

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In Re:

CHAPTER 7 CASE

Alvin Wilbert Smith
SSN XXX-XX-1082

CASE NO. 04-34241 DDO

Debtor.

NOTICE OF HEARING AND MOTION FOR RELIEF FROM STAY

TO: Debtor and other entities specified in Local Rule 9013-3(a).

1. Aurora Loan Services (hereinafter "Secured Creditor"), 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 on September 8, 2004, at 9:30 a.m., or as soon thereafter as counsel can be heard, before the Honorable Dennis D. O'Brien in Courtroom 228A of the above entitled Court located at U.S. Courthouse, 316 North Robert Street, St. Paul, Minnesota.

3. Any response to this motion must be filed and delivered not later than September 2, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays and holidays), or served and filed 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 Rule of Bankruptcy Procedure 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this case was filed on July 21, 2004. The case is now pending in this Court.

5. This motion arises under 11 U.S.C. § 362 and Federal Rule of Bankruptcy Procedure 4001.

This motion is filed under Federal Rule of Bankruptcy Procedure 9014 and Local Rules 9013-1 - 9019-1. Movant requests relief from the automatic stay with respect to property subject to a lien. Movant requests said relief be effective immediately notwithstanding Federal Rule of Bankruptcy Procedure 4001(a)(3).

6. Debtor is indebted to Secured Creditor in the original principal amount of \$225,000.00, as evidenced by that certain mortgage deed dated February 21, 2003, a copy of which is attached hereto as Exhibit "A", together with interest thereon.

7. Debtor's indebtedness is secured by a mortgage on real estate in which Debtor has an interest as evidenced by that certain mortgage deed dated February 21, 2003, executed by Alvin Wilbert Smith, a single person, recorded on April 21, 2003, as Document No. 2033414, a copy of which is attached hereto as Exhibit "A". The name and address of the original creditor is contained in the attached Exhibit "A". The property is located in Dakota County, Minnesota and is legally described as follows to-wit:

Lot 18, Block 4, Cedar Highlands 5th Addition.

Secured Creditor is now the holder of said mortgage and is entitled to enforce the terms thereof.

8. At all times material, Debtor was in default of the payments and performance of obligations to Secured Creditor.

9. Pursuant to 11 U.S.C. § 362(g) the burden is on Debtor to prove absence of cause and/or adequate protection. This secured creditor's interest in the property is not adequately protected where, as of August 19, 2004, Debtor is delinquent in the making of monthly payments as required for the months of February, 2004 through August, 2004, inclusive, in the amount of \$1,871.73 each; accruing late charges and attorneys fees and costs of \$700.00. Debtor has failed to make any offer of adequate protection.

10. Secured Creditor desires to protect its interest in the aforementioned property and requests the Court to vacate the stay of actions and allow foreclosure pursuant to Minnesota law.

11. Secured Creditor has incurred and will incur legal fees and costs to protect and enforce its rights in the subject property.

WHEREFORE, Secured Creditor, by its undersigned attorney, moves the Court for an order for judgment that the automatic stay provided by 11 U.S.C. § 362(a) be terminated so to permit the movant to commence mortgage foreclosure proceedings under Minnesota law and for such other relief as may be just and equitable.

Dated this 19th day of August, 2004.

WILFORD & GESKE

By /e/ James A. Geske
James A. Geske
Attorneys for Secured Creditor
7650 Currell Blvd., Suite 300
Woodbury, MN 55125
651-209-3300
Attorney Reg. No. 14969X

THIS COMMUNICATION IS FROM A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT. ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

May 19, 2004 9:11AM UNIVERSAL TITLE

No. 0582 P. 6/7

2033414

DOC. NO. 2033414

OFFICE OF THE COUNTY RECORDER
DAKOTA COUNTY, MINNESOTA
CERTIFIED THAT THE WITHIN INSTRUMENT
WAS RECORDED IN THIS OFFICE ON AND AT

