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8 **UNITED STATES BANKRUPTCY COURT**  
 9 **DISTRICT OF NEVADA**

10 In re:

11 ROBERT C. GRAHAM, LTD., fdba ROB  
 12 GRAHAM & ASSOCIATES fdba  
 LAWYERSWEST,

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

**RESPONSE OF MARKEL INSURANCE  
 COMPANY TO TRUSTEE'S  
 APPLICATION TO EMPLOY  
 ANDERSON LAW FIRM, LTD., AS  
 SPECIAL COUNSEL**

Hearing Date: May 9, 2017  
 Hearing Time: 11:00 a.m.

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 17 Markel Insurance Company ("MIC") by and through its counsel, Nicholas M. Wieczorek,  
 18 Esq. and Candace C. Carlyon, Esq. of the law firm of Morris Polich & Purdy, LLP, respectfully files  
 19 this Response to Trustee's Application to Employ Anderson Law Firm, LTD. as Special Litigation  
 20 Counsel ...[Dkt. #235] ("the "Application").

21 This Response is made pursuant to 11 U.S.C. §327(e), and is based upon the Points and  
 22 Authorities attached hereto, the pleadings, papers and records on file in this action, and any oral

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1 argument which the Court may entertain at the time of the hearing on the Motion.

2 Respectfully submitted this 8th day of May, 2017.

3 MORRIS POLICH & PURDY LLP

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5 By: \_\_\_\_\_  
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11 POINTS AND AUTHORITIES

12 I. BACKGROUND

13 1. This case arises from allegations of the theft of millions of dollars in client trust  
14 monies from Debtor's accounts.

15 2. Debtor is a Nevada Professional Corporation whose sole officer and director is Robert  
16 Graham.

17 3. MIC issued a Lawyers Professional Liability Insurance Policy to Debtor, effective  
18 January 1, 2016 to January 1, 2017, which provides coverage for "sums the Insured shall become  
19 legally obligated to pay as Damages for Claims against the Insured . . ." (the "Policy"). The Policy  
20 also includes a defense obligation that applies to "suits" against the Insured seeking Damages to  
21 which the insurance applies. (See Dkt. #169.)

22 4. Some 390 former clients of Debtor having notified MIC of possible malpractice  
23 claims against Debtor based on the aforementioned theft, and publicly available information  
24 indicating that grounds for rescinding the Policy exist, MIC recently sought and obtained relief from  
25 the automatic stay in this Court to pursue a rescission and declaratory relief action in another court.  
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1 (Dkt. ##169, 231.) MIC has since filed that action in the Nevada Federal District Court. (See Case  
2 2:17-cv-00975, Dkt. #1.)

3 5. The Trustee is now seeking to employ the Anderson Law Firm as “Special Litigation  
4 Counsel” not only to “assist the Trustee in defending against rescission of the Malpractice Insurance  
5 Policy in the District Court Action” and “evaluate and prosecute, if appropriate, litigation against  
6 MIC,” but also to “pursue the Claims,” defined as the possible malpractice claims of “approximately  
7 390 parties [that have] notified MIC of possible malpractice claims.”  
8

9 6. The Trustee’s Application states that the Trustee “contends that the bankruptcy estate  
10 holds claims against MIC and the Malpractice Insurance Policy as the amount of claims made  
11 against the Malpractice Insurance Policy dwarf the amount of coverage available under such policy,  
12 endangering the remaining assets of the bankruptcy.”

13 7. The Trustee proposes the retention of the Anderson firm be on a contingency basis,  
14 such that the Anderson firm would be entitled to 33 1/3% of “any gross amount of recovery” for pre-  
15 suit work, and 40% of “any gross amount of recovery” once litigation is filed. The referenced  
16 “recovery” would include the recovery “by the Trustee or Bankruptcy Estate arising out of,  
17 pertaining to, or resulting from the pursuit of the Claims in the Litigation,” *i.e.*, the possible  
18 malpractice claims of the 390 parties that have notified MIC of possible malpractice claims.  
19

20 8. The Trustee’s prior request to employ special counsel for the same purpose and on the  
21 same terms (see Dkt. 154) was previously denied by this Court (see Dkt. 231). In doing so, the  
22 Court questioned the propriety of a contingency fee which would (if coverage is available) reduce  
23 the amount payable to claimants victimized by the Debtor and its principal, as well as questioning  
24 the amount of the contingency fee requested.  
25

26 9. While MIC does not object to the Trustee’s choice of counsel, the effort to assign a  
27 percentage of any policy recovery to counsel for the Debtor remains inappropriate.  
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## II. ARGUMENT

### A. The Trustee Cannot Grant a Contingent Interest in the “Claims” and the Proposed Retention Therefore Should Not Include Such Terms.

The proposed contingency fee arrangement reflects that the Anderson firm is being retained, in part, for the purpose of “pursuing the Claims,” *i.e.* the claims of the approximate 390 parties that have notified MIC of possible malpractice claims. However, the claims of the approximate 390 parties that have notified MIC of possible malpractice claims are claims against the Debtor and/or Mr. Graham. They belong to the parties allegedly harmed by the Debtor and/or Mr. Graham, not the estate. Moreover, the Policy provides coverage for certain Damages the Insured is legally obligated to pay to third parties, such that indemnity payments under the Policy are made to third parties, not the Insured/Debtor. The Trustee is improperly attempting to prosecute, and grant a contingent interest in, malpractice claims held by Debtor’s clients. Such conduct is clearly inappropriate. Indeed, the “Claims” the Trustee is proposing to “pursue” using the services of the Anderson firm, recovery for which the Trustee is proposing to give a percentage of to the Anderson firm, are not assignable under Nevada law, even in the context of a bankruptcy matter. “Nevada law prohibits the assignment of legal malpractice claims....” *Tower Homes v. Heaton*, 132 Nev. Adv. Op. 62, 377 P.3d 118, 122 (2016). While the *Tower Homes* case involved an attempt to permit a creditor to bring the estate’s claims, any effort here to permit the estate to bring creditor’s claims (*i.e.* Debtor’s former clients’ malpractice claims against Debtor) is subject to the same prohibition.

Simply put, the Trustee does not own the Debtor’s former clients’ malpractice claims against the Debtor. Such claims cannot be assigned to the Trustee under Nevada law, and she cannot assign a contingency interest in any recovery on them. Just as the Trustee does not own and cannot prosecute the malpractice claims, the Trustee certainly cannot attempt to dilute recovery to claimants (for example, if it was determined that coverage is available) by pledging 40% of the Policy proceeds to her proposed Special Litigation Counsel.

1 For this reason, MIC respectfully submits, the terms of the Trustee's retention of the  
2 Anderson firm should not include the pursuit of malpractice claims or the granting of any  
3 contingency interest in recoveries on them.

4 **III. CONCLUSION**

5 For the reasons stated above, it is respectfully requested that, if the Court approves the  
6 Trustee's retention of the Anderson firm, the terms of the retention not include the pursuit of  
7 malpractice claims or the granting of any contingency interest in recoveries on them.  
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9 Respectfully submitted this 8th day of May, 2017.

10 **MORRIS POLICH & PURDY LLP**

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