

1 Adam B. Nach - 013622
2 **LANE & NACH, P.C.**
3 2001 E. Campbell Avenue, Suite 103
4 Phoenix, Arizona 85016
5 Telephone No.: (602) 258-6000
6 Facsimile No.: (602) 258-6003
7 Email: adam.nach@lane-nach.com
8 Attorney for G. Grant Lyon, Interim Chapter 11 Trustee

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

12 **In re:**
13
14 **ARA MACAO HOLDING, L.P.,**

15 **Debtor.**

16 **(Chapter 11 Case)**

17 **No. 3:18-bk-03615-PS**

18 **INTERIM CHAPTER 11 TRUSTEE'S FIRST**
19 **OMNIBUS OBJECTION TO JUDGMENT**
20 **CREDITOR CLAIMS**

21 **Related Claims:**

- 22 1) **Richard Brown**
- 23 2) **Geoffrey deSibert**
- 24 3) **Gary Nitsche [Claim No. 7]**

25 **Time: TBD**

26 **Date: TBD**

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

G. Grant Lyon, Interim Chapter 11 Trustee ("**Trustee**") by and through his undersigned counsel herein respectfully submits his *First Omnibus Objection to Judgment Creditor Claims* ("**Objection**"). The following creditors' claims arise (at least in part) from the purchase or sale of a security. Therefore, the Claims must be subordinated pursuant to 11 U.S.C. § 510(b) and Fed.R.Bankr.P. 3007. For his Objection, Trustee respectfully submits the following Memorandum of Points and Authorities and the entire record of this administrative case.

MEMORANDUM OF POINTS AND AUTHORITIES

A. FACTUAL BACKGROUND.

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

Lane & Nach, P.C.
2001 E. Campbell Ave., Ste 103
Phoenix, AZ 85016

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

3 3. On June 21, 2018, the Court granted an Order Approving the *Appointment of Trustee (G.*
4 *Grant Lyon)* [Dkt. No. 112] as the Chapter 11 Trustee.

5 4. Upon information and belief, on or about April 30, 2004, the “initial” Limited Partnership
6 Agreement (“**Agreement**”) of the Debtor was executed. Upon information and belief, the Agreement was
7 amended on or about March 5, 2007, and sometime in February 2014.

8 5. Initially, a party could acquire an equity interest in the Debtor by the following manner:
9 acquire a “Partnership Unit” (each unit was \$100,000.00 and treated as a capital contribution to the
10 Debtor) or remit a deposit for the purchase of a condo (these ranged from \$150,000.00, \$75,000.00 or
11 25% of the total condo purchase price).

12 6. Pre-petition, the following three (3) Claimants obtained judgments in their favor against
13 the Debtor: Richard Brown, Geoffrey deSibert, and Gary Nitsche. Each of these Claims arise, inter alia,
14 from the equity interests in the Limited Partnership Unit acquired.

15 7. Upon information and belief, Richard Brown¹ also obtained an arbitration award in his
16 favor wherein the award included \$180,438.00, which is related to a condo unit with the Debtor and,
17 \$104,634.00 for the acquisition of a Partnership Unit. Mr. Brown is identified as a 1% limited partner.
18 *Id.* at P. 6 of 9.

19 8. Upon information and belief, KB Partners I, LP and/or Geoffrey deSibert obtained a
20 judgment in his favor against the Debtor in the amount of \$118,571.00 related to his prior acquisition of a
21 Partnership Unit. Mr. deSibert is also listed as a 1% limited partner. *See* Dkt. No. 92 at P. 3 of 9.

22 9. Gary Nitsche² obtained two separate arbitration awards against the Debtor. The first one
23 in the principal amount of \$150,000.00 (believed to currently be \$172,000.00 of the scheduled amount)
24 related to a deposit for the purchase of a condo unit; and, an arbitration award in the principal amount of
25 \$523,000.00 (believed to be approximately \$531,000.00 of the scheduled amount) related to Partnership
26

27 _____
28 ¹ Listed as creditor on Schedule E/F at Dkt. No. 95, P. 10 of 13.

² Listed as creditor on Schedule E/F at Dkt. No. 95, P. 4 of 13 and filed a proof of claim #7.

1 Units acquired by Mr. Nitsche. Moreover, the List of Equity Security Holders includes Mr. Nitsche as a
2 5.23% limited partner. *Id.* at P. 3 of 9.

3 10. As provided above, a significant portion of the purported Claims of these Claimants arises
4 from the acquisition of the interest in the equity interests in the Debtor.

5 **B. LEGAL AUTHORITY.**

6 **1. Jurisdiction and Venue.**

7 This Court has jurisdiction over Debtor's Chapter 11 case under 28 U.S.C. § 1334. Proceedings
8 with respect to the Objection are core proceedings that the Court may hear and decide. *See* 28 U.S.C. §
9 157(b)(1) and (b)(2)(B). Moreover, venue is appropriate pursuant to 28 U.S.C. § 1408(1).

