

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO**

In re: RALPH LEO BRUTSCHE,

No. 7-11-13326 JS

Debtor.

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SANTA FE SUMMIT HOMEOWNERS' ASSOCIATION, INC.,  
a New Mexico non-profit corporation,

Plaintiff,

v.

Adversary No. 12-1279 J

RALPH L. BRUTSCHE, individually  
and as Trustee of the Ralph L. Brutsche  
Revocable Trust u/t/a dated September 21, 1989; and  
YVETTE J. GONZALES, in her capacity as  
Chapter 7 Trustee,

Defendants.

**ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

THIS MATTER is before the Court on Plaintiff's Motion and Memorandum for Partial Summary Judgment ("Motion for Partial Summary Judgment") filed by Santa Fe Summit Homeowners' Association, Inc., a New Mexico non-profit corporation ("SFSHOA"), by and through its attorneys of record, Hunt & Davis, P.C. (Chris W. Pierce). *See* Docket No. 30. SFSHOA seeks summary judgment on the following claims: 1) specific performance with respect to the conveyance of certain real property designed for use as common areas (the "Common Areas") as required under the Consolidated Declaration of Restrictive Covenants Santa Fe Summit Phases I, II, IV, V, VI and Tesuque Creek ("Covenants");<sup>1</sup> 2) specific

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<sup>1</sup>The Covenants define the Common Areas as follows:

"Common Area" or "Common Areas" means all real and personal property owned and acquired by deed after its formation by the Association which is intended for the common enjoyment of the Owners of the property within the Subdivision. Covenants, ¶ E., p. 3

performance regarding the establishment of utility easements in favor of the SFSHOA (the “Easements”); and 3) quiet title with respect to a gatehouse (the “Gatehouse”) located on a roadway within the Santa Fe Summit subdivision. The Chapter 7 Trustee opposes the motion.<sup>2</sup> Defendant Ralph L. Brutsche did not file a response to the Motion for Partial Summary Judgment. SFSHOA filed a reply.<sup>3</sup> SFSHOA’s evidence offered in support of its Motion for Partial Summary Judgment is insufficient to establish the status of title to the real property subject to SFSHOA’s claims. Consequently fact issues preclude the entry of summary judgment.

## DISCUSSION

### A. Summary Judgment Standards

It is appropriate to grant a motion for summary judgment when the pleadings and other materials in the record, together with supporting affidavits, if any, demonstrate that there is no genuine dispute with respect to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56, made applicable to adversary proceedings by Fed.R.Bankr.P. 7056. The party requesting summary judgment “always bears the initial responsibility of informing the . . . court of the basis for its motion, and . . . [must] demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Even when an opposing party fails to respond to a movant’s request for summary judgment, the movant is not entitled to summary judgment unless the motion is properly supported and establishes that the movant is entitled to judgment as a matter of law.

*See Reed v. Bennett*, 312 F.3d 1190, 1195 (10<sup>th</sup> Cir. 2002)(“a party’s failure to file a response to

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<sup>2</sup>See Defendant Trustee Yvette Gonzales’ Response and Memorandum in Response to Plaintiff Santa Fe Summit Homeowners’ Association Inc.’s Motion for Summary Judgment (“Response”) – Docket No. 39.

<sup>3</sup>See Plaintiff Santa Fe Summit Homeowners’ Association Inc.’s Reply to Defendant Trustee Yvette Gonzales’ Response and Memorandum in Response to Plaintiff Santa Fe Summit Homeowners’ Association Inc.’s Motion for Summary Judgment (“Reply”) – Docket No. 45.

a summary judgment motion is not, by itself, a sufficient basis on which to enter judgment against the party. The district court must make the additional determination that judgment for the moving party is ‘appropriate’ under Rule 56.”). “No defense to an insufficient showing [on summary judgment] is required.” *Id.* (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 161, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)). “[T]he burden on the nonmovant to respond arises only if the summary judgment is properly ‘supported’ as required by Rule 56(c).” *Reed*, 312 F.3d at 1194 (citing *Adickes*, 398 U.S. at 160-61).

