IN THE COURT OF COMMON PLEAS OF PHILADELPHIA

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

JOEL ELFMAN, DDS	:	COMMERCE PROGRAM
	:	
v.	:	FEBRUARY TERM 2001
	:	
ARNOLD BERMAN,	:	No. 2080
JOHN J. TURCHI, JR., and	:	
JOHN TURCHI PARTNERSHIP	:	**Control No. 70359**

ORDER

AND NOW, this 30th day of August 2001, upon reconsideration of plaintiff Joel Elfman's petition for preliminary injunction and in accordance with the opinion contemporaneously filed with this order, IT IS HEREBY ORDERED that the preliminary injunction is GRANTED as follows:

(1) John Turchi, Jr. and 1930-34 Associates shall repair the water system at 1930 Chestnut Street (the "building") so that Dr. Elfman has a continuous supply of safe, potable running water.

(2) Turchi and 1930-34 Associates shall supply heat for the building from October 10 until May 20 each year.

(3) Turchi and 1930-34 Associates shall remove all garbage and debris from the common areas of the building, including trash blocking the stairways and exits.

(4) Turchi and 1930-34 Associates shall maintain at least one working elevator at all times and shall supply the elevator with a working emergency telephone.

(5) Turchi and 1930-34 Associates shall enter into a contract for biweekly maintenance of the elevator.

(6) Turchi and 1930-34 Associates shall provide daily cleaning service to the common areas of the building and the premises leased by Dr. Elfman.

(7) Turchi and 1930-34 Associates shall give Dr. Elfman and his employees full-time access

to the building and the leased premises within three (3) business days of removal of the cease operations order.

(8) Turchi and 1930-34 Associates shall give Dr. Elfman's patients and visitors access to the building and the leased premises Monday through Friday from 8 am to 8 pm and Saturday from 8 am to 4 pm within three (3) business days of removal of the cease operations order..

(9) Turchi and 1930-34 Associates shall not do any residential conversion or other renovation work if that work deprives Dr. Elfman in any way of the use of the leased premises.

(10) Turchi and 1930-34 Associates shall act diligently and in good faith to remedy the electrical violations identified in Exhibit D-1, Tabs A and E (except for violations of Phila.Code § PM-407.2), restore water service to the building, and have the cease operations order lifted and the building re-opened.

(11) Such diligent and good faith efforts shall, at the minimum, consist of all the following:

(a) Within five (5) days of the date of entry of this order, notifying all counsel in writing of the identity of the electrical and plumbing contractors who will repair the electrical and water systems.

(b) Within five (5) days of the date of entry of this order, notifying all counsel in writing of the identity of the third party inspectors who will inspect the electrical and water systems upon completion of repairs.

(c) Within five (5) days of the date of entry of this order, applying or causing to be applied for all permits necessary to repair the water and electrical systems.

(d) Sending copies of each permit to all counsel within five (5) days of issuance.

(e) Requiring the contractors to identify and perform all repairs to the water and electrical systems required by the cease operation order and ensuring that such repairs are completed. If

necessary to identify the required work, the Turchi defendants shall have the contractor walk through the building with the appropriate inspector from the City of Philadelphia Department of Licenses and Inspections ("L&I").

(f) Upon commencement of the repairs, asking L&I to inspect the property and to remove the cease operations order based on good faith partial efforts to remedy the violations.

(g) Requiring the inspectors to inspect the work upon completion and to finalize the permits or state reasons why they cannot finalize the permits, and immediately performing any additional work necessary to have the permits finalized.

(h) Hand-delivering each finalized permit to L&I within three (3) business days of finalization.

(i) Hand-delivering copies of each finalized permit, along with an affidavit that the permits were hand-delivered to L&I, to all counsel within three (3) business days of finalization.

(j) Hand-delivering to all counsel written notice of the removal of the cease operations order within three (3) business days of the removal.

(k) Hand-delivering to counsel for Dr. Elfman keys to the front door of the building within three (3) business days of the removal of the cease operations order.

(l) Hand-delivering to all counsel written notice of any oral or written refusal by L&I to remove the cease operations order within three (3) business days of receiving such notice.

(m) Taking immediate steps in accordance with paragraphs 11(a) through (l) above to remedy all additional violations for which L&I gives notice.

(12) Turchi and 1930-34 Associates shall send to all counsel copies of all written communication from L&I within five (5) days of receipt.

(13) L&I employees with notice of this order are preliminarily enjoined from acting in concert

with Turchi and 1930-34 Associates to keep the building closed by refusing without lawful reason to remove the cease operations order upon receipt of the finalized permits.

(14) All other parties with notice of this order, including 1930-34 Corporation, Walnut Construction and James Sherman, are preliminarily enjoined from acting either in concert with Turchi and 1930-34 Associates or as agents, representatives or employees of Turchi and 1930-34 Associates to keep the building closed or violate this order by any other means.

(15) Turchi and 1930-34 Associates shall pay a daily fine of $500 to Dr. Elfman. The fine is deemed to have begun to accrue on June 10, 2001, inclusive. Turchi and 1930-34 Associates shall hand-deliver the accumulated fines for each week (Sunday through Saturday) to counsel for Dr. Elfman by 4:30 pm on the Monday immediately following that week. The first such Monday shall be September 10, 2001, when Turchi and 1930-34 Associates shall deliver the fines having accumulated from June 10, 2001 to September 8, 2001. The fines shall be in the form of a certified check. Once the cease-operations order is lifted, the building is re-opened and Turchi and 1930-34 Associates have otherwise complied with this order, Turchi and 1930-34 Associates shall petition the court to stay the fine. Should L&I refuse to lift the cease operations order in spite of Turchi and 1930-34 Associates' having otherwise fully complied with this order in good faith, Turchi and 1930-34 Associates shall petition the court to stay the fine.

(16) When any daily fine is paid as provided in paragraph 11 of this order, Turchi and 1930-34 Associates may seek an increase in the amount of the bond and the court will immediately address the request.

(17) Dr. Elfman shall maintain the $1000 bond that he already posted.

(18) Dr. Elfman shall serve a certified copy of this order on 1930-34 Corporation, Walnut Construction, James Sherman, L&I, L&I Commissioner Edward McLaughlin, L&I Deputy Commissioner Dominic Verdi, L&I Inspector Daniel Rosanova and L&I Inspector Kenneth Gassman, Jr.

