No. 23-103

IN THE
United States Court of Appeals for the Federal Circuit

IN RE NIMITZ TECHNOLOGIES LLC,
Petitioner.

On Petition for a Writ of Mandamus to the United States District Court for the District of Delaware in Nos. 21-cv-1247, 21-cv-1362, 21-cv-1855, 22-cv-413
Chief Judge Colm F. Connolly

BRIEF OF HIGH TECH INVENTORS ALLIANCE, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, AND ALLIANCE FOR AUTOMOTIVE INNOVATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 23-103

Short Case Caption In re Nimitz Technologies LLC

Filing Party/Entity High Tech Inventors Alliance, Computer & Communications Industry Association, and Alliance for Automotive Innovation/Amici Curiae

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 11/30/2022

Signature: /s/ Mark S. Davies

Name: Mark S. Davies

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☐ None/Not Applicable
High Tech Inventors Alliance		No parent corporation and no company owns 10% or more of its stock. HTIA's members are as follows: Adobe Systems, Inc.; Amazon.com, Inc.; Cisco Systems, Inc.; Dell Inc.; Google Inc.; Intel Corporation; Micron Technology, Inc.; Microsoft Corporation; Oracle Corporation; salesforce.com, inc.; and Samsung Electronics America.
Computer & Communications Industry Association		No parent corporation and no company owns 10% or more of its stock. CCIA's 28 members are listed on its website at www.ccianet.org/about/members/.
Alliance for Automotive Innovation		No parent corporation and no company owns 10% or more of its stock. Information on AAI's members is available on its website at https://www.autosinnovate.org/about/our-members

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☑ None/Not Applicable ☐ Additional pages attached

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☐ None/Not Applicable ☐ Additional pages attached

Plaintiff Nimitz Technologies LLC identified 12 cases pending in the District of Delaware that "will directly affect or be directly affected by" the pending petition. See Pet. i. In each case, Chief Judge Connolly conducted or scheduled an evidentiary hearing to inquire into compliance with the Court's disclosure rules. Accordingly, amici do not dispute that these cases are likely to be affected by this petition.

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

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STATEMENT OF INTEREST

Amici High Tech Inventors Alliance (HTIA), Computer & Communications Industry Association (CCIA), and the Alliance for Automotive Innovation (AAI) are membership organizations that represent the world's top innovators.[1] Collectively, their members include Amazon, Apple, Cisco, Dell, Ford, General Motors, Google, Honda, Intel, Meta, Micron, Microsoft, Oracle, and Salesforce.

HTIA's, CCIA's, and AAI's members are frequently the targets of baseless suits funded by undisclosed third parties—investors who pay litigation expenses in exchange for a share of the suit's recovery. Members have seen firsthand the various ways in which secret litigation funding warps the course of litigation to the detriment of the parties, the judicial system, and innovation.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici state that no party's counsel authored this brief in whole or in part. No party, party's counsel, or any person other than amici, their members, or their counsel contributed money to fund preparing or submitting this brief. Respondents have consented, and Petitioner does not object, to the filing of this brief.

INTRODUCTION

Third-party litigation funding—the practice of outsiders advancing funds to a party in exchange for a cut of a suit's proceeds—is increasingly common, yet it remains shrouded in secrecy.[2] Recognizing the need to shed light on this practice, Chief Judge Connolly adopted a standing order that requires all parties appearing before him to disclose whether they are receiving outside funding "in exchange for … a financial interest that is contingent upon the results of the litigation," and if so, to describe the terms. Appx353-354.

Petitioner objects to Chief Judge Connolly's standing order and the way he is enforcing Petitioner's compliance with it. But contrary to Petitioner's contention, mandated disclosure of litigation funding is both consistent with federal law and critical to ensuring the smooth functioning, fairness, and integrity of judicial proceedings. Most importantly, with the funders identified, both the court and defendants know who the major players in the suit actually are—and accordingly,

[2] John H. Beisner, Jessica D. Miller & Jordan M. Schwartz, *Selling More Lawsuits, Buying More Trouble*, U.S. Chamber Institute for Legal Reform 4-5 (Jan. 2020), https://tinyurl.com/mryhddt4 (*Selling More Lawsuits*).

who is really driving the litigation, who ultimately stands to benefit, and whether they pose a conflict of interest for the judge. These and other interests more than justify Chief Judge Connolly's standing order, both generally and specifically in these cases, where the purported patent owner is not meaningfully involved in the suits—he did not even know they would be filed—and stands to benefit only minimally from their success despite assuming all the risk.

