Litigation Funding and Confidentiality: A Comprehensive Analysis of Current Case Law

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Litigation Funding and Confidentiality: A Comprehensive Analysis of Current Case Law

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I. INTRODUCTION

As the use of litigation funding has increased, especially in commercial disputes, the single legal issue that causes the most concern among lawyers for clients contemplating using funding is the availability, extent, and reliability of confidentiality afforded the communications necessary with funders. Indeed, this same concern is also very prominent in the minds of lawyers and parties facing parties they believe may be the beneficiaries of litigation funding.

Despite this obvious concern, prior to the publication of the first version of this article in 2018, no one had systematically reviewed all the publicly-available decisions on the subject of confidentiality of information and documents about litigation funding and attempted to draw reasoned conclusions. Until fairly recently, the number of these decisions has been small, but these decisions now appear to number 108. By the time we began the research for this article, these decisions comprised a sufficient body of law to permit a thorough analysis that now allows lawyers – whether representing clients contemplating using funding or clients opposing apparently funded parties – to provide their clients more informed advice and to guide their own actions either in protecting their clients' confidential information or considering attempts to

obtain confidential information from opponents. That is the purpose of this article.[1,2]

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[1] Although this article focuses primarily on court decisions on discovery disputes, the disclosure of litigation funding has also arisen in other contexts, including in the adoption of local disclosure rules.

For instance, on June 21, 2021, the U.S. District Court for the District of New Jersey adopted an unprecedented, broad disclosure rule, which requires parties to disclose the identity of any third-party litigation funders; whether the funder's approval is necessary for litigation decisions, including settlement; and a brief description of the nature of the financial interest. *See* Order Amending Local Civil Rule 7.1.1 (June 21, 2021), https://www.njd.uscourts.gov/sites/njd/files/Order7.1.1%28signed%29.pdf. The New Jersey disclosure rule was used as a model by Chief Judge Colm F. Connolly of the District of Delaware. *See* Standing Order Regarding Disclosure Statements Required by Federal Rule of Civil Procedure 7.1 ("In all cases assigned to Judge Connolly where a party is a nongovernmental joint venture, limited liability corporation, partnership, or limited liability partnership, that party must include in its disclosure statement filed pursuant to Federal Rule of Civil Procedure 7.1 the name of every owner, member, and partner of the party, proceeding up the chain of ownership until the name of every individual and corporation with a direct or indirect interest in the party has been identified."). The International Court of Arbitration to the International Chamber of Commerce ("ICC") adopted a similar rule when it updated its Rules of Arbitration in October 2020. Effective January 1, 2021, Article 11(7) requires parties to disclose the "existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration." *2021 Arbitration Rules*, ICC, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/rules-of-arbitration-2021/#article_11 (last visited June 27, 2021). In January 2017, the Northern District of California updated its districtwide standing order to add language mandating third-party litigation financing disclosure; however, this order is limited to class actions, and not applicable to all civil proceedings. Jason D. Russell, Hillary A. Hamilton, and Matthew E. Delgado, *Third-Party Litigation Financing: Mandatory Disclosure on the Horizon?*, Skadden, Arps, Slate, Meagher & Flom,https://www.skadden.com/-/media/files/publications/2017/04/thirdpartylitigationfinancingmandatorydisclosureon.pdf (Apr. 19, 2017).

There has been debate about the applicability of general corporate disclosure rules to litigation funders. In nine U.S. courts of appeals and thirty district courts there are disclosure rules that arguably implicate litigation funding. These rules also also outside the scope of this article. Roy Strom, *Litigation Funders Risk Disclosure in Court Rules, GAO Moves*, Bloomberg Law, https://news.bloomberglaw.com/business-and-practice/litigation-funders-risk-disclosure-in-court-rules-gao-moves (Sept. 19, 2022, 9:57 AM). *See* Patrick A. Tighe, Survey of Federal and State Disclosure Rules Regarding Litigation Funding, Mem. to Advisory Committee on Civil Rules, https://bolch-test.law.duke.edu/wp-content/uploads/2018/04/Panel-5-Survey-of-Federal-and-State-Disclosure-Rules-Regarding-Litigation-Funding-Feb.-2018.pdf (Apr. 10, 2018) (providing more in-depth discussion of the status of court-rule based disclosure regimes).

In an unusual recent ruling in the context of the proposed settlement of a mass tort claims that is also outside the scope of this article, one court has recently ordered the disclosure in that case of litigation funding with the stated intent being the protection of claimants. *See* Case

Negotiating and obtaining commercial litigation financing for a case requires that a funder and a client discuss confidential information about the case.[3] Before a litigation funder invests in the case, the prospective funder signs a non-disclosure agreement and then conducts due diligence, evaluating the value of the case based on documents and analysis provided by the client, who we will refer to as the plaintiff[4] for simplicity. If the funder decides to invest in the case after seeing its strengths and weaknesses, the funder and plaintiff will consummate a funding agreement. Like the due diligence documents shared with prospective funders, the funding agreement probably includes sensitive information related to litigation strategy, such as the maximum amount of funding offered for the case or attorneys' opinions. Upon financing the plaintiff, the funder will probably continue to communicate with the plaintiff about the budget, strategy, and developments in the case. Naturally, the plaintiff and the funder will want to keep all these communications confidential and protected from discovery during litigation.

If the defendant believes the plaintiff sought or obtained funding, then he may seek to obtain discovery of two kinds of documents discussed above: the funding agreement and "non-deal documents." We include within "non-deal

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Management Order No. 61, 3, *In re 3M Combat Arms Earplugs Prod. Liability Litig.*, No. 3:19-md-02885 (N.D. Fla. Aug. 29, 2023).

[2] In Illinois, Missouri, Montana, West Virginia, and Wisconsin, state laws have been enacted that could potentially affect the disclosure of commercial litigation funding. *See* 815 Ill. Comp. Stat. Ann. 121/1 – 121/999; Mo. Ann. Stat. §§ 436.550 – 436.572 (West); 2023 Mt. Laws Ch. 360 (S.B. 269) (effective Jan. 1. 2024); Wis. Stat. Ann. § 804.01 (West); W. Va. Code Ann. §§ 46a-6N-1 - 46a-6N-5 (West). A detailed analysis of these laws is beyond the scope of this article.

[3] An attorney has a duty to protect a client's confidential information unless the client gives *informed* consent. *See* ABA Model Rules of Prof'l Conduct R. 1.6. The State Bar of California Standing Committee on Professional Responsibility and Conduct has issued a formal opinion that addresses the ethical obligations that arise when a lawyer represents a client whose case is being funded by a third-party litigation funder. *See* Cal. Bar Ass'n Comm. On Prof'l Resp. & Conduct, Op. 2020-204 (2020). The opinion states that as a part of an attorney's duty to protect a client's confidential information, he or she must warn the client of potential risks in sharing confidential information with litigation funders, such as the risk that the client's opposition may seek to compel communications between the funder and the client or lawyer and that a court may hold that the sharing effected a waiver of otherwise available evidentiary privileges. *Id.*

[4] The client is often a plaintiff in an already-filed suit, but could also be a party contemplating filing a lawsuit or a defendant in a suit. We believe our research and analysis in this article would generally apply regardless of whether the client receiving funding is a claimant who has not yet filed suit, a plaintiff in a pending suit, or a defendant facing a claim in litigation. Nevertheless, these issues most frequently arise in a context where the funded party is or becomes a plaintiff in litigation.

documents" all communications besides the contract to provide funding. This might include due diligence materials shared with the funder before the plaintiff and funder agree on funding, communications reflecting negotiations between funder and client over funding terms, and communications after agreement is reached, such as discussions with the funder about mundane administrative matters, litigation strategy, and budgeting. Once the defendant seeks discovery of the funding agreement and non-deal documents, the court either denies the defendant's request, compels the plaintiff to produce all the requested discovery, or compels production of only some of the requested information, excluding privileged or work-product material or material it concludes are not within the scope of permissible discovery. The court may analyze separately the scope of permissible discovery, as well as work-product and privilege issues, for the funding agreement and non-deal documents.

Prior to the publication of the first version of this article, many commentators apparently believe that lawyers were unable to predict whether a court would compel discovery of information shared with a commercial litigation funder because few decisions existed on the issue.[5] This article was written largely to dispel that myth. As of today, even though no appellate court has ruled precisely on when and under what circumstances litigation funding is discoverable[6], enough case law exists to see the shape and trend of the law on these questions. After analyzing 106 trial court decisions, we found courts most often deny or limit discovery of funding agreements and communications with funders, as shown by Figure 1. This trend has held true since the first version of

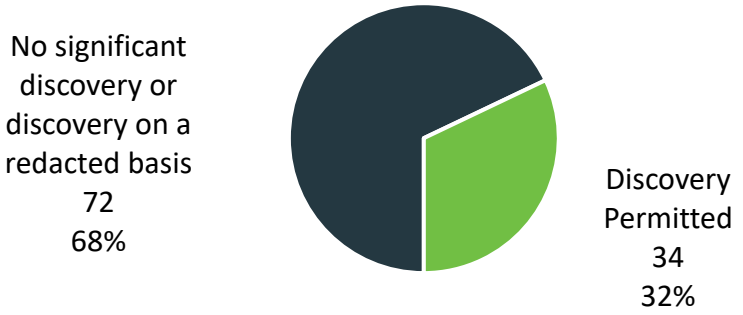
[5] *See, e.g.*, J. Maria Glover, *Alternative Litigation Finance and the Limits of the Work-Product Doctrine*, 12 N.Y.U. J.L. & Bus. 911, 926 (2016) (stating that it is premature to draw any broader conclusions about the trajectory of this case law because there are relatively few decided cases); Michele DeStefano, *Claim Funders and Commercial Claim Holders: A Common Interest or a Problem?*, 63 DePaul L. Rev. 305, 375-76 (2014); Grace M. Giesel, *Alternative Litigation Finance and the Work-Product Doctrine*, 47 Wake Forest L. Rev. 1083, 1085 (2012). News coverage of these cases suggests an even less predictable landscape. *See* Jacob Gershman, *Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight: Courts have continued to divide over whether to order disclosure*, Wall St. J., Mar. 21, 2018, available at https://www.wsj.com/articles/lawsuit-funding-long-hidden-in-the-shadows-faces-calls-for-more-sunlight-1521633600.

[6] In *In re Nimitz Techs. LLC*, No. 2023-103, 2022 WL 17494845 (Fed. Cir. Dec. 8, 2022), on petition for a writ of mandamus, the Federal Circuit found that a standing order in the District of Delaware requiring the disclosure of litigation funding was valid. Additionally, the Lousiana state court appellate division has allowed litigation funding documents to be introduced for purposes of impeachment. *Dantzler v. Delacerda*, No. CW 1108, 2020 La. App. LEXIS 19993 (La. App. 1 Cir. Dec. 30, 2020).

this article. Occasionally, courts have allowed discovery of funding documents, but these cases tend to be unusual and these make up a minority of decisions.

This paper summarizes the outcomes of the discovery decisions we found and then explores the reasoning behind these decisions. Section II summarizes the outcomes and the clear trend toward protecting funding documents from discovery. Section III discusses why relevance to a claim or defense, attorney-client privilege, and the work-product doctrine have protected information shared with funders in these cases. While a few courts have compelled discovery of information shared with funders, after analyzing a properly-raised work-product claim, only seven courts have concluded that sharing information with a funder under normal commercial funding conditions waives all work-product protection.[7] Section IV gives special attention to several leading cases where a judge allowed discovery. This section analyzes the instances in which courts have examined these cases, the manner in which they were assessed, and the reasons

Figure 1: Discovery of Litigation Funding Documents in Cases Discussed in this Article (total cases = 106)



[7] The leading cases in this regard are *Acceleration Bay LLC v. Activision Blizzard, Inc.*, No. 16-453-RGA, 2018 WL 798731, 2018 U.S. Dist. LEXIS 21506, at *5 (D. Del. Feb. 9, 2018) and *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 376 (D. Del. 2010) (finding not clearly erroneous a magistrate's decision that the common interest doctrine did not apply, so the plaintiff waived attorney-client privilege and work-product protection). A recurring circumstance that has resulted in litigation funding being discovered over a work-product defense occurs in infringement patent suits when the financing documents are allowed to be discovered to determine the worth of the patents on issue. *See Broadband ITV, Inc. v. OpenTV Inc.*, No. 17-561922, 2019 WL 13170112 (Cal. Super. June 20, 2019); *Electrolysis Prevention Sols., LLC v. Daimler Truck North Am. LLC*, No. 3:21-171, 2023 WL 4750822 (W.D.N.C. July 24, 2023). Additionally, the district court in *Midwest Ath. & Sports All. LLC v. Ricoh USA, Inc.*, No. 2:19-cv-00514-JDW, 2020 U.S. Dist. LEXIS 169770 (E.D. Pa. Sept. 16, 2020) stated plaintiff's submissions did not permit it to make a determination on whether work-product protection applied to communications between a party and litigation funder, its discussion on the issue strongly indicated that it would reject plaintiff's assertion of the privilege.

why a majority of judges have found these cases unpersuasive. We also provide a forward-looking viewpoint on why courts are unlikely to follow these cases, compared to the majority of decisions that have rejected the discovery of funding documents.

II. SUMMARY OF DISCOVERY DECISIONS

After an extensive search of the federal dockets and major legal databases, we found 136 opinions and orders deciding whether to deny or allow discovery of information shared with litigation funders. We identified 106 of these cases as directly deciding this issue and divided those cases into three general categories. Category One consists of instances where no discovery was allowed.[8] There are sixty cases in this category. In Category Two, courts allowed discovery of the funding agreement or non-deal documents but limited the scope of the discovery by redacting work-product or by denying discovery of work-product. Category Two contains twelve cases. Category Three is made up of cases where the court granted the request for significant, unredacted discovery of the funding agreement and/or non-deal documents. There are thirty-four cases in Category Three.

This article aims to capture the big picture of discovery decisions on litigation funding documents. Of course, the highly fact-specific nature of discovery decisions necessarily makes it challenging to summarize and categorize them without oversimplifying outcomes. Still, we attempt to focus on whether litigation funding documents are protected from discovery based on (1) attorney-client privilege, (2) work-product protection, or (3) lack of relevance. However, some of the discovery disputes do not fit precisely into these three boxes. For this reason, some of the cases included in the summary are not included in the specific breakdown that follows. Specifically, eleven cases are excluded because the decisions hinged on procedural issues, the analysis only applied to class action representatives, there was some additional confounding factor that distinguished the case, [9] or the motion was decided without

[8] Two cases where very limited discovery was allowed was included in Category One because such limited information was ordered to be disclosed.

