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*Electronically Filed On: February 22, 2017*

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

8 **UNITED STATES BANKRUPTCY COURT**

9 **DISTRICT OF NEVADA**

10 In re:  
11 ROBERT C. GRAHAM, LTD. fdba ROB  
12 GRAHAM & ASSOCIATES fdba  
13 LAWYERSWEST,

14 Debtor.

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

**DECLARATION OF SAMUEL A. SCHWARTZ, ESQ. IN SUPPORT OF 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. Beesley

21  
22 I, Samuel A. Schwartz, Esq., hereby declare as follows:

23 1. I am over the age of 18 and mentally competent. Except where stated on  
24 information and belief, I have personal knowledge of the facts in this matter and if called upon to  
25 testify, could and would do so. I make this declaration in support of the *Application to Employ*  
26 *Schwartz Flansburg, PLLC as Special Bankruptcy Counsel for Victoria L. Nelson, Chapter 7*  
27 *Trustee Pursuant to 11 U.S.C. § 327(e) and Federal Rule of Bankruptcy Procedure 2014* (the  
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1 “Application”).<sup>1</sup>

2 2. I am an attorney licensed to practice law in the State of Nevada and admitted to  
3 practice before this Court. I am a managing member with the law firm of Schwartz Flansburg,  
4 PLLC (the “Firm”). The Firm maintains offices at 6623 South Las Vegas Boulevard, Suite 300,  
5 Las Vegas, Nevada 89119.

6 3. This Declaration is made pursuant to 11 U.S.C. § 329 and Federal Rule of  
7 Bankruptcy Procedure 2014(b) and is in support of the Application.

8 4. The Firm is well suited for the type of representation required by Victoria L.  
9 Nelson, the Chapter 7 Trustee (the “Trustee”). The Firm is best able to provide the required  
10 services based on the Firm’s extensive experience in the practice of business, commercial and  
11 complex litigation, with expertise in areas of substantive law likely to become relevant in  
12 prosecution of the Claim.

13 5. The attorneys of the Firm that will render services in relation to the above-  
14 referenced 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 of  
16 Practice for the United States Bankruptcy Court for the District of Nevada (the “Local Rules”)  
17 and will comply with them, as well as the procedures set forth in the “Guide to Applications for  
18 Professional Compensation,” promulgated by the Office of the United States Trustee (the “U.S.  
19 Trustee”) with regard to compensation of professionals.

20 6. Following the Trustee’s request that the Firm represent her in this case as special  
21 bankruptcy counsel, a conflicts check was undertaken, utilizing the Firm’s client list. Based upon  
22 the conflicts check and my information and belief, I believe that the Firm and its attorneys are  
23

24 \_\_\_\_\_  
25 <sup>1</sup> Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11  
26 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The  
27 Federal Rules of Civil Procedure will be referred to as “FRCP” and the Federal Rules of  
28 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”.  
Unless otherwise provided herein, all defined terms shall have the same meaning ascribed to them  
in the Application.

1 “disinterested persons” as defined by 11 U.S.C. § 101 and do not hold or represent any interest  
2 adverse to the bankruptcy estate.

3 7. Although the Firm is seeking retention in accordance with Section 327(e) of the  
4 Bankruptcy Code, the conclusion that the Firm is a “disinterested” person within the meaning of  
5 11 U.S.C. § 101(14) for purposes of 11 U.S.C. § 327(a) is based upon the fact neither the Firm  
6 nor any of its attorneys:

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

24 8. To the best of my knowledge and belief, the Firm represents no interest that is  
25 adverse to the Trustee, to the Debtor’s estate, any creditor, any party in interest, the U.S. Trustee,  
26 or any attorney or accountant employed by the foregoing, in matters upon which it will be  
27 engaged as special counsel.

28 **9. Upon completion of the Firm’s conflicts check and based upon information  
and belief, the Firm’s only connection with the Debtor is the Firm’s current representation  
of the Debtor in this case.**

10 Except for the representation of the Debtor, to the best of my information and  
11 belief, neither the Firm nor any of its attorneys has any connection with the Debtor, the creditors,

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1 any other parties in interest, their respective attorneys and accountants, the Office of the United  
2 States Trustee, or any person employed in the Office of the United States Trustee and that the  
3 Firm and each of its attorneys are all disinterested persons pursuant to 11 U.S.C. § 101(14).

