

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

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

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
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**

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BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION AND SUMMARY

Plaintiffs, BNY Mellon, National Association and The Bank of New York Mellon (collectively, "BNY Mellon"), seek a preliminary injunction to reclaim BNY Mellon's private property from Defendants' continuing trespass, remove the exposure to BNY Mellon from the health and safety risks posed by Defendants' continuing trespass in the dead of winter, and permit BNY Mellon to close its BNY Mellon Green property for the winter as it historically has done.¹

Defendants Occupy Pittsburgh, Jane Does (1-50), and John Does (1-50) (collectively "Defendants") are trespassing on BNY Mellon's private property and have ignored an express notice to end their trespass. Specifically, Defendants have taken possession of BNY Mellon Green, which is properly owned and possessed by BNY Mellon, erected an occupation camp with dozens of tents and other structures and equipment, and announced their intention to

¹ This Introduction and Summary uses certain terms, such as "BNY Mellon Green," "Open Space," and "Urban Open Space," which are defined in the Brief below.

continue their occupation through the winter and beyond to the exclusion of BNY Mellon and its tenants, and guests.

On December 9, 2011, BNY Mellon conspicuously posted a notice at BNY Mellon Green that required Defendants to remove their tents, structures, and camping equipment and stated that overnight camping and the presence of tents, structures, and camping equipment would be prohibited after noon on December 11, 2011. Defendants have refused to comply with BNY Mellon's notice. Instead, as the evidence will show, Defendants tore up BNY Mellon's notice and then publicly claimed to have seized BNY Mellon Green and renamed it "The People's Park."²

Defendants are trespassers and do not have consent from BNY Mellon or any legal privilege or right to maintain an occupation camp on BNY Mellon Green. Defendants apparently contend that BNY Mellon Green is Urban Open Space as defined by the applicable zoning code, and they claim that, if it is Urban Open Space, they have a right to maintain an occupation camp on it to the exclusion of BNY Mellon. Defendants are wrong on both counts. First, BNY Mellon Green is privately owned Open Space accessory to BNY Mellon Client Service Center and is reserved for future development by BNY Mellon, and there is *no* requirement that BNY Mellon provide *any* public access to BNY Mellon Green. Second, under the 1988 Zoning Code that is applicable to BNY Mellon Green (as well as under the current Pittsburgh Zoning Code that went into effect in 1999), even if BNY Mellon Green could be deemed Urban Open Space, Defendants would not have any privilege or right to erect and maintain an occupation camp on it to the exclusion of BNY Mellon. Indeed, Defendants'

² See Moriah Balingit and Liz Navratil, *Legal effort begins to clear Occupiers from Mellon Green*, Pittsburgh Post-Gazette (published Dec. 13, 2011), available at <http://www.post-gazette.com/pg/11347/1196498-53.stm>; (V. Compl. at Ex. 12).

ongoing occupation of BNY Mellon is inconsistent with the characteristics of, and violates the requirements applicable to, property deemed to be Urban Open Space.

Defendants' conduct thus constitutes a clear trespass under Pennsylvania law. Furthermore, even if members of the public have some limited right of access to BNY Mellon Green—*which they do not*—Defendants' conduct in excluding both BNY Mellon and the general public from BNY Mellon Green still would constitute a trespass, as well as a private and public nuisance.

BNY Mellon is entitled to a preliminary injunction ending Defendants' ongoing violation of BNY Mellon's private property rights and can satisfy all the requirements for a preliminary injunction:

- BNY Mellon has a clear right to relief based on its likelihood of success on its trespass or alternative nuisance claims;
- BNY Mellon is suffering, and will continue to suffer, irreparable harm, including: deprivation of its right to possess and control its BNY Mellon Green property; denial of the use and enjoyment of BNY Mellon Green for itself, its tenants, and its guests; inability to close BNY Mellon Green for winter months, as it historically has done; and exposure to liability (increasing at night and with the onset of winter) arising from conditions on BNY Mellon Green and from the conduct of Defendants, including risks to the health, safety, and welfare of people on or near BNY Mellon Green;
- Refusing to grant preliminary injunctive relief will result in greater harm than granting it because: Defendants have no right of access to BNY Mellon Green; their conduct exceeds the scope of any right of access they possibly could claim; and the requested injunctive relief affords Defendants many other ways to accomplish any legitimate goals they may have without violating BNY Mellon's rights;
- A preliminary injunction would serve the public interest by protecting property rights from trespass and by protecting the health, safety, and welfare of people on and near BNY Mellon Green; and
- A preliminary injunction would restore the status quo that existed before Defendants' occupation began and BNY Mellon's requested injunctive relief is appropriately and narrowly tailored.

For these reasons, and as discussed in more detail herein, BNY Mellon respectfully requests that the Court grant Plaintiffs' Motion for Preliminary Injunction filed herewith ("the Motion") and enter the proposed preliminary injunction Order attached to the Motion.

II. STATEMENT OF FACTS

A. **BNY Mellon Acquires Property For BNY Mellon Client Service Center.**

As set forth in the *Verified Complaint for Injunctive Relief*, this Action concerns the trespass by Defendants on certain Open Space accessory to BNY Mellon Client Service Center, known and referred to herein as "BNY Mellon Green," that is wholly owned, operated, and controlled by BNY Mellon. (V. Compl. Exs. 1, 2, & 8). The history of the development of BNY Mellon Green shows that Defendants have no right of access to BNY Mellon Green and that Defendants' conduct exceeds any right of access they possibly could claim.

The history of the development of BNY Mellon Green begins with BNY Mellon's acquisition of certain vacant commercial real estate for the construction of an operations center directly east of BNY Mellon Center (then known as One Mellon Bank Center). (V. Compl. at ¶¶ 7-8). Specifically, on or about February 24, 1998, BNY Mellon, National Association,³ acquired certain real estate situate in the City of Pittsburgh, County of Allegheny, Pennsylvania, and bearing block and lot numbers 2-E-200-01, 2-E-216, 2-E-235, 2-F-215, and 2-F-250 from Card-Flo #1, Inc., by Special Warranty and Quit Claim Deed (the "Card-Flo Deed"). (V. Compl. at ¶ 7, Ex. 1). Subsequently, on or about September 1, 1998, BNY Mellon, National Association, acquired certain real estate situate in the City of Pittsburgh, County of Allegheny, Pennsylvania, and bearing block and lot number 2-F-230 from the Urban Redevelopment

³ BNY Mellon, National Association was formerly known as Mellon Bank, N.A. (V. Compl. at ¶ 1).

