

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Digital Media Solutions, LLC,	)	Case No. 1:19-cv-145
)	
Plaintiff,	)	JUDGE DAN AARON POLSTER
)	
v.	)	MAGISTRATE JUDGE
	)	THOMAS M. PARKER
South University of Ohio, LLC, et al.,)	
	)	ORDER: (1) APPROVING GLOBAL
Defendants.	)	SETTLEMENT AGREEMENT; (2)
	)	APPROVING PAYMENT OF DEFENSE
	)	COSTS; AND (3) BARRING AND
	)	PROHIBITING PARTIES FROM
	)	ASSERTING CERTAIN CLAIMS

Mark E. Dottore, the court-appointed receiver in this action, has filed an amended motion seeking the entry of an order which would: (1) Approve a Global Settlement and Compromise Among Receiver and All Insureds Under the PortfolioSelect For Non-Profit Organizations Liability Insurance Policy; (2) Approve Payment of Defense Costs; (3) and Bar and Prohibit Parties from Asserting Certain Claims (“Amended Motion”).¹ [ECF Doc. 721](#). The Amended Motion seeks approval of a Settlement Agreement entered into by and among the Receiver and all Insureds under a certain PortfolioSelect for Non-Profit Organizations Insurance Policy issued

¹ Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Amended Motion.

by National Union.² The Settlement Agreement will yield a Settlement Payment of \$8.5 million to the Receiver, or his designee, on behalf of the Receivership Estate; provides for releases among the Parties, subject to the terms and conditions set forth in the Settlement Agreement; and seeks a Bar Order in favor of the Insureds and the Insurer. The court has reviewed the Amended Motion and Settlement Agreement, considered the proffer of evidence by Receiver's counsel, heard argument of counsel, separately overruled objections to the motion filed by various persons (ECF Doc. 757) and taken judicial notice of the entire record in this case. Based on the foregoing, the court makes the following Findings of Fact and Conclusions of Law³:

A. Good-Faith Negotiations:

Counsel for the Parties have apprised the court of the negotiations that preceded the Settlement Agreement, and the court finds that the Settlement Agreement is the result of extensive, arm's-length bargaining among the Parties and represents a good-faith compromise and resolution of the matters settled. The Settlement Agreement is not the product of any

² The Parties to the Settlement Agreement are as follows: the RECEIVER, as the federal equity receiver, custodian and liquidator for the Receivership Entities; THE DREAM CENTER FOUNDATION, and its former and current officers, directors, managers, members, employees and affiliates (collectively, "**DCF**"); BRENT RICHARDSON ("**B. Richardson**"); CHRISTOPHER RICHARDSON ("**C. Richardson**"); JOHN CROWLEY ("**Crowley**"); CHAD GARRETT ("**Garrett**"); MONICA CARSON ("**Carson**"); MELISSA ESBENSHADE ("**Esbenshade**"); SHELLEY GARDNER ("**Gardner**"); MICHAEL LACROSSE ("**Lacrosse**"); RANDALL BARTON ("**Barton**"); SHELLY MURPHY ("**Murphy**"); ROB PAUL ("**Paul**"); DEBBI LANNON-SMITH ("**Lannon-Smith**"); STACEY SWEENEY ("**Sweeney**"); PASTOR MATTHEW BARNETT ("**Barnett**"); TIMOTHY SLOTTOW ("**Slottow**"); RUFUS GLASPER ("**Glasper**"); JACK DEBARTOLO ("**DeBartolo**"); CYNTHIA BAUM ("**Baum**"); and JAMES TERRELL ("**Terrell**"). B. Richardson, C. Richardson, Crowley, Garrett, Carson, Esbenshade, Gardner, Lacrosse, Barton, Murphy, Paul, Lannon-Smith, Sweeney, Barnett, Slottow, Glasper, DeBartolo, Baum and Terrell are referred to herein collectively as the "**Ds&Os**," and together with DCF and any and all other persons who are an "Insured" as defined in the either of Policies (including, with respect to the defined Primary Policy, the Receivership Entities and any non-Receivership Entities covered under the Primary Policy including without limitation DCF), the "**Insureds**." The Receiver, the Ds&Os, and DCF are collectively referred to herein as the "**Parties**" or singularly as a "**Party**."

