

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

IN RE:	§	
	§	NO. 11-01-10779-SA
FURR'S SUPERMARKETS, INC.,	§	
INC.,	§	Chapter 11
	§	
DEBTOR.	§	

TGAAR'S CLOSING BRIEF

COMES NOW, TGAAR PROPERTIES, INC., d/b/a WESTWOOD VILLAGE SHOPPING CENTER (“TGAAR Properties”) and TGAAR West Texas, Inc. (“TGAAR West Texas”) (collectively referred to as “TGAAR”¹) and, pursuant to the Court’s Post-Trial Scheduling Order dated January 23, 2004, would show unto the Court as set forth below.

I.

EVIDENCE REFERENCES

Testimony at the January 15, 2004 hearing will be referred to by the name of the witness and page number of the transcript (e.g., “Glasscock p. 24”), deposition testimony will be referred to by the name of the witness and page number (e.g., Sparr, p. 34), Exhibits admitted into evidence at the January 15, 2004 hearing will be referred to by Exhibit number (e.g., “Exh. #1”), and references to pleadings will be by docket number (e.g. “Dkt. #1672”).

¹ Although counsel for the Chapter 7 Trustee expressed, at the hearing, surprise, if not dismay, that both TGAAR Properties and TGAAR West Texas were making claims, both were previously separately and clearly identified as making claims as the manager and owner, respectively, of Store #966. *See, e.g.*, TGAAR’s Response to Motion to Partial Summary Judgment, Dkt. #1929, p. 4, ¶8.

II.

OVERVIEW

The Chapter 11 Debtor exercised an option to extend the “Lease” on “Store #966” in Midland, Texas. Next, the Chapter 11 Debtor “rejected” the “old” Lease and purported to “surrender possession.” Instead of actually surrendering possession, however, the Chapter 11 Debtor only gave up the keys but continued to use Store #966 to store its “Store Equipment” and ignored the pleas of the landlord, “TGAAR,” to sell or move the Store Equipment.

Next, the case was converted to a Chapter 7 bankruptcy case on December 18, 2001. The Chapter 7 Trustee called TGAAR (Gary Baily) in early 2002. She saw an invoice for storage and may have spoken to him twice. Finally, after refusing to return numerous of Gary Baily’s calls, the Chapter 7 Trustee filed a motion to auction off the Store Equipment in Store #966 and several other closed grocery stores. TGAAR supported the motion and cooperated with the auctioneer before, during and after the Thursday auction. No one from the auctioneer remained after 12:00 noon the next day (Friday) to supervise the removal of the Store Equipment.

On June 17, 2002, and again on June 26, 2002, TGAAR complained by letters to the counsel for the Chapter 7 Trustee that (1) substantial damage was done during the unsupervised removal of the Store Equipment, (2) Store #966 was left in a disastrous condition, and (3) that much of the Store Equipment remained in Store #966 (Exh. ##33 and 34).

Finally, TGAAR received a letter on July 3, 2002, that allowed them, for the first time, to “remove” the Store Equipment and clean-up Store #966 without violating the automatic stay.

This would be a relatively simple case but for the bankruptcy. TGAAR would have claims against the Chapter 11 Debtor and the Chapter 7 Trustee for her actions and those of her

agent, the auctioneer, for breach of the Lease as a trespasser, as a tenant-at-sufferance, for clean-up costs and for damage to Store #966.

The question is, does the U.S. Bankruptcy Code protect or insulate the Chapter 11 Debtor and the Chapter 7 Trustee from the results of their actions, including those taken by the auctioneer? We do not believe that it should, and we do not believe that it does, particularly in this case when the Chapter 7 Trustee's testimony demonstrated that:

1. The Chapter 7 Trustee clearly neglected Store #966 and the Store Equipment therein;
2. The Chapter 7 Trustee never knew of the June 17 and June 26, 2002 letters (Exhs. ##34 and 34) complaining of violations of the Auction Order (Exh. #13, a/k/a Dkt. #1674);
3. The Chapter 7 Trustee never set foot in Store #966 or had anyone check on the status, save and except the grossly negligent auctioneer, even though her attorneys received notice of the problems.
4. The auctioneer was never told that the "Auction Order" required him to remove all of the Store Equipment or leave Store #966 in a "broom-clean" condition;
5. The Chapter 7 Trustee never realized that the contract between her and the auctioneer (Exh. #32) required the Chapter 7 Trustee to "pay . . . moving and storage expenses."

Moreover, the auctioneer knew that the removal of the Store Equipment should be supervised, but he failed to provide same.

III.

SUMMARY OF EVIDENCE

A. Furr's Bankruptcy Proceedings.

1. Debtor Furr's Supermarkets, Inc. (the "Debtor") operated a large number of grocery stores in Texas and elsewhere, including "Store #966" located in Midland, Texas. After experiencing financial difficulties, the Debtor filed for bankruptcy protection on February 8, 2001 (Dkt. #1).

2. Prior the expiration of the 60-day acceptance or rejection period under 11 U.S.C. §365 (d)(4), the Debtor filed a motion to extend time to accept or reject certain leases, including the “Lease” on Store #966 (Dkt. #157). Such motion was granted on April 16, 2001 (Dkt. #326).

3. On June 25, 2001, the Debtor and Fleming Companies, Inc. (“Fleming”) executed an “Asset Purchase Agreement” pursuant to which the Debtor agreed to sell and Fleming agreed to purchase certain of the Debtor’s stores and other assets, including Store #966 (*See* Exh. #3, a/k/a Dkt. #542).

4. On July 3, 2001, this Court approved the Asset Purchase Agreement by its Order Granting Motion to Sell Some or All of Debtor’s Operating Assets (Exh. #4, a/k/a Dkt. #710; the “Order Approving Sale”). On or about July 3, 2001, the Sale Motion was granted pursuant to the Order (i) Approving Asset Purchase Agreement with Fleming Companies, Inc. (ii) Authorizing the Sale of All or Substantially All of the Debtor’s Operating Assets and the Transactions Contemplated by Asset Purchase Agreement, and (iii) Granting Related Relief.

5. On July 20, 2001, this Court entered an Order Approving Procedure Relating to the §365 (f)(2) Adequate Assurance Requirement for Assignment of Leases (Exh. #5, a/k/a Dkt. #762; the “Assignment Order”) and a related Confidentiality Protective Order (Exh. #6, a/k/a Dkt. #763; the “Confidentiality Order”).

6. Section 13.5(b) of the Asset Purchase Agreement provides that Fleming shall have the right to assign its rights and obligations thereunder with respect to any store to one or more Third Party Purchasers. (*See* Exh. #3 a/k/ Dkt. #542.)

7. On July 26, 2001, Fleming sent out a Third Party Purchaser Notice, pursuant to the afore-mentioned §13.5(b) of the Asset Purchase Agreement that notified the Debtor that Mal Enterprises, Inc. would purchase Store #966 (Exh. #7).

B. TGAAR's Ownership and Operation of Store #966.

1. TGAAR Properties and TGAAR West Texas are owned by Gary Bailey and Gary Glasscock (Glasscock pp. 26, 112). At the time of the bankruptcy filing, TGAAR West Texas owned (and TGAAR Properties managed as the agent for TGAAR West Texas) the land and improvements in Midland, Texas known in this bankruptcy case as "Store #966" (Glasscock pp. 27-28, 111; Baily pp. 251-52). Store #966 was purchased by TGAAR in 1996 (Baily pp. 251-252; Glasscock pp. 28-29)

2. At the time of the bankruptcy filing, the Debtor was occupying such Store #966 under a "Shopping Center Lease" that was assigned to TGAAR (Glasscock p. 29). Such Shopping Center Lease was executed on August 14, 1980 by Safeway Stores, Incorporated ("Safeway"), as lessee (Glasscock p. 29; Exh. #1). The Shopping Center Lease was subsequently amended on August 24, 1981, to extend the term to December 31, 2001 (Glasscock p. 29; Exh. #1). The Shopping Center Lease and the amendment are collectively hereinafter referred to as the "Lease." The rent under the Lease at the time of the bankruptcy was \$19,043.77 (Glasscock p. 46; Exh. ##35 and A).

