

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

NEW YORK DIRECT MARKETING CORP.,  
d/b/a/ Valpak of New York,

CASE NO.:

8:16-cv-324-T-36 TBM

Plaintiff,

vs.

VALPAK DIRECT MARKETING  
SYSTEMS, INC.,

Defendants.

**COMPLAINT**

Plaintiff, New York Direct Marketing Corp., d/b/a/ Valpak of New York ("Plaintiff" or "VPNY"), hereby files this action against Valpak Direct Marketing Systems, Inc. ("Defendant" or "VDMS"), and in support thereof states as follows:

**PARTIES, JURISDICTION AND VENUE**

1. Plaintiff VPNY is a New York corporation with its principal place of business in New York, New York.
2. Upon information and belief, Defendant VDMS is a Delaware corporation with its principal place of business in St. Petersburg, Florida.
3. This is an action for money damages and for declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.
4. This Court is authorized to grant declaratory judgments under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, implemented through Rule 57 of the Federal Rules of Civil Procedure, and to issue the preliminary and permanent injunctive relief requested under Rule 65 of the Federal Rules of Civil Procedure.

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5. This Court has jurisdiction over this action based upon diversity jurisdiction, under 28 U.S.C. § 1332(a)(1), for civil actions in which the matter in controversy exceeds the sum or value of \$75,000.00, exclusive of interest and costs, and is between citizens of different states.

6. Venue is proper in the U.S. District Court for the Middle District of Florida pursuant to 28 U.S.C. §1391(b), as VDMS is the only defendant named herein and maintains a principal office in St. Petersburg, Florida. Additionally, the parties have contracted to litigate disputes before this Court.

### **GENERAL ALLEGATIONS**

#### **Establishment of the Franchise Relationship**

7. Defendant is a franchising company that offers franchise opportunities for the establishment and operation of a business that promotes and sells cooperative direct mail advertising in VALPAK® Envelopes to be distributed within designated geographic areas (a “Valpak Franchise”).

8. Upon information and belief, Plaintiff was provided with a Valpak Franchise Disclosure Document in March 2010. Attached hereto as **Exhibit 1** is the 2012 Valpak Franchise Disclosure Document (the “Valpak FDD”) which, upon information and belief, Plaintiff believes to be materially and substantially similar to the 2010 Valpak Franchise Disclosure Document for the purposes and clauses cited to and referenced herein.<sup>1</sup>

9. Plaintiff and Defendant (collectively, the “Parties”) entered into a franchise agreement in March 2010 (the “Franchise Agreement”). A copy of the Franchise Agreement is attached hereto as **Exhibit 2**.

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<sup>1</sup> Defendant was legally required to provide Plaintiff with a current Valpak Franchise Disclosure Document at least fourteen days prior to Plaintiff’s execution of any binding franchise agreement. Plaintiff will endeavor to obtain said disclosure document through the process of discovery.

**Plaintiff Was Sold an Exclusive Valpak Territory**

10. Pursuant to the Franchise Agreement, Plaintiff was provided with the County of New York and certain zip codes within Bronx County, New York, within which to operate Plaintiff's Valpak Franchise ("Plaintiff's Territory").

11. Pursuant to various clauses within the Franchise Agreement, the Valpak FDD and the Valpak Intermarket Sales Policy (collectively, the "Franchise Documents"), Plaintiff's Territory was exclusive save for certain exceptions allowing for Defendant to conduct business in Plaintiff's Territory through its National Sales Department ("National Sales"). A copy of the Valpak Intermarket Sales Policy (the "Valpak ISP") is attached hereto as **Exhibit 3**.

12. Item 12 of the Valpak FDD provides that "[Defendant] has not granted and will not grant to any other person the right to use [Defendant's] trademarks in [Plaintiff's] Territory, except as described under the headings 'Intermarket Sales'". Valpak FDD Item 12, Paragraph 2(d).

