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COUNSEL FOR CHAPTER 11 TRUSTEE

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

In re:

**ARA MACAO HOLDINGS, L.P.,**

Debtor.

Chapter 11

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

**CHAPTER 11 TRUSTEE'S OBJECTION TO  
FIRST AND FINAL APPLICATION FOR  
ALLOWANCE OF COMPENSATION AND  
FOR PAYMENT OF EXPENSES TO  
COUNSEL FOR DEBTOR**

S. Cary Forrester, Chapter 11 Trustee for Ara Macao Holding, L.P., ("**Trustee**") hereby objects to the *First and Final Application for Allowance of Compensation and for Payment of Expenses to Counsel for Debtor* (the "**Fee Application**") [DE 220] filed by Burch & Cracchiolo ("**B&C**"), on the grounds that: (1) the Application requests payment for services rendered when B&C was not employed by the estate under 11 U.S.C. § 327 and are, therefore, not compensable under 11 U.S.C. §330; and (2) some of the services rendered by B&C were not reasonably calculated to benefit the estate. Trustee further objects to any use of B&C's \$10,000 retainer for payment of fees not approved by the court.

## **A. FACTUAL AND PROCEDURAL HISTORY**

1. The court has jurisdiction over this matter pursuant to 28 U.S.C. § 157(b). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
2. On April 6, 2018, six petitioning creditors filed an involuntary petition against Debtor under Chapter 11 of the United States Bankruptcy Code;
3. On the same day, the petitioning creditors filed a motion for the immediate appointment of a Chapter 11 trustee [DE 8];
4. On May 7, 2018, Debtor filed its motion to convert the case to a voluntary proceeding under Chapter 11 [DE 63];
5. On May 8, 2018, the Court entered its order converting the case to a voluntary proceeding under Chapter 11 [DE 68];
6. On June 12, 2018, the Court entered its order appointing a Chapter 11 trustee [DE 106];
7. On June 21, 2018, the Court entered its order approving the United States Trustee's appointment of Grant Lyon as Chapter 11 trustee [DE 112];
8. On July 2, 2018, the Official Committee of Unsecured Creditors filed a motion for election of trustee [DE 126]; and
9. On August 2, 2018, the United State Trustee held an election, at which time S. Cary Forrester was elected as Chapter 11 trustee, as reflected in the Report and Certification of Election of Trustee filed by the United States Trustee on August 6, 2018 [DE 196].
10. On September 5, 2018, B&C filed the Fee Application requesting an allowed administrative expense claim for services rendered and fees incurred between May 15, 2018 and August 30, 2018 totaling \$50,822.60. [DE 220].

## B. Legal Argument

1. **A portion of the fees requested were for services rendered when B&C was not employed by the estate under 11 U.S.C. § 327 and therefore are not compensable under 11 U.S.C. §330.**

B&C has requested payment for its services pursuant to 11 U.S.C. §§ 330 and 331. Section 330(a)(1) states that the court may award reasonable fees and compensation to, “. . . a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person *employed under section 327 or 1103*. . .” Because the list of persons to whom reasonable compensation may be awarded does not specifically include “attorneys” or “debtor’s attorneys,” such applicants fall within the catch-all, “a professional person employed under section 327 or 1103.”

Prior to the Court’s June 21, 2018 order approving the United States Trustee’s appointment of Grant Lyon as Chapter 11 trustee, B&C was employed under § 327 by the debtor-in-possession. Trustee does not dispute that any appropriate services rendered and costs incurred prior to June 21, 2018 should be allowed as administrative priority claims. However, upon the appointment of a Chapter 11 trustee, the debtor-in-possession ceased to exist. *See, Lamie v. U.S. Trustee*, 540 U.S. 526, at 532 (2004). As the Supreme Court explained in *Lamie*, “[a] debtor’s attorney not engaged as provided by § 327 is simply not included within the class of persons eligible for compensation.” 540 U.S. at 534 (2004).

