Mr. Jonathan C. Rose
Secretary
Advisory Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

October 21, 2014

RE: Response to Proposed Amendment to Fed. R. Civ. P. 26(a)(1)(A)

Dear Mr. Rose:

Gerchen Keller Capital, LLC, Burford Capital LLC, and Bentham IMF are three of the largest providers of commercial litigation finance in the United States. Corporations large and small rely upon our specialty finance solutions for many reasons, including managing the legal fees and costs associated with federal civil litigation.

We write in response to a letter (the "Letter") submitted on April 9, 2014, by the U.S. Chamber Institute for Legal Reform, among others (the "Chamber"). The Chamber urges the Advisory Committee to amend Federal Rule of Civil Procedure 26 to "require disclosure of third-party investments in litigation" at the outset of every case.[1]

The Chamber's proposal does not merit submission for public comment or any further attention by the Committee. It seeks to amend the rule in order to target a relatively small segment of all federal civil litigation—and to do so when the Chamber itself admits that the supposed "effects" of commercial litigation finance are not yet known and are only "potentially adverse" (the Chamber does not say to whom).[2] Furthermore, this Committee significantly revised Rule 26 less than four years ago, and the Chamber's submission does not justify revisiting such an important provision within such a short time after major changes were instituted.

Perhaps most importantly, the suggested amendment is contrary to the purpose of Rule 26. The Chamber contends that its proposed reworking of Rule 26 is "related to transparency."[3] But the mandatory initial disclosures in Rule 26(a)(1)(A) were not adopted to foster "transparency" for transparency's sake—let alone mandatory disclosure of a litigant's private financial arrangements. Adopted in 1993, paragraphs (1) through (4) of subdivision (a) serve to ensure early disclosure of "certain basic information that is *needed* in most cases to prepare for trial or make an informed decision about settlement."[4] Tellingly, the Chamber

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[1] Letter at 1
[2] *Id.* at 2.
[3] *Id.*
[4] Fed. R. Civ. P. 26, Notes of Advisory Committee on Rules – 1993 Amendment (emphasis added).

makes no effort to demonstrate how its proposed amendment is designed to "help focus the discovery that is needed, and facilitate preparation for trial or settlement."[5] Instead, it proffers four reasons for its amendment, none of which serves the purposes of Rule 26:

First, the Chamber claims mandatory disclosure is needed to "allow courts and counsel to ensure compliance with ethical obligations."[6] But a separate provision, FRCP 7.1, already imposes disclosure obligations that are "calculated to reach a majority of circumstances that are likely to call for disqualification" under applicable rules of professional conduct.[7] If the Chamber truly believes that the rise of commercial litigation finance poses a disqualification issue in the majority of cases (a view we do not share), then it should propose amendments to Rule 7.1. This is not a mere quibble over numeric labeling. The purposes of and burdens imposed by Rules 7.1 and 26 vary dramatically and should not be blurred together.[8]

Second, the Chamber posits that the presence of financing could distort a party's incentive to accept "what might otherwise be a fair settlement offer."[9] For multiple reasons, that argument does not withstand scrutiny. As an initial matter, commercial litigation finance firms receive a return only if a case resolves successfully. Thus, we are highly incentivized to ensure that our financing does not encourage counterparties to turn down risk-appropriate settlement offers. As the Chamber recognizes, rejecting a fair offer (i.e., an offer that fairly balances the plaintiff's and defendant's odds of success) entails taking imprudent risk "in the hopes of securing a larger sum of money."[10] When a party recklessly holds out for a higher settlement amount, it becomes` intolerably more likely that the party—and hence the capital provider—will recover less, or nothing at all. No commercial litigation finance firm seeks to create such perverse incentives, which would fundamentally alter the risk equation to a capital provider's disadvantage just as (or more so than) to a defendant's.

In any event, the Chamber's position is belied by its own proposed amendment. As the Committee knows, lawyers who are engaged on a contingent-fee arrangement often invest their time and firm resources in exchange for up to 50 percent of litigation proceeds. Litigation finance arrangements typically take a smaller share of the eventual recovery. Yet the Chamber's proposed amendment expressly carves out from mandatory disclosure those agreements negotiated by "an attorney permitted to charge a contingent fee."[11] If significant contingency-fee arrangements do not distort settlement incentives, the same holds true for litigation-finance agreements. There is no basis to amend Rule 26 to expressly treat the arrangements differently.

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[5] *Id.*
[6] Letter at 2.
[7] Fed. R. Civ. P. 26, Notes of Advisory Committee on Rules – 2002 Amendment.
[8] Rule 7.1 requires only that a corporate party identify a non-party company holding 10% or more of its stock. That is a far cry from requiring automatic production of a stock purchase agreement or the financing obtained to permit the non-party to acquire a 10% interest.
[9] Letter at 4.
[10] *Id.*
[11] *Id.* at 2.

