

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:)	CHAPTER 7
)	
HAVEN TRUST BANCORP, INC.)	CASE NO. 09-64497-MGD
)	
Debtor.)	
-----)		
)	
CATHY L. SCARVER, Chapter 7 Trustee for Haven Trust Bancorp, Inc.,)	ADVERSARY PROCEEDING NO.
)	
Plaintiff,)	
)	
v.)	
)	
R.C. PATEL, MUKESH C. PATEL, BRIJ M. KAPOOR, MUKUND R. PATEL, NARENDRA D. PATEL, DHIRU G. PATEL, BALVANT PATEL, EDWARD L. BRISCOE, SCOTT DIX, and KENNETH A. CUTSHAW,)	
)	
Defendants.)	
_____)	

COMPLAINT

COMES NOW Cathy L. Scarver (the “Trustee”), Chapter 7 Trustee for Haven Trust Bancorp, Inc. (the “Debtor”), and brings this Complaint as follows:

TRUSTEE, APPOINTMENT, JURISDICTION, AND VENUE

1. Debtor filed a petition for relief under Chapter 7 of Title 11 of the United States Code (the “Bankruptcy Code”) on February 23, 2009 (the “Petition Date”).
2. Cathy L. Scarver is the duly appointed and qualified Chapter 7 Trustee.
3. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and under 28 U.S.C. § 157. Venue is proper under 28 U.S.C. § 1409.

4. This is a core proceeding within the meaning of 28 U.S.C. §157(b).

BACKGROUND AND PARTIES

5. Prior to the Petition Date, Debtor was a Georgia corporation and was the holding company of Haven Trust Bank, an FDIC-insured institution located in Duluth, Georgia. Haven Trust Bank was a state-chartered, non-member institution that was established on January 24, 2000. The bank operated four branches in the Atlanta, Georgia area and loan production offices in Birmingham, Alabama, and Oklahoma City, Oklahoma. At all relevant times, the only major asset of Debtor was its ownership interest in Haven Trust Bank.

6. At all relevant times, the Debtor was organized as an S-Corporation, such that corporate income, losses, deductions, and credits passed through to shareholders for federal tax purposes.

7. At all relevant times prior to the Petition Date, Defendants R.C. Patel, Mukesh C. Patel, Brij M. Kapoor, Mukund R. Patel, Narendra D. Patel, Dhiru G. Patel, Balvant Patel, Edward L. Briscoe, Kenneth A. Cutshaw, and Scott Dix were members of the Board of Directors or officers of the Debtor or both prior to the Petition Date. Defendants R.C. Patel, Mukesh C. Patel, Brij M. Kapoor, Mukund R. Patel, Narendra D. Patel, Dhiru G. Patel, Balvant Patel, Edward L. Briscoe, Kenneth A. Cutshaw, and Scott Dix, as directors or officers of Debtor or both, shall hereinafter be referred to collectively as the "Officer/Director Defendants."

8. At all relevant times prior to the Petition Date, Defendants R.C. Patel, Mukesh C. Patel, Brij M. Kapoor, Mukund R. Patel, Narendra D. Patel, Dhiru G. Patel, Balvant Patel, and Kenneth A. Cutshaw were shareholders of Debtor prior to the Petition

Date, each holding between 0.08 percent and 11.2 percent of the Debtor, as individuals. Defendants R.C. Patel, Mukesh C. Patel, Brij M. Kapoor, Mukund R. Patel, Narendra D. Patel, Dhiru G. Patel, Balvant Patel, and Kenneth A. Cutshaw as shareholders of the Debtor, shall be hereinafter referred to collectively as the “Shareholder Defendants.”

9. The Officer/Director Defendants and the Shareholder Defendants are subject to the jurisdiction of this Court and may be served pursuant to Fed. R. Bankr. P. 7004.

TAKEOVER OF HAVEN TRUST BANK BY THE FDIC

10. On December 12, 2008, the Georgia Department of Banking and Finance closed Haven Trust Bank and named the Federal Deposit Insurance Commission (the “FDIC”) as receiver.

11. The FDIC estimated, in January 2009, that the loss to the Deposit Insurance Fund resulting from Haven Trust Bank’s failure was \$207 million.

12. Subsequently, the FDIC conducted a material loss review of the failure of Haven Trust Bank, as required by Section 38(k) of the Federal Deposit Insurance Act. An objective of this review was to determine the causes of the financial institution’s failure and resulting material loss to the Deposit Insurance Fund.

13. In August 2009, the FDIC issued its Audit Report of Haven Trust Bank, Report No. AUD-09-017 (the “Material Loss Report”). Therein, the FDIC reported, among other things, that the key cause of the failure of Haven Trust Bank was that its Board of Directors did not adequately identify, monitor, and control risk in its loan portfolio.

