

**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

MEMORANDUM ORDER

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiffs Nearly Natural, LLC and NN Super Holdings, LLC (collectively, "Nearly Natural" or "Plaintiffs") move for a Temporary Restraining Order ("TRO") (D.I. 6) and Expedited Discovery (D.I. 4) 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 TRO and Motion for Expedited Discovery are GRANTED.

I. BACKGROUND

Plaintiff Nearly Natural sells artificial plants and trees across the United States and abroad. D.I. 2 ("Compl."), 117. 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.*, 11 18-19. Defendant Milla was employed with Nearly Natural from March 2018 to February 2022. *Id.*, 1 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.*

As part of their compensation, both Milla and Kong received a profit interests award in Nearly Natural's parent company, NN Super Holding, 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.*, ¶¶ 34-36. Plaintiffs allege that Milla and Kong would not have been provided access to the Company's confidential information had they not agreed to the restrictive covenants in the Profits Agreement. *Id.*, ¶ 40.

According to Plaintiffs, Kong founded Defendant Moss & Bloom in September 2021- while still employed with Nearly Natural and in direct violation of several restrictive covenants. *Id.*, ¶ 44. 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.*, ¶ 26. 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 were not given permission to operate Moss & Bloom, nor did the Individual Defendants disclose their interest in Moss & Bloom to Nearly Natural. *Id.*, ¶ 41.

Plaintiffs contend that they learned of Moss & Bloom only recently when Moss & Bloom's Articles of Organization was discovered on their company server. *Id.*, ¶ 27. The Articles of Organization list Kong as the person authorized to manage Moss & Bloom. *Id.*, ¶ 27. Shortly after finding Moss & Bloom's Articles of Operation, 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.*, **1** 49. Plaintiffs note 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.*

Yet, according to Plaintiffs, no legitimate reason exists for Kong to have received direct payments from Nearly Natural's suppliers. *Id.*, **151**. 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 the Company to make over \$12.5 million in orders. *Id.*, **1** 54. However, Plaintiffs note that their evidence is limited since, on or around July 5, 2023, Kong claimed that his Company-issued laptop no longer functioned and began to use his personal laptop to access the Company's systems remotely. *Id.*, **1** 61. Therefore, Plaintiffs contend that, without access to Kong's laptop, they have no way of knowing the extent of Kong's misconduct. *Id.* Finally, 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. *Id.*, **1** 47.

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 (Count 10).

Additionally, Plaintiffs request a TRO and preliminary injunction enjoining all Defendants from: (1) Operating Moss & Bloom or any other entity providing the same or similar products and services as Nearly Natural; (2) Disseminating or using any of Plaintiffs' confidential business information and trade secrets; (3) Contacting any Nearly Natural customers or potential customers; (4) Contacting any Nearly Natural suppliers; (5) Soliciting or encouraging any Nearly Natural employee to leave his or her employment with the Company; and (6) Altering, destroying, or deleting any documents, evidence, and materials (including electronically stored information) that are or could be relevant to the allegations in Plaintiffs' Complaint. D.I. 6. As to Defendant Kong, Plaintiffs additionally request 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.*

II. DISCUSSION

The issuance of a temporary restraining order requires that, for each claim, Plaintiffs show (1) they are likely to succeed on the merits; (2) denial will result in irreparable harm to Plaintiffs; (3) granting the injunction will not result in irreparable harm to Defendants; and (4) granting the

injunction is in the public interest. *TP Grp.-CI, Inc. v. Vetecnik*, No. 1:16-CV-00623-RGA, 2016 WL 5864030, at • 1 (D. Del. Oct. 6, 2016). "The movant cannot be granted relief if it does not meet the threshold for the first two 'most critical' factors: it must demonstrate that it can win on the merits ... and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief." *Ponder v. Maaranu*, C.A. No. 21-1239-MN-CJB, 2021 WL 5279636, at *1 (D. Del. Nov. 12, 2021).

A. Injunction Standard

Success on the Merits: Plaintiffs have shown a likelihood of success on the merits. Individual Defendants signed a Profits Agreement that incorporated covenants restricting the Individual Defendants 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.

Plaintiffs have provided evidence showing that Defendant Kong, while employed by Plaintiffs, founded and continues to operate Moss & Bloom, a business in direct competition with Plaintiff Nearly Natural. Compl., 126 (citing *Singer Deel*, Ex. D). Plaintiffs provide 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. Additionally, Plaintiffs allege that Defendant Kong engaged in a kickback scheme. *Id.* 1145-52, 58-62.

Plaintiffs have also made a sufficient showing that Defendants Kong and Milla, through their employment at Nearly Natural, were provided confidential 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.*, 139-40. Considering Defendant Kong's continued employment with Nearly Natural while working for a direct competitor, Plaintiffs have shown a likelihood that they will succeed in proving that Defendants utilized Plaintiffs' confidential information and trade secrets in order to compete with Plaintiffs.

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). For the following reasons, Plaintiffs have met this burden.

"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)).

Defendant Moss & Bloom sells products that are identical to Nearly Natural's products. Compl., 1 46. According to Plaintiffs, Moss & Bloom's products are also supplied by the same suppliers that Kong met and contracted with on behalf of Nearly Natural. *Id.* The likelihood of

irreparable harm is magnified here given Kong's employment with Nearly Natural and his prior experience as the Company's Vice President of Sales and Business Development.

In *Sensus*, the Court found evidence of irreparable harm where an employee had "in-depth knowledge regarding several key elements of [plaintiffs'] business operations" and was "a former executive" that "managed some large account clients as a Director of Sales." *Sensus USA, Inc. v. Franklin*, 2016 WL 1466488, at *8 (D. Del. Apr. 14, 2016). Similarly, here, Kong held the most senior sales role at Nearly Natural and had real-time and continuous access to Nearly Natural's customer lists, pricing, and sensitive business strategies. Compl., ¶¶ 19, 45.

Even more notable, however, the Court finds that Kong was uniquely positioned within Nearly Natural such that he not only had access to Nearly Natural's confidential information, but the ability to abuse it for both his personal benefit and the benefit of Moss & Bloom to the detriment of Nearly Natural's professional reputation and good will. Plaintiffs noted, for instance, that Kong answered only to Nearly Natural's CEO and 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. *Id.* 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. In fact, Nearly Natural's President and CEO, Robbie Singer, expressed concerns that Kong may have used his position within the company "to trade higher product prices for Nearly Natural in exchange for lower product prices for Moss & Bloom." Singer Decl., ¶ 22. Thus, the Court finds that Kong held more than in-depth knowledge--Kong controlled sales.

Finally, courts have found irreparable harm where, as here, there is evidence that an employee is competing with his or her prior employer in violation of a non-compete agreement.

See Hillard v. Medtronic, Inc., 910 F. Supp. 173, 179 (M.D. Pa. 1995) (emphasis added) ("Medtronic has an interest in preserving customer relationships, these interests were intended to be protected by the non-compete agreement. The evidence of record demonstrates that Conklin is currently acting on behalf of a competitor of Medtronic and pursuing business relationships with customers of Medtronic that he serviced while employed there. To the extent that the restrictive covenant is being violated, Medtronic is suffering irreparable harm by the potential loss of customers posed by Conklin's activities.").

Due to his position and his ongoing relationships with suppliers and customers, the Court agrees with Plaintiffs that the damage caused to Nearly Natural's professional and consumer relationships, reputation, and goodwill could be long lasting and irreparable. At this time, the Court is not certain that monetary damages could adequately compensate for such harm, especially where the scope of the harm remains largely unknown and the alleged wrongful conduct was done in violation of several restrictive covenants. Under the totality of these circumstances, the Court therefore finds that Plaintiffs are likely to suffer irreparable harm if not granted the TRO.

Balance of Hardships and Public Interest. Finally, 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 were allegedly aware of the Profits Agreement's restrictions on competition. 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

TRO that prohibits them from continuing to violate their contractual obligations is in the public interest and is unlikely to cause undue harm.

B. Scope of TRO

In order to maintain the status quo and prevent irreparable harm to Plaintiffs, the Court agrees with Plaintiffs that Individual Defendants must be enjoined from operating Moss & Bloom in order to prevent the Individual Defendants' use of Plaintiffs' confidential information and trade secrets. The Court also agrees with Plaintiffs that Defendants should be enjoined from contacting clients and suppliers given the likelihood that the relationships were the (1) result of confidential information learned at Nearly Natural, and (2) made in violation of the restrictive covenants. Moreover, Defendants' continued correspondence with Nearly Natural's customers or suppliers would only further damage Nearly Natural's professional relationship and reputation, given Defendant Kong's recent termination from Nearly Natural and his interest in promoting a competing business.¹

As to Plaintiffs' specific request that the Court freeze Defendant Kong's assets, the Court agrees that an asset freeze is necessary here. Plaintiffs "can secure the preliminary equitable remedy of an asset freeze with **"(1)** a showing that (plaintiff) [is] likely to become entitled to the encumbered funds upon final judgment and [2] a showing that without the preliminary injunction, (plaintiff) will probably be unable to recover those funds." See *Juul Labs, Inc. v. 4XPODS*, 509 F. Supp. 3d 52, 71 (D.N.J. 2020). In *Juul Labs*, the court found that an asset freeze was reasonable where there is "evidence of large movements or dissipation of funds." *Id.* The court reasoned

¹ At this time, the Court is not prepared to enjoin Moss & Bloom conducting any operations or business. Plaintiffs have not shown that Moss & Bloom only conducts business that uses Nearly Natural's confidential information or trade secrets, and the Court does not know whether Moss & Bloom conducts business that poses no harm to Plaintiffs that cannot be remedied through damages.

that, since "the purpose of a preliminary injunction is to maintain the status quo, *Acierno v. New Castle County*, 40 F.3d 645, 647 (3d Cir. 1994), the new accounts and transfers weigh in favor freezing the assets so that no more movements can occur." *Id.*

Plaintiffs have presented strong evidence in favor of freezing Kong's assets here. First, Plaintiffs discovered through a shared file server that Kong received over \$380,000 from four Nearly Natural suppliers from December 2020 to August 2021. Compl., ¶ 48. Plaintiffs argue that the payments are evidence of a kick-back scheme since "[t]here is no legitimate reason for Kong to receive direct payments" from the suppliers. *Id.*, ¶ 51. Plaintiffs additionally note that some of the wires reference "actual purchase orders" that were issued by the suppliers to Nearly Natural, while others are characterized as "commissions." Since Kong led over \$12.5 million in transactions for Plaintiffs, Plaintiffs believe that they will likely become entitled to significant funds upon a final judgement. *Id.*, ¶ 49; D.I. 7 at 17.

Additionally, without an injunction, there is a chance that Plaintiffs will be unable to recover funds. Plaintiffs argue that this is likely since Kong's bank statements show large movements of funds. For instance, his bank statements show that Kong has moved at least \$70,000 of the approximately \$380,000 wired from suppliers to a Robinhood brokerage account. *See* Singer Deel., ¶24; Exhibit H. Moreover, according to social media postings by Kong, he is a high-stakes gambler and has his own YouTube channel dedicated to high-stakes gambling. *Id.*, Exhibit I. Plaintiffs submit that, for these reasons, the Court should freeze Defendants' assets. The Court agrees for now.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for a Temporary Restraining Order and Motion for Expedited Discovery is granted.

* * *

WHEREFORE, at Wilmington this 17th day of November, 2023, **IT IS HEREBY ORDERED** that:

1. Plaintiffs' Motion for Temporary Restraining Order (D.I. 6) is **GRANTED as follows**. Defendants Korig and Milla are enjoined from the following:
 1. Operating, managing, or being employed by Moss & Bloom or any other entity providing the same or similar products and services as Nearly Natural.
2. All Defendants are enjoined from the following:
 - a. Disseminating or using any of Plaintiffs' confidential business information and trade secrets;
 - b. Contracting with any existing Nearly Natural customers;
 - c. Contacting any existing Nearly Natural suppliers;
 - d. Soliciting or encouraging any Nearly Natural employee to leave his or her employment with the Plaintiffs;
 - e. Altering, destroying, or deleting any documents, evidence, and materials (including electronically stored information) that are or could be relevant to the allegations in Plaintiffs' Complaint.
3. As to Defendant Kong, it is **FURTHER ORDERED AS FOLLOWS**:
 - a. Kong must produce his personal laptop to a third-party forensic examiner to be selected by Plaintiffs, no later than November 20, 2023, for purposes of identifying documents relevant to matters at issue in the Complaint; and
 - b. Kong is hereby enjoined 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.
4. Plaintiffs' Motion for a Preliminary Injunction, (D.I. 6), remains pending. A hearing is scheduled for **December 13, 2023**, at **1:00 PM**, to consider Plaintiffs' Motion for Preliminary Injunction.
 - a. Defendants shall file their Responsive Brief in Opposition to the Motion for Preliminary Injunction on or before December 1, 2023.

- b. Plaintiffs' Reply Brief shall be filed on or before December 8, 2023.
5. The Temporary Restraining Order will expire on **December 13, 2023, at 3:00 PM**, unless otherwise ordered by the Court.
6. Plaintiffs' Motion for Expedited Discovery, pursuant to Federal Rule of Civil Procedure 26(d)(1), (D.1. 4) is **GRANTED**:
- a. Plaintiffs and Defendants have leave to serve limited, expedited discovery before the Rule 26(f) conference.
 - b. Plaintiffs shall collectively serve no more than six (6) expedited discovery requests for production on or before November 20, 2023.
 - c. Defendants shall collectively serve no more than six (6) expedited discovery requests for production on or before November 20, 2023.
 - d. Parties shall respond to discovery requests within seven (7) days of the date that such requests are served and shall use best efforts to produce responsive documents within that timeframe.
7. Because this Memorandum Order is filed under seal, the parties shall meet and confer and submit a joint proposed redacted version no later than seven (7) days after the date of this Memorandum Order. In the absence of a timely request compliant with applicable standards, the Court will unseal the entire Memorandum Order.



GREGORY B. WILLIAMS
UNITED STATES DISTRICT JUDGE