

IN THE UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

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2002 DEC 11 AM 11:28

IN RE:

FURR'S SUPERMARKETS, INC.,  
INC.,

DEBTOR.

§  
§  
§  
§  
§  
§

NO. 11-01-10779-SA

Chapter 11

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

**TGAAR'S REPLY  
TO  
TRUSTEE'S RESPONSE TO TGAAR'S CROSS-MOTION  
FOR PARTIAL SUMMARY JUDGMENT  
AND TO THE  
TRUSTEE'S SUPPLEMENT TO RESPONSE**

COMES NOW, TGAAR PROPERTIES, INC., d/b/a WESTWOOD VILLAGE SHOPPING CENTER and TGAAR WEST TEXAS, INC. (collectively referred to as "TGAAR") and, pursuant to N. Mex. L. Bankr. R. 7056, files this Reply to Trustee's Response to TGAAR's Cross-Motion for Partial Summary Judgment and to the Trustee's Supplement to Response:

**I.**

**OBJECTION TO LATE-FILED RESPONSE**

1. TGAAR filed its Cross-Motion for Partial Summary Judgment on October 29, 2002 (Dkt. #1928). A copy was delivered to opposing counsel by overnight delivery on the same date.

2. Under N. Mex. L. Bankr. R. 7056, "A party opposing the motion shall, within 20 days after service of the motion file a written memorandum containing a short, concise statement in opposition to the motion with authorities." The Chapter 7 Trustee's Response to TGAAR's Cross-Motion for Partial Summary Judgment was thus due on November 18, 2002.



3. The Chapter 7 Trustee filed its belated Response on November 26, 2002 and filed a Supplement to Response (citing authorities) on December 3, 2002. This Reply is timely filed within 10 days of the Supplement to Response.

4. N. Mex. L. Bankr. R. 7056 provides that "All material facts set forth in the statement of the Movant shall be deemed admitted unless specifically controverted."

5. Due to the untimeliness of the Response and the failure to request leave to file a tardy Response, all of the summary judgment evidence contained in TGAAR's Cross-Motion should "be deemed admitted" since it was not timely and specifically controverted. N. Mex. L. Bankr. R. 7056.

6. On the basis of the undisputed facts contained in TGAAR's Cross-Motion for Partial Summary Judgment, such motion should be granted and judgment should be entered for TGAAR except on the issues of (a) the amount of damages to the Lease premises and (b) the amount of the clean-up costs. (Fed.R.Civ.P. 56(c)).

## II.

### **DISPUTED vs. UNDISPUTED FACTS**

1. The Chapter 7 Trustee's Response purports to deny the allegations in ¶'s 3 (partial), 13, 14, 16, 19 (partial), 20, 21, 22, 23 (partial), 25 (partial), 26, 28-36, 37 (partial), and 38-41.

2. In order to controvert competent summary judgment evidence, a party must come forward with competent summary judgment evidence, i.e. sworn denials, that dispute the facts advanced by the moving party. Fed.R.Civ.P. 56 (e) provides that "an adverse party may not rest upon mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits...must set forth specific facts showing there is a genuine issue for trial."

3. The Chapter 7 Trustee belatedly attached two "Affidavits," the "Gonzales Affidavit" and the "Parker Affidavit," to its Response. Even if such Affidavits are considered, they controvert only a very small portion of the facts set forth in paragraphs listed in ¶1, above. Specifically, the Affidavits do not controvert the factual allegations set forth in ¶'s 13, 16, 19, 20, 21, 22, 23, 25, 26 (the Gonzales Affidavit actually admits the facts in ¶26, while the Response denies them), 29, 30, 31, 33, 34, 35, 37, 38, 39, 40, or 41. All of those facts should therefore be "deemed admitted" under N. Mex. L. Bankr. R. 7056 and under Fed.R.Civ.P. 56(e).

