2002 BNH 030 **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

Daniel S. Campano,
Debtor

Bk. No. 01-13112-JMD
Chapter 7

Steven M. Notinger,
Chapter 7 Trustee,
Movant

v.

Auto Shine Car Wash Systems, Inc.,
Respondent

Objection to Claim No. 2

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Attorney for Movant

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MEMORANDUM OPINION

I. INTRODUCTION

The Court has before it an objection by Steven M. Notinger, the Chapter 7 trustee (the "Trustee") for the estate of Daniel S. Campano (the "Debtor"), to the claim of Auto Shine Car Wash Systems, Inc. ("Auto Shine"). Auto Shine filed a proof of claim in the Debtor's bankruptcy case asserting that it holds a claim in the amount of $873,534.55 secured by the Debtor's home in

Greenland, New Hampshire.[1] See POC 2. The Court conducted an evidentiary hearing on the matter on July 29, 2002, and took the matter under advisement. Both parties filed written closing arguments. Based upon the record before it and for the reasons set out below, the Court finds that the Trustee has not met his burden of proof and his objection to Auto Shine's claim must be overruled.

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

Auto Shine is a corporation that is wholly owned and operated by Frank DiTommaso ("DiTommaso"); it engaged in the business of selling, distributing, and servicing car wash systems. The Debtor became employed as a salesman for Auto Shine sometime in the late 1990s. During the course of his employment DiTommaso asked the Debtor if he would be interested in buying the sales and service division of the company as DiTommaso wanted to change careers. The Debtor indicated that he was interested but did not have the money to purchase the business. When the Debtor attempted to obtain financing without success, DiTommaso offered to do a seller financed loan. Accordingly, on March 10, 1999, the Debtor and his newly formed company, Auto Shine Sales and Service, Inc. ("Sales and Service"), executed an asset purchase agreement as well as two promissory notes, one in the principal amount of $890,000.00 and the other in the principal

[1] Subsequent to the filing of Auto Shine's claim, the Debtor's residence was sold pursuant to a court order approving such sale. See Doc. No. 66. Auto Shine's lien, to the extent valid, attached to the proceeds of the sale which are being held by the Trustee.

amount of $34,000.00, to cover the purchase price of $940,000.00.[2] The notes were secured by all of the business assets of Sales and Service. In addition, the Debtor and his non-debtor spouse granted Auto Shine a second mortgage on their home to secure the promissory notes, as well as a limited guaranty made by the Debtor's spouse.

Within months of assuming the sales and service business the Debtor learned that Sales and Service would be losing its largest recurring account, an account with Shell that in the past had resulted in the installation of three to five car wash systems each year. As a result, Sales and Service's cash flow was reduced by several hundred thousand dollars and the Debtor and Sales and Service were unable to make their monthly payments of $10,003.57 to Auto Shine. According to the Debtor, he had conversations with DiTommaso who said he would work with the Debtor regarding repayment; however, on February 13, 2001, Auto Shine brought suit against the Debtor and Sales and Service seeking both a temporary restraining order to secure its interest in Auto Shine's accounts and property and a judgment against Auto Shine and the Debtor in the amount of the outstanding obligation under the $890,000.00 promissory note. The state court issued a temporary restraining order and scheduled a hearing on the complaint for February 21, 2002. At the hearing, the Debtor, represented by counsel, signed an agreement with Auto Shine in which the Debtor reaffirmed the notes and mortgage and agreed to pay Auto Shine the amount of $37,038.69 in order to cure the default under the note. Payment of this amount was to be completed no later than March 15, 2001. The agreement also provided:

> The parties waive any claim counterclaim or cause of action arising out of the sale of assets by the plaintiff to the defendant from the beginning of time to the date of this agreement. It is intended that this be the broadest possible release of any claims, except

[2] The Debtor and/or Sales and Service also obtained a loan from Olde Port Bank, predecessor in interest to Granite Bank, in order to fund the purchase of Auto Shine's vehicles.

> those obligations referred to, in paragraph 1 [relating to payment], which shall continue in force.

