December 21, 2020

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

RE: Three Steps to Facilitate Consideration of Proposal 17-CV-O to Require Disclosure of Third-Party Litigation Funding

Dear Ms. Womeldorf:

We write on behalf of Lawyers for Civil Justice ("LCJ") and the U.S. Chamber Institute for Legal Reform ("ILR") to urge the Advisory Committee on Civil Rules ("Committee") to take three specific steps to facilitate further consideration of Proposal 17-CV-O, which would amend the Federal Rules of Civil Procedure ("FRCP") to require disclosure of third-party litigation funding ("TPLF") agreements.[1]

TPLF is now a pervasive feature of civil litigation, affecting thousands of federal court cases each year. As the Committee has noted, however, many judges remain unaware of its presence[2]—and so are many litigants. Courts rarely inquire about the existence of TPLF, and even less frequently require any type of disclosure to parties. The suggestion that the FRCP should provide transparency to courts and parties about TPLF has been on the Committee's radar for almost seven years. During that time, despite its significant work to learn about the TPLF industry, the Committee has on several occasions expressed a need for further information about specific issues. This letter is intended to assist the Committee by providing a brief summary of the Committee's stated information needs and offering three steps that could help satisfy them.

The Committee's first expression of a need for more information about TPLF related to Proposal 14-CV-B. The October 2014 Agenda Book stated:

> This submission raises a number of intriguing issues in relation to a just-emerging phenomenon. Should the Committee wish to proceed, it might well be important initially to try to get a better grasp of the TPLF phenomenon itself, for devising a rule that suitably deals with it seems to depend on some confidence about how it works.[3]

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[1] On June 1, 2017, LCJ, ILR and 28 other organizations proposed an amendment to Fed. R. Civ. P. 26(a)(1)(A) (Document No. 17-CV-O), which was supplemented by letter dated November 3, 2017 (Document No. 17-CV-GGGGGG).

[2] Advisory Committee on Civil Rules, Agenda Book, Apr. 2-3, 2019 at 76, 220.

[3] Advisory Committee on Civil Rules, Agenda Book, Oct. 30-31, 2014 at 122.

Observing that "[t]here is much to learn,"[4] the Committee at that time decided it "should not act now" in part because "third-party financing practices are in a formative stage" and "[t]hey are being examined by others."[5]

Three years ago, when the Committee took up the topic for the third time[6] in Proposal 17-CV-O, it reiterated "the need to understand the underlying phenomena."[7] The Agenda Book for the November 7, 2017, meeting stated:

> The new submissions dramatically illustrate the range of information that will be needed if any project is to be undertaken. There is a great deal to learn.[8]

One topic of great interest to the Committee was whether disclosure of TPLF agreements would lead judges to ascribe resources to parties without heeding the limitations set forth in the TPLF agreements, as explained in the Agenda Book:

> Third-party funders seem concerned that a court might allow more extensive discovery when it knows that extensive funding is available. . . . An extended version of this concern seems to be that a court will look not only to the funding made available by the agreement but also to the funder's overall resources, blithely treating the funder as a party or attributing the funder's resources to the party regardless of the limits in the funding agreement.[9]

A second category of information important to the Committee was whether TPLF disclosure would cause the particular harms that the funding industry fears, including an increase in harassing motions and attempts to disqualify judges, as described in the Agenda Book as follows:

> First, defendants will follow up on an initial disclosure by seeking more information by means that include discovery from the funder and from other funders the plaintiff may have approached. That will lead to increased motion practice. Second, disclosure will encourage harassing motions based on unfounded claims of ethical violations; in extreme cases, disclosure may prompt tactical motions to disqualify

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4 Advisory Committee on Civil Rules, Agenda Book, Apr. 9-10, 2015 at 51 (Draft Minutes, Civil Rules Advisory Committee, Oct. 30, 2014).

5 *Id*. at 53. One funding company observed that "the Committee's reporter pushed back against each of the Chamber's arguments" for a disclosure rule. *See* Letter from Christopher P. Bogart, Chief Executive Officer, Burford, to Ms. Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure (Sept. 1, 2017).

6 The topic was discussed in 2016 but the Committee again determined not to take any immediate action.

7 Advisory Committee on Civil Rules, Agenda Book, Nov. 7, 2017 at 346.

8 *Id*.

9 *Id*. at 354.

