

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

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

**SPECIAL COMMITTEE’S OPPOSITION TO THE SAFE AHG’S MOTION TO
COMPEL PRODUCTION OF DOCUMENTS**

The Special Committee of the Board of Directors of Rhodium Enterprises, Inc. (the “Special Committee”), opposes the Emergency Motion of the SAFE AHG to Compel Production by Imperium Parties and Debtors, and the Special Committee (“Motion”).

INTRODUCTION

The SAFE AHG does not need the information it demands. In fact, it already has most of the information it seeks now, albeit in a more restricted form than it may prefer. It does not, however, need or have any basis to obtain legal advice Barnes & Thornburg has provided to the Special Committee or information that is otherwise irrelevant to the case or formulating a plan.

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.



The SAFE AHG seeks to compel from the Special Committee production of (i) the entirety of Barnes & Thornburg's report to the Special Committee (the "Report"); and (ii) settlement communications between the Special Committee and Imperium.² But the Special Committee's Report contains privileged legal analysis, which is not subject to discovery. That privilege has never been waived, and the SAFE AHG does not even try to argue that it has.

In fact, the SAFE AHG concedes that it is already in possession of meaningful information regarding the Special Committee's investigation, but unleashes a tempest in a teapot over its inability to do whatever it wants to do with the information. The SAFE AHG's waiver arguments are belied by months of the SAFE AHG's explicit agreements to engage in common interest privilege discussions with the Special Committee, and in other information sharing discussions in which the Special Committee made clear that it was not waiving privilege and that none of its productions should be construed as a waiver. The SAFE AHG proceeded without objection. Furthermore, the Special Committee has engaged in confidential settlement negotiations with Imperium and the SAFE AHG has provided no compelling reason for this Court to set aside the sanctity of the confidence that protects those ongoing negotiations.

The SAFE AHG's demands on the Special Committee within its Motion should therefore be denied.

² To the extent the Motion seeks communications between the Special Committee and the insurance carriers [Dkt. 1080 at ¶¶ 38-42], the Special Committee agrees to conduct a reasonable search and produce responsive communications.

BACKGROUND

1. On August 28, 2024, the Board of Directors of Rhodium Enterprises, Inc. established the Special Committee for purposes of, among other things, investigating any Conflict Matters. A “Conflict Matter” is defined in the Board’s resolutions creating the Special Committee as a matter in which a conflict of interest exists or is reasonably likely to exist between Rhodium Enterprises, on the one hand, and any of its direct or indirect equity holders, affiliates, subsidiaries, directors, officers, or other stakeholders, or any affiliate or other related party of the foregoing (each a “Related Party” and, collectively, the “Related Parties”). The Special Committee retained Barnes and Thornburg LLP (“Barnes & Thornburg”) as its counsel. [ECF Nos. 175, 265.]

2. Since then, Barnes & Thornburg has conducted an extensive investigation and collected hundreds of thousands of documents and electronic communications from a variety of sources—among them Debtors, Imperium Investment Holdings LLC (“Imperium”), Nathan Nichols, Chase Blackmon, Cameron Blackmon, and Nicholas Cerasuolo, filings in related actions, and other publicly available materials—and reviewed approximately 40,000 documents after applying various targeted search terms. Barnes & Thornburg conducted 17 interviews of 11 individuals—including current and former Rhodium officers—spoke with numerous others to obtain background information, and consulted financial and subject-matter experts. The Special Committee’s financial advisor, BDO, also provided extensive forensic and accounting expertise.

3. Throughout the Special Committee's investigation, the SAFE AHG requested extensive information in the form of documents and other updates from the Special Committee. The Special Committee reasonably cooperated in good faith with those requests and coordinated with Debtors regarding the same. Indeed, over \$200,000 of Barnes & Thornburg's fees in this matter can be attributed to addressing requests from and issues related to discovery requests from the SAFE AHG. On multiple occasions, the Special Committee's cooperation included sharing certain information on a mutually-acknowledged common interest basis with the SAFE AHG, which alleged that it was conducting its own investigation into potential estate causes of action. (It has not produced a report, factual or otherwise.)

4. As part of its investigation, the Special Committee requested documents from Imperium, which Imperium agreed to provide on an expedited basis *on the condition* that the Special Committee would not share the documents without Imperium's express consent and subject to Imperium's right to object. Because the documents were produced on an expedited basis, a significant number of the documents were not responsive and some Imperium-privileged documents were inadvertently produced. The Special Committee agreed Imperium's privilege was not waived in light of the inadvertent production, consistent with the applicable Protective Order in this case. [ECF No. 152.]

