

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

BNY MELLON, NATIONAL ASSOCIATION	:	CIVIL DIVISION
and THE BANK OF NEW YORK MELLON,	:	
	:	
Plaintiffs,	:	No.: GD 11-025549
	:	
	:	DEFENDANTS' BRIEF IN
	:	OPPOSITION TO PRELIMINARY
	:	INJUNCTION
	:	
OCCUPY PITTSBURGH, an unincorporated	:	Filed on behalf of Defendants
association, JANE DOES (1-50), and JOHN :	:	Occupy Pittsburgh
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	:	
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BRIEF IN OPPOSITION TO
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I. INTRODUCTION AND SUMMARY

This case is not an ordinary trespass and nuisance action. Mellon’s attempt to close Mellon Green and dismantle the Occupy Pittsburgh occupation raises important issues of federal and state constitutional law, federal statutory law, zoning regulations and common law.

First, while Mellon Green, named People’s Park by Occupy Pittsburgh, is privately owned, it is clearly a public space and under well established federal court precedent is a public forum serving a public function. It has been open to the public, appears to any passerby to be a typical city sidewalk and plaza without any separation or barrier from the adjoining city owned sidewalk, is used by pedestrians as a public thoroughfare and park, and has been designated by Mellon as a “public plaza” when it applied for public subsidies to aid in its construction. Moreover, Occupy Pittsburgh’s protest, as part of the global occupy movement, is clearly expressive of a political message criticizing the widening inequality between the 1% and 99%. The occupation is a critical symbolic component of that message. Occupy’s protest is therefore

protected speech and assembly under the First Amendment and Article I, Sections 7 and 20 of the Pennsylvania Constitution. While the First Amendment permits the regulation of public forums pursuant to narrowly tailored regulations which serve a significant public interest, Mellon seeks no such regulations and instead broadly asserts an absolute discretion to completely close the park to the public.

Second, while Occupy Pittsburgh has not sought Mellon's consent, Mellon gave its consent to the occupation when it began on October 15 via statements made to the police and media that Occupy Pittsburgh could remain in People's Park indefinitely. Moreover, thereabouts on November 1st, 2010, Mellon provide suggested guidelines and conditions to the protestors for "the duration of the occupation," giving no end time whatsoever. Occupy Pittsburgh relied on this consent to its detriment when Mellon unexpectedly provided notice on December 9 that the park would be closed to the public when winter arrived. Occupy Pittsburgh's occupation is in full compliance with Mellon's guidelines and conditions, has continued its peaceful existence, and has not resulted in either any arrests by the City police at the park, nor any significant health or safety incidents. Mellon has not presented Occupy Pittsburgh with any significant complaints about the functioning of the occupation, and did not allege any breach of its park use guidelines in its December 9 notice to vacate.

Third, Mellon's total closure of the park for the winter would not merely preclude Occupy Pittsburgh's occupation, but would bar any protest at the park, would prevent pedestrian access to the park, and would preclude pedestrians requiring the use of wheelchairs or those otherwise physically disabled from using the park's walkway. The closure of the park would violate Pittsburgh zoning laws, which requires Mellon to maintain a wheelchair accessible pathway through the open public space between Ross St and Grant Street. The only remaining

walkway adjacent to the park is not wheelchair accessible which may also violate the Americans With Disabilities Act. The plaza's closure to the public also appears to violate the tax incremental funding agreement (TIF) agreement by which Mellon bank received a multi-million dollar public tax subsidy to finance construction of the Park as well as other public improvements, and which designated Mellon Green as a "public plaza" requiring that it would be open to the public.

Finally, Occupy Pittsburgh asserts that its occupation was brought about in large part in response to BNY Mellon Banks and other major banks illegal, immoral and unethical behavior. Occupy Pittsburgh thus has a defense of unclean hands to the notice of eviction.

This case therefore raises complicated issues of federal, state and local law. Mellon's motion to designate this case as "Complex Litigation" recognizes the complexity of the issues involved in the case.

However, this Court need not and ought not decide these complex issues prior to discovery, trial and complete briefing on the issues. Mellon has utterly failed to demonstrate the immediate and irreparable harm and other equitable requirements that are "essential elements" which it has the burden to demonstrate before a court may grant the "extraordinary remedy" of a preliminary injunction. Mellon makes no showing that there have been any significant injuries or health risks during the occupation, nor that any are imminent. It does not assert that it has suffered any specific, substantial economic injuries during the occupation or will suffer any such harm imminently if the occupation is allowed to continue. It makes conjectural and speculative claims about the possibility of incurring liability for future injuries to protestors or others if the occupation is allowed to continue, but those vague assertions are backed by no evidence that such injuries are likely or imminent.

Faced with the absence of any immediate, irreparable harm, Mellon erroneously asserts that its irreparable harm lies in its inability to exercise its alleged property right to close the park. Pennsylvania courts, however, have rejected the proposition that mere interference with property rights is sufficient to constitute irreparable harm for purposes of a preliminary injunction, instead requiring the movant to demonstrate **in addition** to such interference some significant, immediate harm that will befall it unless preliminary relief is afforded. Mellon has not done so and this motion should be denied for that reason alone.

Nor has Mellon demonstrated any of the other required equitable “elements” for the issuance of preliminary injunctive relief. It seeks a mandatory injunction which is granted only in the rarest of cases, namely an affirmative order mandating defendants to remove their tents and other equipment from the property. It seeks such relief not to preserve or restore the status quo immediately prior to the act that Mellon claims is wrongful – namely Occupy’s failure to vacate Mellon Green on December 11, 2011 after Mellon served notice on December 9 that it should do so. The status quo immediately prior to that alleged wrongful act consisted of Occupy Pittsburgh peacefully and lawfully occupying the Green with Mellon’s consent.

Moreover, Mellon seeks not only to remove Occupy Pittsburgh from Mellon Green, but to close the park totally to the public, directly harming third party pedestrians and people who use wheelchairs, or others who use the park either as a thoroughfare, respite, or political protest. Indeed Mellon seeks to irreparably harm Occupy Pittsburgh by depriving it of protected rights to engage in free speech and assembly. The balance of harms clearly favors defendants. In addition, the public interest supports defendants, as reflected in a resolution by City Council supporting Occupy Pittsburgh as well as the expressions of support from numerous labor unions,

community groups, religious institutions, civil rights organizations and other public interest associations.

II. STATEMENT OF THE FACTS

As part of a worldwide movement of occupations of public and private land for purposes of protesting against oppressive and inequitable economic and political conditions, in early October, 2011 numerous activist groups in Pittsburgh began planning its own march and occupation based on the highly successful Occupy Wall Street movement. On October 15, thousands of marchers participated in a permitted parade through the lower Hill District and downtown Pittsburgh culminating in a rally in Market Square. Immediately thereafter, hundreds more marched through downtown Pittsburgh in support of approximately fifty members of Occupy Pittsburgh who set up tents and began the occupation of the public space next to One BNY Mellon Center which BNY Mellon and its predecessor corporations (“Mellon”) has referred to as Mellon Green and which Occupy Pittsburgh refers to as The People’s Park (“The Park”).

The Park has been devoted to public use since at least 1985 and Mellon has made numerous improvements to The Park since then to make it even more inviting as a spot for conversation and the exchange of ideas. In 1998 as part of a plan to build a new Service Center on Ross Street, in part with public Tax Increment Financing (“TIF”), Mellon was required to develop and maintain land as Urban Open Space and the Park was designated as part of that Urban Open Space. Any part of The Park that may not have been designated as Urban Open Space was designated as Open Space and all parts of the parks have been open for public use of all kinds since 1985. Mellon has not submitted any plans to the City of Pittsburgh to develop on

that land or to do anything but devote it to public use since Mellon improved it as a public plaza in 1998.

Upon setting up tents and occupying The Park on October 15, Occupy Pittsburgh was informed by members of the Pittsburgh Police that Mellon would allow them to stay in The Park indefinitely so long as they acted peacefully and lawfully and did not damage the Park property. Although that permission was not necessary, it certainly indicated to Occupation Pittsburgh that it would not have to deal with an intrusion upon their occupation by Mellon because it was using The Park in a manner that was consistent with its use for the prior twenty five years.

Since October 15, The Park has been filled with members of Occupy Pittsburgh and other activist community and labor groups. The Park has served as a protest center for all of these groups and they have held numerous marches and protest using The Park as a base for those actions. In addition, signs protesting numerous economic and political grievances are on display throughout The Park and are attached to almost every tent in The Park.

On November 1, Mellon's property manager distributed a list of conditions to Occupy Pittsburgh that Mellon wanted the occupiers to comply with for the duration of their stay in The Park. Occupy Pittsburgh had previously been acting largely consistent with those conditions because they related mainly to their own safety. Since November 1, Mellon has never informed Occupy Pittsburgh that it is not complying with all of those conditions. Also, Occupy Pittsburgh has not been cited by the Pittsburgh Police for any alleged illegal conduct or conditions in The Park.

While Occupy Pittsburgh and other community groups and numerous unions have used The Park for protest and demonstration purposes since October 15, The Park has also been open to and used by the general public. The public paths through The Park are used by pedestrians to

walk between Grant and Ross Streets, to go the subway station located at Ross Street and Sixth Avenue, and to walk to One BNY Mellon Center and to Mellon Service Center. Those paths are in use twenty four hours a day because two hotels and numerous commercial buildings in the vicinity are open at all times of the day and night. The Park has also attracted numerous visitors wishing to photograph and observe Pittsburgh's version of a worldwide protest phenomenon. Even Mellon employees, especially its security personnel, have had almost daily contact and friendly conversations with members of Occupy Pittsburgh in The Park, without incident.

Between November 1, 2011, and December 9, 2011, only two things have changed to some extent in The Park and among Occupy Pittsburgh members. With winter coming, Occupy Pittsburgh has made plans to winterize the tents to the extent possible. Because Occupy Pittsburgh does not plan to use propane and was unsure if it would be able to use any other type of artificial heating, it purchased insulated tents, other winter-appropriate temporary structures called yurts, sleeping bags rated to zero degrees Fahrenheit, and additional blankets, coats, hats and other body warmers. Included in these winter plans is snow removal by Occupation Pittsburgh on all of the public paths through The Park. The occupiers also redirected their protests to some extent from general criticism of banking and other financial institutions to more specific criticism of Mellon now that Mellon has been accused in recent weeks by numerous state attorney generals, employee organizations and banking regulators of fraud charges involving over a billion dollars.

