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

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In re:

RHODIUM ENCORE LLC, et al.,¹

Debtors.

Chapter 11

Case No. 24-90448 (ARP)

(Jointly Administered)

TRIAL BRIEF IN SUPPORT OF DEBTORS' MOTIONS TO ASSUME CERTAIN CONTRACTS WITH WHINSTONE US, INC.

¹ The 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 the Debtors in these chapter 11 cases is 2617 Bissonnet Street, Suite 234, Houston, TX 77005.



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TABLE OF CONTRACTS(as of April 22, 2024)

No.	Contracting Date	Contract	Parties to the Contract	
1	July 2020	5MW Power Agreement No. 1	Whinstone	Rhodium Encore LLC
2	July 2020	5MW Power Agreement No. 2	Whinstone	Rhodium Encore LLC
3	July 2020	5MW Power Agreement No. 3	Whinstone	Rhodium Encore LLC
4	July 2020	5MW Power Agreement No. 4	Whinstone	Rhodium Encore LLC
5	July 2020	5MW Power Agreement No. 5	Whinstone	Rhodium Encore LLC
6	July 2020	5MW Power Agreement No. 6	Whinstone	Rhodium 2.0 LLC
7	July 2020	5MW Power Agreement No. 7	Whinstone	Rhodium 2.0 LLC
8	July 2020	5MW Power Agreement No. 8	Whinstone	Rhodium 2.0 LLC
9	July 2020	5MW Power Agreement No. 9	Whinstone	Rhodium 2.0 LLC
10	July 2020	5MW Power Agreement No. 10	Whinstone	Rhodium 2.0 LLC
11	July 2020	5MW Power Agreement No. 11	Whinstone	Rhodium 2.0 LLC
12	July 2020	5MW Power Agreement No. 12	Whinstone	Rhodium 2.0 LLC
13	July 2020	5MW Power Agreement No. 13	Whinstone	Rhodium 10MW LLC
14	July 2020	5MW Power Agreement No. 14	Whinstone	Rhodium 10MW LLC
15	July 2020	5MW Power Agreement No. 15	Whinstone	Rhodium JV LLC
16	July 2020	5MW Power Agreement No. 16	Whinstone	Rhodium JV LLC
17	July 2020	5MW Power Agreement No. 17	Whinstone	Rhodium JV LLC
18	July 2020	5MW Power Agreement No. 18	Whinstone	Rhodium JV LLC
19	July 2020	5MW Power Agreement No. 19	Whinstone	Rhodium JV LLC
20	July 2020	5MW Power Agreement No. 20	Whinstone	Rhodium JV LLC
21	July 2020	Rhodium 30MW Power Agreement	Whinstone	Rhodium 30MW LLC
22	November 2020	Jordan HPC Power Agreement	Whinstone	Jordan HPC LLC
23	December 2020	Rhodium JV Profit Sharing Agreement	Whinstone	Rhodium JV LLC
24	December 2020	Air HPC Profit Sharing Agreement	Whinstone	Air HPC LLC
25	August 2021	Water Supply Services Agreement	Whinstone	Rhodium Industries,
				LLC, Rhodium JV LLC,
				Rhodium 30MW LLC,
				Rhodium Encore LLC,
				Rhodium 2.0 LLC,
				Jordan HPC LLC,
				Rhodium 10MW LLC

INTRODUCTION

At the heart of this dispute are two competing narratives. One of them is consistent with the language of the contracts, the parties' intent, and basic common sense. The other is not.

Rhodium's position is straightforward. Rhodium struck multiple 10-year deals ("Power Agreements") with Whinstone in 2020 for space at Whinstone's largely undeveloped property in Rockdale. The contracts provided for power at a below-market rate and gave Rhodium the profits on sales of its power back to the grid. Rhodium in turn invested \$150 million to develop Whinstone's property for bitcoin mining. As part of this partnership, Whinstone and Rhodium jointly created Rhodium JV, a holding company for partially-owned operating subsidiaries that would actually mine bitcoin in Rockdale's Building C. Whinstone owned 12.5% of Rhodium JV.

In December 2020, Whinstone chose to redeem its 12.5% equity stake in Rhodium JV for "business and tax reasons." Dkt. No. 208 ¶ 6. To accomplish this without affecting the economics of the parties' original deal, the parties executed a Redemption Agreement along with a Profit Sharing Agreement that entitled Whinstone to a synthetic dividend equivalent to its prior ownership interest in Rhodium JV. Because this Agreement was only intended to change the form of Whinstone's equity interest, the Power Agreements that are the lifeblood of Rhodium's operations were left intact. The parties made that clear in the contracts, in the surrounding context, and in their communications.

At the same time, the parties brought a new project online in a different building at Rockdale that followed the same model. They executed a Power Agreement for the partiallyowned operating subsidiary (Jordan HPC) and a Profit Sharing Agreement for its holding company (Air HPC). Like the Rhodium JV Profit Sharing Agreement, the Air HPC Profit Sharing Agreement gave Whinstone a share of the profits that Air HPC receives from Jordan HPC. Also like the

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Rhodium JV Profit Sharing Agreement, the Air HPC Profit Sharing Agreement left Jordan HPC's Power Agreement intact.

Whinstone disagrees with virtually all of this, but its counter-narrative is a tangled web of inconsistencies and contradictions. Whinstone's asserts, for example, that the Power Agreements were all superseded by the Profit Sharing Agreements, even though that defies the plain text, the parties' contemporaneous communications, the parties' subsequent course of performance, and simple common-sense. After all, why would Rhodium abandon the value of the Power Agreements, with their below-market prices and profits from energy sales, in a contract about Whinstone's profit-share? Whinstone also contends that the Profit Sharing Agreements entitle Whinstone to vastly more money than it was entitled to as a part-owner in Rhodium JV. Whinstone contends that it should receive not only a percentage of the profits flowing from the operating subsidiaries, but also a percentage of profits flowing to *outside investors*. That is facially implausible even if it weren't foreclosed by the plain text.

Because Whinstone posits virtually no evidence supporting its bizarre narrative, Debtors expect that Whinstone will devote substantial trial time to its other, pretextual claims of breach of contract and termination, including a deep dive into bolts, fan faults, drips, ladders, and two-yearold invoices that it first produced days before trial. All of this is a sideshow. Whinstone simply wants Rhodium out of Rockdale so that Riot, Whinstone's new parent, can use the valuable power and infrastructure for itself. Recognizing the weakness of its claims about the parties' contracts, Whinstone searched high and low for any other reason that would justify terminating those contracts. It found none. Whinstone's blunderbuss approach only confirms that this whole exercise is a sham.

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Debtors are prepared at trial to present the evidence that supports their motions to assume. And in doing so, Debtors note that the parties' briefing on those motions and on summary judgment has largely crystalized the legal issues in dispute. *See* Dkt. Nos. 272, 332; 364, 397. Yet even in this contentious matter, some issues are not contested. Whinstone does not dispute that to the extent the 25 contracts remain in effect, they are executory. And Whinstone apparently does not dispute that assuming the contracts is a sound business judgment for Debtors. *See generally* Dkt. No. 144. The Court's bifurcation order has also narrowed the trial issues, because any issues regarding cure or offsets that need to be addressed will be decided in Phase 2.²

In Debtors' view, based on the issues that the parties actually dispute, the Court will need to consider and decide five main issues in Phase 1 of the trial. In this brief, Debtors first identify and address those issues. Debtors then explain how the trial is likely to proceed, and preview the core evidence that will be established at trial.

 $^{^{2}}$ This Trial Brief only addresses the issues that will be addressed in Phase 1 of the trial. Rhodium reserves the right to submit an additional trial brief to address the Phase 2 issues, if needed.

