

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:)
)
ITT EDUCATIONAL SERVICES, INC., *et al.*¹) Case No. 16-07207-JMC-7A
)
Debtors.) Jointly Administered

**TRUSTEE’S MOTION TO COMPROMISE AND SETTLE
CERTAIN CLAIMS WITH THE UNITED STATES OF AMERICA**

Deborah J. Caruso, the chapter 7 trustee in this case (the “Trustee”), by counsel, requests, pursuant to 11 U.S.C. §§ 105(a) and 363 and Rule 9019 of the Federal Rules of Bankruptcy Procedure, entry of an order substantially in the form attached hereto as **Exhibit 1** (the “Proposed Order”), approving the terms of a proposed settlement by and between the Trustee, not individually but solely in her capacity as the chapter 7 trustee for, and acting for and on behalf of the Affiliated Debtors (as defined below), and each of the Affiliated Debtors’ respective bankruptcy estates, on the one hand, and the United States of America (the “United States”), acting through the United States Department of Justice (“DOJ”) and on behalf of the Department of Education (“ED”), the Centers for Medicare and Medicaid Services (“CMS”), and the U.S. Department of Veteran Affairs (“VA”), on the other hand, which is embodied in a certain settlement agreement (the “Settlement Agreement”), a copy of which is attached hereto as **Exhibit 2**, on the following grounds:

I. JURISDICTION

1. The Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b).
2. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

¹ The debtors in these cases, along with the last four digits of their respective federal tax identification numbers are ITT Educational Services, Inc. [1311]; ESI Service Corp. [2117]; and Daniel Webster College, Inc. [5980].

3. The statutory predicates for relief are sections 105 and 363 of the United States Code (the “Bankruptcy Code”) and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

II. BACKGROUND

Events Prior to the Bankruptcy Filings

4. ITT Educational Services, Inc. (“ITT”) was founded in 1946 and became a publicly traded company in 1994. ITT grew to be one of the largest for-profit education companies in the country, offering master, bachelor and associate degree programs at its approximately 137 campus locations and online programs to students located in all 50 states and the District of Columbia in a number of subjects, including electronics, drafting and design, criminal justice, business, information technology, health sciences and nursing.

5. By at least 2012, ITT became the subject of various governmental investigations and lawsuits with allegations concerning potentially unlawful acts or practices relating to the advertising, marketing, and origination of private student loans, potential misrepresentations in financial aid, recruitment and other areas, the potential submission of false claims to the United States Department of Education (“ED”), the creation of a subsidized loan programs that ITT should have known students would not be able to repay, and false or misleading representations about financial aid and debt collection practices.

6. By letter dated August 21, 2014, the ED determined that ITT was not “financially responsible” because it did not submit its 2013 audited financial statements and compliance audits to the ED by the June 30, 2014 deadline. The ED nonetheless provisionally certified ITT, thereby allowing it to remain eligible to receive Title IV Funds, subject to two program participation agreements, approved by the ED Secretary on September 15, 2014 and October 24,

2014 (together, the “PPAs”), which set forth the terms of ITT’s continued participation under the Higher Education Act (the “HEA”).

7. In addition to the various covenants and obligations under the PPAs, the ED required ITT to post a \$79,707,879 letter of credit (“LC”) to protect against any liability the ED might incur, *inter alia*, in the event of ITT’s closure.

8. The August 21, 2014 letter also placed ITT on heightened cash monitoring, meaning that ITT would have to submit additional financial documentation to the ED on a periodic basis.

9. By letter dated May 20, 2015, the ED required ITT to provide a bi-weekly report of ITT’s 13-week cash flow statement with financial disclosure notes. The stated basis for requiring the additional reporting requirements was the commencement of the SEC’s civil fraud action against ITT, Kevin Modany and Daniel Fitzpatrick.

10. In or about December 2015, ITT’s LC was replaced at ITT’s request with a cash escrow held by the ED. Pursuant to a December 15, 2015 Escrow Agreement, ITT placed \$79,707,879 into the Escrow Account on December 17, 2015. Upon information and belief, ITT only agreed to make the December 2015 Transfer to the ED’s Escrow Account on the assumption that in doing so it would, among other things, remain eligible to receive Title IV funds for the 2016-2017 academic year.

11. The Escrow Agreement provides, *inter alia*, that the ED “agrees to hold funds on behalf of ITT” and that the ED “will maintain funds” placed in the Escrow Account for the following purposes to: (a) pay refunds of institutional or non-institutional charges owed to or on behalf of former students of [ITT], whether [ITT] remains open or has closed; (b) provide for the “teach-out” of students enrolled at the time of closure of [ITT]; and (c) pay for any liabilities owing to the Secretary arising from acts or omissions by [ITT], on or before the expiration of the

agreement for [the ED] to hold these funds, in violation of requirements set forth in the [HEA], including the violation of any agreement entered into by [ITT] with the Secretary regarding the administration of programs under Title IV of the HEA.

12. On or about June 6, 2016, the ED demanded that ITT provide it with an additional \$44 million in escrowed funds. Upon information and belief, ITT's former management advised the ED that it would be difficult for ITT to make this payment.

13. On July 6, 2016, the ED informed ITT that it could fulfill the additional \$44 million escrow obligation in three installments due July 20, 2016, September 30, 2016, and November 30, 2016. The first installment was paid on July 20, 2016 in an amount equal to about \$14,646,101. After the July 20, 2016 transfer, the total amount in the Escrow Account was approximately \$94,353,980.

14. On August 25, 2016, the ED sent ITT a letter in which it demanded that ITT increase the escrowed amount by an additional \$152.9 million within 20 days to \$247,292,364. The ED stated that the increase was supposedly necessitated by: (a) ITT's inability to resolve the concerns raised by ITT's accreditor, the Accrediting Council for Independent Colleges and Schools ("ACICS"), set forth in ACICS's August 17, 2016 letter; and (b) a decision rendered by the National Advisory Council on Institutional Quality and Integrity ("NACIQI") recommending that the ED not re-recognize ACICS as an accrediting agency. The ED's August 25, 2016 letter further stated that ITT's failure to comply with the demanded increase in escrowed funds would result in the ED suspending ITT's eligibility to admit students who receive Title IV loans. That same day, the ED issued a press release noting that it was barring ITT from enrolling new Title IV students.

15. On September 6, 2016, ITT's former management announced that ITT was permanently shutting down its academic operations.

Events Following the Bankruptcy Filings

16. On September 16, 2016 (the “Petition Date”), ITT, ESI Service Corp. (“ESI”) and Daniel Webster College, Inc. (“DWC,” and together with ITT and ESI, the “Affiliated Debtors”) filed voluntary petitions for relief under chapter 7 of the Bankruptcy Code. The Trustee was appointed interim trustee under section 701 of the Bankruptcy Code in each of the Affiliated Debtors’ bankruptcy cases on the Petition Date, and in accordance with section 702(d) of the Bankruptcy Code, became the permanent case trustee on November 1, 2016 following the conclusion of the meeting of creditors held pursuant to section 341(a) of the Bankruptcy Code.

