19-CV-H

U.S. CHAMBER
Institute for Legal Reform

March 26, 2019

Ms. Rebecca Womeldorf
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Dear Ms. Womeldorf:

I write to respond to a February 20, 2019 letter to the Advisory Committee from Therium Capital Management, Bentham IMF and Burford Capital. In that letter, they argue against amending Rule 26(a) to require disclosure of third-party litigation finance (TPLF) arrangements, describing the proposal as "a considerable departure from the existing rules regarding discovery." [1]

In their letter, they rely heavily on Rule 26(b), which of course deals with the scope of discovery and the relevance of materials to the merits of a litigant's claim. The focus, however should be on Rule 26(a).

What a court may need to know as relevant to the administration of justice in a particular case is often broader than what would be considered relevant to the merits of a case. The undisclosed interest of outside financiers in a lawsuit raises not relevance issues, but ethical and practical issues that are important to a case, regardless of whether they are considered discoverable evidence under Rule 26(b).

For example, parties and courts have a right to know whether the judge presiding over their case or any of the jurors are investors in the funder or its affiliates; to what extent, if any, the funder maintains control or influence over the case; to what extent the interest of the party being funded is diminished under the funding agreement; and whether the funding violates any ethical or judicial standards.[2] And in some cases, the terms of funding agreements may be very relevant to application of the Federal Rules of Civil Procedure—such as in class actions, where such terms may be critical to the adequacy of representation

[1] For convenience, I attach both letters.

[2] The ethics issue is a serious one. Courts in Pennsylvania, New York and other states have struck down funding arrangements because they violate legal ethics rules barring non-lawyer entities from sharing in legal fees. *Justinian Capital v. WestLB Ag* (65 N.E.3d 1253 (N.Y. 2016; *In re DesignLine Corp*. (2017 Bankr. LEXIS 182, at *1 (U.S. Bankr. W.D.N.C. Jan. 20, 2017.

determination under Fed. R. Civ. P. 23(a)(4). *Gbarabe v. Chevron*, 2016 U.S. Dist. LEXIS 103594 (N.D. Cal. Aug. 5, 2016). Under current rules, the identity of third-party funders and their role and influence are cloaked in anonymity.

The U.S. District Court for the Northern District of California—the very court that the litigation funders extensively rely on in making their relevance argument—adopted a rule requiring disclosure in class and collective actions, despite claims of the funding industry like those asserted here. Although the Northern District did not spell out its reasoning for instituting this new requirement, the fact that it applies in ***all*** class and collective actions belies the notion that it was adopted for reasons of evidentiary relevance. Rather, the only fair reading of the rule is that it was implemented for reasons of ethics, probity and sound judicial administration—fundamental precepts that are acutely important in aggregate litigation. The Advisory Committee wrestled with a similar question almost half a century ago, when the Federal Rules of Civil Procedure were amended to require defendant companies to hand over details of their insurance coverage at the outset of a case.

The Advisory Committee concluded then: "Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation." Defendants were deemed to have a duty to disclose this information to defendants under Rule 26(a) in 1970, even if it might not have been considered relevant for purposes of discovery.

The rapid and unregulated growth of litigation funding has put defendants in a similar position to plaintiffs in 1970. Wall Street hedge funds, institutional investors, and public and private companies reportedly have poured as much as $100 billion into litigation finance in recent years. Yet we know almost nothing about these arrangements, and these funding sources are completely unregulated. Defendants, like plaintiffs, have a right to know what they are facing, in order to make a "realistic assessment" of a case as well as the financial resources and motivations of the parties seeking recovery from them. As stated above, they also need to know about potential conflicts of interest or ethical violations that are now wrapped in a veil of secrecy.

The funders' letter asserts that the insurance analogy is inapt because, they claim (without disclosing any evidence) that while insurers exercise control over litigation, litigation funders do not. It would be reckless to accept this assertion without examining the facts and evidence. Indeed, in the very few examples of litigation finance contracts that have come to light, we see similar provisions and even some language that goes beyond the control normally exercised by insurers. There have been clauses giving investors the power to select counsel, advise on litigation strategy and even halt funding if the case isn't proceeding the way they want. In *Gbarabe v. Chevron*, 2016 U.S. Dist. LEXIS 103594, plaintiffs' counsel negotiated an agreement with the outside funder providing for a "success fee" of up to $10.2

million plus 2% of whatever was collected by class members, apparently without their knowledge or approval.

The funders also make a privacy argument, saying a plaintiff's TPLF contract would provide "a roadmap of its litigation strategy." No more so than insurance contracts, which reveal to the opposing party a defendant's financial resources and extent of coverage under various theories of the case.

