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10 UNITED STATES BANKRUPTCY COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 BROBECK, PHLEGER & HARRISON LLP,
14 Debtor,

Case No. 03-32715-DM7

Chapter Number: 7

15 **DECLARATION OF DAVID KIRSCH,**
16 **Ph.D. IN SUPPORT OF TRUSTEE'S**
17 **MOTION REGARDING TURNOVER**
18 **AND ABANDONMENT OF DIGITAL**
19 **RECORDS**

20 Date: July 18, 2006
21 Dept: Courtroom 22
22 Place: 235 Pine Street
23 San Francisco, California
24 Judge: Hon. Dennis Montali

25 I, DAVID KIRSCH, declare as follows:

26 Except as otherwise noted, I make this declaration based upon my own personal
27 knowledge. If called as a witness, I could and would competently testify hereto.

28 1. I received my Ph.D. at Stanford University in History of Technology in 1997. My
research focuses on the history of industry emergence, technological choice and technological
failure.

2. When I became aware of Brobeck, Phleger & Harrison LLP ("Brobeck")'s
liquidation, my research interests led me to inquire about the digital records stored on Brobeck's

1 servers (“Digital Records”). A sizeable portion of the Digital Records includes former clients’
2 files (“Client Files”), including those of failed Dot-Com companies. Given Brobeck’s recognized
3 stature in the California legal community, I also became concerned about Brobeck’s own internal
4 partnership records (“Partnership Records”).

5 3. The digital Client Files contain information and data about Brobeck’s failed Dot-
6 Com clients that are unavailable from other sources. Many of these former clients conducted
7 businesses primarily through digital means, and their digital records were destroyed or lost when
8 the former clients shut down. In these cases, the Client Files contain the material evidence future
9 scholars will need to reconstruct this critical era in the history of technology entrepreneurship.
10 Brobeck’s digital Partnership Records are also an invaluable historical resource, providing a
11 window into the inner workings of a giant in California legal practice. Altogether, the Digital
12 Records comprise a unique historical record of both Dot-Com-era startups and also one of the two
13 largest law firms representing them during the height of the historic Internet boom.

14 4. Consequently, the Library of Congress (“Library”) has expressed a serious interest
15 in preserving the Digital Records. The Library oversees a congressionally-mandated \$99.8
16 million program to preserve at-risk digital records – the National Digital Information
17 Infrastructure and Preservation Program (“NDIIPP”). The Library and NDIIPP have brought
18 significant policy, archival, and technological expertise to my effort to preserve the Digital
19 Records.

20 5. I am aware of the potential problems presented by the confidential relationship
21 under which the Client Files were created. To implement a reproducible solution that
22 simultaneously protects the interests of former clients and preserves historically valuable records,
23 I convened an Advisory Council of esteemed legal scholars and practitioners, the members of
24 which are listed in Appendix A of the Closed Archive Methodology (“Methodology”). The
25 Methodology is attached hereto as **Exhibit A**. The Advisory Council first met in College Park on
26 February 25, 2005. Based on the comments we received at this meeting, the Library and I
27 developed a Methodology for preserving and archiving the at-risk Brobeck Digital Records. We
28 presented this proposal to the Advisory Council at a subsequent meeting on December 2, 2005,

1 where it was received with enthusiastic support; key members of our council have submitted
2 concurrent declarations to this effect. The Methodology systematically protects confidential
3 Client Files by establishing safeguards to prevent improper access to any sensitive documents,
4 and as acknowledged in the Methodology, these restrictions may keep part of Brobeck's Digital
5 Records sealed for many years. However, I would prefer to see the Digital Records safely
6 preserved and off-limits for an extended period of time, rather than erased from a hard disk upon
7 abandonment and forever lost to future scholars.

8 6. The Methodology consists of three (3) phases: the first phase describes the
9 preliminary steps the Library will take in advance of the closed archive's creation; the second
10 phase describes the closed archive's ordinary and ongoing operations; and the third phase
11 describes how statistical information from the closed archive will be made available for academic
12 research. At each phase, the Methodology's procedures restrict access to information covered by
13 the duty of confidentiality and the attorney-client privilege.

