

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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In re:

Chapter 7  
Case No. 04-44902 RJK

Grant Garret Benson and  
Elizabeth Concepcion Vail-Benson,

Debtors.

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NOTICE OF HEARING AND  
MOTION FOR RELIEF FROM STAY

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1. TCF National Bank, (“Movant”), a secured creditor of the above referenced bankruptcy estate, by 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 o'clock p.m., on October 7, 2004, before The Honorable Robert J. Kressel, in Courtroom No. 8 West, at United States Courthouse, 300 South Fourth Street, Minneapolis, Minnesota, or as soon thereafter as counsel may be heard.
3. Any response to this motion must be filed and delivered not later than October 4, 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 September 28, 2004, which is seven days before the date set for the hearing (excluding Saturdays, Sundays and holidays). UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.
4. This motion is filed pursuant to Bankruptcy Rule 4001 and Local Rules 9013-2 and 4001-1 and Movant requests relief from the automatic stay of 11 U.S.C. § 362(a) with respect

to certain property subject to Movant's valid interest.

5. This case was filed as a voluntary case under Chapter 7 of the United States Bankruptcy Code, and the case is now pending in this Court. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 1334 and 157(a), Local Rule 1070-1, Fed. R. Bankr. P. 5005 and applicable rules. This is a core proceeding.
6. By mortgage dated February 22, 2002, in the original principal amount of \$298,700.00 (the "Mortgage") Movant acquired a mortgagee's interest in the following real property (the "Property"), to wit:

The North 631.07 Feet of the South 1153.07 Feet of the West 690.00 Feet of the Southwest Quarter of the Northwest Quarter, Section 29, Township 118, Range 26, as Measured at Right Angles to the South and West Lines Thereof; Records of Wright County, Minnesota

and commonly known as 10390 Ferman Avenue Southwest, Waverly, Wright County, Minnesota 55390.
7. The mortgage was filed for record in the Office of the County Recorder for Wright County, Minnesota on March 6, 2002. A copy of the Mortgage is attached hereto as Exhibit A.
8. Debtors are delinquent under the terms of the note secured by the Mortgage with respect to monthly payments due for the months of May 2004 to date. The outstanding balance due Movant under the terms of the note is \$299,566.78 as of September 13, 2004, and on information and belief, Debtors are delinquent under the terms of the Mortgage in the total amount of \$10,125.05, plus late charges, accruing interest, fees and costs.
9. Debtors' failure to make payments to Movant when due, or otherwise provide Movant with adequate protection of its interest in the Property constitutes cause, within the meaning of 11 U.S.C. § 362(d)(a), entitling Movant to relief from the automatic stay.

10. If testimony is necessary as to any facts relevant to this motion, Paul Warder, Bankruptcy Specialist of Movant, 801 Marquette Avenue, Minneapolis, Minnesota, will testify on behalf of Movant.

WHEREFORE, Movant, respectfully moves the Court for an order modifying the automatic stay of § 362(a) so as to permit Movant to foreclose its Mortgage on the Property, waiving Fed. R. Bankr. 4001(a)(3) to make the order effective immediately and for such other relief as may be just and equitable.

Dated: September 14, 2004.

FOLEY & MANSFIELD, P.L.L.P.

By /s/ Ruth E. Honkanen

Thomas J. Lallier (#163041)

Ruth E. Honkanen (#175924)

Attorneys for Movant

250 Marquette Avenue, Suite 1200

Minneapolis, MN 55401

(612) 338-8788

UNITED STATES BANKRUPTCY COURT  
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MEMORANDUM OF LAW IN SUPPORT  
OF MOTION FOR RELIEF FROM STAY

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TCF National Bank (“Movant”) submits this memorandum of law in support of its motion for relief from the stay in the above-entitled matter.

FACTS

Movant holds a valid, duly perfected mortgage on real property owned by the Debtors. On the date this case was filed, the Debtors were delinquent in respect of payments due under the note and mortgage. Since this case was filed Debtors have made no payments to Movant.

ARGUMENT

Under Section 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). The Debtors in this case have failed to make the payments required by their note and mortgage. Debtors have not otherwise provided Movant with adequate protection of its interest in the property. Such circumstances constitute cause, within the meaning of Section 362(d)(1), justifying relief from the stay. United States Assn. of Texas v. Timbers of Inwood Assoc., Ltd. (In re Timbers of Inwood Assoc. Ltd.), 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d (1988).

Accordingly, Movant is entitled to an order terminating the stay and authorizing it to

foreclose its mortgage on the property.

Dated: September 14, 2004.

FOLEY & MANSFIELD, P.L.L.P.

