No. 21-4014

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 SOUGH 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 Case No. 1:19-cv-00145

BRIEF OF NATIONAL ASSOCIATION OF FEDERAL EQUITY RECEIVERS AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-4014 Case Name: *Digital Media Solutions, LLC, et al v. South University of Ohio, LLC, et al*

Name of counsel: David A. Castleman

Pursuant to 6th Cir. R. 26.1, National Association of Federal Equity Receivers (NAFER)
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on April 5, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ David A. Castleman
Counsel for NAFER as Amicus Curiae

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT OF IDENTIFICATION

The National Association of Federal Equity Receivers ("NAFER") is the premier association for federal equity receivers and the professionals who support their efforts, with over 275 members in 27 states.

NAFER's members are appointed as equity receivers by federal courts throughout the United States to, among other things, manage entities, marshal assets, and distribute funds to creditors. Because NAFER focuses exclusively on matters affecting equity receivers, it has a significant interest in the outcome of this appeal which raises questions as to the importance of using bar orders to maximize the value of a settlement to the receivership estate, and the applicability of the abuse of discretion standard for appellate review of such settlements.

NAFER files this brief pursuant to F.R.A.P. 29(a), and all parties to the appeal have consented to the filing of this brief.

Pursuant to F.R.A.P. 29(a)(4)(E), counsel for NAFER attests that: (i) neither party's counsel authored the brief in whole or in part; (ii) neither party nor its counsel contributed any money that was intended to fund preparing or submitting the brief (and counsel for NAFER is handling the matter pro bono); and (iii) no other person contributed any money that was intended to fund preparing or submitting the brief. Although not covered by F.R.A.P. 29(a)(4)(E), in the interest of full and complete disclosure, counsel for NAFER nevertheless wishes to inform

the Court that, when he and his colleague Kathy Bazoian Phelps worked for a prior firm, Ms. Phelps represented the Receiver-Appellee in a related matter, but counsel for NAFER did not participate in that matter.

STATEMENT REGARDING ORAL ARGUMENT

As the primary industry organization for federal equity receivers, the National Association of Federal Equity Receivers ("NAFER") respectfully submits that it is well-placed to offer the Court its broader perspective on the issues in this appeal. NAFER has an interest in ensuring that bar orders continue to be available to federal equity receivers, and that the correct standard of review is used when an appellant challenges a district court's exercise of its sound discretion. NAFER therefore respectfully requests that the Court allow it to participate in oral argument if such argument would aid the Court.

SUMMARY OF ARGUMENT

As the preeminent not-for profit organization for federal equity receivers and the professionals who support them, the National Association for Federal Equity Receivers ("NAFER" or "Amicus Curiae") respectfully submits this brief as amicus curiae in support of affirmance for two reasons: (1) to provide the Court with context as to why bar orders are critical tools for receivers to maximize the value of the receivership estate available to distribute fairly to all stakeholders, and (2) to explain why the abuse of discretion standard of review for approval of settlements should be maintained in light of the district court's broad equitable power and close supervision of federal equity receivers.

A federal equity receivership is a flexible structure, grounded in the district court's general equity jurisdiction, that allows the court to place disputed assets in a receivership estate and to appoint a receiver to administer the estate. The receiver's role, as a neutral party, is to secure and marshal the assets of the receivership estate and to distribute those assets in a fair and orderly manner based upon a court-approved distribution plan.

A federal equity receiver is empowered to pursue the affirmative claims of the receivership estate and to compromise those claims, for the ultimate benefit of the victims and creditors of the entities in receivership. As a practical matter, some

of the key assets available for receivers are their causes of action against the former directors and officers of the entities in receivership. Those causes of action, part of the receivership *res*, are often most efficiently converted to cash via a settlement funded by directors and officers' liability insurance. That kind of insurance is typically a "wasting" policy in which defense costs reduce the coverage available. Because, as in this case, all insured claims are generally paid from the same policy that is the subject of settlement,[1] the insured and insurer will often demand as a condition to settlement that the district court supervising the receivership enter a bar order to prevent additional claims from being made against the policy at issue. Without the settlement made possible by that bar order, the receiver would be unable to access the policy amounts then available, diminishing the receivership *res*, and ultimately the amount available for victims and creditors.

