UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DAVID MOORE DBAs IMPERIAL EMPORIUM, IRON CROWN, STARCHILD GOODS, FELLOWSHIP CRAFTS, Plaintiff, v. GAMES WORKSHOP, INC., FORGE WORLD, INC., DAVE MOSNER, KEVIN ROUNDTREE, CHRIS CAILOR, CHRIS MYATT, ELAINE O'DONNEL, TOM KIRBY, NICK DONALDSON, TANYA MILUM, STEVEN BINKS, ET AL. Defendants.	Civil Action No. 0:17-cv-61100 Judge William P. Dimitrouleas

DEFENDANTS' MOTION TO DISMISS THE COMPLAINT
AND INCORPORATED MEMORANDUM OF LAW

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Dated: September 5, 2017

Defendants[1], by and through their undersigned counsel, hereby file their Motion to Dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(2), 12(b)(5), and 12(b)(6), and in support thereof state as follows:

I. INTRODUCTION

Plaintiff David Moore ("Plaintiff"), an ostensible *pro se* filer and former authorized retailer of Games Workshop products, has filed nothing more than a "scatter-shot" complaint. He does not plead facts to support any of his claims, instead firing off random, spurious, and conclusory allegations against Defendants. What little may be gleaned from Plaintiff's Complaint and accompanying Affidavit reveals that Plaintiff simply does not like and did not want to comply with Games Workshop's unilateral practices and policies. Now disgruntled after having his retailer authorization revoked by Games Workshop for his failure to comply with those policies, Plaintiff clearly intends to use this lawsuit to air his perceived grievances against Defendants. His inflammatory allegations, however, do not state any claim as a matter of law.

Specifically, Plaintiff has not pled any of the elements of his five causes of action. He does not identify any specific instance of fraud, failing to allege with requisite particularity when any purportedly fraudulent statements were made, who made them, how he relied on them, or how he was damaged. He does not allege the existence of any agreement that could constitute a restraint of trade, and indeed the alleged Games Workshop unilateral practices and policies he complains of are presumptively legal and promote legitimate business objectives. He does not allege to have purchased any Games Workshop stock or security, and thus has no standing to

[1]"Defendants" as used herein collectively refers to Games Workshop Retail, Inc. ("Games Workshop"), incorrectly named as Games Workshop, Inc., and the "Individual Defendants" Dave Mosner, Kevin Rountree, Chris Cailor, Chris Myatt, Elaine O'Donnell, Tom Kirby, Nick Donaldson, and Tanya Milam. Defendant Forge World, Inc. is not a legal entity. Defendant Steven Binks is not a Games Workshop employee and is not represented by the undersigned counsel.

bring a "pump and dump" claim. He has not identified any parties capable of conspiring, and so cannot state a claim for civil conspiracy. And, finally, he has not sufficiently pled the existence of any contract that has been breached, failing, among other things, to plead the essential terms of any such contract. Additionally, Plaintiff has not pled any allegations that could establish the Court's personal jurisdiction over any of the Individual Defendants, five of whom are located in the United Kingdom, and he has not perfected service on any Defendant.

In short, Plaintiff's rambling, disconnected, and incoherent allegations cannot support any of his five counts, nor any other cause of action against Defendants. And they certainly do not entitle him to his outrageous prayed-for relief, including an Order requiring Games Workshop to stop competing with Plaintiff, the nullification of all of Games Workshop's intellectual property rights, and tens of millions of dollars in damages. Even under the most generous pleadings standards, the Complaint must be dismissed.

II. FACTS RELEVANT TO PLAINTIFF'S CLAIMS

A. The Parties

Games Workshop is a corporation located in Memphis, Tennessee that makes and sells tabletop figurines, games, and related products in the fantasy and science-fiction genres. (Compl. at 1.) Games Workshop's products are principally manufactured using its own copyrighted designs. It also manufactures products under license from third party licensors. Games Workshop sells its products through (i) a chain of brick-and-mortar Games Workshop stores, (ii) a network of authorized retailers, and (iii) a website selling online directly to customers. Defendants Mosner, Cailor, and Milam are sales employees of Games Workshop. Defendants Rountree, Myatt, O'Donnell, Kirby, and Donaldson are members of the Board of Directors of Games Workshop's foreign parent, a U.K. company called Games Workshop Group PLC (*id.*), and reside in the United Kingdom.

Until recently, Plaintiff was authorized to sell Games Workshop products through various brick-and-mortar stores. (*See generally id.*) The Complaint refers to stores called Imperial Emporium, Iron Crown, Starchild Goods, and Fellowship Crafts. (*Id.*) Plaintiff does not plead where any of these specific stores are located, but he does aver he has or had stores in Buffalo, New York, and Pompano Beach, Florida. (*See* Moore Affidavit [Aff.] ¶¶ 3.15, 3.18.) According to his Games Workshop 2010 Account Application, Plaintiff purchased his products through Charity Fellowship Crafts & Hobbies, a 501(c)(3) corporate entity.[2] (*See* Ex. 2, Account App., Plaintiff's personal information redacted.) Plaintiff does not allege he purchased products in his individual capacity for his own use or enjoyment.

