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17-CV-XXXXX

September 1, 2017

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

RE: Response to Renewed Proposal to Amend Fed. R. Civ. P. 26(a)(1)(A)

Dear Ms. Womeldorf:

Burford Capital LLC[1]—the largest provider of commercial litigation finance in the United States—writes in response to the letter of June 1, 2017 (the "2017 Letter"), submitted by the U.S. Chamber Institute for Legal Reform and other pro-defendant special interest groups (collectively the "Chamber"). Having failed to persuade the Advisory Committee on Civil Rules (the "Committee") in 2014, the Chamber once again urges the Committee to amend Federal Rule of Civil Procedure 26 to "require the disclosure of third-party litigation funding arrangements in any civil action filed in federal court."[2] The Chamber's proposed amendment is word-for-word identical to its 2014 proposal—it suffers from the same defects, and it deserves the same treatment.

Not only is the Chamber's proposed amendment the same as its previous effort, but the Chamber's 2017 Letter is largely a carbon copy of its April 9, 2014 letter to the Committee (the "2014 Letter"). The Chamber proffers the same arguments as before: that litigation finance inherently "conceal[s]" conflicts of interest, that it scuttles settlement efforts, and that initial disclosure of litigation finance agreements is necessary to facilitate fairer cost-shifting and proportionality between parties.[3] Those arguments are simply wrong, and they are no more persuasive today than they were three years ago.

In 2014, the Committee's reporter pushed back against each of the Chamber's arguments for its dramatic change to the Rule, stating that "[a]n attempt to craft rules now would be premature."[4] The reporter recognized that "a disclosure regime that applies in every case except those exempted by Rule 26(a)(1)(B) might seem far too broad to address the concern[s] raised."[5] Indeed, many of the supposed problems—such as ethical conflicts of interest—generally are not "for trial courts to take the lead" in policing.[6] Moreover, "authorizing discovery of [third-party

[1] Burford Capital LLC is the U.S. operating subsidiary of Burford Capital Limited, a London Stock Exchange-listed company that engages in a variety of legal finance businesses globally.
[2] 2017 Letter at 1.
[3] *See generally* 2017 Letter; 2014 Letter.
[4] Hon. David G. Campbell, *Memorandum re: Report of Advisory Committee on Civil Rules* at 4 (Dec 2, 2014).
[5] Advisory Committee on Civil Rules, Rule 26(a)(1)(A): Reporter's Memorandum & Suggestion 14-CV-B at 10 (Oct. 30-31, 2014) ("Reporter's Mem.").
[6] *Id*. at 7.

litigation funding ("TPLF")] arrangements might differ substantially from the authorization given in 1970 for discovery of insurance agreements."[7] And "[w]hether initial disclosure of TPLF arrangements is useful to deciding cost-bearing issues is uncertain."[8]

The minutes of the Committee's October 30, 2014 meeting highlight the multitude of concerns its members had with amending Rule 26.[9] For example, one "judge expressed doubts about the need for disclosure. He routinely requires the person with settlement authority to be present at conferences; 'I can get the information I need.'"[10] "Another judge agreed that the proposal is premature. We do not yet know enough about the many kinds of financing arrangements to be able to make rules."[11] And another "judge agreed that courts [already] have the tools to get the information needed to rule on discovery issues, and to order appearance by a person with settlement authority, and so on."[12] Ultimately, the Committee decided that "third-party financing practices are in a formative stage. They are being examined by others . . . [w]e should not act now."[13]

In 2016, the Committee again declined to take action on the Chamber's renewed proposal. The Committee acknowledged the Chamber's "suggestion follow[ing] up an earlier submission that the Committee should act to require disclosure of third-party financing arrangements."[14] However, "[t]he Committee decided, as it had earlier, that this topic should remain open on the agenda without seeking to develop any proposed rules now."[15]

Nothing has changed since last year to justify revisiting the Committee's decision. Just as was true in 2016 and in 2014, numerous courts have recognized that litigation funding puts parties on an even footing, rather than allowing defendants to distort litigation outcomes through superior financial resources. Indeed, the Chamber's policy arguments ignore overwhelming evidence of the benefits provided by litigation finance, repeatedly make factual assertions with no support, and mischaracterize aberrant cases as reflecting prevailing trends without disclosing the multitude of countervailing authorities. Moreover, the Chamber's proposal is fundamentally discriminatory, as it ignores the reality that there are many third-party financial stakeholders in complex civil litigation, of which specialty litigation finance providers are only a small subset. The civil justice system manages well the interests of parties and third-party financial stakeholders under its current rules. There is no basis for singling out one particular type of economic interest in litigation without undertaking a complete reformulation of how federal courts address disclosure of *all* economic interests in litigation outcomes.

It is not hard to understand why the Chamber, in the face of all evidence to the contrary, has recycled its 2014 proposal. Simply put, the Chamber and its allies are longstanding foes of civil litigation. They do not stand for a level playing field; rather, they are bare-knuckled players who seek to obtain strategic and tactical advantage for their constituents, and they spend many millions of dollars every year in pursuit of those efforts. Indeed, the Chamber makes no secret of

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[7] *Id*. at 5.
[8] *Id*. at 9.
[9] Minutes of Advisory Committee on Civil Rules at 13 (Oct. 30, 2014) ("Oct. 2014 Minutes").
[10] *Id*.
[11] *Id*.
[12] *Id*. at 14.
[13] *Id*.
[14] Minutes of Advisory Committee on Civil Rules at 35 (Apr. 14, 2016) ("Apr. 2016 Minutes").
[15] *Id*.

its outright contempt for the U.S. litigation system. Lisa A. Rickard, the President of the Chamber's Institute for Legal Reform—the author of the 2017 Letter—recently proclaimed: "Our litigation machine is more grotesque than good design, more destructive than productive. Essentially, it is more monster than machine."[16] Moreover, the Chamber and its fellow signatories to the 2017 Letter are trade groups that lobby for—and are funded by—corporate defendants.[17] In the name of so-called "litigation reform," these groups actively seek to restrict plaintiffs' access to the civil justice system. It is abundantly clear that the Chamber and its fellow signatories' interests would be best served by amending Rule 26 to frustrate plaintiffs' access to capital, thus foreclosing opportunities for plaintiffs to pay the ever-increasing costs associated with complex litigation. The 2017 Letter should be analyzed with its drafters' motivations in mind.

Further confirming the political nature of its proposal, the Chamber makes no effort to define or properly contextualize litigation finance, or what it calls "TPLF." There is a long history in the United States of parties to litigation seeking outside financing from a diversity of sources. For example, parties that cannot afford or do not wish to pay their legal fees and expenses out of pocket: (1) regularly turn to law firms that work on contingency or conditional fee arrangements; (2) approach banks, private funds, or other financial institutions to secure loans, debt, or equity instruments; (3) secure financing in the form of risk-avoidance instruments from insurance companies; or (4) for the last decade or so, work with specialist providers of litigation finance. All of these sources of outside financing—contingent fee law firms, banks, insurers, and specialists—could be considered "third-party financing," and there is no basis for choosing among them for differential treatment. A bank's security interest in the proceeds of a litigation claim is no different from a litigation finance firm's security interest in the proceeds of that same claim. As discussed further below, Burford's business encompasses numerous approaches to litigation finance—just as do the businesses of many major banks and financial institutions. None of those approaches warrant amending Rule 26.

In short, and for the reasons further set forth below, the Chamber's proposal does not merit submission for public comment or any further attention by the Committee.

I. No Material Developments Warrant Reconsidering The Committee's 2014 Decision

The Chamber contends that "there have been several relevant noteworthy developments"[18] since 2014 that merit reconsideration of its old proposal. Not so. The Chamber overstates the "rapid growth" of litigation finance since 2014. And it fails in its effort to use one limited disclosure rule adopted by one federal court in the class-action context as evidence of some broader trend toward requiring initial disclosure of litigation finance agreements.[19]

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[16] Remarks of Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform, at the Litigation Machine, 17th Annual Legal Reform Summit (Oct. 26, 2016), http://www.instituteforlegalreform.com/legal-reform-summit/2016-speaker-showcase.

