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9 UNITED STATES BANKRUPTCY COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11 SANTA ANA DIVISION

12 In re
13 THE TULVING COMPANY, INC., a
California corporation,
14 Debtor.

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

Chapter 7

**LIMITED OPPOSITION TO AND
REQUEST FOR HEARING RE
MOTION FOR ORDER (A)
APPROVING AND AUTHORIZING
THE TRUSTEE AND DEBTOR TO
ENTER INTO SUPPLEMENTAL
CONSENT ORDER ASSESSING
RESTITUTION AND CIVIL
MONETARY PENALTY AGAINST
DEFENDANTS THE TULVING
COMPANY, INC. AND HANNES
TULVING, JR. (B) AUTHORIZING
HANNES TULVING, JR. TO EXECUTE
THE SUPPLEMENTAL CONSENT
ORDER WITH THE UNITED STATES
COMMODITY FUTURE TRADING
COMMISSION ON BEHALF OF THE
DEBTOR, AND (C) FOR RELATED
RELIEF PURSUANT TO SECTIONS 105
AND 362 OF THE BANKRUPTCY
CODE**

[HEARING REQUESTED PURSUANT TO
L.B.R. 9013-1(o)(4)]

1 Levon Gugasian and Armen Gugasian (collectively, the “**Gugasians**”), hereby
2 submit their *Limited Opposition to the Motion for Order (A) Approving and Authorizing*
3 *the Trustee and Debtor to Enter Into Supplemental Consent Order Assessing Restitution*
4 *and Civil Monetary Penalty Against Defendants the Tulving Company, Inc. and Hannes*
5 *Tulving, Jr. (B) Authorizing Hannes Tulving, Jr. to Execute The Supplemental Consent*
6 *Order With The United States Commodity Future Trading Commission On Behalf Of The*
7 *Debtor, And (C) For Related Relief Pursuant To Sections 105 And 362 Of The Bankruptcy*
8 *Code*, filed by Weneta M.A. Kosmala, the Chapter 7 Trustee (“**Trustee**”) of the
9 bankruptcy estate of The Tulving Company, Inc. (“**Debtor**”) [Doc. 666] (the “**Motion**”).
10 In addition, the Gugasians request a hearing on the Motion pursuant to L.B.R. 9013-
11 1(o)(4).

12 The Trustee’s Motion seeks to add \$15.7 million in liability to Debtor’s balance
13 sheet under the terms of a Supplemental Consent Order stemming from an action brought
14 against Debtor by the U.S. Commodity Futures Trading Commission (the “**Commission**”)
15 in the United States District Court for the Western District of North Carolina (the “**District**
16 **Court**”) in 2015. Under any circumstance, the liability to the Commission arose no earlier
17 than January 2016, when the District Court entered the Consent Order.

18 The Trustee has brought adversary proceedings against the Gugasians involving
19 alleged fraudulent transfers purportedly occurring in early 2011 through early 2014. The
20 Gugasians make this Limited Opposition to ensure that the date of any additional liability
21 the Trustee seeks to impose upon Debtor is limited to the proper timeframe of January
22 2016. In addition, the Gugasians oppose any effort by the Trustee to utilize the additional
23 liability of the Consent Order in support of her allegation that Debtor was insolvent at the
24 time of the alleged fraudulent transfers in the adversary proceedings against the Gugasians.
25 Not only are the transactions not fraudulent transfers at all, they also occurred before – in
26 some cases several years before – entry of the Consent Order.

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1 I. **RELEVANT FACTUAL BACKGROUND**

2 On March 10, 2014 (the “**Petition Date**”), Debtor filed a voluntary petition under
3 Chapter 11 of Title 11 of the United States Code, thereby commencing the above-
4 captioned bankruptcy case, Bankruptcy Case No. 8:14-bk-11492-ES. On March 21, 2014,
5 R. Todd Neilson was appointed as the Chapter 11 trustee. On March 29, 2014, the Court
6 entered its Order converting this case to one under Chapter 7 of Title 11 of the United
7 States Code. On June 10, 2014, R. Todd Neilson was appointed as the Chapter 7 trustee.

