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

BRIEF OF RECEIVER - APPELLEE MARK E. DOTTORE

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March 29, 2022

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, Mark E. Dottore makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   Answer: **No**.

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

   Answer: **No**.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This appeal was filed to contest the entry of a "bar order" that was an agreed upon and mandatory requirement of a settlement. Although a "bar order" is a "dramatic measure to be used cautiously," *In re Dow Corning Corp.,* 280 F.3d 648, 658 (6th Cir. 2002), the bar order at issue is essential, fair, and equitable. It is supported by voluminous evidence, the District Court's sufficient and detailed factual findings, as well as its well-reasoned decision. The record, the District Court's findings, the decision, and the appellate briefing are sufficient to support affirmation by this Court.

Should this Court schedule an oral argument as Appellants have requested, the Receiver will welcome the opportunity to argue this case before the Sixth Circuit Court of Appeals.

STATEMENT OF JURISDICTION

Appellee agrees with Appellant's Jurisdictional Statement.

STATEMENT OF ISSUES

Appellants (the "**Dunagan Intervenors**") bear the "weighty burden of showing an abuse of discretion" as they seek to overturn the District Court's approval of the proposed settlement and imposition of a bar order. *Securities and Exchange Commission v. DeYoung*, 850 F.3d 1172 (10th Cir. 2017) *("DeYoung")*. The Receiver entered into a pre-litigation settlement that pays the $8.5 million remaining of the $10 million coverage limit of the Receivership Estate's primary insurance policy while preserving his right to pursue $40 million of excess insurance coverage through additional settlement(s) and/or litigation. As a condition of the settlement, the insurer and insureds (including the Dream Center Foundation and the former officers and directors) required that the District Court enter a "bar order" barring claims against them. The Receiver filed a 39-page sworn Declaration and other evidence in support of the settlement and bar order, which was admitted into evidence without objection. The District Court made detailed findings of fact and ruled that: (1) it had jurisdiction to enter the bar order; (2) the Receiver had standing to bring claims against the insurance policies; (3) the settlement brought complete peace to the settling parties; and (4) the settlement was fair and equitable to the Receivership Estate and to the only objectors - the Dunagan Intervenors. Did the District Court abuse its discretion by approving the settlement and bar order?

STATEMENT OF THE CASE

A. DESPITE THE APPOINTMENT OF A RECEIVER, DCEH COLLAPSES.

In 2017, Dream Center Education Holdings LLC ("**DCEH**"), an Arizona Nonprofit R.DMS 91-1, PageID # 2054-2059[1] purchased three related university

[1] For easy reference, this brief will use the same record designations as Appellants did. R.DMS references the record in *Digital Media Solutions v. South University of Ohio, et al.,* No. 1:19-cv-00145 (N.D. Ohio Jan.18, 2019). "R.Ill" references *Dunagan, et al., v. Illinois Institute of Art, et al.*, No. 1:19-cv-0809 (N.D. Ill. Removed Feb. 7, 2019). "R.DeVos" references *Infusino et al., v. DeVos, et al.* No. 19-3162 (D. D.C. October 22, 2019).

systems from Education Management Corporation ("**EDMC**"). R.DMS 7, PageID # 99. EDMC was financially collapsing and desperate to sell Argosy University ("**Argosy**"), South University ("**South**"), and The Arts Institutes ("**AI**") (collectively, the "**Universities**"). *In re Education Management II, LLC*, District of Delaware, Bankruptcy Case No. 18-11500, Doc 6, filed July 3, 2018 (showing a $1.8 billion 2017 tax loss).

The purchase transaction initially closed in 2017, with a secondary closing in January 2018. R.DMS 7, PageID # 99. While operating in 2018, DCEH not only operated conventional college campuses through its subsidiaries but it also provided managed services for thousands of students and employees including course textbooks, email, student portals, and career and alumni services. R.DMS 91, PageID # 2043-2046. DCEH provided these support services from a 17,000 square foot data center located in Pittsburgh, PA, and a 100,000 square foot center in Chandler, AZ. *Id*., PageID # 2045.

DCEH was wholly owned by Dream Center Foundation (the "**Foundation**"), a faith-based charitable organization in Los Angeles, California. R.Ill 24, PageID # 225. An important part of the Foundation's work is providing mentorship, GED programs, and opportunities for college. *Id*. To that end, DCEH and its wholly owned subsidiaries purchased the Universities. R.DMS 7-1, PageID # 98-99.

DCEH's purchase transaction was financed by Flagler Master Fund SPC Ltd. ("**Flagler**"), an investment fund operated by Candlewood Special Situations Master Fund II, L.P. ("**Candlewood**") with U.S. Bank as collateral agent (collectively, the "**Secured Lenders**"). Within 60 days of closing the purchase transaction, the Secured Lenders were startled to learn DCEH was in desperate financial straits, projecting a 2018 loss of $38 million and working to mitigate losses. R.DMS 7, PageID # 99-101. DCEH also forecast its 2019 and 2020 losses at $64 million and $69 million respectively. *Id.* The Secured Lenders allege that DCEH and its officers and directors misrepresented critical financial data and painted a false picture of the likely success of the venture in their application for the credit facility. (the "**Secured Lender Claims**"). R.DMS 742, PageID # 16773. The Secured Lenders claim they are owed more than $154,476,016.39 in unpaid secured debt (the "**Secured Debt**") on their various lending agreements (the "**Secured Lending Agreements**"). R.DMS 674, PageID # 15382-15383; R.DMS 751, Transcript, PageID # 17529; R.DMS 19, PageID # 221, R.DMS 742, PageID # 16773.

EDMC's sale to DCEH included the Illinois Institute of Art ("**IIA**") and its two campuses, IIA-Schaumburg and IIA-Chicago (Complaint, R.Ill 165, Page ID # 7532), where Emmanuel Dunagan, Jessica Muscari, Robert Infusino and Stephanie Porreca (the "**Dunagan Intervenors**") attended school. R.Ill 24, PageID # 227. The Dunagan Intervenors and other students attending IIA claim that IIA lost its Higher

Learning Commission ("**HLC**") accreditation status because of the change in ownership and that IIA did not publish to its students the truth about HLC's withdrawal of accreditation. R.Ill 165, PageID # 7531-7612. Students at IIA completed degrees and course work they claimed were worthless because of IIA's unaccredited status (the "**Accreditation Claims**"). *Id*., R.DMS 742, PageID # 16774.

Less than a year after closing the purchase transaction, in November 2018, DCEH defaulted on reimbursements to its self-funded ERISA qualified employee health care plan administered by Aetna Life Insurance Company (the "**Aetna Plan**"). R.DMS 249, PageID # 4725. Aetna terminated the Aetna Plan on December 31, 2018, and later filed claims in the Receivership for reimbursement of over $3 million. *Id*. DCEH's management's response to the Aetna Plan termination was simply to form a new self-funded ERISA qualified health care plan (the "**BAS Plan**") with a company by the name of Benefit Administration Service ("**BAS**"). R.DMS 127, PageID # 3304; R.DMS 667, PageID # 15319-15320. DCEH's 1,692 employees paid for coverage under the BAS Plan through payroll deductions. R.DMS 127, PageID # 3304-3305. DCEH's management did not make a single payment on its self-funded BAS Plan. R.DMS 177, PageID # 3786. DCEH's failure to honor its obligations under the Aetna Plan and the BAS Plan (together, the "**Health Plans**") left thousands of Plan Participants with millions of dollars in unpaid medical bills they thought would be paid by their health care insurance (the "**Health Care Claims**"). R.DMS 127, PageID # 3305; R.DMS 667, PageID # 15320; R.DMS 751, Transcript, PageID # 17530. The Health Care Claims are not hypothetical and have left many of the employees overwhelmed by medical debt. *See*, e.g., R.DMS 434, PageID # 11114; *see also*, regarding administration of the Aetna Plan, R.DMS 607, PageID # 13526.

By December 2018, less than a year after the second closing transaction, DCEH was drowning in debt. Its trade creditors were owed $41 million; it had received 15 default notices from landlords; and it was facing 9 separate eviction actions. R.DMS 7-1, PageID # 103. During this time, DCEH paid its operating expenses with money that belonged to students. Students could borrow money in excess of what was required to pay tuition, with those excess sums meant to be disbursed by the DCEH schools to the students as a cash stipend to pay the students' living expenses (the "**Student Stipends**"). R.DMS 234, PageID # 4455. Students were obligated to repay the entirety of the money loaned – including the sums for tuition and living expenses. *Id*.

The United States Department of Education, (the "**DOE**") required DCEH to pay the money to the students out of its own funds and then seek reimbursement from Title IV funding. As DCEH submitted the required certifications to DOE, attesting that it had advanced the Student Stipends, R.DMS 226, PageID # 4330, DCEH used fraudulent accounting entries falsely showing the amounts had been paid to the students when in fact no payments were made. *Id.*, PageID # 4331. When DOE paid DCEH for the stipend it thought had been paid to the students and believing it was reimbursing DCEH for monies already delivered to students, DCEH diverted the money to its operational expenses. R.DMS 132-2, PageID # 3345-3346. (the "**Student Stipend Claims**"). R.DMS 88, PageID # 2025; R.DMS 234, PageID # 4445.

