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17 *[Proposed] Counsel for Chapter 7 Trustee*

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

14 In re:
15 ROBERT C. GRAHAM, LTD. fdba ROB
16 GRAHAM & ASSOCIATES fdba
17 LAWYERSWEST,

18 Debtor.

Case No. BK-S-16655-BTB
Chapter 7

APPLICATION TO EMPLOY NELSON & HOUMAND, P.C., NUNC PRO TUNC, AS GENERAL BANKRUPTCY COUNSEL FOR VICTORIA L. NELSON, CHAPTER 7 TRUSTEE PURSUANT TO 11 U.S.C. §§ 327(a) AND 328(a) AND FEDERAL RULE OF BANKRUPTCY PROCEDURE 2014

Date of Hearing: February 15, 2017
Time of Hearing: 10:00 a.m.
Place: Courtroom No. 4, Second Floor
Foley Federal Building
300 Las Vegas Blvd., S.
Las Vegas, NV 89101

Judge: Honorable Bruce T. Beesley

VICTORIA L. NELSON, the duly appointed Chapter 7 Trustee in the above-captioned bankruptcy case (the “Trustee”), by and through her proposed counsel of record, Kathy Bazoian Phelps, Esq. of the law firm of Diamond McCarthy, LLP and Jacob L. Houmand, Esq. and Kyle J. Ortiz, Esq. of the law firm of Nelson & Houmand, P.C., hereby submits this *Application to*

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1 *Employ Nelson & Houmand, P.C., Nunc Pro Tunc, as General Bankruptcy Counsel for Victoria*
 2 *L. Nelson, Chapter 7 Trustee Pursuant to 11 U.S.C. §§ 327(a) and 328(a) and Federal Rule of*
 3 *Bankruptcy Procedure 2014 (the “Application”).*¹

4 This Application is filed pursuant to 11 U.S.C. §§ 327 and 328 and Federal Rule of
 5 Bankruptcy Procedure 2014. The Application is based on the following Memorandum of Points
 6 and Authorities, the *Declaration of Victoria L. Nelson In Support of the Application to Employ*
 7 *Nelson & Houmand, P.C., Nunc Pro Tunc, as General Bankruptcy Counsel for Victoria L.*
 8 *Nelson, Chapter 7 Trustee Pursuant to 11 U.S.C. §§ 327(a) and 328(a) and Federal Rule of*
 9 *Bankruptcy Procedure 2014 (the “Nelson Declaration”), and the Declaration of Jacob L.*
 10 *Houmand, Esq. In Support of the Application to Employ Nelson & Houmand, P.C., Nunc Pro*
 11 *Tunc, as General Bankruptcy Counsel for Victoria L. Nelson, Chapter 7 Trustee Pursuant to 11*
 12 *U.S.C. §§ 327(a) and 328(a) and Federal Rule of Bankruptcy Procedure 2014 (the “Houmand*
 13 *Declaration”), both of which are filed separately and concurrently with this Court pursuant to*
 14 *Local Rule 9014(c)(2). The Application is also based on the pleadings and papers on file herein,*
 15 *and any argument that may be entertained at the hearing on the Application.*²

16 MEMORANDUM OF POINTS AND AUTHORITIES

17 I. STATEMENT OF FACTS

18 1. On December 15, 2016, an *Involuntary Bankruptcy Petition* [ECF No. 1]³ (the
 19 “*Involuntary Petition*”) was filed against ROBERT C. GRAHAM, LTD., fdba ROB GRAHAM &
 20 ASSOCIATES fdba LAWYERSWEST (the “*Debtor*”) pursuant to 11 U.S.C. § 303. The
 21 _____

22 ¹ Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11
 23 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
 24 Federal Rules of Civil Procedure will be referred to as “FRCP” and the Federal Rules of
 25 Bankruptcy Procedure will be referred to as “FRBP.” The Local Rules of Practice for the United
 26 States Bankruptcy Court for the District of Nevada shall be referred to as the “Local Rules”.

26 ² The Trustee also requests that the Court take judicial notice of all pleadings filed in the above-
 27 captioned bankruptcy case, including adversary proceedings, pursuant to Rule of Evidence 201,
 28 incorporated by reference by FRBP 9017.

