

2011 Aug

8/29/11
ORIGINAL (15)

CAUSE NO. 11-10797 FILED

MARY KAY INC.,
Plaintiff,

v.

ALLISON LEE LAMARR and
DRIVEN, INC.,
Defendant.

§
§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT

L-193rd

2011 AUG 26 PM 1:57
MARY ELIZABETH SIMMONS
DISTRICT CLERK
COUNTY CLERK
JUDICIAL DISTRICT
DEPUTY

DALLAS COUNTY, TEXAS

ORIGINAL PETITION

TO THE HONORABLE COURT:

Plaintiff Mary Kay Inc. files this Original Petition, and in support thereof would show:

I. DISCOVERY CONTROL PLAN

1. This case should proceed under Level 3 of Rule 190 of the Texas Rules of Civil Procedure.

II. PARTIES AND VENUE

2. Plaintiff Mary Kay Inc. 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.

3. Defendant Allison Lee LaMarr is an individual residing in Lakewood, Texas. Her last known address is 309 Camino Arbolago, Lakewood, Texas 78734-3961.

4. Defendant Driven, Inc. is organized under the laws of the State of Texas. Driven, Inc. may be served with process on its registered agent, James P. LaMarr, at 309 Camino Arbolago, Lakewood, Texas 78734-3961.

5. Venue is proper in Dallas County pursuant to Tex. Civ. Prac. & Rem. Code § 15.002(a)(1) because a substantial part of the events or omissions giving rise to the claim occurred in Dallas County, Texas. Venue is also proper in Dallas County pursuant to a written

ACTUALLY
LA MARR

agreement in which the parties agreed to litigate any dispute or controversy concerning any matter related to the agreement in Dallas, County, Texas.

III. FACTS

A. Mary Kay's Business Model

6. Mary Kay is a manufacturer and wholesale distributor of cosmetics, toiletries, skin care, and related products. 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. Notwithstanding its international presence, Mary Kay maintains its national headquarters in Addison, Texas and continues to manufacture products at its manufacturing facility in Dallas, Texas.

7. Mary Kay's 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 Independent Beauty Consultants ("IBCs"), who then sell the products to their customers, the ultimate consumers. Mary Kay offers IBCs education and product knowledge that they can, in turn, share with their customers to provide the highest level of customer service and ensure product satisfaction. In turn, the Mary Kay trademark has earned and enjoys a highly distinctive and famous status, a stature Mary Kay vigorously protects.

8. Mary Kay uses the direct-sales method to market its products. Mary Kay sells its products at wholesale prices, and on a pre-paid basis, to the self-employed IBCs. The IBCs then offer Mary Kay's products to their customers at retail prices. An individual becomes an Independent Beauty Consultant when she/he submits an IBC Agreement, which is accepted by Mary Kay at its Addison, Texas Headquarters, and then purchases a demonstration kit containing product samples and general information for use in her/his business. IBCs make profits from the retail sales of Mary Kay products to their customers. IBCs may also choose to recruit others to

become IBCs and can earn commissions when the individuals recruited make wholesale purchases of products from Mary Kay to sell at retail to their customers.

9. Mary Kay offers certain IBCs who demonstrate exceptional abilities in aiding, counseling, and inspiring other IBCs and who distinguish themselves through success to become a National Sales Director (an "NSD"). The NSD program offers participants the opportunity to earn increased special incentive compensation, the opportunity to participate in certain advertising and other programs using Mary Kay's trademarks as authorized by Mary Kay, and other valuable rights, privileges and benefits. In addition, as part of her participation in the program, an NSD receives valuable specialized instruction, education, and information covering cosmetic arts, leadership, business management, motivation, recruiting and selling techniques through personal participation in educational programs, classes, business meetings, and seminars, and through other Mary Kay sponsored programs and events.

B. The NSD Agreement

10. Ms. LaMarr executed an Independent National Sales Director Agreement ("NSD Agreement") on October 1, 2006, thereby accepting her appointment as an NSD, together with the rights, benefits, privileges, and responsibilities provided under the NSD Agreement. Among other things, Ms. LaMarr agreed to use her best efforts to promote the sale of Mary Kay's products, motivate, counsel, and advise the IBCs and Independent Sales Directors in her sales group, and recruit other IBCs.