Under pressure from regulators in early January 2019, DCEH divested itself of its viable South and AI campuses, and virtually all assets owned by its remaining failing campuses. R.DMS 91, PageID # 2046-2047. DCEH retained the failing and insolvent campuses to transition them to new ownership or close them using a "teach-out." R.DMS 7-1, PageID # 103-106. Absent Title IV funding, DCEH was without the financial wherewithal to transition or teach out the remaining campuses and it sought to protect students and preserve value by agreeing with its creditor(s) that a receiver was necessary. *Id.*, PageID # 102-103. DCEH elected to seek a receivership because a bankruptcy filing would have rendered it ineligible to receive Title IV funding. *Id.*, PageID # 106.

The Receiver was appointed on January 18, 2019. R.DMS 8, PageID # 108. He was and is experienced and qualified. R.DMS 3, PageID # 58-59. All appropriate disclosures were made to the Court. *Id*., PageID # 59-60. The Receiver's role as consultant was specifically disclosed on the record. R.DMS 132-2, PageID # 3346.

A week after he was appointed, the Receiver received a letter (the "**DOJ Letter**") from the United Stated Department of Justice (the "**DOJ**"). R.DMS 737-5, PageID # 16567, R.DMS 742-8, PageID # [1]. The DOJ letter informed the Receiver that:

- The Receivership Entities might close, triggering closed school student loan discharges and consequent liability by DCEH to the Taxpayers;
- Students who are granted discharges of their student loan debt are deemed to have assigned their claims to the Taxpayers (the "**Taxpayers' Claim**");
- The Taxpayers' Claim in the receivership for student loan debt discharge enjoys a first position priority by virtue of the Federal Priority Statute (31 U.S.C. § 3713).

Within weeks of the Receiver's appointment, the irregularities pertaining to the Student Stipend Claims came to light. R.DMS # 132-2, Page ID # 3345-3346. Shortly thereafter, the DOE terminated Title IV funding for the schools. R.DMS 132-1, PageID # 3339-3340. The schools closed within ten days of the DOE's action.

While the Receiver and his staff did their best to grant degrees where possible and transition student credits and school curriculums to other institutions, many students were unable to complete their quarter or semester. R.DMS 742, PageID # 16774. These students claimed that they would not have started the quarter or semester if they had known it was likely, if not outright certain, that the campuses would close before the end of the term. *Id*. The students allege that DCEH failed to make appropriate disclosures regarding the substantial likelihood of failure before the end of the term (the "**Misleading Inducement Claims**"). *Id*.

Not only did students fail to complete their current semester, the sudden shut down of the DCEH schools also caused damage to students because they could not, or did not, continue their studies at another educational institution. This made the students who elected to abandon their college educations eligible for a discharge of their student loans (the "**Discharge Claims**" and together with the Secured Lender Claims, the Accreditation Claims, the Health Care Claims, the Student Stipend Claims and the Misleading Inducement Claims, the "**Receiver's Claims**"). The taxpayers have sustained the loss for the Accreditation Claims, the Student Stipend Claims, and the Misleading Inducement Claims because, as was disclosed in the DOJ Letter, the taxpayers paid off the students' loans and the DOE recovers the students' loan forgiveness amounts from DCEH and other responsible parties. On August 17, 2021, the DOJ filed a Declaration stating that the amount the United States paid in loan forgiveness was $103 million. R.DMS 747, PageID # 17495.

B. AN INTRODUCTION TO THE DUNAGAN INTERVENORS.

Less than three weeks after the Receiver was appointed, on February 6, 2019, lawyers for the Dunagan Intervenors filed a Motion to Intervene as a matter of right. R.DMS 35, PageID # 300, which was granted R.DMS 49, PageID # 1084. The grounds for the motion were "to ensure that [the Dunagan Intervenors] have a forum to present their claims as well as represent the interests of students harmed by Defendants." R.DMS 35-1, PageID # 304. They asserted a "substantial legal interest in the subject matter of the case," and further stated that on behalf of themselves and "other similarly situated students" they intended to seek corrective action for Defendants' misrepresentations about their school's accreditation status. *Id*. They also sought to ensure enforcement of a corrective action plan under a Consent Judgment entered by various states' Attorneys General while the schools were under the management of EDMC. *Id*., PageID # 308. DCEH, as successor, was bound by the Consent Judgment.

Since the Order granting their requested intervention, the Dunagan Intervenors have filed scores of motions, objections, statements, and have vigorously participated in the receivership proceedings. They filed motions for status conferences and discovery. R.DMS 48, PageID # 1073, R.DMS 50, PageID # 1085, R.DMS 64, PageID # 1353, R.DMS 80, PageID # 1951, R.DMS 696, PageID # 15850, R.DMS 713, PageID # 16059. They also weighed in on the nature of the receivership and the content of the Receiver Orders. R.DMS 92, PageID # 2060, R.DMS 98, PageID # 2721, R.DMS 319, PageID # 9256, R.DMS 359, PageID # 10329.

Exaggerating their claims of standing, they opposed a motion by Studio Enterprise Manager LLC ("**Studio**") to pay unpaid health care claims for employees of DCEH schools that were transferred to Studio and permit the forgiveness of certain student loan obligations in exchange for a bar order. R.DMS 475, PageID # 11621, R.DMS 486, PageID # 11694, R.DMS 496, PageID # 11837, R.DMS 500, PageID # 11863. They opposed the securing and management of school records that were not theirs. R.DMS 659, PageID # 14959. When the Receiver filed the original Settlement Motion, the Dunagan Intervenors filed an objection to the form and manner of its service that was so unreasonable the district court declared it frivolous and violative of Rule 11. R.DMS 677, PageID # 15503, R.DMS 679, PageID # 15519.

C. THE DUNAGAN INTERVENORS' OTHER LITIGATION CONCERNING IIA'S LOSS OF ACCREDITATION.

In addition to their participation in the Receivership, the Dunagan Intervenors pursued the same claims for misrepresentation by filing two additional lawsuits. Dunagan and Infusino filed a complaint against the Secretary of Education styled as, *Infusino et al. v. DeVos et al.*, United States District Court for the District of Columbia Case No. 19-3162 (the "**DeVos Litigation**"). They are also plaintiffs in litigation in Chicago styled as *Dunagan et al., v. Illinois Institute of Art Schaumberg et al.*, United States District Court for Northern District of Illinois Case No. 19-cv-809 (the "**Chicago Litigation**").

1. A Brief Synopsis of the DeVos Litigation

On October 22, 2019, Infusino and Dunagan (among others) filed a complaint (the "**DeVos Complaint**") against the DOE and Betsy DeVos in her capacity as United States Secretary of Education ("**DeVos**" and together with the DOE, the "**DeVos Defendants**"),[2] seeking redress under the Higher Education Act for the losses that resulted from the failure to inform them that IIA had lost HLC accreditation. R.DeVos 1. The DeVos Complaint describes in detail the change in

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[2] The DeVos litigation was referenced repeatedly throughout the R.DMS record. *See*, *for example*, R.DMS 486, PageID # 11694; R.DMS 698, PageID # 15947; R.DMS 730, PageID # 16262, R.DMS 731, PageID # 16277; R.DMS 734, PageID # 16437; R.DMS 737, PageID # 16485; R.DMS 742, PageID # 16786; R.DMS 746, PageID # 17389.

ownership from EDMC to DCEH (*Id*., ¶¶ 24-32, PageID # 8-9) and describes the HLC's determination that, after the transfer to DCEH, the schools did not satisfy its criteria for accreditation (*Id*., ¶¶33-40, PageID # 10-11).

The DeVos Complaint further details the failure to inform the students about the school's loss of accreditation and alleges the DeVos Defendants acquiesced and participated in the affirmative misrepresentations made to the students (*Id*., ¶¶ 39, 40, 49, 51, 65-75, 101, PageID # 11-27). Dunagan and Infusino further alleged that the DeVos Defendants had allowed the schools to participate in Title IV loan programs even though those schools were ineligible, had exceeded their statutory authority, and violated the Administrative Procedures Act. *Id*., ¶¶98, 101, PageID # 26-27. The students sought a complete cancellation of their student loans, which they described as unlawful and void *ab initio*. *Id*., ¶114, PageID # 30.

The DeVos Defendants entered into several extensions of time to answer and then entered into a Stipulation vigorously denying any wrongdoing, yet granting complete and total relief to the students (the "**DeVos Settlement**"). R.DeVos 12, PageID # 1-6. The DeVos Settlement cancelled all the students' loans taken out in association with enrollment at IIA during the term in which January 2018 fell and any subsequent terms through IIA's closure (the "**Critical Period**") *Id*., PageID # 2. The DeVos Settlement also issued refunds for all Direct and Parent Plus loans taken out and extended the time within which students could request a closed student loan discharge. *Id*. The students' win was so complete that the DeVos Settlement provided for the payment of the Dunagan Intervenors' lawyers. *Id*., PageID # 5. The lawyers filed fee applications but it appears that there has been no final resolution of this issue.

To implement the DeVos settlement, the DeVos Defendants notified the student loan servicers that the loans were cancelled and no 1099s for loan forgiveness were issued to the students *Id*., PageID # 2-4. IIA's students were provided with automatic loan cancellation that did not involve the surrender of their credits. *Id*. Put another way, the Dunagan Intervenors received academic credit for courses for which they did not pay.

