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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

29 In re:
30 ROBERT C. GRAHAM, LTD. fdba ROB
31 GRAHAM & ASSOCIATES fdba
32 LAWYERSWEST,

33 Debtor.

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

**EX PARTE APPLICATION TO EMPLOY
DIAMOND MCCARTHY LLP, NUNC
PRO TUNC TO DECEMBER 28, 2016, AS
SPECIAL LITIGATION COUNSEL FOR
VICTORIA L. NELSON, CHAPTER 7
TRUSTEE PURSUANT TO 11 U.S.C. §
327(a) AND FEDERAL RULE OF
BANKRUPTCY PROCEDURE 2014**

36 Date of Hearing: N/A
37 Time of Hearing: N/A

38 Judge: Honorable Bruce T. Beesley¹

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

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1 VICTORIA L. NELSON, the duly appointed Chapter 7 Trustee in the above-captioned
2 bankruptcy case (the “Trustee”), by and through her proposed counsel of record Kathy Bazoian
3 Phelps, Esq. of the law firm of Diamond McCarthy LLP and Jacob L. Houmand, Esq. and Kyle J.
4 Ortiz, Esq. of the law firm of Nelson & Houmand, P.C., hereby submits this *Ex Parte Application*
5 *to Employ Diamond McCarthy LLP, Nunc Pro Tunc to December 28, 2016, as Special Litigation*
6 *Counsel for Victoria L. Nelson, Chapter 7 Trustee Pursuant to 11 U.S.C. § 327(a) and Federal*
7 *Rule of Bankruptcy Procedure 2014* (the “Application”).

8 This Application is filed pursuant to 11 U.S.C. § 327 and Federal Rule of Bankruptcy
9 Procedure 2014. The Application is based on the following Memorandum of Points and
10 Authorities, the *Declaration of Victoria L. Nelson In Support of the Ex Parte Application to*
11 *Employ Diamond McCarthy LLP, Nunc Pro Tunc to December 28, 2016, as Special Litigation*
12 *Counsel for Victoria L. Nelson, Chapter 7 Trustee Pursuant to 11 U.S.C. § 327(a) and Federal*
13 *Rule of Bankruptcy Procedure 2014* (the “Nelson Declaration”), and the *Declaration of Kathy*
14 *Bazoian Phelps, Esq. In Support of the Ex Parte Application to Employ Diamond McCarthy LLP,*
15 *Nunc Pro Tunc to December 28, 2016, as Special Litigation Counsel for Victoria L. Nelson,*
16 *Chapter 7 Trustee Pursuant to 11 U.S.C. § 327(a) and Federal Rule of Bankruptcy Procedure*
17 *2014* (the “Phelps Declaration”), both of which are filed separately and concurrently with this
18 Court pursuant to Local Rule 9014(c)(2). The Application is also based on the pleadings and
19 papers on file herein, and any argument that may be entertained at the hearing on the
20 Application.² A true and correct copy of the proposed order granting the relief requested in this
21 Application is attached hereto as **Exhibit “1”**.

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

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3 1. On December 15, 2016, an *Involuntary Bankruptcy Petition* [ECF No. 1]³ (the
4 “Involuntary Petition”) was filed against ROBERT C. GRAHAM, LTD., fdba ROB GRAHAM &
5 ASSOCIATES fdba LAWYERSWEST (the “Debtor”) pursuant to 11 U.S.C. § 303. The
6 Involuntary Petition was filed by the Estate of Michael B. Macknin, the Sharona Dagani Trust,
7 and the Margueritte Owens Revocable Trust (collectively, the “Petitioning Creditors”). *See*
8 Nelson Declaration.

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

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

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

25 5. On December 21, 2016, the Bankruptcy Court entered an *Order on Trustee Motion*
26 *and Order for Relief Under Chapter 7* [ECF No. 21] (the “Order for Relief”). The Order for
27

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

1 Relief provided that the Debtor had consented to the filing of a bankruptcy petition and that the
2 filing of the bankruptcy case was effective as of December 15, 2016 (the “Petition Date”). The
3 Order for Relief further required that the Office of the United States Trustee (the “U.S. Trustee”)
4 appoint an Interim Chapter 7 Trustee pursuant to 11 U.S.C. § 701. *See* Nelson Declaration.