Authority of Pittsburgh, by deed (the "URA Deed"). (V. Compl. at ¶ 8, Ex. 2). The property conveyed under the Card-Flo Deed and the URA Deed hereinafter is referred to as the "BNY Mellon Property." BNY Mellon acquired the BNY Mellon Property, which at the time was vacant, commercial real estate, for a project, the first phase of which involved the construction of a multi-story operations center and associated 650 stall parking garage that is now known as BNY Mellon Client Service Center. (V. Compl. at ¶ 9).

B. BNY Mellon Applies For Project Development Plan Approval Regarding BNY Mellon Client Service Center.

On June 3, 1998, BNY Mellon, through its agent, filed an Application for Project Development Plan Approval with the Office of Zoning Administrator for the Department of City Planning ("City Planning") of Pittsburgh, Pennsylvania (the "Application"), regarding the BNY Mellon Property with BNY Mellon Client Service Center (the "Project"). (V. Compl. at ¶ 10, Ex. 3). The provisions of the Pittsburgh Zoning Code in effect at the time of BNY Mellon's Application for approval of the Project, and governing the City's review and subsequent approval of the Project, is hereinafter referred to as the "1988 Zoning Code." (V. Compl. at ¶ 11, Ex. 4).

BNY Mellon proposed to build on the vacant, commercial real estate, *inter alia*, an eleven-story operations center, parking, required accessory "Urban Open Space," as defined in the 1988 Zoning Code, as well as certain additional temporary accessory "Open Space," also defined in the 1988 Zoning Code, which was intended for future development. (V. Compl. at ¶ 12). Importantly, the Application recognized that "[f]uture phases will be developed" on the Open Spaces. (V. Compl. at Ex. 3 at *3) (emphasis added).

On June 16, 1998, City Planning presented a report to the City Planning Commission for Pittsburgh ("Planning Commission") recommending preliminary approval of the Project (the

“June 16, 1998 Report”). (V. Compl. at ¶ 14). In its June 16, 1998 Report, City Planning stated, “[t]he building will occupy approximately one half the vacant property. **The remainder will be landscaped and reserved for future development.**” (V. Compl. at ¶ 14, Ex. 5 at *3) (emphasis added). The June 16, 1998 Report states that the property to be reserved for future development as the “temporary open spaces” would be created at “Grant and Sixth Avenue [the area known as and hereinafter referenced as “BNY Mellon Green”], and one block to the east at Ross Street and Sixth Avenue.” (V. Compl. at ¶ 15, Ex. 5 at *3).

The Planning Commission preliminarily approved the Project on June 16, 1998, subject to final approval of the landscape, building elevations, and sign designs. (V. Compl. at ¶ 16). Subsequently, City Planning issued a Report (the “November 10, 1998 Report”) recommending final approval of the Project for the November 10, 1998 meeting of the Planning Commission. (V. Compl. at ¶ 17). City Planning described the non-building portion of the Project as follows:

Permanent landscaping includes a permanent pedestrian promenade that will extend from Grant Street through the site to Sixth Ave Extension. This will provide a pedestrian walkway to the main entrance of the new building from Grant Street, and will serve as part of the Urban Open Space requirement. . . . **Temporary open spaces will be created at Grant and Sixth Avenue** and one block to the east at Ross Street and Sixth Avenue.

(V. Compl. at ¶ 17, Ex. 6 at *3) (emphasis added). During the November 10, 1998 regular meeting of the Planning Commission, the Planning Commission recommended final approval of the Project. Again, in its oral presentation, City Planning stated that:

The landscape plan involved a permanent pedestrian promenade extending from Grant Street through the site to Sixth Avenue. This will serve as part of the Urban Open Space requirement....

[A] temporary open space will be created at Grant and Sixth and also one block to the east at Ross and Sixth.

(V. Compl. at ¶ 18, Ex. 7 at *3). That same day the Planning Commission gave final approval to the Project. (V. Compl. at ¶ 18).

C. BNY Mellon Owns And Operates BNY Mellon Green.

BNY Mellon owns BNY Mellon Green, which is a part of block and lot number 2-E-220-1 and was conveyed to BNY Mellon under the Card-Flo Deed. (V. Compl. at ¶ 20). Pursuant to the Planning Commission's approved plan for the Project, BNY Mellon improved the Open Space constituting BNY Mellon Green, which consists of landscaped areas with a series of internal sidewalks, benches, and a central fountain. (V. Compl. at ¶ 21). Also, pursuant to the Planning Commission's approved plan for the Project, BNY Mellon constructed the pedestrian walkway immediately abutting the T-Station and connecting from Grant Street to Ross Street (the "Sidewalk"), which Sidewalk was designated as required accessory Urban Open Space for the Project. (V. Compl. at ¶ 22). The Sidewalk is bordered by BNY Mellon Center, Ross Street, and BNY Mellon Green. (*Id.*).

BNY Mellon, National Association leases BNY Mellon Client Service Center to The Bank of New York Mellon. (V. Compl. at ¶ 23, Ex. 8). Through that lease, The Bank of New York Mellon also enjoys full leasehold rights in, and controls the operation and maintenance of, BNY Mellon Green. (*Id.*). Under the Project and as approved by the Planning Commission, BNY Mellon Green was intended to be reserved for future commercial development, was only temporarily to be used as Open Space, and was not designated as Urban Open Space subject to the Urban Open Space provisions of the 1988 Zoning Code. (V. Compl. at ¶ 24).

D. "Urban Open Space" Differs From "Open Space."

The 1988 Zoning Code required all new structures in the C5-B Golden Triangle District B, including the proposed Project, to designate and provide 20% of the lot area at ground level as Urban Open Space. (V. Compl. at ¶ 25). Urban Open Space is a defined term under the 1988 Zoning Code. (V. Compl. at ¶ 26, Ex. 9). Under the 1988 Zoning Code, Urban Open Space serves one of the following four specific purposes: (1) facilitating pedestrian circulation;

(2) providing space for “relaxation, sitting, informal recreation or activities such as entertainment, exhibits, eating and drinking;” (3) improving access to public transportation; and (4) providing connections to other urban or public open space network. (V. Compl. at ¶ 27); 1988 Zoning Code § 903.02(o)(g) (1988).⁴ However, as defined in the 1988 Zoning Code, Urban Open Space requires limited access to the “general public” but only “during all business hours common to the area of the district” for these four purposes. 1988 Zoning Code § 903.02(o)(g); (V. Compl. at ¶ 28, Ex. 4 at *2 (Sections 903.02(o)(b), (c) & (g))).