> the judge. Third, defendants want disclosure "to better evaluate litigation strategies that are resource-based, rather than merits-based."[10]

A third topic the Committee specified for potential research related to whether TPLF agreements include protected information, as the Agenda Book explained:

> Mandatory disclosure of a funding agreement might disclose protected information. That would depend on the terms of the agreement. No information has been provided to shed light on actual funding-agreement terms, much less the possible practice of embedding protected information in agreements.[11]

During the Committee's November 7, 2017, discussion—which led the Committee to include TPLF in the MDL Subcommittee's purview—the Committee identified four areas that needed to be explored in considering Proposal 17-CV-O:

> It is difficult to develop comprehensive information about the actual terms of financing agreements.[12]
>
> The first question is the familiar drafting question. How would a rule define the arrangements that must be disclosed?[13]
>
> Much of the debate has focused on control of litigation in general, and on settlement in particular.[14]
>
> The concern is that a judge who knows of third-party financing may look to the financing as a resource that justifies more extensive and costly discovery, and even may be inclined to disregard the terms of the financing agreement by assuming there is a source of unlimited financing.[15]

After the MDL Subcommittee took charge of the issue, it proceeded to gather significant information about the TPLF industry. Subcommittee members conducted a series of conference calls and attended various events focused on TPLF.[16] Not all the information received in this manner was particularly definitive. For example, in November 2018, following a funder-sponsored briefing program at the George Washington University Law School, the MDL Subcommittee reported that litigation funders "emphasize that they do not have or want any

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[10] *Id*. at 351.

[11] *Id*. at 353.

[12] Advisory Committee on Civil Rules, Agenda Book, Apr. 10, 2018 at 78-79 (Draft Minutes, Civil Rules Committee, Nov. 7, 2017).

[13] *Id*. at 79.

[14] *Id.* at 80.

[15] *Id.* at 81.

[16] Committee on Rules of Practice and Procedure, Agenda Book, Jan. 28, 2020 at 313 (Report to the Standing Committee, Advisory Committee on Civil Rules, Dec. 26, 2019).

control over the litigation. Indeed, some say they could not come close to having the personnel to review and monitor the day-to-day progress of litigation even if they wanted to and had authority under their agreements to do so."[17] If anything, however, that characterization may have done more to highlight a need for information (rather than satisfy it) because it is squarely at odds with the facts developed by the Subcommittee.

Specifically, as detailed in a letter by the undersigned and others dated March 27, 2019 (Document No. 19-CV-I), each and every funding agreement that has made its way into the record before the Advisory Committee contains provisions ***permitting substantial control or influence over the funded litigation***. For example, in *Boling v. Prospect Funding Holdings, LLC*, 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 TPLF entity] 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."[18] And in a lawsuit filed in 2018, a TPLF entity affirmatively asserted that it had the contractual right to exercise control over the litigation in which it had invested.[19]

In April 2019, the MDL Subcommittee reported that "it seems that litigation funding is growing by leaps and bounds," but observed that "most transferee judges do not report being aware of its use in MDL litigation before them."[20] As the Minutes of the Committee's April 2-3, 2019, meeting report state:

> A judge noted that third-party funding happens without the knowledge of judges. "A number of my colleagues are not even aware that it happens."[21]

In October 2019, the MDL Subcommittee recommended that further work on a potential TPLF disclosure rule should be handled by the full Committee because TPLF "seems at least equally important in a broad range of types of litigation."[22] When the full Committee assumed responsibility for the topic, the Committee made clear that "[t]he question whether a rule change is appropriate to deal with" TPLF in all manner of civil cases "remain[s] under consideration."[23] The plan for further work on the topic was described as follows:

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17 Advisory Committee on Civil Rules, Agenda Book, Nov. 1, 2018 at 161.

18 771 F. App'x 562, 579-80 (6th Cir. 2019)

19 *See* Compl. ¶ 35, *White Lilly, LLC v. Balestriere PLLC*, No. 1:18-cv-12404 (S.D.N.Y. filed Dec. 31, 2018). Additional examples of substantial funder control include the elaborate funding agreements in two class actions filed against Chevron, both of which are also elaborated in greater detail in the June 2017 letter to the Advisory Committee. (*See* Letter to Advisory Committee, Document No. 17-CV-O, at 16-17, June 1, 2017.)

20 Advisory Committee on Civil Rules, Agenda Book, Apr. 2-3, 2019 at 220.

21 *Id*. at 76.

22 Advisory Committee on Civil Rules, Agenda Book, Apr. 1, 2020 at 145.

23 Committee on Rules of Practice and Procedure, Agenda Book, Jan. 28, 2020 at 314 (Report to the Standing Committee, Advisory Committee on Civil Rules, Dec. 26, 2019).

> Professor Marcus will be "point person" on this effort, and he has been collecting relevant materials that come his way. Members of the subcommittee who encounter potentially useful information are asked to forward it to him.[24]

There was no mention of TPLF during the Committee's October 16, 2020 meeting, and no reference to the topic in the Agenda Book.

