

March 27, 2019

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

RE: Proposed Fed. R. Civ. P. 26(a)(1)(A)(v)

Dear Ms. Womeldorf:

On behalf of the Advanced Medical Technology Association, the American Property Casualty Insurance Association, the American Tort Reform Association, the Association of Defense Trial Attorneys, DRI – *The Voice of the Defense Bar*, the Federation of Defense & Corporate Counsel, the Florida Justice Reform Institute, the Insurance Information Institute, the International Association of Defense Counsel, the Las Vegas Metro Chamber of Commerce, Lawyers for Civil Justice, the Louisiana Lawsuit Abuse Watch, the Michigan Chamber of Commerce, the National Association of Mutual Insurance Companies, the National Association of Wholesaler-Distributors, NFIB, the National Retail Federation, the Ohio Chamber of Commerce, the Pennsylvania Chamber of Business and Industry, the Pharmaceutical Research and Manufacturers of America, the Product Liability Advisory Council, the Small Business & Entrepreneurship Council, the South Carolina Chamber of Commerce, the South Carolina Civil Justice Coalition, the State Chamber of Oklahoma, the Texas Civil Justice League, the U.S. Chamber Institute for Legal Reform, the U.S. Chamber of Commerce, the Virginia Chamber of Commerce, and Wisconsin Manufacturers & Commerce,<sup>1</sup> we are writing in further support of the pending proposal to amend the Federal Rules of Civil Procedure to require disclosure of third-party litigation funding (“TPLF”) arrangements in any civil action filed in federal court.<sup>2</sup>

We appreciate that the Advisory Committee on Civil Rules (the “Committee”) has been actively and carefully considering the proposal. However, as the Committee continues that important process, we wish to address several unfounded assertions the TPLF industry has offered in opposition. As explained below, these ten myths fundamentally distort TPLF and the pending proposal.

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<sup>1</sup> Descriptions of each of these organizations are attached as Appendix A.

<sup>2</sup> That proposal – an amendment to Fed. R. Civ. P. 26(a)(1)(A) – was offered by letter to this Committee dated June 1, 2017 (Document No. 17-CV-O), as supplemented by letter dated November 3, 2017 (Document No. 17-CV-GGGGG).

**Myth No. 1.      It is premature to adopt a disclosure requirement for the rapidly evolving TPLF industry.**

TPLF companies have argued that the pending disclosure proposal should be rejected because it is premature. Initially, the industry contended that a disclosure requirement was unnecessary because TPLF usage was so rare. But the industry's boasts of growth and record profits have rendered that argument untenable. Indeed, as the latest MDL Subcommittee report observes, "it seems that litigation funding is growing by leaps and bounds, and in many different contexts."<sup>3</sup> As a result, the industry has shifted to contending that a disclosure rule would be premature since everything is in flux – because the modes and terms of litigation finance arrangements are evolving rapidly. On that basis, the industry urges doing nothing.

Of course, that argument is directly refuted by other points in the new MDL Subcommittee report. Most importantly, that report observes that even though litigation funding has presented major issues in some MDL proceedings,<sup>4</sup> "most MDL judges do not report being aware of its use."<sup>5</sup> Presumably, the same unawareness exists among judges in non-MDL cases in which funding is used. Given the sorts of TPLF-related issues that have arisen in MDL proceedings (as well as non-MDL cases), immediate action on TPLF disclosure is clearly needed so that such important issues do not remain concealed and thereby escape the proper attention of courts and interested parties. The Subcommittee has also observed that according to the Federal Judicial Center research it has been provided, "a number of courts of appeals have local rules requiring disclosure of the interests of . . . investors in the outcome of pending cases, as have several district courts" and that "one district (N.D. Cal.) has a local rule requiring disclosure in class actions."<sup>6</sup> But that research indicates that the local rules requiring TPLF disclosure are a crazy quilt at best, that compliance with these rules is uncertain, and that many districts have no such rules at all.<sup>7</sup> That is precisely the sort of procedural inconsistency among our federal district courts that normally commands the prompt attention of the rulemaking process.

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<sup>3</sup> Briefing Book, Advisory Committee on Civil Rules, April 2-3, 2019 meeting, at 220.

<sup>4</sup> *Id.* at 219-20 (noting that "in the opioid litigation the transferee judge entered an order requiring submission of information about third-party litigation funding for in camera inspection" and that "in the NFL concussion litigation the judge entered an order regarding the enforceability of funding agreements").

<sup>5</sup> *Id.*

<sup>6</sup> Briefing Book, Advisory Committee on Civil Rules, Nov. 1, 2018 meeting, at 159.

<sup>7</sup> See Feb. 7, 2018 Memorandum of Patrick Tighe to Ed Cooper, *et al.*, Briefing Book, Advisory Committee on Civil Rules, April 10, 2018 meeting, at 210-15.