³ All references to “ECF No.” are to the numbers assigned to the documents filed in the above-
 28 referenced case as they appear on the docket maintained by the clerk of the court.

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1 Involuntary Petition was filed by the Estate of Michael B. Macknin, the Sharona Dagani Trust,
2 and the Margueritte Owens Revocable Trust (collectively, the “Petitioning Creditors”). See
3 Nelson Declaration.

4 2. The filing of the Involuntary Petition against the Debtor followed numerous
5 reports that the Debtor had neglected its clients and that its principal, Robert C. Graham, Esq.
6 (“Mr. Graham”), had misappropriated funds from the Debtor’s IOLTA Account. See Nelson
7 Declaration.

8 3. Specifically, on December 9, 2016, the Nevada State Bar filed an *Emergency*
9 *Petition for Temporary Suspension Pursuant to Supreme Court Rule 102(4)* (the “Emergency
10 Petition”) with the Supreme Court of the State of Nevada (Case No. 71849). The Emergency
11 Petition sought a temporary suspension of Mr. Graham based upon his misappropriation of
12 millions of dollars from more than fifty clients, guardianships, special needs trusts and estates.
13 The Emergency Petition further details that Mr. Graham abruptly closed his practice and
14 abandoned more than one hundred clients without providing them with any advance notice. See
15 Nelson Declaration.

16 4. On December 16, 2016, the Petitioning Creditors filed a *Motion to Appoint*
17 *Interim Trustee in Involuntary Case* [ECF No. 3] (the “Interim Trustee Motion”), which sought
18 authority to appoint an interim trustee to take possession of property and to manage the business
19 operations and assets of the Debtor. See Nelson Declaration.

20 5. On December 21, 2016, the Bankruptcy Court entered an *Order on Trustee Motion*
21 *and Order for Relief Under Chapter 7* [ECF No. 21] (the “Order for Relief”). The Order for
22 Relief provided that the Debtor had consented to the filing of a bankruptcy petition and that the
23 filing of the bankruptcy case was effective as of December 15, 2016 (the “Petition Date”). The
24 Order for Relief further required that the Office of the United States Trustee (the “U.S. Trustee”)
25 appoint an Interim Chapter 7 Trustee pursuant to 11 U.S.C. § 701. See Nelson Declaration.

26 6. On December 22, 2016, the Trustee was appointed as the Chapter 7 Trustee in the
27 Debtor’s bankruptcy case [ECF No. 22]. See Nelson Declaration.

28 ...

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1 7. Following her appointment, the Trustee has contacted counsel for the Nevada State
2 Bar, counsel for the Petitioning Creditors, and numerous former clients of the Debtor. *See* Nelson
3 Declaration.

4 8. The Trustee has determined that she will require assistance in administering the
5 Debtor’s bankruptcy case. *See* Nelson Declaration.

6 9. The Trustee now desires to employ the law firm of Nelson & Houmand, P.C. (the
7 “Firm”), as general bankruptcy counsel in the Debtor’s bankruptcy case to assist her in
8 administering the case for the benefit of creditors.⁴ *See* Nelson Declaration.

9 10. Based upon information provided by counsel for the Petitioning Creditors and
10 counsel for the Nevada State Bar, the Trustee believes that there may be a significant amount of
11 litigation arising from the Debtor’s treatment and misappropriation of funds from its IOLTA
12 Account. *See* Nelson Declaration.

13 11. The Trustee will also seek to employ the law firm of Diamond McCarthy LLP
14 (“Diamond McCarthy”) as special litigation counsel to assist with anticipated litigation arising
15 from the Debtor’s bankruptcy case and to provide advice concerning causes of action that can be
16 commenced on behalf of the bankruptcy estate.⁵

17 **II. JURISDICTION AND VENUE**

18 12. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1134.
19 This is a core proceeding pursuant to 28 U.S.C. § 157(b) (2) (A). The statutory basis for the relief
20 sought is Section 327 and FRBP 2014. Venue of Debtor’s Chapter 7 case in this District is proper
21 pursuant to 28 U.S.C. §§ 1408 and 1409.

