17-CV-YYYYY

BENTHAM IMF

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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

September 6, 2017

Dear Ms. Womeldorf:

On behalf of Bentham IMF, a commercial litigation finance company providing funding to claimants and law firms in the United States, I respond to the letter submitted on June 1, 2017 by the U.S. Chamber Institute for Legal Reform (the "Chamber"). In its letter, the Chamber urges the Committee to revisit its 2014 decision not to proceed with a proposed amendment to the Federal Rules of Civil Procedure ("federal rules") to require automatic disclosure of litigation funding agreements at the outset of all civil litigation. None of the "noteworthy developments" cited by the Chamber warrants action by the Committee.[1] To the contrary, three years on, it has become increasingly apparent that a rule requiring automatic disclosure of litigation finance in every civil action is not appropriate.

Summary of Bentham's Position

The Chamber's radical proposal to invade parties' financial privacy and their attorneys' work product is inconsistent with the underlying purpose of the federal rules "to secure the just, speedy, and inexpensive determination of every action." It is also notably contrary to the most recent important implementation of the rules' fundamental purpose—the "proportionality" amendments to Rule 26. Automatic disclosure by definition is not tailored to the "needs of the case," and more often than not, would likely prejudice parties receiving funding and create unnecessary discovery disputes. The Chamber's proposal also rubs against the grain of the emerging consensus of the federal courts that have considered the discoverability of litigation funding documents and found that litigation funding arrangements classically anticipate litigation and thus warrant protection as attorney work product.

The Chamber attempts to tag litigation funding with "problems" that largely either do not exist, or are in truth benefits. "Frivolous litigation" is the Chamber's principal whipping boy. Nothing suggests that litigation funding causes cases of little or no merit to be filed in federal court, or that the Chamber's automatic disclosure proposal would head off such filings. Litigation funding in fact encourages careful assessment of litigation prospects and costs—the antithesis of "frivolous litigation"—and therefore *discourages* frivolous litigation and *promotes* fair settlements, both in theory and in practice.

[1] Some of the Chamber's "noteworthy developments" are not even "developments"—many of the cases and articles that the Chamber cites predate its 2014 proposal, some by decades.

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The Chamber's miscellaneous other arguments are equally misguided. Existing rules already address any issues of attorney ethics and judicial ethics related to litigation funding. Funders are rarely real parties in interest, and their resources are not "parties' resources" for purposes of a proportionality analysis. Automatic disclosure would not advance any interest certain states might have in regulating champerty. The recent rule change in the Northern District of California touted by the Chamber counsels *against* the Chamber's proposal. The Chamber's inapposite analogy to insurance fails on multiple levels.

Litigation funding represents only one of many ongoing developments in the evolution of litigation and dispute resolution. These developments include increased reliance on technology to perform tasks that formerly only lawyers performed, increased use of private resources in resolving disputes, increased control of litigation by the parties themselves, and increased focus on the resource constraints for litigation. These developments are largely beneficial. The Chamber's proposal is an ill-disguised attempt to thwart perhaps the most significant and salutary of them all, namely litigation funding, and we urge the committee to reject it.

I. The Chamber's Proposal Would Override The Federal Court Consensus That Litigation Funding Agreements Are Protected Attorney Work Product.

As far as Bentham is aware, every federal court to have considered the issue has ruled that litigation funding documents, including litigation funding agreements, are protected as attorney work product.[2] *See, e.g., Odyssey Wireless, Inc. v. Samsung Electronics Co., Ltd*, No. 3:15-cv-01738, 2016 WL 7665898, at *4-5 (S.D. Cal. Sept. 20, 2016) ("Odyssey contends that [...] 'the type of agreements at issue here by definition are only contemplated and ultimately prepared because of a very real prospect of litigation.' [...] The work-product doctrine applies to these documents."); *In re Int'l Oil Trading Co.*, 548 B.R. 825, 838 (S.D.Fla. 2016) ("The Funding Agreement itself is work product as it was entered into with the intent to facilitate litigation. [...] [S]ome terms of a litigation funding agreement represent an assessment of risk based on discussions of core opinion work product of the case. Revealing certain terms of the agreement might disclose attorney mental impressions and opinion about the case.").[3]

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[2] There was no work-product determination in *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2016 WL 4154849, at *2 (N.D. Cal. Aug. 5, 2016) because no work-product objection was raised. Incidentally, the Chamber mischaracterizes the funding agreement in *Gbarabe*, stating in its letter that "putative class members will have to hand over part of their recovery to the litigation funder." The funding agreement in fact provides that it is not the class members, but the lawyers, who are obligated to pay the funder, and only out of their contingency fee, not out of the class recovery. *Id.*, Dkt. No. 186-4 (N.D. Cal. filed Sept. 16, 2016), §3.2 on p. 75 of 159, §§11.1-11.7 on pp. 82-83 of 159.

[3] *See also Viamedia, Inc. v. Comcast Corp.*, No. 1:16-cv-05486, 2017 WL 2834535, at *3 (N.D. Ill. June 30, 2017) (concluding that documents disclosed to prospective litigation funders were protected as attorney work product); *Ioengine, LLC v. Interactive Media Corp.*, 1:14-cv-01571 (D. Del. Aug. 3, 2016) (same); *United States v. Homeward Residential, Inc.*, No. 4:12-cv-461, 2016 WL 1031154, at *6 (E.D. Tex. Mar. 15, 2016) ("The Court finds that the litigation funding information is protected by the work product doctrine. The litigation funding documents were between Fisher and actual or potential litigation funders and were used to possibly aid in future or ongoing litigation."); *Morley v. Square., Inc.*, No. 4:10-cv-02243, 2015 WL 7273318 (E.D. Mo. Nov. 18, 2015) (work-product protection not waived by disclosure to litigation funders); *Doe v. Soc'y of Missionaries of Sacred Heart*, No. 11–cv–02518, 2014 WL 1715376, at *3 (N.D. Ill. May 1, 2014) ("[T]the Financing Materials identified by Plaintiff in his privilege log constitute opinion work product. These materials incorporate opinions by Plaintiff's counsel regarding the strength of Plaintiff's claims, the existence and merit of certain of Defendants' defenses, and

