Denver C. Snuffer, Jr. (#3032) denversnuffer@gmail.com
Steven R. Paul (#7423) spaul@nsdplaw.com
Daniel B. Garriott (#9444) dbgarriott@msn.com
Joshua D. Egan (#15593) joshua.d.egan@gmail.com
NELSON, SNUFFER, DAHLE & POULSEN
10885 South State Street
Sandy, Utah 84070
Telephone: (801) 576-1400
Facsimile: (801) 576-1960

Attorneys for R. Gregory Shepard and specially appearing for Diana C. Shepard and the Diana C. Shepard Revocable Trust, dated May 5, 1998.

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, and NELDON JOHNSON, Defendants.	Civil No. 2:15-cv-00828-DN-EJF **OPPOSITION TO RECEIVER'S MOTION FOR ORDER FINDING A BENEFICIAL INTEREST IN CERTAIN REAL PROPERTY WAS AN ASSET OF R. GREGORY SHEPARD AND FOR REMEDIES (ECF 780)** **ORAL ARGUMENT REQUESTED** Judge David Nuffer

COMES NOW R. Gregory Shepard and responds to the Receiver's Motion for Order Finding a Beneficial Interest in Certain Real Property Was an Asset of R. Gregory Shepard and for Remedies (ECF 780). The motion relates to the recovery of a home that is titled in the name of The Diana C. Shepard Revocable Trust, dated May 5, 1998 (the "Trust").

INTRODUCTION

The Trust is a separate legal entity and is not a party to this case. Diana C. Shepard is not a party to this case. Neither the Trust nor Mrs. Shepard have been added as a defendant and their separate assets are not subject to the control or use provided to the Receiver by the Corrected Receivership Order (ECF 491). Greg Shepard is not a grantor or settlor of the Trust, not a trustee of the Trust and loses all right in the Trust and its property if the Shepards are divorced. (See ECF 780-5, Trust Agreement, Article IV, page 3). Mr. Shepard is, at best, only a contingent beneficiary of the Trust.

The Receiver acknowledges the real property he seeks to recover through his motion is titled in the name of the Trust and not in the name of any Defendant to this action or any of the Receivership Entities. The Receivership Order does not remove or relax the requirement to provide due process to non-parties in Mrs. Shepard's or the Trust's position. The Receiver recognizes this and has already filed approximately 70 separate lawsuits against individuals and entities he believes hold assets that may belong to the receivership estate or for which he believes the holder of the property has some liability to the receivership estate. The Receiver has no right against the Trust or its property, other than the right to sue to recover property he believes may belong in the receivership estate. (See ECF 628, Receiver's Motion for Leave to Commence Legal Proceedings.)

The Receiver's motion, ECF 628, specifically identifies his intention to commence a legal proceeding against "Diana Shepard and her trust" ECF 628, page 3. As this Court does not have jurisdiction over the Trust or Mrs. Shepard by motion, this motion should be denied.

This Court has not asserted jurisdiction over the Trust or Mrs. Shepard as parties. Those parties are entitled to defend themselves and their ownership interests in the lawsuit filed against them by the Receiver, which is the only proper method and the proper channel to provide these parties due process. The Trust and Mrs. Shepard are entitled to the due process of jurisdiction, notice, discovery, expert witness designations, reports, and a trial. This Motion is an attempt to avoid those requirements and should be denied.

Furthermore, this motion seeks summary judgment against the Trust and Mrs. Shepard, forcing the Trust to sell the home. However, the Receiver has not supported the motion with admissible evidence as required by FRCP 56. The evidence he relies upon is entirely inadmissible hearsay, lacking any foundation for admissibility.

RESPONSE TO RECEIVER'S STATEMENT OF "UNDISPUTED MATERIAL FACTS"

1. Greg Shepard and Diana Shepard were married prior to December 2, 1986.

RESPONSE: Deny as inadmissible hearsay.

