No. 21-4014

In the United States Court of Appeals for the Sixth Circuit

DIGITAL MEDIA SOLUTIONS, LLC,
Plaintiff,

and

EMMANUEL DUNAGAN; JESSICA MUSCARI; ROBERT J. INFUSINO; and STEPHANIE PORRECA,
Intervenor Plaintiffs-Appellants,

v.

SOUTH UNIVERSITY OF OHIO, LLC, aka DC SOUTH UNIVERSITY OF OHIO LLC, d/b/a SOUTH UNIVERSITY; DCEH EDUCATION HOLDINGS, LLC; ARGOSY EDUCATION GROUP, LLC,
Defendants,

and

MARK E. DOTTORE,
Receiver-Appellee.

On Appeal from the United States District Court
for the Northern District of Ohio, Cleveland
Civil Cases No. 1:19-cv-00145

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Under 6th Cir. Rule 26.1, Intervenor Plaintiffs-Appellees make the following disclosures:

1. Are any parties a subsidiary or affiliate of a publicly owned corporation?

   NO.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   NO.

Dated: January 27, 2022

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This appeal arises from the district court's entry of a "bar order" in a receivership proceeding—an extraordinary form of relief that strips third parties of their right to pursue claims, even, potentially, live claims that are pending in different jurisdictions. It is for this reason that this Court has warned that such a "dramatic measure" must "be used cautiously" and is only justified "in 'unusual circumstances.'" *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002). Oral argument would assist the Court in determining whether those "unusual circumstances"—which must be shown through a clear "record of specific factual findings"—are present in this case, and whether the district court's entry of a bar order was justified.

INTRODUCTION

In late 2017, the executives of the Dream Center Foundation, a California-based missionary organization, had a problem. On the cusp of acquiring their first higher education school they were informed that a change in ownership would force the school to lose its accreditation status—a key signal that a school meets basic educational standards. They were also told, before the sale, that they must portray the school's accreditation status "clearly to the public" and communicate "its impact on current and prospective students." They agreed and, when the purchase went through, the school immediately lost accreditation. The accrediting agency reminded the new owners to inform students that their "courses or degrees are not accredited." But instead, the new owners concealed the loss of accreditation from students and falsely assured them that the school "remain[ed] accredited." It wasn't until the Pittsburgh Post-Gazette broke the news six months later that students learned about the accreditation loss. By the end of the year, the school had closed.

In the wake of these events, several students brought suit in Illinois state court. They sued the Foundation, its holding company, Dream Center Education Holdings (DCEH), the school, and the executives who participated in the decisions to misrepresent the school's status to students. They alleged that the defendants intentionally misrepresented and concealed the school's accreditation status and that, as a result, students were forced to incur thousands of dollars in wasted costs and debt. After

removal, these claims survived multiple motions to dismiss. The allegations that the defendants "intentionally withheld [] information from the students and lied about [the school's] accreditation status for months," the court explained, implicated conduct that was "highly unforeseeable, highly unusual, and potentially criminal."

The defendants, however, had already begun laying the foundation for a different strategy. Working with their paid consultant, Mark Dottore, DCEH convinced one of its creditors to sue it in Ohio federal court and request that a receivership be created over DCEH and the schools it had purchased so that Mr. Dottore, who worked in Cleveland, could "be appointed as receiver." The lawsuit was filed in Ohio and, within hours, the district court there had granted a receivership over DCEH and appointed Mr. Dottore as receiver.

What followed was an unusual proceeding. Normally, receivers are neutral third parties—strangers to the entity seeking receivership—because they are considered an officer of the court, not an agent of the parties. Their job is to stand in the shoes of the receivership entities and vigorously pursue claims to redress injuries suffered by those entities. Although receivers are empowered to litigate their claims, sometimes they settle. Typically, that occurs after the receiver produces a draft complaint that describes the claims he is settling in detail, and conducts "arm's length negotiations" with "professional mediator[s]" and in "plain view" of both federal authorities and interested parties. *SEC v. DeYoung*, 850 F.3d 1172, 1176 (10th Cir. 2017).

That was not the case here. In February 2021, the receiver announced that, after private "negotiations," he had reached a "global settlement" of his claims against the Foundation and a group of former executives, including the ones the students had sued. He insisted that his claims were "confidential." He never produced a complaint identifying his factual allegations or legal claims and repeatedly refused to produce the one document—a "settlement demand letter"—that supposedly outlined them. The receiver insisted, however, that the settlement was "contingent" upon the entry of a "bar order" that would "permanently enjoin[]" the students' pending claims against not just DCEH and the school (the entities in receivership) but also against all of the other non-receivership defendants named in the students' separate lawsuit. Multiple parties voiced serious concerns with this proposal but the district court approved it anyway.

The court's decision approving the settlement and entering a bar order is unsupportable. Bar orders are "an extraordinary form of relief" because they strip "non-settling parties of their day in court, through no fault of their own." *SEC v. Quiros*, 966 F.3d 1195, 1197, 1202 (11th Cir. 2020). They must "be used cautiously" and are "only appropriate in 'unusual circumstances.'" *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002). On the rare occasions when courts have approved them, they have required the receiver to meet "a high bar." *Quiros*, 966 F.3d at 1197. He must establish that (1) the district court has jurisdiction over the property being sought

by the barred claims, (2) he has standing to assert the claims that are being barred, (3) the bar order is necessary to create a global peace, and (4) the bar order is both fair and equitable. And a court may not approve a bar order unless it makes a clear "record of specific factual findings" to support its conclusions that the required conditions have been satisfied. *Dow Corning*, 280 F.3d at 658.

Both the receiver and court failed to adhere to these exacting requirements. The court asserted its jurisdiction over the students' claims but did so without ever making the necessary finding that the students' claims would "directly affect the receiver's assets." *Zacarias v. Stan. Int'l Bank, Ltd.*, 945 F.3d 883, 897 (5th Cir. 2019). And by failing to disclose or otherwise substantiate his claims, the receiver failed to demonstrate that he had standing to pursue, let alone bar, the students' claims. Both the receiver and the court also readily acknowledged that there was no global peace; others—including the receiver himself—remained free to pursue additional claims against the settling parties. Among the objecting parties, only students were shut out. Finally, the court failed to confirm that the bar order was fair or equitable—it just accepted the receiver's word for it. Each of these problems is fatal; taken together, they cast grave doubt on the integrity of the entire receivership. The district court's entry of a bar order should be reversed.

JURISDICTIONAL STATEMENT

The district court exercised diversity jurisdiction under 28 U.S.C. § 1332 over the complaint filed in this action. Order, R.DMS8, PageID108.[1] The court "ha[d] ancillary jurisdiction of the request to appoint a receiver and for an injunction." *Id.* After this case was filed, the named-plaintiff students in the Illinois action were granted party-intervenor status. Order, R.DMS49, PageID1084.This court has appellate jurisdiction under 28 U.S.C. § 1291 because this appeal is from the district court's final orders approving a settlement and barring students from pursuing their claims under 28 U.S.C. § 1292(a)(1) and because the orders appealed from operate as injunctions, barring the non-settling parties from litigating their pending claims. The district court entered judgment on October 20, 2021. Order, R.DMS757, PageID17767; Order, R.DMS758, PageID17779; Order, R.DMS760, PageID17784. The students timely filed a notice of appeal on October 26, 2021. Notice, R.DMS761, PageID17785.

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[1] For ease of reference, we denote as "R.DMS" all references to the record of this case in the district court, *Digital Media Solutions v. South University of Ohio, et al.*, No. 1:19-cv-00145 (N.D. Ohio Jan. 18, 2019). All citations to the record in the students' case in the Illinois Federal District Court, *Dunagan, et al. v. Illinois Institute of Art, et al.*, No. 1:19-cv-0809 (N.D. Ill. Removed Feb. 7, 2019), will be denoted with "R.Ill." And citations to the record in *Dottore v. Studio Enterprise Manager, et al.*, No.1:19-cv-00380-DAP, (N.D. Ohio Feb. 21, 2019), will be denoted with "R.SEM."

STATEMENT OF THE ISSUE

A receiver "seeking a bar order to facilitate a settlement faces a high bar." *Quiros*, 966 F.3d at 1197. To secure one, he must establish—through record evidence—that (1) the district court has jurisdiction over the property being sought by the barred claims, (2) he has standing to assert the claims that are being barred, (3) the bar order is necessary to create "global peace," and (4) the bar order is both fair and equitable. *SEC v. Stan. Int'l Bank, Ltd.*, 927 F.3d 830, 841–45 (5th Cir. 2019) ("*Lloyds*"); *DeYoung*, 850 F.3d at 1182–83. And, before approving such a request, a district court must "ma[k]e a record of specific factual findings that support its conclusions" that each condition has been met. *Dow Corning*, 280 F.3d at 658. Did the district court err when it approved the settlement and bar order here without requiring the receiver to satisfy these conditions and without making the required specific factual findings?

