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6 Proposed Counsel for R. Todd Neilson, Chapter 11  
Trustee for The 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 11

**NOTICE OF MOTION AND MOTION OF R.  
TODD NEILSON, CHAPTER 11 TRUSTEE,  
FOR ORDER CONVERTING CASE TO  
CHAPTER 7; MEMORANDUM OF POINTS  
AND AUTHORITIES; DECLARATION OF R.  
TODD NEILSON IN SUPPORT THEREOF**

Date: May 22, 2014

Time: 10:30 a.m.

Place: United States Bankruptcy Court  
21041 Burbank Blvd.  
Courtroom 302  
Woodland Hills, CA

Judge: Erithe A. Smith

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22 **TO THE HONORABLE ERITHE A. SMITH, UNITED STATES BANKRUPTCY**  
23 **JUDGE, THE DEBTOR, THE UNITED STATES TRUSTEE AND PARTIES**  
**REQUESTING SPECIAL NOTICE:**

24 **PLEASE TAKE NOTICE** that R. Todd Neilson, the duly appointed chapter 11 trustee  
25 (“Trustee”) for the estate of Tulving Company, Inc. (“Debtor”), hereby moves the Court (the  
26 “Motion”) for entry of an order converting this case to Chapter 7 on the grounds that the Debtor has  
27 ceased all business operations, there is no operating income, and there is no reasonable likelihood of  
28 rehabilitation of the Debtor.

1           **PLEASE TAKE FURTHER NOTICE** that the Motion is based on the facts and legal  
2 analysis set forth in the accompanying Memorandum of Points and Authorities and attached  
3 Declaration, the record in this case and any other evidence before the Court prior to or at the hearing  
4 on the Motion, and all matters of which this Court may properly take judicial notice.

5           **PLEASE TAKE FURTHER NOTICE** that, if you wish to oppose this Motion, you must  
6 file a written response with the Court and serve a copy of it upon the undersigned counsel no later  
7 than fourteen (14) days prior to the hearing on the Motion. The failure to properly file and serve an  
8 opposition may be deemed consent to the relief requested in the Motion or a waiver of any right to  
9 oppose the Motion.

10           **WHEREFORE**, the Trustee respectfully requests that this Court enter an order:  
11 (a) converting this case to a case under chapter 7 of the Bankruptcy Code and (b) granting such other  
12 and further relief as is just and proper under the circumstances.

13 Dated: April 30, 2014

PACHULSKI STANG ZIEHL & JONES LLP

14  
15 By /s/ Linda F. Cantor  
Linda F. Cantor

16 Proposed Counsel for R. Todd Neilson,  
17 Chapter 11 Trustee  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**

**STATEMENT OF FACTS**

**A. Background of the Debtor's Business**

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 phone. Over the past year, customer complaints against the Debtor concerning delayed or undelivered orders were increasingly made to the Better Business Bureau as well as various law enforcement agencies. 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 at the business offices of the Debtor by the Secret Service and the Department of Justice and the Debtor's computers, documents and inventory were seized for an ongoing criminal investigation.

**B. Procedural Background of the 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, on March 18, 2014, the United States Trustee filed a *Stipulation Appointing Chapter 11 Trustee* [Docket No. 15] ("Stipulation"), which was signed by both the Debtor and its attorney. The Stipulation was approved by the Bankruptcy Court on March 18, 2014 [Docket No. 16] and an Order was entered by the Court on March 21, 2014 approving the *U.S. Trustee's Application for the Appointment of a Chapter 11 Trustee*, appointing R. Todd Neilson as Trustee of the Debtor's estate [Docket No. 22].

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II.

**ARGUMENT**

A. **Conversion of This Case to Chapter 7 is Warranted Under Section 1112(b) of the  
Bankruptcy Code**

Pursuant to section 1112(b) of the Bankruptcy Code, a court shall convert a Chapter 11 case to a Chapter 7 case for cause on request of a party in interest and after notice and a hearing. 11 U.S.C. § 1112(b); see also In re Rubenstein, 71 B.R. 777, 778 (9th Cir. B.A.P. 1987). Section 1112(b) of the Bankruptcy Code provides in pertinent part that:

(b) (1) Except as provided in paragraph (2) of this subsection, subsection (c) of this section, and section 1104(a)(3), on request of a party in interest, and after notice and a hearing, absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate, the court *shall* convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, if the movant establishes cause.