[17] *See, e.g.*, Amanda Bronstad, *For Plaintiffs Bar, Talking on J&J Means Battling a Shadow Foe*, Nat'l L.J., Aug. 18, 2017, http://www.nationallawjournal.com/id=1202795963299/For-Plaintiffs-Bar-Taking-on-JJ-Means-Battling-a-Shadow-Foe; Resp. in Opp'n to Mot. for Leave to File Brief as *Amicus Curiae* of the Chamber of Commerce at 6 (chart), *DirectTV, LLC . Cordoba*, No. 17-90020 (11th Cir. Aug. 19, 2017), https://static.reuters.com/resources/media/editorial/20170821/directtvvcordoba--excludechamberbrief.pdf.

[18] 2017 Letter at 2.

[19] *See id.* at 2-7.

The Chamber Overstates the "Rapid Growth" of Litigation Finance. The Chamber posits that "there has been a dramatic expansion of TPLF over the last few years."[20] Thus, according to the Chamber, "[t]he scope of TPLF in U.S. civil litigation has reached a point such that" the Federal Rules of Civil Procedure must be amended to "require the disclosure of TPLF arrangements in all civil actions filed in federal court."[21] Even if the Chamber had its facts right (which it does not), the conclusion it posits does not follow naturally from those facts. Saying that "more plaintiffs are borrowing from Citibank to pay their legal fees" would not justify a new regime mandating Rule 26 disclosure of all Citibank borrowers. So too here. That the use of litigation finance is increasing does not itself support imposing a broad new litigation finance disclosure requirement governing every piece of civil litigation in the federal courts.

To support its position, the Chamber cites the increase in revenues realized by litigation finance firms, the increasing use of litigation finance by law firms, and the decision by some litigation finance firms to employ a portfolio strategy for their investments.[22] We laud the increased use of litigation finance by law firms and their clients—including some of the same Fortune 500 companies that the Chamber purports to represent. We also are pleased to note the increasing acceptance of litigation finance by courts. But the growth of litigation finance firms is a misleading indicator of the role of the litigation finance industry in modern civil litigation. Today, just as in 2014, litigation funding arrangements make up a very small percentage of the total spending on litigation in the United States. In 2015, the market for U.S. legal services was estimated at $437 billion.[23] Of that $437 billion, litigation was estimated to make up roughly one-third of legal services activity,[24] or approximately $144 billion. (These numbers, of course, exclude damages and only include money spent on lawyers.) In 2016, Burford, the world's leading provider of litigation finance, committed $378 million of new capital to litigation finance investments globally—not just in the United States.[25] While proud of this achievement and the growth it represents for our clients, employees, and shareholders, we note that the portion of this investment committed to U.S. litigation represents less than 0.25% of annual U.S. legal spending on litigation.

Moreover, the Chamber mistakenly equates the growth of specialized litigation finance companies such as Burford with an increase in the amount of capital provided by third parties to fund litigation. In fact, there is no evidence that firms such as Burford are providing *new* capital that previously was not contributed by third parties to litigation efforts, as opposed to simply professionalizing and institutionalizing historical channels for obtaining outside resources. In the past, companies in need of capital to fund operations (including litigation) have relied on numerous sources of third-party funding, including loans from traditional banks and other lenders. Burford merely provides a specialized alternative to those traditional sources of capital. Unlike traditional banks, however, Burford brings to bear extensive litigation expertise—including numerous former litigators—that makes it better able to evaluate the merits of potential

[20] *Id*. at 7.
[21] *Id*.
[22] *Id*. at 2-9.
[23] Thomson Reuters, *How Big is the U.S. Legal Services Market* (2015), http://legalexecutiveinstitute.com/wp-content/uploads/2016/01/How-Big-is-the-US-Legal-Services-Market.pdf.
[24] The Center for the Study of the Legal Profession at the Georgetown University Law Center, *2015 Report on the State of the Legal Market* at 3, http://www.law.georgetown.edu/academics/centers-institutes/legal-profession/upload/FINAL-Report-1-7-15.pdf.
[25] Burford Capital LLC, 2016 Annual Report at 3, http://www.burfordcapital.com/wp-content/uploads/2017/03/BUR-26890-Annual-Report-2016-web.pdf.

claims prior to committing capital. The growth of litigation finance *firms* does not necessarily equate to the growth of *litigation finance*, but rather indicates increased specialization and professionalization, which benefits clients as well as the civil justice system as a whole.

The Chamber Exaggerates the Impact of Portfolio Investing. The Chamber asserts that portfolio investing "driv[es] the pervasiveness of TPLF and increas[es] the likelihood that it will encourage the filing of spurious lawsuits."[26] The Chamber provides no evidence to support its assertion. And its assertion makes no sense. As a business matter, whether Burford invests in a single matter or a portfolio of matters, it is interested only in funding meritorious lawsuits. As one commentator put it:

> Critics argue that because TPLF providers fund many cases and thus are able to distribute risk across their portfolio of investments, the risks associated with funding a single claim are negligible. They claim this higher risk appetite combined with providers' single-minded pursuit of a return on capital contributes to increased frivolous litigation. This argument does not stand on firm ground, however. *TPLF providers are indeed interested in earning a handsome return on capital, but this incentivizes TPLF providers only to advance money to plaintiffs with meritorious claims. In the words of one of the largest providers in today's industry, "[f]unding meritless suits is a sure way to lose money."* TPLF providers in the commercial context conduct significant due diligence before moving forward with an investment because they offer substantial nonrecourse investments. TPLF providers assess a number of factors including the type and strength of a case, jurisdiction, evidence, potential damages, settlement prospects, and expertise of counsel.[27]

The Chamber further misleadingly implies that portfolio investing is focused on mass tort cases, but that is just wrong.[28] Law firms and businesses of all types and sizes utilize portfolio financing arrangements. The Chamber offers a single example of a law firm ex-employee complaining about one law firm's reliance on third-party capital to fund marketing expenses.[29] But in the Chamber's own words, that case is a "far cry" from the "usual customers" for litigation finance: "companies with big business disputes for their Am Law 200 firms."[30] The Committee's decisions should not be governed by anomalous cases.

The Chamber Exaggerates the Impact of Crowdfunding. Despite the Chamber's effort to exaggerate their significance, crowdfunding and other online funding marketplaces do not have a meaningful market share in the industry. Indeed, the only two examples given by the Chamber—LexShares and Trial Funder—have raised a mere $5.5 million and $100,000, respectively (with TrialFunder stating that it *hopes* to raise another $5 million in the future).[31] Crowdfunding companies should not be lumped together with mainstream litigation finance firms such as Burford. Crowdfunding companies remain such a trivial presence, moreover, that

[26] 2017 Letter at 7.
[27] David R. Glickman, *Embracing Third-Party Litigation Finance*, 43 Fla. St. U. L. Rev. 1043, 1058-59 (2016) (emphasis added; footnotes omitted).
[28] *See* 2017 Letter at 7.
[29] *See id*. at 8.
[30] *Id.*
[31] Sara Randazzo, *Litigation Funding Moves into Mainstream*, Wall St. J., Aug. 4, 2016.

they do not warrant any meaningful consideration by the Committee, much less a broad rule warranting mandatory initial disclosure of litigation finance agreements in all federal civil cases.

