January 31, 2019

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

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

Dear Ms. Womeldorf:

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

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

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

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

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

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

Respectfully submitted,

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