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E-filed November 12, 2007

3 **UNITED STATES DEPARTMENT OF JUSTICE**

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SARA L. KISTLER

7 **UNITED STATES BANKRUPTCY COURT**

8 **DISTRICT OF NEVADA**

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10  
11 In re:

12  
13 **VESCOR DEVELOPMENT, LLC**  
07-15210 -- Lead Case

14 **ADL 1, LLC**  
07-15211

15 **IDL 9, LLC**  
07-15212

16 **JDL 10, LLC,**  
07-15213

17  
18 Debtors.

**Jointly Administered**

Chapter 11 Cases

Judge **Mike K. Nakagawa** Presiding

Date: November 13, 2007

Time: 9:30 a.m.

Place: Courtroom # 2

**Affecting:**

All Cases

**or Only:**

Vescor Development, LLC

ADL 1, LLC

IDL 9, LLC

JDL 10, LLC

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20  
21 **THE UNITED STATES TRUSTEE'S OPPOSITION TO DEBTOR'S MOTION**  
22 **TO STRIKE, AND OBJECTION TO, (1) PORTIONS OF TRUSTEE'S REPLY**  
23 **TO DEBTOR'S OPPOSITION TO MOTION FOR THE APPOINTMENT OF A**  
24 **TRUSTEE PURSUANT TO 11 U.S.C. § 1104(a) WHICH EXPAND THE**  
25 **ARGUMENTS AND RELY ON EVIDENCE NOT RAISED IN THE MOVING**  
26 **PAPERS AND (2) EXHIBITS 13 THROUGH 20, AND ANY RELATED**  
27 **FOUNDATIONAL WITNESSES, ON THE UNITED STATES TRUSTEE'S**  
28 **WITNESS AND EXHIBIT LIST**

1 To the Honorable **MIKE K. NAKAGAWA**, United States Bankruptcy Judge:

2 In opposition to the United States Trustee's Motion for the Appointment of a Trustee  
3 Pursuant to 11 U.S.C. § 1104(a) [DE #56], debtors first claimed that there was no evidence to  
4 support a finding of cause for the appointment of a trustee in this case. Having received the  
5 United States Trustee's reply to that opposition [DE # 93], debtors now object to, and have  
6 moved to strike, relevant evidence that (a) is contained in papers the debtors themselves caused  
7 to be filed with this Court under penalty of perjury; (b) the debtors either were, or should have  
8 been, well aware of when they filed their opposition to the trustee motion with this Court; or (c)  
9 was first disclosed subsequent to the filing of the United States Trustee's trustee motion. The  
10 United States Trustee's reply did not raise new legal arguments, nor identify any new evidence  
11 unknown to the debtors. As a result, debtors' motion to strike should be denied, and their  
12 objection overruled. This opposition is supported by the pleadings and papers comprising the  
13 official Court files in the cases identified in the caption, and the following Memorandum of  
14 Points and Authorities.

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I. No New Legal Arguments Were Raised in the United States Trustee's Reply**

17 In their motion, debtors contend that new legal arguments were advanced in the United  
18 States Trustee's reply to the debtors' opposition to the trustee motion. However, no new  
19 statutory predicate, nor any other new legal basis for appointment of a trustee, was advanced in  
20 the United States Trustee's reply. The United States Trustee's motion and reply seek exactly the  
21 same on exactly the same statutory basis: Appointment of a trustee for cause pursuant to 11  
22 U.S.C. §§ 1104(a)(1) and (3). *See generally*, DE #56 and 93.<sup>1</sup>

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24  
25 <sup>1</sup>The facts in the case of Marcoux v. Farm Serv. & Supplies, Inc., cited by the debtors, are readily  
26 distinguishable: "In their Reply Memorandum, the length of which more than *triples* without permission the limit  
27 set forth in this Court's individual practices, defendants claim for the first time that the jury award should be offset  
28 pursuant to N.Y. C.P.L.R. § 4545(c) by the total amount of social security benefits that they 'believe plaintiff has  
and will continue to receive.' (Defs. Reply Mem. Supp. Mot. New Trial at 34-35.)" Marcoux v. Farm Serv. &  
Supplies, Inc., 290 F. Supp. 457, 484 n. 28 (S.D.N.Y. 2003).

1           **B. No New Facts Unknown to the Debtors Were Raised in the United States**  
2           **Trustee's Reply**

3           Debtors also contend that the United States Trustee's reply presents "new facts,"  
4 including those set forth in paragraphs 8 through 15 of the reply. Debtors' "new facts" claim is  
5 debunked by reference to the record before the Court.

