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U.S. DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK  
LONG ISLAND OFFICE

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK  
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INTERTEK TESTING SERVICES, N.A., INC.,

Plaintiff,

-against-

**OPINION AND ORDER**  
19-cv-7103 (SJF)(ARL)

FRANK PENNISI, NICHOLAS PENNISI,  
WENDY ASKLUND and BIG APPLE  
TESTING, INC.,

Defendants.

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FEUERSTEIN, United States District Judge

On December 19, 2019, plaintiff Intertek Testing Services, N.A., Inc. (“plaintiff” or “Intertek”) commenced this action against defendants Frank Pennisi (“Pennisi”), Nicholas Pennisi (“Nicholas”), Wendy Asklund (“Asklund”) and Big Apple Testing, Inc. (“BAT”) (collectively, “defendants”), seeking, *inter alia*, (i) injunctive relief (A) to enforce restrictive covenants in Pennisi’s agreements with plaintiff, and to enjoin Pennisi from further violating those provisions, (B) to enforce agreements with Asklund and Nicholas concerning plaintiff’s trade secrets and confidential information, and to enjoin them from further misappropriation or dissemination of the company’s trade secrets and confidential information, and (C) to enjoin Nicholas, Asklund and BAT (collectively, the “BAT defendants”) from tortiously interfering with all of the aforementioned agreements; and (ii) damages, including attorneys’ fees, (A) for Pennisi’s alleged breach of contract, (B) for the alleged misappropriation of trade secrets and confidential information by Pennisi, Nicholas and Asklund (collectively, the “individual defendants”) in violation of the Defend Trade Secrets Act of 2016 (“DTSA”), 18 U.S.C. § 1836, and New York State law, and (C) for the BAT defendants’ tortious interference with contractual

relations under the New York common law. On that same date, upon plaintiff's application pursuant to Rule 65 of the Federal Rules of Civil Procedure, and after hearing argument from both sides, the Court entered a temporary restraining order ("TRO"), enjoining and restraining, upon the giving of security as provided therein, pending determination of plaintiff's motion for a preliminary injunction: (i) Pennisi "from performing services, in any capacity for [BAT];"<sup>1</sup> and (ii) the individual defendants "from disclosing any of Intertek's Confidential Information or Trade Secrets, . . . [and] from communicating, contacting, and/or soliciting any customers of Intertek" in violation of the agreements entered into between them and Intertek. (Order for Preliminary Injunction and Temporary Restraining Order ["TRO Order"] at 2-3).

Pending before the Court is plaintiff's motion for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining and restraining, pending the final hearing and determination of this action, (i) the individual defendants "from working with or for [BAT], or any other competitor of Intertek until after October 26, 2020;" (ii) BAT from employing Pennisi until after October 26, 2020; and (iii) all defendants (A) from "directly or indirectly using, disclosing or disseminating to any other person, organization or entity or otherwise using any of Intertek's confidential information or trade secrets, as set forth between [*sic*] the Agreements between the parties[.]" (B) from "directly or indirectly soliciting, contacting, doing business with, calling upon or communicating with any customer, former customer or prospective customer of Intertek with whom . . . [they] had contact or about whom they obtained confidential information . . . during their employment with Intertek, for the

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<sup>1</sup> Although the TRO indicates that Nicholas and Asklund were also temporarily restrained and enjoined "from performing services, in any capacity for [BAT,]" (TRO Order at 2), during the initial pretrial conference before the undersigned on January 9, 2020, after counsel for defendants represented that only Pennisi is subject to non-competition and non-solicitation provisions, the Court indicated that the TRO would not be enforced against defendants who are not subject to a non-compete clause, effectively vacating so much of the TRO as enjoined and restrained Nicholas and Asklund "from performing services, in any capacity for [BAT]." (*Id.*)

purpose of providing or selling services of other business engaged in the services provided by Intertek or that Intertek was engaged in at the time of . . . [the individual defendants'] resignation/separation from Intertek until after October 26, 2020[,]” and (C) “from using, for any purpose, any confidential information or trade secrets of Intertek.” (TRO Order at 2). For the reasons set forth below, plaintiff’s application is granted in part and denied in part.

## I. BACKGROUND

### A. Factual Background

In or about 1983, Pennisi became a partner in Materials Testing Laboratory (“MTL”), a company founded by Kevin Cosgrove (“Cosgrove”) which was “engaged in the business of commercial inspection and testing of the materials and construction of public works, infrastructure, and residential and commercial buildings.” (Declaration of Frank Pennisi [“Pennisi Decl.”], ¶ 2). From 1983 through 2012, Pennisi served as MTL’s Vice President of Mid-Atlantic Operations, pursuant to which he “opened and oversaw divisions in New Jersey, Delaware, Connecticut and Pennsylvania.” (*Id.*, ¶ 3). According to Pennisi, (i) MTL was reorganized in 2012 to become MT Group, LLC (“MT Group”); (ii) Jeffrey Roden (“Roden”), “an operations manager and long-time employee, received shares in the company;” and (iii) Pennisi became the Director of Fenestration for MT Group’s offices in Farmingdale, New York and Cliffwood, New Jersey. (*Id.*, ¶¶ 3-4).

