2004 BNH 008 **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.,
Respondent

Bk. No. 01-10700-JMD
Chapter 11

Objection to Claims Nos. 71 and 82

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MEMORANDUM OPINION

I. INTRODUCTION

On March 22 and 25, 2004, the Court held an evidentiary hearing on yet another set of issues raised in connection with 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). The Court heard testimony from the Debtor's managing member, AGNE's senior vice president of

sales, its former executive vice president and treasurer, and its chief executive officer as well as an equipment dealer and liquidator. The parties agreed that the deposition testimony of AGNE's chief financial officer and a potential purchaser for the Debtor's Berlin store, Dana Brouillette, could be admitted as evidence.

The issue before the Court is whether AGNE is barred from asserting a deficiency claim under Article 9 of the Uniform Commercial Code (the "UCC"), as in effect in New Hampshire in March 2001, because AGNE either (1) strictly foreclosed by retaining the collateral at the Debtor's Berlin and Woodsville stores without conducting a public or private sale of the collateral; or (2) did not comply with the statutory requirement of the UCC to dispose of the collateral in a commercially reasonable manner.

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).

While the findings and rulings in this Memorandum Opinion resolve necessary issues, such findings and rulings are interlocutory and shall not be considered final until this Court enters an order determining the allowed claim of AGNE after any further evidentiary hearings on the Debtor's objection to AGNE's claim and amended claim.

II. FACTS

The Debtor filed a Chapter 11 bankruptcy petition on March 13, 2001 (the "Petition Date"). At that time the Debtor owned and operated four grocery stores located in Berlin, Colebrook, Groveton, and Woodsville, New Hampshire. AGNE's claims in this proceeding arise from a series of promissory notes and subleases which pertain to specific locations. On March 7, 1997, the Debtor borrowed $200,000.00 from AGNE and entered into a Member Loan Security Agreement in connection with the purchase of inventory for its stores in Colebrook and Groveton (collectively the "Colebrook/Groveton Note"). According to POC 82 the principal balance due on the Colebrook/Groveton Note as of the Petition Date was $343,002.77. In 1998 the Debtor purchased two additional stores located in Berlin and Woodsville from Kelley's Food Town, K&R Supermarkets, Inc. and/or the late Karl C. Kelley (collectively the "Kelley Group").

On November 30, 1998, in connection with the purchase of the Woodsville store, the Debtor executed a promissory note in favor of the Kelley Group in the amount of $185,000.00, secured by a first priority security interest in the assets of the Woodsville store (the Kelley/Woodsville Note"). The Debtor also executed a promissory note in favor of AGNE in the amount of $160,718.97 and entered into a Member Loan Security Agreement in connection with the purchase of inventory for the Woodsville store secured by a first priority security interest in the inventory at the Woodsville store, a second priority lien on the other Woodsville assets, and by certain liens and pledges of stock and other interests of the Debtor arising from its membership in AGNE (collectively the "1998 Note"). On April 25, 2000, the Debtor executed a promissory note and security agreement with AGNE, which established a $22,000.00 line of credit for the Woodsville store (the "Line of Credit," and together with the "1998 Note," the "Woodsville

Note"). According to POC 82 the principal balance due on the Woodsville Note as of the Petition Date was $156,857.43.

On November 30, 1998, in connection with the purchase of the Berlin store, the Debtor executed a promissory note in favor of the Kelley Group in the amount of $373,000.00, secured by a first priority security interest in the assets of the Berlin store (the "Kelley/Berlin Note"). The Debtor also executed a promissory note in favor of AGNE in the amount of $138,080.74 and entered into a Member Loan Security Agreement in connection with the purchase of inventory for the Berlin store secured by a first priority security interest in the inventory at the Berlin store, a second priority lien on the other Berlin assets, and by certain liens and pledges of stock and other interests of the Debtor arising from its membership in AGNE (collectively the "Berlin Note"). According to POC 82 the principal balance due on the Berlin Note as of the Petition Date was $123,898.56.

On March 15, 2001, with the Debtor's assent, AGNE filed a motion seeking relief from the automatic stay so that it could take possession of and operate the Berlin and Woodsville stores, which stores the Debtor had indicated to AGNE it intended to close immediately. The Court held an expedited hearing on March 16, 2001, and granted the motion for relief stating:

> AGNE is 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 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 . . . [I]t 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 . . . .

