

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 REPLY BRIEF IN LIEU OF CLOSING ARGUMENT IN THE
TGAAR ADMINISTRATIVE CLAIM CONTESTED MATTER**

Plaintiff Yvette J. Gonzales, Chapter 7 Trustee (the "Trustee"), by counsel, files this reply brief in the contested matter involving TGAAR Properties, Inc.'s ("TGAAR's") Amended Motion for Payment of Administrative Expenses, filed on or about October 30, 2002 (the "Motion"). The first two sections of the brief discuss TGAAR's general argument in its Closing Brief (the "TGAAR Brief"). The remaining sections address specific arguments made in the TGAAR Brief.

I. TGAAR TRIES TO DON THE MANTLE OF VICTIMHOOD, BUT IT DOES NOT FIT

TGAAR attempts to portray itself as a blameless victim, harmed variously by the indifference and slowness of the Trustee and the actions of her auctioneer Walter Parker. The evidence before the Court belies the attempt. Although the Trustee does not claim that she or Mr. Parker were, like Caesar's wife, beyond reproach, TGAAR's own conduct was the primary cause of any loss it suffered. For example:

- Before the subject equipment was auctioned, TGAAR's actions led the Trustee to believe TGAAR was attempting to get the equipment for free. Tr. at 285, 304;
- TGAAR never offered to buy the equipment from the Trustee. Tr. at 269;
- TGAAR never sought automatic stay or other Court relief, to counteract any alleged slowness by the trustee in removing the equipment;

- When the Trustee sought Court authority to auction the equipment, TGAAR's response in essence asked that TGAAR be given all of the auction proceeds. Docket # 1654;
- TGAAR did not give Mr. Parker unfettered access to the subject building, thereby violating the Court's order allowing the auction, TGAAR ex. 13 (the "Auction Order"). Mr. Parker said he was "dumbfounded" and "hamstrung" by TGAAR's behavior. Tr. at 246;
- Before, during, and especially after the auction, TGAAR retained control over the Premises and the equipment removal process, Tr. at 214-219, yet wants to hold the estate liable for the results of that process;
- TGAAR wants to hold the estate liable for "delay damages," yet gave its friend Jim Spar between two and three weeks after the auction to remove equipment. Spar depo. at 15-17;
- TGAAR wants to hold the estate liable for "delay damages," yet admitted that it possibly could have removed the unsold equipment "in a matter of days." Tr. at 128;
- TGAAR increased its claim for building damage and clean-up costs from \$20,000 to \$135,000 in a six-week period. Docket ## 1807 and 1928;
- Despite claiming \$120,000 in building damage, TGAAR did not document the actual cost to repair any alleged damage, instead relying on cryptic "dummy" invoices, prepared long after the alleged repairs were performed. Trustee's main brief at 14-19; and
- TGAAR's evidence of its post-auction "clean-up" cannot be reconciled with the testimony of TGAAR's key witnesses. Trustee's main brief at 11-12.

If TGAAR had acted differently, the equipment sales process likely would have gone as well as it had elsewhere, i.e., without significant problems. For example, TGAAR could have made a reasonable bid for the equipment, but it did not. TGAAR could have filed a motion for relief from stay. It never did. TGAAR could have given Mr. Parker the required access to the entire building. It refused. TGAAR could have given Mr. Parker control over the building until the auction process had been completed.

TGAAR chose not to. TGAAR could have carefully documented any alleged damage caused by the removal of auctioned equipment. It did not do that. TGAAR could have reminded the Trustee and Mr. Parker of the estate's obligation to remove unsold equipment. It did not do that either. TGAAR could have done the post-auction clean-up promptly. Instead, TGAAR chose to spend months in the process.

The Trustee urges the Court to reject TGAAR's attempt to play the victim. The truth is that TGAAR, angered at Furr's rejection of the subject lease, turned a normal liquidation of equipment into a very expensive and unproductive fight, with the apparent purpose of recouping some or all of its lease rejection losses.

II. TGAAR'S CANNOT STOP ASSERTING NEW THEORIES

In her brief, the Trustee pointed out that TGAAR's delay in possession claim (\$61,529.48) was raised for the first time at trial. In a related matter, the Trustee pointed out that TGAAR apparently did not realize until shortly before trial that the Court's auction order required Mr. Parker to dispose of unsold equipment. Trustee's main brief at 8-9.

