

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

In re:

FURR'S SUPERMARKETS, INC.,

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

Debtor.

**TRUSTEE'S BRIEF IN LIEU OF CLOSING ARGUMENT**

Plaintiff Yvette J. Gonzales, Chapter 7 Trustee (the "Trustee"), by counsel, files this written submission in lieu of closing argument after trial of the TGAAR Properties, Inc.'s ("TGAAR's") Amended Motion for Payment of Administrative Expenses, filed on or about October 30, 2002 (docket #1928) (the "Motion"), and the Trustee's objection thereto.

I. INTRODUCTION

This contested matter is the culmination of a battle between the estate and TGAAR that started in August, 2001. TGAAR understandably was upset by Furr's decision to reject the commercial lease for space in TGAAR's Westwood Village Shopping Center in Midland, Texas (the "Lease"); the rejection cost TGAAR many thousands of dollars in lost rent and other damages. To compound the problem, TGAAR had no recourse in the Furr's bankruptcy case, as there is no money available to pay pre-petition unsecured claims. Unlike most unhappy creditors, TGAAR does not appear to have reconciled itself to its fate. Rather, TGAAR seeks to recover as an administrative claim more than \$390,000, which amount would go a long way toward making TGAAR whole on its pre-petition lease beach claim.

The \$390,000 claim has two main components: a claim for about \$214,000 for rent and/or storage charges, and a claim for about \$176,000 for alleged damages related to the May 28, 2002 auction of the equipment located at the former leasehold (the “Premises”). For the most part, the Court has dealt with the rent/storage claim in its ruling on the parties’ cross motions for summary judgment: Of the \$214,000 sought, the maximum award would be \$19,794, which is the net amount realized by the estate in the auction sale. For the reasons stated below, the allowed amount of this portion of TGAAR’s claim should be \$0.

With respect to the alleged damage arising from the auction, the Trustee does not contend that the auction was trouble-free. There appear to have been problems; some were caused by TGAAR, and some may have been caused by the auctioneer and/or his employees. It is clear, however, that TGAAR has uniformly and systematically inflated its damage claims, and also has made it impossible for the Court to determine if, and to what extent, TGAAR was actually harmed by the auction process. TGAAR has done this by submitting conflicting testimony, submitting “dummy” invoices and bids from contractors, and taking positions before this Court that are patently unreasonable. The result is a record that cannot be used to arrive at a fair estimate of a real damage claim, if one exists. For this reason, and because the best evidence indicates that the legitimate Chapter 7 administrative claim is small or nonexistent, the TGAAR administrative claim for alleged damage should be denied.

## II. TIMELINE

The following table sets out some of the pertinent dates and events:

Date	Event	Evidence
8/31/01	TGAAR lease rejected	Court file
9/13/01	TGAAR offers to purchase the subject equipment for \$5,775	TGAAR ex. 9
12/19/01	Case converted to Chapter 7	Court file
2/03-4/03	Conversations between TGAAR and trustee	Trial transcript ("Tr.") at pp. 283
4/24/01	Auction motion filed	Court file
5/6/02	TGAAR response to auction motion filed	Court file
5/22/02	Auction order entered	Court file
5/28/02	Auction held	TGAAR ex. 14
6/26/03	TGAAR asks for permission to dispose of unsold equipment	TGAAR ex. 33
7/3/03	Trustee gives permission to dispose of unsold equipment	TGAAR ex. 18
8/02-10/02	TGAAR's post-auction clean-up	Gutierrez depo. at 31; TGAAR ex. 17; Tr. at 167
8/19/02	TGAAR files original administrative expense application	Court file
10/30/2002	TGAAR files amended application for administrative expense filed	Court file
11/02 or 12/02	TGAAR gives up search for grocery store tenant	Tr. at 119
1/15/03	Goodwill lease signed	TGAAR ex. 28
1/03-5/03	Build out of Goodwill space	Tr. at 127
4/14/03	Court order on Trustee's motion for summary judgment, and accompanying memorandum opinion	Court file
5/03 or 6/03	TGAAR asks contractors to break out work to repaid alleged damage from bills previously rendered	Tr. at 176
6/24/03	Southern Career Institute lease signed	TGAAR ex. 29
7/8/03	Witness depositions in Midland, TX	Submitted depositions
12/03	TGAAR first comes up with delay damages theory	Tr. at 276

### III. THE AUCTION

The auction that TGAAR criticizes so heavily began by the auctioneer advertising the auction within a 300-mile radius of Midland, Texas. Tr. at 201. 39 bidders registered with the auctioneer, tr. at 202, and the gross auction proceeds were about \$25,000. Tr. at 203. The auctioneer, Walter Parker, had conducted a number of auctions for the Furr's estate before the auction in question, and had never had any trouble with the landlords. Tr. at 193.

