

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, to our knowledge, no one has 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 fifty-five. These decisions now comprise a sufficient body of law to permit a thorough analysis that will allow 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

Negotiating and obtaining commercial litigation financing for a case requires that a funder and a client discuss confidential information about the case.² 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

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 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).

² 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 recently 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.*

will refer to as the plaintiff³ 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 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.

Many commentators apparently believe that lawyers cannot predict whether a court will compel discovery of information shared with a commercial litigation funder because few decisions exist on the issue.⁴ Indeed, no appellate court has ruled on precisely this issue. However, after analyzing 52 trial court decisions, we found courts most often deny or limit discovery of funding

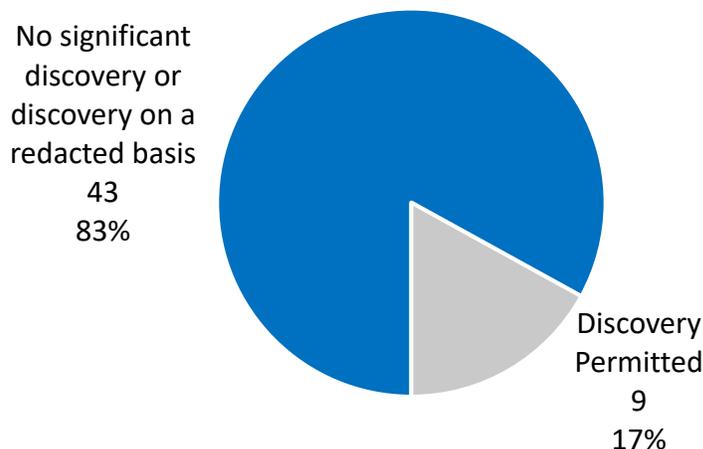
³ The client is often a plaintiff in an already-filed suit, but could also be a party contemplating filing a lawsuit or a defendant in a suit. We believe our research and analysis in this article would generally apply regardless of whether the client receiving funding is a claimant who has not yet filed 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.

⁴ 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>.

agreements and communications with funders, as shown by Figure 1. Occasionally, a court allows discovery of funding documents in unusual cases, but courts so far have not found this minority of decisions persuasive.

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. A few courts have compelled discovery of information shared with funders, but after analyzing a properly-raised work-product claim, only two judges have concluded that sharing information with a funder under normal commercial funding conditions waives all work-product protection.⁵ Section IV gives special attention to several exceptional cases where a judge allowed discovery. It explains why courts have not found these cases persuasive and why future courts likely will not find these cases as persuasive as the majority of decisions denying discovery of funding documents.

**Figure 1: Discovery of Litigation Funding Documents
in Cases Discussed in this Article
(total cases = 52)**



⁵ See *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); *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). Although the district court in *Midwest Ath. & Sports All. LLC v. Ricoh USA, Inc.*, No. 2:19-cv-00514-JDW, 2020 U.S. Dist. LEXIS 194956 (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.

II. SUMMARY OF DISCOVERY DECISIONS

After an extensive search of the federal dockets and major legal databases, we found approximately fifty-five opinions or orders deciding whether to deny or allow discovery of information shared with litigation funders. We identified 52 of these cases as directly deciding this issue and divided those cases into three general categories. In Category One, no discovery was allowed in 32 cases and very limited discovery was allowed in 2 cases. Courts in Category Two, comprising 10 cases, allowed discovery of the funding agreement or non-deal documents but limited it by redacting work-product or by denying discovery of work-product. Category Three contains 9 cases where the court granted the defendant's request for significant, unredacted discovery of the funding agreement or non-deal documents (or, in one old state court case, both).

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 attorney-client privilege, work-product protection, or a lack of relevance. For this reason, we did not count some cases in this summary or in the accompanying Figures. We excluded six cases because the decisions involved other procedural issues rather than an analysis of a privilege or work-product objection to discovery.⁶ We excluded one case where the court denied a motion to compel discovery of a litigation funding agreement without further explanation.⁷ Also, we note below, but excluded from this summary, a case involving a patent monetization

⁶ We excluded *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). 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 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).

⁷See *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).

consultant, whose situation differs somewhat from commercial litigation financing.⁸

Category One – No or Limited Discovery Allowed. First, in thirty-four cases, courts denied the defendant’s request for discovery of information shared with funders. In thirty of these cases, the court refused to compel any discovery of the funding agreement or other information shared with a litigation funder.⁹ In another of these cases, the court did not discuss discovery of the funding agreement and allowed very limited discovery of a few non-deal documents, which were redacted.¹⁰ Similarly, in a divorce proceeding in a different case, the

⁸ *Intellectual Ventures I LLC v. Altera Corp.*, No. 10-1065-LPS, ECF No. 415 (D. Del. Jul. 25, 2013).