³ Any finding of fact constitutes a finding of fact even if it is stated as a conclusion of law, and any conclusion of law constitutes a conclusion of law even if it is stated as a finding of fact.

collusion among the Parties, nor did the Parties negotiate the Settlement Agreement with any intent to prejudice persons or entities subject to the Settlement Agreement.

B. Settlement is Reasonable and in the Best Interests of the Receivership Estate:

The court is familiar with the claims and defenses asserted or that could have been asserted in this court, or otherwise, which have been settled pursuant to the Settlement Agreement, and finds that the Settlement Agreement is fair, reasonable, and adequate within the parameters established by applicable law in this Circuit. Specifically, the court finds and concludes that the Settlement is within the duties of the Receiver and is consistent with the purposes of the Receivership. The Receiver and all Parties have acted in good faith and demonstrated the exercise of prudent business judgment in connection with the Settlement Agreement. The Settlement Agreement falls within the range of reasonableness and is in the best interests of the Receivership Estate.

C. Notice and Opportunity to be Heard:

The form and means of the notice of the Amended Motion and the Hearing that the Receiver and the court provided ([ECF Doc. 681](#)⁴, [ECF Doc. 723](#)) complies with the provisions of this court's order, dated February 19, 2021 ("Notice Order")([ECF Doc. 676](#)), and is good and proper notice pursuant to applicable law and is determined to be the best notice practicable under the circumstances, and no other or further notice is or shall be required. In particular, (a) the court provided notice of the Amended Motion and Hearing electronically via CM/ECF to all parties and counsel who have appeared in this Receivership Case and consented to electronic

⁴ The original motion to approve the settlement was filed on February 18, 2021 ([ECF Doc. 674](#)), and the court granted the receiver's motion to approve the form of notice to affected persons on February 19, 2021 ([ECF Doc. 676](#)).

notice; and (b) the Receiver provided notice of the Amended Motion and Hearing, *via* U.S. Mail, postage prepaid (either via Certified Mail or Regular Mail as set forth in the Notice Order) to: (i) all known parties who have appeared or may be an interested party in the Specified Litigation and Potential Claims; and (ii) all counsel, creditors and interested parties who have appeared but are not registered to receive Notices of Electronic Filings in this Receivership Case; and (c) the Receiver further provided notice by publication in *USA Today* (or a national publication of substantially similar stature) pursuant to the provisions in the Notice Order (collectively, “Noticed Parties”). *See* Certificate of Service ([ECF Doc. 723](#)).

D. Bar Order is Appropriate:

The court finds and concludes that the Bar Order is an appropriate exercise of the court’s sound discretion to facilitate settlements and promote the consensual resolution of disputes. *Gordon v. Dadante*, [336 F. App’x 540](#) (6th Cir. 2009); *Zacarias v. Stanford International Bank, Ltd.*, [945 F.3d 883](#) (5th Cir. 2019); *In re Munford, Inc.*, [97 F.3d 449, 455](#) (11th Cir.1996); *CFTC v. Equity Fin. Grp.*, [2007 U.S. Dist. LEXIS 53310](#) (D.N.J.2007); *S.C. Nat’l Bank v. Stone*, [749 F.Supp. 1419, 1431](#) (D.S.C.1990). In connection therewith, the court finds and concludes that: (1) all of the Claims released under the Settlement Agreement arise from, are related to, or derive from the Receivership or transactions conducted with the Receivership Entities; (2) the Insureds have given valuable consideration for the releases and protections in the Bar Order; (3) the Bar Order is a mandatory condition of the Settlement Agreement, and without the Bar Order, the Settlement Agreement will not be consummated by the Insureds; and (4) entry of this Order approving and implementing the Bar Order is necessary and appropriate in order to achieve the finality and repose contemplated by the Settlement Agreement. As for the Insureds’ consideration, they are parting with \$8.5 million in proceeds from the Primary Policy and

foregoing important rights thereunder; in particular, DCF funded the applicable retention requirements that allowed the Insureds to access the remaining Primary Policy proceeds for the benefit of the Receivership Estate, defended un-stayed litigation claims that could have wasted critical Receivership Estate resources, and DCF and its directors and officers as Insureds have a right to the Primary Policy proceeds for defense fees and expenses and potential indemnity obligations and are willing to forego such rights as against the Primary Policy in order to allow the proceeds to fund the Settlement. Without such contributions, this Settlement may not be possible. The court also finds and concludes that the Bar Order is necessary to protect the assets of the Receivership Estate, namely the proceeds of the Policies, where the Policies are wasting insurance policies, and the Bar Order “forestall[s] a race to judgment that would have diminished the recovery of all creditors against the receivership assets.” *SEC v. Stanford Int’l Bank*, 927 F.3d 830, 843 (5th Cir. 2019).

Based on the foregoing, and for the reasons set forth on the record at the Hearing, which are incorporated by reference herein in their entirety, the court finds and determines that the Settlement Agreement is fair, equitable, falls within the range of reasonableness, is in the best interest of the creditors of the Receivership Estate, and that the Receiver exercised prudent business judgment in connection therewith and satisfied the legal standards under the facts of this Receivership Case.

Based on the foregoing findings of fact and conclusions of law the court hereby orders:

1. **Amended Motion:** The Amended Motion is GRANTED in its entirety.
2. **Settlement Agreement:** The Settlement Agreement is APPROVED in all respects, and the terms and conditions of the Settlement Agreement, including the terms and scope of the Bar Order, are incorporated in this Order as if fully stated herein.
3. **Objections:** Any creditor or other party-in-interest that did not file or assert and

serve a written objection to the Amended Motion, nor raise any objection at the Hearing to the Settlement Agreement, is conclusively deemed to have waived any objection they may have to the Amended Motion, the Settlement Agreement, and the Bar Order. The court has separately ruled on objections to the Amended Motion ([ECF Doc. 757](#)), and any objection not expressly sustained, in whole or in part, in a ruling of the court is hereby overruled.

4. Execution of Documents: The Parties are authorized to execute any and all documents and perform all acts as are necessary and appropriate to effectuate the Settlement Agreement.

5. Releases: The Releases contained in the Settlement Agreement are APPROVED in their entirety and incorporated herein by reference, conditioned on the Receiver's receipt of the Settlement Payment in cleared funds. The Insurer's payment of the Settlement Payment and any Defense Costs (as defined in the Policies) is deemed to have exhausted the limits of the Policies. Upon the Receiver's (or his designee's) receipt of the Settlement Payment in cleared funds, the Policies are immediately DISCHARGED and CANCELLED, and the Insurer is immediately RELEASED from any and all obligations under the Policies. Notwithstanding the complete discharge and cancellation of the Policies, nothing herein shall be construed to release the Insurer's obligation under the Settlement Agreement to exhaust completely the \$10 million Shared Limit of Liability of the Primary Policy's D&O Coverage Section.

