UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISON

MARY KAY INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Case Number 3-12-CV-00029-D**
	§	
AMY DUNLAP,	§	
	§	
Defendant.	§	

BRIEF IN SUPPORT OF PLAINTIFF MARY KAY INC.'S RULE 12(b)(6) MOTION TO DISMISS DEFENDANT AMY DUNLAP'S COUTNERCLAIMS NOS. 1 AND 2

DATE: February 22, 2012

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TABLE OF CONTENTS

I. INTRODUCTION ....**Error! Bookmark not defined.**

II. ALLEGATIONS OF DUNLAP'S COUNTERCLAIM NOS. 1 AND 2 1

III. ARGUMENT AND AUTHORITIES 3

A. Legal Standard 3

B. Dunlap Fails to State a Plausible DTPA Claim. 3

1. Dunlap's Allegations Establish that She is Not a "Consumer" Under the DTPA. 4

a. Dunlap did not Seek or Acquire Goods or Services by Purchase or Lease under the NSD Agreement. 4

b. Dunlap did not Seek or Acquire "Goods or Services" under the NSD Agreement. 6

c. As an Independent Contractor, Dunlap is a Seller, not a Consumer." 9

2. Dunlap's Allegations Show that Mary Kay did not Commit a Wrongful Act By Violating § 2.210(b) of the Texas Business & Commerce Code. 10

C. Dunlap Fails to State a Plausible Antitrust Claim. 10

IV. CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Am. Chiropractic Clinics, P.C. v. Spence,
1995 WL 731786, at * (Tex. App. – Dallas 1995, writ denied) 12

Amey v. Barrera, 2004 WL 63588, at *13 (Tex. App. – Corpus Christi Jan. 15, 2004, no pet.) ... 9

Amstadt v. U.S. Brass Corp., 919 S.W.2d 644 (Tex. 1996).. 4

Ashcroft v. Iqbal, 556 U.S. 662 S.Ct. 1937, 1949 (2009) 3

Backmon-Dunda v. Mary Kay Inc.,
2009 WL 866214, at *6 (Tex. App. – Dallas Apr. 1, 2009, pet. denied)................................. 9

Baker v. Missouri Pac. Truck Lines, Inc.,
616 S.W.2d 389 (Tex. Civ. App. – Houston 1981, no writ) 9

Balsiger v. Clopay Corp., 1992 WL 389784, at *4 (Tex. App. – Dallas 1992, writ denied) 6

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 3

Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535 (Tex. 1981).. 4

Caremark Homecare, Inc. v. New England Critical Care, Inc.,
700 F. Supp. 1033, 1036 (D. Minn. 1988).. 12

Cole v. Champion Enters., Inc., 496 F. Supp. 2d 613 (M.D.N.C. 2007).................................... 11

Craig, 1998 WL 466133, at *2-3 10

DeSantis v. Wackenhut Corp., 793 S.W.2d 670 (Tex. 1990) 11

First Mun. Leasing Corp. v. Blankenship, Potts, Aikman, Hagin and Stewart,
648 S.W.2d 410 (Tex. App. – Dallas 1983, writ ref'd n.r.e.) 7

Fisher Controls Int'l, Inc. v. Gibbons,
911 S.W.2d 135 (Tex. App. – Houston 1995, writ denied) 7, 8

Hand v. Dean Witter Reynolds, Inc.,
889 S.W.2d 483, 497 (Tex. App. - Houston 1994, writ denied).. 7, 8

In re Katrina Canal Breaches Litig., 495 F.3d 191 (5th Cir. 2007) 3

Johnson v. Walker, 824 S.W.2d 184 (Tex. App. – Fort Worth 1991, writ denied) 4

Meineke Discount Muffler v. Jaynes, 999 F.2d 120 (5th Cir. 1993) 7, 8

Philips v. Pitt County Mem. Hosp., 572 F.3d 176 (4th Cir. 2009) 5

Riverside Nat'l Bank v. Lewis, 603 S.W.2d 169 (Tex. 1980) 7

Roberts v. Burkett,
802 S.W. 2d 41, 47 (Tex. App. – Corpus Christi 1990, no writ 5