⁹ *Benitez v. Lopez*, 2019 WL 1578167 (E.D.N.Y. Mar. 14, 2019); *MLC Intellectual Prop., LLC v. Micron Tech., Inc.*, No. 14-CV-03657, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019); *Space Data Corp. v. Google, LLC*, No. 16-CV-02360, 2018 WL 3054797, at *1 (N.D. Cal. June 11, 2018); *In re: Nat’l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018) (stating that “[a]bsent extraordinary circumstances, the Court will not allow discovery into [third-party contingent litigation] financing”); *Lambeth Magnetic Structures, LLC v. Seagate Tech. (US) Holdings, Inc.*, No. CV 16-538, 2018 WL 466045, at *5-6; 2017 U.S. Dist. LEXIS 215773, at 15-16 (W.D. Pa. Jan. 18, 2018); *Viamedia, Inc. v. Comcast Corp.*, No. 16-CV-5486, 2017 WL 2834535, 2017 U.S. Dist. LEXIS 101852 (N.D. Ill. June 30, 2017); *Mackenzie Architects, P.C. v. VLG Real Estate Developers, LLC, et al.*, 2017 WL 4898743 (N.D.N.Y. Mar. 3, 2017); *Telesocial Inc. v. Orange S.A.*, No. 3:14-cv-03985 (N.D. Cal. Sept. 30, 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); *IOENGINE LLC v. Interactive Media Corp.*, No. 1:14-cv-01571 (D. Del. Aug. 3, 2016); *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); *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) (substantively identical order as in related case of *United States ex rel. Fisher v. Homeward Residential, Inc.*); *Yousefi v. Delta Elec. Motors, Inc.*, 2015 WL 11217257 (W.D. Wash. May 11, 2015); *The Abi Jaoudi and Azar Trading Corp. v. CIGNA Worldwide Ins. Co.*, No. 2:91-cv-0785 (E.D. Pa. Jul. 17, 2014); *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711 (N.D. Ill. 2014); *Walker Digital v. Google*, No. 11-309-SLR, ECF No. 280, at *2 (D. Del. Feb. 12, 2013); *Devon It, Inc. v. IBM Corp.*, No. CIV.A. 10-2899, 2012 WL 4748160 (E.D. Pa. Sept. 27, 2012); *Mondis Tech., Ltd. v. LG Elecs., Inc.*, No. 2:07-CV-565-TJW-CE, 2011 WL 1714304 (E.D. Tex. May 4, 2011); *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); *V5 Techs. v. Switch, Ltd.*, 334 F.R.D. 306, 312 (D. Nev. 2019); *Art Akiane LLC v. Art & SoulWorks LLC*, No. 19 C 2952, 2020 U.S. Dist. LEXIS 171682, *7, *15 (N.D. Ill. Sep. 18, 2020); *United Access Techs., LLC v. AT&T Corp.*, 2020 U.S. Dist. LEXIS 103532, at *3 (D. Del. June 12, 2020); *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig.*, 405 F. Supp. 3d 612, 615 (D.N.J. 2019); *Pipkin v. Acumen*, 2019 U.S. Dist. LEXIS 206233, at *3 (D. Utah Nov. 26, 2019); *Dupont v. Costco Wholesale Corp.*, No. 17-04469, 2019 WL 8158471, at *5 (E.D. La. Oct. 15, 2019), *aff’d*, No. CV 17-4469, 2019 WL 5959564 (E.D. La. Nov. 13, 2019); *Elm 3DS Innovations Ltd. Liab. Co. v. Samsung Elecs. Co.*, No. 14-1430-LPS, 2020 U.S. Dist. LEXIS 216796, at *3-4 (D. Del. Nov. 19, 2020); *Impact Engine, Inc. v. Google LLC*, No. 3:19-cv-01301-CAB-DEB, 2020 U.S. Dist. LEXIS 194517, at *1-3 (S.D. Cal. Oct. 20, 2020); *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); *Speyside Medical, LLC v. Medtronic CoreValve, LLC et al.*, 1:20-cv-00361-LPS, ECF No. 88 (D. Del. Mar. 2, 2021).

¹⁰ *Doe v. Soc’y of Missionaries of Sacred Heart*, No. 11-CV-02518, 2014 WL 1715376 (N.D. Ill. May 1, 2014).

court ordered 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.¹¹ Furthermore, in the one of these cases, the court granted a motion to quash a subpoena served on the funder, a non-party in the case.¹² Finally, in another case, the court ruled that the funding agreements were protected by the work product doctrine, but information related to the identities of the funders was not.¹³

Category Two – Limited Discovery Allowed. Second, in ten of the 52 decisions we found, the court held some, but not all, of the material shared with funders constituted work-product that deserved protection from discovery or was not relevant. In seven of these cases, the court only allowed discovery of the funding agreement in redacted form to protect work-product in that document.¹⁴ In three other of these cases, the court remained silent as to discovery of the funding agreement, but compelled discovery of non-deal documents.¹⁵ As discussed below in Section III, the courts in Categories One and Two limited discovery of the funding agreement and non-deal documents because they were

¹¹ *Edelson v. Edelson*, No. CV N20M-09-140, 2021 WL 195035, at *2 (Del. Super. Ct. Jan. 20, 2021) (holding that the respondent was entitled to test the assertions of petitioner with respect to expenses claimed to offset marital assets).

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

¹³ *Cont'l Circuits LLC v. Intel Corp.*, 435 F. Supp. 3d 1014, 1024 (D. Ariz. 2020).

¹⁴ *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); *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].”).

¹⁵ *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.*

not relevant, protected by attorney-client privilege, or protected by the work-product doctrine.