Petitioner's other case-specific objections to Chief Judge Connolly's manner of enforcing his standing order in no way cast doubt on the propriety of that order. Though it should not, if the Court does have concerns with the enforcement, it should address only those specific concerns, lest it cast doubt on an important movement to bring much needed transparency to litigation-funding practices.

ARGUMENT

I. District Courts Have Broad Authority To Require Transparency Around Litigation Funding Given Its Consequences For Case Management.

District courts have ample authority to address, through disclosure, the many ways in which litigation funding affects cases.

A. District courts have broad authority to manage their cases.

District courts have broad authority to regulate the parties before them, and specifically, to require disclosures of pertinent information.

Most fundamentally, "[d]istrict courts have inherent power to manage their own docket." *Mortg. Grader, Inc. v. First Choice Loan Servs. Inc.*, 811 F.3d 1314, 1320-21 (Fed. Cir. 2016). This includes the power to enter and "enforce its order[s]." *Id.* (internal quotation marks omitted).

The Federal Rules of Civil Procedure also broadly empower district courts to "facilitat[e] ... the just, speedy, and inexpensive disposition of the action," Fed. R. Civ. P. 16(c)(2)(P), and specifically, to authorize inquiries into the "parties' resources," Fed. R. Civ. P. 26(b)(1) (describing scope of discovery). Consistent with this authority, district courts regularly require disclosure from parties. For instance, along with Federal Rule of Civil Procedure 7.1's mandatory disclosures,

district courts sometimes require additional disclosures around settlement, insurance, and for pro se parties.[3]

B. Chief Judge Connolly's standing order is based on several interests that fall within his case-management authority.

Chief Judge Connolly's disclosure order is justified by a range of important interests that affect case management, the parties, and even the court's authority to preside over the case. So contrary to Petitioner's contention (Pet. 14-15), the standing order is not based "only" on an interest in identifying the real parties in interest—although that interest more than suffices. *See infra* 14-15.

1. Identifying a suit's key participants

A district judge cannot manage a case and facilitate its "just, speedy, and inexpensive disposition," *supra* 4, if the judge is not

[3] On settlement, *see, e.g.*, Standing Order for All Judges of the Northern District of California, *Contents of Joint Case Management Statement* 2 ¶ 12 (Oct. 20, 2022), https://tinyurl.com/4efmwrzp (N.D. Cal. Standing Order); Judge Jesse M. Furman, *Civil Case Management Plan and Scheduling Order* 1 ¶ 3, https://tinyurl.com/y8vzfay6 (last visited Nov. 30, 2022); Judge Gary Feinerman, *Initial Status Report* 2 § D, https://tinyurl.com/5auph9nn (last visited Nov. 30, 2022). On insurance, *see* Fed. R. of Civil P. 26(a)(1)(iv). On pro se parties, *see, e.g.*, Standing Order re: Initial Discovery Disclosures, United States District Court for the District of Connecticut (Nov. 20, 2018), https://tinyurl.com/5ha95usx.

adequately informed of the key players in the case. *See, e.g.*, *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig.*, 405 F. Supp. 3d 612, 615 (D.N.J. 2019) (discovery of litigation funding appropriate "where there is a sufficient showing that a non-party is making ultimate litigation or settlement decisions"). Chief Judge Connolly expressly invoked this concern. His order permits the parties to seek additional discovery where "the Third-Party Funder has authority to make material litigation decisions or settlement decisions." Appx354. And in the hearing, he cited the need for "transparency .... about who is making decisions in these types of litigation." Appx386; *see also* Appx372 ("I don't know how I can possibly preside over this case without knowing who the parties really are in front of me.").

There is a wealth of evidence that litigation funders participate in key litigation decisions related to (among other things) counsel and settlement. For instance, litigation-funding contracts sometimes require the funder's approval to select and change lawyers.[4]

[4] *See, e.g.*, Maya Steinitz, *The Litigation Finance Contract*, 54 Wm. & Mary L. Rev. 455, 472 (2012) (giving example of funding agreement that

Funders likewise play an important role in settlements. A "best practices" guide by one funder endorsed contract terms that permit the funder to "[r]eceive notice of and provide input on any settlement demand and/or offer, and any response" and participate in settlement decisions.[5] Some contracts even require funder approval to settle, while others require that the plaintiff notify the funder of any settlement offer and give "good faith consideration to the Funder's analysis of the offer."[6] And the presence of the funder may matter to resolution of disputes

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provided list of "Nominated Lawyers" "selected by the Claimants with the Funder's approval"); *Boling v. Prospect Funding Holdings, LLC*, 771 F. App'x 562, 580 (6th Cir. 2019) (funder had to approve change in firms); DiaMedica Therapeutics Inc., Litigation Funding Agreement (Exhibit 10.1) (Dec. 27, 2019), at 3, § 2.2.1 in Current Report (Form 8-K) (Jan. 3, 2020), https://tinyurl.com/yc6j9fhv (DiaMedica Agreement) (permitting funder to withhold funds if plaintiff willfully failed to follow funder-approved lawyers' advice).

