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June 3, 2022

VIA ECF

The Honorable Margo K. Brodie
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

RE: *United States Securities and Exchange Commission v. GPB Capital Holdings, LLC*
No. 21-cv-583-MKB-VMS (E.D.N.Y.)

Dear Judge Brodie:

We respectfully write in response to the letter dated June 2, 2022 (the "Letter") from Plaintiff Securities and Exchange Commission (the "SEC" or the "Commission") regarding the Motion by this Firm's client, Defendant David Gentile, for an order modifying the Court's Amended Order Appointing Monitor (the "Monitor Order") (Dkt. 39) pursuant to Fed. R. Civ. P. 60(b) (Dkts. 79-83).

While we consent to the SEC's request for a conference regarding Mr. Gentile's motion, we strongly disagree with much of the Commission's predicate for such a conference. Since a pre-motion conference is not required by this Court for a motion pursuant to Fed. R. Civ. P. 60 (Brodie Rule 3.A.), ordinarily any such conference would be held once the motion is fully submitted. However, given the degree to which the Commission has provided misleading arguments and inaccurate factual assertions in the Letter – as the Commission did in its motion seeking the appointment of the Monitor over Defendant GPB Capital Holdings, LLC ("GPB" or the "Company") (Dkt. 12) – we agree that a conference is necessary now, even if it is out of the regular course provided by the Federal Rules of Civil Procedure, the Local Civil Rules of this Court, and Your Honor's Individual Practices and Rules.

We will not attempt to rebut each of the SEC's allegations in this letter, but there are several fundamental points that warrant illumination. First, the Commission contends that a receivership is timely and Mr. Gentile's motion is baseless because the Company has, under the Monitor's tenure, liquidated much of the Company's assets. The Commission claims now that "[i]rrespective of Gentile's personal views of his current hand-picked management team, the notion that GPB CH, which is under Court supervision in this civil enforcement action, should continue to engage in the investment advisory business with a long term outlook borders on the absurd" (Letter at 3). In fact, what is "absurd" is the Commission's current assertions are *wholly inconsistent* with the representations it made to the Court in seeking the monitorship in the first place. The Court will recall that the SEC argued that a Monitor was necessary to "ensure that GPB Capital maintains its existing agreements" (Dkt. 12 at 6) and to "maintain stability to preserve assets for investors" (Dkt.

12 at 1) during the pendency of this lawsuit and the indictment against Mr. Gentile. Indeed, the Monitor Order drafted by the SEC specifically required that the "intended investment strategy" of each investment be "consistent with the investment objective as stated in the governing documents" (Monitor Order at ¶ 14). In reality, it appears that the Commission and its Monitor played a game of bait and switch with the Court and Mr. Gentile by saying that a monitor was needed to preserve the status quo and then overseeing a fire sale of the assets managed by a company owned solely by Mr. Gentile. Apparently, contrary to the Commission's statements to the Court, it was the Commission and its Monitor's intention all along to prevent the Company from operating as a going concern and set it up for liquidation.

Second, the Commission and its Monitor's conduct have deprived Mr. Gentile of the due process to which he would have been, and still should be, entitled to had the Commission not misled the Court and sought a receivership from the outset. To make matters worse, when Mr. Gentile sought to communicate with the Company and the Monitor over the issues he ultimately raised in the Motion, the Company and the Monitor refused to engage with him. When he sought to avail himself of the dispute resolution provisions in the Monitor Order, the Commission, the Company, and the Monitor all told the Court at a December 1, 2021 hearing that Mr. Gentile should pursue these issues in lawsuits in Delaware because he was not a party to the Monitor Agreement (Dkt. 63). Left with no choice but to litigate, Mr. Gentile filed the instant motion to alert the Court of these circumstances, seek its guidance in adjusting the Monitor's authority to the Company's current situation, and to ensure that the Monitor and Company abide by the SEC's stated purpose for the monitorship of preserving the status quo. Remarkably, the Motion was met with the Commission's Letter alleging that the motion was brought in bad faith and as a pretext.

