UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DIGITAL MEDIA SOLUTIONS, LLC, *Plaintiff*, v. SOUTH UNIVERSITY OF OHIO, LLC, *et al.*, *Defendants*.	CASE NO. 1:19-cv-145 Judge Dan Aaron Polster Magistrate Judge Thomas M. Parker

INTERVENORS EMMANUEL DUNAGAN, JESSICA MUSCARI, ROBERT J. INFUSINO, AND STEPHANIE PORRECA'S OBJECTIONS TO THE RECEIVER'S AMENDED MOTION FOR APPROVAL OF SETTLEMENT AND BAR ORDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

Other Authorities

INTRODUCTION

Mark Dottore, the Receiver for Dream Center Education Holdings ("DCEH"), has moved this Court to approve a settlement with DCEH's parent, the Dream Center Foundation ("DCF"), and former officers and directors of DCEH (collectively, the "Insureds"). *See* Dkt. 721 (hereinafter, the "Amended Settlement Motion"); *see also* Dkt. 674 (hereinafter, the "Original Settlement Motion"). As part of that settlement, the Receiver proposes a sweeping bar order that would extinguish all active and future lawsuits against both Receivership and non-Receivership entities—including the class action lawsuit pending in the Northern District of Illinois that former Illinois Institute of Art ("IIA") students Emmanuel Dunagan, Jessica Muscari, Robert J. Infusino, and Stephanie Porreca (collectively, the "*Dunagan* Intervenors") filed before the start of this Receivership—without jurisdiction, the *Dunagan* Intervenors' consent, or any meaningful alternative compensation scheme. Such a proposal enlists this Court in an extraordinary incursion into former students' legal rights and the jurisdiction of another federal court. Unsurprisingly, such an expansive and exceptional exercise of this Court's equitable power is unsupported by any law. The *Dunagan* Intervenors therefore object.

BACKGROUND

A. Parties in the *Dunagan* Lawsuit

The *Dunagan* Intervenors are four students who attended IIA campuses, including in 2018 after DCF purchased IIA. They are also plaintiffs and proposed representatives of approximately 1,000 of their fellow students in a class action lawsuit brought against DCF, DCEH, IIA, Brent Richardson, Chris Richardson, and Shelly Murphy in the United States District Court for the Northern District of Illinois. *See generally Dunagan v. Ill. Inst. of Art*, No. 19-cv-0809 (N.D. Ill. removed Feb. 7, 2019). The Court granted their motion to intervene in this Receivership on February 13, 2019. Dkt. 49.

DCF is a California non-profit corporation, the sole owner of DCEH, and the ultimate parent of the buyers of IIA and other schools from Education Management Corporation ("EDMC"). Corrected Third Am. Class Action Compl. [Dkt. 106] ¶¶ 26–27, *Dunagan*, No. 19-cv-0809 (N.D. Ill. Jan. 25, 2021) (hereinafter, "*Dunagan* TAC") (attached hereto as Exhibit 1 to the Declaration of Alexander S. Elson ("Elson Decl.")).

DCEH was an Arizona non-profit limited liability company formed by DCF on January 9, 2017, in order to facilitate the sale of for-profit colleges from EDMC to DCF. *Dunagan* TAC ¶ 25.

IIA, a subsidiary of DCEH, was an institution of higher education with campuses located in Chicago, Illinois, Schaumburg, Illinois, and Novi, Michigan. *Dunagan* TAC ¶¶ 23–24.

At all times relevant to the *Dunagan* litigation, Brent Richardson was the Chief Executive Officer of DCEH and a member of its Board of Directors, Chris Richardson was General Counsel of DCEH, and Shelly Murphy was DCEH's Chief Officer of Regulatory and Government Affairs. *Dunagan* TAC ¶¶ 28–30.

Of the parties described above, only DCEH and IIA are Receivership entities. Dkt. 8 at 3–4.

B. The *Dunagan* Lawsuit

On December 6, 2018, over one month prior to the creation of this Receivership, the *Dunagan* Intervenors filed a lawsuit in Illinois state court against DCF, DCEH, and IIA. The *Dunagan* Intervenors represent a proposed class of students harmed by misrepresentations and omissions regarding IIA's accreditation status.[1] The Receiver has stipulated to this misconduct

[1] The *Dunagan* Intervenors moved for class certification in state court before the case was removed. *See generally* Pls.' Mot. for Class Cert., *Dunagan v. Ill. Inst. of Art,* No. 18-CH-15216 (Cir. Ct. Cook Cty. filed Dec. 7, 2018) (previously submitted to this Court as Dkt. 698-1). Once in federal court, the *Dunagan* Intervenors proposed,

and "recognize[d] the need for restitution for the approximately 1,494 students impacted during the time period between January 20, 2018[,] and June 15, 2018[,] when the accreditation status was not disclosed." Dkt. 323-1 at 3.

Defendant IIA-Schaumburg removed the *Dunagan* matter to the Northern District of Illinois in early February 2019. *See* Notice of Removal [Dkt. 1], *Dunagan*, No. 19-cv-0809 (N.D. Ill. Feb. 7, 2019. Several months later, the case against all defendants except DCF was stayed, pending dissolution of this Receivership. *See* Agreed Order [Dkt. 37], *Dunagan*, No. 19-cv-0809 (N.D. Ill. May 6, 2019). DCF then filed a motion to dismiss on all counts, which the court denied. *See* Order [Dkt. 68], *Dunagan*, No. 19-cv-0809 (N.D. Ill. Jan. 6, 2020) (holding, after extensive briefing, that plaintiffs stated a claim for: (i) misrepresentation of material fact pursuant to the Illinois Consumer Fraud and Deceptive Practices Act ("ICFDPA"); (ii) omission of material fact pursuant to the ICFDPA; (iii) unfairness under the ICFDPA; (iv) negligent misrepresentation; and (v) fraudulent concealment). DCF subsequently answered the complaint and brought a third-party complaint against IIA's accreditor, the Higher Learning Commission ("HLC"). *See* Answer & Third Party Compl. [Dkt 73], *Dunagan*, No. 19-cv-0809 (N.D. Ill. Feb. 28, 2020). In granting HLC's motion to dismiss DCF's third-party complaint, the court observed that the underlying conduct at issue—*i.e.*, defendants refusing to "disclose [that a school recently lost its accreditation] to students, [lying] about its accreditation status in its promotional materials, and continu[ing] to recruit new students using misstatements about its accreditation status"—was "highly unforeseeable, highly unusual, and potentially criminal." *See* Order [Dkt. 128] at 14, *Dunagan*, No. 19-cv-0809, 2021 WL 1196494, at *7 (N.D. Ill. Mar. 30, 2021).

---

without objection, that class certification briefing take place after the close of fact discovery. *See* Joint Status Report [Dkt. 82] at 3, *Dunagan*, No. 19-cv-0809 (N.D. Ill. May 18, 2020) (previously submitted to this Court as Dkt. 698-2). The court has not yet set a briefing schedule for that motion.

