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8 **UNITED STATES BANKRUPTCY COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA, SANTA ANA DIVISION**

9 In re
10 THE TULVING COMPANY, INC., a
11 California corporation,
12 Debtor.
13 TID # 33-0441602

Case No. 8:14-bk-11492-ES
Chapter 7

**REPORT OF CONSUMER PRIVACY
OMBUDSMAN [11 U.S.C. § 332(b)]**

14
15 **TO THE HONORABLE ERITHE A. SMITH, UNITED STATES BANKRUPTCY JUDGE**
16 **AND ALL PARTIES IN INTEREST:**

17
18 **T**his report (the “CPO Report”) is being submitted to assist the Court in its consideration
19 of the facts, circumstances, and conditions of the proposed Sale of possible personally identifiable
20 information of the Debtor¹ under 11 U.S.C. § (“Section”) 363 by the Trustee to
21 Greatcollections.com LLC, a California limited liability company, d/b/a Great Collections (the
22 “Purchaser” or “GC”). Section 332(b) provides that such information may include the presentation

23
24 ¹ All initially capitalized terms not otherwise defined herein shall use those definitions stated in
25 the “NOTICE OF MOTION AND MOTION FOR ORDER: (1) APPROVING ASSET
26 PURCHASE AGREEMENT; (2) APPROVING SALE OF ESTATE'S PROPERTY (DEBTOR'S
27 CUSTOMER LISTS, PHONE NUMBERS, WEB ADDRESS, CERTAIN CUSTOMER FILES,
28 AND RELATED PERSONAL PROPERTY) FREE AND CLEAR OF ALL LIENS, CLAIMS,
ENCUMBRANCES, AND INTERESTS; AND (3) GRANTING RELATED RELIEF” filed in the
above-captioned chapter 7 Case on August 7, 2014 as Document # 158.

1 by the Consumer Privacy Ombudsman (the “CPO”)² of (1) the Debtor’s privacy policy; (2) the
2 potential losses or gains of privacy to consumers if such sale or such lease is approved by the
3 Court; (3) the potential costs or benefits to consumers if such sale is approved by the Court; and (4)
4 the potential alternatives that would mitigate potential privacy losses or potential costs to
5 consumers.

6 I.

7 **THE DEBTOR’S POSSIBLE PRIVACY POLICY**

8 “The Debtor was in the business of selling and purchasing gold, silver, coins, bullion, and
9 other precious metals through its internet website or by phone.”³ Purchased assets under the
10 Agreement include

11 (i) the Debtor's customer lists that are in the Trustee's possession and more
12 specifically described on Exhibit "A" hereto (the "Customer Lists "), (ii) certain
13 customer sales journals in electronic format (QuickBooks) that are in the Trustee's
14 possession and more specifically described on Exhibit "A" hereto (the "Electronic
Customer Files")...

14 See Motion at 17 (Paragraph C.1).

15 The Customer Lists and Electronic Customer Files constitute possible personally
16 identifiable information (the “Possible PII”) under Section 101(41A)(A)(iii) of Title 11 of the
17 United States Code (the “Bankruptcy Code”). It is not certain whether the Debtor had a privacy
18 policy. See correspondence from the Trustee’s counsel to the CPO, a true and correct copy of
19 which is attached hereto and incorporated herein as **Exhibit 1**. A possible privacy policy of the
20 Debtor (the “Privacy Policy”) reads as follows:

21 We do not need to collect personal private information that may be required with
22 credit card transactions. We do not have an online shopping cart that requires your
23 Credit Card number and may require personal information to identify you. We have
24 no commissioned salesmen looking at your records. We have no telemarketers. We
do not sell your private personal information to 3rd parties. We only use the
personal information that is provided to us to serve our customers and to complete
our business transactions.

26 ² Wesley H. Avery was appointed as the CPO pursuant to Section 332 of the Bankruptcy Code
pursuant to an order of the Court filed on October 14, 2014.

27 ³ See Motion at 5:23-24.

1 Id. citing <http://tulving.com/for-sale-gold-bullion-sell-gold-coins.htm> (the “Webpage”)

2 According to the Trustee’s counsel and a review of the Webpage itself by the CPO,
3 customers of the Debtor did not pay by cash or credit card, but instead paid the Debtor by check,
4 money order or wire transfer. Id. Customers could contact the Debtor by fax, telephone, mail or
5 email. Id. The Possible PII collected by the Debtor therefore did not include credit card
6 information, but did include customers’ names and might include mailing addresses, email
7 addresses and telephone numbers.

8 **The CPO assumes that the order of the Court approving the Sale of the Possible PII**
9 **to the Purchaser and/or the Successful Bidder will adopt the Privacy Policy of the Debtor.**

10 See Addendum to Asset Purchase Agreement a true and correct copy of which is attached hereto
11 and incorporated herein as Exhibit 2. As such, the CPO concludes that: (a) the Sale is consistent
12 with the Privacy Policy in compliance with section 363(b)(1)(A), and (b) giving due consideration
13 to the facts, circumstances, and conditions of the Sale, the Sale would not violate applicable non-
14 bankruptcy law in compliance with section 363(b)(1)(B).

15 **II.**

16 **ANALYSIS**

17 A. **The Data Collected by the Debtor Is Probably Not Personally Identifiable**
18 **Information Under the Bankruptcy Code.**

19 What constitutes “personally identifiable information” (“PII”) is defined in part under the
20 Bankruptcy Code as information “provided by an individual to the debtor in connection with
21 obtaining a product or a service from the debtor primarily for personal, family, or household
22 purposes”. See 11 U.S.C. § 101(41A). Because PII provided by an individual to the Debtor in
23 connection with “selling and purchasing gold, silver, coins, bullion, and other precious metals” for
24 investment and eventual resale is not “a product or a service . . . primarily for personal, family, or
25 household purposes”, the data collected by the Debtor is probably not personally identifiable
26 information under the Bankruptcy Code. See, e.g. Searle v. Exley Express, 278 Or 535, 564 P.2d
27 1054 (1977). In Searle, the Oregon Supreme Court articulated a two-part test to determine what
28 constitutes a “personal, family or household purpose”: Objectively, is the good or service at issue

1 customarily purchased for personal, family or household use? And subjectively, was the item at
2 issue purchased by the plaintiff for personal, family or household use rather than for commercial
3 use or resale? See 564 P.2d at 1056. Here, the Debtor's sale of precious metals for investment
4 and eventual resale does not fall with PII as defined under Section 101(41A). See also Black's
5 Law Dictionary (6th Edition) definition of "consumer": "A buyer (other than for purposes of
6 resale)...".

7
8 **B. The Sale Does Not Violate the Privacy Policy of the Debtor, if any, and is therefore**
9 **Permissible.**

10 The Sale is permissible under the Bankruptcy Code if the Court finds that the sale of
11 personally identifiable information governed by a debtor's privacy policy "is consistent with such
12 policy". 11 U.S.C. § 363(b)(1)(A). The privacy of consumers' personally identifiable information
13 in the retail sales context is primarily regulated by the Federal Trade Commission ("FTC") under
14 the FTC Act. Section 5 of the FTC Act declares unfair or deceptive practices in commerce as
15 unlawful.⁴ To determine whether Section 5 of the FTC Act's prohibition against deception has
16 been violated, the FTC will first identify what "express claims," and "implied claims," have been
17 made by a company.⁵ An "express claim" refers to a factual assertion made in an advertisement or
18 promotion or other publicly available statement such as a corporate policy. An "implied claim"
19 refers to the net impression conveyed by all elements of a company's policies or statements
20 "including an evaluation of such factors as the entire document, the juxtaposition of various
21 phrases in the document, the nature of the claim, and the nature of the transactions."⁶ Section 5 is
22 violated when an express or implied claim is "likely to affect a consumer's choice of or conduct
23 regarding a product" and is "likely to mislead reasonable consumers under the circumstances."⁷ In

24
25 ⁴ 15 U.S.C. § 45(a).

26 ⁵ FTC Policy Statement on Deception, *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174
(1984) *available at* <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

27 ⁶ Id.

1 addition, an act or practice may be considered “unfair” if it causes, or is likely to cause, substantial
2 injury to consumers that is not outweighed by countervailing benefits to consumers or competition
3 and is not reasonably avoidable by consumers.⁸

4 The FTC has explicitly applied section 5’s prohibitions against deceptive acts and practices
5 to corporate privacy statements made on the Internet and elsewhere in more than a dozen consent
6 orders. The order issued in the seminal Toysmart.com case is instructive.

7 Toysmart.com (“Toysmart”) was engaged in the advertising, promotion, and sale of toys
8 on the Internet.⁹ In the course of doing business, Toysmart collected information from its
9 customers, including, among other things, its customers’ names, addresses, billing information,
10 and shopping preferences.¹⁰ Like the possible privacy policy of the Debtor, Toysmart’s website
11 included a privacy policy which assured customers that

12 Personal information voluntarily submitted by visitors to our site . . . is never
13 shared with a third party. All information obtained by toysmart.com is used only to
personalize your experience online.¹¹

14 On May 22, 2000, Toysmart announced that it had ceased operations, and on June 9, 2000,
15 Toysmart’s creditors filed an involuntary petition in bankruptcy.¹² One of the assets offered for
16 sale during the bankruptcy case was the personal information Toysmart had collected about its
17 customers.

18 The FTC filed a complaint in the United States District Court for the District of
19 Massachusetts alleging that any sale of Toysmart’s customer information would constitute a

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21 ⁷ Id.

22 ⁸ See generally FTC Policy Statement on Unfairness, appended to *International Harvester Co.*,
104 F.T.C. 949, 1070 (1984) available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm> (last
23 viewed October 3, 2006).

24 ⁹ See First Amended Complaint, Civil Action No. 00-11341 at ¶ 6 (D. Mass. 2000) available at
<http://www.ftc.gov/os/2000/07/toysmartcomplaint.htm> (last viewed October 3, 2006).

25 ¹⁰ Id. at ¶ 9.

26 ¹¹ Id. at ¶ 7.

27 ¹² Id. at ¶¶ 12, 13.

28

1 deceptive act or practice in violation of section 5 of the FTC Act.¹³ On July 20, 2000, Toysmart
2 and the FTC entered a stipulation establishing conditions on the sale of Toysmart's customer
3 information.¹⁴ The stipulation provided that Toysmart could *only* sell its customer information to
4 a "Qualified Purchaser" – that is, a company that concentrates its business in the same industry as
5 a debtor, intends to purchase a debtor's goodwill, agrees to become a debtor's
6 successor-in-interest as to the customer information, and agrees to abide by the terms of a debtor's
7 privacy policy.

8 GC, appears to be in the same industry as the Debtor,¹⁵ appears to be purchasing the
9 Debtor's business goodwill,¹⁶ and as assumed by the CPO above presumably will adopt the
10 Debtor's Privacy Policy as will be stated in the order of the Court approving the Sale. Thus, the
11 CPO believes that GC is a "Qualified Purchaser" in the Bankruptcy Case, and this Sale would
12 satisfy section 5 of the FTC Act.

13 1. **Losses or Gains of Privacy.**

14 Since the personally identifiable information of the Debtor's customers is being transferred
15 to an unaffiliated entity, there is a clear loss of privacy to consumers. However, this loss should
16 be mitigated by GC's adoption of the Privacy Policy.

17 2. **Costs or Benefits to Consumers.**

18 The potential costs or benefits to consumers if the subject sale is approved will obviously
19 depend on GC's planned use of the data. It is reasonable to believe that the foregoing actions have
20 value and are beneficial to the Debtor's customers.

21 3. **Potential Alternatives.**

22 None were identified. As a "Qualified Purchaser", GC's adoption of the Privacy Policy

23 _____
24 ¹³ Id.

25 ¹⁴ See Stipulation and [Proposed] Order Establishing Conditions on Sale of Customer Information,
26 Civil Action No. 00-13995 (Bankr. D. Mass. 2000) (attached as Exhibit E); Stipulated Consent
Agreement and Final Order, Civil Action No. 0011341 (D. Mass. 2000) available at
<http://www.ftc.gov/os/2000/07/toysmartconsent.htm> (last viewed October 3, 2006).

27 ¹⁵ See, e.g. <http://www.greatcollections.com/>

28 ¹⁶ See Motion at 17, Paragraph C(1)(iii).

1 should satisfy the concerns of the Court.

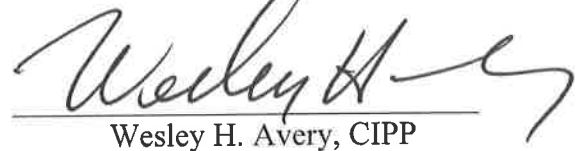
2 No personally identifiable information was disclosed by the CPO as part of this Report.

3 Dated this 16th day of October, 2014, at Valencia, California.

4 Respectfully submitted,

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Wesley H. Avery, CIPP

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Exhibit 1

Wesley H. Avery

From: Jonathan Kim <jkim@pszjlaw.com>
Sent: Thursday, October 09, 2014 3:59 PM
To: Wesley H. Avery
Cc: Linda Cantor
Subject: Tulving; Privacy Policy
Attachments: www.tulving as of 2-8-14.pdf; www.tulving as of 5-19-13.pdf

While based on information available to the Trustee's agents, the Debtor's prepetition www.tulving.com website does not appear to have had listed any privacy policy, it appears that a privacy policy appeared on some pages at <http://tulving.about.ag/>

For example, the link below has the privacy policy:

<http://tulving.about.ag/2013-american-gold-eagle-for-sale-us-coins.htm>

The link below does not have the privacy policy:

http://tulving.about.ag/bullion/stillwater_1_oz_palladium_bar.htm

Further, below is an email from our law library director (and her two pdf attachments) regarding what privacy policy info. the Debtor's website appeared to have before the petition date. As you may know, the Department of Justice had seized the Debtor's records prepetition, and so the Trustee has no records concerning any privacy policy.

Jonathan

Jonathan Kim
Pachulski Stang Ziehl & Jones LLP

From: Leslie Ann Forrester
Sent: Tuesday, August 12, 2014 12:48 PM
To: Linda Cantor
Cc: Jonathan Kim
Subject: RE: Consumer Privacy Ombudsman

I found it on one page, hard to figure out how many other ones also said it.

As of 4/3/13: <http://tulving.com/for-sale-gold-bullion-sell-gold-coins.htm> looked like the attached, and included:

For Sale Gold Bullion Privacy Policy

We do not accept Credit Cards. We do not need to collect personal private information that may be required with credit card transactions. We do not have an online shopping cart that requires your Credit Card number and may require personal information to identify you. We have no commissioned salesmen looking at your records. We have no telemarketers. We do not sell your private personal information to 3rd parties. We only use the personal information that is provided to us to serve our customers and to complete our business transactions. We have no third party paid advertisers on our site. The Tulving Company does not control 3rd party sites and is not responsible for their content and their policies. Links to third party sites are only offered as a convenience to our visitors. We do cooperate with law enforcement investigations, the FBI, and with court orders. If you have any questions regarding our policies and practice's you can call us at 800-995-1708 Or E-Mail hannes@tulving.com or write us at
The Tulving Company (Since 1990)

And that same page looked virtually the same on 2/8/14 (see attached).

FYI, what I use for this is called Wayback Machine, something that Internet Archive produces: <https://archive.org/web/>.

