COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2384CV00071

MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III

vs.

JON DELLI PRISCOLI

Consolidated with

NO. 2384CV00958

Notice of Findings of Fact & Conclusions of Law emailed to Counsel of Record 6/24/24

JON DELLI PRISCOLI

vs.

MICHAEL MILANOSKI, JOHN DEWAELE, DANA RAILCARE, AND THE GRAFTON & UPTON RAILROAD COMPANY

and

NO. 2384CV02141

MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III

vs.

GRAFTON & UPTON RAILROAD COMPANY, FIRST COLONY GROUP, LLC, AND JON DELLI PRISOCOLI

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON GRAFTON & UPTON RAILROAD COMPANY'S COMPLAINT FOR CONTEMPT AGAINST MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III, AND MEMORANDUM AND ORDER ON MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III'S MOTION TO RECONSIDER AND GRAFTON & UPTON RAILROAD COMPANY'S MOTION FOR ATTORNEYS' FEES AND COSTS.

In this hard-fought case, the Grafton & Upton Railroad Company ("GURR") has filed a complaint for contempt pursuant to Mass. R. Civ. P. 65.3 against Michael R. Milanoski and John

P. DeWaele, III (collectively, "Defendants"), alleging that they violated this Court's October 16, 2023 preliminary injunction order ("Order"). GURR also filed a motion for attorney's fees and costs incurred in obtaining the Order. The Defendants have filed a motion to reconsider the Order.

On April 3, 2024, trial was held on GURR's complaint for contempt. The Court considered the complaint and the Defendants' answer, Defendants' Memorandum Relative to Grafton & Upton Railroad Company's Complaint for Contempt, GURR's Motion for Assessment of Legal Fees and Costs against Michael Milanoski and John DeWaele, with a supporting affidavit, as well as the opposition to that motion by Milanoski and DeWaele.

Also on April 3, the Court heard argument on the Defendants' Motion for Reconsideration of Decision on Motion for Preliminary Injunction filed in November 2023, and considered Defendants' supporting memorandum and materials, GURR's opposition to that motion filed in November, GURR's supplement to its opposition filed in December 2023, and GURR's Memorandum of Law on Clarification of the Courts October 16, 2023 Preliminary Injunction filed on April 1, 2024.

For the reasons discussed below, the Court concludes that Milanoski and DeWaele intentionally violated paragraph 1 of this Court's Order, and therefore are **HELD IN CONTEMPT** and **ORDERED** to pay the reasonable attorney's fees and costs incurred by GURR in bringing the contempt action.

As to the motion for reconsideration, the Court heard the motion primarily to determine whether its Order was overbroad in its analysis and thus erroneous as a matter of law. The Court concludes that it was, but only with respect to a portion of paragraph 2 (a), a provision of the Order not at issue in the contempt proceeding. Accordingly, the motion and the Defendants'

related request to be relieved from their assent to the entry of paragraph 2 are **ALLOWED IN PART**, and paragraph 2 (a) as it applies to Milanoski is amended to excise the phrase "and/or in the possession of the Companies."

GURR's motion for attorney's fees incurred in obtaining the injunction is **ALLOWED IN PART** pending a more detailed breakdown on the fees claimed.

FINDINGS OF FACT[1]

A. Overview

The Defendants are plaintiffs in case 2384CV02141. Paragraph 1 of the Court's Order, issued October 16, 2023 in that case, states:

> Plaintiffs are enjoined from further engaging in business with Synagro Rail, either directly or as it may operate under the name Environmental Protection & Improvement Company (EPIC), related to its transshipment project in the Allston neighborhood of Boston, Massachusetts.

The Defendants received notice of the Order on October 16, and filed an emergency motion for a stay on or about that date, which was denied. Answer, ¶ 3.

