ML

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

BUSINESS LITIGATION SESSION
DOCKET NO. 2384CV00071-BLS-2

MICHAEL R. MILANOSKI
Plaintiff,

JOHN P. DEWAELE, III
Plaintiff,

vs.

JON DELLI PRISCOLI
Defendant.

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO MODIFY PRELIMINARY INJUNCTION AND REQUIRE PLAINTIFFS TO POST ADEQUATE SECURITY

Now come Plaintiff, Michael R. Milanoski (hereinafter, "Mr. Milanoski") and Plaintiff, John P. DeWaele, III (hereinafter, "Mr. DeWaele") (collectively, "Mr. Milanoski" and "Mr. DeWaele," the "Plaintiffs"), by and through counsel, and hereby oppose Defendant's Motion to Modify Preliminary Injunction and Require Plaintiffs to Post Adequate Security (hereinafter, the "Motion") for the reasons set forth herein.

PRELIMINARY STATEMENT

Defendant's motion to modify the preliminary injunction should be denied because Defendant has not detailed any material changes requiring modification of the preliminary injunction. Furthermore, the preliminary injunction was entered into with the agreement of all parties. Thus, any modification of the injunction is unwarranted.

Defendant's request for the issuance of bond in any amount should also be denied. Defendant previously agreed to the injunction without any bond provisions. Defendant has not outlined any changed circumstances requiring the issuance of bond. And, Defendant would not suffer any substantial damages given the particularities of this matter.

FACTS

Plaintiffs seek to enforce the terms of the Restated Letter of Intent between Jon Delli Priscoli (hereinafter, "Mr. Delli Priscoli") and Plaintiffs (dated December 1, 2023) (hereinafter, the "Restated LOI"). *See* Complaint, at ¶¶ 40-51. In accordance with the terms of the Restated LOI, Defendant agreed to sell various business assets, including his ownership interest in the Grafton & Upton Railroad Company (hereinafter, "Grafton & Upton" or the "Company"), and several pieces of real estate to Plaintiffs. After executing the Restated LOI, Defendant began breaching various material provisions of the Restated LOI. *Id.* at ¶¶ 25-39. For example, Defendant began negotiating a sale of a portion of the subject assets with unrelated third parties in blatant violation of the Restated LOI. *Id.* At the same time, Defendant attempted to renegotiate the terms of the Restated LOI with Plaintiffs. *Id.* at ¶ 36.

On February 2, 2023, following a hearing and with agreement of the parties, the Court entered the preliminary injunction. *See* Preliminary Injunction (Dkt. No. 8). The preliminary injunction prohibited Defendant from selling, transferring or encumbering the assets subject to the restated LOI. *See id.* The preliminary injunction, however, placed almost no restrictions on Grafton & Upton's operations, allowing the Company's executives to allocate operating revenue without any prohibitions. *See id.*

STANDARD

Under Massachusetts Rule of Civil Procedure 60, a court may modify or vacate an

injunction in limited circumstances. *See* MRCP 60. Specifically, a court may modify a preliminary injunction upon a showing of a mistake, newly discovered evidence or fraud, amongst other limited circumstances.[1] *See id.* Under such circumstances, the moving party must demonstrate "exceptional circumstances" warranting "extraordinary relief." *See AngioDynamics, Inc. v. Biolitec AG*, 780 F.3d 420, 424-25 (1st Cir. 2015). The moving party must also show a "significant change in circumstance" not foreseen when the preliminary injunction was originally issued. *See Great Woods, Inc. v. Clemmey*, 55 N.E.3d 425, 430 (Mass. App. Ct. 2016).

