

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA**

BNY MELLON, NATIONAL ASSOCIATION CIVIL DIVISION  
and THE BANK OF NEW YORK MELLON,

Plaintiffs,

v.

OCCUPY PITTSBURGH, an unincorporated  
association, JANE DOES (1-50), and JOHN  
DOES (1-50),

Defendants.

No.: GD 11-025549

**PLAINTIFFS' BRIEF ON ISSUE OF  
IRREPARABLE HARM**

Code: 003-Trespass Against Property Owner

Filed on behalf of Plaintiffs BNY Mellon,  
National Association and The Bank of New  
York Mellon

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DEPT OF COURT RECORDS  
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As Defendants made clear at the January 10 hearing, Defendants base their opposition to BNY Mellon's Motion for Preliminary Injunction almost entirely on the issue of irreparable harm. With respect to the merits, there simply is no zoning or constitutional principle that permits a group of people to take over someone else's private property as Defendants have taken over BNY Mellon's property here. Because they have no case on the merits, Defendants are reduced to arguing that even if they are violating the law, in their view they are reasonably well-behaved. Therefore, Defendants contend, they should be permitted to continue to completely deprive BNY Mellon of its own property, at least until the final hearing.

This makes no sense and it is not the law. First, Defendants are engaged in a continuing trespass on and seizure of BNY Mellon's property. This continuing wrongful conduct *alone* supports and, indeed, mandates a finding of irreparable harm. Second, Defendants' conduct presents an ongoing risk to health and safety which places BNY Mellon as property owner in jeopardy. This ongoing risk to health and safety also *alone* supports and, indeed, mandates a finding of irreparable harm. Further, where as here, these independently sufficient bases of irreparable harm are present *at the same time*, there can be no question that there is irreparable harm. Third, regardless of their motives, Defendants are now committing a crime—defiant trespass—which *automatically* constitutes irreparable harm. Fourth, because there is no realistic prospect of recovering damages, BNY Mellon has no adequate remedy at law and this is yet another basis for a finding of irreparable harm.

**I. A Continuing Trespass Causes Irreparable Harm.**

In his opening statement, counsel for Defendant candidly acknowledged the Pennsylvania Supreme Court's decision in *Stuart v. Gimbel Bros., Inc.*, 131 A. 728 (Pa. 1926), where the Court reversed the order of the court below and granted plaintiff's motion for preliminary injunction. Counsel also candidly did not attempt to distinguish this case because it is directly on point and

has never been overruled. Instead, counsel argued that the *Gimbel Bros.* case is old. To the contrary, *Gimbel Bros.* states a basic, longstanding and binding principle of Pennsylvania law—that the continuing wrongful taking of someone else’s property constitutes irreparable harm.

In *Gimbel Bros.*, Gimbel’s wanted to build a department store in Philadelphia. However, some of the land Gimbel’s needed was owned by another landowner. Gimbel’s persuaded the City to adopt an ordinance that allowed Gimbel’s to take what otherwise would have been Plaintiff’s property. However, the Pennsylvania Supreme Court found that the ordinance did not permit Defendant to take Plaintiff’s private property. 131 A. at 729.

As Defendants do here, Gimbel’s tried to salvage its case by claiming that there was no irreparable harm. The Pennsylvania Supreme Court squarely rejected this argument:

*The argument that there is no ‘irreparable damage’ would not be so often used by wrongdoers, if they would take the trouble to observe that the word ‘irreparable’ is a very unhappily chosen one, used in expressing the rule that an injunction may issue to prevent wrongs of a repeated and continuing character, or which occasion damages which are estimable only by conjecture and not by any accurate standard.*

*Id.* at 730 (emphasis added) (citations omitted).<sup>1</sup>

Defendants strain to avoid the Court’s on-point decision in *Gimbel Bros.*, but do not cite a single case that is remotely similar to Defendants’ seizure of BNY Mellon’s property. In Defendants’ brief, their lead authority was *Routes 202 and 309 Novelties and Gifts, Inc. v. The*

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<sup>1</sup> Defendants’ conduct is obstructing BNY Mellon’s “right to peaceably enjoy full, exclusive use of [its] property.” *Jones v. Wagner*, 624 A.2d 166, 169 (Pa. Super. Ct. 1993) (“[I]n an action for trespass . . . the harm is not to the physical wellbeing of the land, but to the landowner’s right to peaceably enjoy full, exclusive use of his property.”). And because the Occupation is a *continuing* trespass, every day that the Green is occupied between now and the final hearing compounds that harm. *Id.* at 170 (“The actor’s failure to remove from the land in the possession of another a structure, chattel or other thing which he has tortiously erected or placed on the land constitutes a continuing trespass *for the entire time* during which the thing is wrongfully on the land.”) (emphasis added).