4. TGAAR objects to the last sentence of ¶8 of the Parker Affidavit as it constitutes inadmissible hearsay evidence that is also untrue.

### III.

#### **NOTICE OF WITHDRAWAL SHOULD NOT BAR TGAAR'S CHAPTER 11 CLAIMS**

The Notice of Withdrawal should not bar TGAAR's administrative expense claim because:

1. Such Notice of Withdrawal was filed by TGAAR's former counsel without authority to do so and without the knowledge or consent of TGAAR. Sec ¶6 of the Affidavit of Gary Baily and Gary Glasscock attached hereto (the "TGAAR"). It is believed that Exhibit "B" to the Notice of Withdrawal was filled-in after it was signed and converted into a withdrawal claim without the knowledge or consent of TGAAR (TGAAR Affidavit ¶5-6).

2. The Notice of Withdrawal was filed, for whatever reason, in Adversary Proceeding No. 01-01214-5, but it is also docketed in this case as Dkt. No. 1577.

3. To TGAAR's knowledge, no order was entered allowing the withdrawal of the claim either in this bankruptcy case or in Adversary Proceeding No. 01-01214-5.

4. TGAAR has filed a motion under Fed. R. Civ. P. 60(b) to allow it to withdraw the Notice of Withdrawal or to vacate or set aside the Notice of Withdrawal if it constitutes an order or would otherwise be deemed to be binding upon TGAAR. Such motion also requests the Court to permit, under 11 U.S.C. §503(a), the “tardy” filing of an administrative expense claim “for cause” and “cause” has clearly been shown based on the unauthorized filing of same by TGAAR’s previous counsel.

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.

#### IV.

#### **CHAPTER 7 TRUSTEE’S RELIANCE UPON THE ORDER DATED SEPTEMBER 6, 2001 IS MISPLACED**

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

2. The Trustee’s Response states that “the Court’s order specifically held that Furr’s had surrendered the premises.” TGAAR respectfully disagrees as there is not believed

to be any such holding in such Order. Instead, such Order (¶3) states that “the Debtor is **deemed** to have surrendered such Rejected Leased Property effective as of August 31, 2002.”

3. Next, the Trustee’s Response states that “As of September 1, 2002 (sic), the estates’ post-petition liability under the lease therefore was extinguished.” Such statement is also untrue as the Order specifically states (¶6) that “This Order does not resolve any issues, claims and defenses regarding allowance, amount, or payment of administrative expense claims, if any, of the lessors of the Rejected Leased Property; all such issues, claims and defenses being preserved without prejudice.”

4. The rejection of the post-petition Lease did not absolve the Chapter 11 bankruptcy estate of administrative expense claims for the post-August 31<sup>st</sup> actual use of the Lease premises as such actual use occurred after the Order was signed (save and except 6 days).

5. The Chapter 7 Trustee cited no authority to support its position and none is believed to exist. In contrast, TGAAR cited numerous cases in the Memorandum of Law (Dkt. #1931) filed to support its Cross-Motion (See p. 4), including: “*In re: Climax Chemical Co.*, 167 B.R. 665 (Bankr. N. Mex. 1994) (freight services); *In re: Amarex, Inc., supra*, (portion of bonus attributable to services performed post-petition allowed as an administrative expense); *In re: Cochise College Park, Inc.*, 703 F.2d 1339, 1354 (9<sup>th</sup> Cir. 1983) (where the “trustee actually uses the property, the law is clear” – an administrative expense is allowed); *In re: Dant & Russell, Inc.*, 853 F.3d 700, 701 and 706 (9<sup>th</sup> Cir. 1988) (debtor-in-possession continued to use leased sites for more than a year after bankruptcy filing); *Matter of Hearth & Hinge, Inc.*, 28 B.R. 5959 (S.D. Ohio 1983) (storage of property protected and preserved the estate’s assets); *In re: Thompson*, 788 F.2d 560, 562 (9<sup>th</sup> Cir. 1986).”