STATEMENT OF THE CASE

A. A bar order is an extraordinary remedy that derives from a court's historic equitable authority.

A federal district court's power to issue a bar order in a receivership proceeding traces back to the English chancery courts' authority to "protect[] real property" for creditors "when the court doubted that the party in possession would obey the court's injunction to stay waste and preserve the property, rents, and profits for those ultimately entitled to receive them." 12 Charles A. Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2981 (3d ed. Apr. 2021 update). The practice of equity

receiverships in the federal courts of the United States has, over the years, "expanded as a result of the increasing willingness of courts . . . to undertake the administration of the assets of corporations and other debtors," and was eventually codified by federal Rule 66. *Id.*

For much of the 1800s and 1900s, a federal court's power to issue a bar order was, just as in chancery, both limited and relatively uncontroversial. Bar orders in American courts were "analogous" to "the usual orders in creditors' suits and insolvent proceedings in chancery whereby claimants are required to come in within a limited period or be excluded from participation in assets." *United States v. Elliott*, 57 F.2d 843, 844 (6th Cir. 1932). To avoid the possibility that claimants would bring claims against a receivership estate after proceedings were completed, federal courts issued orders "forever bar[ring] all claims not presented and adjudicated before [a certain date] in receivership proceedings." *Hospelhorn v. Circle City Coal Co.*, 117 F.2d 166, 167–68 (6th Cir. 1941); *see, e.g.*, *Simpson v. Delaney*, 184 F.2d 658, 659 (2d Cir. 1950) (describing issuance of the "usual 'bar order'" in receivership proceeding as "requiring all claimants on or before September 1, 1949, to file their claims"). Bar orders, in other words, were authorized—and frequently employed—to encourage every party with a claim related to a receivership to come forward in a timely fashion. *See Elliott*,

57 F.2d at 844 (explaining that bar order "was intended only to hasten the winding up of the estate and to protect the trustee in its distribution").[2]

Around the mid-twentieth century, Congress expanded the use of bar orders in two specific statutory contexts—bankruptcy proceedings and securities receiverships. *See* Wright & Miller § 2981.

1. *Bankruptcy proceedings.* Beginning with the 1934 Bankruptcy Act, Congress enacted a series of provisions designed, among other things, to vest bankruptcy courts with authority to effectively supervise and administer a debtor's reorganization process. *See Duparquet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 222–24 (1936). One of these provisions, included as part of the Bankruptcy Reform Act of 1978, authorized bankruptcy courts to wield injunctive power, in the form of a bar order, "to enjoin suits that might impede the reorganization process." *See Celotex Corp. v. Edwards*, 514 U.S. 300, 311 (1995) (discussing 11 U.S.C § 105); *In re Bernard L. Madoff Inv. Sec., LLC*, 512 F. App'x 18, 20 (2d Cir. 2013) (explaining that, "where [an] injunction plays an important part in the debtor's reorganization [process]," section 105 "is properly used to enjoin creditors' lawsuits against third parties").

Courts were careful to recognize that such a drastic remedy—permanently extinguishing a pending claim outside the bankruptcy proceeding itself—was

[2] Unless otherwise specified internal quotation marks, citations, alterations, and emphases are omitted from quotations throughout the brief.

permissible only because Congress had expressly authorized it. *See Matter of Munford, Inc.*, 97 F.3d 449, 454–55 (11th Cir. 1996) (approving such an order because section 105(a) "clearly provides that the bankruptcy court can enter 'any order' necessary or appropriate to carry out the provisions of the Bankruptcy Code"); *see also Dow Corning*, 280 F.3d at 658 (permitting bankruptcy court to "enjoin[] a non-consenting creditor's claim against a non-debtor" based on the "statutory grant of power" in 11 U.S.C. § 105(a)); *but see In re Cont'l Airlines*, 203 F.3d 203, 211–15 (3d Cir. 2000) (refusing to read bankruptcy code as permitting non-consensual releases and permanent injunctions). But even in bankruptcy, "[n]o circuit has held or even suggested" that non-consensual releases of third-party claims "are anything less than an extraordinary use of the bankruptcy court's power" that "occupies the spectrum between 'impossible' and 'very rare.'" *In re FirstEnergy Sols. Corp.*, 606 B.R. 720, 733 (N.D. Ohio 2019).

2. Securities receiverships. Congress has also statutorily authorized the expanded use of bar orders in securities litigation. The federal securities acts granted courts a degree of "equitable flexibility"—intended to "preserve and enhance investor confidence in the securities markets." James R. Farrand, *Ancillary Remedies in SEC Civil Enforcement Suits*, 89 Harv. L. Rev. 1779, 1788 (1976). Part of this flexibility included specific statutory authorization for courts to issue bar orders to "discharge" "[a] covered person who settles any private action at any time before final verdict or judgment . . . from all claims for contribution brought by other persons." 15 U.S.C. § 78u-

4(f)(7)(A) (2010); *see id.* ("Upon entry of the settlement by the court, the court shall enter a bar order constituting the final discharge of all obligations to the plaintiff of the settling covered person arising out of the action."). The power to order such a sweeping release was intended to facilitate settlement between one of several codefendants and the plaintiff. *See* David Kaplan, *The Scope of Bar Orders in Federal Securities Fraud Settlements*, 52 Duke L.J. 211, 211–13 (2002) (explaining how the "PSLRA codified an emerging norm by requiring the entry of an order barring contribution claims made by or against certain settling parties in 10b-5 actions").

As with bankruptcy, after Congress enacted these legislative grants of authority, courts began entering complete bar orders in securities litigation. *See, e.g.*, *Lloyds*, 927 F.3d at 840 (finding that the "discretion to issue bar orders" in the securities context is supported by "the statutory grant of power"); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1232 (9th Cir. 1989) (noting that entry of a bar order was "resonant with the purposes of the securities laws"); *SEC v. Wencke*, 622 F.2d 1363, 1372 (9th Cir. 1980) (upholding bar order because "[t]here is a strong federal interest in insuring effective relief in SEC actions brought to enforce the securities laws").

3. Equity receiverships. In extremely rare circumstances equity receivership courts have also used bar orders to extinguish claims of non-consenting third-parties. *See, e.g.*, *Liberte Cap. Grp., LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. 2006) (noting that "[s]uch receiverships are increasingly rare").

This "class of cases . . . fall[s] outside the statutory bankruptcy proceedings or other legislated domain." *Id.* So those courts entering bar orders have relied on their inherent authority under Federal Rule 66 to exercise *in rem* jurisdiction over assets placed into a receivership and to "fashion[]" appropriate relief. *Id.* Such appropriate relief, courts have held, may include the "equitable distribution of [] assets," injunctions "staying litigation against the named receiver and the entities under his control," and, on very rare occasion, bar orders preventing parties from initiating or continuing lawsuits. *See id.*; *see also Liberte Cap. Grp., LLC v. Capwill*, 248 F. App'x 650, 655 (6th Cir. 2007).

B. Regardless of context, bar orders are permitted only in "unusual circumstances."

Even in the statutorily grounded bankruptcy and securities contexts, a bar order is "an extraordinary form of relief" because it strips "non-settling parties of their day in court, through no fault of their own." *Quiros*, 966 F.3d at 1197, 1202. And it does so even where those non-settling parties do not consent and "may not be part of the relevant lawsuit or settlement." *Id.* at 1199. Because bar orders can wipe away a party's valid claims without their consent, courts have recognized that they must "be used cautiously" and are only justified "in 'unusual circumstances.'" *Dow Corning*, 280 F.3d at 658; *see In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1079 (11th Cir. 2015) (warning that bar orders should be used "cautiously and infrequently"). As a result, "the

nonconsensual release of third-party claims against nondebtors remains an exception, not the rule." *In re FirstEnergy Sols.*, 606 B.R. at 735.

To determine what qualifies as one of the "unusual circumstances" in which a bar order is permitted, courts have generally insisted that four requirements be satisfied. *First*, because a receivership only has jurisdiction over the property that is the subject of the receivership, it may only bar claims that "directly affect the receiver's assets." *Zacarias*, 945 F.3d at 897. *Second*, the receiver must himself have standing to assert the claim that is being barred. Because a receiver "stand[s] in the shoes of the entity in receivership," he only has standing to bring and settle claims held by the receivership entity. *Wuliger v. Mfrs. Life Ins. Co.*, 567 F.3d 787, 793 (6th Cir. 2009). So if the receiver seeks to bar third-party claims, he must show that they are "substantially identical" to his own. *Zacarias*, 945 F.3d at 898. *Third*, the bar order must be necessary to bring "Global peace" to the litigation. *Lloyds*, 927 F.3d at 845. And *fourth*, the bar order must be "fair and equitabl[e]." *Quiros*, 966 F.3d at 1199. In addition, any court entering a bar order must "ma[k]e a record of specific factual findings that support its conclusions" that each factor is satisfied. *Dow Corning*, 280 F.3d at 658.