The Debtor was unable to make the required payments under the terms of the agreement. On March 23, 2001, Belanger, Inc. ("Belanger"), the company with which Sales and Service held an exclusive car wash distributorship agreement, terminated that agreement. On or about March 28, 2001, the Debtor had a physical altercation with Sales and Service's landlord regarding unpaid rent, at which point the Debtor decided to vacate the business premises at 22 Lafayette Road in North Hampton.

Accordingly, the Debtor, DiTommaso, who had been present at the premises during the altercation, and Sales and Service's three employees, Bruce White, Louie Mattia, and Sherry Curtis, began removing items from the premises. White and Mattia loaded the company trucks with tools and inventory as directed by the Debtor. White and Mattia then placed the inventory in their garages at their residences. At trial, the Debtor testified that he was unsure of the value of the removed inventory. DiTommaso took the telephone system and computers, including the company's network server. DiTommaso testified that he did not take any of the business records. This is consistent with the Debtor's testimony that he did not turn over any receivable records or bank accounts to DiTommaso. The Debtor took one of the laptop computers as well as a few boxes that contained customer and vendor lists. Curtis testified that she removed paper copies of the accounts payable and receivable records. The computer copies were left on the computer system. She believed that either the Debtor or DiTommaso would contact her regarding the two crates of records she removed from the office; however, they did not. At the time of trial Curtis was still in possession of those records.

White testified that after Sales and Service stopped operating, White and Mattia continued to work for the company's customers on their own. They even considered operating the business

themselves. White indicated that he gave out his personal cell phone number so that customers could contact him; his Sales and Service phone was shut off, he believed, for non-payment. Within a short period of time White began working for DiTommaso and Car Wash Systems & Equipment, LLC ("Car Wash"), DiTommaso's newly formed company. According to White, service to the various car wash customers was not seriously interrupted: they were serviced by Sales and Service through the end of March, then by White and/or Mattia for a short time, and then by Car Wash beginning sometime in April.

On April 6, 2001, Auto Shine's counsel sent a letter to the Debtor's attorney indicating that it was his understanding that "substantially all of the corporate assets" of Sales and Service had been voluntarily surrendered to DiTommaso; that DiTommaso would take commercially reasonable steps to preserve the collateral until such time as it could be disposed of at a public or private proceeding; that DiTommaso would attempt to service Sales and Service's customers until such time as the collateral was disposed of; that the Debtor would continue to work on several prospects for equipment sales in order to make a substantial repayment of the debt, with DiTommaso actually completing the sales transactions and installation of the equipment; and that DiTommaso would consider releasing Auto Shine's mortgage on the Debtor's house depending upon the amount actually recovered and depending upon the Debtor's cooperation. On April 20, 2001, the Debtor sent a letter to DiTommaso agreeing to the terms outlined by Auto Shine's counsel in the April 6, 2001, letter and thanking DiTommaso for allowing him the opportunity to represent DiTommaso's "new company."

The evidence at trial established that in early April 2001, DiTommaso formed Car Wash. Between the date of formation and June 2001, DiTommaso operated Car Wash out of his home. In June 2001, DiTommaso moved Car Wash's operations to 22 Lafayette Road, where Auto Shine

and Sales and Service had previously operated. DiTommaso testified that he ordered new trucks, new inventory, new computers, and a new phone system for the business. DiTommaso stated that when he re-occupied the office space there was some office equipment, desks, bookcases, shelves, and files in the office. However, Car Wash did not utilize these items in its business; rather, DiTommaso piled them up in a corner of the office. DiTommaso also testified that he did not review the documents in the six boxes of customer files that the Debtor had left behind in the office. DiTommaso and his wife both testified that they attempted to retrieve information from the Sales and Service computers, including customer lists and accounts receivable, but were unable to do so.

At trial, White confirmed that what had been left at the office consisted of old shelves and some obsolete equipment, nothing that could be used in Car Wash's business. White also testified that he did not use the Sales and Service vehicles while employed by Car Wash. White testified that to the extent items he removed from Sales and Service were not used to service customers after Sales and Service ceased operating, these items were returned to the 22 Lafayette Road premises. DiTommaso stated that he never saw any equipment that had been loaded onto employee trucks on or about March 28, 2001, after that date. The Debtor testified that he believed that all of the inventory and equipment removed from the business at the end of March 2001 went to DiTommaso. DiTommaso testified that none of the inventory and equipment was transferred to Car Wash.

