

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA  
NEWPORT NEWS DIVISION**

In re:

Michael D. Vick,

Debtor.

Case No. 08-50775-FJS  
Chapter 11

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**MOTION OF THE UNITED STATES TRUSTEE TO APPOINT A  
CHAPTER 11 TRUSTEE AND MEMORANDUM IN SUPPORT**

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W. Clarkson McDow, Jr., the United States Trustee for Region Four, by counsel, moves this Court to order the appointment of a chapter 11 trustee. In support of his Motion, the U.S. Trustee states:

**INTRODUCTION**

The debtor Michael D. Vick (“Mr. Vick”) is a professional football player. Between 2001 and 2006, Mr. Vick received from the Atlanta Falcons of the National Football League salary and bonuses totaling approximately \$60 million.<sup>1</sup> In addition, as one of the world’s most popular and recognizable athletes, he received substantial sums for endorsing various products and services. Accordingly, in 2005 Forbes Magazine listed Mr. Vick as the 19<sup>th</sup> most highly paid

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<sup>1</sup><http://content.usatoday.com/sports/football/nfl/salaries/playerdetail.aspx?lname=V&player=2367>

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celebrity in the world, estimating his total income for the prior year to have been \$37.5 million.<sup>2</sup>

Mr. Vick is currently an inmate at Leavenworth Federal Penitentiary serving a 23 month sentence. Having filed a chapter 11 petition to deal with problems resulting from his loss of income, Mr. Vick is currently a debtor in possession. As such, he is charged with virtually all of the fiduciary duties of a trustee.

It has become clear since the filing of this case that Mr. Vick has very limited knowledge of the state of his finances. Mr. Vick's counsel have advised the court that the filing of accurate schedules of assets and liabilities in this case will be very difficult. It appears that Mr. Vick has routinely relied upon others to make financial decisions for him, giving them discretionary control over large sums of money. This pattern has continued after the filing of the case. Mr. Vick sought court permission to retain an advisor to assist him with his financial problems. That advisor has now been sued by the State of New Jersey for his alleged participation in a fraudulent securities scheme, and Mr. Vick has withdrawn his retention application.

Under the Bankruptcy Code, the Court is directed to order the appointment of a chapter 11 trustee to act as an estate fiduciary if a debtor has engaged in, among other things, gross mismanagement of his financial affairs or if the appointment of a trustee is in the best interests of the creditors and the debtor. 11 U.S.C. § 1104(a). Mr. Vick has seriously mismanaged his financial affairs by continually relying upon untrustworthy persons for advice and giving those persons control over his affairs. Nor is he now in the position to personally manage his financial affairs. The appointment of an impartial trustee in this case would be in the best interests of Mr. Vick's creditors and of Mr. Vick. The trustee would be empowered to unravel Mr. Vick's financial situation. An appropriate investigation will identify and, if necessary, recover from

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<sup>2</sup><http://www.forbes.com/lists/2005/53/20CG.html>

third parties estate assets for the benefit of Mr. Vick's creditors and possibly for Mr. Vick's benefit as well.

### **JURISDICTION**

1. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334.

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A). Venue is proper in this Court under 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for relief are 28 U.S.C. § 586(a)(3), 11 U.S.C. §§ 307, 1104(a)(1) and (2), and Fed. R. Bank. P. 2007.1 and 9014.

### **FACTS**

3. On December 10, 2007, Mr. Vick was sentenced to 23 months in prison at a hearing before the Honorable Henry Hudson in the Richmond Division of the United States District Court for the Eastern District of Virginia. Mr. Vick is currently serving his sentence at Leavenworth Federal Penitentiary in Leavenworth, Kansas.

4. On July 7, 2008, Mr. Vick filed a voluntary petition under Chapter 11, Title 11, U. S. Code.

5. Mr. Vick is a debtor in possession, and no trustee has been appointed in this case.

6. Concurrently with the filing of his petition, Mr. Vick moved this Court to appoint David Talbot as "Designated Responsible Person" (the "Responsible Person Motion").

7. In paragraph 12 of the Responsible Person Motion, Mr. Vick stated that "the appointment of a responsible person to care for Mr. Vick's financial affairs is necessary because Mr. Vick, who may be in prison until the summer of 2009, has limited ability to arrange his finances and limited ability to participate in the bankruptcy case on an in-person basis."

