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8 *Attorney for G. Grant Lyon, Interim Chapter 11 Trustee*

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

11 In re:

(Chapter 11 Case)

12 ARA MACAO HOLDING, L.P.,

No. 3:18-bk-03615-PS

13 Debtor.

**INTERIM CHAPTER 11 TRUSTEE'S  
MOTION TO DISMISS PROPOSED  
ELECTION OF CHAPTER 11 TRUSTEE**

**Time: TBD**

**Date: TBD**

**Location: 230 N. First Avenue  
Phoenix, AZ 85016  
Courtroom No. 601**

14  
15 G. Grant Lyon, Interim Chapter 11 Trustee ("**Trustee**") by and through his undersigned counsel  
16 herein respectfully submits his *Motion to Dismiss Proposed Election of Chapter 11 Trustee* ("**Motion**"),  
17 for his Motion, Trustee respectfully submits the following:

18 1. This case was initiated as an involuntary proceeding filed on April 6, 2018 (the  
19 "**Petition Date**") by KB Partners I, L.P., Christopher de Sibert, Daniel Dorgan, Gary Nitsche, Richard  
20 Umbach and Edgewater Resources, LLC ("**Petitioning Creditors**") under chapter 11 of Title 11 of the  
21 United States Code.

22 2. Ara Macao Holding, L.P. ("**Debtor**") filed a *Motion to Convert Proceeding to Voluntary*  
23 *Action Under Chapter 11*, which the Court granted on May 8, 2018 [Dkt. No. 68].

24 3. On June 21, 2018, the Court granted an Order Approving the *Appointment of Trustee (G.*  
25 *Grant Lyon)* [Dkt. No. 112] as the Chapter 11 Trustee. The Trustee was chosen by the US Trustee after  
26 consultation with the parties in the case, and was otherwise unconnected with the case or its creditors and  
27 parties.

28  
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1 4. On or about July 2, 2018, the Official Unsecured Creditors Committee (“UCC”) filed a  
2 *Motion for Election of Trustee* [Dkt. No. 126]. On July 5, 2018, the Court entered an *Order Denying*  
3 *Motion for Election of Trustee* [Dkt. No. 128] providing that there was no “justiciable issue on which the  
4 Court [could] rule.”

5 5. Upon information and belief, the UCC submitted a request to the Office of United States  
6 Trustee to hold an election pursuant to 11 U.S.C. § 1104(b)(1).

7 6. 11 U.S.C. § 1104(b) refers to 11 U.S.C. 702(b), “creditors may elect one person to serve as  
8 trustee in the case if election of a trustee is requested by creditors that *may* vote under subsection (a) of  
9 this section, **and** hold at least 20 percent in amount of the claims....”

10 7. Pursuant to 11 U.S.C. § 1104(b) and 11 U.S.C. § 702(a), the request for an election must  
11 be made: (a) by creditors; (b) not later than 30 days of the appointment of a trustee under 1104(a); (c) by  
12 creditors holding at least 20% of the “allowable, undisputed, fixed, liquidated, unsecured claim of a kind  
13 entitled to distribution under section 726(a)(2), 726(a)(3), 726(a)(4), 752(a), 766(h), or 766(i) of this  
14 title”; (d) "does not have an interest materially adverse" to the other creditors; *and* (e) "is not an  
15 insider".

16 8. According to the Schedules of Assets and Liabilities filed by the Debtor [Dkt. No. 95],  
17 there are 81 listed unsecured creditors with total claims of approximately \$18.2 million. Accordingly,  
18 by simple math 20% of this creditor pool would equal approximately \$3.6 million in undisputed and  
19 allowable unsecured claims which must join in the election request.

20 9. The request for the election came not from any individual creditor or creditors, but  
21 rather from the UCC. The UCC is made up of the following five (5) creditors: (a) Gary Nitche  
22 (\$704,385); (b) Richard Brown (\$285,072); (c) KB Partners (\$118,571); (d) Richard Beckman  
23 (\$237,167); and (e) Dan Dorgan (\$288,264). These creditor claims total \$1,633,445.00 (or  
24 approximately 8% of the total). It is noteworthy that the request for the election did not come from any  
25 individual creditor or creditors, rather it came from the UCC (which does not hold, as an entity, any  
26 claim).