Not content to assert new theories only at trial, the TGAAR Brief advances two theories never before raised in this contested matter: (i) TGAAR should be given a Chapter 11 administrative claim because it was defrauded by Steve Mortensen, TGAAR Brief at 31-32; and (ii) TGAAR should be given the net auction sales proceeds because of an alleged statutory landlord's lien. TGAAR Brief at 30. The weaknesses of these new theories is discussed below.

The never-ending parade of legal theories bolsters the Trustee's view that TGAAR wants recompense for Furr's decision to reject its lease, and will do and argue almost anything, at any time, to achieve that result.

III. TGAAR VIOLATED THE AUCTION ORDER

TGAAR, which complains that Mr. Parker and the Trustee did not comply with the Auction Order, itself violated the order. The Auction Order required TGAAR and the other landlords to give Mr. Parker "access to the former stores as is reasonably needed to conduct auctions of the Auction Store Equipment." Auction Order, p. 3. As shown elsewhere, TGAAR did not give Mr. Parker reasonable access to the Premises. Trustee's main brief at 4-5. See also Spar depo. at 11. Furthermore, TGAAR did not let Mr. Parker sell the estate's equipment, including the remote compressors, walk-in freezers, and copper lines. Trustee's main brief at 4-5. This allegation is discussed in greater detail in the Trustee's main brief, at 8-10.

IV. THE AUCTIONEER DID NOT SAY HIS AFFIDAVIT WAS FALSE

TGAAR asserts that Mr. Parker "admitted in his deposition that his Affidavit was false, as he did not have personal knowledge of the matters stated in his Affidavit." TGAAR Brief, p14. This assertion is wrong. First, Mr. Parker's deposition is not in the record, and during his trial testimony Mr. Parker said no such thing. Tr. at 220-221; 242-244. Furthermore, TGAAR's allegation that Mr. Parker's affidavit was "false" is based, not on Mr. Parker's testimony, but rather on TGAAR's assertion that "personal knowledge" can only be based on first-hand experience. Tr. 242-244. Some of Mr. Parker's affidavit testimony is based on what his trusted employees told him. Tr. at 243.

Mr. Parker thought, and still thinks, that his personal knowledge can be based upon such information. TGAAR apparently disagrees. That does not make Mr. Parker a liar.

V. THE TRUSTEE DID NOT IGNORE TGAAR'S TELEPHONE CALLS

TGAAR alleges that the Trustee “ignored [Mr. Bailey’s] repeated telephone calls despite the fact that he was always very “polite.” TGAAR Brief at 27. That is not correct. The Trustee testified that she talked to Mr. Bailey twice, once in January, 2002 and once on February 25, 2002. Tr. at 283-284, 286. After that, Mr. Bailey left messages on March 19 and April 10. Tr. at 286. Based on those messages, the Trustee decided to auction the equipment. Tr. at 286. The decision was made before April 18, 2002, the date on which Mr. Bailey left his third message. Id. The Trustee filed her motion to auction April 24, 2002. Two days later, Mr. Bailey called again, but the Trustee assumed he had not yet received the auction sale motion. Id. Thus, while the Trustee did not return some of Mr. Bailey’s telephone calls, she did not ignore them or TGAAR’s situation. Indeed, shortly after the second unreturned telephone call, the Trustee decided to file the auction sale motion. The Trustee may have avoided talking to Mr. Bailey, likely because of her impression that he was angling to get the equipment for nothing, Tr. at 285, 304, but she did not ignore him.

VI. TGAAR DID NOT LOSE DOLLAR TREE AS A TENANT BECAUSE OF THE TRUSTEE'S ACTIONS

TGAAR asserts it “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.” TGAAR Brief at 18. The

evidence does not support this claim as it relates to post-auction conduct.¹ Rather, Mr. Glasscock testified that he held off placing Goodwill in the Premises until after December, 2002 because of his hope of signing a lease with Wal-Mart. Tr. at 119-120. He also said he was in no rush to prepare the Premises for a new tenant after the auction because he “didn’t have anybody to put in there.” Tr. at 129.

