

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

In re NPC INTERNATIONAL, INC., et al, <p style="text-align: center;">Debtors.¹</p>	§ § § § § § §	Chapter 11 Case No.: 20-33353 (DRJ) (Jointly Administered)
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**LIMITED OBJECTION OF THE WENDY’S COMPANY TO THE
DEBTORS’ EMERGENCY MOTION FOR ENTRY OF AN ORDER (I) APPROVING
THE DEBTORS’ SELECTION OF A STALKING HORSE BIDDER, (II) APPROVING
BID PROTECTIONS IN CONNECTION THEREWITH, AND (III) GRANTING
RELATED RELIEF**

The Wendy’s Company (together with its affiliates, “Wendy’s”) hereby submits this limited objection (the “Limited Objection”) to the *Debtors’ Emergency Motion for Entry of an Order (I) Approving the Debtors’ Selection of a Stalking Horse Bidder, (II) Approving Bid Protections in Connection Therewith, and (III) Granting Related Relief* (the “Motion”) [ECF No. 994]. In support of this Limited Objection, Wendy’s respectfully states as follows:

PRELIMINARY STATEMENT

1. Wendy’s files this Limited Objection to express concerns about the proposed Bid Protections² sought for the benefit of the Stalking Horse Bidder and to preserve Wendy’s rights

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, 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). The Debtors’ corporate headquarters and service address is 4200 W. 115th Street, Suite 200, Leawood, KS 66211.

² Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Motion or the Bid Procedures Order (as defined below), as applicable.

with respect to Wendy's qualification process and consent rights in the event of any sale of the Wendy's Assets.

2. Wendy's respectfully submits that the Court should not approve the proposed Bid Protections. The Bid Protections are more likely to chill bidding than encourage it. A Qualified Bidder for the WholeCo Assets would need to increase its bid by approximately \$21 or \$11 million to outbid the WholeCo Stalking Horse Bid under the Bid Procedures. Such a large bid increment is unlikely to encourage bidding. Furthermore, as proposed a \$10.2 million break-up fee will be paid even if Franchisors do not consent to Flynn Restaurant Group LP ("Flynn").

3. Moreover, the Bid Protections do not appear to be necessary to spur competition. The Debtors' Motion reveals that many of the parties who have submitted indications of interest have done so for multiple regions. This suggests that the Bid Protections are not necessary to generate interest in the assets.

4. Lastly, Wendy's files this Limited Objection to make it clear that it has not consented to Flynn becoming a franchisee, let alone the largest franchisee in the Wendy's system. Among other issues, Wendy's has not consented to Flynn's proposed acquisition because Flynn has significant interests in two of Wendy's competitors. Nor have Wendy's and Flynn reached final agreement on other threshold issues, such as the extent of personal guarantees, reimaging and development obligations, store count limitations, or maximum leverage requirements, all of which are critical gating items in Wendy's franchisee qualification process. Given the uncertainty that Flynn could execute a sale, the Bid Protections do not provide any additional security to the estates and should not be approved at this time.

BACKGROUND

5. On July 1, 2020 (the “Petition Date”), the Debtors filed voluntary petitions with this Court under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”).

Bid Procedures

6. On September 25, 2020, the Court entered the *Order Establishing Bid Procedures Relating to the Sale of the Debtors’ Assets* (the “Bid Procedures Order”) [ECF No. 693] approving, among other related relief, auction and bid procedures for the sale of the Pizza Hut Assets, the Wendy’s Assets and the WholeCo Assets (the “Bid Procedures”).

7. The Bid Procedures instituted a Franchisor protocol so that third-party bidders and Franchisors could engage in discussions and disclosures relating to each Franchisor’s “applicable contractual rights,” including each Franchisor’s qualification process for franchisees.³ Bid Procedures § 5. Wendy’s has a customary, objective qualification process for new franchisees and strict requirements for existing franchisees that are vital to the success of the Wendy’s brand and system; such requirements apply to the Debtors and their Wendy’s franchisee, NPC Quality Burgers, Inc. (“NPC”), through the Franchise Agreements (defined below) along with other related agreements between Wendy’s and NPC and other Debtor entities. *See Response of the Wendy’s Company to the Debtors’ Motion for Approval of the Bid Procedures* [ECF No. 642].

8. Consistent with Wendy’s Franchise Agreements and related agreements, the Bid Procedures require Qualified Bidders to disclose “any quick service restaurants or other similar brands that the Qualified Bidder or any affiliates currently operate under” and, in the case of a

³ The Debtors made these updates to the Bid Procedures following responses filed by Pizza Hut and Wendy’s to the *Motion of Debtors for Entry of Orders (I)(A) Approving Bid Procedures for Sale of Debtors’ Assets, (B) Scheduling Auction for and Hearing to Approve Sale of Debtors’ Assets, (C) Approving Form and Manner of Notice of Sale, Auction, and Sale Hearing, (D) Approving Assumption and Assignment Procedures, and (E) Granting Related Relief, and (II)(A) Approving Sale of Debtors’ Assets, (B) Authorizing Assumption and Assignment of Executory Contracts and Unexpired Leases, and (C) Granting Related Relief* [ECF No. 510].

