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**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 RESPONSE TO THE BRIEF
IN LIEU OF CLOSING ARGUMENT
OF THE CHAPTER 7 TRUSTEE**

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") and, pursuant to the Court's Post-Trial Scheduling Order dated January 23, 2004, files this Response to the Brief in Lieu of Closing Argument of the Chapter 7 Trustee ("Chapter 7 Trustee's Brief") and would respectfully 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"). References to the Closing Brief of the

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Chapter 7 Trustee will be designated by paragraph number (e.g., "Chapter 7 Trustee's Brief, p. 4"). References to the Closing Brief of TGAAR will be designated by paragraph number (e.g., "TGAAR's Brief, ¶III.J.1.>").

II.

FACTS NOT DISPUTED BY THE CHAPTER 7 TRUSTEE

1. The Chapter 7 Trustee's Brief does not deny any of the following facts, all of which are undisputedly established by the evidence:

- A. The Auction Order (Exh. 13, Dkt. #1674) required the auctioneer to "remove all of the Store Equipment" and leave Store #966 in a "broom-clean condition" (TGAAR'S Brief, ¶III.H.1.).
- B. The Chapter 7 Trustee never informed the Auctioneer of the aforementioned duties under the Auction Order (TGAAR'S Brief ¶III.H.3.).
- C. Much of the Store Equipment was not removed after the Auction (TGAAR'S Brief ¶III.J.3.);
- D. Store #966 was not left in a "broom-clean condition" (TGAAR'S Brief ¶III.J.5.).
- E. Store #966 was left unsupervised by the Auctioneer or any of his employees after 1:30 p.m. on Friday, the day after the Auction¹ (TGAAR'S Brief ¶III.J.1. and 2.j.).
- F. Store #966 was substantially damaged by the means of removal of the Store Equipment (TGAAR'S Brief ¶III.J.3. and N.1.).
- G. TGAAR was precluded by the automatic stay from removing or moving any of the Store Equipment from September 1, 2001 until the letter dated July 3, 2002 (Exh. 18) was received (TGAAR'S Brief ¶L.1.).
- H. TGAAR informed the Chapter 7 Trustee's counsel of the failure to remove the Store Equipment and the failure to leave Store #966 in a "broom-clean condition" on June 17, 2002 (Exh. 33) and again on June 26, 2002, but the Chapter 7 Trustee never received those letters and was unaware of the *problem created by the Auction and the aftermath* (TGAAR'S Brief ¶III.J.7.).

¹ Actually, it was 12:00 Noon (TGAAR's Brief ¶III.J.1.; Glascock pp. 142-43, 146-47), but the Chapter 7 Trustee's Brief admits that the Auctioneer was gone by 1:30 p.m. on the day after the Auction (Chapter 7 Trustee's Brief p.4).

- I. Neither the Chapter 7 Trustee nor any of her agents, including the Auctioneer, ever came to Midland to view the mess and destruction, even though the Chapter 7 Trustee had been informed on June 17, 2002 that Store #966 “looks like Beirut” (TGAAR’S Brief ¶III.J.7. and 9.i.).
- J. The Chapter 11 Debtor (9/1/01 - 12/18/01) and later the Chapter 7 Trustee (12/18/01 - 7/03/02) used Store #966 to store and protect the Store Equipment and was a trespasser and/or a tenant-at-sufferance under Texas law (TGAAR’S Brief ¶IV.C.1.).
- K. No provision of the U.S. Bankruptcy Code protects the Chapter 7 Debtor or the Chapter 7 Trustee from the consequences of its actions.
- L. Four to five (4 – 5) days was a reasonable time to remove all of the Store Equipment (*see* Parker p. 202; TGAAR’S Brief ¶III.J.4.). This is essentially admitted by the Chapter 7 Trustee in her Brief (p. 4) as that is what the Auctioneer announced at the Auction.

III.

LACK OF PERSONAL KNOWLEDGE/FAILURE TO DISCLOSE OR CALL MATERIAL WITNESSES

It is important to note that (1) the Chapter 7 Trustee has almost no personal knowledge of anything, save and except two “polite” phone calls with Gary Baily³, her refusal to get back to Gary Baily, numerous unreturned phone calls from Gary Baily; (2) the Auctioneer had no personal knowledge (TGAAR’S Brief ¶III.J.9.m.) of anything that occurred before the day of the Auction or after 12:00 Noon on Friday, the day after the Auction; and (3) the Chapter 7 Trustee did not call as witnesses (or list as persons with knowledge of the facts) Lorenzo, who was “suppose” to stay after the Auction but failed to do so (TGAAR’S Brief ¶III.J.1.), or the two (2) employees that conducted the “make-ready” one to two (1/2) weeks before the Auction (TGAAR’S Brief ¶III.J.1.). Those witnesses (former employees of the Auctioneer) were clearly material witnesses that were within the control of or could have been deposed by the Chapter 7

³ The Chapter 7 Trustee’s Brief (Chart in p. 3) attempts to show that such conversations occurred in February and April 2003, but the evidence demonstrates that the conversations occurred in January and or February 2002 (the 2003 appears to be a simple “typo”), but the April appears to be a “stretch” of the facts).

Trustee. TGAAR does not believe that any of such witnesses were ever listed by the Chapter 7 Trustee as having knowledge of the facts, when they clearly did, and were not listed as witnesses (by deposition or otherwise). the Court should conclude that their testimony would have been unfavorable and contrary to that of the Auctioneer.⁴

IV.

CLARIFICATION OF FACTS "MUDDLED" BY CHAPTER 7 TRUSTEE

Being in the unfortunate position of having to deal with the undisputed facts outlined in II above, the Chapter 7 Trustee, in her Brief, attacks TGAAR by attempting to "muddle" the evidence in the Record.

A. Problems At Auction Are Chapter 7 Trustee's Responsibility And Were Not TGAAR's Fault.

The Chapter 7 Trustee admits in her Brief (p. 2) that the Auction was **not** "trouble-free," but instead tries to blame TGAAR for the problems that were clearly caused by the Chapter 7 Trustee and her agent, the Auctioneer.

