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

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

NICHOLAS CERASUOLO'S REPLY IN SUPPORT OF MOTION FOR AN ORDER ALLOWING LATE FILED CLAIM TO BE TREATED AS TIMELY FILED

Nicholas Cerasuolo, a creditor in the above-captioned chapter 11 cases, by and through his undersigned counsel, hereby replies to the Objection to Nicholas Cerasuolo's Motion for an Order Allowed Late Filed Claim to be Treated as Timely Filed [ECF No. 932] (the "Debtors Objection") and the Objection of the Ad Hoc Group of SAFE Parties to Nicholas Cerasuolo's Motion for an Order Allowing Late Filed Claim to be Treated as Timely Filed [ECF No. 941] (the "SAFE AHG Objection, and together with the Debtors Objection, the "Objections") and in support of Nicholas Cerasuolo's Motion for an Order Allowing Late Filed Claim to be Treated as Timely Filed [ECF No. 881] (the "Motion")[2] follows:

PRELIMINARY STATEMENT

1. Despite the apparent position of the Debtors and the SAFE AHG, the Bankruptcy Rules, orders of this Court, and due process mean something. Bankruptcy Rule 2002(a)(7) requires "at least 21 days' notice by mail of . . . the time fixed for filing proofs of claim pursuant to Rule

[1] The debtors and debtors-in-possession in these chapter 11 cases (the "Debtors") 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.

[2] Capitalized terms used but not defined in this Reply shall have the meanings ascribed to such terms in the Motion.

3003(c) . . . ."[3] The Bar Date Order directed that "the Debtors shall cause written notice of the Bar Dates to be mailed via first class mail to . . . all creditors and other known holders of claims or purported claims against the Debtors as of the date of entry of the Bar Date Order" and "all current and former employees (to the extent that contact information for former employees is available in the Debtors' records) . . . ."[4] [ECF No. 284 at ¶ 12]. Due process requires actions reasonably calculated to provide actual notice. None of that happened in this case. Instead of taking issue with those failures, the Debtors and the SAFE AHG find inexcusable fault with Cerasuolo for not constantly checking the docket for the setting of a bar date or understanding the Bankruptcy Code and Bankruptcy Rules better than the Debtors' experienced restructuring professionals.[5]

2. Neither the Debtors nor the SAFE AHG disagree with the factual allegations in the Motion. They do not dispute that (a) Cerasuolo was a "known creditor," (b) the Debtors failed to mail notice as required by Bankruptcy Rule 2002(a)(7) and the Bar Date Order, (c) Cerasuolo was not aware of the actual bar date or the contents of the Bar Date Notice that the Court Order, (d) Cerasuolo believed that Imperium Investments Holdings LLC ("Imperium") and its counsel was

[3] Additionally, Bankruptcy Rule 1007(b)(1) requires a debtor to file schedules of assets and liabilities in the local form. Part 2 of Official Form E/F requires a debtor to list ***all*** creditors with nonpriority unsecured claims. The schedules are signed under penalty of perjury through the declaration contained in Official Form B202.

[4] The notice that the Court ordered the Debtors to serve on known creditors and current and former employees had to be substantially in the form of the Bar Date Notice attached to the Bar Date Order. [ECF No. 284 at ¶ 12]. That Bar Date Notice contained a detailed description of what constated a "claim" and specified that current officers, managers, directors, or employees of the Debtors did not need to file proofs of claim but would need to file proofs of claim within 30 days upon no longer serving in that role.

[5] Despite the involvement of counsel that the Debtors asserted to the Court had "recognized expertise and extensive experience and knowledge . . . in large and complex chapter 11 cases" [ECF No. 168 at ¶ 10], financial advisors with "extensive experience" including approximately 100 cases [ECF No. 169 at ¶ 8], and a separate consultant providing services regarding noticing [ECF No. 33 at p.6], neither the Debtors nor their professionals recognized that Mr. Cerasuolo's right to indemnity was a claim that should have been included on the schedules or provided with notice of the Bar Date. The incomplete and incorrect schedules are a particularly glaring issue. Bankruptcy Rule 1007 requires debtors to file their schedules within a certain period and they are signed under penalty of perjury. Admittedly inaccurate schedules—the Debtors' do not dispute Cerasuolo had a claim for indemnity on the Petition Date—remain pending before the Court without amendment. Somehow, Cerasuolo—without the benefit of counsel or the detailed description set the Bar Date Notice that the Debtors claimed would "provide for clear notice of the Bar Dates and an efficient claims reconciliation process" [ECF No. 269]—was supposed to have an understanding that evaded the Debtors and their experienced professionals. That is not reasonable.

representing his interests in the bankruptcy case, or (e) that Cerasuolo's bankruptcy counsel was not initially retained to represent him in these chapter 11 cases but rather a lawsuit brought by the Fairbairns/Transcend Group.[6] Instead, they simply argue that the neglect by Cerasuolo was not excusable and that Cerasuolo was not denied his constitutional right to due process.

