

CAUSE NO. 06-11432

ROBIN BLACKMON-DUNDA;

IN THE DISTRICT COURT

Plaintiff,

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v.

DALLAS COUNTY, TEXAS

MARY KAY INC., a Texas corporation;

Defendant.

H-160th JUDICIAL DISTRICT

(Hearing set for 1:20 p.m.,
October 19, 2007)

PLAINTIFF'S OPPOSITION TO DEFENDANT MARY KAY INC.'S MOTION FOR PROTECTIVE ORDER WHICH INCLUDES A RULE 76a SEALING ORDER FOR DOCUMENTS AND DEPOSITION TRANSCRIPTS

Defendant Mary Kay Inc. has moved this Court to enter a Protective Order to govern discovery in this case between Plaintiff Robin Blackmon-Dunda Defendant Mary Kay Inc. ("Mary Kay"). The motion by Mary Kay requests, *inter alia*, that the Court Order that certain documents be filed under seal¹, but without citing to the controlling authority of Rule 76a of the Texas Rules of Civil Procedure.

¹ Mary Kay's motion includes a form of proposed Order (attached as Exhibit A to the memorandum filed in support of its Motion for Protective Order) which sets forth the following Rule 76a sealing order:

"8. **Documents Filed Under Seal.** All portions of pleadings, motions, memoranda, briefs, deposition transcripts, discovery requests and responses, exhibits, and other documents, or entire pleadings, motions, memoranda, briefs, deposition transcripts, discovery requests and responses, exhibits, and other documents if not susceptible to separation, that produce, paraphrase, summarize, or otherwise contain any information designated as "Confidential" or "Attorneys' Eyes Only" by a Party, if filed with the Court, shall be filed under seal in an envelope labeled with the caption of this suit, a description of the contents of the envelope, the word "Confidential", and the following statement:

'THIS ENVELOPE CONTAINS INFORMATION SUBJECT TO THE PROTECTIVE ORDER ENTERED BY THE COURT IN THIS SUIT, AND IS NOT TO BE OPENED NOR THE CONTENTS THEREOF DISPLAYED OR REVEALED EXCEPT BY COURT ORDER.'

9. **Depositions.** Any Party may designate a deposition or portion thereof as "Confidential" or "Attorneys' Eyes Only" Material by denominating by page and line those portions of the deposition which are to be considered "Confidential" or "Attorneys' Eyes Only" within seven days (7) days of receiving the transcript and so informing all other Parties of such designation. Each Party shall attach a copy of such written statement or statements to the face of the transcript and each copy thereof in its possession, custody, or control. Until the seven-day period to designate deposition testimony as

Defendant Mary Kay omits a discussion of Rule 76a, but instead cites to a United States Supreme Court case² that deals with federal issues that simply do not pertain to this case in light of the presence of Texas' Rule 76a which adds to the freedoms assured by the First Amendment to the United States Constitution. Mary Kay also cites the case of *In re Ford Motor Company*, 211 S.W.3d 295 (Tex. 2006) for the proposition that where the facts of particular cases actually involve confidential information, such as trade secrets, the parties may stipulate to Agreed Protective Orders that may then be signed by a court. That case did not involve an analysis of Rule 76a in which an objecting party in the case, and/or an intervenor member of the public objects to a "sealing order" by the Court. The Plaintiff does not agree to such an Order in this case, and in fact relies on the requirements of Rule 76a to prevent such an Order from being signed. Defendant also points to certain requests for discovery by Plaintiff requesting financial statements as justification for its position that pre-trial proceedings in this matter should be, at its option, secret.³ In Texas, under Rule 76a, court files "are presumed to be open to the general public and may be sealed only upon a showing" of "a specific, serious, and

"Confidential" or "Attorneys' Eyes Only" has passed, the deposition transcript shall be treated as "Attorneys' Eyes Only." Alternatively, a Party may orally designate testimony as "Confidential" or "Attorneys' Eyes Only" Material during the course of a deposition, in which case, to the extent possible the court reporter shall transcribe the pages so designated in a separate volume marked "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY." Any portion of a deposition so designated, or separately bound volume, shall not be filed with the Court, except in accordance with paragraph 8 of this Protective Order. Notwithstanding the above, the presence of persons attending depositions shall not waive the right to designate any deposition as "Confidential" or "Attorneys' Eyes Only" after receipt of the deposition as described in this paragraph. All persons attending depositions pursuant to the Texas Rules of Civil Procedure or by agreement of the Parties, must leave the room before any discussion of any "Confidential" and/or "Attorneys' Eyes Only" Material that the person is not entitled to review under the provisions of this Order or agree to be bound by this Protective Order by signing a copy of the form annexed hereto as Exhibit "A."