5. At the conclusion of its investigation, Barnes & Thornburg prepared a full report to the Special Committee documenting its factual findings, legal analysis, recommendations, and legal conclusions. As part of its findings, Barnes & Thornburg

concluded that there were at least colorable claims the Estates should bring (“Estate Claims”) in order to preserve assets and value for the Estates’ constituents. Its Report included its own assessment of the strengths of those claims and strategies for pursuing those claims. The Special Committee has carefully guarded the privileged sections of the Report.

6. The Special Committee subsequently shared non-privileged factual information with those who agreed to be bound by the Protective Order or who were otherwise operating under the confidentiality of mediation privilege and Federal Rule of Evidence 408. Yet, even in this instance, the factual background bore appropriate designations asserting privilege and confidentiality, making it evident to any reader—including the SAFE AHG—that the Special Committee had no intention of waiving privilege as to that or any other section of the Report.

7. Also on the condition of being bound by the Protective Order or under the confidentiality of the mediation privilege and Federal Rule of Evidence 408, the Special Committee later shared certain information about the Estate Claims it had identified, the purpose of which was to give stakeholders enough information to make informed decisions regarding a potential plan without sharing the privileged content of the Report. This information was shared with the SAFE AHG. Under these same protections, the Special Committee also shared potential claims it found to be exculpated at the recent mediation. These all documents bore appropriate confidentiality designations, and were shared with the mediation parties, including the SAFE AHG.

8. Further, in conversations about these Estate Claims with the SAFE AHG, the Special Committee expressly stated that it was not waiving privilege and that nothing during the conversation should be construed as waiving or intending to waive privilege. The SAFE AHG proceeded with those conversations without objection. During every conversation with the SAFE AHG about aspects of the Report, the Special Committee reiterated its privilege and the SAFE AHG never objected. The SAFE AHG has even explicitly acknowledged it shares a common interest with the Special Committee with respect to the Estate Claims. The SAFE AHG certainly never claimed the Special Committee's privilege was waived, and it does not do so in its Motion.

9. Since the conclusion of its investigation, the Special Committee has determined that the apportionment of the proceeds from the settlement of the Debtors' disputes with Whinstone US, LLC, and the corresponding sale of the assets located at the Debtors' former facility at Rockdale, Texas, is a Conflict Matter and should be handled on behalf of the Debtors by the Special Committee. Consequently, Barnes & Thornburg has continued to advise the Special Committee not only on potential settlement of the Estate Claims (including using the privileged analysis in its Report to do so), but on a fair allocation of proceeds among competing claimants to the Estates' assets. The SAFE AHG's Motion to Compel threatens a larger invasion into this process—as waiver of the privilege in one instance could be deemed waiver in a larger context.

ARGUMENT

10. The SAFE AHG demands documents be produced on an emergency basis in a motion exceeding 30 pages. [Dkt. 1080.] The issues raised, however, are not an emergency. The SAFE AHG inappropriately weaponizes this Court’s Local Rule 9013-1 and Section G.18 of the Complex Cases Procedure in the Southern District of Texas. The SAFE AHG claims the discovery sought is urgently necessary for depositions that would have been completed by May 16, 2025—but for a tragic incident causing the depositions to be rescheduled. Likewise, the SAFE AHG fails to explain why these documents suddenly became critical to settlement-related discussions—or why it believes this is a critical phase.

11. Within its Motion, the SAFE AHG demands two objectionable sets of documents from the Special Committee, which are addressed in turn below.

I. The Special Committee’s Report is Privileged and Has Been Appropriately Withheld.

12. The SAFE AHG demands the Special Committee should produce its Report without redactions or other restrictions. First, it argues (without citing to *any* legal authority) that “it would be unfair” to use the Estate’s funds toward the Special Committee’s investigation without providing stakeholders “full access” to the resulting findings and conclusions. [Dkt. 1080 at ¶ 36.] Second, it argues that the Report should be produced because the *Debtors* “promised” the findings and conclusions would be “published.” [*Id.* at ¶ 37.] The SAFE AHG entirely misunderstands the Special Committee’s purpose and privilege.

13. It is widely accepted that work generated by a special committee during the course of its investigation, along with its conclusions, are protected by both the attorney-client privilege and the work product privilege. *See Upjohn Co. v. United States*, 449 U.S. 383, 383 (1981); *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.*, 331 F.R.D. 218, 230 (E.D.N.Y. 2019); *In re Woolworth Corp. Sec. Class Action Litig.*, No. 94 CIV. 2217 (RO), 1996 WL 306576, at *2 (S.D.N.Y. June 7, 1996); *Hollinger Int'l Inc. v. Hollinger Inc.*, 230 F.R.D. 508, 512 (N.D. Ill. 2005); *In re OM Sec. Litig.*, 226 F.R.D. 579, 588 (N.D. Ohio 2005); *In the Matter of Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1314 (7th Cir. 1984).