6. Preservation of Receiver's Rights to Pursue Actions for Recovery From Non-National Union Excess Carriers.

Notwithstanding the Releases and Bar Order granted herein, the Receiver shall retain all rights to seek recovery from any Non-National Union Excess Policy, and to name the Insureds as defendants in such actions in order to pursue the policy proceeds of any Non-National Union Excess Policy ("Non-National Union Excess Coverage"). However, any such

action shall only be allowed to the extent the court enters a judgment that is limited to the amount of the Non-National Union Excess Coverage (if any), and under no circumstances shall the Receiver be permitted to pursue any judgment amounts beyond the Non-National Union Excess Coverage from any Insured or affiliate, or officer, director, manager, member, or shareholder of any Insured, nor encourage or obtain any direct monetary benefit from any contribution or reimbursement claims that might be asserted by any of the Non-National Union Excess Coverage entities against any Insured or affiliate, or officer, director, manager, member, or shareholder of any Insured. An Insured is not required to pay any amount within the Non-National Union Excess Coverage if the Non-National Union Excess Carrier refuses or fails to satisfy such obligation (if any). To the extent the Receiver enters into any settlement with a Non-National Union Excess Carrier subsequent to the court's entry of this Order, the parties may add the settling Non-National Union Excess Carrier to this Order, by amendment, and such settling Non-National Union Excess Carrier shall receive the full protections of the Releases and Bar Order herein. Upon the Receiver's receipt of the settlement payment from any settling Non-National Union Excess Carrier in cleared funds, the respective Non-National Union Excess Policy shall be immediately deemed fully exhausted, discharged and cancelled, and the settling Non-National Union Excess Carrier shall be immediately released from any and all obligations under its Non-National Union Excess Policy.

7. Reservation of Insurer's Rights During 36-Month Post-Effective Date Period: The Insurer shall have thirty-six (36) months following the date of the Settlement Payment ("36-Month Post-Effective Date Period") to utilize the Primary Policy in its sole discretion. To the extent any proceeds remain ("Remaining Primary Proceeds") in the Primary Policy's D&O Coverage Section after the expiration of the 36-Month Post-Effective

Date Period, the Insurer shall pay such Remaining Primary Proceeds to the Receiver, or his designee, for the benefit of the Receivership Estate. For purposes of clarity, in no event shall (i) the provisions of this paragraph affect or alter any other terms in this Settlement Agreement, including, without limitation, the immediate effect of the releases or the exhaustion and cancellation of the Policies upon the Receiver's receipt of the Settlement Payment, as set forth below; nor shall (ii) the aggregate amount of National Union's payment of the Settlement Payment, Defense Costs, and Remaining Primary Proceeds (if any) from the Primary Policy exceed \$10,000,000 in the aggregate.

8. Bar Order:

- (a) All Barred Persons (as defined below) are permanently barred, prohibited, enjoined and restrained from filing, commencing, prosecuting, conducting, asserting or continuing in any manner, directly, indirectly or derivatively, any suit, action, cause of action, cross-claim, counterclaim, third-party claim, or other demand (including, without limitation any and all of the Claims, which includes without limitation, any and all of the Receiver's Alleged Claims and the Specified Litigation and Potential Claims, all of which Claims are being released herein) in any federal or state court or any other judicial or non-judicial proceeding (including, without limitation, any proceeding in any judicial, arbitral, mediation, administrative, or other forum) by any Barred Person (as defined below) against or affecting any of the Insureds or the Insurer (Insureds and the Insurer are collectively defined herein as the "**Insured Released Parties**") that arises from, relates to, or derives from the Receivership Entities or transactions involving or related to the Receivership Entities, and which is based in whole and part on any allegation, claim, demand, cause of action, matter or fact directly or indirectly relating in any way to or arising in connection with the Receivership Entities, the Insureds, the Policies, and/or the facts and circumstances underlying the Claims and all other claims that have been made or could be made, in connection with the Receiver's Alleged Claims and/or the Specified Litigation and Potential Claims, or otherwise, whether or not asserted therein, subject to the exceptions set forth herein (collectively, the "**Barred Claims**"). For purposes of this Bar Order, "**Barred Persons**" shall mean any person or entity that has held, holds, may hold, or purports to hold a claim or other debt or liability or an interest in or other right against, in, arising out of, or in any way related to the Receivership Entities and the Insureds (including, without

limitation, all persons that have or could bring claims in connection with the Receiver's Alleged Claims and/or the Specified Litigation and Potential Claims, or otherwise), whether that person or entity filed a proof of claim, proof of interest, or otherwise against the Receivership Estate;