C. This Litigation

1. The Illinois Institute of Art provides accredited class to students in the upper Midwest.

For more than a century, the Illinois Institute of Art (IIA) offered higher education classes and bachelor's and associate degrees for several programs, including

culinary arts, design, and media arts, to students throughout the upper Midwest, including at two campuses in Illinois, IIA-Schaumburg and IIA-Chicago. *See* Complaint, R.1¶165, PageID7532. For years, the school's campuses were accredited by the Higher Learning Commission—a private non-profit accrediting agency recognized by the United States Department of Education—that determines the accreditation for approximately 1,000 colleges and universities throughout the U.S. *Id.*, PageID7532, 7554. Accreditation demonstrates to the public and employers that they can have confidence in a college or university, and, in turn, the degree a graduate earned. *Id.*, PageID7553. When a school lacks accreditation, it signals to employers that a student's educational program has not met widely accepted standards and that the student may have received a sub-par education. *Id.*, PageID7553–54. It also harms the student's ability to transfer credits to other educational institutions. *Id.* The Illinois Board of Higher Education has emphasized to prospective students to "be sure the institution you select is accredited." *Id.*, PageID7553.

2. In 2017, the Dream Center Foundation purchases IIA despite being warned that the sale could result in the school's loss of accreditation.

In early 2017, IIA's then-owner, Education Management Corporation, agreed to sell schools to the Dream Center Foundation—a California-based missionary organization. *Id.*, PageID7538–39. Since 2014, the Foundation had been "actively exploring" options to "acquire an accredited university or university system." *Id.* At the

time of its purchase, the Foundation had no experience operating higher education schools. *Id.* To facilitate its purchase, the Foundation incorporated a wholly owned subsidiary called Dream Center Education Holdings (DCEH) to serve as the direct owner of the schools. *Id.*, PageID7536. Brent Richardson, Chris Richardson, and Shelly Murphy—among the eventual defendants in the lawsuit brought by the students—served as officers of DCEH. *Id.*, PageID7537.[3]

On March 3, 2017, the Foundation issued a press release announcing its plan to acquire the IIA campuses. *Id.*, PageID7538. It assured the school's students and the public that it "will continue to operate these institutions as they have operated." *Id.*, PageID7543. In advance of the sale of IIA, the Higher Learning Commission investigated the proposed change in ownership to determine whether the IIA campuses would retain their accreditation after the sale. Order, R.Ill128, PageID5200. In November 2017, the Commission formally notified DCEH and IIA that, when the transfer was finalized, the school would be placed on a pre-accreditation status. Complaint, R.Ill165, PageID7554. The Commission explained that, to restore IIA's accreditation, the Foundation, DCEH, and IIA had to, among other things, "engage in appropriately autonomous oversight of their institutions." *Id*. It also set forth certain "approval factors" that the new owners needed to address. *Id.*, PageID7555–56.

[3] Below, the parties and court referred to the Dream Center Foundation as "DCF" and Dream Center Education Holdings as "DCEH." To avoid confusion, we refer the Dream Center Foundation as "the Foundation" throughout this brief.

DCEH and IIA accepted these conditions on the Commission's approval of the change in IIA's ownership. *See* Response App'x., R.Ill152, PageID6634.

Consistent with these communications, on the day that the Foundation and DCEH took control of IIA, the school lost its accreditation and became a "Candidate for Accreditation." Complaint, R.Ill165, PageID7532, 7554. The period of IIA's candidacy status was to last a minimum of six months. *Id.*, PageID7556. But IIA never had its accreditation restored; the Commission determined that, after the transfer of ownership, IIA no longer "satisf[ied] its criteria for accreditation." Response, R.DMS737, PageID16486.

3. Instead of telling IIA's students about the school's loss of accreditation, the Dream Center entities affirmatively misrepresent the school's accreditation status to students.

Although the Commission explicitly told DCEH and IIA that the school's accreditation status would be changed—a decision which the new owners accepted—neither DCEH nor IIA warned IIA students. Complaint, R.Ill165, PageID7554. They made the same choice even after IIA's accreditation was officially revoked in January 2018—despite explicit instructions by the Commission to inform students. For instance, the Commission told DCEH that it must "portray [IIA's] accreditation status with [the Commission] clearly to the public," and "clearly state[] its impact on current and prospective students." *Id.* PageID7555. Then, a week later, the Commission again instructed DCEH that IIA needed to inform its students that credits they

earned while IIA was unaccredited "may not be accepted in transfer to other colleges and universities or recognized by prospective employers." *Id.*, PageID7556. These instructions were ignored. *Id.*, PageID7532–33.

Less than a month later, the Dream Center entities and their officers went a step further. They began making affirmatively false and misleading representations to students regarding IIA's accreditation status. For instance, DCEH's vice president, warned Chris Richardson, DCEH's general counsel, and Shelly Murphy, DCEH's chief regulatory and government affairs officer, that language on the school's website "inaccurate[ly]" "say[s] the institutions are 'accredited' by [the Commission]" and that "neither institution has instituted processes for notifying students (prospective, current, or graduating students) of the candidacy status." Response App'x., R.Ill152, PageID6738–39. Chris Richardson asked DCEH's outside counsel "what [to] do" and was told that updating the language would "risk[] student panic." *Id.* So he directed Shelly Murphy to add different language to the school's website stating (falsely): "We remain accredited as a candidate school seeking accreditation under new ownership and our new non-profit status." Complaint, R.Ill165, PageID7561, 7599.

For at least five months after IIA lost its accreditation, the defendants continued to make false and misleading representations on the school's website. They also affirmatively misrepresented the school's accreditation status in the same way to

recruit *new* students—assuring them that the school "remain[ed] accredited" in course catalogues and enrollment agreements. *Id.*, PageID7533, 7599. The Dream Center entities and their officers were so committed to concealing IIA's loss of accreditation that they chose not to appeal the school's loss of accreditation even though it could have mitigated the harm to IIA's students; doing so could have alerted the students to the accreditation loss. *Id.*, PageID7559, 7566, 7601, 7606.

4. The affirmative misstatements about IIA's accreditation leads students to believe their degrees are accredited when in fact they are not.

The new owners' concealment of IIA's loss of accreditation left the school's students in the dark. Students who graduated from IIA between January 20, 2018, and June 19, 2018 never knew that the courses they took during that time were not accredited, just like the degrees IIA ultimately conferred on them. *Id.*, PageID7566, 7570. It wasn't until after the Pittsburgh Post-Gazette revealed that the Commission had removed the school's accreditation, that students and the public first learned that the new owners' purchase and ongoing conduct caused the school to lose accreditation. *Id.*, PageID7533, 7570.

In the face of this public disclosure, DCEH assured the school's current and former students that IIA was likely to reobtain accreditation and that any credits earned since the school lost accreditation would then be deemed fully accredited. *Id.*,

PageID7599. Six months later, IIA closed without ever having been reaccredited. *Id.*, PageID7534.

5. IIA's students bring suit in Illinois against the Foundation, DCEH, IIA, and DCEH's directors and officers.

In December 2018, four students who were enrolled at IIA when it lost accreditation filed suit in Illinois state court on behalf of themselves and more than 1,000 other students against the Foundation, its wholly-owned holding company, DCEH, and IIA. *Id.*, PageID7531–35. The students sought to hold the defendants accountable for the harm that their misconduct caused to IIA's students. The defendants removed the case to federal court in the Northern District of Illinois, where it is currently pending. *Id.*, PageID7534.

The students brought claims under the Illinois Consumer Fraud and Deceptive Practices Act and Illinois common law. *See* Complaint, R.Ill165, PageID7532. Their complaint asserts that the defendants' misrepresentation and concealment of IIA's loss of accreditation caused direct harm to IIA's students, including "debt incurred in order to attend IIA, costs incurred to attend IIA, lost wages, damage to credit, loss of eligibility for financial aid programs, and a diminution in the value of their course credits and degrees." *Id.*, PageID7599. And although the Department of Education in November 2019 discharged IIA students' 2018 federal loans (for the period after the misrepresentations occurred), the students still incurred costs of attendance that substantially exceeded any relief from the government's loan forgiveness—

including payments made out-of-pocket and via private loans. Complaint, R.Ill165, PageID7586–98. As a result of this harm, the students sought relief directly from the Foundation, DCEH, IIA, and the individual defendants. *See id.*, PageID7606.

The Foundation and the individual defendants filed motions to dismiss. The district court denied these motions in a series of orders, rejecting the Foundation's attempt to dismiss the students' "detailed and specific allegations." Order, R.Ill68, PageID1323–24. The Court also observed that "the Dream Center admits that it knew that the Commission withdrew accreditation on January 20, 2018, which was the same date that the withdrawal of accreditation became effective" and yet "intentionally withheld [] information from the students and lied about its accreditation status for months." Order, R.Ill128, PageID5212. Those actions implicated "conduct [that was] highly unforeseeable, highly unusual, and potentially criminal." *Id.*

Having survived the defendants' motions, the case proceeded into discovery. That is now well underway—over 50,000 pages of documents have been exchanged. Objections, R.DMS729, PageID16234. The students have also deposed multiple officers, directors, and employees of the Dream Center entities.