If litigation funding is changing as thoroughly and quickly as the industry suggests, there is more urgency (not less) about requiring disclosure to ensure that whatever evolution is supposedly occurring is transparent. For example:

- Don't courts, parties, and policymakers need to know if as a result of these rapid changes, TPLF entities are exercising even more control over the lawsuits in which they invest?
- Don't courts, parties, and policymakers need to know if these shifts include requirements that class action counsel in funded matters sign over the potential benefits of the litigation without notifying the putative class members?
- Don't courts, parties, and policymakers need to know if the supposed evolution involves TPLF entities buying and completely controlling the litigation of claims, as envisioned by early literature on litigation investing models?<sup>8</sup>

If the federal court rulemaking process embraces the TPLF industry's "wait and see" argument, courts, parties, and policymakers will not know what is happening, since absent adoption of the proposed disclosure rule, the TPLF industry will continue to operate covertly. Of course, that is the unstated goal of this "wait and see" argument – the industry wants the federal judiciary to maintain the complete veil of secrecy over the industry's litigation investment activities.

**Myth No. 2.      TPLF is an amorphous concept that cannot be defined with sufficient precision to allow the drafting of a workable rule.**

Some TPLF entities question whether a workable TPLF disclosure rule can be written, arguing that "litigation funding" takes so many forms that it defies definition. Such arguments ignore the clarity of the specific rule language we have proposed (attached as Appendix B). It requires disclosure of "agreement[s] under which any person, other than an attorney permitted to charge a contingency 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." This definition carefully limits the disclosure requirement to arrangements in which an investor buys an interest in the outcome of a lawsuit. By focusing on those who have thus "invested" in litigation, the proposal is tailored to cover circumstances in which third parties will benefit directly from the outcome of the action and are most likely to be exercising some level of control.

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<sup>8</sup> See Peter C. Choharis, *A Comprehensive Market Strategy for Tort Reform*, 12 Yale J. on Reg. 2, 442-43 (1995).

**Myth No. 3.      The proposed rule is precluded by Fed. R. Civ. P. 26(b).**

In a recent letter to the Committee, several funders urged that TPLF-related information is not “relevant” as defined by Fed. R. Civ. P. 26(b) and that the proposal to require disclosure of such information through amendment to Rule 26 is therefore precluded.<sup>9</sup> History makes clear the ludicrousness of that argument.

Back in 1980, this Committee confronted the question of whether defendants should be required to disclose insurance agreements that may pertain to a lawsuit. In considering that question, 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.”<sup>10</sup> The Committee noted that those courts “avoid[ed] considerations of policy, regarding them as foreclosed.”<sup>11</sup> 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.<sup>12</sup>

That is precisely what we are urging here with respect to TPLF agreements. As was the case with insurance policies back in the 1980 timeframe, there are some court rulings holding that TPLF agreements are irrelevant under Rule 26(b) and should not be subject to discovery. But in our view, those holdings are beside the point. Policy considerations (as set forth in this letter and previous correspondence) strongly favor TPLF agreement disclosure, and notwithstanding any Rule 26(b)-based decisions on the “relevancy” of such information, the Committee can and should recommend adoption of a mandatory disclosure rule regarding TPLF agreements, just as it did regarding insurance agreements back in 1980. 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 even if funders believe they are not relevant under Rule 26(b).

**Myth No. 4.      A disclosure requirement would unfairly single out the TPLF industry, letting others off the hook.**

Another myth pushed by some TPLF companies is that it is unfair to “target” TPLF entities with disclosure requirements without mandating additional disclosures by other civil justice system participants (including some organizations that are signatories of this letter). More specifically, some critics have suggested that if TPLF agreements must be disclosed,

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<sup>9</sup> Letter from Eric Blinderman, CEO, Therium Capital Management, et al., to Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure, at 1 (Feb. 20, 2019) (“Blinderman Letter”).

<sup>10</sup> Fed. R. Civ. P. 26, Advisory Comm. Notes, 1980 amendment.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

organizations filing *amicus curiae* briefs in federal appellate courts should be required to list all of their donors. Of course, this contention is premised on a false analogy. For starters, the filing of *amicus* briefs is already a transparent exercise. When an organization submits an *amicus* brief to a court, the fact of the filing and the filer's identity is known to all. After all, the brief needs to be filed on the public docket, and the filing organization must put its name on the front cover. Presumably, anyone who wants to ascertain the ideological and political leanings of the organization and its membership can simply look at the organization's website. By contrast, litigation funding is not transparent at all. When a litigation funder gets involved in a lawsuit, there is generally **no** disclosure that funding is being used, and no disclosure of which funder is providing it.

The suggestion that there is an equivalent need for disclosure of litigation funding as compared to *amicus* brief filings is also illogical because the two activities are not remotely analogous. When a litigation funding company gets involved in a lawsuit, it pays money to a plaintiff or his/her counsel in exchange for a contingent interest in any proceeds that may flow from the litigation. The funder effectively buys a part of the lawsuit and effectively becomes a party to the matter, standing to share in any money ultimately awarded by the court. Organizations that file *amicus* briefs do not fit that mold at all. By definition, they are not parties to the lawsuit in which they file a brief and have no direct financial interest in the case. Thus, while litigation funders actually invest in lawsuits and acquire a direct financial stake in the outcomes, *amicus* brief filers are merely exercising their First Amendment right to voice views on the policy issues presented by the dispute.

**Myth No. 5.      If a TPLF disclosure mandate is adopted, only revelation of the existence of funding and the identity of the funder should be required; production of the actual funding agreement is unnecessary.**

Given the increasing support for making TPLF more transparent, some TPLF companies have warmed to the idea of disclosing the existence of TPLF and the identity of the funder.<sup>13</sup> However, funders across the board remain emphatically opposed to going any further – that is, to requiring production of the actual funding agreements. While some disclosure would be better than none, production of agreement documents should be required.

Requiring litigants to produce TPLF agreements would simply level the playing field by ensuring that a defendant knows who is really on the other side and whether the plaintiff and his/her counsel – as opposed to some outside funder – is really calling the shots in the litigation. Fed. R. Civ. P. 26(a) already requires defendants to disclose not only the mere existence of insurance and the identity of their insurers, but also copies of the insurance agreements. The federal judiciary promulgated that rule because disclosure “enable[s] counsel for both sides to

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<sup>13</sup> See, e.g., Michael German (Vannin Capital), *Sensible Disclosure Rule for Litigation Finance is the Right Balance*, Bloomberg News (March 15, 2019).

make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation.”<sup>14</sup> That same rationale supports mandatory 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. In short, disclosure of the actual funding agreements should mirror the existing insurance disclosure requirement and enable courts and defendants to more accurately evaluate settlement prospects and to better calibrate settlement initiatives.

Disclosure of TPLF agreements would also shed light on whether the funding arrangements in a particular case raise any legal concerns – whether the arrangement presents any conflicts of interest or related ethical issues; whether the agreement violates any applicable laws governing champerty and maintenance; whether the plaintiff and/or class counsel in a putative class action will adequately represent the class; and whether the funder is vested with undue influence or control over prosecution of the underlying litigation. While disclosure of the fact of outside funding would improve transparency, it is no substitute for production of the actual funding agreement.

**Myth No. 6.      Funders do not control or influence the litigation matters they fund.**

TPLF companies chant the mantra that they do not exercise any sort of control over the litigation they finance. But they offer no real evidence to support that assertion, because doing so would require producing the TPLF agreements they would prefer to keep hidden. The few TPLF agreements that have come to light plainly demonstrate that, unsurprisingly, TPLF entities actually do exercise various forms of control and influence over the litigation matters in which they invest.

For example, in a recently filed action, *White Lilly, LLC v. Balestrier PLLC*, a TPLF company affirmatively asserted that it had the right to exercise control over litigation in which it had acquired an interest.<sup>15</sup> In its complaint, the TPLF company alleged that its TPLF agreement required that specified counsel, who had an existing relationship with the TPLF company, serve as one of the plaintiff’s counsel in the funded lawsuit. Indeed, the TPLF entity alleged that its counsel breached her obligation to serve as the funder’s “‘ombudsman’ to oversee the cases it ultimately invested in, and to *ensure* that the . . . [lawsuits] asserted viable claims and were litigated properly and efficiently.”<sup>16</sup> Further evidencing control, the TPLF entity asserted that it

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<sup>14</sup> Fed. R. Civ. P. 26, Advisory Comm. Notes, 1980 amendment.

<sup>15</sup> No. 1:18-cv-12404 (S.D.N.Y. Dec. 31, 2018), Compl. ¶ 35.

<sup>16</sup> *Id.*

had been assured that the “proposed litigation” would settle “quickly.”<sup>17</sup> The funding agreement also required that “Defendants obtain prior approval for expenses in excess of \$5,000.00.”<sup>18</sup> Clearly, all of these provisions afforded the TPLF entity various means to control or influence the course of the litigation in which it invested.