When Mr. Parker arrived at the Premises, TGAAR informed him that he was not allowed to sell certain property, including the walk-in freezers.<sup>1</sup> Tr. at 195. Mr. Parker also was under the definite impression TGAAR did not grant him access to the back of the Premises. Tr. at 195-197. Because of that, he did not auction off the 19 or so refrigeration compressors, access to which was through the back of the Premises. Id.

At the start of the auction Mr. Parker announced that buyers would have four or five days to remove their purchased equipment. Tr. at 202. Mr. Parker was present on the day of the auction (Thursday, May 28, 2002), and until about 1:30 p.m. the next day. Tr. at 203. When he left, Mr. Parker left one of his employees, Lorenzo Salcedo, to conduct the post-auction "checkout." Tr. at 207-209. Mr. Salcedo had done the checkout eight or ten times before, tr. at 208, without any trouble. Id. As instructed by Mr. Parker, Mr. Salcedo stayed in Midland from Friday afternoon, until the following Monday, after which he returned by bus to El Paso. Tr. at 209. Even after Mr. Salcedo left, a business acquaintance of Mr. Parker named Henry, the foreman of the Second Hand Store in El Paso, Texas, tr. at 210, remained in Midland at the Premises for several additional days.

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<sup>1</sup> TGAAR later disposed of two of the walk-ins, to an undisclosed third party, apparently for no consideration. Tr. at 140.

Tr. at 210. While Mr. Parker was present he did not see anyone damaging the Premises, Tr. at 206, and no one notified him thereafter of any problems. Tr. at 215.

In contrast to other auctions, with the Midland auction Mr. Parker never had control of the Premises. Tr. at 214-215. Rather, TGAAR had keys to the Premises, let people in and out when it felt like it, and even gave a key to the Premises to one of the buyers, James Spar. Tr. at 140, 215; Spar depo. at 15. Mr. Glasscock gave buyers permission to come in after hours and remove their equipment. Tr. at 205, 216. At the time of the auction, Mr. Gutierrez, a TGAAR employee, would unlock the Premises in the morning and lock them at night. Gutierrez depo. at 24. Mr. Spar, an acquaintance of Mr. Glasscock's, did not finish removing his purchased equipment until mid-June. Spar depo. at 15-17. Mr. Gutierrez recalls seeing people removing their equipment until about mid-June. Gutierrez dep. at 25. TGAAR changed the locks to the Premises the week after the auction. Tr. at 162.

Had Mr. Parker been given the kind of access and control he usually enjoys, such as in the auction sale he conducted for the Furr's estate at Clovis, New Mexico, he could have removed the unsold equipment by making a deal with a local "scraper" to remove the equipment in exchange for being able to keep the copper and other valuable metal. Tr. at 218-219.

Before the auction, Mr. Parker announced that anyone purchasing refrigeration equipment had to have a licensed refrigeration person to evacuate the compressor before they moved anything, Tr. at 216, and that all electrical and water lines need to be capped. Id.

#### IV. THE INCREASE IN TGAAR'S CLAIM

TGAAR's administrative claim has more than doubled over time. The following chart summarizes the increases in the claim amount:

Damage Category	Original Motion (8/19/02)	Amended Motion (10/30/02)	Trial (1/15/04)
Rent/storage— Chapter 11	\$0	\$78,099.30	\$78,113.87
Rent/storage – Chapter 7	139,718.50	\$141,151.93 <sup>2</sup>	\$135,479.20
Clean-up costs	\$5,000	\$15,000	\$8,728.60
Damage to building	\$15,000	\$120,000	\$106,797.95
Delay damage	\$0	\$0	\$61,529.48
Total	\$194,349.60	\$354,251.23	\$390,649.10

Among other problems with the large jump in the size of the claim, neither Mr. Glasscock nor Mr. Bailey has any adequate explanation why TGAAR's claim for clean-up costs and damage to the building increased from \$20,000 to \$135,000 between August 19, 2002 and October 30, 2002. Tr. at 125-126, 254, 272-274.