Because a federal equity receiver is an officer of the court, the district court generally supervises closely all significant proposed actions taken by the receiver in administering the receivership estate, and decides whether to approve those actions based on motions that give parties notice and an opportunity to be heard. In the settlement at issue in this appeal, Judge Polster approved it only after Appellants had an opportunity to be heard and their objections resolved in a

[1] Amicus Curiae understands that there is an excess policy that is excluded from the settlement at issue.

detailed, written order. The district court's power to approve the settlement is grounded in its broad equitable discretionary powers to fashion appropriate relief, and is therefore reviewed at the appellate level for abuse of discretion. Protecting the district court's discretion, by ensuring that the correct appellate standard is used, enables district courts to effectively and efficiently administer receivership estates. In their argument, Appellants give lip service to the abuse of discretion standard, but argue in effect for a heightened standard of review for settlements that include bar orders. Amicus Curiae therefore respectfully requests that, in deciding this appeal, the Court decline Appellants' invitation to diminish the discretion of district courts when supervising federal equity receiverships, and to apply the abuse of discretion standard to this entire appeal.

ARGUMENT

I. Bar Orders Are Critical Tools for Federal Equity Receivers to Fulfill Their Historical Purpose of Maximizing the Value of the Receivership Estate for the Benefit of All Stakeholders

A. *Historical Purpose of Federal Court Receivers*

Federal courts have long been exercised their powers of general equity jurisdiction to appoint receivers over assets in litigation. *See, e.g.*, *Cent. Tr. Co. of N.Y. v. E. Tenn. V. & G. Ry. Co.*, 59 F. 523, 523–24 (C.C. 6th (D. Ky.) 1894) (citing *Booth v. Clark*, 58 U.S. 322, 331, 15 L. Ed. 164 (1854)); *Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883, 895 (5th Cir. 2019) ("Equity receiverships are older than this country."). Early cases recognized the rule, still in effect today, that a receiver is "an officer of the court . . . appointed [on] behalf of all parties . . . who may establish rights in the cause," and that the property in the receiver's hands – the modern-day receivership estate – "is *in custodia legis* for whoever can make out a title to it." *Booth*, 58 U.S. at 331; *see also Gulf Ref. Co. of La. v. Vincent Oil Co.*, 185 F. 87, 90 (5th Cir. 1911). A component of the receivership estate has always included the causes of action available to, or inherited by, the receiver who "takes all the property and choses in action [i.e., causes of action] of

the corporation, and may lawfully enforce the collection of the latter by suits and legal proceedings." *Wyman v. Bowman*, 127 F. 257, 265 (8th Cir. 1904).[2]

First promulgated in 1937, and essentially unchanged since a substantial revision in 1946, Federal Rule of Civil Procedure 66 governs the appointment of receivers by federal courts. Rule 66 states:

> These rules govern an action in which the appointment of a receiver is sought or a receiver sues or is sued. But the practice in administering an estate by a receiver or a similar court-appointed officer must accord with the historical practice in federal courts or with a local rule. An action in which a receiver has been appointed may be dismissed only by court order.

This Court has explained: "a district court enjoys broad equitable powers to appoint a receiver over assets disputed in litigation before the court. The receiver's role, and the district court's purpose in the appointment, is to safeguard the disputed assets, administer the property as suitable, and to assist the district court in achieving a final, equitable distribution of the assets if necessary." *Liberte Cap.*

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[2] Initially, a receiver's capacity to sue was limited to the district of appointment, which required ancillary appointments in other districts where the receiver tried to bring suit. *Sterrett v. Second Nat. Bank of Cincinnati, Ohio*, 248 U.S. 73, 76–77 (1918) ("The functions and authority of such receiver are confined to the jurisdiction in which he was appointed"). However, the Judiciary Act of 1948, and corresponding changes in the federal rules, made clear that a federal receiver "shall have capacity to sue in any district without ancillary appointment." 28 U.S.C. § 754; *see also United States v. Franklin Nat'l Bank*, 512 F.2d 245, 249 (2d Cir. 1975) (discussing the legislative history).

Grp., LLC v. Capwill, 462 F.3d 543, 551 (6th Cir. 2006).[3] In many cases, the recipients of the distributions are the victims of the wrongful conduct that led to the bringing of the cases and the appointment of a receiver.