14. The attorney-client and work product privileges of a special committee are separate and distinct from the privilege of the corporation. *See S.E.C. v. Microtune, Inc.*, 258 F.R.D. 310, 317 (N.D. Tex. 2009); *In re BCE W., L.P.*, No. M-8-85, 2000 WL 1239117, at *6 (S.D.N.Y. Aug. 31, 2000); *S.E.C. v. Roberts*, 254 F.R.D. 371, 383 (N.D. Cal. 2008).

15. A special committee evaluating founders' and directors' conduct can withhold its privileged information from the company, including the founders and directors it was tasked with evaluating. *In re Howard Midstream Energy Partners, LLC*, No. CV 2021-0487-LWW, 2021 WL 4314111, at *4 (Del. Ch. Sept. 22, 2021).

16. If this Court finds the Special Committee must produce its full Report without restrictions, it would result in a broad waiver of privilege in scope destroying the Special Committee privilege. *United States v. Citgo Petroleum Corp.*, No. CR. C-06-563, 2007 WL 1125792, at *6 (S.D. Tex. Apr. 16, 2007). Before compelling

information protected by the work product privilege, this Court must require the SAFE AHG to bear its heavy burden—for obtaining work product—in showing (i) its substantial need of the materials to prepare for its case, and (ii) that it cannot obtain substantially equivalent materials by other means. *Crider, Inc. v. Silgan Containers LLC*, No. 3:21-CV-1047-M, 2023 WL 479094, at *15 (N.D. Tex. Jan. 13, 2023). The SAFE AHG clearly fails to carry this heavy burden in its Motion. No legal authority, however, authorizes discovery of information protected by the (intact) attorney-client privilege. *See* Fed. R. Civ. P. 26(b)(1).

17. Here, the Special Committee’s Report is privileged, and that privilege is separate and distinct from the Debtors. *See Citgo Petroleum Corp.*, 2007 WL 1125792, at *6. The SAFE AHG has no right to access the full Report, which was prepared by the Special Committee’s counsel for the Special Committee, simply because it says it wants that access. The Report contains the legal analysis and work product of the Special Committee. Because the Report is privileged, it is not subject to disclosure.

18. The Special Committee has carefully guarded its privilege. To the extent the SAFE AHG implies the privilege protecting the Special Committee’s Report has been waived, the SAFE AHG is wrong. The SAFE AHG fails to identify any conduct by the Special Committee that would constitute a waiver. Moreover, the SAFE AHG has operated for months on the basis that it shares a common interest with the Special Committee. At every turn, the Special Committee has emphasized the lengths it has taken to protect privileged information within its Report. The SAFE AHG never before suggested that the privilege was waived or that it was otherwise entitled to

the Report without restrictions. This first argument for compelling the unrestricted Report therefore fails.

19. The SAFE AHG also misrepresents the Debtors' statement on publishing the Report. The privilege protecting the Report is held by the Special Committee, not the Debtors; the Debtors **cannot** waive the Special Committee's privilege. The Debtors' alleged promise, assuming it was ever made, therefore cannot be construed as a waiver of the privilege protecting Report. This second argument for compelling the unrestricted Report—to the extent this argument is implied by the SAFE AHG—also fails.

20. Importantly, a party must offer an explanation why it needs discovery for a court to compel discovery under Bankruptcy Rule 2004. *In re Snyder*, 52 F.3d 1067 (5th Cir. 1995). The SAFE AHG fails to establish any reason why it needs unrestricted access to the full Report (let alone any legal authority requiring that it be compelled). The SAFE AHG has failed to provide the Court with the authority it needs to compel the full, unrestricted Report. The SAFE AHG alleges in its own Motion that it already has vast amounts of information related to potential claims against “insiders” and other relevant information that it can use to advise its clients. The SAFE AHG further claims to have conducted its own investigation and reached its own conclusions, based in large part on information shared by Debtors and the Special Committee. It can perform its own legal analysis on that information. The SAFE AHG has not even explicitly alleged that the privilege protecting the Report has been waived. The privilege has not been waived.

21. As a result, the Court must deny this request.

II. No Reason Exists to Produce or Remove Restrictions from the April 5 and 19, 2025, Letters from the Special Committee to Imperium or Related Correspondence (*If Any*).

