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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
(SAN FRANCISCO DIVISION)

In re:

BROBECK, PHLEGER and HARRISON, Case No. 03-32715
Chapter 7

San Francisco, California
July 18, 2006
2:00 p.m.

Debtor.

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TRANSCRIPT OF PROCEEDINGS

- 1. OBJECTION TO CLAIMS (AD VALOREM REAL PROPERTY TAX CLAIMS) AS TO TRAVIS COUNTY, TEXAS ONLY
- 2. MOTION FOR AN ORDER UNSEALING THE AMOUNT OF THE HANGER SETTLEMENT PAYMENT
- 3. APPLICATIONS FOR COMPENSATION BY 1) BURR, PILGER AND MAYER, LLP; 2) JEFFER, MANGELS, BUTLER & MARMARO, LLP
- 4. MOTION TO ABANDON/MOTION FOR ORDER (A) AUTHORIZING THE ABANDONMENT OF BROBECK'S DIGITAL RECORDS; B) AUTHORIZING THE TRUSTEE TO TRANSMIT NOTICE OF ABANDONMENT TO FORMER CLIENTS OF BROBECK; C) AUTHORIZING THE TRUSTEE TO ENTER INTO AN ELECTRONIC DATA ACCESS AGREEMENT WITH GALLIVAN, GALLIVAN & O'MELIA, LLC; AND D) GRANTING RELATED RELIEF

BEFORE THE HONORABLE DENNIS MONTALI
UNITED STATES BANKRUPTCY JUDGE

1 APPEARANCES:

2

3 For the Chapter 7
Trustee:

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15 Accounts and
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16 Trustee:

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19 Trustee:

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23 BY: THOMAS M. GEHER, ESQ.
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1 APPEARANCES (CONTINUED):

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4 Court Recorder: LORENA PARADA
5 UNITED STATES BANKRUPTCY COURT
6 235 Pine Street
7 San Francisco, California 94104

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7 Transcription Service: Jo McCall
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9 Recording/Transcribing
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1 Fergus was no longer functioning as their counsel, so they
2 have a method for protecting themselves. So I'll go ahead
3 and grant it. Did you upload an order yet?

4 MR. WYNNE: I'm not sure, Your Honor, but we will.

5 THE COURT: Okay. All right. Thanks very much.

6 MR. WYNNE: Thank you, Your Honor.

7 THE COURT: Okay. Mr. Jones, you've got the watch
8 on the motion to abandon?

9 MR. JONES: Yes, Your Honor.

10 THE COURT: Do we have other appearances on that?

11 MR. MURPHY: Yes, Your Honor, it's Ben Murphy of
12 Hennigan, Bennett & Dorman, LLP for the trustee. Mr. Jones
13 is handling the hearing, but I'm here to help if the Court
14 needs me.

15 THE COURT: Okay.

16 MS. BORREY: And Sarah Borrey of Ropers, Majeski,
17 Kohn & Bentley on behalf of the University of Maryland, a
18 partner of the Library of Congress in the National Digital
19 Information Infrastructure Preservation Program.

20 THE COURT: Well, first of all, let me compliment
21 the Trustee and you, Ms. Borrey, and all the people you've
22 been working for, for a very, very comprehensive and, you
23 know, well thought out and well conceived approach to this
24 problem, a unique problem, and I'm not going to pause and
25 then say "but..." I was quite impressed by the degree of

1 effort that went into something so novel and unique as what
2 the Trustee has asked, and what you, Ms. Borrey, for your
3 clients and others have asked to do.

4 I do have some questions. I don't think they are
5 deal killers, but -- and I don't care who answers it; and
6 they're not in any particular order, but if I've got it
7 right, the sequence is, I sign the order and that -- or
8 promptly thereafter, it constitutes the Trustee's
9 abandonment, and then the University of Maryland or somebody
10 gives the notice of abandonment. Right?

