

**IN THE 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**

**DEFENDANT WELLS FARGO BANK, N.A.’S BRIEF IN OPPOSITION TO  
PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION**

Defendant Wells Fargo Bank, N.A. (“Wells Fargo” or “Defendant”), by and through its undersigned counsel, and pursuant to Rule 65 of the Rules of Civil Procedure, hereby submits this Opposition to Plaintiff Ethan S. Parker’s (“Parker”) Motion for Preliminary Injunction (“Parker’s Motion”). In support thereof, Wells Fargo states as follows:

**SUMMARY OF NATURE OF MATTER**<sup>1</sup>

Parker’s Motion must be denied as moot. Specifically, Parker’s Motion “seeks an injunction prohibiting Wells Fargo from continuing to retain funds belonging to [him],” *see* Parker’s Motion at 1, but, as Wells Fargo has communicated to Parker,

---

<sup>1</sup> By responding to Parker’s Motion Wells Fargo does not waive its argument, based on an arbitration agreement between the parties, that this Court does not have jurisdiction over this matter. *See* Wells Fargo’s Motion to Compel Arbitration and Stay Proceedings and Brief in Support, Dkt. Nos.10-11.

Wells Fargo is in the process of issuing Parker a check for the total value of the funds and expects that Parker will receive that check within the next two and a half weeks. *See Exhibit 1*, Declaration of Oscar Rodriguez ¶¶ 3-4. As a result, Parker is unable to establish that he will face irreparable harm absent an injunction, and is therefore, not entitled to the relief he seeks. Accordingly, Wells Fargo requests that the Court deny Parker’s request for oral argument on Parker’s Motion and deny Parker’s Motion as moot.

### **BRIEF STATEMENT OF FACTS**<sup>2</sup>

On September 27, 2022, Parker applied for and opened a consumer account with Wells Fargo, ending in \*9288 (the “Account”). *See* Parker’s Motion at 3. On or about September 28, 2022, Parker deposited a check from The Variable Annuity Life Insurance Company in the amount of \$207,765.07 (check no. 78667843) into the Account. *Id.* From on or about September 29, 2022 through October 11, 2022, Parker made a series of withdrawals from the Account resulting in a balance of \$204,450.55 (the “Funds”). *See Exhibit 2*, October 2022 Account Statement. On October 13, 2022, Wells Fargo closed the account and held the Funds. *See id.*

---

<sup>2</sup> Because the parties’ dispute is not properly before this Court, *see* Dkt. No. 10, Wells Fargo limits the facts in this filing to the facts that are necessary for this Court to find that Parker’s Motion must be dismissed as moot. This filing does not include the full breadth of facts that support Wells Fargo’s position that it is not liable to Parker for any damages.

On September 29, 2023, Wells Fargo confirmed to Parker that it is in the process of issuing him a check for the Funds. Attached hereto as **Exhibit 1** is a Declaration of Oscar Rodriguez, a Business Execution Consultant at Wells Fargo, further confirming that Wells Fargo is diligently working to issue Parker that check and expects that Parker will receive that check within the next two and a half weeks. *See id.*, ¶¶ 3-4.

### **QUESTION PRESENTED**

I. Whether Parker’s Motion requesting an injunction requiring Wells Fargo to relinquish the Funds to him has been rendered moot as a result of Wells Fargo agreeing to promptly relinquish the Funds to him?

### **ARGUMENT**

#### **I. Legal Standard**

The Fourth Circuit has explained that “[p]reliminary injunctions are not to be granted automatically.” *Wetzel v. Edwards*, 635 F.3d 283, 286 (4<sup>th</sup> Cir. 1980). This is because “[a] preliminary injunction is . . . an ‘*extraordinary remedy*’ that should be granted ‘only in the *limited circumstances which clearly demand it.*’” *Wheelihan v. Bingham*, 345 F. Supp. 2d 550, 553 (M.D.N.C. 2004) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F. 2d 802, 811 (4<sup>th</sup> Cir. 1991) (emphasis added)). There are two types of preliminary injunctions: a mandatory injunction and a prohibitive injunction. *See Wetzel*, 635 F.2d at 286 (describing both). A prohibitive

injunction “preserve[s] the status quo until the rights of the parties can be fairly and fully investigated and determined by strictly legal proofs and according to the principles of equity.” *Id.* A mandatory injunction, on the other hand, “do[es] not preserve the status quo and normally should be granted only in those circumstances when the exigencies of the situation demand such relief.” *Id.*