In another case, *Boling v. Prospect Funding Holdings*,<sup>19</sup> the plaintiff entered into TPLF agreements with Prospect Funding Holding (“Prospect”) and Cambridge Management Group (“Cambridge”) to fund his personal injury lawsuit. The plaintiff later filed suit against Prospect seeking a declaratory judgment that the TPLF agreement was unenforceable. In the course of that litigation, it emerged that the Prospect agreement contained a provision that “[i]f the Proceeds [from settlement] are insufficient to pay the Prospect Ownership Amount in full, [Prospect] shall receive all of the Proceeds.”<sup>20</sup> Such a provision undoubtedly influenced the plaintiff’s ability to settle his case since he was required to accommodate Prospect’s flat fee, which accrued with interest.<sup>21</sup> The agreement also granted Prospect power of attorney “for all matters relating to this agreement and the collection of payments due” and “to do all acts and things necessary, in [Prospect’s] sole discretion, to fulfill [plaintiff’s] obligations under this Purchase Agreement.”<sup>22</sup> The Cambridge agreement similarly required payment of a flat fee in the event of a settlement. And another provision granted Cambridge “the right at any time and from time to time, without notice, to call Plaintiff’s place of business or his/her attorney’s office during normal business hours to inspect the case files and to inspect the correspondence, books and records relating to the Plaintiff’s case or claim.”<sup>23</sup>

These examples echo those noted in the June 1, 2017 proposal to the Advisory Committee. Among them is an excerpt from Bentham IMF’s 2017 “best practices” guide for U.S. matters, which discusses TPLF company control over litigation strategies. That publication noted 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.<sup>24</sup> Such provisions were on display in the putative class action *Gbarabe v. Chevron*

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<sup>17</sup> *Id.* ¶ 45.

<sup>18</sup> *Id.* ¶ 124.

<sup>19</sup> No. 1:14-CV-00081-GNS-HBB, 2017 U.S. Dist. LEXIS 48098 (W.D. Ky. Mar. 30, 2017).

<sup>20</sup> Purchase Agreement §6.1, Complaint at Ex. A, *Boling v. Prospect Funding Holdings, LLC*, No. 1:14-CV-00081-GNS-HBB, 2017 U.S. Dist. LEXIS 48098 (W.D. Ky. Mar. 30, 2017).

<sup>21</sup> *Id.* at 1.

<sup>22</sup> *Id.* at § 6.5.

<sup>23</sup> Plaintiff’s Agreement §7, Complaint Ex. D, *Boling v. Prospect Funding Holdings, LLC*, No. 1:14-CV-00081-GNS-HBB, 2017 U.S. Dist. LEXIS 48098 (W.D. Ky. Mar. 30, 2017).

<sup>24</sup> Bentham IMF, Code of Best Practices (Jan. 2017), <https://www.benthamimf.ca/newsroom/bentham-publications/2017/01/08/bentham-imf-code-of-best-practices-jan-2017>.

*Corp.*<sup>25</sup> The funding agreement in that case (involving Therium, another TPLF company) contained a number of provisions allowing the TPLF entity to exercise control over the litigation, including a “Project Plan” that apparently outlined litigation strategies and provisions that restricted counsel from hiring experts “without [the funder’s] prior written consent”<sup>26</sup> and required that counsel “give reasonable notice of and permit [the funder] where reasonably practicable, to attend as an observer at internal meetings, which include meetings with experts, and send an observer to any mediation or hearing relating to the Claim.”<sup>27</sup>

In sum, despite protests to the contrary, the TPLF companies’ contentions that they do not exercise control or influence over the litigation matters in which they invest is unsupported by the record before this Committee. In fact, as outlined above, the TPLF agreements that have become public strongly suggest that those contentions are false.

**Myth No. 7.      Disclosure will force federal courts to make policy about TPLF-related ethics issues.**

Some opponents argue that requiring disclosure of TPLF arrangements will unnecessarily force federal judges to make policy decisions about TPLF-related ethics issues. In truth, the proposed rule will do no such thing. The proposed rule would merely require *disclosure* of TPLF arrangements, just as Rule 26 already requires the disclosure of myriad other items, including insurance agreements. It does not oblige a court to deal with each and every ramification that may flow from what is disclosed.

If the TPLF companies are correct that their agreements create no ethics concerns, this issue is a red herring – there will be nothing for a court to address. And if ethics issues are presented, the court may address them as it sees fit, most likely by referring the questions to state ethics authorities or suggesting that counsel do so. Only where an issue more directly affects the conduct or propriety of the litigation will the court’s involvement be required. For example, if plaintiffs’ counsel in a putative class action enter into a TPLF agreement, the court may be obliged to consider whether the agreement terms have ramifications for the adequacy of representation requirement of Fed. R. Civ. P. 23(a)(4) (e.g., if the terms give the TPLF entity litigation strategy influence, or if the agreement conveys aspects of any potential class recovery to the TPLF entity).<sup>28</sup>

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<sup>25</sup> 2016 U.S. Dist. LEXIS 103594 (N.D. Cal. Sept. 16, 2016)

<sup>26</sup> *Id.* § 10.1.

<sup>27</sup> *Id.* § 10.2.4.

<sup>28</sup> See, e.g., *Gbarabe*, 2016 U.S. Dist. LEXIS 103594, at \*6 (ordering disclosure of funding agreement in putative class action because the “funding agreement is relevant to the adequacy [of representation] determination [required for class certification] and should be produced to [the] defendant”).

**Myth No. 8.      Disclosure will chill TPLF usage, making it harder for plaintiffs to assert claims.**

Another myth perpetuated by the TPLF industry is that disclosure will have a chilling effect on the use of TPLF and thereby make it harder for potential plaintiffs to get their day in court. This argument is farfetched. After all, any of the myriad other burdens and inconveniences that confront a litigant are far more likely to influence a claim-holder's decision whether to sue. As soon as an action is commenced, a plaintiff must comply with the mandatory initial disclosure requirements of Fed. R. Civ. P. 26(a). That provision requires a plaintiff "without awaiting a discovery request" to provide the other side with the name and address of "each individual likely to have discoverable information," as well as a "copy . . . of all documents . . . that the disclosing party has . . . and may use to support its claims or defenses."<sup>29</sup> Apart from these initial disclosures, a plaintiff whose lawsuit withstands a motion to dismiss will be subject to a range of far more burdensome discovery obligations, including being examined during an oral deposition<sup>30</sup> having to produce documents (including personal emails and text messages), and potentially undergoing an independent medical examination if the case involves claims for personal injuries.<sup>31</sup> Further, the plaintiff may have to endure the challenges of a trial. In short, if a person or entity is weighing the pros and cons of initiating litigation, the question whether his/her litigation funding agreement is going to be disclosed will not be a substantial consideration. Other factors – particularly the potential for compensation – are far more likely to tip the scale. The real reason the TPLF industry opposes disclosure has nothing to do with potential clients. The industry simply prefers to be the rare business allowed to operate in complete secrecy.

**Myth No. 9.      Disclosure of TPLF agreements will reveal sensitive strategic information about the plaintiff's case.**

Another myth is that disclosure of TPLF agreements will reveal sensitive strategic information about a plaintiff's case that invariably constitutes attorney work product. This argument does not hold water. After all, the fact that a plaintiff has resources available to prosecute his/her case is hardly strategic (and probably already known at some level by the defendant in any event) – much less does it qualify as attorney work product. Moreover, one would think that a plaintiff would *want* to telegraph its capacity to go the distance, not hide it.

Of course, to the extent TPLF agreements do provide any strategic insights, disclosure simply evens up the score. Insurance agreements, which must already be disclosed by defendants under the existing Fed. R. Civ. P. 26(a), contain information about the extent of the insurer's obligations to defend the action and how much cash may be available for settlement.

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<sup>29</sup> Fed. R. Civ. P. 26(a)(1)(A)(i)-(ii).

<sup>30</sup> See Fed. R. Civ. P. 30(d)(1).

<sup>31</sup> See Fed. R. Civ. P. 35(a)(1).

Thus, TPLF agreement disclosure would simply establish greater parity in transparency about plaintiffs' and defendants' respective outside resources for litigating a matter.

In the event that any TPLF agreement contains strategic information that actually qualifies as work product, a plaintiff may simply redact those parts before production – as it would where necessary and appropriate in producing other documents. Ultimately, the court may need to review the redactions to confirm that the redacted material actually qualifies as protected work product. But in the end, the proposed rule will not put any real attorney work product at risk of disclosure.

**Myth No. 10.      Disclosure is supported by just a small number of out-of-step “special interest” groups.**

Finally, the TPLF industry has launched a campaign suggesting that there is little support for the TPLF disclosure proposal – that it is backed only by “narrow and well-funded special interests.”<sup>32</sup> This assertion flies in the face of the growing, wide ranging assembly of entities supporting disclosure. Just recently, a long list of in-house counsel from major U.S. companies, including General Electric, Chevron, Ford, Microsoft, Google, Verizon Wireless and AT&T, submitted a letter to this Committee supporting disclosure.<sup>33</sup> While the funders attempted to dismiss this letter as “fundamentally a PR stunt by the Chamber,”<sup>34</sup> it directly contradicts the TPLF industry’s characterizations. Moreover, the undersigned organizations that support the TPLF disclosure rule proposal are comprised of and represent hundreds of companies and thousands of individuals (as described in Appendix A).

The only “special interests” involved in this discussion are the TPLF companies. They are the ones generating record profits from litigation investment activities, and they are expending considerable energy resisting our disclosure proposal, all in an effort to ensure they can continue to operate their businesses in the shadows.

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<sup>32</sup> See Sens. Reintroduce Litigation Funding Transparency Bill, Law360 (Feb. 14, 2019) (quoting statement from Burford Capital).

<sup>33</sup> U.S. Chamber: Institute for Legal Reform, *Re: Proposed Amendment to Fed. R. Civ. P. 26(a)(1)(A)*, (Jan. 31, 2019), [https://www.instituteforlegalreform.com/uploads/sites/1/TPLF\\_letter\\_1.31.19.pdf](https://www.instituteforlegalreform.com/uploads/sites/1/TPLF_letter_1.31.19.pdf).

<sup>34</sup> Letter from Eric Blinderman, CEO, Therium Capital Management, et al., to Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure (Feb. 20, 2019).

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For all of the foregoing reasons, we again urge the Committee to recommend adoption of the attached proposed amendment to Fed. R. Civ. P. 26(a)(1)(A). The Advisory Committee's examination of this proposal is greatly appreciated.

Sincerely,

Advanced Medical Technology  
Association

American Property Casualty Insurance  
Association

American Tort Reform Association

Association of Defense Trial Attorneys

DRI – *The Voice of the Defense Bar*

Federation of Defense & Corporate  
Counsel

Florida Justice Reform Institute

Insurance Information Institute

International Association of Defense  
Counsel

Las Vegas Metro Chamber of Commerce

Lawyers for Civil Justice

Louisiana Lawsuit Abuse Watch

Michigan Chamber of Commerce

National Association of Mutual Insurance  
Companies

National Association of Wholesaler-  
Distributors

National Retail Federation

NFIB

Ohio Chamber of Commerce

Pennsylvania Chamber of Business and  
Industry

Pharmaceutical Research and  
Manufacturers of America

Product Liability Advisory Council

Small Business & Entrepreneurship  
Council

South Carolina Chamber of Commerce

South Carolina Civil Justice Coalition

State Chamber of Oklahoma

Texas Civil Justice League

U.S. Chamber of Commerce

U.S. Chamber Institute for Legal Reform

Virginia Chamber of Commerce

Wisconsin Manufacturers & Commerce

## **APPENDIX A – SUMMARY OF SIGNATORY ORGANIZATIONS**

- **Advanced Medical Technology Association.** The Advanced Medical Technology Association (“AdvaMed”) is the world’s largest trade association of medical device manufacturers. AdvaMed advocates on a global basis for the highest ethical standards, timely patient access to safe and effective products, and economic policies that reward value creation. AdvaMed seeks to advance medical technology to promote healthier lives and healthier economies around the world. AdvaMed’s members range from the largest to smallest medical technology companies doing business in the United States. These companies produce medical devices, diagnostic products and health information systems.
- **American Property Casualty Insurance Association.** Representing nearly 60 percent of the U.S. property casualty insurance market, the American Property Casualty Insurance Association promotes and protects the viability of private competition for the benefit of consumers and insurers. APCIA represents the broadest cross-section of home, auto and business insurers of any national trade association. APCIA members represent all sizes, structures, and regions, which protect families, communities, and businesses in the U.S. and across the globe.
- **American Tort Reform Association.** The American Tort Reform Association (“ATRA”) is the only national organization exclusively dedicated to reforming the civil justice system. The organization is a nationwide network of state-based liability reform coalitions backed by 135,000 grassroots supporters. ATRA’s membership is diverse and includes nonprofits, small and large companies, as well as state and national trade, business and professional associations.
- **Association of Defense Trial Attorneys.** The Association of Defense Trial Attorneys (“ADTA”) is a select group of diverse and experienced civil defense trial attorneys whose mission is to improve their practices through collegial relationships, educational programs, and business referral opportunities, while maintaining the highest standards of professionalism and ethics. Membership in the ADTA is exclusive and limited to one “prime” member in any city with population less than one million.
- **DRI – *The Voice of the Defense Bar.*** DRI is the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation. DRI provides its members with various educational and other tools that help defense practitioners deliver high-quality, balanced and excellent service to their clients and corporations. DRI’s network consists of more than 22,000 defense practitioners and corporate counsel.

