Docket #0763 Date Filed: 02/10/2025
United States Bankruptcy Court
Southern District of Texas
ENTERED
February 10, 2025
Nathan Ochsner, Clerk

IN THE UNITED STATED BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	**CASE NO: 24-90448**
RHODIUM ENCORE LLC, *et al.*,	§	
Debtors.	§	**Jointly Administered**
	§	**CHAPTER 11**

SECOND INTERIM ORDER ON PHASE 1 OF MOTION TO ASSUME EXECUTORY CONTRACTS (ECF NOS. 7 & 32)

I. PROCEDURAL HISTORY

On August 24, 2024, Rhodium Encore LLC, Jordan HPC LLC ("Jordan HPC"), Rhodium JV LLC ("Rhodium JV"), Rhodium 2.0 LLC, Rhodium 10MW LLC, and Rhodium 30MW LLC ("Rhodium 30MW") each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the "Initial Debtors"). The Initial Debtors' cases are jointly administered as *In re Rhodium Encore LLC, et al.*, Case No. 24-90448 (ARP). Contemporaneously, the Initial Debtors also filed a Motion to Assume Certain Executory Contracts with Whinstone US, Inc. ("Whinstone")(the "Motion to Assume").[1] On August 29, 2024, additional affiliates of the Initial Debtors also filed for chapter 11 relief: Rhodium Technologies LLC, Rhodium Enterprises Inc., Rhodium Renewables LLC, Rhodium Ready Ventures LLC, Rhodium Industries LLC, Rhodium Shared Services LLC, Rhodium Renewables Sub LLC, Rhodium 30MW Sub LLC, Rhodium Encore Sub LLC, Rhodium 10MW Sub LLC, Rhodium 2.0 Sub LLC, Air HPC LLC ("Air HPC"), and Jordan HPC Sub LLC (these parties together with the Initial Debtors, are the "Debtors"). The Debtors filed Debtors' Supplemental Motion to Assume Certain Executory Contracts with Whinstone US, Inc. (together, both

[1] ECF No. 7.

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are referred to as the "Motion to Assume").[2] The complete schedule of contracts the Debtors have moved to assume is listed in the Motion to Assume.[3]

After extensive motion practice, and at the request of the parties, the Court agreed to bifurcate the issues for hearing on the Motion to Assume into a Phase 1 and Phase 2.[4] Phase 1 addressed which agreements controlled the relationship between the parties, whether any of the agreements were superseded by other agreements, the existence of defaults, whether any agreements were terminated as a result of a breach, and whether any defaults had continued or had been cured. These issues were hotly contested. Whinstone argued the relationship between Whinstone and the Debtor was controlled by the December 2020 Agreements (as defined herein), whereas Debtors argued all 25 contracts between the parties were in effect and controlling. The Phase 1 hearing was conducted over four days from November 12, 2024, to November 15, 2024. The Court admitted numerous exhibits[5] and heard testimony from nine witnesses. The parties agreed Phase 2 was to be limited to issues of cure, compensation, and adequate assurance.

Following the Phase 1 hearing, this Court issued a 38-page Interim Order on Phase 1 of Motion to Assume Executory Contracts (ECF Nos. 7 & 32) ("Interim Order").[6] The Court asked the parties to confer with each other to determine the scope of Phase 2. After extensive communication, and two status conferences,[7] Whinstone and the Debtors have been unable to agree on the scope of the Phase 2 hearing. Therefore, still at issue following the January 24, 2025, Status

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2 ECF No. 32.
3 ECF No. 32-1 at 4-6.
4 ECF No. 351 (Update provided to court regarding agreement of bifurcation of the trial as stated on the record).
5 Trial Tr., November 12, 2024, 5:19-7:4.
6 ECF No. 579.
7 ECF No. 619; ECF No. 725.