PHASE 1 TRIAL ISSUES

The Court will be presented with five main issues in Phase 1:

- **Issue 1:** Is it a sound business judgment for Debtors to assume the 25 contracts at issue?
- Answer: Yes. Rhodium's business is to mine bitcoin, and the contracts allow Rhodium to mine bitcoin on highly-favorable terms with fixed, low-cost power. Altogether, Rhodium estimates that the contracts are worth approximately \$150 million at present value. Whinstone does not appear to dispute this. Rejecting the contracts results in loss of this value and the need to incur unnecessary expense to move equipment and locate alternative facilities. See Dkt. No. 7 at ¶ 38; Dkt. No. 144; infra Parts I, V.
- **Issue 2:** Did the Profit Sharing Agreements supersede the Power Agreements?
- Answer: No. The parties always intended to have the Power Agreements operate alongside the Profit Sharing Agreements. The plain text and commercial context of the Agreements make this clear. The parties' contemporaneous communications confirm it. And the parties' course of performance removes any possible doubt. *See* Dkt. No. 7 at ¶ 9-17; Dkt. No. 332 at 7-19; Dkt. No. 364 at 3-6; *infra* Part II.
- **<u>Issue 3:</u>** Did Whinstone validly terminate the Profit Sharing Agreements based on monetary defaults?
- **Answer:** No. Rhodium has paid Whinstone everything that it is owed under the Profit Sharing Agreements. Those Agreements require holding companies Rhodium JV and Air HPC to pay Whinstone a percentage of the profits that flow up to them from *partially-owned* subsidiary operating companies. Whinstone purported to terminate the Agreements because it claims it was also owed a percentage of the profits the operating companies disbursed to *outside investors*. That is not what the Profit Sharing Agreements say. *See* Dkt. No. 272 at 14-20; Dkt. No. 332 at 19-27; Dkt. No. 364 at 6-7; *infra* Part III.
- **Issue 4:** Did Whinstone properly terminate the Profit Sharing and Power Agreements based on non-monetary defaults?
- Answer: No. Whinstone's termination notices failed to identify a single non-monetary breach of the Agreements. And the only purported non-monetary breaches it identified before termination that were consistent with contractually-mandated notice provisions were remedied long ago. Rhodium runs a safe and compliant operation and has quickly and properly addressed any conceivable non-monetary breaches. *See* Dkt. No. 272 at 20-33; Dkt. No. 332 at 26-27; Dkt. No. 364 at 8-9; *infra* Part IV.
- **Issue 5:** Are Debtors currently in default of any of the contracts?
- Answer: No. Debtors have paid all amounts due, have not breached (or have cured any alleged breaches of) the Data Center Rules, and have not breached any representations and warranties. *See* Dkt. No. 272 at 14-20; Dkt. No. 364 at 6-9; *infra* Parts III, IV.

LEGAL STANDARD FOR MOTIONS TO ASSUME

"Bankruptcy Code § 365(a) permits [debtors-in-possession], subject to court approval, to assume or reject executory contracts or unexpired leases to which it is a party." *In re TM Vill., Ltd.*, 598 B.R. 851, 857 (Bankr. N.D. Tex. 2019). "[A] contract is executory if 'performance remains due to some extent on both sides' and if 'at the time of the bankruptcy filing, the failure of either party to complete performance would constitute a material breach of the contract, thereby excusing the performance of the other party." *Id.* (quoting *Matter of Provider Meds, L.L.C.*, 907 F.3d 845, 851 (5th Cir. 2018)).

A party opposing a motion to assume based on a claimed pre-petition termination of the contract carries the initial burden of showing it properly "exercised its termination rights" under the terms of the contract. *In re Greenville Am. Ltd. P'ship*, 2000 WL 33710874, at *6, *10 (Bankr. D.S.C. Mar. 24, 2000). This includes establishing "by a preponderance of the evidence" the existence of "defaults . . . and that those defaults have been properly noticed." *In re Pyramid Operating Auth., Inc.*, 144 B.R. 795, 809 (Bankr. W.D. Tenn. 1992). If the objecting party carries its burden, the burden shifts to the debtor to show the contract "has not terminated." *In re Greenville*, 2000 WL 33710874, at *4, *10; *see also In re Vitanza*, 1998 WL 808629, at *14 (Bankr. E.D. Pa. Nov. 13, 1998).

If a contract has not been terminated and is executory, a "court evaluates whether [it] should be assumed or rejected employing the business judgment standard." *In re Senior Care Centers, LLC*, 607 B.R. 580, 587 (Bankr. N.D. Tex. 2019). Under this test, the court evaluates whether "the proposed course of action will be advantageous to the estate and [is] based on sound business judgment." *In re Idearc Inc.*, 423 B.R. 138, 162 (Bankr. N.D. Tex. 2009), *aff'd In re Idearc, Inc.*, 662 F.3d 315 (5th Cir. 2011). "Absent a showing of bad faith or an abuse of business discretion,

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the debtor's business judgment will not be disturbed." *In re TM Vill., Ltd.*, 598 B.R. at 859; *see also Richmond Leasing Co. v. Cap. Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985).

Finally, "a debtor-in-possession that has previously defaulted on an executory contract may not assume that contract unless it: (A) cures, or provides adequate assurance that it will promptly cure, the default; (B) compensates the non-debtor party for pecuniary loss resulting from the default; and (C) "provides adequate assurance of future performance under such contract or lease." *In re Texas Health Enterprises Inc.*, 72 F. App'x 122, 126 (5th Cir. 2003) (quoting 11 U.S.C. § 365(b)(1)). A party opposing a motion to assume based on present defaults "has the initial burden of showing [the] defaults and that those defaults have been properly noticed. *In re Rachels Indus., Inc.*, 109 B.R. 797, 802 (Bankr. W.D. Tenn. 1990). "If defaults are established by the proof, then the burden shifts back to the debtor to provide satisfactory proof that the defaults have either been cured or will be promptly cured and that there would be adequate assurance of future performance." *Id.*

ANTICIPATED PHASE 1 TRIAL EVIDENCE

Debtors expect to present three witnesses in its case in chief: Co-Chief Restructuring Officer Michael Robinson; Rhodium Enterprise Inc.'s co-CEO Nathan Nichols; and Whinstone's former-CEO Chad Harris. Mr. Robinson will explain that assuming these valuable contracts is an exercise of sound business judgment for Debtors. Mr. Nichols will further explain Debtors' business, as well as the parties' history, the contracts, Rhodium's intent in entering into the contracts, and the parties' course of performance after entering into the contracts. Mr. Harris, who negotiated and signed all of the contracts at issue on behalf of Whinstone, will be a hostile witness testifying to the context and circumstances of the parties' contracts, the negotiation of the contracts, and the parties' course of performance.

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Whinstone will then have an opportunity to respond and raise its defenses. Rhodium anticipates that Whinstone will assert three defenses, all of which are meritless: (1) That the Power Agreements cannot be assumed because they were superseded by the Profit Sharing Agreements; (2) that the Profit Sharing Agreements cannot be assumed because Whinstone terminated them for failure to pay the profit-share; and (3) that the Profit Sharing Agreements, along with the Power Agreements, cannot be assumed because Whinstone terminated all these Agreements for non-monetary breaches, including operational and safety issues.³

Depending on the issues that Whinstone chooses to try, Debtors expect to present fact and expert witnesses in rebuttal, potentially including safety and operational experts (Dr. Eric Brown and Dr. Nenad Miljkovic), fact witnesses (Rhodium Enterprises, Inc.'s Director of Finance, Alex Peloubet, and Rockdale Site Manager Brendan Cottrell), and a financial expert (Tiffany Lewis). Dr. Brown, Dr. Miljkovic, and Mr. Cottrell may all potentially testify about the safety and compliance of Rhodium's Rockdale operations. Mr. Peloubet is available to provide additional testimony about Rhodium JV and Air HPC's payments to Whinstone and other financial issues. Ms. Lewis is available to testify about the profit share calculation and errors in the analysis of Whinstone's financial expert.

The cumulative evidence will establish five primary evidentiary takeaways:

- I. Rhodium invested \$150 million at Rockdale in reliance on valuable, longterm contracts that it would never willingly give up.
- II. The contracts, context, and course of performance establish that the parties did not intend to supersede the Power Agreements when they agreed to allow Whinstone to exchange its equity interest for a synthetic dividend.

³ Based on Whinstone's vague discovery responses and ever-changing laundry list of complaints, Rhodium anticipates it may also try to introduce other arguments that it has not yet articulated. Rhodium reserves the right to seek exclusion of evidence related to issues that are irrelevant to the motion to assume and/or not properly disclosed. *See, e.g.*, Dkt. Nos. 368; 369; 370.

- III. Whinstone has received all the profit share payments to which it is entitled.
- IV. Rhodium runs an industry-leading operation that is safe and complies with the Agreements. Whinstone has blown minor, commonplace incidents out of proportion in an attempt to evict Rhodium.
- V. Riot wants to evict Rhodium so that it can use the valuable power and space at the Rockdale Site for itself.

I. Rhodium invested \$150 million at Rockdale in reliance on valuable, long-term contracts that it would never willingly give up.

The evidence will establish that Rhodium invested in Rockdale so that it had a place to mine bitcoin using the valuable 10-year Power Agreements. This point is relevant to Phase 1 trial issues 1, 2, and 3, *supra*. The value of the contracts supports the business judgment standard. And both their value and Rhodium's investment based on that long-term value help show why Whinstone's supersession theory is not only contrary to what the contracts say, but also wholly implausible.

Mr. Nichols will explain that Rhodium's business model was built on the valuable, longterm Power Agreements signed in 2020. Riot and Whinstone themselves recognize that "in 2020, before the Whinstone Facility was built in Rockdale, TX, Whinstone essentially had no money and no customers. Rhodium came to them and agreed to reimburse Whinstone for the cost to construct the building if Rhodium could enter into a 10-year hosting agreement. Because Whinstone had no money and no customers at the time, they happily agreed." *See* Rhodium Trial Ex. 288, Dkt. 379-7, at 3.