- **Federation of Defense & Corporate Counsel.** The Federation of Defense & Corporate Counsel was founded 75 years ago as an international defense organization dedicated to the principles of knowledge, justice and fellowship. Members include: (1) practicing lawyers actively engaged in the private practice of law who devote a substantial amount of their professional time to the representation of insurance companies, associations or other corporations, or others, in the defense of civil litigation and have been a member of the bar for at least eight years; or (2) corporate counsel and other executives engaged in the administration or defense of claims for insurance companies, associations, or corporations who have national, regional or company-wide responsibility for a company of greater than local significance.
- **Florida Justice Reform Institute.** The Florida Justice Reform Institute (“FJRI”) seeks to improve Florida’s civil justice system by fighting wasteful civil litigation through legislation, promoting fair and equitable legal practices, and providing information about the state of civil justice in Florida. FJRI works on such issues as fair settlement, assignment of benefits, phantom damages, legal and medical fee schedules, workers’ compensation costs and the operation of state courts.
- **Insurance Information Institute.** The Insurance Information Institute (“I.I.I.”) seeks to improve public understanding of insurance – i.e., what it does and how it works. I.I.I. is recognized by the media, governments, regulatory organizations, universities and the public as a primary source of information, analysis and referral concerning insurance. The organization’s members consist of both large and small insurance companies doing business in the United States, as well as various universities and the Connecticut General Assembly.
- **International Association of Defense Counsel.** Established in 1920, the International Association of Defense Counsel (“IADC”) advocates legal reform and professional development. IADC’s activities benefit its approximately 2,500 members and their clients, as well as the civil justice system and the legal profession. IADC’s membership consists of partners in large and small law firms, senior counsel in corporate law departments, and corporate and insurance executives. Members represent the largest corporations around the world, including the majority of companies listed in the FORTUNE 500.
- **Las Vegas Metro Chamber of Commerce.** The Las Vegas Metro Chamber of Commerce (“Las Vegas Chamber”) is the largest business organization in Nevada. Founded in the early days of Las Vegas, the Las Vegas Chamber has effectively protected and strengthened the Southern Nevada business community, helping its member businesses grow and thrive and providing a voice for those businesses in local, state and federal government. The Las Vegas Chamber has thousands of member businesses from nearly every industry, representing more than 200,000 people.

- **Lawyers for Civil Justice.** Lawyers for Civil Justice (“LCJ”) is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For more than 30 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.
- **Louisiana Lawsuit Abuse Watch.** Louisiana Lawsuit Abuse Watch (“LLAW”) is a local non-partisan, nonprofit, citizen watchdog group dedicated to stopping lawsuit abuse that hurts Louisiana’s families and threatens local businesses and jobs. Using community outreach, public education and grassroots advocacy, LLAW raises awareness about the costs and consequences of lawsuit abuse and urges elected officials to advance more balance, fairness and common sense in Louisiana’s civil justice system. Since it was formed in 2007, LLAW has grown to nearly 6,000 supporters across the state, representing small business owners, health care providers, taxpayers, workers and their families.
- **Michigan Chamber of Commerce.** The Michigan Chamber of Commerce (“Michigan Chamber”) encompasses approximately 6,600 member employers, trade associations and local chambers of commerce of every size and type in all 83 counties of the state. The Michigan Chamber’s mission is to promote conditions favorable to job creation and business success in Michigan. Michigan Chamber member businesses provide jobs to 1.5 million residents. One of every 2.6 employees in Michigan works for a Michigan Chamber member firm.
- **National Association of Mutual Insurance Companies.** The National Association of Mutual Insurance Companies (“NAMIC”) is the largest property/casualty insurance trade association with more than 1,400 member companies serving more than 170 million auto, home and business policyholders. NAMIC promotes public policy solutions that benefit insurance policyholders and the NAMIC member companies that it represents. NAMIC member companies write nearly \$230 billion in annual premiums, and have 54 percent of homeowners, 43 percent of automobile and 32 percent of the business insurance markets. Membership in NAMIC is not restricted to mutual insurance companies and is open to stock insurance companies, reinsurance companies and industry vendor companies.
- **National Association of Wholesaler-Distributors.** The National Association of Wholesaler-Distributors (“NAW”) is a federation of wholesale distribution associations. NAW works with academia and the distribution consulting community to advance the state of knowledge in wholesale distribution. It also represents the wholesale distribution industry before Congress, the White House and the judiciary on issues that affect the industry’s various lines of trade. NAW members represent all lines of trade and include some of the largest wholesaler-distributors in the United States.

