

**RULES SUGGESTION**  
**to the**  
**ADVISORY COMMITTEE ON CIVIL RULES**

**AN IMPORTANT BUT RARELY ASKED QUESTION: AMENDING RULE 16(c)(2) TO  
PROMPT JUDGES TO CONSIDER INQUIRING ABOUT FINANCIAL INTERESTS  
CREATED BY THIRD-PARTY LITIGATION FUNDING**

September 8, 2022

Lawyers for Civil Justice (“LCJ”)<sup>1</sup> and the U.S. Chamber of Commerce Institute for Legal Reform (“ILR”)<sup>2</sup> respectfully submit this Rule Suggestion to the Advisory Committee on Civil Rules (“Committee”).

**Introduction**

Many federal judges are presiding over lawsuits in which, unbeknownst to the court, a non-party investor has a direct, contingent financial interest in the proceeds produced by any judgment or settlement due to third-party litigation funding—commonly abbreviated as TPLF. Although judges are required to recuse themselves when they know that they or their families have a financial stake in a case, courts remain largely in the dark about the existence of third-party investments in their cases. This is so because the existence of TPLF in a given case need not be disclosed as a matter of course under the Federal Rules of Civil Procedure, and to the extent local rules require the disclosure of direct financial interests, they have largely been ignored. Although the District of New Jersey recently adopted a local rule expressly requiring the disclosure of TPLF-related information at the outset of a case,<sup>3</sup> and certain individual judges<sup>4</sup> have instituted standing rules requiring similar information in their own cases, most judges have no idea whether interests created by TPLF are at play in litigation they are overseeing.

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<sup>1</sup> LCJ is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 35 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

<sup>2</sup> ILR is a program of the Chamber dedicated to championing a fair legal system that promotes economic growth and opportunity. The Chamber is the world’s largest business federation, representing the interests of more than three million businesses of all sizes, sectors and regions, as well as state and local chambers and industry associations, and it is dedicated to promoting, protecting and defending America’s free enterprise system.

<sup>3</sup> See D.N.J. L. Civ. R. 7.1.1, <https://www.njd.uscourts.gov/sites/njd/files/completelocalRules.pdf>. The Northern District of California has also adopted its own TPLF disclosure requirement for class actions. See Standing Order for all Judges of the Northern District of California, Contents of Joint Case Management Statement, § 19, [https://www.cand.uscourts.gov/wp-content/uploads/judges/Standing\\_Order\\_All\\_Judges\\_11.1.2018.pdf](https://www.cand.uscourts.gov/wp-content/uploads/judges/Standing_Order_All_Judges_11.1.2018.pdf) (“N.D. Cal. Standing Order”).

<sup>4</sup> Chief Judge Colm F. Connolly of the District of Delaware recently issued a standing order requiring “[a] brief description of the nature of the financial interest” held by any non-party investor in the matters before him. Standing Order Regarding Third-Party Litigation Funding Arrangements, § 1(c), <https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf>.

Although a uniform TPLF disclosure rule applicable to all civil cases, as described in Rule Suggestion 17-CV-O,<sup>5</sup> would be the most effective way to inform courts and parties about TPLF and the financial interests it creates, an amendment to Rule 16(c)(2)—specifically, the addition of TPLF as a matter for consideration during pretrial conferences—would be very helpful to courts and parties alike. Such a change would help alert judges to the issues of TPLF and facilitate discussion (and potential disclosure) of the non-party stakes in their cases. Some judges may appreciate the addition to Rule 16(c)(2) as befitting the Chief Justice’s recent call for “greater attention to promoting a culture of compliance” in the federal judiciary,<sup>6</sup> particularly on the “matter of financial disclosure and recusal obligations,”<sup>7</sup> which was inspired by the *Wall Street Journal*’s reporting of 685 instances of conflicts of interest.<sup>8</sup> Some judges may value a nudge for reasons beyond their ethical duties, including to learn who should participate in settlement conferences due to their authority or influence over resolution decisions. And some judges may appreciate the signal to learn facts relevant to their understanding of “the parties’ resources” as required by Rule 26(b)(1), fashioning appropriate sanctions, and allocating costs. There are other case-specific reasons as well.<sup>9</sup> For the Committee, adding such a prompt to Rule 16(c)(2) would provide meaningful assistance to judges while sidestepping all of the drafting questions that have complicated its contemplation of a TPLF disclosure rule applicable to all cases. In short, a Rule 16(c)(2) reference to TPLF would assist judges who may find good reasons to inquire about the presence of non-party financial rights to proceeds in their cases while still preserving their complete discretion to make that decision only when appropriate on a case-by-case basis.

