SCAC Meeting Agenda
Friday, August 29, 2025
9:00 a.m.

Location: State Bar of Texas Building
1414 Colorado Street
Austin, TX 78701

Welcome from Chief Justice Tracy Christopher

Status Report from Justice Jane Bland

Justice Bland will report on Supreme Court actions and those of other courts related to the Supreme Court Advisory Committee since the June 27, 2025 meeting.

Comments from Justice Evan Young

I. Summary Judgment

Rule 15-165a Subcommittee:
Richard Orsinger – Chair
Hon. Ana E. Estevez – Vice Chair
Prof. Elaine A. G. Carlson
Prof. William V. Dorsaneo III
John Kim
Hon. Emily Miskel
Giana Ortiz
Pete Schenkkan
Hon. John F. Warren

August 13, 2025 Memo re: Rule 166a
Proposed Revision to TRCP 166a Redlined August 15, 2025
TRCP 166a Redline from Current Rule to August 15, 2025 Proposed Rule
Proposed Revision to TRCP 166a-Clean
HB 16 Floor Amendment

II. Business Court

Business Court Subcommittee:
Marcy Hogan Greer – Chair
Robert Levy – Vice Chair

Hon. Harvey G. Brown
Hon. Jerry Bullard
Rusty Hardin
Hon. Peter Michael Kelly
Hon. Emily Miskel
Christopher D. Porter
Hon. H.R. Wallace, Jr.
Hon. John F. Warren

August 15, 2025 Email from Hon. Grant Dorfman
Exhibit A – SCAC TRCP 363 "PDF" Version From June 27, 2025 Meeting
Exhibit B – SCAC TRCP 363 "Word" Version Dated July 20, 2025
Exhibit C – Hon. Grant Dorfman's Draft TRCP 363
July 24, 2025 Email from Hon. Jerry Bullard with Attachment
August 7, 2025 Letter from Texas Business Law Foundation
TBLF Business Court Working Group Draft and Comments
TBLF and Working Group Description
HB 40 Excerpt

III. Code of Judicial Conduct

Judicial Administration Subcommittee:
Hon. Bill Boyce – Chair
Kennon Wooten – Vice Chair
Hon. Nicholas Chu
Hon. Tom Gray
Michael A. Hatchell
Prof. Lonny Hoffman
Macey Reasoner Stokes
Hon. Maria Salas Mendoza

August 22, 2025 Memo re: Revisions to Code of Judicial Conduct
Exhibit A – Texas Code of Judicial Conduct

IV. Confidential Identity in Court Proceedings

Legislative Mandates Subcommittee:
Jim M. Perdue, Jr. – Chair
Pete Schenkkan – Vice Chair
Hon. John Browning
Hon. Jerry Bullard

Prof. Elaine A. G. Carlson
Hon. David L. Evans
Cynthia Barela Graham
Robert Levy
Richard Orsinger

August 29, 2025 Memo re: Confidential Identities and Other Sensitive Information

V. Texas Rule of Evidence 404 and 405

Evidence Subcommittee:
Hon. Harvey G. Brown – Chair
Roger W. Hughes – Vice Chair
Prof. Elaine A. G. Carlson
Jack P. Carroll
Marcy Hogan Greer
Prof. Lonny S. Hoffman
Hon. Peter Michael Kelly

August 18, 2025 Memo re: Impact of HB 1778 on TRE 404 and 405

VI. Third-Party Litigation Funding

1-14c Subcommittee:
Robert Levy – Chair
John Kim – Vice Chair
Hon. Harvey G. Brown
Constance Pfeiffer
Marcy Hogan Greer
Jim Perdue

August 24, 2025 Memo re: Update on Third Party Litigation Funding with Exhibits

VII. Texas Rules of Evidence

Evidence Subcommittee:
Hon. Harvey G. Brown – Chair
Roger W. Hughes – Vice Chair
Prof. Elaine A. G. Carlson
Jack P. Carroll
Marcy Hogan Greer
Prof. Lonny S. Hoffman

Hon. Peter Michael Kelly

June 20, 2025 Memo re: FRE Amendments Effective December 1, 2024

VIII. Texas Rule of Civil Procedure 4

1-14c Subcommittee:

Robert Levy – Chair
John Kim – Vice Chair
Hon. Harvey G. Brown
Constance Pfeiffer
Marcy Hogan Greer
Jim Perdue

August 6, 2024 Memo re: Proposed Amendment to Rule 4 to Define "Next Day"

June 5, 2024 Email from Victoria Katz re: TRCP Clarification

Tab I-Summary Judgment

August 13, 2025

Memorandum Regarding TRCP 166a

To: Supreme Court Advisory Committee

From: Subcommittee on Rule 15-165a

1. Chief Justice Blacklock's letter of June 5, 2025, referred to the Supreme Court Advisory Committee this item:

> Summary Judgment. SB 293 adds Section 23.303 to the Government Code to impose deadlines on trial courts for considering and ruling on motions for summary judgment. The Committee should draft recommended amendments to Texas Rule of Civil Procedure 166a.

2. The matter was referred by Committee Chair Chief Justice Tracy Christopher to the newly formed Subcommittee on Rules 166-166a. Due to challenging summer travel schedules, the Subcommittee on Rules 15-165 assisted with the project. This combined effort was augmented by volunteers from outside of both subcommittees who were interested in the summary judgment process, and who contributed suggestions and comments as work progressed. Through email exchanges and two Zoom sessions, the subcommittees developed proposed changes to Rule 166a and the summary-judgment process. These changes are reflected in the attached copy of Rule 166a with redlines showing changes to be discussed.

3. Senate Bill 293 of the 89th Legislature Regular Session, Section 2, provides:

> Sec. 23.303. PROCEDURES RELATED TO MOTIONS FOR SUMMARY JUDGMENT; ANNUAL REPORT.
>
> (a) The business court, a district court, or a statutory county court shall, with respect to a motion for summary judgment:
>
> (1) hear oral argument on the motion or consider the motion without oral argument not later than the 45th day after the date the response to the motion was filed; and
>
> (2) file with the clerk of the court and provide to the parties a written ruling on the motion not later than the 90th day after the date the motion was argued or considered.
>
> (b) If a motion for summary judgment is considered by a court described by Subsection (a) without oral argument, the court shall record in the docket the date the motion was considered without argument.
>
> (c) A clerk of a court described by Subsection (a) shall report the court's compliance with the times prescribed by this section to the Office of Court Administration of the Texas

Judicial System not less than once per quarter using the procedure the office prescribes for the submission of reports under this subsection.

(d) The Office of Court Administration of the Texas Judicial System shall prepare an annual report regarding compliance of courts and clerks with the requirements of this section during the preceding state fiscal year. Not later than December 31 of each year, the office shall submit the report prepared under this section to the governor, lieutenant governor, and speaker of the house of representatives and make the report publicly available.

(e) Notwithstanding Section 22.004, Subsection (a) or (b) may not be modified or repealed by supreme court rule.

4. The attached redlined rule is not a recommendation as such from the subcommittees. Rather it represents a consensus view of a model rule that the full Committee can consider, recognizing that some choices remain to be made about certain aspects of the rule. In some instances, a provision was included in the proposed rule, even though it was disliked by some members of the subcommittee, just so it would be discussed by the full Committee.

5. It will be evident to the reader that the proposed rule goes beyond the directive of Section 23.303. This is because some members of the subcommittees felt that the rule, drafted in 1949, and modified in 1951, 1966, 1970, 1977, 1980, 1983, 1987, 1990, and 1997, was in need of a work-over, to make it more understandable. Also, the need to add two deadlines to the summary-judgment process requires that the rule be restructured.

6. Special recognition is due to SCAC member Harvey Brown who volunteered to draft and modify a revised rule, which became the vehicle for the subcommittees to arrive at the final proposal.

7. While each change to the Rule deserves attention, there are several points that are worth noting:

(1) The description of "contents of the motion" now includes both traditional motions and no-evidence motions. No-evidence motions are no longer isolated in subsection (i).

(2) "Time to File a Motion" recognizes the right of courts to set a deadline for filing dispositive motions. It also reinforces the rule that no-evidence motions should be filed only after an adequate time for discovery, by requiring that a no-evidence motion filed before the end of the discovery period must disclose that fact and show good cause for filing early.

(3) "Request for Setting" now distinguishes, pursuant to SB 293, between an oral hearing and a written submission. The proposed language requires that the hearing be set no earlier than 35 days after the request for a setting. This adds 14 days to the previous minimum time, which was no earlier than 21 days after notice to the nonmovant was provided. This extra time is added to make room for a new deadline for filing a summary-judgment response. Since the timetable under this proposed rule runs from the day a hearing is requested, while the timetable

under SB 293 runs from when the *response* is filed, the two timetables are independent. If the movant files an MSJ but delays requesting a setting, it is possible that the 35-day minimum may not allow a setting until after the 45-day deadline to hear the motion has expired. The subcommittees' expectation is that a judge caught in that conflict could resolve the conflict by denying the motion without prejudice, which would reset both deadlines to zero until the movant refiles the motion and the responding party refiles the response. Presumably the movant would request a hearing immediately upon refiling the motion, which would allow at least ten days between the earliest and the latest possible settings.

(4) "Response" requires that a response to an MSJ be filed no later than 14 days prior to the date of the oral hearing or written submission. The response may include evidence and objections to the movant's summary-judgment evidence. The proposed rule requires the responding party to bring the filing of the motion to the court's attention. Notice is required because the filing of the response starts the statutory 45-day clock running. The burden is put on the responding party because some judicial members of the subcommittees felt that in some courthouses there was no reliably close correlation between the clerk's office and the court.

(5) "Reply" creates a new deadline for the MSJ movant to reply to a response at least 7 days before the date of oral hearing or written submission. This reflects the frustration expressed by some judges on the subcommittees when parties file replies the night before or day of the MSJ oral hearing, which does not give the judge sufficient time to review and consider the reply and attached materials before argument begins.

(6) "The Hearing" requires the judge to go forward with the oral hearing unless the MSJ is withdrawn by the movant or the court resets the hearing of submission date. The third sentence of this subsection says that the court may, at any time prior to a response being filed, reset the oral hearing or written submission date which would delay the deadline for the reply to be filed (which counts backwards from the date of hearing or submission). Per the statutory directive, the rule provides that the court must hear oral argument or consider the MSJ on written submission within 45 days of when the response is filed. Also per the statutory directive, if the MSJ is considered on written submission, the clerk of the court must note the date of submission in the docket.

(7) "The Merits of the Motion" is largely former language carried forward. The criteria for granting a no-evidence MSJ has been moved from old Subparagraph (i) to the end of new Subparagraph 7.

(8) 'The Ruling" requires the parties to submit proposed orders before the hearing. The support for this proposal was not unanimous. This requirement could be left for courts to address in local rules or scheduling orders, or dispensed with altogether as being unhelpful. Pursuant to the statutory directive, the new language requires the court to sign a written ruling within 90 days of the hearing or written-submission date. The next sentence is conceptually new. Four events or situations result in an MSJ being overruled by operation of law (i.e., without an order of the court) without prejudice to refiling. The first occurs when the movant passes the hearing, which could cause the court to violate the statutory requirement of a

hearing or submission within 45 days of the response being filed. Thus, a movant who passes a hearing gets the MSJ denied, although without prejudice against resetting it. Also, the reset must be done by filing a written notice with the clerk. The proposed rule does not discuss what happens if the movant does not appear at a hearing without filing a notice of passing the hearing. In that situation, a court may have to deny the MSJ, with or without prejudice, in order to conform to the 45-day statutory deadline. The second event occurs if the court grants a motion for continuance of the hearing or submission. SB 293 sets 45-day deadline to rule with no mention of extending that deadline based on a party's request or even all parties' request for a continuance. If a continuance is warranted, but the statutory 45-day deadline cannot be moved, the only option for the court to comply with the statutory deadline is to deny the MSJ without prejudice. The third event is where a no-evidence MSJ is filed before an adequate time for discovery. The court cannot delay ruling past the statutory 45-day deadline, so again the only alternative is to deny the motion, with or without prejudice to resetting the motion for hearing. The fourth event is where the movant, without leave of court, files evidence after the deadline in Subsection (c)(5), which is 7 days before hearing or submission. This is tantamount to allowing a movant to late-file evidence even without the court's approval. A question arises of whether a court can deny leave to late-file evidence and deny the MSJ with prejudice even though it was overruled by operation of law without prejudice.

(9) "The Appeal" makes explicit something determined by case law, which is that issues must be presented in the summary judgment filings in order to complain on appeal.

(10) "Appendices, References ...." carries forward the prior language but requires that unfiled discovery be filed by the movant at least 35 days before the hearing or submission and by the responding party at least 14 days before hearing or submission.

(11) The old subparagraph (i) on "No-Evidence Motion" has been eliminated because that type of motion is included in other sections of the new rule.

8. To Chief Justice Christopher goes the credit for suggesting the idea of using the denial of an MSJ without prejudice by operation of law as a way to avoid the effect of a rigid timetable that cannot be met for a legitimate reason. There is a concern with the statutory deadlines that some judges may deny MSJs with or without prejudice in order to meet the statutory deadlines.

Submitted by
Richard R. Orsinger
Chair, Subcommittee on Rules 15-165a

RULE 166a. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, ~~at any time after the adverse party has appeared or answered,~~ move with or without supporting affidavits for a summary judgment in ~~his~~ its favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may~~, at any time,~~ move with or without supporting affidavits for a summary judgment in ~~his~~ its favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

1. Contents of the Motion. A traditional ~~The~~ motion for summary judgment shall state the specific grounds in support of the motion.~~therefor.~~ A no-evidence ~~The~~ motion for summary judgment must state the elements as to which there is no evidence.

2. Time to File a Motion. Unless a different deadline~~time~~ is set by local rule or court order, a party may move for ~~file~~ a traditional motion for summary judgment at any time after the adverse party has appeared or answered. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial.

3. Request for Setting of Oral Hearing or Written Submission. Upon a party presenting a request for oral hearing or written submission of the motion, the court shall set the motion for oral hearing or written submission consistent with the other deadlines in this rule, but no earlier than the 35th day after the request.

4. Response. Except on leave of court, ~~with notice to opposing~~ parties~~counsel~~, a~~the~~ non-movant ~~motion and any supporting affidavits~~ shall (a) ~~be~~ file~~d~~ and serve~~d~~ its written response to the motion and any evidence in support of the response and objections to the evidence supporting the motion fourteen days before the oral hearing or written submission date and (b) immediately bring the filing of its response to the court's attention.

5. Reply. The movant may file and serve a reply with responsive arguments or objections to a~~the~~ responding party's response or evidence not later than seven days before the oral hearing or written submission date. A reply may not raise new or independent summary judgment grounds.

6. The Hearing. No oral testimony shall be received at a hearing on a summary judgment motion. The court shall hear oral argument on the motion or consider the motion on written submission without oral argument on the day originally set~~ordered~~ under subsection (c)(3) unless the movant withdraws the motion or the court resets the oral hearing or written submission date to a later date. Before the response to the summary judgment motion is filed, the court may reset the oral hearing or written submission day to any later date, and the new deadlines for the response and reply shall reset accordingly. The court must hear oral argument on the motion or consider the motion on written submission not later than the 45th day after the date the response to the motion

was filed. If a summary judgment motion is considered by a court without oral argument, the court shall record in the docket the date the motion was considered without argument.

7. The Merits of the Motion. ~~-~~No judgment shall be granted except on the grounds stated pursuant to subsection (c)(1). The court ~~judgment sought~~ shall grant a traditional ~~the~~ motion for summary judgment ~~be rendered forthwith~~ if (i) the deposition transcripts, interrogatory answers, admissions, documents, electronically stored information, and other discovery responses specifically referenced or set forth in the motion or response, and (ii) the pleadings, ~~admissions,~~ affidavits, declarations, stipulations of the parties (including those made for purposes of the motion only), and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. ~~Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.~~ A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted. The court must grant a no-evidence motion for summary judgment unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

8. The Ruling. The movants and responding parties shall each submit a proposed order before the oral hearing or written submission date. The court shall sign a written ruling on the motion, file it with the clerk, and provide the ruling to the parties not later than ninety days after the oral hearing or written submission date. A motion for summary judgment is denied *[by operation of law*], without prejudice to being reset for hearing, if: (1) the movant passes the hearing by filing a written notice with the clerk of the court; or (2) the court grants a continuance of the oral hearing or written submission on motion of a party; or (3) the court rules that there was not adequate time for discovery; or (4) the movant files summary judgment evidence later than the deadline provided by Rule 166a(c), Texas Rules of Civil Procedure, without leave of court.

9. The Appeal. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.

(d) Appendices, References and Other Use of Discovery Not Otherwise on File. Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least ~~twenty-one~~thirty-five days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least ~~seven~~ fourteen days before the ~~day of the court-ordered~~ oral hearing or written submission date if such proofs are to be used to oppose the summary judgment.

(e) Case Not Fully Adjudicated on Motion. If summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the judge may at the oral hearing or written submission examine the pleadings and the evidence on file, ~~interrogate counsel,~~ ascertain what

material fact issues exist and make an order specifying the facts that are established as a matter of law, and directing such further proceedings in the action as are just.

(f) Form of Affidavits and Declarations; Further Testimony. Supporting and opposing affidavits and declarations shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit or declaration shall be attached thereto or served therewith. The court may permit affidavits or declarations to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits, declarations, or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(g) When Affidavits or Declarations Are Unavailable. Should it appear from the affidavits or declarations of a party opposing the motion that he cannot for reasons stated present by affidavit or declaration facts essential to justify ~~his~~ its opposition, the court may ~~refuse the application for judgment or may order a continuance~~deny the motion without prejudice to permit affidavits or declarations to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(h) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(i) No-Evidence Motion. ~~After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact. A movant moving for summary judgment under this paragraph and requesting an oral hearing or written submission before the end of a discovery period set by these rules or pretrial order, as applicable, shall disclose that fact in its written request for oral hearing or written submission of its motion and show good cause why the motion should not be denied without prejudice as premature.~~

RULE 166a. SUMMARY JUDGMENT

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1. Contents of the Motion. A traditional motion for summary judgment shall state the specific grounds in support of the motion. A no-evidence motion for summary judgment must state the elements as to which there is no evidence.

2. Time to File a Motion. Unless a different deadline is set by local rule or court order, a party may move for a traditional motion for summary judgment at any time after the adverse party has appeared or answered. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. ~~therefor~~

3. Request for Setting of Oral Hearing or Written Submission. Upon a party presenting a request for oral hearing or written submission of the motion, the court shall set the motion for oral hearing or written submission consistent with the other deadlines in this rule, but no earlier than the 35th day after the request.

4. Response. Except on leave of court, ~~with notice~~ parties, a non-movant shall (a) file and serve its written response to ~~opposing counsel,~~ the motion and any evidence in support of the response and objections to the evidence supporting ~~affidavits shall be filed and served at least twenty-one~~the motion fourteen days before the ~~time specified for hearing. Except on leave of court, the adverse party,~~oral hearing or written submission date and (b) immediately bring the filing of its response to the court's attention.

5. Reply. The movant may file and serve a reply with responsive arguments or objections to a responding party's response or evidence not later than seven days ~~prior to~~before the ~~day of~~oral hearing ~~may file and serve opposing affidavits~~ or ~~other~~ written ~~response~~submission date. A reply may not raise new or independent summary judgment grounds.

6. The Hearing. No oral testimony shall be received at ~~the hearing. The judgment sought shall be rendered forthwith~~a hearing on a summary judgment motion. The court shall hear oral argument on the motion or consider the motion on written submission without oral argument on the day originally set under subsection (c)(3) unless the movant withdraws the motion or the court resets the oral hearing or written submission date to a later date. Before the response to the summary judgment motion is filed, the court may reset the oral hearing or written submission day

to any later date, and the new deadlines for the response and reply shall reset accordingly. The court must hear oral argument on the motion or consider the motion on written submission not later than the 45th day after the date the response to the motion was filed. If a summary judgment motion is considered by a court without oral argument, the court shall record in the docket the date the motion was considered without argument.

7. The Merits of the Motion. No judgment shall be granted except on the grounds stated pursuant to subsection (c)(1). The court shall grant a traditional motion for summary judgment if (i) the deposition transcripts, interrogatory answers, admissions, documents, electronically stored information, and other discovery responses specifically referenced or set forth in the motion or response, and (ii) the pleadings, ~~admissions,~~ affidavits, declarations, stipulations of the parties~~,~~ (including those made for purposes of the motion only), and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. ~~Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.~~ A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted. The court must grant a no-evidence motion for summary judgment unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

8. The Ruling. The movants and responding parties shall each submit a proposed order before the oral hearing or written submission date. The court shall sign a written ruling on the motion, file it with the clerk, and provide the ruling to the parties not later than ninety days after the oral hearing or written submission date. A motion for summary judgment is denied *[by operation of law*], without prejudice to being reset for hearing, if: (1) the movant passes the hearing by filing a written notice with the clerk of the court; or (2) the court grants a continuance of the oral hearing or written submission on motion of a party; or (3) the court rules that there was not adequate time for discovery; or (4) the movant files summary judgment evidence later than the deadline provided by Rule 166a(c), Texas Rules of Civil Procedure, without leave of court.

9. The Appeal. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.

(d) Appendices, References and Other Use of Discovery Not Otherwise on File. Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least ~~twenty-one~~thirty-five days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least ~~seven~~fourteen days before the oral hearing or written submission date if such proofs are to be used to oppose the summary judgment.

(e) Case Not Fully Adjudicated on Motion. If summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the judge may at the oral hearing or written submission examine the pleadings and the evidence on file~~, interrogate counsel~~, ascertain what material fact issues exist and make an order specifying the facts that are established as a matter of law, and directing such further proceedings in the action as are just.

(f) Form of Affidavits and Declarations; Further Testimony. Supporting and opposing affidavits and declarations shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit or declaration shall be attached thereto or served therewith. The court may permit affidavits or declarations to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits, declarations, or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(g) When Affidavits or Declarations Are Unavailable. Should it appear from the affidavits or declarations of a party opposing the motion that he cannot for reasons stated present by affidavit or declaration facts essential to justify ~~his~~its opposition, the court may ~~refuse~~deny the ~~application for judgment or may order a continuance~~motion without prejudice to permit affidavits or declarations to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(h) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(i) No-Evidence Motion. ~~After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.~~

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(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in its favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

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1. Contents of the Motion. A traditional motion for summary judgment shall state the specific grounds in support of the motion. A no-evidence motion for summary judgment must state the elements as to which there is no evidence.

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3. Request for Setting of Oral Hearing or Written Submission. Upon a party presenting a request for oral hearing or written submission of the motion, the court shall set the motion for oral hearing or written submission consistent with the other deadlines in this rule, but no earlier than the 35th day after the request.

4. Response. Except on leave of court, parties, a non-movant shall (a) file and serve its written response to the motion and any evidence in support of the response and objections to the evidence supporting the motion fourteen days before the oral hearing or written submission date and (b) immediately bring the filing of its response to the court's attention.

5. Reply. The movant may file and serve a reply with responsive arguments or objections to a responding party's response or evidence not later than seven days before the oral hearing or written submission date. A reply may not raise new or independent summary judgment grounds.

6. The Hearing. No oral testimony shall be received at a hearing on a summary judgment motion. The court shall hear oral argument on the motion or consider the motion on written submission without oral argument on the day originally set under subsection (c)(3) unless the movant withdraws the motion or the court resets the oral hearing or written submission date to a later date. Before the response to the summary judgment motion is filed, the court may reset the oral hearing or written submission day to any later date, and the new deadlines for the response and reply shall reset accordingly. The court must hear oral argument on the motion or consider the motion on written submission not later than the 45th day after the date the response to the motion

was filed. If a summary judgment motion is considered by a court without oral argument, the court shall record in the docket the date the motion was considered without argument.

7. The Merits of the Motion. No judgment shall be granted except on the grounds stated pursuant to subsection (c)(1). The court shall grant a traditional motion for summary judgment if (i) the deposition transcripts, interrogatory answers, admissions, documents, electronically stored information, and other discovery responses specifically referenced or set forth in the motion or response, and (ii) the pleadings, affidavits, declarations, stipulations of the parties (including those made for purposes of the motion only), and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted. The court must grant a no-evidence motion for summary judgment unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

8. The Ruling. The movants and responding parties shall each submit a proposed order before the oral hearing or written submission date. The court shall sign a written ruling on the motion, file it with the clerk, and provide the ruling to the parties not later than ninety days after the oral hearing or written submission date. A motion for summary judgment is denied *[by operation of law*], without prejudice to being reset for hearing, if: (1) the movant passes the hearing by filing a written notice with the clerk of the court; or (2) the court grants a continuance of the oral hearing or written submission on motion of a party; or (3) the court rules that there was not adequate time for discovery; or (4) the movant files summary judgment evidence later than the deadline provided by Rule 166a(c), Texas Rules of Civil Procedure, without leave of court.

9. The Appeal. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.

(d) Appendices, References and Other Use of Discovery Not Otherwise on File. Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least thirty-five days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least fourteen days before the oral hearing or written submission date if such proofs are to be used to oppose the summary judgment.

(e) Case Not Fully Adjudicated on Motion. If summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the judge may at the oral hearing or written submission examine the pleadings and the evidence on file, ascertain what material fact issues exist and make an order specifying the facts that are established as a matter of law, and directing such further proceedings in the action as are just.

(f) Form of Affidavits and Declarations; Further Testimony. Supporting and opposing affidavits and declarations shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit or declaration shall be attached thereto or served therewith. The court may permit affidavits or declarations to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits, declarations, or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(g) When Affidavits or Declarations Are Unavailable. Should it appear from the affidavits or declarations of a party opposing the motion that he cannot for reasons stated present by affidavit or declaration facts essential to justify its opposition, the court may deny the motion without prejudice to permit affidavits or declarations to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(h) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(i) No-Evidence Motion.

FLOOR AMENDMENT NO._____ BY: _____

Amend H.B. No. 16 (senate committee report) by adding the following appropriately numbered SECTION to Article 9 of the bill and renumbering subsequent SECTIONS of that article accordingly:

SECTION 9.___. (a) Section 23.303, Government Code, as added by S.B. 293, Acts of the 89th Legislature, Regular Session, 2025, and effective September 1, 2025, is amended by amending Subsections (a) and (b) and adding Subsection (b-1) to read as follows:

(a) The business court, a district court, or a statutory county court shall, with respect to a motion for summary judgment:

(1) set the motion for a hearing by [~~hear~~] oral argument [~~on the motion~~] or by submission on a date [~~consider the motion without oral argument~~] not later than:

(A) the 60th [~~45th~~] day after the date [~~the response to~~] the motion was filed; or

(B) the 90th day after the date the motion was filed:

(i) if the court's docket requires a hearing on a date later than the 60th day after the date the motion was filed;

(ii) on a showing of good cause; or

(iii) if the movant consents; and

(2) file with the clerk of the court and provide to the parties a written ruling on the motion not later than the 90th day after the date the motion was heard [~~argued~~] or considered.

(b) The [~~If a motion for summary judgment is considered by a court described by Subsection (a) without oral argument, the~~] court shall record in the docket the date the motion was heard or considered [~~without argument~~].

(b-1) Subsections (a) and (b) do not apply to a motion for summary judgment that is withdrawn.

(b) Section 23.303, Government Code, as amended by this section, applies only to a motion for summary judgment filed on or after the effective date of this Act. A motion for summary judgment filed before the effective date of this Act is governed by the law in effect on the date the motion was filed, and that law is continued in effect for that purpose.

By: Leach, Wilson, Morales of Maverick, H.B. No. 16

Dyson, LaHood, et al.

A BILL TO BE ENTITLED

AN ACT

relating to the operation and administration of and practices and procedures related to proceedings in the judicial branch of state

SECTION 9.15. (a) Section 23.303, Government Code, as added by S.B. 293, Acts of the 89th Legislature, Regular Session, 2025, and effective September 1, 2025, is amended by amending Subsections (a) and (b) and adding Subsection (b-1) to read as follows:

(a) The business court, a district court, or a statutory county court shall, with respect to a motion for summary judgment:

(1) set the motion for a hearing by [~~hear~~] oral argument [~~on the motion~~] or by submission on a date [~~consider the motion without oral argument~~] not later than:

(A) the 60th [~~45th~~] day after the date [~~the response to~~] the motion was filed; or

(B) the 90th day after the date the motion was filed:

(i) if the court's docket requires a hearing on a date later than the 60th day after the date the motion was filed;

(ii) on a showing of good cause; or

(iii) if the movant consents; and

(2) file with the clerk of the court and provide to the parties a written ruling on the motion not later than the 90th day after the date the motion was heard [~~argued~~] or considered.

(b) The [~~If a motion for summary judgment is considered by a court described by Subsection (a) without oral argument, the~~] court shall record in the docket the date the motion was heard or considered [~~without argument~~].

(b-1) Subsections (a) and (b) do not apply to a motion for summary judgment that is withdrawn.

(b) Section 23.303, Government Code, as amended by this section, applies only to a motion for summary judgment filed on or after the effective date of this Act. A motion for summary judgment filed before the effective date of this Act is governed by the law in effect on the date the motion was filed, and that law is continued in effect for that purpose.

RULE 166a. ~~-~~SUMMARY JUDGMENT

(a) For Claimant.~~-~~ A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may~~, at any time after the adverse party has appeared or answered,~~ move with or without supporting affidavits for a summary judgment in ~~his~~its favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) For Defending Party.~~-~~ A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may~~, at any time,~~ move with or without supporting affidavits for a summary judgment in ~~his~~its favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. ~~The~~

1. Contents of the Motion. A traditional motion for summary judgment shall state the specific grounds ~~therefor.~~ in support of the motion. A no-evidence motion for summary judgment must state the elements as to which there is no evidence.

2. Time to File a Motion. Unless a different deadline is set by local rule or court order, a party may move for a traditional motion for summary judgment at any time after the adverse party has appeared or answered. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial.

3. Setting of Oral Hearing or Written Submission. Upon filing a motion for summary judgment, the moving party shall immediately bring the filing of the motion to the court's attention and make a written request for oral hearing or written submission of the motion. The court shall set the motion for oral hearing or written submission not later than the 60th day after the motion was filed. The oral hearing or written submission date may be set after the 60th day, but not later than the 90th day, after the motion was filed a) if the court's docket requires a hearing on a date later than the 60th day after the date the motion was filed, b) upon a showing of good cause, or c) if the movant consents. The oral hearing or written submission date shall be set no earlier than the 35th day after the motion was filed.

4. Response. Except on leave of court, ~~with notice~~a non-movant shall file and serve its written response to ~~opposing counsel,~~ the motion and any evidence in support of the response and objections to the evidence supporting ~~affidavits shall be filed and served~~the motion at least ~~twenty-one~~fourteen days before the ~~time specified for hearing. Except on leave of court, the adverse party,~~oral hearing or written submission date.

5. Reply. The movant may file and serve a reply with responsive arguments or objections to a responding party's response or evidence not later than seven days ~~prior to~~before the ~~day of~~oral

hearing ~~may file and serve opposing affidavits~~ or ~~other~~ written ~~response~~submission date. A reply may not raise new or independent summary judgment grounds.

6. The Hearing. No oral testimony shall be received at ~~the hearing. The judgment sought shall be rendered forthwith~~a hearing on a summary judgment motion. The court shall hear oral argument on the motion or consider the motion on written submission without oral argument on the day originally set under subsection (c)(3) unless the movant withdraws the motion. The court shall record in the docket the date the motion was heard or considered.

7. The Merits of the Motion. No judgment shall be granted except on the grounds stated pursuant to subsection (c)(1). The court shall grant a traditional motion for summary judgment if (i) the deposition transcripts, interrogatory answers, admissions, documents, electronically stored information, and other discovery responses specifically referenced or set forth in the motion or response, and (ii) the pleadings, ~~admissions,~~ affidavits, declarations, stipulations of the parties~~,~~ (including those made for purposes of the motion only), and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. ~~Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.~~ A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted. The court must grant a no-evidence motion for summary judgment unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

8. The Ruling. The movants and responding parties shall each submit a proposed order before the oral hearing or written submission date. The court shall sign a written ruling on the motion, file it with the clerk, and provide the ruling to the parties not later than ninety days after the oral hearing or written submission date. A motion for summary judgment is denied *[by operation of law*], without prejudice to being reset for hearing, if: (1) the movant passes the hearing by filing a written notice with the clerk of the court; or (2) the court grants a continuance of the oral hearing or written submission on motion of a party; or (3) the court rules that there was not adequate time for discovery; or (4) the movant files summary judgment evidence later than the deadline provided by Rule 166a(c), Texas Rules of Civil Procedure, without leave of court.

9. The Appeal. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.

(d) Appendices, References and Other Use of Discovery Not Otherwise on File. Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together

with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least ~~twenty-one~~thirty-five days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least ~~seven~~fourteen days before the oral hearing or written submission date if such proofs are to be used to oppose the summary judgment.

(e) Case Not Fully Adjudicated on Motion. ~~-~~ If summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the judge may at the oral hearing or written submission examine the pleadings and the evidence on file~~, interrogate counsel~~, ascertain what material fact issues exist and make an order specifying the facts that are established as a matter of law, and directing such further proceedings in the action as are just.

(f) Form of Affidavits and Declarations; Further Testimony. ~~–~~Supporting and opposing affidavits and declarations shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit or declaration shall be attached thereto or served therewith. The court may permit affidavits or declarations to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits, declarations, or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(g) When Affidavits or Declarations Are Unavailable. ~~-~~Should it appear from the affidavits or declarations of a party opposing the motion that he cannot for reasons stated present by affidavit or declaration facts essential to justify ~~his~~its opposition, the court may ~~refuse~~deny the ~~application for judgment or may order a continuance~~motion without prejudice to permit affidavits or declarations to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(h) Affidavits Made in Bad Faith. ~~-~~ Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

~~**No Evidence Motion.** After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of~~

~~one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.~~**(i) No-Evidence Motion.**

RULE 166a. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in its favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in its favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

1. Contents of the Motion. A traditional motion for summary judgment shall state the specific grounds in support of the motion. A no-evidence motion for summary judgment must state the elements as to which there is no evidence.

2. Time to File a Motion. Unless a different deadline is set by local rule or court order, a party may move for a traditional motion for summary judgment at any time after the adverse party has appeared or answered. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial.

3. Setting of Oral Hearing or Written Submission. Upon filing a motion for summary judgment, the moving party shall immediately bring the filing of the motion to the court's attention and make a written request for oral hearing or written submission of the motion. The court shall set the motion for oral hearing or written submission not later than the 60th day after the motion was filed. The oral hearing or written submission date may be set after the 60th day, but not later than the 90th day, after the motion was filed a) if the court's docket requires a hearing on a date later than the 60th day after the date the motion was filed, b) upon a showing of good cause, or c) if the movant consents. The oral hearing or written submission date shall be set no earlier than the 35th day after the motion was filed.

4. Response. Except on leave of court, a non-movant shall file and serve its written response to the motion and any evidence in support of the response and objections to the evidence supporting the motion at least fourteen days before the oral hearing or written submission date.

5. Reply. The movant may file and serve a reply with responsive arguments or objections to a responding party's response or evidence not later than seven days before the oral hearing or written submission date. A reply may not raise new or independent summary judgment grounds.

6. The Hearing. No oral testimony shall be received at a hearing on a summary judgment motion. The court shall hear oral argument on the motion or consider the motion on written submission without oral argument on the day originally set under subsection (c)(3) unless the

movant withdraws the motion. The court shall record in the docket the date the motion was heard or considered.

7. The Merits of the Motion. No judgment shall be granted except on the grounds stated pursuant to subsection (c)(1). The court shall grant a traditional motion for summary judgment if (i) the deposition transcripts, interrogatory answers, admissions, documents, electronically stored information, and other discovery responses specifically referenced or set forth in the motion or response, and (ii) the pleadings, affidavits, declarations, stipulations of the parties (including those made for purposes of the motion only), and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted. The court must grant a no-evidence motion for summary judgment unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

8. The Ruling. The movants and responding parties shall each submit a proposed order before the oral hearing or written submission date. The court shall sign a written ruling on the motion, file it with the clerk, and provide the ruling to the parties not later than ninety days after the oral hearing or written submission date. A motion for summary judgment is denied *[by operation of law*], without prejudice to being reset for hearing, if: (1) the movant passes the hearing by filing a written notice with the clerk of the court; or (2) the court grants a continuance of the oral hearing or written submission on motion of a party; or (3) the court rules that there was not adequate time for discovery; or (4) the movant files summary judgment evidence later than the deadline provided by Rule 166a(c), Texas Rules of Civil Procedure, without leave of court.

9. The Appeal. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.

(d) Appendices, References and Other Use of Discovery Not Otherwise on File. Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least thirty-five days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least fourteen days before the oral hearing or written submission date if such proofs are to be used to oppose the summary judgment.

(e) Case Not Fully Adjudicated on Motion. If summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the judge may at the oral hearing or written submission examine the pleadings and the evidence on file, ascertain what material fact issues

exist and make an order specifying the facts that are established as a matter of law, and directing such further proceedings in the action as are just.

(f) Form of Affidavits and Declarations; Further Testimony. Supporting and opposing affidavits and declarations shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit or declaration shall be attached thereto or served therewith. The court may permit affidavits or declarations to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits, declarations, or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(g) When Affidavits or Declarations Are Unavailable. Should it appear from the affidavits or declarations of a party opposing the motion that he cannot for reasons stated present by affidavit or declaration facts essential to justify its opposition, the court may deny the motion without prejudice to permit affidavits or declarations to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(h) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(i) No-Evidence Motion.

Tab II- Business Court

From: [redacted]
To: [redacted]
Cc: [redacted]
Subject: FW: Draft Rule 363 -- 3 versions
Date: Friday, August 15, 2025 12:44:25 PM
Attachments: SCAC Draft Rule 363 from 2025.6.27.1 scac-meeting.pdf
SCAC Rule 363 Revision 1 - pre 9.1.2024 Case Rule 7.18.2025.docx
Rule 363.SGD Draft version.docx

Jaclyn,

At Chief Justice Christopher's urging, I am forwarding my own version of a proposed Rule 363 ("SGD Draft version" in the file name) as a supplement to what I am told the Court has already received from the Supreme Court Advisory Committee – in connection with the latter's work on implementing the changes to our Business Court jurisdiction that will occur when HB 40 goes into effect Sept. 1.

You may also receive a somewhat modified version of my draft from the Texas Business Law Foundation – with whom I previously shared it and my thoughts. (Their version largely tracks my own; the way to tell them apart is they have expressly broken out Montgomery County – to clarify that the Regional Presiding Judge of the 2nd Admin Judicial Region is responsible for any removals to the Business Court attempted from that County.)

I have also attached, for comparison purposes, two different versions of a draft rule that the SCAC was at one time deliberating. Hopefully the file names are self-explanatory. I do not know whether only one or both (or a third version) were ultimately transmitted to SCOTX.

My proposed rule incorporates many elements from these two drafts. But the main differences between my proposed rule and the other two are the following:

- Both the SCAC PDF version of the Rule, and the Word version ("Revision 1"), provide that the statutorily-required "agreed motion of a party" that initiates the transfer request should be ruled upon by the judge in whose court the case is pending [see PDF at (a)(iii) and (c)(ii); Word at (b)(i)]. And the Word version further specifies the content of the agreed motion: it must "address the criteria" that [per (a)(i) and (ii)] the Business Court is to create by local rule. My proposed rule only requires an "agreed motion of a party" to initiate the process and kick it over for decision to the Regional Presiding Judge. My concern: parties should not have to obtain the consent (or denial) of the Judge in whose court the case is pending. [The Business Court statute already contains a mechanism by which a presiding state

court judge may initiate a transfer to the Business Court via the Regional Presiding Judge: *see* Gov't Code Sec. 25A.006(k).] And IF they have to say potentially critical things about the pending court ("address the criteria") in such a motion – in a way not required by the statute, which only specifies "an agreed motion of a party" – then (1) the parties are less likely to invoke the process, for fear of being sent back to a judge they have just bad-mouthed; and (2) comity among the courts will be adversely affected if the state court judge feels he or she is being criticized/adjudged as lazy or incompetent or just unkind to business litigation, when the statute (unjudgingly, if that's a word) says that this procedure is merely intended to "prioritize complex civil actions of longer duration that *have proven difficult for a district court to resolve because of the other demands on the district court 's caseload"* [HB 40, Sec. 56; Gov't Code Sec. 25A.021(a)(1) (emphasis mine)].

- The Word version (at (e)) has an awkward process whereby the Business Court first grants or denies permission for the transfer THEN the Regional Presiding Judge convenes a hearing (before a 3-judge panel that includes the RPJ, the local AJ, and the Business Court Admin PJ) to decide whether the transfer is warranted. But the draft Rule states (correctly, in my opinion) that the panel cannot overturn the Business Court's refusal of the transfer. So why should the panel even meet, if the BC has refused the case? My draft Rule has the RPJ first hear the transfer request (at which time the parties can first address the statutory criteria – and make any criticism of the judge in whose court the case is pending, should they deem it necessary or desirable to do so), then – IF the RPJ recommends it – the Business Court's permission is sought. This seems more efficient.

- Especially so, insofar as my draft of the rule [as does the PDF version, at (c)(1)] requires the RPJ initially to consult with the Business Court APJ "as to [the Business Court's] capacity to accept the transfer of the action without impairing its efficiency and effectiveness." Thus the RPJ will have some indication of whether the Business Court is able/likely to grant permission to the transfer at the time he or she holds a hearing/makes the initial decision on whether the transfer request should be prioritized, and can – if he or she so desires – factor that into the decision to grant or deny priority to the transfer. Which, after all, is what the new statute requires as part of the specified criteria for prioritization: "consider the capacity of the business court to accept the transfer of the action *without impairing the business court 's efficiency and effectiveness in resolving actions commenced on or after September 1, 2024*" [HB 40, Sec. 56; Gov't Code Sec. 25A.021(a)(2) (emphasis mine)].

- My proposed version of the rule contains no requirement – as does the Word version at (a)(i) & (ii) – that the Business Court draft local rules that flesh out the statutory criteria in HB 40, which it will consider when granting or denying a transfer under this provision. To be sure, the proposed Word version of the Rule creates substantial "wiggle room": *"The business court may modify such criteria from time to time based upon its experience in applying them and in disposing of the transferred actions. The business court may apply the published criteria on an objective, determinative basis or on a subjective, qualitative basis supporting the application of its judgement, as it determines to be advisable in the circumstances."* But the statute already lists 3 criteria for consideration. And I think this an unnecessary, and possibly counterproductive, exercise – given that the Business Court's momentary capacity (or lack of same) is far more likely to drive the result than the nature, history, complexity, or any other relevant, innate characteristic of the case in question. In short, if the Business Court gets 7 total case transfer requests in the 3 months after the statute's effective date, it is likely to grant permission to every one. If instead it gets 700 such requests – even if they are all deserving candidates that fulfill any criteria that might be established – the vast majority of them will almost certainly be denied permission to transfer. Publishing detailed criteria that may be honored more in the breach than the observance is not, in my opinion, a formula for reassuring the litigating public that reasoned deliberation drove the decision when, in fact, it was just a numbers game all along.

- Lastly, the Comments appended to the Word version of the proposed Rule provide that a Montgomery County case seeking transfer to the Business Court should be heard and determined by the Regional Presiding Judge of the 11th Admin Judicial Region. I did not address this issue in my version, but I agree with the TBLF's proposed rule that specifies the RPJ of the 2nd Admin Judicial Region should instead be involved in that process. (FYI: There is a possibility that pending legislation, yet to be voted upon, may require a similar exception for Bastrop County.)

I am happy to discuss any of this further by phone, or in person, as you or others may desire.

Thank you for considering my proposed Rule 363, and the above comments.

Best regards,

Hon. Grant Dorfman
Judge, Texas Business Court Eleventh Division
301 Fannin Street, Houston, Texas 77002
[redacted]

Exhibit A

a. if an operating division of the business court includes a county of proper venue, transfer the action to that division; or

b. If there is not an operating division of the business court that includes a county of proper venue, at the request of the party filing the action, transfer the action to a district court or county court at law in a county of proper venue.

Notes and Comments

Comment to 2025 change: To incorporate Section 46 of HB 40, 89th Legislative Session. Special appearances are governed by Texas Rule of Civil Procedure 120a.

RULE 362. INACCESSIBILITY OF BUSINESS COURT JUDGE

(a) A business court judge may grant a writ returnable to another business court judge if that judge cannot be reached by the ordinary and available means of travel and communication in sufficient time to implement the purpose sought for the writ.

(b) In seeking a writ under this subsection, the applicant or attorney for the applicant shall attach to the application an affidavit that fully states the facts of the inaccessibility and the efforts made to reach and communicate with the other business court judge.

(c) The business court judge to whom the application is made shall refuse to hear the application unless the judge determines the applicant made fair and reasonable efforts to reach and communicate with the other business court judge.

(d) The injunction may be dissolved on a showing the applicant did not first make reasonable efforts to procure a hearing on the application before the other business court judge.

Notes and Comments

Comment to 2025 change: To incorporate Section 16 of H.B. 40, 89th Legislative Session.

RULE 363. TRANSFER OF CASES PENDING BEFORE SEPTEMBER 1, 2024, TO BUSINESS COURT.

(a) *Agreed motion.* On agreed motion of the parties, the presiding judge for the administrative judicial region in which a case is pending may order transfer of

a suit filed before September 1, 2024, that is within the business court's jurisdiction to the business court.

(i) The motion should be filed with the court in which the case is pending and

(ii) The judge should sign and file with the clerk an order indicating whether the judge agrees to transfer to the business and referring the motion to the regional presiding judge.

(b) *Notice and Hearing*. The regional presiding judge must notify all parties of the transfer request and set a hearing on the transfer request, and a record should be made of the hearing.

(c) *Transfer decision.*

(i) The regional presiding judge should consult with the presiding judge of the business court as to its capacity to accept the transfer of the action without impairing its efficiency and effectiveness.

(ii) Both the judge in which the case is pending and the regional presiding judge should consider:

(a) whether the case involves complex civil issues, has been pending for some length of time without resolution, or involves issues that have proven difficult for a district court to resolve because of the other demands on the district court's caseload; or

(b) whether the transfer will ensure the facilitation of the fair and efficient administration of justice.

(d) *Clerk Duties*. The business court clerk must assign the action to the appropriate operating division of the business court. If the division has more than one judge, then the clerk must randomly assign the action to a specific judge within that division.

Notes and Comments

Comment to 2025 change: To incorporate Section 56 of H.B. 40, 89th Legislative Session. For cases pending in Montgomery County, the agreed motion should be referred to the Eleventh Administrative Judicial Region. The authorization for this transfer option expires September 1, 2035.

Exhibit B

Proposed TRCP Section 363 and Related Business Court Local Rule Allowing Transfers to the Business Court of Certain Proceedings Commenced Prior to September 1, 2024

RULE 363. TRANSFER OF CASES PENDING BEFORE SEPTEMBER 1, 2024, TO BUSINESS COURT.

(a) *Criteria for Transfers of Pre-September 1, 2024 Actions Pursuant to Texas Government Code Section 25A.021*. (i) The business court shall determine and publish in its local rules criteria that it will consider when requested to grant its permission to allow transfer to the business court from other courts of this state of civil actions satisfying the jurisdictional requirements of the business court that were commenced before September 1, 2024 ("Pre 9/1/2024 Proceedings"). The business court may modify such criteria from time to time based upon its experience in applying them and in disposing of the transferred actions. The business court may apply the published criteria on an objective, determinative basis or on a subjective, qualitative basis supporting the application of its judgement, as it determines to be advisable in the circumstances.

(ii) The criteria established by the business court shall (A) prioritize actions of longer duration that have proven difficult for a transferring court to resolve because of other demands on the court's caseload; and (B) consider the capacity of the business court to accept the transfer of Pre 9/1/2024 Proceedings without impairing the business court's efficiency and effectiveness in resolving actions commencing on and after September 1, 2024.

(iii) The business court may condition the grant of its permission for the transfer of a Pre 9/1/2024 Proceeding to the business court upon agreement of the parties to procedural requirements of the business court of general applicability, or as may be made applicable specifically to the proceeding proposed to be transferred to the business court, as the business court determines to be advisable to support the business court's efficiency and effectiveness in resolving the dispute. The business court may as a condition of granting its permission require the agreement of the parties to re-argue for decision by the business court any issue previously decided in the proceeding that the business court concludes might constitute reversible error if not addressed.

(iv) The decision of the business court to withhold its permission for the transfer of a Pre 9/1/2024 Proceeding is not appealable.

(b) *Filing of Agreed Motion*. A party may file an agreed motion to transfer a Pre 9/1/2024 Proceeding to the business court at any time prior to the commencement of trial of the action. The motion must be filed with (i) the court in which the action is pending, (ii) the local administrative judge for that court, (iii) the regional presiding judge for that court's administrative region and (iv) the administrative presiding judge of the business court. The agreed motion shall address the criteria established by the business court pursuant to Section (a) of Rule 363 and any other matters that the business court may specify in its local rules.

(c) *Action by Business Court to Determine Permission*. (i) Upon receipt of the agreed motion the business court may require the parties to the motion to deliver to the business court such portions of the record of the action as are considered by the business court to be relevant to the business court's decision to grant or withhold its permission for the transfer of the proceeding to the business court.

(ii) The business court may schedule a telephone or in-person conference with counsel, order a further motion and responses, provide further instruction, or issue an order granting or denying its permission for the transfer of the proceeding, as the court, in its discretion, determines is appropriate. Upon reaching a decision to grant or deny its permission, the business court shall provide notice of the decision to the parties and the judges receiving notice of the agreed transfer motion which shall include a brief statement of the basis of for decision.

(e) *Hearing*. The regional presiding judge upon notice of the business court's decision to grant or deny its permission to transfer the Pre 9/1/2024 Proceeding to the business court shall set a hearing on the transfer request. A record should be made of the hearing. At the hearing the decision to grant or deny the agreed motion to transfer, including therein any further conditions agreed to by the parties and the business court, shall be made by the majority of a three judge panel consisting of the regional presiding judge, the local administrative judge for the originating court and the presiding administrative judge of the business court. For the avoidance of doubt, the judicial panel may not order the transfer of the Pre 9/1/2024 Proceeding to the business court in the absence of the business court's grant of its permission, but the judicial panel may decline to approve the transfer despite the business court's permission having been granted. The determination of the panel is not appealable.

(f) *Clerk Duties*. The business court clerk must assign the action to the appropriate operating division of the business court. If the division has more than one judge, then the clerk must randomly assign the action to a specific judge within that division.

Notes and Comments

Comment to 2025 change: To incorporate Section 56 of H.B. 40, 89th Legislative Session. For cases pending in Montgomery County, the agreed motion should be referred to the Eleventh Administrative Judicial Region. The authorization for this transfer procedure expires September 1, 2035.

Business Court Local Rules

Rule X: Criteria for Accepting Transfers of Pre-September 1, 2024 Proceedings Under TRCP 363

(a) When determining whether the Business Court will grant its permission to allow transfer to the Business Court from other courts of this state of civil actions satisfying the jurisdictional requirements of the Business Court that were commenced before September 1, 2024 ("Pre 9/1/2024 Proceedings"), pursuant to Section 25A.021, Government Code, and TRCP 363, the Court will consider the criteria set forth in this Rule X. The determination of the Business Court will be made by the administrative presiding judge of the Business Court or by a panel of Business Court judges designated by the administrative presiding judge. If a Pre 9/1/2024 Proceeding proposed to be transferred to the Business Court may be assigned to a Business Court judge, that judge shall not participate in determining whether to grant the permission of the Business Court for the transfer of the action.

(b) The Business Court will prioritize Pre 9/1/2024 Proceedings of longer duration based upon consideration of (i) the number of days that an action has been pending as an active case since the date of its initial filing, (ii) the number of times that the action has been assigned for trial by the court without proceeding to trial and (iii) demands upon the transferring court's caseload that may have caused the action to be difficult to resolve. The relative weight given to each factor referenced will be determined by the Court based upon such considerations as it deems appropriate in the circumstances.

(c) The Business Court shall consider its capacity to accept the transfer of Pre 9/1/2024 Proceedings based upon (i) the determination of each Business Court judge on a quarterly basis of that judge's availability to accept zero, one or two such actions, (ii) the number of such actions pending before each judge of the Business Court, (iii) the date upon which such action is expected to be ready to proceed to trial, (iv) the amount of the Court's time before and during trial the action is expected to require, (v) the availability on the calendar of each judge of the requisite time to prepare the action for trial and to complete the trial, and (vi) the impact upon the Business Court's capacity to accept the transfer of such actions after the parties' agreement to conditions of acceptance of a transfer authorized by TRCP 363(a)(iii). The relative weight given to each factor referenced will be determined by the Court based upon such considerations as it deems appropriate in the circumstances.

Exhibit C

RULE 363. TRANSFER OF CASES PENDING BEFORE SEPTEMBER 1, 2024, TO BUSINESS COURT.

(a) ***Agreed motion.*** A party may file an agreed motion to transfer a Pre-9/1/2024 Proceeding to the business court at any time prior to the commencement of trial of the action.

(i) The motion should be filed with the court in which the case is pending.

(ii) Upon receipt of the motion, the judge should sign an order referring the motion to the regional presiding judge of the administrative judicial region in which the case is pending.

(b) ***Notice and Hearing*****.** The regional presiding judge must notify all parties of the transfer request and set a hearing on the transfer request, and a record should be made of the hearing.

(c) ***Transfer decision.***

(i) The regional presiding judge should consult with the presiding judge of the business court as to its capacity to accept the transfer of the action without impairing its efficiency and effectiveness.

(ii) At the hearing, the regional presiding judge should consider:

(a) whether the case comports with the business court's jurisdiction;

(b) the opinion of the presiding judge of the business court respecting its capacity, per (c)(i), above;

(c) whether the case involves complex civil issues, has been pending for some length of time without resolution, or involves issues that have proven difficult for a district court to resolve because of the other demands on the district court's caseload; and

(d) whether the transfer will ensure the facilitation of the fair and efficient administration of justice.

(iii) If the regional presiding judge signs and files with the clerk an order denying the transfer request, the action shall be returned to the court in which the case was pending for further handling. The regional presiding judge shall not entertain any subsequent agreed motion to transfer the same case under this rule absent compelling evidence of materially changed circumstances.

(d) ***Permission of the business court required.*** If the regional presiding judge signs and files with the clerk an order granting the transfer request, the clerk shall forward the order to the business court clerk. The business court clerk shall refer the request to the presiding judge of the business court.

(i) The presiding judge of the business court may require the parties to the motion to deliver to the business court such portions of the record of the action as it considers relevant to the decision to grant or withhold permission for the transfer of the proceeding to the business court.

(ii) The presiding judge of the business court may schedule a telephone or in-person conference with counsel, order a further motion and responses, provide further instruction, or issue an order granting or denying its permission for the transfer of the proceeding, as the court, in its discretion, determines is appropriate. Upon reaching a decision to grant or deny its permission, the business court shall provide notice of the decision to the parties and the judges receiving notice of the agreed transfer motion which shall include a brief statement of the basis for the decision.

(e) ***Clerk duties.*** If the business court grants permission, the business court clerk must assign the action to the appropriate operating division of the business court. If the division has more than one judge, then the clerk must randomly assign the action to a specific judge within that division.

(f) ***Orders not appealable.*** The decision of the regional presiding judge to grant or deny a transfer request is not appealable. The decision of the business court to grant or withhold permission to transfer a Pre-9/1/2024 Proceeding is not appealable. Further, the regional presiding judge shall not entertain a subsequent agreed motion to transfer a case under this rule as to which the business court has denied permission to transfer absent compelling evidence of materially changed circumstances.

From:	Jerry Bullard
To:	Evan A. Young
Cc:	Grant Dorfman
Subject:	Business Court jury fee - proposed revisions to the SCOTX fee order
Date:	Thursday, July 24, 2025 12:05:04 AM
Attachments:	Page 601 of 89(R) SB 1 - Enrolled version (see highlighted rider 14).pdf

Good evening, Evan. Hope you and the family are doing well.

I'm following up on our business court jury fee discussion as it relates to a business court-specific rider in the appropriations bill passed by the 89th Legislature relating to the fee. More specifically, at OCA's request prompted in part by our inquiry, SB 1 included a budget rider that expressly authorized our court to collect a jury fee and to spend collected jury fees on jury-related services provided by counties. The relevant excerpt from SB 1 is attached for your convenience.

After discussing the rider with my court colleagues and consulting with OCA about the same, there is some concern that the current SCOTX fee order (misc-docket-24-9047-fees-sc-coas-civil-mdl-business-court.pdf) does not align with the rider because, according to at least one plausible interpretation, the fee order requires the parties to pay the counties directly instead of the business court. We also envision a scenario in which the jury-related services are provided by entities other than governmental entities. As such, we've suggested revisions that are intended to alleviate concerns expressed to date and clarify the fee collection and county/agency expense reimbursement process. The proposed revisions are as follows:

jury fee[5]*..... as ordered by the business court*

[5] *The business court will set the jury fee in an order. The fee will include, at a minimum, ~~a~~ $300 ~~fee~~ for staff time in summonsing jurors and the use of a jury summons system; an estimate ~~fee~~ for any needed security expenses or facilities reimbursement; ~~a fee for~~ the estimated juror pay pursuant to Gov't Code §§ 61.001, 61.002, and 61.0015; and ~~a fee for actual~~ estimated processing costs related to summonsing jurors, including postage, printing costs, and copy costs. The business court will reimburse any jurisdiction or institution providing facilities, personnel, or ~~the jury~~ services for a jury trial for the reasonable and necessary cost of the same, pursuant to procedures published by the business court ~~must submit an invoice so that the business court will have the information necessary to issue the fee order~~ . ~~The business court will allocate these fees between the parties, and the fees will be paid directly to the jurisdiction providing the services.~~ The fee may be amended or (re-) allocated among the parties by order of the business court.*

If necessary, I would be happy to discuss the proposed revisions and the rationale for the same at your convenience.

Jerry

retirement payouts due at the time of agency employees' retirement. Any part of the appropriation made for retirement payouts due at the time of agency employees' retirement that are not necessary for that purpose shall be lapsed by the agency at the end of the biennium.

12. **Costs for Court Text Reminder Program.** Amounts appropriated above to the Office of Court Administration from the General Revenue Fund in Strategy A.1.2, Information Technology, include $2,200,000 in fiscal year 2026 for maintaining the court text reminder program established by House Bill 4293, Eighty-Seventh Legislature, Regular Session, 2021.

13. **Contingency for Senate Bill 9.** Out of amounts appropriated above the Office of Court Administration is appropriated $323,559 in fiscal year 2026 and $289,264 in fiscal year 2027 in General Revenue in Strategy A.1.1, Court Administration, and $5,410,012 in fiscal year 2026 and $101,412 in fiscal year 2027 in General Revenue and 2.0 FTEs each fiscal year in Strategy A.1.2, Information Technology, for the purposes of implementing the provisions of Senate Bill 9, or similar legislation, relating to the release of defendants on bail, the duties of a magistrate in certain criminal proceedings, the regulation of charitable bail organizations, and the notice provided by peace officers to victims of family violence, stalking, harassment, or terroristic threat.

14. **Business Court Filing Fees.** In addition to the amounts appropriated above in Strategy E.1.1, Administer Business Court, filing fees authorized and collected by the Supreme Court of Texas for filings and actions in the business court, and for jury fees, as of August 31, 2025, shall be appropriated to the business court. These funds are appropriated for use by the business court pursuant to Government Code, Section 25A.018, to support the costs of administering the business court and to provide reimbursement to counties for drawing jury panels, selection of jurors, paying jurors and other jury-related processing costs incurred by the district court in the county in which the trial is held. Fees collected under Local Government Code Section 133.151 (a)(1), Section 133.151 (a)(2), Section 133.151 (a-1) and Section 135.101 are not appropriated to the business court by this Act.

OFFICE OF CAPITAL AND FORENSIC WRITS

	For the Years Ending August 31, 2026	August 31, 2027
Method of Financing:		
General Revenue Fund	$ 4,374,154	$ 4,339,955
Total, Method of Financing	$ 4,374,154	$ 4,339,955
This bill pattern represents an estimated 100% of this agency's estimated total available funds for the biennium.		
Number of Full-Time-Equivalents (FTE):	33.5	33.5
Schedule of Exempt Positions:		
Executive Director, Group 5	$185,000	$185,000
Items of Appropriation:		
A. Goal: POST-CONVICTION REPRESENTATION		
A.1.1. Strategy: CAPITAL REPRESENTATION Post-Conviction Capital Representation.	$ 3,283,896	$ 3,271,687
A.1.2. Strategy: NON-CAPITAL REPRESENTATION Post-Conviction Non-capital Representation.	1,090,258	1,068,268
Total, Goal A: POST-CONVICTION REPRESENTATION	$ 4,374,154	$ 4,339,955
Grand Total, OFFICE OF CAPITAL AND FORENSIC WRITS	$ 4,374,154	$ 4,339,955
Object-of-Expense Informational Listing:		
Salaries and Wages	$ 3,781,243	$ 3,781,243
Other Personnel Costs	15,500	15,500
Professional Fees and Services	120,000	120,000
Consumable Supplies	2,400	2,400
Utilities	1,263	1,263

Texas Business Law Foundation

c/o Alston & Bird LLP
2200 Ross Avenue, Suite 2300
Dallas TX 75201

August 7, 2025

Justice Evan Young
Supreme Court of Texas
PO Box 12248
Austin, Texas 78711
Submitted via email

Re: Section 25A.021, Texas Government Code, enacted in House Bill 40, Section 56, by the 2025 Texas Legislature (to be effective September 1, 2025) providing for transfers of actions commenced prior to September 1, 2024, to the Texas Business Court

Justice Young:

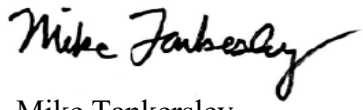
This letter and the attachments are provided on behalf of the Texas Business Law Foundation (TBLF) Business Court Working Group to submit for your consideration a draft Proposed Texas Rule of Civil Procedure 363 (Proposed Rule 363) and related comments that respond to Sec. 25A.021, Tex. Gov't Code (eff. Sept. 1, 2025). The attachments also respond to Proposed Texas Rule of Civil Procedure 363 (SCAC Rule 363) discussed at the meeting of the Supreme Court Advisory Committee (SCAC) held June 27, 2025.

The information and opinions provided herein do not represent the position or views of any individual member, director or officer of the TBLF, any member of the Business Court Working Group, nor any of their firms or employers.

Please do not hesitate to contact me by email or telephone if I can be of any assistance in your evaluation of the attached materials.

The TBLF appreciates the leadership provided by the Supreme Court in support of the organization and launch of the Texas Business Court and looks forward to future opportunities to participate in the development and success of this great innovation in the Texas judiciary.

Sincerely,



Mike Tankersley
Chair, TBLF Business Court Working Group

Cc: Judge Grant Dorfman
SCAC Business Court Rules Subcommittee c/o Robert Levy
Trevor E. Ezell, General Counsel to the Governor

Texas Business Law Foundation
c/o Alston & Bird LLP
2200 Ross Avenue, Suite 2300
Dallas TX 75201

Attachments:
Memorandum – Transfer to the Business Court of Actions Commenced Prior to September 1, 2024 – A Proposal for Responsive Procedural Rules
Attachment A – Proposed TRCP Rule 363
Attachment B – Comments Addressing Proposed TRCP Rule 363
Attachment C – Proposed TRCP Section 363 – Materials Supporting Supreme Court Advisory Committee Meeting held June 27, 2025
Attachment D – Legislative History of HB 40, Section 56
Description of Texas Business Law Foundation and
Business Court Working Group

House Bill 40, Section 56 (Tex. Gov't Code Sec. 25A.021), Enacted by 2025 Texas Legislature

Transfer to the Business Court of Actions Commenced Prior to September 1, 2024 - A Proposal for Responsive Procedural Rules

Our comments and a resulting draft of proposed procedural rules for consideration by the Texas Supreme Court (see Attachments A and B) are provided on behalf of the Business Court Working Group (Working Group) of the Texas Business Law Foundation (TBLF) in response to Section 56 of House Bill 40 (HB 40) enacted by the 2025 Texas Legislature, to be codified as Sec. 25A.021, Tex. Gov't Code. Section 56 calls upon the Texas Supreme Court to adopt rules of procedure allowing the transfer to the Texas Business Court of certain civil actions commenced prior to September 1, 2024, notwithstanding Section 8, Chapter 380 (H.B. 19), Acts of the 88th Legislature, Regular Session, 2023, which otherwise prohibits such transfers.

In the course of preparing this proposal we considered (and adopted the numbering scheme of) proposed Texas Rule of Civil Procedure 363 developed by the Business Court Subcommittee of the Supreme Court Advisory Committee (SCAC) and discussed at the SCAC June 27, 2025, meeting. That proposed rule and the Subcommittee's related commentary are reproduced below at Attachment C. We appreciate the consideration given to Section 56 by the Subcommittee in the very short period of time following the Legislature's enactment of HB 40.

Determining how to best fit the requirements of Section 56 into the Texas Rules of Civil Procedure presents a particular challenge due to the interesting history of its passage through the 2025 Texas Legislature. As summarized in more detail in the legislative history of Section 56 of HB 40 appearing in Attachment D, the substance of Section 56, which was initially drafted by the TBLF, appeared in HB 40 as it was filed on March 14, 2025, by author Representative Brooks Landgraf. By the time that HB 40 was passed by the House on May 12, 2025, and forwarded to the Senate for its consideration, Section 56 had been deleted from the Bill through a floor amendment introduced by Representative Landgraf. The substance of Section 56 did not reappear in the legislative record until it was added back to HB 40 by special votes of the House and Senate as their differing versions of HB 40 were reconciled and passed, literally in the final hours of the final days of the session on May 31 and June 1, 2025.

Policy Background of HB 40, Section 56. The impetus for inclusion of Section 56 in HB 40 was the recognition that House Bill 19 (HB 19) enacted by the 2023 Texas Legislature to create the Business Court had provided Texas businesses with a promising new path to resolve complex business disputes in a more efficient manner, but had done nothing to address the judicial system's existing backlog of large, complex pending business cases cited by supporters of HB 19. Witnesses testifying in support of HB 19 in 2023 reported having prepared large cases for multiple docket calls, over periods of five years or more, without receiving a trial setting. This was described as destroying (or never generating) the incentive of a firm trial date that forces most litigation of this type to a settlement, costing the litigants hundreds of thousands of dollars and impairing their ability to make the business decisions required to advance their companies and the Texas economy as these cases can proceed on without resolution for years.

HB 19 included in Section 8 a strict limitation that the Business Court only accept actions that had commenced on or after September 1, 2024. This was viewed by the authors of HB 19 as necessary to avoid the potential for a flood of existing cases seeking access to the Business Court before it had developed the capability to handle them, and a sense that parties who had commenced litigation in the

Texas judicial system as it existed prior to enactment of HB 19 should be allowed to continue in the venues they had chosen. This policy objective of managing a moderately increasing inflow of cases to the Business Court in its initial years of operation was reflected in other features of the Business Court's limited jurisdiction that were first set in HB 19 in 2023 and then tweaked this year in HB 40 to allow a moderate number of additional cases to reach the Business Court as it matures.

Section 56 of HB 40 is not a reversal of HB 19's Section 8 limitation. It provides a near-term opportunity to open the door of the Business Court to a limited degree to provide the oldest pending pre-September 1, 2024, cases falling within the jurisdiction of the Business Court a firm trial setting. That opening is tempered by the expectation that it can and should be managed in a way that will not erode the Business Court's ability to efficiently resolve the post-September 1, 2024, cases that it was designed to address. It is also tempered by the knowledge that with the passage of less than a decade there will cease to be a meaningful backlog of pre-September 1, 2024 cases.

Section 56 provides the Supreme Court three principal directives to apply in achieving this nuanced policy objective when creating rules allowing the transfer of pre-September 1, 2024, actions to the Business Court: 1) a direction to "prioritize complex civil actions of longer duration that have proven difficult for a district court to resolve because of the other demands on the district court's caseload," 2) a requirement that the movement of such actions be based upon "an agreed motion of a party," and 3) a limitation that those cases should arrive on a Business Court docket only with "the permission of the Business Court."

There is certainly no policy objective expressed in, or that can be reasonably inferred from, Section 56 of HB 40, or any of Chapter 25A as it will be effective on September 1, 2025, of opening the Business Court to the large number of existing one-, two- or three-year-old, pre-September 1, 2024, cases currently proceeding on a reasonably timely basis through the district and county courts.

The only material change introduced to the text of Section 56 of HB 40 as it was initially filed was to provide in the Committee Substitute of HB 40 as voted out of the House Committee on the Judiciary and Civil Jurisprudence that any transfer of a pre-September 1, 2024, case to the Business Court would require "an agreed motion of a party" rather than occurring simply "on motion of a party." This change by itself is expected to further reduce the number of pre-September 1, 2024, cases qualifying for potential access to the Business Court.

Implicit in Section 56, and in HB 19 and HB 40 generally, is the Legislature's recognition, based on the experience of other states creating business courts, that the development of a new institution like the Business Court is not going to benefit from an early excess of litigants. That insight is responsible for a "crawl, walk, run" progression of development based on experience that has characterized other states' business courts, and that is reflected in the progressive expansion of Business Court jurisdiction incorporated by the Texas Legislature in HB 19 and HB 40. This "go slow" approach is both appropriate and necessary for the rules approved by the Supreme Court to implement Section 56.

Attachment A: Proposed TRCP Rule 363

RULE 363. TRANSFER OF CASES PENDING BEFORE SEPTEMBER 1, 2024, TO THE BUSINESS COURT.

(a) ***Agreed motion.*** A party may file an agreed motion to transfer a case commenced before September 1, 2024, that is within the business court's jurisdiction (a "Pre-9/1/2024 Proceeding") to the business court at any time prior to the commencement of trial of the action.

(i) The motion must be filed with the court in which the case is pending.

(ii) Upon receipt of the motion, the judge must sign an order referring the motion to the regional presiding judge of the administrative judicial region in which the case is pending, provided that if the case is pending in Montgomery County the motion shall be referred to the regional presiding judge of the Second Administrative Judicial Region.

(b) ***Notice and Hearing*****.** The regional presiding judge must notify all parties of the transfer request, set a hearing on the transfer request, and make a record of the hearing.

(c) ***Transfer decision.***

(i) The regional presiding judge must consult with the administrative presiding judge of the business court as to its capacity to accept the transfer of the action without impairing its efficiency and effectiveness.

(ii) At the hearing, the regional presiding judge must consider:

(a) whether the case comports with the business court's jurisdiction;

(b) the opinion of the presiding judge of the business court respecting its capacity, per (c)(i) above;

(c) whether the case involves complex civil issues, has been pending for some length of time without resolution, and has proven difficult for a district court to resolve because of the other demands on the court's caseload; and

(d) whether the transfer will ensure the facilitation of the fair and efficient administration of justice.

