

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Lisa Toms
Roger Toms

NOTICE OF HEARING AND
MOTION FOR RELIEF FROM
AUTOMATIC STAY

Debtors

Chapter 13, Case No. 04-31881

TO: Lisa Toms and Roger Toms, INCLUDING TRUSTEE AND OTHER INTERESTED
PARTIES

1. Wells Fargo Bank, N.A., (*Movant*), a corporation, by its undersigned attorneys, 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 9:30 am on September 2, 2004, in Courtroom 228A, 316 North Robert Street, St. Paul, MN 55101 or as soon thereafter as counsel can be heard.

3. Any response to this motion must be filed and delivered not later than on September 5, 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 August 27, 2004, which is seven days before the time 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 court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Federal Rules of Bankruptcy Procedure 5005 and Local Rule 1070-1, and is a core

proceeding. The petition commencing this Chapter 13 case was filed on March 29, 2004. The case is now pending in this court.

5. This motion arises under 11 U.S.C. § 362 and Federal Rules of Bankruptcy Procedure 4001. This motion is filed under Federal Rules of Bankruptcy Procedure 9014 and Local Rules 1201-1215. Movant requests relief with respect to a mortgage lien encumbering real property of Debtors.

6. Debtors above-named are the owners of certain real property located at 911 Northeast 6th Avenue, Austin, MN 55912, legally described as follows, to-wit:

Lot 13, except the North 50 feet thereof, in Block 8 of Railroad Addition to the City of Austin, In Mower County, Minnesota.

7. The indebtedness of Lisa Toms and Roger Toms is evidenced by a Promissory Note and Mortgage dated March 25, 2002, filed of record in the Mower County Recorder's office on April 1, 2002, and recorded as Document No. 502433. A true and correct copy of the front page of the recorded mortgage is attached as Exhibit A. Said mortgage was subsequently assigned to Movant.

8. Movant has filed a Proof of Claim for delinquent payments. Upon information and belief, said Plan has now been confirmed.

9. Pursuant to said Plan, the Debtors were to maintain monthly payments due and payable pursuant to the indebtedness to Movant outside the Plan.

10. The Debtors have failed to pay the monthly payments on the indebtedness, outside the Plan for the months of April 1, 2004 to the present date and as of the hearing date September 1, 2004 will be due for a total delinquency of \$3,933.54 together with reasonable attorneys fees and costs incurred pursuant to the terms of the note and mortgage.

11. By reason of the foregoing, Debtors are in default on payments under the note, mortgage and the Chapter 13 Plan. Movant is inadequately secured and entitled to have the automatic stay lifted and vacated so it can commence foreclosure against the property under the mortgage pursuant to Minnesota Statutes.

WHEREFORE, Movant by its undersigned attorney, moves the Court for an Order that the automatic stay provided by 11 U.S.C. Section 362 (A) be terminated to permit Movant to foreclose its mortgage on the subject property, and for such other and further relief as may be just and equitable.

Dated: August 19, 2004

USSET & WEINGARDEN P.L.L.P

By: /E/ Paul A. Weingarden/Brian H. Liebo
Paul A. Weingarden, #115356
Brian H. Liebo #277654
Attorney for Movant
4500 Park Glen Road, #120
Minneapolis, MN 55416
(952) 925-6888

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

IN RE:

Roger Dale Toms
Lisa Jane Toms

AFFIDAVIT OF PETITIONER

Debtors

Chapter 13, Case No. 04-31881

STATE OF GEORGIA

COUNTY OF FULTON

Diane Sanders, being first duly sworn, deposes and states she is authorized representative of Movant and has direct real-time access to the computer records of Movant which are maintained in the ordinary course of business and that she has read the annexed Notice of Hearing and Motion for Relief From Automatic Stay, and that it is true of her knowledge to the best of her information.

Diane Sanders

Subscribed and sworn to before me this
9th day of August, 2004.

Dunneah E. Welborn
Notary Public



OFFICE OF COUNTY RECORDER
MOWER COUNTY MINNESOTA

DOCUMENT NO. **502433**

I hereby certify that the within instrument was filed in this
office for record on 4/1/2002 at 3 AM, PM
Susan M. Davis, County Recorder

Susan M. Davis

40479
REGISTRATION TAX HEREON OF \$ 122.62
PAID THIS 1st DAY OF April 2002
Robert Hansen CO. TREAS.

[Space Above This Line For Recording Date]

MORTGAGE

0799110MEX

Return To:

**WELLS FARGO HOME MORTGAGE, INC.
FINAL DOCUMENT# X4701-024
3801 MINNESOTA DRIVE
BLOOMINGTON, MN 55435-5284**

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 18.

- (A) "Security Instrument" means this document, which is dated **MARCH 25, 2002** together with all Riders to this document.
(B) "Borrower" is
**LISA J. TOMS AND ROGER D. TOMS AS HUSBAND AND WIFE,
AS JOINT TENANTS**

Borrower is the mortgagor under this Security Instrument.
(C) "Lender" is **WELLS FARGO HOME MORTGAGE, INC.**

Lender is a Corporation
organized and existing under the laws of **THE STATE OF CALIFORNIA**

MINNESOTA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT

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Initials: X L T
X R T

FORM 3084 1/01

ENR01 Rev 06/18/01

Lender's address is

P. O. BOX 5137, DES MOINES, IA 50308-5137

Lender is the mortgagee under this Security Instrument.