No Federal Court Requires Blanket Disclosure of Litigation Finance. The Chamber asserts that since 2014, "at least one federal district court—the U.S. District Court for the Northern District of California—has adopted its own TPLF disclosure requirement."[32] But that disclosure requirement, which is limited to the class-action context,[33] is hardly equivalent to a blanket disclosure requirement for all civil cases under Rule 26. Indeed, the U.S. District Court for the Northern District of California specifically declined to implement a broad disclosure requirement akin to what the Chamber proposes here. In 2016, the court proposed its own revision to Civil Local Rule 3-15 that would have required disclosure of litigation funders in all cases.[34] But the court scrapped its proposed revision[35] in favor of limiting disclosure to solely class action lawsuits, as discussed above.[36]

Notably, the Chamber itself acknowledges that discovery of litigation finance—as opposed to more onerous, mandatory disclosure—has been permitted only in "limited circumstances" or in "disputes between parties and a funder."[37] No federal court, either before or after 2014, has required mandatory disclosure of litigation finance agreements on a scale equivalent to the Chamber's proposal. In fact, *nothing* has occurred since 2014 to justify revisiting the Committee's decision. None of the "relevant noteworthy" developments cited by the Chamber are any more "relevant" or "noteworthy" than they were when the Chamber first posited them to the Committee in 2014. We respectfully submit that the Committee should leave the issue "open on the agenda without seeking to develop any proposed rules now," just as it did last year.[38]

II. The Federal Rules Were Not Designed To Address The Issues Raised By The Chamber

The Federal Rules were not designed to address many of the policy arguments raised by the Chamber, which are unpersuasive in any event. The Rules "govern the procedure in all civil actions and proceedings in the United States district courts . . . to secure the just, speedy, and inexpensive determination of every action and proceeding."[39] Paragraphs (a)(1)(A)(i) through (iv) of Rule 26, in particular, were adopted to ensure early disclosure of "four types of information that have been customarily secured early in litigation through formal discovery."[40] Rule 26 was not adopted to require transparency for transparency's sake. Nor was it designed to

[32] 2017 Letter at 10.
[33] *See* Standing Order for All Judges of the Northern District of California - Contents of Joint Case Management Statement at 2 (eff. Jan. 17, 2017) http://www.cand.uscourts.gov/filelibrary/373/Standing_Order_All_Judges_1.17.2017.pdf ("N.D. Cal. Standing Order") ("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.").
[34] *See* U.S. District Court for the Northern District of California, *Draft Revision of Civil Local Rule 3-15*, https://www.cand.uscourts.gov/news/23.
[35] *See* U.S. District Court for the Northern District of California, *Notice Regarding Civil Local Rule 3-15*, https://www.cand.uscourts.gov/news/210.
[36] *See supra* note 33.
[37] 2017 Letter at 2.
[38] Apr. 2016 Minutes at 35.
[39] Fed. R. Civ. P. 1.
[40] Fed. R. Civ. P. 26(a)(1) advisory committee's note to 1993 amendment (renumbered as part of the 2007 Amendments).

facilitate the application of various state laws raised by the Chamber's letter (*i.e.*, champerty and maintenance doctrines) or to help enforce lawyers' ethical duties, which are traditionally the province of state courts and state bar associations. Moreover, litigation finance does not constitute champerty or maintenance and is consistent with state professional responsibility rules.

The Initial Disclosure Rules Were Adopted to Improve Efficiency, Not to Increase the Overall Scope of Disclosure. The 1993 Amendments to the Civil Rules added the provisions that make up current Rule 26(a)(1)(A) in an effort to achieve "savings in time and expense."[41] The scope of initial disclosure was designed not to be comprehensive or overly burdensome to the parties, but to eliminate the need for formal discovery requests to receive "certain basic information" about the claims and damages alleged.[42] Later amendments reinforce this point. In 2000, for example, the scopes of the witness and document subdivisions were narrowed to just those a party "may use to support its claims or defenses."[43] As explained in further detail below, it strains credulity for the Chamber to imply that a litigation funding agreement is "needed in most cases to prepare for trial or make an informed decision about settlement."[44] Moreover, courts regularly exclude litigation funding agreements on the basis that they are both *per se* irrelevant and generally subject to protection from discovery.[45] The Chamber's proposal attempts to obtain through an initial disclosure what it cannot through normal discovery; that drastically broad expansion is entirely inconsistent with the Committee's original purpose for enacting Rule 26(a).

Rule 26 Should Not Be Amended to Assist a Small Minority of State Courts in Applying Largely Abandoned Champerty and Maintenance Doctrines. The Chamber asserts that "disclosure of TPLF arrangements at the outset of civil lawsuits" is necessary because "recent state and federal court decisions have given renewed vitality to champerty principles, particularly in the TPLF arena."[46] But the Chamber's description of the case law is misleading. As the Ninth Circuit has explained, champerty and maintenance are dying doctrines: "The consistent trend across the country is toward limiting, not expanding, champerty's reach."[47] Indeed, many states never adopted laws relating to champerty and maintenance, viewing them as

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[41] Fed. R. Civ. P. 26(a) advisory committee's note to 1993 amendment.
[42] *Id*.
[43] Fed. R. Civ. P. 26(a)(1) advisory committee's note to 2000 amendment.
[44] Fed. R. Civ. P. 26(a) advisory committee's note to 1993 amendment.
[45] *See Kaplan v. S.A.C. Capital Advisors, L.P.*, No. 12-cv-9350, 2015 WL 5730101, at *3-5 (S.D.N.Y. Sept. 10, 2015); *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 742 (N.D. Ill. 2014).
[46] 2017 Letter at 11.
[47] *Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145, 1156 (9th Cir. 2011); *see also Miller UK Ltd.*, 17 F. Supp. 3d at 727 ("[O]ver the centuries, maintenance and champerty have been narrowed to a filament."); *id*. ("The Massachusetts and South Carolina Supreme Courts have recognized that the champerty doctrine is no longer needed to protect against the evils once feared, such as speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining position because there are now other devices that more effectively accomplish these ends."); *In re Complete Retreats, LLC*, No. 06-50245, 2011 WL 1434579, at *2-3 (Bankr. D. Conn. Apr. 14, 2011) ("'[T]he common law doctrines of champerty and maintenance as applied to civil actions have never been adopted in [Connecticut], and the only test is whether a particular transaction is against public policy.' . . . Issues to consider when determine [sic] whether a funding agreement offends public policy include whether the non-party funder: instigated the litigation; is required to consent to settlement of the litigation; has control of the direction of litigation; and, is a predatory lender taking advantage of an unwary plaintiff."); *Osprey, Inc. v. Cabana Ltd. P'ship*, 532 S.E.2d 269, 279 (S.C. 2000) (holding that doctrine "no longer is required to prevent the evils traditionally associated with" it).

relics of feudal English law.[48] Thus, the "decline of champerty . . . is symptomatic of a fundamental change in society's view of litigation—from a social ill . . . to a socially useful way to resolve disputes."[49] Likewise, litigation finance is wholly consistent with sound public policy because it enables an underfunded plaintiff with meritorious claims to pursue those claims.[50]

Even in those few states where the champerty and maintenance doctrines remain, litigation finance arrangements have been held not to violate them—and Rule 26 would be a wholly inappropriate vehicle to police parties' financial arrangements in any event. Champerty requires the assignment of a claim to a third party who carries on the litigation in the claimant's absence.[51] Litigants who use third-party capital do not assign their claims to the capital provider, but instead continue to litigate those claims on their own behalf.[52] As courts have repeatedly recognized, "an outsider's involvement in a lawsuit does not constitute champerty or maintenance merely because the outsider provides financial assistance to a litigant and shares in the recovery."[53] Thus, numerous courts across the country have held that litigation finance agreements are not champertous.[54]

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[48] *See* Max Radin, *Maintenance by Champerty*, 24 Cal. L. Rev. 48, 67-68 (1935); *see also Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 275-76 (2008) (recounting demise of feudal prohibition of the assignment of causes of action, as "the 'objection of maintenance' yielded to 'the modern commercial spirit' ") (quoting James Barr Ames, *Lectures on Legal History* at 214 (1913)); *Abbott Ford, Inc. v. Superior Court*, 741 P.2d 124, 141 n.26 (Cal. 1987); *Currence v. Ralphsnyder*, 151 S.E. 700, 702 (W.Va. 1929); *Strahan v. Haynes*, 262 P. 995, 997 (Ariz. 1928); *Merchants' Protective Ass'n v. Jacobsen*, 127 P. 315, 318 (Idaho 1912); *Van Gieson v. Magoon*, 20 Haw. 146, 149 (1910); *Schomp v. Schenck*, 40 N.J.L. 195, 202-04 (1878); *Bentinck v. Franklin*, 38 Tex. 458, 472-73 (1873); Stephen Gillers, *Waiting for Good Dough: Litigation Funding Comes to Law*, 43 Akron L. Rev. 677, 688 & n.92 (2010) (noting Ohio's statutory abolition of the doctrine) (citing Ohio Rev. Code Ann. § 1349.55 (2008)); *Wright v. Meek*, 3 Greene 472, 482 (Iowa 1852) (holding that "[i]n this country there is but little or no necessity for enforcing the doctrine of champerty.").

