UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

IN RE:	)	
	)	
VISION GROUP INTERNATIONAL CORP.,	)	
DEBTOR.	)	**Case No. 98-36840whb**
----------	)	**Chapter 7**
	)	
VISION GROUP INTERNATIONAL CORP.,	)	
Plaintiff,	)	
	)	
v.	)	**Adv. Proc. No. 00-0322**
	)	
ROBERT WANG; SUSAN WANG; WANG'S INTERNATIONAL, INC.; ROLI INTERNATIONAL HOLDINGS, LTD.; GRAND METROPOLIS HOLDINGS; and JERRY SHORE,	)	
Defendants.	)	

MEMORANDUM OPINION GRANTING DEFENDANTS' MOTIONS TO DISMISS COMPLAINT AND GIVING PLAINTIFF FORTY-FIVE DAYS TO FILE AMENDED COMPLAINT

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OPINION

This bankruptcy case, filed by Vision Group International Corp., ("VGI") under Chapter 11 of the Bankruptcy Code, was subsequently converted to Chapter 7. Prior to the conversion, the unsecured creditors' committee obtained an order from this Court authorizing that committee to initiate litigation against certain insiders of the debtor in possession. This complaint was filed by the committee "on behalf of the debtor in possession" on May 9, 2000. Upon the conversion to Chapter 7, the committee's counsel was employed by the Chapter 7 trustee to continue with this litigation. All of the defendants have filed separate motions to dismiss, either supported by memoranda of law or adopting the memoranda of other defendants. The plaintiff's counsel has responded to the motions, and oral argument was held on February 15, 2001, after which the Court took the motions under advisement. This Memorandum Opinion's conclusions of law and

consideration of the complaint in the light most favorable to the plaintiff leads the Court to the ultimate conclusion that the complaint must be **DISMISSED** for failure to adequately allege fraud, which is the underlying basis for the complaint, and for failure to state a claim upon which relief can be granted. The order of dismissal will nevertheless give the plaintiff an opportunity to file an amended complaint that specifically alleges fraud.

The complaint must be examined in the context of the debtor being the plaintiff. Notwithstanding its origination through the Chapter 11 unsecured creditors' committee, that committee, and now the Chapter 7 trustee, stand in the shoes of the debtor, having brought the complaint "on behalf of the" debtor. The complaint alleges injury to VGI by its insiders and related entities, without focusing upon any role that the debtor itself may have played in the allegations against the defendants. This is significant in the sense that the defendants are admitted to have been insiders of or related to VGI, and it would be expected that clarity regarding insider transactions would be expressed in the complaint, if for no other reason than to explain how VGI could have been defrauded or deceived by its own insiders.[1] VGI, as the "victim" of the alleged fraud, must sufficiently plead misrepresentations or fraud "flowing from the defendant[s]" to VGI. *Central Distribs. of Beer, Inc. v. Conn*, 5 F.3d 181, 184 (6th Cir. 1993) ("the victim cannot assert a RICO claim absent evidence that the defendant made representations to the victim").

The defendants' motions to dismiss alternatively seek a more definite pleading through an amended complaint. The response to the motions says that an amended complaint can be filed, if given another 180 days. Despite the pendency of these motions since the Fall of 2000, the plaintiff has not offered to amend the complaint in any way. It would appear that the plaintiff seeks more opportunity to find support for its complaint, and in light of the notice that the plaintiff has been

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[1] From this complaint, it can not be determined why VGI would not be a co-conspirator in the alleged fraud, since the only harm alleged is that the debtor incurred debts beyond its ability to pay. The real harm of that would appear to be to the unsecured creditors rather than to the debtor. If the debtor can not show independent injury, the debtor faces a basic standing problem. "'[T]he plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the [predicate act] constituting the violation.'" *Central Distribs. of Beer, Inc. v. Conn,* 5 F.3d 181, 184 (6th Cir. 1993) (quoting *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496, 105 S.Ct. 3275, 3285 (1985)).

given of the complaint's deficiencies, the Court concludes that justice does not require a lengthy opportunity to amend. FED. R. CIV. P. 15(a). The plaintiff either has or does not have a factual basis for this complaint. At oral argument, the Court was not given any new support for the complaint nor any reason why it would take 180 more days to reveal the specific factual basis. The Court will, therefore, give the plaintiff forty-five (45) days from entry of this opinion and its related order to file an amended complaint.[2] Should such an amendment not be filed within that time, this dismissal will be with prejudice to any further complaint.