1. Chapter 7 Trustee's Claim of No Problems With Other Landlords Belies the Record.

It is undisputed that an auction occurred at the Roswell Store (Parker p. 196; Gonzales p. 301) and that the landlord of such store filed a claim on November 21, 2001, for the following (Dkt. #1364):

Repair of roof	\$159,026.00
Southwestern Public Service Utilities	3,252.92
Real property taxes February thru November, 2001	8,862.49*

⁴ The Court should find that the Auctioneer is not a credible witness. He admitted that the Affidavit he filed in support of the Chapter 7 Trustee's Motion for Summary Judgment (Exh. 27) was false in material respects as he did not have personal knowledge of most of the matters of which he claimed he had personal knowledge and Jim Spar testified that such Affidavit was false in material respects (TGAAR's Brief ¶III.J.2.; Parker pp. 244-45).

Rent September through November	<u>49,912.50*</u>
TOTAL	\$221,053.91

*If the premises are not vacated or the contents not sold to Equity Development Corporation prior to December 1, 2001, the claim for rent will increase by \$16,694.50 per month and the claim for real property taxes will increase by \$805.68 per month until the property is vacated.

The Chapter 7 Trustee's claim in her Brief (p. 4) that the Chapter 7 Trustee "never had any trouble with the landlords" seriously strains credibility since Dkt. #1364 clearly demonstrates that such assertion is simply untrue.

2. No Attempt to Get Whole or Pre-Petition Lease Breach Claims.

The Chapter 7 Trustee claims that TGAAR's attempt to recover an administrative claim of \$390,000.00 "would go a long way toward making TGAAR whole on its pre-petition lease breach claims." Such belies the evidence since the term of the Lease on Store #966 undeniably ended on December 31, 2001, so TGAAR's pre-petition claim was only for four (4) months of rent at \$19,043.77/mo. plus a pro rata portion of 2001 ad valorem taxes (TGAAR'S Brief ¶III.B.2.) an amount far less than \$390,000.00 (Exh. 35).

3. TGAAR Did Not Deny the Auctioneer Access to Store #966.

One of the Chapter 7 Trustee's "excuses" for what occurred during the "aftermath" of the Auction is the statement in her Brief (p. 5) that the Auctioneer "never had control of the Premises." Such statement does not raise a legitimate defense and completely distorts the evidence:

a. **Auction Order.** TGAAR undisputedly complied with the Auction Order (Exh. 13, Dkt. #1674) which **only** provided as follows:

It is hereby ORDERED:

* * *

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 clearly did not require TGAAR to give up complete “control” or give up “all keys” to Store #966 (TGAAR’S Brief ¶III.K.). The evidence is undisputed that TGAAR fully complied with the Auction Order, including providing “access” (TGAAR’S Brief ¶III.K.). The Auctioneer was given keys. Both Gary Glasscock and Gary Bailey cooperated fully during the “make-ready” 1-2 weeks before the Auction (TGAAR’S Brief ¶III.K.1.), did not interfere during the auction and cooperated after the Auction by allowing buyers to pick up their purchases (TGAAR’S Brief ¶III.K.1.).

b. No Request by Trustee for All Keys.

There is a complete void of evidence that the Chapter 7 Trustee or the Auctioneer ever even requested from TGAAR complete “control” or “all keys” to Store #966 (Gonzales p. 305). Given the fact that the Auction Order did not require TGAAR to give up complete “control” or “all keys” to Store #966 and the Chapter 7 Trustee and Auctioneer **never** requested same, it strains the credibility of the Trustee to make such “excuse” for the consequences of the “aftermath” of the Auction.

c. No Damages.

Finally, the Auctioneer admitted that he could not think of a single item of damage that resulted from the so-called lack of control (Parker Tr. pp. 221-22). Nevertheless, the Chapter 7 Trustee materially distorts the evidence by making the ridiculous claim in her Brief (p. 5) that:

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 “scrapper” to remove the equipment in exchange for being able to keep the copper and other valuable metal. TR. at 218-219.

It absolutely belies not only the evidence in the Record, but one's imagination, for the Chapter 7 Trustee to claim that because TGAAR retained keys to its Store #966, the Auctioneer could not sell the coffin cases to a scrapper. Cross-examination demonstrates the frailty of such allegation:

Q. You just now said that if you had total I believe the implication was if you had total access to the store, you could have done something similar to these coffin cases and sold them; is that what you said?

A. I said if I had access to the store, I could have sold the – gotten all the unsold stuff out of there by bartering the copper to a scrapper is what I said.

Q. Now the only uncontrolled access you had is the owner of the building had a key; is that right?

A. Well, yes, he and his maintenance man. I don't know how many keys they had.

Q. How did that prevent you from selling the coffin cases?

A. We didn't get any bids on them; we didn't get any bids on them.

A. That's not the question. My question – listen to my question very clearly; okay, carefully; is that fair?

A. I am listening.

Q. **How is it that my client, the TGAAR people and Frank having a key prevent – to their own building, prevent you from selling the coffin cases?**

A. **You mean to a scrapper;** is that what you're talking about?

Q. **Yes.**

A. All right. Number one, he told me that I couldn't sell the walk-ins because I was going to ruin the walls. **So I was afraid to get a scrapper in there for fear that all the floor would be taken up with the copper and the ceiling, I just thought, well, this man is not going to allow this to happen.**

Q. He didn't want to damage it, right?

A. That's right. Now also, I didn't realize that I was supposed to remove everything from that building. I didn't have that in my agreement.

(Parker pp. 221-22.) There is no evidence that the Auctioneer **ever** communicated his "thoughts" with TGAAR or asked them if he could bring in a scrapper to remove the coffin cases. The Chapter 7 Trustee never communicated with the Auctioneer and told him he was required by the Auction Order to "remove the Store Equipment" (*Id.*; TGAAR'S Brief ¶ III.H.3.; Gonzales pp. 293-94; Parker p. 222). At the hearing, the Chapter 7 Trustee made the amazing admission that "this if the first time I have read that sentence [of the Auction Order] that clearly" (Gonzales p. 294).

