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Tulving Company, Inc.

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

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

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

Chapter 7

**NOTICE OF MOTION AND MOTION
FOR ORDER (A) APPROVING AND
AUTHORIZING THE TRUSTEE AND
DEBTOR TO ENTER INTO THE
CONSENT ORDER FOR PERMANENT
INJUNCTION AND OTHER RELIEF
AGAINST THE TULVING COMPANY,
INC. AND HANNES TULVING, JR. (B)
AUTHORIZING HANNES TULVING, JR.
TO EXECUTE THE 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
AND BANKRUPTCY RULE 9019;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF;
DECLARATION OF R. TODD NEILSON**

[NO HEARING REQUIRED PURSUANT
TO L.B.R. 9013-1]

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25 **TO THE HONORABLE ERITHE SMITH, UNITED STATES BANKRUPTCY JUDGE,**
26 **THE OFFICE OF THE UNITED STATES TRUSTEE, PARTIES THAT HAVE FILED**
27 **REQUESTS FOR SPECIAL NOTICE, AND OTHER INTERESTED PARTIES:**
28

1 **PLEASE TAKE NOTICE** that R. Todd Neilson, the duly appointed chapter 7 trustee (the
2 “Trustee”) for The Tulving Company, Inc. (the “Debtor”), in the above-entitled chapter 7 case,
3 hereby files this motion (the “Motion”) for the entry of an order or orders, pursuant to Sections 105
4 and 362 of Title 11 of the United States Code, 11 U.S.C. § 101 et seq. (the “Bankruptcy Code”) and
5 Federal Rule of Bankruptcy Procedure 9019(a) (“Rule 9019”), (a) approving and authorizing the
6 Debtor to enter into the *Consent Order of Permanent Injunction and Other Relief Against The*
7 *Tulving Company, Inc. and Hannes Tulving, Jr.* (the “Consent Order”) by and among the U.S.
8 Commodity Futures Trading Commission (the “CFTC”), the Debtor and Hannes Tulving, Jr.
9 (“Hannes Tulving”), the Debtor’s sole shareholder (collectively, the “Parties”); (b) authorizing
10 Hannes Tulving, on behalf of the Debtor, to sign the Consent Order on behalf of the Debtor, and (c)
11 for related relief. A copy of the Consent Order is appended hereto as **Exhibit A**.

12 The Consent Order resolves, in substantial part, the “*Complaint Against The Tulving*
13 *Company, Inc. and Hannes Tulving, Jr. for Permanent Injunction, Civil Penalties, and Other*
14 *Equitable Relief*” (the “Complaint”), filed by the CFTC alleging violations of the Commodity
15 Exchange Act, 7 U.S.C. §§ 1-26 (2012) (the “Act”) and the Commission’s Regulations
16 (“Regulations”) promulgated thereunder, 17 C.F.R. §§ 1.1-190.10 (2013) in case number 3:15 – cv-
17 424-RJC-DSC (the “CFTC Action”), pending in the United States District Court for the Western
18 District of North Carolina (the “NC District Court”). The grounds for the Complaint are based
19 upon substantially the same operative facts underlying the Debtor’s and Hannes Tulving Plea
20 Agreement, admitting to 18 U.S.C. § 1343 wire fraud charge as set forth in Count One of a Bill of
21 Information in the criminal case against the Debtor and Hannes Tulving also pending in the NC
22 District Court (the “Criminal Case”).¹ An answer or other response to the Complaint is due
23 January 6, 2016.

24 Under the Consent Order, Hannes Tulving and the Debtor will admit to the violations
25 alleged in the Complaint, consent to a permanent injunction against the conduct described therein
26 and agree to the payment of restitution, disgorgement and civil monetary penalties, plus interest, if

27 _____
28 ¹ By Order of this Court entered July 22, 2015 [Docket No. 264], Hannes Tulving was authorized to sign the Plea Agreement and the “*Coordination Agreement for Disbursement of Seized Items from United States to Bankruptcy Trustee and from Trustee to Victims*” (the “Coordination Agreement”) on behalf of the Debtor in the Criminal Case.

1 ordered by the NC District Court. Notwithstanding the foregoing, the payment of disgorgement
2 and civil penalties, plus interests, under the Consent Order will be subordinated to the payment of
3 all claims of the Debtor's customers, and the payment of restitution shall be made to the Trustee for
4 distribution to the Debtor's customers. Provided that the Trustee receives authorization for Hannes
5 Tulving to sign the Consent Order on behalf of the Debtor, the CFTC will submit the Consent
6 Order to the NC District Court for approval.

7 The Trustee, in the exercise of his business judgment, requests approval of the Consent
8 Order, and Hannes Tulving's execution of same on behalf of the Debtor, as fair and reasonable and
9 in the best interests of the Estate. It avoids potentially unnecessary, time consuming and costly
10 multi-district disputes among the Trustee, Hannes Tulving and the CFTC and any claims arising
11 from the Consent Order shall either be subordinated to claims of creditors or paid over to the
12 Trustee for distribution to creditors.

13 **PLEASE TAKE FURTHER NOTICE** that the Motion is based on this Notice and
14 Motion, the accompanying Memorandum of Points and Authorities, the Declaration of R. Todd
15 Neilson that is attached to the Motion, and any other admissible evidence properly brought before
16 the Court.

17 **PLEASE TAKE FURTHER NOTICE** that Local Bankruptcy Rule 9013-1(o)(1) requires
18 that any response to the Motion and a request for a hearing thereon be filed with the Bankruptcy
19 Court and served upon Trustee's counsel at the address appearing on the upper-left hand corner of
20 the caption page to this Motion and the Office of the U.S. Trustee within fourteen (14) days of the
21 date of service of the Motion. Pursuant to Local Bankruptcy Rule 9013-1(h), the failure to timely
22 file and serve written opposition may be deemed by the Court to be consent to the granting of the
23 relief requested in the Motion.

24 **WHEREFORE**, the Trustee respectfully requests that the Court (a) approve and authorize
25 the Debtor to enter into the Consent Order, including taking all actions necessary to implement
26 same, (b) approve the execution of the Consent Order by Hannes Tulving, on behalf of the Debtor,
27 (c) grant relief from the automatic stay to the extent necessary for the possible imposition of claims
28 by the NC District Court under the Consent Order, (d) waive the 14-day waiting period under

1 Bankruptcy Rule 4001(a)(3), and (e) grant such other and further relief as is just and proper under
2 the circumstances.

3
4 Dated: November 23, 2015

PACHULSKI STANG ZIEHL & JONES LLP

5 By /s/ Linda F. Cantor
6 Linda F. Cantor

7 Counsel for R. Todd Neilson, Chapter 7 Trustee
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MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

A. The Background of the Debtor’s Business

The Tulving Company, Inc. (“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. Prior to the filing of the bankruptcy, customer complaints concerning delayed or undelivered orders were increasingly made to the Better Business Bureau against the Debtor and in early March, 2014, a class-action lawsuit was filed against the Debtor and Hannes Tulving, Jr., the Debtor’s sole shareholder and principal (“Hannes Tulving”) in the United States District Court, Northern District of California. A criminal investigation of the Debtor and Tulving by the Government was also being pursued, as described below. The Debtor ceased operations on or about March 3, 2014.

