July 2, 2024

The Honorable Darrell Issa
Chairman, Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Henry C. "Hank" Johnson, Jr.
Ranking Member, Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Issa, Ranking Member Johnson, and Members of the Subcommittee:

Lawyers for Civil Justice (LCJ)[1] respectfully submits this letter in response to the Subcommittee's hearing, "The U.S. Intellectual Property System and the Impact of Litigation Financed by Third-Party Investors and Foreign Entities," held on June 12, 2024.

The increasing use of third-party litigation financing (TPLF) over the past 15 years is raising fundamental questions in civil litigation of all topics, including intellectual property, antitrust, class actions, and torts (especially mass torts). Many judges remain unaware of TPLF and the issues it raises in their cases, and the judges who do seek information about the presence of TPLF in their cases may be doing so in an ad hoc manner without sufficient rules guidance, often making superficial inquires on an ex parte basis with no notice to other parties. Judges handling TPLF questions ex parte lack the benefit of parties' briefing about the issues TPLD can raise in a given case.

LCJ advocates before the Judicial Conference's Committee on Rules of Practice and Procedure for rules that will provide judges and parties with the information essential to understanding TPLF in their cases through clear, uniform rules. At the Subcommittee's hearing, the witnesses agreed that disclosure is appropriate and needed.

There are numerous compelling reasons why uniform rules requiring disclosure will benefit federal courts and parties while improving the transparency and fairness of the federal court system:

[1] LCJ is a national coalition of corporations, law firms, and defense trial-lawyer organizations that promotes excellence and fairness in the civil justice system and supports measures to secure the just, speedy, and inexpensive determination of civil cases. For 37 years, LCJ has been engaged in supporting federal procedural rules reform to promote balance and fairness in the civil justice system, reduce costs and burdens of litigation, and advance predictability and efficiency in litigation.

Provide a Clear, Uniform Process for TPLF Disclosure

Federal judges who seek information about TPLF do so without federal rules guidance. Whether and how such inquiries are made is inconsistent across the federal judiciary and can be resource consuming because judges are developing their own procedures as they go.

As highlighted at the Subcommittee's hearing, Chief Judge Colm Connolly of the U.S. District Court for the District of Delaware issued a standing order requiring disclosure of TPLF and has conducted his own investigations in particular cases, all of which was entirely appropriate and important. But without the benefit of rules guidance, Judge Connolly had to invest substantial time and effort to identify the potential issues, fashion his orders, and understand what information was necessary to figuring out the TPLF issues and their importance in the particular cases before him.

In one case, Judge Connolly found that a patent monetization firm created "shell" entities to hide the fact that it was funding the plaintiffs to bring these cases.[2] He found the plaintiffs were "mere inventory" to advance the funder's objectives.[3] These facts were very important for the judge and parties to understand, and the Federal Rules of Civil Procedure should provide a routine procedure that allows such facts to be understood without putting the onus on each judge to invent new procedures one case at a time.

Other judges have similarly undertaken efforts to uncover the presence of TPLF, either through a standing order or in response to requests in specific cases. In one case, a court ordered a plaintiff to identify the litigation funder, which was disclosed as Burford Capital.[4] The special master in the case was determined to be a former co-counsel with the founder of Burford. Though the special master did not recuse himself, he said the disclosure in the case "prove[d] . . . that is it imperative for lawyers to insist that clients disclose who the investors are."[5] The only way to ensure that such information reaches judges and parties is to have a clear, uniform rule requiring disclosure of TPLF agreements.

Reduce the Risk of Conflicts of Interest

Disclosure of TPLF is important to ensuring that the financial interests of real parties in interest are known to the court. Federal judges are bound by statute,[6] the Code of Conduct for Federal Judges,[7] and the Judicial Conference Mandatory Conflict Screening Policy[8] to recuse themselves when they have a financial interest that could be substantially affected by the outcome of a proceeding. Under the Code of Conduct, this recusal responsibility applies to all financial interests, no matter how

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[2] *Nimitz Techs. LLC v. CNET Media, Inc.*, 2022 WL 17338396 (D. Del. Nov. 30, 2022).