As Plaintiff references, in "Summer 2016," Games Workshop limited Plaintiff's ability to purchase its products because he was selling products online in violation of the company's then-existing internet sales policy (described below) and "'counterfeiting' [Games Workshop's] items." (Compl. ¶ 36.)

B. Policies Governing Plaintiff's Purchases from Games Workshop

Plaintiff's ability to purchase and resell Games Workshop's products is governed by Games Workshop's unilateral policies and conditions of sale. The Complaint references two specific Games Workshop unilateral policies: (1) a policy regarding internet sales, and (2) a policy regarding minimum advertised prices ("MAP policy").

Although Plaintiff claims the internet sales policy was introduced "recently" (Compl. ¶ 15), it was instituted in 2003 and incorporated into Games Workshop's 2013 North

[2] The Account Application lists Federal ID Number 161436967, which is associated with the similarly named Charity Fellowship of Truth Church. (*See* Ex. 1, IRS Report.) The Court may take judicial notice of this record. *See, e.g.*, *Dawkins v. J.C. Lewis Primary Health Care*, No. CV415-043, 2015 U.S. Dist. LEXIS 45984, at *2-3 (S.D. Ga. Apr. 8, 2015) (taking judicial notice of "IRS' 501(c) charitable organization webpage" at motion to dismiss stage).

America Retailer Policy. (*See* Ex. 5, 2013 NA Retailer Policy at 2, 5.)[3] The policy lawfully reserved to Games Workshop the right to sell online and prohibited retailers from selling Games Workshop products through their own websites or on third-party platforms. (*Id.*)

Games Workshop instituted its unilateral MAP policy in May 2017. (*See* Ex. 6, MAP Policy.) The policy prohibits retailers from advertising Games Workshop products at advertised prices which are more than 15% below the Manufacturer's Recommended Price ("MRP"). (*Id.* at 2; *see also* Compl. ¶ 15.) The policy does not dictate the prices retailers may actually charge for Games Workshop products and allows retailers to advertise that customers can contact them for the "lowest price." (Ex. 7, MAP FAQ at 2.) Plaintiff alleges he received notice of his first violation of the policy shortly after it was enacted. (Aff. ¶ 5, Ex. A.)

Plaintiffs' purchases of Games Workshop's products are governed by Games Workshop's conditions of sale. The conditions generally provide that all orders are contingent on Games Workshop's written acceptance and the availability of products. (*See* Ex. 3, NA Cond. of Sale, §§ 1.1, 4.1; Ex. 4, Website Cond. of Sale §§ 3.1, 3.3.1, 3.3.3.)

C. Conduct Allegedly Giving Rise to Plaintiff's Claims

Plaintiff's "shotgun" pleading makes it difficult to identify which of his allegations are intended to support which claims. He generally alleges that Games Workshop agents made representations to him about the volume of products he could order and the value of said products. For example, Plaintiff claims that unnamed Games Workshop "representatives lied" to him "about important, material facts pertaining to the 'number' of items available and

[3] Although courts accept the facts in a complaint as true in considering a motion to dismiss, the Court may consider a document attached to a motion to dismiss where the document is "central to the plaintiff's claim, and its authenticity is not challenged." *Sherrod v. Sch. Bd. of Palm Beach Cnty.*, 550 F. App'x. 809, 811 (11th Cir. 2013); *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005). "Where there is a conflict between allegations in a pleading and the central documents, it is 'well settled' that the contents of the documents control." *In re Fontainebleau Las Vegas Contract Litig.*, 716 F. Supp. 2d 1237, 1246 (S.D. Fla. 2010).

'value' of said items." (Compl. ¶ 9.) Similarly, Plaintiff alleges that Games Workshop's "entire staff" kept "secrets" and that he relied upon the "seemingly sincere representations of [Games Workshop] when ordering products." (*Id.* ¶ 11.) His Affidavit contains other broad averments regarding Games Workshop's alleged failure to ship full orders or that it charged Plaintiff the wrong prices for products. (*See, e.g.* Aff. ¶¶ 3, 15.) In certain instances he concedes that Games Workshop "corrected" the issue (*id.* ¶ 3.15), or that he was able to recover money for items he ordered but allegedly never shipped (*id.* ¶ 30).

Although he brings a breach of contract claim, Plaintiff does not identify any specific contract between the parties, nor any particular term that has been breached. He vaguely alleges a "preexisting and purchased account contract with [Games Workshop] for the promotion and sale of their product line," and admits that Games Workshop "initially and for some time honored its Contractual Obligations and provided product and product support." (Compl. ¶¶ 29-31.) Plaintiff also suggests that Games Workshop had a policy at some unspecified time that "allow[ed] no other retailers to carry their line within 5-miles [sic] of existing retailers." (Aff. ¶ 3.4.) Plaintiff asserts that Games Workshop set up its own locations within five miles of his existing stores, causing one unidentified store to close and another to downsize. (*Id.*)

Plaintiff does not allege *any* conduct with respect to the Individual Defendants aside from Dave Mosner. Mosner's alleged conduct consists of a call to Plaintiff to ask about an order of a specific Games Workshop product (*id.* ¶¶ 15.4-15.8), and a conclusory assertion that Mosner "sabotaged **Store's** ordering capability" (Compl. ¶ 34 (emphasis in original)). Plaintiff does not allege that Mosner was ever acting outside his capacity as a Games Workshop agent.

