

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

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

Plaintiffs,

v.

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

Defendants.

CIVIL DIVISION

No.: GD 11-025549

**PLAINTIFFS' BRIEF IN SUPPORT OF
ADMISSIBILITY OF PLAINTIFFS'
EXHIBITS 36 AND 37**

Code: 003-Trespass Against Property Owner

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

Counsel of Record for These Parties:

Daniel I. Booker, Esquire
PA I.D. No. 10319
Joel P. Aaronson, Esquire
PA I.D. No. 28067
Dusty Elias Kirk, Esquire
PA I.D. No. 30702
Michael E. Lowenstein, Esquire
PA I.D. No. 34880
Jeffrey G. Wilhelm, Esquire
PA I.D. No. 201935

Reed Smith LLP
Firm I.D. 234
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, PA 15222
Telephone: 412.288.3131
Facsimile: 412.288.3063

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BNY MELLON, NATIONAL ASSOCIATION) Civil Division
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**PLAINTIFFS' BRIEF IN SUPPORT OF ADMISSIBILITY OF
PLAINTIFFS' EXHIBITS 36 AND 37**

Plaintiffs, BNY Mellon, National Association, and The Bank of New York Mellon, (collectively, "BNY Mellon"), by their undersigned counsel, respectfully submit this Brief in Support of Admissibility of Plaintiffs' Exhibits 36 and 37.

BNY Mellon has filed an Emergency Motion¹ and Supplemental Emergency Motion² to open and supplement the January 10-11, 2012 Hearing Record based on evidence that came into existence after the January 10 and 11, 2012 hearing on Plaintiffs' Motion for Preliminary Injunction. By the Emergency Motion, BNY Mellon offered into evidence the Affidavit of John Worobij (the "Worobij Aff.") and its Exhibits: (A) video excerpts from Defendants' Day 103 General Assembly held on or about January 25, 2012; and (B) a transcription of the video excerpts (collectively, the "General Assembly Video"), which is Plaintiffs' Exhibit 36. Through

¹ BNY Mellon filed Plaintiffs' Emergency Motion to Supplement the January 10-11, 2012 Hearing Record with Post-Hearing Admissions of Defendants ("Emergency Motion") on January 27, 2012. Defendants filed their opposition to BNY Mellon's Emergency Motion on January 30, 2012.

² BNY Mellon filed Plaintiff's Supplemental Emergency Motion to Supplement the January 10-11, 2012 Hearing Record ("Supplemental Emergency Motion") on January 30, 2012.

the Supplemental Emergency Motion, BNY Mellon offered into evidence a certified record of the Police Criminal Complaint against Robert L. Foltz, Jr. (“Foltz”) filed January 27, 2012 (the “Police Criminal Complaint”), which is Plaintiffs’ Exhibit 37.

Following argument on January 30, 2012, this Court granted both motions,³ and permitted the parties to cite to Plaintiffs’ Exhibits 36 and 37 in their proposed findings of fact and conclusions of law to be filed on January 31, 2012. The Court reserved decision on the issue of admissibility of Plaintiffs’ Exhibits 36 and 37 and afforded the parties an opportunity to submit briefs on the admissibility issue. For the reasons set forth herein, Plaintiffs’ Exhibits 36 and 37 are admissible.

A. The General Assembly Video (PX 36) Is Admissible

The General Assembly Video is highly relevant. It shows discussion at Defendants’ own General Assembly of occupiers’ efforts to de-escalate a situation involving a man with a knife and a woman “holding two knives behind her back . . . waiting to get [the man trying to de-escalate the situation] until she saw [another man] coming from behind.” Worobij Aff. Ex. B at *2. The General Assembly Video also includes a statement by an occupier that they had to remove all of the needles from the occupiers’ medical tent because there is a person “leaving with our medical supplies to engage in risky behavior” in his tent. *Id.* at *1. The General Assembly Video also includes an occupier’s statement that “[w]e’re in a dangerous chaotic situation at that camp and we need to make some major changes.” *Id.* at *3.

Thus, the General Assembly Video is highly relevant to the issue of the health and safety risks posed by the Defendants’ occupation of BNY Mellon Green. This is one of the bases for

³ At argument before the Court on January 30, 2012, BNY Mellon argued and Defendants agreed that the Court has discretion to open and supplement the record.

irreparable harm. Nevertheless, and even though the General Assembly Video is of the Defendants' own General Assembly, which they liken to BNY Mellon's board meetings, Defendants contend that the General Assembly Video is inadmissible hearsay. Def. Response at ¶¶ 1(b), 2 and n.2

Defendants are incorrect. To the contrary, the General Assembly Video is admissible on three independently sufficient bases, as: (1) an admission of a party opponent; (2) an adoptive admission, and (3) a business record.

