IN THE UNITED STATES DISTRICT COURT
FOR THE 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-00145 Judge Dan Aaron Polster Magistrate Judge Thomas M. Parker

SETTLEMENT ADMINISTRATOR'S OPPOSITION TO MOTION OF STUDIO ENTERPRISE MANAGER, LLC FOR A BAR ORDER

Thomas J. Perrelli, Settlement Administrator by Consent Judgment in *Kentucky v. Education Management Corporation*, No. 15-CI-1201 (Ky. Cir. Court Nov. 16, 2015) and related cases ("Settlement Administrator" or "Administrator"), hereby opposes entry of any Bar Order that contains Paragraphs 15 to 18, or similar, of the Bar Order proposed by Studio Enterprise Manager, LLC ("Studio") at Dkt. No. 466-1. Those provisions seek the Court's intervention in a matter that in no way involves the receivership or this Court—and does so in a way that would violate basic principles of federalism, harm defrauded students, and undermine the ability of State Attorneys General and the Settlement Administrator to enforce court-ordered consumer protection requirements. Many of those whose rights Studio seeks to harm are not even parties to this proceeding and have not been served or otherwise made subject to this Court's personal jurisdiction.

The motion should be denied.

BACKGROUND

In 2018, prior to the opening of this receivership proceeding, the Settlement Administrator charged with overseeing compliance with a 2015 Consent Judgment—or 40 substantially identical Consent Judgments, entered by the courts of 40 states (collectively, "the Consent Judgment")—entered into by Dream Center Education Holdings ("DCEH") and 40 State Attorneys General, found that DCEH had violated the Consent Judgment by misrepresenting the accreditation status of two of its schools (the "Accreditation Violation"). Accordingly, exercising his authority under the Consent Judgment, the Administrator required DCEH to submit a plan for providing financial remediation to students who had enrolled and been required to pay tuition during the January 20 to June 15, 2018 period without being told that their school had lost accreditation.

The Consent Judgment under which DCEH and its successors[1] operate provides that in the event of such a violation, the Administrator is to "work in conjunction with [the company] to devise a corrective action plan to remedy" the violation. Consent Judgment ¶ 116(a). It further provides a process if they are unable to agree to a plan: In that instance, "the Attorneys General may take whatever action they deem necessary, including but not limited to bringing an action to enforce this Consent Judgment, filing a new original action, conducting further investigation, or attempting to negotiate a corrective action plan directly with" the company. *Id.*

In this instance, the Administrator has identified two components of an appropriate Corrective Action Plan to remedy the Accreditation Violation. One component relates to the

[1] The Consent Judgment binds not only the original entities against which it was entered, but also "all of their respective … successors[] and assigns," Dkt. No. 77-3 ("Consent Judgment") at 1, and forbids those entities from "participat[ing] directly or indirectly in any activity or form to proceed as a separate entity of corporation for the purpose of engaging in acts prohibited in this Consent Judgment or for any other purpose which would otherwise circumvent any part of this Consent Judgment," Consent Judgment ¶ 133.

receivership: Because the entity in receivership, DCEH, owed at least $3.1 million in funds that were *unrelated* to student loans that DCEH had made to students directly—that is, unrelated to "institutional debts"—the Receiver and DCEH should be required to repay that $3.1 million to affected students. As the Administrator has previously noted, the Court should recognize a constructive trust that consists of, to the extent available, $3.1 million of DCEH's assets that never properly belonged to DCEH and therefore should not be part of its estate. Dkt. No. 323 at 7-9; *see also* Dkt. Nos. 360, 369, 433, & 442. That dispute, involving a receivership entity and funds it holds, is properly part of this proceeding.