3. These undisputed facts require Cerasuolo's claim to be treated as timely, and the authorities cited by the Debtors and the SAFE AHG Group do not dictate a different result. As set out in *In re Cyber Litigation Inc.*, 2021 WL 5047512 (Bankr. D. Del. Oct. 28, 2021), failure to serve a bar date notice by mail as required by Bankruptcy Rule 2002(a)(7), prevents disallowance of a claim on the grounds that it is untimely filed, even when service was made by email. *Id.* at *7-8. The cases cited by the Debtor and SAFE AHG are all critically distinguishable. For example:

a. Both the Debtors and the SAFE AHG repeatedly reference *Cornerstone Valve*, but in that case the creditor was actually served notice of the bar date by mail and did not file a proof of claim until three weeks *after* the court confirmed a plan. *In re Cornerstone Valve LLC*, 2021 WL 1731770, at *4 (Bankr. S.D. Tex. Apr. 27, 2021). Here, Cerasuolo was not served the Bar Date Notice, and the Proof of Claim and Motion were filed more than a month before the mediation to negotiate a plan, at which Cerasuolo will be a participant.

b. In the *ASARCO* decision the Debtors rely upon heavily, the creditor at issue was served "a Supplemental Bar Date Notice two months in advance of the deadline[,]" a settlement had already been reached in reliance on the claims register when the motion for late filed claim was filed, and there was no reason for the creditor's failure to file proofs of claim other than mere oversight. *In re ASARCO, LLC*, 2008 WL 4533733, at *1-3 (Bankr. S.D. Tex. Oct. 3, 2008). Again, here Cerasuolo was not served the Bar Date Notice, and the Proof of Claim and Motion were filed in advance of the parties even submitting an order for the mediation to negotiate a plan.

c. In the *Engage* decision relied upon by the SAFE AHG (a) the plan had already been confirmed and (b) the basis of the decision was that the movants failed to carry their burden when no evidence was submitted despite the "Liquidation Supervisor's"

[6] Bankruptcy Local Rule 9013-1(g) provides that responses to all motions (other than motions for relief from stay) "are governed by FED. R. BANKR. P. 7008." Bankruptcy Rule 7008 incorporates Rule 8 of the Federal Rules of Civil Procedure, which in turn requires specific denials that "fairly respond to the substance of the allegation." Failing to deny an allegation results in the allegation being admitted. FED. R. CIV. P. 8(b)(6). While the general practice of this District is not to require numbered denials as to complaints, the Bankruptcy Local Rules require, at a minimum, that factual disputes be raised in the response or objection to be put in dispute.

> assertion that the creditors had actual knowledge of the bar date. *In re Engage, Inc.*, 315 B.R. 217, 222, 224 (Bankr. D. Mass. 2004) ("[T]he Court has given the Movants meaningful opportunities to develop the record in order to carry their burden. . . .They have declined."). While here it is undisputed that Cerasuolo did not have actual knowledge of the Bar Date, in *Engage* it was "just as reasonable for the Court to infer that these parties had actual knowledge of the Bar Date and their potential exposure to be sued as to conclude that they did not." *Id.* at 225. Further, the bar date was in place in *Engage* from the beginning of the case—becoming aware of the case meant being aware of the bar date—whereas there was no bar date set in these chapter 11 cases for the first 49 days.

Although the Objections reference a myriad of cases to create the illusion of supporting authority, there is none in support of their position.

4. The Debtors and SAFE AHG are not any more accurate in presenting their factual and legal positions. Cerasuolo addresses the key problems below, but one is particularly puzzling. The Debtor and SAFE AHG assert that deeming the Proof of Claim timely would cause prejudice because of plan negotiations under the Court's various mediation orders. That is obviously not true. The first mediation order [ECF No. 894] was filed six (6) days after Cerasuolo's Motion, it was not entered [ECF No. 896] until nine (9) days after the Motion, and Cerasuolo has been a mediation party under both of the mediation orders entered. Any plan negotiations as of March 22 were not so advanced that Cerasuolo's proof of claim would interfere or undo those negotiations.

5. Ultimately, the Court should overrule the Objections and grant the Motion. Bankruptcy Rule 2002(a)(7), this Court's Bar Date Order, and the due process mandate for actual service on known creditors have to amount to more than merely an excuse for bankruptcy professionals to bill. At a minimum, it is excusable for someone to believe that they have meaning. The Court should reject the call to legal nihilism in the Objections.

REPLY ARGUMENTS

A. The undisputed failure of the Debtors to serve notice of the bar date on Cerasuolo by mail, as required by Bankruptcy Rule 2002(a)(7) and the Bar Date Order, is independently sufficient to deem the Proof of Claim timely.

6. Neither the Debtors nor the SAFE AHG dispute that the Debtors failed to service the Bar Date Notice on Cerasuolo by mail as required by the Bar Date Order [ECF No. 284 at ¶ 12] and Bankruptcy Rule 2002(a)(7). There is no dispute that Cerasuolo was a known creditor and the Debtors' former CFO. Nor do they dispute that the Debtors had Cerasuolo's address on file, as reflected in Rhodium Enterprises, Inc.'s Statement of Financial Affairs. [ECF No. 707 at p. 78]. As demonstrated by *In re Cyber Litigation Inc.*, 2021 WL 5047512 (Bankr. D. Del. Oct. 28, 2021), this by itself is a sufficient basis for treating Cerasuolo's Proof of Claim as timely filed.

7. In *Cyber Litigation*, a chapter 11 debtor moved to disallow a claim that the debtor scheduled as its largest unsecured creditor because the proof of claim was filed after the bar date and was therefore untimely. *Id.* at *1. After an evidentiary hearing, the U.S. Bankruptcy Court for the District of Delaware found that the bar date notice was sent (a) by mail to the principal of the creditor at the wrong address and (b) by email to an address that the principal actively used. *Id.* at *1. Despite finding the debtor's service efforts satisfied constitutional due process requirements, the Delaware bankruptcy court overruled the claim objection. *Id.* at *1-2.

