

IN THE UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

2002 AUG 20 PM 1:00

IN RE:  
FURR'S SUPERMARKETS, INC.,  
INC.,  
DEBTOR.

§  
§  
§  
§  
§  
§

NO. 7-01-10779-SA  
Chapter 7

MOTION FOR PAYMENT OF  
ADMINISTRATIVE EXPENSES

COMES NOW, TGAAR PROPERTIES, INC., d/b/a WESTWOOD VILLAGE SHOPPING CENTER ("TGAAR") and files this Motion for Payment of Administrative Expenses and would show unto the Court as follows:

I.

BACKGROUND

1. On February 8, 2001, Furr's Supermarkets, Inc. (the "Debtor") filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code.
2. At the time of the bankruptcy filing, TGAAR owned the "Midland Store" (Furr's No. 966), which the Debtor was occupying under a "Lease" that was initially executed on August 14, 1980 by Safeway Stores, Incorporated ("Safeway"), as lessee.
3. The Lease was subsequently amended on August 24, 1981, to extend the term to December 31, 2001.
4. On October 29, 1987 Safeway assigned the Lease to the Debtor. The Midland Store was thereafter occupied by the Debtor until after it filed its bankruptcy petition on February 8, 2001.

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5. On June 18, 2001, the Debtor exercised, in writing during the Chapter 11 case, its right to extend the Lease for an additional five (5) year period. The term of the Lease was thereby extended until December 31, 2006.

6. By extending the Lease, the Debtor created a new post-petition obligation in the ordinary course of its business during the Chapter 11 case.

7. Subsequently, a lease for the Midland Store was "rejected" during the Chapter 11 bankruptcy case by Order (Dkt. #1031).

8. By letter dated August 23, 2001, the Debtor notified TGAAR that it "will be closing all Stores effective August 31, 2001."

9. By letter dated August 31, 2001 the Debtor sent the keys to the Midland Store to TGAAR. Such letter incorrectly stated that the Debtor "hereby surrenders possession of the premises to you effective August 31, 2001." Such letter also requested TGAAR to bid on the equipment that was still located in the Midland Store.

10. TGAAR promptly responded to the letter of August 31, 2001 soliciting a bid on the equipment (located in the Midland Store) by sending a bid dated September 13, 2001. No response to TGAAR's bid was received. TGAAR made numerous requests after August 31, 2001 for the Debtor (and later, the Chapter 7 Trustee) to actually vacate the premises.

11. On December 19, 2001, the Chapter 11 bankruptcy case was converted to a case under Chapter 7.

12. An "Order" (Dkt. #1674) was entered on May 22, 2002. Such Order gave the Chapter 7 Trustee access to the Midland Store to conduct the auction. The auction to sell equipment was held in the Midland Store on May 30, 2002.

13. Under the Order, the Midland Store was required to be left by the auctioneer in a "broom clean" condition. That also has not occurred.

14. Despite such auction, much of the equipment (plus an enormous amount of junk and trash) remained in the Midland Store well after the date of such auction. Exhibit "A" attached hereto consists of photos of the Midland Store taken after the July 3, 2002 letter (referred to below) was received.

15. The auctioneer represented to TGAAR that all equipment would be removed from the Midland Store promptly (within 4-5 days) after the auction . Such did not occur.

16. After numerous protests by TGAAR, a letter dated July 3, 2002, was finally received by TGAAR from counsel to the Chapter 7 Trustee allowing TGAAR to take possession of the Midland Store and remove the large volume of equipment, junk and trash that remained in the Midland Store. See Exhibit "A".

17. From December 19, 2001, the date of conversion of the case to a Chapter 7 bankruptcy case, to July 3, 2002 (the date of the letter finally allowing use and possession of the Midland Store), TGAAR was deprived of possession and use of its Midland Store. The automatic stay under 11 U.S.C. §362 was in effect and the Chapter 7 Trustee had advised TGAAR's representatives not to "touch" the equipment in the Midland Store. TGAAR was effectively prohibited from removing the equipment and junk in the Midland Store and from taking possession of its Midland Store. The Chapter 7 Trustee used the automatic stay to remain in possession of and actually use the Midland Store to the benefit of the bankruptcy estate, albeit contrary to the wishes and over the protests of TGAAR.

