

1 SCOTT B. COHEN, SBA #014377
2 PATRICK A. CLISHAM, SBA #023154
3 **ENGELMAN BERGER, P.C.**
3636 NORTH CENTRAL AVENUE, SUITE 700
PHOENIX, ARIZONA 85012

4 Ph: (602) 271-9090
4 Fax: (602) 222-4999
5 Email: sbc@eblawyers.com
5 Email: pac@eblawyers.com

6 Attorneys for the Official Committee
6 of Unsecured Creditors
7

8 **THE UNITED STATES BANKRUPTCY COURT**
9 **FOR THE DISTRICT OF ARIZONA**

10 In re
11 ARA MACAO HOLDINGS, L.P.,
12 Debtor.

Case No. 3:18-bk-03615-PS
Chapter 11

13
14 **OFFICIAL COMMITTEE OF UNSECURED CREDITORS' PRELIMINARY**
15 **OBJECTION TO TRUSTEE'S MOTION TO DISMISS TRUSTEE ELECTION**

16 The Official Committee of Unsecured Creditors in the above-captioned reorganization
17 case (the "Committee") hereby objects to the *Interim Chapter 11 Trustee's Motion to Dismiss*
18 *Proposed Trustee Election of Chapter 11 Trustee* (Dkt. 174) (the "Motion") filed by chapter
19 11 trustee Grant Lyon (the "Trustee").

20 The Motion, filed before the election is even to be held, is an obvious attempt by a
21 Trustee that anticipates being displaced to disenfranchise general unsecured creditors. The
22 Motion is also baseless and reflects a fundamental misreading of the two applicable sections
23 the U.S. Bankruptcy Code that trigger the election of a trustee in a chapter 11 proceeding (11
24 U.S.C. § 1104(b)(1)) and then implement the election (11 U.S.C. § 702). Pursuant to the
25 plain language of the U.S. Bankruptcy Code, the process to elect a chapter 11 trustee is a two-
26 step process. First, an election is requested by a "party-in-interest" under 11 U.S.C. §
27 1104(b)(1), and second, a meeting of creditors is held and, assuming a qualifying quorum, an

1 election is conducted under 11 U.S.C. § 702. The Motion is erroneously predicated on using
2 the more general trustee election quorum requirement in Section 702 to render meaningless
3 the express “party-in-interest” language in Section 1104(b)(1). Such a distorted reading
4 deprives committees, debtors, and individual creditors of the right to request an election in a
5 chapter 11 bankruptcy case. Instead of disempowering critical stakeholders, the Committee
6 urges this Court to honor the plain language of the two statutes.

7 **Step 1 – The Request.**

8 Regarding the election Section 1104(b)(1), in pertinent part, provides that:
9 **[O]n the request of a party in interest** made not later than 30 days after the
10 court orders the appointment of a trustee under subsection (a), the United
11 States trustee shall convene a meeting of creditors for the purpose of
12 electing one disinterested person serve as trustee in the case. The election of
13 a trustee shall be conducted in the manner provided in subsections (a), (b),
14 and (c) of section 702 of this title.
15 11 U.S.C. § 1104(b)(1) (emphasis added).

16 By its plain language, § 1104 requires only two things for a proper request for election:
17 (1) the election must be requested by a “party in interest” and (2) the request must be within
18 30 days after the United States trustee has selected a trustee. Indeed, this Court has
19 previously recognized that the provisions of § 1104(b)(1) dictate the procedures by which an
20 election must be requested and scheduled in its Order Denying Motion for Election of Trustee
21 (“Thus, upon a timely request, the United States trustee is required to hold a trustee
22 election.”). Dkt. 128. In this case, the Committee (an undisputable “party-in-interest”)
23 requested an election within 14 days after the appointment of the Trustee and the U.S. Trustee
24 appropriately scheduled a meeting of creditors to conduct an election for August 2, 2018.
25 Thus, the Committee and the U.S. Trustee have complied with all applicable provisions of §
26 1104.

