

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
U.S. INTERNATIONAL & TOURS, INC.,	)	CASE NO. 05-30284 HCD
	)	CHAPTER 7
	)	
DEBTOR.	)	
	)	
	)	
TAROM – S.A., COMPANIA NATIONALA DE	)	
TRANSPORTURI AERIENE ROMANE d/b/a	)	
ROMANIAN AIR TRANSPORT,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 06-3004
	)	
U.S. INTERNATIONAL & TOURS, INC.,	)	
	)	
DEFENDANT.	)	

Appearances:

Shari L. Friedman, Esq., counsel for plaintiff, Marwedel, Minichello & Reeb, P.C., 10 South Riverside Plaza, Suite 720, Chicago, Illinois 60606;

Aladean DeRose, Esq., counsel for debtor, 105 East Jefferson Boulevard, Suite 512, South Bend, Indiana 46601;

J. Richard Ransel, Esq., Trustee, 228 West High Street, Elkhart, Indiana 46516.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 10, 2007.

This adversary proceeding was initiated by the plaintiff's filing of the "Objection of Creditor TAROM S.A., S.C. Compania Nationala de Transporturi Aeriene [Romane] to Trustee's Report of No Assets." The court has construed the Objection to be a complaint. The debtor-defendant U.S. International & Tours, Inc., filed an Answer to the adversary action, which included the affirmative defense that the complaint failed to state a claim upon which relief could be granted. At the pre-trial conference, the parties and the court focused on whether the plaintiff's complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6). The court

directed the parties to brief the issue. The plaintiff filed both a brief opposing dismissal and a motion to file an amended adversary complaint. The debtor opposed the amended complaint and urged the court to dismiss both complaints for their failure to state a claim. The court now considers the defendant's Rule 12(b)(6) affirmative defense seeking dismissal for failure to state a claim, which was construed as a motion to dismiss, and the plaintiff's motion to amend its complaint.

### Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(O) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

### Background

The defendant U.S. International & Tours, Inc. ("the debtor") was a travel agency that specialized in travel from the United States to Romania and Eastern Europe. Tiberius Mihalache was the owner, president, and sole officer and shareholder of the company. Operating from corporate offices in Mishawaka, Indiana, the company began in 1988 and ceased doing business in December 2004. The plaintiff ("TAROM") is the Romanian national airline. As the debtor's largest creditor, it holds an unsecured claim of over \$1.2 million, based upon an international arbitration award issued on November 2, 2001, in TAROM's favor.<sup>1</sup> On December

---

<sup>1</sup> The Court of International Commercial Arbitration of the Romanian Chamber of Commerce and Industry issued Arbitration Award No. 332 on November 2, 2001. The court had considered the sale and purchase agreement  
(continued...)

13, 2004, the United States District Court for the Northern District of Indiana recognized and enforced the foreign arbitral award and judgment awarding TAROM more than \$1.2 million.<sup>2</sup>

The debtor filed its chapter 7 petition on January 28, 2005. TAROM timely filed its proof of claim, in the amount of \$1,240,664.27, against the debtor on February 23, 2005. Counsel for TAROM attended the first meeting of creditors, held on March 1, 2005. At that meeting the debtor testified that its gross receipts were \$2.4 million in 2004 and that it made no profit. On March 23, 2005, the court granted TAROM's motion to compel the debtor to submit to a Rule 2004 examination. At that examination, counsel for the plaintiff deposed the debtor's owner, Tiberius Mihalache. He testified that the debtor's gross receipts were in excess of \$2 million in 2003 and 2004 but that the debtor made no profit because the income was offset by everyday business expenses.

On May 3, 2005, the Trustee filed a Notice of Intent to Abandon Equipment, consisting of office equipment and furniture. No objection was filed. On December 8, 2005, the Trustee filed his Report of No Distribution, stating that he had made a diligent inquiry into the debtor's financial affairs and had concluded that none of the debtor's non-exempt property was available for distribution. The Trustee certified that the estate had been fully administered, and he requested that his report be approved and that he be discharged from further duties as Trustee.

Shortly after the Trustee's report was submitted, TAROM filed a "Motion for Relief from Stay Or in the Alternative, Objection to Discharge of Debtor and/or Discharge of Claim of Creditor TAROM." The

---

<sup>1</sup>(...continued)

by which the plaintiff TAROM had appointed the defendant U.S. International Travel & Tours Inc. as its sale agent to sell air transport documents for passengers and cargo. Under the agreement, the defendant would pay TAROM the value of the transport documents sold, after deducting commissions. The international court found that the defendant failed to comply with its obligation to pay the plaintiff. It ordered the defendant to pay TAROM \$1.2 million for unpaid travel documents sold for and on behalf of the plaintiff. *See* R. 1 Ex. B.

<sup>2</sup> The Order of December 13, 2004, of the United States District Court for the Northern District of Indiana, South Bend Division, declared that the foreign Arbitration Award was a valid and enforceable award and judgment in favor of the plaintiff TAROM and against the defendant U.S. & International Travel & Tours, Inc., in the amount of \$1,233,011.23, plus interest from November 1, 2004. *See TAROM v. U.S. & International Travel & Tours, Inc.*, Case No. 3:04 CV 737.

Trustee did not respond. When the court ordered TAROM to file separate motions and advised it that the relief it sought was in the nature of an adversary proceeding, the plaintiff filed an “Amended Motion for Relief from Automatic Stay” in the main case, Case No. 05-30284 (which motion is being determined by separate order), and “Objection to Trustee’s Report” as an adversary proceeding, listed as Adversary Proceeding No. 06-3004. Both documents were filed on January 9, 2006.<sup>3</sup> The Objection to the Trustee’s Report is presently before the court.