3. The Lease (Exh. #1) provides for six (6) extension options of five (5) years each (p. 6, ¶16), which options may be exercised by the lessee by giving six (6) months written notice before the expiration of the current term of the Lease. The Lease also provides (p. 4, ¶8) that the "Lessee agrees to repair all damage to the leased premises caused by lessee's use other than (1) ordinary wear and tear, . . . and that on surrendering possession it will leave the leased premises in good condition, allowance being made for ordinary wear and tear . . . On surrendering possession . . . lessor agrees to accept the leased premises in a neat and clean condition"

The Lease provides (p. 4, ¶9) that “Lessee may remove [fixtures] from the leased premises at any time but shall repair any damage caused by removal.”

4. Furr’s paid the rent on Store #966 until it filed for bankruptcy (Glasscock p. 29).

5. Although Furr’s requested a waiver of the landlord’s lien, such waiver was never granted (Glasscock pp. 35-36).

C. Chapter 11 Debtor’s Exercise of Option to Extend Shopping Center Lease.

1. On June 1, 2001, the Debtor filed its Motion for Order Approving Sale of Some or All of the Debtor’s Operating Assets and Granting Related Relief; Notice of Auction Sale or Some or All of Debtor’s Operating Assets and Opportunity to Submit Bids (Exh. #3, a/k/a Dkt. #542, the “Sale Motion”). Pursuant to the Sale Motion, the Debtor was seeking to liquidate and sell certain of its assets, including Store #966 and the Lease (Glasscock p. 34; Exh. #3, a/k/a Dkt. #542 and Exh. #3, a/k/a Dkt. #710).

2. Representatives of the Debtor and TGAAR communicated prior to June 18, 2001 concerning whether the Debtor would exercise its option to extend the Lease. On June 18, 2001, the Debtor exercised, in writing, during the Chapter 11 case, the Debtor’s option to extend the Lease for an additional five (5) year period (Glasscock p. 32; Exh. #2). The term of the Lease for Store #966 was thereby extended until December 31, 2006. Such option to extend the Lease was exercised prior to any “rejection” of the Lease (Exh. #12; Dkt. #1031).

3. By extending the Lease, the Debtor created a new post-petition obligation in the ordinary course of its business during the Chapter 11 case. The extension to the Lease was necessary in order for the Debtor-in-possession to sell Store #966 to Fleming (otherwise, the

Debtor would have had very little to sell since the pre-petition Lease terminated by its terms on December 21, 2001) (Glasscock p. 34).

4. Steve Mortensen signed Exhibit #1 as President and Chief Operating Officer of Furr's. Mr. Mortensen never told TGAAR that Exhibit #1 was meaningless or that there could be any problem with such extension (Glasscock pp. 32-33). TGAAR, believing that Store #966 had been leased for another five (5) years, relied on the representations made by Steve Mortensen to their detriment, as they did not seek another tenant for such space until at least six months later (Glasscock p. 33).

5. Subsequent to the entry of the Order Approving Sale, the purchaser under the Sale Motion, Fleming Companies, Inc., gave notice that MAO Enterprises would purchase Store #966 (Exh. #7; Glasscock pp. 34-35).

D. Closing of Store #966.

1. About August 15, 2001, TGAAR first learned that the sale of Store #966 might not go through (Glasscock p. 35). By letter dated August 31, 2001 the Debtor sent the keys to Store #966 to TGAAR (Glasscock p. 37; Exh. #8). Such letter stated that the Debtor "hereby surrenders possession of the premises to you effective August 31, 2001" (Exh. #8). Despite such representation, the Debtor did not surrender possession as the Debtor (and later the Chapter 7 Trustee) left the equipment in Store #966 for over ten months, from September 1, 2001 until after June 2002 (Glasscock pp. 37, 43). The letter dated August 31, 2001 (Exh. #8) also requested TGAAR to bid on the equipment that was still located in Store #966.

2. On September 6, 2001, an Order (Exh. H, a/k/a Dkt. #1031) was entered rejecting the Lease for Store #966. However, the automatic stay was still in effect as to the Store Equipment (*see* Exh. H, a/k/a Dkt. #1031).

3. TGAAR cooperated with the Chapter 11 Debtor, including by opening up Store #966 and allowing them to move cigarettes, beer and food stuffs out to other stores (Glasscock p. 114; Gutierrez Depo. pp. 6-7). TGAAR did remove, at its cost, the “rancid meat” that had been left rotting in the store (Glasscock p. 114; Gutierrez Depo. pp. 6-7).

E. TGAAR’s Attempt to Purchase Store Equipment.

1. After receipt of the August 31, 2001 letter (Exh. #8), Gary Glasscock contacted the Debtor’s representative, who told Glasscock that he thought that the Debtor would accept an offer of between \$5-10,000 for all of the equipment left in Store #966 (Glasscock pp. 39, 41-42, 122).

2. On September 13, 2001, TGAAR responded to the letter of August 31, 2001, by sending a bid for \$5,775 for all of the equipment and assets of the Debtor in Store #966 (Glasscock p. 42; Exh. #9). TGAAR’s intent in making the bid was to get rid of it, i.e., “buy it, then have it hauled off” (Glasscock p. 121).

3. When no response to TGAAR’s bid was received, TGAAR unsuccessfully attempted to contact the Debtor on numerous occasions (Glasscock pp. 42-43, 187). After a while, the Debtor’s phones were disconnected, making contact impossible (*Id.*).

4. After August 31, 2001, TGAAR made efforts to get the Debtor (and later, the Chapter 7 Trustee) to actually vacate the premises by removing or selling the Store Equipment. (Baily pp. 256, 269; Exh. #13, a/k/a Dkt. 1674, p. 2, ¶H; Gonzales pp. 283-85, 292-93 [“message . . . said he needs decision on the equipment”]). Such requests were unheeded.

5. Because the Debtor continued to use Store #966 to store and protect the equipment, beginning in September, 2001, TGAAR sent monthly invoices to the Debtor for “equipment storage” (Glasscock pp. 43-44; Baily, pp. 255-56; Gonzales pp. 288-89; Exh. #10).

F. Fair Rental Value of Store #966.

1. Gary Glasscock has been in the commercial real estate business, through TGAAR, in the Midland and West Texas Areas since 1989 and has owned approximately 20 commercial properties, including storage properties, over that period of time (Glasscock pp. 26, 28, 44). Mr. Glasscock is familiar with the commercial real estate market in Midland, Texas, including commercial and storage rental rates (Glasscock pp. 28, 44).

2. Unairconditioned storage space in Midland, Texas, rents for between \$3-4/ft. (Glasscock p. 45). A fair rental rate for the airconditioned space in Store #966 was \$4/sq. ft. or \$15,000/month (Glasscock p. 45).

3. The fact that TGAAR only offered \$5,775.00 for the Store Equipment (Exh. #9) had nothing to do with the fair rental rate of the building. The Chapter 11 Debtor, and later, the Chapter 7 Trustee, were occupying the entire Store #966 – the Store Equipment was spread out over the entire store (Glasscock pp. 121-22; Baily pp. 257-58; Gutierrez Depo. p. 9). Such Store Equipment would have occupied at least one-half (1/2) of Store #966 even if such Store Equipment had been moved to one side (Baily pp. 257-58). Moving the Store Equipment would have been very expensive (Baily pp. 257-58; Glasscock p. 124). Moreover, TGAAR could not move the Store Equipment to one side of Store #966 because the automatic stay was still in place as to the Store Equipment (*see* Exh. H, a/k/a Dkt. #1031).

