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

REPLY BRIEF OF INTERVENOR PLAINTIFFS-APPELLANTS

ERIC ROTHSCHILD
ALEX ELSON
NATIONAL STUDENT LEGAL DEFENSE NETWORK
1015 15th Street, NW, Suite 600
Washington, DC 20005
(202) 734-7495

MATTHEW W.H. WESSLER
GUPTA WESSLER PLLC
2001 K Street, NW, Suite 850 North
Washington DC 20006
(202) 888-1741
matt@guptawessler.com

May 3, 2022

(additional counsel on next page)

JESSICA GARLAND
GUPTA WESSLER PLLC
100 Pine Street, Suite 1250
San Francisco, CA 94111
(415) 573-0336

Counsel for Intervenor Plaintiffs-Appellants

TABLE OF CONTENTS

Table of Authorities

Cases

Other Authorities

INTRODUCTION

A bar order is an extraordinary remedy. It strips third parties of their day in court—and it does so without their consent and through no fault of their own. Courts have, as a result, imposed a demanding set of requirements on both an appointed receiver and a court overseeing a receivership before they can take the extraordinary step of terminating pending litigation in another jurisdiction. Those requirements include establishing that (1) the district court has jurisdiction over the property being sought by the barred claims, (2) the receiver 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, in the rare cases where a bar order has been approved, courts have made clear that satisfying these criteria requires more than just self-serving statements—the receiver must point specifically to record evidence substantiating his position and a court must make a detailed record of specific factual findings to support the entry of a bar order.

The receiver disputes none of this. Instead, he says that all four conditions were satisfied here, asserting no less than half a dozen times that there was "abundant evidence"—including "documentary proof"—to support the entry of a bar order. But flip to any page in the receiver's brief where this claim is made (start with 38, 42, and 47) and, aside from a single self-serving declaration and the settlement agreement itself, the receiver identifies no evidence to support any of the four requirements. And

the proof is in the pudding: The district court cited no record evidence—*not even* the receiver's declaration—to support its conclusion that the receiver had demonstrated that a bar order was justified. At every step, it just took the receiver's word for it.

Even on its own terms, however, the receiver's defense of the bar order here falls remarkably short. The receiver's purported basis for jurisdiction—the National Union insurance policies—by their terms exclude coverage for the students' "fraud and misrepresentation" claims. And even if that weren't true, the students' claims never specifically targeted those policies anyway; they instead seek recovery from any available source. On standing, the receiver admits (at 39) his actual claims are different from the students—his seek recovery for "misrepresentations adversely affecting DCEH schools," while the students' seek recovery for misrepresentations made directly to them. He nevertheless argues (at 40) this is irrelevant because "both have causes of action for the loss sustained by each." That is not the test for standing. The receiver must show that the third-party's claims arise from the "same loss, from the same entities," are related "to the same conduct, and [arose] out of the same transactions and occurrences by the same actors." *SEC v. DeYoung*, 850 F.3d 1172, 1176 (10th Cir. 2017).[1] Applying the correct test here makes clear that the receiver lacked standing to bar the students' claims.

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

The receiver's arguments on the last two requirements fare no better. The receiver is forced to concede that the bar order was not essential for creating global peace because there was none. By the receiver's own reckoning (at 45), the settlement left multiple parties, including the receiver, "free to recover additional monies." It just excluded the students from this same opportunity. In defense of this fatal concession, all the receiver can offer up is that requiring global peace "would add significant complexity and difficulty to the Receiver's settlement task." That's about as compelling as it sounds. Finally, the receiver insists (at 50) that barring the students from pursuing their claims is fair because they can "adjudicate their claims" through "the Receivership process." But he never explains how this could occur, given that the "litigation trust" process the court approved explicitly prohibits the students from receiving a final judgment from any court. Here again, he just asks this Court to take his word for it.