18. Until the letter of July 3, 2002 was received, TGAAR could not remove the remaining equipment, junk and trash and get the Midland Store in a condition it could be shown

to prospective tenants. In fact, the Midland Store was left in such a dismal state, TGAAR could not and is still not able to show the Midland Store to potential tenants. See Exhibit "A".

19. TGAAR estimates that the cost, including "dump fees," for simply removing the remaining equipment, junk and trash from the Midland Store will be \$5,000.00. Under the Order, such clean-up was to have been done by the Chapter 7 Trustee's agent, the auctioneer.

20. Substantial damage occurred when certain of the equipment sold at the auction was removed from the Midland Store. Such damage could have been avoided or greatly reduced had different methods been used to remove the equipment. TGAAR protested the method of removal before the equipment was removed but the buyers advised that the auctioneer authorized such methods of removal and proceeded to remove the equipment and cause substantial damage to the store premises.

21. TGAAR estimates that it will cost at least \$15,000.00 to repair the damage done to the Midland Store by the buyers that removed the equipment. TGAAR has requested the Chapter 7 Trustee to provide TGAAR with a list of the names and addresses of such buyers, but such list has not yet been received.

22. The Midland Store contains approximately 44,000 square feet. The Chapter 7 Trustee used the Midland Store to store and protect the equipment pending the auction and also to conduct the auction.

23. A holdover tenant is required, under Texas law, to pay rent on the terms that are contained in the original lease. A party that possesses the premises without authority or right to do so is a trespasser. The original lease provided for rents of \$19,043.77/month, plus ad valorem taxes, which total approximately \$33,000.00/year. For the eight (8) calendar months (December-July) following the conversion during which the Chapter 7 Trustee had effective possession of

the Midland Store, the amount of rent under the terms of the Lease totals \$152,349.60, plus prorated ad valorem taxes of \$22,000.00 (8/12 x \$33,000.00). Alternatively, based on the actual number of days of effective possession of the Midland premises (195 days), the amount of rent at the rental rate under the Lease totals \$122,088.37, plus prorated ad valorem taxes of \$17,630.14. TGAAR should be allowed an administrative claim of \$175,349.60 (or \$139,718.50 based on 195 days of usage) based on the rental rates under the original lease for the period from December 19, 2001 to July 3, 2002.

24. Comparable storage space (not shopping center rental space) in Midland, Texas rents for \$3.00/square foot/year. For the 195-day period from the date of conversion to Chapter 7 (December 19, 2001), to July 3, 2002 (the date of the letter), the reasonable storage costs for use of storage space of the size of the Midland Store totals \$70,520.55, (44,000 square feet x \$3.00/square feet/year x 195/365). Such amount is far less than the monthly rental (\$19,043.77, plus ad valorem taxes) under the Lease. Alternatively, TGAAR should be allowed an administrative claim of \$70,520.55 based on the reasonable value of use of the Midland Store for storage space for the period from December 19, 2001 to July 3, 2002 during which the Chapter 7 Trustee had effective possession of the Midland Store.

25. Rather than use the Midland Store, without TGAAR's consent, for storage and to conduct the auction, the Chapter 7 Trustee had an alternative; namely, the Chapter 7 Trustee could have moved the equipment to a different facility, stored it at such facility and then conducted the auction at such facility (or other facility). The costs of any such removal and storage would have been more than the "auction" proceeds and more than the storage costs that should be paid to TGAAR.

## II.

### ANALYSIS

1. The Chapter 7 Trustee actually used the Midland Store belonging to TGAAR for more than six (6) months after the case was converted to Chapter 7 for storage and protection of the equipment and for conducting the auction.