Today, two things seem clear: First, there is no empirical evidence that a TPLF disclosure rule would somehow alter or change the now-mature multi-billion-dollar TPLF industry. Second, the Committee is highly unlikely to obtain answers to the questions it has posed simply by collecting materials that come its way. In fact, the very absence of a disclosure requirement is hampering the Committee's—and the judiciary's and litigants'—understanding of TPLF. As John Beisner observed in a 2014 letter to the Committee:

> the lack of robust data in this area stems largely from the lack of disclosure requirements. Absent any duty to report TPLF arrangements, litigation funding lacks transparency; its presence in a case only occasionally comes to light as a result of discovery or disputes with the funder.[25]

In order to assist the Committee in obtaining the information it has identified as helpful to further consideration of Proposal 17-CV-O, we respectfully suggest the Committee take the following three actions:

1. Send a mini questionnaire such as the one attached as Appendix A to litigation funding entities for the purpose of obtaining answers to questions previously posed by the Committee. A list of entities and addresses is included as Appendix B;

2. Ask the Federal Judicial Center to update its 2017 report about TPLF to ensure it reflects the most current information; and

3. Develop a "sketch" rule for discussion purposes, which would serve to focus Committee attention on important drafting issues. As with the conceptual sketches of Rule 23 amendments in April 2015,[26] Rule 30(b)(6) amendments in April 2017,[27] and the October

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[24] Advisory Committee on Civil Rules, Agenda Book, Apr. 1, 2020 at 165 (MDL Subcommittee, Notes of Conference Call, Nov. 25, 2019).

[25] Letter from John H. Beisner, Skadden, Arps, Slate, Meagher & Flom LLP, to Mr. Jonathan C. Rose, Secretary of the Committee on Rules of Practice and Procedure (Oct. 28, 2014).

[26] Advisory Committee on Civil Rules, Agenda Book, Apr. 9-10, 2015 at 244 ("**These conceptual sketches are not intended as initial drafts of actual rule changes proposals, and should not be taken as such.**").

[27] Advisory Committee on Civil Rules, Agenda Book, Apr. 25-26, 2017 at 296 ("**[T]he Subcommittee has reached no conclusion, even a tentative one, about whether any topic on its discussion list, much less any rule sketch, warrants serious consideration as an amendment idea.**").

2020 draft of an MDL settlement rule,[28] such a sketch would "facilitate discussion"[29] and identify any difficulties and tricky questions.[30] The proposed language in Proposal 17-CV-O (*see* Appendix C), although an excellent place to start, has raised drafting questions concerning what type of entities it applies to (perhaps "any commercial enterprise" is better than "any person, other than an attorney") and what types of agreements should be included (only case-specific arrangements, or inventory agreements as well?). The MDL Subcommittee considered whether a rule should be "approached incrementally" by requiring "only disclosure of the fact of funding and identity of the funder, supplemented by a Committee Note stating that the rule sets a floor that can be supplemented by the court on a case-by-case basis."[31] These are important drafting questions about which a sketch would certainly "facilitate discussion," just as the Committee's other sketches have done.

These three actions should materially advance the Committee's stated desire to learn more about TPLF as it continues its consideration of the proposal to require disclosure, and would clarify once and for all that the multi-billion-dollar litigation funding industry is having seismic effects on our civil justice system. To be clear, the undersigned respectfully maintain that the case has already been established for immediate promulgation of a TPLF disclosure rule because such a rule would: (1) inform courts and parties who is really "in the courtroom"; (2) identify those who hold decision-making authority and influence over litigation strategies, including settlement; (3) allow appropriate information related to proportionality evaluations under Rule 26(b)(1), which requires courts to consider "the parties' resources" in determining the scope of discovery in individual cases; (4) facilitate fairer discussion and decisions over discovery sanctions and cost-shifting requests; and (5) allow courts and counsel to ensure compliance with ethical obligations. However, despite our confidence that the case for a uniform disclosure rule has already been made, we urge that the Committee take the aforementioned three actions because the information elicited is certain to aid the Committee in its consideration of the pending disclosure proposal.

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[28] Advisory Committee on Civil Rules, Agenda Book, Oct. 16, 2020 at 171 ("[T]he subcommittee has not made any decision about whether to recommend attempting to draft a rule. Indeed, even if some provisions regarding these matters would be useful, it need not follow that they should be embodied in a rule . . . .").

[29] *Id*. at 169.

[30] *See, e.g.*, footnotes in Apr. 9-10, 2015 Agenda Book at 249-271 and Oct. 16, 2020 Agenda Book at 173.

[31] Advisory Committee on Civil Rules, Agenda Book, Apr. 2-3, 2019 at 76 (Draft Minutes, Civil Rules Advisory Committee, Nov. 1, 2018).

Thank you for your attention to this important issue.