(D) "Note" means the promissory note signed by Borrower and dated MARCH 25, 2002

The Note states that Borrower owes Lender FIFTY-FIVE THOUSAND FIVE HUNDRED FIVE AND NO/100 Dollars

(U.S. \$ 55,505.00.....) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than APRIL 1, 2032

(E) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(F) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(G) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower (check box as applicable):

- Adjustable Rate Rider
- Balloon Rider
- VA Rider
- Condominium Rider
- Planned Unit Development Rider
- Biweekly Payment Rider
- Second Home Rider
- 1-4 Family Rider
- Other(s) [specify]

Prepayment Rider

(H) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(I) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(J) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(K) "Escrow Items" means those items that are described in Section 3.

(L) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(M) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(N) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(O) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that

governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA. (P) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (I) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (II) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to Lender and Lender's successors and assigns, with power of sale, the following described property located in the

County of MOWER
[Type of Recording Jurisdiction] [Name of Recording Jurisdiction]:

LOT 13, EXCEPT THE NORTH 50 FEET THEREOF, IN BLOCK 8 OF RAILROAD ADDITION TO THE CITY OF AUSTIN, IN MOWER COUNTY, MINNESOTA.

Parcel ID Number: which currently has the address of
811 NE 8TH AVENUE [Street]
AUSTIN [City], Minnesota 55912 [Zip Code]
("Property Address"):

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Lisa Toms
Roger Toms

MEMORANDUM OF LAW

Debtors

Chapter 13, Case No. 04-31881

11 U.S.C. Section 362(d) provides that on request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under section (a) of this section for cause, including lack of adequate protection of an interest in property of such party in interest. Failure of a Chapter 13 debtor to make postconfirmation payments to a mortgagee is sufficient cause for relief from the automatic stay. Reinbold vs. Dewey County Bank, 942 F.2d 1304 (8th Cir. 1991). Following the debtors' filing of the petition on March 29, 2004 no payment has been made to movant for the month(s) of April 1, 2004 to the present and as of the hearing date September 1, 2004 will be due. Accordingly, cause exists for the granting of relief from the automatic stay.

WHEREFORE, Wells Fargo Bank, N.A. respectfully requests this Court to grant movant relief from the automatic stay of 11 U.S.C. Section 362(a).

Dated: August 19, 2004. USSET & WEINGARDEN P.L.L.P

By: /E/ Paul A. Weingarden/Brian H. Liebo
Paul A. Weingarden, #115356
Brian H. Liebo #277654
Attorney for Movant
4500 Park Glen Road, #120
Minneapolis, MN 55416
(952) 925-6888

U.S. BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Lisa Toms
Roger Toms

Debtors

UNSWORN DECLARATION
FOR PROOF OF SERVICE

Chapter 13, Case No. 04-31881

Erin Kay Buss, employed on this date by USSET & WEINGARDEN, attorney(s) licensed to practice law in this court, with office address of Suite 120, 4500 Park Glen Road, Minneapolis, Minnesota 55416, upon penalty of perjury, declares that on August 19, 2004, I served the annexed Notice of Hearing and Motion for Relief from Automatic Stay upon each of the entities named below by mailing to them a copy thereof by enclosing same in an envelope with first class mail postage prepaid and depositing same in the post office at Minneapolis, Minnesota, addressed to each of them as follows:

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

Jasmine Z. Keller
Chapter 13 Trustee
310 Plymouth Building
12 South 6th Street
Minneapolis, MN 55402

Wayne G. Nelson
Attorney at Law
5500 Wayzata Blvd Suite 1025
Minneapolis, MN 55416

Lisa Toms
Roger Toms
911 Northeast 6th Avenue
Austin, MN 55912

/E/ Erin Kay Buss
Erin Kay Buss

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Lisa Toms
Roger Toms

ORDER

Debtors.

Chapter 13, Case No. 04-31881

The above entitled matter came on for hearing upon motion of Wells Fargo Bank, N.A., (*Movant*) pursuant to 11 U.S.C. Section 362 on September 8, 2004 at the U.S. Bankruptcy Court, St. Paul, Minnesota. Appearances were as noted in the record. Based upon the evidence adduced at said hearing, the arguments of counsel, and the Court being fully advised of the premises,

IT IS HEREBY ORDERED THAT:

The automatic stay imposed by 11 U.S.C. §362 is hereby terminated as to the real property over which the Movant, its successors or assigns, has an interest, said property legally described as:

Lot 13, except the North 50 feet thereof, in Block 8 of Railroad Addition to the City of Austin, In Mower County, Minnesota.

Movant may proceed to foreclose its mortgage in accordance with Minnesota Statutes. Movant's request for attorneys fees and costs shall not be considered as this is governed by state law. Notwithstanding Federal Rules of Bankruptcy Procedure 4001(a)(3), this order is effective immediately.

Dated this __ day of _____, 2004.

Judge of the Bankruptcy Court