February 20, 2019

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

Dear Ms. Womeldorf:

We write in response to the January 31, 2019 letter to the Advisory Committee submitted by Brackett Denniston III, Chair of the U.S. Chamber of Commerce's Institute for Legal Reform (the "ILR") and a member of the Chamber's Board of Directors and Executive Committee (collectively the "Chamber"), and various corporate in-house counsel in favor of forced disclosure of litigation funding arrangements in every federal civil case under Fed. R. Civ. P. 26(a)(1)(A) (the "Letter"). Though couched as a modest request for "basic disclosure," the Letter urges a considerable departure from the existing rules governing discovery. In so doing, it parrots the flawed and failed arguments of the ILR, disregards basic precepts of relevance and proportionality underlying Rule 26, offers no cogent or compelling policy rationale, and ignores well-developed jurisprudence on this important issue. We refer the Advisory Committee to previous submissions and only briefly address the substance of this latest communication.

To begin with, relevance forms the backbone of discoverability under the Federal Rules. *See* Fed. R. Civ. P. 26(b)(1). This basic tenet should be the starting point for examining whether an initial disclosure rule makes good sense. Yet the Letter makes no effort to address it. Nor could it: federal courts have routinely rejected litigation-finance-related discovery unless the party seeking it makes a specific showing of relevance. In fact, just last month, the U.S. District Court for the Northern District of California denied—as ***irrelevant***—disclosure of the very information the proposed rule seeks to mandate in every case: the identity of the funder and the specific terms of the parties' agreement. *See MLC Intellectual Prop. LLC v. Micron Tech., Inc.*, No. 14-cv-03657, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019) (finding that defendant's attempts to establish relevance based on potential bias and conflicts of interest concerns were speculative).[1]

The Northern District of California's conclusion follows a long line of cases recognizing the uncontroversial concept that relevance matters under Rule 26, including with respect to funding arrangements. *See, e.g., Miller UK Ltd. v. Caterpillar, Inc.,* 17 F. Supp. 3d 711, 724 (N.D. Ill. 2014) (rejecting discovery into litigation funding arrangements; noting defendant's assertion of relevance lacked "any cogency"); *VHT, Inc. v. Zillow Group, Inc.,* No. C15-1096JLR, 2016 WL

[1] While the court's opinion does not specifically set forth the details of the discovery requests at issue, the discovery record makes clear that defendant sought disclosure of both the the identity of any third-party financier and the terms of any related funding agreement. Joint Discovery Dispute Letter Regarding Financial Interests in Asserted Patent at 1-3, *Micron* (Dkt. No. 259-5).

7077235, at *1 (W.D. Wash. Sept. 8, 2016) (rejecting discovery into litigation funding arrangements absent "some objective evidence that any of Zillow's theories of relevance apply in this case"). The instances in which federal courts have permitted discovery into litigation funding arrangements are exceedingly rare; they arise only under unique circumstances where they are, in fact, germane to the claims and defenses of the parties. The call for blanket forced disclosure under Rule 26 flies in the face of these bedrock relevance principles, and thus, should be viewed with great skepticism by the Advisory Committee.

The advocates for a catch-all disclosure rule ignore a related fact: federal courts can easily handle discovery issues relating to litigation finance under existing Rule 26 and/or their own inherent authority. As the Advisory Committee appropriately observed in rejecting earlier calls for the same Rule 26 amendment, "judges currently have the power to obtain information about third-party funding when it is relevant in a particular case." Hon. David G. Campbell, *Report of Advisory Committee on Civil Rules*, at 4 (Dec. 2, 2014), *available at* https://www.uscourts.gov/sites/default/files/fr_import/CV12-2014.pdf (last visited Feb. 6, 2019). Judge Polster's recent order in the pending opioid MDL in the U.S. District Court for the Northern District of Ohio is a perfect example. *See In re Nat'l Prescription Opiate Litig.,* No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018) (ordering all counsel to submit a description of any third-party funding for *in camera* review, as well as affirmations that funding did not create conflicts or cede case control). Other federal courts have adopted this sensible approach, which balances the court's need to inquire into funding arrangements for a specific, narrow purpose with the fact that funding issues are rarely relevant to the parties' claims and defenses. *See, e.g., Micron*, 2019 WL 118595, at *2 (noting the court's ability to "question potential jurors *in camera* regarding relationships to third party funders and potential conflicts of interest" if necessary at trial). The Letter offers no explanation why the federal courts' current ability to obtain information about litigation funding arrangements is insufficient to address potential concerns that may arise every so often in a particular case. Boiled to its essence, the Letter is a push for forced disclosure of irrelevant information that one party is simply curious to know. That is not the standard for discovery under Rule 26. Nor would any corporate litigant support such a standard outside of the litigation finance context.[2]

