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*[Proposed] General Bankruptcy Counsel for
Victoria L. Nelson, Chapter 7 Trustee*

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:
ROBERT C. GRAHAM, LTD. fdba ROB
GRAHAM & ASSOCIATES fdba
LAWYERSWEST,

Debtor.

Case No. BK-S-16-16655-BTB
Chapter 7

**APPLICATION TO EMPLOY
SCHWARTZ FLANSBURG, PLLC AS
SPECIAL BANKRUPTCY COUNSEL
FOR VICTORIA L. NELSON, CHAPTER
7 TRUSTEE PURSUANT TO 11 U.S.C. §
327(e) AND FEDERAL RULE OF
BANKRUPTCY PROCEDURE 2014**

Date of Hearing: March 28, 2017
Time of Hearing: 1:30 p.m.
Place: Courtroom No. 4, Second Floor
Foley Federal Building
300 Las Vegas Blvd., S.
Las Vegas, NV 89101

Judge: Honorable Bruce T. Beesley¹

VICTORIA L. NELSON, the duly appointed Chapter 7 Trustee in the above-captioned
bankruptcy case (the “Trustee”), by and through her proposed general bankruptcy counsel of
record, Jacob L. Houmand, Esq. and Kyle J. Ortiz, Esq. of the law firm of Nelson & Houmand,

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 P.C., hereby submits this *Application to Employ Schwartz Flansburg, PLLC as Special*
 2 *Bankruptcy Counsel for Victoria L. Nelson, Chapter 7 Trustee Pursuant to 11 U.S.C. § 327(e)*
 3 *and Federal Rule of Bankruptcy Procedure 2014* (the “Application”).

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 *Schwartz Flansburg, PLLC as Special Bankruptcy Counsel for Victoria L. Nelson, Chapter 7*
 8 *Trustee Pursuant to 11 U.S.C. § 327(e) and Federal Rule of Bankruptcy Procedure 2014* (the
 9 “Nelson Declaration”), and the *Declaration of Samuel A. Schwartz, Esq. In Support of the*
 10 *Application to Employ Schwartz Flansburg, PLLC as Special Bankruptcy Counsel for Victoria L.*
 11 *Nelson, Chapter 7 Trustee Pursuant to 11 U.S.C. § 327(e) and Federal Rule of Bankruptcy*
 12 *Procedure 2014* (the “Schwartz Declaration”), both of which are filed separately and concurrently
 13 with this Court pursuant to Local Rule 9014(c)(2). The Application is also based on the pleadings
 14 and papers on file herein, and any argument that may be entertained at the hearing on the
 15 Application.

16 MEMORANDUM OF POINTS AND AUTHORITIES

17 I. STATEMENT OF FACTS

18 1. On December 15, 2016, an *Involuntary Bankruptcy Petition* [ECF No. 1]² (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 Involuntary Petition was filed by the Estate of Michael B. Macknin, the Sharona Dagani Trust,
 22 and the Margueritte Owens Revocable Trust (collectively, the “Petitioning Creditors”). *See*
 23 *Nelson Declaration*.

24 2. On December 16, 2016, the Petitioning Creditors filed a *Motion to Appoint Interim*
 25 *Trustee in Involuntary Case* [ECF No. 3] (the “Interim Trustee Motion”), which sought authority
 26 to appoint an interim trustee to take possession of property and to manage the business operations

27
 28 ² 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 and assets of the Debtor. *See* Nelson Declaration.

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

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

10 5. On February 9, 2017, Markel Insurance Company (“MIC”) filed the *Motion of*
11 *Markel Insurance Company for Relief from Stay Pursuant to 11 U.S.C. 362 to Proceed in Non-*
12 *Bankruptcy Forum* (the “Motion for Stay Relief”) [ECF No. 169]. The Motion for Stay Relief
13 seeks relief from the automatic stay to pursue in a non-bankruptcy forum an action for declaratory
14 relief and to rescind the Debtor’s Malpractice Insurance Policy with MIC (the “Malpractice
15 Insurance Policy”). *See* Nelson Declaration.

