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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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In re:	)	
	)	Case No. 09-31932 TEC
ARDEN VAN UPP,	)	
	)	Chapter 11
Debtor.	)	
	)	Place: United States Bankruptcy Court
2550 Webster Street	)	235 Pine Street, Courtroom 23
San Francisco, CA 94115	)	San Francisco, California
	)	Judge: The Honorable Thomas E. Carlson
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MOTION TO VACATE ORDER DIRECTING THE APPOINTMENT  
OF A TRUSTEE AND FOR OTHER RELIEF

Samuel H. Sloan, being duly sworn, deposes and says:

1. I hereby move to vacate the order entered *sua sponte* by this court on September 29, 2009 directing the US Trustee to appoint a trustee in this case. I am also moving for the following relief.

(a) An order recusing and disqualifying Judge Thomas E. Carlson from appearing in this case due to his inappropriate action in directing the appointment of a trustee without the required notice, opportunity for a hearing and findings of facts.

(b) An order transferring this case to Judge Dennis Montali who heard the previous bankruptcy involving this same debtor and properties. The prior bankruptcy filed in 1992 was extensively litigated, lasted five years and resulted in appeals. The current bankruptcy is the result of decisions that were made in the prior bankruptcy and therefore this case should be put back before the same judge.

(c) An order requiring the creditors to file proofs of claim showing how much they claim is owed by the debtor.

(d) An order directing the return of my computer hard drive that was taken during the recent "clean up" of the property.

(e) An order removing David A. Bradlow as trustee and Wendel, Rosen, Black and Dean as his counsel in this case.

(f) An order allowing electronic filing by me in this case.

2. On September 29, 2009 this court made a *sua sponte* decision directing the US Attorney to appoint a trustee in this case. This decision was wrong and must be reversed because 11 USC 1104 (a) states:

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,

3. As can be plainly seen, this statute has several required elements: (1) There must be a request of a party in interest or of the US Trustee, (2) there must be notice, (3) there must be an opportunity for a hearing and (4) there must be a showing of "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor".

4. None of the required elements of this statute have been fulfilled. Neither any party nor the US Trustee has ever requested the appointment of a trustee. There was no notice. There was no opportunity for a hearing. There was no showing of "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor". Therefore, the order of this court must be vacated. Please note that the prior bankruptcy proceeding involving the same debtor lasted five years of heavy litigation and Judge Montali never saw fit to appoint a trustee.

5. In addition, the proceedings herein are taking place on the wrong premise. The moving papers recently filed all state that the properties are being readied for sale. This is not true. The debtor does not wish to sell any of her properties. She does not agree to the sale of any of her properties. She intends to keep all of these properties until she dies at which time they will be donated to a charitable trust. She recently fired her lawyer Mitchell Hadler because he was proceeding with the sale of her properties against her wishes. Mr. Hadler no longer represents Ms. Van Upp. Her new lawyer

is Thomas Swihart.

6. I have known the debtor since 1966. I helped her pick out and select her first property, 1019 Ashbury Street, which she bought in 1967. I am fully familiar with her history and the history of her ownership of these properties. I am prepared to competently testify at a trial or a hearing on this matter.

7. I am a long time resident of 2550 Webster Street, San Francisco, California, one of the subject properties in this case. The electric bill is in my name. My clothing, papers and personal effects are present in the house. I believe that many of my personal belongings including apparently my computer have been thrown out recently.

8. It is not true that a real estate agent has been appointed to sell these properties. The debtor has not authorized anybody to sell the properties. It is true that Mr. Hadler appointed a real estate agent named Osama to list the properties for sale. (That is really his name. Due to the unfortunate coincidence associating his name with international terrorism, the parties have adopted the practice of calling him "Sam", but that creates the problem of confusing him with me, as my name is also Sam.) Mr. Osama was not authorized by Miss Van Upp to sell the properties and when she fired Mr. Hadler she also by implication fired Mr. Osama.

9. The current bankruptcy is the outgrowth of a previous bankruptcy by the same debtor. In re Arden Van Upp, Case No. 92-33747 DM, and appellate case No. 97-1294. That case went on for five years before Judge Montali. The result of the case was that Arden Van Upp was reorganized under bankruptcy. She basically won the case against Dr. Badgley who had brought the case that forced her into bankruptcy. However, the Badgley case had started in 1973 and went on for 24 years and became known for being the longest running active case in the San Francisco Court System. Although Arden Van Upp won the case, she had to pay more than one million dollars in attorney's fees, including \$750,000 to the law firm of Nossaman, Guthner, Knox and Elloit. Unfortunately, Judge Montali did not award her attorneys fees. Therefore, she had to borrow money to pay her attorney. (Also, at the outset of the case, she had paid the Nossaman firm a check for \$125,000, but they had lost the check.)

