

May 8, 2023

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

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

Dear Mr. Byron:

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, the Computer & Communications Industry Association, DRI Center for Law and Public Policy, the Federation of Defense & Corporate Counsel, the Florida Justice Reform Institute, the High Tech Inventors Alliance, Insurance Information Institute, the International Association of Defense Counsel, the Lawsuit Reform Alliance of New York, Lawyers for Civil Justice, Louisiana Legal Reform Coalition, the Michigan Chamber of Commerce, Montana Chamber of Commerce, the National Association of Mutual Insurance Companies, the National Association of Wholesaler-Distributors, the New Jersey Civil Justice Institute, NFIB, the National Retail Federation, the Ohio Chamber of Commerce, the Pennsylvania Chamber of Business and Industry, the Pennsylvania Coalition for Civil Justice Reform, the Pharmaceutical Research and Manufacturers of America, the Product Liability Advisory Council, Inc., the Small Business & Entrepreneurship Council, the South Carolina Chamber of Commerce, the State Chamber of Oklahoma, the Texas Civil Justice League, the U.S. Chamber of Commerce, the U.S. Chamber of Commerce Institute for Legal Reform, the Vegas Chamber, the Virginia Chamber of Commerce, and Wisconsin Manufacturers & Commerce,¹ 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”) investment arrangements in any civil action filed in federal court.² Recent TPLF developments – particularly a pending suit alleging that the world’s largest litigation funder has seized control of litigation in which it has invested, the growing pervasiveness of TPLF usage in the U.S., and increased (but differing) judicial approaches to monitoring TPLF – highlight why a mandatory uniform disclosure requirement is needed and why the Committee should ultimately adopt the proposed amendment to Rule 26.

¹ A full list of signatories can be found on page 11 and descriptions of each are attached as Appendix A.

² That proposal – an amendment to Fed. R. Civ. P. 26(a)(1)(A) – was offered by most of the undersigned parties 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-GGGGGG).

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

The undersigned sincerely appreciate the Committee’s continued consideration of the underlying Rule 26 proposal. However, we are concerned that misrepresentations by the funding industry regarding their role in the litigation they finance have stymied formal action on that proposal. For example, in response to the renewed proposal, the Committee wrote that “[n]o specific examples are provided” and that “[t]hird-party funders meet these arguments by direct denial.”³ The Committee concluded that such “arguments and responses present conflicting versions of fact that cannot be resolved with the information now at hand.”⁴ And funders have continued to push the narrative that they have no influence or control over the course of litigation. For instance, Burford Capital, the world’s largest litigation funder, has repeatedly stated that it “act[s] as [a] **passive investor** [] and *do[es] not control strategy or settlement decision-making*.”⁵

The undersigned have long maintained that the funding industry’s narrative has never been credible. However, a pending legal dispute involving one of the largest litigation funders now suggests that the narrative is in fact false, raising serious concerns about the veracity of its own public statements and reinforcing why requiring the production of funding agreements in all civil cases is critical to understanding who is controlling those actions. Sysco Corporation, a plaintiff in antitrust suits against various poultry and meat suppliers, filed a petition in mid-March to vacate an injunction issued by an arbitration panel at Burford’s behest preventing Sysco from executing settlement deals with multiple antitrust defendants.⁶ According to the petition, the parties signed a litigation funding agreement in 2019 under which Burford provided Sysco non-recourse capital for the antitrust lawsuits in exchange for a share of the proceeds of any future settlements or judgments in those actions.⁷ When Sysco agreed to give its customers a piece of the antitrust claims in 2022, however, Burford allegedly objected and required that the funding agreement be changed to give Burford the right to review and reject settlement offers, provided Burford’s consent is not “unreasonably withheld.”⁸

Once Sysco began receiving settlement offers it found to be reasonable, Burford allegedly sought to obstruct further settlement negotiations, fearing the amounts were too low.⁹

³ December 6, 2017, Report to the Standing Committee, at 14. Notably, as detailed below, the statement that “no specific examples are provided” is inaccurate.

⁴ *Id.*

⁵ <https://www.burfordcapital.com/how-we-work/with-law-firms/>.

⁶ *See* Petition to Vacate Arbitration Award, *Sysco Corp. v. Glaz LLC*, No. 1:23-cv-01451 (N.D. Ill. filed Mar. 8, 2023), ECF No. 1.

⁷ *See id.* ¶ 20.

⁸ *See* Am. Petition to Vacate Arbitration Award ¶ 40, *Sysco Corp. v. Glaz LLC*, No. 1:23-cv-01451 (N.D. Ill. filed Mar. 20, 2023), ECF No. 18.

⁹ *See id.* ¶¶ 30-40.

