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OF THE
STATE OF DELAWARE**

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RE: *Gentile v. GPB Capital Holdings, LLC*,
C.A. No. 2024-0165-PAF

Dear Counsel:

This letter addresses the parties' cross-motions for summary judgment filed in this action.¹

I. FACTUAL BACKGROUND

This is an indemnification action. Plaintiff David Gentile seeks an order requiring Defendant GPB Capital Holdings, LLC ("GPB") to indemnify him for certain attorneys' fees and expenses incurred in a recent books and records action and in connection with preparing and filing GPB's tax returns. GPB is a Delaware

¹ Citations to the docket in this action are in the form of "Indem. Dkt. [#]." Citations to the docket in the books and records action captioned *Gentile v. GPB Capital Holdings, LLC*, C.A. No. 2023-0273-PAF are in the form of "B&R Dkt. [#]."

limited liability company with its principal place of business in New York.² Gentile founded GPB in 2013.³ Gentile is GPB's sole member and was its manager until February 5, 2021.⁴ GPB is governed under the Limited Liability Company Agreement of GPB Capital Holdings, LLC, dated as of March 20, 2013 (the "LLC Agreement").⁵ Gentile, in his capacity as GPB's sole member, is required by the U.S. Internal Revenue Code to sign all tax returns and filings reporting GPB's profit and loss, including those filed on behalf of GPB.⁶

In January 2021, a federal grand jury sitting in the Eastern District of New York indicted Gentile and others in connection with an alleged fraudulent scheme involving GPB's limited partnerships (the "Criminal Action").⁷ In February 2021, the U.S. Securities and Exchange Commission ("SEC") filed a civil complaint against GPB and Gentile, among others, based on the same alleged underlying facts at issue in the Criminal Action (the "SEC Action").⁸ On February 5, 2021, Gentile

² Indem. Dkt. 1 ("Indem. Compl.") ¶ 5; B&R Dkt. 41 ("B&R PTO") ¶ II.1.

³ Indem. Compl. ¶ 8; B&R PTO ¶ II.2.

⁴ Indem. Compl. ¶ 8.

⁵ B&R PTO ¶¶ II.3, II.5.

⁶ Indem. Compl. ¶ 10.

⁷ B&R PTO ¶ II.7.

⁸ *Id.* ¶ II.8.

resigned as manager, but not member, of GPB, and Robert Chimel was appointed as GPB's manager.⁹

On February 8, 2021, the SEC moved for the appointment of a monitor to oversee GPB's assets.¹⁰ On February 10, 2021, the Court in the Eastern District of New York appointed Joseph T. Gardemal, III as the independent monitor over GPB.¹¹ On March 4, 2021, the U.S. Attorney's Office for the Eastern District of New York moved to intervene in the SEC Action and requested a stay of the SEC Action pending resolution of the Criminal Action.¹² On March 10, 2021, the presiding judge in the SEC Action stayed the SEC Action until the conclusion of the Criminal Action, except for work performed by the monitor, matters related to the monitor, or any future expansion of the monitorship.¹³

On June 13, 2022, the SEC moved to convert the monitorship into a receivership.¹⁴ On July 28, 2023, a federal magistrate recommended that the SEC's

⁹ Indem. Compl. ¶ 9; B&R PTO ¶¶ II.9–10.

¹⁰ B&R PTO ¶ II.11.

¹¹ *Id.* ¶ II.12.

¹² *Id.* ¶ II.13.

¹³ *Id.* ¶ II.14.

¹⁴ Def.'s Indem. Opening & Answering Br. Ex. 2 at Entries 88–90.

motion be granted.¹⁵ Chief Judge Margo K. Brodie adopted the report and recommendation and formally appointed Mr. Gardemal as the receiver (the “Receivership Order”).¹⁶ Gentile appealed the Receivership Order, and a stay of the Receivership Order is currently in place pending appeal.¹⁷ The Second Circuit heard oral argument on the appeal on November 6, 2024.¹⁸

In August 2024, following a July 2024 trial, Gentile was convicted on all counts in the Criminal Action.¹⁹ There are various post-trial motions pending in the Criminal Action, including a motion for acquittal, a motion to dismiss the indictment, and a motion for a new trial.²⁰

A. The Books and Records Action and the Indemnification Action

On March 3, 2023, Gentile filed a complaint in this court pursuant to 6 *Del. C.* § 18-305 to inspect books and records of GPB (the “Books and Records Action”).²¹ In the Books and Records Action, Gentile sought access to certain books

¹⁵ *Id.* Ex. 2 at Entry 157; *id.* Ex. 12.