On December 9, 2011, after almost two months of peaceful coexistence between Mellon and Occupy Pittsburgh and full use of The Park by the public, Mellon served Occupy Pittsburgh with notice to vacate The Park by December 11, 2011. Mellon not only is trying to evict Occupy Pittsburgh from The Park but has stated that it then intends to close this public space for the

winter because it does not want to remove snow, something Occupy Pittsburgh plans to do so the public can continue to use The Park.

On December 12, 2011, Mellon filed this action to evict Occupy Pittsburgh from the Park and, in effect, to close The Park as a center of the protest movement in Pittsburgh and to try in concert with financial institutions nationwide to destroy The Occupy Movement. A hearing on Mellon's Motion for a Preliminary Injunction is scheduled to begin on January 10, 2012.

III. LEGAL STANDARD FOR PRELIMINARY INJUNCTION

"A preliminary injunction is an extraordinary remedy never granted as of right." *Winter v. NRDC*, 555 U.S. 7, 9 (2008); *Hart v. O'Malley* 544 Pa 315, 676 A. 2d 222,223 n1 (1996). This is particularly true where, as here the preliminary injunction sought is not merely prohibitory, but is mandatory in commanding the performance of a positive act such as removing defendants tents and materials." [G]ranted a mandatory preliminary injunction [is] an extraordinary remedy that should be utilized only in the rarest of cases." *Summit Town Center v. Shoe Show*, 573 Pa. 637, 828 A.2d 995, 1005 (2003). *See also Mazzie v. Commonwealth*, 495 Pa 128, 43 A. 2d 985,988 (1981) (this court has often stated that mandatory injunctions "should be issued more sparingly" than prohibitory injunctions).

This court must find that the plaintiff has satisfied six "essential prerequisites" in order to issue a preliminary injunction. *Summit Town Center v. Shoe Show*, 573 Pa. 637, 828 A.2d 995, 1001 (2003). *See also County of Allegheny v. Commonwealth*, 518 Pa. 556, 544 A.2d 1305, 1307 (Pa. 1988) ("For a preliminary injunction to issue, **every one** of the prerequisites must be established; if the petitioner fails to establish **any one** of them, there is no need to address the others.") (emphasis added). "First, a party seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately

compensated by damages. Second, the party must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings. Third, the party must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. Fourth, the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits. Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity. Sixth and finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.” *Id.* (internal citations omitted).

IV. ARGUMENT

A. PLAINTIFFS CANNOT DEMONSTRATE IRREPARABLE HARM

The plaintiffs cannot show that a preliminary injunction is necessary to prevent “immediate and irreparable harm,” and therefore there is no need to even address the other issues they present at this stage in the proceeding. *County of Allegheny, supra* at 1307; *Summit Town Center, supra* at 1001. For even assuming arguendo that the Occupy Movement is illegally trespassing on plaintiffs’ property, which plaintiffs vigorously deny, plaintiffs fail to show what immediate, irreparable harm will befall them if the protest encampment is allowed to continue. Plaintiffs assert absolutely no specific hazard or danger from the encampment, except vague, unsupported allegations that the occupiers are using “propane heaters,” which testimony will show is untrue. The occupy movement here, unlike in some other cities, have continued their protest for more than two months without any problems with the police and pedestrians. Indeed, Mellon raised no objection to the occupation between October 15 and December 9, when they

first served notice to vacate. There were no noise or public safety concerns for that period of time, and Mellon has had 24 hour security guards on duty during this entire period of time. Thus one would think that if there were security or safety concerns, Mellon's security guards would have reported them to the occupiers or the police already.

Nor has the City of Pittsburgh or City Police asserted that there is any criminal or illegal conduct taking place in the People's Park. Despite the presence of hundreds of people and almost daily events over the course of more than two months, no one has been arrested in or around the Occupy Pittsburgh site on Mellon Green.

Mellon asserts speculatively that it might be subject to liability in the future if someone is injured in the park. That claim, however, is pure conjecture and certainly not immediate given the fact that nobody has been injured thus far, that the Occupy Pittsburgh asserts that it will remove all snow and ice from the walkways and in any event it is difficult to see how Mellon could be held liable after taking measures to evict the occupiers, including court action. In *Routes 202 and 309 v. The Kings Men*, the Federal District Court for the Eastern District of Pennsylvania rejected a similar argument to that made here. Plaintiff there claimed that allowing protesters to use its property would cause irreparable harm from the potential liability of the unsafe conditions of the mulched area, and the risk of the protesters injuring themselves. The Court noted that the defendants had conducted their protest "without injury or incident to themselves or others" for a substantial period of time, and that therefore the record did not support this alleged safety hazard. 2011 U.S. Dist. LEXIS 123228 (Oct. 24, 2011). Moreover, the plaintiffs can easily avoid any potential liability by simply posting notice warning any user of the park of any concealed unsafe conditions that may exist (see *Restatement of Torts 2nd* § 342).

Significantly, Mellon presented the occupiers at the site a list of guidelines “the Park Use Guidelines” that they suggested should be followed “for the duration of the occupation of BNY Mellon Green”. A true and correct copy of BNY Mellon’s Park Use Guidelines is attached hereto as Exhibit A. Mellon did not allege in its December 9 notice to vacate that any of the Park Use Guidelines have been violated.

In short, plaintiffs have suggested no reason that the situation changed on December 9, 2011, leading them to suffer irreparable harm except that the weather was getting colder and it wanted to close the park. Mellon makes no allegation that the occupiers have failed to winterize the encampment or take adequate health and safety measures to protect against the onset of cold weather, and in the absence of such factual allegations, their argument is purely speculative. Therefore, even if plaintiffs can prove at trial that plaintiffs are mere trespassers with no rights whatsoever to continue their peaceful protest, (which defendants assert they are not) they cannot demonstrate the “first,” essential element to obtain a preliminary injunction.

Faced with the difficulty of establishing immediate and irreparable harm, the plaintiffs erroneously argue that the mere trespass by the Occupy Pittsburgh movement constitutes harm sufficient to warrant preliminary injunctive relief. Br. at 24-5, citing *Dodson v. Brown*, 70 Pa. Sup. Ct. 359, 361 (1918). However, the Pennsylvania Supreme Court has clearly distinguished between permanent injunctive relief and the preliminary relief plaintiffs seek here, requiring a far stronger showing when preliminary relief is sought. While a permanent injunction may issue where “such relief is necessary to prevent a legal wrong for which there is no adequate redress at law,” by contrast, a party seeking a preliminary injunction must **also** establish immediate “irreparable harm.” *Buffalo Twp. v. Jones*, 571 Pa. 637, 813 A.2d 659, 663 (Pa. 2002); *Board of Revision v. City of Philadelphia*, 607 Pa. 104, 4 A.3d 610, 627 (2010). Therefore it is

insufficient for plaintiffs to merely assert that defendants are trespassing on their property and that they have no adequate remedy at law because damages are not available – they must also establish the “essential requirement” that they will suffer “immediate and irreparable harm” if a preliminary injunction does not issue.

Indeed, the Pennsylvania Supreme Court has held that even where defendants had effected a seizure of plaintiff’s property under Pennsylvania law, the lower court was correct in not issuing a preliminary injunction where there were “no imperative circumstances requiring injunctive relief in these circumstances”. *Wilkes-Barre Independent Co. Newspaper Guild*, 455 Pa 287, 314 A. 2d 251, 253-4 (1974). As the Court noted, even though a seizure in violation of law was ongoing and therefore the Labor Anti-Injunction Act did not preclude the issuance of an injunction, a preliminary injunction was unwarranted “unless the exigencies of the circumstances require instant (or at least temporary) relief.” *Id.* See also *Coatesville Development Co. v. United Food and Commercial Workers*, 374 Pa. Super 330, 542 A. 2d 1380, 1386 (1988) (Beck J. concurring) (“A preliminary injunction is a special equitable remedy which need not be granted in every case which involves a continuing trespass on private property”).

This case is thus different from *Dodson v. Brown*, *supra*. relied upon by plaintiffs. In *Dodson*, the Court held that plaintiffs were entitled to a permanent injunction because damages did not constitute an adequate remedy of law for a property taking. *Dodson v. Brown*, 70 Pa. Sup. Ct. 359, 361 (1918). But here, unlike *Dodson* and similar cases, plaintiffs seek not permanent relief, but preliminary relief, and therefore they must show not merely that there is no “adequate redress at law,” but in addition that they will suffer such irreparable harm as to warrant the extraordinary remedy of a preliminary injunction. Even where a possible trespasser is denying a property owner “temporary use and control of its property,” courts have denied the

property owner relief where no “irreparable harm” has been demonstrated. *Industrial Park Development Co. v. EPA*, 604 F. Supp. 1136 (E.D. Pa. 1985). *Wilkes-Barre supra*.¹ Mellon has not, and cannot demonstrate irreparable harm.

