

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

DIGITAL MEDIA SOLUTIONS, LLC	)	CASE NO. 1:19-cv-145
	)	
Plaintiff,	)	
	)	JUDGE DAN AARON POLSTER
	)	
v.	)	MAGISTRATE JUDGE
	)	THOMAS M. PARKER
SOUTH UNIVERSITY OF OHIO, LLC,	)	
<i>et al.</i>	)	
	)	
Defendants.	)	

**INTERVENORS MARINA AWED, JAYNE KENNEY AND KENDRICK HARRISON’S  
MOTION FOR EXPEDITED DISCOVERY OF STUDENT LOAN STIPEND  
DIVERSION SCHEME**

Intervenor Marina Awed and proposed Intervenor Jayne Kenney and Kendrick Harrison<sup>1</sup>, present and former students at Argosy schools run by Dream Center Education Holdings (DCEH) move for expedited discovery with respect to the diversion of student loan stipends. No one disputes that the federal government forwarded money to the schools and that somebody at Argosy or DCEH took the money that these students borrowed from the federal government to pay students’ living expenses while they pursued their education. As a result of the loss of these funds, the students’ lives and the lives of their families have been thrown into turmoil. Thousands of other Argosy students have suffered the same fate. The diverted funds are not garden-variety receivables of the insolvent Dream Center estate to be pursued over the course of an insolvency

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<sup>1</sup> Ms. Kenney and Mr. Harrison have filed a motion to intervene in this receivership proceeding under separate cover, contemporaneous with the filing of this motion. The Receiver does not oppose that motion.

proceeding, but rather are property received by the schools in trust for the students, which they need to live on to complete their education. The prospects for recovering the money will only diminish the longer it takes to determine the culprits.

Ideally, the Receiver would have investigated this theft with urgency, and promptly volunteered the information it discovered to the Court and to affected students. That has not been his priority. As a result, the Argosy Student Intervenors must proceed on their own, and hereby move the court to require an expedited production of relevant information to students who are directly affected, so that they can determine what remedies are available against whom for the theft of their funds. Alternatively, intervenors request that the Court lift the stay of litigation so that they have the option to file suit against the Receiver to determine and establish the existence and location of the fees held in trust for them.

A memorandum in support is attached hereto.

Dated: April 5, 2019

Respectfully submitted,

*s/Richard S. Gurbst*

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Counsel for Intervenors,  
Marina Awed and Proposed Intervenors Jayne  
Kenney and Kendrick Harrison

**CERTIFICATE OF SERVICE**

It is hereby certified that on the 5th day of April, 2019, the foregoing was electronically filed through the Court's CM/ECF system, which caused the parties or counsel to be served by electronic means. The parties may access this filing through the Court's ECF system.

*s/Richard S. Gurbst*

Richard S. Gurbst

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	)	THOMAS M. PARKER
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Defendants.	)	

**MEMORANDUM IN SUPPORT OF MOTION FOR EXPEDITED DISCOVERY**

**I. Background**

**A. The Argosy Student Intervenors**

The diversion of stipends has deprived students of the very reason for which they borrowed the money—so they could live on it right now, while they pursue their education. Each of the intervenors was attending school full-time in order to advance his or her professional prospects, relying on stipends to pay their living expenses while they went to school. Harrison Decl. (Exh. A); Awed Decl. (Exh. B); Kenney Decl. (Exh. C). The Receiver has acknowledged fielding hundreds of calls “from students facing eviction, impacted by repossession, unable to pay childcare and unable to provide for their families” as a result of not receiving their stipends. Dkt. 55 at 2. That is consistent with the experience of the intervenors.

Proposed intervenor Kendrick Harrison, a disabled veteran who was attending Argosy-Online, relies on his stipend to pay rent and living expenses for his family of eight. Harrison Decl. ¶¶ 3-5, 7. Now that Argosy has closed, he is trying to complete his education at another institution but needs his stipend to live on while he does so. *Id.* ¶ 6. As a result of the stipend diversion, he could not pay his rent, and has been evicted. *Id.* ¶ 12; Michael Vasquez, “‘Ruined’ and Evicted: How Dream Center Closures Are Affecting Students” *The Chronicle of Higher Education* (March 15, 2019) and Michael Vasquez, “How America’s College-Closure Crisis Leaves Families Devasted,” *The Chronicle of Higher Education* (April 4, 2019) (both attached as Exh. D). Because his delinquency on his rent damaged his credit rating, he has been unable to enter into a new lease. Harrison Decl. ¶ 13. On Sunday, March 24, he and his family moved into an extended-stay motel. *Id.* ¶ 12. Without sufficient funds to rent premises for their family, they will likely be forced to separate their children among family members. *Id.* ¶ 13. As a result, his childrens’ education—not to mention their lives more generally—may be disrupted as well.