[49] *Saladini v. Righellis*, 687 N.E.2d 1224, 1226 (Mass. 1997).

[50] As the President of the Supreme Court of the United Kingdom observed, "the public policy rationale regarding maintenance and champerty has turned full circle"—whereas "protect[ing] the poor and weak from exploitation by the rich and powerful" originally supported the doctrines, now the very same policy "positively . . . support[s] the development of litigation funding as a means of securing effective access to justice." Lord David Neuberger, *Annual Lecture: From Barretry, Maintenance, and Champerty to Litigation Funding* at 14, 21 (May 8, 2013), http://www.supremecourt.uk/docs/speech-130508.pdf.

[51] *See Del Webb*, 652 F.3d at 1153.

[52] *See Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co.*, No. 07C-12-134-JRJ, 2016 WL 937400, at *4 (Del. Super. Ct. Mar. 9, 2016) ("The record before the Court demonstrates that [plaintiff] is the bona fide owner of the claims in this litigation, and Burford has no right to maintain this action. In this case, there was no assignment. Neither the FPA nor the Security Agreement assigns ownership of [plaintiff]'s claims against [defendant] to Burford.") (footnote omitted).

[53] *Del Webb*, 652 F.3d at 1157 (citing *Odell v. Legal Bucks, LLC*, 665 S.E.2d 767, 775 (N.C. Ct. App. 2008)).

[54] *See, e.g.*, *Petersen Energia Inversora, S.A.U. v. Argentine Republic*, No. 15-cv-2739, 2016 WL 4735367, at *9 (S.D.N.Y. Sept. 9, 2016) ("Here, the facts sufficient to establish a champertous assignment are not clear from the face of the Complaint. . . . The relevant agreement, which is incorporated by reference in the Complaint, states that, '[t]he parties agree that nothing in this Agreement shall be interpreted to constitute an assignment . . . of the Claims,' and that [plaintiff] retains an interest in the outcome of the case.") (citation omitted); *Miller UK Ltd.*, 17 F. Supp. 3d at 726 ("[E]xacting standards in champerty statutes in other states have been found to be a barrier to the proscription of litigation funding contracts."); *In re Complete Retreats, LLC*, 2011 WL 1434579, at *3 (litigation finance agreement was not champertous); *Charge Injection Techs., Inc.*, 2016 WL 937400, at *3-6 (finding Burford's litigation funding agreement did not violate Delaware champerty law).

Maintenance requires "officious intermeddling"—improperly stirring up meritless litigation out of malice or other illegitimate motives.[55] Courts have further defined "officious intermeddling" as, for example, "offering unnecessary and unwanted advice or services; meddlesome, esp. in a highhanded or overbearing way,"[56] "the act of one improperly, and for the purpose of stirring up litigation and strife, encouraging others either to bring an action or to defend a suit which they have no right to make,"[57] "stirring up strife and continuing litigation,"[58] or "offer[ing] unwanted advice or otherwise attempt[ing] to control the litigation for the purpose of stirring up strife or continuing a frivolous lawsuit."[59] All of those definitions make clear that, in the litigation finance context, a funder does not officiously intermeddle; a funder agrees to provide capital to a funding recipient so that the *recipient* can litigate its *legitimate* claims. Indeed, litigation finance providers have every incentive to avoid "stirring up strife or continuing a frivolous lawsuit"—if the funded party loses, the funder loses its investment.

Even to the extent there could be any claim of champerty, moreover, most jurisdictions have held that a defendant does not have standing to raise it—which makes the Chamber's focus on the issue all the more peculiar.[60] Champerty and maintenance have traditionally been understood as violations by the party providing assistance, not by the party receiving it. Those doctrines are not designed to punish a party with a valid legal claim that seeks help in vindicating its legal rights.[61] Thus, contrary to the Chamber's suggestion, a defendant generally does not "have standing to challenge such an agreement as champertous under the applicable state law," and therefore also has no right to disclosure of whether such an arrangement exists.[62]

The four cases that the Chamber cites do not indicate any trend toward state-law prohibition of third-party litigation funding. The Chamber cites *WFIC, LLC v. LaBarre*, 148 A.3d 812 (Pa. Super. Ct. 2016), but to our knowledge, *WFIC* is alone among state-court cases in holding that loaning funds to assist a litigant in pursuing valid claims constitutes champerty even without an assignment of claims to the lender. As explained above, most other courts have rejected that conclusion. But even *WFIC* makes clear that, "[u]nder Pennsylvania law, if an assignment is champertous, it is invalid"; it nowhere suggests that champerty is an affirmative defense to a plaintiff's claims on the merits.[63] It certainly is not appropriate for the Committee

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[55] *See Miller UK Ltd.*, 17 F. Supp. 3d at 725 ("Officiousness is synonymous with meddlesomeness and can be described as volunteering one's services where they are neither asked for nor needed.").
[56] *Kraft v. Mason*, 668 So. 2d 679, 682 (Fla. Dist. Ct. App. 1996) (quoting *Webster's New World Dictionary* at 988 (2d ed. 1986).
[57] *Id*.
[58] *Oliver v. Bynum*, 592 S.E.2d 707, 711 (N.C. Ct. App. 2004).
[59] *Osprey, Inc. v. Cabana Ltd. P'ship*, 532 S.E.2d 269, 278 (S.C. 2000).
[60] *See Miller UK Ltd.*, 17 F. Supp. 3d at 726 ("Not surprisingly, 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. That is obviously not the situation here.") (citation omitted).
[61] *See, e.g.*, *In re Emerging Commc'ns, Inc. S'holders Litig.*, No. CIV.A. 16415, 2004 WL 1305745, at *29 (Del. Ch. May 3, 2004) ("Champerty cannot be charged against one with an interest in the matter in controversy."); *Drake v. Northwest Nat'l Gas Co.*, 165 A.2d 452, 454 (Del. Ch. 1960) (finding no champerty when the "claimant is the bona fide owner of the claim in litigation"); *Arcoria v. RCC Assocs., Inc.*, No. K13L-06-058 RBY, 2014 WL 620361, at *3 (Del. Super. Ct. Jan. 8, 2014) (holding that because "[p]laintiff has a direct legal interest in the subject matter of this litigation," his "causes of action are not tainted with champerty and maintenance"); *Hannigan v. Italo Petroleum Corp. of Am.*, 178 A. 589, 592 (Del. Super. Ct. 1935) (similar); *Gibson v. Gillespie*, 152 A. 589, 593 (Del. Super. Ct. 1928) (similar).
[62] 2017 Letter at 13.
[63] *WFIC*, 148 A.3d at 819.

to adopt a broad disclosure requirement to facilitate the enforcement of one state's idiosyncratic champerty law, if indeed *WFIC* is even a proper statement of that one state's law.

