

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

ERIN MITCHELL, DANIELLE DIGIROLAMO, :  
JOSH SMITH, DONALD MONTANO, :  
ALEXANDER SUAREZ, TY HAILEY, :  
RAY NEAL, JOSHUA HELTKE, :  
Plaintiffs, :

cv \_\_\_\_\_

v. :

CITY OF NEW HAVEN, JOHN DESTEFANO, :  
DEAN ESSERMAN, PROPRIETORS OF :  
THE NEW HAVEN GREEN, :  
Defendants :

MARCH 13, 2012

**COMPLAINT**

1. On October 15, 2011, and continuing every day since, ordinary citizens took their grievances against the prevailing conditions of poverty, lack of economic opportunity for all, the vast and economic growing divide separating a tiny sliver of Americans from the overwhelming majority of working people, and a host of other issues of pressing and urgent public concern to the New Haven Green. They have met there with other like-minded citizens to erect a tent city designed and intended to be a tangible representation and expression of their frustration over the gap between the rhetoric of the American Dream and reality of their lives. They have remained on the Green to this very day. Yesterday, the City of New Haven informed them they must disperse by noon tomorrow or they will be forcibly evicted. They seek relief in this court in the form of an order permitting them to remain on the Green and a declaratory ruling holding that the Green is not the privileged domain of the founders of the New Haven Colony in the 17<sup>th</sup> century, but a public trust, open and available to all. They raise First Amendment claims of freedom of speech and freedom of association, and related

state-law claims.

2. Jurisdiction of this Court is invoked under provisions of Sections 1331, 1343(3) and 1367(a) of Title 28 and Sections 1983 and 1988 of Title 42 of the United States Code.

3. The plaintiffs, Erin Mitchell, Danielle DiGirolamo, Josh Smith, Donald Montano, Alexander Suarez, Ty Hailey, Ray Neal, Joshua Heltke, currently reside for extended periods on the New Haven Green as part of a national movement hereinafter referred to as the "Occupy" demonstrations. The protests on the New Haven Green are known as "Occupy New Haven."

4. Defendant City of New Haven is a municipal corporation organized and operating under the laws of the State of Connecticut.

5. Defendant John DeStefano is the mayor of the City of New Haven, and its highest policy-making official. He is sued in his official capacity only.

6. Defendant Dean Esserman is the chief of the New Haven Police Department, and reports to a Board of Police Commissioners. He is the City's highest ranking law-enforcement officer, responsible for directing the activities of the police department on a day-to-day basis. He is sued in his individual capacity only.

7. Defendant Proprietors of the New Haven Green, "the Proprietors" was first formed in 1641 and is self-perpetuating , holding neither elections nor being in any way accountable to any elected body. It's five-member board sits for life, and, upon death or disability of a member, the remaining board members meet secretly to select a new board member. The Proprietors claim the right to govern the Green, determining how, and under what circumstances, it can be used. It's current members consist of the

following individuals: United States District Court Judge Janet Bond-Arteron; Drew S. Days, III, professor emeritus at the Yale Law School; Anne Calabresi, wife of the former Dean of the Yale Law School, and current Judge of the United States Court of Appeals for the Second Circuit, Guido Calabresi; Julia McNamara, President of the Albertus Magnus College; and, Robert B. Dannies, Jr., a former banker and member of many non-profit boards of directors. The Proprietors, although unelected and unaccountable to the public at large, are listed by the City of New Haven as a municipal board.

8. Defendants City of New Haven, DeSefano and Esserman, were, at all times relevant to this action, and they remain, state actors. Their acts and omissions described herein took place under color of law, and are intentional.

9. The New Haven Green is a privately owned but publicly maintained 16-acre park and recreation area in the center of New Haven. Its metes and bounds were first established in 1638. It is open to the public 24-hours per day, is maintained by public funds, is served by municipal law enforcement and public safety personnel, and is in every regard, whatever title to the property may be, treated, operated and maintained as a public place. It is a public forum.

### **Speech and Association Claims**

10. Since the protests began on October 15, 2011, approximately 30 people have taken up residence on the Green, occupying a small portion of the park adjacent to Yale University. Their purpose in meeting there is to speak out on such matters of public concern as: the public bailout of bankers in 2008, equitable financing of the public schools, financing of public libraries, the impending crisis wrought by the foreclosure of homes, fraudulent claims of ownership of homes by bankers, job



creation, and the hardship caused in New Haven by Yale University's tax-exempt status.