14. According to the Material Loss Report, Haven Trust Bank concentrated its loan portfolio on acquisition, development, and construction (“ADC”) loans and commercial real estate (“CRE”) loans.

15. The FDIC further reported that Haven Trust Bank had grown rapidly, from \$29 million in assets in its first year of operations, to \$550 million in assets by 2007. According to the Material Loss Report, such rapid growth was partially the result of the use of non-core funding, including brokered deposits, to fund risky ADC loans and other types of CRE lending.

16. The Material Loss Report reported that the value of Haven Trust Bank’s assets declined, culminating in Georgia Banking Officials deeming the bank “not viable.” The bank was thereafter closed in December 2008, and on February 23, 2009, Debtor filed a voluntary Chapter 7 bankruptcy case in the Northern District of Georgia.

DEBTOR’S BANKRUPTCY CASE

17. Debtor has scheduled total debt in the amount of \$9,017,437.49 and total assets in the amount of \$0.00 (Doc. No. 3, p. 1). Debtor’s schedules evidence its insolvency.

18. The Trustee has identified as an asset of the bankruptcy estate claims against Debtor’s shareholders and directors for improper transfers of funds from the Debtor in January and May 2008.

19. In its Statement of Financial Affairs, Debtor identified a portion of the transfers in question, totaling \$313,709.72, representing transfers made to insiders of the Debtor.

THE TRANSFERS

20. On January 16, 2008, Debtor made distributions to shareholders, including to the Shareholder Defendants, in the total gross amount of \$242,238.00 (the “January Transfers”). The individual distributions made by Debtor to the Shareholder Defendants as part of the January Transfers are identified on Exhibit “A” attached hereto.

21. On May 5, 2008, Debtor made distributions to shareholders, including to the Shareholder Defendants, in the total gross amount of \$300,000.00 (the “May Transfers”). The individual distributions made by Debtor to the Shareholder Defendants as part of the May Transfers are identified on Exhibit “B” attached hereto.

22. The transfers referenced in both Paragraph 20 and Paragraph 21 will be hereinafter referred to as the “Transfers.” The Transfers, collectively, totaled \$542,238.00.

23. Debtor made the Transfers to fund payment of income taxes at the shareholder level. Debtors received no benefit or value of any kind whatsoever in exchange for the Transfers.

24. On or about May 7, 2010, the Trustee made demand on Debtor’s shareholders for return of the Transfers. In response, Trustee received a total of \$13,936.87 from certain individual shareholders upon whom demand was made. Accordingly, a total of \$528,301.13 of the Transfers has not been turned over to the bankruptcy estate.

COUNT I: AVOIDANCE AND RECOVERY OF THE TRANSFERS UNDER 11 U.S.C. §§ 548(a)(1)(B) and 550

25. Plaintiff incorporates by reference the allegations of Paragraphs 1 through 24.

26. The Transfers were transfers of an interest of Debtor in property made within two (2) years before the Petition Date. Debtor received no consideration for the Transfers. Debtor received less than reasonably equivalent value in exchange for Transfers.

27. At the time of the Transfers, Debtor was insolvent or became insolvent as a result of the Transfers. Alternatively, Debtor was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the Debtor was an unreasonably small capital.

28. The Transfers are avoidable under 11 U.S.C. § 548(a)(1)(B) and are recoverable from the Shareholder Defendants under 11 U.S.C. § 550.

**COUNT II: AVOIDANCE AND RECOVERY OF THE TRANSFERS
UNDER O.C.G.A § 18-2-75(a) AND 11 U.S.C. §§ 544 & 550**

29. Plaintiff incorporates by reference the allegations of Paragraphs 1 through 28.

30. The Transfers were transfers of an interest of Debtor in property.

31. Debtor received less than reasonably equivalent value in exchange for the Transfers.

32. Debtor was insolvent at the time of the Transfers or was made or became insolvent as a result of the Transfers.

33. At the time of the Transfers, Debtor had one or more actual unsecured creditors, and of these one or more actual unsecured creditors remain unpaid.

34. The Transfers are avoidable pursuant to § 544 and O.C.G.A. § 18-2-75(a) and recoverable against the Shareholder Defendants under §550 of the Bankruptcy Code.

COUNT III: CAUSE OF ACTION FOR ILLEGAL DISTRIBUTIONS TO SHAREHOLDERS UNDER O.C.G.A. §14-2-640(c)

35. Plaintiff incorporates by reference the allegations of Paragraphs 1 through 34.

36. The Officer/Director Defendants were shareholders of the Debtor at the time of the Transfers.

37. Debtor's Board of Directors, including the Officer/Director Defendants, voted for or assented to the Transfers.

38. The Transfers constituted the transfer by the Debtor of money or property.

39. The Transfers were for the benefit of Debtor's shareholders, including the Shareholder Defendants.

40. After giving effect to the Transfers: (a) Debtor was not able to pay its debts as they became due in the ordinary course of business; or (b) Debtor's total assets were less than the sum of its total liabilities, plus the amount that would have been needed, if Debtor were to have been dissolved at the time of the asset transfer, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights were superior to those receiving the distribution.