[5] *Selling More Lawsuits*, *supra*, at 19 (quoting Bentham IMF, *Code of Best Practices* (Jan. 2017)).

[6] DiaMedica Agreement 8, § 6.8; *see, e.g.*, *WAG Acquisition, LLC v. Multi Media, LLC*, Nos. 14-2340, 14-2345, 14-2674, 14-2832, 14-3456, 14-4531, 15-3581, 2019 WL 3804135, at *3 (D.N.J. Aug. 13, 2019) (consent to settle); Liquidia Corporation, Litigation Funding and Indemnification Agreement (Exhibit 10.1), at 8, § 4.1 (Nov. 17, 2020), in Current Report (Form 8-K) (Nov. 18, 2020), https://tinyurl.com/mwx9dcb2 ("prior written consent" necessary to approve settlement).

about payment of judgments or attorneys' fees under 35 U.S.C. § 285, as plaintiffs may be intentionally undercapitalized in an effort to avoid such liability. Or, as here (*infra* 11), plaintiffs may receive a nominal interest, so that their mysterious backers avoid all risk.

The court thus needs to know if funders play a role, formal or informal, in key litigation decisions, so that the funder can be brought into mediations, settlements, or other proceedings as appropriate. That commonly happens with insurance[7]; it should be no different with litigation funders.

In these particular cases, the nominal party is not in control. The hearing revealed that the plaintiff's owner Mark Hall "didn't have any involvement in the litigation decisions;" he didn't even have "prior knowledge of the filing of complaints" or "settlements" involving Nimitz's patents. Appx378-379. Instead, "all the litigation decisions" are made by Mavexar, a third-party associated with IP Edge, and "the lawyers" that Mavexar hires. Appx378.

[7] *See* William P. Lynch, *Why Settle for Less? Improving Settlement Conference in Federal Court*, 94 Wash. L. Rev. 1233, 1251-52 (2019) (discussing insurers' role in settlement conferences).

Chief Judge Connolly had good reason to believe a hearing was necessary to reveal this information about Mavexar. *See* Appx359 (ordering the hearing "to determine whether Plaintiff has complied with the Court's standing order regarding third-party litigation funding"). In the past week alone, an entity that appears related to Mavexar (Backertop Licensing, LLC) filed suit without disclosing Mavexar's financial interest, despite a local rule requiring disclosure of "all persons … and corporations … that may have a pecuniary interest in the outcome of the case."[8]

2. Protecting plaintiffs

Chief Judge Connolly's standing order also recognizes that undisclosed third-party litigation-funding arrangements may result in "the interests of any funded parties or the class (if applicable) ... not being promoted or protected." Appx354; *see also In re Valsartan*, 405 F. Supp. 3d at 615 (discovery of litigation-funding evidence appropriate

[8] Andrew E. Russell, *Mavexar-Related Entity Brings Its Suits to C.D. Cal., Does Not Disclose Mavexar as Party with Pecuniary Interest in the Outcome of the Case*, IP/DE Blog (Nov. 28, 2022), https://tinyurl.com/ydrnkcf5.

where there's a risk that "the interests of plaintiffs or the class are sacrificed or are not being protected").

