UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. GPB CAPITAL HOLDINGS, LLC; ASCENDANT CAPITAL, LLC; ASCENDANT ALTERNATIVE STRATEGIES, LLC; DAVID GENTILE; JEFFRY SCHNEIDER; and JEFFREY LASH, Defendants.	21-cv-00583-MKB-VMS

DEFENDANT GPB CAPITAL HOLDINGS, LLC'S MEMORANDUM IN RESPONSE TO THE OBJECTIONS OF DAVID GENTILE, JEFFRY SCHNEIDER, AND ASCENDANT CAPITAL, LLC TO MAGISTRATE JUDGE SCANLON'S REPORT AND RECOMMENDATION

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I. PRELIMINARY STATEMENT

Defendant GPB Capital Holdings, LLC ("GPB Capital" or "the Company") respectfully submits this response to the Objections of Jeffry Schneider and Ascendant Capital, LLC ("Ascendant") (Dkt. 167), and David Gentile (collectively, the "Objectors") (Dkt. 168), to Magistrate Judge Scanlon's July 28, 2023 Report and Recommendation ("R&R") (Dkt. 157). As described in more detail below, the Objectors' challenges to the R&R and to the conversion of the Monitorship to a Receivership are wholly without merit. Accordingly, GPB Capital respectfully requests that the Court adopt the R&R.

The following is undisputed:

- Gentile did not object to this Court's entry of the Monitor Order (Dkt. 23) or the Amended Monitor Order (Dkt. 39).
- The Amended Monitor Order provides that the Monitor has the authority to approve or disapprove the retention of any management-level professional at GPB Capital and the limited partnerships it manages (the "GPB Funds"). Dkt. 39 at ¶ 6(e).
- The Amended Monitor Order provides that the Monitor has the authority to approve or disapprove any material change in compensation for executive officers of the Company. *Id.* at ¶ 6(d).
- The Amended Monitor Order provides for conversion of the Monitorship to a Receivership in the event of material noncompliance that is not cured within 10 business days. *Id.* at ¶¶ 20-21.[1]
- Without notifying or consulting GPB Capital's CEO, or seeking approval from the Monitor, Gentile purportedly appointed three managers to run the Company (the "Gentile Managers").
- Without notifying or consulting GPB Capital's CEO, or seeking approval from the Monitor, Gentile and the Gentile Managers approved an amended operating

[1] The Amended Monitor Order permits only *GPB Capital* to oppose the conversion of the Monitorship into a Receivership (*see* Dkt. 39 at ¶ 21) ("GPB shall be afforded an opportunity to oppose any [] application by the SEC [to convert the Monitorship to a Receivership] before conversion to a receivership"); the Amended Monitor Order does not explicitly permit Gentile or the other Objectors to assert such objections. Indeed, Judge Scanlon previously held that Gentile could not invoke a similar provision in the Amended Monitor Order, which permitted only GPB Capital to present its "disagree[ments] with [certain] of the Monitor's decisions . . . to a Court-appointed Federal Magistrate Judge . . . for mediation" (*id.* ¶ 4). *See* April 28, 2022 Text Order.

agreement for the Company that purported to, amongst other things, (i) provide up to $400,000 per year in compensation to each of the Gentile Managers; (ii) provide Gentile augmented rights to access the Company's books and records beyond what is required under Delaware law; (iii) allow Gentile unilateral rights to further amend the operating agreement; and (iv) provide Gentile with mandatory, as opposed to discretionary, quarterly tax distributions.

- Gentile told GPB Capital's Manager/CEO, in a letter dated May 27, 2022, that "[a]lthough you retain your role as CEO, you should immediately cease any and all actions taken or to be taken in the capacity as Manager, and you should seek consensus with [the Gentile Managers] regarding the course of GPB and any actions to be taken by the Manager." Dkt. 102-3.

- On May 31, 2022, the Monitor notified Gentile that he had caused violations of the Amended Monitor Order, yet Gentile failed to cure the violations within the 10 business days prescribed by the Amended Monitor Order. *See* Dkt. 102-6.

- In his Rule 60 Motion, dated May 31, 2022, Gentile stated that he sought to amend the Amended Monitor Order to, among other things, eliminate the Monitor's authority to review any corporate transactions whatsoever during "the pendency of any strategic assessment by [the Gentile Managers]," and entirely prevent the Monitor from approving any "s[ale]or [] dispos[ition] of any assets owned or held by GPB or any GPB portfolio company." Dkt. 80 at 1.

- In late June 2022, the Gentile Managers notified the Company that GPB Capital should not take any steps to (i) liquidate assets owned by GPB Capital-managed investment funds (*i.e.*, portfolio companies), (ii) distribute money to investors, or (iii) make any major decisions until they (the Gentile Managers) were consulted with and included in the Company's governance.

In his objections to the R&R, Gentile completely ignores all that has transpired and somehow claims that, because the Gentile Managers were never recognized or compensated by the Company, his actions did not actually harm the Company or Investors, and that a Receivership is thus unwarranted. Gentile's "no harm, no foul" argument is absurd. As a threshold matter, it is not even a colorable argument against conversion of the Monitorship to a Receivership. The Amended Monitor Order permits the SEC to seek a Monitorship solely on the occurrence of an uncured violation of the Amended Monitor Order—*not* only if that uncured violation results in harm.