(iii) In determining whether to grant or deny the transfer request, the regional presiding judge shall prioritize cases described at (c)(ii)(c) above based upon the length of time the cases have been pending as active proceedings.

(iv) If the regional presiding judge signs and files with the clerk an order denying the transfer request, the action shall be returned to the court in which the case is pending for further handling. The regional presiding judge shall not entertain any subsequent agreed motion to transfer the same case under this rule absent compelling evidence of materially changed circumstances affecting the case or in the capacity of the business court to receive transfers of such proceedings without impairing the business court's efficiency and effectiveness.

(d) ***Permission of the business court required.*** If the regional presiding judge signs and files with the clerk an order granting the transfer request, the clerk shall forward the order to the business court clerk. The business court clerk shall refer the request to the presiding judge of the business court.

(i) The administrative presiding judge of the business court may require the parties to the motion to deliver to the business court such portions of the record of the action as are considered relevant to the decision to grant or withhold permission for the transfer of the proceeding to the business court.

(ii) The presiding judge of the business court may schedule a telephone or in-person conference with counsel, order a further motion and responses, provide further instruction, or issue an order granting or denying its permission for the transfer of the proceeding, as the presiding judge, in his or her discretion, determines is appropriate. Upon reaching a decision to grant or deny its permission, the presiding judge of the business court shall provide notice of the decision to the parties and the judges receiving notice of the agreed transfer motion which shall include a brief statement of the basis for the decision.

(e) ***Clerk duties.*** If the business court grants permission, the business court clerk must assign the action to the appropriate operating division of the business court. If the division has more than one judge, then the clerk must randomly assign the action to a specific judge within that division.

(f) ***Orders not appealable.*** The decision of the regional presiding judge to grant or deny a request to transfer a Pre-9/1/2024 Proceeding is not appealable. The decision of the business court to grant or withhold permission to transfer a Pre-9/1/2024 Proceeding is not appealable.

Notes and Comments

Comment to 2025 change: To incorporate Sec. 25A.021, Tex. Gov't Code, Section 56 of H.B. 40, 89th Legislative Session. The authorization for this transfer option expires September 1, 2035.

Attachment B: Comments Addressing Proposed TRCP Rule 363

Subsection (a) – Proposed Rule 363, following Sec. 25A.021, Government Code, provides for the transfer (not removal) of a pending civil action that is within the jurisdiction of the business court and that commenced prior to September 1, 2024 (a "Pre-9/1/2024 Proceeding") on an agreed motion of a party. Sec. 25A.021 does not specify who should receive, hear and decide that motion, requiring the Supreme Court to make that determination in the course of adopting the rules contemplated by the statute. Sec. 25A.021 does require that the motion have the agreement of all parties, which is reflected in each of Proposed Rule 363 and SCAC 363. Proposed Rule 363 concurs with SCAC 363 that the Sec. 25A.021 transfer process will be initiated by a filing in the trial court where the Pre-9/1/2024 Action is pending.

Proposed Rule 363 takes the position that neither the trial judge hearing the Pre-9/1/2024 Proceeding, nor the business court judge to whom the proceeding may be transferred, should participate in deciding the matter. This will avoid any appearance of the personal or professional interests of a judge of either court impacting the determination. Proposed Rule 363 disagrees with SCAC 363's requirement that the trial judge must agree with the motion, but concurs with SCAC 363 that the regional presiding judge will make the decision, particularly in view of the regional presiding judge's statutory responsibilities for the efficient operation in that judge's administrative region of the judicial branch of government and the existing relationship between the regional presiding judge and the trial judge of the originating court.

Providing the originating trial court judge with veto power over the proposed transfer should be avoided because it would be inconsistent with the policy reflected in Sec. 25A.006(f), Government Code that agreements of all parties to move a case to the business court should be liberally supported ("A party may file an agreed notice of removal at any time during the pendency of the action. . . ."). Sec. 25A.006(f)'s phrasing also provides support for the perspective that Sec. 25A.021's reference to an "agreed motion" means agreed by the parties, not by the parties and the judge. Lastly, there does not appear to be a basis in Sec. 25A.021 for a rule that effectively gives the originating trial court judge controlling authority to deny a transfer agreed to by the parties that the regional presiding judge would otherwise approve.

Subsection (a)(ii) of Proposed Rule 363 responds to Section 44 of H.B. 40, which added Montgomery County, located in the Second Administrative Judicial Region to Division Eleven of the business court. Proposed Rule 363 differs from SCAC 363 in providing that the appropriate regional presiding judge to receive the initiating motion and decide whether the subject Pre-9/1/2024 Proceeding pending in Montogomery County should be transferred to the business court is the regional presiding judge of the Second Administrative Judicial Region rather than the regional presiding judge of the Eleventh Administrative Judicial Region. This choice reflects that it is the regional presiding judge of the Second Administrative Judicial region that has direct responsibility for the administration of the courts in that region, and who has the existing legal and working relationship with the judge of any originating trial court located in Montgomery County.

Subsection (b) – Proposed Rule 363 and SCAC 363 are identical in their wording. Each provides for the regional presiding judge referenced in Subsection (a) to receive and hold a hearing on the agreed motion to transfer, and to make a record of the hearing. But, as noted in Subsection (a), for a Pre-9/1/2024 Proceeding pending before a trial court in Montgomery County, Proposed Rule 363 refers the motion to the regional presiding judge of the Second Judicial Administrative Region, whereas SCAC 363 would refer the motion to the regional presiding judge of the Eleventh Judicial Administrative Region.

Subsection (c) – The wording of Subsection (c)(i) appearing in each of Proposed Rule 363 and SCAC 363 is identical, requiring the regional presiding judge, to "consult with the administrative presiding judge of

the business court as to its capacity to accept the transfer of the action without impairing its efficiency and effectiveness" prior to making the decision to approve or deny the agreed motion to transfer. This satisfies the requirement of Sec. 25A.021 that the supreme court in adopting rules "consider the capacity of the business court to accept the transfer of the action without impairing the business court's efficiency and effectiveness in resolving actions commenced on or after September 1, 2024." It also recognizes that if the business court does not have the capacity to accept Pre-9/1/2024 Proceedings at a given time, the administrative presiding judge of the business court will know that and communicate that fact to the regional presiding judge hearing the matter, allowing a swift and efficient conclusion to the process.

Subsections (c)(ii), (iii) and (iv) of Proposed Rule 363 differ from SCAC 363(c) in several important respects. Proposed Rule 363:

- Adds in Subsection (c)(ii)(a) the requirement from Sec. 25A.021 that the decision to grant a transfer of a Pre-9/1/2024 Proceeding to the business court must be based upon a determination that the case comports with the jurisdiction of the business court.
- Adds in Subsection (c)(ii)(b) the requirement from Sec. 25A.021 that the decision to grant a transfer of a Pre-9/1/2024 Proceeding to the business court must be based upon a determination (in this instance derived from the regional presiding judge's consultation with the presiding administrative judge of the business court) that the business court has capacity to accept the transfer without impairing its efficiency.
- In Subsection (c)(ii)(c) changes SCAC 363(c)(ii)(a)'s use of "or" and commas to create three discrete tests, each of which would individually be sufficient (SCAC 363: "whether the case involves complex civil issues, has been pending for some length of time without resolution, **or** involves issues that have proven difficult for a district court to resolve because of the other demands . . .") to use "and" so that all of the listed conditions must be present to support the transfer (Proposed Rule 363: "whether the case involves complex civil issues, has been pending for some length of time without resolution, **and** has proven difficult for a district court to resolve because of the other demands . . .). Proposed Rule 363 more accurately tracks the word usage and meaning in Sec. 25A.021 that the referenced cases that are to be prioritized have all three characteristics ("complex civil actions of longer duration that have proven difficult for a district court to resolve because of the other demands . . .).
- In Subsection (c)(iii) requires the regional presiding judge in determining whether to grant or deny a transfer request to prioritize cases described at (c)(ii)(c), as expressly required by Sec. 25A.021 ("When adopting rules under this section, the supreme court shall: (1) prioritize complex civil actions of longer duration that have proven difficult for a district court to resolve because of the other demands on the district court's caseload; . . .), whereas SCAC 363 omits any reference to prioritization of specific types of cases.
- In Subsection (c)(iv) Proposed Rule 363 describes the procedure to be followed by the regional presiding judge if the motion to transfer is denied (return "to the court in which the case is pending for further handling"), and addresses the question of whether and when the parties might again move to transfer the case the business court (only upon presentation of "compelling evidence of materially changed circumstances affecting the case or in the capacity of the business court to receive transfers of such proceedings without impairing the business court's efficiency and effectiveness").

Subsection (d) – Subsection (d) of Proposed Rule 363 addresses the requirement of Sec. 25A.021 that a Pre-9/1/2024 Proceeding may only be transferred to the business court "upon . . . permission of the

business court under rules adopted by the supreme court for the purpose." SCAC 363 does not reference the concept of the business court's permission being required for a transfer to be authorized or address the process by which that permission is to be established.

Proposed Rule 363(d) addresses the gating question of "who is to go first?" by providing for the regional presiding judge's decision to grant the agreed transfer motion based upon the considerations set forth in the rule to occur prior to the determination of the business court's permission for the transfer. This recognizes that if the regional presiding judge denies the motion to transfer, there is no transfer for the business court to permit. If the business court's lack of capacity to accept transfers of Pre-9/1/2024 Proceedings that are likely to soon move to trial will be the deciding consideration, that information is being provided to the regional presiding judge early in the process pursuant to Proposed Rule 363(c)(i), allowing the regional presiding judge to efficiently deny the motion to transfer.

If the regional presiding judge grants the agreed motion to transfer the Pre-9/1/2024 Proceeding to the business court, Proposed Rule 363(d)(i) and (ii) empower the administrative presiding judge of the business court to engage with the parties to the proceeding to the extent considered necessary or helpful to reach a conclusion as to whether the proceeding is appropriate for transfer to, and efficient disposition by, the business court. The use of the word "permission" in Sec. 25A.021 implies that the judge has broad discretion in making the determination, rather than being expected to apply hard and fast rules to making an objective decision. Subsections (d)(i) and (ii) authorize the administrative presiding judge to take a number of actions to support the exercise of that discretion, including:

- Considering portions of the record of the action as are considered relevant;
- Holding telephone or in-person conferences with counsel;
- Ordering a further motion and responses; and
- Providing further instructions to the parties.

As an example, the business court has established a number of procedures, policies and practices designed to move cases more rapidly and efficiently to and through trial. By the time an action originally filed in the business court is approaching trial it is likely to have accumulated a number of orders and rulings that may materially impact how a trial, particularly a jury trial, is to be conducted by the business court. The administrative presiding judge of the business court may want to evaluate the status of the action relative to those issues, and may seek the agreement of the parties to those kinds of orders and rulings, as a condition to granting the business court's permission. Similarly, the Pre-9/1/2024 Proceeding in the originating trial court may have accumulated a number of pending motions that have not been decided. The administrative presiding judge of the business court may seek to evaluate those motions and the potential for their efficient resolution through examination of the case file and discussions with counsel.

Subsection (e) – Subsection (e) of Proposed Rule 363, addressing the procedure to be followed by the clerk of the business court if the business court's permission to transfer a Pre-9/1/2024 Proceeding is granted, is identical to Subsection (d) of SCAC 363.

Subsection (f) – Subsection (f) provides that the decision of the regional presiding judge to grant or deny an agreed motion to transfer to the business court of a Pre-9/1/2024 Proceeding and the decision of the administrative presiding judge to grant or deny the business court's permission for such a transfer are not appealable. Given the intent evident in Sec. 25A.021 to create a secondary path for access to the business court by parties to proceedings begun prior to September 1, 2024, and that the acceptance of those proceedings by the business court should not impair the court's efficiency and effectiveness in

handling the post-9/1/2024 actions that are to remain the court's primary focus, there is not a basis in the language of the statute or in its policy for granting appeal rights to these decisions.

Attachment C: Proposed TRCP Section 363 - Materials Supporting Supreme Court Advisory Committee Meeting held June 27, 2025

SCAC Discussion and Proposed Rule:

8. Agreed transfers of cases pending before September 1, 2024, to business court. Proposed Rule 363 implements the Legislature's directive in HB 40, §56 to adopt rules to transfer "a civil action commenced before September 1, 2024, that is within the jurisdiction of the business court … on an agreed motion of a party and permission of the business court." Proposed Rule 363 provides for an agreed-motion process first to the judge of the court in which the case is pending and ultimately referred to the regional presiding judge for that court. It includes the legislative considerations for deciding whether to transfer the case, and provides a procedure for effecting the transfer if the motion is granted. It is similar to the process for recusal and disqualification in Rule 18a but is more streamlined for this particular situation. We considered including these provisions in current Rule 356, which may be preferable, but would require a restructuring of that rule, which is currently designed for transfers initiated by a court rather than the parties. The subcommittee points out that HB 40 uses the term "district court" in the factors to be considered but does not limit this transfer provision to district courts. If the intention is to limit this provision to district courts, the rule can be further simplified by changing references to the "court in which the action is pending" to "district judge."

RULE 363. TRANSFER OF CASES PENDING BEFORE SEPTEMBER 1, 2024, TO BUSINESS COURT.

(a) Agreed motion. On agreed motion of the parties, the presiding judge for the administrative judicial region in which a case is pending may order transfer of a suit filed before September 1, 2024, that is within the business court's jurisdiction to the business court.

(i) The motion should be filed with the court in which the case is pending and

(ii) The judge should sign and file with the clerk an order indicating whether the judge agrees to transfer to the business court and referring the motion to the regional presiding judge.

(b) Notice and Hearing. The regional presiding judge must notify all parties of the transfer request and set a hearing on the transfer request, and a record should be made of the hearing.

(c) Transfer decision.

(i) The regional presiding judge should consult with the presiding judge of the business court as to its capacity to accept the transfer of the action without impairing its efficiency and effectiveness.

(ii) Both the judge in which the case is pending and the regional presiding judge should consider:

(a) whether the case involves complex civil issues, has been pending for some length of time without resolution, or involves issues that have proven difficult for a district court to resolve because of the other demands on the district court's caseload; or

(b) whether the transfer will ensure the facilitation of the fair and efficient administration of justice.

(d) Clerk Duties. The business court clerk must assign the action to the appropriate operating division of the business court. If the division has more than one judge, then the clerk must randomly assign the action to a specific judge within that division.

Notes and Comments

Comment to 2025 change: To incorporate Section 56 of H.B. 40, 89th Legislative Session. For cases pending in Montgomery County, the agreed motion should be referred to the Eleventh Administrative Judicial Region. The authorization for this transfer option expires September 1, 2035.

Attachment D – Legislative History of HB 40, Section 56

HB 40 (2025 Texas Legislature) as passed by each chamber on June 1, 2025 and signed by Gov. Abbott

SECTION 56. Chapter 25A, Government Code, is amended by adding Section 25A.021 to read as follows:

Sec. 25A.021. ACTIONS COMMENCED BEFORE SEPTEMBER 1, 2024. (a) Notwithstanding Section 8, Chapter 380 (H.B. 19), Acts of the 88th Legislature, Regular Session, 2023, a civil action commenced before September 1, 2024, that is within the jurisdiction of the business court may be transferred to and heard by the business court on an agreed motion of a party (emphasis added) and permission of the business court under rules adopted by the supreme court for the purpose. When adopting rules under this section, the supreme court shall:

(1) prioritize complex civil actions of longer duration that have proven difficult for a district court to resolve because of the other demands on the district court's caseload;

(2) consider the capacity of the business court to accept the transfer of the action without impairing the business court's efficiency and effectiveness in resolving actions commenced on or after September 1, 2024; and

(3) ensure the facilitation of the fair and efficient administration of justice.

(b) This section expires September 1, 2035.

SECTION 72. Except as provided by Section 25A.021, Government Code, as added by this Act, the changes in law made by this Act apply only to civil actions commenced on or after September 1, 2024.

On May 12, 2025, as HB 40 was being considered on the floor of the House, a floor amendment proposed by Rep. Landgraf was introduced, and passed, that deleted Section 56 and revised Section 72 to delete reference to the new Section 25A.021, so the version of HB 40 considered by the Senate did not include any reference to a new Section 25A.021 providing for the business court to accept transfers of actions commenced prior to September 1, 2024 in the version of HB 40 that the Senate passed on May 28, 2025.

On May 30, 2025 the House refused to concur in certain of the amendments to HB 40 made by the Senate and a conference committee was authorized by each House. During the conference reconciliation process on May 31, 2025, the text of Section 56 was added back to the Bill without any change from the text previously deleted by Rep. Landgraf. Because the new Section 56 of HB 40 agreed to by the conferees had not appeared in either the House or Senate versions of the Bill as passed by those chambers, supermajority votes waiving the rules of each chamber were required on June 1, 2025, the last day of the session, in order to successfully add Section 56 to HB 40.

HB 40 (2025 Texas Legislature) Committee Substitute as reported out of House Committee on the Judiciary and Civil Jurisprudence on April 14, 2025 and filed with Committee Coordinator on May 6, 2025, reflecting revision by Rep. Landgraf (to require an agreed motion) and Texas Legislative Council:

SECTION 56. Chapter 25A, Government Code, is amended by adding Section 25A.021 to read as follows:

Sec. 25A.021. ACTIONS COMMENCED BEFORE SEPTEMBER 1, 2024. (a) Notwithstanding Section 8, Chapter 380 (H.B. 19), Acts of the 88th Legislature, Regular Session, 2023, a civil

action commenced before September 1, 2024, that is within the jurisdiction of the business court may be transferred to and heard by the business court on an agreed motion of a party (emphasis added) and permission of the business court under rules adopted by the supreme court for the purpose. When adopting rules under this section, the supreme court shall:

(1) prioritize complex civil actions of longer duration that have proven difficult for a district court to resolve because of the other demands on the district court 's caseload;

(2) consider the capacity of the business court to accept the transfer of the action without impairing the business court 's efficiency and effectiveness in resolving actions commenced on or after September 1, 2024; and

(3) ensure the facilitation of the fair and efficient administration of justice.

(b) This section expires September 1, 2035.

SECTION 72. Except as provided by Section 25A.021, Government Code, as added by this Act, the changes in law made by this Act apply only to civil actions commenced on or after September 1, 2024.

HB 40 (2025 Texas Legislature) as initially filed March 14, 2025 by Rep. Landgraf (identical to TBLF 2/4/2025 Draft)

SECTION 11. Chapter 25A, Government Code, is amended by adding Section 25A.0210 to read as follows:

Sec. 25A.0210. ACTIONS COMMENCED ON OR BEFORE SEPTEMBER 1, 2024. Notwithstanding Section 8, Chapter 380 (H.B. 19), Acts of the 88th Legislature, Regular Session, 2023, civil actions commenced prior to September 1, 2024, that are within the jurisdiction of the business court as described in Section 25A.004 may be transferred to and heard by the business court on motion of a party (emphasis added) and permission of the business court pursuant to rules of civil and judicial procedure to be adopted by the supreme court, which rules reflect due consideration of:

(1) priority for complex civil actions of longer duration that have proven difficult for a district court to resolve because of the other demands of its caseload;

(2) the capacity of the business court to accept such actions without impairing its efficiency and effectiveness in resolving actions commenced on or after September 1, 2024; and

(3) facilitation of the fair and efficient administration of justice.

SECTION 71. With the exception of Section 12 (*sic – s/b 11*) of this Act, the changes in law made by this Act apply to civil actions commenced on or after September 1, 2024, including actions pending in the business court on the effective date of this Act.

TBLF 2/4/2025 Draft of HB 40 as Delivered to Bill Sponsors

SECTION 12. Chapter 25A, Government Code, is amended by adding Section 25A.0210 to read as follows:

Sec. 25A.0210. ACTIONS COMMENCED ON OR BEFORE SEPTEMBER 1, 2024. Notwithstanding Section 8, Chapter 380 (H.B. 19), Acts of the 88th Legislature, Regular Session,

2023, civil actions commenced prior to September 1, 2024, that are within the jurisdiction of the business court as described in Section 25A.004 may be transferred to and heard by the business court on motion of a party (emphasis added) and permission of the business court pursuant to rules of civil and judicial procedure to be adopted by the supreme court, which rules reflect due consideration of:

(1) priority for complex civil actions of longer duration that have proven difficult for a district court to resolve because of the other demands of its caseload;

(2) the capacity of the business court to accept such actions without impairing its efficiency and effectiveness in resolving actions commenced on or after September 1, 2024; and

(3) facilitation of the fair and efficient administration of justice.

SECTION 72. With the exception of Section 12 of this Act, the changes in law made by this Act apply to civil actions commenced on or after September 1, 2024, including actions pending in the business court on the effective date of this Act.

HB 19 (2023 Texas Legislature)

The following sections of HB 19 creating the Business Court evidence the Legislature's strong policy position of supporting parties in moving cases to the Business Court. It has to be borne in mind that even if that is the Legislature's policy goal, the ability of the Business Court to respond is building up from a low level in September 2024 to what should be a much higher level over coming years.

Sec. 25A.006. INITIAL FILING; REMOVAL AND REMAND.

(f) A party may file an agreed notice of removal at any time during the pendency of the action. If all parties to the action have not agreed to remove the action, the notice of removal must be filed:

(1) not later than the 30th day after the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the business court's jurisdiction over the action; or

(2) if an application for temporary injunction is pending on the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the business court's jurisdiction over the action, not later than the 30th day after the date the application is granted, denied, or denied as a matter of law.

(k) The judge of a court in which an action is filed may request the presiding judge for the court's administrative region to transfer the action to the business court if the action is within the business court's jurisdiction. The judge shall notify all parties of the transfer request and request a hearing on the transfer request. After a hearing on the request, the presiding judge may transfer the action to the business court if the presiding judge finds the transfer will facilitate the fair and efficient administration of justice. The business court clerk shall assign an action transferred under this subsection to the appropriate division of the business court.

SECTION 8. The changes in law made by this Act apply to civil actions commenced on or after September 1, 2024.

Texas Business Law Foundation

The **Texas Business Law Foundation** (**TBLF**) is a Texas non-profit corporation organized in 1988 and supported by leading law firms, corporate law departments, professors of business law and individual attorneys throughout Texas. Its mission is to promote a favorable business climate in Texas through the establishment and maintenance of a modern, effective system of business laws.

For further information on the history, mission and accomplishments of the TBLF, see: https://www.jw.com/wp-content/uploads/2016/09/1239.pdf or contact its Chair, David Harrell, at https://www.troutman.com/professionals/david-e-harrell-jr.html.

The TBLF supported the drafting and filing of legislation proposing the creation of the Texas Business Court in the 2023 Texas Legislature, and in each prior legislative session beginning in 2015, including (i) presenting witnesses in support of those bills; (ii) preparing whitepaper reports addressing the policy and legal implications of the business court legislation; and deploying its lobbyists to engage directly with Governor Abbott, bill sponsors and other key legislators and their staffs.

The **TBLF Business Court Working Group** was organized in January 2024 to draw upon the expertise of trial partners of member firms, respected former judges and the leadership of the TBLF to (i) support the successful launch of the Texas Business Court and Fifteenth Court of Appeals; (ii) develop insights on questions raised by practice before the new courts; (iii) develop and provide well-informed commentary to the business court, the Fifteenth Court of Appeals and the Texas Supreme Court regarding procedural and administrative matters impacting the effectiveness of the new courts; (iv) prepare and lobby for passage of legislation filed in the 2025 and future sessions of the Texas Legislature to support the development of the new courts; and (v) prepare and disseminate articles and informational materials regarding the new courts to assist member firms, their clients and the legal profession generally to be effective in using the courts.

For further information about the Working Group, contact its chair, Mike Tankersley, at [redacted]

TBLF Member Firms – Alston & Bird LLP, Baker Botts LLP, Ben E. Keith Co., Bracewell LLP, Cantey Hanger LLP, Foley & Lardner LLP, Gibson, Dunn & Crutcher LLP, Greenberg Traurig, LLP, Hallett & Perrin, PLLC, Haynes & Boone LLP, Hunton Andrews Kurth LLP, Jackson Walker LLP, Katten Muchin Rosenman LLP, Kirkland & Ellis LLP, McDermott Will & Emery LLP, McKool Smith, Norton Rose Fulbright LLP, Otteson Shapiro LLP, Scheef & Stone LLP, Shearman & Sterling LLP, Sheppard Mullin LLP, Steptoe LLP, Weil Gotschal & Manges LLP, Vinson Elkins, LLP, Whitaker Chalk Swindle Schwartz PLLC

legislature, the governor, the chief justice of the supreme court, or the business court to ensure the business court meets existing and projected demand for the business court 's services in the following two years.

SECTION 56. Chapter 25A , Government Code, is amended by adding Section 25A.021 to read as follows:

Sec. 25A.021. ACTIONS COMMENCED BEFORE SEPTEMBER 1, 2024. (a) Notwithstanding Section 8, Chapter 380 (H.B. 19), Acts of the 88th Legislature, Regular Session, 2023, a civil action commenced before September 1, 2024, that is within the jurisdiction of the business court may be transferred to and heard by the business court on an agreed motion of a party and permission of the business court under rules adopted by the supreme court for the purpose. When adopting rules under this section, the supreme court shall:

(1) prioritize complex civil actions of longer duration that have proven difficult for a district court to resolve because of the other demands on the district court 's caseload;

(2) consider the capacity of the business court to accept the transfer of the action without impairing the business court 's efficiency and effectiveness in resolving actions commenced on or after September 1, 2024; and

(3) ensure the facilitation of the fair and efficient administration of justice.

(b) This section expires September 1, 2035.

SECTION 57. Section 37.001 (a), Government Code, is amended to read as follows:

(a) This chapter applies to a court in this state, other

Tab III- Code of Judicial Conduct

MEMORANDUM

TO: Supreme Court Advisory Committee

FROM: JCC Rules Task Force

DATE: August 22, 2025

RE: Revisions to Code of Judicial Conduct Based on SB 293

The Texas Supreme Court made the following referral on June 25, 2025:

> **Code of Judicial Conduct.** SB 293 amends Section 33.001(b) of the Government Code to define more specifically "wilful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties," as that term is used in the Texas Constitution. The Conduct Commission Procedural Rules Task Force should study whether the Court should amend the Code of Judicial Conduct in response and draft any recommended amendments. The Committee should review the Task Force's recommendations and proposed rules and should conclude its work at the August 29, 2025 meeting.

A copy of the Code is attached as **Exhibit A**. The Task Force provides the following analysis and recommendations.

Under Article V, Section 1-a(6)(A) of the Texas Constitution, a judge may be removed from office for "wilful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, wilful violation of the Code of Judicial Conduct, or wilful or persistent conduct that is clearly inconsistent with the proper performance of [a judge's] … duties or casts public discredit upon the judiciary or administration of justice."

The Government Code further defines "wilful or persistent conduct that is clearly inconsistent with the performance of a judge's duties." *See* Tex. Gov't Code § 33.001(b). Among other things, this term is defined as "wilful, persistent, and unjustifiable failure to timely execute the business of the court, considering the quantity and complexity of the business …." *Id.* at § 33.001(b)(1).

Effective September 1, 2025, SB 293 amends subsection (b)(1)'s definition to add the underlined text so that it reads as follows: "wilful, persistent, and unjustifiable failure to timely execute the business of the court, considering the quantity and complexity of the business***, including failure to meet deadlines, performance measures or standards, or clearance rate requirements set by statute, administrative rule, or binding court order.***" SB 293 also amends Chapter 23 of the Government Code to create specific deadlines for ruling on summary judgment motions (among other requirements applied to courts).

As currently drafted, Canon 3B(9) of the Code of Judicial Conduct states: "A judge should dispose of all judicial matters promptly, efficiently, and fairly." The Code itself does not define or use the statutory term "wilful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties."

Given that the Code has not defined or used the term "wilful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties," SB 293's amendment of that term is not necessarily a reason by itself to amend the Code to add the new statutory definition. But a larger consideration is the benefit of alerting judges, attorneys, and litigants to consult Government Code definitions that inform the meaning of the Code and its application in proceedings involving the Judicial Conduct Commission.

To that end, the Task Force recommends amending the Code's Preamble to add the following underlined text: "The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards ***and the standards set forth in Section 1-a, Article V, Texas Constitution and in Chapters 22, 23, and 33, Texas Government Code.***"

For Committee discussion: Should additional statutory provisions be referenced in the Preamble in addition to those referenced from the Government Code?

For Committee discussion: In light of new mandatory deadlines imposed by SB 293, should Canon 3B(9) be modified as follows: "A judge ~~should~~ ***shall*** dispose of all judicial matters promptly, efficiently and fairly."

The Task Force also considered whether a further definition of the terms "wilful or persistent" is warranted, and concluded that it is not. The Task Force recognizes that line-drawing challenges may be presented by broad terms such as

"wilful" or "persistent." For example: Can a single missed deadline satisfy this standard?

Ultimately, the Task Force concludes that this inquiry is so unavoidably fact-specific and context-dependent that attempts to further define "wilful" or "persistent" likely would create more problems than they would solve by impinging on judicial independence, and on the flexibility and discretion needed to review and address judicial conduct in particular circumstances. *See* Canon 8A.

SB 293's amendment to Section 33.001(b) of the Texas Government Code clarifies and elaborates upon the scope of "conduct that is clearly inconsistent with the proper performance of a judge's duties" and thus sanctionable under Article V, Section 1-a(6) of the Texas Constitution if it is "wilful or persistent." But the amendment does not alter or define the longstanding phrase "wilful or persistent." Amending the Code's Preamble to alert judges, counsel, and litigants of the scope of sanctionable conduct in Section 33.001(b) is therefore sufficient to address SB 293.

If a determination ultimately is made that the Code should be amended to expressly include the term "wilful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties," then this could be accomplished by modifying:

- Canon 8A to add a paragraph directly before the last paragraph to identify the possible removal/discipline/censure consequences of engaging in "wilful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties;" and

- Canon 8B to define that phrase in accordance with Section 33.001(b)'s modified statutory definition.

Exhibit A

TEXAS CODE OF JUDICIAL CONDUCT

(As amended by the Supreme Court of Texas through September 1, 2024)

Preamble

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code of Judicial Conduct are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

Canon 1: Upholding the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved. The provisions of this Code are to be construed and applied to further that objective.

Canon 2: Avoiding Impropriety and the Appearance of Impropriety in All of the Judge's Activities

A. A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. A judge shall not knowingly hold membership in any organization that practices discrimination prohibited by law.

COMMENT

Consistent with section 253.1612 of the Texas Election Code, the Code of Judicial Conduct does not prohibit a joint campaign activity conducted by two or more judicial candidates.

Canon 3: Performing the Duties of Judicial Office Impartially and Diligently

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. Judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply:

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.

(2) A judge should be faithful to the law and shall maintain professional competence in it, including by meeting all judicial-education requirements set forth in governing statutes or rules. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice.

(6) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

(7) A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This requirement does not preclude legitimate advocacy when any of these factors is an issue in the proceeding.

(8) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

(a) communications concerning uncontested administrative or uncontested procedural matters;

(b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter

hear any contested matters between the parties except with the consent of all parties;

(c) obtaining the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond;

(d) consulting with other judges or with court personnel;

(e) considering an *ex parte* communication expressly authorized by law.

(9) A judge should dispose of all judicial matters promptly, efficiently and fairly.

(10) A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. This prohibition applies to any candidate for judicial office, with respect to judicial proceedings pending or impending in the court on which the candidate would serve if elected. A judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge or judicial candidate is a litigant in a personal capacity.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.

C. Administrative Responsibilities.

(1) A judge should diligently and promptly discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge should require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

(5) A judge shall not fail to comply with Rule 12 of the Rules of Judicial Administration,

knowing that the failure to comply is in violation of the rule.

D. Disciplinary Responsibilities.

(1) A judge who receives information clearly establishing that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the State Commission on Judicial Conduct or take other appropriate action.

(2) A judge who receives information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action.

COMMENT

It is not a violation of Canon 3B(8) for a judge presiding in a statutory specialty court, as defined in Texas Government Code section 121.001, to initiate, permit, or consider any ex parte communications in a matter pending in that court.

Canon 4: Conducting the Judge's Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Obligations

A. Extra-Judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or

(2) interfere with the proper performance of judicial duties.

B. Activities to Improve the Law. A judge may:

(1) speak, write, lecture, teach and participate in extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code; and,

(2) serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He or she may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system and the administration of justice.

C. Civic or Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the

performance of judicial duties. A judge may serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the profit of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly or frequently engaged in adversary proceedings in any court.

(2) A judge shall not solicit funds for any educational, religious, charitable, fraternal or civic organization, but may be listed as an officer, director, delegate, or trustee of such an organization, and may be a speaker or a guest of honor at an organization's fund raising events.

(3) A judge should not give investment advice to such an organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

D. Financial Activities.

(1) A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of the judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves. This limitation does not prohibit either a judge or candidate from soliciting funds for appropriate campaign or officeholder expenses as permitted by state law.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a business. A judge shall not be an officer, director or manager of a publicly owned business. For purposes of this Canon, a "publicly owned business" is a business having more than ten owners who are not related to the judge by consanguinity or affinity within the third degree of relationship.

(3) A judge should manage any investments and other economic interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge should divest himself or herself of investments and other economic interests that might require frequent disqualification. A judge shall be informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to be informed about the personal economic interests of any family member residing in the judge's household.

(4) Neither a judge nor a family member residing in the judge's household shall accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to the judge; books and other resource materials supplied by publishers on a complimentary basis for official use; or an invitation to the judge and spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or a family member residing in the judge's household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a gift from a friend for a special occasion such as a wedding, engagement, anniversary, or birthday, if the gift is fairly commensurate with the occasion and the relationship; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a family member residing in the judge's household may accept any other gift, bequest, favor, or loan only if the donor is not a party or person whose interests have come or are likely to come before the judge;

(d) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties.

E. Fiduciary Activities.

(1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

F. Service as Arbitrator or Mediator. An active full-time judge shall not act as an arbitrator or mediator for compensation outside the judicial system, but a judge may encourage settlement in the performance of official duties.

G. Practice of Law. A judge shall not practice law except as permitted by statute or this Code. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

H. Extra-Judicial Appointments. Except as otherwise provided by constitution and statute, a judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his or her country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

COMMENT TO 2000 CHANGE

This change is to clarify that a judge may serve on the Texas Board of Criminal Justice.

I. Compensation, Reimbursement and Reporting.

(1) Compensation and Reimbursement. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's family. Any payment in excess of such an amount is compensation.

(2) Public Reports. A judge shall file financial and other reports as required by law.

Canon 5: Refraining from Inappropriate Political Activity

(1) A judge or judicial candidate shall not:

(i) make pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge;

(ii) knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent; or

(iii) make a statement that would violate Canon 3B(10).

(2) A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party. A judge or judicial candidate may attend political events and express his or her views on political matters in accord with this Canon and Canon 3B(10).

(3) A judge shall resign from judicial office upon becoming a candidate in a contested election for a non-judicial office either in a primary or in a general or in a special election. A judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention or while being a candidate for election to any judicial office.

(4) A judge or judicial candidate subject to the Judicial Campaign Fairness Act, Tex. Elec. Code §253.151, *et seq.* (the "Act"), shall not knowingly commit an act for which he or she knows the Act imposes a penalty. Contributions returned in accordance with Sections 253.155(e), 253.157(b) or 253.160(b) of the Act are not a violation of this paragraph.

(5) A judge or judicial candidate shall not knowingly make a false declaration on a statutorily required application for a place on the ballot for any of the courts listed in Canon 6A(1).

COMMENT

A statement made during a campaign for judicial office, whether or not prohibited by this Canon, may cause a judge's impartiality to be reasonably questioned in the context of a particular case and may result in recusal.

Consistent with section 253.1612 of the Texas Election Code, the Code of Judicial Conduct does not prohibit a joint campaign activity conducted by two or more judicial candidates.

Subpart (5) Canon 5 is added to reflect new statutory requirements relating to applications for judicial office. See Tex. Elec. Code § 141.0311; Tex. Gov't Code § 33.032(i).

Canon 6: Compliance with the Code of Judicial Conduct

A. The following persons shall comply with all provisions of this Code:

(1) An active, full-time justice or judge of one of the following courts:

(a) the Supreme Court,

(b) the Court of Criminal Appeals,

(c) courts of appeals,

(d) district courts,

(e) criminal district courts,

(f) statutory county courts,

(g) statutory probate courts, and

(h) the business court.

(2) A full-time commissioner, master, magistrate, or referee of a court listed in (1) above.

B. A County Judge who performs judicial functions shall comply with all provisions of this Code except the judge is not required to comply:

(1) when engaged in duties which relate to the judge's role in the administration of the county;

(2) with Canons 4D(2), 4D(3), or 4H;

(3) with Canon 4F, unless the court on which the judge serves may have jurisdiction of the

matter or parties involved in the arbitration or mediation;

(4) with Canon 4G, except practicing law in the court on which he or she serves or in any court subject to the appellate jurisdiction of the county court, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.

(5) with Canon 5(3).

C. Justices of the Peace and Municipal Court Judges.

(1) A justice of the peace or municipal court judge shall comply with all provisions of this Code, except the judge is not required to comply:

(a) with Canon 3B(8) pertaining to *ex parte* communications; in lieu thereof a justice of the peace or municipal court judge shall comply with 6C(2) below;

(b) with Canons 4D(2), 4D(3), 4E, or 4H;

(c) with Canon 4F, unless the court on which the judge serves may have jurisdiction of the matter or parties involved in the arbitration or mediation; or

(d) if an attorney, with Canon 4G, except practicing law in the court on which he or she serves, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.

(e) with Canons 5(3).

(2) A justice of the peace or a municipal court judge, except as authorized by law, shall not directly or indirectly initiate, permit, nor consider *ex parte* or other communications concerning the merits of a pending judicial proceeding. This subsection does not prohibit communications concerning:

(a) uncontested administrative matters,
(b) uncontested procedural matters,

(c) magistrate duties and functions,

(d) determining where jurisdiction of an impending claim or dispute may lie,

(e) determining whether a claim or dispute might more appropriately be resolved in some other judicial or non-judicial forum,

(f) mitigating circumstances following a plea of nolo contendere or guilty for a fine- only offense, or

(g) any other matters where *ex parte* communications are contemplated or authorized by law.

D. A Part-time commissioner, master, magistrate, or referee of a court listed in Canon 6A(1) above:

(1) shall comply with all provisions of this Code, except he or she is not required to comply with Canons 4D(2), 4E, 4F, 4G or 4H, and

(2) should not practice law in the court which he or she serves or in any court subject to the appellate jurisdiction of the court which he or she serves, or act as a lawyer in a proceeding in which he or she has served as a commissioner, master, magistrate, or referee, or in any other proceeding related thereto.

E. A Judge Pro Tempore, while acting as such:

(1) shall comply with all provisions of this Code applicable to the court on which he or she is serving, except he or she is not required to comply with Canons 4D(2), 4D(3), 4E, 4F, 4G or 4H, and

(2) after serving as a judge pro tempore, should not act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto.

F. Any Senior Judge, or a former appellate or district judge, or a retired or former statutory county court judge who has consented to be subject to assignment as a judicial officer:

(1) shall comply with all the provisions of this Code except he or she is not required to comply with Canon 4D(2), 4E, 4F, 4G, or 4H, but

(2) should refrain from judicial service during the period of an extra-judicial appointment permitted by Canon 4H.

G. Candidates for Judicial Office.

(1) Any person seeking elective judicial office listed in Canon 6A(1) shall be subject to the same standards of Canon 5 that are required of members of the judiciary.

(2) Any judge or person seeking elective judicial office listed in Canon 6A(1) who violates this Code shall be subject to sanctions by the State Commission on Judicial Conduct.

(3) Any lawyer who is a candidate seeking judicial office who violates Canon 5 or other relevant provisions of this Code is subject to disciplinary action by the State Bar of Texas.

(4) The conduct of any judge or person seeking elective judicial office may be subject to review by the Secretary of State, the Attorney General, or the local District Attorney for appropriate action, as authorized by other statute or rule.

H. Attorneys.

Any lawyer who contributes to the violation of Canons 3B(7), 3B(10), 4D(4), 5, or

6C(2), or other relevant provisions of this Code, is subject to disciplinary action by the State Bar of Texas.

Canon 7: Effective Date of Compliance

A person to whom this Code becomes applicable should arrange his or her affairs as soon as reasonably possible to comply with it.

Canon 8: Construction and Terminology of the Code

A. Construction.

The Code of Judicial Conduct is intended to establish basic standards for ethical conduct of judges. It consists of specific rules set forth in Sections under broad captions called Canons.

The Sections are rules of reason, which should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through the State Commission on Judicial Conduct. It is not designed or intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

B. Terminology.

(1) "Shall" or "shall not" denotes binding obligations the violation of which can result in disciplinary action.

(2) "Should" or "should not" relates to aspirational goals and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined.

(3) "May" denotes permissible discretion or, depending on the context, refers to action that is not covered by specific proscriptions.

(4) "De minimis" denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality.

(5) "Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a

party, except that:

(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(ii) service by a judge as an officer, director, advisor or other active participant, in an educational, religious, charitable, fraternal, or civic organization or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest; and

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

(6) "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian.
(7) "Knowingly," "knowledge," "known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(8) "Law" denotes court rules as well as statutes, constitutional provisions and decisional law.

(9) "Member of the judge's (or the candidate's) family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the candidate maintains a close familial relationship.

(10) "Family member residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides at the judge's household.

(11) "Require." The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

(12) "Third degree of relationship." The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece.

(13) "Retired Judge" means a person who receives from the Texas Judicial Retirement System, Plan One or Plan Two, an annuity based on service that was credited to the system. (Secs. 831.001 and 836.001, V.T.C.A. Government Code [Ch. 179, Sec. 1, 71st Legislature (1989)]

(14) "Senior Judge" means a retired appellate or district judge who has consented to be subject to assignment pursuant to Section 75.001, Government Code. [Ch. 359, 69th Legislature, Reg. Session (1985)]

(15) "Statutory County Court Judge" means the judge of a county court created by the legislature under Article V, Section 1, of the Texas Constitution, including county courts at law, statutory probate courts, county criminal courts, county criminal courts of appeals, and county civil courts at law. (Sec. 21.009, V.T.C.A. Government Code [Ch. 2, Sec. 16.01(18), 71st Legislature (1989)])

(16) "County Judge" means the judge of the county court created in each county by Article V, Section 15, of the Texas Constitution. (Sec. 21.009, V.T.C.A. Government Code [Ch. 2, Sec. 16.01(18), 71st Legislature (1989)])

(17) "Part-time" means service on a continuing or periodic basis, but with permission by law to devote time to some other profession or occupation and for which the compensation for that reason is less than that for full-time service.

(18) "Judge Pro Tempore" means a person who is appointed to act temporarily as a judge.

Tab IV- Confidential Identity in Court Proceedings

From: Legislative Mandates Subcommittee

To: Supreme Court Advisory Committee

Re: Confidential identities and other sensitive information.

SB 441 and SB 2373 amended the Civil Practice & Remedies Code to create three new civil actions. They allow a claimant and require the court to use a pseudonym as a confidential identity in all proceedings in those actions, and require protection of other identifying information.

Both statutes take effect September 1. The Court asks SCAC whether Texas Rule of Civil Procedure 21c and Texas Rule of Appellate Procedure 9 should be changed or comments added to reference or reflect the statutes, and for recommended language.

We offer for SCAC discussion possible amendments to and comments on TRCP 79, TRCP 21c, TRAP 9, and TRJA 12.5.

First, existing Texas Rule of Civil Procedure 79 requires that a petition state the names of the parties and their residences, if known.

In addition to the three new CPRC sections, at least two existing Family Code sections and two existing CPRC sections authorize or require confidential identities in other situations and protection of other identifying information.

We propose amending TRCP 79 to reference statutory exceptions generally, and adding a comment noting these seven.

Second, courts also authorize use of confidential identities in other situations for good cause shown, balancing considerations of privacy and open courts.

We suggest that SCAC recommend amending TRCP 79 to expressly reference use of confidential identity for good cause shown. We offer possible Rule 79 and comment language.

We also provide sources of information on good cause confidentiality caselaw. This is in case the Court desires SCAC discussion of whether to go beyond referencing such confidentiality and develop a good cause for confidential identity rule of procedure. The Court has not asked SCAC to

develop such a rule; it would take more time to do so; and doing so is not subject to the September 1 effective dates of the new statutes.

Third, TRCP 21c defines “sensitive data,” prohibits its inclusion in most civil litigation filings, requires the filing party to redact sensitive data and to give notice to the clerk, and restricts remote access.

We recommend conforming TRCP 21c to the confidential identity statutes by adding telephone number and by broadening home address to address; amending the sensitive data list for clarity; and adding a comment referencing Rule 79.

Fourth, Texas Rule of Appellate Procedure 9.8 protects a minor’s identity in parental rights termination and juvenile court cases by requiring opinions to use an alias consisting of initials or a fictitious name to refer to the minor and if necessary to protect the minor’s identity, to refer to a family member.

We provide a draft amendment to TRAP 9.8 addressing protection in appellate proceedings involving other confidential identities.

TRAP 9.9 provides privacy protection for documents filed in civil cases generally, by requiring redaction.

We recommend that TRAP 9.9 be amended to conform to the amended TRCP sensitive data definition.

Finally, Texas Rule of Judicial Administration 9.5 sets out privacy exemptions of judicial records from the openness to the general public for inspection and copying that is otherwise required.

We recommend amending TRJA 9.5 to correspond to whatever amendments are made to TRCP 79 and 21c and TRAP 9.

1. Amend Rule 79 to conform to confidential identity statutes

Rule 79

Except to the extent confidential identity is authorized or required by statute, the petition shall state the names of the parties and their residences, if known, together with the contents prescribed in Rule 47 above. Upon notice of opposition to use of a confidential identity, petitioner shall promptly file a motion showing statutory authority.

Notes and comment: Statutes requiring or authorizing use of a confidential identity in civil litigation include Family Code section 109.002(d) (minors in appellate court opinions in suits affecting the parent-child relationship (SAPCR), including suits to terminate parental rights); Family Code section 56.01(j) (minor or minor's family in appellate court opinions related to juvenile court proceedings); Tex. Civ. Prac. & Rem. Code section 30.013 (sexual abuse of a minor); Tex. Civ. Prac. & Rem. Code 98.007(a) (human trafficking); Tex. Civ. Prac. & Rem. Code 98B.0021 (production, solicitation, disclosure or promotion of certain artificial intimate visual material); Tex. Civ. Prac. & Rem. Code 98B.0022 (reckless facilitation, by a website or application owner who knows the depicted person did not consent, of production or disclosure of, or processing or facilitation of payment for production or disclosure of, artificial intimate visual material; owner failure to remove or to provide and give notice of an easily accessible system for removal of such material upon request); and Tex. Civ. Prac. & Rem. Code 100B.002 (knowing or intentional dissemination of artificially generated media or a phishing communication for the purpose of financial exploitation).

Statutory context

SB441 at pp. 6-7 amended the CPRC to add sec. 98B.0021, imposing liability for "production, solicitation, disclosure or promotion" of certain "artificial intimate visual material."

SB 441 at pp. 7-8 also added sec. 98B.0022, which did two things relevant here. First, it imposed liability on "a person who owns an Internet website or application, including a social media platform" and "recklessly facilitates production or disclosure" or "recklessly processes or facilitates payment" for

production or disclosure of such material if the person “knows or disregards that the depicted person did not consent.”

Second, sec. 98B.0022 also made it a deceptive trade practice violation for the person who owns etc to fail to: remove the material within 72 hours of request; make an easily accessible system for removal requests; and provide clear and conspicuous notice of the removal process.

S.B. No. 2373 amended the CPRC to add chapter 100B. Sec. 100B.002 creates a cause of action for “a knowing or intentional dissemination of artificially generated media or a phishing communication for the purpose of financial exploitation.”

Each statute allows a claimant to use a confidential identity, defined as “the use of a pseudonym” and “the absence of any other identifying information, including address, telephone number and social security number.”

Each imposes duties on the court to

make the claimant aware he or she may use a confidential identity,

allow the claimant to use it in all filings and other documents presented to the court,

use it in all of the court’s proceedings and records, and

maintain the records in a manner that protects the confidential identity.

Each statute also

limits the persons authorized to use “the true identifying information about the claimant,”

requires the court to order that each such person not divulge the true identifying information, and

requires the court to hold a person who violates the order in contempt.

See SB 441 at pp 8-10, adding CPRC 98B.008. See SB 2373 at pp. 3-5, adding CPRC 100B.004.

Neither statute requires the Court to adopt related rules. New CPRC sec. 98B.008 (e) prohibits amending or adopting rules in conflict with that section.

The confidential identity language in these two 2025 bills closely tracks existing language in Tex. Civ. Prac. & Rem. Code 30.013 (sexual abuse of minors) and 98.007(a)(human trafficking).

2. Amend Rule 79 to reference good cause confidential identity?

The following assumes the statutory exception amendment and comment. It adds for discussion purposes language referencing in Rule 79 the common law/constitutional law "good cause exception" possibility.

We note that, in addition to referencing the existence of the "good cause exception," the Court might wish to consider adopting a rule of procedure specific to motions for leave to use a confidential identity for good cause under such exceptions. This was not a part of the Court's current request for SCAC advice, is not subject to the September 1 deadline, and would require more time to prepare for full discussion at a future SCAC meeting.

Rule 79

Except to the extent confidential identity is authorized or required by statute, or on leave of court for good cause shown, the petition shall state the names of the parties and their residences, if known, together with the contents prescribed in Rule 47 above. Upon notice of opposition to use of a confidential identity, petitioner shall promptly file a motion showing statutory authority or other good cause.

Notes and comment: Statutes requiring or authorizing use of a confidential identity in civil litigation include Family Code section 109.002(d) (minors in appellate court opinions in suits affecting the parent-child relationship (SAPCR), including suits to terminate parental rights); Family Code section 56.01(j) (minor or minor's family in appellate court opinions related to juvenile court proceedings); Tex. Civ. Prac. & Rem. Code section 30.013 (sexual abuse of a minor); Tex. Civ. Prac. & Rem. Code 98.007(a) (human trafficking); Tex. Civ. Prac. & Rem. Code 98B.0021 (production, solicitation, disclosure or promotion of certain artificial intimate visual material); Tex. Civ. Prac. & Rem. Code 98B.0022 (reckless facilitation, by a website or application owner who knows the depicted person did not consent, of production or disclosure of, or processing or facilitation of payment for production or disclosure of, artificial intimate visual material; owner failure to remove or to provide and give notice of an easily accessible system for removal of such material upon request); and Tex. Civ. Prac. & Rem. Code 100B.002 (knowing or intentional dissemination of artificially generated media or a phishing communication for the purpose of financial exploitation). Courts also permit use of a confidential identity for good cause shown.

Caselaw context

Confidential identity statutes override a general presumption of openness in judicial proceedings, with First Amendment implications, that parties must generally identify themselves in their pleadings.

Under exceptional circumstances, however, courts without statutory authority or direction may grant leave for persons to conceal their identities.

The exceptional circumstances include those where prosecution of the suit compels the plaintiff to disclose information "of the utmost intimacy." These circumstances are not exclusive. The test is a balancing of privacy interests against the presumption of openness.

The substantive issues that such motions present perhaps could only properly be addressed if, when and to the extent presented in a particular case or controversy. They certainly as a practical matter would be difficult to address by rule.

If the Court desires discussion in the upcoming SCAC meeting, perhaps the focus should be on whether it would be feasible and desirable to develop a rule of procedure for motions for leave to use a confidential identity.

Several sources on the law of anonymous pleading are available.

A very succinct and recent Texas source is Xavier Rodriguez's opinion in *Doe v. University of the Incarnate Word*, 2019 WL 6727875 (W.D. Tex.—San Antonio 12/10/2019), relying on and updating caselaw in *SMU Association of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 712 (5th Cir. 1979).

An extremely lengthy version is "The Law of Pseudonymous Litigation," a 2022 Hasting law review article by UCLA law professor Eugene Volokh, https://www.hastingslawjournal.org/wp-content/uploads/7.-Volokh_Final.pdf

Professor Volokh summarizes: "When may parties in American civil cases proceed anonymously? The answer turns out to be deeply unsettled."

He “aims to lay out the legal rules (such as they are) and the key policy arguments, in a way intended to be helpful to judges, lawyers, pro se litigants, and academics.” 33 pp. of appendices collect federal caselaw.

A web site collects pseudonymous pleadings in all 50 states:

https://withoutmyconsent.org/50state/filing-pseudonymously/by-state

Another law review article is Cassi Epstein, *Protecting Students' Privacy: Expanding the Use of Pseudonyms in Civil Litigation Concerning Sexual Assault at Colleges in the United States and Canada*, 12 PENN. ST. J. OF LAW & INT'L AFFAIRS 175 (Oct. 2024).

https://insight.dickinsonlaw.psu.edu/cgi/viewcontent.cgi?article=1367&context=jlia

In addition to the *University of the Incarnate Word* opinion, several Texas appellate opinions address pseudonym uses.

•*Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995), ruled that a newspaper could not be held liable for publishing information, not including a rape victim's name, that could allow the victim to be identified. It did not discuss the basis for allowing the plaintiff to proceed under a pseudonym.

•*Topheavy Studios, Inc. v. Doe*, No. 03-05-00022-CV, 2005 WL 1940159 (Tex. App.–Austin August 11, 2005, no pet.) (memo. op.), in plaintiff's suit to enjoin defendant from using topless video of her in video game, the appellate court held that the trial court's granting of plaintiff's motion to proceed under pseudonym was not reversible error. At p. 13, the Court wrote:

> Topheavy argues that the district court erred by allowing Doe to proceed under a pseudonym. Topheavy suggests that the order prevents it from being able to adequately investigate Doe's claims. Accordingly, it claims that the trial court's decision amounts to an unconstitutional gag order. However, the trial court's granting of Doe's motion to proceed under a pseudonym is an interlocutory order that is not appealable at this time. See Tex. Civ. Prac. & Rem. Code Ann. § 51.014 (West Supp. 2004-05).

> Even if the order were appealable, it does not appear that it would hinder Topheavy's ability to prepare an adequate defense. The order specifically allows for full discovery and states that Doe's true name may be used in depositions and in the investigation of the case as long as her name is given to only those individuals who must know her name in order to fully participate in the investigation. Essentially, the order only prevents the disclosure of Doe's true name to the media or in any public forum. We overrule Topheavy's fifth issue.

●In *Texas Voices for Reason and Justice, Inc. v. City of Argyle, et al.*, No. 02-16-00052-CV (Tex. App..–Fort Worth March 30, 2017, no pet.) (Memo. op.), the appellate court ruled that an organization is not required to obtain an order of the court before using pseudonyms for member litigants. The appellate court wrote, at pp. 7-8:

> In fact, even a named plaintiff (as opposed to a member of an association that is named as a plaintiff under the associational-standing doctrine, like TVRJ here) may proceed under a pseudonym in certain circumstances. *See*, *e.g.*, *Does I Through XXIII v. Advanced Textile Corp*., 214 F.3d 1058, 1070 (9th Cir. 2000) ("Article III's standing requirement does not prevent a court from allowing plaintiffs to proceed anonymously simply because plaintiffs seek to protect themselves from retaliation by third parties."); *Doe v. United Servs. Life Ins. Co.*, 123 F.R.D. 437, 439 (S.D.N.Y. 1988) (recognizing that although lawsuits are generally public events and the public has a legitimate interest in knowing pertinent facts, including party names, courts have allowed parties to use fictitious names under special circumstances, particularly when necessary to protect privacy); *Doe v. Deschamps*, 64 F.R.D. 652, 653 (D. Mont. 1974) (allowing pregnant plaintiffs challenging abortion regulations to proceed under pseudonyms); *Topheavy Studios, Inc. v. Doe*, No. 03-05-00022-CV, 2005 WL 1940159, at *7 (Tex. App.-Austin Aug. 11, 2005, no pet.) (mem. op.) (recognizing trial court order allowing plaintiff Doe to proceed under pseudonym did not hinder defendant's ability to prepare a defense because order "specifically allows for full discovery and states that Doe's true name may be used in depositions and in the investigation of the case as long as her name is given only to those individuals who must know her name in order to fully participate in the investigation," thus preventing the disclosure of Doe's true name only to the media or in any public forum); *Mother & Unborn*

Baby Care of N. Tex., Inc. v. Doe, 689 S.W.2d 336, 337 (Tex. App.-Fort Worth 1985, writ dism'd) (explaining pregnant and unmarried women used pseudonyms in filing suit against entity that they believed, after consulting Yellow Pages, performed abortions).

3. Amend TRCP 21c to conform sensitive data definition to statutes

Unlike existing TRCP 21c's "sensitive data" definition, the statutes include "telephone number" in the "other identifying information" to be kept confidential, along with the name.

The statutes also designate as other identifying information "address", rather than "home address" as existing TRCP 21c provides.

As for names, the existing rule's sensitive data definition only includes the name of a minor. It does not include uses of pseudonyms allowed by other statutes or leave of court.

The subcommittee recommends conforming Rule 21c to the statutes authorizing uses of pseudonyms and protecting related identifying information. If Rule 79 is to be amended to authorize uses of pseudonyms and protecting related confidential information by case-specific leave of court, Rule 21c should also be amended accordingly. Finally, we recommend a comment cross-referencing Rule 79.

We also regroup the sensitive data items to combine only those that are of a same type.

Query: who has what responsibility after-the-fact to protect identifying information if a document is filed that does not protect confidential identity?

RULE 21c. PRIVACY PROTECTION FOR FILED DOCUMENTS

(a) Sensitive Data Defined. Sensitive data consists of:

(1) a driver's license number, passport number, social security number, tax identification number, or similar government-issued personal identification number;

(2) a bank account number, credit card number, or other financial account number;

(3) a telephone number;

(4) a birth date;

(5) an address;

(6) the name of any person who was a minor when the underlying suit was filed, or of any person proceeding under a confidential identity under Rule 79; and

(7) any other information identifying a person proceeding under a confidential identity under Rule 79.

(b) Filing of Documents Containing Sensitive Data Prohibited. Unless and except to the extent that the inclusion of sensitive data is specifically required by a statute, court rule, or administrative regulation, an electronic or paper document, except for wills and documents filed under seal, containing sensitive data may not be filed with a court unless the sensitive data is redacted.

(c) Redaction of Sensitive Data; Retention Requirement. Sensitive data must be redacted by using the letter "X" in place of each omitted digit or character or by removing the sensitive data in a manner indicating that the data has been redacted. The filing party must retain an unredacted version of the filed document during the pendency of the case and any related appellate proceedings filed within six months of the date the judgment is signed.

(d) Notice to Clerk. If a document must contain sensitive data, the filing party must notify the clerk by:

(1) designating the document as containing sensitive data when the document is electronically filed; or

(2) if the document is not electronically filed, by including, on the upper left- hand side of the first page, the phrase: "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA."

(e) Non-Conforming Documents. The clerk may not refuse to file a document that contains sensitive data in violation of this rule. But the clerk may identify the error to be corrected and state a deadline for the party to resubmit a redacted, substitute document.

(f) Restriction on Remote Access. Documents that contain sensitive data in violation of this rule must not be posted on the Internet.

Notes and Comments

[we have deleted voluminous comments related to other 21c issues]

Comment to 2013 Change: Rule 21c is added to provide privacy protection for documents filed in civil cases.

Comment to 2025 Change: Statutes allow certain claimants to use pseudonyms and protect the confidentiality of other identifying information. Courts grant leave for other persons to do so. See comment to Rule 79.

4. Texas Rules of Appellate Procedure 9.8 and 9.9

TRAP 9.8 protects a minor's identity in certain appeals and original proceedings in an appellate court: 9.8(b) arising out of a case involving parental-rights termination. 9.8(c) arising out of a case under Title 3 of the Family Code --juvenile court cases.

9.8(a) defines an "alias" as "one or more of a person's initials or a fictitious name, used to refer to the person."

9.8(b) and 9.8(c) each require that all papers submitted to the court, except for the docketing statement identify the minor to be identified only with an alias unless the court orders otherwise.

Each also authorizes the court to order that the minor's parent or family member be identified only by alias if necessary to protect the minor's activity.

Each requires that all documents be redacted accordingly.

Each requires the appellate court in its opinion to use an alias to refer to the minor, and authorizes the court to identify the minor's parent or other family member only with an alias if necessary to protect the minor's identity.

We suggest amending to add a new 9.8(d) and renumber 9.8(d) as 9.8(e):

(d) Other confidential identity cases. In an appeal or an original proceeding in an appellate court, arising out of a case in which a person has been authorized under another statute or by court order for good cause to use a confidential identity:

(1) except for a docketing statement, in all papers submitted to the court, including all appendix items submitted with a brief, petition, or motion:

(A) a person must be identified only by the person's confidential identity; and

(B) all other identifying information must be redacted;

(2) the court must, in its opinion, use the confidential identity to refer to the person.

Tex. R. App. P. 9.9 applies to civil cases generally, and requires that sensitive data be redacted from documents filed in the appellate court. Rule 9.9(c) requires that “sensitive data must be redacted by using the letter “X” in place of each omitted digit or character or by removing the sensitive data in a manner indicating that the data has been redacted.” Rule 9.9(e) provides that documents containing sensitive data must not be posted on the Internet.

We recommend that the TRAP 9.9 sensitive data definition be amended to track any amendment to the TRCP 21c sensitive data definition.

The Texas Supreme Court issued Redaction Guidelines for Electronic Briefs

5. Texas Rule of Judicial Administration 9.5

Under Rule 12.4(a) of the Texas Rules of Judicial Administration:

“Judicial records other than those covered by Rules 12.3 and 12.5 are open to the general public for inspection and copying during regular business hours.”

Rule 12.5 sets out exemptions from disclosure, including

Rule 12.5(c): “Any personnel record that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy”;

Rule 12.5(d) “Any record reflecting any person’s home address, home or personal telephone number, social security number, or family members”;

Rule 12.5(i) “Any record that is confidential or exempt from disclosure under a state or federal constitutional provision, statute or common law, including ... (3) a trade secret or commercial or financial information made privileged or confidential by statute or judicial decision”].

Rule 12.6(d) provides that “If part of a requested record is subject to disclosure under this rule and part is not, the records custodian must redact the portion of the record that is not subject to disclosure, permit the remainder of the record to be inspected, and provide a copy if requested.”

Should the Court promulgate a procedure rule civil cases, requiring a claimant filing under a pseudonym to file a confidential document with the court that identifies the claimant, analogous to Tex. Code Crim. P. Section 57.02?

Tab V- Texas Rule of Evidence 404 and 405

TO: SCAC
FM: Evidence Subcommittee, Roger W. Hughes
Date: August 18, 2025

Re: Impact of HB 1778, on TRE 404 and 405.

Recommendation

1. The subcommittee's recommendation is that HB 1778 does not require amendments to TRE 404 (Evidence of character, crimes, or other acts) or TRE 405 (methods of proving character). HB 1778 amends Code of Criminal Procedure article 38.072 (admission of a minor victim's first outcry in sex crimes) and 38.37 (admission of other wrongs by the accused in sex crimes against minors). Previously, the statutory provisions co-existed in criminal cases; the committee's view is that HB1778's changes will not change that. Article 38.37(b) provides that it controls over TRE 404 and 405.

How the Legislature changes CCP art. 38.37 and 38.072

2. The text of TRE 404/405, former Code of Criminal Procedure art. 38.37 and art. 37.072, and pertinent parts of HB 1778 are attached as App. A, B, C, and D respectively.

3. Former CCP art. 38.37 provided that in certain sex crimes against minors, evidence of other crimes, wrongs, or acts committed by the defendant against the child was admissible for relevant matters, including (1) the defendant's or the child's state of mind, and (2) a previous or subsequent relationship between the defendant and the child. CCP art. 38.37, §1(a, b), §2(b). Such evidence was admissible notwithstanding TRE 404 or 405. CCP art. 38.37, §1(b), §2(b). However, CCP art. 38.37 did not limit the admissibility of evidence of extraneous crimes, wrongs, or acts under any other applicable law. CCP art. 38.37, §4.

   The state had to give notice of intent to use evidence admissible under art. 38.37, §§1 or 2, at least thirty (30) days before trial. CCP art. 38.37, §3. The judge then must find the evidence showed the evidence offered under §2 will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt. CCP art. 38.37, §2-a.

4. HB 1778 §4.05 amended CCP art. 38.37 to:
   a. Expand the list of crime to sexual offenses involving adults and minors.
   b. Change references from "child" to "victim."

c. If evidence is admitted, the court upon request of either party give a limiting instruction orally and in writing.
d. Remove requirements for notice or specific judicial findings.

5. Former CCP art. 37.072 made admissible the hearsay statements by minors or disabled persons in the listed sexual offenses against minors and disabled persons. It applied to statements made by the child to the first adult other than the defendant to whom the child made a statement about the offense. CCP art. 37.072, §2(a). Statements were not inadmissible if the court found the statement was reliable and the victim is available to testify in court or in any other manner provided by law. CCP art. 37.072, §2(b).

   To be admissible the victim's statement had to be (1) about the alleged offense, or (2) if offered during the punishment phase, about a crime, wrong, or other offense against the child who is the victim or another child under age 14, and also be admissible under art. 38.37, TRE 404, TRE 405, or other law. CCP art. 38.072, §2(a).

6. HB 1778 §4.02, §4.03:
   a. Amended §2(a) to apply CCP art 38.072 only to statements by the child or disabled person (1) describing the offense, or (2) if offered during punishment phase, describing a separate crime, wrong, or other act committed against the child, disabled person, or another child under age 18, which statement is admissible under art. 38.37, TRE 404, TRE 405, or other law.
   b. To be admissible, the statements must be made by the minor or disabled person against whom the charged or extraneous offense were allegedly committed and be made to the first adult to whom the child or disabled person made a statement about the charged or extraneous, crime, wrong or act.
   c. The court shall admit more than one statement if each statement describes different conduct by the defendant.

Discussion

7. The subcommittee concludes the changes to CCP art. 38.072 do not require changes to TRE 404 or 405. Article 38.072 is a hearsay exception that requires the statement also be admissible under TRE 404 and 405. It does not override them.

8. Because TRE 404(a)(3)(A) [admissibility of victim's traits] refers to TRE 412 for criminal cases, we may want to consider a change to conform to SB 535 and the new CCP art. 38.372. TRE 404(a)(3)(B) applies only to the victim's trait in homicide cases; that does not require a change. Art. 38.37 applies only to specific sex crimes.

9. The subcommittee concludes there is no reason to amend TRE 404 or 405. CCP art. 38.37 has always provided that it controls notwithstanding TRE 404 and 405. CCP art. 38.27 and TRE 404/405 coexisted peacefully and without confusion. One could argue the amendments to art. 38.37 will not cause confusion in criminal cases.

10. TRE 404(a)(5) defines "victim" as the alleged victim. We do not think that conflicts with HB 1778's changes.

11. TRE 404(b)(1) provides evidence of crimes, wrongs, or other acts is admissible to prove a person's character to show the person would have acted in accordance with that character on a specific occasion. Art. 38.37 changes that in specified sex crime cases. The subcommittee concludes a change to limit TRE 404(b)(1) to civil cases and criminal cases not within CCP art. 38.37 is necessary.

12. TRE 404(b)(2) provides such evidence may be admissible for specific purposes (e.g., motive, intent, preparation, absence of mistake, etc.). This does not conflict with CCP art. 38.37.

13. TRE 404(b)(2) requires the prosecutor give reasonable notice before trial of intent to use such evidence. That conflicted with the former CCP art. 38.37, §3, which required thirty days' notice pre-trial. HB 1778 no longer requires notice for cases commenced after 9/1/25. Arguably TRE 404(b)(2)'s reasonable notice rule is not pre-empted because the phrase "Notwithstanding Rules 404 and 405, Texas Rules of Evidence" applies only to the admissibility of evidence. CCP art. 38.37, §2(b); HB 1778, §4.05 §1(c). The subcommittee does not think trial judges will have a problem with this in criminal cases.

APPENDIX A – TRE 404, 405

Rule 404. Character Evidence; Crimes or Other Acts.

(a) Character Evidence.

(1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions for an Accused.*

(A) In a criminal case, a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.

(B) In a civil case, a party accused of conduct involving moral turpitude may offer evidence of the party's pertinent trait, and if the evidence is admitted, the accusing party may offer evidence to rebut it.

(3) Exceptions for a Victim.

(A) In a criminal case, subject to the limitations in Rule 412, a defendant may offer evidence of a victim's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.

(B) In a homicide case, the prosecutor may offer evidence of the victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(C) In a civil case, a party accused of assaultive conduct may offer evidence of the victim's trait of violence to prove self-defense, and if the evidence is admitted, the accusing party may offer evidence of the victim's trait of peacefulness.

(4) *Exceptions for a Witness.* Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(5) *Definition of "Victim."* In this rule, "victim" includes an alleged victim.

(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice in Criminal Case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On timely request by a defendant in a criminal case, the prosecutor must provide reasonable notice before trial that the prosecution intends to introduce such evidence — other than that arising in the same transaction — in its case-in-chief.

Rule 405. Methods of Proving Character.

(a) By Reputation or Opinion.

(1) *In General.* When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, inquiry may be made into relevant specific instances of the person's conduct.

(2) *Accused's Character in a Criminal Case.* In the guilt stage of a criminal case, a witness may testify to the defendant's character or character trait only if, before the day of the offense, the witness was familiar with the defendant's reputation or the facts or information that form the basis of the witness's opinion.

(b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

APPENDIX B – Former Tex. Code Crim. Proc. Art 38.37

Art. 38.37. Evidence of Extraneous Offenses or Acts.

Sec. 1.

(a) Subsection (b) applies to a proceeding in the prosecution of a defendant for an offense, or an attempt or conspiracy to commit an offense, under the following provisions of the Penal Code:

(1) if committed against a child under 17 years of age:

(A) Chapter 21 (Sexual Offenses);

(B) Chapter 22 (Assaultive Offenses); or

(C) Section 25.02 (Prohibited Sexual Conduct); or

(2) if committed against a person younger than 18 years of age:

(A) Section 43.25 (Sexual Performance by a Child);

(B) Section 20A.02(a)(5), (6), (7), or (8) (Trafficking of Persons);

(C) Section 20A.03 (Continuous Trafficking of Persons), if based partly or wholly on conduct that constitutes an offense under Section 20A.02(a)(5), (6), (7), or (8); or

(D) Section 43.05(a)(2) (Compelling Prostitution).

(b) Notwithstanding Rules 404 and 405, Texas Rules of Evidence, evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters, including:

(1) the state of mind of the defendant and the child; and

(2) the previous and subsequent relationship between the defendant and the child.

Sec. 2.