27 10. Even with respect to the 8% of ostensible unsecured claims seeking the election, not all  
28 five claims are eligible to vote. Of the UCC creditor member claims, three are not counted in the

1 calculation of the total. Specifically, the claims of Nitche, KB Partners and Brown (totaling  
2 \$1,108,028) are not undisputed and represent materially adverse interests to the other general unsecured  
3 creditors. In fact, these three claims result from judgments based on damages related to their equity  
4 interests in the Debtor. As such, those claims are subject to mandatory subordination to the interests of  
5 unsecured creditors, and indeed are treated as equity in bankruptcy cases. *See* 11 U.S.C. § 510(b)<sup>1</sup>; *In re*  
6 *Tristar Esperanza Props, LLC*, 782 F.3<sup>rd</sup> 492 (9<sup>th</sup> Cir. 2015) (damage award of former member of LLC  
7 for repurchase of membership interest is subject to mandatory subordination under § 510(b)); *In re*  
8 *Betacom of Phoenix, Inc.*, 240 F.3<sup>rd</sup> 823 (9<sup>th</sup> Cir. 2001). The Trustee will object to these claims based on  
9 the mandatory provisions of 11 U.S.C. § 510(b).

10 10. Assuming, *arguendo*, that the UCC request for an election is to be treated as the equivalent  
11 of its five constituent member creditors' request (which is arguable), when the three UCC member claims  
12 who are not eligible to vote because their claims are subject to mandatory subordination (and therefore  
13 represent claims that, by definition, are legally adverse to the other unsecured creditors to whom the UCC  
14 owes a fiduciary duty<sup>2</sup>) are removed from the calculation, it is undisputed that less than 20% of  
15 undisputed unsecured claimants have sought the election of a trustee within the proscribed time period  
16 under 11 U.S.C. § 702. Instead of the \$3.6 million in undisputed unsecured claims threshold (20%), the  
17 remaining UCC members have claims totaling approximately \$525,400, or about 2%. The Trustee fully  
18 anticipates that, upon receiving this Motion, the UCC and its professionals will engage in yet another  
19 "mail solicitation" campaign to get other creditors to perhaps join the election request. Such mail  
20 campaigns, using materials that are not disclosed and the Court and Trustee (and other creditors) with no  
21

22 <sup>1</sup> 11 U.S.C. § 510(b) provides in pertinent part as follows:

23 For purposes of distribution under this title, a claim arising from rescission  
24 of a purchase or sale of a security of the debtor...for damages arising from  
25 the purchase or sale of such a security...*shall be subordinated* to all claims or  
26 interests that are senior to or equal the claim or interest represented by such security,  
except that if such security is common stock, such claim has the same priority as common stock.  
[Emphasis added]

27 <sup>2</sup> The Trustee has concerns about this very real conflict as the majority of UCC members hold  
28 claims that are subject to mandatory subordination, making their asserted claims adverse to the priority  
of claims held by other unsecured creditors.

1 disclosure as to what information (or misinformation) is being spread as part of that effort<sup>1</sup>, is antithetical  
2 to the transparency that is (and should be) the hallmark of the bankruptcy process. Such an attempt at this  
3 point would also be untimely.

4 11. The period has expired to request an election and the only request was made by parties,  
5 who in the aggregate, hold substantially less than 20% of the unsecured claims. As such, as a matter of  
6 law the election may not proceed as the conditions necessary were not met. *See, In re Lake States*  
7 *Commodities, Inc.* 173 B.R. 642 (Bankr.N.D.IL 1994).

8 12. The Trustee has been given a job to do, and is an independent party in this bankruptcy.  
9 The Trustee is also an independent fiduciary with fiduciary obligations to all stakeholders in this process.  
10 If there were a legitimate group of 20% of undisputed unsecured creditors that desired to have an election  
11 and timely sought such election, the Trustee would, of course, defer to that process and the results thereof.  
12 The Trustee has concerns, however, about the process being engineered by the UCC and its members, the  
13 agenda of this group and the lack of transparency in this process. The Trustee, as a fiduciary and officer of  
14 this Court, feels he has a duty to bring this to the attention of both the Court and US Trustee.

15 WHEREFORE, Chapter 11 Trustee respectfully requests that the Court enter an Order as follows:

- 16 A. Dismissing the proposed Chapter 11 Trustee election; and,  
17 B. For such other and further relief as this Court deems just and proper.

18 RESPECTFULLY SUBMITTED this \_\_ day of July, 2018.

19 **LANE & NACH, P.C.**

20 By: /s/ Adam B. Nach - 013622  
21 Adam B. Nach  
22 *Attorney for Chapter 11 Trustee*

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25  
26 <sup>1</sup> The Court may recall e mail communications brought to the Court's attention being used by  
27 certain UCC members urging limited partners to not support the formation of a limited partner  
28 committee on the basis that Debtor's counsel would represent such a committee with fees in excess of  
\$250,000. Such misinformation campaigns are perhaps best suited (if at all) to social media, and not as  
part of a transparent judicial process.

**CERTIFICATE OF MAILING**

**A COPY** delivered via first class mail to:

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**WITH A COPY** delivered via electronic notification to:

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By /s/ Terie Flowers Turner

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