TAROM objected to the Trustee’s no-asset report and to dismissal of the bankruptcy, which it claimed “would effectively result in a ‘discharge’ of TAROM’s claim and leave TAROM without any possibility of relief against Debtor.” R. 1 at 3, ¶ 12. It challenged the debtor’s statements that the debtor held gross receipts of over \$2 million in 2003 and 2004 but made no profit in those years because of its high business costs. TAROM insisted that its \$1.2 million claim, based on the debtor’s failure to pay for airline tickets, was an unpaid “cost of sale” business expense for which the debtor should have to account. Appended to the Objection were two documents, the deposition of Tiberius Mihalache (Ex. A) and the Arbitration Award No. 332 (Ex. B).

The debtor denied that it should be required to account for its unsecured debt to TAROM. It claimed that the plaintiff’s complaint was frivolous and was filed in bad faith and that its charges were vague, non-specific suspicions. Because the complaint did not identify any specific asset of the debtor’s estate which the Trustee must administer, it insisted that TAROM’s objection to the Trustee’s report must be dismissed.

TAROM responded, opposing the debtor’s demand for dismissal by pointing to specific facts: First, it had discovered that the debtor’s owner had incorporated a new travel business, U.S. Incentive & Travel Services, Inc. (“U.S. Incentive”), on October 25, 2004, shortly before filing bankruptcy for U.S. International & Travel, Inc. The new business had the same address, same agent, and same type of business, it stated. Second, the debtor’s gross receipts in 2003 and 2004 exceeded \$2 million, and yet the debtor claimed no profit in those years. Third, the debtor’s advertising expenses were three times higher in 2004 than in 2003, and the costs of

---

<sup>3</sup> The protracted nature of this case, caused mainly by the many motions filed by both parties for extensions of time and for continuances throughout this proceeding, is evident. *See* R. 33.

employee travel and training shot up enormously in 2004, the year that the new travel business was started. In light of these facts, TAROM filed a Motion for Leave to File Amended Adversary Complaint contemporaneously with its response to the debtor's Answer.

Appended to the plaintiff's Motion to Amend was its Amended Adversary Complaint ("Amended Complaint"). The new complaint raised new allegations. Count I asserted that the debtor's debt to TAROM should be declared nondischargeable because of the debtor's fraudulent conduct of continuing the debtor's business operations under a different entity, U.S. Incentive. Count II charged that the debtor's president, Tiberius Mihalache, was the alter ego of the corporation and that the corporate veil must be pierced to hold him responsible for the debts of the corporation. Count III was based upon the equitable theory of successor liability. It alleged that the debtor had shielded its assets from its creditors by incorporating another travel service business and then by merging the debtor's business into the newly formed corporation at the same location and with one or more of the same employees. It further claimed that the debtor set up the mirror corporation to escape liability for its debts.

The debtor opposed the Amended Complaint as well as the original complaint. It argued that each count of the Amended Complaint should be dismissed. It noted, first, that corporate debtors under chapter 7 are not granted a discharge and that their debts are not discharged or excepted from discharge. Thus, it argued, no legal basis existed to support a claim of nondischargeability under Count I. It also asserted that the allegations of alter ego were insufficient and thus that Count II did not satisfy the plaintiff's heavy burden of proving that the corporate veil must be pierced. In addition, the debtor claimed that Count III applied only to the non-debtor corporation U.S. Incentive. The debtor insisted that this court should not expand its jurisdiction over a non-party to the bankruptcy. Moreover, because there was no allegation that a particular property held by that non-party was available to the debtor's creditors, the debtor urged the court to dismiss this count as well.

#### Discussion

The questions brought to the court by these parties are twofold: whether the plaintiff's original complaint may be amended, to incorporate new claims, or must be dismissed as a matter of law pursuant to Rule 7012(b) of the Federal Rules of Bankruptcy Procedure and Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.<sup>4</sup> Each party insists that its issue has priority. The court finds that the defendant's Rule 12(b)(6) claim, originally an affirmative defense but construed to be a dismissal motion, arose first. The court at a pretrial conference asked the parties to brief the question whether the allegations of the original complaint failed to state a claim sufficient to grant relief.

*A. Rule 12(b)(6) Dismissal of Complaint*

In order to state a claim for relief, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>5</sup> Fed. R. Civ. P. 8(a)(2). Until recently, courts relied on the Supreme Court's analysis of Rule 8(a) in *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957), and in particular on its mandate that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46; 78 S. Ct. at 102. However, the Court recently criticized the "no set of facts" language in *Conley* and set forth what it considered a more plausible test for satisfying Rule 8(a)(2):

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

---

<sup>4</sup> Federal Rule of Bankruptcy Procedure 7012(b) states that Rule 12 (b)-(h) of the Federal Rules of Civil Procedure is applicable in adversary proceedings. Rule 12(b)(6) is the affirmative defense that the complaint must be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

<sup>5</sup> Federal Rule of Bankruptcy Procedure 7008 states that Rule 8 of the Federal Rules of Civil Procedure applies in adversary proceedings. Rule 8(a) requires that a pleading "shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . , (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." Fed. R. Civ. P. 8(a).

*Bell Atlantic Corp. v. Twombly*, \_ U.S. \_\_\_, 127 S. Ct. 1955, 1964-65, 167 L.Ed.2d 929 (U.S. May 21, 2007) (citations omitted) (effectively overruling *Conley v. Gibson*). According to the Court, “Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief.” *Id.* at 1965 n.3.

