

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:

NPC INTERNATIONAL, INC.,

Debtor.¹

NPC INTERNATIONAL GUC TRUST,

Plaintiff,

v.

INTRUST Bank, N.A.,

Defendant.

Chapter 11

Case No. 20-33353 (DRJ)

Adv. No. **Refer to Summons**

**COMPLAINT TO AVOID AND RECOVER TRANSFERS PURSUANT TO 11 U.S.C.
§§ 547 AND 550 AND TO DISALLOW CLAIMS PURSUANT TO 11 U.S.C. § 502**

The NPC International GUC Trust (the “**Plaintiff**” or “**Trust**”), by and through its undersigned counsel, files this complaint (the “**Complaint**”) to avoid and recover transfers against INTRUST Bank, N.A. (the “**Defendant**” or “**INTRUST**”) and to disallow any claims held by Defendant. In support of this Complaint, Plaintiff alleges upon information and belief that:

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, as applicable, are NPC International, Inc. (7298); NPC Restaurant Holdings I LLC (0595); NPC Restaurant Holdings II LLC (0595); NPC Holdings, Inc. (6451); NPC International Holdings, LLC; (8234); NPC Restaurant Holdings, LLC (9045); NPC Operating Company B, Inc. (6498); and NPC Quality Burgers, Inc. (6457). On June 25, 2021, the Court entered a final decree closing each of the chapter 11 cases other than NPCI’s chapter 11 case [Docket No. 1785]. Commencing on June 25, 2021, all motions, notices and other pleadings relating to any of the Debtors shall be filed in NPCI’s chapter 11 case. The Debtors’ corporate headquarters and service address is 720 W. 20th Street, Pittsburg, KS 66762.

NATURE OF THE CASE

1. Plaintiff seeks to avoid and recover from Defendant, or from any other person or entity for whose benefit the transfers were made, all preferential transfers of property that occurred during the ninety (90) day period prior to the commencement of the bankruptcy proceedings of NPC International Inc., and its affiliated debtors (collectively, the “**Debtors**”) pursuant to sections 547 and 550 of chapter 5 of title 11 of the United States Code (the “**Bankruptcy Code**”).

2. In addition, Plaintiff seeks to disallow, pursuant to sections 502(d) and (j) of the Bankruptcy Code, any claim that Defendant has filed or asserted against the Debtors or that has been scheduled for Defendant. Plaintiff does not waive but hereby reserves all of its rights to object to any such claim for any reason, including, but not limited to, any reason set forth in sections 502(a) through (j) of the Bankruptcy Code.

JURISDICTION AND VENUE

3. The United States Bankruptcy Court for the Southern District of Texas (the “**Court**”) has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334 and the *Order of Reference to Bankruptcy Judges*, General Order 2012-6 (S.D. Tex. May 24, 2012) (Hinojosa, C.J.). The underlying chapter 11 bankruptcy case is captioned *In re: NPC International, Inc.*, Case No. 20-33353 (DRJ).

4. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). In addition, Plaintiff confirms its consent, pursuant to Federal Rule of Bankruptcy Procedure (the “**Bankruptcy Rules**”) 7008 and Rule 7008-1 of the Bankruptcy Local Rules for the United States Bankruptcy Court for the Southern District of Texas, to the entry of a final order by the Court in connection with this adversary proceeding and Complaint to the extent that it is later

determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

5. Venue of the Debtors' chapter 11 cases and this adversary proceeding is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409(a).

6. The statutory and legal predicates for the relief sought herein are sections 502, 547, and 550 of the Bankruptcy Code and Bankruptcy Rules 3007 and 7001.

PROCEDURAL BACKGROUND

7. On July 1, 2020 (the "**Petition Date**"), each of the Debtors commenced a chapter 11 case by filing a voluntary petition for relief in this Court under chapter 11 of the Bankruptcy Code.

8. On July 1, 2020, the Court entered an order authorizing the joint administration of the chapter 11 cases for procedural purposes pursuant to Bankruptcy Rule 1015(b). [D.I. 37].²

9. On January 29, 2021, the Court entered an order confirming the *Second Amended Joint Chapter 11 Plan of NPC International, Inc. and Its Affiliated Debtors* (the "**Confirmation Order**" and, as amended, modified, or supplemented, the "**Plan**," respectively). [D.I. 1528].