Conference on the Motion to Assume[8] is the scope of the Phase 2 hearing. As outlined in the Interim Order and above,

> The Phase 1 hearing addressed which agreements control the relationship between the parties, whether any of the agreements were superseded by other agreements, the existence of defaults, whether any agreements were terminated as a result of a breach, and whether any defaults have continued or have been cured. Phase 2 will address issues of cure, compensation, and adequate assurance.[9]

Using this agreed upon framework and for the reasons set forth below, the Court will conduct a Phase 2 hearing limited to the Ancillary Charge Invoices and the Miscellaneous Invoices (as defined herein) and whether any adequate assurance is necessary.

II. RELEVANT FACTS

In July 2020, Rhodium 30MW entered into a New Hosting Service Agreement ("30MW Agreement") to receive 30MW of power from Whinstone at a fixed price.[10] Also in July 2020, Rhodium JV entered into twenty identical New Hosting Service Agreements with Whinstone ("5MW Agreements," and together with the 30MW Agreement, the "July 2020 Agreements") to receive 5MW of power at a fixed price for a period of ten years.[11] In November 2020, Whinstone and Jordan HPC (a subsidiary of another Debtor entity, Air HPC LLC), entered into the Jordan HPC Colocation Agreement[12] with Whinstone ("Jordan Agreement") for 25MW of power and space in Building B.[13]

The parties then executed three additional agreements with effective dates of December 31, 2020: the Withdrawal, Dissociation, and

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8 ECF No. 725.
9 ECF No. 579 at 4.
10 ECF No. 208-6; ECF 579 at 6.
11 ECF No. 208-5; ECF 579 at 6.
12 ECF No. 208-7; ECF 579 at 6.
13 ECF No. 409 at 3; ECF 579 at 6.

Membership Interest Agreement ("Withdrawal Agreement") pursuant to which Whinstone's 12.5% equity stake in Rhodium JV was redeemed at Whinstone's request for business and tax purposes,[14] the Rhodium JV Hosting Agreement ("December JV Agreement") between Rhodium JV and Whinstone,[15] and the Air HPC Hosting Agreement ("December Air Agreement," and together with the December JV Agreement, the "December 2020 Agreements").[16] The final contract at issue between the parties is the Water Supply Services Agreement ("Water Agreement") by which Whinstone provides water to assist in the cooling of the mining infrastructure.[17] Whinstone argues the Water Agreement was automatically terminated in November 2023 at the same time they argue the December 2020 Agreements were terminated.[18]

Based on the evidence and the plain language of the agreements, this Court found the December 2020 Agreements did not supersede all prior agreements.[19] These reasons are discussed in depth in the Interim Order.[20] This Court then analyzed whether any of the 25 agreements were terminated prior to the petition date and found they were not terminated.[21] The testimony presented in the Phase 1 hearing demonstrated the December 2020 Agreements controlled the profit share, and the July 2020 Agreements controlled the power draw.[22] In

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[14] ECF No. 208 at 4; *See generally*, ECF No. 208-9; ECF No. 579 at 7.
[15] ECF No. 208-3; ECF No. 579 at 7.
[16] ECF No. 208-4; ECF No. 579 at 7.
[17] ECF No. 365-5; ECF No. 579 at 8.
[18] ECF No. 208-12.
[19] ECF No. 579 at 15.
[20] ECF No. 579 at 16-25.
[21] ECF No. 579 at 25-28, 37.
[22] ECF No. 579 at 20-21; Trial Tr., November 14, 2024, 797:6-10 – Debtors cross examination of Harris (Q. And Rhodium, on December 30th, 2020, expressly told you that it wouldn't be Rhodium JV LLC that would be drawing that power, correct? A. That's what it states); Trial Tr., November 12, 2024, 159:7-17 – Debtors direct examination of Nichols (Q. Okay. So at the time the redemption agreement was signed, what hosting or colocation agreements were in place between the parties? A. You had the 20, 5-megawatt contracts, you had the Rhodium 30-Megawatt power contract, you also had the Jordan power contract. Q. So what agreements, to your understanding, was the redemption agreement referring to when it said parties wanted to continue their business relationship? A. All of those power agreements.);