By /s/ Ruth E. Honkanen

Thomas J. Lallier (#163041)

Ruth E. Honkanen (#175924)

Attorneys for Movant

250 Marquette Avenue, Suite 1200

Minneapolis, MN 55401

(612) 338-8788

09/15/2004 WED 8:51 FAX 6123499859 foley & mansfield

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In re:

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VERIFICATION

I, Paul Warder, Bankruptcy Specialist for Movant, declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on: 9/15/04

Signed:   
Paul Warder

05/27/2004 07:57 FAX

TCF BANK

002/018

Ag Preservation Land Fee Receipt # 118475

Registration Tax Receipt # 131045 in the amount of \$ 687.01 has been paid this Date: Mar 6 Year: 2002

Douglas M. Gruber, Auditor/Treasurer  
By: [Signature] clerk

780604  
OFFICE OF COUNTY RECORDER  
WRIGHT COUNTY, MINNESOTA  
CERTIFIED TO BE FILED  
AND/OR RECORDED ON  
02 MAR -6 AM 11:47

After recording, please return to:  
TCF National Bank  
Attn: Title Review 202-010  
101 E. Ohio Street, Suite 101  
St. Paul, MN 55101

RETURN TO:

20.00 cl # 36951  
ds

TCF NATIONAL BANK  
MINNESOTA CONSUMER LENDING DEPARTMENT

CONSUMER LOAN MORTGAGE

Account Number: 099 - 021

NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, THE MAXIMUM PRINCIPAL INDEBTEDNESS SECURED BY THIS MORTGAGE IS  
TWO HUNDRED NINETY EIGHT THOUSAND SEVEN HUNDRED DOLLARS AND 00 CENTS  
Dollars ( \$298,700.00 )

This CONSUMER LOAN MORTGAGE ("Mortgage") is made this 22nd day of February, 2002 by GRANT G BENSON and ELIZABETH C. VAIL-BENSON

Married as Husband and Wife whose address is 10390 FERMAN AVENUE, SOUTHWEST WAVERLY MN 55390-8804 (the "Borrower"), who grants, conveys, mortgages and warrants to TCF National Bank, a national banking association, 801 Marquette Avenue, Minneapolis, MN 55402 (the "Lender"), land and property in Wright County, Minnesota, described as:

SEE ATTACHED...

street address: 10390 FERMAN AVE SW, WAVERLY MN 55390-8804

property identification no. 22000828295  
together with all buildings, improvements, and fixtures on the property, whether now on the property or added in the future, and all easements and other rights that pertain to the property (collectively the "Property"). This Mortgage secures performance and payment under the terms of this Mortgage and Borrower's note dated the same date as this Mortgage in the principal amount of TWO HUNDRED NINETY EIGHT THOUSAND SEVEN HUNDRED DOLLARS AND 00 CENTS Dollars ( \$298,700.00 ), subject to any written amendments to the note agreed to by Lender and Borrower ("Note"). In addition to the indebtedness due under the Note, this Mortgage secures Protective Advances which may be in excess of the maximum principal amount stated above with interest thereon and any other charges due under the Note (collectively "Debt") and the performance of any covenants and agreements of the Borrower contained herein. "Protective Advance" is defined as a payment made by Lender for performance of covenants of Borrower pertaining to insuring or preserving the Property upon Borrower's failure to perform. The full Debt, if not paid earlier, is due and payable on 03/02/2027.  
 If the box preceding this sentence is checked, the interest rate under the Borrower's Note is variable and can change daily, as described in the Note.

**Borrower promises and agrees:**

- To keep the Property in good repair, and to also comply with all laws and ordinances, which affect the Property.
- To pay all taxes, assessments, and water bills levied on the Property, and any other amounts which could become a senior Security Interest. "Security Interest" includes any lien, mortgages or other encumbrance.
- To perform all obligations under any Security Interest on the Property. As of the date hereof, there exists no other Security Interest on the Property, other than as disclosed to Lender on the title insurance commitment or property report or other title evidence obtained by Lender prior to accepting this Mortgage, or on Borrower's loan application.
- To keep the Property insured against fire, windstorm, flood, and such other hazards as Lender may require, in an amount and manner with companies acceptable to Lender, and with the proceeds made payable in the policies to Lender as mortgagee, and to deliver such proof of insurance as Lender may require. Lender will apply any insurance proceeds to pay the Debt, unless Lender agrees in writing that the proceeds can be used differently. If Lender uses the proceeds to reduce the Debt, Borrower will still have to make regular monthly payments until the Debt is satisfied. If Borrower fails to keep the Property insured, Lender may, but is not required to, obtain such insurance to protect Lender's interest. Such insurance obtained by Lender may not protect Borrower's equity interest in the Property. Lender is not required to obtain the lowest cost insurance that might be available.
- That if all or part of the Property is condemned or taken by eminent domain, Borrower directs the party condemning or taking the Property to pay all of the money to Lender. Lender will apply the money to pay the Debt, unless Lender agrees in writing that the money can be used differently. If Lender uses the money to reduce the Debt, Borrower will still have to make regular monthly payments until the Debt is satisfied.
- That if Borrower fails to pay or perform any of Borrower's obligations under this Mortgage, Lender may pay or perform such obligations. Any amount so paid and the cost of any title search and report made after any Default, may be added to the Debt.



