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9 Trustee for The Tulving Company, Inc.

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

13 In re:

14 THE TULVING COMPANY, INC., a
15 California corporation,

16 Debtor.

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

18 Chapter 11

19 **NOTICE OF EXPEDITED MOTION AND**
20 **EXPEDITED MOTION OF THE CHAPTER 11**
21 **TRUSTEE FOR ORDER AUTHORIZING (1)**
22 **REJECTION OF REAL PROPERTY LEASES**
23 **LOCATED IN NEWPORT BEACH,**
24 **CALIFORNIA, AND (2) ABANDONMENT OF**
25 **REMAINING PERSONAL PROPERTY**
26 **PURSUANT TO 11 U.S.C. §§ 105, 365 AND 554;**
27 **MEMORANDUM OF POINTS AND**
28 **AUTHORITIES IN SUPPORT;**
DECLARATION OF R. TODD NEILSON IN
SUPPORT THEREOF

[Application for Order Shortening Time Filed
Herewith]

Date: TBD
Time: TBD
Place: 411 West Fourth Street
Courtroom 5A
Santa Ana, CA 92701

25 **PLEASE TAKE NOTICE** that R. Todd Neilson, the duly appointed chapter 11 trustee (the
26 “Trustee”) in the above-captioned bankruptcy case of The Tulving Company (the “Debtor”), hereby
27 moves (the “Motion”) the Court for entry of an order authorizing and approving the rejection of two
28 real property leases, each dated January 1, 2011, between the Debtor, as tenant, and Levon

1 Gugasian, as landlord (the “Landlord”), for the premises (collectively, the “Leased Premises”)
2 located at (i) 2110 ½ W. Oceanfront Boulevard, Newport Beach, California 92663 (the “Home
3 Office Lease”) and (ii) 2112 ½ W. Oceanfront Boulevard, Newport Beach California 92663 (the
4 “Residential Lease” and, together with the Home Office Lease, the “Leases”), with said rejection
5 being effective as of the date that the Trustee turns over the keys to the Landlord; and (2) the
6 abandonment of any personal property (the “Remaining Personal Property”) belonging to the Debtor
7 remaining at the Leased Premises as of the Rejection Effective Date, with the abandonment being
8 effective as of the Rejection Effective Date.

9 The Debtor no longer occupies or uses the Leased Premises and the Trustee has no need for
10 the Leases in the administration of the estate. Based on his review, the Trustee does not believe that
11 the Leases have any value to the estate and, in fact, believes that the Leases are burdensome to the
12 estate. In order to minimize any further administrative rent obligations of the Debtor’s chapter 11
13 estate and to maximize the estate for the creditors, the Trustee has determined that rejection of the
14 Leases is in the best interest of the estate.

15 **PLEASE TAKE FURTHER NOTICE** that the Trustee, by no later than the Rejection
16 Effective Date, will have removed all personal property of any value to the estate from the Leased
17 Premises. The personal property that remains at the Leased Premises after such removal primarily
18 will be furniture. To the extent there may be any other Remaining Personal Property, it will be of no
19 value to the chapter 11 estate. The cost of removing, storing and marketing the Remaining Personal
20 Property would significantly outweigh the value of that property, therefore, the Remaining Personal
21 Property is burdensome to the estate and should be abandoned effective as of the Rejection Effective
22 Date.

23 **PLEASE TAKE FURTHER NOTICE** that in order to avoid the estate becoming liable for
24 any additional rent under the Leases, which is approximately \$10,300 per month, the Trustee is
25 requesting that the Court shorten the notice period for a hearing on this Motion and set the hearing at
26 the earliest date that is convenient to the Court so that, if the Trustee deems it appropriate, the Leases
27 can be rejected effective as early as of April 30, 2014. When the Court enters an order setting a
28

1 hearing date for this Motion, the Trustee will serve separate notice of the hearing date and the
2 objection deadline.

3 **PLEASE TAKE FURTHER NOTICE** that the Motion is based on and supported by this
4 Notice, the attached Memorandum of Points and Authorities, the accompanying Declaration of R.
5 Todd Neilson, and the arguments of counsel, and other admissible evidence properly brought before
6 the Court at or before any hearing on this Motion. The Trustee further requests that the Court take
7 judicial notice of all other pleadings filed in the above-captioned chapter 11 Case.

