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8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11 In re) Chapter 7
12)
13 BROBECK, PHLEGER & HARRISON, LLP,) Case No. 03-32715-DM7)
14)
Debtor.)

15) **NOTICE OF MOTION AND MOTION FOR**
16) **ORDER (A) AUTHORIZING THE**
17) **ABANDONMENT OF BROBECK'S**
18) **DIGITAL RECORDS; (B) AUTHORIZING**
19) **THE TRUSTEE TO TRANSMIT NOTICE**
20) **OF ABANDONMENT TO FORMER**
21) **CLIENTS OF BROBECK;**
22) **(C) AUTHORIZING THE TRUSTEE TO**
23) **ENTER INTO AN ELECTRONIC DATA**
24) **ACCESS AGREEMENT WITH**
25) **GALLIVAN, GALLIVAN & O'MELIA,**
26) **LLC; AND (D) GRANTING RELATED**
27) **RELIEF**

28) Hearing Date

29) Date: July 18, 2006
30) Time: 1:30 p.m.
31) Dept: Courtroom 22
32) 235 Pine Street, 22nd Floor
33) San Francisco, CA 94104
34) Judge: Hon. Dennis Montali

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1 **PLEASE TAKE NOTICE:** On July 18, 2006, at 1:30 p.m., or as soon thereafter as the
2 matter may be heard, in Courtroom 22 located at 235 Pine Street, San Francisco, CA 94104, the
3 Honorable Dennis Montali will hold a hearing on this Motion filed by Ronald F. Greenspan, chapter
4 7 trustee (the “Trustee”) for Brobeck, Phleger & Harrison LLP (“Brobeck”). Pursuant to Rule
5 9014-1(c)(1) of the Bankruptcy Local Rules of the United States District Court for the Northern
6 District of California, **any written objection to the relief requested in this Motion must be filed**
7 **with the Bankruptcy Court and served upon counsel for Ronald F. Greenspan, Chapter 7**
8 **Trustee for Brobeck, Phleger & Harrison LLP at the address listed above so as to be received**
9 **at least five (5) days prior to the date of the hearing.** Any such written objection must be
10 accompanied by any declarations or memoranda of law the party objecting wishes to present in
11 support of its position. Only those parties who have timely filed and served responses will be heard
12 at such hearing. If there is no timely objection to the requested relief, the Court may enter an order
13 granting such relief without further notice or hearing.

14 **I. RELIEF REQUESTED**

15 By this Motion, the Trustee hereby moves this Court, pursuant to sections 363(b), 554 and
16 105 of the Bankruptcy Code, for an order, substantially in the form of the proposed order attached
17 hereto as Exhibit A, authorizing the Trustee to (i) turn over the digital records stored on Brobeck’s
18 servers (the “Digital Records”) to an outside vendor, Gallivan, Gallivan & O’Melia LLC (“GGO”),
19 (ii) abandon any right, title and interest of the estate in and to the Digital Records after such turnover
20 and in accordance with the Methodology (as that term is defined below), (iii) enter into the
21 electronic data access agreement with GGO (the “Access Agreement”), and (iv) transmit notice of
22 abandonment of the Digital Records to a service list comprised of former clients of Brobeck. This
23 Motion is based upon the record in this case, the accompanying Declarations of Ronald F.
24 Greenspan (the “Greenspan Declaration”), Susan E. Davis, Ph.D.¹ (the “Davis Declaration”),
25 William P. Gallivan (the “Gallivan Declaration”), Mary E. Rasenberger² (the “Rasenberger”
26 _____

27 ¹ Assistant Professor in the College of Information Studies at the University of Maryland.

28 ² Director of the National Digital Information Infrastructure and Preservation Program at the Library

1 Declaration”), Robert W. Gordon³ (the “Gordon Declaration”), Lawrence J. Fox⁴ (the “Fox
2 Declaration”), and David Kirsch, Ph.D.⁵ (the “Kirsch Declaration”), and the facts and argument set
3 forth below.

4 **II. INTRODUCTION**

5 1. Through this Motion, the Trustee seeks permission to alleviate a significant
6 administrative burden on the estate and, at the same time, provide a beneficial public service in
7 connection with a national level historical preservation project of the University of Maryland and the
8 Library of Congress (the “Library”). Since his appointment, the Trustee has maintained Brobeck’s
9 computer servers and the accompanying Digital Records for use in administering the bankruptcy
10 estate. One key use of the Digital Records has been in connection with his efforts to collect
11 receivables from former Brobeck clients. The collection efforts have wound-down substantially,
12 and the Trustee no longer needs immediate access to the Digital Records. The Trustee has
13 investigated alternatives to maintaining Brobeck’s servers at the expense of the estate. Currently,
14 those costs range from \$2,500 - \$5,000 per month. The estate has also incurred additional costs for
15 service and repair to the servers and is likely to face substantial additional expenses in the future.

16 2. For the past several months, the Trustee has engaged in discussions with Dr. David
17 Kirsch, GGO, and counsel for the University of Maryland, regarding the treatment of the Digital
18 Records. Dr. Kirsch introduced the Library’s national historical project and his proposal to include
19 the Digital Records as part of his research. Upon learning of the proposal, the Trustee raised several
20 concerns, including whether he would continue to have access to the Digital Records at a reasonable
21

22
23 of Congress.

24 ³ The Chancellor Kent Professor of Law and Legal History and Professor of History at Yale
25 University.

26 ⁴ Partner and former managing partner of Drinker Biddle & Reath LLP and I. Grant Irely Adjunct
27 Professor at the University of Pennsylvania Law School.

28 ⁵ Assistant Professor of Management and Entrepreneurship at the University of Maryland’s Robert
H. Smith School of Business.

1 cost, and whether the confidentiality of the Digital Records would be protected. Dr. Kirsch and
2 GGO were able to address each of these concerns.

3 3. At the conclusion of the discussions, the Trustee reached an agreement that would
4 allow him to save the day to day costs and at the same time preserve his ability to review the Digital
5 Records in future, while at the same time addressing the Trustee’s concerns regarding confidentiality
6 of the former client files. Through the plan, the Trustee will turn over the Digital Records to GGO,
7 at which time they will be deemed abandoned by the estate. GGO and the University of Maryland
8 would then undertake the necessary work and cost of ensuring the integrity of the data and storing
9 the information on new servers, all while protecting the confidential nature of the files in connection
10 with a methodology that is described in more detail below. If, in the future, the Trustee needs to
11 access Digital Records the Trustee will still be able to do so at a reasonable expense under the terms
12 of the Access Agreement.⁶

13 4. The Trustee submits that there is good cause to support the Motion, as it will relieve
14 the estate of the burden of maintaining the servers, preserve the Digital Records, and also serve a
15 beneficial public purpose.

16 **III. BACKGROUND**

17 **A. General Background**

18 5. Brobeck was organized as a general partnership under the California Uniform
19 Partnership Act by adoption of a General Partnership Agreement dated as of September 1, 1989, of
20 Brobeck, Phleger & Harrison. Brobeck filed a registration as a limited liability partnership on or
21 before September 30, 1997, pursuant to Section 16953 of the Revised Uniform Partnership Act, Cal.
22 Corp. Code § 16100 et seq. (“RUPA”).

23 6. Brobeck’s dissolution was formalized effective February 10, 2003, under Section
24 16801 of RUPA, pursuant to a certain Amended and Restated Partnership Agreement dated as of
25 _____

26 ⁶ The average fee for a “simple” document retrieval and production will be billed at \$200 per hour
27 for requests related to the retrieval of such documents. GGO has informed the Trustee that the
28 average standard document request will take two to three hours, for an average of \$500. A current
draft of the Access Agreement is attached hereto as Exhibit A to the Gullivan Declaration.

1 February 10, 2003. Under this final amendment to the Brobeck partnership agreement, a
2 Liquidation Committee (the “Liquidation Committee”) was formed to carry out Brobeck’s
3 dissolution. Only days later, on February 14, 2003, Brobeck laid off substantially all of the Former
4 Employees.

5 7. On March 25, 2003, the Liquidation Committee entered into an agreement (the
6 “Agreement”) with Larson Gallivan & Gallivan LLC, the predecessor to GGO, to make and
7 preserve a digital backup of Brobeck’s computer network. The Agreement also provided the terms
8 by which Brobeck would be able to recover any electronic files from this storage database in the
9 future. Specifically, the Agreement was meant to provide future Brobeck clients and former
10 Brobeck partners with access to client files at no expense to Brobeck.

11 8. On September 17, 2003, certain of Brobeck’s creditors filed in this Court an
12 involuntary bankruptcy petition against Brobeck under chapter 7 of the title 11 of the United States
13 Code (the “Bankruptcy Code”). On October 10, 2003, this Court entered an order for relief with
14 respect to that petition. On October 14, 2003, E. Lynn Schoenmann was appointed interim trustee.

15 9. The Trustee was elected as chapter 7 trustee for Brobeck on November 21, 2003, and
16 was certified and qualified by the Office of the United States Trustee on December 12, 2003.