4. The invoices for the period September 2001 through January 2002 were for \$15,000/mo. (Glasscock pp. 43-44; Exh. #10). After the conversation between the Chapter 7 Trustee and Gary Baily in late January (or February) 2002, the monthly invoices were reduced to \$10,000/mo. with the hope that such would help get the Store Equipment removed from Store #966 sooner (Baily p. 255; Glasscock pp. 44, 123; Exh. #10).

5. During the period that Store #966 was used by Furr's and the Chapter 7 Trustee to store and protect the Store Equipment, TGAAR has to pay all ad valorem taxes (Exhs. ##15 and 35) (utilities, including electricity @ \$700/mo. minimum), and insurance costs, even though TGAAR could not use or lease the property (Glasscock pp. 38-39, 109-110; Baily pp. 252-53). TGAAR allowed a Church and the Midland Christian School to store some equipment at Store #966 and TGAAR stored some of its own equipment at Store #966 (Glasscock pp. 50, 123-24). Such equipment occupied only about 1,200-1,500 sq. ft. of the entire Store #966, which contained 44,000 sq. ft. (Glasscock pp. 45, 53).

G. Conversion to Chapter 7.

1. On December 19, 2001, the Chapter 11 bankruptcy case was converted to a case under Chapter 7 (Exh. #11, a/k/a Dkt. #1424).

2. In February, 2002 (or late January according to the Chapter 7 Trustee; Gonzales, p. 282), TGAAR's representative, Gary Baily, received a telephone call from the Chapter 7 Trustee inquiring about the invoice she had received for Store #966 (Baily p. 255)². Baily explained that a lot of "Furr's equipment" was still in the Store and that TGAAR was sending invoices for storage (Baily pp. 255-56). When the Chapter 7 Trustee failed to call back as she promised, Baily attempted unsuccessfully to telephone the Chapter 7 Trustee on numerous occasions (Baily pp. 256-57; Gonzales pp. 285-86; Exh. C).

H. Auction Order.

1. Following the filing of a motion (Exh. #12, a/k/a Dkt. #1642) on April 24, 2002, an "Auction Order" (Exh. #13, a/k/a Dkt. #1674) was entered on May 22, 2002. TGAAR supported and agreed to the entry of the Auction Order (Exh. #13). Such Auction Order gave the

² The Chapter 7 Trustee recalls a 2nd conversation on or about February 25, 2002, but such conversation does not add anything material (Gonzales, pp. 284-85).

Chapter 7 Trustee and Walter Parker access to Store #966 to conduct the auction. The Auction Order provided, in pertinent part:

It is hereby ORDERED:

* * *

1. Auction Sales. The Debtor has the authority to conduct an auction sale of the Store Equipment at former stores . . . and 966. The Debtor may use Walter Parker to conduct the auction As part of the auction process, Mr. Parker shall remove all of the Store Equipment from each of the former stores, and would leave them in a “broom-clean” condition

2. Access. The Debtor and/or Walter Parker is hereby granted access to the former stores as is reasonably needed to conduct auctions of the Auction Store Equipment

Such Auction Order also defined “Store Equipment” as follows:

D. The estate owns most of the personal property in former stores ## . . . and 966, such as shelves, refrigeration units, bakery equipment and fixtures, deli equipment, meat department equipment, etc. (together, the “Store Equipment”).

2. Only “fixtures” that were part of the “bakery equipment” were included in the definitions of “Store Equipment.” No fixtures such as sinks, commodes, pipes, air conditioning equipment, electrical wiring that was affixed to an had become part of the building that constituted Store #966 were included in the definition of “Store Equipment,” and the auctioneer was given no authority to sell or remove any of such types of permanent fixtures and improvements (*see* Exh. #13).

3. Despite the fact that the Auction Order (Exh. #13) stated, not once, but twice (p. 2 and p. 3), that “Mr. Parker would remove all Store Equipment from each of the former stores, and would leave them in a “broom-clean” condition,” Mr. Parker was never informed of such requirement (Parker pp. 222-23, 226, 228; Gonzales pp. 293-94). In fact, at the hearing, the

Chapter 7 Trustee made the amazing admission that “This is the first time I have read that sentence that clearly” (Gonzales p. 294).

I. Auction.

1. Parker sent two (2) employees out to Midland about a week before the auction for the “make-ready” (Parker p. 231). Parker was only there the day of the auction (Thursday) and until noon the next day (Friday) and had no personal knowledge of what was said in the “make-ready” meetings between his representatives and Gary Glasscock and Gary Baily (Parker pp. 200-01, 205). The auctioneer’s representatives, saw the Church and other non-Furr’s equipment at the back of Store #966 and suggested that such non-Furr’s equipment located at the back of Store #966 be blocked off (Baily pp. 261-62; Glasscock pp. 48-52, 139; Gutierrez Depo. pp. 9, 42-43). TGAAR did as they were told (*Id.*). The auctioneer’s representatives were never told that they could not look in the back of Store #966 (Gutierrez Depo. p. 11). Parker testified that he had no personal knowledge what was “blocked off” (Parker p. 231), even though other witnesses testified they could see what was behind the “screen mesh” or “wire cage” (Sparr Depo. pp. 31-33). The only property blocked off was non-Furr’s property that belonged to the Church, Midland Christian School and TGAAR (Baily p. 261; Glasscock pp. 48-52; Gutierrez Depo. pp. 9, 42-43; Sparr Depo. pp. 31-33).

2. The Contract between the auctioneer and the Chapter 7 Trustee (Exh. 32; Parker pp. 223-225) stated that the “Owner [i.e., the Chapter 7 Trustee] shall pay . . . moving and storage expenses when necessary.” Parker testified that he did not think moving the Store Equipment was necessary but was unaware of the Auction Order provision that required Parker to move all equipment (Parker p. 226).

3. The auction to sell the Store Equipment was held in Store #966 on Thursday, May 30, 2002 (Parker p. 200). The Store Equipment was sold for \$24,742.50 (\$19,794.00, net of commissions) (Exh. #23).

J. Aftermath of Auction.

1. No one from the auctioneer was present at Store #966 after noon on Friday, the day after the auction, to supervise the removal of the equipment (Glasscock pp. 142-43, 146-47; Murphy Depo. p. 20). Walter Parker tried to testify that one of his employees (Lorenzo) was supposed to be there, but he admitted that he had no personal knowledge that anyone was actually there (Parker p. 235). Parker testified that the employee he left in charge, Lorenzo, “needed supervision” (Parker p. 208), but Parker left no one at Store #966 to supervise Lorenzo (Parker p. 207). Usually after an auction, Parker supervises the removal of the equipment (Parker p. 213), but such was not done after noon on Friday, the day after the auction, as Parker and all of his employees, except Lorenzo, left to go home to El Paso (Parker p. 233).

2. Parker testified that:
 - a. It would not be appropriate to pull sinks off the wall (but did not know who should bear the cost of repair) (Parker pp. 234-35).
 - b. He did not repair any damage (Parker p. 234);
 - c. It was all right to “saw off” copper pipes but that the freon had to be properly evacuated (Parker pp. 241, 216).
 - d. Store #966 was clean before the auction (Parker p. 207).
 - e. He knows that equipment should be removed in a workmanlike manner without tearing the building up (Parker p. 211).
 - f. He was not usually responsible for cleaning up the stores after auctions (Parker p. 211).
 - g. He knows that electrical wires and water pipes must be “capped” (Parker p. 216).
 - h. He removed none of the store equipment (Parker p. 226).