In reliance on these 10-year contracts, Rhodium invested more than \$150 million to build out the Rockdale Site and set up its mining operations. Rhodium paid for building construction, electrical systems, and other infrastructure that Whinstone now owns. That investment only made sense based on the long-term Power Agreements.

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The value of the Power Agreements, including the twenty 5MW Power Agreements, was at least threefold: Low-cost power for Rhodium's mining operations for 10 years; assignability, which allowed Rhodium to build out its operations in phases with outside investors and assign the Power Agreements to either new or existing operating companies, *see* 5MW Power Agreements, Dkt. 272-3 (Nichols Exs. 1.a-t) § 9.1; and the right to share substantially in the profits when Whinstone sold the contracted-for power back to the power grid at high prices (the power credit provisions), *see id.* § 4.8; Rhodium 30MW Power Agreement, Dkt. No. 272-6 at (Nichols Ex. 4) § 5.8 ("Whinstone will sell [the power] in lieu of providing electricity to the Customer if the Ercot Market profitability exceeds the 250% of the contract price" and "distribute[] 100%" of the profits from these sales "to the Customer[.]").

Whinstone insists that Rhodium simultaneously gave up these valuable Power Agreements *and* agreed to increase Whinstone's financial stake in Rhodium's operations, when it executed the Profit Sharing Agreements at the end of 2020. The contracts don't say that. *See infra* Parts II.B., III.A; Dkt. No. 272 at 14-20; Dkt. No. 332 at 7-19. And beyond that critical point, Whinstone's narrative makes no sense. Whinstone cannot explain why Rhodium would have agreed to such unfavorable changes in terms, including abandoning the provisions entitling Rhodium to valuable power credits (a forfeiture of tens of millions of dollars), in exchange for nothing.

Whinstone's narrative is also inexplicable given the undisputed evidence that the Profit Sharing Agreements were the product of *Whinstone* wanting to exchange its equity stake for a synthetic dividend for "business and tax reasons," Dkt. No. 208 at \P 6. Rhodium agreed to accommodate that change for its business partner. But it had absolutely no reason to, and did not, give up the Power Agreements that are the lifeblood of its business, and that justified the

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investments made by Rhodium and its outside investors, to accommodate Whinstone's business and tax interests.

Whinstone knows that its litigation position here is not the deal that the parties struck in 2020. But the building, the infrastructure, and the power currently used by Rhodium are tantalizing prizes for its parent Riot. Whinstone and Riot want to take over and profit from what Rhodium, and the investors in the Rockdale operating companies, have built. The Court should reject that gambit and enforce the deal that the parties made.

II. The plain language of the Agreements, the business context, and the parties' course of performance establish that the Profit Sharing Agreements did not supersede the Power Agreements.

The evidence will establish that the parties did not supersede the Power Agreements when they executed the Power Sharing Agreements that (1) merely exchanged Whinstone's equity stake for a percentage of Rhodium JV's profits, and (2) provided Whinstone with a percentage of newlycreated holding company Air HPC's profits in lieu of an equity stake. Whinstone's position to the contrary is contradicted by the contracts themselves, as well as by the evidence of the parties' intent, understanding, course of dealing, and course of performance. This point is relevant to Phase 1 trial issues 2 and 3, *supra*.

At trial, Mr. Nichols will explain the parties' relationship, how they came to sign the Power Agreements, how they came to sign the Profit Sharing Agreements, and how they carried out their contractual obligations in their first few years of business together. Every piece of this context and history firmly demonstrates the parties' intentions when entering into the Rhodium JV Profit Sharing Agreement: They intended to swap Whinstone's 12.5% equity stake in Rhodium JV for a 12.5% synthetic dividend. Nothing more.

A. The commercial context: Whinstone started as an equity partner, and later asked to swap its equity stake for a synthetic dividend.

The parties' business relationship began when Whinstone pitched Rhodium's founders (including trial witness Nathan Nichols) to fund and build a bitcoin mining center on the nearly empty site that Whinstone had secured in Rockdale. The parties formed a holding company called "Rhodium JV LLC"—standing for Rhodium "Joint Venture"—to carry out these plans. Whinstone owned 12.5% of Rhodium JV. From the start, Rhodium's plan was to build out the mining operation in phases using a phased-based financing model. For the first phase, in April 2020, Rhodium JV formed an operating subsidiary, Rhodium 30MW, and Whinstone and Rhodium 30MW entered into the 10-year Rhodium 30MW Power Agreement. Rhodium 30MW then sold 30% of its membership interest to investors and issued debt to those same investors. It used that capital to build infrastructure at Rockdale and purchase miners and power. After this capital raise, Rhodium JV owned 70% of Rhodium 30MW and outside investors owned the remaining 30%.

The plan was to replicate this initial 30 megawatt phase in several additional phases. At each phase, Rhodium JV would form a new subsidiary, raise capital from investors through the subsidiary, and use that capital to build out additional bitcoin mining operations. To lock in the low-cost, long-term power, Rhodium JV and Whinstone entered into the twenty identical 5MW Power Agreements in July of 2020. *See* 5MW Power Agreements, Dkt. No. 272-3 (Nichols Exs. 1.a-t). These Agreements were freely assignable, *id.* § 9.1, and Rhodium JV planned to assign subsets of these Power Agreements to yet-to-be formed subsidiaries to use at each subsequent phase of their buildout—a fact Rhodium explicitly communicated to Whinstone in writing. *See* Dkt. No. 272-16 (Nichols Ex. 14.b) (slide showing corporate structure and profit-flow).

In the fall of 2020, Whinstone asked to redeem its 12.5% ownership interest in Rhodium JV. For "business and tax reasons," Whinstone wanted to receive the same share of profits from

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Rhodium JV, but without being an equity holder. The parties agreed that Whinstone could redeem its 12.5% ownership interest in Rhodium JV in exchange for a synthetic dividend through which it would receive 12.5% of Rhodium JV's profits. To finalize the arrangement, on December 31, 2020, Rhodium JV and Whinstone entered into two agreements: (1) The Redemption Agreement, through which Whinstone redeemed its 12.5% ownership interest, *see* Dkt. No. 272-8 (Nichols Ex. 6), and (2) the Rhodium JV Profit Sharing Agreement, which required Rhodium JV to pay Whinstone 12.5% of its profits, *see* Dkt. No. 272-9 (Nichols Ex. 7). The same day the parties entered into the Air HPC Profit Sharing Agreement. That Agreement required Air HPC—a newly-formed holding company—to pay Whinstone 50% of its profits, which would come from operating subsidiary Jordan HPC. *See* Dkt. No. 272-10 (Nichols Ex. 8). As with the Rhodium JV Profit Sharing Agreement, so that it could participate in the financial benefits of Rhodium's bitcoin mining without holding an ownership interest. *Id.* Rhodium agreed.

These contracts did not affect the Power Agreements that provided power and other hosting services to the operating companies. The plain text of the Redemption Agreement makes that clear. That Agreement specifically states "the terms and conditions of any other agreements," including "any hosting or colocation agreements [*e.g.*, the 5MW Power Agreements], shall continue." Dkt. No. 272-8 (Nichols Ex. 6) § 4. And Whinstone's corporate representative Jeff McGonegal admitted as much when he conceded that "Rhodium JV and Whinstone are agreeing that *any preexisting hosting or colocation agreements between them continue in force*." Declaration of John Stokes Ex. 1 at 223:16-21 (McGonegal deposition transcript) (emphasis added).

Whinstone's contrary position that the Profit Sharing Agreements superseded the Power Agreements ignores the Redemption Agreement as well as the commercial context. *See URI, Inc.*, 543 S.W.3d 755, 768-69 (Tex. 2018) (evidence of contemporaneous commercial context is relevant

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to contract interpretation even where contract is unambiguous).⁴ There is simply no reason Rhodium would have agreed to terminate independently assignable Power Agreements, and forfeit its right to power credits under those Agreements, when it was getting nothing in return. And the situation is even more inconceivable under Whinstone's view that the Profit Sharing Agreements also promised Whinstone substantially more money through a profit-share provision entitling it to a percentage of profits of operating companies under Rhodium JV and Air HPC, not just a percentage of the funds that flowed up to Rhodium JV and Air HPC after the operating companies paid outside investors. *See infra* Part III.A.

B. The plain text makes clear that the Profit Sharing Agreements do not supersede the Power Agreements.

The plain language of the Power Agreements also confirms that nothing was superseded. The 5MW Power Agreements provide that they cannot be modified, amended, or changed unless the parties "expressly" agree in a writing signed by the parties; otherwise, all of the parties "rights and obligations . . . under this Agreement shall remain in full force and effect":

16.4. No modification, amendment or other change may be made to this Agreement or any part thereof unless reduced to writing and executed by authorized representatives of Whinstone and the Customer. Unless expressly so agreed, no modification or variation of this Agreement shall constitute or be construed as a general waiver of any provisions of this Agreement, nor shall it affect any rights, obligations or liabilities under this Agreement which have already accrued up to the date of such modification or waiver, and the rights and obligations of the Parties under this Agreement shall remain in full force and effect, except and only to the extent that they are so modified or varied.

E.g. 5MW Power Agreements, Dkt. No. 272-3 (Nichols Exs. 1.a-t) § 16.4. An "express" agreement is one that is "[c]learly and unmistakably communicated." EXPRESS, Black's Law Dictionary

⁴ Whinstone may present evidence that the Profit Sharing Agreements were not executed until January 2021, whereas the Redemption Agreement was executed in December 2020. Were that the case, it would make even more clear that the "hosting or colocation agreements" referenced in the Redemption Agreement are the earlier signed Power Agreements.

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(12th ed. 2024). But the Rhodium JV Profit Sharing Agreement never even mentions the 5MW Power Agreements, much less evidences a clear and unmistakable agreement to supersede them. Because there's no explicit statement in the Rhodium JV Profit Sharing Agreement that the parties were modifying or superseding the 5MW Power Agreements, the twenty 5MW Power Agreements "remain[ed] in full force and effect." Dkt. No. 272-3 (Nichols Decl. Exs. 1.a-t) § 16.4.

The Rhodium 30MW Power Agreement and Jordan HPC Power Agreement have similar language. *See* Rhodium 30MW Power Agreement, Dkt. 272-6 (Nichols Ex. 4) § 17.3 ("No modification, amendment or other change may be made to this Agreement or any part thereof unless reduced to writing and executed by authorized representatives of Whinstone and the Customer. Unless expressly so agreed "); Jordan HPC Power Agreement, Dkt. 272-7 (Nichols Ex. 5) § 23.10 ("Unless otherwise expressly permitted in this Agreement, no modification, amendment, or waiver of this Agreement is effective or binding unless made in a writing that references this Agreement and is signed by both Parties."). So, like the 5MW Power Agreements, the Rhodium 30MW and Jordan HPC Power Agreements can only be modified by express agreement of the parties. There are no such agreements.

Whinstone's only response to the plain language of the Redemption Agreement and the Power Agreements is to point to the standard-issue "entire agreement" (or integration) clauses in the Profit Sharing Agreements. *See, e.g.,* Dkt. No. 358 at 17. Those clauses cannot be stretched to accomplish what Whinstone seeks for at least four reasons that Rhodium has explained in detail in its summary judgment filings, *see* Dkt. No. 332 at 7-19, and only briefly restates here:

First, the integration clauses do not expressly reference the Power Agreements and thus are facially inadequate to supersede them. *See id.* at 8.

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Second, the undisputed context shows that Whinstone and Rhodium did not intend this type of integration clause to supersede other contracts. Each of the 22 Power Agreements has a materially identical integration clause. *Id.* at 9-10. And Whinstone admits that all 22 of those contracts were in effect at the same time. *See* Dkt. No. 332-19 (Asay Ex. Q) at 12-13. It makes no sense to argue that 22 contracts co-existed with similar integration clauses, but the same clause in the 23rd and 24th contracts took on a different and much broader meaning.

Third, the integration clauses are expressly limited to the same parties, *see* Dkt. No. 332 at 11-12, Dkt. No. 332-9 (Nichols Ex. 7) § 23.10; Dkt. No. 332-10 (Nichols Ex. 8) § 23.10, and it is undisputed that some of the Power Agreements (Rhodium 30MW and Jordan HPC) are between different parties. Whinstone is asking the Court to re-write the integration clauses to conclude that they override all of the (never referenced) Power Agreements.

Fourth, the "subject matter" of the Profit Sharing Agreements is not the same as the subject matter of the Power Agreements. *See id.* Dkt. No. 332 at 10-12. The primary "subject matter" of the Profit Sharing Agreements is the profit-share payment intended to replace the equity stake Whinstone was relinquishing (or, for Air HPC, to create a financial interest in lieu of equity), not providing power as in the Power Agreements. The parties' communications with one another the day before they signed the Profit Sharing Agreements confirm this. *See* Dkt. No. 272-17 (Nichols Ex. 15) (explaining the Rhodium JV Profit Sharing Agreement "is a way to get you a 12.5% slice . . . it is a financial contract that entitles Whinstone to a revenue share"); *see also* December 28, 2020 email, Dkt. No. 332-6 (Nichols Ex. D).

C. The parties' contemporaneous communications confirm there was no intent to supersede the Power Agreements.

Immediately before executing the Redemption and Profit Sharing Agreements, Rhodium repeatedly told Whinstone and its attorney via email the following basic facts of the agreements:

- Rhodium JV and Air HPC are holding companies that "will not be drawing power." *E.g.* December 30, 2020 email, Dkt. No. 332 (Nichols Ex. E);
- The holding companies own *partial* interest in their operating subsidiaries, which will continue operating at the Site under their own Power Agreements. *E.g. id.* ("the underlying operations of AIR HPC LLC are housed in JORDAN HPC (which already has a separate power agreement in place . . .)").
- The purpose of the Profit Sharing Agreements is to give Whinstone a percentage of the profits of the holdings companies, "which is effectively an indirect . . . interest in" the operating subsidiaries. *E.g.*, December 28, 2020 email, Dkt. No. 332-6 (Nichols Ex. D) (the Air HPC Profit Sharing Agreement "give whinstone 50% of AIR HPC LLC (which is effectively an indirect 25% interest in Jordan); Stokes Ex. 1 at 249:9-12 (Whinstone's corporate representative admitting that "Chad [Harris] was made aware of that math" regarding Air HPC's 50% interest in Jordan HPC).

Whinstone never pushed back on these explanations and even shared them with its attorneys. *See* December 30, 2020 email, Dkt. No. 332-8 (Nichols Ex. E). And no further substantive edits were made to the Agreements after these emails were exchanged. These final communications thus capture the intent of the parties when signing the Profit Sharing Agreements. "It is hornbook contract law that the proper construction of an agreement is that given by one of the parties when 'that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party." *United States v. Stuart*, 489 U.S. 353, 367 n.7 (1989) (citing Restatement (Second) of Contracts § 201(2)(b) (1981)); *see also, e.g., Univ. of Tex. Sys. v. United States*, 759 F.3d 437, 444 (5th Cir. 2014) ("In this circumstance, it is hornbook contract law that the well-disclosed meaning of the SSA governs as

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opposed to any undisclosed meaning that Texas might have held.") (applying Texas law); *Exxon Corp. v. Bell*, 695 S.W.2d 788, 790 (Tex. App. 1985).

Critically, the Court will not see any email communications stating that the intent of the parties in executing the Profit Sharing Agreements was to supersede or extinguish any of the Power Agreements. Nor will it see any communications even remotely suggesting that Rhodium believed it was giving up the highly valuable power credit provisions in those agreements. The Court also will not see any evidence that anyone at the time thought Rhodium 30MW and Jordan HPC— entities already operating at the Site—no longer had contracts with Whinstone. In short, there will be no contemporaneous evidence supporting Whinstone's story.

D. The parties' course of conduct confirms that the Power Agreements remain in effect.

There will be a wealth of course-of-conduct evidence that *both* parties continued operating under the Power Agreements after the Profit Sharing Agreements were executed. Rhodium 30MW and Jordan HPC continued operating their miners at the Rockdale Site without objection, and Whinstone continued charging Rhodium 30MW and Jordan HPC (not Rhodium JV and Air HPC) for power under the terms of their respective Power Agreements. *See* Dkt. 332-13 (Nichols Ex. K).

Just a month and a half after signing the Profit Sharing Agreements, Winter Storm Uri hit the Rockdale Site. Whinstone shut down all power to the Site and sold the power into the ERCOT market for an astronomical profit. Without disclosing those profits to Rhodium, Whinstone proposed a settlement to resolve the "credits" Rhodium 30MW and Jordan HPC should receive for the lost ability to mine bitcoin during the storm. In that settlement agreement, Whinstone explicitly acknowledged (1) that Rhodium 30MW and Jordan HPC operate miners at the Whinstone facility and (2) that they do so pursuant to the Rhodium 30MW Power Agreement and the Jordan HPC Power Agreement. *See* Dkt. No. 332-8 (Nichols Ex. F).

