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Advising Bankruptcy Attorneys for *Amicus curiae*
UNIVERSITY OF MARYLAND

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BROBECK, PHLEGER & HARRISON LLP,
Debtor,

Case No. 03-32715-DM7

Chapter Number: 7

**DECLARATION OF SUSAN E. DAVIS
Ph.D. IN SUPPORT OF TRUSTEE'S
MOTION REGARDING TURNOVER
AND ABANDONMENT OF DIGITAL
RECORDS**

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

I, SUSAN E. DAVIS, declare as follows:

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

1. I am an assistant professor in the College of Information Studies at the University of Maryland. My research focuses on archive administration, archival education, access and organization and leadership in professions.

2. I have been a member of the Committee on Ethics and Professional Conduct of The Society of American Archivists since 2003. As a member of the Committee on Ethics and

1 Professional Conduct, I helped draft The Society of American Archivists' Code of Ethics
2 ("Archivists' Code of Ethics"). A true and correct copy of the Archivists' Code of Ethics is
3 attached hereto as **Exhibit A**.

4 3. I am involved in the Library of Congress' National Digital Information
5 Infrastructure Preservation Program ("NDIIPP") as a member of the Advisory Council to
6 Professor David Kirsch of the University of Maryland ("Dr. Kirsch"). Our primary aim is to
7 advise Dr. Kirsch on the development of a Closed Archive Methodology ("Methodology")
8 establishing a general framework for the preservation of the digital records of the former law firm
9 of Brobeck, Phleger & Harrison LLP ("Brobeck Digital Records"). In particular, we have
10 focused on the complex issues arising from the ethical duty of confidentiality and the attorney-
11 client privilege that attach to these records.

12 4. I have reviewed the Closed Archive Methodology ("Methodology"), a copy of
13 which is attached as Exhibit A to the Declaration of David Kirsch, Ph.D., filed concurrently
14 herewith. The Methodology establishes a general framework for collecting the Brobeck Digital
15 Records that protects the interests of former clients while still preserving the historically valuable
16 client records. Furthermore, the Methodology solves these problems in a way that is consistent
17 with the Archivists' Code of Ethics.

18 5. Phase One establishes a closed archive in which the Brobeck Digital Records will
19 be preserved, but remain inaccessible until certain legal requirements are satisfied. The concept
20 of a closed archive is consistent with Article VI of the Archivists' Code of Ethics, which states
21 that "[a]rchivists may place restrictions on access for the protection of privacy or confidentiality
22 of information in the records."

23 6. Phase Two allows the closed archive to transfer records to parallel collections at
24 traditional archival institutions, but only after obtaining a waiver of attorney-client
25 confidentiality, or noting a change in applicable law. Even though attorney-client confidentiality
26 will no longer apply in either case, other considerations enumerated in the Methodology may still
27 prevent the traditional archives from granting access. These constraints are consistent with
28

1 Article IX of the Archivists’ Code of Ethics, which requires that “[a]rchivists must uphold all
2 federal, state, and local laws.”

3 7. Phase Three allows approved researchers to construct aggregate, anonymous
4 datasets based on the Brobeck Digital Records. Other sensitive records are also used in this
5 fashion. For instance, the U.S. Census operates the Research Data Center Program to allow
6 scholars access to confidential, personal census data, on the condition that they remove only
7 aggregate, anonymous statistics. Phase Three will require the same safeguards and procedures, as
8 enumerated in the Methodology. Accordingly, Phase Three’s aggregate research complies with
9 the requirement to “protect the privacy rights of donors and individuals or groups who are the
10 subject of records,” as described in Article VII of the Archivists’ Code of Ethics.

11 8. I am confident that the proposed Methodology will meet with approval in the
12 community of professional archivists. Archivists are accustomed to dealing with sensitive
13 documents that may require limited access and use, but are less accustomed to dealing with legal
14 records. By clearly separating the management of the legal permissions from the regular issues
15 that archivists handle on a daily basis, the Methodology will allow archivists to focus on the tasks
16 which they do best, while leaving management of attorney-client confidentiality to the specially
17 designated closed archive. At a meeting of the Mid-Atlantic Regional Archives Conference
18 (“MARAC”) that I attended in Dover, Delaware in October 2005, Dr. Kirsch spoke to a packed
19 house of practicing archivists about NDIIPP and the proposed Methodology. In their comments,
20 several archivists enthusiastically endorsed the Methodology’s proposed division of labor
21 between the legal archive’s oversight of confidentiality and the traditional research archive’s
22 handling of use-related issues. These archivists also expressed their excitement about NDIIPP
23 and the Brobeck Digital Records and looked forward to applying the Methodology in practice.

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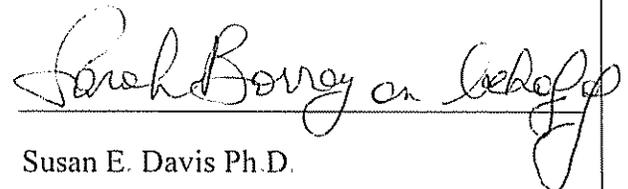
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I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 28th day of June 2006 at Shelter Island, New York.


Susan E. Davis Ph.D.

Ropers Majeski Kohn & Bentley
A Professional Corporation
Redwood City

Borrey, Sarah H.

From: Susan E Davis [sdavis11@umd.edu]
Sent: Wednesday, June 28, 2006 7:27 AM
To: Borrey, Sarah H
Subject: Re: UMD - Dec S. Davis ISO Trustee's Motion to Abandon

Dear Ms. Borrey,

I have read the declaration, and it is consistent with my understanding of the circumstances surrounding the Brobeck Digital Records Project. I agree with the content of the declaration and have no problem with any specific facts contained therein.

I will mail to you my signed copy of the signature page.

Cordially,
Susan E. Davis

Borrey, Sarah H. wrote:

>
> Dr. Davis,
>
> Here is your declaration again. Call me anytime if you have any
> questions.
>
> Sarah H. Borrey
>
> Ropers Majeski Kohn & Bentley
> 1001 Marshall Street
> Redwood City, California 94063
> Direct (650) 780-1639
> Cell (415) 531-4710
> Fax (650) 780-1701
> sborrey@rmkb.com
>
> This communication constitutes an electronic communication within the
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EXHIBIT A

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.