September 25, 2024

The Honorable Harvey Brown
Supreme Court Advisory Committee
10940 W. Sam Houston Pkwy N.,
Suite 100
Houston, TX 77064

RE: Increasing The Transparency Of Third-Party Litigation Funding

Dear Judge Brown:

We are writing on behalf of the Texas Civil Justice League ("TCJL"), the U.S. Chamber of Commerce Institute for Legal Reform ("ILR"), and Lawyers for Civil Justice ("LCJ") in connection with the subject of third-party litigation funding, or "TPLF," which is currently one of the subjects being studied by the Supreme Court Advisory Committee for potential rulemaking. The purpose of this letter is two-fold: (1) to express the undersigned's strong support for the adoption of a disclosure requirement for TPLF arrangements in all civil cases in Texas state court; and (2) to respond to the International Legal Finance Association's ("ILFA") recent letter (the "ILFA Letter" or the "Letter") opposing such a proposal.

TCJL is the nation's oldest and largest state legal reform organization. Its members include hundreds of corporate businesses of all sizes: law firms, professional and trade associations, health care providers, and individuals. For more than three decades, TCJL has represented the common interests of Texas businesses and individuals in achieving an accessible, efficient, and impartial civil justice system. TCJL has pursued a broad civil justice reform agenda and works to assure that regulatory and administrative processes and procedures are fair, equitable, and efficient and do not impose undue burdens or excessive penalties on Texas businesses.

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 millions of businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, so it is wholistically dedicated to promoting, protecting, and defending America's free enterprise system.

LCJ is a national coalition of corporations, defense trial lawyer organizations, and law firms that advocates for excellence and fairness in the civil justice system. Since 1987, LCJ has actively endorsed rule reforms that (1) promote balance in the civil justice system; (2) reduce the costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

TPLF is a rapidly growing business model in which non-parties invest in litigation by paying money to a plaintiff or his/her counsel in exchange for a contingent interest in any

proceeds from the lawsuit. Virtually all TPLF activity in U.S. and Texas courts occurs in secrecy because there is no generally applicable statute or rule requiring disclosure.[1] ILFA's Letter does not dispute either reality. Instead, it claims on the very first page that ILFA "does not oppose reasonable disclosure requirements."[2] That statement is simply not credible given that ILFA has consistently opposed such proposals.[3] Indeed, ILFA devotes the bulk of its Letter to perpetuating a series of claims that the funding industry has repeatedly used to ***resist*** disclosure proposals, including that: (1) the existence of TPLF in a lawsuit is irrelevant to the claims and defenses; (2) funders do not exercise any control or influence over the litigation they invest in; (3) judges approach the question of disclosure differently; (4) foreign investment in litigation is without any risk; (5) disclosure of TPLF arrangements violates the work-product doctrine; and (6) TPLF disclosure threatens to chill speech and violate the First Amendment. As explained below, these claims are either untrue or actually highlight the need for disclosing TPLF arrangements in Texas state courts.

## I. WHETHER TPLF IS RELEVANT TO A PARTY'S CLAIMS OR DEFENSES MISSES THE POINT.

One of the first claims ILFA makes in opposing a TPLF disclosure requirement is that "[t]he facts surrounding how a party finances its litigation . . . are simply not relevant to the merits of the litigation in the vast majority of cases."[4] This argument fundamentally misapprehends the purpose of a TPLF disclosure requirement.

In 1970, the Federal Advisory Committee on Civil Rules (the body responsible for overseeing changes to the Federal Rules of Civil Procedure) confronted the question whether defendants should be required to disclose insurance agreements that may pertain to a lawsuit. The Committee observed that many courts had rejected discovery requests for such agreements, often "reason[ing] from the text of Rule 26(b) that it permits discovery only of matters which will be admissible in evidence or appear reasonably calculated to lead to such evidence."[5] The

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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 ILFA Letter at 1.

3 *See, e.g.*, Statement for the Record, International Legal Finance Association, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, "The U.S. Intellectual Property System and the Impact of Litigation Financed by Third-Party Investors and Foreign Entities" (June 12, 2024), https://docs.house.gov/meetings/JU/JU03/20240612/117421/HHRG-118-JU03-20240612-SD004.pdf (ILFA statement to Congress arguing that mandatory "disclosure would be highly prejudicial and create an unlevel playing field" and "would allow opposing parties to weaponize financing to their advantage"); Statement for the Record, International Legal Finance Association, United States House of Representatives Committee on Oversight and Accountability (Sept. 13, 2023), https://www.congress.gov/118/meeting/house/116346/documents/HHRG-118-GO00-20230913-SD016.pdf (ILFA statement to congress arguing that "forced" (i.e., mandatory) disclosure of TPLF is "highly politicized" and supported by "specious arguments"); ILFA, Comments Regarding Proposed New Local Civil Rule 7.1.1, United States District Court for the District of New Jersey, https://uploads-ssl.webflow.com/5ef44d9ad0e366e4767c9f0c/60aeece4a69ea26e52b1d847_2021%2005%2010%20ILFA%20Letter%20to%20DNJ.pdf (opposing disclosure rule in District of New Jersey).

4 ILFA Letter at 1.

5 Fed. R. Civ. P. 26 advisory committee's notes to 1970 amendment.

Committee noted that those courts "avoid[ed] considerations of policy, regarding them as foreclosed."[6] The Committee ultimately concluded that the Rule 26(b) "relevancy" analysis was beside the point and that policy considerations dictated that insurance agreements should be subject to a mandatory disclosure requirement—that defendants should be required to produce them without need for a discovery request.[7]

Importantly, Texas later reached the same conclusion by adding subsection (b)(7) to Rule 194.2, requiring automatic production of "any indemnity and insuring agreements" at the outset of a lawsuit.[8] Echoing the federal rule's drafters, the Supreme Court has explained that mandatory discovery of insurance agreements "***regardless of their relevance to the underlying suit's merits*** . . . 'enable[s] 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.'"[9]

The same logic supports the disclosure of TPLF agreements. Like the disclosure of insurance agreements, sharing TPLF agreements will provide some sense of the plaintiffs' litigation resources. Further, like insurance agreements, the TPLF agreement will provide insights into the role the third-party player (that is, the TPLF entity) may play in any settlement negotiations. Accordingly, disclosure of the actual funding agreements would complement the existing insurance disclosure requirement and enable courts and defendants to more accurately evaluate settlement prospects and to better calibrate settlement initiatives.

Accordingly, and notwithstanding any decisions on the "relevancy" of such information, the Supreme Court should adopt a mandatory disclosure rule regarding TPLF agreements, just as it did regarding insurance agreements. In particular, the undersigned propose amending Rule of Civil Procedure 194.2(b) by adding TPLF agreements to the list of information that must be produced in initial disclosures. In particular, the undersigned propose adding a new subsection (13) stating the following:

(i) the identity of any commercial enterprise (other than counsel of record) that has a right to receive any payment that is contingent on the outcome of the civil action or a group of the actions of which the civil action is a part;

(ii) and produce to the court and each other named party to the civil action, for inspection and copying, except as otherwise stipulated or ordered by the court, any agreement creating a contingent right referred to in paragraph (i).