Accordingly, mandatory preliminary injunctions, like the one Parker requests here, “are granted even more rarely than prohibitory preliminary injunctions.” *Wheelihan*, 345 F. Supp. 2d at 553. “[A] mandatory preliminary injunction must be necessary . . . to protect against irreparable harm in a deteriorating circumstance created by the [non-moving party].” *Wheelihan*, 345 F. Supp. 2d at 553 (quoting *Sun Microsystems, Inc. v. Microsoft Corp.*, 333 F.3d 517, 526 (4<sup>th</sup> Cir. 2003)). “[T]he authority of the district court judge to issue a preliminary injunction, especially a mandatory one[,] should be sparingly exercised.” *Wetzel*, 635 F.2d at 286.

To establish entitlement to a preliminary injunction, a plaintiff “must, therefore, demonstrate a need not just to preserve the status quo, but to protect herself against irreparably worsening conditions caused by” the defendant.” *Id.* at 554. But, “[e]ven if such a showing is made, [the plaintiff] must also satisfy the requirements described in *Blackwelder Furniture Co. v. Seilig Mtg. Co.*, 550 F.2d 189, 194-96 (4<sup>th</sup> Cir. 1977).” *Id.* In *Blackwelder*, the Court of Appeals for the Fourth Circuit held that the court must consider the following factors in deciding whether to issue a

preliminary injunction: “(1) the likelihood of irreparable harm to the [movant] if the preliminary injunction is denied, (2) the likelihood of harm to the [non-moving party] if the requested relief is granted, (3) the likelihood that the [movant] will succeed on the merits, and (4) the public interest.” *Scotts Co. v. Unites Indus. Corp.*, 315 F.3d 264, 271 (4<sup>th</sup> Cir. 2002) (summarizing the Court’s holding in *Blackwelder Furniture Co.*, 550 F.2d at 94-96).

The Fourth Circuit later clarified that “[i]n applying this four-factor test, the irreparable harm to the [movant] and the harm to the [non-moving party] are the two most important factors” and that the balancing of these four factors produces a “sliding scale that demands less of a showing of likelihood of success on the merits when the balance of hardships weighs strongly in favor of the [movant], and vice versa.” *Sun Microsystems, Inc.*, 333 F.3d at 526. A “request for an injunction to prohibit [or require] an act is rendered moot by the happening of the act.” *Di Base v. SPX Corp.*, 872 F.3d 224, 232 (4<sup>th</sup> Cir. 2017).

**II. Parker’s Motion Must be Denied as Moot because Wells Fargo Is Taking the Action Parker’s Motion asks the Court to Require Wells Fargo to Take.**

Perhaps in recognition of the onerous burden of proving entitlement to a mandatory injunction, Parker’s Motion is embroiled in a game of word smithing in an effort to convince the Court that Parker seeks a prohibitory injunction—he does not; Parker seeks a mandatory injunction. Specifically, Parker’s Motion states

that Parker “seeks an injunction prohibiting Wells Fargo from continuing to retain funds,” *see* Parker’s Motion at 1, 5, 16, and cites to case law allegedly in support of his position that he seeks a prohibitive injunction. *See id.* at 7-8. But Parker’s effort to conceal the true nature of the injunction he seeks is futile.

As a practical matter, if the Court orders Wells Fargo to refrain from “continuing to hold” the Funds, the Court necessarily would have to direct Wells Fargo where to release the Funds. Certainly, Parker is not asking the Court to release the Funds into the abyss. Parker’s Motion confirms as much in arguing that “[b]y *returning the funds* to Mr. Parker, the injunction does no more than perpetuate the status quo. . . .” *See* Parker’s Motion at 14 (emphasis added). In other words, Parker is asking for the Court to order Wells Fargo to “return[] the [F]unds to [him]”—i.e., to affirmatively act.