16 6. The Motion for Stay Relief further states that approximately 390 parties have
17 notified MIC of possible malpractice claims (the “Claims”). *See* Nelson Declaration.

18 7. The Trustee has filed a claim on behalf of the Debtor’s creditor body within the
19 applicable deadlines to file such a claim under the terms of the Malpractice Insurance Policy. *See*
20 Nelson Declaration.

21 8. In order to assist the Trustee in pursuing the Claims and exercising any and all
22 rights held by the Debtor’s bankruptcy estate against the Malpractice Insurance Policy, she now
23 desires to employ the law firm of Schwartz Flansburg, PLLC (the “Firm”), as special bankruptcy
24 counsel in the Debtor’s bankruptcy case for the purpose of evaluating and prosecuting, if
25 appropriate, litigation against MIC. *See* Nelson Declaration.

26 9. The Trustee proposes that the retention of the Firm shall be on a contingency fee
27 basis pursuant to the terms of a retainer agreement (the “Retainer Agreement”). Specifically, the
28 Retainer Agreement provides that the Firm shall be compensated as follows:

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- **Pre-litigation activity.** The Firm shall be entitled to a contingency fee of 40% to be calculated on the gross amount of recovery (i.e., before deducting for or seeking reimbursement of any expenses paid by the Trustee to the Firm or otherwise) generated from all work performed prior to filing a lawsuit or making a formal demand for arbitration. Such work may include, but is not limited to, factual investigation, claims investigation and analysis, document review, factual and legal research, work with experts in preparation of a complaint and the requisite reports that must be filed with a complaint, preparation of demand letters, presuit settlement negotiations, preparation of a complaint and/or arbitration demand, and pre-suit mediation(s), if any.
- **Post-filing litigation activity.** Once any litigation is initiated, either through the filing of a complaint or making a formal demand for arbitration, the Firm shall be entitled to a 40% contingency fee calculated on the gross amount of recovery (i.e., before deducting for or seeking reimbursement of any expenses paid by the Trustee to the Firm or otherwise). Any work performed in the context of an arbitration following a demand for arbitration shall constitute “Post-filing litigation activity.”
- **Appellate activity.** In the event that a notice of appeal is filed by any party, the Firm shall be entitled to an additional 5% contingency fee calculated on the gross amount of recovery (i.e., before deducting for or seeking reimbursement any expenses paid by the Trustee to the Firm or otherwise) for an appeal to the District Court or Bankruptcy Appellate Panel, and an additional 5% contingency fee calculated on the gross amount of recovery in the event of an appeal to the Ninth Circuit Court of Appeals.
- **Payment of Contingency Fee.** With respect to any recovery by the Trustee arising out of, pertaining to, or resulting from the pursuit of the claims in the Litigation, whether through any settlement, judgment, arbitration award, or otherwise, the Trustee shall pay the appropriate contingency fee to the Firm within fourteen (14) days of court approval. The Firm expressly agrees that it is being retained to represent the Trustee in her capacity as the Chapter 7 Trustee in the Bankruptcy Case and, therefore, the Trustee shall not be personally liable for any fees incurred as part of this Agreement.

10. A true and correct copy of the Retainer Agreement is attached to the Schwartz Declaration as **Exhibit “1”**.

II. JURISDICTION AND VENUE

11. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1134. This is a core proceeding pursuant to 28 U.S.C. § 157(b) (2) (A). The statutory basis for the relief sought is Section 327, 1104 and 1106 of the Bankruptcy Code and FRBP 2014. Venue of Debtor’s Chapter 7 case in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

...

1 12. Pursuant to Local Rule 9014.2, if the Court determines that absent consent of the
2 parties the Court cannot enter final orders or judgment regarding the relief requested herein
3 consistent with Article III of the United States Constitution, the Trustee consents to entry of final
4 orders and judgment by this Court.

