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10
11 **IN THE UNITED STATES BANKRUPTCY COURT**
12 **FOR THE DISTRICT OF ARIZONA**

13 In re

14 ARA MACAO HOLDINGS, L.P.,

15 Putative Debtor.

Chapter 11 (Involuntary)

Case No. 3:18-bk-03615-PS

**OBJECTION TO PETITIONING
CREDITORS' MOTION FOR IMMEDIATE
APPOINTMENT OF A CHAPTER 11
TRUSTEE AND REQUEST FOR JUDICIAL
NOTICE**

[FILED UNDER SEAL]

Hearing Date: April 23, 2018
Hearing Time: 1:30 pm
Location: Courtroom 601
230 N. First Avenue
Phoenix, AZ 85003

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25 ***“Third time’s a charm?”***

26 Ara Macao Holdings, L.P. (“**Ara Macao**” or “**Putative Debtor**”) hereby files this
27 Objection to the *Petitioning Creditors’ Motion for Immediate Appointment of a Chapter 11*
28 *Trustee* [Dkt. No. 6] (the “**Motion**”) filed by KB Partners, Inc. (“**KB**”), Christopher de Sibert

1 (“**de Sibert**”), Gary Nitsche (“**Nitsche**”), Daniel Dorgan (“**Dorgan**”), Richard Umbach
2 (“**Umbach**”), and Edgewater Resources, LLC (“**Edgewater**,” and collectively, the “**Petitioning**
3 **Creditors**”).

4 **I. INTRODUCTION.**

5 **A. The Trampling Of Third Party Due Process Rights:** This Court is witnessing
6 the third attempt at a reckless scheme perpetrated by minority interest holders in a limited
7 partnership to take control of that partnership, and more specifically the partnership’s extremely
8 valuable asset—nearly 620 acres of master plan approved property in Belize, which includes a
9 mile of pristine beachfront on the Caribbean Sea (the “**Property**”),¹ all on a fast track basis on
10 inadequate notice.² There is no dispute that the value of the Property, which currently has no
11 secured debt encumbering it, exceeds the value of all legitimate claims (even assuming,
12 *arguendo*, that the Petitioning Creditors’ claims are treated as debt, not equity). Hence, the
13 equity in Ara Macao is undeniably “in the money” and entitled to be heard on any relief sought
14 by these renegade limited partners. The Petitioning Creditors, the holders of approximately 10%
15 equity interests in an Illinois limited partnership,³ all of whom are insiders within the purview of

17 ¹ The Motion recklessly files all manners of non-public, proprietary documents and
18 information in the public record, in complete disregard for any confidentiality concerns, which
19 Ara Macao believes will and has injured the interests of the other partners of Ara Macao. All
20 rights and remedies for such breaches of confidentiality are expressly preserved as against the
21 Petitioning Creditors and those acting in concert with them. One such document filed was an
22 appraisal showing the value of the Property with its current government approved entitlements
23 at being approximately \$61 million. *See* Motion, Ex. 30. Ara Macao, through a separate motion,
is asking this Court to remove all confidential, non-public and proprietary documents from the
public filings and putting them appropriately under seal. *See Motion to (I) File Under Seal*
Debtor's Objection To Petitioning Creditors' Motion for Immediate Appointment of a Chapter
11 Trustee and (II) Place Under Seal Petitioning Creditors' Motion for Immediate Appointment
of a Chapter 11 Trustee.

24 ² Undersigned counsel was retained in this matter on Monday, April 16, 2018, and has
25 been working diligently to get up to speed on this matter on very short timelines.

26 ³ While KB, de Sibert, and Umbach list “judgments” and Dorgan and Umbach list
27 “promissory notes” as the bases for their claims as Petitioning Creditors, in fact the two
28 judgments are based on damages related to the acquisition of the limited partnership interests in
Ara Macao and Umbach’s alleged promissory note was converted to limited partnership units in
Ara Macao, and hence is equity. The two judgments, therefore, are subject to mandatory

1 Bankruptcy Code § 101(31). The Petitioning Creditors⁴ are now also taking their third bite at an
2 apple in the guise of this involuntary bankruptcy and a wholly contrived “emergency” motion to
3 appoint a trustee (even before a response is due on the involuntary petition). This third attempt
4 is based, once again, on breathless allegations of fraud and impropriety. These allegations have
5 all been asserted before, unsuccessfully, twice. That notwithstanding, this latest gambit is an
6 irresponsible attempt to wrest control of a partnership from a general partner that has been
7 working on financing to begin construction on Phase 1 of the Property and otherwise complete
8 the marketing and development of the Property. This third attempt is sought without providing
9 any notice to parties that have a real economic stake in the Project—the 90 or so other limited
10 partners in Ara Macao.