(19) Turchi and 1930-34 Associates shall pay Dr. Elfman reasonable counsel fees and costs that he incurred in opposing the motion for reconsideration and re-litigating the preliminary injunction petition. Dr. Elfman shall file an application for counsel fees and costs within twenty (20) days of the entry of this order. Within twenty (20) days after Dr. Elfman files his application for counsel fees and costs, Turchi and 1930-34 Associates shall file any opposition to the amounts claimed in the application.

(20) The May 10, 2001 Findings of Fact and Conclusions of Law are vacated as to Dr. Elfman. Amended Findings of Fact and Conclusions of Law are entered in accordance with the opinion contemporaneously filed with this order.

BY THE COURT:

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JOHN W. HERRON, J.

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JOHN TURCHI PARTNERSHIP	:	**Control No. 70359**

OPINION

AMENDED FINDINGS OF FACT, ADDITIONAL DISCUSSION AND AMENDED CONCLUSIONS OF LAW IN SUPPORT OF ORDER GRANTING PRELIMINARY INJUNCTION

On June 6, 2001, the court granted reconsideration of the May 10, 2001 preliminary injunction and vacated the injunction. On June 21, 2001, the court clarified the reconsideration order by vacating Findings of Fact 25 and 44 and Conclusions of Law 10, 11 and 12 as to plaintiff Joel Elfman. The court also vacated some of the findings and conclusions in the related case Pennsylvania Fed'n Brotherhood of Maintenance of Way Employees v. 1930-34 Assocs., LP, April Term 2001, No. 1299 (Penn Fed). The Penn Fed case has since settled. Upon reconsideration, the court again grants Dr. Elfman's petition for a preliminary injunction.

As stated in the June 21, 2001 clarification order, the court vacated only certain findings and conclusions; all other findings and conclusions as to Dr. Elfman remained in effect. For the sake of clarity, the court vacates all of the original findings and conclusions as to Dr. Elfman and enters the following amended findings and conclusion and additional discussion in support of the court's

contemporaneously-filed order. These amendments include findings about repairs needed in the building and a finding that Turchi or his agent acting with his knowledge turned off the water. Unchanged findings and conclusions are italicized. The original discussion remains in effect.

AMENDED FINDINGS OF FACT

I. THE PARTIES

1. Dr. Elfman leases office space in a high-rise building at 1930 Chestnut Street, Philadelphia, Pennsylvania. P-3; Pa.Fed.-1.

2. Defendant Arnold Berman owned the building until March 31, 2001 and was Dr. Elfman's original landlord. 4/12/01 N.T.[1] 17; P-3; Pa.Fed-1.

3. Defendant 1930-34 Associates, a limited partnership, bought the building on March 30, 2001 and is Dr. Elfman's current landlord. Stip. ¶ 1.

4. 1930-34 Corporation is the general partner of 1930-34 Associates. 4/12/01 N.T. 66; Stip. ¶ 3.

5. Defendant John Turchi, Jr. is the sole limited partner of 1930-34 Associates and the sole officer, director, employee and shareholder of 1930-34 Corporation. Stip. ¶¶ 2,3.

II. DR. ELFMAN'S LEASE

6. Dr. Elfman conducts a pediatric dental practice out of his office on the 19th floor of the building. 4/12/01 N.T. 12-13; P-3.

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[1] All references to Notes of Testimony ("N.T.") are to testimony and oral argument at the April 12, 2001 hearing on the plaintiffs' petitions.

7. Dr. Elfman has treated more than 4400 patients out of his office in the building over the last two years. He has one associate dentist and fourteen other employees. 4/12/01 N.T. 14.

8. Dr. Elfman's has a seven year lease with a term beginning July 9, 1996 and ending June 30, 2003, with an option to renew for 3 more years. P-3.

9. In Dr. Elfman's lease, the landlord covenanted to

(a) Provide elevator service Monday through Friday from 8:00 am to 8:00 pm and Saturday 8:00 am to 4:00 pm.

(b) Provide heat and air conditioning as reasonably necessary Monday through Friday from 8:00 am to 8:00 pm and Saturday 8:00 am to 1:00 pm.

(c) Clean the leased premises and common areas of the building. P-3, § 7(a).

10. The Elfman lease provided Dr. Elfman with a right of quiet enjoyment of the leased premises. P-3, § 37.

11. A separate provision in the lease, entitled "Quiet Enjoyment," provides that Dr. Elfman shall have the right "to remain as Lessee of the Premises notwithstanding the sale . . . of the Building." P-3, § 48.

12. The lease provides that, in the event of sale of the building, the purchaser would assume and agree to carry out any and all covenants and obligations of the Lessor. P-3, § 37(a).

[Findings 13-18 support the preliminary injunction in the related Penn Fed case and are not relevant here.]

IV. CONDITIONS DURING BERMAN'S OWNERSHIP

19. Under Berman's ownership, conditions in the building deteriorated. 4/12/01 N.T. 86.

20. Only one of the building's four elevators works. The one working elevator breaks down often and has no working emergency telephone. 4/12/01 N.T. 18.

21. Cleaning services stopped in July 2000. 4/12/01 N.T. 19.

22. The City of Philadelphia Department of Licenses and Inspections ("L&I") and the Fire Department cited Berman for code violations including electrical wiring problems, fire alarm dysfunction due to unpaid phone bills, debris blocking building exits, and falling exterior masonry. 4/12/01 N.T. 107, 109-10; D-1.

23. At least three times the city issued cease operations orders requiring the building to be shut for one to three days. 4/12/01 N.T. 19-20, 112.

