2003 BNH 002 **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

Clarkeies Market, L.L.C.,
Debtor

Clarkeies Market, L.L.C.,
Movant

v.

Associated Grocers of New England, Inc. and
Associated Lease Corp.,
Respondents

Bk. No. 01-10700-JMD
Chapter 11

Objection to Claims No. 71, 78, and 82

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MEMORANDUM OPINION

I. INTRODUCTION

The Court has before it the Objection by Debtor to Proof of Claim and Amended Proof of Claim of Associated Grocers of New England, Inc. ("AGNE") (POC 71 and 82) (Doc. No. 266) and the Objection by Debtor to Proof of Claim of Associated Lease Corp. ("ALC") (POC 78) (Doc. No. 270). The parties agreed that they would submit various legal and factual issues to the Court for rulings in advance of a final evidentiary hearing on the AGNE and ALC proofs of claim

and the Debtor's objections to the same. The Court has agreed to determine the issues submitted as part of the process of ruling on the AGNE and ALC proofs of claim. Accordingly, the findings and rulings in this Memorandum Opinion are interlocutory and shall not be considered final until the Court's final determination of the allowed claims of AGNE and ALC after conclusion of the evidentiary hearing.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

The Debtor is a limited liability company that owns and operates grocery stores in northern New Hampshire. On March 7, 1997, the Debtor borrowed $200,000.00 from AGNE under a term promissory note for the initial purchase of inventory at two stores, one located in Colebrook and the other located in Groveton (the "Colebrook/Groveton Note"). On that same date, the Debtor and AGNE entered into a member loan security agreement pursuant to which the Debtor's obligations under the Colebrook/Groveton Note were secured by the inventory, equipment, accounts receivable, and leasehold interest, and the products and proceeds of the foregoing, at the Debtor's Colebrook and Groveton stores (the "Colebrook/Groveton Security Agreement"). AGNE's security interest in the Colebrook and Groveton stores was subject to a first priority security interest held by the Berlin City Bank (the "Bank").

In 1998, the Debtors purchased two additional stores located in Berlin and Woodsville from Kelley's Food Town, Inc., K&R Supermarkets, Inc., and/or their principal Karl C. Kelley

(collectively the "Kelley Group"). In connection with its purchase of the Berlin and Woodsville stores, the Debtor entered into two subleasing agreements with ALC regarding the real property from which these two stores operated. The Debtor executed both subleases on November 30, 1998. Under the Berlin store sublease the Debtor was obligated to pay minimum rent of $31,500.00 for the first nine years of the sublease. Under the Woodsville store sublease the Debtor was obligated to pay minimum rent of $63,000.00 for the first five years of the sublease. Under both subleases the Debtor was obligated to pay real estate taxes, common area charges, and inflation charges as additional rent.

As part of the Berlin and Woodsville transaction, the Debtor borrowed funds from the Kelley Group and additional funds from AGNE. The Debtor executed two asset promissory notes in favor of the Kelley Group in the amounts of $373,000.00 and $185,000.00 to fund the purchase of the Berlin and Woodsville stores and their equipment (the "Kelley Notes"). The Kelley Notes were secured by a first priority security interest in favor of the Kelley Group in the assets of the Berlin and Woodsville stores.

On November 30, 1998, the Debtor executed two additional term promissory notes in favor of AGNE, one in the principal amount of $138,080.74 for the Berlin store (the "Berlin Note") and the other in the principal amount of $160,718.97 for the Woodsville store (the "Woodsville Note"). These loans were obtained in connection with the purchase of the inventory of the Berlin and Woodsville stores and for credit and advances on open account for future purchases and service. On that same date, the Debtor and AGNE entered into two additional member loan security agreements pursuant to which the Debtor's obligations under the Berlin Note and the Woodsville Note were secured by the inventory, equipment, accounts receivable, and leasehold interest, and the products and proceeds of the foregoing, at the Debtor's stores in Berlin and

Woodsville (the "Berlin Security Agreement" and the "Woodsville Security Agreement"). In addition, AGNE guaranteed the Debtor's payment of the Kelley Notes (the "AGNE Guaranties").

As part of the transactions with AGNE with respect to all four stores, the Debtor executed three AGNE member agreements, one on March 7, 1997, and two on November 30, 1998 (the "Member Agreements"). The Member Agreements obligated the Debtor to purchase from AGNE a minimum amount of inventory and supplies for sale and use at the Debtor's stores. The Member Agreements also provided AGNE with a security interest in any stock of AGNE that the Debtor owned either directly or indirectly, legally or beneficially.