B. SFSHOA’s Claims

*The Court cannot determine the status of title to the real property at issue*

SFSHOA asserts that the facts not subject to material dispute establish that Mr. Brutsche retains no interest in the real property that comprises the Common Areas, the real property relating to the Easements, or the Gatehouse, and that the Chapter 7 Trustee succeeded to all of Mr. Brutsche’s interests with respect to the Common Areas, Easements, and the Gatehouse. It is correct that, to the extent Mr. Brutsche had any interest in the Common Areas, easements, and the Gatehouse as of the date he filed his voluntary petition for bankruptcy, his interests became property of the bankruptcy estate. *See* 11 U.S.C. § 541(a)(“The commencement of a case . . . creates an estate . . . comprised of . . . all legal or equitable interests of the debtor in property as of the commencement of the case.”). The Chapter 7 Trustee is charged with administering the bankruptcy estate and succeeds to the debtor’s rights in property as of the commencement of the case.<sup>4</sup> However, as explained below, the evidence now before the Court is insufficient to

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<sup>4</sup>*See* 11 U.S.C. § 704 (duties of Chapter 7 Trustee); *In re Rerisi*, 172 B.R. 525, 527 (Bankr.E.D.N.Y. 1994)(explaining that “[a]s of the date of the filing of a Chapter 7 petition, the Trustee is authorized to administer all of the property of the debtor’s estate. Once the estate is created, no interests in property of the estate remain in the debtor as the estate becomes vested with all of the property and property rights of the debtor. In essence the Trustee stands in the shoes of the debtor and has no more and no less interest than that which the debtor had as of the date of the filing of the petition.”). *See also*, *In re Pimental*, 142 B.R. 26, 28 (Bankr.D.R.I. 1992)(noting that “upon filing a Chapter 7 petition, the debtor is automatically ‘divested of virtually all property interests held as of the

determine the current status of title to the real property at issue in this adversary proceeding. Consequently, the Court cannot grant SFSHOA's request for specific performance with respect to the Common Areas or the Easements, and cannot grant SFSHOA's request to quiet title with respect to the Gatehouse.

In support of Motion for Partial Summary Judgment SFSHOA offered two affidavits of Robert Freeman, President of SFSHOA. *See* Affidavit of Robert L. Freeman in Support of Plaintiff's Motion and Memorandum for Partial Summary Judgment ("Freeman Affidavit")(Docket No. 31) and Supplemental Affidavit of Robert L. Freeman in Support of Plaintiff's Motion and Memorandum for Partial Summary Judgment, and Reply ("Supplemental Freeman Affidavit") (Docket No. 46) (together, the "Freeman Affidavits"). In the Freeman Affidavits, Mr. Freeman avers that the facts contained therein "are known to me to be true of my own knowledge."<sup>5</sup> With respect to the ownership interests in the Common Areas, the real property subject to the Easements, and the Gatehouse, the Freeman Affidavits include the following statements:

The full legal description of the Common Areas which are required by the Covenants to be conveyed to the Santa Fe Summit Homeowners' Association is attached to this Affidavit as Exhibit RF-1, and is a true and correct legal description of the Common Areas which are required to be conveyed to Santa Fe Summit Homeowners' Association, Inc. pursuant to the Covenants. Freeman Affidavit, ¶ 5.

Prior to the filing of the bankruptcy petition, title to the Common Areas was held by Defendant Brutsche, individually and as the Trustee of the Ralph L. Brutsche Revocable Trust u/t/a dated September 21, 1989, and/or by Summit or North Hill. Freeman Affidavit, ¶ 6.

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commencement of the case, and in turn, these interests immediately vest in the estate.")(quoting *Commercial Credit Bus. Loans, Inc. v. Northbrook Lumber Co.*, 22 B.R. 992 (N.D.Ill. 1982)).

<sup>5</sup> *See* Freeman Affidavit, ¶ 1; Supplemental Freeman Affidavit, ¶ 1.

The Association Easements [defined in ¶ 12 of the Freeman Affidavit as the easements designated during the course of construction of the Santa Fe Summit subdivision by Mr. Brutsche, individually or as Trustee of the Ralph L. Brutsche Revocable Trust u/t/a dated September 21, 1989, or through Summit Properties, Inc., North Hill Development Co. or other entities controlled by Mr. Brutsche] are located in whole or in part upon land owned by Defendant Brutsche, either individually, or as Trustee of the Ralph L. Brutsche Revocable Trust u/t/a dated September 21, 1989, or owned by Summit, North Hill, or, upon information and belief, by other entities or individuals controlled by Defendant Brutsche. The properties upon which the Association Easements are located (the “Easement Properties”) include, but may not be limited to, Tract A-1 as shown on that certain plat of survey entitled “subdivision Plat Phases 4, 5 and 6 Santa Fe Summit . . .” filed for record on May 2, 1996 in Book 333, Page 029-034, as Instrument Number 944-040, a true and correct copy of which is attached hereto as Exhibit RF-2, and Phase III as shown on that certain plat of survey entitled “Phase I Santa Fe Summit . . .” filed for record on July 22, 1991 in Book 225, Page 031-032, as Instrument Number 743782, a true and correct copy of which is attached hereto as Exhibit RF-3. Freeman Affidavit ¶ 13.

To the best of my knowledge title to Tract A-1 is held by Ralph L. Brutsche, and title to Phase III is held by Summit. Freeman Affidavit ¶ 14.

The [SFSHOA] is the owner of a gatehouse located on a roadway which was conveyed to the Association by Ralph L. Brutsche by means of a Quitclaim Deed recorded on July 12, 2007 in the Office of the County Clerk, Santa Fe Count, New Mexico, Instrument No. 1491399 (the “Gatehouse”). Freeman Affidavit ¶ 19.<sup>6</sup>

Recorded water, gas and electric easements already exist over Phase III, and the Association’s sewer line, which was constructed by Ralph Brutsche and Summit Properties, Inc. runs through Phase III in the same trench as the existing recorded water, gas and electric easements. Supplemental Freeman Affidavit, ¶ 4.

The Association’s sewer line, which was constructed by Ralph Brutsche and Summit Properties, Inc. already runs through Tract A-1. Supplemental Freeman Affidavit, ¶ 5.

Affidavit testimony offered by a lay witness in support of a motion for summary judgment must be based on personal knowledge. *See* Fed.R.Civ.P. 56(c)(4)(“An affidavit or

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<sup>6</sup>The Freeman Affidavits do not attach a copy of the Quitclaim Deed for the Gatehouse. Nor did SFSHOA otherwise offer a copy of the Quitclaim Deed for the Gatehouse in support of its Motion for Partial Summary Judgment.

declaration used to support or oppose a motion [for summary judgment] must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.”); *Argo v. Blue Cross and Blue Shield of Kansas, Inc.*, 452 F.3d 1193, 1200 (10<sup>th</sup> Cir. 2006)(acknowledging that affidavits offered in support of summary judgment must be made on personal knowledge). “Under the personal knowledge standard, an affidavit is inadmissible if the witness could not have actually perceived or observed that which he testifies to.” *Id.* (quoting *United States v. Sinclair*, 109 F.3d 1527, 1536 (10<sup>th</sup> Cir. 1997)(internal quotation marks omitted)). Where there has been no affirmative showing of personal knowledge of the specific facts contained in an affidavit, the affidavit is not sufficient. *See Antonio v. Barnes*, 464 F.2d 584, 585 (4<sup>th</sup> Cir. 1972)(per curiam)(“The absence of an affirmative showing of personal knowledge of specific facts vitiates the sufficiency of the affidavits . . .”). Even if an affiant recites that he is personally familiar with the matters contained within the affidavit, the Court should exclude those matters that the affiant was not in a position of having personal knowledge of such matters. *Cago v. Slade*, 2010 WL 3239131, \*2 (Bankr.D.N.M. Aug. 13, 2010)(citing *Argo*, 452 F.3d at 1200).

Despite Mr. Freeman’s assertion that his affidavits are based on personal knowledge, the factual statements with respect to the ownership of certain real property and the legal description of the Common Areas are matters outside Mr. Freeman’s ability to know first-hand. There is no foundation for the legal description of the Common Areas attached to the Freeman Affidavit as RF-1. Mr. Freeman simply states in his affidavit that the full legal description of the Common Areas to be conveyed under the Covenants is attached. And while recorded subdivision plats for Tract A-1 and Phase III are attached as exhibits to the Freeman Affidavit, it is impossible for the Court to discern from those attachments the location of the existing easements or the Common

Areas. The Freeman Affidavit contains a statement that “[t]o the best of my knowledge, Tract A-1 is held by Ralph L. Brutsche, and title to Phase II is held by Summit [Properties, Inc.]”

Freeman Affidavit, ¶ 14. Statements of mere belief contained in an affidavit must be disregarded. *Argo*, 452 F.3d at 1200. In sum, the Freeman Affidavit is insufficient to establish the facts asserted therein.

In addition, SFSHOA has presented insufficient evidence to the Court in support of the Motion for Partial Summary Judgment that would establish who or what entit(ies) currently hold title to the real property at issue. No title search for the real property that would show the chain of title and current title ownership was offered in support of the Motion for Partial Summary Judgment. The Freeman Affidavit is insufficient to establish title ownership in the real property. Further, even if Mr. Brutsche had no ownership interest in the real property as of the petition date, subsequent conveyances to him by third parties could have occurred. Because it is not possible for the Court to discern based on the evidence now before the Court who or what entity is the current title owner of or has an interest in the real property at issue, the Court cannot conclude on summary judgment that Mr. Brutsche holds no interest in the real property at issue in this adversary proceeding or that the Chapter 7 Trustee is the successor in interest to the real property interests at issue in this adversary proceeding. Unless and until the current title ownership of the Common Areas is established, the Court cannot grant SFSHOA’s request for specific performance with respect to the Common Areas.

*The legal description for the Common Areas has not been conclusively established*

SFSHOA also contends that the legal description for the Common Areas has been conclusively established. *See* Motion for Partial Summary Judgment, ¶ 13 and Freeman

Affidavit, Exhibit RF-1.<sup>7</sup> The Chapter 7 Trustee’s Response does not dispute this contention contained in SFSHOA’s Fact No. 13. *See* Response, ¶ 1. Mr. Brutsche did not respond to the Motion for Partial Summary Judgment. SFSHOA thus concludes that the legal description for the Common Areas has been established based on the Chapter 7 Trustee’s failure to contest SFSHOA’s Fact No. 13, the Freeman Affidavit, and Mr. Brutsche’s failure to file any response to the Motion for Partial Summary Judgment. However, the Freeman Affidavit is not sufficient to establish the legal description of the Common Areas that must be conveyed under the Covenants. The Freeman Affidavit fails to lay a proper foundation for his personal knowledge of the legal description of the common areas. And while the Chapter 7 Trustee’s response does not contest SFSHOA’s Fact No. 13, the Affidavit of Ralph L. Brutsche in Support of Response to Motion for Partial Summary Judgment and Default Judgment (“Brutsche Affidavit”) attached to the Chapter 7 Trustee’s Response asserts that the Common Areas identified in the legal description attached to the Freeman Affidavit “are all subject to change pending the complete development of Phase III and Tract A-1.” *See* Brutsche Affidavit, ¶ 13.<sup>8</sup> Ordinarily, self-serving, conclusory statements contained in an affidavit must be disregarded. *See Murray v. City*

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<sup>7</sup>Exhibit 4 attached to SFSHOA’s Complaint for Specific Performance, for Determination that a Debt is Not Dischargeable Pursuant to 11 U.S.C. § 523(a)(4) and 11 U.S.C. § 523(a)(6), for Declaratory Judgment/Relief from Automatic Stay, for Establishment of Easements, and to Quiet Title to Real Property (the “Complaint”) also identifies the legal description of the Common Areas. In her answer to the Complaint, the Chapter 7 Trustee simply states that Exhibit 4 attached to SFSHOA’s Complaint “speaks for itself.” *See* Answer to Complaint for Specific Performance, for Determination that a Debt is Not Dischargeable Pursuant to 11 U.S.C. § 523(a)(4) and 11 U.S.C. § 523(a)(6), for Declaratory Judgment/Relief from Automatic Stay, for Establishment of Easements and to Quiet Title to Real Property (“Trustee’s Answer”), ¶ 13 – Docket No. 8.

