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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

<p>In re:</p> <p>HIGHLAND CAPITAL MANAGEMENT, L.P.,¹</p> <p style="text-align: center;">Debtor.</p>	<p>Chapter 11</p> <p>Case No. 19-34054-sgj11</p>
<p>UBS SECURITIES LLC AND UBS AG LONDON BRANCH,</p> <p style="text-align: center;">Plaintiffs,</p> <p>vs.</p> <p>HIGHLAND CAPITAL MANAGEMENT, L.P.,</p> <p style="text-align: center;">Defendant.</p>	<p>Adversary Proceeding</p> <p>No. 21-03020-sgj</p>

**MOTION OF FORMER EMPLOYEES TO
QUASH SUBPOENAS AND BRIEF IN SUPPORT**

¹ The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.



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Mary Kathryn Lucas (née Irving), Jean Paul Sevilla, Scott Ellington, Isaac Leventon, and Matthew DiOrio (collectively, the nonparty “**Former Employees**”), former employees of the Defendant Highland Capital Management, L.P. (the “**Debtor**”), file this motion to quash the Subpoenas to Produce Documents (the “**Document Subpoenas**”) and Subpoenas to Testify at a Deposition (the “**Deposition Subpoenas**,” and together with the Document Subpoenas, the “**Subpoenas**”) served on them by Plaintiffs UBS Securities LLC and UBS AG London Branch (collectively, “**UBS**”), and in support, respectfully show as follows:

I. INTRODUCTION

1. This motion is about discovery in search of a dispute. While UBS and the Debtor *had* hotly contested litigation, they have since settled their dispute with an explicit agreement to cooperate against future adversaries. But only the cooperators (the Debtor and UBS), and *no adversaries*, are present in this “adversary” proceeding. Although no controversy warranting discovery exists, UBS insists not only on proceeding with its discovery requests upon the Former Employees, but doing so on an “emergency” basis. There is neither a controversy nor an emergency.

2. Although the Debtor has settled its disputes with UBS and has made no indication that it is contesting the injunctive relief sought against it in this Adversary Proceeding, UBS still insists that it needs discovery from the Former Employees. Any additional discovery related to the Adversary Proceeding is now moot. So why is UBS so eager to proceed with the Subpoenas against nonparty witnesses?

3. The Subpoenas should be quashed on this basis alone. But should this Court find, contrary to the evidence, that a case or controversy exists and that the Court has jurisdiction over this matter, the nonparty Former Employees move to quash the Subpoenas because they:

(1) impose an undue burden on the Former Employees to appear and testify on the same irrelevant, cumulative, and overbroad topics; (2) are being used as a pretext for unauthorized pre-litigation discovery for other claims targeted at nonparties, including potentially against the Former Employees; and (3) in the specific case of Ms. Lucas, seek document production and testimony from a nonparty who is legally unavailable.

4. Not only do the Former Employees lack notice of much of the claims or relief sought in this Adversary Proceeding because all pleadings but the Complaint have been kept under seal (though served on counsel for the nonparty Official Committee of Unsecured Creditors), but the topics outlined in both the Document Subpoenas and the Deposition Subpoenas are facially overbroad and are an improper, thinly veiled attempt to conduct pre-litigation discovery for future, unrelated claims. These Subpoenas, which were specifically issued in connection with UBS's *uncontested* preliminary injunction request, cannot justifiably be used as pretext to discover information beyond the scope of the injunctive relief sought against the Debtor or otherwise to burden or prejudice the rights of nonparties to the Adversary Proceeding. The Subpoenas should therefore be quashed in their entirety. In the alternative, all discovery should be stayed pending approval of the Debtor's Settlement Agreement with UBS.

II. FACTUAL BACKGROUND

5. During the hearing to confirm the Debtor's plan of reorganization, Debtor's counsel announced that the Debtor had reached a settlement with UBS. Confirmation Hr'g Tr. 15:5-22 (Feb. 2, 2021). As part of this settlement, among other things, the Debtor apparently agreed to cause Highland Credit Opportunities CDO, L.P. (n/k/a Highland Multi Strategy Credit Fund, L.P.) ("**Multi-Strat**"), which was the subject of fraudulent transfer claims by UBS, to make a cash payment of \$18.5 million to UBS and "use reasonable efforts to assist UBS" in collecting a

judgment against two of the Debtor's subsidiaries arising from litigation in the Supreme Court of New York against the Debtor and some of its foreign subsidiaries. *Id.* at 15:15-17; 159:8-14.