4 11. Robert C. Graham, the principal of the Debtor, has agreed to the Firm's  
5 representation of the Trustee as special counsel.

6 12. The fees incurred by the Firm will be handled on a contingency fee basis with the  
7 Firm's fees being dependent upon recovery through settlement or trial, except in the event of  
8 discharge from representation as provided below. The Firm's fees, costs and expenses will be  
9 paid as follows:

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

21 **Post-filing litigation activity.** Once any litigation is initiated, either  
22 through the filing of a complaint or making a formal demand for  
23 arbitration, the Firm shall be entitled to a 40% contingency fee  
24 calculated on the gross amount of recovery (i.e., before deducting for  
25 or seeking reimbursement of any expenses paid by the Trustee to the  
26 Firm or otherwise). Any work performed in the context of an arbitration  
27 following a demand for arbitration shall constitute "Post-filing  
28 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.

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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.

A true and correct copy of the proposed Retainer Agreement with Trustee is attached hereto as **Exhibit “1”**.

13. The Firm understands that its compensation is subject to prior Court approval.

14. The Firm’s representation of the Trustee in the Debtor’s bankruptcy case shall be limited to the prosecution of any claims against MIC concerning the Malpractice Insurance Policy.

15. 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, FRBP and the Local Rules (the “Local Rules”) and orders of the Court. The Firm has no agreement with any other entity to share with such entity any compensation received by the Firm, except as permitted under Section 504(b)(1).

16. The Firm has not shared, or agreed to share, with any other individual or entity, other than with members of the Firm, any compensation paid or to be paid.

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

Dated this 22nd day of February, 2017.

/s/ Samuel A. Schwartz  
Samuel A. Schwartz, Esq.

**EXHIBIT “1”**

SCHWARTZ FLANSBURG, PLLC  
**Retainer Agreement**

1. **Parties.** This Retainer Agreement (this “**Agreement**”), executed in duplicate with each party receiving an executed original, is entered into between SCHWARTZ FLANSBURG, PLLC a Nevada Professional LLC (the “**Firm**”), and Victoria L. Nelson, the Chapter 7 Trustee (the “**Trustee**”) in the bankruptcy case entitled In re Robert C. Graham, Ltd., Case Number BK-16-16655-BTB (the “**Bankruptcy Case**”), currently pending before the United States Bankruptcy Court for the District of Nevada.

2. **Scope of Engagement.** The Firm shall serve as special litigation bankruptcy counsel to the Trustee in the Bankruptcy Case for the purpose of evaluating and prosecuting, if appropriate, litigation for the professional malpractice claims filed against Robert C. Graham, Ltd. with Markel Insurance Company under Policy Number LA303-630.

The Trustee understands she is retaining the Firm, and not any particular attorney, and the services being rendered under the terms of this Agreement will not necessarily be performed by, or under the supervision of, any particular attorney. It is further understood by the Trustee that the responsible attorney may delegate to others in the Firm certain of the services provided to the Trustee. Any such delegation will not affect the Trustee’s obligation to pay the legal fees required under the terms of this Agreement.

3. **Responsibilities of Firm and the Trustee.** The Firm will perform the legal services required under this Agreement; keep the Trustee informed of progress and developments, and respond promptly to the Trustee’s inquiries and communications. The Trustee will be truthful and cooperative with the Firm and its staff; keep the Firm informed of developments, including receipt of any notices or documents relating to this matter from others; supply the Firm with all information requested by the Firm (on a timely basis) to the extent necessary for the Firm to complete the legal services being provided for in this Agreement; and inform the Firm of any changes to the Trustee’s address, telephone number, facsimile number, email address, and whereabouts.

4. **The Trustee’s Address, Telephone and Email Address.** Absent the Trustee’s written notification of any change in the Trustee’s address, email address, or facsimile number, all notices will be either personally delivered to the Trustee, sent to the Trustee by facsimile or email, or delivered to the Trustee by the United States Postal Service via first class mail or by overnight delivery at the Firm’s option. The Trustee’s address, telephone, email address, and facsimile numbers for purposes of this Agreement are as follows: Victoria L. Nelson, Chapter 7 Trustee, 3900 Paradise Road, Suite U, Las Vegas, Nevada 89169.