8 **WHEREFORE**, the Trustee respectfully requests that the Court enter an Order (i) granting
9 the Motion, (ii) authorizing and approving the rejection of the Leases effective as of the Rejection
10 Effective Date, (iii) authorizing and approving the abandonment of the Remaining Personal Property
11 effective as of the Rejection Effective Date and (iv) granting such other and further relief as it deems
12 necessary and appropriate.

13 Dated: April 16, 2014

PACHULSKI STANG ZIEHL & JONES LLP

14
15 By: /s/ Linda F. Cantor
Linda F. Cantor (SBN 153872)

16 Attorneys for R. Todd Neilson, Chapter 11 Trustee
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 In order to avoid incurring unnecessary administrative expenses for the Debtor's chapter 11
5 estate (the "Estate"), the Trustee filed the attached *Expedited Motion of the Chapter 11 Trustee for*
6 *Order Authorizing (i) Rejection of Two Real Property Leases Located in Newport Beach, California,*
7 *and (ii) Abandonment of Remaining Personal Property Pursuant to 11 U.S.C. §§ 105, 365 and 554*
8 (the "Motion") seeking an order of the Court authorizing and approving the rejection of two real
9 property leases located in Newport Beach, as described below, and the abandonment of the
10 Remaining Personal Property. The Debtor no longer occupies or uses the Leased Premises and the
11 Trustee has no need for the Leased Premises in the administration of the estate. Based upon the
12 Trustee's review, the Leases have no value to the estate and the Trustee, therefore, has determined
13 that the rejection of the Leases and the abandonment of the Remaining Personal Property is in the
14 best interest of the estate.

15 **II.**

16 **JURISDICTION AND VENUE**

17 This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This
18 matter relates to the administration of the Estate and is accordingly a core proceeding pursuant to 28
19 U.S.C. § 157(b)(2)(A) and (O). Venue of this case is proper in this Court pursuant to 28 U.S.C. §§
20 1408 and 1409. The statutory predicate for the relief requested herein are sections 365(a) and 554(a)
21 of title 11 of the United States Code (the "Bankruptcy Code").

22 **III.**

23 **STATEMENT OF FACTS**

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

25 The Debtor is a California corporation. Hannes Tulving, Jr. is the President and sole equity
26 holder of the Debtor. The Debtor was in the business of selling and purchasing gold, silver, coins,
27 bullion, and other precious metals through its internet website or by phone. Over the past year,
28 customer complaints concerning delayed or undelivered orders were increasingly made to the Better

1 Business Bureau against the Debtor and in early March, 2014, a class-action lawsuit was filed
2 against the Debtor and Hannes Tulving, Jr. in the United States District Court, Northern District of
3 California. The Debtor ceased operations on or about March 3, 2014. Shortly before the initiation
4 of these proceedings, a raid was conducted at the business offices of the Debtor by the Secret Service
5 and the Department of Justice and the Debtor's computers and documents were seized for an
6 ongoing criminal investigation.

7 **B. Procedural Background of Case**

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

16 **C. The Leases**

17 The Debtor is a party to, among others, two real property leases, each dated January 1, 2011,
18 between the Debtor, as tenant, and Levon Gugasian, as landlord (the "Landlord"), for the premises
19 (collectively, the "Leased Premises") located at (i) 2110 ½ W. Oceanfront Boulevard, Newport
20 Beach, California 92663 (the "Home Office Lease") and (ii) 2112 ½ W. Oceanfront Boulevard,
21 Newport Beach California 92663 (the "Residential Lease" and, together with the Home Office
22 Lease, the "Leases"). Each of the leases is for a ten-year term, commencing January 1, 2011 and
23 terminating February 28, 2012. The base monthly rental for the Residential Lease is \$5,800 with an
24 additional increase of \$500 per month (i.e., a \$6,000 increase annually). The base monthly rental for
25 the Home Office Lease is \$4,500 with an additional increase of \$500 per month (\$6,000 increase
26 annually). The Debtor paid a security deposit to the Landlord in the amount of \$15,000 for each of
27 the Leases. The Trustee is informed and believes that the Landlord applied both security deposits
28 towards payment of unpaid rental in 2013.