Doc. No. 8.

AGNE began operating the Berlin and Woodsville stores on March 16, 2001. An inventory of the stores' goods was conducted by an independent company prior to AGNE re-stocking the stores with its own inventory. The Debtor's inventory in the stores was then sold in the ordinary course. AGNE made no attempt to track the sale of the Debtor's inventory versus the sale of AGNE's inventory, supplied after its takeover on March 16, 2001. With respect to equipment, Michael Violette, AGNE's vice president of sales, testified that AGNE did not prepare a list of equipment present in the two stores as of March 16, 2001. Rather, the only record of equipment for the two stores would have been any record prepared in connection with the Debtor's purchase of the two stores from the Kelley Group in November 1998.

Violette and AGNE's other officers testified that their intent in taking over the Berlin and Woodsville stores in March 2001 was to operate the stores temporarily in order to preserve their value, to improve the stores' operations, and then to market the stores for sale as a going concern. It was apparent to AGNE that the best way to maximize its recovery under the Berlin Note and the Woodsville Note was to sell the collateral located in the stores as a going concern rather than at a foreclosure or liquidation sale. Toward that end AGNE cleaned the stores, supplied new inventory, hired personnel (some of whom had previously worked for the Debtor and some of whom had not), improved employee morale, instituted better pricing controls, advertised store goods, and repaired and replaced equipment when necessary.

On May 2, 2001, counsel for AGNE sent a letter to the Debtor stating:

> This letter will serve as Notice by Associated Grocers of New England, Inc. ("AGNE"), a secured party for certain assets at Clarkeie's [sic] Market stores located at 838 Main Street, Berlin, New Hampshire 03570 and 24 Central Street, Woodsville, New Hampshire 03744, [that AGNE] will sell assets, including, but not limited to, equipment, inventory,

> and accounts receivable or cash on or after May 10, 2001. This Notice is being delivered in compliance with NH RSA 382-A:9-504.

Ex. 2.

AGNE's officers testified that they attempted to market both the Berlin and Woodsville stores by contacting interested parties in the industry to find out if anyone were interested in purchasing either store. AGNE contacted or was contacted by at least eight individuals or companies with respect to these stores. Dana Brouillette, an individual who had previously worked in the Berlin store under different management and who was then employed by a local competitor, expressed interest in the Berlin store. Brouillette's stepfather leased the Berlin store premises to AGNE's affiliate, who subleased the premises to the Debtor. According to AGNE, the discussions with Brouillette were the most promising. Brouillette testified that he was very interested in purchasing the Berlin store because of its location and the fact that he had begun his career in that very store as a teenager. In connection with his potential purchase, Brouillette made inquiries of some individuals who had previously worked at the store and/or were involved in the grocery business, he visited the store on a regular basis to review operations, and he inspected the premises. As a result of these inquiries and visits, Brouillette was concerned with the store's condition, specifically, regarding whether he would need to replace the roof and various equipment, including the furnace and refrigeration units, and whether the store could operate with appropriate gross margins and generate sufficient weekly sales to cover operations and any debt load. When the mill in Berlin, the town's largest employer, closed in August 2001, Brouillette informed AGNE that he was no longer interested in purchasing the Berlin store. According to Brouillette that was "the nail in the coffin." At that point, neither Brouillette's wife nor his

stepfather thought the purchase was a good idea, and Brouillette testified that he needed his family to help him "not just financially, but to work there and run it."

After the Berlin mill closed and the deal with Brouillette fell through, it became clear to AGNE that the store would not be able to continue its operations and be sold as a going concern given the economic climate in the area. Thus, unable to secure a buyer for the Berlin store, AGNE closed the store on September 20, 2001. It did not provide any notice to the Debtor of its intent to do so. It is unclear from the record what happened to any inventory that remained in the Berlin store upon its closing. AGNE is willing, however, to provide a credit to the Debtor for the cost value of the inventory that remained in the store as March 16, 2001.

With respect to the equipment in the Berlin store, AGNE sold three front end cash registers to another grocery store operator in Glen, New Hampshire, for $2,000.00 and a deli case to Kelley's Food Town in Franconia, New Hampshire, for $750.00. AGNE is prepared to provide the Debtor with credit for these sales. AGNE determined that the remaining equipment in the Berlin store was worthless, and in January 2002, it hired Stan & Son Equipment, an equipment dealer and liquidator, to remove the remaining equipment. Stanley Castor, the principal of Stan & Son Equipment, testified that he charged AGNE $10,000.00 to remove the equipment, the majority of which his company just scrapped. Stan & Son Equipment remains in possession of a meat saw and a few other pieces of equipment for which his company has been unable to obtain a buyer. Apparently neither AGNE nor Stan & Son Equipment made any record of what equipment was removed from the Berlin store.