[3] *Id.*

[4] Steven Donziger--Chevron Applications: Donziger, Steven--Day02, Condensed Transcript of Deposition Testimony at 383-86, *In re* Application of Chevron, No. 10 MC 00002 (LAK) (S.D.N.Y. 2010), *available at* http://www.scribd.com/doc/47264957/11-29-10-12-29-10-Deposition-Transcripts-Steven-Donziger-Days-1-8.

[5] *Id.*; *see also* Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 Geo. L.J. 1649, 1650 (2013).

[6] 28 U.S.C. § 455

[7] Code of Conduct for Federal Judges, Canon 3(C)(1)(c)

[8] 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)

small, and extends to any "appearance of impropriety." Judges will have the information necessary for recusal only if parties *and non-parties* are required to disclose direct financial stakes in the outcome of a case.

Ensure that Decision Makers Participate in Court Proceedings

Federal judges—under the Civil Justice Reform Act of 1990,[9] Rule 16 of the Federal Rules of Civil Procedure,[10] and subsequent case law[11]—have the authority to direct representatives with authority to bind the parties to be present during settlement conferences. The Committee Notes to the Rules clarify that this authority includes requiring *non-parties* with decision-making powers to attend, *e.g.*, third-party investors who have some degree of control or veto power over settlement and other litigation decisions. Absent TPLF disclosure, financiers with influence or control over settlement will be unknown to the court and therefore may not be required to participate in settlement conferences, which can undercut judicial management and unnecessarily complicate settlement proceedings while increasing the burden on courts and parties.

Such a scenario arose in a high-profile case involving Sysco Corp., which sought to settle price-fixing claims it brought against several meat producers. After the parties agreed to settlements, the funder vetoed them[12]—even though the funder had publicly stated the parties it funds are "free to run their litigations as they see fit."[13] Here, the court found that the TPLF agreement specified that the funder could veto a settlement, which the court said the funder did in an attempt to secure an increased litigation payout and to set benchmarks for future cases it was planning to finance.[14]

Control over settlement and other litigation decisions is a concern for other courts as well. A funding agreement examined by the Sixth Circuit Court of Appeals stated that an investor had "substantial control" over the litigation, including terms that "may interfere with or discourage settlement."[15] The Sixth Circuit indicated the funding agreement raised "quite reasonable concerns about whether a plaintiff can truly operate independently."[16] Disclosure of TPLF agreements can help courts ensure that settlement conferences and other court proceedings requiring the presence of decision-makers do, in fact, include decision-makers authorized to bind the parties.

Identify the Actual Interests of Parties

Federal judges often need to understand the interests of parties to manage their cases effectively. When a litigation funder is not disclosed, the interests of those who are making or influencing

[9] 18 U.S.C. § 473(b)(5)

[10] Fed. R. Civ. P. 16.

[11] *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.").

[12] Hannah Albarazi, *When a Litigation Funder is Accused of Taking Over the Case*, Law360, Mar. 15, 2023

[13] Leslie Stahl, *Litigation Funding: A Multibillion-dollar Industry for Investments in Lawsuits with Little Oversight*, CBS's "60 Minutes," Dec. 18, 2022 (interview with Burford CEO Christopher Bogart).

[14] Order, *In re: Pork Antitrust Litig. & In re: Cattle and Beef Litig.*, Nos. 18-cv-1776 (JRT/JFD) & 22-md-3031 (JRT/JFD) (D. Minn. Feb. 9, 2024), at 9.

[15] *Boling v. Prospect Funding Holdings, LLC*, 771 F. App'x 562, 579-80 (6th Cir. 2019).

[16] *Id.*

litigation decisions may not be known to the court and parties, resulting in the wasting of judicial resources seeking to resolve issues that may appear to be, but are actually not, driving litigation decisions.

For example, in Massachusetts, a landowner appealed a zoning board decision to allow a developer to demolish buildings on other properties to construct a drugstore.[17] The landowner leased her property to a competing drugstore, and the developer sought discovery to determine if that drugstore was funding the litigation. The court found that litigation funding is "surely a relevant subject to explore in discovery."[18] It explained that "hidden funding can introduce a dynamic into a plaintiff's case—and agenda unrelated to its merits, a resistance to compromise—that otherwise might not be present and, unless known, cannot be managed or evaluated."[19]

Litigation funding has been used for the distinct purpose of harassing or inflicting harm on a defendant, making court efforts at settlement superfluous. Several years ago, the famous wrestler known as Hulk Hogan won a $140 million verdict in an invasion of privacy case against Gawker. Afterwards, it was determined that billionaire Peter Thiel funded the litigation, in part due to his own contentions with Gawker.[20] Further, when Gawker filed for bankruptcy, Thiel sought to buy the company[21]—raising questions about how individuals, competitors or even foreign entities can use TPLF to harass, harm, or devalue their targets. Judges should have the information they need to make inquiries about such issues when appropriate.

