

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:

Pasquale Vescio and Vatsala Vescio
Debtors-in-Possession

Chapter 11
Case # 96-10153

#436-1

**CORRECTED ORDER DIRECTING THE FILING OF AFFIDAVITS
TO ADDRESS VALUATION AND INTEREST RATE ISSUES
RAISED IN SECOND REMAND FROM U.S. DISTRICT COURT**

WHEREAS this chapter 11 case was filed on February 19, 1996 and an Order Confirming the Third Amended Chapter 11 Plan was entered on August 19, 1996; and

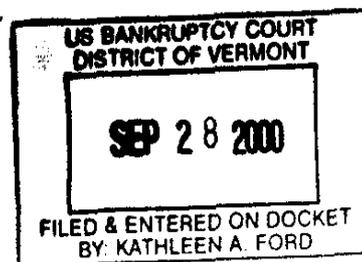
WHEREAS an initial appeal was filed with the U.S. District Court on November 18, 1996 ("the first appeal") which resulted in a remand of the case to this Court ("the first remand") and this Court (Conrad, J.) entered a decision reaffirming its prior ruling on November 20, 1998; and

WHEREAS an appeal of the November 20, 1998 decision was filed with the U.S. District Court on December 1, 1998 ("the second appeal") which resulted in a remand of the case to this Court ("the second remand") on October 6, 1999; and

WHEREAS the U.S. District Court (Sessions, J.) has very clearly and narrowly defined the two issues on remand as follows:

. . . reimposing the risk free interest rate by the Bankruptcy Court is not in conformity with binding Second Circuit precedent. This matter is therefore remanded for a determination of a risk premium which reflects Amresco's risk of receiving deferred payments. Valenti, 105 F.3d at 64 Moreover, since it is unclear whether the valuation of the property is based in part upon the risk of default, the Court remands the issue regarding the valuation of the property to insure there is not double counting of a risk premium.

In re Vescio, 2:99-CV-053 (October 4, 1999) at 8; and



WHEREAS this Court (Conrad, J.) previously credited the testimony of Mr. Pasquale Vescio as the most credible testimony as to value, and that finding has not been brought into question in the second remand, See Id. at 6, footnote 2; and

WHEREAS the only two questions presented on remand are (1) whether the undisputed replacement valuation of the property includes a risk premium and (2) what risk premium should be added to the risk free interest rate in order to compensate Amresco for the risk of receiving deferred payments, as required by In Re Valenti 105 F.3d 55 (2nd Cir. 1997); and

WHEREAS the Valenti Court ruled that the following criteria must be followed in fixing the interest rate:

... we hold that the market rate of interest . . . should be fixed at the rate on a United States Treasury instrument with a maturity equivalent to the repayment schedule under the debtor's reorganization plan. This method of calculating interest is preferable to either the "cost of funds" approach or the "forced loan" approach because it is easy to apply, it is objective, and it will lead to uniform results. In addition, the treasury rate is responsive to market conditions.

...
Because the rate on a treasury bond is virtually risk-free, the . . . interest rate should also include a premium to reflect the risk to the creditor in receiving deferred payments under the reorganization plan. A review of the case law in those jurisdictions that use this approach to determine a fair rate of interest suggests that the risk premium has been set by bankruptcy courts at from one to three percent. The actual rate will depend upon the circumstances of the debtor, including prior credit history as well as the viability of the reorganization plan. *We hold that a range of one to three percent is reasonable in this Circuit but leave it to the bankruptcy court in the first instance to make a specific determination. If the parties are unable to stipulate as to the applicable risk premium, then the bankruptcy court may conduct a hearing limited solely to a determination of that premium.* [citations omitted] [emphasis added]

and

WHEREAS this Court (Conrad, J.) previously held, consistent with Valenti, that the proper risk free interest rate is a United States Treasury note, and found that this instrument has an interest rate of 6.36% per annum, In Re Vescio case # 96-10153 Docket # 230-1 at 3; and

WHEREAS counsel for Amresco and counsel for the Debtor each already submitted a comprehensive Memorandum of Law in response to the second remand; and

WHEREAS the two issues set forth in the second remand do not raise any issues of witness credibility and the reopening of the hearing would be likely to increase both the expense and duration of this already long-lived litigation;

IT IS HEREBY ORDERED that

1. Counsel for the Debtors shall file an Affidavit by Mr. Vescio, not more than three (3) pages in length, setting forth whether Mr. Vescio included a risk premium in his determination of the \$850,000 value of the property and if so, what the risk premium was, what criteria he relied upon in computing both the risk premium and the value of the property, and what the value of the property would be if he were to withdraw that risk premium from his computation, and any other information he deems relevant to the valuation question set forth in the second remand; or, if he did not include a risk premium in his determination of the value of the property, Mr. Vescio should state that in his Affidavit, along with any other information he deems relevant to valuation question set forth in the second remand. Mr. Vescio's Affidavit is to address the value of the property as of the date of the confirmation of the Plan and will supplement - - rather than replace - - his prior testimony.
2. Counsel for the Debtors shall also file an Affidavit by James B. Lurie, their expert on the interest rate issue in the previous hearings, not more than three (3) pages in length, setting forth the interest rate premium he believes most appropriate to add to the risk free interest rate previously set by Judge Conrad, in light of the second remand, and specifically applying the Valenti criteria set forth above.
3. Counsel for Amresco shall file an Affidavit by Jeffrey R. Carr, its expert on the interest rate issue in the previous hearings, not more than three (3) pages in length, setting forth the interest rate premium he believes most appropriate to add to the risk free interest rate previously set by Judge Conrad, in light of the second remand, and specifically applying the Valenti criteria set forth above.

4. These Affidavits are to be filed with the Clerk of this Court and served upon opposing counsel by **October 2, 2000**. Counsel may file Responsive Affidavits, by the same experts who prepared the Affidavits, not more than two (2) pages in length, addressing the interest rate premium issue as prescribed by Valenti and responding to the Affidavits filed by the opposing party. The Responsive Affidavits must be filed with the Clerk of this Court, and served on opposing counsel, by **October 9, 2000**.
5. Counsel for the Debtors and counsel for Amresco may each file a Supplemental Memorandum of Law, not more than three (3) pages in length, focused on the information and opinions set forth in the Affidavits and Responsive Affidavits, and/or on the two issues defined in the second remand, by **October 16, 2000**. These Supplemental Memorandums of Law are not required but may be filed if counsel believes the Affidavits or Responsive Affidavits generate legal arguments not included in the Memorandums of Law previously filed. The Court will consider this matter fully submitted as of 5:00 p.m. on October 16, 2000.
6. This matter shall be placed on this Court's Rutland motion calendar, on **Tuesday, November 14, 2000** at **11:00 a.m.** at which time the Court will read its decision into the record.

SO ORDERED

September 13, 2000
Rutland, Vermont



Colleen A. Brown
U.S. Bankruptcy Judge

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