Burford instituted proceedings to enjoin Sysco from finalizing settlements, and an arbitral panel granted an *ex parte* temporary restraining order in Burford’s favor.¹⁰ These allegations, if true, contradict Burford’s repeated statements (some before this Committee) that it does not exercise any control or influence over the lawsuits it finances.¹¹ But more importantly, they prove precisely why a rule requiring disclosure and production of TPLF agreements in civil litigation is necessary. Indeed, there may be hundreds of plaintiffs in Sysco’s position where funders may have the authority to exercise veto power against the will of the plaintiff, which not only raises serious ethical issues, but also threatens to deter reasonable settlement and needlessly prolong litigation.¹² Automatic disclosure of TPLF agreements guards against these significant risks by making the fact of such TPLF investments transparent and subjecting funders’ representations of non-control to the adversarial process. In short, it provides a backstop against the type of potential abuse alleged in the *Sysco* case.

Importantly, the *Sysco* dispute is not anomalous. The allegations of control there are consistent with the record before this Committee, which contains numerous examples of actual TPLF agreements that grant the TPLF entity authority to control or influence aspects of the funded litigation.¹³ Indeed, we are not aware of any actual agreements that ***do not*** contain

¹⁰ See *id.* ¶¶ 41-58.

¹¹ See, e.g., <https://www.burfordcapital.com/insights/insights-container/common-sense-vs-false-narratives-about-litigation-finance-disclosure/> (“Insurers set limits upon settlement outcomes and thus often control litigation-related decision-making for the defendants they insure, something that providers of commercial litigation finance do not do. ***In litigation finance as it is practiced in the U.S., control remains with the client.***”) (emphasis added); <https://www.burfordcapital.com/how-we-work/with-law-firms/> (“We act as passive investors ***and do not control strategy or settlement decision-making***, and our capital is almost always provided as a non-recourse investment, shifting risk from the firm to Burford.”) (emphasis added); <https://www.burfordcapital.com/insights/insights-container/byline-pli-legal-finance-post-covid/> (“If the matter wins, they can expect a meaningful share of the remaining damages, and if it loses, they keep any capital advanced, locking in a minimum outcome. In both scenarios, ***the company maintains control of its litigation***—and considerably more control over its finances.”) (emphasis added); <https://www.burfordcapital.com/insights/legal-finance-101/> (“Reported use of legal finance—also called litigation finance or litigation funding—has doubled in recent years, as companies and law firms increasingly recognize the benefits of gaining better control over legal budgets and risk ***without ceding control of litigation decision-making or settlement***”) (emphasis added); <https://www.burfordcapital.com/insights/insights-container/how-do-law-firms-use-portfolio-finance/> (“the use of legal finance generally does not alter control of decision-making or attorney-client relationships. Burford makes a portfolio deal directly with the firm, but ***Burford’s role is that of a passive investor.*** Therefore, ***Burford does not control the litigation or settlement strategy and decision-making***, except when agreed to by our client”) (emphasis added); <https://www.sec.gov/Archives/edgar/data/1714174/000110465920081137/filename1.htm> (“Unlike in our legal finance business, where we are ***financing a client who retains decision-making authority in the litigation . . .***”) (emphasis added).

¹² According to exhibits attached to Sysco’s amended petition, Burford’s Chief Investment Officer Jonathan Molot had spoken to Scott Gant, Sysco’s counsel in the underlying antitrust litigation, to secure Gant’s agreement with Burford that the settlements were “unreasonably low.” See Am. Petition, ¶ 34 (citing Second Swiber Decl. Ex. J, Email from J. Molot to K. Daley et al., Sept. 2, 2022). If true, Gant’s actions implicate and likely violate the ethical duties of loyalty critical to the practice of law.

¹³ For example, the elaborate funding agreement utilized by Burford in class action litigation against Chevron “provide[d] control to the Funders” through the “installment of ‘Nominated Lawyers’” – lawyers “selected by the Claimants with the ***Funder’s approval.***” Maya Steinitz, *The Litigation Finance Contract*, 54 Wm. & Mary L. Rev. 455, 472 (2012) (emphasis added). Similarly, in *Boling v. Prospect Funding Holdings, LLC*, the U.S. Court of Appeals for the Sixth Circuit concluded that the terms of the funding agreements involved in that matter “effectively
(cont’d)

provisions affording funders some degree of control or influence over the litigation they are financing – and no such actual agreements have ever been presented to the Committee. The only “evidence” to the contrary is the hollow industry statements that TPLF entities are merely passive investors. But the *Sysco* case and the other actual agreements in the Committee record make clear that such statements are not credible. And the only way to fairly test those representations and ensure that outside interests are not influencing or controlling litigation they are bankrolling in contemplation of a future payout is to require that funding agreements are automatically produced to the other side at the outset of a lawsuit. In short, the serious allegations raised in the *Sysco* case undermine the funding industry’s principal reason for opposing the underlying Rule 26 proposal and warrant the adoption of a uniform mandatory disclosure rule.¹⁴

II. TPLF HAS BECOME AN INCREASINGLY ENTRENCHED ELEMENT OF U.S. LITIGATION, RAISING NEW QUESTIONS ABOUT POTENTIAL MANIPULATION OF THE U.S. JUDICIAL SYSTEM