5. **Compensation.** It is expressly recognized by the Firm that its retention by the Trustee is subject to the entry of an appropriate order by the Bankruptcy Court and that payment of the Trustee's fees will be subject to Bankruptcy Court approval. The Firm shall comply with all relevant Bankruptcy Code and Rules with respect to payment of any attorneys' fees incurred in this matter. In no circumstances shall the Trustee be personally liable for the payment of the Firm's attorneys' fees. Pursuant to this Retainer Agreement, the Firm will be compensated 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.



6. **Costs.** In addition to the Firm's fees for services, the Trustee is responsible to reimburse the Firm for all reasonable out-of-pocket costs that the Firm incurs on behalf of the Trustee. For example, charges for court reporting services, expenses associated with travel, long-distance telephone calls, computerized research services, courier services, fax and other forms of communication, and any other out-of-pocket expenses will be billed to the Trustee. While the Firm may sometimes advance its funds to cover out-of-pocket expenses incurred on behalf of the Trustee, the Firm reserves the right to pass any such expenses on to the Trustee for payment directly to the person who provided the services. The Trustee shall reimburse the Firm for all reasonable out-of-pocket costs 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 out-of-pocket expenses incurred by the Firm as part of this Agreement.

7. **The Trustee's Confidential Material.** The Trustee is informed that Nevada state law requires that the Firm not disclose confidential communications or secrets of a client.

8. **Settlement.** With respect to any legal services relating to disputed matters, the Firm will not settle the Trustee's dispute without the approval of the Trustee, who will have the absolute right to accept or reject any proposed resolution of the disputed matter. The Firm will notify the Trustee promptly of the terms of any proposed resolution or settlement offer received by the Firm relating to the disputed material.

9. **Termination of the Firm.** The Trustee may terminate the Firm at any time by written notice effective when received by the Firm. Unless specifically agreed by the Firm and the Trustee, the Firm will provide no further services on the Trustee's behalf after receipt of the notice. If the Firm is the Trustee's attorney of record in any proceeding, the Trustee will execute and return a substitution of attorney form immediately on its receipt from the Firm. Notwithstanding the discharge, the Trustee will remain obligated to pay the Firm all attorney's fees and expenses required under the terms of this Agreement.

10. **Withdrawal of Attorney.** The Firm may withdraw at any time as permitted under the Rules of Professional Conduct of the State Bar of Nevada. The circumstances under which the Rules permit such withdrawal include, but are not limited to, the following: (a) the Trustee consents; (b) the Trustee's conduct renders it unreasonably difficult for the Firm to carry out the representation effectively; or (c) the Trustee fails to pay attorney's fees as required by this Agreement. The Firm also has the right at its discretion to withdraw from the Trustee's case if the Trustee misrepresents or fails to disclose material facts to the Firm, fails to follow the Firm's advice, fails to cooperate in the preparation of the case, or in the event the Firm determines

it is not in the Firm's and the Trustee's mutual interests to continue the representation.

11. **Expert Witnesses.** It may become necessary in the preparation of the Trustee's case for the Firm to hire expert witnesses, consultants, or investigators. The Firm will not hire such persons unless the Trustee agrees to pay their fees and charges, but the Firm will select which persons should be hired. The Trustee's refusal to authorize hiring of such persons when the Firm considers them necessary could greatly injure the Trustee's case, and if the absence of such persons makes it impossible, the Firm's discretion, to continue with the case, the Firm may withdraw from the representation.

12. **Records Management Retention and Disposition.** When the Trustee's matter is concluded, the Firm shall send the Trustee written notice that the Firm will be closing the file for that matter, and the Trustee can then inform the Firm if the Trustee wants to obtain copies of any items in the Trustee's file. If the Firm does not receive a written request from the Trustee for the Trustee's file, all its contents will be sent to offsite storage. If the Trustee's file is sent off-site for storage before the Trustee has given the Firm a timely request for the Trustee's file, the Firm may charge the Trustee an administrative and shipping cost for retrieval of materials from storage. Except for the Trustee Material and as discussed below, in the event the Trustee wishes to obtain copies of any materials in the Trustee's file, the Trustee agrees to pay reasonable reproduction costs expended to prepare and produce copies of all materials delivered to the Trustee.

