

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

IN RE:

BKY 04-44787 RJK
Chapter 7

Darcy Jo Knoll fka Darcy Jo Thornberg,

**NOTICE OF HEARING AND
MOTION FOR RELIEF FROM STAY**

Debtor.

TO: *All Parties in Interest as Set Forth in the Attached Service List.*

NOTICE OF HEARING

1. Harley Davidson Credit ("Harley Davidson"), a party in interest, by and through its undersigned attorney, moves the Court for the relief requested below and gives notice of hearing herewith.

2. The Court will hold a hearing on this Motion at 2:00 p.m., on Thursday October 28, 2004, before the Honorable Robert J. Kressel in Courtroom No. 8 West, on the 8th Floor, at the United States Courthouse, at 300 South Fourth Street, Minneapolis, Minnesota.

3. Any response to this Motion must be filed and delivered not later than Monday October 25, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays, and holidays), or filed and served by mail not later than Tuesday October 19, 2004 which is seven days before the time set for the hearing (excluding Saturdays, Sundays and holiday). **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §157 and § 1334, Fed. R. Bankr. P. 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The Petition commencing this Chapter 7 case was filed on August 26, 2004. The case is now pending in this Court.

5. This Motion arises under 11 U.S.C. § 362(d)(2) and Fed. R. Bankr. P. 4001. This Motion is filed under Fed. R. Bankr. 9014 and Local Rules 9006-1, 9013-1, et sec. Harley Davidson hereby requests relief from the automatic stay imposed by 11 U.S.C § 362.

FACTS

6. That on or about April 7, 2001, Debtor entered into a Retail Installment Contract and Security Agreement (the "Contract") with Twin Cities Harley Davidson, Inc., for the purchase of a 2001 X11200C Harley Davidson Motorcycle, VIN No. 1HD1CGP141K125879 (the "Vehicle"). A copy of said Agreement is attached as Exhibit "A" and incorporated by reference.

7. That thereafter, the Agreement was assigned to Harley Davidson, with Harley Davidson receiving a first priority security interest in the Vehicle in accordance with the terms of the Agreement. The Confirmation of Lien Perfection of Title issued by the State of Minnesota in connection with the Vehicle lists Harley Davidson as the first lienholder. Said Confirmation of Lien Perfection is attached as Exhibit "B" and incorporated by reference. As holder of the Agreement, Harley Davidson is entitled to enforce the terms thereof.

8. That as of the date hereof, Debtor is indebted to Harley Davidson, pursuant to the Agreement, in the approximate principal amount of Nine Thousand Four Hundred Ninety-Five and 42/100 (\$9,495.42) Dollars.

9. That as of the date hereof, the Debtor is in default in both the payment and performance of her obligations to Harley Davidson under the Agreement, in that Debtor has failed to make the monthly payments called for thereunder for the months of April, May, June, July, August and September 2004, and has additionally failed, upon information and belief, to maintain insurance on the Vehicle, as required under the Agreement.

10. That Harley Davidson is already in possession of the motorcycle and it seeks relief from the automatic stay so that it can liquidate its interest in the collateral.

11. That due to the Debtor's failure to maintain insurance on the Vehicle, Harley Davidson may in fact be forced to obtain insurance thereon at its own cost. If Harley Davidson is in fact required to do so, the cost of said insurance will be added to the amount of the default.

12. That the Vehicle has a retail value of \$7,390.00 according to the Kelley Blue Book Co. website, Sept-Dec 2004 Edition, as per the attached Exhibit "C". Since the outstanding balance is more than the retail value of the Vehicle, the Debtor has no equity in the Vehicle.

13. That Movant's interest is depreciating, while Debtor is failing to make payments. Movant does not have, and has not been offered adequate protection of its interest in the Vehicle. There is no appreciable equity in the Vehicle and in view that this is a Chapter 7 liquidation proceeding, it is not necessary for an effective reorganization.

14. That cause exists within the meaning of 11 U.S.C. § 362(d)(1) and § 362(d)(2), including lack of adequate protection of the interest of Harley Davidson in the Vehicle, entitling Harley Davidson to relief from the automatic stay.