6           Paragraphs 8 and 9 of the United States Trustee's reply do not contain any "new facts"  
7 unknown to the debtors. Paragraphs 8 and 9 of the reply are nothing more than a summary of  
8 information contained in the schedules and statements of financial affairs the debtors themselves  
9 caused to be filed with this Court under penalty of perjury. More particularly, the contents of  
10 paragraphs 8 and 9 of the reply summarize the \$19,333,447.15 in unpaid intercompany loans and  
11 \$5,559,252.82 in potentially preferential insider preferences reflected in debtors' Schedule B and  
12 Statement of Financial Affairs forms. The documents filed by the debtors, which contain the  
13 evidence summarized in Paragraphs 8 and 9 of the reply, are expressly identified in those  
14 paragraphs. *See* DE # 92, p. 4 of 15. Information contained in papers that the debtors  
15 themselves caused to be filed with the Court under penalty of perjury is in no manner new or  
16 prejudicial to them.

17           Paragraph 10 of the reply does not contain any "new facts" unknown to the debtors,  
18 either. Paragraph 10 summarizes papers filed in 8 lawsuits pending in 2 states (Utah and  
19 Nevada) in which one or more of the debtors have been named as defendants. *See generally*,  
20 Motion p. 1 l. 14 - p. 2 l. 4. Debtors are well aware of those lawsuits, as each and every one of  
21 them is identified in the Statement of Financial Affairs forms the debtors caused to be filed with  
22 the Court under penalty of perjury. *See, e.g.*, DE #26, p. 5 of 13. The related complaints were  
23 filed between September 1, 2006 and April 26, 2007, long before the debtors' petitions were  
24 filed.<sup>2</sup> The Affidavit of Jonathan H. Horne, M.D., filed in the Oak Valley Investments case<sup>3</sup> is  
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26           <sup>2</sup>The complaints are identified as Exhibits 13 - 19, inclusive, in the United States Trustee's Witness and  
27 Exhibit List.

28           <sup>3</sup>This document is identified as Exhibit 20 in the United States Trustee's Witness and Exhibit List.

1 dated May 23, 2007, and was filed on May 25, 2007, also well before the debtors' petitions were  
2 filed.

3 Paragraphs 11 through 15 of the reply address facts contained in an opposition to the  
4 United States Trustee's trustee motion filed by parties other than the debtors. *See* Opposition of  
5 Heritage Capital, Inc., Heritage Group, and the Covenant Management Group to United States  
6 Trustee's Motion for the Appointment of a Trustee and Joinder in Debtor's Opposition [DE #85].  
7 The United States Trustee could not address the facts contained in the Heritage opposition earlier  
8 in these proceedings. When asked under oath at October 3, 2007 meeting of creditors whether  
9 he was engaged in attempts to sell the debtors' real estate assets, and to use the proceeds to settle  
10 outstanding litigation with creditors or claimants of other entities, Val E. Southwick refused to  
11 answer and asserted his right to avoid self-incrimination pursuant to the Fifth Amendment to the  
12 United States Constitution. Transcript, DE # 69, p. 55 l. 3 - p. 56 l. 19. The United States  
13 Trustee's motion was filed on October 11, 2007. DE # 56. The Heritage opposition and related  
14 declaration, summarized in paragraphs 11 through 15 of the United States Trustee's reply, were  
15 filed on October 29, 2007. Debtors' opposition to the United States Trustee's motion, also filed  
16 on October 29, 2007, refers at various points to the negotiations and other information contained  
17 in the Heritage Opposition and supporting declaration. *See, e.g.*, DE # 82 at pp. 2, 6-7, 12 - 13,  
18 and 15. Debtors were thus aware of the information contained in the Heritage opposition and  
19 related declaration even before the United States Trustee.

20 Ultimately, the United States Trustee's reply does not present a new legal theory, nor any  
21 "new evidence" resulting in unfair prejudice to the debtors. The United States Trustee's reply is  
22 proper, and the evidence referenced in the debtors' motion is relevant and admissible in  
23 resolving the question of whether cause exists for the appointment of a trustee under 11 U.S.C. §  
24 1104(a). *See generally*, FED. R. EVID. 401 - 403, inclusive.

1 **CONCLUSION**

2 For the reasons and pursuant to the authorities discussed above, the United States Trustee  
3 requests that the Court enter an order denying the debtors' motion to strike, and overruling their  
4 objections to Exhibits 13 through 20. The United States Trustee further requests that the Court  
5 grant such other and additional relief as is just and equitable.

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7 Respectfully submitted,

8 **SARA L. KISTLER**  
9 **ACTING UNITED STATES TRUSTEE**  
10 **REGION 17**

11 By: /s/ August B. Landis  
12 August B. Landis, Assistant United States Trustee  
13 United States Department of Justice  
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