As of March 2004, AGNE remained in possession of the Debtor's equipment and other tangible property located at the Woodsville store, which store AGNE renamed Riverview Market, a name it registered with the State of New Hampshire in January 2002. AGNE continues to

operate the store. Presumably any inventory that remained in the Woodsville store at the time it was turned over to AGNE in March 2001, has been sold or otherwise disposed. AGNE is willing to provide a credit to the Debtor in the amount of the cost of any inventory that remained in the store as of March 2001.

As with Berlin, AGNE attempted to find a buyer for the Woodsville store but none of its discussions proved fruitful. The Woodsville store had its own host of problems. Commencing in May 2001, construction work began on a nearby bridge connecting New Hampshire and Vermont, which involved the construction of a temporary bridge and a road being shifted so that it passed directly through the Woodsville store parking lot. This hindered ingress and egress to the store and ultimately resulted in a loss of sales. Bridge construction was not completed until September 2003.

In addition, in June 2001, Shaws Supermarket opened a brand new store in nearby Littleton, New Hampshire, which also had an adverse effect on the Woodsville's store's sales. Violette testified that during the 2001 to 2003 time period there was upheaval in the marketplace that involved pricing wars between grocers, the ultimate sale of a competing grocery store chain to another retailer, and the closing of a competing grocery store. During this period there was major speculation as to exactly what was happening in the market.

From the time AGNE took over the Woodsville store until the present, AGNE has suffered major losses, totaling over $385,000.00.[1] AGNE's representatives testified that operations appear to be turning around presently such that it may be able to find a buyer for the Woodsville store.

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[1] Between March 16, 2001, and March 31, 2001, the Woodsville store generated $11,803.98 in losses; between April 1, 2001, and March 31, 2002, it generated $246,369.61 in losses; between April 1, 2002, and March 31, 2003, it generated $100,405.16 in losses; and between April 1, 2003, and January 24, 2004, it generated $28,233.71.00 in losses.

With that objective in mind, AGNE recently began placing ads for the sale of the Woodsville store.[2] In January 2004 AGNE placed its first advertisement in The Griffin Report of Food Marketing, and it placed another ad in February 2004 in New Hampshire's News and Food Report. AGNE does not currently have a buyer for the Woodsville store.

At no time after obtaining possession of the Debtor's stores did AGNE ever hire or even discuss the engagement of a business broker to sell either the Berlin or Woodsville stores. According to AGNE, a broker would have charged a fee for its services and would have made any potential deal more difficult. AGNE did not engage the services of an appraiser to appraise the value of the Berlin and Woodsville stores, either as going concern entities or for liquidation purposes.

AGNE filed a claim on July 10, 2001 (POC 71) seeking payment of $635,888.63, on all of the Debtor's obligations to it, not just those arising from the Berlin Note and the Woodsville Note. AGNE later amended the claim on March 19, 2002 (POC 82) and reduced it to $414,749.16. At the evidentiary hearing, AGNE indicated that its claim presently totals $1,061,399.91, computed as follows:

Principal Balance Due:		
Woodsville Note	$156,857.43	
Berlin Note	$123,898.56	
Colebrook/Groveton Note	$343,002.77	
Total Principal Due		$ 623,758.76[3]
Accounting/advertising charges		$ 9,290.15

[2] AGNE had previously placed an ad for the fried chicken machine at the Woodsville store. Apparently that piece of equipment never sold.

[3] The principal balance claimed on each note is the same as the amounts in POC 82.

Kelley Guaranty Payments (thru 2/19/2004)	$ 245,088.00[4]
Attorneys Fees/interest/costs (thru January 2004)	$ 183,263.00
Gross Claim	$1,061,399.91

AGNE also indicated that the Debtor would be entitled to credits of $284,332.33 for the value of the Debtor's AGNE stock, $60,900.00 for the cost value of the Berlin store inventory, $65,200.00 for the cost value of the Woodsville store inventory, and $118,240.00 for adequate protection payments made by the Debtor to AGNE during the course of the Debtor's bankruptcy. These credits total $528,672.33, which would result in a net claim by AGNE of $532,727.60.