6. In her Response, the Chapter 7 Trustee ignored the fact that 11 U.S.C. §365 has no application to the post-petition exercise of the option to extend the Lease. *In re Merry-Go-Round Enterprises, Inc.*, 180 F.3d 149, 161 (4<sup>th</sup> Cir. 1999) (“the application of § 365 [is limited] to prepetition leases ... the Trustee **could not have rejected** the Cutler Ridge lease.”). TGAAR’s Memorandum of Law (Dkt. #1931; p.8) cites numerous additional cases so holding and the Chapter 7 Trustee has yet to cite any authority to the contrary.

7. If the Court is inclined to accept the argument of the Chapter 7 Trustee that the September 6, 2001 Order (DKT. #1031) “held that Furr’s had surrendered the premises,” then the Court should instead vacate or modify the September 6, 2001 Order because it was based on a motion that contained a material misrepresentation of fact. *In re Muma Services, Inc.*, 279 B.R. 478, 486 (Bankr. Del. 2002).

8. In its Motion to Reject Certain Unexpired Real Estate Leases, Subleases and Equipment Leases filed on August 17, 2001 (Dkt. #903), the debtor-in-possession represented that “The Debtor is willing to surrender the leased property on or before August 31, 2001.” TGAAR will show that the debtor in possession knew at that time that it would not completely surrender possession of the Lease premises by August 31, 2001, because the debtor-in-possession knew that it would leave the equipment in the Lease premises (and leave other equipment in other similar lease premises).

## V.

### **POST-PETITION EXERCISE OF OPTION TO EXTEND LEASE CREATED A NEW FIVE-YEAR OBLIGATION**

1. The Chapter 7 Trustee claims that “For TGAAR to prevail, it must show that [the Chapter 11 debtor-in-possession’s] exercise of the renewal option for the lease at issue

was tantamount to assuming the lease under 11 U.S.C. §365(a).” Such statement is devoid of truth and the Trustee’s elaborate argument is simply a smokescreen to avoid the real issue to which the Chapter 7 Trustee has no real response and no authority to cite that is contrary to the authorities on this point cited by TGAAR in its Memorandum of Law (Dkt. #1931, pp. 4-8).

2. First, 11 U.S.C. §365 applies only to pre-petition leases entered into by the Debtor and does not apply to leases executed by the debtor-in-possession. In its Memorandum of Law (Dkt. #1931, p. 4), TGAAR cited the following authorities to support its position:

*“See In re: Cannonsburg Envtl. Assoc., Ltd.*, 72 F.3d 1260, 1265-66 (6<sup>th</sup> Cir. 1996) (“Section 365 does not apply to postpetition contracts or leases negotiated by the debtor-in-possession. . . It would create a financial disincentive for creditors to deal with the debtor-in-possession because holders of administrative expense claims are paid in full, whereas holders of unsecured claims usually receive a smaller distribution.”); *In re: Dant & Russell, Inc.*, 853 F.2d 700, 706 (9<sup>th</sup> Cir. 1988) (“Contrary to debtor-in-possession’s contention, section 365 (a) is inapplicable to leases executed postpetition as that section contemplates a prepetition lease or executory contract which is unexpired on the date of the petition.”); *MGRE, supra* (“The debtor means a person ‘concerning which a case under this title has been commenced.’ 11 U.S.C.A. §101(13). A debtor-in-possession, on the other hand, is a person that only comes into existence when a Chapter 11 case is filed. . . This case now is under Chapter 7, and in Chapter 7 the subject lease is not a lease of the debtor, but rather is a lease of the debtor-in-possession before conversion.”); *In re: Leslie Fay Cos., Inc.*, 168 B.R. 294, 300 (Bankr. S.D.N.Y. 1994) (postpetition contracts are not subject to rejection under 11 U.S.C. §365); *In re: Airport Executive Center*, 138 B.R. 628, 629 (Bankr. M.D. Fla. 1992) (same); *In re: I.M.L. Freight, Inc.*, 37 B.R. 556, 558-59 (Bankr. Utah 1984) (same). (Memorandum of Law, Dkt. #1931), p. 8.”