10. Prior to all of this, she owned her three properties, the Webster Street property, the Steiner Street property, and the Ashbury Street property, free and clear. She was debt free until she had to start borrowing money to pay all her lawyers.

11. In addition to the money it took to pay the Nossaman firm for their legal services, there was the issue of Earthquake Retrofitting. As different administrations take office in City Hall, each new one

brings up again the requirement that she earthquake retrofit her house. This earthquake retrofitting of the Webster Street property would cost millions of dollars and it would destroy the value of her house. It would involve jacking up her house several inches and installing springs under her house. The house was built in 1896. It easily survived the San Francisco 1906 and 1989 earthquakes and will survive any other earthquake because it is built on solid rock at the very peak, the pinnacle of Pacific Heights. The buildings affected by the earthquakes are in the lower areas and near the fault lines and the bay. In addition, the Webster Street property is a private home. Nobody lives there but Arden Van Upp and myself and possibly my children. It is nobody's business but our own whether she should earthquake retrofit the house. Any house up to four units is not required under the law to be earthquake retrofitted.

12. Nevertheless, the City of San Francisco got a \$900,000 default judgment against her for failing to Earthquake Retrofit the house. The city then placed a lien on all her properties for this \$900,000. Because of this \$900,000 lien, she could not borrow money and could not fix up the houses.

13. Very recently, the default judgment for \$900,000 was vacated and the lien was lifted. The City of San Francisco has filed a notice of appeal but has failed to perfect the appeal. However, almost as soon as the \$900,000 judgment was vacated, her creditors, who had not been paid up to date due in part to the \$900,000 judgment and lien, moved to foreclose on her property. The Webster Street had been noticed to be sold at auction just two days after the day that Arden Van Upp filed the current Bankruptcy proceeding.

14. A further problem that led to the current bankruptcy proceeding is the issue of deadbeat tenants. Arden Van Upp has two deadbeat tenants who have not paid rent in months. Each of them owes her more than \$10,000. One of her deadbeat tenants just filed for bankruptcy on August 20, 2009. In re Sarah Villarreal, Case No. 09-32435. That case has been assigned to Judge Montali, which may provide another reason to transfer this case to Judge Montali. I understand that Arden Van Upp has just received a check to pay the current October rent for Sarah Villarreal, who occupies Apartment Number 5 at 2807 Steiner Street. Apparently, Miss Villarreal believes that she does not have to pay her rent for May, June, July, August and September of \$2600 per month because she filed for bankruptcy in August. However, she is mistaken. I have examined her creditors list and Arden Van Upp is not listed as a creditor. The box which asks if she has notified her landlord has not been checked. Also, a creditors meeting has been held and Arden Van Upp was not noticed. Therefore, the rent is still owed. It should now be easier for Miss Villarreal to pay the rent she owes because her other debts are being discharged.

15. The other deadbeat tenant is Judy Sparaco. She has not paid rent since January on the pretext that there is a vine growing across her window. However, she has lived in that apartment for 30 years and the vine has been there all that time. Cutting the plant would kill the fine. I doubt that a vine growing across her window relieves her of the obligation to pay rent. She threatened suit on that and several other grounds, including she wants another new refrigerator. She has low rent, as a rent controlled tenant of only \$1200. She entered into an agreement with Arden Van Upp that she will be paid \$47,500 to move out provided that she moves out by December 31, 2009. In this way, Arden Van Upp would get rid of a tenant who has been causing her trouble for years and then she can raise the rent to market levels. However, because of the current bankruptcy situation, it seems that Arden Van Upp will not be able to pay the \$47,500. Therefore, Judy Sparaco has made a counter offer that she will live for the next three years in the building rent free and after three years she will start paying rent at her current low rent controlled rate and will not move out. Arden Van Upp is not willing to agree to this.

16. For a trustee to be appointed under 11 USC 1104 (a) there must be a showing that there has been "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management". There has been no such showing. I am quite familiar with the management of real estate. I worked for 13 years managing rental properties in Park Slope, Brooklyn, New York. I also worked for a real estate law firm in downtown Brooklyn. Unfortunately, the owner of the real estate I was managing, Allan P. Fogelson, got Alzheimer's Disease, lost his mind and then died and then his lawyer, Jon Sherry, took a gun and blew his brains out, thereby committing suicide.