*Kings Men*, No. 11-CV-5822, 2011 WL 5084569, (E.D. Pa. Oct. 14, 2011) (motion for reconsideration pending). However, as noted in BNY Mellon's reply brief, *The Kings Men* did not involve a trespass and instead involved a protest on a public right of way, *id.* at \*\*14-15. Defendants did not rely on *The Kings Men* at the hearing. At the hearing, Defendants primary authority was *Wilkes-Barre Indep. Co. v. Newspaper Guild, Loc. No. 120*, 314 A.2d 251 (Pa. 1974), a case involving a labor dispute in which the court found that the employer staged the facts to create a false impression of a seizure of the employer's premises and harm to its business.

In *Wilkes-Barre*, the facts adduced at the preliminary injunction hearing showed that the plaintiff-employer reached an agreement with a group of printers and, as the labor dispute continued, it then had the settling printers try to enter the front door of the property, even though: (1) there were numerous other entrances that did not involve picketing; and (2) the printers who had settled with plaintiff normally used these other un-picketed entrances. The Court found that this was staged:

All of these facts indicate that the confrontation between the pickets and the printers was *staged* and amply support the chancellor's conclusion that when the employer reached an agreement with the printers and had the printers report for work at the two front entrances rather than rear entrance they customarily used, 'it was not coincidental but was part of a plan by the (appellant) intended to prejudice the (appellee) union in its collective bargaining with (appellant).'

Since this was the case and the plant was not really blocked, the chancellor did not commit error when he refused to grant the preliminary injunction.

314 A.2d at 254 (emphasis added).

Furthermore, although the Pennsylvania Supreme Court's opinion in *Wilkes-Barre* does not specifically address the issue, the trial court opinion indicates that, like *The Kings Men*, the

*Wilkes-Barre* case did not even involve a trespass (nor was it filed in trespass) and specifically did not involve a seizure of property:

13. There are at least eight other means of ingress and egress to the Plaintiff's premises in addition to the entrances on South Washington Street and State Street.

24. There was no prevention of free access to and from the Plaintiff's property by the pickets.

47. There is not and was not a seizure, holding, damage or destroying by any of the Defendants of the plant, equipment, machinery or other property of the Plaintiff with the intent of compelling the Plaintiff-Employer to accede to the demands, conditions or terms of employment, or for collective bargaining.

*Wilkes-Barre Ind. Co. v. Newspaper Guild, Loc. No. 120*, 1973 WL 17016 (Pa. Com. Pl. Luzerne) at \* 2, \*4.<sup>2</sup>

Furthermore, as the Supreme Court's *Wilkes-Barre* decision recognizes, 314 A.2d at 253, the Supreme Court has held that even intermittent, non-violent mass picketing should be enjoined if it amounts to a seizure of property. *Westinghouse Elec. Corp. v. United Elec., Radio and Mach. Workers of Am.*, 118 A.2d 180 (Pa. 1955). In *Neshaminy Constructors, Inc. v. Phila. Pa. Build. And Cosnt. Tr.*, 303 Pa. Super. 420, 449 A.2d 1389 (Pa. Super. Ct. 1982), the court held that the particular picketing conducted there by a labor union amounted to a seizure of property and warranted preliminary injunctive relief:

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<sup>2</sup> At the hearing, Defendants also discussed the concurring opinion in *Coatesville Dev. Co. v. United Food & Comm. Workers, AFL-CIO*, 374 Pa. Super. 330, 542 A.2d 1380 (Pa. Super. Ct. 1988) (en banc). This concurring opinion which, of course, is not the precedential opinion, misreads *Wilkes-Barre* as involving a seizure of "the employer's private property," which, as shown above, it was not. Furthermore, even the non-precedential concurring opinion makes clear that the plaintiff already had an injunction and that the additional injunction requested involved a shopping center parking lot rather than Plaintiff's grocery store. *Id. at* 341-42.

Whether accompanied by violence or not, picketing which denies access to an employer's plant or property constitutes a seizure thereof and cannot be permitted.

*Id.* at 424.<sup>3</sup>

It is important to note that this is a dispute about who controls a piece of property. In that regard, it is akin to *Gimbel Bros.* (and *White v. Foley*, discussed below). This is not a case about a labor dispute. As *Wilkes-Barre* and *Neshaminy* illustrate, cases involving mass picketing during labor disputes often turn on the question of whether there has been a “seizure” of property by mass picketing within the meaning of Section 206d of the Pennsylvania Labor Anti-Injunction Act, 43 P.S. § 206d(d), and these labor law cases may turn on whether there is a real or only imagined denial of access to the workplace that is the subject of an employment dispute. Defendants’ reliance on cases involving mass picketing during labor disputes under the Pennsylvania Labor Anti-Injunction Act is misplaced. Likewise, Defendants’ miss the mark when they argue that access is not an issue here simply because they do not choose to impede pedestrian traffic on the walkways within BNY Mellon Green. The occupiers cannot deny that their permanent campsite (an activity that appears in none of the labor dispute cases) denies BNY Mellon access to the largest part of its Green, to the parts that, as Ms. Rose-John testified, give the Green its name. They have taken that land to use to serve themselves or others who they may take in. As the evidence undeniably demonstrates, they have destroyed and changed the character of that part of the property through their seizure and taking, and they have denied BNY Mellon access to it. That the occupiers have chosen not to stop pedestrian traffic on the walkways of the Green does not diminish the seizure of the land to which BNY Mellon no longer has access.