III. DISCUSSION

Upon the Debtor's default on its obligations to AGNE, AGNE as a secured creditor had three remedies available to it under the UCC as adopted in New Hampshire at NH RSA 382-A:9-101 et seq.:

1. It could employ strict foreclosure by retaining the collateral in satisfaction of the obligation pursuant to RSA 382-A:9-505;

2. It could reduce its claim to judgment by any available judicial procedure pursuant to RSA 382-A:9-501; or

3. It could sell, lease or otherwise dispose of any or all of the collateral by public or private proceeding pursuant to RSA 382-A:9-504.

Banker v. Upper Valley Refrigeration Co., Inc., 771 F. Supp. 6, 8 (D.N.H. 1991) (citing Lamp Fair v. Perez-Ortiz, 888 F.2d 173, 175-76 (1st Cir. 1989); RSA 382-A:9-501(1), 9-505(2), 9-504(1) & (3)). It is undisputed that AGNE obtained possession of all the inventory, equipment, leasehold

[4] AGNE's itemization of its total claim included a figure of $477,068.00 as its potential total payout to the Kelley Group based upon the Kelley guaranties.

interests, and other tangible property located at the Berlin and Woodsville stores upon order of the Court granting AGNE relief from the automatic stay on March 16, 2001. AGNE then sent the Debtor a notice on May 1, 2001, of its intent to sell those assets in accordance with RSA 382-A:9-504. On July 10, 2001, just prior to the deadline for filing claims in the Debtor's bankruptcy, AGNE filed a claim, which it later amended on March 19, 2002. As a defense to AGNE asserting a claim for a deficiency with respect to the Berlin Note and the Woodsville Note, the Debtor argues that AGNE has strictly foreclosed the Berlin and Woodsville store collateral under the doctrine of implied strict foreclosure[5] or, in the alternative, AGNE has not acted in a commercially reasonable manner in disposing the collateral.

If a creditor successfully forecloses by retaining the collateral that secures a debtor's obligation, the debt is completely satisfied and the creditor must abandon any claim for deficiency. Banker, 771 F. Supp. at 8 (citing Lamp Fair, 888 F.2d at 176). RSA 382-A:9-505(2) requires a creditor who chooses the retention option to send the debtor written notice of its intention to do so:

> [A] secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor and except in the case of consumer goods to any other secured party who has a security interest in the collateral . . . .

Id. In cases in which a creditor has failed to provide written notice of such an intention, the majority of courts have held that such a failure may not be fatal and have deemed that the creditor employed strict foreclosure, regardless of whether the creditor consciously invoked the retention option under the UCC. See Lamp Fair, 888 F.2d at 176 (listing cases); Campano, 293 B.R. at 288 (citing Lamp Fair). A minority of courts do not force the strict foreclosure option upon a creditor

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[5] The parties agree that the Debtor has the burden of establishing its strict foreclosure defense to AGNE's claim. See Notinger v. Auto Shine Car Wash Sys., Inc. (In re Campano), 293 B.R. 281, 285-87 (D.N.H. 2003).

who has failed to provide the required written notification. Lamp Fair, 888 F.2d at 177 (listing cases). In ruling in the Lamp Fair case, the Court of Appeals for the First Circuit did not take a position on this issue. Banker, 771 F. Supp. at 9.

A. Berlin Store

The facts relating to AGNE's repossession and operation of the Berlin store support a finding that AGNE took possession of the Berlin store collateral with the intent to preserve its value in anticipation of selling the store as an operating entity. AGNE took over the store in March 2001 and attempted to improve operations and increase customer counts by cleaning the store, restocking the shelves, restoring employee morale, and fixing pricing controls. Within days of its takeover, AGNE began a series of conversations and meetings with Brouillette, a young man who appeared to have real prospects as a potential buyer for the store. On May 1, 2001, AGNE sent notice of its intent to sell the store after May 10, 2001. Brouillette had concerns regarding the condition of the store and its financial operation, specifically, with the store's gross margins and weekly sales. He had hoped to have family support from his wife and stepfather with regard to both financing and operating the store. When Berlin's largest employer closed its doors, Brouillette and his family got cold feet. At that point, AGNE decided that the store could not support its operations and for that reason it would be unable to obtain a buyer for the store. AGNE closed the doors and hired a company experienced in the grocery equipment business to dispose of the collateral.

