Docket #1614 Date Filed: 09/05/2025

IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	Chapter 11
	§	
RHODIUM ENCORE LLC, *et al.*,[1]	§	Case No. 24-90448 (ARP)
	§	
Debtors.	§	
	§	(Jointly Administered)
	§	

SPECIAL COMMITTEE'S REPLY IN SUPPORT OF ITS MOTION [ECF NO. 1530] TO QUASH LEHOTSKY KELLER COHN LLP'S FIRST SET OF REQUESTS FOR PRODUCTION AND INTERROGATORIES TO DEBTORS PURSUANT TO BANKRUPTCY RULE 2004 [ECF NO. 1515]

The Special Committee of the Board of Directors of Debtor Rhodium Enterprises, Inc. (the "Special Committee") respectfully submits this Reply in Support of its Motion [ECF. No. 1530] to Quash the First Set of Requests for Production and Interrogatories to Debtors filed by LKC [ECF No. 1515].

PRELIMINARY STATEMENT

1. This unnecessary "dispute" results solely from irrational impatience.

2. LKC obfuscates a simple situation to get more money than it is entitled to as fast as it can.

[1] Debtors in these Chapter 11 Cases and the last four digits of their corporate identification numbers are as follows: Rhodium Encore LLC (3974), Jordan HPC LLC (3683), Rhodium JV LLC (5323), Rhodium 2.0 LLC (1013), Rhodium 10MW LLC (4142), Rhodium 30MW LLC (0263), Rhodium Enterprises, Inc. (6290), Rhodium Technologies LLC (3973), Rhodium Renewables LLC (0748), Air HPC LLC (0387), Rhodium Shared Services LLC (5868), Rhodium Ready Ventures LLC (8618), Rhodium Industries LLC (4771), Rhodium Encore Sub LLC (1064), Jordan HPC Sub LLC (0463), Rhodium 2.0 Sub LLC (5319), Rhodium 10MW Sub LLC (3827), Rhodium 30MW Sub LLC (4386), and Rhodium Renewables Sub LLC (9511). The mailing and service address of Debtors in these Chapter 11 Cases is 2617 Bissonnet Street, Suite 234, Houston, TX 77005.

24904482509050000000000008

3. LKC ratchets up its improper behavior to an alarming new level, by ignoring its ethical obligations, ignoring evidence submitted on the issues, and making an absurd request for sanctions.

4. Debtors agree LKC deserves a reasonable payment based on evidence and good faith negotiations—but not yet.

5. Before LKC can be paid, or receive any documents disclosing the principal available under the Settlement Agreement to be allocated toward LKC's success fee, Debtors and Whinstone must first agree on their tax allocation of Property under the Purchase and Sale Agreement.

ARGUMENT

I. LKC Disregards Its Clients' Obligations Under the Contracts, Which It Helped Negotiate, and Under the Internal Revenue Code.

6. As the Special Committee explained in its Motion, Debtors and Whinstone entered into a Settlement and Release Agreement ("Settlement Agreement"), and a Purchase and Sale Agreement that the Court approved on April 8, 2025. [ECF Nos. 921-922.]; [ECF No. 1530 at ¶¶ 12-13].

7. The Purchase and Sale Agreement requires Debtors and Whinstone to agree on the allocation of the Purchase Price for the Property sold (the "Allocation Statement"). [Dkt. 1530-3, at § 2.3.] Property includes "all tangible and certain intangible property of Sellers located at the Facility." [Dkt. 1530-3, at 6.] The money paid in the Purchase and Sale Agreement, the Purchase Price, is in exchange for the Property. [Dkt. 1530-3, at § 2.2.1.] The Purchase Price is an amount equal to One-

Hundred-Eighty-Five Million and 0/100 Dollars ($185,000,000.00). [Dkt. 1530-3, at § 2.2.1(a).]