In her Response, the Chapter 7 Trustee ignored this argument and cited no contrary authorities (and none are believed to exist).

3. Second, the Chapter 7 Trustee tried to recast TGAAR's position to ignore the fact that the option to extend the lease was exercised post-petition and created a new post-petition obligation. TGAAR **has never** argued that the pre-petition lease was "assumed;" nevertheless, the Chapter 7 Trustee relies entirely on this faulty premise.

4. Third, the Chapter 7 Trustee cited no authorities that conflict with the authorities that TGAAR cited on pp. 5-6 of its Memorandum of Law (Dkt. #1931) that discuss the administrative expense status of rentals accruing under contracts entered into post-petition. The Chapter 7 Trustee even cited the decision in *In re: Merry-Go-Round Enterprises, Inc.*, 180 F.3d 149, 156-57 (4<sup>th</sup> Cir. 1999) and *In re: Lampartar Organization, Inc.*, 207 B.R. 48 (E. D. N.Y. 1997) in its Supplement to Response (Dkt. #1958, p.3) on another issue, but failed to acknowledge these cases, much less distinguish them, on this issue even though they are directly in point.

5. Having presented no contrary authority or summary judgment evidence to TGAAR's position and having made no credible argument contrary to TGAAR's position, TGAAR should be granted summary judgment on this issue.

## VI.

### **CHAPTER 7 VS. CHAPTER 11 ADMINISTRATIVE EXPENSES**

1. The Chapter 7 Trustee also argues that the rental expense resulting from the post-petition (but pre-conversion) exercise of the option to extend the Lease by the Chapter 11

debtor-in-possession should be treated as a Chapter 7 administrative expense, not a Chapter 11 administrative expense, as claimed by TGAAR.

2. TGAAR has cited the decision *In re Merry-Go-Round Enterprises, Inc.*, *supra*, 180 F.3d at 162. TGAAR admits that such case holds that the future rent in that case was held to be a Chapter 11 administrative expense rather than a Chapter 7 administrative expense (and even better discussion of such issue in such case is found in *In re Merry-Go-Round Enterprises, Inc.*, 208 B.R. 637 (Bankr. Md. 1997)). However, two facts distinguish the facts in this case from that case.

3. First, the 5-year post-petition obligation in this case commenced **after**, not before, the conversion to Chapter 7. On this basis, all of the future rent should be treated as a Chapter 7 administrative expense since the default occurred after the conversion (on December 19, 2001), since the 5-year option period commenced on January 1, 2002 (the option to extend had to be exercised at least 6 months before the end of the lease term).

4. Second, the Chapter 7 Trustee actually used the Lease premises (to store and protect the equipment and to conduct the auction) from December 19, 2001 through July 3, 2002, the date TGAAR was finally allowed to remove the remaining equipment. Since this actual usage occurred during the Chapter 7 Trustee's "watch," at least the rentals accruing under the post-petition 5-year Lease obligation during the period of the Trustee's actual use should be treated as a Chapter 7 administrative expense.

5. Other cases dealing with the issue of post-petition rental obligations (and holding them to be proper administrative expenses are not clear in distinguishing between whether such expenses should be treated as Chapter 7 expenses or as Chapter 11 expenses.

*See e.g., In re: Chugiak Boat Works, Inc.*, 18 B.R. 292 (Bankr. Alaska 1982); *In re Lamparter Organization, Inc.*, *supra*.

