

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

MARY KAY, INC.,

Plaintiff,

v.

CASE NO.: 3-08-CV-776-G

AMY L. WEBER, SCOTT J. WEBER,
and TOUCH OF PINK COSMETICS,

Defendants.

**DEFENDANTS' ORIGINAL ANSWER TO PLAINTIFF'S
ORIGINAL COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendants, Amy L. Weber, Scott J. Weber and Touch of Pink Cosmetics (collectively "Defendants") file this Original Answer to the Original Complaint for Damages and Injunctive Relief ("the Complaint") filed by Mary Kay, Inc. ("Mary Kay" or "Plaintiff") and for good cause show the following:

1. Defendants admit that Amy Weber was previously a Mary Kay consultant, but denies all remaining allegations in Paragraph 1 of the Complaint.
2. After reviewing information known or reasonably available to them, Defendants are without sufficient information to admit or deny the allegations in Paragraph 2 of the Complaint and therefore deny same.
3. Defendants admit that Amy Weber was a previously Mary Kay consultant and that Ms. Weber received an August 19, 2005 letter from Mary Kay stating that her status as a Mary Kay consultant was terminated, effective September 17, 2005. Defendants deny all remaining allegations in Paragraph 3 of the Complaint.
4. Defendants deny the allegations in Paragraph 4 of the Complaint.

5. Defendants deny the allegations in sentence one of Paragraph 5 of the Complaint.

Defendants admit that Mary Kay is seeking a preliminary injunction, a permanent injunction and money damages in its Complaint, but deny that it is entitled to the relief sought.
6. After reviewing information known or reasonably available to them, Defendants are without sufficient information to admit or deny the allegations in Paragraph 6 of the Complaint and therefore deny same.
7. Defendants admit the allegations in Paragraph 4 of the Complaint.
8. Defendants deny any allegation that Touch of Pink Cosmetics must be authorized by Mary Kay. Defendants further deny sentence 2 of Paragraph 8. Defendants admit the remaining allegations in Paragraph 8 of the Complaint.
9. Defendants admit that Mary Kay has brought claims under 15 USC §§ 1051 *et seq.* and that jurisdiction is proper. Defendants deny any remaining allegations in Paragraph 9 of the Complaint.
10. Defendants admit that Mary Kay has brought claims based on diversity jurisdiction, that this is complete diversity and that Mary Kay claims that damages exceed \$75,000. Defendants deny any remaining allegations in Paragraph 9 of the Complaint.
11. Defendants admit that venue is proper in the Northern District of Texas, Dallas Division, but deny all remaining allegations in Paragraph 11 of the Complaint.
12. After reviewing information known or reasonably available to them, Defendants are without sufficient information to admit or deny the allegations in Paragraph 12 of the Complaint and therefore deny same.

13. After reviewing information known or reasonably available to them, Defendants are without sufficient information to admit or deny the allegations in Paragraph 13 of the Complaint and therefore deny same.
14. Defendants admit the allegations in the sentences 1, 2, 3, 5 and 6 of Paragraph 14 of the Complaint. Defendants deny the allegations in sentence 4 of Paragraph 14 of the Complaint.
15. After reviewing information known or reasonably available to them, Defendants are without sufficient information to admit or deny the allegations in Paragraph 15 of the Complaint and therefore deny same.
16. After reviewing information known or reasonably available to them, Defendants are without sufficient information to admit or deny the allegations in Paragraph 16 of the Complaint and therefore deny same.
17. After reviewing information known or reasonably available to them, Defendants are without sufficient information to admit or deny the allegations in Paragraph 17 of the Complaint and therefore deny same.
18. After reviewing information known or reasonably available to them, Defendants are without sufficient information to admit or deny the allegations in Paragraph 18 of the Complaint and therefore deny same.
19. After reviewing information known or reasonably available to them, Defendants are without sufficient information to admit or deny the allegations in Paragraph 19 of the Complaint and therefore deny same.
20. After reviewing information known or reasonably available to them, Defendants are without sufficient information to admit or deny the allegations in Paragraph 20 of the Complaint and therefore deny same.

21. After reviewing information known or reasonably available to them, Defendants are without sufficient information to admit or deny the allegations in Paragraph 21 of the Complaint and therefore deny same.
22. After reviewing information known or reasonably available to them, Defendants are without sufficient information to admit or deny the allegations in Paragraph 22 of the Complaint and therefore deny same.
23. After reviewing information known or reasonably available to them, Defendants are without sufficient information to admit or deny the allegations in Paragraph 23 of the Complaint and therefore deny same.
24. Defendants deny the allegations in Paragraph 24 of the Complaint.
25. After reviewing information known or reasonably available to them, Defendants are without sufficient information to admit or deny the allegations in sentences 1 and 5 of Paragraph 25 of the Complaint and therefore deny same. Defendants admit that they were offering unsold inventory on eBay under the username “scottw815” beginning in March 2005, as alleged in sentence 2 of Paragraph 25. Defendants deny the allegations in sentences 3, 4 and 6 of Paragraph 25. Defendants admit that Amy Weber received the letter attached as Exhibit E to the Complaint and the letter speaks for itself.
26. Defendants deny the allegations in sentences 1 and 3 of Paragraph 26 of the Complaint and deny that Exhibit D cited in this paragraph is evidence of an offer to re-purchase inventory. Defendants admit that Amy Weber received the letter attached as Exhibit E to the Complaint and the letter speaks for itself.
27. Defendants deny that Amy Weber had a written agreement with Mary Kay. Defendants admit the remaining allegations in Paragraph 27 of the Complaint.

