ILFA | INTERNATIONAL LEGAL FINANCE ASSOCIATION

22-CV-O

October 3, 2022

Advisory Committee on Civil Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-300
Washington, D.C. 20544

RE: Response to September 8, 2022 Rules Suggestion by Lawyers for Civil Justice and the U.S. Chamber of Commerce Institute for Legal Reform (22-CV-M) Concerning Rule 16(c)(2)

The International Legal Finance Association ("ILFA")[1] respectfully submits this response to the September 8, 2022, submission to the Advisory Committee on Civil Rules (the "Committee") from Lawyers for Civil Justice ("LCJ") and the U.S. Chamber of Commerce Institute for Legal Reform ("ILR") concerning Fed. R. Civ. P. 16(c)(2) ("Rule 16"). We refer the Advisory Committee to the previous submissions of ILFA's members[2] and only briefly address the substance of this latest communication.

In 2014, 2015, 2017, 2018, 2019, 2020, and 2021, the ILR and its allies have urged the Committee to adopt an unprecedented proposal to force disclosure of certain funding arrangements in every civil case under Fed. R. Civ. P. 26(a)(1)(A) ("Rule 26"). Having failed to advance that proposal, the ILR/LCJ now urge the Committee to adopt essentially the same proposal via amendment of a different rule, Rule 16(c)(2). The stated rationale in the letter – as well as LCJ's September 1, 2022, proposing to amend Fed. R. App. P. 26.1 ("Appellate Rule 26.1") – is that federal judges might need a "nudge" to determine whether they have a conflict of interest

[1] Founded in September 2020, the International Legal Finance Association is the only global association of commercial legal finance companies. ILFA is a non-profit trade association that promotes the highest standards of operation and service for the commercial legal finance sector. Its founding members include Burford Capital, Omni Bridgeway (formerly known as Bentham IMF), and Therium Capital Management, which previously participated in the Committee's deliberations regarding legal finance.

[2] *See., e.g.*, Letter from Shannon Campagna, Executive Director, International Legal Finance Association, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (April 6, 2021); Letter from Eric H. Blinderman, Chief Executive Officer (U.S.), Therium Capital Management, Allison K. Chock, Chief Investment Officer, Bentham IMF, and Danielle Cutrona, Director, Global Public Policy, Burford Capital, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Feb. 20, 2019); Letter from Christopher P. Bogart, Chief Executive Officer, Burford Capital, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Feb. 20, 2019); Letter from Allison K. Chock, Chief Investment Officer, Bentham IMF, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Sept. 6, 2017); Letter from Christopher P. Bogart, Chief Executive Officer, Burford Capital, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Sept. 1, 2017); Letter from Adam R. Gerchen, Chief Executive Officer, Gerchen Keller Capital, LLC, Christopher P. Bogart, Chief Executive Officer, Burford Capital, and Ralph J. Sutton, Chief Investment Officer, Bentham IMF, to Jonathan C. Rose, Secretary, Advisory Committee on the Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Oct. 21, 2014).

stemming from investments in legal finance providers. The ILR/LCJ's arguments defy logic, law, and fact, and should be rejected.

The ILR/LCJ also cite other basis for amendment that this Committee and the Subcommittee on Multidistrict Litigation (MDL) Subcommittee have extensively studied and rejected after countless meetings, attendance at conferences, feedback from members of the bar, and consideration of documentary and related information.

Federal judges already have ample authority to determine whether a conflict of interest exists. The ILR/LCJ proposal overlooks the essential point that federal judges have ample authority to determine whether a conflict of interest exists.[3] This is not an oversight; it is a red herring. As indicated by the panoply of arguments in their letter that bear no relation to judicial conflicts, the ILR/LCJ seek to disguise their latest bites at the apple regarding Rule 16(c)(2) (and Appellate Rule 26.1)[4] to attain what they are really after: new disclosure rules specific to legal finance.

The true motivation here is to enact a mechanism by which parties in litigation can obtain the financial information of their adversaries to use it to their advantage. Anyone who has spent any time in courtrooms litigating high-stakes commercial matters has encountered demands for disclosure of irrelevant information as a mechanism of delay—as "frolic and detour" that adds to the extraordinary cost of litigation and slows down an already overburdened justice system. Disclosure of legal finance implicates further concerns, the most significant of which is the potential for prejudice to financed parties.

The ILR/LCJ submission offers no explanation why the federal courts' current ability to obtain information about legal finance arrangements is insufficient to address potential concerns that may arise every so often in a particular case. Fundamentally, the proposal 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 litigant support such a standard that would apply more evenly across financial interests.

As the Committee appropriately observed in rejecting earlier calls for an amendment to Rule 26 backed by a similar rationale, "judges currently have the power to obtain information about third-party funding when it is relevant in a particular case."[5] Judge Polster's order in the pending Opioids MDL in the U.S. District Court for the Northern District of Ohio is a perfect example.[6] Other federal courts have adopted this sensible approach, which balances the court's

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[3] Indeed, as the ILR/LCJ submission notes (p. 1), Federal judges have used their inherent authority to issue rules requiring various levels of disclosure of funding. *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; D.N.J. L. Civ. R. 7.1.1, https://www.njd.uscourts.gov/sites/njd/files/completelocalRules.pdf; 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; *see also 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 any funding obtained did not create conflicts or cede case control).