Category Three – Significant Discovery Allowed. In nine exceptional cases, courts compelled significant discovery of usually privileged information. In most of these cases, there was not much case law on this issue at the time of decision, or the plaintiff failed to raise all the usual objections. Section IV discusses the facts, procedural history, and historical context that make these nine cases not as representative of the overall case law as the other forty-four cases in Categories One and Two. In three cases in Category Three, the court compelled production of the funding agreement without any information redacted where, for instance, the funder was a witness in the case.¹⁶ In five other cases, the court compelled production of non-deal documents, without addressing discovery of the funding agreement.¹⁷ In one 2004 Massachusetts case, *Conlon v. Rosa*, the court allowed discovery of the redacted funding agreement and non-deal documents.¹⁸

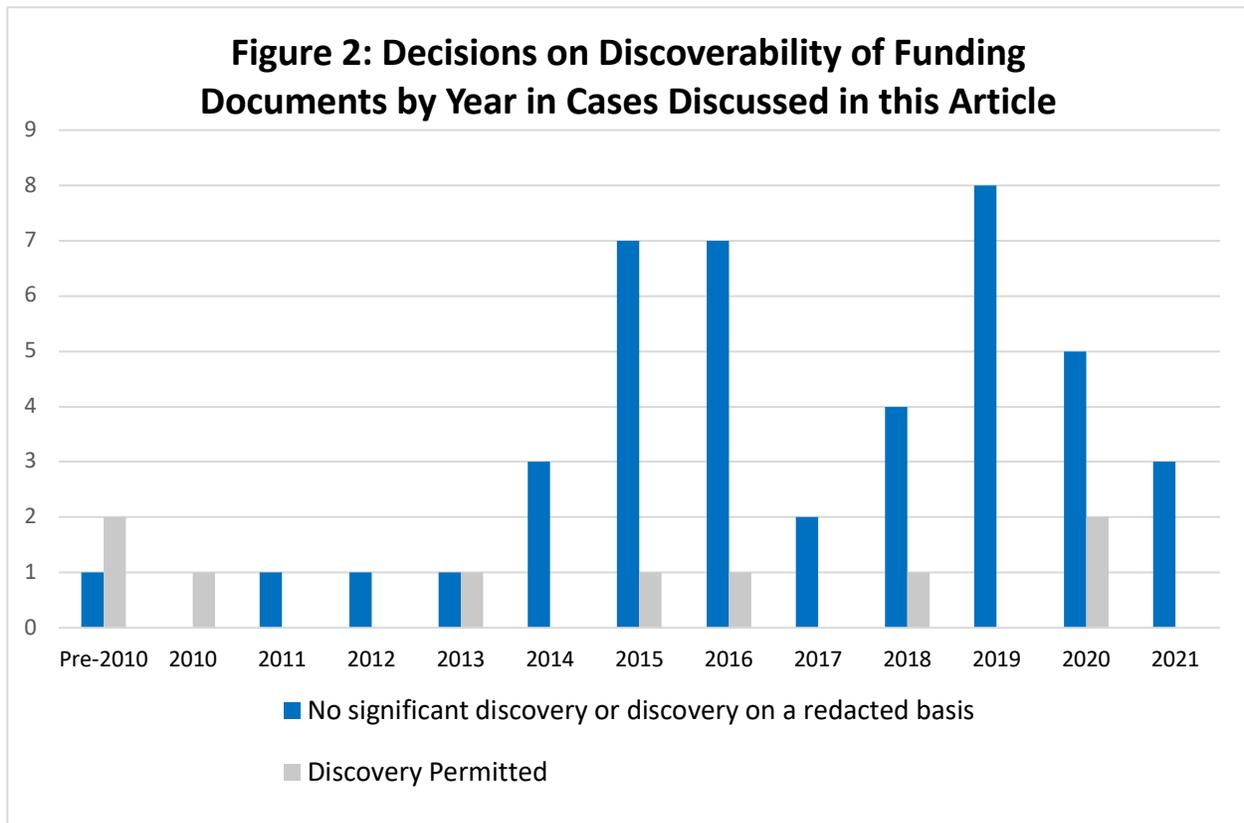
Overall, the vast majority of cases we found did not allow much, if any, discovery of information shared with litigation funders. Moreover, the change in results over time is significant. As illustrated by the increase in the blue bars in Figure 2, over time, courts appear to be moving towards the conclusion that funding agreements and non-deal documents contain a substantial amount of

¹⁶ *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); *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); *Berger v. Seyfarth Shaw, LLP, et al.*, 2008 WL 4681834, at *3 (N.D. Cal. Oct. 22, 2008) (where the funder was to be a witness, the court permitted discovery of documents, including funding agreement, with third-party business associate, but not ordering production of documents sharing legal opinions of Plaintiffs' attorneys, which are privileged).

¹⁷ *Acceleration Bay LLC v. Activision Blizzard, Inc.*, No. 16-453-RGA, 2018 U.S. Dist. LEXIS 21506, at *5 (D. Del. Feb. 9, 2018); *Cohen v. Cohen*, No. 09 CIV. 10230 LAP, 2015 WL 745712, at *2 (S.D.N.Y. Jan. 30, 2015); *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 376 (D. Del. 2010); *Midwest Ath. & Sports All. LLC v. Ricoh USA, Inc.*, No. 2:19-cv-00514-JDW, 2020 U.S. Dist. LEXIS 194956, at *6-7 (E.D. Pa. Sept. 16, 2020); *In re Dealer Mgmt. Sys. Antitrust Litig.*, No. 18-C-864, 2020 U.S. Dist. LEXIS 99767, at *47-49 (N.D. Ill. June 8, 2020).