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<sup>5</sup> See [https://www.uscourts.gov/sites/default/files/17-cv-o-suggestion\\_ilr\\_et\\_al\\_0.pdf](https://www.uscourts.gov/sites/default/files/17-cv-o-suggestion_ilr_et_al_0.pdf).

<sup>6</sup> John G. Roberts, Jr., Chief Justice of the United States, *2021 Year-End Report on the Federal Judiciary*, at 3-4, <https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf>.

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.*

<sup>9</sup> Recently filed complaints in the ongoing bankruptcy proceeding involving recently disbarred plaintiffs’ attorney Thomas Girardi and his law firm, Girardi Keese, highlight some additional reasons why a judge may want to inquire about TPLF in particular cases. According to the first complaint, the orphans and widows of the Lion Air Flight 610 plane crash allege that certain litigation funders improperly took money that belonged to Girardi’s clients. See generally Compl., *Ruigomez v. Miller (In re Girardi Keese)*, No. 2:20-bk-21022-BR, ECF No. 1329 (Bankr. C.D. Cal. filed Aug. 30, 2022). And the second complaint – filed by the Trustee appointed to manage the Girardi bankruptcy estate – alleges that Girardi and his law firm not only siphoned money from their clients, but also did so with the knowledge of litigation funders, improperly shared fees with those entities in contravention of Rule 5.4, and were essentially “implied in fact” partners or “insiders” of Girardi Keese. See Compl. ¶ 11, *Miller v. Counsel Fin. Servs., LLC (In re Girardi Keese)*, No. 2:20-bk-21022-BR, ECF No. 1333 (Bankr. C.D. Cal. filed Aug. 31, 2022).

## I. Undisclosed TPLF Arrangements Are Commonplace.

In many federal civil lawsuits, non-parties to the litigation (i.e., investors)—including individuals (both U.S. and non-U.S. citizens<sup>10</sup>), investment funds (including family offices<sup>11</sup>), hedge fund investors, and foreign countries' sovereign wealth funds<sup>12</sup>—hold legal rights to a portion of any proceeds from the case. These interests derive from investment contracts not only with single-purpose litigation funders, but also in conjunction with mainstream financial institutions, investment advisors, and popular “crowdfunding” websites. Investing in litigation outcomes is a multi-billion-dollar industry in the United States; a recent survey indicates that the value of such investments reached \$11 billion this year,<sup>13</sup> and a single company committed more than \$1 billion in 2021 alone.<sup>14</sup> Non-party financial stakes exist at all stages of civil litigation,<sup>15</sup> in all federal courts, and in cases regarding a wide variety of subject matters.

The nature of these direct financial interests held by non-party litigation investors is well-known: They are completely dependent on the outcome of the case. Litigation finance “is the practice where a third party unrelated to the lawsuit provides capital to a plaintiff involved in litigation in return for a portion of any financial recovery from the lawsuit.”<sup>16</sup> These are not loans. Litigation finance provider LexShares explains:

Solutions are instead structured as non-recourse investments, which means that the funding recipient owes nothing if the lawsuit does not result in a recovery. If the case reaches a positive outcome, then the funding recipient would owe a predetermined portion of any damages recovered.<sup>17</sup>

Another large litigation financing firm, Burford, similarly observes:

In return [for our investment], we receive our contractually agreed entitlement from the ultimate settlement or judgment on the claim and, if the claim does not produce any cash proceeds, we generally lose our capital.<sup>18</sup>

As another litigation financier explains to parties: “If you win, we win.”<sup>19</sup> In short, there is no dispute that outside litigation funders are increasingly acquiring direct pecuniary interests in the

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<sup>10</sup> LexShares Frequently asked questions, <https://www.lexshares.com/faqs> (“LexShares FAQs”) (“LexShares supports funding by non U.S. based investors through our online platform.”).

<sup>11</sup> *Id.* (“LexShares investors include high net worth individuals and institutional investors, including select family offices, hedge funds and asset managers.”).

<sup>12</sup> Burford Capital 2021 Annual Report, at 12, <https://www.burfordcapital.com/media/2679/fy-2021-report.pdf> (“Burford 2021 Annual Report”).