2. The Property [858 West Clover Meadow Drive, Murray, Utah 84123] was purchased by Greg Shepard and Diana Shepard on December 2, 1986.

RESPONSE: Deny as inadmissible hearsay.

3. On September 15, 1998, Greg Shepard executed a quit-claim deed conveying his interest in the Property to Diana Shepard. No consideration was provided for this transfer. This was a "nominal transfer" for estate planning purposes.

RESPONSE: Deny as inadmissible hearsay.

4. The same day, Diana Shepard executed a quit-claim deed conveying her interest in the Property to the Diana C. Shepard Revocable Trust. No consideration was provided for this transfer. This was a "nominal transfer" for estate planning purposes.

RESPONSE: Deny as inadmissible hearsay.

5. As the title indicates, the Diana C. Shepard Revocable Trust is a revocable trust.

RESPONSE: Deny as inadmissible hearsay.

6. On May 23, 2007, a Deed of Trust was recorded on the Property for the benefit of JPMorgan Chase Bank in the amount of $250,000.00 ("JPMorgan Deed of Trust"). Greg Shepard is named as a Trustor in the JPMorgan Deed of Trust, along with Diana Shepard and the Trust. Greg Shepard executed the JPMorgan Deed of Trust in his individual capacity.

RESPONSE: Deny as inadmissible hearsay.

7. On March 24, 2017, at 11:03 am, a warranty deed was recorded on the Property whereby Diana Shepard, as trustee of the Diana C. Shepard Revocable Trust, conveyed the Property to Greg Shepard and Diana Shepard. $10.00 was paid in consideration for the transfer.

RESPONSE: Deny as inadmissible hearsay.

8. Also on March 24, 2017, at 11:03 am, a Deed of Trust was recorded on the Property for the benefit of Guaranteed Rate, Inc., in the amount of $315,000.00 ("Guaranteed Rage Deed of Trust"). Greg Shepard and Diana Shepard are listed as the borrowers in the Guaranteed Rate Deed of Trust. Both Greg Shepard and Diana Shepard executed the Guaranteed Rate Deed of Trust in their personal capacities.

RESPONSE: Deny as inadmissible hearsay.

9. On March 24, 2017, at 3:51 pm, a warranty deed was recorded on the Property whereby Greg Shepard and Diana Shepard conveyed the Property back to the Diana C. Shepard Revocable Trust. $10.00 was paid in consideration for the transfer.

RESPONSE: Deny as inadmissible hearsay.

10. Regarding the March 2017 transfers and Guaranteed Rate Deed of Trust, Diana Shepard stated:

"The title company explained that we needed to deed the house out of the trust into our personal names for the short time it took to record the mortgage, then the house was deeded back to the trust. The same $10 consideration was paid and received, for the transform each of us to the trust."

RESPONSE: Deny as inadmissible hearsay

11. Regarding the Property generally, Diana Shepard stated "Greg Shepard and I are married and have been continuously married while we have resided in the Clover Meadow home [the Property]. It is a marital asset and all payments, upkeep, maintenance and repairs have been done by our family since we purchased the home."

RESPONSE: Deny as inadmissible hearsay,

12. On October 3, 2019, a leading real estate website valued the Property at $663,519.00.

RESPONSE: Deny as inadmissible hearsay.

13. As of May 13, 2019, Greg Shepard owed over $190,000.00 in credit card debt.

RESPONSE: Admit.

14. Between 2010 and 2016 Greg Shepard lost about $100,000.00 investing in foreign exchange trading and a prime bank fraud scheme. He used credit card funds to fund these failed investments.

RESPONSE: Denied. Shepard Global lost investments it made into foreign exchange trading and a prime bank fraud scheme. See Declaration of R. Gregory Shepard ("Greg Shepard Decl.") at 7.