The risk to plaintiffs' interest is baked into the standard terms of funding agreements. Litigation funders are usually the first to recover when a case succeeds. They typically receive both the amount they invested plus the greater of 2-5x the investment or 25-45% of the settlement or verdict.[9] This windfall takes away from the plaintiffs—especially when the lawyers take a cut, too. In some cases, the injured parties walk away empty-handed. For instance, a funding agreement "waterfall" in a case against an HTIA member revealed that the patent

[9] *See, e.g.*, Plaintiffs' Exhibit 8, *Leane v. ChanBond*, No. 3:20-cv-3097 (N.D. Tex. Nov. 2, 2020), Dkt. No. 30-15 (giving funder the greater of 5x the loan or 25% of the settlement or verdict); Prism Technologies Group, Inc., Litigation Funding Agreement (Exhibit 10.10), at 22, Exhibit C, §§ 1.1, 1.2 (Dec. 15, 2016), in Current Report (Form 8-K/A) (Dec. 21, 2016), https://tinyurl.com/5pe9m8kz (promising Bentham—a major funder—2.5x the loan if case ends within 18 months of funding agreement and 3x the loan if it ends after that); AmBase Corporation, Litigation Funding Agreement RAB-AMBASE (Exhibit 10.3) (Sept. 26, 2017), in Current Report (Form 8-K) (listed as Exhibit 10.1) (Sept. 26, 2017), https://tinyurl.com/33sj6j9e (promising funder 30% of proceeds if case is resolved within 36 months and 45% if it is resolved later).

owner would recover nothing even if the settlement was for $50 million.[10]

In these particular cases, there is a real risk that third parties are exploiting the plaintiff. The hearing revealed that Mark Hall, the sole owner of Nimitz, is entitled to only 10% of litigation proceeds, though he is on the hook for 100% of any "liability," including the prevailing party's attorneys' fees. Appx377-378. Yet, as noted, he doesn't even know in advance that suits will be filed on the patents he purports to own.

3. Identifying and avoiding judicial conflicts of interest

Judges must recuse themselves when they have a financial interest that could be affected by the proceedings before them. *See* 28 U.S.C. § 455; Code of Conduct for Fed. Judges, Canon 3(C)(1)(c), https://tinyurl.com/4rter9wp (rev'd Mar. 12, 2019). But judges can't effectively recuse when litigation-funding arrangements are secret. The Federal Rules recognize this in requiring corporate parties to disclose information—often substantial—about their ownership. *See* Fed. R. Civ.

[10] *ChanBond*, *supra*, at 2.

P. 7.1. And Chief Judge Connolly recognized this in his standing order, noting that the parties may show that "conflicts of interest exist as a result of the arrangement." Appx354. Other courts have taken notice, too. *See, e.g.*, *In re Valsartan*, 405 F. Supp. 3d at 615 (discovery of litigation-funding evidence appropriate in connection with "conflicts of interest").

This is no hypothetical concern. A special master in an $18.2 billion case against Chevron had a connection to litigation funders that was revealed only in a deposition.[11] And the risk of conflicts will grow as the litigation-funding industry continues to expand. To date, funders have raised over $11 billion from the kinds of institutions and individuals that judges may have ties to: "state and municipal pension funds, university endowments, foundations, single and multi-family offices, and high-net-worth individuals."[12]

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[11] Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 Geo. L.J. 1649, 1650 (2013).

[12] Roy Strom, *Longford Capital's $250 Million Closes Litigation Finance Fund*, Bloomberg Law (Sept. 22, 2021), https://tinyurl.com/s9frpe7p.

Routine, early disclosure of litigation funding would surface any conflicts of interest early on. In a recent case involving an HTIA member, an untimely disclosure of a conflict of interest required vacatur of a $1.9 billion judgment. *See Centripetal Networks, Inc. v. Cisco Sys., Inc.*, 38 F.4th 1025 (Fed. Cir. 2022), *cert. pet. filed*, No. 22-246 (Sept. 13, 2022) (judge's spouse owned Cisco stock). These belated revelations waste courts' and parties' resources.

In sum, with funding arrangements out in the open, courts can ensure that everything remains above board—that everyone with a role in the litigation is identified and able to participate in key events, like mediation and settlement negotiations; that plaintiffs retain control over the litigation and aren't disadvantaged; and that no conflicts arise.

C. The Patent Act and Federal Rules further justify Chief Judge Connolly's standing order.

Along with the rationales just outlined, identifying the real parties in interest justifies Chief Judge Connolly's disclosure rule. Contrary to Petitioner's contention, "Congress ha[s] [not] already disallowed" inquiries into litigation funding for this reason. Pet. 15. In fact, the Patent Act, along with the Federal Rules of Civil Procedure and precedents Petitioner cites, *supports* such an inquiry.

The Patent Act provisions that Petitioner discusses authorize a "patentee" to bring an infringement action. Pet. 15-18 (citing 35 U.S.C. §§ 100, 281). Federal Rule of Civil Procedure 17(a)(1), which Petitioner also invokes (at 15-16), similarly requires the named plaintiff to be the real party in interest. And this Court's precedents clarify that "only" a patentee or its successors in title have constitutional standing to sue. *See* Pet. 16-17 (citing cases). These authorities merely confirm *who* may bring a patent infringement suit; none holds, or even hints, that "courts cannot consider facts relating to who might be the beneficiaries of patent enforcement." Pet. 16.