27 **Step 2 – The Election.**

As provided in § 1104(b), after a meeting of creditors has been set by the U.S. Trustee
for the purpose of conducting an election, the election itself is to be conducted in the manner
provided in § 702 (a), (b) and (c). Section 702(a) strictly deals with what creditors are
eligible to vote in an election, § 702(b) defines the quorum required to request and hold an

1 election at the time the meeting set by the U.S. Trustee is held, and § 702(c) sets out the
2 threshold required to elect a trustee once a quorum is established under § 702(b). For the
3 convenience of the Court, the entirety of these applicable Bankruptcy Code sections provide
4 as follows:

- 5 (a) A creditor may vote for a candidate for trustee only if such creditor—
6 (1) holds an allowable, undisputed, fixed, liquidated, unsecured claim of a
7 kind entitled to distribution under section 726(a)(2), 726(a)(3),
8 726(a)(4), 752(a), 766(h), or 766(i) of this title;
9 (2) does not have an interest materially adverse, other than an equity
10 interest that is not substantial in relation to such creditor's interest as a
11 creditor, to the interest of creditors entitled to such distribution; and
12 (3) is not an insider.

(b) At the meeting of creditors held under section 341 of this title, creditors
may elect one person to serve as trustee in the case if election of a trustee is
requested by creditors that may vote under subsection (a) of this section, and that
hold at least 20 percent in amount of the claims specified in subsection (a)(1) of
this section that are held by creditors that may vote under subsection (a) of this
section.

- (c) A candidate for trustee is elected trustee if—
13 (1) creditors holding at least 20 percent in amount of the claims of a kind
14 specified in subsection (a)(1) of this section that are held by creditors
15 that may vote under subsection (a) of this section vote; and
16 (2) such candidate receives the votes of creditors holding a majority in
17 amount of claims specified in subsection (a)(1) of this section that are
18 held by creditors that vote for a trustee.

16 In summary, § 702 stands for the proposition that in order to conduct an election, a
17 quorum of at least 20% in amount of the unsecured creditors holding allowed claims and
18 without regard to insider claims (per subsections (a)(2) and (a)(3)) must request an election at
19 the meeting of creditors that has been scheduled by the U.S. Trustee and that a trustee will
20 only be elected if a candidate receives a majority of votes in amount of those claims eligible
21 to vote.

22 To be clear, the Committee does not dispute that an election can only be held at the
23 meeting of creditors set by the U.S. Trustee if more than 20% of eligible unsecured creditors
24 request and participate in an election at the meeting, and only if a majority of those
25 participating vote for a single candidate. The Committee currently anticipates that creditors
26 representing substantially more than 20% of claims eligible to vote under § 702(b) will
27 participate at the meeting of creditors and cast their vote to elect a trustee. Unless and until

1 the meeting is held and a quorum to call for and conduct the election is either established or
2 not, the Trustee has no good faith basis to prosecute the Motion.

3 **The Trustee's Mistake**

4 The Trustee's Motion misreads § 702 as requiring the 20% threshold to be met *to*
5 *merely request that a meeting be held for the purpose of an election.* Respectfully, that
6 reading does violence to the express language of § 1104(b) and has no basis in law. *See*
7 *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (concluding that the
8 plain language of the Bankruptcy Code was conclusive). The Committee notes the Motion
9 lacks citation to any case law in support of the Trustee's misinterpretation of the Bankruptcy
10 Code.

11 Although not articulated by the Trustee in the Motion, it appears as though the Trustee
12 considers §§ 1104(b)(1) and 702 to be in conflict. No such conflict exists. Section
13 1104(b)(1) provides with specificity the requirements that must be satisfied to initiate a
14 trustee election process in chapter 11. After that, as the plain language of § 1104(b)(1)
15 provides, the election is to be "conducted in the manner" provided for in Section 702.
16 Clearly, the intent of Congress when adopting § 1104 was to allow a party-in-interest to
17 trigger the start of an election process that could only later be concluded if a proper creditor
18 quorum appears.