III. ARGUMENT

A. Standard of Review

Plaintiff's inflammatory, irrelevant, and conclusory allegations are insufficient to state any claim under Fed. R. Civ.P. 12(b)(6). Rule 12(b)(6) obligates a plaintiff "to provide the 'grounds' of its 'entitlement to relief'" [which] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Zarrella v. Pac. Life Ins. Co.*, 809 F. Supp. 2d 1357, 1362 (S.D. Fla. 2011) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 550 (2007)). A complaint must contain sufficient factual matter "to state a claim to relief that is plausible on its face." *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). "[C]onclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *NCM of Collier County, Inc. v. Durkin Group, LLC*, No. 2:11-cv-558, 2012 U.S. Dist. LEXIS 87326, at *3 (M.D. Fla. June 25, 2012) (citing *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003)).

Plaintiff has filed *pro se*, which in normal circumstances would mean his Complaint is "held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Fries v. Scott*, No. 3:17-cv-234-J-34JBT, 2017 U.S. Dist. LEXIS 85821, (M.D. Fla. May 8, 2017). As discussed below, Plaintiff is not entitled to file *pro se* and thus is not entitled a lessened Rule 12(b)(6) standard. Regardless, "[a] [*pro se*] complaint that fails to articulate claims with sufficient clarity to allow the defendant to frame a responsive pleading is prohibited." *Id.* "As such, even *pro se* complaints that are 'disjointed, repetitive, disorganized and barely comprehensible' may be dismissed." *Id.*; *see also McFarlin v. Douglas Cty.*, 587 F. App'x 593, 595 (11th Cir. 2014) ("a pro se litigant is still required to conform to procedural rules, and a district judge is not required to rewrite a deficient pleading"). Particularly, a complaint is improper where, as here, among other things, it (1) is "replete with

conclusory, vague, and immaterial facts not obviously connected to any particular cause of action," and (2) "asserts[s] multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts." *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1322-23 (11th Cir. 2015). Plaintiff's Complaint falls within both categories and accordingly "fail[s] to . . . give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Id.* at 1323. His claims must therefore be dismissed.

B. Plaintiff Cannot File As a *Pro Se* Plaintiff and Must Be Represented by Counsel

Plaintiff is not entitled to file *pro se* because his claims arise entirely from the business relationship between Games Workshop and his stores. Plaintiff has dealt with Games Workshop through an account held by a 501(c)(3) corporation. "The rule is well established that a corporation is an artificial entity that can act only through agents, cannot appear *pro se*, and must be represented by counsel" *Alex Garcia Enters. v. Fla. Music Festival*, No. 6:14-cv-509-Orl-36DAB, 2014 U.S. Dist. LEXIS 72008, at *3 (M.D. Fla. May 27, 2014) (citing *Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381, 1385 (11th Cir. 1985)). "This general rule applies even where the person seeking to represent the corporation is its president and major stockholder" and applies equally to small business owners.[4] *Id.*; *see also Wilkinson v. Assaf & Mackenzie, PLLC*, No. 09-cv-377, 2009 WL 3055295, at *2 (N.D.N.Y. Sept. 21, 2009) (holding a plaintiff "having chosen to accept the advantages of doing business as an artificial entity, must bear the burdens associated therewith, including the requirement that the entity appear by counsel"). Accordingly, Plaintiff's Complaint may be dismissed for his failure to retain counsel and, at the very least, his Complaint is not subject to a lessened standard of review.

[4] Plaintiff alleges that he has an L.L.M. and is a "law school graduate," (Compl. at 1; Aff. ¶ 3:13), but he does not appear to be barred in the state of Florida. Defendants are not aware whether he is barred in any other jurisdiction.

C. Plaintiff Fails to Plead Any Specific Facts to Support His Fraud Claim

Under any standard, Plaintiff's claim for fraud fails as a matter of law because he does not plead sufficient details of any instance of alleged fraud. Pursuant to Fed. R. Civ. P. 9(b), a party must "state with particularity the circumstances constituting fraud." This requires well-pled allegations of: "(1) precisely what statements were made in what documents or oral representations or what omissions were made, . . . (2) the time and place of each such statement and the person responsible for making [the] same, . . . (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud." *Space Coast Credit Union v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. 12-60430-CIV, 2014 U.S. Dist. LEXIS 39159, at *13-15 (S.D. Fla. Mar. 25, 2014). The heightened standard "serves an important purpose in fraud actions by alerting defendants to the precise misconduct with which they are charged, and protecting defendants against spurious charges of immoral and fraudulent behavior." *W. Coast Roofing & Waterproofing, Inc. v. Johns Manville, Inc.*, 287 F. App'x 81, 86 (11th Cir. 2008).