Requiring that stringent standards be met before entering a valid bar order operates as a crucial safeguard for the rights of third parties who may lose their opportunity to pursue otherwise valid claims against even non-receivership entities. Affirming the entry of a bar order here would override these crucial safeguards and hand equitable receivership courts nearly unlimited power to bar third-party claims—based on little more than a receiver's say-so. This Court should reverse.

ARGUMENT

I. The district court lacked jurisdiction to enter the bar order.

The receiver's defense of the district court's entry of a bar order begins, as it must, with jurisdiction. He does not dispute that, under Federal Rule 66, a court presiding over an equitable receivership may only bar a claim that "directly impacts the receivership assets." Response Br. at 37; *see SEC v. Stan. Int'l Bank, Ltd.*, 927 F.3d 830, 842–43, 849 (5th Cir. 2019) ("*Lloyds*") (receivership court is foreclosed from barring "third-party claims that do not affect the *res* of the receivership estate"). He argues, however (at 33, 35), that the bar order here satisfied this requirement because the students' claims could "erode[]" one of the "assets of the Receivership Estate"—the proceeds of the National Union insurance policies. According to the receiver, the individual directors, officers, and the Foundation are "entitled to direct coverage under the Policies' terms" for both "liability and indemnification" in the event that they are held liable in the students' case—meaning that a judgment against any of the defendants there could exhaust the proceeds of the policies in the estate. Response Br. at 34–35.

But, as we explained in our opening brief (at 38–39), the "Policies' terms" flatly contradict this claim. On their face, the policies do not insure—either for liability or indemnification—the directors, officers, or the Foundation for claims sounding in fraud. For instance, the primary National Union policy that the receiver identified,

and which covers the directors and officers—*specifically excludes* from coverage any "conduct arising out of, based upon[,] or attributable to any . . . deliberate fraudulent act" committed by a director or officer "if established by any final, non-appealable adjudication in any underlying action." Insurance Policy, R.DMS737-6, PageID16587. And, as the district court acknowledged, the students' claims were for "fraud and misrepresentation." Order, R.DMS757, PageID17758. As but one example, the students' complaint alleged that the directors and officers knowingly "conceal[ed] the loss of accreditation" and "intended to induce a false belief" in students "that there that there had been no material change to the school's accreditation status." Complaint, R.Ill165, PageID7608; *see also* Order, R.Ill128, PageID5212 (court noting that the conduct at the heart of the students' claims involves decisions to "intentionally withl[o]ld . . . information from the students" and to "lie[] about [IIA's] accreditation status for months"). Nevertheless, the district court failed to explain at all why the policy's fraud exclusion would not preclude coverage here.

Nor did the receiver even attempt a response. Because these policies do not provide liability or indemnification coverage for any of the defendants in the students' case, they are incapable of serving as the jurisdictional basis for the district court's order. A final judgment holding the directors and officers liable for this conduct would trigger the policy exclusion—making recovery from those policies impossible. *See, e.g.*, *Rice v. Liberty Surplus Ins. Corp.*, 113 F. App'x 116, 118–123 (6th Cir.

2004) (judgment for defrauding plaintiffs triggers insurance exclusion for deliberately fraudulent conduct). And that is fatal: the receiver identified no other assets within the receivership that could be directly impacted by the students' lawsuit.[2]

There is also no credible evidence to demonstrate that the directors and officers would be *required* to satisfy any damages judgment out of the National Union policies. The students' lawsuit does not specifically target the National Union insurance policies or otherwise compel the defendants in that case to pay any potential judgment from those policies. Complaint, R.Ill165, PageID7610. To the contrary, the students sought relief from any available source, including the four DCEH insurance policies that are not part of the settlement and the directors' and officers' personal assets. *See* Settlement, R.DMS721-3, PageID16138–39. Given this, the bar order should not prevent the students from seeking damages from the assets of the very individuals who defrauded them—especially if, as here, the receiver has not claimed that those assets are part of the receivership estate.