VII. CUTTING THE COPPER LINES DID NOT HARM TGAAR

TGAAR argues it was damaged when buyers cut certain copper lines running between refrigerated cases on the store floor and remote compressors in the compressor room at the back of the store. TGAAR Brief at 14. The argument has no merit because the refrigeration units, compressors, and lines were owned by the estate and were subject to the lien of the secured lenders. Damaging such equipment (if it was damaged) did not harm TGAAR because TGAAR had no interest in the lines. Mr. Parker did not attempt to sell the copper lines to a “scrapper” because he was afraid of TGAAR’s reaction, Tr. at 222, not because TGAAR owned the lines. Similarly, Mr. Parker did not attempt to sell the remote compressors only because he thought TGAAR wouldn’t give him access, not because TGAAR owned the compressors. Tr. at 195-197. TGAAR apparently has trouble distinguishing between the estate’s property and its own property.²

In a related matter, TGAAR wrongly states that Freon was released in violation of environmental laws from thirteen of fourteen copper lines. TGAAR Brief at 14. Mr. Percy, whose testimony TGAAR is relying on for the assertion, did not say that. Mr. Percy testified that “It looked like 13 or 14 of the units had been cut.” Percy depo. at

¹ TGAAR’s claims based on actions taken before the auction are dealt with elsewhere. See the Trustee’s main brief at 6-8.

² This trouble also was evident in Mr. Glasscock’s testimony regarding the alleged damage to the pharmacy display cases and shelves, none of which was owned by TGAAR. Tr. at 55-57.

14. However, it is clear that buyers cut the copper lines even if they had properly removed the Freon from the system before doing so. See, e.g., Murphy depo. at 24; Tr. at 241-42 (Parker testimony). Thus, Mr. Percy could not properly deduce that Freon was discharged into the atmosphere because the copper lines had been cut.

Of the five eyewitnesses who testified at trial or by deposition, four (Mr. Glasscock, Mr. Bailey, Mr. Gutierrez, and Mr. Spar) gave no testimony about seeing improper removal of Freon-using equipment. The fifth eyewitness, Mr. Murphy, said he saw one buyer improperly disconnect a single unit. Murphy depo. at 10. On the other hand, Mr. Murphy testified he properly removed the Freon from the two units he bought. Murphy depo. at 11, 23. Mr. Murphy also saw another buyer, who purchased four units, properly remove the Freon, and saw a third person conducting the disconnection property. Id. at 11. Similarly, Mr. Spar purchased six reach-in refrigeration units that had to be disconnected from remote compressors and lines. Spar depo. at 6-7, 15. There is no evidence Mr. Spar improperly disconnected his purchased units, or let Freon escape into the atmosphere. Spar depo. at 16. If he had, Mr. Parker could not have been held responsible for it, as TGAAR gave Mr. Spar permission to take so long removing his purchased equipment.

Finally, any problems the buyers may have had properly removing Freon from the lines were caused in part by TGAAR, because of questions about access to the compressor room, Murphy depo. at 22-24, and because electricity was not readily available for the required pumping. Id. at 23.

VIII. TGAAR'S "DEPRIVED OF POSSESSION" DAMAGES ARGUMENT IS CONFUSED

TGAAR makes an inconsistent argument about the damages alleged suffered because it was "deprived of possession" of the subject premises. First, TGAAR asserts the estate deprived it of possession from December 19, 2001 through July 3, 2002. TGAAR Brief at 17-18. Later, when TGAAR calculates its alleged damages, the resulting figures are based on alleged lost rent between June and September, 2002. TGAAR Brief at 22-23. This inconsistency in time is never explained.

As argued in the Trustees' main brief, the delay in possession argument is weak on the merits and should be overruled.

IX. TGAAR'S BUILDING DAMAGE CLAIMS FAIL

The Trustee shows in her main brief that TGAAR's claim based on alleged damage to the building should be overruled. She will not repeat her arguments here. The Trustee points out, however, that the TGAAR Brief reflects no embarrassment or regret that the evidence supporting the building damage claim primarily consists of fabricated invoices, prepared after the fact, with none of the detail that would assist the Court in making a ruling. It is revealing, too, that in the six months after the Trustee deposed TGAAR's fact witnesses on alleged building damage, and demonstrated in the depositions that the "invoices" were fabricated and had no back-up documentation, TGAAR did nothing to remedy the problem, obtain the back-up documentation (which allegedly exists), or otherwise bolster its claims.