[4] *See* Lawyers for Justice, Submission to the Advisory Committee on Appellate Rules (Sept. 1, 2022), https://www.uscourts.gov/sites/default/files/22-ap-c_suggestion_from_lcj_-_rule_26.1_0.pdf.

[5] Hon. David G. Campbell, Report of Advisory Committee on Civil Rules, at 4 (Dec. 2, 2014), https://www.uscourts.gov/sites/default/files/fr_import/CV12-2014.pdf.

[6] *See In re Nat'l Prescription Opiate Litig.*, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018).

need to inquire into financing arrangements for a specific, narrow purpose with the fact that funding issues are rarely relevant to the parties' claims and defenses.[7] And still other courts have taken a broader approach demonstrating that the federal courts already have broad discretion to order disclosure of litigation finance when they deem it appropriate.[8]

Importantly, there have never been any real-world examples of judicial conflicts of interest in this regard. Judges are acutely aware of their ethical responsibilities and would be well advised to avoid investing in legal finance entities (whether public or private). Even the ILR/LCJ submission admits that "district judges are (presumably) not personally investing with entities explicitly advertising themselves as 'litigation funders.'" And even if a judge were to have a relationship that rose to the level of warranting disqualification, he or she would be fully equipped to issue an individual practice rule or standing order requiring disclosure of any relationship with that company—as has been done in the Northern District of California, the District of New Jersey, and by Chief Judge Connolly of the District of Delaware. In short, any concern about judicial conflicts of interest is so attenuated that it cannot support the unwarranted disclosure rule targeted at a specific sector of financial institutions of the kind suggested by the ILR/LCJ proposal.[9]

Funded cases are the exception rather than the norm, and many types of third parties beyond legal finance providers could have significant interests attached to litigation outcomes. Examples include banks with outstanding general recourse debt to a company whose health is dependent on a litigation judgment or settlement, and law firms that have taken cases on contingent fee and have their near-term or long-term firm health riding on the outcome. Such arrangements are not deemed relevant to the ultimate disposition of claims and are not required to be disclosed. As a practical matter, adding a special "legal finance disclosure rule" therefore seems both absurdly specific and broadly unnecessary, given that courts have operated for decades without inquiring into the (usually irrelevant) financial health of the litigation parties and their counsel.

It is also important to note that as it relates to the rationale of rooting out conflicts of interest, it would be an unprecedented shift in the intent and purpose of Rule 16. Rule 16 is designed to facilitate the just, speedy, and inexpensive disposition of the action, not to determine the existence of a conflict of interest. As previously discussed, judges already have the inherent

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[7] *See, e.g.*, *MLC Intellectual Property LLC v. Micron*, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019) (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).

[8] ILFA does not endorse any particular approach but the ability to issue sufficient orders is clear.

[9] It is important to note that, contrary to the flawed arguments presented by the ILR/LCJ proposal, there is well-developed jurisprudence in this area demonstrating that federal courts have routinely rejected discovery regarding the sources of financing in litigation unless the party seeking it makes a specific showing of relevance. *See Colibri Heart Valve LLC v. Medtronic CoreValve LLC, et al,* Case No. 8:20-cv-00847 (C.D. Cal. Mar. 26, 2021) (finding legal finance documents not discoverable; defendant's "skepticism" that plaintiff's discovery responses were not accurate or complete did not demonstrate the requisite relevance of the funding documents to the claims and defenses in the matter); *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); *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 724 (N.D. Ill. 2014) (rejecting discovery into legal finance arrangements; noting defendant's assertion of relevance lacked "any cogency"); *VHT, Inc. v. Zillow Group, Inc.*, No. C15-1096JLR, 2016 WL 7077235, at *1 (W.D. Wash. Sept. 8, 2016) (rejecting discovery into legal finance arrangements absent "some objective evidence that any of Zillow's theories of relevance apply in this case"). Federal courts have permitted discovery only in the particular circumstances where it is, in fact, germane to the claims and defenses of the parties. The call for blanket forced disclosure flies in the face of this settled judicial consensus and the principles of relevance and proportionality.

authority to obtain this information when necessary. Setting aside the irony of using Rule 16 to require a disclosure provision that will only lead to slower and more expensive litigation, the ILR/LCJ are trying to shoehorn their desired policy goal of forced disclosure to opposing parties in litigation of the existence of legal finance into any Federal Rule of Civil Procedure, regardless as to whether the justification is fit to purpose.