13. Section 3.1 of the Franchise Agreement grants Plaintiff the right to operate a Valpak Franchise within Plaintiff's Territory,<sup>2</sup> and also provides Plaintiff the right to decide whether to allow other Valpak franchisees to do business within Plaintiff's Territory, except in cases where the client's purchasing representative resides outside of Plaintiff's Territory:

**3.1 Grant.** Subject to, and in accordance with, the remainder of this Section, COMPANY grants to FRANCHISEE, and FRANCHISEE accepts from COMPANY, a right, license, and obligation:

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<sup>2</sup> As further explained below, the Franchise Agreement grants Plaintiff the right to sell Valpak advertisements and services beyond the geographical boundaries of Plaintiff's Territory (New York County and certain areas of Bronx County) whenever such sales are procured through a "Purchasing Representative" who is located within said boundaries. Accordingly, any Valpak business conducted by Plaintiff in this fashion is considered to be within "Plaintiff's Territory" under the Franchise Agreement.

(a) to sell, and place orders for distribution of advertising, Advertising Inserts, or other products and/or services offered by COMPANY, to be placed in VALPAK® Envelopes to be distributed within the Territory, to: (i) any Advertiser which maintains a physical place of business within the Territory; or (ii) a Purchasing Representative with an office located within FRANCHISEE'S Territory;

(b) to sell Electronic Advertising to: (i) any Advertiser which maintains a physical place of business within the Territory; or (ii) a Purchasing Representative with an office located within the Territory;

(c) to sell, and place orders for distribution of advertising...to be distributed outside of the Territory as Intermarket Advertising so long as: (i) the Advertiser from which the FRANCHISEE is soliciting business maintains a Purchasing Representative with an office located within FRANCHISEE's Territory; or (ii) FRANCHISEE has first obtained written consent from the FRANCHISEE in whose territory the Purchasing Representative is located, or from COMPANY if the Purchasing Representative is located in an area that has not been granted to another FRANCHISEE;...

Valpak Franchise Agreement, Section 3.1.

14. The "Purchasing Representative" is defined in Section 2.1 of the Valpak Franchise Agreement as:

a person (1) who has been duly authorized by an advertiser to execute legally binding agreements with Company and Franchisee, on behalf of the advertiser, for the purchase of Advertising Inserts, or other advertising products offered by Company, for distribution through the Valpak system; and (2) who is additionally duly authorized to obligate the Advertiser to pay for such purchases of Advertising Inserts, or other advertising products offered by Company, for distribution through the Valpak System. When an Advertiser has more than one Purchasing Representative, the term only refers to the Purchasing Representative with authority to bind the Advertiser to the Participation Agreement for the sales activity in question.

Valpak Franchise Agreement, Section 2.1.

15. The Valpak ISP is interrelated with the Franchise Agreement and the Valpak FDD.

16. The Valpak ISP provides rules which govern and define how parties to an intermarket sales transaction<sup>3</sup> must interact with one another in order to comply with the rights and obligations set forth within Sections 3.1 through 3.4 of the Valpak Franchise Agreement. See Valpak ISP, Introductory Paragraph, page 3.

17. Section 2 of the Valpak ISP “Sales Rules Governing Franchisee Transactions” provides, in pertinent part, that:

**2.1 A Selling Franchisee must obtain written consent from the applicable Territory Franchisee, or COMPANY if the territory is not owned by a Franchisee, prior to any discussions with a Purchasing Representative related to the sale of VAL-PAK® Advertising if the Purchasing Representative is located outside of the Selling Franchisee’s Territory.**

**2.2 The Intermarket Consent Form must be used in all instances where prior consent is required under the Intermarket Sales Policy...**

**2.4 Territory Franchisees shall be required to respond to all Selling Franchisee consent requests within three (3) business days of receipt of an Intermarket Consent Form from a Selling Franchisee. Should the Territory Franchisee (i) fail to respond to a Selling Franchisee’s Intermarket Consent Form within the requisite three (3) day time period, or (ii) expressly deny such consent request, COMPANY reserves the right, after making a determination, in its sole and binding discretion that the Territory Franchisee has not made, or will not make, a commercially reasonable effort to procure the advertising business of the Advertiser listed on the Intermarket Consent Form, to grant the Selling Franchisee the right to sell to the Advertiser listed on the Intermarket Consent Form VAL-PAK® Advertising into Selling Franchisee’s Territory.**

See Valpak ISP, Sections 2.1 - 2.4 (emphasis added).