No fault can be blamed on TGAAR for the Auctioneer's failure to sell the coffin cases he received no bids at the Auction and did not choose to call a scrapper because he knew TGAAR would object to their floor being damaged by the removal.

B. TGAAR's Amended Motion Increased Its Original Claim of "At Least \$15,000".

1. In its Brief (p. 5), the Chapter 7 Trustee incorrectly claims that: "TGAAR's administrative claim has more than doubled over time" and that "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." The Chapter 7 Trustee then attempts to "bootstrap" this distortion of the evidence into an "excuse" or defense for not being responsible for her actions and those of the Auctioneer.

2. First, the Chapter 7 Trustee confuses the issue by combining claims for clean-up and damage. TGAAR filed its original administrative claim for the clean-up of trash in Store #966 and the destruction of Store #966 on April 19, 2002 (Chapter 7 Trustee's Brief, p. 6). The clean-up costs alone were "estimated" at page 4 in the August 19, 2002 Motion (Exh. F., Dkt. #1364) at \$5,000.00:

19. TGAAR **estimates** that the cost, including “dump fees,” for simply removing the remaining equipment, junk and trash from the Midland Store will be \$5,000.00.

Such claim was filed when the clean-up was in its early stages - it was conducted in August and September 2002 (Exh. 16 and 17). The final clean-up cost estimate at the hearing was only \$8,728.60 (Exh. 35), so the \$5,000 estimate was somewhat conservative, but relatively close nothing for the Chapter 7 Trustee to “scoff at.”

3. More importantly, however, the testimony at the hearing cited in the Chapter 7 Trustee’s Brief (p. 6) for its argument **does not** relate to clean-up costs - it **only** relates to damages to Store #966: “Q: I’m talking about damage to the building.” (Question to Glasscock, Tr. p. 126.) Again, the Chapter 7 Trustee takes a position in its Brief that undercuts its own credibility because it is again distorting the evidence in the Record.

4. Second, at the hearing, and again in its Brief, the Chapter 7 Trustee attempts to distort the evidence in the Record about the original claim in the August 19, 2002 Motion (Exh. F, Dkt. #1364), where TGAAR stated as follows, on page 4:

21. TGAAR **estimates** that it will cost **at least \$15,000.00** to repair the damage done to the Midland Store by the buyers that removed the equipment.

Conveniently, the Chapter 7 Trustee omits a material fact: TGAAR “estimates that it will cost at least \$15,000.00.” Nowhere, but nowhere in the questioning at the hearing or in her Brief, does the Chapter 7 Trustee acknowledge the words in the Motion, “TGAAR **estimates**” or “**at least.**”

5. Despite such omissions of material facts, the Chapter 7 Trustee nevertheless proceeds to argue in her Brief (p. 6) as another “excuse” for not being responsible for the damages that “neither Mr. Glasscock nor Mr. Bailey has any adequate explanation why TGAAR’s claim fee . . . damage to the building increased” between the time of filing the August

19, 2002 Motion (Exh. F, Dkt. #1364) and the filing of the Amended Motion (Dkt. #1928). Well, again, the evidence in the Record demonstrates that this is just another “phantom excuse” for denying responsibility for the consequences of the “aftermath” of the Auction. The testimony of Mr. Baily and Mr. Glasscock cited in the Chapter 7 Trustee’s Brief easily constitutes an “adequate explanation” of why the damage estimate of “**at least \$15,000**” was increased. Mr. Glasscock testified (TR p. 253-54) as follows:

Q. (By Mr. Witt [sic]) Okay. Now the motion that’s F, what day is back on Page 9, what day is it signed?

A. 16th day of August, 2002.

Q. And on Page 21 -- I mean, Page 4 Paragraph 21, what does it say about the cost for damages?

A. “TGAAR estimates that the cost – that it will cost be **at least \$15,000** to repair the damage to the Midland store.”

Q. We made that claim -- it says **at least**, right?

A. Yes.

Q. We made a claim in this case for, looking at Exhibit 35, for \$106,000 including \$50,000 for flooring: is that right?

A. Yes.

Q. Tell me and you also heard the testimony about the amended motion that was filed at the end of October of 2002 for \$120,000 in damages?

A. Yes.

Q. You got all that?

A. Yes.

Q. Can you explain all that to the Court?

A. When the original document was filed and we said the cost would be **at least \$15,000, we had just started the clean-up work and we really had no idea.** When the second when the amendment was filed in October, **we realized that the floor had**

been – how badly the floor was damaged, it would have to be repaired and to take up the floor and to remove the mastic or the adhesive underneath it, we found the **mastic had asbestos** in it and that was going to be tremendously expensive to remove the tile and the mastic, so we amended the claim in October.

Mr. Baily testified as follows (TR pp. 272-73):

Q. How is it then that the two of you, after taking these photos, came up with an estimated \$15,000 damage claim that would jump 75 days later to \$120,000?

A. I believe the claim was **at least** \$15,000 and at the time we made the claim, we had no idea what the cost was going to be.

Q. Why didn't you?

A. Because we had just gotten started on the clean-up.

Q. You did know about the gouge in the floor, right?

A. I don't remember when I became aware of it; I don't remember the date.

Q. You heard the testimony of Mr. Glasscock that he was there almost the minute it happened?

A. Yes, I did hear that testimony.

Q. So he was aware of it?

A. Yes.

Q. And you heard his testimony that he looked at the walls, saw holes in the walls and sounds like by the 20th of August he knew it all; isn't that right?

A. No, I don't believe he had any idea as to damage to the plumbing or to the electrical work at that time.

Q. Well, in these photographs, he was describing what he thought was the damage to the electrical work at that time.

A. Well, that was I don't think he knew at the time. Also, at the time **I don't think he knew what the cost of repair to the floor was going to be. I don't think we knew any of that. We had no idea.**

I think the numbers we came up with – we didn't really start cleaning in there until the very end of July and we probably came up with these numbers the first week in August.