11 The actions of the Petitioning Creditors in this ill-advised litigation strategy not only
12 ignore serious due process rights of the other limited partners in Ara Macao, it tramples them.
13 Amazingly, no notice of the Motion (and its extraordinary relief being requested) and the Order
14 setting the expedited hearing on the Motion has been provided to any of the other limited
15 partners of Ara Macao by the Petitioning Creditors. *See* Certificate of Service filed on April 10,
16 2018 [Dkt. No. 13] (showing service of the Motion and this Court’s Order setting the
17 emergency hearing as being served on only 2 parties—Ara Macao (care of two different parties)
18 and the US Trustee). Moreover, the attempt to replace the general partner with a trustee is in
19 direct contravention to the rights of limited partners in the applicable partnership agreements
20 binding all limited partners. *See* discussion in Section III.C, *infra*.

21 **B. Agreement To Maintain The Status Quo:** Preliminarily, to ensure that the due
22 process rights of all parties are properly protected, and in an effort to ensure that the serious
23 allegations (which are disputed) are able to be heard in a realistic timeframe with participation
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25 subordination and are therefore treated as equity for all purposes in bankruptcy pursuant to
26 Bankruptcy Code § 510(b). Umbach’s note was converted to equity and is listed on Ara
Macao’s record as such.

27 ⁴ Upon information and belief, Ara Macao believes that the Petitioning Creditors are
28 acting in concert with one another to effectuate a takeover of the partnership, to the detriment of
the other stakeholders in this matter. All rights and claims against them are expressly reserved

1 of all interested parties, *Ara Macao agrees (and any Order entered in this matter may so*
2 *provide) that during the pendency of this matter before the Court, Ara Macao will take no*
3 *action to transfer, convey or otherwise encumber the Project without further order of this*
4 *Court based upon notice to all parties.* Taking this wholly contrived “emergency” from the
5 Motion away, there is no reason to fast track litigation seeking extraordinary relief not expressly
6 provided for in the Bankruptcy Code. The Motion should be heard in the ordinary course, not on
7 less than 10 business days’ notice to the General Partner, and without any notice to third parties
8 whose economic interests will be seriously and adversely impacted.

9 **C. The First Two Bites At This Apple:** It is noteworthy that the Petitioning
10 Creditors omitted material pertinent factual and procedural history from the Motion. The
11 Motion filed by the Petitioning Creditors is 15 pages, and contains 39 exhibits consisting of
12 hundreds of pages (again, some of which were improperly filed in the public filings and not
13 under seal in yet a further attempt to damage Ara Macao and the other stakeholders). The detail
14 in the Motion is really not a surprise—almost all of it was the subject of two other litigation
15 matters involving these same parties—*both of which failed* to get the result they are seeking
16 before this Court. Specifically, and as discussed in more detail below, Nitsche commenced an
17 arbitration against Ara Macao before the International Centre for Dispute Resolution in 2015
18 alleging breach of fiduciary duty, fraud and other improper acts against Ara Macao's general
19 partner, and seeking to liquidate the assets of the partnership (the “**2015 Arbitration**”). In the
20 2015 Arbitration, and after a full evidentiary hearing, the arbitrator did not find any fraud,
21 refused to award any punitive damages based on asserted fraud (or attorneys’ fees) and further
22 refused to order the liquidation of the Property. *See* ICC Final Awards dated July 21, 2016,
23 attached hereto as **Exhibit A** (the “**ICC Award**”).⁵ Nitsche only received an award for
24 rescission damages. In 2016, Nitsche filed a petition in Circuit Court of Cook County, Illinois

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26 ⁵ Specifically, Paragraphs 3 (“Claimant's request that Respondent be compelled to
27 liquidate its land holdings or its interest therein is DENIED”), 4 (“Claimant's request for an
28 award of punitive damages is DENIED”), and 5 (“Claimant's request for attorneys' fees is
DENIED”).

1 seeking to confirm the ICC Award. In the process, however, he also attempted to have a
2 receiver appointed. That effort to have a receiver appointed over the Property was denied by the
3 state court pursuant to an order enter on April 24, 2017. A true and correct copy of the Order
4 denying Nitsche’s motion to appoint a receiver is attached hereto as **Exhibit B. STRIKE ONE.**

5 Not achieving the result desired in the 2015 Arbitration and attempt to appoint a receiver
6 in state court, in May, 2016, Umbach (and others) filed yet *another* lawsuit in Circuit Court of
7 Cook County, Illinois, again asserting fraud and *again* seeking appointment of a receiver
8 (pursuant to an “emergency motion,” very much like the Motion before this Court) over Ara
9 Macao and its assets (specifically the Property). *See Umbach, et al. v. ioVest Development,*
10 *LLC, et al.*, Cook County Case 2016-CH-06345 (the “**2016 Lawsuit**”). Judge Kathleen
11 Kennedy, after a hearing on the merits in the new 2016 Lawsuit, expressly declined to appoint a
12 receiver and, again, referred the parties to arbitration. *See* Order dated June 23, 2016, attached
13 hereto as **Exhibit C.** Knowing that the last arbitration did not produce the desired result,
14 Umbach declined to proceed to arbitration, and the 2016 Lawsuit was dismissed for lack of
15 prosecution by Order dated August 2, 2017, a true and correct copy of which is attached as
16 **Exhibit D. STRIKE TWO.**