6. Shortly after the students' lawsuit is filed, a creditor of DCEH moves for a receivership over DCEH and its subsidiaries, including IIA, in Ohio.

Shortly after the students' case was filed in Illinois, a creditor of DCEH filed a separate case in federal court in Ohio. Complaint, R.DMS1, PageID1. Its complaint

sought $250,000 in unpaid invoices and requested the appointment of a receiver over DCEH and its assets and subsidiaries—including IIA, but not over DCEH's parent, the Foundation. *Id.*; Motion, R.DMS3, PageID49.

This receivership request was unusual. Normally, appointed receivers are neutral third parties—strangers to the entity seeking a receivership—precisely because a receiver is considered "an officer of the court" and "not an agent of the parties." Wright & Miller § 2981. But here, DCEH and its allies engineered the entire receivership process. Around the time the students sued DCEH in Illinois, it worked with one of its paid consultants, Mark Dottore, to induce a creditor to initiate a federal lawsuit in Ohio that would result in the selection of Mr. Dottore as the receiver. Email, R.DMS47-8, PageID1059–60 (noting that, because Mr. Dottore was located in Ohio, "the lawsuit would have to be filed by a creditor . . . in the Federal Court sitting in Cleveland").

Finding an Ohio creditor willing to sue DCEH wasn't straightforward. In December 2017, Mr. Dottore's lawyer sent an email to one potential candidate, a landlord, explaining that it was "in the best position to facilitate a lawsuit to sue for breach of your lease in order to invoke the federal courts [sic] jurisdiction" and to "seek the appointment of Mark as receiver." *Id.* DCEH introduced Mr. Dottore as the individual who "has been selected by the principals of [the school's] parent entities [] as the proposed receiver." *Id.*; *see also* Objections, R.SEM9, PageID626 (introducing Mr.

Dottore as "the individual who would purportedly be appointed as receiver"). The email attached a "draft complaint" against DCEH for breach of its lease agreement and requested that the landlord "fill in the blank places" to finalize it. Email, R.DMS47-8, PageID1059–60. The landlord rejected the proposal.

Mr. Dottore, however, soon found a willing collaborator called Digital Media Solutions, a company providing student lead generation services to DCEH. Complaint, R.DMS1, PageID2. On January 18, 2019, Digital Media Solutions filed its complaint and motion to appoint Mr. Dottore as the receiver. *Id.*; Motion, R.DMS3. Later that day, DCEH filed its response agreeing to the request. Response, R.DMS7, PageID93. A few hours later, the court appointed Mr. Dottore as receiver. Order, R.DMS8, PageID110.

On February 6, 2019, four of the students involved in the litigation against the Dream Center entities in Illinois filed a motion to intervene in the receivership proceeding in Ohio. Motion, R.DMS35, PageID300.[4]

7. Without filing a draft complaint or taking any discovery, the receiver proposes a settlement that includes a bar order purporting to extinguish the students' claims in Illinois.

In February 2021, the receiver announced that, after three years, he had reached a "global settlement" of his claims with the Foundation and a large group

[4] The district court referred to the student-plaintiffs as the "Dunagan Intervenors." For simplicity, this brief refers to them as the "students."

of former officers and directors of the Dream Center entities, including Brent Richardson, Chris Richardson, and Shelly Murphy. Motion, R.DMS674, PageID15377–78. The receiver identified a single $10 million primary insurance policy plus an excess policy, also worth $10 million, issued by National Union Fire Company to DCEH. *Id.*, PageID15379. He informed the court that, in exchange for DCEH's payment of $8.5 million from the primary policy, he would agree to relinquish any rights DCEH had to additional recovery from either policy. *Id.*, PageID15385.

The receiver also explained that he proposed to release a host of other entities and individuals, including all the directors and officers of the Dream Center entities, from "each of the [receiver's] potential claims" "that might implicate the [National Union] Policies." *Id.*, PageID15377.[5]

The receiver asserted that the settlement was "contingent upon the Court entering a Bar Order." *Id.*, PageID15388. This proposed bar order would "permanently bar" "any person or entity" from bringing or maintaining "claims" against not just the entity in receivership, but any of the "released parties." It defined "released parties" to include both the Foundation as well as the directors and officers of the

[5] The receiver also identified four additional policies totaling $40 million but informed the court that nothing would foreclose the receiver from pursuing recovery from the same parties he was settling with out of the proceeds of these policies. Settlement, R.DMS721-3, PageID16129–30, 16145. As explained below, however, the receiver's proposed bar order would foreclose any other party from ever reaching these funds.

Foundation and DCEH—all non-receivership parties. *Id.*, PageID15388–89 And it defined the term "claim" broadly, to cover anything that:

> is based in whole and part on any . . . 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 receiver's claims] and all other claims that have been made or could be made, in connection with the Receiver's Alleged Claims . . . or which may implicate the Policies in any way.

Id., PageID15389.

But although the receiver defined the settlement and bar order, in part, by reference to his own claims, he never disclosed what those claims were in his motion or proposed settlement. Instead, he asserted that his claims were "confidential." *Id.*, PageID15380 (referencing a "confidential settlement demand letter" purporting to outline claims against directors and officers). The receiver nevertheless told the court that his undisclosed claims "ha[d] merit," but that litigating them would require "discovery," and "prosecution of motions and preparation for trial," and that this would "deplet[e]" the funds available from the receivership's assets. *Id.*, PageID15387–88.

The receiver's motion prompted multiple objections focused on the implications of the bar order. *See* Motion, R.DMS721, PageID16097 (acknowledging that various parties "filed formal objections" and that "several parties expressed private reservations"). Among those raising concerns was the United States Department of Education, which, under the bar order, would have been foreclosed from pursuing certain claims it held. Government Statement, R.DMS747, PageID17495. The same was

true for the trustee overseeing the bankruptcy of Education Management Corporation, the company that sold IIA to the Foundation. *See* Trustee Objections, R.DMS694, PageID15829 (objecting because it would bar the trustee from pursuing preexisting claims against the receivership entities and the directors and officers). The students also lodged objections. *See* Objections, R.DMS692, PageID15647. They told the court that the receiver had "not provided any information about what claims he is settling" with the Foundation or directors and officers, and that he had refused to produce the demand letter or disclose the nature or basis of his claims. *Id.*

Two months later, the receiver filed an amended settlement motion. *See* Motion, R.DMS721, PageID16094. The receiver amended the bar order to allow the trustee to pursue his claims. *Id.*, PageID16099. He likewise carved out from the bar order the federal government's ability to pursue claims on its behalf against any of the released parties. *Id.*, PageID16101. But the receiver continued to seek the entry of a bar order that would permanently enjoin the students' pending lawsuit in Illinois and bar them from recovering against any of the released parties. *See* Motion, R.DMS674, PageID15382–88; Settlement, R.DMS721-3, PageID16138–40.

In defense of this position, the receiver told the court that the students should not be allowed to pursue their claims "because each of them has been fully compensated by the United States." Response, R.DMS737, PageID16482. The receiver also insisted that the students' claims were preempted by the federal Higher Education

Act or, in the alternative, assigned "to the United States." *Id.*, PageID16482–83, 16502. And, notwithstanding the receiver's claim that the students were fully reimbursed, the receiver also blamed the students for "fail[ing] to mitigate their damages" by not choosing to "surrender all credits they earned while Illinois Art was accredited" to receive "total closed school student loan cancellation." *Id.*, PageID16501.

Multiple parties, including the federal government, again registered their disagreement with the receiver's position. For its part, the Department of Education told the district court that the receiver's claim about preemption "is wrong on the law and wrong based on the students' own allegations." Government Statement, R.DMS747, PageID17497. The government also told the district court that the receiver's assertion that the students' claims had been assigned to the federal government was "equally flawed." *Id.*, PageID1500–01 (citing Response, R.DMS737, PageID16482) (explaining that the students had "describe[d] their damages as excluding the amounts of loans discharged or cancelled").

The government also voiced a broader concern: Approving the receiver's proposed settlement and bar order placed the "personal assets" of individual directors and officers completely out of reach. Transcript, R.DMS751, PageID17544. So, under the settlement, despite being "accused of fraud and other kinds of misrepresentation that have caused damage . . . to the United States . . . and [to] the

students," the directors and officers "pay zero dollars" and are let completely "off the hook." *Id.*, PageID17545.

The students filed their own objections. The receiver's request for a bar order was improper, they explained, because it failed to satisfy any of the four conditions that must be met before third-party claims can be barred. *See* Objections, R.DMS729, PageID16239; *supra* Section I.B. Among other things, the students pointed out that the receiver had repeatedly failed to specify what potential claims he had, let alone provide any evidence that the students' claims against the non-receivership entities were substantially identical to his own, and thus failed to establish his standing to bar the students' claims. *Id.*, PageID16243–45.

