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 SUR-REPLY IN SUPPORT OF OPPOSITION TO RECEIVER'S MOTION TO DISMISS APPEAL

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INTRODUCTION

In his Reply, Duff belatedly but correctly identifies the jurisdictional question facing the Court: Is the Ruling FHFA appeals injunctive for purposes of 28 U.S.C. § 1292(a)(1)?[1] It is.

"An injunction is a court order that may command or prevent virtually any type of action," and thus an "order to … refrain from undertaking a particular action may be considered an injunction even though it is not labeled as such." 43A C.J.S. Injunctions § 1 (Nov. 2022 update). That description fits the order FHFA sought like a glove, and as this Court explained, albeit in a different context, "if it walks like a duck, swims like a duck, and quacks like a duck, it's a duck." *Lake v. Neal*, 585 F.3d 1059, 1059 (7th Cir. 2009).

Here, FHFA sought an order that would have prevented a *specific party* (Duff) from taking a *particular action* (allocation of fees and costs, and ultimately, seizure of funds), in relation to *specific property* (funds in segregated, property-specific accounts embodying the collateral for loans in which FHFA, in its capacity as Conservator has a statutorily protected interest). As importantly, the district court's refusal to grant the order FHFA sought redefined *the legal relationship between the parties*—FHFA asserted statutory protections that on their face supersede whatever authority Duff might otherwise have had over conservatorship property, but the district court disregarded those protections and, contrary to the letter and spirit of

[1] This brief adopts the defined terms set forth in FHFA's Opposition to Receiver's Motion to Dismiss Appeal. Dkt. 15.

FHFA's organic statute, effectively made FHFA subordinate to Duff.

The Ruling is therefore injunctive for purposes of § 1292(a)(1), and the Court should deny Duff's motion and proceed to the merits.

ARGUMENT

Duff insists that "FHFA's argument that this Court's jurisdiction arises from a district court order that has 'the practical effect of an injunction' is strained." Reply at 1. But his Reply is unpersuasive for at least three reasons.

First, Duff incorrectly argues this Court does not have jurisdiction because the order being appealed was the denial of an "objection to [Duff's] motion" and the "only relief FHFA sought" was "denial of that motion" and not injunctive relief. Reply at 1. Though Duff does not dispute that this Court looks to practical effects of an order to determine whether it is injunctive under § 1292(a)(1), *id.*, Duff all but ignores that standard.

Contrary to Duff's argument, it makes no difference that FHFA objected to Duff's allocation motion instead of moving for an injunction expressly. FHFA acted in accord with what the procedural posture of the case required at the time—Duff sought the district court's authorization to impair FHFA's interest in the property at issue, and in response, FHFA objected and sought a court order that would have prevented Duff from taking the actions he proposed. Regardless of the label, the net result is the same: FHFA asked the district court to prevent Duff from commandeering specific assets and effectively destroying a specific and statutorily protected interest that cannot be restored after the fact.

It is well-established that substance trumps form when determining whether an order is injunctive. Indeed, the very first section of the definitive compilation of the law of injunctions states that an "order to … refrain from undertaking a particular action may be considered an injunction even though it is not labeled as such." 43A C.J.S. Injunctions § 1 (Nov. 2022 update); *supra* at 1. And the Supreme Court agrees that § 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). Courts across the country have confirmed that parties do not need to move for an injunction under Rule 65 in the district court for jurisdiction over the interlocutory order to lie under § 1292(a)(1). To name a few examples: (1) a grant of summary judgment on counts requesting equitable relief, *Chicago Joe's Tea Room, LLC v. Vill. of Broadview*, 894 F.3d 807, 811-12 (7th Cir. 2018), (2) a grant of a motion to quash a lien, *Goyal v. Gas Tech. Inst.*, 718 F.3d 713, 717 (7th Cir. 2013), and (3) an order requiring a party to pay "forward-looking and indeterminate" attorney's fees, *Aleynikov v. Goldman Sachs Grp., Inc.*, 765 F.3d 350, 356-57 (3d Cir. 2014), have all been considered injunctive for the purposes of § 1292(a)(1).