Section 959.06(b)(4)(B)(6) of the 1988 Zoning Code expressly distinguishes “Open Space” from “Urban Open Space” by providing that “Open Space, in excess of that required by this ordinance, which may be provided on a development site shall be located and developed in a manner which does not disrupt or diminish the functioning or public utilization of the required [U]rban [O]pen [S]pace.” (V. Compl. at ¶ 29, Ex. 4 at *10). Importantly, the 1988 Zoning Code separately defines Open Space as “that portion of a lot which is not occupied by buildings, parking areas, driveways, streets or loading areas,” and, so defined, treats Open Space less restrictively than Urban Open Space. Unlike Urban Open Space, the 1988 Zoning Code does not require that such Open Space be made accessible to the public at all. (V. Compl. at ¶ 30, Ex. 4 at *2, 10).

E. BNY Mellon Green Is Open Space, Not Urban Open Space.

As part of the Project, BNY Mellon was required to provide approximately 21,405 square feet of Urban Open Space. (V. Compl. at ¶ 31). BNY Mellon provided the required 21,405 square feet of Urban Space and also provided an *additional* 57,874 square feet of Open Space, separate from, and in excess of, the required Urban Open Space. (*Id.*). This additional 57,874

⁴ PITTSBURGH, PA., CODE OF ORDINANCES, ZONING CODE § 903.02(o)(g) (1988).

square feet of Open Space includes the Open Space that constitutes BNY Mellon Green. The additional 57,874 square feet of Open Space is not subject to the requirements of the 1988 Zoning Code governing Urban Open Space. (V. Compl. at ¶ 32). Under the Project and as approved by the Planning Commission, BNY Mellon Green is Open Space, subject (at BNY Mellon's discretion) to future commercial development. (V. Compl. at ¶ 33). In fact, the only portion of the BNY Mellon Property between Grant Street and Ross Street that was designated as required Urban Open Space was the Sidewalk adjacent to BNY Mellon Green that extends from Grant Street to the main entrance at BNY Mellon Client Service Center on Ross Street. (V. Compl. at ¶ 34). Further, no portion of the Project, including BNY Mellon Green, and no portion of the Urban Open Space, including the Sidewalk, was dedicated to the public. (V. Compl. at ¶ 35). BNY Mellon Green was, and remains, privately held, commercial property owned exclusively by BNY Mellon and reserved by BNY Mellon for future development. (V. Compl. at ¶ 36). BNY Mellon is not required by the 1988 Zoning Code to make Open Space at BNY Mellon Green accessible to the public at any time. (*Id.*). Accordingly, BNY Mellon Green is Open Space, and is reserved for future development, and is not Urban Open Space required to be provided in the Golden Triangle Zoning District. (V. Compl. at ¶ 37).

F. Occupy Pittsburgh Sets Up Camp On BNY Mellon Green.

On October 15, 2011, Defendant Occupy Pittsburgh conducted certain operations, including marches and speeches in the City of Pittsburgh, which culminated in Defendants creating a make-shift occupation camp on BNY Mellon Green. (V. Compl. at ¶ 38). The occupation camp occupies essentially the entirety of BNY Mellon Green, and Defendants have possessed BNY Mellon Green by erecting tents and other structures that form the camp. (V. Compl. at ¶¶ 38-39).

Occupy Pittsburgh has represented that there are “50-odd occupiers” at the make-shift Occupy Pittsburgh camp. (V. Compl. at ¶ 40, Ex. 10). Moreover, Occupy Pittsburgh has announced its intention to remain on BNY Mellon Green through the winter and beyond. (V. Compl. at ¶ 41). BNY Mellon understands that Occupy Pittsburgh is seeking to raise funds for materials and supplies and proposes to erect more substantial shelters on BNY Mellon Green. (V. Compl. at ¶ 42). Occupy Pittsburgh has further requested “15lb propane cylinders and propane heaters.” (V. Compl. at ¶ 43, Ex. 11). The presence of combustible heat sources would create safety risks, including but not limited to fire, explosion and carbon monoxide poisoning, if improperly stored or used at BNY Mellon Green. (*Id.*). Occupy Pittsburgh’s conduct shows that it intends to interfere with BNY Mellon’s clear property rights for the foreseeable future.

G. BNY Mellon Posts A Notice Instructing Defendants To Take Down Their Camp And Unequivocally Stating Its Lack Of Consent To Defendants’ Continued Occupation of BNY Mellon Green.

Historically, BNY Mellon closes BNY Mellon Green during the winter by placing chains at all pedestrian entrances to BNY Mellon Green. (V. Compl. at ¶ 44). Because BNY Mellon closes BNY Mellon Green in the winter, there is no snow removal or treatment at BNY Mellon Green. (*Id.*). The continued occupation interferes with BNY Mellon’s closure of its BNY Mellon Green property during winter months.

On December 9, 2011, BNY Mellon delivered and posted at BNY Mellon Green a notice (the “Notice”) that required Defendants to remove “all tents and other structures as well as camping equipment and other stored personal items from BNY Mellon Green by no later than noon on Sunday, December 11, 2011.” (V. Compl. at ¶ 45, Ex. 12). The Notice also stated that “[a]fter that date, overnight camping and the presence of any structures, camping equipment and stored personal items will be prohibited and considered an unlawful trespass. . . .” (V. Compl. at ¶ 46, Ex. 12). Despite adequate notice to vacate the property, Defendants have failed to remove

all tents and other structures, as well as camping equipment and other stored personal items, and continue to engage in camping activities at BNY Mellon Green. (V. Compl. at ¶ 57). As noted above (p. 2 & n. 2), the evidence will show that Defendants have responded to BNY Mellon's Notice by tearing it down and publicly claiming to have seized and renamed BNY Mellon Green as "The People's Park." Thus, they have intruded on BNY Mellon Green intentionally and willfully and continue to intrude on BNY Mellon Green intentionally and willfully, even to the point of claiming to take possession of it. (V. Compl. at ¶¶ 66, 88).

