

## About this Document

This is a letter that I sent to the bankruptcy court on September 20, 2018, about an injustice that occurred in the Tulving Company bankruptcy: among other things, the Trustee signed a stipulation that the net proceeds of the sale of seized goods would go directly to creditors. That never happened.

Bankruptcy courts have "Local Rules", so not all act in exactly the same way. In this case, the bankruptcy courts in the Central District of California apparently do not allow letters to be filed in bankruptcy dockets, as other courts allow. My goal had been for this letter to be on the record, so that anyone researching this case in the future would know that the Judge was well aware of what happened.

My letter was returned, with a letter from the court stating that ex parte communications are not allowed, meaning that you cannot communicate to a Judge without appropriate parties being aware of the information (I believe *all* United States courts have this rule). It says that I should follow the local bankruptcy rules. However, their rules are the same as at least one other district where such letters are posted to the docket (where everyone can see them, which is what I was asking for). Their letter says that my letter was also copied to the U.S. Trustee (who is responsible for investigating bankruptcy fraud, among other things).

I also informed the U.S. Attorney that signed the stipulation requiring the Trustee to give the money to creditors.

So while the Judge did not see what I wrote, and the public does not have access to the letter through the court system, the U.S. Trustee and U.S. Attorney were both complacent with the Trustee violating the stipulation. And the Judge, while she did not get my letter, was the one who authorized the stipulation, and if smart, would have realized that the professionals shouldn't be getting everything if the creditors were promised \$384K.

Joshua Gibbons  
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September 20, 2018

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

Re: 8:14-bk-11492, The Tulving Company Inc

Dear Judge Smith,

I am writing to do my part to ensure that certain information is on the record, in case the Tulving Company bankruptcy is ever investigated in the future.

I am writing regarding three specific issues: [1] the Trustee<sup>1</sup> has failed to distribute the net proceeds of the Non-Error Coin auction to victims<sup>2</sup>, [2] the Trustee has failed to distribute the proceeds of the Rejected Coins<sup>3</sup> that were auctioned (or distributed that money), and [3] the Trustee appears to erroneously be basing her compensation on Error Coin distributions to victims<sup>4</sup>.

The truth is that contrary to what the victims were told, it appears that the current Trustee proposes to base her compensation and that of the original Trustee based on the highly inflated value of the Error Coins distributed to victims, and give none of the \$385K net proceeds to victims.

Given that the Trustee has shown little respect for the desires of the victims<sup>5</sup>, victims likely hold little hope that there will be a resolution to these issues in court. However, the least I can do is make sure that the docket properly reflects information known about what is happening.

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<sup>1</sup> R. Todd Neilson was appointed Chapter 7 Trustee, and was replaced by Weneta M. A. Kosmala about April 1, 2016. I am using the term "Trustee" to refer to whoever the Chapter 7 Trustee was at the time an event occurred.

<sup>2</sup> I am referring to customers of The Tulving Company as victims, rather than creditors, as that is the terminology used in the criminal case against Hannes Tulving, Jr. The bankruptcy is ancillary to the criminal case. It also clearly distinguishes the customers from administrative creditors and others who voluntarily entered this bankruptcy.

<sup>3</sup> Victims were given the option of opting out of receiving the Error Coins. Those coins were to be auctioned, with the proceeds going to victims. See, for example, Docket 623, page 10, lines 6-8.

<sup>4</sup> The Error Coins were distributed to victims, but the Trustee waived compensation based on the value of the coins.

<sup>5</sup> For example, the Trustee gave away customer records for free, despite having no obligation to, and despite the clear desire of victims for their personal information not to be given away (see Docket 596). As another example, 60 creditors signed a letter stating that they opposed the Gugasian settlement, but it was not considered (see Docket 731 and the Trustee's response in Docket 730).

### **Background: The Coordination Agreement, Proposal**

The Trustee signed a stipulation<sup>6</sup> containing a Coordination Agreement with the U.S. Government in the criminal case against Hannes Tulving, Jr. The Coordination Agreement contemplated the Trustee submitting a Proposal<sup>7</sup> for the distribution of Seized Items. The Trustee submitted a Proposal through a motion<sup>8</sup>, which was granted in its entirety<sup>9</sup>.

The Seized Items ended up being [1] Non-Error Coins (which were auctioned June 10, 2018<sup>10</sup>), [2] Error Coins (which were distributed to victims), and [3] Rejected Coins (Error Coins that some victims opted out of receiving, which were auctioned April 8, 2018<sup>11</sup>).

The Proposal, among other things, stated "The Non-Error Coins will be sold at auction and **the Trustee will distribute the net proceeds of the sale of the Non-Error Coins to Victims/Creditors**, on a pro-rata basis, in partial payment of the remaining amount of their claims"<sup>12</sup> (emphasis added), and to remove any doubt, "After all Seized Items and/or their net proceeds have been distributed to the Victims/Creditors, any additional recoveries by the estate will be distributed on a pro rata basis to all creditors on account of their outstanding allowed claims pursuant to the priorities and other provisions of the Bankruptcy Code." In other words, the net proceeds of the Non-Error Coins go directly to victims, regardless of standard bankruptcy priorities.

#### **[1] Net Proceeds of the Sale**

The net proceeds were \$385,314, there cannot be any dispute about that<sup>13</sup>. The Proposal stated that the net proceeds would go to victims. Yet victims have not seen any of this money, nor received any explanation, nor any indication that they might not receive it. In fact, the most recent Trustee report<sup>14</sup> states "the net sale proceeds will be distributed pro rata to all Victim/Creditors at the close of the chapter 7 case." **But no cash has been distributed to the victims, nor is there any sign that the Trustee intends to.**

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<sup>6</sup> Docket 264 is the signed order, others signatures can be seen in Docket 12 in the Hannes Tulving, Jr. criminal case.

<sup>7</sup> Docket 264, page 5, number 4.

<sup>8</sup> Docket 289.

<sup>9</sup> Docket 450.

<sup>10</sup> Docket 600, page 4.

<sup>11</sup> Docket 742, page 7.

<sup>12</sup> Docket 289, page 8.

<sup>13</sup> The Trustee wrote in Trustee Report #9 (August 24, 2016) at <http://tulvingbankruptcy.com>) "The proceeds of the sale for the lots amounted to \$385,314.00". The Trustee's attorney, in her fee application (Docket 640), confirmed "The net proceeds of the auction amounted to \$385,314".

<sup>14</sup> Trustee Report #10, February 10, 2017, which can be found at <http://tulvingbankruptcy.com>.

## [2] Rejected Coins

The Proposal (Docket 289) stated "If a Victim/Creditor chooses not to receive the Error Coins allocated to them, those Error Coins would be auctioned with the Non-Error Coins and such Victim/Creditors would then receive their allocable percentage return from the aggregate Error Coin and Non-Error Coin net sales proceeds..."<sup>15</sup>

That is also exactly what the Trustee told victims. In Trustee Report #9 (August 24, 2016), the Trustee stated "The coins that would otherwise be sent to victim/creditors who determine to "opt-out" of receiving Presidential Error Coins will be auctioned by Great Collections and **the net sale proceeds will be distributed pro rata to all victim/creditors.**" (emphasis added).

The Rejected Coins were auctioned for \$21,656.69<sup>16</sup>. However, Ms. Kosmala appears to be planning to distribute this cash to bankruptcy professionals, rather than the victims as they had been told.

## [3] Trustee Compensation Based on Non-Cash Distribution

It appears that the Trustee is basing her compensation on cash distributions of \$3,279,426.66<sup>17</sup>. This, however, **would blatantly contradict the Proposal.**

For people who are not bankruptcy professionals, Trustee compensation is limited based on how much cash is distributed to creditors<sup>18</sup>. Given that the Error Coins are not a cash distribution, and had wildly differing valuations, this became a concern. Did victims get \$3,000,000, \$100,000, or \$0? That makes a huge difference in how much the maximum amount the Trustee can receive.

The Proposal handled this very clearly. The Proposal specifically addresses this concern by saying "Bankruptcy cases have acknowledged the propriety of trustees making non-cash distributions to creditors... The issue in these cases was not the authority for a trustee to make a non-cash distribution, but rather, whether the trustee may be compensated under section 326(a) for making such non-cash or "constructive disbursements"<sup>19</sup>. The next sentence states "**Here, the Trustee is waiving any fee from the distribution of the Error Coins to Victims/Creditors.**" (emphasis added).

There can be little doubt from what was written in the proposal that the Trustee was not going to be compensated based on the valuation of the Error Coins.

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<sup>15</sup> Docket 289, page 3, footnote 3.

<sup>16</sup> Docket 742, page 12.

<sup>17</sup> I do not know where she got this number from, which is slightly higher than the \$3,242,936.76 amount as Net Disbursements in Docket 764. I calculate \$3,279,424.66 based on her proposed total of \$121,632.81 for the two Trustees, using the calculations in 11 USC 326.

<sup>18</sup> See 11 USC 326 at <https://www.law.cornell.edu/uscode/text/11/326>.

<sup>19</sup> Docket 289, page 11, starting line 19.

Even if the Trustee was going to be compensated based on the valuation of the Error Coins, the \$2,955,113 valuation the Trustee attributes to the coins<sup>20</sup> was highly contested by victims<sup>21</sup>. That valuation came from PCGS, the company that graded the coins, whose opinion is biased<sup>22</sup>. The Trustee admitted that the coins were worth only about \$400,000 in an email sent to some victims around May 5, 2016<sup>23</sup>. Heritage Auctions, the company that auctioned the Non-Error Coins, valued the Error Coins at only \$500,000-\$600,000<sup>24</sup>. One victim was told by Heritage Auctions that "the valuations on these are WAY off and we would probably not be interested in handling them." Another victim was told by GreatCollections (the company that bought the Tulving customer list, and auctioned the Rejected Coins) that his Error Coins valued by the Trustee at \$22K were worth \$4K-\$5K<sup>25</sup>.

The highly inflated valuation can be confirmed from the auction results of the Rejected Coins<sup>26</sup>. Take, for example, "Presidential Dollar - Millard Filmore" in MS68, which the Trustee valued at \$700 each. One was auctioned by GreatCollections for \$110.69.

### **Further Issues**

Although these are the three issues that affect victims at this moment, there were (as can be guessed from the issues identified so far) other issues. For example:

The Proposal stated that the Trustee would auction the Non-Error Coins over a 3-6 month period<sup>27</sup>, and the terms in the motion to auction the coins stated "The Non-Error Coins will be consigned to Heritage for public auction(s) to take place over a six (6) month period<sup>28</sup>". In actuality, all lots were auctioned on the same day, with very little notice given to potential bidders, and nearly no marketing<sup>29</sup>. This obviously reduced the number of bidders.

The auctioneer declared that they would "professionally photograph, as appropriate, samples of the Non-Error Coins for marketing to potential

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<sup>20</sup> Docket 667, page 3, Exhibit A.

<sup>21</sup> Many victims noticed that most of these coins were selling on eBay for a fraction of the valuations assigned to them.

<sup>22</sup> The higher the grades of the coins, the higher the valuations; the higher the valuations of high-grade coins, the more business they get.

<sup>23</sup> The Trustee wrote on or before May 5, 2016 to those who opted out "The [Error Coins] will now be distributed based on the Heritage Auction inventory value (approximately \$400,000)".

<sup>24</sup> Trustee Report #9 (August 24, 2016) p2.

<sup>25</sup> Ian Russell, President of GreatCollections, wrote to the victim "In today's market, these coins are worth about \$4,000-\$5,000. ... They are not something we would purchase outright, since the price guide values are so high - we prefer to auction them for clients so there is no confusion as to pricing."

<sup>26</sup> Docket 742 has the prices realized, Docket 667-1 has the valuations.

<sup>27</sup> Docket 289, page 8, line 3.

<sup>28</sup> Docket 391, page 8, line 8. The motion was granted in Docket 450.

<sup>29</sup> The Notice of Sale of Estate Property (Docket 590) was filed May 10, 2016, with the auction on June 10, 2016.

buyers<sup>30</sup>", but they never did, requiring bidders to travel to Heritage Auctions to view the lots, greatly reducing the number of potential bidders (for example, who would bid on "Lot of assorted bits and pieces" without seeing it?). They also declared that they would "advertise the Non-Error Coins for sale in various print and online media," but that appears to have never happened (it was not even listed on their website).

The Non-Error Coin auction also was a sealed mail bid auction, without allowing online or live bidding<sup>31</sup>. One victim tried to bid in the auction, but stated "I spent a half hour on the phone with Heritage today ... and they assured me (a supervisor too!!) that they have NO KNOWLEDGE WHATSOEVER of the Tulving coin auction".

There were also the issues (see footnote 5) with the Trustee giving away records for free to GreatCollections, and the settlement with the Gugasians that the vast majority of victims opposed<sup>32</sup> (all 60 creditors that expressed their opinion stated that they opposed it<sup>33</sup>).

### **Summary**

The Trustee made an agreement with the Government where the Error Coins would be distributed to victims (and not treated as a cash distribution for purposes of the 11 USC 326 calculation for Trustee compensation), and the Non-Error Coins and Rejected Coins to be sold at auction with net proceeds going to the victims.

The victims did receive the Error Coins. However, the Trustee has failed to meet her end of the bargain with the U.S. Government: the Trustee has refused to distribute the net proceeds of the Non-Error Coins and Rejected Coins, and is attempting to get paid based on the highly inflated value of the Error Coins, which the Trustee expressly stated would not happen.

My expectation is that the Trustee will either not respond to this, or simply respond that she just followed court orders. However, the Trustee (not the Court) should be responsible for making sure that the Coordination Agreement is followed.

Sincerely,

Joshua Gibbons

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<sup>30</sup> Docket 391, page 5, line 14.

<sup>31</sup> Per the auction catalog, page 2.

<sup>32</sup> A survey that 41 creditors took showed that 38 felt that the Settlement Agreement should not be approved by the Court, with 2 creditors unsure, and 1 believing that the Settlement Agreement should be approved.

<sup>33</sup> Docket 731, page 10.



**United States Bankruptcy Court**  
Central District of California  
Ronald Reagan Federal Building & Courthouse  
411 West Fourth Street, Suite 5040  
Santa Ana, California 92701-4593

*Chambers of*  
**Erithe A. Smith**  
*Bankruptcy Judge*

September 25, 2018

*Telephone*  
**(714) 338-5440**  
*Email*

**RESTRICTIONS ON EX PARTE COMMUNICATIONS WITH A JUDGE**

Returned to you herewith is the communication recently received in the chambers of the Honorable Erithe A. Smith, United States Bankruptcy Judge, advising Judge Smith of certain facts and requesting that she take certain action in a pending bankruptcy case. Please be advised that Judge Smith is prohibited from considering or granting any relief requested in an "ex parte" (improperly filed) communication. Rule 9003(a) of the Federal Rules of Bankruptcy Procedure provides:

**Except as otherwise permitted by applicable law, any . . . party in interest and any attorney, accountant or employee of a party in interest shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding.**

Similarly, Canon 3A(4) of the Code of Conduct for United States Judges prohibits a judge from considering ex parte or other improper communications concerning a pending or impending proceeding.

If you would like the court to consider specific matters or to take specific action concerning a pending case or proceeding, you must file an appropriate pleading with the court (supported by declarations if factual issues are involved) in accordance with all applicable national and local bankruptcy rules and properly serve the pleading on all parties who are entitled to notice.

Please consult with your attorney concerning the appropriate procedure for presenting matters to the court for its review and consideration.

Additionally, a copy of your letter has been forwarded to the Office of the U.S. Trustee for assistance.