

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

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

Plaintiffs,

v.

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

Defendants.

) CIVIL DIVISION

) No.: GD 11-025549

) MEMORANDUM OPINION  
) AND ORDER OF COURT

) JUDGE CHRISTINE A. WARD  
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)  
)

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## MEMORANDUM OPINION

The Occupy Pittsburgh movement, in conjunction with Occupy Wall Street and other movements across the country, has effectively communicated their message of wealth disparity and corporate greed through the expressive technique of encampment at selected locations. Nonetheless, despite the diversity and populist nature of the Occupiers' message,<sup>1</sup> the notion of a permanent encampment on either public or private property to the exclusion of other members of the public or a private owner is untenable and has been rejected by every court which has ruled upon it.

Defendants make an interesting argument that privately owned Mellon Green may be considered to be a public forum in the months in which the Green is open to the public. However, even if Mellon Green were considered to be a public forum in the spring, summer and fall, it is not controverted that Mellon/BNY Mellon has always closed the Green in the winter during which time it could not be argued that it is or ever has been a public forum. Therefore, at least in the winter months, Mellon Green is simply private property. There is no zoning, constitutional, statutory or common law ground that permits a group of people to take over someone else's private property as Defendants have taken over BNY Mellon's property here, and effectively prevent the owner from closing its property.

Defendants argue that even if they may not ultimately prevail on the merits, in their view, they do not present immediate irreparable harm to BNY Mellon or the public warranting a preliminary injunction. Therefore, Defendants contend, they should be permitted to continue occupying BNY Mellon property, at least until the final hearing. For the reasons more fully

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<sup>1</sup> This Court acknowledges the testimonies in support of the Occupy encampment from labor leaders, Jack Shea, Fred Redmond, and Neal Bisno, along with that from Pittsburgh City Councilman, Doug Shields, civil rights/human rights activist, Celeste Taylor and member of the City of Pittsburgh/Allegheny County Taskforce on Disabilities, Paul O'Hanlon, Attorney. It is understandable that these groups would admire and support the pluck and resiliency of this hardy band of souls willing to freeze their tails off to demonstrate the plight of the disadvantaged in the shadow of edifices that they believe represent corporate greed and excess.

stated below, this Court does not agree with Defendants' contention and, therefore, grants Plaintiffs' *Motion for Preliminary Injunction*.

#### LEGAL STANDARD

The Court applies the same preliminary injunction standard delineated by the Supreme Court of Pennsylvania in *Warehime v. Warehime*, 580 Pa. 201, 860 A.2d 41 (2004) (*citing Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 573 Pa. 637, 647, 828 A.2d 995, 1001 (2003)), which set forth the six essential elements that a party must establish prior to obtaining preliminary injunctive relief:

The party must show: 1) that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; 2) 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; 3) that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; 4) 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; 5) that the injunction it seeks is reasonably suited to abate the offending activity; and, 6) that a preliminary injunction will not adversely affect the public interest.

*Id.*, 860 A.2d at 46-47 (citation omitted).

#### DISCUSSION

##### I. Injunction is Necessary to Prevent Irreparable Harm

###### A. Continuing Trespass and Seizure Creates Irreparable Harm

Defendants' continuing occupation is causing BNY Mellon immediate and irreparable harm that cannot be adequately redressed through damages, and entry of a preliminary injunction is needed to end this harm. Furthermore, the immediate and irreparable harm from BNY

Mellon's dispossession is increasing and unlikely to abate without injunctive relief.<sup>2</sup> Instead of complying with the Notices, Defendants tore them down and then publicly claimed to have seized BNY Mellon Green and renamed it "The People's Park." Defendants' stated intentions are to remain on BNY Mellon Green continuously and indefinitely.

It is a longstanding principle of Pennsylvania law that the continuous wrongful taking of someone else's property constitutes irreparable harm. *Stuart v. Gimbel Bros., Inc.*, 131 A. 728 (Pa. 1926). In *Stuart v. Gimbel*, Gimbel wanted to build a department store in Philadelphia, and wished to construct tunnels above and below ground for entry into the store. The streets above which the tunnels were to be constructed belonged to a private landowner (in easement), so Gimbel persuaded the City to adopt an ordinance allowing them to construct on the landowner's land and the landowner requested an injunction to restore his use of his land. Gimbel argued that there was no irreparable harm, as the landowner had an alternative remedy-payment for the value of his property. The Supreme Court of Pennsylvania held that Gimbel had no right to the landowner's private property, explaining that:

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

*Id.* at 730 (citations omitted). *See also, Jones v. Wagner*, 624 A.2d 166, 169 (Pa. Super. Ct. 1993) ("[I]n an action for trespass . . . the harm is not to the physical wellbeing of the land, but to the landowner's right to peaceably enjoy full, exclusive use of his property.").