8. The Delaware bankruptcy court's reasoning was straightforward. Bankruptcy Rule 2002(a)(7) sets out mandatory requirements with which parties must comply. *Id.* at *1. It is an important procedural protection for creditors that cannot just be waved away because a party could have perhaps acted differently. *See id.* at *2, *7. A creditor is entitled to receive notice of the bar date by mail, at the address required by Bankruptcy Rule 2002(g). *Id.* at *7. Absent a showing of

harmless error by the objector, a bar date cannot be enforced where notice of the bar date did not comply with the requirements of the Bankruptcy Rules.[7] *Id.* at *7-8.

9. *Cyber Litigation*'s discussion of harmless error is also relevant. While reasoning that harmless error could conceivably apply to Bankruptcy Rule 2002(a)(7), the court held that "it is insufficient to demonstrate that the creditor was sent notice by some other means by which he *might* or *should* have learned of the bar date." *Id.* at *8. Rather, the only way that the failure to serve notice as required by the Bankruptcy Rules to "perhaps" be harmless is if the objector proves that the creditor "obtained actual subjective knowledge of the bar date with more than 21 days' notice . . . ." *Id.* at *1, *2, *8.

10. Neither the Debtors nor the SAFE AHG dispute that Cerasuolo was not served the Bar Date Notice or assert that he had actual subjective notice through some other means. Unlike in *Cyber Litigation*, the Debtors did not even *attempt* to serve him notice. Instead, they assert that Cerasuolo had general knowledge of the chapter 11 cases and could have—with diligence and understanding surpassing that of the Debtors and their professionals—nevertheless found out about the bar date that did not exist for the first 49 days of these cases, its effects, and that his then-untriggered right to indemnity and advance of legal expenses required the filing of a proof of claim. Those arguments are unavailing. At a minimum, the failure of service contributed to Cerasuolo's lack of knowledge of the Bar Date and was not harmless.

B. The authorities regarding excusable neglect cited by the Debtors and SAFE AHG do not support their positions and are distinguishable on their operative facts and reasoning.

11. To get around this problem, the Debtors and the SAFE AHG patch together language from decisions with drastically different facts and inapplicable reasoning. In all but two

[7] The basis for establishing a bar date is Bankruptcy Rule 3003(c)(3). For a bar date to be used against a creditor—i.e., to deprive them of their rights—notice of the bar date must be served as required by other Bankruptcy Rules.

of the authorities cited, the bar date notice was properly served. In one of those outliers, the issue was priority under Bankruptcy Code § 726 (i.e., it was a chapter 7 case) where bar dates are automatically set and the statutory inquiry is expressly about notice of the case.[8] In the other, the objecting party affirmatively asserted that the creditors had actual notice of the bar date and the creditors declined to present evidence, despite the invitation of the court. There is not a single cited authority by the Debtors or the SAFE AHG that is contrary to the relief sought in the Motion or *Cyber Litigation* as applied to the undisputed facts. Cerasuolo addresses these authorities below.

i) In re Cornerstone Valve LLC, 2021 WL 1731770 (Bankr. S.D. Tex. April 27, 2021).

12. Both the Debtors and the SAFE AHG cite to *Cornerstone Valve* in support of their positions. The facts at issue in that case are contrary to those set out in the Motion and undisputed in the Objections.

13. In *Cornerstone Valve*, the U.S. Bankruptcy Court for the Southern District of Texas denied a creditor's motion to compel distribution under a confirmed plan of reorganization. *Id.* at *1. The creditor filed a proof of claim for a pre-petition breach of contract four and a half months after the general claims bar date.[9] *Id.* at *1. The plan had already been confirmed. *Id.* at *3. Although the creditor was unfamiliar with the bankruptcy process, a bankruptcy attorney with whom the creditor consulted in May informed the creditor of the need to file a proof of claim by the bar date in July. *Id.* at *1, *4. Most critically, there was no allegation of a lack of service of notice of the bar date. *See id.* *1-4. The court found that the evidence demonstrated that the creditor

[8] Bar dates are automatically set in chapter 7 cases to be 70 days after the petition date. Knowing about the existence of a chapter 7 case entails knowing about the bar date. Further, the excusable neglect standard expressly does *not* apply to proofs of claim in chapter 7 cases, which are governed by Bankruptcy Rule 3002.

[9] Regarding the four and a half month delay, the U.S. Bankruptcy Court for the Southern District of Texas reasoned that the delay was "not egregious" and noted that it was within the rejection bar date and only three (3) weeks after confirmation of the plan of reorganization. *Id.* at *4.

"knew about the necessity of filing a Proof of Claim months before the bar date." *Id.* Based on these facts, the court ruled that the failure to timely file a proof of claim was not justified by excusable neglect.

14. The only factual similarity between *Cornerstone Valve* and the situation here is the length of the delay. Cerasuolo did not receive notice of the bar date and was not aware of the bar date "months before the bar date." No plan has been confirmed or even proposed. There is an ongoing mediation regarding the plan. And with respect to the length of the delay, the court in *Cornerstone Valve* reasoned that "[t]he length of delay in this case was not egregious." *Id.* To the extent that the authority is relevant, it supports Cerasuolo's Motion.

ii) In re ASARCO, LLC, 2008 WL 4533733 (Bankr. S.D. Tex. Oct. 3, 2008).

15. The Debtors repeatedly cite *ASARCO* in support of their arguments. Again, the facts of that case do not match those present here.