As with all of Plaintiff's causes of action, it is impossible to determine what he is alleging to support his fraud claim. He refers generally to unspecified representations regarding the availability of Games Workshop products and the volume he could order through his account.[5] But these allegations are entirely bereft of the specificity required to state a fraud claim, failing to explain "precisely what statements were made in what . . . oral representations," "the time and place of each such statement," "the person responsible for making" the statement, and "the manner in which [such statements] misled" him. *Space Coast Credit Union*, 2014 U.S.

[5] *See supra* Section II.C.

Dist. LEXIS 39159, at *13-15. Instead, his assertions of "lies" and "secrets" are exactly the types of conclusory, spurious allegations insufficient to meet the Rule 9(b) pleading standard.

To the extent Plaintiff's Complaint and Affidavit elsewhere contain additional references to either Games Workshop's alleged failure to fulfill orders or to other purported representations by Games Workshop agents, Plaintiff's "scatter shot" pleading is insufficient because it "leav[es] the reader to wonder which prior [or subsequent] paragraphs support the elements of the fraud claim." *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1279 (11th Cir. 2006). Defendants cannot be required to piece together Plaintiff's disjointed allegations, seemingly "not connected to the otherwise generally pled claim in any meaningful way," to determine what he is pleading against them. *Id.* Further, any allegation that Games Workshop failed to ship ordered products sounds in contract, not fraud. Similarly, any assertions regarding the "value" of Games Workshop's products, i.e., that their price exceeded their cost, has nothing to do with either his fraud claim or any other. Games Workshop plainly has the right to set the prices at which it sells its products and the "value" of a product is set by the market.

Accordingly, Plaintiff has not pled any facts to support his fraud claims and ultimately fails to put Defendants on notice of the "precise misconduct with which they are charged." *W. Coast Roofing & Waterproofing*, 287 F. App'x at 86. Under such circumstances, Plaintiff's fraud claim must be dismissed.

D. Plaintiff Does Not State a Claim for Violation of the Sherman Act

Although Plaintiff styles his second cause of action as "Restraint of Trade," he fails to provide sufficient notice of what he claims Games Workshop did to violate the antitrust laws. No reading of his Complaint can provide the basis for a Sherman Act claim.

Specifically, Plaintiff has brought a claim pursuant only to Section 1 of the Sherman Act, which proscribes contracts, combinations, or conspiracies in restraint of trade. 15

U.S.C. § 1. In a Section 1 case, the "crucial question" is "whether the challenged anticompetitive conduct stems . . . *from an agreement*." *Twombly*, 550 U.S. at 553 (citations and internal quotations omitted, emphasis added). Accordingly, "Section One applies only to agreements between two or more businesses." *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Comms., Inc.*, 376 F.3d 1065, 1071 (11th Cir. 2004). Plaintiff has not alleged any such agreement here. Indeed, Plaintiff has named as Defendants only Games Workshop, its employees, and directors of its foreign parent, and does not allege the existence of any other conspirator. Under the "intracorporate conspiracy doctrine," however, officers and employees "cannot conspire, for Section 1 purposes, with the corporations that employ them." *Lockheed Martin Corp. v. Boeing Co.*, 314 F. Supp. 2d 1198, 1215 (M.D. Fla. Apr. 22, 2004) (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984)); *see also Bolt v. Halifax Hosp. Med. Ctr.*, 901 F.2d 810, 819 (11th Cir. 1990). Plaintiffs' Sherman Act claim thus fails from the outset.

Further, the conduct Plaintiff complains of is consistent with everyday, lawful business practices and does not violate the Sherman Act as a matter of law. Plaintiff particularly takes issue with Games Workshop's former internet sales policy and its MAP policy—both of which Plaintiff violated and neither of which amount to a restraint of trade. As an initial matter, as this Court has recognized, unilateral policies cannot form the basis of a Sherman Act Section 1 claim because they do not constitute an agreement. *See Vitacost.com v. Oregon Freeze Dry, Inc.*, No 09-cv-08367, 2009 U.S. Dist. LEXIS 74347, at *17-18 (S.D. Fla. July 21, 2009) (Dimatrouleas, J.) (dismissing antitrust claims where defendant's minimum retail price policy was a "[u]nilateral action on the part of" defendant that did "not constitute an antitrust violation"); *see also Worldhomecenter.com, Inc. v. KWC Am., Inc.*, No. 10-cv-7781, 2011 U.S.

Dist. LEXIS 104496, at *19 (S.D.N.Y. Sept. 15, 2011) (dismissing Section 1 claim because internet advertising policy could not be considered an agreement); *MD Prods. V. Callaway Golf Sales Co.*, 459 F. Supp. 2d 434, 437 (W.D.N.C. 2006) (dismissing antitrust claim where prohibition of online sales represented the "mere unilateral action by [defendant] in setting new policies for distribution"). Plaintiff expressly disclaims that either policy here amounted to an agreement. (*See, e.g.*, Compl. ¶¶ 15-16 (internet sales policy "quietly instituted"; MAP policy enacted "without agreement").)