Looked at in the light most favorable to TGAAR, the ex post facto, one-sentence "invoices" show that TGAAR made a critical mistake by not documenting its alleged repair costs when the repairs were made, and then made only half-hearted efforts to go

back and fix the problem. Looked at in the worst light, the Court could conclude that TGAAR did not want to properly document the repair costs because proper documentation would have revealed a negligible damage claim, so TGAAR instead obtained the fabricated invoices after extensive remodel work had been done, with no back-up, in the hope the Court would be fooled.³ Either way, the Trustee urges the Court to overrule the claim, as based on woefully inadequate and improper evidence.

X. TGAAR'S REQUEST TO RECONSIDER ISSUES PREVIOUSLY DECIDED SHOULD BE OVERRULED

TGAAR apparently wants the Court to reconsider its prior rulings on whether (i) TGAAR can collect rent on a lease that has been rejected, TGAAR Brief at 27-28; (ii) TGAAR's storage claim is capped at the value of the stored equipment, TGAAR Brief at 28-30; and (iii) TGAAR has a Chapter 11 administrative expense Furr's exercised an option to extend the lease. TGAAR Brief at 31-33. The implicit or explicit requests for reconsideration should be denied; the Court's ruling on these issues clearly were correct.⁴

XI. TGAAR'S POST-TRIAL ASSERTION OF A FRAUD CLAIM SHOULD BE OVERRULED

In a variation of the claim based on the debtor-in-possession's exercise of the renewal option, TGAAR asserts for the first time in its brief a fraud claim against the estate and Steve Mortensen. TGAAR Brief at 31-32. Fraud was never alleged in this contested matter, let alone plead with particularity. At trial, the words "fraud" or

³ It is strange that some the alleged damage "invoices" were generated when the contractors were doing the build-out work for Goodwill. See, e.g., the "proposal" from Tierra, TGAAR ex. 25, as well as the actual invoice from Tierra, Truatee's ex. I. Goodwill leased only about one-third of the building. Tr. at _____. Was all the damage done on the third of the building occupied by Goodwill?

⁴ TGAAR asserts that the In re C&L Country Market of New Market, Inc., 52 B.R. 61 (Bankr. E.D. Pa. 1985) "has not been followed or adopted by any other court . . ." TGAAR Brief at 28. That is incorrect. See In re Waxman, 148 B.R. 178, 184 (Bankr. E.D.N.Y. 1992); In re Lenny's Distributors, Inc., 1990 Westlaw 790 (Bankr. E.D. Pa. 1990) (following C&L); In re Hanscom Retail Foods, case no. 84-01871G (Bankr. E.D. Pa. 1988) (an unpublished opinion, cited in Lenny's Distributors, that follows C&L).

“misrepresentation” were never spoken by any counsel or witness. TGAAR’s post-trial fraud claim should be summarily overruled as unplead, unlitigated, and untimely.

Furthermore (and this is a fatal flaw in any TGAAR Chapter 11 administrative claim), TGAAR withdrew its Chapter 11 administrative claim on February 22, 2002. Docket #1577. TGAAR therefore has no Chapter 11 administrative claim.

XII. TGAAR’S POST-TRIAL ASSERTION OF A LANDLORD’S LIEN SHOULD BE OVERRULED

In another new theory, TGAAR asserts a landlord’s lien on the subject equipment, and therefore should get the auction proceeds. TGAAR Brief at 30. This claim was never plead or argued at trial, and therefore should be denied.⁵ Furthermore, it would benefit the estate, not TGAAR, if TGAAR’s landlord lien claim had merit, because in that event the Trustee could set aside the landlord lien claim pursuant to 11 U.S.C. §545, and retain the recovery for the benefit of unsecured creditors.

XIII. MISCELLANEOUS CORRECTIONS

The following additional allegations made in the TGAAR Brief should be noted:

a. While both TGAAR Properties, Inc. and TGAAR West Texas, Inc. filed the Motion, there has been no evidence presented that TGAAR Properties, Inc., which is a managing agent for TGAAR West Texas, Inc., has any claim in this case. TGAAR Brief at 1. The obvious claimant is the owner of the subject real property, not the manager of the property. It appears to the Trustee that both TGAAR entities were put forth at trial as claimants to avoid the witness sequestration rule;

b. The auction date was not May 30, 2002, TGAAR Brief at 13, but May 28, 2002. TGAAR ex. 14;

⁵ Any claim to a valid landlord’s lien must be pursued as an adversary proceeding, not (as here) a contested matter. Bankruptcy Rule 7001.

