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9 Attorneys for Defendant  
10 BANK OF AMERICA, N.A.

11 UNITED STATES BANKRUPTCY COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 SAN FRANCISCO DIVISION  
14

15	_____ )	
16	In re: )	Case No. 08-32514
17	HELLER EHRMAN LLP, )	
18	Debtor. )	Chapter 11
19	)	<b>BANK OF AMERICA, N.A.'S</b>
20	)	<b>OBJECTIONS TO THE DEBTOR'S</b>
21	)	<b>MOTION FOR APPROVAL TO (A)</b>
22	)	<b>ABANDON AND DESTROY</b>
23	)	<b>KNOWN ADMINISTRATIVE AND</b>
24	)	<b>CLIENT FILES AND (B) GAIN</b>
25	)	<b>APPROVAL OF PROCEDURE FOR</b>
26	)	<b>REVIEW AND DISPOSITION OF</b>
27	)	<b>UNINDEXED BOXES</b>
28	)	
	)	DATE: June 25, 2010
	)	TIME: 9:30 a.m.
	)	PLACE: U.S. Bankruptcy Court
	)	235 Pine Street, 22 <sup>nd</sup> Floor,
	)	San Francisco, CA
	)	JUDGE: The Honorable Dennis Montali

1 I. Introduction.

2 Secured Creditor, Bank of America N.A. (the “Bank”) hereby files this objection to  
3 the Motion to (A) Abandon and Destroy Known Administrative and Client Files and (B)  
4 Gain Approval of Procedure for Review and Disposition of Unindexed Boxes (the  
5 “Motion”) filed June 4, 2010 by the above-referenced debtor and debtor-in-possession,  
6 Heller Ehrman LLP, (the “Debtor”), in the above captioned case. The Debtor’s Motion is  
7 deficient in many respects. Chief among those deficiencies is the fact that the Motion fails  
8 to identify with reasonable particularity the “administrative files” proposed to be destroyed  
9 and fails to state whether and to what extent it intends to keep and preserve the “Known  
10 Administrative Files” (as described in the Motion) or the administrative files that may be  
11 included in the 50,000 boxes of documents (that have apparently never been reviewed and  
12 were never entered into Heller’s document management system) that are relevant to the  
13 ongoing preference action between the Bank and Heller (“Preference Action”). Based on  
14 the Motion and its supporting papers, the Bank requests the following minimum relief:

15 1. Any order granting the Motion and approving the destruction of Debtor’s  
16 files should require the Debtor to preserve files related to the administration of the Debtor’s  
17 law firm (“Administrative Files”) until Debtor has completed its electronic production in  
18 the Preference Action and given the Bank an opportunity to determine the completeness of  
19 the production and identify documents not already provided in the electronic production  
20 that should be reviewed and produced from the Debtor’s hard copy files.

21 2. With respect to the 50,000 boxes of documents that were never indexed and  
22 put into Legal Key by Debtor (“Unindexed Boxes”), any order granting the Motion should  
23 require the Debtor to identify and preserve Administrative Files within the Unindexed  
24 Boxes.

25 To the extent the Debtor seeks approval for the destruction of Non-Administrative  
26 Files, such as the Unclaimed Client Files, the Bank takes no position concerning the  
27 destruction or abandonment of those files.

28

1 II. ARGUMENT.

2 A. The Debtor has a duty to preserve documents relevant to Preference Action.

3 A litigant has a duty to preserve documents and other evidence which it knows or  
4 reasonably should know is relevant to the action. *In re Napster Inc. Copyright Litigation*,  
5 462 F.Supp. 2d 1060, 1068-69 (N.D.Cal. 2006); *see also A. Farber & Parnters v. Garber*,  
6 234 F.R.D. 186, 193 (C.D. Cal. 2006) (reversed and remanded on other grounds); *Zubalake*  
7 *v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003). The “obligation to preserve  
8 evidence arises when ‘the party has notice that the evidence is relevant to litigation -- most  
9 commonly when suit has already been filed, providing the party responsible for the  
10 destruction with express notice [of the duty to preserve].’” *Hynix Semiconductor Inc. v.*  
11 *Rambus, Inc.*, 591 F. Supp. 2d 1038, 1061 (N.D. Cal. 2006) (quoting *Kronisch v. United*  
12 *States*, 150 F. 3d 112, 126 (2<sup>d</sup> Cir. 1998)). The Debtor’s litigation with the Bank is ongoing  
13 and the Debtor has been responding to the Bank’s document requests for more than a year.  
14 Declaration of Jason A. Catz in Support of Bank of America, N.A.’s Objections to the  
15 Debtor’s Motion for Approval to (A) Abandon and Destroy Known Administrative and  
16 Client Files and (B) Gain Approval of Procedure for Review and disposition of Unindexed  
17 Boxes (“Catz Decl.”) ¶ 3. At a minimum, the Debtor has an obligation to preserve any hard  
18 copy administrative files relevant to the Preference Action at least until it has completed its  
19 electronic document production and can certify that no documents relevant to the  
20 Preference Action that have not been produced or that are being withheld under some claim  
21 of privilege or immunity from discovery are being destroyed. The Debtor must also certify  
22 that it will not assert any objection to the authenticity of the copies of documents produced  
23 in view of their intent to destroy the original documents.