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<sup>2</sup> On December 9, 2011, BNY Mellon posted at all four (4) entranceways to BNY Mellon Green a notice (the "Notice") that required the Occupiers to remove "all tents and other structures as well as camping equipment and other stored personal items from BNY Mellon Green by no later than noon on Sunday, December 11, 2011." The Notice also states that "[a]fter that date, overnight camping and the presence of any structures, camping equipment, and stored personal items will be prohibited and considered an unlawful trespass, which we [BNY Mellon] will seek to remedy by filing for injunctive relief with the court on Monday [December 12, 2011]."

This is primarily a dispute about who controls a piece of property. The Occupiers' conduct here greatly interferes with BNY Mellon's right to exclusive use of its property, including its ability to close the Green in the winter months as it has always done. Just because the Occupiers are not blocking access to the building, or restricting use of the sidewalks, it does not mean that there is not a clear interference with BNY Mellon's property rights. There is no disputing the fact that the Occupiers, by setting up a permanent campsite on Mellon Green, deny Plaintiffs access to the parts of the Green that give the Green its name. The Green has been usurped for the sole purpose of the Occupiers' movement, and has been damaged and changed through the means of protest employed.

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

**B. Additionally, The Harm To People Or Property Or A Risk Of Liability To BNY Mellon Caused By The Continuing Trespass And Seizure Creates Immediate And Irreparable Harm**

Moreover, the harm to people or property or a risk of liability to BNY Mellon caused by the continuing trespass and seizure is further evidence supporting a finding of irreparable harm. The occupation, by forcing the park to remain open during the winter months, when BNY Mellon does not perform snow and ice removal, creates liability exposure for BNY Mellon. In this case, there is exposure not only to the trespassers, but also to the public that is using the sidewalks. While the Occupiers claim that they will remove the snow and ice and protect themselves from hypothermia, BNY Mellon need not believe or rely on these representations, but may make the reasonable business decision that it has made every winter and close the Green.

The need for immediate relief is supported by evidence of a danger to people or property or a risk of liability. "To subject those who claim title to property with those hazards present to

liability exposure for injuries to alleged trespassers creates the potential for irreparable harm.” *White v. Foley*, 54 Pa. D. & C.4th 145, 2001 WL 1842492 (Butler Ct. Com. Pl. 2001) (preliminarily enjoining trespassing neighbors from maintaining play equipment on plaintiff’s property and allowing their children to play on the property because of the risk of “significant liability for potential injuries”), *aff’d without opinion*, 804 A.2d 71 (Pa. Super. Ct. 2002). In *White v. Foley*, the risk to children of playground equipment alone warranted entry of a preliminary injunction. As serious as the risks were in *White v. Foley*, here, the risks caused by the occupation, to the Occupiers, to BNY Mellon employees and to the public at large, including non-adults, are even greater.<sup>3</sup>

Indeed, Pennsylvania appellate courts have routinely affirmed preliminary injunctions granted by Pennsylvania trial courts to prevent immediate and irreparable harm to property interests in land as well as threats to health and safety arising from conditions on land caused by an apparent trespass or nuisance. *See e.g., North Penn Gas Co. v. Mahosky*, 378 A.2d 980 (Pa. Super. Ct. 1977) (affirming a preliminary injunction enjoining trespassing neighbors from constructing a home that would encroach upon a right of way); *The Woods at Wayne Homeowners Ass’n v. Gambone Bros. Constr. Co., Inc.*, 893 A.2d 196, 206-07 (Pa. Commw. Ct. 2006) (affirming a preliminary injunction requiring a developer to remedy a nuisance before weather conditions changed and increased risks to health and safety and further property

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<sup>3</sup> This Court reserved decision on the admissibility of Plaintiffs’ Exhibits 36 and 37, which BNY Mellon had offered into evidence through Emergency Motions presented in court on January 30, 2012. Plaintiffs’ Exhibit 36 contains video excerpts from Occupy Pittsburgh’s Day 103 General Assembly held on January 25, 2012 and a transcription of the video excerpts that had been posted on the Occupy Pittsburgh website. Plaintiffs’ Exhibit 37 is a certified record of the Police Criminal Complaint against Robert L. Foltz, Jr. filed January 27, 2012. Both Exhibits are admissible under established exceptions to the hearsay rule. The General Assembly Video is admissible as an admission of a party opponent, an adoptive admission and as a business record. The Police Criminal Complaint is admissible as a certified public record. However, this Court does not need to rely on any objected to evidence to reach the conclusion of law that a preliminary injunction is necessary to prevent immediate and irreparable harm considering the plethora of non-objected to evidence that supports arriving at the same conclusion.

damage).

Here, the record shows evidence of present dangers and potential risks created by trespass and nuisance. As long as the occupation is allowed to continue, BNY Mellon remains unable to manage the risk of serious harms to people using its property.