B. *Insurance Policies Are Critical Assets of Federal Equity Receivers*

One of the key assets for federal equity receivers seeking to maximize the value of the receivership estate, for the benefit of victims and creditors, are the insurance policies for the directors and officers ("D&O insurance") maintained by the entity placed into receivership. As Judge Posner recognized, the appointment of a receiver frees an entity from the spell of the wrongdoer, allowing the receiver to pursue claims on behalf of the entity. *Scholes v. Lehmann*, 56 F.3d 750, 754-55 (7th Cir. 1995). In federal equity receiverships, those wrongdoers are often the very directors and officers in charge of the entity before the appointment of a

[3] As the advisory committee note to the 1946 Amendment makes clear, Rule 66 does not apply to bankruptcy receivers. While it is true that "bankruptcy and equity receiverships share common legal roots," *see SEC v. Stanford Int'l Bank, Ltd.*, 927 F.3d 830, 842 (5th Cir. 2019), and many Local Rules require receivership estates to be administered similar to bankruptcy estates, the Bankruptcy Code does not apply to federal equity receiverships. One oft-cited advantage to a receivership is that it is more flexible than a bankruptcy. Gerard DiConza, *Receiverships and Their Interplay with the Bankruptcy Code*, 28 No. 1 J. BANKR. L. & PRAC. NL Art. 3 (Feb. 2019) ("A receivership is often a less expensive restructuring alternative to the Chapter 11 process due to less-stringent procedural requirements and fewer constituencies involved."). As such, the requirements for a bar order in bankruptcy, which derive from Section 105 of the Bankruptcy Code, do not apply here. *Cf. In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002) (determining whether § 105 allows for a bar order).

receiver, and the available D&O insurance can be the most significant source of actual recovery, frequently with limits as here in the millions of dollars that the directors and officers simply do not personally have.

D&O insurance is somewhat unusual and can differ significantly from other liability insurance. *See* Stephen Allred, *Key Issues in Evaluating and Negotiating D&O Insurance Coverage*, NOTES BEARING INTEREST, Vol. 35, No. 3 (June 2014). In general, a company or entity purchases a single D&O insurance policy or set of policies for all of its directors and officers, meaning the "same bucket of limits is being used to defend and protect all of the insured directors and officers (and other employees who qualify as individual insureds) in addition to the company." Allred, *D&O Insurance Coverage*, at 21. Unlike other insurance policies, D&O insurance policies are typically "wasting policies" that pay for defense costs of litigation inside the policy limits, meaning that "legal fees and other defense costs erode the limits" and thus the amount available for recovery. *Id*. In addition to all the usual uncertainty surrounding litigation, settling with an insured defendant at an earlier stage allows a federal equity receiver to access the maximum amount of D&O insurance coverage available, before too much is wasted in litigation costs.

For these reasons, courts often approve settlements by receivers that accessed valuable insurance policies. In *SEC v. DeYoung*, 850 F.3d 1172 (10th Cir. 2017), the Tenth Circuit explained that "$3 million of the $5 million settlement

amount came from First Utah's insurance policy with Everest National Insurance Company, and if the case against First Utah were to be litigated, the Everest policy would first be used to pay First Utah's defense costs, which would most likely exhaust the policy and reduce the amount that would otherwise be available to the IRA Account Owners." 850 F.3d at 1183. In another case, the Northern District of Georgia approved a settlement where the insurer paid "the Receiver $1,487,500, which constitute[d] 49% of the maximum policy coverage of $3 million." *SEC v. Alleca*, No. 1:12-CV-3261-WSD, 2015 WL 11199076, at *3 (N.D. Ga. Oct. 15, 2015). The District of New Jersey approved a $700,000 settlement where the policy limit was $1,000,000 and the "Receiver concluded that [the insured's] assets [we]re likely not substantial enough to justify the expense of collection." *CFTC v. Equity Fin. Grp.*, No. CIV. 04-1512 (RBK), 2007 WL 2139399, at *1 (D.N.J. July 23, 2007).