11. To draw attention to these issues of public concern, the plaintiffs and others have erected tents and lean-tos on the Green to protect them from the elements and to serve as symbolic reminders of homelessness and despair among many Americans. The tent city is intended to be a direct and tangible reminder of the tent cities existing during the Great Depression in the 1930s. At the present time, there are 38 such tents and lean-tos on the Green

12. The tents not only enable the petitioners to assemble for the purposes of speaking on matters of public concern, they are also speech acts in and of themselves. Many of the tents are painted with messages advocating the political stances taken by the plaintiffs; some messages raise questions intended to provoke viewers to give greater thought to issues of public concern. The tent city is itself a direct and tangible reminder of the reality of homelessness and the hardship of poverty, facts often swept out of sight and out of mind in urban areas. The city is an ostensive representation of the forgotten America that has little stake in a status quo that regards them as little more than chattel. Its round-the-clock status serves as a direct reminder that the nation's economic crisis is a present and daily reality for millions of Americans.

13. The Occupy New Haven site operates by means of a representative assembly relying upon general assemblies to which all members of the public are invited. Public meetings are held each Wednesday evening and Sunday afternoon, and otherwise as needed, for the purpose of sustaining their political organization, refining their political message, welcoming new members, and speaking out to the community

at large.

14. The Occupy New Haven site conducts daily working groups. Each group consists of six or so members who gather to discuss and resolve logistical issues and maintain a rudimentary and necessary sense of order.

15. The Occupy New Haven site is also the home to numerous, spontaneous political discussions directed at how to get federal, state and local governments to be more accountable to the needs of ordinary people.

16. The plaintiffs' activities, and those of others associated with the Occupy New haven protestors neither interrupt, nor interfere with, the use of the Green by other members of the general public. The tent city occupies only a small portion of the Green. The plaintiffs are unaware of any person or group that has been denied use and enjoyment of the Green as a result of their peaceable assembly.

17. On or about March 11, 2012, the City of New Haven, at the request of the Proprietors, served an eviction notice on the plaintiffs and the New Haven Occupy assembly. That notice informed them they must "take down any and all tents and structures and vacate the New Haven Green" by March 14, 2012 at noon.

18. Upon information and belief, the eviction notice was served at the request of the Proprietors so that the area adjacent to the New Haven Green would be free from signs of political protest during the forthcoming graduation ceremonies at Yale University, as part of the annual effort to create a Potemkin-like aura of serenity in downtown New Haven for those coming from around the world to celebrate commencement ceremonies.

19. The eviction notice cited no compelling government purpose of any kind,

nor, indeed, any purpose at all, for requiring the petitioners and the Occupy New Haven assembly to desist and to cease speaking out about issues of economic justice.

20. The eviction notice is not narrowly tailored, and is not the least restrictive means, of accomplishing any legitimate government purpose.

21. The plaintiffs claim that their rights to freedom of speech and assembly are in imminent risk of deprivation should the City seek to evict them. These rights arise under the First Amendment to the United States Constitution, and under Article First, Sections 4, 5 and 14 of the Constitution of the State of Connecticut.

### **An Action To Quiet Title To The Green And To Dissolve The Proprietors**

22. The New Haven Green is owned by descendants of the founders of the City of New Haven. The plaintiffs contend that the Green is a public trust, analogous to riparian lands, and therefore the public enjoys equitable title to the Green. It has for time immemorial been used as a location for public meetings of all kinds.

23. The seemingly hereditary, private and cloistered manner of selecting members of the Proprietors and giving them lifetime appointments for the purpose of governing a public trust violates Article First, Section 18 of the Connecticut Constitution, which states: "No hereditary emoluments, privileges or honors, shall ever be granted, or conferred in this state."

24. The plaintiffs seek a declaratory ruling that title to the Green is properly in the City of New Haven, and requests that the Constitutional question arising under Article First, Section 18 of the Connecticut Constitution be certified immediately to the Connecticut Supreme Court as the issue is one first impression, and is a matter of state law.



25. The plaintiffs seek dissolution of the Proprietors as the entity purports to govern public property, but by means secret, seemingly hereditary and offensive to the values and principles of a republic.

WHEREFORE, the plaintiffs seek relief as follows:

- A. A temporary injunction and restraining order barring the City from evicting them from the Green on March 14, 2012;
- B. A permanent injunction barring the City from evicting them from the Green at any future time barring a showing of necessity sufficient to satisfy the requirements of the First Amendment and the rights to freedom of speech and assembly arising under the Constitution of the State of Connecticut;
- C. Declaratory relief in the form of a ruling declaring that title to the Green belongs to the City of New Haven, or is, in the alternative, a public trust;
- D. Certification of whether the Proprietor's role in governing the use of the Green violates Article First, Section 18 of the Connecticut Constitution;
- E. Attorney's fees and costs associated with this action.

THE PLAINTIFFS

By



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**MOTION FOR TEMPORARY RESTRAINING ORDER AND INJUNCTION**

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, the plaintiff respectfully moves that the court issue a temporary restraining order and a temporary injunction. The plaintiffs request that this order issue before noon on March 14, 2012 for the following reasons:

1. The plaintiffs are protestors who have occupied the New Haven Green since October 15, 2011.



2. The defendants in this action caused notice to be served on them that they will be evicted unless they quit the Green by noon on March 14, 2012.
3. The defendants did not serve notice on the plaintiffs until March 12, 2012.