10. The effective date of the Plan (the "**Effective Date**") occurred on March 31, 2021. [D.I. 1643]. The Debtors and the Trustee entered into that certain GUC Trust Agreement, and in accordance with the Plan and Confirmation Order, the Trust was established as of the Effective Date of the Plan.³

² All docket items referenced are from Case No. 20-33353, under which the Debtors' bankruptcy cases were jointly administered.

³ D.I. 1457, Ex. E. Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Plan, Confirmation Order, and/or GUC Trust Agreement.

11. Pursuant to paragraph 6 of the Confirmation Order and Article 5.18 of the Plan, the GUC Trust Assets (as defined in the Plan), including all retained Causes of Action arising under chapter 5 of the Bankruptcy Code, were transferred to the Trust. [D.I. 1528]. The instant action constitutes a Retained Cause of Action that was transferred to the Trust.

THE PARTIES

12. Pursuant to the Plan, Confirmation Order, and GUC Trust Agreement, Plaintiff has the capacity, in its own right and name, to pursue, commence, prosecute, compromise, settle, dismiss, release, waive, withdraw, abandon, or resolve GUC Trust Causes of Action under Sections 547 and 550 of the Bankruptcy Code, including this avoidance action.

13. Upon information and belief, Defendant was, at all relevant times, a bank that, among other things, loaned money to one or more of the Debtors. Upon further information and belief, at all relevant times, Defendant's principal place of business has been and is located at 105 N. Main Street, Wichita, Kansas 67202. Plaintiff is informed and believes and, on that basis, alleges that Defendant is a financial institution residing in and subject to the laws of Kansas.

FACTUAL BACKGROUND

Background Concerning the Debtors

14. As more fully discussed in the *Disclosure Statement for First Amended Joint Chapter 11 Plan of NPC International, Inc. and Its Affiliated Debtors* (the “**Disclosure Statement**”),⁴ the Debtors were franchise operators of Pizza Hut and Wendy's locations, with operations in 29 states and the District of Columbia. The Debtors were the largest franchisee of any restaurant concept in the U.S. based on unit count and were the fifth largest restaurant unit operator based on unit count. The Debtors' headquarters were located in Leawood, Kansas and, as

⁴ D.I. 952.

of the Petition Date, the Debtors employed approximately 7,200 full time employees and 22,800 part-time employees.

15. Prior to the Petition Date, the Debtors, as franchise operators, maintained business relationships with various business entities and individuals, through which the Debtors regularly purchased, sold, received, and/or delivered goods and services.

16. The financial difficulties that led to the Debtors' decision to file the chapter 11 cases were, according to filings, attributable to a combination of factors, all of which placed significant stress on the Debtors' liquidity position in the months leading up to the Petition Date.⁵ These factors included, among other things: (i) a negative sales impact from dining room closures and reduced business hours related to COVID-19 quarantine orders, (ii) certain beef and other commodity price increases, and (iii) a decrease in foot traffic resulting from the rise of third-party delivery services for competitors' food. In addition, the Pizza Hut brand had faced a deteriorating brand image in light of the pervasiveness of pizza restaurants and the success of competing brands.

17. As of the Petition Date, Debtor NPC International, Inc.'s ("**NPCI**") summary of assets and liabilities indicated that its liabilities far exceeded its assets by over \$800 million; similarly, Debtor NPC Quality Burger, Inc.'s ("**NPCQB**") liabilities also exceeded its assets by over \$800 million.⁶ As described in Article 3.3 of the Plan and Article VI.C of the Disclosure Statement, General Unsecured Claims (as well as First Lien Secured Claims and Second Lien Secured Claims) comprise an impaired class of creditors and are not expected to be paid in full.

18. During the ninety (90) days before and including the Petition Date, that is between April 2, 2020 and July 1, 2020 (the "**Preference Period**"), the Debtors continued to operate their

⁵ These factors and events are discussed in greater detail in the Disclosure Statement, incorporated herein by reference.

⁶ D.I. 447, 454.

business, including the transfer of money, either by checks, cashier checks, wire transfers, ACH transfers, direct deposits, or otherwise, to various entities.

Background Concerning the Relationship Between the Debtors and Defendant

19. On April 15, 2020, NPCI and NPCQB, each as borrowers, entered into two separate \$10 million promissory notes (the “**PPP Loan(s)**”) with Defendant pursuant to the Coronavirus Aid, Relief, and Economic Security Act (the “**CARES Act**”),⁷ which was signed into law on March 27, 2020.