Dan Dolan, a representative of Granite Bank, Olde Port Bank's successor in interest, testified at trial regarding the status of its loans to Sales and Service. Dolan indicated that it held a first position lien against all of the company's assets. Dolan went to the Sales and Service's office three times after it ceased operating; the first time he went to assess the collateral, the second time

he went to seize Sales and Service's vehicles, and the last time he went with an auctioneer to remove any valuable collateral. The landlord would not provide Dolan with access to the premises during the last visit. Dolan testified that the collateral he viewed during the earlier visits did not appear to be worth much. It consisted mainly of old car wash parts. Dolan was unaware that Sales and Service employees had removed inventory and equipment when the company ceased operating. Dolan indicated that he would have contacted the Bank's attorney if he had known the Bank's collateral had been moved to another location so that the Bank could have liquidated the assets and recouped its losses. Dolan testified that while the Bank was able to liquidate four company vehicles for approximately $25,000.00 and the Debtor did turn over some accounts receivable in April and May totaling less than $1,000.00, the Bank ended up writing off about $55,000.00. Dolan indicated that he had no conversations with Auto Shine or its attorney regarding the preservation and/or sale of the Bank's collateral, and he was unaware whether the Bank's attorney may have had any such conversations with Auto Shine or its attorney.

It is undisputed that Auto Shine never held a private or public sale of the collateral in its possession in order to satisfy the Debtor's and Sales and Service's obligations to it. According to DiTommaso, he was not sure what collateral was Auto Shine's and what collateral belonged to the Bank. He indicated that he was waiting on the sidelines to see what would happen and for that reason he made no attempt to liquidate the items in his possession.

What did happen is the Debtor filed a Chapter 7 bankruptcy petition on October 9, 2001. Auto Shine filed a motion seeking to obtain relief from the automatic stay on February 1, 2002, so that it could liquidate the Debtor's home in order to satisfy the Debtor's and Sales and Service's debt. The Trustee objected to the motion and filed an objection to Auto Shine's claim. The parties filed cross-motions for summary judgment with respect to the objection to Auto Shine's claim, and

the Court denied those motions. On June 7, 2002, the Court approved a sale of the Debtor's residence for $447,900.00. The net sales proceeds in the approximate amount of $90,000.00 are being held by the Trustee. The Court's decision in this matter regarding Auto Shine's claim will determine whether the proceeds will get paid to Auto Shine or to the Debtor's other creditors and the Debtor and his former spouse, on account of their homestead exemptions in accordance with a previously approved compromise and settlement.

III. DISCUSSION

A creditor who seeks to assert a claim against a debtor's estate must file a "proof of claim." 11 U.S.C. § 501(a); United States v. Braunstein (In re Pan), 209 B.R. 152, 155 (D. Mass. 1997). Section 502(a) of the Bankruptcy Code provides that "[a] claim . . . , proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a); Pan, 209 B.R. at 155. The Court may disallow a proof of claim "after notice and hearing." 11 U.S.C. § 502(a); Pan, 209 B.R. at 155. In accordance with Rule 3001(f) of the Federal Rules of Bankruptcy Procedure, at such a hearing, "[a] proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f); Pan, 209 B.R. at 155. To be legally sufficient and prima facie valid under the bankruptcy rules, a proof of claim must (1) be in writing; (2) make a demand on the debtor's estate; (3) express an intent to hold the debtor liable for the debt; (4) be properly filed; (5) be based upon facts which would allow, as a matter of equity, the document to be accepted as a proof of claim; and (6) be accompanied by evidence that any security interest has been perfected. See Pan, 209 B.R. at 155 (citations omitted); Fed. R. Bankr. P. 3001(a), (c), and (d). "[A] claim that alleges facts sufficient to support a legal liability to the claimant satisfies the

claimant's initial obligation to go forward." Pan, 209 B.R. at 155 (quoting in In re Allegheny Intern., Inc., 954 F.2d 167, 173 (3d Cir. 1992)). The prima facie validity of a proof of claim can be overcome by an objection that is supported by "substantial evidence." Id. (citing In re Hemingway Transport, Inc., 993 F.2d 915, 925 (1st Cir. 1993) and others). "In the ordinary Chapter 7 bankruptcy proceeding, '[o]nce the Trustee manages the initial burden of producing substantial evidence . . . the ultimate risk of nonpersuasion as to the allowability of the claim resides with the party asserting the claim.'" Id. (quoting Hemingway, 993 F.2d at 925).