11. In addition to various other rights and privileges provided to Ms. LaMarr under the NSD Agreement, Mary Kay gave Ms. LaMarr a limited license to use certain of Mary Kay's copyrighted materials, as well as Mary Kay's trademarks in conjunction with her business. She acknowledged and agreed, however, to use those trademarks only in such form and manner as prescribed by Mary Kay or as specifically authorized by Mary Kay.

12. As part of her obligation to use her best efforts to promote the sale of Mary Kay's products, Ms. LaMarr also agreed not to promote, distribute or sell to other members of the Mary

Kay independent sales force without Mary Kay's prior written approval any products or services not produced, sold, or endorsed in writing by Mary Kay. She similarly agreed not to promote, distribute, or sell to anyone products which are not produced, sold, or distributed by Mary Kay in a manner which would falsely designate or suggest, or would likely suggest or indicate such products as originating with, or endorsed by Mary Kay.

13. Notwithstanding those restrictions, Mary Kay allowed Ms. LaMarr to author, produce, publish, and market original creative works, including books, audiocassette tapes and videotapes using Mary Kay's trademarks, provided however, those materials are submitted for Mary Kay's prior approval regarding the content, form, and method of distribution of any such work. In executing her NSD Agreement, she agreed that her right to sell or distribute such works is expressly conditioned on entering into an appropriate licensing agreement with Mary Kay.

C. **Ms. LaMarr's Violations of the NSD Agreement**

14. Defendant Driven, Inc. is a vehicle for Ms. LaMarr's motivational speaking and coaching business. As part of that business, Ms. LaMarr created a number of websites, including allisonlamarronline.com and allisonsallstars.com, on which she, among other things, linked to Mary Kay's website and to certain tools, training aids, spreadsheets, documents, and other information designed to assist IBCs succeed in their Mary Kay business. In addition, Ms. LaMarr offered for sale certain unlicensed creative works, including various DVDs and other materials, that purported to help IBCs and Independent Sales Directors succeed in their Mary Kay businesses.

15. Mary Kay notified Ms. LaMarr in writing that her conduct violated her NSD Agreement. In its letters to Ms. Lamarr, Mary Kay alleged that she promoted, distributed, and offered for sale products and services developed by Driven, Inc. to members of the Mary Kay independent sales force. It also alleged that she promoted, distributed, and offered for sale products and services developed by Driven, Inc. in a manner which was likely to cause confusion regarding Mary Kay's endorsement, affiliation, or approval of those products. Mary Kay

demanded that Ms. LaMarr cease immediately from engaging in those activities. Ms. LaMarr refused to comply with her NSD Agreement and Mary Kay's demand. Instead, she continued to sell her DVDs, audio tapes, and other materials to members of the Mary Kay independent sales force without Mary Kay's approval and without an appropriate licensing agreement.

D. Ms. LaMarr's Termination of the NSD Agreement and Continued Violations.

16. On July 5, 2010, Ms. LaMarr notified Mary Kay of her "early retirement" as an NSD. In her statement, she explained that her retirement would "allow [her] to focus on [her] personal passion of empowering all women in business," and that she will be "better equipped to serve this purpose as an individual without being actively involved in a particular organization." Mary Kay confirmed receipt and accepted Ms. LaMarr's termination notice on July 8, 2010.

17. In consideration of the commission compensation under the NSD Agreement and the other rights and benefits provided under it, Ms. LaMarr agreed to certain on-going obligations for a period of two years after the termination of the agreement. She agreed not to (1) solicit or recruit Mary Kay's independent sales force to sell products or services other than those sold by Mary Kay; (2) use any names, mailing lists or other non-public information she obtained during her association with Mary Kay for recruiting or promoting the sale of any other company's products in the United States; (3) solicit or induce any of Mary Kay's independent sales force from terminating their business relationship with Mary Kay; and (4) receive any financial benefit from any other company or business organization based upon the solicitation, recruitment, enrollment for such company of any person whom she knows or has reason to believe is under contract as a member of Mary Kay's independent sales force.