The funders make the further argument that Rule 26 affords courts the power to compel disclosure if warranted. In their letter, they say proponents of disclosure have given no explanation why this power isn't sufficient "to address potential concerns that may arise every so often in a particular case." The explanation is contained in the phrase "arise every so often." Concerns will arise unless the parties and courts have knowledge of them, knowledge they cannot obtain without seeing the funding agreements.

Finally, the funders assert companies use litigation funding. It may be true in some cases, but as one who served for more than 20 years as the general counsel and head of litigation for a major U.S. company, consider me skeptical funding is as popular as some of its supporters maintain. Companies are skilled at identifying meritorious cases and funding them. But, whether companies use funding or not has no relevance to whether these arrangements should be as secret as a Grand Cayman bank account.

The disclosure of TPLF arrangements should not be addressed on an *ad hoc* basis or in one-sided *ex parte* communications with the court. Just as with insurance information, they should be presented in open court at the outset of a case and subject to the full scrutiny and transparency of the normal litigation process. The funding industry has long existed in darkness. It is time for it to emerge into the light.

Respectfully submitted,

Brackett B. Denniston, III
Chair
U.S. Chamber Institute for Legal Reform

Enclosures

February 20, 2019

Ms. Rebecca A. Womeldorf
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Ms. Womeldorf:

We write in response to the January 31, 2019 letter to the Advisory Committee submitted by Brackett Denniston III, Chair of the U.S. Chamber of Commerce's Institute for Legal Reform (the "ILR") and a member of the Chamber's Board of Directors and Executive Committee (collectively the "Chamber"), and various corporate in-house counsel in favor of forced disclosure of litigation funding arrangements in every federal civil case under Fed. R. Civ. P. 26(a)(1)(A) (the "Letter"). Though couched as a modest request for "basic disclosure," the Letter urges a considerable departure from the existing rules governing discovery. In so doing, it parrots the flawed and failed arguments of the ILR, disregards basic precepts of relevance and proportionality underlying Rule 26, offers no cogent or compelling policy rationale, and ignores well-developed jurisprudence on this important issue. We refer the Advisory Committee to previous submissions and only briefly address the substance of this latest communication.

To begin with, relevance forms the backbone of discoverability under the Federal Rules. *See* Fed. R. Civ. P. 26(b)(1). This basic tenet should be the starting point for examining whether an initial disclosure rule makes good sense. Yet the Letter makes no effort to address it. Nor could it: federal courts have routinely rejected litigation-finance-related discovery unless the party seeking it makes a specific showing of relevance. In fact, just last month, the U.S. District Court for the Northern District of California denied—as ***irrelevant***—disclosure of the very information the proposed rule seeks to mandate in every case: the identity of the funder and the specific terms of the parties' agreement. *See MLC Intellectual Prop. LLC v. Micron Tech., Inc.*, No. 14-cv-03657, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019) (finding that defendant's attempts to establish relevance based on potential bias and conflicts of interest concerns were speculative).[1]

The Northern District of California's conclusion follows a long line of cases recognizing the uncontroversial concept that relevance matters under Rule 26, including with respect to funding arrangements. *See, e.g., Miller UK Ltd. v. Caterpillar, Inc.,* 17 F. Supp. 3d 711, 724 (N.D. Ill. 2014) (rejecting discovery into litigation funding arrangements; noting defendant's assertion of relevance lacked "any cogency"); *VHT, Inc. v. Zillow Group, Inc.,* No. C15-1096JLR, 2016 WL

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[1] While the court's opinion does not specifically set forth the details of the discovery requests at issue, the discovery record makes clear that defendant sought disclosure of both the the identity of any third-party financier and the terms of any related funding agreement. Joint Discovery Dispute Letter Regarding Financial Interests in Asserted Patent at 1-3, *Micron* (Dkt. No. 259-5).

7077235, at *1 (W.D. Wash. Sept. 8, 2016) (rejecting discovery into litigation funding arrangements absent "some objective evidence that any of Zillow's theories of relevance apply in this case"). The instances in which federal courts have permitted discovery into litigation funding arrangements are exceedingly rare; they arise only under unique circumstances where they are, in fact, germane to the claims and defenses of the parties. The call for blanket forced disclosure under Rule 26 flies in the face of these bedrock relevance principles, and thus, should be viewed with great skepticism by the Advisory Committee.