15. Since 2017, Greg Shepard has used credit card funds to pay for almost everything.

RESPONSE: Denied. Only since the order freezing Mr. Shepard's assets has Mr. Shepard needed to use credit cards to pay expenses. Other than the income the Court has allowed from social security and other sources, Mr. Shepard has relied on borrowed funds to pay his expenses above the allowed income. Greg Shepard Decl. at 8.

16. In March 2017, before he transferred his interest in the Property to the Trust, Greg Shepard had ten outstanding credit card balances.

RESPONSE: Mr. Shepard admits he has said that around March 2017 he "had about 10 outstanding credit cards. To qualify for the loan financing for the home, I needed to clean up those cards. I had a life insurance policy at the time with substantial accumulated cash value. I withdrew $31,000 on March 21, 2016 to reduce credit card balances. Then, on June 27, 2016, I withdrew another $55,000 from the life insurance and used the funds to reduce credit card balances so we would qualify to refinance the home mortgage."

STATEMENT OF ADDITIONAL FACTS

1. Mrs. Shepard has not been served with a summons to appear in this case in her individual capacity or as trustee of the Trust.
2. The Shepards have lived in the home on Clover Meadow Drive since 1986. See Declaration of Diana Shepard ("Diana Shepard Decl.") at 5.
3. Greg Shepard is not an owner of the home any more than Mrs. Shepard's son, Matt Shepard, or her 96-year-old mother. Living there does not make them owners. Diana Shepard Decl. at 10.

4. The Trust was formed in 1998 "for the benefit of Grantor [Diana C. Shepard] and Grantor's spouse and Grantor's children thereafter." Diana Shepard Decl. at 4.
5. At the time of the Trust's formation, the Shepards hardly knew Neldon Johnson and were not involved in any business dealings with him whatsoever. Diana Shepard Decl. at 11.
6. In 2007, a loan of $250,000 was taken out and the home was used as security for the loan. Both Mrs. Shepard and Mr. Shepard were borrowers on the loan. Diana Shepard Decl. at 12.
7. All payments on the 2007 loan were made from income separate and distinct from RaPower. During the term of the 2007 loan, payments were made on the loan from the Shepards' social security income; Mr. Shepard's employment and ownership of Bigger Faster Stronger, and from Mr. Shepard's teaching and coaching. Diana Shepard Decl. at 13.
8. The 2007 loan matured in 2017 and the Shepards found a better interest rate and loan and borrowed $315,000 to pay off the 2007 loan. Diana Shepard Decl at 14.
9. Both Mrs. Shepard and Mr. Shepard were borrowers on the 2017 loan. Diana Shepard Decl. at 15.
10. The Shepards were required by the lender and the title company to temporarily take the property out of the Trust as part of the closing, then immediately after closing the home was put back into the Trust as always intended. Diana Shepard Decl. at 16.
11. All payments on the 2017 loan were made from income separate and distinct from RaPower or Shepard Global. During the term of the 2017 loan, payments were made on the loan from the Shepards' social security income; Mr. Shepard's employment and ownership of Bigger Faster Stronger, and from Mr. Shepard's teaching and coaching. Some payments on the current loan were made with borrowed funds or charges to credit cards because of the Court's asset freeze order and restriction of funds by the Court. Diana Shepard Decl. at 17.
12. The Shepards were not insolvent in 2017, otherwise they would not have qualified for a loan of $315,000. Diana Shepard Decl. at 18.
13. The 2017 loan transaction was not done to defraud creditors. Diana Shepard Decl. at 19.
14. The Shepards both believe in Neldon Johnson's technology. They believe in bringing clean affordable renewable energy to our state and nation and do some good in the world. So far, it appears no one else has been able to make renewable energy affordable. Diana Shepard Decl. at 20.
15. The Shepards invested almost everything they had in furthering Neldon Johnson's technology. They still believe Neldon's technology can prove to be economically viable in spite of tremendous odds. Diana Shepard Decl. at 21.
16. Mrs. Shepard is a very honest person and she would never, ever be married to a crook or someone who perpetrated a fraud. If Greg Shepard were guilty of fraud, she would have divorced him immediately, but she knows he is innocent. She will die knowing he is not guilty. Diana Shepard Decl. at 22.
17. Also, Mrs. Shepard would never allow her son, Matthew Shepard, to become involved in RaPower3 if his role involved fraud. She would not want him to be hurt by all of this. Diana Shepard Decl. at 23.
18. For many months Mrs. Shepard has wanted to speak from her heart. She believes her husband is an honest man. He would not do what he been accused of doing. He was honest in coaching (Deseret News Football Coach of the Year in 1976) (Lifetime Achievement