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

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

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

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

16 10. Diamond McCarthy LLP (the “Firm”) is a national litigation boutique that
17 practices complex and high-stakes business cases. The Firm represents corporations, creditors’
18 committees, receivers, shareholders, trustees, secured and unsecured creditors, court-appointed
19 trustees and others in bankruptcy litigation as well as parties involved in disputes arising from
20 business dissolutions or restructurings. The Firm has developed a specialty in representing
21 bankruptcy trustees and receivers in litigation involving fraudulent activities and has been lead
22 counsel in large-scale litigation involving recovery of assets in Ponzi scheme cases. *See* Nelson
23 Declaration.

24 11. The Firm has also served as lead counsel in three of the largest law firm
25 bankruptcies in U.S. history. *See* Nelson Declaration.

26 12. The Trustee now desires to employ the law firm of Diamond McCarthy LLP as
27 special litigation counsel to assist with anticipated litigation arising from the Debtor’s bankruptcy
28 case and to provide advice concerning causes of action that can be commenced on behalf of the

1 bankruptcy estate. *See* Nelson Declaration.

2 **II. JURISDICTION AND VENUE**

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

7 14. Pursuant to Local Rule 9014.2, if the Court determines that absent consent of the
8 parties the Court cannot enter final orders or judgment regarding the Application consistent with
9 Article III of the United States Constitution, the Trustee consents to entry of final orders and
10 judgment by this Court.

11 **III. THE FIRM**

12 15. The Firm is well suited for the type of representation required by the Trustee. The
13 Trustee’s conclusion is based on the Firm’s extensive experience in the practice of business,
14 commercial and complex litigation, with expertise in areas of substantive law likely to become
15 relevant in prosecution of the claims in the adversary proceeding. Accordingly, the Trustee has
16 determined that the Firm has the resources and experience necessary to represent it in this case.
17 *See* Nelson Declaration.

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

24 17. The Trustee desires to employ the Firm as special litigation counsel in this
25 bankruptcy case to render the following professional services:

- 26 (a) To investigate the financial affairs of the Debtor and
27 determine if there are any preferential transfers, fraudulent
28 conveyances, or turnover actions that may be filed on behalf
of the bankruptcy estate pursuant to 11 U.S.C. §§ 542, 544,
547, and 548, or other litigation claims owned by the estate

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against third parties.

- (b) To prosecute any and all preferential transfers, fraudulent conveyances, or turnover actions that may be filed on behalf of the bankruptcy estate pursuant to 11 U.S.C. §§ 542, 544, 547, and 548, or other litigation claims owned by the estate against third parties.
- (c) To assist the Trustee in developing legal positions and strategies with respect to litigation matters in these proceedings

18. The Trustee has selected the Firm because of Firm’s experience in in complex and high-stakes business cases, including serving as lead counsel for three of the largest law firm bankruptcies in U.S. history, and its attorneys are well-qualified to represent the Trustee in this case. *See* Nelson Declaration.

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

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

- (a) Are or were a creditor, equity security holder, or insider of the Debtor;
- (b) Are or were, within two (2) years before the date of the filing the bankruptcy petition, a director, officer or employee of Debtor as specified in subparagraph (c) of Section 101(14);
- (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 submits that the Firm is a disinterested person within the meaning of
15 11 U.S.C. § 101(14) for purposes of 11 U.S.C. § 327(a), as it pertains to representing the Trustee
16 as general bankruptcy counsel in the Debtor's Bankruptcy.

