May 21, 2021

<u>VIA EMAIL</u>

William T. Walsh, Clerk of Court
United States District Court
District of New Jersey
Martin Luther King Jr. Federal Bldg. &
U.S. Courthouse
50 Walnut Street
Newark, NJ 07101
localrules@njd.uscourts.gov

RE: *<u>Proposed Local Civil Rule 7.1.1 — Disclosure of Third-Party Litigation Funding (D.N.J.)</u>*

Dear Mr. Walsh,

On behalf of the U.S. Chamber Institute for Legal Reform ("ILR") and New Jersey Civil Justice Institute ("NJCJI"), we are writing to express support for proposed Local Civil Rule 7.1.1, which would require the disclosure of litigation funders in civil cases pending in the U.S. District Court for the District of New Jersey. A program of the U.S. Chamber of Commerce (the "Chamber"), ILR's mission is to champion a fair legal system that promotes economic growth and opportunity. The Chamber is the world's largest business federation, representing the interests of businesses of all sizes, sectors and regions, as well as state and local chambers and industry associations. For more than 100 years, the Chamber has advocated for pro-business policies that help businesses create jobs and grow our economy. NJCJI is the State's leading organization advocating for the business community on matters of law and legal policy. NJCJI promotes a fair and predictable civil justice system, and defends the value of the rule of law in protecting innovation and fostering economic growth.

Third-party litigation funding ("TPLF") is a rapidly growing business model in which third parties pay money to a plaintiff or his/her counsel in exchange for a contingent interest in any proceeds from a lawsuit. At present, virtually all TPLF activity in the District of New Jersey is occurring in secrecy because there is generally no procedural or evidentiary rule requiring disclosure of the use of such funding.[1] Moreover, to the extent defendants seek this information through ordinary discovery, plaintiffs generally object to providing it, and courts often do not compel production of the requested information. Thus, the existence of TPLF in a particular civil action typically becomes known to the court and the parties only if there is compliance with a local rule requiring disclosure. According to a February 2018 research memo prepared by the Federal Judicial Center at the request of the federal Advisory Committee on Civil Rules, the local rules of six U.S. Courts of Appeals (including the Third Circuit) and "a quarter of all federal district courts" include some form of TPLF disclosure requirement.[2] However, the local rules of the District of New Jersey currently have ***no*** TPLF-related disclosure requirements.[3]

The proposed Rule 7.1.1 would plug that gap by requiring the disclosure of (a) the existence of any TPLF in a given case; (b) the identity of the funder; (c) whether the funder's approval is necessary for litigation and settlement decisions (and, if so, the nature of the terms and conditions relating to that approval); and (d) a brief description of the nature of the financial interest.[4] Absent these most basic disclosures, TPLF will continue to operate in secret, hiding potential conflicts of interest and other ethical issues, such as improper fee-splitting between lawyers and non-lawyers. And unless TPLF becomes more transparent, courts will continue to be left in the dark on whether an outside entity is steering a plaintiff's litigation and settlement decisions – a dynamic that is highly relevant to settlement negotiations,

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[1] *See* James Anderson, *Is Increased Transparency into Litigation Financing on the Horizon?*, National Law Review (Jan. 15, 2020), https://www.natlawreview.com/article/increased-transparency-litigation-financing-horizon.

[2] *Survey of Federal and State Disclosure Rules Regarding Litigation Funding* ("Survey"), Feb. 7, 2018, at 1.

[3] *See* Appendix B to Survey.

[4] These straightforward disclosures are narrower than the requested discovery in *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Products Liability Litigation*, 405 F. Supp. 3d 612 (D.N.J. 2019) – a case that appears to have "prompted" the proposed amendment in the first place. *See* Charles Toutant, *Follow the Money? Rule Would Require NJ Lawyers to Disclose Litigation Funding*, Law.com (Apr. 23, 2021), https://www.law.com/njlawjournal/2021/04/23/follow-the-money-rule-would-require-nj-lawyers-to-disclose-litigation-funding/. In *In re Valsartan*, the court declined to compel the production of "***documents and communications*** related to funding or financing" primarily because "there is no binding Third Circuit precedent on whether a plaintiff's litigation funding is a proper subject of discovery." 405 F. Supp. 3d at 614 (emphasis added). The proposed rule does not require the production of actual documents or communications. *See* Prop. Civ. Rule 7.1.1(b). ILR is among many organizations that have urged the federal Advisory Committee on Civil Rules to adopt an amendment to Fed. R. Civ. P. 26 that would require disclosure of TPLF agreements. However, both ILR and NJCJI believe that the proposed District of New Jersey rule is an appropriate transparency step and support its adoption.

