ILFA | INTERNATIONAL LEGAL FINANCE ASSOCIATION

April 7, 2021

Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
c/o Rules Committee Staff
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-300
Washington, D.C. 20544

RE: Response to December 22, 2020 Letter from U.S. Chamber Institute for Legal Reform et al. regarding Proposal 17-CV-O

Dear Rules Committee:

The International Legal Finance Association ("ILFA")[1] respectfully submits this response to the December 22, 2020 letter to the Advisory Committee on Civil Rules (the "Committee") from the U.S. Chamber Institute for Legal Reform and Lawyers for Civil Justice (collectively, the "Chamber"). We refer the Advisory Committee to the previous submissions of some of ILFA's founding members[2] and only briefly address the substance of this latest communication.

Once again, as it did in 2014, 2015, 2017, 2018, and 2019, the Chamber urges the Committee to adopt its proposal to force disclosure of funding arrangements in every civil case under Fed. R. Civ. P. 26(a)(1)(A). However, this Committee and the MDL Subcommittee have extensively studied and rejected the Chamber's approach at every point after countless hearings, receipt of testimony, feedback from members of the bar, and consideration of documentary and related information from ILFA's members, the Chamber and other interested parties. Despite this, the Chamber somehow asserts anew that the Committee's extensive factfinding and research efforts on this topic have fallen short.

[1] Founded in September 2020, the International Legal Finance Association is the only global association of commercial legal finance companies. ILFA is a non-profit trade association that promotes the highest standards of operation and service for the commercial legal finance sector. Its founding members include Burford Capital, Omni Bridgeway (formerly known as Bentham IMF), and Therium Capital Management, which previously participated in the Committee's deliberations regarding legal finance.

[2] Letter from Eric H. Blinderman, Chief Executive Officer (U.S.), Therium Capital Management, Allison K. Chock, Chief Investment Officer, Bentham IMF, and Danielle Cutrona, Director, Global Public Policy, Burford Capital, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Feb. 20, 2019); Letter from Christopher P. Bogart, Chief Executive Officer, Burford Capital, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Feb. 20, 2019); Letter from Allison K. Chock, Chief Investment Officer, Bentham IMF, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Sept. 6, 2017); Letter from Christopher P. Bogart, Chief Executive Officer, Burford Capital, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Sept. 1, 2017); Letter from Adam R. Gerchen, Chief Executive Officer, Gerchen Keller Capital, LLC, Christopher P. Bogart, Chief Executive Officer, Burford Capital, and Ralph J. Sutton, Chief Investment Officer, Bentham IMF, to Jonathan C. Rose, Secretary, Advisory Committee on the Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Oct. 21, 2014).

The Chamber offers the same arguments as in each of its previous submissions regarding control and ethical obligations, which are simply wrong and no more persuasive today than they were then. Moreover, not only has nothing changed to justify revisiting the Committee's decisions, but legal developments since this issue was last considered have only reinforced the Committee's prior decisions:

No federal court has required mandatory disclosure of financing in litigation on a scale equivalent to the Chamber's proposal. Contrary to the Chamber's flawed arguments that disregard well-developed jurisprudence in this area, federal courts have routinely rejected discovery regarding the sources of financing in litigation unless the party seeking it makes a specific showing of relevance.[3] Indeed, federal courts have only permitted discovery in exceedingly rare and unique circumstances where it is, 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 this settled judicial consensus and the principles of relevance and proportionality.

The Chamber's proposal also continues to ignore a related and critical factor of which the Committee is aware: federal courts easily can and do handle these discovery issues under existing Rule 26 and/or their own inherent authority. As the 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."[4] Judge Polster's order in the pending Opioids MDL in the U.S. District Court for the Northern District of Ohio is a perfect example.[5] Other federal courts have adopted this sensible approach, which balances the court's need to inquire into financing arrangements for a specific, narrow purpose with the fact that funding issues are rarely relevant to the parties' claims and defenses.[6]

There is also a growing recognition of the need to consider rules to permit nonlawyer participation in the delivery of legal services. Quite the opposite of the Chamber's contentions, the momentum in many jurisdictions is toward allowing and endorsing broader access to legal finance. A number of states are in various stages of consideration and implementation of rules to permit the delivery of legal services by nonlawyers and nonlawyer law firm ownership.[7] In

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[3] *See Colibri Heart Valve LLC v. Medtronic CoreValve LLC, et al.,* Case No. 8:20-cv-00847 (C.D. Cal. Mar. 26, 2021) (finding legal finance documents not discoverable; defendant's "skepticism" that plaintiff's discovery responses were not accurate or complete did not demonstrate the requisite relevance of the funding documents to the claims and defenses in the matter); *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); *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 724 (N.D. Ill. 2014) (rejecting discovery into legal finance arrangements; noting defendant's assertion of relevance lacked "any cogency"); *VHT, Inc. v. Zillow Group, Inc.*, No. C15-1096JLR, 2016 WL 7077235, at *1 (W.D. Wash. Sept. 8, 2016) (rejecting discovery into legal finance arrangements absent "some objective evidence that any of Zillow's theories of relevance apply in this case").