[2] Falling back, the receiver states that both the Foundation and the directors and officers had already "called upon the Policies to respond to their defense costs" and that "the Policy was paying them, wasting the first layer of coverage" and risking further wasting. Response Br. at 36. But the receiver introduced no evidence to support this claim and, here again, the policies protect against this possibility by requiring that any "advance payments," including for defense costs, "shall be repaid" in the event that the fraud exclusion is triggered. Insurance Policy, R.DMS737-6, PageID16593. There is therefore no credible possibility that even the defense costs could exhaust the assets contained in the insurance policies.

To avoid this problem, the receiver asserts (at 37) that the individual defendants' personal assets "likely cannot be collected." But the receiver offered no evidence for this assertion beyond his own conclusory statement that an "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." Response Br. at 37 (citing Declaration, R.DMS 742, PageID16782). But even that claim was contradicted by the receiver's next sentence, which acknowledges that some directors and officers do in fact have the "financial wherewithal to pay." *Id.* And the only reason the receiver offers for why the students might nevertheless be foreclosed from seeking damages from those defendants who can pay is that the defendants "hired counsel to frustrate collection." *Id.* But hiring counsel has never been, in any context, a reason for a court to bar a plaintiff from pursuing a claim.

II. The receiver's claims are not "substantially identical" to any of the barred claims.

When it comes to the second requirement—the receiver's standing to bar third-party claims—the receiver's arguments are just as weak. Requiring a receiver to demonstrate his standing to bar third-party claims ensures that receivership courts stay within the confines of the "jurisdictional constraints of Article III." *Liberte Cap. Grp., LLC v. Capwill*, 248 F. App'x 650, 655 (6th Cir. 2007). There is no license for receivership courts to enter a bar order terminating the live claims of third-party litigants against non-receivership entities except where such an order is at least in

part intended for those litigants' benefit. *See Lloyds*, 927 F.3d at 842 ("The prohibition on enjoining unrelated, third-party claims without the third parties' consent . . . is a maxim of law not abrogated by the district court's equitable power to fashion ancillary relief measures."). Thus, while a court can bar a third-party litigant from making a "duplicative" claim that a receiver is also attempting to pursue because the receiver is better positioned to do so, a court has no power to bar a third-party's claim that is separate and "distinct" from claims of the receiver. *See Zacarias v. Stan. Int'l Bank, Ltd.*, 945 F.3d 883, 896–98 (5th Cir. 2019).

Here, the receiver agrees (at 38) that, to demonstrate standing, he must show, and the district court must find, that he holds claims that are "substantially identical" to those being barred. To do this, the receiver must demonstrate—with actual record evidence—that both his claims and the third-party's arise from the "same loss, from the same entities," are related "to the same conduct, and [arose] out of the same transactions and occurrences by the same actors." *See DeYoung*, 850 F.3d at 1176; *see also Wuliger v. Mfrs. Life Ins. Co.*, 567 F.3d 787, 793–99 (6th Cir. 2009) (describing how the claims must be the "same"). The receiver barely even tries to make this showing.

To start, he claims there was "abundant evidence" and "documentary proof" supporting "the District Court's finding that the Receiver's Claims were substantially identical to those pursued" by the students. Response Br. at 38. But the receiver identifies only a single document—his own self-serving declaration—that was

introduced into the record to support standing. *See* Response Br. at 37–41 (discussing and citing to just this document). That comes nowhere close to satisfying the requirement that bar orders be supported by a "record of specific factual findings." *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002); *see also SEC v. Quiros*, 966 F.3d 1195, 1201 (11th Cir. 2020) (explaining this must include "traditional extrinsic evidence").