Defendants argue that they have corrected any dangerous conditions in their encampment and, therefore, there is no irreparable harm to BNY Mellon. However, this Court concludes that liability exposure in and of itself coupled with BNY Mellon's inability to be aware of or manage that risk is irreparable harm. No property owner should be forced to wait until some liability producing event or other harm happens on its property in order to obtain injunctive relief. Despite its efforts to resolve this ongoing trespass without confrontation by asking Defendants to leave the property, BNY Mellon is now seeking to secure a court order that can be enforced and that Defendants have said they will peacefully resist.

**C. Finally, BNY Mellon Has Suffered And Will Continue to Suffer Immediate and Irreparable That Cannot Be Adequately Compensated By Monetary Damages**

The Green itself has been damaged by the occupation and restoring it could cost BNY Mellon an estimated \$70,000 to \$100,000. Additionally, BNY Mellon beefed up its security to the tune of \$24,400 per week because of the ongoing presence of the encampment and its occupants. As of January 11, 2012, Occupy Pittsburgh's bank account had a balance of only about \$4,200. Here, Plaintiffs are sustaining significant ongoing damages, which they will never be able to fully recover from the Occupy Pittsburgh movement. Therefore, an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages. *See, The Woods*, 893 A.2d at 204; *Summit Towne Ctr.*, 828 A.2d at 1001.

## II. Balance Of The Harms Favors Granting Injunction

This Court finds that, pursuant to the holding in *Stuart v. Gimbel*, a continuing trespass constitutes irreparable harm. As such, this Court is not required to balance the harms as it would be required to do in the absence of a clear irreparable harm. However, even if this Court was required to balance the harms, this Court is convinced that a refusal to grant the preliminary injunction would result in greater harm to BNY Mellon than the granting of the preliminary injunction causes the Occupiers.<sup>4</sup> Indeed, BNY Mellon's eviction of the encampment will certainly draw publicity and may even assist in communicating the Occupiers' message.

## III. Injunction Will Restore The Status Quo

The preliminary injunction restores the parties to the status quo as it existed before the occupation. Prior to Defendants' occupation, the Green was used by BNY Mellon, its tenants, employees, and guests during non-winter months and was closed routinely during the winter months without objection from the City of Pittsburgh or anyone else since 2001. Therefore, the status quo during the winter is, and has always been, closure. Granting a preliminary injunction that would permit BNY Mellon to close the Green would restore the status quo that existed before Defendants' occupation.

## IV. There Is A Likelihood Of Success On The Merits

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

It is well established in Pennsylvania law that private property rights in real estate are protectable by equitable relief. *Dodson v. Brown*, 70 Pa. Super. 359, 360 (1918) ("If damages

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<sup>4</sup> The Occupiers have made it explicitly clear that occupation itself is a part of their message, and have, therefore argued that the granting of an injunction forcing their removal would restrict their constitutional rights to free speech and expression. It is important to note, however, that the Occupiers have no right to possess Mellon Green. There are other public forums available to them, and other ways for them to spread their legitimate message. Seizure of the specific property owned by BNY Mellon is not necessary in pursuit of their goals. Indeed, the Occupiers may engage in a wide variety of conduct on public or private property, in accordance with applicable laws or the consent of private property owners. This Court is certain that the Occupy movement will continue and find alternative events and venues to protest despite the issuance of this preliminary injunction.

may be substituted for the land, it will amount to an open invitation to those so inclined to follow a similar course and thus secure valuable property rights.”). In seeking a preliminary injunction, a “party’s right to relief is clear if the party seeking the preliminary injunction is likely to prevail on the merits of the permanent injunction.” *The Woods*, 893 A.2d at 204. To establish a clear right to relief, the party seeking an injunction need not prove the merits of the underlying claim, but need only to show that it will likely prevail on the merits on one of its underlying claims. *Summit Towne Ctr.*, 828 A.2d at 1001. Here, BNY Mellon is likely to prevail on the merits of its claim for trespass. Additionally, BNY Mellon is likely to prevail on the merits of its claim for private nuisance.

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

Pennsylvania law defines a trespass as an unprivileged, intentional intrusion upon land in possession of another. *Rawlings v. Bucks County Water & Sewer Auth.*, 702 A.2d 583, 586 (Pa. Commw. Ct. 1997) (citing RESTATEMENT (SECOND) OF TORTS (REST. 2D TORTS) § 158). Here, the Occupiers do not have a right to be on BNY Mellon’s private property and yet, have intentionally remained there. As such, BNY Mellon is likely to succeed on the merits of its claim that the Occupiers are trespassing on Mellon Green.

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

There is no dispute that BNY Mellon owns BNY Mellon Green. In fact, Defendants readily admit that BNY Mellon Green is “privately owned” by BNY Mellon. (Def. Br. in Opp. to Prelim. Inj. at p. 5). BNY Mellon holds both the fee simple and leasehold rights in BNY Mellon Green and possessed it prior to Defendants’ occupation. As such, it is clear that BNY Mellon has met the threshold showing of both ownership and possession.