From these actions, it is clear to the Court that AGNE did not intend to keep the store for its own use, as was the case in Lamp Fair, but rather it intended to retain the collateral only as security for the Debtor's obligations to it pending a sale of the collateral under the UCC. With regard to disposition of collateral, RSA 382-A:9-504(3) provides:

> Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, 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 shall be sent by the secured party to the debtor, and except in the case of consumer goods to any other person who has a security interest in the collateral . . . . 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 which is the subject of widely distributed standard price quotations he may buy at private sale.

The Official Comment to this section of the UCC provides:

> [N]o period is set within which the disposition must be made, except in the case of consumer goods which under Section 9-505(1) must in certain instances be sold within ninety days after the secured party has taken possession. The failure to prescribe a statutory period during which disposition must be made is in line with the policy adopted in this Article to encourage disposition by private sale through regular commercial channels. It may, for example, be wise not to dispose of goods when the market has collapsed, or to sell a large inventory in parcels over a period of time instead of in bulk. Note, however, that under subsection (3) every aspect of the sale or other disposition of the collateral must be commercially reasonable; this specifically includes method, manner, time, place and terms. See Section 9-507(2). Under that provision a secured party who without proceeding under Section 9-505(2) held collateral a long time without disposing of it, thus running up large storage charges against the debtor, where no reason existed for not making a prompt sale, might well be found not to have acted in a "commercially reasonable" manner.

RSA 382-A:9-504, cmt. 6. RSA 382-A:9-507(2) provides:

> The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner. . . . A disposition which has been approved in any judicial proceeding . . . shall conclusively be deemed to be commercially reasonable . . . .

The Official Comment to this section of the UCC provides in relevant part:

> One recognized method of disposing of repossessed collateral is for the secured party to sell the collateral to or through a dealer–a method which in the long run may realize better average returns since the secured party does not usually maintain his own facilities for making such sales. Such a method of sale, fairly conducted, is recognized as commercially reasonable under the second sentence of subsection (2).

RSA 382-A:9-507, cmt. 2. Together, these provisions suggest that a creditor may retain collateral for some period of time and still maintain an action for a deficiency if the creditor holds the collateral with the intent of preserving it or its value for future disposition, even if such future disposition does not result in any proceeds to offset the debt. Such disposition must be commercially reasonable, and this would include sale of the collateral in the regular market, through a dealer, or with court approval.

With respect to the Debtor's inventory, AGNE sold it in the ordinary course of operating the Berlin store. It is apparent that some of the inventory was perishable and therefore could be sold without notice to the Debtor. Other inventory items likely were not perishable and therefore their sale may have required AGNE to provide notice to the Debtor under the UCC. The Court finds that the Debtor was aware and therefore put on notice as of March 16, 2001, the date that AGNE obtained relief from the automatic stay, that AGNE intended to sell the Debtor's inventory to the public through its continued operation of the store. Such disposition of the collateral was made with implicit, if not explicit, court approval. Accordingly, the sale of the inventory was commercially reasonable. The Court concludes that AGNE exercised its rights properly under RSA 382-A:9-504 with respect to the inventory.

With regard to the equipment in the Berlin store, the Court finds that AGNE also exercised its rights properly under RSA 382-A:9-504. AGNE gave notice on May 1, 2001, that it intended

to sell the Berlin store equipment. AGNE had hoped to sell the equipment as part of a sale of the Berlin store. AGNE had conversations with a few individuals about a possible sale and engaged in meaningful discussions with Brouillette. When it became clear that Brouillette would not purchase the store given the recent closing of the Berlin mill and the low level of sales, AGNE opted to close the store in September 2001, and dispose of the equipment. AGNE received $2,750.00 upon private sales of the front end registers and a deli case, and it paid $10,000.00 to have the remaining equipment removed from the premises by a grocery store equipment dealer sometime after January 2002.