¹⁶ *Id.* Ex. 2 at Entries 186–87; *id.* Exs. 18–19.

¹⁷ *Id.* Ex. 2 at Entries 188, 191; *id.* Ex. 20.

¹⁸ *U.S. Sec. & Exch. Comm’n v. GPB Cap. Hldgs., LLC et al.*, No. 23-8010, at Dkt. 92 (2d Cir.).

¹⁹ *United States v. Gentile et al.*, No. 1:21-cr-00054, at Dkt. 472 (E.D.N.Y.).

²⁰ *Id.* at Dkts. 488–90.

²¹ B&R Dkt. 1 (“B&R Compl.”).

and records of GPB for the stated purpose of “preparing and filing accurate tax returns for [GPB] and for himself, both as the majority Member at all relevant times, and as the sole Member of [GPB] since October 2022.”²²

In a November 13, 2023, post-trial decision, the court ruled in favor of Gentile and ordered inspection of certain of GPB’s books and records.²³ The November 29, 2023 implementing order (the “Books and Records Order”), provided that “Gentile may not use information learned through this inspection in other litigations, including the Criminal Action or the SEC Action, unless that information is independently produced in one of those litigations.”²⁴ The court denied Gentile’s request for attorneys’ fees under the bad faith exception to the American Rule.²⁵

The Books and Records Order required that the books and records be made available no later than 10 business days from the date of the order or the entry of the confidentiality order, whichever was later.²⁶ The parties did not enter into a stipulated confidentiality order until May 28, 2024,²⁷ which the court granted the

²² *Id.* ¶ 2.

²³ B&R Dkt. 62 at 34–56.

²⁴ B&R Dkt. 59 (“B&R Order”) ¶ 6.

²⁵ *Id.* ¶ 15.

²⁶ *Id.* ¶ 9.

²⁷ B&R Dkt. 63.

next day.²⁸ Therefore, the books and records were to be uploaded to the data room by June 12, 2024. According to GPB, it uploaded the documents and made the data room available on that date.²⁹

Under the Books and Records Order, the books and records must remain available for three weeks from the date on which the data room is first accessed, subject to Gentile's right to petition the court to extend the three-week period for good cause shown.³⁰ Within one week of the conclusion of the three-week period, the permitted users must complete an affidavit confirming compliance with the confidentiality order and procedures and disclosure restrictions in the Books and Records Order.³¹ The data room has not yet been accessed by Gentile or anyone on his behalf, and the tax returns have not been prepared, signed, or filed.

Despite having not inspected the books and records he requested, on February 22, 2024, Gentile filed this indemnification action seeking fees and expenses incurred in the Books and Records Action and for fees incurred in connection with preparing and filing GPB's tax returns. Both parties moved for summary judgment,

²⁸ B&R Dkt. 64.

²⁹ Def.'s Indem. Opening & Answering Br. 16.

³⁰ B&R Order ¶¶ 9–10.

³¹ *Id.* ¶ 14.

and the court heard argument on the cross motions in October 2024. On November 5, 2024, GPB filed a motion in the Books and Records Action to stay any inspection under the Books and Records Order until the Second Circuit rules on the appeal of the Receivership Order.³² The court granted GPB's motion to stay over Gentile's opposition.³³

II. ANALYSIS

The issues addressed in this ruling were presented on cross motions for summary judgment. Summary judgment may be granted when the record shows that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Ct. Ch. R. 56(c). When cross motions for summary judgment are filed and the parties have not identified any material issues of fact, the cross motions are deemed “the equivalent of a stipulation for decision on the merits based on the record submitted.” Ct. Ch. R. 56(h).

GPB is a Delaware limited liability company and its LLC Agreement is governed by Delaware law.³⁴ Under Section 18-108 of the Delaware Limited Liability Company Act:

³² B&R Dkt. 66.

³³ B&R Dkt. 75.

³⁴ Indem. Compl. Ex. A Art. XVI § 10.

[A] limited liability company may . . . indemnify . . . any member or manager [subject to the standards and restrictions in the LLC Act].