(2) The relief provided in paragraph (1) shall not be granted absent unusual circumstances specifically identified by the court that establish that such relief is not in the best interests of creditors and the estate, if the debtor or another party in interest objects and establishes that—

(A) there is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; and

(B) the grounds for granting such relief include an act or omission of the debtor other than under paragraph (4)(A)—

(i) for which there exists a reasonable justification for the act or omission; and

(ii) that will be cured within a reasonable period of time fixed by the court.

(3) The court shall commence the hearing on a motion under this subsection not later than 30 days after filing of the motion, and shall decide the motion not later than 15 days after commencement of such hearing, unless the movant expressly consents to a continuance for a specific period of time or compelling circumstances prevent the court from meeting the time limits established by this paragraph.

(4) For purposes of this subsection, the term “cause” includes—

1 (A) substantial or continuing loss to or diminution of the estate  
2 and the absence of a reasonable likelihood of rehabilitation;

3 . . .

4 11 U.S.C. § 1112(b) (2006) (emphasis added).

5 Historically, under section 1112(b) of the Bankruptcy Code, bankruptcy courts are given  
6 wide discretion to convert a case to chapter 7 for cause. *In re Koerner*, 800 F.2d 1358, 1367 (5th  
7 Cir. 1986). However, the BAPCPA revisions to section 1112(b) make conversion or dismissal  
8 mandatory upon a finding of “cause”. Section 1112(b) sets forth a list of items that constitute  
9 “cause” for conversion or dismissal. Courts have generally held that this list is not exclusive. *In re*  
10 *Products Int'l Co.*, 395 B.R. 101, 110 (Bankr. D. Ariz. 2008); see also 11 U.S.C. § 102(3), which  
11 provides that “[i]n this title 'includes' and 'including' are not limiting.”

12 **B. Absence of a Reasonable Likelihood of Rehabilitation**

13 Under section 1112(b)(1), cause exists to convert or dismiss where there is both continuing  
14 loss to, or diminution of, the estate and absence of a reasonable likelihood of rehabilitation.  
15 *Johnston*, 149 B.R. at 162; *In re Citi-Toledo Partners*, 170 B.R. 602, 606 (Bankr. N.D. Ohio 1994).  
16 Diminution of an estate exists where, for example, the debtor’s business has ceased or the debtor’s  
17 liabilities outstrip its assets. *Toledo Partners*, 170 B.R. at 606; *In re CCN Realty Corp.*, 23 B.R.  
18 261, 262 (Bankr. S.D.N.Y. 1982). Courts may find that there has been a diminution of the estate  
19 where it is shown that “the estate is suffering some diminution in value.” *Toledo Partners*, 170 B.R.  
20 at 606 (citing *In re Kanterman*, 88 B.R. 26, 29 (S.D.N.Y. 1988)).

21 A debtor lacks “a reasonable likelihood of rehabilitation” where, for example, it lacks  
22 income, operating funds, employees, or “continuing revenue-generating activity.” See *Citi-Toledo*  
23 *Partners*, 170 B.R. at 606-07, 609; see also *In re Johnston* 149 B.R. at 162 (debtor lacked income);  
24 *In Great American Pyramid Joint Venture*, 144 B.R. 780, 791 (Bankr. W.D. Tenn. 1992) (debtor  
25 lacked operating funds). Moreover, the fact that a liquidating plan could conceivably be proffered  
26 should not result in a finding that “a reasonable likelihood of rehabilitation” exists. “Although the  
27 Bankruptcy Code contemplates liquidating plans of reorganization in certain circumstances, the  
28 Court cannot equate the determination of whether [the debtor] possesses a reasonable likelihood of

1 rehabilitation with [the debtor's] ability to effectuate a liquidating plan.” *Toledo Partners*, 170 B.R.  
2 at 607. *See also In re Winshall Settlor's Trust*, 758 F.2d 1136, 1137 (6th Cir. 1985) (“The purpose of  
3 Chapter 11 reorganization is to assist financially distressed business enterprises by providing them  
4 with breathing space in which to return to a viable state ... . '[I]f there is not a potentially viable  
5 business in place worthy of protection and rehabilitation, the Chapter 11 effort has lost its raison  
6 d'etre ...'”) (citation omitted). Where a court finds “no reasonable possibility of reorganization,” it  
7 need not delay conversion. *Johnston*, 149 B.R. at 162.<sup>1</sup>

8 The Debtor has ceased operations; all materials that were sold by the Debtor in the operation  
9 of its business (e.g., gold and silver bullion, other precious coins and metals) were seized by the  
10 Secret Service and the Department of Justice prior to the initiation of this bankruptcy case. The  
11 Debtor has no operating income and its leases are being discontinued by the Trustee to limit  
12 administrative costs. There is no prospect of rehabilitation of the Debtor's business.