8 On March 9, 2016, R. Todd Neilson filed his Complaints for Avoidance and
9 Recovery of Fraudulent Transfers (the “**Complaints**”) against the Gugasians, thereby
10 commencing Adversary Proceedings Nos. 8:16-ap-01083 (“**Armen Gugasian Adversary**
11 **Proceeding**”) and 8:16-ap-01084 (“**Levon Gugasian Adversary Proceeding**,” and
12 collectively, the “**Adversary Proceedings**”). The Complaints in the Adversary
13 Proceedings allege that, between early 2011 and early 2014, which timeframe was before
14 Debtor’s filing of its bankruptcy case, the Gugasians received salaries from Debtor and
15 Debtor paid Levon Gugasian for rent and tenant improvements for real property owned by
16 Levon Gugasian. [Doc. 1 (Levon Gugasian Adversary Proceeding); Doc. 1 (Armen
17 Gugasian Adversary Proceeding).]

18 On April 1, 2016, the Court appointed the Trustee as the successor Chapter 7
19 trustee, replacing Mr. Neilson. On April 11, 2016, the Gugasians filed their Amended
20 Answers to the Trustee’s Complaints, denying the Trustee’s allegations of fraudulent
21 transfers. [Doc. 5 (Levon Gugasian Adversary Proceeding); Doc. 5 (Armen Gugasian
22 Adversary Proceeding).] On August 10, 2016, before the commencement of discovery, the
23 Parties attended a mediation which did not result in a settlement of the Adversary
24 Proceedings. (*See First Stipulation to Continue Pretrial Conference and Related*
25 *Deadlines in Adversary Proceedings* filed in 8:16-ap-01083-ES on March 16, 2017 [Doc.
26 22 (Levon Gugasian Adversary Proceeding); Doc. 22 (Armen Gugasian Adversary
27 Proceeding) (the “**Stipulation**”) at ¶¶ 5–8].)

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1 On or about November 2, 2016, the Gugasians retained new counsel – Rutan &
2 Tucker, LLP – to represent them in the Adversary Proceedings. Since the Gugasians’
3 retention of their new counsel, the Trustee and the Gugasians have been conducting
4 discovery and litigating the Adversary Proceedings. (Stipulation, ¶¶ 10–11.) Currently,
5 the discovery completion deadline is September 29, 2017, and the Pretrial Conference is
6 set for November 16, 2017. [Doc. 24 (Levon Gugasian Adversary Proceeding); Doc. 24
7 (Armen Gugasian Adversary Proceeding).]

8 **II. BRIEF SUMMARY OF RELIEF SOUGHT BY THE MOTION**

9 By the Motion, the Trustee seeks the Court’s approval and authorization to enter
10 into the *Supplemental Consent Order Assessing Restitution and Civil Monetary Penalty*
11 *Against Defendants The Tulving Company, Inc. and Hannes Tulving, Jr.* (the
12 “**Supplemental Consent Order**”). The Supplemental Consent Order provides, among
13 other things, that the Debtor and Hannes Tulving, Jr. shall “pay jointly and severally, a
14 civil monetary penalty in the amount of \$15,761,432, plus post judgment interest” (the
15 “**CMP Obligation**”), pursuant to a Consent Order entered by the District Court in January
16 2016, nearly two years after the Debtor filed its bankruptcy case. (Motion at 7–8.)
17 Pursuant to the Supplemental Consent Order, the CMP Obligation is expressly
18 subordinated to claims of customers of Debtor pursuant to § 726(a)(4) of the Bankruptcy
19 Code. (Motion, Exh. A, at p. 23.)

20 **III. LIMITED OBJECTION**

21 The Gugasians object to the Motion, on a limited basis, to the extent that the
22 Trustee is attempting to attribute the CMP Obligation to the Debtor’s liabilities at any time
23 prior to, as of, or after December 31, 2010, through and including February 17, 2014,
24 which is the end date of the purportedly fraudulent transfers that the Trustee alleges in the
25 Adversary Proceedings. The Trustee alleges in the Complaint in the Levon Gugasian
26 Adversary Proceeding as follows:

27 Plaintiff is informed and believes, and thereon asserts that at all
28 relevant times, and at least since **December 31, 2010**, the Debtor:
(a) was insolvent; (b) was engaged in or was about to engage in
transactions for which its remaining assets were unreasonably small

1 in relation to the s [sic] transactions; or (c) intended to incur, or
2 believed or reasonably should have believed that they would incur,
3 debts beyond its ability to pay as they became due. (Levon
4 Gugasian Adversary Proceeding, Complaint, ¶ 24 (emphasis added);
5 see also Armen Gugasian Adversary Proceeding Complaint, ¶ 12.)

