

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

**ETHAN S. PARKER,
PLAINTIFF,**

v.

**WELLS FARGO BANK, N.A.,
DEFENDANT.**

Case No.: 1:23-cv-00766-UA-JLW

**BRIEF IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION**

Statement of the Nature of the Matter

This is a motion that seeks an injunction prohibiting Wells Fargo from continuing to retain funds belonging to the Plaintiff and no one else that it has so far refused to return.

Plaintiff Ethan Parker was the sole beneficiary of the retirement account belonging to his mother, Gwendolyn Parker. When Mr. Parker received a \$207,765.07 check for the proceeds of that account, he opened an account online with Wells Fargo and deposited the check. About a month after Mr. Parker deposited the funds, Wells Fargo closed down his account for supposed fraudulent activity and seized over \$200,000 in funds. In a consent order entered into with the Consumer Financial Protection Bureau, Wells Fargo conceded that during the time period when Mr. Parker had opened his account it would routinely close customer accounts for alleged fraudulent

activity based upon algorithms that would tag accounts as potentially fraudulent whether or not there was actual fraud. Mr. Parker contends that that was the case with his account.

VALIC, the issuer of the check, has confirmed that the check was issued to Mr. Parker and that he is the valid beneficiary of his mother's account. Wells Fargo has offered no credible explanation for why it continues to hold Mr. Parker's funds.

Because of the overwhelming evidence that these funds belong to Ethan Parker, because there would be no harm to Wells Fargo if it released the funds, and because Mr. Parker has suffered and will continue to suffer irreparable harm if the funds are not returned to him, Mr. Parker asks that the Court order Wells Fargo to release his funds to him.

Statement of Facts

Gwendolyn Parker died on May 22, 2020, leaving her adopted son Ethan her sole heir. Verified Cmpl. (D.E. 1) at ¶¶ 7,8. Mr. Parker was a designated beneficiary for her retirement account with AIG, and he was entitled to payment of death benefits from the retirement account. *Id.* at ¶¶ 9,10; Declaration of Douglas Coe at ¶ 5; Declaration of Shannon Kite at ¶ 3.

Mr. Parker complied with all of AIG's and VALIC's requirements for receiving the death benefits, including providing VALIC with his social

security number. D.E. 1 at 11; Kite Decl. at ¶ 3. After Ms. Parker's death, VALIC Retirement Services Company, a subsidiary of AIG, issued two checks to Ethan Parker:

- Check 78667483 in the amount of \$9,707.82;
- Check 7867883 in the amount of \$207,765.07. *Id.* at ¶ 12; Coe Decl. ¶ 6; Kite Decl. at ¶ 3.

At the time he received the checks, Mr. Parker did not have a bank account, but he was able to cash the \$9,707.82 check. D.E. 1 at ¶¶ 13, 14. Because he had previously banked with Wells Fargo, and because his mother had banked with Wells Fargo, on or about September 27, 2022, Mr. Parker opened the Wells Fargo account ending in XXXX9288 using the Wells Fargo website. *Id.* at 15. Mr. Parker then went to a branch at 500 S. Main Street in Burlington, North Carolina and deposited the \$207,765.07 check into the new account. *Id.* at ¶ 16. He deposited an additional \$5,000 in cash into the account at the same time. *Id.* at ¶ 17.

Between September 28, 2022, and October 13, 2022, he used the account without incident. *Id.* at ¶ 18. On October 13, 2022, without any explanation, Wells Fargo seized the balance in Mr. Parker's account and closed his account. *Id.* at ¶ 19. Wells Fargo has never provided an adequate explanation for why it seized the funds. *Id.* at ¶ 20.

Wells Fargo accused Mr. Parker of forging the check, and represented to him that Wells Fargo expected AIG, or some other unknown claimant, to make a claim for the check. *Id.* at ¶ 21. Mr. Parker demanded the funds from Wells Fargo multiple times, each time he was refused. D.E. 1 at ¶ 23. At Wells Fargo's request, Mr. Parker's counsel contacted VALIC, the issuer of the check, and obtained a letter confirming that the check was valid and had been issued to Mr. Parker. *Id.* at ¶ 24; Coe Decl. at ¶ 9. The letter from VALIC explained that Mr. Parker was the designated beneficiary of Gwendolyn Parker's retirement account, and that two valid checks were issued to him. D.E. 1 at ¶ 25, Exh. 3. This letter was presented to Wells Fargo along with a demand that Wells Fargo provide Mr. Parker with his funds. *Id.* at ¶ 26. Even when presented with evidence that the funds belonged to Mr. Parker, Wells Fargo refused to provide them, implying that either Mr. Parker or his counsel had forged this letter as well. *Id.* at ¶ 27. Douglas Coe, a representative of Corebridge Financial, the company that had sold and administered the retirement account, checked Corebridge's records and has independently confirmed that Mr. Parker was the intended beneficiary of Gwendolyn Parker's account, and had provided all necessary information. Coe Decl. at ¶ 8.