¹⁸ *Conlon v. Rosa*, Nos. 295907, 295932, 2004 Mass. LCR LEXIS 56, at *5, 2004 WL 1627337 (Mass. Land Ct. July 21, 2004).

protected work-product or are not relevant.¹⁹ Nearly all 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 leading decision in this area.²⁰ 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.



¹⁹ See *Micron*, 2019 WL 118595, at *2; *Space Data*, 2018 WL 3054797, at *1; *In re: Nat'l Prescription Opiate Litig.*, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018); *Lambeth*, 2018 WL 466045, at *5-6; *Viamedia*, 2017 U.S. Dist. LEXIS 101852, at *9 (N.D. Ill. June 30, 2017).

²⁰ 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.

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 because the work-product doctrine protects the documents. Accordingly, the few courts permitting discovery of funding documents did so most often due to a finding of no attorney-client privilege, as shown by the grey area Figure 3's third column.

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.”²¹ Defendants have argued funding documents are relevant to determine:

- the adequacy of class counsel;²²
- if the plaintiff no longer has standing because the patent or claim was transferred;²³
- whether funders are indispensable parties or witnesses;²⁴
- whether a funder declined to take a case because the patent in an infringement suit is invalid;²⁵
- whether the plaintiff’s claims are barred under the statute of limitations; and²⁶
- “possible bias issues” with jury members and witnesses.²⁷

²¹ Fed. R. Civ. P. 26(b)(1) (emphasis added).

²² *Kaplan*, 2015 U.S. Dist. LEXIS 135031, at *17-18; *Gbarabe*, 2016 U.S. Dist. LEXIS 103594, at *5-6.

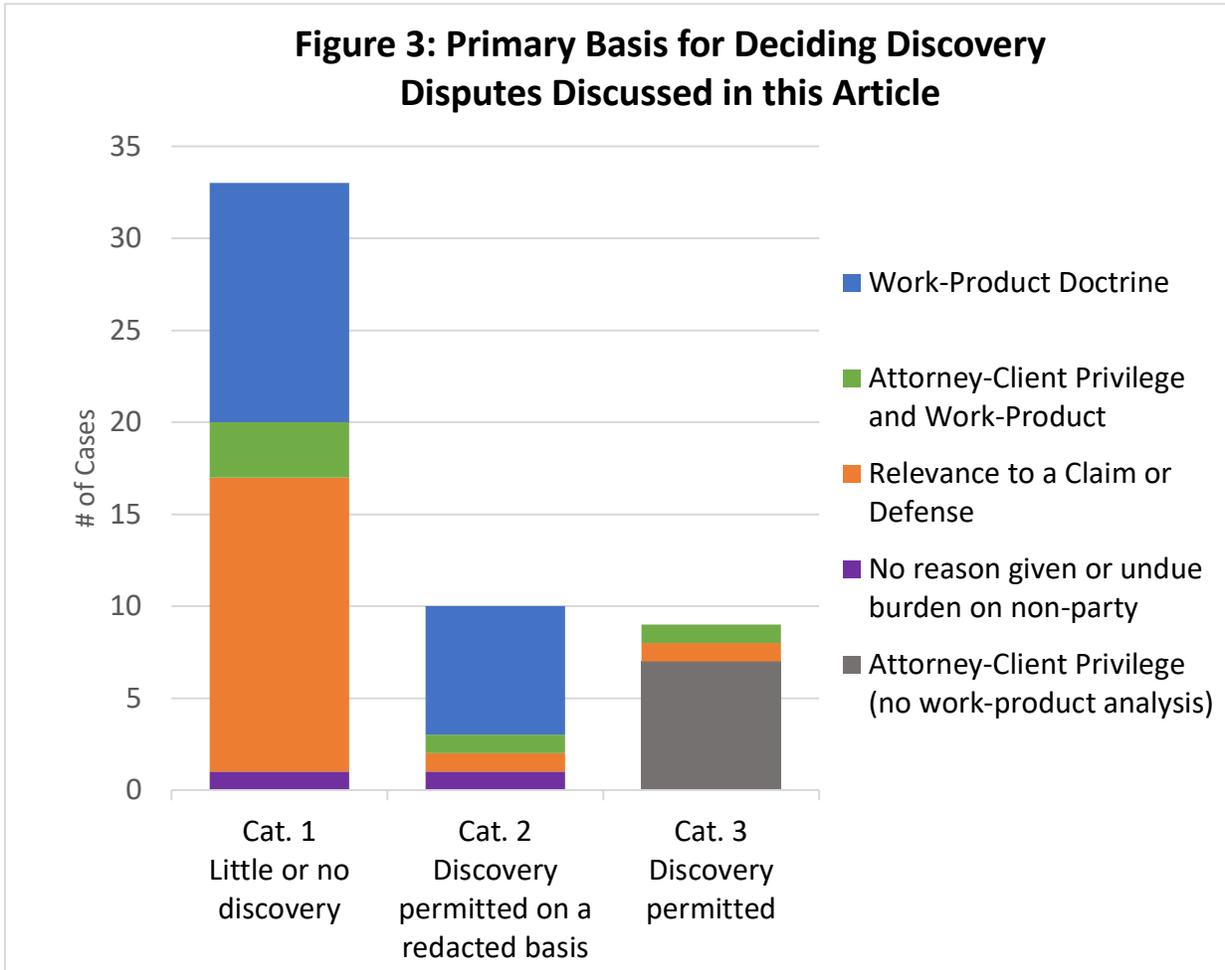
²³ *See VHT*, 2016 U.S. Dist. LEXIS 172373, at *3; *In re Int’l Oil*, 548 B.R. at 838-39; *Cobra*, 2013 U.S. Dist. LEXIS 190268, at * 8-9; *see also SecurityPoint Holdings*, 2019 WL 1751194, at *5-6 (where Defendant United States also argued the Assignment of Claims Act, 31 U.S.C. § 3727, could make a litigation funding arrangement relevant).

