

Outside Counsel

Recent Trends in Litigation Finance Discovery Disputes

Litigation finance is where a nonparty funds a plaintiff's lawsuit in exchange for an interest in the recovery. Some recent estimates place the size of the litigation finance market at over \$100 billion. This burgeoning industry has allowed for greater flexibility in how individuals, businesses and law firms approach litigation.

The increased use of litigation funding has resulted in more demand for disclosure of documents and communications concerning litigation funding arrangements. Such demands typically come from deep-pocketed litigants who seek to deplete a party's funds by requesting funding discovery that is irrelevant to the claims or defenses in the litigation. This article examines recent cases concerning litigation finance discovery requests, which more often than not are rejected on relevancy grounds.

For example, in *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prod. Liab. Litig.*, 405 F. Supp. 3d 612 (D.N.J. 2019), the defendants sought discovery on whether the plaintiffs were backed by litigation funders, the details of the funding,

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and communications and documents regarding the funding. The plaintiffs objected to the discovery requests, although they agreed to produce certain discovery for in camera review.

For starters, the court noted the scope of relevant discovery set forth in Fed. R. Civ. P. 26(b)(1), which permits discovery regarding “any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]” From there the court held that the requested litigation finance information was a “side issue” that had nothing to do with the key issues in the case. The court ruled that such discovery was denied “[u]nless and until defendants make a legitimate showing that plaintiffs' litigation funding is directed to a relevant issues, which has not been done” In so holding, the court relied on a plethora of recent caselaw that has rejected litigation funding disclosure on relevancy

grounds, including the oft-cited case, *Yousefi v. Delta Elec. Motors*, 2015 WL 11217257 (W.D. Wash. May 11, 2015) (“[w]hether plaintiff is funding this litigation through savings, insurance proceeds, a kickstarter campaign, or contributions from [a] union is not relevant to any claim or defense at issue.”).

In *Benitez v. Lopez*, 2019 WL 1578167 (E.D.N.Y. March 14, 2019), the defendants moved to compel the production of documents concerning the plaintiff's financing of a civil rights suit. The defendants argued that they were entitled to discovery on any financing, including the motives behind it because it went to the plaintiff's credibility and possible grounds for impeachment at trial. Citing Federal Rule 26(b)(1), the court held the defendants failed to establish that such discovery was relevant to the claims or defenses in the case. The court stated that the plaintiff's financial backing was irrelevant to issues of credibility, that litigation funding disclosure would not assist the factfinder in determining whether the plaintiff was telling the truth, and whether the case was being funded by a nonparty was irrelevant to any claim or defense at issue in the action.

Similarly, in *United Access Techs. v. AT&T*, 2020 WL 3128269 (D. Del. June 12, 2020), the defendants moved to compel certain litigation funding discovery from the plaintiff, asserting that such discovery was not privileged and should be produced. The plaintiff countered by arguing that the litigation funding information was not relevant. After conducting an in camera review of the funding documents, the court concluded the defendants failed to meet the threshold requirement to show that litigation funding was relevant under Federal Rule 26. The court held that the defendants merely speculated that the plaintiff's sources of funding was relevant and failed to articulate with specificity how funding documents were connected to any claim or defense in the case.

Likewise, in *MLC Intellectual Prop. v. Micron Tech.*, 2019 WL 118595 (N.D. Cal. Jan. 7, 2019), the defendant sought discovery of "persons and entities that have a financial interest in this litigation," including the identify of any third-party funder. The defendant claimed that the discovery was relevant to "to uncover possible bias issues" and needed the discovery "to understand the existence of conflicts of interest to identify and exclude jury members who may have a bias" and to "explore credibility and bias issues concerning [plaintiff's] witnesses."

The court rejected the defendant's request as irrelevant and held that the defendant failed to provide a specific reason to suspect bias or conflicts of interest. The court stated it could question potential jurors in camera

regarding relationships with third-party funders and possible conflicts of interest and that the plaintiff had already confirmed that non-party witnesses were not funding the litigation. As such, the defendant's claims of possible bias and conflicts of interest were purely speculative.

But see *E. Profit Corp. Ltd. v. Strategic Vision US*, 2020 WL 7490107 (S.D.N.Y. Dec. 18, 2020). In this case the plaintiff sought discovery from the defendant

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on the sources of its litigation funding in support of a fraudulent misrepresentation counterclaim. Pre-trial, the defendant moved in limine to exclude any questions or testimony regarding its source of litigation funding, arguing that such disclosure would be irrelevant to the issues in the case. The plaintiff responded by stating it had a good faith belief that an affiliate of the Chinese Communist Party (CCP) had paid the defendant's legal fees and, if true, would negate defendant's counterclaim that it would have never entered into an agreement with plaintiff had it known that the individual who negotiated the agreement on the plaintiff's behalf was actually a CCP double agent.

The court denied the defendant's motion in limine and permitted questioning and testimony on whether defendant had been funded by a CCP agent. The court cited case authority

that admitted funding documents "when such documents are relevant to credibility issues and to show bias of one party for or against another." The court ruled that if the defendant had accepted financing from a CCP agent, it would have been less likely the defendant relied on plaintiff's alleged misstatements that its principal was an opponent of the CCP or that such statements were important to defendant in deciding whether to enter into the agreement.

The recent trend among district courts is to limit discovery into documents and communications relating to litigation funding on relevancy grounds. Absent specific circumstances that link the discovery request to a claim or defense in the case, there appears to be no relevant purpose in seeking litigation funding discovery, other than to place additional cost and burden onto a party's use of litigation funding as a tool to level the playing field against a deep-pocket adversary.