In short, contrary to the TPLF company arguments, the Committee clearly is not precluded from adopting on policy grounds a rule requiring mandatory disclosure of materials that are arguably not relevant under existing discovery rules.

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6 *Id.*

7 *Id.*

8 Tex. R. Civ. P. 194.2(b)(7).

9 *In re Dana Corp.*, 138 S.W.3d 298, 304 (Tex. 2004) (emphasis added) (citation omitted).

## II. THERE IS MOUNTING EVIDENCE THAT FUNDERS EXERCISE CONTROL AND INFLUENCE OVER THE LITIGATION THEY SPONSOR, UNDERSCORING THE NEED FOR A MANDATORY DISCLOSURE RULE.

According to ILFA's Letter, funders are merely "passive investors"—i.e., they do not control or influence the litigation they choose to bankroll.[10] This statement mirrors the claims made by individual funders themselves, including Burford Capital (the world's largest funder), which has repeatedly represented that it "***do[es] not control strategy or settlement decision-making***."[11] However, this narrative is contradicted by several recent examples of actual TPLF agreements that have expressly ceded such authority to third-party investors.

Most notably, Sysco Corporation ("Sysco") filed a series of antitrust class actions against various poultry and meat suppliers that it financed with more than $140 million provided by Burford.[12] During the pendency of the TPLF arrangement, Burford demanded that the funding agreement be changed to give Burford the right to review and reject settlement offers, provided Burford's consent is not "unreasonably withheld."[13] Once Sysco began receiving settlement offers it found to be reasonable, Burford allegedly sought to obstruct further settlement negotiations, complaining that the amounts were too low.[14] Burford instituted proceedings to enjoin Sysco from finalizing settlements, and an arbitral panel granted an *ex parte* temporary restraining order in Burford's favor.[15]

Burford and Sysco eventually settled their dispute. Although most of the details of the settlement remain confidential, one aspect that was publicly disclosed is that Sysco agreed to assign its claims to an affiliate of Burford. The fact that Sysco had to assign its claims to a Burford affiliate just to extricate itself from lawsuits Burford insisted on prolonging raises

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10 ILFA Letter at 10.

11 *See* https://www.burfordcapital.com/how-we-work/with-law-firms/ (emphasis added); *see also, e.g.*, https://www.burfordcapital.com/insights/insights-container/byline-pli-legal-finance-post-covid/ ("If the matter wins, they can expect a meaningful share of the remaining damages, and if it loses, they keep any capital advanced, locking in a minimum outcome. In both scenarios, ***the company maintains control of its litigation***—and considerably more control over its finances.") (emphasis added); https://www.burfordcapital.com/insights/legal-finance-101/ ("Reported use of legal finance—also called litigation finance or litigation funding—has doubled in recent years, as companies and law firms increasingly recognize the benefits of gaining better control over legal budgets and risk ***without ceding control of litigation decision-making or settlement***.") (emphasis added); https://www.burfordcapital.com/insights/insights-container/how-do-law-firms-use-portfolio-finance/ ("[T]he use of legal finance generally does not alter control of decision-making or attorney-client relationships. Burford makes a portfolio deal directly with the firm, but Burford's role is that of a passive investor. Therefore, ***Burford does not control the litigation or settlement strategy and decision-making***, except when agreed to by our client.") (emphasis added); https://www.sec.gov/Archives/edgar/data/1714174/000110465920081137/filename1.htm ("Unlike in our legal finance business, where we are ***financing a client who retains decision-making authority in the litigation*** . . . .") (emphasis added).

12 *In re Pork Antitrust Litig*., MDL No. 3031, 2024 U.S. Dist. LEXIS 97801, at *5 (D. Minn. June 3, 2024).

13 *See* Am. Petition to Vacate Arbitration Award ¶ 40, *Sysco Corp. v. Glaz LLC*, No. 1:23-cv-01451, ECF No. 18 (N.D. Ill. filed Mar. 20, 2023).

14 *See id.* ¶¶ 30-40.

15 *See id.* ¶¶ 41-58.

serious questions about the extent of Burford's control and influence over the actions. Indeed, the defendants in the underlying litigation mounted legal challenges to the substitution of the Burford affiliate as a plaintiff, and the assignment continues to be the subject of significant and ongoing litigation.

Notably, earlier this year, U.S. District Judge John Tunheim (D. Minn.) affirmed a magistrate judge's denial of the requested substitution, reasoning that it "threaten[ed] the public policy favoring the settlements of lawsuits."[16] As the court put it, "Sysco and Burford's conduct is precisely the kind of conduct of which courts are wary." The requested substitution "resulted from their attempt to resolve [a] dispute over whether" Sysco (the plaintiff) or Burford (the investor) "should ***control*** this litigation." While Judge Tunheim refused to "approve such conduct," other judges will have no way of even knowing whether such conduct is at play in their cases unless there is a mandatory requirement that TPLF arrangements (including their terms) be disclosed as a matter of course.

Importantly, the *Sysco* dispute is not an outlier; rather, it mirrors multiple other examples of funder control or influence over litigation. For example, in September 2023, Burford-backed litigants won a potentially $16 billion judgment against the government of Argentina. As a Burford representative put it, "[t]here is no aspect of this case, from ***strategy*** to minutiae, that did not involve an experienced Burford team spending many thousands of hours getting to this point."[17] The elaborate funding agreement utilized by Burford in class action litigation against Chevron in Ecuador also "provide[d] control to the Funders" through the "installment of 'Nominated Lawyers'"—lawyers "selected by the Claimants with the Funder's approval."[18] Similarly, in *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 matter "effectively g[a]ve Prospect [Funding Holdings, LLC (a TPLF entity)] substantial control over the litigation," including terms that "may interfere with or discourage settlement" and otherwise "raise[d] quite reasonable concerns about whether a plaintiff can truly operate independently in litigation."[19] And in *Gbarabe v. Chevron Corp.*, the funding agreement contained several key provisions that suggested Therium Litigation Funding IC, a Jersey-based litigation funder, sought to influence the course of the litigation, including one prohibiting the lawyers from engaging any co-counsel or experts without the funder's consent.[20]

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[16] *In re Pork*, 2024 U.S. Dist. LEXIS 97801, at *13.

[17] Burford Capital Statement on YPF Damages Ruling (Sept. 8, 2023), https://investors.burfordcapital.com/news/news-details/2023/BURFORD-CAPITAL-STATEMENT-ON-YPF-DAMAGES-RULING/default.aspx (emphasis added).

[18] Maya Steinitz, *The Litigation Finance Contract*, 54 Wm. & Mary L. Rev. 455, 472 (2012).

[19] 771 F. App'x 562, 579-80 (6th Cir. 2019).

[20] Litigation Funding Agreement, § 1.1, *Gbarabe v. Chevron Corp.*, No. 3:14-cv-00173-SI, ECF No. 186-4, 69-91 (N.D. Cal. filed Sept. 16, 2016). In a lawsuit filed in 2018, White Lilly, LLC, a TPLF entity, affirmatively asserted that it had the contractual right to exercise control over the litigation in which it had invested by, *inter alia*, requiring that specified counsel (who had an existing relationship with the TPLF company) serve as one of the plaintiff's counsel in the funded lawsuit. *See* Compl. ¶ 35, *White Lilly, LLC v. Balestriere PLLC*, No. 1:18-cv-12404-ALC (S.D.N.Y. filed Dec. 31, 2018). Notably, Bentham IMF—now Omni Bridgeway—specifically

*(cont'd)*

While TPLF agreements have largely remained secret, the handful of disputes between funders and the litigants they finance demonstrate that funders are ***not*** merely passive investors. Rather, they contract for—and often exercise—authority to control or influence (i.e., protect) their investments. A mandatory disclosure requirement in Texas would ensure that plaintiffs and their counsel are driving strategy and litigation decisions rather than third-party investors, who have no fiduciary obligations to the claimants and whose primary interest is maximizing their own profit.

## III. INCREASING JUDICIAL, LEGISLATIVE, AND EXECUTIVE BRANCH CONCERNS ABOUT TPLF AND DISPARATE APPROACHES DEMONSTRATE WHY JUDGES NEED STANDARDIZED GUIDANCE TO STEER THEIR INQUIRIES.

ILFA further claims that federal courts have differing opinions on mandatory disclosure, and that only limited disclosure rules have been adopted.[21] But in so claiming, ILFA fails to grapple with the growing judicial, legislative, and executive branch concern regarding TPLF and the increasing consensus that transparency regarding this practice is necessary. And while there is no doubt that courts have taken varying approaches to the disclosure of TPLF funding agreements, that variability underscores why uniform disclosure rules are needed going forward.

***First***, while ILFA accuses TCJL and ILR of "overstat[ing] the current state of federal rules requiring disclosure,"[22] ILFA is the one that is misstating the state of play. It ignores significant examples of individual federal judges requiring basic TPLF disclosure either through their questioning of counsel or by court order. For example:

- Judge Yvonne Gonzalez Rogers of the U.S. District Court for the Northern District of California orally asked each attorney seeking a leadership position in the recently established social media addiction multidistrict litigation ("MDL") proceeding to divulge in open court whether he or she is using (or plans to use) TPLF.[23]

- Chief Judge Colm Connolly of the U.S. District Court for the District of Delaware issued a standing order requiring litigants to disclose whether their cases are being financed by TPLF, and whether there are any conditions tied to that funding (i.e.,

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contemplated funder control over litigation strategies in its 2017 "best practices" guide for U.S. matters, highlighting the importance of setting forth specific terms in TPLF agreements that give the funder authority to: "[m]anage a litigant's litigation expenses"; "[r]eceive notice of and provide input on any settlement demand and/or offer, and any response"; and participate in settlement decisions. Bentham IMF, Code of Best Practices (Jan. 2017).

[21] ILFA Letter at 1-5.

[22] *Id.* at 1.

[23] Hr'g Tr. 12:21-24, *In re Soc. Media Adolescent Addiction/Pers. Injury Prods. Liab. Litig.*, MDL No. 3047, ECF No. 84 (N.D. Cal. Nov. 9, 2022) ("I want to know explicitly whether you use [TPLF] or intend to use it in this case.").

whether a funder's approval for any litigation or settlement decisions is required).[24]

- Judge J. Philip Calabrese of the U.S. District Court for the Northern District of Ohio has a standing order similar to that of Judge Connolly, requiring the parties to disclose any TPLF funding agreements they may have.[25]

- Judge Paul W. Grimm of the U.S. District Court for the District of Maryland has also required lawyers leading an MDL proceeding concerning a data breach of Marriott hotels to make similar disclosures.[26]

Judge M. Casey Rodgers, who presided over the Combat Arms Earplug MDL proceeding and a recent $6.8 billion settlement, went even further than her fellow jurists. She not only required the parties using TPLF to disclose the agreements, but also "review[ed] those contracts with a high degree of scrutiny" after noting that "[f]or at least the past decade, settlements of th[e] size and nature [of the 3M settlement] have often attracted the attention of third-party litigation funding entities intending to prey on litigants, including settlement participants seeking litigation funding pending the receipt of potential settlement funds."[27] In addition, Judge Rodgers went beyond simply requiring disclosure of the agreements, specifically prohibiting any plaintiff from "obtain[ing] third-party litigation funding, absent the filing of a motion with, and obtaining the prior approval of, th[e] [c]ourt."[28]

Contrary to ILFA's suggestion, the Advisory Committee on Civil Rules also continues to consider a proposed amendment to Rule 26 that would require the production of TPLF agreements as a matter of course in all federal civil cases.[29] While the Advisory Committee has yet to move forward on the underlying proposal, it is included as an agenda item in the Advisory

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[24] *See* Standing Order Regarding Third-Party Litigation Funding Arrangements, https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf. Notably, plaintiffs in multiple patent cases pending before Judge Connolly have challenged the standing order by filing a series of virtually identical petitions for a writ of mandamus with the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit denied each of the petitions, signaling that the standing order will remain in effect for the foreseeable future. *See In re Nimitz Techs. LLC*, No. 2023-103, 2022 WL 17494845, at *3 (Fed. Cir. Dec. 8, 2022).

[25] *See* Rule 26(f) Report of the Parties, Standing Orders, Judge J. Philip Calabrese (N.D. Ohio), https://www.ohnd.uscourts.gov/sites/ohnd/files/Rule%2026%28f%29%20Report%20of%20the%20Parties%20%281.2.2024%29.pdf.

[26] *See* Case Mgmt. Order Regarding Model Leadership Appls. for Consumer Track at 2-3, *In re Marriott Int'l Customer Data Sec. Breach Litig.*, No. 8:19-md-02879-JPB, ECF No. 171 (D. Md. filed Apr. 11, 2019).

[27] Case Mgmt. Order No. 61 (Third-Party Litigation Funding) at 1, 3, *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19-md-02885-MCR-HTC, ECF No. 3815 (N.D. Fla. filed Aug. 29, 2023).

[28] *Id.*

[29] Document No. 17-CV-O, https://www.uscourts.gov/sites/default/files/17-cv-o-suggestion_ilr_et_al_0.pdf (June 1, 2017), as supplemented by letter dated November 3, 2017, Document No. 17-CV-GGGGGG, https://www.uscourts.gov/sites/default/files/17-cv-gggggg-suggestion_us_chamber_et_al_0.pdf. The proposal has been further supplemented with updates and additional information regarding TPLF on an almost yearly basis. *See, e.g.*, Document No. 23-CV-M, https://www.uscourts.gov/sites/default/files/23-cv-m_suggestion_from_35_organizations_-_rule_26_0.pdf (May 8, 2023 letter); Document No. 22-CV-M, https://www.uscourts.gov/sites/default/files/22-cv-m_suggestion_from_lcj_and_ilr_-_rule_16c2_0.pdf (Sept. 8, 2022 letter).

Committee's October 10, 2024 Agenda Book and is still under consideration.[30] Indeed, as the Committee expressly noted in the portion of its 2019 report cited by ILFA, the Committee "continues to study third-party litigation funding (TPLF), ***including various proposals for disclosure***."[31]

ILFA's Letter does not address the substantial Congressional efforts currently underway to address the risks posed by undisclosed TPLF investments. Most recently, following a hearing on TPLF usage in U.S. courts,[32] Representative Darrell Issa (R-CA), Chairman of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, circulated a discussion draft of the Litigation Transparency Act of 2024.[33] The bill would apply to all civil cases in federal courts and would require: (1) disclosure of the use of TPLF within 10 days of execution of a TPLF agreement or when the lawsuit is filed, whichever is sooner; and (2) the production of TPLF agreements at the outset of any federal civil case. Another proposal currently pending before Congress is the Protecting Our Courts from Foreign Manipulation Act of 2023—a bipartisan bill introduced by Senators John Kennedy (R-LA) and Joe Manchin (R-WV) in the Senate, and by Speaker Mike Johnson (R-LA) in the House of Representatives.[34] The legislation would: (1) require disclosure of foreign sources of TPLF in American courts; (2) ban sovereign wealth funds ("SWFs") and foreign governments from investing in U.S. litigation; and (3) require the Department of Justice's national security division to submit a report on foreign TPLF

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[30] *See* Advisory Committee on Civil Rules October 10, 2024 Agenda Book, at 417 (October 2024) https://www.uscourts.gov/rules-policies/records-rules-committees/agenda-books ("It is included on this agenda because there is an ongoing concern about the possible impact of litigation funding on civil litigation in the federal courts.").

[31] Hon. John D. Bates, Report of the Advisory Committee on Civil Rules, at 9 (June 4, 2019) (emphasis added) (cited in ILFA Letter at 3). More recent statements, including the October 10, 2024 Agenda Book from the Committee reflect its continued consideration of the proposal. *See, e.g.*, *supra* note 30; Report of the Advisory Committee on Civil Rules, at 9 (May 11, 2023) ("TPLF remains on the Committee's agenda . . . .") (cited in Committee on Rules of Practice & Procedure, at 792 (June 6, 2023)); Report of the Advisory Committee on Civil Rules, at 7 (Dec. 14, 2021) ("[B]ecause TPLF did appear to be an important and rapidly evolving matter, the Advisory Committee kept the topic on its agenda and has been monitoring it. . . . [T]he Advisory Committee did not decide that immediate action was called for, but it did recognize that TPLF is a large topic, and that continued monitoring was in order. This report outlines current thinking.") (cited in Committee on Rules of Practice & Procedure, at 190 (Jan. 4, 2022)).

[32] The U.S. Intellectual Property System and the Impact of Litigation Financed by Third-Party Investors and Foreign Entities: Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet, 118 Cong. (June 12, 2024).

[33] *See* Press Release, Representative Darrell Issa, *Issa Introduces Discussion Draft of Legislation Reforming Third-Party Financed Civil Litigation* (July 11, 2024), https://issa.house.gov/media/press-releases/issa-introduces-discussion-draft-legislation-reforming-third-party-financed.

[34] At the time of this letter, the bill's Senate sponsors were seeking to include its provisions as an amendment to the National Defense Authorization Act for 2025. *See* S.A. 2333 – 118th Congress (2023-2024): Protecting Our Courts From Foreign Manipulation, Amendment to S. 4638, 118th Cong. (July 11, 2024), https://www.congress.gov/118/crec/2024/07/11/170/115/CREC-2024-07-11-pt1-PgS4667-4.pdf.

to the federal judiciary.[35] The bills have been referred to the House and Senate Judiciary Committees and are awaiting further action.

ILFA similarly omits any discussion of the increasing attention to TPLF by the Executive Branch, which has also recognized the importance of TPLF disclosure. For example, the Securities and Exchange Commission adopted a rule requiring private equity firms to disclose the percentage of their capital targeted for litigation funding.[36] In addition, a growing number of states have recently enacted laws requiring the disclosure of TPLF arrangements. For example:

- In 2018, Wisconsin became the first state to require that "a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person . . . has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise."[37]

- West Virginia enacted a TPLF disclosure law in 2019, which, like Wisconsin's law, requires disclosure of agreements where a litigation financier has a right to receive compensation from the lawsuit.[38] In March 2024, West Virginia's governor signed into law amendments that, among other things: (1) updated the definition of "consumer" to include non-natural people (i.e., businesses); (2) removed commercial tort claims from the list of items excluded from the definition of TPLF; and (3) clarified that counsel are subject to the disclosure requirement.[39]

- Montana recently enacted a bill requiring the disclosure of TPLF agreements that are used to finance lawsuits brought by consumers.[40] This legislation was passed with a unanimous vote in both chambers of the state legislature. The new law also requires that litigation funders register with the Montana secretary of state, makes funders jointly liable for costs, and establishes a 25% cap on the amount that a funder may receive or recover from a lawsuit.

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35 Press Release, U.S. Senator John Kennedy, *Kennedy, Manchin Introduce Bipartisan Protecting Our Courts from Foreign Manipulation Act to End Overseas Meddling in U.S. Litigation* (Sept. 14, 2023), https://www.kennedy.senate.gov/public/2023/9/kennedy-manchin-introduce-bipartisan-protecting-our-courts-from-foreign-manipulation-act-to-end-overseas-meddling-in-u-s-litigation; *see also* Press Release, U.S. Congressman Mike Johnson, *Johnson Introduces Bipartisan 'Protecting Our Courts from Foreign Manipulation Act' to End Overseas Meddling in U.S. Litigation* (Sept. 14, 2023), https://mikejohnson.house.gov/news/documentsingle.aspx?DocumentID=1339.

36 *See* Andrew Ramonas, *SEC Tells Private Equity Firms to Report on Litigation Finance*, Bloomberg Law (May 3, 2023), https://news.bloomberglaw.com/esg/sec-tells-private-equity-firms-to-report-on-litigation-finance.

37 2017 Wis. Act 235, https://docs.legis.wisconsin.gov/2017/related/acts/235.

38 W. Va. Code Ann. § 46A-6N-6 (enacted 2019).

39 S.B. 850, 2024 Reg. Sess. (W.V. Mar. 9, 2024) (signed Mar. 27, 2024).

40 *See* MT LEGIS 360 (2023), 2023 Montana Laws Ch. 360 (S.B. 269) (enacted 2023).

- Indiana also recently passed a law similarly requiring the disclosure of TPLF agreements with consumer parties.[41] Indiana amended that law to also ban funding by certain foreign parties, prohibit commercial litigation financiers from making litigation and settlement decisions, bar parties from providing sealed or protected documents to their litigation funders, and make the contents of commercial litigation funding agreements discoverable.[42]

- Most recently, on June 19, 2024, Louisiana Governor Jeff Landry signed into law Senate Bill 355.[43] The newly enacted law requires, among other things: (1) foreign funders to disclose certain information to Louisiana's attorney general; (2) prohibits funders from influencing or making certain litigation and settlement decisions; and (3) makes the existence of TPLF agreements subject to discovery under Louisiana's Code of Civil Procedure and Code of Evidence rules.[44]

ILFA does not address any of these developments in its Letter. Instead, it baldly claims that the lack of similar legislation in Texas "is a clear signal to the Supreme Court Advisory Committee that the regulation or disclosure of litigation finance is not supported by the members of the legislative body of Texas."[45] But that is rank speculation. Indeed, the fact that other states are increasingly enacting laws designed to make TPLF more transparent strongly suggests that legislators in Texas will likewise be open to reforming this highly secretive practice. In any event, the Supreme Court has a fundamental obligation to ensure the ethical functioning of the Texas civil justice system—irrespective of the views of individual lawmakers with regard to TPLF. Given the serious ethical and other issues raised by TPLF (e.g., improper control over litigation and settlement decisions), a disclosure rule would further that important function.[46]

In short, ILFA is understating the growing recognition among courts, lawmakers, and policymakers that TPLF lacks sufficient transparency.

***Second***, the variability of existing TPLF rules highlights why the Texas judicial system would benefit from a uniform approach to this issue. While the undersigned are unaware of—and have not been able to find—examples of Texas judges addressing TPLF, it is inconceivable

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41 IN LEGIS 63-2023 (2023), 2023 Ind. Legis. Serv. P.L. 63-2023 (H.E.A. 1124) (enacted 2023).

42 Ind. Code Ann. § 24-12-1-0.5, et. seq.

43 Mark Popolizio, *Louisiana Enacts New Third-Party Litigation Funding (TPLF) Law*, Verisk (June 27, 2024), https://www.verisk.com/blog/louisiana-enacts-new-third-party-litigation-funding-tplf-law/.

44 *See generally* https://legis.la.gov/legis/ViewDocument.aspx?d=1382655.

45 ILFA Letter at 7-8.

46 ILFA also claims that Texas courts have a long history of permitting champerty and maintenance because "there is little caselaw in existence" regarding those doctrines in this State. ILFA Letter at 5. But the lack of such caselaw does not mean that the doctrine has been completely abrogated. If anything, the limited caselaw suggests that champerty "may have been replaced or superseded by Texas's barratry statute," which prohibits "the solicitation of employment to prosecute or defend a claim with intent to obtain a personal benefit." *Campbell v. Chase Home Fin. LLC*, No. A-10-CA-884-SS, 2011 WL 13324033, at *2 (W.D. Tex. Sept. 27, 2011) (quoting *State Bar of Tex. v. Kilpatrick*, 874 S.W.2d 656, 658 n.2 (Tex. 1994)). ILFA does not offer any reason why the public policy underlying Texas's barratry statute would not be fairly served by shining some light on secretive investments in litigation that are being made for the sole purpose of pecuniary gain.

that the practice is not being used in this State. As a result, if Texas courts are not already grappling with questions related to TPLF, they will soon have no choice but to confront them. And absent a statewide rule governing TPLF transparency, there is a substantial risk that judges in Texas will take widely divergent approaches.

The federal examples highlighted in ILFA's letter illustrate the checkerboard of differing approaches. For example, at one end of the spectrum is a rule in effect in the District of New Jersey that requires each party to file a certification within 30 days of docketing of the case that discloses the identity of each funder (name, address, place of formation), states whether the funder's approval is necessary for litigation and settlement decisions, and provides a description of the nature of the financial interest.[47] Parties may also be entitled to additional discovery on the details of TPLF agreements upon a showing of good cause.[48] By contrast, a standing order in the Northern District of California only requires parties to provide limited identifying information, has no provisions for additional discovery of the terms of any agreements, and, most importantly, only applies to class, collective, and representative actions.[49]

ILFA also claims that "[v]ery limited disclosure rules have been adopted in" the federal opioid and Zantac MDL proceedings.[50] But while the rules in place in those two litigations are a step in the right direction, they are inadequate. As ILFA acknowledges, the approach taken in those proceedings was for the judge to rely on plaintiffs' counsel's say-so *in camera*—i.e., outside the presence of the defendants. In particular, the counsel whose clients were using TPLF were required to attest that the underlying agreements did not give the funders "any control over litigation strategy or settlement decisions."[51] However, a "yes/no" answer to such a question says nothing about the nature of the arrangement, much less whether it vests an outside funder with authority to influence or control the litigation. Nor can it possibly suffice for a judge to uncritically accept one party's representation that the agreement it or its client has entered into does not raise any control or influence issues. Based on the allegations in the *Sysco* case previously discussed, a lawyer may feel justified in saying that a contract providing the investor shall not "unreasonably withhold" consent does not cede control. But to truly grasp whether an investor retains control, it is necessary to fully and critically examine the agreement itself—with input from all parties—because there may be boilerplate language purporting to preserve party and counsel control that is inconsistent with other substantive provisions empowering funders.

Reviewing an agreement *ex parte* provides judges with better information, but it puts judges in the precarious and complicated position of interpreting contracts without the benefit of the analysis of the other parties to the case and while withholding information from them. A requirement that litigants produce funding agreements to the other side would prevent such a thorny scenario from ever arising by subjecting funding agreements to the adversarial process

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47 *See* D.N.J. L. Civ. R. 7.1.1(a).

48 *See id.*

49 Standing Order for All Judges of the Northern District of California (Nov. 1, 2018).

50 ILFA Letter at 4-5.

51 *Id.* (opioid litigation); *see also id.* (counsel in the *Zantac* litigation were required to answer whether "the litigation funder ha[s] any control . . . over the decision to file or the content of any motions or briefs, or any input into the decision to accept a settlement offer?").

and affording party opponents the opportunity to challenge generic claims that investors are not controlling or influencing the case.

Notably, in contrast to the varying federal approaches to TPLF disclosure, the states that have most recently weighed in on the issue (e.g., Wisconsin, West Virginia, Montana, and Indiana) have generally embraced the approach the undersigned are advocating here. Each of those states generally requires disclosure of the existence of TPLF and the production of the TPLF funding agreement to both the court and the opposing party. Adopting a similar approach in Texas would ensure both that judges in this State approach TPLF disclosure uniformly and that all litigants and courts are consistently able to ascertain whether the usage of TPLF in a given case raises any legal or ethical issues.

As the examples highlighted by ILFA and the undersigned illustrate, there is no question that judges and policymakers are growing increasingly concerned with the secrecy surrounding TPLF. While the federal approaches are an important step in the right direction, their divergent nature underscore why a single statewide approach is the most sensible way to address the issue within the Texas judicial system. And an amendment to the Texas Rules of Civil Procedure requiring any party using TPLF to produce the underlying agreement to his or her opponent at the outset of the case would do just that.

## IV. THE RISE OF TPLF RAISES NEW QUESTIONS ABOUT POTENTIAL MANIPULATION OF THE U.S. JUDICIAL SYSTEM BY FOREIGN ACTORS.

ILFA contends that there is "zero evidence that a hostile foreign state has invested in litigation financing in this country."[52] This argument is unpersuasive for several reasons. For starters, it is entirely circular. As previously discussed, virtually all TPLF activity in U.S. courts occurs in secrecy because there is presently no generally applicable statute or rule requiring disclosure.[53] Moreover, to the extent that defendants seek this information through ordinary discovery, plaintiffs generally resist strenuously, 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 or standing order requiring disclosure (or a public dispute emerges between the plaintiff and the funder). Accordingly, the lack of direct evidence of a foreign hostile actor investing in litigation is of little import.

In any event, the limited data that we do have show that foreign actors, including SWFs and state-owned and operated investment funds, are becoming increasingly involved in TPLF. Indeed, it has come to light that certain Russian billionaires with ties to Vladimir Putin have financed lawsuits around the world through their investment firms in an effort to evade international sanctions. Specifically, Bloomberg has published an investigation of a company called A1 that is a subsidiary of a Russian investment company called Alfa Group. A1 has spent about $20 million in ongoing bankruptcy cases in New York and London on behalf of a Russian agency seeking to recover assets that were embezzled from a Moscow bank. In fact, after three

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52 *Id.* at 10.

53 *See* Anderson, *supra* note 1.

A1 directors were sanctioned in the UK, the three sanctioned directors sold A1 for about $900 to another A1 director who had not been sanctioned. The director who purchased A1, Alexander Fain, admitted in a bankruptcy proceeding that he purchased A1 because of a "'complicated geopolitical situation' potentially affecting the litigation."[54]

The Bloomberg investigation led to questions in Congress, and Deputy Treasury Secretary Wally Adeyemo testified at a Senate hearing that the Treasury Department needs to investigate the use of litigation finance in the U.S. by foreign actors. Adeyemo testified that litigation financing by foreign actors "is an issue we have to look, we have to both work on and try and address."[55] The Deputy Secretary went on to note that "[o]ne of the challenges we have, of course, is that these Russian oligarchs have become quite expert at trying to avoid our sanctions . . . [a]nd from what I've seen, [TPLF] is one of the several ways they're trying to do that."[56]

Foreign investment in U.S. litigation also raises concerns over the misuse of confidential information by foreign actors, including potential adversaries. Purplevine IP Operating Co., Ltd. (Purplevine), a China-based firm that markets itself as a one-stop IP service provider, is financing at least four intellectual property lawsuits in U.S. courts against Samsung Electronics Co. and a related subsidiary.[57] Unlike in most cases, Purplevine's role within the litigation was involuntarily disclosed during litigation in Delaware due to a standing order that the judge overseeing the case—Chief U.S. District Judge Colm Connolly—had previously entered requiring certain basic TPLF-related disclosures.[58] This disclosure, subsequent reporting, and facts learned at trial revealed a tangled relationship between this litigation funder and the patent claims at issue and suggest that Purplevine may have received and relied upon privileged, confidential and highly sensitive information in bankrolling Staton Techiya, LLC's (Techiya) patent infringement claims against Samsung.[59] Although the patent technology at issue related to sound systems and did not directly implicate national security concerns per se,[60] the alleged

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[54] Emily R. Siegel & John Holland, *Putin's Billionaires Dodge Sanctions by Financing Lawsuits*, Bloomberg Law (Mar. 28, 2024), https://news.bloomberglaw.com/litigation-finance/putins-billionaires-sidestep-sanctions-by-financing-lawsuits.

[55] Emily R. Siegel, *Russian Use of Litigation Finance Needs Scrutiny, Treasury Says*, Bloomberg Law (Apr. 10, 2024), https://news.bloomberglaw.com/business-and-practice/russian-use-of-litigation-finance-needs-scrutiny-treasury-says.

[56] *Id.*

[57] Emily R. Siegel, *China Firm Funds US Suits Amid Push to Disclose Foreign Ties*, Bloomberg Law (Nov. 6, 2023), https://news.bloomberglaw.com/business-and-practice/china-firm-funds-us-lawsuits-amid-push-to-disclose-foreign-ties; https://www.purplevineip.com/en/.

[58] *See* Pl.'s Statement Regarding Third-Party Litigation Funding Arrangements, *Staton Techiya, LLC v. Harman Int'l Indus., Inc.*, No. 1:23-cv-00801-JCG, ECF No. 7 (D. Del. filed Aug. 24, 2023).

[59] *See* Samsung's Mot. for Leave to Amend Answer & Counterclaims to Join Purplevine & PV Law as Counterclaim Defs. at 5-6, 14-15, *Staton Techiya, LLC v. Samsung Elecs. Co.*, No. 2:23-cv-00319-JRG-RSP, ECF No. 65 (E.D. Tex. filed June 13, 2023).

[60] *See generally* Compl., *Staton Techiya, LLC v. Harman Int'l Indus., Inc.*, No. 1:23-cv-00801-JCG, ECF No. 1 (D. Del. filed July 25, 2023). An apparent relationship between Purplevine and Chinese consumer electronics giant TCL Corp. raises further questions about whether it or any other foreign actors are investing in U.S. litigation *(cont'd)*

misappropriation of discovery and other confidential litigation materials in the case illustrates the kind of misconduct that could unfold when a foreign entity chooses to fund litigation involving sensitive technology (e.g., semiconductors) that is critical to U.S. national security.[61]

These concerns are not new. More than a decade ago, a leading academic expert on TPLF warned that "the China Investment Corporation (CIC), China's Sovereign Wealth Fund, [could] fund[] a suit against an American company in a sensitive industry such as military technology" and, in the process, "obtain[] highly confidential documents containing proprietary information regarding sensitive technologies from the American defendant-corporation."[62] Multiple federal and state lawmakers have recently echoed this concern. Most recently, in a July 11, 2024 letter to the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts, Texas's own Senator John Cornyn (R-TX) and Senator Thom Tillis (R-NC) warned that "[l]itigation funding is an available weapon for foreign investors to attack domestic businesses" and that "[f]oreign adversaries could use litigation funding mechanisms to weaken critical industries or obtain confidential materials."[63] Also in July 2024, Chairman James Comer (R-KY) of the House Committee on Oversight and Accountability, wrote to Chief Justice John Roberts, urging the Judicial Conference to enact rules requiring TPLF disclosure, noting that TPLF "is now being abused by domestic and foreign actors."[64] Similarly, Senator John Kennedy (R.-LA), in a letter to Chief Justice John Roberts and U.S. Attorney General Merrick Garland, warned that "[m]erely by financing litigation in the United States against influential individuals, corporations, or highly sensitive sectors, a foreign actor can advance its strategic interests in the shadows since few disclosure requirements exist in jurisdictions across our country."[65] In letters to the chief judges of Florida's federal district courts in November 2023, Senators Marco Rubio (R-FL) and Rick Scott (R-FL) "highlight[ed] the dangers of foreign third-party litigation funding (TPLF) and the need for more transparency in the federal judiciary

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for questionable purposes—i.e., to undermine competitors, including in sensitive industries. *See* Emily R. Siegel, *China Firm Funds US Suits Amid Push to Disclose Foreign Ties*, Bloomberg Law (Nov. 6, 2023), https://news.bloomberglaw.com/business-and-practice/china-firm-funds-us-lawsuits-amid-push-to-disclose-foreign-ties.