#### V. ANALYSIS OF TGAAR'S CLAIM

A. Chapter 7 Storage Charges/Rent (\$135,479.20) and Chapter 11 Storage Charges/Rent (\$78,113.87). The Court previously ruled that TGAAR is not entitled to an administrative claim for rent under the lease with Furr's Supermarkets, Inc., because Furr's rejected the Lease as of August 31, 2001.<sup>3</sup> As part of the ruling, the Court held

<sup>2</sup> This amount excludes a claim of \$1,307,626.20, for the five year lease extension option exercised by the debtor in possession before the lease was rejected. The Court overruled this claim in its ruling on the parties' summary judgment motions.

<sup>3</sup> Memorandum Opinion on TGAAR's Motion for Payment of Administrative Expenses and Cross Motions for Summary Judgment.

that any TGAAR claim for storage charges would be capped by the value of the stored equipment. Memorandum opinion p. 16. Based on these rulings, TGAAR's claim for storage charges/rent must be denied to the extent it exceeds \$19,794, which is the amount realized by the estate from the sale of the subject in-store equipment (the "Equipment"). TGAAR ex. #14, p. 7.<sup>4</sup>

TGAAR presented no evidence that it was in a hurry to have the Equipment removed. TGAAR offered the Debtor a small amount for the equipment, during the Chapter 11 case. TGAAR ex. 9. TGAAR never demanded that the Trustee remove the equipment, just that the problem be resolved. Tr. at. 286. TGAAR never filed a motion for relief from the automatic stay to have the equipment removed, nor took any other action that would indicate TGAAR had a problem leaving the equipment in place while it sought a replacement tenant. The Trustee believed TGAAR's actions before the auction sale were designed to force her to give up the equipment for free, rather than have the equipment removed quickly. Tr. at 304. Given the lack of activity in the bankruptcy case and TGAAR's failure to demand prompt removal of the equipment, the Trustee's impression is justified.

Furthermore, TGAAR benefited from keeping the equipment at the Premises, and therefore the reasonable storage charge is \$0. TGAAR attempted to find a grocery store tenant, and showed the store and equipment to prospects. Tr. at 119. In fact, TGAAR's search for a replacement grocery store did not end until November or December, 2002. Id. Gary Glasscock admits that it made the most sense to have a grocery store tenant in the space, id., that he hoped to find a tenant that could use the equipment, tr. at 120, that

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<sup>4</sup> This figure, pro-rated between the Chapter 11 (August 31, 2001 to December 19, 2001) and the Chapter 7 (December 20, 2001 to June 1, 2002), would result in a Chapter 11 claim of about \$8,266.45 and a Chapter 7 administrative claim of about \$11,527.54, subject to all of the Trustee's defenses.

at least one prospect was interested in using the grocery store shelves, *id.*, and that he had heard that Super Mercado used the in-store equipment on another former Furr's location they took over. Tr. at 121. Leaving the store equipment on-site from December 19, 2001 until May 28, 2002 therefore helped rather than harmed TGAAR. The only event TGAAR really can complain about is that the estate did not give the equipment to TGAAR for free, or for the offered nominal consideration of \$5,775. There is no reason to charge the estate for conferring a benefit to TGAAR.

Finally, while TGAAR was billing the Furr's estate between \$10,000 and \$15,000 per month for storage charges, TGAAR was using the back of the Premises to store, free of charge, property and equipment of a church and a school. Tr. at 50-51, 261. TGAAR also stored some of its own property in the back. Tr. at 185, 261. The use of the Premises to store other equipment and property is inconsistent with TGAAR's position that it was harmed by leaving the Furr's equipment in place through the auction sale.

B. Delay in Possession (\$61,529.48). TGAAR seeks \$61,529.48 in damages for the alleged delay in giving TGAAR possession of the Premises after the auction. TGAAR ex. 35; Tr. at 97-98. The claim is based on language in the Court's order authorizing the trustee to conduct the auction sale. TGAAR ex. 13, which says that the auctioneer will remove all in-store equipment. *Id.* As the auctioneer did not remove the unsold equipment in this case, TGAAR argues that it was delayed by four or more months from leasing the subject property to Goodwill Industries and Southern Career Institute. TGAAR ex. 35, p. 1; Tr. at 97-98.