H. BNY Mellon Suffers Immediate And Irreparable Harm As A Result Of Defendants' Ongoing Occupation Of BNY Mellon Green.

Defendants' continued occupation of BNY Mellon Green in the manner set forth above and in the *Verified Complaint for Injunctive Relief* (the "Occupation") constitutes a trespass or alternatively a nuisance. (V. Compl. at ¶¶ 57-58). Defendants' Occupation of BNY Mellon Green denies and has denied BNY Mellon possession and quiet enjoyment of BNY Mellon Green and deprives and has deprived BNY Mellon's tenants, employees, and guests of the use of BNY Mellon Green. (V. Compl. at ¶¶ 59-60). Defendants can demonstrate no lawful basis to support their continued Occupation. (V. Compl. at ¶ 61). Defendants' continued Occupation deprives BNY Mellon of its property rights and causes BNY Mellon immediate, irreparable, and substantial harm, including but not limited to the following:

- (a) BNY Mellon has been denied the use, enjoyment and possession of its property;
- (b) Defendants' continued Occupation of BNY Mellon Green exposes BNY Mellon to the risk of claims as a result of conduct by or injury to the Defendants or third-parties as a result of conditions or conduct created by Defendants on BNY Mellon Green;
- (c) Defendants' continued Occupation harms and threatens BNY Mellon's reputation and goodwill;

- (d) Defendants' continued Occupation will prevent BNY Mellon from closing its BNY Mellon Green property during the winter as it historically has done;
- (e) BNY Mellon is unable to remedy any potential Pittsburgh Zoning Code violations now occurring or that may occur, including for example, the placement of structures without obtaining proper approvals due to the unauthorized use and occupation of BNY Mellon Green by the Defendants;
- (f) Defendants' continued Occupation of BNY Mellon Green causes significant damage to BNY Mellon as, *inter alia*, it incurs utility, insurance, and tax expenses for property which it cannot control or enjoy; and
- (g) Upon information and belief, Defendants' continued Occupation after posting of the Notice constitutes a defiant trespass in violation of 18 Pa. Cons. Stat. § 3503(b).

(V. Compl. at ¶ 62).

III. LEGAL STANDARD

A preliminary injunction is appropriately granted where: (1) the movant possesses a clear right to the injunctive relief; (2) the injunctive relief prevents immediate and irreparable harm to the movant; (3) refusing the injunctive relief will result in greater harm than granting it; (4) the injunctive relief will not adversely affect the public interest; and (5) the injunctive relief is narrowly tailored and restores the status quo as it existed before the defendant's alleged wrongful conduct. *Ambrogi v. Reber*, 932 A.2d 969, 976 (Pa. Super. Ct. 2007).

Under Pennsylvania law, the decision to grant a preliminary injunction rests in the sound discretion of the trial court. *Id.* at 974. However, a preliminary injunction is *routinely* granted to prevent immediate and irreparable harm to property interests in land as well as threats to health and safety arising from conditions on land caused by an apparent trespass or nuisance. *E.g.*, *Chase v. Eldred Borough*, 902 A.2d 992 (Pa. Commw. Ct. 2006) (affirming a preliminary injunction compelling a borough to remedy a nuisance by erecting a barrier to restrict the flight

of baseballs onto adjacent property); *The Woods at Wayne Homeowners Ass'n v. Gambone Bros. Constr. Co., Inc.*, 893 A.2d 196, 206-07 (Pa. Commw. Ct. 2006) (affirming preliminary injunction requiring a developer to remedy a nuisance before weather conditions changed and increased risks to health and safety and further property damage); *Tinicum Twp. v. Del. Valley Concrete, Inc.*, 812 A.2d 758 (Pa. Commw. Ct. 2002) (affirming a preliminary injunction against quarry operator's blasting activities, as a nuisance, based on the risk of injury to those living nearby); *White v. Foley*, 54 Pa. D. & C.4th 145, 2001 WL 1842492 (Butler Ct. Com. Pl. 2001) (preliminarily enjoining trespassing neighbors from maintaining play equipment on plaintiff's property and allowing their children to play on the property because of the risk of "significant liability for potential injuries"), *aff'd without opinion*, 804 A.2d 71 (Pa. Super. Ct. 2002); *N. Penn Gas Co. v. Mahosky*, 378 A.2d 980 (Pa. Super. Ct. 1977) (affirming a preliminary injunction enjoining trespassing neighbors from constructing a home that would encroach upon a right of way); *Utz Potato Chip Co. v. York Parachuting Ctr., Inc.*, 5 Pa. D. & C.3d 63, 1977 WL 256 (Adams Ct. Com. Pl. 1977) (issuing a preliminary injunction prohibiting a parachute jump school from trespassing by dropping students onto plaintiff's property).

IV. ARGUMENT

BNY MELLON IS ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF

Here, the circumstances warrant a preliminary injunction that requires Defendants to:

- (1) immediately remove from BNY Mellon Green all tents and other structures, camping equipment, and stored personal items;
- (2) cease and desist and refrain from camping on BNY Mellon Green or bringing any tents and other structures, camping equipment, or stored personal items to BNY Mellon Green;
- (3) cease and desist and refrain from doing any acts that would interfere with, or obstruct, the free use and enjoyment of any portion of BNY Mellon Green by BNY Mellon, its tenants, and invitees;
- (4) abide by any notice posted by BNY Mellon on the

BNY Mellon Green property that BNY Mellon Green is closed during the winter months; and (5) comply with such other relief as this Court deems just and proper.

A. BNY Mellon Has A Clear Right To Preliminary Injunctive Relief Because It Is Likely To Prevail On Its Trespass And Nuisance Claims.

In seeking a preliminary injunction, a “party’s right to relief is clear if the party seeking the preliminary injunction is likely to prevail on the merits of the permanent injunction.” *The Woods*, 893 A.2d at 204. In order for a plaintiff to show that it is likely to prevail on the merits of a permanent injunction, the plaintiff must be able to show that it will likely prevail on the merits of the underlying cause of action. *See id.* at 207. Here, BNY Mellon is likely to prevail on the merits of its claim for trespass. Alternatively, even if Defendants are not trespassing on BNY Mellon Green (which they are) because of some common right of the general public to access BNY Mellon Green (which there is not), BNY Mellon is likely to prevail on the merits of its claims for private and public nuisance.

1. BNY Mellon Is Likely To Prevail On Its Trespass Claim Because All The Elements Of Trespass Are Satisfied.

BNY Mellon possesses a clear right to relief because it is likely to prevail on the merits of its claim for trespass. Pennsylvania law defines a trespass as an unprivileged, intentional intrusion upon land in possession of another. *Rawlings v. Bucks County Water & Sewer Auth.*, 702 A.2d 583, 586 (Pa. Commw. Ct. 1997) (citing RESTATEMENT (SECOND) OF TORTS (“REST. 2D TORTS”) § 158). Here, all the elements of a trespass are satisfied and there can be no dispute that Defendants are trespassing on BNY Mellon Green:

- BNY Mellon owns BNY Mellon Green and possessed it prior to Defendants’ Occupation;
- BNY Mellon notified Defendants that it does not consent to their continued Occupation of BNY Mellon Green by posting the Notice; and

- Defendants have no privilege or other right to erect or maintain tents and other structures, store camping equipment or personal items, or camp continuously and indefinitely on BNY Mellon Green.

a. BNY Mellon Owns BNY Mellon Green And Possessed It Prior To Defendants' Occupation.

