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

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

DAVID EATON AND SPENCER WELLS'S RESPONSE TO LEHOTSKY KELLER COHN LLP'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION FOR SANCTIONS AGAINST THE SPECIAL COMMITTEE AND BARNES & THORNBURG LLP

David Eaton and Spencer Wells, in their capacities as former members of the Special Committee of the Board of Directors of Rhodium Enterprises, Inc. (the "Special Committee"), one of the debtors in the above-captioned chapter 11 cases (collectively, the "Debtors" or "Rhodium"), file this response to the Supplemental Brief in Support of Its Motion for Sanctions [ECF No. 2389] (the "Sanctions Motion") filed by Lehotsky Keller Cohn LLP ("LKC").

I. INTRODUCTION

1. The Court set a non-evidentiary hearing for June 4, 2026 to resolve threshold legal questions, including whether *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121 (2015), bars the relief requested in LKC's Sanctions Motion. LKC's Supplemental Brief largely avoids that question, devoting most of its five pages to reciting factual allegations and arguing that the Special Committee's *ASARCO* defense is somehow "new." Supplemental Brief ¶¶ 2–3, 6, 8–9. The Court should not be distracted by these diversions. LKC's Sanctions Motion seeks more than $1.5

[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 (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.

million in fees and expenses that LKC incurred in defending its own Fee Application. Whether that relief is labeled "sanctions" or "additional compensation under Section 328," it remains fee-shifting for the cost of fee-defense litigation—precisely what *ASARCO* prohibits. The Sanctions Motion is barred as a matter of law, and the Court need not consider the underlying facts (which have already been developed and fully presented in connection with LKC's motion) to resolve this threshold legal issue.

2. LKC's Supplemental Brief fails to support the relief sought in the Sanctions Motion for three independent reasons. ***First***, LKC's contention that the Special Committee's *ASARCO* arguments are "new" is belied by the record: The Special Committee raised *ASARCO* squarely in its Response [ECF No. 2338] (the "Response"). ***Second***, *ASARCO* bars the specific relief LKC seeks—fee-shifting outside the fee application process—through an after-the-fact motion that is functionally indistinguishable from the fee-defense recovery the Supreme Court held impermissible. ***Third***, LKC's alternative Section 328 argument fails because that provision governs compensation arrangements for estate professionals; it does not authorize fee-shifting sanctions against estate fiduciaries and their counsel.

II. ARGUMENT

A. LKC's characterization of the Special Committee's *ASARCO* arguments as "new" is meritless.

3. LKC asserts that the Special Committee's *ASARCO* argument is "new." Supplemental Brief ¶ 2. This is wrong. In its Response, the Special Committee dedicated Section III(C), spanning pages 29 to 31, to arguing that "*ASARCO* bars LKC's attempt to collect attorneys' fees and expenses for defending its Fee Application under 11 U.S.C. § 328." ECF No. 2338 at 29–31. The Response explained that the Supreme Court "held that counsel retained by the bankruptcy estates cannot collect fees and expenses for defending their own fee

applications," and argued that LKC's request was a "transparent attempt at circumventing" that principle, reasoning that *ASARCO*'s holding "applies equally to Section 328." ECF No. 2338 ¶¶ 85–87.

4. LKC selectively quotes a single sentence from the Response to suggest the Special Committee limited *ASARCO* to Section 328. This is nitpicking, not legal argument. The Response addressed the Sanctions Motion in its entirety; the common denominator across all of LKC's theories is fee-shifting for the cost of defending a fee application, and the Special Committee's invocation of *ASARCO* was directed at that common denominator.

5. LKC further claims that the Special Committee "expressly acknowledged" inherent authority and merely "took issue with whether the Special Committee acted in bad faith." Supplemental Brief ¶ 2. But acknowledging that a court possesses inherent authority in the abstract does not concede that such authority may be deployed to accomplish what *ASARCO* expressly forbids. The Special Committee raised both legal defenses (including *ASARCO*) and merits defenses (including good faith), and they are not mutually exclusive. LKC's effort to recast the Special Committee's *ASARCO* argument as "new" is designed to divert the Court from the threshold legal question it set the June 4 hearing to resolve.