(a) Subsection (b) applies only to the trial of a defendant for:

(1) an offense under any of the following provisions of the Penal Code:

(A) Section 20A.02, if punishable as a felony of the first degree under Section 20A.02(b)(1) (Labor or Sex Trafficking of a Child or Disabled Individual);

(B) Section 21.02 (Continuous Sexual Abuse of Young Child or Disabled Individual);

(C) Section 21.11 (Indecency With a Child);

(D) Section 22.011(a)(2) (Sexual Assault of a Child);

(E) Sections 22.021(a)(1)(B) and (2) (Aggravated Sexual Assault of a Child);

(F) Section 33.021 (Online Solicitation of a Minor);

(G) Section 43.25 (Sexual Performance by a Child); or

(H) Section 43.26 (Possession or Promotion of Child Pornography), Penal Code; or

(2) an attempt or conspiracy to commit an offense described by Subdivision (1).

(b) Notwithstanding Rules 404 and 405, Texas Rules of Evidence, and subject to Section 2-a, evidence that the defendant has committed a separate offense described by Subsection (a)(1) or (2) may be admitted in the trial of an alleged offense described by Subsection (a)(1) or (2) for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant.

Sec. 2-a. Before evidence described by Section 2 may be introduced, the trial judge must:

(1) determine that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt; and

(2) conduct a hearing out of the presence of the jury for that purpose.

Sec. 3. The state shall give the defendant notice of the state's intent to introduce in the case in chief evidence described by Section 1 or 2 not later than the 30th day before the date of the defendant's trial.

Sec. 4. This article does not limit the admissibility of evidence of extraneous crimes, wrongs, or acts under any other applicable law.

Appendix C: Former Tex. Code Crim. Proc. Art 38.072

Art. 38.072. Hearsay Statement of Certain Abuse Victims. [Effective until September 1, 2025]

Sec. 1. This article applies to a proceeding in the prosecution of an offense under any of the following provisions of the Penal Code, if committed against a child younger than 18 years of age or a person with a disability:

(1) Chapter 21 (Sexual Offenses) or 22 (Assaultive Offenses);

(2) Section 25.02 (Prohibited Sexual Conduct);

(3) Section 43.25 (Sexual Performance by a Child);

(4) Section 43.05(a)(2) or (3) (Compelling Prostitution);

(5) Section 20A.02(a)(5), (6), (7), or (8) (Trafficking of Persons);

(6) Section 20A.03 (Continuous Trafficking of Persons), if based partly or wholly on conduct that constitutes an offense under Section 20A.02(a)(5), (6), (7), or (8); or

(7) Section 15.01 (Criminal Attempt), if the offense attempted is described by Subdivision (1), (2), (3), (4), (5), or (6) of this section.

Sec. 2.

(a) [2 Versions: As amended by Acts 2009, 81st Leg., ch. 284] This article applies only to statements that describe the alleged offense that:

(1) were made by the child or person with a disability against whom the offense was allegedly committed; and

(2) were made to the first person, 18 years of age or older, other than the defendant, to whom the child or person with a disability made a statement about the offense.

(a) [2 Versions: As amended by Acts 2009, 81st Leg., ch. 710] This article applies only to statements that:

(1) describe:

(A) the alleged offense; or

(B) if the statement is offered during the punishment phase of the proceeding, a crime, wrong, or act other than the alleged offense that is:

(i) described by Section 1;

(ii) allegedly committed by the defendant against the child who is the victim of the offense or another child younger than 14 years of age; and

(iii) otherwise admissible as evidence under Article 38.37, Rule 404 or 405, Texas Rules of Evidence, or another law or rule of evidence of this state;

(2) were made by the child against whom the charged offense or extraneous crime, wrong, or act was allegedly committed; and

(3) were made to the first person, 18 years of age or older, other than the defendant, to whom the child made a statement about the offense or extraneous crime, wrong, or act.

(b) A statement that meets the requirements of Subsection (a) is not inadmissible because of the hearsay rule if:

(1) on or before the 14th day before the date the proceeding begins, the party intending to offer the statement:

(A) notifies the adverse party of its intention to do so;

(B) provides the adverse party with the name of the witness through whom it intends to offer the statement; and

(C) provides the adverse party with a written summary of the statement;

(2) the trial court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement; and

(3) the child or person with a disability testifies or is available to testify at the proceeding in court or in any other manner provided by law.

Sec. 3. In this article, “person with a disability” means a person 13 years of age or older who because of age or physical or mental disease, disability, or injury is substantially unable to protect the person’s self from harm or to provide food, shelter, or medical care for the person’s self.

APPENDIX D: HB 1778, §4.02 §4.05, §4.08

HB 1778

SECTION 4.02. Section 2(a), Article 38.072, Code of Criminal Procedure, as amended by Chapters 284 (S.B. 643) and 710 (H.B. 2846), Acts of the 81st Legislature, Regular Session, 2009, is reenacted and amended to read as follows:

(a) This article applies only to statements that:

(1) describe:

(A) the alleged offense; or

(B) if the statement is offered during the punishment phase of the proceeding, a crime, wrong, or act other than the alleged offense that is:

(i) described by Section 1;

(ii) allegedly committed by the defendant against the child or person with a disability who is the victim of the offense or against another person who is a child younger than 18 [14] years of age or a person with a disability; and

(iii) otherwise admissible as evidence under Article 38.37, Rule 404 or 405, Texas Rules of Evidence, or another law or rule of evidence of this state;

(2) were made by the child or person with a disability against whom the charged offense or extraneous crime, wrong, or act was allegedly committed; and

(3) were made to the first person, 18 years of age or older, other than the defendant, to whom the child or person with a disability made a statement about the offense or extraneous crime, wrong, or act.

SECTION 4.05. Section 1, Article 38.37, Code of Criminal Procedure, is amended to read as follows:

Sec. 1. (a) Subsection (b) applies to a proceeding in the prosecution of a defendant for an offense, or an attempt or conspiracy to commit an offense, under the following provisions of the Penal Code:

(1) Section 21.02 (Continuous Sexual Abuse of Young Child or Disabled Individual);

(2) Section 21.11 (Indecency with a Child);

(3) Section 21.15 (Invasive Visual Recording);

(4) Section 21.16 (Unlawful Disclosure or Promotion of Intimate Visual Material);

(5) Section 21.165 (Unlawful Production or Distribution of Certain Sexually Explicit Videos);

(6) Section 21.18 (Sexual Coercion);

(7) Section 21.19 (Unlawful Electronic Transmission of Sexually Explicit Visual Material);

(8) Section 25.02 (Prohibited Sexual Conduct); [or

(9) Section 43.25 (Sexual Performance by a Child);

(10) Section 20A.02 [20A.02(a)(5), (6), (7), or (8)] (Trafficking of Persons);

(11) Section 20A.03 (Continuous Trafficking of Persons)

(12) Section 43.05 (Compelling Prostitution);

(13) if committed against a child younger than 18 years of age:

(A) Chapter 21 (Sexual Offenses); or

(B) Chapter 22 (Assaultive Offenses).

(b) Notwithstanding Rules 404 and 405, Texas Rules of Evidence, evidence of other crimes, wrongs, or acts committed by the defendant against the victim of the alleged offense shall be admitted for its bearing on relevant matters, including:

(1) the state of mind of the defendant and the victim; and

(2) the previous and subsequent relationship between the defendant and the victim.

(c) If a court admits evidence under this section and on request by either party, the court shall provide to the jury a limiting instruction regarding the purposes for which the evidence may be used. The court shall provide the limiting instruction:

(1) orally at the time the evidence is admitted; and

(2) in writing on conclusion of the presentation of evidence in the case, at the time written instructions are provided to the jury.

SECTION 4.08. The changes in law made by this article to Chapter 38, Code of Criminal Procedure, apply to a criminal proceeding that commences on or after September 1, 2025. A criminal proceeding that commences before September 1, 2025, is governed by the law in effect on the date the proceeding commenced, and the former law is continued in effect for that purpose.

Tab VI- Third-Party Litigation Funding

MEMORANDUM

TO: **Supreme Court Advisory Committee**

FROM: **Rules1-14c Subcommittee**

RE: **Update on Third Party Litigation Funding**

DATE: **August 24, 2025**

I. Introduction and Background

The Rules 1-14c Subcommittee last reviewed the topic of third party litigation funding in an October 28, 2024, memo (attached at Tab A) and discussed it at the November 1, 2024 SCAC meeting. The following are pertinent developments since the Subcommittee's prior review:

- On May 2, 2025, Texas Civil Justice League sent a letter to Chief Justice Blacklock regarding TPLF. Tab B. On May 8, 2025, Justice Jane Bland responded to TCJL's letter. Tab C.

- On October 10, 2024, the Federal Civil Rules Advisory Committee officially appointed a subcommittee to review third party litigation funding. The Subcommittee was charged to evaluate whether the Federal Rules of Civil Procedure should be amended to require mandatory disclosure of third-party litigation funding. The TPLF Subcommittee met with stakeholders representing funders, the plaintiff's bar, including the American Association of Justice and funders and the corporate and defense bars, including Lawyers for Civil Justice. Attached at Tab D is the TPLF Subcommittee's report to the Advisory Committee in advance of its April 1, 2025, meeting.

- Congressional Proposals

    - On February 7, 2025, Congressman Darrell Issa, Chair of the House Judiciary Subcommittee on Courts, Intellectual Property, Artificial Intelligence and the Internet filed HR 1109 – The Litigation Transparency Act of 2025. Attached at Tab E.

    - On April 7, 2025, Representative Ben Cline filed HR 2675, the Protecting Our Courts from Foreign Manipulation Act of 2025. Attached at Tab F.

    - On May 20, 2025, Representative Kevin Hern and other co-sponsors filed H.R. 3512, the Tackling Predatory Litigation Funding Act. Attached at Tab G. This bill would impose a tax rate of 37% on profits earned by third party entities that finance litigation and would add an additional 3.8% surtax for using the U.S. court system for profit. See also June 6, 2025, Litigation Funding Blog: Why Sen. Tillis' H.R.

3512, the Inaccurately-Named "Tackling Predatory Litigation Funding Act" is a Danger to American Innovation and Patent Ownership

- State Legislative Enactments

  In 2025, multiple state legislatures considered and passed third party litigation funding legislation, including the following states:

  - Arizona: SB 1215 (Regulates certain aspects of commercial litigation funding. Does not address disclosure of funding agreements.)

  - Colorado: HB 25-1329 (Applies to commercial litigation funding – the existence and terms of any litigation financing is subject to discovery. Additional provisions related to foreign funding.)

  - Georgia SB 69 (Applies to both commercial and consumer litigation funding. Requires litigation financers to register with the Department of Banking and Finance; Subjects the existence, terms and conditions of funding agreements to discovery.

  - Kansas SB 54 (Requires the disclosure of TPLF agreement to the court for *in camera* review and a party must deliver a sworn statement disclosing certain facts within 30 days of the commencement of the action or the entry of a funding agreement. Facts that must be disclosed include: identity of all parties to the agreement, whether a funder has control or approval with respect to the subject litigation, whether the funder can receive confidential materials related to the litigation, existence between the funder and any adverse party to the litigation, description of the financial interest, and whether any foreign entities are involved.

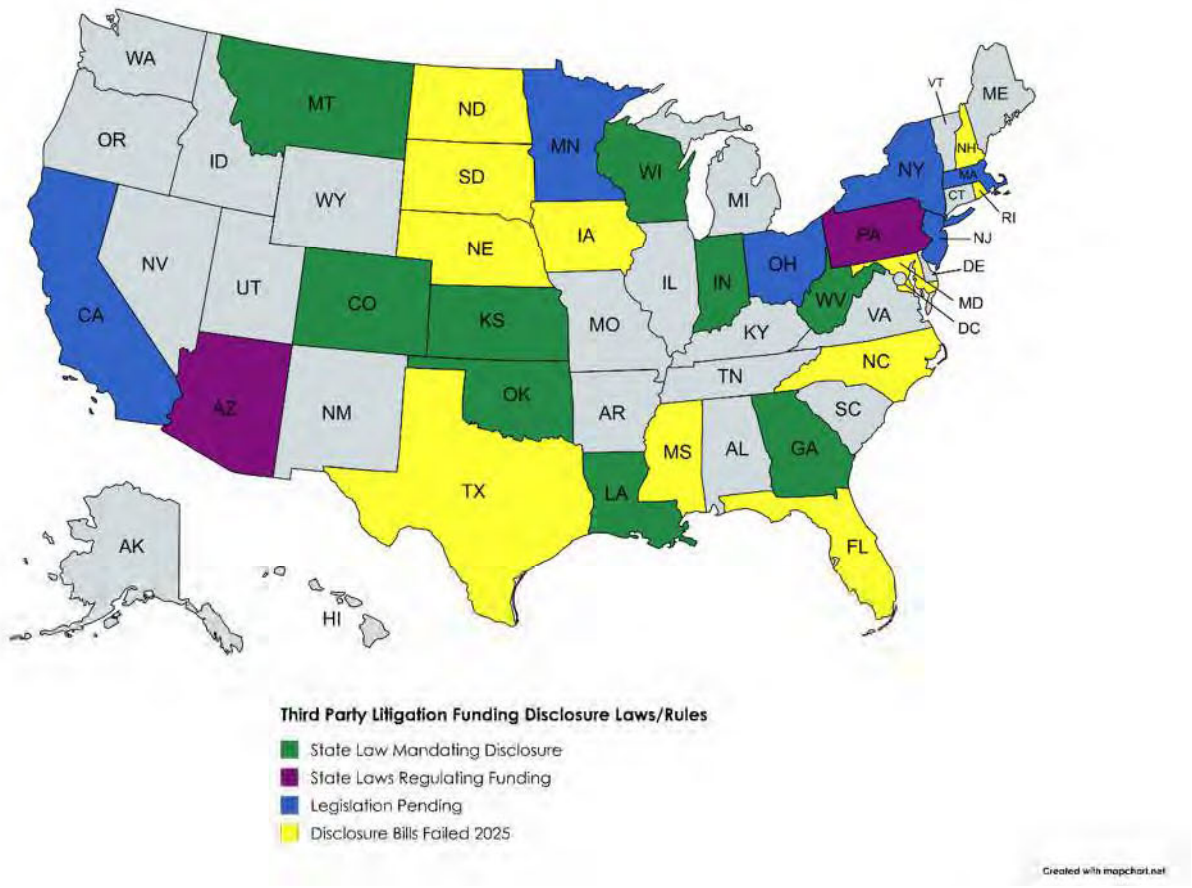
  - Montana SB 511 (Prohibits funding from foreign adversaries, defines portfolio funding and clarifies protections for non-profit entities.)

  - Oklahoma HB 2619 (Subjects commercial TPLF agreements to discovery upon request. Information related to the agreement is not admissible as evidence at trial. Disclosure must include a certification denoting whether a foreign entity is a source of funding.)

A TPLF bill was filed in the Texas Legislature by Senator Brent Hagenbuch, SB 3025. The Bill was referred to the State Affairs Committee but was not set for a committee hearing or vote.

The following is a current overview of legislative enactments mandating funding through August 25, 2025.

State Laws Requiring Disclosure / Regulation of Third-Party Funding Agreements in Litigation - August 2025



- Recent Court decisions:

  - In the Depo-Provera MDL proceeding, the trial court ordered that plaintiffs' counsel and pro se plaintiffs were required to disclose all third-party litigation funding agreements entered into by any plaintiff. In re Depo-Provera Depot Medroxyprogesterone Acetate Prods. Liab. Litig., No. 3:25-md-3140, 2025 LX 225321 (N.D. Fla. July 1, 2025)

  - In In re Uber Techs., Inc., No. 23-md-03084-CRB (LJC), 2025 LX 332355 (N.D. Cal. Aug. 1, 2025), the District Court granted a motion to quash subpoenas issued to law firms seeking information on third party funding, finding:

    - Recognizing that courts have reached different conclusion on the subject, this Court is not persuaded that litigation funding "is relevant to any party's claim or defense" under the circumstances of this litigation. *See id.* Uber has not identified, for example, how litigation funding information "might

affect the plaintiff's credibility or be used for impeachment." *Cf.* *Nunes v. Lizza*, No. 20-cv-4003-CJW, 2021 U.S. Dist. LEXIS 254428, 2021 WL 7186264, at *4 (N.D. Iowa Oct. 26, 2021) (allowing discovery of litigation funding information based on "the unusual facts" of that defamation case, including the possibility that the source of funding was a public figure while a nominal plaintiff was not). There is no indication that discovery into the source or nature of litigation funding could lead in any way, directly or indirectly, to evidence that would be relevant or admissible [*38] at the trials on the merits of these cases. *See* Fed. R. Evid. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."). Plaintiffs' motion to quash is therefore GRANTED.

- The trial court ordered that the disclosure of third-party funding was nonetheless required by local rule inof the Northern District of California that requires the parties to submit a Certification of Interested Entities or Persons.

- In In re Fresh Acquisitions, LLC, Nos. 21-30721-sgj-11, 22-3087-sgj, 3:22-cv-2659-M, 2025 LX 141105 (Bankr. N.D. Tex. June 18, 2025), the U.S. Bankruptcy Court for the Northern District of Texas ruled that the Trustee in Liquidation was required to produce a copy of a litigation funding agreement entered into by the Trustee. On August 4, 2025, the Bankruptcy Court further found that the funding agreement was entered into without proper notice to the court and without authority. (See a copy of the Court's Memorandum Opinion attached at Tab H.

- Recent Legal Scholarship. The following academic papers have been posted to the SSRN peer review site since the last SCAC meeting:

  - Steinitz, Maya, Zombie Litigation: Claim Aggregation, Litigant Autonomy and Funders' Intermeddling (November 01, 2024). Forthcoming in Cornell Law Review, 2025, Boston Univ. School of Law Research Paper No. 24-40, Available at SSRN: https://ssrn.com/abstract=5054864 or http://dx.doi.org/10.2139/ssrn.5054864

  - Goldstein, Ari, Litigation Finance in the Public Square (May 21, 2025). Available at SSRN: https://ssrn.com/abstract=5263929 or http://dx.doi.org/10.2139/ssrn.5263929

  - Parikh, Samir D., The Alchemist's Inversion (August 12, 2024). 110 Cornell L. Rev. (forthcoming 2025), Wake Forest Univ. Legal Studies Paper 4944361, Available at SSRN: https://ssrn.com/abstract=4944361 or http://dx.doi.org/10.2139/ssrn.4944361

- Chamberlain, Nikki and Waye, Vicki C. and Morabito, Vince, How to Address the Regulation of Third-Party Litigation Funding of Class Actions? (November 01, 2024). (2025) 141 L.Q.R. 131, The University of Auckland Faculty of Law Research Paper Series, Available at SSRN: https://ssrn.com/abstract=5083425 or http://dx.doi.org/10.2139/ssrn.5083425

- Grenadier, Steven R. and Grenadier, Brian and Submitter, Stanford GSB, Third-Party Litigation Financing Under a Veil of Secrecy: The Equilibrium Consequences of Disclosure Requirements (June 30, 2025). Stanford Law and Economics Olin Working Paper No. 607, Stanford University Graduate School of Business Research Paper Forthcoming, Available at SSRN: https://ssrn.com/abstract=5331925 or http://dx.doi.org/10.2139/ssrn.5331925

- Myers, Gary, A Comparative Analysis of Third-Party Litigation Funding in the United States and the United Kingdom (December 02, 2024). University of Missouri School of Law Legal Studies Research Paper No. 2024-39, Available at SSRN: https://ssrn.com/abstract=5041409 or http://dx.doi.org/10.2139/ssrn.5041409

- Glover, Maria, Asking the Right Questions About Legal Finance in United States Aggregate Dispute Resolution (April 15, 2025). Theoretical Inquiries in Law, Vol. 25, Issue 2, Pp. 81-116., Georgetown University Law Center Research Paper Forthcoming, (2025). Georgetown Law Faculty Publications and Other Works. 2658., Available at SSRN: https://ssrn.com/abstract=5176067 or http://dx.doi.org/10.2139/ssrn.5176067

- Behrens, Mark, Third-Party Litigation Funding: A Call for Disclosure and Other Reforms to Address the Stealthy Financial Product That Is Transforming the Civil Justice System, 34 Cornell Journal of Law and Public Policy 1 ((Fall 2024) Third-Party Litigation Funding

II Should TPLF Agreements be Disclosed?

One key debate regarding whether to require disclosure of TPLF focuses on whether disclosure of the agreements should be required and under what conditions. Opponents of disclosure contend that the agreements reflect proprietary and privileged content that are not relevant to the matters in dispute and therefore have no useful purpose if disclosed to opposing counsel. Any disclosure, if required, should instead be *in camera* to the Court to enable the court to determine if there are any factors requiring further disclosure.

Proponents argue that lack of disclosure of funding agreements impairs the ability to answer the very question of whether their disclosure is important. They argue that the few agreements that have been disclosed or otherwise been produced in discovery in cases demonstrate why courts and parties should have access to the agreements.

The contracts, they contend, give non-party funders rights than can shape substantive outcomes and can undermine court orders. TPLF contracts for example can require the plaintiff to pay the funder the monetary value of any injunctive relief or specific performance, a strong incentive against non-monetary relief that can skew the remedies presented to, and ultimately ordered by, the court. Some TPLF contracts mandate that the plaintiff and counsel provide all documents obtained in the course of litigation to the funders, a provision likely to be inconsistent with court protective orders. Some TPLF contracts undermine court orders for costs and sanctions by requiring plaintiffs to pay all penalties—even when the misconduct originated with the funder or its handpicked counsel, not the plaintiff. Absent disclosure of these agreements, disclosure proponents assert, courts, opposing counsel, and even individual plaintiffs have no awareness of such provisions, cannot foresee how they might impact the case, and will not even know when they are having an effect—especially since the contracts typically prohibit the plaintiff and counsel from divulging the existence of the agreement or discussing its terms. Disclosure proponents note that in cases where the funding is arranged through the plaintiffs' firm, the plaintiff might not even be aware of the existence of the arrangement.

The ILP Funding Agreement,[1] for example provides that "the Lawyers and ILP will determine what Claims should be pursued in the Proceedings" and that "ILP will give day-to-day instructions to the Lawyers on all matters concerning the Claims and the Proceedings and may give binding instructions to the Lawyers and make binding decisions on behalf of the Plaintiff in relation to the Claims."[2] These rights are reinforced by other provisions, including the requirement that the plaintiff instruct the lawyers to "comply with all instructions given by ILP,"[3] that ILP's "management services" include "providing day-to-day instructions to the Lawyers,"[4] and that the funder's discretionary decision to cease funding requires counsel to "discontinue the prosecution of the Claim."[5] The contract also gives ILP discretion over appeals.[6]

Proponents also point out that some TPLF contracts expressly give the funder the right to accept or reject settlement offers. In the ILP Funding Agreement, the funded plaintiff is not allowed to "discontinue, abandon, withdraw or settle" the litigation or "reject any Settlement offer made by any Defendant" without prior written consent from ILP.[7] The contract prevents the funded plaintiff even from having "any communication with any Defendant" or defense

[1] Litigation Funding Agreement between International Litigation Partners Ltd. and Laurence John Bolitho, March 13, 2014, ("ILP Funding Agreement"), attached as Tab I.

[2] ILP Funding Agreement at §5.1.

[3] *Id*. at §6.3.1 (although this is constrained to some degree by § 13, which restores some rights to the clients in the event that counsel identifies a conflict of interest, except with respect to settlement, which client never controls).

[4] *Id*. at §7.1.

[5] *Id*. at §5.3.

[6] *Id*. at §11.

[7] ILP Funding Agreement at §6.2.

representative.[8] In the event that the funded plaintiff and the funder disagree about whether to settle the case, the contract provides that counsel will decide[9]—the same counsel who take direction from the funder.

Some TPLF agreements require funded plaintiffs to continue pursuing their claims—even if they want to settle. For example, the ILP Funding Agreement and the Therium Funding Agreement[10] require the plaintiff to "diligently prosecute the Proceedings."[11] Similarly, the Legalist Funding Agreement[12] requires the plaintiff "to continue to conduct its prosecution of the Claim(s)"[13] and the Longford Capital Agreement[14] requires the plaintiff to prosecute the claims.[15] A robust provision in the LMFS Funding Agreement provides:

> "Following termination of this agreement by [plaintiff], [funder] … may continue the proceedings without the participation of [plaintiff]" and "shall be entitled to require [plaintiff] to continue proceedings if [funder] does not wish to continue proceedings in its own name and if [funder] does not wish to disclose the fact that the proceedings are being funded.[16]

As Professor Maya Steinitz describes, these contractual clauses could create "zombie litigation"[17]—lawsuits that continue despite all named parties wanting to settle.

Frequently, TPLF agreements require plaintiffs to maximize monetary recoveries over injunctive relief or other forms of equitable relief including specific performance, restitution, rescission, or declaratory relief. For example, the Amendment to Burford/Sysco Agreement required that the plaintiff "shall take such actions as are reasonable and appropriate to maximize

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[8] *Id*. at §6.7.

[9] *Id*. at §13.5.

[10] Therium Capital Management Limited, *Litigation Funding Agreement between Therium Finance AG IC and Dominion Minerals Corp*, 2015, ("Therium Funding Agreement"), attached as Exhibit J.

[11] ILP Funding Agreement at §6.1.4; Therium Funding Agreement at §9.2.6(a).

[12] Litigation Funding Agreement between Legalist Fund II, L.P. and DiaMedica Therapeutics Inc., Dec. 29, 2019, ("Legalist Funding Agreement"), attached as Exhibit K.

[13] *Id*. at §6.3.

[14] Funding Agreement between Longford Capital Fund I, LP, and Quest Patent Research Corporation, Mar. 11, 2014, ("Longford Capital Agreement"), attached as Exhibit L.

[15] *Id*. at §8.1(b).

[16] LMFS Funding Agreement at §(b).

[17] *See* Steinitz, Maya, *Zombie Litigation: Claim Aggregation, Litigant Autonomy and Funders' Intermeddling* (November 01, 2024). Forthcoming in Cornell Law Review, 2025, Boston Univ. School of Law Research Paper No. 24-40, available at: https://ssrn.com/abstract=5054864 or http://dx.doi.org/10.2139/ssrn.5054864.

the Proceeds received from each Claim, giving priority to cash Proceeds."[18] Similarly, the Burford/Sysco Agreement required the named party to "use all commercially reasonable efforts to: (A) pursue such Claim and all of the Counterparty's legal and equitable rights arising in connection with such Claim; (B) bring about the reasonable monetization of such Claim through a Claim Resolution…."[19] The agreement gave effect to this provision by requiring the named party to "retain and remunerate the applicable Nominated Lawyers to prosecute such Claim vigorously in a commercially reasonable manner in order to bring about the reasonable monetization of such Claim through a Claim Resolution" and "cooperate with such Nominated Lawyers in all matters pertaining to such Claim (including providing documents and Information, appearing and causing others within the Counterparty's power to appear for examinations and hearings."[20] The Legalist Funding Agreement goes even further and requires that the plaintiff "shall … pay … an amount equal to the Non-Monetary Claim Proceeds Fair Market Valuation" and provide a valuation,[21] and the Longford Capital Agreement defines "Proceeds" to include the cash value of "injunctions" and non-monetary relief. [22]

III. A Case Against Disclosure

Funders and groups including the AAJ that oppose disclosure offer a strong argument why disclosure is not in the best interests of the parties being funded and is otherwise inequitable. Opponents point out that disclosure of funding agreements generally are not relevant to the merits of the case and therefore should not be subject to discovery or disclosure. Additionally, requiring disclosure of the agreements could infringe on materials protected by the work product doctrine, including litigation strategies. Disclosure also could empower defendants to exploit plaintiffs' financial vulnerabilities.

In a 2022 New York State Bar Association article *The Economic Case Against Forced Disclosure of Third Party Litigation Funding*, St. Jones Professor of Law Keith Sharfman notes why disclosure should not occur:

> Litigation finance information is of particular strategic value. The extent and nature of a party's litigation funding can affect the strength with which a case may credibly be pursued or settled. Why should the law entitle adversaries to have access to this information and enable them to draw inferences from it about the strength of their opponents' cases and about the vigor with which their opponents are equipped to pursue their claims? Why should an adversary get to know how funders regard the claims they fund and, implicitly, how they value other claims that they do not fund?

A 2025 Harvard Business Law Review article, , Cosimo L. Fabrizio, & Patel, Harshit, *Litigation Finance Under Scrutiny: Navigating Mandatory Disclosure and Risks of Funder*

[18] Amendment to Burford/Sysco Agreement at §7(a). Tab M.

[19] Burford/Sysco Agreement at §5.3(b)(i). Tab N.

[20] *Id*. at §5.3(b)(ii).

[21] Legalist Funding Agreement at §3.2.

[22] Longford Capital Agreement at §2.34.

Influence, 15 Harvard Business Law Review 15 (2025), the authors argue against broad disclosure mandates, stating that they offer limited marginal benefits and could deter legitimate funding, resulting in plaintiffs losing access to capital, particularly in higher stakes cases. They also suggest that disputes regarding disclosure will cause satellite disputes and increase litigation complexity. The authors suggest that any disclosure should be tailored to address specific risks rather than impose blanket rules.

IV. Texas Disciplinary Rule of Professional Conduct 1.08(e).

Also pertinent to this discussion is the Texas Disciplinary Rules of Professional Conduct that impose duties on attorneys and restrict their ability to accept compensation – either directly or indirectly – in representing clients. Rule 1.08(e) states:

> (e) A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client consents;
>
> (2) there is no interference with the lawyer's independence of professional judgment or with the
>
> client-lawyer relationship; and
>
> (3) information relating to representation of a client is protected as required by Rule 1.05
>
> Comment 7 elaborates on third parties that acquire an interest in the litigation:
>
> Acquisition of Interest in Litigation
>
> 7. This Rule embodies the traditional general precept that lawyers are prohibited from acquiring a proprietary interest in the subject matter of litigation. This general precept, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for contingent fees set forth in Rule 1.04 and the exception for certain advances of the costs of litigation set forth in paragraph (d). A special instance arises when a lawyer proposes to incur litigation or other expenses with an entity in which the lawyer has a pecuniary interest. A lawyer should not incur such expenses unless the client has entered into a written agreement complying with paragraph (a) that contains a full disclosure of the nature and amount of the possible expenses and the relationship between the lawyer and the other entity involved.

Texas Disciplinary Rules of Professional Conduct, 2022

IV. Proposed Rule Language

To facilitate a fulsome debate on the question, the following is a draft of a proposed rule that would require disclosure of funding in Texas civil proceedings:

Texas Rule of Civil Procedure 14a – Disclosure of Third-Party Litigation Funding

14a (a) Duty to Disclose Third-Party Litigation Funding

A party to a civil action must disclose any agreement under which any person or entity, other than the party's attorney or insurer, has a right to receive compensation contingent on the outcome of the litigation and/or has the right to influence or control litigation strategy, settlement decisions, or attorney selection.

14a(b) Timing of Disclosure

Disclosure must be made within 30 days of the date of commencement of suit or within 30 days after entering into such an agreement, whichever is later.

14a.(c) Protective Orders

Upon motion and for good cause shown, the court may issue a protective order to limit disclosure of specific terms of the funding agreement to prevent undue prejudice, protect trade secrets, or safeguard privileged information.

14a.(d) Continuing Duty

A party must promptly supplement its disclosure if any information required under this rule changes or if additional funding agreements are entered into.

14a.(e) Sanctions

Failure to comply with this rule may result in sanctions under Rule 215, including exclusion of evidence, dismissal of claims, or other appropriate relief.

MEMORANDUM

To: Texas Supreme Court Advisory Committee (SCAC)

From: Rules 1-14c Subcommittee

Re: Rule requiring disclosure of third-party financing

Date: October 28, 2024

I. Evaluation of a rule requiring TPLF Disclosure

In response to the Supreme Court's July 17, 2024 referral letter, the Rules 1-14c Subcommittee reviewed and discussed the topic of Third Party Litigation Funding (TPLF). After a spirited debate, the Subcommittee voted 3:1 to reject a rules amendment that would require disclosure of the existence and content of funding agreements in civil proceedings. A copy of the key materials that our subcommittee considered are attached (members shared numerous additional resources on the topic), including a letter from the International Legal Finance Association (ILFA) and a joint letter from the Texas Civil Justice League, the U.S. Chamber of Commerce Institute for Legal Reform ("ILR"), and Lawyers for Civil Justice ("LCJ").

The Subcommittee also wanted to bring the following related developments to the Committee's attention:

- On October 10, 2024, the Federal Civil Rules Advisory Committee appointed a subcommittee to review and consider rulemaking on TPFL disclosure. The issue has been pending before the Advisory Committee for over a decade.
- The Arizona Supreme Court recently received a report from a twelve-member task force consisting of lawyers, judges, law professors, a member of the public, and various groups as part of its evaluation of Alternative Business Structures (i.e. non lawyer owned legal service providers). The report examined the treatment of TPLF (p. 7-9), gives an overview of TPLF (p. 9-10), and made recommendations (p. 6). The recommendations included judicial training on TPLF and "limited initial disclosure" of the existence of TPLF and the funder but not mandatory disclosure of the agreements through discovery. Instead, it recommended that the civil cover sheet of the lawsuit include a box to indicate whether there was funding in the litigation and the name of the funder so data can be collected regarding TPLF (see recommendation 5). It also discussed "disclosure approaches courts might follow to address the interests and potential conflicts that arise during litigation." *Id*. at 19-20.
- Two Texas courts have concluded that third-party financing agreements in those cases were not usurious and did not violate Texas public policy. *See Anglo-Dutch Petroleum Intern., Inc. v. Haskell*, 193 S.W.3d 87, 104 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (noting agreements "do not contain provisions permitting appellees to select counsel, direct trial strategy, or participate in settlement discussions" and that plaintiffs solicited the "investments after being unable to obtain a conventional loan because it had inadequate collateral."); *Anglo-Dutch Petroleum Intern., Inc. v. Haskell*, 193 S.W.3d 87, 104 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

II Proposed Rule Language

Chief Justice Hecht also requested that our Subcommittee draft a potential rule for consideration if the Committee as a whole votes in favor of a disclosure rule.

We offer the following potential amendment to Rule 194.2.

(d) Initial Disclosure regarding Third Party Litigation Funding.

1. Who must file. A nongovernmental plaintiff, counter-plaintiff, or intervenor in any case that is pending in a business court must file with the court a statement (separate from any pleading) that contains the information set forth in section 3 within 30 days of filing an initial petition or counter-claim or transfer of a dispute to a business court. The disclosure statement must be amended within 60 days of any new or corrected information that is required to be disclosed by Section 3.
2. Definitions. A third-party litigation funder (TPLF) is any third-party entity or person other than an attorney or referring attorney in the case that provides financial support to a party in a lawsuit or claim in any Texas court in exchange for a contingent share of the proceeds generated by that litigation, whether by settlement, judgment, or otherwise
3. Contents. The disclosure statement must state whether any TPLF or other third party other than the lawyers in the case has any financial interest of any kind in any of the recovery of any damages, fees, or other relief in this case.

   Alternative 1: If it does, a second disclosure should be submitted to the court *in camera* that identifies the TPLF and provides the court with a copy of the agreement granting or conveying to it an interest in the recovery in this case.

   Alternative 2: If it does, a second disclosure should be submitted to the court that identifies the TPLF and provides a copy of the agreement granting or conveying to it an interest in the recovery in this case.

TEXAS CIVIL JUSTICE LEAGUE

400 W. 15th Street · Suite 1400 · Austin, Texas 78701 · (512) 320-0474 · WWW.TCJL.COM

May 2, 2025

The Honorable James Blacklock
Chief Justice
The Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Chief Justice Blacklock:

In the last 25 years, the growing prevalence of third-party litigation funding (TPLF) has sparked a national debate over the extent to which TPLF agreements should be disclosed, discoverable, or otherwise regulated by the state. In view of the rapid growth of the TPLF industry, it seems likely that the debate will only intensify. On one hand, proponents seek legislative or judicial action either legitimizing their business or keeping other people's noses out of it. On the other, opponents seek with equal conviction to heavily regulate the industry or at minimum mandate disclosure of TPLF agreements to all parties in the litigation.

To date, at least five states, Wisconsin, Montana, Indiana, Louisiana, and West Virginia, have enacted mandatory disclosure statutes. Several federal district courts have adopted rules requiring disclosure of TPLF agreements to the court, including the Districts of Delaware and New Jersey, the Northern District of Ohio (Eastern Division), and the Northern District of California. More limited disclosure requirements have been adopted in at least three federal MDL cases, while more generally a growing number of other federal district and appellate courts (including the U.S. Court of Appeals for the Third, Fourth, Fifth, Tenth, and Eleventh Circuits) have local rules that require at least some level of disclosure of entities with a financial interest in the outcome of the litigation. Case law in the federal system is somewhat split, with some courts requiring disclosure when specific conditions are met and others denying discovery of TPLF agreements as either irrelevant or protected by attorney work product privilege.[1] Numerous state legal ethics opinions have weighed in on the relation between TPLF and various ethical rules, and the American Bar Association House of Delegates has issued "best practices" guidelines to assist attorneys and third-party funders in navigating the potential legal and ethical pitfalls of TPLF agreements.[2] No uniform standards exist to guide federal and state courts in determining if, when, to whom, and to what extent TPLF agreements should be disclosed.

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[1] See Mark Behrens, Katie Jackson, and Cary Silverman, "Third-Party Litigation Funding: State and Federal Disclosure Rules and Case Law," https://www.iadclaw.org/assets/1/6/5.1_-_Third-Party_Litigation_Funding_-_State_and_Federal_Disclosure_Rules_and_Case_Law.pdf, last visited May 2, 2025.

[2] See "ABA Outlines Best Practices for Third-Party Litigation Funding." https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/111a-annual-2020.pdf, last visited May 2, 2025.

This debate has come to the Texas Legislature as well, most recently in the form of S.B. 2954, which was filed earlier this spring. These proposals called on the Supreme Court to adopt a rule mandating disclosure of TPLF agreements to all parties in a civil action. At the federal level, Rep. Darrell Issa (R-CA 48) has introduced the Litigation Transparency Act to require disclosure of third party litigation funding agreements in all federal civil litigation. Additionally, last year Sen. John Cornyn (R-TX) and Sen. Thom Tillis (R-NC) submitted a letter to the Advisory Committee on Civil Rules, and Rep. James Comer (R-KY 1), Chair of the U.S. House Committee on Oversight and Accountability, did the same to Chief Justice Roberts, calling for uniform national standards requiring the disclosure ot TPLF agreements. Clearly, TPLF has fully emerged as a pressing public policy issue that demands attention and action.

That is why, on behalf of the members of the Texas Civil Justice League, we are renewing our request that you refer the issue to the Supreme Court Advisory Committee for promulgation of an amendment to the Texas Rules of Civil Procedure establishing a framework for disclosure and discovery of TPLF agreements under appropriate circumstances. Your predecessor, Chief Justice Hecht, previously submitted this request pursuant to a letter we submitted in November, 2022, but due to a number of intervening circumstances, it remains pending.

We understand and appreciate that sharp disagreement exists among members of the civil trial bar, the business community, the TPLF industry, and other stakeholders regarding both the threshold question of whether the existence of such agreements should be disclosed at all and, if so, just how much information should be provided. The SCAC, with its broad representation of the civil trial plaintiff's and defense bar, the judiciary, and in-house counsel, is the ideal forum for making policy in this area. At the same time, given the intensifying national interest in bringing transparency to an industry with increasingly influential foreign and domestic players, we do not believe that inaction is an option. Texas must lead.

As for TCJL, we support mandatory disclosure of the existence of third-party funding agreements for both consumer and commercial litigation to all parties in the litigation. In our view, a disclosure statement should include at minimum: (1) the name, address, and place of formation of the third-party funder; (2) whether any third-party funder's approval is necessary for litigation or settlement decisions in the action, and, if the answer is yes, the nature of the terms and conditions of such approval; and (3) a brief description of the type of funding provided and whether any attorney's fees that may be awarded in the matter will be subject to assignment to the third-party funder.[3] A disclosure statement of this nature would put the court and parties on notice a funding company's interest in the outcome of the case without intruding into the realm of attorney work product, litigation strategy, or the specific amount of funding involved. It would also help illuminate whether certain third-party funding arrangements violate Rule 5.04 of the Texas Disciplinary Rules or Professional Conduct.

If it is the case that a TPLF agreement confers authority on the provider to make or participate in litigation or settlement decisions or to receive an assigned share of attorney's fees, a party could make a discovery request for more information, including the agreement itself, provided that such request meets the relevancy and other requirements of the existing rules. This may well be a rare case, given that to our

[3] This proposal closely tracks the Standing Order Regarding Third-Party Litigation Funding Arrangements issued by the Chief Judge of the United States District Court for Delaware. https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf. last visited May 2, 2025.

knowledge most TPLF providers disclaim any involvement in managing or influencing litigation or settlement strategy (although we are not sure of the extent to which fee-splitting between lawyers and non-lawyers may be occurring). But if such influence does exist, the court and other parties should have the tools to assess whether further disclosure should be compelled if it is relevant to identifying potential conflicts-of-interest and protecting the court's and attorneys' respective duties to the judicial system and the litigants they serve.

It is beyond question that the TPLF industry is expanding and that its tentacles are reaching more deeply into our court system. We need to know who is investing in the outcome of litigation in our courts. Judges need to know who is making those investments to ensure compliance with the Code of Judicial Conduct. Lawyers need to know who has a financial interest in the case beyond the opposing parties and their attorneys. The parties need to know what financial resources may be arrayed against them and who may be pulling the strings in the litigation. Most importantly, Texans need to know that the court system they pay for is not being monetized and profited from by foreign hedge funds or any other institutional investor. Judges who dedicate their careers to the bench at great financial sacrifice and jurors who dedicate their time to making sure our citizens receive the justice they deserve should not be exploited by private investors (including foreign entities) looking to make a killing off of *their* public service.

Thank you for your continued commitment to maintaining a fair, efficient, and transparent civil justice system. We deeply appreciate all you are doing and will do on behalf of the citizens of our state.

Sincerely,

George S. Christian
Senior Counsel

201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512/463-1312 Facsimile: 512/463-1365

May 8, 2025

George Christian
Senior Counsel
Texas Civil Justice League
400 W. 15th Street
Suite 1400
Austin, Texas 78701

Re: Third-Party Litigation Funding

Dear George:

Chief Justice Blacklock forwarded your letter to me renewing the Civil Justice League's request for the Supreme Court Advisory Committee to study third-party litigation funding. Thank you for the continued interest in the Court's rules.

As you know, the Court referred this issue to Advisory Committee on July 17, 2024. We asked the Committee to advise whether the Court should adopt rules in connection with third-party litigation funding and to draft any recommended rules. As usual, a subcommittee has had the laboring oar, and the Advisory Committee has discussed this project at some length. Attached is the transcript of those discussions and accompanying supporting materials. The subcommittee is due back for a further report at the Advisory Committee's August 29, 2025 meeting.

The Advisory Committee meetings are public. You are welcome to attend. The August 29 meeting will be held at the State Bar of Texas, 1414 Colorado Street, Austin, Texas 78701. The Advisory Committee's responsibility is to thoroughly vet all matters referred to it and to make recommendations to the Court. Those recommendations are not binding, and the Court conducts an internal review before acting on any proposed new rules.

Should you have further questions, please do not hesitate to contact the Court's Rules Attorney, Jackie Daumerie, or me.

Sincerely yours,

Jane N. Bland
Justice
Liaison, Supreme Court Advisory Committee

Attachments

cc: Hon. Jimmy Blacklock, Chief Justice
Hon. Evan Young, Deputy Liaison, Supreme Court Advisory Committee
Hon. Tracy Christopher, Chair, Supreme Court Advisory Committee
Marcy Hogan Greer, Vice-Chair, Supreme Court Advisory Committee
Hon. Harvey Brown, Chair, 1-14c Subcommittee
John Kim, Vice-Chair, 1-14c Subcommittee
Jackie Daumerie, Rules Attorney

14. Third Party Litigation Funding and Cross-Border Discovery Subcommittees

This section of the agenda book provides brief status reports about ongoing work of other subcommittees. Because this work is at an early stage, this section is limited to providing a general status update. Each subcommittee welcomes reactions from members of the Advisory Committee and expects to continue its ongoing work.

TPLF SUBCOMMITTEE

This subcommittee was created at the Committee's October 2024 meeting, and has embarked on a program designed to educate subcommittee members about the issues involved. The topic has been on the Committee's agenda for a long time, so some background may be useful.

In mid-2014, the Chamber of Commerce proposed that Rule 26(a)(1)(A) be amended to require disclosure of third party funding of cases pending in federal court. At its Fall 2014 meeting, the Committee decided to take no action, in large part because of uncertainty about this relatively new phenomenon. In 2017, the topic was initially assigned to the MDL Subcommittee, but that subcommittee determined that TPLF did not seem to play a prominent role in MDL proceedings. The subject remained on the Committee's agenda, however.

In 2019 – partly in response to inquiries from members of Congress – the full Committee got an extensive report on the fruits of the ongoing monitoring of TPLF and decided to continue to monitor the topic but not otherwise to take action.

Meanwhile, there were developments in other arenas. In Congress, a number of bills calling for disclosure of TPLF were introduced. Most recently, in February 2025, Rep. Issa introduced H.R. 1109 (119th Cong. 1st Sess.), the Litigation Transparency Act of 2025. A copy of this bill is included in this agenda book.

Bills have been introduced in a number of states directing disclosure as well. Several years ago the State of Wisconsin adopted "tort reform" legislation that included disclosure requirements for TPLF arrangements. Other states that have entertained such legislative proposals include West Virginia and Louisiana.

Some district courts have adopted local rules or practices with regard to disclosure of funding. The District of New Jersey adopted a local rule requiring disclosure whether there was funding and, if so, of the identity of the funder. In the Northern District of California, there is a local rule or standing order calling for disclosure in class actions.

TPLF has also attracted substantial academic attention. There have been several academic conferences in the U.S. focusing on funding. In addition, an academic book published in Europe in late 2024 contained a full section on litigation funding. A symposium issue of the law journal of Tel Aviv University, to be published in 2025, contains papers from many scholars (mainly American, including this Reporter) on American experiences and concerns. There likely are other such symposia out there.

There is, in short, little question that TPLF has gained prominence. And the amount of such funding seems to be growing rather rapidly.

There seems to be sharp disagreement as to these developments. On one side, litigation funding is supported in some circles as "unlocking the courthouse door" by facilitating the assertion of valid claims.

On the other hand (as illustrated in connection with the work of the MDL Subcommittee), litigation funding is not supported as enabling the assertion of hundreds or even thousands of groundless claims "found" by claims aggregators and "sold" to lawyers who don't do their Rule 11 due diligence before filing in court. The arguments presented to the MDL Subcommittee in support of vigorous "vetting" of claims in MDL proceedings were partly based on this sort of concern.

From a rulemaking standpoint, beyond deciding whether to regard litigation funding as basically good or bad, there are a number of questions needing answers. Here are some of them:

(1) How does one describe in a rule the arrangements that trigger a disclosure obligation? In an era when lawyers and law firms often rely on bank lines of credit to pay the rent, pay salaries, hire expert witnesses, etc., all seem to agree that TPLF disclosure requirements should not apply to such commonplace arrangements.

(2) Is this problem limited to certain kinds of litigation? For example, some see MDL proceedings or "mass tort" litigation as a particular locus. Others regard patent litigation as a source of concern; in the District of Delaware there have been disputes about disclosure of funding in patent infringement litigation. Yet others (including a number of state attorneys general) fear that litigation funding may be a vehicle for malign foreign interests to harm this country, or at least hobble American companies when they compete for business abroad.

(3) Should the focus be on "big dollar" funding? One sort of funding is what is called "consumer" funding, often dealing with car crashes and involving relatively modest amounts of money. "Commercial" funding, on the other hand, is said in some instances to run to millions of dollars.

(4) Does funding prompt the filing of unsupported claims? Funders insist that they carefully scrutinize the grounds for the claims before deciding whether to grant funding, and that they reject most requests for funding. They also say that they offer expert assistance to lawyers that get the funding to help them win their cases. Since the usual non-recourse nature of funding means that the funder gets nothing unless there is a favorable outcome, it seems that funding groundless claims would not make sense.

(5) The above is largely keyed to funding of individual lawsuits. A new version, it seems, is "inventory funding," which permits the funder to acquire an interest in multiple lawsuits. One might say this verges on a line of credit; in a real sense if a firm's inventory of cases don't pay off the firm can't pay the bank. How such inventory funding actually works remains somewhat uncertain.

(6) If some disclosure is required, what should be disclosed, and to whom should it be disclosed? The original proposal called for disclosure of the underlying agreement and all underlying documentation. But if funders insist on candid and complete disclosure

regarding the strengths and weaknesses of the cases on which lawyers seek funding, core work product protections would often seem to be involved.

(7) Will requiring some disclosure lead to time-consuming discovery forays that distract from the merits of the underlying cases?

(8) What is the court to do with the information disclosed if disclosure is required? One concern is that lawyers seeking funding are handing over control of their cases in contravention of their professional responsibilities. Though judges surely have a proper role in ensuring that the lawyers appearing before them behave in an ethical manner, they would not usually undertake a deep dive into the lawyer-client relationship to make certain the lawyers are behaving in a proper manner.

(9) If judges don't normally have a responsibility to monitor the lawyers' compliance with their professional obligations, does that change when settlement is possible? Should judges then be concerned that settlement decisions are controlled by funders whose involvement is not known to the court?

There surely are other questions to be explored. Prof. Clopton has undertaken to review the growing literature on the subject of litigation funding. And presently it seems likely that the George Washington National Law Center will hold an all-day conference about the topic for the subcommittee, tentatively scheduled for October 23, 2025, the day before the Committee's Fall meeting.

CROSS-BORDER DISCOVERY SUBCOMMITTEE

This subcommittee also remains in the learning outreach mode. Its ongoing efforts include the following, among other things: In May 2024, representatives of the subcommittee met with the Lawyers for Civil Justice in Washington, D.C., to discuss cross-border issues. Then in July 2024, there was a meeting in Nashville with representatives of the American Association for Justice. In August 2024, the Sedona Conference arranged an online session with some of the members of its Working Group 6 (which focuses on cross-border discovery) and during the first week of March 2025, representatives of the subcommittee are attending the meeting of Working Group 6 in Los Angeles and will be on a panel to continue these discussions. In addition, Prof. Clopton has met with a panel of transnational discovery experts affiliated with the ABA. The information-gathering effort continues.

Significant questions remain, however. One is whether there is widespread enthusiasm for rule amendments keyed to cross-border discovery issues. To a significant extent, it seems that lawyers say "we can work that out." The basic tools for working it out seem to be in place in the rules already. There seems no doubt that any party could raise cross-border discovery issues in a Rule 26(f) discovery-planning meeting and present any disagreements to the court under Rule 16.

For at least some lawyers, the current rules appear to be sufficient. To consider one possible rule amendment – to add explicit reference to cross-border discovery to Rule 26(f) – there appear to be sectors of the bar that find that possibility extremely unnerving. For some of them, a rule change along these lines might signal to the judge that it is important to put the brakes on discovery and proceed in a gingerly manner. Some might consider that a recipe for delay tactics.

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119TH CONGRESS
1ST SESSION

H. R. 1109

To amend title 28, United States Code, to provide for transparency and oversight of third-party beneficiaries in civil actions.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 7, 2025

Mr. ISSA (for himself, Mr. COLLINS, and Mr. FITZGERALD) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 28, United States Code, to provide for transparency and oversight of third-party beneficiaries in civil actions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Litigation Transparency Act of 2025''.

SEC. 2. TRANSPARENCY AND OVERSIGHT OF THIRD-PARTY BENEFICIARIES IN CIVIL CASES.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"§ 1660. Third-party beneficiary disclosure

''(a) IN GENERAL.—Except as provided in subsection (b), in any civil action, a party or any counsel of record for a party shall—

''(1) disclose in writing to the court and all other named parties to the civil action the identity of any person (other than counsel of record) that has a right to receive any payment or thing of value that is contingent on the outcome of the civil action or a group of actions of which the civil action is a part; and

''(2) produce to the court and to each other named party to the civil action, for inspection and copying, any agreement creating a contingent right referred to in paragraph (1), including any ancillary agreement or document, except as otherwise stipulated or ordered by the court.

''(b) EXCEPTION.—The requirements under subsection (a) shall not apply with respect to a person that has a right to receive payment described in subsection (a)(1) if the right to receive payment is solely—

''(1) the repayment of the principal of a loan;

''(2) the repayment of the principal of a loan plus interest that does not exceed the higher of 7 percent or a rate two times the annual average 30-year constant maturity Treasury yield, as published

by the Board of Governors of the Federal Reserve System, for the year preceding the date on which the relevant agreement was executed; or

''(3) the reimbursement of attorney's fees.

''(c) TIMING.—The disclosures required by subsection (a) shall be made not later than the later of—

''(1) 10 days after the execution of any agreement described in subsection (a)(2); or

''(2) the time of the filing of the action before the court.

''(d) DUTY TO CORRECT.—A party or counsel of record that made a disclosure required by this section shall supplement or correct each such disclosure in a timely manner—

''(1) if such party or counsel of record learns that the disclosure is or has become incomplete or incorrect in some material respect, if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

''(2) as ordered by the court.''.

(b) CLERICAL AMENDMENT.—The table of sections for chapter 111 of title 28, United States Code, is amended by adding at the end the following:

''1660. Third-party beneficiary disclosure.''.

SEC. 3. APPLICABILITY.

The amendments made by this Act shall apply to any civil action pending on or commenced after the date of enactment of this Act.

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119TH CONGRESS
1ST SESSION

H. R. 2675

To amend chapter 111 of title 28, United States Code, to increase transparency and oversight of third-party funding by foreign persons, to prohibit third-party funding by foreign states and sovereign wealth funds, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 7, 2025

Mr. CLINE introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend chapter 111 of title 28, United States Code, to increase transparency and oversight of third-party funding by foreign persons, to prohibit third-party funding by foreign states and sovereign wealth funds, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Protecting Our Courts from Foreign Manipulation Act of 2025''.

SEC. 2. TRANSPARENCY AND LIMITATIONS ON FOREIGN THIRD-PARTY LITIGATION FUNDING.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"§ 1660. Transparency and limitations on foreign third-party litigation funding

''(a) DEFINITIONS.—In this section—

''(1) the term 'foreign person'—

''(A) means any person or entity that is not a United States person, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801); and

''(B) does not include a foreign state or a sovereign wealth fund;

''(2) the term 'foreign state' has the meaning given that term in section 1603; and

''(3) the term 'sovereign wealth fund' means an investment fund owned or controlled by a foreign state, an agency or instrumentality of a foreign state (as defined in section 1603), or an agent of a foreign principal (as defined in section 1 of the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 611)).

''(b) DISCLOSURE OF THIRD-PARTY LITIGATION FUNDING AND FOREIGN SOURCE CERTIFICATION BY

FOREIGN PERSONS, FOREIGN STATES, AND SOVEREIGN WEALTH FUNDS.—

"(1) IN GENERAL.—In any civil action, each party or the counsel of record for the party shall—

"(A) disclose in writing to the court, to all other named parties to the civil action, to the Attorney General, and to the Principal Deputy Assistant Attorney General for National Security—

"(i) the name, the address, and, if applicable, the citizenship or the country of incorporation or registration of any foreign person, foreign state, or sovereign wealth fund, other than the named parties or counsel of record, that has a right to receive any payment that is contingent in any respect on the outcome of the civil action by settlement, judgment, or otherwise;

"(ii) the name, the address, and, if applicable, the citizenship or the country of incorporation or registration of any foreign person, foreign state, or sovereign wealth fund, other than the named parties or counsel of record, that has a right to receive any payment that is contingent in

any respect on the outcome of any matter within a portfolio that includes the civil action and involves the same counsel of record or affiliated counsel; and

''(iii) if the party or the counsel of record for the party submits a certification described in subparagraph (C)(i), the name, the address, and, if applicable, the citizenship or the country of incorporation or registration of the foreign person, foreign state, or sovereign wealth fund that is the source of the money;

''(B) produce to the court, to all other named parties to the civil action, to the Attorney General, and to the Principal Deputy Assistant Attorney General for National Security, except as otherwise stipulated or ordered by the court, a copy of any agreement creating a contingent right described in subparagraph (A); and

''(C) for a civil action involving an agreement creating a right to receive any payment by anyone, other than the named parties or counsel of record, that is contingent in any respect on the outcome of the civil action by settlement,

judgment, or otherwise, or on the outcome of any matter within a portfolio that includes the civil action and involves the same counsel or affiliated counsel, submit to the court a certification that—

"(i) the money that has been or will be used to satisfy any term of the agreement has been or will be directly or indirectly sourced, in whole or in part, from a foreign person, foreign state, or sovereign wealth fund, including the monetary amounts that have been or will be used to satisfy the agreement; or

"(ii) that the disclosure and certification criteria set forth in subparagraph (A)(iii) and clause (i) of this subparagraph do not apply to the civil action.

"(2) TIMING.—

"(A) IN GENERAL.—The disclosure and certification required by paragraph (1) shall be made not later than the later of—

"(i) 30 days after execution of any agreement described in paragraph (1); or

"(ii) the date on which the civil action is filed.

"(B) PARTIES SERVED OR JOINED LATER.—A party that enters into an agreement described in paragraph (1) that is first served or joined after the date on which the civil action is filed shall make the disclosure and certification required by paragraph (1) not later than 30 days after being served or joined, unless a different time is set by stipulation or court order.

"(3) FOREIGN SOURCE DISCLOSURE AND CERTIFICATION FORMAT.—

"(A) IN GENERAL.—A disclosure required under paragraph (1)(A) and a certification required under paragraph (1)(C) shall—

"(i) be made in the form of a declaration under penalty of perjury pursuant to section 1746 and shall be made to the best knowledge, information, and belief of the declarant formed after reasonable inquiry; and

"(ii) be provided to all other named parties to the civil action, to the Attorney General, and to the Principal Deputy Assistant Attorney General for National Security by the party or counsel of record for

the party making the disclosure and certification, except as otherwise stipulated or ordered by the court.

"(B) SUPPLEMENTATION AND CORRECTION.—Not later than 30 days after the date on which a party or counsel of record for the party knew or should have known that the disclosure required under paragraph (1)(A) or a certification required under paragraph (1)(C) is incomplete or inaccurate in any material respect, the party or counsel of record shall supplement or correct the disclosure or certification.

"(c) PROHIBITION ON THIRD-PARTY FUNDING LITIGATION BY FOREIGN STATES AND SOVEREIGN WEALTH FUNDS.—

"(1) IN GENERAL.—It shall be unlawful for any party to or counsel of record for a civil action to enter into an agreement creating a right for anyone, other than the named parties or counsel of record, to receive any payment that is contingent in any respect on the outcome of a civil action or any matter within a portfolio that includes the civil action and involves the same counsel of record or affiliated counsel, the terms of which are to be satisfied by

money that has been or will be directly or indirectly sourced, in whole or in part, from a foreign state or a sovereign wealth fund.

''(2) ENFORCEMENT.—Any agreement entered in violation of paragraph (1) shall be null and void.

''(d) FAILURE TO DISCLOSE, TO SUPPLEMENT; SANCTIONS.—A disclosure, production, or certification under subsection (b) is deemed to be information required by rule 26(a) of the Federal Rules of Civil Procedure and subject to the sanctions provisions of rule 37 of the Federal Rules of Civil Procedure.''.

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections chapter 111 of title 28, United States Code, is amended by adding at the end the following:

''1660. Transparency and limitations on foreign third-party litigation funding.''.

SEC. 3. REPORT TO CONGRESS.

Not later than 1 year after the date of enactment of this Act, and annually thereafter, the Attorney General shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report on the activities involving foreign third-party litigation funding in Federal courts, including, if applicable—

(1) the identities of foreign third-party litigation funders in Federal courts, including names, ad-

dresses, and citizenship or country of incorporation or registration;

(2) the identities of foreign persons, foreign states, or sovereign wealth funds (as such terms are defined in section 1660 of title 28, United States Code, as added by section 2 of this Act) that have been the sources of money for third-party litigation funding in Federal courts;

(3) the judicial districts in which foreign third-party litigation funding has occurred;

(4) an estimate of the total amount of foreign-sourced money used for third-party litigation funding in Federal courts, including an estimate of the amount of such money sourced from each country; and

(5) a summary of the subject matters of the civil actions in Federal courts for which foreign sourced money has been used for third-party litigation funding.

SEC. 4. APPLICABILITY.

The amendments made by this Act shall apply to any civil action pending on or commenced on or after the date of enactment of this Act.

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119TH CONGRESS
1ST SESSION

H. R. 3512

To amend the Internal Revenue Code of 1986 to establish a tax on income from litigation which is received by third-party entities that provided financing for such litigation.

IN THE HOUSE OF REPRESENTATIVES

MAY 20, 2025

Mr. HERN of Oklahoma (for himself and Mr. FEENSTRA) introduced the following bill; which was referred to the Committee on Ways and Means

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A BILL

To amend the Internal Revenue Code of 1986 to establish a tax on income from litigation which is received by third-party entities that provided financing for such litigation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Tackling Predatory Litigation Funding Act''.

SEC. 2. LITIGATION FINANCING.

(a) IN GENERAL.—Subtitle D of the Internal Revenue Code of 1986 is amended by adding at the end the following new chapter:

"CHAPTER 50B—LITIGATION FINANCING

"SEC. 5000E–1. TAX IMPOSED.

"(a) IN GENERAL.—A tax is hereby imposed for each taxable year in an amount equal to the applicable percentage of any qualified litigation proceeds received by a covered party.

"(b) APPLICABLE PERCENTAGE.—For purposes of subsection (a), with respect to any taxable year, the applicable percentage shall be the amount (expressed as a percentage) equal to the sum of—

"(1) the highest rate of tax imposed by section 1 for such taxable year, plus

"(2) 3.8 percentage points.

"(c) APPLICATION OF TAX FOR PASS-THRU ENTITIES.—In the case of a covered party that is a partnership, S corporation, or other pass-thru entity, the tax imposed under subsection (a) shall be applied at the entity level.

"SEC. 5000E–2. DEFINITIONS.

"In this chapter—

''(1) CIVIL ACTION.—

''(A) IN GENERAL.—The term 'civil action' means any civil action, administrative proceeding, claim, or cause of action.

''(B) MULTIPLE ACTIONS.—The term 'civil action' may, unless otherwise indicated, include more than 1 civil action.

''(2) COVERED PARTY.—

''(A) IN GENERAL.—The term 'covered party' means, with respect to any civil action, any third party (including an individual, corporation, partnership, or sovereign wealth fund) to such action which—

''(i) receives funds pursuant to a litigation financing agreement, and

''(ii) is not an attorney representing a party to such civil action.

''(B) INCLUSION OF DOMESTIC AND FOREIGN ENTITIES.—Subparagraph (A) shall apply to any third party without regard to whether such party is created or organized in the United States or under the law of the United States or of any State.

''(3) LITIGATION FINANCING AGREEMENT.—

"(A) IN GENERAL.—The term 'litigation financing agreement' means, with respect to any civil action, a written agreement—

"(i) whereby a third party agrees to provide funds to one of the named parties or any law firm affiliated with such civil action, and

"(ii) which creates a direct or collateralized interest in the proceeds of such action (by settlement, verdict, judgment or otherwise) which—

"(I) is based, in whole or part, on a funding-based obligation to—

"(aa) such civil action,

"(bb) the appearing counsel,

"(cc) any contractual co-counsel, or

"(dd) the law firm of such counsel or co-counsel, and

"(II) is executed with—

"(aa) any attorney representing a party to such civil action,

"(bb) any co-counsel in the litigation with a contingent fee

interest in the representation of such party,

"(cc) any third party that has a collateral-based interest in the contingency fees of the counsel or co-counsel firm which is related, in whole or part, to the fees derived from representing such party, or

"(dd) any named party in such civil action.

"(B) SUBSTANTIALLY SIMILAR AGREEMENTS.—The term 'litigation financing agreement' shall include any contract (including any option, forward contract, futures contract, short position, swap, or similar contract) or other agreement which, as determined by the Secretary, is substantially similar to an agreement described in subparagraph (A).

"(C) EXCEPTIONS.—The term 'litigation financing agreement' shall not include any agreement—

"(i) under which the total amount of funds described in subparagraph (A)(i)

with respect to an individual civil action is less than $10,000, or

"(ii) in which the third party described in subparagraph (A)—

"(I) has a right to receive proceeds which are derived from, or pursuant to, such agreement that are limited to—

"(aa) repayment of the principal of a loan,

"(bb) repayment of the principal of a loan plus any interest on such loan, provided that the rate of interest does not exceed the greater of—

"(AA) 7 percent, or

"(BB) a rate equal to twice the average annual yield on 30-year United States Treasury securities (as determined for the year preceding the date on which such agreement was executed), or

"(cc) reimbursement of attorney's fees, or

"(II) bears a relationship described in section 267(b) to the named party receiving the payment described in subparagraph (A)(i).

"(4) QUALIFIED LITIGATION PROCEEDS.—

"(A) IN GENERAL.—The term 'qualified litigation proceeds' means, with respect to any taxable year, an amount equal to the realized gains, net income, or other profit received by a covered party during such taxable year which is derived from, or pursuant to, any litigation financing agreement.

"(B) ANTI-NETTING.—Any gains, income, or profit described in subparagraph (A) shall not be reduced or offset by any ordinary or capital loss in the taxable year.

"(C) PROHIBITION ON EXCLUSION OF CERTAIN AMOUNTS.—In determining the amount of realized gain under subparagraph (A), amounts described in section 104(a)(2) and 892(a)(1) shall not be excluded.

"SEC. 5000E–3. SPECIAL RULES.

''(a) WITHHOLDING OF TAX ON LITIGATION PROCEEDS.—Any applicable person having the control, receipt, or custody of any proceeds from a civil action (by settlement, judgment, or otherwise) with respect to which such person had entered into a litigation financing agreement shall deduct and withhold from such proceeds a tax equal to 50 percent of the applicable percentage (as determined under section 5000E–1(b)) of any payments which are required to be made to a third party pursuant to such agreement.

''(b) APPLICABLE PERSON.—For purposes of this section, the term 'applicable person' means any person which—

''(1) is a named party in a civil action or a law firm affiliated with such civil action, and

''(2) has entered into a litigation financing agreement with respect to such civil action.

''(c) APPLICATION OF WITHHOLDING PROVISIONS.—

''(1) LIABILITY FOR WITHHELD TAX.—Every person required to deduct and withhold any tax under this chapter is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payments made in accordance with the provisions of this chapter.

''(2) WITHHELD TAX AS CREDIT TO RECIPIENT OF QUALIFIED LITIGATION PROCEEDS.—Qualified litigation proceeds on which any tax is required to be withheld at the source under this chapter shall be included in the return of the recipient of such proceeds, but any amount of tax so withheld shall be credited against the amount of tax as computed in such return.

''(3) TAX PAID BY RECIPIENT OF QUALIFIED LITIGATION PROCEEDS.—If—

''(A) any person, in violation of the provisions of this chapter, fails to deduct and withhold any tax under this chapter, and

''(B) thereafter the tax against which such tax may be credited is paid,

the tax so required to be deducted and withheld shall not be collected from such person, but this paragraph shall in no case relieve such person from liability for interest or any penalties or additions to the tax otherwise applicable in respect of such failure to deduct and withhold.

''(4) REFUNDS AND CREDITS WITH RESPECT TO WITHHELD TAX.—Where there has been an overpayment of tax under this chapter, any refund or credit made under chapter 65 shall be made to the with-

holding agent unless the amount of such tax was actually withheld by the withholding agent.''.

(b) EXCLUSION FROM DEFINITION OF CAPITAL ASSET.—Section 1221(a) of the Internal Revenue Code of 1986 is amended—

(1) in paragraph (7), by striking ''or'' at the end,

(2) in paragraph (8), by striking the period at the end and inserting ''; or'', and

(3) by adding at the end the following new paragraph:

''(9) any financial arrangement created by, or any proceeds derived from, a litigation financing agreement (as defined under section 5000E–2).''.

(c) REMOVAL FROM GROSS INCOME.—Part III of subchapter B of chapter 1 of the Internal Revenue Code of 1986 is amended by inserting after section 139I the following new section:

''SEC. 139J. QUALIFIED LITIGATION PROCEEDS.

''Gross income shall not include any qualified litigation proceeds (as defined in section 5000E–2).''.

(d) CLERICAL AMENDMENTS.—

(1) Section 7701(a)(16) of the Internal Revenue Code of 1986 is amended by inserting ''5000E–3(c)(1),'' before ''1441''.

(2) The table of chapters for subtitle D of the Internal Revenue Code of 1986 is amended by inserting after the item relating to chapter 50A the following new item:

"CHAPTER 50B—LITIGATION FINANCING".

(3) The table of sections for part III of subchapter B of chapter 1 of such Code is amended by inserting after the item relating to section 139I the following new item:

"Sec. 139J. Qualified litigation proceeds.".

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2025.

○

The following constitutes the ruling of the court and has the force and effect therein described.

Signed August 4, 2025

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re: **FRESH ACQUISITIONS, LLC, *et al.*** **Post-Confirmation/Liquidating Debtors.**	**Chapter 11** **Case No. 21-30721-sgj-11** **(Jointly Administered)**
DAVID GONZALES, TRUSTEE OF THE FRESH ACQUISITIONS LIQUIDATING TRUST **Plaintiff.** **v.** **ALLEN JACKIE JONES, et al.,** **Defendants.**	**Adv. No. 22-3087-sgj** **Civ. Act. No. 3:22-cv-2659-M**

MEMORANDUM OPINION AND ORDER: (A) DECLARING THAT POST-CONFIRMATION LIQUIDATING TRUSTEE'S ENTRY INTO LITIGATION FUNDING AGREEMENT, WITHOUT NOTICE OR COURT AUTHORITY, WAS IMPROPER AND, AS A RESULT, LIQUIDATING TRUST HAS NO CONTRACTUAL OBLIGATION RELATING TO SAME; (B) DIRECTING APPOINTMENT OF A REPLACEMENT POST-CONFIRMATION LIQUIDATING TRUSTEE; AND (C) REQUIRING EXPANDED GLOBAL MEDIATION

I. INTRODUCTION

This order arises in a post-confirmation Chapter 11 context. It arises against the backdrop of seven post-confirmation adversary proceedings that are being prosecuted by a liquidating plan trustee, as plaintiff (the "Liquidating Trustee"). The seven adversary proceedings have now gone on for approximately three years, at great expense, with no end in sight. It has been almost four years since a liquidating plan was confirmed. There has been no distribution to unsecured creditors—nor does one look likely anytime in the near future. The bankruptcy court recently (on June 5, 2025) held a status conference to inquire as to what might be done to speed things along and to encourage more attempts at mediation. The court learned somewhat inadvertently—in response to its inquiries—that the Liquidating Trustee entered into a ***litigation funding agreement***—more than a year after his tenure began as a post-confirmation trustee, without any prior notice (pre- or post-confirmation) to the court or the creditors/trust beneficiaries. According to certain defendants being sued by him, this litigation funding agreement was hampering the prospect of settlement in the post-confirmation adversary proceedings.