In any event, even if Gentile's attempted corporate coup was unsuccessful, his conduct indisputably *did* cause harm—particularly for the very Investors that the Amended Monitor Order was intended to protect. *See* Dkt. 23 at 1 ("The Court finds that . . . the appointment of a monitor in this action . . . is necessary and appropriate for the protection of investors."). As Judge Scanlon correctly found, Gentile's conduct put the Company in a "precarious position," which created "uncertainty" and had "significant consequences," including "damaging [the Company's] financial health and, by extension, the finances of its investors." R&R at 26. Thanks to Gentile's actions and the uncertainty he created, the Company was forced to devote resources to addressing corporate governance issues, and most importantly, it was prevented from distributing money to Investors. The Company avoided further damage only because the SEC's motion to convert the Monitorship into a Receivership stopped Gentile and the Gentile Managers from attempting additional detrimental action. The Receivership—which, if granted, would prevent future attempts by Gentile to take over the Company or improperly interfere with its management—is necessary both to protect Investors' money from Gentile, and to most efficiently facilitate the return of money to Investors who have not received any distributions from the GPB Funds since mid-2018.

As discussed more fully below, the Objectors fail to offer any legally or factually sufficient basis for this Court to reject the R&R. Accordingly, the Court should overrule the objections and adopt Judge Scanlon's R&R.

II. STATEMENT OF FACTS

A. The Formation Of GPB Capital And Its Managed Funds

GPB Capital, which was formed in 2013, is the general partner of the GPB Funds. Dkt. 1 at ¶¶ 2, 23-27, 29. The Company provides management services to the GPB Funds, which at the time that the GPB Funds were actively raising money, targeted potential investments in various business sectors. Between 2013 and 2018, approximately 17,000 investors purchased limited

partnership interests in the GPB Funds ("Investors"). *Id.* at ¶ 2. The GPB Funds utilized their raised capital to acquire assets, including operating businesses, such as automobile dealerships and healthcare technology companies, as well as real estate holdings and other investments (collectively, the "Portfolio Companies"). *Id.* Investors received periodic cash distributions from the GPB Funds, and were initially permitted to redeem out their investment in its entirety. Distributions and redemptions, however, ceased around August 2018. *Id.*

B. The Criminal Case And SEC Enforcement Action Lead To The Appointment Of The Monitor Over GPB Capital And The GPB Funds

On January 29, 2021, a federal grand jury sitting in the Eastern District of New York returned a sealed indictment charging Gentile, Schneider, and Jeffrey Lash (the "Criminal Case"),[2] in connection with an alleged fraudulent scheme involving GPB Capital and the GPB Funds. On February 4, 2021, the SEC filed the instant action based on the same alleged underlying facts at issue in the Criminal Case.

On February 5, 2021, Gentile resigned as GPB Capital's CEO and sole Manager, while retaining his ownership of the Company. Dkt. 90 ¶ 10.With his resignation, Gentile named CFO Rob Chmiel as the Company's new CEO and sole Manager. *Id.* Three days later, the SEC moved for the appointment of a monitor to oversee GPB Capital's assets. In support of its motion, the SEC explained that an independent monitor was "necessary to protect investors, given the actions of GPB Capital's principal, David Gentile." Dkt. 12 at 1. According to the SEC:

> The principal source for potential investor recovery is revenue generated by the several dozen automobile dealerships owned by GPB Capital. These dealerships have contractual relationships with lenders and manufacturers that are now at risk of termination because of, among other things, Gentile's arrest. In addition, GPB Capital, as it has recently done, can sell its dealerships to generate cash, and Gentile and his handpicked management team should not

[2] *United States v. Gentile*, Case No. 1:21-cr-0054-DG-PK (E.D.N.Y.).

> have unchecked authority over incoming cash that could be used to redeem investors.

Id. at 2.

The purpose of the Monitorship was thus (i) to protect GPB Capital's ability to maintain certain contractual arrangements that might otherwise have been impaired by Gentile's arrest, and (ii) to protect Investors' money from the threat posed by Gentile and those associated with him.

The following week, the Court granted the SEC's motion and appointed Joseph T. Gardemal III as Monitor based on its finding that "the appointment of a monitor . . . over [GPB Capital] is necessary and appropriate for the protection of investors." Dkt. 23 at 1. The Court amended the original order appointing the Monitor on April 14, 2021 (the "Amended Monitor Order"). The Amended Monitor Order authorized the Monitor to, among other things, review the current and historical finances and operations of GPB Capital and its investment funds (including audited financial statements), approve or disapprove proposed material corporate transactions, and approve or disapprove the retention of any management-level professional or person. Dkt. 39 at ¶ 6. Gentile did not object to the entry of either the Monitor Order or the Amended Monitor Order.

In the two and one-half years since the Monitor's appointment, and through the combined efforts of the Monitor and the Company's legitimate management team (led by Chmiel), GPB Capital has helped the GPB Funds amass approximately $1 billion from the sale of Portfolio Companies, which the Company intends to distribute to the Investors.