24. On February 20, 2001, Dr. Elfman filed this action against Berman. P-5.

V. 1930-34 ASSOCIATES BUYS THE BUILDING

25. On March 30, 2001, Berman transferred ownership of the building to 1930-34 Associates. Stip. ¶ 1.

26. Turchi bought the building with the intent of converting the entire building to residential use, but he cannot convert it while his tenants' leases are in effect. Thus, his conversion plans included immediate eviction of his tenants. Turchi's half-hearted denials of his intent to evict the tenants were not credible. 7/19/01 N.T. 47-49. The following facts support this finding:

a. In January 2001, Turchi told Dr. Elfman and his staff that he would buy the building, that the building was unsafe, that he planned to gut the building and convert it to residential units, and that all tenants would be forced to leave. 4/12/01 N.T. 21-22, 39.

b. In February or March 2001, Turchi told a Penn Fed employee, Rae Ann Carson, that he would gut the building and convert it to residential units and that all tenants would have to leave. 4/12/01 N.T. 96.

c. On February 22, 2001, Dr. Elfman's counsel hand-delivered to Turchi's counsel copies of the complaint in Elfman v. Berman, the Elfman Lease and notices of building code violations that the L&I issued to Berman. 4/12/01 N.T. 25; P-5.

d. An insurance application for the building, dated March 28, 2001 and listing 1930-34 Associates and Walnut Construction as named insureds, stated that "Insured will notify the present tenants to vacate their present rented space." P-37, 7/19/01 N.T. 47-49. Though the record copy of the application is unsigned, Turchi admitted in his deposition that the statement was accurate. 7/19/01 N.T. 47-49.

e. The construction schedule for the building, dated March 5, 2001, assumed that all tenants would vacate the building before construction began in May 2001. P-22; 7/17/01 N.T. 112-113, 180.

f. As part of a loan application, 1930-34 Associates' attorney wrote to the lending bank that 1930-34 Associates intended "to completely vacate the building (except for the ground floor tenant) and to rehabilitate the entire building." P-38; 7/19/01 49-51.

27. After buying the building, Turchi immediately had the building's heat shut off and the

locks changed. 4/12/01 N.T. 53; 7/18/01 N.T. 30; 7/19/01 N.T. 19. On Saturday, March 31, 2001, Dr. Elfman could not enter the building and had to cancel his patients' appointments for that day. A sign on the door read:

BUILDING HOURS
7:30AM----6:00PM
MONDAY THRU FRIDAY

THE DOORS WILL BE LOCKED
AT ALL TIMES

YOU WILL NOT HAVE ACCESS
WITHOUT A COPY OF A VALID
LEASE

P-4; 4/12/01 N.T. 25.

28. On Monday, Tuesday and Wednesday, April 2-4, 2001, the building's security guards permitted Dr. Elfman, his staff and his patients to enter the building. 4/12/01 N.T. 26-30.

29. Turchi did not give keys for the new locks to the tenants, and Dr. Elfman does not have keys for the new locks. 4/12/01 N.T. 26-30, 97; 7/18/01 N.T. 29; 7/19/01 N.T. 19.

30. On or about April 3, 2001, Turchi or his agent acting with his knowledge turned off the domestic water pumps as part of Turchi's plan to evict the building's tenants. 4/12/01 N.T. 29-30. Turchi personally telephoned L&I and reported the lack of water. 7/19/01 N.T. 23, 56-57. The following facts support the finding that Turchi or his agent acting with his knowledge turned off the water:

a. Turchi planned as early as January 2001 to evict the tenants. Finding of Fact

26. Turchi needed the tenants out so that he could convert the building to residential units. The continued presence of tenants would have made the conversion more expensive and time-consuming. 7/17/01 N.T. 113. As part of this plan he turned off the heat and changed the locks.

b. Turchi sought L&I's intervention even before his company bought the building. In February 2001, he notified L&I Deputy Commissioner Dominic Verdi that the masonry on the 22nd floor was dangerous and that the building should be closed. 7/17/01 N.T. 113-15; 7/19/01 N.T. 53. He also told Verdi that the elevator was dangerous. 7/19/01 N.T. 53.

c. The domestic water pumps were working on March 30, 2001, the day Dr. Berman transferred ownership of the building. 7/17/01 N.T. 56. The water pumps have three settings: off, hand and automatic. On hand, the pumps pump water constantly until turned off. On automatic, the pumps pump water until a float in the tank reaches a certain level, causing a switch to turn off the pumps. P-17; 7/17/01 N.T. 32-34, 50. On March 30, 2001, the domestic water pumps were set to automatic and were working. 7/17/01 N.T. 56.

d. On March 30, 2001, he told tenant Diane Mileski that L&I could close the building at any time. 7/18/01 N.T. 31. On April 3, 2001, Turchi's employee, Denise Kelly, told Dr. Elfman that L&I would visit the building on April 4 and would probably close it down. 4/12/01 N.T. 28. Turchi and Kelly made these comments before any water problems surfaced.

e. Sherman testified at his deposition that after Turchi bought the building, only Sherman and his maintenance supervisor had access to the basement. P-20 at 178. Sherman's retraction of this statement at the reconsideration hearing was not credible. 7/17/01 N.T. 116-17.

f. Neither Turchi nor Sherman tried to dissuade L&I from closing the building.

7/17/01 N.T. 295-96; 7/19/01 N.T. 55. On the contrary, they invited L&I to inspect the water system and Sherman gave L&I a guided tour of the building's defects. 7/17/01 N.T. 125-28. When L&I issued its cease operations orders, Turchi did nothing to cure violations that could have been cured. 7/17/01 N.T. 128-32. Neither Turchi nor Sherman did anything to dispute L&I's finding that the sprinklers did not work, even though they knew the sprinklers worked. 7/17/01 N.T. 122-24; 7/18/01 N.T. 16.

g. Sherman focused his supposed efforts to correct the water problem on a single, small pump that is not connected to the domestic water supply, that is not powerful enough to pump water to the 22nd floor, and that does not have a three-setting switch common to gravity-fed systems. P-12; 7/17/01 N.T. 22, 119, 201-11. In his affidavit, he swore that the single pump was broken and was the cause of the building's water woes. P-19. At the hearing, Sherman recanted this averment. He testified that he had mistakenly believed that the single pump was the domestic water pump, and that he did not learn until June 2001 that the larger twin pumps serviced the domestic water supply. P-14; 7/17/01 N.T. 120. Sherman's explanation for not examining the twin pumps earlier was not credible. 7/17/01 N.T. 201-11. He has 30 years of experience in construction management and has managed renovation of other high rise buildings. 7/17/01 N.T. 81, 108. He admitted to knowing that domestic water pumps for rise buildings always come in pairs. 7/17/01 N.T. 106. He inspected the building before Turchi bought it and drew up a plan for the conversion. 7/17/01 N.T. 133, 180-81; P-22. His March 2001 conversion plan included replacement of the old domestic water pumps with new pumps. P-22; 7/17/01 N.T. 180-81. His feigning ignorance about the pumps supports a finding that he

knew all along that the twin domestic water pumps worked.[2]

VI. THE CEASE OPERATIONS ORDERS

31. On Wednesday, April 4, 2001, L&I inspector Daniel Rosanova inspected the building. Rosanova issued two cease operations orders around noon. 4/12/01 N.T. 124-25 7/18/01 N.T. 10-13.