the adequacy of counsel in class actions and potential cost-shifting obligations. In short, and as elaborated below, the rudimentary disclosures that would be required by the proposed amendment to the local rules are essential to the fair, efficient and ethical functioning of civil litigation in the District of New Jersey for multiple reasons:

1) <u>Ensuring Compliance With Ethical Obligations, Particularly The Avoidance Of Conflicts Of Interest And Inappropriate Fee-Sharing</u>

By identifying persons/entities with a stake in the outcome of the litigation, the contemplated disclosures would allow courts and counsel to ensure compliance with ethical obligations. One of the most important ethical duties of both courts and parties is to avoid conflicts of interest. As one commentator succinctly explained:

> As some [funding] entities are multibillion- and multimillion-dollar publicly traded entities, requiring disclosure of their role will allow judges to determine whether they have a conflict of interest in administering a case. And for privately held [funding] entities, the web of personal relationships judges [or other judicial officers] have could be impacted as well, leading to unintentional appearances of impropriety.[5]

A prime example of this problem arose during a racketeering suit against Steven Donziger, who had helped secure an $18.2 billion judgment against Chevron Corporation on behalf of Ecuadorians allegedly harmed by the company's drilling practices.[6] During a deposition in that proceeding, Donziger was asked to identify the company that had helped finance the underlying suit against Chevron.[7] Upon being ordered to answer the question by the special master assigned to the case, Donziger disclosed that the funder was in fact Burford Capital ("Burford") – one of the largest funders in the world.[8] The special master then disclosed that he was former co-counsel with the founder of Burford, who at one time sent the special

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5 Tripp Haston, *The Missing Key to 3d-Party Litigation Funding*, Law360 (Feb. 7, 2017), https://www.law360.com/articles/888716/the-missing-key-to-3rd-party-litigation-funding.

6 Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 Geo. L.J. 1649, 1650, 1658 (2013).

7 *Id.* at 1650.

8 *Id.*

master a brochure about funding one of Burford's cases.[9] The special master also disclosed that he was friends with Burford's former general counsel.[10] The special master did not recuse himself from the racketeering litigation, and the parties did not insist that he do so.[11] Nonetheless, as the special master recognized, the deposition "prove[d] . . . that it is imperative for lawyers to insist that clients disclose who the investors are."[12]

Disclosure can also ensure that counsel are abiding by their own ethical obligations. After all, counsel in the case may have investment or representational ties to a funding entity that they may need to disclose to their clients, consistent with their zealous representation obligations. For example, if a defendant's counsel is a shareholder in an entity that may profit from a plaintiff's victory in the litigation or represents that entity in other matters, that counsel would need to appropriately address that conflict with his or her client. The proposed amendment would thus aid in the identification of potential conflicts of interest and thereby protect the integrity of the judicial process.

Disclosure may also reduce the likelihood of unethical fee-sharing between lawyers and non-lawyer funders consistent with Model Rule of Professional Responsibility 5.4, which has been adopted in New Jersey and other states.[13] That rule is designed to safeguard the professional independence of attorneys – i.e., ensure that a lawyer's fidelity is to his or her client rather than to an outsider whose primary interest is maximizing its interest in the underlying litigation. However, funders sometimes enter into arrangements directly with lawyers rather than the actual party litigant in a manner that runs afoul of Rule 5.4.

For example, in *Gbarabe v. Chevron Corp.*,[14] the plaintiffs commenced a putative class action arising out of an explosion on an oil drilling rig off the coast of

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9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.* (citation omitted).

13 New Jersey Rules of Professional Conduct, Rule 5.4(a) ("A lawyer or law firm shall not share legal fees with a nonlawyer . . . ."); *see also Matson v. SCO, Silver Care Operations, LLC*, No. 1:17-cv-1918-NLH-AMD, 2020 U.S. Dist. LEXIS 88523, at *3 n.2 (D.N.J. May 19, 2020) ("[I]n New Jersey, non-attorneys are not entitled to retain attorneys' fees and doing so represents the practice of law without a license.") (citing New Jersey Rules of Professional Conduct, Rule 5.4(a)).

