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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

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UNITED STATES OF AMERICA,

Plaintiff,

v.

RAPOWER-3, LLC; INTERNATIONAL  
AUTOMATED SYSTEMS, INC.; LTBI,  
LLC; R. GREGORY SHEPARD; NELDON  
JOHNSON; and ROGER FREEBORN,

Defendants.

**ORDER RE: RECEIVER’S MOTION  
FOR ORDER FINDING A  
BENEFICIAL INTEREST IN  
CERTAIN REAL PROPERTY WAS  
AN ASSET OF R. GREGORY  
SHEPARD AND FOR REMEDIES**

Civil No. 2:15-cv-00828-DN

District Judge David Nuffer

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R. Wayne Klein, the court-appointed receiver (“Receiver”), filed Receiver’s Motion for Order Finding a Beneficial Interest in Certain Real Property Was an Asset of R. Gregory Shepard and for Remedies (“Motion”).<sup>1</sup> The Receiver seeks to recover the interest of R. Gregory Shepard (“Greg Shepard”) in certain real property located at 858 W. Clover Meadow Dr., Murray, UT 84123 (“Property”),<sup>2</sup> and titled in the name of the Diana C. Shepard Revocable Trust (“Trust”). As explained below, the Motion is GRANTED.

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<sup>1</sup> [Docket no. 780](#), filed October 4, 2019; 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 (“Opposition”), [docket no. 797](#), filed November 18, 2019; Reply in Support of Motion for Order Finding a Beneficial Interest in Certain Real Property Was an Asset of R. Gregory Shepard and for Remedies (“Reply”), [docket no. 822](#), filed December 20, 2019.

<sup>2</sup> Motion at 2. The legal description of the Property is found in Paragraph 20(ee) of the Corrected Receivership Order (“CRO”), [docket no. 491](#), filed November 1, 2018.

## TABLE OF CONTENTS

I. STANDARD OF REVIEW.....	2
II. BACKGROUND.....	3
III. DISCUSSION.....	6
A.    The Receiver’s Use of Summary Proceedings Is Proper.....	6
1.    The Receiver has Authority .....	7
2.    Summary Proceedings are Appropriate .....	9
B.    The Undisputed Facts Set forth in the Motion are Admissible.....	10
C.    Greg Shepard Had a Beneficial Interest in the Property.....	13
1.    The Property Is Marital Property. ....	13
2.    Greg Shepard Is a Settlor of the Trust As to His Interest in the Property and the Trust Does Not Shield the Property from Creditors.....	14
D.    A Court-Ordered Sale Is Appropriate.....	16
IV. ORDER.....	17

### I. STANDARD OF REVIEW

The Receiver brings his Motion under Rule 56 of the Federal Rules of Civil Procedure.<sup>3</sup>

A “court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”<sup>4</sup> Facts must be supported by citation to materials in the record and the court must “examine the factual record

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<sup>3</sup> Motion at 9.

<sup>4</sup> [Fed. R. Civ. P. 56\(a\)](#).

and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment.”<sup>5</sup>

## II. BACKGROUND<sup>6</sup>

1. On December 2, 1986, Greg Shepard and Diana Shepard purchased the Property.<sup>7</sup>
  2. Greg Shepard and Diana Shepard were married prior to that date.<sup>8</sup>
  3. On September 15, 1998, Greg Shepard executed a quitclaim deed conveying his interest in the Property to Diana Shepard.<sup>9</sup> No consideration was provided for this transfer.<sup>10</sup>
- This was a “nominal transfer” for estate planning purposes.<sup>11</sup>

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<sup>5</sup> [\*Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.\*, 912 F.2d 1238, 1241 \(10th Cir.1990\).](#)

<sup>6</sup> For convenience, the following facts are drawn largely verbatim from the first 11 of the Receiver’s statement of Undisputed Material Facts. Motion at 4-7. Greg Shepard presents his own Statement of Additional Facts, but none of these additional facts controvert the Receiver’s first 11 fact paragraphs. As explained in Section III.C, *infra*, the Receiver’s first 11 fact paragraphs show that the Property is marital property (i.e., that it was acquired during the Shepards’ marriage) and that Greg Shepard contributed his interest therein to the Trust and is therefore a settlor. To the extent the evidence presented in the Opposition creates a dispute of fact, that dispute is not material to any issue the court must reach.