15. That Harley Davidson desires to protect its interest in the Vehicle, and therefore, requests this Court to vacate the stay of actions under 11 U.S.C. § 362, and allow enforcement of Harley Davidson's security interest in and repossession of the Vehicle pursuant to the Contract and Minnesota law.

16. That Harley Davidson has incurred and will incur legal fees and costs to protect and enforce its rights in the Vehicle, which fees and costs Debtor is liable to Harley Davidson for under the terms of the Agreement.

17. That Harley Davidson requests that any order modifying the automatic stay be effective immediately as allowed under Federal Bankruptcy Rule 4001(a)(3).

18. This notice of motion and motion also serves as notice of default as may be required by Cobb v. Midwest Recovery Bureau Co., 295 N.W.2d (Minn. 1980). If the default is not cured before the hearing, Harley Davidson will repossess the Vehicle promptly upon the Court signing the Order.

19. THIS IS AN ATTEMPT TO COLLECT A DEBT, AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

WHEREFORE, Harley Davidson, by and through its undersigned attorney, respectfully moves the Court for an Order modifying the automatic stay of 11 U.S.C. § 362 so as to allow Harley Davidson to take such steps as may be necessary to obtain possession of the Vehicle, pursuant to the terms of the Contract and Minnesota law, and for such other and further relief as the Court deems just and equitable in the premises.

Dated this 4th day of October, 2004.

THE GURSTEL LAW FIRM, P.A.

BY /e/ Jennifer Berquist
Jennifer M. Berquist (#266681)
Attorneys for Movant
401 North Third Street Suite 590
Minneapolis, Minnesota 55401
Telephone: (612) 843 1080



EXHIBIT

"A"

tabbles



Harley-Davidson CreditSM MINNESOTA

HARLEY-DAVIDSON CREDIT
4150 Technology Way
Carson City, Nevada 89706

RETAIL INSTALLMENT CONTRACT

Dealer Number **2451** Contract Number

Buyer (and Co-Buyer)-Name and Address (include County and Zip Code): DARCY JO THORNBERG 18 KELLY ROAD CHASKA, MN. 55313	Creditor (Seller) Name and Address: TWIN CITIES HARLEY DAVIDSON INC. 10770 165TH ST WEST LAKEVILLE, MN. 55044
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You, the Buyer (and Co-Buyer, if any), may buy the vehicle described below for cash or on credit. By signing this Contract, You agree to buy the vehicle on credit under the agreements on the front and back of this Contract. You agree to pay the Creditor the Amount Financed and Finance Charge according to the payment schedule shown below. The Finance Charge is figured on a daily basis at the Annual Percentage Rate on the unpaid balance of the Amount Financed.

Description of Vehicle. You agree to buy and the Creditor agrees to sell the following vehicle:

Make	Year	New/Used	Model	Color	Identification No.
HARLEY-DAVIDSON	2001	NEW	XL1200	GADE	1HD1CGP141K125879
Describe body and major items of equipment sold:					

DISCLOSURES PURSUANT TO THE FEDERAL TRUTH-IN-LENDING ACT

ANNUAL PERCENTAGE RATE The cost of Your credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost You. E*	Amount Financed The amount of credit provided to You or on Your behalf.	Total of Payments The amount You will have paid after You have made all payments as scheduled. E*	Total Sale Price The total cost of Your purchase on credit, including Your down payment of E*
10.990 %	\$ 4655.58	\$ 12579.78	\$ 17235.36	\$ 3000.00 is \$ 20235.36

Your Payment Schedule Will Be:

Number of Payments	Amount of Payments	When Payments Are Due	Or as Follows:
12	239.38	Monthly beginning 05/07/2001	

Prepayment: If You pay off all Your debt early, You will not have to pay a penalty.
Security Interest: You are giving a security interest in the collateral/vehicle being purchased in connection with this Contract. Any of Your property securing Your other obligations to Creditor also secures Your obligation under this Contract.
Additional Information: See the other side of this Contract for more information including information about nonpayment, default, any required repayment in full before the scheduled date, and security interest.
Notices: The names and addresses of all persons to whom the notices required or permitted by law are to be sent are set forth at the top of this form.