6 *Del. C.* § 18-108. The scope of a party’s right to indemnification under a limited liability company agreement is therefore governed by contractual principles. *Bernstein v. TractManager, Inc.*, 953 A.2d 1003, 1010 (Del. Ch. 2007). When interpreting a contract governed by Delaware law, “the role of a court is to effectuate the parties’ intent.” *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006). Absent ambiguity, Delaware courts will “interpret contract terms according to their plain, ordinary meaning.” *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012).

A. The Books and Records Action

Plaintiff first seeks indemnification for fees incurred in connection with the Books and Records Action. Plaintiff can only obtain indemnification for the Books and Records Action if that action falls within the scope of the LLC Agreement’s indemnification provision. The LLC Agreement provides:

To the fullest extent permitted by applicable law, a Covered Person shall be entitled to indemnification from the Company for any loss, damage or claim incurred by such Covered Person by reason of any act or omission performed or omitted by such Covered Person in good faith on behalf of the Company and in a manner reasonably believed to be

within the scope of authority conferred on such Covered Person by this Agreement[.]³⁵

The LLC Agreement affords indemnification to Covered Persons, which includes members and managers.³⁶ Plaintiff is a Covered Person. Covered Persons are indemnified for “any loss, damage or claim incurred . . . by reason of any act or omission performed or omitted by such Covered Person in good faith on behalf of [GPB].”³⁷ In the corporate context, an action meets the “by reason of” standard “if there is a nexus or causal connection between any of the underlying proceedings . . . and one’s official corporate capacity, . . . regard[less] [of] one’s motivation for engaging in that conduct.” *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 214 (Del. 2005). Plaintiff initiated the Books and Records Action “for the proper purpose of preparing and filing accurate tax returns for [GPB] and for himself.”³⁸ Gentile established a causal connection between the Books and Records Action and his obligation to prepare and file GPB’s tax returns.

Defendant argues that “[a]t no point during the Books and Records Action trial . . . did the Court or Gentile’s expert witness claim that he was required to review

³⁵ *Id.* Art. XII § 4.

³⁶ *Id.* Art. I § 1.

³⁷ *Id.* Art. XII § 4.

³⁸ B&R Compl. ¶ 2.

[GPB’s] books and records before he could sign the tax returns.”³⁹ Even if true, that does not necessarily mean that “Gentile pursued the Books and Records Action of his own accord, motivated solely by his own individual and personal reasons,” as Defendant contends.⁴⁰ The court already held in the Books and Records Action that Gentile established a proper primary purpose of inspecting GPB’s books and records to assist him in filing GPB’s 2021 and 2022 tax returns. Although the court has serious concerns regarding Gentile’s failure to review a single document in the data room or to sign and file the tax returns through the date of oral argument on the cross motions, the court declines to revisit the finding that Gentile demonstrated a proper purpose to warrant inspection. That Gentile was not *required by law* to review the books and records before filing the tax returns does not show the absence of a causal connection between the Books and Records Action and Gentile’s obligations to GPB.

Defendant also argues that “Gentile did not act within the ‘scope of authority conferred on him by the [LLC Agreement]’ in incurring the fees and expenses he seeks to recover” because the LLC Agreement does not explicitly require or

³⁹ Def.’s Indem. Opening & Answering Br. 29.

⁴⁰ *Id.* at 30.

authorize Gentile to file the tax returns.⁴¹ Under GPB’s theory, *no one* would be authorized to sign and file the tax returns under the LLC Agreement. This would lead to an absurd result, which GPB seemed to recognize when it conceded at oral argument that no one other than Gentile has the authority to sign GPB’s tax returns. As GPB’s sole member, Gentile is required, and in fact is the only individual permitted, to certify and file tax returns on behalf of GPB, at least unless and until the stay of the Receivership Order is lifted. A single-member limited liability company is, by default, a disregarded entity for tax purposes and, accordingly, is treated as a sole proprietorship for federal income tax purposes. *See* 26 C.F.R. § 301.7701-3(b) (“[U]nless the entity elects otherwise, a domestic eligible entity is . . . [d]isregarded as an entity separate from its owner if it has a single owner.”). In these situations, the taxpayer is the individual member. As the court held in the Books and Records Action, there is no indication here that GPB has elected to be treated as anything other than a sole proprietorship. As such, Gentile is the taxpayer for GPB.

