

ORIGINAL

FILED

12 FEB 21 10:21 AM
CLERK OF DISTRICT COURT

CAUSE NO. 12-01950

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

Petitioner.

(Tina Cunningham)

§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

1604 H

JUDICIAL DISTRICT

ANGELICA FERNANDEZ

**PETITIONER MARY KAY INC.'S VERIFIED PETITION
TO TAKE A DEPOSITION OF TINA CUNNINGHAM**

Pursuant to Texas Rule of Civil Procedure 202, Petitioner, Mary Kay Inc. ("Mary Kay"), files this Petition to Take a Deposition of Tina Cunningham ("Ms. Cunningham"). Mary Kay seeks to depose Ms. Cunningham, an individual who previously contracted with Mary Kay to sell Mary Kay cosmetics, to investigate potential claims in anticipation of a lawsuit against Ms. Cunningham and others 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 Tina Cunningham, an individual believed to be located at 1213 N. Division Avenue, Urbana, Illinois 61801-1831. Ms. Cunningham's telephone number is (217) 344-2681.

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 Ms. Cunningham to investigate potential claims by Mary Kay against her and others for breach of contract, unfair competition, tortious interference with contractual and business relationships, and/or Texas common law trademark violations.

7. Mary Kay believes Ms. Cunningham has been facilitating the sale of Mary Kay cosmetics on eBay, Inc. ("eBay") under the username "tina9965," in violation of Texas law. eBay is an on-line auction and retail front for individual sellers. Mary Kay suspects Ms. Cunningham as a person who is using Mary Kay's trademarks and selling Mary Kay's products without Mary Kay's permission. Ms. Cunningham 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 Ms. Cunningham for the purpose of reselling such products on eBay.

8. The subject matter of Ms. Cunningham's deposition will be her 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 Ms. Cunningham, in anticipation of claims against Ms. Cunningham and others 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 Ms. Cunningham 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 Ms. Cunningham by oral and videotaped deposition. Petitioner expects to elicit testimony from Ms. Cunningham regarding her involvement in the sale of Mary Kay products on eBay, and in particular, the manner in which she acquired the Mary Kay products she sold on eBay.

11. Petitioner further requests that Ms. Cunningham 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 Ms. Cunningham Mary Kay products which were subsequently sold on eBay, or any individual to whom Ms. Cunningham 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 Ms. Cunningham Mary Kay products which were subsequently sold on eBay, or any individual to whom Ms. Cunningham 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 Ms. Cunningham 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 Ms. Cunningham Mary Kay products which were subsequently sold on eBay.


12. Mary Kay seeks to obtain such testimony to investigate potential claims against Ms. Cunningham and others 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 Ms. Cunningham, and (2) the production of documents and media listed above.

Dated: February 21, 2012

Respectfully submitted,



Larry L. Berg
State Bar No. 00787072
Preston R. Mundt
State Bar No. 24058465
KELLY HART & HALLMAN LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102
Phone: (817) 332-2500
Fax: (817) 878-9280

ATTORNEYS FOR PETITIONER

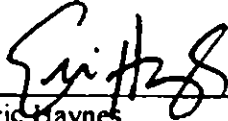
VERIFICATION

STATE OF TEXAS

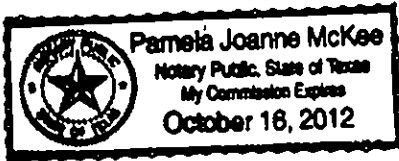
§
§
§

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 February 20, 2012, to certify which witness my hand and official seal.




Notary Public, State of Texas

My commission expires: Oct. 16, 2012

FIAT

Hearing on Petitioner Mary Kay Inc.'s Verified Petition to Take a Deposition of Tina Cunningham is set on the _____ day of _____, 2012, at _____, _____.M., in the courtroom of the _____ Judicial District Court of Dallas County, Texas.

SIGNED this _____ day of _____, 2012.

JUDGE PRESIDING

KELLY HART

PRESTON R. MUNDT
Preston.Mundt@kellyhart.com

February 21, 2012

Via Hand Delivery

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

12-01950

1604-H

Re: 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 OF Deponent TINA CUNNINGHAM;

I have enclosed my firm's check in the amount of \$252.00 to cover filing fees for the petition. Please file the original and return file-stamped copies to me.

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

Sincerely,



Preston R. Mundt

PRM:pm
Enclosures
1324118

FILED
12 FEB 21 PM 2:15
TELEPHONE (817) 878-9370
FAX (817) 878-9820
CLERK
DALLAS CO. TEXAS
DEPUTY