To be sure, in some of these cases, litigation funding agreements have been ordered to be produced, but only where the court found that the defendants had demonstrated a "substantial need" for the agreement under the circumstances. Even then, the court typically ordered the agreement to be produced in redacted form "to protect against disclosure of the mental impressions, conclusions, opinions, or legal theories," etc.[4] These occasional outcomes show that a rule change is unnecessary to ensure that funding agreements will be produced in appropriate cases. The Chamber asks this Committee to override these judges by fiat by requiring parties to disclose their attorney work-product–protected funding agreements *automatically*, in their *entirety*, in *every* case. The Chamber's proposal would abrogate parties' attorney work-product protection and tie the hands of judges who have consistently denied or limited the disclosure of litigation funding agreements.

Bentham is not aware of any example in the history of the federal rules in which a proposed rule has been amended in a manner directly contrary to the apparently unanimous views of the sitting judges who have considered the issue. The Chamber compares its proposed amendment to the current requirement of Rule 26(a)(1)(A) that insurance policies be disclosed, which was part of the 1970 Amendment. With respect to that amendment, however, the context in which the federal courts were then considering the issue was very different. As the Notes of the Advisory Committee on the 1970 Amendment explain:

> Both cases and commentators are sharply in conflict on the question whether defendant's liability insurance coverage is subject to discovery in the usual situation when the insurance coverage is not itself admissible and does not bear on another issue on the case. The division in reported cases is close. State decisions based on provisions similar to the federal rules are similarly divided. It appears to be difficult if not impossible to obtain appellate review of the issue. Resolution by rule amendment is indicated. [5]

The 1970 amendment requiring disclosure of insurance policies was appropriate because federal courts were "sharply in conflict," and state courts were "similarly divided." There is no such conflict or division here. The federal courts are not hopelessly deadlocked or split on the issue. (Nor are the state courts.) They are, to the contrary, remarkably consistent in holding that litigation funding documents are not ordinarily discoverable even on a motion to compel, let alone automatically.

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other observations and impressions regarding issues that have arisen in this litigation."); *Devon IT, Inc. v. IBM Corp.*, No. 10-2899, 2012 WL 4748160, at *1 (E.D. Pa. Sept. 27, 2012) ("Litigation strategy, matters concerning merits of claims and defenses and damages would be revealed if the documents were produced. The matters directly involve the mental impressions of counsel and are protected from disclosure as work-product."); *Mondis Tech., Ltd. v. LG Elecs., Inc.*, No. 2:07–CV–565–TJW--CE, 2:08–CV–478–TJW, 2011 WL 1714304, at *3 (E.D. Tex. May 4, 2011) ("All of the documents were prepared… with the intention of coordinating potential investors to aid in future possible litigation. The Court holds that these documents are protected by the work product protection.").

[4] *See, e.g.*, *Odyssey Wireless*, 2016 WL 7665898, at *7; *In re Int'l Oil Trading Co.*, 548 B.R. at 839.

[5] Fed. R. Civ. P. 26(b)(2) Advisory Committee's note (1970) (citations omitted).

II. The Chamber's Proposal Would Mandate Discovery That Is *Not* "Proportional."

Effective December 2015, Rule 26 was amended to emphasize that the scope of discovery is limited to matters that are "relevant to any party's claim or defense and proportional to the needs of the case."[6] The Chamber told this Committee that it "strongly applauds" and "enthusiastically endorses" the 2015 amendments to Rule 26 because, in the Chamber's view, they serve "to narrow overbroad discovery."[7] The Chamber's proposal to amend Rule 26 again, this time to require automatic disclosure of litigation funding in every civil action, flies in the face of the 2015 proportionality amendments.[8]

The 2015 proportionality amendments require that discovery be "relevant to any party's claim or defense" (as opposed to being relevant only to the "subject matter" of the action) and that parties seeking information make a showing that the requested discovery is "proportional to the needs of the case" based on the comprehensive six-factor test set out in the amended Rule 26. In contrast, an *automatic* disclosure rule would force discovery of litigation funding *in every case* even though it is *not* relevant in most cases, and *not* proportionate to the needs of most cases. In *VHT, Inc. v. Zillow Group, Inc.*, No. C15-1096JLR, 2016 WL 7077235 (W.D. Wash. Sept. 8, 2016), for example, the defendant moved to compel the plaintiff to identify any litigation funder involved in the case. Like the Chamber here, the defendant presented "just theories," "imaginable hypotheticals," and "speculation" as to why the requested information was relevant. *Id.* at *1-2. Citing the "dearth of evidence," the court denied the motion to compel, concluding that the identity of any litigation funder was "negligibly relevant, minimally important in resolving the issues, and unduly burdensome," and was therefore ultimately "disproportional to the needs of the case." *Id.* at *1. The Chamber's proposed amendment would go much further than the request the court denied in *VHT*. It would require not just automatic disclosure of the identity of any funder, but automatic production of any funding agreement.

Even before the "proportionality" amendments went into effect, courts denied attempts to discover funding agreements and the identity of funders in the absence of a showing of relevance.[9] It should go without saying that it would not be "proportional" to require automatic

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

[7] U.S. Chamber Inst. for Legal Reform, Public Comment to the Advisory Committee on Civil Rules Concerning Proposed Amendments to the Federal Rules of Civil Procedure, November 7, 2013 ("Chamber 2013 Comment"), at 1 and 6-7, *available at* http://www.instituteforlegalreform.com/uploads/sites/1/FRCP_Submission_Nov.7.2013.pdf (last visited Aug. 30, 2017).

