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May 8, 2023

BY ECF

The Honorable Vera M. Scanlon
United States Magistrate Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East, 1214 South
Brooklyn, New York 11201

Glen A. Kopp
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Re: Securities and Exchange Commission v. GPB Capital Holdings, LLC, et al., 21 cv. 583 (MKB) (VMS)

Dear Judge Scanlon:

We represent GPB Capital Holdings, LLC (“GPB” or the “Company”) in the above-referenced action. We write in response to the Court’s April 28, 2023 Order permitting the parties to submit a letter as to any fact-based updates related to (1) Defendant David Gentile’s pending motion to amend the Court’s Amended Order Appointing Monitor (the “Rule 60(b) Motion”) (Dkt. 79), and (2) the Securities and Exchange Commission’s (“SEC”) pending order to show cause (Dkt. 88) seeking the appointment of a receiver over the Company and a litigation injunction (the “Receivership Motion”).

The Company appreciates the opportunity to apprise the Court of several relevant factual developments in the roughly one year since Mr. Gentile attempted to wrest control of the Company and the approximately \$1 billion in cash the Company is managing on behalf of investors in its managed funds (the “Funds”). It is that cash that the Company hopes to return to investors on a Fund-by-Fund basis via the proposed receivership. As discussed more fully below, the basis for granting the Receivership Motion is even stronger than it was nearly a year ago. Accordingly, the Company respectfully requests that the Court grant the Receivership Motion.

I. Background

On February 5, 2021, following the commencement of the instant action and his indictment by United States Attorney’s Office for the Eastern District of New York, Mr. Gentile voluntarily stepped down as the chief executive officer (“CEO”) and sole Manager of the Company.¹ He

¹ Even though Mr. Gentile resigned as CEO and Manager of GPB Capital Holdings and from related portfolio companies in February 2021, in the last year he has at least twice falsely represented himself to be a Manager of GPB or a GPB-related entity. In September 2022, Mr. Gentile signed an “Amended Joinder Agreement to the GPB Capital Holdings, LLC Limited Liability Company Agreement” as the Company’s Manager. *See* attached Exhibit A. Then, in November 2022, Mr. Gentile signed a proxy as the “Manager” of a portfolio company from which he had previously resigned. *See* attached Exhibit B. We are not aware of Mr. Gentile having been formally reinstated as a Manager for

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appointed Rob Chmiel, then the Company's Chief Financial Officer ("CFO"), as the Company's sole Manager and interim CEO. Mr. Chmiel has served as the CEO, Manager, and CFO since that time. Shortly thereafter, on February 12, 2021, the Court appointed Joseph T. Gardemal III, Managing Director at Alvarez & Marsal, as the Company's independent monitor (the "Monitor"), based on a finding that "*the appointment of a monitor . . . over [GPB Capital] is necessary and appropriate for the protection of investors.*" Dkt. 23 at 1 (emphasis added). Mr. Chmiel, his team, and the Monitor have worked well together to manage the assets of the Funds to maximize value for investors. The current GPB management team, with the help of the Monitor, has successfully exited several investments across multiple Funds, realizing approximately \$1 billion in net cash and has taken steps to establish a distribution plan to return money to investors.

On May 27, 2022, however, Mr. Gentile – still awaiting a criminal trial in which he is alleged to have defrauded thousands of Fund investors – tried to re-assert control over the Company, the Funds, and the Funds' cash. First, Mr. Gentile purported to appoint Matt Judkin, Rick Murphy, and Michael Fasano as Managers of the Company (the "Gentile Managers") endowed with a voting majority over the management and affairs of the Company and, by extension, the Funds. The Gentile Managers then sought to amend the Company's Operating Agreement to favor themselves and Mr. Gentile personally in a blatant display of self-dealing. Among other things, the amendments to the Operating Agreement would: (1) give Mr. Gentile the ability to unilaterally amend the Operating Agreement without manager consent; (2) provide each of the Gentile Managers with salaries as high as \$400,000 per year; and (3) obligate GPB to make mandatory tax distributions to Mr. Gentile, an item which had previously been left to the discretion of GPB's Manager. *See* Dkt. 90 ¶¶ 21(A)-(F).