C. TGAAR Offered a “Fair” Amount for Equipment.

1. The Chapter 7 Trustee claims in her Brief (p. 7) that “TGAAR offered the [Chapter 11] Debtor a small amount for the” Store Equipment as another “excuse” of why TGAAR’s claims should be denied. First, such “excuse” is not a valid defense as TGAAR’s offer, which TGAAR had no obligation to make, could not have possibly damaged the Chapter 11 Debtor or have affected TGAAR’s right to recover damages. Second, such offer was not only “fair,” using 20/20 hindsight, it should have been accepted.

2. It is undisputed that the Chapter 11 Debtor solicited TGAAR to make an offer (Exh. 8, TGAAR’S Brief III.B.1.). Mr. Glascock followed up on that solicitation up by “contacting the Debtor’s representative, who told Glascock that he thought the Debtor would accept an offer of between \$5-10,000 for all of the Equipment left in Store #966” (Glascock p. 42). Simple mathematics indicates that such offer was fair, and everyone would have been better off if it had been accepted, as the Auction only netted the Chapter 7 Trustee \$19,740.00 (Exh. 23; TGAAR’S Brief ¶III.I.3.). TGAAR would have then cleaned up Store #966 at its own cost and taken possession as early as October 1, 2001 (\$19,740 - \$5,775 [offer] - \$8,728.60 [clean-up costs; Exh. 35] – \$5,236.40). How can the Chapter 7 Trustee claim, in good faith, that an “initial” offer (that the Chapter 11 Debtor never responded or made a counter offer to) of \$5,775 is “small” and then claim that she should not have to pay anything for using Store #966 for a 10-month period (September 1, 2002 – July 3, 2002)? TGAAR submits that she cannot do so.

D. Chapter 7 Trustee's Beliefs as to TGAAR's Motives are Irrelevant.

1. The Chapter 7 Trustee's Brief (p. 7) claims that "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." So what? Her "beliefs" of TGAAR's "intentions" are irrelevant. Did that justify her: (a) To make "no effort at all to remove the Store Equipment" before the Auction? (Gonzales p. 292); (b) To not get back to Gary Bailey as she promised to do? (Gonzales p. 293); (c) To not return Gary Baily's numerous phone calls? (Gonzales pp. 283, 285). The Record is clear that the Chapter 7 Trustee never ever made "any effort to sell the equipment before the auction," never made "any real effort . . . to remove the equipment," never ever tried "to work out any kind of deal with Mr. Baily" or made any "offer to him at all" and "did not call him back after February 25" even though: Mr. Baily was "very polite," and "left a message about the invoices, said the store was full of equipment and said that he needed a decision from me about what I wanted to do." (Gonzales pp. 292-93.)

2. Second, the Chapter 7 Trustee's beliefs do not actually match up squarely with her testimony because she knew that TGAAR was claiming "a lot of money lost [for] rent and storage and - that, you know, if we did work out a deal, it would be where they could get the equipment and the estate would get nothing." (Gonzales p. 285.) Such testimony indicates that TGAAR would have given up its claims for rent and storage (and clean-up) in return for the Store Equipment - the "estate would get nothing" only if the Chapter 7 Trustee is entitled to store the Store Equipment indefinitely "rent-free."

E. TGAAR Did Not Benefit From the Store Equipment Being Left at Store #966.

1. The Chapter 7 Trustee's Brief (p. 7) claims that "TGAAR benefited from keeping the equipment at the Premises, and therefore the reasonable charge is \$0." Although not made

clearly, the Chapter 7 Trustee this is apparently an “excuse” or defense for not removing the Store Equipment before the Auction and not paying a fair amount for storage of the Store Equipment.

2. First, such “excuse,” like the Chapter 7 Trustee’s other “excuses,” has never been elevated nor recognized as a legitimate defense for a trespass or for a tenant-at-sufferance. *See, e.g., O’CONNORS, TEXAS CAUSES OF ACTION, TRESPASS TO REAL PROPERTY* ¶5 (2004).

3. Second, there is no evidence that TGAAR benefited. The fact that TGAAR showed Store #966 as a “grocery store” to perspective tenants only shows that TGAAR attempted to (and eventually successfully did) mitigate its damages. The testimony is clear that this Store Equipment was out-of-date (Glasscock p. 121).

4. Third, even if the Court were to find that TGAAR “benefited,” it would next have to find by how much TGAAR benefited and deduct that from the total storage costs (not from the \$19,794.00 “cap”).

F. Under the Circumstances, TGAAR Should Not Be Penalized for Being Charitable to a Church and Midland Christian School.

1. The Chapter 7 Trustee’s next “excuse” in its Brief (p. 8) for not allowing TGAAR an administrative claim is that “TGAAR was using the back of the Premises to store, free of charge, property and equipment of a church and a school . . . and some of its own property.” Apparently, though not made clear in the Chapter 7 Trustee’s Brief, this is asserted as a defense only to the storage costs. The evidence cited in TGAAR’s Brief (¶III.F.5.) establishes that only a small fraction (2.7 to 3.4%) of Store #966 was used for such purposes.

2. Under the circumstances, i.e., there is no evidence of any harm to the Store Equipment and TGAAR was paying all utilities, insurance, ad valorem taxes (TGAAR’S Brief ¶III.F.5.) at a time when the Chapter 11 Debtor and/or the Chapter 7 Trustee were ignoring

TGAAR's bills for storage and requests to remove the Store Equipment (*see* TGAAR's Brief ¶¶L.1-3.). TGAAR should not be so penalized, but if it is, it should be limited to 2.7 to 3.4% of the gross storage bills, not after the "cap" is applied.

G. TGAAR's "Delay in Possession" Claim is Not Barred by Tardiness.

1. TGAAR admits that subsequent to the filing of its Amended Motion (Dkt. #1928) on October 30, 2002, it came up with a new "theory" or "basis" for the Court to award an administrative expense claim to TGAAR for storage for the period from about June 2, 2002 through at least September 2002 (or at least until July 3, 2002). However, no new facts were alleged as part of such theory and the evidence for the claims made in the original and Amended Motions is the same as the evidence for this "delay" theory for awarding a claim.