The Criminal Case against Gentile and Schneider is scheduled for trial on June 3, 2024 (*see* 1:21-cr-0054, Dkt. 210). On June 12, 2023, the Court accepted Lash's guilty plea, in which he admitted, in part:

> On April 28, 2016, I, along with David Gentile, initiated an interstate wire payment of approximately $1,050,000 from my personal Chase bank account to the Gentile Prime Brokerage Automotive Portfolio Chase bank account. I knew that the money

> would be booked and falsely be represented as revenue in the financial statements of the Automotive Portfolio. I was aware at the time that such funds were not revenue and would be provided to investors and prospective investors to induce them into investing money in the Automotive Portfolio.[3]

1:21-cr-0054, Dkt. 214, 26:11-21.

C. Gentile's 2022 Memorial Day Weekend Coup Attempt

On May 27, 2022, the Friday before Memorial Day weekend 2022, Gentile—still GPB Capital's 99% owner, but sixteen months removed from having any managerial role in the Company—without prior notice to, or conferring with, GPB Capital's CEO, and without seeking approval from the Monitor, purported to take two actions in violation of the Amended Monitor Order. First, Gentile unilaterally appointed three new managers to the Company's management team (*i.e.*, the Gentile Managers), giving them 75% of the Company's voting power. Second, Gentile amended GPB Capital's operating agreement for the benefit of himself and his handpicked managers. The amended operating agreement would, among other things, provide (i) for substantial compensation arrangements for the Gentile Managers, (ii) unilateral power to Gentile to further amend the Company's operating agreement, (iii) mandatory cash distributions to Gentile for taxes, and (iv) expanded rights for Gentile to access Company records. *See* Dkt. 90 at ¶ 21.

In a letter to Chmiel, dated May 27, 2022[4]—but which Gentile did not actually provide to Chmiel until May 31, 2022—Gentile advised Chmiel of his actions, and further stated:

> I expect that [the Gentile Managers] will be given full and immediate access to GPB, its officers and employees, and any other resources or information requested by them to fulfill their mandate as Managers of GPB. Although you retain your role as CEO, *you should immediately cease any and all actions taken or to be taken in the capacity as Manager*, and you should seek consensus with

[3] "Automotive Portfolio" refers to GPB Automotive Portfolio, LP, which is one of the GPB Funds. *See* Dkt. 1 at ¶ 23.
[4] Notably, Gentile did not email the May 27, 2022 letter to Chmiel. Rather, he sent the letter by FedEx to arrive the following business day, May 31, 2022.

> [the Gentile Managers] regarding the course of GPB and any actions to be taken by the Managers.

Dkt. 102-3 (emphasis added). Relatedly, on May 31, 2022, Gentile filed a Motion for Relief Under Federal Rule of Civil Procedure 60(b) (the "Rule 60 Motion"), which sought to further amend the Amended Monitor Order to reduce the Monitor's authority over GPB Capital, and challenged, among other things, GPB Capital's financial management.

Specifically, Gentile proposed certain amendments to the Amended Monitor Order (*see* Dkt. 81-1) that would: (i) allow Gentile to invoke the mediation clause[5] (¶¶ 4, 5); (ii) eliminate the Monitor's authority to approve corporate transactions of less than $10 million (¶ 6(a)); (iii) eliminate the Monitor's authority to review any corporate transactions whatsoever during "the pendency of any strategic assessment by [the Gentile Managers]," where "strategic assessment" is an undefined term (*id.*); (iv) entirely prevent the Monitor from approving any asset sales by the GPB Funds or Portfolio Companies (¶ 6(c)); and (v) alter the Receivership provision, such that the SEC would be required to provide Gentile personally with advanced notice of any intention to convert the Monitorship into a Receivership (¶ 20).[6]

As a result of Gentile's attempted takeover, GPB Capital was, unwittingly, in violation of this Court's Amended Monitor Order. On May 31, 2022, the Monitor notified the Company and Gentile of the violation and of the 10-day cure period. *See* Dkt. 90 at ¶ 22. Gentile, however, took no steps to cure, even though he alone was able to do so. The SEC, relying on provisions in the Amended Monitor Order warning that non-compliance with the Amended Monitor Order would result in conversion of the Monitorship into a Receivership (*see id.* at ¶ 21), filed a motion, dated

[5] Judge Scanlon previously denied Gentile's attempts to utilize this clause for his own benefit. *See* April 28, 2022 Text Order.

[6] For avoidance of doubt, we note that the items described above represent only a portion of the changes that Gentile proposed in seeking to weaken the Monitor's oversight role.

June 13, 2022, to convert and to appoint Gardemal as Receiver (the "Receivership Motion"). *See* Dkt. 88.

On June 30, 2022, attorney Steven L. Hayes, on behalf of the Gentile Managers, sent a letter to outside counsel for the Company and the Monitor. *See* June 30, 2022 Steven Hayes Letter, Dkt. 104 at Ex. A (the "Hayes Letter"). Hayes, amongst other things, questioned why the Company had terminated "three key executives without first consulting with the Gentile Managers and insisted that the Company reinstate these individuals "as soon as practicable." *Id.* at 3.[7] Hayes then implicitly stated the goal of Gentile's coup attempt: to prevent the flow of money to Investors and the further sale of any Portfolio Companies. He wrote:

> We believe that it is in the best interests of the GPB investors that GPB maintain status quo unless and until the newly appointed managers' positions are confirmed by the appropriate court or until the parties can reach an agreement on the newly appointed managers' role. Similarly, until GPB's current manager confers with the newly appointed managers and allow [sic] the newly appointed managers to participate in GPB governance and management oversight, with specific regard to maximizing value for the investors, *liquidation of GPB portfolio company assets, distributions of capital, and major decisions that will affect the course of the GPB funds should not take place*.