16. In *ASARCO*, the United States Bankruptcy Court for the Southern District of Texas denied a motion by creditors to allow proofs of claim out of time. *Id.* at *1. The debtors initiated an adversary proceeding against the creditors in April 2007. *Id.* In June 2007, the debtors amended their schedules to include the creditors and served the claimants with a supplemental bar date indicating that the creditors had 60 days to file a proof of claim. *Id.* at *1, *3. Subsequently, while the period for filing claims under the supplemental bar date notice was pending, the debtors filed a second adversary proceeding against the creditors. *Id.* at *1. The creditors filed their motion in November 2007. *Id.*

17. The court addressed each of the *Pioneer* factors. With respect to prejudice, the court reasoned that there was nothing to distinguish other untimely claims and parties "relied upon the claims register in negotiating a settlement agreement with the Debtor." *Id.* at *2. The court evaluated the length of the delay and reason for the delay together. The court found that the

creditors "provided no reason for failing to timely file their proofs of claim other than mere oversight" and determined this reason did not justify the length of the delay. *Id.* at *3. The Court did not find the creditors engaged in bad faith but determined that the creditors were not so careful and diligent to overcome the other factors. *Id.* at *4.

18. The facts are substantially different with respect to Cerasuolo. He was not served the Bar Date Notice, as this Court ordered, and had valid reasons to believe that Imperium was acting to protect his interests in these chapter 11 cases. There is no settlement that relies on the claims register.[10] And the only parties that would be similarly situated to Cerasuolo are other known creditors on whom the Court ordered service of the Bar Date Notice but were not actually served the Bar Date Notice. If that constitutes a large number of claimants, these cases have bigger problems.

iii) In re Engage, Inc., 315 B.R. 217 (Bankr. D. Mass. 2004)

19. The SAFE AHG relies heavily on *Engage* in its objection, calling it an "analogous case involving strikingly similar facts . . . ." (SAFE AHG Objection at ¶ 25). Despite describing the case at length, however, the SAFE AHG avoids discussing the ***basis*** of the court's decision. What *Engage* actually held was that, under the circumstances of that case, the creditors failed to meet their burden when they presented absolutely no evidence.[11] *Id.* at 225-26.

20. In *Engage*, the U.S. Bankruptcy Court for District of Massachusetts denied the motion of current and former officers and directors of the chapter 11 debtor for leave to file late

[10] The principal settlement in these cases with Whinstone/Riot did not depend on the Debtors' claims register and Cerasuolo was a *party* to that settlement.

[11] The only potential difference between *Engage* and *Cyber Litigation* is whether a party to whom notice of the bar date needs to present any other evidence. *Cyber Litigation* indicated that the potential harmless error of a failure of serving notice needed to be demonstrated by the party seeking to waive the failure of service required by Bankruptcy Rule 2002(a)(7). In *Engage*, the court held that evidence was needed. But evidence *was* submitted in *Cyber Litigation* and the court in *Engage* has a substantial record of each of the creditors taking other actions in the case.

claims. *Id.* at 218-19. The creditors alleged that they were not served notice of the bar date and did not have any separate knowledge of the bar date. *Id.* at 222. The "Liquidating Supervisor" under the confirmed plan objected, disputing the factual allegations and asserting that the creditors were specifically aware of the bar date and the possibility that they would be sued. *Id.* at 223. Although the court offered to set an evidentiary hearing on the matter, the creditors declined, indicating that an evidentiary hearing was not necessary as the record before the court was sufficient. *Id.* at 222. The court concluded that in the absence of any evidence submitted by the creditors, it was just as likely as not that the creditors had actual knowledge of the bar date and were acting strategically. *Id.* at 225-26. The court also reasoned that the failure to present evidence undercut the due process argument that one of the creditors asserted.[12] The court noted that "[d]espite the many chances [the creditors] have been given to present evidence, they have remained conspicuously silent." *Id.* at 225. What the court held was that the creditors failed to meet their burden in the total absence of evidence on a disputed issue. *Id.* at 225-26.

21. *Engage* is not analogous to the situation here. First and foremost, neither the debtor nor the SAFE AHG contend that Cerasuolo was actually aware of the Bar Date. Instead, they assert that he *should* have been aware of the bar date. (SAFE AHG Objection at ¶ 4 ("In other words, Cerasuolo had more than sufficient reason, method and opportunity to learn of the Bar Date for himself to protect his rights as a potential creditor."); Debtor Objection at ¶ 2 ("He certainly should have been aware of the bar date . . . .")). Cerasuolo was not significantly involved in the case like the creditors in *Engage* who were either part of management or had filed pleadings in the case.

[12] This creditor was not merely an outside observer to the case—like Cerasuolo—but had filed and prosecuted an objection to confirmation of the plan. *Id.* at 225. Cerasuolo's first participation in the bankruptcy case was to file his Proof of Claim and the Motion to deem it timely.

And, despite Bankruptcy Local Rule 9013-1(g) deeming the issue admitted, Cerasuolo will submit evidence at the hearing that he was not aware of the Bar Date.

22. Moreover, the circumstances of these chapter 11 cases make it more likely that a party with general knowledge of the case would ***not*** obtain knowledge of the Bar Date. In *Engage*, the court set a bar date shortly after the June 19, 2003, petition date. 315 B.R. at 220. The bar date was set for September 15, 2023. *Id.* When parties in *Engage* became aware of the bankruptcy case, the bar date was already set, and there were approximately 88 days for parties to become aware of the bar date even absent the service required by Bankruptcy Rule 2002(a)(7). The Debtors here waited 49 days before obtaining the Bar Date—from August 30 to October 18, 2024—and only provided thirty-five (35) days of notice. When Cerasuolo became aware of these chapter 11 cases, ***there was no Bar Date*** for him to uncover through his own diligence. There is no reason that a diligent person who is not a bankruptcy professional would know that a bar date might spring into existence overnight and therefore regularly check the docket. That is why Bankruptcy Rule 2002(a)(7) requires service of notice of the bar date.

iv) In re Lehman Bros. Holdings Inc. 433 B.R. 113 (Bankr. S.D.N.Y. 2010).