The Letter repeats a handful of other halfhearted reasons for the proposal to amend Rule 26. These too lack any sound basis in law or policy. The first of these is that litigation funders "effectively become real parties in interest" to a lawsuit in which they provide financing. This argument was thoroughly considered and rejected in *Miller*, which follows the prevailing legal definition of real parties in interest under Rule 17(a)—that is, "the person

[2] For example, in support of the "proportionality" amendments to Rule 26, the U.S. Chamber urged the Advisory Committee to add "a requirement that the information not only be relevant, but also ***material*** to a party's claim or defense." 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*, at 7 (Nov. 7, 2013), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/FRCP_Submission_Nov.7.2013.pdf (last visited Feb. 6, 2019). By contrast, it asks the Advisory Committee to disregard relevance altogether when litigation finance is the subject.

holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." 17 F. Supp. 3d at 728 (quoting *Farrell Constr. Co. v. Jefferson Parish, La.*, 896 F.2d 136, 140 (5th Cir. 1990)). Litigation funders do not fall within this definition, and we are not aware of any federal court decision that has concluded otherwise. The simple fact is that there are often many parties with an economic interest in the outcome of a piece of litigation, and our system makes no effort to identify all of them or to have their interests disclosed; to do so would multiply exponentially the burden on courts and counsel. There is a sound policy reason behind our current limits on party disclosure.[3]

The Letter also draws an analogy between commercial litigation finance and liability insurance to justify forced disclosure. While it may seem superficially appealing to compare the required disclosure of liability insurance under Rule 26(a)(1)(A)(iv), the analogy is hopelessly flawed. Prior submissions to the Advisory Committee explain in detail the differences between the two, including disparities in the information disclosed. Suffice it to say, however, that the Advisory Committee's rationale behind the 1970 amendment to Rule 26(a)(1)(A)(iv) alone undercuts any attempt to cast them as equivalents necessitating parallel disclosures. This includes the reasoning that "insurance is an asset created specifically to satisfy the claim" (funding in no way satisfies the claim); "the insurance company ordinarily controls the litigation" (funders exert no such control); and "disclosure does not involve a significant invasion of privacy" (funding terms convey the funded parties' litigation budget and a roadmap of its litigation strategy). Fed. R. Civ. P. 26, Advisory Comm. Notes, Subdivision (b)(2)--Insurance Policies (1970). Indeed, as the *Miller* court noted after reviewing the relevant litigation funding agreements *in camera*: "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." *Miller,* 17 F. Supp. 3d at 729. After even a minimal level of scrutiny, the analogy simply does not work.

* * *

We work daily with corporate in-house lawyers—including at companies whose interests the Chamber purports to represent—to satisfy their need for capital to support meritorious claims. But this Letter is fundamentally a PR stunt by the Chamber (witness the Chamber's simultaneous media campaign surrounding it) and once again calls into question the

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[3] The comments to the Federal Rules of Civil Procedure perfectly encapsulate the balancing test that the Judicial Conference took when adopting the rule for financial disclosure:

> 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. Unnecessary disclosure of volumes of information may create a risk that a judge will overlook the one bit of information that might require disqualification, and also may create a risk that unnecessary disqualifications will be made rather than attempt to unravel a potentially difficult question. It has not been feasible to dictate more detailed disclosure requirements in Rule 7.1(a).

Fed. R. Civ. P. 7.1 (2002 Committee Notes).

credibility of the ILR. It also highlights the Chamber's and the ILR's blatant hypocrisy in demanding the disclosure of private financial transactions while insisting that its own donor list remain anonymous. Regardless, the Letter adds nothing of substance to the debate about the fitness of a proposal that flouts the foundational principles of Rule 26. Nor does it provide any compelling policy rationale that would lead the Advisory Committee to ignore these important tenets in favor of a rule that would almost certainly bog down courts with additional burdens and delays.

We continue to urge the Advisory Committee to reject the proposed amendment to Rule 26(a)(1)(A).

Respectfully,

Eric H. Blinderman
Chief Executive Officer (U.S.)
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Chief Investment Officer
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