17 Failing at their first two attempts to take control of the partnership and force the
18 liquidation of the Property, the Petitioning Creditors hit upon a new plan. As the Chicago courts
19 and an ICC arbitrator had not given them what they wanted, why not move the forum to
20 Arizona and try it for a third time? Except this time, they would try an involuntary bankruptcy
21 and yet a new “emergency” motion seeking a bankruptcy trustee. Moreover, it would be best in
22 employing this new strategy to not tell the Arizona Bankruptcy Court of the two other attempts
23 made to essentially accomplish the same thing.⁶ This third attempt is a similarly flawed, ill-
24 advised gambit, which damages the partnership and assets of the partnership. Ara Macao
25 expressly reserves all rights against the Petitioning Creditors and those working in concert with

26 ⁶ This omission is troubling at best. As counsel is aware, all lawyers appearing before it
27 have a duty of candor to the tribunal. *See* Ethical Rule 3.3. Moreover, Chicago counsel to the
28 Petitioning Creditors is fully aware of these other attempts as he was counsel in at least one of
those actions.

1 them with respect to any and all damages and sanctions. It is in this procedural context (not
2 disclosed to the Court by the Petitioning Creditors) that this Court has inherited this long
3 dispute.

4 **D. The Hearing Must Be Continued To Allow For Proper And Full Service Of**
5 **All Necessary Parties.** As discussed below, the limited partners in this matter will be directly
6 and materially impacted by the replacement of the general partner in Ara Macao. At a
7 minimum, the scheduled hearing for April 23, 2018 must be continued to allow appropriate
8 service and participation by the nearly 90 other limited partners in Ara Macao to be heard
9 before their rights are prejudiced, possibly irretrievably. Ara Macao has filed a *Motion to*
10 *Continue Evidentiary Hearing on Petitioning Creditors' Motion for Immediate Appointment of a*
11 *Chapter 11 Trustee* concurrently with this Objection.

12 **II. BACKGROUND.**

13 **The Putative Debtor**

- 14 1. Ara Macao is a limited partnership formed in Illinois in 2004.
- 15 2. Ara Macao's general partner is Ara Macao Management Company, LLC
16 ("AMMC"). AMMC has two members, ioVest Development Company, LLC ("ioVest"), and
17 Petitioning Creditor Edgewater Resources, LLC ("**Edgewater**"). ioVest holds a majority of the
18 interests in AMMC and Petitioning Creditor Edgewater holds a minority interest currently
19 vested at 5% and increasing to as high as 20% upon completion of various benchmarks.
20 Petitioning Creditor Edgewater receives other benefits under the AMMC Operating Agreement
21 such as designation of Edgewater as General Contractors for the development of the Putative
22 Debtor. ioVest is the designated manager of AMMC. ioVest is managed by Paul Goguen.

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1 **The Property**

2 3. The primary asset of the Ara Macao partnership includes an approximately 620
3 acre parcel of prime developable resort property in Belize (the “**Property**”), which includes
4 nearly one mile of beachfront property. The Property (with title held in escrow) was fully paid
5 for in 2007.

6 4. Moreover, shortly after the acquisition of the Property, the United States and
7 indeed the world experienced the Great Recession, one of the worst economic downturns since
8 the Great Depression. The economic reality is that the effects of the Great Recession were felt
9 until at least 2015, and some would argue are still felt in some degree today. *See, e.g., **Exhibit***
10 **E.** As a direct result of the Great Recession, discussions with the World Bank (through the
11 International Finance Corporation, its arm dealing with investments in third world countries)
12 put discussions on hold in October 2007.

13 5. The Property is located near Francis Ford Coppola’s landmark and luxurious
14 Turtle Inn in Belize.

15 6. Since its acquisition, and through the efforts of the general partners, a Master
16 Plan for the Property has been approved by the applicable governmental entities in Belize for
17 development of 900 condominiums, 500 single family homes, a 250 slip marina, and 3 hotels
18 with 160 rooms each. This process involved environmental assessments and studies, all as
19 required by the government of Belize. This process took approximately three (3) years.

20 7. Although the Property has not been fully developed, Ara Macao and its
21 management have been working on obtaining necessary approvals, securing funding, or
22 attracting joint venture partners.⁷

23 8. Beginning in September 2005, Ara Macao’s management has issued detailed
24 status reports to Ara Macao’s investors at least once a year. In total, Ara Macao’s management

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26 ⁷ Ara Macao’s approval from the Department of the Environment in the Ministry of
27 Natural Resources in Belize was challenged by an environmental group—the Peinsula Citizens
28 for Sustainable Development Limited. This challenge ultimately had to be resolved before the
Supreme Court of Belize. A true and correct copy of the Supreme Court of Belize’s decision is
attached hereto as **Exhibit G.**

1 has sent thirty (30) such status reports to investors, true and correct copies of which are attached
2 hereto as **Exhibit F** (collectively the “**Status Reports**”). The Status Reports kept the investors
3 informed of the developments (and reasons for delays in development).