Rutherford v. Whataburger, Inc.,
601 S.W.2d 441 (Tex. App. – Houston 1980, writ ref'd n.r.e.) 5

Stearns v. Genrad, Inc., 564 F. Supp. 1309 (M.D.N.C. 1983) 12

Tucker v. Nat'l Linen Serv. Corp., 200 F.2d 858 (5th Cir. 1953) 5

STATUTES

TEXAS BUSINESS & COMMERCE CODE ANNOTATE § 17.45(1) 6

TEXAS BUSINESS & COMMERCE CODE § 2.210(b) 2, 10

TEXAS BUSINESS & COMMERCE CODE § 17.45(4) 4, 5

TEXAS BUSINESS & COMMERCE CODE § 17.46(b) 3

TEXAS BUSINESS & COMMERCE CODE § 17.50(a) 4

TEXAS BUSINESS & COMMERCE CODE § 17.50(h) 4

TEXAS BUSINESS & COMMERCE CODE §§ 17.41-17.63 .... 1, 4

OTHER AUTHORITIES

DECEPTIVE TRADE PRACTICES ACT .... passim

TEXAS INSURANCE CODE chapter 541 4

RULES

FEDERAL RULES OF CIVIL PROCEDURE 12(b)(6) 1, 3, 5

TO THE HONORABLE COURT:

Plaintiff Mary Kay Inc. ("Mary Kay") files this brief in support of its motion to dismiss Defendant Amy Dunlap's ("Dunlap") Counterclaims Nos. 1 and 2 pursuant to Rule 12(b)(6) of the FEDERAL RULES OF CIVIL PROCEDURE.

I. INTRODUCTION

This Court should dismiss Counterclaims Nos. 1 and 2 pursuant to Rule 12(b)(6) of the FEDERAL RULES OF CIVIL PROCEDURE for three reasons: *First*, Dunlap's allegations conclusively show that she was *not* a "consumer" under the DECEPTIVE TRADE PRACTICES ACT ("DTPA") with respect to the National Sales Director Agreement ("NSD Agreement")—the transaction that forms the basis of her DTPA claim—because Dunlap did not acquire "goods or services" "by purchase or lease" under the NSD Agreement. Accordingly, because Dunlap's allegations establish that she was not a DTPA "consumer" as a matter of law, Dunlap's DTPA claim—Counterclaim No. 1—should be dismissed with prejudice.

Second, Dunlap's DTPA claim based on Mary Kay's refusal to allow her to sell or will her business after its termination should be dismissed with prejudice, because Dunlap's allegation that Mary Kay acted wrongfully is disproved by the plain language of the statute cited by Dunlap in the Counterclaim.

Finally, Dunlap's antitrust claim—Counterclaim No. 2—should be dismissed because Dunlap fails to allege facts sufficient to show that the non-solicitation provision contained in the NSD Agreement has an adverse effect on competition in the relevant market.

II. ALLEGATIONS OF DUNLAP'S COUNTERCLAIM NOS. 1 AND 2

Dunlap alleges that Mary Kay "has engaged in false, misleading, and deceptive acts and practices" in violation of the DTPA, TEXAS BUSINESS & COMMERCE CODE §§ 17.41-17.63. *See*

Answer at ¶ 12. "By agreeing to acquire her beauty consulting business as an independent contractor" under the NSD Agreement, Dunlap alleges that she was a "consumer" of Mary Kay's services, as that term is defined in the DTPA. *Id.* She alleges that Mary Kay represented to her and she relied upon Mary Kay's representations that her status as an "independent contractor" afforded her the ownership of her own business. *Id.* at ¶ 12-13.