the Interim Order, this Court ruled all the agreements between the parties are enforceable and subject to assumption. Whinstone argues that because of the findings in the Interim Order, there are "new" defaults arising under the December 2020 Agreements that must be addressed in Phase 2. Whinstone tries to further expand the scope of Phase 2 through the introduction of these new bases of default that did not result in termination.[23] Whinstone's justification for this expansion is the sentence in the Interim Order that "[i]n Phase 2 the Court will determine if any of the nonmonetary defaults (or any other alleged default which did not result in termination) provides a sufficient basis to trigger the Debtors' obligations under 11 U.S.C. § 365(b)(1)."[24] Expansion of Phase 2 is improper, as Phase 1 addressed the existence of defaults and this sentence was not an invitation for Whinstone to introduce new bases of default.[25] This sentence merely explains Phase 2 will focus on whether any identified defaults from Phase 1 will result in the need for cure, compensation, and/or adequate assurance.

III. JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334, which grants district courts original and exclusive jurisdiction

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Trial Tr., November 12, 2024, 171:25–172:16 – Debtors direct examination of Nichols (Q. Do you recall, as between the profit share agreements and the power agreements, which agreements' pricing terms for power the parties followed? A. They always follow the power agreements. Q. And what is the basis of your understanding there? A. Because we always paid for the power that we consume. Q. Okay. And is that the basis for the power charge, to your understanding under the power agreements? A. Yes. Q. Is that the basis for the power charge under the profit share agreements to your understanding? A. No.); ECF No. 579 at 22-23 ("Whinstone charged Debtors for power actually consumed even though that amount of power was less than the then-current Specified Power Draw, as required under the December 2020 Agreements.").

[23] ECF No. 641.

[24] ECF No. 641.

[25] ECF No. 645 at 27; Trial Tr., October 28, 2024, 27:20-22 – The Court to the parties (I don't think it's appropriate to rely on a breach that hasn't been identified during this process.); Trial Tr., October 28, 2024, 27:25–28:2 – The Court to the parties (I just want to make sure that whatever the Debtor -- whatever Whinstone is intending to rely upon for a breach, that that has been identified.).

over all Title 11 cases.[26] Pursuant to 28 U.S.C. § 157(b)(1), bankruptcy judges may hear and determine all core proceedings arising under Title 11. A determination of a debtor's ability to assume an executory contract is a core matter under 28 U.S.C. § 157(b)(2)(A). Therefore, the bankruptcy judge may hear and determine the Motion to Assume. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The basis for the relief requested by the parties are sections 365(a) and 105(a) of the Bankruptcy Code, and rules 6004(h) and 6006 of the Bankruptcy Rules.

IV. DISCUSSION

According to Whinstone, there are four alleged defaults that must be addressed in Phase 2. The Court addresses these arguments in turn.

A. The amount due under the monthly power draw under Section 6.1 of the December JV Agreement.

Whinstone argues Debtors failure to pay the Specified Power Draw was not at issue in Phase 1 because during Phase 1 Whinstone had believed it charged Debtors for power under December 2020 Agreements, but the Interim Order ruled Debtors drew power and were billed under the July 2020 Agreements[27] while the December 2020 Agreements controlled the revenue share.[28] Since there was no supersession and all of the agreements were in effect at the petition date, Whinstone now argues Debtors were contractually required to make payments under Section 6.1 of the December JV Agreement and Debtors did not make these payments. This argument is logically inconsistent because Whinstone has all along alleged the relationship was governed by the December 2020 Agreements. Additionally, Whinstone has already charged Debtors for their power usage. The testimony presented in Phase 1 demonstrated the July 2020 Agreements

[26] 28 U.S.C. § 1334(a).
[27] ECF No. 641 at 3.
[28] ECF No. 579 at 18.

controlled the power draw,[29] and the evidence showed Whinstone never provided power to any Debtor entity beyond the power contracted for and used by the operating companies under the July 2020 Agreements. Whinstone cannot now charge Debtors again for power usage they have already been charged for.