Thus, a claimant establishes a prima facie case against a debtor upon the execution and filing of a proof of claim in accordance with the bankruptcy rules; the objecting party is then required to produce evidence to rebut the claimant's prima facie case; once the objecting party produces such rebuttal evidence, the burden shifts back to the claimant to produce additional evidence to prove the validity of the claim by a preponderance of the evidence. In re Colonial Bakery, Inc., 108 B.R. 13, 15 (Bankr. D.R.I. 1989) (cited in In re Pontarelli, 169 B.R. 499, 501 (Bankr. D.R.I. 1994)). See also In re Narragansett Clothing Co., 143 B.R. 582, 583 (Bankr. D.R.I. 1992). The ultimate burden of proof always rests upon the claimant. Colonial Bakery, 108 B.R. at 15.

Auto Shine filed a timely proof of claim in this bankruptcy case in the amount of $873,534.55 and attached to it copies of the $890,000.00 promissory note and the mortgage on the Debtor's home securing the Debtor's and Sales and Service's obligations to Auto Shine. The Trustee filed an objection to Auto Shine's claim on two alternative theories: (1) the Debtor's obligation to Auto Shine was fraudulently induced and therefore its claim is not valid; and (2) the Debtor's obligation to Auto Shine, while valid, has been satisfied by Auto Shine's strict

foreclosure of the business assets that secured the obligation. Under either scenario, the Trustee seeks to have Auto Shine's claim disallowed.

A. Fraudulent Inducement

The Trustee argues that the Debtor and Sales and Service were fraudulently induced to purchase Auto Shines' sales and service division and to execute notes and the security agreements in order to finance the purchase. According to the Trustee, prior to purchasing the sales and service division, DiTommaso advised the Debtor not to contact Belanger, the company that supplied all of the car washes, parts, and components for the business and the company that had awarded its exclusive northeast distributorship agreement to Auto Shine, which agreement was to be transferred to Sales and Service as part of the sale to the Debtor. DiTommaso had indicated that Belanger might be upset by the change in the holder of the distributorship and that it would be better to contact Belanger after the sales transaction was completed. The Debtor followed DiTommaso's advice and did not contact Belanger until after the sale.

According to the Debtor, a large part of the value of the sales and service division was the Belanger distributorship agreement and the cash flow generated by the purchase and installation of Shell gas station car washes each year. Auto Shine provided the Debtor with financial information regarding the business, which included the expected income from the Shell gas station installations. Shortly after the Debtor purchased the sales and service division, the Debtor learned that Shell intended to purchase its car washes directly from Belanger. According to the Trustee, Auto Shine and DiTommaso knew during the course of their negotiations with the Debtor that Shell intended to purchase its car washes directly from Belanger. The Trustee argues that the financial information produced by Auto Shine and given to the Debtor, together with DiTommaso's advice

not to contact Belanger prior to the sale, fraudulently induced the Debtor and Sales and Service to purchase the business and to execute notes and security agreements to finance the purchase.

As a defense to the Trustee's fraudulent inducement charges, Auto Shine points to the asset purchase agreement which provides in paragraph 3.7 that there were no warranties or representations regarding the sale except as set forth in the asset purchase agreement. According to Auto Shine, it made no warranty that Shell would continue to purchase car washes from Sales and Service. At trial the Debtor acknowledged that the asset purchase agreement contained no contingencies or requirements regarding the Shell account. The Debtor also testified that while he was represented by counsel during the negotiation of the sale, he did not have an accountant conduct an independent review of Auto Shine's financial records.

In addition, the agreement that the Debtor signed on February 21, 2001, to resolve the lawsuit instituted by Auto Shine against the Debtor and Sales and Service, contained a waiver of the Debtor's claims, counterclaims, and causes of action arising out of the sale of Auto Shine's assets to the Debtor and Sales and Service. The agreement clearly stated that the release of claims was "intended [to] be the broadest possible release of any claims."

