UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 17-cv-61100-WPD

David Moore
DBAs: Imperial Emporium, Iron Crown Games,
Starchild Goods, Fellowship Crafts and Hobbies,

Plaintiff,

v.

Games Workshop, Inc., Dave Mosner, Kevin Roundtree,
Chris Cailor, Chris Myatt, Elaine O'Donnel,
Tom Kirby, Nick Donaldson, Tanya Milum,

Defendants.

_____/

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

THIS CAUSE is before the Court on Defendants Games Workshop Retail, Inc. ("Games Workshop"), and Individual Defendants Dave Mosner, Kevin Rountree, Chris Cailor, Chris Myatt, Elaine O'Donnell, Tom Kirby, Nick Donaldson, and Tanya Milam (collectively, "Defendants")'s Motion to Dismiss [DE 15] (the "Motion"), filed herein on September 15, 2017. The Court has carefully reviewed the Motion [DE 15], Plaintiff David Moore's Response [DE 17], the Reply [DE 19], and is otherwise fully advised in the premises.

I. Background

Plaintiff David Moore ("Plaintiff" or "Moore"), proceeding *pro se*, commenced this action on May 31, 2017. [DE 1]. In the Complaint, Plaintiff asserts five counts, as follows:

Count I: Fraud against Games Workshop;

Count II: Restraint of Trade against Games Workshop;

Count III: Willful Pump and Dump Scheme against Games Workshop;

Count IV: Conspiracy against Games Workshop; and

Count V: Breach of Contract against Games Workshop.

See [DE 1] at ¶¶ 8-40.

Defendants have moved to dismiss the Complaint in its entirety.

II. Standard of Review

To adequately plead a claim for relief, Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Under Rule 12(b)(6), a motion to dismiss should be granted only if the plaintiff is unable to articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (abrogating *Conley*, 355 U.S. at 41). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). The Court need not take allegations as true if they are merely "threadbare recitals of a cause of action's elements, supported by mere conclusory statements . . ." *Iqbal*, 556 U.S. at 663. In sum, "a district court weighing a motion to dismiss asks 'not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *Twombly*, 550 U.S. at n. 8 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984)).

III. Discussion

A. *Whether Plaintiff may file on a pro se basis*

According to the Complaint, Plaintiff David Moore does business as several stores (Imperial Emporium, Iron Crown Games, Starchild Goods, Fellowship Crafts and Hobbies), and his claims in this action arise from the business relationship between Plaintiff's stores and Defendants. *See* [DE 1]. Defendants contend that Plaintiff has dealt with Games Workshop through an account held by a 501(c)(3) corporation, precluding Plaintiff from proceeding *pro se*.

This is essentially a standing argument, *i.e.*, that lacks Plaintiff standing to bring these claims because Plaintiff's stores, which operate through a corporation, not individual Moore, is the real party in interest as to the claims alleged in the Complaint. *See* Fed. R. Civ. P. 17(a)*; see also Riggins v. Polk Cty.*, 602 F. App'x 765 (11th Cir. 2015) (holding that plaintiff – who was president of corporation and major shareholder – lacked standing to bring claim, as corporation was real party in interest; affirming district court's order requiring plaintiff to amend complaint to name corporation as plaintiff and to obtain counsel admitted to practice in that district to proceed).

Upon careful review of the Complaint's factual allegations, the Court agrees with Defendants that Plaintiff's stores, which operate through a corporation, not individual Moore, is the real party in interest as to the claims alleged in the Complaint. Therefore, the Court shall dismiss the Complaint and grant leave for Plaintiff to file an Amended Complaint naming the corporate Plaintiff.

Furthermore, it is a well-settled principle of law that a corporation cannot appear *pro se* and must be represented by counsel. *See Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381, 1385-1386 (11th Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *National Independent Theater Exhibitors, Inc. v. Buena Vista Distribution Company*, 748 F.2d 602, 609 (11th Cir. 1985), *cert. denied* 471 U.S. 1056 (1985).

Accordingly, Plaintiff must both file an amended complaint naming the corporation as plaintiff ***and*** must obtain legal representation and have a Notice of Appearance filed in the record by an attorney[1] on or before **October 19, 2017**. Upon a failure of Plaintiff to fulfill both of these requirements, the Court, *sua sponte*, without further notice, shall dismiss this case.

[1] The attorney filing a notice of appearance in the record must either (1) be a member of this Court's bar or (2) request, through local counsel, and be granted, *pro hac vice* status.

B. *Whether the Complaint states a claim pursuant to Fed. R. Civ. P. 12(b)(6)*

In addition to or in the alternative to the dismissal of the Complaint on the grounds stated *supra* in Section A, Defendants also argue that the Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. For the reasons set forth below, the Court agrees.