Whinstone never invoiced Debtors for the Specified Power Draw under Section 6.1 of the December JV Agreement. Furthermore, based on the testimony provided during Phase 1, Harris was expressly told Rhodium JV (one of the Debtor entities) would not be drawing power under the December 2020 Agreements.[30] This testimony contradicts Whinstone's claim they believed they were charging Debtors for power under the December 2020 Agreements.[31] Phase 1 was for addressing the existence of defaults.[32] Whinstone cannot bring up new theories of default during Phase 2, and certainly cannot bring up a new theory of default based on the fact this Court held in Phase 1 that all agreements were in effect, as Whinstone has been arguing from the beginning the December JV Agreement was controlling and it was the earlier agreements between the parties that had been superseded. This argument will not be considered in Phase 2.

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[29] Trial Tr., November 12, 2024, 171:25–172:16 – Debtors direct examination of Nichols (Q. Do you recall, as between the profit share agreements and the power agreements, which agreements' pricing terms for power the parties followed? A. They always follow the power agreements. Q. And what is the basis of your understanding there? A. Because we always paid for the power that we consume. Q. Okay. And is that the basis for the power charge, to your understanding under the power agreements? A. Yes. Q. Is that the basis for the power charge under the profit share agreements to your understanding? A. No.); ECF No. 579 at 22-23 ("Whinstone charged Debtors for power actually consumed even though that amount of power was less than the then-current Specified Power Draw, as required under the December 2020 Agreements.").

[30] Trial Tr., November 14, 2024, 797:6-10 – Debtors cross examination of Harris (Q. And Rhodium, on December 30th, 2020, expressly told you that it wouldn't be Rhodium JV LLC that would be drawing that power, correct? A. That's what it states).

[31] ECF No. 641 at 3.

[32] ECF No. 579 at 4.

B. The amount owed under the Water Agreement for 2024 (up to the petition date).

Whinstone argues they did not invoice Debtors under the Water Agreement because they thought the Water Agreement terminated at the end of 2023, the same time Whinstone argues the December 2020 Agreements were terminated.[33] Whinstone previously invoiced Debtors for the Water Agreement at the beginning of each respective year, but did not bill Debtors in 2024 for water under the Water Agreement.[34] According to the terms of the agreement, Debtor shall pay Whinstone annually on the anniversary of the Effective Date (August 12, 2021)[35] and no invoice is required under the Water Agreement unless requested.[36] As previously discussed, this Court held in the Interim Order that none of the 25 agreements were terminated pre-petition.[37] With all the agreements held enforceable and subject to assumption, Whinstone would like to receive payment from Debtors under the Water Agreement for 2024 and is alleging Debtors non-payment of the amount owed under the Water Agreement is a default.

Whinstone raised this basis of default on January 17, 2025.[38] According to the evidence, Whinstone did not raise this basis of default in any of their earlier filings with this Court. Additionally, Debtors argue Whinstone has not provided useable water and has breached the Water Agreement.[39] This court does not need to determine whether Whinstone breached the Water Agreement. As previously discussed, it is improper for new bases of default to be raised in Phase 2 and Whinstone is trying to use nonpayment of the Water Agreement as a

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[33] ECF No. 676 at 4.
[34] ECF No. 676-6 (email from Michael Thomas to John Stokes).
[35] ECF No. 365-5 at 1.
[36] ECF No. 365-5 at 2.
[37] ECF No. 579 at 25-28, 37.
[38] ECF No. 641; ECF No. 676-6 (email from Michael Thomas to John Stokes).
[39] Trial Tr. November 15, 2024, at 1242:22-23, 1245:19-24 ("I found that the water was well out of specification") (Q. Based on your analysis, using either the inlet or the outlet, was the water that was being provided by Whinstone within the specifications set by Güntner? A. No, it wasn't, neither the inlet nor the outlet.).

new basis of default. Therefore, this Court will not include the Water Agreement in the Phase 2 hearing, especially when failure to pay amounts under the Water Agreement could have been identified in Phase 1 and plead in the alternative, which Whinstone routinely did with respect to other issues.[40]