ITEMIZATION OF AMOUNT FINANCED

1 Cash Price (including any accessories, services, and taxes)	\$ 13500.00 (1)
2 Total Down Payment: Allowance for Trade-in \$ <u>N/A</u> - Prior Credit or Lease Pay Off \$ <u>N/A</u>	
+ Cash Down Payment \$ <u>3000.00</u> + Other - Describe \$ <u>N/A</u>	
Your Trade-in is a Year <u> </u> Make <u> </u> Model <u> </u> VIN <u> </u>	\$ <u>3000.00</u> (2) (If (2) is negative, enter "0" and see line 3 below)
3 Net Prior Credit or Lease Balance Paid to:	\$ <u>N/A</u> (3)
4 Unpaid Balance of Cash Price (1 - 2 + 3)	\$ <u>10500.00</u> (4)
5 Other Charges including Amounts Paid to Others on Your Behalf:	
A Cost of Required Physical Damage Insurance Paid to the Insurance Company Named Below - Covering Damage to the Vehicle* / GAP Insurance	\$ <u>N/A</u> (A)
B Cost of Optional Extended Service Program Paid to the Insurance Company Named Below - Covering Certain Mechanical Repairs*	\$ <u>899.00</u> (B)
C Cost of Optional Credit Insurance for the Term of this Contract Paid to Insurance Company or Companies Named Below.* Life \$ <u>255.28</u> Disability, Accident and Health \$ <u>N/A</u>	\$ <u>255.28</u> (C)
D Official Fees Paid to Government Agencies	\$ <u>9.00</u> (D)
E Taxes Not Included in Cash Price (Describe)	\$ <u>877.50</u> (E)
F Government License and/or Registration Fees (Itemize)	\$ <u>12.00</u> (F)
G Government Certificate of Title Fees	\$ <u>2.00</u> (G)
H Other Charges*(Seller must identify who will receive payment and describe purpose.):	
1 to <u>TWIN CITIES HARLEY</u> for <u>Documentation Fee</u>	\$ <u>25.00</u> (H ¹)
2 to <u> </u> for <u> </u>	\$ <u>N/A</u> (H ²)
3 to <u> </u> for <u> </u>	\$ <u>N/A</u> (H ³)
Total Other Charges and Amounts Paid to Others on Your Behalf (add A thru H ³)	\$ <u>2079.78</u> (5)
6 Amount Financed-Unpaid Balance (4 + 5)	\$ <u>12579.78</u> (6)

* Creditor may retain, or receive, a portion of this amount.

Insurance

NOTICE: No person is required as a condition of financing the purchase of a motor vehicle to purchase, or negotiate, any insurance through a particular insurance company, agent, or broker.
You have requested Seller to include in the balance due under this agreement the following insurance. You request Seller to procure insurance upon the

EXHIBIT

"B"

tabbles

MINNESOTA DEPARTMENT OF PUBLIC SAFETY
DRIVER & VEHICLE SERVICES DIVISION
445 MINNESOTA ST., ST. PAUL, MN 55101
CONFIRMATION OF LIEN PERFECTION - DEBTOR NAME AND ADDRESS

First Class
U.S. Postage
PAID
Permit No. 171
St. Paul, MN

THORNBERG DARCY JO
18 KELLY RD
CHASKA MN 55318

*

33272MD

1ST SECURED PARTY

LIEN HOLDER

Year 01	Make HD	Model RS	Title NR. J1270N350
VIN 1HD1CGP141K125879	Security Date 04/07/01	Rebuilt NO	

RETAIN THIS DOCUMENT - See reverse
side of this form for removing this lien.

