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Electronically Filed On: April 6, 2018

6 *General Bankruptcy Counsel for Shelley D. Krohn, Chapter 7 Trustee*

7
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

**EX PARTE APPLICATION TO EMPLOY
DIAMOND MCCARTHY LLP, NUNC
PRO TUNC, AS SPECIAL LITIGATION
COUNSEL FOR SHELLEY D. KROHN,
SUCCESSOR CHAPTER 7 TRUSTEE
PURSUANT TO 11 U.S.C. §§ 327(a) AND
328(a) AND FEDERAL RULE OF
BANKRUPTCY PROCEDURE 2014**

Date of Hearing: N/A
Time of Hearing: N/A

Judge: Honorable Bruce T. Beesley¹

19 Shelley D. Krohn, the duly appointed Successor Chapter 7 Trustee in the above-captioned
20 bankruptcy case (the “Trustee”), by and through her general bankruptcy counsel of record, Jacob
21 L. Houmand, Esq. and Kyle J. Ortiz, Esq. of the Houmand Law Firm, Ltd., hereby submits this *Ex*
22 *Parte Application to Employ Diamond McCarthy LLP, Nunc Pro Tunc, As Special Litigation*
23 *Counsel for Shelley D. Krohn, Successor Chapter 7 Trustee Pursuant to 11 U.S.C. §§ 327(a) and*
24 *328(a) and Federal Rule of Bankruptcy Procedure 2014* (the “Application”).

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 This Application is filed pursuant to 11 U.S.C. §§ 327 and 328 and Federal Rule of
 2 Bankruptcy Procedure 2014. The Application is based on the following Memorandum of Points
 3 and Authorities, the *Declaration of Shelley D. Krohn In Support of the Ex Parte Application to*
 4 *Employ Diamond McCarthy LLP, Nunc Pro Tunc, As Special Litigation Counsel for Shelley D.*
 5 *Krohn, Successor Chapter 7 Trustee Pursuant to 11 U.S.C. §§ 327(a) and 328(a) and Federal*
 6 *Rule of Bankruptcy Procedure 2014* (the “Trustee Declaration”), and the *Declaration of Kathy*
 7 *Bazoian Phelps, Esq. In Support of Ex Parte Application to Employ Diamond McCarthy LLP,*
 8 *Nunc Pro Tunc, As Special Litigation Counsel for Shelley D. Krohn, Successor Chapter 7 Trustee*
 9 *Pursuant to 11 U.S.C. §§ 327(a) and 328(a) and Federal Rule of Bankruptcy Procedure 2014* (the
 10 “Special Counsel Declaration”), both of which are filed separately and concurrently with this
 11 Court pursuant to Local Rule 9014(c)(2). The Application is also based on the pleadings and
 12 papers on file herein, and any argument that may be entertained at a hearing on the Application.²
 13 A true and correct copy of the proposed order granting the relief requested in this Application is
 14 attached hereto as **Exhibit “1”**.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

15
 16
 17 1. On December 15, 2016, an Involuntary Bankruptcy Petition [ECF No. 1] (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 *Trustee Declaration.*

23 2. The filing of the Involuntary Petition against the Debtor followed numerous
 24 reports that the Debtor had neglected its clients and that its principal, Robert C. Graham, Esq.
 25 (“Mr. Graham”), had misappropriated funds from the Debtor’s IOLTA Account. *See* *Trustee*
 26

27 ² The Trustee also requests that the Court take judicial notice of all pleadings filed in the above-
 28 captioned bankruptcy case, including adversary proceedings, pursuant to Rule of Evidence 201,
 incorporated by reference by FRBP 9017.

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1 Declaration.