Id. (emphasis added).

With the Hayes Letter, the die had been cast: either the Company had to recognize the authority of the Gentile Managers and consult with them before distributing money to Investors or further divesting the GPB Funds' assets, or do nothing until a court determined the propriety of the Gentile Managers' appointments or an agreement was otherwise reached. At no point between the sending of the Hayes Letter and the issuance of the R&R did Gentile or his managers offer a compromise resolution to GPB Capital regarding the governance crisis Gentile created.

[7] The unnamed executives had annual compensation packages worth approximately $1.7 million combined. Dkt. 104 ¶ 14.

D. GPB Capital's Governance Crisis

Since Gentile's takeover attempt, GPB Capital has faced a corporate governance crisis as to who has authority to make decisions on behalf of the Company—that is, Chmiel, the CEO/Manager, or the Gentile Managers (and, by proxy, Gentile). This uncertainty has prevented the Company from executing a plan to distribute approximately $1 billion to investors. Additionally, and as emphasized by the Hayes Letter, the Gentile Managers could take action to prevent any significant corporate decisions, including by blocking money from being disbursed to Investors or by trying to reverse or claw-back distributions, thereby subjecting the Company to substantial litigation risk and additional cost.

Further, the Company was forced to devote significant time and resources to determine what, if any, actions it could take without having to consult with, or otherwise involve, the Gentile Managers, even as the Company steadfastly maintained the Gentile Managers' illegitimacy. Thus, the Company was prevented from carrying out all but the most routine business, and only transact business with respect to Portfolio Companies where the Gentile Managers' authority was not legally relevant.

Gentile's actions had additional consequences for the Company. In early 2023, Chmiel and his management team sought to establish new banking relationships to offset risks with the primary banking relationship of the GPB Funds, Signature Bank, which the New York State Department of Financial Services closed on March 12, 2023. *See* Dkt. 143. Five major financial institutions denied GPB Capital's applications to open new accounts for the Company and the GPB Funds because of Gentile's continued ownership of GPB Capital and the financial institutions' concerns about the limited controls offered by the Amended Monitor Order.

That is to say, despite the fact that the Monitor, by Order of this Court, had by that time been in place with supervisory authority over GPB Capital and the GPB Funds for the better part

of two years, the banks were nevertheless wary of doing business with GPB Capital and its Funds while the specter of the Gentile Managers hung over the Company, which represented Gentile's reemergence as a potentially controlling voice in Company management.

E. The Gentile Managers Resign Only After The R&R Is Issued

Following Judge Scanlon's R&R, the Gentile Managers responded in an apparent (and misguided) attempt to return GPB Capital to its pre-coup status quo. *See* Dkt. 168 at 19-20. First, on August 4, 2023, Michael Fasano resigned as Manager.[8] Dkt. 168-7. Then, weeks later on August 27, 2023, Matt Judkin emailed his resignation to Gentile, with copy to GPB Capital's CEO. *Id.* at 4. In his email, Judkin purported to "follow up . . . in writing to [a] conversation" he supposedly had with Gentile three months prior in "May, 2023." *Id.* Judkin stated that, "[w]ith Rick Murphy resigning on May 4th, I too resigned. Can't and wont [sic] do this with current manager missing. Its [sic] just too much for myself with everything else going on in my life." *Id.* Neither Gentile nor Murphy had previously suggested to Chmiel, or anyone else at the Company, that Murphy might have resigned as a Manager until Judkin raised that prospect in his August 27 email. And the Company only learned of Murphy's written resignation when it was attached as an exhibit to Gentile's Objections to the R&R. *See id.* at 2.

On August 28, 2023, counsel for Gentile notified the SEC and the Monitor that Gentile had allegedly "withdrawn the three Managerial appointments and amendments to the Operating Agreement" of the Company that he had made on May 27, 2022. *See* Dkt. 168-8. Nonetheless, counsel reiterated that Gentile maintained the right as the "sole member of [the Company] to make such lawful modifications and appointments to the Company's management structure and amendments to the Operating Agreement . . . ." *Id.* Finally, Gentile offered "[i]n the spirit of

[8] Interestingly, but not coincidentally, Fasano backdated the effectiveness of his managerial resignation to July 9, 2023.

moving forward productively," to "refrain from taking any unilateral action regarding the management and corporate governance of GPB pending resolution" of this case. *Id*.

Despite the Gentile Managers' resignations or Gentile's withdrawal of their appointments, the Company continues to face corporate uncertainty because of the looming risk that, absent this Court's appointment of a Receiver, Gentile will again take unilateral action with respect to GPB Capital's management structure and the significant funds earmarked for distribution to Investors. Gentile made this point crystal clear when, in his Objections to the R&R, he stated that, despite withdrawing his appointment of the Gentile Managers and his purported amendment to the Company's operating agreement, he nevertheless believes that he has the "right" to do so in the future. *See* Dkt. 168 at 12.

III. ARGUMENT

Magistrate Judge Scanlon's R&R properly concluded that Gentile's violation of the Amended Monitor Order triggered the proposed conversion of the Monitorship into a Receivership. R&R at 14-21. Separately, the R&R properly found that the conversion to a Receivership is an appropriate and necessary exercise of equitable relief under the securities laws to, amongst other things, preserve the status quo, conserve the existing estate, prevent the dissipation of assets, and avoid property loss and irreparable injury to Investors. *Id*. at 23-27. Moreover, the R&R correctly concluded that there are no adequate remedies available to prevent further harm to GPB Fund Investors other than the proposed Receivership. *Id*. The Court should accordingly adopt the R&R.

A. The R&R Properly Found That Gentile Caused Violations Of The Amended Monitor Order Thereby Triggering The Conversion Of The Monitorship To A Receivership.

The R&R properly found that Gentile's actions in appointing the Gentile Managers and amending the Company's operating agreement to provide them each with multi-hundred thousand

dollar annual compensation packages caused the Company to be in violation of the Amended Monitor Order and triggered the conversion of the Monitorship to a Receivership. R&R at 10-21.

The Objectors do not challenge the R&R's factual findings that Gentile (i) unilaterally appointed three managers to run GPB Capital and (ii) amended the Company's operating agreement to provide his managers with significant compensation packages. Rather, Gentile ties himself in knots to argue that the R&R contradicts itself by finding multiple violations of the Amended Monitor Order, while at the same time finding that his actions were either "a legal nullity" or ignored by the Company. *See* Dkt. 168 at 11-13. It is rather ironic that Gentile now seeks to rely on a finding that his conduct had no legal effect, especially when his conduct for the past sixteen months has only suggested that he believes exactly the opposite. And in any event, if Gentile now truly believes that his appointments were non-events—that the amendments were never adopted, and that he did not cause violations of the Amended Monitor Order—then why did Gentile feel the need to "withdraw[]" his actions? *See* Dkt. 168-8 at 1.

Gentile cannot have it both ways. He took actions that plainly violated the terms of this Court's Amended Monitor Order—an Order that he raised no objection to when it was entered in early 2021. And Gentile was unquestionably put on notice that his actions in May 2022 triggered the receivership conversion clause in the Amended Monitor Order (*see* Dkt. 39 ¶ 21). Yet, Gentile took zero steps to cure his violative conduct (while still purporting to reserve the right to undertake the very same conduct again) until more than a year later—that is the definition of "too little, too late." Moreover, the conversion to a receivership is not such a "drastic" remedy when one considers the *drastic* and extreme actions that precipitated the SEC's Receivership Motion. Gentile tried to underhandedly re-take control of a company under the oversight of a court-appointed Monitor—and the approximately $1 billion of Investor money the Company controls—from which

he had resigned a little over a year earlier in the face of a criminal indictment and SEC enforcement action regarding his alleged perpetration of a fraud on those same Investors and related self-dealing.

Accordingly, nothing in either of the Objections to the R&R provide any grounds for not adopting Judge Scanlon's conclusions that Gentile violated the Amended Monitor Order and triggered an independent basis for the conversion to a Receivership.

B. The R&R Properly Considered The Relevant Factors In Recommending A Receivership In Light Of Gentile's Harmful Conduct.

As Judge Scanlon correctly determined, a Receivership is necessary to protect the interests of the GPB Funds' Investors, maintain the status quo, conserve the existing estate, and prevent the dissipation of assets—all in the face of imminent danger to property and irreparable injury from Gentile's actions. There are no alternative remedies that could achieve the same result. Despite their objections to the contrary, the Objectors fail to rebut these sound findings.

1. The Uncertainty Caused By Gentile's Purported Appointment Of New Managers and the Purported Amendments to the Operating Agreement Harmed the Company and the Funds' Investors.

The Objectors drastically understate the corporate authority crisis created by Gentile's unilateral efforts to appoint new managers to GPB Capital and to amend the Company's operating agreement.

Gentile's actions in May 2022 directly caused GPB Capital to violate the Amended Monitor Order. Gentile's contention that "there [has] been no evidence of any supposed 'takeover ploy'" (Dkt. 141) ignores reality: his unilateral appointment of the Gentile Managers and his purported amendments to the GPB Capital operating agreement *are the takeover ploy*. These actions were hardly open, transparent, or "in good faith," as Gentile disingenuously contends. *See* Dkt. 168 at 15 n.8. Rather, Gentile failed to communicate the managerial appointments and

operating agreement amendments to either the Company's legitimate Manager or the Monitor until after the fact. And it was only after Gentile had already commenced his ploy that he filed his Rule 60 Motion to reduce the Monitor's authority. Simply put, on its face, Gentile's conduct was orchestrated to catch the Company and the Monitor off guard and to avoid as much resistance as possible. The steadfast resistance of the Monitor and GPB Capital to Gentile's scheme, which has thus far prevented the success of Gentile's corporate takeover attempt, is not a reason to reject the R&R's recommendation of more stringent protections in the form of the proposed Receivership. If anything, this has made it more apparent that the Receivership is essential to prevent future efforts by Gentile to regain control over the Company and Investors' money.

Further, that GPB Capital's legitimate Manager and the Monitor, working in concert, have succeeded in avoiding even greater disruptions in Company operations speaks to the considerable time and resources they have expended over the past sixteen months in service of mitigating the harm that Gentile caused. It does not, however, serve as evidence that a Receivership is unnecessary.

At the same time, at least some of these mitigation efforts have been in vain. Most significantly, Gentile's actions directly chilled the Company's ability to return money to Investors. The Gentile Managers demanded that the Company forego "distributions of capital" until "[the Company's CEO] confers with [them] and allow[s] [them] to participate in GPB governance." *See* Hayes Letter at 3. Under such a threat, and with Gentile having submitted a legal opinion of a former Delaware Chancery Court judge contending that the appointments were valid under Delaware law, the Company could not take steps to return money to investors without significant risk that the process would be held up in costly litigation or, if cash were somehow distributed to Investors, it would be subject to later claw-back if challenged by Gentile and his managers. In

other words, despite the fact that the Company did not recognize the validity of the Gentile Managers, Gentile nevertheless succeeded in preventing the initiation of a process to return approximately $1 billion to Investors; a crucial step in his naked attempt to regain control of GPB Capital so he could once again manage the GPB Funds' assets and control Investors' money. *See* Dkt. 168 at 10 (contending that "the available evidence suggests . . . [the Company] is better off continuing its operations"). Gentile's actions unquestionably caused significant harm to Investors.

Gentile's efforts to downplay that harm are further reflected in his attempt to distort the history of GPB Capital's transactions. In his Objections, Gentile entirely disclaims responsibility for causing the "uncertainty" around the authority of GPB Capital, calling the R&R's determination "factually untrue." *See* Dkt. 168 at 7. Gentile's argument is that no action he took prevented GPB Capital and the GPB Funds from carrying out its normal business operations. As support, Gentile cites to an April 2023 Monitor Report, which lists "reported realized values of 195%, 213%, and 134% as a result of various mergers & acquisitions and other transactions." *Id.* at 7-8 (citing Dkt. 137 at 24, 25, 27). But what Gentile conveniently leaves out is that all three of the transactions cited in the Monitor's Report *pre-date his 2022 Memorial Day weekend takeover attempt*; GPB Capital sold the three cited-to Portfolio Companies in November 2021, December 2021, and April 2022, respectively. *See* Dkt. 137 at 24, 25, 27.

In other words, if anything, the transactions Gentile has identified reflect the success that GPB Capital's legitimate management team and the Monitor have had *when unimpeded by Gentile*. With the Gentile Managers hanging over the Company, on the other hand, GPB Capital has been unable to begin the distribution process, and instead forced to expend sizeable legal fees—fees which ultimately have been borne by the Investors—to address governance questions, including

the extent to which consultation with the Gentile Mangers is necessary to execute certain transactions.

Additionally, Gentile mistakenly contends that his appointment of the Gentile Managers was irrelevant to the difficulties GPB Capital encountered when it took steps to preserve Investor money held at Signature Bank by transferring the funds to more stable financial institutions. Dkt. 168 at 11. The five financial institutions that rejected GPB Capital's applications for banking services *specifically highlighted* Gentile's continued ownership, coupled with the weak protection afforded by the Amended Monitor Order, as the reason for their rejections. That is to say, the banks, aware that the SEC felt compelled to take *additional* action against Gentile in the form of the Receivership Motion in order to fully and finally prevent his continued involvement in the Company's management, were plainly concerned about partnering with GPB Capital or the GPB Funds.

Finally, the R&R correctly found that Gentile's actions presented a real and imminent threat of financial harm to GPB Capital and its Investors based on (i) the compensation Gentile and his managers allotted to themselves from GPB Capital (up to $400,000 annually per manager); and (ii) the demanded reinstatement of three terminated executives (collectively entitled to approximately $1,700,000 annually). *See* R&R at 23, 26. The only thing that prevented the loss of these funds at Investors' expense was the SEC's Receivership Motion and GPB Capital management's refusal to engage with the Gentile Managers.

If the Monitorship structure were truly acceptable to Gentile, he would have abided by its requirements and sought approval for his appointments and the amendments in accordance with the Amended Monitor Order. Instead, Gentile disregarded this Court's Order and caused harm to GPB Capital and its Investors. It is only *now*, having failed in his attempted takeover, that Gentile

advocates for the "[c]ontinuation of the current Monitorship . . . [which maintains the] status quo" (Dkt. 168 at 15-16). It is no wonder that the Monitorship is *now* the outcome that Gentile finds most appealing: the status quo is what allowed Gentile to inject chaos into GPB Capital's business operations in the first place, and if maintained, is the outcome that would allow him to do so again.

2. The Apparent Resignations Of The Gentile Managers Only Further Support The Need For A Receivership.

Only after Judge Scanlon issued the R&R, did the Company learn that the Gentile Managers had—apparently, already—resigned. *See* Dkt. 168-7. This timing is no coincidence, and GPB Capital contends that Gentile orchestrated the resignations and their disclosures in an attempt to stave off Receivership.

Nevertheless, the resignations do not mitigate the need for a Receiver—instead, they reinforce the plain fact that nothing short of a Receivership will be able to protect the Investors from Gentile. Critically, the resignations reflect that, as long as Gentile has some authority over GPB Capital through his ownership of the Company, neither the Monitor nor the Company's legitimately-appointed Manager can be assured of any stability in the Company's corporate structure. In fact, based on the surreptitious manner in which the Gentile Managers were appointed and later resigned, neither the Monitor nor Mr. Chmiel can be certain who, at this time, even purports to be part of the GPB Capital management team.