First, the Complaint must be dismissed as an impermissible shotgun pleading. *See, e.g.*, *Strategic Income Fund, L.L.C. v. Spear, Leeds & Kellogg Corp.*, 305 F.3d 1293, 1295 (11th Cir. 2002) (condemning as "quintessential 'shotgun' pleading[]" the incorporation of preceding paragraphs where a complaint "contains several counts, each one incorporating by reference the allegations of its predecessors, leading to a situation where most of the counts (*i.e.*, all but the first) contain irrelevant factual allegations and legal conclusions."

Second, the Complaint must be dismissed as to the individual Defendants for failure to state a claim. Five causes of action are alleged in the Complaint, as follows: Count I: Fraud against Games Workshop; Count II: Restraint of Trade against Games Workshop; Count III: Willful Pump and Dump Scheme against Games Workshop; Count IV: Conspiracy against Games Workshop; and Count V: Breach of Contract against Games Workshop. *See* [DE 1] at ¶¶ 8-40. None of the five claims are alleged against the individual defendants Dave Mosner, Kevin Rountree, Chris Cailor, Chris Myatt, Elaine O'Donnell, Tom Kirby, Nick Donaldson, and Tanya Milam. Accordingly, the Court dismisses the Complaint as to individual defendants Dave Mosner, Kevin Rountree, Chris Cailor, Chris Myatt, Elaine O'Donnell, Tom Kirby, Nick Donaldson, and Tanya Milam for failure to state a claim.[2]

[2] In the event that an amended complaint is filed that complies with the Court's ruling in Section III.A and states a claim against the individual defendants, the Court will address the issues of whether the individual defendants must nevertheless be dismissed for lack of personal jurisdiction and/or failure to perfect service of process.

Third, the five individual claims each fail to state a claim as to Games Workshop. The Court highlights some of the deficiencies with the claims here, although this discussion is not exhaustive.

The fraud claim in Count I fails to plead sufficient factual allegations of the alleged fraud to meet the particularity requirement under the heightened pleading standard of Fed. R. Civ. P. 9(b)[3].

The restraint of trade claim in Count II does not allege sufficient facts to support the elements of a claim under Section I of the Sherman Act. *See* 15 U.S.C. § 1. Nor does it allege sufficient facts regarding the relevant geographic and product market and the requisite anticompetitive effect therein. *See Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1336 (11th Cir. 2010).

The pump and dump claim in Count III fails for, *inter alia*, failure to allege that the plaintiff purchased or sold Games Workshop's securities. *See Licht v. Watson, 567 F. App'x 689* (11th Cir. 2014) (holding that plaintiff lacked standing to bring securities fraud "pump-and-dump" scheme, absent allegation that the plaintiff was a buyer or seller of corporation's securities in connection with defendant's alleged scheme).

The civil conspiracy claim in Count IV fails because Plaintiff does not identify any parties legally capable of conspiring under Florida law, which recognizes the intracorporate conspiracy doctrine. *See, e.g., Microsoft Corp. v. Big Boy Distribution LLC*, 589 F. Supp. 2d 1308, 1322 (S.D. Fla. 2008) ("[U"nder the intracorporate conspiracy doctrine, a corporation's officers, directors or employees, acting as agents of the corporation, are deemed incapable of conspiring among themselves or with the corporation.").

[3] "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "Rule 9(b) is satisfied if the complaint sets forth (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (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." *Ziemba v. Cascade International, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (internal quotes omitted).

Finally, the breach of contract claim in Count V fails for, *inter alia*, failing to identify a valid contract that has allegedly been breached and the terms thereof which are alleged to have been breached. *See, e.g.*, *My Classified Ads, L.L.C. v. Greg Welteroth Holding Inc.*, No. 8:14-CV-2365-T-33AEP, 2014 WL 12694164, at *4 (M.D. Fla. Nov. 10, 2014) ("[U]nder Florida law, the elements of a breach of contract action are (1) a valid contract, (2) a material breach, and (3) damages. To prove the existence of a contract, a plaintiff must plead: (1) offer, (2) acceptance, (3) consideration; and (4) sufficient specification of the essential terms.") (internal citations omitted).

IV. Conclusion

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Motion to Dismiss [DE 15] is **GRANTED**.
2. Plaintiff's Complaint is **DISMISSED WITHOUT PREJUDICE**.
3. Plaintiff must file an amended complaint naming the corporation as plaintiff ***and*** must obtain legal representation and have a Notice of Appearance filed in the record by an attorney[4] on or before **October 19, 2017**. Upon a failure of Plaintiff to fulfill both of these requirements, the Court, *sua sponte*, without further notice, shall dismiss and close this case.
4. Any amended complaint must also comply with this Order as to the Complaint's failure to state a claim as set forth in Section III.B.

[4] The attorney filing a notice of appearance in the record must either (1) be a member of this Court's bar or (2) request, through local counsel, and be granted, *pro hac vice* status.

5. Plaintiff's Motion for Summary Judgment and a Motion for Interim Relief, requested in Plaintiff's Response to Defendant's Motion to Dismiss, *see* [DE 17] are **DENIED** as procedurally improper and without merit.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 4th day of October, 2017.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of Record

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