- (b) The intent and purpose of this Bar Order are to enjoin directly the most expansive and comprehensive group of third parties, whether such party is known or unknown, identified or unidentified, suspected or unsuspected, named or unnamed class action members or potential class action members from pursuing any and all claims or causes of action against the Insured Released Parties that would implicate the Policies;
- (c) Notwithstanding anything herein to the contrary, this Bar Order shall NOT

 - (i) relieve the Parties from their obligations under the Settlement Agreement;
 - (ii) preclude the Barred Persons from pursuing any independent claim or action against any of the Insureds, but only if such independent claim or action is completely and wholly unrelated to the activities of the Receivership Entities and such claim is not able to implicate either of the Policies in any manner;
 - (iii) preclude the Receiver from pursuing claims that would implicate any Non-National Union Excess Policies, as set forth in paragraph 6 above;
 - (iv) impair the ability of the Barred Persons to assert claims against Education Management II LLC or its current or former affiliates or subsidiaries or any of their respective current or former directors or officers and any applicable insurance; nor,
 - (v) impair the ability of Barred Persons who have not released the Receivership Estates pursuant to the terms of this Settlement Agreement or otherwise to take such actions as are necessary to assert their claims against the Receivership Entities or their respective estates,
- (d) Notwithstanding anything herein to the contrary, the Barred Claims shall not include, and expressly exclude, any and all claims that (i) the Receiver and Receivership Entities, (ii) the chapter 7 bankruptcy estates of The Art Institute of Philadelphia, LLC, et al. [1] (collectively, the "Education Management Debtors"), and (iii) George L. Miller, the chapter 7 trustee (the "Trustee") of the Education Management Debtors, had, have or may have, whether asserted or not, against one another, that arose from or are related to: (i) that certain Asset Purchase Agreement, as amended (the "DCEH Purchase Agreement") by and among the Education Management Debtors and Dream Center Foundation, a not for profit entity, Dream Center Education Holdings, LLC, and certain of its newly formed subsidiaries (collectively, the "DCEH Buyers"), and (ii)

any and all claims, counterclaims or defenses, whether in equity or under law, regarding any and all proofs of claim filed by the Receiver or Receivership entities (the “DCEH Claims”) in the bankruptcy cases of the Education Management Debtors. For the avoidance of doubt: (a) the Barred Claims prohibit (i) the Education Management Debtors, their current and former officers and directors, and the Trustee from bringing any claims against the Ds&Os and DCF; and, (ii) the Receiver, the Receivership Entities, the Education Management Debtors and the Trustee from bringing any claims against the Policies; and, (b) the Barred Claims shall not include, and expressly exclude, and shall not impair or preclude, any and all claims the Education Management Debtors or Trustee have asserted in Adversary Proceeding No. 20-50627 (LSS) pending in the United States Bankruptcy Court for the District of Delaware.

- (e) Nothing contained in this Order or in the Settlement Agreement (and no action taken by any party in this case) shall require, compromise, stay or otherwise constrain any action or proceeding by any federal government unit (as that term is defined in [11 U.S.C. 101\(27\)](#)). Furthermore, nothing in this Order shall preclude the United States from arguing at any time that any provision in this Order is void or inapplicable to the United States.
- (f) The Bar Order shall prevent any and all actions related to any of the Barred Claims against and/or that may implicate the Insurer and/or the Policies; and
- (g) In the event that any party brings a claim or action against any of the Insured Released Parties subsequent to the entry of this Bar Order which relates to the activities of the Receiver Released Parties or implicates the Policies in any manner, then the Insured Released Parties may seek an expedited hearing with this court to determine whether such claim or action should be enjoined.