4 9. The most recent status report was sent to investors on May 3, 2017. Of particular
5 note, the May 2017 report details efforts to obtain certain environmental clearance or approvals
6 to subdivide from agencies in Belize. The report attached as an exhibit the subdivision approval
7 from the Belizean government issued on March 23, 2017.

8 10. The Property has substantial value, and the Petitioning Creditors are very much
9 aware of this. A November 2016 appraisal valued the Property at \$61 million. A true and
10 correct copy of the November 2016 appraisal is attached hereto as **Exhibit H**.

11 11. The Petitioning Creditors’ Motion does not make any allegations that the
12 Property has declined, or is declining, in value. To the contrary, a recent article published by
13 Bloomberg suggests that the real estate market in Belize will “likely boom in 2018,” citing,
14 among other things, plans for an international airport in Placencia (the town closest to the
15 Property). A true and correct copy of the Bloomberg article is attached hereto as **Exhibit I**.

16 12. The Motion makes a number of baseless allegations concerning the fact that the
17 Property has yet to be transferred to the Debtor. That the transfer of the Property has not been
18 recorded in Belize, however, does not mean that the General Partner made that decision for
19 wrongful purposes. Rather, the decision not to record the ownership interest was made to save
20 the Debtor from incurring hundreds of thousands of dollars in transfer taxes until such time as it
21 was known whether a construction financing source would require title to be taken in a
22 specialized single purpose entity as terms of the financing (which SPE would be owned by the
23 same owners of Ara Macao). Hence, the transfer fee would be paid once, not twice. In any
24 event, the title to the Property is in escrow, and ready to be transferred upon payment of the
25 transfer fee.

The Petitioning Creditors

26
27 13. There are currently approximately 90 limited partners in Ara Macao, with
28 collective investments totaling nearly \$9 million. The Petitioning Creditors include four

1 persons/entities representing limited partners, with investments totaling approximately
2 \$828,000, or only approximately 9% of the total limited partner investments. Those
3 individuals/entities include KB, de Sibert, Nitsche, and Umbach. A true and correct copy of the
4 Ara Macao limited partner roll as of December 31, 2017 is attached hereto as **Exhibit J**. A fifth
5 Petitioning Creditor, Edgewater, is actually a minority member of AMMC, the General Partner
6 of the Putative Debtor.

7 14. Through the Motion, the Petitioning Creditors, as insiders, are essentially
8 attempting to replace the general partner, AMMC, through the guise of a contrived “emergency”
9 in violation of the limited partnership agreements. Put another way, at least as to Petitioning
10 Creditor Edgewater, Edgewater is seeking to gain control of the Putative Debtor, a position
11 Edgewater is not legally entitled to as a minority member of the General Partner under the
12 AMMC Operating Agreement.

13 15. In 2015, Petitioning Creditor Nitsche commenced an arbitration against Ara
14 Macao before the International Centre for Dispute Resolution alleging breach of fiduciary duty,
15 fraud and other improper acts against Ara Macao's general partner, and seeking to liquidate the
16 assets of the partnership.

17 16. In the 2015 Arbitration, and after a full evidentiary hearing, the arbitrator did not
18 find any fraud, refused to award any punitive damages based on asserted fraud (or attorneys;
19 fees) and further refused to order the liquidation of the Property. Nitsche only received an award
20 for rescission damages.

21 17. In 2016, Nitsche filed a petition in Circuit Court of Cook County, Illinois
22 seeking to confirm the ICC Award. In the process, however, he also attempted to have a
23 receiver appointed. That effort to have a receiver appointed over the Property was denied by the
24 state court pursuant to an order enter on April 24, 2017.

25 18. In May 2016, certain parties, including one of the current Petition Creditors—
26 Umbach—against sought the appointment of a receiver in the Circuit Court of Cook County,
27 Illinois, which effectively sought to divest management and the general partner of Ara Macao of
28 control over the development of the Property.

1 11] entered on April 10, 2018 (the “**Hearing Order**”), required the Petitioning Creditors to
2 serve the Order “upon all interested parties to the Trustee Motion via email, facsimile, or U.S.
3 mail” and “file a certificate of service evidencing same.” *See* Hearing Order.

4 24. On April 10, 2018, the Petitioning Creditors filed a *Certificate of Service*
5 indicating that they had only served the Hearing Order on one party (other than the United State
6 Trustee)—Ara Macao. The Petitioning Creditors apparently did not even attempt to serve the
7 Hearing Order on any other limited partner or potential creditor.

8 25. The Motion places the proverbial cart before the horse. The Petitioning
9 Creditors’ Motion requests that the Court appoint a trustee before the Court even makes a
10 determination as to whether there will be an order for relief. This extraordinary relief is
11 requested based upon a contrived emergency and with no notice to parties that will be impacted,
12 including the vast majority of the putative debtor’s other limited partners. Moreover, and as set
13 forth above, Ara Macao has agreed it will take no actions to transfer, convey or encumber the
14 Property without an Order of this Court while these matters are pending—hence, the status quo
15 will be preserved. There is no “emergency”—real or contrived.