13 **C. Conversion to Chapter 7 is in the Best Interests of Creditors**

14 Conversion of this case is in the best interests of creditors. Conversion to chapter 7 will  
15 provide a fiduciary in the chapter 7 trustee who can expediently analyze causes of action and utilize  
16 its powers under the Bankruptcy Code in an effort to recover and liquidate assets in a manner  
17 designed to maximize values for the benefit of the estate. Dismissal, on the other hand, makes little  
18 sense given that the Debtor is under criminal investigation and unlikely to have the ability to address  
19 mounting creditor claims. Certain creditors have already filed suit and a race to the courthouse may  
20 well ensue, to the detriment of other creditors. Bankruptcy will provide a forum for the filing and  
21 administration of creditor claims. In a chapter 7 case, the trustee may analyze the viability of third  
22 party claims and avoidance actions that may be initiated for the benefit of all similarly situated  
23 creditors. Given the requirement that the Court convert or dismiss the case upon a showing of cause,  
24 it is evident that conversion is the only realistic alternative in this instance.

25  
26 <sup>1</sup> Where there is no reasonable possibility of an effective reorganization, the bankruptcy court is not compelled to wait a  
27 certain period of time, to the detriment of creditors, before ordering conversion of the case. *See Stage I Land Co. v. U.S.*  
28 *Dept. of H.U.D.*, 71 B.R. 225, 231 (D. Minn. 1986) (chapter 11 case should be dismissed at the outset for cause where no  
reasonable possibility of a reorganization exists); *In re Economy Cab & Tool Co. Inc.*, 44 B.R. 721, 724 (Bankr. D.  
Minn. 1984) (chapter 11 case may be converted in early stages of proceeding where movant can show that there is “no  
more than a ‘hopeless and unrealistic prospect’ of rehabilitation”).

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**III.**

**CONCLUSION**

For the reasons set forth herein, the Trustee respectfully requests that the Court (a) convert this case to a case under chapter 7 of the Bankruptcy Code and (b) grant such other and further relief as the Court deems just and appropriate.

Dated: April 30, 2014

PACHULSKI STANG ZIEHL & JONES LLP

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

Proposed Counsel for R. Todd Neilson,  
Chapter 11 Trustee

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

**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 *Notice of Motion and Motion of R. Todd Neilson, Chapter 11 Trustee, for Order Converting Case to Chapter 7; Memorandum of Points and Authorities* (the “Motion”). Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Motion.

3. The Motion seeks an order converting the Case to a case under chapter 7 of the bankruptcy code. The Debtor had been in the business of selling and purchasing gold, silver, coins, bullion, and other precious metals through its internet website or by phone. Over the past year, customer complaints against the Debtor concerning delayed or undelivered orders were increasingly made to the Better Business Bureau as well as various law enforcement agencies. 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 at the business offices of the Debtor by the Secret Service and the Department of Justice and the Debtor’s computers, documents and inventory were seized for an ongoing criminal investigation.

4. The Debtor filed 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, on March 18, 2014, the United States Trustee, Debtor and Debtor’s counsel filed a stipulation to appoint a chapter 11 trustee, which was approved by the Bankruptcy Court on March 18, 2014. I was subsequently appointed to act as chapter 11 trustee of the Debtor’s estate.

5. As noted above, the Debtor’s inventory, books and records were seized in connection with a criminal investigation prior to the filing of this case. The Debtor’s business is no longer in



1 operation, and the estate has no need for its three leased premises. I have sought authority to reject  
2 two residential leases and to sell at auction the property located at the Debtor's business premises so  
3 that I can reject that lease as soon as practicable and limit administrative claims against the estate.

4 6. Given the circumstances of this case, it is clear that there is no business to  
5 rehabilitate, and it is my opinion that conversion to chapter 7 is in the best interests of the estate and  
6 its creditors. A chapter 7 trustee can expediently analyze causes of action and utilize its powers  
7 under the Bankruptcy Code in an effort to recover and liquidate assets in a manner designed to  
8 maximize values for the benefit of the estate. Dismissal, on the other hand, makes little sense given  
9 that the Debtor is under criminal investigation and unlikely to have the ability to address mounting  
10 creditor claims. Certain creditors have already filed suit and a race to the courthouse may well  
11 ensue, to the detriment of other creditors. Bankruptcy will provide a forum for the filing and  
12 administration of creditor claims. In a chapter 7 case, the trustee may analyze the viability of third  
13 party claims and avoidance actions that may be initiated for the benefit of all similarly situated  
14 creditors. Given the requirement that the Court convert or dismiss the case upon a showing of cause,  
15 it is my opinion that conversion is the only realistic alternative in this instance.