Discovery is well underway in the *Dunagan* case. Over 50,000 pages of documents have been exchanged and productions continue on a rolling basis. Plaintiffs have also deposed multiple officers, directors, and employees of DCEH and DCF, including Josh Pond (former President of IIA), Ellyn McLaughlin (former Vice President of Accreditation and Assessment for DCEH), Chris Richardson, Johnnie Moore (former DCF board member), and Matthew Barnett (President, founder, and board member of DCF and former member of the DCEH board). Through this discovery, the *Dunagan* plaintiffs learned that DCEH officers Brent Richardson, Chris Richardson, and Shelly Murphy actively participated in and/or authorized the misrepresentation and concealment of IIA's loss of accreditation.[2] For example, Chris Richardson directed DCEH employees—against the recommendation of senior staff—to place false "we remain accredited" language on IIA's website and in its course catalog and other public-facing materials. *See Dunagan* TAC ¶¶ 115, 118, 128, 133–39; see also *id.*, Ex. 5. Accordingly, on January 20, 2021, the *Dunagan* plaintiffs filed a third amended class action complaint naming Brent Richardson, Chris Richardson, and Shelly Murphy as additional defendants in their personal capacity. *Id.* Those three defendants moved the court under Federal Rule of Civil Procedure 12(b)(1) to dismiss the case for lack of personal jurisdiction only.[3] None of the *Dunagan* defendants have made a Rule 68 offer of judgment and the court noted recently

[2] Under Illinois law, an officer, director, or employee is personally liable for their corporation's fraud if, "with knowledge, or recklessly without it, [they] participate[] or assist[] in the fraud." *Hartigan v. E & E Hauling*, 607 N.E.2d 165, 179 (Ill. 1992) (quoting *Murphy v. Walters*, 410 N.E.2d 107 (Ill. App. Ct. 2d Dist. 1980)); *see also, e.g.*, *Prince v. Zazove*, 959 F.2d 1395, 1401 (7th Cir. 1992) (stating that corporate officers are personally liable if they "participated in the conduct giving rise to . . . liability"); *Garcia v. Overland Bond & Inv. Co.,* 668 N.E.2d 199, 206–07 (Ill. App. Ct. 1st Dist. 1996) (stating that, under the Illinois Consumer Fraud Act, allegations that a corporate officer, director, salesperson, or employee actively participated in deceptive advertising are sufficient to state a claim).

[3] Following briefing, the court denied their motions to dismiss with leave to refile at the conclusion of jurisdictional discovery. *See* Order, [Dkt. 133], *Dunagan*, No. 19-cv-0809 (N.D. Ill. Apr. 19, 2021). The *Dunagan* plaintiffs recently deposed all three individual defendants. Should those defendents choose to refile their motions to dismiss, the court has set an expedited briefing schedule to conclude by August 2, 2021. *See* Order, [Dkt. 146], *Dunagan*, No. 19-cv-0809 (N.D. Ill. June 22, 2021).

that the case "must move forward expeditiously." *See* Order [Dkt. 146], *Dunagan*, No. 19-cv-0809 (N.D. Ill. June 22, 2021).

C. This Receivership

On January 18, 2019, a creditor named Digital Media Solutions ("DMS") filed a complaint against South University, one of the schools DCEH owned, seeking payment of $250,000 in unpaid invoices. Dkt. 1. Simultaneously, DMS filed an Emergency Motion for Temporary Restraining Order, seeking the appointment of Mark Dottore as Receiver because he was "uniquely well qualified" for the position and had "been serving as a consultant for DCEH and the [u]niversities since October 9, 2018."[4] Dkt. 3 at 11–12. Later that day, DCEH filed a response that agreed with DMS's motion, including a ten-page declaration from DCEH Chairman Randall Barton. Dkt 7-1 ¶ 20. The Court entered an order appointing Mark Dottore as the Receiver that same day. Dkt. 8.

DCEH's ostensible reason for agreeing to the appointment of a receiver, instead of turning to bankruptcy, was to help students. *See* Declaration of Randy Barton ("Barton Decl.") [Dkt. 7-1] at ¶ 18 (explaining that the more typical course of bankruptcy would deprive schools of access to Title IV funds needed to serve students). In the months leading up to the Receivership, DCEH also engaged in negotiations with state attorneys general to pay restitution to IIA students for misleading them about their school's accreditation status. *See* Section 2 *infra*. Since entering Receivership, DCEH has not fulfilled either commitment.

[4] It was later revealed that since at least November 2018, DCEH and Mr. Dottore had been working together to induce a creditor to initiate a federal lawsuit in Ohio that would result in his appointment as receiver. *See* Def.'s Mem. in Opp'n to Motion for TRO [Dkt. 9] at 5, *Dottore v. Studio Enterprise Manager, LLC*, 19-cv-00380-DAP (N.D. Ohio Feb. 26, 2019) (explaining that "DCEH informed Studio it was contemplating entering into a receivership at the end of November 2018" and "introduced Studio to Mark Dottore, the individual who would purportedly be appointed as receiver"). In fact, Mr. Dottore prepared a draft complaint for one of DCEH's landlords to file against DCEH in order to create the conditions necessary for his appointment. *See* Dkt. 47-8.

The Receivership is now more than two years old. The Court has indicated on numerous occasions its intention to expeditiously bring the Receivership to a close, *see, e.g.*, Dkts. 285, 425, 505, but there is no scheduled termination date. Although the Receivership was created "to protect all stakeholders: the students, creditors, and taxpayers," Dkt. 7 at 3, the Receiver never set up a process for creditors to make claims. Indeed, counsel for Mr. Dottore informed undersigned counsel that he never intends to do so. Letter from Eric Rothschild, counsel for *Dunagan* Intervenors, to Mary Whitmer & Hugh Berkson, counsel for Receiver (Mar. 15, 2021) (attached hereto as Exhibit 2 to the Elson Decl.).

D. The Receiver's Settlement Motion and Proposed Bar Order

The Receiver seeks the Court's approval of an amended settlement agreement with the Insureds wherein the estate will receive $8.5 million in insurance proceeds from National Union Fire Insurance Company ("National Union"), Dkt. 721-3 ¶ 2, some of which, with the agreement of the secured lender, will be used to reimburse pre- and post-Receiver employee medical claims. Amended Settlement Motion ¶ 12. National Union provided one primary policy (totalling $10 million) and one excess policy (totalling $10 million) to cover DCF and DCEH's directors and officers (the "Ds&Os"). Dkt. 721-3 at 3, 8. Pursuant to the amended settlement agreement, the Receiver agreed to relinquish any rights he has to further recover from both the primary $10 million policy as well as the $10 million excess policy. *Id.* ¶ 10. DCF has allegedly paid the $500,000 deductible necessary to access this coverage. *Id.* at 7. Four other excess policies totaling $40 million in coverage are not a part of this settlement, *id.* at 3–4, and the Receiver has not waived his rights to access that additional coverage, *id.* ¶ 12.

The Receiver also proposes a sweeping bar order.[5] Dkt. 721-3 ¶ 6. The proposed bar order would permanently extinguish the legal rights of any person or entity that holds: "[A] claim or other debt or liability or an interest in or other right against, in, arising out of, or in any way related to the Receivership Entities and [DCF and the Ds&Os]" by prohibiting them from "filing, commencing, prosecuting, conducting, asserting or continuing in any manner . . . any suit, action, cause of action, cross-claim, counterclaim, third-party claim, or other demand . . . in any federal or state court or any other judicial or non-judicial proceeding . . . that arises from, relates to, or derives from the Receivership Entities or transactions involving or related to the Receivership Entities." *Id*. The proposed bar order includes a list of at least twenty different active lawsuits or types of claims that the Court would enjoin, including the *Dunagan* case. The intent of this bar order, according to the Receiver, is to "enjoin directly the most expansive and comprehensive group of third parties . . . from pursuing any and all claims or causes of action against [DCF and the Ds&Os] that would implicate the [National Union] policies." *Id*. Yet the proposal goes far beyond that, barring claims (except the Receiver's) against all assets of the Insureds, including both the four excess policies totalling $40 million not included in the settlement and any non-insurance assets. *Id*. No provision has been made to compensate the parties whose claims are being barred. The Receiver claims that the Insureds would not enter the settlement agreement without the proposed bar order. *Id*.

Significantly, the Receiver has not provided any information about what claims he is settling. In the Original Settlement Motion, the Receiver represented only that he has sent a "confidential settlement demand letter" to an unidentified "Special Settlement Counsel to DCF

[5] Initially, the proposed bar order included claims brought by the federal government and state attorneys general. Dkt. 674-1 ¶ 8(a). The amended bar order now excludes the federal government, but not the states. Dkt. 721-2 ¶ 8(e).

and the Ds&Os" in which he claims to have outlined "alleged claims against the Ds&Os" only. Original Settlement Motion ¶ 10. In the Amended Settlement Motion, the Receiver promises to "define[] below" his "Alleged Claims" against the Insureds, Amended Settlement Motion ¶ 4, but never does. The *Dunagan* Intervenors have requested that the Receiver produce this demand letter or otherwise describe the claims he has asserted against the Insureds at least twice, but thus far he has refused to do so.

ARGUMENT

1. The Receiver's proposed bar order exceeds the limits of a receivership court's power.

The Receiver asks this Court to run roughshod over another federal district court,[6] effectively deciding the pending *Dunagan* case without engaging in any of the required stages of litigation: pleadings, discovery, motions practice, or the presentation of evidence. He also urges this Court to ignore the general rule that a settlement—even one approved by a federal court—"may not dispose of the claims of a third party . . . without that party's agreement." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986); *see also City of Warren v. City of Detroit*, 495 F.3d 282, 287 (6th Cir. 2007). Because the Receiver does not have the *Dunagan* Intervenors' consent to settle, he instead seeks a sweeping bar order that will have the same effect of extinguishing their claims. Such a request stretches this Court's equitable powers beyond permissible limits.

Bar orders are "extraordinary form[s] of relief." *SEC v. Quiros*, 966 F.3d 1195, 1197 (11th Cir. 2020); *cf. In re FirstEnergy Sols.*, 606 B.R. 720, 733 (N.D. Ohio 2019) ("No circuit has held or even suggested [that non-consensual] releases [of third-party claims] are anything

[6] This Court must "avoid rulings [that] may trench upon the authority of [a] sister court." *West Gulf Maritime Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 728–29 (5th Cir. 1985).

less than an extraordinary use of the bankruptcy court's power. The circuit split occupies the spectrum between 'impossible' and 'very rare.'"). Although a "district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership," *SEC v. Stanford Int'l Bank*, 927 F.3d 830, 840 (5th Cir. 2019) (hereinafter, "*Lloyds*") (internal citation omitted), that power is not unlimited. *Id.* (citing *Whitcomb v. Chavis,* 403 U.S. 124, 161 (1971)); *see also*, *Zacarias v. Stanford Int'l Bank*, 945 F.3d 883, 897 (5th Cir. 2019) (noting that "there are limits to a receivership court's power" to issue bar orders).

In fact, the power to bar non-settling party litigation against settling parties "is always subject to . . . limitations, [both] statutory and constitutional." *SEC v. Stanford Int'l Bank*, No. 09-cv-00298, 2017 WL 9989250, at *3 (N.D. Tex. 2017) (internal citation omitted) (hereinafter, "*SIB*"). Such limitations include the threshold requirements of jurisdiction and Article III standing. *Wabash R.R. Co. v. Adelbert Coll.*, 208 U.S. 38, 54 (1908); *Liberte Cap. Grp. v. Capwill*, 248 F. App'x 650, 655–56 (6th Cir. 2007) ("*Liberte II*"). Additionally, courts recognize the following factors as limits to their authority: (1) whether the objecting parties' claims are "independent and non-derivative" to those brought by the receiver; (2) whether the barred parties can "participate in the receivership process;" (3) whether the barred parties' suits "directly affect the receiver's assets;" and (4) whether the settlement brings "full and final peace" to the settling parties. *Zacarias*, 945 F.3d at 897; *SEC v. Kaleta*, No. H-09-3674, 2013 WL 2408017, at *6 (S.D. Tex. May 31, 2013) ("*Kaleta I*"); *cf. In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002) (holding that a bankruptcy court may release a non-consenting creditor's claim against a non-debtor only when seven factors are satisfied).[7] These limitations ensure that "a court in

[7] Those factors are: "(1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit aginst the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The

equity [does] not do that which the law forbids." *U.S. v. Coastal Ref. & Mktg.*, 911 F.2d 1036, 1043 (5th Cir. 1990).

The Receiver's proposed bar order cannot satisfy any, let alone all, of these criteria. For that reason, the Court should reject it.

A. The *Dunagan* Intervenors have consented to this Court's personal jurisdiction for a limited purpose only.

As a threshold matter, this Court lacks personal jurisdiction over the *Dunagan* Intervenors.[8] The *Dunagan* Intervernors have never taken any affirmative steps post-intervention that "fairly invite[] the court to resolve the dispute between the parties," such as accepting "a forum selection clause in a contract, . . . filing a proof of claim in a bankruptcy proceeding, or . . . filing an original complaint, a counterclaim[,] or a cross claim." *SEC v. Ross*, 504 F.3d 1130, 1149 (9th Cir. 2007) (internal citations omitted). At most, "the *quid pro quo* for [the *Dunagan* Intervenors'] intervention is that [they have] consent[ed] to have [this Court] determine . . . issues of jurisdiction." *Id.* at 1150. The Sixth Circuit's summary adoption of a *per se* rule that intervenors automatically consent to jurisdiction does not persuasively suggest otherwise, given that it was ultimately based on an erroneous reading of Fifth Circuit precedent that did not address the issue at all. *See County Sec. Agency v. Ohio Dept. of Commerce,* 296 F.3d 477, 483 (6th Cir. 2002) (citing *United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir.1981)); *Oregon*,

---

injunction is essential to reorganization, namely, the reorganization hingers on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly accepted the plan; (5) The plan provides a mechanism to pay for all, or substantiall all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full; and (7) The bankruptcy court made a record of specific factual findings that support its conclusions." *Id.*

[8] The Court also lacks personal jurisdiction over the *Dunagan* putative class. The *Dunagan* class members are not parties to this suit and have no obligation to join it. *Martin v. Wilks*, 490 U.S. 755, 763–65 (1989). They also have not asserted any claims in this proceeding against Receivership entities or the *res* and have never been served with process. No party has likewise filed a claim against them. As a result, the *Dunagan* putative class cannot be bound by any judgment of this Court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) ("It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which [they are] not designated as a party or to which [they have] not been made a party by service of process.").