Litigation funders do not control litigation strategy. The ILR/LCJ proposal argues that a Rule 16(c)(2) "prompt" to disclose legal finance arrangements would help judges identify who may be needed during settlement conferences. But this not only mischaracterizes the way legal finance operates; it is also a specious argument. If there is concern that "control parties" must be known to the court but are going undisclosed, then the proper remedy is to adjust the real-party-in-interest standard or to propose new disclosures regarding "control," as opposed to rules specifically requiring disclosure of legal finance. Moreover, as members of this Committee have previously observed, judges "routinely require[] the person with settlement authority to be present at conferences [and] can get the information [they] need." "[C]ourts [already] have the tools to get the information needed to rule on discovery issues, and to order appearance by a person with settlement authority."[10] Not only is this not the way legal finance operates, but we are unaware of any instance provided by the ILR or LCJ of any such order having been violated.

ILFA's members are passive investors. The organization's best practices state ILFA members should not interfere with the performance of lawyers' duties to the courts and to their clients. A finance provider's ability to control litigation is further limited by the Rules of Professional Conduct, the doctrines of champerty and maintenance, and the pervasive use of protective orders in complex litigation. Our members are mindful of ethical obligations between counsel and their clients in every jurisdiction in which they operate. The ILR/LCJ submission's characterization of industry practice is contrary to voluminous scholarly literature recognizing that "[f]unders generally do not control the course of litigation or unduly interfere with the attorney-client relationship;"[11] the "[u]ltimate decisions regarding settlement and [other] legal strategy are always in the hands of the claimant and lawyer;"[12] legal finance providers "are not in control of the litigation; they are not investing in the litigation; and they are investing in the *potential outcome* of the litigation."[13] Decisions addressing the issue – including by judges who have had the opportunity to review funding documents *in camera* – likewise have found that legal finance providers do not control the underlying litigation.[14]

Legal finance is not "commonplace." Finally, it is worth noting that the ILR/LCJ proposal overstates the prevalence of legal finance, generally and with respect to class actions. Last year, there were 461,478 new civil filings in U.S. district courts.[15] In comparison, the most robust public

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[10] Minutes of Advisory Committee on Civil Rules at 13-14 (Oct. 30, 2014) ("Oct. 2014 Minutes").
[11] Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 Geo. L.J. 65, 92 (2010).
[12] Anne Rodgers, *et al.*, *Emerging Issues in Third-Party Litigation Funding: What Antitrust Lawyers Need to Know*, 16 Antitrust Source 1, 4 (2016), http://app.antitrustsource.com/antitrustsource/december_2016/?pg=14&pm=2&u1=friend.
[13] Joanna S. Bailey, *et al.*, *Third-Party Litigation Financing*, 8 J.L. Econ. & Pol'y 257, 276 (2011) (emphasis added).
[14] *See, e.g.*, *Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Company*, 2016 WL 937400, at *4 (Del. Super. Ct Mar. 9, 2016) ("The Court is not persuaded by [defendant]'s argument that the [agreement] is champertous because of Burford's alleged '*de facto* control.'").
[15] See Federal Judicial Caseload Statistics 2021, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2021.

study of legal finance data study found that in 2021, the number of legal finance investments with a nexus to the U.S. was less than one-tenth of one percent of the number of federal cases.[16] Importantly, commercial legal finance providers are highly selective and predominantly invest in matters where tens to hundreds of millions of dollars are in dispute. Such matters are obviously exceptional.

The ILR/LCJ proposal puts a disproportionate focus on legal finance, presumably because legal finance is one step toward leveling the playing field in matters where the proponents' constituents traditionally held the upper hand in terms of resources and expertise. The desire of one lobbying group to maintain a strategic advantage, however, is certainly not a reason to change Rule 16—or any other federal rule—particularly given that legal finance affects such a marked minority of federal litigation and that the ILR/LCJ have once again failed to identify a problem in need of a solution.[17]

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In light of the foregoing, it is unsurprising that the ILR/LCJ submission offers nothing more than a recycling of mischaracterized and misleading arguments from its prior submissions, several of which have no relevance to Rule 16.[18] Indeed, with no new developments nor relevant examples showing that commercial legal finance is a problem, the ILR/LCJ is engaging in, and thereby acknowledges that, this latest effort is another attempt at a fishing expedition. For the foregoing reasons, and for all the reasons stated in ILFA's members' previous submissions to the Committee, we respectfully submit that this renewed request does not merit this Committee's reconsideration.

Respectfully submitted,

/s/

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[16] *See* The Westfleet Insider: 2021 Litigation Finance Market Report, available at https://www.westfleetadvisors.com/publications/2021-litigation-finance-report/.

[17] The ILR/LCJ's arguments concerning class action oversight fail to hold water for similar reasons. It is exceedingly rare for legal finance providers to receive proceeds directly from class actions. That is because class representatives lack the legal capacity to bind absent members of the putative class to financial arrangements with third parties. Accordingly, third parties cannot directly finance class actions absent court approval. Such approval already provides the oversight about which ILR/LCJ purport to care.

[18] In the spirit of brevity, ILFA does not address all such arguments herein. However, should the Advisory Committee seek further information concerning ILFA's position on the ILC/LCJ proposal and arguments cited, ILFA is prepared to more thoroughly respond.