B. Procedural Background of the Bankruptcy Case

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 the pending criminal investigation and other ongoing litigation against the Debtor, on March 18, 2014, the United States Trustee filed a *Stipulation Appointing Chapter 11 Trustee* [Docket No. 15] (the “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 R. Todd Neilson as Trustee of the Debtor’s estate* [Docket No. 22]. Thereafter upon notice and hearing, the case was converted to a chapter 7 and R. Todd Neilson was appointed and continues to serve as the chapter 7 Trustee [Docket 108].

C. The Criminal Case

On March 8, 2014, Special Agents of the United States Secret Service executed a Search Warrant on the Debtor’s offices on probable cause that the Debtor and Hannes Tulving were engaged in fraud. The Search Warrant resulted in the seizure of the Debtor’s property including

1 rare coins and other valuable items. Criminal proceedings against the Debtor and Hannes Tulving
2 ensued before the United States District Court for the Western District of North Carolina (the
3 “Criminal Case”).

4 Hannes Tulving entered into a Plea Agreement in the Criminal Case. Pursuant to Order of
5 this Court entered July 22, 2015 [Docket No. 264], Hannes Tulving was authorized to sign on
6 behalf of the Debtor, the Plea Agreement and a *“Coordination Agreement for Disbursement of*
7 *Seized Items from United States to Bankruptcy Trustee and from Trustee to Victims”* in the
8 Criminal Case. (Under the Plea Agreement, the Debtor and Hannes Tulving each plead guilty to 18
9 U.S.C. § 1343 wire fraud charge as set forth in Count One of a Bill of Information in the Criminal
10 Case.)

11 On or about September 11, 2015, the U.S. Commodity Futures Trading Commission (the
12 “CFTC”) filed a *“Complaint Against The Tulving Company, Inc. and Hannes Tulving, Jr. for*
13 *Permanent Injunction, Civil Penalties, and Other Equitable Relief”* (the “Complaint”), alleging
14 violations of the Commodity Exchange Act, 7 U.S.C. §§ 1-26 (2012) (the “Act”) and the
15 Commission’s Regulations (“Regulations”) promulgated thereunder, 17 C.F.R. §§ 1.1-190.10
16 (2013) in case number 3:15 – cv-424-RJC-DSC, pending in the United States District Court for the
17 Western District of North Carolina (the “NC District Court”). The grounds for the Complaint are
18 based upon substantially the same operative facts underlying the Debtor’s and Hannes Tulving
19 guilty plea in the Criminal Case referenced above, but the charges are civil and not criminal.

20 In order to consensually resolve the Complaint, the CFTC has proposed that the Debtor,
21 Hannes Tulving and the CTFC (collectively, the “Parties”) enter into a *Consent Order of*
22 *Permanent Injunction and Other Relief Against The Tulving Company, Inc. and Hannes Tulving,*
23 *Jr.* (the “Consent Order”). Hannes Tulving has agreed to the terms of the Consent Order. By this
24 Motion, the Trustee is requesting an Order from this Court authorizing Hannes Tulving to enter into
25 the Consent Order on behalf of the Debtor.

26 Under the Consent Order, Hannes Tulving and the Debtor admit to the violations alleged in
27 the Complaint, consent to a permanent injunction against the conduct described therein and agree to
28 the payment of restitution, disgorgement and civil monetary penalties, plus interest, if ordered by

1 the NC District Court. Importantly, the payment of disgorgement and civil penalties, plus interests,
2 under the Consent Order shall be subordinated to the payment of all claims of the Debtor's
3 customers, and the payment of restitution shall be made directly to the Trustee for distribution to
4 the Debtor's customers. Therefore, the monetary sanctions imposed in the Order will not
5 negatively impact the Estate or its creditors and the injunction is not improper as the Trustee in this
6 chapter 7 case will not operate after the case administration has been completed; most likely, the
7 Tulving Company will be dissolved upon closing of the case. A copy of the Consent Order is
8 appended to the Motion as **Exhibit A** and its provisions are described in more detail below.

9 **D. The Consent Order**

10 Under the Consent Order¹, the Debtor and Hannes Tulving (collectively, the "Defendants")
11 consent and agree to certain Findings of Fact and Conclusions of Law including, without limitation,
12 Defendants' violations of Section 6(c)(1) of the Act, 7 U.S.C. §§9, 15, and Regulation 180.1(a), 17
13 C.F.R. § 180.1: Fraud by Manipulative or Deceptive Devises or Contrivances by knowingly or
14 recklessly: (1) failing to disclose, and omitting, that Tulving Company did not use some customer
15 funds to purchase precious metals; (2) failing to disclose, and omitting, that Tulving Company
16 would not have sufficient precious metals to deliver to some customers; (3) misrepresenting that
17 precious metals ordered by Tulving Company customers would be shipped and delivered; (4)
18 issuing written statements misrepresenting the ownership of precious metals; (5) failing to disclose,
19 and omitting, that the funds paid by some Tulving Company customers would be misappropriated;
20 (6) misappropriating some customer funds by, among other things, using some customer funds to
21 fulfill other customers' orders, paying debts of the company, and also returning the money to
22 previous customers who did not receive their precious metals; and (7) using the mails or other
23 instrumentalities of interstate commerce as part of the fraud; the employment of deceptive devises
24 within the scope of his employment or office for Tulving Company.

25 In addition, Hannes Tulving employed the deceptive devises described above, within the
26 scope of his employment or office for the Debtor under Section 2(a)(1)(B) of the Act, 7 U.S.C. §
27 2(a)(1)(B) (2012), and Regulation 1.2, 17 C.F.R. § 1.2, and therefore the Debtor has liability under

28 ¹ This is only a summary description of the terms of the Consent Order. In the event of any inadvertent inconsistencies
between this summary description and the terms of the Consent Order, the terms of the Consent Order shall govern.

1 Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2012), and Regulation 1.2, 17 C.F.R. § 1.2
2 (2013), as principal for its agent's acts, omissions or failures of the Act and Regulations.

3 The Consent Order further provides that based upon and in connection with the foregoing
4 conduct, pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2012), Defendants are permanently
5 restrained, enjoined and prohibited from directly or indirectly:

6 a. Using or employing, or attempting to use or employ, in connection with any swap,
7 or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject
8 to the rules of any registered entity, any manipulative or deceptive device or contrivance, in
9 contravention Section 6(c)(1) of the Act, 7 U.S.C. §§ 9, 15 (2012), and Regulation 180.1 (a), 17
10 C.F.R. § 180.1(a) (2013).

11 b. Trading on or subject to the rules of any registered entity (as that term is defined in
12 Section 1a(40) of the Act, 7 U.S.C. § 1 a(40) (2012));

13 c. Entering into any transactions involving "commodity interests" (as that term is
14 defined in Regulation 1.3(yy), 17 C.F.R. § 1.3(yy) (2014)) for their own personal account or for
15 any account in which they have a direct or indirect interest;

16 d. Having any commodity interests traded on their behalf;

17 e. Controlling or directing the trading for or on behalf of any other person or entity,
18 whether by power of attorney or otherwise, in any account involving commodity interests;

19 f. Soliciting, receiving or accepting any funds from any person for the purpose of
20 purchasing or selling any commodity interests;

21 g. Applying for registration or claiming exemption from registration with the
22 Commission in any capacity, and engaging in any activity requiring such registration or exemption
23 from registration with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R.
24 § 4.14(a)(9) (2014); and/or

25 h. Acting as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a)
26 (2014)), agent or any other officer or employee of any person (as that term is defined in Section
27 1a(38) of the Act, 7 U.S.C. § 1a(38) (2012)), registered, exempted from registration or required to
28

1 be registered with the Commission except as provided for in Regulation 4.14(a)(9), 17 C.F.R. §
2 4.14(a)(9) (2014).