657 F.2d at 1014 (citing *Marcaida v. Rascoe*, 569 F.2d 828, 831 (5th Cir. 1978)) (holding instead that "an intervenor is treated as if [they were] an original party and ha[ve] equal standing with the original parties" when reinstating the intervenors' appeal). Absent the Court's finding of personal jurisdiction, it cannot grant the Receiver's requested relief barring the *Dunagan* Intervenors' claims.

B. This Court's *in rem* jurisdiction does not extend to bar the *Dunagan* Intervenors' claims.

This Court also lacks subject matter jurisdiction to enter the proposed bar order against the *Dunagan* Intervenors. Such an injunction is not included in, or properly ancillary to, matters within this Court's jurisdiction: Digital Media's claims against the Receivership entities[9] and the Court's *in rem* jurisdiction over the Receivership property.

Although "[t]he appointment of a receiver of a debtor's property by a federal court confers upon it, regardless of citizenship and of the amount in controversy, federal jurisdiction to decide all questions incident to the preservation, collection, and distribution of the assets," *Riehle v. Margolies*, 279 U.S. 218, 223 (1929) (internal citations omitted), "th[at] appointment . . . does not necessarily draw to the federal court the exclusive right to determine *all* questions or rights of action affecting the debtor's estate." *Id.* (internal citations omitted) (emphasis added). Courts do not, for example, obtain exclusive jurisdiction to adjudicate all claims involving personal liability against receivership entities. *See, e.g.*, *id.*; *Brown v. Duffin*, 13 F.2d 708, 709–10 (6th Cir. 1926); *Chicago Title & Tr. Co. v. Fox Theatres Corp.*, 69 F.2d 60, 61 (2d Cir. 1934); *see also Morris v. Jones*, 329 U.S. 545, 549 (1947) ("[T]he notion that such control over the proof of claims is necessary for the protection of the exclusive jurisdiction of the court over the property is a

[9] None of the *Dunagan* Intervenors' claims in the Northern District of Illinois litigation share a common nucleus of operative facts with Digital Media's claims at issue in this Receivership. This Court cannot therefore assert supplemental jurisdiction over them. *See* 28 U.S.C. § 1367(a).

mistaken one."). Courts likewise have no jurisdiction over claims involving personal liability against non-receivership entities. *See, e.g.*, *Lloyds*, 927 F.3d at 841–43; *see also Rishmague v. Winter*, 2014 WL 11633690, at *2 (N.D. Tex. 2014), *aff'd*, 616 F. App'x 138 (5th Cir. 2015) ("[T]his Court can find no authority . . . suggesting that *in rem* jurisdiction is . . . a valid substitute for subject matter jurisdiction."). The *Dunagan* Intervenors' claims against both Receivership entities DCEH and IIA and non-Receiverhip entities DCF and the Ds&Os involve questions of personal liability. Because such claims do not directly affect Receivership property, *see, e.g.*, *Riehle*, 279 U.S. at 224 ("In so far as [a court] determines . . . the existence and amount of the indebtedness of the defendant . . . , it does not deal directly with *any* of the property.") (emphasis added); *Kline v. Burke Constr. Co*., 260 U.S. 226, 229, 234–35 (1922) ("[A] controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing."),[10] this Court has no power to bar them.

C. The Receiver has not demonstrated standing to bring his alleged claims against DCF and the Ds&Os.

A receiver "can only pursue[] claims that a receivership entity itself could have raised." *Wuliger v. Mfrs. Life Ins. Co.,* 567 F.3d 787, 795 (6th Cir. 2009); *see also Javitch v. First Union Sec.,* 315 F.3d 619, 625 (6th Cir. 2003) (holding that because receivers "stand in the shoes of the entity in receivership," they "lack standing to bring suit unless the receivership entity could have brought the same action"). To establish standing, the Receiver must demonstrate that DCEH or IIA "suffered [an] 'injury in fact,' that [was] 'fairly traceable' to the actions of [DCF or the

[10] Some courts, relying by analogy on a "district court's power to enter a blanket stay," have deemed the scope of a receivership court's jurisdiction to permit staying *in personam* claims against the receivership entity (not its property) on the theory that the *defense* of such claims, as opposed to the *relief* they seek, may deplete receivership assets. *See, e.g.*, *SEC v. Universal Fin.*, 760 F.2d 1034, 1038 (9th Cir. 1985); *see also Liberte I*, 462 F.3d at 551. That understanding of the court's jurisdiction conflicts with longstanding precedent. *See Morris*, 329 U.S. at 549; *Riehle*, 279 U.S. at 223; *Kline*, 260 U.S. at 229–35; *Fox Theatres*, 69 F.2d at 61; *Clark on Receivers*, § 625.2 ("It is rather apparent . . . that an injunction cannot . . . have the effect of closing other courts to ordinary actions *in personam* against the defendant.").

Ds&Os], and . . . will likely be redressed by a favorable decision." *Liberte II*, 248 F. App'x at 655 (citing *Bennett v. Spear*, 520 U.S. 154, 162 (1997)); *see also Lloyds*, 927 F.3d at 841 ("[A]n equity receiver may sue *only to redress injuries to the entity in receivership*.") (citation omitted) (emphasis in original). He has not done so here.

In *Liberte II*—which addressed standing in the context of a receiver's authority to bar claims—the Sixth Circuit reversed the trial court's order barring investors' claims against agents and brokers because the receiver lacked standing to bring those claims. 248 F. App'x at 655–59.[11] As the Sixth Circuit explained three years later:

> The Receiver's standing problem in *Liberte [II]* was that none of the receivership entities—VES, CFL, Capwill[,] or Liberte—would have had standing to sue Liberte's brokers for the misrepresentations the brokers made to Liberte's investors[] because none of the entities would have been able to claim any tangible injury traceable to the brokers' misrepresentations to the investors. Because the receivership entities all would have lacked standing, and because of the rule that receivers' rights are limited to those of the receivership entities, the Receiver also lacked standing.

Wuliger, 567 F.3d at 794 (internal citation omitted); *see also Lloyds*, 927 F.3d at 841 ("[A] trustee, who lacks standing to assert the claims of creditors, equally lacks standing to settle them.") (internal citations omitted).

The Receiver's standing problem is even more acute in this case. With respect to DCF, the Receiver does not purport to bring any claim,[12] so the Court has no basis to afford DCF the

---

[11] The Receiver implies that a different Sixth Circuit decision from the same receivership, *Liberte Cap. Grp. v. Capwill*, 462 F.3d 543 (6th Cir. 2006) ("*Liberte I*"), supports the proposed bar order. *See* Dkt. 678 ¶¶ 32, 37. It does not. *Liberte I* upholds the trial court's finding of contempt for violating a blanket stay of litigation *against the receiver*. *Id.* at 551–52, 556–57. It does not analyze the lawfulness of a bar order associated with a proposed settlement.

The Receiver also cites extensively to *Gordon v. Dadante*, No. 1:05-cv-2726, 2008 WL 1805787 (N.D. Ohio 2008), an investment fraud case in which he personally participated. That case does not address the lawfulness of the proposed bar order either because no one objected to it at the time it was proposed. *Id.* at *14 (discussing the fairness of the settlement only), *aff'd,* 336 F. App'x 540, 551 (6th Cir. 2009) (affirming, without discussion, entry of the bar order). The objections that were later made—related to the fairness of the settlement—were plagued with "perplexing . . . conduct," "disunity and confusion," and "potential conflicts of interest," making it a poor precedent to draw any conclusions about the legal boundaries of a receivership court's bar order authority. *Id.* at *6–*8.