²⁴ *VHT*, 2016 U.S. Dist. LEXIS 172373, at *4.

²⁵ Transcript, *IOENGINE*, No. 1:14-cv-01571 (D. Del. Jul. 18, 2016).

²⁶ *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).

²⁷ *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.²⁸ Hence, many courts do not deny discovery of funding documents on this basis.²⁹ Nevertheless, in eighteen cases, courts denied some discovery requests because the funding agreement or communications with funders were not relevant to a claim or defense.³⁰

²⁸ For example, information “need not be admissible in evidence to be discoverable.” Fed. R. Civ. P. 26(b)(1).

²⁹ 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).

³⁰ 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);

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.³¹ 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."³² Similarly, in *V5 Techs. v. Switch, Ltd.*, the District of Nevada held that where parties seek litigation funding information to expose potential bias, "[m]ere speculation by the party seeking this discovery will not suffice."³³

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."³⁴ 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."³⁵ Even after allowing the defendant to file amended counterclaims, the court found that "[n]othing more than speculation supports

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. 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").

³¹ *In re Valsartan*, 405 F. Supp. 3d at 619.

³² *Id.* at 615.

³³ *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.").

³⁴ *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).

³⁵ *VHT*, 2016 U.S. Dist. LEXIS 172373, at *3-4.

[the defendant's] arguments," which consisted of "imaginable hypotheticals."³⁶ Therefore, the requested litigation funding information was "disproportional to the needs of the case," so the court denied the defendant's motion to compel.³⁷

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).³⁸ This argument has not always been 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 . . .'"³⁹ "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."⁴⁰ The court denied the defendants' motion to compel production of litigation funding documents.⁴¹ 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."⁴²

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

³⁶ *Id.* at *4.

³⁷ *Id.*

³⁸ 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 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 under 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 can be found in a Memorandum by Patrick A. Tighe in the Advisory Committee on Civil Rules, Agenda Materials, Philadelphia, PA, April 10, 2018, at 209, available at <http://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf>.

³⁹ *Kaplan*, 2015 U.S. Dist. LEXIS 135031, at *16-17.

⁴⁰ *Id.* at *17.

⁴¹ *Id.* at *17-18.

⁴² 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.

confidentiality,” the client or attorney waives the privilege if he destroys confidentiality of the communications by disclosing their content to a third-party.⁴³ However, courts recognize various exceptions to this general rule of automatic waiver for breaches of confidentiality.⁴⁴ The party asserting the privilege also bears the burden of proving an exception to waiver of the privilege if a disclosure broke the confidentiality required.⁴⁵

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.⁴⁶ Similarly, attorney-client privilege generally may not attach to non-deal documents or communications that were not shared between the attorney and client.⁴⁷ 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.⁴⁸ 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

⁴³ *Miller*, 17 F. Supp. 3d at 731.

⁴⁴ 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, 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.

⁴⁵ 6-26 *Moore's Federal Practice - Civil* § 26.47 (2017).

⁴⁶ *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.”).

⁴⁷ See *Miller*, 17 F. Supp. 3d at 731; see 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).

⁴⁸ Schacknow, *supra* note 35, at 1468.

results in the cases we reviewed: four of the ten cases we found analyzing the issue concluded that the doctrine applies to funding documents.⁴⁹

i. 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.”⁵⁰ We found six 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.⁵¹ 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.⁵² The District of Delaware reached the same conclusion in patent infringement suits in 2010 and in 2018.⁵³ 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.⁵⁴

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.⁵⁵ In both of those cases, a common interest and non-disclosure agreement was in place.⁵⁶ 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.”

⁴⁹ See *Walker*, *Devon*, *Rembrandt*, and *In re International Oil Trading Co.* discussed below for cases finding the common interest exception applies.

⁵⁰ *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).

⁵¹ *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 194956, at *6; *In re Dealer*, 2020 U.S. Dist. LEXIS 99767, at *44.

⁵² *Miller*, 17 F. Supp. 3d at 732-33.

⁵³ *Acceleration Bay*, 2018 U.S. Dist. LEXIS 21506, at *6-9; *Leader*, 719 F. Supp. 2d at 376.