On November 19, 1999, the Debtor and AGNE modified and consolidated the Colebrook/Groveton Note, the Berlin Note, and the Woodsville Note and executed a term note allonge (the "Allonge"), which provided for a readvancement of $100,000.00 by AGNE to the Debtor. The effect of the Allonge is the subject of some dispute as discussed below. On April 25, 2000, after the Debtor and AGNE executed the Allonge, the Debtor executed a promissory note and security agreement with AGNE, which established a $22,000.00 line of credit for the Debtor with AGNE (the "Line of Credit").

On March 13, 2001, the Debtor filed its Chapter 11 bankruptcy petition and, on March 16, 2001, the Court granted AGNE expedited relief from the automatic stay with respect to both the Berlin and Woodsville stores as the Debtor indicated that it intended to close them. Upon obtaining relief from the automatic stay, AGNE began operating the Berlin and Woodsville stores. AGNE apparently closed the Berlin store in the fall of 2001. As of September 11, 2002, AGNE was continuing to operate the Woodsville store.

AGNE and ALC have filed several proofs of claims during the course of the bankruptcy case. On July 10, 2001, AGNE filed a proof of claim indicating that it was owed $635,888.63

(POC 71), which claim AGNE later reduced to $414,749.16 (POC 82). On February 28, 2002, ALC filed a proof of claim asserting that it was owed $104,401.00 with respect to the two subleases (POC 78). On April 17, 2002, the Debtor objected to AGNE's and ALC's claims. After two preliminary hearings on the Debtor's objections to these claims, the Court issued several procedural orders setting forth a schedule for dealing with these objections. The Court held a non-evidentiary hearing on the legal issues on October 31, 2002, and took the matters under advisement.

During the course of the Debtor's bankruptcy case, the Debtor has made adequate protection payments to AGNE in the amount of $3,000.00 per month. In addition, AGNE has been making payments to the Kelley Group on account of the AGNE Guaranties.

III. DISCUSSION

A. AGNE's Claim

AGNE claims that as of March 2002 it was owed $414,749.18, which consists of the following elements:

Liabilities		
Notes/inventory supply	$635,387.83	
Kelley guaranty payments	92,736.00	
Interest	66,339.73	
Attorney's fees and costs	79,958.25	
Subtotal	$874,421.81	
Credits		
Berlin/Woodsville inventory		$126,100.00

Stock		284,332.33
Postpetition payments		49,240.30
Subtotal		$459,672.63
Total		$414,749.18

The Debtor objects to portions of AGNE's claim as described below.

1. Cross-Collateralization

AGNE asserts that the Allonge effectively consolidated all of the Debtor's obligations under the Colebrook/Groveton Note, the Woodsville Note, and the Berlin Note (collectively the "Notes") into one obligation as of November 19, 1999, and that under the terms of the Allonge the "Loan Documents," which included the Notes and the Colebrook/Groveton Security Agreement, the Woodsville Security Agreement, and the Berlin Security Agreement (collectively the "Security Agreements"), provided for a cross-collateralization of the Debtor's obligations. According to AGNE, all or a portion of the remaining principal balance under the Allonge can be treated as debt associated not only with the Colebrook and Groveton stores but also the Berlin and Woodsville stores which the Debtor ceased operating within days of its bankruptcy filing.

The Debtor argues that while the Notes may have been consolidated by the Allonge, the Allonge did not cross-collateralize the Debtor's obligations because it did not amend any of the Security Agreements. The Debtor states that if AGNE had wanted to cross-collateralize the Debtor's obligations, it should have amended the Security Agreements, which it did not.

Section 3(a) of the Allonge provides:

> 3(a) Consolidation. The Notes are consolidated for the purposes of readvancing additional principal under a unified payment schedule and instrument . . . .

The Allonge also provides for a readvance of up to $100,000.00 in principal, on a revolving basis, over a nine month period with interest on the actual outstanding daily balance on the readvance at 10.25 percent per annum (the "Revolving Loan"). Sections 3(g) and 4 of the Allonge provide:

> 3(g). No Other Modification. Except as modified hereby, the terms and conditions of the Notes shall remain in full force and effect.
>
> 4. Ratification of Loan Documents. All of the terms of the Loan Documents, including, without limitation, all provisions thereof creating a security interest . . . in favor of [AGNE] in the property of the [Debtor], are expressly . . . acknowledged, agreed, reaffirmed, and consented to by each of the parties, all as amended and modified hereby.