When considering a motion to dismiss a complaint, the court examines only the pleadings, taking all well-pled facts as true and construing all inferences in favor of the plaintiff. *See Massey v. Merrill Lynch & Co., Inc.*, 464 F.3d 642, 645 (7th Cir. 2006). The court also may consider the documents attached to the pleadings, since they can be independently examined. *See McCreedy v. eBay, Inc.*, 453 F.3d 882, 891 (7th Cir. 2006). In addition, the court is entitled to augment the pleadings by taking judicial notice of matters in the public record. *See Palay v. United States*, 349 F.3d 418, 425 n.5 (7th Cir. 2003) (citing cases). It will deny dismissal under Rule 12(b)(6) if there is some set of facts under which the plaintiff might prevail. *See Byrd v. Homecomings Fin’l Network*, 407 F.Supp.2d 937, 942 (N.D. Ill. 2005) (citing *LaSalle Nat’l Trust, N.A. v. ECM Motor Co.*, 76 F.3d 140, 144 (7th Cir. 1996)).

The debtor argued that the original complaint must be dismissed for failure to state a claim. It first pointed to the chapter 7 Trustee’s informed decision that this was a no-asset estate. *See R. 27* at 2. It noted that the debtor was a travel agency with few hard assets, no real estate, and no assets available to unsecured creditors at the time it filed its chapter 7 bankruptcy. *See id.* at 2-3. The debtor insisted that the plaintiff’s complaint was based only on suspicions. The complaint failed to identify a specific asset of the debtor’s estate that the Trustee must administer or a specific asset not listed on the debtor’s schedules. In short, it presented nothing that could overturn the Trustee’s determination that no assets existed for the Trustee to administer. *See id.* at 3-4.

The court accepts as true the following facts alleged in the original complaint. At the 341 meeting and the Rule 2004 examination, Tiberius Mihalache, owner of the debtor, testified that the debtor had gross receipts of more than \$2 million in 2003 and 2004, the two years prior to its filing bankruptcy, and yet spent all of that income for everyday expenses. He testified to huge leaps in expenses for advertising, employee travel, and employee training in the year before it filed bankruptcy. Mihalache also itemized loans that he made to the

debtor in 2001, 2002, and 2004. He explained that the debtor and its branch offices were part of a holding company incorporated as “Tiberius International, Inc.” *See* R. 1 at 1-3. The plaintiff then argued that the debtor failed to pay TAROM when paying its “cost of sales” expenses. It insisted that Mihalache’s testimony raised questions concerning “the disposition of income and other assets of the Debtor and/or whether assets were properly segregated between Debtor and its sole owner and officer, Tiberius Mihalache.” R. 1 at 3 ¶ 11. TAROM therefore objected to the Trustee’s no-asset report and asked for time to investigate further.

The court reviewed the complaint and its exhibits, taking all well-pled facts as true and construing all inferences in TAROM’s favor. Exhibit A, the deposition of Mihalache taken at the Rule 2004 examination, validated the plaintiff’s allegations. Mihalache testified that the entire travel industry saw a dramatic decline in business after September 11, 2001, *see* R. 1, Ex. A at 16-17, and that the debtor also lost 70% of its sales when TAROM canceled its contract, *see id.* at 17. He also stated that the debtor closed its offices in Detroit in 2003 and in Chicago in 2004. He was asked about the statement he made on the debtor’s Statement of Financial Affairs: “Business had gross receipts in excess of \$2,000,000 per year but this was offset by expenses, resulting in net losses each year.” Mihalache responded that everyday expenses – the cost of sales, salaries, rent, advertising – caused such losses. *Id.* at 31. However, he later testified that he reduced his expenses and cut his staff in 2003. *See id.* at 69. The court finds that the plaintiff proffered sufficient factual allegations concerning the disposition of the debtor’s assets to satisfy its obligation, at this pre-trial stage, to provide grounds for its entitlement to relief.

The court denies dismissal of the plaintiff’s complaint for another reason. The court found that the name of this debtor, “U.S. International & Tours, Inc.,” is different from the name of the defendant before the Court of International Commercial Arbitration, “U.S. International Travel & Tours, Inc.” *See* R. 1, Ex. B. In addition, the defendant before the United States District Court for the Northern District of Indiana, South Bend

Division, had a slightly different name, “U.S. & International Travel & Tours, Inc.”<sup>6</sup> Mihalache testified that “initially, the company was called International Travel & Tours” but that it had to change its name probably 15 years ago because a company in Missouri already had claimed that name. *See* R. 1, Ex. A at 5. He agreed, however, that the name on the First Source bank account of the debtor was “U.S. International Travel & Tours, Inc.” *See id.* at 39. He also stated that the only entity that came under the holding corporation Tiberius International, Inc., was “U.S. International Travel & Tours,” even though the records of Tiberius International, Inc., refer only to “airline ticket agent service.” *See id.* at 78-79. After considering Mihalache’s admission of a name change and the multiple similar names with moving or disappearing ampersands, the court requires a clarification of the legal name of incorporation of the debtor and of any related entities of the debtor. It therefore denies dismissal of the plaintiff’s complaint on this alternate ground.

The court finds that the plaintiff has fulfilled its obligation, in its complaint, of providing a sufficient showing of entitlement to relief. The court therefore denies the debtor’s Rule 12(b)(6) motion for dismissal.