ARGUMENT

1. *No Material Change in Circumstances Has Occurred Since the Issuance of the Preliminary Injunction*

There has been no material change in circumstances since the injunction entered.[2] From 2009 to the present, Defendant has been the sole shareholder of Grafton & Upton – the entity primarily detailed in the Motion. Cmplt. at ¶ 6. From at least 2017 to the present, Defendant has also retained sole control, which includes but is not limited to, making all material decisions involving Grafton & Upton. *See* Affidavit of Michael Milanoski (hereinafter, "Aff. of Milanoski") at ¶¶ 5-6 (attached hereto as Exhibit A). Although Plaintiffs handled the day-to-day operations of Grafton & Upton, Defendant remained intimately familiar with the Company's operations.[3]

As detailed in Mr. Milanoski' s affidavit, to the extent that any of the expenditures outlined by Defendant are legitimate, Defendant knew about many of them prior to the Court's issuance of

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[1] To support the Motion, Defendant includes language from MRCP 60(b), which allows for modification of a preliminary injunction if "it is no longer equitable that the judgment should have prospective application." MRCP 60(b). Yet, the Motion never details why the preliminary injunction is no longer equitable. *See generally* Motion.

[2] Defendant suggests the injunction includes "all assets of Mr. Delli Priscoli." Mtn. at 6. The preliminary injunction is clearly limited to the assets detailed in the Restated LOI. *See* Preliminary Injunction (Dkt. No. 8).

[3] Defendant believes the injunction prevents Grafton & Upton from using any capital for ordinary day-to-day expenses. Mtn. at 5-6. This is patently absurd. Moreover, assuming Defendant's interpretation and Defendant's compliance with said interpretation, Grafton & Upton has not spent any money since February 2, 2023 – this is obviously not the case. *See id.*

the injunction. *See* Aff. of Milanoski at ¶¶ 7-18. First, Defendant knew about all the issues and potential costs associated with the Hopedale lawsuit. *See id.* at ¶ 8. Defendant also made many of the important decisions related to the West Street Project – the project forming the basis of the Hopedale lawsuit – and regularly visited this property to monitor the project's progress. *See id.* at ¶ 9.[4]

Next, during Plaintiffs' employment, the Company began the process of obtaining federal grant and loan money for upgrades to the Company's mainline rails and ties. *See* Aff. of Milanoski at ¶ 11. As of January 2023, however, all of the Company's tracks were in compliance with Federal Railroad Administration standards. *See id.* at ¶ 14. Only a few months ago, this was viewed as a long-term project, making it difficult to understand the genesis of the purported urgency. *See id.* Not only did Defendant know of the upgrades to the mainline rails and ties, but Defendant ordered the Company to stop proceeding with the business appraisal required for the grant and loan application, thereby eliminating any possibility the Company could receive federal funds for this project. *See id.* at ¶ 12.

Turning to another purported expenditure, Defendant also knew about the state of the train engines and the lease terms on another train engine. In fact, Defendant recently terminated a lease on a train engine because of cost increases. Aff. of Milanoski at ¶ 16. As of January 2023, Grafton & Upton leased one locomotive – the lease cancelled by Defendant. *See id.* at ¶ 18. The Company was also repairing an additional locomotive – a normal process commonly funded with operating revenue.[5] *See id.* After this repair, the Company would have five working locomotives, when

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[4] Despite his statements to the contrary, Defendant approved the plan to build a transloading facility on the West Street property (Aff. of Milanoski, at ¶ 10), Defendant approved a plan signed off by an engineer to install tracks on the West Street property and modify the topography of the West Street property (Aff. of Milanoski, at ¶ 10) and Defendant personally ordered the removal or trees on the West Street property (Aff. of Milanoski, at ¶ 10).

[5] For example, in 2022, the Company used roughly $1 million of operating revenue to fund capital expenditures similar to those outlined in Mr. Delli Priscoli's affidavit. Aff. of Milanoski, at ¶ 18.

including the leased locomotive, the repaired locomotive and three other locomotives under the Company's control. *See id.* On an average day, the Company only needs two working locomotives. *See id.* The urgency of any changes to the Company's locomotive fleet remains unexplained and unnecessary.