2. Both TGAAR's original Motion (Exh. F; Dkt. #1364) and its Amended Motion (Dkt. #1928) clearly claimed rent and/or storage for the same June – September 2002 period on which the "delay" theory is based. Moreover, the claims in both Motions were based, in part, on the Chapter 7 Trustee's breach of her duties under the Auction Order. The new "delay" theory or basis is simply another "rationale" of why the Court should award TGAAR an administrative expense for such period. Based on the foregoing, alone, this objection to the "delay" theory should be denied.

3. Bankruptcy Rule 7015 provides that "Rule 15 F. R. Civ. P. applies in adversary proceedings." This motion has been tried like an adversary proceeding. Rule 15(b) F. R. Civ. P. not only makes it clear that TGAAR can amend its pleadings to "conform to the evidence . . . tried by express or implied consent of the parties." Such may be done, as a matter of right, "even after judgment." Rule 15(b) F. R. Civ. P.

4. The Chapter 7 Trustee was clearly informed of the "delay" theory when it received TGAAR's exhibits, because Exhibit 35 clearly outlines such "theory" of damages. The Chapter 7 Trustee did not complain before the hearing because there was no "surprise." Clearly, there was no "surprise" as TGAAR had complained of the Store Equipment being left in Store #966 in the January/February 2002 telephone calls between Mr. Baily and the Chapter 7 Trustee and in the letters sent on June 17 and 26, 2002, following the Auction (Exh. 33 and 34). Since the facts tried were the same, with or without such "delay" theory (i.e., terms of Auction Order, non-removal of Store Equipment by Auctioneer, reasonable time of 4-5 days to remove Store Equipment, protests of violation of Auction Order by Exhibits 33 and 34, and the fair value for storage in Store #966), the Chapter 7 Trustee's claim that it "had no opportunity to conduct discovery on the claim," falls on deaf ears, especially since the Chapter 7 Trustee does not describe, at all, the discovery it needed to conduct to defend against this new "theory" (that was based on the same facts) and cannot possibly claim "surprise" at these allegations.

5. TGAAR present substantial evidence that the Store Equipment damaged TGAAR. Although TGAAR was trying to market Store #966 to new tenants, it is clear that it is difficult to get a new tenant when you cannot tell them when they can take possession. Until July 3, 2003, it is undisputed, TGAAR could not take actual possession of Store #966 or ready it for a new tenant (TGAAR'S Brief ¶III.L.1-3.). In fact, there is substantial evidence that TGAAR would have been able to obtain Dollar Tree as a new tenant if the Store Equipment had been removed within 4-5 days of the day of the Auction, Thursday, May 30, 2002 (TGAAR'S Brief ¶III.L.2; Glasscock pp. 90-91; Baily pp. 276-77, 280-81).

6. Next, the Chapter 7 Trustee again taxes its own credibility by claiming in its Brief that "TGAAR did not seek permission to dispose of the unsold equipment until almost a month

after the auction.” Such runs directly counter to Exhibit 33 which was faxed on June 17, 2002. The Chapter 7 Trustee should have had the Store Equipment removed by June 3-4, 2002 (4-5 days after the Auction) or at least within two (2) weeks (Chapter 7 Trustee’s Brief p. 4; Gonzales p. 295). TGAAR complained by fax within two weeks after such 4-5 day period (Exh. 33). Does a two-week delay give the Chapter 7 Trustee an “excuse” for the consequences of violating the Auction Order - we know of no such rule of limitations or laches.

7. Next, the Chapter 7 Trustee mischaracterizes the evidence in the Record to claim that TGAAR “had already lost Dollar Tree by the time of the May 28, 2002 auction,” citing testimony at “TR. At 129.” However, that is not an accurate summary of the testimony actually in the Record - it is materially different. First, on page 129 of the Transcript, Mr. Glasscock testified that they did not have permission until July 3, 2002 and that is why they lost Dollar Tree. Conveniently, unmentioned was Mr. Baily’s response to Mr. Thuma’s questions and the follow-up (Tr. Pp. 280-82) which demonstrates that the Chapter 7 Trustee’s position is just “plain wrong.”

RE-CROSS-EXAMINATION

BY MR. THUMA:

Q. First week of June would have been too late to save that Dollar Tree tenant, wouldn't it?

A. At the time we didn't know that, because we thought outside chance if we could have gotten in there middle of June. Gary kept hoping we could get in there and just really bust out, get it to them, maybe they would accept it a month late. We didn't realize that - I mean, they said they had to have it by June 1. That was our goal. We thought, well, maybe if we get it the first week of June, we can get this thing built out and turned over to them in July.

But as it drug out, I think it was the I think by the first week in July or the second week in July, we found out they had found another location, they had given up on us.

Q. Did you have any idea -- you didn't really know if they would have taken it a month late, did you?

A. If they what?

Q. If they would have taken it a month late? That was just your hope or speculation?

A. We had no other indication otherwise that they were even looking anywhere else. We didn't know that. We were just hopeful that they would because they said they wanted to in there by June 1, but they hadn't said if not, they were not going to consider the store but that -- that was their deadline. **We were just hopeful they might take it July 1st.**

MR. THUMA: No further questions.

FURTHER REDIRECT EXAMINATION

BY MR WHITT:

Q. How much space would they have taken?

A. I believe 20,000 square feet.

Q. And what would be the rent rate? Would it be the same as Caplan and --

A. It was higher than Goodwill, slightly higher than Goodwill. They were, I believe, going to sign a longer term lease, also.

8. Further, TGAAR could have gotten Goodwill in earlier if the Chapter 7 Trustee had complied with the Auction Order and removed all of the Store Equipment within a reasonable time after the Auction (Glasscock p. 183).