Upon information and belief, Wells Fargo did not conduct any meaningful fraud investigation. D.E. 1 at ¶ 28. Wells Fargo’s conduct in this case is consistent with conduct Wells Fargo had engaged in in the past. *Id.* at ¶ 29. A consent order entered on December 20, 2022, with the Consumer Financial Protection Bureau found that when Wells Fargo “believed that a fraudulent deposit had been made into a consumer deposit account largely based on an automated fraud detection system that identified suspect deposit accounts for employee review, [Wells Fargo’s] typical practice was to freeze the customer’s entire account....” *Id.*, Exh. 4. Under the terms of the consent order, Wells Fargo was required, when it suspected that a deposit in a consumer deposit account may be fraudulent, to use an item-hold or other restraint less than a full freeze of the deposit account when reasonable under the circumstances and sufficient to prevent further fraud. *Id.*, Exh. 4 at 17.

Questions Presented

- 1. Is Ethan Parker entitled to an injunction prohibiting Wells Fargo from continuing to retain funds that it seized from his bank account?**

Argument

Mr. Parker is entitled to a preliminary injunction ordering Wells Fargo to immediately stop holding funds that belong to the Plaintiff. Federal Rule of Civil Procedure 65(a) authorizes federal courts to issue preliminary injunctions. Because a preliminary injunction is “an extraordinary remedy,”

it “may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Getir US, Inc. v. Doe*, Civil Action No. 1:21-cv-01237 (RDA/TCB), 2021 U.S. Dist. LEXIS 259983, at *6-7 (E.D. Va. Dec. 21, 2021) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). To prevail on a motion for a preliminary injunction, the movant must establish that each of four factors weighs in its favor: (1) the likelihood that the moving party will succeed on the merits; (2) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (3) the balance of the equities; and (4) the public interest. *Winter*, 555 U.S. at 20.

I. THIS INJUNCTION WILL MAINTAIN THE STATUS QUO.

“Ordinarily, preliminary injunctions are issued to ‘protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court’s ability to render a meaningful judgment on the merits.’” *Perry v. Judd*, 471 F. App’x 219, 223 (4th Cir. 2012) (quoting *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003)). These are known as prohibitory injunctions. *Murray v. Terry*, No. 2:18-cv-00942, 2018 U.S. Dist. LEXIS 122262, at *6 (S.D. W. Va. July 23, 2018). A mandatory preliminary injunction, on the other hand, compels a defendant “to do something it was not already doing during the last uncontested period preceding the injunction.” *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1155 (10th Cir. 2001).

A. This is a prohibitory injunction because the last uncontested status between the parties was the time when Mr. Parker’s account was still open.

In determining whether an injunction would be “prohibitory” or “mandatory,” the Court must look to the “status quo” to determine whether an injunction would “alter the status quo generally by requiring the non-movant to do something,” or merely “aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending.” *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 235 (4th Cir. 2014). When making this determination, the “status quo” is defined as the “last uncontested status between the parties.” *See Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 378 (4th Cir. 2012).

“[I]t is sometimes necessary to require a party who has recently disturbed the status quo to reverse its actions,” but as the Tenth Circuit has explained, “[s]uch an injunction restores, rather than disturbs, the status quo ante.” *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004); *see United Steelworkers of Am., AFL-CIO v. Textron, Inc.*, 836 F.2d 6, 10 (1st Cir. 1987) (determining that injunction requiring insurance premium payments was not “mandatory” but “prohibitory” because during “last uncontested status” defendant had paid premiums).

The “last uncontested status” was when Mr. Parker maintained the funds from the check that he had cashed in his own account. Under the terms of its consent order with the CFPB, Wells Fargo, “when it suspects that a deposit in a consumer deposit account may be fraudulent, must use an item-level hold or other restraint less than a full freeze of the deposit account when reasonable under the circumstances and sufficient to prevent further fraud.” D.E. 1, Exh. 4 at 17. In other words, the last uncontested status in a situation where fraud is suspected *is an open bank account*.

In this case, Ethan Parker has demonstrated that he was the intended beneficiary of his mother’s retirement account. He asserts that the check he deposited in his Wells Fargo bank account was meant for him and that the funds are his. VALIC, the issuer of the check, concurs. *See id.* Exh. 3. VALI that administers the retirement account, concurs that “the two checks ... were properly issued to him.” *See* Kite Decl. at ¶ 3.

Wells Fargo, on the other hand, has made no claim to these funds and instead continues to hold them for benefit of ... who exactly? Wells Fargo has failed to identify anyone who would conceivably be entitled to these funds other than Mr. Parker. Instead, it appears to be slavishly following the results of a computer analysis, even when reality does not support that

analysis and even when continuing its course is causing it to violate the terms of its consent order with the CFPB.