And even if it were assumed that these policies constituted agreements, they are clearly lawful. As vertical non-price restraints[6], both policies would be analyzed under the rule of reason. *Vitacost.com*; 2009 U.S. Dist. LEXIS 74347, at *17-18; *see also Worldhomecenter.com, Inc. v. Franke Consumer Prods., Inc.*, No. 10-cv-3205, 2011 U.S. Dist. LEXIS 67798, at *14-15 (S.D.N.Y. June 22, 2011) (dismissing plaintiff's complaint and explaining that MAP policies are not price restraints). Plaintiff is thus required to plead (1) the anticompetitive effect of Games Workshop's conduct on the relevant market, and (2) that the defendant's conduct has no procompetitive benefit or justification. *Spanish Broad.*, 376 F.3d at 1071. Plaintiff fatally does not allege any anticompetitive effect of either policy and his allegations belie any such effect. *See id.* at 1072 (explaining plaintiffs must allege harm to market, such as specific damage to consumers). For example, Plaintiff concedes that the MAP policy only applied to advertised prices (*e.g.*, Compl. ¶ 15), and does not allege that the policy dictates what prices retailers can actually charge for Games Workshop products. Indeed, the

[6] Although Plaintiff asserts that Games Workshop engaged in "price-fixing" (*see, e.g.*, Compl. ¶ 25), he has not alleged any conduct to support such a claim. In *Blind Doctor Inc. v. Hunter Douglas, Inc.*, a district court facing a similar claim explained that "plaintiff's understanding of 'price fixing' under the Sherman Act is . . . misguided. Defendant has never dictated the price of its products to the . . . retailers who sell defendant's [products] downstream to consumers." No. 04-cv-2678, 2004 U.S. Dist. LEXIS 18480, at *18 (N.D. Cal. Sept. 7, 2004).

MAP policy provides that it "will apply to only advertised prices" and that each retailer "remains free to establish its own retail prices." (Ex. 6, MAP Policy at 2-3.) The "Frequently Asked Questions" supplementing the MAP policy plainly states that resellers may advertise that customers can contact the reseller for the "lowest price." (Ex. 7, MAP FAQ at 2.) Such a policy does not violate the Sherman Act. *See, e.g.*, *Campbell v. Austin Air Sys., Ltd.*, 423 F. Supp. 2d 61, 68 n.6 (W.D.N.Y. 2005) (MAP policy which "restricts only the minimum prices for which a dealer could advertise" and "explicitly states that a dealer may sell . . . for any price . . . does not violate *Section 1* of the Sherman Act, nor does it constitute proof of a vertical agreement to fix prices").

Also fatal to Plaintiff's claim is the fact that he fails to allege antitrust injury, which must flow from an injury to competition. *Duty Free Ams., Inc. v. Estee Lauder Cos.*, 797 F.3d 1248, 1272 (11th Cir. 2015). Plaintiff's complaint is not that competition has been injured, but that he has been injured by the purported fact that Games Workshop is competing against his stores. The true nature of Plaintiff's Complaint is revealed plainly by its request that this Court order "**GW** to cease ALL online sales that compete with [Plaintiff]," (Aff. ¶ 13 (emphasis in original)). Such relief would of course would turn the Sherman Act on its head.

Further, Plaintiff does not plead either the relevant geographic market or product market, as required. *See Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1336 (11th Cir. 2010) ("antitrust plaintiffs still must present enough information in their complaint to plausibly suggest the contours of the relevant geographic and product markets"). Plaintiff pleads nothing with respect to the geographic market, and with respect to a product market, Plaintiff pleads, in an un-numbered paragraph and without any supporting detail, only that Games Workshop produces "Sci-Fi/Fantasy Tabletop Minis Wargames" and has "80%+ market power." (Compl.

at 1.) Defining the relevant product market, however, requires a plaintiff to make specific factual allegations that are wholly absent here. *See Levine v. Central Fla. Medical Affiliates*, 72 F.3d 1538, 1552 (11th Cir. 1996) (dismissing claim for failure to plead relevant market; plaintiff did not identify market participants or reasonably interchangeable products).

In addition to Plaintiff's pleading defects, both unilateral policies are pro-competitive and in line with Games Workshop's legitimate and justified business objectives. Among other things, the MAP policy allows Games Workshop to maintain its brand image and reputation, and controls the erosion of the brick-and-mortar retail network that it views as essential to its business model. *Cf. Worldhomecenter.com, Inc. v. KWC Am., Inc.*, 2011 U.S. Dist. LEXIS 104496, at *17-19 (S.D.N.Y. Sept. 15, 2011) (explaining business justifications for such a policy); *Blind Doctor*, 2004 U.S. Dist. LEXIS 18480 at *18 ("[I]n an effort to maintain consumer goodwill and a reputation for stellar customer service, defendant merely requires retailers to abide by certain advertising restrictions. Courts have recognized that such advertising restrictions do not rise to the level of an antitrust violation."). Similarly, Games Workshop's internet sales policy allowed Games Workshop to maintain the integrity of its brand, ensure its products were presented in uniform manner online, and prevent free-riding by online resellers on brick-and-mortar retailers like Plaintiff. Concluding such policies run afoul of the antitrust laws would clearly chill procompetitive business conduct.