[9] For example, *Hologram USA, Inc. v. Pulse Evolution Corp.*, No. 2:14-cv-00772-GMN-NJK, 2016 U.S. Dist. LEXIS 87323, at *4-5, 7 (D. Nev. July 5, 2016) (denying discovery due to a failure to timely object) and *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co.*, No. 6:07CV222-ORL-35KRS, 2008 WL 5054695 (M.D. Fla. Nov. 17, 2008) have been excluded. In *Bray*, an early case addressing this issue, the court rejected the plaintiff's blanket objection to discovery on procedural grounds, and the court held it would resolve the discovery objection on a question by question basis in the future. Furthermore, though this article focuses on the discoverability of litigation funding documents, there are some district court cases that discuss the admissibility of litigation funding

explaination.[10] Also, noted below, but excluded from this summary, a case involving a patent monetization consultant, whose situation differs somewhat from commercial litigation financing.[11]

Category One – No or Limited Discovery Allowed. First, in sixty cases, courts denied the defendant's request for discovery of information shared with funders. In nearly all of these cases, the court refused to compel any discovery of the funding agreement or other information shared with a litigation funder.[12] In one

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documents at trial. *See Eastern Profit Corp. Ltd. v. Strategic Vision U.S., LLC*, No. 18-CV-2185, 2020 WL 7490107, at *8 (S.D.N.Y. Dec. 18, 2020) (denying defendant's motion in limine to exclude any questions or testimony regarding the sources of the litigation funding for either side of the action); *Thomas v. Chambers*, No. 18-4373, 2019 U.S. Dist. LEXIS 215380, at *10 (E.D. La. Apr. 26, 2019) (permitting defendant to introduce evidence regarding a financial arrangement between the plaintiffs and two third-party litigation funding companies for impeachment purposes); *Williams v. IQS Ins. Risk Retention*, No. 18-2472, 2019 U.S. Dist. LEXIS 30217, at *10 (E.D. La. Feb. 25, 2019) (holding a third-party funding agreement was not relevant and thus not admissible); *Pinn, Inc. v. Apple Inc.*, 19-01895-DOC, ECF No. 459 (C.D. Cal. July 14, 2021) (excluding evidence or argument regarding litigation funding).

[10] *E.g.*, *United States v. McKesson Corp. et al.*, 1:12-cv-06440-NG-ST, ECF No. 135 (E.D.N.Y., Apr. 28, 2021) (denying defendant's motion to compel in one-line order, and ordering plaintiff to submit any funding agreement to the court for in camera inspection).

[11] *E.g.*, *Intellectual Ventures I LLC v. Altera Corp.*, No. 10-1065-LPS, ECF No. 415 (D. Del. Jul. 25, 2013).

[12] *Medtronic Sofamor Danek, Inc. v. Michelson*, No. 01-2373, 2003 U.S. Dist. LEXIS 25198 (W.D. Tenn. Nov. 6, 2003); *Rembrandt Techs., L.P. v. Harris Corp.*, No. 07C-09-059-JRS, 2009 WL 402332, at *7, 2009 Del. Super. LEXIS 46 (Del. Super. Ct. Feb. 12, 2009); *Mondis Tech., Ltd. v. LG Elecs., Inc.*, No. 2:07-CV-565-TJW-CE, 2011 WL 1714304 (E.D. Tex. May 4, 2011); *Devon It, Inc. v. IBM Corp.*, No. CIV.A. 10-2899, 2012 WL 4748160 (E.D. Pa. Sept. 27, 2012); *Cabrera v 1279 Morris LLC*, 2012 WL 5418611 (N.Y. Sup. Ct. 2013); *Walker Digital v. Google*, Civ. No. 11-309-SLR (D. Del. Feb. 12, 2013); *Doe v. Soc'y of Missionaries of Sacred Heart*, No. 11-CV-02518, 2014 WL 1715376 (N.D. Ill. May 1, 2014); *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711 (N.D. Ill. 2014); *The Abi Jaoudi and Azar Trading Corp. v. CIGNA Worldwide Ins. Co.*, No. 2:91-cv-0785 (E.D. Pa. Jul. 17, 2014); *Kaplan v. S.A.C. Capital Advisors, L.P.*, No. 12-CV-9350 VM KNF, 2015 WL 5730101, at *5, 2015 U.S. Dist. LEXIS 135031, at *18 (S.D.N.Y. Sept. 10, 2015), aff'd, 141 F. Supp. 3d 246 (S.D.N.Y. 2015); *Mobile Telecomms. Techs. LLC v. Blackberry Corp.*, No. 3:12-cv-01652 (N.D. Texas Nov. 2, 2015); *Yousefi v. Delta Elec. Motors, Inc.*, 2015 WL 11217257, 2015 U.S. Dist. LEXIS 180844 (W.D. Wash. May 11, 2015); *Ashghari-Kamrani v. United Services Automobile Assn.*, No. 2:15-CV-478, 2016 WL 11642670, at *14-15 (E.D. Va. May 31, 2016); *Harper v. Everson*, No. 3:15-CV-00575-JHM, 2016 U.S. Dist. LEXIS 197894 (W.D. Ky. June 27, 2016); *Hologram USA, Inc. v. Pulse Evolution Corp.*, No. 2:14-cv-00772-GMN-NJK, 2016 U.S. Dist. LEXIS 87323, at *4-5, 7 (D. Nev. July 5, 2016); *IOENGINE LLC v. Interactive Media Corp.*, No. 1:14-cv-01571 (D. Del. Aug. 3, 2016); *Telesocial Inc. v. Orange S.A.*, No. 3:14-cv-03985 (N.D. Cal. Sept. 30, 2016); *United States ex rel. Fisher v. Homeward Residential, Inc.*, No. 4:12-CV-461, 2016 U.S. Dist. LEXIS 32910, 2016 WL 1031154, (E.D. Tex. Mar. 15, 2016); *United States v. Ocwen Loan Servicing, LLC*, No. 4:12-CV-543, 2016 WL 1031157, 2016 U.S. Dist. LEXIS

32967 (E.D. Tex. Mar. 15, 2016); *VHT, Inc. v. Zillow Group, Inc.*, No. C15-1096JLR, 2016 WL 7077235, 2016 U.S. Dist. LEXIS 172373 (W.D Wash. Sept. 8, 2016); *Mackenzie Architects, P.C. v. VLG Real Estate Developers, LLC, et al.*, No. 1:15-CV-01105-TJM-DJS, 2017 WL 4898743 (N.D.N.Y. Mar. 3, 2017); *Viamedia, Inc. v. Comcast Corp.*, No. 16-CV-5486, 2017 WL 2834535, 2017 U.S. Dist. LEXIS 101852 (N.D. Ill. June 30, 2017); *In re: Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2018 WL 2127807 (N.D. Ohio May 7, 2018); *Lambeth Magnetic Structures, LLC v. Seagate Tech. (US) Holdings, Inc.*, No. CV 16-538, 2018 WL 466045 (W.D. Pa. Jan. 18, 2018); *Space Data Corp. v. Google, LLC*, No. 16-CV-02360, 2018 WL 3054797 (N.D. Cal. June 11, 2018); *Benitez v. Lopez*, 2019 U.S. Dist. LEXIS 64532, 2019 WL 1578167 (E.D.N.Y. Mar. 14, 2019); *Dupont v. Costco Wholesale Corp.*, No. 17-04469, 2019 WL 8158471 (E.D. La. Oct. 15, 2019), *aff'd*, No. CV 17-4469, 2019 WL 5959564 (E.D. La. Nov. 13, 2019); *Hybrid Ath., LLC v. Hylete*, No. 3:17-cv-1767 (VAB), 2019 U.S. Dist. LEXIS 148245, at *37-38 (D. Conn. Aug. 30, 2019); *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig.*, 405 F. Supp. 3d 612 (D.N.J. 2019); *MLC Intellectual Prop., LLC v. Micron Tech., Inc.*, No 14-CV-03657, 2019 WL 118595 (N.D. Cal. Jan. 7, 2019); *Pipkin v. Acumen*, 2019 U.S. Dist. LEXIS 206233 (D. Utah Nov. 26, 2019); *Quan v. Peghe Deli Inc.*, 2019 N.Y. Misc. LEXIS 4516, 2019 WL 3974786 (Sup. Ct. Quens County 2019); *V5 Techs. v. Switch, Ltd.*, 334 F.R.D. 306 (D. Nev. 2019); *Williams v. IQS Ins. Risk Retention*, No. 18-2472, 2019 U.S. Dist. LEXIS 30217, at *10 (E.D. La. Feb. 25, 2019); *Art Akiane LLC v. Art & SoulWorks LLC*, No. 19 C 2952, 2020 U.S. Dist. LEXIS 171682 (N.D. Ill. Sep. 18, 2020); *Cont'l Circuits LLC v. Intel Corp.*, 435 F. Supp. 3d 1014 (D. Ariz. 2020); *Elm 3DS Innovations Ltd. Liab. Co. v. Samsung Elecs. Co.*, No. 14-1430-LPS, 2020 U.S. Dist. LEXIS 216796 (D. Del. Nov. 19, 2020); *Impact Engine, Inc. v. Google LLC*, No. 3:19-cv-01301-CAB-DEB, 2020 U.S. Dist. LEXIS 194517 (S.D. Cal. Oct. 20, 2020); *Pres. Techs. LLC v. MindGeek USA Inc.*, Case No. 2:17-cv-08906, 2020 U.S. LEXIS 258311 (C.D. Cal., Dec. 18, 2020); *United Access Techs., LLC v. AT&T Corp.*, 2020 U.S. Dist. LEXIS 103532 (D. Del. June 12, 2020); *Allele Biotechnology & Pharm. v. Pfizer*, Inc., No. 20-cv-01958-H-AGS, 2021 U.S. Dist. LEXIS 174654, at *4 (S.D. Cal. Sep. 13, 2021); Beam v. Watco Cos., L.L.C., No. 3:18-CV-02018-SMY-GCS, 2021 U.S. Dist. LEXIS 137915 (S.D. Ill. Jan. 20, 2021); *Colibri Heart Valve LLC v. Medtronic CoreValve LLC, et al.*, 8:20-cv-00847-DOC-JDE, ECF No. 111 (C.D. Cal. Mar. 26, 2021); *Coronda v. Veolia N. Am.*, 2021 NYLJ LEXIS 298 (N.Y. Sup. Ct. Apr. 13, 2021); *Edelson v. Edelson*, No. CV N20M-09-140, 2021 WL 195035 (Del. Super. Ct. Jan. 20, 2021); *Neural Magic Inc v. Facebook Inc*, No. 1:20-cv-10444 (D. Mass. December 21, 2021), ECF No. 224 (electronic order); *United States v. McKesson Corp. et al.*, 1:12-cv-06440-NG-ST, ECF No. 135 (E.D.N.Y., Apr. 28, 2021); *Advanced Aerodynamics, LLC v. Spin Master, Ltd.*, No. 6:21-cv-00002-ADA (W.D. Tex. Feb. 4, 2022); *Fleet Connect Sols. LLC v. Waste Connections US, Inc.*, 2022 U.S. Dist. LEXIS 129216 (E.D. Tex.) (June 29, 2022) (ECF No. 59); *Garcia v. City of N.Y.*, 2022 NY Slip Op 33333(U), 2022 N.Y. Misc. LEXIS 5482, Index No. 161140/2017, ¶ 3 (Sup. Ct. N.Y. Cnty., Oct. 3, 2022); *Hardin v. Samsung Elecs. Co., Ltd.*, No. 2:21-CV-00290-JRG, 2022 U.S. Dist. LEXIS 194602 (E.D. Tex. Oct. 25, 2022); *Kove IO, Inc. v. Amazon Web Services, Inc.*, 18-cv-8175 (N.D. Ill., January 26, 2022), ECF No. 497; *Nantworks, LLC v. Niantic, Inc.*, 2022 U.S. Dist. LEXIS 87320 (N.D. Cal. May 12, 2022); *Riseandshine Corporation d/b/a Rise Brewing v. PepsiCo, Inc.*, 21-cv-6324, 2022 WL 1118890 (S.D.N.Y., March 3, 2022), ECF No. 197; *Rodriguez v Rosen & Gordon, LLC*, 2022 N.Y. Misc. LEXIS 1084 (N.Y. Sup. Ct. Mar. 4, 2022); *Taction Technology, Inc. v. Apple Inc.*, No. 21-cv-812, 2022 WL 18781396 (S.D. Cal. Mar. 16, 2022) (ECF No. 44); *Thimes Solutions Inc. v. TP-Link USA Corp.*, No. 19-10374, 2022 WL 18397128 (C.D. Cal. Oct. 6, 2022); *Worldview Entertainment Holdings, Inc. v Woodrow*, 204 A.D.3d 629, 2022 N.Y. App. Div. LEXIS 2790 (N.Y. App. Div. Apr. 28, 2022); *Centripetal Networks, LLC v. Palo Alto Networks, Inc.*, No. 2:21-137 (E.D. Va. Aug. 16, 2023); *GoTV Streaming, LLC v.*

case, the court did not discuss discovery of the funding agreement and allowed very limited discovery of a few non-deal documents, which were redacted.[13] Similarly, in a divorce proceeding, a litigation funder was ordered to produce financial information provided to the litigation funder by the litigant.[14] However, beyond this situation being quite rare, courts have quashed subpoenas served on litigation funders for information related to the funded party when the litigation funder is a non-party to the case. [15] Finally, in another case, the court ruled that funding agreements are protected by the work product doctrine, but information about the identities of the funder was not.[16]

Category Two – Limited Discovery Allowed. Second, in twelve of the 106 decisions analyzed, the court held some, but not all, of the material shared with funders deserved protection from discovery. In nine of these cases, the respondent raised a work-product defense.[17] In two of these instances, the

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Netflix, Inc., No. 2:22-07556-RGK-SHK, 2023 WL 4237609 (C.D. Cal. May 24, 2023); *SiteLock LLC v. GoDaddy.com LLC*, No. 19-02746-PHX-DWL, 2023 WL 3344638 (D. Ariz. May 10, 2023).

[13] *Doe v. Soc'y of Missionaries of Sacred Heart*, No. 11-CV-02518, 2014 WL 1715376 (N.D. Ill. May 1, 2014).

[14] *Edelson v. Edelson*, No. CV N20M-09-140, 2021 WL 195035, at *2 (Del. Super. Ct. Jan. 20, 2021) (ordering a litigation funding company to produce all financial statements and information presented to the company by the litigant, the amounts disbursed in loans to the litigant, and the amounts received from the litigant as repayment but denied the respondent's request for production of the loan documents which included proprietary terms and conditions).

[15] *Mobile Telecomms. Techs. LLC v. Blackberry Corp.*, No. 3:12-cv-01652 (N.D. Tex. Nov. 2, 2015).

[16] *Cont'l Circuits LLC v. Intel Corp.*, 435 F. Supp. 3d 1014, 1024 (D. Ariz. 2020).