Les

Exhibit 2

ADDENDUM TO ASSET PURCHASE AGREEMENT

This Addendum to Asset Purchase Agreement (this “*Addendum*”) is made and entered into as of this ____ day of October, 2014 by and between R. Todd Neilson, solely in his capacity as chapter 7 trustee (“*Trustee*”) for the estate of The Tulving Company, Inc., a California corporation (“*Debtor*”) and Greatcollections.com LLC, a California limited liability company, d/b/a Great Collections (“*Purchaser*” and together with the Trustee, the “*Parties*”). This Addendum modifies and supplements that certain Asset Purchase Agreement dated as of August 1, 2014 (the “*Original Agreement*” and as modified and supplemented by the Addendum, the “*Agreement*”) by and between the Trustee and Purchaser. Capitalized terms used, but not specifically defined, in this Addendum are intended to have the meanings given to such terms in the Original Agreement.

The Parties acknowledge and agree that:

1. Customer Privacy Policy: The Trustee is informed that, during at least some periods and at least in some instances prior to the commencement of the Case pending before the Bankruptcy Court, the Debtor had posted on its business website a policy (the “*Privacy Policy*”) that certain private information (“*Customer Information*”) of the Debtor’s prepetition customers (“*Customers*”) would not be sold to third parties.

2. Purchaser’s Customer Privacy Policy: Purchaser acknowledges and agrees that, in respect to any and all personally identifiable information (as defined in 11 U.S.C. § 101(41A)) of and relating to Customers that may be sold and transferred to Purchaser under the Agreement (subject to approval by the Bankruptcy Court), the Purchaser shall fully abide by and implement the Privacy Policy, as if the Purchaser were in the Debtor’s capacity, solely in respect to the Customer Information. For the avoidance of doubt, subject to the Bankruptcy Court’s approval of the Agreement, the Purchaser is not a third party for purposes of the Privacy Policy.

3. Effect of Addendum: To the extent of any inconsistency between the terms of this Addendum and those of the Original Agreement, the terms of this Addendum shall govern and control. Except to that extent, the Original Agreement and its terms shall be unchanged hereby and shall govern and control.

4. Counterparts: This Addendum may be executed in any number of counterparts, and by the parties hereto on separate counterparts, but shall not be effective until each party has executed at least one counterpart. Each counterpart shall constitute an original of this Addendum, but all the counterparts shall together constitute but one and the same instrument. Each counterpart may be delivered by facsimile transmission or portable data format (PDF), which transmission shall be deemed delivery of an originally executed document.

5. Bankruptcy Court Approval: This Addendum and the sale and transactions contemplated hereunder and under the Agreement are subject to the approval of the Bankruptcy Court.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK.]

IN WITNESS WHEREOF, Seller and Buyer have executed this Addendum as of the date first written above.

SELLER:

**R. Todd Neilson, solely in his capacity as
chapter 7 Trustee of the Estate of The
Tulving Company, Inc.**

By: _____
Name: R. Todd Neilson, chapter 7 Trustee

BUYER:

**Greatcollections.com LLC, a California
limited liability company, d/b/a Great
Collections**

By: _____
Name: Ian Russell
Its: Managing Member

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:
6055 E. Washington Blvd., # 500, Los Angeles CA 90040

A true and correct copy of the foregoing document entitled (*specify*): REPORT OF CONSUMER PRIVACY OMBUDSMAN [11 U.S.C. § 332(b)]

will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) 22 Oct 14, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On (*date*) 22 Oct 14, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

The Tulving Company Inc
P.O. Box 6200
Newport Beach, CA 92658

Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

10/22/14
Date
Wesley H. Avery
Printed Name

[Signature]
Signature

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

ECF Service

Candice Bryner candice@brynerlaw.com

Philip Burkhardt phil@burkhardtandlarson.com, stacey@burkhardtandlarson.com

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United States Trustee (SA) ustpregion16.sa.ecf@usdoj.gov