14 *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2016 U.S. Dist. LEXIS 103594, at *6 (N.D. Cal. Aug. 5, 2016).

Nigeria. Under the agreement entered into by the plaintiffs' counsel and the funder, counsel agreed that the funder would be repaid its $1.7 million investment in the case by way of a "success fee" of six times that amount ($10.2 million), to be paid from attorneys' fees – plus 2% of the total amount recovered by the putative class members.[15] The fact that the funder was to be paid as a "success fee" after the collection of attorneys' fees (i.e., on a contingency basis) means this agreement may have directly violated Rule 5.4's prohibition on fee sharing.

These sorts of provisions can blur the line separating lawyers from non-lawyers and undermine the attorney-client relationship that is at the core of our civil justice system. While the proposed local rule amendment does not require the disclosure of actual terms of funding agreements as a matter of course, it ***does*** require disclosure of the nature of the financial interest acquired by the outside funder. And such disclosure (e.g., whether any return is tied to fees earned by the plaintiff's lawyer) may aid the court in monitoring whether a funding arrangement is purporting to commingle lawyer and non-lawyer funds in contravention of Rule 5.4.

In short, the basic disclosures authorized by the proposed local rule would provide courts and parties with information necessary to prevent potential conflicts of interest and inappropriate fee sharing, promoting ethical litigation in the District of New Jersey.

2) Allowing Parties To Know The Identity Of Their Litigation Adversaries

The proposed amendment would satisfy defendants' entitlement to know their accusers – i.e., who is really on the other side of an action. The decision in *Conlon v. Rosa* is illustrative.[16] In that case, the plaintiffs challenged a decision of a zoning board of appeals to allow a developer to demolish existing buildings and construct a Walgreens drugstore on the site. One of the plaintiffs owned property near the site and leased her property to Brooks Drugs, a competitor of Walgreens. The developer challenged the plaintiff's asserted status as a real party in interest and demanded disclosure of any funding agreement between her and Brooks Drugs, contending that Brooks Drugs was driving the litigation. The plaintiff objected, contending that evidence of such an agreement was not relevant. However, the court disagreed, holding that litigation funding was "surely a relevant subject to explore in

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[15] Litigation Funding Agreement ("*Gbarabe* Funding Agreement") § 1.1, *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, Dkt. No. 186-4 (Ex. 13) (N.D. Cal. filed Sept. 16, 2016).

[16] Nos. 295907, 295932, 2004 Mass. LCR LEXIS 56, at *5 (Mass. Land Ct. July 21, 2004).

discovery."[17] In so holding, the court warned that "[s]uch hidden funding can introduce a dynamic into a plaintiff's case – an agenda unrelated to its merits, a resistance to compromise – that otherwise might not be present and, unless known, cannot be managed or evaluated."[18]

Disclosure of TPLF – including the nature of the financial interest at stake – would also level the playing field in cases in which a plaintiff seeks to make the size or wealth of a corporate defendant a key theme in the litigation. For example, just last summer, a federal court in California recognized that the mere existence of litigation funding can be relevant because, *inter alia*, such information can tend to "refute any David vs. Goliath narrative at trial."[19] Although the court was addressing the potential relevance of TPLF to any "David versus Goliath" narrative within the specific context of patent infringement allegations, the rationale would arguably apply in non-patent cases as well. Simply put, disclosure of the existence of TPLF in a given case and the nature of the financial interest supporting the plaintiff's lawsuit would ensure that juries are not misled on the respective financial resources at play to the extent a "David vs. Goliath narrative" is pressed at trial.

3) <u>Providing The Court And Parties With Information Highly Relevant To Settlement Efforts</u>

The contemplated disclosures are also highly relevant to the all-important issue of settlement. A party that must pay a TPLF entity a percentage of the proceeds of any recovery may be inclined to reject what might otherwise be a fair settlement offer in the hopes of securing a larger sum of money. Indeed, as an executive of a prominent TPLF company previously acknowledged, litigation funding "make[s] ***it harder and more expensive to settle cases***."[20] This is so because the party may seek extra money to make up at least some of the amount (likely substantial) that will have to be paid to the TPLF entity. Further, some TPLF

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17 *Id.* at *6-8.

