

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:

GREGORY JOHN TE VELDE

Debtor.

Case No. 18-11651-A-11

MEMORANDUM

UST-2

Argued and submitted on August 22, 2018

at Fresno, California

Honorable Fredrick E. Clement, Bankruptcy Judge Presiding

Appearances: Terri H. Didion for the U.S. Trustee;
Riley C. Walter, Walter Wilhelm Law Group
for Gregory te Velde; Richard A. Rogan,
Jeffer Mangels Butler & Mitchell LLP for
Rabobank, N.A.; Don J. Poole, Wild, Carter
& Tipton for J.D. Heiskell Holdings, LLC;
Sara L. Chenetz, Perkins Coie LLP for
Boardman Tree Farm, LLC; Hagop T. Bedoyan,
Klein, DeNatale, Goldner, Cooper,
Rosenlieb & Kimball LLP for Conway Hay
Sales; Craig A. Tristao, Coleman &
Horowitt, LLP for Western Ag Improvements,
Inc.; David R. Jenkins for Michael
Schoenau; Carolyn G. Wade for the State of
Oregon; Mikel R. Bistrow, Dinsmore & Shohl
LLP for VFS US LLC; Gloria M. Oates, Dutra
& Oates for Golden State Farm Credit; and
Ronald A. Clifford, Blakeley LLP for the
Official Committee of Unsecured Creditors.

1 For cause, the court may remove the debtor in possession and
2 order the appointment of a trustee. Gregory te Velde ("te Velde"),
3 who operates as a sole proprietorship, owns three dairies in two
4 states with approximately 53,000 animals. Te Velde, personally, filed
5 for chapter 11, becoming the debtor in possession and a fiduciary for
6 his creditors. Since filing, he has continued his long-standing
7 habits of methamphetamine usage and gambling. Drug usage has occurred
8 once or twice per week, and he has gambled estate monies of \$2,000-
9 \$7,000 monthly. Te Velde borrowed \$205,000 without court
10 authorization and, in a one-month period, took personal draws of
11 \$28,000 more than authorized. Does cause exist for appointment of a
12 trustee?

13 I. FACTS

14 Te Velde is, and for the past 37 years has been, a dairyman. He
15 owns and operates three dairies in two states. He owns 53,382 head of
16 livestock. His assets have an aggregate value of \$248 million, and he
17 owes \$160 million. His largest creditor is Rabobank, who is owed \$68
18 million, and who holds a security interest in the majority of his
19 assets. His annual revenues are \$75-100 million.

20 Te Velde's personal and business habits are not consistent with a
21 large-scale business operation or his role as a fiduciary.
22 Historically, he has operated in large part in cash and has continued
23 to do so post-petition. He has gambled estate funds and continues
24 regular use of methamphetamine.

25 Three months ago, he sought the protections of chapter 11. Te
26 Velde, as well as his creditors, and the U.S. Trustee dispute the
27 reasons for the filing. Te Velde credits his financial problems to
28 factors not associated with lifestyle habits, citing low milk prices,

1 construction cost overruns associated with his Oregon dairy, and
2 environmental compliance costs largely related to his Oregon operation
3 as the reasons for filing bankruptcy. The U.S. Trustee and creditors
4 perceive that darker forces have caused his insolvency or, if not the
5 cause, preclude te Velde from effectively resolving his debt problems.

6 II. PROCEDURE

7 The U.S. Trustee has moved to appoint a trustee or, in the
8 alternative, to dismiss the case. The U.S. Trustee is joined by John
9 Deere Construction and Forestry Company, Rabobank N.A., Conway Hay
10 Sales, Boardman Tree Farms, LLC, and the Official Committee of
11 Unsecured Creditors. Te Velde opposes the motion.

12 III. JURISDICTION

13 This court has jurisdiction. 28 U.S.C. §§ 1334, 157(a), (b) (1);
14 General Order No. 182 of the U.S. District Court for the Eastern
15 District of California. This is a core proceeding in which this court
16 may enter final orders. 28 U.S.C. § 157(b) (2) (A), (O).

17 IV. LAW

18 Motions to appoint a chapter 11 trustee are governed by § 1104:¹

19 (a) At any time after the commencement of the case but
20 before confirmation of a plan, on request of a party in
21 interest or the United States trustee, and after notice and
a hearing, the court shall order the appointment of a
trustee--

22 (1) for cause, including fraud, dishonesty,
23 incompetence, or gross mismanagement of the affairs of
24 the debtor by current management, either before or
25 after the commencement of the case, or similar cause,
but not including the number of holders of securities
of the debtor or the amount of assets or liabilities

26
27 ¹ Unless specified otherwise, all chapter and section references are to the
28 Bankruptcy Code, 11 U.S.C. §§ 101-1532 and all "Rule" references are to the
Federal Rues of Bankruptcy Procedure, Rules 1001-9037. All "Civil Rule"
references are to the Federal Rules of Civil Procedure, Rules 1-86.

1 of the debtor; or

2 (2) if such appointment is in the interests of
3 creditors, any equity security holders, and other
4 interests of the estate, without regard to the number
of holders of securities of the debtor or the amount
of assets or liabilities of the debtor.

5 11 U.S.C. § 1104(a).

6 The burden of proof is on the party seeking appointment of the
7 trustee. *In re William A. Smith Const. Co., Inc.*, 77 B.R. 124, 126
8 (Bankr. N.D. Ohio 1987). Courts are divided as to the quantum of
9 proof required, and the issue is unresolved in the Ninth Circuit.