The Chamber's three remaining cases likewise do not suggest increasing application of the champerty or maintenance doctrine to litigation finance:

Maslowski v. Prospect Funding Partners LLC, 890 N.W.2d 756 (Minn. Ct. App. 2017), *review denied* (May 16, 2017), did not apply the champerty doctrine to third-party litigation funding. It merely invalidated a forum-selection clause that would have had the effect of evading Minnesota's champerty law. Minnesota is among the minority of states to continue to recognize a prohibition on champerty,[64] and this case is simply an affirmation of an existing rule.

Justinian Capital SPC v. WestLB AG, 65 N.E.3d 1253 (N.Y. 2016), did not involve anything like an ordinary commercial third-party litigation funding arrangement. Instead, a purchaser of poorly performing notes wanted to sue the issuer of those notes, but wanted to do so in secret.[65] The purchaser of the notes sold the notes to a third party, who then sued the note issuer.[66] As commentators have recognized,[67] the case has highly unusual facts; thus, it should not be considered relevant in deciding whether the Committee should require disclosure of litigation finance agreements. Far more relevant than *Justinian* is New York's champerty statute, which provides an explicit safe harbor for the purchase of litigation claims for more than $500,000.[68] The statute explicitly permits sophisticated commercial litigation funding arrangements used by Burford and other litigation funding providers. Indeed, "New York has long been a leading commercial center, and our statutes and jurisprudence have . . . greatly enhanced New York's leadership as the center of commercial litigation."[69] Thus, "[t]he safe harbor was enacted to exempt large-scale commercial transactions in New York's debt-trading markets from the champerty statute" because "participants in commercial transactions and the debt markets [such as litigation funders] are sophisticated investors who structure complex transactions."[70] The *Justinian* court went out of its way to confine its holding to the very specific facts of that case, which did not involve litigation finance.

Finally, *In re DesignLine Corp.*, 565 B.R. 341 (Bankr. W.D.N.C. 2017), is not on point. As an initial matter, it is a bankruptcy case, governed not by the Federal Rules of Civil Procedure but by the Federal Rules of Bankruptcy Procedure. Because of the special considerations applicable to bankruptcy cases, those rules already require increased levels of disclosure generally (and not merely as to litigation finance) and approval by the court to protect creditors.[71] The funding agreement in that case was found champertous because the agreement

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[64] *See Johnson v. Wright*, 682 N.W.2d 671 (Minn. Ct. App. 2004).
[65] *Justinian*, 65 N.E.3d at 1254-55
[66] *Id*.
[67] *See, e.g.*, Debt Collection/Champerty, 24 Bus. Torts Rep. 355, 357 (2012) ("While other courts had rejected allegations of champerty in similar cases, the facts at bar appeared to be unique, the court believed."); Nathan Crystal, *Litigation Finance: An Overview of Issues and Current Developments (Part i)* at 13, S.C. Law (May 2017) ("While the case at first blush seems to be adverse to litigation funding, the opposite is actually the case.").
[68] Notably, the New York champerty statute contains a safe harbor exempting from its application "any assignment, purchase or transfer . . . having an aggregate purchase price of at least five hundred thousand dollars." N.Y. Judiciary Law § 489(2).
[69] *Justinian*, 65 N.E.3d at 1258.
[70] *Id*.
[71] *See* Fed. R. Bankr. P. 2019.

gave the funder an unusual amount of control over the litigation.[72] The court noted the funder's "power of the purse" because "[t]he trustee would not receive all funds up front to use in her sole discretion. Instead, she must go back to [the funder] on a quarterly basis and ask [the funder] to open its wallet. In each instance, [the funder] is given an opportunity to weigh whether its involvement continues to be a profitable endeavor and whether continued funding is in its, rather than the debtors' creditors', best interest. If not, [the funder] may decline to make additional advances."[73] Once again, the result in that case was driven by the parties' highly unusual arrangement, and not any broader condemnation of third-party litigation funding arrangements.

Litigation Finance Does Not Violate Lawyers' Ethical Duties, Which Are Not the Province of Rule 26 in Any Event. The Chamber argues that litigation finance encourages violations of the rule against sharing attorneys' fees with nonlawyers, and violations of lawyers' duties of loyalty and confidentiality to their clients.[74] To begin with, and contrary to the Chamber's unsupported assertions, litigation finance arrangements are fully consistent with the rules of professional ethics for lawyers. Furthermore, the disclosure requirements of the Federal Rules are not the proper place to police violations of attorney ethics rules, and such violations do not give rise to any cognizable defense on the part of the defendant in federal litigation. By analogy, the rules of professional responsibility of every state prohibit lawyers from representing two clients where there is a concurrent conflict of interest. But the Federal Rules have never been amended to require disclosure of such conflicts, since the enforcement of those rules is a matter for the state bar authorities and not the federal courts.

First, the Chamber alleges that litigation funders and counsel using litigation funding are "ignoring" the principle prohibiting lawyers from sharing legal fees with non-lawyers.[75] But the Chamber cites no support for that assertion. In the lone case the Chamber cites—*Gbarabe v. Chevron Corp.*—the district court *did not even mention* the funding agreement, much less suggest it was unlawful, in denying class certification.[76] While it is true that some forms of litigation finance involve providing funds to attorneys, who in turn repay the funder out of the attorneys' proceeds from a successful litigation, that arrangement is not the type of "fee splitting" that is prohibited by Model Rule of Professional Conduct Rule 5.4 any more than an arrangement whereby a law firm took out a line of credit from Citibank and agreed to repay Citibank using the proceeds of the law firm's client engagements. Not surprisingly, leading legal ethicists have concluded that litigation funding does not implicate the concerns addressed by Rule 5.4.[77]

Second, the Chamber alleges that litigation finance may result in attorneys breaching their duties of loyalty and confidentiality to their clients.[78] Again, putting aside a litigation defendant's lack of standing to enforce such a duty against a plaintiff's attorney, the Chamber offers no evidence that breaches of the duty of loyalty have actually occurred—only theoretical arguments that they "may" occur. And regarding confidentiality, quite contrary to the Chamber's assertion, courts have consistently held that third-party funders are entitled to benefit

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[72] *See In re DesignLine Corp.*, 565 B.R. at 348-49.
[73] *Id*. at 348.
[74] *See* 2017 Letter at 13-16.
[75] *Id*. at 14.
[76] *See Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2017 WL 956628 (N.D. Cal. Mar. 13, 2017).
[77] *See, e.g.,* Anthony J. Sebok, *Unmatured Attorneys' Fees and Capital Formation in Legal Markets*, Forthcoming 2018 U. Ill. L. Rev. at 14 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2956538.
[78] *See* 2017 Letter at 14-15.

from work-product protection.[79] The Chamber's speculative and incorrect suggestions are insufficient to warrant a broad change in the Federal Rules.

III. The Proposed Amendment Is Not Supported By Other Aspects Of The Federal Rules

The Proposed Rule Is Not Warranted as an Extension of Rule 7.1. The Chamber argues that the proposed rule is an appropriate extension of Rule 7.1, which requires that a "nongovernmental corporate party" disclose "any parent corporation and any publicly held corporation owning 10% or more of its stock."[80] But the origins of Rule 7.1 stand in stark contrast to the situation here: Rule 7.1 was adopted because of a number of prominent "news reports of cases in which judges ha[d] inadvertently failed to disqualify themselves because of a failure to connect with financial information that requires disqualification."[81] According to the Committee, "[t]here [had] been two recent waves of embarrassing publicity about inadvertent failures to recuse."[82]

The Chamber has not offered any evidence of any similar risk of judicial conflicts of interest associated with the involvement of third-party litigation funders. That is because federal judges are well aware of their ethical responsibilities, and would be well advised to avoid investing in litigation finance entities (whether public or private). However, if a federal judge ever were to have a relationship with a litigation finance company that rose to the level of warranting disqualification in cases in which that company was involved, such a judge would be fully equipped to issue an individual practice rule or standing order requiring disclosure of any relationship with that company. In short, any concern about judicial conflict of interest is so attenuated that it cannot support a broad disclosure rule of the kind suggested by the Chamber.[83]

It is also important to consider the conscious choice made at the time of the adoption of Rule 7.1 about the extent of disclosure that was desirable in the context of civil litigation. In the interest of judicial efficiency, the Federal Rules of Civil Procedure do not aim for disclosure of every conceivable relationship a party has that might touch a judge. Instead, Rule 7.1 draws a bright line at 10% shareholdings, while exempting debt, derivatives, convertibles and many other kinds of financial interests. As the Committee noted at the time of Rule 7.1's adoption:

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[79] *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 [the plaintiff] obtain financing.").