Despite receiving the Order, both the Defendants personally and through an LLC they formed to perform work for EPIC, called TransloadX, willfully and intentionally violated the Order by further engaging in business with EPIC related to the transshipment of contaminated soil from the Allston rail yard (hereinafter, "the Project"). Indeed, the work continued unchanged until EPIC terminated its agreement with TransloadX on December 18, 2023 in response to GURR's threatening EPIC with a lawsuit.

[1] At the outset of the hearing, the parties stipulated to the admission of Exhibits 1 through 24, and the Court accepted Exhibit 25 during the hearing.

B. Detailed Findings

Jean Mongui, an employee of a GURR affiliate, testified. I credit his testimony. Mongui traveled to the Allston site at approximately 11 A.M. on October 18, 2023 with Jon Delli Priscoli, one of the parties in this case, and observed containers being loaded onto railcars using cranes and Milanoski driving a yard truck.

Shaun Keefe, who is not employed by GURR, testified. I credit his testimony. Keefe went to the Allston rail yard on November 29, 2023, and saw containers bearing EPIC logos being loaded onto rail cars using cranes. He asked a crane operator about the work, who referred Keefe to the manager. In the trailer for the manager, Keefe saw both Milanoski and DeWaele. Keefe had known Milanoski from his work with GURR, and knew that DeWaele had formerly served as general manager for GURR. Keefe spoke with Milanoski and DeWaele and learned that they had left GURR, formed their own company, and were involved in loading contaminated soil onto rail cars at the Allston site for transport and disposal. Milanoski gave Keefe his card, which identified him as an employee of TransloadX.

DeWaele testified. As detailed below, I do not credit most of his testimony.

DeWaele testified that, in or about January 2023, while serving as the general manager of GURR, he started his own consulting company (Exhibit 18) to consult in the railroad industry.

Also while serving as general manager of GURR, and in furtherance of GURR's business, DeWaele met with Elliot Pomeranz, Vice President of EPIC, at GURR's Hopedale site on March 2, 2023 to discuss GURR's role in the Project.

On March 6, 2023, again while employed as GURR's general manager, DeWaele reached out to EPIC by email (Exhibit 19) to solicit, on behalf of himself and Milanoski, transloading

services in Massachusetts and Maine. Milanoski was copied on the email. DeWaele signed the email as a representative of his consulting company.

DeWaele resigned from GURR on March 13, 2023. He testified that he was owed money under his employment contract with GURR at the time he resigned and that the failure to pay him was a material breach of his employment contract, which meant he was no longer bound by the non-solicitation and other covenants in it. As was the case when Defendants opposed the preliminary injunction, the Defendants produced no information to support this theory other than DeWaele's own testimony.

On March 17, 2023, four days after he resigned from GURR, DeWaele sent another e-mail to Pomeranz (Exhibit 20), again as a representative of his consulting company, regarding the Project. He copied Milanoski on the e-mail. Among other things, DeWaele noted that he and Milanoski could work with local railroads to fulfill any contract, exactly the role that GURR was in a position to play in the Project.

TransloadX was subsequently formed by the Defendants, who became its sole managers. DeWaele testified that Pomeranz contacted him in April, after TransloadX was formed, seeking the same services as he sought from GURR, but from a different location. The project under discussion in April between DeWaele and Pomerantz was the same project the two discussed earlier, when DeWaele was general manager of GURR.

In August 2023, TransloadX contracted with EPIC (hereinafter, "the August Agreement") to provide personnel and personnel management for Project at the Allston rail yard on behalf of EPIC. Exhibit 21. DeWaele signed the contract as TransloadX's manager. This was TransloadX's first project. To fulfill it, the company, through the Defendants, bought equipment

and hired, trained, and licensed workers. TransloadX began providing services under the August Agreement in September 2023.

The Order was issued on October 16, 2023. DeWaele testified that he understood the Order to only require that he and Milanoski stop working on the Project, and that TransloadX, the entity they ran, could continue to do so. In other words, DeWaele claimed he understood that the Project could continue in the same manner despite the Order, so long as he and Milanoski did not personally perform the work, even though they had not personally performed the work before the Order was entered. This testimony was illogical and incredible. It was unsupported by any objective evidence, and undercut by the Defendants' motion for reconsideration. Simply put, there would have been no need to move to reconsider if DeWaele believed this improperly narrow reading of the Order.