Award by the National Football League). He was honest in the Bigger Faster Stronger business for thirty years and he is still honest. Diana Shepard Decl. at 24.

19. Mrs. Shepard believes the Receiver should not be allowed under any circumstances to take her home away from her and displace four generations of her family. Diana Shepard Decl. at 25.

ARGUMENT

I. This Court lacks Jurisdiction over the Trust and over Diana Shepard to Rule on the Receiver's Motion.

Neither the Trust nor Mrs. Shepard have been served a summons and complaint by any means allowed under Rule 4, Fed. C. Civ. Pro. They were not joined as parties during the course of the proceedings. They were not allowed to file an answer to a Complaint or other response requiring a more definite statement or a dismissal on the pleadings. They were not afforded the opportunity to conduct any discovery on the issues raised by motion before this Court. They were not able to hire any expert witnesses to help in their defense. They were unable to offer a defense to protect their interests. They were not allowed a jury trial or even the option of a bench trial. They were not allowed to present evidence against claims targeting them. They were not allowed to cross-examine any witness who have offered evidence against them. They were not allowed to present an opening or closing argument at a trial. They were not afforded any motion practice, including motions in limine to prevent incompetent witnesses or improper evidence to be excluded.

These parties have been swept into a receivership by a motion. The first question this court must address is whether it has jurisdiction over these parties. We believe it does not.

In the federal court system, the requirement that a court have personal jurisdiction over litigants appearing before it flows from the Due Process Clause. *Omni Capital Int'l v. Rudolf Wolff & Co.,* 484 U.S. 97 at 104. The due process requirement "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." Id. (quoting *Insurance Corp.*

of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, 72 L. Ed. 2d 492, 102 S. Ct. 2099 (1982)).

Before a federal court may exercise personal jurisdiction over a person, the procedural requirement of service of summons must be satisfied. "[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-445 (1946). Thus, before a court may exercise personal jurisdiction over an individual before it, there must be a basis for the person's amenability to service of summons. This means there must be authorization for service of summons on the person. See *Omni Capital*, Supra, at 104.

Service of process in a federal court is governed by Rule 4 of the Federal Rules of Civil Procedure. Rule 4 was not followed in this case. Mrs. Shepard was not brought within the jurisdiction of the court in this case either in her own capacity or in the capacity of Trustee of the Trust.

The due process clause of the Fourteenth Amendment limits the power of a court to render an order against a person; due process requires that the person be given adequate notice of the action and be subject to the personal jurisdiction of the court. *World-Wide Volkswagen v. Woodson*, 444 US 286, 291.

Without personal jurisdiction over the Trust and Mrs. Shepard, the Court cannot grant the relief requested in the motion by the Receiver.

II. The Receiver should not be allowed to pursue claims against Mrs. Shepard and the Trust in this Case.

The Receiver relies upon *SEC v. Cavanagh*, 155 F.3d 129, 136 (2nd Cir. 1998) to argue that "[f]ederal courts may order equitable relief against a person who is not accused of wrongdoing

in a securities enforcement action where that person: (1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds." In that case, the SEC named Tamar Lehmann as a **defendant** because she was a recipient of proceeds from the sale of stock that were deposited in her account. *Id*. The Court found that her account could be frozen, despite the lack of evidence of any participation by her in the SEC violation. *Id*. The difference between Mrs. Lehmann and Mrs. Shepard or the Trust, is that Mrs. Lehmann was a named **defendant** in that action. The Court had jurisdiction to take action against her. Neither the Trust nor Mrs. Shepard is named as a party in this action.