Several other purported projects and expenditures outlined by Defendant do not seem feasible or necessary. Aff. of Milanoski at ¶ 19. Defendant surmises the Hopedale facility needs additional tracks and storage with associated costs of approximately $7 million. *See* Aff. of Delli Priscoli, at ¶ 11. First, the Hopedale facility does not have any more room for additional tracks and any associated improvements would only cost approximately $1 million.[6] Aff. of Milanoski at ¶ 20. Further, in the past, whenever the Company expended a significant amount on improvements, there was often an agreement with the customer to fund a portion of the expansion or enter into a long-term commitment to use the facility. *See id.* Defendant also concludes the Milford facility parcel needs additional tracks. *See id.* at ¶ 18. As with the Hopedale facility, there is also almost no additional room in Milford and most of the land is owned by the MBTA.[7] *See id.* As with many other claims in the Motion, Defendant provides no support for the necessity of these projects.

Defendant also suggests the existing propane transloading arrangements require modification. Aff. of Delli Priscoli, at ¶ 15. All of the railyards and related infrastructure at the Grafton facility are fully built out. Aff. of Milanoski at ¶ 22. As of January 2023, there was no urgency to upgrade any aspects of the Grafton facility. *See id.*

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[6] Of note, Defendant has not produced any plans or engineering reports to support the $7 million renovation.

[7] Again, Defendant has not produced any plans or engineering reports to evidence the feasibility and necessity of this project.

As an aside, while the Plaintiffs were employed there was never a time that the Company ever expended such a significant amount on improvements as set forth in Defendant's affidavit. Aff. of Milanoski at ¶ 23. The Company did not regularly move forward with capital expenditures related to "opportunities" or "conclusions" by any Company executive. *See id.* Instead, the Company undertook detailed due diligence to consider the feasibility and appropriateness of any projects. *See id.* Defendant's affidavit is void of any such suggestions of thoroughness, such as plans or engineering reports, on behalf of Defendant or the Company.[8]

Defendant has not raised any new facts or material changes in circumstances requiring in a modification of the injunction.[9] *See AngioDynamics, Inc.*, 780 F.3d at 425 (rejecting modification of injunction pursuant to FRCP 60(b)); *Great Woods, Inc.*, 55 N.E.3d at 430-31 (denying motion to modify injunction because moving party failed to show an "unforeseen significant change in circumstances); *Town of Northborough v. Anza*, No. 21-P-442 (Mass. App. Ct. May 13, 2022) (affirming lower court's denial of motion to modify injunction pursuant to MRCP 60); Any such modification would result in irreparable harm to Plaintiffs, caused by Defendant's unfettered ability to encumber assets subject to the Restated LOI. Defendant has free reign to conduct ordinary operations at the Company. However, Defendant cannot further encumber assets and take on additional debt, a reasonable restriction which should remain in effect throughout this litigation.[10]

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[8] It should be noted that throughout his affidavit, Defendant makes assessments commonly reserved for experts.

[9] The case cited by Defendant in relation to modification of the injunction is easily distinguishable. *See Concilio de Salud Integral de Loiza, Inc. v. Perez-Perdomo*, 551 F.3d 10 (1st Cir. 2008) (remanding to lower court because lower court failed to consider all facts and issues before vacating preliminary injunction).

[10] It is unclear whether Defendant discussed selling assets subject to the Restated LOI with the "glass recycler" mentioned in his affidavit. Aff. of Delli Priscoli, at ¶ 14. If so, this would represent a violation of the injunction.

2. *Plaintiffs Should Not Be Required to Post Bond.*

This Court should not require Plaintiffs to post bond for the previously granted injunctive relief. Defendant did not request bond when the parties originally agreed to the injunction. This subsequent request attempts to harass Plaintiffs and gain leverage in this dispute. *See Pineda v. Skinner Servs.*, Nos. 20-1097, 20-1141 (1st Cir. 2021) (affirming lower court's issuance of injunction without bond because enjoined party failed to show any harm resulting from said decision); *Air Line Pilots v. Guilford Transp. Indus.*, 399 F.3d 89 106 (1st Cir. 2005) (refusing to modify lower court's decision on amount of bond). The requested bond amount also bears no relation to any potential damages or costs suffered by Defendant because of the Court's issuance of the injunction.[11] *See Axia Netmedia Corp. v. Mass. Tech. Park Corp.*, 88 F.3d 1, 11 (1st Cir. 2018) (determining purpose of injunction bond to ensure enjoined party compensated for costs incurred as result of injunction). Even when assuming the valuation of Grafton & Upton has some bearing on the bond amount, Defendant has not shown how the injunction would decrease the Company's value. *See Rightstone, Inc. v. Elfers RRH, LLC*, No. 1784CV0286BLS1 (Mass. Super. Ct. July 5, 2018). This argument is also nonsensical because Plaintiffs – and another party involved in the related action - are attempting to purchase the Company for an already agreed upon amount.[12] As a result of the foregoing, Plaintiffs should not be required to post a bond.

