UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:
Pasquale Vescio and Vatsala Vescio Chapter 11 Case
Debtors-in-Possession. **# 96-10153**

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MEMORANDUM OF DECISION GRANTING DEBTOR'S MOTION TO VACATE PORTION OF ORDER, GRANTING CROSS-MOTION TO COMPEL CURING OF ARREARS, AND MODIFYING PAYMENT TERMS OF NCS 1, LLC $850,000 OBLIGATION

The debtors have filed a Motion to Vacate Order Directing Bozzuto's, Inc., Brat-Marl, Inc. (hereafter "Bozzuto's") to Pay $4,250 to NSC 1, LLC and Supporting Memorandum [Dkt. #468-1] asking this Court to find that (1) pursuant to the terms of the Order confirming the plan herein the debtors were not required to make payments to NCS1, L.L.C. (hereafter "NCS") until December 31, 2000, (2) the debtors have in fact been making payments to NCS since April, 1998, (3) the debtors are therefore in a position of having pre-paid NCS approximately $195,500, and (4) therefore that the debtors have made all payments to NCS that are due under the confirmed plan through March, 2003. The debtors' prayer for relief is that, based upon these proposed findings, this Court vacate that portion of the order previously entered by this Court (Conrad, J.) directing the debtors' tenant to pay $4,250 of their rent payment directly to NCS. In response, the creditor, NCS, filed its Opposition to Debtors' Motion to Vacate Order Directing Bozzuto's In (sic), To Pay Rent To Amresco and Cross Motion to Compel [Dkt. #477-1]. NCS opposes the relief sought and disputes the debtors' interpretation of the payment provisions of the Amended Order Confirming the Third Amended Plan and

asserts that (1) the $4,250 payments made by the involuntary assignment of rent from Bozzuto's are adequate protection payments, (2) the Order the debtors seek to modify does not direct NCS to credit these funds as plan payments by the debtors, (3) the effective date of the plan, and hence the date the debtors are required to have begun plan payments, is October 31, 1996, and (4) NCS is entitled to its balloon payment in September, 2002. Based upon these allegations, NCS requests that the Court deny the debtors' motion and cross-moves for an Order compelling the debtors to become current under the payment obligations of the Confirmation Order, as that document is interpreted by NCS. This Court has jurisdiction over this dispute. *See* 28 U.S.C. §§ 157 and 1334; *see also* 11 U.S.C. §105(a).

ISSUES PRESENTED

The many issues raised herein revolve around two fundamental questions: first, the proper interpretation of the payment obligation between these parties in the Amended Order Confirming the Debtors' Third Amended Plan, in light of the many appeals and subsequent orders affecting the subject debt; and second, the proper characterization of payments made to date and computation of the payments remaining to be paid.

PROCEDURAL BACKGROUND

A brief procedural history is essential to an understanding of the arguments presented. On February 19, 1996, the debtors filed a voluntary petition for relief under chapter 11 of title 11 U.S.C. ("the Bankruptcy Code"). The Court (Conrad, J.) entered its Amended Order Confirming Third Amended Chapter 11 Plan on August 19, 1996 (hereafter "the Confirmation Order") and denied motions filed thereafter to amend or modify the plan as confirmed. After successive appeals regarding the valuation of the collateral and the interest rate, this Court (Brown, J.) issued its Order Determining Valuation and Setting Interest Rate for Purposes of the Third Amended Chapter 11 Plan on November 2, 2000, modifying the interest rate the debtors were to pay

NCS (then Amresco, but referred to herein as NCS for purposes of clarity) from 6.36% to 8.235%. No appeal was taken from this final order, thereby rendering the confirmation order non-appealable after November 12, 2000. This date is significant with regard to the debtors' payment obligation to NCS because the Third Amended Chapter 11 Plan, as confirmed (hereafter "the Plan"), provides in pertinent part:

> The first payment will be made on the last day of the first full month following the date on which the confirmation order becomes non-appealable.

In the interim, on March 19, 1998, NCS filed a Motion to Compel Payments Under Confirmed Chapter 11 Plan. Pursuant to a hearing held on NCS's motion, Judge Conrad denied the motion to compel payments without prejudice on April 3, 1998 [Dkt. # 361-1], effectively declining to change the plan provision setting the date on which the plan payments were to commence. This denial of the motion to compel plan payments to commence, notwithstanding the delay in payments caused by the pending appeals, is an important factor in this Court's interpretation of the subsequent orders.