1 **D. The Rejection of the Leases**

2 The Trustee has determined in his business judgment that continued occupancy of the Leased
3 Premises is not in the best interests of the Estate. The Debtor no longer occupies or uses the Leased
4 Premises and the Leased Premises are not necessary for the Trustee's administration of the Estate .
5 The Trustee has determined that the rejection of the Leases, effective as of April 30, 2014, is in the
6 best interests of the estate so that it can avoid the incurrence of additional unnecessary administrative
7 rent, which is no less than \$10,300 per month. The Trustee is, therefore, seeking approval of the
8 rejection of the Leases, which might otherwise become an unnecessary drain on the assets of this
9 estate, with said rejection being effective as of the date that the Trustee turns over the keys to the
10 Landlord.

11 The Trustee does not believe that the Leases hold any value, especially in light of the
12 "carrying costs" the estate would incur during any marketing period and the possibility that no viable
13 assignee would materialize. The base monthly cost of the Leases to the estate is approximately
14 \$10,300, which amounts could be treated as an administrative expenses if the Leases are not rejected
15 in a timely manner.

16 **E. The Abandonment of the Remaining Personal Property**

17 By the Motion, the Trustee seeks to abandon any personal property (the "Remaining Personal
18 Property") belonging to the Debtor remaining at the Leased Premises as of the Rejection Effective
19 Date, with the abandonment being effective as of the Rejection Effective Date. The Trustee, by no
20 later than the Rejection Effective Date, will have removed all personal property of any value to the
21 estate from the Leased Premises. The personal property that remains at the Leased Premises after
22 such removal primarily will be furniture. To the extent there may be any other Remaining Personal
23 Property, it will be of no value to the chapter 11 estate. The cost of removing, storing and marketing
24 the Remaining Personal Property would significantly outweigh the value of that property, therefore,
25 the Remaining Personal Property is burdensome to the estate and should be abandoned effective as
26 of the Rejection Effective Date.

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IV.

ARGUMENT

A. **Immediate Rejection of the Leases Is Justified**

Section 365(a) of the Bankruptcy Code provides that a trustee, “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). This provision allows a trustee “to relieve the bankruptcy estate of burdensome agreements which have not been completely performed.” *Stewart Title Guar. Co. v. Old Republic Nat’l Title Co.*, 83 F.3d 735, 741 (5th Cir. 1996) (citing *In re Muerexco Petroleum, Inc.*, 15 F.3d 60, 62 (5th Cir. 1994)).

The standard applied to determine whether the rejection of an executory contract or unexpired lease should be authorized is the “business judgment” standard. As the Bankruptcy Appellate Panel held in *In re Chi-Feng Huang*, 23 B.R. 798, 800 (B.A.P. 9th Cir. 1982), a trustee may exercise his business judgment to reject executory contracts or unexpired leases that are no longer useful or necessary to the bankruptcy estate. The standard for rejection is satisfied when a trustee has made a business determination that rejection will benefit the estate. *See Commercial Fin. Ltd. v. Haw. Dimensions, Inc. (In re Haw. Dimensions, Inc.)*, 47 B.R. 425, 427 (Bankr. D. Haw. 1985) (“[U]nder the business judgment test, a court should approve a debtor’s proposed rejection if such rejection will benefit the estate.”). In applying the business judgment standard, courts show great deference to the trustee’s decision to reject. *See, e.g., Summit Land Co. v. Allen (In re Summit Land Co.)*, 13 B.R. 310, 315 (Bankr. D. Utah 1981) (noting that, absent extraordinary circumstances, court approval of a debtor’s decision to assume or reject an executory contract “should be granted as a matter of course”).

Based on the Trustee’s knowledge of the Leases and his knowledge of the rental market in the area where the Leased Premises are located, the Trustee does not believe that the estate can obtain any material value by seeking to assume and assign the Leases. This is particularly the case given that the Leased Premises are residential real property (although the Trustee is informed that the Home Office was used as an office), and the estate would be risking the full weight of further possible administrative rent if no assignee materializes for the Leases with no corresponding benefit

1 to the estate. Prompt rejection will minimize unnecessary administrative costs for the benefit of all
2 creditors of the estate. In the exercise of his business judgment, the Trustee has therefore concluded
3 that rejection of the Leases is in the best interests of the estate.