14 7. During Phase One, the Library will notify former clients that it intends to transfer
15 their files into a closed archive. Former clients will have three choices: they may decline
16 inclusion in the closed archive by returning the opt-out form; they may do nothing and thus
17 consent to inclusion in the closed archive; or they may choose to waive their attorney-client
18 confidentiality and thus make their records immediately available. Even clients who fail to object
19 prior to the transfer will have the opportunity to raise their objections and have their files
20 removed at any time in the future. Another aspect of Phase One is the active removal, to the best
21 of our ability, of documents which the Library does not expect will become available for research
22 in the foreseeable future. These documents will include the records of personal clients (as
23 opposed to corporations), sensitive employee records, and others as described. Finally, in
24 preparation for the closed archive's creation, the Library is in the process of negotiating with the
25 Brobeck trustee a license, to the extent the trustee holds any intellectual property rights in the
26 Digital Records.

27 8. Throughout Phase Two, the closed archive will continue to maintain the Digital
28 Records in confidence, meaning that only internal archivists will access the collection, and only

1 under strict non-disclosure agreements for specific preservation purposes, such as migrating file
2 formats to avoid obsolescence. While archivists may need to open an occasional file to control
3 quality, they will not have an ongoing need to open any documents, and when possible, they will
4 do so where attorney-client privilege has been waived. The closed archive's confidentiality
5 protections will only be removed under two specific conditions: if the archive receives a waiver
6 of the attorney-client confidentiality from a former client, or if the applicable law creates an
7 exception to confidentiality applicable to the closed archive's collection. The closed archive will
8 not have the ability to arbitrarily decide whether one of these conditions has been met. Based on
9 the recommendation of our Advisory Council, the Library has adopted a set of protocols for
10 certifying whether a waiver from a former client is valid, found in Appendix D of the
11 Methodology. A future Advisory Council of similar stature to our own will evaluate any changes
12 in applicable law and will opine on the implications for the closed archive.

13 9. The Methodology makes clear that designating particular documents as non-
14 confidential, whether through a waiver or changes in applicable law, is not the same as releasing
15 them to the public. Rather, the documents will be transferred into a separate, traditional archive
16 collection. As provided in the Society of American Archivists' Code of Ethics, a traditional
17 archive implicates additional legal restrictions, such as copyright, trade secrets, and the right of
18 privacy. The Society of American Archivists' Code of Ethics is attached at Exhibit A to the
19 Declaration of Susan Davis filed concurrently herewith.

20 10. Phase Three provides for aggregate statistical research. Although the Client Files
21 contain confidential documents, I believe that aggregate information can be drawn from these
22 documents without affecting the interests of former clients. For example, technology
23 entrepreneurship in the 1990s is remembered today for its excesses, but we have little real
24 evidence to support these judgments beyond the highly visible failures of a small number of Dot
25 Com era ventures. By investigating Brobeck's Dot Com clients *as a population*, we will be able
26 to obtain representative data without disclosing any individual client information. Other sensitive
27 records are also used in this fashion. For instance, the U.S. Census operates the Research Data
28 Center Program to allow scholars access to confidential, personal census data, on the condition

1 that they remove only aggregate, anonymous statistics. Phase Three will require the same
2 safeguards and procedures. An ad-hoc, three-member committee drawn from our Advisory
3 Council will approve meritorious research projects and allow approved scholars access to the
4 closed archive, subject to strict non-disclosure agreements and monitoring provisions. Only
5 anonymous statistical data will be allowed to leave the closed archive's on-site computer.

6 11. The technical construction of the closed archive will be seamless and efficient.
7 The Digital Records will reside on servers at Gallivan, Gallivan & O'Melia ("GGO"), a Seattle-
8 based digital evidence firm, with whom the Estate has contracted to provide data storage and
9 access. GGO is also an NDIIPP partner, and actively supports the Library's effort to preserve the
10 Digital Records. By the motion filed concurrently hereto, the trustee seeks to abandon the
11 Brobeck Digital Files, however the trustee may still need to access certain Digital Files in the
12 future. GGO will work with our NDIIPP partners to prepare the data for transfer. After the
13 bankruptcy case's closure, we will be prepared to physically transfer the data to the closed
14 archive.