8. Prior to filing his petition, Mr. Vick appointed Mr. Talbot as his attorney-in-fact

pursuant to a broadly drafted General Power of Attorney dated June 7, 2008 (“POA”). Mr. Vick signed an addendum to the POA on July 7, 2008. Both the POA and addendum are attached to the Responsible Person Motion as Exhibits C and D. In connection with his retention, Mr. Talbot received from Mr. Vick, or MV7, LLC (an LLC in Mr. Vick’s control) a 2008 Mercedes-Benz S500, valued at between \$80,000 and \$85,000. The vehicle was titled in Mr. Talbot’s name post-petition.

9. After conversations between his counsel and counsel for the U.S. Trustee, Mr. Vick withdrew his initial motion, and filed in its place a Motion to Appoint David Talbot as Financial Advisor to the Debtor (the “Section 327 Motion”), pursuant to 11 U.S.C. § 327.

10. The U.S. Trustee and several creditors filed objections to Mr. Vick’s motion to employ Mr. Talbot. The Court heard Mr. Vick’s motion on July 17, 2008. An Order approving Mr. Talbot’s employment on an interim basis was entered on August 1, 2008. (Docket Entry 79).

11. On July 17, 2008, Mr. Vick, his counsel, and Mr. Talbot participated in an initial debtor interview (“IDI”) with the U.S. Trustee. At the IDI, Mr. Vick and his representatives stated that Mr. Vick had previously granted a power of attorney to a financial advisor named Mary Wong, of Omaha, Nebraska.

12. On July 25, 2008, Mr. Vick filed a motion for an order directing Ms. Wong to turn over information regarding Mr. Vick’s financial affairs. On July 28, 2008, Mr. Vick filed a motion for an order requiring Ms. Wong to produce documents pursuant to Fed. R. Bankr. P. 2004. In both motions, Mr. Vick states that he retained Ms. Wong as his business manager in the “summer or autumn of 2007,” gave her a power of attorney, and gave her at least \$550,000. The debtor accuses Ms. Wong of having “removed additional substantial funds from his Defined

Benefit Plan without his authorization.” Mr. Vick’s motions also include a decision of the New York Stock Exchange Hearing Board barring Ms. Wong from membership in the NYSE due to her misappropriation of customer funds and other questionable activity. According to Mr. Vick, Ms. Wong has been unresponsive to requests for information.

13. On August 8, 2008, the Attorney General of New Jersey filed a Verified Complaint against David Talbot in the Superior Court of New Jersey, Bergen County, seeking injunctive and other relief for Talbot’s alleged violations of New Jersey securities laws. A copy of the Complaint is attached as Exhibit A.

14. In the Complaint, the Attorney General alleges that Mr. Talbot was involved in an ongoing affinity fraud in which he gained the trust of a number of Wyckoff, New Jersey church members. By preying on their religious beliefs, Mr. Talbot allegedly gained their trust, and led them to invest over \$500,000 into a fictitious “asset enhancement contract.” Part and parcel to Mr. Talbot’s alleged fraud was to have his “investors” agree to donate a percentage of their promised profits to His Glory Worldwide, LLC (“His Glory”). Mr. Talbot allegedly represented that His Glory was a non-profit Christian organization. Mr. Talbot then allegedly deposited the investors’ checks directly into a Bank of America bank account in the name of His Glory. A portion of the “investment” money allegedly was transferred to a variety of other entities and co-participants in the fraud scheme. According to the Complaint, Mr. Talbot then used and may continue to use the His Glory bank account to pay his own personal expenses. The Complaint further alleges that Mr. Talbot placed additional funds of investors in other bank accounts subject to his control, and that he used and may continue to use those funds to pay personal expenses.

15. Within hours of learning of the complaint filed against Mr. Talbot in New Jersey, Mr. Vick filed a motion to withdraw his Section 327 Motion. The U.S. Trustee does not oppose

the withdrawal.

16. Mr. Vick has selected personal advisors, including agents and financial advisors, an unknown number of whom have taken advantage of Mr. Vick's trust. Notably, both Ms. Wong and Mr. Talbot obtained broad written authority from Mr. Vick to act as his attorney-in-fact over all of his financial affairs.

17. Mr. Vick has not appropriately supervised the actions of his advisors and is not aware of the current extent of his estate or the amount of his estate lost or transferred to others by his various advisors while acting with power of attorney.

### MEMORANDUM

Grounds exist to appoint a chapter 11 trustee under 11 U.S.C. §§ 1104(a)(1) and (2).

Section 1104(a) provides:

§ 1104. Appointment of trustee or examiner

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

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or 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 of the debtor;

(2) if such appointment is in the interests of creditors, any equity security holders, and other 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; or

(3) if grounds exist to convert or dismiss the case under section 1112, but the court determines that the appointment of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1104(a).