2003 APR 21 AM 11:00

JOEL T. BECHTOLD, COUNTY RECORDER

BY: *DE* Deputy

FEE \$5.00 SURCHARGE \$5.00

CASH CHECK ESCROW

WELL CHARGE

CHARGE TO:

OR

BURNET
TITLE

DAKOTA COUNTY (MINNESOTA) RECORDER
BY: JACOBUS 10:25:42 TUESDAY
REGISTRATION FEE
COUNTY OBSERVATION FEE
RECEIPT NUMBER 583618
\$17.50
\$5.00

Loan No: 81011018

(Spec Above This Line For Recording Data)

MORTGAGE

MIN: 1001975-000020348-8

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 **February 21, 2003** together with all Riders to this document

(B) "Borrower" is **ALVIN WILBERT SMITH, A SINGLE PERSON**

Borrower is the mortgagor under this Security Instrument.

(C) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagor under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P. O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

(D) "Lender" is **BRIER MORTGAGE CORPORATION**

Lender is a **CORPORATION** organized and existing under the laws of **MINNESOTA**. Lender's address is **3201 WEST COUNTY ROAD 42 #102 BURNSVILLE, MN 55306**

(E) "Note" means the promissory note signed by Borrower and dated **February 21, 2003**. The Note states that Borrower owes Lender **Two Hundred Twenty Five Thousand DOLLARS and Zero CENTS**

Dollars (U.S. \$ 225,000.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than **March 1, 2033**

MINNESOTA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT
Form 3024 1/01
Lender Forms, Inc. (400) 448-3055
L147NNA3024 MERS 1/01 (A)

Page 1 of 13

Initials *DE*

RECEIVED

MAR 18 2003
FEB 18 2003

RECORDED COUNTY
DAKOTA COUNTY
TREASURER

MAR 18 2003

EXHIBIT *A*

DAKOTA COUNTY
TREASURER

May 19, 2004 9:11AM UNIVERSAL TITLE No. 0582 P. 7/7

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 MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, with power of sale, the following described property located in the

COUNTY of Dakota
(Type of Recording Jurisdiction) (Name of Recording Jurisdiction)

LOT 16, BLOCK 4, CEDAR HIGHLANDS 5TH ADDITION.

which currently has the address of

17075 GEORGETOWN WAY

(Street)

ROSEMOUNT
(City)

Minnesota

55068
(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 understands and agrees that MERS holds only legal title to the interest granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

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.

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In Re:

CHAPTER 7 CASE

Alvin Wilbert Smith
SSN XXX-XX-1082

CASE NO. 04-34241 DDO

Debtor.

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

ARGUMENT

I. CAUSE EXISTS FOR THE GRANTING OF RELIEF FROM THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362(d)(1) WHERE THE INTEREST OF THIS SECURED CREDITOR IS NOT ADEQUATELY PROTECTED.

Pursuant to 11 U.S.C. § 362(g) the burden is on Debtor to prove absence of cause and/or adequate protection. Secured Creditor's interest in the property is not adequately protected where:

1. As of August 19, 2004, Debtor is delinquent for monthly payments for the months of monthly payments as required for the months of February, 2004 through August, 2004, in the amount of \$1,871.73 each; accruing late charges and attorneys fees and costs of \$700.00.

2. Debtor has failed to make any offer of adequate protection.

CONCLUSION

Secured Creditor is entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1) for cause, and where its interest in the secured property is not adequately protected.

Secured Creditor respectfully requests an order of this Court modifying the automatic stay consistent

with the attached proposed Order.

Dated this 19th day of August, 2004.

WILFORD & GESKE

By /e/ James A. Geske

James A. Geske

Attorneys for Secured Creditor

7650 Currell Blvd., Suite 300

Woodbury, MN 55125

651-209-3300

Attorney Reg. No. 14969X

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

CHAPTER 7 CASE

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SSN XXX-XX-1082

CASE NO. 04-34241 DDO

AFFIDAVIT OF
MECHELLE ALLBAUGH

Debtor.