[17] *Caryle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, No. 7841-VCP, 2015 WL 778846 (Del. Ch. Feb. 24, 2015); *Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co.*, No. CV 07C-12-134-JRJ, 2015 WL 1540520 (Del. Super. Ct. Mar. 31, 2015); *Morley v. Square, Inc.*, No. 4:10CV2243 SNLJ, 2015 WL 7273318, 2015 U.S. Dist. LEXIS 155569 (E.D. Mo. Nov. 18, 2015); *In re Int'l Oil Trading Co., LLC*, 548 B.R. 825, 832 (Bankr. S.D. Fla. 2016); *Elenza, Inc. v. Alcon Labs.*, No. N14C-03-185 MMJ CCLD (Del. Super. Ct. June 14, 2016); *Odyssey Wireless, Inc. v. Samsung Elecs. Co., Ltd*, No. 315CV01735HRBB, 2016 WL 7665898, 2016 U.S. Dist. LEXIS 188611 (S.D. Cal. Sept. 20, 2016); *Alabama Aircraft Indus. v. Boeing Co.*, No. 2:16-mc-01216-RDP, at *31, 33, 49 (N.D. Ala. Feb. 9, 2018; *SecurityPoint Holdings, Inc. v. United States*, No. 1:11-CV-00268, 2019 WL 1751194, at *5-6 (Fed. Cl. Apr. 16, 2019) (recognizing both work-product protection and an objection that the discovery request was not relevant to a claim or defense) (*see also* ECF No. 404, denying motion to compel production of unredacted funding agreement because *in camera* review showed redacted portions of agreement were not relevant); *Fulton v. Foley*, No. 17-CV-8696, 2019 U.S. Dist. LEXIS 209585, at *11 (N.D. Ill. Dec. 5, 2019) (ordering plaintiff to disclose "all non-mental impressions, fact-based information and documents including any statements provided by Plaintiff directly, if any, that was provided to [the funder].").

respondent augmented this defense with argument about attorney client privilege. Of the remaining three cases in Category Two, the respondent objected to turning over the discovery based on relevance twice[18] and relied solely on attorney client privilege once.[19] In several cases, the court only allowed discovery of the funding agreement in redacted form to protect work-product in that document.[20] In four instances, the court remained silent as to discovery of the funding agreement, but compelled discovery of non-deal documents.[21]

Category Three – Significant Discovery Allowed. In thirty-four cases, courts compelled significant discovery of information from litigation funders. In some of these cases, there was not much case law on this issue at the time of decision, or the respondent failed to raise all the usual objections. However, in a majority of instances, discovery was permitted even after the respondent raised work-

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[18] *Queens Univ. v. Samsung Elecs.*, No. 2:14CV53-JRG-RSP (E.D. Tex. Apr. 10, 2015); *Cirba Inc. v. Vmware, Inc.*, No. 19-742-LPS, 2021 LEXIS 238484 (D. Del. Dec. 14, 2021).

[19] *Intellectual Ventures I LLC v. Altera Corp.*, No. 10-1065-LPS, ECF No. 415, at *12 (D. Del. Jul. 25, 2013).

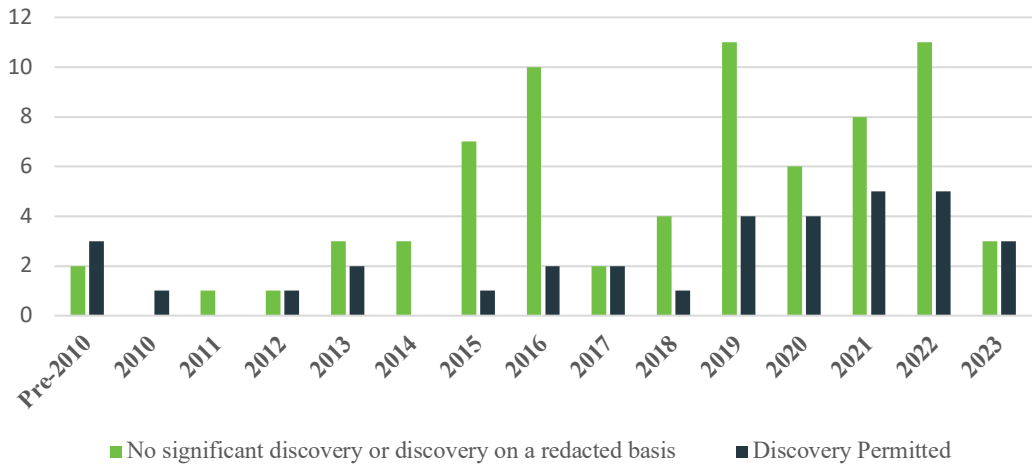
[20] *E.g., SecurityPoint Holdings, Inc. v. United States*, No. 1:11-CV-00268, 2019 WL 1751194, at *5-6 (Fed. Cl. Apr. 16, 2019); *Elenza, Inc. v. Alcon Labs.*, No. N14C-03-185 MMJ CCLD (Del. Super. Ct. June 14, 2016); *In re Int'l Oil Trading Co., LLC*, 548 B.R. 825, 832 (Bankr. S.D. Fla. 2016); *Queens University, et. al. v. Samsung Elecs.*, No. 2:14CV53-JRG-RSP (E.D. Tex. Apr. 10, 2015); *Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co.*, No. CV 07C-12-134-JRJ, 2015 WL 1540520 (Del. Super. Ct. Mar. 31, 2015); *Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, No. CV 7841-VCP, 2015 WL 778846 (Del. Ch. Feb. 24, 2015); *Fulton v. Foley*, No. 17-CV-8696, 2019 U.S. Dist. LEXIS 209585, at *11 (N.D. Ill. Dec. 5, 2019) (ordering plaintiff to disclose "all non-mental impressions, fact-based information and documents including any statements provided by Plaintiff directly, if any, that was provided to [the funder].").

[21] *Odyssey Wireless, Inc. v. Samsung Elecs. Co., Ltd*, No. 315CV01735HRBB, 2016 WL 7665898, 2016 U.S. Dist. LEXIS 188611 (S.D. Cal. Sept. 20, 2016); *Morley v. Square, Inc.*, No. 4:10CV2243 SNLJ, 2015 WL 7273318, 2015 U.S. Dist. LEXIS 155569 (E.D. Mo. Nov. 18, 2015). As in the cases compelling disclosure of the redacted funding agreement, both the *Odyssey* and *Morley* courts allowed for redaction of privileged information or work-product in the non-deal documents produced. The *Alabama Aircraft Indus.* court held that "providing a draft complaint to a litigation funding source does not waive the work-product privilege," but the court allowed discovery of two emails with a funder where only attorney-client privilege was claimed, *Alabama Aircraft Indus. v. Boeing Co.*, No. 2:16-mc-01216-RDP, at *31, 33, 49 (N.D. Ala. Feb. 9, 2018). We categorized that case here and with the cases allowing only redacted discovery because the emails did not appear to be about obtaining litigation funding nor was work-product protection asserted for them. *See id.* In *Cirba Inc. v. Vmware, Inc.*, No. 19-742-LPS, 2021 LEXIS 238484 (D. Del. Dec. 14, 2021), the court announced that only documents that describe or explain the value of the challenged patent are relevant. This provides an avenue for the funder to prevent the funding documents from being discovered.

product, attorney client, and relevance objections.[22] Section IV analyzes nine of these cases in depth and discusses why a minority of courts are persuaded by Category Three precedent.

Overall, sixty-eight percent of cases we found did not allow much, if any, discovery of information shared with litigation funders. This number grows to seventy-five percent when the respondent presents arguments about work-product, attorney client privilege, and relevance or some combination these arguments.

Figure 2: Decisions on Discoverability of Funding Documents by Year in Cases Discussed in this Article



Over time, this pattern holds. Since 2011, each year has seen more courts denying discovery requests related to litigation funding than granting them.[23] This trend holds despite the rise in incidents over time as illustrated by the upward slope of the bar graph in Figure 2. Additionally, most of the leading decisions allowing significant discovery of the funding agreement and non-deal documents in the face of a strong work-product argument by the plaintiff were decided several years ago, before the decision in *Miller v. Caterpillar* in 2014, the

[22] In 10 out of the 34 Category Three cases, work-product, attorney client, and relevance objections were not raised. *E.g.*, *In re Gawker Media LLC*, 2017 Bankr. LEXIS 1798, 2017 WL 2804870 (Bankr. Ct. S.D. NY 2017) (permitting discovery of litigation funding agreements based on a specific Bankruptcy Court rule that allowed the trustee of the bankruptcy to identify and pursue claims against non-parties in order to recoup money for the bankrupt estate).

[23] In 2010, there is only one case in our data set and in that case the court allowed discovery. *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 376 (D. Del. 2010). Complete information is not available for 2023, as the year is not yet complete.

leading decision in this area.[24] The *Acceleration Bay* decision in 2018 was an exception to this trend, but it involved unusual facts and did not distinguish prior cases in a way likely to prompt other courts to depart from the current majority view.

III. WHY COURTS DENY DISCOVERY OF FUNDING DOCUMENTS

Among other requirements for discovery under Federal Rule of Civil Procedure 26, a document must be relevant to a party's claim or defense to be discoverable. Relevant information might still not be discoverable if it is protected by the attorney-client privilege or the work-product doctrine. As discussed in the three sections below, courts deny requests for discovery of litigation funding agreements and non-deal documents because these documents are not relevant, are protected by attorney-client privilege, or are protected work-product. When a plaintiff discloses privileged information or work-product to a third-party, that disclosure may lead to waiver of attorney-client privilege or work-product protection, but exceptions and limits on waiver allow funding documents to retain these protections.

Figure 3 illustrates how often a court has found each of these grounds persuasive when deciding to limit, at least to some extent, a defendant's request for discovery of funding documents. Although each of these three grounds alone has sufficed to deny discovery of any funding documents, courts most often deny or limit discovery of funding documents on relevance grounds. The minority of courts permitting discovery of funding documents did so most often due to a finding of no work-product protection or finding the litigation funding documents relevant.

A. The Requirement of Relevance for Funding Documents to be Discoverable

As a threshold matter in federal court, a party may only discover a "nonprivileged matter that is relevant to any party's claim or defense."[25] Defendants have argued funding documents are relevant to determine:

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[24] *See Leader*, 719 F. Supp. 2d at 376 (2010); *Conlon*, 2004 Mass. LCR LEXIS 56, at *5 (Mass. Land Ct. July 21, 2004). The *Miller* decision was issued in 2014. *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711 (N.D. Ill. 2014). We found more courts have cited *Miller* more than any other case on this issue.

[25] Fed. R. Civ. P. 26(b)(1) (emphasis added).

- the adequacy of class counsel;[26]
- if the plaintiff no longer has standing because the patent or claim was transferred;[27]
- whether funders are indispensable parties or witnesses;[28]
- whether a funder declined to take a case because the patent in an infringement suit is invalid;[29]
- whether the plaintiff's claims are barred under the statute of limitations; and[30]
- "possible bias issues" with jury members and witnesses.[31]

[26] *Kaplan*, 2015 U.S. Dist. LEXIS 135031, at *17-18; *Gbarabe* 2016 U.S. Dist. LEXIS 103594, at *5-6.

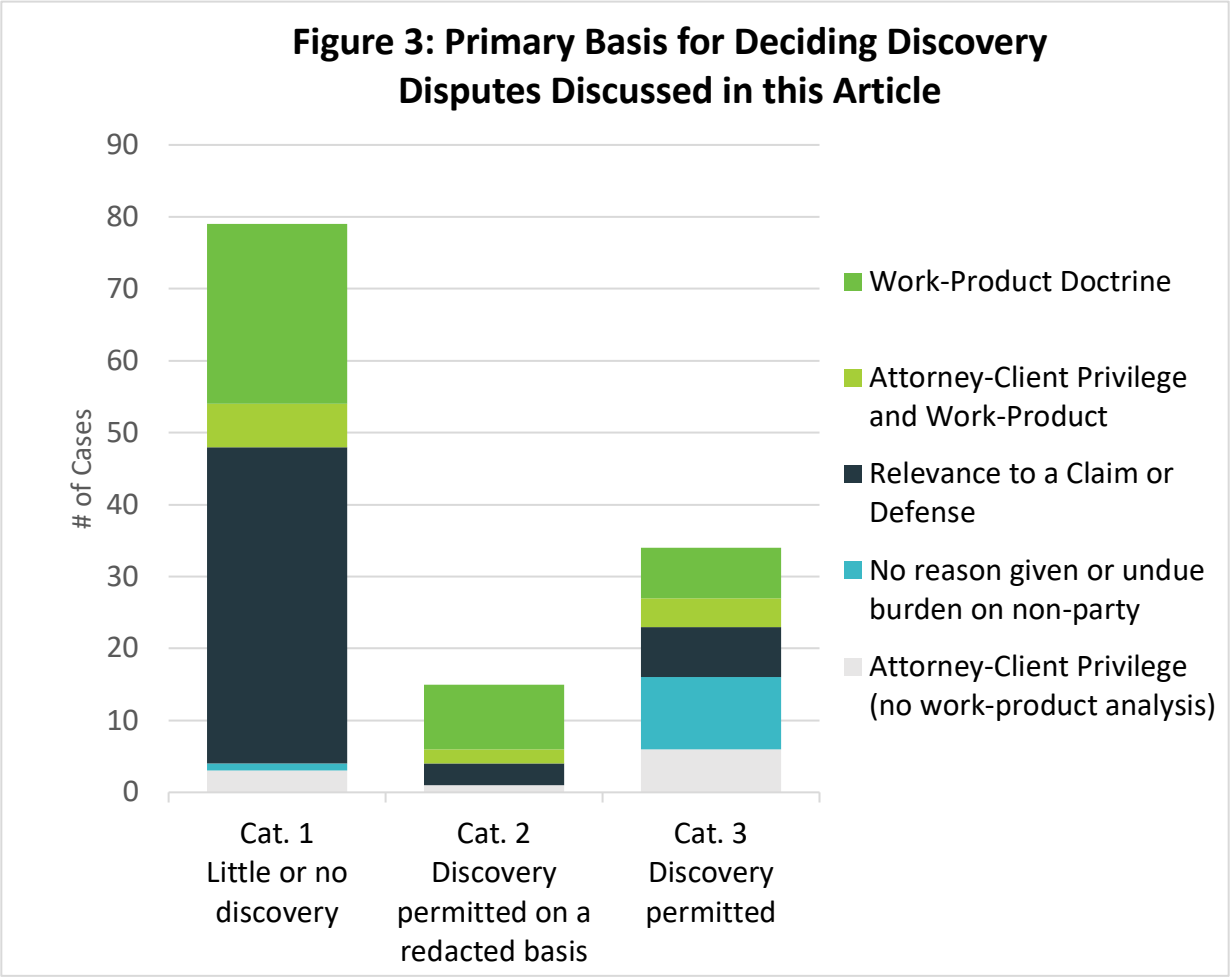
[27] *See VHT*, 2016 U.S. Dist. LEXIS 172373, at *3; *In re Int'l Oil*, 548 B.R. at 838-39; *Cobra*, 2013 U.S. Dist. LEXIS 190268, at * 8-9; *see also SecurityPoint Holdings*, 2019 WL 1751194, at *5-6 (where Defendant United States also argued the Assignment of Claims Act, 31 U.S.C. § 3727, could make a litigation funding arrangement relevant).