The delay damages claim is completely without merit. First, delay damages should not be awarded because the damages were not plead in the Amended Motion, and

Trustee had no opportunity to conduct discovery on the claim. In fact, the “delay damages” argument apparently was conceived by TGAAR within a month before trial, tr. at 276, in a contested matter that had been pending since August 19, 2002. The theory was not mentioned in any of TGAAR’s pre-trial documents. Because the Trustee had no opportunity to prepare a case based on any alleged “delay damage” claim, the claim should be overruled.<sup>5</sup>

Second, the evidence does not support claim to the slightest degree. The auction was held May 28, 2002, while the Goodwill lease was not executed until January 15, 2003. Mr. Glasscock’s testimony makes clear that TGAAR delayed signing a lease with Goodwill, not because of equipment remaining in the Premises, but because TGAAR still hoped Wal-Mart would lease the Premises as a grocery store. Tr. at 119-120. In December, 2002, Wal-Mart informed TGAAR that it was not interested in the space. Tr. at 120. TGAAR thereupon decided to lease a portion of the Premises to Goodwill. Tr. at 120. There is no evidence Wal-Mart would have notified TGAAR sooner if the Premises had been completely clean and bare by mid-June, 2003.

Furthermore, there is no evidence that the condition of the Premises, whatever it was, caused any delay in TGAAR’s marketing efforts. TGAAR began marketing the property in early 2002, months before the auction. Tr. at 116. TGAAR did not seek permission to dispose of the unsold equipment until almost a month after the auction, TGAAR ex. 34, which permission promptly was given. TGAAR ex. 18. While TGAAR had the Trustee’s permission by no later than July 3, 2002 to dispose of any unsold

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<sup>5</sup> Tellingly, none of TGAAR’s original motion, amended motion nor post-auction letter to the Trustee mention any duty to remove the unsold equipment. Court file; TGAAR ex. 33, 34. It appears that TGAAR read or re-read the sale order when preparing for trial, latched on to the paragraph requiring the auctioneer to remove unsold equipment, and concocted the delay damages theory.

property, TGAAR's clean-up of the building did not start until August, and continued until early October, 2002. Tr. at 167; TGAAR ex. 16, 17. This leisurely pace is inconsistent with TGAAR's argument that it was prevented from signing the Goodwill lease by the presence of unsold equipment. In fact, Mr. Glasscock testified that the clean-up did not go faster because "I wasn't going to spend that extra amount of money and labor and equipment to move something if I didn't have anybody to put in there." Tr. at 129. Mr. Bailey admitted that, if needed, TGAAR could have moved the unsold equipment in a "couple weeks, probably," Tr. at 276. Mr. Glasscock agreed that possibly he could have moved the unsold equipment "in a matter of days." Tr. at 128.

Other than Goodwill and the Southern Career Institute, the only tenant prospect TGAAR identified was Dollar Tree. Tr. at 129. Mr. Glasscock admitted, however, that he had already lost Dollar Tree as a tenant by the time of the May 28, 2002 auction. Id. Finally, no mention was ever made, in any letter or telephone call from TGAAR to the trustee, either before or after the auction, of time deadlines created by the needs of a potential new tenant. Tr. at 129-131; 278-279; TGAAR ex. 9, 33, 34.

C. Clean-Up Costs (\$8,728.60). TGAAR asks for \$8,728.60 as reimbursement for the expense of cleaning up the Premises. The request should be denied for a number of reasons. First, the alleged cleaning expenses sought include items not chargeable to the Trustee, including buffing the floors to remove the black marks underneath the store shelving, tr. at 164-165, and work done by an employee in Abilene, Texas. TGAAR ex. 17, p. 13. The scanty record submitted by TGAAR for clean-up costs, consisting only of check stubs, five weekly time cards, and dumpster bills, is insufficient to determine whether the other work performed by the 11 TGAAR employees

is properly compensable. For example, there was no evidence that TGAAR paid the FICA taxes claimed (\$1,060.60). Tr. at 95-96 (Mr. Glasscock said he could not say whether TGAAR did or not).

Second, the estate should be given credit for the value of the copper (\$1,000; tr. at 217), 2 walk-in freezers (\$750 each; tr. at 202-203), and 19 compressors (\$225 each; tr. at 196). The estate should also be given at least \$1,500 credit for the reach-in coolers TGAAR later sold. Tr. at 147. These offsets, which total \$8,275, exceed the clean-up costs. It would be unfair for TGAAR to tax the estate for clean-up costs, yet keep the value of the property that was disposed of in the process.