6. On March 29, 2021, UBS filed a *Motion for Leave to File Adversary Complaint and Other Materials Under Seal* [Bankr. Dkt. No. 2128] (the "**Motion to Seal**"), seeking leave from this Court to file its *Original Complaint for Injunctive Relief* (the "**Complaint**") and *Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction* and supporting documents (the "**Injunction Motion**") under seal.

7. On March 30, 2021, UBS sent preservation notices to each of the Former Employees, notifying them that UBS "will soon commence an adversary proceeding against the Debtor in connection with the Bankruptcy Case" and that UBS will apparently allege that the Debtor, at the direction of the Former Employees, caused nondebtor entities under the Debtor's control to fraudulently transfer certain assets to Sentinel Reinsurance, Ltd. ("**Sentinel**")² in anticipation of a judgment that UBS would obtain through litigation in New York. UBS demanded that the Former Employees retain a broad category of documents, including, but not limited to, the chapter 11 case, the impending adversary proceeding, UBS's litigation against the Debtor (and others) pending in the Supreme Court of New York, and "any future claims or actions that UBS may bring . . . relating to the subject matter of this Notice."

8. The next day, on March 31, 2021, although the Debtor was not copied on UBS's preservation notices to the Former Employees, the Debtor sent the Former Employees litigation-hold notices that were nearly identical to the preservation notices that UBS had sent the evening before. The Debtor's notices mention that UBS "has recently commenced an adversary

² The asserted fraudulent transfer to Sentinel is not referenced anywhere in either of the two proofs of claim filed by UBS (claim #190 and claim #191), and it does not appear that UBS has taken any action to recover the alleged fraudulent transfers from the purported transferee, Sentinel.

proceeding” against the Debtor. The Debtor’s notices similarly seem to point blame at the Former Employees for the Debtor’s alleged transfer of certain assets to Sentinel.

9. Also on March 31, 2021, the Court granted UBS’s Motion to Seal, and UBS filed its Complaint, Injunction Motion, and all related documents entirely under seal with this Court. [Adv. Proc. Dkt Nos. 3-6]. Notably, although the Adversary Proceeding was supposed to be based on a fraudulent transfer claim, neither the transferors (funds managed by the Debtor) nor the transferee (Sentinel) is named as a party. Upon information and belief, UBS never sought post-judgment discovery from the transferors and has not even sought discovery from the alleged transferee Sentinel.

10. On April 1, 2021, the Debtor filed its *Statement with Respect to UBS’s Motion for Leave to File Adversary Complaint and Other Materials Under Seal*, confirming the Debtor’s support for the Motion to Seal and stating that the Debtor and its independent board “conducted a preliminary investigation into the matters underlying the Injunction Complaint by, *inter alia*, examining the Debtor’s books and records and making inquiries of the Debtor’s employees, including in-house counsel. The Debtor shared the results of that preliminary investigation with UBS.” [Bankr. Dkt. No. 2147].

11. Although UBS has served the sealed documents on counsel to the Official Committee of Unsecured Creditors [*See* Adv. Proc. Dkt. No. 19]—a nonparty from which UBS has not sought discovery in this Adversary Proceeding—UBS has yet to provide most of these documents to the Former Employees they seek to depose, who appear to be the potential targets of future claims or actions from UBS (and, potentially, the Debtor).

12. On April 9, 2021, the Court granted UBS’s Motion for Temporary Restraining Order, enjoining the Debtor from “making or allowing funds under its management or control

(including, but not limited to, Multi-Strat and CDO Fund) to make any payments or further transfers to Sentinel or any of its affiliates or any transferees of the Sentinel Entities consisting of, resulting from, or relating to the Transferred Assets until this Court's decision on UBS's requested preliminary injunction." [Adv. Proc. Dkt. No. 21, *Order Granting Plaintiffs' Motion for Temporary Restraining Order*] (the "TRO"). The Debtor did not oppose entry of the TRO and, in fact, agreed that the TRO could remain in place indefinitely until the Court reaches a decision on a preliminary injunction.