The Court notes that the legal description for the common areas attached as Exhibit RF-1 to the Freeman Affidavit is slightly different than the legal description for the common areas attached as Exhibit 4 to the Complaint. *Compare* Exhibit 4 attached to Complaint (including Tract A-1, containing 2.802 acres, more or less; and Tract B, containing 51.971 acres, more or less) *with* RF-1 attached to the Freeman Affidavit (which does not include either Tract A-1, containing 2.802 acres, more or less; or Tract B, containing 51.971 acres, more or less).

<sup>8</sup>Schedule A filed in Mr. Brutsche’s bankruptcy case lists common areas in the Santa Fe Summit development “subject to the Consolidated Declaration of Restrictive Covenants – Santa Fe Summit Phases I, II, IV, V, and VI and Tesuque Creek, upon completion of the infrastructures for the applicable phases” and describes the nature of Mr. Brutsche’s interest as “Fee Simple/subject to the Declaration of Santa Fe Restrictions and Covenants.” *See* Case No. 11-13326-j7 –Docket No. 184. However, Schedule A does not identify the legal description of those common areas.



*of Sapulpa*, 45 F.3d 1417, 1422 (10<sup>th</sup> Cir. 1995)(“To survive summary judgment, nonmovant’s affidavits must be based upon personal knowledge and set forth facts that would be admissible in evidence; conclusory and self-serving affidavits are not sufficient.”)(internal quotation marks omitted)). But here, because SFSHOA’s request for specific performance with respect to the conveyance of the Common Areas cannot be accomplished until the current title to the property has been determined (which has not been established on summary judgment), establishing the legal description for the Common Areas at this stage in the proceeding is pre-mature. Further, SFSHOA has not adequately supported its contention regarding the metes and bounds description of the Common Areas with admissible evidence. Because the Freeman Affidavit is deficient, the Court will not grant SFSHOA’s request for summary judgment establishing the legal description of the Common Areas.

The Motion for Partial Summary Judgment is deficient with respect to the Easements for the same reasons. Until it has been established who or what entity now holds title to the properties over which SFSHOA seeks an easement, Court cannot grant judgment requiring that an easement be granted. SFSHOA’s statement of undisputed material facts is phrased in the alternative with respect to the easements. *See* Motion for Partial Summary Judgment, ¶ 25 and Freeman Affidavit, ¶ 13 (“The Association Easements are located in whole or in part upon land owned by Defendant Brutsche, either individually, or as Trustee of the Ralph L. Brutsche Revocable Trust u/t/a dated September 21, 1989, **or** owned by Summit, North Hill, **or**, upon information and belief, by other entities or individuals controlled by Brutsche.”). This affidavit testimony demonstrates that the affiant does not even have a belief as to exactly who holds title to the property.

If the real property at issue with respect to the Easements is titled in some entity or person other than Mr. Brutsche, the Court may not be able to grant SFSHOA the relief it seeks even if the Court were to determine that SFSHOA is otherwise entitled to obtain an easement. SFSHOA did not name Summit Properties, Inc. (“Summit”)<sup>9</sup> or North Hill Development Co. (“North Hill”) as Defendants in this adversary proceeding. Instead, SFSHOA contends that because Summit and North Hill are entities in which Mr. Brutsche is the 100% shareholder, the Chapter 7 Trustee can exercise Mr. Brutsche’s rights as shareholder to remove and replace the current officers and directors of those entities so that the Chapter 7 Trustee can cause Summit and North Hill to grant or acknowledge the easements in favor of SFSHOA. But naming the sole-shareholder of a corporation as a defendant is not the equivalent of naming the corporation. *Cf. Healthsource, Inc. v. X-Ray Associates of New Mexico, P.C.*, 138 N.M. 70, 77, 116 P.3d 861, 868 (Ct.App. 2005)(“a corporation and a shareholder, even a sole shareholder, are separate entities for legal purposes.”)(citation omitted).

