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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

VICTOR HANNAN, individually and on
behalf of a class of similarly situated
persons,

Plaintiff,

v.

THE TULVING COMPANY, INC., a
California Corporation; and **HANNES
TULVING, JR.**, a California resident,

Defendants.

Case No. 5:14-cv-01054-EJD

**NOTICE OF MOTION AND MOTION
EX PARTE BY PLAINTIFF FOR
LEAVE TO CONDUCT EARLY
DISCOVERY**

Date: TBD
Time: TBD
Ctrm: 4, 5th Flr.
Judge: The Hon. Edward J. Davila
Filed: March 18, 2014

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1 Pursuant to Local Rule 7-10, Federal Rules of Civil Procedure 4(e), 26, and
2 65(b), and the inherent powers of this Court, Plaintiff Victor Hannan (“Plaintiff”)
3 respectfully moves *ex parte* for an order permitting Plaintiff to conduct expedited
4 discovery for the purpose of identifying the location of Defendant Hannes Tulving, Jr.
5 (“Defendant”) so he can be served.

6 The relief requested in this motion is being sought *ex parte* and without notice to
7 Defendant. Good cause exists for such an order because Plaintiff cannot locate
8 Defendant in order to serve process upon him. Furthermore, Defendant has ceased his
9 business operations, moved out of his last known residence, and failed to respond to
10 multiple emails about this case sent to his last known email address. Inquiries into the
11 whereabouts of Defendant made to two attorneys either representing Defendant or
12 having contact with him have not been fruitful, and Plaintiff has attempted to serve
13 Defendant at a variety of addresses with which Defendant is associated.

14 This motion is based upon this Notice and the following memorandum of points
15 and authorities, along with the contemporaneously filed declaration of Karl S.
16 Kronenberger (and exhibit thereto) (“Kronenberger Decl.”), the Complaint on file herein,
17 the proposed order submitted herewith, and any other evidence that may be adduced at
18 hearing.

19
20 Respectfully submitted,

21 DATED: March 18, 2014

KRONENBERGER ROSENFELD, LLP

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23 By: s/ Karl S. Kronenberger
Karl S. Kronenberger

24 Attorneys for Plaintiff
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION AND FACTS**

3 Through this Motion, Plaintiff Victor Hannan (“Plaintiff”) seeks leave to conduct
4 early discovery in this case; specifically, Plaintiff seeks leave to serve a subpoena on
5 California Bank & Trust, which will enable Plaintiff to obtain information about Defendant
6 Hannes Tulving, Jr. (“Defendant”) that would assist in locating Defendant so he can be
7 served.

8 This case arises out of a massive fraud perpetrated by Defendant. Defendant
9 was in the business of buying and selling precious metals, including gold, silver,
10 platinum, and palladium in coin and bar form. (Complaint ¶2.) In the fall of 2013,
11 however, Defendant stopped shipping orders to customers who had ordered precious
12 metals and wired payment to Defendant. (Complaint ¶33.) Defendant has failed to ship
13 precious metals to hundreds of customers, resulting in losses of millions of dollars for
14 customers. (Complaint ¶34.) After the filing of the complaint in this action, over 160 of
15 Defendant’s customers have contacted Plaintiff’s counsel, providing details of their
16 unfulfilled orders that collectively exceed \$5 million. (Kronenberger Decl. ¶3.)

17 On March 7, 2014, Plaintiff filed an application for a temporary restraining order,
18 which the Court granted on March 10, 2014 (the “TRO”). The TRO froze one bank
19 account of The Tulving Company, Inc. and prohibited any transfer or other disposition of
20 precious metals in the possession of either Defendant Hannes Tulving, Jr. or The
21 Tulving Company, Inc. (TRO ¶2.)

22 Immediately after the entry of the TRO, Plaintiff began to attempt to serve the
23 complaint, summons, and the TRO on Defendant. Plaintiff attempted to serve
24 Defendant at three different residential addresses and at the office of The Tulving
25 Company, Inc. Defendant was no longer residing at any of the three residential
26 addresses and Defendant had closed the office of The Tulving Company, and there was
27 no trace of any human activity on the premises. (Kronenberger Decl. ¶4.) Upon
28 continuing this investigation, Plaintiff was informed that Defendant had moved out of his



1 last known residence “two of three weeks” prior to Plaintiff’s service attempts.
2 (Kronenberger Decl. ¶4.)

3 Plaintiff’s other attempts at service have fared no better. Defendant is
4 represented by counsel in the case of *Stach v. The Tulving Company* pending in Orange
5 County Superior Court (OSCS 30-2014-00699829). Plaintiff’s counsel requested
6 Defendant’s counsel in that case either accept service on behalf of Defendant or
7 otherwise facilitate service. Defendant’s counsel has not responded to this request.
8 (Kronenberger Decl. ¶5.)

9 The Tulving Company, Inc. is also represented by bankruptcy counsel in a case
10 recently filed by The Tulving Counsel in the United States Bankruptcy Court for the
11 Central District of California, and Defendant signed the bankruptcy petition in that case
12 on behalf of The Tulving Company, Inc. Plaintiff requested bankruptcy counsel in that
13 case to accept service or otherwise facilitate service of Defendant, but such counsel
14 refused. (Kronenberger Decl. ¶6.)

15 Plaintiff’s counsel has also emailed the complaint and TRO to three email
16 addresses associated with Defendant, including email accounts Defendant used for his
17 business at issue in this case. Two of the email addresses were not functional and
18 Plaintiff’s counsel received no response from the third email address. However, the fact
19 that Plaintiff’s counsel received no delivery failure notification suggests that this third
20 email address is functional and Defendant received a copy of the complaint and TRO.
21 (Kronenberger Decl. ¶7.)

22 Plaintiff’s counsel has exhausted the options currently available, without
23 discovery, to locate Defendant and to serve him with the complaint and TRO.
24 (Kronenberger Decl. ¶8.) Thus, with this motion, Plaintiff seeks to conduct discovery on
25 Defendant’s California Bank & Trust account.

26 It appears that all of Defendant’s customers who wired money to Defendant did so
27 to the same account at California Bank & Trust (ending in 2481), which was frozen
28 pursuant to the TRO. (Kronenberger Decl. ¶9.) Plaintiff believes that California Bank &

1 Trust possesses identifying information for Defendant associated with this account, and
 2 perhaps other accounts owned by Defendant and linked to this account. Such
 3 information may include other known addresses, mobile phone numbers, recent ATM
 4 transactions, email addresses, and outgoing wire transfers. Discovery of this information
 5 will help Plaintiff locate Defendant and complete service.

6 LAW AND ARGUMENT

7 For the reasons set forth above, Plaintiff requires discovery that will enable
 8 Plaintiff to locate Defendant in order to effectuate service upon him. Pursuant to Rule
 9 26, good cause showing as to why such relief is needed, Plaintiff hereby moves the
 10 Court to allow for the immediate discovery, in advance of the required Rule 26(f)
 11 meeting on discovery. Specifically, Plaintiff seeks document discovery from California
 12 Bank & Trust on the bank account used by Defendant to conduct the business at issue
 13 in this action, and any other bank account of Defendant at this bank. Plaintiff attaches
 14 to the Kronenberger Decl. as Exhibit A the "Schedule A" that Plaintiff proposes to attach
 15 to a subpoena to be served upon California Bank & Trust, which contains targeted
 16 document requests, the responses to which will assist Plaintiff in locating Defendants.¹
 17 The Court should also permit Plaintiff to issue such further subpoenas as are required to
 18 obtain identifying information discovered by the Subpoena.

19 **A. Expedited discovery is necessary for proper service.**

20 Rule 26(d) of the Federal Rules of Civil Procedure provides that a party may not
 21 seek discovery from any source before the party has conferred as required by Rule
 22 26(f). An exception to this rule exists, however, permitting expedited discovery where
 23 "good cause" is given by a showing that the need for discovery outweighs any possible
 24 prejudice to the party from whom discovery is sought. *See Semitool, Inc. v. Tokyo*
 25 *Electron America, Inc.* 208 F.R.D. 273, 276 (N.D.Cal. 2002). Discovery is particularly
 26 appropriate where necessary to identify defendants in order to effectuate proper

27 _____
 28 ¹ For the sake of brevity, only the proposed attachment to the form of Rule 45 subpoena
 is attached for the Court's reference.



1 service. See, e.g., *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980) (district court
2 should permit pre-service discovery to “identify” defendants).

3 Although Defendant’s *identity* here is known, Plaintiff has significant need for the
4 immediate discovery to locate him and effect proper service. The concerns driving the
5 Ninth Circuit in *Gillespie* thus apply here; a defendant against whom legitimate claims
6 have been brought should not be permitted to avoid participating in litigation by the
7 mere expediency that his whereabouts are unknown. Discovery is proper to facilitate
8 service of process and thus bring Defendant before this Court.

9 The scope of Plaintiff’s requested discovery is limited to this need and would
10 involve little to no burden or cost. Plaintiff seeks only information from non-parties for
11 the purpose of service. As explained above, this information—which is presumably all in
12 digital format—can be, and often is, digitally copied, backed-up, and stored for future
13 production at little to no cost, or at a minimal cost for which Plaintiff will reimburse the
14 appropriate third parties. Thus, the burden to California Bank & Trust of responding to
15 the subpoena is therefore minimal.

16 Furthermore, the proposed subpoena is minimally invasive, and carefully drafted
17 to meet Plaintiff’s prosecutorial needs, seeking only a) information regarding the
18 account used by the Defendant in perpetrating his fraudulent scheme, which has
19 already been frozen pursuant to the TRO, and b) *identifying* information associated with
20 other accounts at this bank held by Defendant. See *Qwest Comms. Int’l, Inc. v.*
21 *WorldQuest Networks, Inc.*, 213 F.R.D. 418, 420 (D. Colo. 2003) (scope of discovery
22 sought should be considered when determining “good cause” showing).

23 Because Plaintiff has demonstrated a compelling need for the information
24 sought, and the information is necessary to service of process in the present case, and
25 because the discovery is carefully drafted to seek only that information necessary to
26 redress that need, Plaintiff prays the Court issue the order requested.

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CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court issue an order permitting expedited discovery as prayed for herein.

Respectfully submitted,

DATED: March 18, 2014

KRONENBERGER ROSENFELD, LLP

By: s/ Karl S. Kronenberger
Karl S. Kronenberger

Attorneys for Plaintiff

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