HARLEY DAVIDSON CREDIT
4150 TECHNOLOGY WAY
CARSON CITY NV 89706-2009

EXHIBIT

• C "

tabbler



Kelley Blue Book
THE TRUSTED RESOURCE
kbb.com

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BLUE BOOK MOTORCYCLE RETAIL REPORT

September 24, 2004

2001 Harley-Davidson XLC Sportster Custom

2-Cylinder
4-Stroke
1200cc

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- [Motorcycle APRs from 6.15%](#)
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Suggested Retail Value

\$7390



Suggested Retail represents the price a dealership might ask for this make and model. The retail price is not a trade-in or private-party value, but rather assumes that a dealer has absorbed the cost of making the unit ready for sale, advertising, sales commissions, arranging financing and insurance and standing behind the unit for any mechanical or safety problems. Suggested retail represents a fully reconditioned unit in excellent condition, with all original standard equipment. Mileage/condition and additional equipment may have a substantial impact on the value shown above. Actual dealer selling price may vary from this price.

Optional Equipment:

%221%22 Models/Fuel Injected

\$575



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VERIFICATION

Rachel Clark, declare under penalty of perjury that **Senior Bankruptcy Specialist** with Harley Davidson Credit, the Movant herein, that I ha **read** the foregoing Motion, and that the factual information contained therein is true and correct according to the best of my knowledge, information and belief.

DATED this 30th day of September 2004

Harley Davidson Credit

BY Rachel Clark

ITS Sr. Bankruptcy Specialist
Title

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

IN RE:

BKY 04-44787 RJK

Chapter 7

Darcy Jo Knoll fka Darcy Jo Thornberg,

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR RELIEF FROM AUTOMATIC STAY**

Debtor.

Harley Davidson Credit ("Harley Davidson") submits this Memorandum of Law in Support of its Motion for Relief from Automatic Stay in the above-entitled matter.

FACTS

The facts are as outlined in Harley Davidson's Notice of Hearing and Motion for Relief from the Automatic Stay, and all the capitalized terms contained herein have the same meanings as in the Motion.

ARGUMENT

The automatic stay is one of the fundamental rights afforded the debtor in bankruptcy. The automatic stay provides a bankruptcy debtor with “a breathing spell from his creditors’ in which he may attempt ‘a repayment or reorganization plan.’” Farley v. Hanson, 2F.3d 273, 274 (8th Cir. 1993). Application of the automatic stay to secured creditors presents significant issues involving a balance between protecting secured creditors and allowing debtors a reprieve from collection activities.

Pursuant to § 362(d)(1) of the Bankruptcy Code, relief from the automatic stay shall be granted upon request of a creditor "for cause, including the lack of adequate protection of an interest in property of such [creditor]." 11 U.S.C. § 362(d)(1).

Adequate protection is not defined in the Bankruptcy Code. “While the concept of adequate protection is complex, its application is intended to be flexible and molded to the needs of an individual case

so that the purposes of bankruptcy will be accomplished.” In Re All-Way Services, Inc., 73 Bankr. 556, 565 (Bankr. E.D. Wisc. 1987). Each case must be decided on a case by case basis with attention given to the particular facts of the case. H.R.Rep. No. 95-595, 95th Cong., 2d Sess. 339; In Re Johnson, 90 Bankr. 973, 978 (Bankr. D. Minn. 1988). Adequate protection is derived from the fifth amendment protection of property interests of both the debtor and creditor and is meant to reconcile the competing interests of the debtor and the creditor. Federal Land Bank v. Carson (In Re Carson), 34 Bankr. 502, 505 (D. Kan. 1983).

There are a number of factors to be considered in determining whether a secured creditor’s interest is adequately protected, such as equity; necessity of property to an effective reorganization; ability to pay interest or give replacement liens or indubitable equivalents; and the debtor’s care in keeping property insured and repaired. In Re Johnson, 90 Bankr. At 979.

In this case, the Debtor has failed to provide adequate protection to Harley Davidson in connection with its interest in the Vehicle. The Debtor has failed to make the payments required by the terms of the Agreement. The Debtor does not have any equity in the Vehicle. Further she has failed to provide proof of insurance for the Vehicle. Finally, Harley Davidson has incurred and will incur legal fees and costs in connection with the protection and enforcement of its rights in the Vehicle pursuant to the Agreement. Such circumstances constitute cause, within the meaning of §362(d)(1) of the Bankruptcy Code, justifying relief from the automatic stay. See In Re Brown, 70 B.R. 10, 12 (Bky.S.D.Ohio 1986); In Re Chapman, 23 B.R. 176, 178 (Bky. N.D.Ill 1982).