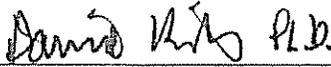
15 12. I am informed that the Trustee will send a notice of abandonment to the former
16 clients. Attached to the notice of abandonment the University of Maryland will send an option
17 sheet to allow former clients to submit to me their choice to opt-out of the Closed Archive or opt-
18 into the traditional archive. Service of the notice of abandonment and Option Sheet will be made
19 at the University of Maryland's expense. A true and correct copy of the Option Sheet is attached
20 hereto as **Exhibit B**. The Option Sheet will provide three choices to the former clients:

- 21 • They may take no action and their records will be preserved in the closed archive.
22 The former clients will, however, retain the right to opt-out and collect their files
23 at any time in the future.
- 24 • They may prevent their records from being transferred to the closed archive by
25 opting-out of the process.
- 26 • If they wish to make their records immediately available outside the Closed
27 Archive, former clients can waive the attorney-client privilege and any ethical duty
28 of confidentiality by opting-in.

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I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 28th day of June 2006 at College Park, Maryland

 P.L.L.C.

David Kirsch Ph D

EXHIBIT A

CLOSED ARCHIVE METHODOLOGY

*Final Copy from the University of Maryland
June 8, 2006*

Given the historical value of the Brobeck Digital Records and the need to preserve them in confidence, the Library of Congress will designate one or more repositories to serve as closed archives, pursuant to the protocols described in this exhibit. The protocols are arranged in sequential phases, as follows:

- Construction of the closed archive through the bankruptcy process
- The closed archive's ordinary operation
- Allowing aggregate statistical research

Phase One: Construction of the closed archive through the bankruptcy process

1. Court Order. Through a cooperative effort between the Library of Congress and the chapter 7 trustee of the estate of Brobeck Phleger & Harrison LLP, the closed archive's formation, consistent with these principles, will be authorized by an order from the Bankruptcy Court before which Brobeck's chapter 7 case has been pending. The parties intend to seek an order authorizing the chapter 7 trustee to abandon any interest of the estate in and to the Brobeck Digital Records and specifying the disposition of the Brobeck Digital Records into the closed archive.
2. Selection. The closed archive will not accept the entirety of the Brobeck Digital Records. Only documents which may one day have historic or educational value, and may, in the future, be appropriate for inclusion in a traditional archive will be transferred to the closed archive. Therefore, the following categories of documents will be automatically excluded from the closed archive:
 - Documents of personal clients;
 - Documents of clients who have opted-out through the notice process described below;
 - Documents of clients who have collected their files from Gallivan or the Brobeck Estate;
 - Sensitive documents related to the employment or partnership relationships between Brobeck and its employees or partners.

However, where documents are not transferred, the archive will make an effort to replace the specific information they contained with statistical generalities or other aggregations.

3. Notice. After the Bankruptcy Court approves the abandonment of the Brobeck Digital Records, we will notify former clients that we intend to transfer their

records to the closed archive. Notice will be made at the University of Maryland's expense to the Estate's client mailing list, as well as by publication in one national newspaper and one San Francisco publication.

- Former clients may prevent their records from being transferred to the closed archive by opting-out of the process.
 - Former clients who take no action will have their records preserved in the closed archive. However, they retain the right to opt-out and collect their files at any time in the future.
 - For former clients who wish to make their records immediately available outside the closed archive, the initial notice will also provide clients the opportunity to waive the attorney-client privilege and any ethical duty of confidentiality through a strictly opt-in process.
4. Brobeck Waiver and License. The Estate has agreed to waive its confidentiality in its administrative partnership records, pursuant to the restrictions in Schedule A. The Estate will also execute a separate agreement providing a non-exclusive license to the Library of Congress and the University of Maryland for any copyrighted documents in the closed archive, to the extent that it holds any copyright. This waiver and license will be effective at the closure of the case.

