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7
8 **UNITED STATES BANKRUPTCY COURT**
9 **DISTRICT OF NEVADA**

10 In re:

11 **VESCOR DEVELOPMENT, LLC,**
07-15210
12 **ADL 1, LLC,**
07-15211
13 **IDL 9, LLC,**
14 **07-15212**
15 **JDL 10, LLC,**
07-15213,

16 Debtors

Chapter 11 Cases

Judge **Mike K. Nakagawa**, Presiding

Date: September 12, 2007

Time: 1:30 p.m.

Place:

Affecting:

All Cases

or Only:

Vescor Development, LLC

ADL 1, LLC

IDL 1, LLC

JDL 1, LLC

19 **THE UNITED STATES TRUSTEE'S OBJECTION TO APPLICATION TO**
20 **EMPLOY MERRILL R. NORMAN, MBA, CPA, AS CHIEF**
21 **RESTRUCTURING OFFICER**
22

23 The United States Trustee opposes the Application to Employ Merrill R. Norman, MBA,
24 CPA, as Chief Restructuring Officer filed by the debtors in the cases identified in the caption.

25 The proposed Chief Restructuring Officer (a) is subject to termination at will by prior
26 management, and (b) will also serve as a designated representative for the debtor entities.

27 Creditor consent to such an appointment is lacking. The circumstances of this case are not
28 extraordinary or peculiar in a fashion that warrants appointment of a Chief Restructuring Officer.

1 The United States Trustee questions whether the debtors' recourse to the retention of a Chief
2 Restructuring Officer is a means generally to avoid appointment of a trustee, and therefore
3 requests that the application be denied. This opposition is premised upon the pleadings and
4 papers comprising the official record in this case, and the following memorandum of points and
5 authorities.

6 **FACTS**

7 1. Debtors' application proposes to retain Merrill R. Norman, MBA, CPA, as a Chief
8 Restructuring Officer, and to have Mr. Norman serve as its designated representative pursuant to
9 Fed. R. Bankr. P. 9001(5), in lieu of Val E. Southwick.

10 2. Attached to debtors' application is a retention agreement, pursuant to which
11 "Norman's services . . . may be terminated by the Debtors, at will, effective no less than twenty
12 days following the filing of a written notice in the Bankruptcy Case." DE # 7 at Exhibit 3, p. 4
13 of 6.

14 3. The retention agreement is, in turn, "Acknowledged and Agreed to" by debtors'
15 manager Apex MM, through Apex MM's President and Secretary, Val E. Southwick.

16 4. It appears that because Mr. Southwick controls the entity that manages the debtors, he
17 retains the ability to terminate Mr. Norman's services under the retention agreement at the heart
18 of the application "at will" through the expedient of a twenty day written notice.

19 5. The retention agreement also provides that if retention of Mr. Norman is approved, he
20 "will not express an opinion or other form of assurance regarding the financial statements
21 provided by the Debtors." DE # 7 at Exhibit 3, p. 4 of 6.

22 6. Mr. Southwick has invoked his Fifth Amendment privileges in connection with the
23 Chapter 11 bankruptcy of a related entity, VesCor Capital, Inc., now pending in the United
24 States Bankruptcy Court for the District of Utah as case no. 07-22435.

25 **MEMORANDUM OF POINTS AND AUTHORITIES**

26 7. When a case presents facts that establish that it is necessary to appoint a fiduciary to
27 take control of the debtor's estate, "the Bankruptcy Code generally contemplates that the office
28 of trustee will be employed." In re Stratesec, Inc., 324 B.R. 158, 160 (Bankr. D.C. 2004).

1 8. "Utilization of the device of a responsible officer ought to be limited to extraordinary
2 circumstances, such as when all sides agree to the appointment." Id.

3 9. One of the debtors' largest creditors has objected to the proposed retention of Mr.
4 Norman. As a result, "there is no showing of consent on all sides to the responsible officer
5 procedure being employed[.]" Stratesec, 324 B.R. at 160-61, *citing In re Gaslight Club, Inc.*,
6 782 F.2d 767 (7th Cir. 1986).

7 10. Where consent is lacking, and the circumstances of the case are not extraordinary or
8 peculiar, appointment of a responsible officer "that is in substance, if not name a trustee [. . .]
9 represents a back-door means of circumventing the statutory requirements, and case law,
10 applicable to the appointment of trustees[.]" In re Adelphia Communications Corp., 336 B. R.
11 610, 664 - 69 (Bankr. S.D.N.Y. 1006).

12 11. Mr. Norman's proposed retention does not allow him to opine as to the accuracy of
13 financial information on the one hand, but seeks to allow him to sign bankruptcy petitions and
14 schedules under oath on the other. After doing so, Mr. Norman can be terminated "at will" on 20
15 days notice. Under the facts of this case, this court should "certainly question recourse to the
16 present procedure as a means generally to avoid appointment of a trustee." Adelphia, 336 B. R.
17 at 668, *quoting Gaslight Club*, 782 F.2d at 772.

18 WHEREFORE, the United States Trustee requests that the court enter an order denying
19 the application, and granting such other and additional relief as is just and equitable.

20 Respectfully submitted,

21 **SARA L. KISTLER**
22 **ACTING UNITED STATES TRUSTEE**
23 **REGION 17**

24 By: /s/ August B. Landis
25 August B. Landis, Assistant United States Trustee
26 United States Department of Justice
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