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

By its Notice posted on December 9, 2011 BNY Mellon made it explicitly clear that it does not consent to the continuing occupation of BNY Mellon. The Occupiers, however, have refused to comply with the Notice, torn it down, and claimed to have seized and renamed BNY Mellon Green. Pennsylvania law makes it clear that such actions are not within the rights of the Occupiers. *Ochroch v. Kia-Noury*, 497 A.2d 1354, 1355-56 (Pa. Super. Ct. 1985) (trespassers "have no right at law or in equity to occupy or appropriate land that does not belong to them."). Absent BNY Mellon's consent, the Occupiers have no legal right to continue their occupation of BNY Mellon Green.

**c. The Green Is Not Urban Open Space And Any Zoning Violation Existing With BNY Mellon's Urban Open Space Does Not Convert The Green Into Urban Open Space**

The 1988 Zoning Code, which controls any land-use issues pertaining to BNY Mellon Green: (1) defines Open Space simply to be that "portion of a lot which is not occupied by buildings, parking areas, driveways, streets, or loading areas;" (2) requires that every Project Development Plan approved by the Planning Commission designate and provide a certain amount of land as Urban Open Space (a term defined separately from Open Space subject to separate requirements); and (3) requires that Open Space "in excess of" required Urban Open Space be "located and developed in a manner that does not disrupt or diminish the functioning or public utilization of the required [U]rban [O]pen [S]pace."

The history of the Project shows BNY Mellon Green was: (1) provided separate from, and in excess of, the Urban Open Space requirement for the Project; (2) intended to be reserved for future commercial development as a subsequent phase of BNY Mellon Client Service Center development; and (3) intended to be used temporarily as Open Space, pending future

development. Thus, BNY Mellon Green is, and always has been, privately held, commercially developable Open Space owned exclusively by BNY Mellon.

Under Pennsylvania law, when a private property owner grants members of the public a right to use its land for limited purposes, this right does not become all-inclusive. There is no right for an individual or group given limited access to private property to occupy and possess that property continuously and indefinitely, to the exclusion of the property owner and the general public. *46 S. 52nd St. Corp. v. Manlin*, 157 A.2d 381, 387 (Pa. 1960) (“no individual has a right to make special or exceptional use” of the private property of another simply because it is subject to a limited right of public access).

The Occupiers contend that because, under the zoning code, Urban Open Space must be handicap accessible that the Green must be part of Urban Open Space. However, the non-accessibility of the Urban Open Space does not convert Mellon Green into Urban Open Space. The issue of the possible zoning code violation regarding the handicap accessibility of the designated Urban Open Space is not before this Court. Neither the Occupiers nor the Amicus Curiae, City of Pittsburgh/Allegheny County Task Force on Disabilities, have filed a claim against BNY Mellon for violation of the Zoning Codes.

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

Under Pennsylvania law, a defendant may be held liable for a private nuisance and the nuisance may be preliminarily enjoined if the defendant’s conduct invades the plaintiff’s interest in the “private use and enjoyment” of his land and the invasion is “intentional and unreasonable.” *Hughes v. Emerald Mines Corp.*, 450 A.2d 1, 4 (Pa. Super. Ct. 1982) (quoting REST. 2D TORTS § 822); *Chase*, 902 A.2d at 993-94 (affirming a preliminary injunction to abate a private

nuisance). Here, the Occupiers are interfering with BNY Mellon's "private use and enjoyment" of Mellon Green. This invasion is both intentional and unreasonable for the following reasons:

First, the occupation is an invasion of BNY Mellon's right to possess Mellon Green and close it for the winter months as it has normally done. BNY Mellon is, therefore, deprived of its normally derived interests in the private use and enjoyment of the land. REST. 2D TORTS § 821D cmt. b (defining "interest in the use and enjoyment of land" to include a person's interests in the use of land, in keeping the land free from physical damage, and in "the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land").

Second, the continued occupation is undoubtedly "intentional." *Hughes*, 450 A.2d at 4-5 (an invasion is intentional "if the actor (a) acts for the purpose of causing it, or (b) knows that it is resulting or is substantially certain to result from his conduct")(quoting REST. 2D TORTS § 825). The Occupiers have made it clear that the continued occupation of Mellon Green is both their intention, and a part of their message. Were it not, they would likely have moved to another location upon the knowledge that they were unwelcome.

Third, the continued occupation is an "unreasonable" invasion. An invasion becomes unreasonable if, *inter alia*, "the gravity of the harm outweighs the utility of the actor's conduct." *Hughes*, 450 A.2d at 5 (quoting REST. 2D TORTS § 826). In this case, BNY Mellon has been virtually stripped of its rights to BNY Mellon Green by conduct that is neither typical for Open Space in the middle of a major city nor sanctioned by the Zoning Codes. The permanent invasion of BNY Mellon's private property is clearly unreasonable.