To the contrary, the caselaw suggests that litigation-funding agreements *can* be relevant to whether the plaintiff has standing to maintain an infringement suit in its own name. *See, e.g.*, *Cobra Int'l, Inc. v. BCNY Int'l, Inc.*, No. 05-cv-61225, 2013 WL 11311345, at *3 (S.D. Fla. Nov. 4, 2013) (ordering production of litigation-funding agreement because "the litigation funding agreement is relevant [to standing] and is not privileged"). Cases like *Prima Tek II, L.L.C. v. A-Roo Co.*, 222 F.3d 1372, 1377-78 (Fed. Cir. 2000) (cited at Pet. 17) confirm that standing turns on whether the plaintiff possess "all substantial rights"

in the patent. Certain features of funding agreements, if present, could transfer enough rights in the patent to deprive the plaintiff of standing to sue (or sue alone, without joining the funder under Federal Rule of Civil Procedure 19). A funding agreement, for instance, could require the funder to consent to settlement or the assignment, licensing, transfer or sale of the patent; afford the funder the right to discontinue litigation under certain circumstances; grant the funder the first priority right to damages; and grant a security interest in the patent with a right to convert the patent to its name in the event of a default. That combination could deprive the plaintiff of all substantial rights in the patent and, with that, standing.

II. Judges, Legislators, And Rulemakers Are Increasingly Recognizing The Need For Transparency Around Litigation Funding.

Chief Judge Connolly is not the only one to appreciate the importance of bringing litigation funding to light. A range of judicial and legislative actors have likewise recognized that transparency

around litigation funding "is necessary to ensure that profiteers are not distorting our civil justice system for their own benefit."[13]

These actors properly see that litigation funding, especially when shrouded in secrecy, threatens the integrity and efficiency of the judicial system. Litigation funders often take bets on cases—even weak ones—hoping they will garner a big payout.[14] Indeed, funders often invest in portfolios of cases in which many are likely to be losers on the chance that one is a winning lottery ticket.[15] But courts exist to serve justice to the parties to a dispute, not line the pockets of third parties looking for a market-beating return.

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[13] Letter from Sen. Charles Grassley and Congressman Darrell Issa, to Judge John Bates, Chairman, Comm. on Rules of Prac. and Proc. of the Jud. Conf. of the United States (May 3, 2021), https://tinyurl.com/3nkepacp; *see* Advisory Committee on Appellate Rules, Agenda Book 290 (Oct. 13, 2022), https://tinyurl.com/5ekt3fhu (quoting the letter).

[14] Paul B. Taylor, *Disclosing High Roller Bankrolling in the Patent Litigation Casino,* J. Pat. & Trademark Off. Soc'y *4-5, 7 (forthcoming), https://tinyurl.com/22z3tmkk.

[15] *See Selling More Lawsuits*, *supra*, at 9 ("Portfolio investing is becoming a bigger and bigger part of the industry" and under it, "[f]unders … largely eschew[] their … vetting processes for evaluating the merits of the cases.").

Funders' gambits also can waste scarce judicial resources by encouraging cases that wouldn't otherwise be brought and are harder to settle. As explained, the typical arrangement entitles the funder to the first and usually very large cut of the recovery. *Supra* 10-11. Because of that, plaintiffs may not be able to accept reasonable settlement offers that would otherwise be desirable. Instead, they have to wait for a larger settlement farther into the litigation so they aren't left empty-handed. Funders, who have promised large returns to their investors, may hold out for an even bigger jury award, even if the odds are long. And needless to say, the secrecy surrounding funding makes it harder for defendants to negotiate efficient settlements.

Finally, the Chamber of Commerce has suggested that undisclosed litigation funding poses a national security threat, as foreign governments (or their agents) may invest in cases to distract American competitors, access sensitive commercial information, and shape public discourse in their national interest—all in secret.[16]

[16] Michael E. Leiter et al., *A New Threat,* U.S. Chamber Institute for Legal Reform, 1-2 (Nov. 2022), https://tinyurl.com/5cnxs3d6.