32. The first cease operations order cited violations of the city's plumbing code, with the explanation: "NO WATER." In a box captioned "Corrective Actions needed to remove this/these condition" the notice stated "CORRECT VIOLATION." The second cease operations order cited violations of the city's fire prevention code. The plumbing violation notice bore the explanation "NO WATER" and the fire violation notice bore the explanation: "NO SPRINKLER. SYSTEM DOWN (NO WATER)." In the box captioned "Corrective Actions needed to remove this/these condition" the notice stated "CORRECT VIOLATIONS." P-26.

33. L&I required the tenants to leave the building. 4/12/01 N.T. 125; P-26. The building remains closed. 4/12/01 N.T. 30, 132; P-26; P-27.

34. At least one day after L&I closed the building, someone at L&I amended the two cease operations orders to include electrical code violations as a basis for closing the building. 7/18/01 N.T. 95-96; P-27. This amendment occurred even though L&I did not cite the building for additional

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[2] There is evidence that the automatic float switch does not work. Dr. Elfman's mechanical engineering expert explained that this problem could have arose after April 4: float switches corrode and fail if not used. 7/17/01 N.T. 49-51.

electrical code violations and even though no electrical inspector had inspected the building since autumn 2000. Ex. D-1; 7/18/01 139, 282, 288-89; 7/17/01 N.T. 274-75.

35. The domestic water system has a gravity-fed tank on the 22nd floor. Two pumps in the basement fill the tank. The tank feeds water into the building. The tank is supposed to be sealed. 4/12/01 N.T. 115-16; 7/17/01 N.T. 37.

36. City inspectors and James Sherman inspected the water system and saw that no water was being the pumped into the tank. The tank has no cover. There are dirt and rust in the tank. Bird droppings are on the side of the tank. 4/12/01 N.T. 79-80, 115-16.

37. With no water for flushing, human waste has accumulated in the buildings toilets. 4/12/01 N.T 33.

38. The heat is turned off in the building. 4/12/01 N.T. 53.

39. There is garbage in the common areas of the building. 4/12/01 N.T 33.

40. The April 4 closing of the building harmed and continues to harm Dr. Elfman. Since April 10, 2001, Dr. Elfman has conducted his practice out of a temporary space in another dentist's office. The temporary space is not satisfactory. It is not set up for pediatric dentistry. There are fewer dental chairs. The space is available for fewer hours per week than Dr. Elfman needs. Because of these unsatisfactory conditions, Dr. Elfman has referred about half of his patients to other dentists. 4/12/01 N.T 31-33.

[Finding 41 supports the preliminary injunction in the related Penn Fed case and is not relevant here.]

42. On Friday, April 6, 2001, Dr. Elfman amended the complaint against Berman to

include John Turchi and John Turchi Partnership -- which Dr. Elfman later learned is called 1930-34 Associates -- as defendants, and filed a petition for a temporary restraining order and preliminary injunction. On the same day, the Court issued a temporary restraining order directing Turchi and the John Turchi Partnership "to take all steps necessary to immediately restore the supply of water to the building; . . . to contact the City of Philadelphia Department of Licenses and Inspections to request the reopening of the building immediately upon the supply of water being restored; [and] immediately take all steps, once the water is restored, to certify the sprinkler system." Dr. Elfman posted $1000 bond. P-4.

43. From April 6, 2001 to April 12, 2001, Turchi did nothing to restore the domestic water supply the pump, clean and seal the tank, certify the sprinkler system, remedy the violations cited by L&I or secure the re-opening of the building. 4/12/01 N.T. 79-80.

44. If the conditions cited in the cease operations orders were corrected, and no further Cease Operations Orders were issued, L&I would allow the building to re-open for business. 4/12/01 N.T. 141.

VII. THE MAY 10, 2001 PRELIMINARY INJUNCTION

45. On April 12, 2001, May 10, 2001, the court held a hearing on the preliminary injunction petitions of Dr. Elfman and of the plaintiff in the related Penn Fed action. The court entered a preliminary injunction against 1930-34 Associates, 1930-34 Corporation[3] and John Turchi (the Turchi

[3] 1930-34 Corporation was a defendant in the related Penn Fed action.

defendants) on May 10, 2001. Among other things, the injunction ordered the Turchi defendants to cure the L&I violations, repair the elevators and restore heat within 10 days or face fines of $500 per day per plaintiff. Elfman v. Berman, February 2001, No. 2080, op. & order (C.P.Phila. 5/10/01) (Elfman I).

46. The Turchi defendants did not comply with the court's May 10, 2001 preliminary injunction order, and -- except for having perhaps removed some garbage -- took no efforts to comply. 7/17/01 N.T. 127-29, 131.

47. Instead, the Turchi defendants filed a motion for reconsideration. They argued that compliance with the injunction was impossible and dangerous. To support their argument, they filed an affidavit of James Sherman. P-19.

48. Sherman is Vice President of Walnut Construction. P-19; 7/17/01 N.T. 80. Turchi is the sole shareholder of Walnut Construction and Sherman's boss. 7/19/01 N.T. 27, 80. Sherman has been the construction manager for other Turchi projects and is the construction manager for 1930-34 Associates. 7/17/01 N.T. 81; 5/16/01 Turchi aff. ¶ 6. He planned the residential conversion of the building. P-22; 7/17/01 N.T. 178-79. Walnut Construction will be the general contractor for the residential conversion of the building. 7/19/01 N.T. 32.

49. In paragraphs 9-16 and 27 of his affidavit, Sherman swore that filling the tank could cause the building's facade and floors to collapse. P-19. Based on averments 9-16 of the affidavit of James Sherman, the court vacated the injunction as to Dr. Elfman. Elfman v. Berman, February 2001,

No. 2080, op. at 2 (C.P.Phila. 6/21/01) (Elfman II).[4] Each of these averments was untrue. 7/17/01 N.T. 88, 91, 96. Sherman made these averments with knowledge of their falsity or with reckless disregard for the truth.