11 MS. BORREY: That's correct.

12 THE COURT: You have indicated, or the papers
13 indicate that the notice will be published, but you didn't
14 tell me where. I hope it's not going to be in the *Daily*
15 *Planet* or something, which is a fine publication in
16 Berkeley, but the only people who read it are the people in
17 Berkeley, so -- where is it going to be published?

18 MS. BORREY: We want it in a national publication
19 as well as a San Francisco publication, but we have yet to
20 decide which one.

21 THE COURT: Well, have you made any choices on
22 that, Mr. Johnson?

23 MR. JONES: Jones.

24 THE COURT: I'm sorry. Well, Johnson's name is on
25 the papers. Oh, yours is too. I had Jones down first and

1 then I thought I misunderstood you. Okay, Mr. Jones. Try
2 again.

3 MR. JONES: That's quite all right. A San
4 Francisco paper would be *The Recorder*, for the national, we
5 could do the *Wall Street Journal* or --

6 THE COURT: But who reads *The Recorder* except the
7 local people around here.

8 MR. JONES: There's also the *Chronicle*.

9 THE COURT: Right. So the *Chronicle* and *Wall*
10 *Street Journal*?

11 MR. JONES: Sure.

12 THE COURT: Again, I'm not pushing it. I want to
13 make sure that there is --

14 MR. JONES: I mean, that's what we had had in mind.
15 We hadn't chosen, but I think the *Wall Street Journal* and --

16 THE COURT: Is it just one publication only?

17 MR. JONES: The *Wall Street Journal*, national
18 edition, should be sufficient, and the *San Francisco*
19 *Chronicle*, I think.

20 THE COURT: One time only? I mean I realize these
21 are expensive things to do and I'm not wedded to something.
22 I just want to know what it is. Is that the thinking?

23 MR. JONES: That was the idea.

24 MS. BORREY: That was our -- yeah.

25 THE COURT: Now I read -- and when I first

1 understood what the Trustee is proposing here and my first
2 reaction was not to be too worried about dead corporations,
3 but to be worried about live humans, and the motion is
4 consistent with the notion that former humans who were
5 clients of Brobeck are not in this system, right?

6 MR. JONES: That's correct. That's --

7 THE COURT: I found that the methodology, perhaps
8 it's nothing more than semantics, but the methodology left
9 me a little uncomfortable in that it said "documents of
10 personal clients" as distinguished from individual clients
11 or clients who were natural persons or something to that
12 effect. Is it -- has the train left the station, Ms.
13 Borrey, in terms of being able to tweak the methodology a
14 little bit?

15 MS. BORREY: Not at all, Your Honor. We can
16 certainly make, you know, an amendment and use the word
17 "individual" instead of a personal client.

18 THE COURT: But I mean I realize that individuals
19 are persons. That's the whole point.

20 MS. BORREY: Right. We can seem --

21 THE COURT: But to me, the personal is more like
22 an, you know, maybe a person of a lawyer rather than a
23 client --

24 MR. BORREY: Right.

25 THE COURT: -- who is a person. So if you -- I

1 don't want to get into each and every word, but if it said
2 documents of clients who are natural persons --

3 MS. BORREY: Right.

4 THE COURT: That would satisfy my concern on that.

5 MS. BORREY: We can certainly change that.

6 THE COURT: And what is going to happen for a
7 notice that goes out to a non-human client that comes back
8 "undeliverable"? In other words, I realize that a lot of
9 the corporate and the non-human clients of Brobeck, from,
10 you know, the early days of Silicon Valley maybe have gone
11 to bankruptcy heaven or assignments for creditors or
12 wherever old failed start-ups go to die, but some of them
13 might be out there with different names and alive and well,
14 and so what happens if a notice goes out to, you know, such-
15 and-such a company and it comes back undeliverable; is that
16 the end of it? Is that person or that entity going to run
17 the risk of having its documents go through this --

18 MS. BORREY: Mr. Jones, do you want to address that
19 first?

20 MR. JONES: Well, I can give it the first shot.
21 The first thing is that we still have to publish notice, and
22 we had a similar issue when we dealt with the abandonment of
23 paper records, that Your Honor might recall, from a couple
24 of years ago. And there, we made certainly every effort to
25 find them, but if we cannot, then -- I would say there are a

1 couple of levels of protection. First of all, by not
2 responding, they're still effectively put in a quarantine.
3 That is, it's not as if we're going to -- this information
4 is going to be published right away.