The only Loan Documents which are expressly amended by the terms of the Allonge are the Notes, and those amendments were expressly limited to the provisions dealing with the terms of the Revolving Loan. No provision of the Allonge expressly amended any of the Security Agreements. AGNE argues that the Court must put the Allonge into the proper commercial context and find that the Security Agreements were necessarily amended to secure the new consolidated obligations under the Allonge.

The Court disagrees with AGNE's arguments for two reasons. First, under the provisions of Section 4 of the Allonge the terms of the original Security Agreements were "agreed" to by the parties except for amendments expressly contained in the Allonge. The Court finds no provision in the Allonge which expressly amends any of the Security Agreements. Second, the Allonge did not consolidate all of the Debtor's obligations under the Notes. Section 3(a) expressly limits the consolidation to the obligations under the Revolving Loan with each of the Notes. Section 3(g) of the Allonge expressly provides that all of the other terms and conditions of the Notes "remain in full force and effect." Therefore, all of the Debtor's obligations under the Notes were not

consolidated by the Allonge. Only the obligations under the Revolving Loan were consolidated. Because the terms of the Allonge expressly limit the extent of consolidation, and acknowledge and reaffirm the existing security agreements, any argument by AGNE that the Court should find that the Allonge impliedly amends any or all of the Security Agreements must be rejected.

Because the Allonge did not amend the terms of any of the Security Agreements, the Court must turn to the agreements themselves to determine what security interests in the Debtor's collateral were granted to AGNE to secure the Debtor's various obligations to AGNE. The Colebrook/Groveton Security Agreement was executed on March 7, 1997, in connection with the Colebrook/Groveton Note. Section 3 of the Colebrook/Groveton Security Agreement provides that:

> 3. Security. As collateral security for the Loan as well as for any and all other liabilities and obligations of [the Debtor] to [AGNE] arising out of or related to the Loan, whether now existing or hereafter created or arising, . . . [the Debtor] hereby grants and conveys to [AGNE] a security interest . . . .

(emphasis added). The plain language of the Colebrook/Groveton Security Agreement provides that the security interest granted to AGNE under the Colebrook/Groveton Security Agreement is limited to the Debtor's obligations under the Colebrook/Groveton Note and any obligation "arising out of or related to" that note. Under the terms of the Allonge, any obligations on account of the Revolving Loan were consolidated with the obligations under the Colebrook/Groveton Note. Therefore, the obligations of the Debtor to AGNE on account of the Revolving Loan are "related to" that note and are secured by the Colebrook/Groveton Security Agreement.

The Woodsville Security Agreement and the Berlin Security Agreement (collectively the "1998 Security Agreements") were both executed on November 30, 1998 and are substantively identical to each other, but different from the Colebrook/Groveton Security Agreement. In the

preamble to the 1998 Security Agreements the term "Loan" is defined as including the "Account Debt" and the "Term Loan." In each of the 1998 Security Agreements the phrase "Term Loan" is defined to mean the respective separate term loan notes executed by the Debtor in relation to the Woodsville and Berlin stores. However, the term "Account Debt" is defined in the 1998 Security Agreements as "credit and advances on open account for purchases and services on such terms and conditions and in such amounts as may be available and approved from time to time by [AGNE]."

The grant of the security interest in the 1998 Security Agreements also differs from the comparable provision in Section 3(A) of the Colebrook/Groveton Security Agreement. Section 2 of the 1998 Security Agreements provides:

> As collateral security for the Loan and for any and all other liabilities and obligations of [the Debtor] (or any Guarantor) to [AGNE], whether now existing or hereafter created or arising . . . [the Debtor] hereby grants and conveys to [AGNE] . . . a lien and security interest . . . .

(emphasis added). Unlike the Colebrook/Groveton Security Agreement, the 1998 Security Agreements did not limit the obligations secured by the security interests granted thereunder to obligations arising out of or related to the Woodsville Note and/or the Berlin Note. The 1998 Security Agreements granted AGNE security interests in the collateral located at the Woodsville and Berlin locations as security not only for the Woodsville Note and the Berlin Note, but also for all other obligations of the Debtor to AGNE, without qualification that the obligation relate to a particular location or note. Therefore, the collateral at the Woodsville and Berlin locations was security for all of the Debtor's obligations to AGNE prior to the execution of the Allonge. The execution of the Allonge did not amend the security interests granted by the 1998 Security Agreements.