18. As is clear from the Franchise Documents, Plaintiff bargained for and indeed purchased an exclusive Valpak territory, which explicitly includes any additional territory/customers not expressly reserved for Defendant where Valpak business is to be transacted through a client’s Purchasing Representative who is located within Plaintiff’s

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<sup>3</sup> ‘Intermarket Sales’ or ‘Intermarket Advertising’ means the selling by a Valpak Franchisee of Advertising Inserts, or other advertising products offered by Defendant, for distribution through the VALPAK® System to households or businesses located in a geographic area that Defendant has licensed to another Valpak Franchisee or into an area that is not licensed to any Valpak Franchisee. See Valpak Franchise Agreement, Section 2, p. 4.

Territory. Consequently, and as plainly provided for within the Franchise Documents, other Valpak franchisees **must get Plaintiff's prior consent** to: (1) sell Valpak business within Plaintiff's geographical territory; and (2) sell Valpak business in any other territory through a Purchasing Representative who is located within Plaintiff's Territory.

19. Sales outside of Manhattan through Purchasing Representatives located within Plaintiff's Territory are of particular importance to Plaintiff's Valpak Franchise.

20. Valpak franchisees and National Sales derive approximately sixty-five percent (65%) of their business from the advertisement of home and garden products or services such as lawn care, window replacement, pesticides, garage doors, kitchen cabinetry and remodeling, roofing services, etc., in addition to automotive services. Meanwhile, Plaintiff derives less than one percent (1%) of its sales from these same advertisements.

21. Plaintiff's Territory is not nearly as conducive to the home and garden and automotive advertisement markets as virtually all other Valpak territories because of Manhattan's condensed, structurally vertical design. For example, the consumers in Manhattan who normally would be targeted by the Valpak advertisement model either rent or own space in flats, apartments, condominiums, and high rise residential buildings where they often do not need, or might not have the personal authority to procure, home and garden products or services such as lawn care, window replacement, pesticides, garage doors, kitchen cabinetry and remodeling (homeowners possibly, but not renters), roofing services, etc., and are much less likely to own cars.

22. These same constraints regularly cause Plaintiff to receive a lesser amount of inbound advertisement requests from other Valpak franchisees and National Sales than is typical in the Valpak franchise system.

23. Plaintiff's Territory was operated at a deficit by Defendant, or its representatives and affiliates, in the years prior to the Parties entering into the Franchise Agreement, causing Defendant's representatives to acknowledge to Plaintiff the difficulties inherent in the Valpak business model within Plaintiff's Territory.

24. Accordingly, Defendant was patently aware of all of the aforementioned fundamental market irregularities within Plaintiff's Territory when it sold Plaintiff's Territory to Plaintiff, and thus Defendant clearly understood that a substantial percentage of Plaintiff's Valpak business would be derived from Purchasing Representatives located within Plaintiff's Territory who contract with the Valpak franchise system, whether through Plaintiff or other Valpak franchisees with Plaintiff's consent, for advertisements taking place outside of Plaintiff's Territory in accordance with the intermarket sales policies set forth within the Franchise Documents.

**Defendant Failed to Rectify Rampant Improper Sales within Plaintiff's Territory**

25. The Franchise Documents provide for the implementation of an internal Valpak mediation process when violative actions arise under the Valpak ISP.

26. Initial complaints are submitted to the "Dispute Resolution Team" (hereafter, the "DRT") to mediate disputes between the parties to a complaint. See Valpak ISP, Section 10(a)-(b).

27. Pursuant to the Valpak ISP, any party to a dispute may appeal the DRT's decision to the President of Defendant.

28. On or about June 9, 2015, Plaintiff availed itself of this procedure when it brought five (5) independent disputes against five (5) different Valpak franchises (the "Violating

Franchises”)<sup>4</sup> for improperly poaching business from Plaintiff’s Territory in violation of the Valpak ISP. Copies of the respective disputes filed against the Violating Franchises are attached hereto as **Composite Exhibit 4<sup>5</sup> and Exhibit 5**.