22 13. Pursuant to Local Rule 9014.2, if the Court determines that absent consent of the
23 parties the Court cannot enter final orders or judgment regarding the Application consistent with
24

25 ⁴ The Application seeks authority to employ the Firm effective as of December 22, 2016, to
26 account for time expended reviewing the docket in the Debtor’s bankruptcy case, conducting
27 legal research, and coordinating conference calls with counsel for the Nevada State Bar and the
28 Petitioning Creditors.

⁵ The Trustee’s request to employ Diamond McCarthy will be sought via a separate application
filed pursuant to Section 327 and FRBP 2014.

1 Article III of the United States Constitution, the Trustee consents to entry of final orders and
2 judgment by this Court.

3 **III. THE FIRM**

4 14. The Firm is well suited for the type of representation required by the Trustee. The
5 Firm specializes in insolvency and reorganization matters, particularly the representation of
6 Chapter 7 Trustees in bankruptcy cases. Attorneys associated with the Firm have represented
7 debtors, Chapter 7 Trustees, various committees and other parties-in-interest, and is qualified to
8 act as attorneys for the Trustee. Accordingly, the Trustee has determined that the Firm has the
9 resources and experience necessary to represent it in this case.

10 15. The attorneys of the Firm that will render services in relation to the above-
11 captioned bankruptcy case are familiar with the United States Bankruptcy Code, the Federal
12 Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure, and the Local Rules and
13 will comply with them, as well as the procedures set forth in the “Guide to Applications for
14 Professional Compensation,” promulgated by the Office of the United States Trustee (the “U.S.
15 Trustee”) with regard to compensation of professionals.

16 16. The attorneys employed by the Firm are duly admitted to practice before this
17 Court.

18 17. The Trustee desires to employ the Firm as her general counsel in this bankruptcy
19 case to render the following professional services:

- 20 (a) To investigate the financial affairs of the Debtor and
- 21 determine if there are any preferential transfers, fraudulent
- 22 conveyances, or turnover actions that may be filed on behalf
- 23 of the bankruptcy estate pursuant to 11 U.S.C. §§ 542, 544,
- 24 547, and 548.
- 25 (b) To prosecute preferential transfers, fraudulent conveyances,
- 26 or turnover actions that may be filed on behalf of the
- 27 bankruptcy estate pursuant to 11 U.S.C. §§ 542, 544, 547,
- 28 and 548.
- (c) To advise the Trustee of her rights and obligations and
- performance of her duties during the administration of this
- bankruptcy case;

...

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- 1 (d) To represent the Trustee in all proceedings before this Court
2 and any other court which assumes jurisdiction of a matter
3 related to or arising in this bankruptcy case;
- 4 (e) To assist the Trustee in the performance of her duties as set
5 forth in 11 U.S.C. § 704;
- 6 (f) To assist the Trustee in developing legal positions and
7 strategies with respect to all facets of these proceedings; and
- 8 (g) To provide such other counsel and advice as the Trustee
9 may require in connection with this bankruptcy case
10 including, but not limited to, serving as co-counsel and local
11 bankruptcy counsel for Diamond McCarthy.

12 18. The Trustee has selected the Firm because its attorneys have experience in matters
13 of this character, are familiar with bankruptcy practice and are qualified to represent the Trustee
14 in this case.

15 19. Following the Trustee’s request that the Firm represent her in this case as general
16 bankruptcy counsel, a conflicts check was undertaken, utilizing the Firm’s client list. Based upon
17 the conflicts check the Firm and its associates are “disinterested persons” as defined by 11 U.S.C.
18 § 101 and do not hold or represent any interest adverse to the bankruptcy estate.

19 20. The conclusion that the Firm is a “disinterested” person within the meaning of 11
20 U.S.C. § 101(14) for purposes of 11 U.S.C. § 327(a) is based upon the fact neither the Firm nor
21 any of its attorneys:

- 22 (a) Are or were a creditor, equity security holder, or insider of
23 the Debtor;
- 24 (b) Are or were, within two (2) years before the date of the
25 filing the bankruptcy petition, a director, officer or
26 employee of Debtor as specified in subparagraph (c) of
27 Section 101(14);
- 28 (c) Hold, or have ever held, an interest materially adverse to the
interest of the estate or of any class of creditors, equity
holders, or parties in interest, by reason of any direct or
indirect relationship to, or interest in, the Debtor or for any
other reason except as stated herein;

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1 (d) Represent, or have ever represented, the Debtor, insiders of
2 the Debtor, creditors of the Debtor, any other party in
3 interest, or their respective attorneys and accountants except
as set forth herein; and

4 (e) Is a relative or employee of the U.S. Trustee or a
5 Bankruptcy Judge except as stated herein.

