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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.

CLASS ACTION

Case No. 3:14-cv-01054-HSG

**JOINT CASE MANAGEMENT
STATEMENT & [PROPOSED] ORDER**

**[PURSUANT TO FED. R. CIV. P. 26(f)
AND CIVIL LOCAL RULE 16-9]**



1 Pursuant to Federal Rule of Civil Procedure 26(f), Local Civil Rule 16-9, Northern
 2 District of California Standing Order, and the Order Reassigning Case, Plaintiff Victor
 3 Hannan (“Plaintiff”) and Defendants The Tulving Company, Inc. and Hannes Tulving, Jr.
 4 (collectively, “Defendants”) jointly submit this case management statement.

5 Defendant The Tulving Company, Inc. has filed a Chapter 11 Bankruptcy Petition
 6 in the United States District Court, for the Central District of California, Case No. 8:14-bk-
 7 11492-ES. As a result, Judge Davila issued a mandatory stay toward Defendant The
 8 Tulving Company, Inc. in the above-referenced action. Defendant Hannes Tulving, Jr.
 9 has engaged in negotiations with the United States Attorney for the District of North
 10 Carolina relating to potential criminal charges against him personally. Plaintiff and
 11 Defendant Hannes Tulving, Jr. submitted a stipulation to stay the case pending this
 12 investigation, and the Court granted an order staying the case in 90-day increments, with
 13 the parties to file a joint status report on day 80 of each 90-day period.

14 **1. JURISDICTION AND SERVICE:**

15 **Subject Matter Jurisdiction:** Plaintiff alleges that this action arises under the
 16 Commodity Exchange Act, 7 U.S.C. §1 *et seq.* and, thus, this Court has jurisdiction over
 17 this action under 28 U.S.C. §1331 and 7 U.S.C. §25(c). This Court has supplemental
 18 jurisdiction over the state law claims under 28 U.S.C. §1367(a) because these claims are
 19 so related to the federal claims in this action that they form part of the same case or
 20 controversy. Moreover, this Court has subject matter jurisdiction under 28 U.S.C.
 21 §1332(d) because the matter in controversy exceeds the sum or value of \$5,000,000
 22 exclusive of interest and costs, and this matter is a class action in which members of the
 23 classes are citizens of different states from Defendant.

24 Defendant does not contest the Court’s subject matter jurisdiction over this action.

25 **Personal Jurisdiction:** Plaintiff has asserted that this Court has personal
 26 jurisdiction over Defendant because Defendant resides in California and a substantial
 27 part of Defendant’s alleged misconduct that gave rise to this action occurred in California.

28 Defendant does not contest the Court’s personal jurisdiction over this action.



1 **Service:** Pursuant to Judge Davila's Order Granting Plaintiff's Ex Parte Motion for
2 Leave to Serve Defendant Hannes Tulving Jr. by Alternative Means [D.E. 45], Defendant
3 was served on April 10, 2014. Plaintiff also identified two additional attorneys who
4 represent Defendant personally. In an abundance of caution, Plaintiff mailed copies of
5 the summons, complaint, TRO, and Judge Davila's order to these attorneys in addition to
6 the service ordered by the Court.

7 Defendant does not contest that service was properly effected in this action.

8
9 **2. FACTS:**

10 **Plaintiff's Statement:** Plaintiff alleges a fraud perpetrated by Defendant.
11 Specifically, Defendants were in the business of buying and selling precious metals,
12 including gold, silver, platinum, and palladium in coin and bar form. In the fall of 2013,
13 however, Defendants stopped shipping orders to customers who had ordered and paid for
14 precious metals, including Plaintiff. Plaintiff had wired payment of \$46,500 to Defendants.
15 Defendants failed to ship precious metals to Plaintiff and hundreds of other customers,
16 resulting in losses of millions of dollars for customers. After the filing of the complaint,
17 over 190 of Defendants' customers contacted Plaintiff's counsel, providing details of their
18 unfulfilled orders that collectively reach nearly \$7 million. Some of these customers
19 submitted declarations in support of Plaintiff's motion for a temporary restraining order.
20 See Dkt. Nos. 11–30.

21 **Defendant's Statement:** Defendant, who is the principal shareholder of the
22 corporation and its chief executive officer, denies the fraud allegations. Defendant did not
23 personally buy and sell precious metals to customers of the company. Defendant
24 contends that his company filed for bankruptcy protection because it could not pay its
25 daily operating expenses, including high-interest payments on inventory that was
26 collateralized for operating expenses. After filing for bankruptcy, the assets of the
27 corporation, including its inventory, was seized by federal officials investigating possible
28 crimes. Defendant has no control over the assets of the company because of the



1 bankruptcy and the seizure action.

2
3 **3. LEGAL ISSUES:**

4 **Plaintiff's Statement:** This action raises the following legal issues:

- 5 • Whether Defendants promised shipment of precious metal products in exchange
- 6 for payments from members of the classes;
- 7 • Whether Defendants breached their agreements with members of the classes by
- 8 failing to deliver precious metal products as promised and within the time required
- 9 by California and federal law;
- 10 • Whether Defendants violated the Commodities Exchange Act through the
- 11 misrepresentations and other conduct described herein;
- 12 • Whether Defendants violated the California Commodity Law through the
- 13 misrepresentations and other conduct described herein;
- 14 • Whether Defendants were unjustly enriched when they retained money paid to
- 15 them by members of the classes without providing the precious metal products
- 16 they promised in return for said money;
- 17 • Whether Defendants converted the funds of members of the classes by taking
- 18 their money without providing the precious metal products they promised in return
- 19 for said money;
- 20 • Whether Defendants engaged in unlawful and fraudulent business practices in
- 21 violation of Business & Professions Code section 17200;
- 22 • Whether Defendants violated California Civil Code § 1770(9) by “[a]dvertising
- 23 goods or services with intent not to sell them as advertised”;
- 24 • Whether Defendants violated California Civil Code § 1770(10) by “[a]dvertising
- 25 goods or services with intent not to supply reasonably expectable demand, unless
- 26 the advertisement discloses a limitation of quantity”; and
- 27 • Whether the putative class should be certified under Federal Rule of Civil
- 28 Procedure 23.



1 **Defendant’s Statement:** Whether Defendant, as a shareholder or officer of the
2 company, has any liability for the alleged violations.

3
4 **4. MOTIONS:**

5 **Pending Motions:** There are no pending motions.

6 **Plaintiff’s Anticipated Motions:** Plaintiff anticipates bringing: a) a motion for
7 class certification under Rule 23, b) a motion for summary judgment and/or summary
8 adjudication, and c) discovery motions if and as needed, and only after attempting to
9 resolve the discovery disputes without Court involvement.

10 **Defendant’s Anticipated Motions:** Defendant does not anticipate bringing any
11 motions.

12
13 **5. AMENDMENT OF PLEADINGS:**

14 Plaintiff may seek to amend the operative complaint upon discovering additional
15 people involved in the alleged misconduct, additional acts of misconduct, and/or to refine
16 his class definitions.

17
18 **6. EVIDENCE PRESERVATION:**

19 Counsel for Plaintiff and Defendants have discussed with their clients the need to
20 preserve all potentially relevant evidence. Moreover, counsel for all parties have
21 discussed with their clients the Court’s Guidelines for the Discovery of Electronically
22 Stored Information, Guideline 2.0.

23
24 **7. DISCLOSURES:**

25 Plaintiff and Defendant served initial disclosures on May 16, 2014.

26 //

27 //

28 //



1 **8. DISCOVERY:**

2 **a. Discovery Taken to Date:**

3 Plaintiff has served document subpoenas on California Bank & Trust and
4 Commodity Exchange, Inc. The parties have not engaged in any other written discovery
5 or taken any depositions.

6 **b. Scope of Anticipated Discovery:**

7 **Plaintiff’s Statement:**

8 Without limiting his right to seek discovery on other topics, Plaintiff anticipates
9 conducting discovery on the following topics:

- 10 • The location of precious metal products that were purchased by members of the
- 11 classes and never delivered;
- 12 • The location of assets of members of the classes that were transferred to The
- 13 Tulving Company, Inc. in exchange for precious metal products that were never
- 14 delivered;
- 15 • Defendants’ participation in the commodity exchange market and/or his
- 16 possession of precious metal products;
- 17 • Defendants’ financial transactions and assets;
- 18 • Defendants’ relationship with banks, financiers, and/or business partners, as well
- 19 as their involvement in the misconduct that gave rise to this action;
- 20 • Inquiries by governmental and/or consumer agencies about Defendants, as well
- 21 the misconduct that gave rise to this action.

22 **Defendant’s Statement:** Defendant does not have possession or control of
23 any of the assets, including inventory, records, etc., of the company. Accordingly,
24 Defendant is unable to provide any discoverable evidence because those assets were
25 seized by the federal government and/or otherwise would be in the control of the
26 bankruptcy trustee.

27 //

28 //



1 **c. Electronically Stored Information:**

2 The parties anticipate that discoverable information in this action will primarily be
3 in electronic form. While the parties believe that the most effective and proportional
4 methods of production of electronically stored information (“ESI”) cannot yet be
5 determined, they agree to cooperate and confer about these issues as discovery
6 proceeds. Thus, the parties will schedule a conference to discuss: a) the systems that
7 contain discoverable ESI, b) the search and production of ESI, and c) the opportunities to
8 reduce costs and increase efficiency in producing ESI.

9 The parties have reviewed and agree to follow the Guidelines for the Discovery of
10 Electronically Stored Information.

11 Notwithstanding the uncertainty about the most effective way to produce all ESI,
12 the parties to accept service by email of documents not filed with the Court in this case
13 under FRCP 5(b)(2)(E).

14
15 **9. CLASS ACTIONS:**

16 **Plaintiff’s Statement:** This is an alleged class action subject to Rule 23. Plaintiff
17 alleges the following classes:

- 18 • All persons in the United States who have purchased and paid for precious metal
19 products from Tulving Company from January 1, 2013 to present, but who have
20 not received such products (the “Nationwide Class”).
- 21 • All persons in California who have purchased and paid for precious metal products
22 from Tulving Company from January 1, 2013 to present, but who have not
23 received such products (the “California Subclass,” and together with the
24 Nationwide Class, the “Classes”).

25 Plaintiff may modify these class definitions after conducting pre-certification
26 discovery, but before seeking class certification. Plaintiff alleges that this action is
27 maintainable under Rules 23(a)(1)-(4) and 23(b)(1)-(3). Plaintiff does not believe that
28 any issues regarding commonality, typicality, numerosity, or adequacy will prevent the



1 certification of the Classes.

2 **Defendant’s Statement:** Defendant is aware of plaintiffs or potential plaintiffs in
3 other cases.

4
5 **10. RELATED CASES:**

6 The parties are aware of the following related cases:

- 7 • *In Re: The Tulving Company, Inc.*, United States Bankruptcy Court for the
- 8 Central District of California, Santa Ana Division, Case No. 8:14-bk-11492-ES.
- 9 • *Stach v. The Tulving Company, Inc.*, Orange County Superior Court, Case No.
- 10 30-2014-00699829-CU-BC-CJC.
- 11 • *Eschbaugh v. The Tulving Company, Inc.*, Orange County Superior Court,
- 12 Case No. 30-2014-00708483- -CU-CO-CJC.
- 13 • *Assaley v. The Tulving Company, Inc.*, Orange County Superior Court, Case
- 14 No. 30-2014-00703063-CU-BC-CJC.

15
16 **11. RELIEF:**

17 **Plaintiff’s Statement:** Plaintiff seeks the following relief: a) certification of the
18 Classes described above; b) a judgment in favor of Plaintiff and the proposed Classes
19 and against Defendant; c) restitution of the money paid by members of the Classes,
20 which was wrongfully taken without providing the precious metal products promised; d)
21 compensatory and exemplary damages as allowed by law; and e) Plaintiff’s and the other
22 Class members’ costs and attorneys’ fees.

23 **Defendant’s Statement:** Defendant prays that the Plaintiffs take nothing.

24
25 **12. SETTLEMENT AND ADR:**

26 Plaintiff has not yet had the opportunity to confer with Defendants about ADR.

27 //

28 //



1 **13. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES:**

2 The parties have not consented to proceed before a magistrate judge for all
3 purposes, and this matter has been reassigned to a district judge.

4
5 **14. OTHER REFERENCES:**

6 The case is not suitable for reference to binding arbitration, a special master, or
7 the Judicial Panel on Multidistrict Litigation.

8
9 **15. NARROWING OF ISSUES:**

10 At this time, the parties do not believe that issues can be narrowed.

11
12 **16. EXPEDITED SCHEDULE:**

13 The parties not believe that this is the type of action that can be handled on an
14 expedited basis with streamlined procedures.

15
16 **17. SCHEDULING:**

17 The parties do not believe it is necessary to establish a scheduled at this time, as
18 the case is stayed as to all Defendants.

19
20 **18. TRIAL:**

21 The parties believe that it is too early to estimate the length of trial.

22
23 **19. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS:**

24 **Plaintiff's Statement:** Plaintiff has filed a Certificate of Interested Entities or
25 Parties and certify that, other than the named parties, there are no such interests to
26 report.

27 //

28 //



1 **Defendant's Statement:** Defendant has not yet ascertained the non-party
2 interested entities or persons, other than those afore-mentioned parties to pending
3 litigation, including the bankruptcy trustee and the federal government.

4
5 **20. OTHER MATTERS:**

6 The parties do not presently know of any other matters to be addressed here at
7 the case management conference that may facilitate the just, speedy and inexpensive
8 disposition of this matter.

9
10 Respectfully submitted,

11 DATED: March 2, 2015

KRONENBERGER ROSENFELD, LLP

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

Attorneys for Plaintiff

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15
16 DATED: March 2, 2015

Of Counsel:

SHAPIRO HABER & URMY LLP

Edward F. Haber (pro hac vice
forthcoming)

Patrick J. Valley (pro hac vice
forthcoming)

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22 DATED: March 2, 2015

GRUENBECK & VOEGLER

By: s/ William K. Voegler
William K. Voegler

Attorneys for Defendant Hannes Tulving,
Jr.



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ATTESTATION OF CONCURRENCE IN FILING

Pursuant to Local Rule 5-1(i)(3), the filer hereby attests that concurrence in the filing of this document has been obtained from each of the other signatories, which shall serve in lieu of their signatures on the document.

Respectfully Submitted,

DATED: March 2, 2015

KRONENBERGER ROSENFELD, LLP

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

Attorneys for Plaintiff



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CASE MANAGEMENT ORDER

The above JOINT CASE MANAGEMENT STATEMENT & PROPOSED ORDER is approved as the Case Management Order for this case and all parties shall comply with its provisions. [In addition, the Court makes the further orders stated below:]

IT IS SO ORDERED.

Dated:

UNITED STATES DISTRICT JUDGE