17. Since I am quite familiar with both the problems in managing real estate, including dealing with dead beat tenants, and with the particularities of the Arden Van Upp cases, I can say with confidence that nobody could do any better than Arden Van Upp has done in managing these properties. For example, in just the past few weeks, she has rented two of her apartments at high premium rents of \$2900 for a two-bedroom and \$1575 for a studio with a loft. The law firm that proposes to take over the management of her properties and intends to charge \$425 per hour to do so has no experience renting apartments and dealing with dead beat tenants like Sarah Villarreal and Judy Sparaco. I however have extensive experience dealing with tenants like that because that was my job for 13 years in Park Slope Brooklyn preparing court cases to evict hard core non-paying tenants like these. Therefore, if anybody is appointed to manage her properties, it should be me. It is note worthy that in the application by the high-powered law firm of Wendel, Rosen, Black and Dean to manage her properties and to charge her \$425 per hour for doing so, they make no mention of doing the things that ought to be

done, which is forcing Sarah Villarreal and Judy Sparaco to pay rent or get out or both, or dealing with the pending appeal by the City of San Francisco against the vacating of the \$900,000 default judgment. Instead they propose to do the very thing that the debtor does not want them to do, which is to sell the properties. That was what Mitchell Hadler wanted to do and he was fired as her lawyer for going against her wishes. Mr. Hadler was informed on September 29, 2009 that he had been fired just prior to the court hearing on this case.

18. In addition, the law firm that is applying to take over the management of the properties, Wendel, Rosen, Black and Dean, has failed to serve all opposing counsel. Their service list, which I found on PACER, shows that only her FORMER lawyer, Mitchell Hadler, was served. Her current lawyer, Thomas Swihart, was not served, nor were any of the attorneys for her creditors served. I believe that the attorneys for her creditors should also object to the appointment of Wendel, Rosen, Black and Dean. Arden Van Upp spends an average of 100 hours per week managing her properties. If they do the same amount of work and charge \$425 per hour for it, they will be charging her \$42,500 per week. Even if they work less or charge less there is little doubt that their fees will soon exceed \$100,000. I know this because I am involved in a case in San Francisco Federal Court before Judge Patel that was just transferred to Texas and already the legal fees in that case exceed \$400,000. As noted previously, the Law Firm of Nossaman, Guthner, Knox and Elloit charged her \$750,000 for the prior bankruptcy ending in 1997.

19. It is obvious that the law firm of Wendel, Rosen, Black and Dean will similarly be charging these huge fees. They are confident of getting paid because they list the properties as being worth \$7.5 million and the debt owed on the properties as being \$3.5 million. Thus, they can charge \$4 million in legal fees and still get paid. There can be little doubt that the law firm of Wendel, Rosen, Black and Dean will charge every penny of it. This is an obvious scam, because they have not shown and they cannot show that they have any experience managing this type of property and they can do any better than Arden Van Upp is already doing. I am hereby calling upon them to withdraw their application to be appointed.

20. I am also moving that this court require all creditors of this estate to file proofs of claim. The creditors keep increasing the amounts they claim that they are owed. If I had a firm figure of how much is owed, I believe that through my own resources in Japan and possibly in China as well I could raise the money to pay off this debt. However, I cannot even approach lenders as long as I do not know how much is really owed. Arden Van Upp believes that the amount she really owes is at least a million dollars less than the seem to be claiming. Mitchell Hadler told me that he was going to file a motion to require them to file proofs of claim, but he never did so.

21. I am also demanding the return of the computer that was in the computer room on the second floor. I suspect that the Mexicans or the Salvadorians that were hired by Kevin Webb to "clean up" the building took it. I am demanding it back.

22. In addition, I am requesting permission to file electronically in this case. I have applied to the agency in this court that handles electronic filing. They have replied that I was not qualified to file electronically. I would like to know why I am not qualified. I already have permission to file electronically in the aforementioned Texas federal case.

WHEREFORE, for all of the reasons set forth above, I request:

(a) An order recusing and disqualifying Judge Thomas E. Carlson from appearing in this case due to his inappropriate action in directing the appointment of a trustee without the required notice and opportunity for a hearing.

(b) An order transferring this case to Judge Dennis Montali, who heard the previous bankruptcy involving this same debtor. The prior bankruptcy filed in 1992 was extensively litigated and resulted in appeals. The current bankruptcy is the result of decisions that were made in the prior bankruptcy and therefore this case should be put back before the same judge.

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(e) An order removing David A. Bradlow as trustee and Wendel, Rosen, Black and Dean as counsel for the trustee in this case.

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Sworn to before me this 8th  
Day of October 2009

Affidavit of Service

Samuel H. Sloan does hereby swear and affirm that on October 8, 2009 he served the within "MOTION TO VACATE ORDER APPOINTING TRUSTEE" by mailing by electronic and postal mail a true copy of the same to the following persons:

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Wendel, Rosen, Black and Dean  
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Sworn to before me this 8th  
Day of October 2009

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NOTARY PUBLIC