In response, the receiver asserted that he could bar the students' claims because they were substantially identical to his own. *See* Response, R.DMS737, PageID16513. Instead of explaining why, the receiver said he would "provide sworn testimony that will provide [the students] with the evidence they need." *Id.* In lieu of any evidence, or even a detailed description of his claims, the receiver filed a declaration that only "summarized generally" eight categories of claims he purported to have against the directors and officers. Declaration, R.DMS742, PageID16773–75. One of the general categories was labeled "Accreditation Claims." The summary of these claims did not describe any claims the receivership entities had against the Foundation or the directors and officers for misrepresenting IIA's accreditation

status. Instead, it described only claims "made *by students* who were attending the DCEH schools in Illinois and Colorado and allege that the schools lost their accreditation status but did not publish to their student bodies the fact that the schools were no longer accredited." *Id.* (emphasis added). The receiver did not explain how he—rather than just the students—plausibly held this category of claims or what injuries the receivership entities experienced as a result of this misconduct.

8. The district court approves the settlement and enters the bar order.

The district court approved the settlement and bar order over the students' objections. *See* Order, R.DMS757, PageID17753. The court held that it had jurisdiction to enter the bar order extinguishing all of the students' claims. It recognized that the students' lawsuit included "fraud and misrepresentation claims" against both the Foundation and the individual directors and officers personally, and that these defendants were independent of the receivership entities. *Id.*, PageID17758. But it nevertheless held that it could exercise jurisdiction to bar these claims because, in its view, the directors and officers "could satisfy" a judgment on these claims "by virtue of the National Union policies," which were "indirect assets of the receivership estate." *Id.*, PageID17758–59.

The court also held that the receiver had demonstrated his standing to pursue these same claims. To reach this conclusion, the court quoted the following exchange between it and the receiver:

> THE COURT: …does the Receiver contend that the Directors and Officers of DCEH and [its member schools] engaged in a pattern of fraudulent activity regarding the financing of the schools, the accreditation of the schools, and the availability of health care coverage [to] employees of the schools from the time of DCEH's acquisition of the schools until the establishment of the Receivership, which was January of 2019, is that correct?
>
> MS. WHITMER: Your Honor, I believe that was one of the claims that we made against the insurance policies.

Id., PageID17759 (quoting Transcript, R.DMS751, PageID17520–21). For the court, this alone demonstrated, "contrary to the [students'] arguments, . . . that the receiver *has* alleged that the receivership suffered an injury traceable to the actions of the [directors and officers]." *Id.* Without additional explanation, the court also stated that "the receivership estate's injury is more easily traceable" to the directors' and officers' actions than the students' "remaining uncompensated damages." *Id.*

The court next concluded that the students' claims were "not 'independent and non-derivative' from the receiver's similar claims." *Id.* Although the court acknowledged that the student and receiver suffered different damages, it characterized both the receiver's and students' claims as alleging that DCEH, the Foundation, and the directors and officers "made misrepresentations adversely affecting DCEH member schools, and specifically, the Illinois Institute of Art." *Id.*, PageID17760. In addition, the court asserted that "there can be no doubt that both sets of claims impact the National Union insurance policy proceeds." *Id.* On this basis, the court concluded that the students' and receiver's "causes of action against the [directors and

officers] are substantially identical." *Id.* It said nothing about the students' claims against the Foundation.

The court did not address or explain how the proposed settlement and bar order would bring global peace to the parties. Nor could it. As the court recognized, the settlement would not prevent multiple parties, including the federal government, from bringing suit against the directors and officers. *See* Transcript, R.DMS751, PageID17536 (noting that the Department of Education "certainly can" bring a lawsuit). The bar order even failed to afford the settling parties peace from the receiver himself—the one party who was compensated by the settling parties. Settlement, R.DMS721-3, PageID16145–46. *See also* Order, R.DMS757, PageID17764 (noting that the settlement "leave[s] open the possibility that the receiver and government might sue"). Instead, the court ruled, "even if the receiver's proposed settlement agreement would not bring full and final peace to the insureds," the students lacked "standing to raise such an argument." *Id.* It did not elaborate further.

Finally, the court reasoned that the bar order was fair because the receiver, in response to the court's direction, created a "litigation trust" to "allow[] for the litigation and safeguarding of the [students'] claims." Order, R.DMS760, PageID17783–84. The "litigation trust" concept was first advanced by the receiver during a hearing on the objections to the receiver's settlement and bar order motion and was supposed to "provide an appropriate forum for the [students] to litigate their claims." Order,

R.DMS749, PageID17508. But what the Receiver ultimately proposed, and the court approved, only allowed the students to file a proof of claim with the Receiver for a pro rata share from the estate, and then only if the students could first prove their claim in "a court of competent jurisdiction on a final and non-appealable basis." Trust Agreement, R.DMS756-2, PageID17721. Neither the receiver nor the court explained what court of competent jurisdiction would be open to students, given that the bar order barred them from all such jurisdictions.

After the bar order was issued, the students' lawsuit in Illinois was stayed. *See* Order, R.Ill183, PageID8188.

STANDARD OF REVIEW

The review of a district court's subject matter jurisdiction to bar claims is de novo. *See Zacarias*, 945 F.3d at 894–95; *Dow Corning*, 280 F.3d at 656. A district court's authority to enter a bar order based on a receiver's standing is also reviewed de novo. *See DeYoung*, 850 F.3d at 1180. Review of a district court's actions in supervising an equity receivership, including the determination of the fairness of a settlement and general propriety of a bar order, is reviewed for an abuse of discretion. *See Lloyds*, 927 F.3d at 839.

SUMMARY OF ARGUMENT

A receiver who seeks a bar order stripping non-consenting third parties of their day in court faces a high bar. Bar orders are an extraordinary form of relief only

justified "in unusual circumstances." *Dow Corning*, 280 F.3d at 658. To justify the entry of one, a receiver must demonstrate, through record evidence, that four conditions have been met: (1) that the district court has jurisdiction over the property being sought by the barred claims, (2) that the receiver has standing to assert the claims that are being barred, (3) that the bar order is necessary to create global peace, and (4) that the bar order is both fair and equitable. Before approving such a request, a district court must also make "a record of specific factual findings" confirming that the four conditions are satisfied. *Id*. Neither the receiver nor the court met its obligations here.

A. The district court failed to demonstrate that it had jurisdiction to bar the students' claims. A federal court sitting in equity exercises *in rem* jurisdiction, and so only has jurisdiction to bar claims that "directly affect the receiver's assets." *Zacarias*, 945 F.3d at 897. But here, the district court held only that the relevant policy proceeds were "indirect assets of the receivership estate." Order, R.DMS757, PageID17759. But, even if true, that would not afford the court jurisdiction to bar the students' claims. Their claims against the Foundation and the individual directors and officers in their personal capacity are for money damages—not for any property or even a share of any particular policy proceeds. The claims thus "exist independently" from any of the assets within the receivership estate. *Lloyds*, 927 F.3d at 847. Because

"receivership courts have no authority to dismiss claims that are unrelated to the receivership estate," the district court had no jurisdiction to bar the students' claims here.

The district court reached a contrary view by accepting the receiver's bare assertion that the non-receivership entities could seek indemnification from the National Union insurance policies. But it did not analyze those policies' coverages and exclusions or otherwise require the receiver to substantiate its claim that any particular policy's proceeds would be diverted from the receiver to the students. By failing to meaningfully reckon with its jurisdiction or make the requisite "record of specific factual findings" to "support its conclusion," the district court's jurisdictional finding cannot be upheld. *Dow Corning*, 280 F.3d at 658.

B. The receiver also lacked the authority to bar the students' claims. A receiver, no less than a court, is "inherently limited by the jurisdictional constraints of Article III." *Liberte,* 248 F. App'x at 655. Because a receiver stands in the shoes of the entity in receivership, he may sue only to redress injuries to the entity in receivership. To bar third-party claims, then, a receiver must show (again with record evidence) that the third-party claims are "substantially identical" to those that are held by the entity in receivership. The receiver barely even tried to make that showing. He repeatedly refused to produce the one document—a "Settlement Demand Letter"—that purportedly "outlined his alleged claims." Motion, R.DMS674, PageID15380.

Instead, he relied on a declaration that simply asserted he "had various Claims" and included a cursory summary of them. Declaration, R.DMS742, PageID16773. But even that summary failed to include claims that the fraud that harmed the students—which involved misrepresentations made specifically to them—also harmed the receivership entities.

C. The district court also entered the bar order despite the fact that it would not create global peace or bring an end to all potential claims related to the receivership estate. *See Lloyds*, 927 F.3d at 841–45. Not only did the receiver expressly carve out multiple third-party's claims from the scope of the bar order, he also crafted the settlement to ensure that he could pursue additional claims against the very same parties upon whom the bar order was supposed to confer global peace. Settlement, R.DMS721-3, PageID16145. The district court recognized this problem but overlooked it, holding that the students lacked "standing to raise such an argument." Order, R.DMS757, PageID17764. The court gave no explanation for this position and cited no authority in support of it. That is because there is none.