#### B. *Motion for Leave to File Amended Complaint*

The plaintiff’s Motion for Leave to File Amended Adversary Complaint stated that the plaintiff had been able to conduct subsequent investigation. *See* R. 20 at 1. It learned this information:

2. . . . [T]he sole owner of Defendant/Debtor incorporated another business, of the same type and form and offering the same services as Debtor, shortly before judgment was entered against Debtor and in favor of Plaintiff on an arbitration award, and shortly before filing for bankruptcy. The second company, U.S. Incentive & Travel Services, Inc., conducts its business out of the same location as did the Debtor; utilizes one or more of the same telephone numbers as did Debtor; and employs one or more of the same persons as did Debtor.

---

<sup>6</sup> The debtor had listed, in its schedules, a judgment against it in the district court, and the plaintiff had described and relied upon the district court’s enforcement of the foreign arbitral award in its complaint. *See* R.1 at 2, ¶ 8. However, neither party had provided the district court decision as an exhibit. Because it is a public document, the court took judicial notice of it. It also took judicial notice of a decision issued by the United States District Court for the Northern District of Illinois, Eastern Division. In that Illinois district court, the plaintiff was named “U.S. & International Travel & Tours, Inc.” *See U.S. & Int’l Travel & Tours, Inc. v. TAROM-S.A., S.C. Compania Nationala de Transporturi Aeriene Romane*, 98 F. Supp. 2d 979 (N.D. Ill. 2000) (granting defendant’s motion to compel arbitration, dismissing case).

3. The sole owner and officer of Debtor and of U.S. Incentive & Travel Services, Inc. is Tiberius Mihalache.

*Id.* at 1-2. Based upon this information, the plaintiff submitted its Amended Complaint with its Motion. *See id.*, Ex. A. It also filed an Opposition to the defendant's motion to dismiss. *See* R. 22. In it, the plaintiff claimed that the new complaint alleged facts which, if proven, supported claims that the debtor improperly used or transferred assets of the corporation; that Tiberius Mihalache was the alter ego of the debtor and should be held liable for the debtor's debts to the plaintiff; and that the new corporation formed by Mihalache was a successor corporation to the debtor and was liable for the debtor's debts. *See id.* at 4-5.

The debtor, in its Response, presented arguments to persuade the court that the plaintiff's Amended Complaint should be dismissed. However, it failed or declined to argue that the plaintiff should not be granted leave to amend the complaint. *See* R. 27.

Rule 15 of the Federal Rules of Civil Procedure, made applicable in this court under Rule 7015 of the Federal Rules of Bankruptcy Procedure, allows amendment of a complaint after the filing of an answer upon leave of court. *See* Fed. R. Civ. P. 15(a); Fed. R. Bankr. P. 7015. The rule states that "leave shall be freely given when justice so requires." This circuit recognizes that Rule 15(a) "favors liberal amendment of pleadings in order to insure consideration of claims on their merits." *In re Stavriotis*, 977 F.2d 1202, 1204 (7th Cir. 1992). It cautions, nevertheless, that some factors may weigh against granting amendment: "'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment.'" *Id.* at 1205 (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L.Ed.2d 222 (1962)).

In this case, the court had not yet ruled on the Rule 12(b)(6) issue when the plaintiff submitted its Motion to Amend and the attached Amended Complaint.<sup>7</sup> The plaintiff's Amended Complaint alleged new

---

<sup>7</sup> After the court ordered the parties to file briefs on the Rule 12(b)(6) issue, the plaintiff filed a motion to extend  
(continued...)

information concerning the formation of a new corporation, U.S. Incentive, by the debtor's owner and president. Taking this allegation as true, the court finds that it is worthy of consideration along with the similarly named corporate entities (U.S. International Travel & Tours, Inc.; U.S. & International Travel & Tours, Inc.; International Travel & Tours) which may or may not be related to the debtor.

The court has weighed the factors counseling against amendment of the complaint. It found much delay throughout this case, but it was caused by both parties. It found no bad faith or dilatory motive on the part of the movant, and no previous requests for amendment. The court is aware that the new allegations in the Amended Complaint impose on the debtor the additional time and expense of defending against the claims. Nevertheless, the debtor did not argue to the court that it was unduly prejudiced by the amendment. *See Disch v. Rasmussen*, 417 F.3d 769, 776 (7th Cir. 2005) (affirming lower courts' allowance of amendment of complaint, noting debtor's failure to show that she was prejudiced by addition of § 727 issues).

When weighing the final factor, futility of amendment, the court recognizes that amendment is futile if the complaint, when amended, cannot withstand a motion to dismiss. *See General Electric Capital Corp. v. Lease Resol. Corp.*, 128 F.3d 1074, 1085 (7th Cir. 1997); *Perkins v. Silverstein*, 939 F.2d 463, 472 (7th Cir. 1991). Without argument from the debtor on this motion, the court grants the Motion for Leave to File Amended Complaint. It now considers the plaintiff's Amended Complaint and the debtor's demands that the three counts of the Amended Complaint be dismissed. Once again the court reviews the facts and any reasonable inferences drawn therefrom in the light most favorable to the plaintiff. *See Massey*, 464 F.3d at 645.

---

<sup>7</sup>(...continued)

the briefing schedule, which was granted. The plaintiff then filed late its opposition to dismissal and a Motion for Leave to File Amended Adversary Complaint (with attached Amended Complaint). The defendant filed a Motion for Leave to File Belated Response, an Amended Motion for Leave to File Belated Response, and Response to Objection to Dismissal and to Motion to Amend, all on the same day. The court accepted the belated filings of the two opening briefs and allowed the plaintiff to file its reply brief late. *See R. 33*. The plaintiff's reply brief was timely. The adversary proceeding then was taken under advisement on March 1, 2007.

