

IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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

IN RE:

FURR'S SUPERMARKETS, INC.,

DEBTOR.

§
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§
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§
§

NO. 7-01-10779-SA

Chapter 7

**TGAAR'S RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT OR ORDER
OR, ALTERNATIVELY
MOTION TO LATE-FILE ADMINISTRATIVE EXPENSE CLAIM**

COMES NOW, TGAAR PROPERTIES, INC., d/b/a WESTWOOD VILLAGE SHOPPING CENTER and TGAAR WEST TEXAS, INC. (collectively referred to as "TGAAR") and files this Motion Under Fed. R. Civ. Proc. 60(b) for Relief from Judgment or Order or, Alternatively Motion to Late-File Administrative Expense Claim and would show unto the Court as follows:

1. TGAAR filed a Cross-Motion for Partial Summary Judgment on October 30, 2002 (Dkt. #1928). The Chapter 7 Trustee filed a response on or about November 26, 2002 (Dkt. #1955).
2. In her Response, the Chapter 7 Trustee argues that the "Notice of Withdrawal" (Dkt. #1577), attached to such Response as Exhibit "A", bars TGAAR's administrative expense claim.
3. For the reasons stated in its Reply to such Response, TGAAR does not believe that such Notice of Withdrawal constitutes an Order or otherwise bars TGAAR's administrative expense claim. In the event that such Notice of Withdrawal would bar or otherwise adversely effect TGAAR's administrative expense claim, TGAAR believes that such Notice of Withdrawal should

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be allowed to be withdrawn or that it should be vacated or set aside. Alternatively, TGAAR should be allowed to late-file “for cause” an administrative expense claim under 11 U.S.C. §503(a).

4. In support of this Motion, the Affidavit of Gary Baily and Gary Glasscock is attached hereto (the “Affidavit”).

5. The Notice of Withdrawal does not purport to be a motion or other request for relief as it did not initiate a contested matter. Further, it was not served in the manner that a pleading in a contested matter was required to have been served.

6. Claims filed under 11 U. S. C. §503(b) are contested matters to which Bankruptcy Rule 9014 applies. Such Rule 9014 provides that Bankruptcy Rule 7054, among others, applies to contested matters unless the “court otherwise directs.” Bankruptcy Rule 7054, in turn, provides that Fed.R.Civ.P. 54(a)-(c) applies, which rules require the entry of a judgment or other order that can be appealed. Since the Notice of Withdrawal requested no relief, was not served as pleadings in contested matters are required to be served (including upon TGAAR) and no order was entered, the Notice of Withdrawal should be treated as a nullity and disregarded.

7. TGAAR was represented by different counsel at the time the Notice of Withdrawal was filed (Affidavit ¶3).

8. TGAAR filed an Application for Allowance of Administrative Expense Claim (the “Application”) on the form it received from the Clerk of the Court. A true and correct copy of such Application, signed on behalf of TGAAR by a representative authorized to do so, is attached to the Affidavit as Exhibit “A” (Affidavit ¶4).

9. Subsequently, TGAAR’s counsel obtained from TGAAR a signed, blank Proof of Claim form, which was filled-in without TGAAR’s approval or knowledge to make it a withdrawal of TGAAR’s administrative expense claim (Affidavit ¶5).

10. TGAAR was not told by its counsel that such counsel was planning to file the Notice of Withdrawal. TGAAR did not authorize any withdrawal of its administrative expense claim. Further, TGAAR was not told that the “blank” Proof of Claim form was to be filled-in in the manner that is attached to the Notice of Withdrawal. Such actions taken by TGAAR’s counsel were not authorized by TGAAR nor were they taken with the knowledge or consent of TGAAR (Affidavit ¶6). The filing of the Notice of Withdrawal did not comply with Bankruptcy Rule 9011.

11. Fed. R. Civ. P. 60(b) provides that “the Court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (6) any other reason justifying relief from the operation of the judgment.”

12. This Motion has been filed within a reasonable time since the Notice of Withdrawal was filed not more than one year after it was filed. Fed. R. Civ. P. 60(b).

13. The foregoing, including the Affidavit, demonstrate that the Notice of Withdrawal was filed by mistake, inadvertence, surprise or excusable neglect or for sufficient other reasons justifying relief. Fed. R. Civ. P. 60(b). TGAAR should not lose its administrative expense claim because its former counsel filed the Notice of Withdrawal, without any authority from TGAAR and without the knowledge of TGAAR. In the event that the Court deems such Notice of Withdrawal as an Order of the Court or views TGAAR’s claim as being withdrawn by such Notice of Withdrawal, TGAAR should be allowed to withdraw such Notice of Withdrawal or such Notice of Withdrawal should be vacated or set aside.

14. A motion to vacate or set aside under Fed. R. Civ. P. 60(b) “is directed to the discretion of the court entering the judgment.” *Thompson v. Kerr-McGee Refining Corp.*, 660 F. 2d 1380, 1385 (10th Cir. 1981). Fed. R. Civ. P. 60(b) ”gives the court a grand reservoir of equitable

power to do justice in a particular case.” *Id.* “That rule should be liberally construed when substantial justice will thus be served.” *Id.*, citing *Pierce v. Cook & Co.*, 518 F. 2d 720, 722 (10th Cir. 1975) (*en banc*).

15. Justice would be served by allowing the Notice of Withdrawal to be withdrawn or vacating same if it constitutes an order under Fed. R. Civ. P. 54. Alternatively, TGAAR should be allowed to late-file a claim under 11 U. S. C. §503(a).

WHEREFORE, PREMISES CONSIDERED, TGAAR requests that this Motion be granted, that TGAAR be allowed to withdraw the Notice of Withdrawal or, if such Notice of Withdrawal constitutes an order, enter an Order vacating or setting aside such Notice of Withdrawal. Alternatively, TGAAR requests that it be allowed to late-file “for cause” its administrative expense claim. TGAAR further requests that this Court grant such other and further relief as may be appropriate.

Dated this 10th day of December, 2002.

Respectfully submitted,

ROBERT K. WHITT
Tex. State Bar No. 21386500
505 N. Big Spring, Suite 402
Midland, Texas 79701
(915) 686-2000 / FAX: (915) 686-2009

BY: 

Robert K. Whitt

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

CERTIFICATE OF SERVICE

I certify that on the 10th day of December, 2002, I mailed and faxed a copy of the foregoing pleading to the following person:

David T. Thuma
500 Marquette N.W., Suite 650
Albuquerque, NM 87102



Robert K. Whitt

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

IN RE:	§	
	§	NO. 7-01-10779-SA
FURR'S SUPERMARKETS, INC.,	§	
	§	Chapter 7
	§	
DEBTOR.	§	

AFFIDAVIT OF GARY R. BAILY AND GARY M. GLASSCOCK

STATE OF TEXAS §
 §
COUNTY OF MIDLAND §

BEFORE ME, on this day personally appeared the undersigned affiants who, after being duly sworn, did depose on their oaths and say as follows:

1. Our names are Gary R. Baily and Gary M. Glasscock. We are both over the age of 21 years, have never been convicted of a crime, have personal knowledge of the matters stated herein and are fully competent to testify to the matters stated herein.

2. We are both officers, directors and owners of TGAAR Properties, Inc. ("TGAAR Properties") and TGAAR West Texas, Inc. ("TGAAR West Texas"). We have been engaged in the commercial real estate business for in excess of 12 years in Midland, Texas and other parts of West Texas and New Mexico and are familiar with the commercial real estate business in Midland, Texas.

3 TGAAR was represented by different counsel at the time the Notice of Withdrawal was filed.

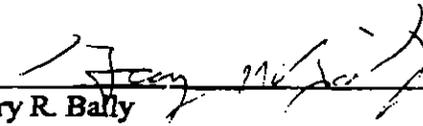
4. TGAAR filed an Application for Allowance of Administrative Expense Claim (the "Application") on the form it received from the Clerk of the Court. A true and correct copy of such Application is attached hereto as Exhibit "A".

5. Subsequently, it is believed that TGAAR's counsel obtained from TGAAR a signed, blank Proof of Claim form, which was filled-in without TGAAR's approval or knowledge to make it a withdrawal of TGAAR's administrative expense claims.

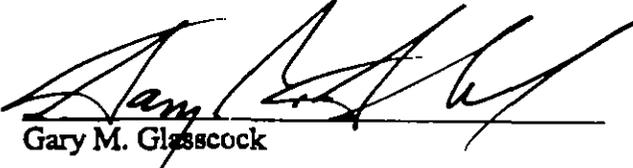
6. TGAAR was not told by its counsel that such counsel was planning to file the Notice of Withdrawal. TGAAR did not authorize any withdrawal of its administrative expense claim. Further, TGAAR was not told that the "blank" Proof of Claim form was to be filled-in in the manner that is attached to the Notice of Withdrawal. Such actions taken by TGAAR's counsel were not authorized by TGAAR nor were they taken with the knowledge or consent of TGAAR.

We have read the foregoing statements and they are true and correct.

FURTHER AFFIANTS SAITH NOT.



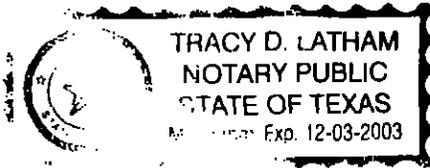
Gary R. Bally



Gary M. Glasscock

THE STATE OF TEXAS §
 §
COUNTY OF MIDLAND §

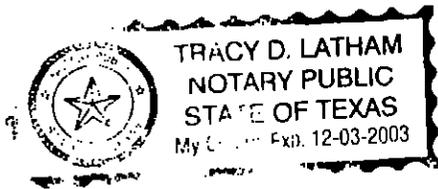
SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me on the 9th day of December, 2002, by Gary R. Baily.



Tracy D. Latham
Notary Public, State of Texas

THE STATE OF TEXAS §
 §
COUNTY OF MIDLAND §

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me on the 9th day of December, 2002, by Gary M. Glasscock.



Tracy D. Latham
Notary Public, State of Texas

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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

Case No. 01-11-10079
Chapter 11

NOTICE OF DEADLINE TO FILE ADMINISTRATIVE CLAIMS

- 1. 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.
- 2. 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 fixed 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.
- 3. 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.
- 4. 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.
- 5. Inquiries About This Notice.** Former Union employees who have questions about this notice may call Greg Frazier (Local 1564) 505-262-1986 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):

1. Legal Name of Claimant: Tqaar Properties, Inc. dba Westwood Village Shopping Center
2. Address: 2200 N. "A" Street, Building Two, Suite 100, Midland, TX 79705
3. Telephone number: 915/685-1980
4. Description of services rendered or goods sold or other basis for claim: Common area-maintenance; taxes; rent due on Store #966
5. Date(s) services were rendered or goods were sold or claim arose: 9-1-01 continuing monthly on rent; 3-1-01 on CAM charges
6. Total amount claimed: \$ 32,673.86 on CAM charges; rent \$57,131.31 on rent continuing at \$19,043.77 per month.

Gary R. Bailey
Signature and title Gary Bailey, President

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).

Exhibit A