D. Finally, the district court abused its discretion in failing to confirm that the entry of the bar order was "fair and equitable . . . with an eye toward its effect on the barred parties." *Quiros*, 966 F.3d at 1199. The court extinguished the students' claims without verifying that the receiver's eleventh-hour litigation trust would provide them with meaningful alternative compensation. The record provides no clarity as

to how the trust would operate in practice, and provides no confirmation that it would provide a fair means by which the students could safeguard their claims. The court also failed to explain how the high price of the bar order was justified or necessary. As it did with the other factors, it simply accepted the receiver's say-so. *See* Order, R.DMS757, PageID17760. Because the court failed to make the "thorough factual findings" that are required before entering a bar order, this Court should reverse. *Seaside Eng'g*, 780 F.3d at 1081.

ARGUMENT

I. The district court's entry of a bar order permanently extinguishing certain third-party claims was error.

A district court has authority under Federal Rule 66 to place assets into an equitable receivership and to then exercise *in rem* jurisdiction over that property "to determine the appropriate relief." *Lloyds*, 927 F.3d at 840. Such appropriate relief may, on rare occasion, include "bar orders to prevent parties from initiating or continuing lawsuits that would dissipate receivership assets." *Id.* But, because a bar order strips "non-settling parties of their day in court, through no fault of their own," it is an "extraordinary form of relief," *Quiros*, 966 F.3d at 1197, 1202, that is justified only "in unusual circumstances," *Dow Corning*, 280 F.3d at 658.

It is for this reason that a receiver "seeking a bar order to facilitate a settlement faces a high bar." *Quiros*, 966 F.3d at 1197. To secure one, a receiver must satisfy—through record evidence—four conditions. He must establish that (1) the district

court has jurisdiction over the property being sought by the barred claims, (2) he has standing to assert the claims that are being barred, (3) the bar order is necessary to create a "Global peace," and (4) the bar order is both fair and equitable. *Lloyds*, 927 F.3d at 841–45; *DeYoung*, 850 F.3d at 1182–83.

And, before approving such a request, a district court must "ma[k]e a record of specific factual findings that support its conclusions" that each condition has been met. *Dow Corning*, 280 F.3d at 658; *see Seaside Eng'g*, 780 F.3d at 1081 (upholding bar order because the district court "made *thorough* factual findings in reaching its decision" and those findings "are amply supported by the evidence"); *Behrmann v. Nat'l Heritage Foundation*, 663 F.3d 704, 712 (4th Cir. 2011) (explaining that court entering a bar order must "make specific factual findings in support of its decision"); *Liberte*, 248 F. App'x. at 655 (rejecting receivership court's "perfunctory" analysis of each condition to support entry of a bar order). In the absence of clear, record-based findings, the entry of a bar order is unsupportable and would "do that which the law forbids." *United States v. Coastal Refin. & Mktg., Inc.*, 911 F.2d 1036, 1043 (5th Cir. 1990).

As we explain below, both the receiver and the district court discarded these demanding requirements. The receiver failed to meet his burden to show each condition was met—for some, the receiver failed to introduce any evidence into the record at all. And, by performing at most a perfunctory analysis of the required factors before entering the bar order, the district court failed to hold the receiver to the high

bar he faces when seeking such an extraordinary remedy, and likewise failed to reckon with its own limitations as a receivership court. The result was an extraordinary order permanently stripping only certain third-parties of their preexisting claims. Order, R.Ill128, PageID5212. Because no authority supports such an order, this Court should reverse.

A. The district court lacked jurisdiction to bar the students' claims against the non-receivership defendants.

The first condition that must be satisfied before a bar order may validly be entered is a familiar one: The court must have "jurisdiction to enjoin the potential claims encompassed by the bar order." *In re Greektown Holdings, LLC*, 728 F.3d 567, 577 (6th Cir. 2013). A federal court sitting in equity and presiding over a receivership exercises "*in rem* jurisdiction," *Lloyds*, 927 F.3d at 841, and, as a result, only has jurisdiction to bar claims that "directly affect the receiver's assets," *Zacarias*, 945 F.3d at 897. This "bedrock proposition" may not be "ignore[d]"—a receivership court may not "permanently bar and extinguish independent[] . . . third-party claims that do not affect the *res* of the receivership estate." *Lloyds*, 927 F.3d at 842–43, 849.

The district court failed to adhere to this strict jurisdictional limitation. It never determined that the students' claims "directly affect the receiver's assets," concluding only that the National Union insurance proceeds were "indirect assets" of the estate. Order, R.DMS757, PageID17756–59. This was disputed, *see* Objections, R.DMS729, PageID16250–52; Reply, R.DMS746, PageID17376–77, but even if the district court's

characterization was correct, the students' damages claims neither referenced nor targeted those proceeds. They instead sought relief from whatever sources were available to the Foundation and the directors and officers—*i.e.*, their personal assets or the four other DCEH insurance policies that were not part of the settlement. *See* Settlement, R.DMS721-3, PageID16138–39. The claims thus "exist independently" from any of the assets claimed by the receivership estate. *Lloyds*, 927 F.3d at 847. Because "receivership courts have no authority to dismiss claims that are unrelated to the receivership estate," the district court had no jurisdiction to bar the students' claims here. *Id.*; *see also In re Heritage Bond Litig.*, 546 F.3d 667, 680 (9th Cir. 2008) (discussing settlement of a securities class action and distinguishing between claims for codefendant contribution and independent claims against settling defendants; former could be dismissed by bar order, but latter claims could not be).

Even if that were not the case, the court offered no justification or explanation why *any* of the defendants "could satisfy" the students' claims with the National Union policies. It just accepted the receiver's assertion. *See* Order, R.DMS757, PageID17760 (noting that the receiver "advised that neither the Ds&Os nor [the Foundation] would waive indemnification rights they may have under the National Union policies"). It did not analyze the language of the policies or otherwise conduct any inquiry (let alone a searching one) into this claim. Had it, the court might have found that policy exclusions precluded the proceeds from being used to indemnify

the defendants for the students' claims sounding in fraud. *Compare* Insurance Policy, R.DMS737-6, PageID16587, 16593 (excluding coverage for deliberate fraudulent conduct), *with Rice v. Liberty Surplus Ins. Corp.*, 113 F. App'x 116, 118–123 (6th Cir. 2004) (explaining that a policy containing an exclusion for deliberate fraud will not cover claims "based on, arising out of, or in any way related to a deliberately dishonest, malicious or fraudulent act or omission or any willful violation of law"). If that were true, the students' claims would not be capable of even indirectly affecting the *res*. The district court's conclusory finding that it had jurisdiction over all of the students' claims failed to reckon with its own jurisdictional limitations and failed to make the requisite "record of specific factual findings" that "support its conclusions." *Dow Corning*, 280 F.3d at 658. That, standing alone, is reversible error.

B. The court had no authority to bar the students' claims because the receiver had no standing to settle or resolve them.

A receiver, no less than a court, is also "inherently limited by the jurisdictional constraints of Article III." *Liberte*, 248 F. App'x at 655. The limitation flows from the basic role of a receiver—which is to simply "stand in the shoes of the entity in receivership." *Wuliger*, 567 F.3d at 793. As a result, "an equity receiver may sue only to redress injuries to the entity in receivership." *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995). And a receiver "who lacks standing to assert the claims of creditors, equally lacks standing to settle them," *DSQ Prop. Co. v. DeLorean*, 891 F.2d 128, 131 (6th Cir.

1989), which means a court in receivership similarly lacks the authority enforce a bar order against such a claim. *See Zacarias*, 945 F.3d at 897.

As a result, if a receiver proposes barring third-party claims, he must show, with record evidence, that the third-party claims are "substantially identical" to those that are held by the entity in receivership. *See id.* at 898; *DeYoung*, 850 F.3d at 1176. In those cases where a receiver has met this burden, they have "drafted a complaint" setting forth, with detailed allegations, "the nature of the claims the Receiver intend[s] to pursue" on behalf of the entity in receivership. *DeYoung*, 850 F.3d at 1176, 1182. Then, after doing that, they have identified with specificity the "duplicative claims" between the receiver's complaint and those contained in any third-party complaint. *Zacarias*, 945 F.3d at 896–98; *see also Wuliger*, 567 F.3d at 794 (receiver's standing to bar claims assessed by comparing claims in receiver's complaint with those brought by third parties). If, based on that comparison, a receiver's and third-party's claims involved "the same loss, from the same entities, relat[ed] to the same conduct, and [arose] out of the same transactions and occurrences by the same actors," then the receiver has standing to bar them. *DeYoung*, 850 F.3d at 1176. If instead the third-party claims are "independent and non-derivative" of the receiver's—because they seek recovery from different defendants for "distinct" injuries based on different conduct—the claims cannot be barred. *Zacarias*, 945 F.3d at 897, 899.