Given the record before it the Court finds that the Trustee has not come forward with substantial evidence to overcome the prima facie validity of Auto Shine's proof of claim. The asset purchase agreement itself stated that no other representations or warranties were made regarding the sale, which would exclude the Court's consideration of any evidence regarding statements or representations regarding the continuation of the Shell business. In addition, even if the Debtor was fraudulently induced to purchase Auto Shine's assets, the Debtor explicitly waived any claim he made have had regarding fraudulent inducement when he signed the February 21, 2001, settlement agreement. The Trustee suggests that the settlement agreement was signed under

duress. However, there is no evidence in the record to support that contention. The Debtor testified that he consulted with his attorney before he signed the agreement. Accordingly, Auto Shine's claim will not be disallowed on the grounds that its claim is invalid because it was fraudulently induced.

B. Strict Foreclosure

Given the Court's decision regarding fraudulent inducement, it is apparent from the record that the Trustee would admit that Auto Shine's claim is facially valid because the Debtor signed the notes and mortgage at issue and the mortgage was properly recorded. Accordingly, the Trustee is not challenging the prima facie validity of Auto Shine's claim. Instead, the Trustee argues that Auto Shine's claim has been satisfied by Auto Shine's strict foreclosure of Sales and Service's assets. Accordingly, the burden is on the Trustee to establish that Auto Shine's claim in the Debtor's bankruptcy case should be completely offset by Auto Shine's retention of corporate assets.

The New Hampshire Uniform Commercial Code ("UCC") applicable in this matter[3] 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).

[3] The parties agree that the documents were executed and the parties' actions were taken prior to July 1, 2001, and therefore the version of the Uniform Commercial Code in effect prior to that date governs this matter.

The secured party must provide the debtor with reasonable notification of the time and place of any public sale or 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, he 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, 888 F.2d 173, 175-76 (1st Cir. 1989), the above-described provisions of the UCC give a secured party three basic options after default: (1) the secured party can 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. In Banker v. Upper Valley Refrigeration Co., Inc., 771 F.Supp. 6 (D.N.H. 1991), the United States District Court for the District of New Hampshire adopted the First Circuit's analysis of these UCC provisions.

The Trustee argues that Auto Shine utilized its option under section 9-505 of the UCC, to retain collateral in total satisfaction of the Debtor's obligation, by retaining some of the business assets of Sales and Service. The evidence at trial revealed that on or about March 28, 2001, Sales and Service ceased operations. On that date inventory and equipment were removed from the leased premises. Specifically, the Debtor removed a laptop computer as well as some boxes containing customer and vendor lists; White and Mattia removed tools and inventory as well as company trucks; Curtis removed paper copies of accounts payable and receivable records; and DiTommaso removed the telephone system and various computers. Other office equipment, desks, bookcases, shelves, files, and old car wash equipment were left behind. From the record at trial it appears that a majority, if not all, of the valuable car wash inventory and equipment that was removed from the business premises by White and Mattia was inventory and equipment that had been prepaid by customers. The record also supports a finding that most, if not all, of the inventory and equipment was installed at customer sites between the time that Sales and Service ceased operating and the time Car Wash was formed.

While some items remained at the leased premises on 22 Lafayette Road and were present when Car Wash re-occupied the space in June 2001, DiTommaso testified that he did not use the items in his new business. DiTommaso stated that he ordered new trucks, new inventory, new computers, and a new phone system for Car Wash. DiTommaso and the Debtor both testified that Auto Shine did not collect Sales and Service's receivables. Rather, the Debtor continued to collect some receivables after March 28, 2001, for both his benefit and the benefit of Olde Port Bank.