1. The General Assembly Video (PX 36) Is Admissible As An Admission Of A Party Opponent

Under Pennsylvania Rule of Evidence 803(25)(A) a "party's own statement in either an individual or a representative capacity" is not excluded under the hearsay rule (Rule 802). The General Assembly Video is a publicly available record maintained by Defendants on their website. Worobij Aff. at ¶¶ 3-4. The video is an exact record of Defendants' General Assembly akin to, and more accurate than, meeting minutes. As described in testimony by occupier Mike Lawson, the General Assembly is the rulemaking and decisionmaking body of Occupy Pittsburgh and the place where points of information are raised. Preliminary Injunction Hearing Transcript ("Tr.") at 256:16-257:4, 257:11-13, 289:1-14 (Lawson Testimony). By design, everyone in Occupy Pittsburgh can speak for Occupy Pittsburgh with an equal voice. As Mr. Lawson explained, if BNY Mellon wants to deal with somebody at Occupy Pittsburgh, BNY Mellon can go to anyone, and everybody in Occupy Pittsburgh has the same authority as everybody else. Tr. at 281:9-24 (Lawson Testimony). The statements made in the General Assembly Video, therefore, constitute admissions of a party opponent under Rule 803(25)(A).

Furthermore, the issues and occurrences discussed in the General Assembly Video were raised by occupiers in describing their personal experiences in the Occupation. As Defendants

point out, the General Assembly Video reflects efforts by these occupiers to address problems that exist in the Occupation, efforts these occupiers were reporting back to the group. However well-intentioned the efforts of these occupiers to keep a lid on what is happening on BNY Mellon Green, this does not change the fact, and instead highlights, that these members of the Occupation are admitting the problems that exist. These statements, simply and unavoidably, are party admissions.

2. The General Assembly Video (PX 36) Is Admissible As An Adoptive Admission

Additionally, under Rule 803(25)(B), a “statement of which the party has manifested an adoption or belief in its truth” is not excluded under the hearsay rule. An adoptive admission by silence occurs when a party fails to respond to a statement under such circumstances that the party would be expected to deny the statement. Rule 803(25)(B) cmt.; *McIntyre v. Unempl. Comp. Bd. of Rev.*, 687 A.2d 416, 418 (Pa. Commw. Ct. 1997) (e.g., failure to deny testing positive for drugs and failure to deny accusation of sleeping on the job during a robbery constitute adoptive admissions). In the General Assembly Video, Defendants discuss, *inter alia*, the theft of needles from their medical tent to “engage in risky behavior,” the presence of knives in a violent confrontation that was narrowly averted, and the fact that they are “in a dangerous chaotic situation at that camp.” *Worobij Aff. Ex. B (Transcription)* at 1-3. No one in the General Assembly contradicts these statements by their fellow occupiers (*id.*), even after discussing whether some of these safety-related issues should be discussed privately with the “livestream off.” *Id.* at 1. With respect to the near-knife fight, at least one other occupier confirms the first occupier’s report. *Id.* at 2. By failing to rebut these reports of dangerous activities on BNY Mellon Green with full knowledge that anyone, even “BNY” or “the cops,” could be watching their General Assembly meeting (*id.* at 1), these statements were adopted as

truthful by the silence of Occupy Pittsburgh's entire rulemaking and decisionmaking body. Rule 803(25)(B).

3. The General Assembly Video (PX 36) Is Admissible As A Business Record

The General Assembly Video also is admissible as a business record. Rule 803(6) provides that records of regularly conducted activity are hearsay exceptions:

A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.⁴

The General Assembly Video is a record of the unincorporated association's regularly conducted General Assembly, livestreamed on and posted to Defendants' website at or near the time of the meeting, according to their regular practice. Tr. at 256:16-258:3, 262:19-263:9, 264:12-16, 289:1-14 (Lawson Testimony); Worobij Aff. at ¶¶ 3-4, Ex. B (Transcription) at 1. The video is a "business" record, no different from, and, by its nature, if anything, more accurate than, the meeting minutes of a company's board of directors. Def. Response at ¶ 1 and n.2 (likening the "meetings of the General Assembly of Occupy Pittsburgh" to the "meetings" of the "Board of Directors of Mellon Bank"). Therefore, the General Assembly Video is admissible under the Rule 803(6) exception to the hearsay rule.

⁴ See also 42 PA. CONS. STAT. § 6108 ("A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission.").