23. Both the Debtors and the SAFE AHG cite to *Lehman Brothers* to support their positions. Again, the key facts at issue are different and the decision does not support their position. Indeed, the court's overall reasoning of the decision supports Cerasuolo's Motion.

24. In *Lehman Brothers*, the U.S. Bankruptcy Court for the Southern District of New York denied seven (7) motions by various creditors that missed the bar date. *Id.* at 117. Each of these creditors knew about the bar date but failed to file their proofs of claim because of ordinary negligence. *Id.* Failing to serve notice of the bar date was not an issue. The only factual overlap here is that a plan had not yet been filed when the creditors filed their respective motions.

25. *Lehman Brothers* does, however, contain a useful description of what constitutes excusable neglect. The court opined:

> Having applied the Pioneer factors nine times, the Court believes that it is in a position to distinguish the excusable neglect found earlier from the inexcusable neglect described in the pending motions. The Court articulates this distinction as follows: Neglect in filing a claim before the expiration of a clear bar date is excusable when the creditor, after conducting a reasonable amount of diligence, is justifiably confused or uncertain as to whether a particular transaction giving rise to a claim is or is not subject to the bar date order. That confusion was the principal reason for granting relief and finding excusable neglect in the bench ruling.

This supports Cerasuolo's position. Whether Cerasuolo's indemnity rights constituted a claim confused the Debtors who were represented by experienced bankruptcy professionals and had the benefit of the Bar Date Notice and Bar Date Order containing a detailed description of what constituted a claim and specifically mentioning indemnity claims. If the Debtors and their professionals were confused—justifiably or not—confusion by Cerasuolo is certainly understandable. He should not be held to a higher standard than estate professionals.

v) In re Profco, Inc., 339 B.R. 614, 618 (Bankr. S.D. Tex. 2005)

26. The SAFE AHG group cites *Profco* for the shocking proposition that "service [of notice of a bar date] is not required where the creditor has reason and opportunity to ascertain the Bar Date and protect his rights, including due to his awareness of the bankruptcy case." (SAFE AHG Objection at ¶ 24). Unsurprisingly, that is not what the case says or stands for at all.

27. In *Profco*, the U.S. Bankruptcy Court for the Southern District of Texas deemed a claim filed by the IRS to be a tardily filed claim under Bankruptcy Code § 726(a)(3). The court reasoned that because Bankruptcy Rule 9006(b)(3)(A) expressly prohibited extensions of time for the filing of proofs of claim in chapter 7 cases under Bankruptcy Rule 3002, it could not enter an order granting a retroactive extension of time under the excusable neglect standard. *Id.* at 619. In

determining the priority of the claim, the court had to determine whether the claim should receive the priority under subsections (a)(1), (a)(2), or (a)(3). The relevant language is:

> Except as provided in section 510 of this title, property of the estate shall be distributed—
>
> (1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title, proof of which is timely filed under section 501 of this title ***or tardily filed on or before the earlier of***—
>
> (A) the date that is 10 days after the mailing to creditors of the summary of the trustee's final report; or
>
> ***(B) the date on which the trustee commences final distribution under this section***;
>
> (2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is—
>
> (A) timely filed under section 501(a) of this title;
>
> (B) timely filed under section 501(b) or 501(c) of this title; or
>
> ***(C) tardily filed under section 501(a) of this title, if—***
>
> ***(i) the creditor that holds such claim did not have notice or actual knowledge <u>of the case</u> in time for timely filing of a proof of such claim under section 501(a) of this title; and***
>
> ***(ii) proof of such claim is filed in time to permit payment of such claim;***
>
> (3) third, in payment of any allowed unsecured claim proof of which is ***tardily filed under section 501(a) of this title***, other than a claim of the kind specified in paragraph (2)(C) of this subsection . . . .

The court's focus on whether the IRS was aware of the case, rather than the bar date established once the case converted to chapter 7, is because that is the inquiry mandated by the statute. The court found that some amounts of the IRS' claim were entitled to priority (i.e., fell under Bankruptcy Code § 726(a)(1)) and other amounts were subordinated (i.e., fell under Code §

726(a)(3). *Profco* does not stand for the proposition that service of notice of the bar date is unnecessary.

28. The differences between *Profco* and these chapter 11 cases are obvious. First, the legal question is different. Bankruptcy Rule 9006(b) allows for retroactive extensions of time for a bar date set under Bankruptcy Rule 3003. Second, the facts are different. In chapter 7 cases, a claims bar date is automatically set at 180 days for governmental entities pursuant to Bankruptcy Rule 3002(c)(1). Having knowledge of the case necessarily entails having knowledge of the bar date. And the amount of time to uncover the existence of the bar date is greater, making it substantially more likely that ordinary diligence would uncover the bar date absent service. Again, for the first 49 days of these chapter 11 cases, there was no bar date for Cerasuolo to uncover and he had no reason to believe that would suddenly change without notice.

vi) The various other cases mentioned in passing in the SAFE AHG Objection do not support the Objections.