8. The Settlement Agreement requires agreement on the Allocation Statement ***as a condition*** of the settlement. [Dkt. 1530-2, at § III(2).] The Settlement Agreement is not completed until the Purchase and Sale Agreement and its corresponding Allocation Statement are completed. The Settlement Agreement also never identifies ***any*** amount allocated specifically toward the settlement of claims. [Dkt. 1530-2.] The principal amount of money to be allocated toward the settlement of claims therefore cannot be determined until after the allocation of the Purchase Price for the Property is complete.

9. Therefore, that allocation must be determined first, and agreed upon with Whinstone. Only after that allocation is agreed upon will the Debtors know how much money remains to be allocated toward settlement of claims under the Settlement Agreement.

10. Debtors will be able negotiate in good faith with LKC on the value of the success fee after that allocation is completed.

11. The Purchase and Sale Agreement requires Debtors and Whinstone to agree on the allocation of the Purchase Price for the Property sold [Dkt. 1530-3, at § 2.3], because such allocation is required by the Purchase and Sale Agreement, to comply with the Internal Revenue Code.

12. The Internal Revenue Code requires the allocation of the Purchase Price paid pursuant to the Purchase and Sale Agreement among the assets that

comprise the Property in order to properly reflect the fair market value ("FMV") of those assets and to properly calculate the seller's gain or loss and the buyer's basis in the purchased assets for federal income tax purposes. *See* 26 U.S.C. § 1060(a) (requiring the consideration received in an asset purchase to be allocated by the buyer and seller among the assets in the manner required by 26 U.S.C. § 338(b)(5)). Likewise, courts will make a similar allocation in the context of a settlement agreement, if the allocation is not otherwise made by the parties to that agreement, in order to calculate the federal income tax treatment of any settlement payment. *Bagley v. Commissioner*, 105 T.C. 396, 410 (1995) (United States Tax Court calculated, and held, that $500,000 out of a $1.5 million settlement actually reflected compensation for punitive damage, where the settlement agreement made no such allocation).

13. The Treasury Regulations provide "sellers and purchasers must allocate the consideration under the residual method as described in §§ 1.338-6 and 1.338-7 … ." 26 CFR § 1.1060-1(a); 26 U.S.C. § 338(b)(5) (requiring consideration to be allocated pursuant to treasury regulations); INTERNAL REVENUE SERVICE, SALE OF A BUSINESS, www.irs.gov/businesses/small-businesses-self-employed/sale-of-a-business (last visited Sept. 5, 2025) ("both the buyer and seller of a business must use the residual method to allocate the consideration to each business asset transferred."); "[C]onsideration is the amount in the aggregate, realized from selling the assets … under section 1001(b)." 26 CFR § 1.1060-1(c)(1). Section 1001(b) states that "[t]he amount realized from the sale or other disposition of property shall be

the sum of any money received plus the FMV of the property (other than money) received … .” 26 U.S.C. § 1001(b). The Treasury Regulations direct the parties to the sale of a business to first value each asset included in the sale independently. *See* 26 CFR § 1.338-6(a)(2). The consideration is then generally allocated in sequential order among seven asset classes and then to each asset in each class in proportion to the assets’ FMV. 26 CFR §§ 1.1060-1(c)(2) and 1.338-6(b).

14. The Purchase and Sale Agreement contemplates the sale of the tangible and intangible assets of (i) Rhodium Renewables LLC, (ii) Rhodium Technologies LLC, (iii) Rhodium 30MW LLC, (iv) Rhodium 2.0 LLC, (v) Rhodium 10MW LLC, (vi) Rhodium Encore LLC, and (vii) Jordan HPC LLC. The parties to that agreement must allocate the consideration paid among those assets in accordance with the Treasury Regulations. *Id.* In sum, the Debtor parties to the Whinstone settlement must pin their allocations to FMV of the assets.[2] Doing this in reverse—allocating settlement funds first to the claims, and second to the purchase of the assets—divorces the allocated amounts from the FMV of the assets. Such a disjuncture increases the probability that the IRS would not respect the purchase price allocation (or the entire settlement allocation).