- i. He does not know if any damage was done after he left at noon on Friday (Parker p. 245).
- j. He did not know whether Lorenzo was actually at Store #966 after Parker left Midland at noon on Friday (Parker p. 235).

One of the buyers at the auction, Jim Sparr, testified that Parker's Affidavit (Exh. #27) was false in material respects (Sparr Depo. pp. 30-33) and Parker admitted in his deposition that his Affidavit was false, as he did not have personal knowledge of the matters stated in his Affidavit (Parker pp. 220-221).

3. Despite such Auction Order and Parker's knowledge of how Store Equipment should be removed, much of the Store Equipment (plus an enormous amount of junk and trash) remained in Store #966 well after the date of such auction (Glasscock pp. 96-97, 145, 151; Baily p. 260; Gutierrez Depo. pp. 18, 26-27). Exhibit #19 consists of photos of Store #966 taken on or about June 26, 2002 by Gary Baily (Baily pp. 258-260). Baily took the photos because Store #966 looked so "bad" and was such a disaster (Baily pp. 259-60). Everyone that saw the store thought it was a disaster or "unbelievable," even after TGAAR removed much of the trash (Mussar Depo. pp. 8-9, 11; Percy Depo. pp. 9-10, 15, 43; Kincaid Depo. pp. 8-11; Easterwood Depo. pp. 9, 13; Gutierrez Depo. pp. 15, 18, 20, 27; Sparr Depo. pp. 8, 22-23; and Murphy Depo. pp. 7-10, 35). One buyer, Jim Sparr, testified that the auctioneer never told him that there was any timetable to remove the items that he purchased (Sparr Depo. p. 61). Electrical wires were cut, pulled and left loose in a dangerous condition (Percy Depo. pp. 40, 44). Copper pipes carrying freon were cut with a "sawzaw" and left "open," which allowed oxidation, both of which ruined the copper pipes that TGAAR had to pay to remove (Percy Depo. pp. 11-14, 17-18, 30, 37, 39). Freon, a hazardous substance, was released in violation of environmental laws from thirteen of fourteen copper lines (Percy Depo. pp. 11-14). Breaker boxes were "ripped out" (Easterwood Depo. pp. 9-10, 13). Easterwood testified that the photos do not show the

extent of electrical damage and that the place was a wreck – unbelievable that someone would do that (*Id.*).

4. The auctioneer’s representatives represented to TGAAR that “they’d be out of [Store #966] by the first week in June” (Baily p. 280) and misled TGAAR to believe “the store would be cleaned out completely” (Baily p. 280). The Chapter 7 Trustee admitted that a reasonable time to remove Store Equipment would be “a couple of weeks” (Gonzales p. 295). When one buyer told Parker that he was going to leave his stuff in there for a while, Parker did not protest (Parker p. 205).

5. Despite the requirement in the Auction Order that Store #966 be left in a “broom clean condition,” the only thing Parker did to clean up Store #966 or remove Store Equipment was to leave a few garbage bags with Lorenzo (Parker pp. 235-36), who did not stay around after noon on Friday, the day after the auction (Glasscock pp. 142-43, 146-47; Murphy Depo. p. 20; Parker p. 233). No clean-up or removal of unsold Store Equipment occurred while Parker was present (Parker p. 245).

6. The Chapter 7 Trustee admitted that she had no idea if anything was damaged by the removal of the Store Equipment (Gonzales p. 300).

7. On June 17, 2002, and again on June 26, 2002, the Chapter 7 Trustee’s counsel received by fax letters protesting the condition of Store #966, including the trash and debris left behind, the failure to remove large amounts of Store Equipment, and the damage done to Store #966 (Exhs. #33 and 34). The Chapter 7 Trustee never received copies of such letters from her counsel (Gonzales p. 296).

8. After such protests by TGAAR, a letter dated July 3, 2002 (the “July 3, 2002 Letter”; Exh. #18), was finally received by TGAAR from counsel to the Chapter 7 Trustee

allowing TGAAR to take possession of Store #966 and remove the large volume of equipment, junk and trash that remained in Store #966 (that is shown in the photos that constitute Exhibit #19).

9. The Chapter 7 Trustee admitted on cross-examination that:
 - a. She did not realize until the January 15, 2004 hearing that the Auction Order required Mr. Parker to “remove all the store equipment” and leave the stores in a “broom-clean” condition (Gonzales p. 294).
 - b. She never spoke to Mr. Parker at all (Gonzales p. 295).
 - c. She does not dispute Parker’s testimony that they entered into Parker’s standard form contract (Gonzales p. 295).
 - d. Walter Parker should have removed the Store Equipment on a timely basis, i.e., a couple of weeks (Gonzales p. 295).
 - e. She was not aware that Store Equipment had not been removed within a couple of weeks.
 - f. She did not receive a copy of Exhibit 33 (June 17, 2002 letter) or Exhibit 34 (June 26, 2002 letter) (Gonzales p. 296).
 - g. She could not recall whether she authorized the sending out of Exhibit 18 (July 3, 2002 letter) (Gonzales p. 296).
 - h. A “reasonable cost of removing the equipment is within the terms of the order” (Gonzales pp. 297-98).
 - i. She never set foot in Store #966 (Gonzales p. 298).
 - j. She admitted she does “not know what broom-clean condition means” (Gonzales p. 298).
 - k. She admitted she has “no idea” about whether Store #966 “was damaged by the way the equipment was removed” (Gonzales p. 300).
 - l. She did not know that the owner of the Roswell Store had complained and filed a motion (Gonzales p. 301). The Court should take judicial notice of Docket #1364, which is a motion that was filed for over \$221,000.00 of administrative expenses for rent, clean-up costs, and damage to the Roswell Store.

m. She admitted she has no personal knowledge about anything that went on at Store #966, including:

- (1) whether the auctioneer was denied access (Gonzales p. 304).
- (2) whether anyone from the auction company was there after noon on Friday following the auction (Gonzales p. 305).
- (3) whether the auctioneer's representatives said it was fine to block off the church stuff in the back of the store (Gonzales p. 306).

K. TGAAR's Compliance with Auction Order.

1. TGAAR complied with all terms of the Auction Order, including providing access to the auctioneer to Store #966 and to all Store Equipment and were cooperative (Glasscock pp. 53, 138-139; Gutierrez Depo. pp. 9-10). Parker and the Chapter 7 Trustee said they thought TGAAR "should have" given up all keys to Store #966, but the Auction Order clearly does not require that (Parker pp. 212-13, 221; Gonzales p. 305). The Chapter 7 Trustee failed to show that any damage resulted to the estate because TGAAR did not give up every single key to Store #966 (Parker pp. 221-22).

L. TGAAR Was Deprived of Possession of Store #966.

1. From December 19, 2001, the date of conversion of the case to a Chapter 7 bankruptcy case, until receipt of the July 3, 2002 Letter, TGAAR was deprived, at least as a practical matter, by the Chapter 7 Trustee of possession and use of Store #966. The automatic stay under 11 U.S.C. §362 was still in effect as to the Store Equipment (*see* Exh. H, a/k/a Dkt. 1031) and TGAAR's representatives had been advised not to "touch" the equipment in Store #966 (Baily p. 258; Glasscock p. 43, 97-98, 109). TGAAR was effectively prohibited from September 1, 2001, until July 3, 2002 from removing the Store Equipment and junk in Store #966 and from actually taking possession and having the use of Store #966 (Glasscock p. 43). The Chapter 7 Trustee (and Chapter 11 Debtor) used the automatic stay that was in effect as to

the Store Equipment to remain in possession of and actually use Store #966 to store and protect the Store Equipment, which benefited the bankruptcy estate, albeit contrary to the wishes and over the protests of TGAAR³.