Therefore, BNY Mellon is likely prevail on its claim for private nuisance, which provides sufficient independent grounds for granting the preliminary injunction.

**B. BNY Mellon Did Not Grant Defendants An Irrevocable License To Use And Occupy Mellon Green**

Defendants allege that BNY Mellon granted them an irrevocable license to occupy Mellon Green, nullifying any trespass or ejectment claims that BNY Mellon might otherwise validly assert. At the same time, Defendants contend that Occupy Pittsburgh's occupation is a "critical symbolic component" of their political message, and that Occupy Pittsburgh has, at no time, sought BNY Mellon's consent to their occupation of Mellon Green. These appear to be antithetical contentions, and, in any event, BNY Mellon did not grant occupy Pittsburgh an irrevocable license.

"A license is a personal and initially revocable privilege to perform an act or series of acts on the land of another." *Hennebont v. Kroger Company*, 289 A.2d 229 (Pa. Super. Ct. 1972). A license need not be in writing; an oral agreement can form a license. *Kovach v. Gen. Tel Co. of Pennsylvania*, 489 A.2d 883 (Pa. Super. Ct. 1985). A license can also be implied, where one party to the action knows of and acquiesces to the action without orally consenting or consenting in writing. *Pa. Game Comm'n v. Bowman*, 474 A.2d 383 (Pa. Commw. Ct. 1984). "A license to use another's land will become irrevocable where the licensee, in reliance upon it, treats his land in a way he would not have treated it, except for the license, that is, by spending money for such changes as would prevent him from being restored to his original position." *Bieber v. Zellner*, 220 A.2d 17 (Pa. 1966).

Defendants argue that BNY Mellon granted them a license to occupy Mellon Green shortly after the occupation began when BNY Mellon told the media and the police that they would allow Occupy Pittsburgh to stay on their property as long as they did not damage it. Defendants further argue that BNY Mellon granted a license to the Occupiers on November 1, 2011, when they issued the "Park Use Guidelines," requiring the Defendants to refrain from

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certain activities while they were occupying the Green. Defendants finally argue that, based on these so-called licenses granted by BNY Mellon, the Occupiers spent substantial sums of money and hours of labor preparing to winterize their camp, resulting in the purchase of a winter-weather mess tent and several sleeping bags made to withstand extreme temperatures. Defendants' contention that it relied on the licenses granted by BNY Mellon, and that these licenses became irrevocable because the reliance was detrimental, falls prey to similar logical inconsistencies analyzed in the Pennsylvania Superior Court case, *Buffington v. Buffington*, 568 A.2d 194 (Pa. Super. Ct 1989).

In *Buffington*, two landowners owned separate land attached to a common road. Both landowners used the road to access their respective properties. One landowner constructed a stream along the road that emptied out onto both properties. The other landowner did not object to the construction of the stream until after the project was complete and even helped out a little in the construction of the stream, seemingly giving his tacit consent to the construction of the stream. The Court of Common Pleas found for the objecting landowner, noting that the implied license formed by the objecting landowners tacit consent was revocable. On appeal, the Pennsylvania Superior Court affirmed, boiling the inquiry into whether a license is revocable down to four questions:

Did appellants acquire a license?

Did appellants justifiably rely on the license extended them by appellees?

Did appellants treat their land in a way they would not have otherwise?

Did they do so to the extent that appellants cannot be restored to their original position?



*Id.* at 199. The Superior Court, in its analysis of these questions, found insufficient evidence of reliance on the implied license, as it was unclear at what point during the construction of the stream the failure to object became an implied license, and, at what point during the implied license, the landowner constructing the stream began to rely on the implied license:

the record is devoid of any testimony or other evidence concerning (1) the duration of the construction effort, in hours or days, since appellant husband testified that he performed all the labor, (2) the complexity of that effort, since appellant indicated only that he used a backhoe, (3) the precise dollar cost of the effort, (4) at what stage of the construction appellees first observed the construction, (5) through what stage appellees observed the construction, and (6) at what point appellants concluded the permission from appellees was complete.

*Id.* at 200. Additionally, the court found insufficient evidence that the landowner constructing the stream would not have done so absent an implied license (“the record is devoid of evidence concerning the manner in which appellants treated their land in a way they would not have otherwise.”). *Id.* at 201. Finally, the *Buffington* court found insufficient evidence that the reliance asserted by the landowner constructing the stream was actually detrimental, as the landowner received a large benefit from the stream’s construction, in the form of water flow onto his property. On this point, the court noted that “it merits mention that our courts have declined to weigh the element of detrimental reliance when a licensee has derived more value in benefits from use of the license than he has expended in reliance on the license.” *Id.* at 201 (citing as an example *Baldwin v. Taylor, et al.*, 166 Pa. 507, 512, 31 A. 250, 252 (1895)).