[61] Notably, 14 state attorneys general sent a letter to the U.S. Department of Justice, bemoaning the secrecy surrounding TPLF and questioning what U.S. Attorney General Merrick Garland and other top officials are doing to ensure that the practice is not threatening U.S. national security interests. *See generally* Letter from Christopher M. Carr (GA), Jason Miyares (VA) et al. to DOJ re: Threats Posed by Third-Party Litigation Funding (Dec. 22, 2022), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2022/pr22-55-letter.pdf ("Carr 12/22/22 Letter").

[62] Maya Steinitz, *Whose Claim is This Anyway? Third-Party Litigation Funding*, 95 Minn. L. Rev. 1268, 1270 (2011).

[63] Letter from U.S. Senators John Cornyn & Thom Tillis to H. Thomas Byron III (July 11, 2024), https://www.cornyn.senate.gov/wp-content/uploads/2024/07/7.11.24-TPLF-Letter.pdf.

[64] Letter from U.S. Congressman James Comer to Hon. John Roberts (July 12, 2024), https://oversight.house.gov/wp-content/uploads/2024/07/TPLF-Letter-07122499.pdf.

[65] Press Release, U.S. Senator John Kennedy, *Kennedy Urges Roberts, Garland to Take Action to Protect National Security from Foreign Actors Meddling in U.S. Courts* (Jan. 9, 2022), https://www.kennedy.senate.gov/public/press-releases?ID=1FBC312C-94B8-409B-B0A3-859A9F35B9F5.

as it relates to this matter."[66] And in a letter to the Department of Justice ("DOJ"), 14 state attorneys general similarly raised questions surrounding the secrecy of foreign TPLF and urged the federal government to take concrete actions to ensure that the practice is not undermining U.S. national security interests.[67]

Most recently, the chief of the Foreign Agents Registration Act ("FARA") Unit at the DOJ, Evan Turgeon, highlighted concerns regarding foreign investment in U.S. litigation. Chief Turgeon explained that the Unit is focusing on SWFs that serve as the alter egos of foreign governments and thus engage in activities that directly promote foreign governments' interests.[68] He also expressed concern regarding the implication of foreign entities funding litigation in U.S. courts. According to Chief Turgeon, foreign entities can weaponize litigation to tie up U.S. businesses and deplete their resources, providing foreign competitors with an advantage. He further expressed concern that foreign adversaries may fund litigation on divisive issues to try to inflame tensions and sow division among the U.S. public. In addition, he cautioned that many foreign litigation funding entities are likely engaged in registrable conduct not covered by the legal or commercial exemptions.

Finally, the bipartisan House Select Committee on the Strategic Competition Between the United States and the Chinese Communist Party has released a report outlining a general strategy to reset the economic relationship between the U.S. and China. In that report, the Committee included two recommendations related to TPLF: (1) that the U.S. "[d]etermine, and then establish, what guardrails are needed to address the possibility of foreign adversary entities obtaining sensitive IP through funding third-party litigation in the United States"; and (2) "[f]or litigation in federal court, require enhanced disclosures for foreign adversary entities and provide judges with the authority to require enhanced disclosures for certain entities under foreign adversary entity control regarding their funding, and, when appropriate, ownership and connection with the foreign adversary government and dominant political party."[69]

In light of these repeated (and growing) concerns and recent examples highlighting the potential for evasion of U.S. sanctions laws and potential misappropriation of confidential and potentially sensitive technology, foreign entities underwriting U.S. litigation undoubtedly raises serious national and economic security questions. The only logical way to resolve those questions is by requiring the disclosure of TPLF arrangements—a simple exercise that will help judges understand if foreign nationals or state actors are using the Texas civil justice system as an unwitting forum for achieving strategic (and perhaps nefarious) goals.

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66 Press Release, U.S. Senator Marco Rubio, *Rubio, Scott Push for Transparency for Foreign Third Party Litigation Funding in U.S. Courts* (Nov. 3, 2023), https://www.rubio.senate.gov/rubio-scott-push-for-transparency-for-foreign-third-party-litigation-funding-in-u-s-courts/.

67 *See* Carr 12/22/22 Letter, *supra* note 60.

68 *See* Brandon L. Van Grack et al., *FARA Officials Preview Major Regulatory Changes and Identify New Areas of Focus*, Lexology (Dec. 6, 2023), https://www.lexology.com/library/detail.aspx?g=06449b32-a4ab-45d1-b623-6c9f157db21c.

69 U.S. Congress, *Reset, Prevent, Build: A Strategy to Win America's Economic Competition with the Chinese Communist Party*, at 21, https://selectcommitteeontheccp.house.gov/sites/evo-subsites/selectcommitteeontheccp.house.gov/files/evo-media-document/reset-prevent-build-scc-report.pdf.

## V. ILFA'S CONCERN THAT FUNDING AGREEMENTS CONSTITUTE PROTECTED ATTORNEY WORK PRODUCT IS OVERSTATED.

ILFA also argues TPLF agreements are protected from disclosure under the work-product doctrine.[70] ILFA cites two cases in support of this argument—*Hardin v. Samsung Elecs. Co.*, No. 2:21-CV-00290-JRG, 2022 WL 14976096, at *2-3 (E.D. Tex. Oct. 25, 2022), and *United States ex rel. Fisher v. Ocwen Loan Servicing, LLC*, No. 4:12-CV-543, 2016 U.S. Dist. LEXIS 32967, at *16 (E.D. Tex. Mar. 15, 2016). But those cases involved sweeping discovery requests that included not only the underlying funding agreement itself, but also a litany of other materials and attorney-client communications revealing actual litigation strategy that were undeniably work product and are well outside the scope of the undersigned's proposal.

The reality is that few courts have actually addressed the precise question of whether funding agreements themselves merit work-product protection. The starting point for any work-product analysis is Texas Rule of Civil Procedure 192.5, which provides that "material prepared," "mental impressions developed," or "communication[s] made" "***in anticipation of litigation or for trial***" are generally not subject to discovery.[71] Of course, the mere existence of TPLF in a case, the name of the funder, and other basic facts related to TPLF are not "material prepared," "mental impressions," or "communications" and thus fall far outside the scope of the doctrine. And wholescale application of the doctrine to the funding agreements themselves is far from clear. A number of courts outside the TPLF context have taken a narrow approach to work-product protection, choosing to apply the doctrine only in situations where the "primary purpose" behind creating the materials was for litigation, ***not*** to further one's business.[72] Because TPLF agreements are created primarily for the purpose of funding litigation, courts that have adopted the "primary purpose" test for analyzing work-product questions should reject claims that the funding agreements are work-product. This is all the more true for portfolio-based TPLF agreements in which an investor chooses to bankroll a group of cases—a decision that is not tied to a particular lawsuit and cannot fairly be said to reflect any legal strategy.