4. Defendants' Responses Cannot Avoid Admissibility

Defendants' Response argues that the General Assembly Video adds no substance to the record. Def. Response at ¶ 1. On the contrary, the General Assembly Video, recorded at the Defendants' General Assembly on or about January 25, 2012, was not available at the time of the hearing and presents key evidence regarding the "dangerous chaotic situation" on BNY Mellon Green, including references to theft, drug use, a near-violent confrontation, and the presence of weapons. Worobij Aff. at ¶¶ 3-4, Ex A; Ex. B (Transcription) at 1-3. The evidence in the General Assembly Video is highly probative of the safety and health risks presented by Defendants' Occupation and, as such, are relevant to the element of irreparable harm.

Defendants also object to the General Assembly Video on the basis that the speakers in the video are not identified by full name and that they could be non-members.⁵ Def. Response at ¶ 2(a). Defendants' objection is irrelevant and, in fact, highlights the danger of the Occupation. First, as shown in the testimony at trial and in the video transcription, the attendees of Occupy Pittsburgh's General Assemblies are decision makers, members of the association, able to speak for Defendants and, as here, campers. Tr. at 252:9-10, 256:16-258:3, 262:19-263:9, 281:9-24,

⁵ Defendants' claim that the "statements are not specific as to time and place" (Def. Response at ¶ 2(b)) is groundless, as the context of the discussions in the video clearly pertain to events occurring during the Occupation of BNY Mellon Green.

Additionally, to the extent that Defendants' objections could be read to imply that those in the General Assembly Video cannot speak for Occupy Pittsburgh, the circumstances of the General Assembly and the statements of the speakers clearly indicate that the speakers are members and mutual agents of Occupy Pittsburgh, engaged in the common enterprise of the Occupation. 6 AM. JUR. 2D ASS'NS AND CLUBS § 1 (an unincorporated association is a "body of individuals acting together for the prosecution of a common enterprise"); *De Villars v. Hessler*, 70 A.2d 333, 335 (Pa. 1950) (unincorporated association members are "cooperatively engaged" and "join in the prosecution of a common enterprise," thereby "creat[ing] a mutual relationship of agency among them"). Accordingly, each member-agent of the General Assembly was authorized to report information to the assembly under Rule 803(25)(C), and acted in the scope of his or her agency by reporting information salient to their common enterprise under Rule 803(25)(C)-(D).

289:1-14 (Lawson Testimony); Tr. at 312:4-7, 335:7-14 (Testimony of Don Carpenter); Worobij Aff. Ex. B (Transcription) at 1-3 (“Last night we had to take out all of the needles from the med tent”; distinguishing livestream viewers from those “living in the camp”—*i.e.*, attendees; “We’re in a dangerous chaotic situation at that camp and we need to make some major changes.”).

Second, implicit in Defendants’ argument is a disavowal of the statements and behaviors of anyone Defendants conveniently deem to be a non-member. Defendants’ refusal to accept accountability for and inability to control what occupiers do on and near BNY Mellon Green is simply untenable.

Plaintiffs’ Exhibit 36, the General Assembly Video, is important evidence and it is admissible on multiple independently sufficient grounds.

B. The Police Criminal Complaint (PX 37) Is Admissible

The Police Criminal Complaint is admissible as a certified public record. A public record certified pursuant to 42 PA. CONS. STAT. § 6103(a) is admissible under 42 PA. CONS. STAT. § 6104(b) to establish the facts recorded therein, unless the sources of information or circumstances are untrustworthy. Under Section 6104(b), “facts recorded in police reports are admissible, as they were recorded pursuant to an official duty, unless they are untrustworthy.” *D’Alessandro v. Pa. State Police*, 937 A.2d 404, 413 (Pa. 2007). At the outset, police reports are presumed to be trustworthy. *Id.* at 414.

Here, the Police Criminal Complaint is a public record certified in accordance with Section 6103(a). Police Criminal Complaint at *1. The Police Criminal Complaint reveals that, on January 27, 2012, Foltz allegedly stole items from and attempted to steal the vehicle of a Common Pleas Court Judge, resisted arrest, spat at the Sheriff’s Deputy, used racial epithets, kicked the arresting officers, stated to a Sheriff’s Deputy that the “Third Reich is going to rise

again and take care of your . . . family,” and ultimately was charged with eight crimes, including (i) Theft from a Motor Vehicle; (ii) Criminal Attempt; (iii) Aggravated Assault; (iv) Aggravated Harassment by Prisoner (v) Resisting Arrest; (vi) Public Drunkenness; (vii) [another] Criminal Attempt; and (viii) Harassment. Police Criminal Complaint at *2-5; Police Criminal Complaint (Affidavit of Probable Cause) at *1-3.