[2] If the Court chooses to consider the Whinstone Settlement in the light of a liquidation, FMV likewise applies, as a corporate liquidation requires analysis of gain or loss “as if the corporation sold the assets to the distributee at fair market value.” INTERNAL REVENUE SERVICE, SALE OF A BUSINESS, www.irs.gov/businesses/small-businesses-self-employed/sale-of-a-business (last visited Sept. 5, 2025).

15. Stated another way, the allocations must be accurate and consistent with the record.

16. The parties' determination of the FMV of the assets and their allocation of the consideration among those assets, as set forth in their written agreement, is binding on them for federal income tax purposes unless the Internal Revenue Service ("IRS") determines otherwise. *See* 26 U.S.C. § 1060(a) ("If … the transferee and the transferor agree in writing as to the allocation of any consideration, or as to FMV of any of the assets, such agreement shall be binding on both the transferee and transferor unless the Secretary determines that such allocation (or FMV) is not appropriate.").

17. The parties are required to report their purchase price allocation to the IRS on IRS Form 8594 attached to their respective federal income tax returns. *See* 26 U.S.C. § 1060(b); and IRS Form 8594.

18. The parties have not yet reached an agreement on the allocation of the consideration to the Property.

19. Nevertheless, LKC is precipitately demanding Debtors determine an allocation of settlement value *before* Debtors know how much money remains to be allocated toward settled issues. LKC entirely disregards FMV (as required by the Internal Revenue Code and Treasury Regulations). Instead, LKC insists Debtors

rely on LKC's own assessment of the value of its work (which we now know they believe amounts to ***$11.5 million***).[3] [ECF No. 1560.]

20. As a result, LKC demands Debtors breach their Purchase and Sale Agreement and violate the Internal Revenue Code and the Treasury Regulations thereunder, by forcing a premature allocation of settlement proceeds.

21. Because the condition of the Purchase and Settlement Agreement has not yet been satisfied—no agreement has been reached with Whinstone on the allocation of the consideration to the Property as required by federal tax law—the dispute has not yet closed. Therefore, Debtors are likewise not yet obligated to negotiate (let alone pay) LKC's legal fees. LKC's fee cannot yet be determined in any enforceable way. Try as LKC might to ignore the reality, the time for Debtors' negotiation ***with LKC*** has not yet arrived—because the negotiation of the purchase price allocation to the purchased assets is ongoing with Whinstone.

22. The Special Committee finds itself in the curious position of explaining repeatedly to LKC—Debtors' ***current counsel***—that allocating a multi-million-dollar payment ***inconsistently*** with the way the payments must be allocated and reported to the IRS creates potential violations of federal tax law and potential federal income tax liability. Likewise, failing to satisfy the terms (it negotiated) is a breach of the Purchase and Sale Agreement. LKC demands that Debtors pay LKC

[3] The Special Committee will object to LKC's fee application separately (which will also include discussion on how their premature fee application changes the potential need for discovery that LKC raises in its opposition [ECF No. 1588, at ¶ 13]) and reserves all rights.

now, and risk reporting that same payment differently to the IRS. These contentions are incredible. LKC's discovery requests should be quashed on this basis alone, and its status conference denied.

II. LKC's Discovery Requests Demonstrate Bad Faith.

23. LKC filed a motion for Rule 2004 discovery on August 7, 2025. [ECF No. 1515.]

24. The Special Committee conferred with LKC's counsel to request it withdraw the unnecessary discovery. [ECF No. 1592-2.] LKC refused and instead filed a motion for a status conference on the discovery. [ECF No. 1529.]