Dunlap complains that Mary Kay's "trade practices . . . were misleading, deceptive, and false because Mary Kay never compensated [Dunlap] for her business after taking it from her without compensation when she resigned as National Sales Director, and would not allow her to sell or will her 'business.'" *Id.* at 13. Dunlap further alleges that "Mary Kay violated the provisions of § 2.210(b) of the TEXAS BUSINESS & COMMERCE CODE" with Section 13 of the NSD Agreement, which provides that the NSD Agreement "shall not be assigned or transferred by [Dunlap]," "since [§ 2.210(b)] requires that contractual rights such as provided for in the [NSD Agreement] are assignable thereby allowing [Dunlap's] business to be assigned or otherwise transferred by gift or will." *Id.*

Regarding her antitrust claim, Dunlap alleges that Mary Kay "is attempting to restrain [her] by use of its unlawful non-compete[1] agreement [contained section 8.10 of the NSD Agreement] from competing with [Mary Kay] and those other independent contractors with whom [Dunlap] seeks to recruit to assist her in building her direct sales business." Answer at ¶ 19. Dunlap asserts that "[s]uch restraints by [Mary Kay] are unreasonable" and Dunlap "has been unfairly damaged and the growth of her business stunted[.]" *Id.*

[1] Dunlap refers to section 8.10 of the NSD Agreement as a "non-compete," *see* Answer at ¶ 19. The provision, however, is more accurately referred to as a non-solicitation agreement. In any case, regardless of whether section 8.10 is called a non-compete or a non-solicitation agreement, for the reasons discussed below, Dunlap fails to state a plausible antitrust claim.

III. ARGUMENT AND AUTHORITIES

A. Legal Standard.

In resolving a Rule 12(b)(6) motion, the Court must follow a two-pronged approach. *First*, the Court must accept all well-pleaded factual allegations as true, *see In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007), but "[t]hread-bare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009). Nor must the Court "accept as true a legal conclusion couched as a factual allegation." *Id.* at 1949-50; *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). *Second*, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 129 S.Ct. at 1950. This determination is context-specific, requiring the Court to draw on its experience and common sense. *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw [a] reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown'—that the pleader is entitled to relief," and it must be dismissed. *Id.* at 1950 (alteration omitted).

B. Dunlap Fails to State a Plausible DTPA Claim.

Dunlap's Counterclaim No. 1 should be dismissed because she fails to plead sufficient facts to show at least two elements of her DTPA claim. To state a claim under the DTPA, a plaintiff must plead and prove the following: (1) the plaintiff is a consumer; (2) the defendant can be sued under the DTPA; (3) defendant committed a false, misleading, or deceptive act or practice that is specifically enumerated in the "laundry list" found in TEXAS BUSINESS &

COMMERCE CODE § 17.46(b) and that was relied on by the plaintiff to the plaintiff's detriment;[2] and (4) the defendant's action was a producing cause of the plaintiff's damages. *See* TEX. BUS. & COM. CODE §§ 17.41-17.63; *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 649 (Tex. 1996). Here, Dunlap fails to plead facts establishing the first and third elements of the claim.

1. Dunlap's Allegations Establish that She is Not a "Consumer" Under the DTPA.

Dunlap pleads facts that conclusively establish that she is ***not*** a "consumer" as a matter of law. Under the DTPA, a consumer is an individual who (1) seeks or acquires (2) by purchase or lease (3) goods or services, and (4) those goods or services form the basis of her complaint. *See* TEX. BUS. & COM. CODE § 17.45(4) (defining "consumer" as "an individual . . . who seeks or acquires by purchase or lease, any goods or services[.]"); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 539 (Tex. 1981) (holding that to qualify as a "consumer" under the DTPA, "the person must have sought or acquired goods or services by purchase or lease" and "the goods or services purchased or leased must form the basis of the complaint"). "The question of whether a plaintiff is a consumer under the DTPA is a question of law to be determined by the court." *Johnson v. Walker*, 824 S.W.2d 184, 187 (Tex. App. – Fort Worth 1991, writ denied). Because Dunlap's allegations conclusively show that she did not seek or acquire "by purchase or lease" "goods or services" that "form the basis of her complaint," her Counterclaim No. 1 should be dismissed with prejudice.

a. Dunlap did not Seek or Acquire Goods or Services *by Purchase or Lease* under the NSD Agreement.