This court was surprised to hear about a litigation funding agreement. The court never heard about it as a possibility in connection with plan confirmation (or otherwise) nor approved it. The court has gone back and scoured the bankruptcy court docket, the Disclosure Statement that the court approved, the Plan that the court confirmed, the form of Liquidating Trust Agreement presented as part of the confirmation evidence (as well as the Liquidating Trust Agreement that was ultimately executed), and the Confirmation Order. Nothing. As a result of this revelation at the June 5, 2025 status conference, on June 18, 2025, this court issued a *Memorandum and Opinion Requiring Liquidating Trustee to: (A) File Litigation Funding Agreement, Unsealed and Unredacted, on Main Bankruptcy Case Docket; and (B) Appear and Show Cause Regarding His*

Authority (or Lack Thereof) to Unilaterally Enter Into Such Agreement ("*Show Cause Order*"). DE # 1112 in main bankruptcy case and DE # 404 in above-referenced adversary proceeding. The Liquidating Trustee resisted filing the litigation funding agreement unsealed or without redaction on the public bankruptcy docket (arguing it was work product or irrelevant), but this court required it to be filed unsealed and unredacted.

As explained in the *Show Cause Order*, the Liquidating Trustee expressed the view at the June 5, 2025 status conference that, since the litigation funding agreement was entered into ***post-confirmation***, he was not required to give notice or obtain court approval and there is no problem, he says, since he controls all litigation decisions (not the litigation funder).

The court held an evidentiary hearing on the *Show Cause Order* on July 30, 2025. The court heard further testimony from the Liquidating Trustee and also heard from two expert witnesses who testified generally about the subject of litigation funding agreements. Based on the evidence and arguments, this court has decided that, even though the Liquidating Trustee entered into the litigation funding agreement post-confirmation—at a time when bankruptcy courts have less oversight and limited bankruptcy subject matter jurisdiction—he nevertheless acted improperly, and this court has subject matter jurisdiction to address it.

First, the solicitation package that went out for a creditor vote in the above-referenced bankruptcy case (i.e., the approved Disclosure Statement, an Exhibit D liquidation analysis attached thereto, the Plan, and Plan documents), as well as the confirmation evidence presented at the confirmation hearing, ***did not disclose litigation funding as a possible means to fund post-confirmation litigation***.

Second, the Liquidating Trust Agreement that was submitted as part of the confirmation hearing did not grant the Liquidating Trustee authority to borrow funds post-confirmation (although neither the Liquidating Trustee nor litigation funder will refer to the litigation funding

as a "loan"). As a result of this lack of disclosure and lack of authority, the Trust will have no contractual liability to the litigation funder.

Third, even if the Liquidating Trust Agreement did grant broad enough authority to the Liquidating Trustee to enter into a litigation funding agreement, this court cannot possibly find here (given the exorbitantly expensive terms of the litigation funding—later described) that the Liquidating Trustee exercised reasonable business judgment or acted as a prudent fiduciary. Pursuant to Bankruptcy Code sections 105(a) and 1142, and Bankruptcy Rule 3020(d), this court is compelled to conclude that the Liquidating Trustee's entry into the litigation funding agreement was an abuse of discretion, harmful to the creditors/trust beneficiaries, and will order that a new liquidating trustee be promptly appointed in substitution of the current Liquidating Trustee. While this is not normally something within the purview of the U.S. Trustee (i.e., appointing a post-confirmation trustee), the court is directing the U.S. Trustee's office, pursuant to this court's power under sections 105(a) and 1142(b) and Bankruptcy Rule 3020(d), to appoint a suitable candidate from its list of panel trustees, since there is no oversight committee under the Liquidating Trust Agreement to perform the task of voting on a new trustee, and, in fact, the Liquidating Trust Agreement has an unworkable requirement of a 75% vote of the beneficiaries of the Liquidating Trust to replace the Liquidating Trustee (it is impossible to perform the math on that, since there are still many unresolved proofs of claim, including a $150 million (or more) priority claim of the IRS).

Finally, the court also is ordering an expanded global mediation to occur that shall include not only the new replacement liquidating trustee and the defendants in the seven adversary proceedings, but also the current Liquidating Trustee and his professionals (who may be subject to disgorgement of fees, as set forth herein) as well as the litigation funder (who paid $2.325

million towards these professionals' fees and may want to explore a consensual way to put this mess behind it).[1]

II. FINDINGS OF FACT

A. Timeline.

On **April 20, 2021**, Fresh Acquisitions, LLC and fourteen related entities in the restaurant business (collectively, the "Debtors") filed Chapter 11 bankruptcy cases (collectively, the "Bankruptcy Case").

On **December 20, 2021**, after approving a section 363 sale of substantially all of the assets of the Debtors, the bankruptcy court confirmed a Chapter 11 Plan liquidating plan (the "Plan"), DE # 498, that was proposed by the Official Committee of Unsecured Creditors ("UCC") appointed in the Bankruptcy Case. *See* the "Confirmation Order." DE # 586. The Plan was a typical liquidating "pot plan," pursuant to which a trust (the "Liquidating Trust" or "Trust") was created, and an individual named David Gonzales, with a firm called Caliber Advisors, LLC in Scottsdale, Arizona, was selected to be the Liquidating Trustee. Mr. Gonzales had been a financial advisor to the UCC pre-petition, and apparently the UCC wanted him to serve as the Liquidating Trustee because he was already somewhat familiar with issues that would be litigated post-confirmation. The Debtors, in opposition, had argued that conversion to a Chapter 7 case, after the sale, would be a more cost-efficient way to wind down the estate than the UCC Plan. Not surprisingly, the UCC disagreed. The UCC's Disclosure Statement that the court approved, in the section entitled "XII. Liquidation Analysis, Best Interest of Creditors," stated:

> *The Committee believes that the orderly liquidation proposed under the Plan is likely to generate greater distributions to creditors than would occur in a Chapter 7 liquidation.* ***Here, the Liquidating Trustee is extremely familiar with the structure of the Debtors' past operations and has already prepared a comprehensive claims analysis****. He has already testified in the Bankruptcy Court*

[1] The litigation funder did show up and participate in a constructive way at the Show Cause Hearing.

> *at length about the potential Causes of Action and has gained momentum in developing a necessary strategy for pursuing litigation.* ***This will save cost [sic] in having a new trustee and new counsel enter into the case and virtually start over. As shown on Exhibit D, the costs of the Litigation Trustee will be a total of $600,000 over the estimated five-year term of the Plan. Payments to a Chapter 7 trustee calculated under Section 326 of the Bankruptcy Code would be a higher amount at about $625,000.*** *Certainly, claimants will receive Distributions under the Plan of at least as much as they would receive in a Chapter 7 liquidation and thus, the Plan meets the best interests of creditors test.*
>
> *The Debtors believe a Chapter 7 liquidation may be more efficient and less costly, and the Chapter 7 trustee is more likely than not to retain Committee professionals to minimize delay and maximize the Committee's purported momentum. The Committee believes that there are no assurances that a Chapter 7 trustee would invest the effort to pursue the Causes of Action to the extent that the Liquidating Trustee would pursue them. It seems much more likely that he/she would hire local professionals with whom he/she has worked with in the past.*

DE # 499, pp 45-46 (emphasis added). The Exhibit D that was attached estimated overall "Litigation Costs" between $150,000 and $350,000 per year. Exhibit D also estimated "Trustee Costs" at $120,000 year (a $10,000 flat fee per month for the Liquidating Trustee). It estimated "Accounting and other" costs at $100,000 the first year of the Plan, and then $60,000 per year thereafter. The Plan was projected to be five years in duration, during which there would be $6.7 million in payments made to priority tax claimants (which would be a 100% dividend) and $9,650,198 in payments to general unsecured creditors (which would be an estimated 13% dividend). To be clear, the UCC's Disclosure Statement and Plan estimated a 5-year period to liquidate the Causes of Action. DE # 499, p. 30. As explained below, things have not turned out remotely close to this forecast by the UCC and its professionals.

The Plan went effective on January 4, 2022. DE # 591. In accordance with the terms of the Plan, the Confirmation Order, and the Fresh Acquisitions Liquidating Trust Agreement (the "Liquidating Trust Agreement"), all of the Debtors' assets, as defined in section 541 of the Bankruptcy Code, including "Causes of Action," were transferred to and vested in the Liquidating Trust. The Liquidating Trustee was granted standing to prosecute the Causes of Action.

On the effective date of the Plan, the holders of general unsecured claims against the substantively consolidated Debtors received a pro-rata beneficial interest in the Liquidating Trust "in full and final satisfaction" of their claims. The Liquidating Trust received a sum of cash (approximately $345,000[2]) to seed the trust. In reviewing the Liquidating Trust Agreement [DE # 499-1, Ex. C], the court now observes, with regret, that ***there was no "Oversight Committee" of trust beneficiaries***, as we typically see, so as to provide a type of "corporate governance" to the Liquidating Trustee. The court is not sure why. The Liquidating Trustee makes decisions for the Trust beneficiaries (the holders of administrative, priority, and unsecured claims) and 75% of that group can vote to remove or replace the Liquidating Trustee.

The Liquidating Trustee (David Gonzales, the former financial advisor to the UCC) immediately took on his role as of the Effective Date of the Plan and hired the former lawyers for the UCC to represent him (Dickinson Wright PLLC).

On **September 12, 2022**, approximately nine months after confirmation, despite the Liquidating Trustee being ***"extremely familiar with the structure of the Debtors' past operations"*** and having ***"already prepared a comprehensive claims analysis"*** and having ***"gained momentum in developing a necessary strategy for pursuing litigation,"*** he finally got around to filing the above-referenced Adversary Proceeding ("Original Adversary Proceeding"). The long-awaited original complaint was 71-pages long, plus eight exhibits, and it named 22 defendants (plus additional "John and Jane Does" and other unknown, fictitious entities) and set forth 27 causes of action. These 27 causes of action (which were mostly, if not entirely, alleged against "insiders" or "affiliates" of the Debtors) ranged from alleged fraudulent transfers, to mismanagement, to breach of fiduciary duties, to misappropriation of government PPP funds, and numerous other torts

[2] *See Declaration of David Gonzales*, p.3, ¶ 20. DE # 1126-1.

and remedies. The court soon ordered severance—in other words, a carving up of the Original Adversary Proceeding into seven different adversary proceedings (the "Seven Adversary Proceedings"),[3] after numerous defendants argued that the complaint filed in the Original Adversary Proceeding contained improper "group pleading" (in other words, there were broad allegations against the general group of defendants in the Original Adversary Proceeding without giving clear notice regarding which allegations and claims were being asserted against whom).

On **July 6, 2023**, ten months after filing the Original Adversary Proceeding, the Liquidating Trustee filed separate "amended" complaints in each of the Seven Adversary Proceedings. Thereafter, in these Seven Adversary Proceedings, the court has seen: (a) motions to withdraw the reference and jury demands (and joinders) filed by certain of the 22 defendants (which were granted, since the defendants clearly had jury trial rights, although the bankruptcy court was designated to handle pre-trial matters); (b) Rule 12(b)(6) motions to dismiss from virtually every single defendant (none were granted); (c) numerous discovery disputes (instigated with motions to compel and motions for protective orders); (d) *Daubert* motions; and (e) 15 separate motions and cross-motions for summary judgment (each of which included 3,000+ pages of aggregate appendices). The six cross motions for summary judgment that the court has ruled upon thus far (in three of the Seven Adversary Proceedings) have been denied,[4] meaning that at least three of the Seven Adversary Proceedings will go to jury trial. It seems likely that all Seven Adversary Proceedings will go to trial. Meanwhile, the District Judge who is assigned to preside over the ultimate jury trials has recently retired.

[3] The six new adversary proceedings created were Adversary Proceeding Nos. 23-03054, 23-03055, 23-03056, 23-03057, 23-03058, and 23-03059.

[4] The defendant's motions for summary judgment as to plaintiff's conspiracy to commit fraudulent transfer claim in each of the three adversary proceedings were granted. *See Memorandum Opinion and Order Denying Cross-Motions for Summary Judgment as to Plaintiff's Fraudulent Transfer Claims and Granting Defendant's Motion for Summary Judgment as to Plaintiff's Conspiracy to Commit Fraudulent Transfer Claim*. DE # 130 (23-03054), DE # 125 (23-03055 and 23-03056).

On **May 3, 2023** (yes, we are going backwards in time now), three months before the Original Adversary Proceeding was separated into the Seven Adversary Proceedings, and unbeknownst to the court or creditors/trust beneficiaries, the Liquidating Trustee entered into a **"Master Prepaid Forward Purchase Agreement by and Between Litchfield Ventures, LLC and Fresh Acquisitions Liquidating Trust,** which was then amended on **October 9, 2024** (collectively, the "Litigation Funding Agreement"). Nothing was filed on the docket to disclose this, nor did Gonzales disclose to the trust beneficiaries at any time prior to entering into the Litigation Funding Agreement that he would be doing so.

On **August 22, 2024** (now, coming up on three years since plan confirmation, and 15 months after entry into the Litigation Funding Agreement) the Liquidating Trustee filed a "Notice of Trustee's Status Report to Beneficiaries" (Status Report")." DE # 1097. The Status Report was extremely dense with information and legal advocacy regarding the Causes of Action against the numerous defendants and the Liquidating Trustee's "stunning discovery finds." Buried in the Status Report (which is 15 pages, plus 7 pages of rather sensational email attachments), there is one sentence that generically references the fact that the Liquidating Trustee had obtained litigation financing. Specifically, after noting that the Debtors' "Owners" were and are "covered by a $2 million D&O policy paying all of their legal fees," the Status Report stated: "The Trustee countered this strategy by securing litigation financing that he believes will be ample to withstand a full trial if necessary." DE # 1097, p. 5 (middle of paragraph 8). That's it.

On **June 5, 2025,** the court had *sua sponte* set a status conference for the simple reason of exploring what might be done to hurry along the Liquidating Trustee's Seven Adversary Proceedings—including having a discussion regarding more mediation (it was attempted unsuccessfully once before). As noted earlier, the court learned, to its surprise, that ***the***

Liquidating Trustee had entered into the Litigation Funding Agreement post-confirmation and that the agreement—according to some defendants—was hampering the prospect of a settlement.

On **June 16, 2025**, the court was presented, over the objection of the Liquidating Trustee, with a copy of the Litigation Funding Agreement. The court certainly understands that not all litigation funding agreements are the same. Presumably, sometimes law firms simply enter into them directly with funders, and the funding might not be that remarkable (for example, the litigation funder might share in a law firm's contingency fee—assuming that is legal in a particular state). The litigation funding is likely, generally pricey, because of the inherent risks and the typically non-recourse nature of it. But the Litigation Funding Agreement here seemed rather amazing to the court. As noted earlier, the term "Forward Purchaser" is used, rather than the term "funder" or "lender." The Liquidating Trustee is referred to as "Forward Seller." It indicates that it is governed by Delaware law. There is no mention of the bankruptcy court or case number. The Litigation Funding Agreement does at least indicate that the Liquidating Trustee has the sole and exclusive right to settle any claim (and the court notes that the approved Disclosure Statement indicated that post-confirmation settlements in excess of $100,000 must be presented to the bankruptcy court for approval). DE # 499 at p. 36. But, the Liquidating Trustee has to provide all details about any settlement to the litigation funder (i.e., the "Forward Purchaser") in writing within two business days (details include such things as offers, demands, proposals, and substance of discussions). So, I guess one might say there were two stages of vetting that the Liquidating Trustee needed to go through before finalizing any settlement: first, with the litigation funder; then, with the bankruptcy judge. As far as pricing, there is a guaranteed funding commitment of $2,325,000 (all of which has now been funded). The promised "return" to the litigation funder is three multiplied by whatever the ***litigation funder*** funds (here, that would be $6,975,000), plus a

12% return[5] on the difference between the overall litigation proceeds and $6,975,000. If there is a default, the "Default Rate" of interest to be charged is 20% per annum compounded monthly.

Using a hypothetical, if ***tomorrow***, the Liquidating Trustee won (or obtained through a settlement) litigation proceeds of **$10 million**, the litigation funder would receive $6,975,000 **plus** 12% of $3,025,000 (the difference between $10 million and $6,975,000) which would equal another **$363,000**. Thus, **$7,338,000** on a **$2,325,000** investment.[6] This would leave only **$2,662,000** for the Liquidating Trustee to use toward paying creditors in the context of a $10 million verdict or settlement. As shown further in Part II.B. below, the Liquidating Trustee's counsel is currently owed **$2,126,278.09** in unpaid fees (even after being paid handsomely with the previously undisclosed litigation funding). Thus, this would actually mean approximately **$500,000** being available for prepetition creditors in the context of a **$10 million** verdict/settlement that occurs tomorrow.

Using another hypothetical, if ***tomorrow***, the Liquidating Trustee realized litigation proceeds of $30 million, the litigation funder would receive $6,975,000 **plus** 12% of $23,025,000 (the difference between $30 million and $6,975,000) which would equal another $2,763,000. Thus, **$9,738,000** on a **$2,325,000** investment.[7] The Liquidating Trustee in this scenario of a **$30 million** verdict/settlement tomorrow realizes **$10,262,000** for him, his professionals, and thereafter the prepetition creditors. Again, as shown further in Part II.B. below, the Liquidating Trustee's counsel is currently owed $2,126,278.09 in unpaid fees (even after being paid handsomely with the previously undisclosed litigation funding). Thus, this would actually mean approximately

[5] This was increased from an original 8% in the October 9, 2024 Amendment to the Litigation Funding Agreement.

[6] *See* DE # 415, p.11 of 29 in Adv. Proc. No. 22-3087.

[7] *See* DE # 415, p.11 of 29 in Adv. Proc. No. 22-3087.

$8,135,721.91 being available for prepetition creditors in the context of a **$30 million** verdict/settlement tomorrow.

Using still another hypothetical, if ***tomorrow***, the Liquidating Trustee realized litigation proceeds of $20 million, the litigation funder would receive $6,975,000 **plus** 12% of $13,025,000 (the difference between $20 million and $6,975,000) which would equal another $1,563,000. Thus, **$8,538,000** on a **$2,325,000** investment. The Liquidating Trustee in this scenario of a **$20 million** verdict/settlement tomorrow realizes **$11,462,000** for him, his professionals, and thereafter the prepetition creditors. Again, as shown further in Part II.B. below, the Liquidating Trustee's counsel is currently owed $2,126,278.09 in unpaid fees (even after being paid handsomely with the previously undisclosed litigation funding). Thus, this would actually mean approximately **$9,335,721.91** being available for prepetition creditors in the context of a **$20 million** verdict/settlement tomorrow.

Obviously, the Liquidating Trustee (and the creditors), as well as the litigation funder, do better if a very large verdict/settlement is obtained. The problem here, among others, is that there is no settlement/verdict that is going to happen ***tomorrow***. And the litigation funding has run out. And the Liquidating Trustee and his counsel continue to accumulate fees. Other random observations: (1) a broker named Fincorp Associates, LLC (individual name Les Baer) obtained a $75,000 broker fee for arranging the litigation funding (this was not disclosed anywhere before being disclosed, generically, in Gonzales's declaration filed in response to the court's Show Cause Order in which he discloses the payment of a "small" and "modest" (but unspecified amount) broker fee); (2) the Liquidating Trustee gave the litigation funder a security interest in the litigation proceeds and the claims themselves; (3) the Liquidating Trustee must consult with the litigation funder regarding any new counsel brought in; and (4) there are indemnities provided by the Liquidating Trustee to the litigation funder.

On **June 18, 2025**, the court issued the Show Cause Order which ordered the Liquidating Trustee to appear on July 30, 2025 at 1:30 p.m. before the bankruptcy court and show cause ("Show Cause Hearing") as to whether his entry into the Litigation Funding Agreement was legally proper (presenting all arguments as to why—despite an apparent lack of disclosure in the Disclosure Statement and lack of authority in the Liquidating Trust Agreement) and also whether the Litigation Funding Agreement was entered into in the exercise of reasonable business judgment. The Show Cause Order indicated that the Liquidating Trustee would be permitted to put on any testimony regarding whether the Litigation Funding Agreement reflects reasonable market terms and whether (unbeknownst to the court) this is a standard practice of post-confirmation Chapter 11 trustees (i.e., entering into a litigation funding agreement post-confirmation and, in particular, doing this without any foreshadowing to the court or creditors at least pre-confirmation, in connection with plan confirmation). The Show Cause Order indicated that the court would consider all remedies, potential sanctions, and potentially an order voiding the Litigation Funding Agreement, depending on the argument and evidence of the Liquidating Trustee.

B. The Liquidating Trustee's Professional Fees and Costs, Post-Confirmation.

While the Liquidating Trustee's counsel was not required to file fee applications during this post-confirmation phase of the case (which is, of course, not unusual post-confirmation in Chapter 11), the court entered a "*Sua Sponte Order Directing Fee Reporting by the Liquidating Trustee*" on May 13, 2022—even before the Original Adversary Proceeding was filed—after former Debtors' counsel raised concern about the Liquidating Trustee's overzealous litigation tactics in a contested matter. The latest report filed by the Liquidating Trustee shows the following pertinent information: (a) Liquidating Trustee's counsel has been paid **$2,215,908.49** for post-confirmation fees and expenses (but it has billed/incurred a total of **$4,342,186.58**; thus, Dickinson Wright PLLC is owed **$2,126,278.09** currently—and the Seven Adversary Proceedings are

nowhere close to going to jury trial); (b) the Liquidating Trustee's financial advisory firm Caliber, of which the Liquidating Trustee is the only employee, has been paid **$371,737.80** for post-confirmation fees and expenses (it has billed $380,212.80)—and this is in addition to the Liquidating Trustee's individual $10,000 flat monthly fee, for which he has been paid **$330,000** (thus, a total of **$701,737** paid to the Liquidating Trustee and his one-man firm); (c) other professionals (tax accountant and a firm handling a contract matter of some sort) have cumulatively been paid **$13,214**). DE # 1111. **Roughly $3 million paid (with at least $2,126,278.09 unpaid)**. The fees and expenses have been funded mostly from the Litigation Funding since, as noted earlier, the Liquidating Trust was seeded with only $345,000 cash and has only received a few hundred thousand dollars in settlements.[8]

C. The Liquidating Trustee's Testimony and the Plan Documents.

The Liquidating Trustee testified at the *Show Cause Hearing* on July 30, 2025, that he has served as a trustee in bankruptcy approximately a half-dozen times (although he has years of collection experience as a banker). He represented that he believed, based on advice of counsel, that he had no obligation to disclose the Litigation Funding Agreement and no need to obtain court approval. He also testified that he never even considered entering into any litigation funding until around December 2022 or January 2023 (more than a year after confirmation) when the defendants in the Original Adversary Proceeding started putting up strong resistance. As a reminder, the Original Adversary Proceeding complaint was 71-pages long, plus eight exhibits, and it named 22 defendants (mostly or entirely insiders) and set forth 27 causes of action. It asserted $100 million in damages. The testimony and argument at the confirmation hearing had been that Mr. Gonzales

[8] Per Gonzales's declaration, the Trust had recovered approximately $670,000 in "preferences, settlements, reimbursements and refunds." DE # 1126-1, pp. 3-4, ¶ 20. The court notes that this amount is nearly twice the $375,000 amount disclosed by the Liquidating Trustee in his August 22, 2024 Status Report as having been recovered by him from his post-confirmation settlements/litigation since his appointment in January 2022. DE # 402, ¶ 6.

was up-to-speed on the claims and theories. It seems shocking to this court that he would not have anticipated massive resistance to a $100 million adversary proceeding, asserting 27 causes of action, against 22 defendants. In any event, Mr. Gonzales testified that he had never used litigation funding in the past. He testified that he never reached out to any local counsel in the Northern District of Texas to see if they might accept representation of him on a contingency basis. The former UCC counsel (Dickinson Wright PLLC), that he hired post-confirmation—that seemed so eager and willing to represent him at confirmation—apparently, did not want to be employed on a contingency basis. He believes that the Litigation Funding Agreement presents market-based terms. He hired a broker at a cost of $75,000 to connect him to a litigation funder. He did not anticipate that the litigation costs, post-confirmation, would ever grow as large as they have—which happened because of the allegedly unanticipated resistance from the defendants in the Seven Adversary Proceedings. The Liquidating Trustee and his counsel still believe that they will win big and that there will be an eventual payout to unsecured creditors. But meanwhile, the Liquidating Trustee acknowledges that ***he has not yet objected to several IRS proofs of claim that total at least $150 million in amount (priority)***. When pressed whether, ultimately, general unsecured creditors might perhaps receive no distribution, for the reason of these IRS claims alone, he testified that he believed the IRS's proofs of claim will be allowed at zero in amount, but he has not been able to afford to hire accountants to sort it out. When asked about his firm Caliber's receipt of **$371,737.80** for post-confirmation fees and expenses, on top of his $330,000 individual fees (flat $10,000 per month for 33 months), he testified that this was for independent contractors he hired that were CPAs and were helping with other proof of claim objections (not the IRS). However, they had done nothing to work on the IRS's massive claims. Moreover, video deposition testimony was played where he had testified inconsistently from the testimony at the Show Cause

Hearing (with regard to whether there were any Caliber employees or contractors assisting him in this Bankruptcy Case at all).

A careful review of the Disclosure Statement, the Plan, the Confirmation Order, and the Liquidating Trust Agreement show that there was no hint of ***the possibility of*** litigation funding—nothing that this court can find to put the court or creditors on notice of it being a possibility that might impact distributions to creditors under the Plan (note that 106 creditors cast ballots in favor of the Plan and 7 creditors cast ballots to reject the Plan). There are well over a dozen provisions in these collective documents that might be considered pertinent. In the Disclosure Statement, Article VI.D., states that "The Liquidating Trust's professionals shall be compensated at their respective hourly rates or on a contingency fee basis as agreed to by the Liquidating Trustee, without further motion, application notice, or other order of the Court. The fees and expenses of the Liquidating Trust's professionals ***shall be satisfied from the Liquidating Trust Assets***." (Emphasis added). The Plan defines "Liquidating Trust Assets" as "all of the Debtors' Assets transferred to the Liquidating Trust." The Plan further states, at Article I, Section 7, that the "fees and expenses of the Professionals ***shall be paid from the Liquidating Trust Assets***." (Emphasis added.) There is also a defined term in the Plan for "Liquidating Trust Administrative Reserves" defined as cash "in an amount necessary to satisfy reasonable costs and expenses of the Liquidating Trustee," and it shows no hint of supplementation of it with litigation funding. Finally, as noted earlier, very pertinent is the Exhibit D attached to the Disclosure Statement that showed "Projected Cash Available for Distribution." It showed projected "Litigation Costs" ranging from $150,000 to $350,000 per year over five years (along with Trustee's monthly fee amounting to $120,000 per year).

The Liquidating Trustee counters that the Liquidating Trust Agreement provided at Article IV, paragraph 7, that "the Liquidating Trustee shall not be required to obtain any approvals from

the Bankruptcy Court . . . and/or provide notice . . . to implement the terms of this Liquidating Trust Agreement, including, without limitation, the sale, transfer, disposal or contribution of any Liquidating Trust Assets retained by the Liquidating Trust . . ." The Liquidating Trustee says that the Litigation Funding Agreement is similar in nature to a "sale" or "transfer" of the Liquidating Trust Assets (in that it is essentially a sale of future proceeds therefrom, or a "waterfall" therefrom, in exchange for immediate cash). This court disagrees. The litigation funder here represents that it uses the title "Master Prepaid Forward Purchase Agreement" on the Litigation Funding Agreement for "tax and structural reasons" (suggesting that the funding is deemed to be an upfront prepayment for a purchase of litigation proceeds with the actual sale being settled at a future date when the litigation proceeds are realized). DE # 415 in Adv. Proc. No. 22-3087, p. 14 of 19. Whatever tax or other motivations exist here, the litigation funder was, in essence, providing capital in exchange for a later, hoped-for return. The litigation funder took a security interest in the claims and proceeds (the court is not aware if it was perfected). This was not anything contemplated in the Plan documents (including the draft Liquidating Trust Agreement) that went out for a creditor vote.[9] Moreover, to the extent the Liquidating Trust Agreement is ambiguous on this point, the ambiguity must be construed against the drafter of it (i.e., the Liquidating Trustee and his counsel).

D. The Expert Witness Testimony.

The litigation funder here, Litchfield Ventures, LLC ("Litchfield"), is an affiliate of GLS Capital, LLC ("GLS"). Litchfield was created for the specific litigation funding involved here.

[9] *Contrast* the different approach taken in the Sears Chapter 11 bankruptcy case. Motion of the Official Committee of Unsecured Creditors for Entry of an Order . . . Authorizing Entry by the Debtors' Estates Into The Litigation Funding Arrangement with Benchmark 21p, L.P., ¶ 44, [DE # 10407],] in *In re Sears Holdings Corp.*, No. 18-23538 (RDD) (Bankr. S.D.N.Y. Apr. 21, 2022) (noting that the Liquidating Trust Agreement approved under the chapter 11 plan authorized the Liquidating Trust Board created thereunder to incur financing to pursue litigation).

Litchfield has its own investors—the court did not inquire who they are.[10] GLS has been in existence since 2018 and is based in Chicago. It is apparently an active player in the commercial litigation funding industry, and it represented that it had never met the Liquidating Trustee or had any relationship with the relevant attorneys at Dickinson Wright PLLC. Prior to this, it had no familiarity with these Debtors or the bankruptcy.

Litchfield presented expert testimony from two experts in the field of litigation funding agreements. One was a law professor (Professor Tom Baker from University of Pennsylvania), and the other was a director at the global investment bank known as Stout Risius Ross, LLC (Joel E. Cohen). Both witnesses seemed knowledgeable regarding litigation funding agreements and seemed to acknowledge that litigation funding is an expensive product because of the risks involved (i.e., the non-recourse nature of it and the general uncertainty and delay of various litigation outcomes). They seem to think that the Litigation Funding Agreement here was within a standard range of market terms for these types of agreements. While the court has little doubt that these witnesses are very knowledgeable, one witness (Baker) testified that he had probably seen a "handful" of these agreements in his lifetime (because they are rarely made public). He knows about market terms from his "research and teaching" and from talking to participants in the industry. The other witness (Cohen) testified that he similarly had only seen a few actual litigation funding agreements. ***It is hard for a judge to determine if something is reasonable or within normal market terms when the experts admit that they have not seen too many***. Certainly, there has been commentary about the opacity of litigation funding agreements. *See* Samir Parikh, *Opaque Capital and Mass-Tort Financing*, YALE L.J. FORUM (Oct. 2023). They are rarely filed

[10] The court believes it could have. *See* ND TX LR 3.1(c) (local District Court Rule requiring a "Certificate of Interested Persons" to be filed with a civil complaint, which includes "legal entities that are financially interested in the outcome of the case").

on court dockets. Sometimes they are even protected from discovery. *See, e.g., Fleet Connect Sols LLC v. Waste Connections US, Inc.*, No. 2:21-CV-00365-JRG, 2022 U.S. Dist. LEXIS 1292167, at *7 (E.D. Tex. June 29, 2022); *In re DesignLine Corp.*, 565 B.R. 341, 344 (Bankr. W.D. N.C. 2017) (describing the trustee's ongoing efforts to seal information relating to litigation funding arrangement and the court's ultimate ruling that permitted shielding only of the proposed litigation budget); *In re Superior Nat. Ins. Gr.*, 2014 WL 51128, at *4 (Bankr. C.D. Cal. 2014) (requiring disclosure of litigation financing arrangement but permitting the trustee to seal terms relating to the amount of financing and how the money is to be used). *But see Dean v. Seidel*, 2021 WL 1541550, at *2 (N.D. Tex. 2021) (litigation funding agreement approved when presented with trustee's motion to employ special litigation counsel; appeal to Fifth Circuit was dismissed for appellant's lack of standing). *See generally* Kara Bruce, *The Promise and Peril of Third-Party Litigation Finance in Bankruptcy*, 44 No. 4 BANKR. LAW LETTER NL 1 (Apr. 2024) (for an extensive discussion of these issues).

III. CONCLUSIONS OF LAW

A. Bankruptcy Subject Matter Jurisdiction.

The court had bankruptcy subject matter jurisdiction to issue the *Show Cause Order* and to have conducted the *Show Cause Hearing*, pursuant to 28 U.S.C. §§ 1334 & 157—despite it being close to four years post-confirmation—since the issues involved bear on the interpretation, execution, and/or implementation of a confirmed plan. The Fifth Circuit has stated that, while bankruptcy subject matter jurisdiction is broad, it narrows once the debtor confirms its reorganization plan, because confirmation dissolves the debtor's bankruptcy estate. It has further elaborated that "related to" bankruptcy subject matter jurisdiction, post-confirmation, narrows to "matters pertaining to the implementation or execution of the plan." *In re GenOn Mid-Atlantic Development, L.L.C.,* 42 F.4th 523, 534 (5th Cir. 2022); *In re Enron*, 535 F.3d 325, 335 (5th Cir.

2008); *Craig's Stores of Tex., Inc. v. Bank of La. (In re Craig's Stores of Tex., Inc.)*, 266 F.3d 388, 390 (5th Cir. 2001). *See also U.S. Brass Corp. v. Travelers Ins. Grp. (In re U.S. Brass Corp.)*, 301 F.3d 296, 304 (5th Cir. 2002); *In re Chesapeake Energy Corporation*, 70 F.4th 273 (5th Cir. 2023).

There can also be "related to" post-confirmation bankruptcy subject matter jurisdiction in a situation in which a bankruptcy court seeks to enforce one of its orders. *Galaz v. Katona (In re Galaz)*, 841 F.3d 316, 322-23 (5th Cir. 2016). Enforcement of prior orders of the bankruptcy court is implicated here. The bankruptcy court issued an order during the Bankruptcy Case approving the Disclosure Statement as adequate that never disclosed the possibility of litigation funding and its potential, significant impact on creditor recoveries. The bankruptcy court similarly issued an order during the Bankruptcy Case approving the UCC's Plan and Liquidating Trust Agreement which never contemplated the possibility of litigation funding.

The Plan in this Bankruptcy Case also happened to contain typical "Retention of Jurisdiction" provisions at Article VIII.

B. Lack of Disclosure and Authority.

As set forth above, there was no disclosure to voting creditors that a tranche of large litigation funding might come ahead of them in payment. This is troubling from a section 1125 perspective. The Plan documents simply were silent on this point and that is unacceptable. In addition to lack of disclosure, the Liquidating Trust Agreement is not worded in a way that contemplated giving the Liquidating Trustee this authority.

C. Lack of Reasonable Business Judgment.

In any event, it is impossible for this court to find or conclude that that Litigation Funding Agreement here (even if the Liquidating Trustee had authority to enter into it—which he did not) was entered into in the exercise of reasonable business judgment, or reflected the actions of a prudent fiduciary. The hypotheticals shown earlier show the net recovery to the Liquidating

Trustee at a $10 million, $20 million, or $30 million settlement/verdict. The problem is that neither a settlement nor a verdict is anywhere on the horizon; the litigation funding is exhausted; the Liquidating Trustee's professionals are owed millions and will presumably continue to accrue millions; and there remain pending $150 million-plus in priority IRS claims that the Liquidating Trustee feels will be favorably resolved, but he has not hired tax experts yet to say that with certainly. This is not good.

The court is mindful of the wise words from Judge Posner of the Seventh Circuit many years ago, in a slightly different context (involving a Chapter 7 trustee):

> The . . . trustee's case . . . invites consideration of ***the exercise of litigation judgment*** by a Chapter 7 trustee. The filing of lawsuits by a going concern is properly inhibited by concern for future relations with suppliers, customers, creditors, and other persons with whom the firm deals (including government) and by the cost of litigation. The trustee of a defunct enterprise does not have the same inhibitions. A related point is that while the management of a going concern has many other duties besides bringing lawsuits, the trustee of a defunct business has little to do besides filing claims that if resisted he may decide to sue to enforce. ***Judges must therefore be vigilant in policing the litigation judgment exercised by trustees in bankruptcy***, and in an appropriate case must give consideration to imposing sanctions for the filing of a frivolous suit. The Bankruptcy Code forbids reimbursing trustees for expenses incurred in actions not "reasonably likely to benefit the debtor's estate," 11 U.S.C. § 330(a)(4)(A)(ii)(I), and authorizes an "appropriate sanction" against parties who file such a claim. Bankruptcy Rule 9011(b)(2), (c)(1)(B); *In re Bryson*, 131 F.3d 601, 603–04 (7th Cir. 1997); *In re Cohoes Industrial Terminal, Inc.*, 931 F.2d 222, 227 (2d Cir. 1991). Not "reasonably likely to benefit the debtor's estate" may well be a correct description of this suit.

Maxwell v. KPMG, LLP, 520 F.3d 713, 718 (7th Cir. 2008) (emphasis added). Here, the issue is different than in the *Maxwell* case (the court does not believe that the Liquidating Trustee has brought frivolous claims), but the Liquidating Trustee's litigation judgment is still implicated. The Liquidating Trustee obtained litigation funding ***without adequate disclosure to creditors and the court or authority***. And it is very expensive. ***This is bankruptcy where creditor recoveries are of paramount concern***. The creditors in this case were warned that their ultimate recovery was

uncertain. But they were advised in the Disclosure Statement that the projected professional fees would run from $150,000 to $350,000 per year, and they were never told that the Liquidating Trustee might pledge their recoveries in favor of pricey financing if things did not go according to plan. When the Liquidating Trustee pivoted to the pricey litigation funding, it was done with no transparency. Transparency is a hallmark of bankruptcy. As the court indicated at the June 5, 2025 status conference, the court is having trouble seeing how "the juice will ever be worth the squeeze" here. It would appear that the unapproved Litigation Funding Agreement has ensured that.

For the reasons set forth above:

IT IS ORDERED that the Liquidating Trustee acted improperly by entering into the Litigation Funding Agreement without there being a disclosure of it as a possible means to fund post-confirmation litigation, as required by Bankruptcy Code section 1125.

IT IS FURTHER ORDERED that the Liquidating Trust Agreement did not grant the Liquidating Trustee authority to borrow funds post-confirmation or undertake litigation funding.

IT IS FURTHER ORDERED that, as a result of this lack of disclosure and lack of authority, the Liquidating Trust has no contractual liability to the litigation funder.

IT IS FURTHER ORDERED that, even if the Liquidating Trust Agreement did grant broad enough authority to the Liquidating Trustee to enter into a litigation funding agreement, the Liquidating Trustee did not exercise reasonable business judgment or act as a prudent fiduciary here, given the exorbitantly expensive terms of the litigation funding.

IT IS FURTHER ORDERED that the Liquidating Trustee's entry into the litigation funding agreement was an abuse of discretion, harmful to the creditors/trust beneficiaries, not permitted under the terms of the Confirmation Order, the Disclosure Statement, the Plan, or the Liquidating Trust Agreement, and constituted an abuse of the bankruptcy process.

IT IS FURTHER ORDERED that, in order to enforce its prior orders and to prevent an abuse of process, a new liquidating trustee shall be promptly appointed in substitution of the current Liquidating Trustee. While this is not normally something within the purview of the U.S. Trustee (i.e., appointing a post-confirmation trustee), the court is directing it, pursuant to this court's power under sections 105(a) and 1142(b) and Bankruptcy Rule 3020(d), to appoint a suitable candidate from its list of panel trustees, since there is no oversight committee under the Liquidating Trust Agreement to perform the task of voting on a new trustee, and, in fact, the Liquidating Trust Agreement has an unworkable requirement of a 75% vote of the beneficiaries of the Liquidating Trust to replace the Liquidating Trustee.

IT IS FURTHER ORDERED that the following parties shall engage in an expanded global mediation as soon as practicable: the new replacement liquidating trustee; the defendants in the Seven Adversary Proceedings; the current Liquidating Trustee, David Gonzales, and his professionals including Caliber and Dickinson Wright PLLC (who may all be subject to disgorgement of fees); and Litchfield, the litigation funder.

###END OF MEMORANDUM OPINION AND ORDER###

EXHIBIT A

INTERNATIONAL LITIGATION PARTNERS LIMITED

LITIGATION FUNDING AGREEMENT

BETWEEN:

INTERNATIONAL LITIGATION PARTNERS LTD

and

LAURENCE JOHN BOLITHO

INERNATIONAL LITIGATION PARTNERS LIMITED
LITIGATION FUNDING AGREEMENT

Date	**13 March 2014**
Parties	**INTERNATIONAL LITIGATION PARTNERS LTD** **of Level 2,90 William Street, Melbourne VIC 3000** **(ILP)** **LAURENCE JOHN BOLITHO** **of 14 Bolitho Road, Kyabram,VIC 3620** **(Plaintiff)**

RECITALS

A. The Plaintiff has one or more Claims against the Defendants and other persons have claims which are the same or similar to the Claims.

B. A Class Action has already been commenced by the Plaintiff against the Defendants in respect of some or all of the Claims.

C. The Plaintiff has requested ILP to manage the Case, pay the Case Costs and provide necessary funding and support for the Case.

D. ILP is prepared to manage the Case, pay the Case Costs and provide necessary funding and support for the Case on the terms of this ILP Agreement

AGREEMENT

1. **Definitions**

1.1. In this ILP Agreement, unless the context otherwise requires:

"**Adverse Costs Order**" means any costs order made in favour of the Defendants (or any of them) against the Plaintiff and/or ILP in the Proceedings in respect of costs of any Defendant incurred during the term of this ILP Agreement.

"**Alternative Dispute Resolution Process**" means any form of negotiation, discussions, mediation, conciliation, expert determination or other form of consensual dispute resolution process which seeks to settle the Claims and/or the Proceedings.

"**Case**" means the Proceedings.

"**Case Costs**" means the following costs and expenses:

(a) the costs and expenses associated with the Case Investigation and Case Management by the Lawyers and/or ILP;

(b) the costs involved in the provision by ILP of any security for costs;

(c) any Adverse Costs Order paid by ILP;

(d) the costs incurred by ILP in quantifying any Adverse Costs Order;

(e) the reasonable legal fees and the reasonable disbursements (including Counsel fees)reasonably incurred by the Lawyers for the dominant purpose of preparing for, conducting and resolving the Proceedings ;

(f) any costs paid by ILP pursuant to this ILP Agreement;

(g) all of ILP's out of pocket costs and expenses paid or incurred in relation to the Case, including in relation to any consultants and experts engaged by ILP ; and

(h) any GST payable on any Supply made by any entity as a result of the above costs or expenses being incurred.

"**Case Investigation**" means the investigation referred to in sub-clause 4.1.

"**Case Management**" means the management described in clause 7.

"**Claims**" means the claim or claims the Plaintiff has or may have against some or all of the Defendants and for loss and damage caused to the Plaintiff by the conduct of one or more of the Defendants in relation to or arising out of the acquisition by the Plaintiff of any Securities.

"**Class Action**" means the proceedings commenced by the Plaintiff in the Supreme Court of Victoria (SCI 2012 7185) against the Defendants.

"**Conflicts Management Policy**" means ILP's policy, as amended from time to time, for managing conflicts.

"**Consideration**" has the same meaning as in the GST Act

"**Costs Order**" means an order made by a Court requiring the Plaintiff and/or ILP to pay the costs incurred by another party to the Proceedings.

"**Court**" means the Supreme Court of Victoria being the court in which the Proceedings are being conducted.

"**Date of Commencement**" means the date this ILP Agreement signed by the Plaintiff.

"**Defendants**" means each of the individuals and corporations named as defendants in the Class Action and any others against whom Proceedings are commenced.

"**GST**" has the same meaning as in the GST Act.

"**GST Act**" means the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth).

"**ILP**" means International Litigation Partners Limited (ACN 167 628 597).

"**ILP Agreement**" means this agreement between the Plaintiff and ILP and, if amended, this agreement as amended.

"**Input Tax Credit**" has the same meaning as in the GST Act.

"**Judgment**" means any judgment of a competent Court against any Defendant in respect of any Claim.

"**Lawyers**" means Mark Elliott of Level 2, 90 William Street, Melbourne, 3000 or any other solicitors appointed in their place as agreed between ILP and the Plaintiff.

"**Legal Work**" means advice and other legal services which the Lawyers consider reasonably necessary in relation to the Proceedings.

"**Plaintiff**" means the company or individual whose details appear on the front page of this ILP Agreement and the successors or assigns of that company or individual.

"**Privilege**" unless the context otherwise requires, means legal professional privilege .

"**Proceedings**" means the Class Action concerning all or some of the Claims,

"**Regulations**" means the Corporations Amendment Regulation 2012 (No. 6) as amended from time to time.

"**Resolution Sum**" means any money received or payment made to settle, compromise or resolve one or more or all of the Claims .

"**Securities**" means unlisted debentures issued by Banksia Securities Limited.

"**Settlement**", means any agreement, compromise, discontinuance, waiver, payment, release, understanding or any other arrangement whatsoever where money, value or a benefit passes from or on behalf of a Defendant to the Plaintiff in respect of one or more of the Claims

"**Supply**" has the same meaning as in the GST Act.

"**Taxable Supply**" has the same meaning as in the GST Act.

"**Termination**" means:

(a) a termination in accordance with this IPL Agreement; and

(b) any completion, failure, avoidance, rescission, annulment or other cessation of effect of this ILP Agreement.

2. **General**

2.1. The written terms of this ILP Agreement constitute the entire agreement between the parties.

2.2. Neither the Plaintiff nor ILP intend to be partners or fiduciaries with or towards each other. Nothing in this ILP Agreement shall constitute the Plaintiff and ILP as partners or fiduciaries.

2.3. There will be no variation or amendment to the terms of this ILP Agreement except in writing signed by each of the Plaintiff and ILP.

2.4. A facsimile transmission of this ILP Agreement signed by any party to it will be treated as an original signed by that party.

2.5. If any provision of this ILP Agreement, or the application thereof to any person or circumstances, shall be or become invalid or unenforceable, the remaining provisions shall not be affected and each provision shall be valid and enforceable to the full extent permitted by law.

2.6. The Plaintiff and ILP will promptly execute all documents and do all things that either of them from time to time reasonably requires of the other to effect, perfect or complete the provisions of this ILP Agreement and any transaction contemplated by it.

2.7. The singular includes the plural in this ILP Agreement and vice versa.

2.8. All references to clauses, sub-clauses and paragraphs are references to clauses, sub-clauses and paragraphs in this ILP Agreement.

2.9. A reference in this ILP Agreement to any legislation or legislative provision includes any statutory modification, amendment or re-enactment of that legislation or legislative provision, and includes any subordinate legislation or regulations issued under that legislation or legislative provision.

3. **Cooling Off Period**

3.1. The Plaintiff may, by written notice given to ILP within 14 days after the Date of Commencement, withdraw from this ILP Agreement. Such withdrawal will cause this ILP Agreement to terminate but will not be treated as a Termination.

3.2. If the Plaintiff withdraws in accordance with sub-clause 3.1, the Plaintiff shall have no continuing or further obligation to ILP save for any obligations of confidence arising in respect of information received by the Plaintiff prior to the withdrawal.

4. **Case Investigation**

4.1. The Plaintiff consents to ILP, at ILP's discretion:

4.1.1. investigating the evidentiary basis for the Claims of the Plaintiff;

4.1.2. collating the material documents;

4.1.3. investigating the capacity of any Defendants to pay any judgment, award or order which may be made against that Defendant relating to the Claims;

4.1.4. investigating the preparedness of the Defendants to resolve the Claims.

4.2. The Plaintiff will provide, or procure the provision of, all information, documents and assistance as ILP may reasonably request for the Case Investigation on the basis that the information and documentation is confidential, provided for the purpose of resolving the Claims of the Plaintiff, remains the exclusive property of the Plaintiff and will be returned by ILP at the conclusion of the Case.

4.3. Notwithstanding sub-clause 4.2 the Plaintiff agrees that any information or documents provided to ILP may be used by ILP in the Case Investigation and may be disclosed by ILP for the purposes of the Proceedings.

4.4. The Plaintiff hereby authorises ILP to seek and obtain any information and documentation which ILP believes may be relevant to the Claims of the Plaintiff from any person or entity.

4.5. The Plaintiff consents to ILP providing a copy of this ILP Agreement to third parties who request evidence of the authority granted to ILP pursuant to sub-clause 4.4.

4.6. Without derogating from anything else in this clause 4, ILP may use the results of its investigations:

4.6.1. to assist ILP in the preparation or prosecution of any proceedings to which this ILP Agreement applies;

4.6.2. to monitor its actual and potential obligations under this ILP Agreement;

4.6.3. to review whether it provides or continues to provide funding in respect of any of the Claims or the Case.

5. **Proceedings**

5.1. The Plaintiff agrees that:

5.1.1. the Lawyers and ILP will determine what Claims should be pursued in the Proceedings;

5.1.2. ILP will give day-to-day instructions to the Lawyers on all matters concerning the Claims and the Proceedings and may give binding instructions to the Lawyers and make binding decisions on behalf of the Plaintiff in relation to the Claims ; and

5.2. ILP may decide, in its sole discretion following consultation with the Lawyers to cease to fund any Claim by giving 14 days' written notice of its decision to the Plaintiff.

5.3. If ILP decides to cease funding any Claim under sub-clause 5.2, then all of ILP's obligations in relation to that Claim, other than ILP's accrued obligations, cease on the date ILP's notice becomes effective. The Plaintiff agrees that on ILP's notice becoming effective, the Lawyers will as soon as is reasonably possible discontinue the prosecution of the Claim concerned by taking any step necessary to discontinue the prosecution of the Claim. For the avoidance of doubt, any such decision by ILP will not result in a termination of this ILP Agreement.

5.4. The accrued obligations of ILP referred to in sub-clause 5.3 comprise:

5.4.1. payment of any outstanding Case Costs incurred in relation to the Claim referred to in that sub-clause up to the date the notice of ceasing to fund takes effect; and

5.4.2. payment of any Adverse Costs Order against the Plaintiff in the Case in respect of costs which arise in, or are attributed to, the period beginning on the Date of Commencement and ending on the date ILP's notice of ceasing to fund takes effect .

6. **The Plaintiff's Obligations**

6.1. For the duration of this ILP Agreement, the Plaintiff must:

6.1.1. subject to this ILP Agreement, follow all reasonable legal advice given by the Lawyers and by counsel retained by the Lawyers in relation to the Proceedings and the Claims ;

6.1.2. promptly provide full, frank and honest instructions to the Lawyers and counsel and provide the Lawyers with all documents in the Plaintiff's possession, custody or power that are relevant to the Claims or the Proceedings;

6.1.3. provide a signed, written witness statement to the Lawyers on their request for use in the Proceedings, attend the Court to give evidence in person if required by the Lawyers to do so and actively participate in any Alternative Dispute Resolution Process;

6.1.4. diligently prosecute the Proceedings and any appeals and do all things necessary to enable the Lawyers to ensure that the Proceedings and any appeals;

6.1.5. comply with all orders of the Court and all statutory provisions, regulations, rules and directions which apply to the Plaintiff in relation to the Claims and the Proceedings;

6.1.6. provide ILP and the Lawyers with full contact details, including where possible an email address, and immediately inform the Lawyers and ILP of any change in contact details;

6.1.7. immediately inform the Lawyers and ILP of any information, circumstance or change in circumstances likely to affect the Claims, any issue in any Proceedings or the recoverability of any Resolution Sum;

6.1.8. promptly take all appropriate actions, at ILP's expense and with ILP's written agreement, to tax or assess any costs claimed by any Defendant in an Adverse Costs Order; and

6.1.9. take all appropriate action to diligently enforce any judgment obtained in the Proceedings against any Defendant.

6.2. For the duration of this ILP Agreement, the Plaintiff must not, without the prior written consent of ILP:

6.2.1. discontinue, abandon, withdraw or settle the Proceedings or the Claims against any Defendant or make any admission in relation to the Claims;

6.2.2. subject to clause 13, reject any Settlement offer made by any Defendant;

6.2.3. reject any offer made by any Defendant to engage in any form of Alternative Dispute Resolution Process; or

6.2.4. terminate the retainer of the Lawyers or retain any other solicitors in place of the Lawyers.

6.3. For the duration of this ILP Agreement, the Plaintiff instructs the Lawyers to:

6.3.1. subject to clause 13, comply with all instructions given by ILP or as is set out in this ILP Agreement;

6.3.2. comply with all orders of the Court and all statutory provisions, regulations, rules and directions which apply to the Plaintiff in relation to the Claims and the Proceedings;

6.3.3. conduct the Proceedings efficiently and effectively;

6.3.4. keep ILP fully informed of all material developments in the Proceedings and in relation to the Claims, including immediately informing ILP if, in the Lawyers' opinion, the Plaintiff's prospects of achieving success in the Proceedings or the Defendant's capacity to pay any judgment is or is likely to be impaired;

6.3.5. provide ILP with a copy of all advice given by the Lawyers or counsel to the Plaintiff in relation to the Proceedings and the Claims and, if requested to do so by ILP, a copy of all documents obtained from, or provided to, any Defendant in the Proceedings;

6.3.6. immediately inform ILP of all Settlement offers or offers to engage in an Alternative Dispute Resolution Process received from any Defendant and allow ILP the opportunity to attend any Alternative Dispute Resolution Process agreed with any Defendant;

6.3.7. obtain, at ILP's expense and with ILP's written agreement, a taxation or assessment of any Defendant's costs comprising any Adverse Costs Order and provide a copy of all documents relating to the taxation or assessment to ILP; and

6.3.8. provide full assistance and co-operation to ILP in relation to opposing, taxing, assessing or resolving any application for security for costs or any Adverse Costs Order.

6.4. The Plaintiff agrees to keep and preserve any documents relating to the Defendants, the Proceedings and/or the Claims that the Plaintiff has in his, her or its possession, custody or control and the Plaintiff:

6.4.1. will provide to the Lawyers all information and documents relevant to the Proceedings and the Claims if and when so requested by the Lawyers;

6.4.2. authorises the Lawyers, without waiving privilege, to provide the information and documents referred to above to ILP; and

6.4.3. if ordered to do so by a Court in any Proceedings relating to his, her or its Claims, authorises the Lawyers to provide the information and documents to the Defendants and to any third party the subject of a Court order.

6.5. The Plaintiff:

6.5.1. will immediately notify ILP if the Plaintiff is requested or required to disclose any information relating to the negotiation, existence, terms or performance of this ILP Agreement and if so requested by ILP will take such steps as may reasonably be available to prevent disclosure of such parts of the information as ILP may nominate;

6.5.2. will not disclose to any person, other than its legal and financial advisors for the purpose of obtaining confidential legal or financial advice, or ILP, any information:

6.5.2.1 to which Privilege or obligations of confidence attach; or

6.5.2.2 which is or may be protected from disclosure by reason that disclosure would or may provide the Defendants with a strategic or tactical advantage in any Proceedings;

unless the disclosure is in accordance with advice from the Lawyers and is necessary for the purposes of the prosecution of those Proceedings.

6.6. The obligations in sub-clause 6.5 are continuing obligations and survive the Termination of this ILP Agreement.

6.7. The Plaintiff will not, during the period of this ILP Agreement, have any communication with any Defendant, or any officer, servant or agent of any Defendant relating to the Claims .

7. **Case Management**

7.1. ILP will provide the following management services in respect of the Case during the term of this ILP Agreement:

7.1.1. advising the Plaintiff on strategy;

7.1.2. considering the advice of the Lawyers and providing day-to-day instructions to the Lawyers (subject to clause 13);

7.1.3. database and document management;

7.1.4. reporting to the Plaintiff in respect of progress; and

7.1.5. facilitating any Alternative Dispute Resolution Process.

7.2. the Plaintiff undertakes, if requested by ILP, to ratify and confirm in writing the validity of any act or exercise of power by ILP done in good faith.

7.3. For the duration of this ILP Agreement, ILP will:

7.3.1. by implementing the Conflicts Management Policy, comply with the requirements of the Regulations; and

7.3.2. provide timely and clear disclosure to the Plaintiff of any material breach of the Regulations by ILP in relation to the subject matter of this ILP Agreement.

8. Case Costs

8.1. ILP will pay the Case Costs on the terms of this ILP Agreement.

8.2. ILP will not seek reimbursement of any internal overheads incurred as part of the Case Costs, other than through the Consideration referred to in sub clause 12.1.2.

8.3. If any Defendant makes any payment by way of costs during the course of the Case then the payment may be utilised by ILP in paying or reimbursing any Case Costs. The Lawyers will pay such monies in accordance with this ILP Agreement as directed by ILP from time to time.

8.4. ILP will pay any Adverse Costs Order.

8.5. If the Court orders the Plaintiff to provide any security for the costs of any Defendant then ILP will provide the security for costs in such other form that ILP determines and the Defendants or the Court accept, relating to costs incurred by a Defendant during the term of this ILP Agreement.

9. Receipt of the Resolution Sum

9.1. The Plaintiff and ILP agree that the Lawyers will (and are hereby directed to):

9.1.1. receive any Resolution Sum;

9.1.2. immediately pay any Resolution Sum into a trust account.

9.2. The Lawyers will hold that part of the Resolution Sum ordered by the Court as being due to ILP under this ILP Agreement on trust for ILP and that part belonging to the Plaintiff and all other members of the Class Action on trust for each of them with the Resolution Sum to be dispensed in accordance with this ILP Agreement and any Court order.

9.3. The Plaintiff and ILP agree that the Lawyers are irrevocably instructed to pay to ILP all amounts ordered by the Court to be payable to ILP under this ILP Agreement;

10. **Payment of the Resolution Sum by the Lawyers**

10.1. If a lump sum amount is received in Settlement of the Claims, then after deducting all amounts required to be paid or reimbursed to ILP under this ILP Agreement, the balance will be distributed to the Plaintiff and other Class Action members on such basis as is ordered by the Court.

11. **Appeals**

11.1. If there is a final judgment in the Proceedings which is not in favour of the Plaintiff and ILP wishes an appeal to be lodged, then the Plaintiff will cause the Lawyers to lodge and prosecute the appeal in the name of the Plaintiff or other appropriate appellant. The Plaintiff and the Lawyers will take all reasonable steps to expeditiously prosecute the appeal. ILP will pay the legal costs and disbursements in connection with the appeal and will pay any Adverse Costs Order if the appeal is unsuccessful.

11.2. If there is a final judgment in the Proceedings in favour of the Plaintiff and the Defendant appeals, then ILP may elect to fund the legal costs and disbursements of the Plaintiff's defence of the appeal. If ILP so elects, the Plaintiff will cause the Lawyers to defend the appeal in the name of the Plaintiff or other appropriate defendant. The Plaintiff and the Lawyers will take all reasonable steps to expeditiously prosecute the defence of the appeal. ILP will pay any Adverse Costs Order if the appeal is lost by the Plaintiff.

12. **Repayment of Case Costs and Consideration**

12.1. Subject to any necessary Court order, the Plaintiff acknowledges and agrees that upon Resolution, ILP is entitled to be paid from the Resolution Sum as follows:

12.1.1. the Case Costs paid by ILP in relation to the Class Action to which the Resolution Sum relates; and

12.1.2. a further amount, as Consideration for the financing of the Case and performance by ILP of its various obligations under this ILP Agreement, being a maximum of 30% of that Resolution Sum.

12.2. No fees, commissions or other payments will become due or owing by the Plaintiff to ILP in relation to the Case.

13. **The Lawyers' Retainer and Settlement**

13.1. The Plaintiff acknowledges and accepts that the Lawyers have entered, or will enter, into an agreement with ILP for the provision of legal services.

13.2. ILP will give day-to-day instructions to the Lawyers on all matters concerning the Claims and the Proceedings, however the Plaintiff may override any instruction given by ILP in so far as it concerns any Claim of the Plaintiff by the Plaintiff giving instructions to the Lawyers.

13.3. Except in relation to Settlement, which is dealt with below, if the Lawyers notify ILP and the Plaintiff that the Lawyers believe that circumstances have arisen such that they may be in a position of conflict with respect to any obligations they owe to ILP and those they owe to the Plaintiff, the Plaintiff and ILP agree that, in order to resolve that conflict, the Lawyers may:

13.3.1. seek instructions from the Plaintiff, whose instructions will override those that may be given by ILP;

13.3.2. give advice to the Plaintiff and take instructions from the Plaintiff, even though that advice is, and instructions are, or may be, contrary to ILP's interests; and

13.3.3. refrain from giving ILP advice and from acting on ILP's instructions, where that advice is, or those instructions are, or may be, contrary to the Plaintiff's interests.

13.4. Nothing in sub-clause 13.3 entitles the Plaintiff to breach, or authorises the breach, of any terms of this ILP Agreement.

13.5. In recognition of the fact that ILP has an interest in the Resolution Sum, if the Plaintiff :

13.5.1. wants to Settle the Class Action for less than ILP considers appropriate; or

13.5.2. does not want to Settle the Class Action when ILP considers it appropriate to do so;

then the Plaintiff agrees that ILP and Plaintiff must seek to resolve their difference of opinion by referring it to counsel for advice on whether, in counsel's opinion, Settlement of the Class Action on the terms and in the circumstances is fair and reasonable in all of the circumstances.

13.6. If Counsel's opinion is that the Settlement is fair and reasonable then the Plaintiff and ILP agree that the Lawyers will be instructed to do all that is necessary to settle the Class Action provided that the approval of the Court is sought and obtained.

14. **Confidentiality and Provision of Documents**

14.1. In providing to ILP any documents or information about the Claims and any Proceedings, the Plaintiff does not intend to waive any Privilege that may attach to such documents or information.

14.2. Unless specifically prohibited by the terms of a court order or other professional obligation, the Lawyers will provide to ILP a copy of any document obtained in the Proceedings by way of discovery, subpoena or any other coercive power of the Court, subject to ILP's, and its officers' and employees', implied undertaking given to the Court.

14.3. ILP and the Plaintiff agree that all information, communications and documents provided to or acquired, exchanged or generated by or between either of them or the Lawyers in relation to the Case ("the Case Information") are provided, acquired, exchanged or generated in circumstances where the Plaintiff is contemplating or conducting litigation against the Defendant. As a result, ILP and the Plaintiff acknowledge that:

14.3.1. all the Case Information is confidential;

14.3.2. the Case Information may be subject to a claim of legal privilege by the Plaintiff; and

14.3.3. the communications are "confidential communications" and the documents are "confidential documents" within the meaning of Part 3.10 of the Evidence Act 1995 *(Cth)*;

unless any part of the Case Information is already in the public domain through no breach of this ILP Agreement.

14.4. ILP and the Plaintiff agree to maintain the confidentiality of, and any legal privilege attaching to, the Case Information that is not in the public domain unless the disclosure of any part of that Case Information is:

14.4.1. agreed to be made by the Plaintiff and ILP; or

14.4.2. authorised by this ILP Agreement; or

14.4.3. otherwise required by law.

15. **Disclosure of Information**

15.1. The Plaintiff warrants that, to the best of the Plaintiff's knowledge, at the Date of Commencement there is no information in the custody, possession or control of the Plaintiff materially relevant to the Claims or the outcome of the Proceedings or the potential for any judgment sum to be recovered in respect of the Claims , which has not been disclosed to ILP.

15.2. If, after the Date of Commencement of this ILP Agreement, the Plaintiff becomes aware of any information which has or may have a material impact on the Claims or the potential for any judgment sum to be recovered, the Plaintiff will immediately inform ILP of that information.

16. **Miscellaneous**

16.1. The Plaintiff and ILP will not do or permit to be done, save as provided in this ILP Agreement, anything likely to deprive any party of the benefit for which the party entered into this ILP Agreement.

16.2. The Plaintiff and ILP will keep the contents of this ILP Agreement confidential in so far as it concerns the terms of the relationship between the Plaintiff and ILP.

17. **Duration of this Agreement**

17.1. This ILP Agreement commences on the Date of Commencement and continues in operation until:

17.1.1. all Proceedings have concluded;

17.1.2. ILP has complied with all of its obligations under this ILP Agreement.

18. **Termination by ILP**

18.1. ILP is entitled, in its sole discretion, to terminate its obligations under this ILP Agreement other than its accrued obligations, by giving 14 days' written notice to the Plaintiff that this ILP Agreement and ILP's obligations under it are terminated.

18.2. All obligations of ILP under this ILP Agreement cease on the date ILP's termination of its obligations referred to in sub-clause 18.1 becomes effective, save for obligations accrued to that date.

18.3. The accrued obligations of ILP referred to in sub-clause 18.1 comprise:

18.3.1. payment of any outstanding Case Costs incurred up to the date the notice of termination takes effect; and

18.3.2. payment of any Adverse Costs Order against the Plaintiff in any Proceedings in respect of costs which arise in, or are attributed to, the period beginning on the Date of Commencement and ending on the date ILP's termination becomes effective.

19. **Termination by the Plaintiff**

19.1. If ILP commits a material breach of this ILP Agreement and does not remedy the breach within 30 days after receiving written notice from the Plaintiff, the Plaintiff may terminate this ILP Agreement forthwith by written notice to ILP.

19.2. If ILP informs the Plaintiff that ILP has agreed to other solicitors becoming the Lawyers, those solicitors will become the Lawyers for the purposes of this ILP Agreement in place of the existing Lawyers.

19.3. Replacement of the Lawyers :

19.3.1. will not result in a Termination of this ILP Agreement; and

19.3.2. will not result in the replacement solicitors assuming any obligations of the Lawyers accrued to the date the appointment of the Lawyers is terminated.

20. **Governing Law**

20.1. This ILP Agreement is entered into in Victoria and is to be construed in accordance with and governed by the laws of Victoria.

20.2. The parties submit to the exclusive jurisdiction of the Supreme Court of Victoria.

Executed:

Signed by)
for and on behalf of **INTERNATIONAL**)
LITIGATION PARTNERS LIMITED)
the presence of:)

.....
Signature of Witness

.....
Signature DIRECTOR

RICHARD BASTOW
(Print) Name of Witness

Signed by **LAURENCE JOHN**)
BOLITHO in the presence of:)

.....
Signature of Witness

.....
Signature

ROBERT CROW
(Print) Name of Witness

EXHIBIT B

Therium Litigation Funding IC
Charter Place, 23/27 Seaton Place, St Helier,
Jersey JE1 1JY

An Incorporated Cell Registered in Jersey number 118617

DATE: 29 MARCH 2016 ~~JANUARY 2016~~ ~~NOVEMBER 2015~~.

~~AMENDED AND RE-STATED~~ LITIGATION FUNDING AGREEMENT

(1) THERIUM LITIGATION FUNDING IC;

(2) JACQUELINE A PERRY QC; and

(3) NEIL J FRASER.

DATED this 29 day of ~~January~~ March 2016

PARTIES:

(1) **THERIUM LITIGATION FUNDING IC** (an incorporated cell registered in Jersey number 118617) whose address is Charter Place, 23/27 Seaton Place, St Helier, Jersey, JE1 1JY ("**Therium**");

(2) **JACQUELINE A PERRY QC**, of 4/5 Grays Inn Square, Grays Inn, London, WC1R 5AH; and

(3) **NEIL J FRASER** of 63 Perryn Road, Acton, London, W3 7LS.

RECITALS:

(A) The Lawyers are attorneys called to the English and or Californian bar and act, pursuant to a contingency fee agreement dated 9th June 2015 (as updated and signed by lead plaintiff on November 21, 2015, to harmonise with the operative pleadings), as attorneys for the lead plaintiff and the putative class in the case of Gbarabe, et al v Chevron Corporation in the Federal Court of San Francisco Action Number 14-cv-00173-SI arising out of the KS Endeavor rig explosion on 16 January 2012.

(B) In order to facilitate the pursuit of the Claim, Therium agreed to fund certain of the disbursements and expenses expected to be incurred in pursuing the Claim, subject to and in accordance with the terms of a Litigation Funding Agreement dated 24th November 2015. The Parties wish to reflect in the documentation various amendments agreed as at the date of the Litigation Funding Agreement and for that purpose enter into this Amended and Re-Stated Litigation Funding Agreement which replaces and supersedes the Litigation Funding Agreement dated 24th November 2015 in its entirety with effect from the Commencement Date.

1. OPERATIVE PROVISIONS:

1.1 Interpretation

In this Agreement the following definitions shall have the following meanings:

"**Business Day**" means a day on which banks generally are open in Jersey and New York for the transaction of normal banking business (other than a Saturday);

"**Challenge Notice**" means written notice setting out the grounds of a challenge to the fees billed which are payable by Therium pursuant to this Agreement;

"**Claim**" means the claims and causes of action of the Claimants as described in Schedule 1;

"**Claimants**" means Natto Iyela Gbarabe and all other plaintiffs and members of the class as certified in the Proceedings represented by the Lawyers, together with their successors and assigns and any other party in relation to which the Lawyers agrees to act in relation to the Claim;

"**Commencement Date**" means 24th November 2015;

"**Contingency Fee Agreement**" means the contingency fee agreement between Natto Iyela Gbarabe as lead plaintiff and the Lawyers dated 9th June 2015 (as updated and signed by lead plaintiff on November 21, 2015, to harmonize with the operative pleadings) and any other agreement between one or more of the Claimants and the Lawyers (and/or Rufus-Isaacs Acland & Grantham) (as varied from time to time) in which the Lawyers (and/or Rufus-Isaacs Acland & Grantham) agree to act or are remunerated in relation to the Claim;

"**Contingency Fee**" means any share of the Proceeds and all value received by, on behalf of, or in lieu of payment to, the Lawyers before or after the date of this Agreement, in connection with or arising out the Contingency Fee Agreement and/or from the Claim;

"**Committed Funds**" means the Committed Funds as detailed in the Schedule;

"**Costs**" means legal costs and Disbursements specified in the Project Plan;

"**Court**" means the United States District Court Northern District of California San Francisco Division and any other court, arbitration panel or tribunal which is seized with the Proceedings from time to time;

"**Defendants**" means those parties listed in Schedule 1;

"**Disbursements**" means the costs and expenses plus any VAT if applicable, where specified in the Project Plan or otherwise agreed or paid by Therium;

"**Lawyers**" means Jacqueline A Perry QC and Neil J Fraser, in their personal capacity and trading as Rufus-Isaacs Acland & Grantham.