2. Such usage by the Chapter 7 Trustee benefited the bankruptcy estate substantially because it saved the bankruptcy estate the enormous cost of having to move all of the equipment out of the Midland Store as well as the costs of storage of such equipment at a different storage facility. Such use of the Midland Store also stored and protected the equipment.

3. Because of the automatic stay, TGAAR was forced to allow the Chapter 7 Trustee to continue to use the Midland Store for storage and protection of the equipment and to conduct the auction. TGAAR did not willingly allow such usage and possession by the Chapter 7 Trustee.

4. Rent for usage of the Midland Store for storage and protection of the equipment and to conduct the auction are a proper administrative expense and should be allowed in full. The fair and reasonable value of the Midland Store for the period the Chapter 7 Trustee effectively used the Midland Store to store and protect the equipment and conduct the auction should be allowed and paid to TGAAR as an administrative expense. The reasonable worth of use and occupancy by the Chapter 7 Trustee is presumed to be equal to the contractual rental rate under the Lease.

5. The auctioneer, approved by the Order, was the agent of the Chapter 7 Trustee.

6. The auctioneer failed to leave the premises in a "broom clean" condition as was required by the Order. The estimated cost to conduct the "clean-up" that the auctioneer failed and refused to conduct is \$5,000.00.

7. The cost of the clean-up should have been paid by the auctioneer and is a proper administrative expense that TGAAR should not have to bear and that this Court should allow in full.

8. The auctioneer, as agent of the Chapter 7 Trustee, allowed (and authorized) buyers at the auction, to remove equipment in a manner that caused substantial damage to the Midland Store.

9. The means used by some of the buyers to remove equipment purchased at the auction from the Midland Store was reckless and senseless. Nevertheless, since the auctioneer's representatives expressly authorized such means of removal, the cost of repair is a proper administrative expense that should be allowed in full.

10. The "actual, necessary costs and expenses of preserving the estate" constitute administrative expenses entitled to priority status. The Chapter 7 bankruptcy estate derived actual benefit from its occupation and usage of the Midland Store to store and protect the equipment and conduct the auction.

11. TGAAR's claims arose post-conversion and therefore arose "during the administration of the [Chapter 7 bankruptcy] estate."

12. Once the lease was rejected and the debtor-in-possession of the Chapter 11 bankruptcy estate represented to TGAAR, in writing, that they were relinquishing possession of the Midland Store, possession of such store should have been actually surrendered. However, such did not occur. The Chapter 7 Trustee kept using the Midland Store for storage (and for the

auction) after the conversion on December 19, 2001. A reasonable delay in vacating the Midland Store might be acceptable to TGAAR, but a period of over six (6) months amounts to a wrongful taking of possession (or even a trespass) that was only accomplished because the Chapter 7 Trustee was “armed” with the automatic stay and threatened to use it if TGAAR attempted to “touch” any of the equipment.

### **III.**

#### **RELIEF REQUESTED**

TGAAR respectfully requests that the following relief be granted:

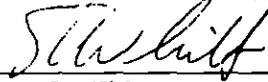
1. Administrative expenses of \$174,349.60 (alternatively, \$139,718.50), based on the rate of rent in the Lease should be allowed and paid to TGAAR for the storage of the equipment from December 19, 2001 to July 3, 2002 and for conducting the auction. Alternatively, administrative expenses of \$70,520.55 should be allowed and paid to TGAAR if the value of comparable storage space is used to measure a fair and reasonable value of the use of the Chapter 7 Trustee of the Midland Store.
2. Administrative expenses of \$5,000.00 should be allowed and paid to TGAAR for the cost of the clean-up of the Midland Store that should have been conducted by the auctioneer as required by the Order (Dkt. #1674).
3. Administrative expenses of \$15,000.00 should be allowed TGAAR for the damages to the Midland Store that were caused by the buyers when they removed the equipment they purchased at the auction.