The Debtor argues that AGNE's actions were not commercially reasonable within the meaning of RSA 382-A:9-504(3) and 9-507(2). The evidence supports a finding that the equipment in the Berlin store was old, and old grocery store equipment has little or no value if not being used as part of an ongoing operation. The Debtor argues that AGNE should have hired an appraiser to value the equipment and/or a business broker in an attempt to market the equipment and/or the store. In the Debtor's opinion hiring a company that buys and sells both new and used grocery store equipment to examine the equipment and determine its best disposition was not commercially reasonable. The Court finds that AGNE's actions satisfy the UCC's requirements. As noted in the Official Comment to the UCC, one commercially reasonable method of disposing of collateral is for the secured party to sell the collateral to or through a dealer. In the instant case, AGNE contacted a well known dealer of used grocery store equipment who determined that the Debtor's equipment was worthless. In fact the dealer charged AGNE $10,000.00 to remove and discard the equipment because, as the dealer testified, the equipment was old, needed upgrading and some of it contained gasses and coolants that needed to be disposed of in an environmentally sound manner. The Court finds this method and manner of disposition reasonable.

With regard to the time it took AGNE to dispose of the collateral, the Court is unable to conclude that the time period was commercially unreasonable. As the Official Comment to the UCC indicates, there is no period within which the disposition must be made except in the case of certain consumer goods. The Official Comment also makes clear that it may be wise not to dispose of goods in some circumstances, e.g., when the market has collapsed. Thus the Court finds that AGNE's attempt to build up Berlin's operations during a six month period in order to improve the store's marketability and its decision thereafter to close the store and hire someone to remove the equipment within a relatively short period of time was not commercially unreasonable.

For these reasons, the Court holds that AGNE properly exercised its rights under RSA 382-A:9-504 with respect to the collateral located in the Berlin store. AGNE is therefore entitled under RSA 382-A:9-504(2) to assert in the Debtor's bankruptcy a deficiency claim with respect to the Berlin Note.

B. Woodsville Store

As with the Berlin store, the facts surrounding AGNE's repossession and operation of the Woodsville store evidence AGNE's intent to preserve the value of the store's collateral in anticipation of selling the store as an operating entity. AGNE took similar steps in Woodsville to restore and improve operations; and as with Berlin, AGNE sent a notice to the Debtor informing the Debtor that it intended to sell the store's assets after May 10, 2001. During this time, again with the Debtor's knowledge and the Court's implicit approval, AGNE continued to sell the Debtor's Woodsville store inventory.

Unlike in Berlin, however, AGNE was unable to generate serious buyer interest in the Woodsville store. While AGNE made similar inquiries of individuals and companies in the industry, no one stepped forward as a promising potential purchaser. Despite the lack of initial

interest in the store, AGNE maintained possession of the Debtor's collateral and continued to use it to operate the store. As time passed in 2001, the store's sales did not improve despite AGNE's efforts. Poor sales were likely the result of nearby bridge work commenced in May 2001 and the opening of a major grocer in nearby Littleton in June 2001. Despite these problems, AGNE continued operating the store instead of liquidating the collateral. More than three years after repossessing the collateral, AGNE continues to operate the Woodsville store and pursue a deficiency claim with respect to the Debtor's obligations related to the store. According to AGNE, no one would have been interested in purchasing the store during the years 2001, 2002, and 2003 because of the huge losses that the store generated during this time. AGNE's representatives testified that the Woodsville store has only recently improved its sales such that marketing the store makes sense. In that regard, AGNE placed two separate ads for the store in January and February 2004.

The Debtor argues that AGNE's actions warrant application of the doctrine of implied strict foreclosure because AGNE has retained the Woodsville store collateral without exercising its right to sell the collateral in accordance with RSA 382-A:9-504(3) as it had indicated it would in May 2001. AGNE has used the collateral as if it were its own after it repossessed it in March 2001. While AGNE's initial intent may have been to use the collateral only as a means for preserving its value pending its sale as part of a larger sale of the Woodsville business, AGNE's continued use of the collateral while operating the store at such significant losses suggests that AGNE had some other plan for the store. Violette's testimony regarding AGNE's monitoring of activity in the marketplace indicates that AGNE did not view Woodsville as merely security for the Debtor's obligations. Otherwise, given the facts, AGNE would have closed the store as it did in Berlin and avoided operational losses.