The common theme to all these cases is that the order requested would have the *practical* effect of either granting or denying mandatory, non-monetary relief, thereby altering the parties' legal relationship. *See Chicago Joe*, 894 F.3d at 812 (stating that § 1292(a)(1) provided jurisdiction to review order that "stripped the case

of its equitable component"); *Goyal*, 718 F.3d at 717 ("Although the district court did not label its order granting Goyal's motion to quash as an injunction, the order had the effect of an injunction . . . ."); *Aleynikov*, 765 F.3d at 356 ("Although the District Court did not use the term 'injunction' in its order, that is not determinative; we must evaluate the nature of the relief granted to determine whether the remedy is injunctive.").

The same is true for the order FHFA sought in the district court. It 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. Opp. at 14-20. Because the Ruling disregards protections Congress granted FHFA and incorrectly subjects FHFA to equitable powers the district court granted Duff, it inverts a legal relationship Congress established. As a result, the "order 'is properly characterized as an "injunction" [because] 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. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 490 (7th Cir. 2012)). Duff's arguments to the contrary fail to refute this fundamental point.

Second, Duff disputes FHFA's point that the Ruling will bring about "serious financial ... uncertainty" sufficient to constitute "serious and irreparable harm." Reply at 5. As an initial matter, the proper standard under the Supreme Court's

Gulfstream decision is that the Ruling "have serious, *perhaps* irreparable, consequence." 485 U.S. at 287-88 (emphasis added). And, as explained in FHFA's opposition, it does. *See* Opp. at 14-20.

Duff responds there is no risk of harm because, in one instance, the district court withheld from disbursement the fees from the GSE accounts, Reply at 6-7—but that response misses the mark. Withholding disbursements from the GSE accounts does not undo the legal effect of the Ruling, alter the underlying allocations to the GSE accounts, or mitigate the harm that will flow from the Ruling upon enforcement; functionally, it imposes a partial stay on the Ruling.[2] In any event, partially (or even completely) staying the Ruling's effect does not change its injunctive nature or the risk of irreparable harm to FHFA for purposes of § 1292(a)(1); otherwise, injunctions could not be stayed pending appeal without destroying appellate jurisdiction.

The fact that the district court thought it best to partially stay the Ruling, in fact, confirms the importance of resolving the issues now. This is because the *allocations* to the GSE accounts (even if not disbursed) affect the allocations to and distributions from the other accounts. Duff does not dispute that 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. When FHFA prevails in its appeal,

[2] Although the district court did not say so, the timing and context of the withholding order suggest it may have been intended, at least in part, to stay the disbursement provisions of the Ruling pending resolution of this appeal. It came after FHFA had noticed the appeal, it applies only to "fees and expenses allocated to the properties at issue in the FHFA's objections," and the district court explained its purpose was "to avoid the issues that may arise in unwinding transactions if the FHFA's objection turns out to be material." Dkt. 1366 at 2.

all those allocations will need to be undone and recomputed, but money is already being disbursed based on allocations that presume Duff is entitled to disregard the statutory protection Congress conferred upon FHFA's property interests. And some of those disbursements will almost certainly be unrecoverable—Duff is entering into settlements that presumably will take certain properties out of the receivership, making it impossible as a practical matter to unwind certain allocations. *See* Dkt. 1343, 1374. But even if some fraction of incorrect disbursements could be recovered, the recovery process would require the expenditure of *other* resources that themselves would need to be drawn from property in the receivership. These are "serious, perhaps irreparable, consequence[s]" under *Gulfstream*, and this Court has not hesitated to find jurisdiction under § 1292(a)(1) in situations where there is a risk of irreparable harm. *See* Opp. 18-19; *USA Gymnastics*, 27 F.4th at 510-11; *In re Forty-Eight Insulations*, 115 F.3d 1294, 1300 (7th Cir. 1997).