B. *ASARCO* bars LKC's after-the-fact sanctions motion because it seeks the same prohibited relief.

6. Contrary to LKC's accusations, the Special Committee does not argue that *ASARCO* categorically bars *all discrete sanctions motions* in bankruptcy cases; the Court unquestionably retains its inherent authority to sanction egregious, bad-faith conduct. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991). Rather, the Special Committee's argument is narrower and more targeted: *ASARCO* bars *this particular* Sanctions Motion because its sole

purpose and effect is to shift fee-defense costs incurred by an estate-retained professional onto estate fiduciaries who exercised their statutory right to object under Section 330(a)(2).

7. In *ASARCO*, the Supreme Court held that Section 330(a)(1) "does not permit bankruptcy courts to award compensation" for fee-defense litigation because it "does not explicitly override the American Rule with respect to fee-defense litigation." 576 U.S. at 135. The Court grounded its holding in the "bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Id.* at 126 (quoting *Hardt v. Reliance Std. Life Ins. Co.*, 560 U.S. 242, 252–53 (2010)).

8. LKC's Supplemental Brief seizes on *ASARCO*'s footnote 4, which observed that the Court's interpretation of Section 330 "does not foreclose sanctions for 'frivolous objections to fee applications' and 'bad-faith litigation conduct.'" Supplemental Brief ¶ 4; *ASARCO*, 576 U.S. at 134 n.4. But this footnote does not create an open-ended authorization for estate-retained professionals to recover all their fee-defense costs simply by invoking the word "sanctions." It acknowledges that courts retain inherent power to police genuinely bad-faith conduct through narrowly tailored sanctions; it does not enable estate-retained professionals to recover the precise relief that *ASARCO* bars by bringing a sanctions motion after prevailing on a fee application. If LKC's reading were correct, *ASARCO* would be meaningless: Any prevailing applicant could repackage a request for its fee-defense costs as a sanctions motion by alleging "bad faith," and the American Rule would apply only to professionals who lose their fee disputes. That result would be both absurd and contrary to the Supreme Court's express holding.

9. Post-*ASARCO* authority supports rejecting creative attempts to work around ASARCO's prohibition. For example, in *In re Boomerang Tube, Inc.*, 548 B.R. 69 (Bankr. D. Del. 2016), the court sustained the United States Trustee's objection to fee-defense provisions in

professionals' retention applications, holding that Section 328(a), "like section 330, is not a 'specific and explicit' statute which 'authorize[s] the award of a reasonable attorney's fee,' 'fees,' or 'litigation costs.'" *Id.* at 72. LKC's use of an after-the-fact sanctions motion rather than a contractual fee-defense provision does not change the analysis.

10. LKC's reliance on *In re Trevino*, 648 B.R. 847, 905 (Bankr. S.D. Tex. 2023), does not alter this conclusion. *Trevino* addressed sanctions for bad-faith conduct under Section 105(a) in a factual context distinct from this case. The Special Committee does not argue that *ASARCO* eliminates the Court's inherent power to sanction bad-faith in all contexts—only that where, as here, the movant is an estate professional seeking to recover fees incurred in its own compensation dispute, the Court must scrutinize whether the "sanctions" label is being used to circumvent what the Supreme Court has prohibited.

11. The policy consequences of adopting LKC's position underscore the correctness of the Special Committee's argument. If estate fiduciaries face personal fee-shifting liability every time they exercise their statutory right to scrutinize fee applications under Section 330(a)(2), independent directors, committee members, and other stakeholders will be deterred from raising even legitimate objections (or even serving in a fiduciary capacity)—undermining the fee-review process that Congress established. The Special Committee's objection was filed in accordance with LKC's own Court-approved engagement letter, which expressly provided that fee disputes "shall be resolved by the Bankruptcy Court." ECF No. 835 at 15. That LKC now does not like what it agreed to is irrelevant.

C. LKC's Section 328 argument fails because Section 328 does not authorize fee-shifting against estate fiduciaries.

12. LKC's Supplemental Brief reasserts its alternative argument that the Court should award LKC additional compensation under Section 328(a), contending that *ASARCO*'s "textual

analysis of the phrase 'actual, necessary services rendered' in Section 330" does not "control the application of a different provision lacking that phrase." Supplemental Brief ¶ 10. This argument fails for multiple independent reasons.