Phase Two: The closed archive's ordinary operation

1. Limited Access. All access to the closed archive will be limited to a small number of trained archivists and digital preservationists at the Library of Congress and its designated repositories. Their access will be limited to the tasks described in this document, and they will sign non-disclosure agreements to this effect.
2. Preservation. Digital objects will quickly degrade if not actively preserved. Hard disks and tapes will eventually deteriorate, and file formats will become unreadable with changes in software. The closed archive will take active steps to preserve the integrity of the data, consistent with best practices forthcoming from the Library of Congress's NDIIPP project. Except for quality control, the digital preservationists will not need to look at actual documents to perform these tasks. This section does not prevent the closed archive from deleting content that no longer meets its collection guidelines.
3. Changes to Confidential Status. Client records may be released upon consent or changes in the applicable law; client records not subject to attorney-client privilege or the ethical duty of confidentiality may be released immediately. The archive will be responsible for certifying client waivers, subject to protocols attached as Appendix D. Certifying changes in applicable law, however, will require convening and obtaining consensus from an advisory committee of similar stature to that of Appendix A. Released records will be copied and transferred to

one or more traditional scholarly collections, but will continue to remain subject to the additional legal restrictions described in (5) below.

4. Third-Party Materials. The University of Maryland's discussions with Brobeck records management personnel indicate that Managed Documents and Databases will not routinely contain client or other third-party materials. Rather, they will consist primarily of Brobeck work product. At the time of the digital backup, Brobeck did not have any centralized means of scanning incoming documents and incorporating them into their database. To identify any third-party documents added in an ad-hoc manner, the archive will give particular care to image or PDF files, as well as the author metadata information in Word documents. Any identified third-party materials will only be released consistent with the terms or expectations governing their original receipt by Brobeck.
5. Additional Legal Restrictions. The closed archive is aware that its collection may still be subject to additional legal constraints such as copyright, trade secret, defamation, and right of privacy, and that these restrictions may persist even after a change in confidential status allows records to be transferred into traditional scholarly archives. Consequently, the closed archive recognizes that the portion of its collection released to traditional archives must be governed by the Society of American Archivists' Code of Ethics (attached as Appendix C), and will require a similar recognition from any partners receiving released materials.

Phase Three: Conducting aggregate statistical research

In cases where no waiver has been obtained, the attorney-client privilege and confidentiality obligations strictly preclude ordinary use. However, other similar confidential records are routinely used for aggregate statistical analysis. The U.S. Census, for instance, allows scholars access to confidential personal census data, on the condition that only aggregate, non-confidential statistics are allowed to leave the facility. The Library of Congress has considered the U.S. Census policy, and, in consultation with its Advisory Council, adopted the following conditions for statistical research.

1. Oversight. When provisions of this phase call for approval or oversight, this responsibility will fall to a three-person ad-hoc panel drawn from the Advisory Council of Appendix A, or a future body of similar stature.
2. Criteria for appropriate research. An examination of appropriateness will consider the credentials of the scholar or scholars, the academic merit of the research topic, and the potential to construct anonymous datasets suitable for disclosure. The research must eventually rely only on aggregated and anonymous data which can be disclosed without allowing inferences about the confidential traits of any particular clients.

3. Conditions of research. Subject to the following conditions, approved scholars will have unfiltered on-site access to the data.
 - Scholars must sign a non-disclosure agreement preventing them from releasing any information from the archive except through the channels discussed in (4) below.
 - Scholars must distill the confidential information into an anonymous statistical format, at a terminal without Internet access or removable media.
 - All activity will be electronically logged and made available to the standing review committee for audit; scholars deviating from their stated research topic will forfeit access.

4. Final release of research. The final dataset must be approved by the standing review committee prior to its leaving the closed archive. Approval will be withheld in any instance where confidential information may be associated with identifiable parties, either by examination of the dataset itself, or through combination with other readily available public data. The review committee may seek the advice of outside experts if questions arise in this final approval process.