C. *Bar Orders Enable Receivers to Maximize Settlement Value and the Recovery Available for Victims and Creditors*

As set forth above, the goal of a federal equity receiver, while case-specific, is generally to marshal the assets of the receivership estate and distribute the proceeds to victims, creditors, and others who have claims against the receivership estate. Requiring recovery to flow through the receivership estate allows for an orderly and fair distribution to claimants based on equitable principles, rather than based on a race to a courthouse. This is especially important where, as is often the

case with insurance proceeds, there is a single pot of money available for settlement, which is often made available contingent on the entry of a bar order. Without such a bar order, both the insured and the insurer have an interest in holding additional coverage back, both to satisfy any potential future judgments and to spend on uncertain future litigation costs.

Recognizing a federal equity receivership is a vehicle well-suited to ensure that settlement proceeds are distributed fairly, courts have approved settlements that were conditioned upon the entry of a bar order, without which a settlement would not be possible. *See, e.g.*, *Gordon v. Dadante*, 336 F. App'x 540, 542 (6th Cir. 2009) (approving a settlement that was conditioned on the entry of a bar order). In *DeYoung*, the Tenth Circuit explained that there was a limited set of funds available, and affirmed the entry of a bar order to maximize the value of settlement to the receivership estate. 850 F.3d at 1183 & n.5 (citing *Gordon* and collecting cases where a similar bar order was approved by a federal court[4]). Limiting the ability of district courts to approve bar orders, on the other hand, would severely impact the ability of a receiver to settle with potential defendants

[4] Specifically, the court cited: *Alleca*, 2015 WL 11199076; *SEC v. Stanford Int'l Bank, Ltd (BDO)*, No. 3:09-CV-0298-N, 2015 WL 10845785 (N.D. Tex. Sept. 23, 2015); *SEC v. Kaleta*, No. 4:09-3674, 2012 WL 401069 (S.D. Tex. Feb. 7, 2012); *Harmelin v. Man Fin. Inc.*, Nos. 06–1944, 05–2973, 2007 WL 4571021 (E.D. Pa. Dec. 28, 2007); *CFTC v. Equity Fin. Grp.*, 2007 WL 2139399; and *SEC v. Capital Consultants, LLC*, No. Civ.00-1290-KI, 2002 WL 31470399 (D. Or. Mar. 8, 2002).

and insurers, which diminishes or eliminates the value of the receiver's causes of action and thus the *res* of the receivership estate.

Even when a bar order prevents objectors from recovering directly, they can often obtain a recovery as claimants on an equitable basis with other similarly situated claimants. Here, in a typical receivership pattern, the objecting parties are also claimants in the receivership estate. Such objections are typically motivated by a belief, accurate or not, that objectors' fair share of the estate may be less than they can obtain by maintaining direct claims. The Fifth Circuit has recognized that a bar order is often necessary to prevent certain objectors from circumventing the orderly process of a receivership: "Allowing investors to circumvent the receivership would dissolve this orderly process—circumvention that must be foreclosed for the receivership to work. It was no abuse of discretion for the district court to enter the bar orders to effectuate and preserve the coordinating function of the receivership." *Zacarias*, 945 F.3d at 902. As Appellants admit, there is a litigation trust set up for them to receive their fair share of the same set of assets at issue (recovery from insured D&Os) through a litigation trust. Requiring a claimant to resolve her claim through the structure set up by a receiver and supervised by a court does not deprive that claimant of due process but rather allows her claim to be resolved with notice and an opportunity to be heard, and to be treated on an equitable basis with other similarly situated investor or creditors.

Id. at 903 ("The [district] court afforded the Plaintiffs-Objectors all the process due: notice and opportunity to be heard on the proposed settlement and bar orders—an opportunity they seized."). The receivership process attains the most fair and equitable outcome for all interested parties in the aggregate, which is an important public policy objective—even if a given claimant is prevented by a bar order from disrupting an entire settlement—because that settlement inures to the benefit of the entire receivership estate.

II. The District Courts' Broad Equitable Powers and Close Supervision of Federal Equity Receivers Warrant Continuing to Analyze the Approval of a Settlement Using the Abuse of Discretion Standard

A. *District Courts Closely Supervise Federal Equity Receivers Through Local Rules, Appointing Orders, Regular Reports, and Approval of Receivers' Actions in Open Court*

Many district courts, including the Northern District of Ohio from which this case originates, have promulgated a generally extensive set of local rules based on Rule 66 that govern the administration of receivership cases. *See, e.g.*, N.D. Oh. Local R. 66.1 (setting specific rules for inventories of the receivership estate, regular reports to be made to the appointing court, compensation for the receiver and his professionals including approval thereof, and administration of estates).