*C. Rule 12(b)(6) Dismissal of Amended Complaint*

Count I of the Amended Complaint asked that the debt owed to the plaintiff be excepted from discharge. *See* R. 20, Ex. A at 6. The ground for this claim was that the debtor perpetrated a fraud upon the plaintiff by filing for bankruptcy but continuing to operate the same business in the same location and with one or more of the same employees, under the name of U.S. Incentive & Travel Services, Inc., which was incorporated by the debtor in October 2004. *Id.* at 5-6. The debtor insisted that Count I be dismissed because there was no basis in the Bankruptcy Code for an exception to discharge of a corporate debtor. *See* R. 27 at 7.

Although documents of incorporation are not in the record, the plaintiff does not dispute that this chapter 7 debtor is an Indiana corporation. A corporate debtor is not entitled to a discharge under the chapter 7 discharge provision of the Bankruptcy Code. *See* 11 U.S.C. § 727(a)(1) (only individuals are granted discharges in a chapter 7 liquidation proceeding); *see also In re Charles Edwards Enters., Inc.*, 344 B.R. 788, 790 (Bankr. N.D. W.Va. 2006). Congress excluded corporations from obtaining a chapter 7 discharge to “avoid trafficking in corporate shells and in bankrupt partnerships.” *See N.L.R.B. v. Goodman (In re Goodman)*, 873 F.2d 598, 602 (2d Cir. 1989) (citing to S.Rep. No. 989, 95th Cong., 2d Sess. 98 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5884); *see also In re Charles Edwards Enters., Inc.*, 344 B.R. at 790. Likewise, the separate debts of the corporation are not discharged. Instead, under chapter 7, the corporation liquidates its assets, makes distributions to creditors, and then ceases to operate or to own any assets.<sup>8</sup> *See N.L.R.B. v. Better Bldg. Supply Corp.*, 837 F.2d 377, 378-79 (9th Cir. 1988) (stating that chapter 7 proceedings cannot dissolve a corporation and that corporate debt survives chapter 7 proceedings); *Braden v. Tri-R Builders, Inc. (In re Tri-R Builders, Inc.)*, 86 B.R. 138, 140 (Bankr. N.D. Ind. 1986) (explaining that, since the chapter 7 corporation becomes defunct, the issue of dischargeability is irrelevant). The court finds that it would be futile to bring a nondischargeability claim against

---

<sup>8</sup> However, state law, not federal bankruptcy law, effects the actual legal dissolution of a corporation incorporated in a particular state. *See* 6 Collier on Bankruptcy ¶ 727.01[3] at 727-12 (15th ed. rev'd 2007); *see also Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 103 F. Supp. 2d 1180, 1183 (N.D. Cal. 2000). If a corporation is not dissolved under state law, it continues to exist and is subject to liability. *See N.L.R.B. v. Better Building Supply Corp.*, 837 F.2d 377, 379 (9th Cir. 1988).

a chapter 7 corporate debtor that cannot discharge its debts. Therefore, Count I of the plaintiff's Amended Complaint, seeking that its debt be declared nondischargeable, must be dismissed.

Count II of the Amended Complaint named Tiberius Mihalache as a defendant in this case. *See R. 20, Ex. A* at 6. It alleged that "Defendant Mihalache exercised complete dominion and control over" the debtor and was the alter ego of the debtor, using the debtor "in whole or in part as a cloak for illegality." *Id.* It asked that the corporate veil of the debtor be pierced and that the plaintiff, the intended victim of the debtor and of defendant Mihalache, be awarded judgment. *See id.* at 7. In its Response, the debtor disagreed. *See R. 27* at 7. After reviewing Indiana law requirements for piercing the corporate veil and holding a corporate officer or shareholder responsible for corporate debt, it asserted that Count II was fatally deficient because it did not allege most of the factors required to demonstrate alter ego liability. *See id.* at 8-10.

The court finds that the debtor relied on the key Indiana cases when summarizing the state law requirements for piercing the corporate veil to hold an individual liable for a corporation's debts. It is clear that "Indiana courts are reluctant to disregard a corporate entity, but will do so to prevent fraud or unfairness to their parties." *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1232 (Ind. 1994). The Supreme Court of Indiana set forth the factors to be considered in determining whether to pierce a corporate veil in *Winkler* and in *Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1994). The Seventh Circuit Court of Appeals, in *National Soffit & Escutcheons, Inc. v. Superior Systems, Inc.*, 98 F.3d 262 (7th Cir. 1996), relied on those two cases when setting forth the Indiana doctrines of alter ego, veil-piercing, and successor liability: Under Indiana law, a claim may be brought against the "alter ego" or "successor corporation" of a corporation when "the corporate form was so ignored, controlled or manipulated that it was merely the instrumentality of another and that the misuse of the corporate form would constitute a fraud or promote injustice." *Id.* at 265. The Seventh Circuit noted that a proof of such a claim would be highly fact-intensive. The Supreme Court of Indiana more recently emphasized that the "burden on a party seeking to pierce the corporate veil is severe." *Escobedo v. BHM Health Associates, Inc.*, 818 N.E.2d 930, 933 (Ind. 2004) (citing *Aronson* and *Winkler*).