For the reasons discussed above, the Court finds that although the provisions of the Allonge, the Colebrook/Groveton Security Agreement, and the 1998 Security Agreements are somewhat complicated, they are clear and unambiguous and are consistent with the provisions of New Hampshire RSA 382-A:9-204 which provides that obligations covered by a security agreement may be secured by after-acquired collateral and that the obligations covered by a security agreement may include future advances or other value previously given. Accordingly, the collateral at the Colebrook and Groveton locations is collateral security for the obligations arising out of the Colebrook/Groveton Note as well as the related Revolving Loan under the Allonge while the collateral now or formerly located at the Woodsville and Berlin locations is collateral security for all of the Debtor's obligations to AGNE.

2. Inventory Payable Amounts, Accounting Services, and Advertising Expenses

The Debtor argues that AGNE has no basis for any charges other than AGNE-supplied grocery charges with respect to the inventory payable amounts for each of the four stores.

a. Interest

The Debtor asserts that AGNE's claim for interest under the Notes is not based upon the proper interest rate and that AGNE has no grounds for claiming interest on the inventory payables or the charges for accounting services and advertising expenses.

Interest on the Debtor's various obligations to AGNE may be included in AGNE's prepetition claim only to the extent that such interest charges are enforceable under applicable non-bankruptcy law. See 11 U.S.C. § 502(b)(1). The Allonge does provide detailed terms for the interest to be charged on the Revolving Loan. That interest was to be fixed at 10.25 percent for a fixed period and at an annual variable rate thereafter. See Allonge §§ 3(d) and (e). It is clear that

the interest rate provisions of the Allonge for the Revolving Loan do not apply to the remaining original balance under each of the Notes. Sections 3(f) and (g) of the Allonge provide:

> 3(f). Maturity Date. [Provisions on readvance principal and readvance debt omitted.] . . . All other amounts and obligations under the Notes, including the Original Debt or otherwise, shall be due and payable in full as provided for in each Note;
>
> 3(g). No Other Modification. Except as modified hereby, the terms and conditions of the Notes shall remain in full force and effect.

(emphasis added). Accordingly, prepetition interest on the AGNE claim shall be computed in accordance with the applicable note with interest on the Revolving Loan being computed under the provisions of the Allonge. Interest after the petition date shall be computed in the same manner, but may be included in AGNE's allowed secured claim only to the extent permitted under 11 U.S.C. § 506(b).

The portion of AGNE's claim which consists of obligations of the Debtor other than those created by the Notes or the Allonge shall include prepetition interest to the extent provided in the terms of the applicable agreement between the parties and enforceable under applicable non-bankruptcy law. See 11 U.S.C. § 502(b)(1). Postpetition interest shall be allowable only to the extent that AGNE's collateral exceeds the amount of its prepetition claim. See 11 U.S.C. § 506(b).

The Court does not have sufficient documentation or evidence to determine if AGNE's claims for interest on unpaid inventory purchases, accounting services or advertising expenses have been determined in accordance with an enforceable agreement between the parties. However, the same principles that the Court has discussed above in connection with AGNE's interest claim shall apply to the claim for prepetition inventory purchases, accounting services and advertising expenses. Because these elements of AGNE's claim are not supported by the proof of

claim or the current record in this contested matter, AGNE must establish the validity and amount of these elements of its claim at a future evidentiary hearing. See Fed. R. Bankr. P. 3001(g).

b. Penalty Charges

The Debtor argues that AGNE should be prohibited from collecting postpetition penalty charges on the inventory payables and the charges for accounting services and advertising expenses. The Court does not have sufficient documentation to determine if AGNE's claims for postpetition penalties, accounting services and advertising expenses have been determined in accordance with the agreements between the parties. However, the same principles that the Court has applied to the computation of AGNE's prepetition claim for such items shall apply to the postpetition claim for accounting services and advertising expenses both prepetition and postpetition subject to the provisions of 11 U.S.C. § 506(b). Because this element of AGNE's claim is not supported by the proof of claim or the current record in this contested matter, AGNE must establish the validity and amount of this element of its claim at a future evidentiary hearing. See Fed. R. Bankr. P. 3001(g).