[8] In enthusiastically endorsing the "proportionality" amendments to Rule 26, the Chamber urged the Committee to limit the scope of discovery even further "by adding a requirement that the information not only be relevant, but also ***material*** to a party's claim or defense." *Id.* at 7. Litigation funding agreements are rarely relevant, and almost never material, to a claim or defense.

[9] *See Kaplan v. S.A.C. Capital Advisors, L.P.*, No. 12-cv-9350, 2015 WL 5730101, at *5 (S.D.N.Y. Sept. 10, 2015) ("[T]he reasons adduced by the defendants in support of their view that they are entitled to discovery of the Litigation Funding Documents [...] are purely speculative. [...] [T]he Court finds that the defendants did not show that the requested documents are relevant to any party's claim or defense."), *aff'd*, 141 F.Supp.3d 246 (S.D.N.Y. 2015); *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 740 (N.D. Ill. 2014) ("The actual transactional documents between Miller and its funder—the 'deal documents' reflect the terms of the funding agreement, the amount funded, and the details about how any recovery is to be divided between Miller and the funder if Miller wins

disclosure of information that courts typically have found is not even relevant. In advocating for the 2015 "proportionality" amendments to the federal rules, the Chamber itself cautioned this Committee that, "[i]nstead of accomplishing its original goals of preventing unfair surprise at trial and ensuring the fair resolution of litigation, discovery is all too often used for strategic purposes."[10] Automatic disclosure of litigation funding would serve the Chamber's "strategic purposes," not the legitimate goals of discovery.

III. The Chamber's Proposal Would Prejudice Parties and Needlessly Burden the Courts.

The Chamber's proposal fails the acid test of any proposed rule amendment, which is whether it would foster "the just, speedy, and inexpensive determination of every action and proceeding."[11] Automatic disclosure of litigation funding agreements would do the opposite.

A. The Chamber's Proposal Would Make Federal Civil Litigation Less Just.

Automatic disclosure of litigation funding agreements would make federal civil litigation *less just* because it would give large corporate defendants an important and unfair advantage—identifying those plaintiffs that lack the resources to weather a lengthy litigation campaign.[12] In cases that are funded, automatic disclosure of the funding agreement would reveal a plaintiff's maximum litigation budget, as well as potential pressure points along the way, based on the economic structure of the deal. In cases that are not funded, an automatic disclosure rule would force plaintiffs to reveal, by omission, that their case has no third-party financial support and that they may therefore not have the wherewithal to withstand a barrage of defense motions and still prosecute the case through trial and appeal. Either way, a rule requiring automatic disclosure of funding arrangements would reveal to large corporate defendants early in the case how susceptible a plaintiff might be to financial pressure—the same pressure that such defendants have so often used to force unfair resolutions of meritorious cases.

B. The Chamber's Proposal Would Make Federal Civil Litigation Less Speedy and More Expensive.

Automatic disclosure of litigation funding agreements would make federal civil litigation *less speedy and more expensive* because it would embolden and enable the Chamber's big-business constituents to clog the courts with frivolous defense motions. Inevitably, defendants notified of the presence of a litigation funder will seek to exploit this fact for strategic gain by filing expensive and time-consuming motions in court.

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the case and what happens if it does not. This and related information [...] have nothing to do with the claims or defenses in the case [...].").

[10] Chamber 2013 Comment at 2.

[11] Fed. R. Civ. P. 1.

[12] For ease of explanation, Bentham refers to third-party-funded litigants herein as "plaintiffs" and to their adversaries as "defendants," though depending on the proceeding, the funded party might be a "counterclaimant," a "petitioner," a "respondent," an "appellee," etc.

Courts would see a multiplication of motions to compel *further* disclosures regarding the funder, the source of its funds, the identities and backgrounds of its decision makers, the nature of its case-selection and due-diligence processes, its communications with its counsel and subject-matter experts, and its communications with the plaintiff, the plaintiff's counsel, and the plaintiff's experts. Making these "fishing expeditions" yet more costly, defendants would also serve and seek to enforce subpoenas on the litigation funders themselves—and not just the funder paying for the litigation, but every funder the plaintiff or its counsel may have approached.

Of course, defendants would not seek such information for its own sake. In claiming to be concerned about ethics and conflicts—which we address on the merits below—the Chamber is really positioning its constituents to file even more frivolous motions of their own. The Chamber's references to "utiliz[ing] discovery tools to uncover unethical conduct by plaintiffs" signal a strategy of filing harassing defense motions for sanctions and to disqualify plaintiffs' counsel. The Chamber's references to judicial ethics signal, in extreme cases, a strategy of filing tactical motions for disqualification of judges. In the vast majority of cases, these defense motions to compel, to sanction, to disqualify, etc. would be unsuccessful on the merits. Unfortunately, however, the piling-on of such motions would often be successful *strategically*, because it would add to the expense and delay of the litigation.

This is perhaps the real key to the Chamber's request. Large corporate defendants have long managed to achieve one-sided settlements by turning civil litigation into a war of attrition that many plaintiffs are not financially equipped to survive. Increasingly, litigation funding is available to level the playing field. The Chamber's proposal for automatic disclosure—and the multiplication of motion practice that would follow—is a rearguard attempt to make it *more* expensive to litigate cases using litigation funding, blunting funding's effectiveness.

IV. The Recent Rule Change in The Northern District of California Counsels *Against* The Chamber's Proposal.

The Chamber cites the January 2017 amendment to the Standing Order for All Judges in the Northern District of California, which provides that "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."[13] The court had initially proposed a rule which would have required disclosure of the identity of any funder in *all* civil cases. After receiving public comments and engaging in its own deliberations, the court adopted the narrower amendment quoted above, applying only in class, collective, or representative actions—all of which are actions in which the court has a special supervisory role to play. The Chamber's proposed amendment is far broader than even the initial proposal of the Northern District of California, which the judges of that district ultimately declined to adopt: not only would the Chamber's proposed amendment apply in *all* civil cases, but it would require *production of funding agreements*, not just identification of funders. The Northern District of California's rulemaking process shows that the Committee should reject the Chamber's proposed amendment, both because the Chamber's proposal is wildly overbroad, and because the district courts will address any legitimate concerns through their own local rulemaking.