5 THE COURT: No, I understand. They go into at
6 least phase two though, right? They go into --

7 MS. BORREY: That's -- yes.

8 MR. JONES: That's correct, Your Honor.

9 THE COURT: So -- well, let me --

10 MS. BORREY: Actually, I can add to that. When and
11 if we do get something that's returned, I know that somebody
12 from the Library or the University of Maryland, Dr. Kirsch,
13 who's sitting in the audience, will most likely contact
14 former Brobeck partners and ask them if they have a further
15 address for that former client, so that we can perhaps cover
16 a little bit more ground.

17 THE COURT: Well, it seems to me that that's
18 constructive, but also if you address an envelope to, you
19 know, whatever the name of this company is, and it comes
20 back, what about a Google search or some other Internet
21 search?

22 MS. BORREY: Absolutely, yeah.

23 THE COURT: Some effort, more than what's reflected
24 here.

25 MS. BORREY: That's certainly the intent of the

1 program, yes.

2 THE COURT: How do you think we could memorialize
3 that? Could that be added?

4 MS. BORREY: I can add that to the methodology.

5 THE COURT: To the methodology?

6 MS. BORREY: Absolutely.

7 MS. JONES: We could modify the methodology to
8 reflect --

9 THE COURT: Well, look, again, I want to -- I meant
10 it when I said I was very impressed by what was done and the
11 thoroughness of it, and so these are tweaks and nothing
12 more. And I don't want to make you come back here for
13 another hearing. I don't want to turn this into a major
14 deal. If I can get an assurance of counsel that there will
15 some language added to the notice provision that says those
16 notices that are returned undeliverable, there would be an
17 attempt to locate them through the Internet searches,
18 contacts with former lawyers who may have handled their
19 affairs or any other reasonable method, words to that
20 effect, I'll be happy with it. Do you think you can live
21 with that? Does that work?

22 MS. BORREY: Yes.

23 MR. JONES: Yes, Your Honor.

24 MS. BORREY: Yes. We definitely will make it a
25 permissive language though so that we do not -- so that we

1 don't add a burden to the Library to have to do this for
2 the, you know, however, many envelopes come back --

3 THE COURT: I understand.

4 MS. BORREY: -- with no return.

5 THE COURT: I understand.

6 MS. BORREY: Okay.

7 THE COURT: Again, to me the possibility of a
8 real -- I'm going to say a live client, having just excluded
9 the human clients, but what I mean is a real live viable
10 functioning partnership or corporation -- the risk of it
11 having confidences disclosed seems to be rare and remote,
12 but -- and I was concerned as were you as you prepared the
13 methodology and worked with the archivists about respecting
14 something that I guess is almost very novel in terms of the
15 attorney-client relationship, but those are things that
16 obviously need to be protected. So, okay. So I mean it
17 when I said it, words that tinker with the methodology
18 consistent with this colloquy, satisfies me.

19 Now, my next question though is, I'm not sure I
20 understand what happens when a former client actually does
21 opt out so that on page 2, it says "former clients may
22 prevent the records from being transferred by opting out,"
23 and then the next bullet point says, "they" meaning the no-
24 action clients, retain the right to opt out and collect
25 their files at any time.

1 MR. JONESS: Well, they were trying to distinguish
2 between those who haven't opted out immediately and want to
3 do so later. Perhaps we better word that more clearly.