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Separately, Rhodium JV formed three new operating subsidiaries (Rhodium Encore, Rhodium 2.0, and Rhodium 10MW) to execute three new phases in 2021. Each operating subsidiary sold part of its equity to outside investors and issued debt to raise the capital necessary to purchase bitcoin miners and supporting infrastructure. On September 30, 2021, Rhodium JV assigned the first fourteen of the 5MW Power Agreements to the three new operating subsidiaries (Nos. 1-5 to Rhodium Encore, Nos. 6-12 to Rhodium 2.0, and Nos. 13-14 to Rhodium 10MW). Dkt. No. 272-4 (Nichols Ex. 2). The next day it gave Whinstone notice of these assignments. Dkt. No. 272-5 (Nichols Ex. 3). Whinstone did not say that the Power Agreements no longer existed. To the contrary, it accepted power deposits from those three operating subsidiaries to initiate their own power draw, Dkt. No. 332-11 (Nichols Ex. 1), and offered no complaint as they began mining operations and drawing power under the Power Agreements.

On several more occasions in the following months, Whinstone, and its new parent Riot, explicitly acknowledged the continued existence of the Power Agreements. *See, e.g.*, Dkt. Nos. 332-12 (Nichols Ex. J); 332-18 (Asay Ex. P). And Whinstone continued charging Rhodium for power under the terms of the Power Agreements. *See* Dkt. No. 332-13 (Nichols Ex. K).

Moreover, beginning in 2022, Whinstone and Riot began complaining that they were not receiving enough in profit share payments. They did not, however, assert that the Power Agreements were no longer in effect and had been superseded. The supersession argument was first asserted by their attorneys in litigation, when Whinstone filed suit against Rhodium in May 2023. It is an after-the-fact litigation position, unrelated to the deal that Rhodium and Whinstone actually struck.

III. Whinstone has received all the profit share payments to which it is entitled.

The evidence will show that Rhodium JV and Air HPC have paid Whinstone what they owe under the Profit Sharing Agreements: A share of the profits that flow up to the holding

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companies from the partially owned subsidiary operating companies. This point is relevant to Phase 1 trial issues 2 and 3, *supra*.

A. Whinstone is entitled only to a percentage of Rhodium JV and Air HPC's profits.

The crux of the payment dispute between Whinstone and Rhodium is simple and legal: Is Whinstone entitled to a percentage of Rhodium JV and Air HPC's profits received from their partially-owned operating subsidiaries, as Rhodium has paid? Or is Whinstone entitled to those profits *plus* a percentage of the money paid to the outside investors in those operating subsidiaries, as Whinstone contends? If Rhodium is correct (and it is), then Whinstone's termination notices asserting payment default are unlawful.

Whinstone's argument fails. The plain language of the Profit Sharing Agreements is dispositive. Both Agreements provide that "Customer shall pay" a "Hosting Share Payment" that is "equal to" a set percentage "of customer EBTIDA," which is calculated by making specified adjustments to "Customer" "Net Income." Dkt. No. 272 at 14-17. Because "Customer" is defined as Rhodium JV in one agreement and Air HPC in the other, Dkt. No. 272-9 (Nichols Ex. 7) at 1, Dkt. No. 272-10 (Nichols Ex. 8) at 1, the only conclusion consistent with the text is that Whinstone is entitled to a percentage of Rhodium JV and Air HPC's adjusted net incomes, not anyone else's.

The evidence at trial will only confirm this plain reading. Recall that Rhodium and Whinstone's business relationship began as a joint venture, Rhodium JV, in which Whinstone had a 12.5% equity stake. Rhodium JV formed the first subsidiary operating company, Rhodium 30MW, in which it had a 70% ownership stake. Whinstone knew that Rhodium JV would not fully own the operating companies, both because it knew Rhodium 30MW was only partially owned and because Rhodium had explained the ownership structure from the outset. *See, e.g., supra* Part II.A., C.; Dkt. 272-16 (Nichols Decl. Ex. 14.b) (slide Rhodium shared with Whinstone showing

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ownership structure). Based on its equity stake in Rhodium JV, Whinstone was only entitled to share in the profits that flowed up to JV from the subsidiary companies. It had no right to a share of 100% of Rhodium 30MW's profits, because outside investors owned 30% of that company.

When Whinstone redeemed this equity interest for "business and tax reasons," Dkt. No. 208 \P 6, it received in exchange an equivalent financial interest in Rhodium JV in the form of a profit-share payment. *See* Redemption Agreement, Dkt. No. 272-8 (Nichols Ex. 6); Rhodium JV Profit Sharing Agreement, Dkt. No. 272-9 (Nichols Ex. 7) § 6.1. The Air HPC Profit Sharing Agreement is structured the same way, giving Whinstone a 50% stake in the profits that flow up to Air HPC from its partially owned operating company, Jordan HPC, instead of affording Whinstone an equity interest in Air HPC. Dkt. No. 272-10 (Nichols Ex. 8) § 6.1.

The Profit Sharing Agreements were thus designed to give Whinstone exactly what it had before (plus an interest in a new phase through newly-formed holding company Air HPC), but in a different form. Rhodium confirmed this in writing to Whinstone the day before the Profit Sharing Agreements were signed. *See* December 30, 2020 email, Dkt. No. 272-17 (Nichols Ex. 15). And Rhodium *rejected* language from Whinstone that would have given Whinstone a stake in the operating companies. *See* Dkt. No. 397-3 (Nichols Ex. 26) (September 21, 2020 email from C. Harris to N. Cerasuolo). Whinstone now wants a different deal, and claims a right to a share of all of the profits of the operating companies. But the contracts do not say that and Whinstone has no explanation for why Rhodium would have agreed to a new arrangement that substantially increased the payments to Whinstone and overrode the interests of outside investors who partially own the operating companies.⁵

⁵ Whinstone may attempt to have its financial expert, Jeffrey Matthews, testify that Annex 2 entitles Whinstone to a share of the profits of the operating customers. But that is a legal opinion that Mr. Matthews cannot give (and a wrong one at that).

B. Rhodium JV and Air HPC paid all amounts due under the Profit Sharing Agreements.

At trial, Debtors will show that Rhodium JV and Air HPC made all required profit share payments as calculated pursuant to Annex 2 to each of the Profit Sharing Agreements. Whinstone cannot show otherwise.

Whinstone may argue that Debtors reduced the profit share payments by making intercompany loans. Their financial expert said nothing of the kind, however. And the fact is, the loans that Whinstone complains of were made *post*-profit share, with the money leftover after Whinstone was paid.

Whinstone may also attempt to muddy the waters by misrepresenting the impact of Rhodium's corporate roll-up transaction to suggest Rhodium "diverted" profit around Whinstone. Dkt. 358 at 20. The roll-up only changed the form in which the outside investors hold their interest in the Rockdale operating companies. The outside investors now hold their interest indirectly through a consolidated holding company called Rhodium Technologies, but they still have the same interest. The roll-up did not impact the profit share calculation at all (and again, Whinstone's financial expert says nothing about it).

IV. Rhodium runs an industry-leading operation that is safe and complies with the terms of the Agreements.

The evidence will also establish that Rhodium's mining operations are safe, appropriate, and comply with the terms of the Agreements and all applicable rules and regulations. Whinstone has desperately searched for some safety or operational issue it can brandish as a breach of contract, and has proffered new theories up to the eve of trial and in violation of this Court's discovery orders. As a result, it is not clear which of Whinstone's ever-shifting theories it will actually present, or how any alleged conduct relates to any contractual provision. But what is clear is that Whinstone's claims of breach—and especially its claims that these breaches supported

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termination—are transparently pretextual and meritless. Whinstone tried versions of its "danger" and "safety" arguments in state court and in arbitration, and it has lost every time. This point is relevant to Phase 1 trial issues 4 and 5, *supra*.

The grab bag of issues that Whinstone has raised so far fail for multiple reasons, including that the alleged issues are minor and immaterial, were promptly cured, and were not properly noticed by Whinstone. Rhodium's Site Manager, Mr. Cottrell, and its two experts, Dr. Miljkovic and Dr. Brown, will rebut Whinstone's false narrative of unsafe site operations.

2022 ATV accident. This isolated incident occurred two years ago, was promptly cured, and was not the subject of a notice of termination.

BitCool spills. Whinstone never purported to terminate any of the 25 contracts based on a BitCool spill. And in any event, spills do not breach any of the Agreements. Rhodium's expert, Dr. Brown, will explain in rebuttal as necessary that BitCool (used in immersion mining) is a nontoxic substance similar to mineral or baby oil. Modest spills from the coolant tubing have been quickly cleaned up without harm to people, equipment, or the environment. Most of the incidents Whinstone has complained about involved modest BitCool spills. Dr. Brown will also testify that these kinds of spills of low-toxicity substances are commonplace at industrial worksites and that Rhodium employees responded appropriately to each incident involving BitCool. Dr. Nenad Miljkovic, an expert in data center thermal management, will confirm that fluid leaks are common, and even inevitable, in immersion cooling facilities such as Building C at the Rockdale Site and do not pose a safety or operational risk to Rhodium's continued operations. Whinstone previously raised its BitCool argument in arbitration and lost. *See* Dkt. No. 272-22 (Asay Ex. 20)at 5 (emergency arbitrator granting Rhodium's request for emergency relief and describing BitCool as a "non-toxic noncorrosive non-conductive and generally non-hazardous biodegradable coolant").