16 I declare under penalty of perjury under the laws of the United States of America that the  
17 forgoing is true and correct.

18 Executed this 30<sup>th</sup> day of April, 2014, at Los Angeles, California.

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22 R. Todd Neilson  
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**PROOF OF SERVICE OF DOCUMENT**

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

A true and correct copy of the foregoing document entitled **NOTICE OF MOTION AND MOTION OF R. TODD NEILSON, CHAPTER 11 TRUSTEE, FOR ORDER CONVERTING CASE TO CHAPTER 7; MEMORANDUM OF POINTS AND AUTHORITIES; 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 30, 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 30, 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 30, 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 30, 2014

Janice G. Washington

/s/ Janice G. Washington

*Date*

*Printed Name*

*Signature*

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

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

3 Andrew S Bisom on behalf of Debtor The Tulving Company Inc  
4 [abisom@bisomlaw.com](mailto:abisom@bisomlaw.com)

5 Candice Bryner on behalf of Interested Party Candice Bryner  
6 [candice@brynerlaw.com](mailto:candice@brynerlaw.com)

7 Stephen L Burton on behalf of Attorney Stephen L. Burton  
8 [steveburtonlaw@aol.com](mailto:steveburtonlaw@aol.com)

9 Linda F Cantor, ESQ on behalf of Other Professional Pachulski Stang Ziehl & Jones LLP  
10 [lcantor@pszjlaw.com](mailto:lcantor@pszjlaw.com), [lcantor@pszjlaw.com](mailto:lcantor@pszjlaw.com)

11 Linda F Cantor, ESQ on behalf of Trustee R. Todd Neilson (TR)  
12 [lcantor@pszjlaw.com](mailto:lcantor@pszjlaw.com), [lcantor@pszjlaw.com](mailto:lcantor@pszjlaw.com)

13 Nancy S Goldenberg on behalf of U.S. Trustee United States Trustee (SA)  
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15 Lawrence J Hilton on behalf of Creditor Jeffrey Roth  
16 [lhilton@oneil-llp.com](mailto:lhilton@oneil-llp.com), [ssimmons@oneil-llp.com](mailto:ssimmons@oneil-llp.com); [kdonahue@oneil-llp.com](mailto:kdonahue@oneil-llp.com)

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19 Matthew B Learned on behalf of Interested Party Courtesy NEF  
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21 Elizabeth A Lossing on behalf of U.S. Trustee United States Trustee (SA)  
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23 R. Todd Neilson (TR)  
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27 Robert J Pfister on behalf of Interested Party Courtesy NEF  
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Michael B Reynolds on behalf of Interested Party Courtesy NEF  
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United States Trustee (SA)  
[ustpreion16.sa.ecf@usdoj.gov](mailto:ustpreion16.sa.ecf@usdoj.gov)

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

2 ***Debtor***

3 **The Tulving Company Inc**  
4 P.O. Box 6200  
5 Newport Beach, CA 92658

***Laurence P Nokes on behalf of Interested  
Party John Frankel***  
Nokes & Quinn  
410 Broadway St Ste 200  
Laguna Beach, CA 92651

6 ***Counsel for Debtor***

7 **Andrew S Bisom**  
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9 8001 Irvine Center Drive, Ste. 1170  
10 Irvine, CA 92618

***Accountants for Landlord***  
Brent Murdoch  
Murdoch & Morris, LLP  
114 Pacifica, Ste. 320  
Irvine, CA 92618

11 ***Trustee***

12 **R. Todd Neilson (TR)**  
13 BRG, LLP  
14 2049 Century Park East - Suite 2525  
15 Los Angeles, CA 90067

***Interested Party***  
Frye & Hsieh  
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Malibu, CA 90265

16 ***U.S. Trustee***

17 **United States Trustee (SA)**  
18 411 W Fourth St., Suite 9041  
19 Santa Ana, CA 92701-4593

***Counsel for Creditor Levon Gugasian***  
Nanette D. Sanders, Esq.  
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20 ***Counsel for U.S. Trustee***

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