The second aspect of the Corrective Action Plan required under the Consent Judgment relates to institutional loans that were made by DCEH, to assist those students in obtaining their education. Had DCEH continued to hold the right to receive payment on those loans into the receivership, those loans would also have been subject to this proceeding.[2] But DCEH sold those loans before these proceedings began. Those loans have nothing to do with the receivership. Prior to DCEH entering receivership, it transferred what rights it had in those loans to Studio,[3] which is not a receivership entity. Studio, in turn, recently transferred the rights it had acquired in those loans to The Arts Institutes International, LLC ("Arts Institutes"), which is also not a receivership entity. Dkt. No. 466-1 ¶ 13. In order to come into compliance with the Consent Judgment, the Arts Institutes must stop collecting on the institutional loans made to the affected students, and must refund payments made on those loans. The Arts Institutes cannot come into compliance with

[2] Indeed, the Settlement Administrator previously understood DCEH to still have held those loans into the receivership. *See* Dkt. 323 at 6-7. The Settlement Administrator subsequently learned that DCEH had sold those loans prior to entering the receivership.

[3] Because Studio is an "assign[ee]" of DCEH in debts owed by students affected by DCEH's material misrepresentation, whatever rights Studio acquired in those loans from DCEH were subject to DCEH's obligation to correct its violation—including by ceasing collections and returning relevant amounts paid. Consent Judgment at 1.

the Consent Judgment by providing the required debt forgiveness and refunds only to those students who sign a release.

In its present motion for a Bar Order, Studio, working with the Arts Institutes, now seeks to evade the obligations of the Consent Judgment, harm Arts Institutes students, and undermine the ability of law enforcement entities—including the Intervenor Settlement Administrator and 40 State Attorneys General who are not party to these proceedings—to fulfill their consumer protection responsibilities. The Settlement Administrator's concerns relate to Paragraphs 15-18 of the proposed Bar Order at Dkt. No. 466-1. Those paragraphs seek this Court's involvement in the terms of the Corrective Action Plan that the Consent Judgment requires for the non-receivership entities. Those paragraphs seek an order "permitting" Studio (which no longer holds the relevant loans, *see* Dkt. No. 466-1 at ¶ 13) to take steps that are already required under the Consent Judgment, with certain modifications. Dkt. No. 466-1 at 1. First, Paragraphs 15 and 16 provide that the relief will be provided only to *students* who "execute a broad general release." *Id.* ¶¶ 15-16. Second, Paragraphs 17 and 18 provide for releases of Studio, the Arts Institutes, and numerous others by the Settlement Administrator and the State Attorneys General. *Id.* ¶¶ 17-18. These releases are sought not just to protect Studio and the Arts Institutes from claims relating to the Accreditation Violation (which would itself be inappropriate under the Consent Judgment), but also for all claims relating to "the EDMC Consent Judgment Obligations"—obligations that involve numerous consumer protection requirements and that expressly extend for years into the future. *Id.* ¶¶ 15-18.

As explained further herein, there is no basis on which this Court should enter an order containing these terms. First, as explained in Part I, these terms have nothing to do with the receivership or receivership entities. Indeed, as Part II demonstrates, this Court lacks jurisdiction

to modify the Consent Judgment—and the Corrective Action Plan process it provides—in these ways. Finally, as Part III explains, Studio's proposed Bar Order would have the Court wade into these waters for the purpose of harming affected students and undermining the ability of the Settlement Administrator and State Attorneys General to enforce relevant consumer protection requirements on Studio, the Arts Institutes, and others.

ARGUMENT

I. Paragraphs 15 to 18 of the Bar Order Are Beyond the Scope of the Receivership Order and Have Nothing to Do With This Proceeding.

Paragraphs 15 to 18 of the Bar Order address subject matters entirely outside the scope of the Receivership Order and should be denied for that reason alone.

Although a district court has "broad powers" in a receivership proceeding, the propriety of action taken within the proceeding is limited by the scope of the receivership order. *See Liberte Capital Grp., LLC v. Capwill*, 99 F. App'x 627, 2004 WL 1152137, at *6 (6th Cir. 2004) (reviewing a district court's interpretation of its receivership order because "[a] receiver has the powers and duties directly stated within [the] order"); 75 C.J.S. Receivers § 134 ("[A] receiver's powers are defined by the orders of the court."). The Court's equitable authority in these proceedings therefore extends to the Receiver, the Receivership Entities, the Receivership Property, and the Receivership Estate, as defined in its Receivership Order. *See* Dkt. No. 8 ¶ 1.