29. The SAFE AHG cites various other cases in passing in an attempt to make its position seem supported. Each of those authorities is also distinguishable on material facts or legal posture. Cerasuolo addresses these briefly, highlighting the differences:

a. *Ellis v. Westinghouse Elec. Co.*, LLC, 11 F.4th 221(3d Cir. 2021)—This case involved an appeal of a district court's grant of summary judgment in favor of a claimant whose claim arose post-confirmation and pre-effective date. *Id.* at 226. The district court ruled that the bankruptcy court lacked authority to discharge claims arising post-confirmation in granting summary judgment for the claimant. *Id.* The Third Circuit Court of Appeals reversed, holding that post-confirmation, pre-effective date claims could be discharged. *Id.* Critically, the debtor served the notice of effective date and administrative claims bar date on the claimant, and the

Third Circuit recognized the need for due process and that the bankruptcy court could potentially accept the late filing. *Id.* at 228, 238-39.

b. *In re Hard-Mire Rest. Holdings, LLC*, 2019 WL 3801861 (Bankr. N.D. Tex. Aug. 12, 2019), aff'd, 619 B.R. 165 (N.D. Tex. 2020)—In this decision, the U.S. Bankruptcy Court for the Northern District of Texas limited a creditor's prepetition attorneys' fees to the amount set out in a proof of claim. *Id.* at *2-3. The court analyzed modified *Pioneer* factors with respect to these increased attorneys' fees, but the critical fact was that the creditor made no effort to file an accurate claim in the first place. *Id.* at *3.

c. *In re Orosco*, 2020 WL 6054695 (Bankr. N.D. Tex. Oct. 13, 2020)—This decision involved a motion by chapter 13 *debtors* to deem their late filed proof of claim on behalf of their secured creditor timely. *Id.* at *1. The court denied their motion because the debtors did not even mention or argue excusable neglect. *Id.* ("Because the Debtors here have not even mentioned excusable neglect in their motion, their motion must be denied."). However, the court allowed the secured creditor's late filed claim as timely, in part, because the case was dismissed for a significant portion of the 70-day period for filing proofs of claim before subsequently being reinstated. *Id.* at *7. The court reasoned that this created a potential due process issue. *Id.*

d. *Seadrill Ltd.*, 2019 WL 7580175 (Bankr. S.D. Tex. Dec. 19, 2019)—In this case, the U.S. Bankruptcy Court for the Southern District of Texas entered an order enforcing a plan injunction and denying the creditor's request for leave to file a late proof of claim. *Id.* at *1. The debtor sent the creditor notice of the bar date to his

last known address reflected in the company's personnel records, which the creditor had failed to update as required by the company's written policies. *Id.* at *2. Moreover, the creditor eventually *did* receive notice of the bar date prior to confirmation and effective date of the plan. *Id.* Instead of acting at that time—after the bar date, but with time for the debtor and creditors to consider the issue in connection with voting on the plan—the creditor ignored the bankruptcy for over a year. *Id.*

e. *In re ValuePart, Inc.*, 802 F. App'x 143 (5th Cir. 2020)—In this case, the Fifth Circuit Court of Appeals affirmed the decision of the bankruptcy court denying a creditor's motion to allow its late-filed claim. *Id.* at *145-46. The creditor was mailed a copy of the bar date notice and the creditor's account manager exchanged emails with the debtor's claims agent about the notice more than three months prior to the bar date, in which the claims agent explained how the creditor could file a proof of claim and reiterating the bar date. *Id.* Notwithstanding this service and communications with the claims agent, the creditor did not file a proof of claim until approximately one year after the bar date. *Id.* at 146. The excusable neglect asserted by the creditor was a language barrier and its failure to fully understand U.S. bankruptcy law. *Id.*

f. *Unit Corp. v. Gilmore*, 2022 WL 956226 (S.D. Tex. Mar. 30, 2022)—In this decision, the U.S. District Court for the Southern District of Texas affirmed a bankruptcy court decision denying a motion to allow a late filed claim. *Id.* at *1. The creditor's litigation attorney was mailed a copy of the bar date notice and had previously received a suggestion of bankruptcy. *Id.* at *2-3. The attorney testified

that because of Covid-19 remote work issues, he did not view the bar date notice until five (5) days after the bar date. *Id.* at *2. The attorney filed a proof of claim and motion for relief from stay 65 days later. *Id.* at *8. Based on inconsistencies with the attorney's testimony, the bankruptcy court concluded that he had "zero" credibility because of an "inability to be truthful[.]" *Id.* at *2. The District Court ultimately found that the bankruptcy court did not abuse its discretion.

g. *In re AMR Corp.*, 492 B.R. 660 (Bankr. S.D.N.Y. 2013)—In this decision, the United States Bankruptcy Court for the Southern District of New York denied a motion to deem a proof of claim timely. *Id.* at 662. The creditor asserted that it did not receive the bar date notice and therefore the bar date could not be strictly enforced against it and excusable neglect. *Id.* However, the evidence indicated that the bar date was properly addressed and put in the mail. *Id.* at 663. The creditor did not present sufficient evidence to rebut the presumption that properly addressed mail was delivered. *Id.* at 664-65. With respect to excusable neglect, the court noted that the creditor was represented by sophisticated counsel, which cut against the claim of excusable neglect. *Id.* at 666. With respect to Cerasuolo, it is undisputed that the Bar Date Notice was not sent to him, and he was not represented by counsel in the bankruptcy case until well after the Bar Date had passed.

h. *In re Motors Liquidation Co.*, 598 B.R. 744 (Bankr. S.D.N.Y. 2019)—In this case, the U.S. Bankruptcy Court for the Southern District of Texas denied a motion to file a late filed claim. *Id.* at 748. The creditor waited over nine years to assert its claim despite its knowledge of the underlying fact. *Id.* And the debtor's claims and

noticing agent served the creditor notice of the bar date, a sale of property related to the claim, and the confirmation of the plan. *Id.* at 752-53.