Qualified Bidder for the Wendy's Assets, any connection to any "quick service restaurant or to any business or commercial activity that derives revenue from the sale of items authorized for sale at Wendy's." Bid Procedures § 6(p). The Bid Procedures also require that a Qualified Bidder complete Wendy's Transaction Information Form and provide supporting documents and financial disclosures, among other things. Bid Procedures § 6(u).

9. As relevant here, the Bid Procedures allow the Debtors to execute a purchase agreement with a WholeCo Stalking Horse Bidder subject to Court approval. Bid Procedures § 2. In the event of a WholeCo Stalking Horse Bid, under Section 6(j) of the Bid Procedures, a Qualified Bid for the WholeCo Assets must result in a value that is greater than the value of the cash purchase price and any proposed assumed liabilities, *plus* "the sum of any applicable bid protections," *plus* \$1 million for any bid for "all of the . . . WholeCo Assets." Bid Procedures § 6(j).

10. The Bid Procedures contemplate "successive and interlocking Auctions if the Debtors timely receive one or more Qualified Bids for each of the Pizza Hut Assets, Wendy's Assets, and WholeCo Assets." Bid Procedures § 14. As structured, the winning bids of the Wendy's and Pizza Hut Auctions will serve as Reserve Bids⁴ to be compared against any Qualified Bids for the WholeCo Assets at the WholeCo Auction and may serve as the Initial Highest Bid for the WholeCo Auction. *Id.* §§ 14, 16(d). The Successful Bid for the WholeCo Assets may be a Qualified Bid for the WholeCo Assets or a combination of the Reserve Bids for the Wendy's and Pizza Hut Assets, which together represent substantially all of the Debtors' assets. *Id.*

⁴ The Debtors may, in consultation with the Consultation Parties, aggregate separate bids from unaffiliated persons to create one bid from a Qualified Bidder. Bid Procedures § 8. Accordingly, it is possible that the Reserve Bid for the Wendy's Assets or the Pizza Hut Assets represents the aggregate bids of multiple bidders for Pizza Hut divisions or regions or Wendy's markets.

Flynn's Discussions with Wendy's

11. Shortly after the Court's entry of the Bid Procedures Order, Wendy's began conversations with representatives from Flynn, which had expressed interest in becoming a Potential Bidder for the WholeCo Assets. Letter from S. O'Neal to J. Sussberg, Oct. 23, 2020 at 2, attached as Ex. A to the *Declaration of Sean A. O'Neal in Support of Limited Objection of The Wendy's Company to the Debtors' Emergency Motion for Entry of an Order (I) Approving the Debtors' Selection of a Stalking Horse Bidder, (II) Approving Bid Protections in Connection Therewith, and (III) Granting Related Relief* (the "O'Neal Declaration"). At this introductory meeting, Wendy's laid out key concerns with the possibility of Flynn owning the Wendy's Assets, including: (i) Flynn's ownership of 369 Arby's restaurants and 137 Panera Bread ("Panera") competitor restaurants,⁵ (ii) the need for Flynn to provide adequate personal guarantees, (iii) Flynn's willingness to develop and reimage Wendy's restaurants and (iv) the need for Flynn to eliminate the cross-collateralization of indebtedness across the Pizza Hut and Wendy's portfolios. *Id.*

12. Since that initial meeting, Wendy's and Flynn have actively continued their discussions on these important issues, as well as others, including in an exchange of letters between counsel on October 22 and 23, 2020. *Id.*; Letter from J. Sussberg to S. O'Neal, Oct. 22, 2020, attached as Ex. B to the O'Neal Declaration. To date, unlike what other potential franchisees have done in similar circumstances, Flynn, has not indicated a willingness to divest its Arby's or Panera

⁵ See Flynn Restaurant Group, <https://www.flynnrestaurantgroup.com/> (last visited Nov. 9, 2020). See *Reed v. LKQ Corp.*, 436 F. Supp. 3d 892, 901 (N.D. Tex. 2020) (taking judicial notice of company website) (citing *United States v. Flores*, 730 F. App'x 216, 219 n.1 (5th Cir. 2018) (Haynes, J., concurring); see also 2 McCormick on Evid. § 330, Facts Capable of Certain Verification (7th ed. 2016) ("Information obtained from online sources is becoming a frequently used basis for judicial notice. To this point, government and corporate websites and well-recognized mapping services are among the most commonly relied upon sources." (footnotes omitted))).

assets in connection with a potential Wendy's transaction⁶ and has not proposed a sufficient guarantee or finalized a development and reimagining plan to allay Wendy's concerns.