Intervenor Awed, trying to earn her law degree as her school is on the verge of collapse, also had to vacate her apartment. Awed Decl. ¶ 8. She is fortunate to be able to move in with her parents—but they are an hour away from school. *Id.* She does not know how she is going to pay for her bar exam classes and registration, which she had planned to use some of her stipend money to cover. *Id.* ¶¶ 6-10.

Proposed intervenor Kenney was enrolled in the Psy.D. program at the Illinois School of Professional Psychology, an Argosy school, until it closed in March 2019. Kenney Decl. ¶ 3. She is planning to continue her studies at another school. *Id.* ¶ 4. She relies on the stipend money for living expenses while she completes her education. *Id.* ¶ 5. Because her stipend funds were stolen from her, she and her mother have liquidated retirement savings in order to meet the living

expenses that she would have paid with her stipends. *Id.* ¶ 8. She has already told her landlord that she may be late on her next month's rent. *Id.* ¶ 9. She has also been late on credit card payments and suffered late fees and closing of one of her cards—negatively affecting her credit rating. *Id.* ¶ 10.

### **B. The Receiver's Response to Missing Stipends**

The Receiver was appointed on January 18, 2019. Shortly after that appointment, reports surfaced in the media that Argosy students weren't receiving student loan stipends. As the urgency of this situation escalated, many students reached out to the Receiver for answers, including Harrison. Harrison Declaration ¶ 9 and Exh. 1 to Declaration.<sup>2</sup> Harrison explained that his “landlord and creditors are threatening legal action as a direct result of this situation.” *Id.* The Receiver assured Harrison that “we are working *around the clock* to recover the funds.” Harrison Declaration ¶ 10 and Exh. 2 to Declaration. (emphasis added).

In a report to the Court on February 19, 2019, the Receiver claimed that the money was “*not missing*” (Dkt. 55 at 2)(emphasis in original). This was not true. He subsequently amended that filing to acknowledge “irregularities,” (Dkt. 68 at 1), and then outright fraud. Dkt. 91 at 11; 3/8/19 Tr. at 62 (transcript excerpts attached as Exhibit E).

The Receiver asserts that his lack of understanding about student-loan stipends was cured on February 20, 2019 when his forensic accountant spoke to two DCEH employees, and reviewed student-account ledgers, and realized that those ledgers had been altered on January 18, 2019 to falsely reflect that the loan stipends had been paid, and then altered again on January 22, to void those entries. *Id.* at 29.

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<sup>2</sup> See also Ben Unglesbee, “Amid growing scrutiny, Dream Center receiver says Title IV funds ‘not missing’.” *Education Dive* (Feb. 20, 2019), available at <https://www.educationdive.com/news/amid-growing-scrutiny-dream-center-receiver-says-title-iv-funds-not-missi/548759/>

Having discovered this fraudulent scheme on February 20 after weeks of confusion, the Receiver did not rush to share these discoveries with the Court, the public, or the defrauded students. The discovery of the defalcations of the student accounts was not disclosed until two weeks later on March 4. Dkt. 91. The February 20 interviews with the DCEH employee—during which “they pretty much told us very forthrightly what had been happening”—were not disclosed until March 8. 3/8/19 Tr. at 29, 44.

Although finding the stipend money owed to Argosy students was described by the Receiver as the Receivership’s “most critical need,” which must be “urgently addressed,”<sup>3</sup> that urgency has never materialized. On February 22, the Receiver stated that he was “in the preliminary stages of a detailed, forensic investigation” regarding the whereabouts of the student funds. (Dkt. 68 at 2.) On March 4, the Receiver stated that he “requires time to complete a proper, detailed investigation, including the timing of the initial defalcations, who signed the requests and requisitions for the money, who knew about the situation, the exact uses of the money, and a final total amount.” Dkt. 91 at 11. At the March 11 hearing, the Receiver purported to still be in the early stages of a “deep dive forensic accounting.” 3/11/19 Tr. at 75 (transcript excerpts attached as Exh. F). We are now six weeks into the Receiver’s forensic investigation into the whereabouts of the student funds and we have learned nothing.

The Receiver has strongly indicated that his priorities will not change. Before filing this motion, undersigned counsel asked the Receiver whether he would promptly respond to the discovery requests. Exh. G. On March 27, the Receiver responded that he would not. *See* Letter from Hugh Berkson to Eric Rothschild (3/27/19). Exh. H. “We do not see it as *the* critical issue

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<sup>3</sup> Letter from Mark E. Dottore, Receiver to Diane Auer Jones, Principal Deputy Undersecretary, United States Department of Education (2/7/19) at 3 (“The Receiver understands that . . . the most critical need is to pay the \$13 million of Argosy student stipends . . . the situation must be urgently addressed.”). Dkt. 48-1.

for which precious resources should be diverted at this moment.” *Id.* at 1. He “also question[s] who you think should pay the bill required to engage in the electronic forensic examination you’ve demanded. The Receivership Estate’s limited financial resources are no secret.” *Id.* at 2.<sup>4</sup>

## II. Argument

“[D]istrict courts within this circuit have applied a good cause standard in determining whether or not to permit expedited discovery.” *Lemkin v. Bell’s Precision Grinding*, C.A. 2:08-CV-789, 2009 WL 1542731, \*2 (S.D. Ohio, June 2, 2009). “Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party.” *Id.* (citations omitted). Good cause can be found “where evidence may be lost or destroyed with time.” *Id.*

Under the unusual circumstances of this unusual case, this standard is met, for multiple reasons. First if this were a bankruptcy proceeding, the formal procedures for creditors to seek information from debtors, including examination pursuant to Fed. R. Bank. P. 2004, would apply. Because the matter is a procedurally ill-defined receivership, claimants such as these intervenors have no such right. They therefore request this Court draw upon bankruptcy procedure to provide a discovery mechanism for them.

Second, the stipends drawn down from the Department are not receivables of the estate to be recovered in the due course of time, for the benefit of all creditors. Rather, they are the property of specific students, received by their schools, “in trust for the intended beneficiaries [students],” so that the student, not their schools, could use them for the specific purpose for which they were

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<sup>4</sup> After this correspondence, counsel for the parties agreed to convene a telephone call on April 3 before the students filed this motion. The Receiver’s counsel did not have any additional information to share on this call, and acknowledged the students’ imperative not to further delay their filing. The Receiver’s counsel reported that its accountant was in Pittsburgh to examine DCEH’s books and records, and agreed to share information the accountant learned from that examination. While the students and their counsel would have hoped these efforts occurred much earlier, the students welcome any information the Receiver provides.

borrowed—paying their living expenses during the semester they enrolled in school. 34 CFR 668.161(b); <https://oha.ed.gov/oha/files/2019/02/2013-60-SP.pdf>. If expedited discovery is not permitted, then the court should permit the Argosy Student Intervenors the right to begin proceedings to recover these funds delivered in trust for their benefit.

Third, just as the Court has found that the failure to pay DCEH employees (Dkt. 172) and landlords is not “fair or appropriate,” (3/11/19 Tr. at 17), students should be treated the same. The stipends they borrowed *are their income for this semester*—no less necessary for their day-to-day subsistence than employees’ salaries and landlords’ rent proceeds. The *students’ landlords* are no more equipped to forego rent than the landlords of the schools—and they haven’t. As a result of the diversion of his stipend, disabled veteran Harrison, his wife, and their children are homeless; Awed was also forced to vacate her apartment.

Fourth, the Receiver has demonstrated an alarming lack of urgency about determining who perpetrated the diversion of the students’ money, and where the money went. The fact that the funds had gone missing has been a feature of the Receivership since it started, and has not changed. What has changed is what was a “critical need” of the Receivership when the diversion was discovered is “not the critical issue for which precious resources should be diverted” anymore. Berkson Letter at 1. Indeed, the Receiver trivializes the stipend issue as being of interest to only “two clients,” (*id.*), despite knowing full well that thousands of students are similarly affected and need to know where their money went. Lest anyone be mistaken, the Receiver suggests that it may *never* be a good use of the “Receiver Estate’s limited financial resources . . . to pay for the staff and the tools required to dive into the electronic databases and uncover the data” pertaining to the diversion of stipends that the students are requesting in discovery. *Id.* at 2.

The Receiver has never explained what is taking so long. All the way back on February 20, two DCEH employees “pretty much told us very forthrightly what had been happening” with the stipend diversion. 3/8/19 Tr. at 29, 44. Yet the Receiver has still not told the Court or students “what had been happening,” nor, apparently, acted on the information the employees provided.

Similarly, the Receiver has been slow to investigate DCEH’s books and records—where the electronic journey of the stipend funds could be retraced. Student loan funds drawn down from the Department of Education *must* be held in a depository account that “clearly identif[ies] that title IV, HEA program funds are maintained in that account.” Dkt. 48 at 3; 34 CFR § 668.163(2). If DCEH obeyed that regulation, tracking the outflow to its next destination should be as simple as looking at the outgoing transactions in such accounts’ ledgers. Even if it did not, the electronic transfer of funds from the Department went to some account, some routing number. And the money went out this same way. All of these transactions have electronic fingerprints.

This is not all so mysterious as the Receiver claims, or at least should not be accepted as so, solely on the Receiver’s say so, while he holds close all the transactional records that could answer these questions. Greater urgency in this regard might result in greater recoveries for students. The Receiver has represented that the students’ money was used for “operating expenses”—implying that it now resides with ordinary businesses and workers who are innocent in their receipt of the stolen money. But he doesn’t actually know that. The Receiver’s forensic accountant admitted that he has not figured out where the money went. 3/11/19 Tr. at 73-74 (“COURT: You don’t know where it went?” LINSKOTT: “That’s correct”). Equally possible is that some or all of the money went into the pockets of the persons who directed and carried out the scheme—who could still be forced to disgorge the stolen money. Neither the Receiver nor the Students will know until the Receiver looks.

Once the Argosy Student Intervenorers learn through discovery who benefitted from the diverted stipends their schools held in trust for them, they can then determine whether they have options for seeking direct recoveries from those recipients. Although their rights to recover the stipends are not necessarily strictly limited to principles of trust law, those principles support a right of recovery in these circumstances. Restatement (Third) of Trusts § 107(2)(“A beneficiary is. . . . entitled to immediate distribution; or (b) the trustee, is unable, unavailable, unsuitable or improperly failing to protect the beneficiary’s interests.”). Even if one assumes the Receiver is the trustee, both criteria are satisfied completely. And if the money went into the pockets of the persons who directed and carried out the scheme—they could be forced to disgorge the stolen money.

### **III. Conclusion**

The theft of \$16 million in federal funds, delivered to schools in trust for students to pay their everyday living expenses, cannot be treated as a casual matter for the Receiver to investigate on his own timeline. This Court must allow affected students to find out where their money went, so they can determine how to recover it. Therefore, the Court should enter an Order in the form attached, requiring the Receiver to respond to the Argosy Student Intervenorers’ discovery on an expedited basis<sup>5</sup>, or lifting the stay against claims by the Students, so they can bring suit against the Receiver to discover and recover the monies that were disbursed to the Receivership Entities in trust.

Alternatively, the Students request an Order by the Court requiring the Receiver to provide a status report, supported by account records of the Receivership entities and the information

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<sup>5</sup> Intervenorers’ proposed discovery requests are attached. Exh. I. Intervenorers are prepared to meet and confer with the Receiver regarding these requests, to insure swift, efficient production of the most responsive information and documents.

learned from current and former employees with knowledge, regarding the status of his investigation and the whereabouts of the diverted funds. And, if the Court determines that it should not proceed with the Receivership (Dkt. 222 at 2), an outcome that intervenor Studio also advocates (Dkt. 229 at 5), the Students request the Court to enter an Order that the Receiver, before his appointment is terminated, shall provide a status report and that personnel of the Receiver and the Receivership entities with knowledge about the stipend diversion appear at a hearing where they can be examined by the Court and affected parties.

Dated: April 5, 2019

Respectfully submitted,

*s/Richard S. Gurbst*

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**CERTIFICATE OF SERVICE**

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*s/Richard S. Gurbst*

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