17 **IV. COMPENSATION**

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

22 25. The Firm proposes the compensation of attorneys be at varying rates currently
23 ranging from \$380 per hour to \$750 per hour for the services of partners of the Firm and at
24 varying rates currently ranging from \$270 per hour to \$320 per hour for the services of associates
25 of the Firm, subject to change from time to time, and all subject to application to, and approval
26 by, this Court pursuant to Sections 330 and 331 of the Bankruptcy Code.

27 26. The Firm proposes the compensation of paraprofessionals be at varying rates
28 currently ranging from \$145 per hour to \$220 per hour for paraprofessionals, subject to change

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1 from time to time, and all subject to application to, and approval by, this Court pursuant to
2 Sections 330 and 331 of the Bankruptcy Code. A true and correct copy of the proposed Retainer
3 Agreement between the Trustee and the Firm is attached to the Phelps Declaration as **Exhibit**
4 **“1”**.

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

8 28. Inasmuch as the Firm will likely be handling numerous fraudulent transfer actions,
9 the Trustee believes that it would be in the best interest of the creditors that the compensation be
10 on an hourly basis as opposed to a contingency fee basis. Further, once a determination has been
11 made as to what cases the Firm will be prosecuting, the Trustee will seek a budget from the Firm
12 in relation to each matter the Firm is handling. *See* Nelson Declaration.

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

18 30. This Application will be submitted to the United States Trustee upon the filing of
19 the same.

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

21 31. Section 327(a) provides authority for a Chapter 7 Trustee to employ certain
22 professionals following court approval:

23 Except as otherwise provided in this section, the trustee, with the
24 court's approval, may employ one or more attorneys, accountants,
25 appraisers, auctioneers, or other professional persons, that do not
26 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.

27 11 U.S.C. § 327(a); *see also* FED. R. BANKR. P. 2014(a).

28 32. In bankruptcy proceedings, professionals who perform services for a debtor-in-

1 possession or Chapter 7 Trustee cannot recover fees for services rendered for the bankruptcy
2 estate unless those services have been previously authorized by a court order. *Id.*

3 33. In the Ninth Circuit, however, “bankruptcy courts have the power to issue *nunc*
4 *pro tunc* (i.e. retroactive) orders authorizing employment in limited circumstances.” *In re Cook*,
5 79 B.R. 475, 477 (B.A.P. 9th Cir. 1987) (citing *In re Laurent Watch Co.*, 539 F.2d 1231 (9th Cir.
6 1976)). In order to establish the appropriateness of an employment application that seeks *nunc*
7 *pro tunc* approval, the Ninth Circuit Court of Appeals (the “Ninth Circuit”) has held that two
8 general requirements must be satisfied: (1) the professional must satisfactorily explain their
9 failure to receive prior judicial approval; and (2) the professional must demonstrate that their
10 services benefitted the bankruptcy estate in a significant manner. *In re Atkins*, 69 F.3d 970, 974
11 (9th Cir. 1995) (citing *In re Occidental Fin. Group, Inc.*, 40 F.3d 1059, 1062 (9th Cir. 1994).

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

28 35. While the Ninth Circuit held that an applicant seeking *nunc pro tunc* employment

1 must satisfactorily explain their failure to receive prior judicial approval and demonstrate that the
2 services benefitted the bankruptcy estate, it also found that the nine (9) factors identified in
3 *Twinton Properties* may be, but need not be, considered by the bankruptcy court in making such a
4 determination. *Id.* at 976.

5 36. In the instant case, the Court should exercise its discretion in approving the *nunc*
6 *pro tunc* employment of the Firm effective as of December 28, 2016, in order to account for time
7 expended reviewing the docket in the Debtor’s bankruptcy case, conducting legal research, and
8 participating in conference calls with the Trustee to discuss case strategy.

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

12 38. Accordingly, the Trustee respectfully requests that the Court approve the
13 employment of the Firm *nunc pro tunc* as of December 28, 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 special litigation 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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[Proposed] Counsel for Chapter 7 Trustee

**Approved As to Form and Content
OFFICE OF THE UNITED STATES TRUSTEE**

/s/ J. Michal Bloom
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