17. On October 4, 2016, the Court entered its *Order Granting Motion for Joint Administration of Chapter 7 Cases* [Docs 221 & 222], directing the Affiliated Debtors’ bankruptcy cases to be jointly administered for procedural purposes only.

18. On March 13, 2017, the United States filed a proof of claim on behalf of the ED in the ITT case (Claim No. 3047 filed in Case No. 16-07207), in the amount of \$230,518,448.49, plus unliquidated amounts, exclusive of interest and other charges (the “ITT EDPOC”). In addition, on March 13, 2017, the United States filed a proof of claim on behalf of the ED in the DWC case (Claim No. 497 filed in Case No. 16-07209), in the amount of \$1,554,738.11, plus unliquidated amounts, exclusive of interest and other charges (the “DWC EDPOC,” and together with the ITT EDPOC, the “EDPOCs”).

19. On March 13, 2017, the United States by and through the CMS filed a proof of claim in the ITT case (Claim No. 3048 filed in Case No. 16-07207), in the amount of \$91,580.70 for the unpaid balance of reinsurance contributions as required by the Patient Protection and Affordable Care Act (the “CMSPOC”).

20. On March 14, 2017, the United States by and through the VA filed proofs of claim in the ITT case and the ESI case (Claim No. 3054 filed in Case No. 16-07207 and Claim

No. 604 filed in Case No. 16-07208), each in the amount of \$3,668,734.12 for education benefits paid by the VA to ITT for student beneficiaries in the fall quarter of 2016, which ITT failed to return when it ceased operations (the “VAPOCs”).

21. On June 5, 2017, the United States by and through the VA filed seventeen (17) additional proofs of claim in the ITT case (Claim Nos. 3272, 3276, 3278, 3279, 3282, 3283, 3284, 3285, 3286, 3287, 3288, 3289, 3290, 3291, 3292, 3293 and 3294, all filed in Case No. 16-07207), in the total combined amount of \$100,088.53 for education benefits paid by the VA to ITT for student beneficiaries in the fall quarter of 2016, which ITT failed to return when it ceased operations (the “Additional VAPOCs”).

22. The United States has asserted a right to setoff for all the claims asserted in these bankruptcy cases, including the EDPOCS, CMSPOC, VAPOCs and the Additional VAPOCs.

23. The Affiliated Debtors’ bankruptcy estates have asserted prepetition claims against the VA in the amount of \$215,937.79 (the “VA Check Claim”) for checks payable to the Affiliated Debtors that were canceled because those checks were not negotiated within one year from the date of issuance. The VA disputes the amounts asserted in the VA Check Claim and contends that the amount owed for the VA Check Claim is \$102,718.24.

24. The ED also has asserted that the amount estimated to be due currently under the ITT EDPOCs has increased to over \$440 million, including interest and other charges.

25. On September 7, 2018, the Trustee commenced an adversary proceeding in this Court, captioned *Deborah J. Caruso, as Chapter 7 Trustee for ITT Educational Services, Inc., ESI Service Corp. and Daniel Webster College, Inc. v. United States Department of Education*, Adv. Proc. No. 18-50271 (the “Adversary Proceeding”), asserting claims against the ED, *inter alia*, to recover the two transfers into the Escrow Account (as described in paragraphs 12 and 15) of approximately \$94 million on the grounds that: (a) such transfers constituted voidable

preferences under section 547 of the Bankruptcy Code; (b) such transfers constituted fraudulent transfers under sections 554, 548, 550 and 551 of the Bankruptcy Code and section 32-18-2-14(2) of the Indiana's Uniform Fraudulent Transfer Act; and/or (c) the ED fraudulently induced the Affiliated Debtors to make such transfers. In addition, the Trustee asserted claims for breach of the September 15, 2014 and October 24, 2014 PPAs, breach of the Escrow Agreement, negligence, unjust enrichment and disallowance or, in the alternative, equitable subordination of the EDPOCs pursuant to sections 502(e)(1) and 510(c) of the Bankruptcy Code.

26. The ED has denied any fault, wrongdoing and liability in connection with the claims alleged in the Trustee's complaint filed in the Adversary Proceeding.

27. In addition, the Affiliated Debtors' bankruptcy estates are due a refund from the Internal Revenue Service (the "IRS") of approximately \$6,960,635.52 for the 2015 tax year (the "2015 Tax Refund"). On January 15, 2020, pursuant to the *Order Granting Motion for Relief from Stay to Offset Pre-Petition Tax Overpayments Against Pre-Petition Taxes, Memorandum of Law, and Notice of Objection Deadline* (the "IRS Stay Relief Order") [Doc 3760], the Court granted the IRS's motion to terminate the automatic stay for the limited purpose of allowing the IRS to offset its non-income prepetition claims of approximately \$107,729.05 (the "IRS Prepetition Claims") against the 2015 Tax Refund.

28. The United States is currently holding overpayments in the amount of the difference between the 2015 Tax Refund and the allowed IRS Prepetition Claims in the approximate amount of \$6,852,906.47, plus applicable interest (the "Tax Refund Balance"). The United States and all applicable United States agencies have asserted setoff rights against the Tax Refund Balance. The Trustee disputes the setoff rights of the United States agencies other than the IRS with respect to the Tax Refund Balance.

III. SETTLEMENT

29. The Trustee and the United States, on behalf of the ED, the CMS, and the VA, have engaged in settlement discussions regarding resolution of the parties' issues, claims and disputes, resulting in the proposed settlement terms embodied the Settlement Agreement attached to this motion as **Exhibit 2**.

30. The parties having considered the facts and circumstances relating to the disputed matters, desire to avoid the burden, risks and expenses attendant to further litigation of the issues, and to settle and to resolve, fully and finally, all issues between the parties, and to that end, they have engaged in arms' length settlement negotiations, have exchanged materials and information, and have determined that the terms and conditions of the proposed Settlement Agreement are desirable, fair, reasonable, adequate and within the range of reasonable settlements.