25. Now, LKC states it is willing to "forgo discovery." [ECF. No. 1588 at ¶ 9.]

26. LKC fails to explain why it believes no further evidence is necessary after demanding it only a few weeks ago. [ECF No. 1515.] The timing suggests that LKC's discovery requests were made in bad faith. LKC's sudden indifference to discovery fortifies the appearance as a frivolous filing intended to spook Debtors and the Special Committee into paying LKC prematurely, and at an exorbitant amount. This is particularly the case when LKC's counsel previously refused to confer with Debtors' counsel on this exact issue, before filing their discovery requests, until after LKC received the current allocation model. [ECF No. 1530-1, at ¶ 13.]

27. The overbreadth of LKC's discovery requests also supports the inference of bad faith. Rather than simply seeking the amount remaining after allocation, which at least provides a base amount for calculating LKC's fees, LKC

sought emails and work paper reflecting the ongoing efforts to determine and negotiate the allocation. [ECF No. 1515, at 7.] If, as LKC now argues, the allocation number negotiated between Whinstone and Debtors is irrelevant to the amount of LKC's fees [ECF 1588 at ¶ 14], why did LKC request extensive discovery on that very topic—if not to harass and intimidate its clients among the Debtors?

28. LKC proposes that its final fee application renders the Special Committee's objection to LKC's discovery request "moot." [ECF No. 1588, at ¶ 4.] But, LKC has not actually withdrawn its discovery requests against Debtors. Therefore, they are still in fact pending. And, if they are anything, they are not yet and have never been ripe.

III. LKC Now Advocates for Ruling Without Evidence and Based on Misrepresentations.

29. LKC now asks the Court to rule on its fee application without the benefit of the actual facts which determine the amount of its Success Fee. *See In re Granite Partners*, 213 B.R. 440, 452 (Bankr. S.D.N.Y. 1997) (citing *Sunward Corp. v. Dun & Bradstreet, Inc.,* 811 F.2d 511, 521 n. 8 (10th Cir.1987) (rejecting fees based on "speculation not proof."); *Hancock v. Chi. Title Ins. Co.*, Civil Action No. 3:07-CV-1441-D, 2013 U.S. Dist. LEXIS 77394, at *22–23 (N.D. Tex. June 3, 2013) (citing *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 762 (Tex. 2012) (stating that when awarding attorneys' fees, a court should exclude "inadequately documented work").

30. Once again ignoring the crux of the issue, that the parties have not yet agreed on the tax allocation of the Property based on its FMV, LKC now tries to keep out any relevant evidence in evaluating the reasonableness of its fees. LKC

ignores the reason for declining discovery and purports to weaponize its concocted, misrepresented circumstances solely for its own personal gain.

31. LKC's argument against barring any further evidence on its fees, "if not now, never," is irrational. The avenue that the Debtors advocate is, "only when the dispute is ripe," which is after Debtors comply with their contractual and federally mandated obligations. One would think Debtors' counsel, legal professionals and fiduciaries, would promote their clients' compliance with such requirements.

32. The axiom that "discovery rules are calculated to prevent trial by ambush" [ECF No. 1588, at ¶ 8] is irrelevant, because the case law which LKC cites is inapposite to the facts of this "dispute." The issue here is not whether trial by ambush is appropriate—the issue is that LKC's discovery request and fee application are premature. There is nothing to discover yet. All funds paid by Whinstone are allocated to the Purchase and Sale Agreement ***until*** the tax allocation of Property is complete and agreed upon. The Special Committee will engage in reasonable ***limited*** discovery—if LKC still views it as necessary—after the allocation is completed and agreed upon. Barring further evidence on LKC's fee dispute does not accomplish the purpose of courts' preventing the introduction of documents that were hidden during discovery. [ECF 1588, at 4.] This is not evidence hidden; it is evidence that does not yet exist.

33. Discovery is not yet closed as LKC contends, such that evidence relating to LKC's fee application is "belated." [ECF No. 1588, at ¶ 9.] This artificial urgency is pure procedural gamesmanship in attempt to shakedown a client.