## VII.

### **CHAPTER 7 AND 11 CLAIMS FOR ACTUAL USE ARE MERITORIOUS**

1. In her Response, the Chapter 7 Trustee admits she received an invoice for \$15,000.00 of rent, admits she spoke by telephone with Gary Baily of TGAAR and admits that Gary Baily telephoned her on at least three (3) times but she failed to return any of these phone calls (Gonzales Affidavit ¶'s 3-4, 8-12).

2. Based on the fact that the Chapter 7 Trustee "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" (Gonzales Affidavit ¶6), the Chapter 7 Trustee argues that TGAAR's administrative expense claim (partly Chapter 11, partly Chapter 7) for rent for the period the equipment was left in the Lease premises is without merit.

3. The Chapter 7 Trustee's argument ignores the fact that the equipment was left in the Lease premises from September 1, 2001 through July 3, 2002 (See Cross-Motion, Dkt. #1928; Gary Baily Affidavit ¶22).

4. TGAAR admits that it has the burden of proof of establishing that the use of the Lease premises to store the equipment and to conduct the auction "actually benefited the estate" as the Chapter 7 Trustee argued in her Supplement to Response (Dkt. #1958, p. 4).

5. In its Memorandum of Law (Dkt. #1931, p. 4), TGAAR said:

“This case does not involve a situation where the debtor-in-possession possessed, but did not actually use, the property in question. See *In re: Mid Region Petroleum, Inc.*, *supra*, (*GATX railcars not used at all*). Instead this case involves a situation where Store #966 was actually used to store and protect the grocery store equipment left therein and such usage actually benefited the estate. *In re: Climax Chemical Co.*, 167 B.R. 665 (Bankr. N. Mex. 1994) (*freight services*); *In re: Amarex, Inc.*, *supra*, (portion of bonus attributable to services performed post-petition allowed as an administrative expense); *In re: Cochise College Park, Inc.*, 703 F.2d 1339, 1354 (9<sup>th</sup> Cir. 1983) (where the “trustee actually uses the property, the law is clear” and an administrative expense is allowed); *In re: Dant & Russell, Inc.*, 853 F.3d 700, 701 and 706 (9<sup>th</sup> Cir. 1988) (debtor-in-possession continued to use leased sites for more than a year after bankruptcy filing); *Matter of Hearth & Hinge, Inc.*, 28 B.R. 595 (S.D. Ohio 1983) (storage of property protected and preserved the estate’s assets); *In re: Thompson*, 788 F.2d 560, 562 (9<sup>th</sup> Cir. 1986).”

Additional authorities holding that the actual post-petition use entitles the landlord (or other party) to an administrative expense claim include *In re: Muma Services, Inc.* 279 B.R. 478, 489 (Bankr. Del. 2002); *In re: Beverage Canners International Corp.*, 255 B.R. 89, 93-94 (Bankr. S.D. Fla. 2000); *In re: Section 20 Land Group, Ltd.*, 261 B.R. 711, 716-717 (Bankr. M.D. Fla. 2000); *In re: Raymond Cossette Trucking, Inc.*, 231 B.R. 80, 85 (Bankr. N.D. 1999); *In re: Patient Education Media, Inc.*, 221 B.R. 97, 103-04 (Bankr. S.D.N.Y. 1998); *In re: Roberds, Inc.*, 270 B.R. 702 (Bankr. S.D. Ohio 2001); *In re: Trak Auto Corp.*, 277 B.R. 655, 666-67 (Bankr. E. D. Va. 2002); *In re: Longua*, 58 B. R. 503, 506 (W.D. Wis. 1986); *In re: Int’l Ventures, Inc.*, 215 B.R. 726 (Bankr. E.D. Ark. 1997).

6. TGAAR clearly met its burden of proof by demonstrating with competent summary judgment evidence that the equipment remained in the Lease premises from September 1, 2001 through July 3, 2002, that such storage protected the equipment, and that

TGAAR paid all property taxes and utilities with respect to the Lease premises for such period. None of such facts were contradicted by any competent summary judgment evidence (Gary Baily Affidavit, ¶'s 10, 19-23, 30). Under the standards set forth for granting summary judgments in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986), TGAAR's motion for summary judgment on this issue should be granted.

### VIII.

#### **NO WAIVER BY TGAAR**

1. If the Chapter 7 Trustee is arguing that TGAAR "waived" its administrative expense claim during that single telephone conversation described in ¶'s 3-5 of her Affidavit, she is indeed on "shaky" ground. As stated in *In re: Merry-Go-Round Enterprises, Inc.*, *supra*, 180 F. 3d at 159, "For [the landlord] to have voluntarily waived its right to an administrative claim, there must be some clear, affirmative language relinquishing that right. . . as traditional waiver principals come into play." *See also, In re: Raymond Cossette Trucking, Inc.*, 231 B.R. 80, 84-85 (Bankr. N.Dak. 1999); *In re: JAS Enterprises, Inc.*, 180 B.R. 210, 216 (Bankr. Neb. 1995). Even under the Chapter 7 Trustee's version of what Gary Baily said (Gonzales Affidavit ¶5), no waiver argument exists.

### IX.

#### **AMOUNT OF BENEFIT TO BANKRUPTCY ESTATE IS IRRELEVANT**

1. The Chapter 7 Trustee claims in its Supplement to Response (Dkt. #1958, p. 4-5) that the bankruptcy "estate received little or no benefit for leaving the subject equipment at TGAAR's supply store property after August 31, 2002" as "the total auction proceeds were

approximately \$15,000.00 and the estate is entitled to only 10% of those proceeds.” (There is, by the way, no competent summary judgment evidence in the record establishing such facts.)

2. Once a “benefit” to the estate has been established (as TGAAR clearly has in its Cross-Motion; Dkt. #1928), the law is absolutely clear with respect to administrative expense claims for rental or use of real estate:

a. In the case of post-rejection use of the Lease premises under a pre-petition agreement, the amount of the claim is the fair rental value for use of the property. This rule was made clear in *In re: JAS Enterprises, Inc.*, 180 B. R. 210, 217 (Bankr. Neb. 1995), a case cited by the Chapter 7 Trustee in its Supplement to Response (Dkt. #1958, p. 4):

“Once the threshold requirements of §503(b)(1)(A) are met, namely that the expenses were actual, necessary, and provided tangible benefit to the bankruptcy estate, the court must determine the amount of the allowed administrative claim. In the case of a landlord’s claim for rent, the amount of the allowed administrative expense claim is not measured by the amount of benefit or profit which the bankruptcy estate actually derived from the use of the premises. See *In re: ICS Cybernetics, Inc.*, 111 Bankr. 32, 41 (Bankr. N.D.N.Y. 1989). Rather, the amount of the allowed administrative claim is measured by the fair rental value for use of the property. *Matter of Zagata Fabricators, Inc.*, 893 F.2d 624, 627, 628 (3<sup>rd</sup> Cir. 1990); *In re: Western Monetary Consultants*, 100 Bankr. 545, 547 (Bankr. D. Colo. 1989) . . .A presumption exists that the rental rate provided in the lease is the fair rental value . . .”

Additional authorities supporting TGAAR’s argument include *In re: Longua*, 58 B.R. 503, 506 (Bankr. W.D. Wis. 1986); *In re: Wedemeier*, 237 F3d 938 (8<sup>th</sup> Cir. 2001); and *Trizechahn 1065 Ave. of the Americas L.L.C. v. Thomaston Mills, Inc.*, 273 B.R. 284 (M.D. Ga. 2002).

b. In the case of a contract entered into post-petition by the debtor-in-possession, the amount of the claim is the amount of the future rent stated in the contract. *See In re: Merry-Go-Round Enterprises, Inc. supra.*

3. No cases were cited to the contrary by the Chapter 7 Trustee in its Supplement to Response (Dkt. #1958) except: *In re: Century Market of New Mew Market, Inc.*, 52 B.R. 61 (Bankr. E. D. Pa.1985), which limited the claim amount to “the amount the debtor’s goods brought at auction,” and cases citing such case. As stated in *In re: Section 20 Land Group, Ltd.*, 261 B.R. 711, 717 (Bankr. M. D. Fla. 2000), “the precise measure of benefits that [the debtor] received . . . does not matter.” *See also, In re: Beverage Canners Int’l. Corp.*, 255 B. R. 89 (Bankr. S. D. Fla. 2000) (“Debtors . . . urge the Court to deny the administrative expense claim because there was no measurable value received from the use. This Court rejects the notion that a bankruptcy court should independently value the consideration provided for under an executory contract where there is no contrary evidence to the bargained for contractual rate. Presumptively, the value of consideration received under an executory contract is the amount set forth in such contract.”).

4. TGAAR’s Memorandum of Law (Dkt. #1931, p. 4), TGAAR further discussed the forgoing “presumption” as follows: “The amount of rent allowed as an administrative expense when the debtor-in-possession actually uses the leased premises is presumed to be equal to the amount of rent set forth in the Lease. *Cochise, supra*, 703 F.2d at 1354 n. 17; *Dant & Russell, supra*, 853 F.2d at 707”.

5. Since the record is devoid of any competent summary judgment evidence of the fair rental value of the Lease premises, the Lease rental rate should be used to measure the damages and summary judgment should be granted on that basis.

X.

**DAMAGES AND CLEAN-UP COSTS**

1. With respect to the damages to the Lease premises and the clean-up costs, TGAAR only asked for summary judgment on the issue of whether there was liability, not the amount thereof. See Cross-Motion, Dkt. #1928, p.14 (“in an amount to be determined at the trial of this matter”).

2. If considered as competent summary judgment evidence, the Parker Affidavit admittedly raises a fact issue about the single issue of whether any damages occurred to the Lease premises (Parker Affidavit ¶12 “no significant damage was done”). Therefore, summary judgment should not be granted on that issue if the Parker Affidavit is considered as evidence. We believe that the evidence at trial will demonstrate that the Parker Affidavit is far from the truth.

3. However, summary judgment should be granted on the issue of liability (not the amount) for the clean-up costs. Such clean-up was mandated by the auction order (Dkt. #1674; ¶1; “broom clean”). At best, the Parker Affidavit (¶12) attempts to raise a “waiver” issue when it states that “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.”

4. Such is far from sufficient to raise a “waiver” defense (which was not pled). See VIII., above.

5. In an apparent effort to disparage TGAAR’s Cross-Motion, the Chapter 7 Trustee also complains in its Response (Dkt. #1955, p.8) that TGAAR revised its estimate of damages from \$15,000.00 to \$120,000.00. As counsel for the Chapter 7 Trustee knows, most

of the increase in the damage claim is due to the discovery that all of the floor tile will have to be replaced because of the damage that occurred when equipment that was sold at auction was removed. Even the Parker Affidavit (¶8) acknowledges that the floor was damaged.

## XI.

### **TGAAR'S CONDUCT DOES NOT ESTOP TGARR'S CLAIMS**

1. Contrary to the Chapter 7 Trustee's allegation, the facts in *In re: Mainstream Access, Inc.*, 134 B.R. 743 (Bankr. S.D.N.Y 1991), are not similar to the facts at hand. Under the peculiar facts in that case, the debtor did not actually benefit from the storage of its furnishings and, on that basis, the administrative claim was denied ("the mere potential for benefit does not satisfy the requirements"). Furthermore, in such case, unlike the case at hand, the "Landlord frustrated the debtors efforts to remove or dispose of the personal property." *Id.*