Duff also argues that FHFA's objections are premature because "the district court has not yet determined that FHFA has *any* interest in the two properties" because the "priority disputes on those properties are pending." Reply at 5. This argument misconstrues the impact of the Ruling, which unambiguously overrode FHFA's statutory protections. That is, the Ruling made clear that HERA will not apply to the fee allocations *regardless of how the priority disputes are resolved*: Absent the Ruling, FHFA's statutory protections would apply even if its liens are deemed (incorrectly in FHFA's view) to be second- rather than first-priority claims on the collateral. *See* Ruling at 7-8. But given the Ruling, FHFA's protections cannot

apply at all. Functionally, therefore, the Ruling impairs FHFA's interest in the collateral in a way that is final and in no way speculative; Duff's suggestion that the HERA issues are not ripe is incorrect.

Third, Duff marches through a faux parade of horribles, claiming that if "[t]aken to its logical conclusion, … FHFA's argument … would spawn appellate jurisdiction over practically any district court order overruling an objection to day-to-day receivership matters. . . ." Reply at 1. Duff is mistaken; this dispute involves the relative priority of two atypical parties—an equitable receiver and a statutory conservator—not a typical conflict about the day-to-day administration of a case. The resolution of most day-to-day receivership matters will not "substantially and obviously alter[] the parties' preexisting legal relationship,'" thereby lacking the defining quality that makes an order injunctive and appealable under § 1292(a)(1). *USA Gymnastics*, 27 F.4th at 511 (quoting *Jamie S.*, 668 F.3d at 490). In that regard, FHFA is situated differently from all other parties in this case: The statutory protections FHFA invoked apply only to FHFA conservatorships.

That is, Congress made clear that FHFA is in the best position to determine how to exercise its powers and functions. The plain text of § 4617(f)'s prohibitive clause—"no court may take any action"—is unqualified and absolute; it "prohibits courts from taking 'any action to restrain or affect the exercise of [the] powers or functions of the Agency as a conservator.'" *Collins v. Yellen*, 141 S. Ct. 1761, 1770 (2021) (quoting 12 U.S.C. § 4617(f)). Likewise, § 4617(j)(3) mandates that "[n]o [conservatorship] property … shall be subject to levy, attachment, garnishment,

foreclosure, or sale without the consent of the Agency ...." 12 U.S.C. § 4617(j)(3).

As a result, while typical parties come to a receivership automatically *subordinate* to the Receiver's equitable powers, FHFA comes to a receivership *protected from* those powers. *See* 12 U.S.C. § 4617(f). Because the district court's Ruling effectively authorizes Duff to override FHFA's statutory protections and to impair or extinguish FHFA's rights in certain property, the Ruling fundamentally altered the pre-existing legal relationship between FHFA and Duff, effectively subordinating FHFA to Duff's powers, contrary to the letter and spirit of FHFA's organic statute.

This fundamental distinction sets the Ruling apart from virtually all other decisions resolving day-to-day receivership matters—typical decisions do not "substantially and obviously alter the parties' preexisting legal relationship," and therefore are not appealable under § 1292(a)(1). *USA Gymnastics*, 27 F.4th at 511. Indeed, for all Duff's bluster about other parties' prior attempts to take interlocutory appeals in this case, no other party has ever even *asserted* that jurisdiction over any prior appeal in this action properly lay under § 1292(a)(1). Because FHFA is situated differently, the Ruling *did* alter FHFA's preexisting legal relationship to the Receiver, and as a result it the Ruling *is* appealable under § 1292(a)(1).

CONCLUSION

The Ruling on appeal walks, swims, and quacks like an injunctive order. Under this Court's precedents, it has the practical effect of denying injunctive relief, and this Court therefore has jurisdiction under § 1292(a)(1).

The Court should deny Duff's Motion and proceed to the merits.

Dated: February 3, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2023, I caused the foregoing **FHFA'S SUR-REPLY IN SUPPORT OF 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