The complaint's theory is fraud-based, summarized in the plaintiff's written response to the motions to dismiss as follows: The plaintiff was a newly organized business entity, that was at all relevant times under-capitalized, while incurring debts in excess of its assets, selling its wares at less than its costs, and failing to pay its trade creditors. This overview of the plaintiff's business activity, even if true, does not in itself state a fraudulent cause of action against anyone. Chapter 11 and 7 bankruptcies often involve business entities that fail because of undercapitalization, and not infrequently such debtors incur excessive debt and sell below cost. They commonly do not regularly pay their trade and tax creditors. In other words, the plaintiff's broad theory would catch virtually every business debtor in bankruptcy. Moreover, taken alone, the elements of the plaintiff's theory don't necessarily infer fraud. There can be other inferences that may be just as, or more, logically drawn from each element. It is necessary, therefore, to examine the complaint closely, to see if it sufficiently alleges the detail required under applicable case authority in this Circuit.

To state its failure most succinctly, the complaint is conclusory in its allegations of fraud, failing to state specific facts to support those conclusions. FED. R. CIV. P. 9(b) requires that "the circumstances constituting fraud or mistake shall be stated with particularity." This complaint does not allege specific acts of fraud by any defendant, relying instead upon a conclusion that VGI's economic failure must have derived from the defendant's fraudulent acts. The complaint does not allege an intent to deceive VGI other than a general intent to deceive in paragraphs 41 and 42. Nor in Counts I-III does it allege that VGI was deceived by or relied upon any misrepresentation of the defendants. Only in paragraph 49 of Count IV does the complaint allege that plaintiff relied on the

[2] The Court notes that this 45 days, coupled with the time this matter has been under advisement, effectively gives the plaintiff over 140 days.

misstatements, and Counts V-VIII reallege paragraph 49. However, Counts IV-VIII do not allege intent to deceive VGI, nor do they identify the misrepresentations. The general allegations of intent illustrate the problem of showing that VGI was the target of the intent. Paragraphs 41, 42 and 49 refer to obtaining products from unsecured creditors of VGI. How could VGI be the victim of the defendants' fraudulent intent in this regard, since VGI was the entity obtaining these products? Would not VGI either have been a willing participant in any alleged fraud related to those purchases, or would not VGI have known that it lacked the financial resources to pay for its own purchases? If the first is true, VGI may not be an appropriate plaintiff. If the second is true, VGI could not be a victim of any fraudulent intent as to those purchases.

Looking at each of the complaint's fraud counts, the failure to specifically allege fraud becomes clear:

Count I alleges violations of 18 U.S.C. § 1962(c), a Racketeer Influenced and Corrupt Organizations Act ("RICO") count relying upon fraud through mail and electronic means. In order to sufficiently state a RICO cause of action under § 1962(c) the plaintiff must allege the existence of an "enterprise" and a "pattern of racketeering activity" on the defendant's part, supported by "two or more predicate offenses," with "a nexus between the pattern of racketeering activity and the enterprise," and an injury that occurred as a result of the existence of these factors. *VanDenBroeck v. Commonpoint Mortgage Co.*, 210 F.3d 696, 699 (6th Cir. 2000).

"'To allege a violation of the mail fraud statute, it is necessary to show that (1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud.'" *Central Distribs.*, 5 F.3d at 184 (quotation omitted). Similar requirements exist to support an allegation of wire fraud. *Id.* The plaintiff in this complaint did not allege any dates or times when the mails or wires were used for such a fraudulent scheme. The Sixth Circuit has said that a § 1962(c) RICO fraud claim is insufficient when "there is no indication of time or place of the alleged fraud." *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 495 (6th Cir. 1990). Lack of such detail leads to failure to show a predicate act, which then leads to "no pattern of racketeering." *Id.*

