UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:
Pasquale Vescio and Vatsala Vescio
Debtors-in-Possession.

Chapter 11 Case
 # 96-10153

Appearances;

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& Leckerling
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MEMORANDUM OF DECISION
AS TO PROPER FORUM FOR MOTION TO DISMISS CASE

The debtors have filed a Motion to Enforce Automatic Stay Against AMRESCO New England II, LP (hereafter "the debtors' motion") asking that this Court enjoin AMRESCO (hereafter "the creditor") from proceeding with the Motion to Convert or, in the Alternative, to Dismiss this bankruptcy case, which they filed in U.S. District Court on March 15, 2001 (hereafter referred to as "the creditor's motion to dismiss"). The basis of the debtors' motion is twofold: first that the creditor's filing of this motion constitutes a violation of the automatic stay created by 11 U.S.C. § 362, and second that the U.S. District Court does not have jurisdiction to address the creditor's motion to dismiss the case. For the reasons set forth below, this Court finds that the creditor's motion to dismiss has been filed in the wrong court, but that the filing of the motion is not a violation of the stay.

The instant case has been pending for nearly five years and certain aspects of the case have been addressed by the District Court while some have been addressed by the Bankruptcy Court. Thus, in order to address the debtors' motion we must review the procedural and jurisdictional history of the debtors' case.

The debtors filed for protection under chapter 11 of title 11 U.S.C. ("the Bankruptcy Code") on February 19, 1996. Pursuant to 28 U.S.C. § 1334, the U.S. District Court would have had original and exclusive jurisdiction over this case in the first instance. However, pursuant to 28 U.S.C. § 157(a) the District Court has the authority "to provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." And, in fact, the U.S. District Court for the District of Vermont entered General Order 34, an Order of Reference, referring all cases filed under Title 11 to the Bankruptcy Court for the District of Vermont. This reference is neither absolute nor permanent; it can be withdrawn in whole or in part at any time. Subsection 157(d) specifically provides

> (d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding required consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

As of the date the instant case was commenced the Order of Reference was in effect. Thus, this Bankruptcy Court had jurisdiction over the instant chapter 11 case as of the date of the filing unless and until the U.S. District Court specifically withdrew the reference as to this case, or some part of it. Although it has not happened often in this District, upon motion of the debtors the reference was withdrawn as to a portion of this case. However, and critical to the analysis of this issue, the reference of the case was not withdrawn *in toto*. Rather, the reference was withdrawn only as to one proceeding which arose in the case, namely A.P. # 96-1015. On September 30, 1999, Hon. William K. Sessions III withdrew the reference in the Merchants Bank v. Vescio adversary proceeding in order to conduct a trial. *See* U.S.D.C. Miscellaneous File No. 99-42, 9/30/99; redocketed Case No. 2:99-cv-317.

Since that time, the adversary proceeding has proceeded before the District Court and any disputes arising in the chapter 11 case itself (also called "the main case") have been heard and addressed by this

Bankruptcy Court. The parties seemed to understand this dichotomy of jurisdiction and both the case and the adversary proceeding moved forward simultaneously in the two federal forums.

For reasons that are not entirely clear from the instant filings, when the creditor filed the subject motion to dismiss the case it filed it in the District Court. If the creditor had been seeking to dismiss the adversary proceeding, it would have been appropriate to file the motion in District Court. But, since the motion clearly seeks to dismiss the chapter 11 case, it should have been filed in the Bankruptcy Court, which has exclusive jurisdiction over the case under the above-cited Order of Reference. It is not difficult to understand how this might have happened inadvertently. Since district courts refer to litigation matters as cases, and bankruptcy courts refer to litigation matters as proceedings -- reserving the term "cases" to apply only to the overall filing (under chapter 7, 9, 11, 12 or 13) seeking a discharge of debts – it is easy to understand how or why there might be some confusion.

Since the enactment of the present system of shared jurisdiction over bankruptcy matters, a number of courts have struggled with the issue of when a bankruptcy court has jurisdiction to the exclusion of a district court. The Second Circuit Court of Appeals has specifically considered the question of the extent of jurisdiction a district court may exercise over a bankruptcy case if it has not withdrawn the reference as to the case, and held that unless the district court is sitting in its capacity as an appellate court, acting upon an appeal from a bankruptcy court decision, or has withdrawn the reference, the bankruptcy court has exclusive jurisdiction over the case and all proceedings arising in, under or related to the case. In re Burger Boys, Inc., 94 F.3d 755, 762 (2nd Cir. 1996)("before deciding the merits of the third extension motion [in the main case], the district court was required to withdraw its reference from the bankruptcy court.").

The cases submitted by the debtors in support of their motion are either distinguishable from or inapplicable to the circumstances of this matter. Ostano Commerzanstalt v. Telewide Systems, Inc., 790 F.2d 206

(2nd Cir. 1986) involves debtors who filed a bankruptcy petition after oral argument of a case pending in the Second Circuit. The Second Circuit merely recognized that the appeal of a district court order was automatically stayed when appellants filed petitions in bankruptcy. Similarly, In re 48th Street Steakhouse, Inc., 835 F.2d 427 (2nd Cir. 1987) indicates that a landlord's termination notice to a prime tenant in bankruptcy violated the automatic stay and In re Flor, 79 F.3d 281 (2nd Cir. 1996) held that a bankruptcy court order denying plan confirmation was not a final order and, thus, the Court of Appeals did not have appellate jurisdiction.

This Court finds no merit in the debtors' argument that the filing of the motion in the District Court violates the automatic stay. Rather, this Court finds that the motion to dismiss the case has been filed in the wrong court and trusts that the U.S. District Court will simply deny the motion and direct the creditor to re-file it in this Court if the creditor wishes to pursue dismissal of the case. This Court's ruling on the motion to dismiss the case may, but need not, have a significant impact on the adversary proceeding pending in District Court, *see* In re Porges, 44 F.3d 159 (2nd Cir. 1995); the District Court will have to make that determination However, that does not alter the fact that unless and until the District Court withdraws the reference as to the entire case, the motion to dismiss the case can be heard only in this Court, pursuant to the clear mandates of 28 U.S.C. §§ 1334 and 157, the Order of Reference, and the limited withdrawal of reference entered by the District Court regarding the adversary proceeding.

Accordingly, the debtors' motion is DENIED.

/s/ Colleen A. Brown
Colleen A. Brown
U.S. Bankruptcy Judge

May 8, 2000
Rutland, Vermont