To vindicate private property rights, a plaintiff seeking to enjoin an invasion of its rights to real property must demonstrate that it has a clear right to the property in question. *See Graham Oil Co. v. BP Oil Co.*, 885 F. Supp. 716, 725 (W.D. Pa. 1994) (“In order to maintain a trespass action, a plaintiff must have had the right to exclusive use and possession of the property at issue.”). There is no dispute that BNY Mellon meets this threshold requirement of exclusive ownership because BNY Mellon holds both the fee simple and leasehold rights in BNY Mellon Green and possessed it prior to Defendants' Occupation. (V. Compl. at ¶ 64, Exs. 1, 2, and 8).

b. BNY Mellon Does Not Consent To Defendants' Continuing Occupation Of BNY Mellon Green.

Absent BNY Mellon's consent, Defendants have no legal right to continue their Occupation of BNY Mellon Green. *Ochroch v. Kia-Noury*, 497 A.2d 1354, 1355-56 (Pa. Super. Ct. 1985) (trespassers “have no right at law or in equity to occupy or appropriate land that does not belong to them.”). BNY Mellon has made it clear that it does *not* consent to Defendants' continuing Occupation of BNY Mellon Green via the Notice posted at BNY Mellon Green on December 9, 2011. (V. Compl. at ¶ 45, Ex. 12). Since noon on Sunday, December 11, 2011, Defendants have refused to comply with the Notice, torn it down, and claimed to have seized and renamed BNY Mellon Green. (*Supra*, p. 2 & n.2); (V. Compl. at ¶ 57). Thus, they have intruded on BNY Mellon Green intentionally and willfully and continue to do so. (V. Compl. at ¶¶ 66, 88).

c. Defendants Possess No Privilege Or Other Right To Continue Their Occupation Of BNY Mellon Green.

The 1988 Zoning Code, which was in effect at the time of BNY Mellon's Application for the Project and which accordingly controls any land-use issues pertaining to BNY Mellon Green, does not provide Defendants with any privilege or right of access to BNY Mellon Green. (V. Compl. at ¶ 36). The 1988 Zoning Code:

- Defines Open Space simply to be that "portion of a lot which is not occupied by buildings, parking areas, driveways, streets, or loading areas;"
- Requires that every Project Development Plan approved by the Planning Commission designate and provide a certain amount of land as Urban Open Space (a term defined separately from Open Space subject to separate requirements);
- Requires that Open Space "in excess of" required Urban Open Space be "located and developed in a manner that does not disrupt or diminish the functioning or public utilization of the required [U]rban [O]pen [S]pace;" and
- Does *not* place any other requirements on such excess Open Space or require that it be made accessible to the public *at all*.

(V. Compl. at ¶¶ 25-30, Exs. 4, 9).

The history of the Project, set forth in detail in BNY Mellon's *Verified Complaint for Injunctive Relief* and in the Statement of Facts (*see* Section II, *supra*), shows BNY Mellon Green was: (1) provided separate from, and in excess of, the Urban Open Space requirement for the Project; (2) intended to be reserved for future commercial development as a subsequent phase of BNY Mellon Client Service Center development; and (3) intended to be used temporarily as Open Space, pending future development. (V. Compl. at ¶ 24). Thus, BNY Mellon Green is, and always has been, privately held, commercially developable Open Space owned exclusively by BNY Mellon. (V. Compl. at ¶¶ 36-37). It is not subject to any of the requirements governing Urban Open Space, and BNY Mellon is *not* required to provide *anyone* with access to BNY Mellon Green *at all*. (V. Compl. at ¶¶ 30, 33).

Defendants appear to contend: (1) that BNY Mellon Green constitutes "Urban Open Space;" and (2) that, if BNY Mellon Green is deemed Urban Open Space, they have a privilege or right to erect or maintain tents and other structures, store camping equipment or personal items, and camp on it. (V. Compl. at ¶ 47).

Defendants' contentions are wrong.

First, for the reasons just discussed, BNY Mellon Green does not constitute "Urban Open Space" under the 1988 Zoning Code or the current Pittsburgh Zoning Code (the "1999 Zoning Code") (which was not in effect when the Project was approved in 1998 and thus is inapplicable). Second, even if BNY Mellon Green could be deemed Urban Open Space (which it is not), Defendants would not have any privilege or right to erect or maintain tents and other structures, store camping equipment or personal items, or camp on it to the exclusion of BNY Mellon. Indeed, Defendants' ongoing Occupation of BNY Mellon Green is inconsistent with the characteristics of, and violates the requirements applicable to, property deemed to be Urban Open Space. (V. Compl. at ¶¶ 52-56).

It is settled that a limited right of public access to private property does not give any individual or group a privilege or right to occupy and possess private property continuously and indefinitely and to the exclusion of the property owner and the general public. *46 S. 52nd St. Corp. v. Manlin*, 157 A.2d 381, 387 (Pa. 1960) ("no individual has a right to make special or exceptional use" of the private property of another simply because it is subject to a limited right of public access).

In *Manlin*, a private property owner brought a trespass action to enjoin certain defendants from maintaining and operating a newsstand on a sidewalk that was on the owner's property. The defendants argued that a public easement over the property and a city ordinance permitting

the sale of newspapers gave them a privilege or right to maintain and operate the newsstand on the sidewalk over the property owner's objection. The Pennsylvania Supreme Court disagreed. Because the owner of the property revoked its consent, and because the city's easement and ordinance did not expressly authorize the defendant's "special or exceptional" use of the property, the maintenance of the newsstand constituted a trespass on the plaintiff's private property that had to be enjoined. *Id.* By parity of reasoning, even if BNY Mellon Green could be deemed Urban Open Space—which it is not—Defendants cannot show that the Code provides them with a right or privilege to erect and maintain tents and other structures, store camping equipment or personal items, or camp continuously and indefinitely on BNY Mellon Green, without BNY Mellon's consent.

Indeed, as noted, even if BNY Mellon Green were deemed to be Urban Open Space under the applicable 1988 Zoning Code, Urban Open Space serves four specific purposes: (1) facilitating pedestrian circulation; (2) providing space for "relaxation, sitting, informal recreation or activities such as entertainment, exhibits, eating and drinking"; (3) improving access to public transportation; or (4) providing connections to other urban or public open space network. (V. Compl. at ¶ 26, Ex. 4). BNY Mellon's prohibitions on erecting or maintaining tents and other structures, storing camping equipment or personal items, and camping continuously and indefinitely on BNY Mellon Green are all consistent with the characteristics, requirements, and purposes of Urban Open Space under the 1988 Zoning Code and, if it were applicable, the 1999 Zoning Code. (V. Compl. at ¶ 56, Exs. 4, 13). The restrictions serve BNY Mellon's legitimate interests in, *inter alia*, protecting health, safety, and welfare on BNY Mellon Green, avoiding actual or threatened damage to the property, limiting the wear and tear on the property, and maintaining the property in an attractive and intact condition for the enjoyment of

BNY Mellon and its employees, tenants, and guests. On the other hand, Defendants' continued Occupation of BNY Mellon Green is inconsistent with the characteristics, requirements, and purposes of Urban Open Space under the 1988 Zoning Code and, if it were applicable, the 1999 Zoning Code. (*Id.*).

The other provisions of the applicable 1988 Zoning Code governing Urban Open Space also provide no support for Defendants' Occupation of BNY Mellon Green. The 1988 Zoning Code expressly contemplates that public access to Urban Open Space may be limited to the "business hours common to the area of the district." (V. Compl. at ¶ 28, Ex. 4 [quoting 1988 Zoning Code at § 903.02(o)(g)]; 1988 Zoning Code at §§ 903.02(b)-(c), *et seq.* And, if it were applicable, the 1999 Zoning Code would allow for the same limitations on public access to Urban Open Space. Simply put, no Zoning Code provision governing Urban Open Space can be construed to give Defendants a right or privilege to erect and maintain tents and other structures, store camping equipment or personal items, or camp overnight on BNY Mellon Green, without BNY Mellon's consent.

Finally, the 1988 and 1999 Zoning Codes only establish general zoning requirements for the development and use of real property located in the City of Pittsburgh. As such, they are enforceable only by the City and do not create privileges or rights in Defendants or any individual person or group. *See Burne v. Kearney*, 225 A.2d 892 (Pa. 1967) (a private party may not enforce general zoning requirements absent a "special" and "peculiar" injury to his or her property).

In sum, Defendants are intentionally intruding upon BNY Mellon's private property, with no consent or other right or privilege to do so. Under Pennsylvania law, their conduct is a trespass, pure and simple. BNY Mellon is likely to prevail on the merits of its trespass claims.

Nothing more is needed to establish a clear right to the preliminary relief that BNY Mellon seeks.

2. Alternatively, BNY Mellon Is Likely To Prevail On The Merits Of Its Claim For Private Nuisance Because All The Elements Of A Private Nuisance Are Satisfied.

Defendants clearly are trespassing on BNY Mellon Green, but if they are not (a false assumption that BNY Mellon is willing to make *only* for the purpose of demonstrating its likely success on its private nuisance claim), the Court should hold that BNY Mellon is likely to prevail on the merits of its claim for a private nuisance.

Under Pennsylvania law, a defendant may be held liable for a private nuisance and the nuisance may be preliminarily enjoined if the defendant's conduct invades the plaintiff's interest in the "private use and enjoyment" of his land and the invasion is "intentional and unreasonable." *Hughes v. Emerald Mines Corp.*, 450 A.2d 1, 4 (Pa. Super. Ct. 1982) (quoting REST. 2D TORTS § 822); *Chase*, 902 A.2d at 993-94 (affirming a preliminary injunction to abate a private nuisance). Here, Defendants' Occupation is invading BNY Mellon's interest in the "private use and enjoyment" of BNY Mellon Green and it is "intentional and unreasonable." Specifically, the record shows that:

- Defendants' Occupation is completely depriving BNY Mellon of its right to possess BNY Mellon Green and use it for the enjoyment of itself and its tenants, employees, and guests;
- Defendants' Occupation is intentional for the reasons stated previously; and
- Defendants' Occupation is unreasonable because the harm to BNY Mellon's property rights is absolute, while Defendants have many alternative places where they may engage in this conduct lawfully.

First, Defendants' Occupation completely deprives BNY Mellon of its right to possess BNY Mellon Green and use it for itself and its tenants, employees, and guests. (V. Compl. at ¶¶ 59-60). This easily qualifies as an invasion of BNY Mellon's interest in the private use and

enjoyment of BNY Mellon Green. REST. 2D TORTS § 821D cmt. b (defining “interest in the use and enjoyment of land” to include a person’s interests in the use of land, in keeping the land free from physical damage, and in “the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land”).

Second, as demonstrated above, Defendants’ continued Occupation is “intentional.” *Hughes*, 450 A.2d at 4-5 (an invasion is intentional “if the actor (a) acts for the purpose of causing it, or (b) knows that it is resulting or is substantially certain to result from his conduct”) (quoting REST. 2D TORTS § 825).

Lastly, there can be no dispute that Defendants’ Occupation is an “unreasonable” invasion. An invasion becomes unreasonable if, *inter alia*, “the gravity of the harm outweighs the utility of the actor’s conduct.” *Hughes*, 450 A.2d at 5 (quoting REST. 2D TORTS § 826).⁵ In this case, the harm to BNY Mellon’s interest in BNY Mellon Green is significant and, indeed, absolute. On the other hand, Defendants’ conduct is not suitable for Open Space in the middle of a major city and is not sanctioned by either the 1988 Zoning Code or the 1999 Zoning Code. (V. Compl. at ¶¶ 27-28, 52, Ex. 4). Defendants may engage in their conduct in many other places lawfully and without creating a nuisance. Indeed, if Defendants wish to camp overnight or engage in a wide variety of conduct, they are free to do so on public property, in accordance with applicable laws, or on other private property, with the consent of such other owner and in

⁵ To determine whether the gravity of the harm outweighs the utility of the actor’s conduct, courts weigh the harm to a property owner’s interests, as well as the following factors: “(a) the social value that the law attaches to the primary purpose of the conduct; (b) the suitability of the conduct to the character of the locality; and (c) the impracticability of preventing or avoiding the invasion.” REST. 2D TORTS § 828; *see also Burr v. Adam Eidemiller, Inc.*, 126 A.2d 403, 423 (Pa. 1956) (“When a person knows that his conduct will interfere with another’s use or enjoyment of land, and it would be practicable for him to prevent or avoid part or all of the interference and still achieve his purpose, his conduct lacks utility if he fails to take the necessary measures to avoid it.”) (citation omitted).

accordance with applicable laws. And Defendants' invasion itself is easily prevented or avoided by compliance with the reasonable terms of the BNY Mellon's Notice. *Burr*, 126 A.2d at 423.

Thus, the Occupation constitutes a clear, intentional, and unreasonable invasion of BNY Mellon's property rights. Even if Defendants are not trespassers, BNY Mellon still is likely to prevail on its claims for private nuisance and this, too, is sufficient to establish a clear right to the preliminary relief that BNY Mellon seeks.

3. Alternatively, BNY Mellon Is Likely To Prevail On Its Public Nuisance Claim Because All The Elements Of A Public Nuisance Are Satisfied.

The analysis and result are similar for BNY Mellon's claim of a public nuisance. Defendants clearly are trespassing on BNY Mellon Green, but if they are not because the general public has some common right of access to BNY Mellon Green (a false assumption that, again, BNY Mellon is willing to make *only* for the purpose of demonstrating its likely success on its public nuisance claim), this Court should hold that BNY Mellon is likely to prevail on the merits of its public nuisance claim. *The Woods*, 893 A.2d at 205 n.13, 206-07 (affirming a preliminary injunction of a public and private nuisance). "A public nuisance is an unreasonable interference with a right common to the general public" and can be remedied at common law by a private plaintiff whose property rights are "specifically injured by the public nuisance over and above the injury suffered by the public generally." *Muehlieb v. City of Phila.*, 574 A.2d 1208, 1211 (Pa. Commw. Ct. 1990) (quoting REST. 2D TORTS § 821B(1)) (definition approved by *Machipongo Land and Coal Co., Inc. v. Com.*, 799 A.2d 751, 773 (Pa. 2002)); *Pa. S.P.C.A. v. Bravo Enter., Inc.*, 237 A.2d 342, 360 (Pa. 1968). The circumstances that justify finding that an interference with a public right is unreasonable include:

- (a) [w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience;

- (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation; or
- (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Muehlieb, 574 A.2d at 1211 (quoting REST. 2D TORTS § 821B(2)) (emphasis removed). Here, Defendants' Occupation is invading any supposed common right of access that the general public could have in accessing and using BNY Mellon Green and is specifically injuring BNY Mellon over and above the injury suffered by the public generally. Specifically, the record shows that:

- Defendants' Occupation is an unreasonable interference with any supposed common right of access that could exist in BNY Mellon Green because it (1) involves a significant interference with public health, safety, peace, comfort and convenience and (2) is of a continuing nature and, as Defendants know, or have reason to know, is having a significant effect upon any supposed common right of access that could exist in BNY Mellon Green.
- BNY Mellon is "specifically injured by the public nuisance over and above the injury suffered by the public generally" because, among other things, it has lost access to all of the passive recreation spaces and informal activities areas of its BNY Mellon Green property.

At a minimum, Defendants' conduct constitutes an unreasonable interference with any supposed public right that could exist in access to BNY Mellon Green under *Muehlieb*, 574 A.2d at 1211, and REST. 2D TORTS § 821B(2)(a) or (c). Defendants' Occupation involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience on and around BNY Mellon Green as noted below (p. 24-26). (V. Compl. at ¶¶ 62, 78-79). Defendants' full-scale Occupation of BNY Mellon Green also is intentionally continuous and plainly usurps any public right that might exist to use the space for, *inter alia*, passive recreation. (V. Compl. at ¶¶ 78-81). Compare, e.g., REST. 2D TORTS § 821B cmt. g

(“The obstruction of a public highway is a public nuisance, although no one is traveling upon the highway or wishes to travel on it at the time.”).

A private plaintiff, like BNY Mellon, can pursue a common law claim for public nuisance where the plaintiff’s property rights are “specifically injured by the public nuisance over and above the injury suffered by the public generally.” *Pa. S.P.C.A.*, 237 A.2d at 360. Here, Defendants’ Occupation distinctly injures BNY Mellon by substantially impairing its use and enjoyment of BNY Mellon Green by depriving access to all of the passive recreation spaces and informal activities areas of BNY Mellon Green. (V. Compl. at ¶¶ 62, 81). Defendants’ Occupation is specifically injuring BNY Mellon over and above the injury suffered by the public generally. Defendants’ conduct has been willingly and intentionally directed against BNY Mellon, and BNY Mellon suffers unique harm including, that, as property owner, BNY Mellon is paying utility, insurance, and tax expenses for property which it cannot control or enjoy and may be subject to claims that it is responsible for any potential violations of the applicable 1988 Zoning Code (or, were it applicable, the 1999 Zoning Code) or other violations of law. (V. Compl. at ¶¶ 62, 83).

Because it is likely that BNY Mellon will prevail on its claim for public nuisance, it has a clear right to relief and an injunction should issue in its favor.

B. Preliminary Injunctive Relief Is Necessary To Prevent Immediate And Irreparable Harm.

Defendants’ continuing Occupation is causing BNY Mellon immediate and irreparable harm, and entry of a preliminary injunction is needed to end this harm. BNY Mellon is being irreparably harmed in numerous ways, including all of those noted previously (pp. 11-12).

Defendants’ Occupation of BNY Mellon Green alone causes immediate and irreparable harm that cannot be adequately redressed through damages and which thus warrants injunctive

relief. *Dodson v. Brown*, 70 Pa. Super. 359, 361, 1918 WL 2935, at *1 (Pa. Super. Ct. 1918). Furthermore, the immediate and irreparable harm from BNY Mellon's dispossession is increasing and unlikely to abate without injunctive relief. Defendants' stated intentions are to remain on BNY Mellon Green continuously and indefinitely. Defendants have refused to comply with BNY Mellon's notice. Instead, as noted previously (p. 2 & n.2), Defendants tore up BNY Mellon's Notice and then publicly claimed to have seized BNY Mellon Green and renamed it "The People's Park."

Defendants' Occupation also presents immediate, ongoing, and increasing risks to the health, safety, and welfare of BNY Mellon's employees, tenants, and guests, and the general public. Defendants' Occupation is inherently dangerous because it entails the continuous and indefinite presence on BNY Mellon Green of numerous people, tents, make-shift structures, various pieces of camping equipment, and unknown personal items. Furthermore, by continuing their Occupation of BNY Mellon Green overnight, Defendants are increasing risks to the health, safety, and welfare of BNY Mellon's employees, tenants, and guests, the general public, and themselves.

The onset of winter weather further increases the Occupation's inherent dangers and the risks to health, safety, and welfare. Defendants recently have requested fifteen-pound propane cylinders and propane heaters. (V. Compl. at ¶ 43, Ex. 11). The storage and use of propane or similar combustible materials at BNY Mellon Green would present an unacceptable risk. (*Id.*) The obvious dangers associated with the storage and use of such materials include fire, explosion, carbon monoxide poisoning, severe injury, or even death. (*Id.*) Furthermore, while such heat sources are inherently dangerous, the absence of adequate heating on BNY Mellon Green also underscores how Defendants' Occupation in the dead of winter is inherently

dangerous and presents an unacceptable risk. This is simply an untenable situation. All of these risks to health, safety, and welfare constitute irreparable harm to BNY Mellon, its employees, tenants, and guests, as well as the general public. *The Woods*, 893 A.2d at 206-07 (preliminary injunction granted to prevent further risk to health, safety, and welfare); *Tinicum Twp.*, 812 A.2d at 765 (same).

Defendants' Occupation exposes BNY Mellon to a risk of liability as a result of conduct by, or injury to, the occupying Defendants, REST. 2D TORTS §§ 333-39, and injury to goodwill. *See W. Penn. Specialty MSO, Inc. v. Nolan*, 737 A.2d 295, 298-99 (Pa. Super. Ct. 1999) (potential disruption of established and prospective business relations constituted irreparable harm warranting preliminary injunction); *and see The York Group, Inc. v. Yorktowne Caskets, Inc.*, 924 A.2d 1234, 1247 (Pa. Super. Ct. 2007) (testimony regarding potential loss of goodwill and future business admissible to establish irreparable harm). Defendants' continuing Occupation, and anything that happens during the Occupation, inevitably is associated with BNY Mellon and injures its goodwill.

Due to the aforesaid immediate, irreparable and substantial harm, BNY Mellon is without an adequate remedy at law. (V. Compl. at ¶ 92). Entry of a preliminary injunction is therefore necessary to prevent further irreparable harm to BNY Mellon.

C. Refusing To Grant Preliminary Injunctive Relief Will Result In Greater Harm Than Granting It.

Greater harm will be inflicted upon BNY Mellon and the general public by the denial of the injunction than the limited harm, if any, which will result to Defendants if the injunction is granted. Injunctive relief will not harm Defendants. Defendants have no right of access to BNY Mellon Green and, even if they did, their Occupation would far exceed any such right of access. Besides, there are many other ways for Defendants to accomplish any legitimate goals they may

have that would not involve erecting or maintaining tents and other structures, storing camping equipment or personal items, camping continuously and indefinitely on BNY Mellon Green, and seizing BNY Mellon's property. Indeed, Defendants may engage in a wide variety of conduct on public property, in accordance with applicable laws, or other private property, in accordance with applicable laws and with the consent of such other owner.

Furthermore, in accordance with PA. R. CIV. P. 1531(b)(1), BNY Mellon will post a bond if a preliminary injunction is entered. BNY Mellon respectfully submits that the bond should be nominal, given the absence of any potential damages to Defendants by requiring them to cease trespassing on BNY Mellon's property. *Broad and Locust Assocs. v. Locust-Broad Realty Co.*, 464 A.2d 506, 509 (Pa. Super. Ct. 1983) (noting that the "unlikelihood that damage would be done to the injunctee was a factor weighing against requiring a larger bond").

Because refusing to grant injunctive relief will result in greater harm than granting it, a preliminary injunction should be issued.

D. Preliminary Injunctive Relief Will Serve, Not Adversely Affect, The Public Interest.

The public interest here is in protecting BNY Mellon's rights as a property owner and in protecting the health, safety, and welfare of people on or near BNY Mellon Green. Defendants have no right of access to BNY Mellon Green and, even if they did, their Occupation would far exceed any such right of access. Preliminary injunctive relief enforcing BNY Mellon's reasonable prohibitions on erecting or maintaining tents and other structures, storing camping equipment or personal items, and camping continuously and indefinitely on BNY Mellon Green will serve, not adversely affect, the public interest.

E. Preliminary Injunctive Relief Would Restore The Parties To The Status Quo As It Existed Before Defendants' Occupation And Be Appropriately And Narrowly Tailored.

Prior to Defendants' Occupation, BNY Mellon Green: (1) was Open Space exclusively owned and possessed by BNY Mellon; (2) was used by BNY Mellon, its tenants, employees, and guests during non-winter months; (3) was closed routinely during the winter months; and (4) had no persons camping overnight on it continuously or indefinitely. (V. Compl. at ¶ 44, Exs. 1, 2, 8). BNY Mellon seeks only a preliminary injunction that would restore the status quo that existed before Defendants' Occupation. To that end, BNY Mellon narrowly tailors its relief to a preliminary injunction to require Defendants to:

- (1) immediately remove from BNY Mellon Green all tents and other structures, camping equipment, and stored personal items;
- (2) cease and desist and refrain from camping on BNY Mellon Green or bringing any tents and other structures, camping equipment, or stored personal items to BNY Mellon Green;
- (3) cease and desist and refrain from doing any acts that would interfere with, or obstruct, the free use and enjoyment of any portion of BNY Mellon Green by BNY Mellon, its tenants, and invitees; and
- (4) abide by any notice posted by BNY Mellon on the BNY Mellon Green property that BNY Mellon Green is closed during the winter months; and
- (5) comply with such other relief as this Court deems just and proper.

The proposed injunction only would enforce BNY Mellon's property rights, promote health and safety, and return BNY Mellon Green to its normal and intended use.

The proposed preliminary injunction therefore would restore the parties to the status quo, and would be narrowly tailored to abate the harm.

V. CONCLUSION

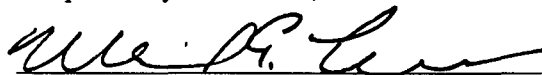
Occupy Pittsburgh is trespassing and has expressed its intention to continue to trespass on BNY Mellon Green. As shown by the *Verified Complaint for Injunctive Relief*, the *Motion for Preliminary Injunction*, and this Brief, BNY Mellon, as owner, is entitled to immediate

injunctive relief to remove Occupy Pittsburgh's encroachment on its fee simple and leasehold interest rights in BNY Mellon Green. All of the prongs necessary for preliminary relief are overwhelmingly met in this instance.

Accordingly, BNY Mellon respectfully requests that this Court enter judgment against Defendants Occupy Pittsburgh, Jane Does 1-50, and John Does 1-50 and grant preliminary injunctive relief pursuant to PA. R. CIV. P. 1531 ordering Defendants Occupy Pittsburgh, Defendants Jane Does (1-50) and John Does (1-50), and all unnamed persons (including but not limited to Defendants' officials, officers, members, and agents), firms, or corporations who are in active concert or participation with any of the Defendants to: (1) immediately remove from BNY Mellon Green all tents and other structures, camping equipment, and stored personal items; (2) cease and desist and refrain from camping on BNY Mellon Green or bringing any tents and other structures, camping equipment, or stored personal items to BNY Mellon Green; (3) cease and desist and refrain from doing any acts that would interfere with, or obstruct, the free use and enjoyment of any portion of BNY Mellon Green by BNY Mellon, its tenants, and invitees; (4) abide by any notice posted by BNY Mellon on the BNY Mellon Green property that BNY Mellon Green is closed during the winter months; and (5) comply with such other relief as this Court deems just and proper.

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Respectfully submitted,



Daniel I. Booker
PA I.D. No. 10319
Joel P. Aaronson
PA I.D. No. 28067
Michael E. Lowenstein
PA I.D. No. 34880
Jeffrey G. Wilhelm
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