Third, TGAAR's clean-up was required because TGAAR did not abide by the Court's order to give the auctioneer reasonable access to the Premises. TGAAR ex. 13.

Finally, the clean-up cost claim should be denied because the evidence supporting the claim is suspect. Mr. Gutierrez, who was the TGAAR employee mainly responsible for the clean-up, Gutierrez depo. at 14, said the clean-up work had been substantially completed by the end of September, 2002. Gutierrez depo. at 31. Mr. Glasscock agreed with this time estimate, tr. at 169, and it is consistent with the employee pay stubs, employee time cards, and the dumpster bills. TGAAR ex. 16, 17. Strangely, however, the contractors hired by TGAAR all testified that the Premises were still cluttered, dirty, and/or trashy in January, 2003. See e.g., Easterwood depo. p. 26-28 (“dirty”; “clutter everywhere” “still pretty cluttered and messy”); Mussar depo. pp 7-8, 39 (“pretty trashed out”; “mountain of trash in the back”; “lumber and all kinds of trash”; “trash was piled up”; “may have even looked worse [than the pictures—TGAAR ex.19]”); Percy depo. at 9-10, 15 (“messy”; “refrigerators everywhere”; “trash on the floor, bottles of pickles and

cans”; “in shambles”; “looked like it had been vandalized more than – stuff had just been thrown around”).

This conflict in the testimony brings into question exactly what TGAAR was doing during the time it says it was cleaning up the Premises. If the contractors are telling the truth, then relatively little clean-up took place before January, 2003, and the testimony of Mr. Gutierrez and Mr. Glasscock is called into question. If the contractors are not telling the truth, then their testimony in support of the damage claims is untrustworthy. Something clearly is wrong with the testimony in this area, and the irreconcilable conflict calls into question the veracity of TGAAR’s key witnesses.<sup>6</sup>

D. Alleged Damage to Tile (\$50,750). TGAAR seeks an administrative claim of \$50,750 for alleged damage to the tile floor of the Premises. The claim is based on an estimate prepared by Mr. Rex Kincaid (“Kincaid”). TGAAR ex. 25. For many reasons, this portion of TGAAR’s administrative claim is without merit and should be disallowed.

At the time of the auction, the floor of the Premises was covered with 1 foot by 1 foot square vinyl composition tile. Kincaid depo. at 6-7. The tile was laid in about 1981. Tr. at 113. The alleged damage is a scratch in the tile floor, allegedly caused by one of the equipment buyers dragging something across the floor during the removal process. Tr. at 58-59. The damage allegedly occurred shortly after the auction. Id.

Mr. Kincaid testified that the alleged scratch was 200 feet long. Kincaid depo. p. 17. Despite this testimony, Mr. Kincaid’s estimate included replacing 3200 square feet of

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<sup>6</sup> There is another, less egregious example of questionable testimony about clean-up costs. During his direct deposition testimony, Mr. Gutierrez estimated that he and his crew filled “about five or six” dumpsters with trash and unsold property. Gutierrez, depo. at 15. On cross-examination, when he was shown the dumpster bills, Mr. Gutierrez changed his estimation to 13 dumpsters. Id at 25-27.

tile. TGAAR ex. 25. It is impossible for a 200 foot-long scratch to appear on each of 3200 foot-square tiles. Mr. Kincaid's explanation of why 3200 square feet of tile would have to be replaced ("Because of the way it was done. You can't just replace that one. It goes across – sideways across) makes no sense. Kincaid depo. at 15-17.

In January, 2003, TGAAR signed a lease with Goodwill, pursuant to which TGAAR agreed to install carpet over the tile for the Goodwill portion of the space. TGAAR ex. 28. About six months later, Kincaid prepared his estimate. Kincaid depo. p. 15. Shortly thereafter, TGAAR signed a lease with Southern Career Institute, pursuant to which TGAAR agreed to remove the tile from their leasehold premises. TGAAR ex. 29. Thus, by the time of Mr. Kincaid's July 8, 2003 deposition, TGAAR had carpeted the Goodwill space and had committed to remove the tile from the Southern Career Institute space.