3. Reimbursement for Payment on AGNE Guaranties

AGNE has asserted a claim against the Debtor for payments it has made on the AGNE Guaranties since the filing of the Debtor's Chapter 11 bankruptcy petition. In addition, AGNE seeks interest on such payments. The Debtor contends that because it owes nothing to the Kelley Group, it owes nothing to AGNE on account of the AGNE guaranties to the Kelley Group. The Debtor alternately contends that if AGNE has any claim on account of the AGNE Guaranties, such claim is not secured because the Kelley Group claim, if any, is unsecured and because the Allonge did not cross-collateralize the Debtor's obligations to AGNE under the AGNE Guaranties.

Section 502(b) of the Bankruptcy Code requires the Court to determine the amount of AGNE's claim as of the petition date. Postpetition interest, expenses and attorney's fees on such a claim are only allowable if the claim is oversecured, and are allowable only subject to the provisions of section 506(b) of the Bankruptcy Code. See In re Center, 282 B.R. 561 (Bankr. D. N.H. 2002). Accordingly, any postpetition payments by AGNE to the Kelley Group are not additions to the AGNE's claim as such payments would already be included in the computation of the claim as of the petition date. Moreover, to the extent that the Kelley Group receives any payment on any allowed claim against the Debtor, the AGNE Guaranty claim shall be reduced.

The amounts the Debtor owes to the Kelley Group directly are part of the Kelley Group's claims, which will be determined by the Court separately after an evidentiary hearing. See Clarkeies Market, L.L.C. v. Kelley's Food Town, Inc. (In re Clarkeies Market, L.L.C.), 2002 BNH 031. After the amount of the Kelley Group claims are established, the amount of AGNE's claim on account of the AGNE Guaranties, as of the petition date, could be determined. However, based upon the record before the Court, it appears that AGNE's claim against the Debtor under the AGNE Guaranties is secured only by the 1998 Security Agreements and the Member Agreements. Therefore, for the reasons discussed in section III.A.5 below, the amount of AGNE's claim under the AGNE Guaranties is likely moot in the absence of the possibility of AGNE having an allowed deficiency claim arising from the Woodsville and Berlin operations.

4. Application of Stock Shares and Patronage

The parties disagree on the valuation date to be applied to the Class B stock and patronage certificates in AGNE held by the Debtor and pledged as collateral for its obligations to AGNE under one or more Member Agreements, copies of which are attached to AGNE's proof of claim dated July 10, 2001 ("POC 71"). The Debtor has also raised the issue of whether the Debtor's

AGNE stock shares and patronage certificates attributable to the Groveton and Colebrook stores can be credited against the Debtor's obligations with respect to the Woodsville and Berlin stores.

The Member Agreements attached to POC 71 were executed in connection with each of the three term notes. The Member Agreements require the Debtor to purchase each calendar year from AGNE inventory constituting at least 50% of the Debtor's annual gross sales so long as any obligation remains unpaid under the respective term note or five years, whichever is longer. Each Member Agreement also provides in section 1:

> 1. Security. In addition to any security given under the Loan Documents, and in accordance with Article IV(c) of [AGNE's] Articles of Agreement and Articles V and VII of the [AGNE's] Bylaws, [Debtor] hereby pledges any and all stock of [AGNE] which [the Debtor] owns . . . and grants a security interest in and right to any patronage refunds, or other distributions, or member savings account funds due or outstanding to [the Debtor] from [AGNE] as security for the payment in full of their obligations under this Agreement and under the Loan Documents.

The record before the Court does not contain the relevant portions of the Articles of Agreement or Bylaws of AGNE referenced in the Member Agreement or any evidence on whether stock certificates, patronage refunds and the like are acquired by the Debtor, allocated by AGNE based upon transactions for all of the Debtor's locations or by individual locations. In addition, there is no provision in the Member Agreements specifying how stock certificates are valued. Accordingly, the Court is unable on this record to determine whether the method and date of valuation of the stock certificates and patronage refunds as collateral is controlled by the provisions of the Bankruptcy Code or by an agreement between the parties. Because this element of AGNE's claim is not supported by the proof of claim or the current record in this contested matter, AGNE must establish the method for valuation and the date of valuation of the stock and patronage refund collateral for purposes of setoff at a future evidentiary hearing. See Fed. R.