Indeed, the two cases that Mellon cites to illustrate that a loss of “goodwill” can constitute irreparable harm illustrates that plaintiff has made no showing of such injury . Pl. Br at 26 citing *W. Penn Specialty MSO, Inc. v. Nolan* 737 A. 2d 295, 298-99(Pa. Super. Ct 1999), *The York Group, Inc. v. Yorktowne Caskets Inc.*, 924 A. 2d 1234,1247 (Pa. Super. Ct. 2007). In both cases, plaintiffs demonstrated immediate irreparable harm by proving an ongoing substantial economic harm due to disruption of “existing patient relationships”, a “substantial competitive disadvantage”, a “significant loss of business opportunities”, or a “loss of market share and business opportunity” which could not be adequately compensated by damages because they were incalculable. *Id.* at 299; 1343. Here, by contrast, it is purely speculative and implausible that Mellon will suffer any serious damage to its goodwill or business because of the encampment on People’s Park. Mellon makes no claim that any clients have severed relationships, bankers refused to do business with it, or that it has or will incur any significant

¹ The cases cited in plaintiffs brief at p 13-14 for the proposition that preliminary injunctions are granted to prevent immediate and irreparable harm to property interests in land, all support Occupy Pittsburgh’s argument that plaintiffs must demonstrate some significant immediate danger or harm **independent of the trespass**. See e.g. *Tinicum Tp v. Delaware Concrete*, 812 A. 2d. 758,765 (Pa Cmwlt. 2002)(preliminary injunction issued because “blasting would cause a **high probability** of rocks endangering the lives and property of those below” (emphasis added), *Woods at Wayne Homeowners v. Gambone*, 893 A 2d 196, 206-207 (Pa Cmwlt. 2006) (preliminary injunction needed because retaining walls were unstable and therefore “**dangerous**”, ,could cause “death” and constituted a “**real and present danger**”)(emphasis added) *North Penn Gas Co v. Mahosky*, 378 A. 2d 980,981 (Pa Super 1977) (defendants construction of a cellar within a few feet of a gas line caused a dangerous situation and prevented gas company from getting access to properly care for its pipeline) No remotely similar facts are alleged here. Two of the cases plaintiffs cite, *Chase v. Eldred Borough*, 902 A. 2d 992 (Pa Commw. Ct 2006), and *Utz Potato Chip v. York Parachuting Ctr., Inc.*, 5 Pa. D. & C. 3d 63 (Adams Ct. Com. Pl. 1977) do not discuss irreparable harm at all because they don’t involve preliminary injunctive relief but rather permanent relief. The only case even arguably similar to this case, is the Butler Common Pleas Court decision in *White v. Foley*, 54 Pa. D. & C. 4th 145 where the court preliminarily joined the maintenance of children’s play equipment on plaintiff’s property, but the potential for children to get hurt on unsupervised play equipment is qualitatively different from the potential of adults to injure themselves in this situation, where nobody has been injured after almost three months of the protest)

loss of business opportunities. While Mellon's damages for any potential loss of goodwill² may be incalculable, that is because they are de minimus, and not substantial, immediate and irreparable.

B. BNY MELLON HAS NOT SHOWN ANY OF THE EQUITABLE PREREQUISITES TO OBTAIN A PRELIMINARY INJUNCTION

1. Mellon Seeks to Alter the Status Quo and Not to Preserve It

BNY Mellon cannot demonstrate that the preliminary injunction it seeks will properly restore "the parties to their status as it existed immediately prior to the wrongful conduct". Summit Towne Center supra. The purpose of a preliminary injunction is to restore or preserve "the last actual and noncontested status which preceded the pending controversy". *Shanaman v. Yellow Cab Co.*, 491 Pa 516, 421 A. 2d 664,667 (1980), *Warner Bros. v. Gittone*, 110 F. 2d 292 (3rd Cir. 1940)

Here, BNY Mellon fails to acknowledge the critical fact in its complaint and brief for preliminary injunction that when Occupy Pittsburgh first established its encampment on October 15, 2011, Mellon consented to Occupy's occupation of the park and provided notice to Occupy of the conditions that should be followed "for the duration of the occupation." Attached as Exhibit A. Occupy has substantially complied with those conditions. Until December 9 2011, Mellon provided no notice to defendants that they were trespassing or otherwise engaged in any unlawful activity or that they had breached the conditions Mellon had set forth for the duration of the occupation. Between October 15 and December 9, the occupation encampment was "noncontested" by Mellon.

² While Mellon claims possible loss of good will, the irony is that Mellon likely engenders more good will by keeping Mellon Green open to Occupy Pittsburgh and the general public instead of closing it down.

The alleged wrongful conduct that forms the basis of Mellon's complaint and motion for preliminary injunction is defendants failure "to remove all tents and other structures", and their continuation of their camping activities despite being given "adequate notice to vacate the property" on December 9,2011. See Pl. Br at 10-11 The status therefore "**immediately** prior to the wrongful conduct" alleged by plaintiff was Occupy Pittsburgh engaging in peaceful protest at The Park without incident or complaint from Mellon or the city police. Mellon now seeks to alter that status quo. Whether Mellon can terminate its consent after defendants relied on it to their detriment is a question to be determined at trial, along with the other claims that defendants and the plaintiffs disagree on.

Nor does Mellon's notice to vacate assert that the occupiers were engaged in unlawful trespass prior to December 11, 2011. Mellon posted the notice on December 9, 2011, stating that after December 11.2011 overnight camping and the presence of any structures and stored personal items will be prohibited and considered an unlawful trespass. (Exhibit 12 Attached to the Complaint). The notice makes no allegation that there was an unlawful trespass prior to that time.

Nor can there be any claim that Occupy Pittsburgh committed the crime of Defiant Trespass prior to December 11, 2011. A person commits Defiant Trespass in Pennsylvania, if knowing he is not licensed or privileged to do so, he enters in any place as to which notice against trespass is given by:

- “(i) Actual communication to the actor;
- (ii) posting in a manner prescribed by law....”

Prior to December 9, neither of these conditions applied to the occupation of People's Park, for Mellon had provided no communication or posting that the occupation constituted a

trespass. Indeed Occupy Pittsburgh understood that, although it had not requested permission to occupy the Green, it had in fact been given such a privilege to do so.

Moreover, “it is a defense to prosecution under this section that: (2) the premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access or remaining on the premises:” Sect 3503(c)(2)

This affirmative defense indisputably applies to the occupation. There is no dispute that at the time Occupy Pittsburgh began its encampment, Mellon Green was “open to members of the public”, and indeed has remained open to members of the public who have continued to walk through the Green and converse with members of Occupy Pittsburgh throughout this period of time. Moreover, it also cannot be disputed that Occupy Pittsburgh substantially complied with the “lawful conditions” suggested by Mellon for the “duration of the occupation” (Exhibit A: Park Use Guidelines), as evidenced by the fact that the December 9 notice failed to allege any breach. Members of Occupy Pittsburgh had no notice of any other conditions imposed on access to or remaining on the premises until December 9. That neither the police nor Mellon moved in any manner to evict or arrest members of Occupy Pittsburgh who were encamped on Mellon Green is further evidence that their conduct immediately prior to the filing of this motion was uncontested and not claimed to be unlawful.

Therefore, Mellon seeks to alter the status quo immediately prior to the alleged wrongful conduct. Occupy Pittsburgh seeks to preserve the status quo pending a trial on the merits. That status quo is that Occupy Pittsburgh was peacefully, nonviolently occupying the Green without causing any significant problems for the police, pedestrians or Mellon, and with Mellon’s consent. That Mellon seeks to alter and not preserve or restore the status quo constitutes sufficient reason to deny its motion for a preliminary injunction.

2. The Issuance of A Preliminary Injunction Would Cause More Harm to Third Parties and Occupy Pittsburgh Than the Harm Prevented to Mellon

BNY Mellon has also not demonstrated that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings. Here, Mellon's only non-speculative claim of harm if an injunction is not granted is that its property rights will not be respected and that it will not be able to put a chain across the entrances to the park for the winter. In contrast, the following significant harm will result to third parties and to defendants if a preliminary injunction is granted:

1). Disabled persons in wheelchairs will be unable to use the only walkway that is wheelchair accessible in the Mellon property between Ross and Grant streets that is open to the public. Mellon did construct a pedestrian walkway parallel and alongside The Park that it now argues is the only Urban Open Space which must be kept open to the public. But if that walkway is Urban Open Space, it was constructed in violation of the zoning regulations and probably the American With Disabilities Act in that it has stairs in the walkway and is therefore inaccessible to persons in wheelchairs. The only walkway meeting the Urban Open Space requirement that it be wheelchair accessible is the walkway through the Park. Although the complicated issue of what exactly is Urban Open Space should be resolved at trial, granting a preliminary injunction allowing Mellon to close the park will harm those disabled persons who seek to use the only accessible walkway through Mellon's open space area to transit between Ross and Grant streets.

2). Mellon's action in closing the park during the winter will also inconvenience and harm the hundreds of pedestrians who walk through the park and have

continued to do so throughout the time during which Occupy Pittsburgh has been camped there.

3). The issuance of the preliminary injunction allowing Mellon to close the park will harm Occupy Pittsburgh's right to free speech and assembly. That injury to first amendment rights and freedoms has long been considered by federal courts to be irreparable. *Elrod v. Burns*, 427 U.S. 347,373 (1976) ("the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury")

4). The issuance of a preliminary injunction will have the effect of granting a permanent injunction and foreclosing defendants claim prior to trial because it will effectively permanently close the encampment. While Mellon claims that defendants may conduct a wide range of other activities on public property, the issuance of a preliminary injunction will effectively end their occupation which is at the heart of their political protest and free speech activities. If the defendants are forced to dismantle their encampment by the issuance of a mandatory preliminary injunction, it would be difficult or impossible for them to reestablish it at a later date after trial.

3. The Public Interest Does Not Support the Issuance of a Preliminary Injunction

The public interest also strongly supports the denial of a preliminary injunction. First, in this case the City Government and City authorities support Occupy Pittsburgh's continued protest. City Council has enacted a resolution supporting Occupy Pittsburgh. Resolution attached as Exhibit B. The City police have taken no action to evict or arrest Occupy Pittsburgh, which presumably they would do in the case of a clear trespasser on private property. Indeed,

the City very recently granted Occupy Pittsburgh a permit to utilize gas powered generators at People's Park.

Second, the public has a strong interest in broad public discourse and the protection of the marketplace of ideas. That interest is not only reflected in the First Amendment and Constitutional jurisprudence affording broad protection to free speech and assembly, but is also concretely demonstrated by the broad array of labor unions, community organizations, religious institutions, civil rights groups and other public interest organizations that support Occupy Pittsburgh's right to continue their occupation of People's Park.

Third, the public and public policy supports insuring that people with disabilities who are in wheelchairs have access to our public thoroughfares, walkways and sidewalks. That interest is reflected in the Americans With Disabilities Act and the City's zoning laws. By closing the park for the winter, Mellon removes the only wheelchair accessible walkway between Mellon's building on Ross Street and Grant Street.