[28] *VHT*, 2016 U.S. Dist. LEXIS 172373, at *4.

[29] Transcript, *IOENGINE*, No. 1:14-cv-01571 (D. Del. Jul. 18, 2016).

[30] *Doe*, 2014 WL 1715376, at *2 (finding the funding documents relevant and contrasting the statute of limitations issue here with *Miller* where the documents were not relevant).

[31] *Micron*, 2019 WL 118595, at *1; *Berger*, 2008 WL 4681834, at *1 (where funder was a witness in case). A variation of this argument was made in the civil rights case against City of New York. In *Benitez v. Lopez*, the Defendants contended that funding was relevant to the Plaintiff's "motives," the Plaintiff's "credibility . . . and [would be] grounds for impeachment at trial." 2019 WL 1578167 at *1. The Eastern District of New York held "the financial backing of a litigation funder is as irrelevant to credibility as the Plaintiff's personal financial wealth . . ." *Id.*



The relevancy threshold is fairly low, allowing for expansive discovery.[32] Hence, many courts do not deny discovery of funding documents on this basis.[33] Nevertheless, in forty-four cases, courts denied some discovery requests because

[32] For example, information "need not be admissible in evidence to be discoverable." Fed. R. Civ. P. 26(b)(1).

[33] Although this article focuses on the discovery of litigation documents prior to trial, at least two district courts have considered the relevancy of litigation funding documents in the post-judgment context. *See Stan Lee Media, Inc. v. Walt Disney Co.*, No. 12-CV-02663-WJM-KMT, 2015 WL 5210655 (D. Col. Sept. 8, 2015) (holding discovery of litigation funding information was permitted where a party argued the funder should be a "party" for the purpose of executing judgments where attorney's fees and costs were assessed); *Tradeline Enterprises PVT. Ltd v. Smith & Sons Cotton, LLC*, No. LA-CV15-08048-JAK, 2019 WL 6898959 (C.D. Cal. Apr. 15, 2019) (permitting discovery of litigation funding information where the request was related to a motion to add a litigation funder as a judgment debtor).

the funding agreement or communications with funders were not relevant to a claim or defense.[34]

Courts are most likely to find information related to litigation funding irrelevant where parties make broad discovery requests based on blanket assertions of relevancy. For instance, in *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig.*, the District of New Jersey denied defendants' request for "carte blanche discovery of plaintiff's litigation funding" in a mass tort case where defendants claimed the information was relevant to, among other things, plaintiffs' credibility and bias and the scope of proportional discovery.[35] However, the court specified that it was "not ruling that litigation funding is off-limits in all instances," and "[i]n cases where there is a showing that something untoward occurred, the discovery could be relevant."[36] Similarly, in *V5 Techs. v. Switch, Ltd*., the District of Nevada held that where parties seek

[34] The court found funding documents and communications not relevant in: *SecurityPoint*, No. 1:11-CV-00268, 2019 WL 1751194 (Fed. Cl. 2019) (see ECF Nos. 303, 404); *Benitez*, 2019 WL 1578167, at *1; *Micron*, 2019 WL 118595, at *2 (N.D. Cal. 2019); *Space Data*, 2018 WL 3054797, at *1 (N.D. Cal. 2018); *Mackenzie*, 2017 WL 4898743, at *3 (N.D.N.Y. 2017); *Telesocial*, No. 3:14-cv-03985 (N.D. Cal. 2016); *VHT, Inc. v. Zillow Group, Inc.*, 2016 WL 7077235, 2016 U.S. Dist. LEXIS 172373 (W.D Wash. Sept. 8, 2016); *Kaplan*, 2015 U.S. Dist. LEXIS 135031, at *18; *V5 Techs.*, 334 F.R.D. at 312; *Art Akiane LLC*, 2020 U.S. Dist. LEXIS 171682, at *7, *15; *United Access Techs., LLC*, 2020 U.S. Dist. LEXIS 103532, at *3; *In re Valsartan*, 405 F. Supp. 3d at 615; *Pipkin*, 2019 U.S. Dist. LEXIS 206233, at *3; *Dupont*, 2019 WL 8158471, at *5; *Elm 3DS Innovations Ltd. Liab. Co.*, 2020 U.S. Dist. LEXIS 216796, at *3–4; *Colibri Heart Valve LLC*, 8:20-cv-00847-DOC-JDE, ECF. 111 at *6; *Speyside Medical, LLC*, 1:20-cv-00361-LPS, ECF No. 88**;** *Michelson*, 2003 U.S. Dist. LEXIS 25198, at *1-4; *1279 Morris LLC*, 2012 WL 5418611, at *1-4; *Ashghari-Kamrani*, 2016 WL 11642670, at *14-15; Harper, 2016 U.S. Dist. LEXIS 197894, at *11-12; *Hylete*, 2019 U.S. Dist. LEXIS 148245, at *37-38; *Quan*, 2019 N.Y. Misc. LEXIS 4516, at *7; *MindGeek*, 2020 U.S. LEXIS 258311, at *16-20; *Pfizer*, 2021 U.S. Dist. LEXIS 174654, at *4; *Beam*, 2021 U.S. Dist. LEXIS 137915, at *3-6; *Coronda*, 2021 NYLJ LEXIS 298, at *1-5; *Neural Magic*, No. 1:20-cv-10444 (D. Mass. December 21, 2021), ECF No. 224; *Waste Connections US*, 2022 U.S. Dist. LEXIS 129216 (ECF No. 59); *Garcia*, 2022 N.Y. Misc. LEXIS 5482, at *3; *Hardin*, 2022 U.S. Dist. LEXIS 194602, at *6-8; *Kove IO*, 18-cv-8175 (N.D. Ill., January 26, 2022), ECF No. 497; *Nantworks*, 2022 U.S. Dist. LEXIS 87320, at *2-3; *Rise Brewing*, 2022 WL 1118890, at *2; *Rodriguez*, 2022 N.Y. Misc. LEXIS 1084, at *4-6; *Taction Tech.*, 2022 WL 18781396, at *2-6; *Woodrow*, 204 A.D.3d 629, 629-30; *Centripetal Networks*, No. 2:21-137, (E.D. Va. Aug. 16, 2023) (ECF No. [XX]); *SiteLock*, 2023 WL 3344638, at *18-24. In *Miller* the "deal documents" were not relevant to a cogent argument. *Miller*, 17 F. Supp. 3d at 724 (finding the deal documents relevant only to arguments without "any cogency").

[35] *In re Valsartan*, 405 F. Supp. 3d at 619.

[36] *Id.* at 615.

litigation funding information to expose potential bias, "[m]ere speculation by the party seeking this discovery will not suffice."[37]

In three intellectual property cases out of the Northern District of California and in one business dispute, courts found the defendants' requests for funding documents not relevant. "Even if litigation funding were relevant (which is contestable), *potential* litigation funding is a side issue at best."[38] In *VHT, Inc. v. Zillow Group, Inc*., the defendant made several unsubstantiated and speculative arguments, such as that an agreement to assign recovery in the case would be relevant to whether the plaintiff "has standing to pursue its copyright infringement claims."[39] Even after allowing the defendant to file amended counterclaims, the court found that "[n]othing more than speculation supports [the defendant's] arguments," which consisted of "imaginable hypotheticals."[40] Therefore, the requested litigation funding information was "disproportional to the needs of the case," so the court denied the defendant's motion to compel.[41]

In class actions, defendants have argued litigation funding documents are relevant to the defendant's determination of the adequacy of class counsel under Federal Rule of Civil Procedure 23(g).[42] This argument has not always been

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[37] *V5 Techs*., 334 F.R.D. at 312. Courts in other districts have also found that broad requests for discovery of litigation funding information are irrelevant for bias or impeachment purposes. *See Art Akiane LLC*, 2020 U.S. Dist. LEXIS 171682, at *15 ("[B]roadly asking in discovery for 'documents relating to third-party funding for this litigation' is insufficient without some detailed, meaningful explanation to satisfy the requirement of relevancy."); *Pipkin*, 2019 U.S. Dist. LEXIS 206233, at *4 (rejecting defendant's argument that plaintiff's funding arrangement was relevant to the credibility and bias of a witness and deeming the argument "entirely speculative and insufficient to demonstrate the relevance of the sought-after fee agreements.").

[38] *Space Data*, 2018 WL 3054797, at *1. Judges reached the same conclusion in two other Northern District of California cases. *Micron*, 2019 WL 118595, at *2; *Telesocial*, No. 3:14-cv-03985 (N.D. Cal. Sept. 30, 2016).

[39] *VHT*, 2016 U.S. Dist. LEXIS 172373, at *3-4.

[40] *Id.* at *4.

[41] *Id.*

[42] *See Kaplan*, 2015 U.S. Dist. LEXIS 135031, at *16-17. *See also Gbarabe*, 2016 U.S. Dist. LEXIS 103594, at *3-4. This issue arises is especially likely to arise in class actions in the Northern District of California because that district has adopted a standing order making the disclosure required for class action sunder Civil Local Rule 3-15 include disclosure of "any person or entity that is funding the prosecution of any claim or counterclaim." *See* https://www.cand.uscourts.gov/filelibrary/373/ Standing_Order_All_Judges_1.17.2017.pdf. A survey of disclosure rules for litigation funding then in existence can be found in a Memorandum by Patrick A. Tighe in the Advisory Committee on Civil Rules, Agenda Materials, Philadelphia,

successful in persuading a court to allow discovery. For example, in *Kaplan v. S.A.C. Capital Advisors, L.P.*, the Southern District of New York found "purely speculative" all the reasons the defendants claimed they were entitled to discovery, including the claim that "the funding agreements 'could cause class counsel's interest to differ from those of the putative class . . .'"[43] "The plaintiffs' admission that they have entered into a litigation funding agreement does not, of itself, constitute a basis for questioning counsel's ability to fund the litigation adequately."[44] The court denied the defendants' motion to compel production of litigation funding documents.[45] In *Gbarabe v. Chevron Corp.*, a class action (and a very unusual case), the Northern District of California ordered production of the entire funding agreement, unredacted, but unlike in *Kaplan*, the plaintiff in *Gbarabe* conceded the relevance of the funding agreement "to the class certification adequacy determination" and also did "not assert that the agreement is privileged."[46]

B. The Applicability of Attorney-Client Privilege to Funding Documents

The attorney-client privilege protects confidential communications, oral or written, between a client and his lawyer who is providing him legal advice. The party asserting the privilege bears the burden of proving the privilege applies to the documents sought in discovery. "Since the purpose behind the attorney-client privilege is to encourage full disclosure to one's lawyer by assuring confidentiality," the client or attorney waives the privilege if he destroys confidentiality of the communications by disclosing their content to a third-party.[47] However, courts recognize various exceptions to this general rule of automatic waiver for breaches of confidentiality.[48] The party asserting the

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PA, April 10, 2018, at 209, available at http://www.uscourts.gov/sites/ default/files/2018-04-civil-rules-agenda-book.pdf.

[43] *Kaplan*, 2015 U.S. Dist. LEXIS 135031, at *16-17.

[44] *Id.* at *17.

[45] *Id.* at *17-18.

[46] *See Gbarabe*, 2016 U.S. Dist. LEXIS 103594, at *4; *Kaplan*, 2015 U.S. Dist. LEXIS 135031, at *14. Later, in the more typical *Micron* case, Judge Susan Illston, who had permitted the discovery in the *Gbarabe v. Chevron* case, held discovery into litigation funding was not relevant. *Micron*, 2019 WL 118595, at *2.

[47] *Miller*, 17 F. Supp. 3d at 731.

[48] *See generally* Jeffrey Schacknow, Comment, *Applying the Common Interest Doctrine to Third-Party Litigation Funding*, 66 Emory L. J. 1461, 1467-80 (2017); Ani-Rae Lovell, Note, *Protecting Privilege: How Alternative Litigation Finance Supports an Attorney's Role*, 28 Geo. J. Legal Ethics 703,

privilege also bears the burden of proving an exception to waiver of the privilege if a disclosure broke the confidentiality required.[49]

In commercial litigation funding cases, the attorney-client privilege may not apply to the funding agreement because that is a contract between the client and a third party, not a confidential communication from client to lawyer.[50] Similarly, attorney-client privilege generally may not attach to non-deal documents or communications that were not shared between the attorney and client.[51] If the information shared with a funder is privileged, then sharing that information with the litigation funder waives the privilege unless an exception applies. There are two potentially applicable exceptions to this waiver of attorney-client privilege: the common interest doctrine and the less frequently used agency exception to waiver.

1. The Common Interest Doctrine

The common interest doctrine "allows communications that are already privileged to be shared between parties having a "common legal interest" without a waiver of the privilege. It does not broaden the overall applicability of attorney-client privilege. Rather, it preserves "an already-existing privilege" that would otherwise be waived by disclosure.[52] In litigation funding cases, this doctrine is the most commonly analyzed exception to waiver of attorney-client privilege. Some courts insist on a "common legal interest" in contrast to a common commercial interest, whereas others define the interest more broadly as a "common enterprise." Overall, there is a split in how courts define the "common interest" required. This divergence in the case law has led directly to divergent results in the cases we reviewed: twelve of the twenty-three cases we

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704 (2015); Grace M. Giesel, *Alternative Litigation Finance and the Attorney-Client Privilege*, 92 Denv. U. L. Rev. 95, 104-118 (2014); Michele DeStefano, *supra* note 2.

[49] 6-26 *Moore's Federal Practice - Civil* § 26.47 (2017).

[50] *In re Int'l Oil Trading Co.*, 548 B.R. at 831 ("As a threshold matter, the Funding Agreement is primarily a contract, not a communication. Under both federal and Florida law, attorney-client privilege applies only to communications, not to contracts.").

[51] *See Miller*, 17 F. Supp. 3d at 731; s*ee also Alabama Aircraft Indus. v. Boeing Co.*, No. 2:16-mc-01216-RDP, at *31, 33 (N.D. Ala. Feb. 9, 2018) (permitting discovery because the attorney-client privilege did not apply to a client's emails with a funder, which were not about obtaining funding).

[52] Schacknow, *supra* note 35, at 1468.

found analyzing the issue concluded that the doctrine applies to funding documents.[53]

a) The Narrow View: "A Common Legal Interest"

Some courts narrowly define the common interest doctrine as "an exception to ordinary waiver rules designed to allow attorneys for different clients pursuing a common legal strategy to communicate with each other."[54] We found several cases where the doctrine was held not to apply to funding documents because the court required and did not find a "common legal interest" between the funder and plaintiff.[55] In analyzing the discoverability of non-deal documents, the seminal *Miller* decision held that a "shared rooting interest in the "successful outcome of a case…is not a common legal interest" because the doctrine is designed to facilitate seeking legal advice or litigation strategies, which a prospective funder does not offer.[56] The District of Delaware reached the same conclusion in patent infringement suits in 2010 and in 2018.[57] A federal court applying New York law described a plaintiff's relationship with litigation funders as "inherently financial," so the common interest exception did not apply to the waiver of privilege for funding documents.[58]

Nonetheless, some courts apparently requiring a "common legal interest" have found the doctrine applies to litigation funding documents. Two short orders from federal courts in 2012 and 2013 state that the common interest doctrine provided an exception to the rule of waiver for privileged funding documents.[59] In both of those cases, a common interest and non-disclosure

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[53] *See Walker*, *Devon*, *Rembrandt*, and *In re International Oil Trading Co.* discussed below for cases finding the common interest exception applies.