Occupy Pittsburgh’s contention that they relied on the license from BNY Mellon to occupy Mellon Green suffers from similar evidentiary weaknesses. As in *Buffington*, it is unclear at what specific point Occupy Pittsburgh began to rely on the implied license to occupy Mellon Green. This point is particularly salient when one asks himself or herself whether Occupy Pittsburgh would have occupied Mellon Green in the absence of any such license, the

answer of which is provided in Occupy's own statement that they never sought consent from BNY Mellon to Occupy. They occupied, nonetheless. Their occupation, and the symbolic expression within it, was a large part of their purpose and was expressive of their message. As such, this Court finds little merit in any contention that the occupation was in response to a granted license to occupy.

Similarly, Occupy Pittsburgh has offered little support for the contention that they detrimentally relied on the license. They allege that they expended money on winterizing their camp, but do not explain how these costs are unique to their specific occupation of Mellon Green, or contend that these costs would not have been incurred were they to occupy a different plot of land, a true public forum, for instance, during the winter. Additionally, Occupy Pittsburgh does not explain how these costs are both "significant" and "permanent," preventing the Occupiers from being restored to their original position. *See, Bieber, supra.* *See also, Pa. Game Comm'n v. Bowman*, 474 A.2d 383 (Pa. Commw. Ct. 1984) (court found that the placing of a trailer and a lean-to on various pieces of property did not constitute the type of permanent, non-recoupable expense necessary to make a license irrevocable). The purchases made in preparation for winter weather are not permanent fixtures. They are not purchases unique to conditions present on BNY Mellon Green. They are purchases that can be transported to the site of the next occupation, should there be one, and used to shield the Occupiers from winter weather conditions, should they occur.

Finally, it bears noting that Occupy Pittsburgh has benefited greatly from their time occupying BNY Mellon Green. They have been able to spread their message - the message of the 99% - to people walking past and sometimes entering their encampment. They have benefited from the expressive conduct of occupying the land, a protest symbol, which has undoubtedly impressed certain messages upon passersby. They have received continuous press

coverage, highlighting not only their message, but also their legal fight to remain on Mellon Green. They have staged an effective, and mostly peaceful form of civil disobedience, occupying a private property to form a community focusing on discourse and inclusion to effectuate change. This Court is certain that these benefits have stemmed from the occupation itself, not from a reliance on a license to occupy Mellon Green indefinitely.

**C. There Was No Dedication of Mellon Green As A Public Asset**

This Court is not persuaded by the Occupiers' argument that the Green was dedicated as a public asset because it was built in part using tax increment financing. Tax increment financing does not somehow strip BNY Mellon of its exclusive ownership of the property it purchased. Any public use of BNY Mellon Green is left up to the discretion of BNY Mellon, who has the right to restrict the use of its property to particular purposes (such as passing through or eating lunch) and for particular seasons (such as warm weather months) and to disallow the public from overnight camping or indefinite occupation. In order for private property to become dedicated as a public asset, there must be clear and convincing evidence that the property was offered to and accepted by the City as a public asset. *Coffin v. Old Orchard Dev. Corp.*, 186 A.2d 906, 910 (Pa. 1962). Here, the evidence shows that Mellon Green was never offered to, or accepted by, the City as a public asset in order to establish a public dedication.

**D. BNY Mellon Does Not Have Unclean Hands**

Defendants argue that, if BNY Mellon Green is closed, the "Sidewalk" (which is the BNY Mellon property adjacent to and not part of the Green) might not comply with the Americans with Disabilities Act or Code requirements. Yet, other fully accessible, public sidewalks border the Sidewalk and the streets around the BNY Mellon Complex. The Sidewalk's features do not give Defendants a right to hold the Green indefinitely. Indeed, BNY Mellon has closed the Green each winter for a decade without complaint from the City of

Pittsburgh. *Cf. McTernan v. City of York*, 577 F.3d 521, 527-28 (3d Cir. 2009) (handicapped entrance ramp to clinic built in part on government-controlled right-of-way was not considered to be a traditional public forum for purposes of free speech and assembly).

**E. Defendants Would Have No Constitutional Right To Camp Indefinitely On BNY Mellon Green, As They Are, Even If It Were A Government - Owned Public Forum**

Defendants contend that BNY Mellon Green is a public forum for constitutional purposes, thus negating the traditional First Amendment requirements of government interference or government ownership of the land. First of all, during the winter months, this Court finds that BNY Mellon Green is not, and has never been a public forum. For the last ten years, BNY Mellon Green has been closed during the winter months, and BNY Mellon has placed a chain across the entrance to the Green, restricting access. The purpose of this restriction is to protect BNY Mellon from liability for injuries on its property, and to protect the public from getting injured on the property. This historic control over its private property clearly demonstrates to this Court that Mellon Green is not held out to the public during the winter months as a place for the sharing of ideas, or even as a place for the enjoyment of lunch or respite. The restricted access during the winter months provides a clear indication that Mellon Green is a separate enclave, a distinguished, non-public place.