5 **III. THE FIRM**

6 13. The Trustee has selected the Firm as her special litigation counsel to investigate,
7 evaluate, and, if appropriate, prosecute the Claims against MIC. The Trustee has concluded that
8 the Firm is the best qualified and, in the Trustee's judgment, is best able to provide the required
9 services and the Firm most likely to secure a favorable outcome in the best interests of the estate.
10 The Trustee's conclusion is based on the firm's extensive experience in the practice of business,
11 commercial and complex litigation, with expertise in areas of substantive law likely to become
12 relevant in prosecution of the Claim. *See* Nelson Declaration.

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

19 15. The attorneys employed by the Firm are duly admitted to practice before this
20 Court.

21 16. The Trustee desires to employ the Firm as her special counsel in this bankruptcy
22 case to render the following professional services: take the role of lead counsel with respect to
23 the evaluation and prosecuting, if applicable, litigation of the Claims; continue the Trustee's
24 detailed investigation into all matters related to the Claims, including any adversary proceeding
25 which may result following the Trustee's investigation (the "Adversary Proceeding"); maintain
26 and settle the Claims, including the Adversary Proceeding; and perform such other legal services
27 (including, but not limited to, appearing before this Court, any other federal court, state court, or
28 appellate courts) as may be required in connection with, and in furtherance of, the foregoing and

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1 which are in the interests of the bankruptcy estate. *See* Nelson Declaration.

2 17. The Trustee has selected the Firm because its attorneys have experience in matters
3 of this character, are familiar with bankruptcy practice and insurance law and are qualified to
4 represent the Trustee in this case. *See* Nelson Declaration.

5 18. The Employment of the Firm will assist the Trustee in fulfilling her statutory
6 obligations under Section 704 by collecting and reducing to money assets of the Debtor's
7 bankruptcy estate. *See* Nelson Declaration.

8 19. Following the Trustee's request that the Firm represent her in this case as special
9 bankruptcy counsel, a conflicts check was undertaken, utilizing the Firm's client list. Based upon
10 the conflicts check the Firm and its associates are "disinterested persons" as defined by 11 U.S.C.
11 § 101 and do not hold or represent any interest adverse to the bankruptcy estate. *See* Schwartz
12 Declaration.

13 20. Although the Firm is seeking retention in accordance with Section 327(e) of the
14 Bankruptcy Code, the conclusion 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) is based upon the fact neither the Firm
16 nor any of its attorneys:

- 17 (a) Are or were a creditor, equity security holder, or insider of
18 the Debtor;
- 19 (b) Are or were, within two (2) years before the date of the
20 filing the bankruptcy petition, a director, officer or
21 employee of Debtor as specified in subparagraph (c) of
22 Section 101(14);
- 23 (c) Hold, or have ever held, an interest materially adverse to the
24 interest of the estate or of any class of creditors, equity
25 holders, or parties in interest, by reason of any direct or
26 indirect relationship to, or interest in, the Debtor or for any
27 other reason except as stated herein;
- 28 (d) Represent, or have ever represented, the Debtor, insiders of
the Debtor, creditors of the Debtor, any other party in
interest, or their respective attorneys and accountants except
as set forth herein; and
- (e) Is a relative or employee of the U.S. Trustee or a
Bankruptcy Judge except as stated herein.

See Schwartz Declaration.

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1 21. The Firm represents no interest that is adverse to the Trustee, to the Debtor's
2 estate, any creditor, any party in interest, the U.S. Trustee, or any attorney or accountant
3 employed by the foregoing, in matters upon which it will be engaged as special counsel. *See*
4 Schwartz Declaration.

5 22. Upon completion of a conflicts check and based upon information and belief, the
6 Firm's only connections with the Debtor is the Firm's current representation of the Debtor in this
7 case. *See* Schwartz Declaration.