17 10. On August 24, 2004, the Court entered an Order Authorizing Assumption of
18 Executory Contracts [Docket No. 471], including the Agreement.

19 11. On February 15, 2005, the Trustee filed a “Motion for Order (A) Authorizing the
20 Abandonment of Files And Other Materials of Former Brobeck Clients; (B) Authorizing the Trustee
21 to Transmit Notice of Abandonment to Former Clients; and (C) Granting Related Relief” (the
22 “Client File Abandonment Motion”), through which the Trustee sought to abandon the paper copies
23 of the files of former Brobeck Clients. The Client File Abandonment Motion outlined the steps
24 taken to notify former Brobeck clients regarding the potential destruction of their files. The Client
25 File Abandonment Motion, which only impacted the files of former Brobeck clients, not Brobeck’s
26 Administrative Files, also provided the former Brobeck clients with contact information for the
27 storage companies at which the files were stored, so that the former Brobeck clients could work
28 directly with the storage companies to retrieve their files.

1 12. On March 21, 2005 this Court held a contested hearing regarding the Client File
2 Abandonment Motion (the “March Hearing”). At the March Hearing, Dr. David Kirsch, a professor
3 from the University of Maryland, presented his statement regarding the Library and his objectives to
4 preserve certain Brobeck digital records after abandonment. Although the Trustee was not yet ready
5 to move to abandon Brobeck’s digital records, Dr. Kirsch did introduce the Library and his objective
6 to prevent permanent destruction of all of Brobeck’s digital records and introduced the objective to
7 preserve the Brobeck digital records in a closed archive (“Closed Archive”).

8 13. On September 14, 2005, the Trustee moved to abandon the paper copies of the former
9 law firm’s partnership records, by filing the “Motion for Order Authorizing the Trustee to Abandon
10 Administrative Files and Related Materials of Brobeck, Phleger & Harrison LLP” (the
11 “Administrative Files Motion”) [Docket No. 1528]. Through the Administrative Files Motion, the
12 Trustee sought to abandon the Brobeck estate’s interest in Brobeck’s remaining paper records. On
13 October 25, 2005, the Court entered an Order approving the Administrative Files Motion.

14 14. Throughout the administration of the case, the Trustee has accessed Brobeck’s
15 records directly from the digital records on Brobeck’s original servers. The Trustee has maintained
16 the servers at the expense of the estate at a cost that ranges from \$2,500 - \$5,000 per month. The
17 estate has had to incur additional amounts for service and repair due to the age of Brobeck’s servers.
18 The time and expense associated with the servers has increased in recent months and are likely to be
19 substantial in the future. The servers have had substantial downtime, and much of the software that
20 resides on the servers is no longer supported. In the past, the Trustee has had to hire outside vendors
21 to retrieve data and to attempt to make use of the dated software

22 15. Recently, during a routine inspection of Brobeck’s Offices at One Market Plaza,
23 Spear Street Tower, San Francisco, CA 94105, an inspector from the San Francisco Fire Department
24 reviewed Brobeck’s office space, and informed a representative of FTI Consulting, Inc (“FTI”), the
25 Trustee’s financial advisor, that the location of Brobeck’s servers appeared to be in violation of
26 several fire codes. Among other things, the inspector noted that the servers were not stored in a
27 location that complied with the Fire Department’s regulations. Converting the existing storage
28 facility to meet the inspector’s specifications would require, among other things, installation of a

1 sprinkler system, an exhaust, and emergency power shutoff switches. The Trustee believes that
2 these conversions would involve significant expense to the estate.

3 16. On several occasions, Dr. Kirsch and the Trustee discussed the possibility of
4 providing the Trustee with access for the Trustee to the digital records through the Library's
5 depository. Discussions ensued regarding a cooperative solution to meet Dr. Kirsch and the
6 Library's preservation objective, the Trustee's potential need to access the Digital Records in the
7 future, and the need to preserve the confidentiality of the files of former Brobeck clients.

8 **B. Digital Records Preservation by the Library of Congress, NDIIPP and the**
9 **University of Maryland.**

10 17. Dr. Kirsch has led the effort to acquire and preserve the digital records of dot-com era
11 ("Dot-Com") companies with the support of the Library. Dr. Kirsch received his Ph.D. at Stanford
12 University in History of Technology in 1997 and has focused his research on the history of industry
13 emergence, technological choice and technological failure. Dr. Kirsch has informed the Trustee that
14 when he learned of Brobeck's intention to liquidate, his research interests led him to inquire about
15 the Digital Records. A sizeable portion of the Digital Records is comprised of files of former
16 Brobeck clients' files ("Electronic Client Files"), including those of failed Dot-Com companies. Dr.
17 Kirsch also informed the Trustee that he became concerned about the digital integrity of Brobeck's
18 own internal partnership records ("Partnership Records"), given Brobeck's recognized stature in the
19 California legal community.

20 18. The Electronic Client Files contain information and data about Brobeck's failed Dot-
21 Com clients that are unavailable from other sources. Many of these former clients conducted
22 business primarily through digital means, and their digital records were destroyed or lost when the
23 former clients shut down. In these cases, the Electronic Client Files contain the material evidence
24 future scholars will need to reconstruct this critical era in the history of technology entrepreneurship.
25 Brobeck's digital Partnership Records are also an invaluable historical resource, providing a window
26 into the inner workings of a significant firm in California legal practice. Altogether, the Digital
27 Records are comprised of records from dot-com era startups and one of the two largest law firms
28 representing them during the height of the historic Internet boom.

1 19. For over two hundred years, the Library has served as the library of the United States
2 and one of the principal repositories of our collective national heritage. Recognizing the increasing
3 importance of digital works, the Library has recently taken affirmative steps to ensure that our
4 nation’s heritage remains equally well protected in the digital age. In December 2000, Congress
5 allocated \$99.8 million to develop a national digital-preservation strategy led by the National Digital
6 Information Infrastructure and Preservation Program (“NDIIPP”). Consistent with the Library’s
7 overall mission, NDIIPP’s experimental programs have fostered collection, archiving and
8 preservation of digital content.

9 20. The Trustee is informed and believes that the Library and NDIIPP support Dr.
10 Kirsch’s plan to collect and preserve the Digital Records as they present a particularly stark example
11 of content that will disappear unless special efforts are made to preserve them.

12 21. Dr. Kirsch has advised the Trustee that he is aware of the potential problems
13 presented by the confidential relationship under which the Client Files were created, and that he has
14 convened an Advisory Council of esteemed legal scholars and practitioners to advise him and the
15 Library in the development of a Methodology for preserving and archiving the at-risk Brobeck
16 Digital Records while protecting the interests of former clients (“Methodology”).⁷ The members of
17 the Advisory Council are listed in Appendix A of the Methodology, which is attached as Exhibit A
18 to the Kirsch Declaration.

19 **C. Cooperative Solution for the Trustee and the Preservation Effort.**

20 22. On May 10, 2006 (the “May 10 Meeting”), the Trustee, his counsel, Dr. Kirsch and
21 his research assistant, the advising bankruptcy attorney for the University of Maryland, William
22 Gallivan of GGO, and Brandon Beal of FTI Consulting met to consider the practical aspects of
23 transferring the Digital Records stored on Brobeck’s servers to GGO, to discuss the means and cost
24 of providing continued access to Brobeck’s records for the Trustee, to review the procedures for
25 setting up and maintaining a closed archive, and to plan a cooperative effort to move for turnover of
26

27
28 ⁷ A copy of the Methodology is attached hereto as Exhibit B.

1 the digital records to GGO and for abandonment of the records by Brobeck after turnover. The May
2 10 Meeting proved successful on all issues.

3 23. The parties agreed that at this point in the administration of the bankruptcy estate,
4 transferring the Digital Records to GGO, a NDIIPP partner, could serve both the Trustee's need to
5 abandon burdensome property and to have continued access to the records to administer the
6 bankruptcy case. The transfer would also serve as the initial step in establishing a NDIIPP archive
7 of the Brobeck records. The Trustee is currently negotiating an agreement with GGO pursuant to
8 which GGO would collect data from the original Brobeck servers, and then, on an ongoing basis
9 upon requests from Brobeck, GGO will retrieve and deliver Digital Records to the Trustee for the
10 continued administration of the Brobeck estate.⁸ All fees related to the collection of the digital
11 records, estimated by GGO at \$31,000, will be paid by the University of Maryland and GGO. The
12 Trustee will pay GGO only for requests for documents on an hourly basis, which the GGO estimates
13 will cost approximately \$500 per retrieval. GGO will work with NDIIPP partners to prepare the
14 data for the archive, allowing the Trustee to benefit from the Library's advancements in data
15 preservation technology. After the bankruptcy case's closure, NDIIPP will be prepared to
16 physically transfer the data to its own closed archive depository.

17 24. At the May 10 Meeting, the parties reviewed and commented on the Methodology for
18 a closed archive and commented on it. Dr. Kirsch revised the Methodology to address some of the
19 issues discussed at the May 10 Meeting.