⁵⁴ *Cohen*, 2015 WL 745712, at *4.

⁵⁵ *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 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).

⁵⁶ *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.

ii. 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.⁵⁷ *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.⁵⁸ The common interest exception alone sufficed for the court to deny the defendant’s motion to compel discovery of non-deal documents.⁵⁹

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.⁶⁰ Like the common interest exception, courts are split over how narrowly to limit the kinds of non-lawyer professionals the exception can cover.⁶¹ 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.⁶²

⁵⁷ *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”).

⁵⁸ *In re Int'l Oil Trading Co.*, 548 B.R. at 832-33.

⁵⁹ *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.

⁶⁰ *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).

⁶¹ *In re Int'l Oil Trading Co.*, 548 B.R. at 834; DeStefano, *supra* note 2, 331-341 (2014).

⁶² *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 194956, at *7.

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.⁶³ 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.⁶⁴ The court interpreted Florida law as protecting communications with any party who assists the client in obtaining legal services.”⁶⁵ And some federal courts have applied the agency exception “to professionals with whom communication may be necessary for the provision of legal advice.”⁶⁶ “Litigation funders may be essential to the provision of legal advice in” cases brought by a creditor with little money against well-funded debtor.⁶⁷ Thus, the agency exception applies to a waiver of attorney-client privilege for non-deal documents shared with a litigation funder.⁶⁸

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).⁶⁹

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 for example. 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

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).

⁶³ *In re Int'l Oil Trading Co.*, 548 B.R. at 835.

⁶⁴ *Id.* at 834-35.

⁶⁵ *Id.* at 834.

⁶⁶ *Id.*

⁶⁷ *Id.* at 835.

⁶⁸ *Id.*

⁶⁹ DeStefano, *supra* note 2, at 352.

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.⁷⁰ As with the assertion of attorney-client privilege, the 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.⁷¹ Of the fifty-three cases we found, twenty-four courts have held that the work-product doctrine provided at least some protection for the information in documents shared with litigation funders.⁷² It did not matter whether the material was prepared before litigation is filed.⁷³ Nor did it matter that the funding documents serve a “business purpose” because the “documents simultaneously also are litigation documents.”⁷⁴ The court in *Miller* explained that an alternative rule denying 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

⁷⁰ 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-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).

⁷¹ 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.

⁷² *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 CLLD; *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.

⁷³ 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.

⁷⁴ *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 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).

Supreme Court refused to permit in *Hickman*,” the seminal decision recognizing work-product protection.⁷⁵

Several courts have found that funding documents satisfy the narrower “primary motivating purpose” test for work-product protection.⁷⁶ 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.⁷⁷ 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.⁷⁸

Besides *Acceleration Bay*, we found two other cases that explicitly rejected work-product protection for funding documents.⁷⁹ In 2008, the district court in *Bray* rejected blanket assertions of work-product protection during a deposition.⁸⁰ 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.⁸¹ 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.”⁸²

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.⁸³ The discovery allowed in these cases was minimal

⁷⁵ See *Miller*, 17 F. Supp. 3d at 735 (quoting *United States v. Adlman*, 134 F.3d 1194, 1199 (2d Cir.1998)).

⁷⁶ *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. Owen 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).

⁷⁷ *Acceleration Bay*, 2018 U.S. Dist. LEXIS 21506, at *5-6.

⁷⁸ *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.

⁷⁹ *Bray* and *Leader*.

⁸⁰ *Bray*, 2008 WL 5054695.

⁸¹ *Leader*, 719 F. Supp. 2d at 376.

⁸² *Midwest Ath. & Sports All. LLC.*, 2020 U.S. Dist. LEXIS 194956, at *9 (holding plaintiff’s submissions did not permit the court to determine whether the work product doctrine applied to litigation funding documents).

⁸³ *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

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, four decisions allowed discovery of non-deal documents with work-product redacted.⁸⁴ These courts granted work-product 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. 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."⁸⁵

i. 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

(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. *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).

⁸⁴ *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; *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); *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).

⁸⁵ Fed. R. Civ. P. 26(b)(3).

for potential adversaries to obtain the information”⁸⁶ Also, the “party asserting waiver has the burden to show that a waiver occurred.”⁸⁷ “The reason for this difference [between waiver of attorney-client privilege and work-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.”⁸⁸

Courts have not found work-product protection waived by disclosure to a litigation funder.⁸⁹ In fact, the defendants in the recent *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.⁹⁰ 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.”⁹¹ 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.⁹²

ii. 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.”⁹³ Two courts have found a defendant’s substantial need for some information overcame work-product protection for some, but not all, information in funding documents.⁹⁴ 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.⁹⁵ The debtor failed to demonstrate a substantial need for the non-deal documents, which the court considered

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

⁸⁷ *Miller*, 17 F. Supp. 3d at 737.

⁸⁸ *Viamedia*, 2017 U.S. Dist. LEXIS 101852, at *6.

⁸⁹ Glover, *supra* note 2, at 925-26 (citing cases).

⁹⁰ *Viamedia*, 2017 U.S. Dist. LEXIS 101852, at *9.

⁹¹ *Mondis*, 2011 WL 1714304, at *3.