[54] *In re Pacific Pictures Corp. v. United States Dist. Court*, 679 F.3d 1121, 1129 (9th Cir. 2012) (a case not involving commercial litigation funding).

[55] *Acceleration Bay*, 2018 U.S. Dist. LEXIS 21506, at *6-9; *Cohen*, 2015 WL 745712, at *4; *Miller*, 17 F. Supp. 3d at 732-33; *Leader*, 719 F. Supp. 2d at 376; *Midwest Ath. & Sports All. LLC*, 2020 U.S. Dist. LEXIS 169770, at *6; *In re Dealer*, 2020 U.S. Dist. LEXIS 99767, at *44; *Medtronic Sofamor Danek, Inc. v. Michelson*, No. 01-2373, 2003 LEXIS 25198 (W.D. Tenn. Nov. 6, 2003) (holding that speculation that the respondent's legal fees were being paid by their competitor was too inextricably intertwined with privileged attorney-client communications).

[56] *Miller*, 17 F. Supp. 3d at 732-33.

[57] *Acceleration Bay*, 2018 U.S. Dist. LEXIS 21506, at *6-9; *Leader*, 719 F. Supp. 2d at 376.

[58] *Cohen*, 2015 WL 745712, at *4. *See also Kove IO, Inc. v. Amazon Web Services, Inc.*, 18-cv-8175 (N.D. Ill. Jan. 26, 2022) (ECF No. 497)

[59] *Walker*, No. 11-309-SLR, at 2 (holding that a patent monetization consultant and the plaintiff had a "common legal interest," even though the consultant was clearly "not a law firm

agreement was in place.[60] A few cases have cited these orders to support the conclusion that funding documents are privileged and not discoverable; but since 2013, however, we could not find any case that has protected funding documents on the ground that the funder and client have a "common legal interest."[61]

b) The Broader View: a "Substantially Similar Legal Interest" or a "Common Enterprise"

Other courts view the common interest doctrine more broadly, as illustrated in two decisions on denying discovery of funding documents. In *Rembrandt Techs., L.P. v. Harris Corp.*, a Delaware state court held that an agreement to enforce patents created a "common legal interest binding the parties" because they shared a "substantially similar" legal interest.[62] *In re International Oil Trading Co*. noted this split among federal courts on how broadly to define "common interest." Without any precedent binding it to one approach, the court chose to adopt the more expansive "common enterprise" approach, which it found more compelling and consistent with Florida law.[63] The common interest exception alone sufficed for the court to deny the defendant's motion to compel discovery of non-deal documents.[64]

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and was not retained to provide legal services"); *Devon*, 2012 WL 4748160, at *1 (holding that the common interest doctrine, which requires a "a shared common interest in litigation strategy," applies where the funder and plaintiff have a common interest in the successful outcome of the case).

[60] *Walker*, No. 11-309-SLR, at 2; *Devon*, 2012 WL 4748160, at *1. The *Acceleration Bay* decision suggests that a written common interest agreement would be necessary but not necessarily sufficient for a common legal interest to exist with a litigation funder. 2018 U.S. Dist. LEXIS 21506, at *8-9.

[61] Recently, the "common legal interest" doctrine has been explicitly rejected by several district courts. *E.g.*, *Hybrid Ath., LLC v. Hylete*, No. 3:17-1767, 2019 LEXIS 148245, at *37-38 (D. Conn. Aug. 30, 2019); *In re Outlaw Lab'ys, LP Litig.*, No. 18-840, 2021 WL 5768123 (S.D. Cal. June 29, 2021).

[62] *Rembrandt*, 2009 Del. Super. LEXIS 46, at *23-31 (Del. Super. Ct. Feb. 12, 2009) (citing *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 365 (3d Cir. 2007) and *In re Regents of the University of California*, 101 F.3d 1386, 1390 (9th Cir. 1996) for the "substantially similar legal interest standard").

[63] *In re Int'l Oil Trading Co.*, 548 B.R. at 832-33.

[64] *Id.* at 833. The court also found the agency exception and work-product doctrine protected the non-deal documents. *Id.* at 835, 837. The court held the funding agreement was protected by the work-product doctrine, though this was overcome for part of the agreement as discussed below. *Id.* at 839.

2. Agency Doctrine

The agency doctrine, sometimes called the *Kovel* doctrine, operates in the same way as the common interest doctrine – as an exception to a waiver of attorney-client privilege. It "protects from discovery the necessary communications with" non-attorney professionals, such as an accountant.[65] Like the common interest exception, courts are split over how narrowly to limit the kinds of non-lawyer professionals the exception can cover.[66] In contrast to the more widely analyzed common interest doctrine discussed above, only one court has analyzed the applicability of the agency doctrine to waiver of attorney-client privilege for funding documents, though there is some academic support for applying it.[67]

In addition to holding the common interest doctrine applied to funding documents, *In re International Oil Trading Co*. held the agency doctrine applied to communications with a litigation funder.[68] As with the common interest doctrine discussed above, the court chose to apply the "broader approach to the "agency exception,"" which it found consistent with Florida law, federal law, and the purpose of the exception.[69] The court interpreted Florida law as protecting

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[65] *Id.* at 833; *see United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (the first case to articulate this exception and applying the exception to an accountant).

[66] *In re Int'l Oil Trading Co.*, 548 B.R. at 834; DeStefano, *supra* note 2, 331-341 (2014).

[67] *In re Int'l Oil Trading*, 548 B.R. at 833-35. The court in *Cohen v. Cohen* alluded to the agency exception to waiver, but the court did not address it because the plaintiff withdrew any privilege argument. 2015 WL 745712, at *2 n.1. Also, the plaintiff in *Viamedia* argued for the agency exception, but the attorney-client privilege issue was not reached by the court since discovery was denied on the basis of work-product protection. Mem. of Law in Support of Pl. Viamedia, Inc.'s Opp'n to Def.'s Mot. To Compel Pl. to Produce Docs., at 10-11, May 17, 2017, Case No. 1:16-cv-05486, ECF No. 117. In *Midwest Ath. & Sports All. LLC*, the court applied the agency doctrine to determine whether communications between a plaintiff and a company that helped the plaintiff obtain litigation funding were protected by the attorney-client privilege and found that it did not apply because the plaintiff hired the company for a business transaction, not to render legal advice. *Midwest Ath. & Sports All. LLC,* 2020 U.S. Dist. LEXIS 169770, at *7.

See Ani-Rae Lovell, Note, *Protecting Privilege: How Alternative Litigation Finance Supports an Attorney's Role*, 28 Geo. J. Legal Ethics 703, 704 (2015) (arguing "that sharing documents with alternative litigation finance firms should not constitute waiver of attorney-client privilege under the *Kovel* doctrine if the party can demonstrate that" the funder's involvement "bolsters several of the recognized roles of the modern attorney.") *But see* Giesel, *Alternative Litigation Finance and the Attorney-Client Privilege*, *supra* note 35, at 139-140 (observing that most courts have a narrow view of the *Kovel* agency doctrine, so they will rarely apply it to litigation funders).

[68] *In re Int'l Oil Trading Co.*, 548 B.R. at 835.

[69] *Id.* at 834-35.

communications with any party who assists the client in obtaining legal services."[70] And some federal courts have applied the agency exception "to professionals with whom communication may be necessary for the provision of legal advice."[71] "Litigation funders may be essential to the provision of legal advice in" cases brought by a creditor with little money against well-funded debtor.[72] Thus, the agency exception applies to a waiver of attorney-client privilege for non-deal documents shared with a litigation funder.[73]

Thus, the agency exception provides a relatively new approach courts may take when analyzing the discoverability of funding documents, but most courts will probably continue to decide the issue more easily on the grounds of work-product protection, as discussed below. Neither party in *In re Int'l Oil Trading Co*. addressed the agency exception. Now, plaintiffs may consider the agency exception yet another argument that could only bolster their case. They should, however, be cautious about how they make all these arguments together. For instance, arguing that the plaintiff and funder have a common legal interest may be undermined by simultaneously arguing the funder serves as an independent non-attorney professional (who would not have the same legal interest in the way joint parties do).[74]

C. Work-Product Protection for Funding Documents

If a court does not consider funding documents protected by attorney-client privilege, they could still be protected by the work-product doctrine, as codified in the Federal Rules of Civil Procedure among other places. Rule 26(b)(3) states that a party may not ordinarily "discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." The majority of federal courts broadly interpret "prepared in anticipation of litigation" as requiring that the documents were prepared "because of" litigation. A small minority of federal courts (most notably the Fifth Circuit) require the "primary motivating purpose" for creating the documents was litigation.[75] As with the assertion of attorney-client privilege, the

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[70] *Id.* at 834.

[71] *Id.*

[72] *Id.* at 835.

[73] *Id.*

[74] DeStefano, *supra* note 2, at 352.

[75] *See* DeStefano, *supra* note 2, at 355 n.239 (listing the Circuits that use the "because of" test and citing articles identifying the two tests); Giesel, *Alternative Litigation Finance and the Work-*

party asserting the privilege – here, the plaintiff – bears the burden of proving the documents satisfy the appropriate test.

Courts often hold that the work-product doctrine protects at least some material in the funding agreement and usually all non-deal documents.[76] Of the 106 cases we found, thirty-five courts have held that the work-product doctrine provided at least some protection for the information in documents shared with litigation funders.[77] It did not matter whether the material was prepared before litigation is filed.[78] Nor did it matter that the funding documents serve a "business purpose" because the "documents simultaneously also are litigation documents."[79] The court in *Miller* explained that an alternative rule denying

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Product Doctrine, *supra* note 2, at 1101. Also, the Wright & Miller treatise prefers the "because of" test, and it states that "the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2024 (3d ed. 2017).

[76] Courts now observe many other decisions have concluded funding documents are protected work-product. *See, e.g.*, *Viamedia*, 2017 U.S. Dist. LEXIS 101852, at *6.

[77] *In re: Nat'l Prescription Opiate Litig.*, 2018 WL 2127807; *Alabama Aircraft Indus. v. Boeing Co.*, No. 2:16-mc-01216-RDP, at *49; *Lambeth*, 2018 WL 466045, at *5-6; *Viamedia*, 2017 U.S. Dist. LEXIS 101852; *Telesocial*, No. 3:14-cv-03985; *Odyssey*, 2016 U.S. Dist. LEXIS 188611; *IOENGINE*, No. 1:14-cv-01571; *Elenza*, No. N14C-03-185 MMJ CCLD; *In re Int'l Oil Trading Co.*, 548 B.R. at 832; *Fisher*, 2016 U.S. Dist. LEXIS 32910; *Morley*, 2015 WL 7273318; *Charge Injection*, 2015 WL 1540520; *Carlyle*, 2015 WL 778846; *Abi Jaoudi*, No. 2:91-cv-0785; *Doe*, 2014 WL 1715376; *Miller*, 17 F. Supp. 3d 711; *Walker*, No. 11-309-SLR; *Devon*, 2012 WL 4748160; *Mondis*, 2011 WL 1714304; *Rembrandt*, 2009 WL 402332; *Impact Engine, Inc.*, 2020 U.S. Dist. LEXIS 194517; *Cont'l Circuits LLC*, 435 F. Supp. 3d 1014; *Elm 3DS Innovations Ltd. Liab. Co.*, 2020 U.S. Dist. LEXIS 216796; *Fulton*, 2019 U.S. Dist. LEXIS 209585; *Hylete*, 2019 U.S. Dist. LEXIS 148245, at *37-38; *MindGeek*, 2020 U.S. LEXIS 258311, at *16-20; *Neural Magic*, No. 1:20-cv-10444 (D. Mass. December 21, 2021), ECF No. 224; *Hardin*, 2022 U.S. Dist. LEXIS 194602, at *6-8; *Kove IO*, 18-cv-8175 (N.D. Ill., January 26, 2022), ECF No. 497; *Nantworks*, 2022 U.S. Dist. LEXIS 87320, at *2-3; *Taction Tech.*, 2022 WL 18781396, at *2-6; *Thimes Solutions Inc. v. TP-Link USA Corp.*, No. 19-10374, 2022 WL 18397128 (C.D. Cal. Oct. 6, 2022); *GoTV Streaming, LLC*, 2023 WL 4237609, at *11-13; *SiteLock LLC*, WL 3344638, at *14.

[78] *See Alabama Aircraft Indus. v. Boeing Co.*, No. 2:16-mc-01216-RDP, at *49 (N.D. Ala. Feb. 9, 2018) (citing *Miller* and holding a draft complaint shared with a funder was protected work-product); *Mondis*, 2011 WL 1714304, at *3.

[79] *Carlyle*, 2015 WL 778846, at *9; *see Lambeth*, 2018 WL 466045, at *5 ("Even if the Court were to . . . consider the relationships to be commercial, the materials nonetheless fall within work-product immunity because they were communications with Plaintiff's agents and in anticipation of litigation."); *see also Miller*, 17 F. Supp. 3d at 735. ("Materials that contain counsel's theories and mental impressions created to analyze [the plaintiff's] case do not necessarily cease to be protected because they may also have been prepared or used to help [the plaintiff] obtain financing."); *Cont'l Circuits LLC*, 435 F. Supp. 3d at 1021 (holding "any business-sustaining

work-product protection for "dual purpose" documents would undermine the work-product doctrine by allowing discovery of attorneys' mental impressions and litigating strategies – "precisely the type of discovery that the Supreme Court refused to permit in Hickman," the seminal decision recognizing work-product protection.[80]

Several courts have found that funding documents satisfy the narrower "primary motivating purpose" test for work-product protection.[81] However, the District of Delaware in *Acceleration Bay* denied work-product protection for communications with a funder because it applied the Fifth Circuit's "primary motivating purpose" test, not the Third Circuit's "because of" litigation test.[82] Here, the choice of the "primary motivating purpose" test led the court to conclude the communications were primarily for the purpose of obtaining a loan since litigation had not commenced at that time.[83]

Besides *Acceleration Bay*, we found eight other cases that explicitly rejected work-product protection for funding documents.[84] The leading cases are *Bray*

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purpose of the litigation funding agreements in this case is 'profoundly interconnected' with the purpose of funding the litigation," and thus, the agreements constitute work product).

[80] *See Miller*, 17 F. Supp. 3d at 735 (quoting *United States v. Adlman*, 134 F.3d 1194, 1199 (2d Cir.1998)).