18. Upon information and belief, Ms. LaMarr created a website in February 2011 "specifically for [her] MK sisters as a place for [her] to share all of the resources [that she] collected during [her] amazing time with MK, from Consultant all the way through National – and beyond!" She purports to offer a "wealth of free information" in her "Library," as well as other "valuable resources [that she] created to help catapult yourself to success" in her "Store."

She also solicits users to join her "PINK!" mailing list to receive her periodic "eColumn 'Digging Deeper,'" which she represents is read by "tens of thousands worldwide." The website has separate links for "Consultants" and "Directors," which point to various "MK resources" that she suggests will lead to, among other things, "DRASTIC" and "HUGE" results in their businesses.

19. In addition to creating this website, Ms. LaMarr also accepted employment, or otherwise became affiliated with another direct sales organization that purports to offer for sale a line of skin care products through a "global network of Independent Consultants." Ms. LaMarr joined this organization as its "Corporate Trainer," and in that role, has touted her prior experience in becoming "the fastest person in company history to reach the top independent position," in becoming "the fastest to reach \$1 million in team sales," in having the "highest first year team sales," and in becoming the "fastest to millionaire status." Ms. LaMarr appears to be responsible for recruiting and training this organization's sales force.

20. In late December 2010, a number of IBCs began to receive email solicitations from Ms. LaMarr's new employer. Some of these email solicitations refer to Ms. LaMarr as a former Mary Kay NSD, and often contain links that feature videos of Ms. LaMarr sharing information in her capacity as a corporate trainer. In February 2011, members of Mary Kay's independent sales force also began receiving emails generated from Ms. LaMarr's website.

21. Upon information and belief and within two years from the date of her termination of her NSD Agreement, Ms. LaMarr has used her website to directly or indirectly solicit or recruit Mary Kay IBCs to sell products or services other than those sold by Mary Kay.

22. Upon information and belief, she has further used names, mailing lists, and other non-public business information which she obtained during her association with Mary Kay to recruit or promote the sale of her own company, Driven, Inc.

23. Finally, upon information and belief, Ms. LaMarr has sought, directly or indirectly, financial benefit or other compensation based on or associated with her solicitation.

recruitment, enrollment or association by employment persons she knows or has reason to believe are under contract as members of Mary Kay's independent sales force. Her activities and conduct constitute violations of her NSD Agreement.

E. Mary Kay's Marks Have Earned a Highly Distinctive and Famous Status

24. As a result of its long and continuous use and vigorous protection of its business model and high quality products, the Mary Kay trademark has earned and maintains a highly distinctive status. Mary Kay develops, manufactures, and markets its products in the United States and worldwide, under its distinctive and famous MARY KAY marks (collectively, the "Mary Kay Marks"). Mary Kay owns the Mary Kay Marks, and the corresponding United States registrations listed below, for use with its cosmetic products, skin care products, and other related goods and services.

<u>Mark:</u>	<u>International Class(es) – First Use in Commerce</u>	<u>Registration No.</u>	<u>Filing - Registration Dates</u>
MARY KAY (Stylized)	Class 3 – At least as early as 9/15/63	817516	10/19/64 – 10/25/66
MARY KAY	Class 3 – At least as early as 5/03/76	1070841	6/01/76 – 8/09/77
MARY KAY (Stylized)	Class 3 – At least as early as 5/25/88	1545983	7/22/88 – 7/04/89
MARY KAY	Class 3 – At least as early as 1963; Class 8 – At least as early as 1990; Class 9 – At least as early as 1990; Class 16 – At least as early as 1980; Class 21 – At least as early as 1990	1842599	8/07/92 – 7/05/94
MARY KAY (Stylized)	Class 3 – At least as early as 1988; Class 8 – At least as early as 1990; Class 9 – At least as early as 1990; Class 16 – At least as early as 1989; Class 21 – At least as early as 1990	2542184	10/30/99 – 2/26/02
MK	Class 3 – At least as early as 2001	2259020	11/22/96 – 4/9/02

25. Mary Kay owns the above registrations, which are valid and subsisting. Registration Numbers 1,070,841, 1,545,983, and 1,842,599 are incontestable in accordance with Section 15 of the Lanham Act, 15 U.S.C. § 1065.

26. Significantly, Mary Kay initially adopted the MARY KAY mark, as early as 1963, and has continuously used the Mary Kay Marks in connection with the sale of its products. As a result of Mary Kay's early adoption and long-established use, the Mary Kay Marks are widely recognized and relied upon by the public in Texas and throughout the United States to identify Mary Kay, Mary Kay® products, the personal customer service that accompanies Mary Kay® products, and to distinguish Mary Kay® products and services from the products or services of others. Moreover, Mary Kay has an extensive media campaign, and Mary Kay uses the Mary Kay Marks in various media formats, including on the Internet, to promote its Mary Kay products. Mary Kay owns the domain www.marykay.com.

27. As a result of the continuous usage and promotion of the Mary Kay Marks, Mary Kay has acquired, in addition to the rights established through registration, recognized common-law rights in the Mary Kay Marks. Mary Kay has also developed valuable goodwill in the Mary Kay Marks.

F. Defendants' Misconduct Causes Mary Kay Substantial and Irreparable Harm.

28. The obligations placed on Ms. LaMarr by the NSD Agreement are intended to protect the integrity of Mary Kay® products, the Mary Kay brand, and preserve the goodwill between Mary Kay, its IBCs, and the ultimate consumers who choose to buy products from them. The terms of the NSD Agreement prohibited Ms. LaMarr from using the Mary Kay Marks in any unapproved advertising or original creative works without Mary Kay's prior written approval. As described above, Ms. LaMarr repeatedly ignored the restrictions on the use of Mary Kay's Marks and trade name during the course of her relationship with Mary Kay.

29. Defendants have continued to use Mary Kay's Marks and trade name on Ms. Lamarr's website and in her original creative works without authorization or consent from Mary Kay after she terminated her NSD Agreement. Defendants' unlawful and unauthorized use of the trademarks and name after her termination harms not only Mary Kay, but also Mary Kay

independent sales force members and consumers who are confused or deceived into purchasing products through her website believing they are purchasing products from an authorized Mary Kay Independent Beauty Consultant. Defendants' use in commerce of Mary Kay's trademarks and name began more than forty years after Mary Kay adopted and began using the Mary Kay mark. As a result, Defendants' unauthorized use began after Mary Kay's trademarks and name became famous.

30. Defendants' unauthorized use of Mary Kay's trademarks and name has also confused or is likely to confuse both Mary Kay IBCs and consumers as to the affiliation, connection, or association of Defendants with Mary Kay, as well as to the origin, sponsorship, or approval of Defendants' products, services, and commercial activities by Mary Kay. As a result of the confusion that has been or is likely to be engendered by Defendants' activities, Mary Kay's trademarks and associated valuable goodwill are therefore being irreparably harmed.

31. Defendants' misconduct has harmed and continues to harm Mary Kay, its IBCs, and consumers. Mary Kay has no control over the content of Defendants' original creative works, the representations made therein, or the quality of customer service accompanying those goods and services. As a result of the confusion that has been or is likely to be engendered by Defendants' activities, Mary Kay's trademarks, name, and associated goodwill are not under the control of Mary Kay and Mary Kay is therefore being irreparably harmed.

Count I
Breach of Contract

32. Mary Kay hereby alleges and incorporates all of the preceding allegations as if set forth fully herein.

33. Mary Kay and Ms. LaMarr entered into the NSD Agreement. By the terms of that Agreement, Ms. LaMarr agreed to use her best efforts to promote the sale of Mary Kay's products: (b) to use Mary Kay's trademarks only in such form and manner as may be prescribed by Mary Kay; (c) not to promote, distribute, or sell to other members of the Mary Kay

independent sales force, without Mary Kay's prior written approval, any products or services which are not produced, sold, or endorsed in writing by Mary Kay and (d) not to promote, distribute, or sell to anyone products which are not produced, sold, and/or distributed by Mary Kay in a manner which would falsely designate or suggest, or would likely suggest or indicate such products as originating with, or endorsed by Mary Kay.

34. In addition, Ms. LaMarr agreed, for a period of two years following the termination of her NSD Agreement not to engage in any of the conduct described above.

