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**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAPOWER-3, LLC; INTERNATIONAL
AUTOMATED SYSTEMS, INC.; LTB1,
LLC; R. GREGORY SHEPARD; NELDON
JOHNSON; and ROGER FREEBORN,

Defendants.

**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**

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

District Judge David Nuffer

R. Wayne Klein, the Court-Appointed Receiver¹ hereby submits this Reply in Support of Motion for Order Finding a Beneficial Interest in Certain Real Property was an Asset of Greg Shepard and for Remedies.²

¹ Defined terms have the meaning given in the Motion.

² See Motion, [Docket No. 780](#), filed October 4, 2019.

INTRODUCTION

Greg Shepard does not dispute the material facts set forth in the Motion. He does not show that the materials cited do not establish the presence or absence of a genuine dispute or claim that the facts in the Motion are disputed or immaterial as required under Rule 56(c) and this Court's local rules.³ Therefore, the Court may deem the material facts in the Motion undisputed.⁴

Instead of disputing the facts in the Motion, Greg Shepard asserts that the Receiver's claims should be pursued in plenary proceedings, objects to the material cited in the Motion as hearsay, and submits self-serving declarations in an attempt to create a factual dispute. Each of these attempts to prevent summary judgment as to Greg Shepard's interest in the Property fail. First, it is well within the Court's authority to resolve disputes as to Receivership Property in summary proceedings. Second, the hearsay objections to the cited material in the Motion are improper and should be rejected. And third, nothing in the declarations creates an issue of fact precluding a finding that Greg Shepard's interest in the Property is a Receivership asset. Moreover, the declarations submitted with the opposition are of no probative value because they contain exclusively conclusory, irrelevant, and/or self-serving statements. Accordingly, the Court should grant the Motion and enter an order in favor of the Receiver.

RESPONSE TO STATEMENT OF ADDITIONAL MATERIAL FACTS⁵

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.

³ See Fed. R. Civ. P. 56(c)(1); DUCivR 56-1(c)(3).

⁴ Fed. R. Civ. P. 56(e)(2).

⁵ Pursuant to DUCivR 56-1(3), only those facts that are disputed for purposes of the Motion are set forth herein.

Response: This paragraph is not material to the Motion. It is well-established that summary proceedings may be used to resolve disputes with non-parties as to property claimed by receivers.⁶

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.

Response: This paragraph constitutes an unsubstantiated legal conclusion that carries no probative weight under Rule 56 of the Federal Rules of Civil Procedure. "Unsubstantiated allegations carry no probative weight in summary judgment proceedings. To defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise."⁷ Further, "conclusory and self-serving affidavits are not sufficient" to preclude a finding of summary judgment.⁸ As set out in the Motion, the Property is marital property of Greg and Diana Shepard, and Greg Shepard is a settlor of the Trust as to the Property.

4. The Trust was formed in 1998 "for the benefit of Grantor [Diana C. Shepard] and Grantor's spouse and Grantor's children thereafter."

Response: The Receiver does not dispute that the paragraph accurately quotes the Trust Agreement for the Diana C. Shepard Revocable Trust.⁹ This paragraph, however, is not material. As set out in the Motion, the Property is marital property of Greg and Diana Shepard, and Greg Shepard is a settlor of the Trust as to the Property.

5. At the time of the Trust's formation, the Shepards hardly knew Neldon Johnson

⁶ See Section I, below; see also Motion, [Docket No. 780](#), Section I.

⁷ *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir.2004).

⁸ *Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir. 1991).

⁹ See [Docket No. 780-5](#), at 1.

and were not involved in any business dealings with him whatsoever.

Response: This paragraph is not material to the Motion. At issue is whether the Property is marital property, whether Greg Shepard is a settlor of the Trust as to the Property, and/or whether Greg Shepard's 2017 transfer of his interest in the Property is voidable.¹⁰

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.

Response: This paragraph is not material to the Motion.¹¹

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.

Response: This paragraph is not material to the Motion.¹²

12. The Shepards were not insolvent in 2017, otherwise they would not have qualified for a loan of \$315,000.

Response: This paragraph constitutes an unsubstantiated legal conclusion that carries no probative weight under Rule 56 of the Federal Rules of Civil Procedure. "Unsubstantiated

¹⁰ See Motion, [Docket No. 780](#).

¹¹ See response to paragraph 5, above.