Since our disclosure proposal was initially offered several years ago, the usage of third-party litigation funding as a form of investment has seeped into all facets of the American civil litigation system. Although it is impossible to measure the precise annual dollar amount invested in U.S. litigation because of the lack of transparency in the industry, “one recent article conservatively estimated this figure around \$2.3 billion,” while another source put it at \$5 billion.¹⁵ According to a 2020 Swiss Re Institute report, U.S. markets account for more than half of the \$17 billion invested globally in litigation.¹⁶ A December 2022 GAO Report found that the amount of funds provided to clients by commercial litigation funders “more than doubled”

g[a]ve [the TPLF entity] substantial control over the litigation,” including terms that “may interfere with or discourage settlement” and otherwise “raise[d] quite reasonable concerns about whether a plaintiff can truly operate independently in litigation.” 771 F. App’x 562, 579-80 (6th Cir. 2019). In a lawsuit filed in 2018, a TPLF entity affirmatively asserted that it had the contractual right to exercise control over the litigation in which it had invested by, *inter alia*, requiring that specified counsel (who had an existing relationship with the TPLF company) serve as one of the plaintiff’s counsel in the funded lawsuit. *See* Compl. ¶ 35, *White Lilly, LLC v. Balestriere PLLC*, No. 1:18-cv-12404 (S.D.N.Y. filed Dec. 31, 2018). And in *Gbarabe v. Chevron Corp.*, the funding agreement contained several key provisions that suggested the funder’s desire to influence the course of the litigation, including one prohibiting the lawyers from engaging any co-counsel or experts without the funder’s consent. *Litigation Funding Agreement*, § 1.1, *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, Dkt. No. 1864 (N.D. Cal. filed Sept. 16, 2016).

¹⁴ Although the specter of funder control is concerning in any civil case, it is particularly troubling in patent litigation, which “can occasionally be susceptible to abuse.” *FastShip, LLC v. United States*, 143 Fed. Cl. 700, 717 (2019) (citing *In re Packard*, 751 F.3d 1307, 1325 & n.21 (Fed. Cir. 2014)) (Plager, J., concurring) *vacated and remanded on other grounds*, 8 F.3d 1335 (Fed. Cir. 2020). The Court of Federal Claims has repeatedly recognized that a reasonable response to this risk is the “disclosure” of TPLF-related information, which “encourage[s] transparency and ensure[s] a shadow broker is not using litigation as a form of harassment.” *Id.*; *see also 3rd Eye Surveillance, LLC v. United States*, 158 Fed. Cl. 216, 228-29 (2022) (ordering discovery related to litigation funders in light of *FastShip*).

¹⁵ Mark Popolizio, *Third-party litigation funding in 2022 – three issues for your radar*, Verisk, Jan. 31, 2022 (citing *Considerations from the ABA’s Best Practices for Litigation Funding*, *The National Law Review*, Volume XI, Number 151 (Feb. 16, 2021); David H. Levitt & Francis H. Brown III, *Third Party Litigation Funding: Civil Justice and the Need for Transparency*, DRI Center for Law and Public Policy (2018), at 1)).

¹⁶ Thomas Holzheu et al., *U.S. Litigation Funding and Social Inflation: the Rising Costs of Legal Liability*, at 3, Swiss Re Institute (Dec. 2021).

between 2017 and 2021.¹⁷ Last year, the funding industry itself repeatedly boasted of its record growth:

- Burford Capital reported: “We deployed more capital than ever before from our balance sheet into assets with the potential to generate our highest returns and profits, auguring favorably for future capital provision income.”¹⁸
- Omni Bridgeway stated: “US business achieved its most profitable year since inception.”¹⁹
- And a survey of litigation funders by Bloomberg News found: “three-quarters of litigation funders . . . said their business has increased since this time last year.”²⁰

Not only has the amount of TPLF investment sharply increased, but TPLF is being used in all kinds of civil litigation. According to the GAO Report, TPLF is being employed in cases involving intellectual property, antitrust, asset recovery, fraud and personal injury.²¹ In an article several months ago, former U.S. Attorney General Michael Mukasey estimated that a full quarter of all U.S. patent cases are financed by third parties.²² As one recent TPLF market survey put it, “demand for litigation financing continues to increase with no signs of slowing down anytime soon.”²³ One would be hard pressed to find an area of law untouched by the TPLF industry.

There are further signs that the Committee’s past reluctance to wade into newly developed markets no longer applies to TPLF. For instance, “funders are using established business practices, strategies, and technology” akin to those employed in any normal financial market.²⁴ The increasing use of portfolio funding is another prime example of how TPLF has grown more sophisticated. Originally, funders invested in individual lawsuits. However, in the past few years, “litigation finance firms have refocused from providing third-party financing to plaintiffs for single cases to financing portfolios of cases and providing the financing directly to law firms.”²⁵ One 2022 survey of major litigation funders found that nearly 70% of capital

¹⁷ <https://www.gao.gov/assets/gao-23-105210.pdf>, at 11.