[81] *United States ex rel. Fisher v. Homeward Residential, Inc.*, No. 4:12-CV-461, 2016 U.S. Dist. LEXIS 32910 *15 (E.D. Tex. Mar. 15, 2016); *United States v. Ocwen Loan Servicing, LLC*, No. 4:12-CV-543, 2016 WL 1031157, 2016 U.S. Dist. LEXIS 32967 (E.D. Tex. Mar. 15, 2016) (substantively identical order as in related case of *United States ex rel. Fisher v. Homeward Residential, Inc.*); *Mondis*, 2011 WL 1714304, at *2-3 (E.D. Tex. May 4, 2011). A bankruptcy court outside the Fifth Circuit agreed. *See In re Int'l Oil Trading Co.*, 548 B.R. at 836 ("Even if the "primary purpose" test exists in the manner presented . . . it is satisfied by" all the written communications between the creditor and his funder).

[82] *Acceleration Bay*, 2018 U.S. Dist. LEXIS 21506, at *5-6.

[83] *Id.* A few years before, the Delaware Chancery Court predicted the choice of test "may be outcome-determinative." *Carlyle*, 2015 WL 778846, at *8 (citing DeStefano, *supra* note 2, at 355–61). Until *Acceleration Bay*, we had not found a decision where the choice of test changed the outcome of a case.

[84] *Bray*, 2008 WL 5054695; *Leader*, 719 F. Supp. 2d at 376; *In re Dealer Mgmt. Sys. Antitrust Litig.*, No. 18-C-864, 2020 U.S. Dist. LEXIS 99767 (N.D. Ill. June 8, 2020); *Midwest Ath. & Sports All. LLC v. Ricoh USA, Inc.*, No. 2:19-cv-00514-JDW, 2020 U.S. Dist. LEXIS 169770 (E.D. Pa. Sept. 16, 2020) (theorizing that work-product protections did not apply to litigation funding documents); *Gamon Plus, Inc. v. Campbell Soup Co.*, No. 1:15-cv-08940, 2020 WL 18284320 (N.D. Ill. May 26, 2022); *Broadband ITV, Inc. v. OpenTV Inc.*, No. 17-561922, 2019 WL 13170112 (Cal. Super. June 20, 2019); *Electrolysis Prevention Solutions, LLC v. Daimler Truck North America LLC*, No. 3:21-171-RJC-

and *Leader*. In 2008, the district court in *Bray* rejected blanket assertions of work-product protection during a deposition.[85] In 2010, the court in *Leader* upheld a magistrate's decision to allow discovery of non-deal documents as not clearly erroneous, but it did not analyze the work-product doctrine apart from claims of attorney-client privilege.[86] In 2020, although not expressly rejecting work-product protection, the Eastern District of Pennsylvania held that it "strongly" suspected that litigation funding documents were not protected because such documents were "transactional."[87]

The work-product doctrine has eroded slightly in several other cases allowing discovery of redacted funding agreements and redacted non-deal documents. For discovery of funding agreements, four decisions compelled production of the funding agreement while allowing the plaintiff to redact core opinion work-product.[88] The discovery allowed in these cases was minimal because the courts treated the funding agreements' strategically valuable terms (such as financial terms and possibility of success) as work-product. For discovery of non-deal documents, five decisions allowed discovery of non-deal documents with work-product redacted.[89] These courts granted work-product

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WCM, 2023 WL 4750822 (W.D.N.C. July 24, 2023); *BCBSM, Inc. v. Walgreen Co.*, No. 1:20-01929, 2023 WL 3737724 (N.D. Ill. May 31, 2023).

[85] *Bray*, 2008 WL 5054695.

[86] *Leader*, 719 F. Supp. 2d at 376.

[87] *Midwest Ath. & Sports All. LLC.*, 2020 U.S. Dist. LEXIS 169770, at *9 (holding plaintiff's submissions did not permit the court to determine whether the work product doctrine applied to litigation funding documents).

[88] *Elenza, Inc. v. Alcon Labs.*, No. N14C-03-185 MMJ CCLD (Del. Super. Ct. June 14, 2016); *In re Int'l Oil Trading Co.*, 548 B.R. at 839; *Charge Injection*, 2015 WL 1540520, at *4-5 (citing *Carlyle*); *Carlyle*, 2015 WL 778846, at *9-10 ("the terms of the final agreement–such as the financing premium or acceptable settlement conditions–could reflect an analysis of the merits of the case"). One court allowed discovery of a funding agreement with redaction, but the court did not cite work-product protection as its rationale for limiting discovery. *See also Queens*, No. 2:14CV53-JRG-RSP (E.D. Tex. Apr. 10, 2015) (ordering, in a cursory opinion, the plaintiff to produce funding agreements with the "dollar amounts" and "percentages" redacted) (excluded from number of decisions eroding work-product because the court did not refer to the work-product doctrine as the basis for its decision).

[89] *Odyssey Wireless*, 2016 U.S. Dist. LEXIS 188611, at *20-24 (allowing discovery of patent valuations, as discussed below); *Morley*, 2015 U.S. Dist. LEXIS 155569, at *10; *Fulton*, 2019 U.S. Dist. LEXIS 209585, at *11 (ordering plaintiff to disclose "all non-mental impressions, fact-based information and documents including any statements provided by Plaintiff directly" to the funder); *Alabama Aircraft Indus. v. Boeing Co.*, No. 2:16-mc-01216-RDP (N.D. Ala. Feb. 9, 2018); *SecurityPoint Holdings, Inc. v. United States*, No. 1:11-CV-00268, 2019 WL 1751194 (Fed. Cl. Apr.

protection for funding documents, but the protection was not absolute for the entirety of the documents. Except for the decisions finding a "substantial need" as discussed below, these decisions do not clearly explain why they chose to permit discovery with redaction instead of completely denying discovery all discovery.

1. Exceptions to Work-Product Protection: Waiver and "Substantial Need"

If funding documents constitute work-product, a defendant can still obtain discovery of the documents if he shows an exception to work-product protection applies. The two main exceptions to work-product protection here are when the disclosure of work-product to a funder (or prospective funder) "substantially increased" the likelihood of the defendant obtaining it, or the defendant has a "substantial need" for these documents. In the cases we found, only the second exception, "substantial need," has led to discovery of funding documents protected by the work-product doctrine.[90] Even if the court allows some discovery under one of these exceptions, the court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."[91]

a) Waiver of Work-Product Protection by Disclosure to Third Party

First, work-product protection may be waived if the materials are disclosed to a third-party. However, unlike the automatic waiver for attorney-client privilege, the "disclosure of a document to third persons does not waive the work-product immunity unless it has substantially increased the opportunities for potential adversaries to obtain the information"[92] Also, the "party asserting waiver has the burden to show that a waiver occurred."[93] "The reason for this difference [between waiver of attorney-client privilege and work-

16, 2019) (see also ECF Nos. 303, 404). *See also Doe v. Soc'y of Missionaries of Sacred Heart*, 2014 WL 1715376, at *4-5 (The defendant requested documents to support its statute of limitations defense, and the discovery allowed here appears to have been extremely limited, which is why we classified this case in Category One).

[90] *E.g.*, *Gamon Plus*, 2020 WL 18284320, at *2 (providing an analysis of why litigation finance documents may be needed in the context of patent infringement litigation).

[91] Fed. R. Civ. P. 26(b)(3).

[92] 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2024 (3d ed. 2017); Schacknow, *supra* note 35, at 1469.

[93] *Miller*, 17 F. Supp. 3d at 737.

product] is the work-product doctrine's roots in the adversarial process—the point of the protection is not to keep information secret from the world at large but rather to keep it out of the hands of one's adversary in litigation."[94]

Courts have not found work-product protection waived by disclosure to a litigation funder.[95] In fact, the defendants in the *Viamedia* case did not even "argue that Viamedia waived the work-product doctrine by disclosing documents to litigation funding firms under" a non-disclosure agreement.[96] In most of the cases we found, the plaintiff executed a non-disclosure agreement or confidentiality agreement prior to sharing non-deal documents, such as due diligence materials, with a funder. This has reassured courts that disclosures to a funder "did not substantially increase the likelihood that an adversary would come into possession of the materials."[97] Even the lack of a confidentiality agreement, oral or written, "may not be fatal to a finding of non-waiver" because "a prospective funder would hardly advance his business interests by gratuitously" sharing due diligence materials with the defendant.[98]

b) The "Substantial Need" Exception to Work-Product Protection

Second, work-product may be discoverable if the party seeking discovery "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."[99] Several courts have found a defendant's substantial need for some information overcame work-product protection for some, but not all, information in funding documents.[100] Both cases limited the discovery to protect the most valuable strategic information.

In re Int'l Oil Trading Co. held that non-deal documents and a funding agreement were both protected work-product.[101] The debtor failed to

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[94] *Viamedia*, 2017 U.S. Dist. LEXIS 101852, at *6.

[95] Glover, *supra* note 2, at 925-26 (citing cases).

[96] *Viamedia*, 2017 U.S. Dist. LEXIS 101852, at *9.

[97] *Mondis*, 2011 WL 1714304, at *3.

[98] *Miller*, 17 F. Supp. 3d at 738.

[99] Fed. R. Civ. P. 26(b)(3).

[100] However, the defendant in *Charge Injection*, for example, failed to demonstrate under Delaware law substantial need for the payment terms in the plaintiff's funding agreement. *Charge Injection*, 2015 WL 1540520, at *5.

[101] *In re Int'l Oil Trading Co.*, 548 B.R. at 837, 838.

demonstrate a substantial need for the non-deal documents, which the court considered "rarely discoverable" opinion work-product.[102] The debtor did, however, successfully demonstrate a substantial need for the funding agreement because the debtor argued it was key to determining whether the creditor transferred some or all of his claim in exchange for financing.[103] Recognizing that "some terms of a litigation funding agreement represent an assessment of risk based on discussions of core opinion work-product of the case," the court ordered discovery of the funding agreement, but allowed the creditor to redact attorney opinions from it.[104]

Similarly, in *Odyssey Wireless*, the defendants demonstrated a substantial need for the plaintiff's valuation of patents at issue in the infringement suit because they had no other information on the plaintiff's valuation of the patents, which was crucial information for their damages case.[105] The court held all the funding documents requested were protected work-product except for the portions on the valuation of the patents.[106]

In conclusion, the work-product doctrine provides strong protection against discovery of funding documents, and it is the most common ground on which courts hold funding documents are not discoverable. There is some concern among academic commentators that "work product protection may not be enough in cases where [a funder] demands confidential information beyond what was created by attorneys" for due diligence, but we did not see that reflected in any of the cases we found.[107] In practice, the work-product doctrine suffices to protect funding documents from discovery because "[r]eputable

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[102] *Id.* at 838.

[103] *Id.* at 838-39.

[104] *Id.* at 839.

[105] *Odyssey Wireless*, 2016 U.S. Dist. LEXIS 188611, at *20-24.

[106] *Id.* This reasoning has been found persuasive by several courts. *Gamon Plus*, 2020 WL 18284320, at *2; *Broadband ITV, Inc. v. OpenTV Inc.*, No. 17-561922, 2019 WL 13170112 (Cal. Super. June 20, 2019); *Electrolysis Prevention Sols., LLC v. Daimler Truck North America LLC*, No. 3:21-171-RJC-WCM, 2023 WL 4750822 (W.D.N.C. July 24, 2023).

[107] Jihyun Yoo, Note, *Protecting Confidential Information Disclosed to Alternative Litigation Finance Entities*, 27 Geo. J. Legal Ethics 1005, 1012 (2014); *accord* Schacknow, *supra* note 35, at 1479 (citing Yoo).

financing providers do not seek information that is confidential due solely to the attorney-client privilege."[108]

IV. EXCEPTIONAL CASES

We identified thirty-four cases in which a court required comprehensive discovery of litigation funding documents. While each of these cases was determined based on its unique circumstances and holds only persuasive influence, there are nine cases among them that stand out as especially significant and warrant further in-depth analysis in this context. These cases have only ever been affirmatively cited on a limited basis.[109] In the first three cases discussed below, the plaintiff was ordered to produce the funding agreement. In the six other of these nine exceptional cases, the courts allowed significant discovery of non-deal documents and some discovery of the funding agreement.

A. Discovery of the Funding Agreement

Discovery of the entire, unredacted funding agreement was allowed in two cases, but neither case analyzed work-product protection for the funding agreement. The third case allowed for discovery of a mostly unredacted funding agreement where the funder was a witness in the case.

In *Gbarabe v. Chevron Corp*., a class action, the court compelled production of the unredacted funding agreement in order to allow the defendant to determine the adequacy of class counsel, who were solo practitioners.[110] In its objection to the discovery, class counsel conceded the relevance of the agreement and did not claim the agreement was privileged.[111] Several aspects of *Gbarabe* distinguish it from the usual discovery dispute over litigation funding documents. First, class counsel did not raise several strong objections to discovery – that the documents were privileged and not relevant. In another earlier class action, for example, the Southern District of New York denied the defendant's discovery request for funding documents because the request was

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[108] Charles Agee, *Guide to Litigation Financing*, at page 7, https://westfleetadvisors.com/wp-content/uploads/2018/11/WA-Guide-to-Litigation-Financing.pdf.

[109] In its attorney-client privilege analysis, *Acceleration Bay* cites *Leader*, but it does not cite any of these litigation funding cases in its section analyzing work-product protection. *Acceleration Bay*, 2018 U.S. Dist. LEXIS 21506, at *5-9.

[110] *Gbarabe v. Chevron Corp.*, No. 14-CV-00173-SI, 2016 WL 4154849, 2016 U.S. Dist. LEXIS 103594, at *4-6 (N.D. Cal. Aug. 5, 2016).

[111] *Id.*

not relevant under Rule 26.[112] Second, class counsel had already voluntarily turned over a redacted version of the funding agreement.[113] Third, class counsel here appeared to be "solo practitioners" who were "dependent on outside funding to prosecute the case."[114] Thus, *Gbarabe* is not representative of most commercial litigation funding cases or even of funding in class actions. No court has cited it yet, and the opinion does not provide a strong basis for future defendants to obtain the same result without the presence of the special facts in *Gbarabe*.[115]

Four years ago, *Cobra Int'l, Inc. v. BCNY Int'l, Inc*. held, without any discussion, that the plaintiff's funding agreement was not privileged and was relevant for the defendant to determine whether the plaintiff transferred ownership of the patent at issue in the infringement suit.[116] The court did not explicitly discuss work-product protection for the funding agreement or whether portions of the agreement could be redacted.[117] Again, we could not find any decision citing *Cobra*. Like *Gbarabe*, its silence on work-product protection suggests it has minimal significance for future cases, unless it appears patent ownership has been transferred.