50. In paragraphs 8, 23 and 24 of his affidavit, Sherman swore that the domestic water pump and the heating system were not functional. P-19. Each of these averments was untrue. 7/17/01 N.T. 101, 104-05, 135-37. Sherman made these averments with knowledge of their falsity or with reckless disregard for the truth.

51. In paragraphs 18-22, 25, and 26 of his affidavit, Sherman swore that the elevator repairs would require three weeks and the electrical repairs would require many months. P-19. These averments were not true. 7/17/01 N.T. 37-39, 219, 224, 246, 251-52; 7/18/01 N.T. 123, 129.

52. Compliance with the original injunction order would not have been impossible or dangerous. Sherman fabricated 8-16, 23, 24 and 27 as an agent of 1930-34 Associates, 5/16/01 Turchi aff. ¶ 6, and as part of the Turchi defendants' plan to keep the building closed. Because Turchi or someone acting with Turchi's knowledge shut off the water and heat, Turchi knew that Sherman's averments about those systems were false or he recklessly ignored that the averments were false. Turchi and 1930-34 Associates knowingly or recklessly obtained reconsideration of the injunction order on baseless grounds.

53. It was clear or should have been clear to the Turchi defendants that reconsideration of the injunction would be fruitless. By ignoring the May 10, 2001 injunction, knowingly or recklessly

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[4] The court vacated the injunction in Penn Fed based on these averments, and based on an averment that the plaintiff in Penn Fed had moved its property out of the building. Elfman II, op. at 2.

procuring reconsideration on baseless grounds, extending these proceedings by more than three months, and causing Dr. Elfman unneeded effort and expense, the Turchi defendants engaged in dilatory, obdurate, vexatious, arbitrary and bad faith conduct.

VIII. CURING THE L&I VIOLATIONS

54. At least one of the two domestic water pumps in the building works. There are two defects with the domestic water system. 7/17/01 N.T. 105.

55. The first defect is that the automatic float system does not work. It is possible for the Turchi defendants to overcome that defect by (a) repairing or replacing the float or (b) filling the tank as needed by using the pump's manual setting. 7/17/01 N.T. 37.

56. The second defect is that the water tank is dirty and uncovered. It is possible for the Turchi defendants to overcome that defect by (a) replacing the tank or (b) cleaning, lining and covering the tank. 7/17/01 N.T. 37-39, 41, 46.

57. Had the Turchi defendants acted diligently, they could have repaired the water system and obtained removal of the cease operations order within 30 days. 7/17/01 N.T. 37-39.

58. The working elevator is safe and is Commonwealth-certified for public use until October 2001, but it needs minor repairs and routine maintenance. 7/17/01 N.T. 219, 224, 246, 251-52. Had the Turchi defendants acted diligently, they could have made any necessary repairs to the elevator within 10 days. 7/17/01 N.T. 246.

59. The sprinkler system works now, and it worked on April 4, 2001. 7/17/01 N.T. 122-23. The Turchi defendants have resolved the sprinkler issue to the City's satisfaction. Stip. ¶¶ 6, 7.

60. There is no evidence that the heating system does not work. 7/17/01 N.T. 135-37; 7/18/01 N.T. 30. There was no heat in the building in April 2001 because Turchi had the heat turned off. 4/12/01 N.T. 53; 7/18/01 N.T. 30.

61. L&I based the amendment to the cease operations orders on "life-safety" electrical violations that can be cured within one to three weeks: lack of exit and emergency lighting, open electrical closets, open panel boxes, unsafe fixtures, unsafe outlet covers. 7/18/01 N.T. 19, 123-24, 128.

62. Had the Turchi defendants acted diligently, they could have cured the life-safety electrical code violations and obtained removal of the cease operations order within 30 days. 7/17/01 N.T. 282; 7/18/01 N.T. 114, 282.

63. Other violations -- improper wiring and inadequate clearance between electrical equipment in the basement -- would not prevent L&I's lifting the cease operations order. 7/18/01 N.T. 19, 123-24, 128.[5] Though such long-term violations can take more than a month to repair, L&I is willing to give owners leeway in fixing those violations. 7/18/01 N.T. 128, 156.

64. Had the Turchi defendants acted diligently, L&I would have lifted the cease operations order within 30 days based on good faith efforts to cure the long-term violations. 7/17/01 N.T. 293-95; 7/18/01 N.T. 128, 156.

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[5] There might not be a clearance violation. Turchi's electrical code expert testimony on the inadequate clearance of the electrical equipment in the basement by applying relatively modern code provisions, which he admitted might not apply to the relatively aged equipment. 7/17/01 N.T. 208-10, 212-13.

ADDITIONAL DISCUSSION[6]

I. SHERMAN'S AFFIDAVIT CONTAINED MANY FALSE AVERMENTS.

The Turchi defendants asked for reconsideration of the May 10, 2001 preliminary injunction order. They argued that compliance would be impossible and dangerous. See Virginian Ry. Co. v. System Fed'n No. 40, 300 U.S. 515, 550 (1937) ("[A] court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of benefit to the plaintiff."). In support of their request, they submitted the affidavit of James Sherman. Sherman is Vice President of Walnut Construction -- which is the Turchi company that will convert the building to residential use -- and the construction manager for 1930-34 Associates.

Compliance with the original injunction order would not have been impossible or dangerous, and Sherman knew it. Sherman's main averment was that filling the water tank as required by the injunction might cause the building's floors or facade to collapse. This averment was false and Sherman knew it was false. Finding of Fact 49. The affidavit contained many other falsities, and Sherman knew many of those were false. Findings of Fact 50 and 51.

The court can only conclude that Sherman made these false averments as part of Turchi and 1930-34 Associates' plan to keep the building closed. He made the averments as an agent of 1930-34 Associates acting within the scope of his authority as its construction manager. 5/16/01 Turchi aff. ¶ 6. 1930-34 Associates -- which, as a limited partnership with a corporate general partner, is a fictional person that can only act through its agents, representatives and employees and those of its general

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[6] This opinion incorporates the Discussion supporting the May 10, 2001 injunction order.

partner -- is chargeable with Sherman's knowledge. Aiello v. Ed Saxe Real Estate, Inc., 508 Pa. 553, 499 A.2d 282, 287 (1985) (holding that principals are bound by their agents' misrepresentations made within the scope of their employment); Lokay v. Lehigh Valley Coop. Farmers, Inc., 342 Pa.Super. 89, 492 A.2d 405, 408-09 (1985) (holding that a corporation -- a fictional person which can only act through its officers, directors and agents -- is liable for fraud of those agents acting within the scope of their authority).[7] Moreover, Turchi actually knew the falsity of Sherman's averments that the water and heat did not work, or he recklessly ignored their falsity. Finding of Fact 52.