On May 31, 2022, Mr. Gentile's counsel notified Mr. Chmiel of the purported Operating Agreement amendments and filed the Rule 60(b) Motion in a further attempt to retake control of the Company by reducing the Monitor's authority. Later the same day, the Monitor notified GPB that the purported appointment of the Gentile Managers and Mr. Gentile's amendments to the Company's Operating Agreement had caused the Company to violate the Amended Monitor Order, which could trigger conversion of the monitorship to a receivership. Dkt. 90 at ¶ 22. The Company was helpless by itself to cure the violation that Mr. Gentile and his managers caused within the required 10-day period. Accordingly, on June 13, 2022, the SEC submitted the Receivership Motion, which sought to (i) convert the monitorship to a receivership; (ii) appoint Mr. Gardemal as Receiver; and (iii) enter a litigation injunction. *See* Dkts. 88-89.

GPB or the portfolio company, nor are we aware of Mr. Gentile having made such a request to the Monitor as would be required under the Amended Monitor Order.

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II. Factual Update

A. Approximately \$1 Billion Remains to be Distributed to Limited Partners in Certain GPB Managed Funds

The proposed receivership was intended to facilitate distributions to limited partners (*i.e.*, investors), most of whom have not received any money from the Funds since mid-2018. It would provide for a court-ordered distribution plan – to be submitted within 45 days of the entry of the order appointing the receiver – that would include provisions for: (i) an initial, interim, and final distribution to investors; (ii) a claims review and reconciliation process; (iii) a dispute resolution process; and (iv) any other mechanisms the receiver would deem reasonably necessary to efficiently distribute money to the Funds’ limited partners. *See, e.g.*, Memorandum in Support of Receivership Motion, Dkt. 89, at 9; Proposed Order Appointing Receiver and Imposing Litigation Injunction, Dkt. 91-1, at ¶ 6(P).

Without the receivership in place, however, the approximately \$1 billion that certain of the Funds are holding in anticipation of distributing to their limited partners remains in GPB-controlled accounts rather than in those limited partners’ hands. This is particularly troubling because, of the approximately 17,000 retail investors in the Funds, a considerable number are senior citizens who, according to the SEC’s Complaint, were allegedly advised when they made their investments that distributions from their respective Funds would be made on a recurring basis. *See* Complaint, Dkt. 1, at ¶¶ 2-4. In addition, over the last two years, many of those same limited partners have incurred tax liability on investment gains that have not yet been realized through a distribution. Put another way, investors are being taxed on income that they have not received. For example, the tax liability for three of the Funds is estimated to be in excess of \$100,000,000 over the last two years.

Finally, while the Company was able to successfully manage the recent wave of instability in the banking sector, in March and April 2023, the current active management team (*i.e.*, Mr. Chmiel and his team, excluding the Gentile Managers) sought to establish new banking relationships to offset risks with the primary banking relationship of the Funds, Signature Bank, which was closed by the New York State Department of Financial Services on March 12, 2023. Five major financial institutions, however, denied applications to open new accounts for the Company and the Funds because of Mr. Gentile’s continued ownership of GPB and the financial institutions’ concerns about the limited controls offered by the Amended Monitor Order. A takeover of the Company by Mr. Gentile and the Gentile Managers combined with a diminished Monitor would undoubtedly threaten the Company’s remaining banking relationships and put the approximately \$1 billion of distributable cash at risk.

B. The Company and the Funds Continue to Incur Significant Litigation Defense Costs

Without a litigation injunction as provided for in the SEC’s proposed Receivership Order, the Company and the Funds have continued to incur substantial litigation defense costs for several pre-existing civil cases which reduce the amount of cash available for distribution to limited

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partners. Taken together, the spate of active litigations for which the Company and the Funds bear these costs has required the Company and the Funds to spend millions of dollars in legal fees, which they will continue to do for the foreseeable future absent a litigation stay. With a receiver in place, however, he (*i.e.*, Mr. Gardemal) would be well-positioned to work with Company management to reach resolutions with litigation counterparties to best return limited partners' money and limit further costly liabilities.

Significantly, for example, the Company and the Funds continue to pay not only their own defense costs, but those of several indemnified defendants and entities, in a putative class action currently pending in the Western District of Texas.² Last summer, the judge denied motions to stay the action until resolution of the individual defendants' criminal case (*i.e.*, Mr. Gentile, Jeffrey Schneider and Jeffery Lash).³ As a result, for nearly the past year, assets of the Company and the Funds have been markedly reduced by its own legal expenses, in addition to those of indemnified individuals and entities in the matter, even though the case is just in the early stages of class discovery. To the extent that a class is certified, the Company will then need to prepare to defend the action on the merits.