<sup>7</sup> Motion, Exhibit 2, ¶ 3.a.

<sup>8</sup> Motion, Exhibit 1 at 1.

<sup>9</sup> Motion, Exhibit 3.

<sup>10</sup> Motion, Exhibit 2, ¶ 3.b. Greg Shepard maintains that “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.” Opposition at 12 (citing Diana Shepard Decl. at ¶ 6). The cited paragraph from Diana Shepard’s declaration states as follows: “When the Trust was formed and funded in 1998, I conveyed 100% ownership of the home into the Trust. Prior to that, Greg Shepard has [sic] given me a quit-claim deed to convey any interest he might have claimed on his own. Full and adequate consideration for the 1998 quit-claim deed was given by Mr. Shepard [sic] to me.” Declaration of Diana C. Shepard, ¶ 6, docket no. 797-1, filed November 18, 2019. Diana Shepard’s statement in her November 18, 2019 declaration is confusing because, on its face, it references consideration that Greg Shepard gave to her for the 1998 quit-claim deed he had given her. Greg Shepard could not give legal consideration for a deed that he was delivering. On the other hand, assuming Diana Shepard intended to say that *she* gave “full and adequate consideration for the 1998 quit-claim deed,” the statement amounts to a mere legal conclusion and is disregarded for that reason.

<sup>11</sup> Motion, Exhibit 2, ¶ 3.b.

4. That same day, Diana Shepard executed a quitclaim deed conveying her interest in the Property to the Diana C. Shepard Revocable Trust.<sup>12</sup> No consideration was provided for this transfer.<sup>13</sup> This was a “nominal transfer” for estate planning purposes.<sup>14</sup>

5. As the title indicates, the Diana C. Shepard Revocable Trust is a revocable trust.<sup>15</sup>

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”).<sup>16</sup> Greg Shepard is named as a Trustor in the JPMorgan Deed of Trust, along with Diana Shepard and the Trust.<sup>17</sup> Greg Shepard executed the JPMorgan Deed of Trust in his individual capacity.<sup>18</sup>

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.<sup>19</sup> \$10.00 was paid in consideration for the transfer.<sup>20</sup>

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 Rate Deed of Trust”).<sup>21</sup> Greg Shepard and Diana Shepard are listed as the borrowers in the

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<sup>12</sup> Motion, Exhibit 4.

<sup>13</sup> Motion, Exhibit 2, ¶ 3.c.

<sup>14</sup> *Id.*

<sup>15</sup> Motion, Exhibit 5 (“Trust Agreement”).

<sup>16</sup> Motion, Exhibit 6.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Motion, Exhibit 7.

<sup>20</sup> Motion, Exhibit 2, ¶ 3.e.

<sup>21</sup> Motion, Exhibit 8.

Guaranteed Rate Deed of Trust.<sup>22</sup> Both Greg Shepard and Diana Shepard executed the Guaranteed Rate Deed of Trust in their personal capacities.<sup>23</sup>

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.<sup>24</sup> \$10.00 was paid in consideration for the transfer.<sup>25</sup>

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 transfer from each of us to the trust.<sup>26</sup>

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.”<sup>27</sup>

#### Facts Relevant to Fraudulent Transfer Issue

Paragraphs 12-16 are not relevant to any material issue, because this decision does not rest on the assertion of a fraudulent transfer. They are stated here only to complete the record.

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Motion, Exhibit 9.

<sup>25</sup> Motion, Exhibit 2, ¶ 3.e.

<sup>26</sup> Motion, Exhibit 1 at 2.

<sup>27</sup> *Id.* at 1.

12. On October 3, 2019, a leading real estate website valued the Property at \$663,519.00.<sup>28</sup>

13. As of May 13, 2019, Greg Shepard owed over \$190,000.00 in credit card debt.<sup>29</sup>

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.<sup>30</sup>

15. Since 2017, Greg Shepard has used credit card funds to pay for almost everything.<sup>31</sup>

16. In March 2017, before he transferred his interest in the Property to the Trust, Greg Shepard had about 10 outstanding credit card balances.<sup>32</sup>

### III. DISCUSSION

#### A. The Receiver's Use of Summary Proceedings Is Proper.

The parties first dispute whether the Receiver may use summary proceedings to recover Mr. Shepard's interest in property titled in the name of his wife's trust, The Diana C. Shepard

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<sup>28</sup> A much more recent search for the Property on Zillow puts the value at \$678,345.00. [https://www.zillow.com/homedetails/858-W-Clover-Meadow-Dr-Murray-UT-84123/12823021\\_zpid/](https://www.zillow.com/homedetails/858-W-Clover-Meadow-Dr-Murray-UT-84123/12823021_zpid/) (last visited November 21, 2020).