In November 2013, Asklund joined MT Group as a Business Development Associate, pursuant to which her responsibilities included “business development and bidding on new projects.” (Declaration of Wendy Asklund [“Asklund Decl.”], ¶ 2).

In 2013, Intertek, which describes itself as “a leading provider of quality solutions around the world,” (Complaint [“Compl.”], ¶ 10; *see also* Declaration of Vinu Abraham [“Abraham Decl.”], ¶ 6), began exploring opportunities to expand its “portfolio of services to include Building & Construction [B&C] commissioning and testing services” in the New York metropolitan area. (Abraham Decl., ¶ 6; *see also* Compl., ¶ 10). Eventually, Intertek’s exploration focused on the acquisition of MT Group, which plaintiff indicates “is one of the largest full service [*sic*] testing and inspection companies servicing the construction industry in the Mid-Atlantic and Northeast regions, including the States of New York and New Jersey.”<sup>2</sup> (Compl., ¶¶ 9-10; *see also* Abraham Decl., ¶ 6). According to plaintiff, since MT Group “had served the New York City metro area’s construction industry for more than 35 years[,] . . . [plaintiff] was particularly interested in acquiring the goodwill and client relationships with MT Group.” (Compl., ¶ 11; *see also* Abraham Decl., ¶ 8; Declaration of Jeffrey Roden [“Roden Decl.”], ¶¶ 6, 8). At that time, MT Group was owned by Pennisi, Cosgrove and Roden (collectively, the “MT Group Members”). (Compl., ¶ 12; *see also* Abraham Decl., ¶ 11; Roden Decl., ¶ 4).

According to plaintiff, in or around August 2015, as the terms of Intertek’s acquisition of MT Group were allegedly “being completed,” Roden commenced a “business relationship” with BAT, described as a New York-based “company which performs special construction inspecting and materials testing on behalf of New York’s engineering and development firms.” (Compl., ¶ 39; *see also* Roden Decl., ¶ 21; Abraham Decl., ¶ 37). Plaintiff further alleges: (i) that “[a]t their first meeting, Roden met with [BAT’s] Chief Executive Officer, Jay Rubin (‘Rubin’),” (Compl., ¶ 40; *see also* Roden Decl., ¶ 21); and (ii) that Roden “met with Rubin and/or [BAT’s] Executive

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<sup>2</sup> Vinu Abraham (“Abraham”), Intertek’s vice president, describes Intertek in virtually the same way following its acquisition of MT Group. (*See* Abraham Decl., ¶ 2).

Director, Joel Lowy (‘Lowy’), either in-person or over the telephone on approximately 100 or more occasions,” throughout the course of his “business relationship” with BAT. (Compl., ¶ 42; *see also* Roden Decl., ¶ 24).

Beginning in or around September 2015, MT Group began performing soil testing for BAT because BAT “lacked the required licensure to perform its own laboratory work” at that time. (Compl., ¶ 41; *see also* Roden Decl., ¶ 22).

After “lengthy negotiations” over a two (2)-year period, Intertek entered into a Sale and Purchase Agreement (the “Purchase Agreement”), dated October 8, 2015, “to acquire MT Group for considerable financial consideration[,]” (Compl., ¶¶ 13, 15; *see also* Abraham Decl., ¶ 9 and Ex. A at p. 12, Art. 2), which, according to plaintiff, it was willing to pay in order to acquire MT Group’s goodwill and relationships in the testing and inspection industries in the New York metropolitan area. (Compl., ¶¶ 14, 19; *see also* Abraham Decl., ¶¶ 10, 12, 15, 30). All of the MT Group Members, including Pennisi, signed the Purchase Agreement. (Compl., ¶¶ 15, 21; *see* Abraham Decl., Ex. A; Roden Decl., ¶ 10). According to plaintiff, it “paid multiple millions of dollars in order to acquire MT Group (the ‘acquisition price’),” in exchange for which the MT Group Members “became employees of the newly-acquired MT Group.” (Compl., ¶ 16; *see also* Abraham Decl., ¶ 17; Roden Decl., ¶ 14). According to Abraham, “the MT Group entity survived the acquisition,” but the MT Group Members “released all ownership interest in the entity.” (Abraham Decl., ¶ 11).

Pursuant to the Purchase Agreement, the MT Group Members, including Pennisi, agreed to a covenant against competition, (Compl. ¶¶ 17, 21; *see also* Abraham Decl., ¶ 16), which provides, in pertinent part, as follows:

“(a) In order to induce [Intertek] to enter into this Agreement...each [MT Group Member] agrees that he will not, without the prior written consent of [Intertek], for

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