II. Clean-Up Costs.

1. The Chapter 7 Trustee makes a legitimate challenge to the clean-up costs. On page 13 of Exhibit 17, it appears that 20 of the 56 hours charged by Efron Gutierrez on his Time Card were for work in Abilene, not at Store #966. We apologize for this oversight. Based on the \$247.00 paid Efron for his 56 hours of work, that would reduce the \$8,721.60 of clean-up costs on Exhibit 35 by \$88.21 ($\$247 \div 56 = \$4.41/\text{hr} \times 20 \text{ hrs} = \88.21).

2. As far as the attack on the FICA taxes, insurance, etc., of \$1,060.00 goes, Mr. Glasscock testified unqualifiedly on TR. P. 95 that the FICA was \$1,060.00, then only added on Tr. P. 96 that he did not know if FICA taxes were paid on all of the wages paid. The statement in the Chapter 7 Trustee's Brief (p. 11) that "there was no evidence that TGAAR paid the FICA taxes claimed (\$1,060.00)" is just contrary to the evidence. We do not recall that there was any cross-examination on the FICA taxes.

3. After receiving the July 3, 2002 letter (Exh. 18), TGAAR was clearly free to dispose of the remaining Store Equipment on any basis it chose -- if not, it relied on material representations of the Chapter 7 Trustee to the contrary. Since the Chapter 7 Trustee had a duty under the Auction Order to leave Store #966 "broom-clean," and given that the Chapter 7 Trustee abandoned the remainder of the Store Equipment, why should there be any offsets to the clean-up costs when TGAAR incurred the costs (save and except the aforementioned \$88.21)? There is no reason.

4. The \$8,728.60 of clean-up costs that TGAAR is claiming (Exh. 35) was only the costs for the initial removal in August-September 2002 -- i.e., the "major part" (Glasscock p. 164). More trash was piled up in the back that TGAAR had to dispose of later, but has not claimed an administrative expense. (Glasscock p. 164).

5. The 19 compressors are simply imaginary. The Auctioneer admitted that they were "upstairs in the back," but he never saw them -- as he said he could not "get in the back" (Parker p. 195-96; 232-33). He admitted that he did not ask Gary Glasscock about them (Parker pp. 195-96). Glasscock testified that the Auctioneer had full access and that most of the compressors were on the roof (TR. p. 136). As for the area where Parker thought there were "19

compressors.” other stuff, but no compressors, were there (Glasscock p. 138). Finally, such compressors, if any, were worthless (Glasscock p. 154).

6. No credit of \$1,500.00 or otherwise should be given against the clean-up costs for the reach-in coolers, a/k/a coffin cases that were left. The clean-up costs did not include removing the coffin cases. After the July 3, 2002 letter, TGAAR had no responsibility for accounting to the Chapter 7 Trustee for any of the abandoned Store Equipment. The Chapter 7 Trustee had a chance to take the coffin cases, was asked to remove them (Exh. 33 and 34) and chose not to do so – it has waived any right to complain now if TGAAR was able to sell anything. Moreover, TGAAR actually incurred costs in removing the coffin cases that it has not included in the \$8,721.60 of clean-up costs.

7. Likewise, with the walk-in coolers. They were abandoned (Exh. 18). TGAAR would have allowed them to be sold if the damage was repaired – that is what the law requires – it was not an unreasonable demand (TGAAR’s Brief ¶IV.C.). Parker chose not to sell them because he did not want to repair the damage to the concrete ceilings above them (Glasscock pp. 137-38). Besides, walk-in coolers were not contained within the definition of Store Equipment in the Auction Order (TGAAR’S Brief ¶III.H.I.).

8. The Chapter 7 Trustee’s claim in its Brief (p. 11) that “TGAAR’s clean-up was required because TGAAR did not abide by the Court’s auction order to give the Auctioneer reasonable access to the Premises” is simply preposterous. No violation occurred (*see* IV.A.3., herein). The Chapter 7 Trustee only claimed that it should have had complete “control” and “all keys” but the Auction Order did not require that and no one even asked TGAAR for same. *See* IV.A.3., herein.).

9. The evidence is undisputed that all the Auctioneer did to clean up was leave some plastic bags (TGAAR'S Brief ¶III.J.5.) and that he did not even know about the Auction Order (TGAAR'S Brief ¶III.H.3.).

10. Finally, the Chapter 7 Trustee claims that the clean-up evidence is suspect because there was lots of trash after October 2002 insinuating that no cleanup occurred in August September 2002; i.e., insinuations that TGAAR is submitting a false claim. There is no conflict in the testimony – if there were, why didn't the Chapter 7 Trustee challenge Mr. Glasscock or Mr. Baily about that subject at the hearing? Mr. Glasscock testified on cross-examination, as follows:

A. Well, to clarify that, that wasn't all the cleanup. It was what I ordered them to do. It was all the major things to get out of the way.

[TR. 164.]

* * *

A. I think it does because when you look at it, even though it was swept up, it still looks like a grenade went off. There's holes in the walls everywhere, the ceiling is missing.

Q. All right. Why did Mr. Mussar of Tierro testify when he began his work it looked like there were mountains of trash in the store and he started in January of 2003?

A. I don't know.

Q. How about your electrician, Colby Easterwood, he said in January or February of 2003 the place was dirty and cluttered?

A. I know where this stuff is. It's in the back of the store. It was piled up about 15 feet high. There was quite a bit still back there in the back. What I'm referring to is the front of the store where we cleaned it out and swept it up. But there was there were still enormous amounts of boxes. They probably left hundreds and hundreds of boxes and crates and those kinds of things in the back of the store against these walls. They may be accurate on those statements.

[TR. p. 170.]

11. This is a "red herring" issue designed only to cloud the issue with "smoke." The initial clean-up was only to make it safe, passable and showable lots more needed to be done.