The Trustee relies upon Lamp Fair and Banker for the proposition that Auto Shine's actions, in retaining the telephone system and computer and in obtaining access to items remaining

in the leased premises, constituted strict foreclosure of Sales and Service's assets pursuant to section 9-505. Neither Lamp Fair nor Banker decided whether a secured creditor must comply with the notice provision outlined in section 9-505(2) which specifically requires a secured creditor to send "written notice" of any proposal to retain collateral in satisfaction of an obligation. See Lamp Fair, 888 F.2d at 176-78; Banker, 771 F.Supp. at 9. The majority of courts find that notice is not a prerequisite to finding that a creditor has employed strict foreclosure; the minority of courts find that notice is a requirement. See Lamp Fair, 888 F.2d at 176-78. In the instant case, it is undisputed that Auto Shine did not send a notice to the Debtor indicating an intent to retain the above-mentioned collateral in full satisfaction of the Debtor's and Sales and Service's obligations. In fact, Auto Shine's counsel sent a letter stating DiTommaso was holding the collateral "until such time as the collateral [could] be disposed of at a public or private proceeding." However, DiTommaso did not sell the collateral as his counsel indicated he would in the April 6, 2001, letter.

Thus, the issue before the Court is whether Auto Shine's claim should be disallowed in full because it retained some of Sales and Service's collateral, without giving notice of an intent to retain such collateral while at the same time providing notice of an intent to sell the collateral, without actually selling it. While the Trustee argues that Lamp Fair and Banker require the Court to find strict foreclosure under these circumstances, the Court finds that those cases are distinguishable and do not require the result urged by the Trustee. Lamp Fair and Banker are distinguishable because in both of those cases the secured creditor apparently took possession of all or substantially all of the debtor's assets. Here, the evidence supports a finding that Auto Shine did not take possession of all or substantially all of the Debtor's assets. It is clear that the Debtor retained a computer and some written records. His employees also took written records as well

as equipment and inventory. The Debtor, not DiTommaso, took steps to recover accounts receivable for his benefit and the benefit of Olde Port Bank, the first lienholder. Thus the record demonstrates that Auto Shine did not assume possession of all or substantially all of the business assets such that a finding of strict foreclosure is warranted, even if the Court were to find that notice under section 9-505 is not mandatory. In addition, the Court notes that the Trustee did not present any concrete evidence regarding the value of any of the business assets, either those retained by DiTommaso or those used by Sales and Service employees after the company ceased operations. Nonetheless, it is apparent to the Court that the value of the items retained by Auto Shine, a telephone system and some computers, did not approximate or even approach the amount of the debt owed to Auto Shine, which totals $873,534.55 at this time. See Munao v. Lagattuta, 691 N.E.2d 818 (Ill. App. 1998) (explaining that the disparity between the value of the collateral and the debt was so great that the creditors' acceptance of the collateral in full satisfaction under an implied retention theory would have made little economic sense). Further, the record supports a finding that DiTommaso never used such collateral in the operation of his new company. Under these circumstances the Court cannot find that the Trustee sustained his burden of establishing that Auto Shine's actions constituted strict foreclosure.[4]

[4] The Court notes that Auto Shine must take steps to comply with the default provisions of the UCC, e.g., sell the collateral in its possession at a public or private sale or abandon the assets to Sales and Service. See Jenkins v. G2S Constructors, Inc., 140 N.H. 219, 228 (1995). Auto Shine should not be permitted to retain the collateral without Sales and Service receiving credit for its value, credit that should be applied first to Sales and Service's obligations to Olde Port Bank, as first lienholder, and second to Sales and Service's obligation to Auto Shine. As noted above, the Court is certain that the value of the collateral remaining in Auto Shine's possession is less than the amount owed by the Debtor and Sales and Service. Accordingly, allowance of Auto Shine's claim in full will not harm the estate where the amount Auto Shine will recover from the proceeds of the sale of the Debtor's residence is no more than $90,000.00.

IV. CONCLUSION

Based on the record, the Court concludes the Trustee did not meet his burden under 11 U.S.C. § 502 and Rule 3001(f) of establishing substantial evidence to demonstrate that the Debtor was fraudulently induced to purchase Auto Shine's sales and service business and to execute financing documents. In addition, the Trustee has not established that Auto Shine's claim should be disallowed on the basis that it was satisfied by Auto Shine's strict foreclosure of Sales and Service's assets. Accordingly, the Court must overrule the Trustee's objection. Auto Shine's claim is allowed as filed.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 13th day of September, 2002, at Manchester, New Hampshire.

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