More recently, in the Southern District of New York, a putative class action filed by GPB's limited partners – which is stayed as against the Company, the Funds, and the defendants in the criminal action – was allowed to proceed against certain other defendants. Accordingly, the Company's counsel, and counsel for parties which the Company and the Funds are obligated to indemnify, have nonetheless expended ample time and resources on document discovery in the action. Additionally, the Company and several of the Funds in the past week filed a Statement of Answer in an arbitration filed with the American Arbitration Association by a broker who sold limited partnership interests in the Funds. This case, too, will require the Company to soon defend itself, and has already cost the Company and the Funds approximately \$100,000 in fees.

* * *

For these reasons, and those stated in the SEC's memoranda in support of the Receivership Motion (Dkts. 89 and 102), the Company respectfully requests that the Court: (i) convert the monitorship to a receivership; (ii) appoint Mr. Gardemal as Receiver; and (iii) enter a litigation injunction.

Respectfully submitted,

/s/ Glen A. Kopp
Glen A. Kopp

² *Kinnie Ma Individual Retirement Account, et al. v. Ascendant Capital, LLC, et al.*, No. 19-cv-01050 (W.D. Tex.).

³ The trial in the criminal case, *United States v. Gentile, et al.*, 21 Cr. 54 (DG) (E.D.N.Y.), is scheduled to start June 3, 2024.

EXHIBIT A

**AMENDED JOINDER AGREEMENT
TO THE GPB CAPITAL HOLDINGS, LLC LIMITED
LIABILITY COMPANY AGREEMENT**

By the execution and delivery of this signature page, the undersigned, GPB Capital Member, Inc., hereby terminates the joinder agreement and therefore is no longer bound by the terms and conditions of the Amended and Restated Limited Liability Company Agreement of GPB Capital Holdings LLC, dated as of May 27, 2022 (The "Amended and Restated Operating Agreement") and authorizes the signature page to be attached to the Amended and Restated Operating Agreement or counterparts thereof.

GPB CAPITAL MEMBER INC.



By: David Gentile
President

Dated: September 30, 2022

Received and Accepted as of September 30, 2022

GPB CAPITAL HOLDINGS, LLC



By: David Gentile, Manager

EXHIBIT B

PROXY FOR ANNUAL MEETING OF SHAREHOLDERS
OF
QT IMAGING, INC.

This Proxy is Solicited on Behalf of the Board of Directors

The undersigned hereby appoints John C. Klock, M.D. with full power of substitution, as attorney and proxy of the undersigned to vote and otherwise represent all of the shares registered in the name of the undersigned at the Annual Meeting of Shareholders of QT Imaging, Inc. (the "Company") to be held by webinar on Thursday, December 8, 2022 at 11:00 a.m., Pacific Time and any adjournment or postponement thereof, with the same effect as if the undersigned were present and voting the shares on all matters set forth in the Proxy Statement, a copy of which has been received by the undersigned, as follows:

1. To elect four Directors to be voted upon by the Shareholders

- FOR all nominees listed below (except as marked to the contrary below)
- WITHHOLD AUTHORITY to vote for all nominees listed below

INSTRUCTION: to withhold authority to vote for any individual nominee, strike a line through that nominee's name in the list below.

John C. Klock, M.D., Richard J. Stanley, Christian S. Fong and Daniel H. Dickson

2. To ratify the appointment of BPM LLP as the Company's independent registered public accountants for the fiscal years ending December 31, 2021 and 2022.

- FOR
- AGAINST
- ABSTAIN

3. To transact such other business as may properly come before the meeting or any adjournment or postponement thereof.

- FOR
- AGAINST
- ABSTAIN

THIS PROXY, WHEN PROPERLY EXECUTED, WILL BE VOTED AS DIRECTED HEREIN BY THE UNDERSIGNED SHAREHOLDERS. IF NO DIRECTION IS MADE, THIS PROXY WILL BE VOTED FOR THE NOMINEES LISTED IN PROPOSAL 1 ABOVE AND FOR PROPOSALS 2 and 3.

Dated 11/30, 2022

Biotech Pharma Investments II LLC
Print Name of Shareholder exactly as it appears on your stock certificate (Must be legible for your vote to count)

[Signature]
Signature of Shareholder
Attestant of Biotech Pharma II LLC
Signature of Shareholder

Please sign your name exactly as it appears on your stock certificate. If shares are held jointly, each Shareholder should sign. Executors, trustees, and other fiduciaries should so indicate when signing. Please sign, date, and return this Proxy immediately to Mikie Price, the Company's Secretary, either by e-mail to qiproxy@qtimaging.com or by regular mail to Mikie Price, QT Imaging, Inc., 3 Hamilton Landing, Suite 160, Novato, CA 94949.