24 1. The Known Administrative Files.

25 There are two categories of documents addressed in the Motion that contain  
26 documents certain to be relevant to the Preference Litigation against the Bank, the  
27 Administrative Files (which are highly likely to contain documents relevant to the  
28 Preference Action) and the 50,000 Unindexed Boxes of documents that were never put into

1 its record management system (Legal Key) by Debtor.

2 The Motion does not make clear which Administrative Files are proposed to be  
3 destroyed and what, if any, Administrative Files the Debtor intends to retain. The Motion  
4 can be read as a request to destroy all “Administrative Files” regardless of age or alleged  
5 relevance on the unfounded assertions that such files are too old, not relevant to the  
6 Preference Action or have already been produced in the Action. At the same time, the  
7 motion could also be read to imply that Administrative Files for the period from 2000 to the  
8 present will be retained. However, it doesn't say that with any clarity.

9 Kyle Everett’s declaration in support of the Motion describes the “Known  
10 Administrative Files.” Everett Decl. ¶ 13. According to Everett, Known Administrative  
11 Files “include accounting records, human resources files, marketing materials, risk  
12 management, billing and collections, general correspondence and contracts relating to day-  
13 to-day management of firm affairs. As with the Unclaimed Client Files, many boxes  
14 continue to be stored on and off-site, but are no longer relevant to the administration of the  
15 Debtor's estate, primarily because they are long past any tax or collection statute of  
16 limitations period.” *Id.*

17 Depending on the time period, many of these types of documents would be relevant  
18 to the Preference Action. Mr. Everett’s declaration may imply that only older  
19 Administrative Files for years that are “long past any tax or collection statute of limitations  
20 period” are proposed to be destroyed - but neither Mr. Everett nor the moving papers  
21 actually say that with any specificity. At a minimum, further clarity on what the Debtor  
22 intends to preserve is necessary before the Debtor can be authorized to destroy any  
23 Administrative Files.

24 Similarly, in paragraph 17 of his declaration, Mr. Everett states: “Finally, the  
25 Debtor believes that the Files [which include the Administrative Files] that are the subject  
26 of the Motion are not relevant to any pending or potential litigation matters involving the  
27 Debtor's estate. In particular, with respect to the pending preference action against Bank of  
28 America, the Debtor has provided and is continuing to provide Bank of America with any

1 and all documents and records that are responsive to its broad discovery requests. The  
2 Debtor believes that the Files that [sic] subject to the Motion are either not relevant to the  
3 litigation with Bank of America due to their age, or [sic] duplicative of records that have  
4 already been or are in the process of being produced to Bank of America in response to its  
5 discovery requests.”

6 The declaration does not explain the factual basis for the claim that the  
7 Administrative Files proposed to be destroyed are not “relevant” to the Preference Action  
8 against the Bank. It is beyond any reasonable dispute that the Administrative Files of the  
9 Debtor include relevant documents such as accounting records, human resource files and  
10 billing and collection materials, by way of example. Mr. Everett, essentially concedes that  
11 point in the third sentence of the paragraph when he states his belief that the Administrative  
12 Files are not “relevant” because they are “duplicative of records that have already been or  
13 are in the process of being produced to Bank of America in response to its discovery  
14 request.” Again, there is no factual basis set out in the declaration for Mr. Everett's belief,  
15 particularly his apparent belief that the Administrative Files are duplicative of records that  
16 are in the process of being produced to the Bank. Nor is there any foundational testimony  
17 in Mr. Everett’s declaration that he has any knowledge of what documents the Debtor has  
18 produced in the Preference Action, how he would know that the documents proposed to be  
19 destroyed are not relevant to the Preference Action, how he would know that the documents  
20 proposed to be destroyed have already been produced in the Preference Action, or how he  
21 would know that the documents proposed to be destroyed are in the process of being  
22 produced in the Preference Action.

23 As the moving papers acknowledge, the Debtor is in the midst of producing  
24 documents in connection with the litigation against the Bank. The Debtor has maintained  
25 that they are nearing the end of their electronic production. If that is truly the case, then  
26 there is little reason that the destruction of the files cannot wait until a reasonable time after  
27 the Debtor has completed its production.