A case that highlights how an injunction can require an affirmative act that maintains the status quo and still be prohibitory is *Steves & Sons, Inc. v. Jeld-Wen, Inc.*, 612 F. Supp. 3d 563 (E.D. Va. 2020). In *Jeld-Wen* the court entered a preliminary injunction that ordered a company that had been withholding product to ship items it was holding pending the resolution of the lawsuit. *Id.* at 581. “Although, on its face, [plaintiff’s] fourth request asks that the Court order [defendant] to act, it does so only to the extent necessary to restore the status quo ... by delivering the currently outstanding [] orders. Consequently, because [plaintiff’s] requested injunction seeks to restore, rather than disturb, the status quo, it is a prohibitory, and not a mandatory, injunction.” *Id.*

B. Even if this injunction is determined to be mandatory, Mr. Parker can still meet the heightened burden of proof.

For certain preliminary injunctions, the movant has a heightened burden of showing that the traditional four factors weigh heavily and compellingly in its favor before obtaining a preliminary injunction. The heightened burden applies to preliminary injunctions that (1) disturb the status quo, (2) are mandatory rather than prohibitory, or (3) provide the

movant substantially all the relief it could feasibly attain after a full trial on the merits. *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 269 F.3d 1149, 1154-55 (10th Cir. 2001). Such injunctions are disfavored. *Id.*

As is discussed above, this injunction does not disturb the status quo – rather, it maintains the status quo by restoring Mr. Parker’s funds to his account, the last uncontested status. Therefore, the injunction is prohibitory rather than mandatory.

Nor does the injunction provide Mr. Parker substantially all the relief he could feasibly attain at trial. His complaint seeks a declaratory judgment that the funds belong to him and injunctive relief. Awarding injunctive relief effectively disposes of the declaratory judgment claim. But three other claims will still remain: conversion, unjust enrichment, unfair and deceptive trade practices. Because these claims would still survive, an injunction would not provide Mr. Parker substantially all the relief he could feasibly attain at trial. Instead, the case could go to trial on the remaining three claims. *See Johnson v. MBNA Am. Bank, Nat'l Ass'n*, No. 1:05CV00150, 2006 U.S. Dist. LEXIS 10533, at *33 (M.D.N.C. Mar. 9, 2006) (Noting that an “injunction, if warranted, can provide the same result the Plaintiff seeks in her declaratory judgment claim.” The court granted a preliminary injunction, dismissed the declaratory judgment claim, and allowed the remaining claims to go to trial.)

As will be discussed below, the facts tilt so heavily in Mr. Parker's favor that the Court should grant the injunction even if it is considered to be mandatory.

II. MR. PARKER IS LIKELY TO SUCCEED ON THE MERITS.

This motion seeks the return of funds to Mr. Parker because he is their rightful owner. The Verified Complaint shows that the check at issue was payable to him, and describes why, as the sole beneficiary of his mother's account, he is entitled to possession of those funds. The only other party who could potentially make a claim to those funds, VALIC, has disclaimed any interest in them. D.E. 1 at Exh. 3. Wells Fargo has never claimed to have an interest in the funds. The facts show that Mr. Parker is not only likely to succeed, but that there is no reasonable scenario in which he does not.

This meets the heightened standard to justify the imposition of a mandatory injunction. Were the Court to determine that this was a mandatory and not a prohibitory injunction, Mr. Parker would have to do more than show he is merely "likely to succeed" he must, instead, show that their right to relief is "indisputably clear." *Cooke v. Lancelotta*, No. SAG-22-297, 2022 U.S. Dist. LEXIS 37654, at *13 (D. Md. Mar. 3, 2022).

In this case, there is no reasonable scenario in which Wells Fargo is entitled to keep possession of Mr. Parker's funds. It is indubitably clear that he will prevail.

III. MR. PARKER WILL BE IRREPARABLY HARMED IF THE FUNDS ARE NOT RELEASED.

Irreparable harm is "neither remote nor speculative, but actual and imminent." *Direx Israel, Ltd. v. Breakthrough Medical Group*, 952 F.2d 802, 812 (4th Cir. 1991) (quoting *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989)). Irreparable harm must be harm that "cannot be adequately satisfied with a monetary award, or accurately calculated, or that involves other rare and exceptional circumstances that justify the extraordinary relief of an injunction." *Barnett v. Young*, No. 5:18-cv-00279, 2018 U.S. Dist. LEXIS 117088, 2018 WL 3405415, at *2 (S.D.W. Va. June 21, 2018) (citing *Hughes Network Sys., Inc. v. InterDigital Communications Corp.*, 17 F.3d 691, 693 (4th Cir. 1994)).

