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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 TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE REGARDING PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

[Fed. R. Civ. P. 65; L.R. 65-1]

Date: TBD  
Time: TBD  
Ctrm: 4, 5th Flr.  
Judge: The Hon. Edward J. Davila  
Filed: March 7, 2014

KRONENBERGER ROSENFELD

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1 Pursuant to Rule 65 of the Federal Rules of Civil Procedure and Local Rule 65-1,  
2 Plaintiff Victor Hannan (“Plaintiff”) respectfully moves *ex parte* for a temporary  
3 restraining order against defendants The Tulving Company, Inc. (“Tulving Company”)  
4 and Hannes Tulving, Jr. (together, “Defendants”), as well as any persons acting in  
5 concert with Defendants or at their direction, to the following effects:

6 1. Temporarily restraining Defendants, and any persons acting in concert  
7 with Defendants or at their direction, from transferring, liquidating, converting,  
8 encumbering, pledging, loaning, selling, concealing, dissipating, disbursing, assigning,  
9 spending, withdrawing, granting a lien or security interest or other interest in, or  
10 otherwise disposing of certain assets, including bank accounts, and gold, silver,  
11 platinum, or palladium products, including coins or bars; and

12 2. Directing any bank or other financial institution at which Defendants may  
13 be found to maintain accounts, to immediately freeze said accounts and maintain all  
14 documents and records thereof.

15 Plaintiff similarly requests that the Court order Defendants to appear at a time  
16 and date set by the Court to show cause, if any, why a preliminary injunction restraining  
17 and compelling them as set forth herein should not be entered during the pendency of  
18 this action.

19 The basis for this motion is that Defendants received payments from hundreds, if  
20 not thousands, of customers (including Plaintiff) for the purchase from Defendants of  
21 precious metal products, including gold, silver, platinum, and palladium coins and bars,  
22 but rather than shipping the products that customers had purchased, Defendants  
23 retained the money and have now apparently ceased operations without delivering the  
24 promised products to their customers. Based on the evidence detailed in the  
25 memorandum below, the most reasonable inference is that Defendants have  
26 absconded with the funds that Plaintiff and the members of the Classes (defined in the  
27 Complaint at ¶¶ 44-45) paid to them. Therefore, prompt action by this Court is  
28 necessary to secure any remaining assets for the benefit of Plaintiff and other members



1 of the Classes.

2 The relief requested in this motion is being sought *ex parte* and without notice to  
3 Defendants. Good cause exists for such an order under Local Rule 65-1(b) because  
4 Defendants have ceased operations and stopped responding to customer inquiries,  
5 leading to the reasonable inference that Defendants are in the process of absconding  
6 with their customers' money and may be in the process of concealing any remaining  
7 assets so as to thwart any recovery against them.

8 This motion is based upon this Notice and the following memorandum of points  
9 and authorities, along with the contemporaneously filed declaration of Victor Hannan  
10 (and exhibits thereto) ("Hannan Decl."), declaration of John Eddy ("Eddy Decl."),  
11 declaration of C. Scott Daudert ("Daudert Decl."), declaration of Rick Leffel ("Leffel  
12 Decl."), declaration of Bruce Lee Fox ("Fox Decl."), declaration of William Quigley  
13 ("Quigley Decl."), declaration of Cherri Elaine Trahan ("Trahan Decl."), declaration of  
14 Michael Azzolini ("Azzolini Decl."), declaration of Brian Erxleben ("Erxleben Decl."),  
15 declaration of Andrew Helfrich ("Helfrich Decl."), declaration of Samantha Chan ("Chan  
16 Decl."), declaration of Nik Meurer ("Meurer Decl."), declaration of Tom Minasian  
17 ("Minasian Decl."), declaration of Jay D. Parks ("Parks Decl."), declaration of Stephen  
18 Scott ("Scott Decl."), declaration of Thomas Meeks-Teal "(Meeks-Teal Decl."),  
19 declaration of Justin Kirk McCormick ("McCormick Decl."), declaration of Gale E. Shultz  
20 ("Shultz Decl."), declaration of Kenneth D. Porad ("Porad Decl."), declaration of Scott  
21 Ziemke ("Ziemke Decl."), declaration of Donna Taubenslag ("Taubenslag Decl."), the  
22 declaration of Mr. Hannan's counsel, Karl S. Kronenberger (and exhibits thereto)  
23 ("Kronenberger Decl."), the Complaint on file herein, the proposed order submitted  
24 herewith, and any other evidence that may be adduced at hearing.