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Overdrawing power. Whinstone claimed in 2022 that Rhodium was overdrawing power, but this was not the subject of a notice of termination. Moreover, there's no evidence supporting Whinstone's two-year old claim, and certainly no evidence that the issue wasn't promptly cured.

Ladders, chemical labeling and storage, missing bolts. After Whinstone improperly shut down Rhodium in January 2024, Whinstone sent a letter complaining of minor operational issues. These were not the subject of any termination letter, and, regardless, Dr. Brown will explain that the issues Whinstone identified were minor and, again, commonplace in industrial sites. Whinstone's own expert, Mr. Gibson, admits that Rhodium promptly cured these issues after receiving notice and they remained cured when he visited the site recently. Stokes Ex. 2 at 159:23-166:23 (Benjamin Gibson deposition transcript).

Dry coolers and fans. Whinstone has floated a host of complaints about the dry cooler systems attached to Building C at Rockdale—complaints that are particularly ironic since, as Dr. Miljkovic will explain, Whinstone breached its contractual obligation to provide an appropriate water source for use with the dry coolers. The low-quality water that Whinstone supplied, when there was any water at all, was harmful. Dr. Miljkovic will rebut Whinstone's claims that Rhodium did not maintain the dry coolers properly and will explain that low-quality, dirty water caused buildup and other problems with the dry coolers. He will also explain that the fan catch system installed in the dry coolers is well-designed and safe, and did not jeopardize the safety or efficiency of Rhodium's operations. These issues were also not the subject of any notice of termination.

Wet floors. Whinstone's other operational complaint is that fluid sometimes leaks or drips from Rhodium's immersion-cooling operations. As an immersion-cooled mine, Building C has tanks and piping filled with BitCool, the nontoxic coolant that helps regulate the temperature of the miners. Whinstone itself admits that Riot has similar leaks and spills, and that they are a normal

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and expected part of the process of having hundreds or thousands of open-topped immersion tanks to cool the miners. The buildings are designed based on the inevitability of spills. Because of the nature of the immersion operation and inevitability of spills, wet floors are not an OSHA violation. OSHA requires mitigation and cleanup, and Rhodium implements standard mitigation procedures. Whinstone's expert admits that Rhodium's procedures are adequate. This complaint, like the other supposed "safety" issues raised by Whinstone, is a pretext, not a genuine concern, and was never the subject of a termination notice.

V. Riot wants to evict Rhodium so that it can use the valuable power and space at the Rockdale Site for itself.

The evidence will also weave a thread that ties all of the issues together and explains why the parties are here in the first place: Rhodium stands in the way of Riot making more money. Riot wants Rhodium out of Rockdale so it can use the power and space available for its own mining operations—and stamp out a direct competitor in the process. The deal Whinstone and Rhodium struck predates Riot's acquisition of Whinstone. Unlike Whinstone, Riot is one of Rhodium's direct competitors in bitcoin mining. After Riot purchased Whinstone, it started digging into Whinstone's "legacy contracts" and realized it did not like the terms. Riot then started a campaign to get out of the contracts. Riot doesn't want any tenants at Rockdale.⁶ Rather, Riot wants to expand its own mining operations, and to do that, it needs Rhodium's power and the infrastructure Rhodium paid to build out.

Riot has not been coy about this: It has repeatedly told its investors it is trying to get out of Whinstone's "legacy contracts" so it can use Rhodium's power and space for itself. *See* Rhodium

⁶ Riot and Whinstone have kicked out all of the other Rockdale tenants. Two, GMO and SBI, have also sued Whinstone. *See GMO Gamecenter USA, Inc. et al v. Whinstone US, Inc.*,1:22-cv-05974-JPC-KHP (S.D.N.Y.); *SBI Crypto Co., LTD. v. Whinstone US, Inc.*, 6:23-CV-00252-ADA-JCM (W.D. Tex.).

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Trial Ex. 31, Dkt. No. 372, Riot Quarterly Report (Form 10-Q) (Aug. 9, 2023) at 33 ("As part of their examination of the Company's Data Center Hosting business segment, management identified several Legacy Contracts inherited through the Whinstone acquisition containing below-market terms."); Rhodium Trial Ex. 34, Dkt. No. 372-3, Riot Quarterly Report (Form 10-Q) (July 31, 2024) at 30 ("In 2023, we made the decision to stop pursuing new hosting contracts and end our legacy contracts, to focus on our self-mining efforts."); Rhodium Trial Ex. 41, Dkt. No. 272-13, Riot Q3 2023 Quarterly Update to investors dated November 7, 2023, at 8 (detailing how Riot "Continue[s] to ... Address[]" "Legacy Contracts" through litigation).

Seen through this lens, Whinstone's campaign against Rhodium, though harassing and unlawful, is at least logical. Whinstone has not been trying to resolve any legitimate disputes. If it were truly concerned about payments, it would have initiated an arbitration two years ago to decide the issue. It did not. And if Whinstone were truly concerned about Rhodium's operations, it would have worked with Rhodium to remedy any supposed issues. But Whinstone instead filed harassing suits that flouted the parties' arbitration agreement and engaged in a self-help eviction and multiple shutdowns to try to get rid of Rhodium.

But Whinstone and Riot cannot throw away Rhodium's long-term contracts just because they no longer like them. Those contracts were the basis for Rhodium's investment in Rockdale, and outside investors' substantial investments in Rhodium's operating companies. They are the centerpiece of Rhodium's business. Rhodium has met its obligations, all the contracts remain in force, and the Court should approve Rhodium's request to assume them.

CONCLUSION

Debtors respectfully request that the Court grant its motions to assume, approve their request to assume all 25 Whinstone contracts, and grant all other and further relief as the Court may deem just and appropriate.

Respectfully submitted this 7th day of November, 2024.

STRIS & MAHER, LLP

/s/ Colleen R. Smith

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Counsel to the Debtors and Debtors-In-Possession

Certificate of Accuracy

I certify that the foregoing statements are true and accurate to the best of my knowledge. This statement is being made pursuant to Bankruptcy Local Rule 9013-1(i).

/s/ Colleen R. Smith Colleen R. Smith

<u>Certificate of Service</u>

I, Colleen R. Smith, hereby certify that on the 7th day of November, 2024, a copy of the foregoing was served by the Electronic Case Filing System for the United State Bankruptcy Court for the Southern District of Texas.

<u>/s/ Colleen R. Smith</u> Colleen R. Smith

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

In re:

RHODIUM ENCORE LLC, et al.,¹

Debtors.

Chapter 11

Case No. 24-90448 (ARP)

(Jointly Administered)

DECLARATION OF JOHN STOKES IN SUPPORT OF TRIAL BRIEF IN SUPPORT OF DEBTORS' MOTIONS TO ASSUME <u>CERTAIN CONTRACTS WITH WHINSTONE US, INC.</u>

I, John Stokes, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am an attorney with the firm Stris & Maher LLP. I am an attorney at law, admitted

to practice in this matter pro hac vice. I represent Rhodium Encore LLC and its debtor affiliates in the above-captioned chapter 11 cases.

2. I submit this Declaration in support of Debtors' Trial Brief in Support of Debtors'

Motions to Assume Certain Contracts with Whinstone US, Inc.

3. Attached hereto as Exhibit 1 is a true and correct copy of excerpts of the transcript

of the deposition of Jeff McGonegal, which was taken as part of this proceeding on October 25,

2024.

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), Jordan HPC Sub LLC (0463), Rhodium 2.0 Sub LLC (5319), Rhodium 10MW Sub LLC (3827), Rhodium 30MW Sub LLC (4386), Rhodium Encore Sub LLC (1064), Rhodium Enterprises, Inc. (6290), Rhodium Industries LLC (4771), Rhodium Ready Ventures LLC (8618), Rhodium Renewables LLC (0748), Rhodium Renewables Sub LLC (9511), Rhodium Shared Services LLC (5868), and Rhodium Technologies LLC (3973). The mailing and service address of Debtors in these chapter 11 cases is 2617 Bissonnet Street, Suite 234, Houston, TX 77005.

4. Attached hereto as Exhibit 2 is a true and correct copy of excerpts of the transcript of the deposition of Benjamin Gibson, which was taken as part of this proceeding on October 22, 2024.