Moreover, this type of RICO claim must include a showing of "material misrepresentation

of fact that was calculated or intended to deceive persons of reasonable prudence and comprehension, and must also show that plaintiffs in fact relied upon that material misrepresentation." *VanDenBroeck*, 210 F.3d at 701. "To satisfy FRCP 9(b), a plaintiff must at minimum allege the time, place and contents of the misrepresentation(s) upon which he relied." *Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984). This Count of the complaint fails to allege a specific time and place of the alleged misrepresentation. In a response to the motions to dismiss, the plaintiff attempts to bolster the complaint with alleged facts not contained in the complaint. Those additional facts are not properly before the Court and were not considered for purposes of the pending motions; however, even if they were considered, they still fall short of the required specificity. Outside of the problem that the plaintiff would have in showing that VGI was deceived by its insiders and the weak allegation of an intent to deceive, there is no showing of VGI's reliance upon any misrepresentation, the latter being a significant hurdle for this plaintiff.

"The purpose of Rule 9(b)['s requirement of specificity as to fraud] is to provide fair notice to the defendant so as to allow him to prepare an informed pleading responsive to the specific allegations of fraud." *Advocacy Org. for Patients and Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315, 322 (6th Cir.), *cert. denied*, 528 U.S. 871 (1999). This complaint's general allegations of use of the mails or wires fails to "identify . . . specific fraudulent representations made through the mails in the course of implementing the scheme, nor do they state to whom the representations were made or whether or how plaintiff[] relied on them." *6100 Cleveland, Inc. v. Staff Builders Int'l, Inc.*, 127 F. Supp.2d 877, 883 (N. D. Ohio 1999).

Paragraph 43 of Count I alleges the amounts of gross sales, unpaid trade debt and taxes within the time covered by the complaint, but no inference of fraud can be drawn from those numbers. In fact, the inference from $5 million in gross sales and $1.7 million in trade debt would be the inverse from a fraudulent one. Paragraphs 41 and 42 allege generalized conclusions of fraud rather than the required specifics of time, place and misrepresentation.

There is no specific allegation in Count I that the plaintiff relied upon the misrepresentations, whatever they were. An allegation of reliance is required. *Blount Fin. Servs., Inc. v. Walter E. Heller and Co.*, 819 F.2d 151, 152-53 (6th Cir. 1987). From this Count of the complaint, it can not be said that the plaintiff was deceived in any way. *See Central Distribs.*, 5 F.3d at 184. Moreover,

"to establish a scheme to defraud, which is an essential element of mail fraud, there must be proof of misrepresentations or omissions which were 'reasonably calculated to deceive persons of ordinary prudence and comprehension.'" *Blount Fin. Servs., Inc.*, 819 F.2d at 153 (quoting *United States v. Van Dyke*, 605 F.2d 220, 225 (6th Cir. 1979)). As in *Blount*, isn't VGI in as good a position as its insider defendants to know of the alleged fraud? If so, how could any reliance by VGI be reasonable?

Counts II and III allege conspiracy by the defendants related to the RICO allegations of Count I. If that first Count's fraud is insufficiently pled, there can be no conspiracy to defraud. *Craighead*, 899 F.2d at 495. If relying upon common law conspiracy, the "plaintiff must plead with particularity, as vague and conclusory allegations unsupported by material facts are insufficient." *Hyland v. Martin*, No. 4:00-cv-8, 2000 U.S. Dist. LEXIS 1634, at *17 (W.D. Mich. Feb. 11, 2000), *aff'd*, 234 F.3d 1268 (6th Cir. Oct. 25, 2000) (unpublished). "To state a [conspiracy] claim under § 1962(d), a plaintiff must plead that the defendant agreed to join the conspiracy, agreed to commit predicate acts, and knew that those acts were part of a pattern of racketeering activity." *Manning v. Stigger*, 919 F. Supp. 249, 254 (E.D. Ky. 1996). This complaint fails to specifically identify the required predicate acts; thus, a generalized pleading that the defendants engaged in a conspiracy is hollow absent the particularity needed to show underlying fraud.