3 For statutory and equitable relief, the Consent Order provides that Defendants shall pay
4 restitution, plus post-judgment interest, to each defrauded customer, if ordered by the NC District
5 Court. However, the payment of such restitution and interest by Defendants shall be made to the
6 Trustee in the Bankruptcy Case for distribution to Tulving Company's customers.

7 Further, under the Consent Order the Defendants shall pay disgorgement and a civil
8 monetary penalty, plus post-judgment interest, to the CFTC, if ordered by the NC District Court,
9 provided that the payment of such disgorgement, penalty and interest by the Tulving Company
10 shall be subordinated to the payment of all claims of Tulving Company customers.

11 The NC District Court shall determine the amounts of restitution, disgorgement and civil
12 monetary penalty and the procedures for payment and distribution of these monetary sanctions by
13 further order upon: (1) motion of the parties submitting to the NC District Court a proposed
14 consent order setting out their agreement on the amounts of restitution, disgorgement and civil
15 monetary penalty to be paid by Defendants in this matter; (2) motion by the CFTC; and/or (3)
16 hearing before the NC District this Court. Under the Consent Order the Defendants also agree to
17 cooperate with the CFTC including providing information and produce documents

18 As discussed herein, the Trustee believes that the compromise reached in the Consent Order
19 is fair and reasonable resolution of the Complaint and is in the best interest of the Estate.

20 II.

21 **THE CONSENT ORDER SHOULD BE APPROVED AS BEING IN THE BEST** 22 **INTERESTS OF THE ESTATE**

23 A. **Standard for Approval of Settlements**

24 "The law favors compromise and not litigation for its own sake. . . ." *Martin v. Kane (In re*
25 *A & C Properties)*, 784 F.2d 1377, 1381 (9th Cir. 1986); *see also Marandas v. Bishop (In re*
26 *Sassalos)*, 160 B.R. 646, 653 (D. Or. 1993) (noting that compromises are favored in bankruptcy).
27 Rule 9019(a) of the Bankruptcy Rules ("Rule 9019(a)") provides in relevant part that "[o]n motion
28 by the trustee and after notice and hearing, the court may approve a compromise or settlement."

1 Rule 9019(a) commits the approval or denial of a settlement to the sound discretion of the
2 bankruptcy court. *See In re Stein*, 236 B.R. 34, 37 (D. Or. 1999). The bankruptcy court, however,
3 should not substitute its own judgment for the judgment of a trustee or a debtor. *See In re Carla*
4 *Leather, Inc.*, 44 B.R. 457, 465 (Bankr. S.D.N.Y. 1984), *aff'd*, 50 B.R. 764 (S.D.N.Y. 1985).

5 When deciding whether to approve a settlement, the bankruptcy court must determine if the
6 settlement is reasonable under the circumstances of the case, fair and equitable, and in the best
7 interest of the estate. *See A & C Props.*, 784 F.2d at 1381. The court is neither required to conduct
8 a mini-trial on the merits of the settlement, *Port O'Call Invest. Co. v. Blair (In re Blair)*, 538 F.2d
9 849, 851 (9th Cir. 1976), nor to determine that the settlement amount is the amount that would have
10 been paid had the matter been litigated. The court need only "canvass the issues and see whether
11 the settlement 'fall[s] below the lowest point in the range of reasonableness.'" *Cosoff v. Rodman (In*
12 *re W.T. Grant Co.)*, 699 F.2d 599, 608 (2d Cir. 1983) (quoting *Newman v. Stein*, 464 F.2d 689, 693
13 (2d Cir. 1972)); *In re Pacific Gas and Elec. Co.*, 304 B.R. 395, 417 (Bankr. N. D. Cal. 2004); *In re*
14 *Planned Protective Servs., Inc.*, 130 B.R. 94, 99 n.7 (Bankr. C.D. Cal. 1991).

15 The bankruptcy court need not conduct an exhaustive investigation
16 into the validity of the asserted claim. It is sufficient that, after
17 appraising itself of all facts necessary for an intelligent and objective
18 opinion concerning the claim's, validity, the court determines that
either (1) the claim has "substantial foundation" and is not "clearly
invalid as a matter of law," or (2) the outcome of the claim's
litigation is "doubtful."

19 *United States v. Alaska National Bank (In re Walsh Construction, Inc.)*, 669 F.2d 1325, 1328 (9th
20 Cir. 1982) (citations omitted).

21 **B. The Consent Order is in the Best Interests of the Estate**

22 The rationale for approval of the Consent Order is straight-forward. The Consent Order
23 resolves the CFTC's civil complaint without the need for litigation or the expenditure of Estate
24 assets including, without limitation, the costs to obtain local counsel or appear before the NC
25 District Court. (Because the Complaint is an action or proceeding by a government unit, the
26 CFTC's action is not stayed under Section 362(b)(4) of the Bankruptcy Code.) Moreover, the
27 remedies sought in the Complaint as against the Debtor will have no negative impact upon the
28 Estate or its creditors. Any restitution that may be imposed against the Debtor under the Consent

1 Order (upon further order of the NC District Court), will result in monies being transferred to the
2 Estate for the benefit of the Debtor's defrauded customers. Any disgorgement or other monetary
3 civil penalties that may be ordered by the NC District Court are subordinated to the claims of all
4 creditors of this Estate. The monetary relief is therefore either favorable or neutral to the Estate.

5 The Consent Order permanently enjoins the Debtor from engaging in future fraudulent,
6 deceptive or manipulative acts including taking actions in violation of the Act or Regulations. For
7 example, the Debtor is also enjoined from entering into, directly or indirectly, transactions
8 involving "commodity interests" (as defined in Regulation 1.3(yy), 17 C.F.R. § 1.3(yy) 2014) for
9 any accounts in which they have an interest, trading, soliciting, receiving or accepting funds for the
10 purpose of purchasing or selling commodity interests, applying for registration or claiming
11 exemption from registration with the Commission or acting as a principal, agent or officer or
12 employee of any person registered, exempted from registration or required to be registered with the
13 Commission.² The Trustee is in the process of administering assets of the Estate; there are and will
14 be no ongoing operations of the Tulving Company. At the time this Case is closed, the Trustee will
15 most likely cause the Debtor to dissolve. Therefore, the injunctions will have no negative impact
16 upon the Estate or its creditors.

17 Finally, the Consent Order admits Findings of Fact and Conclusions of Law regarding the
18 Debtor. However, these are the same findings and conclusions incorporated in the Bill of
19 Information and the Plea Agreement to which Hannes Tulving, on his own behalf and on behalf of
20 the Debtor (pursuant to order of this Court) have already consented and agreed. Hannes Tulving
21 has agreed to the terms of the Consent Order and is prepared to sign the Consent Order in order to
22 resolve the Complaint.