⁹² *Miller*, 17 F. Supp. 3d at 738.

⁹³ Fed. R. Civ. P. 26(b)(3).

⁹⁴ 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.

⁹⁵ *In re Int’l Oil Trading Co.*, 548 B.R. at 837, 838.

“rarely discoverable” opinion work-product.⁹⁶ 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.⁹⁷ 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.⁹⁸

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.⁹⁹ The court held all the funding documents requested were protected work-product except for the portions on the valuation of the patents.¹⁰⁰

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.¹⁰¹ In practice, the work-product doctrine suffices to protect funding documents from discovery because “[r]eputable financing providers do not seek information that is confidential due solely to the attorney-client privilege.”¹⁰²

IV. EXCEPTIONAL CASES

We found nine cases where a court compelled extensive discovery of litigation funding documents, but where the unusual circumstances of the cases distinguishes them from the trend of cases upholding objections to such discovery requests. Not surprisingly, these cases have never been cited affirmatively and followed when a court has decided whether funding documents are protected by the work-product doctrine.¹⁰³ In the cases discussed first below,

⁹⁶ *Id.* at 838.

⁹⁷ *Id.* at 838-39.

⁹⁸ *Id.* at 839.

⁹⁹ *Odyssey Wireless*, 2016 U.S. Dist. LEXIS 188611, at *20-24.

¹⁰⁰ *Id.*

¹⁰¹ 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).

¹⁰² Charles Agee, *Guide to Litigation Financing*, at page 7, <https://westfleetadvisors.com/wp-content/uploads/2018/11/WA-Guide-to-Litigation-Financing.pdf>.

¹⁰³ 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.

the plaintiff had 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. A third older case allowed discovery mostly of the 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.¹⁰⁴ In its objection to the discovery, class counsel conceded the relevance of the agreement and did not claim the agreement was privileged.¹⁰⁵ 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 not relevant under Rule 26.¹⁰⁶ Second, class counsel had already voluntarily turned over a redacted version of the funding agreement.¹⁰⁷ Third, class counsel here appeared to be “solo practitioners” who were “dependent on outside funding to prosecute the case.”¹⁰⁸ 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*.¹⁰⁹

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.¹¹⁰ The court did not explicitly discuss work-product protection for the funding agreement or whether portions of the agreement could be redacted.¹¹¹ Again, we could not find any decision citing *Cobra*. Like *Gbarabe*, its silence on work-product protection

¹⁰⁴ *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).

¹⁰⁵ *Id.*

¹⁰⁶ *Kaplan*, 2015 U.S. Dist. LEXIS 135031, at *17-18

¹⁰⁷ *Id.* at 4.

¹⁰⁸ *Id.* at 4.

¹⁰⁹ 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.

¹¹⁰ *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).

¹¹¹ *Id.*

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.¹¹² 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.¹¹³ Of course, as in *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

A court has allowed significant discovery of non-deal documents in six cases. Five cases, some of which were decided several years ago, focused on the lack of attorney-client privilege protection. Only one 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.*

Most of the cases allowing significant discovery were among the oldest cases we found, with a couple exceptions. *Conlon v. Rosa* was a 2004 action in Massachusetts state court against a zoning board.¹¹⁴ 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.¹¹⁵ The court ordered production of the funding agreement in redacted form, the plaintiff's lease with its funder, and some related documents.¹¹⁶ 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 four cases, courts held non-deal documents were discoverable, without redaction, because they were not privileged. In *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

¹¹² See *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 723 (N.D. Ill. 2014) (distinguishing *Berger v. Seyfarth Shaw LLP*).

¹¹³ *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).

¹¹⁴ *Conlon*, 2004 Mass. LCR LEXIS 56, at *2.

¹¹⁵ *Id.* at *2-5.

¹¹⁶ *Id.* at *12.

privilege.¹¹⁷ The lack of a work-product claim here probably contributed significantly to the court’s decision to allow discovery.

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.¹¹⁸ As in *Gbarabe*, *Cobra*, and *Cohen* above, work-product protection was not discussed apart from attorney-client privilege.¹¹⁹

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.¹²⁰ 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.”¹²¹ 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.¹²² 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.¹²³ 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 the documents it was withholding for in camera review and the defendants’ arguments for why the documents should be disclosed were made very generally.¹²⁴

¹¹⁷ *Cohen v. Cohen*, 2015 WL 745712, at *2 (S.D.N.Y. Jan. 30, 2015).

¹¹⁸ *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 376 (D. Del. 2010).

¹¹⁹ *See id.*

¹²⁰ *See, e.g., In re Int’l Oil Trading Co.*, 548 B.R. at 832-33.

¹²¹ *Intellectual Ventures I LLC v. Altera Corp.*, No. 10-1065-LPS, ECF No. 415, at *12 (D. Del. Jul. 25, 2013).

¹²² *Walker Digital v. Google*, No. 11-309-SLR, ECF No. 280, at *2 (D. Del. Feb. 12, 2013).

¹²³ *In re Dealer*, 2020 U.S. Dist. LEXIS 99767, at *35.

¹²⁴ *Id.* at *47-48.

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.¹²⁵ 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.¹²⁶ 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.¹²⁷

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 recent decision in *Acceleration Bay* was the only decision we found 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. 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.