5. I hereby declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information, and belief.

Dated: November 7, 2024

Signed by: John Stokes

John Stokes

Exhibit 1

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1

ORAL DEPOSITION OF JEFF MCGONEGAL, produced as a witness at the instance of the Rhodium Entities, and duly sworn, was taken in the above-styled and numbered cause on October 25, from 9:15 a.m. to 5:37 p.m., taken at the Offices of Foley & Lardner, LLP, 600 Congress, 14th Floor, Suite E, Austin, Texas, 78701, before Mary Lou Taylor, CSR in and for the State of Texas, reported by machine shorthand method, pursuant to the Texas Rules of Civil Procedure and the provisions stated on the record or attached hereto.

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	223					
1	Q. And that left Whinstone with a zero percent					
2	interest in Rhodium JV, right?					
3	A. I would agree.					
4	Q. Now, let's take a look at the next paragraph.					
5	Do you see No. 4 labeled Continuation of Business					
6	Relationship?					
7	A. Yeah.					
8	Q. It says, quote, Whinstone and Rhodium JV agreed					
9	that all the terms and conditions of any other agreements					
10	entered into between them, including but not limited to					
11	the duties and obligations of the parties to each other					
12	after any hosting or colocation agreements, shall					
13	continue as set forth in such agreements.					
14	Do you see that?					
15	A. Yes.					
16	Q. So in this redemption agreement, Rhodium JV and					
17	Whinstone are agreeing that any preexisting hosting or					
18	colocation agreements between them continue in force,					
19	correct?					
20	MR. MARX: Objection, form.					
21	A. Yes, that's what it says.					
22	Q. All right. Let's put this document away. Going					
23	to return to okay, let's turn to Exhibit 10, which is					
24	the Rhodium JV December 2020 agreement. So let's turn to					
25	Section 6 oh, I'm sorry. Are you still looking for					

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249 50 percent of the profits from Jordan HPC? 1 2 MR. MARX: Objection, form. I quess I'm not sure that's really relevant. 3 Α. 4 Ο. I'm not asking whether it's relevant. I'm just 5 asking whether Whinstone is aware of it. I think Whinstone is aware that the most recent б Α. 7 contract provides 50 percent of the power that's used in 8 Building B in the calculation. 9 Q. Is Whinstone aware that Air HPC receives roughly 10 50 percent of the profits from Jordan HPC? A. Based upon this email, Chad was made aware of 11 that math before the new contracts were signed. 12 Is 50 percent times 50 percent is 25 percent, 13 0. 14 right? Depends -- mathematically, it depends upon who 15 Α. 16 is using what. If -- if Jordan HPC is using 50 percent 17 of the power, then half is at 50 percent, and half is at 18 25 percent. But I -- we're getting into a what-if 19 scenario, because we don't believe that there's anything other than the contract prevailing as of 20 21 December 31, 2020. Q. Did Whinstone push back on Mr. Cerasuolo's 22 23 assertion that Whinstone would receive an indirect 25 24 percent interest in Jordan HPC in December of 2020? 25 Objection, form. MR. MARX:

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288 1 IN THE UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF TEXAS 2 HOUSTON DIVISION 3 _____) IN RE:) CHAPTER 11 4 RHODIUM ENCORE LLC, et al.,) CASE NO 24-90448(ARP) 5 6 DEBTORS.) 7 (Jointly Administered)) 8) 9 10 REPORTER'S CERTIFICATE ORAL DEPOSITION OF JEFF MCGONEGAL 11 12 OCTOBER 25, 2024 I, Mary Lou Taylor, Certified Shorthand Reporter in 13 14 and for the State of Texas, hereby certify to the 15 following: That the JEFF MCGONEGAL, was duly sworn and by the 16 officer and that the transcript of the oral deposition is 17 a true record of the testimony given by the witness: 18 19 That the deposition transcript was duly submitted on 20 _____ to the witness or to the attorney for 21 the witness for examination, signature, and return to me 22 by _____. That the amount of time used by each party at the 23 deposition is as follows: 24 25 MR. WILL THOMPSON - (6h18m)

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1	MR. BRANDON MARX - (0h0m)
2	I further certify that I am neither counsel for,
3	related to, nor employed by any of the parties in the
4	action in which this proceeding was taken, and further
5	that I am not financially or otherwise interested in the
6	outcome of this action.
7	Further certification requirements pursuant to Rule
8	203 of the Texas Code of Civil Procedure will be complied
9	with after they have occurred.
10	Certified to by me on this day of
11	<u>October</u> , 2024.
12	$M \sim 0 T \rho$
13	Mary Lou Taylor
14	MARY LOU TAYLOR TEXAS CSR NO. 2215
15	ACE COURT REPORTING SERVICE & DIGITAL VIDEOGRAPHY
16	220 E. UNIVERSITY DRIVE EDINBURG, TEXAS 78539
17	(956) 380-1100 info@acecourtreporting.com
18	
19	
20	
21	
22	
23	
24	
25	

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1	FURTHER CERTIFICATION UNDER RULE 203 TRCP
2	The original deposition was/was not returned to
3	the deposition officer on;
4	If returned, the attached Changes and Signature
5	page contains any changes and the reasons therefor;
6	If returned, the original deposition was
7	delivered to, Custodial Attorney;
8	That \$ is the deposition officer's
9	charges to the Party for preparing the original
10	deposition transcript and any copies of exhibits;
11	That the deposition was delivered in accordance
12	with Rule 203.3, and that a copy of this certificate was
13	served on all parties shown herein on and filed with the
14	Clerk.
15	Certified to by me this <u>31st</u> day of
16	October, 2024.
17	
18	
19	
20	Mary Lou Taylor
21	MARY LOU TAYLOR TEXAS CSR NO. 2215
22	ACE COURT REPORTING SERVICE & DIGITAL VIDEOGRAPHY
23	220 E. UNIVERSITY DRIVE EDINBURG, TEXAS 78539
24	(956) 380-1100 info@acecourtreporting.com
25	
25	

Exhibit 2

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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.

BENJAMIN GIBSON

Tuesday, October 22nd, 2024 12:01 p.m. - 2:26 p.m.

LOCATION: Prevail Testimony Management Platform

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there, share with Rhodium as they saw fit. 1 2 Did anyone from Whinstone explain to you 0. how the site being out of operation might affect the 3 4 issues you were addressing? 5 That's not something I asked, other Α. than -- obviously, I recognize that you'd have less of б 7 a workforce and operation going on. There's going to be less exposure during that period. But I was aware of, 8 9 you know, what the OSHA standards are, the safety 10 hazards. 11 Operation or not, it was -- these were findings from previously. Let's see what the status of 12 13 them is at this moment in one time. Has it been corrected, addressed, et cetera. 14 15 And you didn't speak to any Rhodium Ο. people about how the operation being shut down might 16 17 affect the issues you were inspecting; is that fair? 18 Yeah. I did not speak to any Rhodium Α. personnel as far as conducting interviews. I more or 19 less was checking back on the issues from the prior 20 21 inspection and the conditions present at the site, 22 which I did not see, you know, any significant change, 23 improvement, et cetera, still present. 24 Got it. Okay. You are next at the site on Q. February 17th, and I'm jumping way ahead, you'll be 25