The debtor set out the eight factors listed in *Aronson* that count as evidence of misuse of the corporate form. *See Aronson*, 644 N.E.2d at 867. The debtor's argument faltered, however, when it asserted that the plaintiff, by alleging only three of the eight factors, did not satisfy the heavy burden placed on it under Indiana law. *See R. 27* at 9. The court finds that the debtor failed to recognize that the eight factors are presented alternatively, not conjunctively. A plaintiff claiming alter ego liability should present evidence of as many of the eight grounds for piercing the corporate veil as it wishes, but it is not required to present evidence of all of them. The operative word, between the last two examples in the list of the eight factors, is "or," not "and." The debtor admitted that the plaintiff proffered allegations of (a) fraudulent representation by the corporate shareholder; (b) use of the corporation to promote fraud, injustice, or illegal activities; and (c) other shareholder acts or conduct ignoring, controlling, or manipulating the corporate form. The plaintiff specifically alleged that Mihalache, as the sole owner and operator of the debtor, exerted complete control over the debtor. It further claimed that, by mismanaging or misappropriating the debtor's assets, Mihalache failed to perform his duties as officer of the company. Those allegations may or may not overcome the presumption of limited shareholder liability, but the court finds that the plaintiff has alleged a sufficient set of facts in Count II to demonstrate grounds to pierce the corporate veil of the debtor. It determines, therefore, that the plaintiff has met its burden of presenting sufficient evidence to state a claim and to withstand a motion to dismiss Count II.

Count III of the plaintiff's Amended Complaint named U.S. Incentive as a defendant in this case. It alleged that U.S. Incentive was the successor corporation to the debtor and asked the court to hold it liable to the plaintiff for the debts owed to it by the debtor. *See R. 20, Ex. A* at 7-8. The debtor asserted that Count III should be dismissed for several reasons. *See R. 27* at 10-12. First, it urged this court not to expand its jurisdiction to cover a creditor's claim against a non-party to the bankruptcy. Second, it argued that Count III cannot be construed as a core proceeding under 28 U.S.C. § 157(b)(2). Third, it noted that the Trustee was satisfied that the debtor's assets were insignificant. Because the plaintiff did not point to property in the hands of U.S. Incentive that may be available to the debtor's creditors, this count must be dismissed, insisted the debtor.

In considering whether one corporation may be liable for the debts of another as a successor corporation, Indiana courts impose liability “where there exists: (1) an implied or express agreement to assume the obligation; (2) a fraudulent sale of assets done for the purpose of escaping liability; (3) a purchase that is a de facto consolidation or merger; or (4) instances where the purchaser is a mere continuation of the seller.” *National Soffit & Escutcheons, Inc.*, 98 F.3d at 266; *see also Winkler*, 638 N.E.2d at 1234 (reviewing doctrine of piercing subsidiary’s corporate veil to reach assets of parent); *Sorenson v. Allied Products Corp.*, 706 N.E.2d 1097, 1099-1100 (Ind. App. 1999) (finding no basis existed to impose successor liability on acquiring company). When the evidence indicates an arm’s-length sale without continuity of ownership, no liability will be imposed on the buyer corporation. *See Glentel, Inc. v. Wireless Ventures, LLC*, 362 F. Supp. 2d 992, 999-1000 (N.D. Ind. 2005) (finding insufficient evidence of successor liability).

The plaintiff alleged that U.S. Incentive was incorporated in anticipation of the large arbitral judgment entered against the debtor. *See* R. 20, Ex. A at 8. It further alleged that the debtor transferred its client base to U.S. Incentive and offered the same services from the same office with the same telephone number and employees. *See id.* It claimed that U.S. Incentive and the debtor are merged corporations, “leaving real ownership unchanged,” with substantial continuity of the debtor’s business. *Id.* The debtor responded that (a) the Trustee was satisfied that the debtor’s assets were insignificant and (b) the plaintiff did not point to property held by U.S. Incentive that may be available to the debtor’s creditors. These arguments against the plaintiff’s allegations, which the court accepts as true, do not require dismissal of this count in the Amended Complaint. The plaintiff was required to present a showing, a set of facts that provided the grounds of its entitlement to relief. The court finds that the plaintiff has met its burden of presenting sufficient evidence of successor liability to withstand a motion to dismiss Count III.

The court, having reviewed the issues presented by the parties, has determined that Count I of the Amended Complaint must be dismissed but that Counts II and III of the Amended Complaint were sufficiently

pled to state a claim. However, the dismissal of Counts II and III is mandated by the following procedural failures in the plaintiff's pleading.

#### D. *Rule 21 Joinder of Parties*

The plaintiff named Mihalache and U.S. Incentive as defendants in Counts II and III. The debtor urged the court not to expand its jurisdiction over persons who are not parties in the bankruptcy.

Rule 21 of the Federal Rules of Civil Procedure, made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7021, allows parties to be “dropped or added by order of the court on motion of any party.” Fed. R. Civ. P. 21; Fed. R. Bankr. P. 7021. The plaintiff herein did not mention Rule 21 or file a motion for leave to add defendants. Two defendants simply were designated as defendants. The plaintiff was required to file a Rule 21 motion and notice of the motion; it did not do so. The opposing parties therefore were not given the opportunity to be heard. Because the proper procedure was not followed, the court denies the addition of the two defendants named in Counts II and III of this Amended Complaint. *See Clark v. America's Favorite Chicken Co.*, 896 F. Supp. 611, 617-18 (E.D. La. 1995).