The issue of whether BNY Mellon Green is a public forum during the non-winter months is a closer question, which need not be decided at this juncture. When Mellon Green is open to the public, namely during the non-winter months, it does contain some of the classic indicia of a public forum. The sidewalks contained in Mellon Green are non-distinguishable from any other public sidewalks and are used as a public thoroughfare for people crossing between Ross Street and Grant Street. *United Church of Christ v. Gateway Center*, 383 F.3d 449, 452 (6th Cir. 2004) (court held that a private sidewalk around a sports arena was a public forum as it was used as a

public thoroughfare). Additionally, there is no barrier between the public city streets and Mellon Green, indicating the Mellon Green is a separate, private entity. *United States v. Grace*, 461 U.S. 171, 180 (1983) (a sidewalk bordering a building was a public forum because “there [was] no separation, no fence, and no indication whatsoever to persons stepping from the street to the curb and sidewalks that they have entered some special type of enclave.”). Further, Mellon Green appears to be held out to the public as a place in which anyone is welcome. In *Coatesville Development Company v. United Food and Commercial Workers*, the Pennsylvania Superior Court, in affirming the denial of a preliminary injunction against a labor union picketing on a private sidewalk and parking lot, held that:

...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...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.

542 A.2d 1380, 1385 (en banc 1988); *Accord, Commonwealth v. Tate*, 432 A.2d 1382, 1386 (1981) (private college could not arbitrarily deny a permit for leafleting where it had a post office and federal book depository on campus, held itself out as a community center, and permitted organizations to use facilities for public speeches). BNY Mellon itself agrees that Mellon Green has traditionally been used an open space for employees and members of the general public to come and eat their lunch, read a book, or get a respite from a busy day. For these reasons, a legitimate issue exists as to whether Mellon Green may be a public forum for constitutional purposes during the non-winter months.

At the same time, the United States Supreme Court and other federal and state courts have explicitly stated that private property, which is opened to the public, does not necessarily

become a public forum. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 & n.8 (1978) (Court discussed specific facts in a prior case needed to designate a privately-owned park as a public forum, including transfer of the property from the government to a private party and government involvement in the management and care of the property). *See also, United Church of Christ v. Gateway Econ. Dev. Corp.*, 383 F.3d 449 (6th Cir. 2004) (court held that a Commons area outside of a sports arena was likely not a public forum, even though it was open to the public, as the private property owner has restricted its use to exclude demonstrations and solicitations). Additionally, the Court has consistently held that any property which is to be designated as a public forum must be a place that has been “devoted to assembly and debate by long tradition or government fiat.” *United States v. Kokinda*, 497 U.S. 720, 728-30 (1990). Thus far, there is little persuasive evidence that BNY Mellon Green has been held out to the public as a place set aside for welcoming of public discourse, or that BNY Mellon Green has taken on a symbolic role as a state actor for purposes of constitutional analysis.

Even if BNY Mellon could be considered to be a state actor during the months in which it is open to the public, it is unlikely that Defendants’ constitutional claims could succeed. While this Court agrees that Occupy Pittsburgh’s protest and message are constitutionally protected symbolic expression, there is simply no history of protection under either the United States or the Pennsylvania Constitution for the indefinite occupation of property, even property that is government-owned and designated as a public forum. The government has always been allowed to impose reasonable time, place, and manner restrictions on the use of its property. *See e.g., Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294-95 (1984) (Court held that a public park regulation prohibiting camping was constitutional, even when applied to protestors wishing to sleep in the park overnight to dramatize the plight of the homeless.) Further, courts issuing “Occupy” decisions have consistently held that it is reasonable for the government to issue

regulations prohibiting indefinite occupation of property owned by the government. *See e.g., Occupy Columbia v. Haley*, No. 3:11-cv-03253-CMC, 2011 WL 6698990 (D. South Carolina Dec. 22, 2011); *Occupy Boston v. City of Boston*, No. 11-4152-G (Mass. Sup. Ct. Dec. 7, 2011); *Davidovich v. City of San Diego*, No. 11CV2675 WQH-NLS, 2011 WL 6013010 (S.D. Cal. Dec. 1, 2011); *Occupy Minneapolis v. County of Hennepin*, No. CIV. 11-3412 RHK/TNL, 2011 WL 5878359 (D. Minn. Nov. 23, 2011); *Occupy Fort Myers v. City of Fort Myers*, No. 2:11-CV-00608-FTM-29, 2011 WL 5554034 (M.D. Fla. Nov. 15, 2011); *Occupy Sacramento v. City of Sacramento*, No. 2:11-cv-02873-MCE-GGH, 2011 WL 5374748 (E.D. Cal. Nov. 4, 2011).