Mechelle Allbaugh, being first duly sworn on oath, deposes and states:

1. That she is the Bankruptcy Specialist of Aurora Loan Services.

2. Aurora Loan Services, is now the holder of a mortgage on real property in which the debtor has an interest. The debtor's indebtedness is evidenced by that certain mortgage deed dated February 21, 2003, executed by Alvin Wilbert Smith, a single person, recorded April 21, 2003, as Document No. 2033414. The property is located in Dakota County, Minnesota and is legally described as follows, to-wit:

Lot 18, Block 4, Cedar Highlands 5th Addition.

3. That she has reviewed the account records relating to the Smith mortgage loan, account no. 0015050388.

4. That as of August 11, 2004, the following amounts were owing on this account:

Unpaid Principal:	\$223,234.27
Interest through August 11, 2004	10,740.57
Attorney's Fees:	700.00
Late Charges:	163.14
Non-Escrow Advances:	220.00 1599.13
Escrow Balance:	726.99

TOTAL: \$235,784.97

837,110.10

5. That the mortgage loan is delinquent for monthly mortgage payments for the months of February, 2004 through August, 2004 in the amount of \$1,871.83 each.

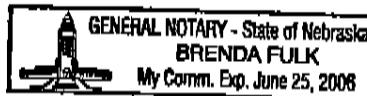
6. This affidavit is given in support of the motion of Aurora Loan Services for relief from the automatic stay.

AURORA LOAN SERVICES

By Mechelle Allbaugh
Its Bankruptcy Specialist

Subscribed and sworn to before me
this 13 day of August, 2004.

Brenda Fulk
Notary Public
9733_1



**UNITED STATES BANKRUPTCY COURT
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SSN XXX-XX-1082

Debtor.

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**UNSWORN DECLARATION
FOR PROOF OF SERVICE**

Diana Waletzko, employed by Wilford & Geske, attorneys licensed to practice law in this Court, with office address at 7650 Currell Blvd., Suite 300, Woodbury, Minnesota, declares that on August 19, 2004, I served the annexed Notice of Hearing and Motion for Relief from Stay, Memorandum in Support of Motion for Relief, Affidavit of Mechelle Allbaugh, and proposed Order to each person referenced below, a copy thereof by enclosing the same in an envelope with first class mail postage prepaid and depositing the same in the post office at Woodbury, Minnesota addressed to each of them as follows:

Alvin W. Smith
17075 Georgetown Way
Rosemount, MN 55068

William I. Kampf
Henson & Efron P A
220 S 6th St Ste 1800
Minneapolis, MN 55402

Mary Jo A. Jensen-Carter
1339 E Cnty Rd D
Vadnais Heights, MN 55109

U.S. Trustee
1015 U.S. Courthouse
300 South 4th Street
Minneapolis, MN 55415

And I declare, under penalty of perjury, that the foregoing is true and correct.

Dated this 19th day of August, 2004.

/e/ Diana Waletzko
Diana Waletzko

**UNITED STATES BANKRUPTCY COURT
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Debtor.

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ORDER

The above entitled matter came on for hearing upon motion of Aurora Loan Services (hereinafter "Secured Creditor"), pursuant to 11 U.S.C. § 362 on September 8, 2004, at U.S. Courthouse, 316 North Robert Street, 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 Secured Creditor, its assignees and/or successors in interest, is granted relief from the stay of actions imposed by 11 U.S.C. § 362 with regard to that certain mortgage deed dated February 21, 2003, executed by Alvin Wilbert Smith, a single person, recorded on April 21, 2003, as Document No. 2033414 covering real estate located in Dakota County, Minnesota, legally described as follows, to-wit:

Lot 18, Block 4, Cedar Highlands 5th Addition

and may pursue its remedies under state law in connection with the subject note and mortgage deed.

Notwithstanding Federal Rule of Bankruptcy Procedure 4001(a)(3),

this Order is effective immediately.

Dated: _____

Judge of Bankruptcy Court