"**Legal Privilege**" means attorney-client privilege, work product protection and/or any other applicable privilege or protection

against disclosure, as well as the Lawyers' obligations of confidentiality to the Claimants;

"**Party**" means a party to this Agreement;

"**Payment**" shall mean a payment made by the Lawyers to Therium made pursuant to this Agreement;

"**Payment Date**" shall mean, in respect of any Payment, the date on which payment is received by Therium in cleared funds;

"**Proceeds**" means any value received by, on behalf of, or in lieu of payment to, the Claimants (including but not limited to any payment received into a trust for the Claimants) before or after the date of this Agreement, in connection with or arising out of the Claim as a result of any judgment, award, order, settlement arrangement or compromise, (including payment of any attorney fee award, costs order, interest, settlement sum, compensation payment, costs and interest), whether in monetary or non-monetary form, whether actual or contingent and before deduction of any taxes in relation thereto;

"**Proceedings**" means the proceedings brought by the Claimants against the Defendant in the case of Gbarabe, et al v Chevron Corporation in the Federal Court of San Francisco, Action Number 14-cv-00173-SI and each and every litigation or arbitral proceeding issued or arising out of or in connection with the Claim or any individual or class proceedings involving the same or similar causes of action as the pending action with respect to the explosion on the KS Endeavor on 16th January 2012, in which the Lawyers may act, including any pre-action correspondence, settlement negotiations or mediation and any enforcement proceedings to enforce payment of any judgment, order, award or settlement agreement, brief details of which are included in the Schedule;

"**Professional Conduct**" means the professional ethical, legal rules and mandates, including the Californian Bar rules, by which the Lawyers are bound, governed and obliged to perform;

"**Project Plan**" means the project plan and budget for Costs for the Proceedings, as may be varied from time to time by agreement between the Parties in accordance with clause 18;

"**Reasonable Costs**" means the Costs, to the extent that those Costs are reasonably incurred by the Claimants in accordance with the terms of this Agreement and are within the limit of the Committed Funds;

"**Reasonable Costs Sum**" means a sum equal to the total of all Costs paid or otherwise funded by Therium pursuant to this

Agreement, whether or not those Costs were reasonably incurred by the Claimants in accordance with this Agreement and whether or not they were specified in the Project Plan;

"**Recovery**" means the recovery of the Contingency Fee or any part thereof;

"**Success Fee**" shall mean a sum equivalent to:

(i) 6x (six times) the total Committed Funds, plus

(ii) 2% of all Proceeds,

together with any VAT payable on such amount (if any);

"**Trust Period**" means the period of 80 years from the date of this Agreement; and

"**VAT**" means value added tax or any similar sales tax at the rate for the time being in force (as may be varied from time to time by HM Revenue & Customs or such other relevant taxation authority).

1.2 Any reference to a Recital, Clause, Schedule or Appendix is to the relevant Recital, Clause, Schedule or Appendix of or to this Agreement and any reference to a sub-clause or paragraph is to the relevant sub-clause or paragraph of the Clause or Schedule in which it appears.

1.3 Except where the context requires otherwise, words denoting the singular include the plural and vice versa, and words denoting any one gender include all genders.

1.4 Any reference to "persons" includes natural persons, firms, partnerships, companies, corporations, associations, organisations, governments, states, foundations and trusts (in each case whether or not having separate legal personality).

1.5 Any reference to a statute, statutory provision or subordinate legislation shall be construed as referring to it as from time to time amended, extended or re-enacted.

1.6 Any phrase introduced by the terms "including", "include", "**in particular**" or any similar expression shall be construed as illustrative and shall not limit the sense of the words following those terms.

1.7 Any obligation on the Lawyers in this Agreement shall be construed to mean the Lawyers joint and severally, both in their personal capacity and working under the style of Rufus-Isaacs

Acland & Grantham and any reference to the Lawyers shall refer to the Lawyers each individually as well as jointly.

2. LIABILITY OF THE PARTIES

This Agreement shall not give rise to any liability on the part of Therium to pay any part of the Defendant's fees, costs or expenses.

3. THE LAWYERS'S PRINCIPAL OBLIGATIONS

3.1 The Lawyers shall at all times:

3.1.1 act with the utmost good faith in all of their dealings with Therium and the Claimants;

3.1.2 comply diligently with the terms of, and their obligations under this Agreement;

3.1.3 prosecute the Claim diligently and use all reasonable endeavours, consistent with the professional conduct of the Claim in accordance with the terms of this Agreement, to recover the maximum possible Contingency Fee in respect of the Claim, either through an agreed settlement, a judgment, an order, or jury trial as soon as reasonably possible;

3.1.4 insofar as is reasonably required to give effect to the terms and commercial purpose of this Agreement, procure that Rufus-Isaacs Acland & Grantham and any other firm or entity engaged either in the conduct of the Claims or engaged to act in whatever capacity for the Claimants or the Lawyers in connection with the Claim, shall at all times perform and act consistently with the terms and commercial purpose of this Agreement; and

3.1.5 Subject to clause 3.1.2:

(a) not enter into any further arrangement for funding the Claim or dealing with the Contingency Fee save as disclosed to Therium prior to the Commencement Date or without Therium's consent (not to be unreasonably withheld or delayed);

(b) not to add a Claimant to the Proceedings save where the Lawyers provide their services to such additional Claimant under the terms of the existing (or equivalent) Contingency Fee Agreement;

(c) (without prejudice to 3.1.5(b) above) give written notice to Therium of its intention to add any further Claimant;

(d) comply diligently with the terms of, and the Lawyers's obligations under, the Contingency Fee Agreement;

(e) not to vary the Contingency Fee Agreement;

(f) not to terminate the Contingency Fee Agreement except in accordance with clause 16 (save where the Lawyers are compelled to stop acting for Professional Conduct reasons, in which case the Lawyers and Therium shall discuss the matter in good faith before any action is taken);

(g) enforce the Claimants' obligations under the Contingency Fee Agreement;

(h) give Therium true copies of all notices received pursuant to the Contingency Fee Agreement without unreasonable delay;

(i) procure that the Contingency Fee is at all times dealt with in accordance with clause 11 and in cleared funds free of any encumbrance, charge or lien, and that it remains free of any encumbrance, charge or lien (other than in favour of Therium);

(j) ensure that the Claim is conducted so as to minimize the likelihood of the Claimant or the Lawyers being ordered to pay the Defendant's fees, costs or expenses or any part of them; and

(k) subject also to clause 10, not seek an order that would adversely affect Therium's rights under this Agreement (save where the Lawyers are compelled to seek such an order for Professional Conduct reasons).

3.2 The Lawyers agree to pay to Therium in accordance with the terms of this Agreement, up to but not exceeding the amount of the Contingency Fee calculated as at the Payment Date:

3.2.1 first, the sum necessary to reimburse Therium the amount of the Reasonable Costs Sum; and

3.2.2 secondly, the Success Fee.

3.3 If the Claimants do not recover any Proceeds in this case, the monies invested by Therium are not required to be repaid. It is realised and understood by the Parties that nothing in this Agreement contains a guarantee that any amounts will be paid to Therium save in the event of recovery of Proceeds by the Claimants.

4. THERIUM'S OBLIGATIONS

4.1 Therium shall at all times:

4.1.1 act in good faith in all its dealings with the Lawyers;

4.1.2 comply diligently with the terms of, and obligations under, this Agreement; and

4.1.3 treat all information relating to the Claim disclosed to it as subject to the confidentiality obligations set out in clause 14.

4.2 Therium shall not be liable or responsible to the Lawyers or the Claimants for any advice, view, comment or consent (or withholding of a consent, unless unreasonably withheld where it is provided that such consent will not be unreasonably withheld) or notice given in the performance of this Agreement.

5. AGREEMENT TO FUND

5.1 In return for the Lawyers agreement to pay, where there is a Recovery and limited to the extent of that Recovery, the Reasonable Costs Sum and the Contingency Fee in accordance with the terms of this Agreement, Therium agrees with effect from the Commencement Date to pay the Claimant's Reasonable Costs incurred up to the amount of the Committed Funds, in accordance with the terms of this Agreement. This includes Reasonable Costs.

5.2 The Lawyers and any other suppliers of services provided for in the Project Plan shall address invoices relating to the Costs described in the Project Plan to Therium and to deliver those invoices to Therium for payment.

5.3 If in the reasonably held opinion of Therium, any Costs invoiced by the Lawyers or any other supplier of services are not Reasonable Costs, Therium shall serve a Challenge Notice on the Claimant, with a copy to the relevant supplier, within 20 Business Days of delivery of the relevant invoice.

5.4 In the event of a Challenge Notice being served, the Lawyers agree to raise any queries identified in the Challenge Notice with the relevant supplier with the aim of reaching an agreement as to the disputed Costs. Where an agreement, satisfactory to Therium, cannot

be reached within 10 Business Days of service of the Challenge Notice, the decision as to whether such Costs are Reasonable Costs shall be taken by an independent costs lawyer (the "**Costs Lawyer**") within 20 Business Days of his appointment. The Costs Lawyer so appointed shall be a member of the Association of Costs Lawyers and shall be appointed jointly by the Parties. Therium and the Lawyers agree to be bound by such decision, and the Lawyers shall use best endeavours to procure the agreement of the relevant supplier to be bound by such decision. Unless the Costs Lawyer directs another person to pay his costs, Therium agrees to meet his costs which shall be treated as part of the Reasonable Costs and within the Project Plan save that the amount of the Committed Funds shall remain unaffected.

5.5 Pending resolution of a Challenge Notice, Therium shall pay all Costs that are not subject to challenge.

5.6 Within 5 Business Days of receiving the Costs Lawyer's decision, Therium will pay any sum owing to either the relevant supplier and/or the Costs Lawyer if directed by the Costs Lawyer.

6. INTEREST

6.1 In the event, due to any action or inaction of the Lawyers, that any sum payable under this Agreement is not paid by its due date, interest will be payable on such sum:

6.1.1 at the rate of 5% per annum above National Westminster Bank Plc's base rate for the time being in force, compounded annually; and

6.1.2 from the date on which payment was due to the date payment is received, or for such other period as may be specified in this Agreement.

7. CHANGES TO THE LITIGATION

7.1 Subject to sub-clauses 3.1.3 and 3.1.5, the Lawyers shall have the right to:

7.1.1 join an additional party to the Proceedings;

7.1.2 add a new cause of action to the claims in the Proceedings; and

7.1.3 commence additional proceedings;

without first giving notice to Therium with an explanation of the impact of such change on the Project Plan and budget.

7.2 Save as set out in clause 7.1 and subject to Therium's prior agreement to any proposed variation to the Project Plan, the Proceedings shall be prosecuted in accordance with the Project Plan and the Lawyers shall use all reasonable endeavours to keep the disbursements within the Project Plan budgets.

8. WARRANTIES

8.1 The Lawyers acknowledge and accept that Therium's decision to enter into this Agreement is based on the information and materials provided by it to Therium (which, subject to legal privilege, shall include all requested copies of all legal advice relating to the Claim and all requested copies of correspondence with the Defendant relating to the Claim) and other documents and materials provided to Therium prior to the Commencement Date and where, for reasons of legal privilege, a document cannot be produced, the Lawyers accept and warrant that they have advised Therium that specific document has been withheld and of its implications for the Claim.

8.2 The Lawyers confirm that, to the best of their knowledge and belief, the information, documents and materials provided (or otherwise notified in accordance with clause 8.1 above) by them to Therium prior to the Commencement Date are accurate, complete and true in all material respects and that the Lawyers have not failed to disclose any information, document and/or material which would be relevant to Therium's decision to enter into and remain bound by this Agreement.

8.3 The Lawyers warrant that, save as disclosed to Therium in writing:

8.3.1 as at the Commencement Date the Lawyers have not granted (or purported to grant) any charge, lien or other security in favour of a third party over the Claim or the Contingency Fee (or otherwise dealt with the same in any way); and

8.3.2 they will not grant (or purport to grant) any such charge, lien or other security over the Claim or the Contingency Fee, until all payments (whether actual or contingent) due to Therium under this Agreement have been met or otherwise extinguished.

8.4 Each Party warrants to the other that the execution and performance of, and compliance with, their respective obligations under this Agreement is fully authorised by each of them and the persons executing the Agreement have the necessary and appropriate authority to do so.

8.5 The Lawyers warrant that they have obtained all necessary instructions, agreements and consents from the Claimants, to the

extent required, to enable them to enter into and perform this Agreement.

8.6 The Lawyers warrant that this Agreement is legal and enforceable under the laws of California, including any applicable professional or regulatory rules.

8.7 The Lawyers warrant that they have, where such consent or instruction is necessary, obtained written irrevocable instructions and consent from the Claimants and where there is no such consent or instruction, the Lawyers will use their best endeavours to ensure that the Claimants agree and/or comply as follows:

8.7.1 as to the matters set out in clause 10.2 below;

8.7.2 that they shall use their best endeavours to support the prosecution of the Claim through the Proceedings;

8.7.3 that they shall not take any step to encourage, induce, cause, procure or behave in such a way that may result in them or one or more of the Claimants withdrawing from the Proceedings; and

8.7.4 that they shall not take any step to encourage, induce, procure or behave in such a way that may result in them or one or more of the Claimants seeking to bypass, circumvent or otherwise adversely affect the Proceedings.

8.8 The Lawyers warrant that so far as they are aware, there is no prospect of Therium being held liable to pay (or contribute to) the Defendant's fees, costs and expenses in the event that the Claim is lost.

8.9 The Lawyers warrant that there is no requirement to disclose the content of this Agreement to the parties to the proceedings or the Court, and that if at any time such a requirement arises or to do so would be prudent and in furtherance of the objectives set out at Clause 10.2, the Lawyers will promptly take all such steps as reasonably practicable to make such disclosure (and shall inform Therium of the existence of such requirement).

8.10 Notwithstanding any other provision of this Agreement, the Lawyers shall not sell, dispose of or in any way alienate their rights such that the Lawyers' right to be paid the Contingency Fee may be materially prejudiced, without the consent of Therium (such consent not to be unreasonably delayed or withheld).

8.11 The Lawyers represent and warrant that there is no legal or professional consideration which would adversely impact any payment otherwise due under clause 3.2. The Lawyers irrevocably undertake that they will not assert any Professional Conduct or ethical prohibition defence or objection to any payment otherwise due under clause 3.2 of this Agreement to Therium and agrees to waive any right to make any such assertion to Therium seeking specific performance for any payment otherwise due under clause 3.2 of this Agreement to Therium.

8.12 The Lawyers warrant that they have no third party indebtedness (other than trade creditors in the ordinary course of The Lawyers' business), and that so far as the Lawyers are aware, there is no reason why they will not be able to repay their liabilities as they fall due for payment.

8.13 The Lawyers warrant that they have in place adequate professional indemnity insurance appropriate to their practice.

9. ACKNOWLEDGEMENTS

9.1 Therium recognises that the Lawyers must at all times comply with its duties under the rules of the California Bar to act independently and in the best interests of the Claimant and in accordance with their other professional duties.

9.2 Nothing in this Agreement entitles Therium to control the conduct of the Claim and/or the Proceedings.

10. THE LAWYERS' FURTHER OBLIGATIONS

10.1 The Lawyers shall not engage any co-counsel or any forensic accountants or other third parties not budgeted for in the Project Plan without Therium's prior written consent, such consent not to be unreasonably withheld and having regard at all times to the Lawyers' Professional Conduct reasons for proposing any such engagement.

10.2 The Lawyers shall (and for this purpose have obtained binding and irrevocable instructions from the Claimants to):

10.2.1 conduct the Proceedings in accordance with the procedural rules applicable in the Court and comply with any judgment, order or award made in the Proceedings;

10.2.2 provide Therium with any documents or information relating to the Claim and Proceedings as may be reasonably requested by Therium subject to the Lawyers not breaching the Claimant's Legal Privilege;

10.2.3 on behalf of the Claimants and on their own account:

(a) diligently prosecute the Proceedings and seek to enforce and recover the Contingency Fee;

(b) devote sufficient and appropriate time and reasonably available resources to the prosecution of the Proceedings and the enforcement and recovery of any Proceeds;

(c) in respect of any forensic accountants or other third parties retained to assist in the Proceedings:

(i) monitor their work and performance; and

(ii) take all reasonable steps to ensure that they carry out their proper and lawful instructions in the Proceedings in a professional manner, promptly and with due expedience;

(d) save as required to preserve the Claimants' legal privilege, keep Therium promptly informed of any significant developments in the Proceedings (including any settlement discussions, any offers received and any information, evidence or advice coming to the attention of the Claimants or the Lawyers, which may be material either to the prospects of success of the Claim or of enforcing any judgment or award or the amount of the Contingency Fee); and

(e) save as required to preserve the Claimants' legal privilege, make a monthly summary report in writing to Therium regarding the overall progress of the Proceedings, giving reasonable particulars of that progress and any developments and Disbursements incurred against the Project Plan;

10.2.4 Subject to the Lawyers not breaching the Claimants' Legal Privilege, give reasonable notice of and permit Therium where reasonably practicable, to attend as an observer at internal meetings, which include meetings with experts, and send an observer to any mediation or hearing relating to the Claim.

10.3 The Parties agree not to do or permit to be done anything likely to deprive each other of any benefit for which the other has entered into this Agreement.

10.4 The Lawyers acknowledge that Therium has relied on the involvement of the Lawyers as acting for the Claimants in agreeing to fund the Proceedings and that termination of their representation of the Claimants may adversely affect the Recovery and the return to Therium. Subject to any Professional Conduct obligations, the Lawyers therefore agree, during the operation of this Agreement, not to terminate their representation of the Claimants without prior consent of Therium such consent not to be unreasonably withheld.

10.5 The Lawyers agree that if Therium requires any advice given by the Lawyers in respect of the Claim and/or the Proceedings to be confirmed by a second opinion, the Lawyers will fully co-operate with any other firm instructed by Therium.

10.6 For the avoidance of doubt, subject to Therium's rights of termination pursuant to clause 16, nothing in this Agreement shall permit Therium to override any advice given by the Lawyers to the Claimants. This includes any opinion given pursuant to clause 10.5 of this Agreement.

10.7 The Lawyers agree to advise and represent the Claimants and conduct the Proceedings with reasonable skill and care and acknowledges and accepts that Therium shall be entitled to rely upon the performance of their professional services as if Therium were a client. The Lawyers further agree that, in the event of loss caused by any breach of its duty to perform its obligations with reasonable skill and care, that the harm suffered by Therium has occurred in England and Wales. In the event of a conflict between the interests of Therium and the Claimant, Therium accepts that the Lawyers shall be obliged to act in the best interests of the Claimants and shall be entitled to continue to act for the Claimants in the Proceedings and Therium waives any conflict so arising.

11. TREATMENT OF CONTINGENCY FEE

11.1 The Lawyers agrees to hold any Contingency Fee received by them or any third party on its behalf, upon trust for Therium throughout the Trust Period on terms that Therium shall be entitled to such part of the Contingency Fee as shall be equal to the total of all amounts due under the terms of this Agreement to Therium.

11.2 The Lawyers shall ensure that the Contingency Fee when payable to it shall be paid into the Escrow Account immediately upon receipt. In the event of Recovery, the Lawyers shall notify Therium as to the amount of that Recovery and provide a calculation of the Contingency Fee together with such supporting documentation as Therium may reasonably require.

11.3 In so far as consistent with their professional obligations as attorneys to the Claimants, the Lawyers shall use their best endeavours to cause any Claim Proceeds to be recovered as quickly as possible.

11.4 The Lawyers shall at the request in writing of Therium execute all documents and do all things that Therium may reasonably require to perfect Therium's entitlement to be paid and/or to ensure Therium is paid any amount, including the Success Fee, due to Therium under this Agreement.

11.5 In the case of any Contingency Fee received in non-monetary form, the Lawyers shall use their best endeavours to gather in the Contingency Fee in accordance with the terms of the Contingency Fee Agreement and the Contingency Fee received shall be held and dealt with by the Lawyers in accordance with clause 11.

11.6 In the case of any Contingency Fee received in a form other than a single cash payment, the Parties agree that the non-cash element shall be valued by an independent valuer agreed by the Parties with the cost of that valuation to be met from the Contingency Fee. Where the Parties cannot agree, within 10 Business Days of receipt of the Contingency Fee by The Lawyers, on the identity of the independent valuer, then the Parties will each appoint their own neutral third party ("a Neutral") and these two Neutrals will select a third Neutral. In each case the Neutral shall be from one of the larger UK accountancy firms with offices in the UK. The majority decision of the Neutrals ("the Neutral Decision") shall be binding upon the Parties.

11.7 If any payment due to Therium from the Contingency Fee is delayed due to action or failure to act on the part of The Lawyers, the Lawyers shall compensate Therium for the delay in making payment by paying to Therium interest on the sum delayed for the period of the delay calculated in accordance with clause 6.

12. EXCLUDED TIME COSTS, EXPENSES AND LIABILITIES

12.1 Therium will not pay nor be liable for any of the following costs, expenses sums or liabilities:

12.1.1 fees and time costs of the Lawyers save as included within the Project Plan (or otherwise agreed);

12.1.2 any fees, time costs, Disbursements and/or other sums incurred as a result of any default by the Lawyers in the performance of their obligations to Therium;

12.1.3 any liability to contribute to the Defendants' fees, costs expenses or the Claimants' liability for fines or penalties;

12.1.4 any fees, time costs Disbursements and/or other sums incurred as a result of any unreasonable failure by the Claimants and/or the Lawyers, to comply with any relevant rules of professional conduct or an order of the Court during the Proceedings;

12.1.5 any fees, time costs Disbursements and/or other sums incurred prior to the Commencement Date (save to the extent that those costs are included in the Project Plan) or after termination of this Agreement; or

12.1.6 any element of VAT or other tax on the provision of services.

12.2 In the event that Therium suffers any fees, time costs Disbursements and/or other sums falling within sub clauses 12.1.1 to 12.1.6 (inclusive) then the Lawyers shall indemnify Therium in respect of any sum paid out by Therium.

13. PRIVILEGE

13.1 Subject at all times to Professional Conduct and Legal Privilege obligations owed to the Claimants, the Lawyers shall use all reasonable efforts to report fully and appropriately to Therium. Therium agrees to take all reasonable steps in respect of any such information to:

13.1.1 maintain its confidentiality;

13.1.2 protect and not waive any privilege attaching to it; and

13.1.3 keep it secure and safe.

13.2 The parties to this Agreement acknowledge and agree that:

13.2.1 the Claimants do not waive or lose any legal professional privilege, litigation privilege, common interest privilege, without prejudice privilege, attorney-client privilege, attorney work product doctrine or other privilege or protection attaching to any information provided to Therium (whether provided by the Claimants or the Lawyers);

13.2.2 The Claimants, the Lawyers and Therium share a common purpose and interest in sharing confidential information for the purpose of pursuing the Claim; and

13.2.3 it is in the mutual interest of the Claimants, the Lawyers and Therium that they share information, including confidential information and/or work product subject always to the protection of legal professional privilege, litigation privilege, common interest privilege, without prejudice privilege, attorney-client privilege, attorney work product doctrine or other privilege or protection attaching to any information that they share.

14. CONFIDENTIALITY

14.1 Therium shall procure that any persons to whom it provides confidential documents or information shall comply with the obligations imposed on Therium pursuant to clause 13.

14.2 Therium will immediately inform the Lawyers of any request or order to disclose their privileged documents or any other privileged information held by Therium, except where informing the Lawyers would contravene any law or regulation.

15. TERMINATION

15.1 This Agreement shall continue in full force and effect until payment of any and all sums due to Therium pursuant to this Agreement and in any event clauses 1 (Interpretation), 6 (Interest), 8 (Warranties), 10 (The Lawyers' Further Obligations), 11 (Treatment of Contingency Fee), 13 to 15 (Privilege, Confidentiality, Termination), 18 (Waiver), 20 and 21 (Invalidity and Succession) and 24 (Dispute Resolution) and 26 (Law and Jurisdiction) shall continue in full force and effect notwithstanding Termination of this Agreement.

15.2 The Lawyers and Therium jointly may at any time agree, by mutual consent in writing, to terminate this Agreement.

15.3 In the event that Therium reasonably considers that there has been a material breach of this Agreement by the Lawyers, Therium shall notify the Lawyers that Therium requires the Lawyers to remedy the breach within 20 Business Days. In the event that the breach is not remedied within that period, Therium shall be entitled to terminate this Agreement forthwith by giving Notice to the Lawyers. Within 5 Business Days of such termination the Lawyers shall reimburse to Therium the amount of the Reasonable Costs Sum together with interest on the amount of the Reasonable Costs Sum calculated in accordance with clause 3.2 from the date of this Agreement to the date of payment and pay to Therium the balance of any and all sums due to Therium pursuant to clause 3.2. The Lawyers further agree to provide all information and documents reasonably required by Therium for the purpose of calculating the sums due in accordance with this clause or for auditing that calculation. For the purposes of this clause 15.3, a material breach shall include,

but not be limited to, any breach of any of the warranties set out in clause 8.

15.4 Exercise of the rights to terminate in accordance with this clause 15 shall not affect any accrued rights or entitlements of Therium including any contingent rights or entitlements.

16. ASSIGNMENT

16.1 The Parties agree that Therium shall be entitled to assign to any group, parent or associated entity and/or sub-contract all of its rights, interests and obligations pursuant to this Agreement.

16.2 Save as provided in clause 16.1, a Party shall not assign or transfer this Agreement or any of its rights under it, or purport to do any of the same, nor sub-contract any or all of its obligations under this Agreement.

16.3 If Therium assigns to a third party in accordance with clause 16.1 it shall notify The Lawyers of such assignment in accordance with clause 21 within five (5) Business Days.

17. VARIATION

No variation to this Agreement shall be valid unless it is in writing and signed by each of the Parties.

18. WAIVER

No forbearance or delay by a Party in enforcing its rights shall prejudice or restrict the rights of that Party and no waiver of any such rights or of any breach of any contractual terms will be deemed to be a waiver of any other right or of any later breach.

19. MOST FAVOURED NATION

Should the Lawyers enter into any subsequent agreement with any other person to provide funding in relation to the Claim which is more favourable than this Agreement, then the Agreement shall be deemed to be modified, in whole, at the election of Therium, to contain terms identical to the subsequent agreement. The Lawyers shall notify Therium promptly of the existence of such more favourable benefits and terms and Therium shall have the right to receive the more favourable benefits and terms with immediate effect from that notice. If requested in writing by Therium, the Lawyers shall amend this Agreement to contain the more favourable benefits or terms.

20. INVALIDITY AND SEVERABILITY

If any of the provisions of this Agreement is or becomes invalid, illegal or unenforceable whether in whole or in part or in relation to any of the

Parties to the Agreement, the validity, legality and enforceability of the remaining provisions, or their validity and enforceability as against other parties, shall not in any way be affected or impaired. The parties shall nevertheless negotiate in good faith in order to agree to the terms of a mutually satisfactory provision or arrangement, achieving so nearly as possible the same commercial effect, to be substituted for the provision so found to be void or unenforceable and each Party shall take any step required, including executing any further or other document, in order to give effect to the Parties' intention in entering into this Agreement.

21. SUCCESSION

This Agreement shall be binding on the Parties, their successors and assigns and the name of a Party appearing herein shall be deemed to include the names of any such successor or assign.

22. NOTICES

22.1 Any Notice to be served under this Agreement shall be in writing and may be delivered by hand or sent by pre-paid first class recorded delivery post to the Party to be served at the relevant address set out in this Agreement.

22.2 Any Notice shall be deemed to have been served:

22.2.1 If delivered by hand, at the time of delivery to the Party; or

22.2.2 if posted, at 10.00am on the second Business Day after it was posted to the Party.

22.3 In proving service of a Notice it shall be sufficient to prove that delivery by hand was made or that the envelope containing the Notice was properly addressed and posted as a pre-paid first class recorded delivery letter.

23. COUNTERPARTS

This Agreement may be signed in any number of counterparts, each of which taken together shall be deemed to constitute one and each of which individually shall be deemed to be an original, with the same effect as if the signature on each counterpart were on the same original.

24. DISPUTE RESOLUTION

24.1 The Parties agree that in the event of any dispute between them relating to:

24.1.1 the distribution of the Contingency Fee or relating to any payment alleged to be payable pursuant to this Agreement; or

24.1.2 termination of this Agreement under clause 15;

24.2 They will give the other written notice of the event of dispute. Within 10 Business Days of either party receiving notice in accordance with this clause 23, the Parties will use their best endeavours to agree to the identity of an Independent Queens Counsel ("**Jointly Appointed Counsel**") or in lieu of such agreement then, the Parties will each appoint their own neutral third party Queens Counsel ("**a Neutral**") and these two Neutrals will select a third such Neutral. The decision of the Jointly Appointed Counsel or the majority decision of the Neutrals as appropriate ("**the Decision**") shall be binding upon the Parties. The costs of this dispute process will be payable as directed by Jointly Appointed Counsel or the Neutrals, as appropriate.

25. NO PARTNERSHIP

Nothing in this Agreement is intended to create a partnership between the parties hereto.

26. LAW AND JURISDICTION

26.1 This Agreement and any dispute arising from or connected with this Agreement, including any dispute concerning the validity of this Agreement and any dispute as to the performance of the Lawyers obligations referred to in clause 10.7 above, is governed by and is to be construed in accordance with the law of England and Wales.

26.2 Save for any dispute resolved finally pursuant to clause 23 above, any dispute arising out of or connected to this Agreement, including the validity or termination thereof, shall be finally resolved by a sole arbitrator under the arbitration rules of the London Court of International Arbitration (the "**LCIA**"). The seat of the arbitration shall be London, the language of the arbitration shall be English and the arbitrator shall be a practising member of the English Bar. The arbitrator shall be appointed by the agreement of the Parties provided that, if the Parties cannot reach agreement on the appointment of the arbitrator within 30 days, then any Party may apply to have the arbitrator appointed by the LCIA.

IN WITNESS of which the Parties have each executed this Agreement as a

deed on the date shown above

SIGNED by **THERIUM LITIGATION FUNDING IC**)
)
)

~~Director~~ Authorised signatory

SIGNED by **JACQUELINE A PERRY QC**)
)
)

Nov. 24 2015

SIGNED by **NEIL J FRASER**)
)
)

November 24, 2015

SCHEDULE

Claim:	The claims and causes of action which are the subject matter of the Proceedings and any other claims and causes of action of the Claimants arising out of the explosion on the KS Endeavor on 16th January 2012.
Commencement Date:	~~The date of this Agreement.~~ 24 NOVEMBER 2015
Defendant:	Chevron Corporation.
Committed Funds:	USD 1,500,000 (One million five hundred thousand US dollars)

APPENDIX 1

Project Plan

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Exhibit 14

THERIUM

Therium Litigation Funding IC
Charter Place, 23/27 Seaton Place, St Helier
Jersey, JE1 1JY
www.therium.com
An incorporated Cell Registered in Jersey number 11981

Ms Jacqueline A Perry QC
4/5 Gray's Inn Square
London
WC1R 5AH

By email

18th May 2016

Dear Jacqueline,

Litigation Funding Agreement between (1) Therium Litigation Funding IC (2) Jacqueline A Perry QC and (3) Neil J Fraser dated 29 March 2016 (the "Funding Agreement").

This letter records the agreement between Therium Litigation Funding IC, you and Neil to vary the Funding Agreement as follows:

(a) the Schedule to the Funding Agreement shall be varied to replace the Committed Funds description in its entirety with the following:

Committed Funds: USD 1,700,000 (One million seven hundred thousand US dollars)

The Funding Agreement shall be read with such consequential changes as are necessary to give effect to this agreement. To the extent that the provisions of the Funding Agreement are inconsistent with this variation, this variation shall prevail. Save in respect of these amendments, all provisions of the Funding Agreement shall remain in full force and effect.

If you have any queries on the above please do not hesitate to contact me. Otherwise please would you arrange for this Variation Letter to be signed below.

Yours sincerely,

For and behalf of Therium Litigation Funding IC

cont


Countersigned:
Jacqueline A. Perry QC
5/26/16.

EXHIBIT H

Exhibit 10.13

Confidential Treatment Requested

FUNDING AGREEMENT

This Funding Agreement, dated as of March 11, 2014, is entered into by and between Longford Capital Fund I, LP ("LCF"), a Delaware limited partnership, on the one hand, and Quest Patent Research Corporation ("QPRC"), a Delaware corporation, and its subsidiary, Quest Licensing Corporation ("QLC" and, together with QPRC, each a "Claim Owner" and "collectively "Claim Owner"), a New York corporation, on the other hand (LCF and Claim Owner are collectively referred to herein as the "Parties" and individually as a "Party").

RECITALS

WHEREAS, QPRC, through its subsidiary QLC, the owner of all right, title and interest to United States Patent Number 7,194,468 entitled APPARATUS AND A METHOD FOR SUPPLYING INFORMATION, possesses certain Claims, as defined in Section 2 below, for which it intends to seek redress.

WHEREAS, LCF is prepared to fund certain Attorneys' Fees, Expenses, Inter Partes Review Expenses and Operating Expenses as each is defined in Section 2 below, associated with the Claims, and Claim Owner is prepared to assign LCF a portion of the Proceeds, as defined in Section 2 below, of the Claims pursuant to the terms of this Agreement.

NOW, THEREFORE, in consideration for the mutual agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties, intending to be legally bound, agree as follows:

1. CONSTRUCTION

1.1 For purposes of this Agreement, defined terms shall have the meanings set forth in Section 2 below.

1.2 Headings are for information only and do not form part of the operative provisions of this Agreement.

1.3 References to this Agreement include references to the Recitals.

1.4 In this Agreement, unless a clear contrary intention appears:

(a) words denoting the singular include the plural and vice versa;

(b) words denoting any gender include all genders;

(c) all references to "$" or dollars shall mean U.S. Dollars;

(d) the word "or" shall include both the adjunctive and the disjunctive meaning thereof; and

(e) the words "include," "includes," and "including" shall be deemed to be followed by the phrase "without limitation."

1.5 The terms of this Agreement have been negotiated between the Parties in an arm's length transaction, and shall not be construed for or against either Party by reason of the drafting or preparation hereof.

2. DEFINITIONS

The following terms shall have the meanings given below:

2.1 "Adverse Claim" means any claim, cause of action, suit, or demand, including any counterclaim or third-party claim that is adverse to Claim Owner, Claim Owner's Affiliates, Claim Owner's Attorneys, LCF, Longford Investment Group, LLC, Longford Advisors, LLC, Longford Capital Management, LP, or LCF's interests pursuant to this Agreement; provided that "Adverse Claim" shall not include any non-monetary counterclaim relating directly to the Claims brought by a Defendant, including allegations regarding the invalidity, non-infringement, or unenforceability of any of the Patents, except to the extent that any such non-monetary counterclaim is in connection with, arises out of, or is otherwise related to any breach (or is based on or relates to facts or circumstances the existence of which would constitute a breach) of any representations or warranties or covenants made by Claim Owner in this Agreement.

2.2 "Agreement" means, collectively, this Agreement, together with all exhibits, schedules and amendments hereto, including all documents expressly incorporated herein by reference.

2.3 "Affiliate" means as to any Person (i) any other Person that directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such Person or its respective successors or (ii) if such Person is an individual, a spouse, parent, sibling, or descendant of such Person, or a trust over which such Person has sole investment and dispositive power for the benefit of such Person, spouse, parent, sibling, or descendant. The term "control" including the terms "controlling," "controlled by," and "under common control with" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting shares, by contract, or otherwise. Affiliates includes such entities whether now existing or later established by investment, merger, or otherwise, including the successors and assigns of such Person. In the case of the United States Government, Affiliates also includes departments or agencies of the United States Government.

2.4 "Assigned Rights" means all of Claim Owner's Rights in and to the Proceeds in an amount equal to the sum of 100% of LCF's Invested Capital plus LCF's Profit that is due in accordance with Section 4.2.

2.5 "Attorneys' Fees" means the fees charged by Claim Owner's Attorneys to prosecute the Claims to completion, including pre-trial, trial, and collections of any settlements, judgments, and awards, and to defend any non-monetary counterclaims brought against the Claim Owner by any of the Defendants relating directly to the Claims, including allegations regarding invalidity, non-infringement, or unenforceability of the Patents. Claim Owner's Attorneys have agreed to represent Claim Owner on a fixed fee and partial contingency arrangement. For the avoidance of any doubt, LCF shall pay Attorneys' Fees of up to ● as follows: (i) a retention fee of ●, to be paid to Claim Owner's Attorneys within 10 business days after the full execution of this Agreement; (ii) a fixed fee of ● per month, to be paid to Claim Owner's Attorneys' within the first 5 business days of each month for the first ● months, commencing with the first full calendar month after the full execution of this Agreement; (iii) a fixed fee of ● per month, to be paid to Claim Owner's Attorneys within the first 5 business days of each month for months ● after the full execution of this Agreement (the amounts paid under clause (ii) and (iii), the "Fixed Fee Payments"); and (iv) a trial fee of ●, to be paid to Claim Owner's Attorneys 5 business days prior to the commencement of trial. If the Claims are resolved, no further Fixed Fee Payments will be made. If the Claims are stayed for any reason, including as a result of inter partes review, no Fixed Fee Payments will be made during the pendency of the stay.

2.6 "Authorization" means an authorization, consent, approval, resolution, license, exemption, filing, notarization, or registration.

2.7 "Authorized" means any act or Authorization required to make an action legally binding on a Party.

2.8 "Claims" means all threatened or actual legal claims, actions, suits, arbitrations, causes of action, or proceedings before any supranational, national, state, municipal, or local entity or governmental authority, whether located within or without the United States, including any U.S. District Court, and demands asserted by Claim Owner or its Affiliates against one or more of the Defendants or against any other parties threatened with or added to a claim, action, suit, arbitration, cause of action, or proceeding brought against any of the Defendants relating to claims of patent infringement of any of the Patents that are or may be included by or on behalf of Claim Owner against the accused parties or included in any settlement or resolution of that Claim.

2.9 "Claim Owner's Attorneys" means the law firm of MoloLamken LLP.

2.10 "Closing" means the closing of the transactions contemplated hereby pursuant to Section 6.

2.11 "Closing Date" means the date on which each of the conditions set forth in Section 6 of this Agreement is satisfied or waived by the applicable Party.

2.12 "Compensable Costs" means the Expenses plus any Inter Partes Review Expenses. For the avoidance of doubt, Claim Owner and Claim Owner's Attorneys have agreed to a cap on the amount of Compensable Costs for which LCF's Committed Amount may be used of ● (the "Compensable Cost Cap"), with any overage being the responsibility of Claim Owner or Claim Owner's Attorneys.

2.13 "Confidential Information" means all documents and information (whether written or oral), including all communications, contracts, and agreements, exchanged by the Parties related to the Parties' relationship, the Funding Documents, or the Claims. The term Confidential Information does not include information that: (i) becomes generally available to the public other than as a result of a breach by a Party of this Agreement, (ii) is already in the receiving Party's possession, provided that such information is not known by the receiving Party to be subject to a contractual or legal obligation of confidentiality to the disclosing Party, or (iii) becomes available to the receiving Party on a non-confidential basis from a source other than the disclosing Party, provided that such source is not known by the receiving Party to be bound by a contractual or legal obligation of confidentiality to the disclosing Party.

2.14 "Defendants" means Bloomberg LP, and at least four additional Persons, which shall be identified by Claim Owner within 90 days of the full execution of this Agreement, and all additional Persons against which Claims are threatened, alleged, or asserted by Claim Owner under this Agreement.

2.15 "Disputes" has the meaning set forth in Section 10.3.

2.16 "Dollar" or "Dollars" means United States Dollars.

2.17 "Due Diligence Fee" means an amount equal to $105,000 in respect of attorneys' fees and expenses incurred by LCF in connection with the second stage of its due diligence investigation.

2.18 "Escrow Holder" means the third-party escrow company mutually selected by LCF and Claim Owner.

2.19 "Event of Default" means any event or circumstance specified as such in Section 9.1 of this Agreement. An Event of Default is "continuing" if it has not been remedied or waived in accordance with this Agreement.

2.20 "Expenses" means reasonable out-of-pocket expenses actually incurred by Claim Owner's Attorneys in connection with the prosecution of the Claims and defending any non-monetary counterclaims brought against the Claim Owner by any of the Defendants relating directly to the Claims, including allegations regarding invalidity, non-infringement, or unenforceability of the Patents. The reasonableness of Expenses incurred by Claim Owner's Attorneys will be determined in accordance with the commercially reasonable costs typically charged for such Expenses. Expenses include reasonable and documented expert and consulting fees; local counsel fees; e-discovery vendors; litigation support services for audio and visual presentations; jury consultants; focus groups; photocopying; postage and delivery; computer-assisted research; filing fees; court reporters and other transcription services; and reasonable travel expenses. Expenses do not include Attorneys' Fees, Inter Partes Review Expenses, or any fees or expenses relating to costs or damages awards against Claim Owner resulting from any Adverse Claim. For the avoidance of doubt, Claim Owner and Claim Owner's Attorneys have agreed to a cap on the amount of Expenses for which LCF's Committed Amount may be used of $1.3 million, with any overage being the responsibility of Claim Owner or Claim Owner's Attorneys.

2.21 "Funding Documents" means, collectively, this Agreement, the Perfection Documents, and any other document contemplated by this Agreement.

2.22 "Inter Partes Review Expenses" means attorneys' fees and out-of-pocket expenses actually incurred by Claim Owner or Claim Owner's Attorneys in connection with the defense of an inter partes review of the Patents. For the avoidance of doubt, Claim Owner and Claim Owner's Attorneys have agreed to a cap on the amount of Inter Partes Review Expenses for which LCF's Committed Amount may be used of ●, with any overage being the responsibility of Claim Owner or Claim Owner's Attorneys. If inter partes review does not occur, such ● set aside for the Inter Partes Review Expenses may be reallocated to pay other reasonable Expenses at the request of Claim Owner's Attorneys, and with the prior written approval of LCF.

2.23 "Joint-Order Escrow Account" means an escrow account held by Escrow Holder, in which the Proceeds of the Claims will be deposited immediately following receipt thereof pursuant to Section 4.2 of this Agreement. Escrow Holder will distribute all Proceeds deposited in the Joint-Order Escrow Account in accordance with the jointly executed written instructions of the Parties to this Agreement.

2.24 "LCF's Commitment" has the meaning set forth in Section 3.1.

2.25 "LCF's Committed Amount" has the meaning set forth in Section 3.1.

2.26 "LCF's Invested Capital" means the sum of the Due Diligence Fee and all other money actually paid by LCF for Attorneys' Fees, Expenses, Inter Partes Review Expenses, and Operating Expenses.

2.27 "LCF's Profit" means LCF's agreed upon share of the Proceeds of the Claims, after receiving the Realization Multiple, calculated as set forth in Sections 4.2(b), 4.2(c), and 4.2(d).

2.28 "Lien" means any mortgage, deed of trust, pledge, lien (common law, statutory or otherwise), security interest, charge or other encumbrance or security or preferential arrangement of any nature, including any conditional sale or title retention arrangement, any capitalized lease and any assignment, deposit arrangement or financing lease intended as, or having the effect of, security.

2.29 "Material Adverse Event" means any event or occurrence that LCF believes could have a material adverse effect on its investment including: (a) a material adverse change in, or material adverse effect upon, any of the Claims, including the dismissal of one or more of the Claims, a change in the law related to one or more of the Claims, a change in Claim Owner's Attorneys, a change in the court or jurisdiction in which any of the Claims is pending, a change in the judge, magistrate, or arbitrator before whom any of the Claims is pending, or a change in strategy with respect to the assertion or prosecution of any of the Claims; (b) a material adverse change in, or a material adverse effect upon, the financial condition, operations, assets, business or properties of Claim Owner; (c) Claim Owner's failure to provide reasonable support and cooperation or inability to perform any of its obligations under any provision of any Funding Document; (d) a material adverse effect upon the legality, validity, binding effect or enforceability of any provision of any Funding Document; or (e) Claim Owner's failure to identify, within 90 days of the full execution of this Agreement, four Persons in addition to Bloomberg against which Claims will be threatened, alleged, or asserted as required by Section 2.14 herein and are satisfactory to LCF in its sole discretion.

2.30 "Operating Expenses" means attorneys' fees and out-of-pocket expenses actually incurred by Claim Owner in conjunction with the assertion of the Claims. For the avoidance of doubt, Claim Owner has agreed to a cap on the amount of Operating Expenses for which LCF's Committed Amount may be used of ●, to be paid by LCF to Claim Owner for the shorter of the period of ● months, or until the resolution of the Claims, as follows: (1) ● to be paid within 10 business days of the full execution of this Agreement; (2) in months ● following the initial ● payment, ● per month within the first 5 business days of each month, commencing with the first full calendar month after the full execution of this Agreement; and (3) in months ● following the initial ● payment, ● per month within the first 5 business days of each month.

2.31 "Patents" means: (i) US Patent No. 7,194,468 and any continuations, continuations-in-part, divisionals, reissues, reexaminations, renewals, supplemental examinations and all other patents or patent applications based on or claiming priority from any of the foregoing; and (ii) any and all other patents owned or acquired by Claim Owner that are asserted, sold to, licensed, alleged, or claimed against any of the Defendants.

2.32 "Perfection Documents" means any agreement, document, or financing statement (and any amendments or continuation statements related thereto) that LCF deems necessary or desirable to perfect the security interest provided by Section 5 of this Agreement.

2.33 "Person" means any individual, firm, company, corporation, partnership, limited liability company, government, state, or agency, or subdivision of a state (or governmental entity), or any association, trust, joint venture, or consortium (whether or not having separate legal personality).

2.34 "Proceeds" means any and all gross, pre-Tax (i) monetary recovery or the value of any other consideration received, or to be received, directly or indirectly by Claim Owner, its Affiliates, related Persons, or any of their permitted assigns as a direct or indirect result of, part of, in connection with, relating to, or arising from, awards, damages, Royalties (including the Value of Royalties), monies, lump-sum payments, up-front payments, settlement amounts, distribution of property, cash value of equities, judgments, settlements, injunctions, sales, contracts, or other cash and non-cash amounts paid, received, or to be received by (which shall include amounts being set off against or otherwise reducing any obligation of Claim Owner or any of its Affiliates), transferred, owed, or inuring, directly or indirectly, to Claim Owner or any of its Affiliates or related Persons, whether as a direct or indirect result of, as part of, arising from, in connection with, or relating to, (x) awards or payments of attorneys' fees, costs and expenses, settlement (reached before and after the initiation of litigation, arbitration, mediation, or a complaint, but after the execution of this Agreement), voluntary dismissals, and awards of sanctions (as permitted by applicable law), license, judgment, order, voluntary dismissals, including any award of sanctions, as permitted by applicable law, or any resolution of the Claims (or any part of the Claims); or (y) contracts, licensing agreements, or royalty agreements from Defendants or from any other parties added to the same action against Defendants, plus (ii) interest received in connection therewith agreed in a settlement or awarded in a judgment. For the avoidance of doubt, Proceeds shall be determined prior to deducting (and shall be gross of) any portion thereof that may be payable by Claim Owner to Claim Owner's Attorneys.

2.35 "Representative" means the employees, officers, directors, partners, members, shareholders, co-investors, potential co-investors, agents, advisors, consultants, accountants, attorneys, trustees, or authorized representatives a Party.

2.36 "Rights" means all rights, titles, claims, options, powers, privileges, and interests.

2.37 "Royalties" means any monies or cash payable, owed to, or inuring to Claim Owner, its Affiliates, or related Persons, or any of their permissible assigns, as a result of a settlement, license, royalties, or other resolution of the Claims, whether voluntary or ordered or adjudicated by the court or a jury, where such monies or cash are payable over a period greater than one year.

2.38 "Security" means a mortgage, charge, pledge, lien, or other security interest securing any obligation of any Person or any other agreement or arrangement having a similar effect.

2.39 "Taxes" means any non-U.S., U.S. federal, state, local, municipal, or other governmental taxes, duties, levies, fees, excises, or tariffs, arising as a result of or in connection with any amounts of property received or paid under this Agreement, including: (i) any state or local sales or use taxes; (ii) any import, value-added, consumption, or similar tax; (iii) any business transfer tax; (iv) any taxes imposed or based on or with respect to or measured by any net or gross income or receipts of any of the Parties; (v) any withholding or franchise taxes, taxes on doing business, gross receipts taxes or capital stock or property taxes; or (vi) any other tax now or hereafter imposed by any governmental or taxing authority on any aspect of this Agreement, the Proceeds, the Investment or the Assigned Rights, and "pre-Tax" shall mean before deduction of any of the foregoing.

2.40 "Value of Royalties" shall mean the following:

(a) The total cash value of the sum of all monies or cash payable to Claim Owner, its Affiliates or related Persons or their assigns during the entire term of any settlement agreement or license agreement, to the extent LCF determines that it can reasonably calculate the cash value with certainty as of the effective date of such settlement agreement or license agreement; or

(b) To the extent LCF determines that it cannot reasonably calculate such cash value with certainty as of the date of such settlement agreement or license agreement, the total cash value shall be calculated as the greater of five percent (5%) and the royalty rate specified in the settlement agreement, license agreement or as adjudicated by the court or jury (or if multiple royalty rates apply, the blended rate as determined by LCF); multiplied by the average of total net sales of the products, services or methods covered by the settlement agreement or the license agreement (the "Licensed Products") for the three-year period preceding the effective date of such settlement agreement and/or license agreement; multiplied by the term of the settlement agreement or license agreement, expressed in years or fractional years; multiplied by a projected growth rate determined by LCF and based on sales of the Licensed Products over that three year period. If less than three years of data is available, LCF may calculate the average sales and the projected growth rate based on the available data.

2.41 To the extent the settlement agreement or license agreement grants a term license with a right of renewal entitling Claim Owner, its Affiliates or related Persons or their assigns to additional Royalties, any subsequent renewals, including license re-negotiations if any, shall be subject to this Section 2.41 for determining the Value of Royalties and Proceeds owed to LCF under this Agreement.

3. FUNDING ARRANGEMENT

3.1 Committed Capital. Subject to the terms and conditions of this Agreement (including Section 3.2), LCF commits to pay Attorneys' Fees, Expenses, Inter Partes Review Expenses, and Operating Expenses in an aggregate amount not to exceed ● (such amount, "LCF's Committed Amount" and LCF's obligation to make payments up to such amount in accordance with and subject to this Section 3, "LCF's Commitment"), subject to and in accordance with the caps on Attorneys' Fees, Expenses, Inter Partes Review Expenses and Operating Expenses.

3.2 Billing Records and Oversight. Claim Owner is required to submit monthly billing records to LCF detailing the Compensable Costs for which reimbursement is sought, which shall be provided by Claim Owner's Attorneys after redaction of privileged information. These records must contain detailed descriptions, including the date each submission was incurred, the amount of each submission, the reason for each submission and, if applicable, written request for reimbursement or payment in respect thereof. Within 30 days following the receipt of such billing records and such written request for reimbursement or payment, LCF shall pay to, or on behalf of, Claim Owner the Compensable Costs for which payment is sought by Claim Owner from LCF; provided that, for the avoidance of doubt, (i) the aggregate amount of money to be paid by LCF pursuant to this Agreement that may be used for Compensable Costs shall not exceed the Compensable Cost Cap and (ii) the aggregate amount of money to be paid by LCF pursuant to this Agreement shall not exceed LCF's Committed Amount. LCF reserves the right not to pay any Compensable Costs that it deems commercially unreasonable. in its sole discretion, provided that LCF shall act in good faith in making its determination of the reasonableness of Compensable Costs, and may terminate LCF's Commitment as set forth in Section 3.7 of this Agreement. Claim Owner's Attorneys will review billing records prior to Claim Owner's sending them to LCF to ensure that they do not contain privileged information. It shall be the responsibility of Claim Owner to submit the billing records and requests for reimbursement or payment to LCF in accordance with this Section 3.2.

3.3 Limitation on LCF's Funding Obligations. Except for LCF's obligation to Fund LCF's Committed Amount in accordance with this Agreement, LCF has no obligation to pay any fees, expenses, or other sums relating to the Claims. LCF has no obligation to pay fees or expenses incurred by Claim Owner or Claim Owner's Attorneys in conjunction with any Adverse Claim. Similarly, LCF has no obligation to pay any settlements, judgments, or awards against Claim Owner relating to any Adverse Claim, including any fee awards against Claim Owner.

3.4 Acknowledgements Regarding the Scope and Nature of LCF's Capital Commitment. The Parties recognize and acknowledge that (i) pursuant to the terms of this Agreement, LCF is purchasing the Assigned Rights from Claim Owner and an ownership interest in Assigned Rights is being sold, transferred, and assigned by Claim Owner to LCF; (ii) the Assigned Rights irrevocably assigned to LCF hereunder are being transferred to LCF in consideration for LCF entering into this Agreement; (iii) unless expressly stated otherwise herein (including pursuant to Section 9.2(a) below), LCF's sole recourse with respect to the Realization Multiple and LCF's Profit shall be contingent upon, and to the extent of, the recovery of Proceeds, and (iv) notwithstanding anything herein to the contrary, in the event LCF has complied with its obligations under this Agreement and Claim Owner receives Proceeds in an amount equal to or greater than the sum of the Realization Multiple and LCF's Profit but does not remit, upon receipt, the total of the Realization Multiple and LCF's Profit to LCF, then Claim Owner shall be liable to LCF for any such deficiency.

3.5 LCF's Commitment Not a Loan. Any amount funded by LCF in respect of LCF's Committed Amount is not a loan. LCF is not acquiring ownership of the Claims, it being acknowledged and agreed, for the avoidance of doubt, that LCF is acquiring ownership of the Assigned Rights. Claim Owner remains the sole owner of the Claims. Neither LCF, Longford Investment Group, LLC, Longford Advisors, LLC, Longford Capital Management, LP, nor their lawyers will provide any legal professional services or legal advice to Claim Owner and Claim Owner agrees to seek such advice exclusively from Claim Owner's Attorneys or other licensed lawyers.

3.6 Exclusivity. During the term of this Agreement, Claim Owner shall not directly or indirectly through any of its Representatives or Affiliates or otherwise (i) encourage, solicit, initiate or participate in any way in discussions or negotiations with; (ii) provide any information to; or (iii) permit access of the type contemplated by Sections 3.8 and 3.9 hereof to any Person (other than LCF) for the purpose of securing from such entity funding for the assertion of any of the Claims.

3.7 Right of Withdrawal. LCF reserves the right to withdraw LCF's Commitment and terminate this Agreement at any time upon a Material Adverse Event within (10) days written notice to Claim Owner and upon such notice LCF shall not be required to make any further payments under this Agreement. In the event LCF exercises this right of withdrawal and this Agreement is terminated, and notwithstanding the prohibition contained in Section 3.6 above, Claim Owner may accept or deploy the capital of another third-party lender or capital source to continue the prosecution of the Claims. If Claim Owner continues to prosecute the Claims following a withdrawal by LCF of LCF's Commitment, and Proceeds are realized from the Claims (or if Proceeds are realized following LCF's withdrawal even though Claim Owner ceases to prosecute the Claims), LCF shall receive from the Proceeds of the Claims, as "first-money-out" an amount equal to LCF's Invested Capital through the date of its withdrawal (less the aggregate amount of any distributions made under Section 4.2(a) below), plus ● of the aggregate Proceeds of the Claims, but under no event will aggregate payments to LCF under this Section 3.7 exceed a sum equal to ● of the aggregate of LCF's Invested Capital. These amounts shall be paid by Claim Owner to LCF within ten (10) days of any Proceeds being paid or transferred to, inuring to or received by Claim Owner (or for its benefit) (and for the purposes of this Section 3.7, Royalties shall be deemed to have been received as of the date of the effectiveness of any license agreement or settlement). Claim Owner shall notify LCF promptly upon the occurrence of a Material Adverse Event.

3.8 Access. During the term of this Agreement, Claim Owner shall provide LCF, Longford Investment Group, LLC, Longford Advisors, LLC, and Longford Capital Management, LP, and their respective auditors, legal counsel, and other authorized representatives complete and unlimited access to inspect, investigate and audit all non-privileged information relating to the Claims, including (i) corporate documents, (ii) documents related to the business, operations, assets, liabilities, and obligations of Claim Owner, (iii) non-privileged communications, and (iv) contracts of Claim Owner. In addition, Claim Owner shall cooperate and promptly respond to all due diligence inquiries. Claim Owner shall consult independent legal counsel in order to protect privileged communications as disclosure of privileged communications could result in waiver of the attorney-client privilege, thus potentially adversely affecting the Claims. If Claim Owner is aware of material privileged communications that could affect LCF's decision to invest or monitoring of its investment, or to withdraw LCF's Commitment, Claim Owner, after consulting independent legal counsel, will disclose the existence, but not the substance, of such communications.

3.9 Matter Monitoring. Claim Owner shall instruct the Claim Owner's Attorneys to keep LCF informed of the progress of the prosecution of the Claims and to provide to LCF all non-privileged information and documentation related to the prosecution of the Claims, including providing (i) reports on settlement negotiations, electronic copies of all pleadings, notices of court hearings, court rulings, and all other non-privileged information as soon as practicable after receipt or creation of such information, and (ii) regular quarterly status reports and timely disclosure of important documents and material events or changes regarding the prosecution of the Claims pursuant to **Exhibit A** hereto. Claim Owner shall not be obligated to provide access to documents the disclosure of which would violate a court order. In no event shall Claim Owner be obligated to disclose any privileged information related to the prosecution of the Claims at any time or for any purpose. Notwithstanding the preceding sentence, pursuant to Section 7.1(i) below, if Claim Owner is aware of information that it reasonably believes could affect LCF's decision to make LCF's Commitment, or to withdraw LCF's Commitment, and Claim Owner is prohibited from disclosing such information because it is privileged, Claim Owner is required to disclose to LCF the fact that such information exists and Claim Owner's assessment, after consultation with counsel, of such information and its effect, if any, on the claims and defenses, even if it cannot disclose the substance of that information. Claim Owner agrees to make the disclosures regarding the matters set forth on **Exhibit A** in accordance with the terms set forth on **Exhibit A**. All information provided by Claim Owner shall be in consultation with its counsel, and all such information shall be true and accurate in all material respects as of the date provided.

4. PROCEEDS FROM THE CLAIMS

4.1 Assignment of an Interest in the Proceeds. In consideration for LCF's Commitment, Claim Owner hereby irrevocably assigns to LCF the Assigned Rights.

4.2 Payment Priority of Proceeds. Upon any Proceeds being received, transferred, paid or inuring to Claim Owner (or for its benefit) (a "Realization Event"), such Proceeds shall immediately be deposited in a Joint-Order Escrow Account for distribution in accordance with LCF's and Claim Owner's joint-written instructions pursuant to the provisions of this Agreement and shall be promptly paid to LCF and Claim Owner, in the following amounts and priority (and for the purposes of this Section 4.2, Royalties shall be deemed to have been received as of the date of the effectiveness of any license agreement or settlement):

(a) Realization Multiple. First, ● to LCF, until LCF has received in the aggregate under this clause (a) and Section 4.3 an amount equal to 100% of the aggregate of LCF's Invested Capital as of the time of such payment (the "Realization Multiple");

(b) Exposure Reduction Payment. Second, ● to LCF and ● to Claim Owner, until LCF has received under this clause (b) and clause (a) above in the aggregate an amount equal to LCF's Committed Amount;

(c) Commitment Multiple. Third, ● to LCF and ● to Claim Owner until LCF has received under this clause (c) an additional amount equal to ● of LCF's Committed Amount;

(d) Tail. Thereafter, ● to LCF and ● to Claim Owner.

4.3 If, upon the payment of Proceeds with respect to any Realization Event, the aggregate Proceeds paid to LCF under Section 4.2 or this Section 4.3 do not, in the aggregate, at least equal the aggregate of LCF's Invested Capital as of the date of such Realization Event, then Claim Owner shall promptly pay to LCF the amount of cash necessary so that such shortfall does not exist, provided that the amount so payable by Claim Owner in connection with such Realization Event shall not exceed an amount equal to the aggregate payments received by Claim Owner under Section 4.2 with respect to such Realization Event and any prior Realization Events. In addition, if upon the earlier of 6 years from the date of the full execution of this Agreement and the date on which all of the Claims have been settled, dismissed, litigated to completion, or otherwise disposed of, the aggregate amounts paid to LCF under Section 4.2 or this Section 4.3 do not in the aggregate at least equal the aggregate of LCF's Invested Capital as of such date, then Claim Owner shall promptly pay to LCF the amount of cash necessary so that such shortfall does not exist, provided that the aggregate amounts so payable by Claim Owner shall not exceed the aggregate amounts of Proceeds received by Claim Owner pursuant to Section 4.2.

5. SECURITY INTEREST

5.1 Security Interest. As collateral security for the obligations of Claim Owner hereunder, Claim Owner grants and assigns to LCF a security interest in all of the Proceeds (to the extent that the right to those Proceeds have not been assigned to LCF pursuant to Section 4.1), *provided* that LCF shall be entitled to recover and retain out of the Proceeds, only such amounts to which LCF is entitled under Section 4.2 of this Agreement and *further* LCF shall remit to Claim Owner any funds from the Proceeds, that exceed the amounts to which LCF is due in accordance with Section 4.2. Claim Owner shall execute and deliver to LCF at the Closing, and LCF may file with any necessary filing offices, the Perfection Documents for the purpose of perfecting LCF's Rights in and to the Proceeds, and as notice to third parties that Claim Owner has conveyed any interest that it may have in or to the Proceeds. As soon as LCF shall have received the full amount due to it under Section 4.2 of this Agreement with respect to all of the Claims, the security interest granted under this Section will terminate.

6. CLOSING

6.1 Conditions Precedent to the Investment. LCF's Commitment shall not be effective unless and until, on the Closing Date, each of the following conditions are satisfied (or waived in writing by LCF):

(a) The representations and warranties of Claim Owner contained in Section 7.1 of this Agreement are true and accurate in all material respects on and as of the date hereof and the Closing Date;

(b) No Event of Default has occurred or would result from the transactions being consummated at such time;

(c) LCF has received the Officer's Certificates attached hereto as **Exhibit B** and **Exhibit C**, executed by the President of Claim Owner, dated as of the Closing Date, certifying as to the matters set forth in Section 6.1(a) and Section 6.1(b); and

(d) The Claim Owner's Attorneys have executed and delivered to LCF the letter agreement attached hereto as **Exhibit D** (including the engagement letter referenced therein).

6.2 Closing. Subject to the terms and provisions of Section 6.1, the obligations of the Parties hereunder shall become effective when Claim Owner has delivered to LCF the Perfection Documents, fully executed and Authorized by or on behalf of Claim Owner (if necessary).

7. REPRESENTATIONS, WARRANTIES, AND INVESTMENT-RELATED DISCLOSURES

7.1 Claim Owner's Representations, Warranties, and Investment-Related Disclosures. Claim Owner makes the representations, warranties, and Covenants set out in this Section 7.1 to LCF as of the date of this Agreement, Closing Date and thereafter for the duration of this Agreement:

(a) Claim Owner is seeking significant license agreements and monetary damages against Defendants by pursuing the Claims.

(b) The Patents are exclusively owned by Claim Owner.

(c) No third party has the right to grant any licenses in and to any of the Patents.

(d) There are no inventorship challenges, opposition, reexamination, or nullity proceedings or interferences declared, commenced or provoked, or to the knowledge of Claim Owner, threatened, with respect to any Patents. Claim Owner has complied with its duty of candor and disclosure to the United States Patent and Trademark Office and any relevant foreign patent or trademark office with respect to the Patents and have made no material misrepresentation with respect to such Patents. No Patent has been intentionally abandoned. Claim Owner has no knowledge of any information that would preclude Claim Owner from having clear title to the Patents or affecting their patentability, validity, or enforceability.

(e) Use of LCF's Committed Amount. Claim Owner shall use LCF's Committed Amount for the purposes set forth in accordance with Section 3.2 hereof and for no other purpose, unless LCF shall have agreed in writing to Claim Owner's using such funds for another purpose prior to such repurposing.

(f) Organization and Good Standing. QPRC and QLC are corporations with their chief executive offices located at 19 Fortune Lane, Jericho, New York 11753. QPRC is duly organized and validly existing under the laws of the State of Delaware and is a corporation in good standing with the Delaware Secretary of State, the New York Secretary of State and all other applicable government entities. "Quest Patent Research Corporation" is the correct legal name of QPRC indicated in the public record of its jurisdiction of organization which shows QPRC to be organized, and its employer identification number is 11-2873662. QLC is duly organized and validly existing under the laws of the State of New York and is a corporation in good standing with the New York Secretary of State and all other applicable government entities. "Quest Licensing Corporation" is the correct legal names of QLC indicated in the public record of the jurisdiction of its organization which shows QLC to be organized, and its New York Department of State ID number is 36697766.

(g) Authorization and Enforceability. Claim Owner has the requisite power and authority to execute and deliver this Agreement and the other Funding Documents, to perform its obligations hereunder and thereunder and to consummate the transactions contemplated hereby and thereby. The execution, delivery and performance by Claim Owner of this Agreement and the other Funding Documents and the consummation of the transactions contemplated hereby and thereby have been duly Authorized by all required action on the part of Claim Owner. Claim Owner has consulted independent legal counsel prior to entering into this Agreement.

(h) Due Execution. This Agreement and the other Funding Documents have been duly executed and delivered by Claim Owner, and, assuming the due authorization, execution and delivery hereof and thereof by LCF, constitute the valid and legally binding obligations of Claim Owner enforceable in accordance with their terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws relating to creditors' rights generally and by general principles of equity.

(i) Litigation. There is no claim, action, suit, proceeding, arbitration, investigation, or inquiry pending before any court or governmental entity threatened against Claim Owner. There is not in existence at present and, except in connection with the Claims, Claim Owner is not aware of the potential for any order, judgment, or decree of any court or other tribunal or any agency enjoining or requiring Claim Owner to take any action of any kind or to which Claim Owner or its assets are subject or bound.

(j) Title to Property; Absence of Liens and Encumbrances, Etc. As of the date of this Agreement and the Closing Date, Claim Owner is solvent and owns and has good and marketable title to its assets, including but not limited to the Patents and the Proceeds, free and clear of all liens and encumbrances or other Security or any Adverse Claim in favor of any Person other than LCF.

(k) No Conflicts. The execution, delivery and performance by Claim Owner of this Agreement and the other Funding Documents in accordance with their respective terms do not and will not, after the giving of notice, or the lapse of time or both, or otherwise (i) conflict with, result in a breach of, or constitute a default under the constituent documents of Claim Owner, or any law, statute, ordinance, rule or regulation, or any court or administrative order or process or, except as is not expected to result in a Material Adverse Event, any contract, agreement, arrangement, commitment or plan to which Claim Owner is a party or by which Claim Owner or its assets are bound (including any agreement or arrangement between Claim Owner or its Affiliates and MoloLamken LLP), (ii) require the consent, waiver, approval, permit, license, clearance or authorization of, or any declaration or filing with, any court or public agency or other authority, or (iii) except as is not expected to result in a Material Adverse Event, require the consent of any Person under any material agreement, arrangement, or commitment of any nature.

(l) Investment-related Disclosures. Claim Owner acknowledges that it has superior knowledge regarding the Claims, due at least in part to its involvement and familiarity with the facts underlying the Claims. Moreover, Claim Owner acknowledges that it will have access to privileged information regarding the prosecution of the Claims that is not available to LCF. In connection with entering into this Agreement, Claim Owner has provided (or has caused Claim Owner's Attorneys to provide) certain information to LCF, including information pertaining to the Claims and potential defenses thereto, and material factual information underlying the Claims. All such information has been provided by Claim Owner in consultation with its counsel, and Claim Owner hereby warrants that all such information was true and accurate in all material respects as of the date it was provided and as of the Closing Date. Claim Owner acknowledges that LCF has relied on the accuracy and completeness of this information in agreeing to make LCF's Commitment. Claim Owner confirms that it has disclosed, and will continue to disclose, all non-privileged material facts in their possession that Claim Owner reasonably believes could affect LCF's decision to make (or to withdraw) LCF's Commitment.

(m) Liens of LCF. The Liens granted to LCF pursuant to this Agreement are duly perfected, first priority Liens with respect to the Proceeds that may be perfected under the UCC by the filing of financing statements. No Claim Owner has transferred any interest in or created any Lien upon any of the Proceeds or the Patents.

(n) Claim Owner has consulted independent legal counsel regarding the use of third-party financing in connection with the Claims and has determined that this Agreement is in compliance with all applicable laws and regulations.

(o) Cap on Attorneys' Fees, Expenses, Inter Partes Review Expenses, and Operating Expenses. Claim Owner has agreed to cap Attorneys' Fees, Expenses, Inter Partes Review Expenses, and Operating Expenses for which LCF's Committed Amount may be used as follows: (1) Attorneys' Fees - ●, (2) Expenses - ●, (3) Inter Partes Review Expenses - ●, and (4) Operating Expenses - ●, with any overage being the responsibility of Claim Owner or Claim Owner's Attorneys.

7.2 LCF's Representations and Warranties. LCF makes the representations and warranties set out in this Section 7.2 to Claim Owner as of the date of this Agreement and the Closing Date.

(a) Organization and Good Standing. LCF is duly organized and validly existing under the laws of the State of Delaware and is a limited partnership in good standing with the Illinois Secretary of State.

(b) Authorization and Enforceability. LCF, through its undersigned representative, has the requisite power and authority to execute and deliver this Agreement and the other Funding Documents, to perform its obligations hereunder and thereunder and to consummate the transactions contemplated hereby and thereby. The execution, delivery and performance by LCF of this Agreement and the other Funding Documents and the consummation of the transactions contemplated hereby and thereby have been duly Authorized by all required action on the part of LCF.

(c) Due Execution. This Agreement and the other Funding Documents have been duly executed and delivered by LCF as appropriate, and, assuming the due Authorization, execution and delivery hereof and thereof by Claim Owner or any other third party thereto, they constitute the valid and legally binding obligations of LCF enforceable in accordance with their respective terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws relating to creditors' rights generally and by general principles of equity.

(d) No Conflicts. The execution, delivery and performance by LCF of this Agreement and the other Funding Documents in accordance with their respective terms do not and will not, after the giving of notice, or the lapse of time or both, or otherwise (i) conflict with, result in a breach of, or constitute a default under the Certificate of Limited Partnership, or the limited partnership agreement, of LCF or any law, statute, ordinance, rule or regulation, or any court or administrative order or process, or any material contract, agreement, arrangement, commitment or plan to which LCF is a party or by which LCF or its assets are bound, (ii) require the consent, waiver, approval, permit, license, clearance or authorization of, or any declaration or filing with, any court or public agency or other authority, or (iii) require the consent of any Person under any material agreement, arrangement, or commitment of any nature.

(e) No Practice of Law. LCF, Longford Investment Group, LLC, Longford Advisors, LLC, and Longford Capital Management, LP and their respective members and partners are not a law firm and do not provide legal advice. No attorney-client relationship is intended, sought, or created by or through the execution of this Agreement. LCF, Longford Investment Group, LLC, Longford Advisors, LLC, and Longford Capital Management, LP and their respective members and partners have not provided, nor will provide at any time in the future, legal advice to Claim Owner regarding or in conjunction with this Agreement or the Claims.

