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6 Attorneys for Secured Creditor,
7 Bank of America, N.A.

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

12 _____)
13 In re:) Case No. 08-32514
14 HELLER EHRMAN LLP,) Chapter 11
15 Debtor.) **LIMITED OBJECTION TO THE**
16) **DEBTOR'S MOTION FOR**
17) **APPROVAL OF FILE DISPOSITION**
18) **PROCEDURES**
19)
20) DATE: April 24, 2009
21) TIME: 10:00 a.m.
22) PLACE: U.S. Bankruptcy Court
23) 235 Pine Street, 22nd Floor,
24) San Francisco, CA
25) JUDGE: The Honorable Dennis Montali
26)
27)
28)

22 I. Introduction.

23 Secured Creditor, Bank of America N.A. (the "Bank") hereby files this limited
24 objection to the Motion for Approval of File Disposition Procedures (the "Motion") filed
25 April 3, 2009 by the above-referenced debtor and debtor-in-possession, Heller Ehrman
26 LLP, (the "Debtor"), in the above captioned case. The Debtor has not sufficiently
27 described in the proposed File Disposition Procedures identified in the Motion how it will
28 preserve documents within its client files that are relevant to the disposition of the Debtor's

1 estate or potential claims brought by the Official Committee of Unsecured Creditors (the
2 “Committee”). The Bank recognizes the propriety of a court approved procedure for
3 disposition of the voluminous client files in the Debtor’s possession (the “Retained Client
4 Files”), but the Bank hereby objects to the Motion insofar as it would lead to either the
5 further destruction of documents relevant to the disposition of the estate or the inability of
6 the Debtor or Committee to produce any documents to Bank that are relevant to the
7 Probable Litigation (as defined below). Based on the Motion and its supporting papers, the
8 Bank has the following principal objections:

9 1. Any order granting the Motion and approving the proposed File Disposition
10 Procedures should require the Debtor to preserve documents among the Retained Client
11 Files that evidence the manner in which the Debtor conducted business with its clients,
12 vendors, and related entities (the “Relevant Firm Files”), including, by way of example,
13 billing records to the clients, engagement letters, conflict waiver letters, payment records to
14 vendors or third parties, and other documents related to the administration of the Debtor’s
15 client matters. It is unclear from the Debtor’s vague description in its Motion of the files
16 and records the Debtor seeks to transfer (and potentially destroy) the extent, if at all, that
17 the Debtor seeks to destroy and dispose of documents potentially related to the threatened
18 litigation against the Bank.

19 2. Any order granting the Motion should require that all sources of electronic data
20 be preserved and accessible (including retaining the use of licensed software needed to
21 access and use the data) until such time that (i) it is determined that the Debtor’s hard
22 drives, servers, and other electronic data contain no documents relevant to the disposition of
23 the Debtor’s estate, or (ii) the threatened litigation against the Bank has been resolved by
24 final order.

25 3. Any order granting the Motion should require the Debtor and the Committee to
26 meet and confer with the Bank to ensure that all documents potentially relevant to the
27 threatened litigation against the Bank are preserved before any of the Retained Client Files
28 are released or destroyed.