In addition to the local rules, in recent times receivers generally are appointed by a district court via a lengthy order that sets out the powers and duties of the receiver and the reasons for the appointment. In this case, Judge Polster

appointed the Receiver-Appellee using such an order. *See* R.DMS 8, PageID #: 108-124.[5] Because it is well established that the receiver is an officer of the court, answerable to the judge who appointed him, "the receiver's powers are coextensive with his order of appointment." *Capwill*, 462 F.3d at 551; *see also* Richard B. Roper, *Equity Receiverships in Sec Enforcement Actions*, 59 THE ADVOC. (TEXAS) 26, 27 (2012) ("Once appointed, the receiver's authority is contained in the order of appointment."); Jared A. Wilkerson, *In Whose Shoes?: Third-Party Standing and "Binding" Arbitration Clauses in Securities Fraud Receiverships*, 8 J.L. ECON. & POL'Y 45, 51 (2011) ("[A] receiver's appointment order and any amendments to it made by the court define, subject to conflicting laws, the receiver's power.").

In their appointment orders, courts typically "give receivers the authority to recover assets, to use the court's nationwide subpoena power to obtain books and documents, to enter and take custody of the defendants' premises, to compromise and settle claims, and to hire and fire employees." Roper, *Equity Receiverships*, at 27. Although there are few legal limitations on who may serve as a receiver (who may not be a federal government employee or a judge), in practice, "the receiver is an attorney or accountant in private practice, who is compensated from

[5] For ease of use, Amicus Curiae will use the same convention for the record below as used by Appellant and Appellee.

the assets of the receivership." Robert G. Wing & Katherine Norman, *SEC Receivers: What Are They and What Do They Do?*, UTAH B.J., NOVEMBER/DECEMBER 2007, at 20. The nature of the receivership will dictate the primary tasks of the receiver, but generally the receiver's goal is to marshal the assets of the receivership estate before "achieving a final, equitable distribution of the assets if necessary." *Capwill*, 462 F.3d at 551. Those assets rarely compensate all potential creditor claimants, as "the claims of victims, consumers, investors, or trade creditors will generally exceed the value of the receivership assets." Philip Stenger, RECEIVERSHIP SOURCEBOOK, Introduction (2015).

Once a federal equity receiver is appointed, the district court is expected to receive regular reports from the receiver on the current status of the receivership, as is often required by local rule. For example, Local Rule 66.1(b) in the Northern District of Ohio requires that "at regular intervals of one month thereafter until discharged, or at such times as the Court may direct, the receiver or other similar officer shall file reports of his or her receipts and expenditures and of acts and transactions in an official capacity." In many cases around the country, receivers file regular status reports, often once a quarter for active receiverships.

Even the costs of receiverships are typically monitored closely by the supervising court. Receivers often file motions to pay the expenses of the professionals assisting with the administration of the receivership estate (lawyers,

accountants, and so forth), also typically once per quarter. Such motions often include detailed time sheets and require a court order before any fees are paid.

A receiver will typically be required to obtain court approval for the disposition of the receivership estate, including the sale of receivership property, the compromise of claims, or the distribution of receivership assets to claimants. Such approval is often given in open court, on motion with notice, after interested parties are given an opportunity to object or otherwise respond to the receiver's proposed course of action. As such, while receivers are often given broad powers to take action, subject only to constraints of equity, their actions are also closely supervised by the district court to ensure that those actions are equitable under the circumstances of the receivership.

B. *The District Courts Have Broad Equitable Power to Fashion Relief in an Equity Receivership Proceeding*

This Court has consistently recognized that "a district court has broad powers in fashioning relief in an equity receivership proceeding." *Gordon*, 336 F. App'x at 545 (citing *Capwill*, 462 F.3d at 551, and *SEC v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 668 (6th Cir. 2001)); *see also Norwest Bank Wisconsin, N.A. v. Malachi Corp.*, 245 F. App'x 488 (6th Cir. 2007); *Quilling v. Trade Partners, Inc.*, 572 F.3d 293, 298 (6th Cir. 2009). These broad powers derive directly from the "federal judge's authority to appoint a receiver," which

itself "flows from the court's extraordinary equity powers." Roper, *Equity Receiverships*, at 26.