<sup>29</sup> Third Supplemental Declaration of R. Gregory Shepard at 2, [docket no. 656](#), filed May 16, 2019.

<sup>30</sup> Motion, Exhibit 10. In his declaration opposing the Motion, Greg Shepard states that “[b]etween 2010 and 2016 Shepard Global lost approximately \$100,000 in investments in foreign exchange trading and a bank fraud scheme.” Declaration of R. Gregory Shepard in Opposition to Receiver's Motion, ¶ 7, [docket no. 797-2](#), filed November 18, 2019. This statement does not necessarily conflict with Greg Shepard's prior statement to the Receiver in Exhibit 10 to the Motion characterizing the loss as personal (“[B]etween 2010 and 2016 . . . I lost about \$100,000 investing in foreign exchange trading and a mining claim option . . .”).

<sup>31</sup> Motion, Exhibit 10. In his declaration opposing the Motion, Greg Shepard states that “[o]nly since the order freezing my assets, after trial, have I needed to use credit cards to pay expenses.” This appears to contradict his prior statement to the Receiver in Exhibit 10 to the Motion (“Since 2017, I have used the credit card balance transfers to pay for almost everything.”), and he fails to explain the inconsistency.

<sup>32</sup> *Id.*

Revocable Trust (“Trust”). Mr. Shepard argues that (1) the CRO does not give the Receiver the authority to file the Motion because it seeks property that “legally belongs to the Trust,”<sup>33</sup> and (2) summary proceedings cannot be brought against individuals that are not served with process under [Fed. R. Civ. P. 4](#).<sup>34</sup> Both arguments are incorrect.

### 1. The Receiver has Authority

Mr. Shepard’s assertion that the Receiver does not have the authority to seek recovery of property titled in the Trust’s name is contrary to the CRO and the controlling case law, which grant the Receiver the authority to bring this motion to recover the property, even if the property is titled in the name of a non-party, such as the Trust or Diana Shepard. The CRO grants the Receiver the following powers and duties:

- a. “To use reasonable efforts to determine the nature, location and value of all property interests of each of the Receivership Defendants, including Johnson and Shepard. These property interests include, but are not limited to: monies, accounts, trusts, funds, digital currencies, securities, credits, stocks, bonds, effects, goods, chattels, intangible property (including patents and other intellectual property), real property, lands, premises, leases, claims, rights, ownership interests in domestic or foreign entities, and other assets, together with rents, profits, dividends, receivables, interest, or other income attributable thereto, of whatever kind, *that the Receivership Defendants own, possess, have a beneficial interest in, or control directly or indirectly.*”<sup>35</sup>
- b. “To take custody, control, and possession of all Receivership Property and records relevant thereto from the Receivership Defendants; to sue for and collect, recover, receive, and *take into possession from third parties all Receivership Property and records relevant thereto.*”<sup>36</sup>

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<sup>33</sup> Opposition at 10.

<sup>34</sup> Opposition at 7-8.

<sup>35</sup> CRO ¶ 13.a, [Docket No. 491](#), filed November 1, 2018.

<sup>36</sup> *Id.*, ¶ 13.b.

- c. “To take such action as necessary and appropriate for the preservation of Receivership Property or to prevent the dissipation or concealment of Receivership Property.”<sup>37</sup>
- d. “To bring legal actions based on law or equity in any state, federal, or foreign court as the Receiver deems necessary or appropriate in discharging his duties as Receiver.”<sup>38</sup>
- e. The Receiver is also “authorized to take immediate possession of all real property of the Receivership Defendants, wherever located, including but not limited to all ownership and leasehold interests and fixtures . . . . The Receiver is authorized to take immediate possession of real property in which Receivership Defendants have a record interest, and to file a motion to take possession (a ‘Possession Motion’) of real property in which Receivership Defendants have a beneficial interest *even if titled in the name of another, such as a spouse or an affiliated entity, such as a family limited partnership*.”<sup>39</sup>
- f. “[T]he Receiver is authorized, empowered, and directed to investigate the manner in which the financial and business affairs of the Receivership Defendants were conducted and, after obtaining leave of this Court, to institute such actions and legal proceedings for the benefit, and on behalf, of the receivership estates as the Receiver deems necessary and appropriate. The Receiver may seek, among other legal and equitable relief, the imposition of constructive trusts, disgorgement of profits, *asset turnover*, avoidance of fraudulent transfers, rescission, restitution, collection of debts, and such other relief from this Court as may be necessary to enforce this Order.”<sup>40</sup>