[2] A plaintiff can also make out a DTPA claim by pleading and proving that the defendant committed one or more of the following acts, which based on Dunlap's allegations, do not appear to be the basis of Dunlap's DTPA counterclaim: (1) a breach of an express or implied warranty; (2) any unconscionable action or course of action; (3) the use or employment of an act or practice in violation of the TEXAS INSURANCE CODE chapter 541; or (4) a violation of one of the "tie-in" consumer statutes, as authorized by TEXAS BUSINESS & COMMERCE CODE § 17.50(h), which are classified as "false, misleading, or deceptive acts or practices." *See* TEX. BUS. & COM. CODE § 17.50(a).

To support her DTPA claim, Dunlap alleges that Mary Kay failed to compensate her for the independent beauty consulting business that she had after she resigned her position, and that Mary Kay purportedly refused to allow her to sell or will her business to others. *See* Answer at ¶ 13 ("These trade practices of Mary Kay were misleading, deceptive, and false in that Mary Kay never compensated Defendant for her business after taking it from her without compensation when she resigned as National Sales Director, and would not allow her to sell or will her business."). Dunlap alleges that "[b]y agreeing to acquire her beauty consulting business as an independent contractor" under the NSD Agreement, she was a "consumer of [Mary Kay's] services." *See id.* at ¶ 12. However, the NSD Agreement, which Dunlap attaches to her counterclaims, conclusively establishes that she was ***not*** a "consumer" under the DTPA.[3]

To be a "consumer" under the DTPA, Dunlap must satisfy the "by purchase or lease" requirement. *See* TEX. BUS. & COM. CODE § 17.45(4) ("'Consumer' means an individual . . . who seeks or acquires by purchase or lease"); *Rutherford v. Whataburger, Inc.*, 601 S.W.2d 441, 444 (Tex. App. – Houston 1980, writ ref'd n.r.e.) ("[T]he words purchase or lease modifies both the words seek and acquire. Thus, the plaintiff must either purchase or lease goods from the defendant or seek to purchase or lease goods from the defendant in order to fall within the purview of § 17.45(4)."); *id.* (holding that plaintiff is not a "consumer" where plaintiff's claim is based on defendant's failure to deliver contest prize and plaintiff did not pay for prize (or chance to win) prize nor did he seek to pay for prize (or chance to win)); *Roberts v. Burkett,* 802 S.W. 2d 41, 47 (Tex. App. – Corpus Christi 1990, no writ) (holding that plaintiff is not "consumer" where plaintiff did not pay for services acquired); *Balsiger v. Clopay Corp.*, 1992 WL 389784, at *4

[3] On a Rule 12(b)(6) motion to dismiss, the court may consider exhibits attached to the complaint. *Philips v. Pitt County Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). If there is a conflict between allegations in the pleadings and exhibits thereto, it is well settled that exhibits control. *See Tucker v. Nat'l Linen Serv. Corp.*, 200 F.2d 858, 864 (5th Cir. 1953).

(Tex. App. – Dallas 1992, writ denied) (holding that where plaintiff neither purchased rope nor sought to purchase rope and rope was gratuitous to plaintiff's purchase of rain gutters, plaintiff was not a DTPA consumer of the rope).

The NSD Agreement shows that Dunlap cannot meet this requirement, because Dunlap acquired nothing under the NSD Agreement "by purchase or lease." Under the NSD Agreement, Mary Kay named Dunlap as National Sales Director ("NSD") "without the payment to [Mary Kay] of any monetary consideration whatsoever given or promised to be given by [Dunlap] for such designation and rights." *See* Agreement (attached as "Exhibit A" to Answer (Doc. # 17-1)) at § 1. Accordingly, because Dunlap's allegations show that she is not a "consumer" under the DTPA, Dunlap's Counterclaim No. 1 should be dismissed with prejudice.

b. Dunlap did not Seek or Acquire "*Goods or Services*" under the NSD Agreement.

Assuming *arguendo* that Dunlap purchased the benefits she acquired under the NSD Agreement, Dunlap is still not a "consumer" under the DTPA because, by entering the Agreement, Dunlap acquired intangibles—*e.g.*, the right to receive commissions; the right to use Mary Kay's name, trade names, and trademarks under certain circumstances; the right to participate in Yellow Pages advertising, *etc.*—which are ***not*** covered by the DTPA.