For example, according to Gentile's Objections, Rick Murphy resigned via email on May 4, 2023, but sent this email only to Gentile, the other illegitimate Gentile Managers, his attorney, and two other unknown attorneys without providing notice to GPB Capital's legitimate Manager or the Monitor. Dkt. 168-7 at 4. Indeed, Chmiel and the Monitor were unaware of Murphy's resignation until Gentile included the resignation notice as an exhibit to his Objections. *See id.* at

2.[9] Similarly, Michael Fasano resigned via an August 4, 2023 letter, where he claimed—with no explanation—that his resignation was effective nearly one month earlier on July 9, 2023. *See id.* at 3. Finally, while Matt Judkin resigned via an August 27, 2023 email to Gentile with a copy to GPB Capital's legitimate Manager, among others, his email does not provide an effective date and at the same time suggests Judkin's resignation was effective along with Murphy's May 4, 2023 resignation. *See id.* at 4 ("With Rick Murphy resigning on May 4th, I too resigned.").

Though the actual dates of the resignations are largely immaterial, the fact that neither GPB Capital nor the Monitor were made aware that all of the Gentile Managers had apparently resigned from their purported roles until after the R&R was issued, combined with Gentile's continued insistence—to this day—that he maintains "the right" to make manager appointments in the future (*see* Dkt. 168 at 12), only underscores the very real need for the conversion to the SEC's proposed Receivership, as the R&R concluded.[10]

Gentile's somewhat perplexing August 28, 2023 letter to the SEC (Dkt. 168-8) (the "August 28 Letter") provides additional support for the adoption of the R&R. There, Gentile claims, for the first time, that he "withdr[ew] the three Manager appointments." Dkt. 168-8 at 1. But that claim contradicts statements that Gentile makes elsewhere in his Objections, as well as statements from the Managers themselves in the exhibits attached to the Objections, in which both

[9] GPB Capital cannot be certain that this resignation email would have ever been communicated to the Company and Monitor had the R&R recommended denying the Receivership Motion. Further, Gentile failed to attach any exhibits evidencing his attempts to forward this resignation email to the Company, and Gentile never sought to update the Court with this development prior to Judge Scanlon's R&R.

[10] The Objectors' arguments concerning the resignation of Fasano and Murphy are also improper. According to the Objectors, Fasano and Murphy resigned prior to the R&R's issuance. As noted, GPB Capital was unaware of these resignations until after the R&R issued, but Gentile has supposedly been aware of at least Murphy's resignation since May 4, 2023. Curiously, Gentile failed to mention that resignation in his May 8, 2023 letter to the Court (*see* Dkt. 141) and never provided an additional update to Judge Scanlon. In *Kruger v. Virgin Atl. Airways, Ltd.,* the Court explained that "[a] district court will ordinarily refuse to consider new arguments, evidence, or law that could have been, but was not, presented to the magistrate judge." 976 F. Supp. 2d 290, 296 (E.D.N.Y. 2013). Accordingly, because Gentile could have presented this evidence to the Judge Scanlon and failed to do so, the Court should not consider the Objectors' contention that the Gentile Managers' resignations weighs against a Receivership.

Gentile and the Gentile Managers contend that the Managers *resigned*. *See, e.g.*, Dkt. 168 at 18 ("[T]he managers appointed by Gentile . . . have since resigned."); Dkt. 168-7 (attaching the Gentile Managers' purported resignations). In other words, it is not even clear from the representations Gentile has made to this Court, the SEC, and the Monitor the mechanism by which the Gentile Managers' status has apparently changed.

Further, in this same August 28 Letter, Gentile also claims to have withdrawn his unilateral amendments to the Company's operating agreement. *See* Dkt. 168-8. Gentile, though, offered no effective dates for his supposed withdrawal of either the manager appointments or the operating agreement amendments, and as a result, GPB Capital is—again—left in a state of uncertainty. Remarkably, Gentile continues to maintain that he has the "right as the sole member of GPB to make such lawful modifications and appointments to the Company's management structure and amendments to the Operating Agreement" (*id.* at 1), and in so doing, demonstrates his continued disregard for the Amended Monitor Order's warning that taking such actions without the approval of the Monitor could result in Receivership (*see* Dkt. 39 ¶ 20-21). In fact, in his letter, Gentile fails to acknowledge the Monitor's authority whatsoever. *See* Dkt. 168-8.

Finally, Gentile also used the August 28 Letter to inform the SEC that he "will refrain from taking any unilateral action regarding the management and corporate governance of GPB pending the resolution of the above-captioned matter." *Id.* The Court should give this representation no weight. Not only does Gentile maintain elsewhere in the letter that he has the right to make these very changes, his promise to refrain from doing so is unenforceable.

As events of the past sixteen months have made clear, neither GPB Capital nor the Monitor can do anything to prevent Gentile from purporting to appoint new managers to GPB Capital at a later date, or from implementing a new self-serving GPB Capital Operating Agreement. Given

Gentile's history of both making significant changes to GPB Capital's operations and failing to even inform the Monitor and legitimate management of these changes, Gentile may have already taken similar actions that no party in this case is aware of (except for Gentile himself). Further, and as noted above, this Court should not ignore that the August 28 Letter already contradicts and undermines the evidence Gentile submitted, and introduces additional confusion about whether the Gentile Managers resigned or were removed. GPB Capital and its Monitorship cannot properly function with this level of uncertainty, and a Receivership is the only viable solution to resolve these issues.