c. It is misleading to state that TGAAR “supported” the Auction Order, TGAAR Brief at 10, since the support was conditioned on getting all of the auction proceeds. Docket #1654;

d. Jim Spar, who testified that he could see what was behind the “screen mesh” or “wire cage” barriers at the back of the building on the day of the auction, TGAAR Brief at 12, also testified that he has access to every inch of the building, that nothing was blocked off at all. Spar depo. at 37. Since no one else so testified, including Mr. Glasscock (see Tr. at 51), Mr. Spar’s testimony in this area is suspect;

e. TGAAR asserts that “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.” TGAAR Brief at 13. That statement is contrary to the testimony of Mr. Parker. Tr. at 207-211;

f. Mr. Parker did not testify that “usually after an auction, Parker supervises the removal of the equipment. . . .” TGAAR Brief at 13. Rather, what he said was that usually his company supervises the removal of equipment, and then at the end turn the keys back to wherever they got them. Tr. at 213;

g. TGAAR alleges: “One buyer, Jim Sparr [sic] testified that the auctioneer never hold him that there was any timetable to remove the items that he purchased (Sparr depo. p. 61).” TGAAR Brief at 14. There is no page 61 to the Spar deposition. On page 6, Mr. Spar testified: Question: “Did they tell you there was a minimum time you had to get in out in”? Answer: “Not that I’m aware of.” Mr. Glasscock, however, is clear that Mr. Parker announced to potential buyers that they had to remove their purchased equipment “within three to five days after the auction.” Tr. at 62.

h. TGAAR alleges: Electrical wires were cut, pulled and left loose in a dangerous condition (Percy Depo. pp. 40-44).” TGAAR Brief at 14. Mr. Percy said he saw this condition “around February” 2003. Percy depo. at 40. In January and February, 2003, however, Mr. Easterwood, the electrician, testified he and his crew did the work to “make the building ready for another grocery store tenant. Easterwood depo. at 32. Furthermore, it is clear from Mr. Percy’s testimony that he is talking about equipment that was left on site after the auction, and was being dismantled by TGAAR. Percy depo. at 39-40. There is no evidence that Mr. Parker or the auction buyers cut lines to unsold equipment; much more likely, the dismantling people, whoever they were, cut the lines;

i. TGAAR alleges: “Breaker boxes were “ripped out (Easterwood Depo. pp. 9-10, 13).” Mr. Easterwood mentioned a single breaker box, and his testimony was that “breakers” were ripped out, not the breaker box;

j. TGAAR alleges: “The auctioneer’s representatives represented to TGAAR that “they’d be out of [Store #966] by the first week of June (Baily p. 280) and misled TGAAR to believe “the store would be cleaned out completely (Baily p. 280). TGAAR Brief at 15. Mr. Baily’s actual testimony is as follows: Q: And you thought that all this stuff would be, all that equipment would be removed? A. That’s what I was told by one of the auctioneer’s representatives, they’d be out of there by the first week in June and I thought the store would be cleaned out completely, everything.” Thus, the only statement Mr. Parker’s employees made was when they would be “out of there.” That is quite different from what TGAAR alleged.

k. TGAAR alleges: “When one buyer told Parker that he was going to leave his stuff in there for a while, Parker did not protest (Parker p. 245).” TGAAR Brief at 205. TGAAR leaves out the crucial fact the Mr. Parker did not protest because the buyer told him “I know the owners of the store and they don’t mind me leaving them and getting them later.” Tr. at 205;

l. TGAAR alleges: “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.” TGAAR Brief at 16. Wrong again. The motion referred to has nothing to do with “clean-up costs,” or for that matter auctioning equipment. Instead the motion deals exclusively with alleged administrative claims incurred before the equipment sale;

m. TGAAR alleges: “TGAAR’s representatives had been advised not to “touch” the equipment in Store #966 (Baily p. 258; Glasscock p. 43, 97-98, 109).” TGAAR Brief at 17. In none of the cited testimony does the word “touch” appear. Mr. Baily’s testimony on page 258 has nothing to do with the allegation. On page 42, Mr. Glasscock stated “we had an order that we couldn’t move anything.” On page 97 he testified “Until we got the letter in July, we could not move anything.” On page 109: “We couldn’t move anything; we couldn’t remove anything.” Thus, if anyone “advised” TGAAR about “touching” the subject equipment, it must have been TGAAR’s counsel, not the Trustee or her counsel. Furthermore, it seems like the advice was wrong, if TGAAR was under the impression there was a court order.

n. TGAAR alleges: “The Chapter 7 Trustee’s counsel complained at the hearing because Gary Baily was “polite” when he spoke to the Chapter 7 Trustee.”

