IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 22-3073

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

and

KEVIN B. DUFF, in his capacity as receiver,
Appellee,

v.

EQUITYBUILD, INC., *et al.*,
Defendants.

APPEAL OF: FEDERAL HOUSING FINANCE AGENCY,
as conservator for Fannie Mae and Freddie Mac.

On Appeal from the United States District Court
for the Northern District of Illinois

APPELLANT'S JURISDICTIONAL STATEMENT
IN RESPONSE TO THE COURT'S DECEMBER 1, 2022 ORDER

Appellant the Federal Housing Finance Agency ("FHFA"), in its capacity as Conservator of Fannie Mae and Freddie Mac (the "Enterprises"), and the Enterprises jointly and respectfully submit this Jurisdictional Statement in response to the Court's December 1, 2022 Order (No. 22-3073, Dkt. 3), requesting "a more detailed discussion addressing [the] claim that the basis for appellate jurisdiction rests on 28 U.S.C. § 1292(a)."

This Court has jurisdiction over this appeal under § 1292(a)(1), because the district court denied FHFA's request for an order that would have had the practical effect of an injunction. Specifically, FHFA sought an order that would have precluded Kevin B. Duff, in his capacity as receiver of EquityBuild Inc., et al. ("Duff"), from appropriating assets in which FHFA has a federally protected interest to compensate Duff and reimburse his costs. Although FHFA did not move under Rule 65 or use the word "enjoin" or "injunction" in its request, the order FHFA sought would, as a practical matter, have had the effect of an injunction: It would have forbidden a specific party from taking specific actions in relation to specific property in which FHFA as conservator holds a legally protected interest enacted by Congress specifically to protect the assets of the Enterprises while under federal conservatorship. A magistrate judge denied FHFA's request that Enterprise assets be protected from dissipation—which protection Congress clearly intended, and the district court affirmed the magistrate judge's ruling; FHFA timely appealed to this Court.

It is black-letter law that an "injunction is a court order that may command or prevent virtually any type of action," and that an "order to … refrain from undertaking a particular action may be considered an injunction even though it is not labelled as such." 43A C.J.S. Injunctions § 1 (Nov. 2022 update). That description fits the order FHFA sought like a glove, and the district court's denial radically changed FHFA's and Duff's legal relationship concerning the property at issue, negating statutory protections Congress granted FHFA. This Court therefore has

jurisdiction over this appeal under § 1292(a)(1).

RELEVANT BACKGROUND

This appeal concerns two properties that were part of a receivership sought by the SEC and granted by the district court in the wake of a Ponzi scheme and that were encumbered by Enterprise-owned mortgages (the "Enterprise Properties"). At all relevant times, each Enterprise has operated under FHFA conservatorship. As Conservator, FHFA has statutory powers under the Housing and Economic Recovery Act of 2008 ("HERA"), to, among other things, preserve and conserve the Enterprises' assets and to collect on obligations due the Enterprises. *See* 12 U.S.C. §4617(b)(2)(B).

In 2020, Duff, with the district court's authorization, sold all properties in the receivership, including the Enterprise Properties, depositing the proceeds into separate accounts corresponding to the individual properties. Each Enterprise was granted a lien against the corresponding account that was equivalent to its pre-sale interest in the real estate. Dkt. 618 at 40-43, Dkt. 681. Critically, these property-specific accounts were not commingled; each holds *specific* funds subject to *specific* liens.

In due course, Duff moved to allocate certain accrued fees and costs to specific properties and to receive an interim payment from the corresponding accounts, including the two accounts representing the Enterprise Properties. Dkt. 1107. Due to the nature of the accounts, Duff effectively sought to *transfer property* without FHFA's consent, not to be awarded a money judgment.

FHFA and the Enterprises objected to any allocation of fees to the accounts corresponding to the Enterprise Properties, because doing so would dissipate the Enterprises' collateral and thereby violate FHFA's statutory powers under HERA to collect on the obligations secured by the properties and to preserve and conserve the Enterprises' assets. Dkt. 1209; *see also* 12 U.S.C. §§ 4617(f), 4617(b)(2), 4617(j)(3). A magistrate judge heard FHFA's objections and overruled them. Dkt. 1258. FHFA timely objected to the magistrate judge's decision, and on October 17, 2022, the district court issued an oral ruling (the "Ruling") affirming the magistrate judge's order, albeit on slightly different grounds. Dkts. 1266, 1325, 1327.

FHFA moved for certification of the Ruling under § 1292(b), Dkt. 1334, and at the same time timely noticed an interlocutory appeal of the Ruling under § 1292(a), Dkt. 1336. On December 1, 2022, the Court ordered FHFA to provide a more detailed discussion addressing its claim that the basis for appellate jurisdiction rests on 12 U.S.C. § 1292(a). No. 22-3073, Dkt. No. 3. On December 21, 2022, the district court denied FHFA's motion for certification under 12 U.S.C. § 1292(b) of the district court's same underlying ruling. Dkt. No. 1358. Upon FHFA's request, this Court extended the deadline for FHFA to provide this jurisdictional statement to January 6, 2023. No. 22-3073, Dkt. No. 9.

STATEMENT OF JURISDICTION

The Court has jurisdiction over the currently pending appeal under § 1292(a)(1) because the Ruling is an interlocutory order with a practical effect that is functionally equivalent to denying an injunction. *See, e.g., Jamie S. v. Milwaukee*

Pub. Sch., 668 F.3d 481, 490 (7th Cir. 2012); *Jones-El v. Berge*, 374 F.3d 541, 543-44 (7th Cir. 2004). That is, § 1292(a)(1) grants the courts of appeals "jurisdiction of appeals from … [i]nterlocutory orders … granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions …." Critically, substance overrides form: § 1292(a)(1) provides appellate jurisdiction over orders that "have the *practical effect* of granting or denying injunctions and have serious, perhaps irreparable, consequence." *Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271, 287–88 (1988) (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981)) (emphasis added). Put somewhat differently, "[a]n order 'is properly characterized as an "injunction" when it substantially and obviously alters the parties' preexisting legal relationship.'" *USA Gymnastics v. Liberty Ins. Underwriters, Inc.*, 27 F.4th 499, 511 (7th Cir. 2022) (quoting *Jamie S.*, 668 F.3d at 490).

This Court has confirmed that mandatory interlocutory orders that "effectively grant or withhold the relief sought on the merits and affect one party's ability to obtain such relief in a way that cannot be rectified by a later appeal" satisfy the "practical effect" test. *Jamie S.*, 668 F.3d at 489-90 ((quoting *In re City of Springfield, Ill.,* 818 F.2d 565, 567 (7th Cir.1987)) (finding appellate jurisdiction to review district court's "lengthy order setting forth an elaborate court-monitored remedial scheme" to address school district's IDEA violations). Likewise, this Court has determined that § 1292(a)(1) provided appellate jurisdiction to review a district court's post-judgment order because "without an immediate appeal, the defendants would have to comply

with the order and incur substantial costs, and would therefore suffer serious irreparable harm." *Jones-El*, 374 F.3d at 544. The imposition of "serious financial … uncertainty" is sufficient to constitute "serious and irreparable harm." *USA Gymnastics*, 27 F.4th at 511; *see also Am. Hosp. Supply Corp. v. Hosp. Prod. Ltd.*, 780 F.2d 589, 596 (7th Cir. 1986) (observing that "defendant's insolvency is a standard ground for concluding that a plaintiff's harm …. will not be cured by an award of damages at the end of the trial").

That reasoning applies here: The Ruling negated statutory protections Congress granted FHFA based on specific circumstances related directly to the Enterprises and their serious financial peril stemming from the Great Recession of 2008. That is, "[c]onsistent with Congress's mandate that FHFA's Director protect the 'public interest,' the Recovery Act invested FHFA as conservator with the authority to exercise its statutory authority and any 'necessary' 'incidental powers' in the manner that 'the Agency [FHFA] determines is in the best interests of the regulated entity or the Agency.'" *Perry Cap. LLC v. Mnuchin*, 864 F.3d 591, 600 (D.C. Cir. 2017) (internal citations omitted). In so doing, the Ruling fundamentally altered the pre-existing legal relationship between FHFA and Duff as it concerns the property at issue. Because Duff's proposed fee allocation effectively authorizes him to override FHFA's statutory protections and to extinguish FHFA's rights in at least a portion of that property, FHFA's efforts to prevent the allocation are substantively identical to analogous efforts seeking to enjoin a dispossession.

The harm resulting from leaving the Ruling in place would be irreparable to the conservatorship estates of the Enterprises, and ultimately to the American taxpayers, because erroneous allocations and distributions may as a practical matter be impossible to undo through a post-judgment appeal. In part, that is because the receivership's assets will already have been exhausted at that point, and clawing back distributions made over what is likely to be a period of years is vanishingly unlikely. For example, on December 28, 2022, the district court approved the distribution to certain claimants-lienholders of all funds corresponding to two non-Enterprise properties, after deduction for Duff's allocated fees and expenses. *See* Dkt. 1363, 1364. The allocated fee amount would necessarily be different if FHFA's objection had been sustained, yet those funds will soon be distributed out of the accounts controlled by Duff. *See* Dkt. 1330, 1363, 1364.

Put somewhat differently, Duff's proposed—and now enforced—fee allocation would have the effect of diminishing Enterprise-owned security interests in funds on deposit in specific accounts; by objecting to these fee allocations (Dkt. 1209), FHFA effectively sought to enjoin them and maintain the status quo of those accounts. That FHFA's interest is now a security interest in money—sale proceeds—rather than real property does not alter this result.[1] FHFA's existing interest is a *secured* interest in *specific* accounts. If the district court's Ruling stands and funds are distributed out

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[1] For purposes of this appeal, FHFA does not address the underlying failure to obtain its consent, as conservator, to sell the properties subject to Enterprise liens. That said, FHFA reserves and does not waive all rights and claims it and its conservatees may have in the event the liens are not satisfied in their entireties.

of the accounts, FHFA would likely be left with only a claim against Duff—an almost-certainly worthless *unsecured* interest in *unspecified* assets. Congress unequivocally did not intend for such to happen when it enacted HERA. *See* 12 U.S.C. §§ 4617(f), 4617(b)(2), 4617(j)(3). Because the receivership's liabilities *already* exceed its assets, the risk of irreparable harm—that FHFA will incur a loss with little if any realistic possibility of recompense after the fact—is obvious and material. *See, e.g.,* Dkt. 638, at 8, 18-20; Dkt. 720, at 1; Dkt. 107, at 10. At an absolute minimum, the district court's order created "serious financial … uncertainty" sufficient to constitute "serious and irreparable harm." *USA Gymnastics*, 27 F.4th at 511.

This Court's decision in *In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294 (7th Cir. 1997) illustrates this point. There, a corporation that manufactured insulation products, some of which included asbestos, filed for bankruptcy. *Id.* at 1297. The bankruptcy court determined that, after the manufacturer paid off other claims against it, its remaining assets were to be deposited in a trust, "which would hold assets for the payment of asbestos-related property damage and present and future personal injury claims. . . ." *Id.* In due course, the trustee divided the trust into two accounts: one to be used to pay the claims of "present claimants," and another to be used to compensate "future claimants." *Id.* Plaintiffs, whose "present" claims had been denied by the trustee, sought a stay on disbursements from the "present claimant reserve" in order "to ensure that there were adequate remaining funds available to pay the costs of defending or settling lawsuits brought by rejected claim

holders and to pay initially rejected claims later deemed to be allowed." *Id.* at 1298. The district court denied plaintiffs' motion to stay. *Id.*

Ultimately, this Court determined that § 1292(a)(1) permitted the appeal of the district court's denial of plaintiff's motion to stay. Specifically, this Court reasoned that, if the distribution was "not stayed, and if the Claimants are ultimately successful in proving their claims allowable under the Plan, the balance of [the] Trust Account will be so depleted that the Claimants' will have little hope of receiving the same payment as other initially allowed present claimants." *Id.* at 1300. "This possibility," therefore, created a "risk of serious consequence" that provided appellate jurisdiction under § 1292(a)(1). *Id.*

So too here. Absent interlocutory appeal, more fees will be allocated and additional funds disbursed in a series of iterative steps that each depends on the correctness of all previous steps. Getting these first allocations right is therefore vitally important, as any error would propagate through the entire series, making it virtually impossible to correct at the end of the case without additional litigation. Extensive calculations would need to be erased and done over, and countless disbursements would need to be clawed back and redistributed according to the corrected calculations.

The district court's contrary analysis (*see* Dkt. 1358) does not refute this conclusion. In essence, the district court held that the allocations subject to FHFA's statutory protections were too small to warrant further attention. That is, in its denial of the § 1292(b) motion for certification, the district court merely noted its

"disagree[ment]" with FHFA's argument "that allocations are iterative, and a mistake now must be corrected to prevent compounding the errors through a series of distributions that will be difficult to unwind." *Id.* at 2. But the district court failed to provide any plausible explanation for its disagreement. *See id.* Instead, the district court offered only the conclusory assertion that the allocations FHFA disputed "deal with a small slice of the pie and will not affect the many millions of dollars at issue with other accounts." *Id.*

That assertion cannot be true. Whether a small slice or not, federal law undeniably protects any piece of that pie under HERA. If FHFA's objection is sustained and fees cannot be allocated to the Enterprise Properties, the fees already putatively allocated to the Enterprise Properties will have to be reallocated, which will necessarily affect all of the existing and future fee allocations. The district court's lack of supporting analysis is particularly striking in light of the fact that *funds are already being distributed* based on allocations that would plainly be incorrect if FHFA's objection is sustained (*see* Dkt. 1330, 1363, 1364)—indicating that "risk of serious consequence" is indisputably present if appellate jurisdiction is not granted. *See Forty-Eight Insulations*, 115 F.3d at 1300.[2]

The practical problems with seeking to recover and redistribute millions of dollars in cash disbursements—surely, in many instances, years after the fact—are

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[2] To be clear, FHFA does not suggest that monies have already been drawn from the Enterprise accounts. Rather, FHFA only means to emphasize that proceeds already being disbursed to claimants, *see* Dkt. 1330, 1363, 1364, are being calculated based on the proposed fee allocations that would impermissibly deplete the Enterprise accounts.

obvious and daunting. For one thing, recipients may cease to exist, disappear, or go bankrupt during the pendency of the action, severely undermining the possibility of recovering any funds improperly distributed to them. It makes far more sense to settle FHFA's objection to the fee allocation at this stage, rather than wait until the end of the litigation to recalculate the allocations consistent with HERA. Indeed, the district court's decision to issue the Ruling in October, rather than waiting until the lien-priority stage of litigation, implicitly recognizes the benefit of resolving these issues at the outset. *See* Ruling at 27. Because the order will impose "serious irreparable harm," *see Jones-El*, 374 F.3d at 544, this Court has jurisdiction to hear this interlocutory appeal under § 1292(a).

CONCLUSION

For the foregoing reasons, this Court has jurisdiction over the currently pending appeal under § 1292(a)(1) because the Ruling is an interlocutory order with a practical effect that is functionally equivalent to denying an injunction.

Dated: January 6, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2023, I caused the foregoing **Appellant's Jurisdictional Statement in response to the Court's December 1, 2022 Order** to be electronically filed through the Court's CM/ECF system, which sent electronic notification of such filing to all parties of record.

/s/ Michael A.F. Johnson