The CRO grants the necessary authority to the Receiver to investigate, take possession or bring legal action to collect, recover, receive and/or take possession of all Receivership property, including real property in which Receivership Defendants like Greg Shepard have a beneficial interest, “*even if titled in the name of another, such as a spouse or an affiliated entity . . . .*”<sup>41</sup>

The CRO defined “Receivership Property” as including property “that the Receivership

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<sup>37</sup> *Id.*, ¶ 13.g.

<sup>38</sup> *Id.*, ¶ 13.l.

<sup>39</sup> *Id.*, ¶ 20 (emphasis added).

<sup>40</sup> *Id.*, ¶ 60 (emphasis added).

<sup>41</sup> *Id.*, ¶ 20.



Defendants own, possess, have a beneficial interest in, or control directly or indirectly.”<sup>42</sup> The CRO specifically included properties that were in the possession of third parties.<sup>43</sup> Thus, the Receiver has the authority and duty to bring this action to recover Receivership Property, even if it is titled in the name of the Trust.

## 2. Summary Proceedings are Appropriate

It is well established that summary proceedings are appropriate as part of the district court’s “broad powers and wide discretion to determine relief in an equity receivership.”<sup>44</sup> “Federal district courts have wide discretion in granting relief in an equity receivership and may use summary proceedings in fashioning such relief.”<sup>45</sup> Indeed, courts are encouraged to use summary proceedings because they decrease litigation costs and prevent further dissipation of receivership assets.<sup>46</sup>

The use of summary proceedings in federal receivership cases also extends to their use against nonparties. “For the claims of nonparties to property claimed by receivers, summary proceedings satisfy due process so long as there is adequate notice and opportunity to be

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<sup>42</sup> *Id.*, ¶ 13(a).

<sup>43</sup> *Id.*, ¶ 13(b).

<sup>44</sup> *Broadbent v. Advantage Software, Inc.*, 415 F. App’x 73, 78 (10th Cir. 2011) (quoting *SEC v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010), and citing, among other cases, *SEC v. Elliott*, 953 F.2d 1560, 1569-70 (11th Cir. 1992); *see also FDIC v. Bernstein*, 786 F. Supp. 170, 177 (E.D.N.Y.1992) (“In keeping with this broad discretion, the use of summary proceedings in equity receiverships, as opposed to plenary proceedings under the Federal Rules of Civil Procedure, is within the jurisdictional authority of a district court.”) (citations, quotation marks, and brackets omitted); *SEC v. Basic Energy & Affiliated Res.*, 273 F.3d 657, 668 (6th Cir.2001) (recognizing propriety of summary proceedings) (citing *Elliott*, 953 F.2d 1560); *SEC v. Sharp Capital, Inc.*, 315 F.3d 541, 545 (5th Cir. 2003) (same).

<sup>45</sup> *United States v. Fairway Capital Corp.*, 433 F.Supp.2d 226, 241 (D. R.I. 2006) (citations omitted).

<sup>46</sup> *Elliott*, 953 F.2d at 1566 (citations omitted).

heard.”<sup>47</sup> In this instance, Mr. Shepard does not present any authority calling into question this rule. And it is apparent that Diana Shepard and the Trust – both of which are identified in the Opposition as specially appearing by the same counsel who represents Greg Shepard<sup>48</sup> – were given adequate notice and opportunity to be heard in this proceeding.

