

Dep 247

CAUSE NO. 11 03407

IN RE: MARY KAY INC.,
A Delaware corporation,

Petitioner.

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IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

191a.1 JUDICIAL DISTRICT

FILED
2011 MAR 08 PM 4:13
GARY FITZSIMMONS
CLERK
DALLAS COUNTY, TEXAS
DEPUTY

**PETITIONER MARY KAY INC.'S VERIFIED PETITION TO TAKE A DEPOSITION
TO INVESTIGATE POTENTIAL CLAIMS**

Pursuant to Texas Rule of Civil Procedure 202, Petitioner, Mary Kay Inc. ("Mary Kay"), files this Petition to Take a Deposition to Investigate Potential Claims ("Petition") and hereby requests authority to depose Benjamin Thayer ("Mr. Thayer"). Mary Kay seeks to depose Mr. Thayer, an individual who previously contracted with Mary Kay to sell Mary Kay cosmetics, to investigate potential claims against Mr. Thayer for breach of contract, unfair competition, tortious interference with contractual and business relationships and/or trademark infringement.

PARTIES

1. Mary Kay is a Delaware corporation, licensed to do business in the State of Texas. Mary Kay maintains its principal place of business at 16251 Dallas Parkway, Addison, Texas 75001.

2. Mary Kay seeks to depose Benjamin Thayer, an individual believed to be located at 3580 S Shawnee Avenue, Pahrump, Nevada 89048. Mr. Thayer's telephone number is (775) 513-0429.

FACTS

3. Mary Kay is a manufacturer and wholesale distributor of cosmetics, toiletries, skin care, and related products. The worldwide success of Mary Kay is undeniable; the Company's products are now sold in over thirty-five (35) markets around the world. Founded in 1963, Mary Kay has become one of the largest direct sellers of skin care products and color cosmetics in the United States.

4. Mary Kay's international success can be attributed to the carefully designed business model it created for the marketing, sale, and distribution of its products. Through this business model, Mary Kay produces the highest quality products and sells them directly to its Independent Beauty Consultants ("IBC"), who then sell the products to their customers, the ultimate consumers. An individual becomes an IBC when she/he submits an IBC Agreement, which is accepted by Mary Kay at its Dallas, Texas Headquarters, and then purchases a demonstration kit containing product samples and general information for use in her/his business.

5. The IBC Agreement also places obligations on the IBC designed to protect the stature of Mary Kay's trademarks. The terms of the IBC Agreement prohibit IBCs from using the Mary Kay name or trademark in any advertising, specifically prohibiting the use of the Mary Kay name and trademark in internet advertising or sales without Mary Kay's prior written approval. Mary Kay expressly retains the exclusive right to use and advertise the Mary Kay name and trademark at its discretion and in a manner consistent with the Mary Kay business model.

6. Mary Kay seeks to depose Mr. Thayer to investigate potential claims by Mary Kay against him for breach of contract, unfair competition, tortious interference with contractual and business relationships, and/or Texas common law trademark violations.

7. Mary Kay believes Mr. Thayer has been facilitating the sale of Mary Kay cosmetics on eBay, Inc. ("eBay") in violation of Texas law. eBay is an on-line auction and retail front for individual sellers. Mary Kay suspects Mr. Thayer as a person who is using Mary Kay's trademarks and selling Mary Kay's products without Mary Kay's permission. Mr. Thayer is a former IBC, contractually prevented from selling Mary Kay products online. Mary Kay did not authorize the sale of any of its products, or the use of its trademarks or trade dress, on eBay. Further, Mary Kay did not authorize any person to sell any of its products to Mr. Thayer for the purpose of reselling such products on eBay.

8. The subject matter of Mr. Thayer's deposition will be his involvement in the sale of Mary Kay cosmetics on eBay and/or the identity of the individuals who have been selling Mary Kay products to, and buying products from Mr. Thayer, in anticipation of claims against Mr. Thayer for breach of contract, tortious interference with contractual and business relationships, unfair competition and Texas common law trademark violations.

9. The IBC Agreement between Mary Kay and Mr. Thayer provides that, the parties "agree that if any dispute or controversy arises between them concerning any matter relating to this Agreement that any issues which either party may elect to submit for legal jurisdiction shall be submitted to the jurisdiction of the courts of the State of Texas and the parties agree that the proper venue shall be Dallas, Dallas County, Texas." This Petition is filed in Dallas County, Texas, where Petitioner anticipates the institution of a suit in which Petitioner may be a party.

REQUEST TO DEPOSE

10. Petitioner asks the Court to issue an order authorizing it to examine Mr. Thayer by oral and videotaped deposition. Petitioner expects to elicit testimony from Mr. Thayer regarding his involvement in the sale of Mary Kay products on eBay, and in particular, the manner in which he acquired the Mary Kay products which were sold on eBay.