Third, the Commission, in highly inflammatory tones, alleges without an actual factual basis that Mr. Gentile recently appointed several GPB managers who were strategically enlisted to assist Mr. Gentile with "seizing the controls of GPB Capital Holdings, LLC and its investment funds" (Letter at 1). That Mr. Gentile is explicitly seeking to *retain and not terminate* the Monitorship is ample proof that he is not attempting to regain control over his company. Even further, Mr. Gentile's Motion avers that he "intends for new management to work with the Monitor, Interim Management, and Board of Highline in the manner that the Court intended and not as an attempt to reach-around the Monitor" (Motion at 24). Neither the notice letter nor Mr. Gentile's appointment of additional Managers restrict the authority of current management. Had the SEC or the Monitor done their homework prior to their declaration of an "emergency," they would have known that two of the additional managers have performed services for the Company during the pendency of the Monitorship. To suggest that these Managers are simply Mr. Gentile's puppets when they are known to, and were retained by, the Company's Interim Management and presumably known to the Monitor is a gross mischaracterization of facts of which the Commission is or should have been aware. Indeed, the newly appointed managers are each highly accomplished professionals with years of specific experience in the industries in which GPB operates.

In reality, there is nothing in the Monitor Order, including paragraph 6, that restricts the Company's Operating Agreement or Mr. Gentile's rights under the Operating Agreement, as the

Company's sole owner, to appoint managers. Under GPB's Operating Agreement, the Members (that is, Mr. Gentile) have the sole right to appoint managers. This appointment power does not belong to GPB, and the Company has no power to unilaterally amend or curtail these appointment rights—by agreement with the SEC or otherwise—without Member consent. Nothing in the Monitor Order provides otherwise – the SEC simply did not seek, nor could it seek, to remove or alter these appointment powers that are clearly available under the Operating Agreement. Yet, the SEC has argued that Mr. Gentile is not a party to the Monitor Agreement, and thus there is no Member consent given to the Monitorship. The SEC cannot have it both ways by arguing on the one hand, that Mr. Gentile is not a party to the Monitor Agreement and therefore cannot avail himself of its dispute procedures, and on the other, claiming that the Monitor Agreement divests him of his *exclusive* right to appoint managers under GPB's Operating Agreement as GPB's sole Member. Ironically, the Company with the Monitor's approval has, in asserting other arguments and justifying other actions, relied on the very same Operating Agreement that authorizes Mr. Gentile, and no one else, to appoint managers to the Company of which he is the sole owner. Here again, the Commission is seeking to divest Mr. Gentile of rights and without due process.

Finally, the Commission's Letter continues to stray from reality in its reference to the notice dated May 27, 2022 (the "Notice") that Mr. Gentile sent to GPB giving notice of the new Managers' appointment, which the Commission claims is designed to "assert management control over GPB CH."[1] Far from the Commission's fabricated accusation, the Notice, which is required for new manager appointments under GPB's Operating Agreement, simply notified Robert Chmiel that while additional Managers were appointed, Mr. Chmiel remains a Manager and the CEO of GPB. The SEC's cherry-picked quote from the Notice merely reminds Mr. Chmiel that he should seek consensus with the newly appointed Managers for any actions requiring Manager approval because the GPB Operating Agreement requires majority approval at the Manager level.

We respectfully submit that the purpose of any conference the Court schedules now should be to: (i) set out a schedule for the Commission to respond to Mr. Gentile's motion pending before the Court; (ii) set a briefing schedule for any relief that the Commission intends to seek; and (iii) ensure that any application by the Commission for the conversion of the Monitorship to a receivership meets the due process and evidentiary requirements for such relief.

Respectfully submitted,

Daniel J. Horwitz

Enclosure

[1] *See* Exhibit A, May 27, 2022 Letter of Member Notice from David Gentile to Robert Chmiel.