18 *Id.*

19 *Impact Engine, Inc. v. Google LLC*, No. 19-cv-1301-CAB-DEB, 2020 U.S. Dist. LEXIS 145636, at *4 (S.D. Cal. Aug. 12, 2020) (citation omitted). While the court subsequently denied a motion to compel the ***production*** of various TPLF-related documents (e.g., draft funding agreements) on work-product protection grounds, it did not purport to preclude the disclosure of the very fact of TPLF in a given case, which is the nub of the proposed amendment under consideration in the District of New Jersey.

20 Jacob Gershman, *Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight*, Wall St. J. (Mar. 21, 2018), https://www.wsj.com/articles/lawsuit-funding-long-hidden-in-the-shadows-faces-calls-for-more-sunlight-1521633600 (emphasis added).

agreements that have become public reveal that TPLF entities often structure their agreements to maximize their take of the first dollars of any recovery, thereby deterring reasonable settlements.

For example, in the Chevron Ecuador litigation previously discussed, the funding agreement included a "waterfall" repayment provision, which provided for a heightened percentage of recovery on the first dollars of any award.[21] Under the agreement, Burford would receive approximately 5.5% of any award, or about $55 million, on any amount starting at $1 billion. However, if the plaintiffs settled for less than $1 billion, the investor's percentage would actually go up.

The contemplated disclosures would specifically shed light on whether the funder's "approval is necessary for . . . settlement" and, if so, "the nature of the terms and conditions relating to that approval."[22] These disclosures would allow both courts and defendants to more accurately evaluate settlement prospects and to better calibrate settlement initiatives. Further, transparency would allow courts to structure settlement protocols with greater potential to succeed. For example, if a litigation funder controls settlement decisions (in whole or in part), the court may wish to require that funder to attend any mediation. Absent the proposed disclosures, the funder's presence as a player in the settlement process likely will remain hidden.

4) Enabling Assessment Of Who May Exercise Control Or Influence Over Litigation

The proposed disclosure rule would provide courts and parties information about whether TPLF companies are exercising control or influence over litigation. TPLF companies frequently dismiss such concerns by asserting that they do not control litigation strategy. However, the few TPLF agreements that have come to light demonstrate that, unsurprisingly, TPLF entities actually do exercise various forms of control and influence over the litigation matters in which they invest.

For example, in *White Lilly, LLC v. Balestriere PLLC*, the TPLF company affirmatively asserted that it had the right to exercise control over litigation in which it had acquired an interest.[23] In its complaint, the TPLF company alleged that its

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21 *See* Funding Agreement Between Treca Financial Solutions and Claimants, *Chevron Corp. v. Donziger*, No. 11-cv-00691, Dkt. No. 356-2 (Ex. B) (S.D.N.Y. filed Nov. 29, 2011).

22 Prop. Civ. Rule 7.1.1(a)(2).

23 Compl. ¶ 35, *White Lilly, LLC v. Balestriere PLLC*, No. 1:18-cv-12404 (S.D.N.Y. filed Dec. 31, 2018).

TPLF agreement required that specified counsel, who had an existing relationship with the TPLF company, serve as one of the plaintiff's counsel in the funded lawsuit. Indeed, the TPLF entity alleged that its counsel breached her obligation to serve as the funder's "'ombudsman' to oversee the cases it ultimately invested in, and to ***ensure*** that the . . . [lawsuits] asserted viable claims and were litigated properly and efficiently."[24] Further evidencing control, the TPLF entity asserted that it had been assured that the "proposed litigation" would settle "quickly."[25] The funding agreement also required that "[d]efendants obtain prior approval for expenses in excess of $5,000.00."[26] These provisions afforded the TPLF entity various means to control or influence the course of the litigation in which it invested.