And, no surprise, the receiver cites no case upholding the use of a bar order under similar circumstances—where the only evidence the receiver introduces is his own declaration. Just the opposite. As we explained in our opening brief (at 40), courts that have approved the use of bar orders have required more. *DeYoung*, 850 F.3d at 1176 (evaluating draft complaint); *Zacarias*, 945 F.3d at 896–98 (evaluating filed complaint); *Wuliger*, 567 F.3d at 794 (same); *SEC v. Alleca*, 2021 WL 4843987, at *4, *10 (N.D. Ga. Sept. 9, 2021) (evaluating a filed complaint and the receiver's "direct testimony and . . . cross-examin[ation]"); *SEC v. Adams*, 2018 WL 9437320, at *1 (S.D. Miss. Dec. 21, 2018) (evaluating a filed complaint); *Harmelin v. Man Fin. Inc.*, 2007 WL 4571021, at *1 (E.D. Pa. Dec. 28, 2007) (accepting the receiver's declaration only because he was first "offered . . . for cross examination to any other counsel or party present"). Even the receiver's own amicus unintentionally makes this point. It claims that "a court is entitled to rule in reliance on the declaration of the receiver." Amicus Br. at 16. But the sole case it cites, *Harmelin v. Man Fin. Inc.*, only relied on the

declaration *after* the receiver agreed to appear "for cross examination [by] any other counsel or party present." 2007 WL 4571021, at *1. Here, neither the receiver nor the court ever allowed the receiver's statements to be subject to cross-examination. Instead, they appear simply to have been uncritically accepted without question. *See* Order, R.DMS757, PageID17754.

Even if an untested and self-serving declaration were enough, the receiver's own declaration fails to substantiate his position that the students' claims are "derivative of and dependent upon the Receiver's [c]laims." Response Br. at 37. In support, the receiver points to a paragraph in the declaration that, he says, "describes the Receiver's 'Accreditation Claims.'" *Id.* at 38 (citing R.DMS 742, PageID16774). But that paragraph does not describe any of "the Receiver's claims." It explicitly describes only the students' claims:

> e. the "Accreditation Claims," are *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. The students completed degrees and/or course work that were claimed to be worthless because their degrees and/or course work credits were granted by an unaccredited institution. Four students, known in the context of this case as the Dunagan Intervenors, have filed claims such as these and are presently litigating those claims in Chicago.

R.DMS 742, PageID16774 (emphasis added).

Nevertheless, relying exclusively on this paragraph, the receiver says (at 39) that "[i]t is hard to imagine that there could be a better indicator of the identical

nature of the Receiver's claims." That is nonsense. While this paragraph describes the students' claims, it contains no discussion or explanation demonstrating *how or why* the receiver also held and pursued similar claims.[3] It is for this reason that courts have nearly uniformly required receivers seeking to bar claims to—at least—provide a draft complaint of their asserted claims (if one has not yet actually been filed) to establish the similarity of claims. *See DeYoung*, 850 F.3d at 1176; *Zacarias*, 945 F.3d at 896–98; *Wuliger*, 567 F.3d at 794. Otherwise, how could a court properly evaluate the question?

The receiver criticizes this basic point (at 38 n.5), arguing that "it is hard to appreciate how such unsworn advocacy might have supplemented the Declaration." But unlike a declaration, a complaint requires "stating the facts each party believes to exist" and provides a means for quickly filtering out "sham claims." C. Wright & A. Miller, Federal Practice and Procedure § 1202 (4th ed. 2022). Put differently, a complaint—unlike a declaration—may not rely on "a formulaic recitation of the elements of a cause of action" but must instead include "sufficient factual matter . . .

[3] Although the receiver asserts (at 38) that he "pursued" certain claims described in the declaration, he failed to introduce any evidence that this was true. Instead, his carefully worded declaration says only that he "concluded that *we had* various Claims," Declaration, R.DMS742, PageID16773 (emphasis added), not that those claims were ever asserted—either in the settlement demand letter he claimed to have sent, Opening Br. at 41, as a claim for policy coverage, or anywhere else.