31. As more specifically spelled out in the proposed Settlement Agreement, it generally provides that:

- (a) The Settlement Agreement will not become effective (the "Effective Date") until all of the following conditions precedent have occurred: (i) all of the parties have executed the Settlement Agreement; and (ii) entry of a final order approving the Settlement Agreement and modifying the automatic stay for parties to effectuate the Settlement Agreement.
- (b) No later than five (5) business days after the Effective Date, the ED shall deliver to the Trustee the sum of \$29,000,000.00 (the "ED Settlement Payment"), representing a portion of the funds transferred by ITT into the Escrow Account prior to the Petition Date. Upon receipt of the ED Settlement Payment (the "Receipt Date"), the Trustee shall place the proceeds of the ED Settlement Payment in a separate reserve account (the "Reserve Account") and hold them in trust for distribution solely for the purposes, and in the sequence, specified below. The funds in the Reserve Account shall be treated as funds subject to setoff under sections 106(c) and 553 of the Bankruptcy Code by the United States, acting through the DOJ for the benefit of the CMS and VA, solely for purposes of the distributions described below, and such distributions shall not be subject to sections 724 and 726 of the Bankruptcy Code.

- (c) No later than five (5) business days after the Receipt Date, in respect of setoff rights of CMS and the VA for amounts in the Reserve Account, the Trustee shall deliver the sum of \$569,000.00 to DOJ. After making this payment, the Trustee shall distribute all amounts remaining in the Reserve Account to the Affiliated Debtors' bankruptcy estates' general operating account for distribution on allowed claims and expenses in the priorities provided in the Bankruptcy Code, and as a result, the funds transferred from the Reserve Account shall then cease to be subject to setoff for the United States' claims against the Affiliated Debtors.
- (d) On the Effective Date, the VA shall be authorized to set off the VA Check Claim against claims asserted by the VA in the VAPOCs in the amount of \$102,718.24, and the stay shall be lifted to allow for such setoff.
- (e) No later than the five (5) business days after the Receipt Date, the Trustee shall file a notice of dismissal that causes the Adversary Proceeding to be dismissed with prejudice.
- (f) The stay shall be lifted to allow the DOJ to set off, on behalf of ED, CMS and the VA, their respective portion of the Tax Refund Balance and the amount each received from the \$569,000 delivered by the Trustee to the DOJ against their allowed proofs of claim.
- (g) In connection with the Tax Refund Balance, the Trustee reserves the right to bring a motion within six (6) months of the date of the Settlement Agreement for expenses (the "Trustee Tax Expense") under sections 326, 330 or 506(c) of the Bankruptcy Code for compensation and reimbursement of her expenses in challenging the IRS Prepetition Claims, including the IRS's prepetition claims for income tax liabilities for 2010, 2011, and 2012. The United States, solely on behalf of ED, CMS and the VA, waives any objection to any motion filed by the Trustee in the case to allow the Trustee Tax Expense in the aggregate sum of not more than \$550,000; provided that this waiver does not affect any right of the office of the United States Trustee.
- (h) After the DOJ sets off, on behalf of ED, CMS and the VA, their respective portion of the Tax Refund Balance and the amount each received from the \$569,000 delivered by the Trustee to the DOJ against their allowed proofs of claim, the United States shall retain any other setoff rights, excluding those to funds transferred from the Reserve Account, and the following agencies' claims shall be reduced and allowed as follows:
 - (i) ITT EDPOC shall be allowed as a general unsecured claim in the amount of \$283,782,751.00;
 - (ii) The DWC EDPOC shall be allowed as a general unsecured claim in the amount of \$1,544,738.11;

- (iii) The CMSPOC shall be allowed as a general unsecured claim in the amount of \$79,917.46;
- (iv) The VAPOC asserted against ITT shall be allowed as a general unsecured claim in the amount of \$2,946,463.35;
- (v) The VAPOC asserted against ESI shall be allowed as a general unsecured claim in the amount of \$3,011,015.88; and
- (vi) The EDPOCs, the CMSPOC, and the VAPOCs shall be disallowed to any extent they exceed the amounts detailed above and the Additional VAPOCs shall be disallowed in their entirety.

IV. RELIEF REQUESTED

32. The Trustee requests entry of an order, substantially in the form as **Exhibit 1**, pursuant to sections 105(a) and 363 of the Bankruptcy Code and Bankruptcy Rule 9019, (a) approving the terms of the Settlement Agreement, (b) authorizing the Trustee to enter into the Settlement Agreement, and (c) directing that the Court shall retain exclusive jurisdiction as to the Settlement Agreement.

V. GROUNDS FOR GRANTING RELIEF

33. A court may authorize a trustee to enter into a settlement so long as it is a sound exercise of the trustee's business judgment. *See* 11 U.S.C. § 363(b); *In re UAL Corp.*, 443 F.3d 565, 571 (7th Cir. 2006) (use under section 363 of the Bankruptcy Code must "[make] good business sense"); *In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991) (section 363 involves exercise of fiduciary duties and requires an "articulated business justification"); *see also In re Olde Prairie Block Owners, LLC*, 448 B.R. 482, 492 (Bankr. N.D. Ill. 2011) (same). Moreover, when applying the "business judgment" standard to a use of estate property under section 363 of the Bankruptcy Code, a trustee's judgment is "entitled to great judicial deference as long as a sound business reason is given." *See In re Efoora, Inc.*, 472 B.R. 481, 488 (Bankr. N.D. Ill. 2012).

34. Similarly, Bankruptcy Rule 9019(a) permits a bankruptcy court to approve a trustee's "compromise or settlement" after notice and a hearing, if such settlement is "fair and equitable . . . and in the best interests of the bankruptcy estate." *Depoister v. Mary M. Holloway Found.*, 36 F.3d 582, 586 (7th Cir. 1994); *see also In re Energy Co-op., Inc.*, 886 F.2d 921, 927 (7th Cir. 1989) ("The benchmark for determining the propriety of a bankruptcy settlement is whether the settlement is in the best interest of the estate."); *In re Smith*, No 02-16450-JKC-7A, 2008 Bankr. LEXIS 2821, *6 (Bankr. S.D. Ind. Sept. 10, 2008) (same). Settlements should be approved unless "the settlement 'falls below the lowest point in the range of reasonableness.'" *In re Commercial Loan Corp.*, 316 B.R. 690, 698 (Bankr. N.D. Ill. 2004) (quoting *Energy Co-op.*, 886 F.2d at 929); *In re Doctors Hosp. of Hyde Park, Inc.*, 474 F.3d 421, 426 (7th Cir. 2007); *see also In re Artra Grp., Inc.*, 300 B.R. 699, 702 (Bankr. N.D. Ill. 2003). Settlements and compromises are favored in bankruptcy because they expedite case administration and reduce unnecessary administrative costs. *Fogel v. Zell*, 221 F.3d 955, 960 (7th Cir. 2000). In determining whether a compromise is in the best interests of the estate, the Court must compare "the settlement's terms with the litigation's probable costs and probable benefits." *In re Am. Reserve Corp.*, 841 F.2d 159, 161 (7th Cir. 1987); *see also Doctors Hosp.*, 474 F.3d at 426 ("Among the factors the court considers are the litigation's probability of success, complexity, expense, inconvenience, and delay, including the possibility that disapproving the settlement will cause wasting of assets." (internal quotation marks and citations omitted); *Commercial Loan*, 316 B.R. at 697 (holding that relevant factors a bankruptcy court should consider in approving a settlement include "the litigation's probability of success, its complexity, and its 'attendant expense, inconvenience and delay'" (quoting *Am. Reserve Corp.*, 841 F.2d at 161)).