4. Such other and further relief as to which TGAAR may be justly entitled.

Dated this 16<sup>th</sup> day of August, 2002.

Respectfully submitted,

ROBERT K. WHITT  
Tex. State Bar No. 21386500  
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BY:   
Robert K. Whitt

**ATTORNEY FOR TGAAR PROPERTIES, INC.,  
d/b/a WESTWOOD VILLAGE SHOPPING  
CENTER**

**CERTIFICATE OF SERVICE**

I certify that on the 16th day of August, 2002, I mailed a copy of the foregoing pleading to the following persons:

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U.S. Trustee  
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Albuquerque, NM 87103

Paul Fish  
P.O. Box 2168  
Albuquerque, NM 87103

Jennie D. Behles  
P.O. Box 849  
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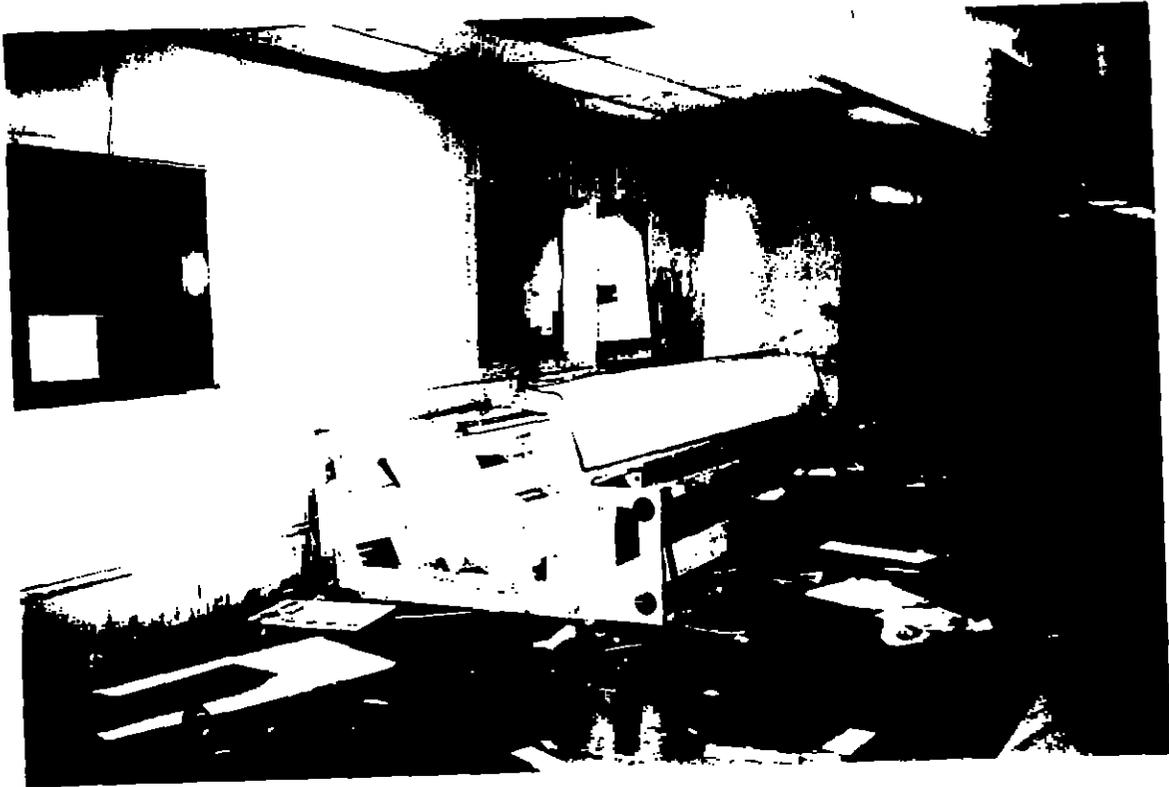


EXHIBIT  
"A"