4 THE COURT: Right. No, no, I don't mind -- I think
5 the wording is fine, but my point is this, I happened to be
6 in my prior life -- this is hypothetical -- the CEO of a
7 dead corporate client of Brobeck, and I'm off on a cruise
8 when you publish this in the *San Francisco Chronicle* and the
9 *Wallet Street Journal*, and I miss it, and then six months
10 later, I find out that all my digital records are sitting on
11 a server in Maryland, and I say, no, I want that back. I
12 don't want to do that. And I go and I read this stuff and
13 it says I have the ability to opt out. So I contact the
14 people in charge, and I say I opt out. But then what
15 happens? It's unclear to me what happens at that point.

16 MS. BORREY: The client can request that their file
17 be deleted or redacted from the system or they can request a
18 copy of their file from Gallivan, Gallivan & O'Melia or the
19 depository at that point at their cost. So --

20 THE COURT: So that's the phrase -- in the second
21 bullet point on page 2, the phrase that says "they" meaning
22 those clients --

23 MS. BORREY: Yes.

24 THE COURT: -- retain the right to opt out and
25 collect their files at any time.

1 MS. BORREY: That's correct.

2 THE COURT: So the notion of having it redacted or
3 deleted probably could go in there also. I mean suppose I
4 say I don't want the files; I just don't want anybody else
5 to see them.

6 MS. BORREY: Right.

7 THE COURT: I take it I can instruct the company
8 that -- I can't remember the names --

9 MS. BORREY: Gollivan.

10 THE COURT: -- I can instruct them to delete --
11 Gollivan to delete --

12 MS. BORREY: Absolutely. Yes.

13 THE COURT: Well, can you then come up with some
14 language on that second bullet point to -- that "they"
15 meaning these clients, the right to opt out and collect
16 their files or have them redacted or deleted?

17 MS. BORREY: Yes, Your Honor.

18 THE COURT: And actually that same phraseology
19 should be in the first bullet point. In other words, the
20 guy who gets the notice and says, count me out, that's one
21 situation. The next one is the one that does nothing and
22 then later on down the road says, hey, wait a minute, count
23 me out.

24 MS. BORREY: Can opt out. Right.

25 THE COURT: Again, I'll put that in the category

1 of, if you want to check with the people that you're
2 answering to, behind you -- I'll wait a second -- but make
3 sure that's workable.

4 MS. BORREY: Right.

5 THE COURT: Do you want to check with them and see?
6 Are they happy with that?

7 MS. BORREY: I think that's fine.

8 THE COURT: Okay. Now, again, I'm personally of
9 the opinion that when this process begins, the notice goes
10 out, anybody that really cares who gets notice will probably
11 respond, and those who don't care, won't. But I don't think
12 you've got a time frame in here. So how much time does
13 somebody have to opt out before the data goes to what you
14 call phase two?

15 MS. BORREY: They have as long as they want, Your
16 Honor. It will go to the closed archive which means that no
17 one will have access to the substance of the documents
18 except to preserve them and put them in a digital format
19 that can still be accessed in the future if the client
20 decides to opt in. But the client continues to have the
21 right to opt out at any time.

22 THE COURT: At any time indefinitely.

23 MS. BORREY: Indefinitely.

24 THE COURT: Okay. So -- well, again, I'm using my
25 bankruptcy orientation to think what people like you and I

1 and the bankruptcy lawyers all think about, there's usually
2 a limit, a scream or die, do something within a certain
3 number of days or else. So you're telling me that's open-
4 ended.

5 MS. BORREY: That's -- we wanted to make it as
6 favorable as possible to the former clients, so --

7 THE COURT: Okay. I accept that. My last comment
8 is very minor, and it has to do with the form which -- where
9 did I find it -- "The Opt-In Sheet."