In recognition of these problems and those outlined above, courts and legislators have enacted, or are working to enact, disclosure rules similar to Chief Judge Connolly's. The District of New Jersey, for instance, has had a local rule in effect since 2021 that requires parties to identify funders, report if funder approval for litigation and settlement decisions is required, and describe the nature of the funder's financial interest in the case.[17] The Northern District of California has, since 2017, required disclosure of litigation funding in class actions.[18] And many other courts have disclosure rules that encompass litigation funding without expressly stating so. That includes 24 out of 94 federal districts, and six federal circuits, which require parties to disclose all entities that are financially interested in the case's outcome.[19]

The Advisory Committee on Civil Rules is also considering several proposals to amend the Federal Rules of Civil Procedure to either

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[17] D.N.J., Local Rule 7.1.1. Disclosure of Third-Party Litigation Funding (June 21, 2021), https://tinyurl.com/4hjas6k4.

[18] N.D. Cal. Standing Order, *supra*, 2 ¶ 18; *see* Alan Glickman et al., *Discovery Trends in Litigation Finance Arrangements*, Bloomberg Law (April 19, 2018), https://tinyurl.com/5ckf3jta.

[19] Advisory Committee on Civil Rules, Agenda Book 209-10 (Apr. 10, 2018), https://tinyurl.com/y8nrc679.

require disclosure of, or permit judicial inquiry into, the presence of litigation funding.[20] Notably, the Advisory Committee's 25-page analysis of the "challenges" a rulemaking on disclosure would pose makes no mention of any federal law or Federal Rule of Civil Procedure that precludes disclosure.[21]

On the legislative front, at least one state (Wisconsin) has passed a law requiring disclosure of litigation funding.[22] At the federal level, there is proposed legislation in both the Senate and the House that would require disclosure of litigation funding in class actions and multidistrict litigations.[23] And the Governmental Accountability Office, at the behest of legislators, is studying the litigation-funding industry.[24]

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[20] Advisory Committee on Civil Rules, Agenda Book 371-72 (Oct. 5, 2021), https://tinyurl.com/4netcn79 (Oct. 2021 Agenda Book); Roy Strom, *Litigation Funders Risk Disclosure in Court Rules, GAO Moves*, Bloomberg Law (Sept. 19, 2022), https://tinyurl.com/26548bh8 (*GAO Moves*).

[21] Oct. 2021 Agenda Book, *supra*, at 371.

[22] Wis. Stat. § 804.01(2)(bg).

[23] Litigation Funding Transparency Act of 2021, H.R. 2025 and S. 840, 117th Cong. (2021).

[24] Strom, *GAO Moves*, *supra*.

III. This Court Should Not Prematurely Cast Doubt On Litigation-Funding Disclosure Requirements.

There is a growing movement toward transparency around litigation disclosure, as just described. Given that, this Court should exercise caution and avoid any ruling that would cast aspersion on disclosure requirements generally.

Such a move would be especially imprudent in the mandamus posture, with its stringent standard and truncated briefing schedule. And it is unnecessary given Petitioner's objections. Although Petitioner generally maligns Chief Judge Connolly's disclosure rule, its concerns center on the contours of his follow-on order requiring the production of additional documents. *See* Pet. 19-26.

Petitioner's concerns are not well founded, not least because Chief Judge Connolly's standing order is justified by several important case-management interests and is perfectly consistent with federal law. *Supra* 5-15. Petitioner has also failed to support its objections based on attorney-client privilege and work-product immunity. When it comes to litigation-funding documents, privileges and protections are often waived or do not even attach. *E.g.*, *Finjan, Inc. v. SonicWall, Inc.*, No. 17-cv-04467, 2020 WL 4192285, at *1 (N.D. Cal. July 21, 2020)

(concluding "that [plaintiff] has waived both the attorney-client privilege and attorney work product protection for the disputed materials"); *Acceleration Bay LLC v. Activision Blizzard, Inc.*, Nos. 16-cv-453, -454, -455, 2018 WL 798731, at *1-2 (D. Del. Feb. 9, 2018) (no work-product immunity because "[t]he documents were … prepared with a 'primary' purpose of obtaining a loan"). Defendants often have to choose between preserving a discovery immunity and securing a litigation-related advantage. Plaintiffs should not get to have it both ways.

Petitioner's broad-brushed claims thus fall far short of its burden to establish privilege, *Finjan*, 2020 WL 4192285, at *3, and Petitioner offers no reason it should be exempted from such a showing.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of mandamus.

November 30, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. Cir. R. 21(e) because this brief contains 3,893 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in Century Schoolbook 14-point font.

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