1           2.     The Unindexed Boxes.

2           Similarly, any Administrative Files included within the 50,000 boxes of Unindexed  
3 Files should also be preserved for some reasonable duration pending completion of  
4 Debtor's production. At a minimum, the persons charged with opening and reviewing the  
5 Unindexed Boxes should be looking for and preserve Administrative Files potentially  
6 relevant to the Preference Action.

7           B.     Prior Meet and Confer Regarding Stored Files Relevant to the Preference  
8                 Action.

9           Finally, the Bank is genuinely surprised that the Debtor would choose to seek the  
10 immediate destruction of the Administrative Files and a protocol for possible destruction of  
11 50,000 boxes of additional files when, less than three months ago, the parties discussed the  
12 necessity for at least some hard copy review from these files after the completion of the  
13 electronic production. The Bank served its document requests on the Debtor more than a  
14 year ago and the Debtor is still in the process of producing responsive electronic  
15 documents. Catz Decl. ¶ 3. Indeed, more than 15 DVDs containing hundreds of thousands  
16 of pages of documents have been produced during the past four weeks. *Id.* at 7.

17           In late February 2010, Debtor's counsel sent the Bank a list of administrative files  
18 from 2004 to present that included files potentially relevant to the Preference Action and  
19 suggested that the bank identify boxes it wanted reviewed. *Id.* at ¶¶ 4-5. At the time,  
20 Debtor's counsel, Terry Young, expressed his belief that many of the responsive documents  
21 were likely to be duplicative of documents that would eventually be produced in Debtor's  
22 ongoing electronic production. *Id.* at ¶ 5. Rather than waste time or expense having the  
23 Debtor or the Bank review boxes of material likely to found in the electronic production,  
24 Bank of America proposed that it would be "prudent to hold off on reviewing these boxes  
25 until we know the final scope of what will be produced electronically and can exclude any  
26 files that are duplicative of the full electronic production." Catz Decl. Ex. A. At the time,  
27 the Debtor expressed no objection to this approach and made no indication that it was  
28 intending to destroy such files in the near term. Catz Decl. ¶ 6. As of this filing, the Debtor

1 has yet to complete its electronic production and has, in fact, produced more than 15 DVDs  
2 containing hundreds of thousands of documents in the past four weeks alone. Catz Decl. ¶  
3 7. The Bank is in the process of reviewing that data but it will have no way of knowing  
4 whether and to what extent the Administrative Files subject to the Motion are truly  
5 duplicative of the electronic documents until the Debtor completes its production and Bank  
6 of America has had a reasonable time to analyze the electronic data produced by the Debtor  
7 in recent weeks. *Id.*

8 On June 16, 2010 counsel for the Bank left a message with Debtor's counsel, John  
9 Fiero, in an effort to raise and resolve the Bank's concerns about the destruction of the  
10 Administrative Files. Catz Decl. ¶ 8. Chris Sullivan, counsel for the creditor's committee  
11 in the Preference Action, returned the call that evening. When the Bank presented several  
12 questions regarding the specifics of what would be preserved, Mr. Sullivan was not able to  
13 definitively address those concerns but said he would inquire about the matter further and  
14 call back with more information. *Id.*

15 Mr. Sullivan called counsel for the Bank on Friday, June 18 but was unable to  
16 address the Bank's concerns about whether and to what extent documents potentially  
17 relevant to the Preference Action were going to be preserved. Catz Decl. ¶ 9. During the  
18 call, the Bank proposed that the Debtor consider: (1) certifying that there are no documents  
19 relevant to the preference action that have not been produced or that are being withheld  
20 under some claim of privilege or immunity from discovery are being destroyed; (2)  
21 certifying that they will not assert any objection to the authenticity of the copies of  
22 documents produced in view of their intent to destroy the original documents; and (3)  
23 proposing a process by which the Bank can identify to them the types of documents likely  
24 to be within the Administrative Files (but not yet found in the electronic production) that  
25 the Debtor should be preserving and the steps the Debtor will take to do so. *Id.* ¶ 10.

26 The parties each expressed their intention to discuss the matter further in the hope  
27 that the parties could resolve their concerns before the hearing on the Motion but had not  
28 resolved their differences at the time of this filing. *Id.*

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III. CONCLUSION.

The Bank respectfully requests that the Court order that all Administrative Files (including Administrative files found within the Unindexed Boxes) be retained until the Debtor completes its document production in the preference action and the Bank has a reasonable opportunity to review the electronic production for completeness. The Administrative Files contain records that are potentially relevant to the claims and defenses in the preference litigation and need to be preserved for some reasonable duration.

Dated: June 18, 2009.

PILLSBURY WINTHROP SHAW PITTMAN LLP

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

M. David Minnick  
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