B&C may attempt to distinguish *Lamie* on the grounds that it dealt with the conversion of a Chapter 11 proceeding to a Chapter 7 proceeding, rather than the appointment of a Chapter 11 trustee. The Bankruptcy Court for the Northern District of California addressed this attempted distinction in *In re Bay Voltex Corporation*, No. 03 42684 EDJ, 2006 WL 3834300 at \*1 (Bankr. N.D. Cal. Dec. 29,

2006). There, the applicant had been appointed counsel for the debtor-in-possession near the inception of the case. About a year later, a Chapter 11 trustee was appointed. The applicant requested payment of costs and fees incurred both before and after the Chapter 11 trustee's appointment. The Chapter 11 trustee objected to the post-appointment portion, citing *Lamie*. The court held that *Lamie* applied and that the distinction between conversion to Chapter 7 and the appointment of a Chapter 11 trustee was "irrelevant." *Id.* The court went on to explain that, "[n]either a chapter 7 debtor nor a chapter 11 debtor out of possession is a trustee, and neither represents the estate. Section 330(a) makes no provision for compensation of professionals employed by a debtor that is not a trustee." *Id.*, citing *Lamie v. U.S. Trustee*, 540 U.S. at 537-38; see also, *In re Henze*, No. 11-13543, 2016 WL 938387, at \*1 (Bankr. N.D. Cal. Mar. 11, 2016)(appointment of a Chapter 11 trustee removed the debtor-in-possession's lawyer from his role as counsel for the estate).

**2. Some of the actions taken by B&C in its representation of the debtor-in-possession did not benefit the estate.**

Some of the services that B&C rendered before the appointment of a trustee were not reasonably calculated to benefit the estate and are, therefore, not compensable. Section 330 requires that services be necessary or beneficial to the estate and prohibits compensation for services that are duplicative or not reasonably likely to benefit the estate. 11 U.S.C. §§ 330(a)(3)(C) and (a)(4)(A). Here, B&C billed \$30,050 for work "... on matters related to contested matters including the defense of a motion to appoint a trustee and the prosecution of a motion to appoint a committee of limited partners." *Fee Application* at p.5. Not only was the appointment of an equity committee unwarranted, as the Court eventually concluded, but seeking such an appointment was tantamount to arguing that the debtor-in-possession could not, or would not, discharge its statutory duties.

Section 1107 of the Code grants the debtor-in-possession the rights, powers, and duties of a trustee. Those duties include a fiduciary duty to the bankruptcy estate and its stakeholders. *See, e.g., Brown v. Gerdes*, 321 U.S. 178 (1944) (counsel in bankruptcy cases seeking compensation from court are held to fiduciary standards); *In re Perez*, 30 F.3d 1209, at n.5 (9th Cir. 1994). Because the Debtor already owed a fiduciary duty to its stakeholders, the appointment of an equity committee to represent the interests of a subset of those stakeholders was duplicative and not reasonably likely to benefit the estate. Therefore, the fees incurred in pursuing the appointment of an equity committee are not compensable.

**3. The retainer being held by B&C should be used only for the payment of Court-approved fees and costs.**

In the Application to Employ B&C, as well as in the Fee Application, B&C discloses its receipt of a \$10,000 retainer from ioVest Management, Inc., on behalf of the Debtor.<sup>1</sup> This comports with the Debtor's monthly operating report for May of 2018 [DE 109], which characterizes the retainer as having come from the Debtor. Trustee objects to any application of this retainer to fees and costs not approved by the Court. To the extent that a portion of B&C's fees are disallowed for the reasons stated above, B&C may not apply the retainer to the disallowed fees. The Bankruptcy Court for the Northern District of California addressed this same issue in *In re Henze*, No. 11-13543, 2016 WL 938387, at \*1 (Bankr. N.D. Cal. Mar. 11, 2016). There, after a Chapter 11 trustee was appointed, the debtor's attorney continued to work for the debtor, and eventually filed a fee application for those services. The Chapter 11 trustee objected. The Court held that *Lamie* applied and barred the

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<sup>1</sup> ioVest Management, Inc. manages ioVest Development, LLC, which in turn manages the Debtor.

application of the retainer to fees incurred after the appointment of the trustee, stating, “. . . at least when the fee agreement is silent on the subject, the rule applies to both retainers and additional fees sought from the estate after the retainer has been exhausted.” *Id.* at \*2.

**C. Conclusion**

Trustee respectfully requests that the Court:

1. Disallow that portion of the fee application that relates to fees incurred after the appointment of the Chapter 11 trustee on June 21, 2018;
2. Disallow that portion of the fee application that relates to fees incurred in connection with the appointment of an equity committee;
3. Prohibit B&C’s use of the \$10,000 retainer for any purpose other than its application to court-approved costs and expenses; and
4. Such other relief the Court deems appropriate.

Dated October 5, 2018

**FORRESTER & WORTH, PLLC**

/s/ SCF (006342)

S. Cary Forrester

Counsel for Chapter 11 Trustee

Copy of the foregoing served by mail or e-mail October 5, 2018, to:

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