<sup>13</sup> Bloomberg Law, *Willkie, Longford Reach \$50 Million Litigation Funding Pact* (June 23, 2021), <https://news.bloomberglaw.com/business-and-practice/willkie-longford-partner-in-50-million-litigation-funding-pact> (“[L]itigation funding . . . has attracted more than \$11 billion in capital, according to a survey this year.”).

<sup>14</sup> Burford 2021 Annual Report at iv (“We wrote \$1.1 billion in group-wide new commitments in 2021, and we deployed \$841 million in cash during the year.”).

<sup>15</sup> LexShares FAQs.

<sup>16</sup> LexShares, Litigation Finance 101, <https://www.lexshares.com/litigation-finance-101>.

<sup>17</sup> *Id.*

<sup>18</sup> Burford 2021 Annual Report at 13.

<sup>19</sup> Appeal Funding Partners, Our Solutions, <https://appealfundingpartners.com/our-solutions/>.

outcome of civil cases. However, there is presently no mechanism for even raising the question of TPLF in a particular case, much less obtaining information as to whether (and, if so, how) TPLF is impacting that case.

## **II. A Rule 16(c)(2) Prompt Would Help Courts Decide Whether To Raise TPLF For Discussion Or Ask For Disclosure.**

### **a. A Rule 16(c)(2) Amendment Would Help Mitigate Conflicts Of Interest.**

Judges are bound by statute,<sup>20</sup> the Code of Conduct for Federal Judges,<sup>21</sup> and the Judicial Conference’s Mandatory Conflict Screening Policy,<sup>22</sup> to recuse themselves when they know that they have a financial interest that would be substantially affected by the outcome of the proceeding. This responsibility applies to financial interests, “however small,”<sup>23</sup> and extends to include any “appearance of impropriety.”<sup>24</sup> To assist this determination, Rule 7.1 requires disclosure of any parent corporation that owns 10 percent or more of a corporate party’s stock.<sup>25</sup> Unfortunately, Rule 7.1 does not require disclosure of any direct non-party financial stakes, even when those rights are directly tied to the outcome of the case. And, for the most part, local rules do not specifically address this deficiency, not only because they vary dramatically from district to district,<sup>26</sup> but also because litigation funders do not believe they apply to their activities. According to Burford, one of the largest litigation funders: “[T]hese broad disclosure provisions in local rules do not appear to be much-followed or enforced.”<sup>27</sup>

Conflicts of interest are not theoretical; they happen. And they can arise even though district judges are (presumably) not personally investing with entities explicitly advertising themselves as “litigation funders.” Judges or their family members may have financial or other entanglements with people or entities (including “crowdfunding” websites) that are making such investments. One example is a racketeering suit arising out of misconduct by attorney Steven Donziger, who had helped secure an \$18.2 billion judgment against Chevron Corporation on behalf of Ecuadorians allegedly harmed by the company’s oil drilling practices.<sup>28</sup> During a deposition in that proceeding, Donziger was asked to identify the company that had helped finance the underlying suit against Chevron.<sup>29</sup> Upon being ordered to answer the question by the

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<sup>20</sup> 28 U.S.C. § 455.

<sup>21</sup> Code of Conduct for Federal Judges, Canon 3(C)(1)(c).

<sup>22</sup> U.S. Courts, Guide to Judiciary Policy, Mandatory Conflict Screening Policy, <https://www.uscourts.gov/sites/default/files/guide-vol02c-ch04.pdf> (last revised Mar. 15, 2022).

<sup>23</sup> Code of Conduct for Federal Judges, Canon 3(C)(3)(c).

<sup>24</sup> Code of Conduct for Federal Judges, Canon 2.

<sup>25</sup> Fed. R. Civ. P. 7.1.

<sup>26</sup> Memorandum from Patrick A. Tighe, Rules Law Clerk, to Ed Cooper, Dan Coquillette, Rick Marcus, and Cathie Struve, *Survey of Federal and State Disclosure Rules Regarding Litigation Funding* (Feb. 7, 2018), in Advisory Committee on Civil Rules, Agenda Book, at 209 (Apr. 10, 2018).

<sup>27</sup> Christopher Bogart, *Common sense vs. false narratives about litigation finance disclosure*, Burford Capital (July 12, 2018), <https://www.burfordcapital.com/insights/insights-container/common-sense-vs-false-narratives-about-litigation-finance-disclosure/> (“Burford Article”) (“[T]hese broad disclosure provisions in local rules do not appear to be much-followed or enforced.”).