19 Assuming *arguendo* a conflict, the Supreme Court's guidance on resolving such
20 conflicts is dispositive in favor of the Committee's reading. As the U.S. Supreme Court held
21 in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012), "[I]t is a
22 commonplace of statutory construction that the specific governs the general." *Id.* (citations
23 omitted). Here the Court's analysis must start with the more particular and applicable
24 Bankruptcy Code section (§ 1104) and read it as the proper standard by which a trustee
25 election in a chapter 11 is triggered. The Trustee's reading does not harmonize the two
26 provisions but renders § 1104 meaningless. As the Ninth Circuit has previously held, the U.S.
27 Bankruptcy Code "ought, upon the whole, to be so construed that, if it can be prevented, no

1 clause, sentence, or word shall be superfluous, void, or insignificant.” *In re Dumont*, 581
2 F.3d 1104, 1111 (9th Cir. 2009) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19 (2001)).

3 A good example of harmonizing Sections 1104(b)(1) and 702 is *In re Aspen Marine*
4 *Group, Inc.*, 189 B.R. 859 (Bankr. S.D. Fla. 1995), where the court resolved a disputed
5 chapter 11 election called for by the committee. In *Aspen Marine*, the bankruptcy court held
6 that an election requested by the committee under § 1104 and conducted after the committee
7 solicited and voted of proxies of creditors was both appropriate and permissible. 189 B.R. at
8 861-63. Like *Aspen Marine*, this Court should reconcile Sections 1104 and 702, rather than
9 follow the Trustee’s lead of rendering language in Section 1104(b)(1) meaningless.

10 For the foregoing reasons, the Committee respectfully requests that the Court deny the
11 Motion and grant such other and further relief as the Court may deem appropriate under the
12 circumstances.

13 **DATED** this 27th day of July, 2018.

14 **ENGELMAN BERGER, P.C.**

15
16 By /s/ PAC, SBA # 023154
17 Scott B. Cohen
18 Patrick A. Clisham
19 3636 North Central Avenue, Suite 700
20 Phoenix, Arizona 85012
21 Attorneys for the Official
22 Committee of Unsecured Creditors
23
24
25
26
27

1 COPY of the foregoing e-mailed this
2 27th day of July, 2018, to:

3 Alan A. Meda
4 **BURCH & CRACCHIOLO, P.A.**
5 Email: ameda@bcattorneys.com
6 *Attorneys for Debtor*

7 Christopher Pattock
8 Renee Sander Shamblin
9 **UNITED STATES TRUSTEE'S OFFICE**
10 Email: christopher.j.pattock@usdoj.gov
11 Email: renee.s.shamblin@usdoj.gov

12 G. Grant Lyon
13 *Trustee*
14 Email: glyon@ateracap.com

15 Adam Nach
16 **LANE & NACH, P.C.**
17 Email: Adam.Nach@lane-nach.com
18 *Counsel for Trustee*

19 Tom Salerno
20 **STINSON LEONARD STREET**
21 Email: thomas.salerno@stinson.com
22 *Proposed Special Counsel for Trustee*

23 William J. Factor
24 Sara S. Lorber
25 **LAW OFFICE OF WILLIAM J. FACTOR, LTD.**
26 Email: wfactor@wfactorlaw.com
27 Email: slorber@wfactorlaw.com
Counsel for Petitioning Creditors

/s Marie K. Kelly

File an Answer/Response/Objection to a Motion:

[3:18-bk-03615-PS Ara Macao Holdings, L.P.](#)

Type: bk

Chapter: 11 i

Office: 3 (Prescott)

Judge: PS

U.S. Bankruptcy Court

District of Arizona

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3:18-bk-03615-PS Notice will be electronically mailed to:

MICHAEL W. CARMEL on behalf of Interested Party Eugene Ingles
michael@mcarmellaw.com, sharon@mcarmellaw.com

PATRICK A CLISHAM on behalf of Creditor Committee OFFICIAL COMMITTEE OF UNSECURED CREDITORS
pac@eblawyers.com, cks@eblawyers.com, bdp@eblawyers.com, mkk@eblawyers.com

