

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

NEARLY NATURAL, LLC and NN  
SUPER HOLDINGS, LLC

Plaintiffs,

v.

NTXHUAV KONG, GUSTAVO MILLA,  
and MOSSNBLOOM, LLC

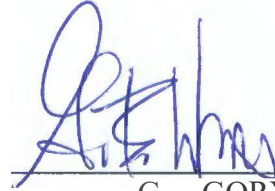
Defendants.

C.A. No. 23-1296

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**MEMORANDUM OPINION**

December 13, 2023  
Wilmington, Delaware



G GORY B. WILLIAMS  
U.S. DISTRICT JUDGE

Pending before this Court is Plaintiffs' Nearly Natural, LLC and NN Super Holdings, LLC (collectively, "Nearly Natural" or "Plaintiffs") Motion for Preliminary Injunction, D.I. 6, against Defendants Ntxhuav Kong ("Kong") and Gustavo Milla ("Milla") (collectively, the "Individual Defendants"), and Defendant MossNBloom, LLC ("Moss & Bloom"). For the reasons set forth below, Plaintiffs' Motion for Preliminary Injunction is GRANTED.

### I. BACKGROUND

Plaintiff Nearly Natural sells artificial plants and trees across the United States and abroad. D.I. 2 ("Compl."), ¶ 17. Until November 14, 2023, Defendant Kong was Nearly Natural's acting Vice President of Sales and Business Development. *Id.* As the Vice President of Sales and Business Development, Kong held the most senior sales role, reporting directly to Nearly Natural's CEO, and oversaw Nearly Natural's key customer and supplier relationships. *Id.*, ¶¶ 18-19. Defendant Milla was employed with Nearly Natural from March 2018 to February 2022. *Id.*, ¶ 22. He worked first as Director of Digital Marketing and eCommerce and was later promoted to Vice President in January 2020. *Id.* According to Plaintiffs, Milla led Nearly Natural's eCommerce strategy and revenue. *Id.*, ¶ 23.

As part of their compensation, both Milla and Kong received a profit interests award in Nearly Natural's parent company, NN Super Holdings, in exchange for agreeing to abide by several restrictive covenants contained in Nearly Natural's Profits Agreement (the "Profits Agreement"). *Id.*, ¶ 25. The restrictive covenants included a noncompetition clause preventing the Individual Defendants from founding, managing, or operating a competing business. *Id.*, ¶ 33. The restrictive covenants also included a non-solicitation clause and several covenants that required the parties to protect Nearly Natural's confidential information from public disclosure.

*Id.*, 11 34-36. Plaintiffs allege that Milla and Kong would not have been provided access to Plaintiffs' confidential information had they not agreed to the restrictive covenants in the Profits Agreement. *Id.*, 140.

According to Plaintiffs, Kong founded Defendant Moss & Bloom in September 2021- while he was still employed with Nearly Natural-in direct violation of several restrictive covenants. *Id.*, 144. Plaintiffs contend that Moss & Bloom is a competing company that sells a wide range of artificial plants and trees and provides identical products and services to Nearly Natural. *Id.*, 126. Additionally, through a search of Moss & Bloom's website, Plaintiffs learned that Moss & Bloom contracts with several of Nearly Natural's suppliers. *Id.* Plaintiffs assert that the Individual Defendants are the only owners of Moss & Bloom. D.I. 26 at 3. However, according to Plaintiffs', the Individual Defendants were not given permission to operate Moss & Bloom, nor did the Individual Defendants disclose their interest in Moss & Bloom to Nearly Natural. Compl., 1 41.