10 Some courts require clear and convincing evidence. *Adams v. Marwil*
11 (*In re Bayou Group, LLC*), 564 F.3d 541, 546 (2nd Cir. 2009); *Official*
12 *Committee of Asbestos Claimant v. G-I Holdings, Inc.* (*In re G-I*
13 *Holdings, Inc.*), 385 F.3d 313 (3rd Cir. 2004). Other courts believe
14 that the preponderance of the evidence standard applies. *Keeley &*
15 *Grabanski Land P'ship v. Keeley* (*In re Keeley & Grabanski Land*
16 *P'ship*), 455 B.R. 153 (8th Cir. BAP 2011); *In re Veblen West Dairy*
17 *LLP*, 434 B.R. 550 (Bankr. D. S.D. 2010). For the purposes of this
18 motion, this court assumes the burden of proof most favorable to the
19 debtor in possession, viz. clear and convincing evidence.

20 V. DISCUSSION

21 A. Cause

22 Cause is not a defined term. 11 U.S.C. § 1104(a). Whether a
23 particular act or omission rises to the level of cause requires
24 consideration of all pertinent facts and circumstances. *In re Gen. Oil*
25 *Distributors, Inc.*, 42 B.R. 402, 409 (Bankr. E.D.N.Y. 1984) ("Implicit
26 in a finding of incompetence, dishonesty, etc., for purposes of §
27 1104(a)(1), is whether the conduct shown rises to a level sufficient
28 to warrant the appointment of a trustee").

1 The court finds cause: te Velde is unwilling, or unable, to
2 comply with his duties as a fiduciary.² At the outset, the debtor in
3 possession's personal and business habits are not compatible with his
4 role as fiduciary. Te Velde admits to long-standing methamphetamine
5 usage. He continued to use methamphetamine one or two times per week
6 post-petition. He admits that his drug use "has negatively impaired
7 my health, family and business." Te Velde also has a long-standing
8 practice of gambling large amounts of money. For example, in the 12-
9 month period prior to seeking the protection of this court, he gambled
10 more than \$77,000. He has continued to gamble post-petition with
11 estate funds in the amount of \$2,000-\$7,000 per month.

12 Te Velde lacks transparency in his dealings. He has a history of
13 dealing largely in cash, and his cash transactions are sometimes not
14 reflected in the Monthly Operating Reports. He admits possession of
15 \$7,000-\$8,000 in cash in a safe at his home but explains that its
16 omission from the Monthly Operating Report was an "oversight." Other
17 cash is missing. When asked to explain a particular \$20,500 post-
18 petition cash withdrawal, he initially stated he was unsure what he
19 did with the money but thought it had been used for personal gambling.
20 Later, he offered a different explanation. "As to the contention of
21 \$20,500 in cash withdrawals, a portion of these funds, at least
22 \$8,000, was used to pay for use of a plane and a pilot who flew me to
23 and from Oregon where my Lost Valley Farm is located and additional
24

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26
27 ² Te Velde's evidentiary objections are overruled. Kristin A. McAbee has laid
28 a sufficient foundation for her declaration. McAbee decl. ¶¶ 5, 6 & 16.
Moreover, her recitation of te Velde's statements during Initial Debtor
Interviews are not hearsay. Fed. R. Evid. 801(d)(2).

1 cash has been used on various business and travel related expenses.
2 The balance was used on personal living expenses."

3 The debtor does not abide by the orders of this court or the
4 strictures of the bankruptcy code. For example, post-petition te
5 Velde borrowed \$205,000 from Pasco Farms without court approval. A
6 second example is that between May 8 and June 2, he was authorized to
7 take personal draws of \$10,000. Instead he took draws of \$38,420.
8 When asked to explain this issue, he stated that he was unaccustomed
9 to personal bank accounts, took the cash he needed, and authorized his
10 bookkeeper to pay his personal bills from the dairy accounts.

11 Te Velde's representations to this court in his pleadings and
12 other filings are not accurate. But one example of this is Schedule
13 A/B filed in support of the petition. According to that schedule his
14 bank account was overdrawn by \$24,898 on the date of the petition.
15 Bank statements reveal a balance of \$164,000 on that date.

16 For each of these reasons, cause exits.

17 **B. Appointment of a Trustee**

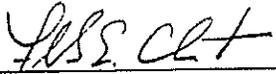
18 Having found cause, the court must decide whether to order
19 the appointment of a trustee or dismiss the case. Dismissal of
20 the case would return the parties to the same dysfunctional
21 debtor-creditor relationship. Several creditors have
22 particularly indicated a preference for a trustee. The Official
23 Committee of Unsecured Creditors' description is colorful, but
24 apt. It described te Velde as "over his skis" and urged the
25 appointment of a trustee. Placing weight on creditors, who are
26 likely those most effected, the court will order the appointment
27 of a trustee.
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VI. CONCLUSION

For each of these reasons, the motion will be granted, and a trustee appointed. The court will issue an order from chambers.

Dated: Sep 12, 2018



Fredrick E. Clement
United States Bankruptcy Judge

**Instructions to Clerk of Court
Service List – Not Part of Order/Judgment**

The Clerk of Court is instructed to send the Order/Judgment or other court generated document transmitted herewith to the parties below. The Clerk of Court will send the Order via the BNC.

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