34. In particular, LKC hangs its hat on testimony from Mr. Topping, Debtors' General Counsel, in a hearing on an entirely different dispute, focused on LKC's retention application—not its actual fees. [ECF No. 1588, at ¶ 14.] The amount of LKC's success fee was not at issue and therefore was only discussed in the abstract based on hypotheticals. In fact, in its July 8, 2025, Order following that very hearing, this Court explicitly reserved judgment on the ***amount*** of LKC's success fee. [ECF No. 1418, at ¶ 14, "At the outset, it is important to note that this opinion is only regarding the retention issue. Any related fee application issues will be considered at the appropriate time."] LKC also fails to explain its omission of this critical reservation in its response. To suggest that the Court already approved the amount of the Success Fee is fallacious.

35. LKC also invites this Court to approve its fee petition based on a presentation given to Debtors' Board of Directors ***in preparation for*** mediation [ECF No. 1561, at ¶¶ 29–33], not on the ***actual*** outcome of settlement.

36. Finally, LKC is misinformed if it believes that the Special Committee has shared allocation information with the SAFE AHG but not with LKC. Perhaps LKC somehow misunderstands the contents of an August 12, 2025, email to the SAFE AHG, which references the Success Fee but does not include ***any*** allocation information. Debtors and the Special Committee have declined to share with LKC

information integral to its complex, ongoing allocation ***negotiations*** with Whinstone. Debtors and the Special Committee have also repeatedly notified LKC they would provide the Allocation Statement of Property as soon as it was agreed upon. The undersigned does not know what LKC is referring to that has been refused. That is likely because there is nothing. If there were anything, LKC surely would have submitted it as evidence to prove its point to this Court.

IV. LKC Fails to Explain or Support its Request for Sanctions

37. In its response brief, LKC requests sanctions and casts aspersions on counsel for the Special Committee. [ECT 1588 at ¶¶ 10, 13]. It ignores the ***evidence*** attached to counsel's declaration. LKC indicates that it considers a declaration signed by a lawyer under penalty of perjury as flatly not credible—suggesting that LKC places no value in the power of an oath, Federal Rule of Civil Procedure Rule 11, or the Professional Rules of Conduct governing the legal profession. Evincing more disingenuity, LKC mischaracterizes counsel's attempts to confer on issues LKC created by filing discovery requests as "harassment." [ECF No. 1588, at ¶ 13.] Its accusations of misconduct are baseless, as explained below.

38. If LKC took the time to brief the sanctions it requests, the law would show it is not entitled to any sanctions in this circumstance (a coincidentally similar approach to that it is taking in its arguments for $11.5 million in fees against its client). LKC does not clearly specify the rule under which it believes that the actions of the Special Committee and its counsel merit sanctions, but instead implies through a parenthetical citation that the Court should issue sanctions based on its inherent authority under 11 U.S.C. § 105(a). [ECF No. 1588, at ¶ 10.]

39. The standard for such sanctions is high, and inapplicable to the Special Committee and counsel. "Recall that a bankruptcy court may sanction litigants only if it finds, by clear and convincing evidence, that they acted in bad faith or willfully abused the judicial process." *Kreit v. Quinn (In re Cleveland Imaging & Surgical Hosp., LLC)*, 26 F.4th 285, 297 (5th Cir. 2022). LKC seems to adopt the position, without saying it outright, that because four months have passed since this Court approved the Whinstone settlement, LKC's fee demand is so inherently righteous that the Special Committee's obstinance must spring from bad faith. [ECF No. 1588, at ¶ 10.] But as explained to LKC ***ad nauseum***, that allocation under the Purchase and Sale Agreement is not yet final. And again, LKC ignores the governing contracts on this issue attached to the Special Committee's Motion.