[13] Standing Order for all Judges of the N.D. of Cal., Contents of Joint Case Mgmt. Stmt., § 19 (Jan. 2017).

V. The Analogy to Insurance Fails.

The Chamber argues that plaintiffs should be required to produce funding agreements because defendants are required to disclose indemnity insurance policies. As discussed above, when the amendment requiring disclosure of insurance policies was added to Rule 26, the federal courts were deeply divided as to the discoverability of such policies, and rulemaking was the only solution. In contrast, the federal courts are broadly *united* in finding that litigation funding documents are *not* routinely discoverable. Moreover, none of the key reasons for the 1970 Amendment requiring the disclosure of indemnity insurance policies supports an amendment requiring disclosure of funding agreements.

The 1970 Notes of the Advisory Committee explain what justified singling out indemnity insurance policies for disclosure:

> The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy.[14]

Unlike an indemnity insurance policy, a litigation funding agreement cannot "satisfy the claim." Therefore, disclosure of its terms would not enable counsel to make a realistic appraisal of the potential value of the case or to settle or dismiss the matter where pursuing litigation would not likely yield a better outcome. Unlike an insurance company, a litigation funding company ordinarily does *not* control the litigation. Unlike disclosure of an insurance policy, disclosure of a litigation funding agreement *does* involve a significant invasion of privacy and of attorney work product. The only thing that insurance policies and litigation funding agreements have in common from the Advisory Committee's list is that they are both only available from the adverse party in the litigation. But this is true of many kinds of information which would never be subject to automatic disclosure.

The disclosure of indemnity coverage does not necessarily give plaintiffs access to the defendant's litigation budget. Rather, the rationale for its disclosure is tied to an early assessment of a defendant's ability (or possible inability) to pay a judgment or settlement *based on the merits of the case*. Automatic disclosure of a plaintiff's ability to pay legal fees and costs, in contrast, would give defendants enormous leverage to force unjust settlements on plaintiffs, with no connection to the merits of the claims or defenses.[15] Such a one-sided automatic disclosure requirement would be inconsistent with the courts' general approach to parties' sensitive financial information, which is to permit discovery of such information where appropriate, but not to require automatic disclosure. For example, defendants' counsel are not required to disclose their law firms' lines of credit at all, let alone automatically, even though

[14] Fed. R. Civ. P. 26(b)(2) advisory committee's note (1970).

[15] The Chamber also claims that automatic disclosure would create "parity" of financial disclosure because some corporate defendants are required under the securities laws to disclose information pertaining to their financial wherewithal. The securities laws, of course, do not apply to all defendants. And, unlike the Federal Rules of Civil Procedure, they are intended to protect investors, not litigants.

such credit, like litigation funding, is often repaid from and secured by attorney's fees generated by the litigation. Nor are defendants required automatically to disclose their litigation reserves or any assistance (financial or otherwise) from third-party allies.[16]

VI. Litigation Funding *Discourages* Frivolous Litigation.

The constant refrain in the Chamber's letter—that the growth of litigation funding and innovations in funding practices will necessarily result in frivolous lawsuits that burden the courts and defendants—has been repeatedly rejected as nonsensical.[17] No funder is interested in funding frivolous cases. A non-recourse funder like Bentham cannot survive, let alone succeed, unless it funds only the most meritorious cases. Bentham rejects over 95% of the matters it considers. This extreme selectivity applies both to single-case investments and law firm portfolio investments, in which Bentham carefully analyzes the portfolio, as well as the law firm's experience and track record. If startup companies are using unconventional funding and case analysis models that might encourage frivolous lawsuits (which is doubtful), they will soon go out of business. The Chamber, of all interest groups, should realize that market dynamics will be far more effective than automatic disclosure at solving any such problem.

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[16] The false analogy between litigation funding and insurance was perhaps best addressed by the court in *Miller UK Ltd.*, 17 F. Supp. 3d at 729-30 (citations omitted):

> I have reviewed *in camera* the agreement between Miller and its funder, and there is nothing in those agreements that remotely supports Caterpillar's attempt to equate Miller's funding agreement to the relationship between an insured and its insurer. Unlike an insurer, the funder in this case has not paid nor will ever pay Miller for any losses caused by Caterpillar's claimed misappropriation of trade secrets and breach of contract; it will never be a plaintiff seeking indemnification from Caterpillar. Nor is it an assignee of Miller. Rather, it is contractually obligated to provide Miller with an agreed amount of funds to assist Miller in defraying expenses incurred in suing Caterpillar to recover for its claimed losses. If Miller loses, that is the end of the matter.
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> Abraham Lincoln once was asked how many legs a donkey has if you call its tail a leg. His answer was four: calling a tail a leg does not make it one. Just so here.

[17] Jonathan T. Molot, *Litigation Finance: A Market Solution to A Procedural Problem*, 99 Geo. L.J. 65, 106 (2010) ("Although opponents of third-party financing predict that such financing might encourage meritless filings rather than meritorious ones, the claim makes little sense."); Anthony J. Sebok, *Betting on Tort Suits After the Event: From Champerty to Insurance*, 60 DePaul L. Rev. 453, 455 n.14 (2011) (explaining "skepticism of studies that claim that litigation financing increases frivolous litigation" and calling efforts to prove such claims "unimpressive"); Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 Cardozo L. Rev. 861, 875 (2015) ("It is not in the funder's interest to fund frivolous cases, because the funder would incur only costs without benefits when the case fails, and a court may sanction the funded party for bringing a frivolous case."); Anne Talcott, *Third-Party Litigation Funding In The United States: An Invitation for Fraud and Increased Litigation or Much Ado About Nothing?*, 11 In-House Defense Quarterly 26 (Winter 2016) ("Attorneys have long acted as the gate keepers, declining to prosecute cases that lack merit because of ethical rules and rules of civil procedure. These rules will continue to act as an obstacle for overly zealous claimants and funders. Moreover, funders are in the business of seeking a return on their investment. Thus, they would have a financial disincentive to provide a non-recourse loan to a claimant with a meritless claim."); *see also* Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *Formal Opinion 2011-2: Third Party Litigation Financing, available at* http://www2.nycbar.org/pdf/report/uploads/20072132-FormalOpinion2011-2Third-partyLitigationFinancing.pdf (last visited Aug. 30, 2017) (commercial funders "undertake an analysis of the merits of the contemplated claim that is more rigorous than the analysis employed in personal injury cases").

