their useful life needs to be replaced and/or are no longer of importance to the operation; the railroad needs to be able to make reasonable business decisions and be free to decide when to sell and when to buy.

14. Currently a glass recycler which leases a building at our Fitzgerald Drive, Hopedale location would like to purchase the building. The cost of the building may be approximately \$10 million which would help pay for the needed track repairs. The sale of the building is currently blocked by the preliminary injunction.

15. The existing propane transloading arrangements at the Grafton facility need to be modified to allow the Grafton & Upton Railroad to receive investment capital to be used to upgrade the railyards and related infrastructure.

16. After Mr. Milanoski was suspended, we conducted a forensic examination of computer equipment and discovered that he had deleted various documents from the Grafton & Upton server, including documents contemporaneously created around the time of the Restated Letter of Intent in which Milanoski and DeWaele valued the Company in the range of \$69,020,000-

\$114,631,050, substantially less than the \$42,930,000 fair market valuation these fiduciaries provided to me. *See* Attachment A, one of several documents that Milanoski created and subsequently deleted which discloses Milanoski's and DeWaele's actual valuation of the transaction.

17. I understand why the Court would enjoin me from selling my shares in the Grafton & Upton Railroad while this dispute is pending, but the current order goes well beyond preservation of the Railroad stock ownership and actually prevents the Railroad from taking the economic steps needed to remain viable and to continue to make upgrades to the tracks, related infrastructure and equipment.

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Signed under the pains and penalties of perjury.

Dated: June 2, 2023



Jon Delli Priscoli

6/2/23

EXHIBIT A

Document
Found on PC
Est. Value

GU Operating and Equipment

Grafton and Upton Railroad Operating Company	\$35,000,000	\$42,000,000	\$3.5M EBIDTA (10-12X's)
GU ROW / Milford / CSX Freight Lease / Upton railyard	\$4,300,000	\$17,500,000	High value if state purchases line - leave freight easement
GU Equipment / Rolling Stock / Locomotives / Stock	<u>\$3,000,000</u>	<u>\$4,000,000</u>	equipment (in LOI) and rail materials
	\$42,300,000	\$63,500,000	GU value with all equipment

Support Business to GU and their real estate

3 Waterville St, Mechanical Building & new railyard	\$3,800,000	\$4,800,000	repair facility (appraisal underway)
42 Westborough Road / Propane Terminal 24/7 & railyard	<u>\$10,000,000</u>	<u>\$13,911,050</u>	significant investment (appraisal underway)
	\$13,800,000	\$18,711,050	GU Support Businesses and RE

Separate Companies and Real Estate

Seaview Transportation & Logistics LLC	\$1,000,000	\$3,000,000	long-term potential given deep harbor, connect 2 railroads
141 Mendon Street / 88,000SF warehouse & new railyard (separate LLC)	\$6,970,000	\$9,620,000	transloading & distribution building (appraisal underway)
140 Realty Trust - 200-acre industrial zoned site bifurcated by GU mainline (offer \$25M from CRG).	<u>\$4,950,000</u>	<u>\$19,800,000</u>	2/3 part of sale (lower value due to litigation - high success rate)
	\$12,920,000	\$32,420,000	Value of Non-GU Operating Businesses and Assets

\$69,020,000 \$114,631,050 Estimated Value Range of Restated LOI 12-1-22

Note: no value has been recorded for permitting and building a new waste facility in Hopedale

Capital Upgrades

Next 24 months ~\$950,000 (Use RIFF or grants when possible)

\$100,000	Propane, add third piping and install third truck pumping station
\$200,000	Locomotive Jacks and other tools to improve efficiency
\$200,000	Rebuild one locomotive and paint four locomotives.
\$250,000	Grapple Truck and other rail maintenance equipment
\$200,000	Track Mobile, Forklift and other equipment for Hopedale distribution

Next 60 months ~\$3,000,000 (Use RIFF or grants when possible)

\$1,500,000	Solar Canopy and Warehouse expansion in Hopedale for additional work
\$1,500,000	Redesign & Install new propane rack system for 12 railcars vs 8 for growth
Match	Upgrade track to 115# rail with new ties from Grafton to Upton (use grants below)

Real Estate (nice to have for future expansion 5+ years out)

\$2,000,000	Acquire land next to GU North Grafton Propane Facility (mixed use)
\$2,000,000	Acquire land next to GU Hopedale GUDC railyard
\$5,000,000	Acquire former Draper Land on other side of Mill River for GU development
\$5,000,000	Acquire additional 100+ acres of land in Upton MA for expansion