1 II. ARGUMENT.

2 A. The Debtor has a duty to preserve documents relevant to probable litigation.

3 The Debtor and Committee have repeatedly indicated to this Court their intention to
4 prosecute a potential preference action against the Bank (the “Probable Litigation”). *See*
5 MPA in Supp. of Mot. For Order Authorizing Creditors’ Committee to Pursue Certain
6 Estate Causes of Action, at 1:26-2:04, 3:15-04:03 (“Motion to Pursue Causes of Action”)
7 (filed March 6, 2009). As soon as a potential claim is identified, a litigant has a duty to
8 preserve documents and other evidence which it knows or reasonably should know is
9 relevant to the action. *In re Napster Inc. Copyright Litigation*, 462 F.Supp. 2d 1060, 1068-
10 69 (N.D.Cal. 2006); *see also A. Farber & Parnters v. Garber*, 234 F.R.D. 186, 193 (C.D.
11 Cal. 2006) (reversed and remanded on other grounds); *Zubalake v. UBS Warburg LLC*, 220
12 F.R.D. 212, 216 (S.D.N.Y. 2003). All that is required to trigger the duty to preserve
13 documents is that the future litigation be probable, which has been held to mean “more than
14 a possibility.” *Hynix Semiconductor Inc. v. Rambus, Inc.*, 591 F. Supp. 2d 1038, 1061
15 (N.D. Cal. 2006) (holding that “probable” must be viewed from the perspective of a
16 plaintiff who is in control of when the litigation is to be commenced). The “obligation to
17 preserve evidence arises when ‘the party has notice that the evidence is relevant to litigation
18 -- most commonly when suit has already been filed, providing the party responsible for the
19 destruction with express notice, but also on occasion in other circumstances, as for example
20 when a party should have known that the evidence may be relevant to future litigation.’”
21 *Id.* at 1061 (quoting *Kronisch v. United States*, 150 F. 3d 112, 126 (2^d Cir. 1998)).

22 The Committee, on behalf of the Debtor, is clearly contemplating litigation against
23 the Bank. Motion to Pursue Causes of Action, 1:26-2:04, 3:15-04:03. In light of this
24 Probable Litigation, the Bank has a significant interest in the preservation of documents
25 relevant to the contemplated claims or its potential defenses to those claims. Both the
26 Committee and the Bank have a duty to preserve documents that may be relevant to the
27 Probable Litigation.

28 Moreover, while the Committee has indicated that it is not aware of any other

1 claims that the Debtor or its successors may have against the Bank, the Debtor has
2 remained silent on whether it will seek to assert any additional claims against the Bank. As
3 the custodian of documents relevant to the claims the Committee seeks to prosecute on
4 behalf of the Debtor—and to the extent, if at all, that the Debtor seeks to assert additional
5 claims against the Bank—the Debtor has an obligation to preserve relevant evidence. Yet,
6 the Debtor is already allowing some of its most current files to be released to attorneys
7 transferring to other firms. *See* Motion, at 3:07-09.

8 These objections are not intended to obstruct the proposed File Disposition
9 Procedures in their entirety, but to ensure that documents relevant to the Debtor’s potential
10 claims against the Bank (which the Committee seeks to prosecute on the Debtor’s behalf)
11 and the Bank’s defenses to these claims, are preserved during the Debtor’s proposed
12 disposition of the Retained Client Files. If the Debtor or Committee releases or destroys
13 documents relevant to the Probable Litigation, it must do so at its own risk and accept the
14 same risk of, and repercussions for, the spoliation of documents that any other litigant
15 would face when deciding to destroy documents after litigation is probable. Ensuring the
16 preservation of relevant documents now helps all parties avoid some of the future discovery
17 conflicts that might result from disposition of the Retained Client Files.

18 B. The File Disposition Procedures should ensure preservation of documents
19 relating to the administration of the Debtor’s client matters.

20 While the Bank anticipates that the majority of the client files likely have no
21 relevance to the Probable Litigation, there are documents contained within the client files
22 that we expect to be relevant to those claims and the File Disposition Procedures should
23 articulate a plan for preserving those documents.