The proper burden of proof for the appointment of a chapter 11 trustee is preponderance of the evidence. *Tradex Corp. v. Morse (In re Tradex Corp.)*, 339 B.R. 823 (D. Mass. 2006) (finding that other decisions holding that the burden of proof was “clear and convincing evidence” are incorrect in light of the Supreme Court’s decision in *Grogan v. Garner*, 498 U.S. 279 (1991)). Nevertheless, even if the evidentiary standard is clear and convincing, as set forth below the U.S. Trustee has met that burden. Once the court has found that cause exists for the appointment of trustee, it has no discretion and must appoint a trustee. *In re Oklahoma Refining Co.*, 838 F.2d 1133 (10<sup>th</sup> Cir. 1988).

If a bankruptcy court orders the appointment of a chapter 11 trustee pursuant to section 1104(a), then subsection 1104(d) requires the U.S. Trustee, after consulting with parties in interest and subject to the court’s approval, to appoint a “disinterested person” to serve in that capacity.

**11 U.S.C. § 1104(a)(1): Cause exists for the appointment of a chapter 11 trustee in this case.**

Though not exclusive, § 1104(a)(1) lists “fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management” as “cause” for the appointment of a trustee. “Current management” typically refers to the management of a corporate debtor. A corporate debtor, acting pursuant to non-bankruptcy law, may replace fraudulent or incompetent management with new management before the filing of a bankruptcy petition and lessen the possibility that a trustee appointment will occur.

This case is different. The debtor, Mr. Vick, is an individual. He cannot replace management. He, like all other individuals, is himself ultimately responsible for decisions affecting his past, present, and future financial affairs. Therefore, Mr. Vick’s conduct of his own financial affairs must be evaluated to determine if cause exists for the appointment of a chapter

11 trustee.

Mr. Vick is incarcerated in a federal penitentiary, and will be released no sooner than the summer of 2009. By his own admission, he “has limited ability to arrange his finances and limited ability to participate in the bankruptcy case on an in-person basis.” (Responsible Person Motion, ¶12). Mr. Vick chose Ms. Wong and Mr. Talbot to manage his affairs, and alleges that he himself has “limited ability” to do so. At the time of filing, Mr. Talbot had complete control over the debtor’s finances, by virtue of the POA. Even before his incarceration, Mr. Vick had given Ms. Wong the same degree of control. Mr. Vick selected these “financial advisors,” and both are suspected of transferring Mr. Vick’s assets for their own benefit. Mr. Vick’s acknowledged inability to manage his own financial affairs coupled with his pattern of turning those affairs over to untrustworthy persons constitutes such gross mismanagement of his affairs as to constitute cause for the appointment of a chapter 11 trustee. Because cause exists, a trustee must be appointed pursuant to 11 U.S.C. § 1104(a)(1).

**11 U.S.C. § 1104(a)(2): Appointment of a trustee is in the best interests of all parties.**

The “best interests” standard of section 1104(a)(2) is broad indeed. “The Court has particularly wide discretion under subsection (a)(2), [which] sets forth a flexible standard for appointment of a trustee even when no cause exists.” *In re Bellevue Place Associates*, 171 B.R. 615, 623 (Bankr. N.D. Ill. 1994). *Accord In re Ionosphere Clubs, Inc.*, 113 B.R. 164, 168 (Bankr. S.D.N.Y. 1990) (“Code § 1104(a)(2) creates a flexible standard and allows the appointment of a trustee even when no ‘cause’ exists”), citing *In re Sharon Steel Corp.*, 871 F.2d 1217, 1226 (3d Cir. 1989). The “factors constituting a basis for appointing a trustee under section 1104(a)(2) are amorphous, diverse and necessarily involve a great deal of judicial discretion.” *In re V. Salvino Oil & Heating Co.*, 99 B.R. 518, 527, n. 11 (Bankr. E.D.N.Y. 1989).

Courts consider the following factors, among others, in determining whether to appoint a chapter 11 trustee under section 1104(a)(2): (1) the trustworthiness of the debtor; (2) the debtor's past and present performance and prospects for the debtor's reorganization; (3) confidence, or lack thereof, of the business community and creditors in present management; and (4) the benefits derived by appointment of a trustee, balanced against the costs of appointment. *See In re Colorado-Ute Elec. Ass'n, Inc.*, 120 B.R. 164, 176 (Bankr. D. Colo. 1990).