Here, BNY Mellon's Notice puts all on notice of similarly reasonable time, place, and manner restrictions for the use of BNY Mellon Green.<sup>5</sup> As previously noted, BNY Mellon has traditionally closed the Green every winter for ten years. These closures have been clearly visible to all persons viewing the Green and no exceptions to these closures have been made for any persons or groups. BNY Mellon has a clear right to close the park to the public during the winter months and evict Defendants for the purpose of such closure. Finally, the nature of the Green itself creates implicit reasonable time, place and manner restrictions prohibiting its use as a campsite or living quarters.<sup>6</sup>

#### **V. Injunction Is Reasonably Suited To Abate The Offending Activity**

The preliminary injunction is appropriately and narrowly tailored to abate the offending activity. Here, BNY Mellon narrowly tailored its requested relief to a preliminary injunction only to the extent necessary to enforce BNY Mellon's property rights, promote health and safety, and return BNY Mellon Green to its normal winter use.

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<sup>5</sup> If BNY Mellon's Notice to Occupy Pittsburgh is not sufficient as such a reasonable time, place or manner restriction or regulation, BNY Mellon could certainly promulgate a restriction in short order.

<sup>6</sup> The nature of the Green itself as a small green space in the heart of downtown should make apparent to all that it is not a space appropriate for camping, such as a state park could be. Similarly, it is implicitly clear that it would not be permissible to put a sign expressing a message on the side of a car or an RV and drive it onto the Green and park.

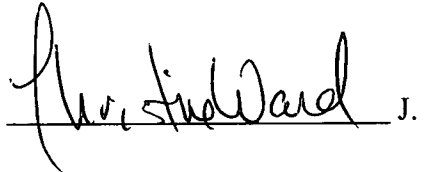
**VI. Injunction Will Not Adversely Affect The Public Interest**

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

**CONCLUSION**

All of the elements necessary to obtain preliminary injunctive relief have been met. Accordingly, an appropriate Order of Court granting the *Motion for Preliminary Injunction* hereby follows.

BY THE COURT:

 J.

Dated: February 2, 2012

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

BNY MELLON, NATIONAL ASSOCIATION	)	CIVIL DIVISION
and THE BANK OF NEW YORK MELLON,	)	
	)	No.: GD 11-025549
Plaintiffs,	)	
	)	JUDGE CHRISTINE A. WARD
v.	)	
	)	
OCCUPY PITTSBURGH, an unincorporated	)	
association, JANE DOES (1-50), and JOHN	)	
DOES (1-50),	)	
Defendants.	)	
	)	
	)	

ORDER OF COURT

AND NOW, this 2nd day of February, 2012, upon consideration of Plaintiffs' *Motion for Preliminary Injunction*, following the two-day hearing held on January 10 and 11, 2012 thereon, along with the proposed Findings of Fact and Conclusions of Law submitted by the parties, and the entire record in this case, it is hereby ORDERED, ADJUDGED and DECREED that said motion is GRANTED. A Preliminary Injunction is hereby entered as follows:

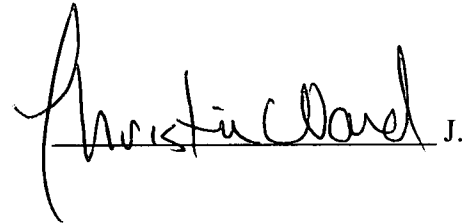
Defendants Occupy Pittsburgh, Defendants Jane Does (1-50) and John Does (1-50), and all unnamed persons (including but not limited to Defendants' officials, officers, members, and agents), firms, or corporations who are in active concert or participation with any Defendants, are hereby ORDERED to:

- (1) within three (3) days remove from BNY Mellon Green all tents and other structures, camping equipment, and stored personal items;
- (2) cease and desist and refrain from camping on BNY Mellon Green or bringing any tents and other structures, camping equipment, or stored personal items to BNY Mellon Green;

- 7 1 1 8
- (3) abide by any notice posted by BNY Mellon on the BNY Mellon Green property that BNY Mellon Green is closed.

This ORDER OF COURT shall become effective upon Plaintiffs filing a bond with the Court in the amount of ten thousand (\$10,000.00) dollars naming the Commonwealth of Pennsylvania as obligee in accordance with Pa.R.Civ.P. 1531(b), which Plaintiffs shall do forthwith. Upon posting of the bond, Plaintiffs shall post this ORDER OF COURT conspicuously at BNY Mellon Green for a period of three (3) days and thereafter as Plaintiffs deem appropriate.

BY THE COURT:

 Kristin Ward J.