6 21. The Firm represents no interest that is adverse to the Trustee, to the Debtor's
7 estate, any creditor, any party in interest, the U.S. Trustee, or any attorney or accountant
8 employed by the foregoing, in matters upon which it will be engaged as counsel.

9 22. Except as set forth herein, neither the Firm nor any of its attorneys has any
10 connection with the Debtor, the creditors, any other parties in interest, their respective attorneys
11 and accountants, the Office of the United States Trustee, or any person employed in the Office of
12 the United States Trustee and that the Firm and each of its attorneys are all disinterested persons
13 pursuant to 11 U.S.C. § 101(14).

14 23. The Trustee is a member of the Firm and regularly employs the Firm to represent
15 bankruptcy estates in other unrelated bankruptcy cases in which she is the Trustee. The Trustee
16 will not personally bill any legal fees in this case.

17 24. The Firm also represents Chapter 7 Trustees in unrelated bankruptcy cases pending
18 before the United States Bankruptcy Court for the District of Nevada.

19 25. The Trustee submits that the Firm is a disinterested person within the meaning of
20 11 U.S.C. § 101(14) for purposes of 11 U.S.C. § 327(a), as it pertains to representing the Trustee
21 as general bankruptcy counsel in the Debtor's Bankruptcy.

22 **IV. COMPENSATION**

23 26. Subject to Court approval, in accordance with 11 U.S.C. § 330, the Trustee seeks
24 to retain the Firm on an hourly basis at the customary and standard rates that the Firm charges for
25 similar representation, plus reimbursement of actual and necessary expenses incurred by the Firm
26 in performing its duties.

27 27. The Firm proposes the compensation of attorneys be at varying rates currently
28 ranging from \$250 per hour to \$325 per hour for the services of attorneys, subject to change from

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1 time to time, and all subject to application to, and approval by, this Court pursuant to Sections
2 330 and 331 of the Bankruptcy Code.

3 28. The Firm proposes the compensation of paraprofessionals be at varying rates
4 currently ranging from \$175 per hour for paraprofessionals, subject to change from time to time,
5 and all subject to application to, and approval by, this Court pursuant to Sections 330 and 331 of
6 the Bankruptcy Code. A true and correct copy of the proposed Retainer Agreement between the
7 Trustee and the Firm is attached to the Houmand Declaration as **Exhibit "1"**.

8 29. The Firm contemplates that it may seek interim compensation during this case as
9 permitted by 11 U.S.C. § 331 and Federal Rule of Bankruptcy Procedure 2016. The Firm
10 understands that its compensation is subject to prior Court approval.

11 30. No promises have been received by the Firm or any attorney of the Firm, as to
12 payment or compensation in connection with the above-referenced bankruptcy case in accordance
13 with the provisions of the Bankruptcy Code, the FRBP, the Local Rules, and orders of the Court.
14 The Firm has no agreement with any other entity to share with such entity any compensation
15 received by the Firm, except as permitted under Section 504(b)(1).

16 31. This Application will be submitted to the United States Trustee upon the filing of
17 the same.

18 **V. REQUEST FOR NUNC PRO TUNC EMPLOYMENT**

19 32. Section 327(a) provides authority for a Chapter 7 Trustee to employ certain
20 professionals following court approval:

21 Except as otherwise provided in this section, the trustee, with the
22 court's approval, may employ one or more attorneys, accountants,
23 appraisers, auctioneers, or other professional persons, that do not
24 hold or represent an interest adverse to the estate, and that are
disinterested persons, to represent or assist the trustee in carrying
out the trustee's duties under this title.

25 11 U.S.C. § 327(a); *see also* FED. R. BANKR. P. 2014(a).

