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6 Tulving Company, Inc.

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

10 In re:

11 THE TULVING COMPANY, INC., a
12 California corporation,

13 Debtor.

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

Chapter 7

**NOTICE OF MOTION AND MOTION
FOR ORDER: (1) APPROVING ASSET
PURCHASE AGREEMENT;
(2) APPROVING SALE OF ESTATE'S
PROPERTY (DEBTOR'S CUSTOMER
LISTS, PHONE NUMBERS, WEB
ADDRESS, CERTAIN CUSTOMER
FILES, AND RELATED PERSONAL
PROPERTY) FREE AND CLEAR OF ALL
LIENS, CLAIMS, ENCUMBRANCES,
AND INTERESTS; AND (3) GRANTING
RELATED RELIEF INCLUDING WITH
RESPECT TO APPROVAL OF
OMBUDSMAN'S FEES AND EXPENSES
AND DISTRIBUTION OF SALE
PROCEEDS ON ACCOUNT OF SUCH
AMOUNTS; MEMORANDUM OF
POINTS AND AUTHORITIES;
DECLARATION OF R. TODD NEILSON**

Sale Hearing

Date: December 18, 2014
Time: 10:30 a.m.
Place: Courtroom 5A
411 West Fourth Street
Santa Ana, CA 92701

1 **TO THE HONORABLE ERITHE SMITH, UNITED STATES BANKRUPTCY JUDGE, THE**
2 **OFFICE OF THE UNITED STATES TRUSTEE AND ANY PARTIES THAT HAVE FILED**
3 **REQUESTS FOR SPECIAL NOTICE, AND OTHER INTERESTED PARTIES:**

4 **PLEASE TAKE NOTICE** that R. Todd Neilson, the duly appointed chapter 7 trustee (the
5 "Trustee") for The Tulving Company, Inc. (the "Debtor"), in the above-entitled chapter 7 case (the
6 "Case"), hereby moves (the "Motion") the Court for the entry of an order, pursuant to sections 105,
7 363 and of title 11 of the United States Code (the "Bankruptcy Code") and Rules 2002, 6004, and
8 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules")¹:

9 (a) authorizing the Trustee to sell (the "Sale") certain personal property of the
10 bankruptcy estate of the Debtor (the "Estate") consisting of the following: customer lists, business-
11 related telephone and fax number(s), a domain name, certain customer sales journals, and other
12 related personal property (as more specifically described in the APA, the "Property") to
13 Greatcollections.com LLC d/b/a Great Collections (the "Stalking Horse Bidder") pursuant to that
14 certain Asset Purchase Agreement and the Addendum thereto (collectively, the "APA")
15 (substantially in the form attached hereto as Exhibit A) or, alternatively, to the successful bidder
16 (the "Successful Bidder") determined in accordance with certain sale and bid procedures as
17 proposed by the Trustee, subject to Court approval (the "Sale Procedures"), pursuant to the
18 applicable agreement with such Successful Bidder, free and clear of all liens, claims, interests and
19 encumbrances pursuant to sections 363(b) and (f) of the Bankruptcy Code, with any such liens,
20 claims, interests and encumbrances to attach to the Sale proceeds of the Property with the same
21 validity (invalidity), priority and perfection as existed immediately prior to such Sale;

22 (b) approving the applicable asset purchase agreement with the Successful
23 Bidder; and

24 (c) granting such other relief as further described in the Motion.

25 **PLEASE TAKE FURTHER NOTICE** that the Trustee has concurrently filed herewith the
26 *Motion for Order: (1) Scheduling Auction and Sale Hearing in Connection with Sale of Debtor's*

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¹ Any capitalized term not defined in this Notice shall have the meaning ascribed to such term in the Motion.

1 *Customer Lists, Phone Numbers, Web Address, Certain Customer Files, and Related Personal*
2 *Property of the Estate; (2) Approving Sale Procedures; (3) Approving Break-Up Fee; (4) Approving*
3 *Notice of Auction and Sale Hearing; and (5) Granting Related Relief (the “Procedures Motion”),*
4 pursuant to which the Trustee seeks the approval of the proposed Sale Procedures, which motion is
5 currently set for hearing on December 4, 2014 at 10:30 a.m. before the Court. The proposed Sale to
6 the Stalking Horse Bidder shall be subject to overbid at an auction in accordance with the Sale
7 Procedures (the “Auction”). As explained more fully in the attached Memorandum of Points and
8 Authorities, after marketing and discussions with various potential buyers, the Trustee determined in
9 his sound business judgment that the proposed Sale of the Property to the Stalking Horse Bidder,
10 subject to overbid, for \$150,000 cash, is in the best interest of the Debtor’s estate.

11 **PLEASE TAKE FURTHER NOTICE** that, pursuant to LBR 6004-1(c)(3), the Trustee
12 discloses that (i) the Trustee does not seek authority to pay any commission in connection with this
13 transaction and (ii) the Trustee is presently unaware of any tax liabilities to the Estate as a result of
14 the proposed Sale.

15 **PLEASE TAKE FURTHER NOTICE** that, by the Procedures Motion, the Trustee requests
16 Court approval of certain deadlines and other dates, including a bid deadline and an Auction date.
17 Upon and subject to approval of the Sale Procedures, the Trustee shall provide parties in interest
18 written notice of such deadlines and dates. Pursuant to Local Bankruptcy Rule 9013-1(f),
19 objections, if any, to the Motion (including with respect to approval of the Sale) must be in writing
20 and filed with the clerk of the Bankruptcy Court and served upon the Trustee’s counsel, Linda
21 Cantor, Esq., Pachulski, Stang, Ziehl & Jones LLP, Suite 1300, Los Angeles, CA 90067, fax: 310-
22 201-0760, lcantor@pszjlaw.com, and the Stalking Horse Bidder’s counsel, Armen Vartian, 1601 N.
23 Sepulveda Blvd. #581, Manhattan Beach, CA 90266, fax: 866-427-3820, armen@vartianlaw.com, **at**
24 **least fourteen (14) days prior to the hearing on the Motion.** UNLESS AN OBJECTION IS
25 TIMELY SERVED AND FILED IN ACCORDANCE WITH THIS NOTICE, IT MAY NOT BE
26 CONSIDERED BY THE BANKRUPTCY COURT AND THE BANKRUPTCY COURT MAY
27 GRANT THE RELIEF REQUESTED WITHOUT FURTHER HEARING AND NOTICE.

1 **PLEASE TAKE FURTHER NOTICE** that the Motion is based on the Memorandum of
2 Points and Authorities and Declaration of R. Todd Neilson (the "Neilson Declaration") attached
3 hereto, the statements, arguments and representations of counsel who appear at the Sale Hearing, the
4 record in this case, any other evidence properly before the Court prior to or at the Sale Hearing and
5 all matters of which this Court may properly take judicial notice.

6 **WHEREFORE**, the Trustee respectfully requests that the Court enter an order: (a)
7 approving the Sale of the Property to the Stalking Horse Bidder or, alternatively, the Successful
8 Bidder, as applicable, free and clear of all liens, claims and encumbrances; (b) approving the
9 applicable asset purchase agreement; (c) finding that the Stalking Horse Bidder or other Successful
10 Bidder (as applicable) is a good faith purchaser pursuant to section 363(m) of the Bankruptcy Code,
11 (d) approving the Ombudsman's requested fees and expenses and direct the payment thereof at the
12 closing of the Sale, out of the net Sale proceeds, and (e) granting such other relief as is fair and
13 equitable.

14 Dated: November 6, 2014

PACHULSKI STANG ZIEHL & JONES LLP

16 By /s/ Linda F. Cantor
Linda F. Cantor

17 Attorneys for R. Todd Neilson, Chapter 7
18 Trustee

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 The Trustee seeks authorization to sell customer lists and other personal property more
5 particularly described below owned by the Estate to the Stalking Horse Bidder or other Successful
6 Bidder for \$150,000 in cash as set forth in the APA or such higher amount that may be bid by the
7 Successful Bidder (the "Sale Proceeds"). Based on his marketing efforts and discussions and
8 negotiations with the Stalking Horse Bidder and other potential bidders, the Trustee believes that the
9 proposed Sale represents a fair and reasonable offer for the Property. Nonetheless, the proposed
10 Sale is subject to overbid (pursuant to the Sale Procedures) in the event another party is willing to
11 provide greater consideration than that offered by the Stalking Horse Bidder.

12 **II.**

13 **JURISDICTION**

14 The court has jurisdiction over this Motion pursuant to 28 U.S.C. § 157 and 1334. This
15 proceeding is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (D). Venue of this case and
16 this Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory
17 predicates for the relief sought herein are sections 105 and 363(b), (f) and (m) of the Bankruptcy
18 Code and Bankruptcy Rules 2002, 6004, and 9014.

19 **III.**

20 **BACKGROUND**

21 **A. The Background of the Debtor's Businesses**

22 The Debtor is a California corporation. The Debtor was in the business of selling and
23 purchasing gold, silver, coins, bullion, and other precious metals through its internet website or by
24 phone. Prior to the filing of the bankruptcy, customer complaints concerning delayed or undelivered
25 orders were increasingly made to the Better Business Bureau against the Debtor and in early March,
26 2014, a class-action lawsuit was filed against the Debtor and its principal in the United States
27 District Court, Northern District of California. The Debtor ceased operations on or about March 3,
28

1 2014. Shortly before the initiation of these proceedings, a raid was conducted at the business offices
2 of the Debtor by the Secret Service and the Department of Justice and the Debtor's computers and
3 documents were seized for an ongoing criminal investigation.

4 **B. Procedural Background of Case**

5 The Debtor commenced this case by the filing of a voluntary petition for relief under chapter
6 11 of the Bankruptcy Code on March 10, 2014. In light of pending criminal investigation and other
7 ongoing litigation, on March 18, 2014, the United States Trustee filed a *Stipulation Appointing*
8 *Chapter 11 Trustee* [Docket No. 15] ("Stipulation"), which was signed by both the Debtor and its
9 attorney. The Stipulation was approved by the Bankruptcy Court on March 18, 2014 [Docket No.
10 16] and an Order was entered by the Court on March 21, 2014 approving the *U.S. Trustee's*
11 *Application for the Appointment of a Chapter 11 Trustee*, appointing R. Todd Neilson as Trustee of
12 the Debtor's estate [Docket No. 22]. Thereafter upon notice and hearing, the case was converted to a
13 chapter 7 and R. Todd Neilson continues to serve as the chapter 7 Trustee [Docket 108].

14 **C. Prior Sale Motion; Ombudsman Report**

15 Previously, on August 7, 2014, the Trustee filed motions for approval of the sale and certain
16 sale procedures in respect to the Property (the "Prior Motions").¹ As noted in his notice of
17 withdrawal [Docket No. 163], the Trustee withdrew without prejudice the Prior Motions. Based on
18 certain concerns related to potential customer privacy issues subsequently raised in respect to the
19 proposed sale, the Trustee determined to postpone any sale of the Property, in order to allow time for
20 the Trustee to further investigate matters related to the voiced concerns. The Trustee learned that,
21 during at least some periods and at least in some instances prior to the commencement of the Case,
22 the Debtor had posted on its business website a policy (the "Privacy Policy") that certain private
23 information ("Customer Information") of the Debtor's prepetition customers ("Customers") would
24 not be sold to third parties. Code section 363(b)(1) provides that the Trustee may not sell personally
25 identifiable information if the Debtor, in connection with offering its products or services, has a
26

27
28 ¹ Other than the subsequent entry by the Trustee and Stalking Horse Bidder into the Addendum, the terms of
the Sale of the Property to the Stalking Horse Bidder remain the same as presented in the Prior Motions,
including the proposed purchase price.

1 policy prohibiting the transfer of such information and if such policy is in effect on the petition date,
2 unless “such sale is consistent with such policy” or a consumer ombudsman is appointed.

3 Based on discussions between the parties, a stipulation between the Trustee and the U.S.
4 Trustee was filed with the Court [Docket No. 165], stipulating to the appointment of a consumer
5 privacy ombudsman (“Ombudsman”), which stipulation was approved by the Court [Docket No.
6 171]. Thereafter, the U.S. Trustee applied for the appointment of Wesley Avery as the Ombudsman
7 (the “Ombudsman Application”) [Docket No. 181], which appointment was approved by the Court
8 (the “Ombudsman Order”) [Docket No. 182]. The Ombudsman Application provided that the
9 Ombudsman’s fees were to be capped at \$15,000, with the understanding that if the Ombudsman’s
10 fees exceed \$15,000, in that case the Ombudsman would be required to file a noticed motion and
11 obtain a hearing, setting forth in such motion the justification for fees exceeding the cap (p. 2, para.
12 4). The Ombudsman Order approved the Application (p. 2).

13 On October 22, 2014, the Ombudsman filed his report (the “Ombudsman Report”) [Docket
14 No. 184], in which, among other things, the Ombudsman concluded, assuming that the buyer adopts
15 the Privacy Policy, the Sale of the Property (i) is consistent with the Privacy Policy in compliance
16 with Code section 363(b)(1)(A) and (ii) would not violate applicable nonbankruptcy law in
17 compliance with section 363(b)(1)(B). As set forth in the Addendum (attached hereto as Exhibit A),
18 the Stalking Horse Bidder agrees to abide by and adhere to the Privacy Policy; if an Auction is held,
19 the successful bidder (if not the Stalking Horse Bidder) will be required by the Trustee to similarly
20 agree to abide by and adhere to the Privacy Policy. Based on the Ombudsman Report, subject to the
21 Court’s approval of the Sale, the Trustee does not believe that there is any impediment to the Sale or
22 that any other actions need be taken in respect to the Privacy Policy and the Customers.

23 IV.

24 THE PROPOSED SALE

25 **A. Debtor’s Property to Be Sold and the Trustee’s Efforts to Obtain Offers**

26 The Debtor’s business is no longer in operation. While the Trustee has previously sold
27 Debtor’s tangible personal property, certain intellectual property remains in the Estate consisting of
28 customer lists including over 12,600 customer names, business-related telephone and fax number(s),

1 a domain name, certain customer sales journals, and other related personal property (collectively, as
2 more specifically described in the APA, the "Property"). The Property is no longer necessary to the
3 administration of the estate and must be disposed of with the goal of maximizing any value. The
4 Trustee has had contact with various potential interested purchasers, and based thereon is informed
5 and believes that the value of the Property will diminish over time and that the best opportunity to
6 maximize value is to sell the Property as soon as practicable subject to the Sale Procedures.

7 As discussed in the Neilson Declaration, prior to the submission of this Motion, the Trustee
8 and his agents engaged in discussions with various potential bidders for the Property. In total, five
9 parties expressed interest in some or all of the Property. After interested parties executed
10 nondisclosure agreements, the Trustee and his agents entered into discussions regarding potential
11 sales. The Stalking Horse Bidder expressed a more immediate interest in moving forward with a
12 potential transaction, and the Trustee entered into extensive negotiations with the Stalking Horse
13 Bidder, which resulted in the terms of the parties' APA.

14 **B. Consideration**

15 The consideration to be paid by the Stalking Horse Bidder (the "Consideration") consists of
16 \$150,000, all cash.

17 **C. Property to be Sold Free and Clear of Interests**

18 The Property shall be sold free and clear of all liens, claims, rights, interests and
19 encumbrances whatsoever ("Interests"), in accordance with section 363(b) and (f) of the Bankruptcy
20 Code, with all then-existing Interests, if any, to attach to the net proceeds of the Sale with the same
21 validity, enforceability, and priority, if any, as existed with respect to the Property as of the date of
22 the commencement of the Debtor's case.

23 **D. Sale Procedures and Opportunity For Overbid²**

24 As detailed in the separately filed Procedures Motion, subject to Court approval, the
25 proposed Sale will be subject to an overbid/Auction process, with notice to be provided to, among
26 other parties in interest, potential bidders for the Property. Pursuant to the Procedures Motion, the

27 _____
28 ² The following discussion is subject to the more specific Sale Procedures described in the Procedures
Motion.

1 Trustee seeks a Sale Hearing to be held no later than December 18, 2014 (subject to the Court's
2 availability), and that the closing of the Sale occur no later than the end of December. The Trustee's
3 goal is to efficiently and expeditiously administer the Estate's assets for the benefit of the Estate's
4 creditors. To preserve the value of the Estate, minimize the deterioration of the value of the
5 Property, and limit the costs of administering the Property and Case, an expedient conclusion to the
6 Sale process will inure to the benefit of the Estate and its creditors. Thus, the Trustee believes that
7 closing a Sale as promptly as practicable is in the best interest of the Estate.

8 V.

9 ARGUMENT

10 A. The Proposed Sale of the Property Should be Approved Under Section 363(b) of the
11 Bankruptcy Code

12 A trustee, after notice and a hearing, may use, sell, or lease property, other than in the
13 ordinary course of business. 11 U.S.C. § 363(b)(1). A trustee's application of his or her sound
14 business judgment in the use, sale, or lease of property is subject to great judicial deference. *See,*
15 *e.g., In re Moore*, 110 B.R. 924 (Bankr. C.D. Cal. 1990); *In re Canyon P'ship*, 55 B.R. 520 (Bankr.
16 S.D. Cal. 1985); *see also Walter v. Sunwest Bank (In re Walter)*, 83 B.R. 14, 19-20 (B.A.P. 9th Cir.
17 1988) (“[T]here must be some articulated business justification for using, selling, or leasing the
18 property outside the ordinary course of business . . . whether the proffered business justification is
19 sufficient depends on the facts of the case. As the Second Circuit held in *Lionel*, the bankruptcy
20 judge should consider all salient factors pertaining to the proceeding and, accordingly, act to further
21 the diverse interests of the debtor, creditors and equity holders, alike.”).

22 In interpreting section 363(b)(1) of the Bankruptcy Code, courts have held that a transaction
23 involving property of the estate generally should be approved where the debtor or trustee can
24 demonstrate “some articulated business justification for using, selling, or leasing property outside of
25 the ordinary course of business.” *In re Continental Airlines, Inc.*, 780 F.2d 1223, 1226 (5th Cir.
26 1986); *accord In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983); *Walter*, 83 B.R. at 19-20; *In*
27 *re Curlew Valley Assocs.*, 14 B.R. 506, 513-14 (Bankr. D. Utah 1981). Among other factors, courts
28 should consider the consideration to be paid, the financial condition and needs of the debtor, the

1 qualifications of the buyer, and whether a risk exists that the assets proposed to be sold would
2 decline in value if left in the debtor's possession. *See Equity Funding Corp. of Am. v. Fin. Assocs.*
3 (*In re Equity Funding Corp.*), 492 F.2d 793, 794 (9th Cir. 1974) (affirming trial court's finding that
4 the proposed sale of the debtor's assets would be in the best interest of the estate in light of
5 impending deterioration of market value of debtor's assets).

6 The Debtor's business is no longer in operation. As chapter 7 trustee, the Trustee's goal is to
7 maximize value from the disposition of the Debtor's remaining assets and to investigate and, if
8 appropriate, pursue causes of action. The Trustee believes that the Consideration to be paid by the
9 Stalking Horse Bidder, subject to any qualified overbid in accordance with the Sale Procedures,
10 represents a fair and reasonable offer in light of all the terms of the proposed Sale, based on the
11 apparent market value of the Property. Nevertheless, the proposed Sale to the Stalking Horse Bidder
12 will be subject to overbid, as described above. Accordingly, the Sale of the Property, as described
13 herein, is designed to generate the greatest Sale Proceeds and is in the best interests of the Estate and
14 its creditors and should be authorized.

15 Further, in connection with the Sale, the Trustee requests that the Court issue findings that, in
16 accordance with Code section 363(b)(1), the Sale of the Property is consistent with the Privacy
17 Policy in compliance with Code section 363(b)(1)(A) and would not violate applicable
18 nonbankruptcy law in compliance with section 363(b)(1)(B). The Trustee submits that the
19 Ombudsman Report bears out and supports such finding.

20 **B. Stalking Horse Bidder Acted in Good Faith in Connection With the Proposed Sale**

21 The proposed Sale was negotiated in good faith, at arms' length and, to the best of the
22 Trustee's information and belief, without collusion or fraud of any kind. Through his marketing
23 efforts, and based on his experience as a chapter 7 trustee, the Trustee has determined that the
24 proposed Sale to the Stalking Horse Bidder, subject to any qualified overbid, represents a fair and
25 reasonable offer for the Property. Neilson Declaration, ¶ 7. Accordingly, this Court should find that
26 the Stalking Horse Bidder acted in good faith within the meaning of section 363(m) of the
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1 Bankruptcy Code.³ See generally *Ewell v. Diebert (In re Ewell)*, 958 F.2d 276, 280 (9th Cir. 1992);
2 *Marin v. Coated Sales, Inc., (In re Coated Sales, Inc.)*, No. 89 Civ. 3704 (KMW), 1990 WL 212899
3 (S.D.N.Y. Dec. 13, 1990) (holding that to show lack of good faith, a party must demonstrate “fraud,
4 collusion, or an attempt to take grossly unfair advantage of other bidders”); see also *In re Sassoon*
5 *Jeans, Inc.*, 90 B.R. 608, 610 (S.D.N.Y. 1988) (quoting *In re Bel Air Assocs., Ltd.*, 706 F.2d 301,
6 305 (10th Cir. 1983)); *In re Pisces Leasing Corp.*, 66 B.R. 671, 673 (E.D.N.Y. 1986) (examining the
7 facts of each case, concentrating on the “integrity of [an actor’s] conduct during the sale
8 proceedings” (quoting *In re Rock Indus. Machinery Corp.*, 572 F.2d 1195, 1998 (7th Cir. 1978)).

9 In the event that a Successful Bidder other than the Stalking Horse Bidder is selected,
10 evidence relating to the good faith of such Successful Bidder shall be presented prior to or at the Sale
11 Hearing.

12 **C. The Sale of the Property Free and Clear of Liens, Claims, and Interests Pursuant to 11**
13 **U.S.C. § 363(f) Should Be Approved**

14 The Trustee requests that the Court approve the Sale of the Property free and clear of all
15 Interests, with any such Interests to attach to the Sale Proceeds with the same validity, enforceability,
16 and priority, if any, as existed with respect to the Property as of the date of the commencement of the
17 Debtor’s case.

18 Section 363(f) of the Bankruptcy Code expressly authorizes a trustee to sell property outside
19 the ordinary course of business “free and clear of any interest in such property of an entity” if any
20 one of the five following conditions is met:

- 21 1. applicable non-bankruptcy law permits sale of such property free and clear of
22 such interest;
- 23 2. such entity consents;
- 24 3. such interest is a lien and the price at which such property is to be sold is
25 greater than the aggregate value of all liens on such property; and
- 26 4. such interest is in bona fide dispute; or

27
28 ³ The form of Sale order to be later submitted by the Trustee will contain a section 363(m) finding, as well as
certain other findings.

1 5. such entity could be compelled, in a legal or equitable proceeding, to accept a
2 money satisfaction of such interest.

3 11 U.S.C. § 363(f). Because section 363(f) of the Bankruptcy Code is written in the disjunctive, any
4 one of these five conditions provides authority to sell the Property free and clear of liens. *See*
5 *Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988).

6 The Trustee is not aware of any lien against the Property that is the subject of this Motion.
7 However, if a holder of a lien or claim receives notice of the sale and fails to object, the Property
8 may be sold free and clear of that lien or claim under section 363(f)(2) of the Bankruptcy Code.
9 Thus, a sale free of Interests is thus permitted.

10 **D. The Ombudsman's Fees and Expenses Should Be Approved and Paid Out of the Sale**
11 **Proceeds**

12 The Trustee has reviewed the Ombudsman's fees in connection with this case which, to date,
13 total less than \$15,000. Consistent with the U.S. Trustee's Ombudsman Application and Order
14 thereon, the Trustee believes that the Ombudsman's fees and expenses should be allowed under
15 Code section 330 (which permits the Court's award of reasonable compensation for actual, necessary
16 services rendered and reimbursement for actual, necessary expenses incurred, to a consumer privacy
17 ombudsman), and that such fees and expenses should be paid to the Ombudsman out of the net sale
18 proceeds of the Sale. *See, e.g., In re Arizona Heart Institute, Ltd.*, 2010 Bankr. LEXIS 5841, *37
19 (Bankr. D. Ariz. Sept. 30, 2010) (sale order including provision directing distribution of certain
20 proceeds for payment of fees and expenses of consumer privacy ombudsman).

21 **E. Request for Waiver of Rule 6004(h) Stay**

22 In order to contact potential bidders as soon as practicable and allow such parties time to
23 commence due diligence prior to the Auction, the Trustee respectfully requests that the order on this
24 Motion be effective immediately, notwithstanding the 14-day stay imposed by Bankruptcy Rule
25 6004(h).

26 As expressed above, the Trustee's goal is to efficiently and expeditiously administer the
27 Estate's assets for the benefit of the Estate's creditors. To preserve the value of the Estate and limit
28 the costs of administering the Property and Case, an expedient conclusion to the Sale process will

1 inure to the benefit of the Estate and its creditors. Waiver of any stay will permit the Auction and
2 proposed Sale to take place as early as possible under the circumstances.

3 **VI.**

4 **CONCLUSION**

5 For all the foregoing reasons, the Trustee respectfully requests that the Court enter an order
6 (a) approving the proposed Sale of the Property to the Stalking Horse Bidder or other Successful
7 Bidder, as applicable, free and clear of all liens, claims and encumbrances; (b) approving the
8 applicable asset purchase agreement; (c) finding that the Stalking Horse Bidder or other Successful
9 Bidder, as applicable, is a good faith purchaser pursuant to section 363(m) of the Bankruptcy Code,
10 (d) approving the Ombudsman's requested fees and expenses under Code section 330 and direct the
11 payment thereof at the closing of the Sale, out of the net Sale proceeds, and (e) granting such other
12 relief as is fair and equitable.

13 Dated: November 6, 2014

PACHULSKI STANG ZIEHL & JONES LLP

15 By: /s/ Linda F. Cantor
16 Linda F. Cantor

17 Attorneys for R. Todd Neilson, Chapter 7
18 Trustee
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DECLARATION OF R. TODD NEILSON

I, R. Todd Neilson, declare as follows:

1. I am the duly appointed chapter 7 trustee (the "Trustee") in the above-captioned bankruptcy case (the "Case"). I make this Declaration on facts within my personal knowledge (albeit my own or that gathered by professionals rendering services to me), or as a result of having reviewed the court file in this Case. If called upon, I can and will competently testify to the facts stated herein.

2. I make this Declaration in support of the *Motion For Order: (1) Approving Asset Purchase Agreement; (2) Approving Sale of Estate's Property (Debtor's Customer Lists, Phone Numbers, Web Address, Certain Customer Files, and Related Personal Property) Free and Clear of All Liens, Claims, Encumbrances, and Interests; and (3) Granting Related Relief Including With Respect to Approval of Ombudsman's Fees and Expenses and Distribution of Sale Proceeds on Account of Such Amounts* (the "Motion"). Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Motion.

3. The Debtor is a California corporation. The Debtor was in the business of selling and purchasing gold, silver, coins, bullion, and other precious metals through its internet website or by phone.

4. The Debtor commenced this case by the filing of a voluntary petition for relief under chapter 11 of the Bankruptcy Code on March 10, 2014. In light of certain pending criminal investigation and other ongoing litigation, on March 18, 2014, the United States Trustee filed a *Stipulation Appointing Chapter 11 Trustee* [Docket No. 15] ("Stipulation"), which was signed by both the Debtor and its attorney. The Stipulation was approved by the Bankruptcy Court on March 18, 2014 [Docket No. 16] and an Order was entered by the Court on March 21, 2014 approving the *U.S. Trustee's Application for the Appointment of a Chapter 11 Trustee*, appointing me as Trustee of the Debtor's estate (the "Estate") [Docket No. 22]. Thereafter upon notice and hearing, the case was converted to a chapter 7 proceeding and I continue to serve as the chapter 7 Trustee [Docket 108].

1 5. The Debtor's business is no longer in operation and certain personal property remains
2 in the Estate. While I previously sold Debtor's tangible personal property, certain intellectual
3 property remains in the Estate consisting of customer lists including over 12,600 customer names,
4 business-related telephone and fax number(s), a domain name, certain customer sales journals, and
5 other related personal property (as more specifically described in the APA, the "Property"). The
6 Property is no longer necessary to the administration of the Estate and must be disposed of with the
7 goal of maximizing any value.

8 6. Shortly after my appointment as Trustee, I and my agents started to receive inquiries
9 from third parties about possibly acquiring some or all of the Property. I immediately set up a
10 procedure which would segregate and administer all inquiries from any interested parties. Given the
11 typical early posture of a bankruptcy trustee engagement and the need for me to get up to speed on
12 and promptly address case issues, I decided that keeping a separate file and doubling back with
13 potential interested parties after more pressing case matters have been addressed would be the best
14 course of action. I have acted as a bankruptcy trustee in various cases for over 30 years, during
15 which period I have sold a large and diverse amount of assets including assets like the Property.
16 Accordingly, I am familiar and experienced with the universe of potential, qualified buyers of assets
17 like the Property, which is relatively small. In total, five parties expressed interest in some or all of
18 the Property. After interested parties executed nondisclosure agreements, I and my agents engaged
19 in discussions regarding potential sales. The Stalking Horse Bidder expressed a more immediate
20 interest in moving forward with a potential transaction, and I entered into extensive discussions with
21 the Stalking Horse Bidder, which resulted in the terms of the parties' APA. Based on my extensive
22 prior experience, as well as discussions with potential interested parties, I believe that the value of
23 the Property will diminish over time and that the best opportunity to maximize value for the Estate is
24 to sell the Property as soon as practicable subject to the overbid procedures requested in the
25 Procedures Motion. As chapter 7 trustee, my goal is to maximize value from the disposition of the
26 Debtor's remaining assets and to investigate and, if appropriate, pursue causes of action. A sale of

1 the remaining property of the Debtor in the Trustee's control and possession, including the Property,
2 will serve that goal and benefit the Estate.

3 7. Through my marketing/solicitation efforts described above, and based on my chapter
4 7 trustee experience, I believe that the \$150,000 offer and other terms set forth in the APA
5 (including provision for the proposed break-up fee) comprise a fair and reasonable offer for the
6 Property, and approval of the APA and Sale is in the best interest of the Estate and its creditors. The
7 proposed Sale was negotiated in good faith, at arms' length and, to the best of my knowledge,
8 without collusion or fraud of any kind. The proposed Sale to the Stalking Horse Bidder will be
9 subject to overbid, as described in the Motion and Procedures Motion, to further ensure that the
10 proposed Sale terms are reasonable. I further believe that the overbid protections and Sale
11 Procedures proposed by the Procedures Motion (including the break-up fee) are reasonable and
12 appropriate and will maximize the recovery for the Estate.

13 8. I am not aware of any lien against the Property that is the subject of the Motion.
14 However, if a holder of a lien or claim receives notice of the Sale and fails to object, the Property
15 will be sold free and clear of that lien or claim under section 363(f)(2) of the Bankruptcy Code.

16 9. In connection with the proposed Sale, I learned that, during at least some periods and
17 at least in some instances prior to the commencement of the Case, the Debtor had posted on its
18 business website a policy (the "Privacy Policy") that certain private information ("Customer
19 Information") of the Debtor's prepetition customers ("Customers") would not be sold to third
20 parties. Based on the Privacy Policy, I stipulated with the U.S. Trustee to the appointment of a
21 consumer privacy ombudsman ("Ombudsman"). Wesley Avery was appointed as the Ombudsman
22 and on October 22, 2014, the Ombudsman filed his report (the "Ombudsman Report") [Docket No.
23 184], in which, among other things, the Ombudsman concluded, assuming that the buyer adopts the
24 Privacy Policy, the Sale of the Property (i) is consistent with the Privacy Policy in compliance with
25 Code section 363(b)(1)(A) and (ii) would not violate applicable nonbankruptcy law in compliance
26 with section 363(b)(1)(B). As set forth in the Addendum (attached hereto as Exhibit A), the Stalking
27 Horse Bidder agrees to abide by and adhere to the Privacy Policy; if an Auction is held, the
28

1 successful bidder (if not the Stalking Horse Bidder) will be required to similarly agree to abide by
2 and adhere to the Privacy Policy. Based on the Ombudsman Report, subject to the Court's approval
3 of the Sale, I do not believe that there is any impediment to the Sale or that any other actions need be
4 taken in respect to the Privacy Policy and the Customers.

5 10. In sum, it is my opinion that the proposed Sale of the Property is in the best interests
6 of creditors because the Estate is liquidating and has no use for the Property. Further, it is the duty
7 of a chapter 7 trustee to liquidate the assets of the bankruptcy estate in an efficient manner.

8 11. I have reviewed the Ombudsman's fees in connection with this case which I am
9 informed, to date, total less than \$15,000. Consistent with the U.S. Trustee's Ombudsman
10 Application and Order thereon, I believe that the Ombudsman's fees and expenses should be allowed
11 by the Court and that such fees and expenses should be paid to the Ombudsman out of the net sale
12 proceeds of the Sale.

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

15 Executed on this 6th day of November, 2014 at Draper, Utah.

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17 /s/ R. Todd Neilson
18 R. TODD NEILSON
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Attorney or Party Name, Address, Telephone & FAX Numbers, and California State Bar Number Linda F. Cantor (Bar No. 153762) Pachulski Stang Ziehl & Jones LLP 10100 Santa Monica Blvd., Suite 1300 Los Angeles, CA 90067 Tel: 310-277-6910 Fax: 310-201-0760 <input type="checkbox"/> Attorney for: R. Todd Neilson, Chapter 7 Trustee	FOR COURT USE ONLY
UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA	
In re: The Tulving Company, Inc. <div style="text-align: right;">Debtor(s).</div>	CASE NO.: 8:14-bk-11492-ES CHAPTER: 7 ADV. NO.:

**ELECTRONIC FILING DECLARATION
(INDIVIDUAL)**

- Petition, statement of affairs, schedules or lists
 Amendments to the petition, statement of affairs, schedules or lists
 Other: Property (Debtor's Customer Lists, Phone Numbers, Web Address, Certain Customer Files, And Related Personal Property) Free and Clear of All Liens, Claims, Encumbrances, and Interests; And (3) Granting Related Relief Including With Respect to Approval of Ombudsman's Fees and Expenses And Distribution of Sale Proceeds On Account Of Such Amounts; Memorandum of Points and Authorities; Declaration of R. Todd Neilson
- Date Filed: _____
 Date Filed: _____
 Date Filed: November 6, 2014

PART I - DECLARATION OF DEBTOR(S) OR OTHER PARTY

I (We), the undersigned Debtor(s) or other party on whose behalf the above-referenced document is being filed (Signing Party), hereby declare under penalty of perjury that: (1) I have read and understand the above-referenced document being filed electronically (Filed Document); (2) the information provided in the Filed Document is true, correct and complete; (3) the "/s/," followed by my name, on the signature line(s) for the Signing Party in the Filed Document serves as my signature and denotes the making of such declarations, requests, statements, verifications and certifications to the same extent and effect as my actual signature on such signature line(s); (4) I have actually signed a true and correct hard copy of the Filed Document in such places and provided the executed hard copy of the Filed Document to my attorney; and (5) I have authorized my attorney to file the electronic version of the Filed Document and this Declaration with the United States Bankruptcy Court for the Central District of California. If the Filed Document is a petition, I further declare under penalty of perjury that I have completed and signed a *Statement of Social Security Number(s)* (Form B21) and provided the executed original to my attorney.



 Signature of Signing Party

November 6, 2014

 Date

R. Todd Neilson

 Printed Name of Signing Party

 Signature of Joint Debtor (if applicable)

 Date

 Printed Name of Joint Debtor (if applicable)

PART II - DECLARATION OF ATTORNEY FOR SIGNING PARTY

I, the undersigned Attorney for the Signing Party, hereby declare under penalty of perjury that: (1) the "/s/," followed by my name, on the signature lines for the Attorney for the Signing Party in the Filed Document serves as my signature and denotes the making of such declarations, requests, statements, verifications and certifications to the same extent and effect as my actual signature on such signature lines; (2) the Signing Party signed the *Declaration of Debtor(s) or Other Party* before I electronically submitted the Filed Document for filing with the United States Bankruptcy Court for the Central District of California; (3) I have actually signed a true and correct hard copy of the Filed Document in the locations that are indicated by "/s/," followed by my name, and have obtained the signature(s) of the Signing Party in the locations that are indicated by "/s/," followed by the Signing Party's name, on the true and correct hard copy of the Filed Document; (4) I shall maintain the executed originals of this Declaration, the *Declaration of Debtor(s) or Other Party*, and the Filed Document for a period of five years after the closing of the case in which they are filed; and (5) I shall make the executed originals of this Declaration, the *Declaration of Debtor(s) or Other Party*, and the Filed Document available for review upon request of the Court or other parties. If the Filed Document is a petition, I further declare under penalty of perjury that: (1) the Signing Party completed and signed the *Statement of Social Security Number(s)* (Form B21) before I electronically submitted the Filed Document for filing with the United States Bankruptcy Court for the Central District of California; (2) I shall maintain the executed original of the *Statement of Social Security Number(s)* (Form B21) for a period of five years after the closing of the case in which they are filed; and (3) I shall make the executed original of the *Statement of Social Security Number(s)* (Form B21) available for review upon request of the Court.

 Signature of Attorney for Signing Party

 Date

 Printed Name of Attorney for Signing Party

EXHIBIT A

(Asset Purchase Agreement with Stalking Horse)

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ASSET PURCHASE AGREEMENT

^{August}
1st This Asset Purchase Agreement (the "**Agreement**") is made and entered into as of this day of ~~July~~, 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**").

Seller confirms and acknowledges that:

A. On March 10, 2014, Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. § 101 et seq. (the "**Bankruptcy Code**"), in the United States Bankruptcy Court for the Central District of California, Santa Ana Division (the "**Bankruptcy Court**") bearing case number 14-11492 (the "**Case**"); and

B. On March 21, 2014, the Trustee was appointed as chapter 11 trustee of the Debtor's estate (the "**Estate**"), and on May 29, 2014, an order was entered by the Bankruptcy Court converting the Case to a chapter 7, and Notice of Appointment of the Trustee as the chapter 7 Trustee was filed on June 10, 2014; and

C. The Trustee, as representative of the Debtor's Estate (hereinafter, "**Seller**") desires to sell, transfer and assign to Buyer, and Buyer desires to acquire from Seller, pursuant to Section 363 of the Bankruptcy Code, the Property (as defined below in Section 1).

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller and Buyer agree that:

1. Sale of Property. Seller hereby sells, transfers, assigns, conveys and delivers to Buyer, all of Seller's right, title and interest in and to (i) the Debtor's customer lists that are in the Trustee's possession and more specifically described on Exhibit "A" hereto (the "**Customer Lists**"), (ii) certain customer sales journals in electronic format (QuickBooks) that are in the Trustee's possession and more specifically described on Exhibit "A" hereto (the "**Electronic Customer Files**"), (iii) the domain name more specifically identified on Exhibit "A" hereto (the "**Domain Name**") and any goodwill that may be symbolized thereby and any rights to sue for past infringement and to receive recoveries therefor, (iv) the business-related phone numbers more specifically identified on Exhibit "A" hereto (the "**Business Numbers**"), and (v) any rights relating to the foregoing items (i) through (iv) (together with preceding items (i) through (iv), the "**Property**"). The Customer Lists and Electronic Customer Files are in electronic format and shall be transferred to Buyer in such format.

2. Purchase Price. In consideration of the transfer of the Property to Buyer, Buyer has delivered a deposit ("**Buyer's Deposit**") to the Seller in the amount of Fifteen Thousand Dollars (\$15,000) to be applied against the purchase price of One Hundred Fifty Thousand Dollars (\$150,000) ("**Purchase Price**"), and upon close of sale, Buyer shall pay to Seller the remaining sum of One Hundred Thirty Five Thousand Dollars (\$135,000) in cash (the "**Cash Payment**").

3. Overbid. The sale of the Property to Buyer shall be subject to overbid at an auction, for which Seller shall seek an approval order from the Bankruptcy Court ("**Bid Procedures Order**") providing for the allowance of bid procedures, a break-up fee (payable by Seller solely from the proceeds of the sale of the Property to a Successful Bidder other than the Buyer), initial and subsequent minimum overbids, the selection of a winning bid ("**Successful Bid**") and a back-up bid, and providing that if no qualified competing bid is received, Buyer's bid shall be determined to be the Successful Bid for the purchase of the Property.

4. Bid Procedures Order. Seller shall request that the Bid Procedures Order include the following provisions: (a) the initial overbid for the Property must be at least \$15,000 in excess of the Purchase Price, (b) subsequent bid increments shall be set at \$10,000, (c) the return of Buyer's Deposit and payment of a break-up fee to Buyer in the amount of \$7,500 in the event that (i) Buyer is not in default under this Agreement, and (ii) the Property is thereafter sold to an alternate purchaser submitting the Successful Bid ("**Successful Bidder**") at the auction ("**Auction**") notwithstanding Buyer's willingness and ability to consummate the purchase of the Property, (d) the Estate shall retain the deposit(s) made by the Successful Bidder and/or the back-up bidder if either the Successful Bidder and/or the back-up bidder fails to close the sale within five (5) business days after entry of a Bankruptcy Court order approving the sale of the Property.

5. Back-Up Bidder Status. If an alternate sale transaction with a Successful Bidder other than Buyer is selected by Seller and approved by the Bankruptcy Court, this Agreement shall not automatically terminate, or if Buyer submitted another higher or otherwise better bid at the Auction that is accepted by Seller as the highest or otherwise best bid but is not ultimately the Successful Bid ("**Superseding Agreement**"), such Superseding Agreement between Seller and Buyer shall not terminate, and this Agreement or the Superseding Agreement, as the case may be, shall constitute a "back-up bid" which shall remain open for acceptance by Seller up to and including the earliest of: (i) the fourteenth (14th) day after the entry of the order of the Bankruptcy Court approving the alternate sale transaction, (ii) the date of the closing of the alternate sale transaction, or (iii) the date of the termination of the Agreement (or Superseding Agreement, if applicable) pursuant to Section 8 (the period in preceding clauses (i), (ii), or (iii), as applicable, the "**Back-Up Period**"). Buyer's designation as "back-up bidder" shall not modify any terms of this Agreement or the Superseding Agreement, as the case may be, subject to this Section 5. Upon the lapse of the Back-Up Period, if Seller does not elect to proceed with closing the transaction pursuant to this Agreement or the Superseding Agreement (as applicable), the Buyer's Deposit shall be promptly returned to Buyer.

6. Competing Transaction. This Agreement is subject to approval by the Bankruptcy Court and the consideration by Seller of higher and better competing bids (each a "**Competing Bid**"). From the date hereon and until the completion of the auction or as otherwise directed by the Bankruptcy Court, Seller is permitted to cause his representatives to initiate contact with, solicit or encourage the submission of any inquiries, proposals or offers by any person, in addition to Buyer, in connection with any sale or other disposition of the Property, provided that such person enters into a non-disclosure agreement in favor of Seller and perform any other acts which are required under the Bankruptcy Code, including supplying information relating to the Property to prospective buyers.

7. Representations and Warranties.



(i) Seller. Seller represents and warrants to Buyer that: (a) to Seller's knowledge, the Estate has good and marketable title to the Property, free and clear of any and all covenants, conditions, restrictions, liens, charges, encumbrances, options and adverse claims or rights whatsoever; (b) Subject to the approval of the Bankruptcy Court, Seller has the full right, power and authority to enter into this Agreement and to transfer, convey and sell the Property to Buyer; (c) to Seller's knowledge, the Customer Lists, Electronic Customer Files, Domain Name and Business Numbers comprise the complete customer lists, electronic customer sales journals, domain names and business numbers, respectively, that were possessed by the Debtor and, in respect to the Customer Lists and Electronic Customer Files, that were seized by the Secret Service and the Department of Justice and turned over to the Trustee; and (d) Seller is not a party to any contract, agreement or commitment to sell, convey, assign, transfer or otherwise dispose of any portion or portions of the Property (other than this Agreement). Notwithstanding anything contained in this Agreement to the contrary, Buyer acknowledges and agrees that Seller is not making any representations or warranties whatsoever, express or implied, beyond those expressly given by Seller in this Section 7 hereof. Buyer acknowledges and agrees that, except for the representations and warranties contained herein, the Property is being transferred, as to condition, on an "AS IS" basis and "WITH ALL FAULTS." Without in any way limiting the foregoing, Seller hereby disclaim any warranty (express or implied) of merchantability or fitness for any particular purpose as to any portion of the Property.

(ii) Buyer. Buyer represents and warrants to Seller that: (a) Buyer has all requisite corporate power and authority to enter into the Agreement and to carry out its obligations hereunder; (b) On the date of this Agreement and the date of closing of the transactions contemplated under this Agreement, Buyer has and will have sufficient funds available to consummate such transactions; (c) there are no legal or other proceedings pending or, to the Buyer's knowledge, threatened in writing against Buyer, which, if adversely determined, would reasonably be expected to prohibit the consummation of the transactions contemplated by this Agreement or materially delay or impair the ability of Buyer to perform its obligations under this Agreement; and (d) Buyer has conducted its own independent review and analysis of the Property, and in entering into this Agreement, Buyer has relied solely upon such investigation and analysis, and Buyer acknowledges that neither Seller, the Trustee, the Debtor nor any of their respective agents make or have made any representation or warranty, either express or implied, relating to the Property, except for the representations and warranties contained in this Agreement (which are subject to the limitations and restrictions contained herein).

5. Termination. This Agreement may be terminated at any time before closing (i) by mutual written consent of Seller and Buyer; (ii) automatically and without any action or notice by Seller or Buyer, immediately upon Seller's bankruptcy case being dismissed or consummation of an alternate sale of the Property to a party other than Buyer; (iii) by Seller, if Seller is not in material breach of the Agreement and there has been a material violation or breach by Buyer of any representation, warranty, or covenant contained in the Agreement that has not been waived by Seller, and Buyer has failed to cure such violation or breach within ten (10) calendar days following receipt of notification thereof by Seller; and (iv) by Buyer, if Buyer is not in material breach of the Agreement and there has been a material violation or breach by Seller of any representation, warranty, or covenant contained in the Agreement that has not been waived by Buyer, and Seller has failed to cure such violation or breach within ten (10) calendar days following receipt of notification thereof by Buyer.