(f) Independent Decisions. LCF will not seek to influence the professional judgment of Claim Owner's legal counsel or otherwise exert control over any threatened or actual litigation. Further, LCF will not constrain, coerce, or otherwise pressure Claim Owner to take any action that it believes is adverse to Claim Owner's interests, including negotiating or settling the Claims in a manner other than Claim Owner believes is in its best interests.

8. ADDITIONAL COVENANTS AND TAXES

8.1 Covenants. For so long as Claims exist, any amount is outstanding, or obligation of Claim Owner is remaining under this Agreement, or the other Funding Documents, each Claim Owner shall (unless it has obtained prior written consent from LCF to the contrary), at its sole cost and expense:

(a) obtain, comply with and use commercially reasonable efforts to do all that is necessary to remain solvent and carry on its business;

(b) prosecute, and to the best of its ability take all necessary actions to ensure that it prosecutes, the Claims with all due skill and care, including maintaining the appointment of Claim Owner's Attorneys to act on the behalf of Claim Owner with respect to the prosecution of the Claims;

(c) not, without the prior written consent of LCF, accept or deploy the capital of any third-party lender or capital source other than LCF in connection with the prosecution of the Claims;

(d) not allow any other Person other than LCF to hold any Security or Adverse Claim over the Patents, the Claims, or the Proceeds, or any rights thereto; notwithstanding the foregoing, in the event that Claim Owner wishes to grant a subordinate security interest in the Proceeds, Claim Owner may do so if (i) the terms of the obligations being secured thereby (including terms of payment by Claim Owner, interest rates, covenants, remedies, defaults and other material terms) are satisfactory to LCF in its sole discretion (notwithstanding the foregoing, LCF will not object to the amount received (or to be received) by Claim Owner from the secured party in exchange for the obligations being secured by such subordinate security interest), and (ii) such obligations being secured thereby have been expressly subordinated in right of payment to all obligations of Claim Owner to LCF hereunder by the execution and delivery of a subordination agreement, in form and substance satisfactory to LCF in its sole discretion;

(e) not transfer, sell, assign, or otherwise dispose of any of its Rights in or under any of the contracts or agreements relating to the Claims or the Proceeds;

(f) not transfer, sell, assign, or otherwise dispose of any of the Patents;

(g) take all actions required or necessary to maintain the Patents in force and not allow any of the Patents to lapse or expire, including but not limited to diligently prosecuting all pending patent applications and paying all maintenance or renewal fees as required by the United States Patent and Trademark Office and other patent offices and administrative agencies around the world;

(h) keep and maintain books and records currently in its possession and essential to the prosecution of the Claims;

(i) not grant any interest in or create any Lien upon any of the Patents, Claims or the Proceeds (except interests in and Liens in favor of LCF); notwithstanding the foregoing, in the event that Claim Owner wishes to grant a subordinate security interest in the Proceeds, Claim Owner may do so if (i) the terms of the obligations being secured thereby (including terms of payment by Claim Owner, interest rates, covenants, remedies, defaults and other material terms) are satisfactory to LCF in its sole discretion (notwithstanding the foregoing, LCF will not object to the amount received (or to be received) by Claim Owner from the secured party in exchange for the obligations being secured by such subordinate security interest), and (ii) such obligations being secured thereby have been expressly subordinated in right of payment to all obligations of Claim Owner to LCF hereunder by the execution and delivery of a subordination agreement, in form and substance satisfactory to LCF in its sole discretion;

(j) not challenge the validity, perfection, or priority of the Liens granted to LCF;

(k) take such action and execute, acknowledge and deliver, at its sole cost and expense, such agreements, instruments or other documents as LCF may require from time to time in order (i) to perfect and protect, or maintain the perfection of, the security interest and Liens purported to be created hereby; (ii) to enable LCF to exercise and enforce its rights and remedies hereunder in respect of the Proceeds; or (iii) otherwise to effect the purposes of this Agreement, including: (A) executing and filing (to the extent, if any, that Claim Owner's signature is required thereon) or authenticating the filing of, such financing or continuation statements, or amendments thereto, and (B) taking all actions required by law in any relevant Uniform Commercial Code jurisdiction, or by other law as applicable in any foreign jurisdiction. Claim Owner shall not take or fail to take any action which would in any manner impair the validity or enforceability of LCF's security interest in and Lien on the Proceeds; and

(l) timely file all tax returns with the appropriate taxing authority and timely pay all Taxes due, whether or not shown on such tax returns; and

(m) Use LCF's Commitment solely for the purposes set forth in Sections 2 and 3 hereof and for no other purpose, unless LCF shall have agreed in writing to Claim Owner's using such funds for another purpose prior to such repurposing.

8.2 Taxes. All Taxes shall be the financial responsibility of the Party obligated to pay such Taxes as determined by applicable law and neither Party is or shall be liable at any time for any of the other Party's Taxes incurred in connection with or related to amounts paid under this Agreement. No Tax shall be withheld on any Proceeds payable to LCF hereunder unless required by law. If any applicable law requires the deduction or withholding of any tax from any such payment to LCF, then the Claim Owner shall be entitled to make such deduction or withholding and shall timely pay the full amount deducted or withheld to the relevant taxing authority in accordance with applicable law and the sum payable to LCF shall be increased as necessary so that, after such deduction or withholding has been made, LCF receives an amount equal to the sum it would have received had no such deduction or withholding been made. Each Party shall indemnify, defend and hold the other Party harmless from and against any Taxes owed by or assessed against the other Party that are the obligations of such Party and from any claims, causes of action, costs, expenses, reasonable attorneys' fees, penalties, assessments and any other liabilities of any nature whatsoever related to such Taxes.

8.3 Successor or Replacement Attorneys. If Claim Owner's Attorneys resign or cease to act as the attorneys for Claim Owner related to the assertion or prosecution of the Claims, then Claim Owner shall appoint successor attorneys to act as its counsel, provided that such appointment shall be subject to the prior written consent of LCF (it being acknowledged and agreed, for the avoidance of doubt, that any change in Claim Owner's Attorneys shall constitute a Material Adverse Event unless such change is agreed to in advance and in writing by LCF), and provided further that, prior to appointing such successor attorneys, Claim Owner shall cause such successor attorneys to execute and deliver to LCF a letter agreement with the same terms and provisions as the letter agreement attached hereto as **Exhibit D**. Should such successor or replacement attorneys be so appointed, all references to obligations of Claim Owner's Attorneys shall, where appropriate and effective of the date of their appointment, be deemed to be a reference to such successor or replacement attorneys.

8.4 Conduct of Business. Claim Owner shall conduct its business in the regular and ordinary course, consistent with past practices. Claim Owner shall keep LCF timely apprised of material commitments and material changes in Claim Owner's business, operations, and financial condition, and material developments with respect to the Claims.

8.5 Disclosure. Claim Owner shall disclose all non-privileged material facts in its possession that could affect LCF's decision to make (or to withdraw) LCF's Commitment.

9. EVENTS OF DEFAULT

9.1 Events of Default. Each of the events or circumstances set out below is an Event of Default:

(a) Non-payment. Claim Owner fails to pay or distribute when due any amount payable or distributable pursuant to this Agreement at the place and in the currency in which it is expressed to be payable.

(b) Other Obligations. Claim Owner fails to comply with any provision of the Funding Documents (other than those referred to in subsection (a) above) and such failure to comply is not cured within thirty (30) days of LCF providing written notice to Claim Owner.

(c) Misrepresentation. Any representation, warranty, or statement made by Claim Owner in this Agreement, in the other Funding Documents, or any other document delivered by or on behalf of Claim Owner under or in connection herewith or therewith is or proves to have been incorrect or misleading in any material respect.

(d) Insolvency.

(i) Claim Owner fails to pay its debts as they become due or suspends making payments on any of its material financial obligations; or

(ii) The value of Claim Owner's assets is less than its liabilities (taking into account contingent and prospective liabilities and contingent and prospective assets).

(e) Insolvency Proceedings. Any legal proceedings are taken in relation to:

(i) the suspension of payments, winding up, dissolution, liquidation, administration or reorganization (by way of voluntary arrangement, scheme of arrangement, or otherwise) of Claim Owner;

(ii) the filing of a voluntary petition for relief under the United States Bankruptcy Code by Claim Owner or the filing of an involuntary petition for relief against Claim Owner which is not dismissed within 45 days of such filing;

(iii) the appointment of a liquidator, receiver, administrative receiver, administrator, compulsory manager or other similar officer in respect of Claim Owner or substantially all of Claim Owner's assets; or

(iv) enforcement of any Security or Adverse Claim over all or substantially all Claim Owner's assets.

(f) A majority change of control of Claim Owner.

9.2 Rights and Remedies. During the continuance of an Event of Default, LCF may, in its sole and absolute discretion, upon written notice to Claim Owner and opportunity to cure in accordance with this Agreement, do any one or more of the following:

(a) declare Claim Owner's obligation to pay the Realization Multiple pursuant to this Agreement immediately due and payable in full from Proceeds that have been received by Claim Owner;

(b) except as otherwise provided herein, without notice to or demand upon Claim Owner, make such payments and do such acts, on behalf of Claim Owner, as LCF reasonably considers necessary or reasonable to protect its rights under this Agreement; or

(c) except as otherwise provided herein, in addition to the foregoing, LCF shall have all rights and remedies provided by law and any rights and remedies contained in any Funding Document (including enforcing its security interest in the Proceeds); or

(d) LCF's Commitment shall terminate, such that LCF shall not be required to make the payments contemplated by Section 3.

10. GOVERNING LAW; WAIVER OF SPECIFIC DEFENSES; DISPUTES

10.1 Governing Law. This Agreement and the rights and obligations of the parties hereunder shall be governed by the laws of the State of New York, without giving effect to any choice of law or conflict of law provision or rule, and shall be construed and enforced in accordance with the law.

10.2 Specific Waivers. To the greatest extent permissible by law, Claim Owner irrevocably waives and forever and unconditionally releases, discharges and quitclaims any claims, counterclaims, defenses, causes of action, remedies, or rights it or its successors in interest has or may in the future have arising from any doctrine, rule, or principle of law or equity that this Agreement, or the relationships or transactions contemplated by this Agreement (i) are against the public policy of any jurisdiction with which Claim Owner has a connection, or (ii) are unconscionable, or (iii) constitute champerty, maintenance, barratry, or any impermissible transfers, assignments or splitting of property, fees or causes of action, or (iv) violate the rules of professional ethics applicable to Claim Owner, LCF, or any of their lawyers.

10.3 Arbitrable Claims. All actions, disputes, claims and controversies under common law, statutory law, rules of professional ethics, or in equity of any type or nature whatsoever, whether arising before or after the date of this Agreement, and directly relating to: (a) this Agreement or any amendments and addenda hereto, or the breach, invalidity or termination hereof; (b) any previous or subsequent agreement between LCF and Claim Owner related to the subject matter hereof to the extent set forth in Section 12.2; (c) any act or omission committed by LCF or its Representatives with respect to this Agreement, or by any member, employee, agent, or lawyer of LCF with respect to this Agreement, whether or not arising within the scope and course of employment or other contractual representation of LCF (provided that such act arises under a relationship, transaction or dealing between LCF and Claim Owner); or (d) any act or omission committed by Claim Owner with respect to this Agreement, or by any employee, agent, partner or lawyer of Claim Owner with respect to this Agreement whether or not arising within the scope and course of employment or other contractual representation of Claim Owner (provided that such act arises under a relationship, transaction or dealing between LCF and Claim Owner) (collectively, the "Disputes"), will be subject to and resolved by binding arbitration under this Section 10.3 and Section 10.4 below. The Parties agree that the arbitrators have exclusive jurisdiction, to the exclusion of any court (except as specifically provided with regard to prejudgment, provisional, or enforcement proceedings in Section 10.5), to decide all Disputes.

10.4 Administrative Body; Situs. Any Dispute arising out of or relating to this Agreement, including the breach, termination, enforcement, interpretation or validity thereof, or the determination of the scope or applicability of this Agreement to arbitrate, shall be determined by arbitration in New York, New York, before a panel of three arbitrators. The arbitration shall be administered using the arbitration rules of the American Arbitration Association ("AAA") current at the time the Dispute is brought, which rules are deemed to be incorporated herein by reference. Each Party shall, upon written request, promptly provide the other Party with copies of all information on which the producing party may rely in support of or in opposition to any claim or defense and a report of any expert whom the producing Party may call as a witness in the arbitration hearing. Moreover, in the event of a Dispute, Claim Owner waives any objection to the production of privileged information relating to the underlying litigation and the Claims.

10.5 Prejudgment and Provisional Remedies. Either Party may commence judicial proceedings only for the purpose(s) of: (i) enforcement of the arbitration provisions; (ii) obtaining appointment of arbitrator(s); (iii) preserving the status quo of the Parties pending arbitration as contemplated herein; (iv) preventing the disbursement by any Person of disputed funds; (v) preserving and protecting the rights of either Party pending the outcome of the arbitration, or (vi) seeking injunctive relief for breach of the confidentiality provisions contained in Section 11. Any such action or remedy will not waive a Party's right to compel arbitration of any Dispute, and any Party may also file court proceedings to have judgment entered on the arbitration award. In any action for prejudgment or provisional relief, any court in which such relief is sought shall determine the availability of such relief without regard to any defenses that may be asserted by the other Party, and any such defenses shall be referred to the exclusive jurisdiction of the arbitrators under Section 10.3. The Parties further agree that a court shall not defer or delay granting prejudgment or provisional relief while any such arbitration takes place. **EACH PARTY HERETO HEREBY IRREVOCABLY WAIVES ANY RIGHT IT MAY HAVE, AND AGREES NOT TO REQUEST, A JURY TRIAL FOR THE ADJUDICATION OF ANY DISPUTE HEREUNDER OR IN CONNECTION WITH OR ARISING OUT OF THIS AGREEMENT OR ANY TRANSACTION CONTEMPLATED HEREBY.**

10.6 Attorneys' Fees. If either Claim Owner or LCF brings any other action for judicial relief with respect to any Dispute (other than those precisely described in Section 10.5), the Party bringing such action will be liable for and immediately pay all of the other Party's costs and expenses (including attorneys' fees) incurred to stay or dismiss such action and remove or refer such Dispute to arbitration. If either Claim Owner or LCF brings or appeals an action to vacate or modify an arbitration award and such Party does not prevail, such Party will pay all costs and expenses, including attorneys' fees, incurred by the other Party in defending such action.

10.7 Enforcement. Any award rendered under this Section shall not be subject to appeal and shall be enforceable in any and all jurisdictions, including in the State of Illinois and the State of New York.

10.8 Confidentiality of Awards. All arbitration proceedings, including testimony or evidence at hearings, will be kept confidential, although any award or order rendered by the arbitrator(s) pursuant to the terms of this Agreement may be confirmed as a judgment or order in any state or federal or other national court of competent jurisdiction where proceedings are necessary or appropriate to enforce any award or order. This Agreement concerns transactions involving commerce among several state and foreign countries.

10.9 Indemnification. Claim Owner agrees to indemnify, defend, and hold harmless, LCF, Longford Investment Group, LLC, Longford Advisors, LLC, and Longford Capital Management, LP, and their respective Representatives from and against all claims by third parties relating to, or arising out of, this Agreement including, without limitation, all claims threatened, alleged or asserted by Claim Owner's Attorneys. For the avoidance of any doubt, Claim Owner agrees to advance to LCF, Longford Investment Group, LLC, Longford Advisors, LLC, and Longford Capital Management, LP, and their respective Representatives all defense costs, including attorneys' fees and expenses, for any third-party claim relating to, or arising out of, this Agreement.

11. CONFIDENTIALITY

11.1 Confidential Information. The Parties shall limit the distribution and disclosure of Confidential Information to their Representatives who have a "need to know" to such information. The Party disclosing the Confidential Information to its Representatives shall ensure that such Representatives adhere to, and comply with, all terms and obligations of confidentiality, use and protection of the Confidential Information as accepted by the Parties under this Agreement.

11.2 Limitations on Disclosure of Confidential Information. The Parties and their Representatives shall not disclose Confidential Information, or the fact that the Parties entered into this Agreement, unless: (i) the Parties agree in writing that such disclosure is acceptable, (ii) such disclosure is required in connection with the enforcement or protection of a Party's rights with respect to this Agreement, or (iii) such disclosure is required by law or regulation, governmental or regulatory authority, court order or judicial process; provided, that each Party agrees to give the other Party (to the extent not prohibited by applicable law, regulation, governmental or regulatory authority, court order or judicial process) written notice of any required disclosure and cooperate in obtaining a protective order or similar protection to preserve the confidential nature of the Confidential Information.

11.3 Public Disclosure. Neither LCF nor Claim Owner shall issue any press release or make any public statement with respect to the existence of this Agreement or the transaction contemplated hereby, except as may be required by applicable law, regulation, governmental, or regulatory authority, judicial process, or court order (in which case the party seeking to issue such press release or make such public statement will, to the extent not prohibited by applicable law, regulation, governmental or regulatory authority, court order, or judicial process, consult the other and obtain the other's approval, which shall not be unreasonably withheld, before issuing any such press release or otherwise making any such public statement). Claim Owner shall keep this Agreement confidential and not disclose it, or any part of it, or any drafts of it, to third parties, except as may be required by applicable law, regulation, governmental or regulatory authority, judicial process, or court order.

12. MISCELLANEOUS

12.1 Privileged Information. Subject to the provisions of Sections 7.1(j) and 3.8, LCF will not request from Claim Owner, and Claim Owner is not required to provide to LCF, documents and information protected by the attorney-client privilege. Claim Owner understands and acknowledges that in the event its Representatives provide privileged information to LCF, such disclosure may be deemed waiver of the applicable privilege. In the event that Claim Owner inadvertently provides privileged information to LCF, LCF will return such information to Claim Owner without reviewing the information.

12.2 Entire Agreement and Amendments. Except as set forth in Section 2(f) of that certain Letter Agreement, dated as of February 17, 2014, by and between LCF and Claim Owner, this Agreement and the other Funding Documents constitute the entire agreement between the Parties with respect to the matters covered herein and supersede all prior agreements, promises, representations, warranties, statements, and understandings with respect to the subject matter hereof as between Claim Owner and LCF. This Agreement may not be amended, altered, or modified except by an amendment or supplement to this Agreement executed by all Parties hereto.

12.3 Partial Invalidity; Severability. If, at any time, any provision of this Agreement or of the other Funding Documents is or becomes illegal, invalid or unenforceable in any respect under any law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions nor the legality, validity or enforceability of such provisions under the law of any other jurisdiction shall in any way be affected or impaired.

12.4 Remedies and Waivers. No failure to exercise, nor any delay in exercising, on the part of LCF or Claim Owner, of any right or remedy under this Agreement or the other Funding Documents shall operate as a waiver, nor shall any single or partial exercise of any right or remedy prevent any further or other exercise or the exercise of any other right or remedy. The rights and remedies provided in this Agreement are cumulative and not exclusive of any rights or remedies provided by law. No provision of this Agreement may be waived except in writing signed by the party granting such waiver.

12.5 Assignment. This Agreement shall inure to the benefit of, and be binding upon the respective successors and assigns of the Parties. Claim Owner shall not assign or delegate its rights or obligations under this Agreement or the other Funding Documents without the prior written consent of LCF, which should not be unreasonably withheld.

12.6 Notices.

(a) All notices, reports and other communications required or permitted under this Agreement shall be in writing. They shall be delivered by hand or sent by regular mail, courier, email or other reliable means of electronic communication to the Parties at their addresses indicated below or at such other address as may be specified hereafter in writing by any of the Parties to the other Party in accordance with this Section 12.6.

Claim Owner:

Jon Scahill
Quest Patent Research Corporation
19 Fortune Lane
Jericho, NY 11753
Email: jscahill@qprc.com

LCF:

William P. Farrell, Jr.
Managing Director
Longford Capital Management LP
150 North Michigan Avenue, Suite 2800
Chicago, Illinois 60601
Email: wfarrell@longfordcapital.com

(b) Any notice, report or other communication hereunder shall be deemed to have been delivered and received (i) on the date delivered, if delivered personally by hand or sent by courier, (ii) on the date sent, if sent by email or other form of electronic communication provided that confirmation of delivery is received by the sending party, and (iii) five (5) business days after mailing, if placed in the US mail, by registered or certified mail, first class postage prepaid, with a request for a confirmation of delivery.

(c) Any notice, report or other communication sent under this Agreement that is sent by fax, email or other electronic communication must be confirmed by sending a hard paper copy thereof to the recipient in accordance with subsection (a) above, provided, the effective date of such notice, report or other communication shall be as specified in subsection (b) above. If the recipient actually received a fax, email or other electronic form of a notice, report or other communication, then the notice, report or other communication shall be deemed to have been given and delivered even if the sender fails to send a hard copy as called for in this subsection or the sender does not receive a confirmation of delivery under subsection (b)(ii) above.

12.7 Survival After Termination. The provisions of Sections 1, 2 (with respect to applicable defined terms), Section 3.6, 4.2, 4.3, 10, 11, and 12 shall survive the termination of this Agreement.

12.8 Costs and Expenses. Claim Owner shall be solely responsible for and bear the costs and expenses, including attorneys' fees, expenses of accountants, brokers, financial advisors, and other representatives and advisors, it incurs at any time in connection with pursuing, or consummating the transaction contemplated by, this Agreement or other Funding Documents.

12.9 No Presumption Against Drafter. This Agreement has been negotiated by the Parties and their respective counsel and will be fairly interpreted in accordance with its terms and without any strict construction in favor of or against a Party.

12.10 Counterparts. This Agreement may be executed in counterparts which, when read together, shall constitute a single instrument, and this has the same effect as if the signatures on the counterparts were on a single copy hereof. A composite copy of this Agreement may be compiled comprising a single copy of the text of this Agreement and one or more copies of the signature pages containing collectively the signatures of all Parties. A facsimile or an electronic mail signature shall be considered due execution and shall be binding upon the signatories hereto with the same force and effect as if the signature were an original, not a facsimile signature.

12.11 No Third-Party Beneficiaries. Except as otherwise set forth in Section 10.9, this Agreement is for the sole benefit of the parties hereto and their respective successors and permitted assigns and nothing herein, express or implied, is intended to or shall confer upon any other Person or entity any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this Agreement, it being acknowledged and agreed, for the avoidance of doubt, that (i) Longford Investment Group, LLC, Longford Advisors LLC, Longford Capital Management, LP, and their respective Representatives are express third-party beneficiaries of this Agreement for the purposes of Section 10.9 and (ii) Claim Owner's Attorneys are not third-party beneficiaries of this Agreement.

[Signature pages follow]

IN WITNESS WHEREOF, the Parties execute this Agreement effective as of the date first set forth above.

QUEST PATENT RESEARCH CORPORATION

By: /s/ Jon C. Scahill
Jon Scahill
President and COO

Dated: March 11, 2014

QUEST LICENSING CORPORATION

By: /s/ Jon C. Scahill
Jon Scahill
President

Dated: March 11, 2014

LONGFORD CAPITAL FUND I,

BY: Longford Investment Group, LLC, its General Partner

By: /s/ William P. Farrell, Jr.
William P. Farrell, Jr.
Managing Director

Dated: March 13, 2014

EXHIBIT A

General Principles for Disclosure of Material Events or Changes

Claim Owner or Claim Owner's Attorneys ("you," "your") shall timely inform LCF of any new or unexpected developments regarding the assertion of prosecution of the Claims, including material changes in:

- Strategy;
- The public profile or any public report about the Claims;
- Facts or law, including factual or legal assumptions about the Claims;
- Developments that may affect the outcome of the Claims; and
- Your expectations about the likely outcome and timing of the Claims.

You shall timely inform LCF of any

- Occurrence of any Event of Default, including a majority change of control in Claim Owner; and
- The occurrence of any of the matters set forth in the definition of "Material Adverse Event."

Please be sure to select the appropriate persons to receive email notification. If in doubt, you may also notify LCF by email or telephone in addition to your posted message.

Regular and Timely Disclosure of Important Documents

Please send LCF all documents related to the prosecution of the Claims, including:

- Copies of all documents filed with any court or arbitration panel;
- Deposition transcripts and other discovery materials;
- All rulings and orders by any court or arbitration panel;
- Key documents related to any material event or change in the prosecution of the Claims;
- Any documents related to possible settlement or other resolution of the Claims; and
- Any scheduling order or other documents that relate to timing of potential resolution of the Claims.

Quarterly Matter Monitoring Report

In addition to the general principles of disclosure outlined herein, you will be required to provide LCF with a quarterly Matter Monitoring Report (the *"Monitoring Report"*) within 21 days after the end of each calendar quarter end (*"Quarterly Reporting Date"*).

LCF understands that material developments may arise in conjunction with the prosecution of the Claims between Quarter Reporting Dates. Accordingly and as more particularly described in the Agreement, please update LCF if there are material developments as and when they occur.

Confidential Treatment Requested

EXHIBIT B

QUEST PATENT RESEARCH CORPORATION

OFFICER'S CERTIFICATE

Dated as of March 11, 2014

The undersigned President and Chief Operating Officer of Quest Patent Research Corporation, a Delaware corporation (the "Company"), hereby certifies to Longford Capital Fund I, LP, a Delaware limited partnership ("LCF"), pursuant to Section 6.1(c) of the Funding Agreement, dated as of March 11, 2014 (the "Agreement"), by and between LCF, Quest Licensing Corporation and the Company, as follows:

1. The representations and warranties of the Company contained in Section 7.1 of the Agreement are, to the best of my knowledge, true and accurate in all material respects on and as of the date hereof.

2. No Event of Default (as defined in the Agreement) has occurred at or prior to the date hereof or would result from the transactions contemplated under the Agreement being consummated on the date hereof.

IN WITNESS WHEREOF, the undersigned has executed this certificate as of the first date written above.

/s/ Jon C. Scahill

Jon Scahill
President

Confidential Treatment Requested

EXHIBIT C

QUEST LICENSING CORPORATION

OFFICER'S CERTIFICATE

Dated as of March 11, 2014

The undersigned President of Quest Licensing Corporation, a Delaware corporation (the "Company"), hereby certifies to Longford Capital Fund I, LP, a Delaware limited partnership ("LCF"), pursuant to Section 6.1(c) of the Funding Agreement, dated as of March 11, 2014 (the "Agreement"), by and between LCF, Quest Patent Research Corporation and the Company, as follows:

1. The representations and warranties of the Company contained in Section 7.1 of the Agreement are, to the best of my knowledge, true and accurate in all material respects on and as of the date hereof.

2. No Event of Default (as defined in the Agreement) has occurred at or prior to the date hereof or would result from the transactions contemplated under the Agreement being consummated on the date hereof.

IN WITNESS WHEREOF, the undersigned has executed this certificate as of the first date written above.

/s/ Jon C. Scahill
Jon Scahill
President

Confidential Treatment Requested

EXHIBIT D

March 11, 2014

Longford Capital Fund I, LP
c/o Longford Capital Management LP
150 North Michigan Avenue, Suite 2800
Chicago, Illinois 60601
Attention: William P. Farrell, Jr.

Re: Quest Patent Research Corporation Funding Agreement

Reference is made to that certain Funding Agreement, dated as of March 11, 2014 (the "Agreement"), by and between Longford Capital Fund I, LP ("LCF"), a Delaware limited partnership, and Quest Patent Research Corporation and Quest Licensing Corporation (collectively, "Claim Owner"). Capitalized terms used but not defined herein have the respective meanings as set forth in the Agreement.

The law firm of MoloLamken LLP ("MoloLamken") hereby (i) acknowledges that MoloLamken has reviewed the Agreement and understands the rights granted to LCF (and the obligations of Claim Owner) thereunder, including, without limitation, the terms and provisions of Sections 3.6, 3.7, 4, 5.1, 7.1, 8.1(d), 8.1(h), 8.1(i), 8.1(j), 9 and 11 of the Agreement and any other terms and provisions applicable to Claim Owner's Attorneys (collectively, the "Specific Sections"), (ii) acknowledges and agrees with the provisions of Section 4 of the Agreement and the priority of payment in favor of LCF established thereby, (iii) confirms and agrees that the terms and provisions of the Agreement (including, without limitation, the terms and provisions of the Specific Sections) do not, and will not, conflict with the terms and provisions of any current or future agreement or arrangement between MoloLamken and Claim Owner (or its Affiliates) in connection with, or relating to, any of the Claims; (iv) confirms and agrees that all costs and fees have been disclosed; (v) confirms and agrees that all proceeds of the civil litigation will be deposited in a Joint-Order Escrow Account for distribution in accordance with LCF's and Claim Owner's joint-written instructions pursuant to the provisions of the Agreement; (vi) confirms and agrees that if the Claims are resolved, no further Fixed Fee Payments (as defined in Section 2.5 of the Agreement) will be made to MoloLamken; (vii) confirms and agrees that if the Claims are stayed for any reason, including as a result of inter partes review, no further Fixed Feed payments will be made to MoloLamken during the pendency of the stay; (viii) confirms and agrees that if MoloLamken resigns or ceases to act as the attorneys for Claim Owner related to the assertion or prosecution of the Claims, then no further Fixed Fee Payments will be made to MoloLamken; (ix) confirms and agrees that MoloLamken is following the written instructions of the Claim Owner with regard to the non-recourse civil litigation advance; and (x) agrees that if any terms of the Agreement conflict with any terms of any agreement between Claim Owner and MoloLamkin, then the terms of the Agreement will control. MoloLamken agrees and acknowledges that it is not a third-party beneficiary of the Agreement.

MoloLamken agrees to represent Claim Owner pursuant to the economic and other terms contained in the Agreement, including the cap on Attorneys' Fees, Expenses, and Inter Partes Review Expenses, and the terms of that certain Engagement Letter between MoloLamken and Claim Owner dated March 3, 2014, a copy of which is attached hereto as Schedule I. MoloLamken has disclosed to LCF its fee agreement and Engagement Letter with Claim Owner and the terms fo that agreement are the terms by which MoloLamken is representing Claim Owner and proceeding in this matter.

MOLOLAMKEN LLP

By: /s/ Steven F. Molo
Name: Steven F. Molo
Title: Partner

Confidential Treatment Requested

Schedule I

March 3, 2014

Jon Scahill
President & COO
Quest Patent Research Corp.
19 Fortune Lane
Jericho, NY 11753

RE: MoloLamken LLP / Quest Patent Research Corp. - Engagement Letter

Dear Mr. Scahill:

Thank you for selecting MoloLamken LLP. We are pleased to serve as your counsel. This letter will confirm our discussion with you regarding our engagement and describe the basis on which our Firm will provide legal services to you.

Scope of Engagement

We have been engaged to represent Quest Licensing Corporation ("QLC"), a subsidiary of Quest Patent Research Corporation ("Quest") (collectively, the "Client" or "you"), in connection with the campaign for the monetization of QLC's U.S. Patent No. 7,194,468 and related patents ("the matter"). Our engagement is limited to the performance of the following services: (i) conducting a pre-complaint licensing campaign, (ii) litigating one or more actions relating to the matter in federal district court, and/or (iii) representing the Client in *inter partes* review proceedings relating to the matter. Our engagement does not extend to any appeal. Because we are not your general counsel, our acceptance of this engagement does not involve an undertaking to represent you or your interests in any other matter.[1]

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[1] In particular, our present engagement does not include responsibility for review of your insurance policies to determine the possibility of coverage for the claim asserted in this matter, for notification of your insurance carriers about the matter, or for advice to you about your disclosure obligations concerning the matter under the federal securities laws or any other applicable law.

Absent written modification – e-mail is acceptable – we agree that our Scope of Work on the matter is limited to the following: serving as counsel in the above-referenced licensing campaign and litigations.

Identification of the Client

Our client in this matter will be solely the Client as identified above. Our representation of the Client in this matter does not necessarily give rise to a lawyer-client relationship between the Firm and any of the Client's affiliates, subsidiaries, directors, officers, employees, or agents.

Client Responsibilities

You agree to pay our statements for services and expenses as provided below. In addition, you agree to be candid and cooperative with us and to keep us informed with complete and accurate factual information, documents, and other communications relevant to the subject matter of our representation or otherwise reasonably requested by us. You have been, and may continue to be, represented by other counsel in this matter and you agree that we are not responsible for their conduct in representing you.

Because it is important that we be able to contact you at all times to consult with you regarding your representation, you agree to inform us, in writing, of any changes in your name, address, telephone number, e-mail address, or other relevant changes regarding you or your business.

Advice About Possible Outcomes

Either at the commencement or during the course of our representation, we may express opinions or beliefs concerning the litigations or various courses of action and the results that might be anticipated. Any such statement made by any lawyer of our Firm is intended to be an expression of opinion only, based on information available to us at the time, and should not be construed by you as a promise or guarantee. We cannot and do not guarantee or promise any outcome. To the extent that we are representing you in a contested matter or investigation, there are many factors outside our control that may play a role in a given outcome.

Termination of Engagement

You may at any time terminate our services and representation. We reserve the right to withdraw our representation, as limited by the applicable rules of professional conduct, upon written notice to you. In the event that we terminate the engagement, we will take such steps as are reasonably practicable to protect your interest in the above litigations. You agree that failure to pay past-due fees and expenses may be grounds for withdrawal, and we shall be entitled to payment on a *quantum meruit* basis for any recovery achieved following our withdrawal. For purposes of this provision the *quantum meruit* calculation is subject to the fee schedule set forth in Exhibit A which is incorporated into this letter, and additionally takes into consideration fee arrangements for substitute counsel that Client necessarily retains to complete the engagement.

Conclusion of Representation: Retention and Disposition of Documents

Your papers and property will be returned to you upon request. Unless you instruct us differently in writing, after seven years following the conclusion of the matter, we will, at the Firm's option, return all of the files to you at your cost or simply destroy them.

Post-Engagement Matters

You are engaging the Firm to provide legal services in connection with a specific matter. After that matter concludes, changes may occur in the applicable laws or regulations that could have an impact upon your future rights and liabilities. Unless you engage us after completion of the matter to provide additional advice on issues arising from the matter, the Firm has no continuing obligation to advise you with respect to future legal developments.

Fees

Our preference is to establish fee arrangements with clients that promote efficiency and reward success. Our fee agreement is set forth in Exhibit A, which is incorporated into this letter.

Costs

We believe that in operating our business, we should be responsible for overhead. Accordingly, we do not charge for ordinary electronic research or incidental copying. However, in the course of our work there are sometimes extraordinary expenses for which the Client must be responsible. We may include on our statements separate charges for services such as non-incidental photocopying, printing costs for printed briefs, outside messenger and delivery service, travel, and filing fees. Such expenses may also include process servers, court reporters, and witness fees. Should we retain outside vendors—for example, local counsel, jury consultants, experts, e-discovery vendors, litigation support services, investigators—who may be necessary, in our judgment, to represent your interests in the litigations, you will be informed first and their fees and expenses generally will be billed directly to you. Client shall have the right to approve the selection of local counsel, expert witnesses, e-discovery vendors, jury consultants and litigation support services for audio and visual presentations. We understand that you have an established budget for costs for the matter and we agree to work with you to have actual expenses meet that budget. In the event that projected costs are anticipated to exceed that established budget, the Firm agrees to obtain the approval of Client prior to incurring such costs.

Payment of Statements

We will render an invoice each month via email and, if you request, via regular mail. Payment is due promptly upon receipt of our statements.

Work with Co-Counsel

You have been represented by other outside counsel in preparing for the matter. You agree that the Firm is not responsible and not liable for any work, errors, or omissions of other outside counsel prior to the Firm's appearance in the matter. Should additional counsel be necessary for the representation, the Client shall be responsible for the payment of any fees of that additional counsel.

Conflicts and Prospective Waiver

The nature of our practice is such that occasionally the Firm may concurrently represent a client that is adverse to another client in a case or matter that is not substantially related to our current representations of either client. We would do this only if, in our professional judgment, we can undertake the concurrent representation without adversely limiting the responsibilities we have to either client. In such a situation, we consider the needs of both clients before undertaking any such representation. Given the nature of our practice, you agree that attorneys at the Firm may represent a party with interests adverse to yours under those circumstances. If we discover a conflict after work has begun, you agree to use reasonable efforts to help us resolve the conflict to the satisfaction of all parties. We agree, however, that your prospective consent to conflicting representation will not apply where, as a result of our representation of you, we have obtained sensitive, proprietary, or other confidential information that, if known to our other client, could be used by the other client to your material disadvantage, unless any confidential information we have obtained would be screened from the lawyers working for our other client.

Resolution of Disputes

We look forward to a productive relationship as your counsel. In the unlikely event that there is a dispute between us regarding our fees, you may have a right to arbitrate such dispute pursuant to Part 137 of the Rules of the Chief Administrator of the Appellate Division of the Supreme Court of New York for engagements governed by New York Law. For other matters, you may have a right to arbitrate subject to applicable rules. If so, we will provide you with a copy of those rules.

To the extent that anything in this letter conflicts with billing guidelines or policies you may have, you understand and agree that the terms set forth herein that are unrelated to your billing policies and guidelines control and are a condition of our undertaking this representation regardless of whether this letter is countersigned. You agree that your consent to our commencement of work shall serve as acknowledgment and agreement to the terms of this letter.

Please review this letter, sign it, and return it to me.

Very truly yours,

/s/ Steven F. Molo

Steven F. Molo, Molo Lamken LLP

AGREED TO AND ACCEPTED:
Quest Patent Research Corporation

Signature: /s/ Jon C. Scahill
By: Jon Scahill

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Exhibit A
Fee Agreement

1. Client shall pay the Firm the sum of ● upon engagement.

2. Client shall pay the firm the sum of ● per month on the first business day of the month, for ● consecutive months, for the Firm's role in the matter. This sum will represent payment for the Firm's work in the matter, and does not include payment for services performed by third parties, including but not limited to Co-Counsel, experts, consultants, and e-discovery vendors.

3. If the matter is not concluded within ● months of this engagement, Client shall pay the firm ● per month for the following ● months. After the first ● months, there will be no more monthly payments.

4. The fees identified in Paragraphs 2 and 3 above are based on the assumption that each action relating to the matter is litigated in one federal district. Each additional district in which an action is to be litigated will add ● to the monthly fee.

5. Client agrees to pay the Firm ● of the amount of any recovery achieved through pre-filing negotiations with any potential defendant in the matter, net of any litigation funder's disbursed costs.

6. Client agrees to pay the Firm ● of the amount of any recovery achieved through litigation against any defendant in the matter, net of any litigation funder's disbursed costs.

7. Once the total contingency fees paid in the matter exceed 4 times the total amount of monthly fees paid in the matter, Client will start receiving a credit for the monthly fees paid to date. For each additional dollar the Firm is paid in contingent fees, Client will receive a dollar credit up to the full amount of monthly fees paid.

8. Alternatively, the Firm will track its time expended on the matter. Once the contingent payments equal 3 times the fees the Firm would have earned had it billed the Client at hourly rates, for each additional dollar the Firm is paid in fees based on contingent fee payments, Client will receive a dollar credit up to the full amount of monthly fees paid.

9. Client agrees to pay the Firm a fixed trial fee of ● payable one week before the start of each trial.

10. In the event a defendant or potential defendant initiates an *inter partes* review in connection with the matter, Client will pay the firm a flat fee of ● for the first challenge, and ● for each additional challenge. If the corresponding litigation(s) are stayed during the course of the *inter partes* review(s), this will toll the applicable litigation monthly fee.

11. In the event Client obtains funding through third party litigation financing providing a lump sum payment upon closing of the financing transaction rather than providing a line of credit, Client agrees that proceeds sufficient to pay the total monthly fees described in Paragraph 4 above, plus 10% to cover the firm's extraordinary expenses that would be due to the Firm and not to any vendor, shall be deposited in the Firm's client escrow account and drawn on to pay the monthly fees in accordance with this agreement. The funds deposited in the Firm's client escrow account are to be used in the first instance to pay the Firm and are not to be used to pay any third-party vendor who may render services related to the representation, including but not limited to experts, consultants, and e-discovery vendors.

12. This agreement applies only to pre-judgment proceedings in the matter. Any post-judgment proceedings would be subject to a separate agreement between Client and the Firm.

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AMENDMENT NO. 1

TO

FUNDING AGREEMENT

This Amendment No. 1, dated as of April 24, 2014 (this "Amendment"), to the Funding Agreement between Longford Capital Fund I, LP a Delaware limited partnership ("LCF"), on the one hand, and Quest Patent Research Corporation, a Delaware corporation ("QPRC"), and its subsidiary Quest Licensing Corporation, a New York corporation ("QLC"), on the other hand, dated as of March 11, 2014 (the "Funding Agreement"), is made between LCF, QPRC, QLC and Quest Licensing Corporation, a Delaware corporation (QLCDE").

WHEREAS, LCF, QPRC and QLC are parties to the Funding Agreement;

WHEREAS, QLC wishes to assign certain Patents and other assets and rights related thereto to QLCDE (the "Assignment"), a wholly-owned subsidiary of QPRC, pursuant to the assignment attached hereto as Exhibit A (the "Assignment Agreement");

WHEREAS, the parties hereto wish to enter into this Amendment No. 1 in order to make certain amendments to the Funding Agreement in connection with such Assignment.

NOW, THEREFORE, it is hereby agreed as follows:

2. Unless otherwise defined herein, capitalized terms used and not otherwise defined herein shall have the meanings ascribed to them in the Funding Agreement.

3. The definition of Claim Owner set forth in the Funding Agreement is hereby amended so that QLCDE, QPRC and QLC, shall each be a "Claim Owner" and "collectively shall be "Claim Owner."

4. Subject to (i) QLCDE, QPRC and QLC executing and delivering to LCF this Amendment No. 1 and (ii) QLCDE delivering to LCF as of the date hereof a fully executed Officer's Certificate in the form attached hereto as Exhibit B, and notwithstanding anything in the Funding Agreement to the contrary, LCF hereby consents to the Assignment pursuant to the Assignment Agreement attached hereto as Exhibit A hereto.

5. QLCDE acknowledges and agrees to perform and fulfill all terms, covenants, conditions and obligations required to be performed and fulfilled by Claim Owner, on and after the date hereof, under the Funding Agreement as if it was an original party thereto, including, without limitation, the obligation to make all payments due or payable hereafter under the Funding Agreement as they become due and payable. QLCDE further acknowledges and agrees to be subject to each restriction to which Claim Owner is subject under the Funding Agreement as if it was an original party thereto. Without derogating from the generality of the foregoing, and notwithstanding anything set forth in the Assignment Agreement, QLCDE acknowledges and agrees that any sale, transfer, assignment, disposition or conveyance by it of, or grant of an interest by it in, any of the rights, title, assets or properties assigned to it under the Assignment Agreement is subject to the restrictions set forth in the Funding Agreement. In addition, QLCDE makes all of the representations and warranties made by Claim Owner under the Funding Agreement (except that QLCDE makes the representations and warranties set out in Section 7.1 of the Funding Agreement to LCF not as of the date of the Funding Agreement and as of Closing Date, but as of the date of this Amendment No. 1 and thereafter for the duration of the Funding Agreement (as amended hereby)).

6. QLCDE further represents and warrants to LCF, as of the date of this Amendment No. 1 and thereafter for the duration of the Funding Agreement (as amended hereby), as follows: (a) QLCDE is a corporation with its chief executive offices located at 19 Fortune Lane, Jericho, New York 11753; (b) it is duly organized and validly existing under the laws of the State of Delaware and is a corporation in good standing with the Delaware Secretary of State and all other applicable government entities; and (c) "Quest Licensing Corporation" is the correct legal name of QLCDE indicated in the public record of the jurisdiction of its organization which shows QLCDE to be organized, and its Delaware Department of State File Number is 5505053.

7. From and after the date hereof, any references to the Funding Agreement shall mean the Funding Agreement, as amended by this Amendment No. 1.

8. QLCDE agrees to deliver to LCF on the date of this Amendment No. 1 the Officer's Certificate attached hereto as Exhibit B.

9. This Amendment No. 1 and the rights and obligations of the parties hereunder shall be governed by the laws of the State of New York, without giving effect to any choice of law or conflict of law provision or rule, and shall be construed and enforced in accordance with the law.

10. This Amendment No. 1 may be executed in counterparts which, when read together, shall constitute a single instrument, and this has the same effect as if the signatures on the counterparts were on a single copy hereof. A composite copy of this Amendment No. 1 may be compiled comprising a single copy of the text of this Amendment No. 1 and one or more copies of the signature pages containing collectively the signatures of all parties. A facsimile or an electronic mail signature shall be considered due execution and shall be binding upon the signatories hereto with the same force and effect as if the signature were an original, not a facsimile signature.

11. Except as specifically amended hereby, the Funding Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the undersigned have executed this Amendment No. 1 to the Funding Agreement as of the date first written above.

QPRC:

QUEST PATENT RESEARCH CORPORATION

By: /s/ Jon C. Scahill
Jon Scahill
President and COO

Dated: April 24, 2014

QLC:

QUEST LICENSING CORPORATION

By: /s/ Jon C. Scahill
Jon Scahill
President

Dated April 24, 2014

QLCDE

QUEST LICENSING CORPORATION

By: /s/ Jon C. Scahill
Jon Scahill
President

Dated April 24, 2014

LCF:

LONGFORD CAPITAL FUND I, LP

BY: Longford Investment Group, LLC, its General Partner

By /s/ William P. Farrell, Jr.
William P. Farrell, Jr
Managing Director

Dated: April 25, 2014

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EXHIBIT A

ASSIGNMENT

WHEREAS, Quest Licensing Corporation, a New York corporation (the “Assignor”), having a principal business address at 19 Fortune Lane, Jericho, New York, is the owner of all right title and interest to the inventions of certain new and useful improvements disclosed in certain patents and patent applications recited in the Patent List attached hereto, for which applications for a United States Letters Patent were executed and Patents have been granted;

WHEREAS, Quest Licensing Corporation, a Delaware corporation (“Assignee”), whose mailing address is 19 Fortune Lane, Jericho, New York, is desirous of acquiring the entire right, title and interest in the same;

NOW, THEREFORE, for good and valuable consideration the receipt of which is hereby acknowledged, Assignor agrees as follows: Assignor agrees to assign, and hereby does assign, to the Assignee its entire right, title and interest in and to each of the patents listed below, as well as to the "Assigned Applications" in the United States of America and all other countries, where "Assigned Applications" means the patents and patent applications recited in the attached Patent List, as well as any and all pending patent applications, including any and all inventions, discoveries and other subject matter described therein, any divisional, continuation, continuation-in-part, substitute, reissue, re-examination or other application claiming priority to or benefit of the patent applications pursuant to any law or treaty, and any patent issuing from the foregoing. This Assignment expressly and specifically, without limitation, assigns to Assignee all rights to sue for past, present, and future infringement, including the right to collect and receive any monetary damages, royalties, or settlements for such infringements, all rights to sue for injunctive or other equitable relief, and any and all causes of action anywhere in the world. Assignor agrees to assign, and hereby does assign, to Assignee the right to claim such priority or benefit. Assignor has not previously conveyed, nor are they aware of an obligation to convey, their rights in the Assigned Applications to a third party. Assignor hereby authorizes the U.S. Patent and Trademark Office, and any other governmental agency in the world, to issue to Assignee all patents resulting from the Assigned Applications and to record Assignee's ownership thereof. At Assignee's reasonable request Assignor agrees, without further remuneration, to execute and deliver documents prepared at Assignee's expense and to provide other cooperation, such as testimony at Assignee's sole cost and expense, as may be reasonably required to evidence or protect Assignee's rights in the Assigned Applications. Assignee may assign or transfer all or part of its rights set forth herein in its sole discretion. Assignor agrees that Assignee may affix hereto or hereon an indication, with its signature, of its acceptance of the assignment and other provisions hereof. If any provision hereunder is unenforceable, the requirements of the provision shall remain to the full extent permissible by law and the offending portions thereof shall be deemed replaced, to the extent possible, with a provision most closely reflecting the purpose of the offending provision.

Confidential Treatment Requested

PATENT LIST

7,194,468

ASSIGNED APPLICATIONS

09/926,751
11/673,691
12/617,373
13/832,012

/s/ Jon C. Scahill
Quest Licensing Corporation
A New York Corporation, Assignor

(Dated) April 24, 2014

NOTARIAL CERTIFICATION OF ASSIGNOR

I, Lee LaMonica, A Notary Public of State of New York Westchester County, hereby certify that Jon C. Scahill, who executed the attached document before me on 4/24/2014, has proven to me on the basis of satisfactory evidence, that he/she had and has full authority to execute documents on behalf of Assignor, a corporation doing business at 19 Fortune Lane Jericho, New York.

/s/ Lee LaMonica
Notary Public

My commission expires: 4/30/2015

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EXHIBIT B

QUEST LICENSING CORPORATION
OFFICER'S CERTIFICATE
Dated as of April 24, 2014

The undersigned President of Quest Licensing Corporation, a Delaware corporation (the "Company"), hereby certifies to Longford Capital Fund I, LP, a Delaware limited partnership ("LCF"), pursuant to Section 6.1(c) of the Funding Agreement between LCF, Quest Patent Research Corporation, a Delaware corporation ("QPRC"), and Quest Licensing Corporation, a New York Corporation ("QLC"), dated as of March 11, 2014 (as amended by the Amendment No. 1 thereto, by and between LCF, QPRC, QLC and the Company, dated as of April 24, 2014, the "Agreement"), as follows:

1. The representations and warranties of the Company contained in Section 7.1 of the Agreement are, to the best of my knowledge, true and accurate in all material respects on and as of the date hereof.

2. No Event of Default (as defined in the Agreement) has occurred at or prior to the date hereof or would result from the transactions contemplated under the Agreement being consummated on the date hereof.

IN WITNESS WHEREOF, the undersigned has executed this certificate as of the first date written above.

/s/ Jon C. Scahill
Jon Scahill
President

EXHIBIT G

Exhibit 10.1

Litigation Funding Agreement

This Litigation Funding Agreement ("Agreement") is made and entered into as of December 27, 2019 (the "Effective Date") by and between LEGALIST FUND II, L.P., a Delaware limited partnership (the "Funder"), and DiaMedica Therapeutics Inc., a corporation organized under the laws of British Columbia, Canada and headquartered in Minnesota, United States of America (the "Plaintiff"). Each of the Funder and the Plaintiff is individually referred to as a "Party" hereunder and collectively, the "Parties" hereunder.

Recitals

A. The Plaintiff has filed a lawsuit against PRA Health Sciences, Inc. and Pharmaceutical Research Associates Group B.V. (collectively, the "Defendant") in an action styled: *DiaMedica Therapeutics Inc. v. PRA Health Sciences, Inc., et al.*, Case No. 1:18-cv-01318-MN, currently pending in the United States District Court for the District of Delaware (the "Action") in connection with the Claim(s) (as defined below) it has against the Defendant.

B. The Plaintiff is being advised on and/or represented in connection with the Claim(s) by Fisher Broyles LLP (the "Lead Counsel").

C. The Plaintiff and the Funder have agreed that the Funder will provide certain funding to facilitate the prosecution of the Claim(s) in exchange for certain payments if any recovery is awarded to the Plaintiff in connection with the Claim(s).

Agreement

The Plaintiff and the Funder, in consideration of the foregoing recitals, the mutual covenants, promises, and agreements hereinafter set forth, the mutual benefits to be gained by the performance thereof, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged and accepted, intend to be legally bound by the terms and conditions of this Agreement.

1.0 Definitions

"Agreement" has the meaning set forth in the introductory paragraph.

"Budget" means the Lead Counsel's reasonable estimate of the funding required to pursue the Claim(s), which is attached hereto as Exhibit A and may be amended by the Parties from time to time in accordance with Section 9.8 of this Agreement.

"Claim(s)" means the claims and causes of action asserted by the Plaintiff in the Action, and in each and every Proceeding(s) (as defined below), as may be amended from time to time, arising out of or in connection with such claims and causes of action.

"Claim Proceeds" means any and all net proceeds, receivables, property, cash, and other consideration due to and/or received by, on behalf of, or in lieu of payment to, the Plaintiff arising out of or in connection with the Claim(s) as a result of any judgment, award, order, settlement arrangement, and/or compromise (including payment of any damages (whether treble, compensatory, punitive, or special), compensation, interest, restitution, recovery, judgment sum, arbitral award, settlement sum, compensation payment, costs, and interest on costs), whether in monetary or non-monetary form, whether actual or contingent, and before deduction of any taxes which the Plaintiff may be liable to pay in connection with such value due to and/or received by Plaintiff; but after deduction of recoupments or setoffs in respect of any claim or counterclaim asserted against Plaintiff by the Defendant; provided, however, that notwithstanding the foregoing, Claim Proceeds shall not include specific performance or any injunctive relief by the Defendant, including, without limitation, production of clinical records or performance of services.

"Committed Funds" means up to an aggregate of $1,000,000.00.

"Common Interest Material" means any discussion, evaluation, negotiation, or any other communication or exchange of information relating to the Claim(s) in any way, whether written or oral, between or among the Plaintiff, the Lead Counsel, the Funder, and/or the Funder's legal counsel, provided that such communication or exchange of information would be protected by attorney–client privilege between the Lead Counsel and the Plaintiff, the attorney work-product doctrine, or some other privilege or discovery protection if not disclosed to a third party lacking a common legal interest.

"Confidential Information" means the Common Interest Material and, to the extent not already covered as Common Interest Material, any communication or exchange of information relating to the Claim(s), including: (a) information, of any type, relevant to understanding the Claim(s); (b) the Lead Counsel's or the Funder's counsel's strategies, tactics, analyses, or expectations of the Parties to the Proceeding(s), regarding the Claim(s) or Claim Proceeds; and (c) any professional work product relating to the Claim(s) or the Claim Proceeds, whether prepared for the Plaintiff, the Lead Counsel, the Funder, or the Funder's counsel. Notwithstanding the foregoing, Confidential Information does not include information that (i) was or becomes generally available to the public other than by breach of this Agreement; (ii) was, as documented by the written records of the receiving Party, known by the receiving Party at the time of disclosure to it or was developed by the receiving Party or its representatives without using Confidential Information or information derived from it; or (iii) was disclosed to the receiving Party in good faith by a third party who has an independent right to such subject matter and information.

"Costs and Disbursements" means the legal fees, court costs, and other miscellaneous expenses specified in the Budget or approved by the Lead Counsel.

"Lead Counsel" has the meaning set forth in the recitals.

"Defendant" has the meaning set forth in the recitals.

"Effective Date" has the meaning set forth in the introductory paragraph.

"Funder" has the meaning set forth in the introductory paragraph.

"Funder Costs Amount" means the total of all Costs and Disbursements actually paid or otherwise funded by the Funder pursuant to this Agreement plus the reimbursement of $10,000.00 to the Funder for its diligence and underwriting costs, whether or not those Costs or Disbursements were reasonably incurred by the Plaintiff in accordance with this Agreement, or whether or not they were specified in the Budget.

"Funder Recovery Amount" means the greater of: [1,2]

(i) $1,000,000.00 if repayment occurs within nine (9) months of the Transfer Date, $2,000,000.00 if repayment occurs after nine (9) months from the Transfer Date but before trial has begun, or $3,000,000.00 thereafter; or

(ii) twenty percent (20%) of the Claim Proceeds.

"JAMS" has the meaning set forth in Section 9.5.

"Non-Monetary Claim Proceeds Fair Market Valuation" means the Plaintiff's good faith determination of the fair market value of any and all non-monetary Claim Proceeds constituting real or personal property other than cash; provided, however, that such Non-Monetary Claim Proceeds Fair Market Valuation shall not include specific performance by the Defendant or any injunctive relief against any Defendants, including without limitation, production of clinical records or performance of services.

[1] Note that in all cases, this is the premium amount paid in addition to the repayment of actual funds spent.

[2] In the event of a termination of this Agreement by either or both of the Parties, the percentage in subsection Funder Recovery Amount will be multiplied by the percentage of the Committed Funds actually paid by the Funder prior to termination.

"Plaintiff" has the meaning set forth in the introductory paragraph.

"Proceeding(s)" means each and every litigation or alternative dispute resolution proceeding arising out of or in connection with the Claim(s), including any settlement negotiation, arbitration, mediation or appeal, as well as any other proceedings which Funder and Plaintiff agree in writing shall be the subject of this Agreement. For the avoidance of doubt, Proceedings shall not include any proceedings governed by Section 9.5 of this Agreement.

"Obligations" means (a) the obligation of the Plaintiff to pay the Funder Costs Amount and Funder Recovery Amount to the Funder, (b) all other debts, liabilities, obligations, covenants and duties of the Plaintiff to the Funder now or hereafter existing, whether joint or several, direct or indirect, absolute or contingent, or due or to become due, arising under or in connection with this Agreement, or any of the transactions contemplated thereby and including any interest due thereon all as set forth in this Agreement; (c) all debts, liabilities, obligations, covenants and duties of the Plaintiff to pay or reimburse the Funder for all expenses, including reasonable out-of-pocket and documented attorneys' fees, incurred by the Funder in connection with the enforcement, attempted enforcement, or preservation of any rights or remedies under this Agreement, including all such costs and expenses incurred during any legal proceeding, including any proceeding under any applicable bankruptcy, insolvency or other similar debtor relief laws; and (d) all interest and fees on any of the foregoing, whether accruing prior to or after the commencement by or against Plaintiff of any proceeding under any applicable bankruptcy, insolvency, or other similar debtor relief laws naming Plaintiff as the debtor in such proceeding, regardless of whether such interest and fees are allowed claims in such proceeding.

"Transfer Date" means the date on which the Action is transferred to the U.S. District Court for the District of Minnesota.

2.0 Funding Terms

2.1 Agreement to Fund Plaintiff. In return for the Plaintiff's agreement to pay from any Claim Proceeds recovered the Funder Costs Amount and the Funder Recovery Amount to the Funder in accordance with the terms of this Agreement, the Funder agrees to pay reasonable Costs and Disbursements in accordance with the terms of this Agreement.

2.1.1 Transfer of Case or Denial of Motion. Plaintiff has filed a motion to transfer venue of the Claims from Delaware to Minnesota. The Funder's agreement to pay reasonable Costs and Disbursements is conditioned on the Claims being transferred to the U.S. District Court for the District of Minnesota. Plaintiff has an obligation to inform Funder when the motion is decided. The Funder shall promptly, no later than three (3) business days after receiving notice of the transfer, advance to the Plaintiff $200,000.00 to an account designated in writing by the Plaintiff to the Funder, which sum represents fees and costs previously paid by Plaintiff in the Action.

2.2 Reasonable Costs and Disbursements Only. Unless otherwise agreed by the Funder, the Funder will not pay and will not be liable under this Agreement for any unreasonable Costs and Disbursements, including without limitation, the following costs, disbursements, or liabilities that may be incurred by the Plaintiff:

2.2.1 costs and/or other sums incurred as a result of the Plaintiff's willful failure (on any one or more occasions) to cooperate with or to follow the advice of the Lead Counsel, subject to Section 6.4;

2.2.2. costs and/or other sums incurred as a result of any default by the Plaintiff under this Agreement after the expiration of any applicable grace or cure period hereunder;

2.2.3 any liability for payment of the Defendant's costs or the Plaintiff's liability for fines or penalties as set forth in a final non-appealable order or decision entered in the Action;

2.2.4 costs and/or other sums incurred as a result of any unreasonable failure by the Plaintiff or the Lead Counsel to comply with applicable law, an order or procedural rule of the applicable court during the Proceedings, or any discovery or other related obligations, in each instance, as set forth in a final non-appealable order or decision entered into in such Proceedings;

2.2.5 costs and/or other sums incurred as a result of any sanctions ordered against the Plaintiff or the Lead Counsel in the Proceedings;

2.2.6 costs and/or other sums incurred prior to the Effective Date (unless such costs are included in the Budget or in this Agreement) or after the term of this Agreement;

2.2.7 costs and/or other sums incurred over sixty (60) days prior to the date the invoice is submitted to the Funder, except as otherwise provided in Sections 2.2.1 and 2.2.6 above; or

2.2.8 any Costs or Disbursements in excess of the Committed Funds.

2.3 Payment Terms; Disputed Amounts. The Plaintiff shall instruct the Lead Counsel and any other service providers provided for in the Budget to address invoices relating to the work described in the Budget to the Plaintiff but mark such invoices payable by the Funder, and to deliver such invoices to the Plaintiff (with a copy delivered to the Funder simultaneously) for payment. After the Plaintiff approves such invoices and the Funder agrees that the Costs and Disbursements on an invoice are reasonable, the Funder shall promptly pay (without setoff, claims, defenses or any deduction) the applicable amount when due up to an aggregate amount not to exceed the Committed Funds. If the Funder, in its reasonable opinion, believes that some or all of the Costs and Disbursements on an invoice are unreasonable and are not required to be paid by the Funder pursuant to this Agreement, the Funder shall provide a written notice setting out the reasons for its belief to the Plaintiff (with a copy to the relevant billing party simultaneously) within twenty (20) days of receipt of the invoice. In the event the Funder provides such a notice, the Funder and the Plaintiff agree to work together with the relevant billing party to resolve the disputed amounts. Pending resolution of such disputed amounts, the Funder shall pay any Costs and Disbursements that are not subject to dispute. In the event that the Funder and Plaintiff are unable to resolve the disputed amounts within thirty (30) days, the Funder and the Plaintiff shall rely on the arbitration procedure set out in Section 9.5 for resolution. The Parties acknowledge and agree that the funding by the Funder to the Plaintiff shall be on a non-recourse basis except to the extent of the Funder's right to share in the Claim Proceeds as set forth in this Agreement.

2.4 Failure to Fund; Cessation of Funding. If the Funder fails to timely release and/or notifies the Plaintiff that it will cease to pay Costs and Disbursements in accordance with the terms of this Agreement, the Plaintiff shall thereafter exercise its reasonable best efforts to enter into alternative funding arrangements in connection with the Claim(s). Funder acknowledges and agrees that it will accept the subordination of its right or entitlement to the Funder Costs Amount or the Funder Recovery Amount to facilitate Plaintiff's ability to secure alternative funding arrangements.

2.5 Change to Lead Counsel Agreement. If Costs and Disbursements under this Agreement include fees for the Lead Counsel, the Plaintiff verifies that the Lead Counsel and the Plaintiff have modified their fee agreement for advice and/or representation in connection with the Claim(s) to convert 25 percent of the Lead Counsel's hourly rate to an alternative fee agreement, which does not affect the Funder's priority on the Funder Costs Amount or the Funder Recovery Amount.

3.0 Recovery Terms

3.1 Agreement to Pay Funder. The Funder Costs Amount and the Funder Recovery Amount shall become payable only in the event that the Plaintiff recovers Claim Proceeds and in all other circumstances shall be non-recourse. In return for the Funder's agreement to pay the Plaintiff's reasonable Costs and Disbursements incurred in accordance with the terms of this Agreement, the Plaintiff agrees to pay the Funder, upon recovery of Claim Proceeds, the Funder Costs Amount and the Funder Recovery Amount. The Plaintiff acknowledges and agrees that the Funder's entitlement to the Funder Costs Amount and the Funder Recovery Amount shall begin to accrue upon the Funder's payment of any portion of the Committed Funds and continue to accrue with subsequent payments by the Funder pursuant to this Agreement, whether or not the Funder provides the entirety of the Committed Funds but only for so long as this Agreement is not terminated by the Funder or by the Plaintiff as a result of the Funder's breach of this Agreement, in which event, Funder Costs Amount and Funder Recovery Amount will be proportionately reduced as noted above. If the Claim Proceeds are insufficient to pay in full both the Funder Costs Amount and the Funder Recovery Amount, then the Claim Proceeds shall be applied exclusively and entirely to paying these amounts to the Funder, after which no further sum shall be due and/or payable to the Funder by the Plaintiff or any other Person pursuant to this Agreement.

3.2 Payment of Claim Proceeds; Non-Monetary Claim Proceeds. The Plaintiff agrees that the Lead Counsel will hold any Claim Proceeds received by it or by the Lead Counsel on its behalf in trust for the Funder, on terms that shall entitle the Funder to receive such part of the Claim Proceeds as shall be equal to the total of the Funder Costs Amount and the Funder Recovery Amount to the extent of such Claim Proceeds. The Plaintiff shall use its good faith best efforts to release Claim Proceeds to the Funder to pay the Funder Costs Amount and the Funder Recovery Amount pursuant to this Agreement as promptly as possible. All Claim Proceeds received in monetary form shall be paid into the Lead Counsel's escrow account immediately upon receipt for further payment to the Funder. In the case of Claim Proceeds received in non-monetary form constituting real or personal property other than cash, as defined above, provided that monetary Claim Proceeds are inadequate to fund the Funder Costs and Funder Recovery Amounts, and unless otherwise agreed by the Funder and the Plaintiff in writing, the Plaintiff shall, as promptly as practicable, pay into the Lead Counsel's escrow account an amount equal to the Non-Monetary Claim Proceeds Fair Market Valuation and simultaneously provide to the Funder in writing (with a copy delivered to the Lead Counsel simultaneously) a statement of the details of the Non-Monetary Claim Proceeds Fair Market Valuation. If the Funder, in its reasonable opinion, disagrees with the Non-Monetary Claim Proceeds Fair Market Valuation, the Funder shall provide a written notice setting out the reasons for its belief to the Plaintiff (with a copy to the Lead Counsel simultaneously) within twenty (20) days of receipt of the Non-Monetary Claim Proceeds Fair Market Valuation statement. In the event the Funder provides such a notice, the Funder and the Plaintiff agree to work together to resolve the disputed fair market value determination of the non-monetary Claim Proceeds. In the event the Funder and the Plaintiff are unable to resolve the disputed fair market value determination of the non-monetary Claim Proceeds within thirty (30) days, the Funder and the Plaintiff shall rely on the arbitration procedure described in Section 9.5 for resolution. Notwithstanding anything to the contrary in this Agreement, no Claim Proceeds shall be released from the Lead Counsel's escrow account until such dispute is finally resolved in accordance with this Section 3.2.

3.3 Unexpected Delay. "Unexpected Delay" occurs when repayment has not occurred within three and one-half (3.5) years past the Transfer Date, and thereafter, the Funder shall receive interest on such unpaid amounts equal to 20% per annum commencing on the three and one-half year anniversary of the Transfer Date and which shall be added to the Funder Costs Amount and Funder Recovery Amount. Such interest will be calculated on an annual basis and will be added to the principal at the end of the prior year. End of year principal will include Funder Costs Amount and Funder Recovery Amounts due based on funding and recovery terms set forth above, plus additional interest accrued to date as provided in this Section 3.3.

4.0 Plaintiff's Representations and Warranties

The Plaintiff represents and warrants to the Funder as follows:

4.1 Full Disclosure. The Plaintiff and the Lead Counsel have provided the Funder with all material information relating to the Claim(s), as requested by the Funder, excluding information protected solely by the attorney–client privilege. To the Plaintiff's knowledge, all information the Plaintiff and the Lead Counsel have provided to the Funder is true and correct in all material respects.

4.2 No Impairment. Other than as already disclosed to the Funder in writing prior to the date hereof or as alleged by the Defendants in the Action, the Plaintiff has not taken any action (including executing documents) or failed to take any action to its knowledge that (a) would materially and adversely affect the Claim(s), or (b) would give any person or entity (other than the Funder and the Plaintiff) an interest in the Claim Proceeds.

4.3 Solvency. The Plaintiff has no bankruptcy proceedings outstanding and has not received any written notice of potential proceedings against it.

4.4 Authority. The Plaintiff is duly organized, validly existing, and in good standing under the laws of its jurisdiction of organization. The Plaintiff has the power and authority to execute and deliver this Agreement and to consummate the transactions contemplated hereby. The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby have been duly authorized by all necessary corporate (or, if applicable, other entity) action on the part of the Plaintiff and no further corporate (or, if applicable, other entity) action is required on the part of the Plaintiff to authorize this Agreement and the transactions contemplated hereby. This Agreement has been duly executed and delivered by the Plaintiff and constitutes the valid and binding obligations of the Plaintiff, enforceable in accordance with its terms, subject to (a) laws of general application relating to bankruptcy, insolvency, and relief of debtors and (b) rules of law governing specific performance, injunctive relief, and other equitable remedies.

4.5 Common Interest. The Plaintiff has received the advice of the Lead Counsel, or of another duly qualified law firm or attorney, regarding the common interest doctrine in California.

5.0 Funder's Representations and Warranties

The Funder represents and warrants to the Plaintiff as follows:

5.1 Committed Funds. The Funder has, and will continue at all times during the term of this Agreement to have, sufficient funds available to fulfill its obligations under this Agreement.

5.2 No Conflicts. Other than as already disclosed to Plaintiff, the Funder has not, as of the Effective Date, (a) paid a referral fee to the Lead Counsel in connection with the Claim(s), the Plaintiff, or this Agreement; (b) entered into any transaction with the Lead Counsel that has or would make the Lead Counsel a part owner of the Funder; (c) contracted with any other party or potential party to the Claim(s); (d) engaged in negotiations with any other party or potential party to the Claim(s); or (e) entered into any relationship with the Lead Counsel that conflicts with the Plaintiff's interests regarding the Claim(s). The Funder does not have a duty, contractual obligation, or other requirement to monetize its interest in the Claim(s) within any particular time frame or which would require the Funder to cease funding the Claim(s). For the avoidance of doubt, the preceding sentence does not include a fiduciary duty that would require the Funder to cease funding the Claim(s) pursuant to Section 8.2.3 because of the Funder's assessment of the viability of the Claim(s). In addition, the Funder has not instituted any action, suit, or arbitration separate from the Claim(s) arising from the same facts, circumstances or law giving rise to the Claim(s), and has not granted (or purported to grant) any charge, lien, or other security interest with respect to the Claim(s) and the Claim Proceeds in any way, other than such payments that would become due after all payments due to the Funder under this Agreement have been satisfied in full.

5.3 No Disclosure of Common Interest Material. The Funder and its legal counsel have not disclosed any Common Interest Material to anyone without the prior written consent of the Plaintiff and has and will continue to maintain at all times during the term of this Agreement the Common Interest Material strictly confidential. The disclosure of Common Interest Material to the Funder pursuant to this Agreement will not at any time result in any waiver of the attorney-client, work product or any other legal privileges that may attach to all or any portion of such Common Interest Material under any applicable law.

5.4 Authority. The Funder is duly organized, validly existing and in good standing under the laws of its jurisdiction of organization. The Funder has the power and authority to execute and deliver this Agreement and to consummate the transactions contemplated hereby. The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby have been duly authorized by all necessary corporate action on the part of the Funder and no further corporate action is required on the part of the Funder to authorize this Agreement and the transactions contemplated hereby. This Agreement has been duly executed and delivered by the Funder and constitutes the valid and binding obligations of the Funder, enforceable in accordance with its terms, subject to (a) laws of general application relating to bankruptcy, insolvency, and relief of debtors and (b) rules of law governing specific performance, injunctive relief, and other equitable remedies.

6.0 Additional Covenants

6.1 Accuracy of Representations and Warranties. Each of the Parties covenants and agrees that all of its representations and warranties made pursuant to this Agreement shall continue to be true and correct throughout the term of this Agreement. Each Party further agrees to promptly notify the other Party in the event a representation or warranty is no longer true and correct.

