

IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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

NO. 7-01-10779-SA

U.S. BANKRUPTCY COURT
ALBUQUERQUE, N.M.

Chapter 7

**AMENDED MOTION/APPLICATION FOR PAYMENT
OF ADMINISTRATIVE EXPENSES**

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

I.

BACKGROUND

1. Debtor Furr's Supermarkets, Inc. (the "Debtor") operated a large number of grocery stores in Texas and elsewhere. Many of the stores the Debtor operated were leased under "non-residential leases," including "Store #966" located in Midland, Texas. After experiencing financial difficulties, the Debtor filed for bankruptcy protection on February 8, 2001 (Dkt. #1).

2. Prior the expiration of the 60-day acceptance or rejection period under 11 U.S.C. §365 (d)(4), the Debtor filed a motion to extend time to accept or reject certain leases, including the "Lease" on Store #966 (Dkt. #157). Such motion was granted on April 6, 2001 (Dkt. #326).

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3. On June 25, 2001, the Debtor and Fleming Companies, Inc. ("Fleming") executed an "Asset Purchase Agreement" pursuant to which the Debtor agreed to sell and Fleming agreed to purchase certain of the Debtor's stores and other assets, including Store #966 (See Dkt. #542).

4. On July 3, 2001, this Court approved the Asset Purchase Agreement by its Order Granting Motion to Sell Some or All of Debtor's Operating Assets (Dkt. #710; the "Order Approving Sale").

5. On July 23, 2001, this Court entered an Order Approving Procedure Relating to the §365 (f)(2) Adequate Assurance Requirement for Assignment of Leases (Dkt. #762; the "Assignment Order") and a related Confidentiality Protective Order (Dkt. #763; the "Confidentiality Order").

6. Section 13.5(b) of the Asset Purchase Agreement provides that Fleming shall have the right to assign its rights and obligations thereunder with respect to any store to one or more Third Party Purchasers.

7. On July 26, 2001, Fleming sent out a Third Party Purchaser Notice, pursuant to the afore-mentioned §13.5(b) of the Asset Purchase Agreement that notified the Debtor that Mal Enterprises, Inc. would purchase Store #966. TGAAR received a copy of such Third Party Purchaser Notice.

8. At the time of the bankruptcy filing, TGAAR West Texas owned (and TGAAR Properties managed as the agent for TGAAR West Texas) the land and improvements in Midland, Texas known in this bankruptcy case as "Store #966." The Debtor was occupying such Store #966 under a "Shopping Center Lease" that was initially executed on August 14, 1980 by Safeway Stores, Incorporated ("Safeway"), as lessee.

9. The Shopping Center Lease was subsequently amended on August 24, 1981, to extend the term to December 31, 2001. The Shopping Center Lease and the amendment are

collectively hereinafter referred to as the "Lease." TGAAR Properties and TGAAR West Texas are collectively referred to hereinafter as "TGAAR."

10. The Lease provides (§16) for six (6) extension options of five (5) years each, which options may be exercised by the lessee by giving six (6) months written notice before the expiration of the current term of the Lease. The Lease also provides (§8) that the "Lessee agrees to repair all damage to the leased premises caused by lessee's use other than (1) ordinary wear and tear, . . . and that on surrendering possession it will leave the leased premises in good condition, allowance being made for ordinary wear and tear . . . On surrendering possession . . . lessor agrees to accept the leased premises in a neat and clean condition . . ." The Lease provides (§9) that "Lessee may remove [fixtures] from the leased premises at any time but shall repair any damage caused by removal."

11. On October 29, 1987, Safeway assigned the Lease to Furr's, Inc., which assumed the obligations thereunder. On or about March 11, 1991, Furr's, Inc. assigned its interest in the Lease to the Debtor. Store #966 was thereafter occupied by the Debtor and operated as a grocery store until after the Debtor filed its bankruptcy petition on February 8, 2001.

12. On or about June 1, 2001, the Debtor filed its Motion for Order Approving Sale of Some or All of the Debtor's Operating Assets and Granting Related Relief; Notice of Auction Sale or Some or All of Debtor's Operating Assets and Opportunity to Submit Bids (the "Sale Motion"). Pursuant to the Sale Motion, the Debtor was seeking to liquidate and sell certain of its assets, including Store #966 and the Lease.