20. Section 1102 of the CARES Act provides for a loan program for certain businesses impacted by the COVID-19 pandemic. Pursuant to section 1102, these loans were unsecured, nonrecourse loans, although guaranteed by the Small Business Administration in the event of default or forgiveness.

21. NPCI and NPCQB each received \$10 million, for a total of \$20 million, in PPP Loan funds from Defendant on April 21, 2020. The funds were first transferred into each of NPCI’s and NPCQB’s accounts at INTRUST. On that same date, the funds were transferred to each of NPCI’s and NPCQB’s main concentration accounts at JPMorgan Chase. The PPP Loan amounts remained in each JPMorgan main concentration account and were comingled with other funds, from which various disbursements or transfers were made on a daily basis in the ordinary course of business.

22. The scheduled maturity date of the PPP Loans was April 15, 2022, with an interest rate of 1.000% per annum, and payments before maturity were allowed without penalty. The first payment of principal and interest for the PPP Loans was due on October 15, 2020, with monthly payments thereafter. The payments to Defendant in respect of the PPP Loans during the Preference

⁷ Pub. L. No. 116-136, 134 Stat. 281 (2020)

Period are set forth on the Statement of Account, which is attached hereto and incorporated by reference as Exhibits A and B.

23. On May 7, 2020, NPCI and NPCQB contacted Defendant, requesting instructions on how to early pay the PPP Loans. Pursuant to that request, Defendant calculated the accrued interest on each loan up to that date. Defendant indicated that the payoff amount for each of the two loans was \$10,006,111.11, with a per diem of \$277.78.

24. On May 7, 2020, NPCI and NPCQB each paid Defendant the PPP Loan principal amounts plus the calculated accrued interest, resulting in a \$10,006,111.11 wire transfer from each (the “**Transfer(s)**”), totaling \$20,012,222.22 in combined payments to the Defendant. As such, Debtors NPCI and NPCBQ made transfers of an interest of their respective property to or for the benefit of Defendant during the Preference Period through payments aggregating not less than the amount set forth on Exhibits A and B hereto.

Background Concerning Plaintiff’s Due Diligence

25. Plaintiff is seeking to avoid all Transfers made by the Debtors to Defendant within the Preference Period.

26. On or about May 31, 2022, Plaintiff, through counsel, sent a demand letter (the “**Demand Letter**”) to Defendant, seeking a return of the Transfers. The Demand Letter indicated the potential statutory defenses available to Defendant pursuant to section 547(c) of the Bankruptcy Code and requested that if Defendant had evidence to support any affirmative defenses, it provide this evidence so that Plaintiff could review and consider the same.

27. Plaintiff also performed its own due diligence evaluation of the reasonably knowable affirmative defenses available to Defendant. As part of Plaintiff’s due diligence, Plaintiff reviewed the Debtors’ books and records in Plaintiff’s possession to identify whether Defendant

provided any new value in the form of “money or money’s worth in goods, services, or new credit” qualifying for the subsequent new value defense under section 547(c)(4) of the Bankruptcy Code. However, Plaintiff is aware of no new value qualifying for this defense. The money comprising the PPP Loans was provided prior to their repayment by NPCI and NPCQB, and the Trust is unaware of any goods, services or new credit provided to the Debtors by Defendant after their repayment. The subsequent new value defense is an affirmative defense, for which Defendant bears the burden of proof under section 547(g). Accordingly, Plaintiff puts Defendant to its burden of proof to establish any new value that qualifies for this defense.

28. Plaintiff additionally reviewed the Debtors’ books and records to identify whether the Transfers were protected under the “contemporaneous exchange for new value” defense under section 547(c)(1) of the Bankruptcy Code. Based on the terms of the PPP Loans, Plaintiff alleges there is a lack of any intent from either the Debtors or Defendant that the repayment of the loans would occur contemporaneously with their disbursement. Accordingly, Plaintiff puts Defendant to its burden of proof to establish any new value that qualifies for this defense.

29. Plaintiff also reviewed the Transfers for the “ordinary course of business” defense pursuant to section 547(c)(2) of the Bankruptcy Code. Plaintiff alleges the Transfers are ineligible for this defense as well. As a starting point, the Transfers do not meet the first requirement that the debt be incurred in the ordinary course of business. The PPP Loans made available pursuant to the CARES Act were in response to a national crisis caused by the COVID-19 pandemic, and not ordinary business loans either as to the Debtors, Defendant, or businesses in general. The Transfers were also not made in the ordinary course of business, as they were not paid pursuant to the ordinary and expected terms of the promissory note.