The court's powers to fashion relief in receivership cases are rooted in its equitable powers, which traditionally filled the gaps when the law fell silent. Today, the court's power to construct relief in a receivership case is generally based on the judge's wide discretion to determine what is fair and just under the circumstances. When approving a settlement, like the one at issue here, a court overseeing a receivership "has wide discretion to determine what relief is appropriate," precisely because "no federal rules prescribe a particular standard for approving settlements in the context of an equity receivership." *Gordon*, 336 F. App'x at 549. This power contrasts with, for example, the district court's role in overseeing a class action settlement where there are more detailed rules in overseeing the process. *Id*. This difference is balanced by the fact that class settlements involve only private parties, whereas a receiver is a party neutral, subject to the general close supervision of the district court. And even though a receiver may be appointed in cases between private parties, like here, once a receiver is appointed, even the underlying action can "be dismissed only by court order." Fed. R. Civ. P. 66.

Consistent with this more flexible regime, and with due process, a court overseeing a receivership is empowered to create a "more open, participatory

process," in which claimants are permitted to "file objections to the proposed settlement, and then [the court may] conduct[] a hearing to address those objections," in lieu of expensive and time-consuming discovery. *Gordon*, 336 F. App'x at 545. In this case, Judge Polster allowed objectors to be heard, and then he issued a detailed ruling based on the objections that Appellants raised. R.DMS 757 PageID #: 17753-67. Allowing a district court to create a flexible process, regardless the result, facilitates federal equity receivers' (and the courts that supervise them) maximization of the receivership estate on behalf of the creditors and victims of the wrongful conduct.

Courts have also understood, consistent with the receiver's role as a neutral party and arm of the court, that it is appropriate for the reviewing court to rely on the declaration of the receiver in approving a settlement. *Harmelin*, 2007 WL 4571021, at *1 ("Accordingly, the Court received [the Receiver's] Declaration which summarizes the process by which he reached settlement with the settling Defendants, and related his opinion that the settlement was fair and reasonable."). Therefore, even though Appellants suggest that the Receiver's declaration was not a valid basis on which a district court could act (Appellants Br. at 41-46), a court is entitled to rule in reliance on the declaration of the receiver, who is after all a neutral arm of the court.

C. *The District Courts' Wide Discretion to Fashion Relief, Combined with Their Close Supervision of Federal Equity Receivers, Support Maintaining an Abuse of Discretion Standard*

Concomitant with the district court's wide discretion to fashion relief in receivership cases, to supervise the administration of receivership estates, and to approve settlements to maximize value for the estate, appellate courts including the Sixth Circuit generally review those actions for abuse of discretion. *See, e.g.*, *Gordon*, 336 F. App'x at 545 ("This Court reviews a district court's decision to approve a settlement agreement in the context of an equity receivership for abuse of discretion." (citing *Capwill*, 462 F.3d at 551)); *see also Sterling v. Stewart*, 158 F.3d 1199, 1201 (11th Cir. 1998) ("Determining the fairness of the settlement [in an equity receivership] is left to the sound discretion of the trial court and we will not overturn the court's decision absent a clear showing of abuse of that discretion."); *DeYoung*, 850 F.3d at 1183 ("While a Claims Bar Order may not be appropriate in all cases, we are persuaded that the district court did not abuse its discretion by entering one in this case."); *Zacarias*, 945 F.3d at 895 ("We . . . review [the court's approval of the settlement] for abuse of discretion."); *see generally* Roper, *Equity Receiverships*, at 26 ("A court's supervision of an equity receivership will not be disturbed absent abuse of discretion.").

This standard is consistent with this Court's view that where a statute, rule, or other law gives the district court discretion, the proper standard of review is

abuse of discretion. *See, e.g.*, *F.T.C. v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 623 (6th Cir. 2014). In this Circuit, "[a]buse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment," which occurs when the "district court applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Paschal v. Flagstar Bank*, 297 F.3d 431, 433–34 (6th Cir. 2002) (quoting *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989), and *First Tech. Safety Sys. v. Depinet*, 11 F.3d 641, 647 (6th Cir. 1993)).