2 3. Specifically, on December 9, 2016, the Nevada State Bar filed an *Emergency*
3 *Petition for Temporary Suspension Pursuant to Supreme Court Rule 102(4)* (the “Emergency
4 Petition”) with the Supreme Court of the State of Nevada (Case No. 71849). The Emergency
5 Petition sought a temporary suspension of Mr. Graham based upon his misappropriation of
6 millions of dollars from more than fifty clients, guardianships, special needs trusts and estates.
7 The Emergency Petition further details that Mr. Graham abruptly closed his practice and
8 abandoned more than one hundred clients without providing them with any advance notice. *See*
9 *Trustee Declaration*.

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

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

20 6. On December 22, 2016, Victoria L. Nelson (“Trustee Nelson”) was appointed as
21 the Chapter 7 Trustee in the Debtor’s bankruptcy case [ECF No. 22]. *See Trustee Declaration*.

22 7. On January 4, 2017, Trustee Nelson filed an *Ex Parte Application to Employ*
23 *Diamond McCarthy LLP as Special Litigation Counsel, Nunc Pro Tunc to December 28, 2016,*
24 *for Victoria L. Nelson, Chapter 7 Trustee, Pursuant to 11 U.S.C. 327(a) and Federal Rule of*
25 *Bankruptcy Procedure 2014* [ECF No. 39] (the “Employment Application”), which sought to
26 employ Diamond McCarthy LLP (the “Firm”) as special litigation counsel to assist with
27 anticipated litigation arising from the Debtor’s bankruptcy case and to provide advice concerning
28 causes of action that can be commenced on behalf of the bankruptcy estate. *See Trustee*

1 Declaration.

2 8. On January 11, 2017, the Court entered an *Order Granting Ex Parte Application to*
3 *Employ Diamond McCarthy LLP as Special Litigation Counsel, Nunc Pro Tunc to December 28,*
4 *2016, for Victoria L. Nelson, Chapter 7 Trustee, Pursuant to 11 U.S.C. 327(a) and Federal Rule*
5 *of Bankruptcy Procedure 2014* [ECF No. 104]. See Trustee Declaration.

6 9. On January 13, 2018, Trustee Nelson died. See Trustee Declaration.

7 10. On January 19, 2018, the Trustee was appointed as the successor Chapter 7 Trustee
8 in the Debtor's bankruptcy case. See Trustee Declaration.

9 11. The Trustee desires to continue to have the Firm represent the bankruptcy estate on
10 the same terms as set forth in the Employment Application.

11 **II. JURISDICTION AND VENUE**

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

16 13. Pursuant to Local Rule 9014.2, if the Court determines that absent consent of the
17 parties the Court cannot enter final orders or judgment regarding the Application consistent with
18 Article III of the United States Constitution, the Trustee consents to entry of final orders and
19 judgment by this Court.

20 **III. THE FIRM**

21 14. The Firm is well suited for the type of representation required by the Trustee. The
22 Trustee's conclusion is based on the Firm's extensive experience in the practice of business,
23 commercial and complex litigation, with expertise in areas of substantive law likely to become
24 relevant in prosecution of claims in adversary proceedings. Accordingly, the Trustee has
25 determined that the Firm has the resources and experience necessary to represent her in this case.

26 15. The Firm's professionals specialize in representing bankruptcy trustees in large
27 and complex bankruptcy and litigation cases around the country. The Firm served as lead trial
28 counsel for various parties having significant roles in the Enron/LJM2, Parmalat, Livent, Bayou

1 Funds, Dreier, LLP, USA Commercial Mortgage, Diversified Lending Group, Inc., Equipment
2 Acquisition Resources, Inc., Bank United, and the Syntax-Brilliant cases, among many others,
3 involving complex fraud, Ponzi schemes, accounting, legal and other malpractice and bankruptcy
4 related claims for which the Firm recovered millions and millions of dollars for its clients.

5 16. The Firm also has extensive experience in financial institution litigation and has
6 represented hedge funds, private equity, global banks, regional and community banks, mutual
7 funds, real estate trusts, trustees of failed banks, liquidators, creditors' committees and other
8 financial institutions.