Evaluate Discovery Requests and Allocate Costs and Sanctions in Accordance with the FRCP

The presence of TPLF is relevant to determinations by the courts regarding discovery, cost allocation, and sanctions under the FRCP. The Rules direct federal judges to assess the resources of the parties in determining the scope of discovery. Specifically, under FRCP Rule 26, as part of a judge's responsibility to assure discovery is "proportional to the needs of the case," he or she is required to factor in "the parties' resources."[22] Similarly, judges should also consider the parties' resources (as well as who is making litigation decisions) when allocating costs and imposing sanctions. When a case is funded by a third-party seeking to profit from the litigation, the cost of discovery and motion practice is a business expense; the determination as to cost allocation may be very different than a situation in which a suit is brought without such funding.

This situation arose in *Abu-Ghazaleh v. Chaul*,[23] in which a Florida court found that TPLF providers were liable for the attorneys' fees of the defendants because the funders were essentially a "party" to the litigation—the funding agreement called for 18.33% of the award and final say over any settlement agreement. On a petition by a defendant for attorney's fees, the court held that the

[17] *Conlan v. Rosa*, Nos. 2959078, 295932, 2004 Mass. LCR Lexis (Mass. Land Ct. July 21, 2004).

[18] *Id.*

[19] *Id.*

[20] Matt Drange, *Peter Thiel's War on Gawker: A Timeline*, Forbes, June 21, 2016.

[21] Michael M. Grynbaum, *Thiel Makes a Bid for Gawker.com, a Site He Helped Bankrupt*, N.Y. Times, Jan. 12, 2018.

[22] Fed. R. Civ. P. 26(b)(1).

[23] 36 So. 3d 691 (Fla. Ct. App. 2009).

funders were "liable for the attorney's fees incurred when they filed a civil theft suit that lacked substantial legal support."[24]

Protect the Interests of Class Action Members

In class actions, federal judges have the responsibility under Rule 23 to assure settlement is "fair, reasonable and adequate" to the class, which includes ensuring that the named plaintiffs and class counsel "fairly and adequately protect the interests of the class."[25] A key concern for the judges is making sure the lawyers do not "trad[e] away possible advantages for the class in return for advantages for others."[26] Therefore, it is incumbent on courts to assess TPLF agreements to determine if proceeds from any proposed settlement or verdict have been promised to funders rather than the class.

The need for disclosure in class actions should be particularly non-controversial, as even a funder has recognized that courts should have access to this information. An executive of a litigation investor said that "the logic for disclosure is somewhat stronger [in class actions], given the court's independent obligation to monitor the protection of class members' interests."[27] In fact, the Northern District of California gave this reason when issuing a standing TPLF disclosure requirement for all class actions.[28]

Ensure Counsel Represent Their Client's Interests, Not Third-Party Funders

Federal judges should be aware of the possibility that a plaintiff's counsel may be beholden to an outside interest, such as a litigation funder, at the expense of their client, the plaintiff. This situation arose in the Sysco case. After Burford vetoed the settlements, Sysco learned that its lawyers worked for Burford in other litigation and accused them of "disloyalty" for providing legal advice to Burford "contrary to Sysco's interests during the dispute."[29] In some cases, investors have asserted a contractual right to assign particular lawyers to serve as a plaintiff's counsel.[30] In these situations, the lawyer-funder relationship may significantly impact the duty of the lawyer to his or her client.

Mass-tort litigation, where plaintiffs are generally not sophisticated parties like Sysco, is particularly susceptible to these dynamics. Many mass-tort plaintiffs cannot identify their own lawyers; they may have joined a lawsuit in response to an ad run by a marketing or claim aggregation firm, which collects and aggregates individual claims with others and sells the claims to law firms. In these situations, the funders may be driving an entire portfolio of a lawyer's cases. Courts and parties need to know whether these dynamics are affecting the litigation.

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[24] *Id.* at 694.