[12] *See* Original Settlement Motion ¶ 10 (describing alleged claims against the Ds&Os only).

protections of a bar order. With respect to his "alleged claims against the Ds&Os," Original Settlement Motion ¶ 10, the Receiver has not produced the settlement demand letter that describes those claims, nor any other evidence upon which the Court could find that the Receiver has standing to bring the claims he purports to be settling. That alone should doom the proposed bar order.

Even if the Receiver produced the settlement demand letter, he, like the receiver in *Liberte II,* is unlikely to be able to demonstrate standing that would justify barring the *Dunagan* Intervenors from prosecuting their case against DCF and the Ds&Os in Illinois. The concealment of IIA's loss of accreditation did not injure DCEH or IIA, nor could it. As the Receiver has already stipulated, DCEH and IIA were among those *doing the concealing*. *See* Dkt. 323-1. Because students are the victims of that misconduct—and the Receiver does not purport to be acting on students' behalf—only students have standing to sue. *See, e.g., Goodman v. FCC,* 182 F.3d 987, 992 (D.C. Cir. 1999) (finding that the receiver "lacks standing to sue the Commission" because he "does not represent the parties who sustained the injury of which he complains").

D. The Receiver has not demonstrated that the *Dunagan* Intervenors' claims are "substantially identical" to his claims against DCF and the Ds&Os.

In the handful of cases the Receiver cites in support of a bar order,[13] courts have barred a non-settling party's claim only when the receiver's claim is "derivative" or "substantially identical." *See, e.g.*, *Zacarias*, 945 F.3d at 897–98 (holding that "the receivership court cannot reach claims that are independent and non-derivative"); *SEC v. DeYoung*, 850 F.3d 1172, 1176

[13] The cases that the Receiver cites arise almost exclusively in receiverships involving SEC enforcement actions against entities that perpetrated a Ponzi scheme or similar fraud on investors, a wholly different context from this Receivership. "[T]he deploy of '[f]ederal equity receiverships [in such cases], despite the name,' nests in 'a federal statutory framework'"—the federal securities laws. *Zacarias*, 945 F.3d at 895 (internal citations omitted). Accordingly, the receivership court's power is subject to "limits that inhere in the focused mission of the Securities Act," which is the protection of investors. *Id.* at 897. As a result of that focus, as described *infra*, the bar orders issued in those cases are materially distinguishable from the one sought here.

(10th Cir. 2017) (noting that district court found claims to be "substantially identical" when they involved "the same loss, from the same entities, relating to the same conduct, and arising out of the same transactions and occurrences by the same actors").[14] Because the Receiver has not provided *any* evidence that the *Dunagan* Intervenors' claims against DCF and the Ds&Os are substantially identical to his own, the bar order should not stand.

Typically, receivership courts analyze the similarity of the receiver's claims to that of non-settling parties by reference to an ancillary lawsuit filed by the receiver. *See, e.g., Zacarias*, F.3d at 891, 894; *Lloyds*, 927 F.3d at 837. Here, the Receiver has not filed any litigation against the defendants in the *Dunagan* case (DCF, Brent Richardson, Chris Richardson, or Shelly Murphy), nor produced any documents describing his claims against them, even after the *Dunagan* Intervenors exposed this glaring gap in the Receiver's Original Settlement Motion. Dkt. 692 at 11–14. There can be no "substantial similar[ity]" between claims when there is no evidence of the claims at all.

The Receiver admits he does not have any claims against DCF, *see* Original Settlement Motion ¶ 10, which excludes the possibility that he has "substantially identical" claims. In lieu of actual claims, the Receiver suggests that DCF has earned a reprieve from the *Dunagan* Intervenors' claims pending in another federal court because it paid a $500,000 deductible to access valuable insurance coverage and actively defended claims that implicate the National Union policies. *Id.* ¶ 17. The Receiver asserts—without citation to any legal authority—that "[w]hen a Court is considering the resolution of potential claims against the receivership estate

[14] *See also SEC v. Kaleta*, 530 F. App'x 360, 362–63 (5th Cir. 2013) ("*Kaleta II*") (per curiam) (upholding bar order because, among other things, it was limited to duplicative claims); *Janvey v. Proskauer Rose, LLP*, No. 3:13-cv-0477, No. 3:09-cv-0721, 2020 WL 418884, at *3 (N.D. Tex. Jan. 24, 2020) (upholding bar order for claims that were not just derivative of the receiver's claims, but the same); *SIB*, 2017 WL 9989250, at *4 (barring objectors' claims because they were "sufficiently similar" and involved "the same parties, the same conduct, the same actors, [and] the same transactions and occurrences").

by a third party that has materially contributed to or participated in the resolution of such claims, the entry of a bar order may be especially appppropiate." *Id.* ¶ 35. But a bankruptcy court in this district recently rejected that exact same proposition. *Cf. In re FirstEnergy Sols.*, 606 B.R. at 738 ("[A] nondebtor's contributions to the reorganization plan cannot alone be the basis to justify their nonconsensual third-party release."). Because the Receiver has no claims against DCF, there is no basis for the Court to bar the *Dunagan* Intervenors' claims.

The Receiver's claims against the Ds&Os suffer a similar fate, albeit for a different reason. The only time the Receiver described his potential claims against the Ds&Os on the public docket, he made no mention of a misrepresentation or fraud claim regarding accreditation that would be "substantially similar" to those of the *Dunagan* Intervenors. *See* Dkt. 428 at 9–10 (describing potential claims against the Ds&Os as "approving fraudulent transfers to related parties; mismanaging the company's healthcare plan, leaving third party administrators and plan participants without the requisite funds due; allowing third parties free reign within and control of the company's operations for a period of time leading up to the date the Receiver was appointed; and, [sic] failing to ensure decisions were made with sound business judgment.").[15] This is not suprising because, as set forth *supra*, the Receiver lacks standing to bring claims related to IIA's loss of accreditation, as the decreased value of students' education and degrees is a harm students uniquely suffered.[16]

---

[15] This recitation of "potential claims" in 2019 is not a substitute for a record of the actual claims that the Receiver purports to have alleged against the Insureds.

[16] Further undermining any suggestion that the Receiver had "substantially identical" claims is the fact the Receiver communicated to Chris Richardson that he was maintaining attorney-client privilege over the very documents that demonstrate Mr. Richardson's involvement with the accreditation misrepresentation. *See* Def. Chris Richardson's Opp'n to Pls.' Mot. to Compel, Ex. B [Dkt. 123-1], *Dunagan*, No. 19-cv-0809 (N.D. Ill. Mar. 8, 2021) (attached hereto as Exhibit 3 to the Elson Decl.). A party cannot claim privilege over documents that it relies upon to support a claim. *Motorola Solutions v. Hytera Commc'ns Corp.*, No. 17-cv-1973, 2018 WL 1804350, at *5 (N.D. Ill. Apr. 17, 2018).

Even worse, one of the Ds&Os—former DCEH General Counsel Chris Richardson—testified that the Receiver has never alleged any claims against him:

> Q: Has the [R]eceiver notified you of his intention to bring claims against you?
> A: No
> . . .
> Q: Have you sought coverage from DCEH's D&O insurer for any purpose?
> A: I don't—I don't believe so.
> Q: Has DCEH's insurer notified you of any claims against you?
> A: No.