C. The amount claimed by Whinstone under the Jeff Matthews calculation.

In the Interim Order, this Court determined the Ernst & Young revenue share calculation used by Whinstone[41] was not correct. At the Phase 1 hearing Whinstone also presented an alternate calculation run by Jeff Matthews using Debtor's methodology.[42] Using that methodology, Matthews found Debtors underpaid Whinstone around $200,000.[43] This Court did not, and does not, take a position on the accuracy of the calculation. However, this Court did find that *if* Matthews's calculations are correct, and Debtors underpaid Whinstone

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[40] ECF No. 208 at 7 ("Out of an abundance of caution and in light of arguments raised by the Debtors in the pre-bankruptcy litigation, Whinstone issued another termination notice on April 22, 2024 identifying additional grounds for terminating the Rhodium JV December Hosting Agreement and, to the extent the twenty 5MW agreements existed and were not previously superseded, Whinstone terminated those agreements, as well, due to existing, uncured defaults."); ECF No. 358 at 23 ("But even if Debtors' interpretation of the Rev Share Payment provision prevails, Rhodium JV and Air HPC still breached their payment obligations."); ECF No. 409 at 21 ("Even if this Court finds that the November 2023 Termination Notice was not effective, Whinstone's April 2024 Termination Notice removes any doubt that any contract that existed between Whinstone and the Debtors is no longer executory.").

[41] ECF No. 386-10.

[42] ECF No. 579 at 27; Trial Tr., November 15, 2024, 1159:22–1160:4 – Whinstone direct examination of Matthews (Q. And is there any other opinion that you formed? A. I ran an alternate calculation. When I reviewed Rhodium's methodology, it appears that they included some deductions that were contained in various operating agreements, and so when I applied those deductions, I also come up with an underpayment to Whinstone.).

[43] ECF No. 579 at 27; Trial Tr., November 15, 2024, 1176:20-25 – Debtors cross examination of Jeff Matthews (Q. You still come up with an underpayment that way? A. I do, yes.).

around $200,000, a $1,500,000 million overpayment made to Whinstone in 2021 resolved any potential breach.[44]

Whinstone next argues that under Section 6.5 of the December 2020 Agreements[45] Debtors cannot off-set any amount owed to Whinstone.[46] However, Whinstone's argument is incorrect.[47] The language of Section 6.5 states "[c]ustomer shall not off-set any amount owed or alleged to be owed by Provider to Customer against any other payments due to Provider."[48] According to this provision, Debtors cannot off-set any amount owed/alleged to be owed by Whinstone to Debtors against any payments Debtors owe to Whinstone. Here, the $1,500,000 million is an overpayment, not a payment Whinstone would owe the Debtors under any of the 25 agreements. Whinstone also argues while Rhodium JV was the party that underpaid Whinstone, Air HPC was the party that overpaid Whinstone, and Air HPC's overpayment cannot be used to cure Rhodium JV's default.[49] This argument ignores the fact Whinstone accepted and has kept the overpayment, making Whinstone more than whole. This argument also misinterprets Matthews' testimony. Whinstone argues Matthews testified the underpayment came from Rhodium JV, but Matthews was using the term "Rhodium" to describe the Debtors generally, rather than to identify a specific Debtor entity.[50]

Whinstone further argues even if the $1,500,000 million overpayment resolves the $200,000 underpayment, a resolved default is still a default that gives rise to the Debtors obligations under Section

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44 ECF No. 579 at 27-28.
45 ECF No. 208-3 at 12; ECF No. 208-4 at 12.
46 ECF No. 641 at 9.
47 ECF No. 641 at 9.
48 ECF No. 208-1 at 12; ECF No. 208-2 at 12.
49 ECF No. 740 at 6; Trial Tr., November 13, 2024, 673:24–674:1 – Debtors direct examination of Alex Peloubet (Q. Which operating entity did that formula error affect? A. It really impacted the Jordan entity.).
50 Trial Tr., November 15, 2024, 1159:24–1160:4 – Whinstone direct examination of Matthews (I ran an alternate calculation. When I reviewed Rhodium's methodology, it appears they included some deductions that were contained in various operating agreements, and so when I applied those deductions, I also come up with an underpayment to Whinstone.).