CONCLUSION

Plaintiffs request that the agreed upon injunction remains as issued. Plaintiffs oppose any modification to the injunction and oppose any request for the posting of a bond.

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[11] Both cases cited by Defendant are distinguishable. *See Steward Health Care Sys., LLC v. Aya Healthcare, Inc.*, 2184CV00513BLS2 (Mass. Super. Ct. Mar. 8, 2021) (tailoring bond amount to potential damages suffered by enjoined party); *Veridiem, Inc. v. Phelan*, 17 Mass. L. Rptr. No. 1, 8 (Mass. Super. Ct. Sept. 26, 2003) (ordering bond where employee left startup company potentially in violation of employment agreement);

[12] Defendant focuses on a red herring email purportedly deleted by Mr. Milanoski. This is not relevant to the Motion and Mr. Milanoski did not delete any documents while employed at Grafton & Upton to hide their existence from Defendant or any of Mr. Milanoski's colleagues.

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

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June 23, 2023

EXHIBIT A

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

AFFIDAVIT OF MICHAEL MILANOSKI

I, Michael Milanoski, based upon my personal knowledge and belief, declare the following under penalties of perjury:

1. I am an individual currently residing at 171 South Main Street, Cohasset, Massachusetts 02025.
2. I was the President of Grafton & Upton Railroad Company (hereinafter, "Grafton & Upton" or the "Company") from May 2017 to February 2023.
3. During this entire period, Jon Delli Priscoli ("Mr. Delli Priscoli") was the sole owner of Grafton & Upton.
4. I was also employed with First Colony Development Group, LLC and various other entities controlled by Mr. Delli Priscoli from May 2017 through February 2023.
5. From May 2017 through January 2023, I had near constant verbal and written communication with Mr. Delli Priscoli regarding his various business interests, including, but not limited to, Grafton & Upton.

6. Beginning shortly after my employment with Grafton & Upton, Mr. Delli Priscoli largely removed himself from the day-to-day management of Grafton & Upton, but Mr. Delli Priscoli still kept abreast of all important developments and retained control of all significant business decisions at Grafton & Upton and his various entities. Mr. Delli Priscoli also regularly visited properties owned by his various entities, signed checks, received weekly updates and reviewed expenses.

7. To the extent that any of the expenditures outlined by Mr. Delli Priscoli are legitimate (as further detailed below), Mr. Delli Priscoli knew about many of the purported issues and associated expenditures outlined in his Affidavit during my tenure at the Company and prior to the Court's issuance of the preliminary injunction on February 2, 2023.

8. First, Mr. Delli Priscoli was intimately familiar with all the issues and potential costs associated with the Hopedale lawsuit (Affidavit of Jon Delli Priscoli, at ¶¶ 6-8 (hereinafter "Aff."). Mr. Delli Priscoli regularly provided his predictions of the various motions and general legal proceeding, assessments of legal theories and commentary on the parties involved in the matter.

9. In accordance with normal business practices, Mr. Delli Priscoli made many of the important decisions related to the West Street Project – the project underlining the Hopedale lawsuit – and regularly visited this property to monitor the project's progress (Aff. at ¶¶ 7-9).