Another example of funder control was the elaborate funding agreement utilized by Burford in the Chevron Ecuador litigation discussed above. Specifically, the funding agreement at issue in that case "provide[d] control to the Funders" through the "installment of 'Nominated Lawyers'" – lawyers "selected by the Claimants with the ***Funder's approval***."[27] The law firm of Patton Boggs LLP had been selected to serve in that capacity, and the execution of engagement agreements between the claimants and Patton Boggs, "a firm with close ties to the Funder, [was] a condition precedent to the funding."[28] "In addition to exerting control, it [was] clear that the Nominated Lawyers, who among other things control[led] the purse strings and serve[d] as monitors, supervise[d] the costs and course of the litigation."[29]

And in another case, *Boling v. Prospect Funding Holdings, LLC*, the U.S. Court of Appeals for the Sixth Circuit concluded that the terms of the funding agreements involved in that personal injury matter "effectively g[a]ve [the TPLF entity] substantial control over the litigation."[30] For example, two of the agreements permitted the funder to require the plaintiff to execute documents or pay filing fees to protect the funder's interest. Another agreement provided that "[i]f the Proceeds [from settlement] are insufficient to pay the Prospect Ownership Amount in full,

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24 *Id.*

25 *Id.* ¶ 45.

26 *Id.* ¶ 124.

27 Maya Steinitz, *The Litigation Finance Contract*, 54 Wm. & Mary L. Rev. 455, 472 (2012) (emphasis added).

28 *Id.*

29 *Id.* at 473.

30 771 F. App'x 562, 579 (6th Cir. 2019).

[Prospect] shall receive all of the Proceeds."[31] Such a provision undoubtedly influenced the plaintiff's ability to settle his case since he was required to accommodate [the funder's] flat fee, which accrued with interest.[32] And "[a]ll four Agreements limited [the plaintiff's] right to change attorneys without [the funder's] consent, otherwise [plaintiff] would be required to repay [the funder] immediately."[33]

Notably, a recently released report by the American Bar Association's House of Delegates repeatedly recognizes and emphasizes the inherent risk of funder control, warning against such control over the litigation itself and even over expenses associated with the lawsuit. Indeed, even when a funder's efforts to control a plaintiff's case are not overt, the existence of TPLF funding may subordinate the plaintiff's own interests in the resolution of the litigation to the interests of the TPLF investor. Disclosure of the existence of funding, the nature of the funding, and the circumstances surrounding any right of the funder to approve litigation decisions or settlement would simply give courts the necessary information to assess who actually controls a civil action.

5) <u>Facilitating Assessment Of Whether Funding Arrangements Violate State-Law Prohibitions</u>

The proposed local rule would enable courts to determine whether funding arrangements are running afoul of state-law prohibitions against champerty – the legal doctrine that bars "someone from funding litigation in which he or she is not a party."[34] Various states prohibit "champerty because such conduct encourages and multiplies litigation."[35] While New Jersey no longer recognizes this doctrine,[36] New Jersey's is not the only law governing cases in the District of New Jersey. And

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[31] Purchase Agreement ("*Boling* Purchase Agreement") § 6.1, *Boling v. Prospect Funding Holdings, LLC*, No. 1:14-CV-00081-GNS-HBB, Dkt. 1-3 (Ex. C to Compl.) (W.D. Ky. filed June 19, 2014); *see generally Boling v. Prospect Funding Holdings, LLC*, No. 1:14-CV-00081-GNS-HBB, 2017 U.S. Dist. LEXIS 48098 (W.D. Ky. Mar. 30, 2017).

[32] *Boling* Purchase Agreement at 1.

[33] *Boling*, 771 F. App'x at 580.

[34] John H. Beisner & Jordan M. Schwartz, *How Litigation Funding Is Bringing Champerty Back To Life*, Law360 (Jan. 20, 2017), https://www.law360.com/articles/882069/how-litigation-funding-is-bringing-champerty-back-to-life.

[35] *Boling*, 771 F. App'x. at 580.

[36] *See Riffin v. Consol. Rail Corp.*, 783 F. App'x 246, 249 (3d Cir. 2019).

recent state and federal court decisions applying other states' laws have given renewed vitality to champerty principles, particularly in the TPLF arena.[37]

For example, in the *Boling* case previously discussed, the fact that the funding agreements at issue gave the funders control over the underlying personal injury litigation led the Sixth Circuit to invalidate those contracts as violating Kentucky's prohibition against champerty and the state's usury laws.[38] As previously discussed, the funding agreements contained multiple clauses that ceded control over the underlying litigation from the claimant to the funder, including provisions limiting the plaintiff's right to change attorneys without the funder's consent and requiring the plaintiff to take actions to protect the funder's interest.[39] In holding that these provisions rendered the TPLF agreements champertous under Kentucky law, the Sixth Circuit reasoned that the "conditions raise quite reasonable concerns about whether a plaintiff can truly operate independently in litigation."[40]

TPLF disclosure would ensure that lawsuits being financed by outside parties are not contravening applicable state-law rules with respect to champerty. While the cases discussed above arose out of disputes between the funder and a funded party or person involved in the funding arrangement, potential champerty violations should be nipped in the bud at the outset of a lawsuit. Indeed, if a party is being sued pursuant to an illegal (champertous) funding arrangement, both that party and the court have a right to know about the existence of funding and whether an outside funder has control over litigation decisions or settlement. In short, without a disclosure requirement, potential violations of state champerty law would remain concealed from the court.

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[37] *See, e.g.*, *Boling*, 771 F. App'x at 580 (affirming holding that series of litigation funding agreements violated Kentucky's champerty prohibition); *WFIC, LLC v. Labarre*, 148 A.3d 812, 818-19 (Pa. Super. Ct. 2016) (counsel's agreement to pay funder out of his fees was champertous under Pennsylvania law because the investors were unrelated parties lacking a legitimate interest in the lawsuit); *In re DesignLine Corp.*, 565 B.R. 341, 343 (Bankr. W.D.N.C. 2017) (trustee's agreement to "sell" several adversarial proceedings to a litigation funder in order to obtain an advance on litigation expenses invalidated as champertous).

[38] *Boling*, 771 F. App'x at 579.

[39] *Id.* at 580.

[40] *Id.*

6) <u>Providing The Court And Parties With Information Highly Relevant To Class Certification</u>

The contemplated disclosures are also highly relevant in purported class actions, particularly in evaluating Fed. R. Civ. P. 23(a)(4)'s adequacy-of-representation requirement. Indeed, Judge Susan Illston recognized that point in the *Gbarabe* case previously discussed, granting the defendant's motion to compel the disclosure of the funding agreement.[41] As the court explained, the "funding agreement is relevant to the adequacy [of representation] determination [required for class certification] and should be produced to [the] defendant."[42] Class actions already raise significant concerns because the individual members of a putative class have little or no ability to control their own claims. Adding a funder to the equation only increases the risk that litigation decisions fail to take account of the putative class members' best interests. Indeed, the funding agreement in *Gbarabe* demonstrates this point, containing several key provisions that suggest the funder's desire to influence the course of the litigation.

For example, in addition to the funding and repayment provisions previously discussed, the agreement in *Gbarabe* referred to a "Project Plan" for the litigation developed by counsel and the funder with restrictions on counsel deviation, particularly with respect to hiring only identified experts.[43] The agreement specifically barred the lawyers from engaging any co-counsel or experts "without [the funder's] prior written consent."[44] Further, another provision required that counsel "give reasonable notice of and permit [the funder] where reasonably practicable, to attend as an observer at internal meetings, which include meetings with experts, and send an observer to any mediation or hearing relating to the Claim."[45] These sorts of provisions potentially undermine the adequacy of representation required for class actions in federal court, providing another important reason for requiring the disclosure of TPLF, the nature of the financial interest at issue and whether the funder has control over litigation or settlement decisions.[46]

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41 *Gbarabe*, 2016 U.S. Dist. LEXIS 103594, at *6.

42 *Id.* at *5-6.

43 *Gbarabe* Funding Agreement §§ 1.1, 10.1.

44 *Id.* § 10.1.

45 *Id.* § 10.2.4.

46 Ultimately, the district court denied certification in *Gbarabe* on several grounds, including adequacy of representation. Although the court did not expressly tie the TPLF agreement to its ruling on adequacy, it did find that plaintiffs' counsel "failed to diligently prosecute this case" – a failure the

In recognition of the relevance of TPLF to the adequacy element of class certification in particular, at least one federal district court – the U.S. District Court for the Northern District of California – has adopted its own TPLF disclosure requirement. That court added to its "Standing Order For All Judges" a provision requiring that "[i]n 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."[47] That action was taken in the immediate aftermath of a panel discussion at the court's annual judicial conference during which TPLF industry representatives took the position that their investments in class actions and other litigation should not be disclosed. As one attorney who studies the litigation funding industry explained, the Northern District of California rule is "really a harbinger and a signal that courts . . . need to consider the presence of third-party financiers in a lawsuit and consider their role."[48]

7) <u>Making Available Information Highly Relevant To Proportionality And Cost Shifting</u>

The disclosure of TPLF arrangements would also be important information to have on the record in the event that a court determines it should shift costs or impose sanctions or levy costs. Rule 26(b)(1) states that the scope of discovery shall be "proportional to the needs of the case, considering . . . ***the parties' resources*** . . . [and] whether the burden or expense of the proposed discovery outweighs its likely benefit."[49] Unlike an average plaintiff, a TPLF entity's business purpose is to raise funds to prosecute and profit from litigation. Thus, the existence of TPLF is relevant to the proportionality element of the scope of discovery. TPLF companies are well-heeled strangers to a case who willingly buy into the litigation hoping to profit from its successful prosecution. For the purposes of the resources element of the proportionality requirement contained in Rule 26(b)(1), any TPLF company that has bought a stake in a case should be considered as part of the "parties' resources." It

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court suggested may have been linked to their struggle in securing funding early on in the litigation. *See Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2017 WL 956628, at *7 n.7, *35 (N.D. Cal. Mar. 13, 2017).

[47] Standing Order for all Judges of the Northern District of California, Contents of Joint Case Management Statement, § 19 (Jan. 2017).

[48] Ben Hancock, *New Litigation Funding Rule Seen as "Harbinger" for Shadowy Industry*, The Recorder, Jan. 25, 2017.

[49] Fed. R. Civ. P. 26(b)(1) (emphasis added).

should not be allowed to hide in the shadows behind a relatively impecunious plaintiff.

Similarly, because a funder is effectively a real party in interest, it should bear responsibility (to the same degree as any other party) in the event there is wrongdoing and a corresponding imposition of sanctions or costs. For example, in *Abu-Ghazaleh v. Chaul*, a Florida state appeals court held that TPLF funders (an individual and company) that controlled the litigation qualified as parties to the lawsuit and therefore became liable for the defendant's attorneys' fees and costs.[50] The state statute at issue in that case specifically authorized the levy of attorneys' fees on the plaintiff where the claim advanced was "without substantial fact or legal support."[51] The court found that the plaintiff's claim was bereft of such legal or factual support. The court then determined that the TPLF providers were liable for the attorneys' fees because they were essentially parties to the litigation (and the named plaintiff was financially unable to pay such fees, which is often the case). The court reached this conclusion by scrutinizing the agreement entered into by the plaintiff and the TPLF providers, which provided that the funders were to receive 18.33% of any award the plaintiffs received and gave them "final say over any settlement agreements proposed to the plaintiffs."[52] As evidenced by *Abu-Ghazaleh*, if courts are put on notice that a third party is financing the underlying litigation, they will be in a much better position to determine how to impose sanctions or other costs, if such costs are warranted in a given case.

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50 *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691, 693-94 (Fla. Dist. Ct. App. 2009).

51 *Id.* at 694 (citation omitted).

52 *Id.*

In sum, the funding arrangements that have managed to see the light of day demonstrate that in some instances, TPLF can inject into a civil lawsuit conflicts of interest, unethical fee-splitting and other legal issues. However, the only way to know whether a particular litigation funding arrangement is violating core legal and ethical precepts or impeding settlement is to make the practice more transparent. Because the proposed amendment would simply do just that, ILR and NJCJI urge the District of New Jersey to adopt the proposed Local Civil Rule 7.1.1.[53]

Sincerely,

Harold Kim
President
U.S. Chamber Institute for Legal Reform

Anthony Anastasio
President
New Jersey Civil Justice Institute

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53 The funding industry presumably will oppose the proposed Local Rule by claiming that it would: (1) discourage the initiation of litigation and/or the use of TPLF; and (2) spawn collateral TPLF-related discovery. However, the proposed Local Rule would do neither. Far from chilling the pursuit of litigation or use of TPLF, disclosure would simply make the practice a little more transparent. The real reason the TPLF industry opposes disclosure has nothing to do with potential clients; it simply prefers to be the rare business sector allowed to operate in complete secrecy. The suggestion that any disclosure of TPLF would regularly give rise to unwarranted collateral discovery disputes is no less specious. As previously noted in text, many local federal courts already require TPLF disclosure; however, there is no evidence that those rules have prompted a tidal wave of peripheral discovery disputes.