On direct examination, Mr. Glasscock admitted that Goodwill insisted on carpet because TGAAR could not fully remove the black stains on the tile where grocery shelves had been sitting for years. Tr. at 94. Mr. Glasscock also admitted that, if TGAAR had needed to replace the tile with the gouge marks, it could easily have done so by using tile from the remaining portion of the building. Tr. at 167-168. TGAAR does not contend that the Southern Career Institute would have agreed to accept the 22-year old linoleum tile as flooring for its leasehold space.

There were 20 to 25 holes in the linoleum under the Goodwill space, cut for electrical outlets, mechanical connections, and the like. Kincaid depo. at 26-27. The holes in the tile totaled about 65 square feet. Id. See also TGAAR ex. 19, pictures 1-2 and 2-2. Some of the tile in the store is a different color from the rest of the tile.

TGAAR ex. 19, picture 3-2. It strains credulity to contend that any tenant would accept 22 year-old, stained, pock-marked, multicolored linoleum tile as its flooring, gouge or no gouge. Furthermore, if Goodwill had agreed to accept the existing tile, it would have been an easy and inexpensive matter to remove 200 or so tiles from the western portion of the Premises and replaced the gouged tiles. Seeking more than \$50,000 in damages for a repair job that would have cost less than \$1,000 is patently unreasonable.

E. Alleged Damage to Walls and Ceiling (\$17,956). This part of the claim should be overruled. The contractor who performed the drywall and ceiling work for TGAAR was Tierro Company, LP (“Tierro”). TGAAR ex. 25. TGAAR asked Tierro to prepare the Premises for the Goodwill lease, Trustee ex. I. Tierro billed TGAAR \$41,986.07 for the work done (the “Actual Tierro Invoice”). Id. The work reflected in the Actual Tierro Invoice was done between January, 2003 and March, 2003. Mussar depo. at 18. After receiving the Actual Tierro Invoice, TGAAR asked Bill Mussar of Tierro to prepare another bill reflecting only the wall and ceiling “repair” work.<sup>7</sup> Mussar depo. at 19-20. Since Mr. Mussar did not keep track of any “repair” work done at the time, he had to go back through Tierro’s time cards and “decipher what went to what. And a lot of it is from recollection.” Mussar depo. at 20. To allocate the materials between the Goodwill build out and repair work, Mr. Mussar used his “best guess.” Mussar depo. p. 23. Based on the time cards and his recollection, Mr. Mussar prepared an “invoice” for \$17,956.19 (the “New Tierro Invoice”). Mussar depo. at 19-24. Mr. Mussar thought the New Tierro Invoice is accurate “within 10 or 15 percent.” Mussar

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<sup>7</sup> It should be emphasized that TGAAR requested all of the work done by Tierro and the other contractors within two months or so after filing its amended motion for administrative expenses. With the work done so shortly after alleging \$120,000 in damages to the building, there is no excuse for TGAAR failing to document, in detail, what the damages were and what it cost to repair them.

depo. p. 21. Neither Tierro nor TGAAR has ever produced the time cards or materials invoices upon which the Actual Tierro Invoice or the New Tierro Invoice are based. Although the New Tierro Invoice is dated April 24, 2003, it likely was not prepared on that date, because TGAAR did not ask Mr. Mussar to prepare the New Tierro Invoice until after TGAAR received the Actual Tierro Invoice. Mussar depo. at 15-16.

A crucial fact is that, when preparing the New Tierro Invoice, Mr. Mussar made no attempt to separate repair work required because of damage caused by the equipment removal process from repair work required by 22 years of normal wear and tear. Mussar depo at p. 20, 26, 33-34. There is no question that a large portion of the work reflected in the New Tierro Invoice was to repair wear and tear damage. See, e.g., Mussar depo. at 26, 30-31. After this problem was pointed out on July 8, 2003, TGAAR never attempted to obtain the required breakdown.

The New Tierro Invoice included charges for missing doors, although Mr Mussar did not know who took the doors or when they were taken. Mussar depo. at 24. The New Tierro Invoice reflects Mr. Mussar's best guess of the repair work Tierro did. Mussar depo. at 18-21. The New Tierro Invoice contains unspecified charges for replacing grease-stained and dirty walls, Mussar depo. at 14, 26, 27, and grease-corroded ceiling tiles and grid. Mussar depo. at 30, 31. It was cheaper to install new ceiling tiles than to wash the old, greasy tiles. Mussar depo. at 33. Goodwill would not have accepted greasy walls for their space. Mussar depo. at 33. For those portions of the drywall of the Premises that were missing or damaged, Mr. Mussar does not know who may have removed or damaged the drywall, or when it might have happened. Mussar depo. at 14.