22. The SAFE AHG also demands the Special Committee should produce settlement negotiation letters that it sent to Imperium on April 5 and 19, 2025, and any related correspondence without restrictions. [Dkt. 1080 at ¶¶ 34-35.] First, it argues the information is not privileged. [*Id.* at ¶ 34.] Second, it argues the information is not protected by the mediation privilege and not immune from discovery under Federal Rule of Evidence 408. [*Id.* at ¶ 35.]

23. Under Bankruptcy Rule 2004, the proponent bears “the burden to show good cause for the [discovery] it seeks.” *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, No. 09–11893 (SMB), 2014 WL 5486279, at *2 (Bankr. S.D.N.Y. Oct. 30, 2014).

24. Federal Rule of Evidence “Rule 408 aims to foster settlement discussions in an individual lawsuit, and therefore insulates the particular parties to a settlement discussion from possible adverse consequences of their frank and open statements.” *In re A.H. Robins Co., Inc.*, 197 B.R. 568, 572 (E.D.Va. 1994); *see also Washington v. Pac. Summit Energy LLC*, No. 4:20-CV-290, 2021 WL 229653, at *3 (S.D. Tex. Jan. 21, 2021). Rule 408 supports a strong public policy of encouraging settlements. *Xcoal Energy & Res., LP v. Smith*, 635 F.Supp.2d 453, 454 (W.D.Va. 2009) (citing *Fiberglass Insulators, Inc. v. Dupuy*, 856 F.2d 652, 654–55 (4th Cir. 1988)).

25. The SAFE AHG already has the April 5, 2025, demand letter from the Special Committee to Imperium and the April 19, 2025, supplemental demand letter

from the Special Committee to Imperium, subject to a mediation privilege and Federal Rule of Evidence 408.

26. The negotiations the Special Committee is conducting with Imperium are confidential and ongoing. The SAFE AHG has voiced no need for the restrictions to be removed, because no reason exists. Likewise, the SAFE AHG fails to offer any case law to penetrate those negotiations or set aside that mediation confidentiality.

27. These were communications made for the purpose of settlement negotiations, protected by Rule 408 and the mediation privilege. Forcing the removal of such protections eliminates their purpose and defiles the ability to negotiate openly for settlement—promoting the waste of judicial resources. *See Xcoal Energy & Res., LP*, 635 F.Supp.2d at 454.

28. Additionally, unrestricted access to this and related correspondence (if any) does not impact the ability of the SAFE AHG to assess a plan. There is no pending litigation or plan to which these documents could relate. If the SAFE AHG wants to get this information in litigation with the insiders, it can subpoena it at the appropriate time. Moreover, these documents (if they exist) are not emergent. Finally, if there is any such correspondence, there is not a meaningful volume.

29. Consequently, the Court must deny this request.

CONCLUSION

WHEREFORE the Special Committee respectfully requests the SAFE AHG's Emergency Motion to Compel Production of Documents as it pertains to documents from the Special Committee be denied, and for such other and further relief as the Court may deem just and appropriate.

Respectfully submitted this 20th day of May, 2025.

BARNES & THORNBURG LLP

/s/ Trace Schmeltz

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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/ Trace Schmeltz
Vincent P. (Trace) Schmeltz III

Certificate of Service

I, Vincent P. (Trace) Schmeltz III, hereby certify that on the 20th day of May, 2025, a copy of the foregoing Motion was served via the Clerk of the Court through the ECF system to the parties registered to receive such service.

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

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SOUTHERN DISTRICT OF TEXAS
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In re:	§	Chapter 11
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	§	
Debtors.	§	(Jointly Administered)
	§	
	§	

**ORDER DENYING THE SAFE AHG’S MOTION TO COMPEL PRODUCTION
OF DOCUMENTS**

Upon consideration of the Emergency Motion of the SAFE AHG to Compel Production by Imperium Parties and Debtors, and the Special Committee (“Motion”) [ECF No. 1080], the Special Committee’s Opposition, and the responses and replies filed by other parties, and arguments and evidence presented, the Court having jurisdiction to consider this matter and relief requested therein pursuant to 28 U.S.C. § 1334; consideration of this Motion being a core proceeding pursuant to 28 U.S.C. § 157; notice of the Motion having been adequate and appropriate under the circumstances; and after due deliberation and sufficient cause appearing; it is:

1. ORDERED that the SAFE AHG’s Motion is denied.

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.

2. ORDERED that, absent further order of the Court, the Special Committee has no obligation to produce its full, unredacted Report without restrictions, or its April 5 and 19, 2025, Letters to Imperium or related correspondence, including removal of any restrictions, in response to the Motion.

DATED:_____

Alfredo R. Perez
United States Bankruptcy Judge

Prepared by:

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