Schedule A: Disclosure of Estate's Administrative Records

(To be determined by estate)

Appendix A: Advisory Council Membership

1. David W. Allard, Allard & Fish, P.C.
2. Maya Bernstein, Privacy Advocate, Department of Health and Human Services
3. Glenn Bugos, Principle Historian, Prologue Group
4. Susan Carle, Professor, Washington College of Law
5. Michael Churgin, Professor in Law, University of Texas Austin
6. Akiba Covitz, Professor, University of Richmond
7. Susan Davis, Professor, University of Maryland
8. John Delaney, Partner, Morrison & Foerster LLP
9. Larry Fox, Partner, Drinker Biddle & Reath LLP
10. Robert W. Gordon, Professor, Yale Law School
11. Peter A. Jaszi, Professor, Washington College of Law
12. Thomas Morgan, Professor, George Washington University Law School
13. Ken Lipartito, Chair, Department of History, Florida International University
14. Nancy Rapoport, Dean, University of Houston Law Center
15. Jonathan T. Rubens, Partner, McQuaid Bedford Van Zandt LLP
16. Rayman Solomon, Dean, Rutgers School of Law-Camden
17. Thomas E. Spahn, Partner, McGuireWoods LLP
18. Peter Swire, Professor of Law, Ohio State University
19. JoAnne Yates, Professor of Management, MIT Sloan School of Management

Appendix B: Technical Data Description

The Gallivan, Gallivan & O'Melia digital backup contains a diverse range of data. For purposes of discussion, we have broken the records into four different categories based on their technical nature.

1. "Managed Documents" are ordinary computer files (Word or Excel documents, etc.) which were centrally managed by Brobeck, such as attorney work product.
2. "Databases" were used by Brobeck to track files and financial information such as billing records or client contact information.
3. "Microsoft Outlook Data" was used by all employees for e-mail and calendars.
4. "Network Share Drives" allowed employees to store files that were not centrally managed by Brobeck.

In addition to client information, the digital backup also contains information related strictly to the administration of the partnership—minutes of committee meetings, financial information, etc. Brobeck assigned a unique identification number ("Client ID") to each of its clients, as well as to administrative partnership activities. Any Client ID beginning with a "9" referred to the partnership.

In order to release any information, we must be able to associate particular documents with the client who has provided consent. Managed Documents are easily tied to particular clients, since the Client ID was attached to each document. Databases contain rows for multiple clients, but these rows can be separated by Client ID as well.

Microsoft Outlook Data is not structured by client, and so efforts to associate particular e-mails with particular clients will be less precise. Certain strategies may prove effective, however. We may filter for e-mails between people in the client contact database and attorneys working for that client. Some attorneys may have organized their e-mail into folders by client. We will develop strategies to link these more complex categories of data to particular clients, so we may release them along with the client's other records.

Network Share Drives are completely unstructured, making it difficult to link files with clients. For this reason, these files will remain in the closed archive indefinitely, pending improvements in technology.

Appendix C: The Society of American Archivists — Code of Ethics for Archivists

Preamble

The Code of Ethics for Archivists establishes standards for the archival profession. It introduces new members of the profession to those standards, reminds experienced archivists of their professional responsibilities, and serves as a model for institutional policies. It also is intended to inspire public confidence in the profession.

This code provides an ethical framework to guide members of the profession. It does not provide the solution to specific problems.

The term “archivist” as used in this code encompasses all those concerned with the selection, control, care, preservation, and administration of historical and documentary records of enduring value.

I. Purpose

The Society of American Archivists recognizes the importance of educating the profession and general public about archival ethics by codifying ethical principles to guide the work of archivists. This code provides a set of principles to which archivists aspire.

II. Professional Relationships

Archivists select, preserve, and make available historical and documentary records of enduring value. Archivists cooperate, collaborate, and respect each institution and its mission and collecting policy. Respect and cooperation form the basis of all professional relationships with colleagues and users.

III. Judgment

Archivists should exercise professional judgment in acquiring, appraising, and processing historical materials. They should not allow personal beliefs or perspectives to affect their decisions.

IV. Trust

Archivists should not profit or otherwise benefit from their privileged access to and control of historical records and documentary materials.

V. Authenticity and Integrity

Archivists strive to preserve and protect the authenticity of records in their holdings by documenting their creation and use in hard copy and electronic formats. They have a fundamental obligation to preserve the intellectual and physical integrity of those records.