Plaintiffs contend that they learned of Moss & Bloom only recently when Moss & Bloom's Articles of Organization were discovered on their company server. *Id.*, 1 27. The Articles of Organization list Kong as the person authorized to manage Moss & Bloom. *Id.*, 1 27. Shortly after finding Moss & Bloom's Articles of Organization, Plaintiffs reviewed Moss & Bloom's 2023 Annual Report-which was on file with the Florida Secretary of State-and learned that Milla was Moss & Bloom's registered agent. *Id.*, 128. Thus, Plaintiffs allege that both Kong and Milla are currently operating Moss & Bloom in direct violation of the Profits Agreement. *Id.*

Through further investigation, Plaintiffs discovered additional documents on the company server that "appear to show at least four Nearly Natural suppliers wired a total of over \$380,000 to Kong's personal bank account for the nine-month period between December 2020 to August

2021." *Id.*, 1 48. The documents, which include Kong's bank statements, show several large payments that were made from suppliers to Kong's personal bank account. *Id.*, 149. Additionally, Plaintiffs located spreadsheets suggesting that Kong was receiving kickback payments from suppliers as recently as August 2023. D.I. 26 at 7, Ex. F. Plaintiffs assert that some of the payments reference actual purchase orders issued by Nearly Natural to certain suppliers while others are characterized as payments of "commission." *Id.*

According to Plaintiffs, no legitimate reason exists for Kong to have received direct payment from Nearly Natural's suppliers. *Id.*, 1 51. Thus, Plaintiffs contend that Kong secretly received kickbacks from some or all of Nearly Natural's suppliers in exchange for Nearly Natural's business. *Id.*, 1 49. Plaintiffs believe that Kong likely received significantly more kickback payments than were discovered since, over the last several years, Kong has instructed Nearly Natural to make over \$12.5 million in orders. *Id.*, 1 54. In addition to collecting kick-backs, Plaintiffs believe that Kong caused Nearly Natural to pay inflated prices for the products he ordered. D.I. 26 at 7, Ex. F. Plaintiffs believe that Kong likely traded higher product prices for Nearly Natural in exchange for lower product prices for Moss & Bloom from some or all of their suppliers; however, Plaintiffs were unable to gather more evidence due to Defendants refusal to respond to any discovery requests. Compl. at 4-5.

On November 14, 2023, Plaintiffs terminated Kong's employment and brought this action against Defendants. Plaintiffs allege the following claims against some or all of the Defendants: Breach of the Restrictive Covenants (Counts 1-3); Violation of the Delaware Uniform Trade Secrets Act (Count 4); Tortious Interference with Contractual Relations (Count 5-6); Civil Conspiracy (Count 7); Breach of Fiduciary Duty (Count 8); Civil RICO (Count 9); and Defend Trade Secrets Act (Count 10).

Plaintiffs sought a TRO and preliminary injunction, enjoining all Defendants from, among other things, operating Moss & Bloom or any other entity providing the same or similar products and services as Nearly Natural and contacting any Nearly Natural customers, potential customers, or suppliers. D.I. 6. As to Defendant Kong, Plaintiffs additionally requested a TRO enjoining him from transferring any assets to any third party, except as necessary for the payment of expenses and other existing financial obligations incurred by Kong in the ordinary course, to the extent Kong has assets less than \$5.5 million or such transfer would reduce Kong's assets below \$5.5 million. *Id.* On November 17, 2023, the Court granted Plaintiffs' request for TRO ("Nov. 17 TRO") and scheduled a preliminary injunction hearing for December 13, 2023, at 1:00 pm. D.I. 13. To prepare for the preliminary injunction hearing, the Court granted Plaintiffs and Defendants leave to seek expedited discovery. *Id.* at 12. Plaintiffs note, however, that Defendants refused to comply with their requests for discovery. D.I. 26 at 3.

Following the Court's Order, Plaintiffs assert that they emailed the Nov. 17 TRO to the last known personal email addresses of both Defendant Milla and Defendant Kong. D.I. 29. Shortly after, on November 20, 2023, Executive Express Courier hand-delivered copies of the Nov. 17 TRO to each Individual Defendant's last known address. *Id.* In a sworn declaration, Milla also confirmed that he received an email with the Court's the Nov. 17 TRO on the day it was issued and explains that he spoke with Defendant Kong about the Order shortly after. D.I. 29, Ex. A ("Milla Decl."), 2. According to Milla, Kong "appeared familiar with its contents." *Id.*, 4. Milla additionally confirmed that he complied with the Court's Order by shutting down Moss & Bloom's website and removing its ability to sell products on Amazon. *Id.*, 5. Defendant Milla informed the Court that he would not oppose Plaintiffs' Motion for Preliminary Injunction. *Id.*, 6.

## II. LEGAL STANDARD

A preliminary injunction is an "extraordinary remedy" that should be granted only in "limited circumstances." *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). The decision to grant or deny preliminary injunctive relief lies within the sound discretion of the district court. *See Greater Phi/a. Chamber of Com. v. City of Phi/a.*, 949 F.3d 116, 133 (3d Cir. 2020). To obtain a preliminary injunction, the moving party must establish: (1) a likelihood of success on the merits; (2) irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the non-moving party; and (4) that the public interest favors such relief. *Kos Pharms.*, 369 F.3d at 708.

The first two factors—likelihood of success on the merits and irreparable harm—are "gateway factors" that the moving party must establish to obtain relief. *Reilly v. City of Ha"sburg*, 858 F.3d 173, 179 (3d Cir. 2017); *Greater Phi/a. Chamber of Com.*, 949 F.3d at 133. Unless the movant meets its burden on these two factors, a preliminary injunction is not warranted, regardless of whether the Court proceeds to consider the balance of equities and the public interest. *Reilly*, 858 F.3d at 179.

## III. DISCUSSION

### A. Motion for Preliminary Injunction

As a preliminary matter, the Court must address Defendants' failure to engage in expedited discovery as ordered by this Court. Plaintiffs contend that, pursuant to the Court's order granting expedited discovery, Plaintiffs served six requests for production on Kong and Milla on November 20, 2023. D.I. 26 at 4. Yet, according to Plaintiffs, Defendants failed to respond to any requested discovery, thus interfering with Plaintiffs' ability to prepare for this Motion. *Id.* In light of these actions, Plaintiffs ask the Court to exercise its discretion to sanction Kong and Milla under Rule 37(b) of the Federal Rules of Civil Procedure. *Id.* Specifically, Plaintiffs request that the Court

deem the facts set forth in Plaintiffs' Motion admitted and bar Defendants from introducing any evidence in opposition. *Id.* 4-5. While the Court agrees that it is within its discretion to order such a sanction, the Court need not do so here, given the Court finds that Plaintiffs have presented sufficient evidence to warrant a preliminary injunction. If, however, Defendants continue to ignore Plaintiffs' discovery request, Plaintiffs' may move the Court to compel, and the Court will impose sanctions on Defendants as it sees fit.

**i. Likelihood of Success on the Merits**

Plaintiffs have shown a likelihood of success on the merits. As the Court noted previously in its Nov. 17 TRO, the Individual Defendants signed a Profits Agreement that incorporated covenants restricting them from operating a competing business or soliciting business in violation of the restrictive covenants. *Singer Deel.*, Ex. B, § 8.10(a) (Profits Agreement). The restrictive covenants include: (1) a non-competition clause, (2) a non-solicitation clause, and (3) provisions restricting the disclosure confidential company information. *Id.* at § 8.10, § 15.3.

Prior to issuing the TRO, the Court found that Plaintiffs provided sufficient evidence that Defendant Kong, while employed by Plaintiffs, founded and continues to operate Moss & Bloom, a business in direct competition with Plaintiff Nearly Natural. D.I. 13 at 5; Compl., 126 (citing *Singer Deel.*, Ex. D). Plaintiffs additionally provided evidence suggesting that Defendant Kong breached the non-solicitation clause and his fiduciary duty by soliciting business from Plaintiffs' suppliers for his competing business venture and engaging in an alleged kickback scheme. D.I. 15 at 5. Finally, Plaintiffs alleged that Defendants Kong and Milla likely misappropriated confidential company information including "Nearly Natural's customer pitch materials and pitch strategy, customer pricing information, the terms of Nearly Natural's contractual relationships with suppliers, documentation of customer and potential customer needs, and lists of customers and

potential customers, including non-public information about the identities and contact details of customer and potential customer contacts." *Id.* at 5-6 (citing Compl., ¶ 39-40). Thus, Plaintiffs argued, and the Court agreed, that Plaintiffs were likely to succeed in proving that Defendants utilized Plaintiffs' confidential information and trade secrets in order to compete with Plaintiffs. *Id.*

New evidence presented by Plaintiffs only supports this finding. That is, since the Court issued the TRO, Plaintiffs argue that they have found evidence that puts "[a]ny doubts about [Defendants'] culpability to rest." D.I. 2 at 6. This new evidence, found on Kong's personal computer, includes documents revealing that Kong and Milla are Moss & Bloom's sole owners. *Id.*, Ex. B. Additionally, Plaintiffs discovered a confidential Nearly Natural document on Kong's personal computer which "show[s] detailed pricing and margin information for some of the same products contained on Moss & Bloom's product list." *Id.* at 7, Ex. E. Having reviewed this evidence, the Court agrees with Plaintiffs that Milla and Kong likely operated Moss & Bloom in violation of their contractual duties to Plaintiffs and did so while improperly using Nearly Natural's confidential information.

## **ii. Irreparable Harm**

"A party seeking a preliminary injunction must establish that it is likely to suffer irreparable harm if the preliminary injunction is not granted and there is a causal nexus between the alleged infringement and the alleged harm." *Doe v. Delaware State Univ. Bd. of Trustees*, C.A. No. 20-1559-MN, 2021 WL 2036670, at \*2 (D. Del. May 21, 2021) (citations omitted). The elements also apply to temporary restraining orders. *See NutriSweet Co. v. Vit-Mar Enterprises, Inc.*, 112 F.3d 689,693 (3d Cir. 1997).



"Grounds for irreparable injury include loss of control of reputation, loss of trade, and loss of goodwill, intangible harms for which it is virtually impossible to ascertain the precise economic consequences." *Astrazeneca AB v. Dr. Reddy's Labs., Inc.*, 145 F. Supp. 3d 311, 319 (D. Del. 2015). Plaintiffs contend that they will suffer irreparable harm from "a loss of customers-and consequently, future profits." D.I. 7 at 16 (citing *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578,596 (3d Cir. 2002)).

In issuing the TRO, this Court noted that Plaintiffs likely suffered irreparable harm given Kong's unique position within the company. D.I. 13 at 6-8. The Court found that Kong's position not only provided him with access to Nearly Natural's confidential information, but also provided him the opportunity to abuse his position for both his personal benefit and the benefit of Moss & Bloom to the detriment of Nearly Natural's professional reputation and good will. *Id.* Of particular concern for Plaintiffs and this Court was Kong's close relationships with Plaintiffs' most critical customers and suppliers, including the four suppliers that Plaintiffs now allege paid Kong thousands of dollars in kickbacks, and Kong's control of Nearly Natural's sales. *Id.*; Compl., 48. For instance, Kong, who answered only to Nearly Natural's CEO, was Nearly Natural's point of contact with their most critical customers and suppliers, including the four suppliers that Plaintiffs now allege paid Kong thousands of dollars in kickbacks. Compl., 19. Kong also led Nearly Natural's negotiation efforts on the price and volume of its purchases and took multiple trips on behalf of Nearly Natural to build relationships with these key suppliers. *Id.*, 50. Thus, due to his position and his ongoing relationships with suppliers and customers, the Court held that Kong's misconduct would likely damage Nearly Natural's professional and consumer relationships, reputation, and good will with its suppliers. D.I. 13 at 6-8.

Since the Court issued the TRO, Plaintiffs have presented additional evidence supporting

this point. Specifically, Plaintiffs have now discovered direct evidence that Kong abused his role within the company to, among other things, purchase products on behalf of his personal and competing venture, Moss & Bloom, from Nearly Natural suppliers. D.I. 26 at 6. For instance, Plaintiffs located a products list for Moss & Bloom on Kong's laptop which reveals that Moss & Bloom only sells artificial plants and trees, and thus competes directly with "Nearly Natural's core business." *Id.*, Ex. C. Plaintiffs similarly located documents showing that Kong ordered close to \$90,000 in products from one of Plaintiffs' key suppliers as recently as June 2023. *Id.*, Ex. D. Finally, and critically here, a spreadsheet uncovered on Kong's laptop reveals not only that Kong received a 10% "commission" on each of Nearly Natural's orders from a particular supplier, but also that Kong inflated Nearly Natural's supplier unit costs, thus forcing Nearly Natural to pay higher costs for its products. *Id.* at 7; Ex. F.

Viewing the evidence as a whole, the Court finds that the risk of damage to Nearly Natural's professional and consumer relationships, reputation, and good will with its suppliers due to Kong's misconduct is likely irreparable.

### iii. **Balance of Hardships and Public Interest**

Turning to a balance of hardships and public interest, the Court finds that Defendants will not suffer a greater harm by being held to their contractual obligations to refrain from competing with Nearly Natural. Defendants Kong and Milla are the only owners of Moss & Bloom, and the Court sees no reason why Defendants would not be aware of the Profits Agreement's restrictions on owning and operating a competing business. D.I. 7 at 14-15. Furthermore, "Delaware upholds the freedom of contract and enforces as a matter of fundamental public policy the voluntary agreements of sophisticated parties." *NACCO Indus., Inc. v. App/ica Inc.*, 997 A.2d 1, 35 (Del. Ch. 2009). *See also Sensus*, 2016 WL 1466488, at \*8 ("It is in the interest of the public to hold parties to the very terms upon which they negotiated and agreed to be bound."). Thus, a

preliminary injunction that prohibits Defendants from continuing to violate their contractual obligations is in the public interest and is unlikely to cause undue harm. Finally, the Court held a hearing to allow Defendants an opportunity to present evidence of hardship or evidence that a preliminary injunction was against public interest. Defendant Kong failed to present any such evidence, and Defendant Milla informed the Court that he would not oppose Plaintiffs' Motion. Accordingly, the Court finds that the balance of hardships and public interest support the grant of a preliminary injunction.

### **B. Security Bond**

Before a preliminary injunction may be issued by this Court, the applicant for the injunction usually must give security "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." Fed.R.Civ.Pro. 65(c). The Third Circuit has strictly interpreted the bond requirement *See Waterfront Comm'n of NY Harbor v. Construction & Marine Equip. Co.*, 928 F.Supp. 1388, 1405 (citing *Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186,210 (3d Cir.1990)). As indicated, in *Hoxworth*, "[w]hile there are exceptions, the instances in which a bond may not be required are so rare that the requirement is almost mandatory." 903 F.2d at 210. For instance, our courts may consider exempting the moving party from the bond requirement "in noncommercial cases." *Temple University v. White*, 941 F.2d 201,219 (3d Cir.1991). This Motion, which asks the Court to enjoin the operation of a competing business, cannot be said to be "noncommercial" in nature. As such, Plaintiffs are required to give security in response to the Court's preliminary injunction.

During the December 13 hearing, Plaintiffs were asked to opine on the proper amount for the bond. From those discussions, the Court determined that a secured bond from Plaintiffs in

the amount of \$1 million is appropriate as security for the preliminary injunction granted.

Plaintiffs shall post the bond on or before Monday, December 18, 2023.

#### IV. **CONCLUSION**

For the reasons above, Plaintiffs' Motion for Preliminary Injunction is granted. The Court will issue an Order consistent with this Memorandum Opinion.