Thereafter, on April 7, 1998, the debtors filed their Motion to Show Cause Why a Contempt Order Should Not Be Entered Against Bozzuto's, Inc. and Brat-Marl, Inc. for Failure to Comply With Court's July 14, 1987 Order Directing Rents, Common Area Maintenance Charges, and Taxes to be Paid to the Vescios. On April 24, 1998, this Court (Conrad, J.) granted the motion and entered its Order Directing Bozzuto's, Inc., Brat-Marl, Inc. to Pay $8,000 Monthly Rents, All Common Area Maintenance Charges, And All Taxes to Vescios Pending Outcome of the Adversary Proceeding #97-1079 and Order Directing Bozzuto's, Inc., Brat-Marl, Inc. to Pay $4,250 Rent To Amresco New England II, LP Pending Outcome of Adversary Proceedings #97-1079; #96-1014; And #96-1015 [Dkt.# 381-1] (hereafter referred to also as "the Distribution Order"). In addition to requiring Bozzuto's to make monthly rental payments to the debtors in the amount of $12,250, the Distribution Order also required the debtor to commence making monthly payments of $4,250 to NCS. Accordingly, Bozzuto's was instructed to forward $8,000 each month directly to the debtors and $4,250 each month directly to NCS, pending the outcome of certain adversary proceedings between the parties.

DISCUSSION AND FINDINGS

The Confirmation Order clearly states that the debtors were to commence payments on the subject debt "on the last day of the first full month following the date on which the confirmation order becomes non-appealable." When the creditor argued that this payment provision was inappropriate or unfair in light of the lengthy appeal litigation, Judge Conrad considered the issue and responded, first, by denying NCS's motion to compel plan payments without prejudice on April 3, 1998, and soon thereafter by ordering other payments to be made to this creditor. It was in conjunction with the hearing regarding the debtors' contempt motion against Bozzuto's that Judge Conrad observed that "it is time for us to start protecting Amresco's position," *see* Transcript of Proceedings, dated April 14, 1998 at p. 15, and ordered *sua sponte* that the debtors start making payments to NCS immediately. This Order was not appealed and the debtors did, in fact, commence monthly payments to NCS in April, 1998. There is no indication, either in that April, 1998 Order or in the transcript of the hearing, that Judge Conrad intended to disturb the date for commencement of payments as set forth in the Confirmation Order, or to compel the debtors to commence making modified plan payments to NCS. Therefore, this Court finds that the payments tendered by the debtors to NCS starting in April, 1998 were not tendered as payments under the Plan nor to be credited as plan payments.

The second issue is the amount of the payments to be made by the debtors to NCS. The Confirmation Order sets forth a payment schedule calling for a debt of $850,000 to be paid over a 7-year term with the monthly payments to be in the amount of $5,665.12 for each month except the last month, when a balloon payment in the amount of $727,647.07 would be due. The monthly payment includes interest at the rate of 6.36% per year and is computed using a 25-year amortization schedule. While it is not clear to this Court how or why these particular payment terms were selected, it is nonetheless bound to enforce, and the parties are bound to perform, the terms of the Confirmation Order. *See* In re Andersen, 179 F.3d 1253, 1256 (10th Cir. 1999); In re Scott Cable Communications, Inc., 259 B.R. 536 (D. Conn. 2001).

Since the interest rate has been appealed and ultimately determined by this Court to be properly set at 8.235%, the monthly payment amount must be re-computed. However, this has no impact on the term of the payments, the structure of the balloon payment, the amortization formula to be used or Judge Conrad's determination that the best way to ensure payment to NCS was through an assignment of the payments from Bozzuto's.

It is this Court's finding that the Order directing Bozzuto's to pay part of its rent to NCS was an interim order effectively to provide NCS with adequate protection payments during the period when an appeal was pending. While this Order requires the debtors to commence monthly payments of $4,250 to NCS, the Order does not specifically characterize the payments as adequate protection payments under the Code. *See* §361. It is essential that a determination be made as to how these payments should be credited. Since the Court has found that these payments were not plan payments, it concludes that they are properly classified as adequate protection payments, as this seems to be the most reasonable construction of the Order under the circumstances. *See* Kern v. Hettinger, 303 F.2d 333, 340 (2nd Cir. 1962)("one of the strongest policies a court can have is determining the scope of its own judgments."); *see also* In re Tomlin, 105 F.3d 933, 941 (4th Cir. 1997)(bankruptcy court is in best position to interpret its orders and is entitled to customary appellate deference); Thomas v. Flaherty, 998 F.2d 1010, 1993 WL 264697 (4th Cir. 1993)(federal court has discretion to interpret its own prior orders); In re Chicago, Rock Island & Pacific Railroad Co., 860 F.2d 267, 272 (7th Cir. 1988)("[A] court is in the best position to interpret its own orders."); Spiker v. Capitol Milk Producers Co-Op, Inc., 577 F.Supp. 416, 417 (W.D.Va. 1983)(citing Kern v. Hettinger, *supra*, with approval). This Court relies on the following factors in reaching this conclusion: (i) Judge Conrad's previous denial of NCS's motion to compel plan payments on April 3, 1998 shortly before entry of this Distribution Order; (ii) Judge Conrad's reference to "protecting Amresco's position ... consistent with my ruling from the other day" during the hearing on the motion for contempt on April 14, 1998 [see Tr., at p. 15]; and (iii) the fact that neither party sought clarification of the Distribution Order regarding the nature of the payments nor filed an appeal.