6. Counterparts. This Agreement 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 Agreement, 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.

7. Successors and Assigns. This Agreement will be binding on, and will inure to the benefit of, the successors and permitted assigns of the Seller and Buyer.

8. Assignment. Neither this Agreement nor any rights and obligations hereunder may be transferred or assigned without the other party's prior written consent.

9. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California applicable to contracts made and performed in California, and, to the extent applicable, the Bankruptcy Code.

10. No Survival of Representations and Warranties. Seller and Buyer hereto agree that the covenants contained in this Agreement to be performed at or after the consummation of a sale shall survive, and Seller and Buyer shall be liable to the other after the date hereof for any breach thereof, but that no other representations and warranties shall survive.

11. Preservation of Records. Seller (or any subsequently appointed bankruptcy estate representative) and Buyer agree that each of them shall preserve and keep the records held by it or their respective affiliates relating to the Property prior to the date hereof until the earlier of (i) one (1) year from the date hereof or (ii) the date of entry of an order of the Bankruptcy Court closing or dismissing the Case, and shall make such records and personnel available to the other as may be reasonably required by such party in connection with, among other things, any estate claims or causes of action, any insurance claims by, legal proceedings or tax audits against or governmental investigations of Seller or Buyer or any of their affiliates or in order to enable Seller or Buyer to comply with their respective obligations under this Agreement and each other agreement, document or instrument contemplated hereby or thereby. In the event Seller, on the one hand, or Buyer, on the other hand, wish to destroy such records after that time, such party shall first give ninety (90) days' prior written notice to the other and such other party shall have the right at its option and expense, upon prior written notice given to such party within that ninety (90) day period, to take possession of the records within one hundred and eighty (180) days after the date of such notice.

12. Bankruptcy Court Approval. Notwithstanding payment of the Buyer's Deposit or any other cash payment by Buyer, the sale, transfer, assignment, conveyance and delivery of the Property by Seller to Buyer and the Seller's obligations hereunder are subject to the approval of the Bankruptcy Court. In the event that the Bankruptcy Court does not approve this Agreement, Seller will return the Buyer's Deposit and any cash payment to Buyer.

13. Notices. All notices and other communications under this Agreement shall be in writing and shall be deemed given (i) when delivered personally by hand (with written confirmation of receipt), (ii) when sent by facsimile (with written confirmation of transmission)

or electronic mail (and no notice of failure of delivery was received within a reasonable time after such message was sent) or (iii) one business day following the day sent by overnight courier (with written confirmation of receipt), in each case at the following addresses, facsimile numbers and e-mail addresses (or to such other address, facsimile number or e-mail address as a party hereto may have specified by notice given to the other party hereto pursuant to this provision):

If to Seller, to:

R. Todd Neilson, chapter 7 Trustee
c/o Berkeley Research Group, LLC
2049 Century Park East, Suite 2525
Los Angeles, California 90067
Telecopier: (310) 299-4750
E-mail: TNeilson@brg-expert.com

With a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
10100 Santa Monica Boulevard, 11th Floor
Loa Angeles, CA 90067-4100
Attention: Linda F. Cantor
Telecopier: (310) 201-0760
E-mail: lcantor@pszjlaw.com

If to Buyer, to:

Great Collections
2030 Main Street, Suite 620
Irvine, CA 92614
Attn: Ian Russell
E-mail: ian@greatcollections.com

With a copy (which shall not constitute notice) to:

Armen R. Vartian
1601 N. Sepulveda Blvd. #581
Manhattan Beach, CA 90266
Telecopier: (866) 427-3820
E-mail: armen@vartianlaw.com

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK.]

IN WITNESS WHEREOF, Seller and Buyer have executed this Assignment 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:

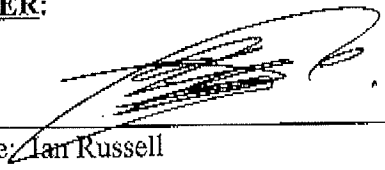
By:  _____
Name: Ian Russell
Its: Managing Member

Exhibit A to APA

Exhibit A

- A. Customer List - January 2011 through Petition Date
Containing the following (Approx. 12,600 - Names, real property addresses, telephone numbers and email addresses)

- B. Customer Files - January 2011 through Petition Date
Containing the following (Name, Product and Quantity sold/purchased, amount paid/received and date)

- C. Domain Name
www.Tulving.com

- D. Business Telephone Numbers
800-995-1708
949-722-0112
949-722-0114
949-722-0290
949-722-0291
949-722-0292
949-722-0293
949-722-0294
949-722-0295
949-722-0296 (Fax)

Addendum to APA

ADDENDUM TO ASSET PURCHASE AGREEMENT

This Addendum to Asset Purchase Agreement (this "*Addendum*") is made and entered into as of this 26 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.

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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 10100 Santa Monica Boulevard, 13th Floor, Los Angeles, California 90067

A true and correct copy of the foregoing document NOTICE OF MOTION AND MOTION FOR ORDER: (1) APPROVING ASSET PURCHASE AGREEMENT; (2) APPROVING SALE OF ESTATE'S PROPERTY (DEBTOR'S CUSTOMER LISTS, PHONE NUMBERS, WEB ADDRESS, CERTAIN CUSTOMER FILES, AND RELATED PERSONAL PROPERTY) FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS; AND (3) GRANTING RELATED RELIEF INCLUDING WITH RESPECT TO APPROVAL OF OMBUDSMAN'S FEES AND EXPENSES AND DISTRIBUTION OF SALE PROCEEDS ON ACCOUNT OF SUCH AMOUNTS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF R. TODD NEILSON 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 November 6, 2014, 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 November 6, 2014, 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.

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 _____, 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.

Potential bidders served by email as described in the Motion

Via Federal Express

The Honorable Erithe A. Smith
United States Bankruptcy Court - Central District of California
Ronald Reagan Federal Building and Courthouse
411 West Fourth Street, Suite 5040 / Courtroom 5A
Santa Ana, CA 92701-4593

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.

November 6, 2014

Janice G. Washington

/s/ Janice G. Washington

Date

Printed Name

Signature

PACHULSKI STANG ZIEHL & JONES LLP
ATTORNEYS AT LAW

1 **1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):**

2 **8:14-bk-11492-ES Notice will be electronically mailed to:**

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1 **2. SERVED BY UNITED STATES MAIL**

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