Sincerely,

Quentin F. Urquhart, Jr.
President
Lawyers for Civil Justice

Harold Kim
President
U.S. Chamber Institute for Legal Reform

APPENDIX A – MINI QUESTIONNAIRE FOR TPLF PROVIDERS

- *What percentage of your funding arrangements are:*
    - *Related to a specific lawsuit*
    - *Related to any law firm's inventory of multiple lawsuits*
    - *Agreements with individual parties rather than law firms*
- *How many federal cases have you provided funding for during the 2018 and 2019 calendar years?*[1]
    - *How many of those cases are class actions?*
    - *How many of those cases are pending in an MDL proceeding?*
- *With respect to each of those cases, please answer the following questions:*
    - *In what court is the case pending?*
    - *What is the nature of the lawsuit? (Please respond using the "Nature of Suit Code" provided in the federal Civil Cover Sheet.*[2])
    - *Was the existence of third-party litigation funding in the case and the identity of the funder disclosed to the court? If so:*
        - *Was the disclosure pursuant to a local rule?*
        - *Was the disclosure ordered by the court?*
        - *Did defendant(s) follow up the disclosure by seeking more information by means that included discovery from the funder and from other funders the plaintiff may have approached?*
        - *Did the disclosure lead to increased motion practice?*
        - *Did the disclosure lead to harassing motions based on unfounded claims of ethical violations?*
        - *Did the disclosure lead to a motion to disqualify the judge?*
        - *Do you have any evidence that the defendant(s) used the disclosure to evaluate litigation strategies that were resource-based, rather than merits-based?*
        - *Do you have any evidence that, because of the disclosure, the court allowed more discovery, or looked not only to the funding available under the agreement, but also to the funder's overall resources, attributing the funder's resources to the party regardless of the limits in the funding agreement?*
        - *Would you be willing to share actual funding agreements so the Committee can understand whether such agreements contain protected*

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[1] "Funding" means any instance in which a litigation funder receiving the inquiry has provided money to a party to a litigation matter, to counsel in a litigation matter, or to any person involved in a litigation matter in exchange for a contingent interest in any proceeds from the litigation, whether by settlement, judgment or otherwise. To the extent that funding has been provided on that basis for a portfolio of cases, each case should be counted and described separately.

[2] The Civil Cover Sheet specifies the following categories of cases: contract; tort; forfeiture/penalty; bankruptcy; property rights; real property; civil rights; prisoner petitions; labor; immigration; social security; federal tax suits; and cases involving other statutes. Each category is further divided into various sub-topics, each corresponding to a particular code.

information and what role such agreements afford you in the underlying litigation?

APPENDIX B – TPLF PROVIDERS

- Armadillo Financial Partners, 2925 Richmond Ave, Houston, TX 77098
- Arrowhead Capital LLC, 477 Madison Avenue, Suite 1230, New York, NY 10022
- Ava Labs, Inc., 263 South 4th Street, Suite 110497, Brooklyn, NY 11211
- Burford Capital Limited, 353 N. Clark St., Suite 2700, Chicago, IL 60654
- Contingency Capital, 399 Park Avenue, New York, NY 10022
- Curiam Capital LLC, 767 5th Ave 9th floor, New York, NY 10153
- EJF Capital, 2107 Wilson Blvd # 410, Arlington, VA 22201
- Fulbrook Capital Management LLC, 870 5th Ave #12C, New York, NY 10065
- GLS Capital, 150 N. Riverside Plaza, Suite 1840, Chicago, IL 60606
- Lake Whillans Litigation Finance LLC, 1350 Avenue of the Americas, New York, NY 10019
- Legalist, 880 Harrison Street, San Francisco, CA 94103
- LexShares, 125 High Street, 25th Floor, Boston, MA 02110
- Longford Capital Management LP, 35 West Wacker Drive, Suite 3700, Chicago, IL 60601
- Omni Bridgeway Limited, 437 Madison Ave 19th floor, New York, NY 10022
- Parabellum Capital LLC, 810 7th Ave, New York, NY 10019
- Pravati Capital, 445 Park Ave #919, New York, NY 10022
- Rembrandt IP Management LLC, 401 City Ave # 900, Bala Cynwyd, PA 19004
- Statera Capital, 171 N. Aberdeen Street, Suite 400, Chicago, IL 60607
- Themis Legal Capital, 733 3rd Ave, New York, NY 10017
- Therium Group Holdings, 1460 Broadway, New York, NY 10036
- Validity Finance, 1270 Avenue of the Americas, Suite 900, New York, NY 10020
- Woodsford Litigation Funding Ltd, 1180 Welsh Road, Suite 200 North Wales, PA 19454

APPENDIX C – PROPOSED AMENDED RULE

The amended Fed. R. Civ. P. 26(a)(1)(A) would read as follows, with the new proposed language in underscore and deletions in ~~strikethrough~~:

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; ~~and~~

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment~~.~~; and

(v) for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.