By failing to name as defendants the other entities that may be the record title owners of the real property at issue herein, SFSHOA cannot obtain a judgment directing those entities to convey real property interests or grant easements. Further, it is not appropriate for the Court, for example, to order a shareholder to remove the members of the board of a corporation, to cause the board to remove the officers, to elect herself as a board member and officer, and then to cause the corporation to make a conveyance. The same problem exists with respect to the Common Areas that SFSHOA asserts may be titled in the name of North Hill or Summit.<sup>10</sup>

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<sup>9</sup>Summit filed its own Chapter 7 bankruptcy case as Case No. 7-13-11132 JA. That bankruptcy case is now closed.  
<sup>10</sup>See Reply, pp. 11 – 13 (stating that either Mr. Brutsche or North Hill held title pre-petition to the common areas identified as Tract A, containing 23.601 acres; Tract C, containing 5.820 acres; Tract D, containing 4.247 acres; Tract A - Tesuque Creek Subdivision, containing 2.268 acres; and the Gatehouse; that Mr. Brutsche and Summit owned the common areas identified as Tract B, containing 4.941 acres; and that Summit is the sole title holder of the common areas identified as Tract A, Phase 1, containing 6.541 acres).

In its Reply, SFSHOA concedes that it “does not currently have a full legal description of the existing water, gas and electric easement,” and that the Chapter 7 Trustee “does not currently control Phase III” over which the claimed easements run, and requests the Court to allow SFSHOA “time to complete its title search and properly describe such easement [over Phase III] in a subsequent Order.” *See* Reply, p. 11. These unanswered questions prevent the Court from granting summary judgment with respect to the Easements. The Supplemental Freeman Affidavit which states that the SFSHOA’s sewer line runs through Phase III in the same trench as existing recorded water, gas and electric easements, and that Mr. Brutsche and Summit constructed SFSHOA’s sewer line that already runs through Tract A-1, is likewise insufficient.

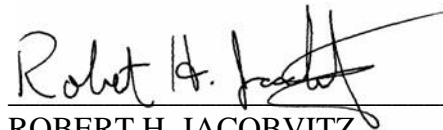
*The Gatehouse*

SFSHOA does not address the Gatehouse issue in its Reply. The Freeman Affidavit asserts that “Defendant Ralph L. Brutsche, either individually, or as Trustee of the Ralph L. Brutsche Revocable Trust u/t/a dated September 21, 1989, has informed me (and possibly other officers, directors and members of the Santa Fe Summit Homeowners’ Association, Inc.) that he claims an ownership interest in the Gatehouse, or makes some claim of lien, interest, right or title adverse to the Association’s claim in and to the Gatehouse.” Freeman Affidavit, ¶ 20. The Brutsche Affidavit includes a statement that Mr. Brutsche has not claimed an interest in the Gatehouse and has already conveyed the Gatehouse to the SFSHOA. *See* Brutsche Affidavit, ¶ 7 (“I have never claimed that I owned the gatehouse after the conveyance to the HOA. I do not have any interest in the gatehouse, do not have a key to the gatehouse and the Plaintiff’s statement is entirely false.”).

As determined above, although the Freeman Affidavit references a Quitclaim Deed conveying the gatehouse to the SFSHOA, the SFSHOA did not offer a copy of the Quitclaim Deed in support of its motion for summary judgment. Further, there is no evidence before the

Court that the quitclaim deed actually conveyed any title. Based on the conflicting affidavit testimony and the lack of evidentiary support with respect to the ownership of the Gatehouse, it is not appropriate to grant summary judgment on SFSHOA's claim for quiet title.

WHEREFORE, IT IS HEREBY ORDERED that the Motion for Partial Summary Judgment is DENIED.

  
ROBERT H. JACOBVITZ  
United States Bankruptcy Judge

Date entered on docket: February 28, 2014

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