13. ***First***, Section 328(a) does not provide the fee-shifting authority LKC seeks. Section 328(a) permits employment of professionals "on any reasonable terms and conditions," and allows post-engagement compensation adjustments only if the original terms "prove to have been improvident in light of developments not capable of being anticipated." 11 U.S.C. § 328(a). The statute says nothing about fee-shifting, prevailing parties, or adversarial litigation. As the *Boomerang Tube* court explained, Section 328's "text does not refer to the award of defense fees to a prevailing party," and, like Section 330, it is not a "specific and explicit" exception to the American Rule. 548 B.R. at 72.

14. ***Second***, the fees LKC seeks are not for services rendered to the Debtors. Section 328(a) "permits only approval of fees or expenses for performing services for the" trustee or committee. *Boomerang Tube*, 548 B.R. at 78. Because the fees LKC seeks were incurred in defending its own Fee Application—*i.e.*, "for services performed for the professionals, not for the [applicable] Committee"—Section 328(a) does not authorize the recovery LKC seeks. *Id.* at 75 (concluding fee-defense provisions were "not reasonable terms for the employment of Committee Counsel because they [did] not involve any services for the Committee" but rather were "for services performed by Committee Counsel only for their own interests"); *see also In re Capitol Litho Printing Corp.*, 573 B.R. 771, 776 (Bankr. D. Ariz. 2017) (denying fee-defense costs because such work "in no way benefitted the estate, but benefitted only the [professional]").

15. ***Third***, even assuming Section 328(a) could authorize a post-engagement compensation adjustment in this context, nothing in the statute contemplates or provides for estate

fiduciaries or their counsel to bear such a compensation obligation. By its plain terms, Section 328(a) authorizes "[t]he trustee, or a committee appointed under section 1102 of this title," to "employ or authorize the employment of a professional person under section 327 or 1103 . . . on any reasonable terms and conditions of employment." 11 U.S.C. § 328(a). The statute does not speak to, much less impose any obligation upon, third-party estate fiduciaries such as the Special Committee members, or their separately retained counsel such as Barnes & Thornburg. LKC's Sanctions Motion seeks to conscript the Special Committee and Barnes & Thornburg into paying LKC's fee-defense costs, but Section 328 provides no mechanism for imposing compensation obligations on them; to do so would be contrary to the statute's plain meaning and structure, and would effectively transform a compensation-adjustment provision into a sanctions mechanism—something Congress plainly did not intend.

16. ***Fourth***, LKC cannot satisfy Section 328(a)'s demanding "improvidence" standard. The Fifth Circuit has recognized that Section 328(a) "creates a 'high hurdle'" requiring the movant to prove "that the subsequent developments were incapable of being anticipated at the time the engagement was approved." *In re ASARCO, L.L.C.*, 702 F.3d 250, 258 (5th Cir. 2012). Here, LKC's own revised engagement letter expressly contemplated that the parties might be unable to agree on the success fee and provided that "such dispute shall be resolved by the Bankruptcy Court." ECF No. 835 at 15. A fee dispute was not merely foreseeable—it was expressly anticipated as a possibility and contractually addressed. LKC cannot claim that the very fee dispute mechanism it bargained for was "incapable of being anticipated."

17. LKC's Supplemental Brief attempts to distinguish *Boomerang Tube* by asserting that it addressed pre-approved fee-defense provisions rather than after-the-fact compensation adjustments. Supplemental Brief ¶ 10 (citing ECF No. 2374 ¶ 47). That is a distinction without a

difference. Whether fee-defense costs are sought through a pre-approved provision or through an after-the-fact motion, the result is the same: The estate bears the cost of a professional's fee-defense litigation. Indeed, an after-the-fact attempt is more objectionable because it denies the estate and the Court the opportunity to evaluate and consent to such terms at the outset of the engagement.

III. CONCLUSION

18. The threshold legal issue before the Court is straightforward. LKC's Sanctions Motion seeks fee-shifting for the cost of defending its own Fee Application. That is the very relief *ASARCO* held impermissible, and LKC cannot circumvent the American Rule by relabeling that relief as "sanctions" or a "Section 328 adjustment." LKC's arguments in its Supplemental Brief to the contrary are meritless.

19. For the foregoing reasons, the Special Committee respectfully requests that the Court find that LKC's Sanctions Motion is barred by *ASARCO* and deny the Sanctions Motion in its entirety.

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Dated: May 29, 2026

Respectfully Submitted,

BAKER BOTTS L.L.P.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on May 29, 2026, a true and correct copy of the foregoing document was served on all parties requesting service via the Court's ECF system.

/s/ Travis A. McRoberts
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