I. Tile Damage.

1. The evidence is undisputed that several deep "gouges" or "scratches" to the floor occurred when one of the buyers negligently unsupervised by the Auctioneer, drug a pallet with a forklift in a semicircle almost from one corner of the store to the opposite corner. The Chapter 7 Trustee says Mr. Kincaid's explanation of why 3,200 square feet of tile had to be replaced "makes no sense" - he could not understand why a [single] scratch 200 feet long would damage more than 200 foot square tiles. Perhaps it makes no sense to a lawyer, but it made perfect sense to Mr. Kincaid, who had been in the flooring business for thirty (30) years (Kincaid Depo. p. 7). He testified in his deposition as follows:

BY MR. THUMA:

Q. The 3,200 square feet was a figure given to you by Mr. Glasscock?

A. Yes, sir.

Q. Did you independently verify whether that was the proper figure?

A. It was within real close. Within 20 foot of it.

Q. How did you come to that conclusion?

A. I figured it.

Q. And tell me what process you went through to make that figure?

A. I followed the scratches all the way through.

Q. How

A. Because I was going to float all that.

Q. How long is **the scratch**?

A. 200 foot. **There's several scratches.**

Q. So if it's 200 foot long, how do you get 3,200 square feet of tile?

A. Because of the way it was done. You can't just replace that one. It goes across sideway across.

2. The fallacy in the Chapter 7 Trustee's criticism of Mr. Kincaid's testimony is partially based on the fact that there were "several scratches," a fact that Kincaid clarified during his cross-examination (Kincaid Depo. p. 17).

3. The proper measure of the damages to the floor is the "reasonable costs of repairs necessary to restore the property to its condition immediately before the injury." **Trinity & Sabine Ry. Co. v. Schofield**, 10 S.W. 575, 576-77 (Tex. 1889); **Knaft v. Langford**, 565 S.W.2d 223, 227 (Tex. 1978); **Lone Star Development Corp. v. Reilly**, 656 S.W.2d 521, 525-26 (Tex. Civ. App. – Dallas 1983); **Weaver Construction Corp. v. Rapier**, 448 S.W.2d 702, 703 (Tex. Civ. App. —Dallas 1969).

4. The fact that a later tenant (Caplan) wanted part of the tile taken up does not reduce the damages. Goodwill wanted carpet, so carpet was laid over the tile. The unscratched tile is still there and can be used in the future (Kincaid Depo. p. 10). The scratched tile still needs replacing. The remainder of the tile has an additional life of 10-20 years and was in good

condition (Kincaid Depo. pp. 7,10; Glasscock pp. 86). It can still be used after the carpet is removed.

5. It does not strain "credulity," as the Chapter 7 Trustee has alleged that a tenant would accept this tile - Goodwill was perfectly happy with it in the work/storage area of its store.

J. Damages to Walls and Ceiling.

1. Glasscock testified that Store #966 (TR. pp. 102-03):

It's probably 200-some-odd feet long by 180 feet wide. That's a lot of sheetrock when some of it goes to the ceiling. Most of that didn't get damaged above 10 feet. But there is considerable damage all along the perimeter of that building.

2. Glasscock further testified that the damages estimated in Exhibit 25 included damages to the ceiling tiles which had to be replaced because (TR. p. 103):

When they took the for example in the bakery, they would take out a couple of those big bakery items along that center wall where the orange is on the map. As they pulled them off the was . . . those vent hoods started falling down through the ceiling.

3. Bill Mussar testified that he was asked to replace the sheetrock and ceiling tiles that had been damaged. (Mussar Depo. pp. 5-7.) He described the "kind of damage" he was "asked to repair" in considerable detail. (Mussar Depo. pp. 10-15.) Exhibit 25 (Depo. Exh. 15) is "an itemization that Gary asked me to prepare that - to separate the work And he said, 'I need to know what of this is mine and what's to finish out the store.'" Mr. Mussar explained on cross-examination in detail how he prepared his itemization (Exh. 25) (Mussar Depo. pp. 19-31). At worst, at least one-half (1/2) of the damage to the sheetrock was due to "missing or torn up" ceiling tiles and sheetrock and the rest was "grease" and all of the "ceiling work . . . was repairing damage" (Mussar Depo. p. 34). That is no basis to completely deny TGAAR its entire

claim when the destructive means of removal of the Store Equipment clearly and severely damaged the sheetrock and ceiling tiles.

4. TGAAR's claim for \$17,956.00 of administrative expenses for damage to the walls and ceilings should be allowed.

K. Electrical Damage.

1. TGAAR's claim for \$19,101.71 as an administrative expense for damage to the electrical wiring and panel boxes at Store #966 is substantiated and should allowed. On the subject of electrical expenses, both Gary Glasscock and Gary Baily testified that such damages were "low" (Glasscock p. 99; Baily pp. 263-64).

2. Gary Baily testified that (TR. pp. 265-66):

We had to replace the electrical wiring and the panel boxes for this build out which compared to a normal build out, I would say the expenses were at least twice what we have ever incurred for something of this size.

Q. Would these panel boxes have been used for whatever tenant was there?

A. Of course.

Q. Do you believe that they were damaged by the way the equipment was removed from the store?

A. They were rendered useless; we couldn't use them.

3. Gary Glasscock testified that (TR. pp. 99-100):

The panels were gone, so we had to put in new panels run all the way back to where the hatched area is that we're still leasing. That's where all the electrical came in. We called those homeruns. Homeruns mean you have to go back to the source with one wire in conduit and take it all the way back. Those panels were pulled and the wire was stretched. The guy with D&E Electrical who did the work [Easterwood], said that he would not use those wires, he could not get them passed. So he had to run a new wire and a

panel from that area back. So that does not reflect on here, that cost.

4. Mr. Glasscock further testified that he did not believe any of the \$19,101.71 figure was for build out for Goodwill and that it was all for damages. (Glasscock p. 100.)

5. What the Chapter 7 Trustee calls the "Dummy D&E Invoice," in its Brief, p. 16, is not a dummy invoice at all. TGAAR hired D&E, owned by Mr. Easterwood, to repair the damage to the electrical wires and panels and get it ready for a new tenant (Glasscock pp. 99-100; Easterwood Depo. pp. 7-9). Later, Mr. Glasscock asked Mr. Easterwood to prepare an estimate to "see what it took to fix the Furr's just like he was going to put another store in there" (Easterwood Depo. p. 31). Such estimate is Exhibit 22 (Depo. Exhs. 12). Mr. Easterwood testified about why it was so expensive to repair the damage (TR. pp. 8-13):

And did you run into anything that was damage? Is there any stuff damaged that you worked on?