Dep. Tr. Of Chris Richardson at 18–19, *Dunagan*, No. 19-cv-0809 (N.D. Ill. Dec. 15, 2020) (relevant excerpts attached hereto as Exhibit 4 to the Elson Decl.).[17]

Indeed, it is implausible that the Receiver could have claims against the settling Ds&Os that are "substantially identical" to those of each of the motley group of actual or potential claimants whose cases will be barred. *See* Original Settlement Motion ¶ 12 (listing ten cases and ten other claimants or types of claimants).[18] In the SEC enforcement cases the Receiver repeatedly cites, the bar order is laser-focused on claims of "*similarly situated* investors," *Zacarias*, 945 F.3d at 896 (emphasis added), not a free-for-all opportunity to bar every type of claimant or claim.[19] The Receiver's sweeping bar order bears no resemblance to those precedents.

---

[17] This deposition took place more than five months after the Receiver claims he sent his settlement demand letter.

[18] Among the cases that the proposed bar order would extinguish are the *Dunagan* Intervenors' consumer protection and fraud case, a breach of lease dispute (*FSP Pacific Ctr. v. Argosy Educ. Grp.*), a Fair Labor Standards Act case (*Burge v. EDMC*), and a Telephone Consumer Protection Act case (*Gillman v. DCEH*), none of which appear similarly situated to each other. The bar order would also foreclose claims by state attorneys general.

[19] In *Lloyds*, the Fifth Circuit affirmed a bar on investors' claims who had the opportunity to participate in the distribution of the receivership estate, but reversed the bar on former employees' claims. 927 F.3d at 847–50; *see also Zacarias*, 945 F.3d at 901 (explaining "critical differences" for why bar orders entered in the same receivership were treated differently).

E. The *Dunagan* Intervenors will not benefit from an alternative compensation scheme.

The Court should likewise reject the proposed bar order because it will forever extinguish the *Dunagan* Intervenors' legal rights without providing any meaningful alternative compensation. *See, e.g.*, *Lloyds*, 927 F.3d at 848 (finding the district court abused its discretion by nullifying claims to insurance proceeds without providing an alternative compensation scheme); *see also In re Greektown Holdings, LLC,* 728 F.3d 567, 579 (6th Cir. 2013) (explaining, in the bankruptcy context, that "[a] bar order that enjoins independent claims and provides no compensation is problematic to say the least" and noting that "[o]ther circuits have found bar orders with similar language to be overly broad because they have the potential to bar claims for independent damages"). The Receiver's assertion that the *Dunagan* Intervenors will retain the right to assert their claims against Receivership entities is both hypothetical and illusory.

Over the past two years, the Receiver has never set up an claims process and has admitted that he never intends to do so. *See* Elson Decl., Ex. 2. In his amended motion, the Receiver adds a clause to the proposed bar order allowing those "who have not released the Receivership Estates pursuant to the terms of this Settlement Agreement or otherwise to take such actions as are necessary to assert their claims against the Receivership Entities or their respective estates." Amended Settlement Motion ¶ 9. Although the Receiver explains that this clause is intended to allow "ordinary administration of those claims," subject to "assignment of proper priority among the estate's various classes of creditors," *id.*, he provides no detail on how or when such a process will take place. Moreover, the Receiver previously stated that even if a claims process were to exist, the *Dunagan* Intervenors "[would] not have any reasonable chance to receive *anything* from the Receivership estate, even if every last penny of every layer of [insurance]

coverage were to be paid." Dkt. 678 at 6 (emphasis in original). That is not what courts evaluating bar orders have meant when they require alternative compensation schemes.

In the small number of cases where courts have approved bar orders, the receivers have earmarked settlement proceeds for payout to the same parties whose claims are being barred. *See Zacarias*, 945 F.3d at 899 ("The Receiver and Investors' Committee sought to recover . . . monies the receiver will distribute to investor-claimants."); *DeYoung*, 850 F.3d at 1178 ("The settlement proceeds were to be distributed [to investors] on a pro rata basis.").[20] The same is true in bankruptcy.[21] *See, e.g.*, *In re Downing Corp.*, 280 F. 3d at 658 ("[T]he bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor [where] [t]he plan provides a mechanism to pay for all, or substantially all, of the . . . classes affected by the injunction [and] [t]he plan provides an opportunity for those claimants who choose not to settle to recover in full."); *see also In re FirstEnergy Sols.*, 606 B.R. at 737 ("[Nonconsensual] third-party release cases involved a plan that provided a fund or a trust funded by the secondary obligors for the benefit of the relevant class of creditors."). No court has asserted the far greater power that the Receiver urges this Court to exercise: depriving creditors of their chosen forum for seeking relief without ensuring alternative compensation.

There is no alternative compensation scheme for the *Dunagan* Intervenors or the proposed class of IIA students to recover for the harm inflicted by both Receivership and non-

---

[20] In addition, the interests of investors were sometimes directly represented in the settlement negotiations. *See, e.g., Zacarias v. Willis Grp. Holding Public Ltd. Co.*, No. 3:13-cv-02570, 2017 WL 6442190, at *1–*2 (N.D. Tex. Aug. 23, 2017) ("*Willis Grp.*") (explaining that the Investors' Committee "participated in the extensive, arm's-length negotiations" and signed the settlement agreement); *see also DeYoung*, 850 F.3d at 1176, 1179 (explaining that settlement negotiations took place "under plain view of the SEC" and ninety-nine percent of the defrauded investors approved the settlement); *cf. In re Dow Corning Corp.*, 280 F. 3d at 658 (noting that the "impacted class, or classes, [must have] overwhelmingly voted to accept reorganization plan" for bankruptcy court to enjoin a non-consenting creditor's claims against a non-debtor). That has not occurred here.

[21] "A receivership court has no more power than a bankruptcy court to dispose of valid claims of non-consenting intervenors." *Lloyds*, 927 F.3d at 842–43.

Receivership entitles. Instead, an unknown portion of the $8.5 million in settlement proceeds is earmarked for health care providers. The remainder will go to recipients other than the students whose claims will be barred, including, presumably, the Receiver and his counsel. Although the original justification for this Receivership was to help students, Barton Decl. [Dkt. 7-1] at ¶ 18, and the Receiver stipulated specifically to IIA students' right to restitution, Dkt. 323-1, Ex. A ¶ 8, the Receiver has now, without justification, seemingly moved them to last in line with no hope of recovery.

F. The *Dunagan* Intervenors' claims do not affect Receivership assets.

In addition to the absence of subject matter jurisdiction over the *Dunagan* Intervenors' claims, *see* Section 1.B *supra*, this Court has yet another reason not to issue the bar order: it "cannot reach claims . . . that do not involve assets claimed by the receivership." *Zacarias*, 945 F.3d at 897. The Insureds' non-insurance assets are not part of the *res*. It is also not clear that the National Union policy proceeds are part of the estate. This Court should therefore not enter the proposed bar order.

To begin, the Receiver does not purport to have any rights to the Insureds' non-insurance assets, nor could he. A bar against claims that might reach those assets would exceed this Court's authority. *Lloyds*, 927 F.3d at 849 ("[T]he district court may not enjoin any claims . . . against the [Insureds] that do not implicate the policy proceeds."). At a minimum, the Court must allow claims against those assets to proceed.