28. Defendants admit that they advertise and sell Mary Kay products on the Touch of Pink website, but deny they are required to have the authorization or consent of Mary Kay as alleged in sentence 1 of Paragraph 28 of the Complaint. Defendants deny that they are “unlawfully advertising,” as alleged in sentence 2. Defendants admit that Exhibit F is a screenshot of the Touch of Pink website and the exhibit speaks for itself.
29. Defendants admit that they advertise and sell Mary Kay products on eBay, but deny they are required to have the authorization of Mary Kay as alleged in sentence 1 of Paragraph 29 of the Complaint. Defendants admit the allegations in sentences 2-4 of Paragraph 29. Defendants deny the allegations in sentences 5 and 6 of Paragraph 29 of the Complaint.
30. Defendants admit Amy Weber is no longer a Mary Kay consultant, admit they do not purchase directly from Mary Kay and admit the wording cited in footnote 3 of Paragraph 30 is contained on the Touch of Pink website. Defendants deny all remaining allegations in Paragraph 30.
31. Defendants deny the allegations in Paragraph 31 of the Complaint.
32. Defendants admit that Exhibit J is an internet article about their eBay store and the Exhibit speaks for itself. Defendants deny the remaining allegations in Paragraph 32 of the Complaint.
33. After reviewing information known or reasonably available to them, Defendants are without sufficient information to admit or deny the allegations in sentences 1 and 3 of Paragraph 33 of the Complaint and therefore deny same. Defendants deny the allegations in sentence 2 of Paragraph 33.

34. After reviewing information known or reasonably available to them, Defendants are without sufficient information to admit or deny the allegations in sentence 1 of Paragraph 34 of the Complaint and therefore deny same. Defendants deny the allegations in sentence 2 of Paragraph 34. Defendants admit that they advertise that they can ship and worldwide and have shipped to multiple countries.
35. After reviewing information known or reasonably available to them, Defendants are without sufficient information to admit or deny the allegations in sentence 1 of Paragraph 35 of the Complaint and therefore deny same. Defendants deny the allegations in sentences 2 and 3 of Paragraph 35.
36. Defendants deny the allegations in Paragraph 36 of the Complaint.
37. Defendants deny they are required to have the authorization or consent of Mary Kay to use the Mary Kay name to describe the product for sale, as alleged in sentences 1 and 2 of Paragraph 37 of the Complaint and deny all remaining allegations in Paragraph 37.
38. Defendants admit that their websites contain the language in sentences 2 and 3 of Paragraph 38, but deny the remaining allegations in Paragraph 38 of the Complaint.
39. Defendants deny the allegations in sentences 1, 3, 6 and 7 of Paragraph 39. Defendants admit they have purchased and continue to purchase key words and have sponsored links on certain internet search engines that include the words “Mary Kay” but deny any remaining allegations in sentences 2 and 3 of Paragraph 39. Defendants deny the remaining allegations in Paragraph 39 of the Complaint.
40. Defendants admit they sell non-Mary Kay related products on their website but deny all other allegations in Paragraph 40 of the Complaint.

41. Defendants admit the allegations in sentence 1, but deny all remaining allegations in of Paragraph 41 of the Complaint.
42. Defendants deny the allegations in Paragraph 42 of the Complaint.
43. Defendants deny the allegations in Paragraph 43 of the Complaint.
44. Defendants deny the allegations in Paragraph 44 of the Complaint.
45. Defendants deny the allegations in Paragraph 45 of the Complaint.
46. Defendants hereby incorporate their answers to Paragraphs 1-45, above.
47. Defendants deny the allegations in Paragraph 47 of the Complaint.
48. Defendants deny the allegations in Paragraph 48 of the Complaint.
49. Defendants deny the allegations in Paragraph 49 of the Complaint.
50. Defendants deny the allegations in Paragraph 50 of the Complaint.
51. Defendants hereby incorporate their answers to Paragraphs 1-45, above.
52. Defendants deny the allegations in Paragraph 52 of the Complaint.
53. Defendants deny the allegations in Paragraph 53 of the Complaint.
54. Defendants deny the allegations in Paragraph 54 of the Complaint.
55. Defendants deny the allegations in Paragraph 55 of the Complaint.
56. Defendants hereby incorporate their answers to Paragraphs 1-45, above.
57. Defendants deny the allegations in Paragraph 57 of the Complaint.
58. Defendants deny the allegations in Paragraph 58 of the Complaint.
59. Defendants deny the allegations in Paragraph 59 of the Complaint.
60. Defendants hereby incorporate their answers to Paragraphs 1-45, above.
61. Defendants deny the allegations in Paragraph 61 of the Complaint.
62. Defendants deny the allegations in Paragraph 62 of the Complaint.
63. Defendants deny the allegations in Paragraph 63 of the Complaint.

- 64. Defendants hereby incorporate their answers to Paragraphs 1-45, above.
- 65. Defendants deny the allegations in Paragraph 65 of the Complaint.
- 66. Defendants deny the allegations in Paragraph 66 of the Complaint.
- 67. Defendants deny the allegations in Paragraph 67 of the Complaint.
- 68. Defendants hereby incorporate their answers to Paragraphs 1-45, above.
- 69. Defendants deny the allegations in Paragraph 69 of the Complaint.
- 70. Defendants deny the allegations in Paragraph 70 of the Complaint.
- 71. Defendants hereby incorporate their answers to Paragraphs 1-45, above.
- 72. Defendants deny the allegations in Paragraph 73 of the Complaint.
- 73. Defendants deny the allegations in Paragraph 73 of the Complaint.
- 74. Defendants hereby incorporate their answers to Paragraphs 1-45, above.
- 75. Defendants deny the allegations in Paragraph 75 of the Complaint.
- 76. Defendants deny the allegations in Paragraph 76 of the Complaint.
- 77. Defendants hereby incorporate their answers to Paragraphs 1-45, above.
- 78. Defendants deny the allegations in Paragraph 78 of the Complaint.
- 79. This Paragraph does not appear to contain allegations for which a response is required. However, to the extent any such allegations are contained therein, Defendants deny such allegations.
- 80. This Paragraph does not appear to contain allegations for which a response is required. However, to the extent any such allegations are contained therein, Defendants deny such allegations.

Defendants deny that Mary Kay, Inc. is entitled to a temporary restraining order, a temporary or permanent injunction, monetary damages, attorney's fees, interest, costs, or any other relief sought in its prayer for relief.

AFFIRMATIVE DEFENSES

Defendants further plead the following defenses to the claims filed by Plaintiff:

1. Defendants are engaged in the lawful purchase and resale of goods.
Defendants purchase and sell genuine Mary Kay products. Thus, Plaintiff's claims for trademark infringement and unfair competition are barred under the First Sale Doctrine.
2. Defendants' use of the Mary Kay trademarks in buying and selling genuine Mary Kay products is permitted as a fair use (Counts 3-8).
3. Defendants' plead the defense of laches based on Plaintiff's unexcused delay in asserting its claims, to the detriment of Defendants.
4. Plaintiff's claims for tortious interference (Counts 1 and 2), unfair competition under Texas common law (Count 6), Texas common law trademark infringement (Count 7) and unjust enrichment (Count 8) are barred, in whole or in part, by the two year statute of limitations.
5. Defendants plead the defense of justification to Plaintiff's claims for tortious interference (Counts 1 and 2).

WHEREAS, Defendants, Amy L. Weber, Scott J. Weber and Touch of Pink Cosmetics respectfully requests that upon hearing of this cause, that Mary Kay, Inc. be awarded nothing by its claims, that Defendants be awarded costs of court and that the Court grant such other and further relief to which they may be justly entitled.

Respectfully submitted,

/Elizann Carroll

Molly Buck Richard

molly@richardlawgroup.com

Texas Bar No. 16842800

Elizann Carroll

elizann@richardlawgroup.com

Texas Bar No. 00787209

RICHARD LAW GROUP, INC.

8411 Preston Road, Suite 890

Dallas, Texas 75225

Telephone: (214) 206-4300

Facsimile: (214) 206-4330

*Counsel for Defendants Amy L. Weber, Scott J.
Weber and Touch of Pink Cosmetics*

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2008, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following counsel authorized to receive electronically Notices of Electronic Filing.

Counsel for Plaintiff Mary Kay, Inc.:

Linda L. Addison
Texas Bar No. 00903700
Melanie B. Rother
FULBRIGHT & JAWORSKI, L.L.P.
1301 McKinney, Suite 5100
Houston, TX 77010
Telephone: (713) 651-5151
Facsimile: (713) 651-5246

Norlynn B. Price
FULBRIGHT & JAWORSKI, L.L.P.
2200 Ross Avenue, Suite 2800
Dallas, TX 75201
Telephone: (214) 855-8000
Facsimile: (214) 855-8200

Richard J. Groos
Sara Wolf
FULBRIGHT & JAWORSKI, L.L.P.
600 Congress Avenue, Suite 2400
Austin, TX 78701
Telephone: (512) 418-3000
Facsimile: (512) 474-7577

/Elizann Carroll