35. For the reasons stated above and incorporated herein, Ms. LaMarr breached her agreements with Mary Kay and caused harm to Mary Kay. Defendants are liable to Mary Kay for breach of contract in an amount to be proven at trial.

Count II
Unfair Competition Under Texas Common Law

36. Mary Kay hereby alleges and incorporates all of the preceding allegations as if set forth fully herein.

37. By and through the acts and omissions described above, Defendants have, without Mary Kay's consent or authorization, used to advertise and/or promote its services, a word, term, name, or symbol, or any combination thereof, including, without limitation Mary Kay's Marks, which are likely to mislead, cause confusion, and/or cause mistake or deception regarding Mary Kay's approval or sponsorship Defendants' business activities.

38. Defendants' acts and omissions described in this Petition and in this Count constitute common law trademark infringement and/or unfair competition under Texas law. Such wrongful acts and/or omissions by Defendants have caused and, unless enjoined by this Court, will continue to cause serious and irreparable injury to Mary Kay for which Mary Kay has no adequate remedy at law. For the reasons described above, Mary Kay is likely to succeed on the merits of its underlying claims. Moreover, the potential injury to Defendants (if any) is minimal, and does not outweigh the actual and/or potential injuries to Mary Kay if Defendant is

not enjoined. Therefore, Mary Kay is entitled to injunctive relief, as further described in the Prayer for Relief in this Petition.

39. Such wrongful acts and/or omissions by Defendants also have caused and will continue to cause actual damages to Mary Kay. Therefore, Mary Kay is entitled to a monetary judgment against Defendants in an amount to be determined by a jury. Mary Kay is further entitled to recover from Defendants the gains, profits, and advantages that Defendants have obtained as a result of such wrongful acts and omissions.

40. Mary Kay is further entitled to recover the costs of this action. Mary Kay alleges that Defendants' conduct was undertaken willfully and with the intention of causing mistake, confusion or deception, and that this is an exceptional case entitling Mary Kay to recover additional damages and reasonable attorneys' fees.

Count III
Injury to Business Reputation

41. Mary Kay hereby alleges and incorporates all of the preceding allegations as if set forth fully herein.

42. By and through the acts and omissions described above, Defendants have, without Mary Kay's consent or authorization, used to advertise and/or promote its services, a word, term, name, or symbol, or any combination thereof, including, without limitation Mary Kay's Marks, which are likely to mislead, cause confusion, and/or cause mistake or deception regarding Mary Kay's approval or sponsorship Defendants' business activities.

43. Defendants' acts and omissions described in this Complaint and in this Count constitute trademark dilution within the meaning of Tex. Bus. & Com. Code § 16.29. Defendants' use of the Mary Kay Marks has diluted the Mary Kay Marks by blurring the distinctiveness and origin of the Mark Kay Marks and by tarnishing the Mark Kay Marks. As a result, the goodwill attached to the Mary Kay Marks has been and is being seriously injured.

44. Such wrongful acts and/or omissions by Defendants have caused and, unless enjoined by this Court, will continue to cause serious and irreparable injury to Mary Kay for which Mary Kay has no adequate remedy at law. For the reasons described above, Mary Kay is likely to succeed on the merits of its underlying claims. Moreover, the potential injury to Defendants (if any) is minimal, and does not outweigh the actual and/or potential injuries to Mary Kay if Defendant is not enjoined. Therefore, Mary Kay is entitled to injunctive relief, as further described in the Prayer for Relief in this Petition.

45. Such wrongful acts and/or omissions by Defendants also have caused and will continue to cause actual damages to Mary Kay. Therefore, Mary Kay is entitled to a monetary judgment against Defendants in an amount to be determined by a jury. Mary Kay is further entitled to recover from Defendants the gains, profits, and advantages that Defendants have obtained as a result of such wrongful acts and omissions.

46. Mary Kay is further entitled to recover the costs of this action. Mary Kay alleges that Defendants' conduct was undertaken willfully and with the intention of causing mistake, confusion or deception, and that this is an exceptional case entitling Mary Kay to recover additional damages and reasonable attorneys' fees.