¹² *Id.*

allegations carry no probative weight in summary judgment proceedings. To defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise.”¹³ Further, “conclusory and self-serving affidavits are not sufficient” to preclude a finding of summary judgment.¹⁴ Greg Shepard’s insolvency is evidenced by paragraph 13-16 of the Material Facts section in the Motion.¹⁵

13. The 2017 loan transaction was not done to defraud creditors.

Response: This paragraph constitutes an unsubstantiated legal conclusion that carries no probative weight under Rule 56 of the Federal Rules of Civil Procedure. “Unsubstantiated allegations carry no probative weight in summary judgment proceedings. To defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise.”¹⁶ Further, “conclusory and self-serving affidavits are not sufficient” to preclude a finding of summary judgment.¹⁷ As set out in the motion, numerous badges of fraud under Utah Code § 25-6-202(1)(a) were present at the time the 2017 transfer occurred evidencing actual intent to hinder, delay, or defraud.¹⁸

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.

Response: This paragraph is not material to the Motion.¹⁹

¹³ *Bones*, 366 F.3d at 875.

¹⁴ *Hall*, 935 F.2d at 1111.

¹⁵ See Motion, [Docket No. 780](#), Facts ¶¶ 13-16.

¹⁶ *Bones*, 366 F.3d at 875.

¹⁷ *Hall*, 935 F.2d at 1111.

¹⁸ Motion, [Docket No. 780](#), at 16.

¹⁹ See response to paragraph 5, above.

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.

Response: This paragraph is not material to the Motion.²⁰

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.

Response: This paragraph is not material to the Motion.²¹

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.

Response: This paragraph is not material to the Motion.²²

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.

Response: This paragraph is not material to the Motion.²³

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

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.

Response: This paragraph is not material to the Motion.²⁴

ARGUMENT

I. The Use of Summary Proceedings is Appropriate.

Greg Shepard's primary argument in opposition to the Motion is that because Diana Shepard and the Trust are not Receivership Defendants, the Court should require that the Receiver seek to recover Greg Shepard's interest in the Property in a separate lawsuit. In support of this argument Greg Shepard asserts that (1) the Corrected Receivership Order does not allow the Receiver to seek recovery of the Property in summary proceedings because it is titled in the name of the Trust and not Greg Shepard, and (2) the Court lacks jurisdiction over the Trust and Diana Shepard because neither was served a summons. Greg Shepard is wrong. The Corrected Receivership Order and the relevant common law standards show that summary proceeding are appropriate here and that this Court has jurisdiction over the Motion.

a. The Corrected Receivership Order Gives the Receiver the Authority to Recover Receivership Property Through the Motion.

The Corrected Receivership Order states that "[t]his Court takes *exclusive jurisdiction* and possession of all assets, of whatever kind and wherever situated, of . . . R. Gregory Shepard . . ."²⁵ Further, it allows the Receiver to file motions seeking turnover and possession of Receivership Property, which is defined as:

monies, accounts, trusts, funds, digital currencies, securities, credits, stocks, bonds, effects, goods, chattels, intangible property (including patents and other

²⁴ *Id.*

²⁵ [Docket No. 491](#), ¶ 2, filed November 1, 2018 (emphasis added).

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.***²⁶

Additionally, the Corrected Receivership Order instructs the Receiver to: (1) determine the nature of all property interests Receivership Defendants have a beneficial in, or control directly or indirectly;²⁷ (2) take custody, control, and possession of all Receivership Property ***including to take possession of Receivership Property from third parties;***²⁸ (3) take such action necessary to prevent the dissipation or concealment of Receivership Property;²⁹ (4) take immediate possession of all real property of Receivership Defendants and to file a motion to take possession of real property which Receivership Defendants have a beneficial interest ***even if titled in the name of another, such as a spouse.***³⁰

In filing the Motion, the Receiver is doing nothing more than what the Corrected Receivership Order instructs him to do: take possession of Receivership Property from third parties and to file a motion to take possession of real property in which Receivership Defendants have an interest, even if titled in the name of another. Importantly, Greg Shepard does not dispute or present any substantive argument against the facts or the law laid out in the Motion. Instead, he only disputes the process. But not only is the Motion permissible under the Receivership Order, it is also allowed and encouraged under the common law standards governing receiverships.

²⁶ ¶ 13(a).

²⁷ *Id.*

²⁸ *Id.*, ¶ 13(b) (emphasis added).

²⁹ *Id.*, ¶ 13(g).

³⁰ *Id.*, ¶ 20 (emphasis added).

b. The Court has Broad Powers and Wide Discretion to Determine Relief in Receiverships.

It is well-established “that the district court has broad powers and wide discretion to determine relief in an equity receivership.”³¹ “A federal district court presiding over an equity receivership has extremely broad power to supervise the receivership and protect receivership assets.”³² “A district judge supervising an equity receivership faces a myriad of complicated problems in dealing with the various parties and issues involved in administering the receivership . . . [a] district judge simply cannot effectively and successfully supervise a receivership and protect the interests of its beneficiaries absent broad discretionary power.”³³ “Accordingly, in fashioning relief in an equity receivership, a district court has discretion to summarily reject formalistic arguments that would otherwise be available in a traditional lawsuit.”³⁴

It is also well-established that “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 heard.”³⁵ Greg Shepard does not—and cannot—dispute the authority the Court has to order relief against non-parties when determining whether certain property belongs to the

³¹ *SEC v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010) (citations omitted).

³² *SEC v. Mgmt. Sols., Inc.*, No. 2:11-CV-01165-BSJ, 2016 WL 4821275, at *3 (D. Utah Sept. 9, 2016) (quoting 65 Am. Jur. 2d Receivers § 135).

³³ *Id.* (quoting *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986)).

³⁴ *Broadbent v. Advantage Software, Inc.*, 415 F. App'x 73, 78 (10th Cir. 2011) (unpublished).

³⁵ *CFTC v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1113 (9th Cir. 1999) (citation omitted); *see also e.g., FTC v. Assail, Inc.*, 410 F.3d 256, 267 (5th Cir. 2005) (relying on *Topworth* in finding summary proceedings are appropriate so long as there is adequate notice and opportunity to be heard); *SEC v. Elliott*, 953 F.2d 1560, 1567 (11th Cir. 1992); *SEC v. Credit Bancorp, Ltd.*, 124 F. Supp. 2d 824, 828 (S.D.N.Y. 2000); *SEC v. Aquacell Batteries, Inc.*, No. 607CV-608-ORL-22DAB, 2008 WL 2915064 (M.D. Fla. July 24, 2008); *CFTC v. Hudgins*, 620 F. Supp. 2d 790 (E.D. Tex. 2009), *aff'd sub nom. Crawford v. Silette*, 608 F.3d 275 (5th Cir. 2010); *Glob. NAPS, Inc. v. Verizon New England, Inc.*, No. CV 02-12489-RWZ, 2015 WL 12781223, at *2 (D. Mass. Mar. 10, 2015).

Receivership estate.³⁶ He makes no attempt to refute or distinguish any of the numerous cases cited in the Motion showing that summary proceedings are appropriate. Instead, he summarily asserts that before the Court can enter any relief that affects the interest of the Trust and/or Diana Shepard, both must be sued in plenary proceedings. This, however, is not the law and plenary proceedings are not required. So long as the constitutional due process requirements of notice and an opportunity to be heard are satisfied, the Court may enter the relief sought in the Motion.³⁷

In fact, this Court in *SEC v. Merrill Scott & Associates*, found that summary proceedings may be used to determine the status of alleged receivership property titled in the name of a non-party.³⁸ There, in finding that the property at issue was receivership property, Judge Tena Campbell held that it was “telling” when a receivership defendant controlled the property titled in the name of the non-party.³⁹ In our case, the facts show that Greg Shepard has control over the Property. He used the Property to secure several promissory notes as a “trustor” or “borrower” and the Property has been his primary residence since 1986. Further, Diana Shepard admitted, under oath, that the original transfer of the Property to the Trust was “nominal” and “for estate planning purposes.”⁴⁰

Additionally, it makes good sense that disputes regarding the status of receivership property be resolved in summary proceedings before the receivership court. As noted above, this Court has exclusive jurisdiction over all Receivership Property and the Receiver is asking the

³⁶ See Motion, [Docket No. 780](#), at Section I(b).

³⁷ See note 35, above.

³⁸ No. 2:02 CV 39, 2006 WL 3813300, at *3-5 (D. Utah Dec. 26, 2006).

³⁹ *Id.* at *6.

⁴⁰ Motion, [Docket No. 780](#), Facts ¶ 4.

Court to determine whether the Property is a Receivership asset. Therefore, as the *F.T.C. v. NHS Systems* court found when considering its jurisdiction to enter an order regarding property claimed by a non-party in a summary proceeding, “[t]o require anything more than *in rem* jurisdiction in order to empower a court to simply determine the proper possessor of that *res* would essentially strip *in rem* jurisdiction of any force or meaning. Thus, insofar as this court’s orders apply to the right to possess and dispose of Receivership [property], the orders are, I conclude, entirely within the court’s authority to issue.”⁴¹

Finally, and confusingly, Greg Shepard claims that two cases purportedly relied upon by the Receiver—*SEC v. Cavanagh*⁴² and *SEC v. George*⁴³—are distinguishable from the instant case. These cases, however, ***are not cited in the Motion or relied upon by the Receiver***. Indeed, Greg Shepard is completely mistaken when he states that “[t]he Receiver relies upon” *SEC v. Cavanagh* and *SEC v. George* for the position that federal courts may order equitable relief against a person who is not accused of wrongdoing where that person has received ill-gotten funds and does not have a legitimate claim to those funds. Nothing in the Motion states that the Trust or Diana Shepard received ill-gotten funds. Instead, the Motion seeks an order finding Greg Shepard has a beneficial interest in property titled in the name of the Trust. Accordingly, not only did the Receiver not cite *SEC v. Cavanagh* and *SEC v. George*, it simply does not make sense that the Receiver would cite these cases in the Motion.

⁴¹ 708 F. Supp. 2d 456, 469 (E.D. Pa. 2009).

⁴² 155 F.3d 129 (2d Cir. 1998).

⁴³ 426 F.3d 786 (6th Cir. 2006).

II. Greg Shepard's Hearsay Objections are Improper.

Greg Shepard's objections to the material facts presented by the Receiver are improper. Rule 56(c)(2) of the Federal Rules of Civil Procedure is clear that objections may be made "that the material cited to support or dispute a fact *cannot be presented in a form that would be admissible in evidence.*"⁴⁴ Greg Shepard does not object that the material cited cannot be presented in a form that would be admissible. Instead, he objects that the materials cited by the Receiver as currently attached to the Motion are not authenticated. This is improper.⁴⁵ Further, Federal Rule of Evidence 103(a)(1)(B) requires that unless "apparent from the context," the objection must "state[] the specific ground,"⁴⁶ 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)."⁴⁷ Greg Shepard's objections uniformly fail this requirement. Moreover, the objections to authentication ring hollow when most of the materials cited in the Motion were provided to the Receiver by Greg or Diana Shepard themselves. If the materials are not authentic, Greg and Diana Shepard are the parties in the best position to show their inauthenticity. It is telling that no such objections were made.

Even assuming Greg Shepard made proper objections under Rule 56—which he did not—"[s]tanding alone, attacks on the credibility of evidence offered by a summary judgment

⁴⁴ Fed. R. Civ. P. 56(c)(2) (emphasis added).

⁴⁵ 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." *SEC v. Mahabub*, No. 15-CV-2118-WJM-MLC, 2017 WL 6555039, at *2 (D. Colo. Dec. 22, 2017) (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).

⁴⁶ Fed. R. Evid. 103(a)(1)(B).

⁴⁷ *Mahabub*, 2017 WL 6555039, at *2.

movant do not warrant denial of a summary judgment motion.”⁴⁸ Greg Shepard’s bare allegations that the materials cited in the Motion are inadmissible hearsay are insufficient grounds to deny the Motion.

In a puzzling argument, Greg Shepard claims that the materials the Receiver attached to the Motion are not in the record as required under Rule 56(c)(1)(A). The Advisory Committee Notes to Rule 56 explain that “[m]aterials that are not yet in the record — including materials referred to in an affidavit or declaration — must be placed in the record.”⁴⁹ By attaching the materials to the Motion, the Receiver placed them in the record. Greg Shepard does not explain—and it is not clear—why materials attached to a summary judgment motion would not be in the record. Common sense and the purpose underlying Rule 56(c)(1)(A) support that attaching a document to a motion makes it part of the record.⁵⁰

a. The Materials Cited in the Motion are Admissible.

Although Rule 56(c) of the Federal Rules of Civil Procedure clearly does not require that materials cited be in admissible form or authenticated to be considered on a motion for summary judgment and Greg Shepard has set forth no basis for why the materials could not be authenticated, the Receiver—out of an abundance of caution—sets forth basis for admission of the materials cited in the Motion.

- Prior Statements by Greg and Diana Shepard:

⁴⁸ *Nat’l Am. Ins. Co. v. Am. Re-Ins. Co.*, 358 F.3d 736, 742 (10th Cir. 2004) (citing *Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir.1996)).

⁴⁹ Fed. R. Civ. P. 56(c)(1)(A) advisory committee note to 2010 amendment.

⁵⁰ *RES-NV CHLV, LLC v. Rosenberg*, No. 2:13CV115DAK, 2014 WL 6610729, at *1 (D. Utah Nov. 20, 2014) (documents placed in the record so that court can review the record and verify the information).

- Exhibits 1, 2, and 10 are admissible under Federal Rules of Evidence 801(d)(1)-(2), and 804(b)(3)-(4) if either Greg or Diana Shepard are unavailable to testify.⁵¹ Greg and Diana Shepard’s lack of substantive objection to their own prior statements confirms that statement are authentic.
- Recorded Deeds, Trust Deeds, and Trust Documents:
 - The materials cited by the Receiver include recorded deeds, recorded trust deeds, and Trust documents.⁵² These materials are admissible under Federal Rules of Evidence 803(14)-(15). The deeds and trust deeds are kept in a public office, are authorized by statute⁵³ as required under 803(14), and the Trust documents are admissible as documents affecting an interest in property under 803(15). Further, these documents are self-authenticating under Federal Rule of Evidence 902(4) and 902(8).

III. The Self-Serving Declarations Do Not Create a Factual Dispute.

Greg Shepard asserts that there are three issues of fact that preclude summary judgment, each of which are based on the Declaration of Diana Shepard attached to the opposition: (1) that “[f]ull and adequate consideration for the 1998 quit-claim deed was given by Mr. Shepard to me”; (2) that no funds derived from the fraudulent scheme were used to pay for any mortgage on the Property; and (3) that the Trust was established in 1998 for estate planning purposes, not to avoid creditors.

⁵¹ See Exhibit 1 ([Docket No. 780-1](#)), 2 ([Docket No. 780-2](#)), and 10 ([Docket No. 780-10](#)).

⁵² See Exhibits 3 ([Docket No. 780-3](#)), 4 ([Docket No. 780-4](#)), 5 ([Docket No. 780-5](#)), 6 ([Docket No. 780-6](#)), 7 ([Docket No. 780-7](#)), 8 ([Docket No. 780-8](#)), and 9 ([Docket No. 780-9](#)).

⁵³ See generally Utah Code § 57-1-1 *et seq.*

First, the Diana Shepard's declaration should be afforded no probative weight because it contains nothing more than conclusory, immaterial or self-serving statements.⁵⁴ Next, even taking Diana Shepard's declaration at face value, none of these facts preclude a finding for summary judgment. In fact, none of these facts are relevant to the Receiver's claims the Property is marital property, that Greg Shepard is a settlor of the Trust as to the Property, or that Greg Shepard's 2017 transfer of his interest in the Property to the Trust is voidable.

First, as shown in the Motion, the essential criterion for determining whether certain property is marital property "is whether a right to the benefit or asset has accrued in whole or in part during the marriage"⁵⁵ and "court should presume 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 property."⁵⁶ It is undisputed that the Property was acquired during the Shepard's marriage.⁵⁷

Second, for the purposes of the Motion, the relevant factors concerning whether Greg Shepard is a settlor of the Trust as to the Property are whether he contributed his interest to the Trust and if he retained a beneficial interest in the Property. As shown in the Motion, he contributed his interest in the Property directly to Trust,⁵⁸ and has retained possession and control of the Property since 1986.⁵⁹ Further, although the argument section of the opposition

⁵⁴ "Conclusory and self-serving affidavits are not sufficient" to preclude a finding of summary judgment. *Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir. 1991).

⁵⁵ *Dahl v. Dahl*, 2015 UT 79, ¶ 26 (quoting *Woodward v. Woodward*, 656 P.2d 431, 432–33 (Utah 1982)).