2. TGAAR could have put new tenants into Store #966 (including possibly Dollar Tree, a “national” tenant, and at least Goodwill) much sooner “but for” the actions and conduct of Furr’s and the Chapter 7 Trustee (Glasscock pp. 97-98, 129, 185; Baily pp. 276-81).

3. Until the letter of July 3, 2002 was received, TGAAR could not begin to remove the remaining equipment, junk and trash and get Store #966 into a condition so could be shown to prospective tenants (Glasscock pp. 90, 97). In fact, Store #966 was left in such a dismal state that TGAAR could not show Store #966 to potential tenants until large amounts were expended to “clean-up” Store #966 (Glasscock p. 89; Baily pp. 259-60).

M. Clean-Up Costs.

1. The cost, including “dump fees,” for simply removing the remaining equipment, junk and trash from Store #966 was \$8,728 (Glasscock pp. 89, 95-96, 168; Exh. ## 35, 16, 17; Gutierrez Depo. pp. 26-27). Under the Auction Order (Exh. #13, a/k/a Dkt. #1674), such clean-up was required to have been conducted by the auctioneer that the Chapter 7 Trustee hired (Exh. #13, a/k/a Dkt. 1674). The only evidence to the contrary was the Chapter 7 Trustee’s observation from viewing the photos (Exh. 19) that “it doesn’t seem that, you know, tens of thousands of dollars would be required to remove the equipment and to clean it up, sweep it out” (Gonzales p. 298). She is correct as \$8,728.00 is less than “tens of thousands of dollars.”

³ The Chapter 7 Trustee’s counsel complained at the hearing because Gary Baily was “polite” when he spoke to the Chapter 7 Trustee. TGAAR should not be penalized because Mr. Baily acted in a “gentlemanly” manner.

N. Damages Resulting From Removal of Store Equipment.

1. The evidence aptly demonstrated that the removal of the equipment by the buyers at the auction was done in an negligent, unsupervised, abusive, and haphazard manner and that substantial damage occurred as a result (*see, e.g.*, Glasscock pp. 51-61, 169-70; Sparr Depo. pp. 8, 22-23; Murphy Depo. pp. 7-10, 35; Gutierrez Depo. pp. 13, 16, 19-20; Easterwood Depo. pp. 9-10, 13; Mussar Depo. pp. 6, 8-9).

2. The evidence establishes that TGAAR suffered at least the following amounts of damages:

Electrical Repair (Exh. #22)	\$19,100.71
Plumbing and Freon Renewal (Exh. #24)	\$18,450.00
Wall Repairs (Exh. #25)	\$17,956.19
Mussar Drywall (Exh. #23)	\$ 34.98
Scissor Lift Rental (Exh. #23)	\$ 506.07
Floor Damage (Exh. #26) (35,000 sq. ft. @ 1.45/sq. ft.)	<u>\$50,750.00*</u>
TOTAL DAMAGES	\$106,797.95*

*If only the damaged floor tile (3,200 sq. ft.) is considered, the Floor Damage is reduced to \$5,640.00, and Total Damages are reduced to \$61,687.95.

3. Each of the categories of damages caused by removal of the Store Equipment is supported by substantial evidence: Electrical Repair (Glasscock pp. 99; 175-77; 181-82; Easterwood Depo. pp. 7, 50; Exh. #22); Plumbing and Freon Removal (Glasscock pp. 101-02, Percy Depo. pp. 8-23, 40, 44, Exh. #24); Wall Repairs (Glasscock pp. 102-03; 172-73; Mussar Depo. pp. 9-17, 19-21, Exh. #25); Scissor Lift Rental (Glasscock pp. 103-04; Exh. #23); Floor Damage (Glasscock pp. 85-88, 104; Kincaid Depo. pp. 5-9, 12-16, 23; Exh. #26).

4. The damage estimates were not prepared by “professional” witnesses (Glasscock p. 190). Instead, they were prepared by reputable, blue-collar types that had actually done the work: “just the kind of guy that would do an honest day’s work for an honest dollar.”

(Glasscock pp. 102, 190; Kincaid Depo. p. 15; Easterwood Depo. pp. 7-8; Pearcy Depo. pp. 8-9; Mussar Depo. pp. 15-16.) Gary Glasscock asked them to give him “an idea of what they think they spent on the clean-up part [and] repairing the damage that was done.” (Glasscock p. 190.) He did not tell them how to prepare, describe or date their invoices (Glasscock p. 190).

5. The foregoing damages could have been avoided or greatly reduced had different methods been used to remove the equipment (Glasscock p. 60).

6. TGAAR protested the method of removal before the equipment was removed but the buyers advised that the auctioneer authorized such methods of removal and proceeded to remove the equipment and cause substantial damage to the store premises (Glasscock pp. 55-61; Exhs. ##33 and 34). The Chapter 7 Trustee never set foot in Store #966, never received copies of the letters sent to her counsel (Exhs. ##33, 34) and only looked at the photos (Exh. #19) to assess the damage (Gonzales pp. 296-98).

O. TGAAR Had No Janitorial Crew.

1. Contrary to Parker’s Affidavit (Exh. #27), TGAAR never had a “janitorial crew” (Glasscock p. 110; Baily p. 258; Gutierrez Depo. pp. 11-12, 19; Murphy Depo. p. 39).

IV.

LEGAL ANALYSIS

A. Removal of Store Equipment and Clean-Up Costs

1. Under the Auction Order (Exh. #13), the auctioneer had a **duty** to remove all of the Store Equipment and clean up the mess so as to leave Store #966 in a “broom clean condition” (*see* III.J.9.d.). Such was not done. The evidence establishes that TGAAR expended at least \$8,728.60 in removing Store Equipment and conducting the clean-up that the auctioneer had a **duty** to conduct (*see* III.M.1.).

2. Since the Chapter 7 Trustee never informed the auctioneer of his duty to clean up the store and remove the Store Equipment (*see* III.J.2.and H.3.), this Court should find that the Chapter 7 Trustee is liable for such obligation. This is particularly true when the contract between the auctioneer and the Chapter 7 Trustee requires the Chapter 7 Trustee to pay “moving and storage” costs (Exh. #32) (*see* III.I.2.).

3. Administrative expenses include “the actual, necessary costs and expenses of preserving the estate.” 11 U.S.C. §503(b)(1)(A). “The actual and necessary expenditures of the Trustee [or debtor-in-possession] in operating the business of the estate, for storage of property, for rent, and for other goods and services incidental to protecting, conserving, maintaining and rehabilitating the estate or certainly contemplated within the phrase ‘actual, necessary costs and expenses of preserving the estate.’” 4 COLLIER ON BANKRUPTCY, ¶503.06[2] (rev. 15th Ed. 2001). For a claim to qualify as an administrative expense for being an actual and necessary cost of preserving the estate, the expense must satisfy two requirements: (1) it must have arisen out of a post-petition transaction between the creditor and the debtor-in-possession (or trustee), and (2) it must have benefited the estate in some demonstrable way. 4 COLLIER ON BANKRUPTCY, ¶503.06[3] (rev. 15th Ed. 2001); *In re: Commercial Financial Services, Inc.*, 246 F.3d 1291 (10th Cir. 2001); *In re: Mid Region Petroleum, Inc.*, 1 F.3d 1130 (10th Cir. 1993); *In re: Amarex, Inc.*, 853 F.3d 1526, 1530 (10th Cir. 1988); *Texas Comptroller of Public Accts. vs. Megafoods Stores, Inc.*, 163 F.3d 1063 (9th Cir. 1998); *In re: Merry-Go-Round Enterprises, Inc.*, 180 F.3d 149, (4th Cir. 1999).