While a handful of courts that have assessed whether funding agreements constitute work product have concluded that the contracts are encompassed by the doctrine, even those courts have been forced to concede that the purpose of a TPLF agreement is quintessentially ***business*** in nature "because the litigation itself arguably is part of the business."[73] Those courts have nonetheless opted to extend work-product protection to the funding agreement on the ground that it was created "because of" litigation, even though business—as opposed to litigation—might have been the primary purpose of the contract.[74] Opting in favor of the narrower "primary purpose" test would more closely align with the overall purpose behind the work-product

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70 ILFA Letter at 8-9.

71 Tex. R. Civ. P. 192.5 (emphasis added).

72 *See In re Blue Cross Blue Shield Antitrust Litig.*, No. 2:13-CV-20000-RDP, 2015 WL 10891632, at *6 (N.D. Ala. Nov. 4, 2015).

73 *Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, No. 7841-VCP, 2015 WL 778846, at *8 (Del. Ch. Feb. 24, 2015).

74 *Id.*

doctrine, by "focus[sing] on the original reasons and purpose for the creation of a document rather than the post hoc characterization of the document ***after*** litigation commences."[75]

In any event, even assuming that funding agreements are technically prepared "in anticipation of litigation," work-product protection is not an ironclad shield. Rather, the protection afforded by the doctrine must yield to disclosure where the requesting party has demonstrated a "substantial need" for the information that cannot be obtained from another source, as a number of courts have recognized. A federal magistrate judge implicitly recognized as much in a decision denying a motion to compel the production of a funding agreement in a patent dispute, noting in a footnote that "[d]efendants do not argue, nor have they shown, that there is a substantial need for these materials and that they will suffer undue hardship in their absence."[76]

For example, in one case, production of a funding agreement was ordered where the funder was alleged to be the real party in interest in the underlying litigation. *In re International Oil Trading Co.*, arose out of litigation between Mohammad Al-Saleh and the International Oil Trading Company, LLC ("IOTC USA") related to the procurement of fuel.[77] When the parties' relationship soured, Al-Saleh entered into a contract with Burford to fund his litigation against IOTC USA, which resulted in a judgment against IOTC USA. After Al-Saleh was unable to collect on the judgment, he filed an involuntary bankruptcy petition. IOTC USA responded to the petition by arguing that Al-Saleh was not the real party in interest; in essence, ***Burford*** (not Al-Saleh) was "in the driver's seat." IOTC USA proceeded to request various materials related to the funding, including the funding agreement itself. The bankruptcy court refused to require the production of actual ***communications*** between Mr. Al-Saleh and Burford. But it found that the funding contract itself was fair game subject to some minor redactions of terms reflecting opinions regarding the merits of the litigation.

Courts have also ordered production of funding agreements where a party has claimed some kind of impropriety (e.g., bias, fraud, or lack of control) in connection with the third-party funding. For example, a court presiding over the bankruptcy of Gawker Media LLC ordered production of funding agreements to explore Gawker's theory that a variety of pre-bankruptcy lawsuits funded by Peter Thiel were part of a "coordinated campaign against" Gawker.[78] Production was also ordered in pelvic mesh litigation where the court determined that documents related to the financing of corrective surgeries and other materials were highly relevant to understanding "the motivation behind the plaintiffs' decisions to undergo corrective surgeries," and would allow the defendant to "gauge the credibility and motives of the nonparties or their agents when interacting with the plaintiffs."[79]

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[75] *In re Blue Cross Blue Shield*, 2015 WL 10891632, at *6 (emphasis added).

[76] *Lambeth Magnetic Structures, LLC v. Seagate Tech. (US) Holdings, Inc.*, Nos. 16-538 & 16-541, 2017 U.S. Dist. LEXIS 215773, at *17 n.8 (W.D. Pa. Dec. 19, 2017).

[77] *In re Int'l Oil Trading Co.*, 548 B.R. 825 (Bankr. S.D. Fla. 2016).

[78] *In re Gawker Media LLC*, No. 16-11700 (SMB), 2017 WL 2804870, at *2 (Bankr. S.D.N.Y. June 28, 2017) (citation omitted).

[79] *In re Am. Med. Sys., Inc.*, MDL No. 2325, 2016 WL 3077904, at *5 (S.D. W. Va. May 31, 2016).

Another circumstance in which courts have ordered production of funding agreements involves purported class actions, where courts have recognized that the terms of these agreements bear directly on whether a named plaintiff and his or her counsel will adequately represent the absent class members. Judge Susan Illston emphasized this concern in *Gbarabe v. Chevron Corp.*, a putative class action arising out of an explosion on an oil drilling rig off the coast of Nigeria.[80] Judge Illston found that the "funding agreement [was] relevant to the adequacy [of representation] determination [required for class certification] and should be produced to [the] defendant."[81]

In summary, while certain communications regarding TPLF may constitute attorney work product in certain circumstances, actual funding agreements are not entitled to such protection. And even assuming such agreements qualify as attorney work-product, a defendant's substantial need for it (e.g., in class actions) would justify disclosing it. Simply put, there is little support for the notion that TPLF agreements themselves should be wholesale shielded from discovery by the work-product doctrine.

## VI. DISCLOSURE OF TPLF AGREEMENTS WILL NOT CHILL FREE SPEECH.

Finally, there is no truth to ILFA's claim that a disclosure requirement will somehow "chill" free speech or infringe on First Amendment protections.[82] That claim is based on a false premise—i.e., that a disclosure rule would require that non-profit organizations involved with public advocacy litigation to disclose their "financial resources" (e.g., donors).[83] Nothing could be further from the truth. The proposal supported by the undersigned would be strictly limited to commercial, for-profit enterprises that actually invest in litigation—i.e., buy an interest in the outcome of a lawsuit seeking money damages. By focusing on those who have invested in litigation for profit-making purposes, the proposal is tailored to cover circumstances in which third parties will derive a direct financial benefit from the outcome of the action. To suggest that this requirement will somehow disrupt non-profit organizations from pursuing such litigation or chill the willingness of their donors to contribute is far-fetched to say the least.

Moreover, to the extent there is any ambiguity over this question, the undersigned would be amenable to tweaking the language of the underlying proposal to explicitly exempt non-profit organizations from the reach of the disclosure rule, as well as their donors. Simply put, organizations that are engaged in public interest advocacy are not for-profit enterprises, much less companies engaged in the business of third-party litigation funding. Rather, they are non-profit entities that initiate litigation to effect change through injunctive or declaratory actions. Any attempt to compare these organizations to the Burfords of the world is an attempt to muddy the waters and obstruct making actual investments in litigation more transparent.

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

81 *Id.*

82 ILFA Letter at 6-7.

83 *Id.*

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At bottom, ILFA's Letter downplays the concerns posed by secret third-party investments in civil litigation, while overstating the consequences of making that clandestine practice just a little more transparent. The Supreme Court should not fall for this sleight of hand. Rather, it should follow the lead of several other states that have recently required the disclosure of TPLF arrangements.

Sincerely,

Lisa Kaufman
General Counsel
Texas Civil Justice League

Stephen Waguespack
President
U.S. Chamber of Commerce Institute for Legal Reform

Molly Craig
President
Lawyers for Civil Justice