40. In fact, LKC's request for sanctions against the Special Committee and Barnes & Thornburg [ECF No. 1588, at ¶ 10] further demonstrates LKC's disregard for an attorney's obligation of candor to the Court. To be clear, the Special Committee, through its attorneys Barnes & Thornburg, requested sanctions against LKC in good faith because LKC served discovery as an adversary ***on LKC's own client***, in its quest to obtain its contingent Success Fee, before the settlement agreement it helped negotiate was finished and while the discovery stay was in effect.

41. Respectfully, the Special Committee is baffled as to how LKC can advance this position. LKC never actually argues it did not violate its legal or ethical obligations to its client, but instead contends such claims are "not supported

by facts." [ECF No. 1588, at ¶¶ 12–13.] LKC's elastic understanding of appropriate legal representation seems to encompass only the facts and positions that support its own advantage and ignores everything else. Texas law, however, takes a different approach. *See Riverwalk Cy Hotel Partners Ltd. v. Akin Gump Strauss Hauer & Feld, LLP*, 391 S.W.3d 229, 236 (Tex. App. 2012) (reversing summary judgment for law firm where plaintiff client had alleged that its attorney "put its interest in collecting excessive legal fees above its client's interest").

42. LKC's comparison of its legal fees to those of counsel for the Special Committee and Debtors is specious and a straw man. [ECF No. 1588, at ¶ 6]. The representations of Barnes & Thornburg and Quinn Emanuel are entirely different from LKC's limited representation in the Whinstone dispute. In its brief, LKC raises such straw man arguments instead of addressing the Special Committee's substantive points regarding the impropriety of LKC's request for a status conference, LKC's failure to engage in mandatory conferral, and the fact that Debtors will share the finalized allocation statement with LKC. [ECF No. 1530 at ¶¶ 23, 42, 48.]

43. Finally, to be clear, LKC has served discovery seeking working papers relating to an ongoing negotiation that will affect the allocation of estate funds. That violated the stay in the Scheduling Order. [ECF No. 1316.] LKC's argument that the automatic stay "has nothing to do with LKC's fees" focuses on the wrong issue. [ECF. No. 1588, at ¶ 12.]

CONCLUSION

44. LKC advances a line of argument that boils down to, "because our work was valuable, we should be paid immediately." [*See* ECF No. 1588, at ¶¶ 5–7]. In contrast, the Special Committee argues, and the law supports, that LKC should be paid what it is contractually entitled to, ***when*** it is contractually entitled to it. Clearly discovery cannot be conducted on those fees until the fees are ripe. They are not yet ripe.

45. In addition to being contractually correct, this ensures that Debtors are not exposed to IRS liability by reporting ***one*** tax allocation of settlement funds to the IRS, while paying LKC based on a ***different*** allocation of settlement funds. The situation is simple. The Special Committee, and Debtors, are endeavoring to honor contractual obligations and to follow tax law.

/ / /

46. For the foregoing reasons, the Special Committee respectfully requests that the Court grant its motion and quash LKC's Discovery Requests, deny LKC's request for status conference, deny LKC's request for attorneys' fees and sanctions, award Debtors' fees and costs of defending themselves from LKC's premature demands, and grant such other relief as may be just and proper.

Dated this 5th day of September, 2025.

BARNES & THORNBURG LLP

/s/ Trace Schmeltz

Vincent P. (Trace) Schmeltz III (*pro hac vice*)
One N. Wacker Drive, Suite 4400
Chicago, Illinois 60606
Telephone: 312-214-5602
Facsimile: 312-759-5646
Email: tschmeltz@btlaw.com

Counsel for the Special Committee of the Board of Directors of Rhodium Enterprises, Inc.

Certificate of Service

I, Vincent P. (Trace) Schmeltz III, hereby certify that on the 5th day of September, 2025, a copy of the foregoing was served via the Clerk of the Court through the ECF system to the parties registered to receive such service.

/s/ Trace Schmeltz
Vincent P. (Trace) Schmeltz III