i. *In re Enron Corp.*, 419 F.3d 115 (2d Cir. 2005)—In this decision, the U.S. Court of Appeals for the Second Circuit affirmed a bankruptcy court's decision to deny a motion to amend its timely filed proof of claim against a debtor to include the debtor's parent corporation or file a new proof of claim against the parent corporation. *Id.* at 118. The debtor actually mailed the bar date notice to potential creditors, and that notice expressly described the requirement for filing claims against each debtor. *Id.* at 119. Further, the creditor asserted to the bankruptcy court that its failure "resulted solely from inadvertence," rather than any matter outside of its control. *Id.* at 126. The Debtors' failure to serve the Bar Date Notice on Cerasuolo was outside of his control.

j. *In re Lyondell Chemical Company*, 543 B.R. 400 (Bankr. S.D.N.Y. 2016)—In this case, the U.S. Bankruptcy Court for the Southern District of New York denied a motion to dismiss and granted a trustee's late-filed motion to substitute in for the debtor. *Id.* at 404-405. The trustee's request was filed approximately 23 weeks late. *Id.* at 404. The court applied the *Pioneer* factors, but the issue was not about a proof of claim. Also, while the SAFE AHG cites this authority for the proposition that "there is no formal presumption of good faith," in paragraph 36 of its objection, the entire quote is: "There is no formal presumption of good faith, ***but courts have indicated that a record lacking bad faith provides appropriate grounds for a finding of good faith.***" *Id.* at 410 (emphasis supplied) The reasoning of the decision

is the exact opposite of what the SAFE AHG indicates and the quotation by the SAFE AHG substantially misleading.

None of these authorities support the SAFE AHG's position. The Court should not be led astray by the SAFE AHG's attempts at illusion.

C. The legal and factual positions taken by the Debtors and SAFE AHG are unsupported or unreasonable.

30. The Debtors and SAFE AHG are no more accurate in their affirmative legal and factual positions. Some of them are disproven by the record already before the Court. Others are unreasonable. In any event, they do not support denial of the Motion.

i) The mediation process had not begun as of March 22, 2025, when Cerasuolo filed the Proof of Claim and Motion, and Cerasuolo is a party to that mediation.

31. The Debtors and the SAFE AHG argue prejudice because negotiations regarding a plan of reorganization have started in the context of the mediation. But that was not true on March 22, 2025, when Cerasuolo filed the Proof of Claim and Motion. Any negotiations since then—including those conducted from April 28 to April 29, 2025—were conducted with ample knowledge of Cerasuolo's asserted claim.

32. The Debtors filed the Agreed Mediation Order Appointing Judge Marvin Isgur as Mediator [ECF No. 894] on March 28, 2025. That was six (6) days after the Motion and Proof of Claim were filed and served on parties in interest. The Court entered that order on March 31, 2025 [ECF No. 896]. On April 18, 2025, the parties filed a modified mediation order [ECF No. 960] adding several parties and appointing Judge Nelms as the mediator [ECF No. 960], which the Court entered on April 21, 2025 [ECF No. 966]. The most recent mediation order specifically provided that "[t]he mediation shall be deemed to have commenced upon its filing on the docket[.]" So, the mediation was *not* ongoing on March 22, 2025. It started on April 18.

33. Moreover, Cerasuolo has been a party to the mediation orders from the beginning. In the original mediation order, he was listed among the "Imperium Parties." This continued in the current mediation order and his attorneys are signatories. The arguments that Cerasuolo's Proof of Claim is somehow unanticipated or uncontemplated in connection with the ongoing plan negotiations are simply and obviously not true. They are among the matters that could be resolved at the mediation.

ii) Potential substantive objection to the Proof of Claim is not "prejudice" within the meaning of Pioneer, and the purported basis of the objection is ill conceived.

34. The Debtors and SAFE AHG also argue that there is prejudice because there might be substantive objections to Cerasuolo's Proof of Claim. But the need to address a claim on the merits is not prejudice. Due process and the opportunity to be heard is not prejudice. And if there were such objections, the parties could have simply raised those objections rather than waste estate resources in trying to cover up the Debtors' failure to comply with the requirements of Bankruptcy Rule 2002(a)(7) and the Bar Date Order that established the Bar Date.

35. Moreover, the basis for this potential substantive objection borders on frivolous. The Debtors reference Bankruptcy Code § 502(e) on the grounds that Cerasuolo's claim is an unliquidated and contingent indemnity claim. (Debtors Objection at n.2, n.4). But the claim is not contingent and it is not just for reimbursement. Under the terms of the Standalone Indemnity Agreement, Cerasuolo is entitled to the advancement of legal fees, including legal fees and expenses incurred in attempting to enforce the agreement, *even if he is unsuccessful*:

> 5. Advancement of Expenses. Notwithstanding any other provision of this Agreement (other than Section 9), the Company shall advance, to the extent not prohibited by law, all Expenses incurred by or on behalf of Indemnitee in connection with any Proceeding (or part of any Proceeding) not initiated by Indemnitee or any Proceeding initiated by Indemnitee with the prior approval of the Board as provided in Section 9(d), within thirty (30) days after the receipt by the Company of a statement or statements from Indemnitee requesting such advance or advances from time to time, whether prior to or after final disposition of such Proceeding. Such statement or statements shall reasonably evidence the Expenses incurred by Indemnitee. Any advances pursuant to this Section 5 shall be unsecured and interest free. In accordance with Section 7(d) of this Agreement, advances shall include any and all reasonable Expenses incurred pursuing an action to enforce this right of advancement, including Expenses incurred preparing and forwarding statements to the Company to support the advances claimed. This Section 5 shall not apply to claim by Indemnitee for expenses in a matter for which indemnity and advancement of expenses is excluded pursuant to Section 9.
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> * * *
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> (d) In the event that Indemnitee, pursuant to this Section 7, incurs costs, in a judicial or arbitration proceeding or otherwise, attempting to enforce Indemnitee's rights under, or to recover damages for breach of, this Agreement, or to recover under any directors' and officers' liability insurance policies maintained by the Company, if any, the Company shall pay on Indemnitee's behalf, in advance, any and all expenses (of the types described in the definition of Expenses in Section 12 of this Agreement) actually and reasonably incurred by Indemnitee in such efforts, regardless of whether Indemnitee ultimately is determined to be entitled to such indemnification, advancement of expenses or insurance recovery, to the fullest extent permitted by applicable law. It is the intent of the Company that, to the fullest extent permitted by applicable law, Indemnitee not be required to incur legal fees or other Expenses associated with the interpretation, enforcement or defense of Indemnitee's rights under this Agreement by litigation or otherwise because the cost and expense thereof would substantially detract from the benefits intended to be extended to Indemnitee hereunder.