The receiver here, however, offered *no* evidence or testimony—none at all—to show that he held claims that were substantially identical to the students' claims. The receiver presented no evidence he had brought claims against any of the defendants in the students' case. *See, e.g.*, Deposition Transcript, R.DMS692-19, PageID15803–05 (testimony of Chris Richardson that he had not been notified of any claims against him). The receiver never filed or otherwise shared a draft complaint setting forth the claims he intended to pursue and the specific allegations supporting those claims. And he refused to produce the one document—his "Settlement Demand Letter"—that purportedly "outlined his alleged claims." Motion, R.DMS674, PageID15380. Instead, the only document the receiver submitted was a "declaration" stating he had "concluded," after an "investigation," that he "had various Claims." Declaration, R.DMS742, PageID16773. But the declaration only "summarized generally" these purported claims and failed to (1) set forth any supporting factual allegations, (2) identify the legal theories underlying the claims, (3) identify the defendants of any of the summarized claims; or (4) explain what injury the receivership entities suffered as a result of the conduct described in the summarized claims.

The declaration also failed to explain how the *receiver himself*—on behalf of the receivership entities—could pursue the students' claims he described. For the claims held by the students—what the receiver called the "Accreditation Claims"—the declaration just described these claims as being "made by students who were attending

the DCEH schools in Illinois and Colorado and allege that the schools lost their accreditation status but did not publish to their student bodies the fact that the schools were no longer accredited." *Id.*, PageID16774. But this just described the students' claims against the Foundation and the individual directors and officers in their personal capacity for conduct directly targeting the students and causing them specific harm. *See* Order, R.DMS757, PageID17758; *see, e.g.*, Complaint, R.Ill165, PageID7599. The receiver made no effort to show how those claims, or anything similar, were also held by the receivership entities. Because it is "the rule that receivers' rights are limited to those of the receivership entities," the receiver's failure to demonstrate on the record how he had standing to bring the students' claims was fatal to his effort to bar them here. *Wuliger*, 567 F.3d at 794.

The district court, for its part, should have recognized this fundamental problem. When it asked the receiver whether he "contend[s] that the Directors and Officers of DCEH and [its member schools] engaged in a pattern of fraudulent activity regarding the . . . the accreditation of the schools," the only response was a hedge—that the receiver "believe[d] that was one of the claims that we made against the insurance policies." Transcript, R.DMS751, PageID17520–21; Order, R.DMS757, PageID17759. That comes nowhere close to satisfying the receiver's obligation to show that his claims and those he wanted to bar involved "the same loss, from the

same entities, relat[ed] to the same conduct, and [arose] out of the same transactions and occurrences by the same actors." *DeYoung*, 850 F.3d at 1176.

Even though the receiver offered no supporting documentation to substantiate this "belief," the district court held "that the receiver *has* alleged that the receivership suffered an injury traceable to the actions of the Ds&Os." Order, R.DMS757, PageID17759 (stating, without explanation, that the receivership estate's injury "is more easily traceable" to the actions of the individual directors and officers than to the students' injuries). And based on this conclusion, the court went on to "find[]" that the claims were "substantially identical." *Id.*, PageID17760. But the court's analysis of whether the receiver's claims were "substantially identical" to those of the students was both perfunctory and flawed. Its entire analysis totaled the following paragraph—without citations to any record evidence:

> The [students] and the receiver both allege that DCEH and DCF employees, and the Ds&Os made misrepresentations adversely affecting DCEH member schools, and specifically, the Illinois Institute of Art. They also both allege they suffered monetary damages as a result of those actions. The [students] contend their damages include unreimbursed college expenses incurred while attending an unaccredited school. The receiver alleges the Illinois Institute of Art and DCEH were damaged by the Ds&Os' misrepresentations and failure to preserve accreditation, which doomed the school to lose federal funding, students, and the ability to operate. The court finds the claims of the [students] and the receiver's causes of action against the Ds&Os are substantially identical.

Id.

That paragraph includes multiple incorrect factual statements. To start, the court asserted that both the students and receiver "allege that DCEH and DCF employees, and the Ds&Os made misrepresentations adversely affecting DCEH member schools, and specifically, the Illinois Institute of Art," and that both "allege they suffered monetary damages as a result of those actions." *Id.* That is wrong, for multiple reasons.

First, the receiver never alleged—even in his claim summary—that the accreditation fraud damaged the receivership entities. The court just supplied a description of the receiver's claims that the receiver never gave, much less supported with evidence.

Second, the students' claims are not based on misrepresentations that "adversely affect[ed] DCEH member schools" and their damages do not turn in any way on those misrepresentations. Instead, the students' claims and damages involve misrepresentations made *directly to them* as students. *See* Complaint, R.Ill165, PageID7599 ("These deceptive acts or practices include . . . misrepresentations to Named Plaintiffs and the class that IIA 'remain[ed] accredited' by HLC after January 20, 2018."); *id.* ("These deceptive acts or practices also include . . . misrepresentations to Named Plaintiffs and the class that IIA was likely to reobtain accreditation[.]"); *id.* ("Defendants intended for Named Plaintiffs and the class to rely upon these misrepresentations.").

The rest of the court's analysis fares no better. The court wrote that the students' harm resulting from the misrepresentations was "substantially identical" to the receiver's harm. Order, R.DMS757, PageID17757. But compare the court's descriptions of the two harms: The students harm was "unreimbursed college expenses incurred while attending an unaccredited school," whereas the receiver's was the school's loss of "federal funding, students, and the ability to operate." *Id.*, PageID17760. Even based just on the court's own description, those harms are not the same. The students' harm is personal to *the students* while the receiver's is based on harm *to the schools*. Third-party claims may not properly be subjected to a bar order unless "the receivership entities have a 'personal stake' in the outcome of the controversy." *Liberte*, 248 F. App'x. at 655–56; *id.* at 658–59 (explaining that "fraud on investors that damages those investors is for the investors, and not the receiver, to pursue, whereas fraud on the receivership entity that operates to its damage is for the receiver to pursue").

This was not the only difference between the students' and receiver's claims. As the receiver himself conceded, the receivership asserted no claims against the Foundation. *See* Motion, R.DMS674, PageID15380; Declaration, R.DMS742, PageID16773–75. Yet, the bar order extinguishes the students' claims against that entity as well. That fails to accord with the strict limitations imposed on proposed bar orders. *See Zacarias*, 945 F.3d at 898 (explaining that, to be "duplicative," the claims

must be against the same defendant); *id.*, at 897 (the receiver must show "[t]he bar order's scope was limited, reaching only . . . duplicative claims" (citing *SEC v. Kaleta*, 530 F. App'x 360, 362–63 (5th Cir. 2013))).

The students' claims, in short, involve separate allegations of misconduct by different defendants, that targeted different parties, and that injured those parties based on separate theories of harm. The court's failure to grapple with these key differences between the claims requires reversal. *See Liberte*, 248 F. App'x. at 655 (overturning bar order where court's analysis was "perfunctory" and failed to reckon with equity receivership's jurisdictional-based limitations); *Seaside Eng'g*, 780 F.3d at 1078–79 (recognizing that, before a district court may enter a bar order, it must first conduct an "inquiry [that] is fact intensive in the extreme").

C. The bar order failed to create the requisite "global peace."

The third condition requires the receiver to demonstrate that the requested bar order is necessary to create "Global peace." *Lloyds*, 927 F.3d at 845; *see, e.g., Zacarias*, 945 F.3d at 889, 891 (describing how bar order was necessary to create "complete peace"). Courts have imposed this requirement because of the extraordinary nature of the remedy—"a bar order buys peace at a high price: It bars potentially valid claims that non-settling parties could assert[.]" *Quiros*, 966 F.3d at 1197. As a result, "the policy behind settlement bar orders supports their use only when they are needed to halt the parties' litigation." *Id.* at 1200. To satisfy this requirement, the bar

order cannot just be a factor in helping create such a peace; instead, the receiver must show that "the bar order is essential"—i.e., "integral"—to the settlement. *Id.* at 1199. If the bar order is not essential to creating the requisite "Global peace," its exceptionally high price cannot be justified. *See Lloyds*, 927 F.3d at 845 (reversing bar order where "'global peace' was achieved not by bar orders" but by the receiver agreeing to drop certain claims). And, as multiple courts have explained, "global peace" carries a clear meaning in this context—the settlement must result in the termination of all potential pending claims against the parties making settlement agreements. *See, e.g.*, *id.*

There can be little doubt that the bar order in this case failed to satisfy this requirement. The receiver conceded that the bar order would not bring global peace to the parties' litigation. The settlement would not extinguish all claims against the receivership entities because it would allow, for instance, the federal government to retain its right to sue the Dream Center entities and directors and officers. *See* Order, R.DMS721-1, PageID16111 ("Nothing contained in this Order . . . shall . . . constrain any action or proceeding by any federal government unit[.]"). It would also permit the receiver himself to pursue recovery from the four additional Non-National Union Excess Policies by naming the Dream Center entities and directors and officers as defendants in such actions. *See* Settlement, R.DMS721-3, PageID16145 ("Notwithstanding the Releases and Bar Order set forth above, the Parties agree that 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[.]"). So, the receiver argued that the settlement and bar order were necessary to obtain peace from *other claimants*—including the students—who had not recovered anything, while preserving for himself the right to pursue additional relief.