¹⁸ See Burford Capital March 29, 2022 Announcement: <https://www.burfordcapital.com/shareholders/announcements-container/fy-2021-rns/>.

¹⁹ See Omni Bridgeway August 2022 FY22 Results Deck: <https://omnibridgeway.com/docs/default-source/investors/investor-presentations/20-a-fy22-investor-presentation>.

²⁰ Annie Pavia, *Are Boom Times Ahead for Litigation Finance?*, Bloomberg, Nov. 13, 2022, <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-are-boom-times-ahead-for-litigation-finance>.

²¹ See <https://www.gao.gov/assets/gao-23-105210.pdf>, at 9, 13.

²² See Michael B. Mukasey, “Patent Litigation Is a Matter of National Security,” THE WALL STREET JOURNAL, Sept. 11, 2022, <https://www.wsj.com/articles/patent-litigation-is-a-matter-of-national-security-chips-and-science-act-intellectual-property-theft-lawsuit-technology-scammers-manufacturing-11662912581>.

²³ Westfleet Insider, *2022 Litigation Finance Market Report*, at 2.

²⁴ *Id.* at 14-15.

²⁵ Maya Steinitz, *The Partnership Mystique: Law Firm Finance and Governance for the 21st Century American Law Firm*, 63 Wm. & Mary L. Rev. 939, 943 (2022).

commitments from litigation funders went towards portfolio funding.²⁶ The GAO Report likewise described “a shift from single-case agreements towards portfolio financing over the last 5 years[.]”²⁷ The development of these sophisticated financial arrangements has facilitated the proliferation of TPLF in the U.S. and made it even easier for the practice to pervade all aspects of the civil justice system.

The growing presence of TPLF in the U.S. has also raised questions about whether (and, if so, to what extent) foreign actors are using TPLF to invest in the U.S. civil justice system. All signs indicate that this phenomenon is in fact occurring, as sovereign wealth funds (“SWFs”), state-owned and operated investment funds, are becoming increasingly involved in TPLF.²⁸ For example, Burford Capital has partnered with an undisclosed SWF since at least 2018 and recently extended this partnership through 2023.²⁹ And another funder, Therium, also has a relationship with an undisclosed SWF.³⁰ The possibility of foreign adversaries taking advantage of TPLF to compromise American interests injects yet another dimension into pending legal disputes unrelated to the actual merits of the suit.

Given the patchwork of practices and rules relating to TPLF disclosure, unsuspecting judges require guidance on how to effectively account for the possibility of foreign adversaries using TPLF to exploit their courtrooms in ways that threaten U.S. national and economic security. A recent letter from Sen. John Kennedy (R.-La.) to Chief Justice of the United States John Roberts and U.S. Attorney General Merrick Garland highlights this very concern, recognizing that “few safeguards exist in any form of law, rule, or regulation to prevent foreign adversaries from participating in civil litigation as an undisclosed third-party in our country’s federal courtrooms.”³¹ Sen. Kennedy warns that “[m]erely by financing litigation in the United States against influential individuals, corporations, or highly sensitive sectors, a foreign actor can advance its strategic interests in the shadows since few disclosure requirements exist in jurisdictions across our country.”³² For instance, some adversaries may see an opportunity to prolong litigation for economic or competitive reasons. They may even seek to access confidential trade secret information for state purposes. Judges have a right to know whether these non-merits-related interests are driving the litigation in their courtrooms. And the proposed mandatory disclosure rule would effectuate that right by requiring all funding agreements to be disclosed as a matter of course.

²⁶ See Westfleet Insider, *2022 Litigation Finance Market Report*, at 6.

²⁷ <https://www.gao.gov/assets/gao-23-105210.pdf>, at 12.

²⁸ <https://www.gao.gov/assets/gao-23-105210.pdf>, at 10 & n.24.

²⁹ See <https://www.burfordcapital.com/shareholders/announcements-container/burford-extends-life-of-sovereign-wealth-fund-arrangement-and-comments-on-fund-management-business/>.

³⁰ <https://www.law.com/americanlawyer/2019/03/25/therium-announces-430m-fund-pushing-investments-past-1-billion/>.

³¹ U.S. Senator John Kennedy, *Kennedy urges Roberts, Garland to take action to protect national security from foreign actors meddling in U.S. courts* (Jan. 9, 2022), <https://www.kennedy.senate.gov/public/press-releases?ID=1FBC312C-94B8-409B-B0A3-859A9F35B9F5>.

³² See *id.*

Against this backdrop of a litigation system beset by entrenched and hidden third-party funders, Congress is showing serious interest in legislating on the subject of TPLF disclosure. Members of Congress have communicated their concerns regarding TPLF secrecy in direct correspondence with this Committee.³³ And in the last Congress, the Litigation Funding Transparency Act was introduced in both the Senate and House.³⁴ Absent action by the Committee, we expect such congressional attention to this topic to continue in the current Session.