13. Representatives of the Debtor and TGAAR communicated during June, 2001 concerning whether the Debtor would exercise its option to extend the Lease. On June 18, 2001, the Debtor exercised, in writing, during the Chapter 11 case, the Debtor's option to extend the Lease for an additional five (5) year period. The term of the Lease for Store #966 was thereby

extended until December 31, 2006. Such extension of the Lease occurred prior to any "rejection" of the Lease.

14. By extending the Lease, the Debtor created a new post-petition obligation in the ordinary course of its business during the Chapter 11 case. The extension to the Lease was necessary in order for the Debtor-in-possession to sell Store #966 to Fleming (otherwise, the Debtor would have had very little to sell since the pre-petition Lease terminated by its terms on December 21, 2001).

15. On or about July 3, 2001, the Sale Motion was granted pursuant to the Order (i) Approving Asset Purchase Agreement with Fleming Companies, Inc. (ii) Authorizing the Sale of All or Substantially All of the Debtor's Operating Assets and the Transactions Contemplated by Asset Purchase Agreement, and (iii) Granting Related Relief (Dkt. #710; the "Sale Order").

16. Subsequent to the entry of the Sale Order, the purchaser under the Sale Motion, Fleming Companies, Inc., elected not to purchase Store #966 (or the Lease).

17. On September 6, 2001, an Order (Dkt. #1031) was entered rejecting the Lease for Store #966.

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

19. By letter dated August 31, 2001 the Debtor sent the keys to Store #966 to TGAAR. Such letter stated that the Debtor "hereby surrenders possession of the premises to you effective August 31, 2001", but Debtor did not do so as the Debtor (and later the Chapter 7 Trustee) left the equipment in Store #966 for over ten months after August 31, 2001. Such letter also requested TGAAR to bid on the equipment that was still located in Store #966.

20. After receipt of the August 31, 2001 letter, the Debtor's representative told TGAAR that he thought that the Debtor would accept an offer of between \$5-10,000 for all of the equipment left in Store #966.

21. On September 13, 2001, TGAAR responded to the letter of August 31, 2001, by sending a bid for \$5,775 for all of the equipment and assets of the Debtor in Store #966. Implicit in such offer was TGAAR's agreement to assume the clean-up costs and the costs of repair that would result when the equipment was removed, which costs far exceed the monetary offer of \$5,775.00. When no response to TGAAR's bid was received, TGAAR unsuccessfully attempted to contact the Debtor on numerous occasions. After a while, the Debtor's phones were disconnected making contact impossible.

22. After August 31, 2001, TGAAR requested the Debtor (and later, the Chapter 7 Trustee) to actually vacate the premises. Such requests were heeded.

23. Beginning in October, 2001, TGAAR sent monthly invoices to the Debtor for "equipment storage."

24. On December 19, 2001, the Chapter 11 bankruptcy case was converted to a case under Chapter 7 (Dkt. #1424).

25. On February 25, 2002, TGAAR's representative received a telephone call from the Chapter 7 Trustee inquiring about the invoices she had received for equipment storage in Store #966. After the facts were explained to the Chapter 7 Trustee by TGAAR, she advised TGAAR that the bankruptcy estate should either pay the equipment storage or abandon the equipment in Store #966 to TGAAR. The Chapter 7 Trustee also stated that she would promptly get back to TGAAR.

26. After waiting patiently for more than two weeks, TGAAR attempted to contact the Chapter 7 Trustee by telephone, to no avail. Approximately 5-6 additional attempts to make contact with the Chapter 7 Trustee were made, also to no avail.

27. Following the filing of a motion (Dkt. #1642) on April 24, 2002, an "Auction Order" (Dkt. #1674) was entered on May 22, 2002. Such Order gave the Chapter 7 Trustee access to Store #966 to conduct the auction. The auction to sell equipment was held in Store #966 on May 30, 2002.

28. Under the Auction Order, Store #966 was required to be left by the auctioneer in a "broom clean" condition. That also has not occurred. The auctioneer was the agent of the Chapter 7 Trustee.

29. Despite such auction, much of the equipment (plus an enormous amount of junk and trash) remained in Store #966 well after the date of such auction. Exhibit "A" attached to the original motion (which Exhibit is incorporated by reference herein) consists of photos of Store #966 taken after the July 3, 2002 letter (referred to below) was received.

30. The auctioneer represented to TGAAR that all equipment would be removed from Store #966 promptly (within 4-5 days) after the auction. Such did not occur.

31. After numerous protests by TGAAR, a letter dated July 3, 2002 (the "July 3, 2002 Letter"), was finally received by TGAAR from counsel to the Chapter 7 Trustee allowing TGAAR to take possession of Store #966 and remove the large volume of equipment, junk and trash that remained in Store #966, as is shown in Exhibit "A".

32. From December 19, 2001, the date of conversion of the case to a Chapter 7 bankruptcy case, until receipt of the July 3, 2002 Letter, TGAAR was unlawfully deprived of possession and use of Store #966. The automatic stay under 11 U.S.C. §362 was in effect and TGAAR's representatives had been advised not to "touch" the equipment in Store #966.

TGAAR was effectively prohibited until July 3, 2002 from removing the equipment and junk in Store #966 and from taking possession of Store #966. The Chapter 7 Trustee used the automatic stay to remain in possession of and actually use Store #966 to the benefit of the bankruptcy estate, albeit contrary to the wishes and over the protests of TGAAR.

33. Until the letter of July 3, 2002 was received, TGAAR could not begin to remove the remaining equipment, junk and trash and get Store #966 into a condition so could be shown to prospective tenants. In fact, Store #966 was left in such a dismal state that, TGAAR could not show Store #966 to potential tenants until large amounts were expended to "clean-up" Store #966. See Exhibit "A".

34. TGAAR estimates that the cost, including "dump fees," for simply removing the remaining equipment, junk and trash from Store #966 will be at least \$15,000.00. Under the Auction Order, such clean-up was required to have been conducted by the Chapter 7 Trustee's agent, the auctioneer.

35. Substantial damage occurred to Store #966 when certain of the equipment sold at the auction was removed from Store #966. 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.

36. TGAAR estimates that it will cost at least \$120,000.00 to repair the damage done to Store #966 by the buyers that removed the equipment under the guidance of the auctioneer. TGAAR 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.

37. Store #966 contains approximately 44,000 square feet. The Chapter 7 Trustee used Store #966 to store and protect the equipment pending the auction and also to conduct the auction. TGAAR has received nothing for the use and possession of Store #966 since August 31, 2001.

38. A holdover tenant is required, under Texas law, to pay rent on the terms that are contained in the original lease. Alternatively, the landlord may treat the holdover tenant as a trespasser. A party, including a Chapter 7 Trustee or a Debtor-in-possession, that possesses the premises without authority or right to do so is a trespasser and is liable as such. Monthly rentals under the Lease (including CAM) are \$19,043.77/month, plus reimbursement for ad valorem taxes, which total approximately \$33,000.00/year.

39. At the very least, TGAAR should be allowed an administrative expense claim for the use and possession of Store #966 based on the fair market value of comparable storage space in Midland, Texas. Comparable storage space (not shopping center rental space) in Midland, Texas rents for \$3.00/sq. ft./yr.

40. Rather than use Store #966, 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 (as they did with the food and goods on the shelves), 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 far more than the "auction" proceeds and more than the storage costs that should be paid to TGAAR for the period of actual use and possession of Store #966.

41. TGAAR has had to pay all the expenses for utilities and all ad valorem taxes during the period (September 1, 2001 to July 3, 2002) that the Debtor-in-possession and the Chapter 7 Trustee actually used and possessed Store #966 to store and protect the equipment.

II.

SUMMARY OF ADMINISTRATIVE EXPENSE CLAIMS

1. The administrative expense claims made by TGAAR are summarized as follows:
 - a. Chapter 11 Claim for Rent/Possession – Pre-Petition Lease. From August 31, 2001 until conversion on December 18, 2001, during which the Debtor-in-possession had actual and effective use and possession of Store #966 and used it to store and protect the equipment. During such period, the amount of rent under the terms of the Lease totals \$68,244.51, plus prorated ad valorem taxes of \$9,854.79 ($109/365 \times \$33,000.00$). TGAAR should be allowed a Chapter 11 an administrative expense claim of \$78,099.30 (based on 108 days of actual possession and usage) based on the rental rates under the Lease for the period from September 1, 2001 to December 18, 2001. If TGAAR is not allowed an administrative expense claim based on the rental rate in the Lease, TGAAR should be allowed an administrative expense claim based on the cost of comparable storage space in Midland, Texas (\$3.00/sq. ft./yr.).¹
 - b. Chapter 7 Claim for Rent/Possession – Pre-Petition Lease. For the period from December 19, 2001 (the day after conversion) through December 31, 2001 (the last days of the original Lease), during which the Chapter 7 Trustee had actual and effective possession and use of Store #966, the amount of rent under the terms of the Lease totals \$8,139.24 ($13/365 \times \$19,043.77/\text{mo.} \times 12 \text{ mo.}$), plus prorated ad valorem taxes of \$1,175.34 ($13.365 \times \$33,000.00$). TGAAR should be allowed a Chapter 7 administrative

¹ If TGAAR is not allowed an administrative expense claim based on the rental rate in the Lease, TGAAR should be allowed an administrative expense claim based on the cost of comparable storage space in Midland, Texas (\$3.00/sq. ft./yr.). For the 108 day period from September 1, 2001 to the date of conversion to Chapter 7 (December 18, 2001), the reasonable storage costs for use of storage space of the size of Store #966 totals \$39,057.53 ($44,000 \text{ sq. ft.} \times \$3.00 \text{ sq. ft./yr.} \times 108/365$). For the 13 day period from December 19, 2001 to the end of the original Lease term (December 31, 2001), the reasonable storage costs for use of storage space of the size of Store #966 totals \$4,701.36 ($44,000 \text{ sq. ft.} \times \$3.00 \text{ sq. ft./yr.} \times 13/365$).

expense claim of \$9,314.58 (based on 13 days of possession and usage) based on the rental rates under the original Lease for the period from December 19, 2001 to December 31, 2001. If TGAAR is not allowed an administrative expense claim based on the rental rate in the Lease, TGAAR should be allowed an administrative expense claim based on the cost of comparable storage space in Midland, Texas (\$3.00/sq. ft./yr.).¹

c. Chapter 7 Administrative Expense - Post-Petition Lease Obligation. For the five (5) years of the extended Lease term (a post-petition obligation), the amount of rent under the terms of the Lease totals \$1,142,626.20(60 mo. x \$19,043.77/mo.) plus estimated ad valorem taxes of \$165,000.00 (5 yrs. x \$33,000.00). TGAAR should be allowed a Chapter 7 administrative expense claim of \$1,307,626.20 for the 5-year period of the post-petition extension of the Lease. At the very least, TGAAR should be allowed a Chapter 7 administrative expense claim of \$131,837.35 ($\$19,043.77 \times 12 \text{ mo.} \times 184/365 + \$33,000.00 \times 184/365$) for the 184 days during 2002 (January 1, 2002 to July 3, 2002) that the Chapter 7 Trustee actually used and possessed Store #966 to store and protect the equipment.

d. Chapter 7 Administrative Expense - Clean-up of Midland Store. The Auction Order required the auctioneer to leave Store #966 in a "broom clean" condition. The Lease required that Store #966 be left in a "neat and clean condition." Such was not done. The auctioneer is the agent of the Chapter 7 Trustee. The costs of the clean-up is estimated at \$15,000.00 and such amount should be allowed as a Chapter 7 administrative expense claim.

e. Chapter 7 Administrative Expense - Damage to Midland Store. Substantial damage resulted when the buyers, acting under the guidance of the

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auctioneer, removed the equipment from Store #966 following the auction. The Lease allowed the lessee's fixtures to be removed from Store #966, but states that they "shall repair any damage caused by removal." None of the damage, which was very substantial, that was caused by removal has been repaired by the auctioneer or the Chapter 7 Trustee. It is estimated that the cost to repair the damage will be \$120,000.00. TGAAR should be allowed a Chapter 7 administrative expense claim of \$120,000.00.

2. 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 Store #966 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 Store #966 for storage space for the period from December 19, 2001 to July 3, 2002 during which the Chapter 7 Trustee had effective possession of Store #966.

III

ANALYSIS

1. The Chapter 7 Trustee actually and effectively possessed and used Store #966 for more than ten (10) months (from September 1, 2001 to July 3, 2002) for storage and protection of the equipment and to conduct 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 Store #966 as well as the costs of storage of such equipment at a different storage facility. Such use of Store #966 also protected the equipment.

3. Because of the automatic stay, TGAAR was forced to allow the Debtor-in-possession and the Chapter 7 Trustee to continue to possess and use Store #966 for storage and protection of the equipment and to conduct the auction. TGAAR did not willingly allow such usage and possession by the Debtor-in-possession or the Chapter 7 Trustee.

4. Rent for possession and usage of Store #966 for storage and protection of the equipment and to conduct the auction should be treated as an administrative expense and should be allowed in full. For the period September 1, 2001 through December 31, 2001 (i.e., under the pre-petition lease) the fair and reasonable value of Store #966 for the period the Debtor and the Chapter 7 Trustee actually and effectively possessed and used Store #966 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. For the 5-year period of the post-petition extension of the Lease, TGAAR should be allowed and paid an administrative expense claim equal to the rent (including ad valorem taxes) under the Lease for such 5-year period.

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

7. The auctioneer failed to leave the premises in a "broom clean" condition as was required by the Auction Order (the Lease also required the premises be left in a "neat and clean condition"). The estimated cost to conduct the "clean-up" Store #966 that the auctioneer failed and refused to conduct is \$15,000.00.

8. The clean-up should have been conducted and paid for by the auctioneer, or at least the Chapter 7 Trustee. If the Chapter 7 Trustee had conducted such clean-up, the costs

thereof would have been a proper administrative expense. TGAAR should not have to bear such administrative expense.

9. 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 Store #966.

10. The means used by some of the buyers to remove equipment purchased at the auction from Store #966 was reckless and senseless. Nevertheless, since the auctioneer's representatives expressly authorized, or at least allowed, such means of removal, the cost of repair is a proper administrative expense that should be allowed in full.

11. 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 Store #966 to store and protect the equipment and conduct the auction.

12. TGAAR's claims arose post-petition and therefore arose "during the administration of the estate."

13. 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 Store #966, possession of such store should have been actually surrendered. However, such did not occur. The Debtor-in-possession and the Chapter 7 Trustee kept using Store #966 for storage and protection of the equipment (and for the auction) after August 31, 2001. A reasonable delay in vacating Store #966 might have been acceptable to TGAAR, but a period of over ten (10) months amounts to a wrongful taking of possession (or even a trespass) that was only accomplished because the Debtor-in-possession and the Chapter 7 Trustee were "armed" with the automatic stay.

IV.

RELIEF REQUESTED

TGAAR respectfully requests that the following administrative expense claims be allowed:

1. Chapter 11 Claim for Rent/Possession Pre-Petition Lease. From August 31, 2001 until conversion on December 18, 2001, during which the Debtor-in-possession had actual and effective use and possession of Store #966 and used it to store and protect the equipment, TGAAR should be allowed a Chapter 11 administrative expense claim of \$78,099.30.

2. Chapter 7 Claim for Rent/Possession Pre-Petition Lease. For the period from December 19, 2001 (the day after conversion) through December 31, 2001 (the last days of the original Lease), during which the Chapter 7 Trustee had actual and effective possession and use of Store #966, TGAAR should be allowed a Chapter 7 administrative expense claim of \$9,314.58.

3. Chapter 7 Administrative Expense – Post-Petition Lease Obligation. For the five (5) years of the extended Lease term (a post-petition obligation), TGAAR should be allowed a Chapter 7 administrative expense claim of \$1,307,626.20.

4. Chapter 7 Administrative Expense – Clean-up of Midland Store. For not complying with the Auction Order and for leaving Store #966 in a disastrous condition (as opposed to a “broom clean” condition), TGAAR should be allowed a Chapter 7 administrative expense claim of \$15,000.00.

5. Chapter 7 Administrative Expense – Damage to Midland Store. For the substantial amount of damage that resulted when the buyers, acting under the guidance of the auctioneer, removed the equipment from Store #966 following the auction, TGAAR should be allowed a Chapter 7 administrative expense claim of \$120,000.00.

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

Dated this 29th day of October, 2002.

Respectfully submitted,

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BY: 
Robert K. Whitt

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

CERTIFICATE OF SERVICE

I certify that on the 29th day of October, 2002, I overnighted via UPS a copy of the foregoing pleading to the following persons:

David T. Thuma
500 Marquette N.W., Suite 650
Albuquerque, NM 87102
(UPS Overnight delivery)


Robert K. Whitt