<sup>28</sup> Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 Geo. L.J. 1649, 1650 (2013).

<sup>29</sup> *Id.*

special master assigned to the case, Donziger disclosed that the funder was Burford Capital.<sup>30</sup> The special master then disclosed that he was former co-counsel with the founder of Burford, who once sent the special master a brochure about funding one of Burford’s cases,<sup>31</sup> and that he was friends with Burford’s former general counsel.<sup>32</sup> The special master did not recuse himself from the racketeering litigation, and the parties did not insist that he do so.<sup>33</sup> Nonetheless, as the special master recognized, the deposition “prove[d] . . . that it is imperative for lawyers to insist that clients disclose who the investors are.”<sup>34</sup>

Because judges do not learn of TPLF in their cases via Rule 7.1 or most local rules, they are unlikely to become aware of conflicts generated by it unless courts make their own inquiries. But many judges do not even think to ask; as a judicial member of the Committee has observed, “[a] number of my colleagues are not even aware that it happens.”<sup>35</sup> A judge who considers it an obligation to determine whether financial entitlements tied directly to the outcome of a case might pose a conflict of interest will likely appreciate a Rule 16(c)(2) prompt to make an appropriate inquiry and start doing so in his or her cases.

**b. A Rule 16(c)(2) Prompt About TPLF Would Help Judges Identify Who May Be Needed During Settlement Conferences.**

Rule 16 authorizes judges “to direct that, in appropriate cases, a responsible representative of the parties be present or available by telephone during a conference in order to discuss possible settlement of the case.”<sup>36</sup> The 1993 Committee Notes clarify that courts have discretion to include non-parties as well: “Whether this would be the individual party, an officer of a corporate party, a representative from an insurance carrier, or someone else would depend on the circumstances.”<sup>37</sup> The Committee Notes further explain that “[t]he explicit authorization in the rule to require personal participation in the manner stated is not intended to limit the reasonable exercise of the court’s inherent powers,” or “its power to require party participation under the Civil Justice Reform Act of 1990,” quoting 28 U.S.C. § 473(b)(5) for the proposition that “civil justice expense and delay reduction plans adopted by district courts may include [a] requirement that representatives ‘with authority to bind [parties] in settlement discussions’ be available during settlement conferences.”<sup>38</sup> Courts have recognized the power to require decision makers to be available at pre-trial conferences.<sup>39</sup> As the Committee knows,<sup>40</sup> there are compelling examples of litigation funders being vested with authority to influence or control litigation decisions, including with regard to settlement. Specifically:

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (citation omitted).

<sup>35</sup> Advisory Committee on Civil Rules, Agenda Book, at 76 (Apr. 2-3, 2019).

<sup>36</sup> Fed. R. Civ. P. 16 advisory committee notes to 1993 amendment.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *See, e.g., In re Stone*, 986 F.2d 898, 903 (5th Cir. 1993) (“[S]ubject to the abuse-of-discretion standard, district courts have the general inherent power to require a party to have a representative with full settlement authority present—or at least reasonably and promptly accessible—at pretrial conferences.”).

<sup>40</sup> *See* Rule Suggestion 19-CV-I, [https://www.uscourts.gov/sites/default/files/19-cv-i-suggestion\\_advanced\\_medical\\_et\\_al\\_0.pdf](https://www.uscourts.gov/sites/default/files/19-cv-i-suggestion_advanced_medical_et_al_0.pdf).

- In *Boling v. Prospect Funding Holdings, LLC*,<sup>41</sup> the U.S. Court of Appeals for the Sixth Circuit concluded that the terms of the funding agreements involved in that matter “effectively give [the non-party investor] substantial control over the litigation,” including terms that “may interfere with or discourage settlement” and otherwise “raise quite reasonable concerns about whether a plaintiff can truly operate independently in litigation.”
- In *White Lilly, LLC v. Balestriere PLLC*,<sup>42</sup> a non-party investor with a financial interest in a lawsuit asserted that it had the right to exercise control over the litigation. In its complaint, the non-party investor alleged that it had a contractual right to assign a particular lawyer to serve as one of the plaintiff’s counsel in the lawsuit and alleged that its counsel breached her obligation to serve as its “ombudsman” to oversee the cases it had invested in. The funding agreement required that “[d]efendants obtain prior approval for expenses in excess of \$5,000.00.”<sup>43</sup>
- A 2017 “best practices” guide by IMF Bentham (now Omni Bridgeway) for non-party financial interests in litigation highlights the importance of giving the investor the authority to: “[r]eceive notice of and provide input on any settlement demand and/or offer, and any response”; and participate in settlement decisions.”<sup>44</sup>
- In the putative class action *Gbarabe v. Chevron Corp.*,<sup>45</sup> the funding agreement required that counsel “give reasonable notice of and permit [the non-party investor] where reasonably practicable, to . . . send an observer to any mediation or hearing relating to the Claim.”<sup>46</sup>
- And in the Chevron litigation discussed above, the funding agreement “provide[d] control to the Funders” through the “installment of ‘Nominated Lawyers’”—lawyers “selected by the Claimants with the *Funder’s approval*.”<sup>47</sup>