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<sup>3</sup> In *Neshaminy*, the parties agreed to combine the preliminary and permanent injunction hearing. However, the court indicated that it would review on a preliminary injunction review standard. *Id.* at 423.

In sum, Defendants' continuing trespass and seizure of property constitutes irreparable harm.

## **II. Ongoing Health And Safety Risk Causes Irreparable Harm.**

As the evidence shows, BNY Mellon does not know and cannot know everything that is going on at BNY Mellon Green. In particular, BNY Mellon does not know what goes on at any given time inside the dozens of tents that Defendants have placed on BNY Mellon Green. Yet, even with this inherent and fundamental limitation, and through only one day of testimony,<sup>4</sup> here is what the evidence already shows to have happened at BNY Mellon Green during the occupation, over and above Defendants' ongoing and defiant trespass:

1. Use of LSD. Affidavit of Jake Reiser ("Reiser Aff.") at ¶ 32, Ex. 7.
2. Use of crack cocaine. Reiser Aff. at ¶ 32, Ex. 7.
3. An assault within BNY Mellon Green leading Pittsburgh Police to seek an "Assault Warrant" for a man that Defendants' counsel described as a homeless man who came on BNY Mellon Green. Reiser Aff. at ¶¶ 45-46.
4. "Dozens" of cans of propane taken away when empty by Mr. Packer. Testimony of Mel Packer; Reiser Aff. at ¶ 33, Ex. 8.
5. Wires across the internal sidewalks leading inside tents at BNY Mellon Green. Testimony of Mel Packer.
6. A kerosene heater in a double flapped tent designed to trap air. Reiser Aff. at ¶ 29.
7. Open flames. Reiser Aff. at ¶ 22; Testimony of Jake Reiser; Reiser Aff. at ¶ 31
8. Presence of a synthetic drug known as "J22". Reiser Aff. at ¶ 32, Ex. 7.
9. Use of marijuana. Reiser Aff. at ¶ 32, Ex. 7.
10. Times "when the medical tent becomes the center of camp life." Plaintiff's Ex. 10A.
11. The use of a gas-powered electric generator and the storage of gas cans. Reiser Aff. at ¶¶ 23-24; Rose-John Aff. at ¶ 36.

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<sup>4</sup> We expect additional dangerous conduct at BNY Mellon Green to be shown as the hearing continues.

12. "One or two cases" when patients at the medical tent "were encouraged" to use the Emergency Room at Mercy Hospital. Plaintiff's Ex. 10A.
13. Unsafe and unsanitary conditions at the camp caused by the occupiers destruction of the BNY Green—this includes slick, muddy conditions throughout the camp as well as the active presence of rodents. Plaintiff's Ex. 7B, Plaintiff's Ex. 10A; and Plaintiff's Ex. 10B.
14. Acknowledgement that extreme winter weather is a real concern for the occupiers. Plaintiff's Ex. 10A; Testimony of Jack Shea (donated because he did not want to see occupiers frozen out).

In a situation where it only takes one instant for something terrible to happen, it simply is not enough to say, as Defendants argue, that Defendants are reasonably well-behaved. No property owner should be subjected to this ongoing and unremitting risk. And, as Mr. Sands testified, no property owner should be forced to wait until something terrible happens to obtain relief. That is exactly the position BNY Mellon finds itself in. Despite its efforts to resolve this ongoing trespass without confrontation by asking Defendants to leave the property, BNY Mellon's only remedy at this point is to secure a court order that can be enforced and that Defendants' have said they will peacefully resist.

The mounting evidence not only of misuse of the Green but also misconduct on the Green and winter health and safety risks is a further and separate basis for irreparable harm. BNY Mellon has briefed this issue in detail and Defendants' brief fails to meet these cases. In particular, Defendants completely fail to address, either in briefing or at the hearing, the highly analogous case of *White v. Foley*:

It is widely known, that children are often injured in and around playgrounds and on playground equipment. To subject those who claim title to property with those hazards present to liability exposure for injuries to alleged trespassers creates the potential for irreparable harm.

