

NELSON & HOUMAND, P.C.
3900 Paradise Road, Suite U, Las Vegas, Nevada 89169
Telephone: (702) 720-3370 Facsimile: (702) 720-3371

1 Jacob L. Houmand, Esq. (NV Bar No. 12781)
Email: jhoumand@nelsonhoumand.com
2 Kyle J. Ortiz, Esq. (NV Bar No. 14252)
Email: kortiz@nelsonhoumand.com
3 NELSON & HOUMAND, P.C.
3900 Paradise Road, Suite U
4 Las Vegas, Nevada 89169-0903
Telephone: 702/720-3370
5 Facsimile: 702/720-3371

Electronically Filed On: May 1, 2017

6 *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

APPLICATION TO EMPLOY
ANDERSEN LAW FIRM, LTD. AS
SPECIAL LITIGATION 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: *OST Pending*
Time of Hearing: *OST Pending*
Place: Courtroom No. 4, Second Floor
Foley Federal Building
300 Las Vegas Blvd., S.
Las Vegas, NV 89101

Judge: Honorable Bruce T. Beesley¹

21
22 VICTORIA L. NELSON, the duly appointed Chapter 7 Trustee in the above-captioned
23 bankruptcy case (the “Trustee”), by and through her proposed general bankruptcy counsel of
24 record, Jacob L. Houmand, Esq. and Kyle J. Ortiz, Esq. of the law firm of Nelson & Houmand,

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”.

1 P.C., hereby submits this *Application to Employ Andersen Law Firm, Ltd. as Special Litigation*
 2 *Counsel for Victoria L. Nelson, Chapter 7 Trustee Pursuant to 11 U.S.C. §§ 327(a) and 328(a)*
 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 Application to Employ*
 7 *Andersen Law Firm, Ltd. as Special Litigation Counsel for Victoria L. Nelson, Chapter 7 Trustee*
 8 *Pursuant to 11 U.S.C. §§ 327(a) and 328(a) and Federal Rule of Bankruptcy Procedure 2014* (the
 9 “Nelson Declaration”), and the *Declaration of Ryan A. Andersen, Esq. In Support of the*
 10 *Application to Employ Andersen Law Firm, Ltd. as Special Litigation Counsel for Victoria L.*
 11 *Nelson, Chapter 7 Trustee Pursuant to 11 U.S.C. §§ 327(a) and 328(a) and Federal Rule of*
 12 *Bankruptcy Procedure 2014* (the “Andersen Declaration”), both of which are filed separately and
 13 concurrently with this Court pursuant to Local Rule 9014(c)(2). The Application is also based on
 14 the pleadings and papers on file herein, and any argument that may be entertained at the hearing
 15 on the 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.

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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 sought relief from the automatic stay to pursue in a non-bankruptcy forum an action for
14 declaratory relief and to rescind the Debtor’s Malpractice Insurance Policy with MIC (Policy
15 Number LA303-630 (the “Malpractice 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. On March 20, 2017, the Court entered an *Order Granting Motion of Markel*
22 *Insurance Company For Relief from Stay Pursuant to 11 U.S.C. § 362 to Proceed In Non-*
23 *Bankruptcy Forum* [ECF No. 209] (the “Stay Relief Order”). *See* Nelson Declaration.

24 9. The Stay Relief Order permits “MIC [to] proceed in an appropriate non-
25 bankruptcy forum with an action for declaratory relief and to rescind the [Malpractice Insurance
26 Policy] . . .” *See* Stay Relief Order, p. 2 ll. 10-14; *See also* Nelson Declaration.

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1 10. On February 22, 2017, the Trustee filed an *Application to Employ Schwartz*
2 *Flansburg, PLLC as Special Bankruptcy Counsel for Victoria L. Nelson, Chapter 7 Trustee*
3 *Pursuant to 11 U.S.C. § 327(e) and Federal Rule of Bankruptcy Procedure 2014* [ECF No. 184]
4 (the “Schwartz Application”). *See* Nelson Declaration.

5 11. The Schwartz Application sought to employ Schwartz Flansburg, PLLC as special
6 bankruptcy counsel pursuant to 11 U.S.C. § 327(e) to assist the Trustee in exercising any and all
7 rights held by the Debtor’s bankruptcy estate against the Malpractice Insurance Policy. *See*
8 Nelson Declaration.

9 12. On March 31, 2017, the Court entered an *Order Denying Application to Employ*
10 *Schwartz Flansburg, PLLC as Special Bankruptcy Counsel for Victoria L. Nelson, Chapter*
11 *Trustee Pursuant to 11 U.S.C. § 327(e) and Federal Rule of Bankruptcy Procedure 2014* [ECF
12 No. 231]. *See* Nelson Declaration.

13 13. At the hearing on the Schwartz Application, the Court denied the Schwartz
14 Application finding that there was a conflict of interest. *See* Nelson Declaration.

15 14. On April 5, 2017, MIC filed a *Complaint for Rescission and Declaratory Relief* in
16 the United States District Court for the District of Nevada (the “District Court Action”). *See*
17 Nelson Declaration.

18 15. In the District Court Action, MIC seeks declaratory relief and to rescind the
19 Malpractice Insurance Policy. *See* Nelson Declaration.

20 16. In order to assist the Trustee in defending against rescission of the Malpractice
21 Insurance Policy in the District Court Action and in pursuing the Claims and exercising any and
22 all rights held by the Debtor’s bankruptcy estate against the Malpractice Insurance Policy, she
23 now desires to employ the Andersen Law Firm (the “Firm”), as special litigation counsel in the
24 Debtor’s bankruptcy case for the purpose of defending any efforts to rescind the Malpractice
25 Insurance Policy and to evaluate and prosecute, if appropriate, litigation against MIC. *See* Nelson
26 Declaration.

27 ...
28 ...

1 17. The Trustee contends that the bankruptcy estate holds claims against MIC and the
2 Malpractice Insurance Policy as the amount of claims made against the Malpractice Insurance
3 Policy dwarf the amount of coverage available under such policy, endangering the remaining
4 assets of the bankruptcy estate. *See In re Endoscopy Ctr. of S. Nev., LLC*, 451 B.R. 527, 546
5 (Bankr. D. Nev. 2011) (recognizing secondary impact and diminution of bankruptcy estate assets
6 may require proceeds of insurance policy to be considered part of bankruptcy estate). Further, the
7 Endoscopy decision recognized that the Ninth Circuit had not yet ruled on the issue, and
8 alternative authority exists. *Id.* at 542; *see, e.g., In re Mahoney Hawkes, LLP*, 289 B.R. 285, 295
9 (Bankr. D. Mass. 2002) (holding that “the language of § 541 is broad enough to cover an interest
10 in liability insurance, namely, the debtor’s right to have the insurance company pay money to
11 satisfy one kind of debt - debts accrued through, for example, the insured’s negligent behavior”).
12 Additionally, the bankruptcy estate may hold claims against certain third parties who are covered
13 by the Malpractice Insurance Policy.

14 18. The Trustee proposes that the retention of the Firm be on a contingency fee basis
15 pursuant to the terms of an engagement letter (the “Engagement Letter”). Specifically, the
16 Engagement Letter provides that the Firm shall be compensated as follows:

17 **Pre-litigation activity.** The Firm shall be entitled to a contingency
18 fee of 33 1/3% to be calculated on the gross amount of recovery
19 generated from all work performed prior to filing a lawsuit or
20 making a formal demand for arbitration. Such work may include,
21 but is not limited to, factual investigation, claims investigation and
22 analysis, document review, factual and legal research, work with
23 experts in preparation of a complaint and the requisite reports that
24 must be filed with a complaint, preparation of demand letters, pre-
25 suit settlement negotiations, preparation of a complaint and/or
26 arbitration demand, and pre-suit mediation(s), if any.

27 **Post-filing litigation activity.** Post-filing litigation activity. Once
28 the 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. Any work performed in the context of an arbitration
following a demand for arbitration shall constitute “Post-filing
litigation activity.”

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Appellate activity. In the event that a notice of appeal is filed by any party, the Firm shall be entitled to a 45% contingency fee calculated on the gross amount of recovery.

Payment of Contingency Fee. With respect to any recovery by the the Trustee or the Bankruptcy Estate rising 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 the Trustee shall pay the appropriate contingency fee to the Firm within fourteen (14) days of court approval of such fee.

Except as otherwise specified herein, the Firm’s fees in the Matter will only be payable out of amounts recovered. If no recovery is obtained, the Trustee will not owe any fees to the Firm.