As far as established funders like Bentham are concerned, there is reason to believe that the rise of litigation funding makes it *less* likely that weak cases will be filed. Plaintiffs and law firms know that established funders are "smart money." A commercial litigation funder's decision to fund a case is a strong vote of confidence in its merits by a group of experienced professionals. Conversely, a decision not to fund a case typically indicates those professionals' uncertainly about liability, damages, or collectability. Where one or more funders declines to fund a case, plaintiffs and law firms are often deterred from pursuing the case using their own resources, even where they *can* do so. In this way, funders act as gatekeepers not only by promoting the filing of stronger cases, but also by discouraging the filing of weaker ones.

Contrary to the Chamber's argument, the increase in the reported income of several litigation funders indicates the *strength* of funded claims, as funders only earn income if the funded claims are successful. In fact, there has not been an increase in litigation, let alone frivolous litigation. The most recent Federal Judicial Caseload Statistics indicate that civil case filings in district courts have *fallen* by 1.4 percent since 2012.[18] Not only does the Chamber fail to show that litigation funding promotes frivolous litigation, it also fails to explain how or why *automatic disclosure* of funding arrangements would help prevent this. It appears that the Chamber is pushing for automatic disclosure not as an end in itself, but as a means to cobble together anecdotal support for future anti-funding proposals in general. As one Committee member observed in 2014, "[t]he proponents of disclosure may be concerned more with generating information to support careful examination of third-party litigation financing in general than with the impact on disclosure in any particular action."[19] The Committee should not lend the imprimatur of federal rulemaking to assist the Chamber in its data-collection project.

VII. Litigation Funding *Promotes* Fair Settlements.

The Chamber argues that litigation funding encourages plaintiffs to reject reasonable settlement offers. If anything, it is more plausible that third-party funding promotes settlement.[20] It is always in a funder's interest to incentivize claimants to *accept* reasonable settlement offers to maximize the likelihood of a reasonable investment return.[21] Moreover, funders rationally would prefer the certainty of a settlement to the uncertainties of trial. If the economic terms of a funding arrangement push a claimant to take an unreasonable settlement position, the whole transaction is likely to be undermined. In practice, funders are careful to prevent this by conservatively valuing claims and structuring transactions to incentivize early resolution.[22]

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[18] U.S. Courts, "Federal Judicial Caseload Statistics 2016," *available at* http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2016 (last visited Aug. 30, 2017).

[19] Civil Rules Advisory Committee Minutes at 11.

[20] J. Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. Rev. 571, 597 (2010) ("It is not at all clear though that third-party financing in fact discourages settlement. To the contrary, there is considerable evidence that the existence of third-party funding actually tends to promote settlement.").

[21] Civil Rules Advisory Committee Minutes at 12.

[22] *See* S. Gillers, *Waiting for Good Dough*, 43 Akron L. Rev. 677, 693 (2010) (funders "dim the plaintiff's enthusiasm to press for trial" by "calibrating the return on its investment to the length of time" to resolution).

The only clear way in which commercial litigation funding impacts the settlement process is by leveling the playing field between parties of different financial means. This helps to focus settlement negotiations on the substantive merits of the claims, not on which party has the greater resources.[23] Committee members previously asked, "is it desirable to facilitate settlement at lower values when the defendant knows there is no outside support and that it may be easier to wear out the plaintiff's reserves?"[24] The answer is no. Although swift settlements are certainly desirable, *fair and reasonable* settlements should remain the paramount goal of a just court system.

Even if third-party funding changes settlement incentives, there is no reason to believe that its impact is any different or more significant than that of contingency fee arrangements, the value of which has long been recognized (and which the Chamber has expressly carved out of its proposed amendment). If there is any fee arrangement that is inimical to early settlement and that is likely to create a financial conflict of interest between an attorney and his or her client, it is the hourly fee. The hourly fee creates an incentive, which every ethical litigator must resist, to draw out the litigation as long as possible. The Chamber has not proposed any heightened disclosure requirements or enhanced ethical safeguards to address this concern.

If anything, there is reason to believe that litigation funding is a *solution* to the perverse incentive and conflicts problems the Chamber raises. Litigation funding often encourages and enables alternative or hybrid fee arrangements, which help to align the financial incentives of attorneys, their clients, and funders with respect to settlement. Once again, not only has the Chamber failed to show that the purported problem (distorted settlement incentives) even exists, it has also failed to explain how automatic disclosure of third-party litigation funding would address it. As Committee members explained when presented with the same argument in 2014, "[i]t is hard to follow the argument that disclosure will remove a deterrent to settlement. Knowing the specific terms of the financing agreement will not contribute to that."[25] Defendants should not be entitled automatically to probe the details of their opponents' financial wherewithal simply to better evaluate litigation strategies that are resource-based, rather than merits-based.

VIII. Existing Rules Already Address Ethical Concerns.

There is no reason to believe that existing ethical and disclosure rules, which have proven adequate to ensure the integrity of the judicial system thus far, are suddenly insufficient. As this Committee noted in 2014, it simply "is not clear that initial disclosure will advance consideration" of whatever ethical questions might be raised by litigation funding.

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[23] Lyon, 58 UCLA L. Rev. at 597-98.