26 33. In bankruptcy proceedings, professionals who perform services for a debtor-in-
27 possession or Chapter 7 Trustee cannot recover fees for services rendered for the bankruptcy
28 estate unless those services have been previously authorized by a court order. *Id.*

1 34. In the Ninth Circuit, however, “bankruptcy courts have the power to issue *nunc*
2 *pro tunc* (i.e. retroactive) orders authorizing employment in limited circumstances.” *In re Cook*,
3 79 B.R. 475, 477 (B.A.P. 9th Cir. 1987) (citing *In re Laurent Watch Co.*, 539 F.2d 1231 (9th Cir.
4 1976)). In order to establish the appropriateness of an employment application that seeks *nunc*
5 *pro tunc* approval, the Ninth Circuit Court of Appeals (the “Ninth Circuit”) has held that two
6 general requirements must be satisfied: (1) the professional must satisfactorily explain their
7 failure to receive prior judicial approval; and (2) the professional must demonstrate that their
8 services benefitted the bankruptcy estate in a significant manner. *In re Atkins*, 69 F.3d 970, 974
9 (9th Cir. 1995) (citing *In re Occidental Fin. Group, Inc.*, 40 F.3d 1059, 1062 (9th Cir. 1994).

10 35. The Ninth Circuit has held that bankruptcy courts can also consider the following
11 nine (9) factors identified by the court in the case *In re Twinton Properties Partnership*, 27 B.R.
12 817, 819-20 (M. Tenn. 1983) in evaluating whether an employment application seeking *nunc pro*
13 *tunc* approval should be approved: (1) the debtor, trustee or committee expressly contracted with
14 the professional person to perform the services which were thereafter rendered; (2) the party for
15 whom the work was performed approves the entry of the *nunc pro tunc* order; (3) the applicant
16 has provided notice of the application to creditors and parties in interest and has provided an
17 opportunity for filing objections; (4) no creditor or party in interest offers reasonable objection to
18 the entry of the *nunc pro tunc* order; (5) the professional satisfied all the criteria for employment
19 pursuant to Section 327 and FRBP 2014 at or before the time services were actually commenced
20 and remained qualified during the period for which services were provided; (6) the work was
21 performed properly, efficiently, and to a high standard of quality; (7) no actual or potential
22 prejudice will inure to the estate or other parties in interest; (8) the applicant's failure to seek pre-
23 employment approval is satisfactorily explained; and (9) the applicant exhibits no pattern of
24 inattention or negligence in soliciting judicial approval for the employment of professionals. *Id.*
25 at 974.

26 36. While the Ninth Circuit held that an applicant seeking *nunc pro tunc* employment
27 must satisfactorily explain their failure to receive prior judicial approval and demonstrate that the
28 services benefitted the bankruptcy estate, it also found that the nine (9) factors identified in

1 *Twinton Properties* may be, but need not be, considered by the bankruptcy court in making such a
2 determination. *Id.* at 976.

3 37. In the instant case, the Court should exercise its discretion in approving the *nunc*
4 *pro tunc* employment of the Firm effective as of December 22, 2016, in order to account for time
5 expended reviewing the docket in the Debtor’s bankruptcy case, conducting legal research, and
6 coordinating conference calls with counsel for the Nevada State Bar and the Petitioning Creditors.

7 38. Finally, the request for *nunc pro tunc* employment only covers a thirteen (13) day
8 period of time from when the Firm first began working on issues related to the Debtor’s
9 bankruptcy case and the filing of the Application.

10 39. Accordingly, the Trustee respectfully requests that the Court approve the
11 employment of the Firm *nunc pro tunc* as of December 22, 2016.

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VI. CONCLUSION

WHEREFORE, the Trustee respectfully requests that the Court enter an Order: (i) approving the employment of the Firm, *Nunc Pro Tunc*, as general bankruptcy counsel to represent the Trustee in this bankruptcy proceeding upon the terms set forth in this Application with payment of all fees and costs by the estate subject to notice and hearing and approval of this Court; and (ii) for such other and further relief as is just and proper.

Dated this 4th day of January, 2017.

NELSON & HOUMAND, P.C.

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