20 25. The Trustee is informed and believes that the Methodology will systematically
21 protect confidential Electronic Client Files by establishing safeguards to prevent improper access to
22 any sensitive documents, and as acknowledged in the Methodology, these restrictions may keep part
23 of Brobeck's Digital Records sealed for many years. The Methodology consists of three (3) phases:
24 the first phase describes the preliminary steps the Library will take in advance of the closed
25 archive's creation; the second phase describes the closed archive's ordinary and ongoing operations;

26
27
28 ⁸ A current draft of the Access Agreement is attached as Exhibit A to the Gallivan Declaration.

1 and the third phase describes how statistical information from the closed archive will be made
2 available for academic research. Each Phase is discussed and analyzed below.

3 26. In light of the technical problems the Trustee has experienced with the Brobeck
4 servers and his need to have continued access to Brobeck records until the closing of the case, the
5 Trustee has determined that the Library, the NDIIPP, and the University of Maryland have presented
6 a beneficial alternative to maintaining the original servers by transferring the Digital Records to
7 GGO and allowing the Trustee to access to the Brobeck records at an hourly charge for retrieval of
8 requested files. Also, the transfer of the Digital Records will permit the Trustee to permanently shut
9 down the original servers, thereby avoiding the costs associated maintenance and repair, as well as
10 with compliance with the requirements of the San Francisco Fire Department. Furthermore, the
11 Trustee is informed and believes that the Methodology proposes a closed archive which adequately
12 protects former clients' attorney-client privilege and complies with the Archivists' Code of Ethics,
13 which is attached to the Davis Declaration. Therefore, the Trustee requests that this Court grant the
14 relief requested herein.

15 **IV. BASIS FOR REQUESTED RELIEF**

16 27. By this Motion, the Trustee hereby moves this Court for an order, pursuant to
17 sections 105 and 554 of the Bankruptcy Code (i) authorizing the turnover of the Digital Records to
18 GGO, (ii) authorizing the Trustee to abandon any interest of the estate, including any possessory
19 interest, in and to the Digital Records, (iii) enter into the electronic data access agreement with
20 GGO, and (iv) authorizing the transmission of notice of turn over & abandonment of the Digital
21 Records to former clients of Brobeck. Pursuant to the Court's equitable power, the Trustee seeks an
22 order authorizing him to turnover the Digital Records to GGO and deeming the Digital Records
23 abandoned by the estate after the turnover.

24 **A. Abandonment Of The Digital Records Is Appropriate Under The**
25 **Circumstances.**

26 1. Section 554 of the Bankruptcy Code provides that "[a]fter notice and a hearing, the
27 trustee may abandon any property of the estate that is burdensome to the estate or that is of
28 inconsequential value and benefit to the estate." 11 U.S.C. § 554. Section 554 of the Bankruptcy

1 Code requires two showings. First, the assets at issue must constitute property of the estate. See 11
2 U.S.C. §§ 541 and 554; see also *Estate of McGahren v. Heck (In re Weiss)*, 111 F.3d 1159, 1167
3 (4th Cir. 1997); *In re Xonics, Inc.*, 813 F.2d 127, 131 (7th Cir. 1987); *In re Delash*, 260 B.R. 4, 13
4 (Bankr. E.D. Cal. 2000). Second, the property to be abandoned must burden the estate or have
5 inconsequential value and benefit to the estate. See *Ybarra v. Boeing N. Am., Inc. (In re Ybarra)*,
6 295 B.R. 609, 618 (B.A.P. 9th Cir. 2003); see also *In re Delash*, 260 B.R. at 12.

7 2. In reviewing the Trustee's decision to abandon the Digital Records, the Court need only
8 ensure that the decision to abandon the property reflects a sound business judgment made in good
9 faith. See *In re Moore*, 110 B.R. 924, 927 (Bankr. C.D. Cal. 1990) (“Accordingly, when called
10 upon to review contested applications for abandonment, a court must focus its examination upon the
11 reasons underlying the trustee's determination and affirm a decision which reflects a business
12 judgment made in good faith, upon a reasonable basis and within the scope of his authority under
13 the Code.”) (quoting *In re Wilson*, 94 B.R. 886, 888 (Bankr. E.D. Va. 1989)). Thus, if a trustee's
14 business judgment has been reasonably exercised, a court should approve the abandonment of
15 assets. See *Moore*, 110 B.R. at 927.

16 3. The Trustee submits that abandonment of the Digital Records pursuant to section 554 of
17 the Bankruptcy Code is reasonable and appropriate under the circumstances. The burdensome
18 nature of whatever interest the estate may or may not have in the Digital Records requires that the
19 Trustee take affirmative steps to ensure that the estate no longer has obligations with respect to the
20 continued storage and/or preservation of the subject files. The Digital Records are both burdensome
21 to the estate and are of inconsequential value and benefit to the estate.

22 4. With respect to the Digital Records stored by Brobeck, the best evidence that the Digital
23 Records are both burdensome and of inconsequential value and benefit, is that the Trustee will incur
24 material costs to maintain and repair the servers, without an accompanying benefit to the estate.
25 Moreover, the Trustee will need to spend material amounts to comply with the requirements of the
26 San Francisco Fire Department. These costs would need to be incurred even though the one of the
27 key purposes in having the current level of daily access to the servers (*i.e.* collecting receivables) has
28

1 been served. To the extent that there is some chance that the Trustee may at some future date desire
2 to retrieve a file, that alone should not prohibit the Trustee from abandoning of the Digital Records.

3 5. Moreover, Brobeck’s servers have no value, or have only inconsequential value, to the
4 bankruptcy estate. The estate is not engaged in the practice of law, and the Trustee does not believe
5 there is a need to keep the servers as a business matter. It is apparent to the Trustee that the storage
6 of Brobeck’s servers and the related compliance costs will outweigh any potential benefit to the
7 estate if the estate is forced to maintain the Digital Records. In fact, any potential benefit of
8 continuing to maintain the Digital Records is likely to dwindle over time.

9 **B. Turnover of the Digital Records to GGO is Appropriate Under the**
10 **Circumstances and Is Within This Court’s Authority.**

11 6. Section 105(a) of the Bankruptcy Code allows this Court to “issue any order, process,
12 or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].”
13 11 U.S.C. § 105(a). Under section 105(a) of the Bankruptcy Code, this Court has expansive
14 equitable powers to fashion any order or decree that is in the interest of preserving or protecting the
15 value of the debtor’s assets. *See, e.g., Chinichian v. Campolongo (In re Chinichian)*, 784 F.2d 1440,
16 1443 (9th Cir. 1986) (“Section 105 sets out the power of the bankruptcy court to fashion orders as
17 necessary pursuant to the purposes of the Bankruptcy Code.”) (citation omitted); *Coie v. Sadkin (In*
18 *re Sadkin)*, 36 F.3d 473, 478 (5th Cir. 1994) (“Section 105(a) authorizes a bankruptcy court to
19 fashion such orders as are necessary to further the substantive provisions of the Bankruptcy Code.”)
20 (quotation omitted).

21 **1. The Methodology is Limited in Scope and Adheres to the Duty of**
22 **Confidentiality and Attorney-Client Privilege.**

23 7. The Trustee is informed and believes that the Closed Archive would serve as a secure
24 depository only for certain of the Electronic Client Files and Partnership Records, and the
25 Methodology prepared by Dr. Kirsch and the Advisory Council to govern the access to the Digital
26 Records would adhere to the restrictions of the attorney-client privilege and duty of confidentiality
27 in addition to the confidentiality principles of the American Archivists’ Code of Ethics. The Library
28 and its partners do not challenge the attorney-client privilege or the duty of confidentiality. Neither

1 of these principles needs to be called into question for the creation of the Closed Archive and for the
2 Library and its partners to preserve the Brobeck Digital Records.

3 8. As noted above, the Methodology consists of three (3) phases: the first phase describes
4 the preliminary steps the Library will take in advance of the Closed Archive's creation; the second
5 phase describes the Closed Archive's ordinary and ongoing operations; and the third phase describes
6 how statistical information from the Closed Archive will be made available for academic research.
7 The Trustee is informed and believes that, at each phase, the Methodology's procedures restrict
8 access to information covered by the duty of confidentiality and the attorney-client privilege.

9 9. During Phase One, the Library will notify former clients that it intends to transfer their
10 files into a closed archive. Former Brobeck clients will have three choices: (1) they may decline
11 inclusion in the Closed Archive by returning the opt-out form; (2) they may do nothing and thus
12 consent to inclusion in the Closed Archive; or (3) they may consent to inclusion in the traditional
13 archive by waiving their attorney-client confidentiality and thus making their records immediately
14 available to research. Even clients who fail to object prior to the transfer will have the opportunity
15 to raise their objections and have their files removed at any time in the future.