24 The Debtor operated a large multinational law firm whose formal structure changed
25 over time. The Debtor asserts that it is a partnership comprised of several distinct entities
26 through which the firm operated its business and conducted its dealings with clients. *See*
27 Declaration of Peter J. Benvenuti in Support of First-Day Motions, at ¶ 3 (filed December
28 28, 2008). The Retained Client Files likely contain documents that evidence the manner in

1 which the Debtor conducted business with its purported related entities, as well as the
2 clients and vendors of the collective Heller Ehrman enterprise. These documents (along
3 with the Relevant Firm Files) provide evidence of the Debtor's operations, including the
4 internal transactions among the Debtor's related entities. Understanding those operations
5 and transactions is necessary to any determination of the true legal relationships among the
6 Debtor and its related entities. Indeed, the Debtor's operational structure will be relevant,
7 and potentially determinative of, among other things, (i) whether the Debtor was solvent at
8 the time or times of each of the alleged transfers the Committee seeks to avoid in the
9 Probable Litigation and (ii) as to what, if any, assets sought to be recovered from Bank
10 were owned by, or subject to rights of, the Debtor or the professional corporations that
11 Debtor asserts are its partners, and against which Bank has maintained filed financing
12 statements that are without challenge.

13 Among the Retained Client Files potentially at issue are administrative documents
14 that evidence Debtor's and the related entities' business activities, including billing records
15 to the clients, engagement letters, conflict waiver letters, payment records to vendors, and
16 other administrative documents.¹ These documents may be relevant to the Probable
17 Litigation and are likely contained within the Retained Client Files.

18 C. The File Disposition Procedures should articulate how electronic Client Files
19 will be disposed.

20 Though the Debtor's Motion is largely directed at the disposition of the hard copy
21 Retained Client Files located in the firms' third party off-site storage facilities, the proposed
22 File Disposition Procedures also contemplates delivery and transfer of electronic client

23
24 ¹ Because neither the Debtor nor Committee has filed any action against the Bank, the
25 Bank cannot be expected to anticipate every possible document that may be relevant to
26 the Probable Litigation. But, at a minimum, these objections put the Debtor (and
27 Committee) on formal notice prior to the disposition or destruction of the Retained Client
28 Files that there are likely documents in these files relevant to the contemplated litigation.
These objections further place the Debtor and Committee on formal notice that the Bank
reserves all of its rights and remedies available to the Bank if the Debtor or Committee
fail to retain any documents relevant to the disposition of the estate or the contemplated
litigation against the Bank.

1 files. The Debtor “does anticipate charging for the retrieval of electronic data which will
2 require the Debtor to incur substantial time and expense processing, compiling, and
3 delivering such data to its former clients.” Motion, at 6:04-06.

4 The Bank objects to the disposition of any Retained Client Files to the extent that
5 the proposed File Disposition Procedures would mean that electronic documents potentially
6 relevant to the threatened claims against the Bank would be destroyed, taken off-line, or
7 rendered less accessible during the litigation of these claims. If the Debtor’s electronic data
8 systems are similar to most large modern law firms, its Retained Client Files are stored on
9 the same collection of servers, hard drives, shared drives, and other electronic storage
10 devices that house the electronic data related to the Debtor’s internal operations, including
11 email, finance and payroll databases, timekeeping systems, firm administration documents,
12 and other data that would constitute Relevant Firm Files.² It may be that, after retrieving
13 electronic data for its clients, the Debtor intends to keep the firm’s electronic data sources
14 operational and easily accessible. In any event, the File Disposition Procedures should at
15 least articulate that the Debtor’s electronic data will be preserved and accessible during this
16 process.

17 D. The Debtor should be ordered to meet and confer with the Bank regarding
18 relevant documents that should be preserved as part of the Files Disposition
19 Procedures.

20 The Motion contemplates that the Debtor “in consultation with the Committee and
21 their respective professionals, seeks authorization to determine (a) which, if any, of the
22 Retained Client Files must be withheld for use in the administration of the Debtor’s estate
23

24 _____
25 ² For the reasons described in this limited opposition, the Bank further objects to Debtor’s
26 proposed File Disposition Procedures to the extent, if at all, the Debtor seeks to dispose of
27 any files that are the property or in the possession of the Debtor’s asserted affiliates: the
28 purported partner professional corporations and shareholders of such corporations. Bank
hereby reserves all rights to contest the ownership of such files and the consequences of
the Debtor’s organizational structure and operations should the Probable Litigation be
commenced.