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- 7. That the term "Default" means (a) Borrower's failure to comply with the terms of this Mortgage; or (b) Borrower's failure to comply with the terms of the Note; or (c) Borrower's failure to comply with the terms of any Security Interest having priority over this Mortgage.

The term "Lender" includes Lender's successors and assigns, and the term "Borrower" includes and binds the Borrower's heirs, personal and legal representatives, successors, and assigns of the undersigned. If this Mortgage is signed by two or more persons, the obligations and Security Interest granted by this Mortgage shall be cumulative and in addition to any other remedies provided by law. Each person who signs this Mortgage is responsible for keeping all of the promises made by Borrower. Lender may choose to enforce its rights against any person signing this Mortgage or against all of them. However, if someone signed this Mortgage, but signed the Note as collateral owner only, then that person will not be required to pay any amount under the Note, but will have signed only to grant, convey, mortgage and warrant any rights that person has in the Property. Also, Borrower may agree to extend, modify, forbear, or make any accommodations with regard to the Note or Mortgage without such collateral owner's consent.

- 8. That Lender shall have a power of sale. This means that if the Borrower is in Default, Lender is authorized and empowered to require immediate repayment of the Debt (called "acceleration"). Lender may (and is hereby authorized and empowered to) foreclose this Mortgage by action or advertisement, pursuant to the Statutes of the State of Minnesota, in such case made and provided, power being expressly granted to sell the Property at public auction, and convey the same to the purchaser in fee simple and, out of the proceeds arising from such sale, to pay the Debt with interest, and all legal costs and charges of such foreclosure and the maximum attorneys' fees permitted by law, with costs, charges, and fees the Borrower agrees to pay. However, before accelerating, Lender will send Borrower a written notice by certified mail which states:

- a. The promise that Borrower failed to keep or the representation or warranty that Borrower breached;
- b. The action Borrower must take to correct that failure;
- c. The date, at least 30 days away, by which the failure must be corrected;
- d. That if Borrower doesn't correct the failure or the representation or warranty that Borrower breached, Lender will accelerate, and if Borrower doesn't pay, Lender or another person may buy the Property at a foreclosure sale;
- e. That Minnesota law allows Borrower to reinstate the Mortgage after acceleration; and
- f. That Borrower may bring suit in court to argue that all promises were kept and to present any other defenses Borrower has to acceleration.

We will send this notice or any other notice required by this Mortgage or by law to your address on file with us unless the law requires a different address.

Lender need not send the notice if the promise Borrower failed to keep consists of Borrower's sale or transfer of all or a part of the Property or any rights in the Property without Lender's written consent. If Borrower does not correct the failure by the date stated in the notice, Lender may accelerate. If Lender accelerates, Lender may foreclose this Mortgage according to the Minnesota Statutes. Borrower gives Lender a power to sell the Property at a public auction. Borrower also agrees to pay Lender's attorneys' fees for the foreclosure in the maximum amount allowed by law.

Lender may retain from the proceeds of the sale the amount of the Debt outstanding, the costs and charges of such sale, and reasonable attorneys' fees provided by Minnesota Statutes, and then remit the surplus monies, if any, as required by law. In the event of any foreclosure or other sale under this Mortgage by virtue of judicial proceedings, advertisement, or otherwise, the Property may be sold in one parcel and as an entirety, or in such parcels, manner, or order as Lender in its sole discretion may elect.