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1 Respectfully submitted,

2 DATED: March 7, 2014

**KRONENBERGER ROSENFELD, LLP**

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Karl S. Kronenberger

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION AND FACTS**

Through this Motion, Plaintiff Victor Hannan seeks a temporary restraining order (“TRO”) and, eventually, a preliminary injunction against Defendants to prevent dissipation of funds Defendants have received from Plaintiff and other members of the proposed Classes as payment for various precious metal products, which Defendants have not delivered pursuant to their agreements with Plaintiff and the members of the Classes. The facts set forth below are based on Plaintiff’s personal knowledge and counsel’s investigation.

***Tulving Company’s Operations***

Hannes Tulving, Jr. established Tulving Company in 1990. (Kronenberger Decl. Ex. A.) Tulving Company’s primary business was the purchase and sale of precious metals in coin and bar form, including gold, silver, platinum, and palladium. (Kronenberger Decl. Ex. B.)

Hannes Tulving, Jr. is the owner and President of Tulving Company. (Kronenberger Decl. Ex. C.) When Tulving Company was still operating, Hannes Tulving, Jr. was directly involved in its day-to-day affairs and personally managed the company. (Kronenberger Decl. Exs. D, E.)

Tulving Company held itself out as a stable, established precious metals dealer, marketing itself prominently on its website as follows: “Gold Silver Bullion U S Precious Metals Dealer Buying Selling Coins Bars At This Same Online Address Since 1995.” (Kronenberger Decl. Ex. B.) According to Tulving Company, over the last thirty years, it “has bought and sold over 1.1 million individual coins,” and from 1999 through March 30, 2013, Tulving Company bought and sold in excess of \$2.1 billion in precious metals. (Kronenberger Decl. Ex. C.) Tulving Company indicates that in 2012 alone, it sold more than \$350 million in precious metals. (Kronenberger Decl. Ex. F.)

Tulving Company also prominently marketed the speed at which it would ship precious metals that customers purchased from it, advertising (i) “Free UPS Next Day



1 Air Shipping on All Orders When You Purchase or Sell”; (ii) “Free Overnight Shipping”;  
2 and (iii) that Tulving Company is “Open 24 Hours a Day – 7 Days a Week.” See  
3 <<http://www.tulving.com>> (animated graphic on website). Tulving Company’s own  
4 website, until very recently, advertised: “Gold, Platinum, and Palladium are typically  
5 shipped within 72 working hours of receipt of your wire,” while “[s]ilver is typically  
6 shipped within about 5 working days after receipt of your wire.” Tulving Company also  
7 represented that it would ship items paid for by check within 14 working days.  
8 (Kronenberger Decl. Ex. G.)

9 Tulving Company’s website provided wire instructions for customers to wire  
10 money to Tulving Company to purchase precious metals. (Kronenberger Decl. Ex. F.)  
11 Specifically, Tulving Company instructed customers to wire the money to Tulving  
12 Company’s account at California Bank & Trust, a San Diego-based bank.

### 13 ***Plaintiff’s Purchase***

14 Plaintiff has completed several purchases of precious metals from Tulving  
15 Company over the last three years. (Hannan Decl. ¶2.) On January 15, 2014, Plaintiff  
16 called Tulving Company’s telephone number advertised on its website and spoke with a  
17 representative of Tulving Company. During that phone call, Plaintiff placed an order for  
18 the purchase of 2,000 “2014 American Eagle 1 Ounce Silver Coins” at a price of  
19 \$23.35/each, for a total of \$46,500 (the “Silver Coins”). (Hannan Decl. ¶3.) Pursuant to  
20 the instructions provided by Tulving Company, Plaintiff wired \$46,500 to Tulving  
21 Company. (Hannan Decl. ¶4.) Tulving Company confirmed the transaction and receipt  
22 of the wired funds through a form email on January 16, 2014, which attached a form  
23 invoice. The text of the form email indicates:

24 This email is to notify you that one of the following has  
25 occurred...

26 1. We have received payment for your order.