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**MEMORANDUM IN SUPPORT OF TEMPORARY INJUNCTION/  
RESTRAINING ORDER**

In Ward v. Thomas, 895 F. Supp. 401 (D.Conn. 1995), this court delineated the standards governing the issuance of temporary injunctive relief:

The court may grant a motion for temporary restraining order if the moving party demonstrates a risk of irreparable harm and either a) a likelihood of success on the merits or b) the existence of sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships decidedly favoring the party requesting the relief. Jackson Dairy, Inc. v. H.P. Hood & Sons, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam).

As to the requirement of irreparable harm, the movant must show that the harm is "actual and imminent" not "remote or speculative." State of New York v. Nuclear Regulatory Commission, 550 F.2d 745, 755 (2d Cir. 1977). The plaintiff must show that the harm in question cannot be remedied by an award of monetary damages. Velez v. McGuire, *supra*.<sup>1</sup> "The Second Circuit has held that the alleged violation of a

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<sup>1</sup> "Where '(1) the injunction sought will alter, rather than maintain, the status quo...or (2) the injunction sought will provide the movant with substantially all the relief sought, and that relief cannot be undone even if the defendant prevails at a trial on the merits,' the moving party must demonstrate both irreparable harm and a clear or substantial likelihood of success on the merits."

constitutional right triggers a finding of irreparable injury. Jolly v. Coughlin, 76 F.3d 468, 482 (2d Cir. 1996). Because violations of constitutional rights are presumed irreparable, Elrod v. Burns, 427 U.S. 347, 373 (1976), 'the very nature of [the] allegations' satisfies the requirement that [the plaintiff] show irreparable injury." State of Connecticut Dept. of Environmental Protection . Occupational Safety and Health Administration, 138 F. Sup. 2d 285, 291 (D. Conn. 2001) (Goettel, J.), quoting Bery v. City of New York, 97 F.3d 689, 694 (2d Cir. 1996), cert. denied, 520 U.S. 1251 (1997). Cf. Kamerling v. Massanari, 295 F.3d 206, 214-15 (2d Cir. 2002).

"[T]he granting of a preliiminary injunction is not a decision on the merits of the plaintiff's suit. It is merely a decision that the suit has enough merit -- which need not be great merit -- to justify an order that will freeze the situation, in the plaintiff's favor, for such time as it may take to determine whether the suit is, or is not, meritorious.

"Specifically, the court asked to grant such relief discounts (that is, multiplies) the harm to the plaintiff if it is withheld by the probability that in the end the plaintiff will prevail in the suit, and compares that discounted harm to the discounted harm to the defendant from granting the relief to the plaintiff....If the plaintiff has a very high probability of prevailing, the discount factor will be small, and if he can then show that he will be seriously and irreparably harmed unless he obtains preliminary relief, the injunction will probably be granted. But even a plaintiff who does not have a very high probability of ultimately prevailing will be entitled to preliminary relief if he faces very

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Koppell v. New York State Board of Elections, 153 F.3d 95, 95-96 (2d Cir. 1998), quoting Jolly v. Coughlin, 76 F.3d 468, 473 (2d Cir. 1996) and Tom Doherty Assocs. v. Saban Entertainment, Inc., 60 F.3d 27, 33-34 (2d Cir. 1995).

great irreparable harm and the defendant very little (unless third parties would be hurt)."

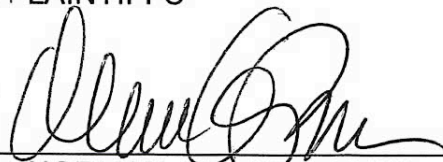
Ayres v. City of Chicago, 125 F.3d 1010, 1013 (7th Cir. 1997) (Posner, C.J.).

A mandatory injunction, as distinct from a prohibitive injunction, is a court order which "will alter, rather than maintain, the status quo...by commanding some positive act." Tom Doherty Assoc., Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 33-34 (2<sup>nd</sup> Cir. 1995). When a plaintiff seeks a mandatory injunction, he must make "a clear showing that [he] is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief." Abdul Wali v. Dughlin, 754 F.2d 1015, 1025 (2<sup>nd</sup> Cir. 1985). Cited with approval in Nicholson v. Scoppetta, 344 F.3d 154, 165 (2<sup>nd</sup> Cir. 2003).

In this case, a temporary injunction is necessary to prevent the immediate and foreseeable harm incident to the prospective eviction of the plaintiffs from the public space they have occupied for the past five months. The defendants gave the plaintiffs little time to seek legal relief, effectively threatening to evict them on short notice. They pray that this court will issue an order freezing the status quo until such time as they can be heard on the merits of their claims.

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