DeWaele also testified that he removed himself from the Project and that he stopped daily operations on behalf of TransloadX. However, the evidence shows that both Defendants continued working on the Project after the Order. DeWaele admitted that after October 16, when the Order was issued, he went to the Allston site with Milanoski and performed work for the Project, and as noted above, Keefe witnessed both at the site on November 29. DeWaele also admitted that, a week after the Order was entered, Milanoski was still running TransloadX.[2] Several emails, moreover, reflect DeWaele and Milanoski's involvement in the Project on or after October 16. See Exhibits 1-7, 9-16, 19-20 (DeWaele); Exhibits 2, 3, 5, 7, 9, 11-13, 15, 16, 19, 21 (Milanoski). For example, the record contains an email dated October 23, 2023 from

[2] DeWaele refused to concede that Milanoski continued to work for EPIC at the Allston site. Instead, he claimed that Milanoski was not there every day, and testified that he did not think Milanoski was regularly on site from October to December. This testimony was not credible and even if it were credible, would have been unconvincing. Milanoski's regular appearance at the Allston site was irrelevant to whether he further engaged in any further business for EPIC after the Order was entered.

Milanoski to Pomeranz reporting rail car movements, Exhibit 3, as well as an October 24, 2023 e-mail from "John DeWaele" to Pomeranz and others at EPIC stating that a railcar was ready to be shipped for the second time, "reconfigured" and with "heavier loads." Exhibit 4.[3] Additionally, in an email from Milanoski to EPIC dated November 19, 2023 (Exhibit 13), Milanoski explained that he and DeWaele would "continue to not bill our time" because of the Order, implicitly confirming that both were still working on the Project more than a month after the Order was entered. It is of no moment that DeWaele worked on other business at the site, as he claimed, or that he personally received no compensation, as the Order forbade the Defendants from further engaging in any business with EPIC in connection with the Project. Further, the record contains an invoice sent from milanoski@transloadx.com to EPIC dated October 29, 2023, reflecting work for the week ending October 28, 2023. See Exhibit 6. The Court concludes that Milanoski sent that e-mail.

DeWaele additionally testified that he and Milanoski took steps promptly after the Order was entered to transfer its employees to EPIC. This testimony was not credible, and the documentary evidence shows that this was not true. Although DeWaele testified that he discussed with EPIC winding down TransloadX in October, the December 11, 2023 agreement ("December Agreement") between EPIC and TransloadX (Exhibit 17), in which they agreed to terminate the August Agreement on December 18, 2023, makes clear that a transfer did not

[3] DeWaele testified that multiple people had access to the e-mail address used and refused to concede that he was present at the Allston site that day or sent the e-mail. The underlying claim, that DeWaele was not knowledgeable about and responsible for the content of the emails that bore his name, was not credible. Only one e-mail, a status report sent to EPIC on November 1, 2023 (Exhibit 8), was arguably sent by someone else, and the evidence reflects that Milanoski sent it. DeWaele conceded this email could have been sent by Milanoski, and offered no testimony suggesting that someone else named Michael could have sent the e-mail. The Court infers that Milanoski sent the email. I further note that DeWaele admitted that he had not stopped working for EPIC as of October 24, 2023, the date of the e-mail contained in Exhibit 4.

happen until December 2023.[4] Moreover, DeWaele admitted that EPIC (not TransloadX, DeWaele or Milanoski) initiated the termination of the August Agreement because GURR threatened EPIC with litigation. The transfer was not the product of any affirmative action by the Defendants, and no evidence shows that the Defendants took prompt and effective steps to come into compliance with the Order. To the contrary, the fact that the Defendants discussed compliance with the Order promptly after its issuance showed that the Defendants understood it and how to comply with it, but chose not to do so for months. Further, the fact that the Defendants took no concrete steps to transfer the business to EPIC until December renders thoroughly incredible DeWaele's assertion that the emails he sent were to keep the Project on a sound footing while it was being transferred to EPIC.