[24] Civil Rules Advisory Committee Minutes at 12; *see also* Gillers, *Waiting for Good Dough*, 43 Akron L. Rev. at 692 ("[E]ven if the prediction that the plaintiff's changed circumstances will increase the likelihood of trial is true, we must ask whether that prospect as a matter of public policy justifies denying the needy plaintiff the financial means that will enable her to reject a settlement offer that is too low. Which harm is worse?"); *id.* at 691 ("No legitimate policy can support denial of funding as a way to squeeze plaintiffs without financial reserves and thereby force an early unjust settlement, especially when defendants can use procedural strategies to buy delay.").

[25] *Id.* at 13.

A. Attorney Ethics.

The Chamber seeks to justify its call for automatic disclosure as "consistent with federal courts' interest in safeguarding legitimate, ethical civil litigation practices," an interest the Chamber notes is supported by existing discovery rules permitting defendants to probe unethical conduct. The Chamber fails to explain why those very same discovery rules are inadequate to address ethical concerns relating to funding. There is nothing that currently prevents a party from probing an adversary's funding arrangements in discovery, so long as those arrangements are demonstrated to be relevant to the issues in the case.

Where there is unethical behavior, courts already have strong tools to address it. 28 U.S.C. §1927 authorizes awards against attorneys who have "multiplied the proceedings… unreasonably and vexatiously." Rule 11 authorizes sanctions against attorneys who file pleadings or other papers without a legal or factual basis. Federal courts also have inherent power to impose sanctions for bad faith conduct and for violations of applicable rules of professional conduct, and even to impose terminating sanctions dismissing cases where warranted.

Existing state ethics rules already address the Chamber's stated concerns that funders are investing in mass tort claims bundled by lawyers through purportedly improper client solicitation practices. Likewise, Model Rule of Professional Conduct 5.4(a) already addresses ethical concerns regarding attorney fee-splitting, and Model Rule 1.7 already addresses the attorney's duty of loyalty to the client and duty to exercise independent professional judgment.[26] Under the Model Rules, a lawyer must disclose a conflict of interest to a client and/or withdraw from a representation if there is "a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests,"[27] including any business or contractual relationships with funders. Lawyers who violate these rules risk malpractice suits and disbarment. Federal regulation is inappropriate for a problem best addressed by the states in licensing, regulating, and supervising the professional conduct of their respective bars.

It is in funders' interest to comply with these rules as well. The Chamber mischaracterizes Bentham's Code of Best Practices to suggest the contrary. Bentham's Code does not provide that a funding agreement should give the funder control over the litigation, but only that a funding agreement should be clear about *whether or not* the funder has control over the litigation. Bentham's funding agreements expressly provide that it does *not* have control over the litigation or settlement.[28]

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[26] In the guise of protecting clients' rights as decision-makers, the Chamber ignores the fact that clients typically instruct their attorneys to protect the confidentiality of their private financial information, including litigation funding agreements. The Chamber's proposed rule would override such client instructions by mandating the disclosure of funding in every case.

[27] MODEL RULES OF PROFESSIONAL CONDUCT 1.7 cmt. [8].

[28] The only exception is a narrow procedural right: the parties agree in advance that a pre-selected neutral arbitrator (typically a retired federal judge) may intervene in cases where *bad faith or fraud* is apparent in a claimant's settlement decision. Bentham has never invoked this procedure, nor has it been a party to an arbitration or litigation with any claimant, for *any* reason.

B. Judicial Ethics.

The Chamber argues that Rule 26 must be amended to require disclosure of litigation funding agreements in all civil cases to avoid judicial conflicts of interest. If this is the Chamber's real concern, it is proposing the wrong amendment to the wrong rule. It is Rule 7.1, not Rule 26, that addresses disclosures required to enable judges to identify and avoid conflicts. Rule 7.1 requires parties to file a disclosure statement that "identifies any parent corporation and any publicly held corporation owning 10% or more of its stock." To alert judges of the involvement of a litigation funder, it would be sufficient to amend Rule 7.1 to require parties to disclose only the *name* of any litigation funding company paying the fees or costs in the case. It is totally unnecessary to amend Rule 26 to require production of litigation funding *agreements*.

But even such an amendment to Rule 7.1 would be inappropriate because it would expand that rule beyond its carefully crafted scope. A comparison of Rule 7.1 to 28 U.S.C. § 455 is instructive. Section 455 includes a list, too voluminous to quote here, of circumstances under which federal judges must disqualify themselves. Despite this long list, the only information that is required to be automatically disclosed in every civil case is the information required by Rule 7.1 quoted above. As the Committee Notes to Rule 7.1 explain:

> Although the disclosures required by Rule 7.1(a) may seem limited, they are calculated to reach a majority of the circumstances that are likely to call for disqualification on the basis of financial information that a judge may not know or recollect. Framing a rule that calls for more detailed disclosure will be difficult. Unnecessary disclosure requirements place a burden on the parties and on courts.[29]

There is no credible argument that the purported need for automatic disclosure of the identity of a litigation funder is *greater* than the need for automatic disclosure of the circumstances listed in section 455, most of which do *not* have corresponding automatic disclosure requirements in Rule 7.1 or in any other rule. In this sense, the Chamber's proposed amendment is extremely under-inclusive. There should either be no amendment at all, or there should be an amendment requiring automatic disclosure of every fact in every case that could ever give rise to a need for judicial recusal under any of the circumstances listed in section 455. Such a comprehensive disclosure rule, of course, would extend to all third-party financial and other interests on the *defendant's* side of a case. Such a rule is unnecessary and inappropriate, but it least it would be fair—and the Chamber would probably be the first to oppose it.

More to the point, the fact that a litigation funding company is paying the bills in a matter before a judge is extremely unlikely to trigger any of the long list of provisions in section 455 requiring recusal. Certainly, no sitting judge should have a financial or business relationship with a litigation funding company. The Code of Conduct for United States Judges states that judges "should refrain from financial and business dealings that exploit the judicial position or involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves."[30] And, "[a]s soon as

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[29] Fed. R. Civ. P. 7.1(a) Advisory Committee's note (2002).