to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The receiver here completely failed to satisfy this basic requirement. He identified no facts demonstrating that any of the receivership entities could recover for similar harms to those suffered by the students. Instead, the receiver only states that "DCEH's management team w[as] negligent in placing a priority on acquiring the schools." Response Br. at 39. That, in the receiver's view is somehow enough to show that his claims are "substantially identical." *Id.*[4] But any claim against DCEH's management team for negligence in this respect is a claim about harm to the "schools"—it does not describe the "same loss" or the "same harm" that the students suffered, *see DeYoung*, 850 F.3d at 1176—and it is focused on different alleged misconduct than the accreditation fraud alleged by the students. And no one disputes that the students are not part of the receivership entities; just because the students made claims against parties related to the receivership does not make their claims the "Receiver's Claims." *See Wuliger*, 567 F.3d at 793 (explaining that because

[4] The receiver also claims that "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[.]" Response. Br. at 39. The receiver (once again) fails to cite anything in support of this proposition. It is also factually incorrect. The students do not allege injury for "misrepresentations adversely affecting DCEH schools." In fact, they alleged misrepresentations *by* the DCEH schools, which are now receivership entities. Complaint, R.Ill165, PageID7570–71, 99.

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). Indeed, as even the receiver himself has acknowledged (at 38), the students have a claim for damages because the schools "did not inform the student body that the schools were no longer accredited"—but that harm could only be suffered by the student body, not by the receivership entities. And even if the receiver *had* detailed claims asserting that the receivership suffered a harm similar to the students' resulting from the defendants' "negligen[ce]," such claims would not be "substantially identical" to the students' claims that sound in fraud.

The receiver also makes a half-hearted effort to distinguish this Court's decision in *Liberte*. There, third-party investors were harmed when certain brokers made material misrepresentations directly to them about some investments. 248 F. App'x at 651. The receiver attempted to bar these investors' lawsuit against the brokers, arguing that any proceeds "recovered by th[e individuals]" would diminish the "assets of the receivership estate." *Id.* at 653–54. But this Court rejected that effort because the receiver lacked standing—none of the receivership entities "would have been able to claim any tangible injury traceable to the brokers' misrepresentations to the investors." *Wuliger*, 567 F.3d at 794 (describing *Liberte*); *see Liberte*, 248 F. App'x at 655–56 (explaining that the receiver lacked standing because he could not "show

that the receivership entities ha[d] a 'personal stake' in the outcome of the controversy involving the [broker-dealers]").

According to the receiver here, the only reason there was no standing in *Liberte* was because the brokers "had no relationship with the receiver or the receivership entities" and "[o]nly the investors were harmed by [the brokers'] actions." Response Br. at 40. The receiver, of course, doesn't cite to anything in the opinion adopting this view, but it is, in any event, wrong. Regardless of whether the brokers separately injured the receivership entities, what matters for standing purposes is—as this Court made clear in its opinion—whether the receivership entities suffered a "tangible injury traceable to the brokers' misrepresentations to the investors." *Wuliger*, 567 F.3d at 794 (citing *Liberte*, 248 F. App'x at 656–57). And here, that rule is outcome determinative. Where multiple types of misrepresentations have been made, the one the students seek damages for did not create "any tangible injury" to the receivership entities. *Id.*

Nor is the receiver correct that, like in *Zacarias*, the third-party claims here are indistinguishable from those held by the receiver. *See* Response Br. at 40–41. The receiver appears to read *Zacarias* as standing for the proposition that claims are substantially identical whenever "every dollar of damages" that a third-party plaintiff could recover from a receivership entity "is a dollar that the Receiver cannot." Response Br. at 40. That both fundamentally misunderstands the nature of a "claim"

in this context and misreads *Zacarias*. First, substantially identical "claims" are not defined by the source of potential damages. They are, instead, defined by whether "they involve[] 'the same loss, from the same entities, related to the same conduct, and arising out of the same transactions and occurrences by the same actors.'" *Zacarias*, 945 F.3d at 898 (quoting *DeYoung*, 850 F.3d at 1176). Second, in *Zacarias*, the third-party's claims were not "independent and distinct from those asserted by the receiver" because "the unchallenged findings of the district court" revealed that the third-party plaintiffs' claims were based on the same misrepresentations as those that formed the basis of the receiver's suit—both involved the same fraudulent investment letters made on the same "letterhead of the defendant companies" and "mediated" by the same "Stanford executives." *Id.* at 899. The same is not true here.