[4] 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.

[5] *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 any funding obtained did not create conflicts or cede case control).

[6] *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).

[7] *See, e.g.,* Press release, "Arizona Supreme Court Makes Generational Advance in Access to Justice." *Arizona Supreme Court, Administrative Office of the Courts,* 27 Aug. 2020, https://www.azcourts.gov/Portals/201/Press%20Releases/2020Releases/082720RulesAgenda.pdf; State Bar of

February 2020, the ABA's House of Delegates went so far as to pass a resolution calling for "regulatory innovations that have the potential to improve the accessibility, affordability, and quality of legal services."[8] Likewise, the Conference of Chief Justices passed a similar resolution, citing "consideration of alternative business structures" as an area for consideration.[9]

In short, the Chamber is continuing to advocate for a considerable departure from existing rules governing discovery and moreover, proposes to direct the method and manner by which the Committee should determine whether its proposal is necessary. Such an approach ignores the years of research that the Committee has spent investigating this issue and reaffirms the Chamber's desperate search for information to define a problem that only it is certain exists.

Indeed, having begged the question that legal finance is a problem, the Chamber thereby acknowledges that this latest effort is simply another attempt at a fishing expedition. ILFA stands ready to assist the Committee in legitimate fact-finding exercises to the extent actually warranted, however, we note that there is nothing in the Chamber's latest submission which would justify such an inquiry. Belying this obvious conclusion is the fact that the Chamber's own members are users of legal finance.[10] As such, the Chamber could easily conduct an internal survey of its members who could waive privilege if they choose to reply as opposed to seeking such privileged and confidential information[11] from ILFA's members under the guise of a Committee-mandated "mini questionnaire."

For the foregoing reasons, and for all the reasons we have stated in our previous submissions to the Committee, we respectfully submit that the Chamber's renewed request does not merit this Committee's reconsideration.

California, "State Bar of California Task Force on Access Through Innovation of Legal Services: Final Report and Recommendations," Mar. 6, 2020, http://www.calbar.ca.gov/Portals/0/documents/publicComment/ATILS-Final-Report.pdf; Press release, "D.C. Bar Global Legal Practice Committee Seeks Public Comment on Rule of Professional Conduct 5.4." *DC Bar*, 23 Jan. 2020, https://www.dcbar.org/news-events/news/d-c-bar-global-legal-practice-committee-seeks-publ; Press release, "To Tackle the Unmet Legal Needs Crisis, Utah Supreme Court Unanimously Endorses a Pilot Program to Assess Changes to the Governance of the Practice of Law." *State of Utah Judicial Council, Administrative Office of the Courts,* 13 Aug. 2020, https://www.utahbar.org/wp-content/uploads/2020/08/Regulatory-Order-PR-8-20.pdf. *See also* Regulatory Innovation Working Group, Commission to Reimagine the Future of New York's Courts, "Report and Recommendations of the Working Group on Regulatory Innovation" (Dec. 3, 2020) (offering broad support for legal finance and noting that Rule 5.4 of the New York Rules of Professional Conduct, which prohibits fee-sharing between lawyers and nonlawyers, should be revised to ensure greater access to legal finance).

[8] American Bar Association, Resolution 115, https://www.americanbar.org/content/dam/aba/administrative/news/2020/02/midyear2020resolutions/115.pdf.

[9] Conference of Chief Justices, Resolution 2: Urging Consideration of Regulatory Innovations Regarding the Delivery of Legal Services, https://www.ncsc.org/__data/assets/pdf_file/0010/23500/02052020-urging-consideration-regulatory-innovations.pdf.

[10] Letter from Eric H. Blinderman, Chief Executive Officer (U.S.), Therium Capital Management, Allison K. Chock, Chief Investment Officer, Bentham IMF, and Danielle Cutrona, Director, Global Public Policy, Burford Capital, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Feb. 20, 2019); Letter from Christopher P. Bogart, Chief Executive Officer, Burford Capital, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Feb. 20, 2019).

[11] *See, e.g.*, *Miller UK Ltd.*, 17 F. Supp. 3d at 734-35 ("For purposes of a privilege analysis, there is nothing unique about cases involving third party litigation funding. . . . Materials that contain counsel's theories and mental impressions . . . do not necessarily cease to be protected because they may also have been prepared or used to help [a party] obtain financing."); *Impact Engine, Inc. v. Google LLC*, Case No. 3:19-cv-01301-CAB-DEB (S.D. Cal. Oct. 20, 2020) (finding funding documents not discoverable based on the attorney work product doctrine); *Continental Circuits LLC v. Intel Corp*., 435 F.Supp.3d 1014, 1020-21 (D. Ariz. 2020) (same).

Respectfully submitted,

/s/

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