6 Whether Debtor was insolvent or solvent as of the date of the transfers to and
7 transactions with the Gugasians that the Trustee seeks to avoid (the “**Transfers**”) is a
8 contested issue that might be dispositive of the Adversary Proceedings. The District Court
9 entered the Consent Order in January 2016. Notably, however, the Motion is silent as to
10 precisely when the CMP Obligation is alleged to have been incurred. If the Trustee seeks
11 to somehow retroactively apply the CMP Obligation to the Debtor’s liabilities, then the
12 Gugasians oppose the addition of more than \$15,761,432 to the Debtor’s liabilities at the
13 time of the alleged Transfers – particularly without any evidence being offered on this
14 issue by the Trustee, and without the opportunity to conduct any discovery on this issue.
15 Indeed, the Trustee apparently is seeking to add more than \$15 million to the Debtor’s
16 liabilities by “consent” of the Trustee (who seeks to impose substantial fraudulent transfer
17 liability on the Gugasians) and Hannes Tulving (who is subject to a cooperation agreement
18 with the government, and who has a significant interest in cooperating with the Trustee
19 and the government). Importantly, the Motion does not provide any ground for any
20 retroactive liability or accounting.

21 Based on the foregoing, the Gugasians submit this Limited Opposition in an
22 abundance of caution, and respectfully request that the Trustee specify the date on which
23 the Debtor is deemed to have incurred the CMP Obligation. If that date impacts the
24 analysis of the Debtor’s solvency as of the date of any of the Transfers alleged in the
25 Adversary Proceedings against the Gugasians, then the Gugasians request that (i) the
26 Motion be denied as lacking any support for such retroactive liability or accounting; or

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1 alternatively, (ii) the Court treat the Motion as a contested matter under Fed. R. Bankr. P.
2 9014, subject to the applicable Rules in Part VII of the Fed. R. Bankr. P., and set the matter
3 for a further hearing.

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5 Dated: June 14, 2017

RUTAN & TUCKER, LLP
RICHARD K. HOWELL
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GERARD M. MOONEY
CAROLINE R. DJANG

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7
8 By: /S/ Roger F. Friedman
9 Roger F. Friedman
10 Attorneys for Interested Parties
11 Levon Gugasian and Armen Haig
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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:
611 Anton Blvd., Ste. 1400, Costa Mesa, CA 92626.

A true and correct copy of the foregoing document entitled (*specify*): **LIMITED OPPOSITION TO AND REQUEST FOR HEARING RE MOTION FOR ORDER (A) APPROVING AND AUTHORIZING THE TRUSTEE AND DEBTOR TO ENTER INTO SUPPLEMENTAL CONSENT ORDER ASSESSING RESTITUTION AND CIVIL MONETARY PENALTY AGAINST DEFENDANTS THE TULVING COMPANY, INC. AND HANNES TULVING, JR. (B) AUTHORIZING HANNES TULVING, JR. TO EXECUTE THE SUPPLEMENTAL CONSENT ORDER WITH THE UNITED STATES COMMODITY FUTURE TRADING COMMISSION ON BEHALF OF THE DEBTOR, AND (C) FOR RELATED RELIEF PURSUANT TO SECTIONS 105 AND 362 OF THE BANKRUPTCY CODE** 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*) June 14, 2017, 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*) June 14, 2017, 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.

Hon. Erithe A. Smith
United States Bankruptcy Court
411 West Fourth Street, Suite 5040
Santa Ana, CA 92701-4593

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.

June 14, 2017
Date

Cecilia Solórzano
Printed Name

/s/ Cecilia Solórzano
Signature

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

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