16 **III. ARGUMENT.**

17 **A. The Cases Relied Upon by the Petitioning Creditors Rest on Questionable**
18 **Statutory Ground and Are Factually Inapposite.**

19 In support of the extraordinary relief they request, the Petitioning Creditors cite to two
20 non-controlling bankruptcy court cases. *See* Motion, p. 10 (citing *In re Prof'l Accountants*
21 *Referral Svcs., Inc.*, 142 B.R. 424 (Bankr. D. Colo. 1992); *In re Alpine Lumber*, 13 B.R. 977
22 (Bank. S.D. Cal. 1981)). The Bankruptcy Code provisions regarding involuntary bankruptcy
23 filings are found in Section 303. Of particular relevance to the present case, Bankruptcy Code
24 § 303(g) provides as follows:

25 At any time after the commencement of an involuntary case *under Chapter 7* of this
26 title but before an order for relief in the case, the court, on request of a party in
27 interest, after notice to the debtor and a hearing, and if necessary to preserve the
28 property of the estate or to prevent loss to the estate, may order the United States
trustee to appoint an interim trustee under section 701 of this title to take possession of
the property of the estate and to operate any business of the debtor.

1 11 U.S.C. § 303(g) (Emphasis added). While Section 303(g) makes specific reference to the
2 appointment of an interim trustee in an involuntary Chapter 7 case, it makes absolutely no
3 mention of such a remedy in an involuntary Chapter 11 case.

4 The Bankruptcy Court for the Eastern District of New York concluded that the absence
5 of such a provision “was not a mere congressional oversight but rather a deliberate omission.”
6 *Matter of Beaucrest Realty Assocs.*, 4 B.R. 164, 165 (Bankr. E.D.N.Y. 1980). The *Beaucrest*
7 court noted: “Clearly the fact that Congress made two specific references to Chapter 7 supports
8 the conclusion that s 303(g) does not authorize a Chapter 11 interim trustee as well as the
9 conclusion that Congress was aware of the fact that it omitted any reference to Chapter 11.
10 There is no analogous provision under Chapter 11 to that contained in s 701. An entire statutory
11 scheme provided under Chapter 7 is conspicuously absent under Chapter 11. Therefore, to infer
12 such a provision as do the petitioners is to do violence to sound statutory construction.” *Id.*

13 The *Beaucrest* court correctly noted that other provisions of Bankruptcy Code § 303
14 provide bankruptcy courts and interested parties with mechanisms to control a putative debtor
15 during the gap period. *Id.* For example, Bankruptcy Code § 303(f) provides that “*except to the*
16 *extent that the court orders otherwise, . . . any business of the debtor may continue to operate,*
17 *and the debtor may continue to use , acquire, or dispose of property*” 11 U.S.C. § 303(f).
18 Accordingly, a court may enter appropriate orders where “there is a fear that the debtor may
19 attempt to abscond with assets” or “dispose of them at less than their fair market value.”
20 *Beaucrest*, 4 B.R. at 165 (“Thus, the result obtained under s. 303(f) is a balancing of the
21 interests of the debtor with those of the creditors. The creditors have a remedy against any
22 adverse actions on the part of the debtor during the period preceding the order for relief.”).

23 As noted by other bankruptcy courts (*see* Section III.B. *infra*), there is scant authority
24 supporting the imposition of an interim trustee during the gap period in an involuntary Chapter
25 11 proceeding. As noted above, the Petitioning Creditors only cite two such cases, neither of
26 which is controlling for this Court. The *Alpine Lumber* case noted by the Petitioning Creditors
27 originated from an entirely different procedural posture. 13 B.R. 977. In that case, an
28 involuntary Chapter 7 proceeding had commenced. *Id.* at 978. Three months after the petition

1 was filed, an interim trustee was appointed for cause under Bankruptcy Code §§ 303(g) and
2 701. *Id.* Prior to a trial on the involuntary proceeding, the partners of the debtor converted the
3 proceeding to Chapter 11 and a question arose “as to whether the interim trustee was entitled to
4 continued possession of the debtor after the voluntary conversion was filed.” *Id.* The *Alpine*
5 *Lumber* court found that the interim trustee could remain in possession because to hold
6 otherwise would allow an involuntary Chapter 7 debtor to remove a trustee by simply
7 converting the case to a voluntary Chapter 11 and avoid the bonding requirements of
8 Bankruptcy Code § 303(g). *Id.* at 979.⁹

9 Similarly, the *Professional Accountants* case involved an entirely different factual
10 scenario. The putative debtor in *Professional Accountants*, PARS was a telemarketing firm. 142
11 B.R. at 426. PARS maintained minimal books and record and there was substantial evidence
12 that when financial statements were prepared in connection with bank loans, the statements
13 were fabricated or contained misstatements or falsifications. *Id.* Furthermore, at the time of the
14 involuntary petition, PARS was no longer an operating business. *Id.* PARS’ principal negotiated
15 an alleged agreement with another firm that he also controlled, which required PARS to pay
16 \$20,000 per month to the other entity as fees for servicing the remaining PARS contracts. *Id.* In
17 *Professional Accountants*, there was direct evidence of debtor funds being used for the personal
18 benefit of the debtor’s principal. *Id.* at 427. Under the circumstances, the Court found that it
19 could appoint a trustee under Bankruptcy Code § 1104(a). *Id.* at 429–31.