Including TPLF as a topic for discussion under Rule 16 would facilitate more accurate and realistic settlement negotiations between the parties. Further, it will allow courts to structure settlement protocols with greater potential to succeed. For example, if a litigation funder

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<sup>41</sup> 771 F. App’x 562, 579-80 (6th Cir. 2019).

<sup>42</sup> Compl. ¶ 35, No. 1:18-cv-12404-ALC, ECF No. 1 (S.D.N.Y. Dec. 31, 2018).

<sup>43</sup> *Id.* ¶ 124.

<sup>44</sup> John H. Beisner, Jessica Davidson Miller and Jordan M. Schwartz, *Selling More Lawsuits, Buying More Trouble: Third Party Litigation Funding A Decade Later*, U.S. Chamber Institute for Legal Reform (Jan. 2020), at 19, [https://instituteforlegalreform.com/wp-content/uploads/2020/10/Still\\_Selling\\_Lawsuits\\_-\\_Third\\_Party\\_Litigation\\_Funding\\_A\\_Decade\\_Later.pdf](https://instituteforlegalreform.com/wp-content/uploads/2020/10/Still_Selling_Lawsuits_-_Third_Party_Litigation_Funding_A_Decade_Later.pdf) (quoting Bentham IMF, *Code of Best Practices* (Jan. 2017)).

<sup>45</sup> No. 14-cv-00173-SI, 2016 U.S. Dist. LEXIS 103594, at \*6 (N.D. Cal. Aug. 5, 2016).

<sup>46</sup> Litigation Funding Agreement § 10.2.4 (dated Mar. 29, 2016) (attached to Decl. of Caroline N. Mitchell in Supp. of Chevron Corp.’s Mem. in Opp’n to Mot. for Class Certification & Mots. to Exclude the Reports & Test. of Onyoma Research & Jasper Abowei as Ex. 13), *Gbarabe v. Chevron Corp.*, No. 3:14-cv-00173-SI, ECF No. 186 (N.D. Cal. Sept. 16, 2016).

<sup>47</sup> Maya Steinitz, *The Litigation Finance Contract*, 54 Wm. & Mary L. Rev. 455, 472 (2012) (emphasis added) (footnote omitted).

controls settlement decisions (in whole or in part), the court may wish to require that funder to attend any mediation. Absent disclosure, the funder's presence as a player in the settlement process likely will remain hidden.

**c. A Rule 16(c)(2) Prompt About TPLF Would Improve Oversight Of Class Actions.**

Rule 23 requires that the named plaintiff and class counsel “fairly and adequately protect the interests of the class.”<sup>48</sup> Consistent with that principle, judges presiding over class action cases must also approve proposed class action settlement proposals, which includes reviewing the parties’ “statement identifying any agreement made in connection with the [settlement] proposal.”<sup>49</sup> According to the Committee Notes, such agreements “normally should be considered,” because those agreements, “although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others.”<sup>50</sup> TPLF agreements providing non-parties a direct right to proceeds from the litigation fit squarely within this obligation. Adding a Rule 16(c)(2) prompt would help inform the judge’s duty to protect class members at other stages of the case as well, including while appointing class counsel, approving attorney’s fees, and entertaining class member objections. These are precisely the reasons that led the Northern District of California to adopt a TPLF disclosure requirement for class actions:

In any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim.<sup>51</sup>

Notably, even non-party litigation investors concede the importance of this information to judges presiding over class actions. As one executive of a prominent TPLF funder put it, “the logic for disclosure is somewhat stronger [in class actions], given the court’s independent obligation to monitor the protection of class members’ interests.”<sup>52</sup> Adding a prompt in Rule 16(c)(2) would apply what the Committee has already found to be important—consideration of non-party contractual interests in settlement proceeds at the settlement stage—to help judges consider an appropriate inquiry that would inform class protections from the outset of the case.