The DTPA defines "goods" as "tangible chattels or real property purchased or leased for use." Tex. Bus. & Com. Code Ann § 17.45(1). This statutory definition "indicates an obvious legislative intent to exclude the purchase of intangibles from the scope of the DTPA." *Hand v. Dean Witter Reynolds, Inc.*, 889 S.W.2d 483, 497 (Tex. App. – Houston 1994, writ denied). And "numerous courts have held that intangibles are . . . excluded from coverage under the DTPA." *Id.* (citing cases where intangibles such as stock certificates, choses in action, money, bills and notes, securities and documents of title, certificates of deposit, and accounts receivable were

excluded from the DTPA); *Fisher Controls Int'l, Inc. v. Gibbons*, 911 S.W.2d 135, 139-40 (Tex. App. – Houston 1995, writ denied) (finding that the DTPA excludes those transactions that primarily convey intangible property).

By entering into the NSD Agreement, Dunlap sought and acquired the right to receive commissions under the terms set out in the Agreement, *see* Agreement at § 3; the right to use Mary Kay's name, trade names, and trademarks under certain circumstances, *see id.* at § 5; and the right to participate in Yellow Pages advertising, *see id.* at § 6.[4] "[A] right is an intangible and therefore does not confer consumer status under the DTPA." *Hand*, 889 S.W.2d at 497; *see also First Mun. Leasing Corp. v. Blankenship, Potts, Aikman, Hagin and Stewart*, 648 S.W.2d 410, 417 (Tex. App. – Dallas 1983, writ ref'd n.r.e.) (abrogated on other grounds) (holding that purchase of the right to receive payment under the terms of a lease was not a "good" under the DTPA because it is an intangible). Furthermore, two of the rights Dunlap acquired under the NSD Agreement were rights to receive or use intangibles (*i.e.* commissions and trademarks). *See Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 174 (Tex. 1980) (money is an intangible not covered by the DTPA); *Snyders Smart Shop v. Santi, Inc.*, 590 S.W.2d 167, 170 (Tex. Civ. App. – Corpus Christi 1979, no writ) (accounts receivable are an intangible not covered by the DTPA); *Meineke Discount Muffler v. Jaynes*, 999 F.2d 120, 125 (5th Cir. 1993) (trademarks are intangibles not covered by the DTPA).

Dunlap alleges that, under the NSD Agreement, she was a "consumer of [Mary Kay's] services." Answer at ¶ 12. Although Dunlap does not allege what "services" she consumed under the Agreement, assuming *arguendo* that Mary Kay provided her with some services

[4] Dunlap also received, *inter alia*, the right to use Mary Kay's copyrighted materials, to purchase or receive promotional materials, to compete for prizes and awards, to participate in benefit programs which might be made available, *see id.* at § 7.2; and the right to receive special recognition by Mary Kay and personal access to Mary Kay's compiled reports and information, *see id.* at § 7.3.

thereunder, these collateral services do not make Dunlap a consumer under the DTPA. When a transaction is a hybrid—involving the purchase of both intangibles and services—to obtain consumer status, the services must have been an important objective of the transaction and not merely incidental to the transaction. *See Hand*, 889 S.W.2d at 500 ("When a transaction's central objective is the acquisition of an intangible, Texas law requires that the collateral service be an important objective of the transaction and not merely incidental to the performance of a transaction excluded under the DTPA.").

Here, the collateral services that may have been provided to Dunlap under the NSD Agreement were merely incidental to the transaction, rather than an objective of the transaction. *See Fisher Controls*, 911 S.W.2d at 140 (holding that where plaintiff contracted to be a sales representative of defendant, did not pay for the right, would receive a commission on sold products, could also buy defendant's products at a discount and resell them on its own behalf, and could attend training sessions provided by defendant, "as a matter of law . . . the few 'collateral services' [defendant] agreed to provide [plaintiff] under the contract were merely *incidental* to the transaction rather than being an *objective* of the transaction" and therefore plaintiff was not a consumer under the DTPA).