Additionally, although the Receiver argues that proceeds from the National Union policies are assets of the estate, Original Settlement Motion ¶ 50 ("By entering the Bar Order and channeling all claims that could implicate the Policies to the Receivership Estate, the Court is preserving the Policies' proceeds for the benefit of the Receivership Estate's stakeholders."), that

is not clearly the case.[22] The jurisprudence regarding whether the proceeds of liability policies are assets of the debtor estate is "anything but straightforward."[23] Courts in the Fifth Circuit—from where the Receiver's bar order cases primarily originate—have generally held that proceeds of a liability policy are not property of the debtor estate. *See, e.g., Sosebee v. Steadfast Ins. Co.*, 701 F.3d 1012, 1023–24 (5th Cir. 2012); *Matter of Edgeworth*, 993 F.2d 51, 56 (5th Cir. 1993); *see also In re Doug Baity Trucking*, No. 04-13537, 2005 WL 1288018, at *2 (Bankr. M.D.N.C. Apr. 21, 2005) ("Debtor has no equitable interest in the proceeds of a liability insurance policy.")[24] In the Sixth Circuit, a bankruptcy court held that proceeds from a D&O liability policy are not proceeds of the debtor's estate. *In re Youngstown Osteopathic Hosp. Ass'n*, 271 B.R. 544, 550 (Bankr. N.D. Ohio 2002). Another court explained that policy proceeds become property of the estate "if depletion of the proceeds would have an adverse effect on the estate to the extent the policy actually protects the estate's other assets from diminution," but are not part of the estate "when . . . indemnification either has not occurred, is hypothetical, or speculative." *In re Arter Hadden, LLP*, 335 B.R. 666, 672 (Bankr. N.D. Oh. 2005) (internal citation omitted). Here, the Receiver has not demonstrated that the policy proceeds are needed to indemnify the estate. He also has not made any record of claims that could reach the proceeds of the excess policies, as he has no pending claims that would trigger those policies, nor any

---

[22] Among the Receiver's potential barriers to recovering proceeds from the National Union policy is the "entity versus insured" exclusion that bars the insured organization, DCEH, from suing an individual insured. *See* National Union Fire Insurance Company, Non-Profit Directors & Officers Liability Policy at 4 (attached hereto as Exhibit 5 to the Elson Decl.). While there are exceptions to this exclusion, including in bankruptcy cases, equity receiverships are not expressly named in those exceptions. *Id.*

[23] George W. Kuney & Donna C. Looper, *When Liability Insurance Policy Proceeds are Property of the Estate—Sometimes, Always, Never—and a Proposal for a Consistent Rule*, 2019 Ann. Surv. of Bankr. Law 1, 1 (2019).

[24] The Fifth Circuit has recognized a limited exception to this rule, not applicable here, where mass tort claims overwhelm the policy limits. *In re OGA Charters*, 901 F3d 599, 601 (5th Cir. 2018). Here, the Receiver's claims have not exhausted, or even come close to exhausting, the full policy limits available under the D&O tower of coverage.

meaningful prospect of bringing them. Given these facts, the Court should not bar the *Dunagan* Intervenors' claims.

G. The proposed settlement does not bring full and final peace to the Insureds.

The Receiver claims that "the Bar Order is a critical condition of the Settlement, without which the Insureds would not enter into the Settlement Agreement." Original Settlement Motion ¶ 47. Courts have recognized that without "full and final peace" that eliminates ongoing liability, parties typically will not settle with a receiver or settle for as much. *Kaleta I*, No. H-09-3674, 2013 WL 2408017, at *6; *see also Willis Grp.*, 2017 WL 6442190, at *3 ("[I]t is clear that the Willis Defendants would never agree to the terms of the Willis Settlement unless they were assured of global peace with respect to all claims that have been, could have been, or could be asserted against [them] by any Person").[25] But the Receiver's proposed bar order does not provide that peace.

The Receiver proposes to extinguish the *Dunagan* Intervenors' claims (along with others' claims) against DCF and the Ds&Os, while preserving his own right to sue them to recover proceeds from their remaining $40 million in excess insurance coverage. Dkt. 721-3 ¶ 12. But "full and final" peace requires a release of all of the Receiver's claims, as much as (or more so) than those of other litigants. *Lloyds*, 927 F.3d at 845 (noting that "[g]lobal peace" was achieved because the Receiver agreed to release all of his claims). A partial bar order that preserves the Insureds' potential liability to the Receiver cannot credibly be a "critical condition of the Settlement," Original Settlement Motion ¶ 47, as the Insureds clearly did not require full peace

[25] The Receiver asserts that "[b]ar orders that do not totally enjoin all claims concerning a receivership estate or the receiver . . . have also been affirmed as valid." Original Settlement Motion ¶ 36. The cases he cites for that proposition do not support his argument at all. In *Kaleta II*, the court upheld a bar order because it preserved the rights of investors to pursue certain types of claims (as well as participate in the receivership claims process), *not* the right of the receiver to pursue additional claims. 530 F. App'x at 362. The opposite is occurring here.

when agreeing to it.[26] Not a single case sanctions this arrangement, which releases the claims of litigants who are not party to the settlement (like the *Dunagan* Intervenors), but not the claims of the parties benefitting from it (like the Receiver). If the Insureds are content to have the Receiver's claims hanging over them, there is no reason that this settlement cannot proceed with the *Dunagan* Intervenors' class claims intact too.

H. The Receiver's remaining case law does not support the broad-sweeping nature of his proposed bar order.

None of the additional cases the Receiver cites support his proposed bar order. Although the court in *CFTC v. Equity Financial Group* held that "law and public policy favor[ed]" the entry of a bar order to facilitate settlement, it did so because the settlement would "lead to a . . . larger recovery for claimants." 2007 U.S. Dist. LEXIS 53310, at *5 (D.N.J. 2007). That is not true here. The initial bar order in *Kaleta II* was also less sweeping than the Receiver's proposed bar order because it allowed objectors to retain their non-duplicative claims against settling third parties closely affiliated with the receivership entities. 530 F. App'x at 363. The final two cases the Receiver cites are even less relevant. *In re Munford*, *Inc.* relies entirely upon bankruptcy statutes and rules to justify its entry of a bar order. 97 F.3d 449, 455 (11th Cir. 1996). And the bar order in *South Carolina National Bank v. Stone* takes place in the context of a class action settlement, preventing non-settling defendants from pursuing crossclaims against settling defendants that were "nothing more than claims for indemnification and contribution" by another name. 749 F. Supp. 1419, 1433 (D.S.C.1990). Together or separately, these cases provide no legal support for the sweeping bar order the Receiver seeks.[27]

---

[26] Additionally, the proposed bar order allows the federal government to retain its rights to sue, further demonstrating that global peace was not required to settle. *See* Proposed Order [Dkt. 721-1] ¶ 8(e).