10. Despite his statements to the contrary, Mr. Delli Priscoli approved the plan to build a transloading facility on the West Street property (Aff. at ¶ 6), Mr. Delli Priscoli approved a plan signed off by an engineer to install tracks on the West Street property and modify

the topography of the West Street property (Aff. at ¶ 7, 9) and Mr. Delli Priscoli personally ordered the removal of trees on the West Street property (*Id.*).

11. Next, during my tenure at Grafton & Upton, the Company began the process of obtaining federal grant and loan money for upgrades to the Company's mainline rails and ties (Aff. at ¶ 10).

12. Mr. Delli Priscoli knew about the Company's efforts to obtain the loans and grants, in fact, Mr. Delli Priscoli ordered the Company to cease said efforts (*Id.*). To complete the loan and grant applications, the Company needed to provide an updated business valuation. Mr. Delli Priscoli ordered the Company to cease efforts to obtain the loan and grants because of this business valuation requirement.

13. Given the above, Mr. Delli Priscoli also recognized the potential costs associated with repairs to the mainline rails and ties.

14. As of January 2023, all of the Company's tracks were in compliance with Federal Railroad Administration standards, making it difficult to understand the purported urgency of the repairs allegedly outlined by RJ Corman Railroad Services.

15. Moreover, during my tenure at the Company, the potential improvements to the mainline rails and ties were viewed as a long-term project.

16. Turning to another purported expenditure, Mr. Delli Priscoli also knew about the state of the train engines and the lease terms on another train engine (Aff. at ¶ 12).

17. In fact, Defendant recently terminated a lease because of cost increases.

18. As of January 2023, Grafton & Upton leased one locomotive – the lease later cancelled by Defendant. The Company was also repairing an additional locomotive – a normal process

commonly funded with operating revenue.[1] After this repair, the Company would have five working locomotives, when including the leased locomotive, the repaired locomotive and three other locomotives under the Company's control. On an average day, the Company only needs two working locomotives.

19. Several other purported projects and expenditures outlined by Mr. Delli Priscoli do not seem feasible or necessary.

20. Mr. Delli Priscoli surmised that the Hopedale facility needs additional tracks and storage with associated costs of approximately $7 million (Aff. at ¶ 11). First, the Hopedale facility does not have any more room for additional tracks. Second, based on my experience, any associated improvements would cost at most $1 million and yield limited return on investment. In the past, whenever the Company spent a significant amount on improvements, there was often an agreement with the customer to fund a portion of the expansion or enter into a long-term commitment to use the facility. It should be noted, however, that throughout my time at Grafton & Upton, the Company has never allocated such a significant amount for improvements.

21. Mr. Delli Priscoli concludes the Milford facility parcel needs additional tracks (Aff. at ¶ 11). As with the Hopedale facility, there is also almost no additional room in Milford and most of the land at the Milford facility parcel is owned by the MBTA.

22. Mr. Delli Priscoli also suggests the existing propane transloading arrangements require modification (Aff. at ¶ 15). All of the railyards and related infrastructure at the Grafton facility are fully built out. As of January 2023, there was no urgency to upgrade any aspects of the Grafton facility.

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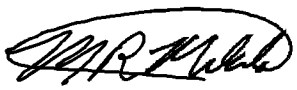
[1] For example, in 2022, the Company used roughly $1 million of operating revenue to fund capital expenditures similar to those outlined in Mr. Delli Priscoli's affidavit.

23. As an overarching point, throughout my time at Grafton & Upton, the Company did not regularly make significant capital expenditures related to "potential opportunities" or "conclusions" by any individual company executive. Moreover, the Company undertook detailed due diligence to consider the feasibility and appropriateness of any contemplated projects. Mr. Delli Priscoli's affidavit, however, reaches conclusions on the necessity of various expenditures without the thoroughness required during my tenure.

24. Lastly, despite Mr. Delli Priscoli's scurrilous allegations, I have never deleted any documents off a Grafton & Upton server to hide any information from Mr. Delli Priscoli or my colleagues (Aff. at ¶ 16).

[SIGNATURE PAGE TO FOLLOW]

Subscribed and sworn to under the penalties of perjury this June 23, 2023.



Michael Milanoski