**B. The Undisputed Facts Set forth in the Motion are Admissible.**

The Receiver’s Motion was accompanied by an *Appendix of Evidence in Support of Motion for Order Finding a Beneficial Interest in Certain Real Property Was an Asset of R. Gregory Shepard and for Remedies* (“Appendix”).<sup>49</sup> The Appendix identified the documents filed in support of the Motion and their sources. These documents were prior statements of Greg Shepard and Diana Shepard (obtained from the identified declarant),<sup>50</sup> the Trust Agreement for the Diana C. Shepard Revocable Trust (obtained from Greg and Diana Shepard),<sup>51</sup> and property transaction records (obtained from the Salt Lake County Recorder).<sup>52</sup>

Greg Shepard opposed the Turnover Motion.<sup>53</sup> In his opposition, he objected to almost every one of the Receiver’s statements of undisputed facts on the basis of hearsay and lack of

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<sup>47</sup> [CFTC v. Topworth Int'l, Ltd.](#), 205 F.3d 1107, 1113 (9th Cir. 1999), followed in [FTC v. Assail, Inc.](#), 410 F.3d 256, 267 (5th Cir. 2005). See also [F.T.C. v. Johnson](#), 567 F. App'x 512, 515 (9th Cir. 2014); [Glob. NAPS, Inc. v. Verizon New England, Inc.](#), No. CV 02-12489-RWZ, 2015 WL 12781223, at \*2 (D. Mass. Mar. 10, 2015); [CFTC v. Hudgins](#), 620 F. Supp. 2d 790, 795 (E.D. Tex. 2009), *aff'd sub nom. Crawford v. Silette*, 608 F.3d 275 (5th Cir. 2010); [SEC v. Aquacell Batteries, Inc.](#), No. 607CV-608-ORL-22DAB, 2008 WL 2915064, \*4 (M.D. Fla. July 24, 2008); [SEC v. Merrill Scott & Assocs., Ltd.](#), No. 2:02 CV 39, 2006 WL 3813300, at \*4 (D. Utah Dec. 26, 2006); [SEC v. Credit Bancorp, Ltd.](#), 124 F. Supp. 2d 824, 828 (S.D.N.Y. 2000).

<sup>48</sup> Opposition at 1.

<sup>49</sup> [Docket no. 781](#), filed October 4, 2019.

<sup>50</sup> *Id.* (Exhibits 1 and 2 are prior statements of Diana Shepard, who is the identified source of those documents, and Exhibit 10 is a prior statement of Greg Shepard, who is the identified source of Exhibit 10).

<sup>51</sup> *Id.* (Exhibit 5 is the Trust Agreement, and Greg and Diana Shepard are the identified source of this exhibit).

<sup>52</sup> *Id.* (Exhibits 3, 4, 6, 7, 8, and 9 are deeds obtained from the Salt Lake County Recorder).

<sup>53</sup> Opposition at 1.

foundation.<sup>54</sup> Greg Shepard’s opposition did not dispute any of the substantive facts asserted in fact paragraphs 1-11, or deny the accuracy or authenticity of any of the documents cited by the Receiver in support of those fact paragraphs.<sup>55</sup> The Opposition was supported by declarations of Greg and Diana Shepard attempting to dispute a few of the facts relied on by the Receiver, but as to fact paragraphs 1-11, they do so only as to a single fact and only in conclusory fashion.<sup>56</sup> And fact paragraphs 12-16 only concern the voidable transfer issue, which is superfluous.

Greg Shepard’s objections based on hearsay and lack of authentication fail to comport with Federal Rule of Evidence 103(a)(1)(B), which requires that an objection to evidence must “state[ ] the specific ground,”<sup>57</sup> or “in other words, explain why the proponent of the evidence will have no way of authenticating it at trial (*e.g.*, lack of a competent witness to testify about the document’s creation).”<sup>58</sup> The only appropriate basis on which to raise an evidentiary objection at the summary judgment phase is “that a fact *cannot* be presented in a form that *would be admissible* in evidence.”<sup>59</sup> Greg Shepard’s objections fail to meet the requirements of [Federal Rule of Civil Procedure 52\(c\)\(2\)](#) and Federal Rule of Evidence 103(a)(1)(B).

Even if Greg Shepard had properly objected to the evidence, the Receiver has sufficiently established its admissibility for purposes of summary judgment. “At the summary judgment stage, evidence need not be submitted in a form that would be admissible at trial, but the content

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<sup>54</sup> *Id.* at 3-5, 11-12.

<sup>55</sup> *Id.*

<sup>56</sup> See footnote 10, *supra*.

<sup>57</sup> [Fed. R. Evid. 103\(a\)\(1\)\(B\)](#).

<sup>58</sup> [SEC v. Mahabub](#), No. 15-CV-2118-WJM-MLC, 2017 WL 6555039, at \*2 (D. Colo. Dec. 22, 2017).

<sup>59</sup> [Fed. R. Civ. P. 56\(c\)\(2\)](#); [Mahabub](#), 2017 WL 6555039, at \*2\_(emphasis in original); see also [Winskunas v. Birnbaum](#), 23 F.3d 1264, 1267–68 (7th Cir.1994) (evidence need not be admissible in form—transcripts inadmissible at trial nevertheless may be considered for purposes of summary judgment—but must be so in content).

or substance of the evidence must be admissible.”<sup>60</sup> “The requirement is that the party submitting the evidence show that it will be possible to put the information, the substance or content of the evidence, into an admissible form.”<sup>61</sup>

Authentication does not require that every document be supported by an affidavit.<sup>62</sup> Rather, “[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”<sup>63</sup> The Appendix indicates that Diana or Greg Shepard, or both, were the sources for four of the Receiver’s exhibits, including three prior statements by the Shepards (Exhibits 1, 2, and 10)<sup>64</sup> and the Trust Agreement for the Diana C. Shepard Revocable Trust (Exhibit 5).<sup>65</sup> The Shepards have not denied being the source of these documents or challenged their authenticity, so they are sufficiently authenticated for purposes of the Motion.<sup>66</sup>

The hearsay objections to these exhibits are likewise without merit. The prior statements of the Shepards offered against the Shepards are nonhearsay under [Fed. R. Evid. 801\(d\)\(1\)-\(2\)](#). The Trust Agreement is a document purporting to affect an interest in property and therefore

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<sup>60</sup> [Tesone v. Empire Mktg. Strategies](#), 942 F.3d 979, 999 (10th Cir. 2019) (citations and quotation marks omitted).

<sup>61</sup> *Id.* at 999 n.15 (citations and quotation marks omitted).

<sup>62</sup> [Law Co. v. Mohawk Const. & Supply Co.](#), 577 F.3d 1164, 1171 (10th Cir. 2009) (trial court committed error of law and therefore abused its discretion in disregarding documents that were not supported by authenticating affidavit “[b]ecause no authenticating affidavit is required”).

<sup>63</sup> [Fed. R. Evid. 901\(a\)](#).

<sup>64</sup> Appendix (identifying Diana Shepard as the source of Exhibits 1 and 2, which respectively appear to be a letter written by Diana Shepard and a declaration signed by Diana Shepard, and identifying Greg Shepard as the source of Exhibit 10, which appears to be an email written by Greg Shepard).

<sup>65</sup> *Id.* (identifying Greg and Diana Shepard as the source of Exhibit 5, the Trust Agreement).

<sup>66</sup> *Cf. Law Co.*, 577 F.3d at 1170 (“[D]ocuments produced during discovery that are on the letterhead of the opposing, producing party are authentic per se for purposes of Federal Rule of Evidence 901.”); [Denison v. Swaco Geolograph Co.](#), 941 F.2d 1416, 1423 (10th Cir. 1991) (same); [Snyder v. Whittaker Corp.](#), 839 F.2d 1085, 1089 (5th Cir. 1988) (documents sufficiently authenticated where party challenging admissibility produced them during discovery and authorship was not disputed).

falls within an exception to the rule against hearsay under [Fed. R. Evid. 803\(15\)](#). Thus, the Receiver's Exhibits 1, 2, 5 and 10 are all admissible.

The Receiver's Exhibits 3, 4, 6, 7, 8, and 9 are also admissible. The Appendix indicates that the Salt Lake County Recorder was the source of these exhibits.<sup>67</sup> There can be little doubt that certified copies of these documents (all of which bear notarial acknowledgments) would be presented at trial and would therefore be self-authenticating pursuant to [Fed. R. Evid. 902\(4\)](#) and (8). These documents affect an interest in property and are kept in a public office, the recording of which is authorized by Utah statute,<sup>68</sup> so they are excepted from the rule against hearsay under [Fed. R. Evid. 803\(14\)](#).

**C. Greg Shepard Had a Beneficial Interest in the Property.**

The Receiver asks for a determination that Greg Shepard had at least a one-half interest in the Property because (1) the Property is marital property of Greg and Diana Shepard, and (2) Greg Shepard is a settlor of the Trust. Both arguments are correct.

**1. The Property Is Marital Property.**

Under Utah law, “[m]arital property is ordinarily all property acquired during marriage and it encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived.”<sup>69</sup> It is “presume[d] that each party is entitled to . . . one-half of the marital property, regardless of which spouse’s name appears on the title to the marital

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<sup>67</sup> Appendix (identifying the Salt Lake County recorder as the source of Exhibits 3, 4, 6, 7, 8, and 9).

<sup>68</sup> [Utah Code Ann. § 57-1-1](#), *et seq.*

<sup>69</sup> *Henshaw v. Henshaw*, 2012 UT App 56, ¶ 16, 271 P.3d 837, 844 (citation and quotation marks omitted).

property.”<sup>70</sup> The Utah Supreme Court has explained that “[t]he essential criterion is whether a right to the benefit or asset has accrued in whole or in part during the marriage.”<sup>71</sup>

The Property is marital property because it was acquired during the marriage of Greg and Diana Shepard. As previously set forth, the Shepards purchased the Property on December 2, 1986, and were married at that time.<sup>72</sup> Since that time, Greg Shepard has demonstrated individual control over the Property, and derived individual benefit therefrom, by using it to secure promissory notes in his individual capacity as borrower or trustor.<sup>73</sup> Further, it is undisputed that the Shepards’ May 5, 1998 conveyance of the Property to the Trust “was a nominal transfer for estate planning purposes.”<sup>74</sup> Additionally, Diana Shepard has expressly characterized the Property as “a marital asset.”<sup>75</sup> The Shepards have presented no evidence or argument casting any doubt on the correctness of this characterization. That being the case, Greg Shepard had at least a one-half interest in the Property at the time of the Receiver’s appointment.

## **2. Greg Shepard Is a Settlor of the Trust As to His Interest in the Property and the Trust Does Not Shield the Property from Creditors.**

Utah law defines a “[s]ettlor” of a trust as “a person . . . who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person’s contribution . . . .”<sup>76</sup>

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<sup>70</sup> *Allen v. Ciokevicz*, 2012 UT App 162, ¶ 46, 280 P.3d 425, 437 (citations omitted).

<sup>71</sup> *Dahl v. Dahl*, 2015 UT 79, ¶ 26, 459 P.3d 276, 289 (quoting *Woodward v. Woodward*, 656 P.2d 431, 432–33 (Utah 1982)).

<sup>72</sup> Section II, *supra*, ¶¶ 1-2.

<sup>73</sup> *Id.* ¶¶ 6, 8.

<sup>74</sup> *Id.* ¶¶ 3, 4.

<sup>75</sup> *Id.* ¶ 11.

<sup>76</sup> Utah Code Ann. § 75-7-103(1)(k); *Dahl*, 2015 UT 79, ¶ 35.

Here, Greg Shepard directly contributed his interest in the Property to the Trust in the warranty deed recorded on March 24, 2017.<sup>77</sup> (He had previously made the same contribution indirectly through “a nominal transfer” to Diana Shepard in September 1998 “for estate planning purposes.”)<sup>78</sup> Based on the contribution of his interest to the Trust, Greg Shepard is a settlor of the Trust.

By its express terms and Utah statutory law, the Trust is revocable. A revocable trust is one that may be revoked or amended by the settlor.<sup>79</sup> Article III of the Trust Agreement provides, in pertinent part, that “Grantor<sup>[80]</sup> retains the right to amend or revoke this Agreement and the Trust, in whole or in part, at any time, by an instrument in writing dated and signed by Grantor or Grantor’s authorized representative and delivered during Grantor’s lifetime to Trustee.”<sup>81</sup> Further, the Utah Uniform Trust Code provides as follows:

If a revocable trust is created or funded by more than one settlor:

(a) to the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses; and

(b) to the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution.<sup>82</sup>

“By its plain language, section 75-7-605 allows [Greg Shepard], as a settlor of the Trust, to revoke the Trust as it relates to [his] contributed property—either marital or separate.”<sup>83</sup>

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<sup>77</sup> Section II, *supra*, ¶ 9.