27 or

28 2. We have shipped your order.





Your invoice has been attached to this email. If your invoice does NOT contain a tracking number or ship date, then it is meant only to inform you that we have received your payment.

You will receive a second email on the day your order ships. Another copy of your invoice will be attached. Your tracking number, along with the ship date, will be included on this invoice, directly underneath the description of the item(s) you ordered. All orders are shipped overnight delivery via UPS Next Day Air Saver....

(Hannan Decl. ¶5 & Ex. A.)

The form invoice attached to the January 16, 2014 email memorialized the transaction in which Plaintiff had entered with Tulving Company. It identified the “Qty” (Quantity) as 2,000, the “Description” as “2014 American Eagle 1 Ounce Silver Coin Sealed Box, the “Price Ea” as 23.35, and the “Amount” as 46,500.00. The invoice identified Plaintiff as both the “Bill To” and “Ship To” contact, and identified the “Pymt Type” as “Wire.” The invoice bore a stamp “PAID 1/16/2014,” confirming that Tulving Company had received Plaintiff’s wire for that amount. (Hannan Decl. ¶5 & Ex. A.)

The invoice did not include a tracking number. Therefore, per the attaching email, the invoice indicated receipt of payment for the order but did not confirm any shipment of the coins Plaintiff purchased. (Hannan Decl. ¶5 & Ex. A.)

As of March 1, 2014, Plaintiff had still not received the Silver Coins he had purchased. On that date, he attempted to call Tulving Company to check on the status of his order. Nobody answered Plaintiff’s call; Plaintiff left a voicemail. (Hannan Decl. ¶6.)

On March 4, Plaintiff emailed Tulving Company to inquire further on the status of his order. (Hannan Decl. ¶7.) Plaintiff has received no response to his email. (Hannan Decl. ¶7.) On the same day, Plaintiff called Tulving Company to check on the status of his order and left another voicemail when nobody answered. (Hannan Decl. ¶7.).

As of the date of this filing, Plaintiff has still received no response to his multiple email and voicemail inquiries on the status of his order. (Hannan Decl. ¶8.)

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***Tulving Company Ceases Operations  
Without Fulfilling Thousands of Paid Orders***

1  
2  
3 In the fall of 2013, reports began to surface on various websites that Tulving  
4 Company was failing to fulfill orders for which payment had been made. (Kronenberger  
5 Decl. Ex. E.) Plaintiff was unaware of these reports when he purchased his silver coins  
6 on January 15, 2014. (Hannan Decl. ¶9.)

7 One website in particular, <http://about.ag>, (a popular website carrying news on  
8 silver trading; “ag” is the periodic table abbreviation for the element silver), detailed the  
9 mounting complaints about Tulving Company’s failure to deliver precious metals for  
10 which it had received payment. The website indicates that beginning in April 2013, the  
11 Better Business Bureau began to receive an increased number of complaints  
12 concerning Tulving Company’s failure to timely deliver precious metals. The Better  
13 Business Bureau and other similar organizations, by November 1, 2013, had received  
14 111 complaints of orders delayed from three to five months. Many of the complaints,  
15 however, were “resolved” by Tulving Company’s promise that it would deliver the orders  
16 about which customers complained. (Kronenberger Decl. Ex. E.)

17 Between November 1, 2013 and the date of Plaintiff’s purchase, complaints with  
18 the Better Business Bureau and other organizations continued to mount. The Better  
19 Business Bureau and other organizations, by January 16, 2014, had logged 303  
20 complaints concerning Tulving Company’s failure to ship purchased precious metals,  
21 totaling \$13.8 million worth of precious metals. (Kronenberger Decl. Ex. E.); *see also*  
22 [http://www.bbb.org/orange-county/business-reviews/gold-silver-and-platinum-  
23 dealers/the-tulving-company-inc-in-newport-beach-ca-13090180/](http://www.bbb.org/orange-county/business-reviews/gold-silver-and-platinum-dealers/the-tulving-company-inc-in-newport-beach-ca-13090180/) (Better Business  
24 Bureau interactive website on Tulving Company and complaints concerning Tulving  
25 Company). These complaints likely represent only a small fraction of the actual number  
26 of customers to whom Tulving Company failed to deliver purchased precious metals,  
27 given that not all customers with unfulfilled orders will have complained specifically to  
28 the Better Business Bureau.

1 During late 2013 and early 2014, in addition to the complaints to the Better  
2 Business Bureau described above, hundreds of Tulving Company customers lodged  
3 complaints on numerous websites and online forums. (Kronenberger Decl. Exs. C, E, H,  
4 I, J, K, L.) Based on Tulving Company's public representations on the volume of its  
5 sales, the website <http://about.ag> estimates that "[t]here may be as many as 10,000  
6 people waiting for their orders" from Tulving Company. (Kronenberger Decl. Ex. E.)

7 Since the date of Plaintiff's purchase of January 16, 2014, complaints about  
8 Tulving Company have continued to mount. The website <http://about.ag> now counts  
9 more than 500 complaints about Tulving Company's failure to deliver previous metals  
10 that customers have purchased. *Id.* (Kronenberger Decl. Ex. E.)

11 On February 12, 2014, the Orange County Register, a California newspaper,  
12 published an article relating the story of a military veteran that "is one of hundreds  
13 waiting on coins from the Tulving Co. in Newport Beach." The article reported:  
14 "Consumers across the country have reported late or missing shipments of rare silver  
15 and gold coins purchased from the Orange County precious-metals dealer." The article  
16 further reported that Hannes Tulving, Jr. did not respond to multiple email and phone  
17 requests for an interview from the newspaper. (Kronenberger Decl. Ex. M.)

18 On February 28, 2014, the website <http://about.ag> reported Tulving Company  
19 was "effectively out of business" and had stopped answering phone calls.  
20 (Kronenberger Decl. Ex. E.) On March 4, 2014, popular investment website The Street  
21 further reported that Tulving Company "has ceased operations" and employees of  
22 Tulving Company "have been told to go home." (Kronenberger Decl. Ex. N at 9.) The  
23 Better Business Bureau now reports on its website: "**! The Tulving Company Inc Is  
24 Believed to Be Out of Business !**" (Kronenberger Decl. Ex. C.)

25 Tulving Company appears to have continued to take purchase orders for  
26 precious metals as late as February 28, 2014, long after it knew it would no longer fulfill  
27 pending or future orders for precious metals. (Compl. ¶ 42; Kronenberger Decl. Ex. E.)  
28 Tulving Company appears to have accepted millions of dollars in payments from



1 thousands of customers across the country while intending **not** to ship any of the  
2 products purchased.

3 Upon information and belief (and the facts evidenced herein), Plaintiff alleges  
4 Tulving Company does not intend to fulfill thousands of pending orders for precious  
5 metals for which it had already collected payments from customers. Rather, Tulving  
6 Company and its owner, Hannes Tulving, Jr., have gone into hiding, ceasing all contact  
7 with customers and the public, despite thousands of outstanding orders. Compl. ¶ 43.

8 ***Since Filing the Complaint, Numerous Other People Have***  
9 ***Contacted Plaintiff's Counsel Reporting Non-Delivery of Purchased Products***

10 Plaintiff filed his complaint only yesterday. Shortly after filing, Plaintiff's Counsel  
11 received numerous communications from other customers of Tulving Company who,  
12 like Plaintiff, had purchased and paid Defendants for precious metal products but have  
13 not received the promised products. Plaintiff submits herewith the declarations of John  
14 Eddy, C. Scott Daudert, Rick Leffel, Bruce Lee Fox, William Quigley, Cherri Elaine  
15 Trahan, Michael Azzolini, Brian Erxleben, Andrew Helfrich, Samantha Chan, Nik  
16 Meurer, Tom Minasian, Jay D. Parks, Stephen Scott, Thomas Meeks-Teal, Justin Kirk  
17 McCormick, Gale E. Shultz, Kenneth D. Porad, Scott Ziemke, and Donna Taubenslag,  
18 evidencing that Plaintiff is one of many customers who have suffered damage from  
19 Defendants absconding with its customers' funds.

20 ***Defendants Have Engaged in Similar Conduct in the Past***  
21 ***and Have Been Unable to Satisfy Customer Claims***

22 This is not the first time Hannes Tulving, Jr. and Tulving Company have failed to  
23 make good on purchases paid for by their customers. In or around 1990, the Federal  
24 Trade Commission sued Hannes Tulving, Jr. and his prior company, Hannes Tulving  
25 Rare Coin Investments for, among other things, "failing to maintain sufficient reserve  
26 funds to honor its buy-back guarantees." The FTC froze the assets of that company and  
27 appointed a receiver to distribute such assets. (Kronenberger Decl. Ex. O at 54.) The  
28 FTC described Mr. Tulving's company as a "scam" and a "ponzi scheme" and



1 acknowledged after the appointment of the receiver that “little was collected” resulting in  
 2 no redress to defrauded customers. (Kronenberger Decl. Exs. P, Q.) Although the FTC  
 3 alleged \$40 million in consumer losses due to Tulving’s conduct at that time, a federal  
 4 court in the FTC’s case against Tulving ordered Tulving to pay only \$1.2 million due to  
 5 Tulving’s “[in]ability to pay.” (Kronenberger Decl. Ex. R.)

### 6 ***Plaintiff’s Complaint***

7 As reflected in Plaintiff’s Complaint, Defendants’ conduct is unlawful on multiple  
 8 fronts. Plaintiff asserts well-pleaded claims, including: (i) breach of contract; (ii)  
 9 violations of the Commodities Exchange Act; (iii) violations of the California Commodity  
 10 Law, Corp. Code § 29536; (iv) violations of California Bus. & Prof. Code § 17200; (v)  
 11 violations of California Civil Code § 1770; (vi) conversion; and (vii) unjust enrichment.  
 12 Plaintiff seeks substantial damages on behalf of himself and two proposed Classes (a  
 13 nationwide class and a class of California customers).

## 14 **II. LAW AND ARGUMENT**

### 15 **A. Requirements for Temporary Restraining Order.**

16 Rule 65 of the Federal Rules of Civil Procedure governs injunctive relief. With  
 17 respect to temporary restraining orders (“TROs”), the Rule provides:

18 The court may issue a temporary restraining order without written or oral  
 19 notice to the adverse party or its attorney only if:

20 (A) specific facts in an affidavit or a verified complaint clearly show that  
 21 immediate and irreparable injury, loss, or damage will result to the movant  
 before the adverse party can be heard in opposition; and

22 (B) the movant's attorney certifies in writing any efforts made to give notice  
 and the reasons why it should not be required.

23 Fed. R. Civ. P. 65(b)(1). Although prior notice is ordinarily required, *id.*, the Rule gives  
 24 the Court the power to issue a TRO without notice if the restrained party is shown to  
 25 have disposed of assets wrongfully in the past, and that the party is likely to dispose of  
 26 the assets or property subject to the injunction before the matter may be set for hearing  
 27 on notice. *See Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878,  
 28 882 (9th Cir. 2003) (TRO will issue where defendant was shown to have dissipated



1 proceeds of wrongful conduct); *First Tech. Safety Sys., Inc. v. Depinet*, 11 F.3d 641,  
2 650-651(6th Cir. 1993) (TRO issued without notice to adverse party who would likely  
3 destroy or dispose of property if notice were given); see also L.R. 65-1(b) (allowing  
4 Court to issue TRO without prior notice “for good cause shown”). The Court may issue a  
5 TRO to “freeze” the assets of a defendant under such circumstances, especially where  
6 it is demonstrated that the defendant acquired those assets from the plaintiff through  
7 illegal means. See *In re Focus Media, Inc.*, 387 F.3d 1077, 1086-87 (9th Cir. 2004)  
8 (affirming “freeze” order against assets of principal shareholder who plundered money  
9 from the corporation).

10 The general purpose of a TRO is to preserve the relative positions of the parties  
11 until a trial on the merits can be conducted. *Granny Goose Foods, Inc. v. Bhd. of*  
12 *Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974); *E. & J. Gallo Winery v.*  
13 *Andina Licores S.A.*, 446 F.3d 984, 990 (9th Cir. 2006); *LGS Architects, Inc. v.*  
14 *Concordia Homes*, 434 F.3d 1150, 1158 (9th Cir. 2006). Injunctions are available as a  
15 matter of the Court’s historic equity powers, most often in cases in which the  
16 commission or continuance of certain acts pending litigation would produce waste or  
17 irreparable injury, where a party threatens to render the Court’s eventual judgment  
18 ineffectual through injurious acts, or where pecuniary compensation would be  
19 inadequate to make the moving party whole for harms suffered by reason of the  
20 threatened conduct during the pendency of the action. See *SEC v. Cavanaugh*, 445  
21 F.3d 105, 120 (2d Cir. 2006) (equitable powers of district courts include accounting,  
22 constructive trust, restitution, and disgorgement, along with traditional injunctive relief).

23 A party seeking injunctive relief must show either: (1) a combination of probable  
24 success on the merits and the possibility of irreparable injury, or (2) that serious  
25 questions are raised and the balance of hardships tips sharply in its favor. *Faith Ctr.*  
26 *Church Evangelistic Ministries v. Glover*, 462 F.3d 1194, 1201-02 (9th Cir. 2006).  
27 Courts judge such applications according to those standards on a sliding scale, in which  
28 the required degree of irreparable harm increases as the probability of success



1 decreases. *LGS Architects*, 434 F.3d at 1155; see also *Harper v. Poway Unified Sch.*  
2 *Dist.*, 445 F.3d 1166, 1174 (9th Cir. 2006) (the greater the relative hardship to the  
3 moving party, the less probability of success must be shown). Under the sliding scale  
4 theory, a party seeking an injunction “need not demonstrate that he will succeed on the  
5 merits, but must at least show that his cause presents serious questions of law worthy  
6 of litigation.” *Topanga Press, Inc. v. Los Angeles*, 989 F.2d 1524, 1528 (9th Cir. 1993).  
7 Injunctive relief is especially appropriate in cases such as the present in which the  
8 conduct of an adverse party “constitutes an overbearing assumption by one person of  
9 superiority and domination over the rights and property of others.” *Fretz v. Burke*, 247  
10 Cal. App.2d 741, 746 (1967).

11 A TRO expires after ten days unless the court finds good cause for an extension  
12 of its effective time, or the affected party agrees to an extension. Fed. R. Civ. P.  
13 65(b)(2). If the TRO is issued without notice to the adverse party, a hearing on a  
14 preliminary injunction must be held at the earliest possible time. Fed. R. Civ. P. 65(b)(3).  
15 The Court may issue the TRO *ex parte* if good cause to do so exists. Local Rule 65-  
16 1(b).

17 **B. Plaintiff Has Shown A Likelihood of Prevailing on the Merits.**

18 The facts set forth so far make it clear that Plaintiff is substantially likely, or even  
19 certain, to prevail on at least some of his claims. Specifically, there can be no dispute  
20 that Plaintiff’s allegations reflect a flagrant and indisputable claim for breach of contract  
21 against Tulving Company based on its retention of Plaintiff’s substantial payment and its  
22 failure to deliver the Silver Coins Plaintiff purchased. Furthermore, there is mounting  
23 evidence that at least hundreds, and likely thousands, of other Tulving Company  
24 customers similarly paid for precious metal products that Defendant has failed to  
25 deliver. Plaintiff has an open-and-shut case for breach of contract.

26 Even at a glance, it is also substantially likely that Plaintiff will prevail on his other  
27 claims. Defendants are liable under the Commodities Exchange Act and the California  
28 Commodity Law for false representations concerning the delivery time for Defendants’



1 products (or even more significantly, their representations that the products would be  
2 delivered *at all*). Based upon the same conduct, Plaintiff also states strong claims for  
3 violation of the California Legal Remedies Act, the California Unfair Competition Law,  
4 conversion, and unjust enrichment.

5 Thus, even at this early stage of this action, it is beyond argument that Plaintiff  
6 will prevail on at least some of his claims against Defendants. Accordingly, Plaintiff is  
7 entitled to obtain a TRO against Defendants in the respects requested herein.

8 **C. Plaintiff Will Suffer Irreparable Harm if a TRO Does Not Issue.**

9 The facts demonstrate clearly that Plaintiff stands to be harmed irreparably if the  
10 Court does not issue a TRO. The proceeds and other property sought to be frozen  
11 through the TRO represent funds that would be paid to Plaintiff and the other members  
12 of the proposed Classes upon the resolution of this case. Without some meaningful  
13 prospect of recovering those funds, Plaintiff and other members of the Classes may  
14 never receive the substantial amounts due to them.

15 A TRO is particularly appropriate here given Hannes Tulving, Jr.'s history in the  
16 precious metals industry. That Mr. Tulving was previously sued by the FTC for \$40  
17 million, and that the FTC was able only to recover \$1.2 million for the benefit of  
18 customers in that case, lends good reason to believe that the same may happen here if  
19 Defendants' assets are not secured quickly. Furthermore, that Defendants have simply  
20 ceased responding to phone calls and emails from hundreds of angry customers and  
21 the press strongly suggests that Defendants may be in the process of absconding with  
22 the funds they obtained from members of the proposed Classes, including Plaintiff. The  
23 Court should act quickly to prevent a repeat of the collapse of Mr. Tulving's prior  
24 company, where Mr. Tulving's customers were left out in the cold, while Mr. Tulving  
25 remained free to reestablish his business and effect his scheme again.

26 **D. The TRO Should Issue Without Notice to the Restrained Parties.**

27 There is ample evidence in this matter to justify the issuance of a TRO without  
28 prior notice to the restrained parties. Plaintiff has laid out in detail, both in the Complaint





1 and in the declarations attached hereto, evidence strongly suggesting that Defendants  
2 are in the process of absconding with the funds of hundreds, if not thousands, of  
3 Defendants' customers. Under these circumstances, it is essential that a "freeze order"  
4 TRO be issued before Defendants and the other restrained parties are notified of  
5 Plaintiff's motion. Undoubtedly, the Court must recognize the potential – in fact, the  
6 likelihood – that providing notice would result in the immediate disappearance of the  
7 assets still in the hands of the restrained parties. If Defendants were to learn that  
8 Plaintiff is seeking action from the Court, there is no end to the mischief they could do  
9 before the Court could restrain them otherwise. Bank accounts could be cleaned out;  
10 precious metal inventories could be transferred or concealed; and Defendants could  
11 again successfully claim poverty against the legitimate claims of their customers. The  
12 fact that this matter involves such damning facts against Defendants, as well as their  
13 history of unlawful conduct resulting in substantial consumer losses, would logically  
14 increase the possibility that they will hide or dissipate assets if they receive notice of  
15 adverse legal action being planned against them. Accordingly, plaintiff respectfully  
16 submits that sufficient cause exists for the issuance of the TRO without prior notice to  
17 the restrained parties.

18 **E. No Undertaking Should Be Required.**

19 Even though Rule 65(c) requires that an undertaking be provided as a condition  
20 to the issuance of a TRO, that requirement has been construed as investing the district  
21 courts "with discretion as to the amount of security required, *if any.*" *Barahona-Gomez*  
22 *v. Reno*, 167 F.3d 1228, 1237 (9th Cir.1999) (citing *Doctors' Assoc., Inc. v. Stuart*, 85  
23 F.3d 975, 985 (2d Cir.1996)). The Court may dispense with the undertaking when it  
24 concludes there is no realistic likelihood of harm to the defendant from enjoining his or  
25 her conduct. *Gorbach v. Reno*, 219 F.3d 1087, 1092 (9th Cir. 2000); *Barahona-Gomez*,  
26 167 F.3d at 1237; see also *Conn. Gen. Life*, 321 F.3d at 882; and *Jorgensen v.*  
27 *Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003). It is up to Defendants to request that a bond  
28 be required, if and when they appear. See *Aoude v. Mobil Oil Corp.*, 862 F.2d 890, 896



1 (1st Cir.1988) (refusing to hear argument regarding the need for bond because the  
2 district court had not been requested to set a bond); *Clarkson Co. v. Shaheen*, 544 F.2d  
3 624, 632 (2d Cir.1976) (finding judge could dispense with bond requirement because no  
4 request for a bond was ever made in district court). Although Rule 65(c) would seem to  
5 require a bond, “[w]e do not, however, believe that the language of Rule 65(c) absolves  
6 the party affected by the injunction from its obligation of presenting evidence that a bond  
7 is needed, so that the district court is afforded an opportunity to exercise its discretion in  
8 setting the amount of the bond.” *Conn. Gen. Life*, 321 F.3d at 883.

9 No undertaking should be required for the issuance of a TRO here. Plaintiff has  
10 demonstrated a strong prima facie case against Defendants. The likelihood of harm if  
11 the TRO is not granted is substantial, and the magnitude of the potential harm is great.  
12 If the TRO is granted, it will be important for Plaintiff to act immediately. Requiring  
13 Plaintiff to obtain an undertaking before the TRO can take effect will only delay the  
14 process and will increase the chance that Defendants will find out about Plaintiff’s  
15 efforts before the TRO can become effective, thus giving Defendants a chance to hide  
16 assets, transfer bank accounts, or go into hiding. Furthermore, there is no risk that  
17 Defendants will suffer any damage if the TRO is later found to have been improvidently  
18 granted. Therefore, no bond or other security should be required as a condition of the  
19 issuance of the TRO.

20 **F. Service by Alternative Means Should Be Authorized.**

21 As explained above, time and expediency are of the essence. Accordingly,  
22 Plaintiff suggests that it would be most efficient to the objectives of the TRO if the Court  
23 were to authorize Plaintiff to serve the TRO upon Defendants and other affected  
24 persons and entities by email, fax, or some other appropriate and immediate means.  
25 Given the fact that Defendants are in the Newport Beach area, and the accounts sought  
26 to be frozen are at a bank based in San Diego, it would be far more efficient and  
27 effective to serve those entities and persons by email or other such means. *Cf. Rio*  
28 *Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1013, 1017 (9th Cir. 2002) (allowing



1 service of process on foreign corporation via email). Accordingly, Plaintiff requests that  
2 the Court authorize the service of the TRO, as well as the Complaint, Summons, and  
3 other process in this action, by email, fax, or other appropriate means reasonably  
4 calculated to provide Defendants and other affected persons and entities with notice of  
5 the TRO and the action.<sup>1</sup>

6 **III. CONCLUSION**

7 For the foregoing reasons, Plaintiff respectfully requests that the Court issue a  
8 temporary restraining order in the respects prayed for herein, and order Defendants to  
9 show cause at an appropriate time and place why a preliminary injunction to the same  
10 effects should not be entered.

11  
12 Respectfully submitted,

13 DATED: March 7, 2014

**KRONENBERGER ROSENFELD, LLP**

14  
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24  
25  
26  
27 <sup>1</sup> Of course, Plaintiff will attempt to effect service of process on Defendants through  
28 conventional means such as personal delivery. These alternative measures are being  
requested in the meantime to effectuate service of the TRO as quickly as possible.