2. A Brief Synopsis of the Chicago Litigation

On December 6, 2018, the Dunagan Intervenors brought the Chicago Litigation as a proposed class action against Illinois Art, DCEH, and the Foundation. They alleged Illinois statutory and common law causes of action for misrepresentation, omission of material fact, unfairness, negligent misrepresentation and fraudulent concealment. The Dunagan Intervenors' Third Amended Complaint (the "**Chicago Complaint**") added as new defendants the officers and directors of DCEH and the Foundation. The Chicago Complaint is attached to the Dunagan Intervenors' Objection to the Settlement as Exhibit 1 to the Elson Declaration.

R.DMS 692-15, PageID # 15702 (Elson Declaration); R.DMS 692-16, PageID # 15704 (Complaint).

The claims made in the Chicago Complaint have the same factual basis as the claims made by the students in the DeVos Complaint. The Chicago Complaint details the acquisition of the EDMC campuses by DCEH (Chicago Complaint ¶¶ 35-95) and discusses the importance of accreditation and Illinois Art's loss thereof (Chicago Complaint ¶¶ 96-121). The Chicago Complaint then describes the alleged misrepresentations and omissions which form the basis of the Dunagan Intervenors' claims, which allegations are identical to those made in the DeVos Litigation. For example, the alleged misrepresentations concerning Illinois Art's accreditation made in the Chicago Complaint's ¶¶ 135, 173 and 123-125 are the same as those made in the DeVos Complaint's ¶¶ 49 and 40. The allegations made in the Chicago Complaint's ¶¶ 175 and 177 match word for word those in ¶¶ 65 and 66 of the Devos Complaint. The visit of John Crowley to Illinois Art complained about in the Chicago Complaint's ¶¶ 188 – 200 are the same as allegations made in the DeVos Complaint in ¶¶69 – 74; and some paragraphs match verbatim. (Chicago Complaint ¶¶ 197 and 198 with DeVos Complaint ¶¶ 72 and 69 respectively).

In short, the Dunagan Intervenors are pursuing claims in the receivership and the Chicago Litigation for which the Dunagan Intervenors have enjoyed significant recovery by virtue of the DeVos Settlement.

3. The Dunagan Intervenors' Claims

(a) Emmanuel Dunagan

Because of the DeVos Settlement, Dunagan received cancellation of his student loans taken out in association with enrollment at IIA during the Critical Period. Based upon information provided in discovery in the Chicago Litigation, the Receiver has alleged Dunagan received more in institutional grants, Pell grants, the DeVos Litigation cancelled student debt and other institutional debt (together, the "**Grants and Debt Cancellation**") than he spent on tuition and other educational charges. R.DMS 737, PageID # 16489-16490.

Despite his claims to the contrary, the fact remains that Dunagan did not rely on any misrepresentations made by the Chicago Defendants. His affidavit discloses that he chose to complete his degree at Illinois Art *after* he learned of its loss of accreditation. R.DMS 733, PageID # 16428, ¶ 12. He refused to take advantage of a closed school student loan discharge because he would lose his credits, which he wanted to keep. *Id*., ¶ 10.[3] He also refused to transfer the credits he earned at Illinois Art while it was accredited to an accredited school and obtain a degree from an

[3] The law provides that if a student is eligible for a closed school student loan discharge, they can apply for the discharge in exchange for the surrender of any credits associated with the coursework for which the discharged loans were issued. Per the statutory structure, a student can keep their credits and the obligation to repay the loan or give up both credits and the obligation to repay the loan. What a student cannot do is enjoy the benefits of the academic credits without paying for those credits.

accredited institution. *Id.*, ¶ 11. Dunagan claims 100% of the cost of his education, including his living expenses ($82,670.47), while retaining all of the accredited and unaccredited school credits he earned. *Id.*, PageID #16429, ¶ 14.

(b) Robert J. Infusino

Infusino, the lead plaintiff in the DeVos Litigation, also received cancellation of his student loans taken in association with enrollment at the Schools during the Critical Period. The Receiver alleges Infusino also received more in Grants and Debt Cancellation than it cost him to attend Illinois Art during the Critical Period. R.DMS 737, PageID # 16491. Infusino claims he is entitled to 100% of his estimated ordinary living expenses during the Critical Period. He does not assert his actual living expenses; rather, he provides Illinois Art catalogue material that estimates a student's living expenses. R.DMS 692-6, PageID # 15686. When the estimated figure is used, Infusino claims damages in the amount of $2,473.45. *Id.*, ¶ 20.

Unlike Dunagan, Infusino does not make a claim for 100% of the cost of his degree because he acted to mitigate his damages by transferring the credits he earned at Illinois Art while it was fully accredited to Full Sail University, an accredited institution. Therefore, thanks in large part to the credits he earned at and transferred from IIA, he now holds a university degree from an accredited institution. *Id.*, ¶ 13.

Infusino has a contract claim separate and apart from the claims made by students in the DeVos Litigation and the Chicago Litigation. *Id.*, ¶15. IIA promised him a $5,000.00 tuition voucher as an incentive to transfer his credits and complete his education. Although Infusino did transfer his credits and complete his education, IIA was financially unable to pay the promised incentive.

(c) Stefanie Porreca and Jennifer Muscari

As with Dunagan and Infusino, Porreca and Muscari received cancellation of their student loans taken out in association with their enrollment at IIS during the Critical Period. The Receiver alleges that Porreca and Muscari each received more in Grants and Debt Cancellation than it cost them to attend IIA during the Critical Period. R.DMS 737, PageID # 16493.

Both Porreca and Muscari claim as further damages *estimated* living expenses; that is, the amount estimated in the student catalogue, not the amount actually spent. After the overpayment occasioned by the amounts paid for Grants and Debt Cancellation is applied, Porreca claims damages in the amount of $2,952.23 R.DMS 734, PageID # 16438, and Muscari claims $2,161.00 R.DMS 731, PageID # 16278.

Neither Porreca nor Muscari availed themselves of the closed school discharge and also chose not to transfer earned credits to an accredited institution. Instead, in addition to their "living expenses" Porreca seeks $108,117.90 and Muscari seeks $98,065.38, which sums represent the total amount expended for their respective degrees. If awarded those damages, Porreca and Muscari would retain the academic credits they earned while IIA was accredited, regardless of the fact they did not pay for them.

D. DCEH HAS TWO INSURANCE POLICIES AT ISSUE.

Prior to the commencement of the Receivership, National Union Fire Insurance Company of Pittsburgh PA (the "**Insurer**" or "**National Union**") issued a PortfolioSelect for Non-Profit Organizations liability insurance policy to Receivership Entity, Dream Center Education Holdings, LLC ("**DCEH**"), under Policy Number 02-420-25-70 ("**Primary Policy**") R.DMS 737-6, PageID # 16570-16617; and also issued a Side-A Edge excess insurance policy to DCEH, under Policy No. 02-42-25-71 ("**Excess Policy**") R.DMS 737-7, PageID # 16618-16657 (the Primary Policy and the Excess Policy, including any and all declarations, amendments, supplements, and endorsements, and subject to all of the policies' terms, conditions and exclusions, are referred to herein collectively as the "**Policies**"), for the initial policy period from October 17, 2017 through October 17, 2018, as extended until April 17, 2019, along with a one-year Discovery Period following April 17, 2019. *Id.*

The named insured is DCEH. *Id.*, PageID # 16574. The Policies insure DCEH and DCEH's management, board of directors, and employees. They also insure DCEH's subsidiaries, their management, boards of directors, and employees. R.DMS 737-6, PageID # 16601 and PageID # 16584. The Foundation is an additional insured under both Policies. *Id.*, PageID # 16606; R.DMS 737-7, PageID # 16651.

The Policies provide coverage to protect and indemnify the Receivership Entities, their various directors and officers ("**Ds&Os**"), and the Foundation in connection with losses, including defense costs, judgments, and settlements, arising from particular types of claims that might be made against the entities or against the individuals in their capacity as directors and officers of the Receivership Entities and the Foundation. R.DMS 742, PageID # 16764.

The Policies are written on a "claims made and reported" basis, and the claims made by the Receivership Entities against the Insureds and certain claims identified below are the only known timely claims remaining against the Policies. *Id.* Importantly, the Policies are "wasting" insurance policies; meaning the limits of coverage are reduced as any costs of defending actions brought against the Receivership Entities, the Ds&Os, and the Foundation are incurred and paid by the Insurer. *Id.*

Prior to the commencement of the Receivership, the following insurers ("**Non-National Union Excess Carrier(s)**") also issued liability insurance policies ("**Non-National Union Excess Policy(ies)**") to DCEH for director and officer excess coverage relating to the Receivership Entities:

Excess Carrier	**Policy**	**Coverage**
Everest National Insurance Company	SC5EX00110-171	$10 million
Starr Indemnity and Liability Company	1000620558171	$10 million
Landmark American Insurance Company	LHS674187	$10 million
Ironshore Indemnity Inc.	003319500	$10 million

R.DMS 742, PageID # 16765; R.DMS, 737-7, PageID # 16631.

