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May 19, 2021

William T. Walsh, Clerk of Court
United States District Court
Martin Luther King Jr. Federal Bldg. & U.S. Courthouse
50 Walnut Street
Newark, NJ 07101

DRI and the DRI Center for Law and Public Policy Comment in Support of Proposed
Amendment to DNJ Local Civil Rule 7.1.1 Regarding Disclosure of Third-Party Litigation
Funding

Dear Clerk Walsh:

DRI¹ and the DRI Center for Law and Public Policy (The Center) support the proposed amendment to DNJ Local Civil Rule 7.1.1. Indeed, although DRI and The Center support the proposed amendment, we suggest that the amendment should go further and require production of the funding agreement itself, in precisely the same manner – and for exactly the same reasons – that Fed.R.Civ.P. 26(a)(1)(iv) requires defendants to produce copies of insurance agreements that that may be liable to satisfy all or part of a possible judgment.

¹ For more than sixty years, DRI has been the voice of the defense bar, advocating for 16,000 defense attorneys, commercial trial attorneys, corporations and corporate counsel and defending the integrity of the civil judiciary. DRI is uniquely placed to provide a dispassionate evaluation of issues impacting TPLF. The DRI Center for Law and Public Policy through scholarship, legal expertise and advocacy, provides the most effective voice for the defense bar in the national discussion of substantive law, constitutional issues, and the integrity of the civil justice system. It is a voice that is heard through published research materials, extensive amicus briefs to the U.S. Supreme Court. DRI members primarily (but far from exclusively) represent defendants in civil litigation, but unlike all of the other participants in a litigated matter, DRI members do not have a personal financial stake in the outcome. To be sure, DRI members deeply care about the well-being of, and often have close and long-standing relationships with, their clients. But unlike the plaintiff, the plaintiff's attorney retained with a contingency fee, the TPLF company, and yes, the defendant itself, the DRI member is not personally impacted by the litigation result. DRI's perspective is as a protector and detailed observer of the

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judicial system, buoyed by the vast experience of members who are active daily in the trenches of state and federal civil courts. The DRI Center for Law and Public Policy, through scholarship, legal expertise and advocacy, provides the most effective voice for the defense bar in the national discussion of substantive law, constitutional issues, and the integrity of the civil justice system. It is a voice that is heard through published research materials, extensive amicus briefs to the U.S. Supreme Court, white papers on topics of national importance to the civil justice system, and various practical tools and resources for DRI members. It likewise serves as objective counsel to policy makers and creative public education initiatives.

That Rule requires production of the actual agreements, not mere identification of them. As detailed in the Center's White Paper on Third Party Litigation Funding ("TPLF"), appended to this Comment and available here.

<https://www.dri.org/docs/default-source/dri-white-papers-and-reports/third-party-litigation.pdf>),

The 1970 Advisory Committee Notes adopting the insurance disclosure requirements gave this reason:

Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect.

These same concerns apply to TPLF agreements. Even where the TPLF agreement gives no rights to control to the TPLF company and is not otherwise admissible in evidence—and as discussed in the White Paper that is not the case in many instances—disclosure permits counsel for both sides to make the same realistic appraisals of settlement and litigation strategy. For the same reasons that the insurance agreement itself, not just disclosure of its existence, is to be provided, TPLF agreements themselves should be provided to the defendants.

As laudable as the proposed amendment is, it still allows the Plaintiff and the TPLF company to self-describe the nature of their agreement and presents the defendant with the near impossible task of showing "good cause" about the scope of the TPLF company's authority without any independent means to determine that scope or make such a showing. As noted in *Gbarabe v. Chevron Corp.*, 2016 U.S. Dist. LEXIS 103594, *6 (N.D. Cal. August 5, 2016):

Plaintiff's proposal for in camera review of the agreement by the Court is inadequate because it would deprive Chevron of the ability to make its own assessment and arguments regarding the funding agreement and its impact, if any, on plaintiff's ability to adequately represent the class.

DRI and The Center recommend that the District consider following the example of Wisconsin and West Virginia who have adopted statutes that require disclosure of the agreement itself, in the same manner as Fed.R.Civ.P. 26(a). Wis. Stat. § 804.01(2)(bg) and W. Va. Code Ann. § 46A-6N-6. Our proposed Rule (or legislation) is similar, as follows:

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Third party agreements. Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement and related documents 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 of a party or the party's attorney by, settlement, judgment, or otherwise.

We highlight the reference to "or the party's attorney," because a growing trend in TPLF agreements is for the funder to enter into agreements with the attorney rather than the party.

In summary, for the reasons described above and discussed in more detail in the White Paper, DRI and The Center urge the District to adopt the proposed amendment to Local Civ. Rule 7.1.1, and further recommends that the District consider a broader rule that requires production of the TPLF agreements without a further showing of good cause.

Respectfully submitted,

Emily G. Coughlin

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