Stalking Horse Motion

13. On November 6, 2020, the Debtors filed the Motion, seeking approval of Flynn affiliates Hut American Group LLC and Wend American Group LLC as the WholeCo Stalking Horse Bidder, the WholeCo Stalking Horse APA and the proposed Bid Protections. Motion ¶¶ 7, 14.

14. The Motion describes a competitive sale process for the Wendy's and Pizza Hut Assets that has resulted in 26 active potential buyers conducting due diligence on at least some of the Wendy's Assets and 32 such active potential buyers conducting due diligence on at least some of the Pizza Hut Assets. *Id.* ¶ 5. As of the date of the motion, 43 parties have submitted 75 indications of interest for some or all of the Wendy's Assets and 11 parties have submitted 17 indications of interest for some or all of the Pizza Hut Assets. *Id.* In both cases, many of the indications of interest have provided for independent bids for multiple regions. *Id.* The Motion acknowledges the Franchisors' involvement in the sale process and acknowledges that the Franchisors' consent rights are necessary to effectuate the Sale Transaction. *Id.* ¶ 6.

15. The WholeCo Stalking Horse APA contemplates the following Bid Protections: (i) reimbursement of reasonable and documented fees and expenses not to exceed \$1,500,000 (the "Expense Reimbursement"), payable in certain circumstances; and (ii) a break-up fee equal to (A) 2.5% of the Base Value (approximately \$20.4 million) payable if, after obtaining the Franchisors' consent, the Debtors consummate a Competing Bid (the "Break-Up Fee"), subject to certain further conditions; or (B) 1.5% of the Base Value (approximately \$10.2 million) payable if the WholeCo

⁶ Indeed, Debtors' sponsor divested interest in competitor Five Guys Burgers & Fries when they acquired Wendy's assets. *See infra* paragraph 38.

Stalking Horse Bidder does not obtain the Franchisors' consent and the Debtors consummate one or more Competing Bid(s) (the "Franchisor Consent Break-Up Fee" and, together with the Break-Up Fee, the "Proposed Break-Up Fees"), subject to certain further conditions. *Id.* ¶ 21.

16. The WholeCo Stalking Horse APA provides that the Break-Up Fee will be paid so long as the aggregate purchase price received through a Competing Bid is an amount equal to at least the Purchase Price plus the Break-Up Fee. *Id.* ¶ 18. In contrast, the Franchisor Consent Break-Up Fee will be paid so long as the aggregate cash consideration received with a Competing Bid is equal to or more than the Purchase Price minus the Break-Up Fee. *Id.*

17. Wendy's files this Limited Objection to address concerns about the Bid Protections and Flynn's ability to obtain Wendy's consent for the Sale Transaction.

RESPONSE

I. The Bid Protections are Unnecessary and Will Potentially Chill Bidding

18. Courts in the Fifth Circuit have applied both the "business judgment rule" under Section 363(b) of the Bankruptcy Code and the "actually necessary to preserve the value of the estate" standard that applies to administrative expenses under Section 503 of the Bankruptcy Code in analyzing whether to approve bid protections. *See, e.g., In re ASARCO, L.L.C.*, 650 F.3d 593 (5th Cir. 2011); *In re Acis Cap. Mgmt., L.P.*, 604 B.R. 484, 517 (N.D. Tex. 2019). Under either standard, the Court should not approve the Bid Protections because they are unnecessary and potentially harmful to a competitive bidding process under the circumstances here.

A. The Court Should not Approve the Proposed Break-Up Fees

19. Any break-up fee—especially the Proposed Break-Up Fees of approximately \$20.4 or \$10.2 million—would be a burdensome, unnecessary expense in this case, even if Flynn is ultimately able to obtain consent from the Franchisors (which, as stated below, Wendy's has not provided).

20. In the context of bankruptcy auction sales, “break-up fees ‘are sometimes authorized . . . because they provide an incentive for an initial bidder to serve as a so-called ‘stalking horse,’ whose initial research, due diligence, and subsequent bid may encourage later bidders.’” *In re ASARCO, L.L.C.*, 650 F.3d at 602 n.9 (citing *In re 310 Assocs.*, 346 F.3d 31, 34 (2d Cir. 2003)); *see also Canatxx Gas Storage Ltd. v. Silverhawk Cap. Partners, LLC*, 2008 U.S. Dist. LEXIS 37803, *18 (S.D. Tex. May 8, 2008) (stating that break-up fees may serve to “discourage a bidding strategy designed to hold back competitive bids until late in the process” and “enhance the bidding process by creating momentum toward closing a sale”). However, where there is already a competitive bidding process underway and a break-up fee could chill bidding, break-up fees are viewed with significant skepticism. *See In re O'Brien Env't Energy, Inc.*, 181 F.3d 527, 537 (3d Cir. 1999) (affirming order denying bidder’s post-sale application for break-up fee, noting that “the bidding *might have been even more heated* had the court definitively ruled that [bidder] was not entitled to a break-up fee or expenses earlier in the process.” (emphasis added)).

