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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 MARY E.
16 RASENBERGER IN SUPPORT OF
17 TRUSTEE'S MOTION REGARDING
18 TURNOVER AND ABANDONMENT OF
19 DIGITAL 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, MARY E. RASENBERGER, 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 am the Director of the National Digital Information Infrastructure and
Preservation Program (NDIIPP) at the Library of Congress. I am a member of the bars of the
State of New York and Washington, D.C. and a 1989 graduate of Harvard law School. I
practiced law at White & Case in New York, NY and Washington DC, then at Skadden, Arps,
Slate, Meagher & Flom, as Of Counsel, and Morrison & Foerster in New York, NY, as Counsel,

1 prior to coming to the Library of Congress as a Policy Planning Advisor with the U.S. Copyright
2 Office in 2002, the position I held immediately prior to my current position.

3 2. For over two hundred years, the Library of Congress (“Library”) has served as the
4 library of the United States and one of the principal repositories of our collective national
5 heritage. For most of that period, our task required the collection and preservation of works
6 produced and distributed in analog form. Recognizing the increasing importance of digital works,
7 the Library has recently taken affirmative steps to ensure that our nation’s heritage remains
8 equally well protected in the digital age.

9 3. In December 2000, Congress responded to this preservation challenge by
10 allocating \$99.8 million to develop a national digital-preservation strategy—an effort to be led by
11 the Library through the National Digital Information Infrastructure and Preservation Program
12 (“NDIIPP”). Consistent with the Library’s overall mission, NDIIPP’s experimental programs are
13 fostering our ability to collect, archive and preserve digital content over time periods spanning
14 hundreds of years. NDIIPP believes the success of this effort depends on identifying important
15 at-risk digital objects, developing the technical architecture to collect and preserve these objects
16 across a national network of trusted partners, analyzing the costs to implement this architecture on
17 a large scale, and, perhaps most importantly, striking an appropriate policy balance between
18 digital preservation and protecting intellectual property.

19 4. The Library and NDIIPP have supported Professor David Kirsch’s project at the
20 University of Maryland primarily to explore this policy balance and to preserve important at-risk
21 materials. Through the project Dr. Kirsch plans to collect and preserve Dot-Com business
22 records—a particularly stark example of content that will disappear if we follow collecting
23 procedures developed for the paper world. Many Dot-Com ventures conducted businesses
24 through purely digital means, and their own digital records were destroyed or lost when they shut
25 down. And in the ordinary course of Brobeck’s bankruptcy, their legal records would be
26 destroyed as well. The Library is aware of the potential problems presented by the confidential
27 relationship under which the Client Files were created, and NDIIP addresses these legal and
28 ethical issues as I discuss below.

1 5. To that end, Dr. Kirsch convened an Advisory Council of legal scholars and
2 practitioners. As an active participant in the Advisory Council’s deliberations, I attest that the
3 process was open and fair and focused on resolving the ethical issues involved in archiving legal
4 records. Based on the Advisory Council’s recommendation, the Digital Records will be
5 preserved in a dark archive, which will be governed by the Closed Archive Methodology
6 (“Methodology”) attached as Exhibit A to the Declaration of David Kirsch filed concurrently
7 herewith. As acknowledged in the Methodology, these restrictions and safeguards may keep part
8 of the Digital Records sealed for many years. However, the Library would prefer to see the
9 Brobeck Digital Records safely preserved and off-limits for an extended period of time, rather
10 than erased from a hard disk upon abandonment and forever lost to future scholars.

11 6. The Library’s NDIIPP partnership is an ideal environment in which to create the
12 closed archive. Aside from the University of Maryland, other partners are currently researching
13 standards and best practices for digital preservation, including the problems of media degradation
14 and format obsolescence. Even seemingly simple tasks can present challenges in this
15 environment and are being thoroughly researched. In the Archive Ingest and Handling Test, we
16 collaborated with Harvard, Johns Hopkins, Old Dominion and Stanford to test different
17 mechanisms for transferring complex and diverse collections of records into permanent
18 repositories. The results of this test are being shared with and built upon by other NDIIPP
19 partners. As an NDIIPP partner itself, Gallivan, Gallivan & O’Melia (“GGO”) can learn from
20 this test and prepare to transfer the Digital Records to a permanent closed archive.

21 7. The Library will designate one or more of closed archives to accept the records
22 pursuant to the Methodology. We will base our designation on a thorough review of the
23 institution’s ethical and financial integrity; we will consider only institutions with the resources
24 and commitment to implement the Methodology. We may also make additional designations,
25 perhaps in other geographical areas to limit the risk that catastrophe would destroy the collection.

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8. While saving the Brobeck records themselves will be a thoroughly rewarding experience, I must also remark that developing a mechanism for safely preserving confidential records is an accomplishment that will have far wider benefit. In fact, absent action such as this, confidential records will become one of the biggest casualties of the new digital recordkeeping era. Quite simply, and contrary to conventional wisdom, digital files are more fragile than their paper counterparts; while the Library holds paper records dating to the founding of our country, digital data from as early as a decade ago is already unreadable and obsolete. Since archives must intervene much sooner to stabilize digital data, the problems of confidentiality are much closer to the surface. The Methodology makes clear that the Library and its partners will competently and reliably provide former clients mandated protections of confidentiality.

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 28 day of June 2006 at Washington, D.C.

Mary E. Rasenberger

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