

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In Re:

Patrick Luna  
Tarla Luna

NOTICE OF HEARING AND  
MOTION FOR RELIEF FROM  
AUTOMATIC STAY

Debtor

Chapter 7, Case No. 04-34045  
-----

TO: Patrick Luna and Tarla Luna, INCLUDING TRUSTEE AND OTHER INTERESTED  
PARTIES

1. Wells Fargo Bank, N.A., (“Movant”), a corporation, by its attorneys, moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion at 10:30 am on September 7, 2004, in Courtroom 228B, 200 Federal Building, 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 1 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 26, 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, FRBP Nos. 5005 and Local Rule 1070-1. This is a core proceeding. The Chapter 7 case was filed on July 12, 2004, and is now pending in this court.

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

6. Debtor above-named is the owner of certain real property located at 201 Northwest 1st Street, New Richland, MN 56072, legally described as follows, to-wit:

Lot 7, Block 18, Original plat in the Village, now City, of New Richland, Minnesota, according to the plat thereof on file and of record in the Office of the County Recorder in and for the County of Waseca and State of Minnesota.

7. The indebtedness of Patrick Luna and Tarla Luna is evidenced by a Promissory Note and Mortgage dated March 26, 1998, filed of record in the Waseca County Recorder's office on March 31, 1998, and recorded as Document No. 219135. 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. The Debtor has failed to pay monthly mortgage payments since May 1, 2004, and is in default in the amount of \$2,980.57 together with reasonable attorneys fees and costs incurred pursuant to the note and mortgage. Debtor has failed to make any offer of adequate protection. Accordingly, Movant's interest is inadequately protected.

9. The total amount due under the mortgage and note as of the date of hearing is \$56,067.88.

10. The Debtors have estimated the value of the homestead as \$40,000.00 and accordingly, Debtor has no equity in the premises and the property is not necessary to an effective reorganization.

11. Upon information and belief, Debtor intends to permit the foreclosure sale of the real property and has no intention of reaffirmation of the debt.

12. By reason of the foregoing, Movant is entitled to have the automatic stay lifted and vacated so it can recommence the mortgage foreclosure action 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:

Patrick P. Luna  
Tarla L. Luna

AFFIDAVIT OF PETITIONER

Debtors

Chapter 7, Case No. 04-34045  
-----

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  
21st day of July, 2004.

Dunneah E. Welborn  
Notary Public



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219135

MNCM-3024-C-1

219135-9pages

PAT LOEFFLER, WASECA CO. TREASURER  
# 0606

Patrick P. & Tarla L. Luna  
to  
Norwest Mortgage, Inc.

Office of County Recorder  
County of Waseca, Minnesota

DATE March 31, 1998

REGISTRATION TAX HEREON OF 131.10

TREASURER'S RECEIPT NO. 1578

COUNTERSIGNED Suzanne Root  
Deputy COUNTY TREASURER

Laurie Hutter  
Deputy COUNTY JUDGE

I hereby certify that the within instrument was  
filed in this office for record on the 31st day of  
March A.D., 19 98 at  
2:00 o'clock P.M and was duly  
microfilmed as Document No. 219135

Andrew Olson  
County Recorder

By \_\_\_\_\_ Deputy

100-NA PNB P110

[Space Above This Line For Recording Data]

# MORTGAGE 418

THIS MORTGAGE ("Security Instrument") is given on **MARCH 26, 1998**  
The mortgagor is **PATRICK P. LUNA AND TARLA L. LUNA, HUSBAND AND WIFE**

("Borrower"). This Security Instrument is given to **NORWEST MORTGAGE, INC.**

which is organized and existing under the laws of **THE STATE OF CALIFORNIA**, and whose  
address is **P.O. BOX 5137, DES MOINES, IA 503065137**

**FIFTY SEVEN THOUSAND AND 00/100**

("Lender"). Borrower owes Lender the principal sum of

**Dollars (U.S. \$\*\*\*\*\*57,000.00).**

This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which  
provides for monthly payments, with the full debt, if not paid earlier, due and payable on  
**APRIL 01, 2028** and for interest at the yearly rate of **7.375**

percent. This Security Instrument secures to Lender: (a) the repayment of  
the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the Note; (b) the  
payment of all other sums, with interest, advanced under paragraph 7 to protect the security of this Security

**MINNESOTA-Single Family-FNMA/FHLMC UNIFORM INSTRUMENT**

VMP (GRIMN) (9702)

Form 3024 9/90

Amended 5/91

Page 1 of 8

Initials: PA JL

VMP MORTGAGE FORMS - (800)521-7291



219135

Instrument; and (c) 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, with power of sale, the following described property located in WASECA County, Minnesota:

See legal description attached hereto;

TAX STATEMENTS SHOULD BE SENT TO: NORWEST MORTGAGE INC., P.O. BOX 5137, DES MOINES, IA 503065137

which has the address of 201 NW 1ST STREET, NEW RICHLAND  
Minnesota 56072

[Street, City],

[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 mortgage, 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.