8 23. Section 327(e) provides that the Trustee, with the Court's approval, may employ
9 for a specified special purpose, other than to represent the trustee in conducting the case, an
10 attorney that has represented the debtor, if in the best interest of the estate, and if such attorney
11 does not represent or hold any interest adverse to the debtor or to the estate with respect to the
12 matter on which such attorney is to be employed.

13 24. The Trustee submits that the Firm is a disinterested person within the meaning of
14 Section 101(14) for purposes of Section 327(e), as it pertains to representing the bankruptcy
15 estate's interest as special bankruptcy counsel. *See In re Fondiller*, 15 B.R. 890, 892 (B.A.P. 9th
16 Cir. 1981) (Stating that "[Section] 327(e) of the Code specifically provides that, under certain
17 circumstances, the attorney for the debtor may serve as special counsel for the trustee.")

18 25. The *Fondiller* court allowed the trustee to employ special counsel who also
19 represented creditors in the same bankruptcy case, explaining that the provision in Section 327(a)
20 prohibiting the trustee from hiring counsel who hold or represent an interest adverse to estate
21 means that attorney must not represent an adverse interest relating to services which are to be
22 performed by that attorney.

23 26. Furthermore, Robert C. Graham, the principal of the Debtor, has agreed to the
24 Firm's representation of the Trustee as special counsel. *See* Schwartz Declaration.

25 **IV. COMPENSATION**

26 27. The fees incurred by the Firm will be handled on a contingency fee basis with the
27 Firm's fees being dependent upon recovery through settlement or trial, except in the event of
28 discharge from representation as provided below. The Firm's fees, costs and expenses will be

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paid as follows:

Pre-litigation activity. The Firm shall be entitled to a contingency fee of 40% to be calculated on the gross amount of recovery (i.e., before deducting for or seeking reimbursement of any expenses paid by the Trustee to the Firm or otherwise) generated from all work performed prior to filing a lawsuit or making a formal demand for arbitration. Such work may include, but is not limited to, factual investigation, claims investigation and analysis, document review, factual and legal research, work with experts in preparation of a complaint and the requisite reports that must be filed with a complaint, preparation of demand letters, pre-suit settlement negotiations, preparation of a complaint and/or arbitration demand, and pre-suit mediation(s), if any.

Post-filing litigation activity. Once any litigation is initiated, either through the filing of a complaint or making a formal demand for arbitration, the Firm shall be entitled to a 40% contingency fee calculated on the gross amount of recovery (i.e., before deducting for or seeking reimbursement of any expenses paid by the Trustee to the Firm or otherwise). Any work performed in the context of an arbitration following a demand for arbitration shall constitute “Post-filing litigation activity.”

Appellate activity. In the event that a notice of appeal is filed by any party, the Firm shall be entitled to an additional 5% contingency fee calculated on the gross amount of recovery (i.e., before deducting for or seeking reimbursement any expenses paid by the Trustee to the Firm or otherwise) for an appeal to the District Court or Bankruptcy Appellate Panel, and an additional 5% contingency fee calculated on the gross amount of recovery in the event of an appeal to the Ninth Circuit Court of Appeals.

Payment of Contingency Fee. With respect to any recovery by the Trustee arising out of, pertaining to, or resulting from the pursuit of the claims in the Litigation, whether through any settlement, judgment, arbitration award, or otherwise, the Trustee shall pay the appropriate contingency fee to the Firm within fourteen (14) days of court approval. The Firm expressly agrees that it is being retained to represent the Trustee in her capacity as the Chapter 7 Trustee in the Bankruptcy Case and, therefore, the Trustee shall not be personally liable for any fees incurred as part of this Agreement. *See Exhibit “1” to the Schwartz Declaration.*

28. The Firm understands that its compensation is subject to prior Court approval. *See Schwartz Declaration.*

29. No promises have been received by the Firm or any attorney of the Firm, as to payment or compensation in connection with the above-referenced bankruptcy case in accordance with the provisions of the Bankruptcy Code, the FRBP, the Local Rules, and orders of the Court.