4. The \$8,728.60 should be allowed as a Chapter 7 administrative expense. The Auction benefited the estate (or it should have), so the expenses that TGAAR incurred for the clean-up that the auctioneer and Chapter 7 Trustee should have done, pass the “benefit analysis”

test for determining whether the expenses were “necessary” to preserve the estate. 4 COLLIER ON BANKRUPTCY, ¶503.06[3] [b] (rev. 15th Ed. 2001). The unusual nature and the amount of the damage does not remove such damages from being allowed as an administrative expense. For example, in *In Re: N. P. Mining Co., Inc.*, 963 F.2d 1449 (11th Cir. 1992), fines, based on violations of environmental regulations, were considered costs ordinarily incident to the operation of a regulated mining business sufficient to confer administrative expense status. In this case, costs incurred in the Auction, that were authorized by Order of this Court (Dkt. #1674), should be treated as allowable administrative costs despite their “unusual nature and amount of the damages.”

B. Delay in Obtaining Possession

1. As stated above, the Auction Order required the removal of all of the Store Equipment and the clean-up of Store #966. The Chapter 7 Trustee admitted that this should only take a “couple of weeks” (*see* III.J.9.d.). TGAAR, after supporting the entry of the Auction Order, and cooperating with the auctioneer, did not sit on its rights when the Store Equipment was not timely removed (*see* III.D.3., H.1. and K.1.). TGAAR sent Exhibits 33 and 34 to the Chapter 7 Trustee’s counsel, complaining of the delay, the damages, and the mess left behind (*see* III.J.7.). The Chapter 7 Trustee never received those letters from her counsel (*see* III.J.9.f.).

2. Finally, by letter dated July 3, 2002, TGAAR obtained permission from the Chapter 7 Trustee through her counsel (although it appears that she did not know about it) to take actual possession of Store #966 and remove the remaining Store Equipment (*see* III.L.3.). It took until the end of September 2002 to conduct the initial clean-up (*see* III.L.3.and M.1.). The Chapter 7 Trustee violated the Auction Order by allowing the auctioneer to conduct himself in

the manner he conducted himself (*see* III.N.1.). Such caused a considerable delay in TGAAR's ability to obtain new tenants (*see* III.G.2., H.1-3., J.1., 3-9., and L.1-3.).

3. TGAAR still had an excellent chance of obtaining Dollar Tree as a tenant (*see* III.L.2.). This excellent prospective tenant was lost as a result of the delay. Goodwill was ready to move in at any time. TGAAR lost rentals and good tenants because of the delays and non-compliance with the Auction Order by the auctioneer and the Chapter 7 Trustee (*see* III.G.2., H.1. and 3., and J.1, 3-9., L.1.-3.).

4. The damages for the delay in complying with the Auction Order were computed by taking the monthly rentals from Southern and Goodwill and multiplying them by 4 months (June-September, 2002), the period of the delay. This delay cost TGAAR \$61,529.48, as set forth in Exhibit 35 (alternatively, \$60,000 based on the reasonable storage rental rate of \$15,000/mo. for 4 months).

5. The Chapter 7 Trustee complained that TGAAR raised this theory shortly before the hearing. Such is true, but TGAAR has always asks for damages for the June-September 2002 period – this is just a different theory on which TGAAR bases its claim that damages should be awarded (*see* Dkt. ##1928, 1929 and 1931, TGAAR's Motion for Summary Judgment, etc.). A different theory can be advanced for the same damages and same facts at any time without being untimely.

C. Damages Caused By Removal of Equipment.

1. Chapter 7 Trustee Was a Tenant-At-Sufferance and/or a Trespasser.

After the Order was entered by the Court rejecting the Lease (Exh. H, a/k/a Dkt. 1031), the Chapter 11 Debtor, and after conversion, the Chapter 7 Trustee, were either tenants-at-sufferance and/or trespassers. A tenant-at-sufferance is merely an occupant in naked possession

of the property – i.e., one who wrongfully continues in possession of property after his right to possession has ceased. *ICM Mortgage Corp. v. Jacob*, 902 S.W.2d 527 (Tex. App.—El Paso 1994). The rejection order ended their right to possession, but not their possession – they were therefore a tenant-at-sufferance or trespasser.

2. A trespasser includes one who has a duty to remove property from the land of another, but does not do so. *Clark v. Whitehead*, 874 S.W.2d 282, 284 (Tex. App.—Houston [1st Dist.] 1994); *Creative Cabinets, Inc. v. Jorrie*, 538 S.W.2d 207 (Tex. Civ. App.—San Antonio 1976); *Allen v. Virginia Hill Water Supply Corp.*, 609 S.W.2d 633, 635-36 (Tex. App.—Tyler 1980, no writ) (erecting or maintaining building that encroaches on the land of an adjoining owner is trespass); *North Ridge Corp. v. Walraven*, 957 S.W.2d 116, 121 (Tex. App.—Eastland 1997, pet. den.) (surface lessee committed trespass by placing equipment beyond boundary of its leased property); *Pentagon Enters. v. Southwestern Bell Telephone Co.*, 540 S.W.2d 477, 478 (Tex. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (defendant left telephone poles encroaching on land purchased by plaintiff); *Mobile Pipe – Dillingham v. Stark*, 437 S.W.2d 359 (Tex. App.—Beaumont 1969) (placing of unusable pipe). In *Clark v. Whitehead*, *supra*, 874 S.W.2d at 284, the court relied upon the following evidence in finding that the former tenant was a trespasser/holdover tenant:

- a. Pipe and pipe racks remained on the property;
- b. Boxes were inside the building;
- c. Trash piles were on the back lots;
- d. A pipe loader and a truck drove across the property;
- e. A man was burning trash on the property;
- f. A shed was repainted; and

g. Cars drove across the property.

Similarly, in *Creative Cabinets, Inc. v. Jorrie*, *supra*, 538 S.W.2d at 209, the court, relying on evidence that “fixtures and property” of the appellant were still on the leased premises, found that the “tenant was still occupying the premises.” “The gist of an action for trespass to realty is the injury to the right of possession.” 70 TEX. JUR.3d 406; *Pentagon Ent. v. Southwestern Bell Tel. Co.*, 540 S.W.2d 477 (Tex. App.—Houston [14th Dist.] 1976, writ ref’d n.r.e.). The RESTATEMENT OF TORTS 2d, §158, provides that “one is subject to liability for trespass . . . if he intentionally . . . fails to remove from the land a thing which he is under a duty to remove.” The RESTATEMENT OF TORTS 2d, §160 similarly provides that “a trespass may be committed by the continued presence on the land of a . . . chattel, or other thing if the actor fails to remove it after the consent has been effectively terminated.” Texas courts have routinely cited the above-referenced sections of the Restatement of Torts 2d with approval. *See, e.g., Watson v. Brazos River Elec. Power Coop.*, 918 S.W.2d 639, 645-46 (Tex. App.—Waco 1996, writ den.)

3. Both a tenant-at-sufferance and a trespasser are liable for the damages caused from removal of equipment. Parker admitted that the Store Equipment should have been removed in a workmanlike manner without damage to the building (*see* III.J.2.a, e, g, and i). He also admitted that the employee he left behind needed supervision (*see* III.J.1.). The evidence establishes that the employee left behind, Lorenzo, did not remain at the site and was gone shortly after noon on Friday (*see* III.J.1). Chaos resulted, and TGAAR’s building was damaged by the manner in which Store Equipment was removed (*see* III.J.3, 7 and 9.). The Chapter 7 Trustee never had any idea of what was going on in Store #966 and, at the hearing, did not seem to care (*see* III.J.9.).