II. TURCHI BOUGHT THE BUILDING INTENDING TO EVICT HIS TENANTS.

The Turchi defendants also requested reconsideration of finding 25 that they intentionally evicted Dr. Elfman. The court granted reconsideration of that finding for the limited purpose of determining whether the fines were equitable.[8] The Turchi defendants' request turned out to be baseless. The testimony at the hearing on reconsideration showed that their conduct was more egregious than simply "intentionally allow[ing] the building to fall into disrepair such that L&I would order closure of the building." Turchi actively sought the building's closure by turning off the domestic

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[7] Having received and enjoyed the benefits of Sherman's falsities by gaining reconsideration of the injunction order and delaying reopening of the building, and having persisted with opposing the injunction even after the falsity of those averments became clear at the July 17-19, 2001 hearing, 1930-34 Associates would be estopped from asserting that Sherman acted outside the scope of his authority by making false averments. See Lokay, 492 A.2d at 409 ("[E]ven if a corporation can raise the defense that an officer acted [or] contracted . . . outside the scope of his authority, it is estopped from doing so where it has received and enjoyed the benefits of that act or contract.")

[8] Turchi's intent is not relevant to whether Turchi breached the lease or constructively evicted Dr. Elfman. Elfman II, op. at 2-3 & n. 1.

water supply or having it turned off. They diverted attention from this fact by pretending that the single pump was the domestic water pump.

III. IF TURCHI AND 1930-34 ASSOCIATES CURE THE ELECTRICAL AND WATER VIOLATIONS, L&I MUST OPEN THE BUILDING.

The evidence presented at the hearing on reconsideration confirms finding 44: if Turchi and 1930-34 Associates cure the electrical and water violations, L&I will be required to remove the cease operations order. 7/18/01 N.T. 71. See also Phila. Code § A-505.1 (authorizing L&I to vacate premises "pending compliance with" a cease operations order). Furthermore, if L&I follows its past practice, it will reopen the building before Turchi and 1930-34 Associates cure the violations if there are good faith steps to make the repairs. Therefore, the court will enjoin Turchi[9] and 1930-34 Associates[10] to act in good faith to cure the violations.

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[9] Turchi argues that the court cannot enjoin him because he is not personally liable to Dr. Elfman. The court need not now decide whether Turchi is personally liable, because it can enjoin him in his official capacity as an agent of 1930-34 Associates. See Americans Be Independant v. Commonwealth, 114 Pa.Commw. 179, 321 A.2d 721, 727 (1974) ("[Because] a corporation acts only through its officers, agents, representatives and employes[, a]n injunctive order against a corporation can be enforced by enforcement proceedings against officials of the company who know of the order and who thereafter violate it.").

[10] In its second proposed conclusion of law, Turchi argues that "1930-34 Associates L.P. is not a party to this action and cannot be enjoined," presumably because Dr. Elfman sued "John Turchi Partnership" rather than 1930-34 Associates. The court rejects this argument. The amended complaint describes John Turchi Partnership as "the partnership (actual name unknown) set up by Turchi to take title to the property [located at 1930-34 Chestnut Street, Philadelphia] on March 30, 2001." Amended Complaint ¶ 4. Because 1930-34 Associates took title to the building on March 30, 2001, "John Turchi Partnership" could only have referred to 1930-34 Associates. Stip. ¶ 1. There is no objection to service. Therefore, 1930-34 Associates is a party to this action. See Powell v. Sutliff, 410 Pa. 436, 189 A.2d 864, 865 (1963) (allowing the plaintiff to correct name of a misnamed defendant after statute of limitations had run because the misnamed defendant was already a party to the action).

In entering the preliminary injunction, the court relies on the time-honored presumption that L&I will act lawfully and in good faith and lift the cease operations order when required. Albert v. Lehigh Coal & Nav. Co., 431 Pa. 600, 246 A.2d 840, 845 & n. 5 (1968); Beacom v. Robison, 157 Pa.Super. 515, 43 A.2d 640, 643 (1945); Pennsylvania State Ass'n of Twp. Supervisors v. Department of Gen'l Servs., 666 A.2d 1153, 1156 (Pa.Commw.Ct. 1995), aff'd, 547 Pa. 160, 689 A.2d 224 (1997). Reviewing the record of L&I's conduct in this case, however, gives the court cause for concern. L&I seems to have gone out of its way to help Turchi close the building. L&I based the original cease operations order on two violations: no domestic water and no fire sprinklers. P-26. L&I ordered the building closed before citing any electrical violations. Stip. ¶ 8; P-26; 7/18/01 N.T. 11-12. Daniel Rosanova, L&I's water inspector, admitted that, in 25 years as an inspector, he had never issued nor heard of anyone issuing a cease operations order in a high-rise building for lack of domestic water. 7/18/01 N.T. 18-19. Deputy Commissioner Dominic Verdi, who has been with L&I for 10 years, admitted the same thing. 7/17/01 N.T. 296. It is questionable whether lack of domestic water is even a legal basis for issuing a cease operations order. Phila. Code § A-505.1.[11]

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[11] The Philadelphia Administrative Code gives L&I authority to issue cease operations orders if

> (1) Any occupancy, use or other activity is being performed in or on any building, structure or land, or any part thereof, without required Zoning and/or Use Registration permits, Certificate of Occupancy or other permits;
> (2) There is actual or potential danger to the building occupants or those in the proximity of any structure or premises because of explosives, explosive fumes or vapors or the presence of toxic fumes, gases or materials, or operation of defective equipment;
> (3) Any structure or part thereof is found to be in a dangerous or unsafe condition due to inadequate maintenance, deterioration, damage by natural causes, fire or faulty construction that . . . is likely to cause *imminent* injury to persons or property;

The water inspector's closing the building for a sprinkler violation was extraordinary, given that the sprinklers worked then and work now. The building's sprinkler system is separate from its domestic water supply system. The water inspector testified that he did not investigate the sprinkler system and nobody told him that it was not working. 7/18/01 N.T. 16. Instead, he unilaterally assumed that, because the domestic water supply was not working, the sprinkler was not working. 7/18/01 N.T. 17. Such an assumption by a veteran water inspector is incredible, given that he knew that high-rise buildings usually have separate domestic water and sprinkler systems. 7/18/01 N.T. 16-17.