Moreover, even if the services offered under the NSD Agreement were an important objective of the transaction (which they were not), to be entitled to consumer status, Dunlap's complaint must be *about* those services. *See Hand*, 889 S.W.2d at 500 ("When the basis of the complaint is the purchase of the intangible instead of any collateral services, the plaintiff is not entitled to consumer status."); *Meineke*, 999 F.2d at 125 (holding that plaintiff is not consumer where basis of complaint is trademark rights—not any equipment or services provided by defendant); *Amey v. Barrera*, 2004 WL 63588, at *13 (Tex. App. – Corpus Christi Jan. 15, 2004,

no pet.) (holding that plaintiff was not a consumer, even though important objective of transaction was tangible physical assets, where plaintiff's claims are based on customer accounts sold—an intangible). Here, Dunlap does not complain about any services provided under the NSD Agreement. Instead, she complains that Mary Kay did not pay her for her business when she resigned as NSD and did not permit her to sell or will her business—both intangibles (money and assignability rights) that Dunlap alleges she is entitled to base on her status as an independent contractor under the NSD Agreement. Thus, Dunlap is not a "consumer" under the DTPA. *See Backmon-Dunda v. Mary Kay Inc.*, 2009 WL 866214, at *6 (Tex. App. – Dallas Apr. 1, 2009, pet. denied) (holding that where plaintiff' sales director's claims were based on Mary Kay's refusal to allow plaintiff to transfer her rights under the terminated agreement, plaintiff is not a "consumer" under the DTPA).

c. As an Independent Contractor, Dunlap is a Seller, not a "Consumer."

Dunlap alleges that "[b]y agreeing to acquire her beauty consulting business as an independent contractor," she was a consumer of Mary Kay's services. *See* Answer at ¶ 12. However, by agreeing to act as an independent contractor for Mary Kay, it is more accurate to say that Dunlap was a *seller*, not a *consumer*. The NSD Agreement created a relationship whereby Dunlap was "an independent contractor for commission compensation," Agreement at § 11.1, whereby Dunlap's commission earnings were "contingent upon the results of [her] efforts in promoting sale of Mary Kay products and in inspiring, motivating, counseling and aiding others to become successful sellers of Mary Kay products," *id.* at § 8.1. Accordingly, because Dunlap entered into a contract whereby she agreed to provide results for compensation, Dunlap is not a "consumer" under the DTPA. *See Baker v. Missouri Pac. Truck Lines, Inc.*, 616 S.W.2d 389, 392-93 (Tex. Civ. App. – Houston 1981, no writ) (holding that where plaintiff sought to

entered into a contract to deliver freight for defendant for compensation, plaintiff was not a consumer as defined in the DTPA as a matter of law); *Craig*, 1998 WL 466133, at *2-3 (noting that independent contractor in transaction of providing her catering services for compensation was a seller, not a DTPA consumer).[5]

2. *Dunlap's Allegations Show that Mary Kay did not Commit a Wrongful Act By Violating § 2.210(b) of the Texas Business & Commerce Code.*

Dunlap alleges that Mary Kay committed a false, misleading, or deceptive act because Section 13 of the NSD Agreement provides that the "Agreement, or any part hereof, shall not be assigned or transferred by [Dunlap] and may be assigned by [Mary Kay] to [Dunlap's] successor." Dunlap alleges that this provision of the NSD Agreement violates § 2.210(b) of the Texas Business & Commerce Code. *See* Answer at ¶ 13. The plain terms of the statute cited by Dunlap, however, disproves her claim. Section 2.210(b) provides:

> ***Unless otherwise agreed*** all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance.

TEX. BUS. & COM. CODE § 2.210(b) (emphasis added). Here, in Section 13 of the NSD Agreement, the parties have "otherwise agreed" that the NSD Agreement shall not be assigned or transferred by Dunlap. Thus, Mary Kay did not commit a wrongful act by "violating" TEXAS BUSINESS & COMMERCE CODE § 2.210(b), and Dunlap's DTPA counterclaim based on Mary Kay's refusal to allow her to sell or will her business should be dismissed with prejudice.