During this violent confrontation, Foltz “asked to be released so he could go back to his tent,” explaining that “he was staying at the encampment at [BNY Mellon Green]” and that he was “part of the 99% movement to Occupy Pittsburgh.” *Id.* at *2. Similar to *D’Alessandro*, Foltz’s admission that he is an occupier is admissible because: (1) Foltz had no reason to lie about where he stays⁶; (2) the “investigating officer would need to probe . . . [his] address[], in order to collect information for charging decisions, for providing notice, etc.”; and (3) the officer had no motivation to incorrectly report this information. 937 A.2d at 414-15 (reversing Commonwealth Court and finding a police report statement that an assault victim was a firearm license applicant’s “live in girlfriend” to be both trustworthy and admissible under Section 6104(b)). Therefore, the police report, including Foltz’s admission that he is an occupier and member of Occupy Pittsburgh, is admissible under Section 6104(b).

Like the General Assembly Video, the Police Criminal Report is highly relevant. It is difficult to imagine a starker example of the health and safety risks posed by the Occupation. At argument, Defendants objected to the Police Criminal Report because the allegedly criminal conduct described therein did not occur on BNY Mellon Green, Foltz is not a true member of

⁶ To the contrary, Mr. Foltz’s statements during his arrest and processing were all too truthful and revealing about his views, and reflect heightened indicia of reliability. Having shared these views, there is no reason to believe Mr. Foltz would lie about a non-controversial matter of where he was staying or whether he was a part of Occupy Pittsburgh.

Occupy Pittsburgh (or so Defendants claim), and (in their opinion) Foltz has a psychological disorder. None of these objections address the fact that the Police Criminal Report is a freestanding admission. Surely, a police officer could testify that Mr. Foltz told him or her that he is a member of Occupy Pittsburgh, sleeps at the camp, and wanted to go back to his tent. The statutory hearsay exception obviates the need for an officer to do so. *D'Alessandro*, 937 A.2d at 513.


In these circumstances, Defendants' objections go to the weight of the evidence, not its admissibility. Even in this narrower sphere, irrelevant to admissibility, Defendants' arguments are unpersuasive. As the Court noted at argument, Defendants' contention that Mr. Foltz is not a member of Occupy Pittsburgh (even though he said he was) again reveals a fundamental lack of accountability that, in and of itself, presents major risks. As Mr. Lawson testified, Defendants' camp is open to everyone; Defendants do not exclude "a single person" Tr. at 257:25-258:3. According to Defendants, anybody can sleep on BNY Mellon Green except minors without a "guardian." Tr. at 259:5-6. Defendants cannot blithely decline accountability for the people they choose allow to sleep on BNY Mellon Green. Similarly, the fact that the allegedly criminal conduct occurred away from BNY Mellon Green and the possibility that Mr. Foltz has a psychological disorder does not help Defendants' cause. On the contrary, it shows that the Occupation presents a severe danger that extends well beyond the boundaries of BNY Mellon Green. The Police Criminal Report, therefore, is an admissible certified public record and is highly probative of the threat of immediate, irreparable harm Defendants' ongoing Occupation poses to BNY Mellon and to the public.

For all of the foregoing reasons, BNY Mellon respectfully requests that this Court admit into evidence Plaintiffs' Exhibit 36, the Affidavit of John Worobij, including its

Exhibits A and B (the General Assembly Video excerpts and transcription), and
Plaintiffs' Exhibit 37, the Police Criminal Complaint.

Dated: January 31, 2012

Respectfully submitted,



Daniel I. Booker, Esquire

PA. I.D. 10319

Joel P. Aaronson, Esquire

PA I.D. No. 28067

Dusty Elias Kirk, Esquire

PA I.D. No. 30702

Michael E. Lowenstein, Esquire

PA I.D. No. 34880

Jeffrey G. Wilhelm, Esquire

PA I.D. No. 201935

Reed Smith LLP

Firm I.D. 234

Reed Smith Centre

225 Fifth Avenue

Pittsburgh, PA 15222

Telephone: 412.288.3131

Facsimile: 412.288.3063

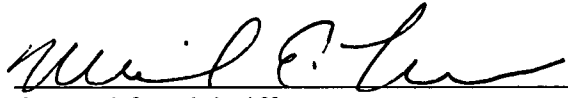
Counsel for Plaintiffs BNY Mellon,
National Association and
The Bank of New York Mellon

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Plaintiffs' Brief in Support of Admissibility of Plaintiffs' Exhibits 36 and 37 to be served upon the following via hand delivery:

Michael J. Healey, Esquire
Healey & Hornack, P.C.
436 7th Avenue, Suite 2901
Koppers Building
Pittsburgh, PA 15219

Dated: January 31, 2012



Counsel for Plaintiffs
BNY Mellon, National Association and
The Bank of New York Mellon