Third, the Chamber advances a largely irrelevant argument regarding fee and cost shifting against a losing party. The Chamber argues that "a litigation-funding disclosure provision would facilitate a fuller, fairer discussion of motions for cost-shifting in cases involving onerous e-discovery." On the Chamber's view, "if a plaintiff's suit is being financed by a lucrative TPLF company," shifting costs might be more appropriate.[12] But motions for cost shifting are infrequently made and less frequently granted. Even assuming that a commercial litigation finance agreement might occasionally be relevant to a cost-shifting inquiry after discovery has commenced, this hardly converts the agreement into the sort of "basic information that is needed in *most cases* to prepare for trial or make an informed decision about settlement."[13]

Even where a party moves for cost shifting, the litigation finance arrangement is not likely to prove relevant. A motion to shift discovery costs requires the moving party to show that the opposing party's discovery requests are unduly burdensome and expensive.[14] If that condition is satisfied, courts considering whether to shift costs generally weigh a seven-factor balancing test, of which the "total cost of production, compared to the resources available to each party" is but a single factor.[15] Even in the small subset of cases in which a party seeks to shift costs, the presence of a commercial litigation finance firm will not tip the scales.

The Chamber's related, contradictory point—that third-party finance firms are both "a real party in interest for practical purposes" and "well heeled strangers to a case," and that this somehow bears on the proportionality of discovery[16]—is flawed for numerous reasons. As commercial litigation finance firms, we do not purchase a party's claim, interfere with the attorney-client relationship, or dictate settlement strategy. Although capital providers benefit if a case is resolved successfully, it is black-letter law that such benefit is insufficient to transform an entity into the real party in interest.[17] If the Chamber wishes to redefine who constitutes the real party in interest in federal court, it must propose an amendment to Rule 17. It should not be permitted to use Rule 26 as a backdoor means of changing who constitutes a party, and hence what falls within the ambit of "parties' resources" for purposes of the proposed amendment to Rule 26(b)(1).

Regardless, promoting proportional, cost-effective discovery (which we support) requires a balance between the value of the claims on the one hand and the relevance and burdens of

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[12] *Id.* at 4, 5.
[13] Fed. R. Civ. P. 26, Notes of Advisory Committee on Rules – 1993 Amendment (emphasis added). In any event, provisions of Rule 26(f) on discovery plans specifically contemplate a role for the district court in dealing with any anticipated issues relating to electronic discovery.
[14] Fed. R. Civ. P. 26(b)(2)(C).
[15] *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 284 (S.D.N.Y. 2003).
[16] Letter at 4, 5.
[17] *See, e.g.*, 6A Fed. Prac. & Proc. § 1543 (stating that the purpose of the real-party-in-interest rule "is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to ensure generally that the judgment will have its proper effect as res judicata"); *see also Miller UK Ltd. v. Caterpillar, Inc.*, ___ F. Supp. 2d ____, 2014 WL 67340, at *10–11 (N.D. Ill. Jan. 6, 2014) (holding that a litigation funding arrangement did not establish the funder as a real party in interest under Rule 17).

discovery on the other. The source of financing for the claim—be it stockholder's equity, debt, or third-party financing—is entirely beside the point. Yet the Chamber's proposal would spur irrelevant discovery skirmishes over who has funded a claim, rather than on whether the claim itself has merit. That inefficient diversion of scarce judicial resources disserves the stated purpose underlying Rule 26.

Fourth, the Chamber suggests that mandatory initial disclosures are needed "in the event that a court determines it should impose sanctions or other costs."[18] This justification proposes to increase discovery burdens in *every* case to accommodate the tiny subset of cases in which litigation misconduct warrants the imposition of sanctions or other costs. Once again, that reasoning is incompatible with the purpose of Rule 26(a)'s initial disclosure requirements, which is to further the provision of materials that are almost always needed to prepare for trial and to formulate settlement strategy.

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These are but a few of the reasons that the Chamber's proposed amendment is neither desirable nor necessary. It does not merit this Committee's further attention. If the Committee chooses to submit the proposal for comment, however, we will take the opportunity to set forth our position in more detail.

Ethics counsel for Gerchen Keller Capital, LLC (Professor David Dana), Burford Capital LLC (Professor Anthony J. Sebok), and Bentham IMF (Professor W. Bradley Wendell) have reviewed and endorse this letter.

Respectfully submitted,

Adam R. Gerchen
Chief Executive Officer
Gerchen Keller Capital, LLC

Christopher P. Bogart
Chief Executive Officer
Burford Capital LLC

Ralph J. Sutton
Chief Investment Officer
Bentham IMF

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[18] Letter at 6.