The Firm and the Trustee agree that all client-supplied materials (hereafter, the "**Trustee Material**") are the property of the Trustee. "**Lawyer End Product**" means for example, finalized contracts, pleadings, and trust documents. In the event the Trustee wishes to obtain copies of any Lawyer End Product during the representation, at the conclusion of the representation, or thereafter, the Firm shall deliver the requested copies, but the Trustee shall pay the costs of reproduction as provided above. The Firm and the Trustee agree that "**Lawyer Work Product**" means the property of the Firm. Lawyer Work Product includes, for example drafts, notes, internal memoranda, electronic files, and lawyer representation and administration materials, including lawyer-client correspondence and conflicts materials. The Firm shall retain all Lawyer Work Product and shall have no obligation to supply copies of Lawyer Work Product to the Trustee.

At the end of the established retention period, normally seven (7) years after the Trustee's matter is closed, the Firm will send a Final Notice of Intent to Destroy Records (the "**Final Notice**") to the Trustee at the Trustee's last known address. The Trustee will have the opportunity to retrieve her Trustee Materials or obtain copies of the Lawyer End Product within forty-five (45) days after the date of Final Notice is sent, or the Trustee may direct the Firm to forward the Trustee Materials or copies of the Lawyer End Product to the Trustee or to another legal representative, at the Trustee's expense. If

the Trustee fails to retrieve the Trustee Materials or obtain copies of the Lawyer End Product or request the Firm to forward them within forty-five (45) days of the Final Notice, the Firm will consider the Trustee's non-response as the Trustee's authorization to destroy the Trustee Materials and the Trustee's entire file.

13. **Disclaimer of Guaranty.** Although the Firm may offer an opinion about possible results regarding the subject matter of this Agreement, the Firm cannot guarantee any particular result. The Trustee acknowledges that the Firm has made no promises about the outcome and that any opinion offered by the Firm in the future will not constitute a guaranty.

14. **Trustee Concerns.** In the event the Trustee has concerns with the manner in which the Trustee's matter is being handled by the Firm, the Trustee has any unresolved concerns with any statement for services received from the Firm, or the Trustee has other matters that it wishes to discuss regarding the terms of this Agreement, the Trustee may, at its discretion, address those concerns to the Firm. The Firm agrees to negotiate in good faith to resolve any the Trustee concerns in a manner equitable to both parties.

15. **Independent Determination as to Fairness and Reasonability.** The Trustee acknowledges that (a) the Firm did not act as its counsel in preparing or negotiating this Agreement; (b) the Trustee has made sufficient investigation and inquiry to determine that the terms of this Agreement are fair and reasonable; (c) this Agreement was the product of an arm's length negotiation between the Trustee and the Firm; (d) the Trustee has had ample opportunity to review this Letter of Engagement independently and to the extent that the Trustee has chosen to do so, with separate counsel; and (e) the Trustee is entering into this Letter of Engagement freely and voluntarily.

16. **Severability.** In case any one or more of the provisions in this Agreement shall be found unenforceable in any respect, we have agreed that such unenforceability shall not affect any other provision, and that all other provisions of this Letter of Engagement shall remain valid and enforceable.

17. **Integration/Amendment.** This Agreement constitutes the final and only agreement of the parties hereto regarding the Firm's representation of the Trustee in the Bankruptcy Case, and it supersedes any prior written or oral understandings or agreements between the parties regarding that subject. This Agreement may not be modified, amended, or replaced except in a writing signed by the parties hereto.

18. **Execution in Counterparts.** It is understood and agreed that this Agreement may be signed in a number of identical counterparts, each of which shall be deemed an original for all purposes, but all of which shall constitute one and the same

agreement.

19. **Effective Date of Agreement.** The effective date of this Agreement will be the date when, having been executed by the Trustee, one copy of this Agreement is received by the Firm.

The foregoing is agreed to by:

**VICTORIA L. NELSON, CHAPTER 7 TRUSTEE**

\_\_\_\_\_  
Date:\_\_\_\_\_

**SCHWARTZ FLANSBURG, PLLC**

\_\_\_\_\_  
By:\_\_\_\_\_  
Its: Manager  
Date:\_\_\_\_\_