In short, over the last several years, the U.S. has become the fulcrum of TPLF activity, the practice has become more sophisticated, and it appears to have been accompanied by expanded efforts by funders and possibly foreign actors. These developments all weigh in favor of making TPLF more transparent – which is exactly what the pending Rule 26 disclosure proposal would accomplish.

III. DISPARATE APPROACHES TO TPLF DISCLOSURE DEMONSTRATE WHY JUDGES NEED STANDARDIZED GUIDANCE TO STEER THEIR INQUIRIES

In the years since the undersigned’s previous letter, there has been increasing judicial recognition of the need to make TPLF more transparent, with a growing number of district courts and individual judges requiring some form of TPLF disclosure.³⁵ For example, individual federal judges are increasingly issuing orders or making informal inquiries about TPLF. Just recently, Judge Yvonne Gonzalez Rogers of the U.S. District Court for the Northern District of California orally asked each attorney seeking a leadership position in the recently established social media addiction multidistrict litigation (“MDL”) proceeding to divulge in open court whether he or she is using (or plans to use) TPLF.³⁶ Last year, Chief Judge Colm Connolly of the U.S. District Court of the District of Delaware issued a standing order requiring litigants to disclose whether their cases are being financed by TPLF, and whether there are any conditions tied to that funding (i.e., whether a funder’s approval for any litigation or settlement decisions is required).³⁷ Judge Paul W. Grimm of the U.S. District Court for the District of Maryland has

³³ See Ltr. from C. Grassley and D. Issa, May 3, 2021, https://www.uscourts.gov/sites/default/files/21-cv-1_suggestion_from_senator_grassley_and_representative_issa_-_third_party_litigation_funding_0.pdf.

³⁴ See Litigation Funding Transparency Act of 2021, H.R. 2025, 117th Cong. (2021); Litigation Funding Transparency Act of 2021, S. 840, 117th Cong. (2021).

³⁵ The Executive Branch has also recently acted related to TPLF. See Andrew Ramonas, *SEC Tells Private Equity Firms to Report on Litigation Finance*, Bloomberg Law, May 3, 2023, <https://news.bloomberglaw.com/esg/sec-tells-private-equity-firms-to-report-on-litigation-finance>.

³⁶ Hr’g Tr. 12:21-24, *In re Soc. Media Adolescent Addiction/Pers. Injury Prods. Liab. Litig.*, MDL No. 3047 (N.D. Cal. Nov. 9, 2022) (“I want to know explicitly whether you use [TPLF] or intend to use it in this case.”).

³⁷ See Standing Order Regarding Third-Party Litigation Funding Arrangements, <https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf>. Notably, plaintiffs in multiple patent cases pending before Judge Connolly have challenged the standing order by filing a series of virtually identical petitions for a writ of mandamus with the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit denied each of the petitions, signaling that the standing order will remain in effect for the foreseeable future. See *In re Nimitz Techs. LLC*, No. 2023-103, 2022 WL 17494845, at *3 (Fed. Cir. Dec. 8, 2022).

also required lawyers leading an MDL proceeding concerning a data breach of Marriott hotels to make similar disclosures.³⁸ And another judge overseeing a large swath of federal opioid cases, Judge Dan A. Polster of the U.S. District Court for the Northern District of Ohio, required that lawyers connected with the cases disclose the existence of any third-party funding.³⁹ Although these instances show that judges are becoming aware of TPLF’s pervasive presence, they also demonstrate that judges would benefit from FRCP guidance on how to obtain this critical information and what to do with it.

The examples discussed above show that some judges are inquiring about the existence of TPLF in their cases. But merely asking whether TPLF is being used – especially when done *ex parte* – is not an adequate inquiry because absent a clear definition of the term, the response may be elusive. Further, a “yes/no” answer to that question says nothing about the nature of the arrangement, much less whether it vests an outside funder with authority to influence or control the litigation. Nor can it possibly suffice for a judge to uncritically accept one party’s representation that the agreement it or its client has entered into does not raise any control or influence issues. Based on the allegations in the *Sysco* case, a lawyer may feel justified in saying that a contract providing the investor shall not “unreasonably withhold” consent does not cede control. But to truly grasp whether an investor retains control, it is necessary to fully and critically examine the agreement itself – with input from all parties – because there may be boilerplate language purporting to preserve party and counsel control that is inconsistent with other substantive provisions empowering funders.

Reviewing an agreement *ex parte* provides judges with better information, but it puts judges in the precarious and complicated position of interpreting contracts while withholding information from the other parties to the litigation. Imagine a future case in which a funder’s control later becomes a central issue (perhaps in relation to a settlement, as in the *Sysco* case), and it comes to light that the judge previously held *ex parte* discussions about the funding arrangement or even reviewed the contract without alerting the other side. The pending Rule 26 proposal would prevent such a thorny scenario from ever arising by subjecting funding agreements to the adversarial process and affording party opponents the opportunity to challenge boilerplate claims that investors are not controlling or influencing the case.