2. Courts have repeatedly rejected estoppel arguments. The Trustee cited the decision in *In re: JAS Enterprises, Inc.*, 180 B. R. 210, 216 (Bankr. Neb. 1995) in its Supplement to Response, but failed to mention such decision's clear holding on estoppel when the Trustee made its estoppel argument:

"JAS argues that the Stocks are estopped from claiming an administrative expense by their conduct in allowing JAS to remain on the property after the Lease was deemed rejected. While it is true that §365(d)(4) obligates the debtor-in-possession to surrender the premises to the landlord upon rejection, landlords are provided remedies under the Code if the premises are not so surrendered. However, I conclude that failure of a landlord to exercise its rights to obtain possession of the leased premises does not, in itself, estop a landlord from seeking an administrative expense."

See also, *In re: Raymond Cossette Trucking, Inc.*, 231 B.R. 80, 84-85 (Bankr. N.Dak. 1999); *In re: Int'l Ventures, Inc.*, 215 B.R. 726 (Bankr. E.D. Ark. 1997); *In re: Pudgie's Development of NY, Inc.*, 239 B.R. 688, 696 (S.D.N.Y. 1999) (Landlord that "sat on its rights" not entitled to super-priority status).

**XII.**

**CONCLUSION**

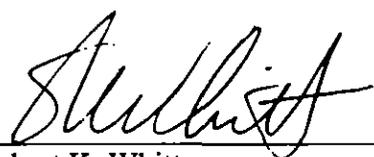
TGAAR's Cross-Motion for Partial Summary Judgment should be granted in its entirety. At best, the late-filed Parker Affidavit only raises a question of fact about whether the bankruptcy estate is responsible for the damage that occurred after the auction, and a partial summary judgment should be granted as requested except on that issue.

Dated this 10<sup>th</sup> day of December, 2002.

Respectfully submitted,

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BY: \_\_\_\_\_

  
Robert K. Whitt

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

**CERTIFICATE OF SERVICE**

I certify that on the 10<sup>th</sup> 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**

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

**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.

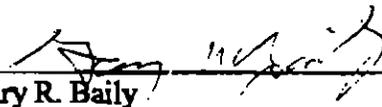
4. TGAAR filed an Application for Allowance of Administrative Expense Claim (the "Application") on the form it received from the Clerk of the Court. A true and correct copy of such Application is attached hereto as Exhibit "A".

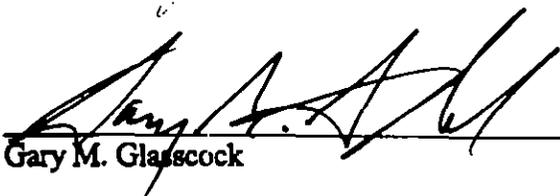
5. Subsequently, it is believed that TGAAR's counsel obtained from TGAAR a signed, blank Proof of Claim form, which was filled-in without TGAAR's approval or knowledge to make it a withdrawal of TGAAR's administrative expense claims.

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.

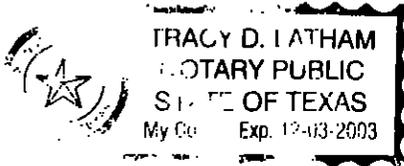
FURTHER AFFIANTS SAITH NOT.

  
\_\_\_\_\_  
Gary R. Baily

  
\_\_\_\_\_  
Gary M. Glascock

THE STATE OF TEXAS §  
  §  
COUNTY OF MIDLAND §

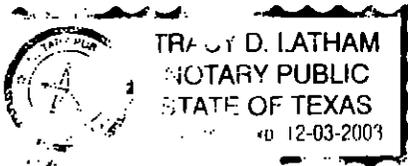
SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me on the 9<sup>th</sup> day of December, 2002, by Gary R. Baily.



*Tracy D. Latham*  
\_\_\_\_\_  
Notary Public, State of Texas

THE STATE OF TEXAS §  
  §  
COUNTY OF MIDLAND §

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me on the 9<sup>th</sup> 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: Taar 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