Even the court recognized that the bar order would not secure full and final peace for the settling parties. *See* Order, R.DMS757, PageID17764 (acknowledging the possibility that "the receiver's proposed settlement agreement would not bring full and final peace"). But it approved the order anyway, holding that the students somehow lacked "standing to raise such an argument." *Id.* The court did not explain why and cited no authority for this view. There is none. Parties affected by a potential bar order are obviously empowered to make exactly this argument, *see, e.g.*, *Quiros*, 966 F.3d at 1199, not least because it is a necessary requirement to justify the entry of the bar order in the first place. Regardless, the court still has its own duty before entering the bar order, to "ma[k]e a record of specific factual findings that support its conclusions," *Dow Corning*, 280 F.3d at 658, including as to why the bar order and settlement will bring "Global peace," *Lloyds*, 927 F.3d at 845.

The "full and final peace" requirement asks whether *any other* claims—beyond those that would be subject to a bar order—would be left intact after the settlement as a way to assess whether the bar order is "essential to settling the litigation." *Quiros*,

966 F.3d at 1200 (explaining that bar orders "play an integral role in facilitating settlement" where they "allow defendants to 'buy' peace from 'crossclaims for indemnity, contribution, and other causes related to the underlying litigation'"). That matters because, when the settlement does not "halt the parties' litigation," the "policy behind settlement bar orders" evaporates. *Id.* Here the bar order indisputably failed to guarantee peace by all parties; it even failed to secure the settling parties—including the Foundation and directors and officers—peace from the receiver.

There is no way around that problem here. Although the court suggested that both the receiver and federal government were in "unique positions," it failed to explain how this was so or demonstrate how that could somehow change the calculus here. Order, R.DMS757, PageID17764. It also failed to identify any authority supporting such a statement. As multiple courts have explained, global peace means that a settlement results in the termination of *all* potential pending claims against the estate. *See, e.g.*, *Lloyds*, 927 F.3d at 845 (recognizing that global peace must include the release of *the receiver's* claims); *SEC v. Kaleta*, 2013 WL 2408017, at *3 (S.D. Tex. May 31, 2013) (same). There is, in short, no receiver- or government-based exception to this requirement.

Moreover, even though the bar order could not have been "essential" for "global peace"—because there was none—neither the receiver nor district court even demonstrated that the bar order was essential to the claims that were actually

settled. When a party argues that a bar order is essential—as the receiver did here, *see* Motion, R.DMS674, PageID15395—it is his burden to prove it. *Quiros*, 966 F.3d at 1200. But the only reason the receiver gave to support his claim that the bar order was essential—that the parties would not settle without "full and final peace"—was demonstrably false. *See* Response, R.DMS737, PageID16518 (claiming "the proposed Settlement serves to provide the Insureds full and final peace").

Nor did the district court follow through on its duty to "determine[] that [the defendants] would not have settled without the Claims Bar Order." *DeYoung*, 850 F.3d at 1183. Rather, the court concluded that it was "necessary to bar the [students'] claims" based entirely on the receiver's counsel's unsupported say-so. Order, R.DMS757, PageID17760 ("[T]he receiver, and counsel for DCF have advised [the court]" that, "absent the negotiated bar order . . . . neither the Ds&Os nor DCF would waive indemnification rights they may have under the National Union policies."). By reaching this view in such conclusory fashion, the court failed to make any "specific factual findings," abdicating its role as a receivership court.

D. The bar order was neither fair nor equitable.

Finally, the court must confirm that the settlement[] [is] fair and equitable." *Lloyds*, 927 F.3d at 840; *see Seaside Eng'g*, 780 F.3d at 1079 (explaining that courts may only enter bar orders "where essential, fair, and equitable"). A district court's duty to confirm that a bar order is "fair and equitable" must be focused, in particular,

"with an eye toward its effect on the barred parties." *Quiros*, 966 F.3d at 1199. In determining the equity of such a bar order, a court that "look[s] only to the fairness of the settlement as between the debtor and the settling claimant," and ignores third-party rights, "contravenes a basic notion of fairness." *Lloyds*, 927 F.3d at 847.

Neither the court nor the receiver were able to show why the extraordinary remedy of a bar order here was equitable. That is because it was not. The court pointed to the eleventh-hour litigation trust that the receiver created in response to the court's request as the key reason why the bar order was fair. *See* Order, R.DMS760, PageID17783–84 (explaining that "the establishment of the Trust is a part of the court's basis for finding that the settlement of the insurance claim should be approved"). According to the court, that trust was designed to "allow[] for the litigation and safeguarding of the [students'] claims." *Id.*, PageID17784. But neither the receiver nor the court were able to explain how, in practice, the trust would allow the students to accomplish these goals.

That is not surprising. On the same page that the receiver assured the students that the trust would provide them with a fair process to pursue their claims, he claimed to "doubt[] that the [students] have any [remaining] claims." Reply, R.DMS756, PageID17679; *see also* Receiver's Response, R.DMS678, PageID15514 (stating, in his view, "the [students] do not have any reasonable chance to receive *anything* from the Receivership estate"). And, despite the receiver's promise that the

trust would provide a fair procedure for the students to litigate their claims, he announced that the trust would not even establish a "procedure to determine the amount of the [students'] claims." Reply, R.DMS756, PageID17678. Instead, the receiver offered only that "[t]he [c]ourt with or without input from the parties, will determine how the matter proceeds so that the [students] are treated with fairness and have an opportunity to present evidence and be heard." *Id.*, PageID17679. The record provides no clarity as to how the trust would operate in practice and provides no confirmation that it would provide a fair means by which the students could "safeguard" their claims.

The absence of any clearly defined procedure was not the only problem. The litigation trust is, when read together with the bar order, almost certainly illusory. The trust purported to limit any payments to claims "that are determined by a court of competent jurisdiction on a final and non-appealable basis." Trust Agreement, R.DMS756-2, PageID17721. But the bar order explicitly prohibits the students from litigating in, and receiving a final judgment from, any court. *See supra* Section I.C.7. So the bar order short-circuits any meaningful possibility of satisfying the trust's requirement.

But even if the court had thoroughly vetted the proposed trust, that, standing alone, would have been insufficient to show that a balance of the equities favored entering the bar order. *See Dow Corning*, 280 F.3d at 658 (explaining that a court must

make "specific factual findings" to justify the high cost of a bar order). The receiver argued that the costs of defending the students' claims "waste[s]" the policy proceeds, and that the student's claims might "overwhelm" the proceeds. Response, R.DMS737, PageID16512, 16517–18. But both arguments rely entirely on the receiver's speculation about the potential effect of these costs on the receivership's assets. Without more, the mere possibility that potential costs, in the form of legal fees or spillover recovery, could be drawn from the receivership assets is insufficient to justify a bar order. What's required instead is a showing that "every dollar" the third parties might recover "is a dollar that the receiver cannot," and that, as a result, "the receiver's pro rata distribution to investors" would be "frustrat[ed]." *Zacarias*, 945 F.3d at 900. Because the receiver here made no effort to (1) quantify the amount of potential legal costs or amount of spillover recovery, or (2) the potential likelihood that either would frustrate the pro rata distribution of the assets, he failed to meet his burden. *See, e.g.*, *DeYoung*, 850 F.3d at 1183 (justifying bar order, in part, based on showing that legal costs would "exhaust the policy").

Without any evidence in the record, there was no meaningful way the court could have evaluated the significance of this issue. Instead, without performing its own analysis, the court accepted as true the receiver's unsupported claims that the high cost of the bar order was justified and thus it was equitable. That was error. *See id.* at 1178 (instructing that a court must "scrutinize[] the proposed settlement very

carefully" and "not merely accept the representations of the Receiver" before entering a bar order). By failing to make the requisite "*thorough* factual findings in reaching its decision . . .[that] are amply supported by the evidence," the court's conclusion that the bar order was fair and equitable cannot be justified. *Seaside Eng'g*, 780 F.3d at 1081.

CONCLUSION

The district court's order approving the settlement and entering the bar order should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,924 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2022 I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Sixth Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ Matthew W.H. Wessler
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ADDENDUM:
DESIGNATION OF RECORD

Appellants hereby designate the following filings in the district court's record for *Digital Media Solutions v. South University of Ohio et al.*, No. 1:19-cv-00145 (N.D. Ohio Jan. 18, 2019), as relevant pursuant to Sixth Circuit Rule 28.

From the *Digital Media Solutions* Case (Northern District of Ohio, Case No. 1:19-cv-00145):

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