The litigation regarding the Proof of Claim that has already occurred—and would by necessity occur in any substantive objection—would defeat the Debtors' purported basis for the objection.

iii) The Debtors and the SAFE AHG fail to dispute or present arguments regarding the reasons for the delay beyond the failure of the Debtors to serve Cerasuolo the Bar Date Notice.

36. The Debtors and SAFE AHG do not acknowledge or address the other reasons for Cerasuolo's delay in filing the Proof of Claim asserted in his Motion. They do not dispute Cerasuolo's belief that Imperium's counsel would be protecting his rights as it did for the other members of Imperium (for which Cerasuolo has been required to pay through cash calls).[13] They

[13] This belief was not unreasonable. Essentially, all Imperium needed to do was add Cerasuolo's name to the proofs of claim that were already filed for Imperium and its other members.

pretend that Shannon & Lee LLP represented Cerasuolo in the bankruptcy case from the outset, rather than the limited matter of the removal of the Fairbairn's action in the Tarrant County, Texas district court. The SAFE AHG—the only parties that conferred with Cerasuolo before filing an objection, as required by the Bankruptcy Local Rules—ignored the information provided at that conference. And both Objections gloss over the fact that there was no bar date for the first 49 days of the case when Cerasuolo became aware of the bankruptcy. They are not responding to the argument Cerasuolo actually makes in the Motion.

37. Despite not being disputed, these other grounds will be established through evidence at the hearing on the Motion. That Imperium filed proofs of claim with all the other members indicated is already before the Court. Shannon & Lee LLP's engagement letter from January 2, 2025, indicates the original scope of engagement is what was indicated in the Motion:

> *Scope of Engagement.* S&L shall serve as attorney and litigation counsel for the Client in connection with the following (the "Matter"): Advising you in connection with removal of Cause No. 342-360258-24 (the "Fairbairn Action") pending in the District Court, Tarrant County Texas to the U.S. Bankruptcy Court for the Southern District of Texas having jurisdiction over the Rhodium Encore LLC, et. al., (collectively, "Rhodium") Bankrutpcy Case No. 24-90448 (the "Bankruptcy Case").

And the evidence will demonstrate that Cerasuolo's rights under the Standalone Indemnity Agreement became non-contingent on March 12, 2025, when he received his first bill for legal fees related to the Fairbairn litigation.

D. Even if, for the sake of argument, the SAFE AHG's position that failure to serve the Bar Date Notice does not violate due process, the closeness of the question constitutes an equitable consideration appropriate to consider for excusable neglect.

38. The SAFE AHG argues that because Cerasuolo knew generally of the bankruptcy, applying the Bar Date to eliminate his claim despite the lack of service required by the Bankruptcy Rules and the Bar Date Order does not violate the Cerasuolo's right to due process. But this misses the point. The Constitution does not establish what is equitable or how courts should exercise their discretion. It is the absolute floor of what is acceptable—irrespective of what courts deem

equitable, what procedural rules provide, or even what acts of Congress mandate—not the standard that is appropriate. The fact that it is a close enough question to require argument and numerous citations to address demonstrates that it is the kind of equitable factor relevant for this Court's consideration.

CONCLUSION

39. The correct outcome is clear. When the Court set the Bar Date, it ordered that the Debtors serve the Bar Date Notice by mail to known creditors and former employees of the Debtors. This was required by Bankruptcy Rule 2002(a)(7). The Debtors—represented by experienced bankruptcy professionals—did not comply with the Court's order or the requirements of the Bankruptcy Rules with respect to Cerasuolo. As set out in *Cyber Litigation*, absent the objectors demonstrating that failure of service error was harmless, the Bar Date created by the Court's order and the Bankruptcy Rules should not be held against him. Further, to the extent that Cerasuolo not becoming aware of the Bar Date notwithstanding the failure of service can be deemed "neglect," it is clearly excusable neglect. The Motion should be granted.

Dated: April 28, 2025

Respectfully submitted,

SHANNON & LEE LLP

/s/R. J. Shannon

R.J. Shannon
State Bar No. 24108062
Kyung S. Lee
State Bar No. 12128400
2100 Travis Street, STE 1525
Houston, Texas 77002
Email: rshannon@shannonleellp.com
klee@shannonleellp.com
Phone: (713) 714-5770

Counsel to Nicholas Cerasuolo

CERTIFICATE OF SERVICE

I hereby certify that the forgoing document was served (a) by the Court's CM/ECF System on all parties registered to receive such service at the time of filing and (b) by U.S.P.S. first class mail on the persons on the attached mailing list within one business day of filing.

/s/R. J. Shannon
R. J. Shannon