6.2 Duty to Cooperate. The Plaintiff covenants to cooperate in the prosecution of the Claim(s), including without limitation, that the Plaintiff will cause its officers, executives, and employees to promptly and fully assist the Lead Counsel as reasonably necessary to conduct and conclude the Claim(s). For the avoidance of doubt, such assistance includes all actions any plaintiff may reasonably expect undertaking, including, without limitation, submitting to examination, verifying statements under oath, and appearing at any Proceedings.

6.3 Duty to Conduct Claim(s). The Plaintiff covenants that it shall exercise its reasonable best efforts to continue to conduct its prosecution of the Claim(s) until their settlement or final resolution as long as the Lead Counsel continues to represent the Plaintiff on a contingency basis or the Funder continues to fund the Claim(s) in accordance with this Agreement.

6.4 Control of Claim(s). The Plaintiff shall retain control over the conduct of the Claim(s) and in particular over settlement of the Claim(s) with the Defendant. Without limiting the previous sentence, however, the Plaintiff agrees to take and follow the legal advice of the Lead Counsel at all appropriate junctures (excluding, however, the Lead Counsel's advice whether to make or accept any offer to settle the Claim(s), which shall be decided by the Plaintiff in its sole and absolute discretion).

6.5 No Interference. The Parties recognize that the Lead Counsel must at all times comply with its ethical duties to act in the best interests of the Plaintiff and in accordance with its other professional responsibilities and duties. Nothing in this Agreement entitles the Funder to interfere in the conduct of the Claim(s) and/or the Proceedings.

6.6 Duty to Inform. The Plaintiff agrees and undertakes to keep the Funder reasonably informed about the progress of the Claim(s) insofar as is proportionate, reasonably practicable, and in a manner consistent with maintaining applicable privileges and all applicable laws. In providing to the Funder any documents or information about the Claim(s) and the Proceedings, the Plaintiff does not intend to waive any privilege that may attach to such documents or information. Subject to the Funder's confidentiality obligations under this Agreement, subject to and pursuant to any applicable protective order, and subject to the Lead Counsel's reasonable judgment with respect to the preservation of all applicable legal privileges of the Plaintiff's, the Plaintiff hereby irrevocably instructs the Lead Counsel to provide written status reports to the Funder, in form and detail reasonably acceptable to the Funder, at least once each calendar quarter during the pendency of the Claim(s); upon the occurrence of any material event in the Claim(s); and from time to time upon the Funder's reasonable request. In addition, but subject to the foregoing, the Plaintiff hereby irrevocably instructs the Lead Counsel to provide to the Funder within three (3) business days following receipt a copy of any material document or filing made or obtained in the Proceedings by way of discovery, subpoena, or any other lawful means, including without limitation, the following:

6.6.1 Non-Privileged Information: The Plaintiff hereby irrevocably instructs the Lead Counsel, and if further instructions are needed, undertakes to instruct the Lead Counsel, to provide the Funder with copies or summaries of all material, non-privileged information, regardless of the information's source, confidentiality, or form, unless the Funder already possesses or controls such information.

6.6.2 Attorney Work Product: Acknowledging that this Agreement contains provisions requiring the Parties to protect the confidentiality of any Confidential Information disclosed to it and that such information includes attorney work product, the Plaintiff hereby irrevocably instructs the Lead Counsel, and if further instructions are needed, undertakes to instruct the Lead Counsel, to provide the Funder with all material attorney work product relating to the Claim as soon as practicable.

6.6.3 Attorney–Client Privileged Information: Relying on the Parties' agreement that they share a common legal interest and that communicating attorney–client privileged information to the Funder in the furtherance of that interest does not waive the privilege, the Plaintiff undertakes to share such information on a topic-by-topic basis, provided that neither the Plaintiff nor the Lead Counsel shall disclose attorney–client protected information to the Funder unless (i) the Plaintiff has discussed with the Lead Counsel the information to be shared, the reason for the sharing, and the probable consequences if the sharing is ultimately held to waive the privilege; and (ii) the Plaintiff has given written consent to such information sharing.

6.7 No Change in Lead Counsel Without Funder Notice. The Plaintiff agrees and undertakes that it will not engage a new attorney or law firm by executing a retainer agreement or other contract to employ such attorney or law firm to advise and/or represent the Plaintiff in connection with the Claim(s), without giving the Funder thirty (30) days' prior notice and without giving good faith consideration to the Funder's response, if any.

6.8 Funder Notifications of Settlement. The Plaintiff agrees that it will immediately notify the Funder upon receiving a settlement offer and provide the Funder with the complete details of the offer in such notice. The Plaintiff agrees that it will not make a settlement offer without first notifying the Funder of the proposed offer, including the complete details of the proposed offer. The Plaintiff agrees that it will not respond to a settlement offer or make a settlement offer until after giving good faith consideration to the Funder's analysis of the offer, provided that the Funder communicates its analysis within two (2) business days of receiving notice of the offer in accordance with this section. The Funder agrees to waive the right to offer analysis if the Lead Counsel and the Plaintiff determine that doing so would adversely affect their ability to come to an agreement with the Defendant. Such waivers can be called on by the Lead Counsel without notification, on a case-by-case basis. For the avoidance of doubt, the Parties acknowledge and agree that any decision regarding settlement of Claim(s), including the ultimate decision whether and for how much to settle any Claim(s), lies solely with the Plaintiff.

6.9 Indemnification. Plaintiff agrees to indemnify the Funder with respect to any and all losses or damages (including reasonable out-of-pocket and documented attorney's fees and any other costs of recovering the same) suffered by the Funder as a result of any negligence or breach of duty owed by the Lead Counsel to the Plaintiff in connection with the Claim(s) or the Proceedings, including without limitation, duties owed in connection with (a) the preparation and/or provision of (or failure to provide) any documents, materials, or information relating to the Claim(s) prior to or subsequent to the Effective Date and (b) the prosecution of the Claim(s) and/or the conduct of the Proceedings prior to or subsequent to the Effective Date. The Plaintiff agrees to cooperate with the Funder in the pursuit of any suit filed against the Lead Counsel by either the Plaintiff or the Funder in connection with such loss or damage. The indemnity in this section is limited to the extent of any successful recovery of such loss or damage or costs in any such proceedings against the Lead Counsel. The Funder shall indemnify the Plaintiff with respect to any and all losses or damages (including reasonable out-of-pocket and documented attorneys' fees and any other costs of recovering the same) suffered by the Plaintiff as a result of (i) the breach of, inaccuracy of, or failure to comply with, any of the warranties, representations or covenants of the Funder in this Agreement, including, without limitation, any damages suffered by the Plaintiffs arising out of the loss of any privilege with respect to any Common Interest Materials disclosed to the Funder pursuant to this Agreement.

6.10 Future Encumbrances. The Plaintiff shall not itself, nor shall it cause, permit, or allow, directly or indirectly, anyone else to, create, assume, incur, suffer, or permit to exist any pledge, encumbrance, security interest, assignment, lien, or charge of any kind or character on the Claim(s) without the Funder's written approval. The Plaintiff shall not itself, nor shall it cause, permit, or allow any sale sell, transfer, issue, reissue, exchange, or grant any option with respect to the Claim(s) without the Funder's written approval.

7.0 Common Interest and Confidentiality

7.1 Common Interest. The Plaintiff and the Funder agree they share a common legal interest and, to the degree necessary to further their common legal interest, agree to share Common Interest Material in accordance with the terms of this Agreement only to the extent such disclosure would not, in the sole judgment of the Lead Counsel, result in a waiver of any privilege that may attach to such Common Interest Material. The Plaintiff and the Funder agree the material would not be shared if the common legal interest did not exist. The Plaintiff and the Funder do not waive any legal professional privilege, common interest privilege, or other privilege or protection attaching to any documents and information disclosed to the Funder. Any privileged information and documents disclosed at any time to the Funder have been or will be disclosed on the additional basis that the Funder has, or will have, a common interest in the pursuit and success of the Proceedings and will at all times take all reasonable steps to maintain that privilege. It is agreed that the provision of privileged documents does not amount to any waiver of privilege, and the Funder shall not use these for any purpose other than in respect of this Agreement, except a purpose to which the Parties have consented in writing or as required by law or regulation.

7.2 Non-Disclosure Generally. During the term of this Agreement and for five (5) years following its termination, the recipient of Confidential Information of the other Party shall not disclose, use, or make available, directly or indirectly, any such Confidential Information to anyone (including, without limitation, the existence and terms of this Agreement), except as needed to perform its obligations under this Agreement, as the disclosing Party otherwise authorizes in writing, or as required by law. When disclosing, using, or making Confidential Information available in connection with the performance of its obligations under this Agreement or as permitted by the disclosing Party, the recipient shall take reasonable steps to preserve the confidentiality of the Confidential Information on terms no less restrictive than as set forth in this Agreement. The Parties agree that neither the execution of this Agreement nor the provision of Confidential Information enables the other Party to use the Confidential Information for any purpose or in any way other than as specified in this Agreement.

7.3 Potentially Enforceable Disclosure Requests. If a Party receiving Confidential Information receives a potentially enforceable request for the production of such Confidential Information, including without limitation, a subpoena or other official process, that Party will promptly notify the disclosing Party in writing, unless such notice is prohibited by law. If allowed, such notice shall be given before complying with the request and shall include a copy of the request. If the request is of the recipient of Confidential Information, and notice to the disclosing Party is prohibited by law, the recipient must make a good faith effort to contest the disclosure, if permitted under applicable law. The recipient shall also make a good faith effort to obtain an agreement protecting the confidentiality of the Confidential Information prior to disclosing it. If a disclosing Party elects to contest the request, the receiving Party shall not make any disclosure until a final, non-appealable or non-stayed order has been entered compelling such disclosure. The contesting Party shall pay its own expenses and control its contest, provided that, if the recipient contests a request when forbidden by law to give the disclosing Party notice of the disclosure request, the disclosing Party shall reimburse the recipient's reasonable expenses promptly after being notified of them.

8.0 Term

8.1 Term. The term of this Agreement shall commence on the Effective Date and terminate upon the earlier to occur of (a) the satisfaction in full of all payment obligations of the Plaintiff to the Funder pursuant to this Agreement and (b) the early termination of this Agreement pursuant to Section 8.2.

8.2 Termination. The term of this Agreement may be terminated by:

8.2.1 the mutual written agreement of the Parties;

8.2.2 either Party in the event the other Party commits a material breach of this Agreement, which breach has not been cured within ten (10) days following written notice of the breach from the non-breaching Party to the breaching Party (provided that if such breach is impossible to cure, the term may be terminated immediately upon notice of such breach to the breaching Party); or

8.2.3 by the Plaintiff upon written notice to the Funder after a failure by the Funder to fund the Costs and Disbursements as provided in this Agreement; or

8.2.4 the Funder, upon thirty (30) days advance written notice to the Plaintiff, in the event that:

(a) the Plaintiff or the Lead Counsel has made a material misrepresentation or omitted to disclose a material fact that is materially adverse to the merits of the Claim(s);

(b) the Lead Counsel is no longer actively representing the Plaintiff in the Claim(s) or the Plaintiff has provided the Funder with notice in accordance with Section 6.7 that it intends to engage a new attorney or law firm (unless the Plaintiff has obtained the Funder's prior written consent to engage the new attorney or law firm);

(c) the Funder reasonably concludes that because of a change of factual circumstances the Claim(s) is not or are not commercially viable; or

(d) there exists one or more events or a material change of circumstances that make it unlikely that the Plaintiff can recover Claim Proceeds sufficient to repay the Funder the Funder Costs Amount.

Any mutual agreement or notice of termination pursuant to this Section 8.2 shall be simultaneously provided to the Lead Counsel.

8.3 Effect of Termination. In the event the term of this Agreement is terminated pursuant to Section 8.2, the Funder shall have no further obligation to fund the reasonable Costs and Disbursements of the Plaintiff following the effective date of the termination. Any such termination by the Plaintiff shall not affect any accrued rights or entitlement of the Funder to receive the Funder Costs Amount and the Funder Recovery Amount pursuant to this Agreement. Any such termination by the Funder shall result in the proportionate reduction of the accrued rights or entitlement of the Funder to receive the Funder Costs Amount and the Funder Recovery Amount as noted above. Any termination pursuant to Section 8.2 shall not serve as a waiver of such Party's right to seek damages at law or other remedy in equity.

8.4 Survival. Sections 1, 3 (other than Section 3.1), 4, 5, 7, 8, and 9 shall survive any termination of the term of this Agreement.

9.0 Miscellaneous

9.1 Limitation of Funder's and Plaintiff's Liability. Except where directly and demonstrably caused by gross negligence or willful misconduct on the part of Funder, under no circumstances shall the Funder be liable for any outcome or disposition with respect to the Claim(s). IN NO EVENT SHALL FUNDER, PLAINTIFF, THEIR RESPECTIVE AFFILIATES OR ANY OF THEIR RESPECTIVE DIRECTORS, OFFICERS, EMPLOYEES, ATTORNEYS, OR AGENTS BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY, OR PUNITIVE DAMAGES ARISING FROM OR DIRECTLY OR INDIRECTLY RELATED TO THE AGREEMENT, INCLUDING, WITHOUT LIMITATION, LOSS OF REVENUE, ANTICIPATED PROFITS, OR LOST BUSINESS, DATA OR SALES, OR COST OF SUBSTITUTE SERVICES, EVEN IF FUNDER OR ITS REPRESENTATIVE OR SUCH INDIVIDUAL HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN NO EVENT SHALL THE TOTAL LIABILITY OF FUNDER FOR ALL DAMAGES, LOSSES, AND CAUSES OF ACTION (WHETHER IN CONTRACT OR TORT, INCLUDING, BUT NOT LIMITED TO, NEGLIGENCE OR OTHERWISE) ARISING FROM THE AGREEMENT EXCEED, IN THE AGGREGATE, THE COMMITTED FUNDS.

9.2 Survival of Warranties. Unless otherwise set forth in this Agreement, the representations and warranties of the Parties contained herein shall survive the execution and delivery of this Agreement and shall in no way be affected by any investigation or knowledge of the subject matter thereof by or on behalf of the other Party.

9.3 Successors and Assigns. The terms and conditions of this Agreement shall inure to the benefit of and be binding upon the respective successors and assigns of the Parties, provided that the Plaintiff may not assign the rights and obligations under this Agreement without the prior written consent of the Funder.

9.4 Governing Law. This Agreement shall be governed by the internal laws of the State of California without respect to any rules regarding choice of law.

9.5 Dispute Resolution. Any dispute, claim, or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation, or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in San Francisco, CA before one (1) arbitrator. The arbitration shall be administered by JAMS Alternative Dispute Resolution ("JAMS") pursuant to its Comprehensive Arbitration Rules and Procedures then in effect and in accordance with the Expedited Procedures in those Rules. Service of any notice, including for service of process in any subsequent enforcement of the arbitration award in court may occur via electronic mail. The Parties agree to submit to the personal jurisdiction of California for the purposes of such arbitration, and judgment upon any award rendered in such arbitration will be binding and may be entered in any court having jurisdiction thereof.

Each Party will bear its own costs in respect of any disputes arising under this Agreement, except that the prevailing Party shall be entitled to recovery of reasonable attorney's fees in connection with any dispute that results in a total or partial judgment in favor of the prevailing Party.

9.6 Counterparts. This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Counterparts may be delivered via facsimile, electronic mail, or other transmission method.

9.7 Notices. All notices and other communications given or made pursuant to this Agreement shall be in writing and shall be deemed effectively given upon the earlier of actual receipt, or (a) personal delivery to the Party to be notified, (b) when sent, if sent by electronic mail or facsimile during normal business hours of the recipient, and if not sent during normal business hours, then on the recipient's next business day, (c) five (5) days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (d) one (1) business day after deposit with a nationally recognized overnight courier, freight prepaid, specifying next business day delivery, with written verification of receipt. All communications shall be sent to the respective Parties at their address as set forth on the signature page, or to such e-mail address, facsimile number, or address as subsequently modified by written notice given in accordance with this section.

9.8 Amendments and Waivers. Any term of this Agreement may be amended, terminated, or waived only with the written consent of the Parties.

9.9 Severability. The invalidity or unenforceability of any provision hereof shall in no way affect the validity or enforceability of any other provision. If any provision of this Agreement is determined to be invalid or unenforceable under applicable law and regulations by a court of competent jurisdiction, that provision shall be limited or eliminated to the minimum extent necessary so that this Agreement shall otherwise remain in full force and effect and be enforceable.

9.10 Delays or Omissions. No delay or omission to exercise any right, power, or remedy accruing to any Party under this Agreement, upon any breach or default of any other Party under this Agreement, shall impair any such right, power, or remedy of such non-breaching or non-defaulting Party nor shall it be construed to be a waiver of any such breach or default, or an acquiescence therein, or of or in any similar breach or default thereafter occurring; nor shall any waiver of any single breach or default be deemed a waiver of any other breach or default theretofore or thereafter occurring. Any waiver, permit, consent, or approval of any kind or character on the part of any Party of any breach or default under this Agreement, or any waiver on the part of any Party of any provisions or conditions of this Agreement must be in writing and shall be effective only to the extent specifically set forth in such writing. All remedies, either under this Agreement or by law or otherwise afforded to any Party, shall be cumulative and not alternative.

9.11 Force Majeure. In the event that either Party fails or is unable to perform any of its obligations under this Agreement due to any cause beyond its reasonable control, such Party shall give the other Party prompt notice of such cause, and use its reasonable best efforts to promptly correct such failure or delay in performance.

9.12 Investments Not Loans. All references in this Agreement to funding the costs and expenses of pursuing the Claim(s), however described, shall be construed to be references to Funder's investment in the Claim(s) and associated right to share in the Claim Proceeds together with the other rights set out in this Agreement, in return for its associated obligations set out in this Agreement, and it shall not be construed as a loan from the Funder to the Plaintiff or giving rise to a lender-borrower arrangement and/or relationship.

9.13 Additional Savings Clause. The Parties agree that this Agreement is not a loan and is not subject to any usury provision of the applicable state. All agreements between the Plaintiff, the Lead Counsel and the Funder are hereby expressly limited so that in no contingency or event whatsoever shall the amount paid or agreed to be paid to the Funder for the use, forbearance, or detention of the money to be funded in this Agreement exceed the maximum permissible under applicable law. If, from any circumstance whatsoever, fulfillment of any provision hereof, at the time performance of such provision shall be due, shall be prohibited by law, the obligation to be fulfilled shall be reduced to the maximum not so prohibited, and if from any circumstance the Funder should ever receive as interest (although Funder denies any "interest" is due) hereunder an amount which would exceed the highest lawful rate, such amount as would be excessive interest shall be applied to the reduction of the principal of the Agreement (against installments of principal due hereunder in the inverse order of their maturity) and not to the payment of interest. This provision shall control every other provision of all agreements between and among the Plaintiff, the Lead Counsel, and the Funder.

9.14 Advice on this Agreement. Each Party represents to the other Party that it (a) has read this Agreement; (b) has been represented in the preparation, negotiation, and execution of this Agreement by legal counsel of the Party's own choice or has voluntarily declined to seek such counsel; (c) understands the terms and consequences of this Agreement; and (d) is fully aware of the legal and binding effect of this Agreement.

9.15 Entire Agreement. This Agreement (including any exhibits or schedules thereto) constitutes the full and entire understanding and agreement between the Parties with respect to the subject matter hereof, and any other written or oral agreements relating to the subject matter hereof existing between the Parties are expressly canceled.

(*Signature Page Follows*)

IN WITNESS WHEREOF, the Parties hereto have executed this Litigation Funding Agreement as of the Effective Date.

PLAINTIFF:

DiaMedica Therapeutics Inc.

By: /s/ Rick Pauls
Name: Rick Pauls
Title: President and Chief Executive Officer
Address: 2 Carlson Pkwy, Suite 200
Minneapolis, MN 55447
E-mail: rpauls@diamedica.com

FUNDER:

LEGALIST FUND II, L.P.
By: Legalist GP II, L.L.C., its General Partner

By: /s/ Eva Shang
Name: Eva Shang
Title: Manager
Address: 880 Harrison Street
San Francisco, CA 94107
E-mail: eva@legalist.com

LEAD COUNSEL:

Fisher Broyles, LLP

By: /s/ Alfred J. Monte
Name: Alfred J. Monte
Title: Partner
Address: 1650 Market Street, 36th Fl
Philadelphia, PA 19103
Email: alfred.monte@fisherbroyles.com

List of Exhibits

Each of the following exhibits to this Litigation Funding Agreement has been omitted in accordance with Item 601(a)(5) of Regulation S-K. The registrant will furnish supplementally copies of the omitted exhibits to the SEC upon its request.

Exhibit A – Budget

Exhibit B – Wire Details

EXHIBIT D

Execution Copy

Glaz LLC
Posen Investments LP
Kenosha Investments LP

March 31, 2022

Sysco Corporation
1390 Enclave Parkway
Houston, TX 77077
Attn: Eve McFadden

Re: Amendment No. 1 to Second Amended and Restated Capital Provision Agreement

Dear Eve:

We refer to the Second Amended and Restated Capital Provision Agreement, dated as of December 22, 2020, between Sysco Corporation (the "***Counterparty***" or "***you***") and each of Glaz LLC (fka Roslindale LLC), a Delaware limited liability company ("***Capital Provider No. 1***"), Posen Investments LP, a Delaware limited partnership ("***Capital Provider No. 2***"), and Kenosha Investments LP, a Delaware limited partnership ("***Capital Provider No. 3***") (the "***Existing CPA***"), pursuant to which the Capital Providers provided capital to the Counterparty to finance certain of its food antitrust legal claims. Capitalized terms used herein but not defined have the meanings given thereto in the Existing CPA.

Capital Provider No. 1 and Capital Provider No. 3 now wish to provide to the Counterparty, and the Counterparty wishes to accept, additional capital to further monetize the Counterparty's food antitrust legal claims. This letter agreement sets forth the terms and conditions of the incremental investment and, upon its due execution and delivery by all parties hereto, constitutes Amendment No. 1 to the Existing CPA ("***Amendment No. 1***"). As amended by this Amendment No. 1, the agreement between the Counterparty and the Capital Providers is referred to herein as the "***2021 Amended CPA***".

In their capacity as the providers of capital to the Counterparty under the Existing CPA, each of Capital Provider No. 1, Capital Provider No. 2 and Capital Provider No. 3 is referred to herein as an "***Existing Capital Provider***". In their capacity as the providers of capital to the Counterparty under this Amendment No. 1, each of Capital Provider No. 1 and Capital Provider No. 3 is referred to herein as a "***2021 Capital Provider***".

Pursuant to the Existing CPA, the Existing Capital Providers have provided a total of [redacted] allocated as follows: [redacted]

1. 2021 Capital Amounts.

a. Within 10 Business Days of the execution and delivery of this Amendment No. 1, the 2021 Capital Providers shall provide Capital Amounts to the Counterparty in respect of all Claims in the aggregate amount of [redacted] (upon provision to the Counterparty, the "***2021 Invested Amount***"), upon which the total amount provided to the Counterparty by all Capital Providers pursuant to the 2021 Amended CPA shall be $137,500,000, allocated as follows: [redacted]

b. [redacted]

c. The 2021 Capital Providers shall retain [redacted] from the 2021 Invested Amount to cover their closing and other costs in connection with this Amendment No. 1. Such amount shall be deemed included in the Capital Amounts for all purposes under the 2021 Amended CPA.

2. Outstanding Capital Commitment. The Counterparty and the Existing Capital Providers acknowledge that, pursuant to Section 2.1(a)(iii) of the Existing CPA and subject to all terms and conditions thereof, as of the date hereof the Capital Providers are committed to providing up to an additional [redacted]

3. Amendments to Definitions.

a. References to the term "***Capital Providers' Entitlement***" shall mean the Capital Providers' Entitlement as defined in the Existing Agreement or the sum of all amounts payable to the Capital Providers pursuant to Section 6 of this Amendment No. 1, as the context requires.

b. The following defined term is hereby added to Exhibit A of the Existing Agreement, in alphabetical order: "***Applicable Purchases***" means, in respect of any Claim, the recorded volume of sales between the Counterparty and an Adverse Party of the product at issue in such Claim during the time period of the alleged conspiracy as stated in the operative putative class complaint.

c. Each of the defined terms "***Chickens Claim***", "***Pork Claim***", "***Beef Claim***", "[redacted]" and "[redacted]" is hereby amended to exclude from its respective description in item 1 of Annex II any portion of the Counterparty's purchases assigned by the Counterparty for purposes of their assertion under federal antitrust laws to [redacted]

4. Hypothetical Illustration. The hypothetical illustrations set forth in Annex III of the Existing CPA are hereby replaced in their entirety with the hypothetical illustrations set forth in Annex I hereto, which demonstrates, for illustration purposes only, the application of the waterfall set forth in Section 6 of this Amendment No. 1. Section 2.2(e) of the Existing CPA is hereby deemed amended accordingly.

5. Continuing Interest in Litigation. The Counterparty intends by this Amendment No. 1 to preserve and maintain its economic and business interests in the Claims, including but not limited to its economic interest in the Claims and its business interest in the vigorous enforcement of antitrust laws. [redacted]

6. [redacted]

7. Maximization of Litigation Outcome; Non-circumvention.

a. In addition to and without limiting the obligations of the Counterparty to the Capital Providers pursuant to Section 5.3(b) of the Existing Agreement, the Counterparty shall take such actions as are reasonable and appropriate to maximize the Proceeds received from each Claim, giving priority to cash Proceeds.

b. Section 5.3(b)(v) of the Existing CPA shall be amended and restated in its entirety as follows:

(v) shall provide immediate notice by email to the Capital Providers of any settlement offer made by the Adverse Party and shall not accept a settlement offer without the Capital Providers' prior written consent, which shall not be unreasonably withheld, provided however, that the Capital Providers (and their respective Affiliates) shall have no right to exercise control over the independent professional judgment of its Nominated Lawyers and shall not seek to impose a commercially unreasonable result with respect to settlement;

c. The Counterparty shall not, directly or indirectly, by any acts or omissions circumvent, or attempt to circumvent, the obligations set forth in this paragraph 5 or in Section 5.3(b) of the Existing CPA or the intent of the transactions contemplated by the 2021 Amended CPA.

8. Reversion to Existing CPA. In the event a court or tribunal of competent jurisdiction holds or decides (as applicable) that this Amendment No. 1 deprives the Counterparty of standing in a Claim against any Adverse Party or otherwise forecloses the Counterparty from prosecuting a Claim against any Adverse Party, this Amendment No. 1 shall be null and void ab initio and the Existing CPA shall immediately be deemed in full force and effect, without any action by any party, as if this Amendment No. 1 had never taken effect; provided, however, that the 2021 Invested Amount shall become part of the New Invested Amount for purposes of calculating the Capital Providers' Entitlement thereunder.

9. Reaffirmation, etc. Each Capital Provider, on the one hand, and the Counterparty, on the other hand, hereby (i) reaffirms to the other(s), as of the date hereof, the representations and warranties, covenants and agreements made by it in each Transaction Document; and (ii) forever waives and releases any claims they may have against the other(s), to the extent based on conduct or omissions predating the date of execution of this Amendment No. 1, whether known or unknown, suspect or unsuspected, including but not limited to any claims related to the 2021 Amended CPA and all other claims arising under state, federal or other law. Except to the limited extent amended hereby, all provisions of the Transaction Documents remain in full force and effect, and continue to be the legal, valid, and binding obligations of the parties thereto.

[*Signature page follows*.]

If you agree with the terms set forth above, kindly execute this Amendment No. 1 in the spaces provided below and return a copy to us. Please retain a copy for your records.

Very truly yours,

Capital Provider No. 1:

GLAZ LLC

By: _____
DocuSigned by:
22968E34B789473...
Name:
Title: Authorized Signatory

Capital Provider No. 2:

POSEN INVESTMENTS LP

By: Chicago Onshore Funding Limited,
its General Partner

By: _____
DocuSigned by:
22968E34B789473...
Name:
Title: Director

Capital Provider No. 3:

KENOSHA INVESTMENTS LP

By: Green Bay GP LLC,
its General Partner

By: _____
DocuSigned by:
22968E34B789473...
Name:
Title: Authorized Signatory

Acknowledged and agreed,

Counterparty:

SYSCO CORPORATION

By: _____
DocuSigned by:
Eve McFadden
F3F94DDB5E914AF...
Name: Eve M. McFadden
Title: Senior Vice President,
General Counsel and
Corporate Secretary

ANNEX I

(Waterfall Illustrations)

The hypotheticals below are solely for the purposes of demonstrating how the waterfall described in Section 6 of Amendment No. 1 would work in practice:

Scenario 1:

Assumptions:

[redacted]

Chicken Proceeds Distribution	Recipient	Reference
[redacted]	[redacted]	[redacted]

[1] Months calculated from anniversary date of the First Amended Agreement, June 9, 2020.

Pork Proceeds Distribution	Recipient	Reference

Scenario 2:

Assumptions:

Chicken Proceeds Distribution	Recipient	Reference

[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	
[redacted]		
Pork Proceeds Distribution	Recipient	Reference
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]		
Beef & [redacted] Proceeds Distribution	Recipient	Reference
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]		

Scenario 3:

Assumptions:

- [redacted]

[redacted]

Pork Proceeds Distribution	Recipient	Reference
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]		
Chicken Proceeds Distribution	Recipient	Reference
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]		
Beef & [redacted] Proceeds Distribution	Recipient	Reference
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	

Scenario 4:

Assumptions:

Chicken Proceeds Distribution	Recipient	Reference
Beef & Proceeds Distribution	Recipient	Reference

[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	
[redacted]		

EXHIBIT C

PRIVATE & CONFIDENTIAL

ATTORNEY WORK PRODUCT

SUBJECT TO CONFIDENTIALITY AGREEMENT

PROTECTED FROM DISCLOSURE BY APPLICABLE PRIVILEGES

This document contains protected attorney work product and discloses through its structure and terms the mental impressions of counsel. Access to this document is restricted by confidentiality agreement and professional privilege.

Dated as of December 22, 2020

Second Amended and Restated Capital Provision Agreement

---

between

The Counterparty named in Annex I hereto

and

The Capital Providers, as defined in the introductory paragraph hereof

CONTENTS

SECTION **PAGE**

SECOND AMENDED AND RESTATED CAPITAL PROVISION AGREEMENT, dated as of December 22, 2020 ("***Agreement***"), between SYSCO CORPORATION, an entity organized or formed under the laws of the jurisdiction identified in Annex I (the "***Counterparty***"), on the one hand, and each of ROSLINDALE LLC, a limited liability company formed under the laws of the State of Delaware ("***Capital Provider No. 1***"), POSEN INVESTMENTS LP, a limited partnership formed under the laws of the State of Delaware ("***Capital Provider No. 2***"), and KENOSHA INVESTMENTS LP, a limited partnership formed under the laws of the State of Delaware ("***Capital Provider No. 3***", Capital Provider Nos. 1, 2 and 3, severally but not jointly, each a "***Capital Provider***" and collectively, the "***Capital Providers***"), on the other hand.

WHEREAS, the Counterparty, before interacting with the Capital Providers in regard to the matters described herein and without any influence from the Capital Providers, decided to pursue the Claims, as defined in Exhibit A and identified on Annex II to this Agreement;

WHEREAS, the Counterparty has consulted with and sought advice from an Affiliate of the Capital Providers about the Counterparty's ability to obtain external capital based on the potential future value of the Claims;

WHEREAS, the Counterparty has provided or may provide confidential materials protected by the attorney-client privilege and/or the attorney work product doctrine, or other existing law protecting such materials from disclosure, to the Capital Providers and their Affiliates, subject to a non-disclosure and common interest agreement and in reliance on the common interest privilege, the work product doctrine, and other existing law protecting such materials from disclosure;

WHEREAS, the Capital Providers or their Affiliates have conducted research and analysis and communicated views and opinions both internally and to the Counterparty, all in reliance on that same common interest privilege, work product doctrine, and other existing law protecting such research, analysis and communications from disclosure;

WHEREAS, the Capital Providers and the Counterparty entered into that certain Capital Provision Agreement, dated as of October 15, 2019 (the "***Original Agreement***"), to provide for financing in connection with the Counterparty's legal claims relating to its purchases of broiler chickens (collectively, as more specifically described on Annex II, the "***Chickens Claim***");

WHEREAS, the Capital Providers and the Counterparty revised the Original Agreement by entering into that certain Amended and Restated Capital Provision Agreement, dated as of June 9, 2020 (the "***First Amended Agreement***"), to provide for additional financing in connection with the Counterparty's legal claims relating to its purchases of pork products (collectively, as more specifically described on Annex II, the " "***Pork Claim***");

WHEREAS, the Capital Providers and the Counterparty now wish to expand their financing arrangement to include legal claims of the Counterparty relating to its purchases of beef products, [redacted], and [redacted] (collectively, as each set of claims is more specifically described on Annex II, the "***Beef Claim***", "[redacted]" and "[redacted]", respectively);

WHEREAS, the parties wish to amend and restate the First Amended Agreement to accomplish the foregoing;

WHEREAS, the Capital Providers are each passive providers of external capital and have not become owners of, partners in, or parties to the claims or any part thereof or acquired any rights as to their control or resolution; consequently, while the Capital Providers will receive certain information with respect to the Claims and consult with the Counterparty thereon, the Counterparty remains in full control of the assertion and resolution of the claims; and

WHEREAS, the parties are sophisticated and are entering into this Agreement freely and entirely of their own volition following independent legal advice from experienced counsel, and do not believe that this Agreement or the transactions it contemplates are inconsistent with any relevant law or public policy.

NOW, THEREFORE, in consideration of the mutual agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

1. DEFINITIONS

Certain capitalized terms used herein have the meanings assigned thereto in Exhibit A. Capitalized terms used but not otherwise defined in Exhibit A have the respective meanings assigned to such terms elsewhere in this Agreement.

2. CAPITAL PROVISION OBLIGATIONS AND CAPITAL PROVIDERS' ENTITLEMENT

2.1 Capital Amounts

The Capital Providers have provided and shall provide capital to the Counterparty as set forth below.

(a) Capital Amounts:

(i) *Chickens Claim.* Pursuant to the Original Agreement, the Capital Providers provided to the Counterparty [redacted] in respect of the Chickens Claim on October 15, 2019.

(ii) *Pork Claim*. Pursuant to the First Amended Agreement, the Capital Providers provided to the Counterparty [redacted]

[redacted] in respect of the Pork Claim on June 12, 2020.

(iii) *New Claims*. Pursuant to this Agreement, the Capital Providers shall provide to the Counterparty up to [redacted] in respect of the New Claims, as follows:

(A) [redacted] (the "***Initial New Investment Amount***") within 15 Business Days of the execution and delivery of this Agreement (the "***Initial New Investment Payment Date***"), and

(B) a maximum of [redacted], in periodic installments (each, an "***Additional Payment***") of [redacted] each, in accordance with clause (iv) of this Section 2.1(a), to be used solely for the payment of reasonable Claim Costs (as defined in Section 5.3(b)) incurred by the Counterparty in connection with the Claims other than the Chickens Claim.

(iv) *Manner of Provision of Additional Payments*. Each Additional Payment shall be made within 15 Business Days of the Capital Providers' receipt of a written request from the Counterparty stating that the remaining balance of previously provided Additional Payments is less than [redacted] (provided that the first such request shall require no such statement). The Counterparty shall hold all Additional Payments in a segregated account dedicated to paying fees and expenses of the Claims (other than the Chickens Claim).

(b) Allocation of Funding. All Capital Amounts shall be provided by the Capital Providers in accordance with the following allocation:

(i) Capital Provider No. 1: [redacted]
(ii) Capital Provider No. 2: [redacted]
(iii) Capital Provider No. 3: [redacted]

(c) Transaction Costs. To cover their closing and other costs, the Capital Providers retained [redacted] of the Capital Amounts provided under the Original Agreement and [redacted] of the Capital Amounts provided under the First Amended Agreement. The Capital Providers shall retain an additional [redacted] from the Initial New Investment Amount to cover their closing and other costs in connection with this Agreement. All such amounts shall be deemed included in the Capital Amounts for all purposes under this Agreement.

2.2 Capital Providers' Entitlement

In consideration of their agreement to provide the Capital Amounts, the Capital Providers shall be entitled to receive the amounts set forth below.

(a) Generally.

(i) *Amount of Capital Providers' Entitlement.* The "***Capital Providers' Entitlement***" is equal to the sum of the following:

[redacted]

(ii) [redacted]

(iii) [redacted]

(b) Chickens Waterfall. All Proceeds of the Chickens Claim ("***Chickens Proceeds***") shall be distributed as follows:

[redacted]

(c) Pork Waterfall. All Proceeds of the Pork Claim ("***Pork Proceeds***") shall be distributed as follows:

[redacted]

(d) New Claims Waterfall. All Proceeds of the Beef Claim, the [redacted], and the [redacted] ("***New Claim Proceeds***") shall be distributed as follows:

[redacted]

(e) Hypothetical Illustration. Annex III sets forth certain hypothetical scenarios, for illustration purposes only, demonstrating the application of the waterfalls set forth in clauses (b), (c), and (d) of this Section 2.2.

(f) Allocation of Entitlement Among Capital Providers. Capital Provider No. 1, Capital Provider No. 2, and Capital Provider No. 3 shall each be entitled to a pro rata portion of the Capital Providers' Entitlement based on the respective Capital Amounts provided by each of them.

3. PAYMENT OBLIGATIONS OF THE COUNTERPARTY

3.1 Payments

(a) *Non-Recourse Agreement.* The Capital Amounts are provided to the Counterparty on a non-recourse basis, and the Capital Providers' Entitlement is exclusively derived from, computed on the basis of, and paid from Proceeds. If there are no Proceeds, the Counterparty shall not have any obligation to pay the Capital Providers' Entitlement (including any repayment of Capital Amounts provided).

(b) *Notice*. If at any time Proceeds arise, the Counterparty shall immediately notify the Capital Providers of the amount of such Proceeds and the Claim to which such Proceeds relate.

(c) *Due Date for Payment of Entitlement*. Except as otherwise set forth in Section 3.2(a)(ii), within three (3) Business Days of the Counterparty's (or the Payment Agent's) receipt of any Proceeds, the Counterparty (or the Payment Agent) shall pay such Proceeds to the Capital Providers in accordance with Section 2.2 until the Capital Providers' Entitlement has been paid in full. Such payment obligation shall be absolute and unconditional and shall not under any circumstances (including a dispute about the payment) be delayed, suspended, or avoided. The only basis for not making such payment directly to the Capital Providers in accordance with the timeframe set forth in this clause (c) shall be pursuant to Section 29(c) or 3.2(a)(ii).

(d) *Circumstances of All Payment Obligations.* The Counterparty shall be obligated to make a payment to the Capital Providers hereunder only upon (i) the receipt of Proceeds, (ii) an award of Proceeds that, due to a set-off for counterclaims or any other reason, does not result in a receivable from the applicable Adverse Party but is a positive amount pursuant to clause (v) of the definition of "Proceeds" herein (also deemed a "receipt" by the Counterparty of Proceeds hereunder), or (iii) a payment obligation having arisen under Section 4.2, 10, 11(c), 13 or 25(b).

3.2 Proceeds to Payment Agent, etc.

(a) *Payment and Delivery of Proceeds*.

(i) Prior to any payment or delivery of Proceeds, if such Proceeds shall be delivered in cash or by check or other instrument, then the Counterparty shall direct the payor to pay or deliver such Proceeds not to the Counterparty but rather directly to the Payment Agent (with proper endorsements if by check or other instrument).

(ii) If all or a portion of Proceeds consist of property other than cash, then the Capital Providers shall be entitled to receive, at their option, either (A) an immediate payment in cash of the full portion of the Capital Providers' Entitlement due at the time such Proceeds are received, calculated based on

the present value of any non-cash Proceeds or (B) an undivided interest in any such non-cash Proceeds in the amount of the full portion of the Capital Providers' Entitlement due at the time such Proceeds are received, whereupon the Counterparty shall (A) diligently take any and all such actions as are necessary to receive and monetize such property in a commercially reasonable manner at prevailing market rates, that has been approved by the Capital Providers in their sole discretion, and (B) cause the prompt payment of the applicable portion of the Capital Providers' Entitlement from the cash realized from such monetization in accordance with this Agreement.

(b) *Proceeds Held in Trust, etc.* If, notwithstanding Section 3.2(a), any Proceeds are instead received by the Counterparty or a third party other than the Payment Agent on the Counterparty's behalf, the Counterparty shall, or shall direct such third party to, (i) hold such Proceeds in trust for the benefit of the Capital Providers consistent with Section 2.2; (ii) segregate such Proceeds from all other funds and property; and (iii) forthwith pay or deliver such Proceeds to the Payment Agent in accordance with clauses (i) and (ii) of Section 3.2(a).

4. PAYMENTS GENERALLY

4.1 Place and Account for Payment

Each payment to a party required under this Agreement shall be made (a) to the payment account for such party (or the Payment Agent, as the case may be) specified on Annex II or in the Escrow Agreement, as applicable; (b) in the currency specified in Section 2; (c) on the due date for value on that date in the place where such account is located; (d) unless otherwise agreed in writing, by wire transfer of freely transferable and immediately available funds; and (e) otherwise in the manner customary for payments in the specified currency.

4.2 Interest on Overdue Amounts

If the Counterparty defaults in the performance of any payment obligation under this Agreement, the Counterparty shall on demand pay interest (before as well as after judgment, if applicable) at the Default Rate on the overdue amount to the Capital Providers for the period from (and including) the original due date for payment to (but excluding) the date of actual payment.

4.3 Waiver of Right of Set-Off

Each amount that the Counterparty is obligated to pay under this Agreement shall be paid without set-off, deduction, or counterclaim.

5. COVENANTS

5.1 Covenants of Each Party

The Counterparty, on the one hand, and each Capital Provider, on the other hand, agree that, so long as such party has or may have any obligation to the other under this Agreement or any other Transaction Document:

(a) it shall preserve and maintain its corporate existence, except to the extent that the failure to do so would not have a Material Adverse Effect;

(b) it shall use all reasonable efforts to maintain in full force and effect all consents, approvals, actions, authorizations, exceptions, notices, filings, and registrations of or with any Governmental Authority that are required to be obtained by it with respect to this Agreement or any other Transaction Document and shall use all reasonable efforts to obtain any that may become necessary in the future; and

(c) it shall comply with all applicable laws and orders of any Governmental Authority to which it may be subject if failure to so comply could reasonably be expected, either individually or in the aggregate, to have a Material Adverse Effect.

5.2 Covenants of the Capital Providers

With respect to the Claims, each Capital Provider agrees with the Counterparty that:

(a) such Capital Provider and its respective Affiliates are not, and shall not by virtue of entering into this Agreement or any other Transaction Document become, a party to the Claims;

(b) without limiting the obligations of the Counterparty under Section 5.3(b) or the rights granted to the Capital Providers under Section 13.1(b), such Capital Provider shall not be entitled to control or direct the conduct of the Claims, or to require settlement thereof;

(c) the Counterparty shall have day-to-day and overall control over the conduct of, and responsibility for, the Claims and neither the Capital Providers nor their respective Affiliates shall exercise, or seek to exercise, any such control over the Claims;

(d) such Capital Provider and its respective Affiliates shall do nothing that compromises the professional duties of any of the Nominated Lawyers;

(e) such Capital Provider and its respective Affiliates shall act in good faith in all of its dealings with the Counterparty and shall comply diligently with this Agreement.

5.3 Covenants of the Counterparty

The Counterparty agrees with the Capital Providers that, so long as the Counterparty has or may have any obligation under this Agreement or any other Transaction Document:

(a) subject to Section 17 of this Agreement, the Capital Amounts shall be used solely for the purchase of merchandise and services; and without limiting the generality of the foregoing, Additional Amounts shall be used as specified in Section 2.1(a)(iii)(B);

(b) with respect to each Claim, the Counterparty:

(i) shall use all commercially reasonable efforts to: (A) pursue such Claim and all of the Counterparty's legal and equitable rights arising in connection with such Claim; (B) bring about the reasonable monetization of such Claim through a Claim Resolution; and (C) collect and enforce any settlement, final judgment or award;

(ii) shall, at its own expense (taking into account the Capital Amounts) and in a timely manner: (A) retain and remunerate the applicable Nominated Lawyers to prosecute such Claim vigorously in a commercially reasonable manner in order to bring about the reasonable monetization of such Claim through a Claim Resolution; (B) subject to the Engagement Agreement, cooperate with such Nominated Lawyers in all matters pertaining to such Claim (including providing documents and information, appearing and causing others within the Counterparty's power to appear for examinations and hearings), including promptly authorizing and discharging all fees, expenses, and other payment obligations necessarily or reasonably recommended or incurred in association with pursuing such Claim to a Claim Resolution; (C) take all actions necessary or appropriate to collect and enforce any settlement, final judgment or award (the costs and expenses of doing all of the foregoing described in clauses (A) – (C), "***Claim Costs***"); and (D) actively manage the incurrence of Claim Costs with the goal of achieving a Claim Resolution, and the collection and enforcement thereof, efficiently and cost-effectively;

(iii) subject to Section 9.4, shall itself, or cause the applicable Nominated Lawyers to, within the five (5) Business Days preceding the end of each calendar month, (A) provide the Capital Providers with a report containing the information described on Exhibit B (each, a "***Monthly Report***") and (B) with respect to items (1) and (2) thereon, provide a copy to the Nominated Lawyers unless such items were prepared by the Nominated Lawyers;

(iv) subject to Section 9.4, shall itself, and cause the applicable Nominated Lawyers to, (A) keep the Capital Providers fully and promptly apprised of each material development in relation to such Claim and (B) respond fully

and promptly to any request by the Capital Providers, their Affiliates, or Representatives for any information regarding such Claim;

(v) shall provide immediate notice by email to the Capital Providers of any settlement offer made by the Adverse Party and shall in good faith give the Capital Providers an opportunity to discuss such settlement offer prior to the Counterparty accepting or rejecting it, provided however, that the Capital Providers (and their respective Affiliates) shall have no right to exercise control over the independent professional judgment of the Counterparty and its Nominated Lawyers and shall not seek to coerce the Counterparty and its Nominated Lawyers with respect to settlement;

(vi) shall provide immediate notice by email to the Capital Providers of a Claim Resolution or any receipt of any Proceeds, or of any event that is expected to generate a Claim Resolution or the receipt of any Proceeds;

(vii) shall not do anything to prejudice any benefits, rights or causes of action sought or advanced in connection with, or the general pursuit of, such Claim;

(viii) other than with the prior written consent of the Capital Providers, shall not dispose of, transfer, encumber or assign, nor otherwise create, incur, assume, or permit to exist any Adverse Claim with respect to, all or any portion of such Claim (or any interest therein) or any Proceeds thereof (or any right to such Proceeds);

(ix) shall not set off or agree to set off any amounts against such Claim;

(x) shall not, prior to a Claim Resolution with respect to all Claims, agree to settle or otherwise resolve any separate action, claim, suit, or arbitration brought by or against any Adverse Party or any of the Adverse Party's Affiliates in a manner that would impact the Counterparty's performance of its covenants in clauses (i) or (ii) of this Section 5.3(b), a potential Claim Resolution of one or more Claims, and/or the Capital Providers' Entitlement; and

(xi) shall at its sole cost maintain in place the effective, enforceable Escrow Agreement.

(c) Within two (2) Business Days after the Counterparty knows or has reason to believe that any of the following has occurred or is likely to occur, the Counterparty shall deliver to the Capital Providers a notice describing the same in reasonable detail and, together with such notice or as soon thereafter as possible, a description of any action that the Counterparty has taken or proposes to take with respect thereto:

(i) any Potential Remedy Event or Remedy Event;

(ii) any action, suit, or proceeding of the kind described in Section 6.3(b) has been or shall be brought; or

(iii) a material failure by the Counterparty, or any Nominated Lawyers on the Counterparty's behalf, to pay when due any undisputed amounts owing to any litigation services providers (e.g., experts) retained in connection with a Claim (after giving effect to any applicable notice requirement or grace period).

(d) The Counterparty shall not, without the Capital Providers' prior written consent (which consent shall not unreasonably be withheld), directly or indirectly, permit any amendments to the economic terms or scope of representation set forth in any Engagement Agreement.

(e) If the Nominated Lawyers in respect of any Claim cease to act as the Counterparty's legal counsel for such Claim for any reason (including the Counterparty's decision to replace such Nominated Lawyers, which decision the Counterparty is free to make at any time), or the Counterparty needs to retain new legal counsel for a Claim outside the scope of the Engagement Agreement(s) with such Nominated Lawyers, then the Counterparty shall, subject to the Capital Providers' prior written consent (with respect to which the Capital Providers shall be free to apply their own experience and subjective judgment, but which consent shall not unreasonably be withheld), appoint successor attorneys or new attorneys to act as its counsel who have a similar level of quality and reputation as such Nominated Lawyers. The Counterparty shall not grant successor attorneys or any new attorneys economic compensation associated with a Claim that, standing alone or when considered together with any economic compensation to which current Nominated Lawyers would remain entitled, is superior to the compensation set forth in the Engagement Agreement(s) with such current Nominated Lawyers without the Capital Providers' prior written consent, which shall not be unreasonably withheld or delayed. The Counterparty will promptly deliver to the Capital Providers a copy of any Engagement Agreement with any successor or new attorney. If such successor attorney or any new attorney, as applicable, are appointed, all references to "Nominated Lawyers" in respect of the applicable Claim will be deemed to refer to and include such successor, replacement or additional counsel.

(f) The Counterparty shall retain Nominated Lawyers for each New Claim on an hourly fee basis unless the Capital Providers have given their consent in writing to an alternative fee arrangement. Prior to appointing Nominated Lawyers for each of the New Claims, the Counterparty shall consult with the Capital Providers in good faith and obtain the Capital Providers' prior written consent (with respect to which the Capital Providers shall be free to apply their own experience and subjective judgment, but which but which consent shall not unreasonably be withheld). Upon retaining counsel for such Claims, (i) the Counterparty will promptly deliver to the Capital Providers a copy of the applicable Engagement Agreement and (ii) all references to "Nominated Lawyers" hereunder will be deemed to refer to such

counsel with respect to the applicable Claim.

(g) [redacted]

(h) The Counterparty shall ensure that, at all times, all payment obligations of the Counterparty under this Agreement shall rank in right of payment at least *pari passu* with all unsecured, unsubordinated indebtedness of the Counterparty.

(i) The Counterparty has, and reasonably expects to continue to have, sufficient assets available to it with which to discharge such Claim Costs as may be necessary to comply with its covenants under this Agreement, including those set forth in Section 5.3(b)(ii), in the event the Additional Amounts are exhausted.

6. REPRESENTATIONS AND WARRANTIES

6.1 Representations and Warranties of Each Party

On each Representation Date, the Counterparty, on the one hand, and each Capital Provider, on the other hand, represents and warrants to the other as follows:

(a) It (i) is duly organized or formed and validly existing under the laws of the jurisdiction of its organization or formation and, if relevant under such laws, in good standing, (ii) is qualified to do business in each jurisdiction in which the nature of its business so requires, and (iii) has not filed any certificates of dissolution or liquidation, or any certificates of domestication, transfer or continuance in any jurisdiction.

(b) It has the power to execute this Agreement and the other Transaction Documents to which it is a party, to deliver this Agreement and the other Transaction Documents it is required by this Agreement to deliver, and to perform its obligations under this Agreement and the other Transaction Documents; and, to the extent necessary, it has taken all necessary action to authorize such execution, delivery and performance.

(c) Such execution, delivery and performance do not and shall not violate or conflict with any law applicable to it, any provision of its constitutional documents, any order or judgment of any court or other Governmental Authority applicable to it or any of its assets or any contractual restriction binding on or affecting it or any of its

assets (including, with respect to the Counterparty, the Engagement Agreement(s) and any provisions therein).

(d) All consents, approvals, actions, authorizations, exceptions, notices, filings, and registrations that are required to have been obtained by it with respect to this Agreement or any other Transaction Document have been obtained and are in full force and effect, and all conditions of any such consents, approvals, actions, authorizations, exceptions, notices, filings and registrations have been complied with.

(e) This Agreement and the other Transaction Documents constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms (subject to applicable bankruptcy, reorganization or similar laws and to general equitable principles).

(f) It is acting for its own account, and it has made its own independent decisions to enter into this Agreement and the other Transaction Documents, and the transactions contemplated hereby and thereby, and as to whether this Agreement and the other Transaction Documents and such transactions are appropriate or proper for it based upon its own judgment and upon advice from such advisers as it has deemed necessary.

(g) No communication (written or oral) received from the other party shall be deemed to be an assurance or guarantee as to the expected results of this Agreement or any other Transaction Document, or any of the transactions contemplated hereby or thereby.

(h) No party has given any investment advice or rendered any opinion to the other party as to whether entering into this Agreement in exchange for the rights received is prudent.

(i) It is capable of assessing the merits of and understanding (on its own behalf or through independent professional legal advice), and understands and accepts, the terms, conditions and risks of this Agreement and the other Transaction Documents, and the transactions contemplated hereby and thereby.

(j) The Parties' representations to one another shall remain true, correct, and complete at all times during the term of this Agreement.

6.2 Representations and Warranties of the Capital Providers

(a) On the Representation Date coinciding with the date of this Agreement, the Capital Providers each represent and warrant to the Counterparty, on behalf of themselves and their Affiliates, as follows:

(i) They have received sufficient information concerning the Claims to make

an informed decision regarding the transactions contemplated with respect to the Claims under this Agreement, and have had the opportunity to access, and have accessed, due diligence information and to make related inquiries regarding the Claims. On the basis of such information and diligence as they have deemed appropriate in their independent judgment, they have independently and without reliance on the Counterparty, either for information (other than the covenants, representations, and warranties contained herein) or investment advice, made their own analysis and decision to enter into this Agreement.

(ii) They are sophisticated investors and have such knowledge and experience in financial and business matters that they are capable of evaluating the merits and risks of entering into this Agreement; (i) bearing the risks of an investment in the Claims; (ii) making an informed investment decision regarding their investment in the Claims; and (iii) analyzing and protecting their own interests in deciding whether to enter into the transactions contemplated under this Agreement.

(b) On each Representation Date (except as otherwise specifically provided below), the Capital Providers each represent and warrant to the Counterparty, on behalf of themselves and their Affiliates, as follows:

(i) They have been represented by such legal and tax counsel and any other advisors selected by them as they found necessary to consult concerning the transactions contemplated under this Agreement and to review and evaluate the tax, economic, and other ramifications of same.

(ii) They have been advised and understand that their participation in the transactions contemplated under this Agreement involve a high degree of risk. They have the ability to bear the economic risk of entering into this Agreement, and at the present time and for an indefinite period of time can afford a complete loss of their investment in the Claims.

6.3 Representations and Warranties of the Counterparty

On each Representation Date (except as otherwise specifically provided below), the Counterparty represents and warrants to the Capital Providers as follows:

(a) No Remedy Event or Potential Remedy Event has occurred and is continuing and no such event or circumstance would occur as a result of its entering into or performing its obligations under this Agreement or any other Transaction Document.

(b) No litigation or other proceedings before any court or other Governmental Authority, official, tribunal, or arbitrator that could reasonably be expected, either individually or in the aggregate, to have a Material Adverse Effect, have been

commenced by or against the Counterparty or, to the best of the Counterparty's knowledge, are threatened against, the Counterparty, any other Person.

(c) It is not insolvent, is not in the zone of insolvency, is able to pay its debts when due, and has no insolvency proceedings threatened or outstanding against it.

(d) It is not materially overdue in the filing of any Tax return nor overdue in the payment of any material amount in respect of Tax.

(e) As of the date of this Agreement, it has entered into the Engagement Agreements in respect of each Claim as described on Annex II. True and complete copies of all Engagement Agreements have been provided to the Capital Providers.

(f) With respect to each Claim:

(i) it is the sole legal and beneficial owner of, has good title to, and possesses sole control of, such Claim, free and clear of any Adverse Claim;

(ii) (A) as of the date of this Agreement, it has not received any payments in connection with such Claim, and (B) any payments in connection with such Claim received after the date of this Agreement have been disclosed to the Capital Providers in accordance herewith;

(iii) it has full power and authority to bring such Claim and has obtained all necessary corporate and other authorizations to do so;

(iv) it has not disposed of, transferred, encumbered, or assigned all or any portion of such Claim (or any interest therein) or any Proceeds thereof, whether by way of security, subrogation, assignment to an insurer, or otherwise;

(v) it has not set off or agreed to set off any amounts against such Claim, and there exist no rights of set-off or similar rights against the Counterparty that could permit any set-off of or counterclaim against such Claim;

(vi) (A) it has not taken any steps or executed any documents which could reasonably be expected, either individually or in the aggregate, to have a Material Adverse Effect; (B) it has disclosed to the Capital Providers in accordance with its reporting obligations hereunder any instances in which anyone else has done or purported to do so; and (C) it has disclosed to the Capital Providers in accordance with its reporting obligations hereunder any asserted or unasserted claim, lien, or judgment against it which could reasonably be expected, either individually or in the aggregate, to have a Material Adverse Effect; and

(vii) subject to Section 9, it has disclosed to the Capital Providers all information (in any and all media) in the knowledge, possession, or control of the

Counterparty or any of its Representatives that is or is likely to be material to the Capital Providers' assessment of such Claim (including the enforcement and collection of any related settlement, award, or judgment); any and all such information has been provided to the Capital Providers in its true, complete, and correct form and is, to the knowledge of the Counterparty, accurate; the Counterparty believes (and does not have, and has not been informed by any of its Representatives of, any belief to the contrary) that such Claim is meritorious; and the Counterparty has not been advised by the applicable Nominated Lawyers or any other legal counsel or litigation funder that the Claim is unlikely to succeed.

(g) It is not relying on any communication (written or oral) of any Capital Provider or any of their respective Affiliates as legal advice or as a recommendation to enter into this Agreement or any other Transaction Document, or any of the transactions contemplated hereby or thereby, it being understood that information and explanations related to the terms and conditions of this Agreement and the other Transaction Documents, and the transactions contemplated hereby and thereby, shall not be considered legal advice or as such a recommendation.

(h) Based on the Counterparty's review of its corporate governance documents and policies, and after consultation with its legal counsel, the Counterparty has determined that the execution, delivery and performance of this Agreement and the Transaction Documents is authorized without any specific corporate action or authorization.

7. MATERIAL NON-PUBLIC INFORMATION

The Counterparty acknowledges that it may from time to time be in possession of material non-public information relating to the Capital Providers and their Affiliates, their business, prospects, financial condition, results of operations, and strategy, including information about each Claim and its progress and prospects; and the Counterparty shall not, and shall direct its Representatives not to, disclose such information or trade (or encourage others to trade) securities of the Capital Providers or their Affiliates, to the extent publicly traded, on the basis of such material non-public information.

8. CONFIDENTIALITY

8.1 Exclusive Ownership of Information by Disclosing Party

Each recipient of Confidential Information hereunder (the "***Recipient***") agrees that all Confidential Information provided to it is and shall remain at all times the exclusive property of and owned by the other party (the "***Disclosing Party***"), or any of its Affiliates or contract counterparties, as the case may be; and that the Recipient's use or awareness of such Confidential Information shall create no rights, at law or in equity, in the Recipient in or to such information, or any aspect or embodiment thereof. Neither the execution of this Agreement or any other Transaction Document, nor the furnishing of any Confidential

Information hereunder, shall be construed as granting, whether expressly or by implication, estoppel or otherwise, any license to distribute or title to any patent, trademark, copyright, service mark, business and trade secret or other proprietary right, title or interest in or to such Confidential Information, or to use such Confidential Information for any purpose other than as specified in this Agreement or any other Transaction Document, or to constitute a waiver of any attorney-client privilege or work product protection.

8.2 Non-Disclosure of Information

(a) Other than pursuant to Section 8.4, the Recipient shall not for any reason (i) disclose, reveal, report, publish, transfer or make available, directly or indirectly, to any Person other than its Representatives authorized pursuant to Section 8.3, nor use for any purpose other than the fulfillment or enforcement of its obligations hereunder (collectively, "***Disclose***"), any Confidential Information provided to it by the Disclosing Party until the later of (A) the seventh (7^{th}) anniversary of the date of this Agreement or (B) the second (2^{nd}) anniversary of a Claim Resolution of all Claims to which such Confidential Information relates; nor (ii) in perpetuity Disclose any Protected Material provided to it by the Disclosing Party.

(b) To the extent the Counterparty provides the Capital Providers or any of their Affiliates with any material that is subject to the Agreed Confidentiality Order, the Capital Providers and their Affiliates agree to abide by the terms of such Agreed Confidentiality Order. The decision to provide the Capital Providers or any of their Affiliates with material that is subject to the Agreed Confidentiality Order shall be at the sole discretion of the Counterparty and the applicable Nominated Lawyers unless and until the Capital Providers or their designated agent(s) execute Attachment A to the Agreed Confidentiality Order pursuant to paragraph 6(b)(6) thereof, which they shall be entitled to do at their sole discretion.

(c) Moreover, notwithstanding any other provision of this Agreement, at no time shall the Recipient knowingly disclose any Confidential Information or Protected Material to any Adverse Party or any other adversary, potential adversary, or conduit to an adversary of the Counterparty, and the Recipient shall treat such materials in a manner that does not substantially increase the likelihood that any of the foregoing shall come into possession of it.

(d) No press release or other announcement concerning the existence of this Agreement, the parties to this Agreement, or the funding provided under this Agreement shall be made by any party without the prior written consent of the other party; provided however, that (i) the Capital Providers shall have the limited right to, at any time, describe the general nature of the funding provided under this Agreement on their or their Affiliates' websites or in filings and disclosures required by law, so long as such description does not identify the Counterparty or make express reference to a Claim; and (ii) the Counterparty shall be free, at any time, to disclose such information regarding the nature, terms and existence of this Agreement and the other Transaction Documents as the Counterparty, in its sole

discretion, determines it is required to disclose under the federal securities laws of the United States, provided that the Counterparty has provided the Capital Providers or its Affiliates a copy of such disclosure sufficiently in advance of the time such disclosure will be included in any report to be filed or furnished with the Securities and Exchange Commission such that the Capital Providers may consult with the Counterparty with respect thereto prior to the filing or furnishing of such report.

8.3 Confidentiality Procedures

The Recipient shall ensure that the Confidential Information it receives is not divulged or disclosed to any Person except its Representatives who have a "need to know" such information. The Recipient shall procure its Representatives' compliance with this Section 8 and shall be responsible for its or its Representatives' failure to so comply.

8.4 Judicial and Official Disclosure Requests

(a) If a Recipient receives a request, including in any judicial, arbitral, or administrative proceeding or by any Governmental Authority, to disclose any Confidential Information, then such Recipient shall, before complying with such request if legally permitted, promptly provide written notice of such request, including a copy of such request, to the Disclosing Party, sufficiently in advance so that the Disclosing Party may contest the requested disclosure. If, upon such notice, the Disclosing Party elects to contest the requested disclosure (all such contests being at the Disclosing Party's expense and under its control; provided that the Disclosing Party shall consult with the Recipient about such contests), to the extent legally permitted the Recipient shall not disclose any Confidential Information until such time as a final, non-appealable, or non-stayed order has been entered compelling such disclosure, and the Recipient shall cooperate with the Disclosing Party in its contest.

(b) If any such request for the disclosure of Confidential Information seeks disclosure of this Agreement, any other Transaction Document, any terms hereof or thereof, the identities of the Capital Providers or the Counterparty, or any communications between the Counterparty and the Capital Providers, then the Recipient shall (i) notify the other parties immediately; (ii) object to such disclosure on all applicable bases, including work product doctrine, common interest privilege, and relevance, as applicable; and (iii) cooperate in good faith with the other parties regarding the management of such objections.

(c) Should the Disclosing Party not contest the requested disclosure, the Recipient shall not have any obligation to do so; the Recipient may, however, contest the requested disclosure even if the Disclosing Party elects not to do so.

(d) Notwithstanding anything herein to the contrary, the obligations of the Recipient in connection with requests for the disclosure of Confidential Information described

in this Section 8.4 shall not apply with respect to requests made by a regulatory or self-regulatory body having jurisdiction over the Recipient when such disclosures are required by law as a matter of general or routine examinations in which no specific request is made for Confidential Information relating to the Disclosing Party or the Claim(s).

9. LEGAL PRIVILEGE

9.1 Common Interest Privilege Applies

The parties agree that the Counterparty, the Capital Providers, and the Capital Providers' Affiliates have a "common legal interest" in each Claim and its successful prosecution, this Agreement, the other Transaction Documents, and any discussion, evaluation and negotiation and other communications and exchanges of information relating thereto. The parties further agree that in providing to the Capital Providers or the Capital Providers' Affiliates any documents or information about any Claim, the Counterparty does not intend to waive any applicable Privilege or protection that may attach to the documents or information.

9.2 Information Subject to Privilege Protection

Notwithstanding any contrary provision of this Agreement, the parties agree that any Protected Material shall at all times remain subject to all applicable Privileges, it being the express intent of the parties and their Affiliates to preserve intact to the fullest extent applicable, and not to waive, by virtue of this Agreement or otherwise, in whole or in part, any and all Privileges to which Protected Material, or any part of it, is, may be or may in the future become subject. It is the good faith belief of the Disclosing Party that Privileges, including the common interest privilege, attach to the Protected Material and disclosure of Protected Material is made in reliance on that good faith belief.

9.3 Information Subject to Work Product Protection

The parties agree that without limiting the foregoing, any materials prepared in anticipation of litigation by or for the Counterparty, the Capital Providers, any of their respective Affiliates, or any of their respective Representatives shall remain subject to work product protection. The Capital Providers and their Affiliates shall be considered "representatives" of the Counterparty given that the Counterparty requested assistance and advice from them regarding the plausibility of the Counterparty's obtaining external capital to finance its legal claims. Moreover, the parties agree that information shared between the Counterparty and the Capital Providers is shared pursuant to a common interest and non-disclosure agreement (as set forth herein), and the exchange of such information does not increase the risk of disclosure, inadvertent or otherwise, to any Adverse Party or any other adversary and does not lessen or waive the protection secured under work product doctrine. Disclosure of work product is made in reliance on that good faith belief.

9.4 No Obligation to Provide Privileged Information

Notwithstanding other provisions of this Agreement, the Counterparty is not obliged to provide to the Capital Providers any information that is subject to attorney-client privilege; provided that if the Counterparty withholds from the Capital Providers information otherwise required by this Agreement on the basis of attorney-client privilege, any other Privilege, or any similar doctrine of confidentiality, it shall provide prompt notice thereof to the Capital Providers.

10. INDEMNIFICATION OF THE CAPITAL PROVIDERS

(a) The Counterparty agrees to indemnify, defend and hold each Capital Provider and its Representatives ("***Indemnitees***") free and harmless from and against any and all losses, costs, charges, damages, and expenses (including reasonable attorneys' fees and costs of experts and advisors) (collectively, "***Losses***") that may be imposed on, incurred by or asserted against any Indemnitee in any matter relating to any Transaction Document, Claim, or actual or prospective investigation, litigation or other proceeding relating to a Transaction Document or Claim; provided that (i) any Losses arising from the gross negligence or willful misconduct of a Capital Provider or any of its Representatives, as determined by a court of competent jurisdiction in a final non-appealable judgment or order, shall be excluded from the foregoing indemnification and (ii) if a Capital Provider suffers any loss of its investment due to insufficient Proceeds, such loss shall not constitute indemnified Losses hereunder unless (and only to the extent that) such insufficiency was caused by a material breach of this Agreement caused by the Counterparty.

(b) Any amounts owed as a result of the indemnification obligations set forth in this Section 10 are independent of the Counterparty's obligation to pay the Capital Providers' Entitlement. Any Indemnitee who receives notice of a claim for which it shall seek indemnification hereunder shall promptly notify the party from which the Indemnitee shall seek indemnification (the "***Indemnifying Party***") of such claim in writing. The Indemnifying Party shall have the right to assume the defense of such action at its cost with counsel reasonably satisfactory to the Indemnitee, but shall not have the right to settle or compromise any claim or action without the written consent of the Indemnitee. The Indemnitee shall have the right to participate in such defense with its own counsel at its cost. Any failure by the Indemnitee to give prompt notice of a claim hereunder shall not relieve the Indemnifying Party of its indemnification obligation except to the extent the Indemnifying Party is actually prejudiced by such failure.

11. EXCULPATION; REINSTATEMENT

(a) Other than its obligations to provide the Capital Amounts to the Counterparty, no Capital Provider shall have any obligation to fund any fees, expenses, or other sums in relation to any Claim, and all such fees, expenses, or other sums shall be the sole responsibility of the Counterparty. Without limiting the generality of the foregoing,

no Capital Provider shall have any obligation to pay any sums awarded against, or penalties incurred by, the Counterparty, including any costs orders, awards, interest, damages, expenses, or penalties against the Counterparty, nor to fund any legal fees or any other costs whatsoever incurred as a result of defending any counterclaim brought against the Counterparty in relation to any Claim or defending any enforcement or other proceedings against the Counterparty.

(b) The liability of each Capital Provider under this Agreement and the other Transaction Documents (and the transactions contemplated hereby and thereby) in relation to any Claim is equal to the aggregate of all Capital Amounts committed by such Capital Provider in relation to such Claim, except in the event of any fraud of such Capital Provider or reckless activity of such Capital Provider amounting to fraud. This limitation of liability is absolute and applies to liability for (without limitation) breach of contract, negligence and gross negligence, and for any damages that may constitute compensatory damages, lost profit, expenses, costs, losses or charges, or consequential, exemplary or punitive damages or otherwise. This limitation of liability extends to each Capital Provider and its Representatives.

(c) To the extent any payment received by the Capital Providers, or obligation incurred by the Counterparty pursuant to any of the Transaction Documents, is subsequently invalidated, declared to be fraudulent or preferential, set aside or required to be repaid in whole or in part by the Capital Providers or paid over to a trustee, receiver or any other entity, whether under any bankruptcy law, insolvency, fraudulent transfer law or otherwise (any such payment or obligation being hereinafter referred to as a "***Challenged Item***"), then the obligations of the Counterparty pursuant to this Agreement with respect to such Challenged Item shall (i) be fully reinstated and revived, as the case may be, notwithstanding such payment or incurrence, and (ii) to the extent of each such Challenged Item, remain effective and continue in full force and effect as if said Challenged Item had not occurred or been made. The Counterparty shall indemnify each Capital Provider on demand for all reasonable third party costs and expenses (including the reasonable fees and disbursements of outside counsel) incurred by such Capital Provider in connection with such rescission or revival, including any such costs and expenses incurred in defending against any claim alleging that such payment constituted a preference, fraudulent transfer, or similar payment.