Apart from these ad hoc judicial inquiries, local district court rules are increasingly addressing TPLF disclosure. While these local rules reflect a growing recognition of the importance of TPLF transparency, they too are inadequate. As pointed out in the December 2022 GAO Report, “[t]here is no nationwide requirement to disclose litigation funding agreements to courts or opposing parties in U.S. federal litigation.”⁴⁰ And to the extent courts have required some form of disclosure, they have taken widely divergent approaches.⁴¹ In

³⁸ See Case Mgmt. Order Regarding Model Leadership Appls. for Consumer Track at 2-3, *In re Marriott Int’l Customer Data Sec. Breach Litig.*, MDL No. 19-md-2879, ECF No. 171 (D. Md. filed Apr. 11, 2019).

³⁹ See *In re Nat’l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018).

⁴⁰ <https://www.gao.gov/assets/gao-23-105210.pdf>, at 26.

⁴¹ See *id.*

particular, courts differ on who must disclose a financial interest, who is entitled to the disclosed information, what details must be disclosed, and in what kinds of cases disclosure is mandated.

For example, at one end of the spectrum is the District of New Jersey, which adopted a local rule that requires multiple layers of TPLF disclosure in all cases. In particular, each party must file a certification within 30 days of docketing of the case that discloses the identity of each funder (name, address, place of formation), states whether the funder’s approval is necessary for litigation and settlement decisions, and provides a description of the nature of the financial interest.⁴² Parties may also be entitled to additional discovery on the details of TPLF agreements upon a showing of good cause.⁴³ Although Chief Judge Connolly’s aforementioned standing order closely mirrors the District of New Jersey’s approach, it only applies to cases pending before that particular judge. As a result, a significant number of cases pending in the District of Delaware (including a bevy of patent cases) are presently not subject to any TPLF-specific disclosure requirements.

At the opposite end of the spectrum is the Northern District of California, which only requires parties to provide limited identifying information, has no provisions for additional discovery of the terms of any agreements, and, most importantly, only applies to class, collective, and representative actions. The limited scope of the N.D. Cal. Order means that the vast majority of cases pending in that district are not subject to any TPLF-specific disclosure requirements. This includes patent lawsuits, which rarely take the form of class actions despite accounting for an increasing proportion of suits in which TPLF is used.

These examples illustrate that the current TPLF disclosure landscape is a checkerboard of disparate standards. As a result, the existence and extent of TPLF disclosure is a function of where the particular funded case is pending. While some funders, like Burford, concede “that local rules in *some* contexts can require disclosing the identities of litigation funders despite the fact that these rules do not explicitly mention litigation funders,” others, such as Omni Bridgeway, take the position they do not fall within the ambit of these orders and rules.⁴⁴ Indeed, the authors of a Federal Judicial Center (“FJC”) February 2018 research memorandum concluded that “[c]ompliance with these local rules is difficult to ascertain because district courts have not drafted their [disclosure requirements] in a uniform manner.”⁴⁵

The proposed amendment to Rule 26 would solve these problems by providing a clear and easy-to-implement disclosure requirement for TPLF. The proposal clearly articulates what qualifies as litigation funding – i.e., “a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action.”⁴⁶ 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

⁴² See D.N.J. L. Civ. R. 7.1.1(a).

⁴³ See *id.*

⁴⁴ See *Survey of Federal and State Disclosure Rules Regarding Litigation Funding*, at 5 (Feb. 7, 2018).

⁴⁵ *Id.* at 6.

⁴⁶ See Appendix B.

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.

Moreover, the proposed amendment to Rule 26 would also ensure that funding agreements themselves are disclosed at the outset of a case – which none of the current rules or approaches requires as a matter of course. Production of funding agreements is critical to assessing whether the existence of TPLF in a particular case raises any legal or ethical issues. For example, absent disclosure of the actual funding agreement, there is no way to know whether (and, if so, to what extent) the document vests control or influence over the litigation in the funder, all but guaranteeing that conditions like those in the *Sysco* case will go undetected. Such information is not only critical to ensuring the professional independence of the lawyer representing the party using TPLF, but also to flagging potential violations of state champerty and maintenance laws as well as the adequacy of both class counsel and named plaintiffs in class actions (consistent with Fed. R. Civ. P. 23(a)(4)). Disclosure of the funding agreement also facilitates more effective settlement negotiations by giving all parties a sense of their opponent’s litigation resources – which is information that is required of, for example, defendants that must produce insurance agreements at the outset of a lawsuit pursuant to Fed. R. Civ. P. 26(a)(1)(A)(iv). Finally, disclosure of funding agreements will also help judges understand if foreign nationals or state actors are using the U.S. judicial system as an unwitting forum for achieving strategic (and perhaps nefarious) goals, including military and industrial espionage, and economic goals such as raising the costs of doing business for U.S. companies.⁴⁷ Put another way, although the disclosures set forth in the local rules and orders discussed above are important steps in the right direction, they are not a substitute for production of the actual funding agreements.