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22 ⁹ The *Alpine Lumber* court found as follows:

23 Once cause has been found to exist for the purposes of appointing an interim
24 trustee pursuant to s 303(g), the alleged debtor may remove him by but two
25 methods. One is to post a bond as set forth in s 303(g). The other may be to
26 convince the court, after a noticed hearing, that the causes which led to the
27 appointment in the first place are no longer present. Neither was done here. A
28 voluntary filing of a Chapter 11 is not a substitute for the proper way to
remove an interim trustee once appointed for cause.

Id.

1 As noted in the *Beaucrest* case discussed above, the statutory predicate for the
2 appointment of an interim Chapter 11 trustee is questionable at best. Furthermore, the Motion
3 does not present facts similar to those in *Professional Accountants*. Here, the primary asset of
4 the putative debtor is a valuable piece of real estate. There are limited cash holdings. There is no
5 evidence that Ara Macao's assets are being dissipated or siphoned off for the benefit of its
6 insiders. Rather, the Motion recites baseless allegations that have no factual support and are
7 certainly disputed. Notice has been wholly insufficient to allow other real parties in interests
8 with material economic interests at stake to be heard. Allowing an "emergency hearing"
9 involving an evidentiary presentation on very short notice with no meaningful right to have
10 participation and discovery by interested parties, and using that to support the granting of an
11 extraordinary remedy not expressly provided for in the Bankruptcy Code, is a gross deprivation
12 of due process. As noted above, many of the Motion's exhibit citations are nonsensical and have
13 no relation to the preceding statements. At this stage, the Petitioning Creditors have come
14 nowhere close to establishing cause under Bankruptcy Code § 1104 or any other provision they
15 purport to rely upon.

16 **B. Even if this Court Determines It Has the Authority to Appoint an Interim**
17 **Trustee, the Facts Do Not Warrant Such an Extreme Remedy In This Case.**

18 It is indisputable that even with proper service and notice, the relief sought by the
19 Petitioning Creditors is extraordinary. In a case seeking an interim gap period Chapter 11
20 trustee that involved strikingly similar facts, the Bankruptcy Court for the District of Delaware
21 found that the creditor movants had not met the extremely high burden that needed to be
22 satisfied. *In re Diamondhead Casino Corp.*, 540 B.R. 499 (Bankr. D. Del. 2015). As noted by
23 the *Diamondhead* Court, an involuntary petition is an "extreme remedy." *Id.* at 505. The
24 appointment of an interim trustee, however, is "an even more extreme remedy." *Id.* The
25 Bankruptcy Court for the District of Delaware noted that there is limited case law applying
26 Bankruptcy Code § 303(g) because requests for such relief are rare. *Id.* The *Diamondhead* Court
27 further noted that "requests for interim trustees should be denied in the absence of an
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1 exceptionally strong need for doing so.” *Id.* It further cautioned that such requests should only
2 be granted where a movant shows “a substantial risk of loss to the estate.” *Id.*

3 In *Diamondhead*, the putative debtor began to focus on the development of a land-based
4 casino resort in Mississippi in the year 2000. *Id.* at 501. From 2000 through 2015, it had no
5 operations and, aside from a small amount of cash, its only tangible asset was 404 acres of
6 undeveloped land. *Id.* The property, however, had considerable value. *Id.* at 502. At the time of
7 the involuntary filing, the putative debtor did not have the funds to develop the property. *Id.* It
8 needed to either raise funds or find a joint venture partner. *Id.*¹⁰ Prior to the involuntary filing, a
9 group (including one of the petitioning creditors) undertook an effort to remove the putative
10 debtor’s incumbent board of directors. *Id.* at 504. That effort was unsuccessful. *Id.* Having
11 failed in that effort, certain investors sought to place the putative debtor in an involuntary
12 bankruptcy case. *Id.* at 505.

