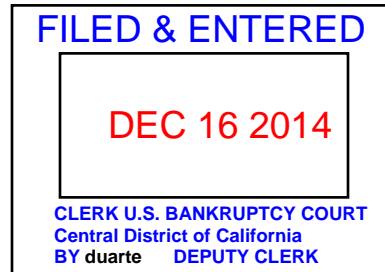


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5 Counsel for R. Todd Neilson, Chapter 7 Trustee for The
6 Tulving Company, Inc.

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

10 In re:

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

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

Chapter 7

13 Debtor.

ORDER: (1) SCHEDULING AUCTION AND SALE HEARING IN CONNECTION WITH SALE OF DEBTOR'S CUSTOMER LISTS, PHONE NUMBERS, WEB ADDRESS, CERTAIN CUSTOMER FILES, AND RELATED PERSONAL PROPERTY OF THE ESTATE; (2) APPROVING SALE PROCEDURES; (3) APPROVING BREAK-UP FEE; (4) APPROVING NOTICE OF AUCTION AND SALE HEARING; AND (5) GRANTING RELATED RELIEF INCLUDING APPROVING OMBUDSMAN REPORT

Sale Procedures Hearing:

Date: December 4, 2014
Time: 10:30 a.m.
Place: Courtroom 5A
411 West Fourth Street
Santa Ana, CA 92701

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26 A hearing was scheduled for December 4, 2014 ("Procedures Hearing"), on the proposed
27 sale, bidding and auction procedures and related matters provided for in this Order (the "Procedures
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1 Matters”) as set forth in the *Motion for Order: (1) Scheduling Auction and Sale Hearing in*
2 *Connection With Sale of Debtor’s Customer Lists, Phone Numbers, Web Address, Certain Customer*
3 *Files, and Related Personal Property of the Estate; (2) Approving Sale Procedures; (3) Approving*
4 *Break-Up Fee; (4) Approving Notice of Auction and Sale Hearing; and (5) Granting Related Relief*
5 *Including Approving Ombudsman Report* [Docket No.187] (the “Motion”)¹ filed by R. Todd
6 Neilson, the duly appointed chapter 7 trustee (the “Trustee”) for The Tulving Company, Inc. (the
7 “Debtor”), in the above-entitled chapter 7 case (the “Case”). The Court, having considered the
8 Motion and the Procedures Matters, the lack of any response or objection to the Motion, the record
9 in the Case; and the Court having issued its tentative ruling on the Court’s Calendar granting the
10 Motion and stating that no appearance at the Procedures Hearing by movant was required; the
11 Trustee having rested on the Court’s tentative ruling; and after due deliberation and sufficient cause
12 appearing therefor;

13 **IT IS HEREBY FOUND AND DETERMINED THAT:**

14 A. The Court has jurisdiction over this matter and over the property of the Debtor and
15 Estate pursuant to 28 U.S.C. §§ 157(a) and 1334. This matter is a core proceeding pursuant to 28
16 U.S.C. § 157(b)(2)(A), (M), (N), and (O). The statutory predicates for the relief sought herein are 11
17 U.S.C. §§ 105 and 363 and Fed. R. Bankr. P. 2002, 6004, and 9014. Venue of the Case and the
18 Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

19 B. The relief granted herein is in the best interests of the Estate, its creditors, and other
20 parties in interest.

21 C. The notice of the Motion, the Procedures Matters, and the Procedures Hearing given
22 by the Trustee constitutes due and sufficient notice thereof.

23 D. Any and all objections to the relief requested in the Motion relating to the Procedures
24 Matters are overruled.

25 E. The Trustee has articulated good and sufficient reasons for the Court to (i) approve
26 the Sale Procedures, (ii) approve the Break-Up Fee as provided in that certain Asset Purchase

27 _____
28 ¹ Capitalized terms not defined herein have the meaning ascribed to such term in the Motion.

1 Agreement and Addendum thereto (collectively, the “APA”) attached hereto as **Exhibit 1**, (iii)
2 approve the form and manner of notice of the Motion, the Auction, the Sale Hearing, and (iv) set the
3 date of the Auction and the Sale Hearing.