In addition, Gentile is also the designated “Tax Matters Partner” of GPB. Under the LLC Agreement, the Tax Matters Partner has “the power to manage and control, on behalf of [GPB], any administrative proceeding at the Company level

⁴¹ *Id.* at 29–30.

with the Internal Revenue Service relating to the determination of any item of Company income, gain, loss, deduction or credit for federal income tax purposes.”⁴²

The parties dispute the specific powers that this section confers on the Tax Matters Partner, but the court’s holding is the same in any event. Indemnification is to be provided so long as Gentile acted “in a manner *reasonably believed* to be within the scope of authority conferred on [Gentile] by this [LLC] Agreement.”⁴³ It is entirely reasonable for Gentile to believe he has the authority to file tax returns on behalf of GPB, considering he is the designated Tax Matters Partner and the only individual permitted under federal tax law to certify and file the tax returns on behalf of GPB. Because the underlying purpose of the Books and Records Action (*i.e.*, to review and file GPB’s tax returns) was reasonably within the scope of Gentile’s authority under the LLC Agreement, the court finds that the Books and Records Action was likewise within his authority.

The last issue then becomes whether Plaintiff is required to show that he initiated the Books and Records Action in good faith. “[W]hen an alternative entity’s operating agreement grants mandatory indemnification to ‘the fullest extent permitted by law,’” as GPB’s LLC Agreement does here, “the grant includes a right

⁴² Indem. Compl. Ex. A Art. XI § 1(a).

⁴³ *Id.* Art. XII § 4 (emphasis added).

to mandatory indemnification when an individual has been successful ‘on the merits or otherwise,’ without having to show good faith.” *Meyers v. Quiz-DIA LLC (Meyers D)*, 2017 WL 2438328, at *7 (Del. Ch. June 6, 2017) (quoting *Stockman v. Heartland Indus. P’rs, L.P.*, 2009 WL 2096213, at *13–18 (Del. Ch. July 14, 2009)). Although both parties here recognize this principle, Defendant argues that Plaintiff was not “successful on the merits” in the Books and Records Action and thus that he is required to make a showing of good faith, which GPB claims he cannot do.⁴⁴ Defendant claims Plaintiff was not successful on the merits because “[t]he Court denied Gentile’s demand for unlimited access.”⁴⁵ This argument is unpersuasive.

In determining “success on the merits,” the court “looks strictly at the outcome of the underlying action.” *Brown v. Rite Aid Corp.*, 2019 WL 2244738, at *8 (Del. Ch. May 24, 2019). Gentile “need only prevail—in a strictly legal sense—in terms of the outcome of a proceeding.” *Evans v. Avande, Inc.*, 2021 WL 4344020, at *4 (Del. Ch. Sept. 23, 2021). In the Books and Records Action, the court ruled in Plaintiff’s favor. Plaintiff sought a judgment ordering the inspection of GPB’s books and records,⁴⁶ whereas GPB sought an order dismissing the complaint with

⁴⁴ Def.’s Indem. Opening & Answering Br. 28.

⁴⁵ *Id.*

⁴⁶ Pl.’s B&R Pre-Trial Opening Br. 21.

prejudice.⁴⁷ Although the court placed certain restrictions on Plaintiff's right to inspection, that does not change the ultimate outcome that Plaintiff prevailed on his claim. Accordingly, Plaintiff was successful on the merits in the Books and Records Action, and a showing of good faith is not required. Plaintiff is entitled to indemnification for the fees incurred in the Books and Records Action, including the expert expenses. This decision does not address the amount of fees to which Plaintiff is entitled. That issue is for another day.

B. The 2020 Tax Returns

Plaintiff next seeks indemnification for fees incurred in connection with the preparation and filing of GPB's amended 2020 tax returns. This is entirely separate from the indemnity for the Books and Records Action or for any future indemnity for the preparation and filing of later tax returns.

The court again first turns to whether there is a causal connection between the preparation of the amended 2020 tax returns and Gentile's capacity as a member of GPB. As explained above, Gentile, as GPB's sole member, is the only individual permitted to certify and file GPB's tax returns, at least unless and until the stay of the Receivership Order is lifted. Accordingly, there is a causal connection between

⁴⁷ Def.'s B&R Pre-Trial Answering Br. 45.

the preparation of the amended 2020 tax returns and Gentile's status as the sole member and the Tax Matters Partner of GPB. Also for the reasons explained above, it is entirely reasonable for Gentile to believe he has the authority to file amended tax returns on behalf of GPB.