Bankr. P. 3001(g). If the Debtor disputes AGNE's contention, it shall need to develop an evidentiary record and present legal arguments at said future hearing.

5. Strict Foreclosure

The Debtor argues that AGNE's claims have been entirely satisfied through AGNE's repossession and retention, without a public or private sale, of the collateral at the Woodsville and Berlin stores under the doctrine of implied strict foreclosure. AGNE denies that the doctrine of implied strict foreclosure applies under the facts of this case because (1) the Debtor essentially abandoned the Woodsville and Berlin stores, forcing AGNE to take possession; (2) AGNE's security interest in the equipment at the two locations is junior to the lien of the Kelley Group; (3) AGNE has tried without success to sell the stores; (4) AGNE has given the Debtor full credit for the value of the inventory in the two stores when they were abandoned; (5) AGNE has operated the two stores at a loss; and (6) the full amount of the Debtor's indebtedness is secured by more collateral than the personal property located at the two stores.

The New Hampshire Uniform Commercial Code ("UCC")[1] provides that when a debtor is in default under a security agreement, a secured party has the rights and remedies provided by the UCC and by the security agreement, with certain exceptions, which rights include the ability to sue on the note itself and obtain a judgment. N.H. RSA 382-A:9-501. After default a secured party may sell, lease, or otherwise dispose of any or all of the collateral securing the debtor's obligation. N.H. RSA 382-A:9-504(1). The disposition of the collateral may be by public or private proceeding, but every aspect of the disposition including the method, manner, time, place, and terms must be commercially reasonable. N.H. RSA 382-A:9-504(3). The secured party must

[1] The documents were executed and AGNE's repossession of the Woodsville and Berlin stores occurred prior to the revisions to the UCC which were effective July 1, 2001; therefore, the UCC in effect prior to that date governs this matter.

provide the debtor with reasonable notification of the time and place of any public sale or with reasonable notification of the time after which any private sale or other intended disposition is to be made. Id. The secured party may buy at any public sale and, if the collateral is of a type customarily sold in a recognized market or is of a type that is the subject of widely distributed standard price quotations, the secured party may buy at a private sale. Id. When a secured party disposes of collateral after default, the disposition discharges the security interest under which the disposition was made. N.H. RSA 382-A:9-504(4). A secured party that is in possession of collateral may, after default, propose to retain the collateral in satisfaction of the debtor's obligation. N.H. RSA 382-A:9-505(2).

If a secured party chooses to retain the collateral, the secured party must send written notice of such a proposal to the debtor and to any other secured party who has a security interest in the collateral. Id. If the debtor objects in writing within thirty days from the receipt of the notification, the secured party must dispose of the collateral under section 9-504 of the UCC. Id. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation. Id.

As explained by the United States Court of Appeals for the First Circuit (the "First Circuit") in Lamp Fair, Inc. v. Perez-Ortiz, the UCC gives a secured party three basic options after default: (1) the secured party may simply sue on the note itself and obtain a judgment; (2) the secured party may retain the collateral in satisfaction of the obligation; or (3) the secured party may dispose of the collateral by public or private proceeding and seek a deficiency judgment to the extent the proceeds from disposition are insufficient to satisfy the obligation. Lamp Fair, Inc. v. Perez-Ortiz, 888 F.2d 173, 175-76 (1st Cir. 1989). In Banker v. Upper Valley Refrigeration Co., Inc., the United States District Court for the District of New Hampshire applied the First

Circuit's analysis in interpreting N.H. RSA 382-A:9-504. Banker v. Upper Valley Refrigeration Co., Inc., 771 F.Supp. 6 (D.N.H. 1991).

The facts in the Lamp Fair and Banker decisions are strikingly similar to the facts of this case. In Lamp Fair the secured creditor had provided purchase money financing for the acquisition of a retail lighting store. After the debtor decided that he could not or would not pay the balance owed under the purchase contract and the notes, he returned the store, and all of the inventory, equipment and other collateral therein, to the secured creditor. The secured creditor began immediately to operate the store. About one month later the secured creditor sent the debtor a bill for the difference between the balance owed and the value of the store and inventory which had been returned. Lamp Fair, 888 F.2d at 174-75. The secured party never sold the repossessed collateral.

