

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In Re:

Kenneth Rutherford  
Carolyn Rutherford

NOTICE OF HEARING AND  
MOTION FOR RELIEF FROM  
AUTOMATIC STAY

Debtors

Chapter 13, Case No. 04-34049

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TO: Kenneth Rutherford and Carolyn Rutherford, INCLUDING TRUSTEE AND OTHER  
INTERESTED PARTIES

1. National City Home Loan Services, Inc., (*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 a.m. on November 3, 2004, in Courtroom 228A, 200 Federal Building, 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 October 29, 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 October 25, 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 July 12, 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 18875 Exclusive Path, Farmington, MN 55024, legally described as follows, to-wit:

Lot 5, Block 4, Nelsen Hills Farm 7th Addition, Dakota County, Minnesota.

7. The indebtedness of Kenneth Rutherford and Carolyn Rutherford is evidenced by a Promissory Note and Mortgage dated August 7, 2003, filed of record in the Dakota County Recorder's office on October 16, 2003, and recorded as Document No. 2125517. 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 for the months of April 1, 2004 through July 1, 2004. 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 August 1, 2004 to the present date and as of the hearing date November 1, 2004 will be due for a total delinquency of \$7,267.56 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: October 18, 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:

Kenneth Rutherford  
Carolyn Rutherford

AFFIDAVIT OF PETITIONER

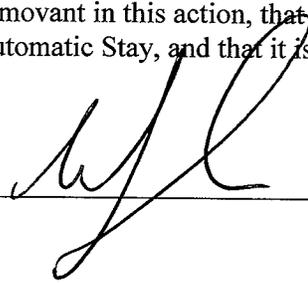
Debtors

Chapter 13, Case No. 04-34049  
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STATE OF PENNSYLVANIA )

COUNTY OF Allegheny )

Michael Carr, being first duly sworn, deposes and states on oath that she/he is employed by National City Home Loan Services, Inc., the movant in this action, that she/he has read the annexed Notice of Hearing and Motion for Relief From Automatic Stay, and that it is true of her/his knowledge to the best of her/his information.



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Subscribed and sworn to before me this  
29 day of September 2004.

Charlene Jones  
Notary Public

Notarial Seal  
Charlene M. Jones, Notary Public  
Pittsburgh, Allegheny County  
My Commission Expires Jan. 17, 2005  
Member, Pennsylvania Association of Notaries

DOC. NO.

2125517

2125517

OFFICE OF THE COUNTY RECORDER  
DAKOTA COUNTY, MINNESOTA

CERTIFIED THAT THE WITHIN INSTRUMENT  
WAS RECORDED IN THIS OFFICE ON AND AT

2003 OCT 16 PM 12:00

JOEL T. BECKMAN, COUNTY RECORDER

BY: *JF* Deputy  
FEE: *30.00* SURCHARGE: *5.00*

CASH  CHECK  ESCROW

WELL  CHARGE

CHARGE TO: \_\_\_\_\_  
O/R \_\_\_\_\_

Excel Title, LLC  
6900 Wedgewood Rd. #425  
Maple Grove, MN 55311

DAKOTA COUNTY TREASURER-AUDITOR  
10/14/2003 13:55:50 825289 506.00  
REGISTRATION TAX 5.00  
COUNTY CONSERVATION FEE  
RECEIPT NUMBER 624177

[Space Above This Line For Recording Data]

### MORTGAGE

Return To:  
First Franklin Financial Corporation  
2150 North First Street  
San Jose, CA 95131  
Loan number: 0031744816/5,516

*Rm 8055*  
AFTER RECORDING PLEASE RETURN TO:  
EXCEL TITLE, LLC  
6900 WEDGEWOOD RD. #425  
MAPLE GROVE, MN 55311  
*A*

This loan is being made pursuant to section 47.204 of the Minnesota Statutes.

#### 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 16.

(A) "Security Instrument" means this document, which is dated August 7, 2003 together with all Riders to this document.