Count IV is again a fraud count, alleging that the defendants' misrepresentations caused the plaintiff to incur unsecured trade debt. Because of the complaint's failure to identify with particularity the misrepresentations, this Count on its own is insufficient. The apparent misrepresentation upon which the plaintiff now relies is the defendants' alleged promise to capitalize VGI. The Court may not infer fraud even if it is true that one or more of the defendants at some point in time stated its intent to inject capital into VGI but then failed to do so. As with other general allegations in this complaint, there may be equally persuasive, and nonfraudulent, explanations for the defendants changing their minds, including their own financial inability to comply.[3] That having been said, it remains that the complaint does not allege specifics about time, place and content of the

[3] The Court takes note of the fact that one of the defendants, Wang's International, Inc., is a voluntary debtor in Chapter 11 in this judicial district. That alone indicates that Wang's was having financial difficulty.

alleged promise(s) to inject capital. Moreover, one of the complaint's allegations is that Wang's International, Inc. ("Wang's") created an illusion of capital injection by prepaying invoices of goods purchased from VGI. Assuming that allegation, although it too lacks specific detail, is true, it does not establish fraud. A logical inference is that Wang's was in fact injecting capital by prepaying invoices: When a purchaser of goods prepays there is a risk that the seller will not deliver and that the purchaser is left with a claim for the prepayment. Nondelivery of the goods would have the practical result of that purchaser having injected capital, albeit involuntarily. This Court may not infer, from the complaint's allegations, that Wang's, or other defendants, misrepresented an intent to inject capital. It may, rather, be inferred that this was the agreed upon method for injection. This plausible alternative inference illustrates why this complaint needs specifics about time, place and contents of the alleged misrepresentations. Without them, the Court is left to speculate, and the Court is not permitted to bolster an insufficient fraud complaint with such speculation.

Count V alleges conversion of VGI's property for the benefit of the defendants, from August 12, 1997 though December 4, 1998. Despite these dates, we are left to wonder what property was converted and by whom. The complaint only says "certain" property. Paragraph 21 says that "assets" of VGI were transferred to the defendants, but again the general term "assets" lacks specificity. Moreover, were they transferred to a particular defendant or to them as co-conspirators? This lack of specificity becomes glaring by illustration of the following: The complaint only has one specific reference to the defendant Jerry Shore, paragraphs 14's allegation of his residency and officer position with Wang's and VGI. How is this defendant put on notice of the subject of converted assets? Although Count V is not technically a fraud count, it is so closely related to the overall fraud-based allegations that more particularity is required. *See Krieger v. Gast*, No. 4:99-cv-86, 2000WL 288442, at *6 (W.D. Mich. Jan. 21, 2000) ("Rule 9(b) applies to non-fraud claims 'grounded in fraud.'"); *see also* discussion, *infra*, concerning Count VI. The bare conclusory statement that the defendants converted VGI's property in a certain time period does not put the defendants on sufficient notice.

Count VI alleges breach of fiduciary duty. To the extent the claim is asserted against shareholders who were not directors or officers of VGI, it fails under FED. R. CIV. P. 12(b)(6). This Court is not aware of, and plaintiff has not alleged, any duties that minority or majority shareholders

owe to a corporation. Therefore Count VI must be dismissed as to Grand Metropolis, seventy-percent shareholder; Grand Metropolis' sole owner, Roli International Holdings Ltd.; and Roli's wholly owned subsidiary, Wang's International, Inc. *See* Compl. at ¶¶ 3-16. These defendants are not alleged to be officers or directors of VGI. The complaint does name other defendants as officers or directors: Jerry Shore and Robert Wang, directors of VGI; and Susan Wang, officer of VGI. *See id.*; TENN. CODE ANN. §§ 48-18-301, 48-18-302, and 48-18-403 (governing standards for officers and directors of corporations).

FED. R. CIV. P. 8(a)(2) requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." Count VI clearly asserts breach of fiduciary duty but does not allege why plaintiffs are entitled to relief for that claim, that is how the defendants breached their duty. *See* Compl. at ¶¶ 52-56. Since Count VI realleges all preceding paragraphs, we could infer from the factual statement of the complaint that the plaintiff contends that the defendants breached their fiduciary duty to VGI by "engag[ing] in a fraudulent commercial Bust Out Scheme . . . . by forcing VGI to perform a seemingly legitimate wholesale business." Compl. at ¶¶20-21.[4] Because the "fraudulent Bust Out Scheme" is fraud-based, Rule 9(b) applies, requiring pleading with particularity. *See* FED. R. CIV. P. 9(b) ("In *all* averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.") (emphasis added); *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368 & n.15 (5th Cir. 2001) ("Rule 9(b) applies by its plain language to all averments of fraud, whether they are part of a claim of fraud or not."); *Krieger*, 2000 WL 288442, at *6 ("Rule 9(b) applies to non-fraud claims grounded in fraud."). The Sixth Circuit has not considered whether Rule 9(b) applies to non-fraud claims grounded in fraud, but this Court follows the logic of those circuits holding that Rule 9(b) applies to non-fraud Securities Act claims. The Ninth Circuit reasoned that the Securities Act has the same policy considerations as

[4]Paragraph 21 alleges the steps VGI took to establish "a seemingly legitimate wholesale business," and it states that "[t]he *result* of the Bust Out Scheme was to leave VGI insolvent with debt, including federal withholding taxes and unsecured debt while assets of VGI were transferred to Defendants." Complaint at ¶21 (emphasis added). Thus, the plaintiff may not be alleging that VGI's insolvency or transfer of assets or undercapitalization, *id.* ¶22, constituted breach of fiduciary duty, but rather, the complaint can be read to assert that defendants breached their fiduciary duty to VGI when they "engaged in a fraudulent Bust Out Scheme." *Id.*, ¶20.

Rule 9(b), which

> serves to give defendants adequate notice to allow them to defend against the charge and to deter the filing of complaints "as a pretext for the discovery of unknown wrongs," to protect professionals from the harm that comes from being subject to fraud charges, and to "prohibit [ ] plaintiff[s] from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis."

Krieger, 2000 WL 288442, at *6 (quoting *Anderson v. Clow (In re Stac Elecs. Sec. Litig.)*, 89 F.3d 1399, 1405 (9th Cir. 1996) (requiring plaintiff to plead Security Act claim with particularity), *cert. denied*, 520 U.S. 1103 (1997)); *see Melder v. Morris*, 27 F.3d 1097, 1100 n.6 (5th Cir. 1994) (same); *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 288 (3d Cir.) (same), *cert. denied*, 506 U.S. 934 (1992); *Sears v. Likens*, 912 F.2d 889, 892-93 (7th Cir. 1990) (same); *cf., e.g., Lone Star Ladies Inv. Club*, 238 F.3d at 368 (not applying Rule 9(b) to Securities Act claims that expressly excluded any allegations sounding in fraud); *Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1251 (10th Cir. 1997) (same); *In re Prison Realty Sec. Litig.*, 117 F. Supp.2d 681 (M.D. Tenn. 2000) (same). *Contra Carlon v. Thaman (In re NationsMart Corp. Sec. Litig.)*, 130 F.3d 309 (8th Cir. 1997) (holding that Rule 9(b) did not apply to § 11 claims under the Securities Act), *cert. denied*, 524 U.S. 927 (1998).

"Rule 9(b) should transcend the label affixed to a claim by a plaintiff because '[a] mere allegation, or 'averment,' of [fraud] could still serve to injure a defendant's reputation, regardless of whether such allegation is necessary to establish liability under the cause of action.'" *Krieger*, 2000 WL 288442, at *6 (discussing and quoting *Taam Associates, Inc. v. Housecall Med. Res., Inc.*, No. 1:96-CV-2214A-JEC, 1998 WL 1745361, at *11, 1998 (N.D. Ga. Mar. 30, 1998)). "Thus, where fraud is alleged, the claim should be tested under Rule 9(b)'s requirements even if the claim may be established without proof of fraud." *Id.* *Krieger* concluded that the claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty were subject to Rule 9(b), because "[t]he crux of the allegations in those counts, which specifically reference the Wrongful Plan, is that the Inside Defendants dissuaded Krieger and the minority shareholders from exercising their appraisal rights by misleading them about the true value of their GMC stock." *Id.* at *7.

Based upon the logic of these opinions, the Court will dismiss Counts V and VI for lack of sufficient particularity.

Count VII alleges intentional misrepresentation, which requires the plaintiff to allege that the defendants knowingly or recklessly made a false representation to a past or existing material fact with intent to defraud VGI, which must have been unaware of the falsity of the representation and acted in justifiable reliance thereon and as a result of its reliance suffered an injury. *First Tennessee Bank Nat'l Ass'n v. Real Seafood Co. of Knoxville, Inc.*, No. 1338, 1990 WL 73888, at *2 (Tenn. Ct. App. June 6, 1990). This complaint does not identify a past or existing material fact that was misrepresented, and it never alleges that VGI was unaware of the falsity of any representation. As previously discussed, the complaint has, at best, a weak allegation concerning the defendants' intent to defraud VGI. The Plaintiff has failed to state a claim upon which relief can be granted in Count VII, and this Count will be dismissed under FED. R. CIV. P. 12(b)(6).

Count VIII alleges negligent misrepresentation, based upon the defendants' breach of a duty of due care to VGI. Although admitting that they had such a duty, some of the defendants point out that the complaint fails to identify a single negligent misrepresentation, and the Count does not allege that VGI relied upon any negligent misrepresentation. *See Ritter v. Custom Chemicides, Inc.*, 912 S.W.2d 128, 130-31 (Tenn. 1995) (following Restatement (Second) of Torts, §522). This Count will also be dismissed for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6).

CONCLUSION

After reading the complaint, one is left to wonder about the bigger question of how the plaintiff corporation, which was admittedly owned or controlled by one or more of the defendants, could have been deceived by the defendants. It is apparent from the plaintiff's response to the motions to dismiss that the real reason for the complaint being filed is that the debtor's unpaid unsecured creditors are aggrieved. That response says that the defendants' "object was to profit themselves at the cost of defrauded creditors of [VGI]." The complaint, however, relies upon fraud against the debtor, VGI, and any fraud committed against VGI's creditors is an entirely different matter. As an example of how the plaintiff confused this distinction, the plaintiff's response to the motions to dismiss said that the defendants misrepresented VGI's creditworthiness. It would seem impossible for the defendants to misrepresent to VGI its own creditworthiness; rather, the plaintiff seems to be relying upon a misrepresentation to VGI's creditors. Even if that were a correct

assumption, would it not be VGI who represented its creditworthiness to its creditors? There is nothing in the complaint to indicate that the defendants represented anything to the creditors of VGI.[5]

Based upon the foregoing analysis, the Court concludes that the complaint simply fails to state with sufficient particularity the support for its fraud allegations and that the non-fraud counts are so closely tied to the other counts as to be fraud-based as well. The complaint must be dismissed for its failure to comply with FED. R. CIV. P. 9(b). The insufficient support for the fraud allegations render the complaint one that fails to state a claim upon which relief can be granted and some Counts fail under the more general standard of FED. R. CIV. P. 12(b)(6).

As previously noted, the plaintiff's response to the defendants' motions to dismiss improperly asserts facts that are not included in the complaint. One defendant's reply to that response, while moving for a striking of the improperly asserted material, itself introduced new facts, an excerpt from one defendant's deposition. The Court has ignored either party's factual allegations that were not a part of the complaint.

A separate order will be entered, consistent with this memorandum opinion, **DISMISSING** the complaint. Because of the plaintiff's delay in offering any amendment to the complaint, the length of time that the plaintiff has been on notice of the motions to dismiss, the plaintiff's response that it would need yet another 180 days to provide any amendment, and the prejudice that such delay causes to the defendants who are charged with fraud, the Court concludes that justice does not require a lengthy opportunity for amendment. The plaintiff will be given forty-five (45) days from entry of this Opinion and its related Order to file an amended complaint that adequately states the basis for the fraud and other counts. Should the plaintiff decide not to file an amended complaint within that time, which will not be extended absent good cause shown, the dismissal of this

[5] The Court notes that the complaint's attachment is a lengthy analysis of VGI by its chief operating officer, in the form of a report and recommendations to VGI's Board of Directors. A fair reading of that report, made after the debtor was already in serious default with its creditors, does not necessarily support the complaint's allegations. More than anything else, the report is a cry for financial help, but it does not establish that the defendants were in a position to provide any help, nor does it support fraud against VGI by these defendants. In fact, the report flies in the face of some allegations. For example, the report says that the debtor's "inefficiencies" caused the debtor's cost of manufacture to exceed its selling price, a conclusion that conflicts with the allegation that the defendants conspired to sell below cost.

complaint will be with prejudice.

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WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

Date:_____