10 **2. Omnibus Objection to Claims.**

11 The objections to the above referenced claims are joined together based on the similarity in basis
12 for the claim and pre-petition judgment/award obtained on behalf of the Claimant.

13 [O]bjections to more than one claim may be joined in an omnibus objection if all the
14 claims were filed by the same entity, or the objections are based solely on the grounds
15 that the claims should be disallowed, in whole or in part, because:

16 ...
17 (7) they are interests, rather than claims....

18 *See* Fed.R.Bankr.P. 3007(d). Therefore, this Omnibus Objection is proper based on the Claimants
19 includes their equity interest in the Debtor as part of their overall Claim(s).

20 **3. Subordination of Claims Related to Equity Interest.**

21 All three (3) of the above named Claimants acquired Partnership Units to become a limited
22 partner of the Debtor. The Partnership Units acquired are "security" as defined in 11 U.S.C. §
23 101(49)(xiii).

24 For the purpose of distribution under this title, a claim arising from rescission of a
25 purchase or **sale of a security of the debtor** or of an affiliate of the debtor, for damages
26 arising **from the purchase or sale of such a security, or for reimbursement or**
27 **contribution allowed** under section 502 on account of such a claim, shall be
28 subordinated to all claims or 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 (bold emphasized).

See, 11 U.S.C. § 510(b). Section 510(b) automatically subordinates the claims arising from rescission
of a purchase or sale of a security of the debtor. The entire amount of Mr. deSibert's Claim arose from
the purchase of a Partnership Unit; and, the majority of both Mr. Nitsche's and Mr. Brown's Claims arose

1 from a similar purchase of Partnership Units. Therefore, Section 510(b) mandates that Mr. deSibert's
2 Claim is subordinated in its entirety. At least \$531,000.00 of Mr. Nitsche's must be subordinated, as well
3 as \$104,634.00 of Mr. Brown's Claim. "The critical question for purposes of § 510(b),... is not whether
4 the claim is debt or equity *at the time of the petition*, but rather whether the claim *arises from* the purchase
5 or sale of a security. The claim must be subordinated if there is a sufficient 'nexus or causal relationship
6 between the claim and the purchase'". See, *In re Tristar Esperanza Properties, LLC*, 782 F.3d 492, 497
7 (9th Cir. 2015) (*Citation omitted*).

8 Therefore, sufficient cause exists to subordinate the each of the above Claims based on the
9 relationship (or purchase) of the Partnership Units giving rise to the basis for the alleged Claims.

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

- 11 A. Subordinating \$104,634.00 of Mr. Brown's Claim to all creditors or interests as set
12 forth in 11 U.S.C. § 510(b), and classifying the balance of the Claim (\$180,438) as
13 a general non-priority unsecured Claim, without prejudice, to further review by the
14 Trustee;
- 15 B. Subordinating KB Partners I, LP and/or Mr. deSibert's Claim to all creditors or
16 interests as set forth in 11 U.S.C. § 510(b);
- 17 C. Subordinating \$531,000.00 of Mr. Nitsche's to all creditors or interests as set forth
18 in 11 U.S.C. § 510(b), and classifying the balance of the Claim (\$172,000.00) as a
19 general non-priority unsecured Claim, without prejudice, to further review by the
20 Trustee; and,
- 21 D. For such other and further relief as this Court deems just and proper.

22 RESPECTFULLY SUBMITTED this 26th day of July, 2018.

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

24
25 By: /s/ Adam B. Nach - 013622
26 Adam B. Nach
27 Attorney for Chapter 11 Trustee
28

CERTIFICATE OF MAILING

A COPY delivered via first class mail as follows:

Richard Brown
314 Joseph's Way
Media, PA 19063

Gary Nitsche
305 N. Union Street, Second Floor
Wilmington, DE 19805

Geoffrey deSibert
KB Partners I, LP
9380 York Rd.
Monterey, CA 93940

WITH A COPY delivered via electronic notification to:

Alan A. Meda
Burch & Cracchiolo PA
Email: ameda@bcattorneys.com
Attorney for Debtor

Engelman Berger, PC
Email: pac@eblawyers.com
Email: sbc@engelmanberger.com
Attorneys for Unsecured Creditors Committee

Law Office of William J. Factor
Email: wfactor@wfactorlaw.com
Email: slorber@wfactorlaw.com
Attorneys for Petitioning Creditors

Christopher J. Pattock
Office of the U.S. Trustee
Email: Christopher.J.Pattock@usdoj.gov

Gary Nitsche
Email: lglenn@attys4u.com
Email: qnitsche@attys4u.com

By /s/ Terie Flowers Turner