365.[51] The evidence shows Whinstone never provided notice to Debtors of the alleged $200,000 underpayment as required under the terms of the December 2020 Agreements.[52] Therefore, there is no default to be included in a Phase 2 hearing.

D. The amounts identified in Whinstone's proof of claim for prepetition invoices ($2,243,438.25).

Whinstone argues that after reviewing its productions it has determined all or nearly all the 47 invoices totaling $2,243,438.25, or similar information about the unpaid amounts, have been timely and previously produced.[53] Whinstone states it merely produced the information again on October 29, 2024, following Debtor's requests for Whinstone to supplement its interrogatory responses.[54] Debtor argues none of the invoices were properly disclosed in discovery.[55] According to Debtor, Whinstone did not disclose the invoices in discovery in response to Debtor's interrogatories,[56] and only identified the invoices on October 30, 2024, after the close of discovery.[57]

Based on the information submitted by the parties after the Phase 1 hearing, it appears nine of the invoices totaling $760,711.78 came due post-petition. These invoices cannot form the basis of the pre-petition default, and in any event, Debtor has agreed to pay them.

An additional 16 invoices totaling $1,108,533.23 for ancillary charges incurred at Building C ("Ancillary Charge Invoices") are the subject of a dispute between the parties. Phase 2 will address any legal issues

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[51] This argument was made in the slideshow Whinstone produced for the January 24, 2025, status conference.

[52] ECF No. 208-3 § 17.1.1; ECF No. 208-4 § 17.1.1 (It is a Termination Event if "a Party fails to make a payment to the other Party owed under this Agreement when due, unless such default is remedied within three (3) Business Days following the breaching Party's receipt of notice by the non-breaching Party of such failure.").

[53] ECF No. 641-2 (Invoice and AR Production Reconciliation excel spreadsheet).

[54] ECF No. 641 at 9.

[55] ECF No. 676 at 9.

[56] ECF No. 676-4.

[57] ECF No. 676 at 10; ECF No. 676-5.

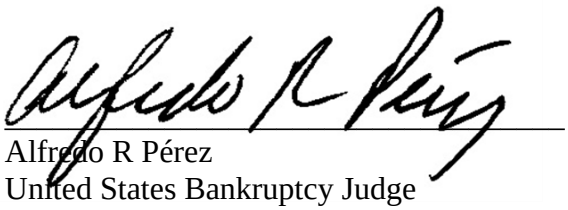
relating to the Ancillary Charge Invoices as well as the 22 remaining invoices totaling $374,145.98 ("Miscellaneous Invoices"). In other words, whether the Ancillary Charge Invoices or the Miscellaneous Invoices are valid and properly owed, whether demand was ever made for payment of any of these invoices, and which amounts (if any) that are not resolved by the overpayment may still be owed.

V. CONCLUSION

For the reasons stated above, amounts claimed to be due under the power draw, the Water Agreement, and the Jeff Matthews calculation are not the proper subject for a Phase 2 hearing because they were never raised prior to or during Phase 1, a proper demand was never made for them, and at least as it relates to the $200,000 underpayment under the Jeff Matthews alternate calculation, to the extent it may have been owed, it was satisfied by the overpayment.

With respect to the Ancillary Charge Invoices and the Miscellaneous Invoices, this Court will conduct a Phase 2 hearing on February 26, 2025, at 1:00 p.m. (Central Time) at Houston Courtroom 400, to determine the validity of these invoices including any legal issues, whether demand was ever made for payment, and which amounts (if any) are still owed after consideration of the overpayment and whether any adequate assurance is necessary.

SIGNED 02/10/2025



Alfredo R Pérez
United States Bankruptcy Judge