Here, nothing in the Receivership Order or its subsequent modifications relates to claims against Studio or the Arts Institutes discussed in the proposed Bar Order:

- The Consent Judgment obligations to cease collection and make refunds on institutional loans now owned by the Arts Institutes affects no interests or rights of the Receiver or the Receivership Entities; neither Studio, the Arts Institutes, nor the Settlement Administrator are in receivership.

- The obligations that the Settlement Administrator asserts against the Arts Institutes and Studio do not arise under the Receivership Order.
- The Receiver has requested no relief here. Indeed, the Receiver "takes no position" as to Paragraphs 15 to 18 of the proposed Bar Order. Dkt. No. 477 at 2. The relief is requested by Studio, a third party.
- The relief that Studio seeks on behalf of itself, the Arts Institutes, and numerous others is not based on the Receivership Order.

Studio has provided no reason that this Court should be involved in any aspect of the Consent Judgment that does not involve an entity in receivership. Indeed, the handful of authorities cited by Studio address settlements *with receivers* involving *the interests of a receivership estate*, and cannot support the unprecedented sweep of Paragraphs 15 to 18 purporting to bar claims against the Arts Institutes, Studio, and others. Dkt. No. 449 at 22-25. Studio provides no authority for a receivership court to enjoin claims of non-parties against a non-receivership entity on a non-receivership issue. *Cf. SEC v. DeYoung*, 850 F.3d 1172, 1176 (10th Cir. 2017) (approving a bar order for claims against a receiver following a fairness determination by the SEC and the district court, and approval of 99% of affected third parties). As a court in this district recently explained, when a "receiver erroneously takes possession of property of a third party not subject to the receivership," that party need not seek leave of the receivership court "before filing suit … because the receiver's action is outside the scope of the receivership order." *Bowman v. City of Olmstead Falls*, No. 16-cv-2084, 2016 WL 7368720, at *3 (N.D. Ohio 2016). This proposed Bar Order is ever further afield from the receivership proceeding, for it is made by a third party, not even the Receiver, seeking an injunction against claims involving non-receivership property. Nor has Studio made any showing of the factors necessary to justify such an injunction.

See Sandison v. Mich. High Sch. Athletic Ass'n, 64 F.3d 1026, 1030 (6th Cir. 1995); *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

The only apparent reason for Studio to insert Paragraphs 15 to 18 into the proposed Bar Order is to use the receivership proceedings as cover for an end run around independent obligations of the Arts Institutes and Studio under the Consent Judgment. The Court should not allow its authority to be abused in this manner. Indeed, this Court has previously denied a motion from the Receiver to enjoin third parties "because of an issue completely unrelated to the original reasons justifying the receivership" that would, therefore, "broaden the scope of this receivership to deal with … prospective claims." *See* Dkt. No. 344 at 5-6. The Court should do so here, as well.

II. This Court Lacks Jurisdiction to Enter Paragraphs 15 to 18 of the Proposed Bar Order.

It is clear, at this point, that Studio does not want—and does not want the Arts Institutes—to remedy the 2018 Consent Judgment violations unless they *get something* in return. While both DCEH (prior to the receivership) and the Receiver (since the receivership) have acknowledged that the students in question enrolled and took out loans while the schools were falsely telling them that they were accredited, Studio's Bar Order indicates that the Arts Institutes will forgive loans only for students who release their claims against a long list of parties, and only if the Settlement Administrator, State Attorneys General, and others release their claims, too. While Studio's position reflects a problematic attitude towards its and the Arts Institutes' compliance obligations, it is a position that some companies might take in a litigation posture.

That other companies might seek a release in order to provide this relief in other contexts is irrelevant, because the obligation here arises in the context of consent judgments that expressly provide a mechanism for resolving situations like these. Entering a Bar Order like that proposed by Studio would interfere with the mechanisms that the state courts' consent judgments provide—

resulting in the modification of procedures reflected in the final judgments of 40 state courts, in a manner that enjoins non-party State Attorneys General from exercising sovereign enforcement authority under the Consent Judgment and other state law. This Court lacks constitutional authority to enter such an order.