Electrical code violations were not a basis for the original cease operations orders. P-26; 7/18/01 N.T. 90-91. At least one day after L&I ordered the building closed, somebody in L&I had the orders amended to include electrical violations. P-27; 7/18/01 N.T. 92-93; 102-03.[12] The amendment seems extraordinary. In 1994, while Berman was the owner, L&I inspected the building and issued notices of most of the electrical code violations that are at issue in this suit, but did not order the building closed. D-1, Tab A. In September 2000, during Berman's ownership, L&I again inspected

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> (4) Any condition is observed which presents an *immediate* danger to life or property[;]
> (5) Any [unsafe] or unsanitary condition is observed which presents an immediate danger to the health of the occupants of any *abutting premises* due to the presence of raw sewage, garbage, rubbish or infestation.

Phila. Code. §A-505.1.

[12] The enforceability of the amendment is also questionable. The amendment consisted only of someone's checking the "Electrical" box on the old order. L&I did not describe in writing, as required, the electrical condition that presented a danger. Phila. Code § A-505.2.

the building and issued notices of the remaining electrical code violations at issue ,[13] but allowed the building to remain open. Ex. D-1, Tab E; 7/18/01 N.T. 157. L&I has cited no additional electrical code violations since its 2000 inspection and did not inspect the building's electrical systems again before amending the cease operations orders. Ex. D-1; 7/18/01 139, 282, 288-89; 7/17/01 N.T. 274-75.

Nonetheless, someone had the cease operations orders amended to include electrical code violations as a basis for closing the building. No L&I witness satisfactorily explained who made the amendment. Rosanova, a water inspector, testified that he did not even check for electrical violations. 7/17/01 N.T. 25, 274. Commissioner Edward McLaughlin testified that Deputy Commissioner Verdi ordered the amendment. 7/18/01 N.T. 102-03. Deputy Commissioner Verdi testified that electrical inspector Kenneth Gassman checked off the electrical box because the 1994 and 2000 violations had not been corrected. P-33; 7/17/01 N.T. 273-74. Gassman denied checking the box. 7/18/01 N.T. 149. Gassman did not even inspect the building until after the cease operations orders were amended. 7/17/01 N.T. 274-75. In fact, there is no record that Gassman ever inspected the building in 2001. D-1, Tabs M and N; 7/17/01 N.T. 284-85.

The L&I witnesses did not explain, and without an electrical inspection L&I could not have

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[13] The notice, issued October 2, 2000, included violations of Phila.Code § PM-407.2. Ex. D-1, Tab E. These violations were among the bases for the cease operations orders. 1930 Chestnut Street is a commercial building. Section PM-407.2 -- which requires the safe installation of electrical equipment, wiring and appliances in *residential* occupancies -- does not apply to 1930 Chestnut Street. As a matter of law, the notices of these violations are void and unenforceable. The only other violation cited in October 2, 2000 was failure to obtain an electrical permit when required. D-1, Tab E.

known, how electrical conditions in the building had changed since October 2000 so as to warrant amending the cease operations orders.

Though a finding on this point is not yet necessary, the record would likely support a finding that Turchi colluded with certain L&I employees to close the building and keep it closed. Any further attempt by the Turchi defendants to unduly influence L&I into keeping the building closed will violate the injunction. Furthermore, non-parties may not knowingly help a person violate an injunction. Neshaminy Water Resources Auth. v. Del-Aware Unlimited, Inc., 332 Pa.Super. 461, 481 A.2d 879, 883 (1984). Should any L&I employee with notice of the injunction collude with Turchi or 1930-34 Associates and refuse to lift the cease operations order without reason, that L&I employee will be subject to sanctions for contempt. Id. (holding that unnamed party was subject to sanctions for contempt where it acted in concert with a named defendant in violating an injunction). Evidence of such collusion might include L&I's failure to remove the cease operations order in spite of having received finalized permits showing that Turchi has cured the electrical and water systems violations.

IV. THE INJUNCTION WILL BE ENFORCEABLE AGAINST 1930-34 CORPORATION, WALNUT CONSTRUCTION AND OTHER AGENTS, REPRESENTATIVES AND EMPLOYEES OF 1930-34 ASSOCIATES.

Dr. Elfman requests that the court enjoin 1930-34 Associates and Walnut Construction. These companies are not parties to Dr. Elfman's action. But they and any other agent, representative, or employee of Turchi or 1930-34 Associates will be subject to sanctions for contempt if they willfully violate the injunction in their representative capacity. Belle v. Chieppa, 442 Pa.Super. 371, 659 A.2d 1035, 1039-40 (1995) ("[A]ppellants' willful violation of the order in their capacity as directors,

officers and shareholders of the [defendant] corporation was clearly contumacious and subject to a civil contempt citation, regardless of whether appellants were joined as parties."); Neshaminy Water Resources Auth., 481 A.2d at 883; Americans Be Independent v. Commonwealth, 114 Pa.Commw. 179, 321 A.2d 721, 727 (1974) ("[Because] a corporation acts only through its officers, agents, representatives and employes[, a]n injunctive order against a corporation can be enforced by enforcement proceedings against officials of the company who know of the order and who thereafter violate it.").

V. THE COURT WILL REINSTATE THE FINES.

Under the May 10, 2001 preliminary injunction order, the court gave the Turchi defendants ten (10) days to comply with the order. On the eleventh day, absent compliance, the Turchi defendants were to pay a $500 per day fine. Given the Turchi defendants' having actively sought closure of the building to circumvent Dr. Elfman's lease, their having intentionally ignored the injunction order and their having knowingly or recklessly procured reconsideration of the injunction order on false grounds, it would be inequitable to allow them to escape the fines that would have accumulated from the May 10, 2001 injunction. The court therefore retroactively reinstates the fines against Turchi and 1930-34 Associates.

There is testimony that, had the Turchi defendants acted in good faith to comply with the May 10, 2001 injunction order, the permitting and inspection process for the water and electrical systems might have caused compliance with the order to have taken more than 10 days. The testimony also shows that 30 days would have been sufficient to get the building re-opened. Therefore, the court will

deem the fine to have begun accruing on the 31st day after entry of the May 10, 2001 order.