30. Based upon Plaintiff's review of the information provided by Defendant prior to filing this Complaint, and after performing Plaintiff's own due diligence evaluation of the reasonably knowable affirmative defenses to avoidance of the Transfers, Plaintiff has determined that Plaintiff may avoid the Transfers even after taking into account Defendant's anticipated affirmative defenses.

31. During the course of this proceeding, Plaintiff may learn (through discovery or otherwise) of additional transfers made to Defendant during the Preference Period or that may be avoidable under other provisions of the Bankruptcy Code. It is Plaintiff's intention to avoid and recover all avoidable transfers of property made by the Debtors, as well as interests of the Debtors in property, to or for the benefit of Defendant or any other transferee. Plaintiff reserves the right to amend this original Complaint to include the following: (a) further information regarding the Transfer(s); (b) additional transfers; (c) modifications of and/or revision to Defendant's name; (d) additional defendants; and/or (e) additional causes of action, if applicable (collectively, the "**Amendments**"), that may become known to Plaintiff at any time during this adversary proceeding, through formal discovery or otherwise, and for the Amendments to relate back to this original Complaint.

CLAIMS FOR RELIEF

First Claim for Relief

(Avoidance of Preference Period Transfers by NPCI – 11 U.S.C. § 547)

32. Plaintiff incorporates all preceding paragraphs as if fully re-alleged herein, to the extent they are not inconsistent with allegations contained in this First Claim for Relief.

33. As more particularly described on Exhibit A attached hereto and incorporated herein, during the Preference Period, NPCI made a Transfer to or for the benefit of Defendant in an aggregate amount not less than \$10,006,111.11.

34. The Transfer was made from NPCI as identified on Exhibit A, and constituted transfers of an interest in property of NPCI.

35. Defendant was a creditor at the time of the Transfer by virtue of the PPP Loan, which NPCI was obligated to repay with interest.

36. The Transfer was to or for the benefit of a creditor within the meaning of section 547(b)(1) of the Bankruptcy Code because the Transfer either reduced or fully satisfied a debt or debts then owed by NPCI to Defendant.

37. The Transfer was made for, or on account of, an antecedent debt or debts owed by NPCI to Defendant before such Transfer was made, as asserted by Defendant and memorialized in the PPP Loan, which constituted a “debt” or “claim” (as those terms are defined in the Bankruptcy Code) of Defendant prior to being paid by NPCI as set forth on Exhibit A hereto.

38. The Transfer was made while the Debtors were insolvent. Plaintiff is entitled to the presumption of insolvency for each Transfer made during the Preference Period pursuant to section 547(f) of the Bankruptcy Code.

39. Each Transfer was made during the Preference Period, as set forth on Exhibit A.

40. As a result of each Transfer, Defendant received more than Defendant would have received if: (a) the Debtors’ chapter 11 cases were cases under chapter 7 of the Bankruptcy Code; (b) the Transfers had not been made; and (c) Defendant received distributions on account of its debts under the provisions of the Bankruptcy Code. As evidenced by the Debtors’ schedules filed in the underlying bankruptcy case as well as the proofs of claim that have been received to date, and as described in the Plan and Disclosure Statement, the Debtors’ liabilities exceed their assets such that the Debtors’ unsecured creditors will not receive payment of their claims in full from the Debtors’ bankruptcy estates.

41. In accordance with the foregoing, each Transfer is avoidable pursuant to section 547(b) of the Bankruptcy Code.

Second Claim for Relief
(Avoidance of Preference Period Transfers by NPCBQ– 11 U.S.C. § 547)

42. Plaintiff incorporates all preceding paragraphs as if fully re-alleged herein, to the extent they are not inconsistent with allegations contained in this Second Claim for Relief.

43. As more particularly described on Exhibit B attached hereto and incorporated herein, during the Preference Period, NPCBQ made a Transfer to or for the benefit of Defendant in an aggregate amount not less than \$10,006,111.11.

44. The Transfer was made from NPCBQ as identified on Exhibit B, and constituted transfers of an interest in property of NPCBQ.

45. Defendant was a creditor at the time of the Transfer by virtue the PPP Loan, for which NPCBQ was obligated to repay with interest.