A. Well, it was just a wreck. It was all tore apart. Period

* * *

We had to make all that sanitary. The City wouldn't allow anybody to work in there or lease anything if, you know, you had bare wires.

* * *

And there was a breaker box . . . that was just tore the breakers were even ripped out, where you could tell somebody had taken the wire and physically just ripped the breakers out.

* * *

There was a main feeder to this panel that was gone . . . it looks like somebody took it apart right here and took it apart over here and pulled all the wire out of it.

* * *

I did over \$100,000 on this building. And Gary had asked me to pull out what I thought pertained to this. So I met with my foreman, and we came up with this number here.

* * *

This picture doesn't show the magnitude of I mean, it was a wreck. I can't believe anybody would do that, really.

6. Easterwood's deposition goes on and on about the tremendous amount of damage that was done to Store #966. He clearly attempted to make a good-faith estimate of what it cost to put the store back to where it was. There is no contrary evidence of damages. Mr. Easterwood had been in the electrical business for 22 or 23 years (Easterwood Depo. p. 4). Clearly, TGAAR sustained at least \$19,101.71 of damages to the electrical wires, panel boxes, etc., as a result of the damage caused by the removal of the Store Equipment and at least that amount should be allowed as an administrative expense.

I. Plumbing and Freon Damage.

1. Mr. Glascock testified as to the extensive damage that the removal of the Store Equipment caused to the plumbing, and he testified that the \$18,450.00 of damages estimated by Bosworth Company and Marty Percy was a reasonable estimate of the costs of such damages (Exh. 24).

2. Mr. Percy testified that Bosworth Company did the demolition work on the plumbing and the recovery of the refrigerant (Percy Depo. pp. 7-8). He went with his boss, Mr. Parson (Percy Depo. p. 8). Mr. Percy identified Exhibit 24 (Depo. Exh. 13):

It looks like the bill for the work on the Furr's building.

Q. Okay. And was this for the bill for all of the work done on the Furr's building?

A. No. It looks like it's just for the recovery of the refrigerant and the demolition of the items needed.

Q. Okay. What other work did y'all do out there besides what's described here, the demolition and the removal of the refrigerant?

A. Repaired air conditioners, tore out a bunch of duct work, put in new duct work, put in a new system. We did the bathrooms, heaters, shop heater in the back. Quite a bit of stuff we did.

Q. Was some of that work in connection that you just described in connection with the build out for the Goodwill Industry space?

A. Some of it was. But a lot of it – a lot of what we did was we had to take out everything that was left from Furr's. That's what this is for.

Q. Okay. And was – why was the stuff why was it taken out?

A. It was unusable.

(Pearcy Depo. pp. 8-9.)

3. Mr. Pearcy testified that he had been in the air conditioning business for 11 years (Pearcy Depo. p. 4). He further testified that the refrigerant (the "R12") is a "hazardous substance" that "you can't just vent it out into the atmosphere" (Pearcy Depo. p. 11). He then testified that they "removed quite a bit" of refrigerant "But a lot of it had already been" released and "It didn't look like none of the caps had been taken off or anything to show that they had recovered the refrigerant" (Pearcy Depo. p. 11).

4. Mr. Pearcy testified that the copper refrigerant lines had been ruined because an improper method of disconnecting the units had been used (Pearcy Depo. p. 12). A "sawzaw" had been used to cut the lines, which resulted in metal shavings being caught in the "oil trap in it" (Pearcy Depo. p. 12). Such causes the compressor to "lock up" and therefore ruins the copper tubing (Pearcy Depo. pp. 12-13). The copper tubing was also ruined because "all the copper was left open," causing it to oxidize and turn green, which renders it unusable (Pearcy Depo. p. 12).

5. Mr. Percy testified that a portion of the cost in Exhibit 24 was for removing the freon that was left and removing the ruined copper tubing (Percy Depo. pp. 13-14).

6. Mr. Percy testified that the store was in shambles (Percy Depo. pp. 15-16):

Q. Did the stuff look like it had been taken out with care, removed with care?

A. No. There was sinks ripped off the walls, and holes in the walls where they had yanked sinks and tore the anchors through the wall . . .

* * *

A. It was in very bad shape. It was worst than most.

7. Mr. Percy testified that the copper tubing would have been “usable again” if they had been “properly cut off and capped” (Percy Depo. pp. 17-18).

8. The evidence establishes that TGAAR sustained at least \$18,450.00 of damages to the plumbing as a result of the removal of the Store Equipment and that such amount should be allowed as an administrative expense.

CONCLUSION

The Chapter 7 Trustee’s Brief does not raise any recognized defense to TGAAR’s claims for administrative expenses. The Chapter 7 Trustee and the Chapter 11 Debtor occupied Store #966 as trespassers or as tenants-at-sufferance and are responsible for payment of the fair value of the use of Store #966 and for all damages resulting from the removal of the Store Equipment. The Chapter 7 Trustee’s Brief did not successfully attack any of the primary facts established at the hearing, including those set forth in II, above. The Chapter 7 Trustee’s Brief did not establish any “excuse” for the Trustee’s violation of the Auction Order, which the Trustee clearly violated by not removing the Store Equipment and by not leaving Store #966 in a “broom-clean condition.”

TGAAR should be allowed as administrative expense, at least \$8,633.39 of clean-up costs (\$8,721.60 - \$88.21); at least \$61,529.48 of damages for violating the Auction Order and delaying TGAAR's possession (and useful possession) of Store #966; and \$106,797.95 of damages caused by removal of the Store Equipment (or at least \$61,687.95 if only 3,200 sq. ft. of tile is considered).

In addition, TGAAR should be allowed administrative expenses for the holdover/trespass possession by the Chapter 11 Debtor and the Chapter 7 Trustee as set forth in the Conclusion of TGAAR's Closing Brief.

Dated this 22nd day of March, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 22nd day of March, 2004, a true and correct copy of the foregoing was served on the following persons:

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Robert K. Whitt