² *Seattle Times v. Rinehart*, 467 U.S. 20 (1984).

³ Those discovery requests posed in Plaintiff's Request for Production were served on Defendant months ago and none of them are the subject of discovery motions or demands at this time, and serve only to distract the Court from the fact that there is no **pending** discovery request from which Defendant would have the right to apply for the Court's protective order.

substantial interest which **clearly** outweighs” that “presumption of openness” and which outweighs “any probable adverse effect” of sealing the records. (emphasis added)

Here, this lawsuit, involves the former Queen of the Sapphire Seminar who had built one of the largest sales volume producing Sales Units of over 600 Beauty Consultants and Offspring Sales Directors⁴ one of 1.6 million Mary Kay independent contractors in 30 countries worldwide, accounting for a portion of its more than \$2.2 billion in sales,⁵ and includes serious allegations of deceptive trade practices by Mary Kay in representing to those who buy its products and sign up for its business opportunity that they will own their “own business” when in fact Mary Kay prohibits its independent contractors from selling or willing their “businesses,” and refuses to compensate them for their loss of the income stream they have built upon their termination, either voluntary or involuntary.

Defendant Mary Kay has terminated Plaintiff, one of its top producing Sales Directors and an Independent Beauty Consultant of 17 years standing with Mary Kay, on 30 days notice without setting forth any cause at all for the termination, without compensating Plaintiff for the loss of “her business” or allowing her to sell “her business” to a third party.⁶ This case has tremendous implications for the right to know, and indeed, the **safety** of the public from predatory practices of direct sales companies such as those alleged in Plaintiff’s Amended Petition. As Exhibit 1 attached hereto indicates, the issues in this lawsuit involving Plaintiff’s claims that her business and income stream were forfeited against her will and contrary to her extraordinarily successful business

⁴ Plaintiff’s Amended Petition, paragraph 6.

⁵ See, Exhibit 5 to Plaintiff’s Amended Petition, entitled Mary Kay Inc. 2006 Fact Sheet

⁶ See, Plaintiff’s Amended Petition, County IV, Deceptive Trade Practices

building efforts, Robin Blackmon-Dunda's case against Mary Kay is worthy of public interest.

When applying Rule 76a, Texas Rules of Civil Procedure, the Texas Supreme Court has indicated that requests to seal documents filed in such a case as this one must follow each of the material terms of that Rule which pertains to the particular dispute over the sealing of documents. *See, In re The Dallas Morning News*, 10 S.W.3d 298 (Tex. 1999) The Defendant has not met its heavy burden in overcoming the presumption against sealing court filings in this matter and its motion for protective order seeking to make this highly public matter a more or less "secret" proceeding, at its and its counsel's option by simply designating discovery materials and deposition transcripts as "confidential" or "attorneys' eyes only," should be denied.

Respectfully submitted this 8th day of October, 2007



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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 facsimile on Defendant's counsel of record, as identified below, on this the 9th day of October, 2007:

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BUSINESS

Mary Kay, former associate at odds

Sales director fired over contract issues sues to get business back

09:57 PM CST on Friday, November 24, 2006

By KATHERINE YUNG / The Dallas Morning News

Top salespeople for Mary Kay Inc. usually get pink Cadillacs, not pink slips. But in September, the company fired Robin Blackmon-Dunda of Bedford for contract violations. Now the former sales director is suing to get her business back.

She filed a lawsuit this month accusing Addison-based Mary Kay of breach of contract, deceptive trade practices, defamation and other misdeeds.

In addition to damages, she wants her status restored as a Mary Kay sales director, where she generated a \$220,000 annual income.

Her sales unit, which included nearly 700 beauty consultants around the country, generated more than a million dollars in revenue in 2005.

It was the top sales unit in Texas in 2004 and 2005, ranking fifth out of 14,000 nationwide.

Mary Kay, a family-owned direct seller of skin care products and cosmetics, said in a statement that it is "prepared to defend itself vigorously against her allegations."

Despite warning Ms. Blackmon-Dunda, 43, of the contract violations, she "continued to engage in activities that were specific violations of her contracts," the company said.

"The activities at issue were believed to be potentially misleading to other members of the Mary Kay independent sales force and to consumers who might mistakenly believe that Ms. Blackmon-Dunda's activities were on behalf of or endorsed by Mary Kay Inc."