The advocates for a catch-all disclosure rule ignore a related fact: federal courts can easily handle discovery issues relating to litigation finance under existing Rule 26 and/or their own inherent authority. As the Advisory Committee appropriately observed in rejecting earlier calls for the same Rule 26 amendment, "judges currently have the power to obtain information about third-party funding when it is relevant in a particular case." Hon. David G. Campbell, *Report of Advisory Committee on Civil Rules*, at 4 (Dec. 2, 2014), *available at* https://www.uscourts.gov/sites/default/files/fr_import/CV12-2014.pdf (last visited Feb. 6, 2019). Judge Polster's recent order in the pending opioid MDL in the U.S. District Court for the Northern District of Ohio is a perfect example. *See In re Nat'l Prescription Opiate Litig.,* No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018) (ordering all counsel to submit a description of any third-party funding for *in camera* review, as well as affirmations that funding did not create conflicts or cede case control). Other federal courts have adopted this sensible approach, which balances the court's need to inquire into funding arrangements for a specific, narrow purpose with the fact that funding issues are rarely relevant to the parties' claims and defenses. *See, e.g., Micron*, 2019 WL 118595, at *2 (noting the court's ability to "question potential jurors *in camera* regarding relationships to third party funders and potential conflicts of interest" if necessary at trial). The Letter offers no explanation why the federal courts' current ability to obtain information about litigation funding arrangements is insufficient to address potential concerns that may arise every so often in a particular case. Boiled to its essence, the Letter is a push for forced disclosure of irrelevant information that one party is simply curious to know. That is not the standard for discovery under Rule 26. Nor would any corporate litigant support such a standard outside of the litigation finance context.[2]

The Letter repeats a handful of other halfhearted reasons for the proposal to amend Rule 26. These too lack any sound basis in law or policy. The first of these is that litigation funders "effectively become real parties in interest" to a lawsuit in which they provide financing. This argument was thoroughly considered and rejected in *Miller*, which follows the prevailing legal definition of real parties in interest under Rule 17(a)—that is, "the person

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[2] For example, in support of the "proportionality" amendments to Rule 26, the U.S. Chamber urged the Advisory Committee to add "a requirement that the information not only be relevant, but also ***material*** to a party's claim or defense." U.S. Chamber Inst. for Legal Reform, *Public Comment to the Advisory Committee on Civil Rules Concerning Proposed Amendments to the Federal Rules of Civil Procedure*, at 7 (Nov. 7, 2013), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/FRCP_Submission_Nov.7.2013.pdf (last visited Feb. 6, 2019). By contrast, it asks the Advisory Committee to disregard relevance altogether when litigation finance is the subject.

holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." 17 F. Supp. 3d at 728 (quoting *Farrell Constr. Co. v. Jefferson Parish, La.*, 896 F.2d 136, 140 (5th Cir. 1990)). Litigation funders do not fall within this definition, and we are not aware of any federal court decision that has concluded otherwise. The simple fact is that there are often many parties with an economic interest in the outcome of a piece of litigation, and our system makes no effort to identify all of them or to have their interests disclosed; to do so would multiply exponentially the burden on courts and counsel. There is a sound policy reason behind our current limits on party disclosure.[3]

The Letter also draws an analogy between commercial litigation finance and liability insurance to justify forced disclosure. While it may seem superficially appealing to compare the required disclosure of liability insurance under Rule 26(a)(1)(A)(iv), the analogy is hopelessly flawed. Prior submissions to the Advisory Committee explain in detail the differences between the two, including disparities in the information disclosed. Suffice it to say, however, that the Advisory Committee's rationale behind the 1970 amendment to Rule 26(a)(1)(A)(iv) alone undercuts any attempt to cast them as equivalents necessitating parallel disclosures. This includes the reasoning that "insurance is an asset created specifically to satisfy the claim" (funding in no way satisfies the claim); "the insurance company ordinarily controls the litigation" (funders exert no such control); and "disclosure does not involve a significant invasion of privacy" (funding terms convey the funded parties' litigation budget and a roadmap of its litigation strategy). Fed. R. Civ. P. 26, Advisory Comm. Notes, Subdivision (b)(2)--Insurance Policies (1970). Indeed, as the *Miller* court noted after reviewing the relevant litigation funding agreements *in camera*: "there is nothing in those agreements that remotely supports Caterpillar's attempt to equate Miller's funding agreement to the relationship between an insured and its insurer." *Miller,* 17 F. Supp. 3d at 729. After even a minimal level of scrutiny, the analogy simply does not work.