In short, it is impossible to review the New Tierro Invoice, which is a single sentence fragment,<sup>8</sup> and make a fair determination of which amount, if any, is attributable to damage caused by removal of the auctioned equipment.

F. Alleged Damage to Building Wiring (\$19,100.71). TGAAR seeks an award of \$19,100.71 for alleged damage to the electrical wiring of the Premises. The claim is unsubstantiated and should be denied. The electrical contractor, D&E Electrical (“D&E”) began work in February, 2003, tr. at 178, in response to a telephone call from Mr. Glasscock. Easterwood depo. at 29.<sup>9</sup> TGAAR called D&E to help build out the Goodwill space and prepare it for occupancy. Tr. at 178. The Goodwill build out was completed by May, 2003. Tr. at 179.

D&E generally billed once a week, and Mr. Easterwood estimated that as of July, 2003, D&E had sent 18 or so invoices to TGAAR (the “Actual D&E Invoices”). Easterwood depo. at 29. Each Actual D&E Invoice was sent to TGAAR a week or two after the work was done, whenever Mr. Easterwood’s workload allows him to prepare the invoices. Easterwood depo. at 30. The total of the Actual D&E Invoices for the Goodwill build out was in excess of \$100,000. Tr. at 178-179.

Mr. Easterwood testified that in May or June, 2003, TGAAR asked Mr. Easterwood to “go back and see what it took to fix the Furr’s just like he was going to put in another [grocery] store in there.” Easterwood depo. at 31. In response, Mr. Easterwood prepared TGAAR ex. 22 (the “Dummy D&E Invoice”). Easterwood depo. at 30-32. Although Mr. Easterwood prepared the Dummy D&E Invoice in May or June,

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<sup>8</sup> Should the estate be liable for “Misc. demo”? “Refurr walls @ meat & freezers”? “Replace missing doors”?

<sup>9</sup> At trial, Mr. Glasscock first asserted that Mr. Easterwood worked on the building shortly after the auction to cap electrical wires. Tr. at 160. On cross-examination, Mr. Glasscock changed his testimony and concluded that the work was done by the buyers of the equipment. Tr. at 162.

2003, he dated it February 23, 2003. TGAAR ex. 22. Mr. Easterwood admits that the February 23, 2003 date was wrong, and that “he just pulled it out of the air.” Easterwood depo. at 41. Although TGAAR had already paid D&E Electric for the work, Mr. Easterwood prepared the Dummy D&E Invoice to appear to be billing TGAAR for the amount shown.<sup>10</sup>

There is no dispute that the Goodwill lease was signed January 15, 2003. Nevertheless, Mr. Easterwood testified that Mr. Glasscock asked him, in January or February 2003, to prepare the Premises for another grocery store tenant, allegedly saying “I think I’ve got a grocery store moving in here.” Easterwood depo. p. 32-34.<sup>11</sup> Mr. Easterwood also claims that in January or February, 2003, D&E Electric did repair work on an electrical junction box, and ran a new “feeder” line to the junction box, and then a month later D&E Electric undid that work and moved the junction box. Easterwood depo. at 35. In fact, Mr. Easterwood claims that D&E did a lot of repair work that later had to be undone or redone. Easterwood depo. at 33-37.

Mr. Easterwood could not explain why TGAAR would ask D&E Electric to prepare the Premises for another grocery store when the Goodwill lease had been signed. Easterwood depo. at 41. Mr. Easterwood also had no documentation to substantiate the \$19,100.71 in the Dummy D&E Invoice. Easterwood depo. at 39-40. To this day, neither D&E Electric nor TGAAR has produced any time cards or other records with which the Court or the trustee might substantiate all or any part of the Dummy D&E Invoice.

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<sup>10</sup> Mr. Glasscock admitted that TGAAR had no intention of paying D&E Electric twice for the same work. Tr. at 181.

<sup>11</sup> Mr. Glasscock denies he ever made this statement to Mr. Easterwood. Tr. at 177.

The conflicting testimony of Mr. Easterwood and Mr. Glasscock, the strange assertion that work was ordered that no sensible landlord ever would request, the fabrication of the invoice, and the lack of detail on the invoice, all dictate that TGAAR's claim for electrical repair work should be denied.