21. Wendy’s submits that the Proposed Break-up Fees should not be approved at this time for two reasons. First, the Proposed Break-Up Fees are likely to have the opposite effect of a court-approved break-up fee and may deter future bidding efforts for any portion of the Assets. The WholeCo Stalking Horse APA contemplates an approximately \$20.4 million break-up fee payable if Flynn obtains the Franchisors’ consent, and, in the alternative an approximately \$10.2 million break-up fee payable even if Flynn does not obtain the Franchisors’ consent. Motion ¶ 21. Under Section 6(j) of the Bid Procedures, a Qualified Bid for the WholeCo Assets must result in a value that is greater than the value of the cash purchase price and any proposed assumed liabilities, *plus* “the sum of any applicable bid protections,” *plus* \$1 million. Bid Procedures Oder

§ 6(j). Accordingly, a Qualified Bidder for the WholeCo Assets would be required to increase its bid by between approximately \$21 and \$11 million to be successful, even though that additional value will ultimately not inure to the Debtors. Such a large bidding increment will discourage bidders, not “encourage later bidders.” *In re ASARCO, L.L.C.*, 650 at 602 n.9.

22. What’s more, the Franchisor Consent Break-Up Fee is payable even if the Franchisors do not consent to the WholeCo Stalking Horse APA and Flynn is ineligible to consummate the Sale Transaction. Motion ¶¶ 6, 18. Bidders will not be incentivized to outbid the Stalking Horse Bidder at the premium required if the Stalking Horse Bidder has no certainty of closing and the Stalking Horse Bidder itself will not be eligible to close without the Franchisors’ consent. The Franchisor Consent Break-Up Fee could also directly diminish value recovered by the estate. The WholeCo Stalking Horse APA provides that the Franchisor Consent Break-Up Fee will be paid so long as the aggregate cash consideration received with a Competing Bid is equal to or more than the Purchase Price minus the Break-Up Fee, Motion ¶ 18, such that the Debtors could be subject to a \$10.2 million haircut on the aggregate cash proceeds from the Competing Bid if the Competing Bid equals the Purchase Price. The fee is rendered even more burdensome to the estates because, under the preceding circumstance, Flynn could be the only beneficiary—it does not need to obtain Franchisors’ consent but nevertheless receives a fee at the estates’ expense.

23. Second, the sale process of the Wendy’s and Pizza Hut Assets is already a competitive process designed to maximize value for the Debtors’ estates even without the Bid Protections. In short, the Bid Protections are not necessary to spur competition because the Wendy’s and Pizza Hut sale process has not and will not suffer from many of the difficulties that often require break-up fees. The Debtors have already received 92 indications of interest for the Wendy’s and Pizza Hut Assets from 54 parties and are currently engaged with at least 26 potential

buyers who are conducting diligence on at least some of Wendy's Assets and at least 32 for at least some of Pizza Hut Assets. Motion ¶ 5. This is not a process that is suffering from a need to "attract additional bidders that otherwise would be deterred." *In re ASARCO LLC*, 441 B.R. 813, 831 (S.D. Tex. 2010).

24. There is no need to incentivize a WholeCo stalking horse bidder to jumpstart competition. The Debtors' Motion reveals that many of the parties who have submitted indications of interest have done so for multiple regions. Motion ¶ 5. The "successive and interlocking Auctions" are designed so that competition generated from the Wendy's and Pizza Hut Auctions flows directly into the WholeCo Auction because the bids of the winners of the Wendy's and Pizza Hut Auctions serve as Reserve Bids. Bid Procedures § 14. The ongoing sales process for the Wendy's and Pizza Hut Assets is already sufficiently competitive and will maximize value for the estates without the need to incentivize a WholeCo stalking horse bidder with a break-up fee.

25. In addition to the clear indications of interest the Debtors have received from third parties for both the Wendy's and Pizza Hut Assets, each of the Franchisors is deeply involved and committed to a successful sale of all of the Assets. Since the Petition Date, Wendy's has been actively involved in helping the Debtors identify potential bidders that are already approved franchisees or have begun Wendy's qualification process. In fact, on behalf of a consortium of qualified franchisees (who would be the ultimate buyers at the closing), Wendy's has submitted one of the indications of interest for all of the Wendy's Assets.⁷ As the Debtors represented at the October 30 hearing, such a bid from Wendy's could "maximize value" for the Debtors' estates.

⁷ Under this consortium bid, regional buyers would agree to acquire most, if not all, of the regional assets on the date that the sale closed, directly from the Debtors. Wendy's would backstop the purchase to provide greater certainty and a sale to pre-qualified franchisees. *Hr'g Tr., Oct. 30, 2020, In re NPC International, Inc., et al.*, Case No. 20-33353 (DRJ) at 9:3-24.

Hr'g Tr., Oct. 30, 2020, In re NPC International, Inc., et al., Case No. 20-33353 (DRJ) at 8:21–22.

B. The Court Should not Approve the Expense Reimbursement

26. The Debtors also seek permission to reimburse Flynn's expenses up to \$1.5 million. Motion ¶ 21. As described in the Motion, the Expense Reimbursement will be payable if the WholeCo Stalking Horse APA is terminated by the Debtors in certain situations, namely as a consequence of the WholeCo Stalking Horse Bidder not receiving Franchisor consent. *Id.* ¶ 18 (citing Stalking Horse APA § 8.01).

27. The Expense Reimbursement suffers from the same detriments as the Proposed Break-Up Fees. It creates a chilling effect on others who would seek to outbid Flynn's WholeCo Stalking Horse Bid without any commensurate benefit to the estate. In addition, other bidders are already engaged in due diligence for the Wendy's and Pizza Hut Assets without the benefit of an expense reimbursement.

C. Wendy's Has Not Approved Flynn as a Franchisee

28. Wendy's has not consented to the transfer of the Franchise Agreements (as defined below) and related assets to Flynn. As the Motion acknowledges, Wendy's consent is a condition precedent to Flynn's ability to effectuate a sale. Motion ¶ 6. Nonetheless, the Bid Protections would require that the estates transfer value to Flynn even if Flynn fails to secure the Franchisors' approval. Given the uncertainty that Flynn could ever execute a sale, the Bid Protections do not provide any additional security to the estates and should not be approved at this time.

i. Wendy's Consent is a Precondition to the Sale Transaction

29. The Debtors operate approximately 394 restaurants pursuant to various franchise agreements, including various extensions and consents (the "Franchise Agreements").⁸ These Franchise Agreements are executory contracts that grant NPC a right to use Wendy's proprietary marks and require that Wendy's consent in writing prior to the assignment of a Franchise Agreement. Specifically, Section 13.2 of the Legacy Franchise Agreement provides:

Franchisee understands and acknowledges that Franchisor has entered into this Agreement in reliance on the business skill, financial capacity, and personal character of Franchisee and any Guarantor (or if Franchisee or Guarantor is a business entity, the owners of any direct or indirect interest in Franchisee or Guarantor) Accordingly, without the prior written consent of Franchisor:

13.2.A. Neither Franchisee nor any Owner shall transfer, pledge, or otherwise encumber this Agreement, any of the rights or obligations of Franchisee under this Agreement, any direct or indirect interest in Franchisee, or any material asset used in the Franchised Business

30. Section 15.2.A of the Updated Franchise Agreement includes a substantially similar provision:

Franchisee understands and acknowledges that Franchisor has entered into this Agreement in reliance on the business skill, financial capacity, and personal character of Franchisee and any Guarantor (or if Franchisee or Guarantor is a business entity, the owners of any direct or indirect interest in Franchisee or Guarantor) Accordingly, without the prior written consent of Franchisor . . . :

15.2.A. Neither Franchisee nor any Owner shall assign, transfer, pledge, issue, redeem, or otherwise encumber this Agreement, any of the rights or obligations of Franchisee under this Agreement, the Franchised Business, the Restaurant, any direct or indirect interest in Franchisee, Franchisee's rights to use the System, the Proprietary Marks, any Confidential

⁸ All but 29 of the Wendy's restaurants operated by NPC use the same form franchise agreement (collectively, the "Legacy Franchise Agreements"). Quality is Our Recipe, LLC Unit Franchise Agreement, undated, attached as Ex. C to the O'Neal Declaration. The document governing the operation of the 29 Wendy's restaurants that are not governed by the Legacy Franchise Agreement and any new system franchisee is an updated form of the franchise agreement (the "Updated Franchise Agreements"). Quality is Our Recipe, LLC Unit Franchise Agreement, undated, attached as Ex. D to the O'Neal Declaration. The Debtors are also scheduled to open one more new Wendy's restaurant by the end of December, which will be governed by the Updated Franchise Agreement.

Information and/or the Manual, or any material asset used in the Franchised Business (all collectively referred to as “Transfers”);

31. Here, Wendy’s consent rights are enforceable, even in bankruptcy. Section 365(c)(1) of the Bankruptcy Code provides that a debtor in possession may not assign an executory contract if:

(a) “applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession . . .,” and (b) “such party does not consent to such assumption or assignment . . .”

See also In re Rupari Holding Corp., 573 B.R. 111, 117-18 (Bankr. D. Del. 2017) (“Although Bankruptcy Code § 365(f)(1) grants the debtor the right to assign an executory contract regardless of a contract provision or applicable law prohibiting, restricting or conditioning assignment, § 365(f)(1) is expressly subject to Bankruptcy Code 365(c).”).

32. Wendy’s trademarks are protected by “applicable law” that require Wendy’s consent to the assignment of the Franchise Agreements and related agreements. *See, e.g., In re Taylor Inv. Partners II, LLC*, 533 B.R. 837 (Bankr. N.D. Ga. 2015) (debtors may not assume franchise agreement since the Lanham Act excused movant from accepting performance from a party other than the debtors); *In re Wellington Vision, Inc.*, 364 B.R. 129, 135 (S.D. Fla. 2007) (finding assignment of a franchise agreement that contained a trademark license required consent of the franchisor); *In re Travelot Co.*, 286 B.R. 447, 455 (Bankr. D. Ga. 2002) (“The grant of a non-exclusive [trademark] license is . . . one personal to the assignee and thus not freely assignable to a third party. Accordingly, a licensor need not accept performance from or render performance to an entity other than the licensee.” (internal citations omitted)).

33. Wendy’s franchisees, like NPC and any future successful bidder, are ambassadors of Wendy’s and the bearer of its proprietary marks—they are, in other words, the face of the brand.

Wendy's maintains its brand, in part, through its objective qualification process for new franchisees and strict requirements for existing franchisees. These obligations are imposed on NPC through the Franchise Agreements along with other related agreements between Wendy's and NPC as well as other Debtor entities.

34. Section 13.3.I of the Legacy Franchise Agreement and Section 15.4.I of the Updated Franchise Agreement require that a proposed franchisee "shall execute the standard form franchise agreement then being offered to new System franchisees, and such other ancillary agreements as Franchisor may require for the Franchised Business, which agreements shall supersede this Agreement in all respects, and the terms of which agreements may differ from the terms of this Agreement" Consistent with the terms of the Franchise Agreements, to the extent the Debtors intend to assume and assign the Franchise Agreements and related agreements as part of the sale process, they must assign the agreements in their entirety, including the objective qualification process and requirements imposed on NPC and franchisees generally. *See Stewart Title Guar. Co. v. Old Republic Nat'l Title Ins. Co.*, 83 F.3d 735, 741 (5th Cir. 1996) ("It is well established that as a general proposition an executory contract must be assumed or rejected in its entirety." (citations and internal quotation marks omitted)). Likewise, when an agreement is assumed and later assigned, the "assignee, is bound by all provisions of the contracts." *In re ATP Oil & Gas Corp.*, 517 B.R. 756, 759-60 (Bankr. S.D. Tex. 2014) ("An executory contract . . . must be assumed in its entirety. A debtor may not pick and choose those portions that it wishes to enforce and reject those that it does not deem desirable. That is black letter law engraved in stone." (citations and internal quotation marks omitted)); *see also In re Nat'l Gypsum Co.*, 208 F.3d 498, 506 (5th Cir. 2000) ("Where the debtor assumes an executory contract, it must assume the entire

contract, *cum onere*—the debtor accepts both the obligations and the benefits of the executory contract” (citations omitted)).

35. As is relevant to the Motion, the Franchise Agreements and the Global Transaction Policy (as defined below), which is incorporated by reference in the Franchise Agreements, along with the Relationship Agreement, by and among Quality is Our Recipe, LLC, NPC Restaurant Holding II LLC, NPC International, Inc. and NPC Quality Burgers, Inc., dated January 31, 2018, attached as Ex. E to the O’Neal Declaration (the “Relationship Agreement”), the Development Agreement by and among Quality is Our Recipe, LLC, NPC Quality Burgers, Inc. and NPC International, Inc., dated January 31, 2018, attached as Ex. F to the O’Neal Declaration (the “Development Agreement”) and the Consolidated Development Agreement, by and among Quality is Our Recipe, LLC, NPC Quality Burgers, Inc. and NPC International, Inc., dated December 23, 2019, attached as Ex. G to the O’Neal Declaration (the “Consolidated Development Agreement”), together restrict NPC’s involvement with competitors of Wendy’s, include a guarantee of NPC’s performance under the Franchise Agreements and impose reimaging and development benchmarks and footprint restrictions on NPC, among other objective criteria by which Wendy’s maintains the success of and the equilibrium in its system. *See generally* Legacy Franchise Agreement §§ 13, 16; Updated Franchise Agreement §§ 15, 18.

ii. Flynn Has Not Satisfied Wendy’s Objective Criteria

36. The Motion states that Flynn “believes it has appropriately addressed all articulated Franchisor concerns and issues.” Motion ¶ 6. There is no basis for this belief. There are numerous critical hurdles to Flynn satisfying Wendy’s objective franchisee criteria. Wendy’s has been working with the Debtors and Flynn to resolve these important issues and is prepared to continue

such negotiations in good faith, but as of the filing of this Limited Objection, Wendy's is not hopeful that it will reach agreement on these incredibly important issues.

37. First, and most critically, Flynn has significant holdings in Wendy's competitors Arby's and Panera. The Franchise Agreements grant Wendy's the absolute right to refuse to transfer for, among other reasons, the proposed franchisee's failure to comply with Wendy's restrictions "relative to involvement in any business which competes with Wendy's," Legacy Franchise Agreement § 13.3.A(vi); Updated Franchise Agreement § 15.4(A)(vi), and requires that franchisees covenant to similar restrictions, Legacy Franchise Agreement §§ 16.2.B, 16.3; Updated Franchise Agreement §§ 18.2.A., 18.3.