Appellants improperly attempt to chip away at this standard, which applies when reviewing the entire settlement and goes hand in glove with district courts' broad equitable powers to supervise federal receiverships. Appellants cite *Zacarias* for the proposition that a federal court reviews its *subject matter* jurisdiction de novo. (Appellant Br. at 31 (citing *Zacarias*, 945 F.3d at 894-95).) But Appellants then argue that "subject matter jurisdiction" is based on whether Appellants' claims existed independently of the receivership estate. (Appellant Br. at 37-39.) That mischaracterizes the *Zacarias* inquiry, however, which was whether the district court had subject matter jurisdiction over the barred claims. *Zacarias*, 945 F.3d at 902 (finding subject matter jurisdiction existed). Here, however, Appellants concede that their claims are pending in the Northern District of Illinois, so there is no question that those claims could be heard by any federal district court. *See* 28

U.S.C. § 1404 (allowing transfer to any judicial district on consent of the parties). While it is paradigmatic that subject matter jurisdiction must always be reviewed de novo, *see, e.g.*, *United States v. Bacon*, 884 F.3d 605, 608 (6th Cir. 2018), this Court should decline Appellants' invitation to expand that de novo review to how the challenged claims interact with the receivership estate. That relationship is the core substance of the settlement over which the district court has discretion to approve, and which is reviewed for abuse of that discretion.

Appellants further attempt to chip away at the abuse of discretion standard by stating that a "district court's authority to enter a bar order based on a receiver's standing is also reviewed de novo," citing to the *DeYoung* decision, and then using that standard to challenge whether the Receiver in this case had standing to assert Appellants' claims as a precondition for entering a bar order. (Appellant Br. at 31, 41-46.) However, as the court in *DeYoung* made clear, the relevant inquiry subject to de novo review was not whether the receiver had standing to assert the intervenors' claims, but whether the receiver had standing to assert *his own* claims against the insured defendant in order to achieve a settlement financed predominantly by the defendant's insurance policy. *DeYoung*, 850 F.3d at 1181-83. The district court found that the Receiver below had standing to bring his own claims against the insureds, R.DMS 757 PageID #: 17559, a decision that is

broadly consistent with the necessary power of a federal equity receiver to pursue claims against former directors and officers of the entity in receivership.

Finally, Appellants turn the abuse of discretion standard on its head by suggesting that the district court should be reversed because it failed to make "thorough factual findings" supporting the "extraordinary remedy" of a bar order. (Appellant Br. at 35, 51.) In effect, Appellants are abandoning the deferential standard of review for abuse of discretion required by this and other Circuits, substituting a heightened standard of review. But as this Court has held, the abuse of discretion applies to the *entire review* of "a district court's decision to approve a settlement agreement in the context of an equity receivership," even when that review contains challenges to the sufficiency of the district court's factfinding or the entry of a bar order. *Gordon*, 336 F. App'x at 545. In general, receivers spend substantial resources to provide district courts with sufficient factual bases for settlements, as is appropriate and is evident in this case where Appellee submitted a 39-page sworn declaration in support of the settlement. (Appellee Br. at 2.) Appellants' proposed standard of review, however, would require receivers to expend even more resources developing an even more detailed factual record in order to meet a heightened standard of review, at further cost to the receivership estate, thereby diminishing the funds available for creditors and victims with no discernible corresponding benefit to the court or the receivership estate.

Amicus Curiae respectfully suggests that the interests of courts, receivers, and the creditors and victims for whose benefit receivers act, are all served by continuing to trust the federal district courts closest to the underlying facts and circumstances to exercise discretion, with appellate review available for when that discretion is abused.

CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully suggests that this Court should review the District Court's approval of the settlement under an abuse of discretion standard. Amicus Curiae further respectfully suggests that the Court should not place additional burdens on the ability of a receiver to negotiate a settlement that contains bar order, or limit on the district court's discretion to approve such a settlement. Allowing district courts to retain their discretion to approve settlements in connection with their already close supervision of federal equity receiverships, with appellate review available for when that discretion is abused, properly balances the due process rights of all stakeholders while avoiding

excess costs that only serve to diminish the funds available for the victims and creditors on whose behalf the receiver ultimately acts.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this brief on counsel of record on April 5, 2022 by CM/ECF.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because it contains 5,137 words/uses a monospaced typeface, excluding the parts of the brief exempt by FRAP 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14 point Times New Roman.

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