19. A true and correct copy of the Engagement Letter is attached to the Andersen Declaration as **Exhibit “1”**.

II. JURISDICTION AND VENUE

20. 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.

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

III. THE FIRM

22. The Trustee has selected the Firm as her special litigation counsel to defend against rescission of the Malpractice Insurance Policy in the District Court Action, to investigate and evaluate, and, if appropriate, prosecute the Claims against MIC. The Trustee has concluded that the Firm is the best qualified and, in the Trustee’s judgment, is best able to provide the required services and the Firm most likely to secure a favorable outcome in the best interests of the estate. The Trustee’s conclusion is based on the firm’s extensive experience in the practice of bankruptcy, commercial, and complex litigation, with expertise in areas of substantive law likely

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1 to become relevant in prosecution of the Claims. *See* Nelson Declaration.

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

8 24. The attorneys employed by the Firm are duly admitted to practice before this
9 Court.

10 25. The Trustee desires to employ the Firm as her special counsel in this bankruptcy
11 case to render the following professional services: defend against rescission of the Malpractice
12 Insurance Policy in the District Court Action; take the role of lead counsel with respect to the
13 evaluation and prosecuting, if applicable, litigation of the Claims; continue the Trustee’s detailed
14 investigation into all matters related to the Claims, including any adversary proceeding which
15 may result following the Trustee’s investigation (the “Adversary Proceeding”); maintain and
16 settle the Claims, including the Adversary Proceeding; and perform such other legal services
17 (including, but not limited to, appearing before this Court, any other federal court, state court, or
18 appellate courts) as may be required in connection with, and in furtherance of, the foregoing and
19 which are in the interests of the bankruptcy estate. *See* Nelson Declaration.

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

23 27. The Employment of the Firm will assist the Trustee in fulfilling her statutory
24 obligations under Section 704 by collecting and reducing to money assets of the Debtor’s
25 bankruptcy estate. *See* Nelson Declaration.

26 28. Following the Trustee’s request that the Firm represent her in this case as special
27 bankruptcy counsel, a conflicts check was undertaken, utilizing the Firm’s client list. Based upon
28 the conflicts check the Firm and its associates are “disinterested persons” as defined by 11 U.S.C.

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1 § 101 and do not hold or represent any interest adverse to the bankruptcy estate. *See Andersen*
2 Declaration.

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

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

23 *See Andersen Declaration.*

24 30. The Firm represents no interest that is adverse to the Trustee, to the Debtor’s
25 estate, any creditor, any party in interest, the U.S. Trustee, or any attorney or accountant
26 employed by the foregoing, in matters upon which it will be engaged as special counsel. *See*
27 Andersen Declaration.

28 31. The Trustee has previously employed the Firm to represent bankruptcy estates in
other unrelated bankruptcy cases in which she is the Trustee. *See Andersen Declaration.*

IV. COMPENSATION

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

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Pre-litigation activity. The Firm shall be entitled to a contingency fee of 33 1/3% to be calculated on the gross amount of recovery 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. Post-filing litigation activity. Once the 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. 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 a 45% contingency fee calculated on the gross amount of recovery.

Payment of Contingency Fee. With respect to any recovery by the Client or the Bankruptcy Estate rising 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 Client shall pay the appropriate contingency fee to the Firm within fourteen (14) days of court approval of such fee.

Except as otherwise specified herein, the Firm’s fees in the Matter will only be payable out of amounts recovered. If no recovery is obtained, the the Trustee will not owe any fees to the Firm.

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

34. 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.

35. 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). *See* Andersen Declaration.

1 36. This Application will be submitted to the United States Trustee upon the filing of
2 the same.

3 **VI. CONCLUSION**

4 WHEREFORE, the Trustee respectfully requests that the Court enter an Order: (a)
5 granting the Application and authorizing the employment of the Firm as special counsel on the
6 terms set forth in this Application with payment of all fees and costs subject to notice and hearing
7 and approval of this Court; and (b) for such other and further relief as is just and proper.

8 Dated this 1st day of May, 2017.

9 **NELSON & HOUMAND, P.C.**

10 By: /s/ Kyle J. Ortiz
11 Jacob L. Houmand, Esq. (NV Bar No. 12781)
12 Kyle J. Ortiz, Esq. (NV Bar No. 14252)
13 3900 Paradise Road, Suite U
14 Las Vegas, Nevada 89169-0903
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