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Signed and Filed: August 09, 2006

DENNIS MONTALI  
U.S. Bankruptcy Judge

Counsel for Ronald F. Greenspan,  
Chapter 7 Trustee for Brobeck, Phleger & Harrison LLP

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

In re ) Case No.03-32715-DM7 Chapter 7  
)  
BROBECK, PHLEGER & HARRISON LLP, ) CHAPTER 7  
)  
Debtor. ) **ORDER GRANTING 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 ELECTRONIC DATA**  
) **ACCESS AGREEMENT WITH**  
) **GALLIVAN, GALLIVAN & O'MELIA,**  
) **LLC; AND (D) GRANTING RELATED**  
) **RELIEF**

Hearing Date

Date: July 18, 2006  
Time: 1:30 p.m.  
Dept.: Courtroom 22  
235 Pine Street, 22nd Floor  
San Francisco, CA 94104  
Judge: Hon. Dennis Montali

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1 This matter coming before the Court on the “Motion for Order (A) Authorizing the  
2 Abandonment of Brobeck’s Digital Records; (B) Authorizing the Trustee to Transmit Notice of  
3 Abandonment to Former Clients of Brobeck; (C) Authorizing the Trustee to Enter into Electronic  
4 Data Access Agreement with Gallivan, Gallivan & O’Melia, LLC; and (D) Granting Related Relief”  
5 (the “Motion”)<sup>1</sup>, filed by Ronald F. Greenspan, chapter 7 trustee (the “Trustee”) for Brobeck,  
6 Phleger & Harrison LLP (“Brobeck”); and

7 The Court having reviewed and considered the Motion, the Declaration of the Trustee in  
8 support of the Motion, and the file and record in this case, the Court hereby finds and concludes that:

9 A. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334,  
10 and this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

11 B. Notice of the Motion was reasonable and appropriate under the circumstances.

12 C. The relief requested in the Motion is in the best interest of the bankruptcy estate and  
13 within the sound business judgment of the Trustee.

14 D. The transmission of the notice of abandonment is a reasonable means of locating  
15 former Brobeck clients in an effort to advise such former clients (i) of their opportunity to decline  
16 inclusion in the Closed Archive by returning the opt-out form provided with the notice; (ii) that  
17 failure to respond will result in the inclusion of their files in the Closed Archive; and (iii) that they  
18 may consent to inclusion in the traditional archive by waiving their attorney-client confidentiality  
19 and thus making their records immediately available to research.

20 E. The legal and factual bases set forth in the Motion and the accompanying declaration  
21 and documents establish just cause for the relief granted herein.

22 **NOW, THEREFORE, IT HEREBY IS ORDERED THAT:**

- 23 1. The Motion is GRANTED on the basis set forth in this Order.  
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27 <sup>1</sup> All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the  
28 Motion.

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2. The Trustee is hereby authorized to turn over the Digital Records to GGO as soon as practicable. The Brobeck estate shall thereupon be deemed to have abandoned any interest in and to the Digital Records.

3. The abandonment of the Digital Records and governance of the Brobeck Closed Archive shall proceed in accordance with the Methodology attached hereto as Exhibit 1.

4. The Trustee is further authorized to send, at the University of Maryland's expense, the notice of abandonment of the Digital Records to former Brobeck clients. The notice shall include NDIIPP's opt-in, opt-out or take no action form with regard to that former client's file.

5. The Trustee is further authorized to enter into the Access Agreement with GGO.

\*\*END OF ORDER\*\*

# **EXHIBIT 1**

## CLOSED ARCHIVE METHODOLOGY

*August 3, 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 clients, where the client is or was a natural person;
  - 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 once in each of The Wall Street Journal (National Edition) and the San Francisco Chronicle.

- Former clients may choose to opt-out of the process, which will allow them to either (a) collect their files at their own expense, (b) request that their files not be transferred to the closed archive, or (c) both.
- Former clients who take no action will have their records preserved in the closed archive. If, after their records have been preserved, clients who have previously taken no action wishes to opt-out, the closed archive will remove their client files from the closed archive.
- 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.

In the event that a notice to a former client is returned as undeliverable, the Library of Congress may attempt to locate the former client through the use of internet search engines, contacts with former counsel who may have handled the former client's affairs, or by employing other reasonable methods. The Library of Congress may attempt to contact any former client in the future to obtain additional waivers of confidentiality. However, the Library of Congress is not obligated to make any such additional attempts to contact former clients.

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 NDIPP 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. 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.”

**COURT SERVICE LIST**

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