TGAAR Brief at 18, n. 3. There is no support in the record for this allegation, which likely explains why TGAAR did not cite to any portion of the record in support;

o. TGAAR alleges that the estate used the automatic stay to leave the subject equipment at the premises, “contrary to the wishes and over the protests of TGAAR.” TGAAR Brief at 18. That allegation is incorrect. See the Trustee’s main brief at 6-8;

p. TGAAR alleges: “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).” TGAAR Brief at 18. First, Mr. Baily’s cited testimony has nothing to do with the allegation. Second, the “large amounts” apparently are no more than \$8,728.60. TGAAR Brief at 20. Of this amount, furthermore, the estate cannot be charged for the time spent attempting to remove the black marks on the tile floor, where the grocery store shelves had sat for 20 years. Tr. at 164-165. Third, as argued in the Trustee’s main brief, the clean-up amounts should be reduced by the money TGAAR realized during the process, which reduces the clean-up claim to \$0. Trustee brief at 11-12. Finally, Mr. Glasscock’s testimony cited in support of this allegation is questionable, since he says “when I show a space in an office building or a medical building, unless it is near pristine, being walls painted, nice carpet, it’s hard for other people to visualize how something will look. If they come in here and see it like that, it’s pretty distressing.” Tr. at 89. TGAAR signed the lease with Goodwill Industries, however, on January 15, 2003. TGAAR ex. 28. Elsewhere Mr. Glasscock’s testimony made clear in mid-January, 2003, the premises were far from painted, carpeted, etc. See, e.g., Trustee Brief at 11-12; Tr. at 178 (electrician began work in February,

2003); Mussar depo. at 18 (wall and ceiling work done between January and March, 2003);

q. TGAAR alleges: “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” TGAAR Brief at 19. As shown elsewhere, the evidence on this point is not nearly as strong as TGAAR would like the Court to believe. Furthermore, there is little or no evidence about when the removal occurred, and whether any resulting damage can fairly be attributable to the estate. Given (i) Mr. Parker’s inability to control access to the building, (ii) TGAAR’s agreement with various buyers allowing them to come in at night or long after the auction was over; and (iii) TGAAR’s sales of equipment to buyers months after the auction, there is no way to allocate responsibility fairly;

r. TGAAR alleges: “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 damages to the store premises (Glasscock pp. 55-61; Exhs. ##33 and 34).” TGAAR Brief at 20. First, Exhibit 33 does not address the allegation. Second, Exhibit 34 repeats the allegation, but provides no factual support. Third, the cited Glasscock testimony refers to an alleged conversation between Mr. Glasscock and one of Mr. Parker’s employees, not a buyer. Tr. at 60-61. Finally, Mr. Parker’s testimony is strictly contrary to this. Tr. at 241 (“We asked them to do things in a workmanlike manner, be responsible”). Given Mr. Glasscock’s general demeanor and extensive experience in the commercial real estate business, it is difficult to believe he would allow buyers to damage

his building if he saw them doing it, regardless of what they or Mr. Parker's employees might, or might not, have told him.

s. TGAAR alleges: "the evidence establishes that the employee left behind, Lorenzo, did not remain at the site and was one shortly after noon on Friday. TGAAR Brief at 25. That is not true. Mr. Parker testified that "I sure wasn't there to check on him, but he phones me a couple of time and I told him Henry was to come and take over and he was going to take the bus back and he could have been, you know, I don't know what to tell you on that." Tr. at 235. Elsewhere Mr. Parker testified to his understanding the Mr. Salcedo was taken to the bus station by Henry, and did return to El Paso as agreed. Tr. at 209.

XIII. CONCLUSION

If it had approached the equipment sale process reasonably, as other landlords did, TGAAR would have suffered little or no damage, and any slight harm that did result would have been easy to identify, quantify, and pay. This 18-month contested matter would have been unnecessary. TGAAR unwisely chose a different course, however, and now must pay the price for its decision. After extensive litigation, the record before the Court does not support any award of damages, and raises questions about TGAAR's actions, credibility, and good faith. TGAAR's administrative expense claims 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 22d day of March, 2004.

Filed Electronically

David T. Thuma