- 9. That Borrower shall not assign or transfer the Property or any beneficial interest in the Property by deed, bond for deed, contract for deed, installment sales contract, escrow agreement, or other instruments, or in any manner whatsoever, without Lender's prior written consent. Lender's written consent is not required in the following circumstances:

- (a) the creation of a lien or other encumbrance subordinate to Lender's Security Interest which does not relate to a transfer of rights of occupancy in the Property (provided that such lien or encumbrance is not created pursuant to a contract for deed);
- (b) the creation of a purchase-money Security Interest for household appliances;
- (c) a transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;
- (d) the granting of a leasehold interest which has a term of three years or less and which does not contain an option to purchase (that is, either a lease of more than three years or a lease with an option to purchase violates this provision);
- (e) a transfer, in which the transferee is a person who occupies or will occupy the Property, which is:
  - (i) a transfer to a relative resulting from the death of Borrower;
  - (ii) a transfer where the spouse or child(ren) becomes an owner of the Property; or
  - (iii) a transfer resulting from a decree of dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement by which the spouse becomes an owner of the Property; or
  - (f) a transfer into an inter vivos trust in which Borrower is and remains the beneficiary and occupant of the Property, unless, as a condition precedent to such transfer, Borrower agrees to provide Lender with reasonable means acceptable to Lender by which Lender will be assured of timely notice of any subsequent transfer of the beneficial interest or change in occupancy.

- 10. That Lender or its agent may make reasonable entries upon and inspections of the Property. Lender shall give Borrower notice at the time of or prior to an inspection specifying reasonable cause for the inspection.

- 11. That if the loan secured by this Mortgage is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charge collected or to be collected in connection with the loan exceeds the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the outstanding Debt or by making a direct payment to Borrower. If a refund reduces the Debt, the reduction will be treated as a partial prepayment, without any prepayment charge under the Note.



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TCF BANK

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SCHEDULE "A"

THE NORTH 631.07 FEET OF THE SOUTH 1153.07 FEET OF THE WEST 590.00 FEET OF THE SOUTHWEST QUARTER OF THE NORTHWEST QUARTER, SECTION 29, TOWNSHIP 119, RANGE 26, AS MEASURED AT RIGHT ANGLES TO THE SOUTH AND WEST LINES THEREOF. RECORDS OF WRIGHT COUNTY, MINNESOTA.

ABSTRACT PROPERTY

ORDER NO. 1181550

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780604

**Unsworn Affidavit of Service**

**STATE OF MINNESOTA )**  
**) ss.**  
**COUNTY OF HENNEPIN )**

I, Jacquelyn J. LaVaque, declare under penalty of perjury that on September 16, 2004 , I mailed copies of the attached **Notice of Hearing and Motion for Relief From Stay, Memorandum of Law in Support of Motion, and proposed Order** by first class mail, postage prepaid, to each entity named below at the address stated below for each entity:

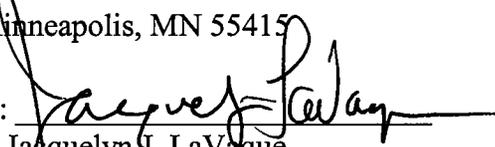
Grant Benson  
Elizabeth Concepcion Vail-Benson  
10390 Ferman Avenue SW  
Waverly, MN 55390

Dorraine A. Larison  
1010 W. St. Germain, Room 600  
St. Cloud, MN 56301

Executed on: September 16, 2004

Craig W. Andresen, Esq.  
2001 Killebrew Drive Suite 330  
Bloomington, MN 55425

U.S. Trustee  
1015 United States Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415

Signed:   
Jacquelyn J. LaVaque  
Foley & Mansfield, P.L.L.P.  
250 Marquette Avenue  
Suite 1200  
Minneapolis, MN 55401

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DISTRICT OF MINNESOTA

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Debtors.

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ORDER GRANTING  
RELIEF FROM STAY

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The above-entitled matter came before the Court on the motion of TCF National Bank (“Movant”) seeking relief from the automatic stay of Section 362(a) of the Bankruptcy Code. Appearances were noted in the Court’s record. Based upon the proceedings had on said date, the statements of counsel, and all of the files and records herein, the Court now finds that cause exists entitling Movant to the relief requested.

NOW, THEREFORE, IT IS HEREBY ORDERED that the automatic stay of Section 362(a) of the Bankruptcy Code is immediately terminated as to Movant, and Movant is [authorized to enforce its security interest as provided by contract and state law in the subject:](#)

The North 631.07 Feet of the South 1153.07 Feet of the West 690.00 Feet of the Southwest Quarter of the Northwest Quarter, Section 29, Township 118, Range 26, as Measured at Right Angles to the South and West Lines Thereof; Records of Wright County, Minnesota

and commonly known as 10390 Ferman Avenue Southwest, Waverly, Wright County, Minnesota 55390.

Notwithstanding Fed. R. Bankr. 4001(a)(3), this order is effective immediately.

Dated: \_\_\_\_\_.

\_\_\_\_\_  
Robert J. Kressel  
United States Bankruptcy Judge