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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
GRAHAM & ASSOCIATES fdba
12 LAWYERSWEST,

13 Debtor.

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

APPLICATION TO EMPLOY
EISNERAMPER LLP AS FORENSIC
ACCOUNTANT, NUNC PRO TUNC TO
MARCH 17, 2017, 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: April 25, 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

21 VICTORIA L. NELSON, the duly appointed Chapter 7 Trustee in the above-captioned
22 bankruptcy case (the “Trustee”), by and through her general bankruptcy counsel of record, Jacob
23 L. Houmand, Esq. and Kyle J. Ortiz, Esq. of the law firm of Nelson & Houmand, P.C., hereby
24 files this *Application to Employ EisnerAmper LLP As Forensic Accountant, Nunc Pro Tunc to*

25 _____
26 ¹ Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11
27 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
28 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 *March 17, 2017, for Victoria L. Nelson, Chapter 7 Trustee Pursuant to 11 U.S.C. §§ 327a) and*
 2 *328(a) and Federal Rule of Bankruptcy Procedure 2014 (the “Application”).*

3 This Application is filed pursuant to 11 U.S.C. §§ 327 and 328 and Federal Rule of
 4 Bankruptcy Procedure 2014. The Application is based on the following Memorandum of Points
 5 and Authorities, the *Declaration of Victoria L. Nelson In Support of Application to Employ*
 6 *EisnerAmper LLP As Forensic Accountant, Nunc Pro Tunc to March 17, 2017, for Victoria L.*
 7 *Nelson, Chapter 7 Trustee Pursuant to 11 U.S.C. §§ 327a) and 328(a) and Federal Rule of*
 8 *Bankruptcy Procedure 2014 (the “Nelson Declaration”), and the Declaration of Hubert Klein,*
 9 *CPA In Support of Application to Employ EisnerAmper LLP As Forensic Accountant, Nunc Pro*
 10 *Tunc to March 17, 2017, for Victoria L. Nelson, Chapter 7 Trustee Pursuant to 11 U.S.C. §§*
 11 *327a) and 328(a) and Federal Rule of Bankruptcy Procedure 2014 (the “Klein Declaration”),*
 12 both of which are filed separately and concurrently with this Court pursuant to Local Rule
 13 9014(c)(2). The Application is also based on the pleadings and papers on file herein, and any
 14 argument that may be entertained at the hearing on the Application.

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I. STATEMENT OF FACTS**

17 1. On December 15, 2016, an *Involuntary Bankruptcy Petition* [ECF No. 1]² (the
 18 “*Involuntary Petition*”) was filed against ROBERT C. GRAHAM, LTD., fdba ROB GRAHAM &
 19 ASSOCIATES fdba LAWYERSWEST (the “*Debtor*”) pursuant to 11 U.S.C. § 303. The
 20 *Involuntary Petition* was filed by the Estate of Michael B. Macknin, the Sharona Dagani Trust,
 21 and the Margueritte Owens Revocable Trust (collectively, the “*Petitioning Creditors*”). *See*
 22 *Nelson Declaration.*

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

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 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.

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

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

9 5. Consistent with her obligations under Section 704(a)(4), the Trustee began
10 investigating the Debtor’s financial affairs immediately following her appointment as Chapter 7
11 Trustee. *See* Nelson Declaration.

12 6. Following discussions with counsel for the Petitioning Creditors and the State Bar
13 of Nevada, the Trustee has served seventeen (17) subpoenas (the “Subpoenas”) requesting the
14 production of documents on third party financial institutions, title companies, accountants, and
15 other entities that may have information related to the Debtor’s financial affairs. One of the
16 Subpoenas was served on City National Bank, N.A., the bank where the Debtor held its general
17 operating account and IOLTA trust account. The majority of the institutions that were served with
18 the Subpoenas have produced responsive documents. *See* Nelson Declaration.

19 7. The Trustee has also employed Agilitec IT (“Agilitec”), a technology services
20 firm, to recover thousands of documents deleted by Mr. Graham from his Dropbox, Inc. account
21 (the “Dropbox Account”) prior to the filing of the Involuntary Petition. Agilitec was successful in
22 restoring all files that were deleted by Mr. Graham. The Trustee has also obtained copies of the
23 Debtor’s books and records pertaining to its business operations and the accounting of its IOLTA
24 trust account. *See* Nelson Declaration.

25 8. The Trustee requires the assistance of a forensic accountant to analyze the
26 Debtor’s books and records and the financial records that have been produced pursuant to the
27 Subpoenas. *See* Nelson Declaration.

28 . . .

1 9. Accordingly, the Trustee seeks to employ EisnerAmper LLP (“EisnerAmper”) as
2 forensic accountant *nunc pro tunc* to March 17, 2017.³ *See* Nelson Declaration.

3 **II. JURISDICTION AND VENUE**

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

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

12 **III. EISNERAMPER**

13 12. The Trustee seeks to employ EisnerAmper as forensic accountants in connection
14 with her administration of the Debtor’s bankruptcy case to perform the following services:
15 tracing cash flows and other transfers; analyzing materials obtained through the discovery
16 process; locating bank accounts; identifying the location and disposition of recoverable assets;
17 assisting in identifying potential avoidable transfers such as preferences and fraudulent
18 conveyances and other recoverable transfers; offering testimony; and performing other forensic
19 accounting analysis. *See* Nelson Declaration.

20 13. EisnerAmper is experienced in accounting issues and forensic accounting and is
21 qualified to provide the accounting consulting and testimonial expertise required by the Trustee in
22 connection with Trustee’s administration of the Debtor’s bankruptcy estate. *See* Klein
23 Declaration.

24 14. The Trustee submits that the ability to draw on this broad and extensive experience
25 makes EisnerAmper particularly qualified to provide the expert accounting services required by
26

27 ³ The request to employ EisnerAmper, *nunc pro tunc*, is appropriate because it will allow
28 EisnerAmper to begin reviewing the documentation produced from the Subpoenas and the
Debtor’s books and records.

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1 the complexities of the Debtor’s bankruptcy case.

2 15. EisnerAmper will provide expert accounting and financial services to the
3 bankruptcy estate. Such services will include accounting consulting and expert witness testimony
4 and related issues raised in prosecution of contested matters and adversary proceedings, including
5 the Debtor’s solvency, financial condition, and ultimately with assisting in the tracking and
6 recovery of funds.

7 16. Following the Trustee’s request that EisnerAmper represent her in this case as
8 forensic accountant, a conflicts check was undertaken, utilizing EisnerAmper’s client list. Based
9 upon the conflicts check EisnerAmper and its associates are “disinterested persons” as defined by
10 11 U.S.C. § 101 and do not hold or represent any interest adverse to the bankruptcy estate. *See*
11 *Schwartz Declaration.*

12 17. The conclusion that EisnerAmper is a “disinterested” person within the meaning of
13 11 U.S.C. § 101(14) for purposes of 11 U.S.C. § 327(a) is based upon the fact neither
14 EisnerAmper nor any of its attorneys:

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

18 18. EisnerAmper represents no interest that is adverse to the Trustee, to the Debtor’s
estate, any creditor, any party in interest, the U.S. Trustee, or any attorney or accountant

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1 employed by the foregoing, in matters upon which it will be engaged as forensic accountant. *See*
2 Klein Declaration.

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

8 20. The Trustee has employed EisnerAmper in unrelated bankruptcy cases in which
9 she has been appointed as Chapter 7 Trustee.

10 21. The Trustee submits that EisnerAmper is a disinterested person within the meaning
11 of Section 101(14) as it pertains to representing the Debtor’s bankruptcy estate as forensic
12 accountant.

13 **IV. COMPENSATION**

14 22. The Trustee desires to employ EisnerAmper and its professionals on an hourly
15 basis. EisnerAmper has agreed to provide accounting services to the Debtor’s bankruptcy estate
16 at a blended hourly rate of \$375. A true and correct copy of the proposed retainer agreement
17 between the Trustee and EisnerAmper is attached to the Klein Declaration as **Exhibit “1”**.

18 23. The Firm understands that its compensation is subject to prior Court approval. *See*
19 Klein Declaration.

20 24. No promises have been received by EisnerAmper or any employee of
21 EisnerAmper, as to payment or compensation in connection with the above-referenced
22 bankruptcy case in accordance with the provisions of the Bankruptcy Code, the FRBP, the Local
23 Rules, and orders of the Court.

24 25. EisnerAmper has no agreement with any other entity to share with such entity any
25 compensation received by EisnerAmper, except as permitted under Section 504(b)(1). *See* Klein
26 Declaration.

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

2 26. Section 327(a) provides authority for a Chapter 7 Trustee to employ certain
3 professionals following court approval:

4 Except as otherwise provided in this section, the trustee, with the
5 court's approval, may employ one or more attorneys, accountants,
6 appraisers, auctioneers, or other professional persons, that do not
7 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.

8 11 U.S.C. § 327(a); *see also* FED. R. BANKR. P. 2014(a).

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

12 28. In the Ninth Circuit, however, “bankruptcy courts have the power to issue *nunc*
13 *pro tunc* (i.e. retroactive) orders authorizing employment in limited circumstances.” *In re Cook*,
14 79 B.R. 475, 477 (B.A.P. 9th Cir. 1987) (citing *In re Laurent Watch Co.*, 539 F.2d 1231 (9th Cir.
15 1976)). In order to establish the appropriateness of an employment application that seeks *nunc*
16 *pro tunc* approval, the Ninth Circuit Court of Appeals (the “Ninth Circuit”) has held that two
17 general requirements must be satisfied: (1) the professional must satisfactorily explain their
18 failure to receive prior judicial approval; and (2) the professional must demonstrate that their
19 services benefitted the bankruptcy estate in a significant manner. *In re Atkins*, 69 F.3d 970, 974
20 (9th Cir. 1995) (citing *In re Occidental Fin. Group, Inc.*, 40 F.3d 1059, 1062 (9th Cir. 1994).

21 29. The Ninth Circuit has held that bankruptcy courts can also consider the following
22 nine (9) factors identified by the court in the case *In re Twinton Properties Partnership*, 27 B.R.
23 817, 819-20 (M. Tenn. 1983) in evaluating whether an employment application seeking *nunc pro*
24 *tunc* approval should be approved: (1) the debtor, trustee or committee expressly contracted with
25 the professional person to perform the services which were thereafter rendered; (2) the party for
26 whom the work was performed approves the entry of the *nunc pro tunc* order; (3) the applicant
27 has provided notice of the application to creditors and parties in interest and has provided an
28 opportunity for filing objections; (4) no creditor or party in interest offers reasonable objection to

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1 the entry of the *nunc pro tunc* order; (5) the professional satisfied all the criteria for employment
2 pursuant to Section 327 and FRBP 2014 at or before the time services were actually commenced
3 and remained qualified during the period for which services were provided; (6) the work was
4 performed properly, efficiently, and to a high standard of quality; (7) no actual or potential
5 prejudice will inure to the estate or other parties in interest; (8) the applicant's failure to seek pre-
6 employment approval is satisfactorily explained; and (9) the applicant exhibits no pattern of
7 inattention or negligence in soliciting judicial approval for the employment of professionals. *Id.*
8 at 974.

9 30. While the Ninth Circuit held that an applicant seeking *nunc pro tunc* employment
10 must satisfactorily explain their failure to receive prior judicial approval and demonstrate that the
11 services benefitted the bankruptcy estate, it also found that the nine (9) factors identified in
12 *Twinton Properties* may be, but need not be, considered by the bankruptcy court in making such a
13 determination. *Id.* at 976.

14 31. In the instant case, the Court should exercise its discretion in approving the *nunc*
15 *pro tunc* employment of EisnerAmper effective as of March 17, 2017, in order to allow
16 EisnerAmper to begin analyzing the financial records produced pursuant to the Subpoenas and the
17 Debtor's books and records.

18 32. Accordingly, the Trustee respectfully requests that the Court approve the
19 employment of EisnerAmper *nunc pro tunc* as of March 17, 2017.

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VI. CONCLUSION

WHEREFORE, the Trustee respectfully requests that the Court enter an Order: (a) authorizing the employment of EisnerAmper as forensic accountant pursuant to the terms set forth in this Application with payment of all fees and costs subject to notice and hearing and approval of this Court; and (b) for such other and further relief as is just and proper.

Dated this 22nd day of March, 2017.

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