At bottom, even given their most generous reading, Plaintiff's allegations cannot state a claim under the Sherman Act. He has alleged only unilateral policies restricting advertised prices and/or reservation of internet sales to the manufacturer alone, and even if an agreement had been alleged, any allegations that Games Workshop's practices unreasonably

restrain trade "are merely conclusory and thus not sufficient to survive the Motion to Dismiss." *Vitacost.com*, 2009 U.S. Dist. LEXIS 74347, at *18.

E. Plaintiff Does Not Have Standing to Bring a "Pump and Dump" Claim

Plaintiff does not, and cannot, state a claim based on a "Pump and Dump Scheme." (*See* Compl. ¶¶ 21-23.) The Eleventh Circuit has explained that a "pump and dump scheme involves artificially inflating the price and volume of an owned stock. . . to sell the stock at a higher price. Once the overvalued shares are dumped, the price and volume of shares plummet and unsuspecting investors lose their money." *United States v. Curshen*, 567 F. App'x 815, 816 (11th Cir. 2014). Aside from his failure to allege facts supporting this claim, Plaintiff does not allege he has ever purchased Games Workshop securities and thus he has no standing to pursue such a claim. *See Licht v. Watson*, 567 F. App'x 689, 691-92 (11th Cir. 2014) (affirming dismissal of *pro se* plaintiff's pump and dump claims because he did not allege he purchased or sold defendant's securities). The claim must therefore be dismissed.

F. Plaintiff's Civil Conspiracy Claim Fails As a Matter of Law Because He Does Not Identify Any Possible Conspirators nor Plead an Actionable Wrong

Plaintiff appears to plead a state law claim for civil conspiracy, but this claim also fails as a matter of law because Plaintiff does not identify any parties capable of conspiring. (Compl. ¶¶ 24-27.) Again, Plaintiff does not name as Defendants any party beyond Games Workshop, its employees, and its foreign parent's board members. Florida law too recognizes the intracorporate conspiracy doctrine, which dooms Plaintiff's conspiracy claim. *See, e.g.*, *Williams v. Michelin N. Am., Inc.*, No. 6:04-cv-815, 2005 U.S. Dist. LEXIS 24427, at *6-8 (M.D. Fla. Oct. 21, 2005) (holding that corporation cannot conspire with its employees, and its employees, when acting in scope of their employment, cannot conspire among themselves.). Additionally, Plaintiff cannot bring a civil conspiracy claim without sufficiently pleading an

independent wrong or tort. *See Michael Titze Co. v. Simon Prop. Group*, 400 F. App'x 455, 461 (11th Cir. 2010). Because Plaintiff does not sufficiently state any other cause of action, his conspiracy claim must be dismissed on this ground as well.

G. Plaintiff Fails to Allege Any Specific Contract or Term That Has Been Breached and Does Not Plead the Elements of a Breach of Contract Claim

Plaintiff does not sufficiently identify any particular contract or term that has been breached, thereby failing to provide Defendants with notice of the basic elements of his purported breach of contract claim. Plaintiff must "allege sufficient facts identifying how [Games Workshop] materially breached the agreement [and] what damages he has incurred." *Mirabal v. Bank of Am. Corp.*, No. 15-cv-21838, 2015 U.S. Dist. LEXIS 187930, at *5 (S.D. Fla. Sept. 30, 2015) (dismissing claim). He is required not only to allege "the existence of a valid contract," but also to "identify the terms of the contract that he contends the Defendant breached." *Id.*[7]

Within his cause of action for breach of contract, Plaintiff pleads only a vague "preexisting and purchased account contract with Defendant [Games Workshop] for the promotion and sale of their product line," purportedly entered into "[o]n or about 1997." (Compl. ¶ 29.) Assuming this contract ever existed, Plaintiff does not plead how it was breached or any specific terms that were violated. Instead, he alleges only that Games Workshop "for some time *honored its Contractual Obligations* and provided product and product support" (*id.* at ¶ 31 (emphasis added).) This clearly does not state a breach of contract claim.

Elsewhere, Plaintiff alleges that Games Workshop's unilateral MAP policy "contradict[ed] their previous assurances and [the parties'] extant long-held Verbal Good Faith

[7] Because it is unclear what contract Plaintiff alleges has been breached, Defendants cite Florida breach of contract law when addressing Plaintiff's claim. It matters little which law is applicable to Plaintiff's claim, however, as he has failed to plead the most rudimentary elements of a breach of contract claim.