16 10. The Closed Archive constructed in Phase One will limit access to materials protected by
17 attorney-client confidentiality and privilege. This protection will remain in place until the Closed
18 Archive receives permission from a former client, or until it determines that confidentiality or
19 privilege no longer (or never did) apply to a particular file. Former Brobeck clients whose
20 documents could potentially be included in the Closed Archive will be notified via the Estate's
21 client mailing list.

22 11. Several classes of documents will be excluded from preservation by the Closed Archive
23 before its construction. The Library will reject any files relating to the representation of personal
24 clients (as opposed to corporate or institutional clients), as well as any files documenting Brobeck
25 employment or partnership relationships. The files of former Brobeck clients who object to
26 inclusion in the Closed Archive will also be removed, along with the files of any former clients who
27 have approached the estate or GGO in the past to retrieve their records. This exclusion process
28 bypasses any confidentiality issues related to these records, and ensures that they are destroyed in a

1 fashion which eliminates the possibility of future access. Because the remaining protected files will
2 be preserved strictly within the Closed Archive, the Trustee believes this arrangement precludes any
3 breach of the duty of attorney-client confidentiality or privilege.

4 12. Phase Two of the Methodology describes the Closed Archive’s ordinary operation.
5 Two safeguards protect documents during this phase. First, only internal archivists working on
6 preservation-related tasks will handle the confidential files, and they will sign non-disclosure
7 agreements strictly limiting their activities. Second, nothing will be transferred outside the Closed
8 Archive without either (a) the receipt of the former clients’ written waiver of attorney-client
9 confidentiality and privilege, or (b) a relevant change in the applicable law governing confidentiality
10 deemed sufficient by an advisory committee of legal ethicists.⁹

11 13. Finally, Phase Three provides for aggregate statistical research. The Trustee is
12 informed and believes that several safeguards are in place to protect attorney-client confidentiality
13 and privilege during this phase. The Trustee is also informed and believes that this phase is modeled
14 on other existing uses of sensitive data, such as the Research Data Center Program operated by the
15 U.S. Census to allow scholars access to confidential, personal census data. This phase offers similar
16 safeguards, such as a thorough evaluation of a research project’s academic merit, with the strict
17 exclusion of commercial projects. Any scholars passing this review will sign non-disclosure
18 agreements and conduct their work strictly within the Closed Archive, just as the archivists in Phase
19 Two. The Closed Archive will then monitor both the scholars’ activity and their work-product, the

20
21
22 ⁹ It is reasonable to assume that laws governing the confidentiality of client files may change at
23 some point in the future. There have been studies to determine where various members of the legal
24 community stand on the issue of setting time limits on the attorney-client confidentiality, resulting in
25 the proposition that access be granted to client files after fifty years unless a party makes a strong
26 case otherwise. *See* Marsha Trimble, *Archives and Manuscripts: New Collecting Areas for Law*
27 *Libraries*, 83 Law Libr. J. 429 (1991) at 441-442; Akiba J. Covitz, *Providing Access to Lawyers’*
28 *Papers: The Perils...and The Rewards*, Legal Reference Services Q., Vol. 20, No. 1/2, 2001, at 162. Certain researchers devoted to the subject of access to lawyers’ papers have attempted to establish and implement procedures to provide reasonable ethical access to lawyers’ papers. *See* Jon Gerter, *The Lex Files, What’s To Be Done With Lawyers’ Private Papers After Their Death?*, AMERICAN LAWYER, June 1998 at 76; Hiller Zobel, Alfred Konefsky, & Jerold Auerbach, *Lawyers Papers as a Source of Legal History*, 69 Law Libr. J. 303-328 (1976).

1 latter of which must be approved by a review committee before release. Because these procedures
2 adequately prevent the release of any protected information, Phase Three, like Phase One and Two,
3 does not violate the attorney-client privilege or the duty of confidentiality, and the Closed Archive
4 protects the rights of former clients.

5 14. The Trustee is informed and believes that the Methodology also solves the
6 confidentiality issues in a way that is consistent with the Archivists’ Code of Ethics. The concept of
7 a closed archive is consistent with Article VI of the Archivists’ Code of Ethics, which states that
8 “[a]rchivists may place restrictions on access for the protection of privacy or confidentiality of
9 information in the records.”¹⁰ Phase Three’s aggregate research complies with the requirement to
10 “protect the privacy rights of donors and individuals or groups who are the subject of records,” as
11 described in Article VII of the Archivists’ Code of Ethics. Archivists are accustomed to dealing
12 with sensitive documents that may require limited access and use, but are less accustomed to dealing
13 with legal records. The Trustee is informed and believes that the Methodology clearly separates the
14 management of documents restricted by legal principles from the management of regular archiving
15 issues.

16 **2. The Closed Archive Benefits the Estate, Protects Confidentiality and**
17 **Preserves Historically Valuable Documents.**

18 15. The creation of the Closed Archive by turning over the Digital Records to a Library
19 depository can fulfill the needs of the bankruptcy estate while protecting the confidentiality of the
20 Electronic Client Files, and benefiting archivists and history. The Brobeck records reside in the
21 form of the Digital Records on the original Brobeck servers, which require a specific environment
22 and constant maintenance. These costs have become burdensome to the bankruptcy estate. In
23 addition, the original servers are rapidly deteriorating, increasing the possibility that their breakdown
24 will prevent further retrieval of the Digital Records by the Trustee, and result in the permanent loss
25 of the historically valuable Digital Records. The Trustee now has the opportunity to turnover the
26 Digital Records to GGO, a NDIIPP partner specialized in computer forensics, electronic evidence
27

28 ¹⁰ A copy of the Archivists’ Code of Ethics is attached hereto as Exhibit C.

1 production and digital discovery services. GGO has informed the Trustee that it estimates that
2 downloading the Digital Files from the original servers and organizing, sorting and restoring the
3 data in a form that facilitates review and retrieval will cost \$31,000, which will not be charged to the
4 Brobeck estate. The University of Maryland and GGO would assume the cost of turnover of the
5 Digital Records to GGO, and the Trustee would have continued access to the records for a fraction
6 of the costs of maintaining the servers. The average document request takes two to three hours, for
7 an average of \$500 retrieval fee. Transferring the Digital Files to GGO would also preempt the
8 likely breakdown of the servers, avoiding the irreversible loss of the Digital Records.

9 16. As discussed above, the Methodology is designed to protect the privacy rights of
10 Brobeck’s former clients. The Library and its partners will seek historically-minded clients willing
11 to waive their attorney-client privilege to release the records in the traditional archive, thereby
12 respecting the confidentiality of the Electronic Client Files and the former client’s attorney client
13 privilege.

14 17. Preservation of these Digital Records is worthwhile from a historical perspective.
15 Furthermore, a number of prominent law firms have allowed access to their records, including client
16 files for the sake of history.¹¹ This collection is unique by its volume and Brobeck’s significance in
17 the legal world. Altogether, the Brobeck Digital Records comprise a unique historical record of
18 Dot-Com-era startups and one of the two largest law firms representing them during the height of
19 the historic Internet boom.

20 18. Finally, authorizing the Methodology’s proposed Closed Archive offers an opportunity
21 to set a higher standard for the collection of sensitive legal records. Archivists and librarians who
22 have archived other legal collections, including attorney-client files, have created access
23 arrangements that merely met with the donor’s approval, and may not have given the necessary
24 regard to whether those arrangements adequately protected confidentiality. In this case, creation of

25 _____
26 ¹¹ See KENNETH LIPARTITO AND JOSEPH PRATT, BAKER & BOTTS IN THE MODERN DEVELOPMENT OF
27 HOUSTON, AUSTIN (1991); NANCY LISAGOR AND FRANK LIPSUS, A LAW UNTO ITSELF: THE UNTOLD
28 STORY OF THE LAW FIRM SULLIVAN AND CROMWELL (1989); ROBERT L. NELSON, PARTNERS WITH
POWER : THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM (1988).

1 the Closed Archive has to withstand a much stricter scrutiny due to its creation out of the bankruptcy
2 case. The scholars of the Advisory Council have thoroughly examined the complex issues of
3 confidentiality and attorney-client privilege helping to draft comprehensive guidelines sensitive to
4 these principles. The Methodology delineates what the archivists may do, how they may do it and
5 who will supervise them, all with due sensitivity to the applicable ethical principles. As such, the
6 Closed Archive and Methodology could lead the way in designing comprehensive guidelines to
7 manage access to sensitive legal collections.

8 **C. Transmission of the Notice of Abandonment is a Reasonable Means of**
9 **Informing Former Brobeck Clients of the Abandonment of the Digital Records.**

10 19. Brobeck’s former clients have had ample opportunity to receive their files in connection
11 with the pre-bankruptcy winding up as well as during the administration of the case. Former Clients
12 as well as Former Brobeck Partners have had ready access to the Digital records via the Gallivan
13 contracts. Accordingly, the Trustee does not have a strong concern that possible destruction of the
14 Digital Records would prejudice any former clients of Brobeck. To be sure, however, the Trustee
15 proposes that the Court authorize the transmission of the notice of abandonment, via United States
16 mail, postage prepaid, to those former Brobeck clients that were sent notice in connection with the
17 Client File Abandonment Motion, as well as by publication in one national newspaper and one San
18 Francisco publication. The notice of abandonment will include an option sheet to allow former
19 Brobeck client to submit their choice to opt-out of the Closed Archive or opt-into the traditional
20 archive (the “Option Sheet”). Service of the notice of abandonment and the Option Sheet will be
21 made at the University of Maryland’s expense.