E. THE RECEIVER NEGOTIATES A SETTLEMENT.

As part of the Receiver's management of the Receivership Estate and in accord with his fiduciary duties, the Receiver secured the books and records of the Receivership Entities, R.DMS 742, PageID # 16770-16771 and engaged the law firm of McCarthy, Lebit, Crystal & Liffman Co., LPA ("**McCarthy**") as special litigation counsel. *Id*. The books and records were obtained from DCEH's data center in Pittsburgh, Pennsylvania (the "**Data Center**"), from records maintained on the individual campuses, and from information compiled to comply with subpoenas and requests for documentations received from parties, state education entities, and accreditation bodies. *Id*.

The documents (the "**Nextpoint Documents**") were deposited into McCarthy's e-discovery platform known as Nextpoint that allows users to search and sort by key word search. R.DMS 742, PageID # 16772. In addition to reviewing and searching the Nextpoint Documents, under the Receiver's direction and supervision, McCarthy conducted scores of interviews with the Receivership Entities' former employees and other third parties to investigate the circumstances surrounding the purchase, operation, and closure of the Receivership Entities and their schools. *Id*.

Based upon the investigation, the Receiver concluded that DCEH's management team was negligent by placing a priority on acquiring the schools and keeping them open over any other concern, such as abiding by Department of Education and Department of Labor rules and regulations. *Id*. DCEH and its management team misrepresented facts to its secured lenders, its employees, and its students. *Id*. When DCEH applied for and used Title IV funds, it misrepresented whether the Student Stipends had been paid, causing an existential cash flow crisis. R.DMS 742, PageID # 16773. As a result of these wrongful actions, the DOE shut off Title IV funding and thereby ensured the prompt demise of the entire enterprise and the initiation of claims by stakeholders against DCEH, the Receivership Entities, the Foundation, and their officers and directors (collectively, the "**Insureds**"). *Id*.

Beginning in July 2020, the Receiver and his counsel engaged in extensive and difficult negotiations with National Union concerning the possibility and terms of a settlement of all the claims. *Id.*, PageID # 16775. By December 2020, they concluded their negotiations with a settlement (the "**Settlement**") that contained the following terms and conditions:

1. A settlement payment of $8.5 million, payable upon the entry of a final order approving the Settlement. R.DMS 721-3, PageID # 16136;

2. The preservation of the Receiver's rights to pursue recovery actions against the Non-National Union Excess Policies. R.DMS 721-3, PageID # 16145;

4. A bar order enjoining the pursuit of claims against National Union and the Insureds. R.DMS 721-3, PageID # 16138;

4. Broad general releases for the Insureds. R.DMS 721-3, PageID # 16141-16142;

5. Releases of National Union and the Policies. R.DMS 721-3, PageID # 16142-16143.

The Settlement Agreement *Id.*, PageID # 16127 provided for the payment of the remaining policy limits under the Primary Policy R.DMS 742, PageID # 16766, *and* permitted the Receiver to continue to pursue his claims under the other non-National Union Excess Policies. The latter objective was achieved by allowing the Receiver to name the Insureds as defendants in future lawsuits on the various claims, but, shielded their assets from attachment in the event he recovered a judgment. The Settlement thus preserved $40 million of coverage under the four excess insurance policies and made the remaining primary coverage immediately available to pay claims in the Receivership Estate. The Settlement was contingent upon the entry of an Order by the District Court approving the Settlement that included the Bar Order. R.DMS 721-3, PageID # 16140, R.DMS 742, PageID # 16777.

The Receiver filed his original Motion for an Order Approving [the Settlement] on February 18, 2021. R.DMS 674, PageID # 15377. The EDMC Trustee objected to the Motion. R.DMS 694, PageID # 15828. In addition, the United States asked for more time to negotiate revisions to the Health Care Plan and adding specific language to the Order preserving its sovereign immunity, which the district court granted on April 7, 2021, [non-document docket entry]. Several students who were creditors in the EDMC bankruptcy case sought to preserve their claims, if any, in the Receivership R.DMS 685, PageID # 15576, R.DMS 686, PageID # 15584, R.DMS 688, PageID # 15604, R.DMS 695, PageID # 15838. The Dunagan Intervenors also objected to the Settlement. R.DMS 692, 15647. As is frequently the case when a receiver or trustee receives objections to a proposed settlement, the Receiver sought to resolve them before the hearing by seeking consensual resolution.

The Receiver filed his First Amended Motion for an Order Approving [the Settlement] (the "**Amended Settlement Motion**") on June 18, 2021. R.DMS 721, PageID # 16094. The Amended Settlement Motion carefully documented and explained each change that had been made in the proposed Order, and included a redlined version of Order showing the changes that had been made. R.DMS 721-2, PageID # 16115. The proposed order was amended to add language that specifically stated that the students (and any other persons) who had claims against EDMC or the Receivership Entities would be able to file and assert those claims. R.DMS 721, PageID # 16099, ¶ 8(c). The EDMC Trustee resolved his matter with the Foundation, and the settlement between them was approved by the Delaware Bankruptcy Court. R.DMS 721, PageID # 16099-16100; *In re The Art Institute of Philadelphia, et al.*, District of Delaware, Bankruptcy Case No. 18-11535, Doc 167, filed August 12, 2021.

The United States required that language be inserted into the proposed Settlement Order sufficient to preserve its sovereign immunity. To that end, the Receiver included language identical to that previously inserted in the Amended Receiver Order, R.DMS 150, PageID # 3488, ¶ 13, for the same reason. R.DMS 721, PageID # 16101. Per DOL's demand and with its approval, the Receiver added a formal Health Care Payment Plan which provided a detailed framework for payment of thousands of employee Health Care Claims out of the proceeds of the Settlement. *Id*.

These changes addressed and/or resolved all objections to the Settlement by all parties except those made by the Dunagan Intervenors. The District Court scheduled briefing and a hearing on August 18, 2021. R.DMS 722, PageID # 16185. On August 10, 2021, eight days before the scheduled hearing date, the Receiver filed a 39-page sworn Declaration, (the "**Declaration**"), regarding the suitability and appropriateness of the Settlement. R.DMS 742, PageID # 16760. In support of the Declaration, the Receiver attached 14 documents, including (among other things) the Policies, the Non-National Union Excess Policies, the Settlement Agreement, the DeVos Complaint, the Chicago Complaint, and the Letter from the U.S. Department of Justice outlining its claims. Both the Declaration and the Exhibits were admitted into evidence without objection. R.DMS 751, PageID # 17564. R.DMS 767, PageID # 17829.

The Declaration contains in depth analysis of how he and his counsel understood the claims and his likelihood of success should he litigate the issues, the challenges regarding collection of a judgment should he win after a trial, the complexity and expense of the litigation and the paramount concerns of all creditors. R.DMS 742, PageID # 16779-16785. It is important to note that the Settlement was achieved *without litigation* and cost associated therewith. As explained in the Declaration, litigating the claims would be terribly expensive, reducing the recovery by the amount of the 40% contingency fee while at the same time wasting the Policies with the Insureds' defense costs. R.DMS 742, PageID # 16784.

F. THE RECEIVER ESTABLISHES A CLAIMS ALLOWANCE PROCEDURE AND THE LITIGATION TRUST.

The Receiver acknowledges that the United States, the Secured Lenders, the Health Care Claimants, and the Dunagan Intervenors have claims against the Policies and the Non-National Union Excess Policies (collectively, the "**D&O Policies**"). Both the Secured Lenders and the United States have agreed to allow a carve-out from their pro rata claim recovery from the Policies to ensure the Health Care Claims are paid in full. R.DMS 721, PageID # 16101. The Secured Lenders also claim priority through their perfected first position priority lien. The United States claims first priority through the Federal Priority Statute (31 U.S.C. § 3713). R.DMS 737-5, PageID # 16567, R.DMS 742-8, PageID # [1].

As a prerequisite to approving the bar order, the trial court required that the Receiver establish a litigation trust to value the Dunagan Intervenors' claims and preserve and protect their stake in the Policies and the proceeds of any further recovery. R.DMS 749, PageID # 17508. The Receiver filed the DCEH Insurance Litigation Trust Agreement (the "**Trust Agreement**") on September 14, 2021. R.DMS 752, PageID # 17569. The Trust Agreement provides that the Receiver's Claims against the Non-National Union Excess Carriers will be transferred to the

Litigation Trust (the "**Trust**") and settled or litigated. R.DMS 756-2, PageID # 17719-17720. Any recovery is paid to the Trust. *Id*.

The Trust allows for both the valuation and the segregation and payment of the Dunagan Intervenors' claims. R.DMS 756-2, PageID # 17721. Valuation occurs in a court of competent jurisdiction, presumably in a proceeding ancillary to the Receivership proceeding. Distribution is pursuant to Paragraph 3.2 of the Trust Agreement. R.DMS 756-2, PageID # 17724.

The Receiver has not, to date, requested any further claims administration procedure in the receivership case for creditors and claimants with lower priority than the Secured Lenders and the Taxpayers for the simple reason that such a claims procedure will consume additional resources without any likelihood of providing those creditors any recovery. Lower priority creditors will not receive any payments even if *all* $40 million of Non-National Union Excess Policy proceeds are recovered because the claims of the Secured Lenders, the Taxpayers and the Dunagan Intervenors will consume all funds available from the Policies and the Non-National Union Excess Policies. R.DMS 756-2, PageID # 17725.