The last inquiry then is whether the fees incurred in preparing and filing the amended 2020 tax returns were incurred in good faith. When an indemnification provision employs the phrase "shall indemnify," it "not only mandates indemnification; it also effectively places the burden on [the company] to demonstrate that the indemnification mandated is not required." *VonFeldt v. Stifel Fin. Corp.*, 1999 WL 413393, at *3 (Del. Ch. June 11, 1999). In other words, the burden of proof here is shifted to GPB to demonstrate that Gentile did not file GPB's amended 2020 tax returns in good faith.

GPB argues that Gentile is not entitled to indemnification for losses incurred in preparing and filing the amended 2020 tax returns because Gentile amended the tax returns in an "attempt at self-dealing."⁴⁸ The sole basis for this assertion of self-dealing is GPB's claim that Gentile secretly "sought to have the resulting \$240,733.00 refund check issued and sent to him personally."⁴⁹ GPB argues that it

⁴⁸ Def.'s Indem. Opening & Answering Br. 23.

⁴⁹ *Id.*; see also *id.* Ex. 6.

“only learned of the existence of [the] refund payment because the NYC Finance Department declined to send the refund to Gentile’s Florida address, and instead sent the check to [GPB’s] office address on file, in New York City.”⁵⁰ Plaintiff does not deny that he requested the refund check to be sent to his personal address, nor could he, as there is supporting evidence in the record that Gentile attempted to have the more than \$240,000 refund mailed to his home address.⁵¹ Although Gentile did not inform GPB beforehand that he was filing an amended return, Gentile’s counsel informed GPB by letter on March 15, 2022, that the 2020 tax returns contained accounting and legal omissions and errors and informed GPB that Gentile’s tax counsel had taken steps to correct the errors, including by filing an amended return.⁵² The March 15 letter informed GPB’s counsel that (1) the original return was not authorized because Gentile did not sign it, as he was required to do, (2) the original return overstated taxable income, and (3) an amended return had been filed. This would obviously result in a refund, and if GPB knew the refund was forthcoming, as it should have, it would be difficult for Gentile to keep that refund for himself undetected. Gentile’s notification to GPB of the filing of the amended 2020 tax

⁵⁰ *Id.* at 9; *see also id.* Ex. 7.

⁵¹ *Id.* Ex. 6.

⁵² *Id.* Ex. 5; B&R PTO ¶ II.30.

returns weighs against a finding of bad faith, even if that notification was after the amended returns had already been filed.

GPB would like the court to infer that Gentile intended to keep the refund check for himself and thus that he did not act in good faith. The court cannot do so on the present record. The preparation of tax returns in general is part of Gentile's duties as GPB's sole member, and receiving an unexpected \$240,000 refund can reasonably be considered to be in GPB's best interests. It is GPB's burden to establish that Gentile did not act in good faith. While the attempted re-direction of the refund check could be evidence that Gentile intended to keep the refund check for himself, the March 15 letter notifying GPB of the amended return suggests otherwise. GPB has not met its burden of establishing that Gentile did not act in good faith. Plaintiff is entitled to indemnification for the fees incurred in connection with the preparation and filing of the amended 2020 tax returns. But again, this decision is limited to liability, and the court does not address the reasonableness of the requested amount of fees at this time.

C. Fees on Fees

The last issue is whether, and to what extent, Plaintiff is entitled to "fees on fees" for initiating the present action. "Plaintiffs who successfully enforce their indemnification rights in Delaware are entitled to fees-on-fees." *Meyers v. Quiz-DIA*

LLC (Meyers II), 2018 WL 1363307, at *11 (Del. Ch. Mar. 16, 2018). “[W]ithout an award of attorneys’ fees for the indemnification suit itself, indemnification would be incomplete.” *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 561 (Del. 2002). Gentile has been successful in this action in establishing his right to indemnity. Thus, he is entitled to indemnity for fees incurred in litigating this action. The specific amount and reasonableness of the indemnification to which Plaintiff is entitled for his fees on fees is for another day. The parties should first confer on whether they can agree on an amount of fees on fees. If the parties cannot agree on an amount, then Plaintiff can make an application pursuant to Court of Chancery Rule 88.

III. CONCLUSION

Accordingly, Plaintiff’s motion for summary judgment is granted and Defendant’s motion for summary judgment is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ Paul A. Fioravanti, Jr.

Vice Chancellor