G. Alleged Damage to Refrigeration and Plumbing (\$18,450). The TGAAR claim for alleged damage for duct repair and removal of refrigeration equipment is extremely weak and should be overruled. The claim is based on work done by The Bosworth Company ("Bosworth"), which started work in the Premises in January, 2003. Percy depo. at 21-22. In about June, 2003, or at any rate, about the same time Mr. Glasscock asked the other contractors to prepare their "invoices" or "proposals", Mr. Glasscock asked a Mr. Farris Parson of Bosworth to prepare TGAAR ex. 24 (the "Dummy Bosworth Bid"). Tr. at 183. Mr. Glasscock has no idea how Mr. Parsons arrived at the figure reflected in the Dummy Bosworth Bid (\$18,450). Tr. at 184. Although prepared in the summer of 2003, the Dummy Bosworth Bid is dated January 15, 2003. TGAAR ex. 24. Although the work had already been done and paid for, the Dummy Bosworth Bid is drafted like a bid for work yet to be done, and indeed states "thank you for the opportunity of bidding this project." Id.

Unfortunately for all concerned, Mr. Parsons was not available to explain the Dummy Bosworth Bid, either at trial or by deposition. The Bosworth representative who was produced for a deposition, Mr. Marty Percy, knew nothing about the Dummy Bosworth Bid, including when it was prepared, Percy depo. at 22-23, how the "bid" amount was arrived at, id. at 24, why it was drafted to look like a bid, id., or why it was dated January 15, 2003. Id. at 22-23. Since Mr. Glasscock did not know the answers to

these questions either, there is nothing in the record to allow the Court to determine what portion of the Dummy Bosworth Bid, if any, reflects legitimate expenses to repair any damage caused by removal of auctioned equipment.

Furthermore, it appears that an unknown portion of the Dummy Bosworth Bid is for removing the remote refrigeration compressors. Percy depo. at 13-14. Bosworth apparently retained the compressors and copper lines, and sold the copper lines. Percy depo. at 25-28. No one knows if the value of the copper lines or the compressors is reflected as a credit on the Dummy Bosworth Bid.

H. Other Problems with the Building Damage Claim. Apart from the problems with TGAAR's proof, including the contractor's ex post facto estimates/bills/bids with no detail or back-up, TGAAR's damage claim should be denied for another reason as well: It would not be fair to impose liability on the estate for alleged damage to the building, when neither the estate nor Mr. Parker ever had control over the Premises or the equipment removal process. As set forth above, TGAAR retained keys to the building, allowed buyers to remove equipment weeks after the auction was over, changed the locks on the building, and otherwise made it impossible for the estate and Mr. Parker to monitor the removal process and insure that no damage was done. In fact, months after the auction, TGAAR was still selling reach-in cases and other equipment, and Mr. Gutierrez and a crew of high school students were removing a large quantity of unsold equipment. Tr. at 147-149, 151-153, 182; Gutierrez depo. at 15. There is nothing in the record to indicate whether those activities caused any damage to the building. If some damage occurred, TGAAR is asking the estate to pay for it, since the deposition testimony of the contractors does not mention any attempt to differentiate

between alleged damage caused by the estate versus damage caused by TGAAR's employees or actions. That is improper.

## VI. CONCLUSION

TGAAR's claims for rent/storage charges and delay damages can easily be dispensed with, either because of the Court's earlier ruling or because of obvious flaws in TGAAR's position. The claim for clean-up costs should be substantially reduced or eliminated since TGAAR's actions prevented the auctioneer from doing what the sale order required him to do, and the estate should get credit for the value of the property left behind. Finally, TGAAR's claim for alleged damage to the Premises fails because, inter alia, the record TGAAR presented to the Court makes it impossible for the Court to arrive at a reasonable figure (if any damage occurred that was the responsibility of the auctioneer). TGAAR's Motion should be denied.

JACOBVITZ, THUMA & WALKER  
a Professional Corporation

By: Filed electronically  
David T. Thuma  
500 Marquette, N.W., #650  
Albuquerque, NM 87103  
(505) 766-9272  
Attorneys for the Plaintiff

The undersigned hereby certifies that a copy of the foregoing was served by first class mail on:

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

this 8th day of March, 2004.

Filed Electronically  
David T. Thuma