PATRICK A CLISHAM on behalf of Petitioning Creditor Edgewater Resources, LLC
pac@eblawyers.com, cks@eblawyers.com, bdp@eblawyers.com, mkk@eblawyers.com

PATRICK A CLISHAM on behalf of Petitioning Creditor KB Partners I, L.P.
pac@eblawyers.com, cks@eblawyers.com, bdp@eblawyers.com, mkk@eblawyers.com

PATRICK A CLISHAM on behalf of Petitioning Creditor Christopher de Sibert
pac@eblawyers.com, cks@eblawyers.com, bdp@eblawyers.com, mkk@eblawyers.com

PATRICK A CLISHAM on behalf of Petitioning Creditor Daniel Dorgan
pac@eblawyers.com, cks@eblawyers.com, bdp@eblawyers.com, mkk@eblawyers.com

PATRICK A CLISHAM on behalf of Petitioning Creditor Gary Nitsche

pac@eblawyers.com, cks@eblawyers.com, bdp@eblawyers.com, mkk@eblawyers.com

PATRICK A CLISHAM on behalf of Petitioning Creditor Richard Umbach
pac@eblawyers.com, cks@eblawyers.com, bdp@eblawyers.com, mkk@eblawyers.com

SCOTT B. COHEN on behalf of Creditor Committee OFFICIAL COMMITTEE OF UNSECURED CREDITORS
SBC@ENGELMANBERGER.COM, mkk@eblawyers.com

SCOTT B. COHEN on behalf of Petitioning Creditor Edgewater Resources, LLC
SBC@ENGELMANBERGER.COM, mkk@eblawyers.com

SCOTT B. COHEN on behalf of Petitioning Creditor KB Partners I, L.P.
SBC@ENGELMANBERGER.COM, mkk@eblawyers.com

SCOTT B. COHEN on behalf of Petitioning Creditor Christopher de Sibert
SBC@ENGELMANBERGER.COM, mkk@eblawyers.com

SCOTT B. COHEN on behalf of Petitioning Creditor Daniel Dorgan
SBC@ENGELMANBERGER.COM, mkk@eblawyers.com

SCOTT B. COHEN on behalf of Petitioning Creditor Gary Nitsche
SBC@ENGELMANBERGER.COM, mkk@eblawyers.com

SCOTT B. COHEN on behalf of Petitioning Creditor Richard Umbach
SBC@ENGELMANBERGER.COM, mkk@eblawyers.com

WILLIAM J FACTOR on behalf of Petitioning Creditor Edgewater Resources, LLC
wfactor@wfactorlaw.com, bharlow@wfactorlaw.com, dranallo@wfactorlaw.com

WILLIAM J FACTOR on behalf of Petitioning Creditor KB Partners I, L.P.
wfactor@wfactorlaw.com, bharlow@wfactorlaw.com, dranallo@wfactorlaw.com

WILLIAM J FACTOR on behalf of Petitioning Creditor Christopher de Sibert
wfactor@wfactorlaw.com, bharlow@wfactorlaw.com, dranallo@wfactorlaw.com

WILLIAM J FACTOR on behalf of Petitioning Creditor Daniel Dorgan
wfactor@wfactorlaw.com, bharlow@wfactorlaw.com, dranallo@wfactorlaw.com

WILLIAM J FACTOR on behalf of Petitioning Creditor Gary Nitsche
wfactor@wfactorlaw.com, bharlow@wfactorlaw.com, dranallo@wfactorlaw.com

WILLIAM J FACTOR on behalf of Petitioning Creditor Richard Umbach
wfactor@wfactorlaw.com, bharlow@wfactorlaw.com, dranallo@wfactorlaw.com

SARA E LORBER on behalf of Petitioning Creditor Edgewater Resources, LLC
slorber@wfactorlaw.com, bharlow@wfactorlaw.com

SARA E LORBER on behalf of Petitioning Creditor KB Partners I, L.P.
slorber@wfactorlaw.com, bharlow@wfactorlaw.com