4 **B. Abandonment of Remaining Personal Property Is Appropriate**

5 Section 554(a) of the Bankruptcy Code provides that, “[a]fter notice and a hearing, the
6 trustee may abandon any property of the estate that is burdensome to the estate or that is of
7 inconsequential value and benefit to the estate.” 11 U.S.C. § 554(a). In evaluating decisions to
8 abandon property of the estate, courts focus on whether such decision reflects a business judgment
9 made in good faith. *See, e.g., In re Cult Awareness Network, Inc.*, 205 B.R. 575, 579 (Bankr. N.D.
10 Ill. 1997) (citations omitted); *In re Wilson*, 94 B.R. 886, 888-889 (Bankr. E.D. Va. 1989); *In re*
11 *Moore*, 110 B.R. 924, 928 (Bankr. C.D. Cal. 1990) (“The choice of which type of action [is
12 appropriate to liquidate the assets of the estate] (whether it be acceptance of the offer, a counteroffer,
13 negotiation, open bidding, or bringing a formal motion for abandonment) belongs to the trustee
14 within the sound exercise of the trustee's business judgment so long as the trustee fulfills his
15 statutory duties.”).

16 The Trustee believes that the value of the Remaining Personal Property is *de minimis*.
17 Abandonment of the Remaining Personal Property is appropriate because the cost of moving, storing
18 and marketing the Remaining Personal Property would out strip the value of that property. Further,
19 its abandonment is necessary to eliminate any issues regarding administrative expenses associated
20 with leaving the property at the Premises.

21 After duly considering such factors, the Trustee has determined, in the exercise of his sound
22 business judgment, that abandonment of the Remaining Personal Property is in the best interests of
23 the Estate and requests that the Court approve abandonment of the Remaining Personal Property
24 effective as of the Rejection Effective Date.

V.

CONCLUSION

For the reasons set forth herein, the Trustee respectfully requests that the Court enter an order (a) granting the Motion, (b) authorizing and approving the rejection of the Leases effective as of the Rejection Effective Date, (c) authorizing and approving the abandonment of the Remaining Personal Property effective as of the Rejection Effective Date and (d) granting such other and further relief as it deems necessary and appropriate.

Dated: April 16, 2014

PACHULSKI STANG ZIEHL & JONES LLP

By: /s/ Linda F. Cantor
Linda F. Cantor (SBN 153762)

Attorneys for R. Todd Neilson, chapter 11 Trustee

PACHULSKI STANG ZIEHL & JONES LLP
ATTORNEYS AT LAW
LOS ANGELES, CALIFORNIA

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DECLARATION OF R. TODD NEILSON

I, R. Todd Neilson, declare as follows:

1. I am the duly appointed chapter 11 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 *Expedited Motion of the Chapter 11 Trustee for Order Authorizing (i) Rejection of Two Real Property Leases Located in Newport Beach, California, and (ii) Abandonment of Remaining Personal Property Pursuant to 11 U.S.C. §§ 105, 365 and 554* (the "Motion"). Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Motion.

3. The Debtor is a California corporation. Hannes Tulving, Jr. is the President and sole equity holder of the Debtor. The Debtor was in the business of selling and purchasing gold, silver, coins, bullion, and other precious metals through its internet website or by telephone. Over the past year, 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. in the United States District Court, Northern District of California. The Debtor ceased operations on or about March 3, 2014. Shortly before the initiation of these proceedings, a raid was conducted on the business offices of the Debtor by the Secret Service and the Department of Justice and the Debtor's computers and documents were seized for an ongoing criminal investigation.

4. On March 10, 2014, the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. In light of the pending criminal investigation and other ongoing litigation, 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 Order was entered by the Court on March 21, 2014, approving my appointment as Trustee of the Debtor's estate.

1 5. On March 21, 2014, the Court entered an Order appointing myself as Chapter 11
2 Trustee of the Debtor's estate [Docket No. 22].

3 6. I am informed and believe that the Debtor is a party to, among others, two real
4 property leases, each dated January 1, 2011, between the Debtor, as tenant, and Levon Gugasian, as
5 landlord, for the Lease Premises located at (i) 2110 ½ W. Oceanfront Boulevard, Newport Beach,
6 California 92663, and (ii) 2112 ½ W. Oceanfront Boulevard, Newport Beach California 92663. I am
7 informed and believe that each of the leases is for a ten-year term, commencing January 1, 2011 and
8 terminating February 28, 2012. The base monthly rental for the Residential Lease is \$5,800 with an
9 additional increase of \$500 per month (i.e., a \$6,000 increase annually). The base monthly rental for
10 the Home Office Lease is \$4,500 with an additional increase of \$500 per month (\$6,000 increase
11 annually). I am informed and believe that the Debtor paid a security deposit to the Landlord in the
12 amount of \$15,000 for each of the Leases. I am informed and believe that the Landlord applied both
13 security deposits towards payment of unpaid rental in 2013.

14 7. I have determined in my business judgment that continued occupancy of the Leased
15 Premises is not in the best interests of the Estate. The Debtor no longer occupies or uses the Leased
16 Premises and the Leased Premises are not necessary for the administration of the Estate. I have
17 determined that the rejection of the Leases, effective as of no later than April 30, 2014, is in the best
18 interests of the estate, in order to avoid the incurrence of additional unnecessary administrative rent
19 of approximately \$10,300 per month. Therefore, I request approval of the rejection of the Leases,
20 which might otherwise become an unnecessary drain on the assets of this estate, with said rejection
21 being effective as of the date that I turn over the keys to the Landlord.

22 8. I do not believe that the Leases hold any value, especially in light of the "carrying
23 costs" the estate would incur during any marketing period and the possibility that no viable assignee
24 would materialize. The base monthly cost of the Leases to the estate is approximately \$10,300,
25 which amounts could be treated as administrative expenses if the Leases are not rejected in a timely
26 manner.

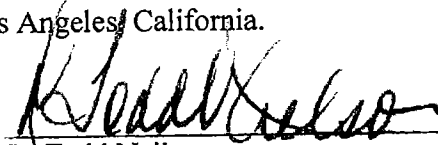
27 9. I further request to abandon any Remaining Personal Property belonging to the
28 Debtor remaining at the Leased Premises as of the Rejection Effective Date, with the abandonment

1 being effective as of the Rejection Effective Date. By no later than the Rejection Effective Date, all
2 personal property of any value to the estate will have been removed from the Leased Premises. The
3 personal property that remains at the Leased Premises after such removal primarily will be furniture.
4 To the extent there may be any other Remaining Personal Property, it will be of no value to the
5 chapter 11 estate. I believe that the value of the Remaining Personal Property is *de minimis*.
6 Abandonment of the Remaining Personal Property is appropriate because the cost of moving, storing
7 and marketing the Remaining Personal Property would out strip the value of that property. Further,
8 its abandonment is necessary to eliminate any issues regarding administrative expenses associated
9 with leaving the property at the Premises.

10 10. After duly considering such factors, I have determined, in the exercise of my sound
11 business judgment that abandonment of the Remaining Personal Property is in the best interests of
12 the Estate and request that the Court approve abandonment of the Remaining Personal Property
13 effective as of the Rejection Effective Date.

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

16 Executed this 16th day of April, 2014, at Los Angeles, California.

17 
18 R. Todd Neilson

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is 10100 Santa Monica Boulevard, 13th Floor, Los Angeles, California 90067

A true and correct copy of the foregoing document **NOTICE OF EXPEDITED MOTION AND EXPEDITED MOTION OF THE CHAPTER 11 TRUSTEE FOR ORDER AUTHORIZING (1) REJECTION OF REAL PROPERTY LEASES LOCATED IN NEWPORT BEACH, CALIFORNIA, AND (2) ABANDONMENT OF REMAINING PERSONAL PROPERTY PURSUANT TO 11 U.S.C. §§ 105, 365 AND 554; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT; DECLARATION OF R. TODD NEILSON IN SUPPORT THEREOF** 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 April 16, 2014, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On April 16, 2014, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served):

Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on April 16, 2014, 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 / Courtroom 5A
Santa Ana, CA 92701-4593

Service information continued on attached page

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

April 16, 2014

Date

Janice G. Washington

Printed Name

/s/ Janice G. Washington

Signature