4. The cost of restoration or repair is recoverable from the trespasser or from a tenant-at-sufferance. *More v. Rotello*, 719 S.W.2d 372, 378 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.); *Brazos Elec. Power Coop. v. Taylor*, 576 S.W.2d 117, 120 (Tex. App.—Waco 1978, writ ref'd n.r.e.); *McDaniel Bros. v. Wilson*, 70 S.W.2d 618, 621 (Tex. App.—Beaumont 1934, writ ref'd); *Milo Szar v. Gonzalez*, 619 S.W.2d 283, 285 (Tex. App.—Corpus Christi 1981, no writ) (costs awarded to restore property to former condition); 70 TEX. JUR.3d 420-21.

5. The auctioneer admitted he had a duty to supervise the removal of the Store Equipment, but the evidence establishes that he shirked such duty (*see* III.J.1. and 2.). Such constitutes all of the elements of negligence. *D. Houston, Inc. v. Love*, 92 S.W.3d 450, 454 (Tex. 2002). TGAAR has shown that it incurred at least \$61,687.95 in damages as a result of the means of the removal of the Store Equipment. Such figure includes only \$5,640.00 of damage to the floor (based on damage to 3,200 sq. ft.). There was evidence that the damage to the floor should be calculated at \$50,750.00, based on damage to 35,000 sq. ft. of flooring tile. In such event, the total damages caused by the removal of the Store Equipment would be increased to \$106,797.95.

6. All of the foregoing damages were set forth in Exhibit 35 and were discussed in III., above. Although such damages were “unusual in nature and substantial in amount,” they should be allowed as Chapter 7 administrative expenses for the reasons set forth in IV.A.3. and 4., above.

D. Damages for Holdover/Possession During Chapter 7 Case.

1. While it is true that the Chapter 7 Trustee inherited a problem that she did not create (i.e., the Store Equipment being on the premises of Store #966 when the case was

converted), she did little to correct the problem (*see* III.J.9.). Although she said she talked to Gary Baily twice, she admitted that she never got back to him with a solution and ignored his repeated telephone calls despite the fact that he was always very “polite” (*see* III.G.2.and J.9.).

2. The Store Equipment was in Store #966 when the case was converted, and it remained there until the auction (and some of it, long thereafter) (*see* III.D.1. and G.1.).

3. As stated above, the Chapter 7 Trustee was a tenant-at-sufferance and/or a trespasser. A landlord may elect to treat a tenant in possession after expiration of a lease as a trespasser or a holdover tenant. *Bockelmann v. Marynick*, 788 S.W.2d 569, 571 (Tex. 1990); TEXAS PRACTICE GUIDE, LANDLORD-TENANT RELATIONSHIP, §11.346 (2004). In either event, the Chapter 7 Trustee (and Chapter 11 Debtor) are required to compensate TGAAR for the reasonable value of the use of the property. TGAAR is entitled to at least the reasonable rental value of the premises. *United General Ins. Agency of Midland, Inc. v. American National Ins. Co.*, 740 S.W.2d 885, 887 (Tex. App.—El Paso 1987, no writ) (tenant-at-sufferance); *Brazos Elec. Power Coop. v. Taylor*, 576 S.W.2d 117, 120 (Tex. App.—Waco 1978, writ ref’d n.r.e.) (“The measure of damages arising from temporary injury to land is ordinarily the cost and expense of restoring the land to its former condition, plus any loss or damages occasioned by being deprived of the use of the land, with interest.”); *Mangham v. Hall*, 564 S.W.2d 465, 468 (Tex. Civ. App.—Corpus Christi 1978) (lost profits awarded as damages for trespass); *Allen v. Virginia Hill Water Supply Corp.*, 609 S.W.2d 633 (Tex. App.—Tyler, 1980); 70 TEX. JUR.3d 420; TEXAS PRACTICE GUIDE, LANDLORD-TENANT RELATIONSHIP, §§11.346-347. TGAAR’s lost profits are equal to the lost rentals as the evidence shows that TGAAR paid all of the expenses.

4. The evidence established that TGAAR sent invoices for the storage of the Store Equipment (*see* III.E.5. and F.4.). These invoices were in the amount of \$15,000.00 for the

period from September through December, 2001 and \$10,000.00 for the period from January-May 2002 (*see* III.E.5. and F.4.). The testimony shows that TGAAR reduced the storage costs to \$10,000.00/mo. after visiting by telephone with the Chapter 7 Trustee and in hope that the Store Equipment would finally get removed (*see* III.F.4.). The evidence establishes that the \$15,000.00/month is the reasonable rental value of the premises for storage (*see* III.F.1. and 2.). Based on \$15,000.00/month, TGAAR should be awarded \$6,300.00 for the portion of the month of December that Furr's was in Chapter 7 and \$75,000.00 for the period from January through May (a total of \$81,300.00). If the reasonable rental value is reduced to \$10,000.00/month for the January-May period based on the reduced invoices for such months, the total would be reduced to \$56,300.00. If the reasonable rental value of the premises for the month of June 2002 is added, due to the fact that TGAAR did not get permission to move the Store Equipment until July 3, 2002, an additional \$15,000.00 (or at least \$10,000.00) should be added to the total.⁴

5. TGAAR is fully cognizant of the Memorandum Opinion dated April 14, 2003 by this Court on the cross-motions for summary judgment. In such Memorandum Opinion, the Court stated that while "the estate benefited from the storage of the Equipment . . . the benefit received by the estate, however, will not exceed the actual value of the Equipment because it would not be 'necessary' to pay more to store equipment than it was worth," *citing In Re: C&L Country Market of New Market, Inc.*, 52 B.R. 61, 63 (Bankr. E.D. Pa. 1985). TGAAR believes that such reasoning in *C&L Country Market* has not been followed or adopted by any other court and should not be followed by this Court as such would actually constitute a wrongful taking of property in violation of the property owner's Constitutional and other rights. The fact that the Store Equipment turned out to be worth less than \$20,000.00 only further demonstrates

⁴ TGAAR is cognizant of the fact that it has now requested reasonable rental value for the month of June 2002 on two occasions. TGAAR does not believe that it should be awarded reasonable rental value for the month of June 2002 more than once.

that the Chapter 11 Debtor and Chapter 7 Trustee should have removed the Store Equipment much earlier.

6. If the “cap” set forth in *C&L Country Market* is applied, however, the damages would be reduced to the amount the Store Equipment was worth. This would be \$24,742.50 if the gross sales price is used to determine “worth” or \$19,794.00 if the net amount paid Furr’s Supermarkets, Inc., after auctioneer’s commissions, is used to determine “worth.” (Exh. #23.)

7. TGAAR is also fully cognizant of the discussion in the Memorandum Opinion concerning the limitation of damages based on the amount of the premises actually utilized. In this case, the evidence establishes that Store #966 had 44,000 sq. ft. and that the Store Equipment was scattered throughout and occupied all of Store #966 (*see* III.F.3. and 5.).

8. The testimony also established that the Store Equipment would have occupied only 50% of the premises if it had been moved to one side, but that the cost of moving the Store Equipment would have been substantial (*see* III.F.3.). TGAAR could not move the Store Equipment because of the automatic stay (and because it would require disconnecting and result in possible damage) and the Chapter 7 Trustee chose not to do so (*see* III.F.3.). Based on the foregoing, TGAAR does not believe it would be appropriate to reduce the damages based on the amount of space that the Store Equipment would have occupied if it had been moved to one side.

9. The evidence also established that TGAAR utilized approximately 1,200-2,000 sq. ft. of the 44,000 sq. ft. to store equipment, etc. owned by a Church, the Midland Christian School, and TGAAR (*see* III.F.5.). Due to the fact that TGAAR was paying the utilities, insurance, and ad valorem taxes (*see* III.F.5.) while it was receiving nothing at all from the Chapter 11 Debtor or the Chapter 7 Trustee, TGAAR does not believe it should be penalized for

the “donations” that it made to the Church and school or for storing a small amount of its own equipment.

