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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

**DEFENDANT’S MOTION TO MODIFY PRELIMINARY INJUNCTION
AND REQUIRE PLAINTIFFS TO POST ADEQUATE SECURITY**

Defendant Jon Delli Priscoli respectfully moves this Honorable Court to modify the Preliminary Injunction entered by the Court on February 2, 2023. Upon assuming control of the Grafton & Upton Railroad (“Grafton & Upton” or the “Railroad”), Mr. Delli Priscoli discovered numerous capital projects in addition to various related business transactions which must be promptly addressed and which 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 on an expeditious basis will jeopardize the continued viability of the Railroad.

Defendant Delli Priscoli further requests that a bond be set to safeguard him and the Grafton & Upton 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. Given that the Plaintiffs’ have valued the transaction at over \$42,000,000 in communications to Mr. Delli Priscoli and as high as \$114,600,000 privately amongst themselves, a bond of \$25,000,000 would be appropriate to protect Mr. Delli Priscoli’s interests while the injunction is in effect.

In support of this Motion, Defendant Delli Priscoli would show by affidavit submitted with this motion as follows:

1. On February 2, 2023, and for the purpose of maintaining the status quo while the dispute is being litigated, this Court issued a preliminary injunction barring Mr. Delli Priscoli from selling, transferring or encumbering his interest in the Railroad and other assets while the instant case is pending.

2. 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.

3. 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, including:

A. 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 immediately be upgraded from Light Rail ASCE 85 lb. per yard to Heavy Rail 115 lb. per yard. Financing must be arranged by the Railroad to finance this essential project, which is estimated to cost in excess of \$10 million. Projects of this nature require many months of lead time so that the necessary material, equipment, and workforce can be assembled. The current injunction bars the acquisition of financing to start this needed project, delaying its completion.

B. Mr. Delli Priscoli determined that the Railroad's transfer facility in Hopedale, MA must have track added, and an additional storage facility installed. The likely costs of these upgrades, approximately \$7 million, must be financed.

C. Two train engines need to be replaced; the lease for one is expiring and the other is failing.

There are various other pieces of equipment that need repair. The current injunction bars financing for these expenditures. Replacement cannot wait.

D. 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.

E. Currently a glass recycler which leases a building at the Railroad's 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.

F. Mr. Delli Priscoli would like the Railroad to reopen settlement negotiations with the Town of Hopedale and other interested parties 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. Continued delay in initiating settlement discussions requires the expensatures for legal expenses and tend to make the dispute even more intractable.

4. Mr. Delli Priscoli is struggling trying to manage 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. This applies not only to the specific Railroad assets that were subject to a letter of intent with Defendants Milanoski and De Waele, but to all of his other assets as well.

5. The injunction contains no exception for expenditures made in the ordinary course of the Railroad's business. The injunction contains no exception to allow financing for needed capital improvements. The order against encumbering any ownership interests effectively precludes the Railroad from obtaining bank loans for needed capital projects. 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.

6. Adherence to the terms of the current preliminary injunction will cause the 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.

7. Given the costs to the business and the damages caused by delays in renovations and replacement of track and equipment, a bond must be required that can fully compensate Mr. Delli Priscoli if he prevails for all costs and damages incurred due to the injunction.

8. The Revised Letter of Intent values the Grafton & Upton deal at approximately \$43 million dollars. In their Verified Complaint, Milanoski and DeWaele claim to have secured a bank financing commitment of \$20,000,000. 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. *See* Affidavit of Jon Delli Priscoli, Attachment A. Given the amount of losses that could be sustained if Mr. Delli Priscoli continues to be barred from making prompt and necessary repairs, renovations and other needed expenditures, a substantial bond of \$25 million dollars should be required.

9. MRCP 65(C) provides:

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. No such security shall be required of the United States or of the Commonwealth or of a political subdivision of the Commonwealth or of any officer or agency of any of them.

10. The Court has not found, nor have Plaintiffs presented, good cause that would exempt Plaintiffs from filing a bond to protect Mr. Delli Priscoli from sustained damages due to the injunction if their claims against Mr. Delli Priscoli are rejected. Indeed, if Mr. Delli Priscoli is unable to make capital and other business expenditures on the Railroad, its continued viability may be at risk. Given the claim of bank financing commitment in their Verified Complaint, Plaintiffs should be able to secure a protective bond for \$25 million dollars.

For these reasons, 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.

Rule 9A(d)(1) Certification

The undersigned counsel for Defendant has attempted in good faith to confer with counsel for Plaintiffs regarding this Motion. On May 15, 2023 and again on May 17, 2023, counsel for Defendant contacted counsel for Plaintiff by email to request a telephone to confer regarding the relief requested in this Motion. Counsel for Plaintiffs never responded.

Request for Hearing

Pursuant to Superior Court Rule 9A(c)(2), counsel for Defendant respectfully requests that the Court schedule a hearing on this Motion as soon as reasonably practicable.

Respectfully Submitted,

JON DELLI PRISCOLI

By his attorneys,

/s/ John F. Welsh

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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:

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/s/ John F. Welsh _____

John F. Welsh