First, it should be clear that the relief Studio seeks is inconsistent with the Consent Judgment process. The Bar Order provides that the Arts Institutes, which holds the affected students' loans, would forgive certain debts and make certain refunds. Dkt. 466-1 at ¶ 13. The Settlement Administrator has informed the Arts Institutes (and Studio) that in order to come into compliance with the Consent Judgment, the loan forgiveness and refunds cannot be contingent on students or others providing a release of any claims. Whether the parties subject to the Consent Judgment agree with that requirement or not, the Consent Judgment expressly provides a process for resolving disputes about the requirements of a Corrective Action Plan: If the Settlement Administrator and company cannot agree, "the Attorneys General may take whatever action they deem necessary." Consent Judgment ¶ 116(a). Studio here seeks to avoid that possibility, by appealing the Settlement Administrator's requirement to a federal court—not one of the courts that entered the Consent Judgment.

This process would inappropriately inject this Court into a state court process. It is the longstanding rule that a consent judgment or decree cannot be modified or set aside by *the entering court* without the assent of the parties or a showing of circumstances justifying a modification. *See United States v. Swift & Co.*, 286 U.S. 106, 120 (1932) ("What was then solemnly adjudged [in a consent judgment] will not be lightly undone at the suit of the offenders[.]"); *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992) ("A party seeking modification of a consent decree bears the burden of … showing [a] significant change either in factual conditions or law."). A

collateral attack on a state court's consent judgment in *an unrelated federal proceeding* is even more improper, for when a "federal district court is in essence being called upon to review a state court judgment[,] '[t]his it may not do.'" *Voinovich v. Ferguson*, 586 N.E.2d 1020, 1029 (Ohio 1992) (quoting *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462, 483-84 n.16 (1983)); *see also Gilbert v. Ferry*, 401 F.3d 411, 416-18 (6th Cir. 2005); *cf. Lance v. Dennis*, 546 U.S. 459, 466 n.2 (2006) (*Rooker-Feldman* doctrine may apply to "a de facto appeal in a district court of an earlier state decision involving" a predecessor in interest).

Further, the lack of subject matter jurisdiction here is particularly acute when Studio is seeking relief—protection against the enforcement of the Consent Judgment against Studio, the Arts Institutes, and others—in which the Receiver has no stake and therefore no Article III standing to seek himself. *See* Dkt. No. 477 at 2 (noting that receiver "takes no position" on this relief). As the Sixth Circuit has noted, when "none of the receivership entities … would [be] able to claim any tangible injury traceable to" the possible enforcement actions by students, the Settlement Administrator, or State Attorneys General that Studio seeks to prevent, it is difficult to identify any ground on which the Court has authority to release these claims in a receivership action. *DeYoung*, 850 F.3d at 1181 (quoting *Wulinger v. Mfr.'s Life Ins. Co.*, 567 F.3d 787, 794 (6th Cir. 2009)).[4]

[4] The proposed Bar Order would also violate the Anti-Injunction Act to the extent that it would enjoin future enforcement of the Consent Judgment. The Anti-Injunction Act provides that a federal court "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. This "applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective. The prohibition is applicable whether such … proceeding is taken in the court which rendered the judgment or in some other." *Hill v. Martin*, 296 U.S. 393, 403 (1935). "[T]he bar of § 2283 applies not only while the proceedings are in progress. It cannot be evaded by prohibiting utilization of the results of a completed state proceeding." 17A Wright & Miller, Fed.

Modifying the Consent Judgment's processes through this federal proceeding is even more unjustifiable to the extent the Bar Order it would enjoin State Attorneys General from enforcing and "assist[ing] ... the efforts of any other party attempting to" enforce state consumer protection obligations. Dkt. No. 466-1 ¶¶ 17-18. The Eleventh Amendment and the Constitution's federal structure provide States and their officers immunity from suit in federal court, except in very limited circumstances. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54-55 (1996); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997). It would raise serious comity and federalism problems if this Court, in the absence of the need to vindicate federal rights and given the availability to Studio of a state forum, were to enjoin the Administrator and dozens of State Attorneys General from enforcing a Consent Judgment entered in their own state courts in response to violations of their own state consumer protection laws, and from assisting private efforts by their own state's citizens. *See Coeur d'Alene Tribe*, 521 U.S. at 270-75.