12. REMEDY EVENTS

The occurrence at any time with respect to the Counterparty of any of the following events constitutes a "***Remedy Event***":

12.1 Failure to Pay or Deliver

The Counterparty fails to make, when and where due, any payment owing to a Capital Provider hereunder.

12.2 Breach or Repudiation

Other than the obligations referenced in Section 12.1, which is governed by such section, the Counterparty fails to comply with or perform any of its obligations in accordance with this Agreement or any other Transaction Document if (a) such failure, if remediable, is not remedied within (subject to Section 13.3) ten (10) Business Days after written notice thereof is given to the Counterparty and (b) (i) such failure could reasonably be expected to have a Material Adverse Effect; or (ii) the Counterparty or any of its Representatives disaffirms, disclaims, repudiates, or rejects in writing, in whole or in part, or challenges the validity of, this Agreement or any other Transaction Document.

12.3 Misrepresentation

A representation by the Counterparty in this Agreement or any other Transaction Document proves to have been incorrect or misleading in any material respect when made or deemed to have been made.

12.4 Bankruptcy

Any of the following occurs with respect to the Counterparty: (a) the voluntary or involuntary commencement of a case or proceeding by or against it under any applicable bankruptcy, insolvency or similar law affecting creditors' rights now or hereafter in effect, or any other procedure under any law of any jurisdiction having a similar or analogous nature or effect, and such case, proceeding or procedure is not dismissed or otherwise terminated within sixty (60) days of its commencement; or entry of a decree or order by a court of competent jurisdiction, appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or similar official having powers over it or all or a substantial part of its property; (b) the inability or failure generally, or admission in writing of its inability, to pay its debts as they become due; (c) dissolution (other than pursuant to a consolidation, amalgamation or merger); or (d) the adoption of any resolution or other authorization, or the taking of any action in furtherance of, or indicating its consent or intent to consent to, approve of, or acquiesce in, any of the foregoing by its board of directors (or similar governing body) or any committee thereof or by its equityholders entitled to vote on and authorize the same.

12.5 Reorganization Without Assumption

The Counterparty consolidates or amalgamates with, or merges with or into, or transfers all or substantially all its assets to, or reorganizes, reincorporates, reconstitutes or divides into or as, another entity (or other entities) and as a direct or indirect result of such consolidation, amalgamation, merger, transfer, reorganization, reincorporation, reconstitution or division, either (a) no single resulting, surviving or transferee entity (a "Counterparty Successor") has assumed all the obligations of the Counterparty under this Agreement and/or the other Transaction Documents; or (b) the assets against which the Capital Amounts have been committed are no longer held by such a Counterparty Successor.

13. REMEDIES

13.1 Available Remedies Generally

If at any time a Remedy Event has occurred with respect to one or more Claims, the Capital Providers shall be entitled to (except as otherwise provided in this Section 13) exercise one or more of the following remedies (in each case without thereby relieving the Counterparty of any of its obligations under Section 3):

(a) with respect to those Claim(s) to which the Remedy Event relates, the Capital Providers may take any and all actions on behalf of the Counterparty that the Capital Providers may deem necessary or advisable in order to prosecute the Claim(s) to bring about the monetization thereof through a Claim Resolution and to collect and enforce any settlement, final judgment or award; and, in connection therewith, the Counterparty hereby (i) irrevocably appoints Capital Provider No. 1 as the Counterparty's attorney-in-fact, with full authority in the place and stead of the Counterparty and in the name of the Counterparty or otherwise, from time to time following the date such Remedy Event occurred, in Capital Provider No. 1's discretion, to take any such actions to the extent consistent with the Counterparty's interests in the Claim, including to settle or compromise the Claim or to appoint new Nominated Lawyers, and (ii) agrees to, and to cause its Affiliates and its and their Representatives to, cooperate fully with the Capital Providers and counsel in all matters pertaining to the Claim(s), including producing necessary documents, submitting to examination for the preparation of written statements and subscribing to the same under oath if required, consulting with counsel and its designees as they require for purposes of prosecuting such Claim(s) and enforcing any award, and appearing at any hearings in connection with such statements or such Claim(s) generally; and

(b) subject to the provisions of Section 29, the Capital Providers may pursue all other legal and equitable remedies available to the Capital Providers under applicable law in connection with the enforcement of its rights under this Agreement and the other Transaction Documents.

13.2 Remedies Cumulative

Except as provided otherwise in this Agreement, the rights, powers, remedies and privileges provided in this Agreement and the other Transaction Documents are cumulative; may be exercised singularly, concurrently, or successively at the Capital Providers' option; and may be exercised or enforced without constituting a bar to the exercise or enforcement of any other such rights, powers, remedies and privileges.

13.3 Cure Periods

If the failure to cure a Remedy Event described in Section 12.2 within a period of time shorter than ten (10) Business Days would be reasonably likely to result in an adverse effect

on a Claim or the value or collectability thereof due to exigencies of the litigation or arbitration process, the Capital Providers may by notice to the Counterparty shorten the cure period to the extent necessary to avoid or minimize such likelihood.

14. ENFORCEMENT OF CLAIM RESOLUTION

If, for any reason other than the bankruptcy or liquidation of an Adverse Party, or the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or similar official having powers over it or all or a substantial part of an Adverse Party's property, by the date that is one-hundred-eighty (180) days after the date of any Claim Resolution, any portion of a judgment, award, or settlement payment owing to the Counterparty as a result thereof remains unsatisfied, the Capital Providers shall, at their option and upon notice to the Counterparty, be entitled to engage judgment enforcement professionals of their own choosing (including those affiliated with the Capital Providers) to pursue enforcement of the same. In the event the Capital Providers elect to do so, (a) they shall pay their designated judgment enforcement professionals their reasonable and customary fees and expenses, (b) any and all costs incurred by the Capital Providers in such regard shall constitute Capital Amounts in respect of the Claim to which such enforcement activities relate, and (c) in consideration of their provision of such Capital Amounts, the Capital Providers' Entitlement shall be increased by an amount equivalent to such additional Capital Amounts plus a rate of return on such additional Capital Amounts equal to the highest effective rate of return applicable to any Capital Amounts set forth in Section 2.

15. TERMINATION BY THE COUNTERPARTY

The Counterparty shall have the right, but not the obligation, to terminate the Counterparty's obligations under this Agreement upon ten (10) Business Days' written notice to the Capital Providers from and after the Capital Providers' failure to pay the full Initial New Investment Amount by the Initial New Investment Payment Date, provided that such failure is continuing at the end of the ten (10) Business-Day period. In the event of such termination by the Counterparty, this Agreement shall be deemed null and void, provided however that the First Amended Agreement shall remain in full force and effect. In the event the Capital Providers have made a partial payment of the Initial New Investment Amount (and/or any Additional Payment), the Counterparty shall return such partial payment to the applicable Capital Provider(s) before the Counterparty exercises its termination rights hereunder.

16. LIMITATIONS ON TRANSFER, SUCCESSORS AND ASSIGNS; THIRD PARTY BENEFICIARIES

(a) Neither this Agreement nor any other Transaction Document, nor any right or obligation in or under this Agreement or any other Transaction Document, may be transferred (whether by way of security or otherwise) or delegated by the Counterparty without the prior written consent of the Capital Providers, except that upon written notice to the Capital Providers, the Counterparty may (without

prejudice to any other right or remedy of the Capital Providers under Section 12 or 13) make a transfer of all (but not less than all) of its rights and obligations under this Agreement and the other Transaction Documents pursuant to a consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all its assets to, another entity other than an Adverse Party or an Affiliate of an Adverse Party, provided that such transfer would not cause a Material Adverse Effect. Each Capital Provider may assign its rights and obligations under this Agreement and the other Transaction Documents, in whole or in part, to another Person without the consent of the Counterparty. Any purported transfer that is not in compliance with this provision shall be void.

(b) This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

(c) No Person other than the parties hereto (and the Indemnitees and any permitted transferee hereunder) shall have any rights under this Agreement.

17. TAX WITHHOLDING

The Counterparty shall make all payments under or in connection with this Agreement without any deduction or withholding for or on account of any Tax, save only as may be required by applicable law. If any such deduction or withholding is required by law to be made, the Counterparty shall (a) promptly notify the applicable Capital Providers upon becoming aware that it must make such a deduction or withholding; (b) pay to the relevant authorities (within the time allowed) the full amount required to be deducted or withheld (including the full amount required to be deducted or withheld from any additional amount paid by the Counterparty to the applicable Capital Providers under clause (d) of this Section 16); (c) promptly provide an official receipt (or a certified copy or such other evidence reasonably acceptable to the applicable Capital Providers) evidencing the relevant withholding and payment to such authorities; and (d) pay to the applicable Capital Providers such additional amounts as are necessary to ensure that (after making any such withholdings or deductions) the net amount actually received by such Capital Providers in respect of the payment due from the Counterparty equals the amount which such Capital Providers would have received if no such withholdings or deductions had been required.

18. ANTI-CORRUPTION; DATA PROTECTION

(a) The Counterparty acknowledges that the Capital Providers seek to comply with all applicable anti-money laundering, sanctions, anti-corruption, and anti-bribery laws and regulations (collectively, "***Anti-Corruption Rules***"). In furtherance of these efforts, the Counterparty represents and warrants as follows:

(i) it is not the target of any economic or financial sanctions with respect to the United States Government (including the U.S. Department of Treasury Office of Foreign Assets Control), the United Nations Security Council or the European Union; and

(ii) neither it nor any of its Affiliates, nor to its knowledge anyone acting on its behalf, has at any time:

(A) violated, or engaged in any activity, practice or conduct which would violate, any applicable Anti-Corruption Rule;

(B) used funds or assets for any unlawful contribution, gift, entertainment or other unlawful expense, or made any bribe, rebate, payoff, influence payment, kickback or other unlawful payment; or

(C) directly, or indirectly through its agents, Representatives or any other Person authorized to act on its behalf, offered, promised, paid, given, or authorized the payment or giving of money or anything else of value to any government official or other Person while knowing or having reason to believe that some portion or all of the payment or thing of value will be offered, promised, or given, directly or indirectly, to a government official or another Person for the purpose of influencing any act or decision of such government official or such Person in his/her or its official capacity, including a decision to do or omit to do any act in violation of his/her or its lawful duties or proper performance of functions or inducing such government official or such Person to use his/her or its influence or position with any Government Authority or other Person to influence any act or decision,

in each case in order to obtain or retain business for, direct business to, or secure an improper advantage for, the Counterparty or any of its Affiliates.

(b) The Counterparty will not engage in any business or other activities, including through agents or subcontractors, that could cause a Capital Provider to be in direct or indirect violation of any applicable Anti-Corruption Rule.

(c) The Counterparty acknowledges and agrees that, notwithstanding anything to the contrary, the Capital Providers shall have no obligation to make or receive any payment or take any other action if the Capital Providers conclude in good faith that making or receiving such payment or taking such action would violate any applicable Anti-Corruption Rule.

(d) In connection with the exchange of information under this Agreement, each of the Counterparty and the Capital Providers will comply with all applicable data protection laws, including the General Data Protection Regulation (GDPR), as required, and not process any personal data other than instructed unless processing required by applicable law to which the contracted processor is subject. Each will safeguard all data, including implementing appropriate security measures, as required under applicable data protection laws.

19. NOTICES

19.1 Effectiveness of Notices

Any notice or other communication in respect of this Agreement shall be in writing and may be given in any manner described below to the address or number provided for the recipient in Annex I and shall be deemed effective as indicated:

(a) if delivered in person or by courier, on the date it is received;

(b) if sent by certified or registered mail or the equivalent (return receipt requested), on the date it is received; or

(c) if sent by email, on the date sent in the absence of any immediate automated response indicating the message was not received or would not be timely read, and if such an immediate automated response is received by the sender, on the date the sender receives an acknowledgement from the recipient,

unless the date of receipt is not a Business Day or the communication is received after the close of business on a Business Day, in which case such communication shall be deemed given and effective on the first following day that is a Business Day. Notices to the Counterparty shall be copied to the applicable Nominated Lawyers, and the time of effectiveness of each such notice shall be the effective time of receipt by either the Counterparty or such Nominated Lawyers, whichever occurs earlier.

19.2 Change of Details

Either party may by notice to the other in accordance with Section 18.1 change the address or email details at which notices or other communications are to be given to it.

20. AMENDMENTS

No amendment, modification or waiver in respect of this Agreement shall be effective unless in writing and executed by the Counterparty and the Capital Providers.

21. ENTIRE AGREEMENT

This Agreement constitutes the entire agreement between the parties relating to the subject matter hereof and is the final and complete expression of their intent. The parties represent and warrant that no prior or contemporaneous negotiations, promises, agreements, covenants or representations of any kind or nature, whether made orally or in writing, have been made or relied upon by them, whether in negotiations leading to this Agreement or relating to the subject matter hereof, which are not expressly contained herein, or which have not become merged and finally integrated herein; it being the intention of the parties that in the event of any subsequent litigation, controversy or dispute concerning the terms and provisions of this Agreement, no party shall be permitted to offer or introduce oral or

extrinsic evidence concerning the terms and conditions hereof that are not included or referred to herein and not reflected in writing.

22. COUNTERPARTS

This Agreement and the other Transaction Documents (and each amendment, modification and waiver in respect thereof) may be executed and delivered in counterparts (including by facsimile or digital transmission), each of which shall be deemed an original.

23. SURVIVAL OF OBLIGATIONS

With respect to each Claim, the rights and obligations of the parties under Sections 3, 4, 6, 7, 8, 9, 10, 11 and 13 through 30 in relation to such Claim shall survive any Claim Resolution or the exercise by the Capital Providers of any remedies with respect to such Claim pursuant to Section 13.

24. NO WAIVER

A failure or delay in exercising any right, power or privilege in respect of this Agreement or any other Transaction Document shall not be presumed to operate as a waiver, and a single or partial exercise of any right, power or privilege shall not be presumed to preclude any subsequent or further exercise, of that right, power or privilege or the exercise of any other right, power or privilege.

25. SEVERABILITY

If any term of this Agreement or any other Transaction Document, or the application thereof to either party or any circumstance, is held to be unenforceable, invalid or illegal (in whole or in part) for any reason (in any relevant jurisdiction), the remaining terms, modified by the deletion of the unenforceable, invalid or illegal portion, shall continue in full force and effect, and such unenforceability, invalidity, or illegality shall not otherwise affect that of the remaining terms, so long as this Agreement and the other Transaction Documents as so modified continues to express, without material change, the original intentions of the parties as to the subject matter hereof and the deletion of such portion of this Agreement or any other Transaction Document shall not substantially impair the respective expectations or reciprocal obligations of the parties or the practical realization of the benefits that would otherwise be conferred upon the parties. The parties shall endeavour in good faith negotiations to replace any prohibited or unenforceable provision with a valid provision the economic effect of which comes as close as possible to that of the prohibited or unenforceable provision.

26. EXPENSES

(a) Except as otherwise expressly provided in this Agreement or any other Transaction Document, each party shall bear its own expenses in connection with the

negotiation, execution, delivery and performance of this Agreement and the other Transaction Documents.

(b) The Counterparty shall, on demand, indemnify and hold harmless the Capital Providers for and against all reasonable out-of-pocket expenses, including legal fees and disbursements, incurred by the Capital Providers by reason of the enforcement and protection of their rights under this Agreement or any other Transaction Document, including costs of collection and of the enforcement of this Section 25(b).

27. RELATIONSHIP OF PARTIES

(a) The Capital Providers and certain of their Affiliates are engaged in a capital provision and advisory business principally focused on assets connected to litigation, arbitration or mediation; one or more other Affiliates focus on investment in assets connected to litigation, arbitration or mediation. The Capital Providers and their Affiliates are not law firms and are not engaged in the practice of law with respect to any Claim or the Counterparty. The Counterparty may not, and shall not, rely on any of the Capital Providers or their Affiliates for legal advice.

(b) Nothing in this Agreement or any other Transaction Document shall give rise to or be construed to create a fiduciary, lawyer-client, lender-borrower, agency, or other non-contractual relationship between the Counterparty and any Capital Provider.

(c) Neither this Agreement nor any other Transaction Document creates any partnership, joint venture, or any other type of affiliation between the Counterparty and any Capital Provider, nor does this Agreement or any other Transaction Document create a joint interest in any Claim for any purpose, including for U.S. federal, state and local income tax purposes. The Capital Providers are not partners, nor are they engaged in any partnership or joint venture with one another.

28. GOVERNING LAW

Except as set forth otherwise in Section 29, this Agreement shall be construed in accordance with, and this Agreement and all matters arising out of or relating in any way whatsoever to this Agreement (whether in contract, tort or otherwise) shall be governed by, the law of the State of New York (without reference to any conflict of law principles or choice of law doctrine that would have the effect of causing this Agreement to be construed in accordance with or governed by the law of any other jurisdiction).

29. DISPUTE RESOLUTION

(a) Any and all of the following shall (to the exclusion of any other forum except as set forth herein) be referred to and finally resolved by arbitration under the LCIA Arbitration Rules (2014) of the London Court of International Arbitration (the "***Rules***" and the "***LCIA***"), which Rules are deemed to be incorporated by reference

into this clause: any dispute, controversy or claim arising out of or in connection with (i) this Agreement (including this Section 29); (ii) any other Transaction Document; (iii) any relationship or interaction between the Counterparty, on the one hand, and any Capital Provider(s), on the other hand; or (iv) a claim or assertion by any other Person of any right arising out of or in connection with this Agreement (including this Section 29) or any other Transaction Document, including, as to all such disputes, claims and controversies, any question regarding (x) the existence, arbitrability, validity or termination of this Agreement (including this Section 29) or any other Transaction Document, (y) any relationship or interaction between the above identified parties, or (z) the obligation of any Person to arbitrate any such dispute.

(b) Except as otherwise specifically provided in this Agreement (including this Section 29) or any other Transaction Document, (i) the arbitral tribunal (the "***Tribunal***") shall have the exclusive power to grant any remedy or relief that it deems appropriate, whether provisional or final, including but not limited to emergency relief, injunctive relief and/or any other interim or conservatory measures or other relief permitted by the Rules (collectively, "***Conservatory Measures***"), and any such measures ordered by the Tribunal shall, to the extent permitted by applicable law, be deemed to be a final award on the subject matter of such measures and shall be enforceable as such in any court of appropriate jurisdiction; and (ii) prior to the formation or expedited formation of the Tribunal (under Article 5 or 9A of the Rules), the provisions of Article 9B of the Rules shall apply to any request for Conservatory Measures.

(c) The referral of a dispute to arbitration shall not suspend or interfere with the Counterparty's (or the Payment Agent's) obligation to make timely payment to the Capital Providers of the Capital Providers' Entitlement (or any portion thereof); provided that if the Counterparty disputes its (or the Payment Agent's) obligation hereunder to pay any amount to the Capital Providers, the Counterparty must (or, as applicable, cause the Payment Agent to) (i) commence an arbitral proceeding pursuant to this Section 29 within two (2) Business Days after the date such amount was (but for the dispute) due, (ii) make timely payment to the Capital Providers of any undisputed amounts and (iii) immediately deposit any and all disputed amounts in a dedicated account with the LCIA as fund holder, which amounts shall be released, including any interest thereon, as directed in writing by the Tribunal in any award, order or decision, unless the parties expressly agree otherwise in writing.

(d) Any request for arbitration or response thereto submitted to the LCIA may be delivered by any means (including email) set forth in Section 18 (Notices) or any other means that is reasonably likely to achieve actual service.

(e) The number of arbitrators shall be three. Subject to Article 8 of the Rules, each party to the arbitration shall nominate one arbitrator and the two arbitrators nominated by the parties shall, within ten (10) days of the nomination of the second

party-nominated arbitrator, agree upon and nominate a third arbitrator who shall act as Chairman of the Tribunal. If no agreement is reached within ten days or at all, the LCIA Court shall select and appoint a third arbitrator to act as Chairman of the Tribunal.

(f) The seat, or legal place, of arbitration shall be New York, New York. Notwithstanding the terms of Section 27 (Governing Law), the U.S. Federal Arbitration Act shall govern the interpretation, application and enforcement of this Section 29 and any arbitration proceedings conducted hereunder. The language to be used in the arbitral proceedings shall be English.

(g) In addition to the confidentiality requirements imposed on the parties by Article 30 of the Rules, each party is obligated to keep confidential the existence and content of any arbitral proceedings initiated hereunder and any rulings or award except (i) to the extent that disclosure may be required of a party to fulfill a legal duty, protect or pursue a legal right, or enforce or challenge an award in *bona fide* legal proceedings before a state court or other judicial authority, (ii) with the consent of all parties, (iii) where needed for the preparation or presentation of a claim or defense in such arbitral proceedings, (iv) where such information is already in the public domain other than as a result of a breach of this clause (g), or (v) by order of the Tribunal upon application of a party.

(h) In addition to the authority conferred upon the Tribunal by the Rules, the Tribunal shall have the authority to order production of documents in accordance with the IBA Rules on the Taking of Evidence in International Arbitration as current on the date of the commencement of the arbitration. No other form of disclosure or discovery shall be permitted.

(i) The judgment of any court of appropriate jurisdiction shall be entered upon any award made pursuant to an arbitration conducted pursuant to the terms of this Section 29.

(j) Any attempt by the Counterparty, a Capital Provider, or any other Person subject to this Section 29 to seek relief or remedies in any forum that contravenes this Section 29 shall constitute a breach of this Agreement and entitle the non-breaching party to damages, equitable relief, and full indemnification against all costs and expenses incurred in connection therewith.

(k) The parties, being sophisticated commercial entities with access to counsel, irrevocably waive and forever and unconditionally release, discharge, and quitclaim any claims, counterclaims, defenses, causes of action, remedies and/or rights that they have or may have in the future arising from any doctrine, rule or principle of law or equity that this Agreement or any other Transaction Document, or any of the relationships and transactions contemplated hereby or thereby, (i) are against the public policy of any relevant jurisdiction; (ii) are unconscionable or contravene any laws relating to consumer protection; (iii) are usurious or call for payment of

interest at a usurious rate; (iv) were entered into under duress; (v) were entered into as a result of actions by a Capital Provider that violated its obligations of good faith and/or fair dealing; (vi) constitute illegal gambling or the sale of unregistered securities; (vii) constitute malicious prosecution, abuse of process or wrongful initiation of litigation; or (viii) constitute champerty, maintenance, barratry or any impermissible transfer, assignment or division of property or choses in action. The parties specifically agree that any issues concerning the scope or validity of the foregoing waiver shall be within the exclusive jurisdiction of the Tribunal.

30. ADMINISTRATIVE AND COLLATERAL AGENT

(a) Each of Capital Provider No. 2 and Capital Provider No. 3 hereby appoints Capital Provider No. 1 as administrative and collateral agent for the Capital Providers hereunder. As such, Capital Provider No. 1 is hereby authorized to act on behalf of Capital Provider No. 2 and Capital Provider No. 3 for the purpose of (i) giving and receiving notices, waivers, consents, approvals and instructions; (ii) acquiring, holding and enforcing any and all liens on collateral granted by the Counterparty to secure the Capital Providers' rights hereunder; (iii) enforcing any other rights of the Capital Providers under this Agreement and any other Transaction Document, including filing and proving a claim for the aggregate amount of the Counterparty's obligations to the Capital Providers hereunder in the event of any bankruptcy or insolvency proceeding relating to the Counterparty; and (iv) taking such other actions as Capital Provider No. 1 deems appropriate to administer this Agreement and the other Transaction Documents; in each case together with such powers and discretion as are reasonably incidental thereto.

(b) The use of the term "agent" or any similar or equivalent term in connection with the foregoing appointment is not intended to imply any fiduciary or other duties arising under legal principles governing agency relationships. Capital Provider No. 1 shall not have any duties or obligations in its capacity as administrative and collateral agent except those expressly set forth herein, and its appointment and all rights and duties of it as an agent hereunder shall be ministerial and administrative in nature. Notwithstanding the appointment of Capital Provider No. 1 as administrative and collateral agent, Capital Provider No. 1 shall have the same rights and powers in its capacity as a Capital Provider hereunder as Capital Provider No. 2 and Capital Provider No. 3, and Capital Provider No. 1 may exercise all such rights and powers as though it were not administrative or collateral agent. The provisions of this Section 29 are for the benefit of the Capital Providers; no other party shall have any rights as a third party beneficiary of any provision of this Section 29, provided that the Counterparty shall be entitled to rely on any notices, waivers, consents, approvals or instructions provided to it by Capital Provider No. 1 as being on behalf of all the Capital Providers.

(c) Capital Provider No. 1 may perform any and all of its duties and exercise its rights and powers as administrative and collateral agent hereunder by or through any one or more sub-agents or servicing entities appointed by it. The exculpatory provisions

in the following clause (d) shall apply to any such sub-agent or servicing entity.

(d) Capital Provider No. 1 shall not be liable for any action taken or not taken by it (i) with the consent or at the request of Capital Provider No. 2 and Capital Provider No. 3, (ii) as Capital Provider No. 1 believed in good faith was necessary under the circumstances or (iii) in the absence of its own gross negligence or willful misconduct. In its capacity as administrative and collateral agent, Capital Provider No. 1 shall be entitled to rely upon, and shall not incur any liability for relying upon, any notice, request, certificate, consent, statement, instrument, document or other writing believed by it to be genuine and to have been signed, sent or otherwise authenticated by the proper Person.

31. RULES OF CONSTRUCTION

Unless the context otherwise clearly requires: (a) the definitions of terms herein shall apply equally to the singular and plural forms of the terms defined; (b) whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms; (c) the words "include", "includes" and "including" shall be deemed to be followed by the phrase "without limitation"; (d) the word "shall" shall be construed to have the same meaning and effect as the word "will"; (e) any definition of or reference to any agreement, instrument or other document herein shall be construed as referring to such agreement, instrument or other document as from time to time amended, supplemented, restated or otherwise modified (subject to any restrictions on such amendments, supplements or modifications set forth herein); (f) any reference herein to any Person shall be construed to include such Person's successors and assigns; (g) the phrase "to its knowledge" and phrases of similar import shall be construed to mean the best knowledge, after due inquiry, of any director, officer, manager, member, partner, principal or employee of the entity to which the phrase refers; (h) the words "herein", "hereof" and "hereunder", and words of similar import, shall be construed to refer to this Agreement in its entirety and not to any particular provision hereof; (i) all references herein to Sections, Annexes, Exhibits and Schedules, as applicable, shall be construed to refer to Sections of, and Annexes, Exhibits and Schedules to, this Agreement, and the same are incorporated herein as part of this Agreement; and (j) the headings used in this Agreement are for convenience of reference only and are not to affect the construction of or to be taken into consideration in interpreting this Agreement.

[Remainder of this page intentionally left blank.]

IN WITNESS WHEREOF, the parties have executed and delivered this Amended and Restated Capital Provision Agreement as of the date first written above.

Capital Provider No. 1:

ROSLINDALE LLC

By: _____
Name:
Title: Authorized Signatory

Capital Provider No. 2:

POSEN INVESTMENTS LP

By: Chicago Onshore Funding Limited,
Its General Partner

_____
Name:
Title: Director

Capital Provider No. 3:

KENOSHA INVESTMENTS LP

By: Green Bay GP LLC,
Its General Partner

_____
Name:
Title: Authorized Signatory

IN WITNESS WHEREOF, the parties have executed and delivered this Amended and Restated Capital Provision Agreement as of the date first written above.

Counterparty:

SYSCO CORPORATION

By: DocuSigned by: Eve M. McFadden
88140BD4A9E4F9...
Name: Eve M. McFadden
Title: Senior Vice President, General Counsel and Corporate Secretary

EXHIBIT A

Defined Terms

"***Additional Payment***" has the meaning set forth in Section 2.1(a)(iii).

"***Advanced Expenses***" means the total amount of reasonable unreimbursed expenses (e.g. experts, court reporters, travel expenses) incurred by the applicable Nominated Lawyers in connection with the Chickens Claim.

"***Adverse Claim***" means, with respect to any Claim or any interest therein or any Proceeds thereof, (i) any mortgage, deed of trust, lien, pledge, hypothecation, encumbrance, charge or security interest in, on or affecting such Claim or any interest therein or any Proceeds thereof, (ii) the interest of a vendor or a lessor under any conditional sale agreement, capital lease or title retention agreement (or any financing lease having substantially the same economic effect as any of the foregoing) relating to such Claim or any interest therein or any Proceeds thereof, (iii) any purchase option, call or similar right of a third party with respect to such Claim or any interest therein or any Proceeds thereof and (iv) any other claim that a claimant has an interest in such Claim or any interest therein or any Proceeds thereof or that it is a violation of the rights of the claimant for another person to hold, transfer or deal with such Claim or any interest therein or any Proceeds thereof.

"***Adverse Party***" means, with respect to any Claim, individually and collectively, the Person(s) named as defendants or counterclaim defendants in such Claim, as set forth on Annex II, and any other Person added or joined to the Claim from time to time as a defendant or indemnitor or against whom proceedings are asserted or threatened even if such Person is not named or served, and in each case their respective Affiliates and successors.

"***Affiliate***" means, with respect to a specified Person, another Person that directly, or indirectly through one or more intermediaries, Controls or is Controlled by or is under common Control with the Person specified. For this purpose, "***Control***" means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ability to exercise voting power, by contract or otherwise, and "***Controlling***" and "***Controlled***" have meanings correlative thereto.

"***Agreed Confidentiality Order***" means the Agreed Confidentiality Order issued in connection with the Chickens Claim on November 8, 2016.

"***Anti-Corruption Rules***" has the meaning set forth in Section 17.

"***Applicable Proceeds***" has the meaning set forth in Section 2.2(d)(ii).

"***Beef Claim***" has the meaning set forth in the Recitals hereto.

"***Business Day***" means a day on which commercial banks and foreign exchange markets settle payments and are open for general business (including dealings in foreign exchange and foreign currency deposits) in New York.

"***Capital Amounts***" means the amounts set forth as such in Section 2.1.

"***Capital Providers***", "***Capital Provider No. 1***", "***Capital Provider No. 2***" and "***Capital Provider No. 3***" have the meanings set forth in the introductory paragraph of this Agreement.

"***Capital Providers' Entitlement***" has the meaning given thereto in Section 2.2(a).

"***Chickens Claim***" has the meaning set forth in the Recitals hereto.

"***Chickens Invested Amount***" means the sum of all amounts actually paid to the Counterparty by the Capital Providers hereunder in respect of the Chickens Claim.

"***Chickens Multiple***" has the meaning given thereto in Section 2.2(b).

"***Chickens Percentage Return***" has the meaning given thereto in Section 2.2(b).

"***Chickens Preferred Return***" has the meaning given thereto in Section 2.2(b).

"***Chickens Proceeds***" has the meaning given thereto in Section 2.2(b).

"***Claim***" means any of the Chickens Claim, Pork Claim, Beef Claim, [redacted], or [redacted], as applicable; and "***Claims***" means, collectively, the Chickens Claim, Pork Claim, Beef Claim, [redacted], and [redacted].

"***Claim Costs***" has the meaning set forth in Section 5.3(b).

"***Claim Resolution***" means either full and final settlement of a Claim or the entry of a final, non-appealable and enforceable award or judgment, in either case resolving with prejudice all aspects and elements of a Claim. In circumstances where a final, non-appealable and enforceable award or judgment does not automatically come into being upon the rendering of a dispositive decision, a Claim Resolution shall be deemed to have occurred on the date that is sixty (60) days following such dispositive decision in the absence of any subsequent challenge thereto.

"***Confidential Information***" means any non-public, confidential or proprietary information relating to: (i) a Capital Provider and its Affiliates and Representatives, information provided by them about their business and operations or the structures and economic arrangements they use in their business, including the nature, terms and existence of this Agreement and the other Transaction Documents, the existence of any relationship between the Counterparty and a Capital Provider or any of its Affiliates or Representatives, and the discussions and negotiations related thereto; (ii) any Claim, including the names of the parties and potential other parties to such Claim; the factual, legal, technical, economic

and financial background of such Claim; and the procedural status, theories, strategies and tactics for the prosecution or defense of such Claim; (iii) billing arrangements, rates, financial or fee arrangements; (iv) any financial statements, accounts or other similar information or materials; (v) business or financial information, business plans and relationships, marketing or product data; (vi) algorithms, computer databases, computer programs, computer software and systems, intellectual property, trade secrets and trademarks; (vii) research, scientific data, specifications, technical data, techniques and technology; and (viii) other proprietary or non-public information, data or material; in all cases regardless of whether such information is (A) written or oral, irrespective of the form or storage medium, or (B) specifically identified as "Confidential". Notwithstanding the foregoing, Confidential Information does not include information that (x) was or becomes generally available to the public other than as a result of a disclosure by the Recipient; (y) was available to the Recipient on a non-confidential basis prior to its disclosure; or (z) was developed independent of the information derived from the Confidential Information.

"***Conservatory Measures***" has the meaning set forth in Section 29.

"***Counterparty***" has the meaning set forth in the introductory paragraph of this Agreement.

"***Default Rate***" means a rate per calendar month of 2.5%, compounded daily, or the maximum rate permitted by law, whichever is lower.

"***Disclosing Party***" has the meaning set forth in Section 8.1.

"***Engagement Agreement***" means any engagement, retainer or similar agreement between the Counterparty and Nominated Lawyers (including any successor or new Nominated Lawyers designated in accordance with Section 5.3(e)) governing or purporting to govern the terms of the representation of the Counterparty by such legal counsel with respect to a Claim, as provided to the Capital Providers and set forth on Annex II. In the case of any Engagement Agreements amended or entered into after the date hereof, Annex II shall be deemed amended to include such agreements only upon the Capital Providers' approval, respectively, of the relevant amendments in accordance with Section 5.3(d) or of the retention of the successor or new counsel in accordance with Section 5.3(e) or (f).

"***Escrow Agreement***" means an escrow agreement, in form and substance reasonably satisfactory to the Capital Providers in all respects, among the Counterparty, the Capital Providers and a third party escrow agent, pursuant to which the escrow agent agrees to serve as Payment Agent under this Agreement, including the obligations to receive Proceeds of all Claims from the Adverse Parties on the Counterparty's behalf and distribute such Proceeds in accordance with Section 2.2.

"***First Amended Agreement***" has the meaning given thereto in the Recitals hereto.

"***Governmental Authority***" means the government of the United States of America, any other nation or any political subdivision thereof, whether state or local, and any agency, authority, instrumentality, regulatory body, court, central bank or other entity exercising

executive, legislative, judicial, taxing, regulatory or administrative powers or functions of or pertaining to government.

"***Initial New Investment Amount***" has the meaning set forth in Section 2.1(a)(iii).

"***Initial New Investment Payment Date***" has the meaning set forth in Section 2.1(a)(iii).

"***Invested Amount***" means the sum of the Chickens Invested Amount and the Pork Invested Amount.

"[redacted]" has the meaning set forth in the Recitals hereto.

"***LCIA***" has the meaning set forth in Section 29.

"***Material Adverse Effect***" means, with respect to any event or circumstance and either party, one or more of (i) the material impairment of its ability to perform any of its obligations under this Agreement or any other Transaction Document, (ii) the material impairment of the rights or remedies available under this Agreement or any other Transaction Document to the other party and (iii) solely in the case of the Counterparty, an adverse effect on any Claim or the value or collectability thereof.

"***Monthly Report***" has the meaning set forth in Section 5.3(b).

"***New Capital Multiple***" has the meaning given thereto in Section 2.2(d).

"***New Capital Preferred Return***" has the meaning given thereto in Section 2.2(d).

"***New Claim Proceeds***" has the meaning given thereto in Section 2.2(d).

"***New Claims***" means, collectively, the Beef Claim, the [redacted] and the [redacted]

"***New Invested Amount***" means the sum of all amounts actually paid to the Counterparty by the Capital Providers hereunder in respect of the Beef Claim, [redacted] and [redacted]

"***Nominated Lawyers***" means, with respect to any Claim, the Person or Persons identified as such on Annex II and/or any successor or new legal counsel appointed as described herein.

"***Nominated Lawyers Contingency Percentage***" means the percentage of Proceeds that the Nominated Lawyers for the Chickens Claim are entitled to receive pursuant to their Engagement Agreement.

"***Original Agreement***" has the meaning set forth in the Recitals hereto.

"***Payment Agent***" means, with respect to any Claim, the escrow agent under the Escrow Agreement.

"***Person***" means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership or other entity or Governmental Authority.

"***Pork Claim***" has the meaning set forth in the Recitals hereto.

"***Pork Invested Amount***" means the sum of all amounts actually paid to the Counterparty by the Capital Providers hereunder in respect of the Pork Claim.

"***Pork Multiple***" has the meaning set forth in Section 2.2(c).

"***Pork Percentage Return***" has the meaning set forth in Section 2.2(c).

"***Pork Preferred Return***" has the meaning set forth in Section 2.2(c).

"***Pork Proceeds***" has the meaning set forth in Section 2.2(c).

"***Potential Remedy Event***" means any event which, with the giving of notice or the lapse of time or both, would constitute a "Remedy Event".

"***Privileges***" has the meaning set forth in the definition of "Protected Material".

"***Proceeds***" means, collectively: (i) any and all gross, pre-tax monetary awards, damages, recoveries, judgments or other property or value awarded to or recovered by or on behalf of (or reduced to a debt owed to) the Counterparty on account or as a result or by virtue (directly or indirectly) of a Claim, whether by negotiation, arbitration, mediation, diplomatic efforts, lawsuit, settlement, or otherwise; and includes all of the Counterparty's legal and/or equitable rights, title and interest in and/or to any of the foregoing, whether in the nature of ownership, lien, security interest or otherwise; (ii) any consequential, rescissionary, punitive, exemplary or treble damages, pre-judgment interest (including damages comparable to pre-judgment interest), post-judgment interest, penalties, and attorneys' fees and other fees and costs awarded or recovered on account thereof; (iii) any recoveries against attorneys, accountants, experts, directors, officers or other related parties in connection with any of the foregoing or the pursuit of a Claim; (iv) without limiting any of the foregoing, any value conveyed to any Person in connection with a Claim or the resolution or termination thereof; and (v) the amount of any reduction in the amount of any award by reason of a set-off for any reason, including counterclaims and third party claims, or as a result of a costs order against the Counterparty or as result of any other quantifiable order. All of the foregoing constitute Proceeds in any form, including cash, real estate, negotiable instruments, intellectual or intangible property, choses in action, contract rights, membership rights, subrogation rights, annuities, claims, refunds, prospective price reductions, volume purchase commitments, exclusive dealing arrangements and any other rights to payment of cash and/or transfer(s) of things of value or other property (including

property substituted therefor), whether delivered or to be delivered in a lump sum or in installments.

"***Protected Material***" means any Confidential Information that is the work product of qualified legal advisers and/or attorney work product, protected by the attorney-client privilege or any similar privilege in any jurisdiction including, for the avoidance of doubt, legal professional privilege and/or litigation or arbitral privilege, or that is protected by any rules of professional secrecy in any jurisdiction (collectively, "***Privileges***"), including: (i) information prepared by a party to a Claim or any of its Affiliates or their counsel, advisors, consultants or agents; or (ii) information prepared by a Capital Provider or any of its Representatives in connection with the review of a Claim, including legal and factual memoranda, case analyses and evaluations.

"***Recipient***" has the meaning set forth in Section 8.1.

"***Remedy Event***" has the meaning set forth in Section 12.

"***Representation Date***" means (i) the date hereof, (ii) each date on which the parties agree to cause any Claim to become subject to this Agreement, (iii) each date on which the Capital Providers are obligated to or do make any payment of Capital Amounts and (iv) in the case of the Counterparty, each date on which a Monthly Report is delivered (provided that, in the event of a failure to deliver any Monthly Report by its due date, the Representation Date shall instead be such due date); provided that, for the avoidance of doubt, even though an agreement or payment referred to in clause (ii) or (iii) above relates to a specific Claim, a "Representation Date" shall be deemed to occur with respect to each Claim that is then subject to this Agreement.

"***Representatives***" means, with respect to any person or entity, as applicable, its directors, officers, managers, members, partners, principals, employees, shareholders and participants (or potential shareholders and participants), Affiliates, related entities, agents, assignees (or potential assignees), reinsurers, lawyers, accountants, consultants, advisors, auditors, and independent contractors.

"***Rules***" has the meaning set forth in Section 29.

"***Tax***" means any tax, duty, contribution, impost, withholding, levy or other charge or withholding of a similar nature (including use, sales and value added taxes), whether domestic or foreign, and any fine, penalty, surcharge or interest in connection therewith.

"***Tier 1 Capital Providers Percentage***" means [redacted]

"***Tier 2 Counterparty Percentage***" means [redacted]

"***Transaction Documents***" means, collectively, this Agreement, the Escrow Agreement and any other agreements, documents, instruments, or certificates entered into or delivered in connection with this Agreement.

"***Tribunal***" has the meaning set forth in Section 29.

"[redacted]" has the meaning set forth in the Recitals hereto.

EXHIBIT B

Form of Monthly Report

Item:	**Response:**
1. Description of the status of each Claim and any meaningful developments during the preceding calendar month, including copies of any pleadings, court filings or similar documents.	
2. The billings and accrued expenses of the Nominated Lawyers and any Claim-related fees and expenses paid by or on behalf of the Counterparty to any other Person, in each case attributable to the preceding calendar month.	
3. Any noncompliance by the Counterparty with its obligations to the Nominated Lawyers under any Engagement Agreement.	

ANNEX I

Counterparty: Sysco Corporation

1. Type of Entity:	Corporation
2. Jurisdiction of Organization or Formation:	State of Delaware
3. Notice Information:	Address: 1390 Enclave Parkway, Houston, TX 77077 Fax Number: 281-584-2510 Email Address: eve.mcfadden@corp.sysco.com Attn: Eve McFadden
4. Notice Information for Nominated Lawyers for Chickens and Pork Claims:	Address: 1401 New York Ave., NW, Washington, DC 20005 Fax Number: 202-237-6131 Email Address: sgant@bsfllp.com Attn: Scott Gant / Boies Schiller Flexner LLP
5. Notice Information for Nominated Lawyers for Beef, [redacted], and [redacted]:	In each case to be provided by the Counterparty in writing upon designation of Nominated Lawyers in accordance with Section 5.3(f).

Capital Provider No. 1: Roslindale LLC

6. Type of Entity:	Limited liability company
7. Jurisdiction of Organization or Formation:	State of Delaware
8. Notice Information:	Roslindale LLC 251 Little Falls Drive Wilmington, DE 19808 Email Address: info@litfinsolutions.com Attn: Manager

Capital Provider No. 2: **Posen Investments LP**

9. Type of Entity:	Limited partnership
10. Jurisdiction of Organization or Formation:	Delaware
11. Notice Information:	Posen Investments LP 251 Little Falls Drive Wilmington, DE 19808 Email Address: info@litfinsolutions.com Attn: Manager

Capital Provider No. 3: Kenosha Investments LP

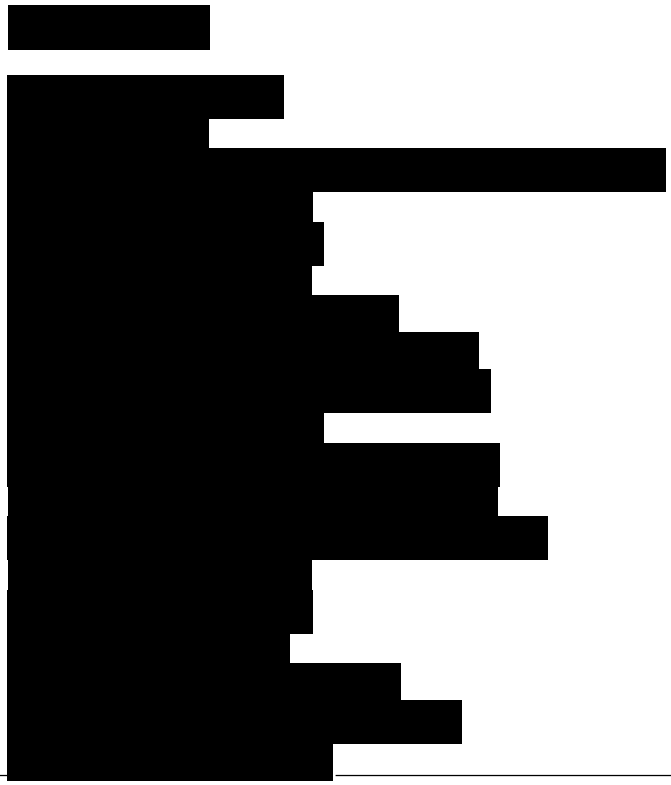
12. Type of Entity:	Limited Partnership
13. Jurisdiction of Organization or Formation:	Delaware
14. Notice Information:	Kenosha Investments LP 251 Little Falls Drive Wilmington, DE 19808 Email Address: info@litfinsolutions.com Attn: Manager

ANNEX II

1. Description of the Claims:	Each and every claim or counterclaim made or to be made by the Counterparty in, or in any action arising from or related to the facts and claims asserted in, (i) the Chickens Claim: the matter captioned *Sysco Corp. v. Tyson Foods, et al.,* Case No. 18cv700 (N.D. Ill.); (ii) the Pork Claim: an opt-out direct action to be filed related to the putative class action in *In re Pork Antitrust Litigation,* Case No. 18cv1776 (D. Minn.); (iii) the Beef Claim: an opt-out direct action to be filed in *In re DPP Beef Litigation*, Case No. 20-cv-1319 (D. Minn.); (iv) [redacted] (v) [redacted] in the event the Counterparty fails to file an opt-out direct action in any of the foregoing class actions, then the Claims include the Counterparty's claims and counterclaims as a class member therein.
	Each Claim also includes any variations or expansions of the above claims by the addition of any claims and/or parties from time to time, as well as the following: (i) any and all related pre- and post-trial proceedings or processes (or pre- and post-hearing proceedings or processes, where applicable) in or in connection with such claim(s), including the pursuit of costs or post-judgment or post-arbitral award remedies; (ii) all proceedings seeking to appeal, challenge, confirm, enforce, modify, correct, vacate, or annul

	a judgment or award, as well as proceedings on remand or retrial or rehearing; (iii) all ancillary, parallel, or alternative dispute resolution proceedings and processes arising out of or related to the acts or occurrences alleged in such claim(s) (including conciliation or mediation or court filings seeking discovery for or filed in aid of a contemplated or pending arbitration); (iv) remands, re-filings or parallel filings of such claim(s), and any other legal, diplomatic, or administrative proceedings or processes founded on the same or related underlying facts giving rise to or forming a basis for such claim(s); (v) ancillary or enforcement proceedings related to the facts or claims alleged from time to time or that could have been alleged in such claim(s) at any time; (vi) all arrangements, settlements, negotiations, or compromises made between the Counterparty and any adverse party having the effect of resolving any of the Counterparty's claims against any adverse party that are or could be or could have been brought in such claim(s); and (vii) all rights of the Counterparty to collect any damages or awards or otherwise exercise remedies in connection with any of the foregoing.
2. Payment account of the Counterparty:	[redacted]
3. Payment accounts of each of Capital Provider Nos. 1, 2 and 3:	To be provided in writing.

4. Identity of the Adverse Parties:	**Chickens Claim**: TYSON FOODS, INC.; TYSON CHICKEN, INC.; TYSON BREEDERS, INC.; TYSON POULTRY, INC.; PILGRIM'S PRIDE CORPORATION; KOCH FOODS, INC.; JCG FOODS OF ALABAMA, LLC; JCG FOODS OF GEORGIA, LLC; KOCH MEAT CO., INC.; SANDERSON FARMS, INC.; SANDERSON FARMS, INC. (FOOD DIVISION); SANDERSON FARMS, INC. (PRODUCTION DIVISION); SANDERSON FARMS, INC. (PROCESSING DIVISION); HOUSE OF RAEFORD FARMS, INC.; MAR-JAC POULTRY, INC.; PERDUE FARMS, INC.; PERDUE FOODS, LLC; WAYNE FARMS, LLC; FIELDALE FARMS CORPORATION; GEORGE'S, INC.; GEORGE'S FARMS, INC.; SIMMONS FOODS, INC.; SIMMONS PREPARED FOODS, INC.; O.K. FOODS, INC.; O.K. FARMS, INC.; O.K. INDUSTRIES, INC.; PECO FOODS, INC.; HARRISON POULTRY, INC.; FOSTER FARMS, LLC; FOSTER POULTRY FARMS; CLAXTON POULTRY FARMS, INC.; MOUNTAIRE FARMS, INC.; MOUNTAIRE FARMS, LLC; MOUNTAIRE FARMS OF DELAWARE, INC.; AGRI STATS, INC. **Pork Claim**: AGRI STATS, INC. CLEMENS FOOD GROUP, LLC HORMEL FOODS CORPORATION

	INDIANA PACKERS CORPORATION JBS USA SEABOARD FOODS, LLC SMITHFIELD FOODS, INC. TRIUMPH FOODS, LLC TYSON FOODS, INC. THE CLEMENS FAMILY CORPORATION HORMEL FOODS, LLC JBS USA FOOD COMPANY JBS USA FOOD COMPANY HOLDINGS MITSUBISHI CORPORATION (AMERICAS) SEABOARD CORPORATION TYSON FRESH MEATS, INC. TYSON PREPARED FOODS, INC. HATFIELD QUALITY MEATS, INC. ERBERT & GERBERT'S, INC. **Beef Claim**: JBS USA FOOD COMPANY HOLDINGS TYSON FOODS INC. CARGILL INC. NATIONAL BEEF PACKING COMPANY 

	[redacted]
5. Identity of the Nominated Lawyers:	**Chickens Claim**: Boies Schiller Flexner LLP **Pork Claim**: Boies Schiller Flexner LLP **Beef Claim**: To be determined in accordance with Section 5.3(f). [redacted] To be determined in accordance with Section 5.3(f). [redacted] To be determined in accordance with Section 5.3(f).
6. Engagement Agreements:	**Chickens Claim**: Engagement Letter, dated November 16, 2017, from Nominated Lawyers to Counterparty, as modified by the Addendum to Engagement Letter, dated September 9, 2019, from the Nominated Lawyers to Counterparty **Pork Claim**: Engagement Letter, dated April 18, 2020, from the Nominated Lawyers to the Counterparty **Beef, [redacted], and [redacted] Claims**: In each case to be provided by the Counterparty upon designation of Nominated Lawyers in accordance with Section 5.3(f).

ANNEX III

(Waterfall Illustrations)

The hypotheticals below are solely for the purposes of demonstrating how the waterfalls described in Section 2.2(b)-(d) would work in practice:

Scenario 1:

Assumptions:

[redacted]

Chicken Proceeds Distribution	Recipient	Reference
[redacted]	[redacted]	[redacted]

[1] Months calculated from anniversary date of the First Amended Agreement, June 9, 2020.

[redacted]	[redacted]	[redacted]
Pork Proceeds Distribution	Recipient	Reference
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]roceeds – 2.2(c)(vi)
[redacted]		

Scenario 2:

Assumptions:

[redacted]

Chicken Proceeds Distribution	Recipient	Reference
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]

[redacted]	[redacted]	[redacted]
[redacted]		
Pork Proceeds Distribution	Recipient	Reference
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]		
Beef, [redacted] & [redacted] Proceeds Distribution	Recipient	Reference
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	
[redacted]		

Scenario 3:

Assumptions:

- [redacted]

Pork Proceeds Distribution	Recipient	Reference
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]		

Chicken Proceeds Distribution	Recipient	Reference
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]		
Beef, [redacted] & [redacted] Proceeds Distribution	Recipient	Reference
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]		

Scenario 4:

Assumptions:

- [redacted]

Chicken Proceeds Distribution	Recipient	Reference
[redacted]	[redacted]	[redacted]
Beef, [redacted] & [redacted] Proceeds Distribution	Recipient	Reference
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]		

Tab VII- Texas Rules of Evidence

Texas Supreme Court
Advisory Committee

Memo

To: Texas Supreme Court Advisory Committee (SCAC)

From: TRE Subcommittee

Date: June 20, 2025

Re: FRE amendments effective December 1, 2024

The Evidence Subcommittee was asked to review the Federal Rules of Evidence new rules and amendments adopted on December 1, 2024. **The blue lines below show the changes in the federal rule. The red font with italics and highlighting shows our changes to the federal rule or tweaks to the corresponding TRE.**

This memo summarizes each rule, quotes the new rule or amendments, quotes portions evidence committee's official comments, and makes a recommendation for each rule.

Rule 107. Illustrative Aids [New Rule]

FRE 107 creates a new rule for demonstrative evidence now to be called "illustrative aids"; defines "illustrative aids" and allows their use in jury deliberations only with consent of parties or judicial finding of "good cause." Nonetheless, illustrative aids are not evidence.

(a) Permitted Uses. The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

(b) Use in Jury Deliberations. An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:

(1) all parties consent; or
(2) the court, for good cause, orders otherwise.

(c) Record. When practicable, an illustrative aid used at trial ~~must~~ *may upon the request of any party* be entered into the record.

(d) Summaries of Voluminous Materials Admitted as Evidence. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

The committee notes explain:

- The term "illustrative aid" is used instead of the term "demonstrative evidence," as that latter term has been subject to differing interpretation in the courts. An illustrative aid is any presentation offered not as evidence but rather to assist the trier of fact in understanding evidence or argument. "Demonstrative evidence" is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact.

- Examples of illustrative aids include "depictions, charts, graphs, and computer simulations." These kinds of presentations, referred to in this rule as "illustrative aids," have also been described as "pedagogical devices" and sometimes (and less helpfully) "demonstrative presentations"—that latter term being unhelpful because the purpose for presenting the information is not to "demonstrate" how an event occurred but rather to help the trier of fact understand evidence or argument that is being or has been presented.

- It is possible that the illustrative aid may be prepared to distort or oversimplify the evidence presented or stoke unfair prejudice. This rule requires the court to assess the value of the illustrative aid in assisting the trier of fact to understand the evidence or argument.

- If the court does allow the aid to be presented at a jury trial, the adverse party may ask to have the jury instructed about the limited purpose for which the illustrative aid may be used.

- The amendment therefore leaves it to trial judges to decide whether, when, and how to require advance notice of an illustrative aid.

The Committee on Rules of Practice and Procedure explained that Rule 107 provides that illustrative aids can be used unless the negative factors "substantially" outweigh the educative value of the aid, made clear that illustrative aids are not evidence, and referred to Rule 1006 for summaries of voluminous evidence.

Comments: This rule appears unnecessary but not harmful.

Recommendation: The committee recommends the adoption of this rule.

The committee discussed whether to make this Rule 108 or renumber current Rule 107 as Rule 108. Renumbering so TRE and FRE have the same rule numbers when possible is helpful pedagogically for students learning the federal and state rules in an evidence class and for conducting legal research using federal authorities to support arguments in state court. On the other hand, it may create confusion when looking at prior Texas authorities. On balance, the committee recommends using the federal rule number; the federal rules and state rules have the same numbers except the end of Article VI—FRE 614 does not have a counterpart in the Texas rules, FRE 615 is TRE 614 and Texas has a particular rule on producing a witness's statement in criminal cases (TRE Rule 615).

Rule 613. Witness's Prior Statement

FRE 613(b) [prior inconsistent statements] provides that prior inconsistent statements are inadmissible until the witness is allowed to first explain or deny the statement. However, a court may order otherwise. The "flexibility" is added to address situations where witness becomes unavailable, or the witness openly admits the inconsistency.

It provides:

2 * * * * *

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Unless the court orders otherwise, ~~Extrinsic~~ extrinsic evidence of a witness's prior inconsistent statement ~~is admissible only if~~ may not be admitted until after the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it~~, or if justice so requires~~. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

The committee notes explain:

- Rule 613(b) has been amended to require that a witness receive an opportunity to explain or deny a prior inconsistent statement *before* the introduction of extrinsic evidence of the statement.

- The amendment preserves the trial court's discretion to delay an opportunity to explain or deny until after the introduction of extrinsic evidence in appropriate cases, or to dispense with the requirement altogether. A trial judge may decide to delay or even forgo a witness's opportunity to explain or deny a prior inconsistent statement in certain circumstances, such as when the failure to afford the prior opportunity was inadvertent and the witness may be afforded a subsequent opportunity, or when a prior opportunity was impossible because the witness's statement was not discovered until after the witness testified.

Comments: Texas Rule 613 already requires a party to give a witness an opportunity to explain or deny a prior inconsistent statement before the introduction of evidence of the statement.

Recommendation: The committee recommends *against* the adoption of this rule because Texas Rule 613 adequately covers this.

But we do recommend tweaking TRE 613 to adopt the concept from the new federal rule that a court should have discretion to allow a party to use a prior inconsistent statement in some limited circumstances. FRE 613 does this through the phrase, "Unless the court orders otherwise." We could add the same phrase at the beginning of TRE 613(a)(4). If so, it would read as follows:

Unless the court orders otherwise, [e]xtrinsic evidence of a witness's prior inconsistent statement is not admissible unless the witness is first examined about the statement and fails to unequivocally admit making the statement.:

We also recommend adding a comment that quotes the FRE committee comment quoted above. It would state as follows:

> The trial court *has* discretion to delay an opportunity to explain or deny until after the introduction of extrinsic evidence in appropriate cases, or to dispense with the requirement altogether. A trial judge may decide to delay or even forgo a witness's opportunity to explain or deny a prior inconsistent statement in certain circumstances, such as when the failure to afford the prior opportunity was inadvertent and the witness may be afforded a subsequent opportunity, or when a prior opportunity was impossible because the witness's statement was not discovered until after the witness testified.

These changes address a problem when the extrinsic evidence of a prior inconsistent statement is not discovered until after the witness has been excused so there is no opportunity to allow the witness to review it. This change gives the trial court discretion to address that issue.

Rule 801. Definitions That Apply to Hearsay Article; Exclusions from Hearsay

FRE 801(d)(2)(E)'s amendment provides that if a party's claim or defense is directly derived from the declarant or the declarant's principal and the statement would be admissible against the declarant or the declarant's principal as an "opposing party's" statement, then it will be admissible against the opposing party. It is somewhat convoluted, but the idea is that if the opposing party's claim or defense is "directly derivative" of a declarant, then the statements by that declarant or by the declarant's agents within the scope of their agency may not be hearsay.

Note: The section numbers differ between the Federal and Texas Rule. Texas adds subsection (c) defining "matter asserted." Therefore FRE 801(d)—entitled "statements that are not hearsay"—is TRE 801(e).

* * * * *

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

* * * * *

(2) ***An Opposing Party's Statement.*** The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;
(B) is one the party manifested that it adopted or believed to be true;
(C) was made by a person whom the party authorized to make a statement on the subject;
(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

If a party's claim, defense, or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.

The committee notes explain:

- The rule has been amended to provide that when a party stands in the shoes of a declarant or the declarant's principal, hearsay statements made by the declarant or principal are admissible against the party. For example, if an estate is bringing a claim for damages suffered by the decedent, any hearsay statement that would have been admitted against the decedent as a party-opponent under this rule is equally admissible against the estate.

- The rule is justified because if the party is standing in the shoes of the declarant or the principal, the party should not be placed in a better position as to the admissibility of hearsay than the declarant or the principal would have been. A party that derives its interest from a declarant or principal is ordinarily subject to all the substantive limitations applicable to them, so it follows that the party should be bound by the same evidence rules as well.

The Committee on Rules of Practice and Procedure explained that the amendment to Rule 801(d)(2) "would resolve the dispute in the courts about the admissibility of statements by the predecessor-in-interest of a party-opponent, providing that such a hearsay statement would be admissible against the declarant's successor-in-interest."

Comments: No additional comments.

Recommendation: We recommend making this amendment to the rule, although it will be located in TRE 802(e).

Also note that TRE 801(e)(2) does not have FRE 801(d)(2)(E)'s provision that the statement alone does not prove the declarant's authority or agency for a principal. Roger Hughes suggests adopting the federal rule's provision that the statement itself does not establish the declarant's authority or the scope of the relationship. He would suggest amended TRE 801(e)(2) to provide:

> The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Roger Hughes' concern is the hardship to the party against whom the out-of-court statement is offered. His example is a realty case over construction of a deed concerning a possibly ambiguous provision; Plaintiff's claims come from the deed. Defendant wants to offer an out-of-court statement by Smith, grantor's alleged employee. The grantor is dead or otherwise unavailable to give testimony. Plaintiff wants to prove the grantor did not employ Smith, did not authorize the statement, or otherwise denies Smith's scope of agency/employment. If the statement alone is proof of agency/employment/scope, Plaintiff has a hardship to disprove them because the grantor is dead or unavailable.

Professor Goode has no problems with that suggestion and thinks it is consistent with the few Texas cases he has reviewed on the subject.

**Rule 804. Exceptions to the Rule Against Hearsay—
When the Declarant Is Unavailable as a Witness**

FRE 804(3) [declarant unavailable] is amended to modify the statement against interest exception for criminal cases. Should this be referred to the CCA? Regardless, the Texas exception for statements against interest is in TRE 803(b)(24) and therefore does not require the witness to be unavailable.

* * * *

(b) The Exceptions. * * *

(3) ***Statement Against Interest.*** A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness ~~if offered in a criminal case as one that tends to expose the declarant to criminal liability,~~ after considering the totality of circumstances under which it was made and any evidence that supports or undermines it.

*** * * * ***

The committee notes explain:

- Rule 804(b)(3)(B) has been amended to require that in assessing whether a statement is supported by "corroborating circumstances that clearly indicate its trustworthiness," the court must consider not only the totality of the circumstances under which the statement was made, but also any evidence supporting or undermining it.

The Committee on Rules of Practice and Procedure explained that Rule 804(b)(3) provides a hearsay exception for declarations against interest. In a criminal case in which a declaration against penal interest is offered, the rule requires that the proponent provide "corroborating circumstances that clearly indicate the trustworthiness" of the statement. There is a dispute in the courts about the meaning of the "corroborating circumstances" requirement. The proposed amendments to Rule 804(b)(3) would require that, in assessing whether a statement is supported by corroborating circumstances, the court must consider not only the totality of the circumstances under which the statement was made, but also any evidence supporting or undermining it.

Comments: Professor Goode notes that the language highlighted above is in the federal rule but not the state rule. He has not seen it in any case but thinks it might be helpful but is not necessary.

Recommendation: None of us has expertise in criminal matters but we agreed the change seems reasonable. The CCA should be consulted before making any change in this rule.

Rule 1006. Summaries to Prove Content

FRE 1006 on summaries of voluminous evidence is amended. FRE 1006(a) provides that underlying documents must be admissible, but not necessarily offered in evidence. New FRE 1006(c) provides that summaries, charts, or calculations that act only as "illustrative aids" are controlled by FRE 107.

> **(a) Summaries of Voluminous Materials Admissible as Evidence.** The ~~proponent~~ court may admit as evidence ~~use~~ a summary, chart, or calculation offered to prove the content of voluminous admissible writings, recordings, or photographs that cannot be conveniently examined in court, whether or not they have been introduced into evidence.
>
> **(b) Procedures.** The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.
>
> **(c) Illustrative Aids Not Covered.** A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 107.

The committee notes explain:

- Rule 1006 has been amended to correct misperceptions about the operation of the rule by some courts. Some courts have mistakenly held that a Rule 1006 summary is "not evidence" and that it must be accompanied by limiting instructions cautioning against its substantive use. But the purpose of Rule 1006 is to permit alternative proof of the content of writings, recordings, or photographs too voluminous to be conveniently examined in court. To serve their intended purpose, therefore, Rule 1006 summaries must be admitted as substantive evidence and the rule has been amended to clarify that a party may offer a Rule 1006 summary "as evidence." The court may not instruct the jury that a summary admitted under this rule is not to be considered as evidence.

- Rule 1006 has also been amended to clarify that a properly supported summary may be admitted into evidence whether or not the underlying voluminous materials reflected in the summary have been admitted.

- A summary admissible under Rule 1006 must also pass the balancing test of Rule 403. For example, if the summary does not accurately reflect the underlying voluminous evidence, or if it is argumentative, its probative value may be substantially outweighed by the risk of unfair prejudice or confusion.

Comments: This is a good clarification.

Recommendation: We recommend adopting this rule and including the third bullet point quotation in a comment on the rule.

Tab VIII-Texas Rule of Civil Procedure 4

Texas Supreme Court
Advisory Committee

Memo

To: Texas Supreme Court Advisory Committee (SCAC)

From: Subcommittee on Rules 1-14c

Date: August 6, 2024

Re: Proposed Amendment to Rule 4 to define "next day"

Request to Amend Rule 4

The subcommittee on Rules 1-14c has reviewed the request by Aderant Computer Law, a software-based courts publisher providing deadline information to law firms, that we amend Rule 4 to define "next day." TRCP 4 does not define next day. It states:

> The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.

Tex. R. Civ. P. 4. In contrast, FRCP 6(a)(5) defines next day:

> ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

Background

Some Texas rules set deadlines before a hearing or event. *See, e.g.,* TRCP166a(c) (requiring summary-judgment motion to be "filed and served at least twenty-one days before the time specified for the hearing"). Others set deadlines after an event. *See., e.g.,* TRCP329b(a) (requiring new-trial motion to be "filed prior to or within thirty days after the judgment or other order complained of is signed").

As noted by Aderant in its request for an amendment:

> When counting forward from an event there is little ambiguity as to what is considered the "next day*"* under TRCP 4. However, when counting backwards, if the deadline falls on a weekend or holiday, it is uncertain what is the "next day." Is the next day the preceding day (backward), counting in the same direction as the initial time period, or is it the succeeding day (forward)? For example, TRC[P 1]66a(c) says that the deadline to file and serve opposing affidavits and other responses to a summary judgment motion is

> "not later than seven days prior to the day of hearing." If the 7th day prior to the hearing falls on a weekend or holiday, would the deadline move forward to the 6th day prior to the hearing, or backwards to the 8th day prior to the hearing?
>
> We are aware of the case *Hammonds v. Thomas,* 770 S.W.2d 1, 2-3 (Tex. App--Texarkana 1989, no writ), which ruled that the summary judgment response deadline moves forward to the 6th day prior to the hearing, however it is our understanding that at least one later case disagreed with this ruling. We also are aware *of* the case *Lewis v. Blake,* 876 S.W.2d 314,316 (Tex. 1994), which ruled that TRCP 4 applies to all deadlines, not just forward counting deadlines. The *Lewis* court, however, was limited to whether extra time should be added to the deadline to serve notice of a motion for summary judgment when the notice is served by mail. It did not address what direction a deadline moves under TRCP 4 when the last day falls on a weekend or holiday.

Texas courts have split on "the applicability of Rule 4 to time periods that are counted backwards in time, as opposed to those counted forward," as observed by *Reichhold Chemicals, Inc. v. Puremco Mfg. Co.*, 854 S.W.2d 240, 246–47 (Tex. App.—Waco 1993, writ denied):

> *Compare Hammonds v. Thomas*, 770 S.W.2d 1, 3 (Tex. App.—Texarkana 1989, no writ) (holding that Rule 4 applies to Rule 166a, so that controverting affidavits required to be filed seven days before a summary-judgment hearing could be filed on July 5 when the seventh day before the hearing was July 4) *with Old Republic Ins. Co. v. Wuensche,* 782 S.W.2d 346, 348–49 (Tex. App.—Fort Worth 1989, writ denied) (affirming the refusal of an amended pleading and holding that Rule 4 does not apply to the requirement of Rule 93 that a verified denial be filed "not less than seven days before ... trial").

Id. at 247. *Reichold* followed *Old Republic* and held that that "'Rule 4 assumes that time calculations are not calculated backwards from a date ... [but] start with some act, event, or default" and that the rule was intended to *extend* time periods, not *shorten* them." *Id.*

Reichold was later criticized by the Fourteenth Court of Appeals as inconsistent with a subsequent Texas Supreme Court decision in *Lewis v. Blake*. *Melendez v. Exxon Corp.*, 998 S.W.2d 266, 275–76 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *see also Sosa v. Central Power & Light,* 909 S.W.2d 893, 895 (Tex. 1995) (reiterating that *Lewis* held Rule 4 applies to any period of time prescribed by the rules of procedure and holding that Rule 4 applies to the time period in Rule 63 regarding amendment of pleadings). The *Melendez* court counted forward, as the court did in *Sosa*, and thus held that the supplementation of discovery responses was timely.

Aderant suggested that Texas adopt a clarifying rule like Federal Rule of Civil Procedure 6(a)(5), which defines next day and removes any ambiguity. It states:

> ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

Fed. R. Civ. P. 6(a)(5).

Recommendation

We unanimously agreed that this definition should be added to our Rule 4.

From: Victoria Katz
To: Rulescomments; Blake Hawthorne
Subject: TRCP 4 clarification
Date: Wednesday, June 5, 2024 1:58:37 PM
Attachments: image538625.png

Good afternoon,

Although TRCP 4 does not have amendments pending and is not out for comment, we are writing in the hopes of receiving clarification of the term “next day” as used therein. If there is a more appropriate person/e-mail to whom to direct our question, we would appreciate being provided that information.

TRCP 4 says, “The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.” [Emphasis added.] However, the term “next day” is not defined.

When counting forward from an event there is little ambiguity as to what is considered the "next day" under TRCP 4. However, when counting backwards, if the deadline falls on a weekend or holiday, it is uncertain what is the "next day." Is the next day the preceding day (backward), counting in the same direction as the initial time period, or is it the succeeding day (forward)? For example, TRCO 166a(c) says that the deadline to file and serve opposing affidavits and other responses to a summary judgment motion is “not later than seven days prior to the day of hearing.” If the 7th day prior to the hearing falls on a weekend or holiday, would the deadline move forward to the 6th day prior to the hearing, or backwards to the 8th day prior to the hearing?

We are aware of the case *Hammonds v. Thomas*, 770 S.W.2d 1, 2-3 (Tex. App.—Texarkana 1989, no writ), which ruled that the summary judgment response deadline moves forward to the 6th day prior to the hearing, however it is our understanding that at least one later case disagreed with this ruling. We also are aware of the case *Lewis v. Blake*, 876 S.W.2d 314, 316 (Tex. 1994), which ruled that TRCP 4 applies to all deadlines, not just forward counting deadlines. The *Lewis* court, however, was limited to whether extra time should be added to the deadline to serve notice of a motion for summary judgment when the notice is served by mail. It did not address what direction a deadline moves under TRCP 4 when the last day falls on a weekend or holiday.

Further, to avoid confusion in the future regarding backward counting deadlines in Texas state courts, we respectfully propose that the Texas courts amend TRCP 4 to define the term “next day” for both forward and backward counting deadlines. A model for such amendment might be the amendment to the Federal Rules of Civil Procedure (“FRCP”), which was made to clarify a very similar ambiguity. FRCP 6(a)(5) now says, “The ‘next day’ is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.“

Aderant CompuLaw is a software-based court rules publisher providing deadline information to many firms practicing in the Texas state courts. Because this ambiguity in TRCP 4 is causing considerable confusion for our users, we would greatly appreciate any information you are able to provide us regarding this issue.

Sincerely,

Victoria Katz
Senior Rules Attorney

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