⁵⁶ *Allen v. Ciokewicz*, 2012 UT App 162, ¶ 46, 280 P.3d 425 (citing *Stonehocker v. Stonehocker*, 2008 UT App 11, ¶ 15, 176 P.3d 476); see also *In re Charlton*, 389 B.R. 97 (Bankr. N.D. Cal. 2008) ("Under Utah law, which spouse holds title does not determine whether property is marital property.").

⁵⁷ Motion, [Docket No. 780](#), Facts ¶ 1-2.

⁵⁸ *Id.*, ¶ 9.

⁵⁹ *Id.*, ¶¶ 2, 11. Although the March 2017 transfer establishes that Greg Shepard is a settlor of the Trust, the September 1998 transfers to Diana Shepard and then to the Trust do not preclude Greg Shepard from being a settlor of the Trust. Diana Shepard stated that the transfer was "nominal" for "estate planning purposes." He has retained possession and

brief contains no substantive argument regarding Greg Shepard's status as a settlor of the Trust, the first paragraph of the introduction summarily states that "Greg Shepard . . . loses all right in the Trust and its property if the Shepards are divorced." This statement is wrong. As shown by the Trust Agreement, in the event of divorce Trust assets may be allocated to Greg Shepard by divorce decree.⁶⁰ Therefore, because all property acquired during marriage is presumed to be marital property, Greg Shepard is entitled to his interest in the Property in the event of divorce under the Trust Agreement.

Third, the relevant factors that allow for the avoidance of Greg Shepard's 2017 transfer of his interest in the Property under the Utah Uniform Voidable Transactions Act or its predecessor the Uniform Fraudulent Transfer Act⁶¹ are whether Greg Shepard retained possession or control of the Property after the transfer, if the transfer was to an insider, if before the transfer was made Greg Shepard had been sued or threatened with suit, if the transfer was of substantially all the Greg Shepard's assets, and if Greg Shepard was insolvent or became insolvent shortly after the transfer was made.⁶² Each of these factors were present at the time the transfer was made.⁶³

Finally, the Court should reject the declarations attached to the opposition. Although no statement made in the declarations creates a factual dispute that precludes the entry on the order sought in the Motion, the substance of the declarations show the self-serving nature of the

control of the Property at all times since 1998. *See id.*, Facts ¶¶ 2, 11. He executed trust deeds on the property in his individual capacity. *See id.*, Facts ¶¶ 6, 8.

⁶⁰ [Docket No. 780-5](#), at 3.

⁶¹ *See* Utah Code § 25-6-202(1)-(2); Utah Code § 25-6-5(1)-(2).

⁶² Utah Code § 25-6-202(2).

⁶³ Motion, [Docket No. 780](#), at 15-17.

Shepards' statements. On February 1, 2019, Diana Shepard declared, under the penalty of perjury, in a declaration submitted to the Receiver, that in 1998 Greg Shepard conveyed his interest in the Property to her as a "nominal transfer for estate planning purposes" where "[n]o payment of consideration was required."⁶⁴ Then, nine months later in the declaration attached to the opposition, she declared that "[f]ull and adequate consideration for the 1998 quit-claim deed was given by Mr. Shepard to me."⁶⁵ Diana Shepard's willingness to make written sworn statements inconsistent with prior written testimony show that the declaration submitted with the opposition merits little probative value.

CONCLUSION

For the foregoing reasons and the reasons stated in the Motion, the Court should grant the Motion and enter an order: (1) determining that a half-interest in the Property belonged to Greg Shepard; (2) that Diana Shepard execute a warranty deed transferring ownership of one-half interest in the Property to the Receiver; and (3) that the Property be sold and proceeds of such sale be used to satisfy any outstanding mortgages with the excess proceeds divided between the Receiver and Diana Shepard in proportion to their interests. The Receiver requests that the order direct Diana Shepard to make such transfer within 10 days of the entry of such order.

DATED this 20th day of December, 2019.

PARR BROWN GEE & LOVELESS, P.C.

/s/ Michael S. Lehr

Jonathan O. Hafen

Jeffery A. Balls

Michael Lehr

⁶⁴ *Id.*, Facts ¶ 3.

⁶⁵ Diana Shepard Declaration ¶ 6, attached to the opposition at [Docket No. 797-1](#).

Attorneys for R. Wayne Klein, Receiver

CERTIFICATE OF SERVICE

I hereby certify that the above **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** was filed with the Court on this 2^{0th} day of December, 2019, and served via ECF on all parties who have requested notice in this case.

/s/ Michael S. Lehr