4 F. The Break-Up Fee, to the extent payable under the APA, (i) shall be deemed an actual
5 and necessary cost and expense of preserving the Estate, (ii) is of substantial benefit to the Estate,
6 (iii) is reasonable and appropriate, including in light of the size and nature of the Sale and the efforts
7 that have been and will be expended by the Stalking Horse Bidder, (iv) has been negotiated by the
8 parties and their respective advisors at arm’s length and in good faith, and (v) is necessary to ensure
9 that the Stalking Horse Bidder will continue to pursue the proposed Sale. The Break-Up Fee is a
10 material inducement for, and condition of, the Stalking Horse Bidder’s entry into the APA. The
11 Stalking Horse Bidder is unwilling to commit to purchase the Property under the terms of the APA
12 unless the Stalking Horse Bidder is assured of receiving the Break-Up Fee, if the Break-Up Fee
13 becomes due and owing under the APA.

14 G. The Sale Notice (as defined below) is calculated to provide adequate notice
15 concerning the proposed Sale of the Property, and will provide due and adequate notice of the relief
16 sought in the Motion, and is hereby approved.

17 H. The Sale Procedures are reasonable and appropriate and represent a fair and
18 appropriate method for maximizing the realizable value of the Property.

19 I. The Court has reviewed the report (the “Ombudsman Report”) filed as Docket No.
20 184, by the consumer privacy ombudsman, Wesley Avery (the “Ombudsman”). The Ombudsman
21 Report concludes, and the Court finds, that the Sale will be and is consistent with the Privacy Policy
22 in compliance with Code section 363(b)(1)(A), and giving due consideration to the facts,
23 circumstances, and conditions of such Sale, no showing was made that such Sale would violate
24 applicable nonbankruptcy law, in compliance with Code section 363(b)(1)(B).

25 **NOW, THEREFORE, IT IS HEREBY ORDERED THAT:**

26 1. The Motion is GRANTED.
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1 2. Any objections filed in response to the Motion and the relief granted herein are
2 hereby OVERRULED.

3 3. The Sale contemplated by the APA is designated as the “Stalking Horse Bid.”

4 4. Upon execution of a confidentiality agreement, any person identified by the Trustee,
5 with the assistance of his advisors, as reasonably likely to be a Qualified Bidder (as defined below)
6 that wishes to conduct due diligence on the Property with respect to a potential overbid may be
7 granted access to all material information that has been or will be provided to the Stalking Horse
8 Bidder. If the Trustee, in his discretion, determines that a Potential Bidder does not constitute a
9 Qualified Bidder (as defined below), then such Potential Bidder’s ability to receive due diligence
10 access or additional non-public information shall terminate.

11 5. Any prospective bidder (each a “Potential Bidder”) that wishes to participate in the
12 bidding process for the Property must, no later **than December 15, 2014 at 5:00 p.m.** (Pacific Time)
13 (the “Bid Deadline”) do all of the following:

14 a. Submit to the Trustee, through his counsel, an irrevocable offer in the form of
15 an executed APA (the “Modified Agreement”) without financing, internal approval or due diligence
16 contingencies, at a price that conforms with the following Paragraph 5.b, and on such other terms
17 that are no less favorable to the Estate than those contained in the APA. The Potential Bidder shall
18 also submit a “blacklined” or otherwise marked copy of the Modified Agreement reflecting the
19 differences between the Modified Agreement and the APA executed by the Stalking Horse Bidder.

20 b. Agree, in such Modified Agreement, to a purchase price that provides for the
21 following (the “Purchase Price”): payment in cash at closing in an initial minimum amount equal to
22 or exceeding the sum of \$165,000 (\$150,000 plus \$15,000).

23 c. Make a good faith cash deposit in the form of a cashier’s check or wire
24 transfer, in an amount equivalent to 10% of the proposed Purchase Price (the “Bid Deposit”), into a
25 segregated account maintained by the Trustee (the “Segregated Account”). The Bid Deposit shall
26 immediately become non-refundable (subject to the next sentence) and credited toward the Purchase
27 Price, if and when the transaction with the Potential Bidder making such Bid Deposit is deemed the
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1 Successful Bid or Back-Up Bid at the Auction and approved by the Court at the Sale Hearing. If a
2 Potential Bidder's bid is not designated as a Qualified Bid (as defined below), or such bid is not
3 approved as the Successful Bid or the Back-Up Bid at the Sale Hearing, the Bid Deposit of such
4 bidder will be returned to such bidder within three (3) business days after the Sale Hearing.

5 d. Provide written evidence reasonably satisfactory to the Trustee of (i) the
6 identification of the Potential Bidder, its principals, and the representatives thereof who are
7 authorized to appear and act on its behalf for all purposes regarding the contemplated transaction, (ii)
8 the Potential Bidder's corporate or other authority to enter into the contemplated transaction, (iii)
9 identification of all individuals of the Potential Bidder and its advisors that will attend the Auction,
10 and (iv) its financial ability to fully and timely perform all obligations under the Modified
11 Agreement if it is declared to be the Successful Bidder.

12 e. Disclose any connections or agreements with the Debtor, the Trustee, the
13 Stalking Horse Bidder, and any other known Potential Bidder or Qualified Bidder.

14 6. If a Potential Bidder delivers all of the materials described in paragraph 5, above,
15 (including the Bid Deposit) by the Bid Deadline, the Trustee will determine whether the Potential
16 Bidder (i) has demonstrated the financial ability to consummate the purchase of the Property, is
17 reasonably likely to be able to and willing to consummate the contemplated transactions and (iii) has
18 otherwise satisfied all of the requirements described in paragraph 5, above. If the Potential Bidder
19 has satisfied the requirements of this paragraph 6, the Trustee shall designate the Potential Bidder as
20 a "Qualified Bidder" and such bid as a "Qualified Bid." The Stalking Horse Bidder shall be deemed
21 to be a Qualified Bidder and the APA shall be deemed a Qualified Bid.

22 7. If the Trustee receives at least one (1) Qualified Bid from a Qualified Bidder other
23 than the Stalking Horse Bidder prior to the Bid Deadline, then the Trustee shall notify the Stalking
24 Horse Bidder and each other Qualified Bidder that the Trustee intends to conduct an auction (the
25 "Auction") to consider all Qualified Bids, subject to reasonable rules as may be established by the
26 Trustee. The Auction to determine the Successful Bidder for the Purchased Assets shall be held on
27 **December 16, 2014 at 10:00 a.m.** (Pacific Time) at the offices of Pachulski, Stang, Ziehl & Jones
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1 LLP, 10100 Santa Monica Blvd., Suite 1300, Los Angeles, California 90067. Each bidder
2 participating at the Auction will be required to confirm that it has not engaged in any collusion with
3 respect to the bidding or the Sale.

4 8. Subject to paragraph 15 below, only the Stalking Horse Bidder and other Qualified
5 Bidders may bid at the Auction. Copies of all Qualified Bids shall be provided to the Stalking Horse
6 Bidder and each other Qualified Bidder prior to the Auction. At the commencement of the Auction,
7 the Trustee shall identify the bid that he has determined to be the highest and best offer and shall
8 permit the Stalking Horse Bidder and other Qualified Bidders to submit higher and better bids. Each
9 subsequent bid must exceed the amount of the preceding bid by not less than \$10,000 and shall not
10 be modified in a manner that causes it no longer to be a Qualified Bid. The Auction will be an “open
11 format” such that all participants are contemporaneously to be made aware of the particulars of any
12 Qualified Bids that are submitted. At the conclusion of the Auction, the Trustee shall determine
13 which bid(s) shall be deemed the Successful Bid and Back-Up Bid (if any). The Trustee shall file a
14 notice announcing the results of the Auction and the identity of the Successful Bidder and the Back-
15 Up Bidder on the Court’s docket as soon as practicable after conclusion of the Auction. The Trustee
16 shall request at the Sale Hearing that the Court authorize the Trustee to consummate the Sale of the
17 Property to the Successful Bidder and, should the Successful Bidder fail to close, to the Back-Up
18 Bidder. The Trustee reserves the right to cancel the Auction and seek to move forward with a
19 private sale to the Stalking Horse Bidder. Promptly following the conclusion of the Auction, the
20 Successful Bidder shall complete and sign all agreements, contracts, instruments or other documents
21 evidencing and containing the terms and conditions upon which such bid was made. Bid Deposits of
22 the bidders other than the Successful Bidder and Back-Up Bidder shall be returned, subject to the
23 terms of the APA in the case of the Stalking Horse Bidder.

24 9. If bids have been submitted by more than one Qualified Bidder, the Qualified Bidder
25 that makes the next-highest and best bid to that of the Successful Bidder shall become the back-up
26 bidder (the “Back-Up Bidder”) and such Back-Up Bidder’s final and highest and best bid (the
27 “Back-Up Bid”) shall remain open pending the closing of the Successful Bid (the “Closing Date”).
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1 If a bid of the Stalking Horse Bidder is the next-highest and best bid to that of the Successful Bidder,
2 then such bid of the Stalking Horse Bidder shall be the Back-Up Bid, subject to the terms and
3 conditions of the APA relating thereto.

4 10. The Estate shall retain the Bid Deposit(s) made by the Successful Bidder and/or the
5 Back-Up Bidder if either the Successful Bidder and/or the Back-Up Bidder (as applicable) fails to
6 close the Sale within five (5) business days after entry of a Bankruptcy Court order approving the
7 Sale of the Property.

8 10. If the Trustee does not receive at least one Qualified Bid from a Qualified Bidder
9 other than the Stalking Horse Bidder, then no Auction shall be scheduled or conducted, and the
10 Court at the Sale Hearing shall proceed to consider the approval of the Sale of the Property to the
11 Stalking Horse Bidder as set forth in the APA.

12 11. If the Stalking Horse Bidder is not the Successful Bidder, subject to the terms and
13 conditions in the APA, the Trustee shall, pursuant to the APA, pay the Stalking Horse Bidder the
14 Break-Up Fee. The Break-Up Fee, to the extent payable under the APA, shall (i) be paid out of and
15 from the proceeds of the Sale of the Property to the Successful Bidder (or if applicable, the Back-Up
16 Bidder), constitute an administrative expense against the Estate under Bankruptcy Code section
17 503(b), and constitute liquidated damages, without regard to the Stalking Horse Bidder's ultimate
18 damages, and the Stalking Horse Bidder shall not retain any other rights, remedies, claims,
19 counterclaims, and defenses against the Estate in relation to the Sale. For the avoidance of doubt,
20 the Break-Up Fee shall be payable to the Stalking Horse Bidder in the event that: (i) the Stalking
21 Horse Bidder is not in default of any of its obligations under the APA, *and* (ii) the Property is
22 thereafter sold to a Successful Bidder other than the Stalking Horse Bidder at the Auction for
23 consideration in excess of the Consideration, notwithstanding the Stalking Horse Bidder's
24 willingness and ability to consummate the purchase of the Property, which payment shall be made to
25 the Stalking Horse Bidder promptly following closing of the Sale of the Property to the Successful
26 Bidder, from the proceeds of such Sale.

1 12. The Court shall hold a hearing on **December 18, 2014 at 10:30 a.m.** (Pacific Time)
2 (the “Sale Hearing”) to consider the approval of the Sale as set forth in the Motion and the *Motion*
3 *for Order: (1) Approving Asset Purchase Agreement; (2) Approving Sale of Estate’s Property*
4 *(Debtor’s Customer Lists, Phone Numbers, Web Address, Certain Customer Files, and Related*
5 *Personal Property) Free and Clear of All Liens, Claims, Encumbrances, and Interests; and (3)*
6 *Granting Related Relief Including With Respect to Approval of Ombudsman’s Fees and Expenses*
7 *and Distribution of Sale Proceeds on Account of Such Amounts* (the “Sale Approval Motion”)
8 approve the Successful Bidder and Back-Up Bidder, if necessary, and confirm the results of the
9 Auction, if applicable.

10 13. If the Sale transaction with the Successful Bidder does not close, the Back-Up Bid
11 shall, upon notice by the Trustee to the Back-Up Bidder, be deemed the Successful Bid without
12 further order of the Court, and the Back-Up Bidder shall be required to consummate the Sale
13 transaction in accordance with the applicable asset purchase agreement, and the Back-Up Bidder
14 shall be subject to the terms of this Order as if it were the initial Successful Bidder. If the Stalking
15 Horse Bidder is not the Successful Bidder or Back-Up Bidder, the Stalking Horse Bidder shall have
16 the right, but not the obligation, to keep its bid open pending the closing of a transaction with a
17 Successful Bidder.

18 14. Upon approval by the Court of the Successful Bidder and subject to the terms and
19 conditions of the applicable asset purchase agreement, the Successful Bidder’s Bid Deposit shall
20 become non-refundable and deemed forfeited to the Estate if the asset purchase agreement is
21 thereafter terminated as a result of a breach by the Successful Bidder or failure by the Successful
22 Bidder to close the proposed transaction as specified in this Order and/or the applicable asset
23 purchase agreement. The Bid Deposit of the Back-Up Bidder shall remain on deposit in the
24 Segregated Account pending the Closing Date (as defined below), and such deposit shall become
25 non-refundable and deemed forfeited to the Estate if the Back-Up Bidder is declared the Successful
26 Bidder and if the applicable asset purchase agreement is thereafter terminated as a result of a breach
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1 by the Back-Up Bidder or failure by the Back-Up Bidder to close the proposed transaction as
2 specified in this Order and/or the applicable asset purchase agreement.

3 15. Notwithstanding any other provision herein, the Trustee, in his sole discretion, shall
4 determine whether any bid for the purchase of the Property has satisfied all the conditions set forth
5 above or if the Trustee believes it is in the best interest of the Estate to waive any or all of the above
6 conditions, including permitting a bidder to bid at the Auction without submitting a prior Qualified
7 Bid.

8 16. The Trustee may modify the Sale Procedures set forth in this Order at any time prior
9 to or during the Auction if the Trustee determines, following consultation with the Stalking Horse
10 Bidder, in his reasonable judgment, that such modifications are reasonable and will better promote
11 the goals of the Auction process and are in the best interest of the Estate and the creditors thereof.

12 17. As set forth in the Motion filed and served on November 6, 2014, objections to the
13 Sale and Sale Approval Motion were required to be in writing and filed with the Court and served on
14 (i) the Trustee's counsel, Linda Cantor, Esq., Pachulski, Stang, Ziehl & Jones, LLP, 10100 Santa
15 Monica Blvd., Suite 1300, Los Angeles, CA 90067, fax: 310-201-0760, lcantor@pszjlaw.com, (ii)
16 the Stalking Horse's counsel, Armen Vartian, 1601 N. Sepulveda Blvd. #581, Manhattan Beach, CA
17 90266, fax: 866-427-3820, armen@vartianlaw.com, and (iii) the Office of the United States Trustee
18 (the "Objection Recipients"), on or before **December 4, 2014 at 5:00 p.m. (Pacific Time)**,
19 provided, however, in the event that the Successful Bidder at the Auction is a person or entity other
20 than the Stalking Horse Bidder, any supplemental or further objections (a "Supplemental
21 Objection") to the Sale of the Property to the Successful Bidder shall be filed and served by no later
22 than **December 17, 2014 at 5:00 p.m. (Pacific Time)** (the "Objection Deadlines"). The
23 Supplemental Objection shall be limited only to issues arising from the Successful Bidder being a
24 person or entity other than the Stalking Horse Bidder. The Trustee (1) shall file with the Court a
25 notice disclosing the Successful Bidder as soon as reasonably practicable after the Auction and (2)
26 may reply to the issues raised in any Supplemental Objection at the Sale Hearing.

1 18. Notice of (a) the Order, (b) the Sale Procedures, (c) the Auction, (d) the Objection
2 Deadlines, and (e) the Sale Hearing shall be provided within three (3) business days after entry of
3 this Order, by the Trustee via ECF notification, U.S. mail, facsimile and/or email, upon the Service
4 Parties (defined below), substantially in the form attached hereto as **Exhibit 2** (the “Sale Notice”),
5 and such notice shall be good and sufficient, and no other or further notice shall be required, under
6 the circumstances. Subject to any applicable provisions of the Court’s August 6, 2014 Order
7 Limiting Scope of Notice [Docket No. 157], the “Service Parties” are (i) any parties known by the
8 Trustee to have expressed an interest to him in a transaction with respect to the Property; (ii) any
9 other parties that the Trustee and his advisors believe may potentially have an interest in acquiring
10 the Property; (iii) any entities known by the Trustee to have asserted any lien or interest in the
11 Property; (iv) the United States Trustee; and (vii) all parties who have requested special notice in the
12 Case.


13 19. The Ombudsman Report is hereby approved under Code sections 332 and 363(b)(1).

14 20. Notwithstanding any applicability of Bankruptcy Rule 6004(h) and/or any other
15 Bankruptcy Rule, the terms and conditions of this Order shall be immediately effective and
16 enforceable upon entry hereof.

17 21. This Court shall retain jurisdiction to enforce and interpret the provisions of this
18 Order.

19 #####

24 Date: December 16, 2014

23 
24 Eritha Smith
25 United States Bankruptcy Judge