13 In seeking to appoint an interim trustee, the petitioning creditors in *Diamondhead* made
14 strikingly similar arguments to those of the Petitioning Creditors in the present case. The
15 *Diamondhead* Court noted that the crux of the petitioning creditors’ argument in that case was
16 “that management has mismanaged the Property by not developing it in the last 15 years.” *Id.* at
17 507. Similar to the present case, the petitioning creditors in *Diamondhead*, did not cite any loss
18 that the estate would incur during the gap period. *Id.* The *Diamondhead* Court found that factor
19 to be critical. *Id.* at 508 (“*Diamondhead* is (and has been) a non-operating entity for the past 15
20 years, with a wholly owned subsidiary that owns real estate. There was no testimony that during
21 the gap period anything different will occur, or that the Property will be sold”).
22 Furthermore, the Court found that there was no testimony that the equity in the subject property
23 would decline or that, as a result, an equity cushion would be depleted during the gap period. *Id.*
24 at 508. “[L]ack of trust in management or frustration with the lack of progress on the

25 ¹⁰ Similar to the present case, the putative debtor in *Diamondhead* had been working for
26 years to obtain financing to develop the property but had run into several external obstacles:
27 “Ms. Vitale testified that multiple external hurdles hampered the development of the Property,
28 including litigation from environmental groups over permitting, waiting for the Army Corps of
Engineers to perform an environmental impact survey, Hurricane Katrina, the collapse of the
financial markets, and the BP oil spill. *Id.* at 503.

1 development of the Property, no matter how justified, does not suffice to warrant an interim
2 trustee on the facts of this case.” *Id.*

3 **C. The Petitioning Creditors Are Seeking To Replace the AMMC Through A**
4 **Contrived “Emergency” In Violation of the Limited Partnership**
5 **Agreements.**

6 The Petitioning Creditors ask this Court to appoint a Trustee to replace the existing
7 management of the Debtor, which in this case is the General Partner of the limited partnership.
8 The efforts of Petitioning Creditors amount to an impermissible attempt to change the General
9 Partner of the Project to the detriment of the limited partners.

10 The Project is governed by a limited partnership agreement entered into by over 80
11 separate limited partners. The initial limited partnership agreement was executed as of April 30,
12 2004 (the “**Initial Limited Partnership Agreement**”). The Initial Limited Partnership
13 Agreement was amended and restated as of March 5, 2007 (the “**Amended and Restated**
14 **Partnership Agreement**”) and amended by the first amendment to the amended and restated
15 partnership agreement dated May 5, 2014 (the “**First Amendment**”). True and correct copies of
16 the Amended and Restated Partnership Agreement and the First Amendment are attached hereto
17 as **Exhibit K**.

18 **i. Only a Super Majority of the Limited Partners May Replace the**
19 **General Partner.**

20 Pursuant to the Partnership Agreement the limited partners retain the exclusive right to
21 replace the General Partner. Section 2.01 of the First Amendment establishes Ara Macao
22 Management Company, LLC as the General Partner of the Partnership.

23 Section 2.01 states:

24 Section 2.01. ARA MACAO MANAGEMENT COMPANY, LLC, a Michigan limited
25 liability company, shall be the sole General Partner of this Partnership. No other person
26 or organization shall be admitted to the Partnership as a General Partner, and, except as
27 specifically provided or permitted by this Agreement, no substitute of the General
28 Partner shall become a General Partner in this Partnership.

1 The Limited Partnership Agreement requires the affirmative vote of 75% of the limited
2 partnership interests to replace the General Partner. The limited partners by a 75% vote may
3 replace the General Partner for “cause” or elect a new General Partner upon the removal,
4 insolvency or bankruptcy of the General Partner. “Cause” includes entry of a final judgment
5 finding intentional misconduct or gross negligence. Section 9.01(a) and (b). The Petitioning
6 Creditors have tried twice to obtain such a judgment and have twice failed. The Petitioning
7 Creditors now seek to circumvent Section 9.1 of the Partnership Agreement by filing the
8 Motion.

9 **ii. The Consent of All Limited Partners Interests is Required to Admit**
10 **Another General Partner.**

11 The role of the General Partner is so critical to the process that the consent of all limited
12 partners is required for the General Partner to admit another party as a general partner. The
13 Partnership Agreement, specifically prohibits the admission of any other General Partner
14 without the consent of all Limited Partners. Section 6.03(h) of the Amended and Restated
15 Partnership Agreement states “The General Partner shall not, without the prior written consent
16 of all Limited Partners: . . . (5) admit any other Person as a General Partner, except as
17 specifically permitted by the terms of this Agreement.”

18 **iii. Each of the Limited Partners Reaffirmed the Limited Partnership**
19 **Agreement as Recently as 2014.**

20 Petitioning Creditors acknowledge that the Limited Partnership Agreement was
21 amended in 2014. That amendment was signed by each of the limited partners. Pursuant to that
22 amendment each of the limited partners agreed that “[e]xcept as amended by this First
23 Amendment, the terms and conditions of the Amended & Restated Limited Partnership
24 Agreement remain in full force and effect.” First Amendment Section 7. The limited partners’
25 reaffirmation of the Partnership Agreement undercut the Petitioning Creditors’ tale of scores of
26 disgruntled limited partners.