[30] CODE OF CONDUCT FOR UNITED STATES JUDGES, CANON 4(D).

the judge can do so without serious financial detriment, the judge should divest investments and other financial interests that might require frequent disqualification."[31] In the absence of any such financial relationship on the judge's part, there is no need for automatic disclosure.

While there is some theoretical risk of a judge having a personal relationship with individuals employed by or investing in litigation funders, this risk is no greater than the possibility of a judge having a personal relationship with any other interested third party. Provided the judge is not aware of the interested third party's relationship to the case, there is no conflict requiring recusal. 28 U.S.C.A. § 455(b)(5)(iii) applies only where a close *family* relation—not a neighbor, not a casual acquaintance—of the judge is "*known by the judge* to have an interest that could be substantially affected by the outcome of the proceeding." The catch-all provision of 28 U.S.C.A. § 455(a) requires a judge's recusal only "in any proceeding in which his impartiality might reasonably be questioned." A judge's impartiality cannot reasonably be questioned merely because the judge happens to know some person who has some relationship to a third party that, *unbeknownst to the judge*, might be funding the case.

IX. Funders Are Rarely Real Parties in Interest, And Their Assets Are Not "Plaintiff's Resources."

The Chamber broadly asserts that "a funder is effectively a real party in interest," but the typical commercial litigation funder is a passive investor, while the "real party in interest" is commonly understood as "the person holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery."[32] Because most litigation funders do not exercise control over litigation strategy or settlement decisions, it would be unfair to subject them to sanctions arising out of such decisions. In any event, as Committee members recognized in 2014, the Chamber's argument that disclosure enables courts to better shift discovery costs ignores that "cost-shifting does not seem to happen often, and an inquiry into third-party financing can always be made at the time of a cost-shifting motion."[33] Cost-shifting and other specific issues are "better dealt with in the case than by adopting initial disclosure."[34]

As noted above, Rule 26 has been amended since the Chamber last requested automatic disclosure of litigation funding to require courts to consider "the parties' resources" as part of a "proportionality" analysis. However, it would be no more appropriate to consider the assets of a plaintiff's third-party litigation funder than it would be to consider the assets of a defendant's lender. A third-party funder's assets are not "plaintiff's resources," just as a defendant's *bank's* assets, or a defendant's *insurer's* assets, are not "defendant's resources."

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[31] *Id.*

[32] *See Farrell Constr. Co. v. Jefferson Parish, La.*, 896 F.2d 136, 140 (5th Cir.1990); *see also Miller UK Ltd.*, 17 F. Supp. 3d at 728-29 (rejecting defendant's argument that funder was a real party in interest and/or subrogee analogous to insurer). The sole case cited by the Chamber in support of its argument, *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691, 693-94 (Fla. Ct. App. 2009), turned on whether a funder in a bankruptcy proceeding with unusually strong control rights was a "party" under Florida laws that defined the term "party" as "any person who participates in litigation regardless of whether or not the party is actually named in the pleadings."

[33] Civil Rules Advisory Committee Minutes at 12.

[34] *Id.* at 13.

X. <u>Automatic Disclosure In All Federal Cases Is An Entirely Inappropriate Approach To A Minority Of States' Champerty Concerns.</u>

The Chamber argues that automatic disclosure of litigation funding agreements should be required in every *federal* case, because some *states* do not permit litigation funding. It is far from clear that the federal rules should be pressed into the service of policing compliance with state substantive law. For instance, states regulate attorney fee agreements and attorney conflicts of interest, among many other things. By the Chamber's logic, broad automatic disclosures should be required at the beginning of every *federal* case to allow officious parties to assess whether their adversaries' counsel are in compliance with all applicable *state* laws.

In any event, only a minority of states restrict litigation funding.[35] California, by far the largest state of all, with the largest court system in the world (larger even than the United States' federal court system), affirmatively endorses litigation funding. In *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1136-37 (1990), the California Supreme Court rebuffed an attempt by a defendant against whom litigation had been funded (PG & E) to hold the third-party funder (Bear Sterns) liable:

> In fact we have no public policy against the funding of litigation by outsiders. If any person who induced another to bring a lawsuit involving a colorable claim could be liable in tort, free access to the courts could be choked off with an assiduous search for unnamed parties. It is important to remember what PG & E is trying to achieve through this lawsuit. It seeks to enjoin Bear Stearns from further participation in the lawsuit in order to avert what it considers to be the irreparable harm of an adverse judgment. It is essentially seeking to abort the lawsuit by starving the litigant of funds. In *Sierra Club v. Butz, supra*, 349 F.Supp. 934, too, there were doubtless persons who induced the representatives of the club to bring the action, and who provided financial assistance in support of the lawsuit, who were not named parties. Yet it would defeat the purpose of assuring free access to the courts, and cause a flood of oppressive derivative litigation, to assess tort liability for their activities. [...] Our legal system is based on the idea that it is better for citizens to resolve their differences in court than to resort to self-help or force. It is repugnant to this basic philosophy to make it a tort to induce potentially meritorious litigation.

In this excerpt, the California Supreme Court could just as aptly have been describing the Chamber's proposal to require automatic disclosure of litigation funding.

To be sure, some other states take a different view, but the patchwork nature of states' approaches to litigation funding—some permitting it outright, some restricting it in various ways, and some prohibiting it—counsels *against*, not for, sweeping rulemaking by this Committee. Even in those states that do prohibit third-party litigation funding, often the law simply declares the funding agreement itself unenforceable as between the parties to the agreement. In such

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[35] ABA Commission on Ethics 20/20, Informational Report to the House of Delegates on Alternative Litigation Finance (2011), *available at* https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf (last visited Aug. 30, 2017), at 11.

states, the fact that a case is funded does not give rise to an affirmative defense by the defendant in the funded case, nor to a tort claim by the defendant against the funder.[36] Automatic disclosure of third-party litigation funding would accomplish nothing in the vast majority of states, where champerty is not available as an affirmative defense to funded claims.