**d. A Rule 16(c)(2) TPLF Prompt Would Help Inform Judges’ Decisions Relating To The Scope Of Discovery, Protective Orders, And Sanctions.**

Rule 26(b)(1) defines the scope of discovery to include consideration of “the parties’ resources.”<sup>53</sup> A judge who is ruling on a discovery scope question therefore might want to be aware of any TPLF in the case, which is plainly relevant to the parties’ resources. For the same

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<sup>48</sup> Fed. R. Civ. P. 23(a)(4).

<sup>49</sup> Fed. R. Civ. P. 23(e)(2) and (3).

<sup>50</sup> Fed. R. Civ. P. 23(e)(2) advisory committee notes to 2003 and 2018 amendments.

<sup>51</sup> N.D. Cal. Standing Order § 19.

<sup>52</sup> Cayse Llorens, chief executive officer, and Matthew Oxman, vice president of business development and investments, LexShares Inc., *What Litigation Funding Disclosure In Delaware May Look Like*, Law360 (June 10, 2022), <https://www.law360.com/articles/1501720/what-litigation-funding-disclosure-in-delaware-may-look-like> (“Llorens & Oxman Article”).

<sup>53</sup> Fed. R. Civ. P. 26(b)(1).

reasons, a judge fashioning a protective order—particularly one that allocates expenses pursuant to Rule 26(c)(1)(B)—might want to consider inquiring if non-parties hold direct stakes in any proceeds from the case. Similarly, a court may want to know if the case is being funded pursuant to TPLF when contemplating an appropriate sanction under Rule 37. Because TPLF arrangements can mean that an investor is effectively a real party in interest, a court might find that an investor should bear responsibility in the event there is wrongdoing and a corresponding imposition of sanctions or costs. In cases potentially involving any of these matters, judges would likely appreciate a prompt to make an appropriate inquiry regarding the existence of TPLF in the litigation.

### **III. Amending Rule 16 To Provide A Useful Prompt Would Be Simple.**

Adding an effective prompt to Rule 16 would be simple. Where Rule 16(c)(2) lists “matters for consideration,” adding a point along the following lines would suffice:

Consider whether any person (other than named parties or counsel of record) has a right to compensation that is contingent on obtaining proceeds from the civil action, by settlement, judgment or otherwise.

Unlike the mandatory disclosure rule that the Committee has been considering, a Rule 16(c)(2) prompt does not require the Committee to wrestle with: the types of cases to which it applies; the types of litigation funding entities or arrangements governed by such a rule; whether a mandatory rule would negatively affect the litigation finance industry;<sup>54</sup> the sources of funding covered; what must be disclosed; to whom disclosure is made; or whether follow-on discovery is appropriate. A case-by-case approach, governed by individual judges’ discretion, will allow for appropriate handling of these issues tailored to the circumstances of each case. Furthermore, a Rule 16(c)(2) approach would be in keeping with the view expressed by TPLF investors themselves that “we would recommend that courts treat disclosure on a case-by-case basis.”<sup>55</sup>

### **Conclusion**

The Committee should amend Rule 16(c)(2) to prompt judges to consider inquiring about prevalent but undisclosed non-party investments in their cases. Doing so would help judges better oversee their cases and promote more informed decisions while honoring their judicial discretion. It would also support the Judicial Conference’s goal of promoting a greater “culture of compliance” in the judiciary because, without knowing whether a non-party holds a financial stake in the proceeds of a case that is directly affected by the outcome, judges may be unable to determine whether such an interest creates a conflict for themselves or others. Some judges will appreciate the reminder to identify the people who may be needed during a settlement conference. And some judges will value the prompt to learn facts potentially relevant to “the parties’ resources,” protective orders, and sanctions.

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<sup>54</sup> A Rule 16(c)(2) prompt would be even less onerous to the industry than Chief Judge Connolly’s mandatory Standing Order, which “is unlikely to have onerous effects on litigation finance,” according to one large litigation finance company. Llorens & Oxman Article. Burford does not list a disclosure requirement specifically as a risk to its business in its regulatory filings. *See* Burford 2021 Annual Report.

<sup>55</sup> Llorens & Oxman Article.