Contract." (Compl. ¶ 15.) Plaintiff pleads no details of this purported verbal contract, failing to allege the requisite "(1) offer; (2) acceptance; (3) consideration; and (4) sufficient specification of the essential terms." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009). He also does not explain how the MAP or internet policy, or sale of products by Games Workshop with margins unacceptable to Plaintiff, or the rejection of some portion or all of an offer to purchase (product orders) breached the alleged agreement or how he has been damaged. Similarly, Plaintiff cannot state a claim by averring that Games Workshop breached a territorial restriction policy by opening its own retail outlets near Plaintiff's stores. (*See* Aff. ¶ 3.4.) Plaintiff does not allege whether this purported policy was part of any agreement, when any such agreement was entered, or what the specific conditions of the policy were.

Finally, to the extent Plaintiff argues his breach of contract claim arises from Games Workshop's alleged failure to ship him the full volume of products he ordered, this conduct does not constitute a breach of any contractual obligation. Trade orders placed by Plaintiff were governed by Games Workshop's 2013 Conditions of Sale, which provided that "No order shall be deemed to be accepted unless and until accepted in writing by a duly authorized officer of the Company."[8] (Ex. 3, NA Cond. of Sale §§ 1.1, 4.1.)[9] With respect to any orders Plaintiff placed through Games Workshop's website, the governing terms and conditions of sale state that a customer's "order constitutes an offer to buy Products" and that acceptance occurs through "an email that confirms that the Products have been d[i]spatched." (Ex. 4, Website Cond. of Sale § 3.1.) Games Workshop further reserved the right to "decline any

[8] To the extent Plaintiff challenges the interpretation of any of the terms in Games Workshop's 2013 Conditions of Sale, they are governed by Maryland law. (*See* Ex. 3, ¶ 17.1.)

[9] Because Plaintiff does not provide the dates of any events alleged in the Complaint, it is unclear which policies covered which orders and related conduct. Games Workshop revised its Conditions of Sale in May 2017, but the relevant provisions were unchanged.

order (or part of any order) where the Products are unavailable for any reason" and to "place restrictions on the volume of any Product ordered where the availability of a product is limited." (*Id.* §§ 3.3.1, 3.3.3.) Accordingly, at all relevant times, any order Plaintiff attempted to make from Games Workshop was contingent on Games Workshop's acceptance of the order and the availability of its products.

Finally, as discussed, Plaintiff has not pled that he has been damaged in any manner in connection with any orders placed with Games Workshop, admitting either that Games Workshop ultimately shipped him his order and charged him the correct price (*see* Aff. ¶ 3.14) or that he disputed the transaction and recovered (under very questionable circumstances) any money paid to Games Workshop (*id.* ¶ 30). Accordingly, Plaintiff fails entirely to state a claim for breach of contract.

H. None of the Individual Defendants Are Subject to Personal Jurisdiction

Beyond Plaintiff's failure to state any viable claims, the Complaint must be dismissed under Fed. R. Civ. P. 12(b)(2) as to the Individual Defendants because they are not subject to personal jurisdiction in Florida. A two-part test determines personal jurisdiction over non-residents like the Individual Defendants: (1) the state long-arm statute must provide a basis for personal jurisdiction, and (2) sufficient minimum contacts must exist between the defendant and the forum. *Sculptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 626 (11th Cir. 1996); *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009) (plaintiff must allege sufficient facts making out prima facie case of jurisdiction). As the Individual Defendants lack any meaningful contact with Florida, Plaintiff expectedly fails to plead *any* facts that could subject them to personal jurisdiction. None of the Individual Defendants, save for Defendant Mosner, are even referenced in the Complaint aside from the caption.

The Florida Long-Arm Statute provides for both general jurisdiction and specific jurisdiction. *See* Fla Stat. § 48.193; *Sokolowski v. Erbey*, No. 9:14-cv-81601, 2015 U.S. Dist. LEXIS 180508, at *11-13 (S.D. Fla. Dec. 8, 2015) (Dimitrouleas, J.). Regarding the former, " a defendant may be haled into a Florida court if it is 'engaged in substantial and not isolated activity within [the] state, whether such activity is wholly interstate, intrastate, or otherwise.'" *Id.* (quoting Fla. Stat. § 48.193(2)). "Florida courts have held this . . . requirement to mean, and subsume, the 'continuous and systematic general business contacts' standard sufficient to satisfy the due process requirement of minimum contacts for general jurisdiction." *United Techs.*, 556 F.3d at 1275 n.16. Plaintiff has not alleged any such contacts for the Individual Defendants and, indeed, there are none.[10] To the extent Plaintiff alleges communications with Defendant Mosner, such incredibly limited "contacts as [a] corporate representative[]" are not such that he "should reasonably have anticipated being haled into Florida to be sued in [his] individual capacity." *See Home Design Servs. v. Banyan Constr. & Dev., Inc.*, Civ. No. 5:07-cv-5-0c-10GRJ, 2007 U.S. Dist. LEXIS 43634, at *11-12 (M.D. Fla. June 15, 2007) (internal quotations and citations omitted).