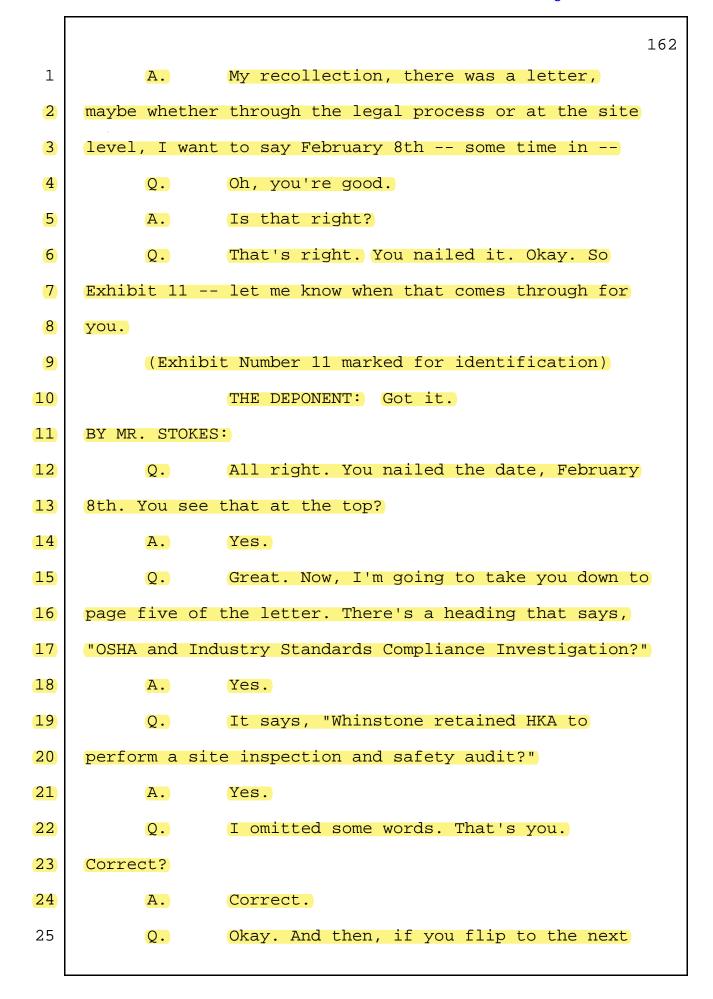
159

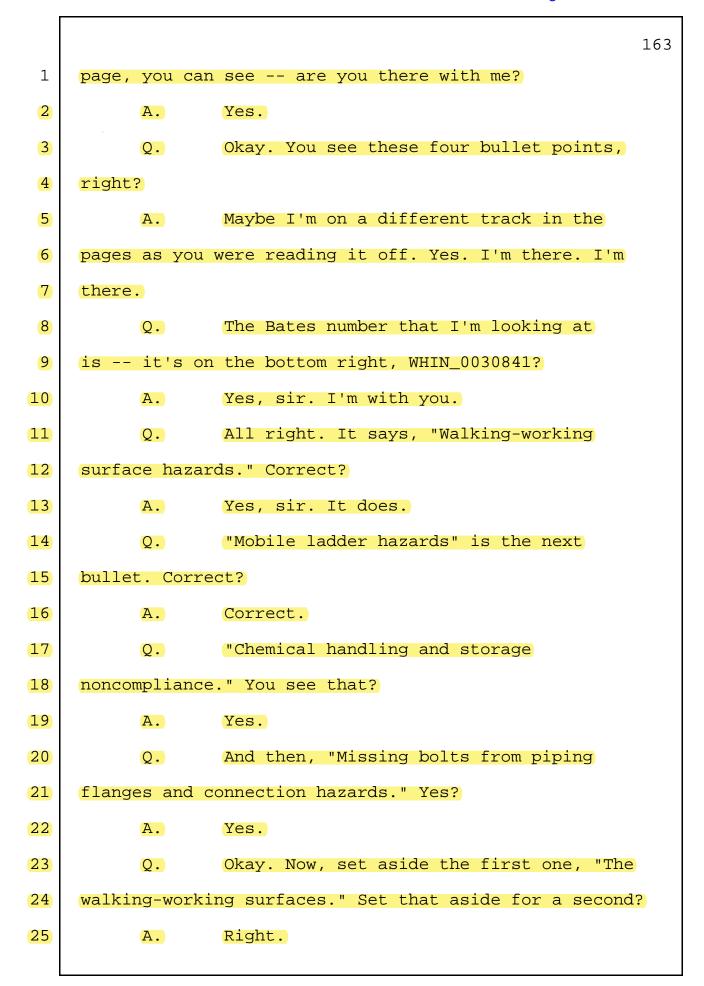
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1	happy to know, to page 46 of your report.
2	A. Okay.
3	Q. Am I right that February 17th was the
4	next visit?
5	A. That's correct. Yes, sir.
6	Q. Okay. At this point, you acknowledge
7	that sorry. A thing came up and lost my train of
8	thought. Strike that question.
9	At this point, you acknowledge that at
10	least some of the issues you previously identified had
11	been corrected; is that true?
12	A. That is correct. Yes, sir. Some of those
13	prior issues had been rectified at that point during
14	the February visit. That's correct.
15	Q. Okay. And if I'm just reading
16	paragraph sorry.
17	A. Two seconds. I want to close the
18	[inaudible]. There's light coming in from outside.
19	Q. Do it.
20	A. Thank you.
21	Q. Yeah. All good. I know that feeling.
22	A. Yeah.
23	Q. Okay. Picking back up here. Paragraph 47
24	of your report.
25	A. Yes, sir.

]	
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1	Q. You say that the issues resolved included
2	the bolting of flanges and piping connections had been
3	addressed and corrected?
4	A. That's right.
5	Q. That the mobile ladder stands, which had
6	been modified and altered, had been removed from
7	Rhodium's Building C?
8	A. Yes.
9	Q. And it appeared, at that point, that
10	elevated work was being performed with the scissor
11	lifts?
12	A. Correct. Correct.
13	Q. And then the chemical storage issues had
14	also been resolved, and the open containers were
15	removed and or properly covered?
<mark>16</mark>	A. Correct. That's right.
17	Q. You still observed some leaking wet
18	floor issues that you were attributing to leaks and
19	spills. Fair?
20	A. Fair. Yes, sir.
21	Q. Okay. And your report doesn't mention any
22	other ongoing issues as of February 17th, right?
23	A. Correct. That's right.
24	Q. Okay. Are you aware of the date on which
<mark>25</mark>	Rhodium was informed of your January findings?

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1	Q. Isn't it the case that as of February
2	17th, all of the issues flagged here have been
3	resolved?
4	A. Based upon return to the site, the leaks
5	and spill or the wet floors was the item that remained
6	persistent throughout while the yeah, the ladders,
7	the flammable material storage, and the missing bolts
8	and piping connections had been resolved. That is
9	correct.
10	Q. Okay. And you specifically opined in your
11	report that the issues with the bolts, flanges, and
12	piping connections
13	A. Right.
14	Q had been addressed, right?
15	A. Yes. From my inspection, all the bolts
<mark>16</mark>	have been put in place. There were still some leaks,
17	but there was no longer just you know, because
18	missing bolts is one of the first things that may
19	result in leaks if you don't have the uniform, even
20	compression on that flange joint. But yeah, from what I
21	saw, they had installed all the bolts.
22	Q. Got it. And just looking back to your
23	report now. I'm looking at paragraph 47.
24	A. Right.
<mark>25</mark>	Q. You wrote that the bolting of flanges and

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piping connections had been addressed and corrected. 1 That's what you wrote? 2 3 Α. Yes. 4 Ο. Okay. But you were still seeing liquid on the floor. Correct? 5 Yeah. There were still some leaks. But as б Α. 7 far as the bolts had been put in place, or the cap screws and stud bolts, yes, they've been put in place 8 9 on the flanges. 10 Q. And the piping connections that you had previously identified had been addressed and corrected? 11 Regarding the bolting issue. Yes, sir. 12 Α. Okay. Doesn't that suggest to you that 13 0. 14 the wetness was, at least at this point, coming from 15 the tanks themselves? 16 Α. No, sir. I still saw leaks at the 17 flanges. So again, this is -- I don't expect you to know this, but -- because it's not in your realm, but 18 just having the bolts there is one step. 19 You need all the bolts for the joint to 20 have the proper joint assembly, but you also -- they 21 22 have to be torqued in a proper sequence. You've got 23 that big circle, and, say, there's eight here, here, 24 here, here, and a certain amount with each torque applied to get the proper tension needed and uniform 25

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deformation of the gasket inside that creates the 1 2 sealing or seating surface. 3 And so, it's not just the bolts. The 4 bolts are a big part of that and how you achieve it, 5 but you have to have the flange joint aligned. If you have one a little bit high, a little low, it's all kind 6 7 of little things that can affect and relate to the 8 leaks. But the bolts was the big first step we needed. 9 But then it also requires several other 10 factors to get that joint snug and tight without a 11 leak. So no, it doesn't mean to me that that fixed the leaks, but it does mean they put the bolts in that 12 should have been there. 13 Okay. All right. Then the last site visit 14 0. occurred October 3rd; is that right? 15 16 Α. That's right. Yes, sir. 17 Q. Fair to say no significant change from February 17th? 18 That is fair. Yes, sir. The leaks and 19 Α. spill issue was still an issue, but the mobile ladders 20 21 were gone. Flammable material storage was no longer. 22 That material was removed. The bolts were still in 23 those flange joints. So, yeah, pretty similar finding. 24 Did you attend this visit personally? Q. No. We've talked about that. I think I 25 Α.

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1	CERTIFICATE OF REPORTER
2	STATE OF NEW YORK)
3	COUNTY OF NEW YORK)
4	
5	I, Joshua Burke, do hereby certify that I was
6	authorized to report the deposition of BENJAMIN GIBSON;
7	that the Deponent was duly sworn by me; that the
8	testimony then given by BENJAMIN GIBSON was transcribed
9	under my direction by David L. Kelly, LSR, CSR, CP and
10	that the foregoing transcript is a true and correct
11	record of the testimony given, to the best of my
12	ability.
13	I further certify that I am not a relative,
14	employee, attorney, or counsel to any of the parties,
15	nor am I a relative or employee of any of the parties'
16	attorneys or counsel connected with the action, nor am
17	I financially interested in the action.
18	
19	DATED this 25th day of October 2024.
20	Joshua Burke
21	Joshua Burke
22	Notary Public, State of New York Commission: 01BU6315298
23	Expiration: 2/2/2027
24	
25	