The Court in *Miller* aptly distinguished cases where the funder will be a witness in the case because financial interest is relevant to a witness's potential bias.[118] For example, in the 2008 *Berger v. Seyfarth Shaw LLP* case, some discovery was permitted into the issue of the funder's potential bias as a witness, but the legal opinions of the plaintiffs' lawyers was still protected.[119] Of course, as in

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[112] *Kaplan*, 2015 U.S. Dist. LEXIS 135031, at *17-18

[113] *Id.* at 4.

[114] *Id.* at 4.

[115] In fact, Judge Illston, who permitted discovery in *Gbarabe*, recently denied a defendant's request for discovery as to litigation funding because it was not relevant to the intellectual property case. *Micron*, 2019 WL 118595, at *2.

[116] *Cobra Int'l, Inc. v. BCNY Int'l, Inc.*, No. 05-61225-CIV, 2013 WL 11311345, 2013 U.S. Dist. LEXIS 190268 (S.D. Fla. Nov. 4, 2013).

[117] *Id.*

[118] *See Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 723 (N.D. Ill. 2014) (distinguishing *Berger v. Seyfarth Shaw LLP*).

[119] *Berger v. Seyfarth Shaw LLP*, 2008 WL 4681834, at *2-3 (N.D. Cal. Oct. 22, 2008); *see Yousefi*, 2015 WL 11217257, at *2 (funding from labor union may be relevant to determining credibility and potential bias of labor union witnesses).

Miller, a commercial funder will not be a witness in the typical case, so *Berger* has very limited application in the commercial litigation funding setting.

B. Discovery of Non-Deal Documents, Including Diligence Materials

The court allowed significant discovery of non-deal documents in the following six cases. Five cases of these cases, some of which were decided several years ago, focused on the lack of attorney-client privilege protection. The final case, *Acceleration Bay*, concluded neither attorney-client privilege nor work-product protection applied to non-deal documents after separately analyzing both doctrines.

1. Attorney-Client Privilege Did Not Apply to Non-Deal Documents in Conlon, Cohen, Leader, In re Dealer, and Midwest Ath.

The most influential cases that allowed for significant discovery were among the oldest cases we found, with a few notable exceptions. For example, *Conlon v. Rosa* was a 2004 action in Massachusetts state court against a zoning board.[120] This was not a typical commercial litigation finance case because apparently the plaintiff's tenant funded the zoning challenge to prevent the tenant's business competitor from opening a store nearby.[121] The court ordered production of the funding agreement in redacted form, the plaintiff's lease with its funder, and some related documents.[122] This discovery decision is hard to separate from the specific circumstances of the parties, whose relationship was unlike that typical of the commercial litigation finance industry.

In the following four cases, where courts deemed non-deal documents as subject to discovery without redaction due to their lack of privilege, each court arrived at this determination based on the distinct facts from each case. *Cohen v. Cohen*, a divorce case where the court applied New York law, the plaintiff withdrew her claim that emails with her funder constituted work-product, and the court permitted discovery of emails between the funder and the plaintiff because the communications with the funder waived any applicable attorney-client privilege.[123] The lack of a work-product claim here probably contributed significantly to the court's decision to allow discovery.

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[120] *Conlon*, 2004 Mass. LCR LEXIS 56, at *2.

[121] *Id.* at *2-5.

[122] *Id.* at *12.

[123] *Cohen v. Cohen*, 2015 WL 745712, at *2 (S.D.N.Y. Jan. 30, 2015).

In the 2010 *Leader v. Facebook* decision, the district court judge upheld as not clearly erroneous a magistrate's decision to allow discovery of information shared with a prospective funder. The *Leader* court acknowledged that the law at that time was unsettled on how broadly to define the common interest exception to waiver of the attorney-client privilege.[124] As in *Gbarabe*, *Cobra*, and *Cohen* above, work-product protection was not discussed apart from attorney-client privilege.[125]

Leader has had minimal influence on the subsequent litigation funding discovery disputes we found. A bankruptcy court in Florida expressly distinguished *Leader* and chose not to follow its approach.[126] The District of Delaware cited *Leader* in its analysis of the common interest doctrine in the 2018 *Acceleration Bay* decision, which is discussed below. However, the District of Delaware has not followed *Leader* in cases involving patent monetization consultants, suggesting a possible shift or split within the District on this issue. In *Intellectual Ventures v. Altera*, Judge Stark, who was the then magistrate judge earlier upheld in *Leader*, granted attorney-client privilege protection to some communications with a consultant because a sufficient common interest existed between the plaintiff and the consultant who helped "review, evaluate, and negotiate deals in order to assist [the Plaintiff] in acquiring patents."[127] Likewise, the court in *Walker Digital* found a sufficient common interest existed with a patent monetization company to preserve attorney-client privilege or work-product protection for documents shared with that company.[128] Thus, when considered alongside the many decisions we found since *Leader*, *Leader* was one early decision that does not represent the current position of most courts or even, perhaps, the District of Delaware.

In *In re Dealer*, an antitrust case, communications and documents between the plaintiff and a potential litigation funder were not protected by the attorney-client privilege.[129] However, the court did not have enough information to make a specific ruling on the plaintiff's assertion of the work product doctrine concerning the same communications because the plaintiff did not submit all of

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[124] *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 376 (D. Del. 2010).

[125] *See id.*

[126] *See, e.g., In re Int'l Oil Trading Co.*, 548 B.R. at 832-33.

[127] *Intellectual Ventures I LLC v. Altera Corp.*, No. 10-1065-LPS, ECF No. 415, at *12 (D. Del. Jul. 25, 2013).

[128] *Walker Digital v. Google*, No. 11-309-SLR, ECF No. 280, at *2 (D. Del. Feb. 12, 2013).

[129] *In re Dealer*, 2020 U.S. Dist. LEXIS 99767, at *35.

the documents it was withholding for in camera review and the defendants' arguments for why the documents should be disclosed were made very generally.[130]

The court in *Midwest Ath.*, a patent infringement case, held that communications between the plaintiff and a litigation funder were not protected by the attorney-client privilege.[131] The court explained that the common interest exception did not apply because the funder did not acquire an interest in the asserted patents and the relationship between a plaintiff and its litigation funder alone is not enough to create a common interest.[132] Similar to the court in *In re Dealer*, the court noted that plaintiff's submissions did not permit the court to determine whether the work product doctrine applied to litigation funding documents, though its opinion suggested that work product protection would not have applied regardless.[133]

2. Neither Attorney-Client Privilege Nor Work-Product Protection Applied to Non-Deal Documents in Acceleration Bay

Besides the cursory denial of work-product protection in *Leader*, the *Acceleration Bay* decision remains the leading case for instances where a court explicitly denied a plaintiff's claim of work-product protection for funding documents and allowed significant discovery of non-deal documents without redaction. Since *Acceleration Bay*, courts have decided to follow the reasoning of the decision five times.[134] Courts are still unlikely to allow discovery of litigation funding documents after *Acceleration Bay* because it dealt with an unusual application of the law to uncommon facts.[135] In fact, following this decision,

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[130] *Id.* at *47–48.

[131] *Midwest Ath.*, 2020 U.S. LEXIS 169770, at *6–7.

[132] *Id.* at *6.

[133] *Id.* at *9.

[134] In re Dealer Mgmt. Sys. Antitrust Litig., No. 18-C-864, 2020 U.S. Dist. LEXIS 99767 (N.D. Ill. June 8, 2020); Midwest Ath. & Sports All. LLC v. Ricoh USA, Inc., No. 2:19-cv-00514-JDW, 2020 U.S. Dist. LEXIS 169770 (E.D. Pa. Sept. 16, 2020); Gamon Plus, Inc. v. Campbell Soup Co., No. 1:15-cv-08940, 2020 WL 18284320 (N.D. Ill. May 26, 2022); Electrolysis Prevention Solutions, LLC v. Daimler Truck North America LLC, No. 3:21-171-RJC-WCM, 2023 WL 4750822 (W.D.N.C. July 24, 2023); BCBSM, Inc. v. Walgreen Co., No. 1:20-01929, 2023 WL 3737724 (N.D. Ill. May 31, 2023).

[135] This is demonstrated most strongly by the reasoning of *Broadband ITV, Inc. v. OpenTV Inc.*, No. 17-561922, 2019 WL 13170112 (Cal. Super. June 20, 2019). In this case, the court held that the communications between the plaintiff and their litigation funder prior to the date the plaintiff filed the litigation are relevant and should be turned over. However, the court also allowed the

courts have continued to rule for respondents at a ratio of two to one against allowing significant discovery.

To begin with, the facts of *Acceleration Bay* were uncommon because the plaintiff and funder had not yet executed a common interest or non-disclosure agreement during their communications about funding.[136] More importantly, as discussed in Section III above, the court in *Acceleration Bay* did not apply the controlling "because of litigation" test used in the Third Circuit. Instead, it applied the Fifth Circuit's "primary motivating purpose" test for work-product, and it applied that test more narrowly than several prior decisions involving discovery of funding documents.[137] Surprisingly, the court's work-product analysis did not cite to any of the opinions we identified above that specifically address why funding documents qualify as work-product.[138] In addition, the court held that the funding documents did not qualify for attorney-client privilege because their disclosure to the funder breached the required confidentiality. The absence of a common interest between the prospective funder and future plaintiff, as evidenced (in part) by the lack of any written agreement at the time of the communications, prevented the common interest exception from curing that breach.[139] The court's finding of no common interest is consistent with some prior decisions, but there is a split of authority on this issue.[140]

Although there are now numerous decisions on attorney-client privilege and work-product protection for funding documents, the analysis in *Acceleration Bay* suggests courts may still be unfamiliar with the issue.[141] Furthermore,

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plaintiff to assert work product and attorney-client privilege defenses and stated that it will not compel the plaintiff to produce any discovery that falls under those protections. *Id.* at *5-6.

[136] *Acceleration Bay*, 2018 U.S. Dist. LEXIS 21506, at *8. Additional facts specific to this case, as noted in the Special Master's opinion, are that the plaintiff initially claimed there were no responsive documents to produce and did not log the funding communications as privileged. No. 1:16-cv-00454-RGA, ECF No. 327, at *4-7 (Nov. 22, 2017).

[137] *See supra* note 67 and accompanying text (citing cases from the Fifth Circuit and a case from the Eleventh Circuit).

[138] *See Acceleration Bay*, 2018 U.S. Dist. LEXIS 21506, at *5-6.

[139] *Id.* at *7-9 (citing *Leader* to support the conclusion that there was no common legal interest).

[140] *See supra* note 40 and accompanying text.

[141] At least one district court has distinguished the decision in *Acceleration Bay*, though it did so in the context of a relevancy analysis. In *United Access Techs., LLC*, the District of Delaware rejected a defendant's argument that under the decision in *Acceleration Bay* "communications

plaintiffs should execute a common interest and non-disclosure agreement with funders before sharing confidential information.[142]

V. CONCLUSION

Particularly over the past five years, there has been a significant uptick in the amount of court decisions regarding the discoverability of litigation funding documents. These rulings have generally been decided in favor of litigation funders and respondents who are trying to preserve the confidentiality of their litigation funding arrangements. Additionally, there has been a trend where the denial of these discovery requests is predominately attributed to claims that the litigation funding documents lacks relevance to a claim or defense. Additionally, numerous courts have held that litigation funding is protected by either attorney client privilege or, more commonly, the work-product doctrine.

We find no compelling rationale for courts to shift their stance and abandon the reasoning that currently protects litigation funding documents from being discovered. This is because courts that opt to permit the discovery of such documents have distinct and discernible reasons for their departure from the prevailing approach. For the foreseeable future, we imagine that courts will continue to align with the precedent set by *Miller* and its progeny and protect litigation funding documents from discovery.

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with prospective sources of funding, as well as subsequent litigation updates to eventual funders, are 'relevant to central issues like [patent] validity and infringement, valuation, damages, royalty rates, and whether plaintiff is an operating company.'" *United Access Techs., LLC*, 2020 U.S. Dist. LEXIS 103532, at *4. The court held that *Acceleration Bay* "does not hold (as no case should) that such materials are always relevant, without any consideration of additional factors." *Id.*

[142] In a later opinion, Judge Andrews advised against broadly reading his *Acceleration Bay* decision, explaining that a written agreement is one factor in finding whether parties share a common legal interest. *TC Tech. LLC v. Sprint Corp.*, 16-CV-153-RGA, 2018 WL 6584122, at *5 (D. Del. Dec. 13, 2018). District courts have also noted that confidentiality agreements bolster one's argument against waiver of work-product protection. *See Impact Engine, Inc.*, 2020 U.S. Dist. LEXIS 194517, at *3 (holding the fact that the documents contained confidentiality provisions and that the funder had a common interest to that of the attorney or client weighed in favor of not imposing a waiver).

APPENDIX A

Decisions Concerning Discoverability of Litigation Funding Agreements and Documents Related to Litigation Funding
(Through August 2023)

Medtronic Sofamor Danek, Inc. v. Michelson, No. 01-2373, 2003 U.S. Dist. LEXIS 25198 (W.D. Tenn. Nov. 6, 2003).

Conlon v. Rosa, Nos. 295907, 295932, 2004 Mass. LCR LEXIS 56, 2004 WL 1627337 (Mass. Land Ct. July 21, 2004).

Berger v. Seyfarth Shaw, LLP, et al., 2008 U.S. Dist. LEXIS 88811, 2008 WL 4681834 (N.D. Cal. Oct. 22, 2008).

Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co., No. 6:07CV222-ORL-35KRS, 2008 WL 5054695 (M.D. Fla. Nov. 17, 2008).

Rembrandt Techs., L.P. v. Harris Corp., No. 07C-09-059-JRS, 2009 WL 402332, 2009 Del. Super. LEXIS 46 (Del. Super. Ct. Feb. 12, 2009).

Leader Techs., Inc. v. Facebook, Inc., 719 F. Supp. 2d 373, 376 (D. Del. 2010).

Mondis Tech., Ltd. v. LG Elecs., Inc., No. 2:07-CV-565-TJW-CE, 2011 WL 1714304 (E.D. Tex. May 4, 2011).

SSL Servs., LLC v. Citrix Sys., No. 2:08-cv-158-JRG, 2012 U.S. Dist. LEXIS 198173 (E.D. Tex. May 23, 2012).

Devon It, Inc. v. IBM Corp., No. CIV.A. 10-2899, 2012 WL 4748160 (E.D. Pa. Sept. 27, 2012).

Walker Digital v. Google, Civ. No. 11-309-SLR (D. Del. Feb. 12, 2013).

Cabrera v 1279 Morris LLC, 2012 WL 5418611 (N.Y. Sup. Ct. 2013).

Intel Corp. v. Prot. Captial LLC, No. 13cv1685 GPC (NLS), 2013 U.S. Dist. LEXIS 201883 (S.D. Cal. Oct. 2, 2013)

Cobra Int'l, Inc. v. BCNY Int'l, Inc., No. 05-61225-CIV, 2013 WL 11311345, 2013 U.S. Dist. LEXIS 190268 (S.D. Fla. Nov. 4, 2013).

Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711 (N.D. Ill. 2014).

Doe v. Soc'y of Missionaries of Sacred Heart, No. 11-CV-02518, 2014 WL 1715376 (N.D. Ill. May 1, 2014).

The Abi Jaoudi and Azar Trading Corp. v. CIGNA Worldwide Ins. Co., No. 2:91-cv-0785 (E.D. Pa. Jul. 17, 2014).

Cohen v. Cohen, No. 09 CIV. 10230 LAP, 2015 WL 745712 (S.D.N.Y. Jan. 30, 2015).

Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A., No. CV 7841-VCP, 2015 WL 778846 (Del. Ch. Feb. 24, 2015).

Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co., No. CV 07C-12-134-JRJ, 2015 WL 1540520 (Del. Super. Ct. Mar. 31, 2015).

Queens University v. Samsung Elecs., No. 2:14CV53-JRG-RSP (E.D. Texas Apr. 10, 2015).

Yousefi v. Delta Elec. Motors, Inc., 2015 WL 11217257, 2015 U.S. Dist. LEXIS 180844 (W.D. Wash. May 11, 2015).

Kaplan v. S.A.C. Capital Advisors, L.P., No. 12-CV-9350 VM KNF, 2015 WL 5730101, 2015 U.S. Dist. LEXIS 135031 (S.D.N.Y. Sept. 10, 2015), *aff'd*, 141 F. Supp. 3d 246 (S.D.N.Y. 2015).

Mobile Telecomms. Techs. LLC v. Blackberry Corp., No. 3:12-cv-01652 (N.D. Texas Nov. 2, 2015).

Morley v. Square, Inc., No. 4:10CV2243 SNLJ, 2015 WL 7273318 (E.D. Mo. Nov. 18, 2015).

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United States v. Ocwen Loan Servicing, LLC, No. 4:12-CV-543, 2016 WL 1031157, 2016 U.S. Dist. LEXIS 32967 (E.D. Tex. Mar. 15, 2016).

In re Int'l Oil Trading Co., LLC, 548 B.R. 825, 832 (Bankr. S.D. Fla. 2016).

Haghayeghi v. Guess?, Inc., 2016 U.S. Dist. LEXIS 193963 (S.D. Cal. Mar. 18, 2016)

Ashghari-Kamrani v. United Services Automobile Assn., No. 2:15-CV-478, 2016 WL 11642670 (E.D. Va. May 31, 2016).

Elenza, Inc. v. Alcon Labs., No. N14C-03-185 MMJ CCLD (Del. Super. Ct. June 14, 2016).

Harper v. Everson, No. 3:15-CV-00575-JHM, 2016 U.S. Dist. LEXIS 197894 (W.D. Ky. June 27, 2016).

Hologram USA, Inc. v. Pulse Evolution Corp., No. 2:14-cv-00772-GMN-NJK, 2016 U.S. Dist. LEXIS 87323 (D. Nev. July 5, 2016)

IOENGINE LLC v. Interactive Media Corp., No. 1:14-cv-01571 (D. Del. Aug. 3, 2016).

Gbarabe v. Chevron Corp., No. 14-CV-00173-SI, 2016 WL 4154849, 2016 U.S. Dist. LEXIS 103594 (N.D. Cal. Aug. 5, 2016).

VHT, Inc. v. Zillow Group, Inc., No. C15-1096JLR, 2016 WL 7077235, 2016 U.S. Dist. LEXIS 172373 (W.D Wash. Sept. 8, 2016).

Odyssey Wireless, Inc. v. Samsung Elecs. Co., Ltd., No. 315CV01735HRBB, 2016 WL 7665898, 2016 U.S. Dist. LEXIS 188611 (S.D. Cal. Sept. 20, 2016).

Telesocial Inc. v. Orange S.A., No. 3:14-cv-03985 (N.D. Cal. Sept. 30, 2016).

In re Gawker Media LLC, et al., 2017 Bankr. LEXIS 1798, 2017 WL 2804870 (Bankr. Ct. S.D. NY 2017).

AVM Techs., LLC v. Intel Corp., Civil Action No. 15-33-RGA, 2017 U.S. Dist. LEXIS 65698 (D. Del. Apr. 29, 2017).

Mackenzie Architects, P.C. v. VLG Real Estate Developers, LLC, et al., No. 1:15-CV-01105-TJM-DJS, 2017 WL 4898743 (N.D.N.Y. Mar. 3, 2017).

Viamedia, Inc. v. Comcast Corp., No. 16-CV-5486, 2017 WL 2834535, 2017 U.S. Dist. LEXIS 101852 (N.D. Ill. June 30, 2017).

Lambeth Magnetic Structures, LLC v. Seagate Tech. (US) Holdings, Inc., No. CV 16-538, 2018 WL 466045 (W.D. Pa. Jan. 18, 2018).

Acceleration Bay LLC v. Activision Blizzard, Inc., No. 16-453-RGA, 2018 U.S. Dist. LEXIS 21506, 2018 WL 798731 (D. Del. Feb. 9, 2018).

Alabama Aircraft Indus. v. Boeing Co., No. 2:16-mc-01216-RDP (N.D. Ala. Feb. 9, 2018).

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

Space Data Corp. v. Google, LLC, No. 16-CV-02360, 2018 WL 3054797 (N.D. Cal. June 11, 2018).

Quan v. Peghe Deli Inc., 2019 N.Y. Misc. LEXIS 4516, 2019 WL 3974786 (Sup. Ct. Queens County 2019).

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Benitez v. Lopez, 2019 U.S. Dist. LEXIS 64532, 2019 WL 1578167 (E.D.N.Y. Mar. 14, 2019).

SecurityPoint Holdings, Inc. v. United States, No. 1:11-CV-00268, 2019 WL 1751194 (Fed. Cl. Apr. 16, 2019) (see also ECF Nos. 303, 404).

Broadband ITV, Inc. v. OpenTV Inc., No. 17-561922, 2019 WL 13170112 (Cal. Super. June 20, 2019).

Harris v. Celadon Trucking Services, No. 18-03317, 2019 WL 13223683 (E.D. La. Aug. 28, 2019).

Hybrid Ath., LLC v. Hylete, No. 3:17-cv-1767 (VAB), 2019 U.S. Dist. LEXIS 148245 (D. Conn. Aug. 30, 2019).

V5 Techs. v. Switch, Ltd., 334 F.R.D. 306 (D. Nev. 2019).

In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig., 405 F. Supp. 3d 612 (D.N.J. 2019).

Dupont v. Costco Wholesale Corp., No. 17-04469, 2019 WL 8158471 (E.D. La. Oct. 15, 2019), *aff'd*, No. CV 17-4469, 2019 WL 5959564 (E.D. La. Nov. 13, 2019).

Pipkin v. Acumen, 2019 U.S. Dist. LEXIS 206233 (D. Utah Nov. 26, 2019).

Fulton v. Foley, No. 17-CV-8696, 2019 U.S. Dist. LEXIS 209585 (N.D. Ill. Dec. 5, 2019).

In re Zantac (Ranitidine) Prods. Liab. Litig., No. 2924, 2020 U.S. Dist. LEXIS 62805 (S.D. Fla. Apr. 3, 2020).

In re Dealer Mgmt. Sys. Antitrust Litig., No. 18-C-864, 2020 U.S. Dist. LEXIS 99767 (N.D. Ill. June 8, 2020).

United Access Techs., LLC v. AT&T Corp., 2020 U.S. Dist. LEXIS 103532 (D. Del. June 12, 2020).

Gordon v. Great W. Cas. Co., No. 2:18-CV-00967 LEAD, 2020 U.S. Dist. LEXIS 144234 (W.D. La. July 8, 2020)

Midwest Ath. & Sports All. LLC v. Ricoh USA, Inc., No. 2:19-cv-00514-JDW, 2020 U.S. Dist. LEXIS 169770 (E.D. Pa. Sept. 16, 2020).

Art Akiane LLC v. Art & SoulWorks LLC, No. 19 C 2952, 2020 U.S. Dist. LEXIS 171682 (N.D. Ill. Sep. 18, 2020).

Impact Engine, Inc. v. Google LLC, No. 3:19-cv-01301-CAB-DEB, 2020 U.S. Dist. LEXIS 194517 (S.D. Cal. Oct. 20, 2020).

Elm 3DS Innovations Ltd. Liab. Co. v. Samsung Elecs. Co., No. 14-1430-LPS, 2020 U.S. Dist. LEXIS 216796 (D. Del. Nov. 19, 2020).

Pres. Techs. LLC v. MindGeek USA Inc., No. 2:17-cv-08906, 2020 U.S. LEXIS 258311 (C.D. Cal., Dec. 18, 2020).

Dantzler v. Delacerda, No. CW 1108, 2020 La. App. LEXIS 1993 (La. App. 1 Cir. Dec. 30, 2020).

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Speyside Medical, LLC v. Medtronic CoreValve, LLC et al., 1:20-cv-00361-LPS, ECF No. 88 (D. Del. Mar. 2, 2021).

Colibri Heart Valve LLC v. Medtronic CoreValve LLC, et al., 8:20-cv-00847-DOC-JDE, ECF No. 111 (C.D. Cal. Mar. 26, 2021).

Coronda v. Veolia N. Am., 2021 NYLJ LEXIS 298 (N.Y. Sup. Ct. Apr. 13, 2021).

United States v. McKesson Corp. et al., 1:12-cv-06440-NG-ST, ECF No. 135 (E.D.N.Y. Apr. 28, 2021).

In re Outlaw Lab'ys, LP Litig., No. 18-840, 2021 WL 5768123 (S.D. Cal. June 29, 2021).

Gordon v. Rowley, No. 4:20-84, 2021 WL 2697532 (M.D. GA. June 30, 2021).

Pinn, Inc. v . Apple Inc., No. 16-cv-1805, Dkt. No. 459 (C.D. Cal., July 14, 2021).

Allele Biotechnology & Pharm. v. Pfizer, Inc., No. 20-cv-01958-H-AGS, 2021 U.S. Dist. LEXIS 174654 (S.D. Cal. Sep. 13, 2021).

Nunes v. Lizza, No. 20-cv-4003-CJW, 2021 U.S. Dist. LEXIS 254428 (N.D. Iowa Oct. 26, 2021).

Cirba Inc. v. Vmware, Inc., Civil Action No. 19-742-LPS, 2021 U.S. Dist. LEXIS 238484 (D. Del. Dec. 14, 2021).

Neural Magic Inc v. Facebook Inc, No. 1:20-cv-10444 (D. Mass. Dec. 21, 2021), ECF No. 224 (electronic order).

Kove IO, Inc. v. Amazon Web Services, Inc., 18-cv-8175 (N.D. Ill., Jan. 26, 2022), ECF No. 497.

Smith-Jordan v. Love, No. 19-14699, 2022 U.S. Dist. LEXIS 13874 (E.D. La. Jan. 26, 2022).

Advanced Aerodynamics, LLC v. Spin Master, Ltd., No. 6:21-cv-00002-ADA (W.D. Tex. Feb. 4, 2022).

3rd Eye Surveillance v. United States, No. 15-501C, 2022 U.S. Claims LEXIS 141, 158 Fed. Cl. 216 (Fed. Cl. Feb. 9, 2022).

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Riseandshine Corporation d/b/a Rise Brewing v. PepsiCo, Inc., 21-cv-6324, 2022 WL 1118890 (S.D.N.Y. Mar. 3, 2022) (ECF No. 197).

Rodriguez v Rosen & Gordon, LLC, 2022 N.Y. Misc. LEXIS 1084 (N.Y. Sup. Ct. Mar. 4, 2022).

Taction Technology, Inc. v. Apple Inc., No. 21-cv-812, 2022 WL 18781396 (S.D. Cal. Mar. 16, 2022) (ECF No. 44).

Worldview Entertainment Holdings, Inc. v Woodrow, 204 A.D.3d 629, 2022 N.Y. App. Div. LEXIS 2790 (N.Y. App. Div. Apr. 28, 2022).

In re Bayerische Motoren Werke Ag., 2022 U.S. Dist. LEXIS 81660 (N.D. Ill. May 5, 2022).

Nantworks, LLC v. Niantic, Inc., 2022 U.S. Dist. LEXIS 87320 (N.D. Cal. May 12, 2022).

Gamon Plus, Inc. v. Campbell Soup Co., No. 1:15-cv-08940, 2020 WL 18284320 (N.D. Ill. May 26, 2022).

Fleet Connect Sols. LLC v. Waste Connections US, Inc., 2022 U.S. Dist. LEXIS 129216 (E.D. Tex.) (June 29, 2022) (ECF No. 59).

In re Nimitz Techs. LLC, No. 2023-103, 2022 WL 17494845 (Fed. Cir. Dec. 8, 2022).

BCBSM, Inc. v. Walgreen Co., No. 1:20-01929, 2023 WL 3737724 (N.D. Ill. May 31, 2023).

Electrolysis Prevention Solutions, LLC v. Daimler Truck North America LLC, No. 3:21-171-RJC-WCM, 2023 WL 4750822 (W.D.N.C. July 24, 2023).

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Thimes Solutions Inc. v. TP-Link USA Corp., No. 19-10374, 2022 WL 18397128 (C.D. Cal. Oct. 6, 2022).

Hardin v. Samsung Elecs. Co., Ltd., No. 2:21-CV-00290-JRG, 2022 U.S. Dist. LEXIS 194602 (E.D. Tex. Oct. 25, 2022).

Smartmatic USA Corp. et al. v. Fox Corp. et al., No. 151136/21, 2023 N.Y. App. Div. LEXIS 776 (N.Y. Sup. Ct. Mar. 29, 2023).

SiteLock LLC v. GoDaddy.com LLC, No. 19-02746-PHX-DWL, 2023 WL 3344638 (D. Ariz. May 10, 2023).

Speyside Medical, LLC v. Medtronic CoreValve LLC et al, No. 1-20-cv-00361 (D. Del. May 23, 2023).

GoTV Streaming, LLC v. Netflix, Inc., No. 2:22-07556-RGK-SHK, 2023 WL 4237609 (C.D. Cal. May 24, 2023).

Centripetal Networks, LLC v. Palo Alto Networks, Inc., No. 2:21-137 (E.D. Va. Aug. 16, 2023).

APPENDIX B

Decisions Concerning Discoverability of Litigation Funding Agreements and Documents Related to Litigation Funding – Organized by Jurisdiction
(Through August 2023)

STATE COURTS (AND FEDERAL COURTS APPLYING STATE LAW)

Alabama

Alabama Aircraft Indus. v. Boeing Co., No. 2:16-mc-01216-RDP (N.D. Ala. Feb. 9, 2018).

Arizona

Cont'l Circuits LLC v. Intel Corp., 435 F. Supp. 3d 1014 (D. Ariz. 2020).

SiteLock LLC v. GoDaddy.com LLC, No. 19-02746-PHX-DWL, 2023 WL 3344638 (D. Ariz. May 10, 2023).

California

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