VI. DR. ELFMAN IS ENTITLED TO COUNSEL FEES AND COSTS.

Dr. Elfman requests counsel fees, expert fees and expenses for the motion for reconsideration and the re-opened injunction hearing. The court grants the request and will order Dr. Elfman to submit an application for all fees and costs claimed.

A court may award reasonable counsel fees "as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter" or "for conduct of another party in commencing the matter or otherwise [that] was arbitrary, vexatious or in bad faith." 42 Pa.C.S.A. 2503(7) and (9).

"[C]onduct of another party in commencing the matter or otherwise" means conduct in initiating the matter or in raising defenses. 42 Pa.C.S.A. § 2503(9); Cher-Rob, Inc. v. Art Monument, Inc., 406 Pa.Super. 330, 594 A.2d 362, 364-65 (1991); White v. Redevelopment Auth., 69 Pa.Commw. 307, 451 A.2d 17, 20 (1982). Dilatory conduct is conduct that "tend[s] or is intended to cause delay or to gain time or to put off a decision." Black's Law Dictionary, at 457 (6th ed. 1990). See also Thunberg v. Strause, 545 Pa. 607, 682 A.2d 295, 299 (1996) (citing Black's Law Dictionary for meanings of standards of conduct in 42 Pa.C.S.A. 2503(7) and (9)). Obdurate conduct is conduct that is "stubbornly persistent in wrongdoing." Merriam Webster's College Dictionary, at 801 (10th ed. 1996). Arbitrary conduct is conduct "based on random or convenient selection or choice rather than on reason or nature." Thunberg, 682 A.2d at 299. Vexatious conduct is conduct that is without sufficient grounds in either law or fact and that is for the sole purpose of causing annoyance. Id. And a bad faith defense

is one asserted "for purposes of fraud, dishonesty, or corruption." See Id.

The conduct of Turchi and 1930-34 Associates has been dilatory, obdurate, vexatious, arbitrary and in bad faith. They defied the court's May 10, 2001 injunction order. At best, some of the repairs could have taken more than the ten days allotted by the May 10 order. But instead of beginning the repairs in good faith and asking for an extension of time, they did no repairs. Instead they filed a motion for reconsideration asserting a dishonest defense based on a false affidavit. Their conduct caused more than three months delay in these proceedings, and caused Dr. Elfman needlessly to spend time and money opposing the motion for reconsideration and re-litigating his petition. In re Estate of Liscio, 432 Pa.Super. 440, 638 A.2d 1019, 1022 (1994) (pursuing claim with no reasonable possibility of success prolonging litigation justifies award of counsel fees); Dooley v. Rubin, 422 Pa.Super. 57, 618 A.2d 1014, 1018 (1993) ("[T]he intent of the rule permitting the recovery of counsel fees is . . . to sanction those who knowingly raise, in bad faith, frivolous claims which have no reasonable possibility of success, for the purpose of harassing, obstructing or delaying the opposing party."); Brenckle v. Arblaster, 320 Pa.Super. 87, 466 A.2d 1075, 1078 (1983) (affirming award of counsel fees where the defendant among other things raised frivolous arguments and defied a court order); In re Estate of Schramm, 696 A.2d 1206, 1213-15 (Pa.Commw.Ct. 1997) (holding that party's continued pursuit of exceptions to a guardian's account, even after evidence showed that exceptions were without merit, was dilatory, obdurate and vexatious conduct).

Dr. Elfman also requests expert fees and expenses. A court of equity has discretion to award costs. Stotsenburg v. Frost, 465 Pa. 187, 348 A.2d 418, 422 (1975); Gordon v. Hartford Sterling Co., 350 Pa. 277, 38 A.2d 229, 233 (1944) (affirming award of costs against a party whose

allegations in the litigation came "very close to fraudulent representations" and whose futile arguments and dilatory moves cost much time and expense); Brenckle, 466 A.2d at 1078 (affirming award of costs for party's bad faith conduct during pendency of equity action). The court grants the request for costs, but does not now determine which items are recoverable. See 42 Pa.C.S.A. 1726 (statutory guidelines for awarding costs); Pa.R.C.P. 1523-1527 (rules governing allowance of costs in equitable actions); In re Kling, 433 Pa. 118, 249 A.2d 552, 554 (1969) (holding that, under repealed statute, expert fees are not recoverable as costs). Dr. Elfman's application for counsel fees and costs and any opposition to that application should cite legal authority for whether the specific costs claimed are recoverable.

AMENDED CONCLUSIONS OF LAW

1. Dr. Elfman has a right to remain in his office until June 30, 2006.

[Conclusion 2 supports the preliminary injunction in the related Penn Fed case and is not relevant here.]

3. The change in the building's ownership does not affect Dr. Elfman's rights under the lease.

4. 1930-34 Associates owe Dr. Elfman a duty to comply with the terms of the leases, including a duty to supply potable running water, elevator service, heat and cleaning services.

5. 1930-34 Associates covenanted to provide Dr. Elfman with quiet enjoyment of the leased premises. This covenant includes a duty to provide full-time access to the leased premises, a duty to comply with the City of Philadelphia Code and a duty to take all steps necessary to remove the

violations cited by the cease operations orders such that the building is re-opened.

6. 1930-34 Associates has breached and continues to breach these duties.

7. 1930-34 Associates has constructively evicted the Dr. Elfman.

8. Dr. Elfman has a clear right to specific performance of these covenants.

9. Dr. Elfman will suffer imminent, irreparable harm not compensable by monetary damages if defendants continue to breach these duties.

10. Greater injury will occur from denying the preliminary injunction than from granting it.

11. A preliminary injunction will restore the parties to the status quo.

12. A preliminary injunction ordering Turchi and 1930-34 Associates to comply with the lease is reasonable to abate the harm to the Dr. Elfman.

13. Dr. Elfman is entitled to reasonable counsel fees and costs in opposing the motion for reconsideration and re-litigating the preliminary injunction petition.

CONCLUSION

On the basis of the record of the original petition for preliminary injunction and the proceedings on reconsideration of that petition, the court will enter a contemporaneous order granting Dr. Elfman's petition for a preliminary injunction and his request for counsel fees and costs. Dr. Elfman has already posted bond and need not post additional bond at this time.

BY THE COURT:

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JOHN W. HERRON, J.

DATE: August 30, 2001