#### E. *Standing*

The court questions *sua sponte* whether the plaintiff is the proper party to raise these issues. Generally, in a bankruptcy case which contains an alter ego claim that involves a debtor corporation, under Indiana law the proper party to bring those claims against an officer, director, or shareholder of the corporation is the bankruptcy trustee, who represents the rights of the debtor and interests of all the creditors. *See Koch Refining v. Farmers Union Cent. Exchange, Inc.*, 831 F.2d 1339, 1346 (7th Cir. 1987), *cert. denied*, 485 U.S. 906, 108 S. Ct. 1077, 99 L.Ed.2d 237 (1988). In this case, however, the Trustee filed his report finding that the corporate debtor had no assets. Before the court could rule on the report and close the case, the plaintiff filed its objection to the report. The Trustee filed no response to the objection. The plaintiff did not ask the Trustee to

abandon any of the claims TAROM now asserts and did not petition the bankruptcy court to compel the Trustee either to bring suit or to abandon the action to the plaintiff. *See Koch*, 831 F.2d at 1347 n.9.

Had the case closed in an orderly fashion, the automatic stay would have lifted and creditors would have been entitled to prosecute their claims outside of bankruptcy. *See DeLeon v. Beneficial Construction Co.*, 55 F.Supp.2d 819, 824 (N.D. Ill. 1999) (concluding that unsecured creditors are entitled to prosecute debtor only at close of case); *cf. N.L.R.B. v. Better Bldg. Supply Corp.*, 837 F.2d 377, 379 (9th Cir. 1988) (stating that corporate debt would survive chapter 7 bankruptcy proceeding and would be charged against corporation when it resumed operations).<sup>9</sup> Until the case closes or the trustee abandons potential claims, however, the creditors cannot proceed with their claims. *See National American Ins. Co. v. Ruppert Landscaping Co., Inc.*, 187 F.3d 439, 441 (4th Cir. 1999), *cert. denied*, 528 U.S. 1156 (2000) (affirming that trustee, not individual creditor, has standing to pursue claim). The plaintiff's rapid filing of an objection, in this case, left the debtor's main bankruptcy case open, the debtor's property intact as property of the estate, and the Trustee with standing to pursue potential claims.

In the present posture of this case, the Trustee is the proper party to pursue the alter ego and successor corporation liability claims on behalf of all the debtor's creditors. *See Cable v. Ivy Tech State College*, 200 F.3d 467, 472-73 (7th Cir. 1999) ("In liquidated proceedings, *only* the trustee has standing to prosecute or defend a claim belonging to the estate.").

It has long been established that a trustee has the authority to prosecute or decline to bring an action on behalf of the estate. Bankruptcy Rule 6009. The trustee may abandon an action to a third party and that party may then pursue it.

*Koch*, 831 F.2d at 1346-47. The court is aware that the Trustee, after investigating the financial affairs of the debtor pursuant to his duties under 11 U.S.C. § 704, determined that the estate had no assets to pursue. Nevertheless, the Trustee's decision that the case was a no-asset case did not constitute a de facto abandonment

---

<sup>9</sup> The district court, in *DeLeon*, warned the creditors that the post-bankruptcy debtor "is insolvent and certainly judgment-proof" and that creditors "will likely be left with little more than a piece of paper not worth the cost of its enforcement" if the creditors prevail. *DeLeon*, 55 F.Supp.2d at 824.

of any estate property. *See Quarre v. Saylor (In re Saylor)*, 108 F.3d 219, 221 n.3 (9th Cir. 1997). Likewise, the Trustee’s decision not to pursue a particular claim did not amount to an abandonment of the claim. *See In re Eagle Enters.*, 265 B.R. 671, 679 (E.D. Pa. 2001). The plaintiff may have standing to pursue the claims herein only after the Trustee has abandoned them and after “the facts show an injury to the plaintiff[] significantly different from the injuries to creditors in general resulting from the diversion of corporate assets.” *Ashland Oil Co. v. Arnett*, 875 F.2d 1271, 1280 (7th Cir. 1989). Although it seems, from the Trustee’s inaction, that he has relinquished the claims now asserted by the plaintiff, under § 554 abandonment requires notice and a hearing. *See* 11 U.S.C. § 554; Fed. R. Bankr. P. 6007. The court determines, therefore, that the plaintiff does not have standing to raise the claims in Counts II and III.

#### F. *Jurisdiction*

The debtor also asserted that Count III of the Amended Complaint cannot be construed as a core proceeding because a claim against a third party is not included in the fifteen categories of proceedings under 28 U.S.C. § 157(b)(2). Section 157(b) lists the types of proceedings which are referred to bankruptcy judges by district courts. Section 157(b)(2) enumerates the “core proceedings” which bankruptcy judges may hear and determine. It expressly states that its list of proceedings is not all-inclusive and that bankruptcy judges are not limited to the sixteen listed therein.<sup>10</sup> This court’s jurisdiction is not limited by that list. The Seventh Circuit Court of Appeals found that, under Indiana law, the bankruptcy court had jurisdiction and its trustee was the proper party to bring an alter ego claim involving a debtor corporation. *See Koch Refining*, 831 F.2d at 1346. The court finds that its jurisdiction extends as well to successor liability claims involving a debtor corporation.

The general reason for allowing the corporation’s “veil to be pierced,” for recognizing that the corporation is a “fictitious entity” which is simply a business conduit of another entity, and for holding its shareholders personally liable is usually an equitable one: There is a need to secure a just determination.

---

<sup>10</sup> The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 added a new core proceeding, (P): “recognition of foreign proceedings and other matters under chapter 15 of title 11.” 28 U.S.C. § 157(b)(2)(P).