III. It is undisputed that the bar order will not halt the parties' litigation.

As the receiver himself acknowledges, the third requirement for a bar order is that the order be "essential" to the settlement and necessary to create "global peace." Response at 42. Yet, here, after initially asserting (without support) that "peace w[ill] reign," the receiver freely admits that the bar order *does not* create that requisite peace. *See* Response Br. at 23 (quoting the settlement agreement as "permitt[ing] the Receiver to continue to pursue his claims under the other non-National Union Excess Policies" and "allowing the Receiver to name the Insureds as defendants in future lawsuits on the various claims"); *see also id.* at 45 (noting the receiver "will"

name the insured as defendants to "pursue tens of millions of dollars of insurance coverage" from the "the non-National Union Policies"). That is a fatal concession. If a bar order does not create a "global peace," it cannot as a matter of logic be considered "essential" to creating peace. *See Quiros*, 966 F.3d at 1199–1200 (holding that global peace requires "resolving the settling parties' dispute" and recognizing "the policy behind settlement bar orders supports their use only when they are needed to halt the parties' litigation").

The only explanation the receiver offers is that requiring global peace "would add significant complexity and difficulty to the Receiver's [] task." Response Br. at 45. That is absurd. A receiver is not exempted from this requirement simply because it would require more work. Courts recognize that requiring global peace *is* the "high price" that must be met before a court may bar "valid claims that non-settling parties could assert." *Quiros*, 966 F.3d at 1197. Unsurprisingly, the Receiver cites no authority for his position. That is because there is none. A bar order is only permitted if it is "essential to resolving the settling parties' dispute." *Id.* at 1197–98. *See Zacarias*, 945 F.3d at 889–91 (upholding bar order because it was instrumental in delivering "total peace"); *Lloyds*, 927 F.3d at 845 (reversing receivership court's entry of bar order because the it failed to deliver "[g]lobal peace"); *DeYoung*, 850 F.3d at 1182–83 (approving a bar order only after the district court engaged in "careful[] evaluat[ion]" to determine that the parties "would not have settled without the

Claims Bar"). Bar orders are the exception, not the rule; the receiver's proposal would turn that on its head.

What's more, even to the extent the settlement created *some* peace, the receiver failed to show that the bar order was "essential" in doing so. As before, the receiver asserts (at 42) that there was "abundant evidence" that the bar order was essential to the settlement. And yet again, the receiver's brief fails to identify any actual evidence supporting this claim. For example, the receiver claims (at 23) the settlement was the result of "extensive and difficult negotiations with National Union." But no actual record evidence substantiates this assertion—indeed, it's not at all clear what concessions the receiver even made National Union make in exchange for the bar order. So what work did the bar order do? The receiver does not say.

IV. The district court's entry of a bar order was inequitable.

Finally, the receiver insists that the district court's entry of the bar order was equitable. The receiver acknowledges that, for the order to be fair and equitable, the settlement must provide a fair process for the barred parties to pursue their claims. *See* Response Br. at 50–51. Courts require the creation of such a process because "[t]he district court and Receiver lack[the] authority to dispossess claimants of their legal rights to share in receivership assets 'for the sake of the greater good.'" *Lloyds*, 927 F.3d at 846. A court would thus "abuse[] its discretion by extinguishing [an intervenor's] claims to the policy proceeds, while making no provision for them to

access the proceeds through the Receiver's claims process." *Id.* at 845. Here, the receiver argues that this requirement is satisfied because the settlement included a Litigation Trust that affords a fair process for the barred parties to pursue their claims.