The real motive behind the Chamber's champerty argument was eloquently exposed and rejected by the court in *Miller*:

> To sustain a maintenance/champerty defense in this case would create a greater legal wrong than vindicating the defense would avert. It would effectively [...] encourage future commercial dishonesty—a wrong of manifestly greater significance than whatever wrong could be averted by recognizing the defense at the insistence of the alleged tortfeasor, who is a stranger to the contract claimed to be champertous.

Miller UK Ltd., 17 F. Supp. 3d at 726-727.

XI. <u>Conclusion.</u>

The Chamber argues that automatic disclosure is now appropriate because the industry has grown since 2014. Again, the Chamber is wrong about both its premise and its conclusion. While the rate of increase in available litigation funding has been significant, the overall number of funded cases remains very low, representing only a fraction of one percent of total civil case filings. What growth there has been is not something to be "exposed," but rather fostered, as it reflects increasing demand from attorneys and their clients for this valuable resource for parties facing the ever-increasing costs of litigating meritorious claims. As one Committee member put it in 2014, funding "makes it possible to bring cases that deserve to be brought." As New York Justice Eileen Bransten put it, litigation funding "allows lawsuits to be decided on their merits, and not based on which party has deeper pockets or stronger appetite for protracted litigation."[37]

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[36] *See, e.g.*, *Miller UK Ltd.*, 17 F. Supp. 3d at 726 (N.D. Ill. 2014) (explaining that champerty and maintenance are not a "viable defense" to litigation claims which are unrelated to the agreement, and also that "the few state courts that have held funding agreements champertous under their state statutes have only done so in the context of a suit by the parties to the contract seeking its enforcement"); *Kipperman v. Onex Corp.*, 411 B.R. 805, 886 (N.D. Ga. 2009) ("A third party who is not party to an agreement cannot raise the agreement's nature as a champertous or maintenance contract as a defense to claims between it and a party to the agreement."); *Welch v. Coro, Inc.*, 97 F. Supp. 185, 186 (S.D.N.Y. 1951) ("The law is that the defendant in an action has no standing to complain that there is a champertous agreement between the party suing him and someone else- *i.e.* a defendant cannot avail himself of a champertous agreement to which he is not a party as a defense to an action brought against him.").

[37] *Lawsuit Funding, LLC v. Lessoff*, Index No. 650757/2012, 2013 WL 6409971, at *6 (N.Y. Sup. Dec. 9, 2013) (Bransten, J.); *see also Miller UK Ltd.*, 17 F. Supp. 3d at 718 ("Where a defendant enjoys substantial economic superiority, it can, if it chooses, embark on a scorched earth policy and overwhelm its opponent. . . . But even where a case is not conducted with an ulterior purpose, the costs inherent in major litigation can be crippling, and a plaintiff, lacking the resources to sustain a long fight, may be forced to abandon the case or settle on distinctly disadvantageous terms."); *Hamilton Capital VII, LLC, I v. Khorrami, LLP*, No. 650791/2015, 2015 WL 4920281 at *5 (N.Y. Sup. Aug. 17, 2015) ("Modern litigation is expensive, and deep pocketed wrongdoers can deter lawsuits from being filed if a plaintiff has no means of financing her or his case. Permitting investors to fund firms by lending money secured by the firm's accounts receivable helps provide victims their day in court."); *In re Int'l Oil Trading Co., LLC*, 548 B.R. at 835 ("[W]ithout litigation funders, parties owed money, or otherwise stymied by

That dozens of organizations have signed on to the Chamber's letter does not show that the Chamber's proposal enjoys broad support. To the contrary, the signatories are all advocacy organizations for corporate defendants. There is not a single impartial signatory, let alone a single signatory on the other side.[38] When one considers the general hostility the Chamber has shown toward litigation and discovery in general, its advocacy here for a broad automatic disclosure requirement appears to be motivated by concerns other than the healthy functioning of the legal system.[39]

There is an emerging consensus among the federal courts that have actually considered and ruled upon motions for discovery of litigation funding documents (including litigation funding agreements). That consensus is that these documents are ordinarily *not* discoverable. That the Chamber and its big-business allies make their automatic disclosure proposal in the face of this trend exposes their true motive—to achieve through top-down regulation what they have failed to achieve through courtroom advocacy. The Chamber's proposal is an attack on the sound discretion of district judges and magistrate judges, as well as on financial privacy, client confidentiality, the attorney work-product protection, the goals of the federal rules, and Rule 26's renewed emphasis on proportionality. This Committee should decline to entertain the Chamber's agenda.

Bentham is appreciative of this Committee's continued study of litigation funding, which Bentham believes provides significant value to parties with meritorious claims but limited means, and to the law firms that fight for them. Bentham appreciates the opportunity to respond to the Chamber's proposal and would welcome further opportunities to assist this Committee in its consideration of the important and evolving role of litigation funding in the legal industry.

Sincerely,

Allison K. Chock
Chief Investment Officer
Bentham IMF

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deep-pocketed judgment debtors, might have reduced or no ability to pursue their claims. Litigation funders may be essential to the provision of legal advice in such cases.").

[38] David Brodwin, *The Chamber's Secrets: A closer look at the U.S. Chamber of Commerce reveals it may not be as pro-business as it claims*, US News & World Report (Oct. 22, 2015), *available at* http://www.usnews.com/opinion/economic-intelligence/2015/10/22/who-does-the-us-chamber-of-commerce-really-represent.

[39] U.S. Chamber Inst. for Legal Reform, Issues: Discovery (last visited Aug. 30, 2017) (describing discovery as "one of the most hostile and burdensome civil litigation procedures in the United States"), http://www.instituteforlegalreform.com/issues/discovery.