Finally, the students and State Attorneys General whose rights and authority the proposed Bar Order purports to extinguish are non-parties who have not been served or otherwise made subject to the personal jurisdiction of this Court. *See SEC v. Bilzerian*, 378 F.3d 1100, 1103 (D.C. Cir. 2004) (citing *Haile v. Henderson Nat'l Bank*, 657 F.2d 816 (6th Cir. 1981)). The proposed Bar Order would therefore also violate the constitutional due process rights of non-parties it

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Prac. & Proc. § 4222 (quotation marks omitted). Paragraphs 15 to 18 expressly enjoin parties to the Consent Judgment, a "completed state proceeding," from making it "effective." Studio offers no explanation of how the Bar Order is necessary to aid this Court's jurisdiction. Indeed, as explained above, the proposed Bar Order is outside the scope of these proceedings and entirely unnecessary, as Studio is already legally obligated to undertake the loan forgiveness unconditionally. This is exactly the kind of collateral effort to defeat a state proceeding that the Anti-Injunction Act was intended to prevent.

purports to bind without notice or opportunity to be heard. *See Hansberry v. Lee*, 311 U.S. 32, 40 (1940).[5]

III. The Proposed Bar Order Would Harm Students, the Settlement Administrator, and State Attorneys General.

That the proposed Bar Order has nothing to do with this proceeding, and would inject this Court into state court consent judgments in an unconstitutional manner, are reason enough that the Bar Order should be rejected. But that Studio proposes that the Court intervene here *in order to harm students*, and to interfere with the ability of the Settlement Administrator and State Attorneys General to enforce the law, makes Studio's position untenable.

First, the proposed Bar Order would make students worse off, not better off. While Studio frames the Bar Order as seeking an order "permitting" the Arts Institutes to forgive debts and refund payments, the Arts Institutes is already required to take exactly those steps. Those steps are prerequisites to coming into compliance with the Consent Judgment. Further, the Arts Institutes must provide this forgiveness and these refunds, for all students whose loans it holds who were affected by the misrepresentations—whether those students execute a release or not. If the Court grants Studio's motion, the only relevant effect for students will be *to deny* this required relief to those who do not sign a release.

Second, the proposed Bar Order would undermine the ability of the Settlement Administrator and the State Attorneys General to fulfill their own obligations to protect students. The Consent Judgment does not provide for the Settlement Administrator to give a "release" of any claims, and it expressly provides that "nothing in this Consent Judgment limits the right of the

[5] The Settlement Administrator represents only his own interest in overseeing implementation of the Consent Judgment itself, pursuant to his appointment by the courts in which it was entered. The Settlement Administrator is not the legal representative of the affected students or the State Attorneys General.

Attorneys General to conduct investigations or examinations or file suit for any violation of applicable law." Consent Judgment ¶ 119. Studio's Bar Order proposes to limit the ability of these entities to enforce the law.

If the Court refuses to enter a Bar Order containing Paragraphs 15 through 18, all of the affected students will be entitled to the forgiveness and refunds at issue, and the Settlement Administrator and State Attorneys General will go forward with their current abilities to enforce the law. Entering the Bar Order's Paragraphs 15 through 18 does nothing to promote the rights of students or consumer protection going forward. To the contrary, it would harm all of those interests.

Finally, as discussed above, those who would be most affected by the Bar Order—over a thousand students and 40 State Attorneys General—are not even parties in this proceeding. Studio seeks to prejudice the rights of these entities with a Bar Order that it delayed filing, until eleven days after it filed a motion seeking its approval, and in a proceeding in which they have not been served and are not present to respond. One "who seeks equity must do equity," *Mfr.'s Fin. Co. v. McKey*, 294 U.S. 442, 449 (1935), and Studio's proposal—in addition to asking the Court's involvement far beyond its constitutional limits—is deeply inequitable.

CONCLUSION

The motion for the proposed Bar Order should be denied. Because the proposed Bar Order would make a final determination of rights and claims of both parties and non-parties and would operate as an injunction, the Settlement Administrator requests that if the Court enters the proposed Bar Order, it grant a temporary stay pending the resolution of an immediate appeal of its order to the Sixth Circuit. *See* 28 U.S.C. § 1292(a)(1); Fed. R. Civ. P. 54(b).

Respectfully submitted,

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/s/ Grant Keating

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2019 a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Grant Keating

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