* * *

The facts of the *Sysco* case – and the obvious implication that disputes over control of litigation could be happening in many federal cases without judges or opposing parties even knowing about it – demonstrates the risk of inaction by this Committee. Notably, even some prominent funders have recently publicly recognized that TPLF raises serious questions and expressed a willingness to “support limited disclosure” on the ground that increased transparency could both “lead more cases to settle” and “clear the record” regarding industry practices.⁴⁸ While the undersigned welcome this development, the concerns discussed throughout this letter will continue to grow unless and until the Committee moves forward and adopts the underlying Rule 26 proposal.

⁴⁷ For a more fulsome explication of these and other reasons for disclosure (e.g., ascertaining potential bias of witnesses, assessing proportionality of discovery requests and potential cost-shifting and preventing exploitation of mass tort plaintiffs from unnecessary surgeries), see David H. Levitt & Francis H. Brown III, *Third Party Litigation Funding: Civil Justice and the Need for Transparency*, DRI Center for Law and Public Policy Third Party Litigation Funding Working Group, <https://www.dri.org/docs/default-source/dri-white-papers-and-reports/third-party-litigation.pdf>.

⁴⁸ See <https://www.law360.com/articles/1551647/litigation-funders-seek-transparency-in-disclosure-debate>.

For all of the foregoing reasons, we urge the Committee to recommend adoption of the attached proposed amendment to Fed. R. Civ. P. 26(a)(1)(A).

Sincerely,

Advanced Medical Technology Association	National Retail Federation
American Property Casualty Insurance Association	New Jersey Civil Justice Institute
American Tort Reform Association	NFIB
Association of Defense Trial Attorneys	Ohio Chamber of Commerce
Computer & Communications Industry Association	Pennsylvania Coalition for Civil Justice Reform
DRI Center for Law and Public Policy	Pennsylvania Chamber of Business and Industry
Federation of Defense & Corporate Counsel	Pharmaceutical Research and Manufacturers of America
Florida Justice Reform Institute	Product Liability Advisory Council
High Tech Inventors Alliance	Small Business & Entrepreneurship Council
Insurance Information Institute	South Carolina Chamber of Commerce
International Association of Defense Counsel	Texas Civil Justice League
Lawsuit Reform Alliance of New York	The State Chamber of Oklahoma
Lawyers for Civil Justice	U.S. Chamber of Commerce
Louisiana Legal Reform Coalition	U.S. Chamber of Commerce Institute for Legal Reform
Michigan Chamber of Commerce	Vegas Chamber
Montana Chamber of Commerce	Virginia Chamber of Commerce
National Association of Mutual Insurance Companies	Wisconsin Manufacturers & Commerce
National Association of Wholesaler-Distributors	

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.** The American Property Casualty Insurance Association (“APCIA”) is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions—protecting 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 comprised of some of the finest trial attorneys in the various states of the United States, the District of Columbia, Puerto Rico, Canada and France and The United Kingdom of Great Britain and Northern Ireland and the Republic of Ireland. Founded as the Association of Insurance Attorneys (AIA) in 1941, it has established itself as one of the major defense trial attorney organizations in the legal profession.
- **Computer & Communications Industry Association.** The Computer & Communications Industry Association (“CCIA”) is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For more than fifty years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. CCIA members are at the forefront of research and development in technological fields such as artificial intelligence and machine learning, quantum computing, and other computer related inventions. CCIA members are also active participants in the patent system, holding approximately 5% of all active U.S. patents and significant patent holdings in other jurisdictions such as the EU and China."
- **DRI Center for Law and Public Policy.** Founded in 2012, the DRI Center for Law and Public Policy (“the Center”)—through scholarship, legal expertise, and advocacy—provided

the most effective voice for the defense bar in the discussion of substantive law, judicial process, constitutional issues, and the integrity of the civil justice system at both the national and state levels. Two of the Center's three primary committees—Legislation and Rules and Public Policy are comprised of numerous task forces and working groups that undertake in-depth studies of a range of topics and publish comments, articles, and white papers on a variety of issues. These resources serve not only as a practical tool for DRI members, but also as objective counsel to policymakers and effective public education assets. The Amicus Committee files amicus curiae briefs in carefully selected cases that present issues of importance to civil litigation defense lawyers and their clients.