The Receiver further relies upon *SEC v. George*, 426 F.3d 786, 798 (6th Cir. 2005) where the court upheld a disgorgement order directing a gift recipient to return assets purchased with money derived from defendant's fraudulent scheme. Again, the innocent party against whom the SEC sought disgorgement, was joined in the case and named as a **defendant** in the action. *Id*. The disgorgement order was entered against party **defendants**. *Id*. Indeed, in each of the cases the Receiver relies upon for this proposition, the court enforced the requested relief against a **named party**. The Receiver has gone to the trouble of obtaining leave of the Court to pursue a claim against the Trust and against Mrs. Shepard in a separate proceeding – not in this action. As such, this motion must be denied and the Receiver should pursue his claims against the Trust and against Mrs. Shepard in the proper forum, not in his motion here.

The Receiver summarily states that the Receivership Order (ECF 491) and the Affiliates Order (ECF 636) grants him the authority "to investigate, take possession or bring legal action to collect, recover, receive, and/or take possession of <u>all Receivership property</u>, including real property in which Receivership Entities have a beneficial interest <u>even if titled in the name of another, such as a spouse.</u>" (emphasis added). This is partially correct, but imputes too much. It

does not give him the authority to take possession of property **owned by another**. All property (both real and personal) that the Receiver has identified and is seeking to recover is not Receivership Property titled in the Trust, but legally belongs to the Trust. It has a superior claim to ownership and title to the property. It is not Receivership Property held in name only.

The Trust was properly formed in 1998 to hold property--many years before the claims in the RaPower case were asserted. The Trust claims ownership over the identified property, Greg Shepard has no claim to ownership over any Trust property, including the home. As such, at a minimum, a genuine issue of material fact precludes summary judgment on this point. The Court cannot weigh the evidence and make a ruling on this issue under Rule 56.

The grounds authorized for recovering what the Receiver believes is receivership property is provided and ordered under ECF 628. That ruling grants the Receiver the right (and duty) to bring a "legal action" to recover receivership property which the Receiver claims is in the possession of another. A separate legal proceeding is the appropriate avenue to litigate his claims.

Mrs. Shepard is neither a Receivership Defendant nor a Receivership Entity. Neither the Receivership Order nor the Affiliates Order grants the Receiver any authority over her and her assets. Those orders may authorize the Receiver to bring legal action against the Trust and Mrs. Shepard, but they do not grant him authority over her or her possessions. Simply noting that Greg Shepard is obligated on the mortgage loan, which is hearsay, does not make the resulting property a Receivership Asset. Given the assertion of ownership and title by the Trust, the motion should be denied.

Taking this argument, a step further, the Receiver claims its authority is based on pursuing Greg Shepard's assets or interests. Greg Shepard in not a grantor or settlor of the Trust. He has no powers in the Trust. He cannot amend the Trust. He cannot force a distribution of the home

from the Trust. He has no beneficial interest in the Trust to which the Receiver can attach his claims. He is a debtor on the property only. He has lent his credit and credit worthiness to qualify for a loan that is secured by the property. That is not an interest in property that gives the Receiver the right to sell the property and claim ½ interest in the equity.

II. The Motion Fails for Lack of Proof as all of the Receiver's Exhibits are Inadmissible Hearsay and are not Properly Before the Court.

The Federal Rules of Civil Procedure allow a court to grant summary judgment only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) and (c). Furthermore, under Rule 56, facts must be supported by citation to materials in the record and the court "[i]n applying this standard, we examine the factual record and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003 (10th Cir. 2002).