The lawsuit and Ms. Blackmon-Dunda's termination have caused a small uproar in the Mary Kay independent sales force, which boasts more than 700,000 members in the U.S.

It's sparked lively discussions on blogs and anti-company Web sites.

Ms. Blackmon-Dunda, who was an independent executive senior sales director at Mary Kay, sold the company's products for 19 years.

She and her mother, Jo Ann Blackmon, were the first mother-daughter million-dollar sales directors in the company's history.

Judge to decide

"I want a judge to decide, 'Is this enough for you to take a 19-year career away from me?' " said Ms. Blackmon-Dunda, whose sales earned her the use of 11 cars, including six pink Cadillacs. "All along I thought I worked for myself."

Mary Kay sometimes terminates members of its sales force, but usually for a lack of sales.

"It is rare that the company must act to terminate an agreement for compliance issues, and we are saddened when it happens," said Mary Kay spokesman Randall Oxford.

According to the lawsuit, Mary Kay sent Ms. Blackmon-Dunda letters over a period of several years about violating company policies.

She was accused of placing a sales order in another person's name; endorsing the business of a family friend; selling hostess aprons, instructional DVDs, CDs and travel vouchers; and promoting lending services from a third party.

The company's sales force is not allowed to sell or endorse any products but Mary Kay's.

Ms. Blackmon-Dunda said there is an innocent explanation for each infraction.

She says she sold the CDs at cost only because she had so many requests for them.

And she placed the sales order in another person's name because the woman didn't want her husband to find out she was selling Mary Kay products. The money for the order came from that person, Ms. Blackmon-Dunda said.

"This is minor," she said. "There have been directors accused of doing illegal, immoral things. I didn't break a law.

"I'm very much a by-the-rules, law-abiding person," she said.

But on April 8, 2005, Ms. Blackmon-Dunda was called to a meeting with five Mary Kay executives, threatened with termination and put on indefinite probation, the lawsuit states.

The probation ended in March, she said.

On Aug. 2, she stood before a crowd of thousands of cheering women and was allowed to speak in recognition of her sales unit's performance.

Eight days later, she received a letter from Mary Kay that gave her 30 days' notice that the agreements she had signed with the company would be terminated.

"In situations where the company ends a relationship, I can promise you that we never take a decision like that lightly," Darrell Overcash, Mary Kay's U.S. president, wrote to the company's national sales directors in late August.

"Generally it is only after repeated unsuccessful attempts to help someone understand she is doing something wrong, do we ever get to the point where the company feels we need to terminate a

relationship."

Contract signed

In 1994, when Ms. Blackmon-Dunda became a sales director – one step up from the entry-level independent beauty consultant – she signed a contract.

The lawsuit alleges that some of the contract terms are illegal and invalid for independent contractors.

For example, the contract says she can't sell or transfer her business if she's terminated or dies. It also doesn't provide any compensation if she's terminated or dies.

When asked about these allegations, the company said in a statement: "This lawsuit is really about someone wanting to add provisions and concepts to a contract that were not there when the agreement was signed and executed. Mary Kay has lived up to all provisions of the agreement as it was signed and approved by Ms. Blackmon-Dunda.

"Had Ms. Blackmon-Dunda lived up to her obligations under the agreement, we doubt that she would be complaining about the legality of the agreement with which she had no complaints for the more than 12 years that it was in place."

Mom running the business

Since Ms. Blackmon-Dunda's termination, her sales unit has been led by her mother, who will be retiring at year's end, said Gina Henebury, a Mary Kay beauty consultant in Granbury and a member of the unit.

Jo Ann Blackmon declined to comment for this story.

"A lot of ... [the consultants] are disheartened about it," Ms. Henebury said.

"We miss Robin terribly. She just had a way of drawing people out. She would see the potential that was there."

Ms. Henebury recalled how Ms. Blackmon-Dunda helped her launch her business three years ago by encouraging her to distribute little bags filled with samples of Mary Kay products and her business cards.

"Robin is the kind of person that will excel at whatever she does," she said. "She's so incredibly innovative."

She doesn't fully understand why her former sales director was terminated, Ms. Henebury said, but she remains loyal to Mary Kay. "My faith is still in Mary Kay the company and the products."

Today, Ms. Blackmon-Dunda is working for a local wellness center.

"I wouldn't have filed the lawsuit unless I felt I had a tremendous reason to do it," she said. "I don't want to hurt anyone I love."

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