G. THE DISTRICT COURT ISSUES ITS DECISION.

The District Court ruled on the Receiver's Amended Motion on October 20, 2021. In doing so, the District Court did not merely accept the Receiver's representations. R.DMS 757, PageID # 17765. It reviewed the Amended Motion and

Settlement Agreement, considered the proffer of evidence by Receiver's counsel, heard argument, and took judicial notice of the entire record in the case. *Id*. Thereafter, it entered four separate but interrelated orders approving the Settlement: (i) Order on Objections to Receiver's Settlement with Insurance Carrier (R.DMS 757, PageID # 17753); (ii) Order Approving the Global Settlement Agreement [etc.] (R.DMS 758, PageID # 17768); (iii) Order Approving Payment of Medical Expenses (R.DMS 759, PageID # 17780); and (iv) Order Approving the Litigation Trust (R.DMS 760, PageID # 17783).

The Dunagan Intervenors appealed only three of these orders: they did not appeal the portion of the District Court's ruling that pertains to the payment of the Health Care Claims. R.DMS 761, PageID # 17785.

SUMMARY OF THE ARGUMENT

A district court has broad authority to place assets into receivership "to preserve and protect the property pending its final disposition." *Securities and Exchange Commission v. Stanford International Bank, Ltd.*, 927 F.3d 830 (5th Cir. 2019), (herein after *Lloyd's*) *citing Gordon v. Washington*, 295 U.S. 30, 37, 55 S. Ct. 584 (1935) and *Gilchrist v. General Electric Capital Corporation*, 262 F.3d 295, 302 (4th Cir. 2001). The primary purpose of the equitable receivership is the marshaling of the estate's assets for the benefit of aggrieved investors and other creditors of the receivership entities. *Lloyd's*, at 840, citing *SEC v. Hardy*, 803 F.2d

1034 (9th Cir. 1986). A district court has "broad powers in fashioning relief in an equity receivership proceeding." *Liberte Capital Group, LLC v. Capwill,* 421 F.3d 377, 382 (6th Cir. 2005).

A receiver has wide powers to acquire, organize and distribute the property interest of the receivership. *Lloyd's* at 840. Once property is placed into the receivership, the district court has broad powers and wide discretion to determine appropriate relief. *Id.*, *see also*, *DeYoung*, *Zacarias v. Stanford International Bank*, 945 F.3d 883 (5th Cir. 2019)("*Zacarias*"). "The receiver's role, and the district court's purpose in the appointment, is to safeguard the disputed assets, administer the property as suitable, and to assist the district court in achieving a final, equitable distribution of the assets if necessary." *Liberte Capital Group LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. 2006), ("*Capwill, 462*") citing, *Moore's Federal Practice,* ch. 13 ¶¶66.02-.03 (3d ed. 1999).

Such powers permit the barring of proceedings that would undermine the receivership's operation. *Zacarias,* at 902. Stating that it was no abuse of discretion for the district court to enter bar orders, the *Zacarias* Court said, "Allowing investors to circumvent the receivership would dissolve this orderly process—circumvention that must be foreclosed for a receivership to work." *Id*. Thus, "[i]t is axiomatic that a district court has broad authority to issue blanket stays of litigation to preserve the property placed in receivership . . ." *Lloyd's*, at 840. "Because the court's power of injunction arises from its power over the assets in question, non-parties to the underlying litigation may be bound by a blanket stay." *Capwill, 462*, at 551.

The Dunagan Intervenors have received complete or substantial compensation for the injury they sustained; nevertheless, they want to continue their race to be paid first from the Policies' proceeds. To do so, they must show that the District Court abused its discretion when it approved the Settlement and the Bar Order. An abuse of discretion occurs only when the district court "committed a clear error of judgment, such as applying the incorrect legal standard, misapplying the correct legal standard, or relying upon clearly erroneous findings of fact." *ACLU v. McCreary County, Ky.*, 607 F.3d 439, 450 (6th Cir. 2010). When a district court balances the equities, "it is overruled only in the rarest of cases." *Hadix v. Johnson,* 182 F.3d 400, 404 (6th Cir. 1999).

Here the District Court issued four Orders which taken together comprise a single decision. It made extensive findings based upon strong, competent, and substantial evidence. The District Court's decision is firmly rooted in well-developed equitable legal principles that are applied consistently throughout the United States Circuit Courts. The District Court determined that (1) it had sufficient jurisdiction to enter the Bar Order; (2) the Dunagan Intervenors claims were not "independent and non-derivative" from the Receiver's; (3) the Dunagan Intervenors were the only difficulty standing in the way of global peace; and (4) the settlement was fair and equitable to the Receivership Estate and to the Dunagan Intervenors. This Court should affirm the District Court's decision.

I. STANDARD OF REVIEW

The entry of a bar order, like other equitable actions taken by a district court supervising an equity receivership, is reviewed for abuse of discretion. *Lloyd's* at 839; *In re Healthsouth Corp. Securities Litigation*, 572 F.3d 854, 858 (11th Cir. 2009)("The court reviews the imposition of a settlement bar order for abuse of discretion"), [*citation omitted*]. *DeYoung*, at 1182 ("In challenging the propriety of the bar order, Intervenors have the 'weighty burden of showing an abuse of discretion.") [*citation omitted*].[4]

The standard of review for equitable remedies is generally abuse of discretion. *Ewing v. Horton*, 914 F.3d 1027 (6th Cir. 2019), dissent fn 1, p. 1036, *citing*, *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L.Ed.2d 641 (2006) ("The decision to grant or deny permanent injunctive relief is an act of

[4] The Receiver denies that there are any jurisdictional issues to be decided by this Court, and therefore disagrees with Appellant's standard of review. In *Lloyd's*, another Fifth Circuit case considered contemporaneously with *Zacarias* and cited by Appellants, the Court did not separate out issues of jurisdiction. Rather, the Court stated that it was not subject matter jurisdiction that drove a limitation on bar orders and determined that standard of review to be "abuse of discretion." *Lloyd's*, p. 842. However, should this Court determine that there are matters that pertain to the Court's subject matter jurisdiction to enter the bar order, then only the jurisdictional issues are reviewed *de novo*. *Zacarias, citing*, *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015).

equitable discretion by the district court, reviewable on appeal for abuse of discretion."). *See also*, *Barrett v. Sec'y of Health & Human Services*, 840 F.2d 1259, 1263 (6th Cir. 1987).

II. ARGUMENT

A. THE DECISION IS SUPPORTED BY VOLUMIOUS EVIDENCE AND ABUNDANT FINDINGS OF FACT

1. The District Court Had Jurisdiction Sufficient to Support the Entry of the Bar Order.

The Dunagan Intervenors argue their claims do not affect the *res* of the Receivership Estate, Appellant's Brief, R.31, PageID # 45, and further that the District Court found that the Policies were only "indirect assets of the estate" and never found that the Dunagan Intervenors' claims "directly affect the receiver's assets." *Id*.

The Receiver, and the record, disagree. Under the heading: "Intervenors' Claims Impact Receivership Assets," the Court properly found,

> the prosecution of the Dunagan Intervenors' claims *directly impacts assets that are available to the receivership*. The insurance assets would not be available to the receivership but for the actions of the receiver to assert claims against the Ds&Os and to negotiate the settlement thereof with their (and [the Foundation's]) carrier. And those insurance proceeds are being eroded by the insureds' (and insurer's) cost of defending that case. By approving the settlement agreement and issuing the bar order, the *court will be exercising its broad equitable powers to preserve the insurance proceeds—putative assets of the receivership case—for the benefit of many*. R.DMS 757, Page ID # 17763-17764. (*emphasis added*).

The Court further found "*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.'" R.DMS 758, PageID # 17772 (*emphasis added*).

The District Court's finding is firmly rooted in the evidence of this case and the applicable case law and was not an abuse of discretion. Courts almost universally hold that insurance policies are property of the estate of a corporate debtor. *In re Davis*, 730 F.2d 176, 184 (5th Cir. 1984); *In re Minoco Group of Cos. Ltd*., 799 F.2d 517, 519 (9th Cir. 1986); *MacArthur Co. v. Johns-Manville Corp*., 837 F.2d 89 (2nd Cir. 1988); *A.H. Robbins Co., Inc. v. Piccinin*, 788 F.2d 994, 1001 (4th Cir. 1986). Whether the proceeds of those policies are property of the estate must be analyzed in light of the policies' contractual provisions. *Youngstown Osteopathic Hospital Assn. v. Ventresco (In re Youngstown Osteopathic Hospital Assn.)*, 271 B.R. 544, 550 (2002), citing, *Camall Co. v. Steadfast Insur. Co. (In re Camall Co.)*, 2001 U.S.App. LEXIS 17243 at *12 (6th Cir. July 31, 2001).