13. On April 15, 2021, the Debtor filed its *Motion for Entry of an Order Approving Settlement with UBS and Authorizing Actions Consistent Therewith* [Bankr. Dkt. No. 2199] (the "Settlement Motion"), confirming that "[t]he Debtor will use reasonable efforts to assist UBS in, among other things, collecting its judgment against the Funds and assets the Funds may own." Part of these collection efforts includes "cooperat[ing] with UBS and participat[ing] (as applicable) in the investigation or prosecution of claims or requests for injunctive relief against the [Former Employees] . . . believed to be involved with the Purchase Agreement, Insurance Policy, Transferred Assets, the transfer of the MSCF Interests, or any potentially fraudulent transfer of assets from the Funds to Sentinel" Ex. 1 to the Settlement Motion, Settlement Agreement § 1(c)(iii). The Settlement Agreement even contemplates that the Debtor and UBS will work together as "co-plaintiff pursuing claims on behalf of or for UBS" against the Former Employees. See Settlement Agreement § 1(c)(x).

14. Thus, no case or controversy exists because the Debtor and UBS are cooperating regarding the subject of the Adversary Proceeding, namely in recovering the assets allegedly transferred from the Debtor-managed funds to Sentinel. In stark contrast to its litigation posture prior to the Settlement Motion, the Debtor has not opposed a single action or request for relief by

UBS in this matter. UBS appears to be using this Adversary Proceeding in support of its effort to bring separate claims unrelated to the Debtor's estate and against non-debtor parties, presumably against the transferors (the funds), the transferee (Sentinel), and the alleged persons who effectuated the transfers (including, as alleged by the Debtor and UBS, the Former Employees).

15. On April 16, 2021, Mr. Sevilla and Mr. DiOrio were formally served with a Document Subpoena and Deposition Subpoena.³ On April 19, 2021, Mr. Leventon was formally served with a Document Subpoena and Deposition Subpoena, and service was accepted on behalf of Mr. Ellington and Ms. Lucas for the Document Subpoena and Deposition Subpoena addressed to each. Each Document Subpoena includes twelve broad categories, which are nearly identical for each Former Employee. UBS originally demanded production in two or fewer business days.

16. Counsel for the Former Employees reached out to counsel for UBS in an effort to understand why UBS was seeking discovery from the Former Employees on such an expedited basis and why UBS was refusing to provide the Former Employees with a copy of the Complaint. In a phone conference on April 27, 2021, counsel for UBS was unable to provide any basis for requiring an extremely expedited schedule for document production and depositions of the Former Employees. Indeed, any supposed emergency is belied by the fact that UBS and the Debtor have agreed to extend the Debtor's deadline to answer the Complaint to June 2, 2021. There simply is no emergency. Rather, UBS and the Debtor are merely working in concert to help the Debtor avoid stating publicly that it does not oppose the relief sought so they can continue to pretend there is an actual case or controversy entitling UBS to conduct discovery on the Former Employees.

³ On or around April 5 and 6, 2021, the Former Employees each received a Document Subpoena and a Deposition Subpoena, although these Subpoenas were not formally served at that time.

17. To that end, when asked whether the Debtor had taken a position on the relief sought in the Complaint, counsel for UBS misled counsel for the Former Employees by stating they did not know whether the Debtor opposed the relief but they thought it was unlikely the Debtor would oppose. At the time, UBS knew (but counsel for the Former Employees did not because they had not yet seen the Complaint) that the Debtor was *not* opposing UBS's request for injunctive relief. Contrary to what UBS's lawyers told counsel for the Former Employees on the phone, [REDACTED]

18. As a result of those discussions, counsel for UBS agreed to provide a copy of the Complaint to the Former Employees upon execution of a strict confidentiality agreement. Accordingly, counsel for UBS agreed to postpone the depositions originally noticed for April 20, 2021 until counsel for the Former Employees had an opportunity to review the Complaint following the execution of a confidentiality agreement.

19. In the evening of May 5, 2021 counsel for UBS emailed counsel for the Former Employees, promising to send the next day a draft of the proposed confidentiality agreement for the Former Employees to sign, and stating that deposition subpoenas would be re-issued for "the end of next week and the week of May 17." Late on Thursday evening, May 6, 2021, counsel for UBS sent a draft confidentiality agreement to counsel for the Former Employees. Among other things, the confidentiality agreement prohibits the Former Employees from discussing the Complaint with each other, even in the context of privileged communications with counsel.

20. In the evening on Friday May 7, 2021, less than 24 hours after delivering the draft confidentiality agreement, UBS filed newly issued subpoenas demanding production of documents by all five Former Employees no later than Tuesday May 11, 2021 at 9:00 a.m. and scheduling

depositions beginning on Thursday, May 13, 2021. Counsel for UBS served such subpoenas by email on counsel for the Former Employees in the afternoon of Saturday May 8, 2021.

21. Subsequently, counsel for the Former Employees asked Debtor's counsel if the Debtor opposed the preliminary injunction; Debtor's counsel never responded to that simple question. Absent such opposition, the Subpoenas would produce no evidence for use in support of any currently contemplated hearing or in opposition to any currently contemplated relief against any party. The Debtor is the *only* defendant to the Adversary Proceeding, and given that the only relief sought by UBS in the Complaint is to turn the unopposed TRO into a preliminary, and then a permanent, injunction, the Debtor appears to be unopposed to *all* the relief sought by UBS in the Complaint. This renders the entire proceeding moot.

22. In the afternoon of Tuesday May 11—less than 42 hours before UBS's unilaterally scheduled deposition of one of the Former Employees was set to begin—UBS finally provided counsel for the Former Employees a copy of the Complaint (subject to the confidentiality agreement). The following morning, before counsel for the Former Employees even had the opportunity to talk to their clients about the just-provided Complaint, counsel for UBS emailed counsel for the Former Employees threatening to file a motion to compel compliance with the Subpoenas.

III. LEGAL STANDARD

23. A party may command a non-party to produce documents or testify at a deposition under Federal Rule of Civil Procedure 45. Fed. R. Civ. P. 45(a)(1)(A)(iii). However, this command is not without limits. The court for the district where compliance is required *must* quash or modify a subpoena that "(i) fails to allow a reasonable time to comply; (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c); (iii) requires disclosure of privileged or

other protected matter, if no exception or waiver applies; or (iv) subjects a person to undue burden.” Fed. R. Civ. P. 45(d)(3)(A) (emphasis added).

24. Additionally, a party issuing a subpoena under Federal Rule of Civil Procedure 45 “must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.” The court “must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney’s fees—on a party or attorney who fails to comply.” *MetroPCS v. Thomas*, 327 F.R.D. 600, 606 (N.D. Tex. 2018).

IV. ARGUMENT

A. **The Subpoenas must be quashed because they are invalid and premature.**

25. There is no live dispute between UBS and the Debtor. UBS and the Debtor were historically contentious but they have resolved their dispute via the Settlement Agreement. UBS and the Debtor have agreed to cooperate on the issues that are the subject of the instant litigation, including an expense-sharing agreement in pursuing the claims. *See supra* ¶ 13. In February 2021, the Debtor voluntarily provided UBS with information related to the subject of the Subpoenas, including an apparently privileged report that included interviews with the Debtor’s employees and in-house counsel. *See* Case No. 19-34054, Dkt. 2199 at ¶ 10.

26. With respect to relief in the Adversary Proceeding, UBS cannot seek any damages from the Debtor, [REDACTED] *See* Ex. 1 to the Settlement Motion, Settlement Agreement § 3(a). With respect to injunctive relief, while the Debtor’s failure to oppose the TRO, standing alone, would not be dispositive, the Debtor has indicated no opposition to the preliminary injunction or any permanent injunction on the same issues. In this Adversary Proceeding, the “defendant”: (i) has a formal cooperation agreement directly on topic with the “plaintiff”; (ii) cannot be liable for damages; (iii) has agreed to all

injunctive relief; and (iv) has not indicated any opposition to further injunctive relief. This goes beyond mere cooperation; this is friendly-party litigation.

27. That this is friendly-party litigation with no actual dispute between the two parties is evident from the fact that the Debtor and UBS reached a global settlement on March 30, 2021, and the very next day UBS filed the Complaint. The settlement included a covenant of cooperation, and UBS wasted no time at all invoking it.

28. The friendly-party nature of this litigation has two consequences. First, in the absence of an actual dispute, the Court has no jurisdiction. Second, it prejudices the rights of the alleged “non-parties” who are UBS’s—and potentially the Debtor’s—true targets.

29. As an initial matter, no actual controversy exists upon which this Court has jurisdiction to allow the Subpoenas. *See John Doe #1 v. Veneman*, 380 F.3d 807, 814 (5th Cir. 2004) (“Without an actual case or controversy, a federal court has no jurisdiction.”); *see also see Western Benefit Solutions, LLC v. Gustin*, Case No. 1:11-CV-00099-EJL-CWD, 2012 U.S. Dist. LEXIS 138860, at *9 (D. Idaho Sept. 24, 2012) (“future compliance with the [third party subpoena] is moot given that this matter has settled.”).

30. Additionally, the Subpoenas are part of UBS’s litigation strategy designed to prejudice non-parties (including the Former Employees) and to circumvent the rules applicable to the normal litigation process.

31. First, *secrecy*: the majority of the pleadings are filed under seal, and the Former Employees only a few days ago obtained the Complaint, subject to a restrictive confidentiality agreement. The Former Employees have not even seen the remaining pleadings, including the Injunction Motion and attached exhibits that are the alleged basis for seeking discovery in support of a preliminary injunction.

32. Second, *urgency*: while the alleged reason for the discovery is to obtain evidence in support of a preliminary injunction, the requested discovery relates to the underlying transaction that occurred in 2017, and not any current activities of any party. Despite this, UBS seeks the Former Employees' discovery on shortened notice based on false urgency: the preliminary injunction appears to be unopposed, to be ruled on at a hearing the setting of which the plaintiff has yet to even request.

33. Third, *denial of procedural rights*: by positioning its actual adversaries as non-parties, UBS is able to engage in one-sided litigation, denying its adversaries the right to see all pleadings, to see the allegations against them (rather than just generally knowing the claims relate to a past transaction), to file motions to dismiss those allegations prior to discovery proceeding, to propound discovery of their own, and to see the documents and deposition testimony of other parties and non-parties. If the Former Employees were true non-parties, this would not matter. However: (i) the preservation notices; (ii) the express terms of the Settlement Agreement mentioning potential claims against the Former Employees, and (iii) the fact that [REDACTED] [REDACTED] [REDACTED] all indicate otherwise.

34. Without seeing the Injunction Motion or the supporting documents filed under seal in the Adversary Proceeding, the Former Employees may be prejudiced because there may be allegations in the Adversary Proceeding against the Former Employees, similar to those made in the preservation notices and Settlement Agreement, to which they would have a right to defend as parties. Without seeing the pleadings filed in the Adversary Proceeding, the Former Employees cannot: (i) adequately determine the relevance of the topics on which they are being compelled to testify or the documents they are being compelled to produce; (ii) adequately prepare for and

defend any deposition in which they are compelled to testify; or (iii) determine whether they have interests sufficient to support intervention in the Adversary Proceeding. *See Texas v. United States*, 805 F.3d 653, 658 (5th Cir. 2015) (discussing cases and noting “our cases reveal that the [Rule 24(a)(2) intervention of right] inquiry turns on whether the intervenor has a stake in the matter that goes beyond a generalized preference that the case come out a certain way.”).

B. The Subpoenas must be quashed because they seek irrelevant information and impose an undue burden on the Former Employees.

35. In addition, Federal Rule of Civil Procedure 45 provides that the Court “*must* quash or modify a subpoena that: . . . (iv) subjects a person to undue burden.” Fed. R. Civ. P. 45(d)(3)(A)(iv) (emphasis added).

36. To determine whether the subpoena presents an undue burden, courts consider the following factors: “(1) relevance of the information requested; (2) the need of the party for the documents; (3) the breadth of the document request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested documents; and (6) the burden imposed. Further, if the person to whom the document request is made is a non-party, the court may also consider the expense and inconvenience to the non-party.” *See Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004). Moreover, “a subpoena presents an undue burden when the subpoena is facially overbroad.” *Id.*; *see also MetroPCS*, 327 F.R.D. at 610.

37. Here, the balancing of these factors favors quashing the Subpoenas.

38. *First*, there is a mismatch between the Subpoenas and the actual injunction claims before the Court. The Deposition Subpoena seeks information about historical, rather than current, transactions, while the requested injunction can only address current, on-going transactions. The deposition topics seek information about the formation, organization, and direction of Sentinel, when such formation presumably happened years ago. They further seek information related to a

2017 transfer of assets from certain Debtor-affiliated funds to Sentinel, including a 2018 memo related to the same. The subpoenas end with Topic 7 seeking, without time limitation, information on all assets transferred from the Debtor or certain of its affiliates to Sentinel. None of these topics, save perhaps No. 7, seeks information about *current* transfers that may be the subject of injunctive relief. Rather, they seek information related to *prior* transfers, which only can be solved by a claim against the transferors or transferees, none of whom are parties to this litigation (and also, notably, are not the Former Employees). On its face, the relevance of the topics listed in Attachment A to the Document Subpoenas to any preliminary injunction hearing is not apparent.

39. *Second*, assuming *arguendo*, that the Subpoenas seek information subject to current transfers which may be the subject of an injunction, the TRO only seeks to halt the *Debtor* from further transferring assets to Sentinel. Presumably, the preliminary injunction would do the same. It is undisputed that the Former Employees are unable to effectuate transfers from the Debtor to anyone at this time, so they cannot possibly be the subject of relevant discovery. Additionally, the preliminary injunction apparently is *uncontested*, leading to the query of why *any* discovery is required in this Adversary Proceeding.

40. *Third*, to the extent there are any current transactions, UBS can seek (and apparently has been receiving on a voluntary basis) this information directly from the Debtor without need for an adversary proceeding. Most, if not all, of the categories of documents identified in the Deposition Subpoenas and Document Subpoenas are actually in the Debtor's possession and not the proper subject of discovery from a nonparty. *See Scrum Alliance, Inc. v. Scrum, Inc.*, Civ. No. 4:20-cv-00227, 2020 U.S. Dist. LEXIS 209352, at *7 (E.D. Tex. Nov. 9, 2020) ("Instead of burdening nonparties, Plaintiff should obtain the information directly from the source."). For example, upon termination by the Debtor, the Former Employees returned all Debtor property,

including any laptops or equipment, and thus have no possession, custody, or control over these documents (including documents identified in the topics listed in Attachment A to the Notices of Deposition). See *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 821 (5th Cir. 2004) (limiting document request to documents in an individual’s actual “possession, custody, or control” and barring the request for documents to which one has “access” by virtue of their position with an employer).

41. *Fourth*, because the Former Employees do not know the scope of the injunctive relief requested in the Adversary Proceeding, the Former Employees may not fully object to the relevance of the documents requested in the Document Subpoenas or the topics asserted in the Deposition Subpoenas, or defend themselves in any deposition. The Notice of Deposition attached to each of the Deposition Subpoenas notes that each Former Employee will be deposed *in connection with* the Injunction Motion against the Debtor *and* a number of additional topics set forth in Attachment A.⁴ The Former Employees should be able to see the entire record to enable them to adequately assert their objections.

42. *Fifth*, whether a party’s discovery requests are relevant “turns on whether they are ‘reasonably calculated’ to lead to evidence admissible as to [its] claims” or defenses against its opponent *in the underlying case*. *Andra Grp., LP v. JDA Software Grp., Inc.*, 312 F.R.D. 444, 449(N.D. Tex. 2015) (emphasis added). Here, the Debtor already has settled its disputes with UBS. There apparently will be no contested preliminary injunction hearing. Nonetheless, the document requests and topics attached to the Deposition Subpoenas cast a net far wider than that needed from nonparties for any uncontested preliminary injunction against the Debtor. Therefore, UBS’s

⁴ These topics are nearly identical to the document requests outlined in the Document Subpoenas and, as such, are addressed together in this Motion to Quash.

need for any documents or testimony from the Former Employees related to the underlying preliminary injunction is moot. *John Doe #1 v. Veneman*, 380 F.3d 807, 814 (5th Cir. 2004) (“Generally settlement of a dispute between two parties renders moot any case between them growing out of that dispute.” (quoting *ITT Rayonier Inc. v. United States*, 651 F.2d 343, 345 (5th Cir. 1981))).

43. *Sixth*, the Subpoenas violate the rule against pre-litigation discovery. The document requests and deposition topics appear to be aimed at gathering information to support UBS’s and the Debtor’s separate, future claims against numerous potential parties, including perhaps the Former Employees—as explicitly set out in the Settlement Agreement. As an example, the documents requested and topics listed in the Document Subpoenas include the formation and organizational structure of Sentinel, which is not a party to the Adversary Proceeding, as well as the purpose, terms, amendments, and communications relating to various documents created in 2017 and 2018. *See MetroPCS*, 327 F.R.D. at 610 (court retains discretion to deny subpoena when the request “exceeds the bounds of fair discovery”). This information is related to ***potential future claims or actions*** that UBS may bring against the Former Employees or other nonparties to the Adversary Proceeding, as noted in UBS’s preservation notices and the Settlement Agreement, not the underlying preliminary injunction.⁵ These concerns are legitimate, particularly since this Court has acknowledged that “[t]here may be other lawsuits that mushroom” from what is alleged in the Complaint, but at this time, this Adversary Proceeding is solely against UBS and the Debtor. Hr’g Tr. on Mot. for Protective Order 36:2-4. Seeking documents and pre-litigation depositions from the Former Employees ***for potential future claims***—under the guise of discovery in connection

⁵ The claims asserted in the preservation notice and Settlement Agreement relate to alleged asset transfers from and to entities that are non-debtors and are not parties to the Adversary Proceeding. Any such claims would fall well outside this Court’s jurisdiction.

with a preliminary injunction hearing—is an abuse of the discovery process and otherwise reaches beyond the bounds of permissible discovery here. *See MetroPCS*, 327 F.R.D. at 627-28 (granting motion to quash non-party subpoena because the record did not support a determination that the deposition testimony would be relevant to support claims against the defendants in the instant action). Simply put, UBS cannot use these Subpoenas to get around the general bar against pre-litigation discovery, only permitted in limited circumstances under Federal Rule of Civil Procedure 27. *See, e.g., In re Ramirez*, 241 F.R.D. 595, 596 (W.D. Tex. 2006) (Rule 27 may not be used as a vehicle for discovery prior to filing a complaint; it is only available in special circumstances to preserve known testimony that could otherwise be lost).

44. *Seventh*, the burden imposed on the five Former Employees by producing documents and taking their depositions on the same topics outweighs UBS's need for all of these documents and depositions. UBS has the burden "not to make unreasonably cumulative or duplicative requests such that the burden or expense of complying with the requests outweighs their likely benefit." *See MetroPCS*, 327 F.R.D. at 614. Yet, the topics contained in the Deposition Subpoenas are almost identical among the five nonparty Former Employees, making no effort to tailor topics to each individual or avoid duplication. Further, many of these topics appear to be those better suited for a corporate representative of the Debtor and/or Sentinel. None of the Former Employees is a corporate representative of the Debtor or Sentinel, nor should the Former Employees be compelled to speak on these topics as if they are.

45. Considering: (i) the irrelevance of the Subpoenas to the relief sought in the preliminary injunction; (ii) the use of the Subpoenas as a pretext to obtain information related to other potential claims; (iii) the ability of UBS to seek the documents from the Debtor; and (iv) the

undue burden imposed on the Former Employees in producing documents and testifying on such broad topics without any reasonable notice, the Subpoenas must be quashed in their entirety.

C. In the alternative, all discovery in the Adversary Proceeding should be stayed pending approval of the Settlement Agreement.

46. It is clear that the entire Adversary Proceeding is a pretext to obtain pre-litigation discovery against the Former Employees. But if the Subpoenas are not quashed, then—at a minimum—all discovery should be stayed pending approval of the Settlement Agreement between the Debtor and UBS. Given the Debtor’s apparent consent to the relief requested in the Adversary Proceeding and its commitment under the Settlement Agreement to cooperate with UBS, the Debtor is almost certain to abide by the preliminary injunction. Because Federal Rule of Civil Procedure 1 aims to secure a “just, speedy, and *inexpensive* determination of every action,” the nonparty Former Employees should not be forced to bear the cost and potential prejudice of depositions that may soon be made irrelevant by approval of the Settlement Agreement. Fed. R. Civ. P. 1 (emphasis added). If for some reason the Settlement Agreement is not approved and the Debtor ends up challenging the injunctive relief sought in the Adversary Proceeding (which would then create a controversy that does not currently exist), the relevance and need for the Subpoenas can be reevaluated at that time.

D. Due to her legal unavailability, the Subpoenas against Ms. Lucas should be quashed in their entirety.

47. Finally, Ms. Lucas is legally unavailable under Federal Rule of Evidence 804(a)(4), as she is currently on disability and on maternity leave following her own hospital stay after recently welcoming twins, who required a stay in the newborn intensive care unit. *See* Fed. R. Evid. 804(a)(4) (providing that a witness is unavailable when they cannot be present to testify because of a then-existing physical illness). “[N]on-parties have greater protections from discovery,” and the “burdens on non-parties will impact the proportionality analysis.” *MetroPCS*,

327 F.R.D. at 610. In this case, the burden on Ms. Lucas will not only be impracticable, but impossible in light of her disability and leave. Although UBS has been asked to voluntarily withdraw its Subpoenas as to Ms. Lucas, it has refused to do so. Indeed, at a meet-and-confer regarding the Subpoenas on May 12, 2021, counsel for UBS questioned whether maternity leave constituted a “legitimate disability” and would only agree to look into relieving Ms. Lucas of any obligation to appear at a deposition if they conclude that being a recent mother of twins who had to be hospitalized in the NICU qualifies in their view as a “legitimate disability.” As such, Ms. Lucas seeks the protections of this Court when her disability prevents her from reviewing documents in response to the Document Subpoena, let alone preparing for and attending a deposition as sought in the Deposition Subpoena.

48. Given that the information sought from Ms. Lucas is more readily available from the Debtor, UBS has other options for obtaining such information. Instead of burdening Ms. Lucas, UBS may obtain the information from the Debtor. *See Scrum Alliance*, Civ. No. 4:20-cv-00227, 2 at *7.

V. CONCLUSION AND PRAYER

49. The Former Employees respectfully request that this Court grant this Motion to Quash UBS’s Subpoenas to Produce Documents and Subpoenas to Testify at a Deposition that command the testimony of the Former Employees in their entirety. In the alternative, the Former Employees respectfully request that discovery be stayed pending approval of the Settlement Agreement.

Dated: May 15, 2021

Respectfully submitted,

/s/ Frances A. Smith

ROSS & SMITH, PC

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CERTIFICATE OF CONFERENCE

In compliance with L.B.R. 7007-1(b), I certify that a meet-and-confer was conducted with UBS counsel on May 12, 2021 regarding the subpoenas. At that conference, counsel for the Former Employees informed counsel for UBS that a decision on whether to file the motion to quash would be made and conveyed to them by the end of the day on May 15, 2021. To that end, counsel for the Former Employees emailed counsel for UBS before filing the motion to quash, informing them that the motion was being filed. Counsel for the Former Employees understands that UBS opposes the motion.

/s/ Frances A. Smith

Frances A. Smith

CERTIFICATE OF SERVICE

I certify that on this 15th day of May 2021, a true and correct copy of the foregoing was served via ECF-Electronic Notice on all parties receiving ECF-Notice in this case.

/s/ Frances A. Smith

Frances A. Smith

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

<p>In re:</p> <p>HIGHLAND CAPITAL MANAGEMENT, L.P.,¹</p> <p style="text-align: center;">Debtor.</p>	<p>Chapter 11</p> <p>Case No. 19-34054-sgj11</p>
<p>UBS SECURITIES LLC AND UBS AG LONDON BRANCH,</p> <p style="text-align: center;">Plaintiffs,</p> <p>vs.</p> <p>HIGHLAND CAPITAL MANAGEMENT, L.P.,</p> <p style="text-align: center;">Defendant.</p>	<p>Adversary Proceeding</p> <p>No. 21-03020-sgj</p>

ORDER GRANTING MOTION OF FORMER EMPLOYEES TO QUASH SUBPOENAS

¹ The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

This matter coming before the Court on *Motion of Scott Ellington, Isaac Leventon, Jean Paul Sevilla, Matthew DiOrio, and Mary Kathryn Lucas to Quash Subpoenas* [Docket No.] (the “Motion”), the Court having reviewed the Motion, finds that (i) the Court has jurisdiction over this matter under 28 U.S.C. § 1334, and (ii) notice of the Motion was sufficient under the circumstances; and for the reasons stated on the record by the Court at the hearing;

IT IS HEREBY ORDERED THAT:

1. The Motion is hereby Granted.
2. The Subpoenas are quashed.
3. Notwithstanding any Bankruptcy Rule or Local Bankruptcy Rule that might otherwise delay the effectiveness of this Order, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.
4. This Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

END OF ORDER

Submitted by:

/s/ Frances A. Smith

ROSS & SMITH, PC

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