35. Here, the Trustee, in the exercise of her business judgment, believes that the Affiliated Debtors' bankruptcy estates should accept the settlement terms based on the merits of

the ED's defenses to the claims asserted in the Adversary Proceeding and the risk and expense to the Affiliated Debtors' bankruptcy estates if the Adversary Proceeding was litigated. The Trustee believes entry into the Settlement Agreement is in the best interest of the Affiliated Debtors' bankruptcy estates and represents a sound exercise of her business judgment. The various disputes between the parties are complex, and the outcome of the Adversary Proceeding is uncertain. Resolution of the Adversary Proceeding, if litigated, has the potential to, and likely will, prove costly and time consuming to all parties, and absent resolution of the issues covered by the Settlement Agreement, costs associated therewith will continue to accrue. Entry into the Settlement Agreement will resolve such issues consensually, bringing the Trustee another step closer to resolution of the bankruptcy cases.

36. For the foregoing reasons, the Trustee has determined, in the exercise of her sound business judgment, that the Settlement Agreement is fair, equitable, in the best interest of the Affiliated Debtors' bankruptcy estates, and well within the range of reasonableness for approval under Bankruptcy Rule 9019(a). Accordingly, the Trustee submits that the Court should approve the settlement terms and the Trustee's entry into the Settlement Agreement.

VI. NOTICE

37. Pursuant to the *Notice, Case Management and Administrative Procedures* (the "Case Management Procedures") approved by the Court on October 4, 2016 [Doc 220], the Trustee will serve a copy of this motion, including the exhibits, on the following (as defined in the Case Management Procedures): (a) the Core Group; (b) the Request for Notice List; and (c) the Appearance List, which includes counsel for the United States, acting through the United States Department of Justice, on behalf of the ED, the CMS and the VA, and class counsel for the Student Claimant Class.

NOTICE IS GIVEN, that pursuant to the Case Management Procedures, any objection to this motion must be in writing and filed with the Bankruptcy Clerk by no later than **4:00 p.m.** (prevailing Eastern time) on **July 8, 2020**. Those not required or not permitted to file electronically must deliver any objection by U.S. mail, courier, overnight/express mail or in person at:

116 U.S. Courthouse
46 East Ohio Street
Indianapolis, IN 46204

The objecting party must also serve a copy of the written objection upon the Trustee's counsel, at Counsel for Trustee Deborah J. Caruso, Rubin & Levin, P.C., 135 N. Pennsylvania Street, Suite 1400, Indianapolis, IN 46204. **If an objection is NOT timely filed, the requested relief may be granted without a hearing.**

NOTICE IS FURTHER GIVEN that in the event an objection to this motion is timely filed, a hearing on this motion and such objection will be conducted on **July 15, 2020** at **1:30 p.m.** (prevailing Eastern time), in Room 325 of the United States Courthouse, 46 East Ohio Street, Indianapolis, IN 46204.

WHEREFORE, the Trustee respectfully requests entry of an order, substantially in the form attached hereto as **Exhibit 1**, granting the relief requested herein and granting the Trustee all other just and proper relief.

Respectfully submitted,

RUBIN & LEVIN, P.C.

By: /s/ Meredith R. Theisen

Meredith R. Theisen

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2020, a copy of the foregoing *Trustee's Motion to Compromise and Settle Certain Claims with the United States of America* was filed electronically. Pursuant to Section IV.C.3(a) of the Case Management Procedures, notice of this filing will be sent to the following parties through the Court's Electronic Case Filing System. Parties may access this filing through the Court's system.

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I further certify that on June 25, 2020, pursuant to Section IV.C.3(c) of the Case Management Procedures, a copy of the foregoing *Trustee's Motion to Compromise and Settle Certain Claims with the United States of America* was emailed to the following:

Arlington ISD/Richardson ISD: Ebony Cobb at ecobb@pbfc.com
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SWRE Deal V Building, LLC: Paul Weiser at pweiser@buchalter.com
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/s/ Meredith R. Theisen
Meredith R. Theisen

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EXHIBIT 1

[Proposed Order]

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:)
)
ITT EDUCATIONAL SERVICES, INC., *et al.*¹) Case No. 16-07207-JMC-7A
)
Debtors.) Jointly Administered

ORDER GRANTING TRUSTEE’S MOTION TO COMPROMISE AND SETTLE CERTAIN CLAIMS WITH THE UNITED STATES OF AMERICA

This matter is before the Court on the *Trustee’s Motion to Compromise and Settle Certain Claims with the United States of America* (the “Motion”) [Doc ____], filed by Deborah J. Caruso, the chapter 7 trustee in this case (the “Trustee”). In the Motion, the Trustee, not individually but solely in her capacity as Trustee for the bankruptcy estates of the Affiliated Debtors,² approving the Settlement Agreement by and between the Trustee, on the one hand, and the United States, acting through the DOJ and on behalf of the ED, CMS and VA, on the other hand, a copy of which was submitted with the Motion.

¹ The debtors in these cases, along with the last four digits of their respective federal tax identification numbers are ITT Educational Services, Inc. [1311]; ESI Service Corp. [2117]; and Daniel Webster College, Inc. [5980].

² Capitalized terms used but not otherwise defined herein shall have the meanings used in the Motion.

The Court, having considered the Motion and having convened a hearing on July 15, 2020, being otherwise duly advised in the premises and after due deliberation and consideration of the records in this case and the Adversary Proceeding, determines that the Motion should be, and hereby is, GRANTED. Accordingly,

IT IS THEREFORE ORDERED as follows:

1. The Motion is GRANTED in its entirety.
2. The Trustee is authorized and directed to take all actions required under the Settlement Agreement and all such actions are hereby approved.
3. Pursuant to the standards set forth under Bankruptcy Rule 9019, the Court finds that the proposed Settlement Agreement is fair, reasonable, adequate and within the range of reasonable settlements.
4. The automatic stay pursuant to section 362 of the Bankruptcy Code is hereby lifted for the sole purposes of allowing the setoffs as described in the Settlement Agreement.
5. The Trustee is hereby authorized to make the payments as described in the Motion and in the Settlement Agreement via wire transfer.
6. The Trustee's right to bring a motion within six (6) months of the date of the Settlement Agreement for the Trustee Tax Expense under sections 326, 330 or 506(c) of the Bankruptcy Code for compensation and reimbursement of her expenses in challenging the IRS Prepetition Claims, including the IRS's prepetition claims for income tax liabilities for 2010, 2011, and 2012, is hereby reserved and the United States, solely on behalf of ED, CMS and the VA, have waived any objection to any motion filed by the Trustee in this case to allow the Trustee Tax Expense in the aggregate sum of not more than \$550,000; provided however, this waiver does not affect any right of the office of the United States Trustee.

7. After the DOJ sets off, on behalf of ED, CMS and the VA, their respective portion of the Tax Refund Balance and the amount each received from the \$569,000 delivered by the Trustee to the DOJ against their allowed proofs of claim, the United States shall retain any other setoff rights, excluding those to funds transferred from the Reserve Account, and the following agencies' claims shall be reduced and allowed as follows:

- (a) ITT EDPOC shall be allowed as a general unsecured claim in the amount of \$283,782,751.00;
- (b) The DWC EDPOC shall be allowed as a general unsecured claim in the amount of \$1,544,738.11;
- (c) The CMSPOC shall be allowed as a general unsecured claim in the amount of \$79,917.46;
- (d) The VAPOC asserted against ITT shall be allowed as a general unsecured claim in the amount of \$2,946,463.35;
- (e) The VAPOC asserted against ESI shall be allowed as a general unsecured claim in the amount of \$3,011,015.88; and
- (f) The EDPOCs, the CMSPOC, and the VAPOCs shall be disallowed to any extent they exceed the amounts detailed above and the Additional VAPOCs shall be disallowed in their entirety.

7. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order will be effective immediately and enforceable upon entry of this Order.

8. This Court shall retain jurisdiction to interpret and to construe, and to implement and to enforce the terms of, the Settlement Agreement and this Order.

###

EXHIBIT 2

[Settlement Agreement]

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered, by and between Deborah J. Caruso, not individually but solely in her capacity as Chapter 7 trustee (“Trustee”) for, and acting for and on behalf of ITT Educational Services, Inc. (“ITT”), ESI Service Corp. (“ESI”) and Daniel Webster College, Inc. (“DWC”) (ITT, ESI and DWC, together, the “Debtors”), and each of the Debtors’ respective bankruptcy estates (the “Estates”), on the one hand, and the United States of America (“United States”), acting through the United States Department of Justice (“DOJ”) and on behalf of the Department of Education (“ED”), the Centers for Medicare and Medicaid Services (“CMS”), and the U.S. Department of Veteran Affairs (“VA”) (each party referenced above is a “Party” and all parties referenced above are, collectively, the “Parties”).

RECITALS

On September 16, 2016 (the “Petition Date”), the Debtors each filed voluntary petitions for relief under Chapter 7 of Title 11 of the United States Code (11 U.S.C. §§ 101, *et. seq.*, the “Bankruptcy Code”) in the United States Bankruptcy Court for the Southern District of Indiana (the “Bankruptcy Court”), which petitions are being jointly administered by the Bankruptcy Court under Case No. 16-07207-JMC-7A (the “Bankruptcy Case”);

On or about March 13, 2017, the United States filed a Proof of Claim on behalf of ED in the ITT case (Claim No. 3047 filed in Case No. 16-07207), in the amount of \$230,518,448.49, plus unliquidated amounts, exclusive of interest and other charges (the “ITT EDPOC”);

On or about March 13, 2017, the United States filed a Proof of Claim on behalf of ED in the DWC case (Claim No. 497 filed in Case No. 16-07209), in the amount of \$1,544,738.11, plus unliquidated amounts, exclusive of interest and other charges (the “DWC EDPOC,” and together with the ITT EDPOC, the “EDPOCs”);

On or about March 13, 2017, the United States by and through the CMS filed a Proof of Claim in the ITT case (Claim No. 3048 filed in Case No. 16-07207), in the amount of \$91,580.70 for the unpaid balance of reinsurance contributions as required by the Patient Protection and Affordable Care Act (the “CMSPOC”);

On or about March 14, 2017, the United States by and through the VA filed Proofs of Claim in the ITT case and the ESI case (Claim No. 3054 filed in Case No. 16-07207 and Claim No. 604 filed in Case No. 16-07208), each in the amount of \$3,668,734.12 for education benefits paid by the VA to ITT for student beneficiaries in the fall quarter of 2016, which ITT failed to return when it ceased operations (the “VAPOCs”);

On or about June 5, 2017, the United States by and through the VA filed seventeen (17) additional Proofs of Claim in the ITT case (Claim Nos. 3272, 3276, 3278, 3279, 3282, 3283, 3284, 3285, 3286, 3287, 3288, 3289, 3290, 3291, 3292, 3293 and 3294 all filed in Case No. 16-07207), in the total combined amount of \$100,088.53 for education benefits paid by the VA to ITT for student beneficiaries in the fall quarter of 2016, which ITT failed to return when it ceased operations (the “Additional VAPOCs”);

The United States asserts a right to setoff for all the claims asserted above to the extent that agencies of the United States owe amounts to ITT;

The Estates asserted prepetition claims against the VA in the amount of \$215,937.79 (the “VA Check Claim”) for checks payable to the Debtors that were canceled because those checks were not negotiated within one year from the date of issuance;

The VA disputes the amounts asserted in the VA Check Claim and contends that the amount owed for the VA Check Claim is \$102,718.24;

ED asserts that the amount estimated to be due currently under the ITT EDPOCs has increased to over \$440 million, including interest and other charges;

On or about September 7, 2018, the Trustee commenced an adversary proceeding in the Bankruptcy Court, captioned *Deborah J. Caruso, as Chapter 7 Trustee for ITT Educational Services, Inc., ESI Service Corp. and Daniel Webster College, Inc. v. United States Department of Education*, Adv. Proc. No. 18-50271 (the “Adversary Proceeding”), asserting claims against ED, *inter alia*, to recover two transfers into escrow (the first in the amount of approximately \$79,707,879 made on or about December 17, 2015 and the second in the amount of approximately \$14,646,101 made on or about July 20, 2016) on the grounds that: (a) such transfers constituted voidable preferences under section 547 of the Bankruptcy Code; (b) such transfers constituted fraudulent transfers under sections 544, 548, 550 and 551 of the Bankruptcy Code and sections 32-18-2-14(2) of Indiana’s Uniform Fraudulent Transfer Act; and/or (c) ED fraudulently induced the Debtors to make such transfers. In addition, the Trustee asserted claims for breach of the September 15, 2014 and October 24, 2014 Program Participation Agreements, breach of an escrow agreement, negligence, unjust enrichment and disallowance or, in the alternative, equitable subordination of the EDPOCs pursuant to sections 502(e)(1) and 510(c) of the Bankruptcy Code;

ED denies any fault, wrongdoing and liability in connection with the claims alleged in the Trustee’s complaint in the Adversary Proceeding;

The Estates contend that they are due a refund from the Internal Revenue Service (the “IRS”) of approximately \$6,960,635.52 for the 2015 tax year (the “2015 Tax Refund”);

On January 15, 2020, the Bankruptcy Court granted the IRS’s motion to terminate the automatic stay for the limited purpose of allowing the IRS to offset its prepetition claims against the Debtors (the “IRS Prepetition Claims”);

The United States is holding overpayments in an amount of the difference between the 2015 Tax Refund and the allowed IRS Prepetition Claims (the “Tax Refund Balance”);

The United States and all applicable United States agencies assert setoff rights against the Tax Refund Balance;

The Trustee disputes the setoff rights of United States agencies other than the IRS with respect to the Tax Refund Balance;

In connection with the Tax Refund Balance, the Trustee reserves rights to bring a motion within six months of the date of this Agreement in the Bankruptcy Case for expenses (“Trustee Tax Expense”) under sections 326, 330 or 506(c) of the Bankruptcy Code for compensation and reimbursement of her expenses in challenging the IRS Prepetition Claims;

The Parties have concluded that it is in their respective best interests to resolve their disputes and related matters on the terms set forth in this Agreement, without any Party admitting any liability therefor;

Each of the Parties believes that the compromise and settlement provided herein is fair and reasonable, and in their respective best interests;

The Parties each have consulted with their respective counsel in connection with the matters related to the subject matter of this Agreement; and,

The foregoing recitals do not reflect all of the facts and circumstances and/or all of the legal and factual arguments or contentions of the Parties regarding the matters concluded by this Agreement and/or that led up to the execution of this Agreement.

NOW, THEREFORE, the Parties agree as follows:

1. **Conditions Precedent to Effectiveness of Agreement.**

a. Other than as set forth in this Section, the effectiveness and enforceability of this Agreement against the Parties is subject to and conditioned on: (i) all of the Parties having executed this Agreement; and (ii) the entry of a final order by the Bankruptcy Court approving this Agreement and modifying the automatic stay for parties to effectuate this Agreement. The occurrence of the last of the above to occur shall constitute the “Effective Date.” For purposes of this Agreement, “final order” means an order of the Bankruptcy Court, as entered on the docket of the Bankruptcy Court, the operation or effect of which has not been stayed, reversed, vacated, modified or amended, and as to which order the time to appeal has expired and as to which no appeal or motion for stay or other relief from such order was filed or, if filed, remains pending; provided, however, that the possibility that a motion may be filed pursuant to Rules 9023 or 9024 of the Federal Rules of Bankruptcy Procedure beyond the time to appeal shall not mean that an order is not a final order.

b. In the event this Agreement is not approved by the Bankruptcy Court then: (i) to the extent reasonably practicable, the Parties shall be restored to their respective positions as of the date of this Agreement with all of their respective claims and defenses preserved as they existed on that date; and (ii) except for the provisions of this Section 1(b), the terms and provisions of this Agreement shall be null and void and shall have no further force or effect with respect to the Parties, and neither the existence nor the terms of this Agreement (nor any negotiations preceding this Agreement nor any acts performed pursuant to, or in furtherance of this Agreement) shall be used in any action or proceeding for any purpose.

2. **ED Settlement Payment and Its Distribution.**

a. No later than the five (5) business days after the Effective Date, ED shall deliver to the Trustee, via funds transfer according to transfer instructions provided by the Trustee, the sum of Twenty-Nine Million dollars (\$29,000,000.00) (the “ED Settlement Payment”), representing a portion of the funds transferred by ITT into escrow prior to the Petition Date. The day on which the Trustee receives the ED Settlement Payment shall be referred to as the “Receipt Date.” On the Receipt Date, the Trustee shall place the proceeds of the ED Settlement Payment in a separate reserve account (“Reserve Account”) and hold them in trust for distribution solely for the purposes, and in the sequence, specified in subsections (b) and (c) of this Section. The funds in the Reserve Account shall be treated as funds subject to setoff under sections 106(c) and 553 of the Bankruptcy Code by the United States, acting through the DOJ for the benefit of the CMS and VA, solely for purposes of the distributions described in subsection (b) of this Section, and such distributions shall not be subject to sections 724 and 726 of the Bankruptcy Code.

b. No later than five (5) business days after the Receipt Date, in respect of setoff rights of CMS and the VA for amounts in the Reserve Account, the Trustee shall deliver the sum of Five Hundred Sixty Nine Thousand dollars (\$569,000.00) to DOJ pursuant to funds transfer instructions that DOJ separately will provide to the Trustee.

c. After making the payment described in subsection (b) of this Section, the Trustee shall distribute all amounts remaining in the Reserve Account to the Estates’ general operating account for distribution on allowed claims and expenses in the priorities provided in the Bankruptcy Code, and as a result, the funds transferred from the Reserve Account shall then cease to be subject to setoff for the United States’ claims against the Debtors.

3. **VA Set-Off.** On the Effective Date, the VA shall be authorized to set off the VA Check Claim against claims asserted by the VA in the VAPOCs in the amount of One Hundred Two Thousand Seven Hundred Eighteen dollars and Twenty-Four cents (\$102,718.24), and the parties agree, subject to approval of this Agreement by the Bankruptcy Court, that the stay shall be lifted to allow for such setoff.

4. **Dismissal of the Adversary Proceeding.** No later than the fifth (5th) business day after the Receipt Date, the Trustee shall file, pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i) (as made applicable by Fed. Bankr. R. P. 7041), a notice of dismissal that causes the Adversary Proceeding to be dismissed with prejudice pursuant to the terms of this Agreement and with each Party to bear its own costs, expenses, and attorneys’ fees.

5. **Payment on Account of Agencies’ Set-Off Rights With Respect to the Reserve Account and the 2015 Tax Refund.** The parties agree, subject to approval of the Bankruptcy Court, that the stay shall be lifted to allow DOJ to set off, on behalf of ED, CMS and the VA, their respective portion of the Tax Refund Balance and amounts delivered under Section 2(b) against their allowed proofs of claim as reflected in this Agreement.

6. **Trustee’s Fees and Expenses Relating to Tax Refund Balance.** The United States, solely on behalf of ED, CMS and the VA, waives any objection to any Trustee motion in

the Bankruptcy Case to allow the Trustee Tax Expense in the aggregate sum of not more than \$550,000; provided that this waiver does not affect any right of the office of the United States Trustee.

7. **Allowance of Claims of ED, CMS and VA and Reduction of These Agencies' Claims after Reserve Amount and Tax Refund Balance Applied.** After the setoff for which Section 5 provides, the United States shall retain any other setoff rights, excluding those to funds transferred from the Reserve Account as provided in Section 2(c), and the following agencies' claims shall be reduced and allowed as follows: (i) the ITT EDPOC shall be allowed as a general unsecured claim in the amount of \$283,782,751.00, (ii) the DWC EDPOC shall be allowed as a general unsecured claim in the amount of \$1,544,738.11; (iii) the CMSPOC shall be allowed as a general unsecured claim in the amount of \$75,917.46; (iv) the VAPOC asserted against ITT shall be allowed as a general unsecured claim in the amount of \$2,946,463.35, and (v) the VAPOC asserted against ESI shall be allowed as a general unsecured claim in the amount of \$3,011,015.88. The EDPOCs, the CMSPOC, and the VAPOCs shall be disallowed to any extent they exceed the amounts detailed in the immediately preceding sentence. The Additional VAPOCs shall be disallowed in their entirety.

8. **Release by the Debtors.**

a. Subject to and conditioned upon the occurrence of the Effective Date and receipt of all payments by the Trustee as provided in this Agreement, the Estates and the Debtors hereby fully and unconditionally release, remise, acquit and forever discharge ED, CMS, and the VA and any of their past, present and future agents, attorneys, employees, representatives, assigns and beneficiaries, each in his, hers or its capacity as such (the "United States Released Parties") from any and all claims, causes of action, or liabilities whether known or unknown, fixed or contingent that may exist as of the Petition Date until the Effective Date, including but not limited to claims that (i) the Trustee has asserted in the complaint filed in the Adversary Proceeding, (ii) arise out of or are related to the circumstances giving rise to the Adversary Proceeding, whether or not asserted in the Adversary Proceeding, (iii) arise out of or are related to any agreements between ED and the Debtors, (iv) arise out of or are related to ED's, CMS's, or VA's conduct with respect to the Debtors, or (v) are related checks payable to the Debtors that were canceled because the checks were not negotiated within one year from the date of issuance (collectively, the "Estates Released Claims").

b. The Trustee, on behalf of the Debtors, represents, warrants and covenants that the Debtors have not assigned any or all of the Estates Released Claims as against any United States Released Party, and shall not directly or indirectly (including derivatively) assert any Estates Released Claim or seek to enforce any judgment obtained on any Estates Released Claim against any United States Released Party.

c. With respect to the Estates Released Claims, the Trustee, on behalf of the Debtors and the Estates, expressly waives any and all rights that the Estates may have under any applicable statute or doctrine or principle of law restricting the release of claims that a releasor does not know or suspect to exist at the time of executing a release, which claims, if known, may have materially affected the releasor's decision to give the release. In connection with this waiver and relinquishment, the Trustee is aware that she may hereafter discover claims currently

unknown or unsuspected, or facts in addition to or different from those that she now knows or believes to be true with respect to the matters released herein. Nevertheless, it is the joint intention of all Parties to the Agreement that the Agreement and this release shall settle each and every claim, dispute, and controversy, known or unknown, fixed or contingent, that the Debtors and the Estates have or may have against the United States Released Parties. In furtherance of this intention, the release given hereunder, on behalf of the Debtors and the Estates, shall remain in effect as full and complete releases notwithstanding the discovery or existence of any facts or claims.

d. Notwithstanding the foregoing, nothing in the preceding subsections of this Section shall apply to the performance or enforcement of obligations created by this Agreement.

e. Nothing in this Agreement shall be deemed to release, remise, acquit or discharge any claims, causes of action, liability, borrower defense claims, closed school claims or any other claims held by former students of ITT or DWC, including but not limited to, the class of students certified in the Bankruptcy Case.

9. **Release by ED, CMS, and VA.**

a. Subject to and conditioned upon the occurrence of the Effective Date and receipt of all payments by the United States as provided in this Agreement and the limitations in subsection (e) of this Section, the United States fully and unconditionally releases, remises, acquits and forever discharges the Trustee (acting in her capacity as Trustee), the Debtors, and the Estates (the "Trustee Released Parties") from any and all claims, causes of action, or liabilities whether known or unknown, fixed or contingent that may exist as of the Petition Date until the Effective Date (collectively, the "US Released Claims"), except for claims that have been allowed under this Agreement.

b. The United States, acting through the United States Department of Justice and on behalf of ED, CMS, and VA, represents, warrants and covenants that it has not assigned any or all of the US Released Claims as against any Trustee Released Party, and shall not directly or indirectly (including derivatively) assert any US Released Claim or seek to enforce any judgment obtained on any US Released Claim against any Estates Released Party.

c. With respect to the US Released Claims, the United States, acting through the United States Department of Justice and on behalf of ED, CMS, and VA, expressly waives any and all rights that ED, CMS and VA may have under any applicable statute or doctrine or principle of law restricting the release of claims that a releasor does not know or suspect to exist at the time of executing a release, which claims, if known, may have materially affected the releasor's decision to give the release. In connection with this waiver and relinquishment, the United States, acting through the United States Department of Justice and on behalf of ED, CMS, and VA, is aware that it may hereafter discover claims currently unknown or unsuspected, or facts in addition to or different from those that it now knows or believes to be true with respect to the matters released herein. Nevertheless, it is the joint intention of all Parties to the Agreement that the Agreement and this release shall settle each and every US Released Claim. In furtherance of this intention, the release given hereunder, or on behalf of ED, CMS and VA, shall

remain in effect as full and complete releases notwithstanding the discovery or existence of any facts or claims.

d. Notwithstanding the foregoing, nothing in the preceding subsections of this Section shall apply to the performance or enforcement of obligations created by the Agreement, or any distribution to ED, VA or CMS on account of their revised proofs of claim pursuant to Sections 3, 4, or 7.

e. Notwithstanding the releases granted under this Section, nothing in this Agreement shall be deemed to release, remise, acquit or discharge any claims, causes of action, or liability that could be asserted by any agency of the United States other than ED, VA or CMS, or claims relating to: (a) any liability arising under Title 26, United States Code (Internal Revenue Code); (b) any criminal liability; (c) any claims, rights or defenses arising under 31 U.S.C. §§ 3729-33 (False Claims Act), 31 U.S.C. §§ 3801 et seq. (Program Frauds Civil Remedies Act), or any common law cause of action for fraud; or (d) any liabilities asserted in any proofs of claim (other than the EDPOCs, the VAPOCs, and the CMSPOC) filed by the United States or its agencies.

10. **Authority of Parties.**

a. Each Party hereby represents and warrants that she or it has full authority to enter into this Agreement, including the releases in Sections 8 and 9, subject to the provisions of Section 1.

b. Each person executing this Agreement represents that he or she (i) is fully competent to execute this Agreement, (ii) is over eighteen (18) years of age, (iii) is not a person for whom a guardian has been appointed with authority to conduct property and business transactions, including this Agreement, (iv) can read and understand English, and (v) if applicable, is fully authorized to sign this Agreement on behalf of the Party on whose behalf they are signing.

11. **No Admissions/Inadmissibility.** Nothing in this Agreement shall constitute a finding or admission of wrongdoing or violation of law by any Party. This Agreement shall not be admissible in any proceeding except to enforce its terms. Nothing in this Agreement and the settlement provided for herein, whether or not consummated, shall constitute or be construed as evidence of or a finding or admission of wrongdoing, liability or violation of law by any Party. Each of the Parties understands and agrees that this Agreement, the negotiations surrounding this Agreement, any payments made in relation to this Agreement, and any evidence relating thereto shall not constitute, be construed as, or be offered or received into evidence for any reason other than for purposes of enforcing this Agreement.

12. **Severability.** If any provision hereof should be held invalid, illegal or unenforceable in any respect by a tribunal of competent jurisdiction in any jurisdiction, then, to the fullest extent permitted by law, the Parties shall add as part of this Agreement a provision as similar in terms to such invalid, illegal or unenforceable provision as may be possible that is

legal, valid and enforceable.

13. **Good Faith.** The Parties agree that this Agreement was negotiated in good faith by the Parties, and reflects a settlement that was reached voluntarily after consultation with each of the Parties' legal counsel.

14. **Counterparts.** This Agreement may be executed in one or more counterparts, by facsimile, electronic mail or other means acceptable to the Parties, with each counterpart to be considered an original portion of this Agreement, all of which taken together shall constitute one and the same instrument.

15. **Entire Agreement.** This Agreement integrates the whole of all agreements and understandings of any sort or character between the Parties concerning the subject matter of the Agreement and supersedes all prior negotiations, discussions, or agreements of any sort whatsoever, whether oral or written, concerning the subject matter of the Agreement. There are no representations, agreements or inducements relating to the subject matter hereof, except as set forth expressly and specifically in this Agreement. With respect to the subject matter of this Agreement, the rights of the parties against one another shall be governed exclusively by this Agreement and applicable law. There are no conditions precedent or subsequent to this Agreement, except as expressly stated herein. The Parties have no right to rely on any prior or contemporaneous representations made by anyone concerning this Agreement and have not so relied.

16. **Successors and Assigns.** This Agreement shall be binding upon, and inure to the benefit of, the successors of each of the Parties hereto, including any corporation or other entity into or with which any party merges, consolidates or reorganizes. This Agreement shall not be assignable by anyone without the express written consent of all of the Parties.

17. **Further Assurances.** Each Party will execute such documents and other instruments and take such further action as may be reasonably required or desirable to carry out the provisions of this Agreement and the transactions contemplated by this Agreement.

18. **Costs.** Each Party shall bear her or its own costs and attorneys' fees in connection with the preparation, negotiation, review, and documentation of this Agreement, with respect to all matters subject to this Agreement, and with respect to the Adversary Proceeding.

19. **Governing Law and Jurisdiction.** This Agreement shall be governed by and construed in accordance with federal law. To the extent state law supplies the federal rule of decision, the law of Indiana shall provide the applicable state law without regard to any conflict of law provisions.

20. **Binding Effect.** This Agreement shall be binding upon each of the Parties and

shall inure to the benefit of the Parties.

21. **Headings.** Headings used herein are for convenience only and shall not in any way affect the construction of, or be taken into consideration in interpreting, this Agreement.

22. **Rules of Interpretation.** Except as otherwise specified in this this Agreement, each of its references to a “Section” are to numbered Sections of this Agreement. The Parties acknowledge and agree that each has been given the opportunity to review this Agreement with their respective legal counsel and agree to the particular language in each provision herein. In the event of an ambiguity in or dispute regarding the interpretation of this Agreement, the interpretation of this Agreement shall not be resolved by any rule providing for interpretation against the party who causes the uncertainty or against the drafter. The Parties expressly agree that in the event of an ambiguity or dispute regarding the interpretation of this Agreement, the Agreement will be interpreted as if each party participated in the drafting hereof.

23. **Survival of Representations and Warranties.** All representations and warranties made in this Agreement shall survive the completion of the transactions contemplated by this Agreement.

24. **No Third Party Rights Created.** The Parties specifically disavow any intention to create rights in third parties under or in relation to this Agreement, except as otherwise expressly provided herein.

25. **Waiver, Amendments.** No waiver, amendment, alteration, modification or termination of any provision of this Agreement shall be binding unless made in writing and signed by the Parties. No Party may construe another Party’s conduct, or a course of conduct, inaction or failure to press that Party’s rights under this Agreement as a waiver of any of the rights or obligations under this Agreement.

26. **Notices.** Any and all notices required or permitted under this Agreement and any and all correspondence shall be in writing and shall be e-mailed, personally delivered, mailed by registered or certified mail, return receipt requested, or by overnight delivery to the Parties at the addresses set forth below, unless and until a different address has been designated by written notice to the other Settling Parties. A notice is deemed delivered (a) on the same day it is sent if via e-mail or personal delivery and received before 5:00 p.m. eastern time on that day; (b) on the next Business Day after it is sent if via overnight delivery or via email or personal delivery and received after 5:00 p.m. on the date of delivery; and (c) on the third (3rd) Business Day after it is sent if via registered or certified mail. Each Party may change the address by written notice in accordance with this Section.

Notice to the Trustee:

Ms. Deborah J. Caruso, Esq.
Rubin Levin, P.C.
135 N. Pennsylvania Street, Suite 1400
Indianapolis, Indiana 46204
Email: dcaruso@rubin-levin.net

With a copy to:

Rubin & Levin, P.C.
Attn: Meredith R. Theisen
135 N. Pennsylvania Street
Suite 1400
Indianapolis, IN 46204 60602
Telephone: (317) 860-2877
Facsimile: (317) 453-8602
Email: mtheisen@rubin-levin.net

Notice to the United States:

ED:
Natasha Varnovitsky
400 Maryland Ave, Ste 6E215, SW,
Washington, DC 20202

CMS:

Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244
Attention: Leslie M. Stafford
Office of the General Counsel
RM. C2-05-23

VA:
Julie Lawrence, Chief of Operations
VA Debt Management Center
1 Federal Dr Ste 4500
PO Box 11930
St. Paul, MN 55111

With a copy to:

Michael S. Tye, Esq.
U.S. Department of Justice

P.O. Box 875, Ben Franklin Station
Washington, D.C. 20044-0875

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the latest date set forth below.

United States of America
Department of Justice, Civil Division

X: _____

Name: Michael S. Tye

Title: Trial Attorney

Date: _____

**Deborah J. Caruso, in her capacity as Chapter 7
Trustee for ITT Educational Services, Inc., ESI
Service Corp. and Daniel Webster College, Inc.**

X: _____

Name: Deborah J. Caruso

Title: Trustee

Date: _____