[80] Fed. R. Civ. P. 7.1(a).

[81] Minutes of Advisory Committee on Civil Rules at 9 (Apr. 10-11, 2000).

[82] *Id*. at 10.

[83] The Chamber's invocation of the *Chevron v. Ecuador* case illustrates the point. In that case, a private attorney serving as a discovery special master, Max Gitter of Cleary Gottlieb, determined that disclosure of plaintiffs' litigation funders was appropriate under the circumstances. As Mr. Gitter himself acknowledged, it was "[b]y amazing coincidence" that he happened to have been former co-counsel with Burford's chief investment officer and acquainted with its Chief Executive Officer. Dep. of Steven Donziger at 631:18-633:22 (Nov. 29, 2010), *In re Application of Chevron*, No. 10 MC 00002 (LAK) (S.D.N.Y. 2010), ECF No. 306-1 ("Donziger Dep."). Notably, Mr. Gitter did not recuse himself despite those relationships, and the parties did not seek his recusal. Moreover, the Chamber misrepresents Mr. Gitter's testimony. Mr. Gitter did not, as the Chamber states (at 16), receive a "brochure about funding one of Burford's cases." Instead, Chris Bogart, the former general counsel of *Time Warner* (and not, as the Chamber misstates, general counsel of Burford), sent Mr. Gitter a brochure to suggest he join the company as a special advisor. Donziger Dep. at 631:18-633:22.

> 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).[84]

Litigation finance is far less prevalent than many other kinds of financial interests that by policy choice remain undisclosed.

Litigation Finance Agreements Are Not Analogous to Insurance Coverage Under Rule 26. The Chamber asserts that requiring initial disclosure of litigation finance agreements is justified by "[p]arity" concerns between a funded plaintiff and a defendant—mainly that "Rule 26 already requires the disclosure of insurance coverage, including insurance that will pay for the defense."[85] However, as the Committee has recognized in the past, there are differences between litigation finance and insurance arrangements that make the Chamber's analogy inapt.[86]

In 1970, the Committee amended Rule 26(b)(2) to require disclosure of a defendant's insurance coverage because it felt that "[d]isclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation."[87] In doing so, however, the Committee expressly limited the new requirement "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; [and] (2) because the insurance company ordinarily controls the litigation."[88] The Committee made clear that "[t]he provision applies only to persons 'carrying on an insurance business' and thus covers insurance companies and not the ordinary business concern that enters into a contract of indemnification."[89] Notably, the Committee *specifically excluded* from disclosure under Rule 26 any "personal and financial information concerning the insured, discovery of which is beyond the purpose of this provision."[90]

There are a number of differences between insurance coverage and litigation finance agreements that do not support the Chamber's assertion that the two are analogous. First, as discussed in greater detail below, litigation funders do not "ordinarily control[] the litigation." Unlike insurers, who typically assume the position of the litigant and control the underlying lawsuit, litigation funders do not assume the claims at issue or attempt to control the litigation.

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[84] Fed. R. Civ. P. 7.1 advisory committee's note to 2002 amendment.
[85] 2017 Letter at 22.
[86] *See* Oct. 2014 Minutes at 11 (stating that "the analogy is not perfect").
[87] Fed. R. Civ. P. 26(b)(2) advisory committee's note to 1970 amendment.
[88] *Id*. (emphasis added).
[89] *Id*.
[90] *Id*.

Second, at the time of the 1970 amendment, many cases were "sharply in conflict on the question [of] 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 in the case."[91] Unlike insurance coverage, however, there is virtually no conflict over whether litigation finance agreements are subject to discovery where the agreement "is not itself admissible and does not bear on another issue in the case."[92] Nor has the Chamber presented any evidence to suggest otherwise. As the Committee noted in 2014, "[l]ong before 1970, liability insurance had come to play a central role in supporting actual effectuation of general tort principles. Litigation financing is too new, and experience with it too limited, to come squarely within the same principle."[93]

Third, insurance is "an asset created specifically to satisfy the claim."[94] Thus, disclosure of insurance coverage and the associated coverage limits informs the parties (particularly the plaintiff) of the total amount they may receive from a defendant's primary source of financing. This particularly affects settlement, as a plaintiff may agree to take a lower settlement offer if a defendant lacks a high coverage limit.[95] Unlike insurance coverage, however, litigation finance is not "an asset created specifically to satisfy the claim." Litigation funders typically provide financial assistance to a plaintiff in exchange for a share of the recovery if the plaintiff is victorious; the amount to which a litigation funder is entitled would not inform the parties of the total amount that the plaintiff can receive from a primary financial source of the defendant, nor the total amount that the plaintiff is entitled to receive should he or she win. On the other hand, mandatory disclosure of funding agreements would provide the *defendant* with detailed knowledge of the plaintiff's ability to fund the litigation—giving defendants a strategic advantage they are not entitled to obtain.

Fourth, the mandatory disclosure requirement of liability insurance in Rule 26 is much narrower in scope than the Chamber's proposal to require mandatory disclosure of "any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise."[96] Courts have refused efforts by plaintiffs to use the mandatory disclosure of liability insurance coverage to secure all portions of insurance documents connected to the defendant's liability coverage, as opposed to just those portions that address the disclosure required by Rule 26—*i.e.*, the insurance agreement stating the amount of money available to satisfy a judgment against the defendant. Courts have refused plaintiffs access under Rule 26 to an insurer's reservation of rights letter connected to a liability policy (*see, e.g.*, *Native American Arts, Inc. v. Bundy-Howard, Inc.*, No. 01 C 1618, 2003 WL 1524649 (N.D. Ill. Mar. 20, 2003) or an accounting of how much of the policy limits in a policy had been used for legal fees before an insured had assumed the cost of its own representation and secured new counsel (*see, e.g.*, *Excelsior College v. Frye*, 233 F.R.D. 583 (S.D. Cal. 2006). The plain meaning of the Chamber's proposal—to require mandatory

[91] *Id*.
[92] *Id.*; *see Kaplan*, 2015 WL 5730101, at *5 ("[T]he defendants did not show that the [funding agreement is] relevant to any party's claim or defense. Therefore, the defendants' motion to compel production of the plaintiffs' Litigation Funding Documents is denied."); *Miller UK Ltd.*, 17 F. Supp. 3d at 742.
[93] Oct. 2014 Minutes at 11.
[94] Fed. R. Civ. P. 26(b)(2) advisory committee's note to 1970 amendment.
[95] *See, e.g.*, *Cook v. Welty*, 253 F. Supp. 875, 877 (D.D.C. 1966).
[96] 2017 Letter at 2.

disclosure of "any agreement" involving litigation finance—would allow a defendant to obtain information about a plaintiff's litigation posture that courts prohibit *plaintiffs* from securing under the same insurance disclosure requirements cited by the Chamber as support for its proposal.

Thus, disclosure of litigation finance agreements would not "enable counsel for both sides to make the same realistic appraisal of the case," because the amount a defendant could realistically pay in damages to a plaintiff is not affected by the presence of litigation finance.[97] "Unlike an insurer, [a third-party litigation funder] . . . has not paid nor will ever pay [the plaintiff] for any losses . . . it will never be a plaintiff seeking indemnification from [the defendant] . . . [i]f [the plaintiff] loses, that is the end of the matter."[98] As "calling a tail a leg does not make it one," neither does "[c]alling [a plaintiff's] funder a subrogee . . . make it one."[99]

The Committee has long recognized other distinctions between insurance coverage and litigation finance. In 2014, the reporter to the Committee noted that "knowing that the other side has an 'unlimited budget' to continue the litigation . . . does not seem to be the reason that discovery of insurance agreements was authorized in 1970, and discovery of [litigation finance] agreements seems to raise different issues."[100] The reporter similarly recognized the fact that "insurance is a *peculiarly* regulated business."[101] And unlike insurance coverage, which had been "customarily secured early in litigation"[102] since at least 1970, there is no evidence to suggest that the same is true for litigation finance agreements. Indeed, as the Chamber's letter itself indicates, the opposite is true: litigation finance agreements have *not* been "customarily secured early in litigation."[103]

IV. <u>The Chamber's Policy Concerns Are Unsubstantiated</u>

The Chamber proffers a number of policy arguments regarding the practices of litigation finance. Specifically, the Chamber asserts that litigation funders seek to control the litigation, that litigation finance scuttles settlement efforts, and that mandatory initial disclosure of litigation finance agreements should be required in all cases because litigation funders are real parties in interest.[104] All of the Chamber's arguments are misplaced. At any rate, the Chamber's disapproval of litigation finance as a policy matter does not justify amending Rule 26 to require disclosure of such arrangements.

Litigation Funders Do Not Control Litigation Strategy. The Chamber's purported concerns of control by litigation funders mischaracterize the way litigation finance operates. Burford's practice—and, to the best of its knowledge, the practice of other large litigation finance companies—is that it does not obtain any contractual right to control the decisions of the litigant and its counsel with respect to the litigation. Burford makes this clear in its marketing materials. For example, the frequently asked questions ("FAQ") section of Burford's website

[97] Fed. R. Civ. P. 26(b)(2) advisory committee's note to 1970 amendment.
[98] *Miller UK Ltd*, 17 F. Supp. 3d at 729-30.
[99] *Id*.
[100] Reporter's Mem. at 4.
[101] *Id*. (emphasis added).
[102] Fed. R. Civ. P. 26(a)(1) advisory committee's note to 1993 amendment.
[103] *See* 2017 Letter at 9.
[104] *See* 2017 Letter at 16-21.

clearly states that it does not "get any rights to manage the litigation in which we invest. . . . Just as a leasing company does not tell you how to drive your car, we don't drive the litigation. Nor do we get any rights to control the settlement of the litigation, which remains wholly in the litigant's control."[105] Similarly, the FAQ section of litigation funder Therium's website states that "Therium has no influence on the cases, and in particular, does not control settlement."[106] Indeed, this is standard practice, as evidenced by similar statements made by other litigation finance companies.[107]

The Chamber cites litigation funder Bentham IMF's "Best Practices" document as evidence that Bentham seeks to control the litigation in which it invests.[108] But that document actually states the opposite: "The funder shall not induce a litigant's counsel to breach their professional duties,"[109] including counsel's duty of loyalty to the litigant (and only the litigant). And nothing in the document indicates that Bentham's statement that it may "[m]anage a litigant's litigation expenses"[110] means that Bentham seeks to exert control over the litigation or take part in any of the litigant's decision-making. Similarly, Bentham's statement that it "provide[s] *input* on any settlement demand and/or offer, and any response" does not equate to control of the litigation or settlement.[111] Because litigation funders are repeat players in the litigation space, and the underwriters and case managers typically are experienced litigators themselves, many litigation funding clients expect and appreciate input from their funder about litigation strategy. In fact, this expertise is part of the reason funding clients choose to work with litigation funders—it is part of a funder's value-add.

The Chamber's characterization of industry practice is contrary to voluminous scholarly literature recognizing that "[f]unders generally do not control the course of litigation or unduly interfere with the attorney-client relationship."[112] The "[u]ltimate decisions regarding settlement and [other] legal strategy are always in the hands of the claimant and lawyer."[113] Litigation funders "are not in control of the litigation; they are not investing in the litigation; they are

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[105] Burford Capital LLC, *Frequently Asked Questions*, http://www.burfordcapital.com/faqs.
[106] Therium Group Holdings Ltd., *Frequently Asked Questions*, http://www.therium.com/frequently-asked-questions.
[107] *See, e.g.*, Lake Whillans, *Ethics*, http://lakewhillans.com/ethics ("Ensuring that there are no restrictions on the ability of claimholder's trial counsel to exercise independent judgment on behalf of the claimholder throughout the litigation." "Protecting the trial lawyer's duty of loyalty to the client."); Harbour Litigation Funding, *Code of Conduct for Litigation Funders* at 2 (Jan. 2014), https://www.harbourlitigationfunding.com/wp-content/uploads/2015/07/code-of-conduct_for_litigation_funders_-jan-2014-final-pdfv2-2.pdf ("A funder will . . . not take any steps that cause or are likely to cause the Funded Party's solicitor or barrister to act in breach of their professional duties." "A funder will . . . not seek to influence the Funded Party's solicitor or barrister to cede control or conduct of the dispute to the funder."); Vannin Capital, *FAQS*, http://vannin.com/content/FAQs.php ("[Y]our case will be run in the same way it would have been if it wasn't funded. You will retain control of all key decision making and can continue to use your first choice of law firm and counsel.").
[108] 2017 Letter at 17.
[109] Bentham IMF, *Code of Best Practices* at 1 (Jan. 9, 2017), https://www.benthamimf.ca/docs/default-source/default-document-library/bentham-imf-codes-of-best-practices.pdf?sfvrsn=6.
[110] *Id*. at 2.
[111] *Id*. (emphasis added).
[112] Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 Geo. L.J. 65, 92 (2010).
[113] Anne Rodgers, *et al.*, *Emerging Issues in Third-Party Litigation Funding: What Antitrust Lawyers Need to Know*, 16 Antitrust Source 1, 4 (2016), http://app.antitrustsource.com/antitrustsource/december_2016/?pg=14&pm=2&u1=friend.

investing in the *potential outcome* of the litigation."[114] Cases addressing the issue likewise have found that litigation funders do not control the underlying litigation.[115]

Moreover, the Chamber mischaracterizes the two examples it offers. The Chamber asserts that the funding agreement utilized by Burford in a dispute involving Chevron and Ecuador is "[a] prime example of substantial funder control."[116] But "the Agreement also states that 'the Claimants may at any time without the consent of the Funder either settle or refuse to settle the Claim for any amount.' "[117] The Chamber focuses on one term of the agreement permitting Burford to approve the lawyers selected by the litigant.[118] But that provision did not allow Burford to select the litigant's counsel; it merely ensured that counsel was selected from a long list of highly qualified and reputable "nominated" law firms, or another law firm with Burford's approval (not to be unreasonably withheld). Once a firm was selected, the litigant's counsel retained all duties to the litigant, and Burford did not have any right to approve or disapprove settlement, or otherwise control the underlying litigation.[119] It is wholly appropriate—and beneficial to the civil justice system—for Burford to ensure that the litigation it funds is handled by top-notch lawyers, while still leaving the ultimate choice of counsel and litigation decision-making authority solely in the client's hands.

The Chamber also asserts that the funding agreement in *Gbarabe v. Chevron Corp.* "contains several key provisions that suggest the funder's desire to influence the course of the litigation."[120] Yet the provisions the Chamber cites merely gave the funder the ability to monitor and provide input on the litigation. The funding agreement did not vest in the funder any right to approve or disapprove settlement, or otherwise control the underlying litigation.

Litigation Finance Promotes Settlement Efforts. Without any real support, the Chamber asserts that litigation finance "delay[s] and distort[s] the settlement process."[121] In fact, experience shows that litigation finance actually *promotes* settlement efforts between the parties.

"[T]here is considerable evidence that the existence of third-party funding actually tends to promote settlement."[122] Because a litigation funder receives a return only if a case resolves successfully, funders have an incentive to ensure that financing does not encourage counterparties to turn down risk-appropriate settlement offers. A plaintiff is similarly incentivized: as "third-party lending agreements include a structural incentive to settle, and to do so as quickly as possible,"[123] a plaintiff who wants to maximize their own recovery will want to

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[114] Joanna S. Bailey, *et al.*, *Third-Party Litigation Financing*, 8 J.L. Econ. & Pol'y 257, 276 (2011) (emphasis added).
[115] *See, e.g.*, *Charge Injection Techs., Inc.*, 2016 WL 937400, at *4 ("The Court is not persuaded by [defendant]'s argument that the [agreement] is champertous because of Burford's alleged '*de facto* control.' ").
[116] 2017 Letter at 17.
[117] Maya Steinitz, *The Litigation Finance Contract*, 54 Wm. & Mary L. Rev. 455, 472 (2012) (quoting the Funder Agreement).
[118] *See* 2017 Letter at 17.
[119] *See* Steinitz, 54 Wm. & Mary L. Rev. at 472 (citing the Funder Agreement).
[120] 2017 Letter at 17.
[121] *Id.* at 18.
[122] Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. Rev. 571, 597 (2010).
[123] *Id*.

"make every effort to bring their cases to resolution at the earliest possible point in the process."[124]

Litigation finance arrangements also encourage a defendant to settle as early as possible, freeing up critical judicial resources for other cases. A defendant's awareness of the fact that a plaintiff can withstand a drawn-out litigation may "forc[e] a recalcitrant defendant to approach a case reasonably and pragmatically in light of the fact that its adversary has the resources to meaningfully prosecute the matter."[125] Indeed, "[b]oth the public and the justice system benefit when litigants with legitimate disputes face one another on a level playing field."[126] Otherwise, a defendant will often drag out litigation to pressure an indigent plaintiff to accept "unfair or unjust settlements brought about by a party's economic desperation or financial inability to litigate meritorious claims."[127] In sum, litigation finance leads to fairer settlements based on the merits of the case, rather than a party's ability to fund its litigation efforts.[128]

Litigation Funders Are Not Real Parties in Interest. The Chamber argues that "a funder is effectively a real party in interest" that "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."[129] That is not correct. Under Rule 17, "[t]he real party in interest is the person holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery."[130] Litigation funders do not "hol[d] the substantive right sought to be enforced,"[131] because the litigant continues to hold the claim and prosecute it itself.

Because litigation funders are not real parties in interest under Rule 17, Rule 26(b)(1)'s direction to "conside[r] . . . the [real] parties' resources" in determining the scope of discovery does not support requiring initial disclosure of litigation finance agreements. Nor would Rule 26 mandate the disclosure of litigation funders even if they were real parties in interest under Rule 17 (which they are not), because Rule 26 does not mandate the disclosure of real parties in interest *at all*.[132]

Moreover, disclosure of litigation funding agreements would not be "important information to have on the record in the event that a court determines it should impose sanctions or other costs under Rule 11, [and] Rule 37,"[133] because neither Rule 11 nor Rule 37 applies to litigation funders. The sanctions provided by those rules apply to attorneys and "parties," but, as discussed above, litigation funders are not "parties" as defined by Rule 17, and they do not serve as the litigant's counsel.

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[124] *Id*.
[125] Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 Mercer L. Rev. 649, 661 (2005).
[126] *Id*.
[127] *Id*.; *see In re K.A.H.*, 967 P.2d 91, 93 (Alaska 1998) ("Defendants, aware of the economic pressure burdening unaided plaintiffs, have every economic incentive to prolong the litigation with frivolous motions and discovery.") (quoting Charles W. Wolfram, *Modern Legal Ethics* § 9.2.3 (1986)).
[128] *See* Molot, 99 Geo. L.J. at 83.
[129] 2017 Letter at 19.
[130] *Farrell Constr. Co. v. Jefferson Parish*, 896 F.2d 136, 140 (5th Cir. 1990).
[131] *Id*.
[132] *See* Fed. R. Civ. P. 26.
[133] 2017 Letter at 20.

The Chamber's reliance on *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691 (Fla. Dist. Ct. App. 2009), a Florida state court case, is misplaced.[134] First and foremost, the court merely determined whether an errant individual and an investment company "were 'parties' within the meaning of" three *Florida* state statutes, *not* whether they were real parties in interest under Rule 17.[135] And in contrast to a typical litigation finance arrangement (as discussed in further detail above), the individual funder completely "controlled the litigation."[136] Indeed, that particular individual "had to approve the filing of the lawsuit; controlled the selection of the plaintiffs' attorneys; recruited fact and expert witnesses; received, reviewed and approved counsel's bills; and had the ability to veto any settlement agreements. [The funder] even paid $13,000 for the medical expenses of plaintiffs' main witness."[137] It is clear that *Abu-Ghazaleh* does not reflect the practices of professional litigation funders. Nor can an interpretation of Florida state statutes *possibly* be relevant for determining whether, under Rule 17, litigation funders should be considered real parties in interest in federal court.

Amending Rule 26 for Class Action and Mass Action Cases Is Not Warranted. The Chamber asserts that the need for disclosure requirements is "most acute" in the class-action context because "aggregate litigation already involves little, if any, control by the plaintiffs" and thus exposes absent class members to a situation where the litigation finance company will control the lawsuit.[138] The Chamber's concerns are misplaced. As explained above, litigation funders do not control the litigation; the parties and their counsel do. And the Chamber's suggestion that the need for a new disclosure rule is *greater* in the class-action context is backwards, given that Rule 23 already contains numerous procedural safeguards for absent class members, including Rule 23(a)'s requirements of adequacy of representation. The Chamber has offered no evidence in support of its assertion that a broad amendment to Rule 26 is necessary to ensure that absent class members' interests are properly protected.

The Northern District of California's standing order confirms that an across-the-board disclosure requirement is unnecessary.[139] That court considered requiring disclosure of litigation funders in *every* civil lawsuit, but it ultimately limited the scope of the order to apply only to class actions.[140] Likewise, while the court in *Gbarabe* ultimately granted the defendant's motion to compel disclosure of the funding agreement, it did so only after finding that the agreement was relevant to the adequacy determination because of the specific "circumstances of *this case*."[141] Notably, neither the litigation funder nor the plaintiff's lawyers in *Gbarabe* contested that relevance determination or opposed disclosure.

Finally, the Fairness in Class Action Ligation Act ("FCALA") does not support the Chamber's position. Importantly, FCALA does not propose to require disclosure of third-party

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[134] *See id.*
[135] *Abu-Ghazaleh*, 36 So. 3d at 693.
[136] *Id*.
[137] *Id*.
[138] 2017 Letter at 20.
[139] *See generally* N.D. Cal. Standing Order.
[140] *See* U.S. District Court for the Northern District of California, *Comments Received on Draft Local Rule 3-15*, https://www.cand.uscourts.gov/filelibrary/2879/Comments-Received-On-Draft-CLR-3-15.pdf; U.S. District Court for the Northern District of California, *Notice Regarding Civil Local Rule 3-15*, https://www.cand.uscourts.gov/news/210.
[141] *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2016 WL 4154849, at *2 (N.D. Cal. Aug. 5, 2016) (emphasis added).

litigation funding arrangements in *all* cases, only in class action lawsuits.[142] And FCALA is not law: although it passed the House, it is far from clear whether the Senate will enact it. The Committee thus should give no weight to FCALA in its decision-making.

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For all of the foregoing reasons, we respectfully submit that the Chamber's renewed request does not merit this Committee's reconsideration.

Respectfully submitted,

/s/

Christopher P. Bogart
Chief Executive Officer

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[142] "In any *class action*, class counsel shall promptly disclose in writing to the court and all other parties the identify of any person or entity, other than a class member or class counsel of record, who has a contingent right to receive compensation from any settlement, judgment, or other relief obtained in the action." Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 103(a) (emphasis added).