10. Based on the discussion in IV.A.3. and 4., above, and the authorities and reasonings stated in this Court’s Memorandum Opinion dated April 14, 2003, TGAAR should be allowed Chapter 7 administrative expenses for the reasonable storage rent/value of Store #966.

E. Damages for Holdover/Possession During Chapter 11 Case.

1. For the reasons set forth above, TGAAR should be awarded, as a Chapter 11 claim, the reasonable rental value of Store #966 for the period that the Chapter 11 Debtor used Store #966 to store the equipment (September 1, 2001 through December 18, 2001). This amount should be \$15,000.00 per month as established above. The total for the September 1, 2001 through December 18, 2001 period, as set forth in Exhibit 35, is \$53,700.00.

F. Landlord’s Lien.

1. TGAAR claimed a landlord’s lien. Any person leasing or renting all or part of a building for non-residential use has a preference lien on all property of the tenant or sub-tenant in the building to secure the payment of rent due. TEX. PROP. CODE §54.021; TEXAS PRACTICE GUIDE, LANDLORD-TENANT RELATIONSHIP, §11.358 (2004); TEX. JUR.3D, LANDLORD AND TENANT, §204. The evidence establishes that TGAAR was requested by Furr’s to waive its landlord’s lien, but that it chose not to do so (*see* III.B.5.). The Auction Order preserved TGAAR’s rights to its landlord’s lien (Exh. #12, a/k/a Dkt. #1642). Such lien is claimed as to the “worth” of the Store Equipment, which is at least the \$19,794.00 of net proceeds of the auction sale that the Chapter 7 Trustee received.

G. Liability of Chapter 7 Trustee for Auctioneer's Conduct.

1. The relationship created between an auctioneer and the owner is “one of agent and principal.” *Joe T. Presswood v. Houston Industrial Welding School, Inc.*, 585 S.W.2d 763, 766 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.), *citing* 7 TEX. JUR.2D, AUCTIONS AND AUCTIONEERS, §5 and 7 AM. JUR.2D, AUCTIONS AND AUCTIONEERS, §64.

2. The Chapter 7 Trustee is liable for the wrongful acts and conduct of the auctioneer, as its agent. *Celtic Life Ins. Co. v. Coats*, 885 S.W.2d 96 (Tex. 1994). No provision in the U.S. Bankruptcy Code alters this general rule of law.

H. Damages for Exercising Option to Extend the Lease/Fraud.

1. The evidence demonstrates that while the Chapter 11 Debtor was attempting to sell a number of its stores, including Store #966, and during the Chapter 11 bankruptcy case, that:

- a. Steve Mortensen signed and sent to TGAAR a letter, dated June 18, 2001, exercising the option to extend the Lease for an additional five (5) years at \$19,043.75/mo. plus ad valorem taxes (*see* III.B.2. and C.2.).
- b. The Chapter 11 Debtor was attempting to sell Store #966 and exercising the option to extend the Lease to Store #966 was required in order to have anything to sell as the Lease on Store #966 otherwise expired on December 31, 2001 (*see* III.L.1. and 3.).
- c. Steve Mortensen signed the option to exercise the extension as President and CEO of the Chapter 11 Debtor (*see* III.C.4.).
- d. He never told TGAAR that such exercise of the option was meaningless or had any problems (*see* III.C.4.).
- e. TGAAR relied on Mortensen's exercise of such option and representations to their detriment and suffered damages (*see* III.C.4.).

2. The rent for the five-year period of the extension of the Lease is \$1,142,625.00 (\$19,043.75/mo. x 60 mo.). From this should be deducted the rent that TGAAR should receive under the Goodwill lease (\$246,854.52 [\$5,610.33/mo. x 44 mos. {5/1/03 to 12/31/06}] of the 60

mos.]) and Kaplan lease (\$265,385.46 [\$7,172.58/mo. x 37 mos. {12/01/03 to 12/31/06} of the 60 mos.]) that TGAAR obtained to mitigate their damages (Glasscock pp. 92-93). After reductions for TGAAR's efforts to mitigate, the Chapter 11 case damages for the exercise of the option and the subsequent breach are therefore \$630,385.04. Any amount allowed as a Chapter 7 claim by this Court for the use of Store #966, would probably further reduce this claim.

3. TGAAR is cognizant of this Court's Memorandum Opinion dated April 14, 2003, where is ruled that the exercise of the option on June 18, 2001, was, in effect, nullified by the Order entered on September 6, 2001, rejecting the Lease (Exh. H, a/k/a Dkt. #1031). TGAAR adopts the arguments it made in connection with its Motion for Summary Judgment, but does not expect the Court to reverse its ruling on this issue.

4. The evidence at the hearing further demonstrates that Steve Mortensen, as agent for the Chapter 11 Debtor, committed fraud and that TGAAR was damaged thereby. All of the elements of a common law fraud claim have been proven. *Formosa Plastics Corp. v. Presidio Engineers & Contractors*, 960 S.W.2d 41, 47-48 (Tex. 1998).

5. The Chapter 11 Debtor was liable for the frauds committed by its agents. *Light v. Wilson*, TGAAR asserts that the damages set forth below should be awarded for this fraud. At the very least, TGAAR was delayed by at least six months in seeking new tenants because of Steve Mortensen's misrepresentations. Rent for such six (6) months (\$114,262.50) should be awarded based on the rent rate in the Lease of \$19,043.75 (Exh. ## 1, 35), or at least \$90,000.00 of damages should be awarded for six (6) months as a Chapter 11 administrative claim for the fair rental value for storage of Store #966 (\$15,000.00/mo.) (*see* III.F.4.).

V.

CONCLUSION

Based on the foregoing, TGAAR Properties, Inc. and TGAAR West Texas, Inc. should be allowed the damages set forth in Exhibit #35 and above, as Chapter 7 or Chapter 11 administrative expenses. Such damages have been shown to have been the actual and necessary expenditures incurred in connection with selling the Store Equipment at auction and storing and protecting such Store Equipment prior to the auction. While the auction may have turned out to be a “disaster,” particularly for TGAAR, resulting in unusual and substantial expenses, the auction was to have benefited the estate and the expenses related thereto incurred during the Chapter 7 case should therefore be treated as Chapter 7 administrative expenses.

The administrative expenses that should be awarded to TGAAR as a result of the violation of the Auction Order are as follows:

Clean-Up Costs	\$ 8,728.60
Delay in Obtaining Possession	\$ 61,529.48

The administrative expenses that should be awarded to TGAAR for the damages caused by the manner in which the Store Equipment was removed totaled \$106,797.95 (alternatively, \$61,687.95 if only the damaged floor tile [3,200 sq. ft.] is considered).

The administrative expenses that should be awarded for the holdover/possession during the Chapter 7 case are as follows:

December 19 - 31, 2001 (0.42 mo.)	\$ 6,300.00
January 1 – June 2, 2002 (5.067 mo.)	\$ 55,000.00
June 3 – July 3, 2002 (1 mo.)	<u>\$ 10,000.00</u>
TOTAL	\$ 71,300.00

The administrative expenses that should be awarded for the holdover/possession during the Chapter 11 case are as follows:

September 1 – December 18, 2001(3.58 mo.) \$ 53,700.00

Additional administrative expenses should be allowed relating to the exercise of the option to extend the Lease for an additional five (5) years and the fraud committed by Steve Mortensen. The amount of such expenses are set forth in IV.H., above.

Dated this 8th day of March, 2004.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I certify that on the 8th day of March, 2004, a true and correct copy of the foregoing was served on the following persons:

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


Robert K. Whitt