The gravamen of the inquiry is who is entitled to access to the insurance policy proceeds. Here, DCEH is the named insured. R.DMS 737-6, PageID # 16574. The Policies insure DCEH's subsidiaries, their management, boards of directors, and employees. *Id*., PageID # 16601 and PageID16584. The Foundation, although not a

Receivership Entity, is an additional insured by endorsement. *Id*., PageID # 16606; R.DMS 737-7, PageID # 16651. The Policies' and the Non-National Union Excess Policies' provisions provide coverage such that the Receivership Entities, the Foundation, and the Ds&Os: (i) have a legally cognizable claim to the proceeds of the Policies because they are named insureds under the Policies; (ii) are insured under both the liability and indemnification clauses; (iii) have made claims under the Policies; and, (iv) are entitled to direct coverage under the Policies' terms. *In re Equinox Oil Co. Inc.*, 300 F.3d 614 (5th Cir. 2002); *In re Babcock & Wilcox Co.*, 69 Fed Appx. 659, at *1 (5th Cir 2002). *See also all coverage policies*, R.DMS 767, PageID # 17829, District Court's Order of February 28, 2022.

It is undeniable that the Policies and the Non-National Union Excess Policies are assets of the Receivership Estate. The Receivership Entities are faced with massive claims asserted by the Health Care Claimants, the Secured Lenders, and the United States. These claims are not hypothetical or speculative, and they vastly exceed the value of the proceeds available under the Policies and the Non-National Union Policies. The Receiver's goal is to recover as much of the proceeds and distribute them equitably among claimants, including the Dunagan Intervenors. The largest asset of the Receivership Estate is the proceeds of the Policies and the Non-National Union Excess Policies.

The Dunagan Intervenors do not offer any analysis of the Policies or the Non-National Union Excess Policies that would remove them from the assets of the Receivership. A compelling reason to consider them assets of the Receivership is that after the Receiver called upon the Policies to respond to the Receiver's Claims, the Insurer offered the remaining policy limits.

The Dunagan Intervenors also argue they were targeting only the Non-National Union Excess Policies and the personal assets of the Foundation and the Ds&Os, which they describe as "non-receivership assets." While it is hard to believe that the Dunagan Intervenors would not seek access to an indemnity payment from the proceeds of the Primary Policy, it is absolutely clear that the Foundation and the Ds&Os had rights against both the Policies and the Non-National Union Excess Policies to pay their defense costs and indemnify them. The reason to purchase D&O coverage is to protect the personal assets of a company's employees, officers, and directors.

Because of the Chicago Litigation, both the Foundation and the Ds&Os had called upon the Policies to respond to their defense costs, and the Policy was paying them, wasting the first layer of coverage. R.DMS 751, PageID # 17522. Had the Policy been exhausted by the Foundation's and Ds&Os' defense costs and indemnification claims, the excess layers would have been called upon to respond and would have paid and been wasted.

As to the personal assets of the Foundation and the Ds&Os, the Receiver's Declaration states that his investigation into the solvency of the Insureds determined that most of them do not have funds available to make a meaningful payment on a judgment. R.DMS 742, PageID # 16782. Those Insureds who do have some financial wherewithal to pay the Receiver's Claims hired counsel to frustrate collection. *Id*. In short, the Dunagan Intervenors want to overturn a settlement that will benefit all stakeholders to chase a sum which likely cannot be collected.

The Dunagan Intervenors are simply incorrect when they argue the Non-National Union Excess Policies are not Receivership Assets. The District Court properly found that the Policies and the Non-National Union Excess Policies were assets of the estate and were being eroded by the Dunagan Intervenors' claims.

2. The District Court Properly Found the Student's Claims Were Not "Independent and Non-derivative" From the Receiver's.

The Dunagan Intervenors can and have participated in the Receivership process, their claims are derivative of and dependent upon the Receiver's Claims, and their Chicago Litigation directly impacts the receivership assets. As such: the Receiver had standing to settle and resolve them; the Litigation Trust provides a concrete, efficient, structured mechanism to value, protect, and pay their claims; and, the District Court's order barring their claims was properly entered.

The Dunagan Intervenors wrongly allege that there is no evidence to support the District Court's finding that the Receiver's Claims were substantially identical to those pursued by the Dunagan Intervenors. Both the Declaration and the exhibits which were admitted into evidence without objection R.DMS 751, PageID # 17564 provide abundant evidence and the documentary proof for the District Court's findings of fact.[5]

The Claims pursued by the Receiver are described in the Declaration ¶ 35. R.DMS 742, PageID # 16773. "Claims" is a defined term and includes Claims against the Foundation and the Ds&Os. Declaration ¶ 3 *Id.*, PageID # 16762 (defining the "Insureds" as including the Foundation and the Ds&Os). See also, Declaration, ¶¶ 7, 8, and 9, R.DMS 742*,* PageID # 16763-16764.

The Declaration describes the Receiver's "Accreditation Claims" as those made by students who were attending the DCEH schools in Illinois and Colorado. R.DMS 742, PageID # 16774. The Receiver's allegations are that the schools lost their accreditation but did not inform the student body that the schools were no longer accredited. *Id*. The Declaration continued, "Four students, known in the context of this case as the Dunagan Intervenors, have filed claims such as these and

[5] The Dunagan Intervenors contend that the Receiver should have drafted a Complaint, but it is hard to appreciate how such unsworn advocacy might have supplemented the Declaration or provided further underpinnings to establish the Receiver's Claims against the Policies to the Dunagan Intervenors' satisfaction.

are presently litigating those claims in Chicago." *Id*. It is hard to imagine that there could be a better indicator of the identical nature of the Receiver's Claims than the statement that the Dunagan Intervenors are presently litigating "claims such as these" in Chicago.

Moreover, the Declaration states that DCEH's management team were negligent in placing a priority on acquiring the schools and keeping them open over any other concern, such as abiding federal regulations or being truthful with lenders, employees, *and students*. R.DMS 742, PageID # 16772-16773 (*emphasis added*). The Declaration further alleges that management's misdeeds triggered "the prompt demise of the entire enterprise and the initiation of claims by a variety of stakeholders." *Id*.

Both the Dunagan Intervenors and the Receiver allege injury by DCEH, IIA, the Foundation, and Ds&Os (same entities/actors); for misrepresentations adversely affecting DCEH schools, including and specifically IIA (same transactions and occurrences). Both the Dunagan Intervenors and the Receiver allege their loss flows from the actions and transactions by these entities and actors. The Court reasonably found "the claims of the Dunagan Intervenors and the receiver's causes of action against the Ds&Os are substantially identical. And there can be no doubt that both sets of claims impact the National Union insurance policy proceeds." R.DMS 757, PageID # 17760.

The Dunagan Intervenors argue that their claims are independent of the Receiver's and cite *Liberte v. Capwill*, 248 F.App'x 650 (6th Cir. 2007) ("*Capwill, 248*"). As was explained in *DeYoung*, at 1181, in *Capwill, 248*, broker-dealers who had no relationship with the receiver or the receivership entities induced investments from investors through misrepresentations to them. Only the investors were harmed by their actions. The brokers' mere sale of securities did not adversely affect the receivership entities and the receiver could show no injury to the receivership entities by the brokers' misrepresentations. The Sixth Circuit denied the receiver's motion for a settlement and bar order.

In the case at bar, the Receivership Entities, the Foundation, and the Ds&Os misrepresented the accreditation status of the schools to the detriment of both the students and the schools they operated and both have causes of action for the loss sustained by each. Thus, every dollar spent by the Policies in defending the Dunagan Intervenors' allegations and every dollar of damages the Dunagan Intervenors recover from the Policies is a dollar that the Receiver cannot, thereby frustrating the Receiver's key equitable charge to effect a pro rata distribution to creditors. *Zacarias*, at 900. And the argument that the Dunagan Intervenors' substantially identical claims against the Foundation cannot be barred because the Foundation is not a Receivership Entity also fails because the Foundation is an Insured under the Policies and the Non-Union Excess Policies, and the failure to bar claims against the

Foundation directly implicates Receivership Assets. *Securities & Exchange Commission v. Kaleta*, 530 F. App'x 360, 362 (5th Dir. 2013). (*unpublished*).

The Dunagan Intervenors' attempt to distinguish their claims from those of the Receiver by alleging that their action is one in fraud; that the students had "direct contact," and that the harm is personal to the students. In *Zacarias*, identical arguments were described and disregarded by the court as mere "word play." *Zacarias*, at 900. DCEH was a fabric of misrepresentation and fraud: to the secured lenders, the Health Care Claimants/employees, and the students (whose stipend, accreditation and discharge claims were paid by the United States). Like the objectors in *Zacarias*, the Dunagan Intervenors "rode the receivership train to the end and then decided to hold up a settlement with deep pockets." *Id*.

The District Court came to the only conclusion it could: it found that the claims against the Foundation and the Ds&Os were not "independent and non-derivative" from the receiver's claims and that they involved assets claimed by the Receivership. R.DMS 757, PageID # 17759, and going further, the District Court found that the Receivership Estate's injury is more easily traceable to the actions of the Ds&Os than the Dunagan Intervenors' remaining uncompensated damages. R.DMS 757, Page ID # 17759. The District Court did not abuse its discretion in issuing its findings and its decision.

