INVENTORS
DEFENSE ALLIANCE

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Carolyn A. Dubay, 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: Disclosure of Third-Party Participation in Litigation

Dear Ms. Dubay:

On behalf of the Inventors Defense Alliance, a nonpartisan advocacy organization working to protect inventors' rights and ensure they can access the capital needed to enforce their patents in court, I write to reaffirm our opposition to mandatory third-party litigation funding disclosure requirements.

As you know, earlier last month, 214 companies and organizations urged the Committee to adopt an amendment requiring parties in federal civil litigation to disclose "the name, address, and telephone number of any nonparty individual or entity (other than the counsel of record) that, whether directly or indirectly, is providing funding for the action and has a financial interest therein…"

Mandatory disclosure would disadvantage the inventors and small businesses that rely on litigation funding to level the playing field against better-capitalized defendants.

Patent infringement lawsuits are expensive. AIPLA has reported median litigation costs of approximately $3M-$5M for high-stakes patent cases, but sophisticated technology disputes involving multiple patents, PTAB proceedings, source-code discovery, and expert-intensive damages analyses can require budgets materially exceeding $10M per side and even more once the cost of USPTO post-grant proceedings are factored in.

For an independent inventor or startup squaring off against a much larger corporation with a well-funded legal department, those expenses can make a valid patent practically impossible to enforce without outside financing. Third-party litigation funding allows inventors to pursue meritorious infringement claims -- even if that entails years of litigation -- without risking their livelihood or derailing their growth plans.

The mere existence of this third-party financing helps discourage "efficient infringement," a well-documented practice in which large companies deliberately poach smaller firms' patents instead of licensing them -- effectively betting that any litigation costs will be less expensive than a licensing fee.

Onerous disclosure requirements can give those large corporate defendants unfair leverage over a smaller plaintiff. Most importantly, disclosure of the funding terms provides valuable insight into plaintiffs' financial resources, business relationships, and litigation and settlement strategy. IDA has

previously warned that such information could give defendants a roadmap for pursuing a war of attrition against smaller plaintiffs.

The proposed rule is also unclear about the extent of disclosures required. The proposal stipulates that plaintiffs must identify anyone who "directly or indirectly" provides funding for their lawsuit and has a financial interest in it. Read broadly, that language could sweep in people far removed from the case.

Consider a teacher whose pension fund invests in an SEC-registered investment fund that provides litigation funding to a startup's patent infringement lawsuit. Would the plaintiff be required to disclose the SEC registered investment fund, the pension fund, and that teacher's name, address, and telephone number -- even though the teacher likely doesn't even know the lawsuit exists and has no say in how it is handled?

In many cases, such as that described above, broad disclosure would simply be impossible. A litigation funder or the recipient of litigation funding may not even know the identities or contact information of investors several layers removed from the investment. IDA has previously warned that overly broad disclosure rules could sweep in shareholders, equity investors, and pension beneficiaries. Requiring their disclosure would also undermine legitimate expectations of financial privacy and open up avenues for harassment.

America's 36 million small businesses employ nearly 46% of private-sector workers and generate 43% of U.S. GDP. We should not make it harder for these job creators to protect their intellectual property, simply because they lack the resources of a multinational defendant. Litigation funding exists for this very purpose -- to provide access to justice to those who cannot otherwise afford it.

The Committee itself has recognized that crafting a litigation-funding disclosure rule without undesirable consequences presents significant challenges. We respectfully urge the Committee not to adopt a sweeping disclosure mandate that could chill investment, expose confidential financial relationships, and disadvantage independent inventors and small businesses. Instead, to the extent any rule is implemented, it should be surgically precise and formulated to avoid harm or bias.

Thank you for your consideration.

Sincerely,

Kristen Osenga
Chief Policy Counselor
Inventors Defense Alliance

ABOUT THE INVENTORS DEFENSE ALLIANCE

The Inventors Defense Alliance is a nonpartisan, nonprofit, 501(c)(4) advocacy organization that works to build support for inventors' rights, safeguard justice, and protect access to capital. Learn more at www.InventorsDefense.org.