27 **iv. The Motion Violates the Due Process Rights of All Partners.**
28

1 As noted above, the Petitioning Creditors only provided notice of the Motion and the
2 related hearing to Ara Macao. The Petitioning Creditors have not served copies of the Motion or
3 the Hearing Order on any of the other limited partners or potential creditors. The Petitioning
4 Creditors are not only attempting to steamroll the rights of Ara Macao, but also the rights of the
5 nearly ninety (90) additional limited partners that have no notice of these proceedings
6 whatsoever. Although the court ordered the Petitioning Creditors to notice all interested parties,
7 the Petitioning Creditors failed to notice a single limited partner. The failure to provide such
8 parties with notice is especially egregious considering that the Petitioning Creditors actions are
9 directly contrary to the terms of the Partnership Agreement discussed above.

10 It is further worth noting that limited partnership interest are mandatorily subordinated
11 to other creditors pursuant to Bankruptcy Code § 510(b). As noted above, the Motion puts the
12 cart before the horse by seeking the appointment of a trustee before a determination is even
13 made as to whether an order for relief will be entered. This relief is being requested by four
14 limited partners (out of more than 90) and a couple of creditors with claims totaling roughly
15 \$600,000. The putative debtor, meanwhile, holds an interest in considerably valuable land
16 which is unencumbered by any secured debt. In other words, the putative debtor is not even
17 insolvent by any standard.

18 **IV. ARA MACAO CONSENTS TO THE PRESERVATION OF THE STATUS QUO.**

19 As noted above, the drastic remedy of appointing an interim trustee during the gap
20 period of an involuntary Chapter 11 case should only be granted, if at all, where movants can
21 demonstrate severe risk of loss to the estate during such period. The Petitioning Creditors here
22 have not, and indeed cannot, demonstrate such risk. Furthermore, in order to allay any of the
23 Petitioning Creditors' concerns, Ara Macao agrees that it will not transfer, encumber or convey
24 the Property or any other estate asset without further order of this Court and notice to creditors.
25 Ara Macao will consent to such relief being granted by this Court pursuant to Bankruptcy Code
26 § 303(f). Accordingly, there is no "emergency" that would justify the Petitioning Creditors
27 trampling the due process rights of Ara Macao and the nearly 90 other limited partners that have
28 not even received notice of these extraordinary proceedings. This course of action will allow the

1 Court to set these proceedings in the normal course and will allow Ara Macao and those other
2 limited partners to be heard.

3 **V. REQUEST FOR JUDICIAL NOTICE**

4 Defendants request that this Court take judicial notice of the records and documents on
5 file in the state court and arbitration proceedings references above. Federal Rule of Evidence
6 201(b) provides that “[t]he court may judicially notice a fact that is not subject to reasonable
7 dispute because it: (2) can be accurately and readily determined from sources whose accuracy
8 cannot reasonably be questioned.” See FED. R. EVID. 201(b)(2). A court may take judicial notice
9 of its own records as well as documents filed in other courts. See *Reyn’s Pasta Bella, LLC v.*
10 *Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (taking judicial notice of documents
11 related to a settlement in another case that bore on whether the plaintiff was still able to assert
12 its claims in the pending case); *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*,
13 136 F.3d 1360, 1364 (9th Cir. 1998) (taking judicial notice of court filings in a state court case
14 where the same plaintiff asserted similar and related claims); *Hott v. City of San Jose*, 92 F.
15 Supp. 2d 996, 998 (N.D. Cal. 2000) (taking judicial notice of relevant memoranda and orders
16 filed in state court cases). “[C]ourts routinely take judicial notice of documents filed in other
17 courts . . . to establish the fact of such litigation and related filings.” *Kramer v. Time Warner*
18 *Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (citations omitted). “The existence and content of
19 opinions and pleadings are matters capable of accurate and ready determination by resort to
20 official court files that cannot reasonably be questioned.” *Bogart v. Daley*, No., CV 00-101-BR,
21 2001 WL 34045761, at *2 (D. Or. June 28, 2001) (citing FED. R. EVID. 201(b)(2)).

22 **VI. RESERVATION OF RIGHTS.**

23 The Petitioning Creditors primarily consist of a small minority of investors who have
24 repeatedly attempted to oust the general partner of Ara Macao. The Petitioning Creditors
25 continue to make unsubstantiated allegations of fraud and dishonesty despite such claims having
26 been denied in at least two other forums. In light of the foregoing, Ara Macao hereby expressly
27 reserves all of its rights and remedies to seek attorneys’ fees and costs against the Petitioning
28

1 Creditors on the grounds of bad faith, as set forth in Bankruptcy Code § 303(i) and as otherwise
2 appropriate under the facts, law and equities of this matter..

3 **VII. CONCLUSION.**

4 WHEREFORE, based upon the foregoing and the entire record before this Court, Ara
5 Macao respectfully requests that the Court enter an order denying the Motion and granting Ara
6 Macao such other and further relief as is just and necessary under the circumstances.

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RESPECTFULLY SUBMITTED this 18th day of April, 2018.

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By: /s/ Thomas J. Salerno

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Exhibits Available Upon Request

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