- **National Retail Federation.** The National Retail Federation (“NRF”) advances the interests of the retail industry through advocacy, communications and education. NRF is the world’s largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation’s largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans.
- **NFIB.** NFIB is the voice of small business, advocating on behalf of America’s small and independent business owners, both in Washington, D.C., and in all 50 state capitals. NFIB is nonprofit, nonpartisan, and member-driven. Since our founding in 1943, NFIB has been exclusively dedicated to small and independent businesses, and remains so today.
- **Ohio Chamber of Commerce.** Founded in 1893, the Ohio Chamber of Commerce is Ohio’s largest and most diverse statewide business advocacy organization. It works to promote and protect the interests of its more than 8,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. As an independent point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena.
- **Pennsylvania Chamber of Business and Industry.** Founded in 1916, the Pennsylvania Chamber of Business and Industry (“Pennsylvania Chamber”) has served as “The Statewide Voice of Business™” by advocating public policies that expand private sector job creation and lead to a more prosperous Pennsylvania for all of its citizens. The Pennsylvania Chamber is the largest business association in Pennsylvania, and consists of more than 9,400 member businesses of all sizes and industry sectors throughout the state – from sole proprietors to Fortune 100 companies – representing nearly 50 percent of the private workforce in Pennsylvania.
- **Pharmaceutical Research and Manufacturers of America.** The Pharmaceutical Research and Manufacturers of America (“PhRMA”) represents the country’s leading biopharmaceutical research companies. PhRMA’s mission is to conduct effective advocacy for public policies that encourage the discovery of important new medications for patients by biopharmaceutical research companies. PhRMA members, which include some of the largest pharmaceutical companies in the United States, invest billions in the research and development of innovative medicines that enable patients to live longer, healthier and more productive lives.
- **Product Liability Advisory Council.** Formed in 1983, the Product Liability Advisory Council (“PLAC”) is a non-profit association that analyzes and shapes the common law of product liability and complex litigation. PLAC’s mission is to help members successfully manage every link in the liability chain – from product design to manufacture to distribution through sale to end-users, and on to post-sale responsibilities. PLAC is comprised of more than 100 leading product manufacturers and 350 of the most elite product liability defense attorneys operating in the United States and abroad.

- **Small Business & Entrepreneurship Council.** The Small Business and Entrepreneurship Council (“SBE Council”) is a 501c(4) advocacy, research and education organization dedicated to protecting small business and promoting entrepreneurship. SBE Council educates elected officials, policymakers, business leaders and the public about key policies that enable business start-up and growth. SBE Council’s members include entrepreneurs and small business owners.
- **South Carolina Chamber of Commerce.** The South Carolina Chamber of Commerce (“South Carolina Chamber”) is the leading statewide organization championing a favorable business climate for South Carolina companies and employees. Its mission is to strategically create and advance a thriving, free-market environment where South Carolina businesses can prosper. The South Carolina Chamber represents its members, which include both small and large companies, by assisting them with legislative advocacy and tracking, marketing, connecting and expanding their bottom line.
- **South Carolina Civil Justice Coalition.** The South Carolina Civil Justice Coalition (“SCCJC”) is the state’s united voice for the business community on tort and workers’ compensation issues. Some of SCCJC’s recent achievements include successful lobbying efforts that resulted in the enactment of tort reform legislation that, among other items, capped punitive damages, limited circuit solicitors’ ability to hire counsel unless approved in writing by the Attorney General, and imposed caps on appeals bonds.
- **State Chamber of Oklahoma.** Representing more than 1,500 Oklahoma businesses and 350,000 employees, the State Chamber of Oklahoma has been the state’s leading advocate for business since 1926. The organization’s mission is to advance public policies that promote Oklahoma businesses and employees.
- **Texas Civil Justice League.** The Texas Civil Justice League (“The League”) is the nation’s oldest and largest state legal reform organization. It has pursued a broad civil justice reform agenda, including successful efforts to enact legislation restricting forum shopping, limiting punitive damages and joint and several liability and deterring frivolous lawsuits. The League’s members include hundreds of corporate businesses of all sizes, law firms, professional and trade associations, health care providers and individuals.
- **U.S. Chamber Institute for Legal Reform.** The U.S. Chamber Institute for Legal Reform (“ILR”) is an affiliate of the U.S. Chamber of Commerce dedicated to making our nation’s civil legal system simpler, faster and fairer for all participants. The U.S. Chamber of Commerce is the world’s largest business federation, representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting and defending America’s free enterprise system.

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- **Virginia Chamber of Commerce.** The Virginia Chamber of Commerce ("Virginia Chamber") is the leading non-partisan business advocacy organization in the Commonwealth of Virginia. Working in the legislative, regulatory, civic and judicial arenas at the state and federal level, the Virginia Chamber seeks to promote long-term economic growth in the Commonwealth. The Virginia Chamber's members include 25,000 Virginia companies, ranging from small businesses to Fortune 500 companies.
- **Wisconsin Manufacturers and Commerce.** Wisconsin Manufacturers and Commerce ("WMC") is the state chamber of commerce, the state manufacturers' association and the state safety council. Founded in 1911, WMC is Wisconsin's leading business association dedicated to making Wisconsin the most competitive state in the nation. The association has nearly 3,800 members that include both large and small manufacturers, service companies, local chambers of commerce and specialized trade associations.

## **APPENDIX B – PROPOSED AMENDED RULE**

The amended Fed. R. Civ. P. 26(a)(1)(A) would read as follows, with the new proposed language in underscore and deletions in ~~strikethrough~~:

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.; and

(v) for inspection and copying as under Rule 34, 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.