IT IS ORDERED as set forth below:

Date: February 5, 2014

W. Homer Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
JOHN ANDREW BILBO, Debtor.	:	BANKRUPTCY CASE NO. 11-13160-WHD
GRIFFIN E. HOWELL, III, Chapter 7 Trustee for the Estate of John Andrew Bilbo, Plaintiff, v.	:	ADVERSARY PROCEEDING NO. 13-1054
US FOODS, INC., Defendant.	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE

ORDER

The above-styled adversary case comes before the Court on a Motion to Dismiss

Complaint (hereinafter the "Motion") filed by US Foods, Inc. (hereinafter the "Defendant"), requesting that the Court dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6),[1] the Complaint to Set Aside and Recover Preferential Transfers filed by Griffin E. Howell, III (hereinafter the "Trustee"), in his capacity as Chapter 7 Trustee of the bankruptcy estate of John Andrew Bilbo (hereinafter the "Debtor"). The Trustee opposes the dismissal of the complaint. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 157(b)(1), as a core proceeding defined under 28 U.S.C. §§ 157(b)(2)(A) & (F). See also 11 U.S.C. § 1334.

Procedural History and Statement of Facts.

On September 23, 2011, the Debtor filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code[2] (hereinafter the "Code") in the United States Bankruptcy Court for the Northern District of Georgia. Thereafter, Griffin Howell, III was appointed as the Chapter 7 Trustee. On September 23, 2013, the Trustee filed his two-count complaint, seeking (1) to avoid preference payments allegedly made to US Foods, Inc. and recover their value pursuant to Sections 547(b) and 550(a) of the Code, respectfully, and (2) an award of attorney's fees and expenses pursuant to the Official Code of Georgia Annotated (hereinafter the "O.C.G.A.") § 13-6-11.

The complaint's first count sets forth that the Debtor, an individual, owns and

[1] Federal Rule of Civil Procedure 12(b)(6) is made applicable to this adversary case by its incorporation into Federal Rule of Bankruptcy Procedure 7012. See FED. R. BANKR. P. 7012.

[2] 11 U.S.C. § 101 *et. seq.*

manages a restaurant business incorporated as "Bilbo's Bar-B-Que, Inc." The complaint proffers, however, that the Debtor operated the business as a sole proprietorship, known as "Bilbo's BBQ," and identified the business as a sole proprietorship on his individual tax returns until the corporation was administratively dissolved by Georgia's Secretary of State on the date of August 22, 2011.[3] According to the complaint, the Trustee contends that within the 90-day preference period,[4] the Debtor made a series of payments to the Defendant, totaling no less than $53,073.00. The remainder of the first count recites the six elements necessary for a finding of a preferential transfer under Section 547(b).[5] The complaint's first count does not provide the manner in which these alleged preferential transfers were made or the source from which the funds were drawn. The complaint,

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[3] It is important to note that upon administrative dissolution under Georgia law, the corporation "continues its corporate existence," though it is restricted from carrying on any business, except that necessary for winding up its affairs and liquidating its business. O.C.G.A. § 14-2-1421(c).

[4] The 90-day preference period is the 90 days immediately preceding the voluntary petition date. See 11 U.S.C. § 547(b)(4).

[5] Section 547(b) of the Code provides that "the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
(3) made while the debtor was insolvent;
(4) made—
(A) on or within 90 days before the date of the filing of the petition; . . . and
(5) that enables such creditor to receive more than such creditor would receive if—
(A) the case were a case under chapter 7 of this title;
(B) the transfer had not been made; and
(C) such creditor received payment of such debt to the extent provided by the provisions of this title."

however, was supplemented by documents presented by both parties, which the Court finds integral to this cause of action and will assimilate into its analysis.

The alleged preference payments were made by checks, all of which identify the drawer as "Bilbo's BBQ," endorsed by "John Bilbo." The account information associated with the checks provides that the "Account Title & Address" is:

> JOHN A BILBO
> BILBO'S BBQ
> 769 ATLANTIC AVE
> BREMEN GA 30110-1823

Under the account agreement's "Ownership of Account" tab, the box identifying "Corporation - For Profit" is checked. Additionally, an individual named "Amanda Arp" is identified in the account information as the "Owner/Signer" and "John Bilbo" is identified as the "Non-Individual Owner." According to the account agreement, both are authorized signatories.

The complaint's second count simply proclaims that the Defendant has been "stubbornly litigious," thereby entitling the Trustee to costs and expenses associated with this action under O.C.G.A. § 13-6-11. There are, however, no factual allegations setting forth in what manner the Defendant has caused any unjustifiable difficulties.

On November 26, 2013, the Defendant filed the instant Motion, which asserts that the complaint's first count should be dismissed because it fails to plead adequately two of the required elements for a finding of a preferential transfer: "(1) that the payments were a transfer of an '*interest of the debtor* in property'; and (2) that the transfer was made 'for or

on account of an antecedent debt *owed by the debtor*.'" Def.'s Br. 4 (emphasis in the original). The Motion contends that the corporation is distinct and separate from the Debtor and that the complaint is "devoid" of any justification for attributing the corporation's debts and asset transfers to the Debtor.

The Motion further asserts that the complaint's second count should be dismissed because, among the absence of any factual allegations relating to the claim, there is no state law basis for relief where the cause of action arises solely from federal bankruptcy law and where there is no underlying state law claim. Additionally, the Defendant contends that any recovery under O.C.G.A. § 13-6-11 is predicated on the Trustee's prevailing in the underlying cause of action.

Conclusions of Law

A. Incorporation by Reference Doctrine.

Accompanying the Defendant's Motion and Brief were copies of the 10 checks in question, and attached to the Trustee's Response Brief was the corresponding account agreement for the checking account. See Def.'s Br., Ex. A. (Adv. Docket No. 7); See also Trustee's Br., Ex. A. (Adv. Docket No. 8). Ordinarily, the attachment of evidence or other documentation to the pleadings would require the Court to examine this motion under summary judgment standards, in accordance with Rule 12(d):

> If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.

FED. R. CIV. P. 12(d). Despite the language of Rule 12(d), the Eleventh Circuit has adopted

the "incorporated by reference" doctrine. See Day v. Taylor, 400 F.3d 1272, 1274 (11th Cir. 2005); see also Horsey v. Feldt, 304 F.3d 1125, 1134 (11th Cir. 2002). Under this doctrine, a court may consider any integral document attached to a motion to dismiss without converting the motion into one for summary judgment, but only if the document in question "is: (1) central to the plaintiff's claim; and (2) undisputed." Horsey, 304 F.3d at 1134. "Undisputed," in this context means that the "authenticity of the document is not challenged." Id.; see also In re Clower, 463 B.R. 573, 576 (Bankr. N.D.Ga. 2011) (Drake, B.J.).

In this case, the Trustee's underlying claim is ultimately dependent on who was responsible for and whose funds satisfied the debt to US Foods, Inc. during the preference period. Therefore, the checks and account agreement are central to the Trustee's claim and to this adversary proceeding in general. The authenticity of the attached documents are not disputed. The Court, therefore, finds that the Motion satisfies the elements of the "incorporation by reference doctrine" and does not require conversion into one for summary judgment.

B. Rule 12(b) Standard.

The Defendant seeks dismissal of the Trustee's complaint for failure to state a claim upon which relief can be granted. Rule 8 of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 7008 of the Federal Rules of Bankruptcy Procedure, requires that a complaint contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2); See also FED. R. BANKR. P. 7008.

The Court shall dismiss a proceeding under Rule 12(b)(6) only where that short and plain statement fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).

When considering a Rule 12(b)(6) motion to dismiss, the Court must accept as true all factual allegations set forth in the complaint and, on the basis of those facts, determine whether the plaintiff is entitled to the relief requested and, in the process, must draw all reasonable inferences in the light most favorable to the non-moving party. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554-56 (2007); Daewoo Motor Americ, Inc. v. General Motors Corp., 459 F.3d 1249, 1271 (11th Cir. 2007); Hill v. White 321 F.3d 1334, 1335 (11th Cir. 2003); Grossman v. Nationsbank, N.A., 225 F.3d 1228, 1231 (11th Cir. 2000); Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1273 n.1 (11th Cir. 1999). However, the Court is authorized to reject a plaintiff's legal conclusions, labels, and unsupportable assertions of fact. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 555).

A Rule 12(b)(6) motion tests the legal sufficiency of a complaint. See Coggins v. Abbett, 2008 WL 2476759 at *4 (M.D.Al. 2008). Prior to the Supreme Court's decision in Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554-56 (2007), a motion to dismiss could only be granted if the claim established "no set of facts . . . which would entitle [the plaintiff] to relief." See Coggins v. Abbett, 2008 WL 2476759 at *4 (M.D.Al. 2008) (quoting Conley v. Gibson, 355 U.S. 41, 41-45-46 (1957) and Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). In Twombly, however, the Supreme Court imbued the sufficiency of the complaint with a plausibility standard, holding that the Court must dismiss a case where the well pled

facts do not state a claim that is plausible on its face. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (discussing Twombly). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" or that the plaintiff can establish the necessary elements of the cause of action. Id.; see also In re Clower, 463 B.R. 573, 576 (Bankr. N.D.Ga. 2011) (Drake, B.J.). The factual allegations in the complaint need not be fully developed, but they must include sufficient factual information to provide the grounds on which the claim rests, and they "must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Twombly, 550 U.S. at 555. Nonetheless, the Court need not accept as true "formulaic" or "threadbare recitals of a cause of action's elements, supported by mere conclusory statements." Twombly, 550 U.S. at 545; Iqbal, 556 U.S. at 663-64.

C. Sufficiency of the Complaint.

The preference provisions authorize the Trustee to "avoid any transfer of an interest of the debtor in property . . . ." 11 U.S.C. § 547(b). Accordingly, a transfer is preferential only if the property transferred belonged to the debtor. The Supreme Court has interpreted the phrase "interest of the debtor in property" as "that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings." 5 Colliers on Bankruptcy ¶ 547.03[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. rev. 2013) (quoting Begier v. IRS, 496 U.S. 53, 58 (1990)). Consequently, the Trustee may only seek to avoid a transfer of those interests that the Debtor would have held at the time

of the petition, but for the transfer. Id. (quoting Clinka v. Bank of Vermont, 97 F.3d 22, 25 (2nd Cir. 1996)). Section 541 defines property of the estate, inter alia, as the legal and equitable interests of the debtor as of the time of the bankruptcy petition. 11 U.S.C. § 541. Appropriately, for purposes of identifying whether the property transferred would have been a property interest of the Debtor, and thus an asset of the estate, the Court refers to state law. See Butner v. United States, 440 U.S. 48, 54 (1979); Bailey v. Big Sky Motors, Ltd., 314 F.3d 1190, 1197 (10th Cir. 2002).

Likewise, the preference provisions of the Code require that the transfer of a debtor's interest in property must be made "for or on account of an antecedent debt owed by the debtor . . . ." 11 U.S.C. § 547(b)(2). Accordingly "[n]umerous cases hold that there can be no preference where there is no debtor-creditor relationship." In re Evans Potato Company, Inc., 44 B.R. 191, 193 (Bankr. S.D.Oh. 1984) (finding that an individual's personal line of credit could not be attributed to the debtor-corporation, though the debtor-corporation received the benefits of the individual's transactions and paid the individual's account, because the debtor-corporation had no account of its own with the creditor) (citing Ellet-Kendall Shoe Co. v. Martin, 222 F.851 (8th Cir. 1915); In re Kayser, 177 F. 383 (3rd Cir. 1910), Mandel v. Scanlon, 426 F.Supp. 519 (W.D.Pa. 1977); Ortliev v. Baumer, 6 F.Supp. 58 (S.D.N.Y. 1934); In re Hudson Valley Quality Meats, Inc., 29 B.R. 67 (Bankr. N.D.N.Y. 1982)); accord In re Dupuis, 265 B.R. 878, 882 (Bankr. N.D.Oh. 2001); see also In re Rodriguez, 895 F.2d 725, 728 n.5 (11th Cir. 1990) (favoring as authority In re Evans Potato Company, Inc.); Tidwell v. Galbreath, 207 B.R. 309, 324 (Bankr. M.D.Ga.1997) (finding

that a gift from one party to another is not a preferential transfer).

The Bankruptcy Code defines a “creditor” as any “entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor[.]” 11 U.S.C. § 101(5). A “debtor,” is simply defined as a “person . . . concerning [whom] a case under this title has been commenced.” 11 U.S.C. § 101(13). It then follows, pursuant to these definitions, that a debtor-creditor relationship exists when an entity holds a claim[6] against a person who commences a case under the Code.

Therefore, the complaint must allege sufficient facts that, when assumed as true, show the property transferred would have been property of the Debtor upon the commencement of this case, but for the transfer of said property, and that the payments were made on account of debt resulting from a debtor-creditor relationship between the Debtor and US Foods, Inc.

It is well settled that a "corporation is a separate entity, distinct and apart from its stockholders . . . , and insulation from liability is an inherent purpose of incorporation." Clark v. Cauthen, 239 Ga.App. 226, 227 (Ga.App. 1999) (internal citations omitted); see also Miller v. Harco Nat'l Ins. Co., 274 Ga. 387, 391 (2001) ("[C]orporations are generally separate legal entities from their shareholders."). Thus, the complaint must allege facts that support a legal theory which plausibly ties the debt of and payments from the incorporated entity, "Bilbo's Bar-B-Que, Inc.," to its sole shareholder and raises the right to recovery

[6] "Claim" is broadly defined under the Code as a "right to payment . . . ." 11 U.S.C. § 101(5).

beyond the speculative level. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). From a review of Trustee's complaint and brief in opposition, the Court identifies three theories from which the Trustee may be attempting to link the corporation to the Debtor. Each shall be addressed individually.

I. Reverse Veil Piercing.

Although the business was incorporated, the complaint alleges that the Debtor operated the business as a sole proprietorship. This statement appears conclusory and is only supported by the facts that the Debtor operated the business under the name "Bilbo's BBQ," instead of "Bilbo's Bar-B-Que, Inc.;" that the Debtor's individual name is listed on the checking account; and that the Debtor treated the restaurant as a sole proprietorship for tax purposes. However, the Trustee, by alleging a lack of corporate formalities, has raised the specter of "veil piercing."[7]

Traditional corporate veil piercing occurs when a third-party is permitted to disregard the corporate entity by satisfying debts of the corporation out of the assets of an individual owner-shareholder. This doctrine is recognized in Georgia in "exceptional circumstances" in which the corporate form has been abused, typically for illegitimate or fraudulent purposes. See In re Friedman's Inc., 385 B.R. 381, 413-14 (Bankr. S.D.Ga. 2008); see also Guarantee Ins. Co. v. Merchants Emp'r Benefits, 2010 WL 3937325 at *10 (M.D.Ga. 2010).

Though the Trustee's factual allegations appear seriously deficient in proffering the

[7] Assuming the Trustee has standing to pierce the veil. Compare generally Paul v. Destito, 250 Ga.App. 631 (2001) with In re Mattress N More, Inc., 231 B.R. 104 (Bankr.N.D.Ga.1998) (Bihary, B.J.).

necessary elements for veil piercing, see Guarantee Ins. Co. v. Merchants Emp'r Benefits, 2010 WL 3937325 at *10 (M.D.Ga. 2010); In re Friedman's Inc., 385 B.R. 381, 414 (Bankr. S.D.Ga. 2008) (citing McKesson Corp. v. Green, 266 Ga.App. 157, 166 (Ga.App. 2004) and Baillie Lumber Co. v. Thompson, 279 Ga. 288, 290 (Ga. 2005)), the Court recognizes that the traditional doctrine potentially may be applied to link the debts of the corporation to the individual Debtor, thus creating joint and several liability and, thereby, making the corporation's debt to US Foods, Inc. one that was simultaneously an antecedent debt of both the corporation and the Debtor.[8] Assuming, *arguendo*, that this is true, the Trustee would still be required to provide a link establishing that the assets transferred from the corporation were property interests of the Debtor.

However, to link assets, ostensibly belonging to the corporation, to the Debtor, the Trustee would not be attempting traditional veil piercing, but the contrary. "[R]everse veil piercing extends the traditional veil piercing doctrine to permit a third-party creditor to pierce the veil to satisfy the debts of an individual out of the corporation's assets." Acree v. McMahan, 276 Ga. 880, 881 (Ga. 2003) (internal quotations omitted). With the exception of one exceedingly narrow context, Georgia has firmly rejected the concept of "reverse piercing, at least to the extent that it would allow an 'outsider,' . . . to reach a corporation's

[8] These issues were never briefed, and the Court, without making a judgment as to the effect, recognizes that veil piercing may only create an equitable remedy for the injured party by permitting the satisfaction of a corporate debt out of the assets of the individual, without actually shifting the legal liability to the owner-shareholder. For the purposes of this Order, the Court shall give the Trustee the benefit of the doubt and assume that finding traditional veil piercing appropriately shifts the legal liability.

assets to satisfy claims against an individual corporate insider." Id.; see also Holiday Hospitality Franchising, Inc. v. Noons, 749 S.E.2d 380, 380 (Ga.App. 2013) (refusing to recognize a fraud exception to Acree); Carrier 411 Serv., Inc. v. Insight Tech., Inc., 322 Ga.App. 167, 170 (Ga.App. 2013); Guarantee Ins. Co. v. Merchants Emp'r Benefits, 2010 WL 3937325 at *10 n.1 (M.D.Ga. 2010); Otero v.Vito, 2009 WL 3063426 at *6 (M.D.Ga. 2009); Lollis v. Turner, 288 Ga.App. 419, 422 (Ga.App 2007); but see Miller v. Harco Nat'l Ins. Co., 274 Ga. 387, 391 (Ga. 2001) (attributing, "at least where the business involved is a motor carrier[,]" insurance coverage to the corporate judgment debtor under a theory that the corporate entity was the "alter ego" of the insured controlling shareholder).

The Trustee contends that the Debtor's corporation was operated like a sole proprietorship, as presumably the alter-ego of the Debtor. Assuming the Trustee establishes the antecedent debt of the corporation as simultaneously the antecedent debt of the Debtor, the Trustee must make a plausible showing that the assets of the corporation, itself, could be attached to the Debtor's individual antecedent debt and would have been property of the estate in the absence of their transfer. Because Georgia does not recognize a general theory of reverse veil piercing—and because this Court should otherwise respect the corporation as an entity, distinct from the Debtor—it appears that, assuming the truth of all facts asserted, there would be no cause of action linking the corporation's assets to the Debtor under a theory of alter-ego or veil piercing.

II. Unregistered Trade Name.

The complaint's facts state that Bilbo's Bar-B-Que, Inc. was operated under the name

"Bilbo's BBQ." Moreover, the checks used to accomplish the transfer to US Foods, Inc. bear the name "Bilbo's BBQ," with no indication of corporate status. Further, "Bilbo's Bar-B-Que, Inc." fails to register "Bilbo's BBQ" as an official trade name for the corporation. The Trustee asserts in his brief that "Bilbo's BBQ" acts as an unregistered trade name, which should be regarded as a fictitious entity or personal business name of the Debtor, resulting in individual liability to its user. Presumably, it is also the Trustee's contention that any payments or transfers from this unregistered trade name should be attributed to the Debtor.

Indeed, the Trustee cites to a case that generally supports this proposition. See Jones v. Burlington Indus., 196 Ga.App. 834 (Ga.App. 1990) ("An undertaking by an individual in a fictitious or trade name is the obligation of the individual."); see also Stone v. Allen, 201 Ga.App. 842 (Ga.App. 1991) (citing Jones); Pinson v. Hartsfield International Commerce Center, Ltd. 191 Ga.App. 459, 461 (Ga.App. 1989) ("Similarly, 'if a contract is entered into by an agent in the name of a nonexistient principal, the inference is that the agent is bound on it.'"). However, "a mere misnomer of a corporation in a written instrument, or in a law, or in a judicial proceeding is not material or vital in its consequences, *if the identity of the corporation intended is clear or can be ascertained by proof.*" Pinson v. Hartsfield International Commerce Center, Ltd. 191 Ga.App. 459, 461 (Ga.App. 1989) (internal citations omitted) (emphasis in the original).

The factual context of Jones and Stone were decidedly different from Pinson and those factual allegations in the complaint before the Court. In Jones and Stone, sole proprietorships operating under the trade names preexisted any incorporated entities.

Burlington Indus., 196 Ga.App. 834, 834 (Ga.App. 1990); Stone v. Allen, 201 Ga.App. 842, 842 (Ga.App. 1991). More importantly, the preexisting trade names substantially varied from the official names of the incorporated entities. See Burlington Indus., 196 Ga.App. 834, 837 (Ga.App. 1990) (comparing "RBJ Textiles" to "RONJON, Inc."); Stone v. Allen, 201 Ga.App. 842, 842 (Ga.App. 1991) (comparing "Pools by Stone" to "Poolco, Inc."). In fact, both courts specifically mentioned that because of the discrepancy of the trade names from the corporate names and because of the unregistered status of the trade name at the critical date of the relevant agreements, the converse party could have had no notice that it was dealing with the corporation in question. Burlington Indus., 196 Ga.App. 834, 837 (Ga.App. 1990) ("In fact, the name RBJ Textiles, Inc., and RBJ Textile(s) on their face appear to be completely separate legal entities from that of RONJON, Inc. . . . Thus, the use of the names . . . did not place appellee on notice that it was, at any point in time, dealing with the RONJON, Inc."); Stone v. Allen, 201 Ga.App. 842, 843 (Ga.App. 1991) ("[N]o evidence was presented to show that plaintiffs knew or should have known they were contracting with a corporate entity known as Poolco, Inc.").

Contrastingly, the Pinson Court recognized that a "corporate name usually consists of several words, and an omission . . . of one or more is not so likely to confuse and mislead, or to hide the identity of the entity intended . . . ." Pinson v. Hartsfield International Commerce Center, Ltd. 191 Ga.App. 459, 461 (Ga.App. 1989). The important thing concerning the Pinson Court was a determination of what entity the contracting parties intended to be the parties to an agreement. Id. The Court ultimately found the name "Pinson

Air Freight, Inc.," which didn't exist, was merely an irrelevant misnomer of "Pinson Air Freight of Chattanooga, Inc.," which did exist. Id. at 461-62.; see also Hawkins v. Turner, 166 Ga.App. 50, 51-52 (Ga.App. 1983) (finding that although the name "Hawkins Plumbing Co., Inc." had not been registered by "Hawkins Heating & Plumbing Co., Inc.," as a trade name, the omission did not warrant a finding against the individual that he was conducting business under a fictitious or trade name of a nonexistent entity).

Likewise, on the face of the complaint, it does not appear that "Bilbo's BBQ," the name on the checks, in any manner confuses the party intending to contract with US Foods. It appears to be a mere misnomer of the spelled out "Bilbo's Bar-B-Que, Inc." No other factual allegations are advanced by the Trustee that raise the right to relief above the speculative level under a theory that the Debtor operated under a fictitious or personal trade name.

III. Incorporation Does Not Conclude All Business Activity to Be Acts of the Corporation.

The Trustee asserts in his brief that the fact that "Bilbo's Bar-B-Que, Inc." was incorporated does not require a conclusion that "all" of the Debtor's business activities be treated as acts of the corporation. In support, the Trustee cites the cases of In re Hughes, 2007 WL 7026854 (Bankr. S.D.Ga. 2007) and United States v. Ward, 197 F.3d 1076 (11th Cir. 1999). In Hughes, the Court determined that a debtor's tax application to the Georgia Department of Revenue bound the Debtor to the designation of the business as a "sole proprietorship," despite his honest belief that the business was incorporated. In re Hughes,

2007 WL 7026854 at *3 (Bankr. S.D.Ga. 2007). However, unlike the situation alleged before this Court, the court in Hughes found that the debtor's two business endeavors were appropriately determined to be separate business entities. Id. at *2.

In Hughes, the debtor initially established a business named "Complete Concrete Company" and selected "sole proprietorship" in the tax form submitted to the Georgia Department of Revenue. Id. at *1. Subsequently, he incorporated a company known as "Complete Concrete, Inc." Id. The two entities had different employer identification numbers, different taxpayer identification numbers, and different principal addresses. Id. Additionally, the debtor never amended his withholding tax election, thereby putting the Georgia Department of Revenue on notice that he intended the entities to be one and the same. Id. at 2. The court in Hughes was left with no other "reasonable" decision than to conclude that two entities existed, that they were separate and distinct from one another, and that the obligations of the unincorporated entity should be treated as those of the sole proprietorship, for which the Debtor was personally responsible. Id. at 3.

Likewise, in Ward, the court found that the individual's incorporation of a company was merely the "perpetuation of the sole proprietorship" previously operated by the individual. United States v. Ward, 197 F.3d 1076, 1080 (11th Cir. 1999). However, Ward's facts show that the individual operated his business as a sole proprietorship prior to establishing a corporation under a similar, though not identical, name. Id. at 1078.

Unlike Hughes and Ward, there were no allegations in the complaint establishing that the Debtor operated two independent entities, nor were there allegations that the restaurant,

itself, preexisted the incorporation of "Bilbo's Bar-B-Que, Inc." nor were any other allegations made that allows the court to draw the reasonable inference that "Bilbo's BBQ's" business activities are anything more than that of the corporation's. The Trustee merely makes the conclusory statement that the debtor operated "the business as a sole-proprietorship." Given the facts alleged, the Trustee has failed to state a claim that is plausible on its face.

IV. Final Analysis.

From the complaint and the Trustee's brief, the Court reasons that the previously discussed theories are what the Trustee may be relying upon to attribute the debts and assets of the Debtor's corporation to the Debtor. The Court finds that all three theories either fail to create a foundation for relief or fail to establish a plausible claim that raises the right to relief above the speculative level. To the extent that the Trustee has other theories that may link the assets and debts of the corporation to the Debtor, the trustee has failed to articulate them sufficiently, as to put US Foods, Inc. or the Court on notice of what they may be. Accordingly, the Court finds that the Trustee's complaint fails to state a claim upon which relief can be granted.

D. Fees.

Because any award of attorney's fees are predicated on the Trustee's prevailing in the underlying cause of action, the Court shall, at the present time, deny the Trustee's request for attorney's fees.

Conclusion.

After reviewing the Trustee's complaint, the parties' briefs and accompanying documents, and after analyzing each of the parties' respective positions in the light most favorable to the Trustee, it appears that the Trustee cannot plausibly establish a preference claim as to the value of funds transferred to US Foods, Inc. on behalf of "Bilbo's BBQ" for the ostensible antecedent debt of the corporation. Consequently, the Court finds that the Trustee's complaint fails to allege sufficient facts or state a claim upon which relief can be granted.

However, as the Court prefers to make decisions on a substantive basis, rather than a procedural one, the Court believes that the Trustee should be given the opportunity to amend his complaint, if he so chooses and in his believing, of course, that a plausible claim can be satisfactorily articulated. For the reasons set forth above, the Court conditionally grants the Defendant's Motion, subject to the Trustee's amending the complaint within thirty (30) days. Accordingly, it is hereby

ORDERED that the Trustee shall have thirty (30) days from the date of this Order in which to amend his complaint;

FURTHER ORDERED that if the Trustee's fails to amend the complaint within thirty (30) days, the Defendant's Motion to Dismiss Complaint shall be **GRANTED**, this adversary proceeding, Adv. Proc. No. 13-01054-WHD, shall hereby be **DISMISSED**, and the Clerk is **DIRECTED** to close this case without further instruction from the Court;

FURTHER ORDERED that the Defendant shall not be required to submit an

"answer" to the complaint, until and unless the Trustee amends the complaint, in which case the Defendant shall be accorded the prescribed time under the Bankruptcy Rules to answer or further move the Court under Rule 12 of the Federal Rules of Civil Procedure.

The Clerk is **DIRECTED** to serve a copy of this ORDER upon the Trustee, the Defendant, respective counsel, and the United States Trustee.

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