Courts within this Circuit have routinely held that requests for the “return” of something are mandatory injunctions. *See e.g., X Corp. v. Doe*, 805 F. Supp. 1298, 1311-12 (E.D. Va. 1992) (holding that a company’s request for defendant to “return” documents he took when he left the company amounted to a mandatory injunction); *see also Western Indus.-North, LLC v. Lessard*, Case No. 1:12cv177 (JCC/TRJ), 2012 U.S. Dist. LEXIS 78206, at \*6-7 (E.D. Va. June 5, 2012) (“An order requiring Lessard to return Dixie to Western would have compelled action on Lessard’s part and altered the status quo. Western’s claim that it could recover Dixie without any

affirmative action on Lessard's part . . . is meritless. By Western's logic, any order compelling a party to turn over possession of an object could qualify as prohibitive injunctive relief so long as the other party merely offered to retrieve the object. This, of course, would render the distinction between mandatory and prohibitive injunctive relief meaningless.") (internal citation omitted). In short, Parker's request for an order requiring Wells Fargo to "return" the Funds to him is a request for a mandatory injunction.

Nevertheless, regardless of whether the injunction Parker seeks is characterized as mandatory or prohibitive, Parker's request for an injunction has been rendered moot because Wells Fargo has informed Parker that it will issue him a check for the total value of the Funds and Wells Fargo is in the process of issuing that check to Parker. *See Exhibit 1, ¶¶ 3-4*. Therefore, Parker is unable to set forth, by a "clear showing," *see Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 292 (4th Cir. 2011), evidence that an injunction is necessary to "protect [him]self against irreparably worsening conditions caused by" Wells Fargo. *See Wheelihan*, 345 F. Supp. 2d at 553. Wells Fargo has agreed to promptly take the very same action that Parker's Motion asks the Court to order Wells Fargo to take. Wells Fargo anticipates that it will be able to send Parker a check for the Funds within two and a half weeks. **Exhibit 1, ¶ 4.**

**CONCLUSION**

WHEREFORE, Defendant Wells Fargo Bank, N.A. respectfully requests that this Honorable Court decline to schedule a hearing on Parker's Motion and deny Parker's Motion as moot.

Dated: October 5, 2023

Respectfully submitted,

*/s/ Jasmine K. Gardner*

---

Jasmine K. Gardner  
(N.C. State Bar No. 47853)  
**MCGUIREWOODS LLP**  
Fifth Third Center  
201 North Tryon Street, Suite 3000  
Charlotte, NC 28202  
Telephone: 704-343-2262  
Facsimile: 704-343-8825  
jgardner@mcguirewoods.com

Ava E. Lias-Booker (*Via Special Appearance*)  
MD. State Bar 8612010312  
Chauna A. Abner (*Via Special Appearance*)  
MD. State Bar 1712140111  
**MCGUIREWOODS LLP**  
500 E. Pratt Street, Suite 1000  
Baltimore, Maryland 21202-3169  
Telephone: 410.659.4400  
Facsimile: 410.659.4599  
alias-booker@mcguirewoods.com  
cabner@mcguirewoods.com

***Counsel for Wells Fargo Bank, N.A.***



**CERTIFICATION AS TO WORD LIMITATION**

Pursuant to Local Rules 7.3(d), the undersigned hereby certifies this brief contains fewer than 6,250 words (as determined by the word count of Microsoft Word).

This the 5<sup>th</sup> day of October, 2023.

*/s/ Jasmine K. Gardner*

\_\_\_\_\_  
Jasmine K. Gardner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on October 5, 2023, a copy of the foregoing Defendant Wells Fargo Bank, N.A.'s Brief in Opposition to Plaintiff's Motion for Preliminary Injunction was served via the CM/ECF System on all counsel of record.

*/s/ Jasmine K. Gardner*

\_\_\_\_\_  
Jasmine K. Gardner