Although a mere threatened monetary injury, which can be redressed in damages, is often insufficient to establish the irreparable injury essential to the issuance of a preliminary injunction, when, as here, much more is involved, that injury can form the basis to grant an injunction. *See, e.g., Corbin v. Corbin*, 429 F. Supp. 276, 282 (M.D. Ga. 1977). In *Corbin*, the plaintiff, like Mr. Parker, demonstrated a strong likelihood of success on the

merits. In addition, in *Corbin*, the court noted that the “plaintiff because of his financial circumstances might well lose his property before the court can act.” *Id.*

That is precisely the case here. Mr. Parker’s mother was the 50% owner of the property at 2108 Wilkins Street, Burlington, NC. D.E. 1 at ¶ 60. Because Wells Fargo seized funds that demonstrably belong to him, Mr. Parker faces the loss of family property. *Id.* at ¶¶ 61, 62. Mr. Parker’s mother and grandmother bought the house when he was in the first grade. Parker Dec. at ¶ 8. He lived in the house as a child, spent Christmases there, and raised his daughter there. *Id.* at ¶ 8. He lost all of his mother’s belongings because he could not afford to pay storage fees after he could no longer access his inheritance. *Id.* at ¶ 9. To him, this represents the last thing of his mother’s that he can save. *Id.* at ¶ 10.

Because of “the unique nature of real estate,” and in particular because this is a house that is part of his family’s heritage, losing it solely because Wells Fargo continues to hold Mr. Parker’s funds would cause him irreparable harm. *See Norman Pulliam & Patriot's Plantation II, LLC v. Clark*, Civil Action No. 4:11-cv-03047-RBH, 2012 U.S. Dist. LEXIS 70669, at *44-45 (D.S.C. May 21, 2012).

“[M]easuring the irreparability of harm to a plaintiff seeking preliminary injunctive relief[] requires assessment of the costs to defendant. If the cost is minimal, the threatened injury may be all the more irreparable.” *Crawford v. Univ. of N.C.*, 440 F. Supp. 1047, 1059 (M.D.N.C. 1977). Wells Fargo makes no claim on the funds it is holding. It would cost the bank nothing if the Court were to prohibit its continued possession of the funds. On the other hand, Mr. Parker has made a strong showing of having a probable right to those funds. The cost to Wells Fargo of returning the funds to the plaintiff might well be zero.

IV. THE BALANCE OF EQUITIES TILTS HEAVILY IN MR. PARKER’S FAVOR.

While as shown above Mr. Parker will be irreparably harmed if an injunction does not issue, it is very unlikely that Wells Fargo will be injured at all. Wells Fargo claims to be holding Mr. Parker’s funds for the benefit of some unnamed third party. By returning the funds to Mr. Parker, the injunction does no more than perpetuate the *status quo* until the merits can ultimately be resolved. In the highly unlikely event that some presently unknown third party shows up to contradict the evidence presented by both Mr. Parker and VALIC that the check is valid, that person can bring whatever claims they might have against Mr. Parker and VALIC. Wells Fargo would play no role in any such action. Because Wells Fargo stands to

suffer no harms, the balance of equities tips almost completely in Mr. Parker's favor.

V. IT IS IN THE PUBLIC INTEREST TO ISSUE THIS INJUNCTION.

The CFPB Consent Order notes that Wells Fargo engaged in unfair acts and practices when it froze consumer accounts based on an automated fraud detection system and seized consumer's funds. D.E. 1 Ex. 4 at 12. Under the terms of the Order, Wells Fargo was required to change this practice and use lesser restraints such as item-level holds. *Id.* The CFPB Consent Order found that the practice of freezing consumer deposit accounts was an unfair, deceptive or abusive practice because it was likely to cause consumers substantial injury that is not reasonably avoidable, and the substantial injury is not outweighed by countervailing benefits to consumers or to competition. *Id.* Exh. 4 at 13.

Ordering release of the improperly held funds meets both the spirit and the letter of the Wells Fargo consent order. *See, e.g., Crawford*, 440 F. Supp. at 1059 (granting an injunction meets the public interests by ensuring plaintiff received the right to protection that a governmental agency provided them).

Conclusion

For the foregoing reasons, Ethan Parker asks that this Court enter a preliminary injunction prohibiting Wells Fargo from continuing to retain funds it seized from his bank account.

Dated: September 14, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with LR 7.3(e) because it contains less than 6,250 words, exclusive of the caption, signature blocks, certificates, cover page, and indices. I further certify that this document was prepared using Microsoft Word and uses the 13-point proportional font Century Schoolbook.

Dated: September 14, 2023

/s/ James C. White

CERTIFICATE OF SERVICE

I hereby certify that I have served this Brief by CM/CEF and U.S. Mail

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