Rule 56 expressly requires that the evidence used to support a motion for summary judgment must be materials from the record. See Fed.R.Civ.P. 56(c)(1)(A). The Receiver does not rely on evidence to support this motion from the record of this case. Rather, the Receiver relies on unsupported documents allegedly acquired as part of the Receiver's investigation.

While the Receiver may have acquired these documents, they are not authenticated in any fashion, not by the author or by the custodian of records of any institution they were obtained from, and not even by the Receiver who claims to have obtained them from his investigation.

"'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). The United States Court of Appeals for the Tenth Circuit has stated that courts cannot consider hearsay in deciding a motion for summary

judgment. See *Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1541 (10th Cir. 1995) ("It is well settled in this circuit that we can consider only admissible evidence in reviewing an order granting summary judgment. Hearsay testimony cannot be considered because [a] third party's description of [a witness'] supposed testimony is not suitable grist for the summary judgment mill." (internal quotations and citations omitted)).

Pursuant to Fed. R. Evid. 803(6), business records are admissible despite their hearsay nature if the records' custodian, or another qualified witness, testifies the records (1) were prepared in the normal course of business; (2) were made at or near the time of the events recorded; (3) were based on the personal knowledge of the entrant or of a person who had a business duty to transmit the information to the entrant; and (4) are not otherwise untrustworthy. *United States v. Ary*, 518 F.3d 775, 786 (10th Cir. 2008).

The Receiver has not authenticated nor provided any testimony from any witness to provide the necessary foundation for any of the exhibits used as evidence in support of the factual statements made in this motion. All exhibits he relies upon are hearsay. This Court cannot consider hearsay to decide a motion for summary judgment. See *Gross*, 53 F.3d at 1541. Having failed to support by affidavit or admissible testimony any of the factual statements made by the Receiver to support the motion, summary judgment must be denied.

III. There Are Factual Disputes Preventing Summary Judgment.

The Statement of Additional Material Facts and the accompanying Declaration from Mrs. Shepard demonstrate material facts are in dispute and therefore summary judgment cannot be granted. Fed. R. Civ. P. 56(a). In particular, Mrs. Shepard states that any conveyance of the Property from Greg Shepard to her as part of the Trust formation was done with full and adequate consideration. Diana Shepard Decl. at ¶ 6. Further, she disputes that funds received from RaPower

were used to satisfy the mortgage or obligations relating to the Property. Rather, the funds to pay the mortgage and household expenses came from Bigger, Faster, Stronger, from the Shepards' Social Security income and from Mr. Shepard's teaching. See Declaration of Mrs. Shepard.

Mrs. Shepard has testified that the establishment of the Trust in 1998 was done for estate planning purposes and not to avoid creditors and certainly not to avoid the claims asserted in this action. Id. at ¶ 7. Additionally, there is a genuine issue of material fact whether Mr. Shepard has a beneficial interest of any kind in the Trust or in the home. As such, the motion should be denied.

CONCLUSION

Even if this Court ignores the lack of jurisdiction over the Trust and over Mrs. Shepard, and considers the hearsay the Receiver has supplied as support for this motion, there exists genuine issues of material fact as to whether or not there is any interest in the Property attributable to Greg Shepard, what is the value of that interest and what claims or defenses the Trust may have over calculation of an interest in Mr. Shepard.

Given these and other genuine issues of material fact, this Court cannot grant summary judgment.

DATED this 18th day of November, 2019.

NELSON SNUFFER DAHLE & POULSEN

/s/ Steven R. Paul
Denver C. Snuffer, Jr.
Daniel B. Garriott
Steven R. Paul

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed using the court's CM/ECF filing system and that system sent notice of filing to all counsel and parties of record.

In addition, the foregoing was mailed or emailed as indicated to the following who are not registered with CM/ECF.

Greg Shepard greg@rapower3.com

/s/ Steven R. Paul
Attorneys for Glenda Johnson, LaGrand Johnson and Randale Johnson