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We work daily with corporate in-house lawyers—including at companies whose interests the Chamber purports to represent—to satisfy their need for capital to support meritorious claims. But this Letter is fundamentally a PR stunt by the Chamber (witness the Chamber's simultaneous media campaign surrounding it) and once again calls into question the

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[3] The comments to the Federal Rules of Civil Procedure perfectly encapsulate the balancing test that the Judicial Conference took when adopting the rule for financial disclosure:

> Although the disclosures required by Rule 7.1(a) may seem limited, they are calculated to reach a majority of the circumstances that are likely to call for disqualification on the basis of financial information that a judge may not know or recollect. Framing a rule that calls for more detailed disclosure will be difficult. Unnecessary disclosure requirements place a burden on the parties and on courts. Unnecessary disclosure of volumes of information may create a risk that a judge will overlook the one bit of information that might require disqualification, and also may create a risk that unnecessary disqualifications will be made rather than attempt to unravel a potentially difficult question. It has not been feasible to dictate more detailed disclosure requirements in Rule 7.1(a).

Fed. R. Civ. P. 7.1 (2002 Committee Notes).

credibility of the ILR. It also highlights the Chamber's and the ILR's blatant hypocrisy in demanding the disclosure of private financial transactions while insisting that its own donor list remain anonymous. Regardless, the Letter adds nothing of substance to the debate about the fitness of a proposal that flouts the foundational principles of Rule 26. Nor does it provide any compelling policy rationale that would lead the Advisory Committee to ignore these important tenets in favor of a rule that would almost certainly bog down courts with additional burdens and delays.

We continue to urge the Advisory Committee to reject the proposed amendment to Rule 26(a)(1)(A).

Respectfully,

Eric H. Blinderman
Chief Executive Officer (U.S.)
Therium Capital Management

Allison K. Chock
Chief Investment Officer
Bentham IMF

Danielle Cutrona
Director, Global Public Policy
Burford Capital

January 31, 2019

Ms. Rebecca Womeldorf
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Proposed Amendment to Fed. R. Civ. P. 26(a)(1)(A)

Dear Ms. Womeldorf:

As in-house counsel at major U.S. corporations, we write to voice support for the proposal to amend Fed. R. Civ. P. 26(a)(1)(A) to require in civil actions the disclosure of agreements giving a non-party or non-counsel the contingent right to receive compensation from proceeds of the litigation. *See* July 1, 2017 letter to Advisory Committee from 30 corporate and defense counsel organizations (proposing language for a new Fed. R. Civ. P. 26(a)(1)(A)(v)).

We believe the reasons for requiring full disclosure are strong and well documented in the record before the Advisory Committee. When litigation funders invest in a lawsuit, they buy a piece of the case; they effectively become real parties in interest. Defendants (and courts) have a right to know who has a stake in a lawsuit and to assess whether they are using illegal or unethical means to bring the action. Further, in assessing discovery proportionality and addressing settlement possibilities, both the court and the defendant need to know who is sitting on the other side of the table — is it an impecunious individual seeking recourse based on the merits of his/her case or is there also a multi-million dollar litigation funder driven by the need to satisfy investor expectations?

The proposal seeks only basic disclosure; it does not seek to prohibit or regulate litigation finance. No harm would flow from requiring such basic transparency about who has invested in a lawsuit and the terms of that investment, at least none that could not be protected by the court, as the proposal contemplates. We have heard the suggestions that any third-party litigation funding ("TPLF") disclosures should be *in camera* only and/or should be limited to a few points (e.g., confirmation that funding is being used, identification of the funder) based on the premise that disclosure of the actual agreement documents will unveil sensitive strategic information about a party's capacity to prosecute the litigation. But that is precisely the argument made 30 years ago in opposing demands for full disclosure of defendants' insurance agreements, which some funders have described as a defense-side form of litigation funding. In 1970, the Advisory Committee rejected those arguments in adopting Fed. R. Civ. P. 26(a)(1)(A)(iv), which requires disclosure of all insurance agreements in civil cases.

If a TPLF agreement disclosure requirement is not adopted, our Federal Rules will retain their current inequity; defendants will still be required to disclose to opposing counsel their

contracts with insurers, but plaintiffs will be allowed to keep their funding arrangements under wraps. The practical effects of TPLF arrangements on pending litigation, including any ethical ramifications, should not be addressed through one-sided *ex parte* communications or on the basis of incomplete information. Such matters should be subject to the full transparency and scrutiny of the litigation process.

Finally, we note that some litigation funders have contended that major companies are generally indifferent or opposed to such a disclosure requirement because corporate use of TPLF is allegedly widespread. No evidence has been proffered to support that assertion. Nor is it consistent with our experience. But regardless of who uses litigation finance, that fact should not shield the fair disclosure of those arrangements.

Respectfully submitted,

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General Electric

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