- **Federation of Defense & Corporate Counsel.** The Federation of Defense & Corporate Counsel (“FDCC”) 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. To facilitate these goals, the Institute employs research and advocacy in support of meaningful tort reform legislation.
- **High Tech Inventors Alliance.** The High Tech Inventors Alliance (HTIA) is a consortium of innovative technology companies that include global leaders in software, e-commerce, cloud computing, artificial intelligence, quantum computing, digital advertising and marketing, streaming, networking and telecommunications hardware, computers, smartphones, and semiconductors. HTIA’s mission is to promote technological innovation, economic growth, and American jobs by advocating reforms to achieve a more efficient, effective, and inclusive patent system.
- **Insurance Information Institute.** At the Triple-I (“I.I.I.”), we want the people to have the information they need to make educated decisions, manage risk, and appreciate the essential value of insurance. With more than 60 insurance company members - including regional, super- regional, national and global carriers - we are the #1 online source for insurance information. Our website, blog and social media channels offer a wealth of data-driven research studies, white papers, videos, articles infographics and other resources solely dedicated to explaining insurance and enhancing knowledge.
- **International Association of Defense Counsel.** The International Association of Defense Counsel (“IADC”) has been serving a distinguished membership of corporate and insurance defense attorneys and insurance executives since 1920. IADC’s activities benefit its

approximately 2,500 members and their clients, as well as the civil justice system and the legal profession. Moreover, the IADC takes a leadership role in many areas of legal reform and professional development. 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.

- **Lawsuit Reform Alliance of New York.** The Lawsuit Reform Alliance of New York (“LRANY”) is a not-for-profit association of businesses, healthcare professionals, membership organizations, and concerned citizens dedicated to reform of the legal system in order to foster a better business climate, promote job growth and address the growing cost of lawsuit abuse.
- **Lawyers for Civil Justice.** Lawyers for Civil Justice (“LCJ”) is a national coalition of defense trial lawyer organizations, law firms, and corporations 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 Legal Reform Coalition.** Since 2008, the Louisiana Legal Reform Coalition (formerly the Louisiana Coalition for Common Sense) (“LLRC”) has worked at the State Capitol to improve the civil justice system and curb lawsuit abuse. More needs to be done. Unless state lawmakers prioritize legal reform, Louisiana will lag in business investment and job creation.
- **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.
- **Montana Chamber of Commerce.** As the leading business advocate, the Montana Chamber of Commerce (“Montana Chamber”) envisions a business climate that is optimal for Montana business prosperity. To create and sustain an optimal business climate, business prosperity, and a strong Montana economy, the Montana Chamber, through advocacy, education, and collaboration, works to provide an empowered and educated workforce, reduce business growth obstacles, and advance positions that promote success for Montana businesses.
- **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 (“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 its founding in 1943, NFIB has been exclusively dedicated to small and independent businesses, and remains so today.
- **New Jersey Civil Justice Institute.** The New Jersey Civil Justice Institute (“NJCJI”) is the State’s leading organization advocating for the business community on matters of law and legal policy. NJCJI promotes a fair and predictable civil justice system, and defends the value of the rule of law in protecting innovation and fostering economic growth.
- **Ohio Chamber of Commerce.** Since its founding in 1893, the Ohio Chamber of Commerce (“Ohio Chamber”) has been the leading advocate and resource for businesses throughout the Buckeye State. The Chamber has more than 8,000 members, including individually owned and operated businesses serving small communities as well as publicly traded corporations operating on a global scale.
- **Pennsylvania Chamber of Business and Industry.** Founded in 1916, the Pennsylvania Chamber of Business and Industry (“PA 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 close to 10,000 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.

- **Pennsylvania Coalition for Civil Justice Reform.** The Pennsylvania Coalition for Civil Justice Reform (“PCCJR”) is a statewide, nonpartisan alliance of organizations and individuals representing businesses, professional and trade associations, health care providers, nonprofit entities, taxpayers, and other perspectives. The coalition is dedicated to bringing fairness to our courts by elevating awareness of civil justice issues and advocating for legal reform in the legislature. Also, as Pennsylvania is one of the few states with a partisan judicial election system, we strongly encourage all citizens to be educated voters and participate in judicial elections.
- **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, Inc.** Formed in 1983, the Product Liability Advisory Council, Inc. (“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.
- **The State Chamber of Oklahoma.** The State Chamber of Oklahoma (“The State Chamber”) has been the state’s leading advocate for business since 1926 and is the guardian

of business in Oklahoma. We work on behalf of our members, the Oklahoma business community, to affect legislative change and create a pro-growth climate statewide. The State Chamber leverages meaningful partnerships, resources and coalitions to achieve legislative results that strengthen Oklahoma's economy.

- **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 of Commerce.** The U.S. Chamber of Commerce (“the Chamber”) is the world’s largest business federation, representing the interests of businesses of all sizes, sectors and regions, as well as state and local chambers and industry associations. For more than 100 years, the Chamber has advocated for pro-business policies that help businesses create jobs and grow our economy.
- **U.S. Chamber of Commerce Institute for Legal Reform.** A program of the U.S. Chamber of Commerce, the U.S. Chamber of Commerce Institute for Legal Reform’s (“ILR”) mission is to champion a fair legal system that promotes economic growth and opportunity. The Chamber is the world’s largest business federation, representing the interests of businesses of all sizes, sectors and regions, as well as state and local chambers and industry associations. For more than 100 years, the Chamber has advocated for pro-business policies that help businesses create jobs and grow our economy.
- **Vegas Chamber.** The Vegas Chamber (“Vegas Chamber”) is the largest business organization in Nevada. Founded in the early days of Las Vegas, the 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.
- **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.