[27] The Receiver implies that the bar order entered in connection with DCEH's transaction with Studio Enterprise Manager, LLC sets a precedent for the bar order requested now. Original Settlement Motion ¶ 38. He

2. The *Dunagan* Intervenors continue to suffer harm that has not been fully compensated.

Based on his pleading opposing discovery, the Receiver appears poised to argue that the *Dunagan* Intervenors' objections lack merit because they have nothing at stake if their claims are barred. *See, e.g.,* Dkt. 678 at 5. Not so. Even if the Court had jurisdiction and a factual record to determine the value of the *Dunagan* Intervenors' and other putative class members' claims,[28] that record would bely the Receiver's assertion that the *Dunagan* Intervenors' remaining damages are "modest at best." Dkt. 678 at 5.

It is true that federal and institutional loan cancellations have reduced the *Dunagan* plaintiffs' damages,[29] but they continue to suffer substantial damages due to tuition payments made out-of-pocket or via private loans that have yet to be refunded. The Dunagan plaintiffs' remaining damages fall primarily into two categories: (1) the cost of attendance at IIA during 2018 when the school lost its accreditation and failed to disclose that fact to students; and (2) the entire cost of attendance for students who obtained an unaccredited degree. *See, e.g.*, Decl. of Emmanuel Dunagan ("Dunagan Decl.") ¶ 14 (estimating Dunagan's unaccredited degree

---

omits, however, that multiple parties challenged that bar order, including *Dunagan* Intervenor Stephanie Porreca. Ultimately, the Receiver himself moved (along with Studio) to eliminate the bar on claims against Studio (and to provide greater financial relief to students than was originally contemplated). Dkt. 547. The Court granted the Receiver's motion on March 23, 2020. Dkt. 554. Regardless, even the original Studio bar order did not purport to bar existing lawsuits against non-Receivership entities. *See* Dkt. 501.

[28] If DCF and the Ds&Os genuinely believe that the *Dunagan* Intervenors' damages have little to no value, they have every opportunity to prove that in the Northern District of Illinois or test it with an offer of judgment or settlement offer.

[29] In November 2019, the United States Department of Education—in response to litigation brought by undersigned counsel on behalf of the *Dunagan* Intervenors and other students—cancelled approximately $11 million in federal student loans for borrowers who attended IIA and the Art Institute of Colorado ("AIC"). *See* Press Release, U.S. Dep't of Educ., "Secretary DeVos Cancels Student Loans, Resets Pell Eligibility, and Extends Closed School Discharge Period for Students Impacted by Dream Center School Closures" (Nov. 8, 2019), *available at:* https://www.ed.gov/news/press-releases/secretary-devos-cancels-student-loans-resets-pell-eligibility-and-extends-closed-school-discharge-period-students-impacted-dream-center-school-closures. On March 23, 2020, this Court approved an order providing approximately $1.6 million in forgiveness of institutional student loans made by IIA and AIC to certain students, including intervenor Stephanie Porreca. Dkt. 554 at 4. AIC students who benefited from both of these discharges are not part of the *Dunagan* lawsuit.

damages as $82,670.47 after offsetting loan cancellations and grants); Decl. of Robert J. Infusino ("Infusino Decl.") ¶ 20 (estimating Infusino's 2018 damages as $7,373 after offsetting loan cancellations and grants); Decl. of Jessica Muscari ("Muscari Decl.") ¶¶ 12, 17 (estimating Muscari's 2018 damages as $2,161 and her unaccredited degree damages as $98,065.38 after offsetting loan cancellations and grants); Decl. of Stephanie Porreca ("Porreca Decl.") ¶¶ 11, 17 (estimating Porreca's 2018 damages as $3,732 and her unaccredited degree damages as $108,897.67 after offsetting loan cancellations and grants). Prior to receivership, DCEH leadership discussed nearly identical bases for restitution, estimating that students who received a C or higher during the misrepresentation period could be entitled to $7.79 million or "those who were really impacted"—students who graduated with unaccredited degrees—$38 million. *See, e.g.*, Email from Stacy Sweeney, Chief Officer for Academic Affairs, DCEH, to Robert A. Paul, et al., Directors & Officers, DCEH (Nov. 11, 2018 8:07 PM) (attached hereto as Exhibit 6 to the Elson Decl.). Even after the loan discharges, the *Dunagan* Intervenors's claims against DCF and the Ds&Os—together with those of the class of former IIA students they seek to represent—are no "modest" sum.

3. The Receiver has not demonstrated the fairness of the proposed settlement.

In addition to the defects in the bar order, the Receiver has not adequately supported his assertion that, as to the Receivership entities, DCF, and the Ds&Os, "[t]he terms of the Settlement here are fair and equitable." Original Settlement Motion ¶ 18. The Receiver's preferred case states that the "critical considerations" for the fairness of a settlement, include: (1) the receiver's potential claims; (2) his damages; (3) his chances of succeeding on his claims; and (4) the costs, in time and money, of pursuing his claims. *Gordon I*, No. 1:05-cv-2726, 2008 WL 1805787, at *1 (unpublished). Courts also consider the settling party's ability to pay. *See,*

e.g., DeYoung, 850 F.3d at 1184 (finding the settlement to be fair based in part on the conclusion that the settling bank paid the most it could without risking undercapitalization). Detailed information is needed to assess these factors. *See, e.g.*, *Gordon v. Dadante*, 336 Fed. App'x 540, 542–43 (6th Cir. 2009) (noting that Mr. Dottore "submitted a memorandum containing an extensive analysis of the fairness of the settlement agreement," including an analysis of the merits of his potential claims and recoverable damages); *DeYoung*, 850 F.3d at 1176, 1178 (explaining that the receiver took depositions, had access to settling parties' records, produced a draft complaint, and "spent the better part of one year in arm's-length negotiations under the view of the SEC"). Here, the Receiver has presented no evidence of what any of his claims are, the damages he is entitled to recover on those claims, or his likelihood of success.[30]

CONCLUSION

The Receiver's proposed bar order is both contrary to law and patently unjust. If the bar order is approved, students harmed once by DCF's, DCEH's, and the Ds&Os' concealment of IIA's loss of accreditation will be victimized yet again, losing their legal right to pursue compensation. For that reason alone, the *Dunagan* Intevenors request that the Court deny the Receiver's Amended Settlement Motion and refuse to enter the proposed bar order.

[30] In terms of the Insureds' ability to pay, the Receiver has represented that the Insureds have $60 million in available insurance coverage to pay judgments against them, of which he has settled for $8.5 million. Whether that is a fair settlement of his claims will have to await production of the other information courts require. If it is a fair settlement, it begs the question what equitable interest is being advanced by cutting off all other litigants from the substantial resources left to pay their claims.

Respectfully Submitted,

/s/ Eleanor Hagan
Eleanor M. Hagan (Bar # 0091852)
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
Telephone: +1 216 479 8500
E-mail: Eleanor.hagan@squirepb.com

Eric Rothschild (Admitted *Pro Hac Vice*)
Alexander S. Elson (Admitted *Pro Hac Vice*)
NATIONAL STUDENT LEGAL DEFENSE NETWORK
1015 15th Street NW, Suite 600
Washington, DC 20005
Telephone: +1 202 734 7495
E-mail: alex@defendstudents.org
eric@defendstudents.org

Counsel for Intervenors
Emmanuel Dunagan, Jessica Muscari, Robert J. Infusino, and Stephanie Porreca

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Objections were served upon all parties of record by the Court's electronic filing system this 8th day of July, 2021.

/s/ Eleanor Hagan
Eleanor Hagan
One of the Attorneys for Intervenors