It is always difficult to determine what another judge intended when he or she issued a particular decision, and the determination is even more challenging when the facts and procedural status of the case are complicated. But, here, where Judge Conrad used the phrase that it was time to give the creditor some protection, shortly after specifically denying that creditor's motion to compel commencement of plan payments, the most logical interpretation would be that he intended these payments to be adequate protection payments. *See* Security Mutual Casualty Co. v. Century Casualty Company, 621 F.2d 1062, 1066 (10th Cir. 1980)("If there is any ambiguity or obscurity" in an order "reference may be had to the findings and the entire record for the purpose of determining what was decided.")

Furthermore, it is also important to observe that Judge Conrad would have been familiar with the cases directing adequate protection payments to an undersecured creditor, such as he had before him in this case, be limited to protection only of the secured portion of its claim, and here the monthly payment figure he chose to protect Amresco's interest was just slightly below the monthly payment that would be due to compensate for the passage of time on an $850,000 debt using a 6.36% interest [or present value] factor. *See* United Savings Association of Texas v. Timbers of Inwood Forest Associates, 484 U.S. 365, 108 S.Ct. 626 (1988)(adequate protection appropriate to extent of secured claim); In re Martin, 761 F.2d 472, 477-78 (8th Cir. 1985)(adequate protection for secured creditor requires such relief as will result in realization of value); In re Ashbridge, 66 B.R. 894, 899 (Bankr. D. N.D. 1986)(adequate protection is a flexible concept which must be determined on a case-by-case basis); *see also* In re Air Vermont, 39 B.R. 684 (Bankr. D. Vt. 1984); In re Johnston, 38 B.R. 34, 36-37 (Bankr. D. Vt. 1983). If Judge Conrad had intended to direct the commencement of plan payments, it is this Court's conclusion that he would have granted or reconsidered the creditor's recently rejected motion to compel plan payments by the debtors, or described the payments as plan payments and either ordered the monthly amount to match the figure set forth in the Plan or explained why a different figure was being used.

Once this Court reaches the determination that the Distribution Order did in fact direct adequate protection payments, it must next address whether the payments made under the Distribution Order should have ceased once the payments under the Confirmation Order were to begin, and if so, what remedies are appropriate in light of that determination. This Court's conclusion is that the term of the Distribution Order directing Bozzuto's to pay $4,250 per month to NCS should be vacated, since the Confirmation Order has become non-appealable and that provision is therefore now moot.

The correct monthly payment amount under the plan must be determined in light of the Order setting a new interest rate, entered by this Court on November 2, 2000. Pursuant to the terms of the Confirmation Order, the outstanding debt of $850,000 must be amortized over 25 years, be payable in equal monthly installments for a period of 83 months, be repaid with interest computed at 8.235% per annum, and be satisfied in full through the payment of a balloon payment in the 84th month following the month in which the Confirmation Order became non-appealable, and the debtor must commence this repayment schedule in the first full month following the month in which the Confirmation Order became non-appealable. This Court finds that under the terms of the Plan, the Confirmation Order became non-appealable on November 12, 2000 and, thus, the plan payments should have commenced on December 31, 2000.

Applying the revised interest rate will increase the amount of the monthly payment, as well as the amount of the balloon payment. This formula results in the following payment terms:

- The first payment was due on December 31, 2000;
- The revised monthly payment amount is **$6,693.31** for each of the 83 months from December 31, 2000 through October 31, 2007;
- The balloon payment, in the revised amount of **$752,705.58**, is due on November 30, 2007.

Applying this formula and taking into account that the debtors have not made any plan payments to date, the Court finds that the debtors are 13 plan payments in arrears (i.e., December, 2000 through the

present). However, the debtors have made payments in the amount of $4,250 during this period. Therefore, the debtors are in arrears for an amount equal to the difference between 13 months at $4,250 and 13 months of the corrected payment of $6,693.31 per month (i.e., an arrears of $31,763.03). There is no question that chapter 11 debtors are required to remain current under the terms of their confirmed plans. *See* In re Seaview Estates, Inc., 213 B.R. 427 (Bankr. E.D.N.Y. 1997); In re The Ledges Apartments, 58 B.R. 84 (Bankr. D. Vt. 1986). The tortured procedural history and complex series of overlapping orders in this case have given rise to legitimate questions as to the correct interpretation of the payment obligation herein and warrant the debtors having a reasonable opportunity to cure the payment arrearage. This Court finds that six months is a reasonable time for the debtors to cure this arrearage, but its determination of this cure period is without prejudice to the debtors seeking additional time to cure upon a showing of good cause. This Court also finds that NCS's receipt of monthly payments from April 1998 through the present, and the commencement of full plan payments from this month forward, have protected, and will continue to protect, NCS from a deterioration in its position and, therefore, NCS will not be likely to suffer any economic injury as a consequence of the debtors having this opportunity to cure the default in plan payments.

It is indeed unfortunate that neither party sought clarification as to the nature, purpose or application of the $4,250 per month payments ordered in the Distribution Order, and equally dismaying that the debtors did not commence, and the creditor did not demand, plan payments as of December 31, 2000. But these circumstances do not provide a sound basis for this Court to now modify the terms of the Confirmation Order. At this point, this Court may only direct that steps be taken to restore the parties to where they should have been at this time under the terms of the Confirmation Order and the subsequent orders of this Court, without undue prejudice to either party. *See* In re IBI Security Service, Inc., 133 F.3d 205 (2nd Cir. 1998).

Under 11 U.S.C. §105(a), this Court has the authority to use its equitable powers to construe and enforce its orders. *See* In re Johns-Manville Corp., 97 B.R. 174 (Bankr. S.D.N.Y. 1989)(even without specific retention provision in chapter 11 plan, bankruptcy court has post-confirmation jurisdiction to interpret and

administer the plan and to interpret and enforce its own orders under §§105(a) and 1142(b)). It is particularly important here that the determination to accomplish the *status quo ante* balances the interests of the parties in a way that mirrors, to the extent possible, the balance that was created in the Confirmation Order, taking into account what has transpired since the entry of the Confirmation Order. Here, the debtors have made significant payments to the creditor since April 1998, but the amount of the monthly payments was not even sufficient to keep the creditor in the same economic position *vis a vis* this obligation as it was in on the date of the Confirmation Order, and substantial time has gone by without any reduction of the debt. *See* United Savings Association of Texas v. Timbers of Inwood Forest Associates, 484 U.S. 365, 108 S.Ct. 626 (1988); In re Sharon Steel Corp., 159 B.R. 165 (Bankr. W.D.Penn. 1993). On the one hand, by allowing the debtors the full seven-year term of repayment, crediting the post-December, 2000 payments toward plan payments and granting the debtors six months to cure the arrears and; on the other hand, authorizing the creditor to apply the pre-December, 2000 payments as adequate protection payments, declaring a default under the plan and directing a prompt cure, and continuing the assignment of rent as the source of payment, this Court believes it is enforcing the terms of the confirmed plan and carrying out the intent of the Court as evidenced by the Confirmation Order and Judge Conrad's post-confirmation orders in the manner least disruptive of the original terms of the Confirmation Order.

Accordingly, the Debtors' motion to vacate that portion of the Order directing Bozzuto's, Inc., Brat-Marl, Inc to pay $4,250 directly to NSC 1, LLC is GRANTED and the requirement that the debtors make adequate protection payments is hereby rescinded as of December 31, 2000. NCS's cross-motion seeking an order directing the debtors to become current under the Plan is GRANTED and the debtors are hereby ordered (i) to make monthly payments to NCS in the amount of $6,693.31 by the last day of each month commencing on February 28, 2002, (ii) to cure the arrears in the amount of $31,763.03 within six (6) months by submitting an additional monthly payment of $5,293.83 to NCS during the six (6) month period commencing February 28, 2002, and (iii) to comply with the payment terms set forth above and as otherwise set forth in the Third

Amended Chapter 11 Plan . NCS is directed to apply the $4,250 per month payment made by the debtors through November 30, 2000 as an adequate protection payment; to credit each $4,250 per month payment made by the debtor thereafter as a plan payment, in accordance with the above formula; and to acknowledge that the debtors are fully in compliance with their plan obligations as to the subject debt if they make the payments in the amounts and time frames set forth above. Bozzuto's, Inc. and Brat-Marl, Inc. are hereby directed to make $6,693.31 of the monthly rental payment obligation of $12,250 payable directly to NCS and pay the balance of the rent payment directly to the debtors starting no later than March, 2002 and continuing through the expiration of the lease term or until October 31, 2007, whichever comes first.

This decision does not modify any term of the Confirmation Order other than (1) to re-compute the monthly payment obligation and balloon payment based upon the correction of the interest rate pursuant to this Court's Order dated November 2, 2000, and (2) to set the exact date on which plan payments must commence based upon this Court's determination of when the confirmation Order became non-appealable. All other terms of the Confirmation Order remain in full force and effect.

February 15, 2002
Rutland, Vermont

Colleen A. Brown
United. States Bankruptcy Judge