Count IV
Common Law Misappropriation

47. Mary Kay hereby alleges and incorporates all of the preceding allegations as if set forth fully herein.

48. Mary Kay authored, developed, and created various tools, training aids, spreadsheets, documents, and other information and materials to assist independent sales force members succeed in their Mary Kay businesses through extensive time, labor, skill, and resources. Through the operation of their website allisonlamarpink.com, Defendants have used that information and those materials to compete with Mary Kay, giving them a special advantage in that competition. Defendants' activities have caused damage to Mary Kay.

Count V
Attorneys' Fees

49. Mary Kay hereby alleges and incorporates all of the preceding allegations as if set forth fully herein.

50. Mary Kay retained the undersigned attorneys to represent it in this action and agreed to pay reasonable and necessary attorneys' fees. Mary Kay seeks recovery of its reasonable and necessary attorneys' fees through trial and all appeals in accordance with Section 38.001 of the Texas Civil Practice & Remedies Code and applicable law.

Count VI
Injunctive Relief

51. Mary Kay hereby alleges and incorporates all of the preceding allegations as if set forth fully herein.

52. Defendants have damaged Mary Kay, and are continuing to damage Mary Kay, by the willful and unlawful acts complained of herein. Unless Defendants are restrained by this Court, they will cause irreparable injury to Mary Kay for which there is no adequate remedy at law. Accordingly, Mary Kay seeks the entry of the injunctive relief requested below.

REQUEST FOR JURY TRIAL

53. Mary Kay demands a trial by jury.

PRAYER FOR RELIEF

For the reasons stated above, Plaintiff Mary Kay prays:

A. that Defendants, their officers, agents, servants, employees, attorneys, and all those persons in active concert or participation with Defendants, be preliminarily and permanently enjoined and restrained from competing unfairly with Mary Kay and from using the Mary Kay Marks in any manner whatsoever that is likely to cause confusion, including:

- I. falsely or misleadingly representing themselves and their activities, goods, and services to be sponsored by, approved by, or affiliated with Mary Kay;

2. falsely or misleadingly representing any product or service of Defendants or others as originating from, being sponsored by, or approved by Mary Kay;
3. committing any other acts or making any other representations, express or implied, that would infringe any of Mary Kay's trademark rights, or that would confuse, mislead, or deceive consumers as to Defendants' sponsorship of, approval by, or affiliation with Mary Kay;
4. inducing, assisting, or abetting any other person or business entity in engaging in or performing any of the activities referred to in subparagraphs (1)-(3) above;

B. that Defendants, their officers, agents, servants, employees, attorneys, and all those persons in active concert or participation with Defendants, be preliminarily and permanently enjoined and restrained from further breaches of Ms. LaMarr's agreements with Mary Kay;

C. for an award of damages sustained as a result of Defendants' activities, trebled as allowed by law;

D. for an award of exemplary damages sustained as a result of Defendants' activities;

E. for an accounting of Defendants' sales resulting from Defendants' activities and unjust enrichment, and that their profits be paid over to Mary Kay, increased as the court finds to be just under the circumstances of this case and that the unlawfully obtained Mary Kay® products in Defendants' possession, custody, or control be disposed of appropriately as the court finds to be just under the circumstances of this case;

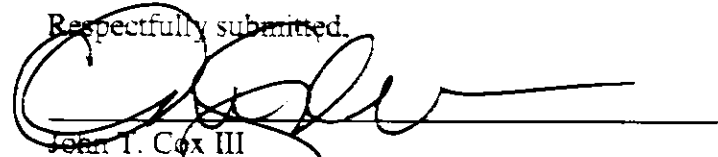
F. for an award of attorneys' fees and costs as allowed by law;

G. for an award of prejudgment and post-judgment interest on all sums awarded; and

H. for such other and further relief as the court may deem just, equitable and appropriate.

DATED: August 26, 2011

Respectfully submitted,



John I. Cox III

Texas Bar No. 24003722

Christopher J. Schwegmann

Texas Bar No. 24031515

LYNN TILLOTSON PINKER & COX, L.L.P.

2100 Ross Avenue, Suite 2700

Dallas, Texas 75201

(214) 981-3800 Phone

(214) 981-3839 Fax

ATTORNEYS FOR PLAINTIFF