9 17. It is anticipated that Kathy Bazoian Phelps and Michael Yoder, partners of the
10 Firm, will serve as primary counsel in this matter. Ms. Phelps has more than 25 years of
11 experience as a lawyer in bankruptcy law, fiduciary representation and fraud litigation, as well as
12 serving as a fiduciary herself. Kathy's practice includes representing trustees and receivers,
13 serving as a Chapter 11 trustee, representation of litigants and parties in interest in bankruptcy and
14 receivership cases and other insolvency proceedings. She is particularly knowledgeable about the
15 administration of Ponzi scheme cases and has extensive litigation experience in claims arising in
16 these types of cases, including fraudulent transfer litigation. Ms. Phelps has lectured widely and
17 written on bankruptcy and receivership matters, with a focus on Ponzi schemes. She is the co-
18 author of *The Ponzi Book: A Legal Resource for Unraveling Ponzi Schemes*.

19 18. Partner Michael Yoder has extensive experience in complex litigation involving
20 bankruptcy, third party and professional liability. This experience includes spearheading a number
21 of forensic fraud investigations, serving as lead or co-lead investigative attorney in connection
22 with: (a) a \$600 million hard money lender in Las Vegas; (b) a \$350+ million international fraud
23 involving a television importer formerly listed on NASDAQ; (c) a \$400 million fraud involving
24 real estate investment funds in Oakland, California; and (d) a \$150 million Ponzi scheme in
25 Sacramento, California.

26 19. The attorneys of the Firm that will render services in relation to the above-
27 captioned bankruptcy case are familiar with the United States Bankruptcy Code, the Federal
28 Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure, and the Local Rules and

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1 will comply with them, as well as the procedures set forth in the “Guide to Applications for
2 Professional Compensation,” promulgated by the Office of the United States Trustee (the “U.S.
3 Trustee”) with regard to compensation of professionals.

4 20. The Trustee desires to employ the Firm as her special litigation counsel in this
5 bankruptcy case to render the following professional services:

- 6 (a) To investigate the financial affairs of the Debtor and
7 determine if there are any preferential transfers, fraudulent
8 conveyances, or turnover actions that may be filed on behalf
9 of the bankruptcy estate pursuant to 11 U.S.C. §§ 542, 544,
10 547, and 548, or other litigation claims owned by the estate
11 against third parties.
12 (b) To prosecute any and all preferential transfers, fraudulent
13 conveyances, or turnover actions that may be filed on behalf
14 of the bankruptcy estate pursuant to 11 U.S.C. §§ 542, 544,
15 547, and 548, or other litigation claims owned by the estate
16 against third parties.
17 (c) To assist the Trustee in developing legal positions and
18 strategies with respect to litigation matters in these
19 proceedings.

20 21. The Trustee has selected the Firm because of the Firm’s experience in in complex
21 and high-stakes business cases, including serving as lead counsel for three of the largest law firm
22 bankruptcies in U.S. history, and its attorneys are well-qualified to represent the Trustee in this
23 case.

24 22. Following the Trustee’s request that the Firm represent her in this case as special
25 litigation counsel, a conflicts check was undertaken, utilizing the Firm’s client list. Based upon
26 the conflicts check the Firm and its associates are “disinterested persons” as defined by 11 U.S.C.
27 § 101 and do not hold or represent any interest adverse to the bankruptcy estate.

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

- (a) Are or were a creditor, equity security holder, or insider of
the Debtor;

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- (b) Are or were, within two (2) years before the date of the filing the bankruptcy petition, a director, officer or employee of Debtor as specified in subparagraph (c) of Section 101(14);
- (c) Hold, or have ever held, an interest materially adverse to the interest of the estate or of any class of creditors, equity holders, or parties in interest, by reason of any direct or indirect relationship to, or interest in, the Debtor or for any other reason except as stated herein;
- (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.