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.¹²⁸ 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.¹²⁹ 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.¹³⁰ 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

¹²⁵ *Midwest Ath.*, 2020 U.S. LEXIS 194956, at *6–7.

¹²⁶ *Id.* at *6.

¹²⁷ *Id.* at *9.

¹²⁸ *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).

¹²⁹ See *supra* note 67 and accompanying text (citing cases from the Fifth Circuit and a case from the Eleventh Circuit).

¹³⁰ See *Acceleration Bay*, 2018 U.S. Dist. LEXIS 21506, at *5-6.

that breach.¹³¹ The court’s finding of no common interest is consistent with some prior decisions, but there is a split of authority on this issue.¹³²

Although there are now numerous decisions on attorney-client privilege and work-product protection for funding documents, the decision in *Acceleration Bay* suggests courts may still be unfamiliar with the issue.¹³³ Furthermore, plaintiffs should execute a common interest and non-disclosure agreement with funders before sharing confidential information.¹³⁴

¹³¹ *Id.* at *7-9 (citing *Leader* to support the conclusion that there was no common legal interest).

¹³² *See supra* note 40 and accompanying text.

¹³³ 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 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.*

¹³⁴ 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).

V. CONCLUSION

In the last five years especially, we have found the vast majority of courts deciding denied discovery of litigation funding documents because of the work-product doctrine or, as a number of courts have held, because litigation funding is not relevant to a claim or defense. Work-product protection has consistently been the strongest ground for denying discovery of funding documents, and we expect courts to continue to follow the approach in *Miller* and its progeny. Although a few courts have departed from this approach, their work-product analysis (or lack thereof) remains the minority view and has yet to persuade courts.

APPENDIX A

Decisions Concerning Discoverability of Litigation Funding Agreements and Documents Related to Litigation Funding (Through July 2021)

Conlon v. Rosa, Nos. 295907, 295932, 2004 Mass. LCR LEXIS 56, at *5, 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, at *3 (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, at *7, 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).

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).

Cobra Int'l, Inc. v. BCNY Int'l, Inc., No. 05-61225-CIV, 2013 WL 11311345, at *3, 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, 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).

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

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); *see also 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 issued in related case).

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).

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).

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).

MLC Intellectual Prop., LLC v. Micron Tech., Inc., No 14-CV-03657, 2019 WL 118595 (N.D. Cal. Jan. 7, 2019).

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).

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 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).

Midwest Ath. & Sports All. LLC v. Ricoh USA, Inc., No. 2:19-cv-00514-JDW, 2020 U.S. Dist. LEXIS 194956 (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).

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

Edelson v. Edelson, No. CV N20M-09-140, 2021 WL 195035 (Del. Super. Ct. Jan. 20, 2021).

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).

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

APPENDIX B

Decisions Concerning Discoverability of Litigation Funding Agreements and Documents Related to Litigation Funding – Organized by Jurisdiction (Through July 2021)

STATE COURTS (AND FEDERAL COURTS APPLYING STATE LAW)

California

Berger v. Seyfarth Shaw, LLP, et al., 2008 U.S. Dist. LEXIS 88811, 2008 WL 4681834, at *3 (N.D. Cal. Oct. 22, 2008).

Delaware

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).

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).

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

Edelson v. Edelson, No. CV N20M-09-140, 2021 WL 195035 (Del. Super. Ct. Jan. 20, 2021).

Florida

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

Massachusetts

Conlon v. Rosa, Nos. 295907, 295932, 2004 Mass. LCR LEXIS 56, at *5, 2004 WL 1627337 (Mass. Land Ct. July 21, 2004).

New York

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

FEDERAL COURTS

Listed alphabetically according to the state where the court sits.

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).

California

Berger v. Seyfarth Shaw, LLP, et al., 2008 U.S. Dist. LEXIS 88811, 2008 WL 4681834, at *3 (N.D. Cal. Oct. 22, 2008).

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

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

MLC Intellectual Prop., LLC v. Micron Tech., Inc., No 14-CV-03657, 2019 WL 118595 (N.D. Cal. Jan. 7, 2019).

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).

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).

Delaware

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

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

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

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).

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

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

Florida

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

Cobra Int'l, Inc. v. BCNY Int'l, Inc., No. 05-61225-CIV, 2013 WL 11311345, at *3, 2013 U.S. Dist. LEXIS 190268 (S.D. Fla. Nov. 4, 2013).

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

Illinois

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).

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

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

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

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

Louisiana

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).

Missouri

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

New Jersey

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

New York

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).

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

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).

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

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

Nevada

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

Ohio

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

Pennsylvania

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

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

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

Midwest Ath. & Sports All. LLC v. Ricoh USA, Inc., No. 2:19-cv-00514-JDW, 2020 U.S. Dist. LEXIS 194956 (E.D. Pa. Sept. 16, 2020).

Texas

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

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

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

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); see also *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 issued in related case).

Utah

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

Washington

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

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

Federal Court of Claims

SecurityPoint Holdings, Inc. v. United States, No. 1:11-CV-00268, 2019 WL 1751194, at *5-6 (Fed. Cl. Apr. 16, 2019) (see also ECF Nos. 303, 404).

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