Because AGNE has retained the Woodsville store collateral for more than three years, the Court finds that AGNE has retained the collateral in complete satisfaction of the Debtor's Woodsville store obligations. In essence, AGNE has made a defacto election of the strict foreclosure option under the UCC. See Wang v. Wang, 440 N.W.2d 740, 746 (S.D. 1989); see also Mercantile Bank of Joplin N.A. v. Nicsinger (In re Nicsinger), 136 B.R. 228, 236 (W.D. Mo. 1992) (noting that courts sometimes find an implied election of strict foreclosure when the creditor "has retained the collateral for more than a year and either allowed the collateral to remain idle, resulting in a diminished net return on its liquidation, or used the collateral for its own personal gain during the period of retention"); Crosby v. Reed (In re Reed), 176 B.R. 189, 193 (B.A.P. 9th Cir. 1994) (explaining that some courts hold that an election may be implied from an unreasonably prolonged retention of the collateral by the secured party). The Court agrees that "it would be unfair to the debtor to allow a secured creditor to retain possession of the collateral for an excessive period of time, use it extensively, or allow it to depreciate in value, and then profit by asserting a right to a deficiency based on its own failure to furnish the requisite notice." Nicsinger, 136 B.R. at 236 (citations omitted). For those reasons, the Court is compelled to find that AGNE's actions constitute strict foreclosure despite its lack of notice to the Debtor that it had decided to retain the collateral in full satisfaction of the Woodsville store debt under the retention option contained in RSA 382-A:9-505(2).

Even if the Court were to conclude that AGNE's actions did not constitute strict foreclosure because AGNE failed to provide the required notice under the UCC,[6] alternatively, the

[6] In Campano, the United States District Court for the District of New Hampshire noted that "the New Hampshire Supreme Court has not yet read the notice requirement out of RSA 382-A:9-505(2), and may not do so." Campano, 293 B.R. at 288 (citing LaRoche v. Amoskeag Bank (In re LaRoche), 969 F.2d 1299, 1303 (1st Cir. 1992); Jenkins v. G2S Constructors, Inc., 140 N.H. 219, 227 (1995)).

Court would be compelled to find that AGNE has not acted in a commercially reasonable manner within the meaning of RSA 382-A:9-504(3). AGNE's failure to dispose of the Woodsville store equipment within three years of its repossession is not commercially reasonable, especially because AGNE did not demonstrate to the Court that it was unable to dispose of it during this period. AGNE offered no evidence that it had contacted a business broker or some other professional to discuss selling the store after AGNE's own efforts in that regard failed. The equipment dealer who was contacted by AGNE with respect to the Woodsville store collateral testified that the equipment was worth $6,000.00, as of September 2003.[7] AGNE has not pursued liquidating the collateral to date.

The Court finds that AGNE has failed to satisfy the preconditions under the UCC's disposition option for obtaining a deficiency. AGNE did not sell the Woodsville equipment by either public or private[8] sale, it has not leased the collateral, nor has it otherwise disposed of the collateral. Rather, AGNE has retained the collateral for a period of more than three years during which time AGNE has used the collateral as if it were its own. "Failure to sell collateral within a commercially reasonable time may affect the secured party's claim for a deficiency judgment." Nelson v. Armstrong, 582 P.2d 1100, 1109 (Idaho 1978) (citing J. White & R. Summers, Handbook of Law Under the Uniform Commercial Code §§ 26-11, 26-15 (1972)). Accordingly, AGNE is barred from asserting a deficiency claim with respect to the Woodsville Note.[9]

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[7] The bid indicated that Stan & Son Equipment would have charged $20,700.00 to remove the equipment and to clean up the store.

[8] This assumes that a private sale was even a possibility given the language in RSA 382-A:9-504(3) permitting private sales only if the collateral is of "a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations." See Lamp Fair, 888 F.2d at 177.

[9] The Court does not find merit in AGNE's rebuttable presumption argument and agrees with the First Circuit when it stated that "[t]his retention-plus-deficiency-judgment-plus-presumption theory does not

IV. CONCLUSION

For the reasons articulated above, AGNE is entitled to assert a deficiency with respect to the Berlin Note as part of its claim in bankruptcy but AGNE is not entitled to assert a deficiency with respect to the Woodsville Note because AGNE has strictly foreclosed the Woodsville store collateral or, in the alternative, it has failed to act in a commercially reasonable manner as required by the UCC.

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 claim of AGNE until the Court considers and rules on all outstanding issues raised by the Debtor in its objection. The Court will issue an order consistent with this opinion.

ENTERED at Manchester, New Hampshire.

Date: April 8, 2004

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

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strike us as a very plausible analysis of § 9-504, however." Lamp Fair, 888 F.2d 177.