9. Approved Payments (including Defense Costs):

- (a) The automatic stay imposed by the court in the Initial Receiver Order, and any other Order entered in the Receivership Estate, and/or any other applicable injunction (“Stay”) does not apply to the proceeds of the Primary Policy. To the extent the Stay applies to any portion of the Policies, it is modified and lifted to allow the Insurer in its reasonable discretion, to settle, advance and make payment solely from the Remaining Policy Proceeds of the Primary Policy’s D&O Coverage Section on behalf of any and all Insureds under the Primary Policy, either jointly or severally, for (i) any and all Claims that have been or may be made against the Policies and/or any of the Insureds, whether direct or indirect, including, without limitation, claims by the Receiver and for any Defense Cost Matters, (ii) any and all other applicable Loss covered

under the Policies, and (iii) any and all Defense Costs, including payments for fees and expenses to defense counsel, experts, or other third-party professionals and vendors, who may be retained on behalf of the Insureds, that have already incurred or will be incurred in connection with any such Claims or potential litigation, including Defense Cost Matters (“**Approved Payments**”);

- (b) The Insurer is authorized and allowed, but not directed, to make the Approved Payments under the terms herein on behalf of the Insureds. The Insurer, in accordance with the Policies and subject to all rights of the Insureds and their counsel, shall determine if the Approved Payments (including Defense Costs) are reasonable and necessary, and no further motion, notice or court order is necessary for the Insurer to make the Approved Payments;
- (c) The Approved Payments shall reduce the Shared Limits of Liability applicable to the D&O Coverage Section of the Primary Policy and shall not be considered a violation of the Stay, nor shall they be considered property of the Receivership Estate;
- (d) The Receiver, the Receivership Entities, the Receivership Estate, and any subsequent receiver, trustee or successor for the Receivership Entities, are not allowed to recover any payment of Defense Costs, including attorneys’ fees, advanced in accordance with the terms of the Primary Policy and this Order;
- (e) Nothing in the Settlement Agreement nor this Order shall constitute (i) a waiver, modification, or limitation of the contractual rights and obligations provided for in the Policies or the Insurer’s reservation of all of its rights, remedies and defenses under the Policies; nor (ii) a finding that such sums are due and owing under either the Policies; and,
- (f) Nothing in the Settlement Agreement nor this Order shall give the Insureds or their counsel, representatives, agents, or assigns, or anyone acting through them, any rights in and to the Settlement Payment, and the Parties expressly acknowledge that, notwithstanding anything in the Settlement Agreement, in the event the Insurer fails to pay any of the Insureds’ current and future reasonable attorneys’ fees, professional fees, and expenses relating to the Receivership, the Specified Litigation and Potential Claims, the Settlement Agreement, the enforcement of this Order against any Barred Person, and related matters, for any reason, the Insureds or their counsel, representatives, agents or assigns or anyone acting through them shall have no claim in or to the Settlement Payment and the Releases herein in favor of Receiver shall remain in full force and effect.

10. Notice: In addition to service that will be effected electronically on all parties that are registered to receive electronic notice in this Receivership Case, the Receiver's counsel is directed to serve a copy of this Order on all Noticed Parties pursuant to the provisions in the Notice Order, and such service is deemed good and adequate service of this Order.

11. Retention of Jurisdiction: The court retains jurisdiction to enforce, implement, and interpret the terms of this Order and the Settlement Agreement and all other matters addressed herein, including without limitation, the Bar Order contained herein. Before any party or entity seeks to prosecute in any manner whatsoever any claims, debts or obligations they believe are not released by this Bar Order, such party must first seek relief from this court, and such party shall be deemed to have affirmatively consented to the jurisdiction of this court to enter final orders and judgments on such issue.

12. Waiver of Stay:

This Order is immediately valid and fully effected upon its entry, and any stay that may be applicable to this Order is hereby waived.

IT IS SO ORDERED.

Dated: October 20, 2021

s/Dan Aaron Polster
United States District Judge

s/Thomas M. Parker
United States Magistrate Judge