3. The Bar Order is Essential to the Settlement and Provides the Insureds with Peace.

The Dunagan Intervenors argue that the Bar Order is not "essential" to the Settlement and that it will not create "global peace." There is abundant evidence that the Bar Order was a requirement of the Settlement and therefore "essential." As to global peace, the Dunagan Intervenors fundamentally misconstrue the concept. The Dunagan Intervenors are not "settling parties" and the requisite "global peace" does not require that the Receiver solicit and receive consensual agreement from them. Here, peace would reign but for the Dunagan Intervenors' appeal, as all settling parties have signed on, and the Receivership Estate's other creditors agree that the Settlement is in the best interests of the Receivership Estate.

"A bar order must be essential to resolving the settling parties' litigation." *Securities and Exchange Commission v. Quiros*, 966 F.3d 1195, 1197 (11th Cir. 2020). "The policy driving bar orders also supports interpreting 'essential' to mean 'essential to settling the litigation.'" *Quiros,* at 1200. The *Quiros* court explained that bar orders such as the one here stem from "public policy strongly favoring pretrial settlement in complex cases, which can occupy a court's docket for years on end, depleting resources of the parties and the taxpayers while rendering meaningful relief nearly elusive." *Id*. Bar orders play an integral role in facilitating settlement as they "allow defendants to 'buy' peace from 'crossclaims for indemnity, contribution, and other causes related to the underlying litigation.'" *Id*.

Regarding the Settlement here, the Insurers and the Insureds agreed upon their Settlement contract. The Insureds received protection for their personal assets and the Receiver is permitted to sue them to pursue his claims against the Non-National Union Excess Carriers. But for the Bar Order, the Ds&Os and the Foundation would face endless claims from the Dunagan Intervenors and perhaps others which claims they would tender to the insurance carriers. In giving up their claims against the applicable insurance carriers, they are giving up the first line of defense for their personal assets. Therefore, both the Insureds and National Union demanded the Bar Order. Absent the protection afforded by the Bar Order, National Union, the Ds&Os, and the Foundation would not have agreed to the Settlement.

The Receiver submitted extensive evidence to support his request for a Bar Order. For example, the Settlement Agreement itself refers to the entry of a Bar Order ". . . to facilitate the Settlement contained herein, and as an *essential, material and integral element of such Settlement* . . ." R.DMS 721-3, PageID # 16138, R.DMS 742-1, PageID # 16810 (*emphasis added*). The Settlement Agreement continues, "In the event such potential holder of a claim timely objects [to the Bar Order] and the Parties and/or Court do not resolve or overrule the objection to the satisfaction of the Insured Released Parties, *then any of the Insured Released Parties shall have the right to withdraw from the Settlement Agreement without the need for Court approval or the consent of any Party, and such Settlement shall be null and void*."

R.DMS 721-3, PageID # 16139, R.DMS 742-1, PageID # 16811 (*emphasis added*). Pursuant to this language, the Receiver's failure to resolve *a single objection to the bar order*—including the one before this appellate Court—renders the Settlement effectively *null and void*.

In addition to the clear language of the Settlement Agreement, the Receiver's Declaration swears that the Settlement is contingent upon, among other things, the District Court entering the Amended Bar Order approving the Settlement and incorporating the Bar Order. R.DMS 742, PageID # 16777. Based upon all the evidence, and not merely the Receiver's say-so R.DMS 757, PageID # 17765, the District Court held "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." R.DMS 758, PageID # 17771.

Citing *Lloyd's*, the Dunagan Intervenors complain that the Settlement must result in the "termination" of *all* potential pending claims against the settling parties. *Lloyd's* does not say that, nor do any of the other cases who write on the issue. *See*, *e.g., Quiros,* at 1200-1202, where the Receiver is required to *resolve*, not *terminate*, his litigation with the Insureds. In *Lloyd's*, the Receiver not only continued actions against some but not all insureds but also sought to cut off the non-settling insureds from their coverage rights under the policies. The non-settling insureds appealed and the Fifth Circuit held the bar order was inequitable because the Receiver had placed the non-settling insureds in a vice, forcing them to defend the Receiver's Claims without recourse to the insurance coverage. Nothing like that is happening here. The Receiver is not pursuing any of the Insureds' assets and Bar Order protects the Insureds from third party claimants.

The Settlement preserved the Receiver's Claims against the non-National Union Policies. Accordingly, he can and will pursue tens of millions of dollars of insurance coverage for the benefit of the estate. The Dunagan Intervenors inexplicably argue that, because the Receiver is free to recover additional monies from additional tiers of coverage, the requisite "peace" is missing. They argue that the only way "global peace" could be achieved is by way of a simultaneous settlement against all tiers of insurance coverage. Such a requirement would add significant complexity and difficulty to the Receiver's settlement task, and the delay in finding a settlement solution or litigating to the bitter end would allow the Dunagan Intervenors the opportunity to beat everyone else to a judgment. In the meantime, they would continue to waste the Policies so that after the Dunagan Intervenors took their share, there would be less for the other constituencies to recover.

The District Court did not have the luxury of waiting; it recognized that the Policy had already paid $1.5 million of costs and equity required that it consider that the remaining $8.5 million will be paid immediately, alleviating the suffering of the

Health Care Claimants and addressing critical issues of funding in the Receivership case. R.DMS 757, PageID # 17765.

The Dunagan Intervenors also say the Settlement should be rejected by this Court unless the Bar Order is enforceable against the United States. To begin with, the settling parties all consented to the language required by the United States. It is identical to the language in the Amended Receiver Order, R.DMS 150, PageID # 3488, ¶ 13, and was required by the United States to remove any doubt about the preservation of its sovereign immunity. The United States, as sovereign, "is immune from suit save as it consents to be sued . . ." *United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, (1976), p. 399. As such, a litigant may not file a suit "to restrain the Government from acting or compel it to act." *Dugan v. Rank Irrigation District*, 372 U.S. 609, 620, 83 S.Ct. 999 (1963); *Transamerica Assurance Corp. v. Settlement Capital Corporation*, 489 F.3d 256, 261(6th Cir. 2007) Put simply, the Bar Order is ineffective against the United States with or without the added language. Acknowledging that fact should not count against those advocating for this Settlement.

The Dunagan Intervenors talk about peace, but they are litigating in three separate forums on their fully or substantially paid claims and they are the only Appellant here before the Sixth Circuit Court of Appeals appealing a Settlement involving countless individual parties and constituencies. The District Court called their position on peace, "disingenuous."[6] Based upon its review of the record R.DMS 757, PageID # 17764, the District Court held that the Bar Order is a required and essential foundation piece of the Settlement. The *only* thing standing in the way of global peace is this appeal by the Dunagan Intervenors.

4. The Settlement is Fair and Equitable to the Dunagan Intervenors.

The Dunagan Intervenors contest the Settlement's fairness, arguing that the Settlement is neither fair nor equitable to them. There is abundant evidence in support of the Settlement's fairness to all, and the District Court's findings based on that evidence were not an abuse of discretion.

(a) The Settlement is Fair and Equitable to All Individuals and Constituencies

The Receiver testified in his Declaration that the Settlement would pay the remaining limits on the Primary Policy--$8.5 million: a substantial economic benefit to the Receivership Estate. R.DMS 742, ¶¶ 15,41, PageID # 16766, 16778. The money is available to creditors now, rather than after protracted litigation. R.DMS 742, ¶ 62, PageID # 16786. Because litigation was not required, the Receivership Estate saved the expenditure of the Receiver's counsel's 40% contingency fees, and

[6] Given that the Dunagan Intervenors object to a settlement that would provide them with a pro-rata distribution of the recovery, one wonders how a settlement with *all* tiers of coverage – which would also provide for a pro-rata distribution – would do anything but draw another objection from the Dunagan Intervenors, further delaying recovery by those injured.

further avoided the continuing wasting of the Policy due to payment of the Foundation's and Ds&Os' defense costs. R.DMS 742, ¶ 57, PageID # 16784. The Settlement completely resolves the Receiver Claims against the Insurer, the Foundation, and the Ds&Os, while preserving his rights to continue the prosecution of his claims against the Non-National Union Excess Policies. R.DMS 742, ¶ 39, PageID # 16776. The Receivership Estate receives cash, not a judgment of questionable collection. R.DMS 742, PageID # 16782-16783.

The District Court reviewed the Receiver's Declaration and took judicial notice of the entire record in the case. It found the Settlement: was (i) the result of extensive, arm's length bargaining among the settling parties; (ii) represented a good faith compromise, R.DMS 758, PageID # 17769; (iii) was fair, reasonable, and adequate; and, (iv) was ultimately in the best interest of the entirety of the Receivership Estate. R.DMS 758, PageID # 17770. The District Court further found that the Insureds gave valuable consideration for the releases and protections of the Bar Order; in particular, the Foundation funded the applicable retention requirements that allowed the Insureds to access the remaining Primary Policy proceeds for the benefit of the Receivership Estate. R.DMS 758, PageID # 17772. And, the Court found the Foundation and the Ds&Os have a right to the Primary Policy proceeds for defense fees and expenses and are willing to forego such rights in order to allow the proceeds to fund the Settlement. *Id*. The District Court further found that if the Dunagan Intervenors are allowed to litigate their claims, the Insureds will not waive their contractual rights under the National Union Policies, thereby making settlement impossible. R.DMS 757, PageID # 17765.