41. As such, the Transfers were illegal distributions to shareholders pursuant to O.C.G.A. § 14-2-640(c), which should be set aside and recovered for the benefit of Debtor's estate.

42. The Officer/Director Defendants, directors of the Debtor at the time of the Transfers, are liable for the amount of the Transfers.

COUNT IV: CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY

43. Plaintiff incorporates by reference the allegations of Paragraphs 1 through 42.

44. At the time of the Transfers, the Debtor was insolvent or was within the zone or vicinity of insolvency.

45. At the time of the Transfers, the Officer/Director Defendants owed to Debtor's creditors various fiduciary duties, including the duty of loyalty, the duty of care, the duty of faith and fair dealing, and the duty to manage and preserve Debtor's assets for the benefit of Debtor's creditors.

46. Debtor's directors, including the Officer/Director Defendants, breached their fiduciary duty to Debtor's creditors by voting for and assenting to the Transfers.

47. The Officer/Director Defendants directly and indirectly benefitted from the Transfers by virtue of their positions with and interests in Debtor.

48. The breach of fiduciary duties caused damages and harm to Debtor and to its creditors in an amount to be determined at trial.

COUNT V: CAUSE OF ACTION FOR UNJUST ENRICHMENT

49. Plaintiff incorporates by reference the allegations of Paragraphs 1 through 48.

50. The Transfers were made for the benefit of Debtor's shareholders, including the Shareholder Defendants.

51. The Transfers were made to shareholders, including the Shareholder Defendants, to enable payment of income taxes which were never due and for which payment was never made. Rather, the Shareholder Defendants retained the Transfers for themselves.

52. As a result, the Shareholder Defendants have been unjustly enriched and have benefitted at the direct expense of the bankruptcy estate.

53. Accordingly, the Shareholder Defendants should be required to disgorge the portions of the Transfers made to them, and Plaintiff should recover from the Shareholder Defendants the value of same.

WHEREFORE, Trustee prays that the Court enter judgment in her favor and against the Shareholder Defendants and the Officer/Director Defendants as follows:

- (a) avoiding the Transfers and awarding recovery to Plaintiff in an amount not less than \$528,301.13, the full amount of the Transfers, or such other value as is established at trial, against each of the Defendants;
- (b) awarding actual and compensatory damages against each of the Defendants in an amount to be determined at trial;
- (c) awarding pre-judgment and post-judgment interest at the legal rate on the amount of Plaintiff's judgment as allowed under 28 U.S.C. § 1961 from the date of this Complaint;
- (d) awarding the costs, expenses, and fees incurred by Plaintiff in prosecuting this Complaint; and
- (e) providing such other and further relief as the Court may deem just and proper.

Respectfully submitted this 22nd day of February, 2011.

LAMBERTH, CIFELLI, STOKES
ELLIS & NASON, P.A.

Counsel for Trustee

By: /s/ J. Michael Lamberth

J. Michael Lamberth

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By: /s/ Maggie Rentz

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EXHIBIT "A"
JANUARY 2008 TRANSFERS TO SHAREHOLDER DEFENDANTS

<u>Shareholder Defendant</u>	<u>% Owned</u>	<u>Distribution Amount</u>
R.C. Patel	11.2%	\$27,136.31
Mukesh C. Patel	11.2%	\$27,136.31
Brij M. Kapoor	6.81%	\$16,503.23
Mukund R. Patel	5.45%	\$13,213.03
Narendra D. Patel	5.46%	\$13,226.33
Dhiru G. Patel	5.46%	\$13,226.33
Balvant R. Patel	4.17%	\$10,111.59
Kenneth A. Cutshaw	0.08%	\$187.25
	Total:	\$120,740.38

EXHIBIT "B"
MAY 2008 TRANSFERS TO SHAREHOLDER DEFENDANTS

<u>Shareholder Defendant</u>	<u>% Owned</u>	<u>Distribution Amount</u>
R.C. Patel	11.2%	\$33,607.00
Mukesh C. Patel	11.2%	\$33,607.00
Brij M. Kapoor	6.81%	\$20,438.45
Mukund R. Patel	5.45%	\$16,363.70
Narendra D. Patel	5.46%	\$16,380.16
Dhiru G. Patel	5.46%	\$16,380.16
Balvant R. Patel	4.17%	\$12,522.71
Kenneth A. Cutshaw	0.08%	\$231.90
	Total	\$149,531.08