RECEIVED

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

DAKOTA COUNTY  
TREASURER-AUDITOR

Form 3024 1/01

VMP -6(MN) (0005)

Page 1 of 15

Initials: *KR CR*

VMP MORTGAGE FORMS - (800)521-7281



Document # L074MN

(B) "Borrower" is  
KENNETH N RUTHERFORD  
, and CAROLYN A RUTHERFORD, husband and wife

Borrower is the mortgagor under this Security Instrument.

(C) "Lender" is FIRST FRANKLIN FINANCIAL CORPORATION

Lender is a Corporation  
organized and existing under the laws of Delaware  
Lender's address is 2150 North First St.,  
San Jose, CA 95131

Lender is the mortgagee under this Security Instrument.

(D) "Note" means the promissory note signed by Borrower and dated August 7, 2003

The Note states that Borrower owes Lender

TWO HUNDRED TWENTY THOUSAND & 00/100 Dollars

(U.S. \$ 220,000.00 ) plus interest. Borrower has promised to pay this debt in regular Periodic  
Payments and to pay the debt in full not later than September First, 2033

(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]:

- |   |   |  |
|---|---|--|
| <input checked="" type="checkbox"/> Adjustable Rate Rider | <input type="checkbox"/> Condominium Rider              | <input type="checkbox"/> Second Home Rider                                 |
| <input type="checkbox"/> Balloon Rider                    | <input type="checkbox"/> Planned Unit Development Rider | <input type="checkbox"/> 1-4 Family Rider                                  |
| <input type="checkbox"/> VA Rider                         | <input type="checkbox"/> Biweekly Payment Rider         | <input checked="" type="checkbox"/> Other(s) [specify]<br>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 [Type of Recording Jurisdiction] of Dakota [Name of Recording Jurisdiction]:

Legal Description attached hereto and made a part hereof  
Adjustable Rate Rider attached hereto and made a part hereof

Prepayment Rider attached hereto and made a part hereof

Parcel ID Number: 145050605004  
18875 EXCLUSIVE PATH  
FARMINGTON  
("Property Address"):

which currently has the address of  
[Street]  
[City], Minnesota 55024 [Zip Code]

# Exhibit A

## Legal Description:

LOT 5, BLOCK 4, NELSEN HILLS FARM 7TH ADDITION, DAKOTA COUNTY, MINNESOTA.

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In Re:

Kenneth Rutherford  
Carolyn Rutherford

MEMORANDUM OF LAW

Debtors

Chapter 13, Case No. 04-34049  
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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 July 12, 2004 no payment has been made to movant for the month(s) of August 1, 2004 to the present and as of the hearing date November 1, 2004 will be due. Accordingly, cause exists for the granting of relief from the automatic stay.

WHEREFORE, National City Home Loan Services, Inc. respectfully requests this Court to grant movant relief from the automatic stay of 11 U.S.C. Section 362(a).

Dated: October 18, 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:

Kenneth Rutherford  
Carolyn Rutherford

Debtors

UNSWORN DECLARATION  
FOR PROOF OF SERVICE

Chapter 13, Case No. 04-34049  
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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 October 18, 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

Craig W. Andresen  
Attorney at Law  
2001 Killebrew Drive, Suite 330  
Bloomington, MN 55425

Kenneth Rutherford  
Carolyn Rutherford  
18875 Exclusive Path  
Farmington, MN 55024

/E/ Erin Kay Buss  
Erin Kay Buss

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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In Re:

Kenneth Rutherford  
Carolyn Rutherford

ORDER

Debtors.

Chapter 13, Case No. 04-34049  
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The above entitled matter came on for hearing upon motion of National City Home Loan Services, Inc., (*Movant*) pursuant to 11 U.S.C. Section 362 on November 3, 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 5, Block 4, Nelsen Hills Farm 7th Addition, Dakota 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