The District Court further found that: (i) 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 forestalls a race to judgment that would have diminished recovery of all creditors against the Receivership Estate, R.DMS 758, PageID # 17772; (ii) everyone consented except the Dunagan Intervenors R.DMS 757, PageID # 17765; and, (iii) the Settlement will bring $8.5 million into the estate immediately. *Id*. The District Court balanced the equities, noting that the money would be available to pay the Health Care Claimants and other needed expenses. *Id*. There is no legitimate dispute regarding the fairness of the Settlement to the Receivership Estate. The Dunagan Intervenors' remaining argument is that the Settlement is not fair as to them.

(b) The Settlement is Fair and Equitable to the Dunagan Intervenors

The Dunagan Intervenors question the future fairness of the Receiver, the Litigation Trust, and the District Court that implemented it. They claim the Receiver is biased because he asserts that the Dunagan Intervenors have already received substantial if not total compensation. And they argue that it is unclear as to how the Litigation Trust would operate in practice, referring to the benefits of the Litigation

Trust as "illusory." Vague possibilities should not be given priority over the hard realities confronting the Receiver and the District Court.

What is absent from the Dunagan Intervenor's argument is any equitable rationale for allowing them to continue their race to first place in line for the proceeds of the Policy or the Non-National Union Excess Policies. They do not make any attempt to validate their advantage-seeking or offer any (much less an equitable) reason they are entitled to take more of the proceeds than, say, the Health Care Claimants, who are waiting patiently in line. The Dunagan Intervenors did not even appeal the Health Care Order (R.DMS 759, PageID # 17780), an integral part of the Settlement, tacitly acknowledging the bad optics and obvious inequity caused by substantially compensated students paying themselves first (and again) before any money reaches the Health Care Claimants, who are fighting off medical creditors. The Dunagan Intervenors use the language of equity but seek inequitable results. They are trying to "jump the queue," come what may to their fellow claimants who remain within the Receivership's distribution process. *Zacarias*, at 902. This appellate court should not allow it.

The law defines "fairness" to the Dunagan Intervenors; it means that they can participate in the Receivership process on an equal footing with everyone else and adjudicate their claims in that process, receiving their fair percentage amount, not more or less. *Zacarias*, at 897. In response to this requirement, the District Court and the Receiver have made every possible accommodation. Before implementing the Bar Order, and as a condition precedent to its implementation, the District Court required the Receiver to propose a litigation trust to protect the interests of the objecting Dunagan Intervenors.

The Receiver did so, drafting provisions that required all of the proceeds from the Insurance Claims to be paid to the Litigation Trust R.DMS 752-1, PageID # 17574; allowing the Dunagan Intervenors a full *pro rata* share in those funds R.DMS 752-1, PageID # 17577; and setting aside and preserving an amount sufficient to pay the Dunagan Intervenors' claims until they are quantified in an ancillary proceeding, or in another court of competent jurisdiction R.DMS 752-1, PageID # 17574. The Dunagan Intervenors cast aside these protections and called them unfair because their singular goal is to achieve special treatment. Therefore, no fair treatment will suffice for the Dunagan Intervenors.

The District Court acknowledged that the Receivership required careful management of limited assets and difficult choices. R.DMS 757, PageID # 17766. The Receiver, the District Court, and other constituencies such as the Secured Lenders, the Health Care Claimants, and the United States have bent over backwards to meet the high bar for the implementation of the Insurer's and the Insureds' required Bar Order. The Dunagan Intervenors have exercised their voice in the Receivership proceedings, have already received substantial compensation, enjoy meticulous protection of their remaining interests, and they have received abundant equity and fairness. Fairness now requires that this Court affirm the decision of the District Court and allow the Settlement to be implemented.

CONCLUSION

For the reasons set forth above, this Court should affirm the decision of the District Court.

Dated: March 29, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-face volume limitation of Fed. R. App. P. 32(a)(7)(B) and 6 Cir. R. 32(b) because it contains 11,891 words, as determined by the word count function of Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I certify that the foregoing was electronically filed on March 29, 2022. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Mary K. Whitmer
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Counsel for Appellee-Receiver, Mark E. Dottore

ADDENDUM:

DESIGNATION OF RECORD

Appellee hereby designates 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):

Doc. No.:	Description	PageID #
3	Emergency Motion for Receiver	58-60
7	Response to Emergency Motion for Receiver	99-101
7-1	Randall Barton Declaration	98-99,102-106
8	Order Appointing Receiver	108
19	Secured Lenders' Motion to Intervene	221
35	Dunagan Motion to Intervene	300
35-1	Dunagan Brief in Support of Motion to Intervene	304, 308
48	Dunagan Emergency Motion for Conference/Hearing	1073
49	Order Authorizing Intervention of Student Intervenors	1084
50	Order Denying Dunagan Emergency Motion for Conference/Hearing	1085

Doc. No.:	Description	PageID #
64	Dunagan Renewed Motion for Status Conference	1353
80	Order Granting Dunagan Renewed Motion for Status Conference	1951
88	Awed Motion to Intervene	2025
91	Receiver's First Report	2043-2047
91-1	Graphic Depiction of DCEH Corporate Structure	2054-2059
92	Dunagan Objection to Motion to Amend Receivership Order	2060
98	Dunagan Memorandum in Support of Motion to Vacate Receivership Order	2721
127	BAS Motion to Intervene	3304-3305
132-1	Department Of Education Letter of February 27, 2019	3339-3340
132-2	Receiver's Response to DOE February 27, 2019, Letter	33345-3346
150	Amended Order Appointing Receiver	3488
177	BAS Response and Reservation of Rights	3786
226	Transcript of March 8, 2019, Hearing	43330-4331

Doc. No.:	Description	PageID #
234	Kenney and Harrison Motion to Intervene	4445,4455
249	Miller Declaration	4725
319	Dunagan Position Statement re: Final Receivership Order	9256
359	Dunagan Objection to Receiver's Proposed Modification	10329
434	Simon Motion to Intervene	11114
475	Dunagan Objection to Studio Motion to Authorize Sale and Clear Liens	11621
486	Dunagan Objection to Studio Motion to Assume and Pay Employee Benefits and Forgive Loans	11694
496	Dunagan Supplemental Objection	11837
500	Dunagan Reply to Studio Response	11863
558	Receiver Response to Nevada Position Statement	17771
607	Receiver Response to Aetna Motion for Relief From Stay	13526
659	Dunagan Response to Receiver's Motion re: Student Records	14959

Doc. No.:	**Description**	**PageID #**
667	Receiver Expedited Motion to Execute Agreement re: Pricing and Administering Health Care Claims	15319-15320
674	Original Motion for Settlement	15382-15383
677	Dunagan Motion to Vacate	15503
679	Order Denying Dunagan Motion to Vacate	15519
685	Rice Objection	15576
686	Hunter-Southern Objection	15584
688	Duke Objection	15604
692	Dunagan Objections to Original Settlement and Bar Order	15647
692-6	Infusino Cost of Attendance Estimate	15686
692-15	Elson Declaration	15702
692-16	Chicago Complaint	15704
694	Chapter 7 Trustee's Objection to Receiver's Motion for Settlement and Bar Order	15828
695	Castillo Objection	15838
696	Dunagan Motion for Expedited Discovery	15850

Doc. No.:	**Description**	**PageID #**
698	Dunagan Reply In Support of Motion For Expedited Discovery	15974
713	Dunagan Motion to Clarify	16059
721	Amended Motion to Approve Settlement	16099-16101
721-2	Redlined Proposed Order Approving Settlement	16115
721-3	Proposed Settlement	16127,16136,16138-16139,16140-16143,16145
722	Order	16185
730	Infusino Affidavit	16262
731	Muscari Affidavit	16277-16278
733	Dunagan Affidavit	16428-16429
734	Porreca Affidavit	16437-16438
737	Receiver's Response to Intervenor's Objections	16485,16489-16491,16493
737-5	U.S. Department of Justice Letter Dated January 25, 2019	16567
737-6	Insurance Policy	16570-16617
737-7	Insurance Policy	16574,16618,16631,16651,16677

Doc. No.:	Description	PageID #
742	Receiver's Declaration in Support of Settlement	16764-16766,16770-16779,16782-16784,16786
742-1	Proposed Settlement Agreement	16810-16811
742-8	Stipulated Order of Dismissal	[1]
746	Intervenor's Reply in Support of Objections	17389
747	Government Response to Receiver's Settlement Motion	17495
749	Court's Minute Order Granting Settlement Motion	17508
751	Hearing Transcript on Settlement and Bar Order held on August 18, 2021	17522,17529-17530,17564,16762-16764,16773
752	Notice of Filing of DCEH Insurance Litigation Trust	17569
752-1	Proposed DCEH Insurance Litigation Trust	17574,17577
756-2	Litigation Trust Agreement	17719-17721,17724-17725
757	Order Overruling Objections to Receiver's Settlement	17759-17760,17763-17766

Doc. No.:	**Description**	**PageID #**
758	Order Approving Settlement and Bar Order	17769-17770,17772
759	Order Approving Medical Expense Payment	17780
760	Order Approving Litigation Trust	17783
761	Notice of Appeal	17785
767	Motion to Supplement Correction of the Record	17829