Finally, the public has a strong interest in keeping public spaces that are dedicated to public uses and paid for by public subsidies open and available to public use. Occupy Pittsburgh wants to keep people's park, which is a public space open to the public. In contrast, Mellon wants to close it down to the public for the winter.

Arrayed against these strong public interests, Mellon asserts only the interest of a private property owner to do whatever it wants with its property. As will be demonstrated supra in the following sections, that interest is not absolute, and in this context of a public plaza built with public subsidies and used by the public, Mellon's interest in totally closing the park does not and cannot outweigh the public's interest in pedestrian walkways, handicap access and furthering the public discourse and free speech and assembly.

C. BNY MELLON CANNOT DEMONSTRATE THAT ITS RIGHT TO RELIEF IS CLEAR BECAUSE OCCUPY PITTSBURGH'S ACTIVITIES ARE PROTECTED BY ARTICLE I, SECTIONS 7 AND 20 OF THE PENNSYLVANIA CONSTITUTION AND THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

Plaintiff argues this case as a simple trespass claim, no different than defendants camping in some private property owner's back yard or Mellon Bank's offices. However, this case clearly raises broader constitutional concerns than an ordinary trespass action, and Occupy Pittsburgh's activities are protected by the free speech and assembly provisions of the Pennsylvania and United States Constitutions.

Whatever its technical legal status (and defendants believe it is Urban Open Space), the sidewalk and grassy areas surrounding constituting what Occupy Pittsburgh terms the People's Park is generally open to the public and appears to any passerby as a typical city sidewalk and plaza, and therefore constitutes a public forum for constitutional purposes. Occupy Pittsburgh's encampment clearly constitute activity which has an expressive, free speech message and purpose. While the First Amendment permits the regulation of free speech activities in a public forum, it has no narrowly tailored regulations prohibiting erecting tents or overnight camping. Moreover, Mellon has permitted defendants to engage in their protest activities in the Park, a consent which Occupy Pittsburgh has relied on to its detriment. Finally, Mellon's closing of the entire area is overbroad and would harm not only defendants, but the public in general.

This case comes before this Court in a different posture than other cases involving Occupy movements around the country. First, here unlike in New York or other cities, the City Government does not seek to eject the protesters, and therefore the public interest does not support the plaintiffs. Second, as will be demonstrated below, in other cities the authorities acted

pursuant to city ordinances clearly and often narrowly³ restricting protesters right to establish encampments, whereas here Mellon has no such regulations and asserts the right to act pursuant to its absolute, unfettered discretion. Third, in other municipalities, the city asserted that the protestors were committing some specific harms that endangered public safety or disturbed the public, allegations which are absent here. Finally, in those other cases, the City argued that it wanted to keep the area open for the public, whereas here Mellon wants to close the sidewalk and park totally while the Occupy Movement seeks to keep it open for itself, pedestrians and the public. Mellon's action here would violate the First Amendment and the Pennsylvania Constitution for several reasons.

1. The People's Park Constitutes a Public Forum

For over 20 years, the walkways and small park that Occupy Pittsburgh is utilizing have been open to the public, utilized by the public, and viewed by any pedestrian or passerby as no different than an ordinary city sidewalk or public plaza. There are no fences enclosing it, nor notices warning people that they are trespassing on private property, or any other indications that the public is excluded from the area. Indeed, The Park was designated as a "public plaza" in Mellon's development documents and in the documents awarding public subsidies to construct it.

Irrespective of whether People's Park is to be considered Urban Open Space (which defendants contend it is), it is certainly an area that while privately owned, looks like a public sidewalk and plaza, is open to the public, was denoted a public plaza, has been utilized by the public, and thus contains the classic indicia of a public forum for constitutional purposes.

Commonwealth v. Tate, 495 Pa 158, 432 a. 2d 1382, 1386 (1981) (leafleters could not be arrested

³ Where the regulations were not clear or narrowly drawn, courts have declared them unconstitutional. See *Occupy Columbia* infra

for trespass on grounds of private college which were open to the public); *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788,801 (1985) (“private property dedicated to public uses” can be a public forum); *Freedom from Religion Foundation v. City of Marshfield*, 203 F. 3d 487 (7th Cir. 2000) (private park located within a public park is a public forum); *Venetian Casino Resort v. Local Joint Executive Board of Las Vegas*, 257 F. 3d 937,946 (9th Cir. 2001) (“Property that is dedicated to public use is no longer truly private” and becomes a public forum); *United Church of Christ v. Gateway Center*, 383 F. 3d 449, 452-3 (6th Cir 2004) (private corporation’s rule forbidding protests on a privately owned sidewalk was unconstitutional because sidewalk was a public forum despite being private property); *First Unitarian Church v. Salt Lake City*, 308 F. 3d 1114,1122(10th Cir 2002) (“forum analysis does not require the existence of government property at all”, and First Amendment may still apply to private property); *Sumnum v. Duchesne City*, 482 F. 3d 1263, 1270 (10th Cir. 2007) (even if park is privately owned, it may still be a public forum, with the inquiry centering on the objective, physical characteristics of the property).

Moreover, Mellon Bank received a multi-million public subsidy through Tax Increment Financing (TIF) to construct the Project, including The Park, which it designated as a “**public plaza**.” That public tax subsidies were used in connection with construction of The Park, and that The Park was designated a “public” plaza, supports its designation as a public forum which must be made available for public use and not totally closed to the public at Mellon’s absolute discretion.

As the United States Supreme Court has often noted, “streets, sidewalks and parks”, are “‘public places’ historically associated with the free exercise of expressive activities”, and thus presumptively public forums. *United States v. Grace*, 461 U.S. 171,177 (1983) (“Wherever the

title of streets and park may rest, they have been immemorially held in trust for the use of the public”); *Hague v. CIO*, 396 U.S. 496,515 (1939) (Roberts J.) Sidewalks and parks are traditionally “quintessential public forums”, irrespective of whether they are principally used for transit or for speech. *Intl Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 697 (1992) (J. Kennedy concurring and dissenting). Thus, in *Grace*, the Court held that while the Supreme Court building might not be a public forum, the sidewalk bordering the building was a public forum because “there is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that they have entered some special type of enclave”. *Id.* at 180

Federal Circuit Courts have applied the *Grace* analysis to privately owned sidewalks. Where a privately owned sidewalk is “open to the public for general pedestrian passage, and is “virtually indistinguishable from the public sidewalks” courts have found them to be public forums. *United Church of Christ v. Gateway*, 383 F.3d supra at 452; *Venetian Casino Resort*, supra 257 F.3d at 947. The key question is whether the area in question has the physical characteristics of a traditional public forum and is used as a “public thoroughfare”, “dedicated to general pedestrian passage.”. *First Unitarian Church* 308 F.3d supra at 1128; *ACLU v. City of Las Vegas*, 333 F.3d 1092, 1101(9th Cir 2003); *McTernan v. City of York*, 577 F.3d 521,527 (3rd Cir. 2009) (where ramp was not designed to facilitate general pedestrian traffic but only served to effectuate the access of patrons to the facility, it was not a public forum). Thus, the Sixth Circuit held that a privately owned sidewalk was a public forum for two reasons: first it “looks and feels like a typical public sidewalk”, and second, “like its publicly owned counterparts, the Gateway Sidewalk also is a public thoroughfare” 383 F.3d supra at 452. *See also Lewis v.*

McCracken, 782 F. 2d 702, 710- 712 (S.D. Ind. 2011) (privately owned sidewalk which ran adjacent to state road was a traditional public forum)

Similarly, the pedestrian passageway and surrounding grassy areas that constitute the People’s Park looks and feels like a public sidewalk, park and plaza, and most importantly, it serves not simply to effectuate the access of pedestrians to Mellon’s buildings, but as a general public thoroughfare for pedestrians to transit between Ross and Grant streets as well as an urban mini-park. As in *Grace* and other cases finding that a public forum exists, there is no fence or separation barrier indicating that one was entering into a special enclave different than a traditional park or sidewalk. *Grace*, 461 US at 180 (no separation, fence or any other indication to people passing); *Freedom from Religion Foundation*, 203 F. 3d at 494 (“No visual boundaries currently exist that would inform the reasonable but knowledgeable observer that the Fund property should be distinguished from the public park”).

Pennsylvania Courts have also held that private property can constitute a public forum in certain instances, and that private institutions can thus be subject to the restraints of Article I of the Pennsylvania Constitution protecting the right to free speech and assembly. *Commonwealth v. Tate*, 495 Pa 158 (1981)⁴ The governing principle is that where a private landowner opens its

⁴ State action is not an issue in this matter for three reasons. First, that Mellon Green/People's park is a public forum mandates the conclusion that Mellon's actions with respect to the park constitute a public function and thus constitute state action. *United Church of Christ v Gateway* 383 F. 3d 449,454 (6th Cir. 2004)(" our decision that the Gateway Sidewalk is a public forum necessarily requires that the Sidewalk be treated as state owned for the purposes of the First Amendment") Second, under the *Tate* holding which remains good law, if a private institution creates a public forum, it is subject to the Pennsylvania Constitution’s protections of speech and assembly. Third, here a ruling by this Court that BNY Mellon ordering the eviction of Occupy Pittsburgh would clearly constitute state action under the principle articulated by the United States Supreme Court in *Shelley v. Kramer* 334 U.S. 1 (1948) In *Shelley*, the Court held that state action existed when the state’s judiciary enforced a restrictive covenant between private parties. So too, by requesting judicial enforcement of its asserted property rights, BNY Mellon seeks to utilize the power of the state – in this case, as in *Shelley*, the State’s judicial branch – to enforce its purported rights and deny defendants their free speech rights. By seeking state power to bar defendants from exercising their free speech rights, plaintiffs are invoking state action, in a similar manner to that of the private college in *Tate* which sought prosecution of protestors under the Defiant Trespass laws. Thus, the question here is whether plaintiff’s property which is open to the public and used by the public is a traditional public forum, and not whether Mellon Bank is a state actor.

property to public use, it can forbid certain political uses only if it has a clear, unambiguous policy prohibiting political speech on its sidewalks, parks or malls, where the public has notice of the proscription.

In *Tate*, the Court reversed a defiant trespass conviction of protestors for leafleting outside of a public lecture on a private college campus in spite of the college's objection, "in an area normally open to the public." *Id.* at 173-174. The Court held that

The defiant trespass statute under which appellants were convicted is clearly designed to protect the right of property, but it by no means permits every private landowner in every instance to invoke the power of the state to protect that right....Mindful of both this Commonwealth's great heritage of freedom and the compelling language of the Pennsylvania Constitution, we hold that, in certain circumstances the state may reasonably restrict the right to possess and use property in the interests of freedom of speech, assembly and petition."⁵

Id.

Five years later, in *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut Life Insurance Co.*, 512 Pa 23, 515 A.2d 1331, 1333 (1986), the Court plurality distinguished *Tate* in holding that "the Pennsylvania Constitution does not guarantee access to private property for the exercise of such rights [to speech] where, as here, **the owner uniformly and effectively prohibits all political activities and similarly precludes the use of its property as a forum for discussion of matters of public controversy**" (emphasis added). The Court plurality emphasized the distinction with *Tate*: "the public at large, including appellants were invited to South Hills Village for commercial purposes: shopping, dining and entertainment. Political solicitation **was uniformly** forbidden." *Id.* at 1336 (emphasis added). The "Tate analysis does not support appellant's claim" because "[b]y adhering to a strict no political solicitation

policy, appellee has uniformly and generally prevented the mall from becoming a public forum.” *Id.* at 1337.

The Superior Court en banc elaborated on and explained the *Socialist Workers Party* rationale in *Coatesville Development Company v. United Food And Commercial Workers*, albeit in a common law context. 374 Pa. Super 300, 542 A. 2d 1380 (en banc 1988) In *Coatesville*, the Superior Court affirmed a trial court’s denial of a preliminary injunction against a labor union’s informational picketing on a privately owned sidewalk and parking lot outside a Giant Eagle store located in a shopping mall. While the Court avoided the constitutional issue and denied the preliminary injunction on common law principles, it nonetheless distinguished *Social Workers* in holding that:

in the absence of any unambiguous and meaningful prohibition on the use of the shopping center property, we cannot conclude that under the common law the trial court erred in allowing the union to continue its activities on the property until the rights of the parties were finally determined. We hold that the trial court properly denied the preliminary injunction in this case because where a private property owner holds his property open for public use and invites the public onto the property, the property owner is not entitled to an injunction against peaceful informational picketing.... in the absence of an established policy specifically and unambiguously prohibiting such picketing on the property in the specific location where the picketing is being conducted and in the absence of a publication of the policy prohibiting such activity where those conducting the prohibited activity can reasonably be expected to be aware of the publication of the policy.

Id. at 1385. The Court distinguished *Socialist Workers* because in that case the shopping mall had a permit requirement and a “clear and unambiguous, uniformly applicable policy” precluding “all political solicitation on its property”. *Id.*

Here, as in *Coatesville*, BNY Mellon holds The Park open to public use and invites the public onto the property, but does not assert, and defendants have no knowledge of, a clear, unambiguous, established and uniformly applicable policy, prohibiting political protests, rally or encampments on its property. Moreover, here Mellon not only has no uniform policy, but indeed

consented to Occupy Pittsburgh's use of The Park to engage in its protest. The Superior Court's unanimous⁶ en banc holding in *Coatesville* strongly supports the rejection of Mellon's request for a preliminary injunction here.

2. Occupy Pittsburgh's Activities Constitute Expressive, Protected Speech

Various United States District Courts have recently held that the Occupy Movement's symbolic conduct of tenting and sleeping in a park 24 hours a day to simulate an "occupation" is protected by the First Amendment because it is intended to communicate a particular message and is reasonably understood by the viewer to be communicative. *Freeman v. Morris, Maine Comm'r of Public Safety*, 2011 U.S. Dist. LEXIS 141930 No. 11-cv-00452-NI (D. Maine, December 9, 2011) (finding that tent city in Augusta Maine was protected symbolic, expressive conduct because "those who view the tent cities erected by the Occupy movement in general and by Occupy Augusta in particular are likely to understand that these tent cities in parks and squares near centers of government and finance symbolize a message about the unequal distribution of wealth and power in this country"); *Occupy Columbia v. Haley*, 2011 U.S. Dist. LEXIS 145115, C/A No. 3:11-cv-03253 (D. S.C. December 16, 2011) ("Plaintiffs have shown that they intend to communicate a particularized message that is substantially likely to be understood by those who observe their 24 hour occupation, including camping and sleeping, on the State House grounds") *Occupy Fort Myers v. City of Fort Myers*, 2011 U.S. Dist. LEXIS 131778, No. 2:11-cv-00608 (M.D. Fla. Nov. 15, 2011) ("tenting and sleeping in park ... is symbolic conduct which is protected by the First Amendment"); *Occupy Minneapolis v. County of*

⁶ In *Coatesville*, all nine Superior Court judges ruled that the company was not entitled to a preliminary injunction. Seven joined the majority opinion; Judge Beck concurred separately, and Judge Tamilla concurred in the result, but would have decided the constitutional question to hold that under *Tate*, the union had a constitutional right to engage in picketing on the shopping mall's private property.

Hennepin, 2011 U.S. Dist. LEXIS 135646, No. 11-3412, (D. Minn. Nov. 23, 2011)(agreeing that erecting of structures and sleeping was symbolic conduct protected by First Amendment.

Counsel for defendant have not found any decision holding that the Occupy movement's setting up of tents and sleeping overnight are not expressive, symbolic conduct protected by the First Amendment.

Similarly, Occupy Pittsburgh's tenting and camping are protected, expressive symbolic conduct. Occupy Pittsburgh's message has been clear and consistent in condemning the enormous inequality that exists between the 99% and the 1%. Moreover, its physical occupation is mainly symbolic of the need to occupy the public discourse and to dislodge Mellon Bank and the other large banks and corporations from their excessive influence over the country's public policy and debate. Thus, the 24 hour camping and erecting tents on the grounds is central to the Occupy movements message – namely this is not an ordinary protest but an attempt to change business as usual. In addition, the physical location of the site is symbolic in that Bank of New York Mellon, with its principal address of one Wall Street, represents the financial institutions that the Occupy Movement is protesting.

Occupy Pittsburgh's physical occupying is thus expressive of its broader symbolic occupying. The first definition of the verb "to occupy" in Webster's Dictionary is "to engage the attention". The Occupy movement has engaged the nation's attention, as attested to by the extensive media attention that it has received. It affected the public discourse in large measure because it was not a one or two hour demonstration, which often fails to get much attention, but rather a 24 hour, ongoing, continuous protest involving an encampment.

Occupy Pittsburgh is a symbolic occupation in another important aspect. The occupiers have kept the sidewalk and pedestrian passageways open throughout these last few months, they

have not sought nor have they disturbed Mellon Bank's operations. Their point is not to shut Mellon or the park down, it is simply to symbolically occupy it so as to engage the public attention and affect the political dialogue. Indeed, the occupation of People's Park has become a center of free speech activities and a launching ground for protests, educational activities and demonstrations throughout the city and not just at the site of the encampment.

Finally, one goal of the Occupy movement is to illustrate how a democratic, existing community can govern itself in an egalitarian fashion. That there is an actual encampment, where the participants have general assemblies to decide not only political questions, but issues of how to live equally and cooperatively together in difficult circumstances, is critical to their overall message that a different form of governance is possible. As one District Court put it, "The Plaintiffs also intend to model an ideal form of governance". *Freeman v. Morris*, supra.

3. Mellon Has No Narrowly Tailored Restrictions Prohibiting Occupy Pittsburgh's Activities in the Park and Instead Seeks to Completely Close The Park To The Public.

That Occupy Pittsburgh's encampment is protected expressive speech taking place in a public forum does not mean that it cannot be regulated by Mellon or the City. As with conduct taking place in any public forum, BNY Mellon and the City can impose narrowly tailored, content neutral time, place and manner restrictions. Here Mellon has no such restrictions (other than the Park Use Guidelines, which permit encampment).

The cases addressing symbolic sleeping or camping in parks or sidewalks make a clear distinction. Where the controlling entity has clear, narrowly tailored restrictions that are substantially related to an important purpose of regulating or prohibiting camping, courts have affirmed those restrictions. *Clark, Freeman, Occupy Minnesota*. Where in contrast, the Court determines that the controlling entity has either an overbroad, vague, or inconsistent policy, the Court has enjoined the prohibition on camping or sleeping.

Thus, for example, in *Metropolitan Council Inc. v. Safir*, a District Court enjoined a New York City ban on sleeping on sidewalks as overbroad and not narrowly tailored to further the government's asserted interests. 99 F. Supp 2d 438, 445-447 (SD NY 2000) There, as here, the organizers of the protest took significant measures to ensure that the sleeping protest presented no danger and disturbance. *Id.* at 445-447. More recently in *Occupy Columbia v. Haley*, the District Court enjoined Columbia from prohibiting Occupy Columbia from camping on the State House grounds because the purported policy restrictions a) failed to provide notice to the public of the restrictions, b) had not been applied consistently, c) did not provide clear guidance to law enforcement officials and d) are vague and give unbridled discretion to the official charged with their enforcement. *Columbia supra* at *37-*40.

Here, BNY Mellon cannot demonstrate that they have narrowly tailored restrictions furthering an important interest which leaves open ample alternative means of protest. First, Mellon has not proffered any policy whatsoever, and it is doubtful that a policy exists. Rather, Mellon claims that it has unfettered, absolute discretion to do whatever it wants with the Park, even to shut it down completely. Moreover, having allowed Occupy Pittsburgh to erect its encampment, and specifically setting out a series of conditions which Occupy Pittsburgh has complied with, Mellon provides no significant rationale for now changing its position except to say that as the property owner it has the right to. By closing the Park down, Mellon would affect not only Occupy Pittsburgh, but the interests of pedestrians wanting to walk through The Park as they do now, and particularly wheelchair pedestrians who cannot use the walkway that Mellon constructed in its undisputed Urban Open Space, because of the stairs that Mellon unlawfully included in the walkway.

Nor, unlike other cases that allowed cities to close down Occupy sites, does Mellon make any serious claim that Occupy Pittsburgh presents a health or safety hazard, or is controlling the park to the exclusion of others. *See e.g. Isbell v. City of Oklahoma City*, 2011 U.S. Dist LEXIS 142506 Civ-11-1423-D (D.W.D. Okla., December 12, 2011) (police chief and Mayor refused to renew permit for Occupy OKC’s permit for camping in park when occupants were mainly transient causing disturbances and safety issues, such as public intoxication, noise complaints, a death occurring in one tent which may have been due to drug use, and another disturbance resulting in damage to property and assault of a police officer) at *17-18. In contrast to *Isbell* and similar cases, the Court in *Metropolitan Council* found that the particular symbolic demonstration involving sleeping “was unlikely to pose the risks that the ban seeks to avoid, in light of the precautions routinely taken by protest organizers and the police”, and thus enjoined the ban. 99 F. Supp 2d. supra at 447

The Pennsylvania Supreme Court has similarly imposed a balancing test to determine whether restrictions or prohibitions on expressive activity are permissible in forums open to the public. In *Tate*, the Court held that “we must balance the college’s right to possess and protect its property against appellants’ rights of expression in light of [the] particular place at [the] particular time”. 432 A.2d at 1390. Quoting the Supreme Court of New Jersey, the *Tate* Court noted that even where a private property owner is constitutionally obligated to honor speech and assembly rights of others, the owner “is entitled to fashion reasonable rules to control the mode, opportunity and site for the individual exercise of expressional rights upon his property”. *Id.*

While the balancing that *Tate* required ought to be conducted at trial and not on this motion for preliminary injunction (*See Coatesville*), Mellon faces several obstacles in meeting the criteria set forth in *Tate*. First, it has no rules whatsoever, except the Park Use Conditions

that it set forth when Occupy Pittsburgh first established its encampment. Second, if Mellon claims that the walkway adjacent to The Park is Urban Open Space, then its proposed closure of The Park for the winter would be unlawful because the only accessible walkway between Grant and Ross goes directly through The Park and would be closed to the public.

D. BNY MELLON CANNOT DEMONSTRATE THAT ITS RIGHT TO RELIEF IS CLEAR BECAUSE BNY MELLON IS UNLIKELY TO PREVAIL ON ITS TRESPASS AND NUISANCE CLAIMS

BNY Mellon is not likely to prevail on its trespass and ejection claims. First, BNY Mellon does not have a legal right to exclusive use and possession of Peoples Park. Rather, BNY Mellon is legally required to maintain Peoples Park as Urban Open Space for use by the general public. In addition, BNY Mellon received a substantial public subsidy specifically for construction of a “public plaza” and other public improvements, and may not now seek the equitable powers of this Court to deny the use of the Park by the taxpaying public. Second, even if this Court were to decide that BNY Mellon has the legal right to close The Park to the general public, BNY Mellon has granted Defendants a license to occupy and use The Park, subject to certain conditions, which license became irrevocable after Defendants expended substantial sums of money and labor hours in reliance thereon. Finally, Mellon does not have narrowly tailored regulations prohibiting encampment at The Park, and therefore may not eject Defendants from the Park for that reason.

Nor is BNY Mellon likely to prevail on either of its nuisance claims. Defendants will show that, ever since Defendants’ occupation of Peoples Park began on October 15, 2011, Plaintiffs’ tenants, employees and guests, as well as the general public, have enjoyed the ability to access and use The Park 24 hours a day. Plaintiffs, on the other hand, have stated an intention to (illegally) close Peoples Park for the winter if their injunction request is granted and

Defendants are removed. It is therefore Plaintiffs, not Defendants, who stand to deprive Plaintiffs' tenants, employees and guests and the general public of the use and enjoyment of the Park.

1. BNY Mellon Is Not Likely to Prevail on Its Trespass and Ejectment Claims Because It is Legally Required to Make Peoples Park Available for Public Use, and Defendants' Use of The Park for Continuous Public Assembly is Consistent with that Public Use

BNY Mellon does not have a legal right to exclusive use and possession of Peoples Park. Rather, BNY Mellon is legally required to make Peoples Park available for public use.

a. Peoples Park Has Been Designated as Urban Open Space, and Therefore BNY Mellon Is Legally Required to Make Peoples Park Available for Public Use

The Defendants have not had an opportunity to fully investigate this issue through discovery, and the record that currently exists before this Court is incomplete. However, even the inadequate current record contains sufficient facts to support the conclusion that the area comprising The Park was considered to be Urban Open Space by the Pittsburgh Planning Commission when it approved the project development plan for the Mellon Service Center (the "Project") in 1998.

Plaintiffs contend in their Complaint and in their Brief in Support of Motion for Preliminary Injunction that the Project provided a total of 79,279 square feet of open space (erroneously characterized as 21,405 square feet of Urban Open Space and 57,874 square feet of Open Space) (Complaint, ¶31, Plaintiff's Brief, §II.E). Plaintiffs further contend that The Park was contained within this 79,279 square foot area (Id.). Plaintiffs' own exhibit indicates that the Planning Commission treated the entire 79,279 square feet of open space as "Urban Open Space" (Complaint, Ex.5).

Exhibit 5 of the Complaint is a June 16, 2008, Zoning Report (the "June Zoning Report") prepared by the Pittsburgh Zoning Administrator for the Planning Commission, along with

minutes of the Planning Commission's June 16, 1998, meeting. The Planning Commission's approval was needed for the Project, and that approval was based, at least in part, on the June Zoning Report (Complaint, Ex. 5, p.1 and p.5). As Plaintiffs have pointed out, the 1988 Pittsburgh Zoning Code required that at least 20% of the entire lot area for the Mellon Service Center development be set aside as Urban Open Space. The June Zoning Report, in Section 4 (top of the third page) indicates that *the minimum "Required" Urban Open Space was 41,609 square feet, but that the "Proposed" Urban Open Space was 79,279 square feet* (Id.).

According to the Complaint, the area comprising The Park was within this 79,279 square feet of proposed Urban Open Space (Complaint, ¶31). All or a very substantial part of the area comprising The Park was therefore considered to be Urban Open Space by the Planning Commission when it approved the Mellon Service Center project.

The area comprising Peoples Park is also the only open space mentioned in any of the development documents in the current record that satisfies the legal requirements for Urban Open Space under the 1988 Zoning Code. Under the 1088 Zoning Code, Urban Open Space is required to be handicap accessible. (Verified Complaint, Ex. 4, subsection (f) in the definition of Urban Open Space). The pedestrian promenade that the Plaintiffs claim to be the only required Urban Open Space for the Project contains a series of steps and is not handicap accessible. The promenade therefore does not meet the minimum criteria for Urban Open Space as provided in the 1988 Zoning Code. Peoples Park, on the other hand, is handicap accessible, and it is clear from the limited record currently before this Court that the walkways that cross Peoples Park provided the necessary handicap access that allowed the Planning Commission to approve the Project.

The November 10, 1998, Zoning Report (Exhibit 6 of the Verified Complaint) addresses the handicap accessibility issue. A Landscape Plan (Section 5 of the Zoning Report) referred to the pedestrian promenade as “part” of the Urban Open Space requirement, and went on to say: “The Grant Street open space will have a rolling lawn that is crossed by two paths that provide handicapped access between Ross Street and Grant Street.”

It should be assumed that the Planning Commission was aware of the handicap accessibility requirements in the 1988 Zoning Code and would not have approved a project development plan that failed to provide handicap accessible Urban Open Space. In other words, the Planning Commission could not and would not have approved the Project if the only Urban Open Space was the pedestrian promenade as Plaintiffs contend. But as the area comprising Peoples Park does meet all criteria for Urban Open Space under the 1988 Zoning Code, and as the November 10, 1998, Zoning Report does explicitly refer to the area as providing handicap access, the Planning Commission must have considered Peoples Park as Urban Open Space when it gave conditional approval for Mellon’s Project.

Plaintiffs’ contention that the area comprising The Park was designated as “temporary” open space is a red herring. There is nothing in the record to indicate that Mellon could revoke the Urban Open Space designation at its discretion. Rather, the June Zoning Report merely leaves the door open for Mellon to submit a project development plan for the temporary open space at some point in the future, at which time the Planning Commission would need to once again consider whether the requisite Urban Open Space requirement is satisfied. Nothing in the record indicates that Mellon has presented any plans to develop on any portion of The Park and provide substitute Urban Open Space in another location. “Temporary” or not, Peoples Park was

considered to be Urban Open Space by the Planning Commission, and nothing has happened since June 16, 1998, to change that designation.

Defendants believe that a complete review of the documents related to the development of the Mellon Service Center project will provide further evidence that BNY Mellon is required to maintain The Park for use by the general public as Urban Open Space.

b. In Light of BNY Mellon’s Receipt of a Substantial Public Subsidy for the Construction of a “Public Plaza”, BNY Mellon Should be Estopped From Arguing that the Tax Paying Public Has No Legal Right to Use The Park

Peoples Park and other public improvements related to the Mellon Service Center were constructed with a substantial tax subsidy. After requesting and accepting a public subsidy to construct The Park as a “public plaza”, BNY Mellon may not now seek the equitable powers of this Court to deny the use of the Park by the taxpaying public.

In 1998, the City of Pittsburgh, Pittsburgh Public Schools, and Allegheny County (the “Three Taxing Bodies”), awarded Mellon tax increment financing (“the Mellon TIF”) in the amount of \$6,988,528 (Answer and New Matter, Exhibit B). The Mellon TIF financed Redevelopment Bonds issued by the Pittsburgh Urban Redevelopment Authority, and provided a grant of \$6,988,528 to Mellon for the Project (*Id.*). According to the Bond Issue Official Statement, “[c]osts being funded with Bond proceeds include public improvements such as new sidewalks, intersection reconstruction, public transit station improvements and *a public plaza adjacent to the Mellon Facilities*” (*Id.*, emphasis added). The Park is the “public plaza” referred to in the Official Statement. (Answer and New Matter, Exhibit B-2).

Several members of Occupy Pittsburgh – as well as members of the general public who regularly use The Park - are currently or have been taxpayers within the Three Taxing Bodies during the period of the Mellon TIF. By arguing that Peoples Park is not Urban Open Space, and by stating an intention to close The Park to the general public for the winter, BNY Mellon is

attempting to deprive the taxpaying public of a public asset whose construction they subsidized. The Official Statement makes it clear that the \$6,988,528 in taxpayer subsidy that Mellon received was intended to pay for “public” improvements, including a “public” plaza. Even if this Court were to find that Peoples Park is not Urban Open Space within the meaning of the Pittsburgh Zoning Code, it would be manifestly unjust to permit BNY Mellon argue now that The Park is not “public” space.

c. Defendants’ Use of The Park for Continuous Public Assembly Is Consistent with the Public Use to Which the Park Has Been Dedicated

The 1988 Pittsburgh Zoning Code requires that the Park be open to the public 24 hours a day. Section (d) of the definition of “Urban Open Space” states that Urban Open Space must be open to the public “at least during all business hours common to the area of the district in which it is located” (Complaint, Ex.4). At least 2 hotels operate in the area of the GT-B district in which the Park is located. The Omni William Penn, with 596 guest rooms, is located adjacent to the Park on Grant Street. The Doubletree Hotel, with 308 guest rooms, is located adjacent to the Park on Sixth Avenue and Bigelow Square. These hotels are open for business 24 hours a day. The Mellon Service Center is also located adjacent to the Park on Ross Street. BNY Mellon employs hundreds of people at the Mellon Service Center around the clock. The “business hours common to the area” are therefore 24 hours, and BNY Mellon is legally required to keep the Park open to the public 24 hours a day.

As explained more fully in Section IV.C.1 above, the free exercise of expressive activities is an implied use of every public space. The Pittsburgh Zoning Code is silent as to time, place and manner restrictions on public assemblies and other expressive activities on Urban Open Space, and the Defendants’ use and occupation of the Park can therefore not be held to be in violation of any such restrictions. BNY Mellon has not alleged the publication or posting of

any such restrictions prior to the start of Defendants' occupation. And while BNY Mellon did provide Defendants with guidelines for Defendants' use and occupation of The Park after the occupation began, as more fully explained in Section IV.D.2 below, the Defendants are in full compliance with those guidelines.

Finally, one of the express purposes for which Urban Open Space is designed to be used is to "facilitate pedestrian circulation" (Complaint, Ex.4). Defendants' use and occupation of the Park facilitates pedestrian circulation in that, but for Defendants' continued occupation, Plaintiffs would illegally close The Park to the public and foreclose pedestrian access for the winter.

d. Since BNY Mellon Lacks the Legal Right to Exclusive Use and Possession of Peoples Park, It Can Not Maintain an Action in Trespass

In order to maintain an action in trespass, "a plaintiff must have had the right to exclusive use and possession of the property at issue." *Graham Oil Co. v. B.P. Oil Co.*, 885 F.Supp 716, 725 (W.D.Pa. 1994). Because The Park is Urban Open Space and/or a "public plaza" whose construction was subsidized with taxpayer funds, BNY Melon lacks a legal right to exclusive use and possession of The Park, and cannot maintain an injunction action to preclude Defendants' public use.

Plaintiffs' reliance on *46 S. 52nd Corp v. Manlin*, 157 A.2d 381 (Pa. 1960) is misplaced. *Manlin* concerned a private use of public space – a for-profit news stand. *Manlin* at 381; see also *Manlin* at ____ (Bell, J., concurring in part and dissenting in part: "[Manlin] is not claiming or making *public* use of the sidewalk *in common with all other members of the public*, but he is claiming an absolute and exclusionary right to appropriate a particular segment of the sidewalk for his own private and exclusive use and profit.") (emphasis in the original). By contrast, Defendants are using The Park in common with all other members of the public, for an expressly public purpose – open and free public expression concerning matters of significant political and

social importance. Whatever right BNY Mellon may have to preclude private and exclusive use of The Park by individuals for profit does not allow BNY Mellon to exclude members of the general public from using The Park for expressive public assembly.

2. BNY Mellon Is Not Likely to Prevail on Its Trespass and Ejectment Claims Because BNY Mellon has Granted Defendants an Irrevocable License to Use and Occupy The Park.

As previously mentioned, in order to maintain an action in trespass, BNY Mellon must have had the right to exclusive use and possession of the property in question. *Graham Oil Co.* at *Id.* Because BNY Mellon granted Defendants a license to use and occupy The Park, which license became irrevocable upon Defendants' reasonable detrimental reliance thereon, BNY Mellon may not maintain an action in trespass.

a. BNY Mellon Granted Defendants a License to Use and Occupy Peoples Park

On October 15, 2011, BNY Mellon caused Pittsburgh Police Lieutenant Ed Trapp to communicate to Defendants that Defendants would be permitted to use and occupy The Park “as long as you don't damage the property” (New Matter, ¶13). On or about November 1, 2011, BNY Mellon provided Defendants with a list of guidelines (the “Park Use Guidelines”) specifying the conditions under which Defendants would be permitted to occupy and use The Park (Answer and New Matter, Exhibit A). The Park Use Guidelines stated, in relevant part, “*For the duration of the occupation of BNY Mellon Green, we kindly request that you please observe the following safety and good neighbor reminders and take all necessary precautions to reduce the risk of fire and injury to persons and property*” (Id.). The Park Use Guidelines made repeated references to “the occupation”, “occupants” and “occupying” (Id.).

A license to use the property of another is created when a landowner consents to such use verbally or in writing. See *Kovach v. Gen. Tel. Co. of Pennsylvania*, 489 A.2d 883 (1985). By causing its consent to Defendants' use and occupation of The Park to be communicated to the

Defendants, and by providing Defendants with written guidelines governing such use and occupation, BNY Mellon granted Defendants a license to use and occupy The Park, subject to the stated conditions, “[f]or the duration of the occupation.”

b. Defendants’ License to Use and Occupy Peoples Park Became Irrevocable After Defendants Expended Substantial Sums of Money and Hours of Labor in Reliance Thereon.

At no time prior to posting a notice to vacate on December 9, 2011 (the “Notice”, Ex. 12 of the Complaint) did the Plaintiffs indicate to Defendants that permission to use The Park would be revoked, regardless of whether Defendants continued to comply with the Park Use Guidelines, so that the Plaintiffs could close the Park for the winter. When BNY Mellon communicated its consent to Defendants' use and occupation of The Park, it could easily have added “until we close Mellon Green for the winter” or “until December 9, 2011”, but it did not. Such qualifying language was also conspicuously missing from the Park Use Guidelines, which instead stated that they would be in effect “for the duration of the occupation.” Defendants will show that, in reliance upon the verbal statement and the Park Use Guidelines, and prior to BNY Mellon's posting of the December 9, 2011, Notice directing Defendants to vacate The Park, Defendants expended substantial sums of money and hours of labor preparing to “winterize” their camp. The detrimental actions taken by Defendants and their members and supporters in reliance upon BNY Mellon's grant of a license to use and occupy the Park “for the duration of the occupation” include, but are not limited to, the purchase of a military grade “mess tent”, the purchase of several sleeping bags rated for use at temperatures as low as zero degrees Fahrenheit.

Licenses are ordinarily revocable at will, but Pennsylvania has adopted the equitable doctrine of irrevocable license, which recognizes that if the grant of license is followed by an expenditure of money in reliance thereon, the license is irrevocable and binding as a contract.

Kovach at _____. See also *Thompson v. McElarney*, 82 Pa. 174 (Pa. 1876) (oral license can not be

revoked where it induces another to incur an expense that would not otherwise have been incurred); and *Huff v. McAuley*, 53 Pa. 208 (Pa. 1866) (grant of license becomes irrevocable if followed by the expenditure of money on the faith of the grant). The expenditure necessary to establish an irrevocable license can be money or labor. See *Messinger v. Washington Township*, 137 A.2d 890 (Pa. Super. 1958) (an expenditure of \$100 in laying a pipe and drain was sufficient to render a license irrevocable). The principle of irrevocable license is similar to the principle of equitable estoppel. *Zivari v. Willis*, 611 A.2d 293 (Pa. Super 1992). Equitable estoppel arises “when one by his acts, representations [or] admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.” *Id.* at ____ (emphasis added).

In *Zivari*, two property owners (the Willises) constructed a garage and driveway connecting to a private road owned by an adjoining property owner (*Zivari*). *Id.* At 293. Upon learning of the project, *Zivari* told the Willises “of course, I’ll let you use [the private road], but you should have asked.” *Id.* A few months after the project was finished, *Zivari* filed a complaint in equity seeking to enjoin the Willises from using the road. *Id.* The Superior Court held that, when he made the statement, *Zivari* created a license that he could have revoked at will, but that once the Willises relied upon that statement to their detriment, the license became irrevocable, and *Zivari* was estopped from denying them the right to use the road. *Id.* at ____.

By communicating its consent to Defendants’ use and occupation of The Park “indefinitely” and for “as long as you don’t damage the property”, by providing guidelines for the use and occupation of The Park “for the duration of the occupation”, and by failing to inform Defendants that BNY Mellon intended to revoke the license and close The Park for the winter

regardless of whether Defendants adhered to the Park Use Guidelines, BNY Mellon caused Defendants to believe that they could continue to use and occupy The Park for the duration of the occupation, and Defendants justifiably acted to their detriment in reliance upon that belief. As a result, BNY Mellon has forfeited the right to revoke the license at will, and may only revoke the license in the event of an uncured breach of the Park Use Guidelines.

BNY Mellon's December 9, 2011, Notice to Vacate did not allege any breach of the Park Use Guidelines (Complaint, Ex.12). If it becomes necessary to do so (i.e., if BNY Mellon delivers a revised notice to vacate alleging breach of the Park Use Guidelines), the Defendants are able to show that they are in full compliance with those Guidelines.

3. BNY Mellon Is Not Likely to Prevail on Its Nuisance Claims Because BNY Mellon Can Not Show that Defendants' Conduct Intentionally and Unreasonably Deprives BNY Mellon or the General Public of the Use and Enjoyment of The Park

The Plaintiffs assert both a “private nuisance” and a “public nuisance” claim. Both of these claims require a showing that Defendants have deprived others of the use and enjoyment of Peoples Park, and that such deprivation is both intentional and unreasonable. Plaintiffs can not meet this burden of proof.

a. BNY Mellon Is Not Likely to Prevail on Its Private Nuisance Claim Because BNY Mellon Can Not Show that Defendants' Conduct Intentionally and Unreasonably Deprives BNY Mellon of the Use and Enjoyment of The Park

BNY Mellon alleges that Defendants have completely deprived BNY Mellon of its right to use and enjoy The Park, and that such deprivation is both intentional and unreasonable (Plaintiffs' Brief, §IV.A.2). BNY Mellon offers no facts at all in support of its “deprivation of use and enjoyment” claim (Id.). Contrary to BNY Mellon’s unsubstantiated assertion, Defendants can show that ever since the occupation of Peoples Park began on October 15, 2011, BNY Mellon’s tenants, employees and guests have enjoyed access to and use of The Park 24 hours a day. BNY Mellon’s agents and employees have visited and inspected every aspect of

Defendants' occupation ever since the occupation began, and the Plaintiffs' employees regularly use and enjoy The Park. Accordingly, BNY Mellon cannot meet its burden of proving that it has been deprived of the use and enjoyment of The Park.

Nor can BNY Mellon meet its burden of proving that any deprivation is intentional. Pennsylvania follows the Restatement Second of Torts with respect to claims of private nuisance. *Hughes v. Emerald Mines Corp.*, 450 A. 2d 1 (Pa. 1982). Section 825 of the Restatement states that “[a]n invasion of another's interest in the use and enjoyment of land or an interference with the public right 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. Again, BNY Mellon has alleged no facts to support its claim that Defendants intend to interfere with its use and enjoyment of The Park, and, in fact, Defendants have actively encouraged all members of the general public, including BNY Mellon tenants, employees and guests, to enter and use The Park.

Finally, BNY Mellon cannot meet its burden of proving that any deprivation is unreasonable. Under the Restatement, an intentional invasion becomes unreasonable if (a) the gravity of the harm outweighs the utility of the actor's conduct, or (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible” (Restatement 2nd of Torts, §826). Again, BNY Mellon has alleged no facts whatsoever to support this claim. On the contrary, and as more fully explained in Section IV.B.2 above, the utility of Defendants' use and occupation of The Park to the public far outweighs any harm to the Plaintiffs.

b. BNY Mellon Is Not Likely to Prevail on Its Public Nuisance Claim Because BNY Mellon Can Not Show that Defendants' Conduct Intentionally and Unreasonably Deprives the Public of the Use and Enjoyment of The Park

BNY Mellon argues in its Brief both that the general public has no right to use The Park, and that Defendants' use and occupation of The Park infringes on that supposedly nonexistent right. In reality, it is the Defendants who are fighting to preserve the public's right to use and enjoy The Peoples Park. The Defendants' renamed The Park "The Peoples Park" specifically in response to BNY Mellon's illegal attempts to close it to public use. Ever since Defendants' occupation of The Park began on October 15, 2011, the general public has enjoyed round the clock access to and use of The Park. Plaintiffs, on the other hand, have stated an intention to (illegally) close Peoples Park for the winter if their injunction request is granted (see, e.g., Plaintiffs' Brief, §II.H(d)). It is therefore the Plaintiffs, not Defendants, who stand to deprive the general public of the use and enjoyment of The Park.

E. PLAINTIFFS HAVE NO RIGHT TO SEEK EQUITABLE RELIEF FROM THIS COURT SINCE THEY COME TO THE COURT WITH UNCLEAN HANDS.

(1) The Purpose and Effect of Plaintiffs' Injunction Request Is to Allow Plaintiffs to Commit an Illegal Act, to Wit: to Close Peoples Park to the General Public in Violation of the Pittsburgh Zoning Code.

The Plaintiffs state that it is their intention to close People's Park to the public for the winter months as they have "historically" done, and that Defendant's continued occupation of the Green will prevent them from doing so (see, e.g., Verified Complaint ¶91(f)). The Plaintiffs' request for preliminary and permanent injunctive relief is designed, in substantial part, to allow Plaintiffs to close People's Park to the public for the winter months (Verified Complaint, 4th prayer for relief in Counts I, III, IV and V).

As more fully explained in Section IV.D.1.a. above, all or a substantial part of Peoples Park was considered by the Planning Commission to be Urban Open Space when the Project was approved in 1998, and nothing has happened since that time to change that designation. Under the 1988 Pittsburgh Zoning Code, Urban Open Space must be “maintained for use by the general public” and kept open to the public “at least during all business hours common to the area of the district in which it is located” (Verified Complaint, Ex. 4). The businesses that operate in the area of the planning district in which the Park is located – including BNY Mellon Tower and the BNY Mellon Client Service Center - maintain business hours during the winter months. BNY Mellon is therefore legally obligated under the 1988 Zoning Code to keep the Park open to the general public during the winter months.

It is a cornerstone of equitable jurisprudence that a party seeking an equitable remedy must do so with "clean hands." *Gaudiosi v. Mellon*, 269 F.2d 873, 881 (3d Cir. 1959). The clean hands doctrine demands that a court “should not, in an ordinary case, lend its judicial power to a plaintiff who seeks to invoke that power for the purpose of consummating a transaction in clear violation of law.” *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387 (1944). Moreover, “where a suit in equity concerns the public interest, as well as the private interests of the litigants, this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case, it not only prevents a wrongdoer from enjoying the fruits of his transgression, but averts an injury to the public.” *Precision Instrument Manufacturing Co. v. Automotive Co.* 324 U.S. 806, 815 (1945).

The purpose and effect of BNY Mellon’s request for injunctive relief is to allow BNY Mellon to close the Park to the public in violation of the Pittsburgh Zoning Code, and accordingly that request should be denied.

(2) The Effect of Plaintiffs' Injunction Request Is to Allow Plaintiffs to Discriminate Against People with Disabilities in the Provision of Public Space.

The 1988 Pittsburgh Zoning Code requires that Urban Open Space be “[a]ccessible to the handicapped” (Verified Complaint, Ex. 4). In addition, as a “place of public gathering” and/or a “place of recreation,” Urban Open Space would constitute a public accommodation under the Americans with Disabilities Act (ADA), which prohibits discrimination against people with disabilities in the provision of public accommodations. 42 U.S.C. §§12181 and 12182.

The Sidewalk that the Plaintiffs claim to be the only required Urban Open Space for the Project contains a series of steps and is not handicap accessible. The walkways crossing through People’s Park provided the necessary handicap access that allowed the Planning Commission to approve the Project. If Plaintiffs’ request for preliminary and permanent injunctive relief is granted, the effect will be to allow Plaintiffs to close the only handicap accessible public space between Grant Street and Ross Street for the winter months, and to instead provide a stairway as the only public space in that location. The granting of Plaintiffs’ injunction request would therefore allow Plaintiffs to deny handicap accessible Urban Open Space in violation of the Pittsburgh Zoning Code and to discriminate against people with disabilities in the provision of a public accommodation in violation of the ADA.

As stated above, a party seeking an equitable remedy must do so with "clean hands" (*Gaudiosi* at Id.), a court in equity should not lend its authority to a plaintiff who seeks to act in violation of the law (*Johnson* at Id.), and those considerations are even stronger where there is a potential harm to the public interest (*Precision Instrument* at Id.). Granting Plaintiffs’ request for injunctive relief would not only allow Plaintiffs to act in violation of the Pittsburgh Zoning Code and the ADA, it would aid in discrimination against people with disabilities, which is manifestly against the public interest.

V. CONCLUSION

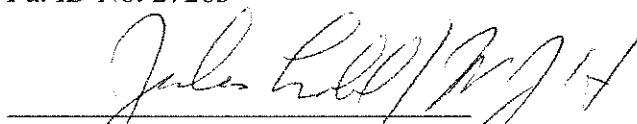
Accordingly, and for all the reasons stated above, Defendants respectfully request that this Honorable Court deny Plaintiffs' request for a Preliminary Injunction in this matter.

Thursday, January 05, 2012

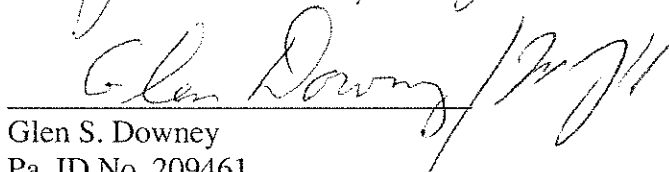
Respectfully submitted,



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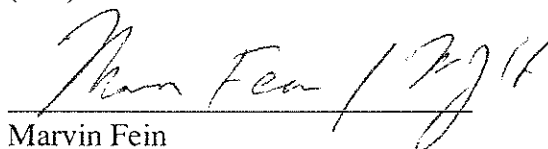


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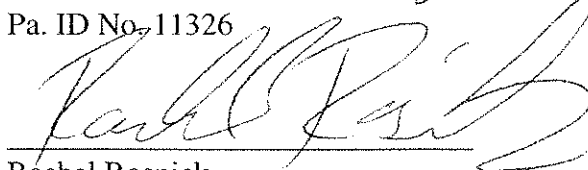


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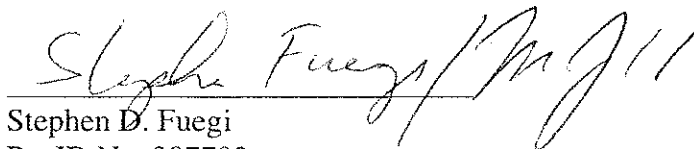
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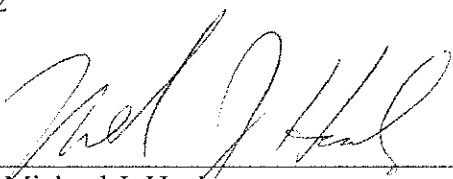
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served this 5th day of January 2012 by personal service and e mail upon counsel for Plaintiffs as follows:

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