22 20. Among other things, the notice of abandonment will inform former Brobeck clients:

- 23 a. That they may prevent their records from being transferred to the
24 closed archive by opting-out of the process.
- 25 b. That if they take no action, then their records will be preserved in
26 the closed archive. Former Brobeck clients will, however, retain the right
27 to opt-out and collect their files at any time in the future.

1 c. That if they wish to make their records immediately available
2 outside the closed archive, the Abandonment Notice will also provide
3 former Brobeck clients the opportunity to waive the attorney-client
4 privilege and any ethical duty of confidentiality through a strictly opt-in
5 process.

6 The Trustee submits that the transmission of the notice of abandonment is a reasonable means of
7 locating former Brobeck clients and is appropriate under the circumstances. Further, providing a
8 “final call” to the former clients would be a good practice so that all concerned can have notice of
9 the treatment of the Digital Records.

10 **D. Similar Relief Has Been Granted by Bankruptcy Courts with Respect to the**
11 **Turnover and Abandonment of Medical Records.**

12 21. Chapter 7 trustees routinely request abandonment of property that is burdensome to the
13 estate. As discussed below, due to the ripe age of the Brobeck servers the costs of maintenance have
14 become burdensome to the Estate. However, the request for authority to turn over the Digital
15 Records to GGO for preservation prior to deeming them abandoned is within the scope of Section
16 105 to the extent not implicit in section 554. In this instance, for abandonment to take place in a
17 way that preserves the Trustee’s access to the Brobeck records, the Trustee requests permission to
18 turn over the Digital Records to GGO prior to this Court deeming them abandoned.

19 22. Admittedly, precedent for indefinite preservation of abandoned property is scarce.
20 However, chapter 7 trustees and bankruptcy courts have been faced with a similar dilemma in
21 dealing with disposition of medical records of liquidating businesses. *See* David W. Allard, Esq.,
22 Deborah L. Fish, Esq., “Health Care Providers and Bankruptcy. Medical Records Issues: Whose
23 Are They and Who Pays?,” National Association of Bankruptcy Trustees 2005 Spring Seminar
24 Materials Re Health Care Providers and Bankruptcy (2004).¹²

25 23. Allard and Fish grapple with the issue that notwithstanding the position that a
26 liquidating trustee is exempt from having to comply with state law that regulates on-going business

27 _____

28 ¹² A copy of the materials is attached hereto as Exhibit D.

1 activities when liquidating a business, a patient and/or the State has a compelling interest in assuring
2 that medical records are preserved. *Id.* at 4; *See also*, 1 Collier on Bankruptcy ¶ 10.03, at 10-5 (15th
3 ed. rev.). This article presents the creative solutions devised by the trustees and bankruptcy courts
4 faced with the dilemma of authorizing abandonment while simultaneously directing preservation of
5 records at no cost to the estate. In *In re LGW Management Associates, Inc., et al.*, Case No. 96-
6 55416 (WS) (Bankr. E.D. Mich.), a chapter 7 case then pending before the U.S. Bankruptcy Court
7 for the Eastern District of Michigan, the bankruptcy court entered two orders, the first of which
8 permitted the trustee to charge a reasonable fee of \$15.00 per patient for the turnover of their
9 medical records while a more permanent solution could be found, and provided the trustee immunity
10 from liability except for willful and intentional acts. The second order continued the first order until
11 the medical records could be turned over to the hospital for preservation and then deemed the
12 records abandoned. Allard & Fish, *supra* at 6.

13 **E. The Terms of the Proposed Form of Order are Reasonable and Should be**
14 **Approved.**

15 24. The Trustee proposes a variant of the solution provided by the Michigan bankruptcy
16 court. The proposed order would provide for the following:

- 17 • Authorizes the Trustee to turn over the Digital Records to GGO. The Digital Records
18 shall be deemed abandoned by the Brobeck estate once the Digital Records are turned
19 over to GGO.
- 20 • Releases the Trustee from any liability for failure to locate a former Brobeck client or for
21 any action taken with respect to the turnover of the Digital Records from the original
22 Brobeck servers to GGO, except for willful and intentional acts taken in violation of the
23 order.
- 24 • Directs that this abandonment will occur as soon as practicable, expected to be on or
25 before July 31, 2006, and will include all Digital Records except those expressly
26 excluded pursuant to the Closed Archive Methodology, attached to the order.

- 1 • Approves the Closed Archive Methodology as the procedure pursuant to which
- 2 abandonment of the Digital Records and governance of the Closed Archive shall
- 3 proceed.
- 4 • Approves the Access Agreement.
- 5 • Authorizes the Trustee to send, at the University of Maryland’s expense, the notice of
- 6 abandonment of the Digital Records to former Brobeck clients, which includes the
- 7 NDIIPP’s Option Sheet with regard to that former client’s file.

8 25. The Trustee respectfully submits that the proposed terms are reasonable. If entered, the
9 order will permit the Trustee to alleviate an administrative burden while still providing him with the
10 flexibility to access the documents in the future.

11 **F. This Court Should Grant the Trustee the Authority to Enter into the Access**
12 **Agreement.**

13 26. The Trustee also seeks, pursuant to sections 363(b) and 105 of the Bankruptcy Code,
14 authority to enter into the Access Agreement. Section 363 provides in pertinent part that “[t]he
15 trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of
16 business, property of the estate” 11 U.S.C. § 363(b). Such use, sale or lease of property of the estate
17 pursuant to section 363(b) is appropriate when a “sound business purpose” justifies the proposed
18 action. *See, e.g., In re Delaware & Hudson R.R. Co.*, 124 B.R. 169, 176 (D. Del. 1991) (noting that
19 the Third Circuit has adopted the “sound business purpose” test to evaluate motions brought
20 pursuant to section 363(b)); *see also Stephen Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir.
21 1986) (adopting the “sound business purpose” standard for sales proposed pursuant to section
22 363(b)); *Titusville Country Club v. Pennbank (In re Titusville Country Club)*, 128 B.R. 396, 399
23 (Bankr. W.D. Pa. 1991) (same).

24 27. In this case, the Trustee proposes to enter into the Access Agreement so that he may
25 have continued access to the Digital Records. Under the terms of the Access Agreement, GGO will
26 do the following: (i) acquire the Digital Records, (ii) check for data integrity, (iii) index, search and
27 filter the data in a form that facilitates review, production and issue coding by attorneys and
28 paralegals. After GGO has acquired the Digital Records, GGO will charge fees for simple

1 document retrieval and production will be billed at \$200/hour for requests related to the retrieval of
2 documents. GGO has informed the Trustee that the average standard document request will take
3 between two to three hours, for an average of \$500, and will be delivered on a DVD to the Trustee's
4 counsel via Federal Express. Non-standard document requests could take longer and GGO will
5 provide an estimate for any request that exceeds \$500.

6 28. The Access Agreement will allow the Trustee to protect the digital integrity of the
7 Digital Records, while at the same time ensuring future access to those files, and at a substantially
8 reduced cost. For these reasons, the Trustee believes that approval of the Access Agreement will
9 accomplish a "sound business purpose."

10 **V. NO PRIOR REQUEST**

11 29. No previous request for the relief sought herein has been made to this or any other
12 Court.

13 **VI. CONCLUSION**

14 30. WHEREFORE, for the foregoing reasons, the Trustee respectfully requests that the
15 Court enter an order, substantially in the form attached hereto as Exhibit A, granting the relief
16 requested herein and such other and further relief as the Court deems just and proper.