But, as we have explained, that process is illusory. It requires the students to first establish the value of their claims in a court of competent jurisdiction—which is itself foreclosed by the bar order. *See* Opening Br. at 52 (explaining that the bar order explicitly prohibits the students from receiving a final judgment from any court). The receiver has no answer to this problem, so he asks the Court to simply ignore it—offering up in response only the non sequitur that "[v]ague possibilities should not be given priority over the hard realities confronting the Receiver and the District Court." Response Br. at 50. But it is not a "vague possibility" that the students won't be able to access the Litigation Trust. The trust and bar order, by their terms, make it a clear *impossibility* because the students are barred from fulfilling a requirement of the trust—bringing a claim in a court of competent jurisdiction to establish the value of their claims.

And even if the litigation trust was not illusory, the structure of the settlement nevertheless fails to satisfy the equitable requirements for a bar order. In determining whether a settlement and bar order is equitable, courts must focus on whether the parties being barred have had their rights adequately protected—not just whether

the receivership estate is maximized. That is why, even in the cases the receiver cites upholding bar orders, courts only found the bar order equitable because the intended beneficiaries of a settlement included the barred parties themselves, not just the estate or creditors generally. *See Zacarias*, 945 F.3d at 894–95 (settlement benefitted all "similarly situated investors" and proceeds accumulated through the settlements were all earmarked for those investors); *DeYoung*, 850 F.3d at 1175–6 (settlement was intended "for the benefit of the IRA Account Owners"); *SEC v. Kaleta*, 2012 WL 401069, at *3, *6–7 (S.D. Tex. Feb. 7, 2012), *aff'd*, 530 F. App'x 360 (5th Cir. 2013) (approving bar order only after confirming that it would not bar the majority of the objectors' claims and finding that the "[t]he Settlement [was] in the best interests of all the Estate's claimants, including the Objectors"). Here, however, the settlement failed to allocate the proceeds gained through settlements to the barred parties themselves.

To sidestep the lack of a viable claims process, the receiver argues that it doesn't matter if the students can recover through the process because, in his view, the students have already recovered their damages. That is wrong—not even the district court accepted this assertion, which relies (at 16) on the receiver's own earlier, unsupported "alleg[ation]"—but it is also irrelevant. The amount of the students' damages is not at issue in this appeal; the proper forum to dispute the amount of damages would instead be the Illinois federal district court, where that issue was

being litigated until the bar order stayed that litigation. In the Illinois district court, however, the students' claims survived multiple rounds of motions to dismiss and at no point did the defendants there argue that the students had already fully recovered on their damages.

Finally, faced with a process that failed to create any realistic pathway for the students to pursue their claims, the receiver's last move is to point the unfair flag elsewhere. He claims (at 50) it is the students who are trying to create an unequal outcome by "jump[ing] the queue" of creditors. That is false. After being defrauded by DCEH, DCF, and their directors and officers, all the students want is to prevent the receiver from stripping them "of their day in court, through no fault of their own," while the very individuals who defrauded them are protected by the receiver from suit. *Quiros*, 966 F.3d at 1202.

CONCLUSION

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

Respectfully submitted,
/s/Matthew W.H. Wessler

MATTHEW W.H. WESSLER
GUPTA WESSLER PLLC
2001 K Street, NW, Suite 850 North
Washington DC 20006
(202) 888-1741
matt@guptawessler.com

JESSICA GARLAND
GUPTA WESSLER PLLC
100 Pine Street, Suite 1250
San Francisco, CA 94111
(415) 573-0336

ERIC ROTHSCHILD
ALEX ELSON
NATIONAL STUDENT LEGAL DEFENSE NETWORK
1015 15th Street, NW, Suite 600
Washington, DC 20005
(202) 734-7495

May 3, 2022

Counsel for Intervenor Plaintiffs-Appellants

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 5,101 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.

/s/ Matthew W.H. Wessler
Matthew W.H. Wessler

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 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
Matthew W.H. Wessler