54 Pa. D. & C. 4th 145, 150 (Pa. Ct. Com. Pls. 2001), *aff'd without opinion*, 804 A.2d 71 (Pa. Super. Ct. 2002)

Defendants' claimed distinction—that somehow it is reasonable for BNY Mellon to bear this risk because Defendants are adults—is untenable. Further, since the Defendants claim that BNY Mellon's property is open to everyone, there is no reason that this risk could not involve children at any time.

In sum, these ongoing health and safety risks alone establish irreparable harm. Furthermore, here we have shown both an ongoing trespass and ongoing health and safety risks that put BNY Mellon in jeopardy. The combined presence of these independently sufficient bases of irreparable harm unquestionably shows irreparable harm.

### **III. Defendants' Defiant Trespass Constitutes Automatic Irreparable Harm.**

There is a third independently sufficient basis upon which BNY Mellon has shown irreparable harm. In Pennsylvania, the violation of an express statutory provision *per se* constitutes irreparable harm.<sup>5</sup> Pennsylvania's criminal trespass statute defines a defiant trespasser as someone who, "knowing that he is not licensed or privileged to do so . . . enters or remains in any place as to which notice against trespass is given." 18 Pa. Cons. Stat. § 3503(b)(1). The December 9, 2011 Notice, of which Defendants admit that they were fully aware, stated that, after December 11, 2011, "overnight camping and the presence of any

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<sup>5</sup> *Pa. Pub. Util. Comm'n v. Israel*, 52 A.2d 317, 321 (Pa. 1947) (court found irreparable harm and ultimately granted preliminary injunction where plaintiff made a prima facie showing that Defendants were operating taxi cabs in violation of law); *Unified Sportsmen of Pa. v. Pa. Game Comm'n (PGC)*, 950 A.2d 1120, 1133 (Pa. Commw. Ct. 2008) (court overruled preliminary objections and found sufficient allegation of irreparable harm where Plaintiff made averment that defendant violated statutory duties); *Stilp v. Commonwealth of Pa.*, 910 A.2d 775, 787 (Pa. Commw. Ct. 2006) (court overruled preliminary objections and found sufficient allegation of irreparable harm where plaintiff made averment that defendant violated law), *aff'd sub nom.*, *Stilp v. Commonwealth of Pa.*, 601 Pa. 429, 974 A.2d 491 (2009); *Council 13, Am. Fed'n of State, County and Mun. Employees, AFL-CIO v. Casey*, 141 Pa. Commw. 199, 595 A.2d 670, 674 (1991) (court found irreparable harm where plaintiff showed that Commonwealth neglected statutory requirements, although the Court ultimately granted relief by way of the issuance of a writ of peremptory mandamus); 15 Standard Pennsylvania Practice 2d § 83:71 (2012).

structures, camping equipment, and stored personal items will be prohibited and considered an *unlawful trespass.*" (Compl. ¶¶ 45-46; Answer ¶¶ 45-46). BNY Mellon's prima facie showing that Defendants' violated 18 Pa. Cons. Stat. § 3503 per se constitutes irreparable harm. After December 11, 2011, Defendants have been, and they remain, defiant trespassers.

**IV. The Fact That There Is No Adequate Remedy At Law Is Another Basis Of Irreparable Harm.**

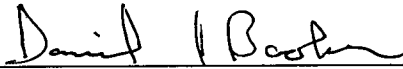
Finally, there is no adequate remedy at law for this injury to BNY Mellon's property rights because: (1) any attempt to award damages for Defendants' continuing trespass would be "estimable only by conjecture and not by any accurate standard" (*Gimbel Bros*, 131 A. at 730 (citation omitted)); and (2) the costs of pursuing any damages would exceed the recovery obtained. *Greyhound Bus Lines, Inc. v. Peter Pan Bus Lines, Inc.*, 845 F. Supp. 295 (E.D. Pa. 1994) (entering preliminary injunction based on continuing trespass, enjoining competitor's bus drivers from, *inter alia*, driving on plaintiff's property, entering plaintiff's terminal, and marching on the terminal steps). In addition to the incalculable damage reflected in, *inter alia*, the complaints BNY Mellon has received (Rose-John Aff. and testimony) and the enormous and on-going disruption of life for BNY Mellon and its employees, tenants, and guests on BNY Mellon's downtown campus, the evidence shows, *inter alia*, that BNY is spending over \$24,000 per week in added security, and faces substantial costs in repairing BNY Mellon Green, costs that are continuing. There is no realistic prospect of recouping these amounts. This is yet another basis by which BNY Mellon has shown irreparable harm.

**V. Conclusion**

For all of these reasons, Defendants' claim that BNY Mellon has not sustained irreparable harm is incorrect. The status quo—BNY Mellon's control of its own property—should be restored, and, we respectfully submit, the preliminary injunction should be entered.

Dated: January 11, 2012

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing Plaintiffs' Brief on Issue of Irreparable Harm to be served upon the following via hand delivery:

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