**UNIFORM COVENANTS.** Borrower and Lender covenant and agree as follows:

**1. Payment of Principal and Interest; Prepayment and Late Charges.** Borrower shall promptly pay when due the principal of and interest on the debt evidenced by the Note and any prepayment and late charges due under the Note.

**2. Funds for Taxes and Insurance.** Subject to applicable law or to a written waiver by Lender, Borrower shall pay to Lender on the day monthly payments are due under the Note, until the Note is paid in full, a sum ("Funds") for: (a) yearly taxes and assessments which may attain priority over this Security Instrument as a lien on the Property; (b) yearly leasehold payments or ground rents on the Property, if any; (c) yearly hazard or property insurance premiums; (d) yearly flood insurance premiums, if any; (e) yearly mortgage insurance premiums, if any; and (f) any sums payable by Borrower to Lender, in accordance with the provisions of paragraph 8, in lieu of the payment of mortgage insurance premiums. These items are called "Escrow Items." Lender may, at any time, collect and hold Funds in an amount not to exceed the maximum amount a lender for a federally related mortgage loan may require for Borrower's escrow account under the federal Real Estate Settlement Procedures Act of 1974 as amended from time to time, 12 U.S.C. Section 2601 *et seq.* ("RESPA"), unless another law that applies to the Funds sets a lesser amount. If so, Lender may, at any time, collect and hold Funds in an amount not to exceed the lesser amount. Lender may estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with applicable law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is such an institution) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items. Lender may not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and applicable law permits Lender to make such a charge. However, Lender may require Borrower to pay a one-time

219135

576

LOT SEVEN (7), BLOCK EIGHTEEN (18), ORIGINAL PLAT IN THE VILLAGE, NOW CITY, OF NEW RICHLAND, MINNESOTA, ACCORDING TO THE PLAT THEREOF ON FILE AND OF RECORD IN THE OFFICE OF THE COUNTY RECORDER IN AND FOR THE COUNTY OF WASECA AND STATE OF MINNESOTA.

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In Re:

Patrick Luna  
Tarla Luna

MEMORANDUM OF LAW

Debtor

Chapter 7, Case No. 04-34045  
-----

Wells Fargo Bank, N.A. ("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, perfected mortgage on real property owned by the Debtor. On the date of filing, the Debtor was delinquent under the note and mortgage. Since this case was filed Debtor has made no payments to Movant and the arrears total \$2,980.57.

**ARGUMENT**

1. Under Section 362.(d)(2) 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." The Debtor in this case has failed to make payments required by the note and mortgage for a period of more than 5 months. Debtor has not otherwise provided Movant with adequate protection of its interest in the property. Such circumstances constitute cause, within the meaning of §362(d)(1), justifying relief from the stay. In Re: Video East, Inc., 41 B.R. 176 (Bkrtcy. E.D. Pa. 1984); In Re: Frascatore, 33 B.R. 687 (Bkrtcy. E.D. Pa. 1983).

2. Pursuant to §362(d)(2) of the Bankruptcy Code, relief from the stay is appropriate where Debtor has no equity and the property is not necessary to an effective reorganization. 11 U.S.C. §362(d)(2). See, In Re: Gellert, 55 B.R. 970 (Bkrtcy. D. N. H. 1983). In this case the

balance due Movant is \$56,067.88. The value of the property is approximately \$40,000.00.

Clearly, the Debtor has no equity in the property, and as this is a Chapter 7 case, the property is not necessary to an effective reorganization.

### **CONCLUSION**

Movant is entitled to relief from the automatic stay pursuant to 11 U.S.C. §362(d)(1) for cause, where its interest in the secured property is not adequately protected. Movant is also entitled to relief from the automatic stay pursuant to 11 U.S.C. §362(d)(2) when Debtor has no equity, and when the property is not necessary to an effective reorganization.

Movant respectfully requests an Order of this Court modifying the automatic stay consistent with the attached proposed Order.

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:

Patrick Luna  
Tarla Luna

Debtor

UNSWORN DECLARATION  
FOR PROOF OF SERVICE

Chapter 7, Case No. 04-34045  
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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

John Hedback  
Chapter 7 Trustee  
2855 Anthony Lane S. #201  
St. Anthony, MN 55418

Ronald J. Lundquist  
Attorney at Law  
10 S. 5th Street, Suite 700  
Minneapolis, MN 55402

Patrick Luna  
Tarla Luna  
306 Trondheim Road  
Kenyon, MN 55946

/E/ Erin Kay Buss  
Erin Kay Buss

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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In Re:

Patrick Luna  
Tarla Luna

ORDER

Debtor.

Chapter 7, Case No. 04-34045  
-----

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 7, 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 and/or assigns, has an interest, said property legally described as follows, to-wit:

Lot 7, Block 18, Original plat in the Village, now City, of New Richland, Minnesota, according to the plat thereof on file and of record in the Office of the County Recorder in and for the County of Waseca and State of 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