17
18 DATED: June 28, 2006

HENNIGAN, BENNETT & DORMAN LLP
Bennett Murphy
James O. Johnston
John L. Jones II

19
20
21
22 By: /s/ Bennett J. Murphy
Bennett J. Murphy

23
24 Counsel for Ronald F. Greenspan,
25 Chapter 7 Trustee for Brobeck, Phleger &
26 Harrison LLP
27
28

EXHIBIT A

1 HENNIGAN, BENNETT & DORMAN LLP
Bennett Murphy (SBN 174536)
2 James O. Johnston (SBN 167330)
John L. Jones II (SBN 225411)
3 865 South Figueroa Street, Suite 2900
4 Los Angeles, California 90017
Telephone: (213) 694-1200
5 Fax: (213) 694-1234

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

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

12 In re) Case No.03-32715-DM7 Chapter 7
)
13 BROBECK, PHLEGER & HARRISON LLP,) CHAPTER 7
)
14 Debtor.) **ORDER GRANTING MOTION FOR**
) **ORDER (A) AUTHORIZING THE**
15) **ABANDONMENT OF BROBECK'S**
) **DIGITAL RECORDS; (B) AUTHORIZING**
16) **THE TRUSTEE TO TRANSMIT NOTICE**
) **OF ABANDONMENT TO FORMER**
17) **CLIENTS OF BROBECK; (C)**
) **AUTHORIZING THE TRUSTEE TO**
18) **ENTER INTO ELECTRONIC DATA**
) **ACCESS AGREEMENT WITH**
19) **GALLIVAN, GALLIVAN & O'MELIA,**
20) **LLC; AND (D) GRANTING RELATED**
) **RELIEF**
)
21)
)

22) Hearing Date
)

23) Date: July 18, 2006
) Time: 1:30 p.m.
) Dept.: Courtroom 22
) 235 Pine Street, 22nd Floor
) San Francisco, CA 94104
25) Judge: Hon. Dennis Montali
)
26)

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”)¹, 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 their in the Closed Archive; and (3) that they may consent to
18 inclusion in the traditional archive by waiving their attorney-client confidentiality and thus making
19 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 ¹ 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 set forth in the Motion.

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 B

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 C

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.

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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.

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

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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.

EXHIBIT D

NATIONAL
ASSOCIATION OF
BANKRUPTCY
TRUSTEES

SPRING SEMINAR

APRIL 8 & 9, 2005
Don CeSar Beach Resort
St. Petersburg, FL

HEALTH CARE PROVIDERS AND BANKRUPTCY

MEDICAL RECORDS ISSUES: Whose Are They and Who Pays?

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I. Whose Medical Records Are They?

A. Introduction

When discussing the “ownership” of medical records and bankruptcy, we are no longer discussing the “zone of insolvency.” A Chapter 7 (liquidation) or Chapter 11 (reorganization) bankruptcy petition¹ must be filed thereby submitting the health care provider to the jurisdiction of the United States Bankruptcy Court (the “Court”). 28 U.S.C. 959(b) requires a trustee, receiver or manager (including a debtor in possession) to manage and operate the property in his possession according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. According to *Collier on Bankruptcy* it is clear that “a debtor in possession or an operating trustee must comply with all applicable state laws that regulate any aspect of “carrying on”² a business.”³ Although, on its face, the statutory language of section 959(b) is plain in that it only applies to state, and not federal nonbankruptcy law, any operating trustee⁴ or debtor in possession would be well

¹See pp. 1-2 of Duties of Trustees During Zone of Insolvency.

²Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in **carrying on** business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury. (emphasis added) 28 U.S.C. § 959(a).

³1 *Collier on Bankruptcy*, ch 10 (Matthew Bender 15th ed. rev.), p. 10-5.

⁴Whether a Chapter 11 trustee or Chapter 7 trustee operating a business pursuant to Court order.

advised to follow nonbankruptcy federal law just as the health care provider was required to do prior to filing. This is particularly true when it is understood that complex federal legislation regarding medical records such as the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") preempts state laws that conflict with it except in certain limited circumstances.

B. Operating Businesses

One of the most relevant provisions of HIPAA is the one which grants patients the right to access protected health information ("PHI"). PHI is individually identifiable information that is either transmitted or maintained, in any form or medium, (electronic or otherwise) relating to: the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual or the past, present, or future payment for the provision of health care to an individual.⁵ HIPAA also grants patients the right to obtain an accounting of non-routine uses and disclosures of PHI.⁶ Of course, Michigan law requires a health facility or agency to keep and maintain a record for each patient including a full and complete record of tests and examinations performed, observations made, treatments provided, and in the case of a hospital, the purpose of hospitalization.⁷ Moreover, "Record retention requirements are often contained in contracts, policies and procedures of third-party payers and other entities with whom a health care provider transacts business."^{8,9} Additionally it may be often misunderstood by physicians, health care personnel and their patients, but it is well established under Michigan law,¹⁰ the law in most other states¹¹ and under Federal law that the ownership of the paper (or other medium on which the records are recorded) must be distinguished from the information itself. "The document containing the information belongs to the physician. The patient, however, is entitled to have the information made available

⁵45 CFR § 164.501

⁶45 CFR § 164.522-§ 164.528

⁷MCLA § 333.20175(1)

⁸The Council of the Health Care Law Section of the State Bar of Michigan, Current and Immediate Past Chairs, James B. Falahee, Jr., Stephen P. Clifton, Health Care Records Retention Manual, p. 3, 2002.

⁹The numerous federal and state legal requirements and accreditation/professional association guidelines for the retention of medical records may be found in the Health Care Records Retention Manual cited in footnote 8 and subsequent editions of same. Additionally, the Michigan State Medical Society is currently editing an updated version of Medical Records Information which will be available soon at no costs to its members by contacting the Society at (517) 336-5769.

¹⁰Thomas C. Payne, M.D., "Vital Signs," Michigan Medicine, p. 27, March, 1999.

¹¹Lois M. Collins, "Rx for privacy," Deseret News, September 2, 2001.

for inspection and copying.¹² Thus despite the fact that it appears that a health facility¹³ or agency¹⁴ or a licensed health care professional¹⁵ who created the PHI owns the medical records, it may be irrelevant in the case of an operating entity because under HIPAA and Michigan law, the patient (or anyone he or she may authorize in writing) is entitled to access the information and because an operating business, which has been provided relief from its prepetition debt, is both financially able to and accustomed to complying with state and federal regulations regarding medical records.

C. Liquidating Businesses

However ownership of PHI or medical records may be very relevant in the context of a Chapter 7 liquidation proceeding which typically has no funds unencumbered by a bank or other secured lender.

Collier on Bankruptcy states:

“By negative implication, a *liquidating* trustee appointed in a Chapter 7 case should be exempt from having to comply with state law that regulates on-going business activities because the business has been shut down, and the trustee is merely selling the assets of the estate.”^{16,17,18}

¹²Payne, *supra*, p. 27

¹³“Health facility” means a licensed hospital (MCLA §§ 333.21501 *et. seq.*) a psychiatric hospital, psychiatric unit, or partial hospitalization psychiatric program licensed under the Mental Health Code (MCLA §§ 330.1001-330.2106) a licensed nursing home or hospital long-term care unit (MCLA § 333.20106(6)) a licensed freestanding surgical outpatient facility or a licensed health maintenance organization (MCLA § 333.22205 subd (1)).

¹⁴“Licensed health facility or agency” means a health facility or agency licensed under Article 17 of the Public Health Code, Act No. 368 of the Public Acts of 1978, §§ 333.20101 - 333.22260 (MCLA § 600.538a(1)(a)).

¹⁵“Licensed health care professional” means an individual licensed or registered under article 15 of the Public Health Code, Act No. 368 of the Public Acts of 1978, §§ 333.16101 - 333.18838 and engaged in the practice of his or her health profession in a sole proprietorship, partnership, professional corporation, or other business entity. However, licensed health care professional does not include a sanitarian or a veterinarian. (MCLA § 600.538a(1)(b)).

¹⁶*Collier on Bankruptcy*, *op. cit.*, p. 10-5

¹⁷*Missouri Dep't of Natural Resources v. Valley Steel Prods. Co.*, 157 B.R. 442 (Bankr. E.D. Mo. 1993); *In re Corona Plastics, Inc.* 99 B.R. 231 (Bankr. D.N.J. 1989); *In re Borne Chem. Co.*, 54 B.R. 126 (Bankr. D.N.J. 1984); *but cf. Lancaster v. Tennessee Dept. Of Health & Env't (In re Wall Tube & Metal Prods. Co.)*, 831 F.2d 118, 17 C.B.C.2d 736 (6th Cir. 1987); *see also In re Stevens*, 16 C.B.C.2d 253, 68 B.R. 774 (D. Me. 1987).

¹⁸Collier also notes that it is unclear whether a reorganized debtor or liquidating trustee under a liquidating plan of reorganization must comply with state laws that regulate continuing businesses.

Moreover PHI or medical records are clearly within the definition of property of the estate pursuant to United States Bankruptcy Code (the "Code") section 541, which states:

The commencement of a case under section 301, 302 or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section,¹⁹ all legal or equitable interests of the debtor in property as of the commencement of the case.²⁰

II. Who Pays?

A. Liquidating Businesses

However, the mere fact that statutes appear to exempt Chapter 7 trustees and possibly others who are administering estates being liquidated may mean very little to a bankruptcy judge who believes that a patient and/or the State has a compelling interest in assuring the medical records are preserved. and who is armed with the Code section 105, which essentially states that the Court may issue any order, process or judgment appropriate to carry out other provisions of the Code.²¹

Examples of this analysis may be found both in Texas and Michigan. In November, 2001 the Texas Attorney General and the Texas Department of Health reached an agreement with the Chapter 7 bankruptcy trustee of Tri City Health Centre of Dallas regarding the disposition of an estimated 400,000 patient medical records which the trustee wished to abandon as too burdensome.²² The Court entered a stipulated order requiring all such records to be transferred to EMCC Inc., an entity collecting the hospital's accounts receivable (presumably for a secured creditor). EMCC agreed to store the records for a period of 12 months at its own expense, after which the Court would again review the arguments of the parties regarding the ultimate disposition of the records.²³ The trustee argued that without any funds remaining in the bankruptcy estate, he was financially unable to store the records, and thus sought permission to abandon them. The order further ensured that if the Court no longer required the records to be maintained, they must be thoroughly destroyed to protect the patients' privacy.

¹⁹Not applicable.

²⁰11 U.S.C. § 541.

²¹22 U.S.C. § 105.

²²(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate ...

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate. 11 U.S.C. § 554.

²³To date, we have been unable to determine the ultimate disposition of the records.

But privacy issues are only some of the concerns of patients. In a similar case in Michigan,²⁴ the authors' firm represented a Chapter 7 trustee in a case in which the debtor operated four radiology clinics which generated approximately 200,000 individual patient records and films (mammograms). It was alleged by some of patients and the Michigan State Attorney General and that these records could never be destroyed because they were vital to the patients who needed the records to compare to current records to assist in the diagnosis of breast cancer and other tumors. The Attorney General alleged that there are provisions in both state and federal law which specifically pertain to retention of mammograms and their availability to patients. Under state law, the Public Health Code requires that radiation machines used for mammography be registered and meet certain criteria.²⁵ They stated that under administrative rules governing mammography: "Mammograms shall be retained for not less than 7 years or shall be given to another person for placement in the patient's medical record as directed by the patient or the primary care provider."²⁶ They stated further that Congress has enacted laws requiring certification by the Department of Health and Human Services of facilities which provide mammography.²⁷ Criteria for certification require that mammograms and associated records be maintained:

- (i) For a period of not less than 5 years, or not less than 10 years, if no additional mammograms of the patient are performed at the facility, or longer if mandated by State or local law; or
- (ii) Until requested by the patient to permanently transfer the records to a medical institution, or to a physician of the patient, or to the patient herself, and the records are so transferred.²⁸

However, the trustee had no funds for the storage, maintenance, administration (including turnover to patients or their physician) or even destruction of the records. He further alleged that he did not have sufficient medical expertise to ensure that patients received complete or accurate medical records and films, nor were there unencumbered funds in the bankruptcy estate to employ health care professionals or personnel to perform these services. Finally, the trustee alleged that the Debtor's former principals (the physicians) had the responsibility and the requisite expertise to resolve these issues and that an order of abandonment would prevent them from shirking their duties and relying on a trustee incapable of performing them.

²⁴*In re LGW Management Associates, Inc., et al.* U.S. Bankruptcy Court Eastern District of Michigan Southern Division Chapter 7 Case No. 96-55416-WS.

²⁵MCLA § 333.13523.

²⁶1993 AACRS R 325.5656.

²⁷42 UCS § 263b.

²⁸21 CFR 900.12(e).

Both the Trustee and the Court should be credited with devising creative solutions to these apparently irresolvable issues. The Trustee recruited an Army Reserve unit familiar with medical records to ship the records at no cost to the estate to a hospital which volunteered to store, maintain and administer the medical records also at no cost to the estate. The Court entered two orders (Exhibits A and B) the first of which essentially permitted the trustee to charge a reasonable fee of \$15.00 per patient²⁹ for the turnover of their medical records on a weekly basis, while a more permanent solution could be found and provided the trustee immunity from liability except for willful and intentional acts. The second order continued the first order until the medical records could be turned over to the hospital and then deemed the records abandoned. Yet the order of abandonment raises significant, unanswered questions as to whether or not the physicians' responsibilities with respect to the medical records would be continued, or at a minimum revived, by the entry of the order of abandonment.³⁰

B. Proposed Congressional Solutions

The United States Senate recognized the issues described herein and attempted a solution in proposed legislation which has yet to be enacted into law but might still be in the future. The proposal (Exhibit C), which passed both the House and the Senate after a conference report was issued, was pocket vetoed by President Clinton in December, 2000. The bill (which will not suffer a presidential veto if passed again during the present administration) essentially provided that if a health care business commenced a bankruptcy case and the trustee did not have sufficient funds to pay for the storage of patient records as required under applicable Federal and State law, that the trustee would publish a notice advising that he or she would destroy the records one year later.

The trustee would also be required under the proposed law to attempt to notify each patient (200,000 to 400,000 patients in the cases cited above) and their insurance carrier by mailing a notice to the last known address of the patient. If the patient records were not claimed, the trustee would be required to determine the appropriate Federal agencies and contact them by certified mail to request them to deposit the patient records with that agency.³¹ Finally, the trustee would be required to destroy the records by—

- “(A) if the records are written, shredding or burning the records; or
- (B) if the records are magnetic, optical or other electronic records, by otherwise destroying those records so that those records cannot be retrieved.”³²

²⁹State law requires medical record copying charges to be “reasonable.” The Michigan State Medical Society recommends up to a 20 cent per page charge for copies or taxes. Physicians may charge other actual costs of copying x-rays, EEGs, EKGs and imaging records. Postage may be updated to the charge as well. *Payne, op. cit.*, pp. 26-27.

³⁰The orders, neither of which was appealed, specifically required that they be served on the physicians, their counsel and malpractice carrier and other interested parties.

³¹No Federal or State agency would agree to accept deposit of the patient records in *LGW Management* cited above despite being notified, and in some instances, participating in the abandonment hearings.

³²S. 220 § 351(3). Disposal of patient records.

The authors testified regarding the proposed legislation before the Judiciary Subcommittee on Administrative Oversight and the Court³³ and met with legislative staffers of members of the judiciary subcommittee of both the House and the Senate.³⁴ The essence of the testimony and the discussions with the staffers was the inability of a trustee in a "no asset" case (a case without unencumbered funds) to perform the requirements of the proposed law. An Analysis of Costs to Comply With Section 351 Disposal of Patient Records (Exhibit D) was prepared by the authors and provided to the staffers. The conclusion reached by the analysis was that it would cost over \$3,500.00 to comply in small cases of 500 patients or less and almost \$36,000.00 to comply in mid-size cases of 10,000 patients, without even considering the costs of disposal of the records. The authors were reluctant to estimate the potential costs for larger cases, such as the two cases cited above involving 200,000 to 400,000 patient records, which conceivably could cost as much as 20 to 40 times the \$36,000 estimate for a mid-size case. It was the authors' position that the proposed law should be substantially modified in order to avoid passing legislation which was impossible to perform.³⁵ Even if the estimates of costs were off by a factor of 10, there are no funds in no asset cases to provide the required services.

C. Possible Solutions

A possible solution that would be feasible to perform would be to require creditors who enter into financial transactions secured by the debtor's assets (including accounts receivable) with health care facilities or professionals, to consider medical record responsibilities from the commencement of their relationship. If it is understood from the beginning that a small percentage of health care providers will file Chapter 7 bankruptcies and that the costs of preserving and/or destroying medical records should be factored into the initial transaction, these costs will be paid by all debtors prepetition, when funds will be available. In effect a fund will be established and administered by secured creditors, who will be required to disburse the costs to preserve and/or destroy medical records as a legitimate surcharge expense against the collateral in each case. The alternative will be to hold responsible only the licensed health care professionals who have provided medical services to patients of the bankrupt health care providers.³⁶ Consequently these issues are of paramount importance to the entire medical community who may wish to support appropriate lobbying efforts to ensure that medical records are properly handled and patients fully protected in every bankruptcy liquidation.

³³Testimony of Deborah L. Fish, Esq. regarding S.1914, The Business Bankruptcy Reform Act: Preserving Quality Patient Care In Health Care Bankruptcies, June 1, 1998; (an earlier version of the Senate bill).

³⁴David W. Allard, February 21, 22, 2001, Washington, D.C.

³⁵However, few changes were made to the entire bill due to political considerations.

³⁶Indeed, it is arguable that the filing of a Chapter 7 bankruptcy only adds an additional responsible party (albeit one who is incapable of performance) but does not relieve the original responsible parties from their obligations under various State and Federal laws.

Exhibit A
Order Regarding Partial Settlement of Trustee's Motion to Abandon
Medical Records and Adjourning Hearing

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

LGW MANAGEMENT ASSOCIATES, INC.	Chapter 7
and	Case No. 96-55416
	Hon. Walter Shaparo
NORTH OAKLAND RADIOLOGY, P.C.	Case No. 96-55425
and	
NORTH OAKLAND RADIOLOGY GROUP, P.C.	Case No. 96-55433
and	
NORTH OAKLAND RADIOLOGY OF SOUTHFIELD	Case No. 96-55435
and	
NORTH OAKLAND RADIOLOGY WATERFORD, P.C.	Case No. 96-55437

ORDER REGARDING PARTIAL SETTLEMENT OF TRUSTEE'S
MOTION TO ABANDON MEDICAL RECORDS AND ADJOURNING HEARING

The Trustee having filed his Motion to Abandon Medical Records (the "Motion"), objections having been filed and made at the hearing by various parties; the parties having reached a partial resolution following argument on the Motion and that resolution having been expressed on the record at the hearing; and the Court having expressed approval of the terms at the hearing; and the Court being duly advised;

IT IS ORDERED that:

1. The Trustee will release records to patients or their doctors within 7 days of receipt of an appropriate executed

release, authorization from the patient, and a reasonable fee of \$15 per patient. It is anticipated that records in the Trustee's possession will be made available once per week until further order of the Court.