24. The Firm represents no interest that is adverse to the Trustee, Trustee Nelson, to the Debtor’s estate, any creditor, any party in interest, the U.S. Trustee, or any attorney or accountant employed by the foregoing, in matters upon which it will be engaged as counsel.

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

26. The Firm was special litigation counsel for Trustee Nelson, the Chapter 7 Trustee that was initially appointed in the Debtor’s bankruptcy case.

27. The Trustee has employed the Firm as special litigation counsel in an unrelated bankruptcy case in which she is the chapter 7 trustee.

28. The Trustee submits that the Firm is a disinterested person within the meaning of 11 U.S.C. § 101(14) for purposes of 11 U.S.C. § 327(a), as it pertains to representing the Trustee as special litigation counsel in the Debtor’s bankruptcy case.

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IV. COMPENSATION

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2 29. Subject to Court approval, in accordance with 11 U.S.C. § 330, the Trustee seeks
3 to retain the Firm on an hourly basis at the customary and standard rates that the Firm charges for
4 similar representation, plus reimbursement of actual and necessary expenses incurred by the Firm
5 in performing its duties.

6 30. The Firm proposes the compensation of attorneys be at varying rates currently
7 ranging from \$380 per hour to \$750 per hour for the services of partners of the Firm and at
8 varying rates currently ranging from \$270 per hour to \$320 per hour for the services of associates
9 of the Firm, subject to change from time to time, and all subject to application to, and approval
10 by, this Court pursuant to Sections 330 and 331 of the Bankruptcy Code.

11 31. The Firm proposes the compensation of paraprofessionals be at varying rates
12 currently ranging from \$145 per hour to \$220 per hour for paraprofessionals, subject to change
13 from time to time, and all subject to application to, and approval by, this Court pursuant to
14 Sections 330 and 331 of the Bankruptcy Code.

15 32. The Firm contemplates that it may seek interim compensation during this case as
16 permitted by 11 U.S.C. § 331 and Federal Rule of Bankruptcy Procedure 2016. The Firm
17 understands that its compensation is subject to prior Court approval.

18 33. Inasmuch as the Firm will likely be handling numerous fraudulent transfer actions
19 and/ or other litigation claims owned by the estate against third parties, the Trustee believes that it
20 would be in the best interest of the creditors that the compensation be on an hourly basis as
21 opposed to a contingency fee basis. Further, once a determination has been made as to what
22 causes of action the Firm will be prosecuting, the Trustee will seek a budget from the Firm in
23 relation to each matter the Firm is handling. *See* Trustee Declaration.

24 34. No promises have been received by the Firm or any attorney of the Firm, as to
25 payment or compensation in connection with the above-referenced bankruptcy case in accordance
26 with the provisions of the Bankruptcy Code, the FRBP, the Local Rules, and orders of the Court.
27 The Firm has no agreement with any other entity to share with such entity any compensation
28 received by the Firm, except as permitted under Section 504(b)(1).

1 V. REQUEST FOR NUNC PRO TUNC EMPLOYMENT

2 35. 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 36. 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 37. 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 38. 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 39. 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 40. In the instant case, the Court should exercise its discretion in approving the *nunc*
15 *pro tunc* employment of the Firm effective as of the appointment of the Trustee.

16 **VI. CONCLUSION**

17 WHEREFORE, the Trustee respectfully requests that the Court enter an Order: (i)
18 approving the employment of the Firm, *Nunc Pro Tunc* to the appointment of the Trustee, as
19 special litigation counsel to represent the Trustee in this bankruptcy proceeding upon the terms set
20 forth in this Application with payment of all fees and costs by the estate subject to notice and
21 hearing and approval of this Court; and (ii) for such other and further relief as is just and proper.

22 Dated this 6th day of April, 2018.

23 **HOUAND LAW FIRM, LTD.**

24 By: /s/ Kyle J. Ortiz

25 Jacob L. Houmand, Esq. (NV Bar No. 12781)

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