*Id.* at 1344 (citations omitted). Because *Koch* recognized that “Indiana courts review ‘the entire relationship between parent and subsidiary,’” *see id.* at 1345 (citation omitted), in this court’s view successor corporations are reviewed in the same way. Courts in other states have made different jurisdictional determinations concerning alter ego, veil piercing, and successor liability claims, depending on their state laws, but this court does not doubt that it has jurisdiction over the alter ego and successor liability claims herein and that the Trustee has standing to pursue them until he expressly abandons them.<sup>11</sup>

In light of these facts – that the debtor’s bankruptcy case remains open, the debtor’s property still is the property of the estate, and the Trustee is the appropriate party to bring claims to disregard the corporate entity and to hold its president and sole shareholder and/or its successor corporation liable – the court will “sift the circumstances” surrounding these claims to see that justice is done in the administration of this bankruptcy estate. *Koch*, 831 F.2d at 1350 (citing *Pepper v. Litton*, 308 U.S. 295, 307, 60 S. Ct. 238, 245, 84 L.Ed. 281 (1938)). Although many specific issues remain, the dominant question raised by the plaintiff is whether the corporate debtor’s property has been misused by its controlling officer or successor corporation to the detriment of this plaintiff. The Trustee must determine whether the pursuit of these claims – or of any other claims – could result in restoring assets to the bankruptcy estate for the benefit of all the debtor’s creditors. “A chapter 7 liquidation case will not protect a debtor from subsequent ‘alter ego’ liability if a new corporation is formed to carry on the business of the former entity.” 6 *Collier on Bankruptcy* ¶ 727.01[3] at 727-12 (Alan N. Resnick & Henry J. Sommer, eds. in chief, 15th ed. rev’d 2007) (citing *N.L.R.B. v. Better Building Supply Corp.*, 837 F.2d 377 (9th Cir. 1988)); *see also N.L.R.B. v. Goodman (In re Goodman)*, 873 F.2d 598, 602 (2d Cir. 1989) (stating that, when a debtor’s bankruptcy estate is closed, its liabilities are not discharged and “any successor or alter ego of [the corporation] will become liable for those obligations”). Of particular concern to the court, in addition, is the

---

<sup>11</sup> Some courts have found that a veil piercing or alter ego claim is a core proceeding as long as state law permits such claims. *See, e.g., In re Charles Enters., Inc.*, 344 B.R. 788, 790-91 (Bankr. N.D.W.Va. 2006); *In re Flutie New York Corp.*, 310 B.R. 31, 59-61 (Bankr. S.D.N.Y. 2004). Others have found that claims to pierce the corporate veil are non-core related claims still within the bankruptcy court’s jurisdiction. *See Krasny v. Bagga (In re Jamuna Real Estate, LLC)*, 357 B.R. 324, 331 (Bankr. E.D.Pa. 2006).

possibility that the chapter 7 corporate debtor was used as a sham, a corporate shell that changed names prior to filing bankruptcy and resumed business to perpetrate a fraud upon the bankruptcy court itself.

Legislative history indicates that section 727(a)(1) was designed to prohibit the kind of business activity undertaken here. The primary concern underlying this section was to prevent businesses from evading liability by liquidating debtor corporations and resuming business free of debt. . . . The drafters chose not to make corporate debt dischargeable so that corporations continuing to operate could not avoid previously incurred debt.

In adopting section 727(a)(1), Congress intended that corporate debt would survive Chapter 7 proceedings and would be charged against the corporation when it resumed operations. If the [debtors] conducted their business through [different corporations], those corporations would be liable for the NLRB judgment. . . .

*Better Bldg. Supply Corp.*, 837 F.2d at 379 (citations omitted) (stating that § 727(a)(1) was intended to stop trafficking in corporate shells). The Trustee, perhaps after consultation with the plaintiff's counsel, has "first crack" at considering whether to bring suit or to abandon the claims now. See *National Am. Ins. Co.*, 187 F.3d at 441.

In summary, the court approached this adversary proceeding as it was presented by the parties. The court initially found that the plaintiff's original complaint, filed as an Objection to the Trustee's Report but construed to be a complaint, stated a claim and would not be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). It next granted the plaintiff's Motion for Leave to File Amended Complaint. With respect to the Amended Adversary Complaint, the court granted the debtor's motion to dismiss Count I of the Amended Complaint on the grounds of failure to state a claim and of futility of amendment. Although it first found that Counts II and III stated claims that could withstand the debtor's motion to dismiss, the court nevertheless denied the Amended Complaint in its entirety on the ground that the plaintiff lacks standing to bring the claims.

## CONCLUSION

For the reasons set forth in this Memorandum of Decision, the court preliminarily grants the Motion for Leave to File Amended Adversary Complaint filed by the plaintiff TAROM – S.A., S.C. Compania Nationala

de Transporturi Aeriene Romane. Addressing the Amended Adversary Complaint of the plaintiff, the court grants the motion of debtor U.S. International & Tours, Inc., to dismiss Count I of the plaintiff's Amended Adversary Complaint for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of Bankruptcy Procedure 7012(b), and for futility of amendment, pursuant to Federal Rule of Civil Procedure 15(a) and Federal Rule of Bankruptcy Procedure 7015. The court dismisses Counts II and III of the plaintiff's Amended Adversary Complaint on the ground that the plaintiff lacks standing to bring the claims therein. Accordingly, the plaintiff's Amended Adversary Complaint is dismissed in its entirety.

SO ORDERED.

/s/ Harry C. Dees, Jr.  
HARRY C. DEES, JR., CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT