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

FHFA'S OPPOSITION TO RECEIVER'S MOTION TO DISMISS APPEAL

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INTRODUCTION

Kevin B. Duff, in his capacity as receiver of EquityBuild Inc., et al. ("Duff"), incorrectly asks the Court to dismiss this appeal based on a red herring. Duff observes that this is a receivership case and argues that jurisdiction would not be proper under 28 U.S.C. § 1292(a)(2), which governs "[i]nterlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof."

But FHFA has not invoked § 1292(a)(*2*). Instead, FHFA grounds this appeal on § 1292(a)(*1*), which allows for interlocutory appeals of orders that have the practical effect of denying an injunction, as the district court's order did here.

Implicitly, Duff assumes that interlocutory orders in receivership cases can be appealed, if at all, *only* under § 1292(a)(2), but there is no hint of that in the statute, and neither this Court nor any other Court of Appeals has ever held it. Indeed, one of the cases Duff cites—*SEC v. Black*, 163 F.3d 188 (3d Cir. 1998)—positively refutes the proposition, as does this Court's decision in *People ex rel. Hartigan v. Peters*, 861 F.2d 164 (7th Cir. 1988), which Duff ignores.

Perhaps Duff—who submitted his motion two days *before* FHFA was due to file its Jurisdictional Statement (Dkt. 12, 13)—incorrectly assumed FHFA was relying on § 1292(a)(*2*). That would be inexplicable, as FHFA cited § 1292(a)(*1*) in its notice of appeal and its docketing statement. In any event, Duff's has put FHFA to the burden

of refuting an argument that is largely beside the point, and the Court will now have to address it.

The Court has jurisdiction under § 1292(a)(1) and should deny Duff's motion.

BACKGROUND AND PROCEDURAL HISTORY

This appeal concerns two properties that were swept into civil fraud action instituted by the SEC against defendants Equitybuild Inc. et al. In that action, the district court appointed Duff as receiver, to secure real estate and other assets; certain parcels 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. Each Enterprise was granted a lien against the corresponding account, 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*, 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 impermissibly 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.[1] 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), with the deadline later extended to January 6, 2023. No. 22-3073, Dkt. No. 3, 9. Later that month, the district court denied FHFA's motion for § 1292(b)

[1] Despite Duff's contrary contention, moving for certification under § 1292(b) is not inconsistent with taking an appeal under § 1292(a). *See* Wright & Miller, 16 Fed. Prac. & Proc. Juris. § 3929.1 (3d ed.).

certification. Dkt. 1358.

On January 4, 2023—two days *before* FHFA's jurisdictional statement was due—Duff filed a Motion to Dismiss Appeal. Dkt. 12. FHFA timely filed its jurisdictional statement January 6, 2023. Dkt. 13.

ARGUMENT

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 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 an interest that is protected by a statute enacted by Congress to safeguard the assets of the Enterprises while under federal conservatorship.

By overriding that unequivocal statutory protection, the district court's Ruling radically changed FHFA's and Duff's legal relationship concerning the property at issue, which under this Court's precedent is the hallmark of an order with the practical effect of an injunction. As a result, this Court has jurisdiction over this appeal under § 1292(a)(1). Duff's arguments about § 1292(a)(2) do not refute—or even

address—the Ruling's dispositively injunctive effect.

I. SECTION 1292(a)(2) DOES NOT PRECLUDE FHFA FROM APPEALING THE RULING UNDER § 1292(a)(1)

The premise behind Duff's motion—that § 1292(a)(2) provides the exclusive jurisdictional basis for interlocutory review of orders entered in a receivership case—is unfounded and incorrect. No one disputes that § 1292(a)(2) *allows* parties to appeal certain interlocutory orders related to receiverships before judgment. But, as an *enabling* statute, § 1292(a)(2) does not *prohibit* appeals of interlocutory orders in receivership cases if jurisdiction properly lies under § 1292(a)(1), or the collateral-order doctrine, or § 1292(b). The plain text of § 1292(a) makes this clear, and so does the case law interpreting it. Indeed, *Duff himself* points the Court to the *Black* case, in which the Third Circuit specifically held that orders lifting an asset freeze in a receivership case "constituted orders *modifying* an injunction, from which an interlocutory appeal is permissible under 28 U.S.C. § 1292(a)(1) …." 163 F.3d at 194 (emphasis in original). *See also* Mot. at 13.

And *Black* is no black swan—numerous other cases reach the same conclusion. *See, e.g.*, *SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 86-87 (2d Cir. 2002). The Eleventh Circuit's decision in *SEC v. Torchia* is right on point. *See* 922 F.3d 1307 (11th Cir. 2019). There, a district court entered an interlocutory order requiring a party "to either remit [certain funds] or assign [an insurance policy] to the receiver." *Id.* at 1314. The affected party sought to take an immediate appeal of the order, and the receiver objected that jurisdiction was lacking. The Eleventh Circuit rejected that

argument, holding that jurisdiction was proper under Section 1292(a)(1). *Id*. The same analysis applies here. This Court's precedential decision in *Peters* is also on point; there, the Court held that "[t]here is no question" an order relating to an injunction "is expressly appealable (without regard to finality) under 28 U.S.C. § 1292(a)(1)," notwithstanding that it was issued in a receivership case. 861 F.2d at 165.

A. The Plain Text of the Statute Establishes that § 1292(a)(2) Is Not the Exclusive Jurisdictional Basis For Interlocutory Review of Orders Entered in a Receivership Case

These decisions, and others like them, faithfully apply the statute's plain language, which makes clear that § 1292(a) is *not* the exclusive mechanism for interlocutory review of orders entered in a receivership case. Section 1292(a) provides that "the courts of appeals shall have jurisdiction of appeals" from each of the three discrete types of interlocutory orders identified in subsections (1), (2), and (3). 28 U.S.C. § 1292(a). The language "shall have jurisdiction" is quintessentially mandatory, not discretionary. *See Maine Community Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020); *U.S. v. Cook*, 432 F.2d 1093, 1098 (7th Cir. 1970). Since jurisdiction is mandatory, this means that any exceptions to jurisdiction in § 1292(a) must be explicit.

Looking first to § 1292(a)(1), there is only one express exception to jurisdiction, and that is "where a direct review may be had in the Supreme Court." 28 U.S.C. § 1292(a)(1). Duff has not argued that direct review may be had in the Supreme Court

and, thus, that exception does not apply. As a matter of basic statutory interpretation, the presence of that *express* exception means that additional, unstated exceptions—such as the one Duff proposes—cannot be *implied*. *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001).

Nor does § 1292(a)(*2*) include any language that revokes jurisdiction that would be present otherwise or otherwise supersedes the grant of jurisdiction in § 1292(a)(1). Instead, § 1292(a)(2) is phrased as an enabling statute that gives an immediate right of appeal for certain interlocutory orders involving receiverships, *without* stating that it is the only ground on which orders in receivership cases can be appealed or purporting to carve such orders out of other appeal-enabling provisions. As an enabling statute that *permits* otherwise-prohibited interlocutory appeals, § 1292(a)(2) does not *prevent* the appeal of an interlocutory order if jurisdiction properly lies under § 1292(a)(1) or (3). Although the language of § 1292(a) does not include "and" or "or" separating its three subsections, it is obvious that they must be disjunctive, otherwise interlocutory appeals would only be available for injunctive orders entered in admiralty receiverships. Since the provisions are disjunctive, none operates to the exclusion of any other.

An analogy to subject-matter jurisdiction in the district courts illustrates the point. One statutory provision, 28 U.S.C. § 1331, confers jurisdiction over cases "arising under the Constitution, laws, or treaties of the United States," while the adjacent provision, 28 U.S.C. § 1332(a), confers jurisdiction over cases between

citizens of different States where the matter in controversy exceeds $75,000. Consider a case in which a citizen of Illinois brings a federal-law claim against a citizen of Missouri, seeking a total damages award of $74,999. This is a near-miss under the diversity statute—complete diversity is present, but the amount in controversy is a dollar shy of the threshold. Would it be reasonable to infer that because the case approaches but barely misses qualifying for *diversity* jurisdiction, *federal-question* jurisdiction somehow becomes unavailable? Of course not—no one would argue that the case could not be brought in federal court under § 1331. Yet that is the result Duff's logic would compel; as such, Duff's logic is fallacious. It is no less fallacious in the context of the distinct grounds for *appellate* jurisdiction conferred by Sections 1292(a)(1) and 1292(a)(2)—a near miss under one provision does not disqualify a case from jurisdiction conferred by the other.

To argue the contrary, Duff claims a false slippery slope whereby allowing this appeal would "open [the Court]to a flood of appeals from these and other claimants on the basis that the District Court is refusing to rule their way and/or provide them immediate relief." Mot. at 12. Like most slippery-slope arguments, Duff's is overstated and incorrect, as an easily applicable limiting principle applies: To be appealable, the interlocutory order would need to have the practical effect of granting or denying an injunction to fall within § 1292(a)(1)).[2] The myriad district court

2 Not to mention that FHFA's appeal is specific to the statutory powers Congress conveyed to FHFA under HERA to, among other things, preserve and conserve the Enterprises' assets and collect on obligations.

rulings a court would make that *do not* have the practical effect of granting or denying an injunction—surely the great majority of rulings in the district court case here and virtually every other case—are not appealable now, and would not become appealable under FHFA's analysis.

B. Case Law Confirms that Jurisdiction Can Properly Lie Under § 1292(a)(1) in a Receivership Case

In light of the clear statutory language, it should come as no surprise that courts around the country—including this Court—agree that Section 1292(a)(2) is *not* the exclusive basis of jurisdiction for appeals of interlocutory orders in cases involving receiverships.

As noted above, this Court squarely held in *Peters* that "[t]here is no question" an order relating to an injunction "is expressly appealable (without regard to finality) under 28 U.S.C. § 1292(a)(1)," notwithstanding that it was issued in a receivership case. 861 F.2d at 165. This Court's decision is no outlier; as explained above, the Second Circuit in *Credit Bancorp*, the Third Circuit in *Black*, and the Eleventh Circuit in *Torchia*—to name just a few—agree on the point.

Similarly, in *SEC v. Wealth Mgmt. LLC*, 628 F.3d 323 (7th Cir. 2010), this Court concluded that it had jurisdiction over a "district court's order affirming the receiver's distribution plan" under the collateral-order doctrine because the order "satisfie[d] all three criteria" necessary "[t]o fall within the scope of this doctrine." *Id.* at 330. Were Section 1292(a)(2) the exclusive route to appellate jurisdiction over interlocutory orders in receivership cases, that decision would have come out

differently. Likewise, the Fifth and Sixth Circuits have held that the collateral-order doctrine provides jurisdiction over district court orders affirming a receiver's distribution plan. *See SEC v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 666–67 (6th Cir. 2001); *SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 330-31 (5th Cir. 2001). Not one of these courts concluded that because the order arose from a receivership case, § 1292(a)(2) was the only available source of jurisdiction over the receivership-related appeal—and, of course, each court had a responsibility to examine its jurisdiction *sua sponte* had any doubt existed. Evidently, none did.

Indeed, the opposite conclusion—the position Duff espouses—would make no sense. That is, § 1292(a)(2) allows for the immediate appeal of an interlocutory decision (1) appointing a receiver or (2) refusing orders to wind up receiverships or take steps to accomplish the purposes thereof. 28 U.S.C. § 1292(a)(2). But those are not the only kinds of orders granted in receivership cases—injunctions are routinely granted, too. *See, e.g., Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 999 F.2d 314, 316 (8th Cir. 1993). Under Duff's logic, if a receiver sought an injunction to prevent a bank from facilitating a party's attempt to abscond with receivership assets and the district court denied that request, the receiver would be barred from taking an interlocutory appeal. That would be absurd, and no decision supports it.[3]

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[3] It is true that interlocutory orders *appointing a receiver or expanding the scope of a receivership* are not appealable under Section 1292(a)(1), even though some might argue that such orders have an injunctive flavor. *See, e.g.*, *SEC v. Complete Bus. Sols. Group, Inc.*, 44 F.4th 1326, 1333 (11th Cir. 2022). But that is because the Supreme
[*Footnote continues on next page.*]

Duff's citation to *In re Saffady,* 524 F.3d 799 (6th Cir. 2008), Mot. at 9, does not alter this reality. That decision, in relevant part, involves an appeal of an order vacating the appointment of a receiver. *Saffady*, 524 F.3d at 803-04. Critically, the affected party there "did not [ever] demand injunctive relief" against the receiver. *Id.* at 804. But here, by contrast, FHFA *did* seek an order that was functionally injunctive—it would have prohibited the receiver from assessing and ultimately seizing property in which FHFA has an undisputed statutorily protected interest. Thus, unlike here, the appellant in *Saffady* argued that an order *dissolving the receivership* is akin to the modification of an injunction. *Id.* But, as the Sixth Circuit pointed out, § 1292(a)(*2*) expressly allows for interlocutory appeals of orders appointing receivers. *Id.* Thus, if an order dissolving a receivership modified an injunction, an order appointing a receiver would be akin to granting an injunction. *Id.* As such, allowing an appeal for an order dissolving a receivership would render § 1292(a)(2) superfluous because there would be no need to specifically permit the interlocutory appeal of an order appointing a receiver. *Id.* This appeal is different; FHFA is not challenging an order relating to the appointment of a receiver or

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Court has held that "[o]rders granting injunctions and orders *appointing receivers* are … entirely independent." *Id*. (quoting *Highland Ave. & B.R. Co. v. Columbian Equip. Co.*, 168 U.S. 627, 631 (1898)) (emphasis added). In that limited context, the more specific § 1292(a)(2) supersedes the more general § 1292(a)(1), *id*., but that is irrelevant here, as the Ruling *does not* appoint a receiver or expand the receivership's scope. As the *Torchia* case discussed above, *supra* at 5, confirms, the same circuit that decided *Complete Business Solutions* has unequivocally held that an "order requiring [a party] to … remit [specific funds] … to [a] receiver" is functionally an injunction and therefore appealable "under § 1292(a)(1)." 922 F.3d at 1314.

anything else addressed directly or by implication in Section 1292(a)(2)., Instead, FHFA's appeal falls well within the scope of § 1292(a)(*1*).

C. Duff's Remaining Arguments Fall Flat Because They Rely Solely on § 1292(a)(2)

Because § 1292(a)(2) does not prohibit appeals under § 1292(a)(1), Duff's remaining two arguments against jurisdiction are easily dispatched. *First*, Duff observes that the Seventh Circuit dismissed three appeals arising out of this receivership for "not falling under any jurisdictional exception." Mot. at 7-8. But none of those three dismissals is relevant here; each purported to invoke jurisdiction under 28 U.S.C. § 1292(a)*(2)*, not § 1292(a)*(1)*. *See* Order, *SEC, et al., v. Federal National Mortgage Association, et al.*, No. 20-3114, Dkt. 28 at 2; Order *SEC, et al., v. Ventus Holdings, LLC, et al.*, No. 20-3155, Dkt. 16 at 2; *SEC, et al., v. Ventus Holdings, LLC, et al.*, No. 21-2664, Dkt. 12 at 2. As explained above, FHFA is not seeking an appeal under § 1292(a)(2). Nor does FHFA contend that § 1292(a)(2) supports the appeal here. The matter at issue in those attempted appeals—whether jurisdiction was proper under § 1292(a)(2)—is simply not presented here.

Second, Duff highlights cases in which courts of appeals denied jurisdiction under 28 U.S.C. § 1292(a)(*2*). Mot. at 11-13. Critically, almost every case that Duff cites omits any analysis of jurisdiction under § 1292(a)(*1*).[4] Because most of these

[4] *See U.S. v. Antiques Ltd. P'ship,* 760 F.3d 668 (7th Cir. 2014); *SEC v. Wealth Mgmt. LLC*, 628 F.3d 323 (7th Cir. 2010); *SEC v. Enterprise Tr. Co.*, 559 F.3d 649 (7th Cir. 2009); *SEC v. Huber*, 702 F.3d 903 (7th Cir. 2012); *Duff v. Central Sleep* [*Footnote continues on next page.*]

courts did not hear arguments regarding jurisdiction under § 1292(a)(1), Duff's statement that multiple circuits have "reject[ed] the type of expansive jurisdictional argument advanced here by the Appellants" (*id.* at 13) is wholly unsupported by the cases he cites. And the *Black* case Duff cites unequivocally confirms that appellate jurisdiction under Section 1292(a)(1) doesn't magically disappear just because the underlying case involves a receivership—the case holds that an order entered in a receivership case *was appealable under Section 1291(a)(1).* 163 F.3d at 194.

In his long string-cite, Duff cites only one case where an appellate court considered its jurisdiction to hear an interlocutory order from a receivership case under both § 1292(a)(1) and § 1292(a)(2): *Commodity Futures Trading Comm'n v. Walsh,* 618 F.3d 218 (2d Cir. 2010). But again, that case is not relevant to the appeal at hand. In *Walsh*, the Second Circuit did not have jurisdiction under § 1292(a)(1) because "the district court's order referring [a party's] request for the release of some of her funds to the court-appointed receiver [was] not injunctive—either explicitly or practically"—*not* because § 1292(a)(2) made § 1292(a)(1) presumptively inapplicable. 618 F.3d at 225 n. 3. To the contrary, the Court separately analyzed whether jurisdiction was available under either provision, confirming that had either been satisfied, the appeal would have been proper. *Id.* And here, unlike in *Walsh*, the

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Diagnostics, LLC, 801 F.3d 833 (7th Cir. 2015)*; SEC v. Hardy*, 803 F.2d 1034 (9th Cir. 1986); *State St. Bank & Tr. Co. v. Brockrim, Inc.,* 87 F.3d 1487 (1st Cir. 1996); *Netsphere, Inc. v. Baron*, 799 F.3d 327 (5th Cir. 2015); *Plata v. Schwarzenegger,* 603 F.3d 1088 (9th Cir. 2010).

Ruling is not merely a *procedural* referral of a request to the receiver. Instead, the Ruling FHFA appeals was *substantive*— it had the practical effect of denying an injunction to protect the assets of Fannie Mae and Freddie Mac that Congress deemed were to be controlled by FHFA as Conservator. *See infra* at Section II; *see also* Dkt. 13.

II. DUFF DOES NOT DISPUTE THAT THIS COURT HAS JURISDICTION OVER THE APPEAL UNDER § 1292(a)(1)

Notably, Duff's Motion does not even acknowledge the relevant standard governing appeals under § 1292(a)(1). As FHFA explained in its Jurisdictional Statement, 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. *See, e.g., Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 485, 490 (7th Cir. 2012); *Jones-El v. Berge*, 374 F.3d 541, 544 (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 …." *See supra* at 4.

Critically, substance trumps 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. American Brands, Inc.*, 450 U.S. 79, 84 (1981)) (emphasis added). There is no serious question that the

same standard applies in receivership cases. *See, e.g.*, *AmSouth Bank v. Dale*, 386 F.3d 763, 772-73 (6th Cir. 2004). In *AmSouth*, as here, the party that sought the order at issue did not move under Rule 65, yet the Court held that jurisdiction under § 1292(a)(1) was proper. *Id.*

As this Court has explained, "[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 applies that standard in receivership cases, as all others. *See, e.g.*, *Gautreaux v. Chicago Hous. Auth.*, 178 F.3d 951, 958 (7th Cir. 1999). And the imposition of "serious financial … uncertainty" is sufficient to constitute "serious and irreparable harm" for the purposes of § 1292(a)(1). *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").

Here, the reasoning in these cases fits like a glove. 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. *See* Dkt. 13 at 7. For example, on December 28, 2022, the district court approved the distribution to certain 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. To this, Duff provides no answer.

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.[5] FHFA's existing interest is a *secured* interest in *specific* accounts. If the district court's Ruling stands and funds are distributed out 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 Duff's liabilities *already* exceed his assets, the risk of

[5] 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.

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.

Having jumped the gun with his motion, Duff does not engage with this reasoning, but instead seeks only to distinguish a couple of cases based on superficial factual differences. For instance, Duff points out that *Jones-El* "involved the failure of the defendant to abide by terms of a consent decree," and *Jamie S.* "deal[t] with the implementation of reform of the special education system in Milwaukee." Mot. at 10. But the fact that both cases had injunctions in place and "did not involve receiverships" (*id.*) does not negate the reality that this Court permitted appeals in both cases to go forward because the orders at issue had the practical effect of injunctive orders, notwithstanding some differences in form. *Jamie S.*, 668 F.3d at 490; *Jones-El*, 374 F.3d at 543-44.

In both cases, this Court focused its analysis on the fact that the orders had the "practical effect" of granting or denying an injunction—not, as Duff suggests, that *other* injunctions were already in place. Mot. at 10. That is, in *Jamie S.*, this Court determined that it had jurisdiction over the interlocutory order because it "effectively grant[ed] . . . the relief sought on the merits and affect[ed] one party's ability to obtain such relief in a way that cannot be rectified by a later appeal." 668 F.3d at 490.

Likewise, the *Jones-El* Court concluded that § 1292(a)(1) provided appellate jurisdiction to review the 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." 374 F.3d at 544.

Duff's emphasis on the fact that "there is not . . . even an allocation that has been made or approved with respect to the properties as to which FHFA has asserted an interest that would be subject to review" (Mot. at 7) does not affect this conclusion. Indeed, this Court's decision in *In re Forty-Eight Insulations*, 115 F.3d 1294 (7th Cir. 1997), illustrates why: 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 practical problems with seeking to recover and redistribute millions of dollars in cash disbursements—surely, in many instances, years after the fact—are 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)(1).

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. Therefore, this Court should deny Duff's Motion.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2023, I caused the foregoing **FHFA'S OPPOSITION TO RECEIVER'S MOTION TO DISMISS APPEAL** 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