SARA E LORBER on behalf of Petitioning Creditor Christopher de Sibert
slorber@wfactorlaw.com, bharlow@wfactorlaw.com

SARA E LORBER on behalf of Petitioning Creditor Daniel Dorgan

slorber@wfactorlaw.com, bharlow@wfactorlaw.com

SARA E LORBER on behalf of Petitioning Creditor Gary Nitsche
slorber@wfactorlaw.com, bharlow@wfactorlaw.com

SARA E LORBER on behalf of Petitioning Creditor Richard Umbach
slorber@wfactorlaw.com, bharlow@wfactorlaw.com

ALAN A. MEDA on behalf of Debtor Ara Macao Holdings, L.P.
ameda@bcattorneys.com, tdunham@bcattorneys.com

ADAM 1 NACH on behalf of Trustee, Chapter 11 G GRANT LYON
adam.nach@lane-nach.com, tturner@lane-nach.com, sheila.rochin@lane-nach.com, danica.kolb@lane-nach.com, deborah.mckernan@lane-nach.com

ADAM B NACH on behalf of Trustee, Chapter 11 G GRANT LYON
adam.nach@lane-nach.com, sheila.rochin@lane-nach.com, danica.kolb@lane-nach.com, deborah.mckernan@lane-nach.com

ADAM B. NACH on behalf of Trustee, Chapter 11 G GRANT LYON
adam.nach@lane-nach.com, tturner@lane-nach.com, danica.kolb@lane-nach.com, deborah.mckernan@lane-nach.com, maria.alcala@lane-nach.com

CHRISTOPHER J PATTOCK on behalf of U.S. Trustee U.S. TRUSTEE
Christopher.J.Pattock@usdoj.gov

THOMAS J. SALERNO on behalf of Trustee, Chapter 11 G GRANT LYON
thomas.salerno@stinson.com, lindsay.petrowski@stinson.com, karen.graves@stinson.com

RENEE SANDLER SHAMBLIN on behalf of U.S. Trustee U.S. TRUSTEE
renee.s.shamblin@usdoj.gov

3:18-bk-03615-PS Notice will not be electronically mailed to:

RICHARD ALDER, JR
1228 PINE ST
WINNETKA, FL 60093

CARLA ALONGI
8606 CALLIE AVE
MORTAN GROVE, IL 60053

Francesco Alongi
8606 Callie Ave
Morten Grove, il 60053

JOSEPH CAMAIONI
27575 FERRY RD #101
WARRENVILLE, IL 60555

RICHARD DE SALVO
781 S MIDLOTHIAN
MURDELEIN, IL 60060

KIMBERLY GAGLIANO
846 BISQUE DRIVE
BARRINGTON, IL 60010

ANTHONY GAGLIENO
846 BISQUE DRIVE
BARRINGTON, IL 60010

MARIA GARRISON
1260 W WASHINGTON #703
CHICAGO, IL 60607

MICHAEL GOLDSTEIN
224 PACIFIC STREET
BROOKLYN, NY 11204

JAY GUSTAFSON
11044 ZUMBROTA CT
BLAINE, MN 55449

CARLTON HARMS
23651 W MILTON RD
WAUCONDA, IL 60084

EMMANUEL W HATZ
2115 YEAMAN PL APT 510
NASHVILLE, TN 37206

DEBBIE MAUE
515 W BELDEN AVE #9
CHICAGO, IL 60614

CANDIS MIXON
107 FORSYTH TRL
CANTON, GA 30115

JANICE MOEN
4587 RFD
LONG GROVE, IL 60047-7645

RICHARD MUEHLFELT
266 CENTER STREET
WILLIAMS BAY, WI 53191

MARK RABIEJ
2508 ORCHARD BEAH RD
MCHENRY, IL 60050

KENNETH RUMPH
11056 EATEN CT
WESTCHESTER, IL 60514

KERTH WEYLER
5506 W 2505

RUSSEVILLE, IN 46979