***The trustworthiness of the debtor.***

Mr. Vick has admitted that he is unable to manage his financial affairs, and he has repeatedly turned those affairs over to untrustworthy persons.

***The debtor's past and present performance and prospects for his reorganization.***

Mr. Vick's past performance includes his decisions to hire Ms. Wong and Mr. Talbot, and to give them near autonomy over his finances. As set forth above, both Ms. Wong and Mr. Talbot have taken advantage of Mr. Vick's trust, and the trust of their other clients for their own benefit. The prospects for Mr. Vick's reorganization are, as yet, unclear. Mr. Vick and his counsel suggested at the IDI that he will sell several parcels of real estate to fund the bankruptcy estate. However, a liquidation of this kind may not fully repay creditors. His creditors may benefit if significant future earnings are included in a plan of reorganization. *See* 11 U.S.C. §1129(a)(15).

***Lack of confidence of the creditors in the present "management."***

Mr. Vick will be incarcerated in federal prison for many months to come. He has acknowledged on the record in this case that he is unable to manage his financial affairs. He sought, through the proposed retention of Mr. Talbot, to obtain the services of a financial advisor to assist him in the management of his affairs. Several creditors filed objections to Mr. Talbot's

retention. Mr. Vick has wisely withdrawn the retention motion in light of the discovery of Mr. Talbot's apparent involvement in a fraudulent securities scheme. These circumstances must necessarily undermine Mr. Vick's creditors' confidence in his ability to manage his affairs.

***The benefits of appointing a chapter 11 trustee outweigh the costs.***

By granting a broad power-of-attorney first to Ms. Wong and then to Mr. Talbot, Mr. Vick relinquished control over his affairs to these individuals. Both Wong and Talbot may have benefitted from Mr. Vick's trust by transferring certain of Mr. Vick's assets to themselves and to entities in their control for their own benefit. Mr. Vick cannot at this time manage his own affairs. A trustee can and will manage this estate.

Mr. Vick's incarceration will render it nearly impossible for him to actively pursue the assets of the estate as debtor-in-possession. By his own admission, Mr. Vick "has limited ability to arrange his finances and limited ability to participate in the bankruptcy case on an in-person basis." (Responsible Person Motion, ¶12). A chapter 11 trustee will be better able to manage the estate. Additionally, an appointed trustee will be subject to a fidelity bond.

Significant uncertainty exists over what assets belong to Mr. Vick's estate and over the validity of certain claims that have been asserted against that estate. A chapter 11 trustee, in the exercise of the trustee's powers of investigation under 11 U.S.C. § 1106(a)(3) and the trustee's avoidance powers under chapter 5 of the Bankruptcy Code, will be able to identify and recover assets for the benefit of the estate. Those assets will be available for the payment of legitimate claims against the estate. Recoveries by the trustee could very well ultimately redound to the benefit of Mr. Vick as well.

On the other hand, the failure to appoint a trustee will result in Mr. Vick trying to manage his estate from prison. The appointment of an objective and disinterested trustee will result in a

streamlined administration of this case, free from the difficulties that have followed Mr. Vick and his chosen advisors. Mr. Vick's own Responsible Person Motion initially sought broad authority for Mr. Talbot in a substantially similar role to that of a chapter 11 trustee. His own pleadings admit the need for a trustee. The benefits outweigh the costs to this estate. This Court should order the appointment of a chapter 11 trustee under 11 U.S.C. § 1104(a)(2) for the benefit of all parties involved.

WHEREFORE, the United States Trustee requests that this Court order the appointment of a chapter 11 trustee and grant such other and further relief as this Court deems appropriate and just.

Respectfully Submitted,

W. Clarkson McDow, Jr.  
United States Trustee  
for Region Four

By: /s/ Kenneth N. Whitehurst, III  
Debera F. Conlon  
Assistant United States Trustee

Kenneth N. Whitehurst, III  
Trial Attorney

**CERTIFICATE OF SERVICE**

I certify that on August 12, 2008, a true copy of the foregoing was mailed, postage prepaid, to the debtor at USP Leavenworth, P.O. Box 100, Leavenworth, KS 66048 and were served by electronic mail on counsel for the debtor, Paul K. Campsen, Dennis T. Lewandowski, counsel for the Official Committee of Unsecured Creditors, John D. McIntyre, and all registered participants in the case pursuant to II.B.4 of the Administrative Procedures of the CM/ECF System for the United States Bankruptcy Court for the Eastern District of Virginia.

/s/ Kenneth N. Whitehurst, III

Kenneth N. Whitehurst, III