29. Specifically, Plaintiff complained of and provided ample evidence that the Violating Franchises violated the Valpak Franchise Agreement and the Valpak ISP when they executed various VAL-PAK Sales Agreements with and/or performed various advertising jobs for certain Renewal by Andersen franchises owned by Moore Holdings (“RBA”) through a centralized Purchasing Representative who was located squarely within Plaintiff’s Territory.<sup>6</sup>

30. Plaintiff discovered that in most instances these improper actions had been occurring for several years, collectively causing Plaintiff hundreds of thousands of dollars in lost profits.

31. Plaintiff argued in the mediation that it had been financially harmed by the Violating Franchises’ improper actions and sought various damages.

32. On or about August 17, 2015, the DRT issued an order (the “DRT Order”) in Plaintiff’s favor, finding that Plaintiff “has demonstrated that the Purchasing Representative of the Advertiser for the Renewal by Andersen Franchisees located in Boston, Central New Jersey, Long Island, Los Angeles and Orange County is the Marketing Director for Moore Holdings and that she maintains a physical place of business within the Territory of Valpak of

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<sup>4</sup> The Violating Franchises consists of: Valpak of Boston; Valpak of Central New Jersey; Valpak of Long Island; Valpak of Los Angeles; and Valpak of Orange County. Upon information and belief, Valpak of Los Angeles and Valpak of Orange County are either owned by or affiliated with Defendant.

<sup>5</sup> Plaintiff submitted identical exhibits for its disputes against Valpak of Central New Jersey; Valpak of Long Island; Valpak of Los Angeles; and Valpak of Orange County; however, Plaintiff submitted a slightly amended group of exhibits for its dispute with Valpak of Boston.

<sup>6</sup> Within Plaintiff’s exhibits to the dispute filings (attached hereto within **Composite Exhibit 4 and Exhibit 5**), Plaintiff provided the DRT and Vivio with e-mail communications between Plaintiff’s representative and the RBA Purchasing Representative, Marie Palumbo, wherein Ms. Palumbo directly admits that she is the Purchasing Representative for RBA.

New York.” DRT Order (p. 4). A copy of the Dispute Resolution Team’s August 17, 2015 Order is attached hereto as **Exhibit 6**.

33. The DRT properly found that the Purchasing Representative for each of the Violating Franchises was located within Plaintiff’s Territory in accordance with the plain rules of the Valpak Franchise Agreement and the Valpak ISP. However, the DRT improperly and arbitrarily limited Plaintiff’s damages awards to a collective total of approximately fifty thousand dollars (\$50,000) between and among the Violating Franchises.

34. Accordingly, on or about August 31, 2015, Plaintiff appealed the DRT Order to the President of Defendant, Michael Vivio (“Vivio”), insofar as it improperly limited the damages owed to Plaintiff as aforementioned. A copy of Plaintiff’s Appeal of the DRT Order is attached hereto as **Exhibit 7**.

35. Upon information and belief, the Violating Franchises also appealed the DRT Order to Vivio seeking to overturn the DRT’s finding of liability against each of them.<sup>7</sup>

36. On September 16, 2015, Vivio issued his decision concerning the various appeals of the DRT Order (“Vivio’s Decision”). A copy of Vivio’s Decision is attached hereto as **Exhibit 8**.

37. Not only did Vivio refuse to award Plaintiff its lost profits due to the Violating Franchises’ bad acts, but Vivio completely overturned the DRT’s findings on the evidence that the RBA Purchasing Representative was located within Plaintiff’s territory, thereby effectively denying Plaintiff any relief pursuant to its claims.

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<sup>7</sup> Plaintiff was never provided with copies of the alleged appeals submitted to Vivio by the Violating Franchises, nor was Plaintiff provided with any of the Violating Franchises’ documentation and “evidence” submitted to the DRT.

38. As the evidence will bear out in this case, the DRT's decision with regard to damages, and Vivio's decision in toto, was arbitrary and capricious in the face of the underlying facts in this matter.

39. Through the DRT Order and Vivio's Decision, jointly and severally, Defendant has manifestly disregarded the Franchise Documents and the rules and regulations therein.

40. Upon information and belief, a significant factor behind Vivio's decision to completely ignore and set aside the relevant facts of Plaintiff's dispute with the Violating Franchises was that certain officers and executives of Defendant have special relationships with ownership of the Violating Franchises.

41. Upon information and belief, a significant factor in Vivio's decision to arbitrarily and capriciously or manifestly disregard Plaintiff's rights under the Franchise Documents was that the RBA Purchasing Representative communicated that she did not care about Valpak's internal rules or territories and that her company might cease doing business with Defendant's entire Valpak franchise system if it had to abide by such Valpak territorial restrictions.

42. This reveals and highlights a material conflict between Defendant and Plaintiff with regards to the issues at hand.

43. Per the Franchise Documents and as is standard in franchising, Defendant receives royalties or other remunerations from Valpak franchisees through the operation of their Valpak Franchises.

44. If Defendant followed its rules and procedures and enforced Plaintiff's rights under the Franchise Documents, then Defendant may very well have cost itself a franchise client. Accordingly, when faced with the dilemma of enforcing and protecting Plaintiff's clear and obvious rights under the Franchise Documents, versus protecting Defendant's self-

interests and those of its favored franchisees, Defendant unfortunately chose to protect the interests of the latter at Plaintiff's expense.

45. Plaintiff bargained for and has paid ample consideration for the fruits and benefits of Plaintiff's Territory.

46. Plaintiff has been stripped of these benefits in the past, and pursuant to Vivio's Decision, Plaintiff effectively has been precluded from fully benefiting from Plaintiff's Territory in the future.

47. Furthermore, upon information and belief, Plaintiff has been harmed through lost profits by other, separate actions of Valpak franchisees where Defendant has failed to enforce the rules and regulations of the Franchise Documents in protection of Plaintiff's Territory. Plaintiff fully expects that such facts will come to light through the process of discovery.

48. Plaintiff has engaged the law firm of Murray Law, P.A. to prosecute the above-styled action on Plaintiff's behalf, and has agreed to pay Murray Law P.A., its reasonable attorneys' fees and costs.

49. All conditions precedent to the filing of this Complaint have been performed, have occurred or have been waived.

#### **COUNT I - DECLARATORY JUDGMENT**

50. Plaintiff reasserts and realleges the allegations contained in paragraphs 1 through 49 as if fully set forth herein.

51. This is an action for Declaratory Judgment pursuant to 28 U.S.C. § 2201(a), and also Florida Statutes, § 86.011, *et seq.*

52. The Parties have a contractual, franchise relationship pursuant to the Franchise Documents.

53. Pursuant to the Franchise Documents, Plaintiff has an exclusive territory within which it may enjoy the benefits of its contractual rights and operate its Valpak Franchise in accordance with, and in reliance upon, the policies set forth therein.

54. The Parties widely disagree as to whether Defendant has failed to properly provide Plaintiff with, or to adequately enforce, the territorial benefits that it contracted to provide to Plaintiff under the Franchise Documents.

55. Specifically, the Parties disagree as to whether Defendant violated the Franchise Documents when it failed, and continues to fail, to enforce its rules and policies in Plaintiff's favor and against the Violating Franchises who, jointly and severally and in clear violation of the Valpak ISP, executed various VAL-PAK Sales Agreements with or performed various advertising jobs for certain Renewal by Andersen franchises through a centralized Purchasing Representative located within Plaintiff's Territory.

56. The aforesaid bad acts of the Violating Franchises are ongoing and continuous.

57. As such, there is a bona fide, actual, present need for the court declaration sought by Plaintiff regarding this present controversy between Plaintiff and Defendant.

58. Plaintiff's rights and privileges are dependent upon the facts, or the law applicable to the facts, in this case.

59. Defendant has an actual, adverse, and antagonistic interest in the subject matter in fact or law, as it is claiming that the actions of the Violating Franchises are proper under the Franchise Documents and that Plaintiff does not have the right to certain protections and benefits as is provided for Plaintiff through the Franchise Documents.

60. Plaintiff seeks a declaration of its rights, Defendant's obligations, and other legal relations pertaining to the Franchise Documents and Plaintiff's continued right to fully

operate its Valpak Franchise in Plaintiff's Territory for Plaintiff's benefit to the full extent provided to Plaintiff through the Franchise Documents.

61. Plaintiff asserts that the relief sought is not merely the giving of legal advice by this Court.

WHEREFORE, Plaintiff New York Direct Marketing Corp., respectfully requests that this Court enter final judgment in favor of Plaintiff New York Direct Marketing Corp., and against Defendant Valpak Direct Marketing Systems, Inc., for a judicial declaration that (1) the Violating Franchises' actions as discussed herein were in violation of the Valpak Intermarket Sales Policy; and (2) Defendant had an obligation to provide Plaintiff with, and also to enforce, the territorial rights provided to Plaintiff within the Franchise Documents; (3) Defendant breached the Franchise Documents when Defendant failed to enforce its franchise system rules and policies in favor of Plaintiff and against the Violating Franchises; and (4) for all damages incurred as a result of Defendant Valpak Direct Marketing Systems, Inc.'s breaches of the Franchise Agreement and the Franchise Documents, together with pre-judgment interest, costs, attorneys' fees, and any other relief the Court deems just and equitable.

#### **COUNT II– BREACH OF CONTRACT**

62. Plaintiff reasserts and realleges the allegations contained in paragraphs 1 through 49 as if fully set forth herein.

63. As required by federal law, Defendant, upon information and belief, provided Plaintiff with a then current Valpak FDD pursuant to the Parties' negotiations and execution of the Franchise Agreement.

64. As required by federal law, the Franchise Agreement and the Valpak FDD cannot conflict as to material terms.

65. Plaintiff and Defendant entered into a valid and enforceable franchise agreement in March 2010.

66. The Valpak ISP is incorporated into the Franchise Agreement.

67. Accordingly, the material rights and obligations of the Parties and the terms and policies to be enforced throughout the Parties' franchise relationship are generally set forth within the Franchise Documents.

68. Pursuant to the Franchise Documents, Plaintiff has an exclusive territory within which it may enjoy the benefits of its contractual rights and operate its Valpak Franchise in accordance with, and in reliance upon, the policies set forth therein.

69. Defendant has breached the Franchise Agreement through its failure to properly provide Plaintiff with, or to adequately enforce, the territorial benefits that it contracted to provide to Plaintiff under the Franchise Documents.

70. Additionally, Defendant breached the Franchise Agreement through its continued failure to enforce its rules and policies in Plaintiff's favor and against the Violating Franchises who, jointly and severally and in clear violation of the Valpak ISP, executed various VALPAK Sales Agreements with or performed various advertising jobs for certain Renewal by Andersen franchises through a centralized Purchasing Representative located within Plaintiff's Territory.

71. Due to Defendant's aforesaid breaches of the Franchise Agreement and the Franchise Documents, Plaintiff has suffered substantial damages in the form of lost profits and other benefits.

WHEREFORE, Plaintiff New York Direct Marketing Corp., respectfully requests that this Court enter final judgment in favor of Plaintiff New York Direct Marketing Corp. and against Defendant Valpak Direct Marketing Systems, Inc., for all damages incurred as a result

of Defendant Valpak Direct Marketing Systems, Inc.'s breaches of the Franchise Agreement and the Franchise Documents, together with pre-judgment interest, costs, attorneys' fees, and any other relief the Court deems just and equitable.

**COUNT III – BREACH OF CONTRACT AND  
BREACH OF GOOD FAITH AND FAIR DEALING**

72. Plaintiff reasserts and realleges the allegations contained in paragraphs 1 through 49 as if fully set forth herein.

73. As required by federal law, Defendant, upon information and belief, provided Plaintiff with a then current Valpak FDD pursuant to the Parties' negotiations and execution of the Franchise Agreement.

74. As required by federal law, the Franchise Agreement and the Valpak FDD cannot conflict as to material terms.

75. Plaintiff and Defendant entered into a valid and enforceable franchise agreement in March 2010.

76. The Valpak ISP is incorporated into the Franchise Agreement.

77. Accordingly, the material rights and obligations of the Parties and the terms and policies to be enforced throughout the Parties' franchise relationship are generally set forth within the Franchise Documents.

78. As is clear from the Franchise Documents, Plaintiff bargained for and indeed purchased an **exclusive** Valpak territory, which explicitly includes any additional territory/customers not expressly reserved for Defendant where Valpak business is to be transacted through a client's Purchasing Representative who is located within Plaintiff's Territory. Consequently, and as plainly provided for within the Franchise Documents, other Valpak franchisees must get Plaintiff's prior consent to: (1) sell Valpak business within

Plaintiff's geographical territory; and (2) sell Valpak business in any other territory through a Purchasing Representative who is located within Plaintiff's Territory.

79. Sales outside of Manhattan through Purchasing Representatives located within Plaintiff's Territory are of particular importance to Plaintiff's Valpak Franchise.

80. Valpak franchisees and National Sales derive approximately sixty-five percent (65%) of their business from the advertisement of home and garden products or services such as lawn care, window replacement, pesticides, garage doors, kitchen cabinetry and remodeling, roofing services, etc., in addition to automotive services. Meanwhile, Plaintiff derives less than one percent (1%) of its sales from these same advertisements.

81. Plaintiff's Territory is not nearly as conducive to the home and garden and automotive advertisement markets as virtually all other Valpak territories because of Manhattan's condensed, structurally vertical design. For example, the consumers in Manhattan who normally would be targeted by the Valpak advertisement model either rent or own space in flats, apartments, condominiums, and high rise residential buildings where they often do not need, or might not have the personal authority to procure, home and garden products or services such as lawn care, window replacement, pesticides, garage doors, kitchen cabinetry and remodeling (homeowners possibly, but not renters), roofing services, etc., and are much less likely to own cars.

82. These same constraints regularly cause Plaintiff to receive a lesser amount of inbound advertisement requests from other Valpak franchisees and National Sales than is typical in the Valpak franchise system.

83. Plaintiff's Territory was operated at a deficit by Defendant, or its representatives and affiliates, in the years prior to the Parties entering into the Franchise Agreement, causing

Defendant's representatives to acknowledge to Plaintiff the difficulties inherent in the Valpak business model within Plaintiff's Territory.

84. Accordingly, Defendant was patently aware of all of the aforementioned fundamental market irregularities within Plaintiff's Territory when it sold Plaintiff's Territory to Plaintiff, and thus Defendant clearly understood that a substantial percentage of Plaintiff's Valpak business would be derived from Purchasing Representatives located within Plaintiff's Territory who contract with the Valpak franchise system, whether through Plaintiff or other Valpak franchisees with Plaintiff's consent, for advertisements taking place outside of Plaintiff's Territory in accordance with the intermarket sales policies set forth within the Franchise Documents.

85. Florida contract law recognizes an implied covenant of good faith and fair dealing in every contract. The implied covenant of good faith imposes upon each party a duty of good faith and fair dealing in the performance and enforcement of the parties' contract.

86. Defendant breached the Franchise Agreement and the Franchise Documents, and failed to deal fairly and in good faith with Plaintiff in the performance of its obligations, discretionary or otherwise, through its: (1) failure to properly provide Plaintiff with, or to adequately enforce, the territorial benefits that it contracted to provide to Plaintiff under the Franchise Documents; and (2) failure to enforce its rules and policies in Plaintiff's favor and against the Violating Franchises who, jointly and severally and in clear violation of the Valpak ISP, executed various VAL-PAK Sales Agreements with or performed various advertising jobs for certain Renewal by Andersen franchises through a centralized Purchasing Representative located within Plaintiff's Territory.

87. Further, after knowingly breaching the terms and conditions of the Franchise Agreement and the Franchise Documents in the manner suggested above, and after being put

on notice by Plaintiff as to many of these same failures, Defendant, through its representatives, refused to rectify these issues in any manner and effectively broadcasted to all Valpak franchisees that it would allow unauthorized poaching of business from Plaintiff's Territory in certain respects.

88. Plaintiff has been materially damaged as a result of Defendant's breaches including Defendant's breach of its implied covenant of good faith and fair dealing.

WHEREFORE, Plaintiff New York Direct Marketing Corp., respectfully requests that this Court enter final judgment in favor of Plaintiff New York Direct Marketing Corp., and against Defendant Valpak Direct Marketing Systems, Inc., for all damages incurred as a result of Defendant Valpak Direct Marketing Systems, Inc.'s breaches of the Franchise Agreement and the Franchise Documents, and breaches of the Franchise Agreement and the Franchise Document's implied covenant of good faith and fair dealing, together with pre-judgment interest, costs, attorneys' fees, and any other relief the Court deems just and equitable.

#### **COUNT IV - NEGLIGENCE**

89. Plaintiff reasserts and realleges the allegations contained in paragraphs 1 through 49 as if fully set forth herein.

90. As required by federal law, Defendant, upon information and belief, provided Plaintiff with a then current Valpak FDD pursuant to the Parties' negotiations and execution of the Franchise Agreement.

91. As required by federal law, the Franchise Agreement and the Valpak FDD cannot conflict as to material terms.

92. Plaintiff and Defendant entered into their Franchise Agreement in March 2010.

93. The Valpak ISP is incorporated into the Franchise Agreement.

94. Accordingly, the material rights and obligations of the Parties and the terms and policies to be enforced throughout the Parties' franchise relationship are generally set forth within the Franchise Documents.

95. Pursuant to the Franchise Documents, Plaintiff has an exclusive territory within which it may enjoy the benefits of its contractual rights and operate its Valpak Franchise in accordance with, and in reliance upon, the policies set forth therein.

96. Pursuant to the Franchise Documents, Defendant has a duty to uphold and enforce the rules and policies it created, advertised, and sold to Plaintiff in order to induce Plaintiff to buy into and invest in the Valpak franchise system.

97. Defendant was negligent in the performance of its obligations, discretionary or otherwise, under the Franchise Agreement and the Franchise Documents through Defendant's: (1) failure to properly provide Plaintiff with, or to adequately enforce, the territorial benefits that it contracted to provide to Plaintiff under the Franchise Documents; and (2) failure to enforce its rules and policies in Plaintiff's favor and against the Violating Franchises who, jointly and severally and in clear violation of the Valpak ISP, executed various VAL-PAK Sales Agreements with or performed various advertising jobs for certain Renewal by Andersen franchises through a centralized Purchasing Representative located within Plaintiff's Territory.

98. Further, after negligently failing to perform its duties pursuant to the terms and conditions of the Franchise Agreement and the Franchise Documents in the manner suggested above, and after being put on notice by Plaintiff as to many of these same failures, Defendant, through its representatives, willfully or negligently refused to rectify these issues in any manner and effectively broadcasted to all Valpak franchisees that it would allow unauthorized poaching of business from Plaintiff's Territory in certain respects.

99. As a proximate result of Defendant's aforesaid willful or negligent acts, Plaintiff has suffered substantial damages in an amount to be determined at trial.

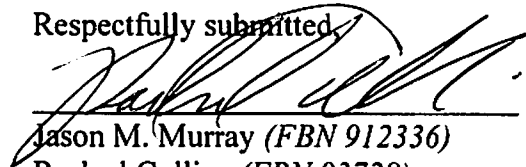
WHEREFORE, Plaintiff New York Direct Marketing Corp., respectfully requests that this Court enter final judgment in favor of Plaintiff New York Direct Marketing Corp. and against Defendant Valpak Direct Marketing Systems, Inc., for all damages incurred as a result of Defendant Valpak Direct Marketing Systems, Inc.'s willful and negligent breaches of its duties under the Franchise Agreement and the Franchise Documents, together with pre-judgment interest, costs, attorneys' fees, and any other relief the Court deems just and equitable.

**DEMAND FOR JURY TRIAL**

100. Plaintiff hereby requests a jury trial on all issues raised in this Complaint.

Dated: February 5, 2016

Respectfully submitted,



Jason M. Murray (FBN 912336)

Rashad Collins (FBN 93728)

Isabel Yague (FBN 93152)

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