[25] Fed. R. Civ. P. 23(a)(4), (e)(2), and (3).

[26] Fed. R. Civ. P. 23(e)(2) advisory committee notes to 2003 and 2018 amendments.

[27] 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).

[28] N.D. Cal. Standing Order § 19.

[29] Order, *In re: Pork Antitrust Litig. & In re: Cattle and Beef Litig.*, Nos. 18-cv-1776 (JRT/JFD) & 22-md-3031 (JRT/JFD) (D. Minn. Feb. 9, 2024), at 2.

[30] *White Lilly, LLC v. Balestriere PLLC*, No. 1:18-cv-12404-ALC, ECF No. 1 (S.D.N.Y. Dec. 31, 2018).

Inform Trial Rulings on Evidence Admissibility and Acceptable Lines of Questioning

Litigation funders do not just fund lawyers litigating individual cases. They fund marketing campaigns to generate mass tort litigation claims regardless of their validity. They also may fund organizations that pay experts to develop studies supporting causation theories in their litigations. Without disclosure of TPLF, it may be impossible to know whether there is a financial connection between a funder and an expert or some other litigation actor. This information may be vital to a court's ruling on the admissibility of expert evidence, as well as proper lines of questioning. For example, a defendant may seek to impeach a plaintiff's expert if that expert's funding came from a source supported by the funders. When the existence of a funder is not disclosed, these determinations cannot be made.

LCJ's Federal Rules Proposals Supporting TPLF Disclosure

Courts and parties should know about any TPLF agreement in their cases. This transparency is critical to the ability of federal judges to administer their cases and is essential to ensuring a fair process for parties.

To this end, LCJ continues to advocate before the Committee on Rules of Practice and Procedure for specific rule amendments to support or require such appropriate TPLF disclosures. Four proposals are currently pending:

(1) **Rule 26 Disclosure**: Rule 26 should be amended to add TPLF agreements to the list of initial disclosures a party must provide to other parties in the litigation without awaiting a discovery request. This would treat TPLF agreements the same as insurance agreements.

(2) **Rule 16 Disclosure**: TPLF agreements should be added to the list of topics that parties discuss among themselves and with the court during initial conferences. This would alert judges to the issues that TPLF may present to their dockets and facilitate discussion of non-party stakes in their cases.

(3) **Appellate Disclosure**: Rule 26.1 of the Federal Rules of Appellate Procedure should be amended to require disclosure of TPLF so that appellate judges have information necessary to determine whether they should recuse themselves from a case due to actual or apparent conflicts of interest. Although six federal circuits have local rules that appear on their face broad enough to require TPLF disclosure, none of them specifically identifies TPLF agreements—a fact funders use to assert the rules do not apply to them.

(4) **Rule 7.1 Disclosure**: FRCP Rule 7.1, which provides disclosures so that judges can be properly informed when determining if they need to recuse themselves from a case, should be amended to require disclosure of any TPLF arrangements. Currently, 50 of 94 federal districts have local rules more robust on disclosure than Rule 7.1, an indication judges want more information than currently required by the federal rule. Of those with local rules, about a quarter have disclosure requirements seemingly broad enough to include identification of litigation funders, but the funders insist these rules do not apply to them, and the rules are ineffective in eliciting information about TPLF.

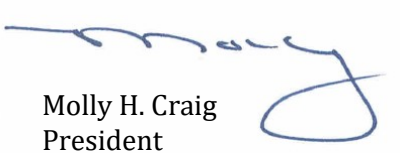
In Camera Review is Inadequate to Protect Courts and Parties

An important question arose at the hearing: whether *in camera* review of TPLF agreements would suffice. It would not. Such a practice would unduly burden judges by requiring them to reach legal conclusions related to a case without the benefit of briefing or argument by the parties and would fail to provide fair notice to the parties about who is influencing or making key litigation decisions, including about settlement.

It is important to have a uniform approach to TPLF that is predictable and self-effectuating. Disclosure of TPLF to the court and parties, similar to how the FRCP handles disclosure of insurance policies, should become an established rule for all federal civil cases.

The Subcommittee's hearing was very helpful in bringing significant attention to concerns about the presence and impact of third-party investments in civil litigation. Courts and parties need clear, uniform rules guidance for how to manage the process of obtaining information about TPLF in federal civil cases.

Sincerely,



Molly H. Craig
President