C. **Dunlap Fails to State a Plausible Antitrust Claim.**

Dunlap fails to state a claim for violations of federal antitrust laws because she fails to

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[5] The *Craig* court contrasted the caterer's role as "seller" in the transaction to provide catering services to the family with the caterer's role as "consumer" in (and beneficiary of) the transaction by the family (who hired caterer for the wedding) to rent the venue for the wedding—noting that just because caterer was not a consumer in the first transaction does not mean she cannot be a consumer in the second. *See id.* at 1998 WL 466133, at *2-3.

allege sufficient facts showing that the non-solicitation provision in the NSD Agreement adversely affects competition in the relevant market. Post-employment non-competition and non-solicitation agreements are not per se violations of the Sherman Act but must be analyzed under the rule of reason. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex. 1990) (discussing federal antitrust law and citing cases). "To establish a violation under the rule of reason, one must prove that the agreement has an adverse effect on competition in the relevant market." *Id.*

> Rule of reason analysis under antitrust laws must not be confused with reasonableness analysis under the common law. Rule of reason analysis tests the effect of a restraint of trade on *competition*. By contrast, whether a noncompetition agreement is reasonable depends upon its effect on the parties, the *competitors*, as it were. The two standards are not directly related. An agreement may be reasonable as between the parties and nevertheless violate antitrust laws. Conversely, an agreement may be unreasonable as between the parties and yet not violate the rule of reason test under the antitrust laws.

Id. Dunlap alleges that Mary Kay, "by use of its unlawful non-compete agreement," is attempting to restrain her from competing with Mary Kay and Mary Kay's independent contractors. *See* Answer at ¶ 19. Dunlap alleges that "[s]uch restraints by [Mary Kay] are unreasonable," and Dunlap "has been unfairly damaged and the growth of her business stunted[.]" *Id.* These allegations, however, fall far short of sufficiently alleging an adverse effect on *competition* in the relevant market. A non-compete or a non-solicitation agreement may be unreasonable as between the parties (and adversely affect the restrained party) and yet not violate the antitrust laws. *Id.*; *Cole v. Champion Enters., Inc.*, 496 F. Supp. 2d 613, 635 (M.D.N.C. 2007) (holding that antitrust plaintiff cannot show an adverse effect on competition by merely showing that he was unreasonably restrained from competing with defendant); *Stearns v. Genrad, Inc.*, 564 F. Supp. 1309 (M.D.N.C. 1983) (holding that estimate of plaintiff's lost

sales does not show any adverse effect on competition in the relevant market).

Dunlap has alleged no facts showing an adverse effect on the relevant market. Indeed, Dunlap alleges no facts defining the relevant market, showing Mary Kay's market power, the market competitors, or the effect the non-solicitation agreement had on the price and availability of the relevant products in the relevant area. *See Am. Chiropractic Clinics, P.C. v. Spence*, 1995 WL 731786, at * (Tex. App. – Dallas 1995, writ denied) ("Ordinarily [to show a substantial adverse effect on competition in the relevant market], a plaintiff must delineate the relevant market and show that the defendant has enough market power to significantly impair competition."); *id.* (dismissing antitrust claim where plaintiff presented no evidence showing what actual effect the noncompetition agreements had on the price and availability of chiropractic care in the relevant market). Accordingly, Dunlap's Counterclaim No. 2 should be dismissed. *See Caremark Homecare, Inc. v. New England Critical Care, Inc.*, 700 F. Supp. 1033, 1036 (D. Minn. 1988) (dismissing antitrust counterclaims because claimant failed to allege that non-compete has an anticompetitive effect on the relevant market as a whole).

IV. CONCLUSION

For the foregoing reasons, Mary Kay respectfully asks the Court to dismiss Dunlap's Counterclaims Nos. 1 and 2 under Rule 12(b)(6) for failure to state a claim. Because Dunlap cannot cure the defects with her DTPA counterclaim, Mary Kay asks the Court to dismiss Counterclaim No. 1 with prejudice and without leave to amend. Mary Kay further asks for any other relief, whether in law or in equity, to which it may be justly entitled.

Date: February 22, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served via the Court's ECF system on counsel of record on the 22nd day of February 2012.

/s/ Christopher J. Schwegmann
Christopher J. Schwegmann

4822-7902-2094, v. 4