38. Flynn owns a significant portfolio of Wendy's competitors—specifically 137 Panera restaurants and 369 Arby's restaurants.⁹ The Legacy Franchise Agreement prohibits a franchisee from owning or having any interest in "[a]ny quick-service restaurant selling . . . products similar to Franchisor which is located within a three-mile radius of Restaurant, or within a three-mile radius of any restaurant operating under the System." Legacy Franchise Agreement § 16.2.B.2. Both Arby's and Panera sell products that are similar to those sold by Wendy's.¹⁰ The Updated Franchise Agreement which will govern any new franchisee like Flynn, and the Relationship Agreement which is applicable to all of NPC's Wendy's restaurants is even

⁹ See *supra* note 5.

¹⁰ Panera offers a variety of salads on its menu. Panera, Salads, <https://delivery.panerabread.com/menu/category/22> (last accessed Nov. 11, 2020). Wendy's promotes its salad offerings as part of its overall vision of offering great food that is made fresh. Wendy's, Fresh-Made Salads, <https://order.wendys.com/category/102/freshmade-salads> (last accessed Nov. 10, 2020). Arby's offers a selection of fried and grilled chicken sandwiches, sides such as French fries, and desserts, including milk shakes. Arby's, Our Menu, <https://arbys.com/our-menu/> (last accessed Nov. 10, 2020). Wendy's also sells fried and grilled chicken sandwiches, a variety of French fries and its signature Frosty® frozen dessert. <https://order.wendys.com/categories?site=menu> (last accessed Nov. 11, 2020). Further, for the avoidance of doubt, both Arby's and Panera are quick service restaurants offering drive-through service. See Arby's, Locations, <https://locations.arbys.com/> (last accessed Nov. 11, 2020); Panera Bread, Order Panera Bread, <https://delivery.panerabread.com/orderingHelp/> (last accessed Nov. 10, 2020).

more clear on this point and specifically identifies both Arby's and Panera as prohibited competitors.¹¹ Such a conflict is particularly troublesome under these facts because Flynn would be Wendy's largest franchisee operating 394 Wendy's restaurants and at the same time own more than 500 restaurants in directly competing brands.

39. Prospective franchisees are required to divest of any competing interests they may have in order to enter the Wendy's system. In fact, that's exactly what Debtors' sponsor had to do when NPC acquired Wendy's assets. Relationship Agreement § 3.10 (requiring Debtors' sponsor to sell 100% of his Five Guys Burgers & Fries franchise interest). Failure to resolve this significant issue could potentially open the floodgates to other Wendy's franchisees seeking to own competitive brands, which would be contrary to Wendy's overall corporate strategy and harmful to its relationships with other franchisees who have been denied such waivers.

40. Second, the WholeCo Stalking Horse APA presents complexities for Wendy's customary footprint limitations and restaurant reimaging and development requirements imposed on large franchisees. The Franchise Agreements grant Wendy's the "absolute right" to withhold its consent in the event the result of the transfer "would be, in the sole opinion of Franchisor, a disproportionately large ownership of Wendy's restaurants by the Proposed Franchisee compared with the number of restaurants operated by all franchisees in the System." Legacy Franchise Agreement § 13.3.B; Updated Franchise Agreement § 15.4.B. Consistent with this restriction, it has been Wendy's custom and practice to impose restaurant limitations for their larger franchisees to avoid an over-concentration of franchises in a single owner. As an example, NPC is restricted

¹¹ Updated Franchise Agreement § 18.2.A; *see also* Relationship Agreement (defining "Specifically-Identified Competitive Restaurants" as "any of the following restaurants: **Arby's**, Burger King, Carl's Jr., Checkers, Chick-fil-A, Church's Chicken, Culver's, Five Guys Burgers and Fries, The Habit Burger Grill, Hardee's, In-N-Out Burger, Jack-in-the-Box, McDonald's, **Panera Bread**, Raising Cane's, Rally's, Shake Shack, Smashburger, Sonic, Steak 'n Shake, Whataburger, White Castle and Zaxby's." (emphasis added)); *see also* Legacy Franchise Agreements § 13.3.I; Updated Franchise Agreements § 15.4.I.

from operating more than 400 Wendy's restaurants, subject to certain conditions. Relationship Agreement § 4.22.

41. As NPC's bankruptcy has made abundantly clear, there are good reasons to put limits on a franchisee's store ownership. Under the proposed deal, Flynn would acquire 394 Wendy's restaurants and, like the Debtors, become the single largest franchisee in the Wendy's system. In addition to Flynn inheriting the existing obligations under the Relationship Agreement, Wendy's would, as is customary, negotiate a restaurant limitation to manage Flynn's development vis-à-vis the rest of Wendy's system. Wendy's is simply not willing to expose itself to such concentrated ownership, which can be damaging to the brand and the Wendy's system.