In Banker the secured creditor who had provided purchase money financing to the purchaser of his business filed suit for the unpaid balance of the obligation. Four months later the secured creditor took possession of stock certificates of the purchaser pursuant to a security agreement. After more than three months of unsuccessful attempts to reach a settlement agreement on repayment of the balance owed, the secured creditor began exercising his rights as a shareholder. He removed the purchaser as an officer and director of the corporation and then caused the corporation to file a voluntary petition under Chapter 11 of the Bankruptcy Code. Banker, 771 F.Supp at 7. At no time did the secured creditor attempt to sell the repossessed collateral. Id. at 9.

In this case AGNE supplied the Debtor with purchase money financing for the Woodsville and Berlin stores. On March 13, 2001, the Debtor commenced this proceeding by filing a voluntary petition under Chapter 11 of the Bankruptcy Code (Doc. No. 1). On March 15, 2001,

AGNE filed its Assented to Ex Parte Motion for Relief From Stay on Expedited Basis (Doc. No. 2) (the "Stay Relief Motion"). After an expedited hearing on March 16, 2001 this Court entered an order granting the Stay Relief Motion (Doc. No. 8) (the "Stay Relief Order"). The Stay Relief Motion alleged that the Debtor had advised AGNE that it intended to immediately close the Woodsville and Berlin stores while continuing to operate the Groveton and Colebrook stores. Further, the Debtor had consented to AGNE taking immediate possession of the Woodsville and Berlin stores. Stay Relief Motion at ¶ 12. AGNE also alleged that the immediate closing of the Woodsville and Berlin stores would potentially jeopardize AGNE's collateral which was primarily groceries and perishables. Stay Relief Motion at ¶ 15. Finally, the Stay Relief Motion requested the Court to grant immediate relief from the automatic stay to permit AGNE:

> to exercise its rights under the Allonge and various Loan Documents regarding the Debtor's Woodsville and Berlin stores, to allow AGNE to operate such stores, liquidate its collateral and/or otherwise exercise its rights under the various loan documents and applicable non-bankruptcy law . . . .

Stay Relief Motion at ¶ A.

In the Stay Relief Order, AGNE was granted relief from the automatic stay:

> to take possession of and operate the Debtor's stores located in Berlin, New Hampshire and Woodsville, New Hampshire (collectively, the "Stores"), and to exercise all of its rights, subject to any senior rights or liens of other secured creditors, with regard to AGNE's interest in the Debtor's inventory, equipment, leasehold interests, and other tangible personal property located at the Stores; provided, however, relief is not granted with regard to any accounts, records, tradenames and general intangibles . . . .
>
> [effective with AGNE's possession of the Stores] it shall be AGNE's responsibility as of that time and date for all claims, costs and expenses arising from the operations of the Stores . . . it is the purpose of this provision to ensure that there are no administrative expenses claimed by any party against the estate of the Debtor arising out of the operations of the Stores by AGNE . . . .

> AGNE shall provide appropriate accounting of its operations to any party that requests the same . . . .

AGNE sought and received relief from the automatic stay to exercise any and all of its rights under the UCC to operate the two stores that it repossessed and to liquidate the collateral. AGNE has retained the collateral in the Woodsville and Berlin stores with a public or private sale.

The question is whether AGNE may both retain the collateral in the Woodsville and Berlin stores and receive an allowed unsecured claim in the amount of any deficiency. In Lamp Fair, the First Circuit found that a majority of courts that have dealt with this issue have held that a secured creditor's conduct in retaining the collateral on a permanent basis constitutes strict foreclosure under N.H. RSA 382-A:9-505(2), irrespective of whether the secured creditor consciously chose to invoke that option. Lamp Fair, 888 F.2d at 176. The First Circuit also pointed out that a minority of courts have refused to "force" strict foreclosure on an unwilling secured creditor. Id. at 177. However, the First Circuit denied the secured creditor in Lamp Fair a deficiency judgement without the need to decide if whether implied strict foreclosure applied. Id. at 178.

If implied strict foreclosure applies to AGNE because of its retention of the collateral in the Woodsville and Berlin stores, then it cannot have a deficiency claim or an allowed unsecured claim. See N.H. RSA 382-A:9-504(2). If implied strict foreclosure does not apply, AGNE has not met the necessary prerequisites under the UCC for a deficiency judgment. See N.H. RSA 382-A:9-504. Because it is undisputed that AGNE has not sold the collateral in the Woodsville or Berlin stores at a public or private sale, it would not be entitled to a deficiency judgment under applicable non-bankruptcy law and, therefore, is not entitled to a deficiency claim for the obligations secured by the 1998 Security Agreements which arise out of the Woodsville and Berlin locations. See 11 U.S.C. § 502(b)(1). However, the denial of that portion of AGNE's unsecured claim arising from obligations associated with the Woodsville and Berlin locations does not affect

the validity or perfection of any security interest which it may hold in other property of the Debtor to secure such claims.