10 MS. BORREY: Yes.

11 THE COURT: Let me see if I can find it now. I had
12 it, and I had something marked on it. Now I have to find
13 it.

14 MS. JONES: The second exhibit of the Kirsch
15 declaration?

16 THE COURT: Yeah, okay. That's where it is.

17 The Opt-In Sheet in the "if you take no action"
18 paragraph refers to "with the Court," without anywhere
19 identifying the Court. And so again, maybe the cover notice
20 will show the court, but I don't know -- I want to make sure
21 that the person who receives this knows where to find it,
22 and if you're telling me that it'll be part of a package
23 that has the name and address of the court, that's fine.

24 MS. BORREY: Yes. Okay.

25 THE COURT: But it wasn't clear to me what the

1 bundle will be, that it's either in the published notice or
2 in the mailing.

3 MS. BORREY: We were going to send out a short form
4 notice and then also this option sheet. But we can
5 certainly add a reference to the Court's website.

6 THE COURT: Well, no. Wait a minute. Maybe I'm
7 not focusing on something. Where did you show me the short
8 form notice, or did you?

9 MS. BORREY: I don't think we attached that to the
10 packet that was sent.

11 THE COURT: Okay. Well then, think of it this way.
12 Think about any notice you get from a Bankruptcy Court
13 generally. It's got the title and the court and the case
14 number and the caption and the what have you. If you're
15 telling me that you contemplate something like that, that's
16 one thing, but I'm not saying you need to do that. It may
17 be that you want to de-emphasize the role of the Bankruptcy
18 Court. I don't really have a strong feeling. I just want
19 to make sure the person who gets this knows that there is a
20 court somewhere that, you know --

21 MS. BORREY: Right.

22 THE COURT: -- that they can blame if they don't
23 like it or they can go to, you know, in terms of accessing
24 court documents to find out, well, what's this all about,
25 and look at things like today's record.

1 MS. BORREY: Right.

2 THE COURT: So I don't have a preference on how you
3 do it, but I want to make sure that it's there.

4 MR. JONES: We'll make sure that's done.

5 THE COURT: Well, but I keep -- maybe I'm
6 overstating my case here, but I think about all the notices
7 that I see and we all -- bankruptcy people see in the paper,
8 assuming we read them, you see the name of the court; you
9 see the name of the case; you see the name of the judge; you
10 see the names of the lawyers, and if anybody wants to
11 respond to those things, they know where to go. So suppose
12 you, Mr. Jones, are, you know, you're outraged at this and
13 you think that the court should stop the whole thing. You
14 need to do -- you need to know how to go about doing it, and
15 if nothing else, you got to have a home place and a case and
16 a caption number.

17 So I'll leave it to both of you and whoever you
18 want to confer with. My only instruction then is, get the
19 name and address of the court. I think, Ms. Borrey, getting
20 the website probably isn't good enough because that doesn't
21 give -- that doesn't give people access to the docket. They
22 have to have a case number.

23 MS. BORREY: That's correct. Right. You're right.

24 THE COURT: And I'm not trying to make this an
25 invitation for somebody to flood the court with concerns

1 because I doubt there will be any, but -- so one way or the
2 other, either in the option sheet or in some sort of cover
3 page so that you don't have to be a, you know, you don't
4 have to go on a treasure hunt to find out what the court is.

5 Okay? Those are my only concerns. Again, I think
6 you did a thorough job, and I will be interested to see what
7 the future holds in store for this project. So to Dr.
8 Kirsch and all of his colleagues, I wish you -- I
9 congratulate you for undertaking this task, and I hope it
10 proves to be professionally satisfying to you and to the
11 public and to the people that care about the history of what
12 you're trying to capture here.

13 So, thanks very much.

14 MS. BORREY: Thank you very much, Your Honor.

15 MR. JONES: Thank you, Your Honor.

16 THE COURT: Okay.

17 (Whereupon, the proceedings are concluded at 2:33 p.m.)

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CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a correct transcript from the digital sound recording of the proceedings in the above-entitled matter.

DATED: July 24, 2006

By: /S/ Jo McCall