1 and (b) what period of time such Retained Client Files must be retained for such purposes.”

2 *See* Motion, at 6:24-27.

3 By these objections, the Bank has put the Debtor and the Committee on notice that
4 there are documents that are relevant to the Probable Litigation among the Retained Client
5 Files. While the Debtor (and the Committee, should it prosecute the contemplated action)
6 must necessarily decide which documents the Debtor (and Committee) are obliged to
7 preserve, and bear the risks and consequences associated with those decisions, the best
8 course would be for the Court to further require the Debtor and Committee to meet and
9 confer with the Bank about the types of documents that should be preserved, the scope of
10 that preservation effort, and the period of time the documents should be retained. Such an
11 order would be consistent with Federal Rule of Civil Procedure 26(f)(2) which requires
12 parties to confer about the preservation of electronically stored information at the outset of
13 litigation.

14 III. Conclusion.

15 For these reasons, the Bank respectfully requests that any order granting Debtor’s
16 Motion and approving the File Disposition Procedures require the Debtor to (1) preserve
17 documents in the Retained Client Files relevant to the Probable Litigation or any other
18 litigation the Debtor or Committee contemplates; (2) order the Debtor (and Committee) to
19 preserve and maintain each source of electronic data devices until such time that it is
20 determined that it does not contain any Relevant Firm Files; and (3) meet and confer with
21 the Bank about preservation of relevant documents in the Retained Client Files.

22
23 Dated: April 17, 2009.

24 PILLSBURY WINTHROP SHAW PITTMAN LLP

25 By /s/ M. David Minnick (Cal. Bar No. 54148)

26 M. David Minnick

27 Michael P. Ellis

28 Attorneys for Bank of America, N.A.

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6 Attorneys for Secured Creditor,
7 Bank of America, N.A.

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

12 _____)
13 In re:) Case No. 08-32514
14 HELLER EHRMAN LLP,) Chapter 11
Debtor.) PROOF OF SERVICE BY U.S. MAIL
15)
16) DATE: April 24, 2009
17)
18) TIME: 10:00 a.m.
19)
20) PLACE: U.S. Bankruptcy Court
21) 235 Pine Street, 22nd Floor,
22) San Francisco, CA
JUDGE: The Honorable Dennis Montali

23 I. Michael P. Ellis, the undersigned, hereby declare as follows:

24 I am employed in the City of San Francisco, State of California, in the office
25 of a member of the bar of this Court. I am over the age of eighteen years, and not a
26 party to the within action. My business address is Pillsbury Winthrop Shaw Pittman
27 LLP, 50 Fremont Street, San Francisco, CA 94105-2228. My mailing address is 50
28 Fremont Street, P. O. Box 7880, San Francisco, CA 94120-7880. On April 17,

1 2009, I served the following document titled

2

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○ **LIMITED OBJECTION TO THE DEBTOR'S MOTION FOR APPROVAL OF FILE DISPOSITION PROCEDURES**

4

on the parties in this action as follows:

5

[See Attached Service List]

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7

(BY MAIL) I caused each envelope, with postage thereon fully prepaid, to be placed in the United States mail at San Francisco, CA. I am readily familiar with the practice of Pillsbury Winthrop Shaw Pittman LLP for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

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(BY FACSIMILE) The above-referenced document was transmitted by facsimile transmission and the transmission was reported as complete and without error to the numbers listed above.

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(BY PERSONAL SERVICE) I delivered to an authorized courier or driver authorized by _____ to receive documents to be delivered on the same date. A proof of service signed by the authorized courier will be filed forthwith.

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I declare under penalty of perjury that the foregoing is true and correct.

21

Executed this 17th day of April, 2009, at San Francisco, California.

22

23

24

/s/ Michael P. Ellis (Cal. Bar. No. 209434)
Michael P. Ellis

25

26

27

28

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