2. The Trustee, the estate, and any entity or person employed by the Trustee on a voluntary basis or otherwise shall not be liable for failure to locate patient records or for any action taken with respect to the turnover of patient records except for willful and intentional acts taken in violation of the Court's order.

3. Patient records shall not be destroyed, abandoned (as abandonment is defined in 11 U.S.C. § 554), or disposed of (except, of course, in the manner described in paragraph 1 above) by the Trustee or anyone who has notice of the Court's order, until further order of the Court.

4. The hearing on the Trustee's motion for abandonment shall be adjourned to July 8, 1999, at which time a more permanent solution to the problem shall be considered by the Court.

5. This Order shall be served on the parties who appeared on the record at the hearing, the landlords at the clinic locations formerly operated by Debtors, Dr. Wayburn and his counsel, MICOA (Dr. Wayburn's malpractice carrier), Dr. Fred Lucas c/o Lucas Medical Associates, Inc., and Anthony DeFao.

A TRUE COPY

CLERK, U.S. BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN

BY: _____

John H. Munn
Deputy Clerk

DATE: JUN 21 1999

WALTER SHAPERO

U.S. BANKRUPTCY COURT JUDGE

APPROVED FOR IMMEDIATE ENTRY:

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Dated: **NOV 21 1999**

32/794/pld/Order.state

Exhibit B
Order Regarding Settlement of Trustee's Motion to Abandon Medical
Records and Adjourning Hearing

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

1999 JUL -8 A 11: 20

LGW MANAGEMENT ASSOCIATES, INC.	CLERK U.S. BANKRUPTCY COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION	Chapter 7 Case No. <u>96-55416</u> Hon. Walter Shapiro
and		
NORTH OAKLAND RADIOLOGY, P.C.		Case No. 96-55425
and		
NORTH OAKLAND RADIOLOGY GROUP, P.C.		Case No. 96-55433
and		
NORTH OAKLAND RADIOLOGY OF SOUTHFIELD		Case No. 96-55435
and		
NORTH OAKLAND RADIOLOGY WATERFORD, P.C.		Case No. 96-55437

ORDER REGARDING SETTLEMENT OF TRUSTEE'S
MOTION TO ABANDON MEDICAL RECORDS AND ADJOURNING HEARING

The Trustee having filed his Motion to Abandon Medical Records (the "Motion"), objections having been filed and made at the hearing by various parties; the parties having reached a partial resolution following argument on the Motion and that resolution having been expressed on the record at the hearing and in an Order Regarding Partial Settlement of Trustee's Motion to Abandon Medical Records and Adjourning Hearing entered June 21, 1999 (the "June 21 Order"); the Trustee having made significant efforts to organize the records and distribute them to patients per the June 21 Order, the parties having now reached a complete settlement of the Motion; and the Court being duly advised;

IT IS ORDERED that:

1. The Motion is granted in full, subject only to the provisions set forth below.

2. The Trustee will continue to release records to patients or their doctors within 7 days of receipt of an appropriate executed release, authorization from the patient, and a reasonable fee of \$15 per patient. It is anticipated that records in the Trustee's possession will be made available once per week until transfer of the records to Huron Valley Sinai Hospital ("HVSH") as described below.

3. The Trustee, the estate, and any entity or person employed by the Trustee on a voluntary basis or otherwise (and including the landlord at the Novi Clinic as defined below) shall not be liable for failure to locate patient records or for any action taken with respect to the turnover of patient records except for willful and intentional acts taken in violation of the Court's Orders (i.e., this Order and the June 21 Order).

4. Patient records shall not be destroyed, abandoned (as abandonment is defined in 11 U.S.C. § 554), or disposed of (except, of course, in the manner described in paragraph ²~~1~~ above) by the Trustee or anyone who has notice of the Court's order, until turnover of the records to HVSH. This turnover will occur on or before July 25, 1999 and will include all records formerly located at the Debtors' clinic locations as well as those records located at the Debtors' affiliate North Oakland Radiology-Nov, P.C. (the "Novi Clinic"), including all records formerly belonging to the

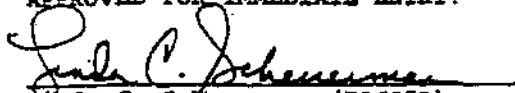
Novi Clinic, per the request of Dr. Wayburn, the physician formerly in charge of and responsible for the records.

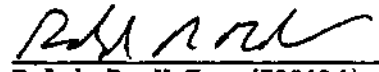
5. Once records are turned over to RVSE, the records turned over shall be deemed abandoned by the Debtors' estates.

6. This Order shall be served on the parties who appeared on the record at the hearing, the landlords at the clinic locations formerly operated by Debtors, Dr. Wayburn and his counsel, MICOA (Dr. Wayburn's malpractice carrier), Dr. Fred Lucas c/o Lucas Medical Associates, Inc., and Anthony DeFeo.



U.S. BANKRUPTCY COURT JUDGE

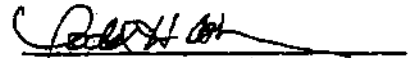
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JUL 08 1999

Dated: _____

32/796/pld/Order, abandon

Exhibit C
Sec. 1102. Disposal of Patient Records

1 SEC. 1102. DISPOSAL OF PATIENT RECORDS.

2 (a) IN GENERAL.—Subchapter III of chapter 3 of
3 title 11, United States Code, is amended by adding at the
4 end the following:

5 **“§ 351. Disposal of patient records**

6 “If a health care business commences a case under
7 chapter 7, 9, or 11, and the trustee does not have a suffi-
8 cient amount of funds to pay for the storage of patient
9 records in the manner required under applicable Federal
10 or State law, the following requirements shall apply:

11 “(1) The trustee shall—

12 “(A) promptly publish notice, in 1 or more
13 appropriate newspapers, that if patient records
14 are not claimed by the patient or an insurance
15 provider (if applicable law permits the insur-
16 ance provider to make that claim) by the date
17 that is 365 days after the date of that notifica-
18 tion, the trustee will destroy the patient
19 records; and

20 “(B) during the first 180 days of the 365-
21 day period described in subparagraph (A),
22 promptly attempt to notify directly each patient
23 that is the subject of the patient records and
24 appropriate insurance carrier concerning the
25 patient records by mailing to the last known ad-
26 dress of that patient, or a family member or

1 contact person for that patient, and to the ap-
2 propriate insurance carrier an appropriate no-
3 tice regarding the claiming or disposing of pa-
4 tient records.

5 "(2) If, after providing the notification under
6 paragraph (1), patient records are not claimed dur-
7 ing the 365-day period described under that para-
8 graph, the trustee shall mail, by certified mail, at
9 the end of such 365-day period a written request to
10 each appropriate Federal agency to request permis-
11 sion from that agency to deposit the patient records
12 with that agency, except that no Federal agency is
13 required to accept patient records under this para-
14 graph.

15 "(3) If, following the 365-day period described
16 in paragraph (2) and after providing the notification
17 under paragraph (1), patient records are not claimed
18 by a patient or insurance provider, or request is not
19 granted by a Federal agency to deposit such records
20 with that agency, the trustee shall destroy those
21 records by—

22 "(A) if the records are written, shredding
23 or burning the records; or

24 "(B) if the records are magnetic, optical,
25 or other electronic records, by otherwise de-

1 stroying those records so that those records
2 cannot be retrieved.”.

3 (b) CLERICAL AMENDMENT.—The table of sections
4 for chapter 3 of title 11, United States Code, is amended
5 by inserting after the item relating to section 350 the fol-
6 lowing:

“351. Disposal of patient records.”.

7 **SEC. 1108. ADMINISTRATIVE EXPENSE CLAIM FOR COSTS**
8 **OF CLOSING A HEALTH CARE BUSINESS AND**
9 **OTHER ADMINISTRATIVE EXPENSES.**

10 Section 503(b) of title 11, United States Code, as
11 amended by this Act, is amended by adding at the end
12 the following:

13 “(8) the actual, necessary costs and expenses of
14 closing a health care business incurred by a trustee
15 or by a Federal agency (as that term is defined in
16 section 551(1) of title 5) or a department or agency
17 of a State or political subdivision thereof, including
18 any cost or expense incurred—

19 “(A) in disposing of patient records in ac-
20 cordance with section 351; or

21 “(B) in connection with transferring pa-
22 tients from the health care business that is in
23 the process of being closed to another health
24 care business;