Furthermore, no payments have been made as required by the contract between the Debtor and the Movant and the Movant has otherwise not been provided with adequate protection of its interest in the collateral or adequate assurance of future performance under the terms of the contract. Such failure constitutes cause within the meaning of §362(d)(1) of the Bankruptcy Code thereby provide a basis for

relief from the automatic stay. United Savings Assn. of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 108 U.S. 365, 98 L.Ed.2d 740 (1988); In re Reinbold v. Dewey County Bank, 942 F.2d 1304, 1306 (8th Circuit 1991).

The court opined in *In re Albany Partners, Ltd.*, relief from stay is appropriate under § 362(d)(2) where no equity exists and the property is not necessary to an effective reorganization. In re Albany Partners, Ltd., 749 F.2d 670 (11th Circuit 1984). In this case, the balance owed to the Movant exceeds the value of the Vehicle, resulting in no equity for the Debtor. Since the Debtor sought bankruptcy protection under Chapter 7, it is clear that the Vehicle is not necessary for an effective reorganization.

CONCLUSION

Accordingly, Harley Davidson is entitled to an Order terminating the automatic stay and authorizing it to proceed with repossession and/or liquidation of the Vehicle pursuant to the Agreement and Minnesota law.

Respectfully submitted,

THE GURSTEL LAW FIRM, P.A.

BY /e/ Jennifer Berquist

Jennifer M. Berquist (#266681)

Attorneys for Movant

401 North Third Street, Suite 590

Minneapolis, Minnesota 55401

Telephone: (612) 843 1080

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

IN RE: BKY 04-44787 RJK
Chapter 7

Darcy Jo Knoll fka Darcy Jo Thornberg,

Debtor

**UNSWORN CERTIFICATE
OF SERVICE**

I, Jennifer Berquist, declare under penalty of perjury, that I am an employee of The Gurstel Law Firm, P.A. and on the 4th day of October, 2004, I served copies of the attached Notice of Hearing and Motion for Relief from Automatic Stay, Memorandum of Law and proposed Order, on all persons listed below, at the addresses shown, by mailing to each of them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at Minneapolis, Minnesota, to-wit:

DARCY JO KNOLL FKA DARCY JO THORNBERG
18 KELLY ROAD
CHASKA, MINNESOTA 55318

RICHARD J. HAEFELE, ESQ.
P.O. BOX 85
CHASKA, MINNESOTA 55318

U S TRUSTEE'S OFFICE
1015 U S COURTHOUSE
300 SOUTH FOURTH STREET
MINNEAPOLIS MN 55415

JOHN STOEBNER, TRUSTEE
120 SOUTH SIXTH STREET SUITE 2500
MINNEAPOLIS, MINNESOTA 55402

Executed on: October 4, 2004

/e/ Jennifer Berquist _____
Jennifer Berquist
401 North Third Street, Suite 590
Minneapolis, Minnesota 55401

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

IN RE:

BKY 04-44787 RJK
Chapter 7

Darcy Jo Knoll fka Darcy Jo Thornberg,

ORDER

Debtor.

The above-entitled matter came before the Court on the 28th day of October, 2004, on the Motion of Harley Davidson Credit ("Harley Davidson") seeking relief from the automatic stay imposed by 11 U.S.C. § 362 of the Bankruptcy Code. Appearances, if any, were as noted on the record.

Based upon the proceedings had on said date, and statements of counsel, and all files and records herein, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that Harley Davidson its assigns, assignees and/or successors in interest, is granted relief from the automatic stay imposed by 11 U.S.C. § 362. Notwithstanding Fed. R. Bankr. P. 4001 (a)(3), this order is effective immediately, and Harley Davidson is authorized to immediately commence repossession of the Vehicle, or otherwise satisfy its interests in the Vehicle more specifically described below, in accordance with the Agreement and Minnesota law:

2001 X11200C Harley Davidson Motorcycle
VIN No. 1HD1CGP141K125879

BY THE COURT:

DATED:

The Honorable Robert J. Kressel
Judge of Bankruptcy Court