DeWaele additionally claimed that disengaging from EPIC was complicated by the fact that TransloadX had loaded hazardous materials onto railcars and was responsible for them until they arrived at their ultimate destination, a process that requires 30 days or so. But he failed to testify as to whether that responsibility could have been transferred to EPIC or some other entity such that DeWaele could have complied with the Order.

Milanoski testified. As detailed below, I do not credit most of his testimony.

Milanoski, similar to DeWaele, testified that GURR owed him in excess of $800,000 in wages at the time of his termination in February 2023. He claimed that GURR's chief financial officer confirmed this with its auditor, and that therefore his contract had been breached and he

[4] Pursuant to the December Agreement, TransloadX agreed that EPIC could hire TransloadX's seven employees currently working at the Allston site, and EPIC agreed that if the injunction was removed, it would revive the August Agreement. The agreement was countersigned by both Milanoski and DeWaele. The signatures were dated December 12, 2023.

was no longer bound by the restrictions in his employment agreement. He, however, provided no further support for the claim that he was owed wages under the contract.

Milanoski also testified that while at GURR, he had no contact with Pomeranz, and that his first contact with Pomeranz was through DeWaele in April 2023, after he was terminated from GURR. He admitted on cross, however, that he was copied on the March 6, 2023 e-mail (Exhibit 19) sent from DeWaele to Pomerance in which DeWaele told Pomeranz that "we" – the Court infers that "we" refers to DeWaele and Milanoski – wanted to work with EPIC on transloading in Massachusetts and Maine. He also conceded that he saw the March 17, 2023 e-mail from DeWaele to Pomeranz (Exhibit 20), on which he was copied, providing prospective hourly rates and other details for the Project. The email was sent three days before he and DeWaele established TransloadX.

Milanoski claimed he was confused by the language in the Order because it was not clear whether it required him to terminate the contract, especially in light of TransloadX's environmental responsibility for the contaminated soil while it was in transit. This testimony incredible – as noted above, soon after the Order was issued, Milanoski and DeWaele discussed terminating the contract with EPIC and transferring TransloadX's employees, showing that they understood the Order. Further, it was also unsupported by the record. For instance, in the memorandum in support of the Defendants' motion for reconsideration, Defendants' counsel did not contend that the Order was unclear or confusing. In any event, these claimed issues did not prevent compliance, which he and DeWaele belatedly effected in December, two months after the Order issued, notably at EPIC's insistence.

Milanoski further testified that there were safety issues in terminating the business immediately and that he began the process of winding down the company when the Order was

issued. This testimony was not credible. The Court finds that the safety issue was the environmental responsibility DeWaele claimed TransloadX bore for the contaminated soil while in transit. Milanoski testified that it took approximately 30 days to dispose of the contaminated soil, and that TransloadX was responsible under the applicable regulations for that soil, but Milanoski did not claim it was impossible to transfer that responsibility elsewhere, such as to EPIC, which presumably occurred after the December Agreement, or explain why this supposed obligation prevented compliance going forward with shipments that were not in transit as of the date of the Order. Moreover, the evidence does not reflect that he began the process of winding down the company when the Order was issued. Milanoski continued going to the Allston site and continued billing EPIC for TransloadX's work, and admitted seeing both Keefe and Mongui at the Allston site. Indeed, after the injunction was issued, Milanoski sent the Order to Pomeranz, agreed with Pomeranz to continue the business of TransloadX at the Allston site as usual, and discussed with Pomerantz EPIC's hiring of TransloadX's staff to continue to work *if* TransloadX could no longer manage them. This makes clear that Milanoski could have complied with the Order but chose to continue to operate TransloadX despite it.

CONCLUSIONS OF LAW

A. Contempt

"[A] civil contempt finding [must] be supported by clear and convincing evidence of disobedience of a clear and unequivocal command." In re Birchall, 454 Mass. 837, 853 (2009).

The first question is: was paragraph 1 of the Order clear and unequivocal? The Court concludes that it was.

Paragraph 1 of the Order, issued October 16, 2023, states:

> Plaintiffs are enjoined from further engaging in business with Synagro Rail, either directly or as it may operate under the name Environmental Protection & Improvement

Company (EPIC), related to its transshipment project in the Allston neighborhood of Boston, Massachusetts.

This portion of the Order is clear and unequivocal. Nothing in this record suggests the Defendants failed to comply with paragraph 1 of the Order because of any confusion as to what it meant. Indeed, their motion for reconsideration raised no claim of ambiguity, and in December 2023, the Defendants eventually complied with the Order by transferring its employees to EPIC. Both of the Defendants testified they began discussing the transfer in October as a method to comply with the Order but inexplicably failed or refused to undertake it until prompted by EPIC.

The only potential ambiguity to which the Defendants point is the phrase "engaging in business." In essence, they argue that because they did not take any compensation for their work on the Project, they were no longer engaging in business with EPIC. This argument fails for at least two reasons.

First, the Defendants' overly-narrow reading of the Order to limit its application to their personal profit-making makes little sense given the factual context in which the preliminary injunction was sought. The Defendants did not personally contract with EPIC to do any work on the Project in the first place, and instead engaged in business with EPIC through TransloadX, an entity they solely owned and controlled. The Order thus plainly prohibited them from "further" engaging in business with EPIC through TransloadX.

Second, the Defendants' argument that they could have continued business through TransloadX is meritless as a matter of law. Although expressly directed at the Defendants, TransloadX itself was also subject to the injunction. Under Mass. R. Civ. P. 65(d), an injunction is binding not only upon the parties to the action, but "upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

Cf. Bird v. Capital Site Mgmt. Co., 423 Mass. 172, 178–179 (1996) ("A person who was not a party to an action in which an order was entered may in certain circumstances be found to be in contempt of that order. 'Any person ... though not a party to the cause, who counsels or aids a party in disobeying a decree, is himself punishable.' Commonwealth v. Hudson, 315 Mass. 335, 347 (1943). ... The concept is reflected in the Massachusetts Rules of Civil Procedure. See Mass. R. Civ. P. 71 ... [and] 65(d)[.]").

To the extent that the Defendants argue that the Order was unclear because compliance was impossible, that contention is baseless. The Defendants concede that, after the Order was issued, they discussed with EPIC winding down TransloadX's operations by transferring its employees to EPIC. That is exactly what they did in December, at EPIC's insistence, not theirs. They inexcusably failed to effect this method of complying with the Order, and failed to take any other steps to comply with the Order, until then. If nothing else, the December Agreement demonstrates plainly that compliance was not impossible.

The second question is: is there clear and convincing evidence of disobedience? There is. The evidence before the Court clearly and convincingly reflects that the Defendants willfully refused to comply in any respect with the Order from October 16, 2023, when it was issued, to December 18, 2023, when the August Agreement was terminated. Instead, the Defendants, personally and through their company, TransloadX, continued to engage in business with EPIC in connection with the Project as per usual, despite the Order. The Defendants' arguments to detract from this conclusion are meritless.

The Defendants argue that their motion for reconsideration somehow suspended the Order. It did not. First, that motion was immediately denied. Second, they offer no support for the theory that they could ignore a court order because they believed they might eventually be

relieved from complying with it. The law is directly to the contrary. "Even if erroneous, a court order must be obeyed, and until it is reversed by orderly review, it is to be respected. Only where the court lacks jurisdiction to make an order or where an order is transparently invalid on its face may a party ignore a court order and attempt to evade sanctions by litigating the validity of the underlying order." Mohamad v. Kavlakian, 69 Mass. App. Ct. 261, 264 (2007) (internal citations and quotations omitted). See also, e.g., D.A.C. v. L.M.C., 93 Mass. App. Ct. 1109, 2018 WL 2106863, at *3 (2018) (Rule 1:28 decision) (a party cannot unilaterally ignore an order in the hopes of obtaining other relief).

The Defendants also claim they needed time to comply with the Order. This argument is also meritless. The record in this case shows that the Defendants failed to comply *at all* with the Order until EPIC forced the issue, not that they failed to *promptly* comply. Further, Fortin v. Commissioner of Massachusetts Dep't of Pub. Welfare, upon which the Defendants rely, does not hold that needing time to comply is a defense; to the contrary, it holds that good faith is not a defense to civil contempt, only impossibility is. 692 F.2d 790, 796 (1st Cir. 1982). Here, as noted above, compliance was not impossible. Even had a short period of time been necessary to transfer operations from TransloadX to EPIC, the evidence shows that the Defendants did not even attempt immediate and prompt compliance.

Since the Court concludes that the predicates for contempt have been established, the third question is: what sanctions are appropriate?

"[T]he purpose of civil contempt is remedial." Sodones v. Sodones, 366 Mass. 121, 129–130 (1974). While punitive fines are available in criminal contempt convictions, the Court in a civil contempt proceeding is only authorized to impose compensatory fines for the actual loss caused by the contemptible action and attorney's fees and costs. Town of Manchester v.

Department of Env't Quality Eng'g, 381 Mass. 208, 215 (1980), abrogated on other grounds by In re Birchall, 454 Mass. 837 (2009) ("[A] punitive fine cannot be imposed upon a contemnor in a civil contempt proceeding. Where a fine is imposed in a civil contempt proceeding it must not exceed the actual loss to the complainant caused by the contemnor's violation of the order in the main case, plus the complainant's reasonable expenses in enforcing his rights.") (internal citation omitted); Labor Relations Comm'n. v. Fall River Educators' Assn., 382 Mass. 465, 475 (1981) (both compensatory and coercive orders are appropriate remedies in civil contempt proceedings). See also Giannetti v. Thomas, 32 Mass. App. Ct. 960, 961 (1992) ("there is no question that counsel fees and costs are allowable in determining a compensatory fine payable to the prevailing party in a civil contempt proceeding"); Demoulas v. Demoulas Super Mkts., 424 Mass 501, 571 (1997) ("As a matter of law, the awarding of attorney's fees and costs is an appropriate element of a successful civil contempt proceeding ... This award is proper regardless of whether the court has considered the violation of the underlying order to be wilful, and it is within the court's discretion to formulate a remedy in a civil contempt proceeding.").

There is no basis to assess actual losses suffered by GURR other than reasonable attorneys' fees and costs in bringing the contempt action. The Court will award those reasonable attorneys' fees and costs.

B. Reconsideration

The Defendants seek reconsideration of both paragraphs 1 and 2 of the Order, two extraordinary requests, particularly given that they assented to the restrictions contained in paragraphs 2 (a) and 2 (b) of the Order at the original hearing on GURR's motion for the preliminary injunction. As to paragraph 2, they are, in essence, requesting to be relieved from that agreement as to those provisions.

Under the Business Litigation Session's Formal Guidance Regarding Motions to Reconsider ("Formal Guidance"), "[a] motion for reconsideration should only be filed when there has been an intervening change in the law, newly discovered evidence that was not previously available, or a clear error of law." This is consistent with Rule 9D of the Superior Court Rules, which provides that:

> A Motion for Reconsideration shall be based on (1) newly discovered evidence that could not be discovered through the exercise of due diligence before the original motion was filed; (2) a change of relevant law; or (3) a particular and demonstrable error in the original ruling or decision. A Motion for Reconsideration shall otherwise raise no new grounds for relief not raised in the original motion or opposition and shall not reiterate previously advanced arguments.

The Formal Guidance is also consistent with case law holding that "[a] motion for reconsideration 'should specify (1) "changed circumstances" such as (a) newly discovered evidence or information, or (b) a development of relevant law; or (2) a particular and demonstrable error in the original ruling or decision.'" Commonwealth v. Charles, 466 Mass. 63, 84 (2013), quoting Audubon Hill S. Condominium Ass'n v. Community Ass'n Underwriters of America, Inc., 82 Mass. App. Ct. 461, 470 (2012).

The Defendants do not point to newly discovered evidence, but rather seek to present evidence that could have been submitted during the original motion for a preliminary injunction or to re-present unsuccessful arguments they made earlier, such as GURR's alleged breach of their employment agreements, an argument they insufficiently supported. This is improper. They also seek to relitigate the Court's interpretation of the word "account" in their employment agreements. The Defendants point to no new authority supporting its position on this point or any error of law in the Court's interpretation of that word.

The only potential demonstrable error of law the Defendants raise concerns whether the Court's order was overbroad. They argue that the Order improperly enforced the non-compete provisions of their employment agreements, which GURR did not seek, presumably to avoid conflict with the Non-Compete Act, G. L. c. 149, § 24L.[5] That statute sets forth the minimum requirements for an enforceable "non-competition agreement." See G. L. c. 149, § 24L (b). A "noncompetition agreement" within the scope of the statute includes "an agreement between an employer and an employee, or otherwise arising out of an existing or anticipated employment relationship, under which the employee or expected employee agrees that he or she will not engage in certain specified activities competitive with his or her employer after the employment relationship has ended." Id. at § 24L (a). It also "include[s] [a] forfeiture for competition agreement[ ]." Id. However, "(i) covenants not to solicit or hire employees of the employer [and] (ii) covenants not to solicit or transact business with customers, clients, or vendors of the employer" are not considered noncompetition agreements. Id.

The Order, at 11-12, relies on the non-competition language of the employment agreements, not the non-solicitation language. This non-competition language does not meet the minimum standards set out in the statute. The non-competition restriction in Milanoski's contract is overlong – 24 months rather than 12 months. See id. at § 24L (b) (iv). Both employment agreements do not state that the employee has the right to consult with counsel, and there is no mention or no evidence of a 10-day consideration period. See id. at § 24L (b) (ii). The agreements also contain no geographic limit (§ 24L (b) (v)), are not limited to services provided during the last two years of employment (§ 24L (b) (vi)), and include no garden leave

[5] GURR concedes that it did not and does not seek to enforce any non-competition provisions.

clause (§ 24L (b) (vii)). Therefore, to the extent the Court's analysis relied on enforcing the non-competition language of the agreements, it was in error.

However, paragraph 1 is still valid. The Court had before it, and considered, the non-solicitation provisions, which are exempt from the scope of § 24L (b). See G. L. c. 149, § 24L (a). Moreover, as GURR argues, the evidence shows DeWaele, while still employed by GURR and on behalf of himself and Milanoski, violated these restrictions by soliciting business from EPIC, a former GURR customer, as reflected in the March 6, 2023 email (Exhibit 19). Therefore, paragraph 1 of the Order, which only prohibits the Defendants from continuing business with EPIC, falls within the carve-out to § 24L. Accordingly, the Defendants motion for reconsideration as to this paragraph of the Order is denied.

That leaves paragraph 2. It states:

> Until February 10, 2025, for Milanoski, and until March 27, 2024, for DeWaele, Plaintiffs are enjoined from:
>
> (a) Soliciting or accepting business relating in any manner to competing products or to products, processes, or services from any of the customers or accounts of the Companies and/or in the possession of the Companies. "Competing product" means any product, process, or service (A) which is identical to, substantially the same as, or an adequate substitute for, any product, process, or service of the Companies, in existence or under development, on which Milanoski and/or DeWaele worked during the time of employment with the Companies or about which Milanoski and/or DeWaele acquired confidential information and (B) which is (or could reasonably be anticipated to be) marketed or distributed in such a manner and in such a geographic area as to actually compete with such, product, process or, service of the Companies and/or any of the Companies which they manage; and
>
> (b) Either directly or indirectly, soliciting or encouraging any employee or independent contractor or business associate of the Companies to end or diminish in any way his or her employment or other relationship with the Companies or any of the Companies they manage, including by contacting GURR employees with job opportunities with TransloadX.

Under the Order, the restrictions against DeWaele expired in March. Thus, as to DeWaele, there is no reason to allow the Defendants' request to be relieved of their assent to these provisions or the motion for reconsideration.

Nor is there any reason to allow this unusual request as to Milanoski with respect to paragraph 2 (b), as "covenants not to solicit or hire employees of the employer" are another type of non-solicitation provision that are exempted from § 24L (b). See G. L. c. 149, § 24L (a)

That leaves paragraph 2 (a) as it applies to Milanoski. The language in that paragraph is based on Section 8(b) of Milanoski's employment agreement in which he agreed to restrictions against soliciting or accepting "business relating in any manner to competing products or to products, processes or services ... from any of the customers or accounts of the Companies and/or in the possession of the Companies" for 24 months following termination of his employment.[6] As noted above, the statute exempts "covenants not to solicit or transact business with customers, clients, or vendors of the employer." G. L. c. 149, § 24L (a). Accepting business from a customer or account, as reflected in the agreement, is the functional equivalent of transacting business, a restriction allowed under the statute. Thus, the contractual provision is consistent with the statutory carve out if the Court eliminated the phrase "and/or in the possession of the Companies," which arguably applies beyond GURR's customers, as it would prohibit soliciting or accepting business relating in any manner to competing products or to products, processes, or services then in the possession of the Companies. Under the agreements and the statute, the Court has discretion to reform or revise the agreements to render them valid and enforceable to the extent necessary to protect legitimate business interests. See id. at § 24L (d). Were the phrase "and/or in the possession of the Companies" excised, paragraph 2 (a) would

[6] DeWaele's agreement had similar language.

be valid. The Court thus partially allows the Defendants' request to be relieved of their agreement and their motion for reconsideration, amending paragraph 2 (a) of the Order as it applies to Milanoski to excise the phrase "and/or in the possession of the Companies."

In the agreements, parties agreed the GURR would be entitled to "recover any attorneys' fees and costs incurred in obtaining [injunctive] relief," but that "[o]therwise, in connection with any action to enforce the terms of this Agreement, each party shall bear such parties own costs and expenses including without limitation, attorneys fees related to such enforcement." GURR is thus entitled to reasonable attorney's fees and costs for obtaining the original injunction, and not for the subsequent litigation, such as with respect to the motion to reconsider. See, e.g., Citizens Bank of Massachusetts v. Travers, 69 Mass. App. Ct. 174, 176-177 (2007) (award of attorney's fees expressly permitted under a contract limited to those that are fair and reasonable).

ORDER

For the foregoing reasons, as to the Complaint for Contempt, the Court finds Defendants Michael Milanoski and John DeWaele **IN CONTEMPT**, and **ORDERS** them to pay GURR its reasonable attorneys' fees and costs in bringing the contempt action.

As to the Defendants' Motion for Reconsideration, that motion and related request to be relieved from their assent to entry of paragraph 2 the Order is **ALLOWED IN PART** in that the phrase "and/or in the possession of the Companies" as it applies to Milanoski is excised from paragraph 2 (a) of the Order.

GURR's motion for attorney's fees incurred in obtaining the injunction is **ALLOWED IN PART**.

Ten days from the docketing of this decision, GURR, after compliance with Superior Court Rule 9C, shall serve on the Defendants pursuant to Superior Court Rule 9A a motion and

full support for any claim it seeks to make for reasonable attorney's fees and costs incurred in obtaining the original injunction and/or arising from litigation of the contempt complaint.

SO ORDERED.

M. D. Ricciuti
MICHAEL D. RICCIUTI
Chief Justice of the Superior Court

Dated: June 20, 2024