

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

02 NOV 26 PM 4:21
U.S. BANKRUPTCY COURT
ALBUQUERQUE, NM

In re:

FURR'S SUPERMARKETS, INC.,

Case No. 7-01-10779-SA
Chapter 7

Debtor.

TRUSTEE'S RESPONSE TO TGAAR PROPERTIES, INC.'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, AND OBJECTION TO THE AMENDED MOTION FOR PAYMENT OF ADMINISTRATIVE EXPENSES

Yvette J. Gonzales, the Chapter 7 trustee (the "Trustee") of the estate of Furr's Supermarkets, Inc. ("Furr's"), hereby responds to TGAAR Properties, Inc.'s ("TGAAR's") Cross-Motion for Partial Summary Judgment, filed on or about October 29, 2002 and docketed as #1929 (the "Cross-Motion"), and Amended Motion/Application for Payment of Administrative Expenses, filed on or about October 30, 2002 and docketed at #1928 (the "Amended Expense Motion"), and states:

I. Response to the Alleged Additional Undisputed Facts In the Cross-Motion

1. The Trustee admits the allegations in paragraphs 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 17, 18, 24, and 27 of the Cross-Motion.

2. The Trustee admits the allegations in paragraph 3 of the Cross-Motion, except that the purchase agreement referred to did not identify which stores Fleming or its assignees would purchase, and which would be left out of the purchase transaction.

3. The Trustee denies the allegations in paragraph 13 of the Cross-Motion to the extent the allegations imply that the estate retained any liability to TGAAR for rent or other amounts with respect to the extended term, after the lease ultimately was rejected. That is a legal issue, however, not a factual issue.

195

4. The Trustee denies the allegations in paragraph 14 of the Cross-Motion. This is a legal issue, not a factual allegation.

5. The Trustee denies the allegations in paragraph 16 of the Cross-Motion. Pursuant to the notices filed by Fleming in the bankruptcy case and noticed to the landlords affected, TGAAR was notified of Fleming's decision on or before August 31, 2001. The Trustee refers to the record in this bankruptcy case, and TGAAR's own admissions, in support of this denial.

6. The first portion of paragraph 19 of the Cross-Motion is admitted. The Trustee denies that the subject property was not surrendered, as this Court's September 6, 2001 order specifically so held.

7. The Trustee denies the allegations in paragraph 20 of the Cross-Motion.

8. The Trustee believes that the allegations in paragraph 21 of the Cross-Motion are incorrect, and therefore denies them, but has no way of contacting the former Furr's employees that were involved in dealing with TGAAR.

9. The Trustee denies the allegations in paragraph 22 of the Cross-Motion, at least with respect to the actions of the Chapter 7 Trustee. See the Affidavit of Yvette J. Gonzales (the "Gonzales Affidavit"), paragraphs 3-15. However, the Trustee does admit that she heeded TGAAR's request to remove the equipment from store #966.

10. The Trustee denies the allegations in paragraph 23 of the Cross-Motion, except that she admits that she received certain bills from TGAAR allegedly for storage.

11. The Trustee admits the first sentence of paragraph 25 of the Cross-Motion, although she does not know the exact date of the telephone call. The Trustee denies the allegation that she agreed to pay for storage or abandon the equipment. Gonzales Affidavit, ¶7.

12. The Trustee denies the allegations in paragraph 26 of the Cross-Motion. Gonzales

Affidavit ¶ 3-15.

13. The Trustee denies the allegations in paragraph 28 of the Cross-Motion. The Auction Order speaks for itself, and is part of the record of this case.

14. The Trustee denies the allegations in paragraph 29 of the Cross-Motion. See the Affidavit of Walter Parker (“Parker Affidavit”), ¶ 3-12.

15. The Trustee denies the allegations in paragraph 30 of the Cross-Motion. Parker Affidavit, ¶ 3-12.

16. The Trustee denies the allegations in paragraph 31 of the Cross-Motion. Gonzales Affidavit ¶15.

17. The Trustee denies the allegations in paragraph 32 of the Cross-Motion. This is a legal issue, not a matter of fact. Furthermore, it is undisputed that TGAAR could have sought relief from the automatic stay at any time, and failed to do so. even though the cost of seeking such relief would have been a fraction of the amount the parties are now spending on litigation.

18. The Trustee denies the allegations in paragraph 33 of the Cross-Motion. This is a legal issue, not a matter of fact. Furthermore, TGAAR could easily have filed a motion for relief from stay, but chose not to do so for reasons of its own. Finally, see the Parker Affidavit ¶3-12.

19. The Trustee denies the allegations in paragraph 34 of the Cross-Motion. In addition, TGAAR is not seeking summary judgment on the amount of any claimed “clean-up” costs, so the allegation is irrelevant to the Cross-Motion.

20. The Trustee denies the allegations in paragraph 35 of the Cross-Motion. Parker Affidavit ¶ 3-12.

21. The Trustee denies the allegations in paragraph 36 of the Cross-Motion. Parker Affidavit ¶ 3-12. In addition, TGAAR is not seeking summary judgment on the amount of any

claimed damage to the store, so the allegation is irrelevant to the Cross-Motion.

22. The Trustee admits the allegations in paragraph 37 of the Cross-Motion to the extent that she has not paid any amounts to TGAAR. The balance of the paragraph is denied. Gonzales Affidavit, ¶ 3-14.

23. The Trustee denies the allegations in paragraph 38 of the Cross-Motion. This is a legal issue, not a matter of fact. The legal argument is incorrect, as the estate is not and cannot be a holdover tenant. Furthermore, the equipment was left at the premises with the landlord's consent.

24. The Trustee denies the allegations in paragraph 39 of the Cross-Motion. This is a legal issue, not a matter of fact. In addition, TGAAR is not seeking summary judgment on the amount of any claimed "storage" costs, so the allegation is irrelevant to the Cross-Motion.

25. The Trustee denies the allegations in paragraph 40 of the Cross-Motion. Parker Affidavit ¶ 3-12.

26. The Trustee denies the allegations in paragraph 41 of the Cross-Motion that the Debtor or the Chapter 7 Trustee used and possessed store #966, for the reasons set out elsewhere.

II. Summary Judgment is Not Appropriate for TGAAR's Administrative Expense Claims.

The Trustee filed a narrow summary judgment motion for a portion of TGAAR's administrative expense claims, arguing that TGAAR has no legal basis for asserting an administrative expense claim for rent or storage charges. In response to this focused motion, the Cross-Motion seeks a broad summary judgment on TGAAR's entire claim, even though the claim is based entirely on hotly disputed facts and questionable legal assertions. The Cross-Motion clearly is inappropriate and should be denied.

A. The Chapter 11 Claim For Rent or Storage is Without Merit. TGAAR's Chapter 11 administrative claim fails for a number of reasons. First and foremost, TGAAR withdrew its

administrative rent claim on or about February 22, 2002. A copy of the Notice of Withdrawal is attached hereto as Exhibit A. The Trustee does not know why TGAAR is now attempting to resurrect its Chapter 11 administrative expense claim, as clearly it was withdrawn. If TGAAR asserts that for some reason the withdrawal was without legal effect, that position obviously would preclude summary judgment in TGAAR's favor.

Second, the rent claim is based a lease that was rejected pursuant to Court order no later than August 31, 2002. Furthermore, the Court's order specifically held that Furr's had surrendered the premises. As of September 1, 2002, the estate's post-petition liability under the lease therefore was extinguished. Furr's vacated the premises as of August 31, 2002, leaving behind only the store equipment. While there may be a factual dispute about the circumstances under which the equipment remained at the store before it was sold at auction, TGAAR cannot now attempt to enforce the rejected lease.

Third, to the extent TGAAR argues that the Chapter 11 estate is liable for five years of rent because of Furr's exercise of the renewal option during the Chapter 11, the argument is without merit. The exercise of the option was not tantamount to assuming the lease, since such an assumption can only be done with Court approval. 11 U.S.C. §365(a). It is undisputed that no such approval was ever given. When the lease was rejected as of August 31, 2001, the entire amount owed to TGAAR under the lease, including any amounts owed for the option period, became a pre-petition unsecured claim, 11 U.S.C. §365(h), subject to TGAAR's obligation to mitigate its damages, and subject to the rent damage cap in 11 U.S.C. §502(a)(6).

Finally, in any event the amount of TGAAR's claim would be limited to the benefit conferred upon the bankruptcy estate. 11 U.S.C. § 503(b).

B. The Chapter 7 Claim For Rent or Storage is Without Merit. The Trustee disputes the

factual and legal basis for the Chapter 7 claim based on rent and/or storage charges. As set forth in the Gonzales Affidavit, the Trustee continued to deal with TGAAR on the understanding that the parties may agree to leave the equipment on site until TGAAR could determine whether it could find a grocery store tenant. In such an event, TGAAR would have been greatly benefited by the equipment having remained in the store. There is no dispute that the highest value for the equipment would have been to another grocery store retailer renting the store, or that such a tenant would pay more rent if it could obtain a grocery store space and equipment as part of a package deal. Furthermore, until TGAAR found a grocery store tenant or determined finally that no such tenant could be found, it made economic sense to both parties to leave the equipment at the store.

Once it became clear to the Trustee that TGAAR wanted the equipment removed, and would not pay a fair price for it (a matter of approximately two months), the Trustee arranged for the equipment to be sold by auction as soon as possible.

It should be noted that TGAAR could have filed a motion for relief from automatic stay at any time after August 31, 2001 to seek removal of the equipment. It never did so, nor did it take any other action, except to send extremely high bills for "storage charges," talk to the Trustee about what options the parties had, and make low-ball offers to buy the equipment. In addition, when the Trustee filed a motion to sell the equipment, TGAAR objected.

Finally, as with the Chapter 11 administrative expense claim, the amount of the claim would be limited in any event to the benefit conferred upon the bankruptcy estate. 11 U.S.C. § 503(b). Such a benefit was minimal, and most likely close to \$0.

C. The Chapter 7 Claim For Option Period Rent is Without Merit. TGAAR apparently is attempting to get around the fact that it withdrew its Chapter 11 administrative claim (which would include any claim based on Furr's exercise of the lease extension option) by arguing that

somehow when Furr's exercised the five-year extension option, the rent became a Chapter 7 claim. That is nonsense. TGAAR cited no law in support of this novel proposition, and there is no such legal support. The Trustee has asked TGAAR to withdraw this claim as in conflict with Bankruptcy Rule 9011. The Trustee understands TGAAR currently is considering the request.

D. TGAAR's Chapter 7 Claim for Clean-up Costs Is Not Subject to Summary Judgment.

The Trustee has no idea why TGAAR asked for summary judgment on its argument that the estate should be liable for clean-up costs, since it is obvious that there is a substantial factual dispute on the issue. The matter will have to be tried.

E. TGAAR's Chapter 7 Claim for Damage Is Not Subject to Summary Judgment.

Similarly, the Trustee does not understand why TGAAR is seeking summary judgment on the issue of the estate's liability to TGAAR for alleged damage to the store, since the facts surrounding that damage (whether it occurred and/or who caused it) are in substantial dispute. The Trustee does not believe that TGAAR's store was damaged during the auction process. The Walter Parker affidavit supports the Trustee's position. Instead, it appears to the Trustee that TGAAR has been a disgruntled landlord for some time and is using every conceivable device to extract money from the estate, by fair means or foul. The fact that TGAAR has inflated the "damage" claim from \$15,000 to \$120,000 supports this view.

III. The Amended Expense Motion Should be Denied.

The Amended Expense Motion asks for the same relief as TGAAR's original motion, but also adds (i) a \$1.3 Million Chapter 7 administrative expense claim, under the theory that the Trustee is obligated for the five year lease option exercised by Furr's before the lease was rejected, and (ii) increases the claim for alleged damage to the store building caused by removing the equipment from \$15,000 to \$120,000. The Trustee objects to the Amended Expense Motion. In support of her

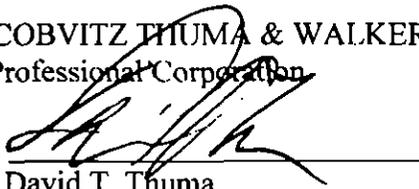
objection, the Trustee incorporates by reference her objection to the original motion, her motion for partial summary judgment, and her response to the Cross-Motion above. In addition, as set forth above the Trustee believes the \$1.3 Million Chapter 7 administrative expense claim violated Bankruptcy Rule 9011. Her counsel has put TGAAR's counsel on notice of this belief, and TGAAR's counsel currently is considering whether to withdraw the claim. Furthermore, the Trustee wonders how the "damage" claim could have ballooned from \$15,000 on August 16, 2002 up to \$120,000 on October 30, 2002. TGAAR has given no explanation why its earlier estimate of \$15,000 in claimed damages was off by \$105,000.

IV. Conclusion.

The Cross-Motion should be denied in its entirety, and the Amended Expense Motion should be denied. If TGAAR does not withdraw the portion of the Amended Expense Motion seeking a \$1.3 Million Chapter 7 expense, then the Trustee reserves the right to seek an appropriate sanction under Bankruptcy Rule 7011.

WHEREFORE, the Trustee prays that the Cross-Motion and the Amended Expense Motion be denied, and for all other just and proper relief.

JACOBVITZ THUMA & WALKER
A Professional Corporation

By: 

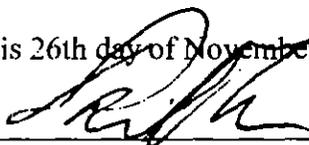
David T. Thuma
500 Marquette N.W., Suite 650
Albuquerque, New Mexico 87102
(505) 766-9272
(505) 766-9287 (fax)
Counsel for the Chapter 7 Trustee

The undersigned hereby certifies that a copy of the foregoing was mailed and e-mailed, with supporting affidavits, to:

Robert K. Whitt
505 N. Big Spring
Suite 402
Midland, TX 79701

U.S. Trustee
P.O. Box 608
Albuquerque, NM 87103

this 26th day of November, 2002.



David T. Thuma

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
FURRS SUPERMARKETS, INC.
Debtor.

Proceeding # 11-01-10779-SA

SAFEWAY, INC.
Plaintiff,

vs.

Adversary No. 01-01214-S

FURRS SUPERMARKETS, INC.,
WESTWOOD JOINT VENTURE, AND
TGAAR PROPERTIES, INC.,
Defendants.

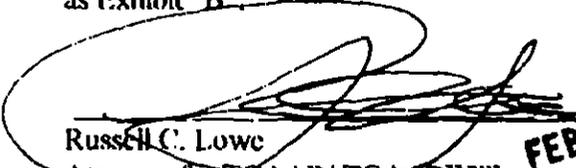
WESTWOOD JOINT VENTURE, AND
TGAAR PROPERTIES, INC.,
CounterPlaintiffs,

vs.

SAFEWAY, INC.
CounterDefendant.

**NOTICE OF WITHDRAWAL OF ADMINISTRATIVE
PROOF OF CLAIM FILED ON NOVEMBER 21, 2001
WITH REGARD TO TGAAR PROPERTIES, INC., AND STORE # 966**

PLEASE TAKE NOTICE that TGAAR PROPERTIES, INC. hereby withdraws, in its entirety, the Proof of Claim it filed by and through Gary Bailey, its President in response to the "Notice of Deadline to File Administrative Claims" mailed to the matrix by Furrs' counsel in the Chapter 11 proceeding. (See Attached POC). November 21, 2001 POC attached as Exhibit "A" and Withdrawal of 11/21/2001 POC attached as Exhibit "B".


Russell C. Lowe
Attorney for TGAAR/TGAARWII
POB 90536
Albuquerque, New Mexico 87199-0536
(505) 764-9706

FEB 22 2002

DATE: 2/22/2002

EXHIBIT

A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

NOV 21 2001

In re:
FURR'S SUPERMARKETS, INC.,
Debtor

United States Bankruptcy Court
Albuquerque, New Mexico

NOTICE OF DEADLINE TO FILE ADMINISTRATIVE CLAIMS

- Administrative Claims Must be Filed by November 23, 2001.** The United States Bankruptcy Court in this chapter 11 case has entered an Order providing that, except as set forth below, all administrative claims must be filed by November 23, 2001 (the "Admin Claim Bar Date"), or the claims will be disallowed and barred. Any claim arising post-petition (the petition date is February 8, 2001) may be an administrative claim. Examples include claims for goods or services provided to Furr's Supermarkets, Inc. ("Furr's") post-petition, and post-petition claims for personal injury, other torts, rent, taxes, severance benefits, vacation pay, wages, and health and medical benefits. Such claims may or may not be entitled to an administrative priority.
- Exceptions to the Admin. Claim Bar Date.** No former employee of Furr's need file an administrative claim by the Admin. Claim Bar Date if (a) the former employee was represented by United Food and Commercial Workers Union Local 540 or Local 1564 (the "Union"); (b) the claim is for severance benefits, vacation pay, health and medical benefits, and/or unpaid wages under a collective bargaining agreement or health and welfare trust; and (c) the former employee agrees to be bound by the outcome of any litigation by the Union with respect to such claim. Former Union employees have the right to file their own claims and retain their own counsel. The Admin. Claim Bar Date applies to any and all other administrative claims by former Furr's employees. In addition, the Admin. Claim Bar Date does not apply to reclamation claims (that bar date was filed by prior order), professional fee claims, administrative claims arising after October 31, 2001, claims under contracts or leases assumed with Court approval, or claims already filed.
- Claims Must Be Filed by the Bar Date.** All administrative claims required to be filed by the Admin Claim Bar Date must be actually received by the Clerk of this Court on or before that date. The address for filing is Office of the Clerk of the Court, United States Bankruptcy Court, Third Floor, 421 Gold Ave. S.W., Albuquerque, N.M. 87102 (or P.O. Box 546, Albuquerque, N.M. 87103). You should use the claim form attached below to file your claim. You may submit this entire page when you file your claim.
- This is Not a Pre-Petition Unsecured Claim Bar Date.** This notice does not apply to pre-petition unsecured claims against Furr's. No bar date has yet been set for filing pre-petition unsecured claims. If it appears that there may be sufficient funds available to pay a dividend to pre-petition unsecured creditors, a separate notice of bar date will be sent.
- Inquiries About This Notice.** Former Union employees who have questions about this notice may call Greg Frazer (Local 540) 504-262-2986 or Nick Sanchez (Local 540) 800-282-0714.

Robert H. Jacobvitz/David T. Thuma
JACOBVITZ, THUMA & WALKER P.C.
500 Marquette N.W., Suite 650
Albuquerque, N.M. 87102
Attorneys for the Debtor in Possession

APPLICATION FOR ALLOWANCE OF ADMINISTRATIVE CLAIM

The undersigned claims that Furr's owes the undersigned for goods, services, and/or labor sold or rendered by the undersigned to Furr's after February 8, 2001, or asserts any other post-petition claim for which the undersigned requests an administrative priority as follows (please print or type; attach invoices, contracts, or other supporting documents if applicable, attach additional sheets if necessary):

- Legal Name of Claimant: TEAK Properties, Inc. dba Westwood Village Shopping Center
- Address: 2200 N. "A" Street, Building Two, Suite 100, Midland, TX 79705
- Telephone number: 815/685-1980
- Description of services rendered or goods sold or other basis for claim: Common area-maintenance; taxes; rent due on store #368
- Date(s) services were rendered or goods were sold or claim arose: 8-1-01 continuing monthly on rent; 2-1-01 on CMA charges
- Total amount claimed: \$32,673.55 on CMA charges; \$57,131.31 on rent; total of \$90,004.86 per month

Gregory M. Kelly, President
Signature and title

Return for filing to: Clerk of Court, United States Bankruptcy Court, Third Floor, 421 Gold Ave. S.W., Albuquerque, N.M. 87102 (or P.O. Box 546, Albuquerque, N.M. 87103).

NOV 30 '01 11:12



15832428118

PAGE 03

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO (ALBUQUERQUE)

Name of Debtor FURRS SUPERMARKETS, INC.		Case Number 01-11-10770
Name of Claimant (the person or other entity to whom the debtor owes money or property): Russell C. Lynn PO Box 90334 Albuquerque, NM 87199-0336		<input type="checkbox"/> Check box if you are aware that someone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars. <input type="checkbox"/> Check box if you have never received any notice from the bankruptcy court in this case. <input type="checkbox"/> Check box if the address of claimant from the address on the envelope sent to you by the court.
Name and Address where notices should be sent: (505) 764-97056		
Telephone Number:		THE SPACE UNDER COURT USE ONLY
Account or other matter by which credit for claim can be shown:		Claim from <input type="checkbox"/> this claim <input type="checkbox"/> or from a previously filed claim, dated _____
1. Basis for Claim <input type="checkbox"/> Goods sold <input type="checkbox"/> Services performed <input type="checkbox"/> Money loaned <input type="checkbox"/> Personal injury/wrongful death <input type="checkbox"/> Taxes <input type="checkbox"/> Other NOTICE OF WITHDRAWAL OF POC (Filed Nov 21, 2001)		<input type="checkbox"/> Refers to claim as defined in 11 U.S.C. § 541(c)(2) <input type="checkbox"/> Wages, salaries, and compensation (fill out below) Your \$#: _____ Unpaid compensation for services performed from _____ to _____ (date)
2. Date claim was incurred:		3. If court judgment, date obtained:
4. Total Amount of Claim at Time Case Filed If all or part of your claim is secured or entitled to priority, also complete item 5 or 6 below <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.		
5. Secured Claim <input type="checkbox"/> Check this box if your claim is secured by collateral (including a right of setoff). Brief Description of Collateral: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other _____ Value of Collateral: \$ _____ Amount of arrearage and other charges in claim ever filed included in secured claim, if any: \$ _____		6. Unsecured Priority Claim <input type="checkbox"/> Check this box if you have an unsecured priority claim Amount entitled to priority \$: _____ Specify the priority of the claim: <input type="checkbox"/> Wages, salaries, or commissions (up to \$4,650), earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3). <input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4). <input type="checkbox"/> Up to \$ 2,100* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6). <input type="checkbox"/> Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7). <input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8). <input type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(____). <small>*Amounts are subject to adjustment on 4/1/04 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.</small>
7. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.		
8. Supporting Documents: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of account, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.		
9. Date-Stamped Copy: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.		
Date 2-20-02	Sign and print the name and title, if any, of the debtor or other person authorized to file this claim (attach copy of power of attorney, if any): Ray Bailey, Vice President	
Penalty for providing fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.		



5. During the discussion, Mr. Bailey said that I should either sell the equipment to him, pay him storage charges of some amount, or work out some other arrangement that would be mutually beneficial.

6. I took it from the conversation that TGAAR was not demanding that I immediately remove the equipment, but was instead receptive to the idea that the equipment could remain in place for some period of time to see if a grocery store tenant could be found to purchase the equipment.

7. It was clear to me from my conversation with Mr. Bailey that he understood that \$15,000 per month for storage was much more than the equipment was worth, and was excessive. I have no idea how Mr. Bailey came up with the figure of \$15,000 per month, or the figure of \$10,000 per month used for later months. I never agreed to either figure, and never agreed to pay TGAAR any other amount.

8. After our discussion in February, 2002, my records indicate that Mr. Bailey called me on March 19, 2002. Mr. Bailey left a message about the invoices, said that the store was full of equipment, and said that he needed a decision from me about what I wanted to do.

9. My records indicate that on April 18, 2002, Mr. Bailey called again and left a message with his fax number and e-mail address. There was no other message.

10. In response to the messages left by Mr. Bailey and the small amount of money TGAAR had previously offered for the equipment (I had never received any indication that TGAAR was willing to pay more than about \$5,000), I asked my attorneys to file a motion to allow an auction of the equipment at store #966. Such a motion was filed April 24, 2002.

11. My records indicate that on April 26, 2002, Mr. Bailey called and left another message. The message said nothing other than that he had called.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:

FURR'S SUPERMARKETS, INC.,

Case No. 7-01-10779-SA

Chapter 7

Debtor.

AFFIDAVIT OF WALTER PARKER

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

Walter Parker, after being duly sworn upon his oath, states:

1. I am the owner of Walter Parker Auctioneers, a sole proprietorship. I execute this Affidavit in support of the Chapter 7 Trustee's Response to TGAAR Properties, Inc.'s Cross-Motion for Partial Summary Judgment (the "Response").

2. The facts stated in this Affidavit are known to me to be true of my own knowledge or from my business records ordinarily kept in the course of regularly conducted business activities. I am competent to testify as to such facts and would so testify if I appeared in Court as a witness at the trial in this matter.

3. Before the auction of the subject equipment at former store #966 in Midland, Texas, TGAAR Properties, Inc. ("TGAAR") refused to give me or my employees access to the back of the store. Some valuable items were located there, such as refrigeration pumps, compressors, and walk-in refrigerators. Other property owned by the estate may have been stored or hidden there, but I had no way of determining this because TGAAR would not let us in the back of the store to look;

EXHIBIT

 C

4. The auction was held May 30, 2002. I left in the afternoon of May 31, 2002, my checkout people left on or about June 3, 2002, and turned over their duties to a representative of the Second Hand Store of El Paso, Texas, who we coordinate with in most auctions, and who is a trusted business associate) left on June 9, 2002. During that time, buyers of the equipment were removing their purchases from the store. One of the owners of TGAAR was present during the auction, and TGAAR's employee, named Frank, was present much of the time thereafter;

5. On June 7, 2002 TGAAR changed the locks on the building;

6. When my representative left the store on June 9, 2002, there was no appreciable damage caused by removal of the equipment;

7. While my employees and representative were at the store supervising removal of the equipment, Frank was letting people into the store at all hours. At no time did we or our associates have complete control of the building;

8. I was not able to sell certain "coffin cases," which the landlord later sold. When the buyer removed the coffin cases, I heard that the buyer damaged the floor;

9. I did not sell the copper refrigeration pipes running through the store because, although valuable, I knew that removal of the pipes could cause damage;

10. Some of the buyers knew TGAAR's owners well. One buyer, Jim Sparr of Custom-mize, who purchased certain reach-in cases, told my employee not to worry about overseeing the removal of the equipment, because he knew the owner well and was going to be at the store for a month, removing his equipment and cleaning the store; and

11. With respect to cleaning the premises, my employees did a lot of trash removal and cleaning, but were stopped fairly early on in the process by a janitorial staff

hired by TGAAR, who told them not to worry about cleaning up the store, as they were going to take care of it.

12. In summary, no significant damage was done to the store during the process of removing the equipment I sold at auction. If there was any damage, it must have occurred after June 9, 2002. Furthermore, I would gladly have left the building in a "broom clean" condition, as I had agreed to do, if I had been given control of the building and if my employees and I had not been told, by people TGAAR hired, that it was not necessary.

Further affiant sayeth not.


WALTER PARKER

VERIFICATION

STATE OF TEXAS)
)
COUNTY OF EL PASO) ss.

Walter Parker, being first duly sworn, upon his oath states that he has read the foregoing Affidavit and knows the contents thereof and that the same is true and correct to the best of his knowledge and belief.

WALTER PARKER

SUBSCRIBED AND SWORN TO before me this ____ day of November, 2002.

Notary Public

My commission expires:
