

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

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	)	<b>Case No. 19-34054-sgj-11</b>
In Re:	)	Chapter 11
	)	
HIGHLAND CAPITAL	)	Dallas, Texas
MANAGEMENT, L.P.,	)	Thursday, June 24, 2021
	)	2:30 p.m. Docket
Debtor.	)	
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	)	
UBS SECURITIES, LLC, et.	)	<b>Adversary Proceeding 21-3020-sgj</b>
al.,	)	
	)	- PLAINTIFFS' MOTION TO COMPEL
Plaintiffs,	)	AND RESPONSE TO MOTION OF
	)	FORMER EMPLOYEES TO QUASH
v.	)	SUBPOENAS [74]
	)	- MOTION OF FORMER EMPLOYEES
HIGHLAND CAPITAL	)	TO QUASH SUBPOENAS [70]
MANAGEMENT, LP,	)	
	)	
Defendant.	)	
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TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,  
UNITED STATES BANKRUPTCY JUDGE.

WEBEX APPEARANCES:

For Plaintiff UBS	Sarah Tomkowiak
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1 APPEARANCES, cont'd.:

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3 Defendant:

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transcript produced by transcription service.

1                   DALLAS, TEXAS - JUNE 24, 2021 - 3:05 P.M.

2                   THE COURT: All right. Well, we'll now turn to the  
3 UBS versus Highland Capital matter. This is Adversary 21-  
4 3020. Sorry to keep you all waiting. I'll get lawyer  
5 appearances. Do we have an appearance, first, from UBS, the  
6 Plaintiff?

7                   MS. TOMKOWIAK: Yes, Your Honor. Can you hear me all  
8 right?

9                   THE COURT: Yes, I can.

10                  MS. TOMKOWIAK: Okay, great. This is Sarah Tomkowiak  
11 of Latham and Watkins on behalf of the Plaintiffs, UBS. And  
12 I'm joined by my colleague Andy Clubok as well.

13                  THE COURT: All right. Good afternoon.

14                  I'll go ahead and take Debtor-Defendant's appearance,  
15 although I didn't see a Debtor pleading on this dispute. Who  
16 do we have appearing for the Debtor?

17                  MR. FEINSTEIN: It's Robert Feinstein, Your Honor.  
18 Good afternoon. And you're correct, the Debtor did not  
19 interpose any pleadings on this one. I believe a couple of my  
20 colleagues are on and listening, but I'll be handling the  
21 matter today to the extent the Court has any questions for the  
22 Debtor.

23                  THE COURT: All right. Thank you.

24                  Now, for the five Former Employees who have filed a motion  
25 to quash subpoenas, Ms. Smith, are you appearing?

1 MS. SMITH: Yes, Your Honor. Frances Smith of Ross &  
2 Smith on behalf of the five Former Employees: Matt DiOrion,  
3 Scott Ellington, Isaac Leventon, Mary Kathryn Lucas, and John  
4 Paul Sevilla. And Your Honor, I have with me Charles Cowden,  
5 who is our associate, and he will be running my PowerPoint  
6 presentation today.

7 THE COURT: All right. Good afternoon to you all.

8 I assume everyone else is just an interested observer or  
9 witness.

10 So, with that, I'll talk about how we're going to proceed.  
11 Technically, we have, first in time, the Former Employees'  
12 motion to quash, but then we have a motion to compel filed  
13 right after that. Have you all talked about who's going to go  
14 first today?

15 MS. SMITH: Your Honor, we -- this is Frances Smith.  
16 We have conferred multiple times, and we recently conferred by  
17 email regarding the witnesses and exhibits. We did not  
18 specifically address who would go first. I assumed that I  
19 would because my motion was first in time and that has been  
20 Your Honor's usual practice.

21 We did confer regarding the witness and exhibits, and we  
22 have stipulated to the admittance of the Former Employees'  
23 Exhibits 1 through 24 at Docket 89 and we have stipulated to  
24 UBS Exhibits 1 through 7 at Docket 90.

25 We do not have an agreement on UBS Exhibits 8 and 9, and

1 so they'll offer them if they need them, and Ms. Tomkowiak can  
2 jump in here, and then I'll object if needed.

3 We believe the Court can decide both motions on the  
4 papers, the arguments of counsel, and the documentary evidence  
5 before it, so we have not designated any witnesses and we,  
6 given the time constraints on Your Honor's docket, we decided  
7 that we would not present any live witnesses.

8 THE COURT: All right. Well, first, Ms. Tomkowiak,  
9 do you confirm there's a stipulation on admissibility of  
10 Exhibits 1 through 24 of the five Former Employees?

11 MS. TOMKOWIAK: Yes, Your Honor. I can confirm that  
12 that's our agreement, and also we are fine if Ms. Smith wants  
13 to proceed first.

14 We also didn't specifically discuss this, but given that  
15 the motions are related, to say the least, I think it would be  
16 appropriate for us to -- I assume we're going to argue them  
17 together, rather than going back and forth. But again, I have  
18 not discussed that with Ms. Smith.

19 THE COURT: That makes sense.

20 MS. SMITH: That was my assumption, too, Ms.  
21 Tomkowiak, and --

22 MS. TOMKOWIAK: Yes. It's Tomkowiak.

23 THE COURT: Okay.

24 MS. TOMKOWIAK: The W sounds like a --

25 MS. SMITH: Tomkowiak.

1 THE COURT: Okay. So, Exhibits 1 through 24 are  
2 admitted at Docket Entry 89. Exhibits 1 through 7 of UBS are  
3 admitted at Docket Entry 90. And UBS either will or will not  
4 try to offer 8 and 9 separately.

5 (Former Employees' Exhibits 1 through 24 are received into  
6 evidence. UBS Securities' Exhibits 1 through 7 are received  
7 into evidence.)

8 THE COURT: All right. Well, Ms. Smith, you may  
9 proceed with your presentation.

10 MS. SMITH: Okay. Your Honor, if you could give my  
11 associate, Charles Cowden, authority to run a PowerPoint  
12 presentation.

13 THE COURT: All right. Certainly.

14 MS. SMITH: Your Honor, --

15 THE COURT: Certainly.

16 MS. SMITH: I'm sorry.

17 THE COURT: Go ahead, Mr. Cowden.

18 MS. SMITH: Okay. Your Honor, where we are, the plan  
19 has been confirmed since February 22nd, 2021. The UBS  
20 settlement has been approved since May 27th. Under the  
21 complaint, UBS states that it wants injunctive relief against  
22 the Debtor, which is the only entity it can enjoin in this  
23 forum. The requested discovery does not further that relief.

24 So, why are we here? Your Honor, we have a discovery in  
25 search of a dispute.

1           As set forth in the pleadings, and as Your Honor has  
2 recognized, this is an adversary between UBS and the Debtor.  
3 No other parties. Now UBS and the Debtor have agreed on the  
4 substance of UBS's requested injunctive relief. The Debtor  
5 has agreed to the relief in the TRO. The Debtor has  
6 affirmatively agreed to the preliminary injunction in its  
7 answer. In its answer, the Debtor did not state that it is  
8 opposed to the permanent injunction. The Debtor does not deny  
9 a single substantive allegation in the complaint.

10           So, on the current record, the Court could enter the  
11 permanent injunction today, or the Debtor and UBS could  
12 stipulate to the injunction, like the parties did in another  
13 adversary connected to this large bankruptcy case, Number 20-  
14 3190.

15           Instead, UBS and the Debtor have kept this lawsuit alive  
16 to ask the Court to exercise its power against third parties  
17 to obtain discovery that they do not need for the Court to  
18 make a decision on the relief sought. The Court should grant  
19 the motion to quash and to deny the motion to compel for three  
20 reasons.

21           First, the issue is moot. The discovery was sought in  
22 support of a preliminary injunction that is now unopposed and  
23 a TRO that has already been granted. There is no live  
24 controversy for which additional evidence, either testimonial  
25 or documentary, is needed for the Court to enter an order

1 granting the injunctive relief sought against the Debtor. In  
2 fact, the Debtor is contractually bound to cooperate with UBS.

3 There is no necessary evidence. UBS has not identified a  
4 single fact that it needs from any of the Former Employees  
5 that is necessary for the Court to make the decision on the  
6 requested injunctive relief. The record before Your Honor was  
7 sufficient to make a decision on the TRO and grant it. It was  
8 sufficient to make a decision on the preliminary injunction,  
9 and the Debtor has agreed to that in its answer. It should  
10 therefore be sufficient for a permanent injunction granting  
11 the same relief. It is incumbent upon UBS to articulate what  
12 they need and why, and why they cannot get that information  
13 from the Debtor.

14 Your Honor, a very short timeline of the facts. This case  
15 has been going on for a long time. The parties, I think, have  
16 said it's been ten-plus years. I haven't been here for most  
17 of it. On February 2nd, the Debtor and UBS announced at the  
18 confirmation hearing that they had settled all the disputes  
19 between them. Then negotiations were reopened, as we heard,  
20 and they renegotiated during February and March, and on March  
21 30th UBS and the Debtor executed a settlement agreement with  
22 the revised terms.

23 Your Honor, under the settlement agreement, which is our  
24 Exhibit 2, under Paragraph 1C, the Debtor agrees that it will  
25 provide reasonable assistance to UBS in connection with any



1 legal action UBS takes to return the transferred assets to the  
2 Funds. The Debtor will cooperate with UBS and participate in  
3 the investigation or prosecution of claims or requests for  
4 injunctive relief against the Funds, which is what we have  
5 here. The Debtor will cooperate with UBS to assign or convey  
6 any such assets described in Section 1C Romanette vi, or any  
7 other assets owned or controlled by the Funds, and the Debtor  
8 will use reasonable efforts to assist UBS to collect its  
9 judgment against the Funds and HFP and assets the Funds or HFP  
10 may own.

11 In addition, any litigation in which the Debtor is a co-  
12 plaintiff with UBS or a plaintiff pursuing claims on behalf of  
13 or for UBS's benefit shall be conducted in consultation with  
14 UBS. And then there's some reimbursement. For every dollar  
15 UBS recovers from the Funds, UBS will reimburse the Debtor ten  
16 percent of the recovery. And finally, the Debtor will respond  
17 as promptly as reasonably possible to requests by UBS for  
18 access to documents.

19 Your Honor, then on March 31, the day after UBS and the  
20 Debtor signed this settlement agreement with all of those  
21 provisions where the Debtor's going to cooperate, UBS filed a  
22 complaint under seal.

23 Before we filed our response, Your Honor, we discussed  
24 with the attorneys at Latham the portions of the complaint  
25 that we intended to reference in our response, and we received

1 their agreement that we could, with reference to those  
2 sections, file our response without filing it under seal. And  
3 we will do our best, Your Honor, not to go beyond the scope of  
4 that in referencing the complaint today. We appreciate their  
5 accommodation so -- to prevent from having to file something  
6 else under seal.

7 UBS alleged that it has information causing it to believe  
8 that the Debtor, under Mr. Seery's management and control,  
9 will engage in prohibited conduct, which is defined as making  
10 payments or further transfers to Sentinel or any of its  
11 affiliates. That's Exhibit 16, which we did not file on the  
12 docket, Your Honor, because it's the sealed complaint, but we  
13 did provide it in Your Honor's notebook.

14 Why would Mr. Seery violate the settlement agreement that  
15 was so hard-fought? UBS does not elaborate in the complaint  
16 why it thinks Mr. Seery would engage in prohibited conduct.  
17 UBS's sole stated reason for needing injunctive relief is its  
18 concern that, absent the relief, Mr. Seery would allow the  
19 transfer to Sentinel or its affiliates of the Sentinel  
20 redemption payment or the CDO Fund assets. That's in the  
21 complaint at Paragraph 49.

22 Shortly after filing the complaint under seal, UBS began  
23 serving the Former Employees with document and deposition  
24 subpoenas, seeking documents and testimony on an expedited  
25 basis, purportedly related to the complaint and the motion for

1 TRO. The Former Employees were not permitted to read either  
2 the complaint or the motion for TRO at that time.

3 Over the next six weeks or so, we negotiated the terms of  
4 a confidentiality agreement and sought to resolve issues  
5 relating to the subpoenas without need for Court intervention.  
6 We were successful in the confidentiality agreement, Your  
7 Honor, but we were not successful in negotiating the terms of  
8 the relief sought in the motions.

9 On April 2nd, notices of deposition were sent to Former  
10 Employees. On April 9th, the TRO was entered, restraining the  
11 Debtor from making or allowing the funds under its management  
12 or control to make any payments or further transfers to  
13 Sentinel.

14 The Debtor agreed to the entry of the TRO. The conduct  
15 prohibited by the TRO is precisely the same conduct that UBS  
16 seeks to enjoin the Debtor from committing with the  
17 preliminary and permanent injunctions.

18 These are not -- Your Honor, these are not actions that  
19 the Debtor could commit inadvertently and these are not  
20 actions that the Former Employees could commit on behalf of  
21 the Debtor.

22 On April 15th, more notices of depositions were sent to  
23 the Former Employees, and the Debtor filed a settlement motion  
24 seeking the Court's approval of the settlement agreement under  
25 Bankruptcy Rule 9019.

1           On May 3rd -- on April 27th, we had a meet-and-confer, and  
2 UBS said the Debtor was likely unopposed to UBS's relief but  
3 that UBS was not sure.

4           On May 3rd, the Debtor and UBS filed a stipulation under  
5 which UBS agreed to allow the Debtor additional time to answer  
6 the complaint until June 2nd.

7           On May 14th, they filed a second stipulation and proposed  
8 scheduling order, setting the trial out to October.

9           On May 7th, we had more notices of deposition sent to the  
10 Former Employees. And these are the latest depositions, Your  
11 Honor, and they recite that they are in connection with the  
12 Plaintiff's motion for a temporary restraining order and  
13 preliminary injunction against Highland Capital. They are the  
14 only notices that have been -- the only notices that have been  
15 issued therefore relate exclusively to the TRO and the  
16 preliminary injunctions.

17           On May 11th, we received the complaint for the first time.

18           On May 20th, UBS said for the first time that it needs  
19 this discovery in connection both with the preliminary  
20 injunction and the permanent injunction.

21           Then, on May 21, the Court had the hearing on the 9019  
22 motion, and the motion was granted. During the hearing, Mr.  
23 Seery testified that all disputes between UBS and the Debtor  
24 were resolved.

25           Following the Court's approval of the settlement

1 agreement, the only capacity in which the Debtor is opposed to  
2 UBS in any litigation is as proxy for the Funds. And that's  
3 Mr. Seery's testimony at the hearing transcript 125, Page 125,  
4 4-9, and that is in our transcript excerpts at Exhibit 3.

5 On May 27th, the Court entered the order granting the  
6 settlement motion and approving the settlement agreement. And  
7 then on June 2nd the Debtor filed the answer to the complaint.  
8 The complaint states that the Debtor lacks the knowledge or  
9 information sufficient to form a belief as to whether the  
10 Debtor, under Mr. Seery's management and control, were engaged  
11 in the prohibited conduct. We do not believe that is  
12 plausible. There is simply no live dispute.

13 My first point, Your Honor, the motion to compel is moot.  
14 The subpoenas at issue in both the motion to compel and the  
15 motion to quash were issued solely in connection with UBS's  
16 request for a preliminary injunction, not a permanent  
17 injunction. Those are at our Exhibits 11 through 15, and  
18 they're also included in the UBS exhibits.

19 In fact, UBS has stated in 22 different documents,  
20 including the live subpoenas and the notice of deposition  
21 currently at issue before this Court, that it needed the  
22 discovery in connection with Plaintiff's motion for a  
23 temporary restraining order and preliminary injunction.

24 Moreover, the Debtor has agreed to the relief UBS seeks.  
25 In the complaint, UBS recites that the Debtor is not opposed

1 to the injunction, saying, indeed, the Debtor does not object  
2 to the relief UBS seeks.

3 And then in the Debtor's answer to the complaint, the  
4 Debtor admits the allegations in the complaint to the extent  
5 they refer to the requests for a temporary or preliminary  
6 injunction.

7 In the motion to compel, UBS acknowledged that it was  
8 seeking discovery only to present evidence at the yet-to-be  
9 scheduled hearing on the requested preliminary injunction.

10 In its brief, for the first time, UBS argues that it needs  
11 discovery in order to develop fully a record supporting good  
12 cause to enter into the preliminary and permanent injunction.  
13 First time the permanent injunction is mentioned.

14 Thus, it was only after the Former Employees pointed out  
15 that the preliminary injunction was unopposed that UBS  
16 suddenly changed its position, now arguing that it needs the  
17 discovery in support of the permanent injunction.

18 Your Honor, UBS needs no additional discovery from anyone,  
19 let alone nonparty Former Employees, on its request for  
20 preliminary injunction, which has now been agreed to, and is  
21 only now moving the goalpost, arguing it needs discovery on  
22 the permanent injunction, to make it appear as if there is a  
23 live dispute or a point of contention with the Debtor on this  
24 issue.

25 UBS's own papers contradict its revisionist narrative.

1 The April 2nd, April 15th, and the May 7th deposition notices  
2 all refer only to the TRO and the preliminary injunction.

3 Because UBS issued the subpoenas solely in connection with  
4 the preliminary injunction, which is now agreed, there is no  
5 need for any discovery from the Former Employees.

6 In fact, no party has opposed the relief sought in the  
7 complaint, so the Court could enter the order and do it  
8 without further discovery. Everybody is here today. You have  
9 the Debtor here and you have UBS here. UBS does not need a  
10 record to defend on appeal because the Debtor is the only  
11 person who has standing to appeal and the Debtor is not  
12 opposed. So, on that first element, the Court should deny the  
13 motion to compel as moot and grant the motion to quash.

14 Second, Your Honor, there is no live case or controversy  
15 between the Debtor and UBS. UBS and the Debtor, although  
16 nominally Plaintiffs and Defendant, are not actual adversaries  
17 in this proceeding. In fact, Mr. Seery testified that the  
18 settlement agreement resolves all of the disputes between UBS  
19 and the Debtor. At the hearing, the question was, And will  
20 this settlement, if approved, take care of all disputes  
21 between UBS and the Debtor? And Mr. Seery's answer was, I  
22 believe it will, yes. And that's the hearing transcript at  
23 Exhibit 3.

24 Additionally, in the settlement agreement itself, the  
25 Debtor contractually agreed to all the relief sought in the

1 complaint.

2 The settlement agreement says the Debtor will provide  
3 reasonable assistance, cooperate, and participate in the  
4 investigation or prosecution of claims for injunctive relief  
5 against the Funds, cooperate with UBS to assign the assets,  
6 otherwise use reasonable efforts to assist UBS to collect  
7 against the Funds.

8 Then we compare that with the TRO, and the TRO provides  
9 that the Debtor is temporarily enjoined and restrained from  
10 making or allowing the Funds under its management or control,  
11 including, but not limited to, Multi-Strat and the CDO Fund,  
12 to make any payments or further transfers to Sentinel or any  
13 of its affiliates.

14 This has been reiterated by the testimony of Mr. Seery.  
15 Mr. Seery also acknowledged that the Debtor is a defendant in  
16 this proceeding solely in its capacity as a representative of  
17 the Funds.

18 Your Honor, to put this in perspective, compare the  
19 Debtor's contractual agreement which says the Debtor will use  
20 reasonable efforts to cooperate with UBS and participate as  
21 needed in the investigation or prosecution of claims or  
22 request for injunctive relief against the Funds -- like this  
23 lawsuit -- compare that with the injunction against the Funds,  
24 where they're temporarily enjoined and restrained from making  
25 or allowing Funds under its management or control to make any



1 payments or further transfers to Sentinel; the fact that the  
2 Debtor is a defendant only as a representative of the Funds;  
3 and the conclusion is, How is the Debtor meeting its  
4 contractual obligation? It's by standing as a defendant to  
5 give UBS unopposed injunctive relief against the Funds and  
6 discovery from third parties.

7 Your Honor, unless the Debtor intended to deliberately  
8 breach the settlement agreement with its contractual  
9 obligations to UBS just one day after making them, the Court  
10 can only be left with the conclusion that the Debtor acting as  
11 defendant in this proceeding is how it's cooperating with UBS.  
12 The complaint sets up a cooperative party for the purpose of  
13 taking discovery from nonparties who lack the full procedural  
14 rights and constitutional due process protection of parties.

15 The Debtor's counsel has so far refused to respond to a  
16 letter that I sent asking them if they were opposed and asking  
17 for their position on the relief sought in the complaint. The  
18 Debtor is not being straightforward in its answer. A true  
19 adversary would have either replied to the letter and said  
20 it's opposed to the injunction or stated its opposition to the  
21 relief in the answer to the complaint, and the Debtor did  
22 neither.

23 UBS argues that there's still a dispute because the --  
24 with the Debtor because UBS fears that, in the absence of  
25 injunctive relief, the Debtor will engage in prohibited

1 conduct. But UBS should be relieved now. Its initial  
2 concerns appear to be entirely unfounded. Mr. Seery has  
3 testified under oath that the -- that under the settlement  
4 agreement the Debtor has certain obligations, and that the  
5 Debtor would continue to adhere to those obligations. Those  
6 obligations include the efforts to cooperate with the  
7 injunctive relief. He further testified that the Debtor has  
8 the further obligation to cooperate and participate in  
9 recovering the assets.

10 These -- the inconsistent positions that UBS has taken so  
11 far can be seen clearly in the pleadings and hearings in this  
12 case. For example, the motion to compel was at first an  
13 emergency hearing, but then the Debtor's date was -- answer  
14 date was extended, and the TRO has been in place indefinitely.  
15 So we don't have an emergency any more.

16 At first, the preliminary injunction was a contested  
17 matter seeking a preliminary injunction, but now the Debtor  
18 does not object to the preliminary injunction.

19 At first, the preliminary injunction discovery was in  
20 connection with the Plaintiff's motion for TRO and preliminary  
21 injunction. When we pointed out that that rendered it moot,  
22 UBS says, well, it needs discovery for the permanent  
23 injunction.

24 The Debtor -- at first, the Debtor did not object to any  
25 of the relief sought, as stated in the complaint, but then UBS

1 says the Debtor didn't -- did not oppose the relief only as it  
2 related to the preliminary injunction.

3 So that's where we are now. Even if there had been a  
4 dispute before, there is no longer. UBS claims that UBS --  
5 shows that UBS has no true party opponent.

6 The bottom line is that the relief affects three potential  
7 counterparties to UBS: the Debtor; the Funds, with the Debtor  
8 as agent; and Sentinel. The Debtor has no interest as a  
9 direct litigant and has settled with UBS. It faces no further  
10 liability. The Funds have no interest in defending the case.  
11 The Debtor, on their behalf, has undertaken to send all  
12 proceeds from the transferred assets to UBS without further  
13 court action. Only Sentinel, the payee on the alleged  
14 transfers from the Funds, has any interest in defending  
15 against the injunctive relief, and Sentinel is not a party to  
16 this proceeding.

17 It is also notable that UBS admits that the enjoined  
18 parties are the Funds, not the Debtor. That's the memorandum  
19 in support at Paragraph 39. It's the Debtor's managed Funds  
20 that would be enjoined if UBS's request for permanent  
21 injunction is successful. But UBS hasn't sued those Funds,  
22 only the Debtor as their manager. If UBS had sued the funds  
23 as nonparties and nondebtors, they would have likely had to  
24 sue them in New York, or at least in the District Court. So  
25 UBS was creative in their selection of the defendant and seek

1 to create jurisdiction over parties in this Court where there  
2 is none.

3 UBS even claims to have brought this lawsuit for the  
4 benefit of the Debtor. The complaint states that, in the  
5 absence of injunctive relief, UBS and the Debtor will be  
6 irreparably harmed. That's at Paragraph 47. UBS and the  
7 Debtor are united in seeking the Court's stamp of authority on  
8 their agreement to withhold further payments from the Funds to  
9 Sentinel, without including Sentinel or the Funds themselves  
10 as parties.

11 Finally, UBS's argument that regardless of the Debtor's  
12 stance UBS needs discovery to fully develop a record  
13 supporting a permanent injunction is spurious. UBS needs no  
14 record for the Court to enter an order granting the relief UBS  
15 seeks in its complaint. The only parties to the action agree  
16 that such an order should be entered. The only plausible --  
17 or if they don't agree to the permanent injunction, they have  
18 definitely not opposed it by the way they've done their  
19 answer. The only plausible reason for needing to develop  
20 fully a record is if UBS anticipates an appeal from the order.  
21 But only the Debtor has standing to appeal, and the Debtor  
22 apparently has no inclination to appeal, but would be in  
23 breach of the settlement agreement if it did so. And Mr.  
24 Seery has testified that the Debtor intends to adhere to its  
25 obligations.

1           So, absent opposition from the Debtor, UBS has no need to  
2 either make its record or defend its record against any party  
3 in these proceedings.

4           Your Honor, the applicable case law supports our position.  
5 In *Doe v. Veneman*, the Fifth Circuit held that the exercise of  
6 judicial power under Article III of the United States  
7 Constitution depends upon the existence of a case or  
8 controversy. Without an actual case or controversy, a federal  
9 court has no jurisdiction. The actual controversy must exist  
10 at all stages of the litigation, not merely at the time the  
11 complaint is filed.

12           Your Honor, we understand that at the time the complaint  
13 was filed that UBS's settlement was not approved yet, and so  
14 maybe they might have needed it at that time, but as the way  
15 things have played out, and with the continued agreements of  
16 the Debtor, they -- it is not a controversy at this time.

17           Also, this Court specifically held that a settlement of a  
18 dispute between two parties renders moot any case growing  
19 between them out of that dispute.

20           Also, the discovery is not relevant, according to the  
21 *Andragrute* (phonetic) case, because whether a party's  
22 discovery requests are relevant turns on whether they are  
23 reasonably calculated to lead to evidence admissible as to its  
24 claims or defenses in the underlying case. So it has to be in  
25 this case, the UBS versus Highland case. Here, UBS -- the

1 Debtor and UBS have settled all claims between them, so there  
2 is no need for documents or testimony in the underlying case.

3 Also, in *Scrum Alliance*, the -- discovery is unduly  
4 burdensome. Instead of burdening nonparties, Plaintiffs  
5 should obtain the information directly from the source. The  
6 direct source is the Debtor. The Debtor has already agreed to  
7 promptly provide reasonable discovery and documents under the  
8 settlement agreement.

9 The Former Employees have returned all Debtor property,  
10 and the Debtor has contractually agreed to provide it to UBS.  
11 So UBS should look to the Debtor for the information it seeks.

12 And then finally, in the *Metro PCS* case, that court  
13 squashed a subpoena directed at a third party because the only  
14 basis for the subpoena was that a witness testified that the  
15 third party may be involved in a scheme with the Defendant in  
16 the Plaintiff's lawsuit. Your Honor, this was a pre-filing  
17 case that I believe that it is applicable to this case because  
18 no lawsuit has been filed against my clients. There's no  
19 pending lawsuit against the Former Employees. The third  
20 parties -- our -- my clients' testimony is not necessary to  
21 prove or support the Plaintiff's claim. And the district  
22 Court in *Metro PCS* quashed the subpoena because the third-  
23 party testimony was not necessary to prove or support the  
24 plaintiff's claim. There was no evidence in the record that  
25 the third party's testimony would be relevant to the lawsuit.

1 And the Court specifically said, A party may no more use  
2 third-party discovery to develop new claims or defenses that  
3 are not already identified in the pleadings than it may use  
4 discovery served on a party to find the claims themselves,  
5 rather than to find support for properly-pleaded claims.

6 In *Metro PCS*, the District Court discussed several factors  
7 in determining that the subpoena was unduly burdensome. All  
8 of these factors, Your Honor, weigh in favor of the Former  
9 Employees. I won't spend a lot of time, but to run quickly  
10 through them: the relevance of the information requested. In  
11 this case, they're requesting historical data. It is not  
12 relevant for what the Debtor is going to do in the future.

13 The need of the party for the documents. The Debtor has  
14 already agreed that it would provide all relevant documents.  
15 And Mr. Morris testi -- not testified -- Mr. Morris stated on  
16 the record that the Debtor has been subject to voluminous  
17 subpoenas, requests for documents.

18 The breadth of the request. We have 12 categories of  
19 documents, 10 of which were not limited by time.

20 And the time period covered. Either there's no time  
21 period or we go all the way back to 2017 or 2016, which,  
22 again, has no bearing on the future conduct of the Debtor.

23 The particularity with which the documents are described.  
24 Requests 1, 11, and 12 are vague, not described with  
25 particularity.

1           And the burden imposed. The burden is simply that this  
2 discovery is unnecessary.

3           Therefore, the logic in *Metro PCS* is compelling and  
4 applies to this case. And the District Court in *Metro PCS*  
5 found that nonparties have greater protection from discovery.  
6 I believe UBS stated at the last -- at one of the earlier  
7 hearings that, as nonparties, they have no protection under  
8 the Federal Rules. That's inaccurate. As nonparties, they  
9 have greater protection from discovery. And the burden on  
10 nonparties will impact Rule 26's proportionality analysis.

11           Ultimately, Your Honor, you should adopt the same  
12 framework and reach the same conclusion as *Metro PCS*. The  
13 depositions and discovery sought by UBS directed to the Former  
14 Employees are unduly burdensome because the testimony sought  
15 is unnecessary for UBS to prove or support the relief it seeks  
16 from the Court regarding this complaint. Remember, they want  
17 to enjoin future actions of the Debtor. That's what Your  
18 Honor is deciding.

19           Your Honor, there is only one circumstance where the  
20 Federal Rules allow for discovery where there is no actual  
21 case or controversy, and that is Rule 27. Rule 27 is a very  
22 narrow path, and we are not on it. This case is really about  
23 the settlement agreement and how it assigns UBS claims against  
24 the Former Employees. The only logical conclusion that this  
25 Court can draw is that UBS wants this discovery so they can



1 bring claims against the Former Employees, and that is  
2 expressly what Rule 27 prohibits.

3 In the *In re Ramirez* case, the Court held that Rule 27 may  
4 not be used as a vehicle for discovery prior to filing a  
5 complaint. And the complaint that we are talking about is a  
6 future potential complaint against the Former Employees. It  
7 is only available in special circumstances, to preserve known  
8 testimony that could otherwise be lost.

9 *Ramirez* also quoted *In re Ford*. Here, *Ford* seeks to  
10 discover or uncover testimony, not to perpetuate it. *Ford*  
11 simply wants to know who shot Roberts and why. Rule 27 does  
12 not provide for such discovery. And Your Honor, that's what  
13 we have here.

14 Let's look at what UBS is asking for from the Former  
15 Employees in comparison to the relief sought. UBS seeks to  
16 enjoin the Debtor, which is not controlled by Former  
17 Employees, from allowing its Funds, which are controlled only  
18 by the Debtor as manager, from transferring assets to  
19 Sentinel, which the Debtor has already agreed not to do. If  
20 we compare that to the documents that they have requested from  
21 the Former Employees -- which are historical data, documents  
22 from 2016 to present, communications between Sentinel and the  
23 Former Employees who left the Debtor six months ago, documents  
24 related to the 2017 transaction, documents related to the 2018  
25 tax memo, valuation of transferred assets -- UBS does not need

1 discovery from the Former Employees on these because,  
2 according to the settlement agreement, the Debtor will respond  
3 as promptly as reasonably possible to the requests by UBS for  
4 access to the documents.

5       Importantly, nowhere in UBS's documents does it try to  
6 connect the dots between the relief it is requesting,  
7 enjoining the Debtor, and the information it is seeking,  
8 historical data. UBS needed to come up with a roadmap for the  
9 Court on why it needed this extraordinary relief. We have  
10 asked, and they have filed paper and responses, and we still  
11 do not have an adequate answer to that. We have met and  
12 conferred on multiple occasions, and they have still not  
13 adequately answered that question.

14       Third, Your Honor, the Court should deny the motion to  
15 compel because UBS has not identified a single fact that is  
16 necessary for the Court to make a decision on the requested  
17 injunctive relief against the Debtor. UBS is abusing the  
18 bankruptcy process and seeking nonparty discovery, in bad  
19 faith, for improper purposes.

20       Your Honor, UBS knows the Debtor supported the TRO, the  
21 Debtor is not imposed to preliminary injunction, and is  
22 contractually prohibited from interfering from -- reasonable  
23 injunction relief, injunctive relief like the permanent  
24 injunction. UBS alleges in the complaint that UBS had  
25 information causing it to believe the Debtor would engage in

1 prohibited conduct. But UBS does not explain in the complaint  
2 why, just a day after Mr. Seery signed that settlement  
3 agreement, with all of those provisions on how he was going to  
4 cooperate, that they then believed the Debtor would, in one  
5 day, breach the settlement agreement and engage in prohibited  
6 conduct.

7       There is no reason for them to make these allegations if  
8 all it wanted was an entry of an order granting the injunctive  
9 relief against the Debtor. UBS and the Debtor, having just  
10 executed their settlement agreement, could have submitted an  
11 agreed order with the complaint and requested that the Court  
12 enter it. They could have stipulated, as Mr. Dondero and the  
13 Debtor did in 3190.

14       Instead, they had an ulterior motive to pursue discovery  
15 against nonparties on an uneven playing field. UBS, with the  
16 Debtor's cooperation, is using this Court for an improper  
17 purpose, to find support for whatever causes of action UBS is  
18 trying to manufacture against the Former Employees and others.

19       So this adversary proceeding is anything but adversarial.  
20 That the Debtor is cooperating with UBS by helping UBS  
21 maintain the illusion of an actual controversy is evident from  
22 what has happened so far: agreeing to file the complaint  
23 under seal so that nonparties that UBS is seeking discovery  
24 from cannot tell what the allegations are. UBS should have  
25 known that those discovery requests would be met with a

1 reasonable request by Former Employees to see the complaint,  
2 which it was.

3 UBS responded by offering to make the complaint available  
4 only upon acceptance of unreasonable conditions, such as  
5 agreeing before seeing the complaint not to oppose the  
6 discovery requests.

7 UBS then used that delay they had created by insisting on  
8 unreasonable terms as grounds for its motion to compel and its  
9 accompanying request for expedited consideration.

10 While UBS was pressing the Former Employees for  
11 accelerated discovery, they agreed on the other hand to extend  
12 the Debtor's deadline for answering to June 2nd. Under that  
13 timeline that they attempted to manufacture, the Debtor would  
14 not have had to state its position on the relief sought until  
15 after UBS had obtained the discovery that it was seeking from  
16 nonparties.

17 Once the Former Employees were finally able to read the  
18 complaint, it confirmed what we had suspected: namely, that  
19 the Debtor did not oppose the relief sought.

20 When the Court denied UBS's motion to expedite the motion  
21 to compel, the Debtor was forced to file its answer to the  
22 complaint on June 2nd or seek a further extension. The Debtor  
23 explicitly confirmed in its answer that it's not opposed to  
24 the preliminary injunction. But the Debtor continued to  
25 cooperate with UBS by refusing to take a position on the

1 permanent injunction.

2       The idea that UBS needs to conduct (garbled) discovery on  
3 the Former Employees in order for the Debtor to make up its  
4 mind on whether it supports or opposes a permanent injunction  
5 is just illogical. UBS and the Debtor had enough information  
6 about the Sentinel transactions to renegotiate the terms of  
7 their global settlement, putting a value on claims relating to  
8 it, and agreed to revised settlement amounts. They had  
9 sufficient information to accuse the Former Employees of a  
10 parade of vaguely-defined horrors in the complaint, in the  
11 settlement motion, at the hearing on the settlement motion,  
12 and in the motion to compel. UBS, they had enough information  
13 to agree to a TRO and to not oppose a preliminary injunction.  
14 And now for them to say they don't have enough information for  
15 the permanent injunction, it's not believable.

16       The Debtor and UBS should have resolved, if there was a  
17 dispute seeking to invoke the Court's power to adjudicate the  
18 dispute, before they filed the complaint.

19       UBS could simply take Mr. Seery's deposition and ask  
20 whether the Debtor is opposed to the permanent injunction, and  
21 if so, why, and how the Debtor can take that position without  
22 reaching a settlement agreement.

23       UBS wants discovery enforced by court power before they  
24 will even tell the Court if there's a dispute. If there is a  
25 dispute, then the Debtor must have breached its cooperation

1 obligations the day after settling with UBS, and somehow this  
2 was never mentioned to Your Honor at the settlement motion  
3 hearing.

4       Alternatively, if there's no dispute, the Court has no  
5 power to enforce UBS subpoenas against the Former Employees.

6       UBS is looking for information that has no bearing on  
7 whether the injunctive relief should be granted. There is  
8 simply no fact that my clients are in possession of that the  
9 Debtor does not have that UBS needs to obtain from them before  
10 this Court can grant the order that UBS seeks, which is to  
11 enjoin the Debtor. UBS has weaponized the discovery process  
12 to obtain information they hope to use in a potential future  
13 litigation. The Court should not reward those litigation  
14 tactics.

15       Your Honor, UBS has not answered these three key  
16 questions: whether UBS would consider it a breach of the  
17 settlement agreement if the Debtor opposed the permanent  
18 injunction; what are the factual obstacles as of today that  
19 UBS needs to overcome for the Court to enter the injunctions;  
20 and of those factual obstacles, what are the facts that UBS  
21 can only get from the Former Employees?

22       Because UBS has not or cannot answer these questions, Your  
23 Honor, the motion to quash must be granted and the motion to  
24 compel must be denied.

25       Thank you, Your Honor, for your time.

1 THE COURT: All right. Thank you. Ms. Tomkowiak,  
2 I'll hear your argument.

3 MS. TOMKOWIAK: Thank you, Your Honor. Again, it's  
4 Sarah Tomkowiak on behalf of UBS.

5 So, I'm going to attempt to streamline some of the points  
6 that I've prepared in response to Ms. Smith's comments. But I  
7 want to start by just taking a big step back here. We are  
8 dealing with incredibly serious issues. Ms. Smith's clients  
9 are the ones who are at the very heart of the fraud and the  
10 events that we allege in our complaint. These are not third-  
11 party tangential or speculative involvements. And now their  
12 counsel has come here and really accused us of bad faith for  
13 seeking discovery from the persons who instructed the  
14 transfers, effectuated the transfers, from Mr. Ellington, who  
15 owns 30 percent of Sentinel, from Mr. DiOrio, who was a  
16 director, or at least one time was a director of Sentinel.

17 So to suggest that the discovery sought is not relevant --  
18 and Your Honor, the standard for relevancy is just that it is  
19 possibly relevant to the claims and defenses in this matter --  
20 is not -- you know, it's a bit absurd. You know, it strikes  
21 us as absurd, and it's certainly not an abuse of the discovery  
22 process.

23 I want to talk about the settlement agreement first. And  
24 in particular, you know, Ms. Smith said several times that all  
25 of the claims between UBS and the Debtor have been settled.

1 She omits a key carve-out from the release in the settlement  
2 agreement, and we cite it in our brief. Our brief is Docket  
3 76. We cite it at Page 21, Paragraph 51. The settlement  
4 agreement, which is at the docket at 2200-1, I want to read  
5 from it. So this is from -- it's Section 3A(6(6)). And so  
6 Section 3 is the release, and then this particular dispute,  
7 this dispute here, this adversary proceeding, is explicitly  
8 carved out from the release in Section Subsection 6, where it  
9 says -- carves out any action taken by UBS against any person  
10 or entity, including any HCLM -- HCMLP party or MSCF party, to  
11 enjoin a distribution on the Sentinel redemption or the  
12 transfer of any assets currently held by or within the control  
13 of CDO Fund to Sentinel or a subsequent transferee, or to seek  
14 to compel any action that only such person or entity has  
15 standing to pursue or authorize in order to permit UBS to  
16 recover the insurance proceeds, transferred assets, the Phase  
17 I judgment, or any recovery against HFP.

18 And then the remainder of that section goes on to explain  
19 certain circumstances under which a portion of the fees and  
20 expenses that the Debtor would incur in connection with that  
21 action would be reimbursable.

22 And so, Your Honor, it is incorrect to say that this  
23 instant dispute was somehow released or covered by the  
24 settlement agreement or that there is no -- are no remaining  
25 disputes between the two parties.



1 I want to go back, then, to the question of relevancy.  
2 Again, there can be no real question that the documents and  
3 the testimony that UBS is seeking are relevant. They seek  
4 information about the assets that were transferred, the  
5 accounts that were used to transfer the assets, and  
6 information about other assets or transfers that might provide  
7 the facts to support UBS's showing for -- of irreparable harm  
8 that monetary damages cannot remedy.

9 And it's very implausible for us to believe, based on what  
10 we know, that these Former Employees, including an employee  
11 who is a part-owner of Sentinel, the transferee, do not have  
12 any possible relevant information. It would surprise us  
13 greatly if we are permitted to take these depositions and  
14 that's what comes out of it. We don't believe that could  
15 possibly be true, given what we know at this time.

16 You know, Ms. Smith referenced the fact that our subpoenas  
17 call for some historical data. I don't think that's  
18 particularly unique, Your Honor, in the context of a request  
19 for injunctive relief. All requests for injunctive relief are  
20 based upon, you know, current facts or historical facts that  
21 support enjoining some future action. And here, we're not  
22 only seeking information about those past actions, but also  
23 information that might relate to current transfers of assets  
24 or future transfers -- for example, ongoing cash  
25 contributions, dividends, other income from the transferred

1 assets that would be presently unknown to UBS.

2 So, again, going back to where I started, and as Your  
3 Honor acknowledged when we were here in April at the hearing  
4 on Mr. Dondero's motion for a protective order in which  
5 several of these same arguments were made, this is really  
6 serious stuff. We were informed of a massive fraud on the eve  
7 of our settlement negotiations. This discovery is very  
8 critical to confirm under oath what these Former Employees who  
9 were involved with these transfers actually know and actually  
10 did.

11 The complaint has allegations, Your Honor, and those were  
12 based on the information that UBS knew in March when we filed  
13 the complaint, but we need discovery to substantiate those  
14 allegations. And based on the evidence that we obtained, UBS  
15 might need to amend its complaint, we might need to conform  
16 the scope of the permanent injunction that we seek to the  
17 actual evidence in the case, as you do, you know, towards  
18 trial. But to meaningfully exercise those rights, we're  
19 entitled to take discovery, and this discovery is  
20 unquestionably relevant.

21 So, with that showing of relevance, I want to talk a  
22 little bit about the burden. The burden here, then, once we  
23 make that showing, really falls on the Former Employees here  
24 to somehow show that the discovery is too burdensome. Their  
25 primary point seems to be that this is unnecessary discovery.

1 That is not true. And I will address the accusations that  
2 were made about this being cooperative or friendly litigation  
3 in a moment. But that's their first point.

4 You know, in terms of actual burden, there's no real  
5 argument that this discovery is too burdensome. With respect  
6 to documents, we've explained that we were are only seeking  
7 documents that are not in the possession of the Debtor. So,  
8 for example, documents that these employees have in their  
9 personal email accounts or documents that they have access to  
10 because of their direct ties to Sentinel, so those documents  
11 would not necessarily be in the possession of the Debtor and  
12 we could not get them from the Debtor.

13 The topics are also appropriately limited, Your Honor.  
14 These topics are substantially similar to those that were in  
15 the document subpoena that we served on Mr. Dondero, which  
16 Your Honor reviewed in connection with the April hearing that  
17 we had. And, you know, we've submitted them as well, so you  
18 have them in front of you on these motions as well.

19 Each of these Former Employees, we didn't really talk a  
20 lot about them, or Ms. Smith didn't really talk about them  
21 individually, but they all -- they all played a role, Your  
22 Honor, and they all played a different role in the events that  
23 are alleged in our complaint. They are separate pieces of the  
24 puzzle.

25 So, for example, you know, Mr. Ellington, again, he owns

1 30 percent of Sentinel, and on information and belief, he came  
2 up with this whole scheme. And so that's his role.

3 Mr. Leventon, on information and belief, carried that  
4 scheme out. And he's on emails regarding this so-called  
5 insurance policy that was purchased with the assets.

6 Mr. DiOrion was at one time a director of Sentinel. He  
7 signed several documents on Sentinel's behalf.

8 Mr. Sevilla was involved in the formation of Sentinel and  
9 in directing the asset transfers.

10 And then Ms. Lucas was involved in the execution of the  
11 transfers and included in some correspondence setting up  
12 Sentinel's financial accounts.

13 So those are, briefly, some of the differences between the  
14 witnesses and why we believe that each of them have  
15 discoverable information here.

16 And we've offered to minimize the burden on these  
17 nonparties in several respects. We have offered to speak with  
18 them beforehand to potentially stream -- streamline these  
19 depositions. We will take them remotely. We offered to meet  
20 and confer regarding which Former Employee is best suited to  
21 respond to each topic. And we will strive to avoid  
22 duplicative questioning, of course.

23 And in response to all of those offers, you know, they've  
24 -- they moved to quash, and here we are. But we certainly  
25 offered and continued to remain willing to do our best to

1 minimize any real burdens or inconveniences on these  
2 witnesses.

3 None of the other arguments that were offered today  
4 presents a reason to deny our motion to compel, or on the flip  
5 side, reason to grant the motion to quash.

6 And I would just note that the standard there and the  
7 burden on the Former Employees is quite high. They're  
8 required to show good cause, and the standard in the Fifth  
9 Circuit is extraordinary circumstances, and there are no  
10 extraordinary circumstances here that would prevent this  
11 discovery. If anything, the extraordinary circumstances  
12 warrant taking this discovery.

13 So the first and the primary argument that has been raised  
14 in support of their motion to quash is this idea that there's  
15 no real live dispute here and that this is friendly-party  
16 litigation. Your Honor might recall that Mr. Dondero made  
17 those same arguments when he sought a protective order, and at  
18 the hearing back in April, on April 28th, Your Honor said, and  
19 I quote, "It's a stretch to view any litigation between UBS  
20 and Highland as friendly litigation, two parties that have  
21 vigorously litigated against each other for many, many years."

22 What you -- what this is, as you correctly observed in  
23 April, and what it remains to be, is cooperation. The  
24 settlement agreement between UBS and Highland requires  
25 cooperation. That's what it says. Those are the words that

1 were used. They were used and selected, you know, very  
2 precisely. You -- the words were up here on the screen. You  
3 have studied that settlement agreement. I know that you  
4 reviewed it and approved it after a lengthy 9019 hearing, so  
5 you're familiar with it.

6 But all that it requires is for the Debtor to provide UBS  
7 with reasonable assistance and cooperate with UBS. It does  
8 not say that the Debtor must agree to any injunctive relief  
9 that UBS might seek now or in the future. It does not  
10 stipulate to an injunction. I suppose maybe we could have,  
11 but frankly, Your Honor, a stipulation between the two parties  
12 would not provide for the same type of protection against some  
13 collateral attack that a court order would, and a court order  
14 like the one that we're seeking here. The Debtor has other  
15 constituencies. Again, the settlement language was chosen  
16 carefully, it was very precise, and it's worded in terms of  
17 cooperation.

18 The other argument that was raised several times during  
19 Ms. Smith's presentation is the idea that the Debtor is not  
20 objecting to the preliminary injunction, and so our request  
21 that -- for this discovery referenced the preliminary  
22 injunction, and because the Debtor has now stated in its  
23 answer to the complaint that it will not oppose that relief,  
24 our requests are moot. Respectfully, Your Honor, that's a bit  
25 of ironic statement. This is just really the product of the

1 delay that has been caused by the Former Employees refusing to  
2 sit for depositions and provide us with documents.

3 So, just to go back to the timing, we filed our complaint  
4 in March. We first got this discovery from Ms. Smith's  
5 clients in April 2021, right after we filed our complaint.  
6 And it was our intent to take expedited discovery in support  
7 of a preliminary injunction. We moved expeditiously to do  
8 that, and we thought the discovery we were seeking was pretty  
9 straightforward.

10 Mr. Dondero fought that. These employees have fought  
11 that. And so here we are, nearly three months later.

12 In the meantime, on June 2nd, the Debtor filed its answer  
13 to the complaint and indicated that it would not object to a  
14 preliminary injunction. And we did permit them a reasonable  
15 extension of time as a courtesy. Frankly, I do that, you  
16 know, whenever possible in response for a reasonable request  
17 from an adversary. And so, yes, we granted them that  
18 extension. They filed their answer and they indicated that  
19 they would not oppose the relief sought.

20 They did not say whether they would object to a permanent  
21 injunction, and at this stage it's our understanding that  
22 they're not agreeing to that, and certainly not before a  
23 fully-developed record.

24 But frankly, Your Honor, the more important point is that  
25 it is irrelevant whether or not the Debtor objects or not. It

1 is the Court that needs to decide whether or not UBS has met  
2 the standard for obtaining a preliminary injunction or a  
3 permanent injunction. And we are concerned that the Court  
4 will not have a full enough record to make those  
5 determinations either at the preliminary stage or at trial,  
6 and the information sought from the Former Employees is  
7 relevant to both.

8       The standards for obtaining a preliminary injunction and a  
9 permanent injunction are similar; they're not identical. To  
10 obtain permanent relief, we have to show that we have suffered  
11 irreparable harm; that the remedies available at law, such as  
12 monetary damages, are inadequate to compensate us for that  
13 harm; that when you consider the balancing of the equities or  
14 the hardships between the plaintiff and defendants a remedy in  
15 equity is warranted; and then you also have to consider  
16 whether the public interest would be disserved by a permanent  
17 injunction.

18       A permanent injunction is, as you know, generally a remedy  
19 that's contemplated at the conclusion of a trial, which has  
20 been set for this case, and a preliminary injunction is  
21 usually decided earlier, and then for a preliminary injunction  
22 we have to make a similar showing, but only that there's a  
23 substantial likelihood of success and irreparable harm and  
24 that we are likely to succeed on the merits.

25       In both instances, these are high standards. It is not



1 just the Debtor, the Defendants, and Trust that must be  
2 considered; it is the public interest as well. And those are  
3 the facts that we need to develop in discovery to support our  
4 motion or a request for an injunctive relief.

5 For example, one of the transfers that UBS seeks to enjoin  
6 relates to Sentinel's interest in Multi-Strat. Multi-Strat is  
7 its own separate entity that has other investors. Sentinel is  
8 also its own separate entity, and they might have other  
9 claimants to the transfers that we're seeking to enjoin.

10 So there's more than just the Debtor's interests that's  
11 here at stake. At minimum, the public interest is also at  
12 stake, and the discovery that we're seeking is all in  
13 furtherance to support our requests both for a preliminary  
14 injunction and a permanent injunction and to enable us to meet  
15 those high standards and for the Court to decide whether we  
16 have.

17 Just a couple more brief points. I want to address  
18 briefly this concern that the information might be used  
19 against Ms. Smith's clients in future litigation. That is not  
20 sufficient grounds to quash the subpoenas. And, again, just a  
21 bit of déjà vu: Mr. Dondero made that exact same argument as  
22 well. Your Honor rejected it, and rightfully so. As Your  
23 Honor said at the time, there might be other lawsuits that  
24 come out of the allegations in this complaint, and I hear  
25 those concerns, and, frankly, those concerns speak volumes as

1 to, you know, these employees' involvement in the facts  
2 alleged in the complaint. But while that information that  
3 we're seeking might be relevant to potential future claims  
4 against these individuals or others, there's no abuse of the  
5 discovery process where, as here, the discovery is also  
6 relevant to our request for injunctive relief.

7 So for all of these reasons, we would ask the Court to  
8 enter an order compelling the Former Employees to produce  
9 documents on an expedited basis. They've had these requests  
10 for many, many months. I think Your Honor provided Mr.  
11 Dondero with seven days to respond to them. If they truly  
12 don't have, you know, a lot of documents, then the burden  
13 should not be that great. And then to sit for depositions.  
14 We would also ask that Your Honor, on the converse of that,  
15 deny the motion to quash.

16 And finally, Your Honor, as we noted in our brief, we are  
17 seeking fees and costs under Rule 37(a)(5) for our efforts in  
18 filing this motion. I mean, look, we -- we attempted -- this  
19 is a small point here, but we attempted to serve these Former  
20 Employees 70 times. We issued numerous subpoenas. Deadlines  
21 have come and gone. We've filed a whole motion on alterative  
22 service, as you know, with respect to Mr. Dondero. We had one  
23 prepared with respect to these witnesses as well. We did not  
24 seek any fees or anything in connection with all of that, but  
25 we're doing it now because, you know, we just feel like, if we

1 don't, then everything in this case will just continue to be  
2 litigated, including what we feel is very highly-relevant,  
3 minimally-burdensome discovery requests from -- from third  
4 parties who are pretty central to the allegations as alleged  
5 in the complaint.

6 That's all I have, Your Honor, until -- unless you have  
7 any questions. And I did want to, you know, reserve some  
8 rights to briefly rebut anything that Ms. Smith has to say in  
9 connection with our motion to compel.

10 THE COURT: All right. Well, I do have a few  
11 questions for both of you. I guess I'm going to ask one or  
12 two of them of you, Ms. Tomkowiak, and then after that I'm  
13 actually going to go to Mr. Feinstein and see if he wants to  
14 say anything about this, because his client has certainly been  
15 talked about a lot here even though there's no pleading on  
16 this discovery issue.

17 First, a very simple question. I've lost track of is this  
18 complaint still entirely under seal? Do we have a redacted  
19 version that's out there? I know a lot of people have now  
20 been provided the complaint. Where do we stand on that, just  
21 so I know?

22 MS. TOMKOWIAK: Sure, Your Honor. I can address  
23 that. The complaint is still under seal. You're right that  
24 several individuals have been provided copies of it in  
25 connection with our discovery requests, pursuant to

1 confidentiality agreements.

2 THE COURT: Okay. Including all of these five  
3 employees? They've all seen the whole thing now?

4 MS. TOMKOWIAK: They have all seen the whole  
5 complaint, yes. All of them have had access to the complaint  
6 for months now, I think.

7 THE COURT: Okay. Months?

8 Okay. And one reason I was waffling on that is I knew  
9 that there had been some discussions in court about giving  
10 certain people the complaint, but I remembered at some point  
11 in time the complaint, or the motion to seal, contemplated it  
12 being unsealed to the world, and I couldn't remember what was  
13 suggested on that front. What was suggested as far as when  
14 this is going to be unsealed?

15 MS. TOMKOWIAK: In our, you know, in our papers, Your  
16 Honor, we had suggested that that point in time would come at  
17 the preliminary injunction hearing. I realize that -- well,  
18 at least speaking from UBS's perspective, we thought that that  
19 point in time would have been sooner. And at this point, we  
20 are prepared to unseal the complaint itself if -- you know.  
21 And I believe our papers also contemplated that. We said that  
22 it would remain sealed until the preliminary injunction  
23 hearing or unless we requested to.

24 THE COURT: Okay. So, the way I'm analyzing this is  
25 we have a series of issues, and depending on how I answer

1 issue number one we may not get to any other issues. But  
2 obviously, the Former Employees here have argued, first,  
3 primarily, there's no case or controversy. This is a friendly  
4 adversary proceeding between UBS and the Debtor. The Debtor  
5 is going to agree to a permanent injunction, according to Ms.  
6 Smith's argument, so what this really is is, you know, an  
7 argument that the Court, I don't know, maybe lacks subject  
8 matter jurisdiction. I suppose that's another way of phrasing  
9 it. But even if that's not the right terminology, it's  
10 premature, it's improper pre-litigation discovery, you  
11 shouldn't be able to do discovery in this litigation.

12 Okay. So I want you to more squarely address how this  
13 discovery relates to the permanent injunction. You're  
14 refuting that it's a foregone conclusion you're going to get a  
15 permanent -- an agreed permanent injunction? You're saying  
16 that you don't know the Debtor is going to agree to that and  
17 therefore you need this discovery because you don't know for  
18 sure how it's going to play out? Is that what I hear you  
19 saying?

20 MS. TOMKOWIAK: Well, it's -- yes, that is not, and  
21 from UBS's perspective, a foregone conclusion. We haven't  
22 been told that. You know, we think that -- we all think --  
23 UBS believes that the record has to support that, that there  
24 has to be evidence before Your Honor to support that, but, you  
25 know, perhaps I should let Mr. Feinstein speak, since we are

1 talking about the Debtor.

2 THE COURT: All right. Well, there's -- I guess are  
3 you positively going to get the Debtor's agreement on this?  
4 And I guess there's the issue of the judge is not a potted  
5 plant. I still need to hear evidence, even if something's  
6 agreed. I guess you could phrase it that way. So you need to  
7 support with evidence a request for a permanent injunction.

8 But Mr. Feinstein, why don't you add to Ms. Tomkowiak's  
9 answer there if you have something to add.

10 MR. FEINSTEIN: Sure. I'd be happy to, Your Honor.  
11 First, let me start by saying this was not a party or a  
12 litigation that the Debtor wanted to be invited to. I mean,  
13 Your Honor knows the history here, that only a few months ago  
14 the Debtor uncovered what appears to be a massive fraud, the  
15 transfer of over \$100 million of assets out of the Funds to  
16 Sentinel. And we -- that contrary to what Ms. Smith said, she  
17 said there are simply no facts the Debtor doesn't know about  
18 this. That is -- that is fundamentally false. Okay? We  
19 discovered a fraud. We don't know the dimensions of it. We  
20 have, through internal emails, like a sense of what happened,  
21 but we want to see the full record come out here before  
22 there's a permanent injunction.

23 The other thing that I think is worth pointing out, Your  
24 Honor, is that, far from being collusive or cooperating with  
25 UBS, when UBS -- when we went to them and told them about this

1 discovery, among other things, they said, We would like the  
2 Debtor, in its capacity as investment manager for Multi-Strat,  
3 to agree not to make any distributions to Sentinel. And we  
4 said no. We said we're uncomfortable with that. We have  
5 responsibilities as an investment advisor. There are many  
6 other investors in that fund, and that we don't feel  
7 comfortable simply agreeing not to make a distribution to any  
8 particular investor.

9 And the next thing that happened is that UBS determined to  
10 sue the Debtor. Again, this is -- we're spending estate funds  
11 to be involved in this litigation, this is not a party we  
12 wanted to be involved in, but here we are.

13 Did we have grounds at the time the case began to oppose a  
14 TRO or preliminary injunction? No, but we would like to see a  
15 full record develop.

16 As Your Honor noted, you've got findings to make, and so  
17 do we, as fiduciaries. And frankly, it's more protective of  
18 the Debtor as investment manager to be subject to a court  
19 order that says "Don't make a distribution" than for the  
20 Debtor to do what UBS had initially asked, which was simply to  
21 agree to not make a distribution to a Multi-Strat investor.

22 So, you know, UBS started this lawsuit. We answered. I  
23 think our answer speaks for itself. But to be clear, we've  
24 not agreed to a permanent injunction, and won't until we see a  
25 factual record that supports it.

1           And there's a lot about the underlying facts that the  
2 Debtor would like to know, because this, again, this is --  
3 there's -- contrary to what Ms. Smith said, the facts are  
4 unknown, and the people who know them are, among others, are  
5 the Former Employees.

6           I think the other thing that's important, Your Honor, to  
7 know is that, you know, to the extent that anybody is critical  
8 of how the Debtor is defending this litigation brought by UBS,  
9 Sentinel is free to intervene. In fact, Sentinel's two owners  
10 are represented here today. Mr. Dondero owns the majority of  
11 it. He's on the line. And Mr. Ellington owns the rest of it,  
12 and he's represented by counsel. So if Sentinel is -- wants  
13 to, you know, enter this litigation, the Debtor certainly has  
14 no objection.

15           And, you know, but, you know, they've been resisting  
16 service of process on subpoenas. I don't know whether they'll  
17 resist being named in the lawsuit. But they didn't on their  
18 own seek to intervene, which we kind of expected they would.

19           So, you know, we didn't invent the fact pattern. We're in  
20 a difficult situation because we're unwilling to do what UBS  
21 wanted us to do, which is simply agree not to make any more  
22 distributions. And we lack the underlying facts to really  
23 form an adequate basis. So, you know, we're -- we took no  
24 position on the motion to compel and the motion to quash, but  
25 would we like to see all the facts come out on the record?



1 Yes, we would. And in the interim, we're just going to abide  
2 by the Court's ruling in this adversary. We're really not  
3 part of the motion practice today. But that's -- I think that  
4 fairly states our position.

5 THE COURT: Okay. Thank you, Mr. Feinstein.

6 I have a few more questions for each Ms. Tomkowiak and Ms.  
7 Smith. Assuming I were to grant the motion to compel, do you  
8 have any evidence in the record of these 70 attempts at  
9 service? I mean, obviously, I can pull up all your exhibits.  
10 I have them here. Was that among your exhibits?

11 MS. TOMKOWIAK: Yes. I believe so, Your Honor. I am  
12 looking at my declaration right now to be able to point you in  
13 the right place on that. I know that we set forth the history  
14 of our attempts at service in our brief as well. So that was  
15 Docket 76. And those attempts are set forth in the background  
16 section, so at Pages 5 --

17 (Interruption.)

18 A VOICE: Your Honor, (inaudible). We accepted  
19 service.

20 MS. TOMKOWIAK: I'm sorry. And then there's Exhibit  
21 24.

22 THE COURT: I'm hearing people talk over. I'm sorry.  
23 Say again?

24 MS. TOMKOWIAK: And then there's also Exhibit 24 to  
25 my declaration. My declaration is Docket 75. And the

1 affidavits of attempted service are at Exhibit 24 for that.  
2 So it would be Docket 75-25, I believe.

3 THE COURT: Okay.

4 MS. SMITH: Your Honor, this is Ms. Smith. If I may  
5 --

6 THE COURT: Okay.

7 MS. SMITH: -- assist Your Honor on one point.

8 THE COURT: Okay.

9 MS. SMITH: As soon as I was retained, I conferred  
10 with I believe it was Ms. Katie George, and we accepted  
11 service on behalf of two of our clients. At the time they  
12 were seeking service was two days after the motion was filed  
13 -- the complaint was filed under seal. We had no idea what it  
14 was about. And, you know, some of those attempts at service  
15 were on Ms. Lucas, who was recovering from a difficult  
16 pregnancy. I don't know about Ms. Tomkowiak's practices, but  
17 answering your door to strangers, it is not against the law  
18 not to answer your door to strangers.

19 At the time -- by the time I got retained, Your Honor, and  
20 we realized the complaint was out there, we accepted service  
21 within just a couple of days. I believe I even sent them an  
22 email before I was retained saying, I'm in the process of  
23 being retained and I would check with each of my five clients.  
24 So I think that's -- you know, it's water under the bridge,  
25 Your Honor, it's unfortunate, but it really has no bearing on

1 the relief they're seeking today.

2 And I sat here and listened to Ms. Tomkowiak and Mr.  
3 Feinstein repeatedly misquote me. Your Honor, I never said  
4 today this was friendly litigation. I used Your Honor's own  
5 words at the hearing on the protective order that the stance  
6 where we are now is a spirit of cooperation between the Debtor  
7 and UBS, which, you know, has evolved over time.

8 And Your Honor, Ms. Tomkowiak never answered my three  
9 questions. The three questions that I put at the end, and now  
10 she's had her whole presentation, and the Debtor. They never  
11 went back and answered those three questions that Your Honor  
12 should be entitled to answers to before ruling on this and  
13 putting discovery obligations on nonparties: Would the Debtor  
14 be in breach of the settlement agreement if it opposed the  
15 permanent injunction, which it has not done? What are the  
16 factual obstacles as of today that UBS needs to overcome to  
17 get the injunction? Your Honor, of course, I mean, to say  
18 that you are a potted plant? Of course not. You have -- but  
19 Your Honor has access to a lot more information than I do at  
20 this point because the TRO has been sealed. And so there's a  
21 lot of exhibits to the TRO that we know nothing about. So  
22 what are the factual obstacles as of today that Your Honor  
23 requires to enter a permanent injunction that are different  
24 from the TRO and the preliminary injunction, when Ms.  
25 Tomkowiak just explained that the standards are very similar?

1 And of these factual obstacles, what is it that UBS can only  
2 get from my clients? They still -- both of them spoke at  
3 length, and neither one of them answered those three  
4 questions.

5 Also, Your Honor, because of the way the record is,  
6 there's no evidence at all on the ownership in your -- in your  
7 record for today's hearing. Now, there may be in the overall  
8 case record -- it's sealed, big sections of it are sealed --  
9 that I don't know, but there's been no evidence as to Mr.  
10 Ellington's percentage ownership in Sentinel, and I frankly  
11 just don't know if that's correct or not.

12 And also, the numerous allegations Ms. Tomkowiak made  
13 against the other clients that I have, she made them all upon  
14 information and belief. So there's no evidence on them,  
15 either, in today's record.

16 THE COURT: Well, okay. I'm going to interject here,  
17 because I didn't ask all the questions I have to ask. Well, I  
18 guess I'll go back to Ms. Tomkowiak. Why don't you answer  
19 that question? I feel like it's a risky proposition to go  
20 down this "what if" trail, but would it be UBS's position that  
21 the Debtor is in breach of the settlement agreement with UBS  
22 if it doesn't agree to a permanent injunction? What is your  
23 answer to that?

24 MS. TOMKOWIAK: I think that's a difficult question  
25 to answer at this particular point in time, Your Honor. I

1 mean, there's nothing in the settlement that specifically  
2 speaks to that. There's nothing that says what the Debtor's  
3 obligations would be in terms of this dispute that was carved  
4 out from the general release, as I mentioned.

5 Whether or not that constituted a breach of its  
6 obligations to provide reasonable assistance or, you know,  
7 cooperate with, again, I don't know those terms are synonymous  
8 with "just agree to whatever we ask." And I think that,  
9 again, what we are -- what we seek on a permanent injunction  
10 might not be exactly what we are seeking now at the  
11 preliminary stage. So, without all of those variables known,  
12 I'm not sure that I can squarely answer yes or no --

13 THE COURT: Okay.

14 MS. TOMKOWIAK: -- to that hypothetical at this  
15 point.

16 THE COURT: Let me go back to Mr. Feinstein. I mean,  
17 I don't want to put words in your mouth, but I think this is  
18 what I was hearing. You waffled a little, saying, well, we  
19 are a fiduciary and --

20 MR. FEINSTEIN: Well, Your Honor, the --

21 THE COURT: -- people are not afraid to --

22 MR. FEINSTEIN: The cooperation agreement --

23 THE COURT: People are not afraid to sue Debtor  
24 affiliates or Debtor-connected personnel or make  
25 administrative claims. I mean, are you straddling that

1 tightrope here with agreeing to a permanent injunction  
2 potentially? Is that one of the things you're worried about?

3 MR. FEINSTEIN: No, Your Honor. We tried to be  
4 transparent about what our concern was. We're an investment  
5 manager for Multi-Strat. So we refused the request to simply  
6 withhold any further distri... you know, as investment  
7 manager, withhold any further distributions to Sentinel and --  
8 out of concern for our contractual and fiduciary obligations  
9 as investment manager.

10 So the settlement agreement with UBS obligates the Debtor  
11 to "reasonably cooperate." I think it would be unreasonable  
12 for them to expect us to risk breaching our fiduciary duties  
13 or our contractual obligations under the management agreement.

14 THE COURT: Okay. I perhaps used --

15 MR. FEINSTEIN: So we feel like it's appropriate that  
16 this be in court.

17 THE COURT: I perhaps used too harsh words that made  
18 you feel uncomfortable, but that's exactly what I was asking  
19 you about, that you're -- you are kind of straddling a  
20 tightrope here, I suppose, fulfilling your fiduciary duties  
21 but --

22 MR. FEINSTEIN: Well, --

23 THE COURT: -- but having your duty to cooperate? So  
24 you're still saying --

25 MR. FEINSTEIN: We --

1 THE COURT: -- we're going to see how it plays out?

2 MR. FEINSTEIN: Yes, and we really, in all candor to  
3 the Court, Your Honor, we don't view this through the lens of  
4 our obligation to cooperate. We were asked to cooperate and  
5 we said no in terms of withholding distributions. We were  
6 sued. And we think there should be a full evidentiary record,  
7 because we don't -- maybe there's an innocent explanation to  
8 everything that happened with Sentinel and the transfer of  
9 these assets, and these witnesses could bring to light  
10 something that might change the Debtor's mind. But right now,  
11 we don't have a basis to deny many of the things that are in  
12 the UBS complaint. And when we put denying the (garbled)  
13 information and belief, it was for good reason. We lack a lot  
14 of the information surrounding these transactions. And we  
15 wish things would be developed.

16 THE COURT: Okay. All right. Well, back to -- thank  
17 you. Back to Ms. Smith. So, confirm: these Former  
18 Employees, they're all here locally? I mean, that doesn't  
19 really matter, I suppose, because Ms. Tomkowiak said it would  
20 be a video deposition. But if you could just answer my  
21 question. They're all here locally, correct?

22 MS. SMITH: I believe that they are, Your Honor.

23 THE COURT: Okay. At least four out of five of them  
24 were in-house lawyers for the Debtor, correct?

25 MS. SMITH: I don't know that that's correct, Your

1 Honor.

2 THE COURT: Okay. Well, --

3 MS. SMITH: Mr. Ellington and Mr. Leventon were in-  
4 house lawyers. I'm not sure --

5 THE COURT: I know John Paul Sevilla is.

6 MS. SMITH: I don't think Mr. DiOrion is.

7 THE COURT: John Paul Sevilla has been a witness  
8 before, and it was represented he's an in-house lawyer or was  
9 an in-house lawyer. Matthew DiOrion, I don't -- I've heard  
10 that name but I can't remember. Was he a lawyer, or no?

11 MS. SMITH: I don't -- he's not a lawyer, Your Honor,  
12 and neither is Mary Kathryn Lucas.

13 THE COURT: All right. What is the status of Mary  
14 Kathryn Lucas's maternity leave? How much longer is she on  
15 maternity leave?

16 MS. SMITH: I don't know that, Your Honor. She has  
17 been on maternity leave I think about two months. I don't  
18 know how much leave she gets exactly.

19 THE COURT: Okay. Well, --

20 MS. SMITH: Your Honor, we still haven't heard the  
21 answer to Question 2 or 3. What are the factual obstacles as  
22 of today that UBS needs to overcome to get this injunction?  
23 And 3, of those factual obstacles, what is it that UBS can  
24 only get from our clients? I mean, they're nonparties to  
25 this.



1 THE COURT: All right. Well, --

2 MS. SMITH: The Rules of Civil Procedure are supposed  
3 to protect them, not limit them.

4 If you look at, Your Honor, the case *Traut v. Quantum*  
5 *Servicing, LLC*, it's a Judge Horan case here in the Northern  
6 District, Rule 37 does not by its terms address a motion to  
7 compel a party or nonparty to appear for a deposition. The  
8 only recourse expressly provided under the Rules for a party  
9 seeking another party's deposition is to properly notice the  
10 deposition and file a motion under Federal Rule of Civil  
11 Procedure if and when the deponent fails to appear.

12 That's not where we are here, Your Honor. We timely -- we  
13 timely and properly filed a motion to quash before we were  
14 required to perform under the deposition notices, and so we  
15 are not at the point where Your Honor can compel a deposition  
16 of our clients.

17 THE COURT: All right. Let me just throw another --  
18 I'm not going to -- I mean, Ms. Tomkowiak, if you want to  
19 answer Questions No. 2 or 3, fine. I feel like your answer to  
20 Question 1 kind of subsumed those questions as well. But is  
21 there anything you want to say before I ask my last question  
22 of Ms. Smith?

23 MS. TOMKOWIAK: I mean, I would prefer to address  
24 questions from Your Honor and not Ms. Smith, but I will say  
25 briefly that what we're -- the discovery we want, the facts

1 that we want, are the facts that prove our allegation. That's  
2 what we want. And I don't think I should have to lay out, you  
3 know, the rest of our legal strategy in that regard in terms  
4 of how exactly we intend to prove we're entitled to injunctive  
5 relief.

6 MS. SMITH: Your Honor, they have only alleged that  
7 we have knowledge about what happened in 2017, nothing about  
8 what the Debtor's current transactions with Sentinel are.  
9 What happened in 2017 is relevant to a damages claim that has  
10 not been filed against these Defendants. They must show that  
11 there is currently a dispute, not that there might be a  
12 dispute down the road if the Debtor doesn't agree. They have  
13 not met their burden, Your Honor, for a motion to compel.

14 THE COURT: Okay. My brain always goes down, I  
15 guess, different trails, always looking for a pragmatic  
16 approach. You've made some very compelling technical  
17 arguments here, Ms. Smith, that have given me a lot of pause,  
18 and I'm pondering the procedural issues. But let me ask you  
19 this practical question. Let's say you're correct regarding  
20 this discovery being premature, not necessary to a case or  
21 controversy. Couldn't UBS turn right around and file a motion  
22 to take 2004 exams of these Former Employees?

23 MS. SMITH: Your Honor, they could. And if they do,  
24 then Your Honor should deny that motion. A 2004 exam is  
25 unfettered and broad and commonly recognized as more of a

1 fishing expedition. That's *In re Correra*. The courts limit  
2 the use of 2004 when there is an adversary proceeding or a  
3 contested matter is pending, since 2004 is broader in scope  
4 than the ordinary rules of discovery. Even if the dispute is  
5 not a contested matter, courts have refused to allow  
6 questioning under the guise of a 2004 that's not primarily  
7 intended to further the goal of maximizing the value of the  
8 estate.

9 That is not what we have here.

10 Once an adversary or a contested matter has been  
11 commenced, discovery must be made pursuant to Federal Rule of  
12 Bankruptcy Procedure 7026, rather than by a 2004 exam. And  
13 that's *In re Washington Mutual*.

14 THE COURT: Whoa, whoa, whoa. Wait.

15 MS. TOMKOWIAK: That's a Delaware case, Your Honor.

16 THE COURT: Wait, wait, wait. There is not an  
17 adversary proceeding pending against your five clients. So,  
18 --

19 MS. SMITH: And that's the problem, Your Honor.

20 THE COURT: Well, --

21 MS. SMITH: So there shouldn't be discovery against  
22 them.

23 THE COURT: You're saying there is zero way that UBS  
24 will ever get discovery from your clients? Because here's the  
25 trail my brain is going down.

1 MS. SMITH: In this -- no, Your Honor, I'm not saying  
2 that. I'm saying that, in this -- in this adversary  
3 proceeding. The current posture of this adversary proceeding.  
4 Because, remember, 2004 has to do with the acts of the Debtor,  
5 and it should be intended to maximize the Debtor's estate.

6 THE COURT: Okay.

7 MS. SMITH: Once the adversary --

8 THE COURT: Stop. Stop. Stop right there.

9 MS. SMITH: They chose the adversary proceeding.

10 THE COURT: Stop right there. Your clients are not  
11 parties to this adversary proceeding. So if you're correct  
12 that there's no case or controversy to which discovery against  
13 your clients would be directed here, my question was, couldn't  
14 UBS turn around and file a motion to take 2004 exams? It  
15 wouldn't be subject to the case law I think you're citing  
16 that, oh, if there's an adversary pending, you can't take a  
17 2004, because the adversary proceeding is not pending against  
18 your five clients.

19 And, also, nowhere in 2004 is there a reference to it has  
20 to be aimed towards maximizing assets. I mean, it's -- you  
21 know, it can relate to acts of the debtor, financial condition  
22 of the debtor, conduct, property. I mean, it's pretty broad.  
23 And I've looked at this before, and I don't think it's limited  
24 to pre-confirmation.

25 MS. SMITH: Remember we're -- remember we're post-

1 confirmation, Your Honor, where your jurisdiction is limited.

2 Also, there's case --

3 THE COURT: I just said I've looked at this before  
4 and there does not appear to be a limitation on 2004's use to  
5 pre-confirmation. Now, maybe you know of case law I don't  
6 know about, but --

7 MS. SMITH: Well, I do have one case, Your Honor,  
8 that says a creditor who has commenced an adversary proceeding  
9 should be limited to discovery in that proceeding, pursuant to  
10 the Federal Rules of Civil Procedure, as to entities affected  
11 by the adversary proceeding.

12 And although we're not parties, Your Honor, we're  
13 definitely entities affected by the adversary proceeding.  
14 We've been drug into this with all of the deposition notices.  
15 So to say that we're not parties and so we're not entitled to  
16 protection, we're definitely entities affected by the  
17 adversary proceeding.

18 And it goes also to the issues addressed in the adversary  
19 proceeding, not just the people but the issues addressed in  
20 the adversary proceeding. And they've saying they -- they  
21 can't have it both ways. They can't say that we only need  
22 this discovery from these Defendants to prove up the relief  
23 we're seeking in this adversary proceeding. We need a fully-  
24 developed record in this adversary proceeding. If that's  
25 their argument, which they have made repeatedly, then they

1 should be limited by the Rules to the adversary proceeding.  
2 That's where they get to -- that's how they get to take their  
3 discovery. So, it's limited.

4 When you file an adversary proceeding, the Federal Rules  
5 of Civil Procedure limit you to Rule 26 as to entities  
6 affected by the adversary proceeding, which we definitely are,  
7 and as to issues addressed in the adversary proceeding.  
8 They're not saying they want all, you know, they want to  
9 investigate all acts of the Debtor. They're saying they want  
10 this discovery for this adversary proceeding, Your Honor. And  
11 that is *In re Buick*, 174 B.R. 299. And that, I think it  
12 specifically addresses our point. It recognizes that -- and  
13 then there's also *In re Blinder*. Entities not affected by the  
14 adversary proceeding do not get the greater protections. But  
15 we're definitely affected by the adversary proceeding, Your  
16 Honor.

17 THE COURT: Okay. My last question is --

18 MS. SMITH: I don't know if I gave you the cite. *In*  
19 *re Buick*, 174 B.R. --

20 THE COURT: My last question is, does it matter at  
21 all here that we're talking about three of the five employees  
22 having been in-house lawyers and fiduciaries? Fiduciaries  
23 during this bankruptcy case. I mean, in other words, these  
24 are not just any old third parties.

25 MS. SMITH: Your Honor, --

1 THE COURT: These are folks, three --

2 MS. SMITH: Right.

3 THE COURT: -- at least, three at least, who had  
4 fiduciary duties to this bankruptcy estate, and now they're  
5 resisting cooperating in discovery. Is that a relevant fact  
6 or not?

7 MS. SMITH: Your Honor, I don't think it's relevant  
8 to -- we have to keep matching up the discovery to the relief  
9 that they want. These -- these -- none of these Former  
10 Employees are currently at the Debtor. They're not directing  
11 the Debtor. They can in no way cause any of the problems, you  
12 know, the -- the discovery does not line up with the relief  
13 that they're seeking.

14 None of these employees have -- Former Employees can in  
15 any way direct the Debtor to either breach its obligations  
16 under the settlement agreement, to effect any transfers, they  
17 can't move Debtor assets. So they are seeking an injunction  
18 -- that's what they want, to enjoin the future acts of the  
19 Debtor -- and there's nothing that these employees will say  
20 that can, you know, change the relief.

21 It's -- I understand. I mean, we understand. They want  
22 to ask -- they want to ask questions or they may want to sue  
23 people. But it doesn't relate, there's no nexus between what  
24 they're asking and the relief that they're seeking, which is  
25 to enjoin the Debtor. And that's why they won't answer the

1 questions. Not that --

2 THE COURT: Okay.

3 MS. SMITH: I mean, I agree, --

4 THE COURT: Okay.

5 MS. SMITH: -- I'm not going to answer Ms.

6 Tomkowiak's questions. But if Your Honor poses them, I'm

7 going to try my best to answer them.

8 THE COURT: Ms. Smith, --

9 MS. TOMKOWIAK: Your --

10 THE COURT: -- my last question -- I said the last  
11 one was my last, but I think this one really is. Do you have  
12 any evidence in the record of burdensomeness? So, you know,  
13 assuming I get past the case or controversy argument and I  
14 find that UBS, you know, has shown relevance here, I think I  
15 need evidence of undue burdensomeness from anyone making that  
16 argument. I think the case law makes it clear that I need to  
17 have evidence of why is this burdensome. So, what is my  
18 evidence of that?

19 MS. SMITH: Your Honor, it's burdensome because even  
20 if you do not -- and I'm hoping that that's not the case --  
21 but you find that what they're asking for is relevant, it's  
22 still burdensome because they are nonparties and they can get  
23 the evidence that they need --

24 THE COURT: Right. What is my evidence?

25 MS. SMITH: -- from the Debtor.



1 THE COURT: What is my evidence?

2 MS. SMITH: They've gotten it so far.

3 THE COURT: The case law I think in this district and  
4 in this circuit is clear. I can't just have lawyer argument  
5 for burdensomeness. I need evidence.

6 MS. SMITH: Your Honor, the Debtor agreed to the TRO  
7 and the preliminary injunction on sealed motions. I don't  
8 know what the evidence is there. But the Debtor has already  
9 agreed to the TRO and the preliminary injunction. If there  
10 was evidence sufficient to support both of those, there should  
11 be evidence sufficient to support the permanent injunction,  
12 which is seeking the same relief. And they were able to do  
13 both of those things without any discovery or any input at all  
14 from my clients.

15 THE COURT: Okay. That's --

16 MS. SMITH: And they still have not said --

17 THE COURT: Again, that's an argument.

18 MS. SMITH: -- what facts they need.

19 THE COURT: Again, that's an argument. That's not  
20 evidence. How is this burdening Mr. Ellington and Mr. Sevilla  
21 and Mr. Leventon and Mr. DiOrion to sit for a deposition and  
22 produce any responsive documents they have?

23 MS. SMITH: Your Honor, discovery is always a burden.  
24 There's your time. Your effort. Your legal fees. I mean,  
25 they -- of course there's a burden. There's a financial

1 burden --

2 THE COURT: Well, it has to be unduly.

3 MS. SMITH: -- and there's a time burden for getting  
4 prepared for this.

5 THE COURT: It has to be unduly burdensome.

6 Okay. Well, again, this has given me a lot of pause, the  
7 various arguments and procedural complexities, I guess you  
8 could say. But this is where I come out on this. I'm going  
9 to deny the motion to quash and grant the motion to compel.  
10 I'm not going to shift any attorney's fees. So that's the  
11 bottom line. But here's where I come out. I think that the  
12 Employees have failed to convince me that this is premature or  
13 there's no case or controversy to which the discovery would  
14 relate here or this is just pre-litigation discovery for some  
15 future suit, maybe, and so, you know, is improper for all of  
16 that.

17 Again, I mean, we have some compelling arguments, but  
18 bottom line, I think it all boils down to the fact that we  
19 don't know positively one hundred percent that we are going to  
20 have an agreed permanent injunction between Plaintiff and  
21 Defendant here.

22 And number two, I used that expression, I'm not a potted  
23 plant. Well, I'm not a potted plant. I need evidence one  
24 day, even if it's agreed between Plaintiff and Defendant, to  
25 support the issuance of a permanent injunction.

1           So that's where I stand on this. So therefore I think  
2 that the Plaintiffs are entitled to develop their evidence to  
3 support issuance of a permanent injunction one day, even if it  
4 is agreed.

5           MS. SMITH: Your Honor, if you're inclined to do  
6 that, we would request that the order provide that any  
7 discovery obtained, either testimonial or documentary, only be  
8 used for the purpose that UBS says they need it, to fully  
9 develop the record for this permanent injunction, and that  
10 they not be allowed to use it for any other purpose, like  
11 future lawsuits.

12           THE COURT: Okay. That's denied. And I'll continue  
13 with my ruling.

14           So, I overrule the argument that this is improper and  
15 premature, no case or controversy.

16           So the next step in the analysis, as I see it, is has UBS  
17 met its burden of establishing relevance for this discovery?  
18 And I think they have. I think that it's very plausible,  
19 under the arguments they have made, that these Former  
20 Employees, three of which were in-house lawyers, might very  
21 well have information that bears on the claims made in this  
22 adversary proceeding that might support a permanent injunction  
23 against the Debtor.

24           Again, if the Debtor is going to be enjoined from making  
25 payments or causing some of its Funds or subsidiaries from

1 making payments to Sentinel, then we need to hear a little bit  
2 more about why it would be making payments to Sentinel and  
3 what that whole relationship is about. So I do find relevance  
4 is established.

5 Then the third step of the analysis here is, once UBS has  
6 met its burden of establishing relevance, which I think it  
7 has, I need evidence of undue burden from the Employees, and I  
8 just don't think I have it here.

9 The last things I will say is I always say, again and  
10 again, facts matter, and some facts that matter here to me --  
11 and, again, these, I suppose, negate burdensomeness, if I  
12 should consider that argument here -- we have local Former  
13 Employees. You know, the invitation, if you will, has even  
14 been made that it be a video deposition. These Employees have  
15 counsel that has been actively engaged in the bankruptcy case  
16 for a time.

17 And, again, these are not just any nonparties. These are,  
18 three out of the five, former in-house lawyers. Sophisticated  
19 parties. I think they would be very likely to have relevant  
20 information about what is a very serious matter that has been  
21 raised in this adversary. And it just troubles me, shall I  
22 say, that lawyers who have fiduciary duties, who had  
23 fiduciary duties to this Chapter 11 debtor for many months,  
24 and may have relevant information, are resisting the  
25 discovery. That's just the way I roll on these things.

1           So, I guess I will add that while I understand rules are  
2 rules and procedures are procedures, I feel like, even if the  
3 Employees were to be correct on this issue, UBS or the Debtor  
4 would have the right to take 2004 exams. And it would be  
5 winning the battle but losing the war, at least on resisting  
6 discovery, for that reason.

7           So I grant the motion.

8           As I said, I'm not going to shift attorney's fees here  
9 under Rule 37(a)(5). That's a strongly-worded rule that kind  
10 of starts out saying the Court must, after giving an  
11 opportunity to be heard, require a deponent whose conduct  
12 necessitated the motion, or the attorney advising it, or both,  
13 to pay reasonable expenses, including attorney's fees of the  
14 movant. But I can not do that if I find that other  
15 circumstances make an award of expenses unjust. I'm going to  
16 give some benefit of the doubt here and find other  
17 circumstances here so as not to shift attorney's fees in that,  
18 you know, again, we have a procedural argument that I said,  
19 you know, was somewhat compelling. We had one employee who,  
20 you know, was on maternity leave. And the argument that we  
21 tried 70 times to serve and were ineffective, well, it's a  
22 little -- it's a little bit different than just that, from  
23 what Ms. Smith presented.

24           So, that is the ruling of the Court. I think seven days  
25 to produce from the date of this order is reasonable.

1           And I know it's summertime. I don't know if you want to  
2 talk while you have the Court about appearance on depositions.  
3 I'd really just like you all to work that out. But is there  
4 anything you want to address right now as far as when they  
5 shall appear? I would think within the next 30 days, on an  
6 agreeable date, would be fine. Even if people have vacations,  
7 that gives a lot of wiggle room. Anyone want to weigh in on  
8 that?

9           MS. SMITH: I think Mr. Ellington is on an extensive  
10 vacation with his father, or is going to be, but I think, on  
11 the rest, 30 days, I may be able to work that out. I would  
12 like a shot, at least, of working it out with Ms. Tomkowiak.  
13 Given that we have five clients and, you know, two attorneys  
14 on this, so we'll be doing some back-to-back depositions.

15           THE COURT: All right. Ms. Tomkowiak? Thirty days?  
16 Does that sound like something you're agreeable to?

17           MS. SMITH: You're on mute. Also, Ms. -- I don't  
18 know Ms. Lucas's maternity leave, Your Honor, and so I would  
19 like to strike her from the --

20           THE COURT: I meant to address that.

21           MS. SMITH: -- deposition roll, or if not, extend it.

22           THE COURT: I meant to address her, and I forgot. I  
23 think we need a special agreement with regard to her. So I  
24 think you even offered something, Ms. Tomkowiak, special with  
25 regard to her, right? Maybe within 30 days of her maternity

1 leave ending, something like that?

2 You're on mute.

3 MS. TOMKOWIAK: Thank you. I thought I took it off.  
4 I think, as a -- as a general matter, 30 days is okay. I  
5 mean, our past experience here is making us a little bit wary.  
6 I think that with respect to Ms. Lucas, we would like to know  
7 when her maternity leave is going to end. If -- if -- you  
8 know. And then, yes, I think that that's probably a  
9 reasonable accommodation to make, 30 days within, you know,  
10 the ending of her maternity leave, unless it somehow falls,  
11 you know, very far in the future. But we can address that  
12 when we know.

13 With respect to Mr. Ellington, Your Honor, I'm a bit  
14 concerned about this extended vacation, and, you know,  
15 frankly, he might be the most important one of them all, given  
16 his role in the matter here and the fact that we've offered,  
17 you know, to consider doing this remotely, by video. So,  
18 again, if -- I would like, you know, there to be an order that  
19 even with respect --

20 THE COURT: Okay. You don't have to say anything  
21 more. Thirty days for him.

22 MS. TOMKOWIAK: Okay.

23 THE COURT: I don't care if he's on safari in Africa.  
24 He can find a place to log in from a phone. It's hard when  
25 you're there, because -- some of us have been there, right?

1 But he can find a way.

2 MS. SMITH: And he actually is on safari in Africa,  
3 Your Honor.

4 THE COURT: I had no idea. I had no idea. That was  
5 just random, because that's the one place I've traveled where  
6 it's kind of hard to get a connection. But he can -- he can  
7 find a way.

8 MS. SMITH: I -- that safari. It was very difficult  
9 to get a connection.

10 THE COURT: Yes. I mean, just so you know, Ms. Smith  
11 --

12 MS. TOMKOWIAK: Your Honor, if I --

13 THE COURT: Ms. Smith and I were on the same Bar trip  
14 with, you know, a hundred other people. It wasn't like the  
15 two of us went together.

16 All right. Anything else?

17 MS. TOMKOWIAK: Yeah. Well, just one other thing,  
18 Your Honor. On the documents, can we set a date certain for  
19 those as well? Perhaps 10 days, so that we have, then, 20  
20 days, you know, to do the depositions? Or -- or at least  
21 earlier, if we're going to schedule a deposition sooner,  
22 although I --

23 THE COURT: Well, I --

24 MS. TOMKOWIAK: -- doubt that will be the case.

25 THE COURT: I said within seven days of entry of the



1 order.

2 MS. TOMKOWIAK: Seven? Okay.

3 THE COURT: And then depos within 30 days. All  
4 right. I'll look for your order. We stand adjourned.

5 THE CLERK: All rise.

6 (Proceedings concluded at 4:56 p.m.)

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CERTIFICATE

20 I certify that the foregoing is a correct transcript from  
21 the electronic sound recording of the proceedings in the  
above-entitled matter.

22 **/s/ Kathy Rehling**

**06/30/2021**

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\_\_\_\_\_  
Kathy Rehling, CETD-444  
Certified Electronic Court Transcriber

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Date

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