

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

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In re:

FURR'S SUPERMARKETS, INC.,

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

Debtor.

**TRUSTEE'S SUPPLEMENT TO 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 supplements her response 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"). TGAAR argues in its Cross-Motion and Amended Expense Motion that it is entitled to an administrative expense claim of more than \$1.5 Million because Furr's exercised a renewal option during the Chapter 11 bankruptcy case on TGAAR's pre-petition store lease, and because certain equipment was left at the former location until it was auctioned in May, 2001. In her response the Trustee showed why TGAAR's arguments fail. The Trustee now files this supplement to cite additional authority in support of her position.<sup>1</sup> The Trustee also submits the Affidavit of Yvette Gonzales, duly notarized, and the Affidavit of Walter Parker, in a format that is sufficient under the

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<sup>1</sup> Due to the discovery schedule in the pending avoidable preference actions, the Trustee's counsel did not get an opportunity to respond to TGAAR's cross-motion for summary judgment until November 26, 2002. This supplement expands upon the Trustee's response. The Trustee has no objection to giving TGAAR additional time to file its reply to the Trustee's response, as amended hereby.

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Federal Rules of Civil Procedure without being notarized (there is no notary convenient to Mr. Parker's office). The introductory paragraph of Mr. Parker's affidavit was also changed, to reflect

I. The Subject Lease Was Never Assumed.

For TGAAR to prevail, it must show that Furr's exercise of the renewal option for the lease at issue was tantamount to assuming the lease under 11 U.S.C. §365(a), because only by such an assumption could TGAAR have obtained an administrative claim for future rent. Courts are uniform, however, in enforcing the provision of §365 that requires notice to creditors and a court order before a debtor can assume an unexpired lease. See generally JAS Enterprises, Inc., 180 B.R. 210, 215 (D. Neb. 1995) ("because a non-debtor party to an assumed lease obtains an administrative claim, and therefore priority in payment over other unsecured creditors, by virtue of assumption of a lease, the Bankruptcy Code does not permit a debtor to assume an unexpired lease without court approval and prior notice to creditors."). See generally In re Klein Sleep Products, Inc., 78 F.3d 18, 29 (2d Cir. 1996) (since leases assumed post-petition are entitled to administrative expense status, courts will block assumption of leases except in unusual circumstances); In re Sharon Steel Corp., 872 F.2d 36, 40 (3d Cir. 1989) (addressing the argument that an executory contract had been assumed by implication, the court said "This court has not been presented with a motion to assume the contract . . . nor has there been notice thereof to creditors, nor a hearing held thereon, nor has a plan of reorganization been approved. Accordingly, we dismiss this contention as without merit."). In the Furr's Chapter 11 case, notice was given to creditors with respect to the TGAAR lease, and a court order was entered on the lease, but both were in connection with Furr's motion to reject TGAAR's lease, not to assume it. It is impossible to conclude, based on the undisputed facts and the clear legal requirements, that Furr's assumed the TGAAR lease. Without such a conclusion, TGAAR's \$1.3 Million rent claim fails.

Consistent with the foregoing, courts have held or implied that exercising a lease renewal option post-petition is not tantamount to assuming the lease, and leaves the debtor free to assume or reject the lease later in the case. See In re Circle K Corp., 127 F.3d 904, 910 (9th Cir. 1997), cert. denied, 522 U.S. 1148 (1998) (a debtor can exercise an option to renew without curing pre-petition defaults, so that the choice under section 365 to assume or reject the lease is preserved); In re Webster Clothes, Inc., 36 B.R. 260 (D. Md. 1984) (the right of a debtor to exercise a renewal option is independent of the right to assume or reject the lease, and there is no requirement that the debtor cure pre-petition defaults before it can exercise a renewal option).

II. There is no Legal Support for the Proposition that Future Rent Accruing under the TGAAR Lease in the Option Period Could Ever be a Chapter 7 Administrative Expense.

There is no support in the law for TGAAR's proposition that claimed future rent owed under the subject lease (apparently because Furr's exercised a renewal option post-petition), could ever be considered a Chapter 7 administrative expense claim in the converted Chapter 7 case. Indeed, in cases facts far more favorable to the landlord courts have limited the administrative expense claims to a Chapter 11 expense, not a chapter 7 expense. See, e.g., In re Merry-Go-Round Enterprises, Inc., 180 F.3d 149 (4<sup>th</sup> Cir. 1999) (new lease entered into by the debtor in possession could not be rejected by the subsequent chapter 7 trustee (because §364(d)(4) only applies to pre-petition leases), but landlord was nevertheless limited to a Chapter 11 administrative expense); In re Lamparter Organization, Inc., 207 B.R. 48 (E.D.N.Y. 1997) (on facts similar to those in Merry-Go-Round, the future rent claim amount was treated as a Chapter 11 administrative expense claim, not a Chapter 7 expense claim). The facts of these two cases were favorable for the landlord because new, post-petition leases arguably cannot be rejected by a subsequent chapter 7 trustee, as the language of §365(d)(4) has been held to apply only to leases entered into by the debtor, not the debtor in

possession. Where, as here, the best TGAAR could hope for is a finding that Furr's implicitly assumed TGAAR's pre-petition lease (it did not), TGAAR clearly cannot have a Chapter 7 administrative expense for all future rent under the subject lease. Such a result is blocked by §364(d)(3), which provides for automatic rejection of all leases that are not assumed within 60 days of conversion to Chapter 7.

III. TGAAR's Administrative Expense Claim For Post-Rejection Storage Costs is Limited to Actual Benefit to the Estate.

To obtain an administrative expense claim (either Chapter 11 or Chapter 7) for "storing" the equipment at issue, TGAAR must demonstrate that its actions actually benefited the estate. In re Mainstream Access, Inc., 134 B.R. 743, 750 (Bankr. S.D.N.Y. 1991) (the mere potential for benefit to the estate does not satisfy the requirement of §503(b)(1) that the estate receive an actual benefit); JAS Enterprises, Inc., 180 B.R. at 219 (same); Kinnan & Kinnan Partnership v. Agristor Leasing, 116 B.R. 162, 166 (D. Neb. 1990) (same). TGAAR has the burden of proof on this issue. JAS Enterprises, Inc., 180 B.R. at 218, citing In re Butcher, 108 B.R. 634, 637 (Bankr. E.D. Tenn. 1989) and In re Communications Management & Information Inc., 172 B.R. 136, 141 (Bankr. N.D. Ga. 1994).

V. The Post-Rejection Storage Charges Cannot Exceed the Benefit to the Estate.

The estate received little or no benefit for leaving the subject equipment at TGAAR's empty store property after August 31, 2001: The total auction proceeds were approximately \$15,000, and the estate is entitled to only 10% of those proceeds. The majority rule is that an administrative claim for preserving or "storing" the estate's personal property must bear some reasonable relationship to, and/or not exceed, the value of the equipment stored. See In re C&L Country Market, Inc., 52 B.R. 61 (Bankr. E.D. Pa. 1985) ("in the absence of countervailing circumstances, the actual, necessary

costs and expenses of preserving assets of the estate under §503(b)(1)(A) cannot exceed the value of those assets”). In re Waxman, 148 B.R. 178, 183 (E.D.N.Y. 1992) (citing C&L Country Market); In re Lenny’s Distributors, Inc., 1990 WL 790 (Bankr. E.D. Pa. 1990) (following C&L Market).

VI. The Court Should Deny All Storage Charges, Given TGAAR’s Conduct in the Case.

In one case with similar facts the bankruptcy court denied the landlord any administrative expense claim for post-rejection rent or storage charges. The landlord in In re Mainstream Access, Inc., 134 B.R. at 74, submitted an administrative expense claim for \$297,231.13, based upon the fact that the debtor left furniture and other property in the leased premises after the lease was rejected.<sup>2</sup> The claim represented pro-rated rent and related charges from October 17, 1989 until March 22, 1990, when the property was sold, over the landlord’s objection, at auction. In denying the landlord’s claim in its entirety, the bankruptcy court held:

In this case, Debtor had no equity in the property, and no plans to use it in its reorganization. Had it so desired, Landlord could have pursued any one of a number of options to rid itself of Debtor and Debtor’s property. First, Landlord could have moved as soon as Debtor commenced this proceeding for an order requiring Debtor to assume or reject immediately. [citation omitted] Second, when Debtor did attempt to arrange to move its property on Nov. 1, 1989, Landlord could have allowed Debtor to do so, and then filed an administrative expense claim for the “actual, necessary costs and expenses of preserving the estate.” 11 U.S.C. §503(b)(1). A third possibility is based on Article 19 of the Lease, which required Debtor to remove all property on request of Landlord. Prior to rejection of the Lease by operation of law on Oct. 17, 1989, Landlord could have, but did not, request that the property be removed. Such a request made pre-rejection would have created in this debtor-in-possession a duty to “timely perform all of the obligations of the debtor . . . under [the] unexpired lease of nonresidential real property.” 11 U.S.C. § 365(d)(3). A fourth option was to move for relief from the stay to take possession of the premises and the personalty that remained there. [citation omitted] Fifth, Landlord could have moved for an order requiring the property to be abandoned. . . .

Landlord took no steps to get Debtor out the door. Rather, what Landlord has

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<sup>2</sup> The property was pledged to a secured lender, although the secured lender had failed to properly perfect its security interest, and ultimately the property’s net sale proceeds went to pay the landlord’s lien.

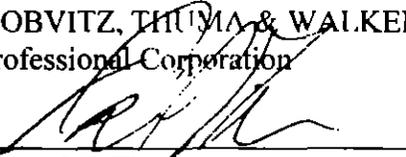
done is to hold on tight and demand that Debtor pay for a dance it tried to avoid.

134. B.R. at 749. Holding that the Debtor received no actual benefit from having its property sit at the leased premises after rejection of the lease, the court denied the administrative expense claim in its entirety.

The TGAAR claim is similar. TGAAR made very low offers to purchase the subject equipment, objected to the Trustee's motion to auction the equipment, always took the position that the equipment could not be sold without paying TGAAR large sums of money, and never made the slightest effort to have the equipment removed. Only when (over TGAAR's objection) the equipment was sold at auction<sup>3</sup> did TGAAR take action in this Court, filing a \$1.5 Million administrative expense claim. Under these circumstances, the Court, after a trial of all factually disputed issues, should deny TGAAR's claim in its entirety.

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

Counsel for the Chapter 7 Trustee

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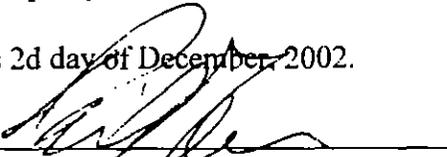
<sup>3</sup> According to the auctioneer retained by the Trustee, TGAAR did not cooperate in the auction process, did not allow the auctioneer to sell all of the property on site, did not give the auctioneer access to the entire premises, allowed people unrelated to the auction process to come and go in the building at all hours, sold property that remained after the auction was over to unrelated third parties, and is now attempting to collect \$120,000 from the estate for damage allegedly caused by auction buyers, when any such damage could only have been caused by persons who bought the estate's property from TGAAR, not the auctioneer.

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

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

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

this 2d day of December, 2002.

  
\_\_\_\_\_  
David T. Thuma



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.

12. My records do not indicate any other conversations with Mr. Bailey or anyone else at TGAAR.

13. Until it became clear to me that Mr. Bailey wanted the equipment to be removed or to be able to purchase the equipment for a nominal amount, I was under the impression based on what Mr. Bailey said to me that a more reasonable, middle course

could be negotiated, e.g., to leave the equipment at the store for some period of time while Mr. Bailey attempted to find a grocery store tenant.

14. As soon as it became clear to me that no such "win-win" solution could be agreed to, I immediately began the process of removing the equipment by auction sale.

15. I never received any protests from TGAAR after the auction was completed.

Further affiant sayeth not.

*Yvette J. Gonzales*  
YVETTE J. GONZALES

VERIFICATION

STATE OF NEW MEXICO }  
COUNTY OF SANDOVAL }

ss.

Yvette J. Gonzales, being first duly sworn, upon her oath states that she has read the foregoing Affidavit and knows the contents thereof and that the same is true and correct to the best of her knowledge and belief.

*Yvette J. Gonzales*  
YVETTE J. GONZALES

SUBSCRIBED AND SWORN TO before me this 2<sup>nd</sup> day of December, 2002.

*Guillermo Chavez*  
Notary Public

My commission expires:

~~November~~ October 28<sup>th</sup>, 2003



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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**

Walter Parker, swears and declares as follows:

1. I am the sole shareholder of Walter Parker, Auctioneer, Inc., a Texas corporation formed on September 3, 2002. The activities hereinafter referred to were conducted by Walter Parker, Auctioneer, 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;

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.

I declare under penalty of perjury that the foregoing is true and correct. Executed on the 2 day of December, 2002.

  
WALTER PARKER