42. At the same time that Wendy's imposes ownership limits on franchisees, it also requires them to build new restaurants and meet certain reimagining standards. Under Wendy's development agreements, franchisees are required to develop and build new restaurants over a certain period. *See generally* Wendy's Global Transaction Policy § IV.B.3, dated July 1, 2020, attached as Ex. H to the O'Neal Declaration (the "Global Transaction Policy"). Again, as an example, the Development Agreement and the Consolidated Development Agreement collectively require NPC to open 38 new restaurants by December 31, 2025. Development Agreement, Exhibit B(iii); Consolidated Development Agreement, Exhibit B. Franchisees are also required to reimage their restaurants at regular intervals. *See* Legacy Franchise Agreement § 6.10 (refurbish and remodel requirement up to every five years); Updated Franchise Agreement § 6.10 (refurbish and remodel requirement approximately every ten years). As part of any consent to a transaction in these proceedings, Wendy's would, as is customary, also negotiate a new development agreement and Flynn would be bound by certain re-imagining requirements. Wendy's and Flynn have not reached agreements on these important issues.

43. Third, Wendy's requires personal guarantees from its franchisees. A case in point is the NPC Franchise Agreements which require and are secured by a guarantee. *See* Legacy Franchise Agreement § 25.2; Updated Franchise Agreement § 22.7. Such guarantees provide certainty and predictability, particularly when Wendy's extends its system to new franchisees. As of the date of this Limited Objection, Wendy's and Flynn have not agreed on the terms of a guarantee.

44. Fourth, as part of its qualification process, Wendy's imposes limitations on a franchisee's leverage and indebtedness. A proposed franchisee must meet Wendy's requirements related to financial structure, resources and capital. Legacy Franchise Agreement § 13.3.A. Section IV.D of the Global Transaction Policy imposes specific financial standards for potential transferees, including a minimum equity investment and a maximum lease adjusted leverage ratio. Section III.B of the Global Transaction Policy also requires that potential transferees disclose the contemplated debt structure by submitting to Wendy's a completed Transaction Information Form. Wendy's has not received this information and therefore cannot confirm whether Flynn is in compliance with these financing requirements.

45. In view of these significant issues, particularly Flynn's significant involvement with Wendy's direct competitors, Wendy's has been working in good faith with the Debtors and Flynn. Wendy's will continue negotiations with Flynn but is not hopeful that it will reach agreement on these threshold issues. As such, it is premature to approve the Bid Protections.

II. Reservation of Rights

46. This Limited Objection is without prejudice to Wendy's rights to raise further objections to any future sale of Wendy's Assets or the WholeCo Assets based on its rights under the Franchise Agreements and related agreements or at law during or prior to any future sale

hearing. For the avoidance of doubt, Wendy's expressly reserves the following rights, among others, in connection with any sale of the Wendy's Assets.

47. More specifically, and without limiting any contractual or legal rights it may have, Wendy's reserves (a) its consent rights discussed above under Section 365(c) as well as other similar rights under the Franchise Agreements and related agreements relating to the transfer of Wendy's Assets, including Wendy's right of first refusal and right of first offer, (b) its rights under Section 365(b) and (f), which require that if a debtor in possession assumes or assigns an executory contract it must provide "adequate assurance of future performance," 11 U.S.C. §§ 365(b)(1)(c), 365(f)(2), and (c) its right to require that any WholeCo Sale Transaction be subject to the Wendy's and Pizza Hut separation requirements imposed by the Restructuring Support Agreement and Wendy's existing Relationship Agreement with the Debtors, which among other things, require a separation of the Pizza Hut and Wendy's businesses. *See* Relationship Agreement § 3.12.

CONCLUSION

48. For the reasons stated above, the relief requested in the Motion should be denied unless modified as provided herein or providing such other relief as the Bankruptcy Court deems just and proper.

Dated: November 12, 2020

Respectfully submitted,

/s/ Tom A. Howley

Tom A. Howley

Texas Bar No. 24010115

Eric Terry

Texas Bar No. 00794729

HOWLEY LAW PLLC

Pennzoil Place – South Tower

711 Louisiana St., Suite 1850

Houston, Texas 77002

Telephone: 713-333-9125

Facsimile: 713-659-9601

Email: tom@howley-law.com

Email: eric@howley-law.com

-and-

Sean A. O’Neal

(Admitted Pro Hac Vice)

Shannon Daugherty

(Admitted Pro Hac Vice)

CLEARY GOTTLIEB

STEEN &

HAMILTON LLP

One Liberty Plaza, 1 Liberty St,

New York, NY 10006

Telephone: 212-225-2000

Facsimile: 212-225-3999

Email: soneal@cgsh.com

Email: sdaugherty@cgsh.com

Counsel to The Wendy’s Company

CERTIFICATE OF SERVICE

I certify that on November 12, 2020, I caused a copy of the foregoing document to be served by electronic transmission to all registered ECF users appearing in these cases.

/s/ Tom A. Howley
Tom A. Howley