<sup>78</sup> *Id.* ¶ 3.

<sup>79</sup> *Dahl, 2015 UT 79*, ¶¶ 29-32.

<sup>80</sup> A trust “settlor” is also sometimes referred to as a “grantor,” Restatement (Third) of Trusts § 3 cmt. a (2003), which is the term used in the Trust Agreement here.

<sup>81</sup> Motion, Exhibit 5, § 3.1.

<sup>82</sup> *Utah Code Ann. § 75-7-605(2)*.

<sup>83</sup> *Dahl, 2015 UT 79*, ¶ 38.

In his opposition memorandum, Greg Shepard denies that he is “a grantor or settlor of the Trust,” saying that he has “no powers” therein and is unable to “amend the Trust” or to “force a distribution of the home from the Trust.”<sup>84</sup> He also denies having any “beneficial interest in the Trust to which the Receiver can attach [the Receiver’s] claims” and characterizes himself as “a debtor on the property only.”<sup>85</sup> In making these arguments, however, Greg Shepard does not address the Utah statutory provisions or case law cited above, or show they do not apply. His conclusory arguments are therefore unpersuasive.

Because Greg Shepard may revoke the Trust as to his interest in the Property, that same interest is subject to the claims of Greg Shepard’s creditors. “During the lifetime of the settlor, the property of a revocable trust is subject to the claims of the settlor's creditors.”<sup>86</sup> As a result, as argued by the Receiver, “Greg Shepard’s transfer of his interest in the Property to the Trust does not prevent the Receiver from taking control of Shepard’s interest in the Property.”<sup>87</sup> Based on the above conclusions, it is unnecessary to address the parties’ arguments as to whether any transfer to the Trust is voidable as fraudulent.

#### **D. A Court-Ordered Sale Is Appropriate.**

A creditor in Utah who has obtained a levy on property owned by an individual [debtor] and another in joint tenancy or tenancy in common “may have the property partitioned . . . .”<sup>88</sup> However, “[i]f the court determines that the property or any part of it cannot be partitioned

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<sup>84</sup> Opposition at 10-11.

<sup>85</sup> *Id.* at 11.

<sup>86</sup> [Utah Code Ann. § 75-7-505\(1\)](#).

<sup>87</sup> Motion at 15.

<sup>88</sup> [Utah Code Ann. § 78B-5-512](#).



without great prejudice to the owners, the court may order the property sold.”<sup>89</sup> Here, the Receiver asserts, and Greg Shepard does not deny, that partitioning the Property would cause “great prejudice to the Receivership Estate and to Diana Shepard because the Property is a single family home in a subdivision such that dividing the Property is not practical.”<sup>90</sup> Additionally, the Receiver notes the prejudice that would result to the Receivership Estate if the Property were “partitioned instead of sold with the profits divided between the owners,” as contemplated in the CRO.<sup>91</sup> Under the circumstances highlighted by the Receiver, the Property should be sold.

#### **IV. ORDER**

For the foregoing reasons, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Motion<sup>92</sup> is GRANTED. IT IS FURTHER ORDERED that

(1) a one-half interest in the Property belonged to Greg Shepard at the time of the Receiver’s appointment;

(2) Diana Shepard must, within 10 days of the filing of this Order, execute a warranty deed transferring ownership of one-half interest in the Property to the Receiver; and

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<sup>89</sup> Utah Code Ann. § 78B-6-1212(1).

<sup>90</sup> Motion at 17.

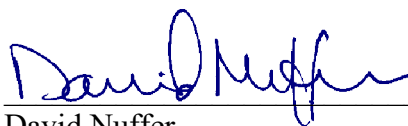
<sup>91</sup> *Id.* (citing CRO, ¶¶ 88-91; Utah Code Ann. § 78B-6-1220 (requiring that recorded liens be satisfied before remaining proceeds are divided among property owners according to respective shares)).

<sup>92</sup> [Docket no. 780](#), filed October 4, 2019.

(3) the Receiver must sell the Property and use the proceeds of such sale to satisfy any outstanding mortgages, with the excess proceeds to be divided between the Receiver and Diana Shepard in proportion to their interests.

Dated December 7, 2020.

BY THE COURT:

A handwritten signature in blue ink, appearing to read "David Nuffer", is written over a horizontal line.

David Nuffer  
United States District Judge