23 An additional consideration is that the Consent Order does not impose any more obligations
24 on the Debtor than it might incur in any event through a judgment after trial, a process that the
25 Trustee believes is unnecessary from the perspective of the Estate and its creditors. Accordingly,
26 the Trustee believes that the Consent Order is fair and reasonable and in the best interests of the
27 Estate, and requests that it be approved and that Hannes Tulving, Jr., be authorized to execute the

28 ² This is only a summary of the Consent Order, a copy of which is appended to the Motion. In the event of any
inconsistency between this summary and the Consent Order, in all events, the terms of the Consent Order shall control.

1 Consent Order on behalf of the Debtor.

2 **III.**

3 **THE COURT SHOULD GRANT RELIEF FROM THE AUTOMATIC STAY TO THE**
4 **EXTENT NECESSARY TO IMPLEMENT THE TERMS OF THE CONSENT ORDER**

5 Section 362 of the Bankruptcy Code provides that a petition “operates as a stay, applicable
6 to all entities, of--

7 (1) the commencement or continuation, including the issuance or
8 employment of process, of a judicial, administrative, or other action
9 or proceeding against the debtor that was or could have been
10 commenced before the commencement of the case under this title, or
to recover a claim against the debtor that arose before the
commencement of the case under this title;

11 (3) any act to obtain possession of property of the estate or of
12 property from the estate or to exercise control over property of the
estate; [and]

13 (6) any act to collect, assess, or recover a claim against the debtor that
14 arose before the commencement of the case under this title....

15 11 U.S.C. § 362(a)(1), (3) and (6).

16 While the automatic stay generally prohibits the commencement of an action against a
17 Debtor arising from its pre-petition conduct, there is an exception to that broad injunction with
18 respect to actions commenced by governmental units to enforce their regulatory power. Even so,
19 that exception does not include the enforcement of a monetary judgment. Specifically, Section
20 362(b)(4) of the Bankruptcy Code provides, in pertinent part, that:

21 (b) The filing of a petition under section 301, 302, or 303 of this title,
22 or of an application under section 5(a)(3) of the Securities Investor
Protection Act of 1970, does not operate as a stay—

23 (4) under paragraph (1), (2), (3), or (6) of subsection (a) of this
24 section, of the commencement or continuation of an action or
25 proceeding by a governmental unit or any organization exercising
26 authority under the Convention on the Prohibition of the
Development, Production, Stockpiling and Use of Chemical
27 Weapons and on Their Destruction, opened for signature on January
28 13, 1993, to enforce such governmental unit’s or organization’s
police and regulatory power, including the enforcement of a
judgment other than a money judgment, obtained in an action or
proceeding by the governmental unit to enforce such governmental
unit’s or organization’s police or regulatory power;

1 11 U.S.C. § 362(b)(4) (emphasis added).

2
3 The provisions of the Consent Order relating to the imposition of monetary judgments
4 against the Debtor for restitution , disgorgement and penalties, may run afoul of section 362(a).
5 Accordingly, the Trustee requests that the stay under Section 362(a) of the Bankruptcy Code be
6 lifted to the extent needed to permit the imposition of claims under the Consent Order.

7 **IV.**

8 **THE CONSENT ORDER SHOULD BE EFFECTIVE IMMEDIATELY**

9 Bankruptcy Rule 4001(a)(3) provides: “An order granting a motion for relief from an
10 automatic stay made in accordance with Rule 4001(a)(1) is stayed until the expiration of 14 days
11 after the entry of the order, unless the court orders otherwise.” The Debtor has obtained an
12 extension of time, through January 6, 2016 to answer or otherwise respond to the Complaint.
13 Given the benefit to the Estate of resolving the Complaint through the Consent Order, and the
14 limited scope and ancillary role of the stay relief requested herein, the Trustee requests that the
15 order approving the motion be deemed effective when entered.

16 **V.**

17 **CONCLUSION**

18 **WHEREFORE**, the Trustee respectfully requests that the Court (a) approve and authorize
19 the Debtor to enter into the Consent Order, including taking all actions necessary to implement
20 same, (b) approve the execution of the Consent Order by Hannes Tulving, on behalf of the Debtor,
21 (c) grant relief from the automatic stay to the extent necessary for the possible imposition of claims
22 by the NC District Court under the Consent Order, (d) waive the 14-day waiting period under
23 Bankruptcy Rule 4001(a)(3), and (e) grant such other and further relief as is just and proper under
24 the circumstances.

25 Dated: November 23, 2015

PACHULSKI STANG ZIEHL & JONES LLP

26
27 By /s/ Linda F. Cantor
Linda F. Cantor

28 Counsel for R. Todd Neilson, Chapter 7 Trustee

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 *Notice Of Motion And Motion For Order (A) Approving And Authorizing The Trustee And Debtor To Enter Into The Consent Order For Permanent Injunction And Other Relief Against The Tuvling Company, Inc. And Hannes Tuvling, Jr. (B) Authorizing Hannes Tuvling, Jr. To Execute The 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 And Bankruptcy Rule 9019* (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. Prior to the filing of the bankruptcy, customer complaints concerning delayed or undelivered orders were increasingly made to the Better Business Bureau against the Debtor and in early March, 2014, a class-action lawsuit was filed against the Debtor and Hannes Tuvling in the United States District Court, Northern District of California. A criminal investigation of the Debtor and Tuvling by the Government was also being pursued, as described below. The Debtor ceased operations on or about March 3, 2014.

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 the pending criminal investigation and other ongoing litigation against the Debtor, on March 18, 2014, the United States Trustee filed a Stipulation Appointing Chapter 11 Trustee, which was signed by both the Debtor and its attorney. The Stipulation was approved by the Bankruptcy Court on March 18, 2014 and an

1 Order was entered by the Court on March 21, 2014 approving the U.S. Trustee's Application for the
2 Appointment of a Chapter 11 Trustee, appointing me as Trustee of the Debtor's estate. Thereafter
3 upon notice and hearing, the case was converted to a chapter 7 and I was appointed and continue to
4 serve as the chapter 7 Trustee of the Debtor's Estate.

5 5. I am informed and believe that on March 8, 2014, Special Agents of the United
6 States Secret Service executed a Search Warrant on the Debtor's offices on probable cause that the
7 Debtor and Hannes Tulving were engaged in fraud. The Search Warrant resulted in the seizure of
8 the Debtor's property including rare coins and other valuable items. Criminal proceedings against
9 the Debtor and Hannes Tulving ensued before the United States District Court for the Western
10 District of North Carolina.

11 6. Hannes Tulving entered into a Plea Agreement in the Criminal Case. Pursuant to
12 Order of this Court entered July 22, 2015 Hannes Tulving was authorized to sign on behalf of the
13 Debtor, the Plea Agreement and a "Coordination Agreement for Disbursement of Seized Items
14 from United States to Bankruptcy Trustee and from Trustee to Victims" in the Criminal Case.
15 (Under the Plea Agreement, the Debtor and Hannes Tulving each plead guilty to 18 U.S.C. § 1343
16 wire fraud charge as set forth in Count One of a Bill of Information in the Criminal Case.)

17 7. On or about September 11, 2015, the U.S. Commodity Futures Trading Commission
18 filed a "Complaint Against The Tulving Company, Inc. and Hannes Tulving, Jr. for Permanent
19 Injunction, Civil Penalties, and Other Equitable Relief", alleging violations of the Commodity
20 Exchange Act, 7 U.S.C. §§ 1-26 (2012) and the Commission's Regulations promulgated thereunder,
21 17 C.F.R. §§ 1.1-190.10 (2013) in case number 3:15 - cv-424-RJC-DSC, pending in the United
22 States District Court for the Western District of North Carolina. The grounds for the Complaint are
23 based upon substantially the same operative facts underlying the Debtor's and Hannes Tulving's
24 guilty plea in the Criminal Case referenced above, but the charges are civil and not criminal.

25 8. In order to consensually resolve the Complaint, the CFTC has proposed that the
26 Debtor, Hannes Tulving and the CTFC enter into a Consent Order of Permanent Injunction and
27 Other Relief Against The Tulving Company, Inc. and Hannes Tulving, Jr. I am informed and
28 believe that Hannes Tulving has agreed to the terms of the Consent Order. By the Motion, I, as

1 Trustee of the Debtor, am requesting an Order from this Court authorizing Hannes Tulving to enter
2 into the Consent Order on behalf of the Debtor. A copy of the Consent Order is appended to the
3 Motion as **Exhibit A**.

4 9. Under the Consent Order, Hannes Tulving and the Debtor admit to the violations
5 alleged in the Complaint, consent to a permanent injunction against the conduct described therein
6 and agree to the payment of restitution, disgorgement and civil monetary penalties, plus interest, if
7 ordered by the NC District Court. Importantly, the payment of disgorgement and civil penalties,
8 plus interests, under the Consent Order shall be subordinated to the payment of all claims of the
9 Debtor's customers, and the payment of restitution shall be made directly to me, as Trustee, for
10 distribution to the Debtor's customers. Therefore, the monetary sanctions imposed in the Order will
11 not negatively impact the Estate or its creditors.

12 10. The rationale for approval of the Consent Order is straight-forward. The Consent
13 Order resolves the CFTC's civil complaint without the need for litigation or the expenditure of
14 Estate assets including, without limitation, the costs to obtain local counsel or appear before the NC
15 District Court. Moreover, the remedies sought in the Complaint as against the Debtor will have no
16 negative impact upon the Estate or its creditors. Any restitution that may be imposed against the
17 Debtor under the Consent Order (upon further order of the NC District Court), will result in monies
18 being transferred to the Estate for the benefit of the Debtor's defrauded customers. Any
19 disgorgement or other monetary civil penalties that may be ordered by the NC District Court are
20 subordinated to the claims of all creditors of this Estate. The monetary relief is therefore either
21 favorable or neutral to the Estate.

22 11. The Consent Order permanently enjoins the Debtor from engaging in future
23 fraudulent, deceptive or manipulative acts including taking actions in violation of the Act or
24 Regulations. For example, the Debtor is also enjoined from entering into, directly or indirectly,
25 transactions involving "commodity interests" (as defined in Regulation 1.3(yy), 17 C.F.R. § 1.3(yy)
26 2014) for any accounts in which it has an interest, trading, soliciting, receiving or accepting funds
27 for the purpose of purchasing or selling commodity interests, applying for registration or claiming
28 exemption from registration with the Commission or acting as a principal, agent or officer or

1 employee of any person registered, exempted from registration or required to be registered with the
2 Commission. I am in the process of administering assets of the Estate; there are and will be no
3 ongoing operations of the Tulving Company. At the time this Case is closed, I will most likely
4 cause the Debtor to dissolve. Therefore, the injunctions will have no negative impact upon the
5 Estate or its creditors.

6 12. Finally, the Consent Order admits Findings of Fact and Conclusions of Law
7 regarding the Debtor. However, these are the same findings and conclusions incorporated in the
8 Bill of Information and the Plea Agreement to which Hannes Tulving, on his own behalf and on
9 behalf of the Debtor (pursuant to order of this Court) have already consented and agreed. I am
10 informed and believe that Hannes Tulving has agreed to the terms of the Consent Order, including
11 the Findings of Fact and Conclusions of Law, and he is prepared to sign the Consent Order in order
12 to resolve the Complaint.

13 13. An additional consideration is that the Consent Order does not impose any more
14 obligations on the Debtor than it might incur in any event through a judgment after trial, a process
15 that I believe is unnecessary from the perspective of the Estate and its creditors. Accordingly, in
16 the exercise of my business judgment as Trustee, I believe that the Consent Order is fair and
17 reasonable and in the best interests of the Estate, and I respectfully request that it be approved and
18 that Hannes Tulving, Jr., be authorized to execute the Consent Order on behalf of the Debtor.

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

21 Executed this 21st day of November 2015, at Draper, Utah.

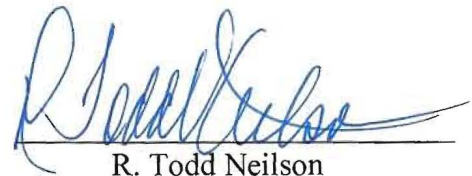
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25 R. Todd Neilson
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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

_____)	
UNITED STATES COMMODITY FUTURES)	
TRADING COMMISSION,)	
)	Case No. 3:15-cv-424-RJC-DSC
Plaintiff,)	
)	
v.)	
)	
THE TULVING COMPANY, INC. and)	
HANNES TULVING, JR.,)	
)	
Defendants.)	
_____)	

CONSENT ORDER OF PERMANENT INJUNCTION
AND OTHER RELIEF AGAINST
THE TULVING COMPANY, INC. AND HANNES TULVING, JR.

On September 11, 2015, Plaintiff U.S. Commodity Futures Trading Commission (the "Commission" or "CFTC") filed a Complaint against The Tulving Company, Inc. ("Tulving Company") and Hannes Tulving, Jr. ("Tulving") (Tulving Company and Tulving collectively, "Defendants") for Permanent Injunction, Civil Penalties, and Other Equitable Relief, for violations of the Commodity Exchange Act ("Act"), 7 U.S.C. §§ 1-26 (2012), and the Commission's Regulations ("Regulations") promulgated thereunder, 17 C.F.R. §§ 1.1-190.10 (2013).

I.

CONSENTS AND AGREEMENTS

To effect partial settlement of the matters alleged in the Complaint against Defendants without a trial on the merits or any further judicial proceedings, Defendant Tulving and, subject to the approval the U.S. Bankruptcy Court for the Central District of California, Santa Ana Division, as Case No. 14-11492 ("Bankruptcy Case"), Tulving Company:

1. Consent to the entry of this Consent Order of Permanent Injunction and Other Relief Against Tulving Company, Inc. and Hannes Tulving, Jr. ("Consent Order");
2. Affirm that they have read and agreed to this Consent Order voluntarily, and that no promise, other than as specifically contained herein, or threat, has been made by the CFTC or any member, officer, agent or representative thereof, or by any other person, to induce consent to this Consent Order;
3. Acknowledge service of the summons and Complaint;
4. Admit the jurisdiction of this Court over them and the subject matter of this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2012);
5. Admit the jurisdiction of the CFTC over the conduct and transactions at issue in this action pursuant to the Act, 7 U.S.C. §§ 1-26 (2012);
6. Admit that venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2012);
7. Waive:
 - (a) Any and all claims that they may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2012) and 28 U.S.C. § 2412 (2012), and/or the rules promulgated by the CFTC in conformity therewith, Part 148 of the Regulations, 17 C.F.R. §§ 148.1-148.30 (2014), relating to, or arising from, this action;
 - (b) Any and all claims that they may possess under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, §§ 201-253, 110 Stat. 847, 857-868 (1996), as amended by Pub. L. No. 110-28, § 8302, 121 Stat. 112, 204-205 (2007), relating to, or arising from, this action;

(c) Any claim of Double Jeopardy based upon the institution of this action or the entry in this action of any order imposing a civil monetary penalty or any other relief, including this Consent Order; and

(d) Any and all rights of appeal from this Consent Order.

8. Consent to the continued jurisdiction of this Court over them for the purpose of implementing and carrying out the terms and conditions of all orders and decrees, including orders setting the appropriate amounts of restitution, disgorgement and civil monetary penalty (subject to the provisions set forth herein with respect to Tulving Company), that may be entered herein, to entertain any suitable application or motion for additional relief within the jurisdiction of the Court, to assure compliance with this Consent Order and for any other purpose relevant to this action, even if Defendants now or in the future reside or operate outside the jurisdiction of this Court;

9. Agree that they will not oppose enforcement of this Consent Order by alleging that it fails to comply with Rule 65(d) of the Federal Rules of Civil Procedure and waives any objection based thereon;

10. Agree that neither they nor any of their agents or employees under their authority or control shall take any action or make any public statement denying, directly or indirectly, any Findings of Fact or Conclusions of Law in this Consent Order, or creating or tending to create the impression that this Consent Order is without a factual basis; provided, however, that nothing in this provision shall affect their: (a) testimonial obligations, or (b) right to take legal position in other proceedings to which the CFTC is not a party. Defendants shall undertake all steps necessary to ensure that their agents or

employees under their authority or control understand and comply with this agreement; and

11. By consenting to the entry of this Consent Order, admit the Findings of Fact and Conclusions of Law in this Consent Order. Further, Defendants agree and intend that the Findings of Fact and Conclusions of Law contained in this Consent Order shall be taken as true and correct and be given preclusive effect, without further proof, in the course of (a) any current or subsequent bankruptcy proceeding filed by, on behalf of, or against Defendants; (b) any proceeding pursuant to Section 8a of the Act, 7 U.S.C. § 12a (2012), and/or Part 3 of the Regulations, 17 C.F.R. §§ 3.1 -3.75 (2014); and/or (c) any proceeding to enforce the terms of this Consent Order, including but not limited to proceedings to set the amount of restitution, disgorgement, and civil monetary penalty to be paid by Defendants in the above-captioned matter (subject to the provisions set forth herein with respect to Tulving Company). Defendants do not consent to the use of this Consent Order, or the Findings of Fact and Conclusions of Law in this Consent Order, as the sole basis for any other proceeding brought by the CFTC.

12. Agree to provide immediate notice to this Court and the CFTC by certified mail, in the manner required by paragraph 47 of Part V of this Consent Order, of any bankruptcy proceeding (other than the Bankruptcy Case) filed by, on behalf of, or against them, whether inside or outside the United States.

13. Agree that no provision of this Consent Order shall in any way limit or impair the ability of any other person or entity to seek any legal or equitable remedy against Defendants in any other proceeding.

14. Defendants consent to pay restitution, plus post-judgment interest, in an amount to be determined upon subsequent consent order or motion by the CFTC and/or hearing before this Court. All restitution ordered by this Court shall be paid by Defendants to the Trustee in the Bankruptcy Case for distribution by the Trustee to claims of customers.

15. Defendants consent to pay disgorgement, plus post-judgment interest amount to be determined upon subsequent consent order or motion by the CFTC and/or hearing before this Court.

16. Defendants consent to pay a civil monetary penalty, plus post-judgment interest, in an amount to be determined upon subsequent consent order or motion by the CFTC and/or hearing before this Court.

17. Any civil monetary penalty or disgorgement obligation imposed by the District Court shall be accorded the priority under section 726(a)(4) of Title 11 of the United States Code (“Bankruptcy Code”), 11 U.S.C. § 726(a)(4), and shall accordingly be subordinated to claims of customers of the Tulving Company and other senior classes of creditors, including general unsecured creditors, in the Bankruptcy Case pursuant to Section 726(a)(4) of the Bankruptcy Code. Nevertheless, the imposition of any civil monetary penalty or disgorgement obligation shall constitute timely filed, allowed subordinated penalty claims of the CFTC in the Bankruptcy Case payable to the extent any funds are left in the Tulving Company Bankruptcy estate after satisfaction of all customer claims, all general unsecured claims and all other claims senior to a penalty pursuant to section 726 of the Bankruptcy Code. For greater certainty, all contractually subordinated claims are senior to the civil monetary penalty and disgorgement obligations unless otherwise expressly subordinated to penalties of the type described in Section 726(a)(4) of the Bankruptcy Code.

18. The issues of necessary relief pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2012), regarding restitution for Defendants' defrauded investors, disgorgement and appropriate civil monetary penalties to be assessed against Defendants are still unresolved and are hereby reserved for further determination by this Court.

II.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

19. The Court, being fully advised in the premises, finds that there is good cause for the entry of this Consent Order and that there is no just reason for delay. The Court therefore directs the entry of the following Findings of Fact, Conclusions of Law, permanent injunction and equitable relief pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2012), as set forth herein. The findings and conclusions in this Consent Order are not binding on any other party to this action.

THE PARTIES AGREE AND THE COURT HEREBY FINDS:

A. Findings of Fact

a. The Parties To This Consent Order

20. Plaintiff Commodity Futures Trading Commission is an independent federal regulatory agency that is charged by Congress with administering and enforcing the Act, 7 U.S.C. §§ 1-26 (2012), and the Regulations promulgated thereunder, 17 C.F.R. §§ 1.1 - 190.10 (2014).

21. Defendant Tulving Company, Inc. is a California corporation that is in the business of buying and selling precious metals, including gold, silver, platinum, and palladium in coin and bullion form. Tulving Company has never been registered with the CFTC.

22. Defendant Tulving Company, Inc. is a debtor under chapter 7 of the Bankruptcy Code pending before the United States Bankruptcy Court for the Central District of California, Santa Ana Division, Case No. 14-11492.

23. Defendant Hannes Tulving, Jr. is a resident of Newport Beach, California. Tulving is the sole owner, president, and shareholder of Tulving Company. He directed the actions of Tulving Company at all relevant times. Tulving has never been registered with the CFTC.

b. Defendants Offered Contracts of Sale of Commodities in Interstate Commerce by Selling Precious Metals in Coin and Bullion

24. From in or about August 2013 through in or about January 2014 ("Relevant Period"), Defendants took approximately \$150 million of customer orders of gold, silver and platinum in interstate commerce, and at least \$15 million from customers was not delivered as specified.

25. As part of their fraud, Defendants used the mails or other instrumentalities of interstate commerce to receive funds from and send funds to customers.

c. Defendants Fraudulently Solicited Customers by Making False and Misleading Representations and/or Omitting Material Facts

26. During the Relevant Period, Defendants represented to members of the public that Tulving Company was a highly reputable precious metals firm that delivered precious metals to customers. Tulving Company held itself out as a stable, established dealer in precious metals through its website, www.tulving.com ("website"). The website stated that, from 1999 through March 30, 2013, Tulving Company bought and sold in excess of \$2.1 billion in precious metals. The website also represented that Tulving Company sold more than

\$350 million in precious metals during 2012.

27. The website provided instructions for customers to purchase metals by sending funds to Tulving Company. Customers were instructed to send a check by mail to the address of Tulving Company or wire funds to bank accounts in the name of Tulving Company. During the Relevant Period, Defendants received at least \$15 million for the purpose of purchasing and selling precious metals in coin and bullion form where no merchandise was delivered.

28. During the Relevant Period, at least 381 persons from locations throughout the United States, including the Western District of North Carolina, submitted orders with Tulving Company for the purchase of precious metals. During this time, Defendants received at least \$15 million from mail and wire transfers from these persons to purchase precious metals from Tulving Company.

29. During the Relevant Period, Defendants misrepresented, among other things, confirmation of purchase and sale transactions with some Tulving Company customers. Defendants falsely represented to some customers that precious metals would be purchased after receipt of customer funds and that precious metals would be shipped to customers. Defendants knew that their representations regarding the purchase of precious metals were false because they did not purchase precious metals on behalf of some customers and misappropriated a portion of customer funds.

30. During the Relevant Period, Defendants failed to disclose, and omitted, that they never purchased any precious metals on behalf of some Tulving customers. Defendants also failed to disclose, and omitted that some Tulving customer funds would be

misappropriated.

d. Defendants Misappropriated Customer Funds

31. During the Relevant Period, Defendants misappropriated customer funds by, among other things, using customer funds to fulfill other customers' orders, paying debts of the company, and also returning the money to previous customers who did not receive their coins, all in furtherance of keeping the business going.

e. Tulving Acted as Controlling Person and Agent for Tulving Company

32. Tulving acted as the sole controlling person and agent of Tulving Company. Tulving was the sole shareholder and president of Tulving Company, and he acted solely on behalf of Tulving Company. Tulving was the sole person responsible for making business decisions on behalf of Tulving Company and controlled the operations of Tulving Company.

B. Conclusions of Law

a. Jurisdiction and Venue

33. This Court has jurisdiction over this action pursuant to Section 6c of the Act, as amended, 7 U.S.C. § 13a-1 (2012), which provides that whenever it shall appear to the CFTC that any person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act or any rule, regulation, or order promulgated thereunder, the CFTC may bring an action in the proper district court of the United States against such person to enjoin such act or practice, or to enforce compliance with the Act, or any rule, regulation or order thereunder.

34. Venue properly lies with the Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2012), because Defendants are found in, inhabit, or transact business in the

Western District of North Carolina, and the acts and practices in violation of the Act occurred, are occurring, or are about to occur, within this District.

b. Violations of Section 6(c)(1) of the Act, 7 U.S.C. §§9, 15, and Regulation 180.1(a), 17 C.F.R. § 180.1: Fraud by Manipulative or Deceptive Devises or Contrivances

35. By the conduct described in the paragraphs above, Defendants cheated and defrauded, or attempted to cheat and defraud, and willfully deceived, or attempted to deceive, their customers by, among other things, knowingly or recklessly: (1) failing to disclose, and omitting, that Tulving Company did not use some customer funds to purchase precious metals; (2) failing to disclose, and omitting, that Tulving Company would not have sufficient precious metals to deliver to some customers; (3) misrepresenting that precious metals ordered by Tulving Company customers would be shipped and delivered; (4) issuing written statements misrepresenting the ownership of precious metals; (5) failing to disclose, and omitting, that the funds paid by some Tulving Company customers would be misappropriated; (6) misappropriating some customer funds by, among other things, using some customer funds to fulfill other customers' orders, paying debts of the company, and also returning the money to previous customers who did not receive their precious metals; and (7) using the mails or other instrumentalities of interstate commerce as part of the fraud in violation of Section 6(c)(1) of the Act, 7 U.S.C. §§ 9, 15 (2012), and Regulation 180.1(a), 17 C.F.R. 180.1(a) (2013).

36. Tulving employed deceptive devises as described above, within the scope of his employment or office for Tulving Company. Therefore, Tulving Company is liable under Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2012), and Regulation 1.2, 17 C.F.R. § 1.2 (2013), as principal for its agent's acts, omissions or failures of the Act and Regulations.

37. Unless restrained and enjoined by this Court, there is a reasonable likelihood

that Defendants will continue to engage in the acts and practices alleged in the Complaint and in similar acts and practices in violation of the Act and Regulations.

III.

ORDER FOR PERMANENT INJUNCTION

IT IS HEREBY ORDERED THAT:

38. Based upon and in connection with the foregoing conduct, pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2012), Defendants are permanently restrained, enjoined and prohibited from directly or indirectly:

- a. Using or employing, or attempting to use or employ, in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance, in contravention Section 6(c)(1) of the Act, 7 U.S.C. §§ 9, 15 (2012), and Regulation 180.1(a), 17 C.F.R. § 180.1(a) (2013).

39. Defendants are also permanently restrained, enjoined and prohibited from directly or indirectly:

- a. Trading on or subject to the rules of any registered entity (as that term is defined in Section 1a(40) of the Act, 7 U.S.C. § 1a(40) (2012));
- b. Entering into any transactions involving "commodity interests" (as that term is defined in Regulation 1.3(yy), 17 C.F.R. § 1.3(yy) (2014)) for their own personal account or for any account in which they have a direct or indirect interest;

- c. Having any commodity interests traded on their behalf;
- d. Controlling or directing the trading for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving commodity interests;
- e. Soliciting, receiving or accepting any funds from any person for the purpose of purchasing or selling any commodity interests;
- f. Applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption from registration with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2014); and/or
- g. Acting as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2014)), agent or any other officer or employee of any person (as that term is defined in Section 1a(38) of the Act, 7 U.S.C. § 1a(38) (2012)), registered, exempted from registration or required to be registered with the Commission except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2014).

IV.

STATUTORY AND EQUITABLE RELIEF

40. Defendants shall pay restitution, plus post-judgment interest, to each defrauded customer, if ordered by the Court, and the payment of such restitution and interest by defendants shall be made to the Trustee in the Bankruptcy Case for distribution to Tulving Company customers.

41. Defendants shall pay disgorgement, plus post-judgment interest, to the CFTC, if ordered by the Court, provided that the payment of such disgorgement and interest by the Tulving Company shall be subordinated to the payment of all claims of Tulving Company customers in accordance with paragraph 17 above.

42. Defendants shall pay a civil monetary penalty, plus post-judgment interest, to the CFTC, if ordered by the Court, provided that the payment of such penalties and interest by the Tulving Company shall be subordinated to the payment of all claims of Tuling Company customers in accordance in accordance with paragraph 17 above.

43. The Court shall determine the amounts of restitution, disgorgement and civil monetary penalty and the procedures for payment and distribution of these monetary sanctions by further order upon: (1) motion of the parties submitting to the Court a proposed consent order setting out their agreement on the amounts of restitution, disgorgement and civil monetary penalty to be paid by Defendants in this matter; (2) motion by the CFTC; and/or (3) hearing before this Court, provided in all events that the payment of disgorgement and civil monetary penalty by the Tulving Company shall be subordinated to the payment of all claims of Tulving customers in accordance with paragraph 17 above.

44. In connection with any CFTC motion for restitution, disgorgement and/or civil monetary penalties, and at any hearing held on such a motion: (a) Defendants will be precluded from arguing that they did not violate the federal laws as alleged in this Consent Order; (b) Defendants may not challenge the validity of their consents and agreements herein or this Consent Order; (c) solely for the purposes of such motion, the Findings of Fact and Conclusions of Law in this Consent Order shall be accepted as and deemed true by the Court; and (d) the Court may determine the issues raised in the motion on the basis of affidavits, declarations,

excerpts of sworn deposition or investigative testimony, witness testimony, and documentary evidence, without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure. In connection with the CFTC's motion for restitution, disgorgement and/or civil monetary penalties, the parties may take discovery, including discovery from appropriate non-parties.

45. Defendants shall cooperate fully and expeditiously with the CFTC, including the CFTC's Division of Enforcement, in any current or future investigation, civil litigation or administrative matter related to the subject matter of this action. As part of such cooperation, Defendants shall comply, to the full extent of their abilities, promptly and truthfully with any inquiries or requests for information including but not limited to, requests for production of documents and authentication of documents, shall provide assistance at any trial, proceeding, or investigation related to the subject matter of this action, including but not limited to, requests for testimony, depositions, and/or interviews. Should the CFTC file any additional actions related to the subject matter of this action, Defendants are directed to appear in the judicial district in which such action is pending, or in a suitable judicial district agreed to by the parties, to provide deposition testimony and trial testimony should such testimony be necessary.

V.

MISCELLANEOUS PROVISIONS

46. Notice: All notices required to be given by any provision in this Consent Order shall be sent certified mail, return receipt requested, as follows:

Notice to the CFTC:

Director, Division of Enforcement
U.S. Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, D.C. 20581

Notice to Defendants Tulving Company, Inc. and Hannes Tulving, Jr.:

James F. Wyatt, III
Wyatt & Blake, LLP
435 East Morehead Street
Charlotte, NC 28202

With a copy to the Chapter 7 Trustee appointed by the Bankruptcy Court in the Bankruptcy Case:

R. Todd Neilson
BRG, LLP
2049 Century Park East, Suite 2525
Los Angeles, CA 90067

All such notices to the CFTC shall reference the name and docket number of this action.

47. Entire Agreement and Amendments: This Consent Order incorporates all of the terms and conditions of the settlement among the parties hereto to date. Nothing shall serve to amend or modify this Consent Order in any respect whatsoever, unless: (a) reduced to writing; (b) signed by all parties hereto; and (c) approved by order of this Court.

48. Invalidation: If any provision of this Consent Order or if the application of any provision or circumstance is held invalid, then the remainder of this Consent Order and the application of the provision to any other person or circumstance shall not be affected by the holding.

49. Waiver: The failure of any party to this Consent Order or of any customer at any time to require performance of any provision of this Consent Order shall in no manner affect the right of the party or customer at a later time to enforce the same or any other

provision of this Consent Order. No waiver in one or more instances of the breach of any provision contained in this Consent Order shall be deemed to be or construed as a further or continuing waiver of such breach or waiver of the breach of any other provision of this Consent Order.

50. Waiver of Service, and Acknowledgement: Defendants waive service of this Consent Order and agree that entry of this Consent Order by the Court and filing with the Clerk of the Court will constitute notice to the Defendants of its terms and conditions. Defendants further agree to provide counsel for the Commission, within thirty (30) days after this Consent Order is filed with the Clerk of Court, with an affidavit or declaration stating that Defendants have received and read a copy of this Consent Order.

51. Continuing Jurisdiction of this Court: This Court shall retain jurisdiction of this action in order to implement and carry out the terms of all orders and decrees, including orders setting the appropriate amounts of restitution, disgorgement and civil monetary penalty, that may be entered herein, to entertain any suitable application or motion for additional relief within the jurisdiction of the Court, to assure compliance with this Consent Order and for any other purpose relevant to this action.

52. Injunctive and Equitable Relief Provisions: The injunctive and equitable relief provisions of this Consent Order shall be binding upon Defendants, upon any person under their authority or control, and upon any person who receives actual notice of this Consent Order, by personal service, e-mail, facsimile or otherwise insofar as he or she is acting in active concert or participation with Defendants.

53. Authority: Entry into this Consent Order by Hannes Tulving, Jr. on behalf of

Tulving Company is subject to the authorization of the United States Bankruptcy Court in the Bankruptcy Case.

54. Counterparts and Facsimile Execution: This Consent Order may be executed in two or more counterparts, all of which shall be considered one and the same agreement and shall become effective when one or more counterparts have been signed by each of the parties hereto and delivered by facsimile, e-mail, or otherwise to the other party, it being understood that all parties need not sign the same counterpart. Any counterpart or other signature to this Consent Order that is delivered by any means shall be deemed for all purposes as constituting good and valid execution and delivery by such party of this Consent Order.

55. Defendants understand that the terms of the Consent Order are enforceable through contempt proceedings, and that, in any such proceedings they may not challenge the validity of this Consent Order.

56. Nothing in this Order prevents Defendants from buying or selling on a wholesale basis legal tender third party independently certified gold, silver, platinum or palladium coins. Defendants will not be buying or selling commodity gold, silver, platinum or palladium bars.

57. There being no just reason for delay, the Clerk of the Court is hereby directed to enter this *Consent Order Of Permanent Injunction And Other Relief Against The Tulving Company, Inc. and Hannes Tulving, Jr.*

IT IS SO ORDERED on this ____ day of _____

UNITED STATES DISTRICT JUDGE

CONSENTED TO AND APPROVED BY:

Luke Marsh
Richard Foelber
Attorneys for Plaintiff
U.S. Commodity Futures Trading
Commission
1155 21st Street, NW
Washington, DC 20581

Date: _____

Hannes Tulving, Jr.

The Tulving Company, Inc.
By Hannes Tulving, Jr. as President

Date: _____

Approved as to form:

James F. Wyatt, III
Attorney for Defendants Hannes Tulving, Jr.
and The Tulving Company
Wyatt & Blake, LLP
435 East Morehead Street
Charlotte, NC 28202

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 entitled (*specify*): **NOTICE OF MOTION AND MOTION FOR ORDER (A) APPROVING AND AUTHORIZING THE TRUSTEE AND DEBTOR TO ENTER INTO THE CONSENT ORDER FOR PERMANENT INJUNCTION AND OTHER RELIEF AGAINST THE TULVING COMPANY, INC. AND HANNES TULVING, JR. (B) AUTHORIZING HANNES TULVING, JR. TO EXECUTE THE 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 AND BANKRUPTCY RULE 9019; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; 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 24, 2015**, 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*) **November 24, 2015**, 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 (*date*) **November 24, 2015**, 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.

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
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 24, 2015

MYRA KULICK

/s/ Myra Kulick

Date

Printed Name

Signature

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

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

- Wesley H Avery wamiracle6@yahoo.com, wavery@rpmlaw.com
- Candice Bryner candice@brynerlaw.com
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- Richard C Spencer rspencer@rspencerlaw.com
- United States Trustee (SA) ustpregion16.sa.ecf@usdoj.gov

2. SERVED BY UNITED STATES MAIL:

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Laurence P Nokes on behalf of Interested Party

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