Plaintiff similarly fails to establish specific jurisdiction under the long-arm statute, which provides in pertinent part that a party subjects himself or herself to jurisdiction by:

> 1. Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state; [or]
>
> 2. Committing a tortious act within this state.

Fla. Stat. § 48.193(1)(a)1-2. Plaintiff does not, and cannot, allege that the Individual Defendants' activities "show a general course of business activity in the state for pecuniary

[10] Attached as Exhibits 8 - 15 are the Declarations of the Individual Defendants, which demonstrate that none of the Individual Defendants has sufficient contacts to subject him or her to personal jurisdiction in Florida.

benefit." *See Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A.*, 421 F.3d 1162, 1167 (11th Cir. 2005) (identifying relevant factors). Plaintiff's scatter-shot pleading also fails to state that any Defendant committed a "tortious act within the state." *See It's a 10, Inc. v. Beauty Elite Group, Inc.*, Civ. No. 13-cv-60154, 2013 U.S. Dist. LEXIS 53816, at *7 (S.D. Fla. Apr. 16, 2013) (jurisdiction not established where complaint "does not specifically allege any wrongful actions taken by [an employee] individually"); *8100 R.R. Ave. Realty Trust v. R.W. Tansill Constr. Co.*, 638 So. 2d 149, 151 (Fla. 4th DCA 1994) (the court must "of necessity determine whether [the complaint] states a cause of action in tort, in order to determine jurisdiction").

Additionally, the Individual Defendants are protected by the "corporate shield doctrine," under which "acts performed by a person exclusively in his corporate capacity not in Florida but in a foreign state may not form the predicate for the exercise of personal jurisdiction over the employee in the forum state." *See Klayman v. Judicial Watch, Inc.*, Civ. No. 13-20610-CIV-ALTONAGA, 2013 U.S. Dist. LEXIS 126789, at *26-27 (S.D. Fla. Sept. 5, 2013) (quoting *Kitroser v. Hurt*, 85 So. 3d 1084, 1088 (Fla. 2012)). "The rationale behind this doctrine is the unfairness in forcing an individual to defend an action filed against him or her personally in a forum in which the only relevant contacts are acts performed outside the forum state and not for the employee's benefit but for the exclusive benefit of the employer." *Id.* No exception to the corporate shield doctrine applies here.

Given that the Florida long-arm statute does not reach the Individual Defendants, the jurisdictional inquiry ends. Even if it did, however, exercising personal jurisdiction over the Individual Defendants would violate the Due Process Clause of the Fourteenth Amendment. *See CCTV Outlet, Corp. v. Desert Sec. Sys. L.L.C.*, Civ. No. 17-cv-60928, 2017 U.S. Dist. LEXIS 125254, at *5-6 (S.D. Fla. Aug. 7, 2017). As discussed above, for the vast majority of the

Individual Defendants, Plaintiff has not pled any allegations at all, let alone contacts with Florida. Plaintiff alleges only that Mosner made a few stray, irrelevant statements to Plaintiff, with no indication that such statements had any connection to Florida. Plaintiff thus fails to "identify [a] specific nexus" between Mosner's purported conduct and the forum as required, and, accordingly, the exercise of personal jurisdiction over any Individual Defendant would not comport with due process. *Sokolowski*, 2015 U.S. Dist. LEXIS 180508, at *15.

I. Defendants Rountree, Myatt, O'Donnell, Kirby, and Donaldson Must Be Dismissed Because They Have Not Been Served With the Complaint

Plaintiff has not perfected service on any Defendant, which would normally require dismissal of his Complaint under Fed. R. Civ. P. 12(b)(5). Defendants Games Workshop, Mosner, Cailor, and Milam, however, have offered to waive service as a courtesy and, moreover, have submitted this motion as if they were properly served on August 15, 2017. The other Individual Defendants are directors of Games Workshop's foreign parent and each resides in the United Kingdom. (*See* Exs. 9, 11-14.) Accordingly, they will not accept service, may only be served under Fed. R. Civ. P. 4(f), and are exempt from the failure to waive provisions of Fed. R. Civ. P. 4(d)(2). Plaintiff's failure to serve the foreign individual Defendants Rountree, Myatt, O'Donnell, Kirby, and Donaldson mandates their dismissal from this case.

IV. CONCLUSION

For the foregoing reasons, the Complaint fails to state any claims and to establish jurisdiction over the Individual Defendants. It should be dismissed in its entirety.

Dated: September 5, 2017

Respectfully submitted,

s/ Charles S. Marion
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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 5th day of September, a true and correct copy of the foregoing Motion to Dismiss and Incorporated Memorandum of Law was electronically filed through the Case Management/Electronic Case Filing ("CM/ECF") system, and served on the following through Federal Express mail:

David Moore
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Fort Lauderdale, Florida 33305

Plaintiff

s/ Charles S. Marion
Charles S. Marion