In short, without a Receivership, the Company's governance, its business operations, and Investor well-being will continue to be subject to Gentile's self-serving whims.

3. A Receivership Is Necessary To Protect Investors, And No Alternative Remedy Would Be Sufficient.

The Objectors' argument in support of alternative remedies is incorrect and misleading. *See* Dkts. 167 at 12; 168 at 15. For over two years, the Court and the parties attempted an alternative remedy in the form of a Monitorship. And despite the Monitor's and GPB Capital management's successes maximizing value for Investors by selling certain Portfolio Companies, Gentile's actions have laid bare the truth of the current situation: the protections afforded to Investors by the Monitor are ultimately insufficient.

Gentile caused GPB Capital to violate the Amended Monitor Order, at which point a Receivership became necessary—a consequence that the Amended Monitor Order explicitly warned could occur. *See* Dkt. 39 at ¶ 21 ("If GPB does not comply with the above provisions and does not make requested changes within the Cure Period, upon motion of the SEC resulting in a Court Order, the Monitorship shall convert to a receivership."). Indeed, the Objectors' complaint that receiverships "should not follow requests by the SEC as a matter of course" (*see* Dkt. 167 at

2; Dkt. 168 at 6 (quoting *S.E.C. v. Am. Bd. of Trade, Inc.*, 830 F.2d 431, 436 (2d Cir. 1987))) ignores that the SEC only sought a Receivership after Gentile took action that violated an Order of the Court that provides for the appointment of a Receiver.

Moreover, the Objectors' argument that "the proper purpose of a receivership is to 'preserve the status quo'" (Dkt. 167 at 19) misstates the relevant caselaw. As plainly established in both the R&R (Dkt. 157 at 22) and the caselaw that the Objectors themselves cite, preserving the status quo is *a* proper purpose of a receivership, not *the* proper purpose. *See* Dkts. 157, 167, and 168 (citing *Eberhard v. Marcu*, 530 F.3d 122, 131 (2d Cir. 2008)). The liquidation of assets can also be a proper purpose. For example, in *S.E.C. v. Malek*, 397 F. App'x 711, 715 (2d Cir. 2010), the Second Circuit held that the district court properly exercised its equitable authority in approving a receivership and distribution plan that liquidated the receivership estate. The Second Circuit reiterated its position from *Am. Bd. of Trade, Inc.*, that it had "never vacated or modified a receivership order on the ground that a district court improperly attempted to effect a liquidation." *Id.* (quoting 830 F.2d at 437).

The Objectors also ignore the context of their cited cases, which further rebut their claim that liquidation cannot be a proper purpose of a receivership. In *Malek*, the Second Circuit explained that it only disfavors liquidation of assets under a receivership when a party seeks to use that receivership as an alternative to bankruptcy. *Malek*, 397 F. App'x at 714; *see also Eberhard*, 530 F.3d at 132 ("receivership[s] should not be used as an alternative to bankruptcy"), *Esbitt v. Dutch-Am. Mercantile Corp.*, 335 F.2d 141, 143 (2d Cir. 1964) ("We see no reason why violation of the Securities Act should result in the liquidation of an insolvent corporation via an equity receivership instead of the normal bankruptcy procedures."). Those concerns are not present here. GPB Capital itself has no assets to preserve, and Gentile is not an owner of either the GPB Funds

or the Portfolio Companies (beyond whatever limited partnership interests he owns as an ordinary GPB Fund Investor). GPB Capital is the general partner and manager for the GPB Funds that, in turn, own the Portfolio Companies (sometimes through intermediary entities). The Company—including under Gentile' tenure as CEO—provided management services to the GPB Funds in exchange for a management fee. *See* Dkt. 90 at ¶¶ 6, 9, 36. As reflected in the R&R and proposed Receivership order, the Receiver here would sell Portfolio Companies with the goal of maximizing funds to distribute to Investors and distribute those funds through a process approved and overseen by the Court, and *not* for reasons that would be better served by bankruptcy procedures.

GPB Capital has only a handful of remaining Portfolio Companies left to manage across the GPB Funds. Thus, the time is ripe to return money to the Investors and focus on maximizing the value of the limited Portfolio Companies remaining under GPB Capital's management.

C. Judge Scanlon Did Not Err By Recommending A Receivership Without Holding A Hearing.

Gentile has identified no caselaw in which a court has held that a hearing is required prior to the appointment of a Receiver. In contrast, the Second Circuit has held that a district court may appoint a receiver without first holding an evidentiary hearing, particularly where there are no material disputes of fact. *See United States v. Ianniello*, 824 F.2d 203, 207 (2d Cir. 1987) (citing *Carter-Wallace, Inc. v. Davis-Edwards Pharmacal Corp.*, 443 F.2d 867, 872 (2d Cir. 1971)). Importantly, Judge Scanlon requested written updates prior to issuing the R&R (*see* April 28, 2023 Text Order), and the Objectors identified no additional arguments, factual developments, or factual disputes that required a hearing to resolve. *See* Dkt. 141.

Accordingly, Judge Scanlon's decision to recommend the appointment of a Receiver without holding a hearing was proper.

IV. CONCLUSION

For the foregoing reasons, the Court should adopt Judge Scanlon's R&R.

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New York, New York

Respectfully submitted,

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