11. Petitioner further requests that Mr. Thayer be ordered to preserve and produce for inspection and copying the following documents and items:

- a. All computer disks or drives, or information stored on any computer, server, or electronic storage device, containing information that refers or relates to the sale of Mary Kay products on eBay, including the identity of any individual who provided Mr. Thayer Mary Kay products which were subsequently sold on eBay, or any individual to whom Mr. Thayer provided Mary Kay products which were subsequently sold on eBay;
- b. All hard copy documents that refer or relate to the sale of Mary Kay products on eBay, including the identity of any individual who provided Mr. Thayer Mary Kay products which were subsequently sold on eBay, or any individual to whom Mr. Thayer provided Mary Kay products which were subsequently sold on eBay;
- c. All hard copy or electronic documents that came from, once belonged to, or were copied from any individual and/or company who sold Mr. Thayer Mary Kay products which were subsequently sold on eBay; and
- d. All hard copy or electronic documents that were sent to or were copied to any individual and/or company who sold Mr. Thayer Mary Kay products which were subsequently sold on eBay.

12. Mary Kay seeks to obtain such testimony to investigate potential claims against Mr. Thayer for breach of contract, tortious interference with contractual and business relationships, unfair competition and/or Texas common law trademark violations. The benefit of allowing the deposition outweighs the burden or expense of the procedure because it allows Mary Kay to investigate potential claims before utilizing judicial resources and immediately filing a lawsuit or for injunctive relief.

13. FOR THESE REASONS, Petitioner requests that the Court set a date for hearing on this Petition and, after the hearing, issue an order authorizing (1) Petitioner to take the oral and videotaped deposition of Mr. Thayer, and (2) the production of documents and media listed above.

Dated: March 18, 2011

Respectfully submitted,



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Preston R. Mundt
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ATTORNEYS FOR PETITIONER

VERIFICATION

STATE OF TEXAS

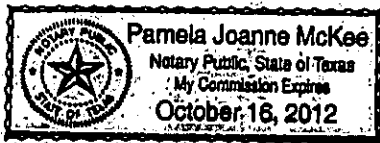
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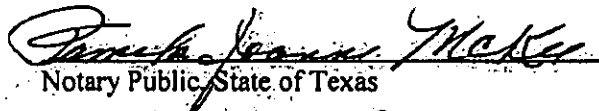
COUNTY OF DALLAS

BEFORE ME, the undersigned Notary Public, on this day personally appeared Eric Haynes and, after being duly sworn, stated under oath that he is the Senior Counsel for Mary Kay Inc.; that he has read the above Petition; and that the statements contained in the Petition are within his personal knowledge and are true and correct.


Eric Haynes

SUBSCRIBED AND SWORN TO BEFORE me on March 15, 2011, to certify which witness my hand and official seal.




Notary Public, State of Texas

My commission expires: Oct. 16, 2012

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FILED
2011 MAR 18 PM 4:34
GARY FITZSIMMONS
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Austin, Texas 78701
1000 Louisiana, Suite 400
Houston, Texas 77002
DEPUTY

March 18, 2011

Via Hand Delivery

Gary Fitzsimmons, District Clerk
Dallas County District Clerk
600 Commerce Street, Suite 103
Dallas, Texas 75202

In Re Mary Kay Inc., A Delaware Corporation

Dear Clerk:

I have enclosed the original and five copies of the following for filing:

1. PETITIONER MARY KAY INC.'S VERIFIED PETITION TO TAKE A DEPOSITION TO INVESTIGATE POTENTIAL CLAIMS of deponent Benjamin Thayer;
2. PETITIONER MARY KAY INC.'S VERIFIED PETITION TO TAKE A DEPOSITION TO INVESTIGATE POTENTIAL CLAIMS of deponent Inez Thayer;
3. PETITIONER MARY KAY INC.'S VERIFIED PETITION TO TAKE A DEPOSITION TO INVESTIGATE POTENTIAL CLAIMS of deponent Garry Honeycutt; and
4. PETITIONER MARY KAY INC.'S VERIFIED PETITION TO TAKE A DEPOSITION TO INVESTIGATE POTENTIAL CLAIMS of deponent Stephanie Honeycutt.

I have enclosed my firm's check in the amount of \$988.00 to cover your filing fees for the four petitions. Because these cases are related, I request that they be filed in the same court. Please file the originals and return file-stamped copies to me.

If you have any questions, please do not hesitate to contact me.

Sincerely yours,


Preston R. Mundt

Enclosures

FIAT

Hearing on Petitioner Mary Kay Inc.'s Verified Petition to Take Deposition to Investigate Potential Claims is set on the _____ day of _____, 2011, at _____, _____M., in the courtroom of the _____ Judicial District Court of Dallas County, Texas.

SIGNED this _____ day of _____, 2011.

JUDGE PRESIDING