6. Postpetition Use of Cash Registers by AGNE

The Debtor asserts that it should receive a credit against AGNE's claim for each month that AGNE used the Berlin cash registers postpetition. AGNE disputes the Debtor's claim for such a credit. For the reasons discussed in section III.A.5 above, the Debtor's claim for a credit is moot because AGNE is not entitled to an allowed unsecured claim arising out of the Berlin location or the AGNE Guaranties.

B. ALC's Claim

As noted above, in connection with its purchase of the Berlin and Woodsville stores, the Debtor entered into two subleasing agreements with ALC regarding the real property from which these two stores operated. ALC claims that it is owed $104,401.00 on account of the subleases, consisting of the following elements:

Berlin Store	
Prepetition amounts owed	$ 1,212.00
One year rent including charges for water bill	31,007.00
Subtotal	$32,219.00
Woodsville Store	
Prepetition amounts owed	$ 2,782.00
One year rent including charges for real estate taxes	69,400.00
Subtotal	$72,182.00
Total	$104,401.00

The Debtor objects to ALC's claim for the reasons discussed below.

1. Timeliness of Claim

The Debtor argues that ALC's claim must be disallowed as being untimely filed as ALC filed its claim on February 28, 2002, and the bar date was July 11, 2001. According to the Debtor, its subleases with ALC terminated prepetition and therefore ALC held a claim on the petition date that should have been filed prior to the bar date for filing proofs of claims. ALC argues that the subleases did not terminate prepetition and therefore its claim is not yet due as the subleases, which are executory, have not yet been rejected by the Debtor. However, it is undisputed that the Debtor ceased operating the Berlin and Woodsville stores on March 16, 2001, and turned over their operation to AGNE. Thus, regardless of whether the subleases were terminated prepetition or whether the Debtor should have formally rejected the subleases postpetition, it was clear to all parties and the Court that as of March 16, 2001, the Debtor would no longer be occupying or utilizing the Berlin and Woodsville store locations. The Stay Relief Order expressly provided that AGNE was to take possession of and operate the Woodsville and Berlin stores effective March 16, 2001. In addition, the Stay Relief Order provided that effective with AGNE's possession of those stores it was solely responsible for the expenses of operation of the stores and that no administrative expense claim would thereafter be allowed against the Debtor's estate arising from such operations.

Accordingly, the Court finds that to the extent that ALC may have held a claim for prepetition rent as of March 16, 2001, it should have filed its proof of claim by July 11, 2001. Fed. R. Bankr. P. 3003(c) provides that a proof of claim must be filed in a Chapter 11 case within the time fixed by the Court. Such time may be extended "for cause shown," or may be enlarged when the failure to act during the specified period was "the result of excusable neglect." See Fed.

R. Bankr. P. 9006(b)(1). Based on the record before it the Court cannot find "cause" or "excusable neglect." Accordingly, ALC's claim shall be denied as being untimely filed unless ALC is able to establish at an evidentiary hearing the requisite cause or excusable neglect.

2. Calculation of Claim under 11 U.S.C. § 502(b)(6) and Mitigation of Damages

The Debtor questioned whether ALC's claim has been properly calculated under section 502(b)(6) of the Bankruptcy Code. The Debtor also asserted that ALC has not properly mitigated its damages. As it appears that ALC's claim will be disallowed as untimely filed, and in the absence of sufficient evidence in the current record, the Court need not make such determinations at this time. If the Court determines to enlarge the time for ALC to have filed such claim, the determination of the amount of ALC's claim shall be made upon ALC's proof of claim and the evidentiary record established by ALC and the Debtor at any hearing on the objection to the claim.

IV. CONCLUSION

This opinion constitutes the Court's partial findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052, but shall not constitute a final order on the allowance of the claims of AGNE or ALC until the Court enters a final order after further evidentiary hearings. The Court will issue a separate order requiring the parties to file a proposed join procedural order prior to a further pre-hearing status conference at which the Court shall schedule such further evidentiary hearings.

Dated: January 22, 2003

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge