

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:15-cv-424-RJC-DSC**

**UNITED STATES COMMODITY)
FUTURES TRADING COMMISSION,)
)
Plaintiff,)
)
vs.)
)
THE TULVING COMPANY, INC. and)
HANNES TULVING, JR.,)
)
Defendants.)
_____)**

ORDER

**CONSENT ORDER OF PERMANENT INJUNCTION AND OTHER RELIEF AGAINST
THE TULVING COMPANY, INC. AND HANNES TULVING, JR.**

On September 11, 2015, Plaintiff U.S. Commodity Futures Trading Commission (the "Commission" or "CFTC") filed a Complaint against The Tulving Company, Inc. ("Tulving Company") and Hannes Tulving, Jr. ("Tulving") (Tulving Company and Tulving collectively, "Defendants") for Permanent Injunction, Civil Penalties, and Other Equitable Relief, for violations of the Commodity Exchange Act ("Act"), 7 U.S.C. §§ 1-26 (2012), and the Commission's Regulations ("Regulations") promulgated thereunder, 17 C.F.R. §§ 1.1-190.10 (2013). (Doc. No. 1).

I. CONSENTS AND AGREEMENTS

To effect partial settlement of the matters alleged in the Complaint against Defendants without a trial on the merits or any further judicial proceedings, Defendant Tulving and Defendant Tulving Company, subject to the approval the U.S. Bankruptcy Court for the Central District of California, Santa Ana Division, as Case No. 14-11492 ("Bankruptcy

Case”):

1. Consent to the entry of this Consent Order of Permanent Injunction and Other Relief Against Tulving Company, Inc. and Hannes Tulving, Jr. ("Consent Order");
2. Affirm that they have read and agreed to this Consent Order voluntarily, and that no promise, other than as specifically contained herein, or threat, has been made by the CFTC or any member, officer, agent or representative thereof, or by any other person, to induce consent to this Consent Order;
3. Acknowledge service of the summons and Complaint;
4. Admit the jurisdiction of this Court over them and the subject matter of this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2012);
5. Admit the jurisdiction of the CFTC over the conduct and transactions at issue in this action pursuant to the Act, 7 U.S.C. §§ 1-26 (2012);
6. Admit that venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2012);
7. Waive:
 - a. Any and all claims that they may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2012) and 28 U.S.C. § 2412 (2012), and/or the rules promulgated by the CFTC in conformity therewith, Part 148 of the Regulations, 17 C.F.R. §§ 148.1-148.30 (2014), relating to, or arising from, this action;
 - b. Any and all claims that they may possess under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, §§ 201-253, 110 Stat. 847, 857-868 (1996), as amended by Pub. L. No. 110-28, § 8302, 121 Stat. 112, 204-205 (2007), relating to, or arising from, this action;

- c. Any claim of Double Jeopardy based upon the institution of this action or the entry in this action of any order imposing a civil monetary penalty or any other relief, including this Consent Order; and
- d. Any and all rights of appeal from this Consent Order.

8. Consent to the continued jurisdiction of this Court over them for the purpose of implementing and carrying out the terms and conditions of all orders and decrees, including orders setting the appropriate amounts of restitution, disgorgement and civil monetary penalty (subject to the provisions set forth herein with respect to Tulving Company), that may be entered herein, to entertain any suitable application or motion for additional relief within the jurisdiction of the Court, to assure compliance with this Consent Order and for any other purpose relevant to this action, even if Defendants now or in the future reside or operate outside the jurisdiction of this Court;

9. Agree that they will not oppose enforcement of this Consent Order by alleging that it fails to comply with Rule 65(d) of the Federal Rules of Civil Procedure and waives any objection based thereon;

10. Agree that neither they nor any of their agents or employees under their authority or control shall take any action or make any public statement denying, directly or indirectly, any Findings of Fact or Conclusions of Law in this Consent Order, or creating or tending to create the impression that this Consent Order is without a factual basis; provided, however, that nothing in this provision shall affect their: (a) testimonial obligations, or (b) right to take legal position in other proceedings to which the CFTC is not a party. Defendants shall undertake all steps necessary to ensure that their agents or employees under their authority or control understand and comply with this agreement; and

11. By consenting to the entry of this Consent Order, admit the Findings of Fact and Conclusions of Law in this Consent Order. Further, Defendants agree and intend that the Findings of Fact and Conclusions of Law contained in this Consent Order shall be taken as true and correct be given preclusive effect, without further proof, in the course of (a) any current or subsequent bankruptcy proceeding filed by, on behalf of, or against Defendants; (b) any proceeding pursuant to Section 8a of the Act, 7 U.S.C. § 12a (2012), and/or Part 3 of the Regulations, 17 C.F.R. §§ 3.1 -3.75 (2014); and/or (c) any proceeding to enforce the terms of this Consent Order, including but not limited to proceedings to set the amount of restitution, disgorgement, and civil monetary penalty to be paid by Defendants in the above-captioned matter (subject to the provisions set forth herein with respect to Tulving Company). Defendants do not consent to the use of this Consent Order, or the Findings of Fact and Conclusions of Law in this Consent Order, as the sole basis for any other proceeding brought by the CFTC.

12. Agree to provide immediate notice to this Court and the CFTC by certified mail, in the manner required by paragraph 47 of Part V of this Consent Order, of any bankruptcy proceeding (other than the Bankruptcy Case) filed by, on behalf of, or against them, whether inside or outside the United States.

13. Agree that no provision of this Consent Order shall in any way limit or impair the ability of any other person or entity to seek any legal or equitable remedy against Defendants in any other proceeding.

14. Defendants consent to pay restitution, plus post-judgment interest, in an amount to be determined upon subsequent consent order or motion by the CFTC and/or hearing before this Court, All restitution ordered by this Court shall be paid by defendants to the Trustee in the

Bankruptcy Case for distribution by the Trustee to claims of Victims.

15. Defendants consent to pay disgorgement, plus post-judgment interest amount to be determined upon subsequent consent order or motion by the CFTC and/or hearing before this Court,

16. Defendants consent to pay a civil monetary penalty, plus post-judgment interest, in an amount to be determined upon subsequent consent order or motion by the CFTC and/or hearing before this Court,

17. Any civil monetary penalty or disgorgement obligation imposed by the District Court shall be accorded the priority under section 726(a)(4) of Title 11 of the United States Code (“Bankruptcy Code”), 11 U.S.C. § 726(a)(4), and shall accordingly be subordinated to claims of customers the Tulving Company and other senior classes of creditors, including general unsecured creditors, in the Tulving Company Bankruptcy Proceeding pursuant to Section 726(a)(4) of the Bankruptcy Code. Nevertheless, the imposition of any civil monetary penalty or disgorgement obligation shall constitute timely filed, allowed subordinated penalty claims of the CFTC in the Tulving Bankruptcy Proceeding payable to the extent any funds are left in the Tulving Company Bankruptcy estate after satisfaction of all customer claims, all general unsecured claims and all other claims senior to a penalty pursuant to section 726 of the Bankruptcy Code. For greater certainty, all contractually subordinated claims are senior to the civil monetary penalty and disgorgement Obligations unless otherwise expressly subordinated to penalties of the type described in Section 726(a)(4) of the Bankruptcy Code.

18. The issues of necessary relief pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2012), regarding restitution for Defendants' defrauded investors, disgorgement and appropriate civil monetary penalties to be assessed against Defendants are still unresolved

and are hereby reserved for further determination by this Court.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

19. The Court finds that there is good cause for the entry of this Consent Order and that there is no just reason for delay. The Court therefore directs the entry of the following Findings of Fact, Conclusions of Law, permanent injunction and equitable relief pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2012), as set forth herein. The findings and conclusions in this Consent Order are not binding on any other party to this action.

The parties agree and the Court hereby finds:

A. Findings of Fact

a. The parties to this Consent Order

20. Plaintiff Commodity Futures Trading Commission is an independent federal regulatory agency that is charged by Congress with administering and enforcing the Act, 7 U.S.C. §§ 1-26 (2012), and the Regulations promulgated thereunder, 17 C.F.R. §§ 1.1 - 190.10 (2014).

21. Defendant Tulving Company, Inc. is a California corporation that is in the business of buying and selling precious metals, including gold, silver, platinum, and palladium in coin and bullion form. Tulving Company has never been registered with the CFTC.

22. Defendant Tulving Company, Inc. is a debtor under chapter 7 of the Bankruptcy Code pending before the United States Bankruptcy Court for the Central District of California, Santa Ana Division, Case No. 14-11492.

23. Defendant Hannes Tulving, Jr. is a resident of Newport Beach, California. Tulving is the sole owner, president, and shareholder of Tulving Company. He directed the actions of Tulving Company at all relevant times. Tulving has never been registered with the

CFTC.

b. Defendants Offered Contracts of Sale of Commodities in Interstate Commerce by Selling Precious Metals in Coin and Bullion

24. From in or about August 2013 through in or about January 2014 ("Relevant Period"), Defendants took approximately \$150 million of customer orders of gold, silver and platinum in interstate commerce, and at least \$15 million from customers was not delivered as specified.

25. As part of their fraud, Defendants used the mails or other instrumentalities of interstate commerce to receive funds from and send funds to customers.

c. Defendants Fraudulently Solicited Customers by Making False and Misleading Representations and/or Omitting Material Facts

26. During the Relevant Period, Defendants represented to members of the public that Tulving Company was a highly reputable precious metals firm that delivered precious metals to customers. Tulving Company held itself out as a stable, established dealer in precious metals through its website, www.tulving.com ("website"). The website stated that, from 1999 through March 30, 2013, Tulving Company bought and sold in excess of \$2.1 billion in precious metals. The website also represented that Tulving Company sold more than \$350 million in precious metals during 2012.

27. The website provided instructions for customers to purchase metals by sending funds to Tulving Company. Customers were instructed to send a check by mail to the address of Tulving Company or wire funds to bank accounts in the name of Tulving Company. During the Relevant Period, Defendants received at least \$15 million for the purpose of purchasing and selling precious metals in coin and bullion form where no merchandise was delivered.

28. During the Relevant Period, at least 381 persons from locations throughout the

United States, including North Carolina, submitted orders with Tulving Company for the purchase of precious metals. During this time, Defendants received at least \$15 million from mail and wire transfers from these persons to purchase precious metals from Tulving Company.

29. During the Relevant Period, Defendants misrepresented, among other things, confirmation of purchase and sale transactions with some Tulving Company customers. Defendants falsely represented to some customers that precious metals would be purchased after receipt of customer funds and that precious metals would be shipped to customers. Defendants knew that their representations regarding the purchase of precious metals were false because they did not purchase precious metals on behalf of some customers and misappropriated a portion of customer funds.

30. During the Relevant Period, Defendants failed to disclose, and omitted, that they never purchased any precious metals on behalf of some Tulving customers. Defendants also failed to disclose, and omitted that some Tulving customer funds would be misappropriated.

d. Defendants Misappropriated Customer Funds

31. During the Relevant Period, Defendants misappropriated customer funds by, among other things, using customer funds to fulfill other customers' orders, paying debts of the company, and also returning the money to previous customers who did not receive their coins, all in furtherance of keeping the business going.

e. Tulving Acted as Controlling Person and Agent for Tulving Company

32. Tulving acted as the sole controlling person and agent of Tulving Company. Tulving was the sole shareholder and president of Tulving Company, and he acted solely on

behalf of Tulving Company. Tulving was the sole person responsible for making business decisions on behalf of Tulving Company and controlled the operations of Tulving Company.

B. Conclusions of Law

a. Jurisdiction and Venue

33. This Court has jurisdiction over this action pursuant to Section 6c of the Act, as amended, 7 U.S.C. § 13a-1 (2012), which provides that whenever it shall appear to the CFTC that any person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act or any rule, regulation, or order promulgated thereunder, the CFTC may bring an action in the proper district court of the United States against such person to enjoin such act or practice, or to enforce compliance with the Act, or any rule, regulation or order thereunder.

34. Venue properly lies with the Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2012), because Defendants are found in, inhabit, or transact business in the Western District of North Carolina, and the acts and practices in violation of the Act occurred, are occurring, or are about to occur, within this District.

b. Violations of Section 6(c)(1) of the Act, 7 U.S.C. §§9, 15, and Regulation 180.1(a), 17 C.F.R. § 180.1: Fraud by Manipulative or Deceptive Devises or Contrivances

35. By the conduct described in paragraphs 1 through 32 above, Defendants cheated and defrauded, or attempted to cheat and defraud, and willfully deceived, or attempted to deceive, their customers by, among other things, knowingly or recklessly: (1) failing to disclose, and omitting, that Tulving Company did not use some customer funds to purchase precious metals; (2) failing to disclose, and omitting, that Tulving Company would not have sufficient precious metals to deliver to some customers; (3) misrepresenting that precious metals ordered by Tulving Company customers would be shipped and delivered; (4) issuing written

statements misrepresenting the ownership of precious metals; (5) failing to disclose, and omitting, that the funds paid by some Tulving Company customers would be misappropriated; (6) misappropriating some customer funds by, among other things, using some customer funds to fulfill other customers' orders, paying debts of the company, and also returning the money to previous customers who did not receive their coins; and (7) using the mails or other instrumentalities of interstate commerce as part of the fraud in violation of Section 6(c)(1) of the Act, 7 U.S.C. §§ 9, 15 (2012), and Regulation 180.1(a), 17 C.F.R. 180.1(a) (2013).

36. Tulving employed deceptive devices as described above, within the scope of his employment or office for Tulving Company. Therefore, Tulving Company is liable under Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2012), and Regulation 1.2, 17 C.F.R. § 1.2 (2013), as principal for its agent's acts, omissions or failures of the Act and Regulations.

37. Unless restrained and enjoined by this Court, there is a reasonable likelihood that Tulving will continue to engage in the acts and practices alleged in the Complaint and in similar acts and practices in violation of the Act and Regulations.

III. PERMANENT INJUNCTION

38. Based upon and in connection with the foregoing conduct, pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2012), Defendants are permanently restrained, enjoined and prohibited from directly or indirectly:

- a. Using or employing, or attempting to use or employ, in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance, in contravention Section 6(c)(1) of the Act, 7 U.S.C. §§ 9, 15 (2012), and Regulation 180.1(a), 17 C.F.R.

§ 180.1(a) (2013).

39. Defendants are also permanently restrained, enjoined and prohibited from directly or indirectly:

- a. Trading on or subject to the rules of any registered entity (as that term is defined in Section 1a(40) of the Act, 7 U.S.C. § 1a(40) (2012));
- b. Entering into any transactions involving "commodity interests" (as that term is defined in Regulation 1.3(yy), 17 C.F.R. § 1.3(yy) (2014)) for their own personal account or for any account in which they have a direct or indirect interest;
- c. Having any commodity interests traded on their behalf;
- d. Controlling or directing the trading for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving commodity interests;
- e. Soliciting, receiving or accepting any funds from any person for the purpose of purchasing or selling any commodity interests;
- f. Applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption from registration with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2014); and/or
- g. Acting as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2014)), agent or any other officer or employee of any person (as that term is defined in Section 1a(38) of the Act, 7 U.S.C. § 1a(38) (2012)), registered, exempted from registration or required to be registered with the Commission

except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2014).

IV. STATUTORY AND EQUITABLE RELIEF

40. Defendants shall pay restitution, plus post-judgment interest, to each defrauded customer, if ordered by the Court, and the payment of such restitution and interest by defendants shall be made to the Trustee in the Bankruptcy Case for distribution to Tulving Company customers.

41. Defendants shall pay disgorgement, plus post-judgment interest, to the CFTC, if ordered by the Court, provided that the payment of such disgorgement and interest by the Tulving Company shall be subordinated to the payment of all claims of Tulving Company customers in accordance with paragraph 17 above.

42. Defendants shall pay a civil monetary penalty, plus post-judgment interest, to the CFTC, if ordered by the Court, provided that the payment of such penalties and interest by the Tulving Company shall be subordinated to the payment of all claims of Tulving Company customers in accordance with paragraph 17 above.

43. The Court shall determine the amounts of restitution, disgorgement and civil monetary penalty and the procedures for payment and distribution of these monetary sanctions by further order upon: (1) motion of the parties submitting to the Court a proposed consent order setting out their agreement on the amounts of restitution, disgorgement and civil monetary penalty to be paid by Defendants in this matter; (2) motion by the CFTC; and/or (3) hearing before this Court, provided in all events that the payment of disgorgement and civil monetary penalty by the Tulving Company shall be subordinated to the payment of all claims of Tulving customers in accordance with paragraph 17 above.

44. In connection with any CFTC motion for restitution, disgorgement and/or civil

monetary penalties, and at any hearing held on such a motion: (a) Defendants will be precluded from arguing that they did not violate the federal laws as alleged in this Consent Order; (b) Defendants may not challenge the validity of their consents and agreements herein or this Consent Order; (c) solely for the purposes of such motion, the Findings of Fact and Conclusions of Law in this Consent Order shall be accepted as and deemed true by the Court; and (d) the Court may determine the issues raised in the motion on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, witness testimony, and documentary evidence, without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure. In connection with the CFTC's motion for restitution, disgorgement and/or civil monetary penalties, the parties may take discovery, including discovery from appropriate non-parties.

45. Defendants shall cooperate fully and expeditiously with the CFTC, including the CFTC's Division of Enforcement, in any current or future investigation, civil litigation or administrative matter related to the subject matter of this action. As part of such cooperation, Defendants shall comply, to the full extent of their abilities, promptly and truthfully with any inquiries or requests for information including but not limited to, requests for production of documents and authentication of documents, shall provide assistance at any trial, proceeding, or investigation related to the subject matter of this action, including but not limited to, requests for testimony, depositions, and/or interviews. Should the CFTC file any additional actions related to the subject matter of this action, Defendants are directed to appear in the judicial district in which such action is pending, or in a suitable judicial district agreed to by the parties, to provide deposition testimony and trial testimony should such testimony be necessary.

V. MISCELLANEOUS PROVISIONS

46. Notice: All notices required to be given by any provision in this Consent Order shall be sent certified mail, return receipt requested, as follows:

- a. Notice to the CFTC:
 - i. Director, Division of Enforcement
U.S. Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, D.C. 20581
- b. Notice to Defendants Tulving Company, Inc. and Hannes Tulving, Jr.:
 - i. James F. Wyatt, III
Wyatt & Blake, LLP
435 East Morehead Street
Charlotte, NC 28202
- c. With a copy to the Chapter 7 Trustee appointed by the Bankruptcy Court in the Bankruptcy Case:
 - i. R. Todd Neilson
BRG, LLP
2049 Century Park East, Suite 2525
Los Angeles, CA 90067

All such notices to the CFTC shall reference the name and docket number of this action.

47. Entire Agreement and Amendments: This Consent Order incorporates all of the terms and conditions of the settlement among the parties hereto to date. Nothing shall serve to amend or modify this Consent Order in any respect whatsoever, unless: (a) reduced to writing; (b) signed by all parties hereto; and (c) approved by order of this Court.

48. Invalidation: If any provision of this Consent Order or if the application of any provision or circumstance is held invalid, then the remainder of this Consent Order and the application of the provision to any other person or circumstance shall not be affected by the

holding.

49. Waiver: The failure of any party to this Consent Order or of any customer at any time to require performance of any provision of this Consent Order shall in no manner affect the right of the party or customer at a later time to enforce the same or any other provision of this Consent Order. No waiver in one or more instances of the breach of any provision contained in this Consent Order shall be deemed to be or construed as a further or continuing waiver of such breach or waiver of the breach of any other provision of this Consent Order.

50. Waiver of Service, and Acknowledgement: Defendants waive service of this Consent Order and agree that entry of this Consent Order by the Court and filing with the Clerk of the Court will constitute notice to the Defendants of its terms and conditions. Defendants further agree to provide counsel for the Commission, within thirty (30) days after this Consent Order is filed with the Clerk of Court, with an affidavit or declaration stating that Defendants have received and read a copy of this Consent Order.

51. Continuing Jurisdiction of this Court: This Court shall retain jurisdiction of this action in order to implement and carry out the terms of all orders and decrees, including orders setting the appropriate amounts of restitution, disgorgement and civil monetary penalty, that may be entered herein, to entertain any suitable application or motion for additional relief within the jurisdiction of the Court, to assure compliance with this Consent Order and for any other purpose relevant to this action.

52. Injunctive and Equitable Relief Provisions: The injunctive and equitable relief provisions of this Consent Order shall be binding upon Defendants, upon any person under their authority or control, and upon any person who receives actual notice of this Consent Order,

by personal service, e-mail, facsimile or otherwise insofar as he or she is acting in active concert or participation with Defendants.

53. Authority: Entry into this Consent Order by Hannes Tulving, Jr. on behalf of Tulving Company is subject to the authorization of the United States Bankruptcy Court in the Bankruptcy Case.

54. Counterparts and Facsimile Execution: This Consent Order may be executed in two or more counterparts, all of which shall be considered one and the same agreement and shall become effective when one or more counterparts have been signed by each of the parties hereto and delivered by facsimile, e-mail, or otherwise to the other party, it being understood that all parties need not sign the same counterpart. Any counterpart or other signature to this Consent Order that is delivered by any means shall be deemed for all purposes as constituting good and valid execution and delivery by such party of this Consent Order.

55. Defendants understand that the terms of the Consent Order are enforceable through contempt proceedings, and that, in any such proceedings they may not challenge the validity of this Consent sent Order.

56. Nothing in this Order prevents Defendants from buying or selling on a wholesale basis legal tender third party independently certified gold, silver, platinum or palladium coins. Defendants will not be buying or selling commodity gold, silver, platinum or palladium bars.

57. There being no just reason for delay, the Clerk of the Court is hereby directed to enter this Consent Order Of Permanent Injunction And Other Relief Against The Tulving Company, Inc. and Hannes Tulving, Jr.

Signed: January 4, 2016



Robert J. Conrad, Jr.
United States District Judge