46. The Transfer was to or for the benefit of a creditor within the meaning of section 547(b)(1) of the Bankruptcy Code because the Transfer either reduced or fully satisfied a debt or debts then owed by NPCBQ to Defendant.

47. The Transfer was made for, or on account of, an antecedent debt or debts owed by NPCBQ to Defendant before such Transfer was made, as asserted by Defendant and memorialized in the PPP Loan, which constituted a “debt” or “claim” (as those terms are defined in the Bankruptcy Code) of Defendant prior to being paid by NPCBQ as set forth on Exhibit B hereto.

48. The Transfer was made while the Debtors were insolvent. Plaintiff is entitled to the presumption of insolvency for each Transfer made during the Preference Period pursuant to section 547(f) of the Bankruptcy Code.

49. Each Transfer was made during the Preference Period, as set forth on Exhibit B.

50. As a result of each Transfer, Defendant received more than Defendant would have received if: (a) the Debtors' chapter 11 cases were cases under chapter 7 of the Bankruptcy Code; (b) the Transfers had not been made; and (c) Defendant received distributions on account of its debts under the provisions of the Bankruptcy Code. As evidenced by the Debtors' schedules filed in the underlying bankruptcy case as well as the proofs of claim that have been received to date, and as described in the Plan and Disclosure Statement, the Debtors' liabilities exceed their assets such that the Debtors' unsecured creditors will not receive payment of their claims in full from the Debtors' bankruptcy estates.

51. In accordance with the foregoing, each Transfer is avoidable pursuant to section 547(b) of the Bankruptcy Code.

Third Claim for Relief
(Recovery of Avoided Transfers – 11 U.S.C. § 550)

52. Plaintiff incorporates all preceding paragraphs as if fully re-alleged herein, to the extent they are not inconsistent with the allegations contained in this Third Claim for Relief.

53. Plaintiff is entitled to avoid the Transfers pursuant to section 547(b) of the Bankruptcy Code.

54. Defendant was the initial transferee of the Transfers or the immediate or mediate transferee of such initial transferee or the person for whose benefit the Transfers were made.

55. Accordingly, pursuant to section 550(a) of the Bankruptcy Code, Plaintiff is entitled to recover the Transfers from Defendant, plus interest thereon to the date of payment and the costs of this action.

Fourth Claim for Relief
(Disallowance of all Claims – 11 U.S.C. § 502(d) and (j))

56. Plaintiff incorporates all preceding paragraphs as if fully re-alleged herein, to the extent they are not inconsistent with allegations contained in this Fourth Claim for Relief.

57. Defendant is a transferee of transfers avoidable under section 547 of the Bankruptcy Code, which property is recoverable under section 550 of the Bankruptcy Code.

58. Defendant has not paid the amount of the Transfers, or turned over such property, for which Defendant is liable under section 550 of the Bankruptcy Code.

59. Pursuant to section 502(d) of the Bankruptcy Code, any and all Claims of Defendant and/or its assignee, against Plaintiff or the Debtors must be disallowed until such time as Defendant pays to Plaintiff an amount equal to the aggregate amount of the Transfers, plus interest thereon and costs.

60. Pursuant to section 502(j) of the Bankruptcy Code, any and all Claims of Defendant, and/or its assignee, against the Debtors previously allowed by the Debtors or by Plaintiff, must be reconsidered and disallowed until such time as Defendant pays to Plaintiff an amount equal to the aggregate amount of the Transfers.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that the Court grant the following relief against Defendant:

A. On Plaintiff's First, Second, and Third Claims for Relief, judgment in favor of Plaintiff and against Defendant avoiding the Transfers and directing Defendant to return to Plaintiff the Transfers pursuant to sections 547(b) and 550(a) of the Bankruptcy Code, plus interest from the date of demand at the maximum legal rate and to the fullest extent allowed by applicable

law, together with the costs and expenses of this action including, without limitation, attorneys' fees;

B. On Plaintiff's Fourth Claim for Relief, judgment in favor of Plaintiff and against Defendant disallowing any claims held or filed by Defendant against the Debtors or Plaintiff until Defendant returns the Transfers to Plaintiff pursuant to section 502(d) and (j) of the Bankruptcy Code; and

C. Such other and further relief as this Court may deem just and proper.

Dated: June 29, 2022

ASK LLP

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