Archivists may not alter, manipulate, or destroy data or records to conceal facts or distort evidence.

VI. Access

Archivists strive to promote open and equitable access to their services and the records in their care without discrimination or preferential treatment, and in accordance with legal requirements, cultural sensitivities, and institutional policies. Archivists recognize their responsibility to promote the use of records as a fundamental purpose of the keeping of archives. Archivists may place restrictions on access for the protection of privacy or confidentiality of information in the records.

VII. Privacy

Archivists protect the privacy rights of donors and individuals or groups who are the subject of records. They respect all users' right to privacy by maintaining the confidentiality of their research and protecting any personal information collected about them in accordance with the institution's security procedures.

VIII. Security/Protection

Archivists protect all documentary materials for which they are responsible and guard them against defacement, physical damage, deterioration, and theft. Archivists should cooperate with colleagues and law enforcement agencies to apprehend and prosecute thieves and vandals.

IX. Law

Archivists must uphold all federal, state, and local laws.

Approved by the SAA Council, February 5, 2005.

Appendix D: Protocols for Certifying Waivers of Confidentiality

1. Former clients or their successors-in-interest must address and deliver waivers of confidentiality directly to the closed archive.
2. The closed archive will consult Brobeck's records to confirm that the signer is designated to act on behalf of the former client; if the signer is a successor-in-interest, the closed archive will require documentation that the former client's interest in confidentiality has passed to the successor-in-interest.
3. Waivers must contain the following language, or that of similar effect:

“[Former Client] understands that, in connection with Brobeck’s representation of [Former Client], Brobeck created, received and/or stored information and materials that are protected by and subject to the attorney-client privilege, the work product doctrine and/or other confidentiality obligations (“Protected Materials”) that prevent Brobeck from disclosing such Protected Materials without [Former Client]’s consent. Nonetheless, in the interest of contributing to historical scholarship and archival preservation of cultural materials, [Former Client] hereby waives any such privilege, work product and other confidentiality obligations, and consents to the use of Protected Materials by the Library of Congress and its sublicensees.”

EXHIBIT B

OPTION SHEET

What Is The Digital Archive of the Birth Of The Dot Com Era?

The Library of Congress's National Digital Information Infrastructure and Preservation Program ("NDIIPP") is part of a national effort to preserve our digital heritage. Joined by The University of Maryland and other partners, NDIIPP aims to memorialize the Dot Com Era by preserving the Brobeck Digital Records in an archive that will be established upon closure of the bankruptcy estate. In the interim, you may choose among the following options:

Your Three Options:

IF YOU TAKE NO ACTION, the estate will turn over all Digital Files to the archive and your digital files will be preserved in an archive subject to the restrictions of a closed archive methodology on file with the Court.

OPT-IN: _____ [Company Name] (the "Company") understands that, in connection with Brobeck's representation of the Company, Brobeck created, received and/or stored information and materials that are protected by and subject to the attorney-client privilege, the work product doctrine and/or other confidentiality obligations ("Protected Materials") that prevent Brobeck from disclosing such Protected Materials without the Company's consent. Nonetheless, in the interest of contributing to historical scholarship and archival preservation of cultural materials, the Company hereby waives any such privilege, work product and other confidentiality obligations, and consents to the use of the Protected Materials by the Library of Congress and its sublicensees. Access to the Company's records will continue to be governed by traditional archive principles as set forth in the Code of Ethics of the Society of American Archivists.

OPT-OUT: I do not wish _____ [Company Name] (the "Company")'s Digital Files to be turned over to the Closed Archive.
You may contact the interim repository regarding disposition of your digital files at: Gallivan Gallivan O'Melia LLP, 101 Yesler Way Suite 507, Seattle, WA 98104-3448 -- Tel: 206-652-1441.

Acting on behalf of _____ [Company Name], I hereby request execution of the above checked option.

By: _____

(Former) Title: _____

Date: _____

If you opt-in or opt-out, please check the appropriate box, sign, and return to:

**David Kirsch
University of Maryland
Robert H. Smith School of Business
4544 Van Munching Hall
College Park, MD 20742**